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Governance and Organized Crime in Brazil: Proposal for Interagency Cooperation to Prevent and Repress Corruption through Financial Intelligence

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SUMMARY

Brazil currently lacks a cohesive, strategic institutional model for responding to the problem of corruption. There is a clear coordination challenge that needs to be addressed. The success of Brazil's Financial Activities Control Council (COAF), which focuses on money laundering and illicit financial transactions, offers an example of effective interagency coordination and intelligence-sharing. Using COAF as a model, Brazil could create a similar structure to address the problem of corruption.

History of the Problem

This brief analyzes two main problems regarding corruption in Brazil and provides several recommendations based on international experiences. The first problem centers on the effectiveness of anti-corruption strategies in Brazil. The second challenge builds on the first: Can inter-institutional cooperation and the use of financial intelligence improve a country's capacity to address corruption?

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The current institutional model in Brazil for responding to the problem of corruption is fragmented and superimposed. Efforts to coordinate and articulate action are isolated, operational, and nonstrategic, challenging the country's ability to effectively prevent and suppress corruption.

This coordination challenge is readily observable in the relationship between the federal, state and municipal governments—as well as within the federal government and within each state and each municipality—and is further supported by the data.

A key piece of evidence used in this report is a study produced by STAR (the Stolen Asset Recovery Initiative), titled "Few and Far: The Hard Facts on Stolen Asset Recovery." The report, published in 2014 by the World Bank and the United Nations Office on Drugs and Crime (UNODC), demonstrated countries' inability to recover financial losses due to corruption.

This study, conducted with member countries of the Organization for Economic Co-operation and Development (OECD), indicated that only $147 million was recovered between 2010 and June 2012. Between 2006 and 2009, stolen assets recovered totaled $276 million. These sums are a tiny fraction of the total amounts diverted annually due to corruption, which is estimated to be close to $40 billion.

This is a matter for concern, as it demonstrates the need for a more effective mechanism to track diverted funds, but also for methods to ensure that individuals and legal entities harmed by acts of corruption do not incur further damage as authorities seek to halt embargo illicit financial movements.

In Brazil, the ongoing Lava Jato Investigation has confirmed the difficulty of recovering diverted funds. According to data produced by the Public Prosecutor's Office in the State of Paraná, although prosecutors are seeking repayment of more than R$38.1 billion (US$ 11.3), thus far only R$11.5 billion (US$ 3.4 billion) is on the table through plea-bargains, just R$3.2 billion (US$ 920 million) has been frozen, and a mere R$759.9 million (US$ 225 million) has been repatriated.

Transparency International recently published its findings for the 2017 Global Corruption Perception Index and Brazil's ranking has fallen significantly, decreasing 17 points since 2016. It is now ranked 96th out of 180 countries.

Current Responses to Corruption in Brazil

In Brazil, important advances have been made in the prevention and repression of corruption at the institutional and legislative levels, stemming from the Federal Constitution of 1988.

At the institutional level, this has involved the creation of new agencies and initiatives that improved the management and regulation of information, thereby improving monitoring and the capacity to quickly identify the "money trail" and the networks of illicit personal, corporate, and political relationships.

Among these new structures, it is worth specifically mentioning the Federal Accounting Court (TCU), the Comptroller General's Office (CGU), the Financial Activities Control Council (COAF) and the Department of Asset Recovery and International Legal Cooperation (DRCI). Each agency, within its area of jurisdiction, produces highly qualified information to identify and expose each criminal enterprise in its entirety.

In the case of TCU, it is important to note two specific functions of the court: first, its authority to conduct financial audits, to ensure the accountability of government entities; and second, its authority to conduct operational audits (the systematic gathering and collection of information about the characteristics, processes, and results of a specific program, activity, or organization), to help ascertain the details of public construction projects, such as highways, railways, and airports.

The CGU, which is linked to the Ministry of Transparency, Monitoring, and Accountability, already collaborates with the TCU, although it focuses on the process of public procurement. In addition, it is responsible for internal control actions, public audits, corrections, preventing and combating corruption, and complaint resolution (through the office of the ombudsman). Some of the specific issues monitored include: public biddings, expenses on corporate credit cards, accommodation and transportation per diems, and outsourcing. The CGU issues warnings for transactions that fall into any of the dozens of types of wrongful acts indicated, generally during CGU audits.

The COAF, on the other hand, focuses specifically on the prevention and suppression of money laundering and it is responsible for monitoring atypical financial transactions. The COAF cooperates with Financial Intelligence Units (UIF), its global counterparts, through the exchange of information related to equity and financial transactions. In the Lava Jato Operation, the COAF cooperated by sharing its Financial Intelligence Report (RIF), which documented cases of financial irregularity.

Finally, the Department of Asset Recovery and International Legal Cooperation, created in 2003 as an agency within the Ministry of Justice and Public Security, is the central authority on international legal assistance procedures, in civil and criminal matters. This jurisdiction to manage international legal cooperation procedures was defined in accordance with the United Nations Convention against Transnational Organized Crime, as well as from bilateral cooperation agreements. This role was transferred from the

Ministry of Foreign Affairs to the Ministry of Justice as a way of improving the state's capacity to articulate and streamline mutual assistance procedures. In case of the Lava Jato Operation, there were over 200 requests for cooperation in three years, both civil and criminal. The nature of these requests ranged widely, including the communication of procedural acts, production of evidence abroad, information-sharing, preventive measures (e.g. seizure of assets, search and seizure), and repatriation of funds.

However, the institutional rearrangement was not limited to the creation of agencies and redefinition of jurisdictions, but also included important initiatives to articulate the goals of inter-institutional coordination, such as the Brazilian Strategy for the Fight Against Corruption and Money Laundering (ENCCLA). ENCCLA was created in 2003 within the Ministry of Justice, to reduce the distance between agencies and to promote alignment, integration, and interaction among institutions on a number of initiatives, including the discussion and preparation of bills, such as the Law of Criminal Organizations (Law 12850/2013). Other results obtained by ENCCLA include:

- The creation of the Brazilian Qualification and Training Program Against Corruption and Money Laundering (PNLD), which since 2004 has certified about 15,000 agents across Brazil;
- The creation of the Brazilian Registry of Financial System Clients (CCS), under management of the Central Bank of Brazil (BACEN);
- The standardization of request/response methods and the respective tracking in regards to breaches in banking secrecy, and the development of the Banking Movement Investigation System (SIMBA);
- The creation of the Technology Laboratory against Money Laundering, which aims to optimize investigations and judicial proceedings by streamlining the analysis of big data; and
- The drafting of a bill to regulate the public declaration of property and other assets that form the private wealth of public officials. The draft bill became law as Federal Decree 5.483/2005, which included: the creation of the Brazilian System of Seized Assets, managed by the Brazilian Council of Justice (CNJ), and promotion of advanced chattel mortgage, thus permitting higher effectiveness in the cut of criminal organizations' financial flows;
- The creation of the Register of Disreputable and Suspicious Entities (CEIS), maintained by the Comptroller General's Office, which ensured more publicity, transparency and social control over the companies that engage with public authority;
- The creation of the Brazilian Register of Entities (CNEs), under management of the Ministry of Justice; and finally,

- The consolidation of central authority for purposes of international legal cooperation, i.e. higher effectiveness of justice with the possibility of searching for new evidence abroad, preparation of new bills and proposals for amendments, particularly the bill on criminal organizations (Law 12850/2013), money laundering (Law 12863/2012), extinction of domain (civil forfeiture of property related to illegal actions), and intermediation of interests (lobbying).

At the legislative level, progress also continues. It is possible to recognize in the Brazilian legal system an increasingly broad and synergistic regulatory model, which is aimed at curbing deviations, increasing transparency, reducing opportunities for crime, establishing greater controls and restrictions, minimizing pressure situations, rationalizing the decision-making process, and ensuring increased accountability.

At the international level, it is important to reference the significant legal cooperation under multilateral treaties and bilateral agreements, ratified by Brazil and incorporated into the legal framework used in the Lava Jato Operation. These include over 180 requests for assistance, of which 130 are requests Brazil made to 33 countries, and 53 are requests received from 24 countries for sharing information and evidence; the production of evidence abroad; access to bank data; tracking, freezing and repatriation of assets, and extradition, among others.

Of particular note are the United Nations Convention against Transnational Organized Crime and Corruption, as well as the Convention of the Organization for Economic Co-Operation and Development (OECD), specifically regarding the exchange of tax information, recommendations of the Financial Action Task Force (FATF), and bilateral agreements for mutual assistance in criminal matters, with 20 countries, including the United States, Switzerland, Spain, the United Kingdom, France, Italy, Canada, and Mexico.

At the domestic level, several important laws—many of which are boosted by Brazil's international commitments—were used by the investigators in the Lava Jato Operation in investigations into criminal offenses, as well as in civil and administrative cases, especially for plea-bargains. There were more than 150 plea deals by parties under investigation.

The following statutes should be highlighted:

- **Law 8429/1992**: Administrative misconduct law, which punishes actions that violate the principles of public administration, cause loss to the public treasury, or give rise to illicit enrichment;
- **Law 8.666/1993**: Bidding law, which establishes a legal system for government procurement through competition, based on the assumption that this is the best way to protect the public interest;

- **Law 9.613/1998**: Defines the crime of money laundering, established the Brazilian system against money laundering, and created the Financial Activities Control Council; also defines the administrative liability of a number of persons obliged to report suspicious financial transactions. This law was subsequently amended by Law 12683/12, that, among other new terms, excluded the list of crimes prior to money laundering;
- **Law 12527/2011**: Information access law, which regulates the right to information in the public administration sphere, supported by the publicity principle, in which the right to secrecy is considered a temporary exception, and one that is only applicable in the cases set forth by law;
- **Law 12.813/2013**: Addresses conflicts of interest in the exercise of office or employment in the federal executive power and subsequent impediments to the exercise of office or employment;
- **Law 12.846/2013**: Known as Brazil's anti-corruption law, it regulates the strict civil and administrative liability of legal entities involved in acts of corruption, and defines a series of governance procedures to be adopted by them, including a code of conduct and integrity, in-house communication standards, and qualification and training programs;
- **Law 12.850/2013**: Defines organized crime and regulates various procedural instruments that can be used to build solid criminal investigations, such as undercover agents, plea-bargains, access to master data files of telephone companies and financial systems, among others;
- **Law 13.260/2016**: Regulates the provisions of Item XLIII of Art. 5 of the Federal Constitution, governing terrorism, to address investigative and procedural provisions, and reformulating the concept of a terrorist organization; and also amends Law 7960 of December 21, 1989, and Law 12850 of August 2, 2013;
- **Law 13.303/2016**: Clarifies the legal status of companies that have public ownership of company shares, and requires: the adoption of codes of conduct and integrity, objective and meritocratic criteria for holding executive positions, a probation on partisan political patronage in appointing executives, a prohibition on public officeholders being members of boards of directors, the submission of a number of transparency requirements, and risk management.

One of the advances mentioned above stands out: the creation of the Financial Activities Control Council (COAF) by Law 9.613/98, as the body responsible for governance on the prevention and repression of money laundering in Brazil, with support in the area of intelligence to manage the risk of moving money of suspect origin, as well as to boost the efforts of accountability and regulatory bodies at the criminal, civil and administrative levels.

The aforementioned institution is supported by two key elements: a) its collective composition, comprised of a range of agencies with different responsibilities, including to regulate, such as the Central Bank, and to investigate, such as the Federal Police Department; and b) its compulsory reporting regime whereby all economic sectors (e.g., financial, luxury, real estate, and insurance) vulnerable to the movement of illicit funds are required to communicate suspect transactions.

In addition, the COAF became part of a large international cooperation network for sharing financial information and intelligence, mainly in the adoption of preventative measures and for tracking movements.

However, the governance structure in place to address money laundering through the COAF is not specifically for corruption, and corruption has a competing, fragmented and overlapping institutional design.

Policy Options

There are two possible ways to orient Brazilian policy to confront corruption, taking into consideration the key points and central issues described in the previous sections.

The first path is focused on legislative improvements, specifically in regards to the expansion of controls and accountability at the criminal, civil, and administrative level.

The second path is focused on management and governance solutions to the problem of corruption, including its causes and effects. The goal of this option is to improve the capacity of knowledge, information, and inter-institutional coordination: a more appropriate model for admittedly complex situations, and one that contrasts with a fragmented jurisdictional regime, such as corruption.

This second model is the best option for building capacity to control corruption. The COAF, as stated previously, offers a clear example of this type of cooperative model being used successful to combat money laundering, and it could be replicated for the prevention and repression of corruption for the following reasons:

1. The COAF is the best Brazilian interagency experiment for the management of complex, interdisciplinary problems (such as money laundering). The COAF's mandate is not exhaustive in its own right, but its work directly and closely interfaces with other problems, such as organized crime, terrorist financing, and especially corruption;
2. The sustainability of the COAF, as an inter-institutional cooperation initiative, is based on a number of factors that enable good governance, such as its creation by law, its culture and mindset of cooperative and shared efforts, standardized processes and

procedures, a high level of commitment by its integral agencies, a human resources selection process supported by technical criteria, its management structure, the responsibility shared across member agencies for strategic management, its policy regarding domestic and international communication, and its leadership and prominence;

3. According to international consensus and Brazil's own domestic experience, financial intelligence is one of the most efficient mechanisms for monitoring the movements of illegal businesses and the exploitation of vulnerabilities;

4. The risk matrix developed and tested by COAF to identify the flow of suspicious funds, which creates different opportunities for intervention and thereby increases the potential for criminal accountability, may be equally replicable for the prevention and repression of corruption, supported by financial intelligence;

5. The logic in the prevention and repression of money laundering through the monitoring of financial transactions mirrors the logic of prevention and repression of corruption.

The COAF model provides a sound governance option to control the issue of corruption within the Brazilian context.

The adoption of this model for anti-corruption efforts could be implemented in two ways, either through the expansion of the COAF's current authority or through the creation of a similar structure to control corruption under the scope of Law 12.846/2013. Like COAF, this new structure would be linked to the Ministry of Finance, considering the importance of the regulatory body's role in the establishment and implementation of its operating policy, particularly in the financial system.

Recommendation

Given the multifaceted challenge of addressing corruption, the following is proposed: the amendment of Law 9.613/98, in order to expand the objective of the law and the authority of the Financial Activity Control Council in preventing and suppressing corruption; and the amendment of Law 12.846/2013 to create a structure similar to the COAF, with the following adjustments:

- In addition to current agencies that make up the COAF, to include in the composition of the new structure other control and regulation bodies, such as Administrative Council for Economic Defense (CADE) and TCU;

- To expand the number of persons required to report to the COAF to include private, legal entities that contract directly and indirectly with the Public Administration;
- To authorize the COAF or a similar anti-corruption structure to formalize terms of cooperation with other control bodies at the state and local levels, expanding the database.

Conclusion:

The Brazilian Anti-Corruption Law (Law 12.846/13), unlike the Anti-Money Laundering Law (Law 9.613/98), does not define the governance system to be used to control corruption, but solely defines the authority system for the application of sanctions. As a result, there is no proper agency dedicated to managing the problem of corruption, through risk analysis, specifically focusing on intelligence activities; and there is also lacking a mandatory reporting system for the public and private sectors. In light of these gaps, there is significant need for changes in policy for dealing with corruption, either through the expansion of the COAF's authority or through the formation of a similar structure under Law 12.846/13, in addition to the creation of mandatory information networks similar to the provisions of the Anti-Money Laundering Law.

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