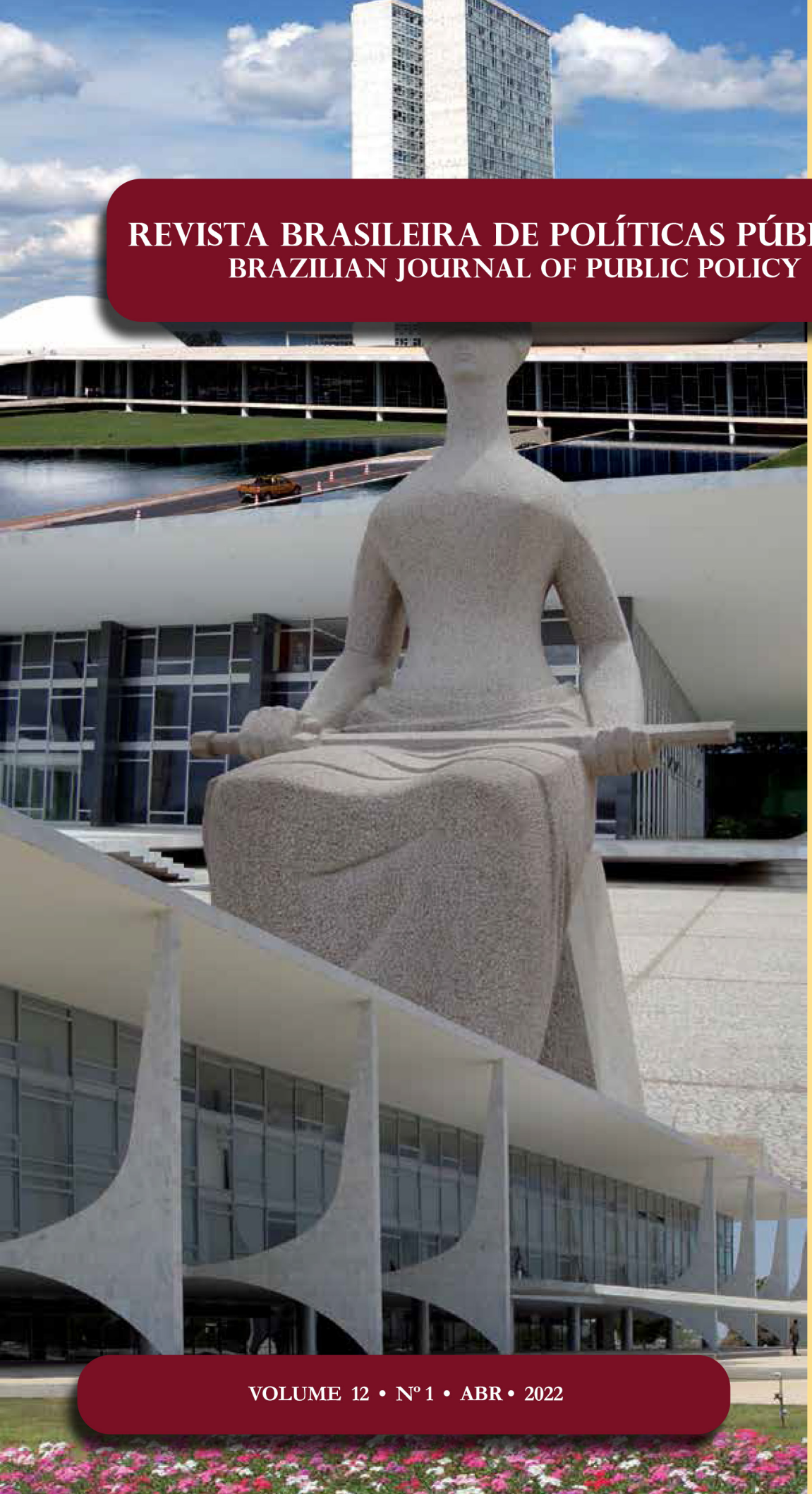

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Why Brazil? Why Petrobras? Why not Odebrecht?: patterns and outcomes of the U.S. Foreign Corrupt Practices Act and the role of the U.S. in the Car Wash Operation

Por que o Brasil? Por que a Petrobrás? Por que não a Odebrecht?: padrões e resultados para o U.S. Foreign Corrupt Practices Act e o papel dos EUA na Operação Lavajato

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Sumário

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Why Brazil? Why Petrobras? Why not Odebrecht?: patterns and outcomes of the U.S. Foreign Corrupt Practices Act and the role of the U.S. in the Car Wash Operation*

Por que o Brasil? Por que a Petrobrás? Por que não a Odebrecht?: padrões e resultados para o U.S. Foreign Corrupt Practices Act e o papel dos EUA na Operação Lavajato

Maria Paula Costa Bertran**

Maria Virgínia Nabuco do Amaral Mesquita Nasser***

Abstract

The main objective of this paper is to describe how Brazil as a country, and Petrobras as a company, were natural candidates to a remarkable anti-corruption enforcement under the U.S. Foreign Corrupt Practices Act - FCPA. Our description is based on both data and literature review. Our data reveals that non-U.S. companies and specific economic sectors, such as oil and gas, have been privileged targets under the U.S. expanded jurisdiction, granted due the FCPA. Furthermore, literature review leads us to the idea that Brazil is a capital-export country with substantial influence over Latin America and Africa – therefore providing an additional incentive to a focus on the country, as the promotion of cleaner practices in Brazil could potentially have positive trickle-down effects beyond its borders. The article expands the game-theory hypothesis developed by Griffith and Lee, as it demonstrates that remarkable foreign anti-bribery enforcements do help establish a new, expanded paradigm of anti-corruption surveillance and that Petrobras would have incentives to press for a cleaner environment. However, we conclude the same is not true about Odebrecht. Odebrecht's fragile situation due to debarments and reputational problems, the maintenance of political extorsion in the heavy construction and infrastructure market, and the role of foreign companies less embedded in the FCPA standards make Odebrecht an unlikely engine of change. Our conclusions indirectly question the Brazilian authorities' role in the so-called Car Wash Operation, as the success of the foreign anti-corruption enforcement may conceal local fragilities and overestimate its institutional readiness.

Keywords: Corruption; Expanded jurisdiction; FCPA; Latin America; Car Wash Operation.

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** Professora Visitante Associada na Stanford Law School em 2020. Fulbright Chair in Democracy and Human Development em 2018. Professora da USP desde 2012. Mestre e Doutora em Filosofia do Direito e Sociologia pela USP.
E-mail: bertran@usp.br

*** PhD na Universidade de São Paulo, LLM na London School of Economics.
E-mail: mvivimesquita@yahoo.com.br

Resumo

O principal objetivo deste artigo é descrever como o Brasil, como país, e a Petrobras, como empresa, eram candidatos naturais a uma notável atuação anticorrupção dos EUA, por intermédio do *U.S. Foreign Corrupt Practices Act* – FCPA. Nosso objetivo é construído sobre dados e revisão da literatura. Os dados apresentados neste trabalho revelam que empresas não estadunidenses e setores econômicos específicos, como petróleo e gás, têm sido alvos privilegiados na jurisdição expandida dos Estados Unidos, viabilizada pelo FCPA. Além disso, a revisão da literatura indica o Brasil como país exportador de capital com influência na América Latina e na África. A importância regional do Brasil fornece um incentivo a ações anticorrupção no país, já que a promoção de práticas mais limpas no Brasil tende a gerar resultados positivos para toda sua área de influência, além de suas fronteiras. O artigo expande a hipótese da teoria dos jogos desenvolvida por Griffith e Lee, ao demonstrar que casos célebres do FCPA ajudam a estabelecer novos padrões de vigilância aos quais provavelmente aderiu, por exemplo, a Petrobras, que passou a ter incentivos para pressionar por um ambiente mais limpo. No entanto, concluímos que o mesmo provavelmente não ocorreu com a Odebrecht. A atualmente frágil Odebrecht, apequenada por problemas reputacionais, dificilmente seria motor de mudança institucional para o setor de construção pesada no Brasil e nos outros países onde atuava. Nossas conclusões tangenciam o debate sobre o efetivo papel das autoridades brasileiras na Operação Lava Jato, uma vez que o sucesso da fiscalização anticorrupção estrangeira tende a ocultar fragilidades locais e superestimar a prontidão institucional dos países cujas empresas sofrem uma grande autuação do FCPA.

Palavras-chave: Corrupção; Jurisdição extraterritorial; FCPA; América Latina; Operação Lavajato.

1 Introduction

Corruption seems to be everywhere. Clean countries seem to be the exception, not the rule. The Corruption Perception Index is one of the leading indexes for measuring corruption. The CPI scores 180 countries and territories by their perceived levels of corruption, according to experts and businesspeople. The CPI uses a scale from 0 to 100, considering that 100 is very clean and 0 is highly corrupt. More than two thirds of the countries score below 50/100[1].

Considering this scenario, that seems to point to disseminated corruption around the world, would there be any priorities for foreign anti-bribery enforcement? How and why do the foreign anti-corruption apparatuses select the cases to enforce and the cases to dismiss? Do the companies involved in the so-called Car Wash Operation in Brazil reflect a potential target to the U.S. prosecutors, under the extraterritorial jurisdiction enabled by the Foreign Corrupt Practices Act - FCPA? If the behaviour of these companies falls withing the pattern to the FCPA enforcement, should we revaluate the merits of local initiatives against corruption in Brazil and Latin America?

The answer to these questions is highly controversial. U.S. prosecutors have considerable discretion on which companies to prosecute, since the guidelines they must follow are quite broad. However, evidence shows that previous U.S. anti-bribery enforcement action follows certain patterns, even if they are not formally imposed by the rules governing U.S. prosecutors.

At least two patterns emerge from U.S. antibribery action: it is predominantly international and sector--specific.

[1] TRANSPARENCY INTERNATIONAL. Corruption perception index. 2019. Available in: https://www.transparency.org/en/cpi/2019 Access on: January 23, 2021.

First, the highest settlements involve international, non-U.S. companies. Not only that, the highest settlements are systematically concentrated on companies based on capital exporting countries that influence other markets beyond their frontiers.

A remarkable FCPA punishment against companies from a capital exporting country represents a stimulus for the creation of anti-corruption practices more aligned with the FCAP (and the OECD) not only in that country, but in its entire area of influence. Because Brazil is an exporter of capital with influence over Latin America and Africa, the encouragement of practices in line with the FCPA tends to reverberate positively beyond its borders. A major corruption scandal involving a German company can create positive effects in Europe as a whole, for example. This happened, in fact, with the sanctions the FCPA imposed to Siemens in 2008, which triggered an impressive legal and self-regulation impact across Europe.

Second, companies from specific economic sectors receive more enforcement than others. That suggests the influence of particular sectors' agents in the process of choosing the cases to be enforced. The oil and gas industry surpasses by far all other economic sectors in the number of cases under the FCPA.

In this paper, we argue that Petrobras, a company from the oil and gas sector headquartered in Brazil, was a predictable target for the billionaire settlement ultimately signed with the FCPA agents in 2018. Brazil was living its best moment as a capital-export country. In addition to promoting a cleaner environment for the oil and gas industry, an outstanding case in Brazil could boost its underperforming anticorruption apparatus, with positive impact on its neighbours and its economic partners, as described in the game theory hypothesis developed by Griffith and Lee[2].

Differently, was the case of Odebrecht, the Brazilian heavy construction and infrastructure company that implicated politicians in several countries in Latin America and Africa. We argue it was probably only tagged along under the FCPA because of its connections with Petrobras. However, the Odebrecht case represented a superior symbol to promote the general idea of anti-bribery deterrence in multiple countries, as it revealed a sophisticated scheme that involved several prominent politicians[3] and nurtured an outstanding media appeal. Unlike the anticorruption improvements Petrobras may represent in Brazil and its areas of

[2] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019.

[3] "The vice-president of Ecuador, Jorge Glas, became the highest-ranking government official to be convicted in the scandal when he was sentenced in December 2017 to six years in jail. Prosecutors said he took $13.5m (£10.2m) in bribes from Odebrecht. […]. Colombia charged a former vice-minister for transport and a former senator. The man who ran the election campaign of the former president, Juan Manuel Santos, has alleged it was financed with irregular Odebrecht payments. Mr. Santos, who is a Nobel Peace Prize winner, said he did not authorize any payments or know about them. Next door in Venezuela, former chief prosecutor Luisa Ortega has fled the country after being sacked. She alleges that President Nicolás Maduro is implicated and that a top court is blocking an investigation. Odebrecht has denied her other allegation - that they paid $100m (£76.5m) to the socialist party's vice-president, Diosdado Cabello. Venezuela has taken unfinished projects away from Odebrecht and blocked the company's bank accounts. In Peru, four ex-presidents have been placed under investigation. Ollanta Humala and his wife Nadine Herediaare are facing potentially lengthy prison sentences for allegedly receiving payments to fund his presidential campaigns in 2006 and 2011. Alan García, who served as president from 1985 to 1990 and again from 2006 to 2011, killed himself with a bullet to the head on April 17 as police came to arrest him over claims he took bribes from Odebrecht. Former President Alejandro Toledo, accused of taking $20m in bribes, is thought to be living in the U.S. and the Peruvian government has put up a $30,000 reward for information leading to his arrest. Staying with Peru, opposition leader Keiko Fujimori has come under preliminary investigation. The attorney general says a note found on Marcelo Odebrecht's mobile phone implicates her. She denied receiving money from the company. Panama charged 17 people including government officials and charged Odebrecht $59m in compensation. A lawyer from Mossack Fonseca — the firm at the centre of the Panama Papers leak — accused President Juan Carlos Varela of receiving Odebrecht donations. Mr Varela denies all wrongdoing. Mexico summoned a former director of state oil company Pemex and other employees to give evidence over alleged Odebrecht bribes, while the Dominican Republic asked Odebrecht for $184m compensation over the next eight years.

Chile started an investigation and seized documents from the Odebrecht offices, while the firm agreed to pay Guatemala $17.9m in compensation for bribes paid to an official for public work, the attorney general's office said in January. And Brazilian newspaper O Globo reports (in Portuguese) that 29 countries, including Sweden, the U.S., France and the UK asked Brazil for help with their own Odebrecht investigations." ODEBRECHT case: Politicians worldwide suspected in bribery scandal. BBC News, 2019. Available in: https://www.bbc.com/news/world-latin-america-41109132 Access on: January 23, 2021.

influence, we offer arguments that the Odebrecht case has been unable to take the heavy construction sector to a cleaner status.

J&F, the financial arm of the Batista family, which produces animal protein, ended the cycle of convictions of Brazilian companies under U.S. jurisdiction. The J&F's settlement with the US authorities was formalized in October 2020. J&F recognized their executives paid bribes to receive funds from the Brazilian government-owned National Bank of Economic and Social Development (BNDES) and to receive investments from private pension funds. The moment of the J&F settlement distanced itself in time from the sanctions over Petrobras, Odebrecht and the politicians of the Workers' Party (Partido dos Trabalhadores). However, they are all part of the same context of corruption and punishment. J&F's sentence was remarkably low, in comparison to Petrobras and Odebrecht. This possibly reveals, through the analysis of the two patterns on which this text is built, a metamorphosis of the national identity of the group, less Brazilian and more American, after the acquisition of important slaughterhouses in the USA.

We have divided this paper into four parts, in addition to this introduction. First, we describe the basic structure of the U.S foreign anti-corruption apparatus (What is the FCPA and how did it reshape antibribery apparatus around the world?). Second, we present the patterns that prove a non-randomized, sector-specific selection of cases (What does data show about the FCPA?). Thirdly, we offer alternative explanations for the contours of the foreign anti-bribery enforcement, including the time-limited success of the Car Wash Operation, and present the game theory hypothesis (Why Brazil? Why Petrobras?). The last part (Why not Odebrecht?) describes how the game theory hypothesis is unlikely to explain the enforcement against Odebrecht. Also, in the last part (New competitors, old practices?), we explore the outcomes of the foreign and the local anti-bribery enforcement against Odebrecht and its local competitors, pointing out to the entry of new competitors, with the maintenance of systemic grand corruption in the heavy construction and infrastructure market.

2 What is the FCPA and how did it reshape antibribery apparatus around the world?

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977 by Jimmy Carter, as a response to international bribery scandals from his predecessor Richard Nixon. The FCPA allows for the extraterritorial jurisdiction of the United States, which in essence means that the U.S. can hold companies and/or individuals accountable for actions taken out of its territory.

For many decades, its existence was mainly symbolic, as very few, if any cases were enforced per year under the FCPA until the beginning of the 2000s[4]. A common explanation for the lack of enforcement by the FCPA during its first decades was that American industry argued the FCPA created an uneven playing field for U.S. companies in global commerce. While the American companies had the FCPA constraint, European countries usually allowed tax deduction for the bribes their companies paid in developing countries[5]. The first international constraint to such a practice (out of the U.S.) was only formalized in 1997, by

[4] Until 2000, the average number of FCPA enforcements was 3.5 cases per year. After 2000, the average number of enforcements per year was ten times more. From 1977 to 2000, 60 cases were enforced by the U.S. Department of Justice and 19 cases were enforced by the Securities and Exchange Commission, summing up less than 80 cases under the FCPA enforcement. Between 2001 and 2019, 366 cases were enforced by the U.S. Department of Justice and 283 cases were enforced by the Securities and Exchange Commission, summing up 649 cases. The exact number of cases per year and types of resolution for each case are available online at Stanford Law School Foreign Corrupt Practices Act website, in the tab Statistics and Analytics. STANFORD LAW SCHOOL. Types of SEC Resolutions. 2019. Available in: http://fcpa.stanford.edu/statistics-analytics.html?tab=6 Access on: January 23, 2021.

[5] PIETH, Mark. International cooperation to combat corruption. Institute for International Economics, p. 119-131, 1997. Available in: https://www.piie.com/publications/chapters_preview/12/6iie2334.pdf Access on: January 23, 2021.

the Organization of Economic Cooperation and Development (OECD), with its "Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials".

The FCPA was the inspiring model for the Organization of Economic Cooperation and Development (OECD) Anti-bribery Convention[6]. Other conventions[7] followed its overall structure. Brewster[8] states that the turning point of the FCPA enforcement came exactly after the OECD Convention and the dissemination of the idea that foreign anti-bribery enforcement was something to improve local markets and institutions. She argues that the OECD Convention allowed American prosecutors to adopt an "international--competition neutral" enforcement strategy, investigating not only domestic corporations bribing overseas, but their foreign rivals alike. The OECD treaty legitimizes the foreign prosecution initially created by the U.S., prompting both its adoption by other countries (for example, the enactment of the United Kingdom Bribery Act in 2010[9]) and the acceptance of international cooperation as something neutral[10].

The FCPA contains provisions for both criminal and civil liability[11]. Its enforcement can target companies or individuals. For tackling corruption, the FCPA has two major mechanisms: antibribery provisions and accounting provisions. The implementation of the FCPA is carried by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). While the DOJ deals with the FCPA's criminal elements, the SEC deals with the accounting provisions and the civil enforcement of the FCPA.

The DOJ is part of the Executive branch of the United States government. Within the DOJ, the Fraud Section of the Criminal Division has primary responsibility for all FCPA matters. The FCPA Unit within the Fraud Section handles all FCPA matters for the DOJ, and regularly works jointly with U.S. Attorneys' Offices. The SEC is an agency responsible for protecting investors. The SEC enforces the laws related to the capital markets in the U.S. The role of the SEC in the FCPA reflects the importance of capital markets in the U.S. The FCPA enforcement by the SEC represents not only the protection of investors, but also the protection of the image and reputation of the American stock market.

Concerning the antibribery provisions, the FCPA prohibits the offer, payment, promise to pay, or authorization of payment of any money, gift or things of value to foreign officials, political parties, political

[6] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. 1999. Available in: http://www.oecd.org/corruption/oecdanti-briberyconvention.htm Access on: January 23, 2021.

[7] ORGANIZATION OF AMERICAN STATES. Inter-American Convention Against Corruption. 1996. Available in: http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp Access on: January 23, 2021; UNITED NATIONS. United Nations Convention against Corruption. 2003. Available in: https://www.unodc.org/unodc/en/corruption/uncac.html Access on: January 23, 2021. We also mention the recommendations of the Financial Action Task Force, an intergovernmental organization dedicated to fighting money laundering and the funding of terrorism.

[8] BREWSTER, Rachel. Enforcing the FCPA: international resonance and domestic strategy. Virginia Law Review, v. 103, n. 8, p. 1611-1684, 2017. Available in: https://www.virginialawreview.org/volumes/content/enforcing-fcpa-international-resonance-and-domestic-strategy Access on: January 23, 2021.

[9] Influenced by the international stimulus, Brazil also incorporated foreign anti-bribery enforcement, expanding its jurisdiction to cases involving foreign officials in acts committed by Brazilian companies outside its territory. The disposition appears in the so-called Brazilian Clean Companies Act, of Lei n. 12,846, from August 1st, 2013. We reproduce the article in Portuguese: "Art. 28. Esta Lei aplica-se aos atos lesivos praticados por pessoa jurídica brasileira contra a administração pública estrangeira, ainda que cometidos no exterior."

[10] FISHMAN, Andrew; VIANA, Natalia; SALEH, Maryam. The secret history of U.S. involvement in Brazil's scandal-wracked Operation Car Wash. The Intercept, 2020. Available in: https://theintercept.com/2020/03/12/united-states-justice-department-brazil-car-wash-lava-jato-international-treaty/ Access on: January 23, 2021; VIANA, Natália; NEVES, Rafael. O FBI e a Lavajato: diálogos vazados mostram proximidade entre PF, procuradores e o FBI no caso da Lava Jato, incluindo "total conhecimento" das investigações sobre a Odebrecht. The Intercept Brasil, Jul. 2020. Available in: https://apublica.org/2020/07/o-fbi-e-a-lava-jato/ Access on: January 23, 2021.

[11] CRIMINAL DIVISION OF THE U.S. A resource guide to U.S. Foreign Corrupt Practices Act. 2. ed. USA: Securities and Exchange Commission, 2020. Available in: https://www.justice.gov/criminal-fraud/file/1292051/download Access on: January 23, 2021.

parties' officials or candidates, directly or indirectly, with the intention of influencing or inducing them in order to obtain new business or retain the business they already have.[12]

Concerning the accounting provisions, the FCPA requires that the companies listed on stock exchanges in the U.S. (or those required to file periodic reports with the SEC, even if they are not properly listed in the American stocks) make and keep accurate books and records. These companies are called "issuers"[13]. Several sizeable companies from Latin America seek to raise funds in the U.S. financial market because local capital markets are not as well developed. Braskem and Petrobras were issuers in the U.S., but Odebrecht and J&F were not.

The enforcement of the FCPA over international companies and persons has rendered the U.S. a tremendously broad jurisdiction. Slight connections between a bribery transaction and the U.S. market or territory can ground prosecutors' decisions to bring a case under U.S. authorities. A few examples of these subtle liaisons include placing a telephone call or sending an e-mail, text message, or fax from, to, or via the United States. The U.S. jurisdiction also applies if an alien attends a meeting in the U.S. that furthers a foreign bribery scheme. Another prevalent connection is the use of American banks in transactions with liaisons to a bribery scheme. The jurisdiction of the U.S. over Odebrecht's acts of corruption was triggered under the FCPA due to the engagement of Odebrecht's employees in corruption while on U.S. territory. Petrobras' case fell under the FCPA because the company was an "issuer" in the U.S. market.

The bar for FCPA responsibility is quite low. Brewster and Buell[14] state that it is easier to prosecute a company for violating the FCPA than for unlawfully selling ill fated mortgages. When it comes specifically to SEC enforcement, FCPA violations are considered much easier to prove than other security frauds. Any failure to maintain books and records that accurately and fairly reflect the corporation's transactions may trigger the SEC enforcement. Corruption usually takes place in secrecy. Accordingly, bribe payments are not registered in the company's records. However – the reason why the SEC's job is easy lies exactly here – the lack of formal registry for any bribe payments is sufficient to trigger the SEC enforcement.

The FCPA system relies heavily on prosecutorial discretion. Brewster and Buell[15] state that "The American prosecutor is famously the king or the queen of discretion: discretion to decide whom to prosecute for what offenses and whom to leave unmolested by legal action."

Indeed, the discretion exists both in which cases to prosecute[16], and how to settle. A number of resolutions other than indictment are available to the authorities. The DOJ attorneys can decline to prosecute,

[12] 15 U.S.C. § 78dd -1 Prohibited foreign trade practices by issuers [Section 30A of the Securities Exchange Act of 1934]

[13] "The FCPA's antibribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and stockholders acting on behalf of an issuer; (2) "domestic concerns" and their officers, directors, employees, agents, and stockholders acting on behalf of a domestic concern; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States. A company is an "issuer" under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act. In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A company thus need not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers. […]". CRIMINAL DIVISION OF THE U.S. A resource guide to U.S. Foreign Corrupt Practices Act. 2. ed. USA: Securities and Exchange Commission, 2020. p. 9-10. Available in: https://www.justice.gov/criminal-fraud/file/1292051/download Access on: January 23, 2021.

[14] BREWSTER, Rachel; BUELL, Samuel. Law and market: the market for global anticorruption enforcement. Law & Contemporary Problems, v. 80, p. 193-214, 2017. Available in: https://scholarship.law.duke.edu/lcp/vol80/iss1/8 Access on: January 23, 2021.

[15] BREWSTER, Rachel; BUELL, Samuel. Law and market: the market for global anticorruption enforcement. Law & Contemporary Problems, v. 80, p. 193-214, 2017. p. 12. Available in: https://scholarship.law.duke.edu/lcp/vol80/iss1/8 Access on: January 23, 2021.

[16] Ten factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea agreements or other settlements. They are: the nature and seriousness of the offense, including the risk of harm to the public; the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management; the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it; the corporation's willingness to cooperate with the government's investigation, including as to potential wrongdoing by

or propose a plea agreement, a deferred prosecution agreement, or a non-prosecution agreement. In a plea agreement, the defendant admits the facts pertaining to the charges and its guilt. The deferred prosecution agreement postpones all accusations, while defendants simultaneously file a charging document with the court. The authorities request that the prosecution be deferred in time, which means that the case is temporarily suspended, but it can be brought to a plea agreement or to future court hearings. Authorities may propose that the defendant pay fines, keep external monitors inside the company, and rearrange its anti-corruption programs. A non-prosecution agreement guarantees the company will not have to answer for its unlawful practices in the future. This solution can be cumulated with fines and rigorous penalties. Deferred prosecution agreements and non-prosecution agreements are also available to the SEC.

Under the enforcement of the FCPA, Odebrecht[17], Odebrecht's subsidiary partner Braskem[18] (one of the leading chemical industries in the Americas) and J&F[19] (the financial arm of the biggest meat processing group in the world, including JBS-Swift and Pilgrim's Pride) pleaded guilty. Petrobras[20] settled a non-pro-

the corporation's agents; the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging or resolution decision; the corporation's timely and voluntary disclosure of wrongdoing; the corporation's remedial actions, including any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution; collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution; the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and the adequacy of the prosecution of individuals responsible for the corporation's malfeasance. CRIMINAL DIVISION OF THE U.S. A resource guide to U.S. Foreign Corrupt Practices Act. 2. ed. USA: Securities and Exchange Commission, 2020. p. 51. Available in: https://www.justice.gov/criminal-fraud/file/1292051/download Access on: January 23, 2021.

[17] UNITED STATES. Departament of Justice. Plea Agreement, United States v. Odebrecht S.A., 16-cr-643. Eastern District of New York. 2016. Available in: https://www.justice.gov/criminal-fraud/file/920101/download Access on: January 23, 2021. When setting the penalty, the DOJ considered that Odebrecht did not voluntarily disclose the conduct, but was to receive full credit for cooperation, since it conducted an investigation to bring evidence and information related to the illegal conduct and facilitated and encouraged cooperation and voluntary disclosure by current and former personnel, engaged in "extensive remedial measures" including terminating the employment and disciplining individuals, revamping its compliance mechanisms, and also agreeing to retain a compliance monitor. In view of that Odebrecht received a 25% discount of the bottom of the applicable US Sentencing Guidelines Fine Range. The parties agreed that gross pecuniary gain resulting from the payment of more than USD788 million in bribes was USD 3.336. Hence, the penalty applicable could reach USD 6.672 per offense, resulting on a fine range of USD 6.0048 to USD 12.0096. Parties agreed that, applied the mentioned discount, the appropriate criminal penalty would be of USD 4,503,600,000. Odebrecht made representations to the DOJ, the Eastern District of New York Attorney and the Brazilian Authorities alleging that the company was unable to pay for the penalty, which was then reduced to USD 2,6 billion, payable in ten years to the United States, Switzerland and the Brazilian Authorities, subject to the confirmation of Odebrecht's financial feasibility to pay by them. Amounts paid to the Brazilian and Swiss authorities would be offset from the penalty due under the agreement. So far, only US Authorities collected 10% of the penalty.

[18] UNITED STATES. Departament of Justice. Plea agreement, United States of America v. Braskem S.A., 16-cr-644. Eastern District of New York. 2016. Available in: https://www.justice.gov/criminal-fraud/file/920091/download Access on: January 23, 2021.

[19] UNITED STATES. Departament of Justice. Plea Agreement, United States of America v. J&F Investimentos S.A., Cr. No. 20-CR – 365 (MKB). Eastern District of New York. Available in: https://www.justice.gov/opa/press-release/file/1327381/download Access on: January 23, 2021. J&F Investimentos SA was a private investment holding company based in Sao Paulo, Brazil. It was wholly owned by brothers Wesley Batista and Joesley Batista. J&F owned approximately 250 companies in 30 countries worldwide. JBS, S.A., which was controlled by J&F, was the world's largest meat and protein producer, also based in Sao Paulo, Brazil. According to the documents in this case, between 2005 and 2017, J&F, along with J&F's co-owners and executives the Batista brothers, JBS, and unnamed Brazilian intermediaries, conspired to violate the FCPA by paying bribes to foreign officials in Brazil. The officials included high-ranking members of both the legislative and executive branches of the Brazilian government as well as high-ranking executives at Banco Nacional de Desenvolvimento Economico e Social ("BNDES"), a Brazilian state-owned bank, and at Fundação Petrobras de Seguridade Social ("Petros"), a Brazilian state-controlled pension fund established for the benefit of employees at Brazil's state-owned oil company Petroleo Brasileiro S.A. - Petrobras. The bribes were paid to ensure that J&F and JBS would receive financing and equity transactions from BNDES, Petros, and Caixa Economica Federal, another Brazilian state-owned bank.

[20] UNITED STATES. Departament of Justice. Non-Prosecution Agreement, the United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Eastern District of Virginia, and Petróleo Brasileiro S. A ("Petrobras"). 2018. Available in: https://www.conjur.com.br/dl/doj.pdf Access on: January 23, 2021; UNITED STATES. Departament of Justice. Order instituting cease-and-desist proceeding pursuant to section 8A of the Securities Act of 1933 and Section 21 C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, Securities and Exchange Commission, Administrative Proceeding File no. 3-18843. 2018. Available in: https://www.sec.gov/litigation/admin/2018/33-10561.pdf Access on: January 23, 2021. Under the Non-Prosecution Agreement, Petrobras agreed to pay a criminal

secution agreement. Eletrobrás[21] received a small fine and a cease-and-desist order. In Brazil, the operation that investigated these five cases — and more than twenty of Odebrecht's competitors — was known as the Car Wash Operation[22].

The Car Wash Operation was an unprecedent case of crime dismantlement in Brazil. It has always been unclear whether the Brazilian antibribery institutions could dismantle the traditional schemes of grand corruption by themselves. In the next sessions, we argue that the support of the U.S. was the vital reason that allowed local institutions to successfully sanction the widespread corruption involving public companies (Petrobras and Nuclebras) and the most important private companies raised under the protection of the Brazilian government (Odebrecht, Braskem, and J&F).

Two non-Brazilian companies (Samsung[23] and Vantage Drill[24]) were also involved in the Petrobras' corruption scheme and were under the FCPA enforcement.

3 What does data show about the FCPA?

FCPA enforcement against foreign companies results in higher fines than enforcement against U.S. companies. According to the Stanford Law School FCPA Clearinghouse, the list of the most significant FCPA sanctions of all times based on penalties and disgorgement follows below:

penalty of US$ 853,200,000 (of which USD 682,560,000 were to be credited to the amount the company would pay to Brazil and penalties to be paid to SEC) and to undertake a thorough restructuring of its compliance program, which progress would have to be monitored and reported to the U.S. Department of Justice for two years.

[21] "Centrais Eletricas Brasileiras S.A. ("Eletrobras") was a Brazilian power generation, transmission and distribution company whose shares were registered with the SEC and traded on the New York Stock Exchange. The Brazilian government owned a 51% stake in Eletrobras and appointed a majority of Eletrobras's board members. Eletrobras Termonuclear S.A ("Eletronuclear") was Eletrobras's majority-owned nuclear power generation subsidiary. Officers at Eletronuclear engaged in a bid-rigging and bribery scheme connected to the construction of a nuclear power plant. Under the scheme, private Brazilian construction companies paid bribes through inflated contracts to the Eletronuclaer officers in order to obtain the contracts for the power plant's construction." STANFORD LAW SCHOOL. Case information: in the matter of Centrais Eletricas Brasileiras S.A. Available in: http://fcpa.stanford.edu/enforcement-action.html?id=731 Access on: January 23, 2021.

[22] The name of the operation refers to the location of one of the offices that was responsible for the money laundrying of the scheme. It was an office above a car-washing company, an innocuous and inconspicuous location. BRASIL. Ministério Público Federal. Operação Lava Jato. Available in: http://www.mpf.mp.br/grandes-casos/lava-jato Access on: January 23, 2021.

[23] "Samsung Heavy Industries Co. Ltd. ("Samsung"), headquartered in the Republic of Korea, was an engineering company that provided shipbuilding, offshore platform construction, and other construction and engineering services. Samsung maintained offices in several countries around the world, including a branch office in Houston, Texas. Samsung conspired to pay approximately $20 million in commission payments to a Brazilian intermediary, knowing that portions of the money would be paid as bribes to officials at Petrobras, Brazil's national oil company. The payments were made in connection with a drill ship that Samsung was selling to a Houston-based offshore oil drilling company. Samsung understood that the Houston company would only exercise its option to purchase the drillship if it secured a contract with Petrobras. Consequently, the payments Samsung directed to the Petrobras officials were made in order to cause Petrobras to enter into a contract to charter the drillship. That contract was obtained." STANFORD LAW SCHOOL. Case Information: United States of America v. Samsung Heavy Industries Co. Ltd. 2019. Available in: http://fcpa.stanford.edu/enforcement-action.html?id=769 Access on: January 23, 2021.

[24] "Vantage Drilling International ("Vantage") was an offshore drilling company headquartered in Houston, Texas and registered under the laws of the Cayman Islands. According to the allegations in the enforcement action, a director on Vantage holding's board, who was also the company's largest shareholder, entered into a series of agreements with an official at Petrobras' International Division to pay bribes to the official in exchange for granting a contract to deliver a new ultra-deep-water drillship. The bribes were paid from the holding director's personal funds and were made through a Brazilian agent." STANFORD LAW SCHOOL. Case Information: in the matter of vantage drilling international. Available in: http://fcpa.stanford.edu/enforcement-action.html?id=724 Access on: January 23, 2021.

Table 1 – The ten highest FCPA settlements, according to the Stanford Law School FCPA Clearinghouse, from 1977 to 2020

Company	Headquarters Country	Monetary Sanction
1 – Odebrecht S.A.	Brazil	US$ 3,557,626,137
2 – Airbus SE	France	US$ 2,091,978,881
3 – Petróleo Brasileiro S.A. - Petrobras	Brazil	US$ 1,786,673,797
4 – Telefonaktiebolaget LM Ericsson	Sweden	US$ 1,060,570,832
5 – Telia Company AB	Sweden	US$ 965,604,372
6 – Mobile Telesystems Public Joint Stock Company	Russia	US$ 850,000,400
7 – Siemens Aktiengesellschaft	Germany	US$ 800,002,000
8 – VimpelCom Ltd	Netherlands	US$ 795,326,798
9 – Alston S.A.	France	US$ 772,291,200
10 – Société Generale S.A.	France	US$585,553,288

Source://fcpa.stanford.edu/statistics-topten.html?filter=largest_monetary_sanctions Richard L. Cassin, author from the renowned *FCPA Blog*, offers a slightly different list.

Table 2 - The ten highest FCPA settlements, According to Richard L. Cassin, on the *FCPA Blog*, from 1977 to December 2019

Company	Headquarters Country	Monetary Sanction /year
1 - Petróleo Brasileiro S.A.	Brazil	$1.78 billion in 2018
2 - Telefonaktiebolaget LM Ericsson	Sweden	$1.06 billion in 2019
3 - Telia Company AB	Sweden	$965 million in 2017
4 - MTS	Russia	$850 million in 2019
5 - Siemens	Germany	$800 million in 2008
6 - VimpelCom	Netherlands	$795 million in 2016
7 - Alstom	France	$772 million in 2014
8 - Société Générale S.A.	France	$585 million in 2018
9 - KBR / Halliburton	United States	$579 million in 2009
10 - Teva Pharmaceuticals	Israel	$519 million in 2016

Source: https://fcpablog.com/2019/12/09/ericsson-jolts-the-fcpa-top-ten-list/

The Siemens and the Petrobras cases are present in both lists. Cassin removed the Odebrecht/Braskem case on the FCPA Blog, one of the most important sources in the area, after US prosecutors reduced penalties based on Odebrecht's claim of inability to pay (see footnote 14). The Stanford FCPA Clearinghouse kept the Odebrecht case on the list of the top ten convictions. Cassin does not include the Airbus SE case, because it was settled in 2020. Cassin includes the Teva Pharmaceuticals case. Teva Pharmaceuticals plays an important role in explaining the Israel's recent anti-corruption response, according to the Griffith and Lee's model, to be presented below. In addition to Brazil, Israel and Russia, all other companies are European institutions.

In both lists, non-US companies dominate the top ten places on fines. No American company appears on the list of Stanford Law School FCPA Clearinghouse. Cassin assigns the ninth place (out of ten places) to the American KBR / Halliburton.

The economic sectors of the companies subject to FCPA enforcement offer the second pattern for our analysis. There is a remarkable feature for companies that belong to specific industries such as the oil and gas industry and the aerospace/defence sector.

Table 3 - Industry Classification of the FCPA, from 1977 to May 2021

Industry Classification	Number of cases FCPA matters
Oil and Gas companies	92
Healthcare	66
Industrial goods	58
Technology	47
Aerospace/Defence	43
Consumer Goods	43
Financial	36
Basic Materials	31
Services	30
Communication Services	27
Transportation	20
Utilities	9
Real Estate	5
Conglomerates	3
Non-profit organization	1

Source: http://fcpa.stanford.edu/statistics-analytics.html?tab=9

In addition to Petrobras, international cooperation between the FCPA agencies and the federal prosecutors in Brazil reached the oil and gas trading company Vitol in December 2020[25]

4 Why Brazil? Why Petrobras?

How and why do the foreign anti-corruption apparatus select which international bribery cases to enforce and which to dismiss?

In Brazil, all evidence of crime that have identifiable suspects leads prosecutors to offer a criminal complaint. In Brazil, the criminal complaints will normally be analysed and sentenced by a judge. In the U.S., prosecutors choose both the cases and how to enforce them. Kevin Davis states that virtually all FCPA cases against corporations were resolved "through some sort of voluntary agreement, without any prior judicial hearing". According to Davis, "in the entire history of the FCPA, only two cases involving corporate defendants have gone to trial."[26]

Before presenting Griffith and Lee's model, we explore three common answers offered to broach the question that opens this session.

The first theory points out that the FCPA (and other foreign anti-bribery laws, as the United Kingdom Bribery Act, from 2010) are enacted to signify a commitment to universal values and human concerns. In this view, states are motivated by moral or altruistic aims. Rich countries assume that corruption is harmful to all societies and seek to eradicate corruption not only in their domestic environment but everywhere. It seems feasible that some capital-exporting states may wish to regulate foreign bribery in poor developing countries. Griffith and Lee state that, according to this view, the enforcement of the anti-bribery laws occurs

[25] UNITED STATES. Department of Justice. Vitol Inc. Agrees to Pay over $135 Million to Resolve Foreign Bribery Case. 2020. Available in: https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case Access on: January 23, 2021.

[26] DAVIS, Kevin. Between impunity and imperialism: the regulation of transnational bribery. Oxford: Oxford University Press, 2019. p. 144.

when "[…] the political and moral orders *align* to permit it"[27]. This explanation does not foresee the FCPA patterns of enforcement.

The second theory points to what Griffith and Lee call a "realist" or "rent-seeking"[28] orientation focused on the states' motivations to enact and enforce these laws. The basic intuition of this model is that a particular country will enact or enforce its foreign anti-corruption laws when to do so is perceived as being in the state's national interest. According to this possible interpretation, the enforcement against Petrobras would be predictable because of the discoveries involving the pre-salt layer[29] and the achievable expectation that Petrobras would become a major player in the oil and gas sector.

In the same vein, Odebrecht would be a target for foreign anti-bribery enforcement because its growth represented a risk to clean companies based in clean countries. In this sense, the foreign anti-bribery enforcement against both Petrobras and Odebrecht would be in the interest of the U.S. First, in sabotaging Petrobras and forcing the offer of the Brazilian oil reserves to international companies. Second, in weakening or excluding Odebrecht from the heavy construction and infrastructure global market. Andrew Spalding describes how the foreign anti-bribery legislation should be understood as economic sanctions against emerging markets[30]. Spalding's work is representative of these ideas. This model is appealing for "why" but fails to offer answers on "how".

Griffith and Lee call the third approach "institutionalist"[31]. According to the authors, this approach shares with the human rights view the idea that anti-corruption is a public good to be improved. It focuses on the design, interactions, and ways of working from institutions at both international and domestic levels. On the international level, the institutionalist approach investigates the multilateral treaties and their soft-power/peer-pressure organizations, like the OECD. On the domestic level, this approach centres its attention on the national laws, government agencies, and its local actors.

Griffith and Lee examine U.S. institutions. However, it is possible to reframe their institutionalist approach to encompass the narratives that describe the Car Wash Operation as a symbol of improvement of Brazilian institutions and the local legal system. This description highlights some institutions (such as the Federal Prosecutors' Office, or Ministério Público Federal) as finally mature and prepared to deal with international anti-bribery cooperation[32]. In this sense, some people advocate that the cooperation process that allowed the FCPA enforcement against Petrobras, Odebrecht, and the local sanction of multiple politicians and businesspeople under the Car Wash Operation was a symbol of local anti-bribery apparatus excellence.

A different and promising interpretation to explain the local institutions' performance under the Car Wash Operation in Brazil is that a remarkable FCPA enforcement makes local initiatives almost unavoidable, even if local apparatuses were not mature enough. The companies have many incentives to accept the agreements to limit their exposition as perpetrators under the U.S. jurisdiction. The support of the U.S. in collecting evidence and sharing investigation expertise temporarily expands the ability of the local apparatuses to reveal schemes and reach agents that were never enforced before.

[27] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019.

[28] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019. p. 1249.

[29] BRAZIL'S oil boom: filling up the future. The Economist, 2011. Available in: https://www.economist.com/briefing/2011/11/05/filling-up-the-future Access on: January 23, 2021.

[30] SPALDING, Andrew Brady. Unwitting sanctions: understanding anti-bribery legislation as economic sanctions against emerging markets. Florida Law Review, v. 62, 2010.

[31] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019. p. 1249.

[32] ENGELMANN, Fabiano; MENUZZI, Eduardo de Moura. The internationalization of the brazilian public prosecutor's office: anti-corruption and corporate investments in the 2000s. Brazilian Political Science Review, v. 14, n. 1, 2020. DOI: doi.org/10.1590/1981-3821202000010006 Available in: https://www.scielo.br/j/bpsr/a/YMCbnpvptB99PLMxDxmv53j/?lang=en Access on: January 23, 2021.

The fourth theory, the one developed by Griffith and Lee[33], is a game-theory hypothesis based on two degrees of actions. They assume the primary causal actors that foster foreign anti-bribery major movements are "business interest groups". In this sense, the focus is not on states, international organizations, or non--governmental organizations, but business interest groups that can lobby all the other actors to provide a better environment for their own interests. It does not mean that states have no role. But it does mean that private interests motivate state actors.

The FCPA enforcement levels the playing field within the markets, creating equal restraints for all companies in specific sectors. This is the first degree. Eventually, these companies become leading activists for cleaner practices. They can even lobby for more aggressive anti-bribery enforcement in their home countries, as their level-playing field "antidote". This is the second degree.

Griffith and Lee's basic idea is that after remarkable settlements, when prominent foreign companies like Petrobras in Brazil, Siemens in Germany, BAE Systems in the U.K., or Teva in Israel paid fines and made agreements to settle U.S. FCPA prosecutions, they stopped resisting enforcement of analogous laws in their home jurisdictions. These companies realize they can't escape international anti-corruption regulation in the United States, a large market they could not forego because of the FCPA enforcement they suffered. As FCPA monitors prevent the companies from keeping their bribe strategies for years after the deals with the U.S. authorities, companies accede to the regulations. The companies' interests in lobbying their home governments for lax corruption enforcement fade, and they expect other local companies to be as clean as they are.

Griffith and Lee describe how this structure would work in Brazil with the Petrobras case:

> […] it is possible to make a prediction on the future course of the enforcement of foreign anti-corruption laws in Brazil based on our model. In light of the historic Petrobras settlement — the first to pass the $ 1 billion mark in terms of total value — one would expect Brazil to ramp up enforcement of its own foreign anti-corruption laws, particularly against foreign companies. […] At present, Transparency International reports that Brazil is a "moderate" enforcer [against corruption]. If we are right, that characterization will change in the future [although Brazil] […] may need some time to develop the necessary legal architecture, including the development of a specialized enforcement agency, enhanced whistleblowers protections, and the implementation of non-prosecution agreements.[34]

It is worth mentioning that the U.K. Bribery Act was enacted in 2010, just one year after BAE Systems, a British aerospace, and defence company, reached an agreement following a long FCPA investigation that resulted in the third-largest settlement in history. The German technology giant Siemens paid US$800 million in 2008, a value that remained the largest settlement in the history of the FCPA for ten years until the announcement of the Petrobras agreement in 2018. After the Siemens case, Germany has become a leading jurisdiction in the enforcement of foreign corruption laws. Teva Pharmaceuticals, a generic drug maker, paid US$519 million in FCPA punitive damages in 2016, the tenth biggest settlement according to the FCPA blog top ten, and became a symbol of the vigorous new anti-bribery enforcement in Israel.

Griffith and Lee[35] establish a correlation between the countries with proficient anti-bribery enforcement jurisdictions and the previous FCPA enforcement against its home companies.

> Nearly all the 'active' or 'moderate' enforcement jurisdictions in 2018 [according to the Transparency International report] are home states of foreign companies subject to FCPA actions by U.S. enforcement authorities that result in very public and large settlements and non-prosecution agreements.

[33] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019.

[34] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019. p. 1261.

[35] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019. p. 1259.

Recent events in Brazil question the statement above. It is undeniable that a remarkable FCPA case shifts the enforcement apparatus of a country, considering both the learning process local institutions receive from the U.S. authorities, and the internal stimulus from the companies that now lobby for a cleaner environment. However, as Brazilian antibribery institutions experience alarming attacks under the actual president of Brazil, Jair Messias Bolsonaro, it seems that the positive impacts of the U.S. FCPA were time limited. Bolsonaro ended the Car Wash Operation in 2020, claiming that corruption is no longer an issue in his government[36]. As mentioned before, a feasible interpretation to explain the Car Wash Operation in Brazil is that a remarkable FCPA enforcement makes local initiatives almost unavoidable, even if local apparatuses are not mature enough and would never be able to achieve such results by themselves alone. This interpretation supports the literature that describes a possible lack of neutrality and the political bias in Car Wash Operation outcomes[37].

The Petrobras case seems to reproduce the pattern described by Griffith and Lee. The company is likely to shift its governance structures to comply with global legal constraints, and lobby for a cleaner internal market. Our paper expands Griffith and Lee's model as a suitable explanation for the role played by the FCPA in the multiple corruption cases connected to the Car Wash Operation in Brazil. Griffith and Lee's model claims that foreign companies targeted by the FCPA will lobby in their own jurisdictions to strengthen anti-corruption enforcement. But this theory assumes that corporations survive and convert to cleaner practices, ignoring the possibility that they will collapse and be replaced by other competitors using the same disquieting tools. This distinction is clearly illustrated by the contrast between Petrobras and Odebrecht.

5 Why not Odebrecht?

Theoretically, Odebrecht has interest in lobbying governments for severe corruption enforcement, just like Petrobras. However, Odebrecht asked for preliminary bankruptcy in Brazil[38] and in the U.S.[39] It is unlikely that Odebrecht will be able to successfully press for a cleaner market. We argue that neither did the FCPA enforcement (and the Car Wash Operation) shift the equilibrium of disseminated corruption in the heavy construction and infrastructure market in Brazil, nor did it occur in most of the countries in which the company operated in Latin America and Africa. We argue that the enforcement only rearranged the players in the market[40]. If we are correct, two questions emerge: does any rationality for the foreign anti-bribery authorities remain in such a remarkable case? What will happen in the heavy construction and infrastructure market?

[36] FAGUNDES, Murillo. Bolsonaro says Brazil Is corruption-free, ends carwash probe. Bloomberg, 2020. Available in: https://www.bloomberg.com/news/articles/2020-10-07/bolsonaro-declares-brazil-corruption-free-and-ends-carwash-probe Access on: January 23, 2021.

[37] AVRITZER, Leonardo; MARONA, Marjorie. A tensão entre soberania e instituições de controle da democracia brasileira. Dados – Revista Brasileira de Ciências Sociais, v. 60, n. 2, p. 359-393, 2017. DOI: doi.org/10.1590/001152582017123 Available in: https://www.scielo.br/j/dados/a/zVx3cB4dJVqQcNbbNkGmSwc/?lang=pt Access on: January 23, 2021; ARANTES, Rogério; MOREIRA, Thiago. Democracia, instituições de controle e justiça sob a ótica do pluralismo estatal. Opinião Pública: Revista do CESOP, v. 25, n. 1, p. 97-135, 2019. DOI: dx.doi.org/10.1590/1807-0191201925197 Available in: https://www.scielo.br/j/op/a/y9dCbmHBdT8QJTDZh563fFx/?lang=pt Access on: January 23, 2021.

[38] ALVES, Aluisio; MANDL, Carolina; BAUTZER, Tatiana. Brazil's Odebrecht files for bankruptcy protection after years of graft probes. Reuters, 2019. Available in: https://www.reuters.com/article/us-odebrecht-bankruptcy/brazils-odebrecht-files-for-bankruptcy-protection-after-years-of-graft-probes-idUSKCN1TI2QM Access on: January 23, 2021.

[39] HALL, Kevin G. Brazilian-based engineering giant Odebrecht S.A. files new bankruptcy case in Manhattan. Miami Herald, 2019. Available in: https://www.miamiherald.com/news/business/international-business/article234449572.html Access on: January 23, 2021.

[40] An important executive from Odebrecht declared that the competitors that are not involved with the Car Wash operation look at my clients and say: "No, Odebrecht cannot help you anymore. I am the one who is going to help you now. You have to transfer Odebrecht's contracts to me." Mr. Benedicto Barbosa da Silva Júnior hearing on 2/3/2017 at the Brazilian Electoral Court, page 52.

Relating to the first question, we argue that Odebrecht represented a coherent target for the foreign anti--bribery agents. Not because of the two-level game described by Griffith and Lee. In fact, we argue that the Odebrecht case was able to maximize the visibility of anti-bribery enforcement in all the countries involved, with a potentially bigger exposure in the media considering the connections with the local political elites.

Most FCPA cases do not allow explicit connections of causality regarding prosecutors' intentions. However, Petrobras seems to represent a distinct case that perfectly fits both the oil and gas sector pattern and its location in Brazil, a key capital exporting country, according to Griffith and Lee's model. Odebrecht could magnify the Petrobras case because of the local outcomes in nothing less than twelve countries: Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.

Deterrence is based upon the idea that potential wrongdoers perceive the consequences of their actions. Odebrecht had the potential to promote special deterrence as it created a unique impact on media and a showcase of the FCPA/OECD power in all Latin America and part of Africa.

Kevin Davis describes how agencies act to "manipulate" deterrence incentives, expanding the perceptions of the likelihood of being sanctioned. Communication is pointed as a central strategy in this process. According to Davis:

> The best way to break into the newsfeeds of corporate decision makers and public officials is to do things that are news-worthy, such as imposing surprisingly harsh penalties or targeting high-profile figures. For all but the most careful analysts, perceptions of transnational bribery law have been influenced more strongly by well-publicized cases such as […] *Lava Jato*, than by less publicized but more typical cases.[41]

In december 2016, Odebrecht and its executives admitted to having paid bribes in a joint agreement that involved U.S., Brazil and Switzerland authorities. The Brazilian Federal Prosecution Service provided six months of total confidentiality to the illegal practices carried out by Odebrecht and its members. This period would allow the company to reach out the other countries' authorities and start a negotiation process on their own terms, without the pressure of self-incrimination. Raquel de Mattos Pimenta and Otávio Venturini state that "soon after the parties signed the agreements, the DOJ released public statements on the Odebrecht transnational scheme, as it traditionally does in its cases. The publicity given by the DOJ contrasted with the non-trial agreement signed with the Brazilian Federal Prosecution Service. Clause 19 of the Brazilian agreement pro-vided six months of total confidentiality to the confessed practices that directly involvedforeign public agents. It would give the company time to reach out to otherauthorities and start a negotiation process before the Public Prosecutor's Office resumedinvestigative cooperation with others."[42]. The U.S. authorities, using its discretion, shared the evidence about the Odebrecht case right away. It may reveal some of the deterrence incentives described by Kevin Davis.

The second question, concerning the market results of the anti-bribery enforcement, points to three different scenarios: a) an effective transformation of the heavy construction market to a totally clean environment; b) the maintenance of the same practices of corruption with the same actors, and c) the entry of new competitors in the market, including clean companies that have incorporated the tradition of anti--bribery measures in their institutional design in addition to companies that expect to conquer new markets by adapting to the local insidious practices, if they have to.

One needs more time to evaluate the scenario "a", but we have elements to consider that it is unlikely the Odebrecht case will provide a clean environment for the heavy construction market in Brazil or in other countries. We affirm that based on the lack of structural reforms, mandatory measures to prevent compa-

[41] DAVIS, Kevin. Between impunity and imperialism: the regulation of transnational bribery. Oxford: Oxford University Press, 2019. p. 181.

[42] PIMENTA, Raquel; VENTURINI, Otávio. Cooperação internacional e acordos de leniência em casos de corrupção transnacional: um estudo do caso Odebrecht. Revista Direito GV. V. 17 n 2. mai-ago 2021, p. 14.

nies from being extorted by politicians. Bribes to "avoid problems" with the public administration remain a structural problem. Many defendants in the Odebrecht pointed out that they made donations to politicians to avoid default of contracts, delays in payments, and technical constraints created by potentially endless red tape set in motion by extortive politicians or their henchmen. Sometimes, the red tape is created by contradictory policy measures designed by bureaucrats with no intention to extort, but nevertheless creating incentives for businesses to resort to politicians to get around the regulatory measures.

In Brazil, a company or an individual face extraordinary challenges when filing a claim against public bodies. Even if the private company does have all the evidence to prove in court that the government did not pay its due obligations, the company cannot seize government properties or constraint for the overdue payment. Instead, any debt must be collected through a unique and extremely lengthy procedure[43], which renders the default administration a complex issue for any company contracting with governments. In December 2020, the Brazillian Congress approved a new bidding law. The text shyly mitigates the imbalance of positions between the Public Administration and the private companies. Other proposed reforms, both legal and institutional, remain pending.[44]

Most of the bribe schemes described in the Odebrecht case refer to payments to direct or secure contract agreements. However, the peculiar role of bribes to guarantee the due course of a contract, as just mentioned, clearly appears in the statement of facts within Odebrecht's plea agreement. In Ecuador, Odebrecht experienced many problems related to a construction contract that had already been signed with the government. Odebrecht agreed to make corrupt payments to the government official "to solve problems"[45] regarding this contract. In Guatemala, Odebrecht paid a high-ranking government official a "percentage of the value of the contract over the life of the project in exchange for the official assisting Odebrecht with obtaining payments under the contract"[46] (a contract that had already been signed with Odebrecht). In Panama, the government official would ensure Odebrecht's participation in "[…] and payment under the contracts"[47].

The scenarios "b" and "c" are complementary. New competitors can both push for better governance, or adapt to local practices. It is important to mention that Odebrecht's competitors in Brazil are unlikely to constitute clean companies suffering from the outrageous behaviour of Odebrecht.[48] These companies were born and raised in the same symbiotic ecosystem of public funding, public procurement contracts, cartels and political influence that created the opportunity for Odebrecht's corruption machine. Many of these companies were involved (in different degrees) in the Car Wash Operation in Brazil, although only Odebrecht suffered the FCPA enforcement[49].

[43] In Portuguese the name of this special procedure is "requisição de precatórios", which can be roughly translated as "judicial bond".

[44] MOHALLEM, Michael Freitas et al. (org.). Novas medidas contra a corrupção. Rio de Janeiro: Escola de Direito do Rio de Janeiro da Fundação Getúlio Vergas, 2018.

[45] UNITED STATES. Departament of Justice. Plea Agreement, United States v. Odebrecht S.A., 16-cr-643. Eastern District of New York. 2016. p. B-18. Available in: https://www.justice.gov/criminal-fraud/file/920101/download Access on: January 23, 2021.

[46] UNITED STATES. Departament of Justice. Plea Agreement, United States v. Odebrecht S.A., 16-cr-643. Eastern District of New York. 2016. p. B-19. Available in: https://www.justice.gov/criminal-fraud/file/920101/download Access on: January 23, 2021.

[47] UNITED STATES. Departament of Justice. Plea Agreement, United States v. Odebrecht S.A., 16-cr-643. Eastern District of New York. 2016. p. B-20. Available in: https://www.justice.gov/criminal-fraud/file/920101/download Access on: January 23, 2021.

[48] "Odebrecht paid bribes to officials of Petrobras […]/, to, among other things, ignore the fact that it colluded with several other construction companies in bidding for supply contracts. As a result, the entire market was unfair; the whole point of the bid-rigging scheme was to ensure that even the lowest bid for any contract was well above the minimally profitable price one would expect to see in a truly competitive market." DAVIS, Kevin. Between impunity and imperialism: the regulation of transnational bribery. Oxford: Oxford University Press, 2019. p. 62.

[49] SPINETTO, Juan Pablo; VALLE, Sabrina. Petrobras imposes ban on builders in carwash probe. Bloomberg, 2014. Available in: https://www.bloomberg.com/news/articles/2014-12-30/petrobras-imposes-ban-on-builders-in-car-wash-probe Access on: January 23, 2021; PARAGUASSU, Lisandra. Brazil's Andrade Gutierrez to pay $381 million fine to settle graft charges. Reuters, 2018. Available in: https://www.reuters.com/article/us-brazil-corruption-andrade/brazils-andrade-gutierrez-to-pay-381-million-fine-to-settle-graft-charges-idUSKBN1OH22U Access on: January 23, 2021.

When Odebrecht became the primary target of prosecution by U.S. and Brazilian authorities, the company committed itself to adopting integrity policies, thereby abandoning its former practices. Locally, most of the companies involved in the Car Wash Operation also agreed to implement anti-bribery compliance procedures. As mentioned before, only time can tell whether putting major construction companies under compliance programs will eradicate illicit associations with local politicians.

6 New competitors, old practices?

New competitors in the Brazilian market are already a reality after the enforcement against the traditional Brazilian companies by both the FCPA and the Car Wash Operation. Novaes[50] proves this in analysing airport concessions in Brazil. Prior to the Car Wash Operation, most bid winners were local companies. After the Car Wash Operation, most of them were international companies. Scenario "b" (the maintenance of the same practices of corruption with the same actors) is no longer possible.

Our final aim is to analyse scenario "c": the entry of new competitors including both clean companies with anti-bribery governance and companies prone to adapt to the local practices. At this point, we once again refer to Griffith and Lee,[51] considering their hegemonic stability theory after the end of the Cold War and the role of China as a central player in the Global South.

The idea that remarkable cases like Petrobras, Siemens, BAE or Teva Parmaceuticals are able to shift internal markets is connected to a broader idea, related to the distribution of power in international relations. Griffith and Lee state that key markets like Germany, Brazil or Israel, can coordinate other states under their influence. The foreign anti-bribery enforcement against companies from these countries would represent not only a shift in its internal markets, but a whole new global anti-bribery order, enlarged from their area of influence.

After the end of the Cold War, there was the expectation that the U.S. and the European Union would have sufficient leverage in the world economy to create a hegemonic group that could lead other economies to the standards originally implemented by the FCPA. The cases Siemens in Germany and Teva in the U.K. were able to promote a swift and efficient alignment of Europe to the FCPA/OECD paradigm. The regional importance of countries like Israel, Japan, Korea, Brazil and Russia defied the alignment expectation for the rest of the world. The rise of China as a remarkable economic power brings additional doubts about that antibribery tentative alignment.

China is the location of the majority of improper payments enforced by the FCPA in cases between 2011 and 2020. Differently from Brazil, Germany, or Israel, none of these improper payments were connected to Chinese companies. All of them refer to international companies operating in China[52].

Table 4 - Location of Improper Payments, FCPA enforcements from 2011 to 2020

China	48
Brazil	16
India	14
Mexico	13
Russia	12

[50] NOVAES, Natália Fazano. The brazilian new economic matrix and rationality shift in public contracts: the airport concession case after The Operation Car Wash. 2020. Not published yet.

[51] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019.

[52] MINTZ GROUP. Where the bribes are. Available in: https://www.fcpamap.com/ Access on: January 23, 2021.

Indonesia	11
Angola	9
Argentina	8
Saudi Arabia	8
Venezuela	8

Source: Stanford Law School FCPA Clearinghouse.[53]

In this sense, Griffith and Lee add that

> enforcing the FCPA against Chinese businesses subject to FCPA jurisdiction while also operating in capital-exporting countries may not pressure the Chinese government to enforce its own foreign anti-bribery laws on Chinese companies (although it may enforce them against foreign companies operating in China).[54]

What would happen if a Chinese company, state-owned by the People's Republic of China, received a remarkable enforcement from the FCPA, as Petrobras did? Would this state-owned company accept the legitimacy of the foreign jurisdiction? A possible explanation for the lack of an exceptional anti-bribery case in China, against a proper Chinese company, suggests wise caution from the U.S. apparatus. Would a Chinese company accept the FCPA extraterritorial jurisdiction?

The Brazilian government supported Odebrecht, Braskem, and J&F financially[55] and politically[56] with the intention of creating capital-export companies[57]. This symbiosis was ambiguous. Some companies were chosen to be protected by the Brazilian government and received the stimulus to become capital export leaders. But they had to continuously feed the interests of politicians to maintain their regulation favourable and receive your payments due. Construction tycoons in Brazil have acted together to direct the State's investments towards large development projects construction. They also wanted to ensure that award-winning companies belong to a small group of large construction companies. This process has existed since the military dictatorship in Brazil, which began in 1964[58].

After being big companies, these enterprises diversified their activities for concession services, the maritime industry, the chemical sector and other investments, always gravitating around the primary sector. In the symbiosis, Odebrecht and the other construction companies have always been called to donate to campaigns and participate in government works. Marcelo Odebrecht, former president of the family company, complained that the government forced him to invest in projects such as the construction of a soccer

[53] "This chart identifies the countries where bribes were offered or paid, based on allegations in Enforcement Actions initiated within the last ten years. Data is culled from Enforcement Actions within FCPA Matters to avoid double counting that could otherwise occur when, for example, the same or affiliated defendants are sued in different Enforcement Actions for the same underlying bribery scheme. Each country will be counted only once per FCPA Matter regardless of the number of bribes allegedly offered or paid to officials in that country. If a single FCPA Matter implicates more than one country, that Matter will be counted once for each unique country implicated. The data used to generate this graphic were culled from publicly available documents filed in connection with the Enforcement Actions and may not reflect all countries where bribes were offered or paid." STANFORD LAW SCHOOL. Home page chart descriptions. Available in: http://fcpa.stanford.edu/resources/home-page-charts-descriptions.pdf Access on: January 23, 2021.

[54] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019. p. 25.

[55] SCHAPIRO, Mario Gomes. Rediscovering the developmental path?: development bank, law and innovation finance in the brazilian economy. In: TRUBEK, D. et al. (eds.). Law and the new developmental state: the brazilian experience in Latin American context. Cambridge: Cambridge University Press, 2013. p. 114-164.

[56] AMORIM, Celso. Brazilian foreign policy under President Lula (2003-2010): an overview. Revista Brasileira de Política Internacional, n. 53, p. 214-240, 2010. DOI: doi.org/10.1590/S0034-73292010000300013 Available in: https://www.scielo.br/j/rbpi/a/CMNH5Hc6x63gRKQKY4yGgbj/?lang=en Access on: January 23, 2021.

[57] TRUBEK, David M.; COUTINHO, Diogo; SCHAPIRO, Mário. Toward a new law and development: new state activism in Brazil and the challenge for legal institutions. The World Bank Legal Review, 2012. Available in: https://elibrary.worldbank.org/doi/10.1596/9780821395066_CH16 Access on: January 23, 2021.

[58] CAMPOS, Pedro Henrique Pedreira. Estranhas catedrais: as empreiteiras brasileiras e a ditadura civil-militar, 1964-1988. Rio de Janeiro: Eduff, 2017.

stadium for the Corinthians team, a personal request from the former president Luís Inácio Lula da Silva. Another request was to invest in the sugar and alcohol sector. After Odebrecht made significant investments in land acquisition and the development of sugar and ethanol plant projects, the government cut taxes on ethanol, jeopardizing ethanol in the Brazilian market. This situation led Marcelo Odebrecht to return to the government and demand measures to save the industry. However, aid would not be "given" for free. Minister Hermann Benjamin asked Marcelo Odebrecht if he didn't feel like a "kind of owner" of the government, Marcelo replied, mentioning the two cases described above: "in fact, I felt a little bit like the jester"[59].

The Brazilian strategy is deliberately reproduced in China, a country in which the public support to the private sector can grow without the heavy burdens of the FCPA paradigm. In addition to that, China does not have to deal with the burdens of a multiparty immature democracy, in which the final act of the state depends on several internal legal and illegal agreements, as it happened in Brazil. The Chinese strategies allow the perfect conditions for the Chinese companies to flourish in Latin America and Africa.

In this point of view, China is today what Europe was until the end of the 90s. Germany did not push Siemens to bribe in Latin America. However, Germany did not limit Siemens in doing so. Chinese companies should not be seen as companies prone to bribe, in a way to mimic Odebrecht's role. However, it is vital to consider that the Chinese companies are not submitted to the political background created by the OECD and FCPA paradigm. China did not sign the OECD Antibribery Convention, for instance. This analysis is more important if we consider the Global South as a priority for the economic enhancement of China, as described in the Belt and Road Initiative, Xi Jinping's ambitious program of funding and building infrastructure projects in the developing world.

Griffith and Lee offer a wise closure to the competition process established after Odebrecht's incapacitation[60] and the lowering of its local competitors:

> Chinese companies may thus continue to pay bribes to build political capital among developing-world elites. They might even do the work at lower rates thanks to state loans, subsidies, and programs designed to deploy idle capacity from the Chinese construction industry to infrastructure projects abroad.[61]

7 Conclusion

Data suggest that foreign anti-bribery enforcement is not randomized. Non-Americans companies receive higher penalties than American companies. Furthermore, certain economic sectors receive more assessments than others. Based on this, we affirm that Petrobras and Brazil were predictable targets for a major FCPA case. The oil and gas sector is the sector with the highest FCPA assessments. Countries with regional influence are targets for the construction of large cases.

The statement above is based on the game theory model developed by Griffith and Lee. The authors claim that some countries are targets for their companies to receive major FCPA cases. The idea is that a big FCPA case in a capital-exporting country is able to potentialize deterrence effects and better governance not only in the companies' headquarter or its economic sector, but also in its area of influence and all economic sectors

[59] BRASIL. Tribunal Superior Eleitoral. Ação de Investigação Judicial Eleitoral. AIJE 1943-58.2014-6.00.0000/DF. Termo de transcrição. Relator: Ministro Herman Benjamin, March 6, 2017. Available in: https://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2017/04/CLAUDIO-MELO-FILHO-DEPOIMENTO-AO-TSE.pdf Access on: January 23, 2021.
[60] THOMAS, W. Robert. Incapacitating criminal corporations. Vanderbilt Law Review, v. 905, n. 72, 2019. Available in: https://vanderbiltlawreview.org/lawreview/2019/04/incapacitating-criminal-corporations/ Access on: January 23, 2021.
[61] GRIFFITH, Sean J.; LEE, Thomas H. Toward an interest group theory of foreign anti-corruption laws. University of Illinois Law Review, v. 19, 2019. p. 25.

We conclude that Griffith and Lee's model explain the enforcement against Petrobras in Brazil. However, we have expanded Griffith and Lee's model to demonstrate that the Odebrecht case does not represent the same pattern. Odebrecht (and its local competitors) can hardly guarantee a market with best practices. The maintenance of bureaucracy and the lack of reforms to curb political extortion suggest the perpetuation of corruption or capture schemes. While new competitors tend to replace Odebrecht and its former competitors in most contracts, the corruption structure remains prone to involve companies that did not incorporate the FCPA and OECD anti-corruption paradigm.

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