

THE ABSENCE OF CRITERIA IN DEFINING THE MOST APPROPRIATE JURISDICTION FOR INVESTIGATING TRANSNATIONAL BRIBERY

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Abstract: In the Global Administrative Law, the aim is to examine the presence of normative gaps in the national norms incorporated into the Brazilian legal system following the ratification of the Convention on Combating Bribery of Foreign Public Officials of the Organization for Economic Cooperation and Development – OECD in which refers to the definition of the most appropriate jurisdiction for the investigation and prosecution of legal entities for bribery of foreign public officials. The aim is to discuss aspects of the internationalization of a public policy applicable to the policy of combating international corruption, and the main challenges of transposing international standards into domestic administrative law, such as that established by the OECD.

Keywords: Global Administrative Law. Transposition of international standards. Transnational bribery. Normative gap. Consequences.

INTRODUCTION

A topic of debate since time immemorial, the fight against corruption dates back to the Roman Empire, a time when the word “*corruption*” was used to conceptualize a conduct or effect of corrupting ethical standards related to the collection of taxes, the granting of services and the application of public resources.

With the globalization of markets and the expansion of international trade, concern about this phenomenon, especially from the end of the 90s, expanded across the globe, especially

due to the influence of North Americans with the edition of *Foreign Corrupt Practice Act – FCPA* in 1977 after the emblematic political scandal called “Watergate” that occurred in 1974 in the United States, one of the biggest cases of corruption in that country. Thus, concern about the phenomenon of corruption and with it, the process of the production of transnational public policies aimed at confronting this phenomenon began to grow¹.

In 1997, the Organization of American States – OAS drafted the Inter-American Convention on Combating Corruption, which was followed by the Convention on Combating Corruption of Foreign Public Officials of the Organization for Economic Co-operation and Development – OECD, which became a landmark in the combating corruption in the sphere of international commercial transactions, and the United Nations Conventions against Transnational Organized Crime and against Corruption, the latter signed in Mérida, Mexico.

After the signing of these Conventions, their guidelines were incorporated into the Brazilian legal system by Decrees number: 3,678², November 2000, number: 4,410³, of October 2002, number: 5015⁴, March 2004, and number: 5,687⁵, of January 2006. As a result of the adjustment, Brazil published Law number: 12,846, of August 1, 2013 – known as the Anti-Corruption Law or Clean Company Law – with the purpose of preventing and combating harmful acts carried out by legal entities against the Public Administration. Commitments were made to strengthen

1. FARIA, Carlos Aurélio Pimenta de. Public policies and international relations. Government and Public Policies Collection. Brasília: Enap, 2018, p. 9.

2. Decree number: 3,678, of November 30, 2000. Promulgates the Convention on Combating Corruption of Foreign Public Officials in International Commercial Transactions, concluded in Paris, on December 17, 1997.

3. Decree number: 4,410, of October 7, 2002. Promulgates the Inter-American Convention against Corruption, of March 29, 1996, with a reservation for art. XI, paragraph 1, item “c”.

4. Decree number: 5,015, of March 12, 2004. Promulgates the United Nations Convention against Transnational Organized Crime.

5. Decree number: 5,687, of January 31, 2006. Promulgates the United Nations Convention against Corruption, adopted by the United Nations General Assembly on October 31, 2003 and signed by Brazil on December 9, 2003.

the development of mechanisms necessary to prevent, detect, punish and eradicate corruption, in view of its harmful effects on political stability and the security of societies, and the weakening of democratic institutions and values, ethics and justice and the commitment to sustainable development and the rule of law, as highlighted in the preamble of the UN Convention against corruption.

The economic losses caused by corruption are significant, according to data released by the Federation of Industries of the State of São Paulo – FIESP, which pointed out that the average cost of corruption in the country varies between 1.38 and 2.2% of the Gross Domestic Product – GDP ⁶, which corresponds to approximately R\$200 billion in updated numbers in 2022, considering the national GDP of R\$9 trillion. Transparency International, a civil organization that leads the fight against global corruption, also highlighted significant data when dealing with the Corruption Perception Index – IPC – *Corruption Perceptions Index*) produced by it as the main corruption indicator in the world, which evaluates 180 countries and territories by assigning scores on a scale between 0 and 100 regarding the perception of integrity in a country (or perception of corruption in the public sector). He highlighted that Brazil reached 40 points in 2016 and ranked 79th in a universe of 176 countries, and that in 2022, its score dropped to 38 and fell to 94th position, which shows that Brazil has increased its already high level of risk of corruption in global terms⁷. The United Nations Office on Drugs and Crime - UNODC and the United Nations Development Program - UNDP estimate that,

6. Corruption report: economic costs and combat proposals. Available at: <http://www.fiesp.com.br/indices-pesquisas-e-publicacoes/relatorio-corrupcao-custos-economicos-e-propostas-de-combate/>. Accessed on: May 30, 2023.

7. *Corruption perception index*. Available at: Accessed on May 30, 2023.

8. UNITED NATIONS. UN News. Global Perspective Human Reporting. Available at: Accessed on June 2, 2023.

9. FURLAN, Flávia; PADUA, Luciano: The fall of the oligarch. *Exame Magazine*, Year 51, number: 3, 02/15/2017. Editora Abril, p. 78-85.

10. Executive summary: *Corruption perception index*, p. 5. Available at: Accessed on May 30, 2023.

11. FARIA, Carlos Aurélio Pimenta de. **Public Policies and International Relations**. Brasília: ENAP, 2018, p. 12-14.

per year, US\$ 1 trillion is paid in bribes, while US\$ 2.6 trillion is diverted through acts of corruption - values which are equivalent to 5% of global GDP, that is, corresponding to the total wealth produced on the planet each year⁸. The global campaign jointly launched by UNDP and UNODC recognizes corruption as one of the biggest impediments to achieving sustainable development goals. Added to this are the social and political losses related to income concentration. According to the ranking published by *The Economist magazine*, the sectors of the economy most susceptible to corruption concentrate Brazilian billionaires and represent around 2.5% of the country's gross domestic product – GDP ⁹.

One of the recommendations set out in the executive summary of the Report produced by Transparency International in 2022 is that countries with the highest IPC scores need to “*be firm in cracking down on international bribery and professional enablers who are complicit in these practices, such as bankers and lawyers. They also need to take advantage of new forms of cooperation to ensure that illicit assets can be effectively tracked, investigated, confiscated and returned to victims.*”¹⁰

Actions aimed at combating this evil, subject to agreement between Brazil and other signatory countries in international governmental organizations, such as the OECD, UN and OAS, in addition to receiving the influence of data produced by those organizations ¹¹, as well as informal actors, depend the development and formatting of transnational public policies to be effective.

In this context and for the scope of this article, it is important to establish the

differences between a global public policy and a transnational policy, in order to delimit the analysis, to the concept of transnational public policy, in view of its impacts on the investigation of cross-border bribery practices.

International politics can be seen as that carried out between Nation-States; there are no common rules established in a cooperative and coordinated manner between countries, but internalized standards in each country with the aim of allowing each State to act in tackling a given common problem between nations; can be conceptualized as one that is developed, implemented and disseminated with the effective participation of actors, groups operating at the international level or through international, national or local governance structures¹². In an attempt to contextualize the term “global” in terms of public policy, Emily Bauman and Sarah Muller point out that the term means the possibility that all countries share the same problems of a given public policy, regardless of the existence of effective interaction between them¹³. Transnational politics goes beyond the limit of the national State, as its construction is influenced by different actors, such as non-governmental organizations, informal networks, among others¹⁴.

Considered as an international phenomenon, corruption must be tackled at the international level through transnational public policies, under penalty of not achieving the minimum effectiveness that is expected so that nations around the world can achieve better levels of development from the

availability greater volume of resources spent on corruption. The main cause of corruption problems experienced at the transnational level and within the national territory may be related to the insufficiency of public policies adopted by public authorities¹⁵ in this field, whether internationally or internally.

If Brazil’s transnational anti-corruption public policy focuses on combating bribery, its effectiveness must be investigated and possible flaws that could distort its application must be reduced.

In this article, the deductive method was used to analyze the international and national standards established with that objective, as well as the review of academic literature referring to the basic categories established by Global Administrative Law to establish the concept of global administrative law, used here for the analysis of the OECD Convention standards that deal with jurisdiction over bribery.

TACKLING CORRUPTION WITH THE INSTITUTION OF A TRANSNATIONAL PUBLIC POLICY

No country is immune to corruption¹⁶. Previously seen solely as a public problem for each nation-state, in which the concern was with the payment of bribes to a public agent with a view to obtaining undue benefits, corruption acquired the *status* of a transnational public problem to be faced (prevented and combatted) in its characteristics, causes and consequences, and

12. Orenstein, MA *The new pension reform as global policy*. *Global Social Policy*, vol. 5, number: 2, p. 175-202, 2005. Available at: Accessed on: June 20, 2023.

13. Bauman, Emily; Miller, Sarah Deardorff. *Comprehensive literature review of Global Public Policy. Creating a framework for understanding Global Refugees Policy*. *Refugee Studies Centre, University of Oxford. CSR Working Paper Series*, number: 87, 2012, p. 8. Available at: Accessed on: June 20, 2023.

14. FARIA, Carlos Aurélio Pimenta de. **Public Policies and International Relations**. Brasília: ENAP, 2018, p. 13.

15. CRESPO, André Pereira; VARELLA, Marcelo Dias. The insufficiency of public policies in the penitentiary system to respond to the unconstitutional state of affairs: a problem common to all powers. *R. Fac. Dir. UFG*, v. 43, p. 01-24, 2019.

16. Organization for Economic Co-operation and Development – OECD. Available at: Accessed on June 14, 2023.

possible solutions or alternatives¹⁷. Therefore, as a matter of public interest, transnational corruption must be faced with public policies that must be formulated and developed by those who manage and are interested parties in transnational businesses.

In a scenario characterized by interdependence and the actions of different actors, with different preferences and powers distributed in a non-symmetrical way, the coordination of actions, as well as cooperation and communication can guarantee better results and effectiveness of public policy¹⁸. Therefore, when it comes to confronting transnational corruption, no actor alone will be able to produce the results desired by public policy, especially because the financial, political and organizational resources necessary for its effectiveness are distributed among all States, governmental and non-governmental organizations.¹⁹

Global interdependence encourages the coordinated action of national States through the use of instruments capable of achieving the effectiveness of public policy²⁰, so that each State is a debtor and a creditor of a transnational anti-corruption policy, depending on the degree of its internal corruption and functioning. of its control systems²¹. This greater degree of interdependence²² demands the adoption of coordinated action strategies, measures aimed at normative alignment and cooperation between global actors, especially so that they are able to face the sophistication, strengthening and expansion of organized

crime in the transnational space.

The Convention of the Organization for Economic Co-operation and Development – OECD represents international encouragement, especially from countries that are part of the Organization, in order to regulate and harmonize instruments for combating transnational corruption by countries around the world. Currently, this public policy was established through accession by countries and, as a result, the organization began to expand its influence into domestic law.

Brazil's greater insertion in the global context of anti-corruption public policy stems from the importance of the Brazilian economy achieved through the economic growth of the BRICs, as pointed out in the third Report of the Working Group on Transnational Bribery of the Organization for Economic Cooperation and Development – OECD²³. With a view to overcoming its economic and social problems arising from corruption and aligning itself with the global agenda of reducing levels of transnational corruption, Brazil established Law number: 12,846, of August 10, 2013, later regulated by Decree number: 8,420, of 2015, revoked by Decree number: 11,129, of 2022, and the administrative responsibility of legal entities for cross-border bribery practices, as well as leniency agreements and the administrative accountability process as instruments of its transnational anti-corruption public policy.

The Anti-Corruption Law represented an

17. PIETH, Mark. International Cooperation to Combat Corruption. In: *Corruption and the global economy*. Kimberly Ann Elliot (org); translated by Marsel Nascimento Gonçalves de Souza. Brasília: Editora Universidade de Brasília, 2002, p.185.

18. CALM. Paul; COSTA, Arthur Trindade Maranhão. op. cit. p.13. Available at: <http://periodicos.unb.br/index.php/rp3/article/view/9126/6853>. Accessed on: February 12, 2017.

19. CALM. Paul; COSTA, Arthur Trindade Maranhão. op. cit. p.13. Available at: <http://periodicos.unb.br/index.php/rp3/article/view/9126/6853>. Accessed on: February 12, 2017.

20. CARLI, Carla Veríssimo de. Money laundering – ideology of criminalization and discourse analysis. Ed. Porto Alegre: Verbo Jurídica, 2012. p. 246.

21. KLITGAARD, Robert E. *Controlling Corruption*. University of California Press, 1.ed. 1988, p. 23.

22. Available at: Accessed on: June 14, 2023.

23. Report of the OECD Working Group on Bribery, 2014. Available at: https://www.gov.br/cgu/pt-br/assuntos/articulacao-internacional/convencoes-internacionais/convencao-da-ocde/arquivos/avaliacao3_portugues.pdf. Accessed on: June 28, 2023.

opportunity to incorporate new instruments to combat transnational corruption in the Brazilian legal system, as demonstrated by the Explanatory Memorandum of the Bill – PL number: 6,826, of 2010, which preceded it:

The draft aims to fill a gap in the Brazilian legal system regarding the liability of legal entities for committing illegal acts against the Public Administration, especially for acts of corruption and fraud in bidding and administrative contracts. It is known that corruption is one of the great evils that affect society. The political, social and economic costs it entails are notorious. It compromises political legitimacy, weakens democratic institutions and the moral values of society, in addition to generating an environment of insecurity in the economic market, compromising economic growth and scaring away new investments. Controlling corruption therefore plays a fundamental role in strengthening democratic institutions and enabling the country's economic growth.

4. The gaps referred to here are those relevant to the absence of specific means to reach the assets of legal entities and obtain effective compensation for losses caused by acts that benefit or interest, directly or indirectly, the legal entity. It is also necessary to expand punishable conduct, **including to meet the international commitments assumed by Brazil to combat corruption.** [...]

Furthermore, the draft bill presented **includes the protection of foreign Public Administration, due to the need to meet the international commitments to combat corruption assumed by Brazil when ratifying the United Nations Convention against Corruption (UN), the Inter-American Convention to Combat Corruption (OAS) and the Organization for Economic Co-operation and Development (OECD) Convention on Combating Corruption of Foreign Public Officials in International Commercial Transactions.**

8. With the three Conventions, Brazil is obliged to effectively punish legal entities that carry out acts of corruption, especially the so-called transnational bribery, characterized by the active corruption of foreign public officials and international organizations. Therefore, it is urgent to introduce regulations on the matter into the national legal system - which, in fact, the country is already being charged with - as the change promoted in the Penal Code by Law number: 10,467, of June 11, 2002, which typified active corruption in international commercial transactions, only affects natural persons and does not have the power to affect legal entities that may benefit from the criminal act. [emphasis]

From reading the Explanatory Memorandum of PL number: 6,826, of 2010, it can be seen that confronting transnational corruption was considered strategic from both preventive and repressive aspects. It was pointed out that the bill aimed to fill the gaps and adapt to the international commitments signed by Brazil ("*hard law*" and "*soft law*" obligations), and to encourage the establishment of preventive mechanisms. In this scenario in which combating transnational corruption has become a national policy established by Brazil based on agreements agreed by the country with the signing of the OECD Convention, it becomes extremely important to verify the applicability of the international standard and the established national standards from there, to achieve that objective.

Studies carried out within the scope of Global Administrative Law regarding the criteria considered necessary for the institution of an administrative standard applied transnationally may help to understand the standard of the OECD Convention that deals with national jurisdiction for the investigation of bribery committed by national companies abroad, and its applicability in Brazil.

THE TRANSNATIONAL DIMENSION OF ADMINISTRATIVE LAW

As a global normative phenomenon, the policy of confronting transnational corruption challenges and is challenged by the state legal monopoly and territoriality²⁴, given the difficulties faced by administrators²⁵ in discovering a global legal space²⁶ in which the normative force of Administrative Law is supposedly inserted. Global (DAG).

“Some believe that administrative law is always domestic par excellence and that if it is global, then it cannot be administrative law, since global law concerns relations between states²⁷.”

It turns out that the emergence of this theoretical field called Global Administrative Law is justified by the presence of these global phenomena, capable of constituting the global administrative order, sometimes located on the margins of States and with the ability to regulate themes traditionally linked to the public interest, which can be described, categorized and standardized. The influence of North Americans and Europeans, and the consequent intensification of legal relations of a transnational nature and the actions of non-state organizations, gave rise to this new field of studies with different aspects of the so-called Global Administrative Law – DAG,

with the aspiration of go beyond the field of existing disciplines, such as International Administrative Law – DIA (branch of Public International Law) and International Administrative Law – DAI²⁸.

International Administrative Law is different from what is considered International Administrative Law, which also differs from the DAG published by the *Institute for International Law and Justice (IILJ) of New York University*, where the main protagonists of research involving the administrative law of global aspirations. But there is a common element between the DIA and the DAI, namely, the extraterritoriality of Administrative Law, however, with the national State as the central figure. The DAI is responsible for establishing national laws that deal with the interests of different countries, while the DIA is concerned with legal regimes relating to the organization and functioning of international organizations, as well as substantive norms aimed at regulating internal legal situations, international or transnational²⁹.

The DAG demonstrates and reinforces its value from the moment the state figure ceases to play a central role in extraterritoriality and begins to play a leading role in studies and discussions in the administrative sphere³⁰.

From the perspective of the founders of the New York University School of Law, among the five types of global regulation that exist

24. SOUSA, Otávio Augusto Venturini de Sousa. **Theories of Global Administrative Law and Standards: challenges to the statehood of Law.** São Paulo: FGV, 2019, p. 50-60.

25. ROQUE, Miguel Prata. *The transnational dimension of administrative law: a cosmopolitan view of legal-administrative situations.* Lisbon: AAFDL. 2014. p. 33-61.

26. CASSESE, Sabino: *The global legal space.* *Revista de Administración Pública*, n. 157, p. 11-26, 2002. SASSEN, Saskia. *The global inside the national: A research agenda for sociology.* *Sociopedia. isa*, v. 1, p. 3-10, 2010. SASSEN, Saskia. *Globalization or denationalization*, 10 *Rev. Int'l Pol. Econ*, v. 1, number: 6, p. 14-15, 2003. SASSEN, Saskia. *The global city: Introducing a concept.* *Brown J. World Aff.*, v. 11, p. 27, 2004.

27. CASSESE, Sabino: *Administrative Law without the State-The Challenge of Global Regulation.* *NYU Int'l. L. & Pol.*, v. 37, p. 663-694, 2004. p. 670.

28. SOUSA, Otávio Augusto Venturini de Sousa. **Theories of Global Administrative Law and Standards: challenges to the statehood of Law.** São Paulo: FGV, 2019, p. 54-56.

29. ROQUE, Miguel Prata. **The transnational dimension of administrative law: a cosmopolitan view of legal-administrative situations.** Lisbon: AAFDL. 2014. p. 470, 472, 473, 484 and 485.

30. SOUSA, Otávio Augusto Venturini de Sousa. **Theories of Global Administrative Law and Standards: challenges to the statehood of Law.** São Paulo: FGV, 2019, p. 55-56.

for the DAG, namely: (a) administration by formal international organizations, (b) administration based on the collective action of transnational networks and cooperation arrangements between national regulatory authorities (horizontal form of administration), (c) administration conducted by national regulators in the form of treaty, network or other cooperative regimes (distributed administration), (d) administration by private intergovernmental hybrid arrangements and (e) administration by private institutions with regulatory functions³¹, the first three rely on the participation of the State that regulates transnational administrative relations (DAI and DIA) in the production of the standard, while the last two rely on non-state participation.

For Kingsbury, Krisch and Stewart, Global Administrative Law encompasses “*the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular ensuring that they meet adequate standards of transparency, participation, decision motivation and legality, and providing effective review of the rules and decisions made by these bodies*”³². Pragmatically, they are concerned with pointing out legal solutions to global governance problems.

31. KINGSBURY, Benedict; KRISCH, Nico; STEWART, Richard B. The emergence of global administrative law. *Law and contemporary problems*, v. 68, number: 3/4, 2005. p. 20.

32. KINGSBURY, Benedict; KRISCH, Nico; STEWART, Richard B. The emergence of global administrative law. *Law and contemporary problems*, v. 68, number: 3/4, 2005. p. 28.

33. CASSESE, Sabino: *What is Global administrative law and why study it. Global administrative law: An Italian perspective. RSCAS Policy Paper*, vol. 4, p. 1-10, 2012. p. two.

34. *Essays on global administrative law and its application in Brazil*, Organizer Michelle Ratton Sanchez Badin. São Paulo: FGV Direito SP, 2016, p. 119-120.

35. An example from the global arena is provided by the standards generated by the *Codex Alimentarius Commission*. These are not, in and of themselves, mandatory; They are given binding force by the World Trade Organization. One authority produces rules, another gives them binding force. The rule is not binding from the beginning, but only because another authority imposes compliance on those under its jurisdiction. [...] Global Administrative Law is not just global, not just administrative and not just legal. It is not just global, because it includes many supranational regional or local agreements and authorities. [...]. **Global administrative law is not just law, because it also includes many types of soft law and standards.** (...) Global Administrative Law is deterritorialized. Global regulatory regimes present legislation (treaties, rules, policies, *standards, soft law*) without legislatures (CASSESE, Sabino: *Administrative Law without the State-The Challenge of Global Regulation*. NYUJ Int'l. L. & Pol., v. 37, p. 663-694, 2004. p. 675).

Based on research from another of the main schools focused on the study of DAG, it points to an environment in which the State accepts “losing” part of its autonomy or sovereignty in exchange for influence in a broader scope than the national one³³.

In the context of globalization, International Law and its institutions are playing an increasingly important role, especially in relation to developing countries, which are “*obliged to cede their political, social and economic sovereignty to international institutions*”, which is why it points to the emergence of a Global State made up of various international institutions with the ability to regulate the economy, politics and social life of national States³⁴.

In the case of this article, the Organization for Economic Cooperation and Development – OECD gave transnational binding to its anti-bribery and anti-corruption Convention and its evaluation reports in relation to the actions of countries, including Brazil, and established standards regarding the implementation of policies and actions aimed at combating bribery and transnational corruption, in the same line as that pointed out by Cassese when citing the World Trade Organization³⁵.

However, it is questioned whether the absence in the OECD Convention standard of procedures and criteria for defining the most

appropriate jurisdiction for investigating cross-border bribery practices meets Brazil's objectives of combating infractions of that nature and meets its own expectation of the international organization regarding the fight against cross-border bribery by our country. This is because, through Brazil's Assessment Report on the implementation of the Convention drawn up in October 2014, it was recommended "that Brazil take all necessary measures with a view to establishing jurisdiction over legal entities, provided for in Article 28 of the Anti-Corruption Law, more comprehensive [...]". The evaluation team recommended that the Working Group continue "monitoring how jurisdiction is exercised over natural and legal persons when the crime is committed in whole or in part abroad".

Corruption is a subject that demands from legal interpreters the understanding that combating it involves the establishment of a transnational public policy that depends on specific instruments and the actions of global actors³⁶. established by these transnational actors, including richer national states (United States and European Union), on national public policies³⁷, as pointed out in previous lines, at the same time that transnational corruption takes advantage of the heterogeneity and inconsistencies of the various laws to expand and, in³⁸this sense, it is essential that effective strategies are adopted to combat this evil.

The existence of gaps in the OECD Convention standard leaves it up to national

States to define the "best" jurisdiction for investigating cases of bribery committed abroad and, at a transnational level, there is a risk that this definition will occur by the most powerful and influential, which may not meet the national objective and that indicated by the Organization itself, of internally combating the practice of harmful acts by national companies in foreign territory. The State is responsible for playing its role in the global arena, as it is an indispensable instrument of global institutions, whether as a manager of a non-state entity or by establishing networks with international governmental and non-governmental organizations³⁹. "Global institutions derive their jurisdiction and powers from national governments."⁴⁰

Therefore, it is of fundamental importance to create a harmonious transnational system, to be observed by all OECD Member States to, in addition to facilitating the investigation of cases, promote the implementation of policies to combat corruption by all countries affected.

To this purpose, in the quest to achieve and make Brazilian interests effective, it is necessary in our opinion and without the intention of exhausting the discussions, to determine the nature, character and limits of the transnational norm established by the OECD, in light of an evolving Global Administrative Law, as proposed by Benedict Kingsbury, Nico Krisch and Richard Stewart⁴¹, especially with the establishment of substantive and procedural rules negotiated and clearly presented by the countries involved.

36. PFLUG, Samantha Ribeiro Meyer. OLIVEIRA, Vitor Eduardo Tavares. **Brazil and the international fight against corruption**. BRASÍLIA: Federal Senate Legislative Information Magazine, a.46, n. 181. Jan./Mar. 2009, p. 188.

37. FARIA, Carlos Aurélio Pimenta de. **Public policies and international relations**. Government and Public Policies Collection. Brasília: Enap, 2018, p. 13.

38. CASTRO, Tony Gean Barbosa de. **Tackling transnational corruption: essentiality of international cooperation**. RDPJ. Brasília: Jul-Dec-2018, Year 2, number: 4, p. 227-244.

39. CASSESE, Sabino: *Global administrative law: The state of the art*. *International Journal of Constitutional Law*, vol. 13, number: 2, p. 465-468, 2015. p. 467.

40. CASSESE, Sabino: *What is Global administrative law and why study it*. *Global administrative law: An Italian perspective*. RSCAS Policy Paper, vol. 4, p. 1-10, 2012. p. 4.

41. KINGSBURY, Benedict; KRISCH, Nico; and STEWART, Richard. B. *The emergence of Global Administrative Law*. In: *LAW AND CONTEMPORARY PROBLEMS*, vol. 68:15, Summer Autumn, 2005.

THE CONSEQUENCES OF TRANSPOSING THE GLOBAL ANTI-BRIBERY STANDARD TO THE NORMATIVE AND REGULATORY DESIGN OF BRAZILIAN JURISDICTION

The standard of the OECD Convention that deals with the investigation of transnational bribery points out that countries harmed by practices of this nature must establish among themselves the one with the most appropriate jurisdiction to do so, but it does not dictate how the countries will make this choice and what the criteria or parameters to be used for this purpose.

When dealing with the construction of a standard that is intended to be international, studies within the scope of Global Administrative Law establish three basic categories with regard to the concept of 'Law'. So, let's check it:

- a) constitutive administrative law, which constitutes the legal authority of any administrative body and requires delegation of authority to act at the national level;
- b) substantive administrative law established by the administrative body, including legislative and judicial or decision-making acts; It is
- c) administrative procedural law that governs the way in which the administrative body can act.

With regard to the latter, DAG administrators say that there must be

administrative procedural law at an international level that regulates the way in which the administrative body can act in the global space.

It turns out that, in the case presented, this procedure was not established by the OECD Convention on combating transnational bribery, so there is a risk that the most influential and richest countries dictate not only the rules, but also lead the investigations and the gains obtained from them, to the detriment of others.

When dealing with the influence of the richest countries, Manuel Ballbé states that globalization is a product of Americanization, which extrapolated its administrative and regulatory model to the entire world⁴². The characteristics of the North American legal system and *US Administrative Law* began to influence the European continent and international institutions, such as the United Nations, with the aim of establishing a regime focused on the protagonism of the individual and extraterritoriality.⁴³ Cases drawn from the application of laws such as *US Foreign Corrupt Practices Act – FCPA* of 1977, demonstrate the incidence of North American jurisdiction in facts occurring outside its territory due to nationality⁴⁴, or even in the absence of this characteristic⁴⁵.

Due to the marginalization and lack of coherence of the Brazilian legal system, which is also silent regarding its jurisdiction in relation to action against cross-border bribery, national Public Law may start to coexist in this field, with the existing dilemma

42. BALLBE, Manuel. The future of it administrative right in globalization: get in the Americanization and the Europeanization. Public administration magazine, n. 174, p. 215-276, 2007. p. 216 and 218.

43. VENTURINI, Otávio. Theories of Global Administrative Law and standards.

44. VENTURINI, Otavio; CARVALHO, André Castro; MORELAND, Allen. General Aspects of US Foreign Corrupt Practices Act (FCPA). In CARVALHO, André Castro; BERTOCCELLI, Rodrigo de Pinho; ALVIM, Tiago Cripa; VENTURINI, Otavio. Compliance manual. Forensics: São Paulo. 2019. p. 331.

45. *All About Panalpina. FCPA Professor*. Available at: <http://fcpaprofessor.com/all-about-panalpina/>. Accessed on June 15, 2023. Case of United States V. Panalpina, Inc. Panalpina World Transport (Holding) Ltd., headquartered in Switzerland and therefore outside of American territory, was punished by the DOJ and SEC due to an operation bribery of foreign officials. Bribery actions occurred between 2002 and 2007 involving countries such as Angola, Azerbaijan, Brazil, and Russia

of the predominance of States United States and the European Union in imposing their standards, promoting adjustment costs for their maintenance in the market ⁴⁶. Jonathan R. Macey criticizes what he calls regulatory imperialism, which consists of the ability of a nation-state to unilaterally impose its regulatory preferences on the domestic regimes of other countries ⁴⁷.

In a similar sense, BS Chimni points out, when he says that “*Contemporary International Law and its institutions have an imperial character: a transnational capitalist class (CCT) has emerged and has been shaping International Law and its institutions in its favor*” ⁴⁸. Fundação Getúlio Vargas – FGV-SP has also criticized the effects of legal globalization on Brazilian institutions ⁴⁹.

In this sense, the absence of procedures and criteria in defining the most appropriate jurisdiction for investigating cross-border bribery practices tends to reinforce the leading role of the strongest and most influential States in combating infractions of that nature. Leaving it up to national States to define the “best” jurisdiction may create the risk of this definition being made by the most powerful and influential, which may not meet the national objective of combating the practice of harmful acts by national companies in foreign territory.

CONCLUSION

The ideal would be to establish a public policy to combat global corruption, with the adoption of common rules established in a cooperative and coordinated manner between countries, but it is known that the challenges to establishing this space or global scenario are great, as When it comes to building international public policy, international partners are competitors ⁵⁰and public policy tends to work if there is a “win-win” because it exists to satisfy the largest and most powerful global actors.

In addition to these conflicts of interest between the States involved based on impositions of the strongest in many cases, there are also institutional power limits on the actions of transnational organizations and regulatory networks themselves, in addition to those imposed by the domestic rules and culture of each country ⁵¹. As a consequence, the standards they establish are *soft standards*, with “loose” applicability and effectiveness that can be questioned.

In the case of the OECD Convention to combat corruption of foreign public officials in international commercial transactions, the standard is silent regarding the criteria to be used in the procedure for defining the most appropriate jurisdiction for the initiation of proceedings to investigate a transnational offense when more of a State party to the Convention has jurisdiction over it. The rule simply establishes that the parties involved must, at the request of one of them, deliberate

46. DREZNER, Daniel W. *Globalization, harmonization, and competition: the different pathways I'm policy convergence*. *Journal of European Public Politics*, vol. 12, number: 5, p. 841-859, 2005. p. 846.

47. MACEY, Jonathan R. *Regulatory globalization as a response to regulatory competition*. *Emory LJ*, v. 52, p. 1353-1379, 2003. p. 1367-1371.

48. *Essays on global administrative law and its application in Brazil*, Organizer Michelle Rattton Sanchez Badin. São Paulo: FGV Direito SP, 2016, p. 119.

49. *Essays on global administrative law and its application in Brazil*, Organizer Michelle Rattton Sanchez Badin. – São Paulo: FGV Direito SP, 2016.

50. BALLBE, Manuel. *The future of it administrative right in globalization: get in the Americanization and the Europeanization*. *Public administration magazine*, n. 174, p. 215-276, 2007. p. 216 and 218.

51. VERDIER, Pierre Hugues. *Transnational Regulatory Networks and Their Limits*. Available at: Accessed on June 30, 2023.

on the determination of the most appropriate jurisdiction to initiate proceedings.

Therefore, there is a risk of the richest and most developed nations becoming the protagonists in a scenario of global imperialism, so that nations with lower levels of development are supporting and harmed, including the non-effectiveness of their policies. internal initiative to combat transnational bribery carried out by its national companies, including the division of the proceeds of sanctions applied by the country with the 'best jurisdiction' for illicit practices outside its territory.

Therefore, it is necessary to discuss the criteria and procedures to be adopted in cases of this nature in the global space, so that gaps such as those mentioned can be filled in the national legal system with regard to administrative procedural law on a global basis. The discussion about a domestic and transnational administrative procedure to say how things will work in the area of investigating cross-border bribery is of fundamental importance so that the Brazilian policy to combat this illicit act can actually be implemented in the country and have effective results for the Brazil.

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