

**The Anticorruption Leniency Program in Brazil:
A Path Towards Institutional Cooperation**

Rafael Tonicelli de Mello Quelho

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Supervisor: Professor Matthew C. Stephenson

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The enactment of the Clean Company Act (CCA or Law No. 12,846/2013) represented an unprecedented effort of Brazil to mitigate its longstanding problem with corporate corruption. The statute imposes strict civil and administrative liability on legal entities for the practice of corrupt acts against national and foreign Public Administration. In addition, it establishes the possibility of execution of leniency agreements between infringing legal entities and public authorities, enabling the reduction of sanctions in exchange for collaboration in investigations. Despite being a promising tool to rehabilitate companies and leverage the State's investigative powers, experience has shown that the Brazilian anticorruption leniency program suffers from severe deficiencies. Brazil has adopted a model of institutional multiplicity to fight corruption, meaning that multiple institutions have overlapping authority to enforce anticorruption measure. Currently, the lack of cooperation among these multiple institutions has led to an environment of legal uncertainty and unpredictability that undermines the willingness of companies to adhere to such programs. For instance, in theory, a company may sign a leniency agreement with one institution and later be sanctioned by another one for the same facts informed in the agreement. In order to provide a greater level of predictability, efficiency and attractiveness to the Brazilian anticorruption leniency program, this paper proposes cooperative procedures and a new institutional arrangement to address the issue.

Keywords: Corruption; Brazil; anticorruption policy; leniency agreements; institutional multiplicity.

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I. Introduction

In the last few decades, the fight against corruption has emerged as one of the most relevant topics in the international agenda since corruption is considered the root of many social and economic problems around the world. Notably, many corruption schemes are characterized by a collusion between corporations and government agents. On one side, corporations supply government agents (public officials and politicians) with improper payments. On the other side, government agents furnish special treatment to these corporations, allowing them to influence public policies and obtain public procurement contracts at inflated prices. Such schemes generate market inefficiencies and ineffectiveness of public services and policies. In order to change this state of affairs, worldwide efforts have been undertaken to deter corporate corruption. The enactment of the Foreign Corrupt Practices Act (FCPA) in 1977¹ by the United States and the conclusion of several international treaties² are representative examples of those efforts. Despite being a country that has historically suffered with endemic corruption, Brazil had no such provisions until the early 2000s.

¹ See, generally, U.S. Dep't of Justice & Enft Div, U.S. Sec. & Exch. Comm'n, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2d ed. 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download>. The FCPA imposes criminal sanctions on U.S. individuals and legal entities subject to U.S. jurisdiction for paying bribes to foreign public officials. In the last decades, it became a benchmark for anti-bribery legislation across the world. Examples of legislation inspired in the FCPA include the CCA enacted in Brazil in 2013, and the Bribery Act enacted in the United Kingdom in 2010.

² The two most prominent international treaties about corporate corruption are: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), which requires signatory countries to criminalize international bribery; and the United Nations Convention against Corruption (2005), which has a broader scope and establishes a set of preventive and reactive measures to fight corruption.

In 2013, the Brazilian Government enacted the Clean Company Act (CCA or Law No. 12.846/2013)³ as a result of intense international and domestic pressure. In the international level, Brazil was a signatory of three anticorruption conventions: the OECD Anti-Bribery Convention, the Inter-American Convention Against Corruption, and the United Nations Convention Against Corruption (UNCAC). According to these conventions, Brazil had a longstanding and unfulfilled commitment to impose liability on legal entities for corrupt acts. In the domestic level, a popular and massive movement took place through all the country.⁴ The movement demanded legal reforms against impunity and corruption, mainly related to political leaders.

Among the many contributions brought by the statute, three provisions can be highlighted:

- (i) The imposition of strict civil and administrative liability on legal entities for the practice of corrupt acts against national and foreign Public Administration.
- (ii) The execution of leniency agreements between infringing legal entities and public authorities, enabling the reduction of sanctions in exchange for collaboration in investigations.
- (iii) Incentives for companies to implement integrity (compliance) programs since the adoption of such programs has a mitigating effect on the dosimetry of the sanctions to be applied.

³ Lei No. 12.846, de 1 de Agosto de 2013 [Law No 12.846 of Aug. 1, 2013], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013 (Braz.).

⁴ Gary Duffy, *Brazil's Leaders Caught Out by Mass Protests*, BBC NEWS (Jun. 17, 2013), <http://www.bbc.com/news/world-latin-america-22947466>.

In the years that followed its enactment, the CCA passed through a trial by fire with the deflagration of the Operation Car Wash. The operation, deemed by some commentators as the one of the largest anticorruption investigations in world history,⁵ revealed a promiscuous and long-term relationship between the private and public sectors of the country. In the unveiled corruption scheme, big infrastructure companies paid bribes and kickbacks to politicians and high-ranked public officials in exchange of overpriced contracts and undue influence in the country's public policies.⁶ The Operation Car Wash represented an unparalleled opportunity to test the recent legal provisions specially designed to punish and rehabilitate corrupt corporate entities.

The test demonstrated that the promising statute suffered from an important shortcoming: there was a lack of predictability and transparency in its leniency program. The Brazilian anticorruption strategy is based on a model of institutional multiplicity – an arrangement where multiple institutions have overlapping authority to enforce legal provisions. Experience has demonstrated that the lack of coordination among the various institutions involved in the fight against corruption has been severely jeopardizing the success of the leniency program. Currently, an infringing company that intends to adhere to a leniency program will be confronted with the following challenges: uncertainty about the authority that should be contacted to negotiate a settlement; difficulties to calculate the consequences of a possible settlement; and the possibility of being punished even after the

⁵ Jonathan Watts, *Operation Car Wash: Is this the biggest corruption scandal in history?*, THE GUARDIAN, (June 01, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>.

⁶ See, e.g., PAUL LAGUNES & JAN SVEJNAR, eds, CORRUPTION AND THE LAVA JATO SCANDAL IN LATIN AMERICA (2020) (presenting a complete panorama of the corruption scandal).

conclusion of an agreement. The aforementioned challenges significantly undermine the interest of a company to self-report.

The purpose of this paper is to suggest an institutional arrangement that could overcome this crucial shortcoming by leveraging the level of coordination among anticorruption agencies and thereby providing companies with the ability to properly assess the advantages and disadvantages of adhering to a program. An increased level of inter-agency cooperation, instead of deleterious competition, will likely create a more predictable environment and reduce the transaction costs involved in the negotiations of the agreements.

This paper is organized as follows. In **chapter II**, the Brazilian anticorruption framework is explained. A particular focus is devoted to explaining the institutional multiplicity model, its strengths, and weaknesses. In **chapter III**, the Brazilian anticorruption leniency program is evaluated. To this end, we analyze two cases that illustrate the practical problems faced by proponents of leniency agreements when negotiating with Brazilian authorities. In **chapter IV**, a cooperative and coordinated institutional arrangement is proposed and compared with the current scenario. Finally, **chapter V** presents the conclusions of this paper.

II. The Brazilian Anticorruption Framework

This chapter is divided into 3 parts. The first part describes the institutions that comprise Brazil's anticorruption system; the second part describes the main statutes

with anticorruption provisions; and the third part briefly describes the leniency regimes that coexist in the country.

1. The Institutional Framework

A. Institutional Multiplicity: Benefits and Challenges

The Brazilian anticorruption framework relies on institutional multiplicity, meaning that there is a multitude of government agencies with overlapping powers to perform accountability functions.⁷

Each country may adopt different strategies to tackle corruption; however, it is possible to notice that their anticorruption systems share a peculiar characteristic in common. All of them are comprised of accountability institutions that perform three primary functions:⁸ (i) oversight/monitoring to detect potential illicit conducts; (ii) investigation of potentially illicit conducts; and (iii) punishment when there is satisfactory evidence that actual corruption has taken place. There is a clear interdependence among these functions. For instance, deficiencies in the oversight function will result in less cases to investigate, whereas deficiencies in the investigation function will result in less punishment.⁹

Institutional multiplicity consists in allocating multiple institutions to each of these three functions, adding redundancy and improving the performance of the overall system.

⁷ Mariana M. Prado & Raquel de M. Pimenta, *Systemic corruption and institutional multiplicity: Brazilian examples of a complex relationship*, 71 THE UNIVERSITY OF TORONTO LAW JOURNAL 74, 74 (2021).

⁸ *Id.* at 80.

⁹ *Id.*

The interactions among the accountability institutions can benefit the overall system in four different ways:¹⁰

- (i) **Compensation:** If one of the institutions fails to perform its role, there will be an alternative one able to carry on the task. The fundamental idea of the arrangement is to provide several institutional paths to tackle corruption, making the system more robust to withstand failures.
- (ii) **Collaboration:** accountability institutions can combine their human and technical resources to increase the effectiveness of their actions.
- (iii) **Complementarity:** institutions from different areas of expertise join forces to increase the likelihood of success of anticorruption initiatives.
- (iv) **Competition:** an institution will seek to enhance its own performance as a response to positive outcomes achieved by a similar institution.

Three advantages have been associated to this institutional arrangement. Firstly, it has been argued that the existence of multiple accountability institutions increases the probability of detection and punishment of corrupt behavior, resulting in an increased deterrent effect.¹¹

Secondly, it has been defended that the model provides a useful mechanism for transformative and incremental reforms in the anticorruption system.¹² Changing internal

¹⁰ Mariana M. Prado & Lindsey D. Carson, *Brazilian Anti-Corruption Legislation and its Enforcement: Potential Lessons for Institutional Design*, 4(1) JOURNAL OF SELF-GOVERNANCE AND MANAGEMENT ECONOMICS 34, 41 (2016) [hereinafter Prado & Carson, *Potential Lessons for Institutional Design*].

¹¹ Lindsey D Carson & Mariana Mota Prado, *Using Institutional Multiplicity to Address Corruption as a Collective Action Problem: Lessons from the Brazilian Case*, 62 Q REV ECONOMICS AND FINANCE 56, 61 (2018) [hereinafter Carson & Prado, *Corruption as a Collective Action Problem*].

¹² *Id.* at 63.

culture and the way an institution operates may be a hard and costly endeavor. On the other hand, creating new institutions, without extinguishing the existing ones, is “less likely to face political resistance from interests who benefit from the status quo”.¹³ Under this approach, a new institution may provide innovative methods to fight corruption, insert new cultural values, and incentivize its counterparts to improve their performance.

Finally, it is conjectured in the literature that the model provides an institutional arrangement suitable to mitigate systemic corruption.¹⁴ Since the model creates alternative paths to execute the core accountability functions, it is expected that principled individuals will have at their disposal alternative channels to report illicit conducts even though a set of institutions is compromised.¹⁵ Under this line of reasoning, the model “could potentially reduce the costs for those who are more inclined to engage in principled behavior to deviate from the standard corrupt behavior that prevails in society”.¹⁶

On the other hand, two main shortcomings have been associated to the model. As a first drawback, the model is resource demanding because it requires the allocation of two or more institutions to perform similar functions. In that regard, some commentators may argue that institutional multiplicity implies an inefficient allocation of resources.¹⁷ Nevertheless, it is important to point out that, in certain circumstances, redundancy may compensate the additional costs. In that situation, the funds retrieved by a redundant institution may surpass its operational costs to the government, thereby providing a positive

¹³ *Id.*

¹⁴ Prado & Pimenta, *supra* note 7, at 81.

¹⁵ *Id.*

¹⁶ Carson & Prado, *Corruption as a Collective Action Problem*, *supra* note 11, at 63.

¹⁷ Prado & Carson, *Potential Lessons for Institutional Design* *supra* note 10, at 41.

economic return. Hence, the viability of the model depends on the availability of resources and the level of corruption found in each country.

The second disadvantage that one can argue lies in the fact that the model may foster a deleterious form of competition. Under this form of competition, one institution may try to undermine the efforts of its counterparts.¹⁸

B. Institutional multiplicity in oversight

At the federal level, the oversight function is mainly performed by two auditing institutions: the Federal Court of Accounts [*Tribunal de Contas da União* (TCU)] and the Office of the Comptroller General [Controladoria-Geral da União (CGU)].

The Federal Court of Accounts (TCU) is the external control institution of the federal government, meaning that it is an autonomous institution not included in any of the three government branches (Executive, Legislative and Judiciary). It has the function of overseeing public bodies that handle federal funds. Its oversight activity includes audits on performance, budget, asset administration, finances, and accounts of the targeted public bodies.¹⁹

The Office of Comptroller General (CGU) is an internal control institution of the Executive branch. Mainly, CGU has been performing activities in the following fronts:

¹⁸ Carson & Prado, *Corruption as a Collective Action Problem*, *supra* note 11, at 63.

¹⁹ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 71.

ombudsman activities, internal affairs, auditing of federal funds, and enforcement of the CCA provisions.²⁰

The aforementioned auditing bodies provide two independent and autonomous paths to supervise the application of federal funds. It has been reported in the literature that the redundancy in the oversight function has generated positive outcomes.²¹ As an example, in 2006, through its monitoring process, CGU uncovered a municipal corruption scheme in the provision of public healthcare services.²² The resulting operation was later baptized as Operation Bloodsucker (*Operação Sanguessuga*).²³ In this episode, the corruption scheme was undetected by the TCU's control mechanisms. One may conjecture that Operation Bloodsucker would constitute an example of complementarity, in which the different auditing methods deployed by these institutions would complement each other; or compensation, in which the actions of one institution would compensate failures of the other.²⁴

²⁰ See, generally, Office of the Comptroller General, *Portfolio*, (2020), <https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/institucionais/arquivos/portifolio-ingles.pdf>. The structure of the CGU comprises: the Office of the General Ombudsman (OGU), which receives complains from citizens about suspected misconducts; the Federal Secretariat of Internal Control (SFC), which performs auditing functions over federal expenditures; the National Disciplinary Office (CRG), responsible for conducting disciplinary procedures on civil servants and for determining the liability of legal entities under the CCA; and the Anticorruption Federal Secretariat (SCC), responsible for the negotiation of leniency agreements and carrying on investigative and intelligence activities.

²¹ Mariana M. Prado & Lindsey D. Carson & Izabela Correa, *The Brazilian Clean Company Act: Using Institutional Multiplicity for Effective Punishment*, OSGOODE LEGAL STUDIES RESEARCH PAPER SERIES 119, 32-34 (2016).

²² *Id.*

²³ Andreza Matatais & Gabriela Guerreiro, *Operação Sanguessuga completa 1 ano sem punir maioria dos envolvidos*, FOLHA ONLINE, (May 03, 2007), <https://www1.folha.uol.com.br/folha/brasil/ult96u91880.shtml>. The Bloodsucker scandal was a corruption scheme in which businessmen and public officials colluded to fraud public procurement bids for the acquisition of ambulances. The profits of the resulting overpriced contracts were distributed among the participants of the scheme.

²⁴ Prado & Carson & Correa, *supra* note 21 at 34.

C. Institutional multiplicity in investigation

At the federal level, the main investigative bodies of Brazil are the Department of Federal Police [Departamento da Polícia Federal (DPF)] and the Federal Prosecution Service [Ministério Público Federal (MPF)].

Federal Police (DPF) is part of the Executive branch, being subordinate to the Ministry of Justice and Public Safety. Among its many functions, the agency is responsible for investigating and repressing interstate and international crimes, criminal offenses against federal entities, and for preventing and repressing drug trafficking.²⁵

The Federal Prosecution Service (MPF) is an autonomous and independent institution in the same way as the TCU. It has the authority to conduct criminal investigations; bring criminal charges; try criminal cases; institute civil investigation and public civil suit to protect public and social property, the environment, and other diffuse and collective interests; among other functions.²⁶

Often, these two institutions join forces in high-profile criminal cases as a mechanism to increase the efficacy of investigations. The importance of the collaboration between them is illustrated in the prominent Operation Car Wash.²⁷ In that situation, the vast extension and complex nature of the corruption scheme called for a significant mobilization of resources to guarantee the success of the operation.

²⁵ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 144, § 1.

²⁶ *Id.* at art. 129.

²⁷ Fernanda R. Vilares, *Operation Car Wash: What Does That Mean?*, in LESSONS OF OPERATION CAR WASH: A LEGAL, INSTITUTIONAL, AND ECONOMIC ANALYSIS, 14-20 (Fabio R. Bechara & Paulo C. Goldschmidt eds., 2020), https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/BI-09212020-Car%20Wash%20Report_v2.pdf (describing with details the interagency task force lead by the Brazilian Federal Police and the Federal Prosecution Service that took place during Operation Car Wash).

D. Institutional Multiplicity in Punishment

In the last few decades, Brazil has been adopted institutional multiplicity in punishment as a mechanism to effectively enforce its anticorruption policy.²⁸ Traditionally, the Judiciary branch is the institution with powers to impose sanctions on individuals for illicit conducts, either by civil or criminal procedure. Nevertheless, over the years, this approach has proved to be limited since a criminal case or a civil lawsuit can take several years to be adjudicated by the Judiciary, contributing to an atmosphere of impunity and underdeterrence. In order to change this situation, as observed by Prado *et. al*, the Brazilian government engaged in a different strategy to tackle corruption by granting punitive powers to specialized administrative agencies, such as the Office of the Comptroller General (CGU) and the Federal Court of Accounts (TCU).²⁹ Through less costly administrative proceedings, these agencies can impose sanctions like debarment and fines in a faster and more effective way. Based on empirical data, Prado *et. al* demonstrated that this new approach has a compensatory effect over the Judiciary's underperformance.³⁰

2. The Legal Framework

Institution multiplicity implies the existence of independent normative systems. In the last decades, the country enacted several statutes that imposed civil and administrative liability for corrupt acts as a mechanism to ensure a more expedited punishment of wrongdoers, since a criminal conviction demands a heightened burden of proof and can

²⁸ Prado & Carson & Correa, *supra* note 21 at 40.

²⁹ *Id.*

³⁰ *Id.* at 40-46.

take many years. Apart from the Brazilian Penal Code and specific criminal statutes,³¹ these other statutes with anticorruption provisions have become a relevant part of the country's legal framework and are briefly described in this section.

A. The Clean Company Act (CCA)

Since its enactment, the CCA³² has become the working horse in the fight against corporate corruption in Brazil. The statute imposes civil and administrative liability on legal entities for corrupt acts committed by their employees against local and foreign public administration.

The statute adopts a strict liability standard, meaning that firms can be held liable regardless of proof of intent or negligence.³³ Thus, a company may be held liable even if an employee acted on his or her own to commit a fraud, despite the compliance program and internal controls maintained by the company.

The illicit acts in the statute are broadly defined with the likely purpose to increase its punitive scope. The list includes five conducts: bribery (the act of promising, offering, or giving, directly or indirectly, undue advantage to a public official or related third party); financing or sponsoring bribery; using third parties to dissimulate bribery schemes; public procurement frauds; and hindering investigations.³⁴

³¹ An important aspect that should be pointed out is that in Brazil, criminal liability on corporations is only admitted in environmental matters.

³² See Lindsay B. Arrieta, *Taking the Jeitinho out of Brazilian Procurement: The Impact on Brazil's Anti-Bribery Law*, 44 PUB. CONT. L.J. 157 (2014) (explaining the Clean Company Act's provision and its impact in the relationship between government and public contractors).

³³ Lei No. 12.846, de 1 de Agosto de 2013 [Law No 12.846 of Aug. 1, 2013], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013, art. 2 (Braz.).

³⁴ *Id.*, art 5.

The law establishes two different sets of sanctions. A set of sanctions that can be administratively enforced, and another that can be judicially enforced. The administrative sanctions include: a fine of 0.1% to 20% of the gross revenues earned by the legal entity in the fiscal year prior to the filing of the administrative proceedings; and extraordinary publication of the condemnatory decision.³⁵ The administrative fine shall never be lower than the advantage obtained in the commitment of the wrongful act.³⁶ The judicial sanctions include: loss of the advantages or profits directly or indirectly obtained from the illicit action; partial suspension or interdiction of the entity's activities; prohibition of receiving public funds (incentives, subsidies, grants, donations or loans) from one to five years; and compulsory dissolution of the company (the so-called corporate death penalty).³⁷

Pursuant to the institutional multiplicity model, the statute follows a decentralized enforcement system. The three levels of government (federal government, states, and municipalities) are entitled to enforce the CCA provisions.³⁸ Thus, if a small municipality is victimized by corporate corruption, its government will have the authority to pursue the punishment of the offender. At the federal level, the Office of the Comptroller General (CGU) is the institution with the authority to apply the administrative sanctions;³⁹ the Attorney General's Office [Advocacia-Geral da União (AGU)] and the Federal Prosecution Service (MPF) are the institutions with powers to file the respective lawsuit.⁴⁰

³⁵ *Id.*, art. 6.

³⁶ *Id.*, art. 6, I.

³⁷ *Id.*, art. 19.

³⁸ *Id.*, art. 19, caput.

³⁹ *Id.*, art. 9, caput.

⁴⁰ *Id.*, art. 19, caput.

The CCA authorizes the Public Administration to sign leniency agreements with firms that violated its provisions. In the agreements, the firm commits to disclose its wrongdoings, provide evidence, and collaborate with investigations in exchange of attenuated penalties. Specifically, the collaboration must achieve two results: the identification of other agents involved in the illicit conduct; and the expedited provision of information and documents that prove the illicit conduct.⁴¹

The program may serve as an important tool for law enforcer to gather information and combat systemic corruption. For instance, certain types of misconducts, such as cartels in public procurement, are difficult to investigate without the collaboration of one of the offenders, and leniency agreements can significantly reduce the costs of investigations. Other important benefit is that the program is designed to rehabilitate the applicant. The attenuated sanctions may significantly reduce the punitive burden faced by the firm, allowing it to remain operative in the market. For instance, the ability to contract with the government and receive public funds may be indispensable for the continuity of a company.

The overall design of the statute provides incentives for firms to strengthen their internal control procedures and compliance programs.⁴² By doing so, the firm will reduce the likelihood of corruption cases and, if they occur, the firm will be able to detect them and promptly negotiate and furnish evidentiary material to government agencies, so that it can enjoy the benefits of a leniency agreement.

⁴¹ *Id.*, art. 16, I and II.

⁴² *See* Decreto No. 8.420, de 18 de Março de 2015 [Decree No 8,420 of Mar. 18, 2015], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 19.3.2015, art. 37, IV; art. 41; and art 42 (Braz.). This federal decree establishes more detailed rules for the enforcement of the CCA. The mentioned articles describe the parameters of an effective compliance program and how it should be assessed by government authorities.

B. Other Relevant Laws.

The Clean Company Act coexists with other three important laws: the Administrative Improbability Law (Law No. 8.429/1992); the Public Bidding and Contracts Law (Law No. 14,133/2021); and the Antitrust Law (Law No. 12,591/2011).

The Administrative Improbability Law imposes administrative and civil liability on public officials and political agents for illicit enrichment, damages to the treasury, and acts against the principles of public administration.⁴³ The sanctions include: restitution to treasury; disgorgement; loss of public position; fines; and suspension of political rights for up to fourteen years.⁴⁴

The Administrative Improbability Law also extends liability to third parties who contributed with the illicit outcome, encompassing natural persons and legal entities.⁴⁵ In addition to fines and disgorgement, legal entities can be debarred, meaning that they can be prohibited from contracting with the State.⁴⁶

In the first years of the CCA, there was a clear overlap between the CCA and the Administrative Improbability Law, and a company could cumulate sanctions from both statutes. In 2021, the statute underwent an extensive reform, and this issue was properly addressed. Currently, when a conduct is punishable under both statutes, the CCA will prevail.⁴⁷ There is also a provision expressly prohibiting double jeopardy (in Latin, *bis in*

⁴³ Lei No. 8.429, de 2 de Junho de 1992 [Law No 8,429 of Jun. 2, 1992], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 3.6.1992, arts. 9-11 (Braz.).

⁴⁴ *Id.*, art. 12.

⁴⁵ *Id.*, art. 3.

⁴⁶ *Id.*, art. 12, § 8º.

⁴⁷ *Id.*, art. 1, § 2º.

idem), which would consist in cumulation of sanctions for the same conduct.⁴⁸ The sanctions are imposed through judicial procedure initiated either by the Prosecution Office or a government attorney.⁴⁹ At the federal level, the lawsuit can be filed by the Federal Prosecution Service (MPF) or the Attorney General's Office (AGU).

The Public Bidding and Contracts Law (Law No. 14,133/2021) sets procedural rules for public procurement in Brazil.⁵⁰ The original piece of legislation dates to 1993 (Law No. 8,666/1993) and passed through a significant reform in 2021. According to the statute, legal entities that frauds public procurement may face the following administrative sanctions: restitution of the damage caused to the government entity;⁵¹ fines;⁵² and debarment⁵³. The agencies responsible for the initiation, conduction and adjudication of the punitive administrative procedure are: the agency that was harmed by the corrupt act; the Federal Court of Accounts (TCU); or the Office of the Comptroller General (CGU). It is another case of institutional multiplicity. If a fraud in public procurement takes place in a government institution and is not detected by its internal control, the specialized auditing agencies (TCU or CGU) will be able to detect the fraud and take the required legal actions.

The Law also introduces in the Brazilian Penal Code a list of eleven crimes, specifically related to public procurement. The purpose of criminalizing frauds in public procurement is to serve as a powerful deterrent for public officials and businessmen

⁴⁸ *Id.*, art. 12, § 7º.

⁴⁹ The legal reform of 2021 removed the public advocacy's authority to file the lawsuit. By means of an injunction the Brazilian Federal Supreme Court has suspended the new provision. The matter is yet to be definitively decided by the Court through the ADI 7043.

⁵⁰ Lei No. 14.133, de 1 de Abril de 2021 [Law No 14,133 of Apr. 1, 2021], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.4. 2021 (Braz.).

⁵¹ *Id.*, art. 163.

⁵² *Id.*

⁵³ *Id.*, art. 156, IV.

involved in the biddings. For illustration purposes, the list of conducts includes: breach of the confidentiality of the bidding; frustration of the competitive aspect of the procedure; and waiving a bid in cases not authorized by law. The Public Prosecution Office is the authority with powers to press the respective criminal charges. At the federal level, this role is performed by the Federal Prosecution Service.⁵⁴

Other piece of legislation of great interest when analyzing corruption cases in Brazil is the Antitrust Law (Law No. 12,529/2011),⁵⁵ which structures the competition protection system of the country and establishes preventive measures and sanctions for violations against the economic order. The importance of this statute in corruption cases lies in one particular conduct: cartels in public procurement. Companies that supposedly should behave as competitors collude to artificially allocate contracts among themselves. Consequently, goods and services are furnished to the government at higher prices and inferior quality. The main strategies used in cartel schemes are: the submission of deliberately non-competitive proposals (the cartel members submit purposefully overpriced proposals to benefit the company that was chosen to win the bid); bid suppression (cartel members deliberately refrain from submitting a proposal); and market division.

The sanctions are: administrative fines varying from 0.1% to 20% of the gross turnover earned by the firm corresponding to the field of economic activity where the cartel took place; divestiture of assets; publication of the condemnatory decision; prohibition of contracting with official financial institutions; exclusion from public procurements for a

⁵⁴ *Id.*, Capítulo II-B.

⁵⁵ Lei No. 12.529 de 30 de Novembro de 2011 [Law No 12,529 of Apr. 1, 2021], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.11. 2011 (Braz.).

minimum period of 5 years.⁵⁶ Aiming at destabilizing anticompetitive arrangements, the Antitrust Law allows the Administrative Council of Economic Defense [Conselho Administrativo de Defesa Econômica (CADE)] to conclude leniency agreements with companies and individuals. This law pioneered the insertion of non-trial resolutions in Brazil and its successful implementation inspired the leniency provisions of the CCA.

3. The Brazilian Leniency Programs

Currently, there are four leniency different leniency programs: (i) an anticorruption corruption leniency program jointly enforced by the Office of the Comptroller General (CGU) and the Attorney General's Office (AGU); (ii) an anticorruption leniency program enforced by the Federal Prosecution Service (MPF); (iii) an antitrust leniency program enforced by the Administrative Council of Economic Defense (CADE); and (iv) a financial system leniency program⁵⁷ enforced by the Securities and Exchange Commission of Brazil [Comissão de Valores Mobiliários (CVM)] and the Central Bank of Brazil [Banco Central do Brasil (BC)].⁵⁸

The Operation Car Wash unveiled an extensive corruption scheme, in which a group composed of some of the biggest infrastructure firms of the country engaged in a cartel in public procurement that operated from the late 1990s to 2014.⁵⁹ The illicit acts committed by the firms involved the jurisdiction of several institutions through three

⁵⁶ *Id.*, arts. 37-38.

⁵⁷ Lei No. 13.506 de 13 de Novembro de 2017 [Law No 13,506 of Nov. 13, 2017], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.11. 2017 (Braz.) (establishing the leniency program for illicit actions committed against the Brazilian Financial System).

⁵⁸ See AMANDA ATHAYDE, MANUAL DOS ACORDOS DE LENIÊNCIA NO BRASIL: TEORIA E PRÁTICA [HANDBOOK OF LENIENCY AGREEMENTS IN BRAZIL: THEORY AND PRACTICE] (Braz.) (2019) (providing a complete and didactic description on the leniency programs that comprise the Brazilian legal framework).

⁵⁹ RAQUEL DE MATTOS PIMENTA, A CONSTRUÇÃO DOS ACORDOS DE LENIÊNCIA DA LEI ANTICORRUPÇÃO [THE CONSTRUCTION OF LENIENCY AGREEMENTS OF THE CLEAN COMPANY ACT] 91-92 (Braz.) (2019).

different negotiation tables (CGU/AGU; MPF; and CADE), generating operational and predictability problems for potential collaborators, such as excessive transaction costs (see figure 1). For this reason, these three leniency regimes will be briefly described.

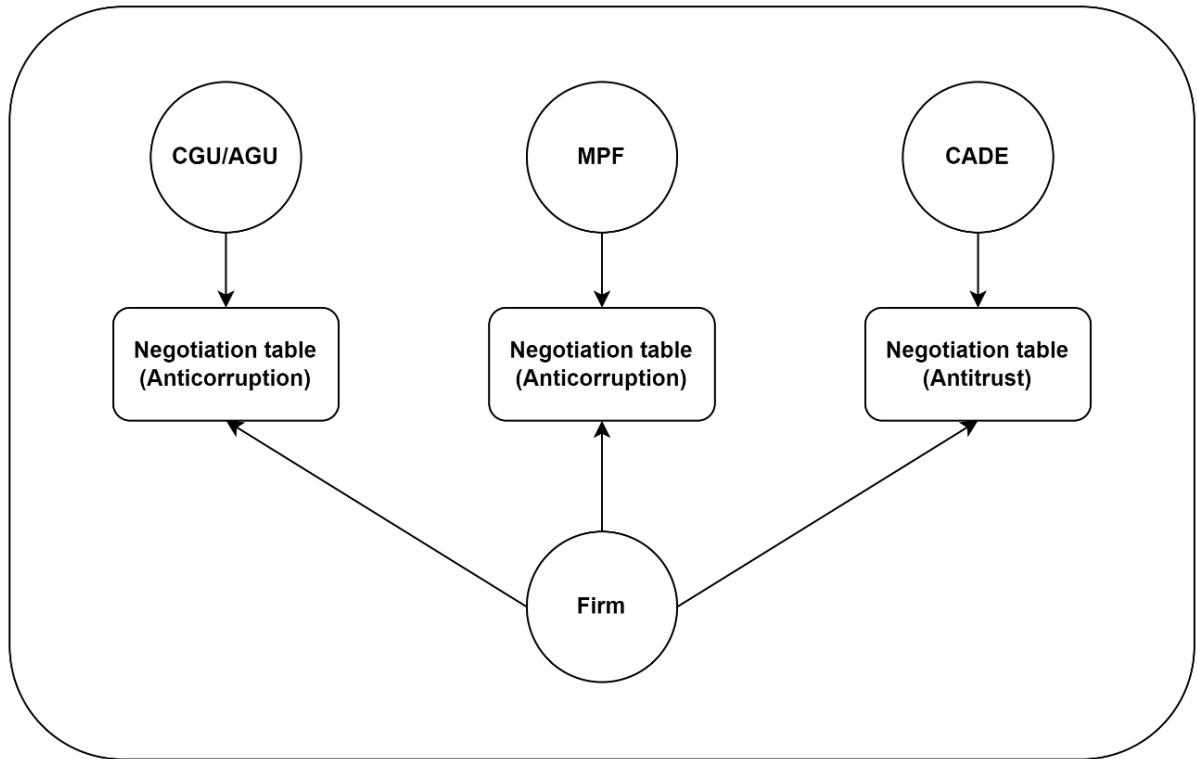


Figure 1: Institutional arrangement for leniency negotiations in cases of cartel in public procurement.

A. The Leniency Program enforced by the CGU/AGU

As outlined in the previous section, in the federal level, the CCA created a regime with administrative sanctions enforced by the Office of the Comptroller CGU and judicial sanctions enforced by the AGU or the MPF. In order to leverage the efficiency and legal certainty in these agreements, the CGU and the AGU started to jointly work in leniency

negotiations since 2016.⁶⁰ This initiative expanded the benefits that could be granted in exchange for collaboration. As a result, a firm can receive the attenuation of the administrative and judicial sanctions imposed by the CCA as well as the sanctions of the Public Bidding and Contracts Law. Regarding the administrative sanctions, the applicant can be benefited with a reduction of the administrative fine by up to two-thirds; exemption from making the condemnatory decision public; and exemption from the prohibition of receiving public funds.⁶¹ Regarding the judicially enforced sanctions, the applicant legal entity can be benefited with a total exemption.

It is important to notice that, before the reform of the Administrative Improbability Law in 2021, there was an overlap with the CCA, making it necessary, at the time, the participation of the AGU to exempt the applicant from administrative improbity penalties.

The leniency program conducted by the CGU/AGU does not encompass individual criminal liability, what constitutes a major drawback in possible incentives.

B. The Leniency Program enforced by the MPF.

The leniency program enforced by the Federal Prosecution Service (MPF) does not have any explicit legal provision. By means of a systematic interpretation of the provisions of the Constitution, the CCA, and the Improbability Administrative Law before its reform, the MPF claimed the power to conduct its own leniency program.⁶² Its rules were defined by

⁶⁰ Portaria Conjunta No. 4 de 9 de Agosto de 2019, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.08.2019 (Braz.) (establishing procedures for the Office of the Comptroller General and the Attorney General's Office to jointly negotiate and execute leniency agreements with legal entities).

⁶¹ Lei No. 12.846, de 1 de Agosto de 2013 [Law No 12.846 of Aug. 1, 2013], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 2.8.2013, art. 2 (Braz.), art. 16, § 2º.

⁶² Quinta Câmara de Coordenação e Revisão do Ministério Público Federal [Fifth Chamber of Coordination and Revision of the Federal Prosecution Service], Estudo Técnico No. 01/2017 [Technical Study No. 01/2017] (Sep. 2017), <http://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/estudo-tecnico/doc/Estudo%20Tecnico%2001-2017.pdf>

the Fifth Chamber of Coordination and Review of the MPF (an oversight board that deals with anticorruption matters) through *soft law* instruments.⁶³ It became a *de facto* leniency program

In 2017, a Federal Court ruled that a leniency agreement executed by the MPF needed the participation of the CGU.⁶⁴ Despite that fact, the MPF has been extensively using leniency agreements since the Operation Car Wash.⁶⁵

The leniency program conducted by the MPF brings as a benefit the exemption of the judicial sanctions that are in its scope of functions. The institution also has allowed the adhesion of natural persons to the leniency agreements in order to concede them criminal immunity,⁶⁶ augmenting the attractiveness of their leniency program.

C. The Leniency Program enforced by the CADE.

It is the first leniency program implemented in Brazil and the most developed one. The Antitrust Law established a leniency program conducted by the Administrative Council of Economic Defense (CADE). The possible benefits are: the extinction of the administrative punitive action or the reduction from one to two thirds of the applicable pecuniary penalty.⁶⁷ The antitrust leniency agreement also admits the application of

⁶³ Quinta Câmara de Coordenação e Revisão do Ministério Público Federal [Fifth Chamber of Coordination and Revision of the Federal Prosecution Service], *Orientação No. 7/2017* [Technical Guidance No. 07/2017] (Aug. 24, 2017), http://www.mpf.mp.br/pgr/documentos/ORIENTAO7_2017.pdf

⁶⁴ TRF-4, Agravo de Instrumento No. 5023972-66.2017.4.04.0000, Relator: Des. Vania Hack, 22.08.2017.

⁶⁵ To the present day, the institution has signed 47 leniency agreements. For sake of transparency, the institution keeps an Internet portal with information about concluded leniency agreements. <https://sig.mpf.mp.br/sig/servlet/mstrWeb?evt=3140&src=mstrWeb.3140&documentID=DE8159D411EA799D1A090080EF2586DD&Server=MSTRIS.PGR.MPF.MP.BR&Project=Unico&Port=0&share=1>.

⁶⁶ Currently, in the leniency program conducted by the MPF, natural persons can be benefited. If the legal requirements are satisfied, the MPF grants criminal immunity by means of a *rewarded collaboration*, a non-trial resolution for natural persons.

⁶⁷ Lei No. 12.529 de 30 de Novembro de 2011 [Law No 12,529 of Apr. 1, 2021], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.11. 2011 (Braz.), art. 86.

individuals, who can receive criminal immunity for the crime of cartel. In that circumstance, the Federal Prosecution Service, as the institution with powers to enforce criminal liability, participates in the deal to ensure the transaction.

III – Assessment of the Brazilian Anticorruption Leniency Program

In this chapter, we assess the Brazilian anticorruption leniency program. Firstly, the desired characteristics of an effective leniency program are described. Secondly, we analyze two significant cases that illustrate the practical problems faced by proponents of leniency agreements when negotiating with Brazilian authorities. Thirdly, a general assessment of the current state of the Brazilian anticorruption leniency program is presented.

It is important to set the parameters about the desired characteristics of an effective leniency program. It is crucial that a leniency program satisfies certain prerequisites to ensure that companies have an interest in self-reporting and that it achieves certain objectives. These parameters are described in the next two subsections.

1. The Cornerstones of an Effective Leniency Program

The cornerstones are prerequisites that must be in place in order to induce companies to self-report. A defect in the adoption of any of them may undermine the

effectiveness of the entire program. The cornerstones are three: threat of severe sanctions; heightened fear of detection; and a combination of transparency and predictability.⁶⁸

A. Threat of Severe Sanctions

The first prerequisite consists in creating a threat of severe sanction among those who did not apply for leniency.⁶⁹ Depending on the country's legal system, a legal entity may face criminal, civil or administrative sanctions. Regardless of their nature, sanctions cannot be perceived by companies as mere business and administrative costs. The sanctions that a company may have to bear for an illicit action must outweigh its potential rewards.

In this context, financial penalties may be of limited effect.⁷⁰ In order to induce leniency applications, jurisdictions may seek a combination of monetary and non-monetary sanctions. The resulting combination must be viewed by business executives as an actual risk to the continuity of their companies' activities or as a source of severe personal disutility. Non-monetary sanctions against legal entities include debarment (prohibition of contracting with the government), prohibition of operating in a given market, and compulsory dissolution. Non-monetary sanctions against individuals include imprisonment and prohibition of carrying out a specific professional activity. Notably, law

⁶⁸ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division U.S. Department of Justice, *Cornerstones of an Effective Leniency Program Address at the ICN Workshop on Leniency Programs* (Nov. 22-23, 2004), <https://www.justice.gov/atr/file/518156/download>; ATHAYDE, *supra* note 58, at 63-74 (explaining that these cornerstones originally thought in the context of antitrust leniency programs are also applicable to other types of leniency programs).

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 7.

enforcement agents⁷¹ and Economics researchers⁷² have pointed out that imprisonment constitutes a powerful incentive for applying to leniency.

B. Heightened Fear of Detection

A heightened fear of detection constitutes the second prerequisite, meaning that companies have to perceive a non-negligible probability of being caught.⁷³ The provision alone of severe sanctions will be innocuous in an environment that is permissive with corrupt behavior, either because law enforcement agencies are inoperative or even because they have been captured by interest groups. There must be in place institutional and legal frameworks that inflict distrust and fear in the participants of the corruption scheme. This can be achieved through a series of measures such as: substantial benefits for self-reporting, severe consequences of being caught, highly active law enforcement agencies, and publicization of successful anticorruption operations. The idea behind those measures is to generate a race for leniency applications even when offenders perceive a small possibility that authorities might unveil the corruption scheme.

C. Transparency and Predictability

As a third prerequisite, the leniency program must be transparent and predictable.⁷⁴ Transparency requires that there are clear standards and policies regarding the procedure, and predictability requires that a company be able to accurately predict the possible consequences of a confession. There must exist explicit and well-known standards for each

⁷¹ *Id.* at 8.

⁷² Reinaldo Diogo Luz, Giancarlo Spagnolo, *Leniency, Collusion, Corruption, and Whistleblowing*, 13 JOURNAL OF COMPETITION LAW & ECONOMICS, 745 (2017).

⁷³ Hammond *supra* note 68, at 9.

⁷⁴ *Id.* at 18.

stage of a leniency application, from the opening of the investigations to the stage of sentencing and calculation of fines. Furthermore, prosecutorial discretion must be narrowed as a mechanism to leverage the level of predictability of the program and attract the adhesion of more companies.⁷⁵

2. The Objectives of a Leniency Program

A leniency program must achieve certain objectives (or results) to the government. They are the reasons or justifications for the existence of the program. If the intended results or objectives are not accomplished, the program then represents an unnecessary burden to society that should be extirpated. Three objectives must be achieved: enhancement of the investigative capabilities of the State; deterrence; and rehabilitation of the offending company.⁷⁶

A. Enhancement of the Investigative Capabilities of the State

A leniency program must enhance the investigative capabilities of the State by increasing the likelihood of detection of wrongdoings and the efficiency of investigations.

The secretive nature of corruption makes it especially costly to be detected: there is no crime scene or eyewitnesses of the illicit conduct. Frequently, the only parties who have complete knowledge about the practice are the participants of the scheme, who may employ sophisticated techniques to cover their trails, such as the use of shell companies

⁷⁵ *Id.* at 18-19. As a practical example, Scott Hammond explains how the Antitrust Division of the DOJ eliminated prosecutorial discretion to incentivize the adhesion of offending companies.

⁷⁶ In this paper, we consider that leniency agreements must fulfill those three main objectives. It differs from other works in the literature. *See, e.g.,* ATHAYDE, *supra* note 58. Athayde lists seven justifications for the existence of leniency programs: (i) the detection of illicit conducts; (ii) evidence gathering; (iii) efficiency and effectiveness of investigations; (iv) the termination of the illicit conduct; (v) punishment of reported wrongdoers; (vi) restitution of damages to the offended parties; and (vii) deterrent effect.

and the assistance of an extensive network of professionals (accountants, real estate agents, notaries, and lawyers) to launder money.

Assuming that the right incentives are in place, the possibility of companies to self-report will significantly increase the authorities' ability to detect corrupt practices. This fact can be confirmed by empirical data. In a recent study, the OECD reviewed foreign bribery cases that took place in the 43 signatories of the Anti-Bribery Convention in the period of 1999-2017.⁷⁷ The international organization identified self-reporting by the offending companies as the primary source of detection (22% of the cases)⁷⁸ and the commonest way that companies learnt about the bribery scheme was through internal audits (22% of the self-reporting cases).⁷⁹

The improvement in the efficiency of investigations can be seen through different prisms. The collaboration of someone who participated in the wrongdoing will represent an important shortcut by reducing the costs of investigations. A traditional investigation may involve the issuance of several subpoenas and the allocation of human and technical resources to analyze a significant number of documents. In a different fashion, an insider will likely supply authorities with relevant and well-selected evidence to unravel the most intricate corruption schemes.

Furthermore, leniency programs enable authorities to rapidly unveil schemes where traditional investigative techniques would likely fail. For instance, the perpetrators of corruption often employ a multitude of methods to manage and hide the practice over time,

⁷⁷ OECD, *The Detection of Foreign Bribery*, (December 12, 2017), <https://www.oecd.org/corruption/the-detection-of-foreign-bribery.htm>.

⁷⁸*Id.* at 10.

⁷⁹ *Id.* at 22.

such as data encryption and off-book communication systems.⁸⁰ In that regard, the collaboration from one of the participants allows authorities to have a direct and less costly access to this kind of evidence.

B. Deterrence

A leniency program must inflict deterrence on potential offenders. It is a direct consequence of the two previously mentioned prerequisites: threat of severe sanctions and heightened fear of detection.

Under a Law and Economics perspective, it is possible to affirm that an effective leniency program increases the probability of punishment which, in turn, diminishes the expected utility derived from the illicit act, making it a much less attractive endeavor.⁸¹

C. Rehabilitation of the Offending Company

As a third function, a leniency program must promote the rehabilitation⁸² of the offending company.

The elimination of a company from the market may decrease social welfare due to the economic benefits brought by its activities (number of jobs, collected taxes, goods and

⁸⁰ See, e.g., Plea Agreement, United States v. Odebrecht S/A. United States v. Odebrecht S.A., 16-cr-643 (E.D.N.Y. filed Dec. 21, 2016); Ramon Collado, *Punta Catalina: Power and Corruption in the Dominican Republic*, TRANSPARENCY INTERNATIONAL, (June 25, 2020), <https://www.transparency.org/en/blog/punta-catalina-power-corruption-dominican-republic>. For illustration purposes, Odebrecht, one of the companies involved in the Car Wash scandal, used an information technology system called Drousys, which allowed its employees to secretly communicate with financial operators and other co-conspirators about the bribes. They also used codenames to identify the entire network of participants (employees, financial operators, co-conspirators, politicians, and public officials).

⁸¹ Aaron Chalfin, and Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 JOURNAL OF ECONOMIC LITERATURE 5 (2017) (demonstrating how an increase in the probability of punishment reduces the expected utility derived from the illegal action).

⁸² STEVEN SHAVELL, ECONOMIC ANALYSIS OF LAW 535 (2004). Rehabilitation is defined as the induced reduction in the one's propensity to commit an illicit conduct.

services furnished to society). Even if the company participated in multiple corruption schemes in the past, it might be socially desirable not to incapacitate⁸³ it by debarment or compulsory dissolution. For those circumstances, the rehabilitation provided by non-trial resolutions emerges as a more productive approach. The compliance obligations attached to them reduces the propensity of an infringing company to commit future violations⁸⁴ and induce it to nurture a more ethical culture within its corporate environment.

A relevant anecdotal example often cited in the literature is the Siemens AG's case in the early 2000s. The company was responsible for a major corruption scheme in which approximately USD 1.3 billion in bribes were paid for public officials across the globe (Asia, Africa, Europe, Middle East and the Americas).⁸⁵ From 2008 onwards, after reaching settlements with multiple jurisdictions, the company started the implementation of a radical internal reform to fix an entrenched culture of institutionalized corruption.⁸⁶ The imposition of incapacitation sanctions against the company would constitute a severe burden and would likely undermine its ability to make those changes.

⁸³ *Id* at 531-535. Incapacitation consists in preventing an individual from engaging in a harmful act by removing him or her from society. Broadly speaking, in the case of corporations, it consists in removing it partially or entirely from a given market.

⁸⁴ Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1420 (2009) (analyzing how DPAs and NPAs are important tools in the rehabilitation process of offending companies).

⁸⁵ OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, 208-2011 (2019), <https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf>

⁸⁶ Stefan Schembra, Andreas Georg Scherer, *Organizational strategies in the context of legitimacy loss: Radical versus gradual responses to disclosed corruption*, 15(3) STRATEGIC ORGANIZATION 301, 321-23, (2017) (describing the radical and unprecedented reform implemented by Siemens in the years the followed the disclosure of the corruption scandal).

3. Case Study: SBM Offshore N.V.

A. Description of the Case

SBM Offshore N.V. is a Dutch conglomerate specialized in the construction and leasing of Floating Production Storage and Offloading (FPSO) vessels to the offshore oil and gas industry. From 1996 to 2012, the parent company SBM and its US-based subsidiary SBM Offshore USA paid approximately USD 180 million in commissions to intermediaries and sales representatives.⁸⁷ A portion of those resources were used to pay bribes to public officials in five different countries (Brazil, Equatorial Guinea, Angola, Kazakhstan, and Iraq) as a means to retaining or obtaining contracts with state-owned oil companies.⁸⁸ The undue payments were known by SBM's employees, including a member of the Management Board of the North American subsidiary.⁸⁹

Given the transnational character of the bribery scheme, in the following years, parallel investigations took place in three different jurisdictions: United States, Netherlands, and Brazil. In 2012, SBM Offshore N.V. self-reported to the Dutch Public Prosecutor's Office (*Openbaar Ministerie*) and, in 2013, it self-reported to the U.S. Department of Justice (DOJ).⁹⁰ In November 2014, the Dutch authorities and SBM Offshore signed an out-of-court resolution in which the company agreed to pay a fine (USD 200 million) and engage in a monitorship program.⁹¹ In November 2017, SBM Offshore N.V. and its U.S. subsidiary reached a settlement with the DOJ, in which the parent

⁸⁷ OECD *supra* note 85, at 202.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 204.

company entered into a three-year Deferred Prosecution Agreement (DPA) and the subsidiary entered into a guilty plea.⁹²

In Brazil, the Federal Prosecution Service (MPF) initiated investigations on SBM's wrongdoings in 2011 with focus on the bribery scheme that took place at Petrobras, a Brazilian state-controlled oil company that was the main customer of SBM at the time.⁹³ In 2014, upon request, the Federal Prosecution Service (MPF) received international assistance from authorities of the United States, the Netherlands and Switzerland to gather evidence for its investigative criminal procedure.⁹⁴ Simultaneously, the Office of the Comptroller General (CGU) had an administrative investigation in course.⁹⁵

In July 2016, in a press release, SBM Offshore announced that they reached a settlement with Brazilian authorities. The parties were the Office of the Comptroller General (CGU), the Attorney General's Office (AGU), the Federal Prosecution Service (MPF) and Petrobras. The terms of the agreement provided that SBM would receive full discharge and exemption from legal actions for the illicit conducts that occurred between 1996 and 2012.⁹⁶ In exchange, the company would pay a fine of USD 162.8 million, which included a compensation in favor of Petrobras; accept a reduction of 95% in future bonus performance payments in ongoing contracts with Petrobras (USD 179 million); fully cooperate with Brazilian authorities in the developments of the case; implement

⁹² *Id.*

⁹³ *Id.* at 203.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Press Release, SBM, Leniency Agreement Signed between Brazilian Authorities, Petrobras and SBM Offshore, (Jul. 16, 2016), <https://www.sbmoffshore.com/newsroom/press-releases/2016/16-07-2016/leniency-agreement-signed-between-brazilian-authorities>.

improvements in its internal compliance program; and engage in a three-year monitorship program conducted by Brazilian authorities.⁹⁷

That would be the first leniency agreement under the CCA. However, in accordance with internal instructions of the Federal Prosecution Service (MPF), its participation in the agreement was subject to the approval of a review board: the Fifth Chamber of Coordination and Review of the MPF. The Chamber rejected the terms of the agreement. In summary, the review body concluded that there was a lack of proportionality among the immunity granted, the evidence provided by the company, and the total payment for damage compensation.⁹⁸ The Chamber argued that the global payment was insufficient to cover the damages caused by the corruption scheme and that it was unsure whether the probatory material furnished by the company would help them to advance their bribery investigations in Petrobras.⁹⁹ The Chamber informed that, in connection with the case, there were ongoing criminal investigations supported with information provided by the Dutch Public Prosecutor's Office and by individuals who signed plea agreements.¹⁰⁰ The absence of any reference to this evidence indicated that there was no collaboration between the prosecutors from the civil litigation team and the prosecutors from the criminal team, which made the Chamber recognize the necessity of improving the internal cooperation among the prosecutorial teams of the MPF.¹⁰¹

⁹⁷ *Id.*

⁹⁸ Press Release, MPF, MPF não homologa acordo de leniência com a SBM Offshore, (September 1, 2016), <http://www.mpf.mp.br/pgr/noticias-pgr/mpf-nao-homologa-acordo-de-leniencia-com-a-sbm-offshore>

⁹⁹ 5 CCR, Inquérito Civil nº 1.30.001.001111/2014-42 e apensos, Relatora: Mônica Nicida Garcia, 01.09.2016, 43-46 (Braz.).

¹⁰⁰ *Id.* at 67-68.

¹⁰¹ *Id.*

As a consequence of the aforementioned decision, the agreement failed, and the company had two options: renegotiate two separate resolutions (one with CGU/AGU/Petrobras and another with the MPF); or face the risk of punishment, including terminating its business in Brazil. The Dutch company chose the first option.

On July 26, 2018, another press release was issued by the company, informing that SBM Offshore, Petrobras, CGU and AGU signed a new agreement, which provided the following obligations to the company: a global payment of USD 148 million (USD 71 million as a civil fine and USD 77 million as compensation for damages); reduction of 95% in future bonus performance payments in undergoing contracts with Petrobras; cooperation with investigations in cases related to the unveiled bribery scheme; and a three-year monitorship program.¹⁰² In exchange, CGU and AGU agreed to refrain from adopting any legal measures that could jeopardize the company's ability to conduct business in Brazil.¹⁰³ In the press release, the company informed the market that administrative improbity lawsuits filed by the Federal Prosecution Service (MPF) were still pending in the Brazilian jurisdiction.¹⁰⁴

On September 01, 2018, SBM Offshore announced that it reached a final settlement with the Federal Prosecution Service (MPF), which provided that, in addition to the payments determined in the previous settlement with CGU/AGU/Petrobras, the company would pay an additional amount of USD 48 million to Petrobras.¹⁰⁵ The terms of that new

¹⁰² Press Release, SBM, Leniency Agreement Signed between SBM Offshore, Brazilian Authorities and Petrobras (Jul. 26, 2018), <https://www.sbmoffshore.com/newsroom/press-releases/2018/26-07-2018/leniency-agreement-signed-between-sbm-offshore-brazilian>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Press Release, SBM, Agreement Signed Between SBM Offshore, Brazilian Public Prosecutor (Sep. 01, 2018), <https://www.sbmoffshore.com/newsroom/press-releases/2018/01-09-2018/agreement-signed-between-sbm-offshore-and-brazilian-public>.

agreement seemed to be substantially similar to the ones provided in the first leniency agreement signed with CGU/AGU/Petrobras. The only noticeable difference was the additional payment of damages compensation.

The description of the case is entirely based on public information. Given the confidential nature of the agreements, it is not possible to verify if additional probatory material was provided to the Federal Prosecution Service (MPF) and what were the reasons that motivated the differences in the calculation of damages.

B. Analysis of the Case

The case illustrates the challenges imposed by institutional multiplicity. The illicit conduct of the company triggered the jurisdiction of three different law enforcement bodies: the Office of the Comptroller General (CGU) with the power to enforce the administrative sanctions of the CCA; the Attorney General's Office (AGU)¹⁰⁶ and the Federal Prosecution Service (MPF), both with powers to enforce the judicial sanctions of the CCA and the Administrative Improbity Law. Additionally, the MPF also had the power to pursue the criminal punishment of the individuals involved in the bribery. This state of affairs clearly indicated that separate negotiations with each institution could represent a considerable burden for the company. Therefore, as an attempt to provide more efficiency and legal certainty to the procedure, all the institutions with jurisdiction over the case reunited in a coordinated effort to make the settlement possible. It is important to point out that the participation of the legal entity harmed by the corruption scheme (Petrobras S.A.)

¹⁰⁶ As reported in the second chapter, currently, the CGU and the AGU work in close cooperation as they jointly negotiate and execute leniency agreements. At the time of the SBM negotiations, that cooperation had not been established yet.

was uncommon. The confidentiality of the procedure does not allow us to identify the reason for this unusual arrangement, but it could be conjectured that it was an effort to bring more reliability to the resolution since Petrobras could, in theory, file a civil action against SBM if it did not agree with the amount of damages determined by the law enforcement agencies.

Despite the attractiveness of a single negotiation table, some fundamental problems became evident with the Fifth Chamber's decision to reject the settlement.

Firstly, it was revealed an information asymmetry and lack of coordination among the law enforcement agencies. In the decision, the Fifth Chamber acknowledged that there was another team of prosecutors which had more probatory material than the team that participated in the negotiations of the agreement. It would be reasonable to expect that all the relevant evidence would be shared among all government agencies involved in the negotiations. It would create a common baseline to evaluate the usefulness of the evidence provided by the company.

Furthermore, some commentators question the reasonableness of the demand of the Fifth Chamber for more probatory material.¹⁰⁷ The Federal Prosecution Service (MPF) was receiving assistance from Dutch authorities. Thus, it would be expected that the probatory material furnished by SBM was substantially equal to the material shared by Dutch authorities with the MPF.

¹⁰⁷ VALDIR M. SIMÃO, MARCELO P. VIANNA, O ACORDO DE LENIÊNCIA NA LEI ANTICORRUPÇÃO: HISTÓRICO, DESAFIOS E PERSPECTIVAS [LENIENCY AGREEMENT IN THE ANTICORRUPTION LAW: HISTORY, CHALLENGES AND PROSPECTS] 205 (2017) (Braz.).

Secondly, the failure in concluding the first settlement could have generated distrust and thereby dissuaded the company from engaging in new negotiations. The company would have to bear the transaction costs of two separate negotiation tables. One may speculate that the main incentive for the company to choose renegotiation was the belief that the evidence provided through international cooperation could be sufficient for a conviction, resulting in the termination of ongoing contracts and the loss of future business opportunities with Petrobras.

The case also demonstrated that the agencies involved in the negotiations did not agree on the methodology to calculate the damages compensation. This constitutes a severe weakness in the anticorruption program since it makes the program unpredictable for a proponent.

According to public information released to the media, the terms of the two leniency agreements seemed to be substantially similar. The only noticeable difference was the calculated value of damages compensation. Therefore, one could conjecture that a single negotiation table with the participation of all the Brazilian agencies would be a feasible institutional arrangement and would significantly reduce the transaction costs. It would require an effective cooperation with the sharing of evidence and a unified methodology to calculate the compensation of damages established in the law.

4. Case Study: Angra 3 Nuclear Reactor

A. Description of the Case

Brazil counts with one nuclear power plant named Angra with two reactors in operation (Angra 1 and 2). The complex is administered and operated by Eletronuclear, a

state-controlled company with monopoly in nuclear power generation. In 2010, after a hiatus of more than 20 years, the construction of a third reactor (Angra 3) was reinitiated. In 2014, in the course of Operation Car Wash, authorities unveiled that a cartel in public procurement was interfering in the project.¹⁰⁸ As a cartel, the companies fixed prices and conditions and divided the market among themselves, deciding which company would be the winner of each bid.¹⁰⁹ Additionally, the companies paid bribes to senior executives of Eletronuclear, who let them inflate the prices of the contracts. A portion of those improper payments was transferred to influential politicians and political parties to finance their electoral campaigns.¹¹⁰ As a cartel in public procurement, it triggered the anticorruption jurisdiction of the Office of the Comptroller General (CGU) and the Federal Prosecution Service (MPF), and the antitrust jurisdiction of the Administrative Council for Economic Defense (CADE).

Some companies that participated in the scheme sought to collaborate with authorities by means of leniency agreements, aiming to reduce their sanctions and keep ongoing projects with the government. However, the Federal Court of Accounts (TCU) imposed a five-year debarment sanction against two of these companies, Construtora Andrade Gutierrez S/A and UTC Engenharia S/A.¹¹¹ Each of these companies filed a writ

¹⁰⁸ Jeb Blout, *Brazil police arrest 19 in Eletrobras nuke-plant bribe probe*, REUTERS (July 6, 2016), <https://www.reuters.com/article/us-brazil-corruption/brazil-police-arrest-19-in-eletrobras-nuke-plant-bribe-probe-idUSKCN0ZM13N>.

¹⁰⁹ Brazilian Federal Government, *CADE signs leniency agreement in cartel in public bidding of Angra 3 nuclear power plant*, (July 31, 2015), <https://www.gov.br/cade/en/matters/news/cade-signs-leniency-agreement-in-cartel-in-public-bidding-of-angra-3-nuclear-power-plant>. According to this press-release, the cartel had the participation of the following construction companies: Construtora Andrade Gutierrez S/A, Construtora Norberto Odebrecht S/A, Construtora Queiroz Galvão S/A, Construções e Comércio Camargo Correa S/A, EBE – Empresa Brasileira de Engenharia S/A, Techint Engenharia e Construções S/A, and UTC Engenharia.

¹¹⁰ Jeb Blout, *supra* note 108.

¹¹¹ TCU, Acórdão 483/2017, Relator: Bruno Dantas, 22.03.2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U], 06.10.2017, 134 (Braz.).

of mandamus petition to the Supreme Federal Court (STF) sustaining that the leniency agreements preempted the Federal Court of Accounts from imposing any sanction for the conducts reported in them. In a joint trial, STF decided the two cases.¹¹²

At the time of the sanction, Andrade Gutierrez had signed leniency agreements with the MPF and CADE; and UTC had signed a leniency agreement with CADE. Both companies were in negotiations with CGU/AGU. The motivation behind the sanction was the fact that the Federal Court of Accounts (TCU) disagreed about the amount calculated as damages compensation, which it believed it was superior to the one established in the settlements. Apparently, the TCU expected to induce a renegotiation of values.

The main argument sustained by the TCU relied on its constitutional duty to oversee public expenditures, quantify possible damages to the Treasury, and seek its effective restitution.¹¹³ In that regard, the argument continued, the constitutional provision would trump the federal law provisions that supported the settlements and a decision in other direction would mean the suppression of the powers granted to the TCU by the Constitution.

The Court ruled in favor of the two companies on the grounds that debarment sanctions imposed by the TCU for the same facts reported in the agreements were incompatible with the constitutional principles of efficiency and legal certainty.¹¹⁴ Justice

¹¹² The two cases were: MS 35.435 filed by Andrade Gutierrez, and MS 36.496 filed by UTC. There were two other writs of mandamus decided in the same trial: the MS 36.526 filed by Queiroz Galvão, which dealt with the possibility of the company negotiating an agreement directly with the TCU; and the MS 36.173 filed by Artec, which dealt with the admissibility of evidence used by the TCU to sanction it.

¹¹³ CONSTITUIÇÃO FEDERAL/1988 [C.F.] [CONSTITUTION], art. 71.

¹¹⁴ S.T.F., Voto Conjunto MS No 35.435/DF e MS No 36.426/DF, Relator: Min. Gilmar Mendes, 30.03.2021, 49 (Braz.). Pending publication. Available at: <https://www.conjur.com.br/dl/stf-analisa-inidoneidade-empresas.pdf>.

Gilmar Mendes, who issued the majority opinion, observed that the TCU still has the authority to seek the full restitution of damages to the treasury; however, in order to achieve this endeavor, it cannot resort to sanctions that would obstruct the performance of leniency agreements.¹¹⁵

The Court affirmed the importance of coordination among the public bodies that comprise the anticorruption system as a mechanism to safeguard legal certainty and incentivize the adoption of the agreements. In the words of Justice Gilmar Mendes:

As asserted in the present opinion, the interpretation of the multiple leniency regimes that are part of the anti-corruption microsystem must ensure (i) the alignment of the institutional incentives for collaboration and (ii) the implementation of the principle of legal certainty, so that collaborating companies can predict the applicable sanctions and benefits when adopting a collaborative stance with the Government.

The achievement of these two objectives – institutional alignment and assurance of legal certainty – demands a continuous dialogue between the bodies and entities involved in the fight against acts of economic macro-criminality. Such an effort is essential to encourage the execution of new leniency agreements, which are understood as key instruments for detecting secret and high-potential illicit harmful to the Public Administration.¹¹⁶

The Court also asserted that the imposition of the sanction could mean a corporate “death penalty”, since those companies depend on large government infrastructure contracts to generate revenue and pay the obligations of the leniency agreements.¹¹⁷ The sanctions would highly discourage the adhesion of new proponents and would mean a breach of previously accorded obligations by the Public Administration.¹¹⁸

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 42. In a free translation from Portuguese: “Como já assentado no presente voto, a interpretação conjugada dos múltiplos regimes de leniência que se inserem no microssistema anticorrupção deve zelar (i) pelo alinhamento de incentivos institucionais à colaboração e (ii) pela realização do princípio da segurança jurídica, a fim de que os colaboradores tenham previsibilidade quanto às sanções e benefícios premiaiais cabíveis quando da adoção de postura colaborativa com o Poder Público.”

¹¹⁷ *Id.* at 48.

¹¹⁸ *Id.* at 46.

B. Analysis of the Case

The decision of the Brazilian Supreme Federal Court correctly identified the contractual nature of leniency agreements and their use as a public policy tool to promote corporate rehabilitation.

The Brazilian leniency agreements establish a bilateral relationship between the State and the offending company that signed the deal. The proponent assumes several obligations: provision of evidence, collaboration in the investigations, restitution of values to the treasury, and strengthening of its internal controls. In exchange, the State assumes the commitment of imposing mitigated sanctions. Hence, the leniency program must be seen as a two-way scenario. If the State aims at enjoying the benefits provided by the program, it must implement efforts towards the coordination of its anticorruption entities to prevent their contradictory behavior. Although the anticorruption system is comprised of several independent entities, they all represent one single party: the State. In that sense, the debarment of Andrade Gutierrez and UTC would clearly represent a breach of a contractual arrangement.

If the case was decided differently, the entire anticorruption leniency program would be endangered. Remarkably, Andrade Gutierrez succeeded in signing leniency agreements with all the entities with jurisdiction over the case (CGU/AGU; MPF; and CADE), which would theoretically mean that the company was at a safe harbor. Were the debarment sanction applied, a negative message of distrust and unpredictability would be passed to potential collaborators, generating significative disincentives for future adhesions.

Additionally, there was an increasing transplant of non-trial resolutions into Brazil's legal system, which reveals a deliberate choice of legislatures and law enforcers in favor of those mechanisms to combat illicit conducts in different spheres (criminal, administrative and civil). Specifically, the leniency program established by the CCA is a key component in a public policy directed towards the rehabilitation of legal entities, a fact that was rightly observed by the Court in its decision. There is an interest that the company be able to perform productive economic activities, implement more solid compliance programs, pay the imposed fines, and restitute damages to the treasury. The imposition of debarment would represent a disruption in this public policy matter and make the performance of the agreements completely unfeasible, generating severe economic inefficiencies.

It is possible to conjecture that the actions of the TCU could have been motivated in part by some sort of competition. Originally, the CCA haven't explicitly granted any power to the TCU in matters related to its enforcement. Prior to the episode described in the case, there was an attempt to modify the CCA and grant the TCU with supervisory powers over leniency agreements in such a way that the institution would have the last word in the approval of the settlements.¹¹⁹ The proposal was not approved by the Legislative Branch.

Despite the positive aspects of the decision, it is not fully immune to criticism. The Court did not say anything about the *de facto* leniency program enforced by the MPF.

¹¹⁹ In 2015, the Executive Branch issued a legislative proposal, Medida Provisória No. 703/2015, making the Federal Court of Accounts (TCU) an oversight entity of anticorruption leniency agreements. After the execution of a settlement, it would be sent to the TCU, which would determine whether there was any remaining value to be restituted to the Public Treasury.

Assessing the constitutionality of the program and providing a final word on that matter would also enhance the legal certainty of the overall system.

5. Assessing the Brazilian Anticorruption Leniency Program

We shall analyze whether the current anticorruption leniency program satisfies the three prerequisites (or cornerstones): fear of severe sanctions; heightened fear of detection; and predictability and transparency.

The requirement of heightened fear of detection is adequately fulfilled. The Brazilian anticorruption system is comprised of several institutions with powers to monitor, investigate and punish illicit conducts. Its decentralized and pervasive nature increases the probability of detection and makes the system less prone to be captured by private actors. In this context, it is relevant to point out that Brazilian grand media has been reporting many successful anticorruption operations conducted by those agencies, what instigates in offenders a genuine fear of detection.

The requirement of threat of severe sanctions is also adequately satisfied. The most important innovation of the CCA was the imposition of liability to legal entities whose employees engaged in corrupt acts. Before the enactment of the CCA, there were no incentives for companies to invest in due diligence and strengthen their compliance programs. As previously described, the CCA implemented severe administrative and judicial sanctions. Administrative sanctions include substantial monetary sanctions that can be applied in a more effective and expedited way. Since the Brazilian Judiciary suffers with morosity, the administrative sanctions of the law play a key role in a firm's decision to adhere to the program. Thus, the threat effect is properly fulfilled by the program.

The problem arises regarding the third requirement of transparency and predictability. The case studies demonstrate through practical means that the institutional multiplicity model has led to a dysfunctional and undesirable situation. Currently, an applicant is not able to properly assess the advantages and disadvantages of adhering to a leniency program. As could be observed, due to the lack of coordination among accountability institutions, after a settlement for a violation under the CCA, the firm will incur in the risk of being investigated and penalized by an institution that did not participate in the settlement.

Furthermore, one of the goals of a leniency program is to enhance the investigative capabilities of the State, providing it with evidence that could be useful in ongoing and future cases. The current model allows an applicant firm to provide evidence to the several government agencies in a selective way, resulting in asymmetric information among them. Therefore, it is possible that a company settles with two different agencies and that these two agencies acquire different information on the same facts.

Lastly, the current institutional arrangement suffers from a major operational drawback. Depending on the illicit conduct, a firm that aims to adhere to a leniency program will have to separately negotiate with different agencies through independent procedures, resulting in considerable transactions costs and imposing an excessive burden on those who wish to collaborate. In the second case study, it was correctly asserted by the Supreme Federal Court that this situation contradicts the constitutional principle of efficiency.

IV. A Cooperative and Coordinated Institutional Model for the Brazilian Leniency Program

1. Problem Statement

The need for a “one-stop shop” for negotiating leniency agreements have become one of the most discussed topics in the Brazilian legal scholarship.¹²⁰ It would be no exaggeration to affirm that such a structure is considered a holy grail by many practitioners in the field of corporate law.¹²¹ A legislative solution is desirable and would involve an alignment of the incentives of the multiple leniency regimes and the enhancement of the cooperation mechanisms between agencies;¹²² however, such a solution would take long and would face the risk of being detached from the practical reality of the agencies.

The main idea is to propose a solution that does not depend on legislative changes, responds to the need for more transparency and predictability, and complies with the mandates of efficiency,¹²³ legal certainty,¹²⁴ and prohibition against double jeopardy (*non bis in idem*)¹²⁵ established in the Brazilian Constitution.

A shift of paradigm must occur, and the current dysfunctional model must be replaced by a more collaborative and coordinated institutional arrangement. Under this new

¹²⁰ See, e.g., Fundação FHC, *Leniency agreements: theory and practice in Brazil and in the United States* (Aug. 20, 2018), <https://fundacaoofhc.org.br/debates-en/leniency-agreements-theory-and-practice-in-brazil-and-in-the-united-states>. Fundação FHC, a Brazilian Think Tank on public policy, organized an event with authorities, legal scholars and lawyers to discuss solutions to the leniency program in Brazil.

¹²¹ See Luz & Spagnolo, *supra* note 72 (describing the economic efficiencies that would arise from the implementation of a “one-stop-shop” for leniency agreements).

¹²² Paulo B. Silveira, Victor O. Fernandes, *The Car Wash Operation in Brazil: Challenges and Perspectives in the Fight Against Bid Rigging*, in *Global Competition Enforcement: New Players, New Challenges*, 130 (Paulo B. Silveira & William E. Kovacic eds., 2019).

¹²³ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 37.

¹²⁴ *Id.* at art. 5º, XXXVI.

¹²⁵ *Id.*

perspective, the leniency programs should be understood as part of a broader and more important public policy directed towards the construction of a more ethical corporate environment in Brazil. In order for this public policy to succeed it is critical that the law enforcement agencies involved in that endeavor engage in close and coordinated collaboration.

The potential of leniency agreements can be demonstrated by means of empirical data. The Administrative Improbability Law was the first anticorruption statute of Brazil and, until 2019, it did not authorize any kind of non-trial resolution. According to official data, from 2006 to 2016, the convictions under that Law totaled an amount of BRL 1.9 billion that should be restituted to the public treasury.¹²⁶ From this total amount, only BRL 2.7 million (0.1%) were effectively recovered.¹²⁷ In contrast, from 2015 to 2022, CGU/AGU have executed 18 leniency agreements, totaling BRL 15.55 billion.¹²⁸ From this total amount, BRL 6.09 billion have already been paid.¹²⁹

2. A Coordinated and Adaptive Leniency Shop and its Prerequisites

We propose a *coordinated and adaptive shop* for leniency agreements in Brazil. Under this model, the institutions with powers to negotiate and execute them will organize themselves as a coordinated coalition, working under standardized procedures. For the scope of the project, we consider the federal public institutions with authority to negotiate

¹²⁶ Jaqueline Barbão, Fabiana L. de Oliveira, *Retrato do Cadastro Nacional de Condenados por Ato de Improbidade Administrativa e por Ato que Implique Inelegibilidade (CNCIAI)*, 2 Revista 24, 30, 2017 CNJ

¹²⁷ *Id.*

¹²⁸ Painei – Acordos de Leniência [Leniency Agreements - Dashboard], Apr. 2022, <https://www.gov.br/cgu/pt-br/assuntos/combate-a-corrupcao/acordo-leniencia>

¹²⁹ *Id.*

and execute leniency agreements: the Office of the Comptroller General along with the Attorney General's Office (CGU/AGU); the Administrative Council for Economic Defense (CADE); the Federal Prosecution Service (MPF);¹³⁰ the Securities and Exchange Commission of Brazil (CVM); and the Central Bank of Brazil (BC).

This coalition aims at allowing the government to uniformly respond to a leniency proposal. **It is adaptive because, for each type of wrongdoing reported by the applicant, the negotiation table will have a different composition.** For instance, a cartel in public procurement would involve the Administrative Council for Economic Defense (CADE); the Office of the Comptroller General along with the Attorney General's Office (CGU/AGU); and the Federal Prosecution Service (MPF).

The idea of a coalition of law enforcement agencies is not entirely novel since some commentators have superficially suggested similar mechanisms as an adequate solution to the problem.¹³¹ The contribution of this paper resides in providing a concrete description on how an institutional arrangement of this kind would work in the Brazilian scenario. Other concrete mechanisms are possible and might be compared with the new model here proposed.

The closer and coordinated collaboration inherent to the model requires a considerable institutional effort in the strategic and operational levels. To make the model

¹³⁰ In chapter 2, we outlined that the MPF has a *de facto* authority to negotiate and execute leniency agreements. Even in the absence of that *de facto* power, the participation of the MPF would be highly desirable in order to negotiate criminal amnesty with natural persons.

¹³¹ See, e.g., João Victor Freitas, *How anticorruption enforcement can undermine antitrust amnesty programs, and what to do about it*, THE GLOBAL ANTICORRUPTION BLOG (Jun. 14, 2019), <https://globalanticorruptionblog.com/2019/06/14/how-anticorruption-enforcement-can-undermine-antitrust-amnesty-programs-and-what-to-do-about-it/>.

viable, some prerequisites must be fulfilled. These prerequisites are described in the following lines.

As a first prerequisite, in the strategic level, agencies must promote the alignment of their objectives, and the creation of common policies and guidelines. Each agency may intend to achieve different objective by means of its leniency program. For instance, the CADE has the objective to protect the market by disarticulating cartels, whereas the CGU has the objective to protect public assets by disarticulating corruption schemes. It is important that they engage in institutional dialogue to prevent contradictory behavior in law enforcement.

In the operational level, the agencies must implement a standardization of procedures and methodologies. Important procedures that could be standardized include: common information security measures to ensure the confidentiality, integrity, and availability of data; chain of custody mechanisms; procedures on how evidence will be received, stored, and discarded; procedures on how interviews will be conducted and recorded; procedures on how a monitorship program will be conducted; etc. Regarding methodologies, it would be of paramount importance to define a unified methodology for the calculation of fines and damages. In both practical cases discussed in chapter 3, the calculation of damages was a source of controversy and dispute between agencies. Athayde lists five different methodologies to calculate damages.¹³² A unified methodology of calculation of fines and damages would bring more reliability and trust to the system, making the leniency programs more attractive to applicants.

¹³² ATHAYDE, *supra* note 58, at 57-60.

Agencies must also adopt a negotiation framework when they interact among themselves and when they interact with the leniency applicant.¹³³ The use of such a framework will contribute to increase the efficiency of negotiations and the chances of success. In that regard, it is worth noting the Attorney General’s Office has made efforts in that direction by elaborating a handbook on negotiations.¹³⁴

Figure 2 illustrates the current leniency model in Brazil, in which agencies are not strategically aligned and independent negotiations must take place. Figure 3 illustrates the proposed coordinated and adaptive model that emulates a “one-stop shop”.

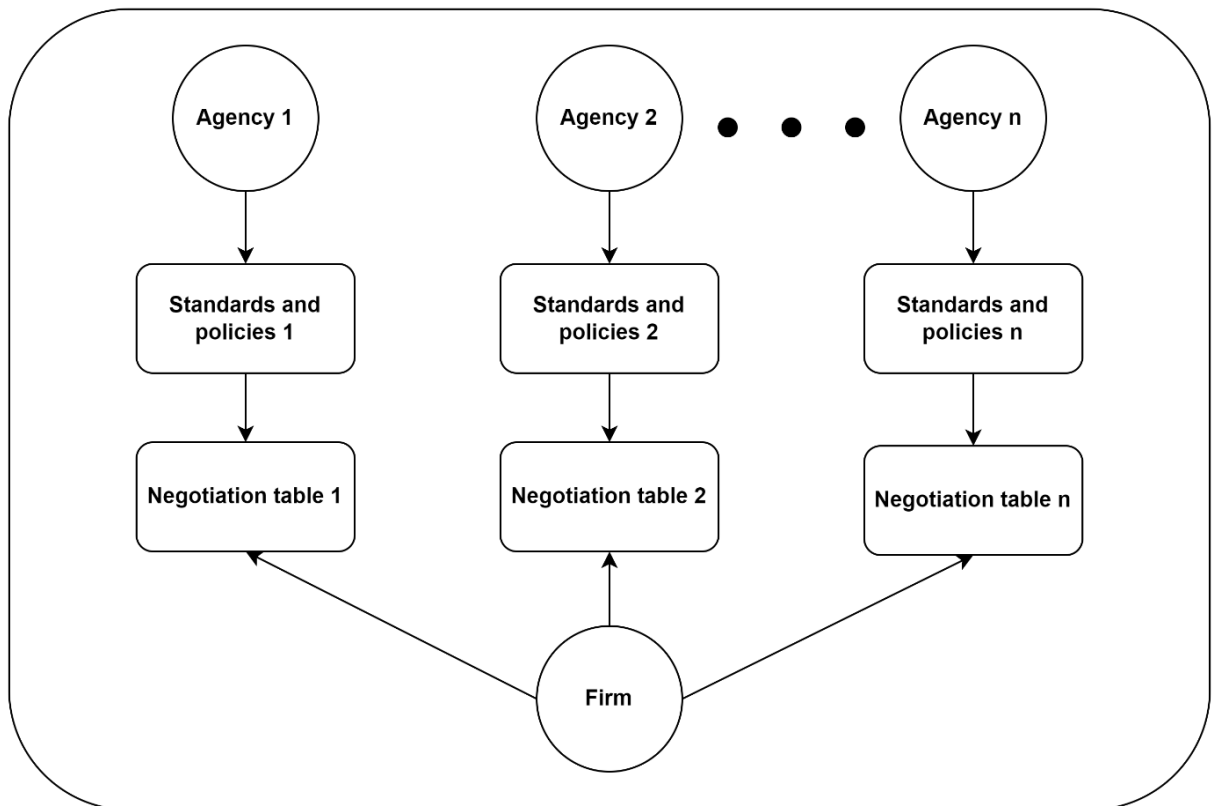


Figure 2: Current situation of the leniency programs in Brazil.

¹³³ See, e.g., ROGER FISHER and WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (3rd. ed. 2011).

¹³⁴ DIOGO P. F. DOS SANTOS et. al, *MANUAL DE NEGOCIAÇÃO BASEADO NA TEORIA DE HARVARD* (2017).

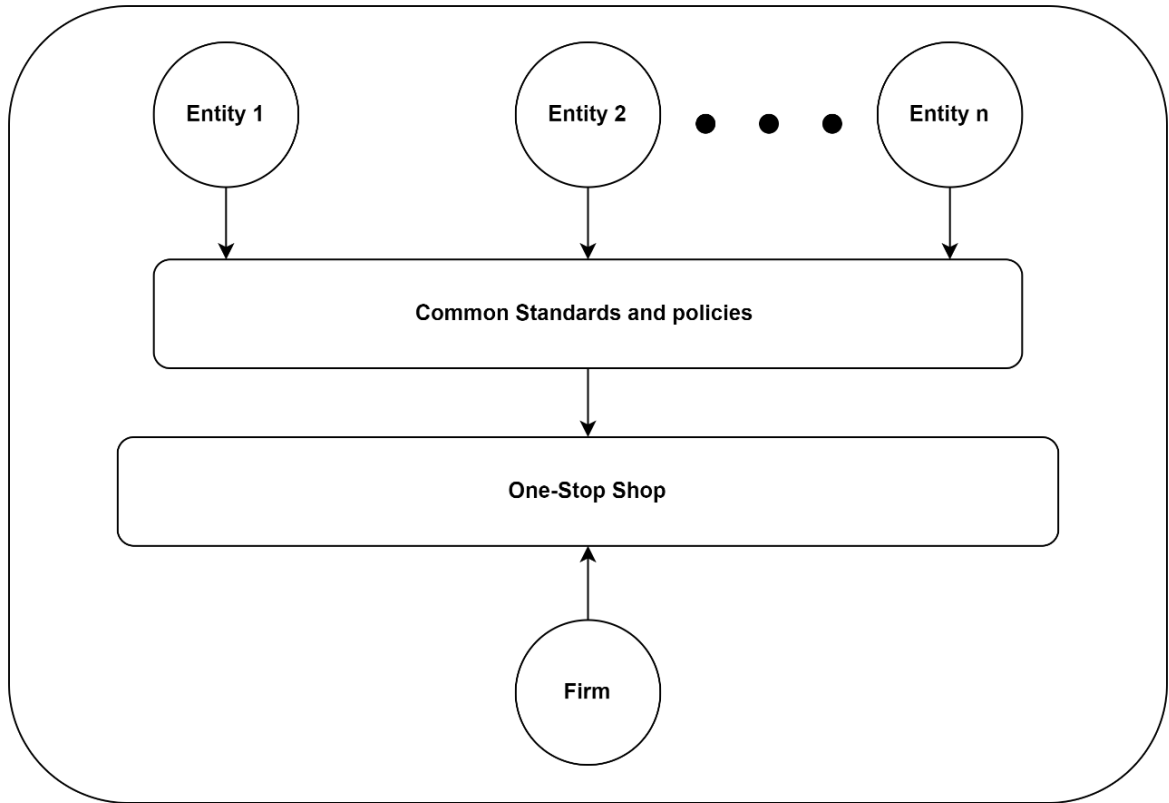


Figure 3: The model of a coordinated and adaptive shop proposed in this paper.

3. Description of its Operation

Assuming that the previous prerequisites are adequately fulfilled, the coordinated and adaptive model works as follows:

- (i) Upon receiving a leniency application, the member of the coalition will grant a marker to the applicant and verify if there is any overlap jurisdiction over the case. If there is no overlap, the agency will work alone. Otherwise, it will mandatorily contact the other competent agencies to initiate a coordinated negotiation.

- (ii) Each agency will designate a committee to participate in the proceedings. The committees will work as a task force, sharing information, analyzing evidence, and defining the next steps in the negotiations.
- (iii) The probatory material will be simultaneously provided by the applicant to all the government agencies that participate in the negotiation table.
- (iv) The government agencies will share among themselves the previous evidence that each of them has in connection with the case. By performing this action, the task force will compose a common baseline and resolve any information asymmetry that could exist among them. The evidence provided by the company will be compared with that common baseline. For a successful settlement, it is expected that the new evidence surpasses this common baseline.
- (v) The adaptive and coordinated shop evaluates if the proposal fulfils the legal requirements for a settlement and the level of collaboration and evidence offered. After this assessment, a decision is made through consensus.
- (vi) The shop will offer a leniency package to the applicant, contemplating all the benefits that the applicant would receive in case of acceptance. The shop will not offer a leniency package if the application does not satisfy the legal requirements posed by the governing laws or if it is detected that the applicant was lying or hiding information.
- (vii) If the leniency applicant refuses the offer, the evidence provided will be securely discarded and the next applicant in line will be contacted. If the leniency applicant accepts the offer, the settlement is concluded, and all the

participating government agencies will refrain from adopting any sanction against the firm for the illicit facts reported during the proceedings.

- (viii) In some circumstances, a monitorship program will be part of the deal. In that situation, the agencies will be free to determine which one will be responsible for monitoring the infringing company.

4. Benefits of the Model

In this section, the benefits of the coordinated and adaptive shop are enumerated.

A. Increased Predictability, Transparency, and Legal Certainty

In terms of predictability, presently, an applicant is not able to assess the exact consequences of a settlement and to make a more informed decision. A leniency applicant has to engage in multiple negotiations with different agencies, and different results may be achieved because the agencies adopt distinct parameters to evaluate a proposed collaboration.

In terms of transparency, an agency may publicize its assessment parameters and procedures in a more tangible and intelligible way, whereas others may describe them in more generic terms, posing some difficulties for a company to evaluate the costs of negotiating and its chances of success.

In terms of legal certainty, as it was demonstrated in the case involving TCU, even when a settlement is achieved, there is a non-negligible probability that another agency with jurisdiction over the case may sanction the company for the same facts reported.

The proposed model addresses these issues. Firstly, the model simultaneously provides a uniform response for leniency applications and prevents contradictory behavior from law enforcement agencies. Once an application is submitted, a single negotiation table is set with all the competent agencies, and a single response is given to the applicant (a denial, when the application does not fulfill the legal requirements; or a leniency package, when those requirements are satisfied). The model also preconizes the standardization and publicization of procedures, guidelines and parameters used by those agencies when they work together. The model provides a considerably more predictable and stable environment for companies.

B. Reduction in the Transaction Costs

The leniency model currently in place in Brazil is characterized by high transaction costs in the negotiation and monitorship phases. In the negotiation phase, a firm that aims at resolving its legal matters must participate in different and independent negotiation tables. In each one of them, the firm will have to provide evidence and its employees will have to be interviewed. After negotiations, assuming the firm succeeded in signing multiple settlements, each of them might demand a monitorship program as one of the conditions. This means that the firm will have to send different reports and be assessed multiple times by different government agencies through the duration of the program.

In the proposed model, these transaction costs will be significantly reduced. The model emulates a one-stop shop. All the evidence will be provided through a single channel; the interviews and depositions will be simultaneously carried out with all the agencies. Similarly, at the end of the agreement, the firm will engage in a single monitorship program conducted by the participating government agencies. The firm will

have to produce a single report, which will be sent through a single channel and shared by all the agencies responsible for overseeing whether it is complying with the conditions of the agreement.

C. Increased Attractiveness

This feature follows as a direct consequence of the reduced transaction costs and the increased predictability, transparency, and legal certainty provided by the new institutional arrangement. The existence of a “one-stop-shop”, where all the implications of the illicit conduct can be negotiated with the competent agencies through a single channel is considerably more attractive than the current model, where each implication must be separately negotiated. The reunion of incentives in a single point will likely increase the adherence to leniency programs in Brazil.

D. Construction of a Bottom-Up Solution

The proposed model allows the government agencies that comprise the coalition to collaboratively develop a joint solution suitable to their needs. Their experience in conducting leniency negotiations provides them the tools and knowledge to establish a set of procedures in accordance with their practical reality. In that sense, a top-down solution imposed by the Legislature faces the risk of not being as effective, because the Legislature may not have all the relevant information about the practical issues of leniency negotiations.

E. Solution to the Information Asymmetry Problem

When participating of distinct leniency negotiations, a firm may provide information in selective ways to the different agencies. For instance, it may furnish more

information to an agency that is already investigating the case, while omitting information from an agency that did not have previous knowledge about the illicit conduct. Another problem that arises in independent and separate negotiations is that the oral statements of the involved parties may differ when they are independently dealing with distinct agencies. Consequently, the current model is prone to inconsistencies in the statement of facts that each government body will have at the end of a settlement, a completely undesirable situation.

In the coordinated and adaptive shop, there is no such problem. The entire information is simultaneously provided to all the participating agencies, avoiding inconsistencies. Furthermore, the new model allows the participating agencies to share among themselves previously collected information that they have. This feature makes it easier for them to detect when the applicant is omitting information or even making false statements. Because of that, the firm will be compelled to provide as complete information as possible to increase its chances of obtaining a settlement.

F. Equalization of Expertise Levels

The implementation of independent leniency programs conducted by different government agencies may increase disparities in their levels of expertise. The number of agreements negotiated and concluded, and the technical and human resources allocated by each agency will make a difference in their respective levels of expertise to conduct a leniency program. The model based on a coordinated and adaptive shop will contribute to mitigate these disparities. The continuous institutional dialogue inherent to the model will likely level up the expertise of the agencies that are less experienced in conducting a leniency program.

G. Complementarity

The proposed model nurtures complementarity (i.e., mutual collaboration of law enforcement agencies of different specialization areas) and thus lead to better results. As previously described, for each negotiation, the competent agencies will work as a task force, analyzing evidence, interviewing witnesses, calculating fines, proposing remedial actions, and so on. It is worth noting that this collaborative approach has been successfully deployed by Brazil in other contexts, such as the fight against organized crime.¹³⁵

H. Better Workload Division among Law Enforcement Agencies

The current model generates an inefficient use of resources. In each independent negotiation table, similar activities are carried out by each law enforcement agency: analysis of evidence, conduction of interviews, meetings with attorneys, accounting calculations, etc. In the model here proposed, resources are deployed in a more rational fashion. For instance, interviews and meetings occur with all the involved parties, what reduces duplication of efforts. Moreover, the agencies involved in the negotiations are free to divide certain tasks among themselves, resulting in a better workload division. For example, the model can be a valuable tool to deal with asymmetries in technical and human resources among agencies. One agency may have more resources than other participants of the coordinated and adaptive shop. The new model allows the division of workload in accordance with these differences.

¹³⁵ Robert Muggah, LESSONS FROM ORGANIZED CRIME TASK FORCES: BRAZIL AND BEYOND, GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME (Oct. 16, 2017), <https://globalinitiative.net/analysis/lessons-from-organised-crime-task-forces-brazil-and-beyond/>

5. Critiques to the Model

The coordinated and adaptive shop emerges as an ambitious solution for a pressing problem and, as any ambitious solution, it is subject to criticism. The main critiques that could be made are the following: (i) increased complexity of negotiations and difficulties in achieving a consensus; and (ii) increased danger of information leakage.

As a first critique, one may argue that having multiple agencies in the same negotiation table increases the complexity of the negotiation and makes it difficult for them to achieve a consensus. This is a sensible concern. The proposed model relies on important prerequisites: standardization of procedures and methodologies; alignment of objectives; creation of common guidelines and policies. If the agencies work under common standards and principles, the chances of not achieving a consensus will be low. For instance, well-defined methodologies for the calculation of fines and damages will result in less disagreement among agencies.

Regarding the second concern (increased risk of information leakage), the model requires the implementation of information security measures and chain of custody mechanisms to ensure information confidentiality and accountability. It should be emphasized that the risk of information leakage in the current model, where multiple and independent negotiations take place, is also high.

The risks identified are acceptable, because the model reduces the complexity of the interactions between the leniency applicant and the government, and the risks can be efficiently mitigated.

6. On the Feasibility of the Model

The implementation of the new model is subject to operational and political barriers. An initial analysis of the Brazilian *status quo* suggests that the cultural barriers in creating a permanent an environment of institutional collaboration might constitute the main obstacle to its adoption.

Regarding the operational feasibility, some practical cases demonstrate that a more collaborative model can be implemented in Brazil: the partnership between CGU and AGU in the negotiation of anticorruption leniency agreements; and the participation of the MPF in antitrust leniency agreements, in which the institution has granted criminal amnesty to individuals when the respective legal requirements were fulfilled. Both examples were described in chapter 2.

Additionally, there were important episodes in which CGU/AGU and the MPF successfully collaborated: the leniency agreements signed with Technip (2019) and Samsung Heavy Industries (2021).

In the first case, Technip, a French engineering company for the energy industry, participated in offshore platform projects in Brazil between 2003 and 2007.¹³⁶ According to public record, Technip bribed employees of the state-controlled company Petrobras to secure those contracts.¹³⁷ The settlement had the participation of the Department of Justice

¹³⁶ Reuters Staff, *BRIEF-FMC Technologies, Technip S.A. contacted by U.S. DOJ regarding offshore platform projects*, REUTERS (Nov. 29, 2016), <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>.

¹³⁷ Press Release, DOJ, *TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over \$296 Million in Global Penalties to Resolve Foreign Bribery Case* (Jun. 25, 2019), <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>.

(DOJ), CGU/AGU, and the MPF.¹³⁸ To resolve the foreign bribery charges, the company agreed to pay a combined total fine of approximately USD 296 million.¹³⁹

The second case is very similar to the first one. Samsung Heavy Industries, a South Korean shipbuilder company, corruptly paid approximately USD 20 million in commissions to a Brazilian intermediary.¹⁴⁰ The South Korean shipbuilder knew that part of the money would be used to bribe Petrobras' employees to secure business advantages in several projects conducted by the Brazilian oil company between 2007 and 2013.¹⁴¹ Negotiations took place between 2019 and 2021 with North American and Brazilian authorities. Ultimately, Samsung reached an agreement with the DOJ, CGU/AGU, and the MPF and agreed to pay USD 75 million in global penalties to resolve the international bribery case.¹⁴²

These two high-profile cases demonstrate that a collaborative model involving CGU/AGU and MPF is feasible in operational terms. These facts suggest that one could be optimistic about a coordinated and adaptive shop for leniency agreements that involved all the federal agencies. On the other hand, implementing a culture of permanent collaboration among law enforcement agencies seems to be the greatest challenge involved in the implementation of the model. A recent episode occurred in 2020 illustrates this difficulty.

In an effort to confer legal certainty and predictability to the anticorruption leniency program, the Supreme Federal Court (STF) mediated a **Technical Cooperation**

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Press Release, DOJ, Samsung Heavy Industries Company Ltd Agrees to Pay \$75 Million in Global Penalties to Resolve Foreign Bribery Case (Nov. 22, 2019), <https://www.justice.gov/opa/pr/samsung-heavy-industries-company-ltd-agrees-pay-75-million-global-penalties-resolve-foreign>

¹⁴¹ *Id.*

¹⁴² *Id.*

Agreement (TCA) among anticorruption agencies.¹⁴³ The Office of the Comptroller General (CGU), the Attorney General’s Office (AGU), the Ministry of Justice and Public Security (MJSP), and the Federal Court of Accounts (TCU) have signed the TCA. The Federal Prosecution Service (MPF) participated in the negotiations, is listed as a signatory, but had not signed it yet, since the Fifth Chamber issued a Technical Note¹⁴⁴ advising the Head of the MPF not to do so.

The TCA adopts a strategy that is similar to the coordinated and adaptive leniency shop proposed in this paper. It establishes guidelines to govern the collective efforts of the participating agencies, describes the pillars that shall be observed in the execution of leniency agreements under the CCA, and provides concrete actions that shall be adopted by the signatories. The most relevant provisions of the TCA are as follow:

- (i) It provides that the CGU, AGU, MPF, and when applicable the Federal Police (a Department of the MJSP) shall seek to act in a coordinated manner in the negotiations of leniency agreements and, when applicable, parallel individual collaboration agreements¹⁴⁵. The measure is intended to resolve simultaneously the liability of natural persons and legal entities under

¹⁴³ Acordo de Cooperação Técnica que Entre si Celebram o Ministério Público Federal, a Controladoria-Geral da União (CGU), a Advocacia Geral da União (AGU), o Ministério da Justiça e Segurança Pública (MJSP) e o Tribunal de Contas da União (TCU) em Matéria de Combate à Corrupção no Brasil, Especialmente em Relação aos Acordos de Leniência da Lei No. 12.846, de 2013 [Technical Cooperation Agreement Among the Federal Prosecution Service, Comptroller-General’s Office (CGU), Attorney General’s Office (AGU), Ministry of Justice and Public Security (MJSP), and Federal Court of Accounts (TCU) Regarding Anti-Corruption in Brazil, Particularly Leniency Agreements Under Law No. 12.846 of 2013] (Aug. 6, 2020), <https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Acordo6agosto.pdf>

¹⁴⁴ Fifth Chamber of the Federal Prosecution Service, Nota Técnica No. 2/2020 [Technical Note No. 2/2020] (Aug. 10, 2020), <http://www.mpf.mp.br/pgf/documentos/NotaTecnicaAcordodeCooperacaoFinal.pdf>.

¹⁴⁵ Rewarded collaboration (in Portuguese, *colaboração premiada*) is the agreement negotiated with natural persons regarding criminal amnesty.

several different statutes (the CCA, the Administrative Improbability Law, and related criminal legislation).¹⁴⁶

- (ii) It establishes a policy of mutual collaboration in law enforcement. In the course of an investigation, if one agency detects that another one might have jurisdiction over the case, it will notify it.¹⁴⁷
- (iii) The negotiation and execution of the anticorruption leniency agreements are under the responsibility of the CGU and AGU.¹⁴⁸
- (iv) It establishes the role of the TCU in assessing the amount of damages that should be restituted to the treasury.¹⁴⁹

In practical terms, the TCA provides that the CGU and AGU negotiate and execute the leniency agreement and then inform the TCU and the MPF about the settlement. The TCU would verify whether it has any objection regarding the amount that should be restituted to the treasury. The MPF would enforce the provisions of the Administrative Improbability Law and the related criminal statutes by granting criminal and civil amnesty to offenders when the legal requirements were fulfilled and using the new evidence to prosecute third parties. Moreover, by signing the TCA, the MPF would have access to the resolution and the evidence provided by the applicant. If the institution evaluated them as unsatisfactory, it would be free not to participate in the settlement and to seek the punishment of the offenders by means of independently gathered evidence.

¹⁴⁶ Technical Cooperation Agreement, *supra* note 143, at 10-11.

¹⁴⁷ *Id.* at 10.

¹⁴⁸ *Id.* at 11.

¹⁴⁹ *Id.*

The TCA with the adhesion of the MPF could resolve the several issues regarding the enforcement of the CCA by ensuring more predictability to the system. Nevertheless, the Fifth Chamber of the MPF rejected the terms of the agreement. The Fifth Chamber provided a list of arguments to justify its non-adhesion: the lack of a centralized body;¹⁵⁰ the absence of the CADE, BACEN, and the CVM;¹⁵¹ the legal basis for the TCA;¹⁵² limitations in its institutional mission;¹⁵³ among others.

This episode demonstrates in a practical manner the challenges involved in constructing a bottom-up collaborative solution in the Brazilian scenario. Therefore, one may conjecture that the main barrier to the implementation of the new model resides in creating a culture of permanent interinstitutional collaboration.

V. Conclusion

Institutional multiplicity has been often deemed as one the strengths of the Brazilian anticorruption framework, as it enhances the detection capabilities of the State and makes the overall system more robust against failures. Nevertheless, the practical experience of the country has demonstrated that this model may lead to undesirable situations. One such situation has been occurring in the context of leniency agreements. The coexistence of multiple leniency programs conducted by different agencies has created an unstable and

¹⁵⁰ Fifth Chamber of the Federal Prosecution Service, *supra* note 144, at 22.

¹⁵¹ *Id.* at 27.

¹⁵² *Id.* at 15-16.

¹⁵³ *Id.* at 7.

unpredictable environment that undermines the incentives that companies would have in adhering to those programs.

Leniency programs constitute more than an investigation instrument in the fight against corporate criminality. They constitute an important public policy instrument with the scope of creating a more ethical business environment in Brazil and with the potential to produce several beneficial effects: rehabilitation of companies, preservation of jobs, restitution to victims, mitigation of impunity, a more efficient use of resources in law enforcement, among others. Currently, it is a matter of survival for those programs that the multiple law enforcement agencies responsible for their implementation work in close and coordinated collaboration.

This paper proposed a new institutional arrangement as a solution to that problem: a coordinated and adaptive shop. Depending on the nature of the wrongdoing reported by the applicant, a different negotiation table is set with all the agencies with jurisdiction over the case. All the negotiations occur through a single channel and, as a result of the joint negotiations, the applicant receives a unified response from the State

Although the model requires a great level of effort from the institutions in standardizing procedures and aligning policies, it makes institutional multiplicity compatible with leniency agreements as it reduces transaction costs and provides a more stable and predictable environment, thereby increasing the attractiveness of those programs to potential applicants.

It is important to point out that the greatest challenge for the implementation of the new model seems to be the creation of a culture of permanent cooperation among the multiple institutions that comprise the Brazilian anticorruption system.