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# Brazil's New Anti-Corruption Law

## Implications for Multinational Companies

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# Anti-Corruption Enforcement

- Emerging Trend Towards Multi-National Enforcement
  - Foreign Corrupt Practices Act
  - U.K. Bribery Act
  - Chinese Investigations
  - Brazil's Anti-Corruption Law

# Historical Background

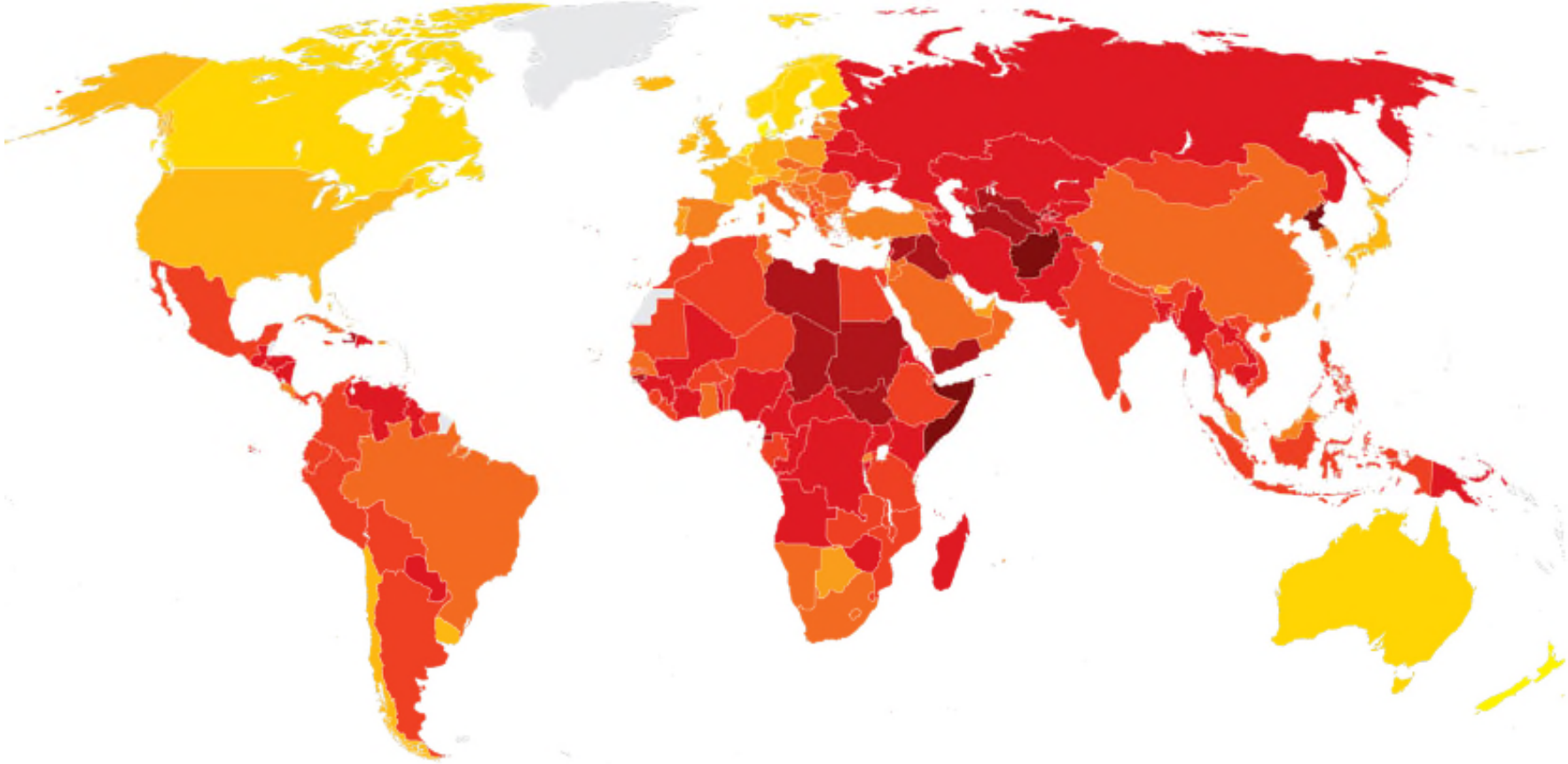
- **Existing Legal Framework**

- Brazilian Penal Code
- Law on Administrative Improbity (No. 8,429/1992)
- Bid Law (No.8,666/1993)
- Code of Ethics for Public Officials of the Brazilian Federal Administration (Decree No. 1,171/1994)

- **International commitments**

- United Nations Convention Against Corruption
- Inter-American Convention Against Corruption - OAS
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- United Nations Convention against Transnational Organized Crime

# Historical Background



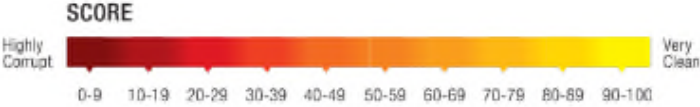
**BRAZIL**

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2013 Score      Rank  
**42**            **72 / 177**

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2012 Score  
**43**



\* Transparency International

# Historical Background

- International Pressure
- Conviction of Governmental Officials for Corruption (“Mensalão” – Criminal Lawsuit 470)
- 2013 Demonstrations and Riots

## Substantive Terms: Unlawful Conduct

- **Corruption**: To Promise, Offer or Give, Directly or Indirectly, an Undue Advantage to a Public Official, or to a Related Third Party
- Use of an Intermediary with the Intent to Conceal the Interests or the Identity of the Beneficiaries (Requires Intent)
- Financing, Subsidizing or Otherwise Sponsoring Unlawful Acts (Strict Liability)

# Substantive Terms: Unlawful Conduct

- Against Public Bids and Contracts
  - Several Actions that Result in Bid Rigging
  - Fraudulently Obtain any Undue Advantage or Benefit in Connection with Amendments or Extensions of Contracts
  - Manipulate or Defraud the Economic-Financial Equilibrium of a Contract
- Create Obstacles to Investigations or Audits by Public Officials or Entities



## Substantive Terms: Who is Subject to the Law

- All Brazilian Corporate Forms
  - Includes all Subsidiaries of Multinational Companies
- Foundations
- Associations
- Foreign Companies with Headquarters, Branches or Representation in Brazil

# Substantive Terms: Innovations

- Administrative Sanctions
  - Corruption
  - Fraud in Public Bids
  - Imposition of Difficulties to Investigations
- Strict Liability
  - No Need to Prove Culpability
- Penalties Imposed on Companies
  - Previously, Only Individuals for Most Cases
- Extra-Territorial Reach
  - Acts by Brazilian Companies Against Foreign Public Administration, Even When Abroad

# Substantive Terms: Administrative Sanctions

- Administrative Fine
  - 0.1% to 20% of Gross Revenue
  - BRL 6K to BRL 60 Million
- Extraordinary Publication of the Decision
  - In Major Newspaper
  - On Website
  - At the Company Premises

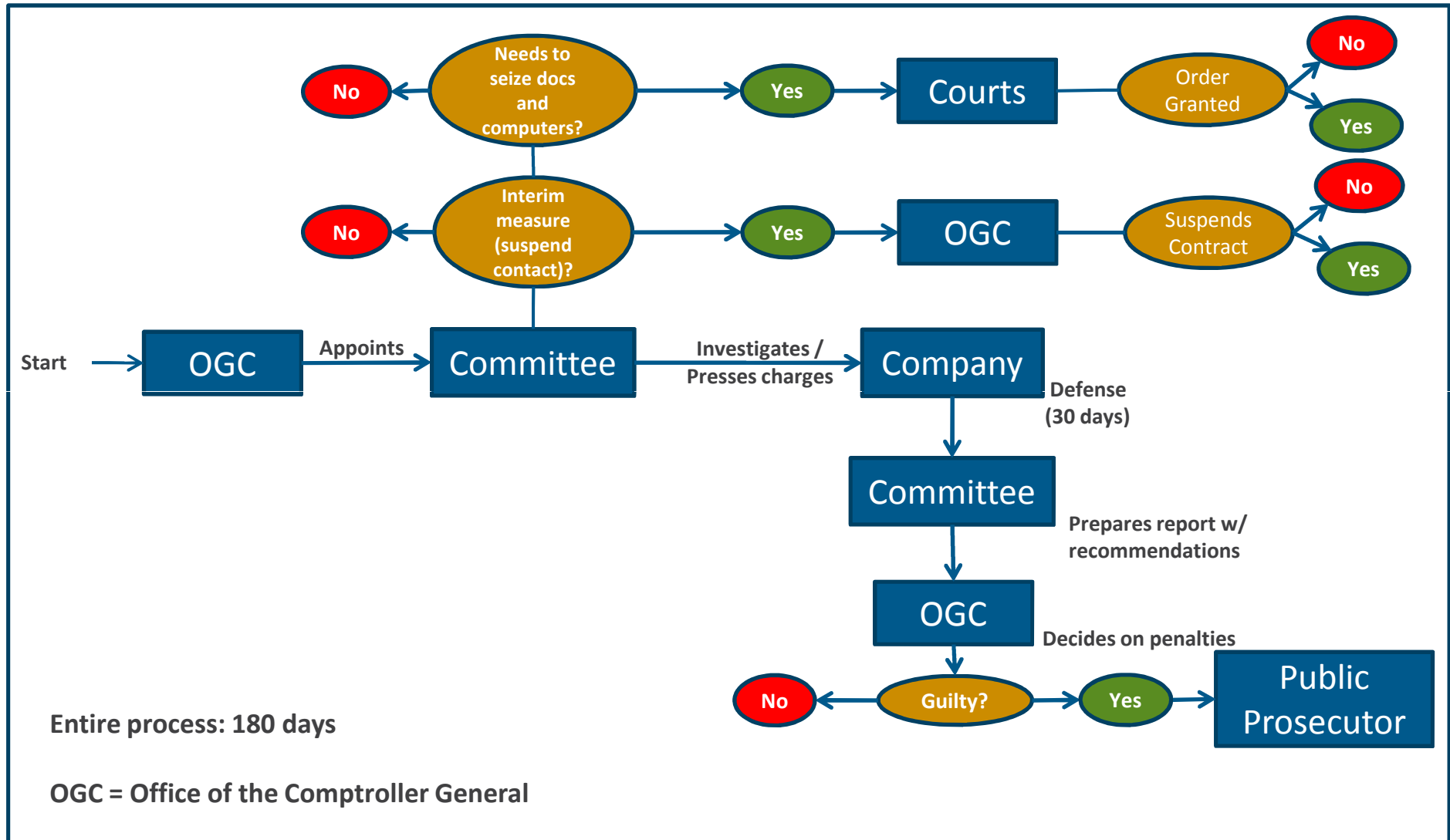
## Substantive Terms: Judicial Sanctions

- Disgorgement of Assets, Rights or Values that were Acquired as a Result of the Offense
- Suspension or Prohibition of the Activities of the Legal Entity
- Prohibition from Obtaining Incentives, Subsidies, Grants, Donations or Loans from Public Authorities, for up to Five Years
- Compulsory Dissolution of the Legal Entity

## Substantive Terms: Factors for Application of Penalties

- Seriousness of the Violation
- Advantage Obtained or Intended
- Whether or not the Violation was Consummated
- Degree or Danger of Damage
- Negative Effects Produced
- Ability to Pay
- Value of the Contracts
- **Whether the Legal Entity has Cooperated with the Investigation**
- **Existence and Effectiveness of the Compliance Program**

# Substantive Terms: Procedure



# Incentives to Prepare

- Regulation is Still Pending
- Compliance Programs
  - Can Result in Reduced Sanctions
- Self-Reporting Mechanism
  - Can Result in Reduced Sanctions
  - Leniency Program

## Incentives to Prepare

- Possibility of Leniency Agreement if the Legal Entity:
  - Is the First to Come Forward and Demonstrates its Interest to Cooperate
  - Ceases its Involvement in the Practice
  - Confesses its Participation and Cooperates with the Investigation



## Incentives to Prepare

- Leniency Agreement May Result in:
  - Exemption from the Extraordinary Publication
  - Exemption from Prohibition from Obtaining Tax Incentives and Donations
  - Fines Reduced up to 2/3
- Leniency Program does not Exempt Companies from Obligation to Repair any Damages Caused

## Implications for Compliance

- Penalty Mitigation Provisions Place Premium on Effective Compliance Programs
- Strict Liability for Acts of Agents Also Provides Substantial Incentive for Building Compliance Infrastructure
- Penalties Provisions Offer Clues as to Those Elements of Compliance Programs Likely to Be Given Weight
  - Internal Mechanisms and Procedures on Integrity
  - Effective Application of Code of Conduct
  - Whistleblower Incentives
  - Audit

# Implications for Compliance

- What are Key Elements of An Anti-Corruption Program for Companies Doing Business in Brazil?
  - Initial Assessment of Compliance Risks
  - Statement of Anti-Corruption Compliance Policy, Including Explanation of Consequences of Non-Compliance
  - Assigned Compliance Responsibility within Senior Management
  - Specified Compliance Procedures
    - Due Diligence with Respect to Agents and Other Intermediaries
    - Due Diligence with Respect to Joint Venture Partners and Acquisitions
    - Standard Compliance Provisions in Contracts
    - Limitations on Promotional Expenditures

## Implications for Compliance

- What are Key Elements of an Anti-Corruption Program for Companies Doing Business in Brazil? (Contd.)
  - Fair and Accurate Record-Keeping
  - Orientation and Repeated Training of Key Personnel
  - Periodic Self-Certification Process
  - Procedures for Reporting Violations or Suspected Violations
  - Periodic Compliance Audits to Test Policy's Effectiveness
  - Periodic Risk Assessments and Corresponding Modifications of Compliance Program
- Be Alert for Regulatory Clarification

# Implications for Internal Investigations

- More Enforcement Bodies Implies Increased Risks of Detection and Prosecution
  - Risk Assessment No Longer Limited to Prospects of U.S. Enforcement
  - Growing Potential for Simultaneous or Successive Enforcement Actions in Multiple Jurisdictions
  - Internal Investigations Take on Increased Importance

# Implications for Internal Investigations

- Assessing Risks requires *Facts*, not Assumptions
  - Investigation at Direction of Counsel
  - Preliminary Assessment to Determine Investigative Scope
  - Fact-Gathering Process Must be Defensible
  - Reassess Risks and Strategies as Facts Develop

# Implications for Internal Investigations

- Global Investigation, but Subject to Local Laws
  - Local Data-Protection Laws
  - Local Privacy Laws
  - Local Employment Laws
  - Importance of Local Legal Expertise

# Implications for Disclosure Decisions

- Decisions Must Consider Costs/Benefits on Global Basis
  - Likelihood of Enforcement Action(s)
  - Possible Incentives
    - Potential Availability of Leniency Programs
    - Potential to Reduce Sanctions Through Self-Disclosure even Absent Leniency
  - Possible Disincentives
    - Difficult to Limit Disclosures
    - Difficult to Preserve Privileges
    - Expanded Potential for Civil Litigation



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Thank you for joining us.

Questions? Please email [evilleda@mayerbrown.com](mailto:evilleda@mayerbrown.com)

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