

The Petrobras Corruption Scandal: Could the company be punished by FCPA anti-bribery provisions?*

O escândalo de Corrupção da Petrobras: a empresa poderia ser punida por disposições antisuborno da FCPA?

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293

Abstract: Recent news are broadcasting one of Brazil's greatest corruption scandal involving the oil giant Petrobras, along with various other Brazilian and foreign companies. Petrobras' case turned corporate compliance into a common topic among Brazilian business players in the past year. As most Brazilian companies still take first steps towards entering foreign markets, the ongoing investigations of U.S. Government against Petrobras have raised general awareness on the importance of complying with foreign jurisdictions. Among various legislations that must be observed by foreign companies investing in the United States, the Foreign Corrupt Practices Act is undoubtedly one of the most important. The FCPA has a broad scope of application, as the concept of corrupt practices is very extensive and many foreign companies with business in the U.S. are subjected to its provisions. Furthermore, it encompasses a dangerous combination of high penalties and Government's rather aggressive prosecution. It is with that in mind that we shall analyze the complex corruption case within Petrobras and its implications in regard of the FCPA. This Article (i) provides an overview of the Petrobras corruption scandal and the principal FCPA anti-bribery provisions, elements and requisites and (ii) analyzes Petrobras' peculiarities and if it may be considered punishable within the scope of FCPA anti-bribery provisions.

Keywords: Corruption. FCPA anti-bribery provisions. Petrobras

Resumo: Notícias recentes estão transmitindo um dos maiores escândalos de corrupção no Brasil envolvendo a gigante do petróleo Petrobras juntamente com várias outras

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empresas brasileiras e estrangeiras. O caso da Petrobras a *compliance* corporativa um tema comum entre empresários brasileiros no ano passado. Como a maioria das empresas brasileiras ainda dá os primeiros passos no sentido de entrar em mercados estrangeiros, as investigações em curso pelo Governo dos EUA contra a Petrobras aumentaram a conscientização geral sobre a importância do cumprimento de leis de jurisdições estrangeiras. Entre as várias legislações que devem ser observadas por empresas estrangeiras que investem nos Estados Unidos, a Lei de Práticas de Corrupção no Exterior (FCPA) é sem dúvida uma das mais importantes. O FCPA tem um âmbito de aplicação amplo, já que o conceito de corrupção é muito extenso e muitas empresas estrangeiras com negócios nos EUA estão sujeitos às suas disposições. Além disso, temos uma perigosa combinação de elevadas multas e uma atuação agressiva do Governo Americano em torno de acusações baseadas no FCPA. É com isso em mente que vamos analisar o complexo caso de corrupção dentro Petrobras e suas implicações no que diz respeito ao FCPA. Este artigo: (i) fornece uma visão geral do escândalo de corrupção da Petrobras e as principais disposições anticorrupção do FCPA, seus elementos e requisitos e (ii) analisa peculiaridades da Petrobras e se ela pode ser considerada processada no âmbito das disposições anticorrupção da FCPA.

Palavras-chave: Corrupção. FCPA disposições anticorrupção. Petrobras.



I. Introduction

Although corruption has always been a sad reality in Brazilian society and politics¹, news in recent times have shocked most of its citizens². In the recent *mensalão* corruption scandal, several politicians were allegedly being paid monthly ‘allowances’ (*mensalão*) with public money by the government, in exchange for having projects favorably voted by congressmen³. It is believed that payments to politicians reached the amount of R\$ 144 million that went on between 2005 and 2006⁴. Several high-rank politicians, among which former Minister of Staff (*Ministro da Casa Civil*), José Dirceu, and former Worker’s Party President (*Presidente do Partido dos Trabalhadores*), José Genoino, were condemned by Brazilian Supreme Court (*Supremo Tribunal Federal*) to imprisonment penalties, in an unparalleled judgement⁵.

Only 1 year after the condemnation of all politicians implied in that scheme, Brazilian Federal Prosecution Authority claimed to have discovered a major corruption scheme within Petrobras, at that time Brazil’s biggest company⁶. As investigations developed, Petrobras turned from a symbol of national pride to another source of dirt in Brazilian politics. While current government claims that corruption has always existed and it is being investigated only under their rule⁷, the truth is that such topic has never been so present in our daily lives. From the moment Brazilians listen to the car radio on their way to work to the moment they watch television before going to bed, corruption is the breaking news.

¹ See generally Raymundo Faoro, *Os donos do poder* (Globo, 3 ed. 2001) (providing a historical perspective of corruption in Brazil, from the days of the Portuguese colonization until the end of the 20th century)

² Brazilian journal *Folha de São Paulo* has created a timeline with the principal news regarding the Petrobras investigations, available at <http://www1.folha.uol.com.br/especial/2014/petrolao>.

³ Paulo Moreira Leite, *A outra história do mensalão: as contradições de um julgamento político* (Geração Editorial, 1 ed. 2013) (Leite provides an overview of the mensalão corruption scandal and its judgement by Brazilian Supreme Court)

⁴ Supremo Tribunal Federal, Ação Penal No. 470, Relator: Min. Joaquim Barbosa, Diário de Justiça Eletrônico (D.J.e.), 22.04.2013 (Braz.)

⁵ *Id.*

⁶ Ministério Público Federal, Denúncia, E-Processo 5049557.142013.404.7000, 22.04.2014 (Braz.).

⁷ President Dilma Rousseff, Address to reporters on Feb. 20, 2015, available at <http://videos.bol.uol.com.br/video/dilma-corrupcao-na-petrobras-deveria-ter-sido-investigada-ha-20-anos-04020D9A3964E0995326>.



Brazilian public opinion has been a major source of struggle against corruption, even though Brazilians are considered tolerant regarding public corruption⁸. In the year of 2013 Brazil saw the largest protests in a decade, since the impeachment of President Collor in 1992⁹. Public pressure was the main reason for the enactment, on that same year, of the anticorruption law¹⁰ (*Lei Anticorrupção*), an *avant-garde* legislation that has inaugurated criminal corporate liability in Brazil and imposes fines as high as 20% of corruptor's annual gross revenue. Furthermore, corruption has been a current theme in international discussions and negotiations¹¹. The deepening of Globalization and the emergence of new countries as important business centers has critically improved the effort of developed countries in fighting corruption of their own companies overseas¹². Examples of such efforts are legislations passed in the United States (Foreign Corrupt Practices Act), United Kingdom (Bribery Act) and OECD (International Anti-Bribery Convention).

By that same token, developing countries may now have access to foreign markets, consumers and capital¹³. As consequence, they must comply with foreign legislation concerning topics such as product liability, securities, accounting standards, corruption etc. Failure to address these issues of foreign law may prove fatal to Brazilian multinational companies, as other jurisdictions might have a harder approach on fighting

⁸ Fernando Filgueiras, *A tolerância à corrupção no Brasil: uma antinomia entre normas morais e prática social*, 15 *Opinião Pública* 386 (2009), available at <http://www.scielo.br/pdf/op/v15n2/05.pdf>.

⁹ Folha de São Paulo, *Protesto em São Paulo é o maior desde manifestação contra Collor*, Folha de São Paulo (Jun. 17, 2013), available at <http://www1.folha.uol.com.br/cotidiano/2013/06/1296834-protesto-em-sao-paulo-e-o-maior-desde-manifestacao-contr-collor.shtml>.

¹⁰ Lei No. 12.846, de 1 de agosto de 2013, Diário Oficial da União (D.O.U.) de 02.08.2013. (Braz.)

¹¹ Luís de Sousa, Peter Larmour & Barry Hindess (Editors), *Governments, NGOs and Anti-Corruption: The new integrity warriors*, (Routledge, 1 ed., 2009).

¹² Transparency International has recently release a report entitled *Exporting Corruption* in which it analyzes how hard countries are fighting corrupt acts of their companies overseas. Available at https://www.transparency.org/exporting_corruption.

¹³ Sherban Leonardo Cretoiu et al, *Ranking FDC das Multinacionais Brasileiras 2015* (Fundação Dom Cabral, 10 ed., 2015) (providing an overview of the presence of Brazilian companies overseas)



corruption than Brazil's¹⁴. Cases like Petrobras investigation by American authorities have raised awareness in Brazil about compliance measures, even though Petrobras corruption does not completely personify common FCPA cases. Petrobras' case has also set ground for a number of securities class actions by U.S. shareholders and investigations by U.S. authorities concerning other Brazilian companies allegedly involved in bribes and with securities listed in the U.S., such as Braskem and Eletrobras¹⁵. It is with that in mind that the article shall analyze Petrobras peculiarities and if it may be considered punishable within the scope of FCPA anti-bribery provisions.

Section I deals with Petrobras corruption scheme, in which it will be fully described by recent developments in their investigations, the mechanism through which corruption was operated and the parties and the amounts allegedly involved. Section II examines general FCPA provisions, such as agents subjected to its jurisdiction, prohibited practices, U.S. territorial jurisdiction concerning such practices and penalties provided by this law. Section III focuses on analyzing if Petrobras corrupt practices fall within the scope of the FCPA and, thus, if the company may be punished by it.

II. Petrobras and the corruption scheme

On the daily, the media in Brazil and abroad broadcast news about the Petrobras corruption case. A once innovative and promising oil company is now on the verge of one of the greatest corruption scandals in Brazilian history. In this chapter we shall analyze the company's structure and its relation with the Brazilian government and, more specially, the various ongoing investigations and conclusions made by prosecution authorities in regards to corrupt practices perpetrated by Petrobras employees and managers. Although proofs gathered are very realistic and incriminating¹⁶, investigations are still taking place and no conclusive judgment has yet been pronounced.

¹⁴ Recently, french company Alstom agreed to pay U.S. authorities a fine of US\$ 772 million on FCPA charges. German Siemens also paid a high amount in 2008 (US\$ 450 million).

¹⁵ The Rosen Law Firm, Press Release, *available at* <http://www.rosenlegal.com/cases-665.html>.

¹⁶ The current cooperation with prosecutors from Switzerland has enabled Brazilian authorities to collect a number of proofs and bank accounts allegedly related to corruption within the Petrobras.



- a) Petrobras: An overview of the company, its legal nature and managing structure

Petroleo Brasileiro S.A. (Petrobras) is a government-owned corporation, a private legal entity which is strongly controlled by Brazilian government, especially concerning the appointment of directors and other high-rank officers¹⁷. Its activities comprise oil and gas drilling and refining, Petrobras being considered one of the most innovative companies in deep water petroleum exploration¹⁸. Petrobras is ranked no. 28 in Fortune's 500 biggest companies, operating in 24 countries, with almost US\$ 300 billion in total assets¹⁹. It is a publicly-traded company, which has the Brazilian government as its biggest shareholder. For that purpose, the Federal government possesses a minimum of 50% plus 1 of all voting shares. Furthermore, even though government is the biggest shareholder, Petrobras is submitted to the rules of private law, as its Articles of Incorporation, Article 1 sets forth²⁰.

As stated, government has great influence on decisions taken by Petrobras²¹. Members on the Board of Directors of Petrobras are also government ministers or executives nominated by politicians. For example, the Finance Minister (*Ministro da Fazenda*) and the Budget Minister (*Ministro do Planejamento*) are traditionally members of the Board of Directors. Therefore, the composition of Petrobras Board of Directors is a clear example of how politically-driven the company is, with Directors and Executives being often nominated with no respect to their technical or intellectual competencies²².

¹⁷ As a matter of example, out of current 9 members of its Board of Directors, 6 were appointed by the Federal Government of Brazil.

¹⁸ Heller Redo Barroso, *Brazil Pre-Salt: Safety and Local-Content Regulations and Technology for Brazil's Deepwater World Oil* (March 11, 2010), available at <http://www.worldoil.com/magazine/2010/september-2010/features/brazil-pre-salt-safety-and-local-content-regulations-and-technology-for-brazil-s-deepwater>.

¹⁹ Fortune, *Global 500*, available at <http://fortune.com/global500/petrobras-28/>

²⁰ « Art. 1 - Petróleo Brasileiro S.A. - Petrobras is a joint stock corporation controlled by the Federal Government, of indeterminate duration, to be governed by the terms and conditions of the Joint Stock Corporation Law (Law nº 6,404 of 15 December 1976) and by these Bylaws. » Such Article establishes that Petrobras shall be governed by the terms of the Brazilian Corporation Law - Lei No. 6.404 de 15 de Dezembro 1976, Diário Oficial da União (D.O.U.) de 17.12.1976 (Braz.).

²¹ *Supra*, note 17

²² Ana Clara Costa & Gabriel Castro, *Renato Duque, o fiel soldado do PT na Petrobras*, Veja (Nov 14, 2014), available at <http://veja.abril.com.br/noticia/economia/renato-duque-o-fiel->



The appointment of Petrobras' directors based on political alliances was probably one of the main reasons for the corruption surrounding the company²³, which was first revealed in the Pasadena case.

b) The *Pasadena Refinery* case

The Pasadena Refinery case was the most influential case of all current investigations of Petrobras. The Brazilian company acquired an oil refinery in Pasadena for the amount of US\$ 1.25 billion, even though CNP, a Belgian Group, at that moment the seller, had previously paid only US\$ 42.5 million for the same refinery located in Texas. According to the Brazilian Federal Court of Auditors²⁴ (*Tribunal de Contas da União*), the overbilling in this sole deal reached the amount of US\$ 580,428,571.30.

Petrobras closed an agreement in 2006 with Astra Oil, an oil company of the CNP Group, in which Petrobras paid US\$ 360 million for 50% of the refinery²⁵. Although the deal was not questioned at first, it became suspicious when it came to general knowledge the price Astra Oil had paid in the previous year (2005) for 100% of the propriety, that is, US\$ 42.5 million²⁶. Part of the disparity was justified by the market conditions of petroleum at that time²⁷. However, Brazilian authorities found a major problem in a put-option clause found in the contract closed between both companies²⁸.

soldado-do-pt-na-petrobras/ (Providing an overview on how political connections are determinant to being promoted within Petrobras).

²³ *Id.*

²⁴ Tribunal de Contas da União, Decisão, TC 005.406/2013-7, Jul. 23, 2014, (Braz.)

²⁵ Petrobras, *Esclarecimento sobre compra da refinaria de Pasadena*, Apr. 17, 2014, available at <http://www.petrobras.com.br/fatos-e-dados/esclarecimento-sobre-compra-da-refinaria-de-pasadena.htm>.

²⁶ *Id.*

²⁷ Macrotrends, *Crude Oil Price History Chart*, available at <http://www.macrotrends.net/1369/crude-oil-price-history-chart> (last visited October 01, 2015)

²⁸ Carolina Gonçalves, *Graça Foster: omissão de cláusulas em Pasadena causa incômodo para o cidadão*, EBC Brasil (Apr. 30, 2014), available at <http://www.ebc.com.br/noticias/politica/2014/04/omissao-de-clausulas-em-compra-de-refinaria-causa-incomodo-diz-graca> (reporting on Graça Foster, former CEO of Petrobras, when invited to provide answers about the Pasadena case before the Brazilian House of Representatives).



Put option clauses are rather common in commercial transactions and perfectly legal in Brazil²⁹ and in many other foreign jurisdictions. It sets forth the possibility that one of the contracting parties may constrain the other party to buy his quota in the venture³⁰. In 2008, Astra Oil exercised the put option, obliging Petrobras to buy the last 50% of the propriety for US\$ 820.5 million, comprising a total expense of US\$ 1.18 billion for the refinery³¹. The most shocking was that a report sent to the Petrobras Board of Directors before closing the Pasadena agreement with Astra Oil had no mention about the put option clause whatsoever³². The omission of such important aspect of the deal led to a wrong analysis by the Board of Directors³³. Moreover, the Pasadena Refinery deal was the trigger of investigations that led to the full disclosure of the corruption scheme.

c) Parliamentary Committee of Inquiry (*Comissão Parlamentar de Inquérito*)

In view of the various accusations against Petrobras by authorities and the media, opposition political parties took the opportunity to gather from their peers enough signatures to create a Parliamentary Committee of Inquiry, with the purpose of investigating Petrobras' irregular activities³⁴. Since many senators, governors and deputies were allegedly linked with the bribery scandal, the inquiry was mostly concerned about gathering information on that matter and having an insight on how the bribery scheme worked³⁵.

²⁹ Renato Ourives Neves, *Estrutura do contrato de opção e suas aplicações*, 11 Rev. Virt. Faculd. Milton Campos (2013), available at <http://www.revistadir.mcampos.br/PRODUCAOCIENTIFICA/artigos/renatoourivesestruturacontratoopcaoasuasaplicacoes.pdf>

³⁰ *Id.*

³¹ Petrobras, *Esclarecimento sobre compra da refinaria de Pasadena*, Apr. 17, 2014, available at <http://www.petrobras.com.br/fatos-e-dados/esclarecimento-sobre-compra-da-refinaria-de-pasadena.htm>.

³² *Supra*, note 28.

³³ Guilherme Serodio, *CGU vai instaurar processo para apurar omissão na compra de Pasadena*, Valor Econômico (Mar. 24, 2014), available at <http://www.valor.com.br/politica/3492426/cgu-vai-instaurar-processo-para-apurar-omissao-na-compra-de-pasadena>

³⁴ Câmara dos Deputados, *Comissão Parlamentar de Inquérito - Petrobras*, (Feb. 03, 2015) (Braz.), available at <http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/parlamentar-de-inquerito/55a-legislatura/cpi-petrobras>

³⁵ Câmara dos Deputados, *Plano de Trabalho*, Comissão Parlamentar de Inquérito - Petrobras, (Mar. 2015) (Braz.), available at <http://www2.camara.leg.br/atividade->



Alberto Youssef, the principal money launder, played a key role in the coordination of the scheme. He was inquired by the Committee, amongst others. He gave detailed information on how the scheme was made between other companies and Petrobras:

“There was a deal between companies. When new ventures were announced by Petrobras the companies used to gather and define who would win the bidding procedure³⁶. A company would win the competition and pay 1% ahead. Otherwise it would not do the works. It was very clear for all. There were large size ventures that were dealt by the large companies. The companies themselves defined previously the winner. The percentage was negotiated before they had a contract winner. Every large company knew that for any venture in the Supplies Department they would have to pay a toll of 1% and some more for the engineering sector of Petrobras.”³⁷

According to Youssef, the creation of cartels to explore government contracts with Petrobras was not the only source of corruption in the scheme. All contracts were overbilled, with a special destination for politicians, as he states:

“There was clearly a pick of the ventures inside and outside Petrobras. This cartel led to overbilled prices. (...) There was an average increase of 3% on the contract value, which was destined to politicians”³⁸

The Parliamentary Committee has found strong evidence of fraud in Petrobras contracts³⁹. A list of conclusions was elaborated by the Committee, in which Congressmen have cited 52 suspects that were involved with the bribery scheme. Amongst those 52 suspects, some of the largest construction companies of Brazil were mentioned.⁴⁰

legislativa/comissoes/comissoes-temporarias/parlamentar-de-inquerito/55a-legislatura/cpi-petrobras/arquivos-destaque/roteiro-de-trabalho

³⁶ Even though Petrobras is a private entity, it is subjected to bidding procedures in accordance with Art. 67 of Lei No. 9.478/97, 06 de Agosto de 1997, Diário Oficial da União (D.O.U.) de 07.08.1997 (Braz.).

³⁷ Alberto Youssef, Deposition before Justiça Federal (Brazilian Federal Court), October, 2014 (Braz.), available at <https://www.youtube.com/watch?v=LNkZaR68p44>.

³⁸ *Id.*

³⁹ Câmara dos Deputados, *Relatório Final*, Comissão Parlamentar de Inquérito - Petrobras, (Oct. 2015) (Braz.), available at <http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/parlamentar-de-inquerito/55a-legislatura/cpi-petrobras/documentos/outros-documentos/relatorio-final-da-cpi-petrobras>

⁴⁰ Jornal do Senado, Ano XX, No. 4229 de 19 de Dezembro de 2014 (Braz.).



d) Federal Prosecution Authority Complaint

In light of all evidences the Brazilian Federal Prosecution Authority filed complaints against several companies and Petrobras employees⁴¹. One of the accused was Petrobras former director Nestor Cerveró. According to prosecutors, Cerveró, director of the international branch of Petrobras, had been coordinating a scheme of bribery for foreign companies that worked with Petrobras between 2006 and 2012⁴². He was thus indicted of committing the crimes of money laundry, corruption and other crimes against the national financial system⁴³.

Prosecutors have concluded that bribery and overbilled contracts were not an exception, but a common rule within Petrobras and, as it is common to a scheme of such magnitude, other companies' directors were equally accused for similar charges⁴⁴. Other middlemen were also claimed responsible for laundering and delivering bribery money to politicians⁴⁵.

e) First sentence and actual state of investigations

Following investigations by Brazilian authorities, a decision was rendered on April 22th 2015⁴⁶ by the Brazilian Federal Court, which condemned 8 defendants on overbilling and corruption charges perpetrated during the construction of a Petrobras refinery in Pernambuco, Brazil (*Refinaria Abreu e Lima*). Penalties were of imprisonment of up to 12 years, along with fines correspondent to the amount of damage⁴⁷.

The decision, however, is confined to only one of Petrobras ventures. Brazilian federal prosecution authority has ongoing investigations and inquiries, which recently

⁴¹ Brazilian Federal Prosecution Office has created a website dedicated to detail the procedures related to Petrobras corruption. See generally <http://lavajato.mpf.mp.br/>

⁴² Ministério Público Federal, Denúncia, E-Processo 5049557.142013.404.7000, 22.04.2014 (Braz.).

⁴³ Justiça Federal, Sentença, 13ª vara federal de Curitiba, Ação Penal 5083838-59.2014.4.04.7000/PR, 17.08.2015 (Braz.).

⁴⁴ Ministério Público Federal, Denúncia, E-Processo 5036528-23.2015.404.7000, 24.07.2015 (Braz.).

⁴⁵ *Id.*, note 43.

⁴⁶ Justiça Federal, 13ª vara federal de Curitiba, Ação Penal 5026212-82.2014.4.04.7000/PR, 22.04.2015 (Braz.).

⁴⁷ *Id.*, note 43.



culminated in the preventive detention of Odebrecht CEO Marcelo Odebrecht, Latin America's biggest building company⁴⁸.

Furthermore, the Brazilian Supreme Court (*Supremo Tribunal Federal*) is believed to soon deliver a sentence on the so-called 'political nucleus' of the corruption scheme⁴⁹. Among defendants there are several governors, ministries and the current Presidents of the Senate and the House of Representatives⁵⁰. Although not yet directly implicated with the criminal activities, it is speculated that investigations could lead to the involvement of former President Luiz Inácio Lula da Silva and current President Dilma Rousseff⁵¹.

II. The Foreign Corrupt Practices Act

a) Historical Background

The Foreign Corrupt Practices Act was enacted in 1977 in the context of discoveries made by the Securities and Exchange Commission. The *Report of Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices*⁵² stated an estimate of 400 US companies that paid bribes to officials of foreign governments with the scope of having business advantages⁵³. Moreover, the report detailed information on how such payments were concealed, mostly through record falsifying, and offered *de lege ferenda* guidelines to the issue⁵⁴.

⁴⁸ Justiça Federal, 13ª vara federal de Curitiba, Pedido de busca e apreensão criminal 5024251-72.2015.4.04.7000/PR, 24.07.2015 (Braz.)

⁴⁹ Brazilian Constitution, in its Art. 102, I, a, sets forth that members of the Senate and House of Representatives shall be judged by *Supremo Tribunal Federal*. See Constituição Federal (C.F.) (Constitution) art. 102, I (Braz.).

⁵⁰ Laryssa Borges, *Lista do Petrolão reúne cúpula do Congresso e 5 partidos*, *Veja* (March 06, 2015), available at <http://veja.abril.com.br/noticia/brasil/lista-do-petrolao-reune-cupula-do-congresso-e-partidos/>.

⁵¹ Filipe Coutinho, Thiago Bronzatto & Diego Escosteguy, *Marcelo Odebrecht ameaça derrubar a República*, *Epoca* (June 20, 2015), available at <http://epoca.globo.com/tempo/noticia/2015/06/marcelo-odebrecht-ameaca-derrubar-republica.html>.

⁵² Securities and Exchange Commission, *Report of Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices* (May, 1976), available at <https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf>

⁵³ *Id.*

⁵⁴ *Id.*



Within the scenario that exposed broad corporate corruption the FCPA was passed⁵⁵. The FCPA contains two main provisions: anti-bribery and accounting rules that should be obeyed by companies⁵⁶. This legislation has set a new ground rule for corruption punishment related to conducts committed outside the United States territory⁵⁷. Although previous legislation criminalized corrupt practices within US borders, especially those concerning tax, securities and antitrust law, the then-existing laws were considered deficient in relation to the acts exposed by the SEC Report⁵⁸.

The Foreign Corrupt Practices Act was the first legislation that addressed the corruption in the reality of International Corporate Business and has been the principal supporter of the uniformity of laws against corruption in the world⁵⁹. Those laws range from the 1997 OECD Convention on Combating Bribery of Foreign Public Official in International Business Transactions⁶⁰ to the 2013 Brazilian *Lei Anticorrupção*⁶¹. The underlying motives of such provisions are such that corruption discourages good governance practices, and that it creates unfair and anti-competitive business environment while fostering criminal activity across borders, such as, but not limited to, human trafficking and money laundering⁶².

b) Subjects covered by the FCPA

⁵⁵ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. (1977)

⁵⁶ Department of Justice & Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

⁵⁷ Koehler, Mike, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio State L. Journal 930 (2012).

⁵⁸ *Id.* at 931 (“Upon discovery of the foreign corporate payments problem, Congress’s first task was to determine if the payments were adequately captured by existing law. (...) While certain existing laws did indirectly deal various aspects of the problem, the prevailing view was that existing laws were deficient and that a new and directive legislative remedy was needed.”).

⁵⁹ See generally Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 Michigan Journal of International Law 129 (2010).

⁶⁰ Mark Pieth, Lucinda A Low & Peter J Cullen, *The OECD convention on bribery* (Cambridge University Press, 2007).

⁶¹ Lei No. 12.846, de 1 de agosto de 2013, Diário Oficial da União (D.O.U.) de 02.08.2013. (Braz.).

⁶² Bin Dong, *The causes and consequences of corruption* (March 2011) (Ph.D dissertation, Queensland University of Technology), available at http://eprints.qut.edu.au/44126/1/Bin_Dong_Thesis.pdf



The FCPA sets forth three broad categories of persons and entities that are subject to its provisions: “Issuers”, “Domestic Concerns” and certain persons and entities acting while in the territory of the United States. The first two subjects must obey the FCPA rules even when conducting business outside the United States, whereas any individual may be punished by FCPA if corrupt practices are perpetrated within the United States.

An “Issuer”⁶³ is, according to the Securities Exchange Act of 1934, any company that has securities registered (Section 12) in the United States⁶⁴ or is required to file periodic or other reports with the SEC (Section 15A)⁶⁵. The legal definition of Securities can be found at 15 U.S.C. §77b (a). Thus, companies listed on a national securities exchange in the United States, as stock or American Depositary Receipts, must comply with the FCPA. “Domestic Concerns”⁶⁶ are defined as any individual who is a citizen, national, or resident of the United States. This category also encompasses legal entities with principal place of business in the United States, such as corporations, partnerships, associations, business trusts etc⁶⁷. Moreover, FCPA punishes conducts of bribing foreign officials perpetrated within territory of the United States even if the person or entity does not fit into the categories of Issuer and Domestic Concerns⁶⁸. The sanctions of the legislation shall also be applied to any officer, employee, agent, director or stockholder acting on behalf of those subjects⁶⁹.

c) Corrupt Practices Prohibited by the FCPA

As noted above, the FCPA forbids both bribery of foreign officials and falsifying of records. The legislation recognizes that unlawful alteration of company books is often

⁶³ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1977).

⁶⁴ Securities Exchange Act, 15 U.S.C. § 78l et seq. (1934).

⁶⁵ Securities Exchange Act, 15 U.S.C. § 78o (1934).

⁶⁶ Foreign Corrupt Practices Act, 15 U.S.C § 78dd-2 (1977).

⁶⁷ Department of Justice & Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

⁶⁸ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-3 (1977).

⁶⁹ For Brazilian readers it is important to stress that a company may be criminally liable according to United States Law. *Vide New York Central & Hudson River Railroad vs United States*, 212 US 481 (1909). See also Anca Iulia Pop, *Criminal Liability of Corporations - Comparative Jurisprudence* (2006) (Thesis, Michigan State University), available at http://www.law.msu.edu/king/2006/2006_Pop.pdf.



used with purpose of masquerading illicit activities⁷⁰. Even though the prohibition of forgery of records contains relevant provisions within the FCPA, the *Petrobras* case poses a greater question in relation to the anti-bribery provisions, since, as far as investigations have been conducted, there is no available evidence of falsified records⁷¹. Therefore, on such grounds, it would not be possible to conduct a proper research with regard to FCPA fraud provisions.

Regarding anti-bribery acts that violate the FCPA, a person or organization will be punished only if the government proves that the conduct contains five different elements⁷²: a) a payment, offer, authorization, or promise to pay money or anything of value; b) to a foreign government official, or to any other person, knowing that the payment or promise will be passed on to a foreign official; c) with a corrupt motive; d) for the purpose of influencing any act or decision of that person, inducing such person to do or omit any action in violation of lawful duty, securing an improper advantage, or inducing such person to use his influence to affect an official act or decision; e) in order to assist in obtaining or retaining business for or with, or directing any business to, any person.

Under the terms of the FCPA, corrupt acts need not be paid in order to be considered a violation. Nor need it be made in cash. The interpretation given to the provisions is extremely extensive⁷³, as it includes offers or promises to pay anything of value. The upcoming non-conclusion of the contract or business benefit cannot be argued as defense once the perpetrator has already made the offer⁷⁴. Furthermore, the expression

⁷⁰ Securities and Exchange Commission, Report of Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (May, 1976), available at <https://www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf>

⁷¹ Investigations conducted by Brazilian authorities are not focused on unveiling falsifying of records, as such acts are not solely punishable within the scope of the Brazilian Anticorruption Law.

⁷² R. Christopher Cook & Stephanie Connor, *The Foreign Corrupt Practices Act: an Overview*, January 2010, available at <http://www.jonesday.com/files/Publication/3325b9a8-b3b6-40ff-8bc8-0c10c119c649/Presentation/PublicationAttachment/d375c9ee-6a11-4d25-9c30-0d797661b5ff/FCPA%20Overview.pdf>.

⁷³ Department of Justice & Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>

⁷⁴ United States v. Innospec, Inc., 10-cr-00061 (D.D.C. 2010)



“anything of value” may include any unusual gifts of any value. In a recent case, Securities and Exchange Commission has sanctioned two employees of a U.S. Company that paid Saudi-Arabian officials a “world tour” that had no relation with the ongoing negotiation of a business contract with the government⁷⁵. Such case demonstrates how extensive government’s interpretation is regarding the expression “anything of value”.

The law defines “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof”⁷⁶, giving a broad sense to the term. Since only a few FCPA cases go to trial, government’s expansive interpretation of the expression has been a major source of research⁷⁷. The term “instrumentality”, however, still raises doubt within the doctrine and its meaning will be analyzed in the next chapter, in order to discover if Petrobras’ executives are considered foreign officials. Payments made to third parties may also fall within the FCPA purposes, provided that the payer knew it was ultimately destined to a foreign official⁷⁸.

FCPA requires that the conduct be made “corruptly”. In the Senate’s words, an act is considered corrupt if it “make(s) clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client.”⁷⁹ Naturally, the proof of such corrupt intent poses great challenge to the Government, especially concerning cases where payments are minor gifts or considered “normal” by the foreign country standards. In the case ⁸⁰*United States v. Liebo*⁸¹, for instance, a defendant raised the question that paying for a Nigerian official’s honeymoon airline ticket had no corrupt motive, but otherwise seen as a “gift” with no relation to an upcoming contract on Nigerian military planes. The Court,

⁷⁵ Press Release 2014-257, Securities and Exchange Commission (Nov. 14, 2014), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543472839#.VJN5UJ0AAF>

⁷⁶ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(h)(2)(A) (1977).

⁷⁷ Mike Koehler, *The Façade of FCPA enforcement*, 41 Georgetown Journal of International Law 907 (2010).

⁷⁸ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(h)(3) (1977).

⁷⁹ United States Senate, Report of the Committee on Banking, Housing and Urban Affairs No. 95-114 (May 2, 1977), *available at* <http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf>.

⁸⁰ David P. Burns & Erin K. Sullivan, *Navigating the FCPA’s Complex Scienter Requirements* (2009), *available at* <http://www.gibsondunn.com/publications/Documents/Burns-Sullivan-NavigatingTheFCPAComplexScienterReq.pdf>.

⁸¹ *United States vs Liebo*, 923 F.2d, 1308 (8th Cir. Minn. 1991).



however, in sight of the cases' peculiarities, such as the role and influence of the official in the contract approval process and proximity of the contract approval and the gift, ruled that the payment was made corruptly. Violations of FCPA provisions also have to be willful, meaning that conducts are committed voluntarily, with knowledge of the unlawfulness of the conduct⁸².

Along with the aforementioned elements, acts perpetrated must also contain a specific intent, embodied in the expression "in order to assist in obtaining or retaining business"⁸³. Such expression has been interpreted in a broad sense by Courts to include any kind of improper advantage in relation to its competitors, such as winning a contract, avoiding contract termination or evading taxes. In the leading case *United States v. Kay*⁸⁴, American Rice Inc. was punished for paying Haitian officials with the purpose of reducing taxes and duties on their products. Even though the payment took place without any relation to a government contract, the Court of Appeals for the Fifth Circuit envisaged that such acts fell within the scope of the FCPA, as long as they were intended to have an effect in "assisting in obtaining or retaining business"⁸⁵.

d) FCPA Territorial Jurisdiction

United States authorities only have jurisdiction over 3 categories of anti-bribery provisions⁸⁶. U.S. nationals, citizens, resident and U.S.-based firms are always liable for corrupt acts perpetrated anywhere in the world, since they are under the nationality principle⁸⁷. Foreign-based issuers, however, are not bound to such principle and may only be prosecuted by U.S. authorities if a territorial nexus is present. FCPA states that such

⁸² Bryan v. United States, 524 U.S. 184, 191-92 (1998).

⁸³ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a)(1977).

⁸⁴ United States v. Kay, 513 F.3d 432 (5th Cir. 2007)

⁸⁵ *Id.*

⁸⁶ Department of Justice & Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>

⁸⁷ *Id.*



defendants must⁸⁸⁹ “make use of the mails or any means or instrumentality of interstate commerce”⁹⁰. The Resource Guide to the U.S. Foreign Practices Acts provides an overview of some acts that may trigger U.S. jurisdiction:

“Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.”⁹¹

In the case *United States v. Straub*, the Southern District of New York Court found that an e-mail sent from a foreign country and not directed to the United States, but “routed and/or stored on network servers located within the United States”⁹² fell within the provision of interstate commerce. Such decision demonstrates the broad extension given by Courts and Government to this concept.

The last category is designated to non-issuer and non-domestic subjects that practice corrupt acts while in the United States⁹³. In that category, any individual that practices such acts in the United States territory may be punished, regardless of its nationality.

e) Possible Sanctions and Penalties for Violations of the FCPA

Violators of the FCPA anti-bribery provisions are subjected to civil and criminal penalties, which may be applied both to the legal entity and individuals that acted on its behalf. Individuals may face two categories of penalties: economic sanctions or imprisonment⁹⁴. The FCPA sets forth penalties for criminally prosecuted individuals of

⁸⁸ Sean Hecker & Margot Laporte, *Should FCPA territorial jurisdiction reach extraterritorial proportions?* 42 American Bar Int. Law News (2013), available at http://www.americanbar.org/publications/international_law_news/2013/winter/should_fcpa_territorial_jurisdiction_reach_extraterritorial_proportions.html

⁸⁹ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (1977)

⁹⁰ Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a) (1977).

⁹¹ Department of Justice & Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

⁹² SEC v. Straub, F.2d, No. 11 Civ. 9645 (RJS 2013).

⁹³ U.S. v. Patel, No. 09-cr-338 (D.D.C. 2009)

⁹⁴ This provocative article gives us an insight on how a debarment penalty would have FCPA provisions being more efficient. See Drury D. Stevenson & Nicholas J. Wagoner, *FCPA*



up to \$100,000.00 per violation, which may be cumulated with imprisonment in a maximum of 5 years⁹⁵. Civil fines of up to \$10,000.00 are also possible⁹⁶. Prosecutors have been perseveringly prosecuting individuals on bribery charges⁹⁷. This fact is credited to various factors, including globalization and the 2008 crisis that has exposed the unscrupulous and corrupt facet of some American companies⁹⁸. Business entities may also face civil and criminal penalties. Naturally, fines for the violation of anti-bribery provisions are higher and may go up to \$2 million per violation⁹⁹. Civil penalties, however, may reach a maximum of \$10,000.00¹⁰⁰.

The Alternative Fines Act (AFA) may also be applied to sanctions on bribery charges and may lead to fines that exceed the maximum provided by the FCPA. The AFA states that an entity may be fined up to twice the gain resulting from its corrupt conduct or twice the loss that a person other than the defendant has suffered¹⁰¹. Moreover, debarment and suspension of a contract with the government is possible, provided that it is in the public's interest for the Government's protection¹⁰². Such decision, however, is fully discretionary and may only be applied by the responsible agency and may not be requested by the DOJ or the SEC¹⁰³.

Although only advisory¹⁰⁴, the U.S. Sentencing Guidelines provides general rules on how sanctions should be applied to organizations involved in foreign corruption crimes. In such *formula* a number of steps must be followed, and in each one of them there are several factors that may influence the amount of the penalty. The first step is the

Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775 (2011), available at <http://ir.lawnet.fordham.edu/flr/vol80/iss2/13>.

⁹⁵ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2(g)(2)(A) (1977)

⁹⁶ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2(g)(1)(B) (1977)

⁹⁷ FCPA Professor, A Focus on DOJ FCPA Individual Prosecutions, Jan. 20, 2015, available at <http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-3>.

⁹⁸ See generally Corporate Crime Reporter, *Mendelson says criminal bribery prosecutions doubled in 2007* (2008), available at <http://www.corporatecrimereporter.com/mendelsohn091608.htm>.

⁹⁹ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2(g)(1)(A) (1977)

¹⁰⁰ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2(g)(1)(B) (1977)

¹⁰¹ U.S. Sentencing Guidelines, 18 U.S.C. § 3571(a), 3571(d) (2006).

¹⁰² Code of Federal Regulations, 48 C.F.R. § 9.402(b)

¹⁰³ Department of Justice & Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> (last visited October 18, 2015)

¹⁰⁴ United States v. Booker, 543 U.S. 220 (2005)



establishment of a base fine that corresponds to the pecuniary gain derived from the act or the loss caused by it¹⁰⁵. A culpability score is then calculated based on factors such as organization's prior history, its cooperation with the investigations and to which level its personnel was involved in the acts of corruption¹⁰⁶.

III. The Petrobras Corruption Scheme and The FCPA

As mentioned earlier, although investigations by Brazilian authorities are not yet conclusive and that only one sentence has yet been rendered, the Petrobras' corruption scheme has actually damaged the company itself¹⁰⁷. In contrast with common FCPA cases, where defendants receive great benefits from bribery of foreign officials, the present case shows different features. *Grosso modo*, Petrobras acted as an intermediate between building companies, politicians and political parties¹⁰⁸. Building companies were rewarded with contracts for Petrobras' ventures, in exchange for overbilled prices (3% as it is believed) destined to politicians, with Petrobras' employees coordinating such scheme and having profit from it¹⁰⁹.

Although the aforesaid scheme does not fall entirely within the FCPA and its legislator's original scope, it does not mean that the conducts perpetrated are not punishable by the FCPA anti-bribery provisions. The Brazilian federal prosecution organ (*Ministério Público Federal*) has gathered evidence that some of the oil company's directors paid bribes regularly to politicians, in a pace that went on for about 6 years¹¹⁰. Furthermore, as stated in the company's Articles of Incorporation, it is incumbent upon the Board of Officers to sign business contracts (Article 35, IV)¹¹¹, with the approval of

¹⁰⁵ U.S. Sentencing Guidelines, U.S.S.G. §8C2.4. (2006).

¹⁰⁶ U.S. Sentencing Guidelines, U.S.S.G. §8C2.5 (2006).

¹⁰⁷ *Petrobras divulga balanço auditado com prejuízo bilionário com corrupção*, O Globo (Apr. 22, 2015), available at <http://g1.globo.com/jornal-nacional/noticia/2015/04/petrobras-divulga-balanco-auditado-com-prejuizo-bilionario-com-corrupcao.html>.

¹⁰⁸ Alberto Youssef, Deposition before Justiça Federal (Brazilian Federal Court), October, 2014 (Braz.), available at <https://www.youtube.com/watch?v=LNkZaR68p44>.

¹⁰⁹ *Id.*

¹¹⁰ Ministério Público Federal, Denúncia, E-Processo 5049557.142013.404.7000, 22.04.2014 (Braz.).

¹¹¹ "Art. 35 - In addition to the matters of the original competence of a full-board deliberation as provided for in art. 33 of these Articles of Incorporation, the Board of Executive Officers may deliberate about managerial acts of business of the individual responsibility of each one of the



the Board of Directors (Article 28, V)¹¹². Such provisions demonstrate that fraudulent contracts were not an isolated practice of some directors of Petrobras, but perhaps a common policy within the business, as it was approved by its high-ranking officers. Suspicions of involvement in such contracts have even reached current President Dilma Rousseff, who was President of the Board of Directors at the time of “Pasadena” contract was signed¹¹³. In spite of the fact that *Ministério Público Federal* did not find any evidence to prosecute Ms. Rousseff¹¹⁴, Brazilian Federal Court of Auditors recommended¹¹⁵ Petrobras’ Employees (former CEO Sérgio Gabrielli and 7 Officers) to pay the sum of US\$ 580,4 million related to damages caused to the company by the Pasadena contract¹¹⁶.

Nevertheless, FCPA anti-bribery provisions do not require an actual profit resulting from the perpetrated conduct. Understanding whether the corruption scheme falls within FCPA scope requires a complex research into the law and the criminal acts carried out by employees. To better comprehend, it is imperative the analysis of such conducts in relation to the FCPA, the framing of Petrobras’ officers and directors as “foreign officials” and the company itself as an “issuer”, and the presence of the territorial nexus with the United States through the element of “interstate commerce”.

a) Is Petrobras an Issuer to the eyes of the FCPA?

Officers within the contact areas established by the Board of Directors in the Basic Organizational Plan. Furthermore, it is incumbent upon the Officers: (...)

IV - to sign deeds, contracts and agreements as well as to manage the funds of the Corporation, always jointly with another Officer.”

¹¹² “Art. 28 - The Board of Directors is the highest-level guiding and directing body of Petrobras; it is incumbent upon it: (...)

V - to approve every year the amount above which acts, contracts or operations, although up to the competence of the Board of Executive Officers, particularly those provided for in items III, IV, V, VI and VIII of art. 33 of these Articles of Incorporation, must be submitted to the approval of the Board of Directors;”

¹¹³ Tribunal de Contas da União, Decisão, TC 005.406/2013-7, Jul. 23, 2014, (Braz.) (Federal Court of Auditors investigated Dilma Rousseff’s relation to the Pasadena, but found no evidence of wrong doing)

¹¹⁴ Ministério Público Federal, Press Release NF 1.00.000.004878/2014-72, Jul 22, 2014, available at http://noticias.pgr.mpf.mp.br/noticias/noticias-do-site/copy_of_pdfs/representacao_Pasadena.pdf.

¹¹⁵ According to Brazilian law, Court of Auditors may only issue recommendations.

¹¹⁶ Tribunal de Contas da União, Decisão, TC 005.406/2013-7, Jul. 23, 2014.



As it has previously been discussed, FCPA sets forth 3 categories of covered subjects: “Issuers”, “Domestic Concerns” and certain persons and entities acting while in the territory of the United States. Concerning the category “Issuers”¹¹⁷, the expression comprises both companies that issue securities within U.S. territory and companies obliged to file periodic books or reports with Securities and Exchange Commission. As U.S. Government may only persecute individuals or companies that fall within at least one of the aforementioned categories, it is relevant to analyze if Petrobras may be considered an “Issuer”.

Petrobras has not only stocks traded in Bovespa (*São Paulo Stock Exchange*) but also in the New York Stock Exchange under the codes PBR and PBR/A¹¹⁸. It is, *ergo*, an issuer of securities in the terms of Section 12 of the Securities Exchange Act of 1934¹¹⁹ and an “Issuer” within the purpose of the FCPA¹²⁰. In addition, Petrobras American Depositaries Receipts correspond to circa 38% of its stocks, with U.S. stockholders representing a great source of capitalization and number of stockholders. Therefore, U.S. Government has legitimate jurisdiction over Petrobras concerning FCPA provisions.

b) Is The Interstate Commerce Element Present in the Corruption Scandal?

As Petrobras falls into the category of a foreign-based “Issuer” in the eyes of the FCPA, it is imperative the existence of a territorial nexus with the United States in order to trigger its jurisdiction¹²¹. Initially, it is important to stress that research on the matter of interstate commerce is extremely limited at this point, due to secrecy that covers most

¹¹⁷ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(a) (1977)

¹¹⁸ New York Stock Exchange, available at <https://www.nyse.com/quote/XNYS:PBR> (last visited October 18, 2015).

¹¹⁹ Securities Exchange Act 15 U.S.C. § 78l et seq. (1934).

¹²⁰ João Carlos de Assis wrote a rather critical article to Brazilian magazine *Carta Maior* on the evil effects of having Petrobras under United States jurisdiction. According to Mr. Assis, as a result of the internalization promoted by Brazil’s former neo-liberal government, the company itself should not be guilty for its directors’ acts and yet may be fined billions of dollars by U.S. ‘anti-public-sector’ justice. João Carlos de Assis, *Petrobras: sob a lei dos Estados Unidos?*, Carta Maior (Dec. 17, 2014), available at <http://cartamaior.com.br/?/Editoria/Politica/Petrobras-sob-a-lei-dos-Estados-Unidos-/4/32462>.

¹²¹ Department of Justice & Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.



of the operations and investigations concerning the corruption issue¹²². However, investigations led by Brazilian Federal Police, gathered evidence of bribery money laundering into Swiss bank accounts¹²³. Furthermore, recent press article believes that payments made by construction companies were sent to other offshore accounts and enterprises, including an account in a Miami bank in name of Alberto Youssef, one of the corruption scheme major coordinators¹²⁴.

In the extent of the material currently available for public access, no evidence has been found linking the entire corruption scheme to U.S. banks, companies, nationals, residents, nor related to a meeting taking place within U.S. territory. There is solely one exception to it: the Pasadena case. Pasadena Refinery is located in the U.S., in the city of Pasadena, Texas. As bribes allegedly came from an over-billed sales contract of a refinery in Texas, U.S., Department of Justice has jurisdictional competence to report violations of the FCPA, especially in view of the extensive interpretation to the expression “Interstate Commerce” given by Department of Justice and Securities and Exchange Commission¹²⁵.

Nonetheless, Pasadena refinery sale does not grant U.S. authorities jurisdiction over the whole corruption scheme. It is our opinion that there should be a full analysis of each one of the “corrupt deals”, as to find a territorial nexus with U.S. jurisdiction, in compliance with International Law principles and customs concerning extraterritoriality¹²⁶. Furthermore, although Supreme Court precedent *Morrison v. National Australia Bank*¹²⁷ has not yet been applied to FCPA, it provides a satisfying answer to the issue of extraterritoriality and should be valid to FCPA cases. *Morrison*

¹²² Brazilian Constitution guarantees the secrecy of criminal procedures whenever it is necessary to the public interest.

¹²³ André Richter, *Switzerland to repatriate \$26 million to Brazil*, EBC Agência Brasil (Nov. 27, 2014), available at <http://agenciabrasil.ebc.com.br/en/geral/noticia/2014-11/switzerland-repatriate-26-million-brazil>

¹²⁴ *Doleiro fazia entrega internacional de dinheiro para empreiteira*, Folha de São Paulo (Dec. 27, 2014), available at <http://www1.folha.uol.com.br/poder/2014/12/1567772-doleiro-fazia-entrega-internacional-de-dinheiro-para-empreiteira-diz-revista.shtml>

¹²⁵ Department of Justice & Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012)*, available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

¹²⁶ Annalisa Leibold, *The Extraterritorial Application of the FCPA Under International Law*, 51 Willamette L. Rev. 225 (2015).

¹²⁷ *Morrison v. Nat’l Australia Bank*, 561 U.S. 247 (2010).



establishes jurisdictional boundaries for extraterritoriality, stating that transnational frauds may be prosecuted in the United States “only when substantial acts in furtherance of the fraud were committed within the United States (...) or when the fraud was “intended to produce” and did produce “detrimental effects within” the United States”¹²⁸. It is therefore our opinion that U.S. authorities shall only have jurisdiction over the Petrobras’ case if the corrupt act was: (i) perpetrated within the United States; or (ii) intended to produce and produced harmful effects within the United States.

c) Could Petrobras Employees Be Considered Foreign Officials?

Petrobras corruption scandal analysis also must answer the question of whether Petrobras’ employees may be considered “foreign officials” according to FCPA¹²⁹. Such answer is pertinent to determine if companies that paid bribes to Petrobras’ officials may also be punished through the United States anti-corruption law¹³⁰. Concerning bribes allegedly paid by Petrobras’ officers to Brazilian politicians, it is clear that foreign politicians fall within the category of Foreign Officials.

FCPA states that government has to prove that payments were made to “foreign officials” or knowingly that they would be destined to such officials¹³¹. The concept of “Foreign Officials”, however, is subjected to great doubt within jurisprudence and has only been partially resolved by Eleventh Circuit case *United States v. Esquenazi*¹³². The principal question raised within the case was to what extent foreign state-owned enterprises’ employees may be considered “Foreign Officials” within FCPA scope. Eleventh Circuit ruled that such analysis must be made according to certain aspects, although they constitute a *numerus apertus* list. It states, *in verbis*:

“An “instrumentality” under section 78dd-2(h)(2)(A) of the FCPA is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own. Certainly, what constitutes control and

¹²⁸ *Id.*

¹²⁹ See generally Paul Rose, *State Capitalism and the Foreign Corrupt Practices Act*, 73 Ohio St. L. J. 1069 (2012), available at http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Rose_.pdf (Providing an overview of the definition of public officials within the scope of the FCPA).

¹³⁰ As we have mentioned above, foreign companies may also fall within the scope of the FCPA.

¹³¹ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(a)(3) (1977).

¹³² *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).



what constitutes a function the government treats as its own are fact-bound questions. It would be unwise and likely impossible to exhaustively answer them in the abstract. (...) To decide if the government “controls” an entity, courts and juries should look to the foreign government’s formal designation of that entity; whether the government has a majority interest in the entity; the government’s ability to hire and fire the entity’s principals; the extent to which the entity’s profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed. (...) Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.” (p. 20)¹³³

In accordance with the provisions established by the Court, U.S. Department of Justice believes that “state-owned business enterprises may, in appropriate circumstances, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials”¹³⁴. It also brings up factors that should be taken into consideration for the analysis of the term “instrumentality”, such as “the foreign state’s own characterization of the enterprise and its employees, i.e., whether it prohibits and prosecutes bribery of the enterprise’s employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.”¹³⁵

Considering the guidelines created by the Eleventh Circuit and the Department of Justice, it is our opinion that Petrobras’ employees fall within the FCPA concept of “foreign officials”. Such statement is supported by numerous factors. Even though Petrobras is governed by the terms of Brazilian Joint Stock Corporation Law¹³⁶ and its

¹³³ *Id.*

¹³⁴ United States: Review of Implementation of the Convention and 1997 Recommendation, *ORG. FOR ECON. CO-OPERATION & DEV.* 1, 6 (Apr. 1999), *available at* <http://www.oecd.org/dataoecd/16/50/2390377.pdf>

¹³⁵ U.S. Department of Justice, U.S., Response to the Phase I Questionnaire (Oct. 30, 1998).

¹³⁶ Lei 6.404 de 15 de Dezembro 1976, *Diário Oficial da União (D.O.U.)* de 17.12.1976 (Braz.)



corporate object submitted to free competition basis¹³⁷, a set of facts concerning the company counterbalance what is provided in its Articles of Incorporation.

Petrobras has been a key company to government's projects. Since its creation in the 50s President Vargas government, Petrobras has been widely used as a governmental entity and propaganda¹³⁸. At that time, a popular campaign, called "The oil is ours", was founded by a handful of politicians and granted Petrobras full monopoly for the exploitation of oil and gas resources¹³⁹, which would only be partially broken in 1997. Moreover, Brazilian Federal Government still nominates a great part of the company's directors, with 6 out 9 current members of the Board of Directors being elected by Government. It is indeed a tradition that the Board of Directors has the Minister of Economy as its President and another Minister as one of the Directors. Notwithstanding the control exercised by the Government, Petrobras is also widely used as means of political and economic decisions. Petrobras oil sales price, for instance, is commonly altered or maintained in order to satisfy Government's inflation rates requirements¹⁴⁰, with no serious regard to international prices, a fact that led to many critics from investors¹⁴¹. Lastly, Brazilian Criminal Law provides an extensive concept of Government Official, including in that term State Owned Enterprises Employees (Brazilian Penal Code, art. 327)¹⁴²

For the aforementioned reasons, we believe that Petrobras Employees should be considered "foreign officials".

¹³⁷ "Art. 3 (...) Paragraph 1 - Economic activities related to the corporate object shall be developed by the Corporation on a free competition basis with other companies according to market conditions, due consideration given to further principles and guidelines of Law no 9,478 of 6 August 1997 and of Law no 10,438 of 26 April 2002."

¹³⁸ Wladimir Tadeu Silveira Coelho, *O monopólio estatal do petróleo no Brasil: a criação da Petrobras*, 8 História imagem e narrativas (2009), available at <http://www.historiaimagem.com.br/edicao8abril2009/petrobras.pdf>.

¹³⁹ Lei No. 2004 de 03 de Outubro 1953, Diário Oficial da União (D.O.U.) de 03.10.1953 (Braz.).

¹⁴⁰ See generally Jonathan Barros Vita & Paulo Antonio Brizzi Andreotti, *Petrobras e o preço dos combustíveis: os novos paradigmas da intervenção do Estado na economia*, 18 Scientia Juris, 25 (2014)

¹⁴¹ Jon C. Ogg, *Can investors trust the big petrobras giants?*, 24/7 Wall St. (Feb. 3, 2015), available at <http://247wallst.com/energy-business/2015/02/03/can-investors-trust-the-big-petrobras-gains/>.

¹⁴² Decreto-Lei 2.848, 07 de Dezembro 1940, Diário Oficial da União (D.O.U.) de 31.12.1940 (Braz.).



d) Conducts Carried Out by Petrobras Employees

Based on currently available information, Petrobras employees perpetrated conduct that meets FCPA requirements, except one of them. Bribes were, according to investigation, effectively paid to Brazilian politicians, with a corrupt purpose of influencing officials to act contrary to their lawful duty.

Despite such payments, their actions did not contain any intent of “obtaining or sustaining business”, as this was actually the intent of the construction companies, which ensured contracts with Petrobras in exchange of bribes¹⁴³. As a matter of fact, Petrobras was the greatest victim of such scandal. In the Pasadena case, for instance, Petrobras in 2008 ended up paying Astra Oil US\$ 1.18 billion for the refinery, 27 times more than the Belgian company paid for it in 2005 (US\$ 42.5 milion)¹⁴⁴.

According to *United States v. Kay*, a key judgment concerning the interpretation of the expression “to assist in obtaining or sustaining business”, Court ruled that:

“After a rigorous analysis of the FCPA and its legislative history, we concluded that ‘in diametric opposition to the district court[,] that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes could fall within the purview of the FCPA’s proscription,’ but ‘[i]t still must be shown that the bribery was intended to produce an effect - here, through tax savings - that would ‘assist in obtaining or retaining business.’ ”(p. 4)¹⁴⁵

The precedent widens the number of acts that fall within FCPA scope, which was before that case mostly restricted to bribes with the scope of ensuring contracts with foreign governments, but it still sets forth a limit that must be observed: the intent that the bribe will have the effect of assisting in obtaining or retaining business. Such intent, also called business purpose, is not found in the Petrobras case.

¹⁴³ Alberto Youssef, Deposition before Justiça Federal (Brazilian Federal Court), October, 2014 (Braz.), available at <https://www.youtube.com/watch?v=LNkZaR68p44>.

¹⁴⁴ Tribunal de Contas da União, Decisão, TC 005.406/2013-7, Jul. 23, 2014 (Braz.).

¹⁴⁵ *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007)



IV. Conclusion

It is our opinion that Petrobras corruption scheme was not a common example of FCPA cases. Petrobras was indeed the greatest victim of this scheme, with construction companies being awarded government contracts without due bidding procedure and politicians receiving large sums of bribe money¹⁴⁶. In its 3Q2014 Financial Report issued on April 22nd, 2015, Petrobras has estimated an amount of USD 2.5 billion of additional expenses related to over-billed contracts¹⁴⁷. Nevertheless, an accurate and objective analysis of the facts is vital to understand if Petrobras may be punished through FCPA anti-bribery provisions. We have tried to identify the most important facts on that scheme, as well as the principal FCPA anti-bribery provisions.

As we analyzed such facts - with restrictions to the available information and no final judgement yet rendered by Brazilian authorities - it became clear that Petrobras could not be considered guilty on FCPA anti-bribery charges. Nevertheless, FCPA also contains provisions concerning accounting frauds, though it was not the scope of this article. It is indeed likely that Petrobras may have committed such frauds in order to hide bribes, but available material on that issue is still precarious and could not suffice to conduct a proper research.

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¹⁴⁶ Alberto Youssef, Deposition before Justiça Federal (Brazilian Federal Court), October, 2014 (Braz.), available at <https://www.youtube.com/watch?v=LNkZaR68p44>.

¹⁴⁷ Petrobras' financial results are available in English at <http://www.investidorpetrobras.com.br/en/financial-results>.



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