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# Brazil's Landmark Clean Company Act: Comparison to the OECD Anti-Bribery Convention and Issues

Sonia Zaheer

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# Brazil's Landmark Clean Company Act: Comparison to the OECD Anti-Bribery Convention and Issues

Sonia Zaheer\*

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*No country is going to create wealth if its leaders exploit the economy to enrich themselves or if police can be bought off by drug traffickers.<sup>1</sup>*

*—President Barack Obama.*

## I. INTRODUCTION

Corruption in the international marketplace remains an endemic problem.<sup>2</sup> The U.S. government estimates that bribery affects competition for international commercial contracts worth billions of dollars each year.<sup>3</sup> Sadly, the list of companies that, allegedly, have engaged in bribery of foreign public officials includes numerous big names.<sup>4</sup> The extensive list includes Hewlett-Packard, Oracle, Pfizer, Johnson & Johnson, General Electric, Eli Lilly and Company, Ralph Lauren Corporation, Goodyear Tire & Rubber Company, Alcoa World Alumina LLC,<sup>5</sup> Walmart,<sup>6</sup> AG Siemens, Halliburton,<sup>7</sup> Tyson Foods, Lucent

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\* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2015; B.A., Psychology and Kinesiology, California State University, Sacramento, 2003. I thank my faculty advisor, Professor Michael Malloy, for his superb guidance and assistance. I also thank my family for their continued support.

1. David M. Luna, *The Georgetown Journal of International Law 2010 Symposium: Combating Global Corruption (FCPA Enforcement)*, U.S. DEPARTMENT OF STATE (Mar. 22, 2010), <http://www.state.gov/j/inl/rls/rm/139408.htm>.

2. *Turning a Blind Eye to Bribing Foreign Officials*, TRANSPARENCY INTERNATIONAL (Oct. 7, 2013), [http://www.transparency.org/news/feature/turning\\_a\\_blind\\_eye\\_to\\_bribing\\_foreign\\_officials](http://www.transparency.org/news/feature/turning_a_blind_eye_to_bribing_foreign_officials); *Helping Countries Combat Corruption: The Role of the World Bank*, THE WORLD BANK GROUP, <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor08.htm> (last visited May 13, 2014); see TRANSPARENCY INT'L, *EXPORTING CORRUPTION: PROGRESS REPORT 2014: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY* 2-7 (2014), available at [http://www.transparency.org/whatwedo/publication/exporting\\_corruption\\_progress\\_report\\_2014\\_assessing\\_enforcement\\_of\\_the\\_oecd](http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd).

3. Thomas J. White, *U.S. Efforts to Combat Foreign Corrupt Practices*, 92 AM. SOC'Y INT'L L. PROC. 162, 163 (1998).

4. These companies have been investigated for, charged with, settled as a result of being charged with, plead guilty to, or convicted of bribing foreign public officials. *SEC Enforcement Actions: FCPA Cases*, U.S. SECURITIES AND EXCHANGE COMMISSION (Apr. 8, 2015), <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.

5. In January 2014, Alcoa World Alumina LLC, a subsidiary of the aluminum giant, Alcoa Inc., plead guilty to bribing officials in Bahrain. The company settled with U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) for a combined \$384 million in criminal fines, forfeiture, and disgorgement. The total amount of the settlement and the \$161 million in disgorgement that Alcoa agreed to are some of the largest amounts of such penalties in FCPA enforcement history. *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture*, THE U.S. DEPARTMENT OF

Technologies, Chevron, Avon Products,<sup>8</sup> Monsanto, Titan Corporation, Triton Energy Limited, and InVision Technologies<sup>9, 10</sup>.

Bribery on the international level results in many grave consequences.<sup>11</sup> It distorts markets, hinders economic development, and undermines democratic accountability.<sup>12</sup> It inflicts massive costs on countries, causes misallocation of resources, distorts public policy, and undermines enforcement of rule of law.<sup>13</sup> It hurts those companies that choose to follow the law and rightfully refuse to participate in bribery.<sup>14</sup> Bribery in the international marketplace also severely threatens global security, as it enables transnational crimes, including drug trafficking and money laundering.<sup>15</sup>

On August 1, 2013, Brazil enacted the Clean Company Act, placing administrative and civil liability on legal entities engaging in bribery of public officials.<sup>16</sup> The Act went into effect on January 29, 2014.<sup>17</sup> Brazil's enactment of the Clean Company Act is a landmark development with global significance.<sup>18</sup> As of 2013, Brazil is estimated to be the eight largest economy in the world, ranked

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JUSTICE (Jan. 9, 2014), <http://www.justice.gov/opa/pr/2014/January/14-crm-019.html>; Richard L. Cassin, *Alcoa Disgorgement is Third Biggest in FCPA History*, THE FCPA BLOG (Jan. 10, 2014, 2:18 PM), <http://www.fcablog.com/blog/2014/1/10/alcoa-disgorgement-is-third-biggest-in-fcpa-history.html>.

6. The DOJ and SEC are currently investigating allegations of bribery against the Mexican subsidiary of Wal-Mart Stores Inc., Wal-Mart de Mexico. The company allegedly paid bribes to Mexican government officials, between 2002 through 2005, in order to establish additional stores in certain regions. Breon S. Peace et al., *The FCPA Statute of Limitations—a Way Out for Wal-Mart?*, BLOOMBERG BNA (Sep. 27, 2012), <http://about.bloomberglaw.com/practitioner-contributions/the-fcpa-statute-of-limitations%E2%80%9494a-way-out-for-wal-mart/>.

7. *Halliburton Announces Settlement of Department of Justice and Securities and Exchange Commission Foreign Corrupt Practices Act Investigations*, HALLIBURTON (Feb. 11, 2009), [http://www.halliburton.com/public/news/pubsdata/press\\_release/2009/corpnews\\_021109.html](http://www.halliburton.com/public/news/pubsdata/press_release/2009/corpnews_021109.html).

8. Rachel Louise Ensign, *Details of \$135 Million Avon FCPA Settlement Emerge*, WALL ST. J. (May 1, 2014, 10:31 AM ET), <http://blogs.wsj.com/riskandcompliance/2014/05/01/details-of-135-million-avon-fcpa-settlement-emerge/>.

9. *SEC Settles Charges Against InVision Technologies for \$1.1 Million for Violations of the Foreign Corrupt Practices Act*, U.S. SECURITIES AND EXCHANGE COMMISSION (Feb. 14, 2005), <http://www.sec.gov/litigation/litreleases/lr19078.htm>.

10. *SEC Enforcement Actions: FCPA Cases*, *supra* note 4.

11. White, *supra* note 3, at 163.

12. *Id.*

13. BUREAU OF ECON. & BUS. AFFAIRS, U.S. DEP'T OF STATE, *BATTLING INTERNATIONAL BRIBERY I* (2004), available at <http://www.state.gov/documents/organization/36667.pdf>.

14. White, *supra* note 3, at 163.

15. BUREAU OF ECON. & BUS. AFFAIRS, *supra* note 13, at 1.

16. Lei No. L12846 [Clean Company Act], de 1 de Agosto de 2013, DIARIO OFICIAL DA UNIAO [D.O.U] de 2.8.2013 (Braz.), available at [http://www.cov.com/files/upload/E-Alert\\_Attachment\\_Brazilian\\_Clean\\_Companies\\_Act\\_Original.pdf](http://www.cov.com/files/upload/E-Alert_Attachment_Brazilian_Clean_Companies_Act_Original.pdf). In writing this Comment, the author has utilized an English translation of the Clean Company Act.

17. *Id.*; J.P., *Brazil's New Anti-Corruption Law: Hard to Read*, THE ECONOMIST (Jan. 29, 2014, 21:40), <http://www.economist.com/blogs/schumpeter/2014/01/brazil-s-new-anti-corruption-law>.

18. Kevin M. LaCroix, *The Brazilian Clean Companies Act*, LEXISNEXIS LEGAL NEWSROOM (Dec. 11, 2013), <http://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/archive/2013/12/11/the-brazilian-clean-companies-act.aspx>.

by Gross Domestic Product.<sup>19</sup> It is also the largest and one of the most robust economies in Latin America.<sup>20</sup> Brazil is thus recognized as a “significant political and economic power in Latin America, and an emerging global leader.”<sup>21</sup> Notwithstanding the above-mentioned impressive credentials, corruption is a widespread and deeply-rooted phenomenon in Brazil.<sup>22</sup> It is estimated that corruption costs the country approximately forty billion dollars each year.<sup>23</sup> In 2014, Brazil ranked sixty-nine out of 174 countries on the Transparency International Corruption Perceptions Index.<sup>24</sup> This abysmal ranking reflects the nation's substantial problems with corruption.<sup>25</sup>

Despite such prevalence of corruption in Brazil, before the enactment of the Clean Company Act, Brazil's express laws only held individuals liable for engaging in bribery of public officials, not legal entities.<sup>26</sup> This was the state of law even though, since December 1977, Brazil had been a signatory of The Organization for Economic Co-operation and Development's (OECD's) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention or the Anti-Bribery Convention).<sup>27</sup> The Convention requires that its signatory states (parties) impose criminal liability on legal entities engaging in bribery of foreign public officials.<sup>28</sup>

This Comment argues that the Clean Company Act generally conforms to, and in several respects, even exceeds the requirements of the Anti-Bribery Convention.<sup>29</sup> However, whether Brazil will successfully meet the expectations of the OECD and those of its people hinges upon Brazil's proper enforcement of the

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19. *The World FactBook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html> (last visited Feb. 13, 2015).

20. *Id.*; Fernando Avelar, *FCPA Risks for U.S. Companies in Latin America, Renewable Energy Thrives in Brazil, and the New PRI: Enrique Pena Nieto*, 18 LAW & BUS. REV. AMS. 605, 608 (2012).

21. PETER J. MEYER, CONG. RESEARCH SERV., RL 33456, BRAZIL-U.S. RELATIONS 1 (2010).

22. *Brazil: One Million People Demand Accountability*, TRANSPARENCY INTERNATIONAL (June 21, 2013), [http://www.transparency.org/news/feature/brazil\\_one\\_million\\_people\\_demand\\_accountability](http://www.transparency.org/news/feature/brazil_one_million_people_demand_accountability); Shannon K O'Neil, *Dilma Rousseff Gearing Up for Reelection*, VOXXI (Oct. 4, 2013), <http://voxxi.com/2013/10/04/dilma-rousseff-gearing-up-for-reelection/>.

23. *Brazil: One Million People Demand Accountability*, *supra* note 22.

24. *Corruption Perceptions Index 2014: Results*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2014/results> (last visited Mar. 23, 2015).

25. *Brazil: One Million People Demand Accountability*, *supra* note 22.

26. *See infra* Part II.E; THE WORKING GROUP ON BRIBERY, OECD, BRAZIL: PHASE 1 REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 2 (2004), *available at* <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/33742137.pdf>.

27. *See infra* Part II.E; THE WORKING GROUP, *supra* note 26, at 2; *Brazil Enacts Tough Anti-Bribery Law Required by OECD*, REUTERS (Aug. 2, 2013, 2:42 PM ET), <http://www.reuters.com/article/2013/08/02/us-brazil-bribery-idUSBRE97111A20130802>.

28. *See infra* Part III.A.3; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, ¶¶ 1-2, Dec. 17, 1997, 37 I.L.M. 1, *available at* [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

29. *See infra* Part III.

Clean Company Act.<sup>30</sup> Part II of this Comment explores the evolution of international anti-bribery laws, the OECD's role, and the circumstances behind enactment of Brazil's Clean Company Act. Part III compares the relevant provisions of the Convention to those of the Act and concludes that the Act meets each provision except Enforcement. Part IV proposes three key steps Brazil should take in order to effectively enforce its new law. Specifically, Brazil should make it a top priority to aggressively and objectively investigate and prosecute cases of bribery of public officials.<sup>31</sup> Brazil should ensure that all enforcement agencies across the country adopt uniform procedures and interpretations of the Act.<sup>32</sup> Lastly, it should collaborate with other countries in investigations and prosecutions.<sup>33</sup>

## II. BACKGROUND ON INTERNATIONAL LAWS AGAINST BRIBERY OF FOREIGN PUBLIC OFFICIALS

It has been said that the phenomenon of bribery is “as old as human nature itself.”<sup>34</sup> This section explores the evolution of anti-bribery laws across the globe, the OECD's role in setting standards for and enforcement of these anti-bribery laws, and the backdrop against which Brazil has enacted its landmark Clean Company Act.

### A. *Evolution of International Anti-Bribery Laws*

During the last four decades, countries from across the globe have enacted legislation to combat bribery in international marketplace.<sup>35</sup> The movement began when U.S. Congress passed the Foreign Corrupt Practices Act (FCPA) in 1977.<sup>36</sup> The impetus for this initiative was the Watergate scandal of 1973, which had revealed much more than just a corrupt Richard Nixon presidency.<sup>37</sup> The U.S. Securities Exchange Commission (SEC) and the Office of the Watergate Special Prosecutor discovered a widespread pattern of misconduct, where corporations had used their “slush” funds to make questionable payments to foreign agents.<sup>38</sup> More than 400 companies disclosed to the SEC that they had made questionable

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30. See *infra* Part III.H.

31. See *infra* Part IV.

32. See *infra* Part IV.

33. See *infra* Part IV.

34. Mark Pieth, *Introduction*, in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 3, 5 (Mark Pieth et al. eds., 2d ed. 2014).

35. STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* xvii (2d ed. 2010).

36. Pieth, *supra* note 34, at 10-11; White, *supra* note 3, at 163.

37. MIRIAM F. WEISMANN, *CRIME, INCORPORATED: LEGAL AND FINANCIAL IMPLICATIONS OF CORPORATE MISCONDUCT* 94 (2009).

38. *Id.* at 94-95.

or illegal payments to foreign public officials and politicians.<sup>39</sup> Such payments added up to more than \$300 million.<sup>40</sup> At the time, over 117 of these companies ranked in the top Fortune 500 companies.<sup>41</sup> In a famous case, Gulf Oil Corporation and its vice president, Claude Wilde, were criminally prosecuted for using corporate funds to make illegal gifts to politicians, including a \$100,000 gift to President Richard Nixon.<sup>42</sup> In another case, Lockheed Martin admitted making payments in the amount of twenty-two million dollars to foreign government officials.<sup>43</sup> As a reaction to such revelations, the FCPA was enacted.<sup>44</sup>

United States then began making efforts to internationalize the FCPA.<sup>45</sup> Influencing other countries to enact legislation similar to the FCPA became an important goal for the U.S. business community, Congress, and presidential administrations.<sup>46</sup> This was partly because the U.S. business community quickly realized that the FCPA placed competitive disadvantage on U.S. businesses.<sup>47</sup> The law placed significant restrictions and requirements on U.S. businesses, none of which bound their non-U.S. competitors.<sup>48</sup> Additionally, the United States believed that strong, uniform rules adopted by countries across the globe would lead to fostering “economic development and . . . deepening of democratic institutions.”<sup>49</sup>

Consequently, in 1989, a year after the FCPA was reformulated, United States requested the OECD to draft an instrument on combating bribery of foreign public officials.<sup>50</sup> The OECD appeared to be the best-suited organization for this purpose because its membership included major exporting and investing nations from across the globe.<sup>51</sup> Furthermore, OECD's well-established peer review system and soft law procedures especially attracted the United States.<sup>52</sup>

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39. *Id.* at 95.

40. *Id.*

41. *Id.*

42. *Id.* at 94.

43. DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE* 5-6 (2d ed. 1999).

44. *Id.* at 7.

45. United States encouraged United Nations to draft an anti-corruption treaty; however, that effort failed in 1979. Pieth, *supra* note 34, at 10-12.

46. White, *supra* note 3, at 163.

47. Pieth, *supra* note 34, at 11.

48. *See id.*

49. White, *supra* note 3, at 163.

50. Pieth, *supra* note 34, at 12-13.

51. *Id.* at 13.

52. *Id.*

*B. The OECD and Its Role*

The OECD was established in 1960 in order to help implement the European Recovery Program, also known as the Marshall Plan, a United States sponsored, post-World War II reconstruction plan for Europe.<sup>53</sup> Since then, the OECD's role has expanded and it now functions as the "pre-eminent organisation of the industrialised nations for international economic research" and analysis.<sup>54</sup>

OECD's mission is to promote "policies that will improve the economic and social well-being of people around the world."<sup>55</sup> Currently, while thirty-four countries from across the globe are members of the OECD, the organization also maintains cooperative relations with a large number of nonmember countries.<sup>56</sup> The OECD also maintains cooperative, official relations with other international organizations such as the International Labour Organization, Food and Agriculture Organization, International Monetary Fund, World Bank, International Atomic Energy Agency, and many other United Nations bodies.<sup>57</sup> OECD is an active partner of the G20.<sup>58</sup>

*C. OECD's System of Review*

Two organizations, the OECD Working Group on Bribery in International Business Transactions and Transparency International, work together to ensure that parties to the Anti-Bribery Convention implement and enforce the Convention through their own laws.<sup>59</sup> The Working Group generally conducts a rigorous, three-phase review of the steps taken by parties to implement the Convention.<sup>60</sup> During Phase 1 review, the Working Group evaluates whether the implementing legislation of a party adequately conforms to the Convention.<sup>61</sup> During Phase 2 review, the Group determines whether the party is effectively applying its own legislation.<sup>62</sup> During Phase 3 review, the Group assesses the party's enforcement efforts again and makes further recommendations.<sup>63</sup>

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53. *Id.*

54. *Id.* at 14.

55. *About the OECD*, OECD, <http://www.oecd.org/about/> (last visited Dec. 10, 2013).

56. *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Dec. 10, 2013). OECD member countries are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. *Id.*

57. *Id.*

58. *Id.*

59. *Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Feb. 14, 2014).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*



*D. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

Also known as the Anti-Bribery Convention, this multilateral treaty was adopted in December 1997 and entered into force in February 1999.<sup>64</sup> Currently, forty countries from across the globe have signed on to the Convention, which include the thirty-four OECD members and six nonmembers—Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa.<sup>65</sup> The Convention is the only international anti-corruption scheme that targets the “supply side” of the bribery transaction.<sup>66</sup> Essentially, the Convention focuses on reducing the inflow of corrupt funds into economies.<sup>67</sup> None of the Convention’s provisions apply to foreign commercial bribery, which concerns incidents where private individuals or legal entities provide kick-backs or other benefits to other private individuals or entities for delivering improper assistance in obtaining, retaining, or directing business.<sup>68</sup> The Convention only covers transnational corruption in business transactions that involved delivery of any pecuniary or other advantage upon a public official.<sup>69</sup> It does not target domestic corruption of any sort.<sup>70</sup>

*E. Enactment of Brazil's Clean Company Act*

Several reasons served as the impetus for enactment of the Clean Company Act. Recently, Brazilian masses vehemently protested in more than eighty cities across Brazil, demanding that their politicians address the endemic problem of corruption in their country.<sup>71</sup> Brazilians insisted that their politicians be held accountable.<sup>72</sup>

Another reason that likely motivated Brazil to enact the Clean Company Act is encouragement from the OECD to comply with its Anti-Bribery Convention.<sup>73</sup>

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64. Pieth, *supra* note 34, at 19-20.

65. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited Mar. 10, 2015).

66. *Id.*; Pieth, *supra* note 34, at 30-31.

67. Pieth, *supra* note 34, at 30-31.

68. DEMING, *supra* note 35, at 310, 316 n.10.

69. Ingeborg Zerbes, *The Offense of Bribery of Foreign Public Officials*, translated in *THE OECD CONVENTION ON BRIBERY: A COMMENTARY* 59, 67-69 (Mark Pieth et al. eds., 2d ed. 2014).

70. *Id.*

71. *Brazil: One Million People Demand Accountability*, *supra* note 22.

72. *Id.*

73. *THE WORKING GROUP ON BRIBERY, 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* 65 (2007), available at <http://www.oecd.org/brazil/39801089.pdf>; *THE WORKING GROUP*, *supra* note 26, at 35.

Brazil signed the Convention in 1997 and ratified it in 2000.<sup>74</sup> Initially, in order to comply with the Convention, Brazil amended its Penal Code and criminalized bribery of foreign public officials by individuals.<sup>75</sup> However, the country did not create any additional criminal, administrative, or civil penalties for legal entities who engaged in this offense.<sup>76</sup> In its Phase 1 and Phase 2 reviews of Brazil's efforts to implement the Convention, the Working Group recommended that Brazil expressly prohibit legal entities from engaging in bribery of foreign public officials.<sup>77</sup> Specifically, in its Phase 2 Review report in 2007, the Working Group urged Brazil to "take urgent steps to establish the direct liability of legal persons for the bribery of a foreign public official."<sup>78</sup>

Now that Brazil has enacted the Clean Company Act, Nicola Bonucci, the director of legal affairs at the OECD, has acknowledged that the Act is "an important step toward bringing Latin America's largest economy into line with international standards."<sup>79</sup>

### III. DOES THE BRAZILIAN CLEAN COMPANY ACT MEASURE UP TO THE OECD CONVENTION?

The Clean Company Act has been called "[t]he 'next big thing' in global anti-corruption," "tough," "far-reaching," and "landmark."<sup>80</sup> As companies across the world prepare to comply with the Act, the question is how the law compares to the Anti-Bribery Convention. This section compares each of the Convention's relevant provisions to those of the Clean Company Act. The section concludes that the Act either meets or exceeds all Convention requirements, except those on enforcement.

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74. THE WORKING GROUP, *supra* note 26, at 2.

75. *Id.*

76. *Id.* at 35.

77. *Id.*; THE WORKING GROUP, OECD, BRAZIL: PHASE 2 REPORT, *supra* note 73, at 65.

78. THE WORKING GROUP, OECD, BRAZIL: PHASE 2 REPORT, *supra* note 73, at 65.

79. Stella Dawson, *Brazil's Corporate Bribery Law is a Step Forward but Faces Tough Scrutiny—OECD official*, THOMSON REUTERS FOUNDATION (Nov. 22, 2013, 22:28 GMT), <http://www.trust.org/item/2013112222839-uqglw>.

80. T. Markus Funk et al., *The 'Next Big Thing' in Global Anti-Corruption: The Brazil Clean Companies Act*, WESTLAW J. WHITE-COLLAR CRIME, Apr. 2014, at 12; *Brazil Enacts Tough Anti-Bribery Law Required by OECD*, *supra* note 27; *Brazil Signs into Effect a New, Far-Reaching Anti-Bribery Law: What Impact will it have on Your Organization?*, NYSE, <https://welcome.corpedia.com/events/brazil-signs-into-effect-a-new-far-reaching-anti-bribery-law-what-impact-will-it-have-on-your-organization/> (last visited Feb. 3, 2014); Jaclyn Jaeger, *Brazil Passes Landmark Anti-Bribery Law*, COMPLIANCE WEEK (July 9, 2013), <http://www.complianceweek.com/brazil-passes-landmark-anti-bribery-law/article/302203/>.

A. *The Offense of Bribery*

There are several elements of what constitutes the offense of bribery under the Anti-Bribery Convention.<sup>81</sup> The following discussion presses that the Clean Company Act either meets or exceeds each element, as defined in the Convention.

1. *Definition of Bribery*

Under the Anti-Bribery Convention, the offense of bribery includes intentional offers, promises, or actual giving of any “undue pecuniary or other advantage,” directly or indirectly, to a foreign public official “for that official or for a third party,” so that the official would act in such a manner in relation to her official duties that an improper advantage is bestowed.<sup>82</sup> The foreign public official’s culpable conduct includes affirmative acts as well as omissions.<sup>83</sup> Furthermore, the offense of bribery includes “complicity” in an act of bribery.<sup>84</sup> Consequently, authorizing, inciting, or aiding and abetting acts of international bribery are also forbidden.<sup>85</sup>

The Clean Company Act adopts an expansive definition of bribery and refers to it as “acts against the public administration, national or foreign.”<sup>86</sup> Such acts include the following:

- I. Promoting, offering, or giving, directly or indirectly, “an improper benefit to a public agent” or to a person related to the public agent;
- II. Financing, sponsoring, subsidizing, or bearing the cost, in any manner, for the performance of specified illegal acts;
- III. Utilizing third parties to cover up the offense, its perpetrators, or beneficiaries;
- IV. Hindering or defrauding the “competitive nature”<sup>87</sup> of public requests for bids and contracts in any manner; and
- V. Hindering or interfering with the investigatory or supervisory work of public bodies.<sup>88</sup>

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81. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 1, ¶ 1.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Clean Company Act, art. 5 (Braz.).

87. Art 5. further enumerates specific forbidden acts concerning public requests for bids and contracts. *Id.*

The Clean Company Act not only meets but exceeds the scope set by the Convention as to what constitutes the offense of bribery. First, the Convention's definition only applies to bribery of foreign public officials.<sup>89</sup> The FCPA follows this approach and forbids only bribery of foreign public officials.<sup>90</sup> By contrast, the Clean Company Act applies to bribery of both foreign and domestic public officials.<sup>91</sup> Second, the Act goes beyond the essential elements of the offense of bribery under the Convention—namely, promising, offering, giving, aiding, attempting, and conspiring—and includes in its definition of bribery: financially supporting bribery, covering up bribery or its perpetrators, hindering or defrauding the “competitive nature” of public requests for bids and contracts, and hindering the investigatory or supervisory work of public entities.<sup>92</sup> Third, the Convention expressly excludes small facilitation payments to public officials from the definition of bribery.<sup>93</sup> Essentially, small payments made to public officials in order to induce them to perform their duties, “such as issuing licenses or permits,” are not a part of the offense of bribery under the Convention.<sup>94</sup> The FCPA also does not expressly apply to such payments.<sup>95</sup> The Clean Company Act, on the other hand, includes facilitation payments within the scope of its definition of bribery, and provides no exceptions for such payments.<sup>96</sup> Brazil has reasoned that even if such payments may be small in amount, they nevertheless injure morality, credibility, and efficiency of public service.<sup>97</sup>

## 2. *Persons Covered*

Article 1 of the Convention prohibits “any person” from intentionally committing acts of foreign bribery.<sup>98</sup> The term, “person” includes legal persons, such as corporations and other legal entities, as well as natural persons.<sup>99</sup>

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88. *Id.*

89. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 1, ¶ 1.

90. 15 U.S.C.A. § 78dd-2 (West 1988).

91. Clean Company Act, art. 5 (Braz.).

92. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 1, ¶ 1; *id.*

93. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at cmt. 9.

94. *Id.*

95. 15 U.S.C.A. §§ 78dd1(b), -2(b) (West 1988).

96. Clean Company Act, arts. 1, 5 (Braz.).

97. Brazil made this explanation in the context of not excluding small facilitation payments from the definition of bribery in the initial law that it passed in order to implement the Convention. Law No. 10,467, of June 11, 2002, criminalized bribery of public officials for individuals, but not for legal entities. THE WORKING GROUP, *supra* note 26, at 2, 8.

98. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 1, ¶ 1.

99. Zerbes, *supra* note 69, at 73.

The Clean Company Act complies with this requirement and expressly applies to legal persons, including business companies, professional companies, foundations, and associations of entities or persons.<sup>100</sup> The corporate or organizational structure of these legal persons is irrelevant under the Act.<sup>101</sup> Additionally, managers, administrators, or any natural persons of the legal entity, who participated in the illegal act may also be held individually liable.<sup>102</sup> Individuals are liable to the extent of culpability of their acts.<sup>103</sup>

The Act reaches beyond the Convention's express requirements as to persons covered in two ways. First, it applies even if the legal entity undergoes a merger, transformation, or contractual change.<sup>104</sup> Second, any legal entity related to that change guilty of bribing a foreign public official is jointly and severally liable, but only to the extent of having to pay any fines and indemnification for damages caused by the offense.<sup>105</sup> Thus, any controlled or controlling companies of the offending legal entity may be jointly and severally liable.<sup>106</sup>

### 3. Nature of the Offense

At the very outset, in its first Article, the Convention states that parties "shall take such measures as may be necessary to establish that it is a criminal offence" to engage in bribery of any foreign public officials.<sup>107</sup> Given such clear and express preference, one issue of great concern to the OECD is that the Act only imposes civil and administrative liabilities on offenders.<sup>108</sup> The Act does not declare that bribery of foreign public officials by legal entities is a criminal offense.<sup>109</sup>

Under the Brazilian system, corporations and other enterprises, as legally created, artificial entities, are not deemed capable of criminal liability.<sup>110</sup> The Brazilian Constitution does create two narrow exceptions to this rule. First, under Article 225, Paragraph 3, legal entities engaging in conduct "injurious to the environment" may face criminal liabilities.<sup>111</sup> However, criminal penalties under

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100. Clean Company Act, art. 1 (Braz.).

101. *Id.*

102. *Id.* at art. 3.

103. *Id.*

104. However, successor liability is limited by Article 4 § 1. *Id.* at art. 4.

105. *Id.*

106. Clean Company Act, art. 4 (Braz.).

107. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 1, ¶ 1.

108. See Dawson, *supra* note 79; Clean Company Act, arts. 6, 18 (Braz.).

109. See generally Clean Company Act (Braz.).

110. THE WORKING GROUP, *supra* note 26, at 10.

111. *Id.*

this exception have rarely been imposed on legal entities, if ever.<sup>112</sup> Also, the underlying theory behind this exception remains controversial in Brazil.<sup>113</sup>

Second, Article 173.V, Paragraph 5, of the Brazilian Constitution of 1998 provides for criminal penalties if legal entities engage in acts “against the economic and financial order and against the popular economy.”<sup>114</sup> In its Phase 1 Review report of 2004, the Working Group contemplated that Brazil could impose criminal liability upon legal entities engaging in bribery of foreign officials under this exception.<sup>115</sup> However, Brazilian authorities rejected the possibility and explained that there was no likelihood that Brazil will impose criminal liability on legal entities under this exception in the near future because such liability remained a “subject of intense academic debate” in Brazil.<sup>116</sup> Although laws have been enacted under this exception, any proposals in draft bills to impose criminal liability on legal entities were defeated.<sup>117</sup>

The Clean Company Act’s refusal to classify bribery of foreign public officials by legal entities as a criminal offense does not render the Act non-compliant with the Convention. Although the Convention has an express preference for criminal liability, it does not require parties to place such liability.<sup>118</sup> Official Commentary 20<sup>119</sup> explains that parties are not required to impose criminal liability on legal entities if, under that party’s legal system, criminal liability is not applicable to legal entities.<sup>120</sup>

Germany is one such party.<sup>121</sup> Like Brazil, Germany has rejected the concept of imposing criminal liability upon legal entities.<sup>122</sup> Thus, although corruption is a

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112. Until 2004, no criminal penalties had been imposed on a corporation under this exception. In 2012, Brazilian federal prosecutors charged Chevron Corporation and Transocean Ltd., along with seventeen executive officers of the two companies, with “crimes against the environment” as a result of an oil spill in the Atlantic Ocean. However, a Brazilian federal court later dismissed the charges. *Id.*; Jeb Blount & Joshua Schneyer, *Chevron, Transocean Charged in Brazilian Oil Spill*, REUTERS (Mar. 21, 2012, 7:47 PM), <http://www.reuters.com/article/2012/03/21/us-chevron-spill-idUSBRE82K0PL20120321>; AP, *17 Oil Executives Have Been Accused of ‘Environmental Crimes’ in Brazil*, BUSINESS INSIDER (Mar. 21, 2012, 6:29 PM), <http://www.businessinsider.com/brazilian-prosecutor-files-criminal-charges-against-chevron-and-transocean-2012-3>; Associated Press, *Brazilian Judge Dismisses Criminal Charges Against Chevron and Transocean Over Oil Spill*, FOX NEWS (Feb. 21, 2013), <http://www.foxnews.com/world/2013/02/21/brazilian-judge-dismisses-criminal-charges-against-chevron-and-transocean-over/>.

113. THE WORKING GROUP, *supra* note 26, at 10.

114. *Id.*

115. *See id.*

116. *Id.*

117. *Id.*

118. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at cmt. 20.

119. The OECD Official Commentaries are akin to the legislative history of the Convention. As such, they are helpful in determining the intent of the negotiators. DEMING, *supra* note 35, at 316 n.8.

120. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at cmt. 20.

121. T. Markus Funk & Jess A. Dance, *Global Litigator: Germany’s Increasingly Robust Anticorruption Efforts*, LITIG., Spring 2012, at 56, 56.

122. *Id.*

criminal offense for individuals, the German Act on Combating International Bribery of Foreign Public Officials in International Business Transactions only creates administrative liability for legal entities engaging in bribery of foreign public officials.<sup>123</sup> Nevertheless, the Working Group has concluded that the German Act meets the Convention's requirements.<sup>124</sup>

#### 4. *Strict Liability*

The Convention only applies to those individuals or legal entities that had the requisite intent to commit an act of bribery of a foreign public official.<sup>125</sup> Similarly, the FCPA requires a finding of corrupt intent.<sup>126</sup> The Clean Company Act, on the other hand, contains no intent requirement and expressly imposes strict civil and administrative liabilities on legal entities.<sup>127</sup> No showing of negligence or willfully corrupt conduct is necessary under the Act.<sup>128</sup> Thus, as long as the offense was committed in the interest of the legal entity, or for its benefit, the legal entity is liable under the Act.<sup>129</sup> President Dilma Rousseff was quoted as saying, ““what do we have to lose?”” when explaining her decision to exercise her line item veto power to delete any fault or intent requirement from the Act.<sup>130</sup> She believed that such requirements would result in insufficient disincentives for engaging in the offense of bribery of public officials.<sup>131</sup>

#### B. *Responsibility of Legal Persons*

Article 2 of the Anti-Bribery Convention directly addresses accountability of legal persons.<sup>132</sup> The Convention provides: “Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”<sup>133</sup> Prior to

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123. *Id.*; THE WORKING GROUP, OECD, GERMANY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1-2 (1999), available at <http://www.oecd.org/germany/2386529.pdf>.

124. THE WORKING GROUP, OECD, GERMANY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, *supra* note 123, at 19.

125. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 1.

126. 15 U.S.C.A. §§ 78dd1(a), -2(a) (West 1988).

127. Clean Company Act, art. 1 (Braz.).

128. Rita Motta & Steven M. Bauer, Commentary, *Brazilian Anti-Corruption Law: 7 Implications and Challenges for Companies Doing Business in Brazil*, LATHAM & WATKINS (Jan. 6, 2014), [www.lw.com/thoughtLeadership/lw-brazil-anti-corruption-law](http://www.lw.com/thoughtLeadership/lw-brazil-anti-corruption-law).

129. *Id.*

130. Andy Spalding, *Brazil's President Dilma Takes a Stand*, THE FCPA BLOG (Aug. 4, 2013, 8:32 PM), <http://www.fcpcbog.com/blog/2013/8/4/brazils-president-dilma-takes-a-stand.html>.

131. *Id.*

132. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 2.

133. *Id.*

enacting the Clean Company Act, Brazil did not expressly forbid legal entities from engaging in this offense.<sup>134</sup> The Act complies with the Convention's requirement and imposes strict civil and administrative liability on legal entities engaging in the offense.<sup>135</sup>

### *C. Sanctions*

The Convention requires that parties impose "effective, proportionate or dissuasive criminal penalties," on those involved in bribery of foreign public officials.<sup>136</sup> Such penalties must be comparable to those imposed upon offenders involved in bribery of the party's own public officials.<sup>137</sup> Additionally, bribes, proceeds of bribery of a foreign public official, or property that corresponds in value to such proceeds should be subject to seizure and confiscation.<sup>138</sup> If seizure and confiscation are not possible, parties should impose "monitory sanctions of comparable effect."<sup>139</sup> In addition to these penalties, the Convention recommends that parties shall consider imposing civil or administrative sanctions. The Convention allows parties to adopt non-criminal penalties, as long as they are "effective, proportionate and dissuasive," if that party's laws do not allow criminal penalties against entities.<sup>140</sup>

The Clean Company Act exceeds the Convention's requirements on sanctions, as it imposes several layers of severe fines and other harsh consequences on legal entities engaging in bribery of foreign public officials.<sup>141</sup>

#### *1. Administrative Fines*

The Clean Company Act imposes fines ranging from 0.1% to 20% of "gross billings" of the company during the fiscal year.<sup>142</sup> If gross billings of a company cannot be determined, fines ranging from R\$6,000<sup>143</sup> to R\$60,000,000 shall be imposed.<sup>144</sup> In any event, these fines must be equal to or greater than the benefits gained from the acts of bribery, as defined under the Act.<sup>145</sup> However, the Act

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134. THE WORKING GROUP, *supra* note 26, at 10-11.

135. Clean Company Act, art. 1 (Braz.).

136. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 3.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at cmt. 20.

141. Clean Company Act, art. 6 (Braz.).

142. *Id.*

143. R\$ is the sign for Brazilian currency, the Real.

144. Clean Company Act, art. 6 (Braz.).

145. *Id.*



enumerates the following eight factors for enforcing authorities to consider when deciding severity of penalties:

- I. Seriousness of the violation;
- II. Benefit gained or sought by the violator;
- III. Whether the violation was consummated or not;
- IV. Degree of injury or danger of injury resulting from the violation;
- V. Negative effects caused by the violation;
- VI. Financial status of the violator;
- VII. Whether the legal person cooperated in discovering the violation;
- VIII. Whether the legal person had established internal mechanisms and procedures for integrity, audit, and incentives to report irregularities and whether the legal person effectively applied its codes of ethics and conduct within the framework it established;
- IX. The number of contracts the legal person holds with the injured entity.<sup>146</sup>

## 2. *Publication of Adverse Judgment*

In addition to potentially severe administrative fines, in case of an adverse judgment against a legal entity, the Act provides for “extraordinary publication” of such a judgment.<sup>147</sup> The Act mandates that a summary of the adverse judgment against a legal entity be made publically visible in at least three places: i) in a widely-circulated publication of the area where the violation occurred and where the legal entity operated,<sup>148</sup> ii) in the entity’s establishment or place of business, and iii) on the entity’s website.<sup>149</sup> The summary should remain posted for at least thirty days and at the expense of the legal person.<sup>150</sup>

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146. *Id.*

147. *Id.*

148. The Act provides if there is no widely circulated publication in the area, the announcement should be made in a nationally circulated publication. *Id.*

149. *Id.*

150. Clean Company Act, art. 6 (Braz.).

### *3. Judicial Liability*

The Clean Company Act imposes judicial liability upon legal entities, in addition to administrative liability.<sup>151</sup> The Act gives federal and local governments the authority to prosecute actions against legal entities suspected of engaging in bribery of public officials.<sup>152</sup> Specifically, attorney's offices, legal representation agencies, entities equivalent to legal representation agencies, and public ministries of the Union, the states, the Federal District, and the municipalities may bring cases against legal entities.<sup>153</sup> Any of the following judicial penalties may be imposed upon a legal entity found guilty of violating the Clean Company Act:

- I. Confiscation of money, assets, or rights that represent a direct or indirect benefit resulting from the violation;<sup>154</sup>
- II. Suspension or partial prohibition of operations;
- III. Compulsory dissolution of the legal entity "shall be ordered" if it were proved that: i) the entity was "habitually used to facilitate or promote" bribery of public officials or ii) the legal entity "was established to cover up or hide illegal interests or identity" of the beneficiaries of bribery of public officials;
- IV. A ban on receiving incentives, subsidies, subventions, donations, or loans from public entities and public financial institutions.<sup>155</sup> This ban may last for a period of one year to five years.<sup>156</sup>

### *4. Leniency Agreements*

The Convention does not contain any provisions prescribing its signatories to enter into leniency agreements with entities engaging in bribery of foreign public officials.<sup>157</sup> The Clean Company Act, however, gives "public bodies" the discretion to enter into leniency agreements with such entities if all of the following conditions are met:

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151. *Id.* at art. 18.

152. *Id.* at art. 19.

153. *Id.*

154. However, the rights of a third party with good faith may not be prejudiced. *Id.*

155. *Id.*

156. Clean Company Act, art. 19 (Braz.).

157. *See generally* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28.

- I. Legal entity responsible for committing the offense “effectively collaborates” with authorities in investigation and administrative proceedings;
- II. The legal entity was the party who first expressed the desire to cooperate with authorities in investigation of its illegal acts;
- III. Starting on the date when a leniency agreement was proposed, the legal entity completely ceased its involvement in the illegal acts; and
- IV. The legal entity admitted that it participated in the illegal acts, “fully and permanently” cooperated with authorities in investigation, and appeared in all administrative proceedings whenever requested, at its own expense.<sup>158</sup>

There are two express requirements under the Act for the finding that the legal entity “effectively collaborated” with authorities.<sup>159</sup> First, if applicable, the legal entity must identify any other parties that were involved in the violation.<sup>160</sup> Second, the legal entity must promptly turn over all information and documents that prove the illegal act.<sup>161</sup> In the event that the legal entity fails to comply with a finalized leniency agreement, the entity will be prevented from entering into a new agreement for three years, starting with the date of noncompliance.<sup>162</sup>

Successfully entering into a leniency agreement with the authorities may result in a reduction of penalties for the legal entity.<sup>163</sup> For example, the entity's fines may be reduced by up to two-thirds.<sup>164</sup> Moreover, the entity may be exempt from certain administrative and judicially imposed civil penalties.<sup>165</sup> The Act specifies that a legal entity that manages to enter into a leniency agreement may be able to avoid: i) extraordinary publication of the adverse judgment against it, and ii) the harsh judicial penalty of suspension or compulsory dissolution of the entity.<sup>166</sup> However, entering into a leniency agreement does not relieve the entity of its liability to fully cure any damage caused by the violation.<sup>167</sup>

That the Clean Company Act allows for such leniency agreements is of great concern to the OECD.<sup>168</sup> The Working Group is specifically concerned about the

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158. Clean Company Act, art. 16.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Clean Company Act, art. 16 (Braz.).

165. *Id.*

166. *Id.*

167. *Id.*

168. Dawson, *supra* note 79.

degree of leniency that might be given to such companies because similar provisions have proven controversial in Russia and some Eastern European countries.<sup>169</sup> However, the allowance for leniency agreements does not make the Brazilian Act *per se* noncompliant with the OECD Anti-Bribery Convention. This is evident from the fact that the United States allows for varying degrees of leniency in consequences if the legal entity cooperates.<sup>170</sup> For example, the DOJ takes into account self-reporting, cooperation, and remedial efforts by the entity when resolving FCPA violation matters.<sup>171</sup> The United States also allows deferred prosecution agreements as a result of cooperation by the legal entity.<sup>172</sup>

5. *The Clean Company Act's Sanctions are Effective, Proportionate, and Dissuasive*

Article 3 of the Convention provides: "In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions."<sup>173</sup> The sanctions imposed by the Clean Company Act meet the Convention's requirement of being effective, proportionate, and dissuasive.<sup>174</sup> This is illustrated by the fact that the sanctions imposed under the Act are either similar to or even more severe and far-reaching than those imposed by other nations that have aggressively enforced the Anti-Bribery Convention through their own laws, such as the United States and the United Kingdom.<sup>175</sup>

For instance, administrative penalties under the Clean Company Act<sup>176</sup> are comparable to the corporate penalties under the FCPA, which can range up to two million dollars, or twice the amount of the monetary gain that the legal entity sought when engaging in bribery.<sup>177</sup> Moreover, unlike the Act, neither the FCPA nor the U.K.'s 2010 Bribery Act impose joint and several liability upon parent,

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169. *Id.*

170. CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENFORCEMENT DIV., U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 54-56 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

171. *Id.*

172. *Id.*

173. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 3.

174. *See supra* Part III.C.

175. *See supra* Part III.C; Funk & Dance, *supra* note 121, at 56-57; THE WORKING GROUP ON BRIBERY, OECD, UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS 3, 4 (2012), available at <http://www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf>; *see SEC Enforcement Actions: FCPA Cases*, *supra* note 4.

176. Clean Company Act, art. 6 (Braz.).

177. Marcelo dos Santos Barradas Correia et al., *A Comparison of the New Brazilian Anticorruption Law, the FCPA, and the UK Bribery Act*, ASSOCIATION OF CORPORATE COUNSEL (Sep. 24, 2013), <http://www.acc.com/legalresources/quickcounsel/cnbalfuba.cfm?makepdf=1>.

subsidiary, or affiliated companies.<sup>178</sup> Lastly, while the FCPA and the U.K. Bribery Act do not provide for dissolution of legal entities, the Clean Company Act does.<sup>179</sup>

#### D. Jurisdiction

The Convention requires that if the offense of bribery of a foreign public official is committed within a party's territory, the party should take necessary measures to establish jurisdiction over that bribery.<sup>180</sup> Parties should establish jurisdiction even if the violation was only partly committed within its territory.<sup>181</sup> Furthermore, parties that already have jurisdiction to prosecute its nationals for offenses committed outside the party's territory should establish jurisdiction to prosecute instances of bribery of foreign public officials.<sup>182</sup>

The Clean Company Act meets the Convention's requirements relating to jurisdiction. It establishes jurisdiction over legal entities domiciled in Brazil, or those with representation offices located in Brazil.<sup>183</sup> The Act also establishes jurisdiction over legal entities that are affiliated with such companies.<sup>184</sup> For example, the Act applies to controlling companies, controlled companies, related companies, companies within the framework of a contract, and consortium partners.<sup>185</sup> The Act applies even if the legal entity is temporarily established in Brazil.<sup>186</sup> Lastly, the Brazilian Act meets the Convention's requirement on extending jurisdictions to violations committed outside a party's territory by providing that it applies to violations committed by Brazilian legal entities against foreign public administrations outside Brazil.<sup>187</sup>

#### E. Statute of Limitations

Article 6 of the Convention states that any "statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence."<sup>188</sup> The Clean

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178. *Id.*

179. *Id.*

180. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 4.

181. *Id.*

182. *Id.*

183. Clean Company Act, art. 1 (Braz.).

184. *Id.* at art. 4.

185. However, the liability of these listed companies is limited to paying fines and indemnification of any damages caused. *Id.*

186. *Id.* at art. 1.

187. *Id.* at art. 28.

188. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 6.

Company Act adopts a statute of limitations of five years, calculated from the date when the violation became known to the authorities.<sup>189</sup> In cases of ongoing violations, the time is calculated from the date when the violation ended.<sup>190</sup> Moreover, the statute of limitations is tolled upon institution of administrative or judicial proceedings commenced for the purpose of determining whether a legal entity violated the Act.<sup>191</sup>

The Clean Company Act meets the Convention's requirement of adopting a statute of limitation that allows adequate time for investigation and prosecution of violations. First, the Working Group has approved the statute of limitations period adopted by the FCPA, which is five years from the time that the violation was committed.<sup>192</sup> The Act adopts a longer period because it provides for a statute of limitation which starts from the time when the violation became known.<sup>193</sup>

#### *F. Extradition*

The Convention requires that bribery of foreign officials should be considered an extraditable offense under the laws of the parties to the Convention.<sup>194</sup> Additionally, parties "shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official."<sup>195</sup>

The Clean Company Act does not expressly declare bribery of foreign public officials as an extraditable offense.<sup>196</sup> However, Brazil has stated that "bribery of a foreign public official is an offence for which extradition can be granted within the scope of its [existing, specific extradition] laws and extradition treaties with other Parties to the Convention."<sup>197</sup> Additionally, the Act established jurisdiction over violations committed by Brazilian legal entities against foreign public administrations outside Brazil.<sup>198</sup> Therefore, the Brazilian law meets the Convention's requirements on extradition.

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189. Clean Company Act, art. 25 (Braz.).

190. *Id.*

191. *Id.*

192. In its Phase 1, Phase 2 and Phase 3 review reports, the Working Group has encouraged the United States to adopt a longer statute of limitations. THE WORKING GROUP ON BRIBERY, OECD, UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 175, at 5.

193. Clean Company Act, art. 25 (Braz.).

194. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 10.

195. *Id.*

196. *See generally* Clean Company Act (Braz.).

197. THE WORKING GROUP, *supra* note 26, at 35; THE WORKING GROUP, OECD, BRAZIL: PHASE 2 REPORT, *supra* note 73, at 31.

198. Clean Company Act, art. 28 (Braz.).

*G. Monitoring and Follow-Up*

When signing on to the Convention, parties agree to cooperate with the OECD Working Group on Bribery in “carrying out a [program] of systematic follow-up” and monitoring to assure full implementation of the Convention.<sup>199</sup> Brazil has cooperated with the Working Group in completing three, rigorous reviews.<sup>200</sup> The Phase 1 review was completed in September 2004.<sup>201</sup> Phase 2 Review took place in December 2007.<sup>202</sup> Recently, during May 2014 through October 2014, the Working Group completed its Phase 3 review of Brazil's efforts to implement the Convention.<sup>203</sup> For this purpose, members of the Group conducted an on-site visit, where they met representatives of the Brazilian public and private sectors, media, a Parliamentarian, the Minister of State, and Head of the Office of the Comptroller-General.<sup>204</sup> The evaluation team expressed “its appreciation to Brazil for its efforts in the evaluation process.”<sup>205</sup> Brazil, thus, meets the requirements of this provision.

*H. Enforcement*

The Convention allows parties to investigate and prosecute instances of bribery of foreign public officials based on their own “rules and principles.”<sup>206</sup> The Convention, however, requires that parties do not consider national economic interest, potential effect on relations with other states, or the identity of the offender when investigating or prosecuting bribery.<sup>207</sup> In its 2007 Revised Recommendation on Combating Bribery in International Business Transactions, the OECD put forth two additional measures.<sup>208</sup> First, “complaints of bribery of foreign public officials should be seriously investigated by competent authorities.”<sup>209</sup> Second, governments of parties to the Convention should provide adequate resources to allow effective prosecution of such bribery.<sup>210</sup>

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199. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at art. 12.

200. OECD WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL 7 (2014), available at <http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf>.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Clean Company Act, art. 5 (Braz.).

207. *Id.*

208. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at cmt. 27.

209. *Id.*

210. *Id.*

Brazil is yet to meet the Convention's requirements on enforcement. In 2014, Transparency International categorized Brazil as a country that was engaged in "Little or No Enforcement" of the Anti-Bribery Convention.<sup>211</sup> To make matters worse, just recently, Brazil's state-run oil giant, Petrobras, became engulfed in allegations of corruption and money-laundering, allegedly involving hundreds of millions of dollars.<sup>212</sup> Given such state of affairs, as Nicola Bonucci has recognized, the critical question is how Brazil will to enforce its Clean Company Act.<sup>213</sup>

Notwithstanding the recent corruption scandals in Brazil, it should not be ignored that Brazil has recently taken several revolutionary and promising steps towards fighting corruption.<sup>214</sup> It is significant that the country passed the landmark Clean Company Act.<sup>215</sup> Prior to enacting the law, President Rousseff exercised her line item veto power to reject three provisions of the bill because those provisions would have reduced the bill's impact.<sup>216</sup> Moreover, in June 2013, Brazil's Senate passed a bill that declared corruption a "heinous crime," increasing the minimum prison sentence from two to four years for individuals guilty of this crime.<sup>217</sup> In 2012, the Brazilian Supreme Court transfixed the country when it publicly tried and convicted several officials accused of engaging in a vote-buying scheme for the former President Luiz Inacio Lula da Silva.<sup>218</sup> Twelve of these officials were sent to prison even though their cases were still on appeal.<sup>219</sup> Carlos Ayres, co-chair of the anti-corruption and compliance committee of the Brazilian Institute of Business Law, has reported that "number of arrests for public corruption has increased 133 percent since 2008."<sup>220</sup> It is still uncertain, however, that Brazil will effectively enforce the Clean Company Act.<sup>221</sup>

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211. The report also shows that 30 out of the 40 countries who have signed the OECD Convention are barely investigating and prosecuting bribery of foreign public officials. TRANSPARENCY INT'L, *supra* note 2, at 2, 5-7.

212. Mary Anastasia O'Grady, *An Escalating Corruption Scandal Rocks Brazil*, WALL ST. J. (Apr. 12, 2015, 6:06 PM), <http://www.wsj.com/articles/an-escalating-corruption-scandal-rocks-brazil-1428876380>.

213. Dawson, *supra* note 79.

214. Spalding, *supra* note 130.

215. *Id.*

216. President Rousseff rejected the following provisions: i) limit on "financial liability to the value of the contract obtained with the bribe," ii) showing of intent or fault requirement for some sanctions, and iii) lenient treatment of defendant if government itself was also involved in corruption. *Id.*

217. *Brazil Senate Toughens Punishments for Corruption*, BBC NEWS (June 27, 2013), <http://www.bbc.co.uk/news/world-latin-america-23081103>.

218. Dawson, *supra* note 79.

219. *Id.*

220. *Id.*

221. LaCroix, *supra* note 18; Stuart Vincent Campbell, *Perception is Not Reality: The FCPA, Brazil, and the Mismeasurement of Corruption*, 22 MINN. J. INTL. L. 247 (2013).



#### IV. THREE KEY STEPS TOWARDS EFFECTIVE ENFORCEMENT OF THE CLEAN COMPANY ACT

Brazil should take at least three key steps in order to effectively enforce the Clean Company Act. Brazil should make it a top priority to aggressively and objectively investigate and prosecute cases of bribery of public officials.<sup>222</sup> All enforcement agencies across Brazil should adopt uniform procedures and interpretations under the Clean Company Act.<sup>223</sup> Brazil should collaborate with other countries, such as the United States, in investigation and prosecution.<sup>224</sup>

##### A. Aggressive and Objective Prosecution

In order to effectively enforce its ambitious Clean Company Act, Brazil should adopt the attitude of countries that have been declared the champions in enforcing the Anti-Bribery Convention through their own laws.<sup>225</sup> Such countries include United States, Germany, and United Kingdom.<sup>226</sup> The common thread among these countries' efforts is that they have made it a top priority to aggressively and objectively investigate and prosecute instances of bribery of foreign public officials.<sup>227</sup>

In addition to having the right attitude, aggressive enforcement involves strengthening agencies in charge of investigation and prosecution.<sup>228</sup> Because the Clean Company Act allows multiple governmental agencies to bring actions against legal entities suspected of engaging in bribery, Brazil should properly invest in strengthening all such agencies.<sup>229</sup> Brazil should also take measures to properly train its investigators and prosecutors, belonging to all enforcement agencies.<sup>230</sup>

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222. White, *supra* note 3, at 163.

223. THE WORKING GROUP, OECD, BRAZIL: PHASE 2 REPORT, *supra* note 73, at 15.

224. See Andrew Tyler, *Enforcing Enforcement: Is The OECD Anti-Bribery Convention's Peer Review Effective?*, 43 THE GEO. WASH. INT'L L. REV. 137 (2011); Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VIRGINIA J. OF INT'L L. DIGEST 1, 41 (2012).

225. Funk & Dance, *supra* note 121, at 56-57; BUREAU OF ECON. & BUS. AFFAIRS, *supra* note 13, at 1; THE WORKING GROUP ON BRIBERY, OECD, UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 175, at 3, 4.

226. Funk & Dance, *supra* note 121, at 56-57; BUREAU OF ECON. & BUS. AFFAIRS, *supra* note 13, at 1; THE WORKING GROUP ON BRIBERY, OECD, UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 175, at 3, 4.

227. Funk & Dance, *supra* note 121, at 56-57; BUREAU OF ECON. & BUS. AFFAIRS, *supra* note 13, at 1; THE WORKING GROUP ON BRIBERY, OECD, UNITED STATES: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS, *supra* note 175, at 3, 4.

228. White, *supra* note 3, at 163; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 28, at cmt. 27.

229. See *supra* Part III.C.3.

230. J.P., *supra* note 17.

Aggressive and objective prosecution is especially important for Brazil because corruption has become deeply-rooted in the country.<sup>231</sup> Despite well-known and substantial problems with corruption, Brazil did not commence any prosecutions involving foreign bribery between 2009 to 2012.<sup>232</sup> Furthermore, only four investigations were commenced during the same period.<sup>233</sup> The country has performed “Little or No Enforcement” of the Anti-Bribery Convention.<sup>234</sup> In such circumstances, it is imperative that Brazil aggressively and objectively investigate and prosecute any cases involving bribery.

*B. Uniform Procedures and Interpretation of the Clean Company Act*

The Brazilian Act allows several different governmental agencies to enforce its provisions.<sup>235</sup> Specifically, administrative authorities, public prosecutors, and government regulators may bring actions against legal entities suspected of engaging in bribery.<sup>236</sup> While such allocation of authority gives power to several layers of governmental entities, it also creates the possibility that different entities will adopt different procedures.<sup>237</sup> Even worse, it is possible that different enforcement agencies will interpret key terms of the Act differently.<sup>238</sup> For example, different local authorities across Brazil could adopt contradictory criteria for what constitutes an “adequate compliance scheme,” as outlined under Article 6 § 6 of the Act.<sup>239</sup> Similarly, different enforcement agencies could determine differently as to what constitutes “hindering the investigatory or supervisory work of public bodies,” an ambiguous provision of the Act.<sup>240</sup> Some commentators are concerned that if different enforcement authorities across Brazil chose to adopt different procedures and interpretations than those adopted by the federal government, ambiguity and even more corruption could result.<sup>241</sup>

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231. *See supra* Parts II.E., III.H.

232. TRANSPARENCY INT’L, EXPORTING CORRUPTION PROGRESS REPORT 2013: ASSESSING ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 6, 23 (2013), *available at* [http://www.transparency.org/whatwedo/pub/exporting\\_corruption\\_progress\\_report\\_2013\\_assessing\\_enforcement\\_of\\_the\\_oecd](http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd).

233. *Id.*

234. *Id.*

235. *See supra* Part III.C.3.

236. *See supra* Part III.C.3.

237. Elizabeth Macknay, *Brazil’s New Anti-corruption Law*, HERBERT SMITH FREEHILLS (Jan. 21, 2014), <http://www.herbertsmithfreehills.com/insights/legal-briefings/brazils-new-anti-corruption-law>;

238. J.P., *supra* note 17.

239. *Id.*; Clean Company Act, art. 6 (Braz.).

240. John Rupp, Advisory, *New Brazilian Anti-Bribery Statute*, COVINGTON (Aug. 9, 2013), *available at* [http://www.cov.com/files/Publication/83260639-b097-4908-843c-1434efafca9e/Presentation/PublicationAttachment/8c7a9c35-5f0c-4e2f-9e12-168b79085722/New\\_Brazilian\\_Anti-Bribery\\_Statute.pdf](http://www.cov.com/files/Publication/83260639-b097-4908-843c-1434efafca9e/Presentation/PublicationAttachment/8c7a9c35-5f0c-4e2f-9e12-168b79085722/New_Brazilian_Anti-Bribery_Statute.pdf); Clean Company Act, art. 5 (Braz.).

241. J.P., *supra* note 17.

In order to ensure that the Clean Company Act is enforced effectively and evenly, Brazil should take steps to adopt uniform procedures and interpretations under the Act.<sup>242</sup> It may be best for all enforcement authorities to adopt the procedures and interpretations adopted by the federal government.<sup>243</sup> This seems particularly suitable because recently the federal government has taken affirmative, concrete steps in the right direction, showing at least an outwardly determination to seriously crack down on corruption in Brazil.<sup>244</sup> If federal procedures and interpretations reflect a similar zeal for uprooting corruption, universal application of those exact procedures and interpretations may be the best solution for Brazil.

*C. Collaboration with Other Nations in Investigation and Prosecution*

Corruption can be hard to detect, especially corruption on international level.<sup>245</sup> As Hamilton Cruz, one of the directors at Brazil's Office of the Comptroller General, explained, "'It is not easy to follow the money. It is not easy to locate a fake company. It is not easy to see who took the decision (to bribe).'"<sup>246</sup> Moreover, some of the most notable successes in investigation and prosecution of bribery at the international level were the result of joint efforts between two or more countries.<sup>247</sup> For instance, a 2008 joint investigation by Germany and the United States of Siemens AG, a German engineering multinational company, resulted in \$1.3 billion in fines for the company.<sup>248</sup> Investigation and prosecution of TSKJ, a consortium of four multinational companies, involved enforcement authorities of five countries, namely France, Italy, Switzerland, United Kingdom, and United States.<sup>249</sup> Furthermore, the United States and United Kingdom jointly investigated and prosecuted BAE Systems PLC, a global defense and aerospace company.<sup>250</sup>

It is clear that Brazil can benefit from collaborating with other countries in investigation and prosecution of suspected bribery, whether it has treaties with those countries or not. Fortunately for Brazil, since the enactment of the Clean Company Act, the DOJ, the Federal Bureau of Investigations, and the SEC have been "much more willing to share information with Brazil on fraud, bribery and

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242. *See id.*

243. *Id.*; Macknay, *supra* note 237.

244. *See supra* Part III.H.

245. Stella Dawson, *Interview- Brazil will Soften Bribery Sanctions on Companies with Strong compliance*, THOMSON REUTERS FOUNDATION (Dec. 11, 2013, 08:03 AM), <http://www.trust.org/item/20131211080313-hl76f/?source=search>.

246. *Id.*

247. Spahn, *supra* note 224, at 23-31.

248. *See* Tyler, *supra* note 224, at 137.

249. Spahn, *supra* note 224, at 28-29.

250. *Id.*; *About BAE Systems in the United States*, BAE SYSTEMS, [http://www.baesystems.com/our-company-rus/bae-systems-inc-rus/about-us?\\_afrLoop=275438789221000](http://www.baesystems.com/our-company-rus/bae-systems-inc-rus/about-us?_afrLoop=275438789221000) (last visited Feb. 12, 2014).

corruption.”<sup>251</sup> Brazil and United States are already working together in investigating allegations of bribery against a leading Brazilian aircraft manufacturing company, Embraer.<sup>252</sup> Brazil should continue to collaborate with United States and other countries from across the globe in order to effectively enforce the Clean Company Act.

## V. CONCLUSION

Some commentators believe that the situation of corruption among Brazilian public officials is analogous to the following: “Just as a fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out while taking money for themselves.”<sup>253</sup> However, Brazil is now at an important crossroads. On one hand, it has been rapidly growing locally and internationally.<sup>254</sup> It increasingly serves as “the global or regional headquarters for multinational corporations.”<sup>255</sup> It continues its efforts to attract foreign investment.<sup>256</sup> On the other hand, companies across the globe are progressively unwilling to do business in countries where bribery and corruption are rampant.<sup>257</sup> Although Brazil has a deeply-rooted problem of corruption, Brazilians have vehemently spoken up against corruption in their country.<sup>258</sup> The Brazilian government has finally taken a tough stance against corruption in enacting the Clean Companies Act, a law that either meets or exceeds the OECD Anti-Bribery Convention’s requirements.<sup>259</sup> All eyes are on Brazil as it prepares to host the Olympic Games in 2016.<sup>260</sup> Against this backdrop, it is imperative that Brazil take all necessary measures to actively and aggressively enforce its new anti-bribery law, the Clean Company Act.

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251. Dawson, *supra* note 245.

252. *Id.*

253. Campbell, *supra* note 221, at 247 (quoting DONALD MACKENZIE BROWN, *THE WHITE UMBRELLA: INDIAN POLITICAL THOUGHT FROM MANU TO GANDHI* 58 (1964)).

254. Sheppard Mullin Richter & Hampton, *Brazil: The Brazilian Anti-Corruption Act Of 2013 (Act # 12846)*, MONDAQ (Feb. 16, 2014), <http://www.mondaq.com/x/292696/international+trade+investment/The+Brazilian+AntiCorruption+Act+of+2013+Act+12846>.

255. *Id.*

256. *Id.*

257. Spahn, *supra* note 224, at 23-31; Luciano Vaz Ferreira & Fabio Costa Morosini, *The Implementation of International Anti-Corruption Law in Business: Legal Control of Corruption Directed to Transnational Corporations*, 2 AUSTRAL. J. STRATEGY & INT’L REL. 241 (2013).

258. *See supra* Parts II.E, III.H.

259. *See supra* Parts II.E, III.

260. J.P., *supra* note 17.

