Another BRIC in the Anti-Corruption Wall:
Brazil considers foreign bribery law overhaul.

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The Brazilian Congress is now considering Draft Bill 6.826/2010 that would dramatically strengthen its foreign bribery law. This is a significant development – the result of years of effort by Brazilian authorities working closely with their OECD, United States, and other counterparts. It is also timely. Sophisticated Brazilian-based multinationals are quickly expanding internationally, and encountering corruption risk. At the same time, Brazil is grappling with corruption on the domestic front: the President's administration has lost six Ministers to corruption allegations since June 2011, and the country consistently ranks high on corruption risk indices.

Brazil's effort is part of a broader movement. Countries that have adopted the OECD Anti-Bribery Convention, the United Nations Convention Against Corruption and other treaties are working to strengthen their anti-corruption laws. The FCPA Professor summarized Turkey's recent progress in an earlier post. The Brazilian bill should improve its treaty implementation status with the OECD. (Brazil's gaps were highlighted in the OECD's Country Monitoring Reports for Brazil.) Moreover, as a significant effort by a major economy and regional leader, this bill may have impact outside of Brazil.

These provisions constitute dramatic changes in the Brazilian legal system. According to Carlos Henrique da Silva Ayres, one of the attorneys heading the Anti-Corruption and Compliance Committee of the Brazilian Institute for Business Law (Ibrademp):

> The new law still requires some adjustments; however, it should be more easily applied than current laws. It introduces features that are relatively new or non-existent in the Brazilian anti-corruption arena, such as the credits corporations will get for compliance programs, self-disclosure and cooperation with authorities.

Key Provisions in Brazil's Draft Legislation

In addition to penalizing domestic bribery, Brazil's draft bill prohibits bribery of foreign public officials, defining the act in a way that appears consistent with the OECD Anti-Bribery Convention. Some provisions are particularly relevant:

Corporate Liability. The draft bill establishes the direct civil liability of corporations (also known as "legal persons") for bribery of foreign public officials. It also makes corporations liable for the acts of their directors, officers, employees and agents under the theory of *respondeat superior.* These are dramatic developments in a country where the notion of corporate liability has received only limited recognition.

These changes bring Brazilian law closer to the U.S. Foreign Corrupt Practices Act (FCPA). Why not extend criminal liability to corporations, like the FCPA does? The answer is reflected in Brazil's civil law system. Unlike common law jurisdictions, civil law systems generally do not apply criminal liability to legal persons. Civil law typically considers corporations to be abstract, intangible entities that have no capacity for the *mens rea* (intent) required to establish criminal conduct.

The OECD Antibribery Convention recognizes this variation in legal systems and compensates for it. Article 3(2) provides:

> In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

Tightened Sanctions. The draft bill would establish harsh consequences for bribery of foreign officials. Fines would range between 1% and 30% *of the company's gross revenue*. In addition, the bill would make prosecutions public, potentially creating reputational risk. Companies can be debarred from public contracts based on bribery violations.

These steep penalties appear responsive to the requirement of sanctions that are "effective, proportionate and dissuasive." If the legislation is enacted, it will be important to watch how Brazilian courts apply these sanctions. The OECD Working Group on application of the convention is certain to review that question (see a previous review here).

Voluntary Disclosure, Cooperation, and Compliance Programs. The draft bill provides that the government should take into account voluntary disclosure, cooperation with government investigations, the existence of pre-existing and effective compliance programs, and other factors when determining sanctions. Specifically, Article 9 states:

> The following will be taken into consideration at the application of the sanction:

I. the seriousness of the offense;
II. the advantage obtained or sought;
III. the accomplishment or non-accomplishment of the offense;
IV. the extension of the breach or the danger of injury;
V. the negative result caused by the injury;
VI. the economic status of the company;
VII. the cooperation in investigating the facts, through practices such as reporting violations to public authorities before a legal proceeding is initiated and the promptness in providing information in the course of investigations; and
VIII. the existence of internal integrity mechanisms and procedures, audits, and incentives to report violations, as well as the effective application of codes of ethics and conduct within the company.

This also makes the Brazilian approach similar to that of the FCPA. In fact, many of the provisions in the Brazilian bill appear to be directly lifted from the U.S. Department of Justice's McNulty Memorandum and Chapter 8 (Sentencing of Organizations) of the 2010 United States Federal Sentencing Guidelines. But the bill goes further than the FCPA by incorporating considerations of such factors into the law. Under the FCPA, such factors make up enforcement policy and practice.

The difference, again, flows from Brazil's civil law system. As a general principle of law, prosecutors and public authorities do not have discretion to seek specific sanctions. Rather, sanctions must be determined in accordance with a written law. Invoking a memorandum on enforcement practice would have little, if any, effect before a Brazilian court. In order to have any relevance, considerations like cooperation and compliance must be written into the law.

Mr. Ayres, along with Bruno Carneiro Maeda (also of Ibrademp), have testified before the Brazilian Congress about the draft legislation. They point out some lingering questions related to Article 9. They seek clarification on whether companies will get credit for their cooperation after proceedings have already begun. They are also concerned that the draft bill does not describe the elements of a credit-worthy compliance program.

Foreign Official. The Brazilian draft bill defines "Foreign Public Administration" and "Foreign Public Official" in a way that is consistent with the OECD and United Nations Conventions. Specifically, Article 6 provides:

> The agencies and government entities or diplomatic representations of a foreign country are considered foreign public administration, no matter

> their level or sphere of government, as well as companies held directly or indirectly by the government of a foreign country.
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> For purposes of this law, a foreign government official is any individual who, although momentarily or without payment, holds a public position, employment or function in any public agency or entity or diplomatic representations of foreign country, and also in companies held directly or indirectly by the government of a foreign country or in any international public organization.

This definition encompasses a broad range of entities, including agents of the state, state-owned enterprises, international public organizations, and other instrumentalities of the state. This definition would make employees at these entities "foreign public officials." The broad definition appears to stand in contrast with ongoing efforts in the United States to clarify or narrow the meaning of that term.

Accounting Provisions. The Brazilian draft bill does not include any accounting provisions, as required under Article 8 of the OECD Anti-Bribery Convention. However, Brazil's laws provide similar provisions elsewhere, which work to meet the OECD requirement as noted in the OECD Working Group Phase II Report. The report also notes that, while an advanced framework for accounting requirements exists under other laws, requirements under the law for internal controls have room for development.