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The Brazilian Law Against Corruption

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On August, 2013, the Federative Republic of Brazil has promulgated a Law No. 12,846 (the “**Law Against Corruption**” also known as “**LAC**”), which became¹ that commits corrupt acts which are called “harmful acts”.

What was firstly announced and perceived as Brazil’s first step toward joining the many countries that have enacted hard against corruption laws, has become a cause of concern, especially for foreign companies operating in Brazil due to broad application of its terms.

In this sense, this brief article has the scope of providing its readers about the main aspects of Brazil’s LAC. Also, we intend to make some comments regarding how effective compliance program may be analyzed by the authorities and the strict liability

¹ For the purpose of this article, we will refer to the legal entities subject to the LAC as “any company doing business in Brazil”. It is important to mention that all and any legal entities, regardless of the origin, form of organization or the corporate model adopted, personified or not, doing business in Brazil will be subject to the Brazilian LAC.

effective in January 29th, 2014. LAC, as referred here forth in this article, imposes civil and administrative liability on any company doing business in Brazil provided by LAC. Finally, this article also provides a comparison chart of Brazil’s LAC to the U.S. Foreign Corrupt Practices Act (“**FCPA**”) and to the Japan’s Unfair Competition Prevention Act.

1. Context

Before stepping into LAC’s main aspects, it is important to mention that corruption is one of Brazil’s biggest problems and several social scientists have directly linked corruption to the social gap and inequality presented in the Brazilian society. In addition to this, taking into account that Brazil’s judiciary system is very slow, there is a sense of impunity among the population which inhibits ethics in business. Differently from developed countries, lawsuits may take decades to be finalized.

In accordance with the Corruption Perceptions Index

2013, published by Transparency International, Brazil ranks 72 out of 177 countries, with an overall score of 42. This Index scores 177 countries and territories on a scale from 0 (highly corrupt) to 100 (very clean).

It is important to note that LAC's was a project inspired by the FCPA and was going through Brazil's National Congress normal process of approval for some years, when suddenly, was enacted by the Congress. The new law was enacted, in part, to address the Organization for Economic Co-operation and Development's (OECD) requirements related to Brazil's compliance with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In addition and most importantly, it responds to the Brazilian public's demand for increased government transparency and integrity as demonstrated in the manifestation occurred on July, 2013.

Some experts say that the LAC was not ready to be enacted yet and further discussion should occur and this is the reason why there are some doubts regarding the interpretation of the LAC.

2. General LAC's aspects

In general terms, LAC prohibits any company doing business in Brazil (acting through directors, officers, employees or through third parties, external companies or individuals) from doing "harmful acts" against "public administration", national and foreign.

The prohibited conduct – a.k.a "harmful act" - is a very broad definition and includes not only the actual payment or provision of any undue advantage to any public official, but also the acts of offering, promising,

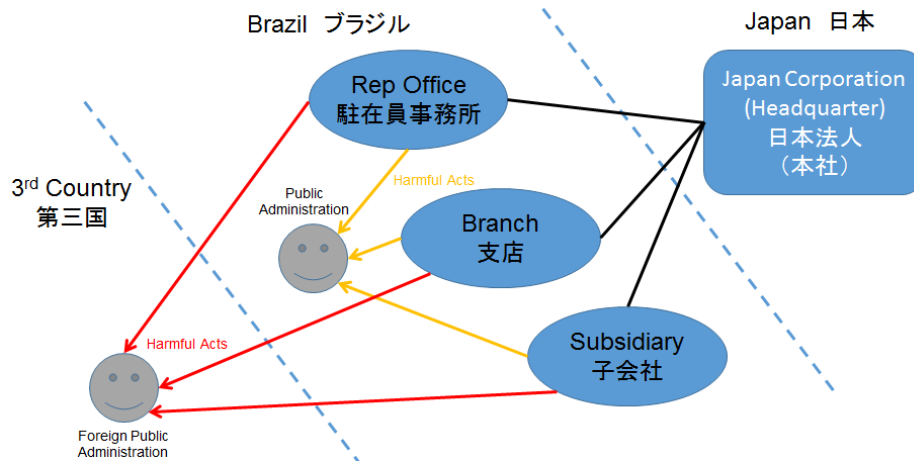
sponsoring or otherwise supporting such activity². Facilitation payments is also included in this definition. In addition to this very wide definition of "harmful act", there is no specific provision stating what public administration is.

Despite of this fact, LAC only defines the term 'foreign public administration' meaning governmental agencies and entities or diplomatic representations of a foreign country, at any level or sphere of government, as well as legal entities controlled, directly or indirectly, by a foreign country's government. LAC states that anyone, even temporarily or without compensation, who holds a position, job, or public function in state bodies, entities, or in diplomatic representation offices of a foreign country, as well as legal persons controlled directly or indirectly by a public authority of a foreign country or in international public organizations, are deemed foreign public administration.

² In accordance with LAC, harmful acts to the public administration, national or foreign, are those, which violate the national or foreign public patrimony, principles of the public administration, or the international commitments assumed by Brazil. LAC provides a extense list of type of harmful acts, including but not limited to: (i) to promote, offer, or give, directly or indirectly, an improper benefit to a public agent, or to a third person related to him; (ii) finance, bear the cost of, sponsor, or in any manner subsidize the performance of the illegal acts stipulated herein; (iii) to use an intermediate person or entity in order to conceal or disguise the real interests or the identity of the beneficiaries of acts carried out; (iv) to obstruct the activities of investigation or supervision performed by public authorities, entities or agents, or interfere in its operations, including with the scope of the regulatory agencies and supervisory bodies of the national financial system; and (v) in regard to public bids and contracts, basically hinder or defraud, through collusion, agreement, or any other method, the competitive nature of a public request for bid procedure.

A typical scenario for the application of LAC to

Japanese companies doing business in Brazil will be as below:



3. Administrative and Judicial sanctions and the advantages of the Compliance Program.

In case there is a harmful act, any company doing business in Brazil may be sanctioned administratively and judicially. The administrative penalties that shall be applied to any company doing business in Brazil liable for the “harmful acts” stipulated in LAC are the following: (i) – a fine, in the amount of 0.1% (zero point one percent) to 20% (twenty percent) of the gross revenues of the fiscal year prior to the institution of the administrative proceeding, excluding taxes, which shall never be less than the benefit gained, if it is possible to estimate it; and (ii) extraordinary publication of the adverse judgment.

In the case it is not possible to use the criteria of the amount of gross revenue of the legal person, the fine shall be from R\$ 6,000 (six thousand reais) to R\$ 60,000,000 (sixty million reais).

On the other hand, judicially, any company doing business in Brazil may be convicted to very harsh punishes, such as: (i) confiscation of assets, rights or values which represent direct or indirect, advantage or profit obtained from the infraction; (ii) Suspension or partial interdiction of its activities; (iii) compulsory dissolution of the legal entity; (iv) prohibition on receiving incentives, subsidies, grants, donations or loans from public agencies or public entities and financial institutions controlled by the government, for a minimum period of one (1) and maximum of five (5) years.

As it may be noticed from the sanctions above, Brazilian LAC provides severe punishments for the harmful acts. One of the most acclaimed and celebrated aspects of LAC is the incentive for compliance programs to be adopted by any company doing business in Brazil. As per the Brazilian Law, in so far, compliance programs were not mandatory, except for financial and similar institutions. The incentive is provided in Section 7 of LAC, which reads as follows:

“Section 7 - The following will be taken into consideration when applying the sanctions:

(...)

VIII - The existence of mechanisms and internal procedures of integrity, auditing and incentive for reporting irregularities and the effective enforcement of an ethical code and the conduct into the scope of the legal entity”

This implies in a great incentive for Compliance programs and it may be perceived as something without any costs involved. However, it is important to mention that any company doing business in Brazil shall have an effective compliance program. In other words, if the Compliance program is just a book of rules that no one follows and there is no enforcement, it will not be considered as existent for the purpose of diminishing the sanction.

Despite of having expressly provided that the compliance programs will be taking into consideration when applying the sanction, LAC does not provide how these compliance programs shall be implemented. This is a problem that may be solved by the Federal Decree still pending on being issued.

Nonetheless, taking into account the wording provided by the LAC, it could be said that Brazil has adopted a generally accepted concept of compliance (i.e., the integration of disciplines in order to enforce legal regulations and laws, the policies and guidelines established for the business and for the activities of the institution or company, as well as to prevent, detect and treat any deviation or nonconformity that might occur).

4. “Strict” liability and jointly liability for affiliates.

During some debates made with colleagues and international lawyers, one of the most notorious issues regarding LAC was the strict liability provided by law. This is very distinctive to the Brazilian Law.

In accordance with LAC, any company doing Business in Brazil may be strictly liable for harmful acts without need to prove negligence or misconduct. In other words, a company doing business in Brazil may be liable even without knowing that has done a harmful act. This means that the company has to control and audit every third party related to it, which might create opportunity costs for the company. Together with the broad concept of harmful act and public administration mentioned above, the strict liability is very characteristic to LAC.

In addition, LAC expressly provides that the controlling entities, controlled entities, affiliates or, under the scope of the respective contract, the consortium shall all be jointly liable for the practice of the harmful acts. In accordance with the Brazilian legal system, affiliate may be deemed as a company in which an investor holds 10% (for corporations) or 20% (for LLCs) of equity, even without any control. Therefore, in thesis, it is possible for an investor to be held liable jointly even when holding 10% or 20% of equity in a Company with no control. This specific part regarding affiliate is not proportional and there is a possibility this will be further detailed in a Federal Decree to be issued by the Federal Government.

In case the Federal Decree does not impose restriction

to this jointly liability, we deem that the conceptual of affiliate for the purpose of LAC may be challenging judicially, based on constitutional principles.

5. Comparison among LAC, Japan and United States

During my stay in Japan as visiting attorney at Matsuda

& Partners, I had the opportunity to study jointly with the members of such firm, whom helped me understand and compare the main aspects of the laws against corruption in Brazil, Japan and United States. Based on such study, I have attached below the comparison chart of Brazilian LAC, Japanese Unfair Competition Prevention Act and US FCPA for the readers' reference.

COMPARISON AMONG LAWS AGAINST CORRUPTION OF BRAZIL, JAPAN AND UNITED STATES			
	BRAZIL LAW AGAINST CORRUPTION	JAPAN UNFAIR COMPETITION PREVENTION ACT	USA FOREIGN CORRUPT AND PRACTICES ACT
Date	Published in 2013 and in force in 2014	1998	1977
Punishment on Foreign Officials	Yes	Yes	Yes
Main Rule	Article 5- (...) acts harmful to the public administration, national or foreign, are those (...) which violate the national or foreign public patrimony, principles of the public administration, or the international commitments assumed by Brazil, including : (...) to promote, offer, or give, directly or indirectly, an improper benefit to a public agent, or to a third person related to him;(...)	Article 18 – No person shall provide, or offer or promise to provide, any money or any other gain to a foreign public officer, etc. for the purpose of having the foreign public officer, etc. act or refrain from acting in a particular way in relation to his/her duties, or having the foreign public officer, etc. use his/her position to influence another foreign public officer, etc. to act or refrain from acting in a particular way in relation to that officer's duties, in order to acquire an illicit gain in business with regard to	Section 30A (a) - It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780(d) (...) to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value (...)

		international commercial transactions.	
Allows Facilitation Payments?	No	No	Yes
Private corruption	No	No (with limited exceptions in company law)	No
Responsibility of a company over agent which practices corruption	Direct liability	Direct liability	Direct liability
Establishes imprisonment as part of the punishment?	No, this law does not. However, it may be judged as crime by the Brazilian Penal Code or other specific laws.	Yes, up to 5 years of imprisonment with work	Yes, imprisonment not more than 20 years
Maximum penalty	At the administrative level, from 0.1% to 20% of the gross revenue of the company or up to R\$ 60mi. On judicial level, loss of assets, suspension of activities.	(Individual) Imprisonment with work of not more than 5 years or fine of not more than 5 million yen, or both. (Legal Entity) Not more than three hundred million yen,	~Anti-bribery Provisions~ (Individual) Criminal fine up to USD 250,000; imprisonment up to 5 years Civil penalty up to USD 10,000 (Legal Entity) Criminal fine up to USD 2 million; may be increased to twice the gain or loss resulting from the corrupt payment Civil penalty up to USD 10,000 ~Accounting Provisions~ (Individual) Criminal fine up to USD 5 million; may be increased to twice the gain or loss resulting from the corrupt payment; imprisonment up to 20 years Civil penalty up to USD 100,000 (Legal Entity)

			Criminal fine up to USD 25 million; may be increased to twice the gain or loss resulting from the corrupt payment Civil penalty up to USD 500,000
Parent, affiliated companies and subsidiaries and member of the same consortium can be held liable?	Yes, jointly liable.	No	No
Leniency Agreements	Yes	No	Yes
Reduction in fines due to the existence of compliance	Yes	No	Yes

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