

# **CORPORATE SOCIAL RESPONSIBILITY AND CORRUPTION: BRAZILIAN PERSPECTIVE**

How to comply with CSR in Corrupt Countries



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# 1 INTRODUCTION

## 1.1 The legal sources and presentation of the paper

The current vision of society no longer accepts that companies simply act in accordance with the Law. The philosophy that “companies’ economic inefficiency can harm society”, which could be the base for the idea that companies just have to take care of their own profits, is no longer supported<sup>1</sup>. Increasing discussions on environmental issues, the strengthening of civil society’s voice in a global context, the changes in State’s structure and the existence of extreme poverty have set the stage for discussions on the importance of socially responsible action by Corporations. The society expects companies to have social projects and to engage effectively in solving problems external to them.

Corporate Social Responsibility addresses the social commitment of companies to world problems. This commitment is no longer within the individual sphere, i.e., just on the employees’ side, but is also linked to the day-to-day of companies, to their development policies.<sup>2</sup>

However, in the exercise of their activities and performance of their social obligations, Corporations keep close connection with States, whether by submitting themselves to the rules and inspections by the authorities, or when applying for government certificates or

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<sup>1</sup> AZAMBUJA, M. Lecture given in the Seminar: “Company, Corporation Responsibility and Social Investment”; in Banco Nacional de Desenvolvimento Econômico e Social (BNDES). Rio de Janeiro, October, 2001.

<sup>2</sup>[http://www.ead.fea.usp.br/Semead/7semead/paginas/artigos%20recebidos/Socioambiental/SA18\\_Mapeando\\_selva\\_de\\_teorias.PDF](http://www.ead.fea.usp.br/Semead/7semead/paginas/artigos%20recebidos/Socioambiental/SA18_Mapeando_selva_de_teorias.PDF)

licenses to carry out their work and projects. In this relation with governments, corruption, in its many ways, may hamper the operational process, or even raise the cost of productive investment and social projects, making it impossible to develop them.

In the public sector, acts of corruption such as misappropriation of funds, preference of suppliers – which will, possible, make products or services more expensive to be chosen on account of bribes - have a direct impact on the social rights of the population, since those deviations from public budget will represent a direct reduction of investments in social policies. A corrupt State does not have enough money to provide an appropriate educational infrastructure, since it will have to pay low salaries, which will result in less qualified teachers and lower quality education; or, even, weak public health services due to the lack of funds to build healthcare centers or hospitals; and, even worse, the reduction of funds to invest in food programs.

The same may happen with companies. If they need to spend part of their budget in corrupt acts, they will not be able to comply with social projects or even environmental protection systems.<sup>3</sup> In other words, corruption may make it impossible for companies to find basic conditions to comply with their corporate social responsibility (CSR) obligations. Hence, CSR cannot work unless corruption is reduced. It is essential for business society to fight corruption, not as part of CSR obligations, but as pre-requisite to be able to comply with CSR.

With more focus on that issue and attention being paid to sustainability and transparency in International Business, many countries are now making greater efforts to eradicate corruption, which will create proper conditions for a deeper involvement of business groups in social responsibility actions.

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<sup>3</sup> 2007, International Council on Human Rights Policy; THE POLITICISATION OF ANTI-CORRUPTION CAMPAIGNS - José C. Ugaz S. M., p. 10. Available at: <http://www.ichrp.org/en/working-papers>

In view of this scenario, the purpose of this paper is to show the negative impact that corruption in the public sector can have on Business and, therefore, in Corporate Social Responsibility.

For clarification purposes, we will first address a legal approach of corruption and CSR, as well as some historic facts.

In the next chapter, an overview of the parallel between States and enterprises activities will be discussed, in order to establish a line of connection and influence between the two sectors. The central idea is that companies can be held liable when, from this interaction of obligations with the State, damages are caused to the society.

In chapter 3, an analysis of how companies can avoid corruption and Human Rights abuses will be made. We will analyze whether and how Corporations can protect their business against corruption, enabling CSR. During this chapter, a number of specificities relating to each process will be analyzed.

Finally, Chapter 4 will discuss whether the private sector can take measures to help the State promote a more honest and transparent environment, not only by reducing the number of businesses involved in acts of bribery and corruption, but also by interfering in public policies in a more direct way.

However, it is important to clarify that for the sake of brevity, among the different forms of corruption and their impact on CSR policies, as well as the focus of CSR, this paper will only deal with: (i) corruption in the Public Sector; (ii) the direct impact of corruption; and (iii) the external focus of CSR (environmental issues, relation with society, etc.). Corruption in the Private Sector, the indirect impact of corruption, focus on labor law and Human Rights debates are, thus, outside the scope of this paper.

Nevertheless, most of the theoretical work found on corruption and CSR tends to concentrate on aspects internal to companies, discussing corruption within business transactions or the legal obligation to comply with CSR, but hardly addressing the relevant legal issues external to corporations, such as conditions to comply with CSR or corruption in the public sector. Despite a comprehensive search of legal libraries and databases, the amount of legal work found on external aspects was not significant when compared to the time spent.

Thus, when a reader observes this paper's presentation, discussions and conclusions, he/she should bear in mind that articles and information found on websites of the main NGOs responsible for those debates provided the main legal source for this paper.

## 1.2 Regulatory Reforms

### 1.2.1 Corruption

In Brazil, several types of reforms have taken place in the past years. International Law has been ratified and national Law is keeping a closer watch on corruption.

On the international level, Brazil has ratified three international conventions against corruption: the United Nations Convention against Corruption (UNCAC), on June 15, 2005; the Inter-American Convention against Corruption, of the Organization of American States (OAS), on October 7, 2002; and the Convention on the Bribery of Foreign Public Officials in International Business Transactions, of the Organization for Economic Cooperation and Development (OECD), on August 24, 2000.

On the national level, Brazil has enacted laws on and taken measures for transparency, integrity and ethics; confidentiality of data; monitoring of public budget and spending;

disciplinary procedures and money laundering<sup>4</sup>; all in an attempt to implement anti-corruption methods.

Specific rules have existed since 1990, but the majority was created from 2001 to 2005. Even a General Comptroller's Office (CGU), was created in 2001. CGU is a Federal Government agency in charge of assisting in defending public assets and enhancing management transparency through internal control activities, public audits, corrective and disciplinary measures, corruption prevention and combat, and coordinating ombudsman's activities.

Previously, the main focus was on basic matters as standards of conduct for public offices. Definitions of corrupt acts are described in some articles of the Penal Code, such as:

Article 313 on Concussion: *“obtaining an undue advantage, for oneself or for others, directly or indirectly, as a result of one’s public office. Penalty - imprisonment from two to eight years and fine”*; or

Article 317 and 333, on Passive and Active corruption, respectively: *“Art 317 - Request or receive, for oneself or for another person, directly or indirectly, on account of one’s position, an undue advantage, or promise to accept such advantage: Penalty - imprisonment from two to twelve years and fine. ”*; *“Art 333 - Offer undue advantages or promises to a public official with the purpose of obtaining, omitting or delaying an official act: Penalty - imprisonment from two to twelve years and a fine.”*<sup>5</sup>

In addition, crimes of Corruption are also mentioned in other Brazilian Laws, such as the Law preventing Crimes against the tax order and against consumers (Law No. 8,137/90); or Law banning the unlawful enrichment of public officials (Law No. 8,429/92); and also, Money Laundering or concealment of property, rights and values Law (Law No. 9,613/98).

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<sup>4</sup> <http://www.cgu.gov.br/AreaPrevencaoCorrupcao/Legislacao/>

<sup>5</sup> Free translation by the author.



But with time and under the pressure of society, the Legislative began to develop more precise rules, addressing issues such as unlawful enrichment and Ethics of the Federal Executive Branch. Some examples:

- **Treatment of conflict of interests** – There is a bill in the National Congress (bill No. 7,528/2006) which deals with situations generated by the conflicts between public and private interests.

- **Criminalization of unlawful enrichment** - Bill No. 5,586/2005, awaiting approval by the National Congress. Under this bill, any public official who unduly possesses, keeps or acquires for himself or for others property or securities of any nature incompatible with his financial condition incurs in unlawful enrichment, punishable by imprisonment from three to eight years and a fine. The bill is an adaptation of national legislation under Article 20 of the UNCAC<sup>6</sup>.

- **Autonomy for the crime of money laundering** - Bill No. 3,443/2008 to amend Law No. 9,613/98 ([http://www.planalto.gov.br/ccivil\\_03/Leis/L9613.htm](http://www.planalto.gov.br/ccivil_03/Leis/L9613.htm)). Thus, all the crimes taking place prior to the crime of money laundering will be abolished. That is, it will be a crime, by itself, the washing of property, rights and values coming from any criminal offense, a part of the occurrence of any prior crime.

Even though it may seem that the necessary legislative reforms to eradicate corruption are being made, or at least planned, this paper will show that the solution to the problem is still far away and remote.

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<sup>6</sup> Article 20:unlawful enrichment: “Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, unlawful enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”

## 1.2.2 CSR

Some countries' legal systems still allow unacceptable business behaviour with respect to Human Rights, Environmental protection or labor relations. These systems lack provisions on social responsibility, which makes Companies engaged in social policies follow only international standards.

This is not the case in Brazil. The Brazilian legal system provides standards regarding Corporate Social Responsibility<sup>7</sup>. However, businesses also have to follow international guidelines, since Brazil accepted them.

However, those international guidelines are just the so-called “*soft laws*”. They are codes of conduct and principles of reference made by non-government institutions and bodies that do not require approval by State, since an international Law binding to all countries is difficult to develop, due to matters of sovereignty and different cultures. Anyways, the international guidelines may influence countries that adopted them to change their own regulations to follow an internationally accepted standard.<sup>8</sup>

As main international guidelines, *inter alia*, there are OECD Principles (which cover, in addition to a broad category of human rights, employment; industrial relations; protection of the environment; and bribery.); Tripartite Declaration of Principles Concerning Multinational Enterprises; the UN Global Compact; or Regional Norms; Non-governmental Organization/ Non-profit-organization-initiated Norms; Government Initiated Norms; Industrial Association Initiated Norms; Trade Union Initiated Norms, among others.<sup>9</sup>

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<sup>7</sup> Ibid, at 4

<sup>8</sup>[http://www.ead.fea.usp.br/Semead/7semead/paginas/artigos%20recebidos/Socioambiental/SA18\\_Mapeando\\_selva\\_de\\_teorias.PDF](http://www.ead.fea.usp.br/Semead/7semead/paginas/artigos%20recebidos/Socioambiental/SA18_Mapeando_selva_de_teorias.PDF)

<sup>9</sup> <http://www.law.monash.edu.au/castancentre/projects/mchr/>

The UN Global Compact, for example, is a voluntary program aimed at engaging companies in ten universally accepted principles connected with issues of international human rights, labor rights, environmental standards and, nowadays, anti-corruption. At first, it was nine principles, apart from the anti-corruption principle. But the UN Global Compact felt that to achieve its goal and make business society comply with all its principles, it was necessary to include a principle on anti-corruption, since corruption was recognized as a major hindrance to sustainable development. In other words, even the UN Global Compact recognized that to comply with CSR it is essential that businesses first fight corruption, differentiating anti-corruption obligations, however, from CSR obligations.

Also, seeking the active involvement of the business sector, the UN Compact requires chief executive officers to send a letter to the UN Secretary-General expressing a clear commitment to their principles, as a pre-requisite to taking part in the Global Compact. However, the commitment is demonstrated by taking concrete steps within the organisation to act on the Compact principles. In addition, a Progress Report must be published on a yearly basis. The purpose of this Report is to share experiences on the Global Compact website and with companies' stakeholders. In September 2009, there were approximately 312 Brazilians participants from the private business sector, the public sector and others.<sup>10</sup>

On a national level, the Brazilian legislation did not change significantly, since even before joining those international instruments, the Brazilian legal system already had provisions that demanded a more social behavior from businesses.

Basic Human Rights are provided for in the Brazilian Federal Constitution, i.e., in the country's fundamental law. Therefore, these rights must be followed by everyone, whether

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<sup>10</sup> Information available at:

[http://www.unglobalcompact.org/ParticipantsAndStakeholders/search\\_participant.html?submit\\_x=page](http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?submit_x=page)

individuals or legal entities.<sup>11</sup> Other examples from the same legal document are the rights of employees, such as:

“**Article 7:** The following are rights of urban and rural workers, among others, that aim to improve their social conditions: XX - protection of the labor market for women through specific incentives, as provided by law; XXX - prohibition of any difference in wages, in the performance of duties and in hiring criteria by reason of sex, age, color or marital status; XXXI - prohibition of any discrimination with respect to wages and hiring criteria of handicapped workers”.

“**Article 8:** Professional associations and unions are permitted.”

An example of responsibility more guided towards the outside, i.e., where companies’ acts must not adversely affect society as a whole and not only the company’s employees, can be found in the Brazilian Corporation Law (Law No. 6,404/1976). Article **117** of such Law prescribes:

“A controlling shareholder shall be liable for any damage caused by acts performed by the abuse of its power. Paragraph 1: An abuse of power may take place in any of the following forms: (a) guiding a corporation towards an objective other than in accordance with its corporate purposes clause or **harmful to national interest**, or inducing it to favor another **Brazilian or foreign** corporation to the detriment of the shareholders' interest in the profits or assets of the corporation or of the **Brazilian economy**.” (Emphasis added).

Article **154**, in turn, provides that:

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<sup>11</sup> Article 5 of Brazilian Federal Constitution: “All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:”.

“An officer shall use the powers conferred upon him by law and by the bylaws to achieve the corporation’s corporate purposes and to support its best interests, including the requirements of the **public at large and of the social role of the corporation.**” (Emphasis added)

Hence, it is clear that Brazil has the necessary legal framework to require businesses to comply with CSR obligations. However, the conditions to put these legal provisions into practice are what lack in the Brazilian system. These conditions can only be achieved by eradicating corruption.

### 1.3 Brazilian Private Sector Initiatives

As a complement to regulatory reforms, private initiative has also helped improve the national scenario.

Brazil has signed several partnerships and agreements for the development of cooperation projects aimed towards preventing and fighting corruption, as well as improving the ability of Brazilian auditors to identify fraudulent practices and misappropriation of public resources.<sup>12</sup>

Moreover, a “Council of Public Transparency and Fight against Corruption” was created to discuss and suggest measures for the improvement of the systems’ control and to increase transparency in the public administration and implement management strategies to fight corruption and impunity. This council was an initiative from the Brazilian Government together with representatives of ten public entities, including the Federal Attorney’s Office and the Federal Audit Court, and ten bodies of the civil society, including the Brazilian Bar Association (OAB), the Brazilian Association of Media (ABI), the National Conference of

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<sup>12</sup> Partnership with the UN Office of Drugs and Crime (UNODC); agreement with the British Embassy, by General Comptroller’s Office (CGU), project: "Fighting Corruption in Brazil".

Brazilian Bishops (CNBB), and the non-profit organizations Institute Ethos and Transparency Brazil.

Moreover, the General Comptroller's Office (CGU), created the so-called "Public Transparency Portal", which allows any citizen to monitor the accounts of the federal government.

Furthermore, various non-governmental institutions engaged considerable efforts in the fight against corruption. In 2005, for instance, a Business Pact for Integrity and Against Corruption was introduced by the Ethos Institute for Business and Social Responsibility, in partnership with Patri Government Relations & Public Policy, the United Nations Program for Development (UNDP), the United Nations Office on Drugs and Crime (UNODC), the World Economic Forum and the Brazilian Committee of the Global Compact.

By signing this pact, the companies take the responsibility to disseminate the anti-corruption Brazilian legislation to its employees and stakeholders, pursuing its full application. In addition, companies undertake to prohibit any form of bribery, to work for legality and transparency by contributing with political campaigns and to demand the transparency of information and cooperate in investigations, when necessary.

In turn, companies that evaluate the risk of investment have included, since the 1980's, the item "corruption" in the assessment of countries. Moreover, indicators on the political system and the investment environment have started to include more information on political interference in bureaucratic or judicial decisions, the existence of black markets, corruption practices, nepotism and fraud in business between the State and the private sector.

As a result, business behavior has changed dramatically. Today, when a corrupt act within a company or among its transactions is found, the company is identified as a high risk business, which of course scares out investors. So today, in order to keep their investors,

companies need to prevent acts of corruption. For that purpose, many companies have developed Internal Codes of Conduct, enhanced the monitoring of employees' actions and committed to good corporate governance practices.

In a recent study published by the consultancy firm M & E Management & Excellence on the implementation of measures of governance in Latin American companies, six among the top ten companies with higher scores are Brazilian, which shows the interest and involvement of the Brazilian business sector in preventing and fighting corruption in the country.<sup>13</sup>

However, it seems that after all that has been done in Brazil, a better system to monitor corruption is still lacking. A survey conducted in 2003 by Transparency Brazil on corruption and fraud from the perspective of the private sector in Brazil shows that 96% of the surveyed companies considered corruption as an important or very important obstacle to business development in Brazil<sup>14</sup>. In the Global Fraud Report prepared in Brazil by Kroll and published in 2008, an average of 20% of a sample of 890 companies suffered the effects of acts of corruption / bribery in the previous three years.

Finally, a report published in June 2009 by the World Bank, which gathered information from NGOs, governments and research institutes, shows that Brazil did not significantly improve its mechanisms to control corruption in the last 12 years, since Brazil achieved only -0.03 points, out of a maximum score of +2.50 and minimum of -2.50. In the ranking of Latin America, Brazil was behind the Chile (+1.31) and Uruguay (+1.02), and technically tied with Peru (+0.02).<sup>15</sup>

Those statistics demonstrate that, despite all regulatory reforms and initiatives, Brazil still has a long way to go to fight corruption.

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<sup>13</sup> <http://www.management-rating.com/index.php?lng=en&cmd=210>

<sup>14</sup> <http://www.transparencia.org.br/docs/kroll-final-2003.pdf>

<sup>15</sup> [http://www.estadao.com.br/nacional/not\\_nac395368,0.htm](http://www.estadao.com.br/nacional/not_nac395368,0.htm)

With regard to CSR, large companies have innovative projects to protect the environment and children's rights. This gave rise to the enactment of the Child and Adolescent Statute<sup>16</sup>. However, we will show that even though Brazil has the necessary legal framework, there is still a lack of basic conditions to demand compliance with CSR obligations in a more complete way.

#### 1.4 Brazilian perspective of CSR throughout time

The history of CSR is cyclical and is debated from the origin of the first companies in the Modern Era. The concept has been changing, just as the perception that society has on business.

In general, the development of CSR occurred in the following way: (1) In the Middle Age, trade was not valued and the church was responsible for the distribution to the society of the economic surplus delivered by merchants, (2) reforms such as the Protestant Reform brought a more expressive manifestation from Jews in the market and above all the creation of mercantilist policies. This caused a change in behavior and economic agents began to sell under the seal of the State, valuing enrichment, and with very little social responsibility – an example of this is the intense exploitation of colonies, especially in Latin America (Modern Era) (3) With the economic liberalism, the thoughts advocated was to seek individual success as a means to achieve public benefits (4) With the collapse of the New York Stock Exchange that led to the Keynesian "revolution", the State regained

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<sup>16</sup> “Criança Esperança” Campaign, that spreading the Universal Declaration of the Rights of the Child contributed to the inclusion of Article 227 in the 1988 Brazilian Federal Constitution, which guarantees the rights of Brazilian children. Two years later, this article gave rise to the Child and Adolescent Statute, an important Law of Children Rights.



presence in the economy; and (5) In view of globalization and "neoliberalism" new requirements of social responsibility were imposed to businesses.<sup>17</sup>

The Industrial Revolution is also a landmark of CSR. The impacts that companies caused on the environment, workers and society resulted in the need to rethink the role of business in society.

The so-called shock of oil in 1973, the end of an intense growth of the world economy and the strong pressure from the environmental movement of the 70's strengthened new discussions on CSR. Policies to protect the ecosystem began to be introduced in developed countries. In this period, a concern with sustainable development emerged in international relations and in the Third Sector.

Since the 90's, companies have started to pay more attention to subjects such as product safety, honesty in advertising, environmental protection, dealing with minorities and working with individuals with special needs.

With a more global trade, the demand for companies to have higher levels of social responsibility increased.

The rise of organized civil society (or Third Sector) also plays a crucial role in this context. Although characterized by the rejection of the logic state (first sector) and market (second sector) it is increasingly acting in conjunction with them to expand their activities and raise funds.

The Brazilian industry suffered the impact of global movements and maintained the same perception of corporate social responsibility as that in the world and international trade.

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<sup>17</sup>[http://www.ead.fea.usp.br/Semead/7semead/paginas/artigos%20recebidos/Socioambiental/SA18\\_Mapeando\\_selva\\_de\\_teorias.PDF](http://www.ead.fea.usp.br/Semead/7semead/paginas/artigos%20recebidos/Socioambiental/SA18_Mapeando_selva_de_teorias.PDF)

## 1.5 The new role of Business Class

As demonstrated above, corporations are liable for the impacts that their activities can bring to society as a whole. They must follow basic principles of ethics and transparency in the relationship with their employees and stakeholders (interested parties). In addition, they must require socially responsible behavior from their suppliers, shareholders, investors and public bodies, respecting the differences, promoting educational activities and environmental preservation, promoting the welfare and quality of life of its employees, customers and the whole community.

That behavior should be enough for Companies to achieve their goals and business social function. Companies have to comply with Human Rights, Labor and Environment Law, pursuing a sustainable development.

However, nowadays, to meet basic conditions to fulfil CSR obligations, companies must also help States comply with their own obligations. Having the knowledge of that business' needs, States are trying to get advantage from the situation and waiting for the private sector to fulfil the needs of society.

Dwight W. Justice used to say that “Governments were using CSR as a substitute for their own failure to address the social consequences of globalization.”<sup>18</sup> But unfortunately this is today's reality and as the history of CSR has shown us, it is now the duty of businesses to develop societies.

Moreover, businesses should also help States fight against corruption, since they are the most affected by this practice. This assertion is quite clear in the comments made by Andrew Clapham<sup>19</sup> on the OECD Guidelines, when discussing the “union-free-zones”. It is

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<sup>18</sup> D. W. Justice, ‘The international trade union movement and the new codes of conduct’, in Jenkins, Pearson, and Seyfang (2002) 90-100, at 99.

<sup>19</sup> ‘Human Rights Obligations of Non-State Actors’ Oxford, 2006 – p. 206

demonstrated that in those zones Governments allow some exceptions on human rights protection, health, safety, or labor laws. But, in fact, States are just trying to guarantee their promises of a cheap and docile workforce, on the costs of worker's rights. It is a corrupt political decision.<sup>20</sup> In the end, it is the investors that may be extremely exposed to a situation of risk and be called to account.<sup>21</sup>

Therefore, if corporations can be liable for State abuses, it is better to help States not to commit those abuses. It is no longer just a matter of ensuring sustainable development, but also protecting their businesses from being liable from corruption practices and human rights abuses.

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<sup>20</sup> N. Klein, *No Logo* (London: Flamingo, 2001) at 210-211

<sup>21</sup> “Where one is dealing with recognizable consumer brands it is the multinational enterprises themselves rather than governments that are most sensitive to the type of reporting and complaints highlighted here. Even though the governments that have established these zones are mostly outside the OECD area, as explained above, the OECD companies are vulnerable to complaints wherever they operate.” (n 2 above).

## 2 CSR vs. CORRUPTION – A CONNECTION BETWEEN CORPORATIONS AND STATE' OBLIGATIONS

### 2.1 Establishing a connection between Corporation and State through CSR

One of the focuses of CSR is Human Rights. Andrew Clapham, the OECD Principles, the Tripartite Declaration of Principles Concerning Multinational Enterprises and the UN Global Compact divided them in three dimensions: *respect*, *protect* and *promote* human rights.

According to them, the legal obligation would be from States, and corporations would have a “secondary responsibility”.<sup>22</sup> This classification is justified first because States are the ones who can and should implement Conventions and Declarations they sign and, second, because if it was different, States might not comply with their duties.<sup>23</sup>

Corporations should apply human rights principles “within their respective spheres of activity and influence”<sup>24</sup> and not for the whole society or in the field of primary guarantees.

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<sup>22</sup> Andrew Clapham; ‘Human Rights Obligations of Non-State Actors’ Oxford, 2006 – p. 220

<sup>23</sup> ‘there is a serious risk that, if TNCs (Transnational Corporations) were given a responsibility of their own for ensuring the protection and promotion of human rights, States would find it easier to divert the blame, and the duty to take remedial action, from themselves’. Opinion prepared for the International Chamber of Commerce, ‘In the Matter of the Draft “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights”’. Opinion of Professor Emeritus Maurice Mendelson QC, 4 April 2004, at para.20. Annexed to the submission of the Confederation of British Industry to the Office of the High Commissioner for Human Rights, available at <http://www.ohchr.org/english/issues/globalization/business/contributions.htm>

<sup>24</sup> Global Compact Principle 1

The connection with State happens exactly because, in practice, the success of companies in complying with their social responsibility is directly connected with the effective fulfilment of States' duties; and, in performing its social function, companies may be directly affected by the inertia of the State, or its lack to comply with its obligations. John Ruggie argued that "The root cause of the business and human rights predicament today lies in the governance gaps created by globalization."<sup>25</sup>

Before further discussing the interaction between States' and companies' duties and providing examples of how companies should *respect*, *protect* and *promote* human rights, it is interesting to compare this classification with the view expressed in John Ruggie's report of 2008, in which he made an interesting analysis and defended that corporate social responsibility cannot be linked to a State's obligations, and that the concept of "secondary responsibility" is mistaken.<sup>26</sup>

John Ruggie defended that companies must *respect* Human Rights, and this obligation exists irrespectively of the State's duties, since is a basic social expectation. He argued that "Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social license to operate."

Society has an image from each company and this image is established depending on whether or not corporations respect human rights. Failure to comply with human rights will have a material adverse impact on a companies' image. This is also the main way to

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<sup>25</sup> Report made by John Ruggie, in 2008, to the Special Representative of the Secretary-General on Human Rights Council.

<sup>26</sup> Report of 2008, to the Special Representative of the Secretary-General on Human Rights Council, p. 15: "This formula emphasizes precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights."

achieve enforceability of *Soft Laws*. But that fact does not mean that CSR is a range of responsibilities determined only by social expectations without any connection with the State's obligations. If it was, would mean that businesses are connected to an imprecise and expansive list of responsibilities, since social expectations have certain level of unpredictability, and this may mean a 'privatization of a Government's function to define the do's and don'ts by enacting civil and criminal laws: being that not a prerogative of private actors'<sup>27</sup>.

Thus, it is clear that if States do not comply with their duties, the society's expectations over corporations may be higher than usual and almost impossible to fulfill, making companies liable even if they respect national and international standards of Human Rights., This makes even more clear the real connection between Corporate responsibility and a State's obligations. The increase of social expectation happens because society, due to the lack of action by the State, becomes more deficient and underprivileged.

Therefore, even though it is true that businesses should follow international standards, this fact alone does not mean that companies should fulfill all expectations of society. Companies do not have to deal with those expectations that are directed to States but have been not fulfilled by them due to a lack of economic interest, structural problems, or corruption.

Curiously, even John Ruggie said that "While corporations may be considered "organs of society", they are specialized economic organs, not democratic public interest institutions. As such, their responsibilities cannot and should not simply mirror the duties of States."<sup>28</sup>; as for example the particular public duty of the State to fulfill social expectations.

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<sup>27</sup> See International Chamber of Commerce and International Organization of Employers, "*the sub-Commission's Draft Norms*" (March 2004). <http://www.business-humanrights.org/Links/Repository/179848/jump>.

<sup>28</sup> Ibit 6, p. 16

It is therefore fundamental to establish a connection between the social responsibility of States and the enterprises to better clarify and define the responsibilities of each, leaving the choice of that definition not only to the vulnerable expectations of society.

Thus, confirming the idea until now held and following the initial classification presented, from a practical point of view, for companies, to *respect* human rights would be, for example, not to create impediments to their employees associated to some union, which is a right that should be ensured and protect by the State, in the national laws and through governmental protection.

Therefore, companies which respect that right should not be liable, not even through a social judgement, if their employees are not able to make associations because the State failed to provide conditions, protection or even authorization to the creation of those trade unions. This is an exclusive obligation of States that directly impacts Corporate Responsibility without being a duty in itself.

In turn, to *protect* human rights would be the company using its influence to preserve those rights, such as by terminating contracts with suppliers which do not respect human rights, but not directly supervising them, which is, again, an exclusive duty of the State. This of course includes a recommendation of *due diligence* by companies with regard to business partners, the obligation not to contribute to or benefit from human rights abuses and the indirect obligation to gather information on the human rights impact of their principal activities, which will be discussed further.

Finally, there is the obligation to *promote* human rights, which is not as clear as the others, since it is considered even by the UN General Assembly<sup>29</sup> as a prime responsibility and

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<sup>29</sup> GA Res. 53/144 ‘Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’, adopted 9 December 1998, preamble para.7.

duty of States. However, NGOs have understood that companies fail to use their influence to deter States from abusing human rights.

But, what would “companies’ influence” be? John Ruggie made a very clear distinction between two types of “spheres of influence”. He defended that sphere of influence, as introduced by the Global Compact, covers two different meanings of influence: first, the true impact of a company’s activities that may cause harm to human rights; and second, the influence that a company may have over actors that are causing harm.

The first situation would be the direct obligation of companies to respect Human Rights.<sup>30</sup> However, the second one may represent a danger for companies, which may be held liable even in cases in which they have some influence but did not cause, directly or indirectly, the harm in question. In this line of thought, John Ruggie is against the attribution of responsibility to enterprisers alone on the basis of their “influence”.

In addition, companies should be liable for government human rights abuses only if they contributed to the event or received some type of advantage from that harm, and not when they just had some kind of influence on the State.

Hence, an acceptable expectation will be that companies which have a significant amount of power, because they may exercise some direct impact in government policies, voluntarily spread international standards of human rights to governments that do not have previous knowledge or enough structure to comply with those rights. However, there should be no legal obligation for companies to do so and to “fix” political polices, since such obligation could cause unjust liability of companies, for instance when companies do not have any direct influence on a State’s acts or when the State is perfectly aware of Human Rights but arbitrarily does not apply them. In this last case, the international community should pursue liability of the State grounded on the conventions it signed.

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<sup>30</sup> John Ruggie considered that company obligation is just to respect Human Rights, using the word “protect” and “promote” just for state.



Let us imagine that a certain company wishes to carry out some social program and, in order to do that, it needs to obtain a license or certificate from the Government, but refuses to bribe any official and is denied such license or certificate. Will the company not be able to put the program into practice? Should this company leave the society without the care and protection provided by the program it wishes to implement? In those cases, what would society expect from States?

Hence, it is clear that Corporate Social Responsibility is directly connected with State's obligations. They are separated just in the specific area of influence, but still impact each other. While CSR is applicable to a more restricted area, State obligations cover business performance, since they are broader and should provide the basic conditions to enable CSR.

## 2.2 The impact of State's corruption in CSR obligations

The previous section provided a brief explanation on how corruption can impact CSR obligations by increasing costs of capital and suppressing access to investment, which reduces companies' budgets for social programs, thus increasing uncertainty and undermining long-term sustainability.

All those reasons should be enough to exemplify the damages that a State's corruption can bring to CSR obligations. However, to better understand this topic, it is important to have an overview of the classification of State corruption, which may happen in different levels, given a different impact in the CSR programs and society. For the sake of brevity, this paper will address only the levels of corruption in political, judicial and public competition, showing the impact of each of those corrupt acts in CSR.

### 2.2.1 Political Corruption

Political corruption happens in different forms and reaches companies in various ways. Among all the factors responsible for the increase of corruption in the public sector, the following can be highlighted: 1) high discretionary power of the State in the conduction and implementation of policies; 2) high bureaucracy, which negatively affects the business environment and reduces the efficiency of public administration; 3) low salaries in the public sector; and 4) a slow and inefficient judicial system, which will be discussed further.

Brazil is a Constitutional Federal Republic, and, therefore, has a decentralized political structure. There are 27 states and 5,651 municipalities, which are in charge of providing a wide range of public services. This high level of decentralization, together with high discretionary power of each representative of the government, Governors (heads of each state of the federation) or Mayors, is one of the main reasons why federal government has so much difficulty in implementing solid anti-corruption initiatives.

Misappropriation of funds, which in itself is already classified as a crime, but also a form of corruption, is the main problem.<sup>31</sup> Hence, the federal government provides funds for social programs such as food programs, but eventually the resources are diverted to rich people and politically well-connected citizens in some towns, since the public official in charge for the program receives some kind of “gift”/ “exchange of favours” / “bribery” / “kickbacks” to never carry out the program or leave it incomplete.

Furthermore, bureaucracy is also a significant factor that increases corruption. Administrative procedures are very complicated; obtaining public licences and permits is a

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<sup>31</sup> The Comptroller General of the Union (CGU) has found financial irregularities in more than 70% of the country's municipalities.

<http://www.cgu.gov.br/AreaAuditoriaFiscalizacao/AuditoriasAnuaisPrestConta/index.asp>

burdensome, time-consuming procedure.<sup>32</sup> However, in order to make profits, corporations must maintain a certain speed in the execution of their business and, therefore, need to keep their licenses and permits updated. Moreover, companies need to obtain public utilities such as telephone, electricity and water. Public officials, in turn, due to their low salaries, also need some “extra motivation” to carry out their usual tasks. Thus, there are several companies that are basked by public officials for bribes or other kinds of unofficial payments to get those usual public services done.

All those “political corrupted acts” affect the budget of the company, since they represent an extra amount of money for regular public services. This situation does not occur in the standard implementation of companies’ activities in a non-corrupt State. This means that exactly in those countries where large companies should implement more social programs they may not be able to do so, since their budgets are used for “extra payments”.

### 2.2.2 Judicial Corruption

The formal independence of judges, a fundamental principle to guarantee fairness on decision- making, is granted by several legal provisions. Also, The Judiciary’s broad functional and structural autonomy are provided for in the Constitution. But even so, state courts are often subject to political and economic influence.<sup>33</sup> Furthermore, The Brazilian legal system is complex and overburdened, thus it is a slow system.

Freedom House 2008 has observed that the judiciary, using its formal independence, instead of fight to improve the Legal System, resists changes and stops investigations of

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<sup>32</sup> “Companies (in Brazil) can expect to go through 18 administrative steps to start a business, which may take up to 152 days and cost 8.2% of GNI per capita.” Information available at the website: <http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/brazil/snapshot/>

<sup>33</sup> According to the US Department of State 2007, available at: <http://www.state.gov/g/drl/rls/hrrpt/2007/100630.htm>

judicial corruption.<sup>34</sup> According to Transparency International 2006, the general picture of the judiciary in Brazil is an inefficient and impunity system.<sup>35</sup>

Currently the only mechanism of external control over the judiciary is the National Council. However, since this body is composed mainly by judges and its decisions can be annulled by the judiciary itself the impartiality of this body could be questioned.

Moreover, high-ranking public servants are protect by partial immunity. Acts from the President, ministers, legislators and high court justices, for example, can be analyze and controlled only from the Supreme Court, an overloaded institution, which also contributes to the worsening of judicial corruption.

The World Bank & IFC in “Doing Business 2009” reported that enforcing a commercial contract in Brazil requires a company to go through an average of 45 administrative procedures, taking an average of 616 days at a cost of 16,5% of the claim.<sup>36</sup> Enforceability of contracts is even more difficult and expensive if companies have to face corruption to get the process going on. It became a very expensive process and even more cumbersome.

Thus, with a corrupted, unfair, without remedy or control, slow and expensive Judiciary, legal uncertainty grows and makes impossible for poor people and small companies to access justice. Actually, this makes it impossible for everyone to access justice..

Having access to justice means that everyone must be able to take file a case before court under equal conditions. When a judge, instead of rendering an impartial decision, favors of one of the parties based on personal, economic, political or any other reason, justice becomes corrupted and equal access to justice no longer exists, which constitutes a violation to this fundamental right.

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<sup>34</sup> Available at: <http://www.freedomhouse.org/template.cfm?page=22&country=7359&year=2008>

<sup>35</sup> Available at: [http://www.transparency.org/publications/gcr/gcr\\_2006](http://www.transparency.org/publications/gcr/gcr_2006)

<sup>36</sup> Available at: [http://www.doingbusiness.org/documents/fullreport/2009/DB09\\_Full\\_Report.pdf](http://www.doingbusiness.org/documents/fullreport/2009/DB09_Full_Report.pdf)

In this scenario, why develop social programs that does not have the possibility to provide any system of enforceability? In case society has violated their rights, the program is disrespected, to whom they can submit their complaints if the own judiciary is corrupt and unfair?

Within that perspective, CSR is, once more disregarded and may be considered a waste of time and money by most of business society that became without sufficient conditions to comply with CSR.

Therefore, judicial corruption does not affect society and businesses in the same way as political corruption. It does not affect just the state of law and CSR obligations, it also deprives violated society of any kind of remedy or even sense of what is right or wrong.

### 2.2.3 Corruption in Public Procurement / Tenders

“Public procurement: The most common form of corruption in public procurement occurs when conditions for participation in a tender competition are defined in such a way as to preordain the result. One mechanism that can help reduce this risk would be for tender conditions to be subjected to public discussion before the formal call is made.”<sup>37</sup>

However, corruption in public procurements process does not include just a criteria designed to fit specific companies, but also requesting bribes in exchange for secret information about procedures, and information leaked with the aim of influencing the outcome of tenders.

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<sup>37</sup> An advice given at CMI Report, from 2008, “Collaboration on Anti-Corruption between Norway and Brazil”, by Tina Søreide and Claudio Weber Abramo.

Also, invariably, companies are asked for contributions for individual politicians or political parties for their political campaigns, with the promise of being awarded public contracts. So, again, when it comes to public procurements, high-level politicians are involved in bribery.

All those kinds of corruption in a tender may also affect CSR when there is a financial loss for companies, since they will not have enough budget for social programs or to carry out environmental protection programs, which demand a lot of research, development of new technology and a supervision system.

The financial loss may happen after consecutive losses of business opportunities caused by a company's refusal to participate in a corruption act, for instance by bribing the public official in charge, and then losing the bid. This economic effect may harm the development of social policies, but still, most of the victims choose not to file formal complaints because they fear they might suffer sanctions and retaliation from those involved and lose even more contracts in the future.

The impact in CSR obligations by State corruption is clearly negative and should receive more attention.

### 2.3 Liability of Corporations

Since companies' responsibilities are connected with States' obligations and since developing countries usually lack enough structure to comply with their legal duty to promote, respect and protect human rights, some scholars, as well as the ICC (International Chamber of Commerce) criticize UN Global Compact Principles and argue that even when companies may have good policies, they may be held liable just for investing in those countries where governance and human rights problems are most serious.

National and international corporations can face legal proceedings in Brazil on the grounds of CSR or transparency, based on national Law or even International Law (*Hard Law*).

However, due problems as lack of structure or state's jurisdiction in most of the cases, nowadays, *Soft Law* is the most widely used remedy to achieve liability of transnational corporations, in the same way as *Hard Law*.

Thus, both "*Hard Law*" and "*Soft Law*" may have provisions to hold companies liable. The differences regarding accountability in the investment process are that *Hard Law* seeks to balance profit making with well defined social responsibility, while *Soft Law* seeks to involve business in social responsibility voluntarily and by mutual understanding.<sup>38</sup>

In addition, *Hard Law* is a binding rule, which means that the failure to comply with it may result in criminal punishment, which may affect investment if combined with other factors such as sovereign risk and high cost of labor, as a result of the need to transfer investments to regions with weaker regulations. On the other hand, *Soft Law* is not a set of rules with coercive power, but persuasive power at the most, since it may lead to shame leading to reputation risks. So it may also aggravate the social and political risks of a project.

Furthermore, both *Soft Law* and *Hard Law* increase costs of investment, but *Soft Law* also improves businesses' bottom line, since it attracts investment through a weak regulatory framework that allows innovation when implementing and monitoring social programs.

This cost, in case of *Hard Law*, is quite high in Brazil, since proceedings pursuing an analysis of CSR or transparency may cost more than the amount of the injury that will be

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<sup>38</sup> Article "Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?" Part I, by Bede Nwete, which can be found at: <http://www.germanlawjournal.com/article.php?id=820>

examined, including technical experts' fees, legal fees and other costs. In addition, such proceedings may last for more than 20 years.

Furthermore, any provision from *Hard Law* will demand a company to build schools or invest in primary health care for the entire community in their area of expertise and influence.

In this way, *Soft Law* remains the best alternative regarding issues of CSR and transparency, since it benefits not only Companies and Governments, but also stakeholders. This conclusion is supported by Bede Nwete, when arguing that “It has to be admitted that the above issues overlap, as there are no clear distinctions in certain cases between the soft law and the hard law and their effects. Nevertheless the distinction uses criteria based largely on the practical effect of adopting one approach rather than the other.”<sup>39</sup>

Thus, both sets of rules can be use to achieve liability of Companies. *Hard Law* will pursue the responsibility in court, but *Soft Law* may obtain accountability even faster than courts and in a more effective way, since the process of affecting a Company image can happen quite fast, and a company worried about its image (usually companies that sell products and services directly in the market) will work faster to repair any damage, even though this may not save the image of the executive in charge of the company's management, the CEO for example.

A company' image can be easily damaged if Corporations are unable to perform their duty of CSR because there is a lack of transparency by States, which, as demonstrated above, reflects directly on CSR obligations and makes businesses liable.

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<sup>39</sup> Ibid, at 23 – p. 26



This may cause companies to avoid investing in developing countries and discourage exploration, which will ultimately affect a country's economy and consequently, the fight against poverty.

However, that same effect may motivate corporations by arising their interest in natural resources and in investing in developing countries and supporting campaigns and policies that seek to solve, or at least minimize, the corruption problem and weak human rights enforcement.

### 3 HOW TO COMPLY WITH CSR IN A CORRUPTED COUNTRY

After the “protect, respect and remedy” policy framework proposed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business Enterprises, at its June 2008 session, the doctrine is unanimous in pointing out the *due diligence* process as the best way to avoid Human Rights abuses, knowing clients and suppliers, the society of influence and preventing corruption.<sup>40</sup>

The *due diligence* process applies internally or even externally. Applying it internally helps companies formulate strategies to ensure that its own employees, in the high level or not, will comply with CSR, respect Human Rights and refrain from taking part in corrupt acts, what can be achieved through the implementation of Codes of Conduct, internal training and re-education, follow-up, strict monitoring, among other measures. In turn, the purpose of external *due diligence* processes is to try to conceive a policy or strategy to avoid those harmful acts by others, such as States, suppliers or clients. For the sake of brevity, we will only address the interaction of those two points of view, avoiding going deeper into the internal perspective and getting further in the external one, which demands more complicated measures. This technique will be inverted with regard to CSR.

In order to comply with CSR obligations, companies must engage their efforts to prevent acts of corruption. Based on this, we will now discuss two *due diligence* processes: the

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<sup>40</sup> A traditional definition of *due diligence* is “the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation”. *Black’s Law Dictionary*, 8<sup>th</sup> edition (2006).

process to avoid corruption and the process to avoid Human Rights abuses and ensure the necessary conditions to apply CSR obligations.

### 3.1 Avoiding corruption

Many institutions, NGOs, scholars and rules suggest anti-corruption measures. Some of them, like the “Business Anti-Corruption Portal”, have very good suggestions, such as the necessary attention that should have been given to specific risks involved when choosing an agent, the process of getting information about the country and the agent, evaluating contractual conditions, determining territory, validity, remuneration and responsibilities. Nevertheless, these ideas refer only to the initial activities of a company, such as choice of representatives, premises and hiring procedures, but fail to address corruption and bribery related to the day-to-day affairs of the company.<sup>41</sup>

Others, like the Chr. Michelsens Institutt, divided anti-corruption strategies in two kinds of approaches: *transaction*-based and *institutions*-based. The purpose of the first is to guarantee that individual transactions are based on free and competitive exchange rather than bribery. The purpose of the latter is to seek reforms in the political and economic institutions of a country, to prevent corruption in the whole country and not only within a particular transaction, thus improving public and private governance, and developing a functional civil society.<sup>42</sup> However, they do not discuss any practical strategies.

Most of the rules and guidelines issued by institutions and NGOs contain a number of definitions and are very repetitive when referring to provisions of International

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<sup>41</sup> It is attached some flowcharts proposed by the Portal – Annex I and II. This Portal was developed and maintained by Global Advise Network and financed, *inter alia*, by the Ministers of Foreign Affairs of Denmark, German, Norway and Sweden. <http://www.business-anti-corruption.com/due-diligence-tools/>

<sup>42</sup> Private sector approaches to combating corruption: <http://www.cmi.no/publications/file/?3045=changing-perspectives>

Conventions, even though they are all right and necessary. However, suggestions of measures are usually quite unrealistic, as the measures suggested often fail to indicate any form of practical implementation of effective anti-corruption measures.<sup>43</sup>

Meanwhile, most of these resources are unanimous in emphasizing that the most important measure to be considered by companies is to analyze the market in which they will operate and how the politician practices and the various forms of corruption may affect their activities and products.

With that information in hands, corporations can avoid situations that can be disastrous for them and making wrong decisions can involve them in illegal situations.

The idea is that companies themselves develop their own anti-corruption strategy that fits the company's products and the markets in which the company operates. Deal with risk management, keeping in mind the market information collected, can be fundamental in corporations' practical work with anti-corruption.

Starting from this idea, we will show the main practical ways to avoid corruption. Focus will be given on measures to avoid the three forms of corruption discussed above, namely political, judicial and in tenders.

### 3.1.1 Avoiding Political corruption

As discussed in the second chapter, political corruption and bribery may happen in numerous relations and ways, such as through the misappropriation of funds, what is also

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<sup>43</sup> The Institute NORAD mentioned in its Report of 2000, about "Good Governance and Anti-Corruption Action Plan 2000/2001": "The rapidly expanding international anti-corruption literature is rich in descriptions and declarations of intents, but so far has little to offer in lessons learnt". Available at:

<http://norad.no/en/Tools+and+publications/Publications/Publication+Page?key=109368>

crime of theft of public funds; speeding up of bureaucratic procedures after payment of bribes or even requests for donations for political campaigns with promises of award of public contracts.

The first and the second examples occur when the private sector makes donations and the third example occurs when companies pay bribes. Therefore, a way to avoid corruption would be to keep close watch on the donation transaction and negotiation.

Generally, in order to implement an effective anti-corruption strategy, it is first of all important to conduct deep research on the country's situation, law and to work with organizations representing the private sector, such as chambers of commerce or business associations, since they have the right position to solve the collective action problem and get broad-based private sector support behind an anti-corruption campaign. However, companies should always pay attention to the credibility of the organization and commitment in order to avoid getting involved with a corrupt institution.

INDEM Foundation<sup>44</sup> made an important and clear division of anti-political-corruption measures. They divide the strategy in three interconnected groups:

- a) Measures adjusting the practices of the business operation.
- b) Measures defining the strategy and contents of the business' joint effort.
- c) Macro-level measures (political and administrative) aimed at change of the situation in the country as a whole. (Which will be further discussed in the fourth chapter).

The main measure mentioned to be pursued by a company as a management principle to avoid conditions for bribe, extortion, as well as remain independent from authorities, is to adjust their everyday practices to strictly comply with the current legislation.

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<sup>44</sup> A Regional Non-Governmental Foundation "Information Science for Democracy", in its Final Report of 2004, about "Business and Corruption: How To Combat Business Participation in Corruption"; available at: <http://www.cipe.org/programs/corruption/index.php>

So again, businesses should pursue a specific knowledge of laws and rulings regulating their specific sphere of business and the administrative powers involved, keeping a constant updated of that knowledge.

To act strictly within the legal parameters, companies have to spread legislation among its employees and suppliers and have to daily monitor the compliance by them. Companies should not contribute with political parties if the situation may create the perception that the intention is to obtain a business contract or advantage as a direct result of the contribution. They must keep clear financial and accounting records of donations in their books, with an oversight by external autonomy audit, making public any kind of payment to the public sector.

Moreover, enterprises have to monitor and track their contributions; whether for political parties or social programs, just to make sure that they have been applied to the intended purpose.

A very practical system to avoid bribery is indicated by Transparency International for easy implementation within companies. It shows each action that should be taken within the company structure, the person in charge of each step and the time need to implement those measures and avoid corruption in the day-to-day affairs of a company.<sup>45</sup>

For example, a primary responsibility of the owner of a company, or the CEO, is to develop an anti-corruption/anti-bribe policy, starting with a commitment by the CEO and a decision to implement a program that makes the policy possible. This should be made within one month. After that, a senior manager or project team should analyze all legal requirements, define specific risks of the company, review current practices and write the policy and

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<sup>45</sup> It is attached as Annex III of this paper. Available at:

[http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles/six\\_step\\_implementation\\_process](http://www.transparency.org/global_priorities/private_sector/business_principles/six_step_implementation_process)

process of implementation, everything in three to six months. After the development of a detailed anti-corruption program, its implementation, monitoring and assessment of results, the company should not have problems with corruption anymore, at least within the organization and its transactions.

With that kind of attitude it will be difficult for a public official to ask for bribery or to misappropriate funds. However, those measures are not enough to avoid the corruption that happens between third parties and directly affects the business of companies that comply with the Law, as discussed above.

Therefore, likewise, the company should also take steps to pursue what is called collective resistance through the already mentioned business community organizations and associations.

Those organizations will be able to, *inter alia*, develop and support campaigns to convince the State of the benefit of having a profitable and stable business atmosphere; they can facilitate the exchange of information, legislative changes and experiences among member companies, making public success measures, which may motivate companies to act within the limits of the law and avoid bribery; develop series of seminars and training courses even for small business owners or public officers, and provide more consulting services and market analysis. In addition, they will have the possibility to implement control mechanisms to monitor their members' compliance with ethical standards.

Those two approaches, private and collective, may help protect business society of political corruption. However, it is still necessary for associations and the business community to take long-term measure acting directly on State, helping with change of policies, public strategies and conflicts of Laws. However, it is important not to go beyond the private effort, which could hamper the development of individual policies by making the State's position stricter. This will be discussed in the next chapter, since it is a way to help states to take further steps to fight corruption.

### 3.1.2 Avoiding Judicial Corruption

NORAD, The Norwegian Agency for Development Cooperation, a directorate under the Norwegian Ministry of Foreign Affairs, in its Report of 2000, about “Good Governance and Anti-Corruption Action Plan 2000/2001”, mentioned that “A good regulatory framework provides the structure for the management of a country’s resources. The existence of an efficient and independent judiciary ensures compliance by instituting conditions for impartial and expeditious arbitration and settlement of disputes. Accountability of public officials reinforces business confidence, deters corrupt practices and contributes to the creation of an enabling environment for vibrant private sector activity. Transparency strengthens accountability and the quality of decision-making. Participation is necessary for generating social capital and societal cohesion”.<sup>46</sup>

So, according to the institute NORAD, the basic conditions to a company/society comply with law, is provide by an efficient and independent judiciary, which will guarantee impartial and expeditious Court system.

However, considering that the main way to companies fight political corruption would be strict compliance of law, how they can fight it if the law is not enforceable due a corruption in the judiciary? How they can pursue accountability of a corrupt public official?

Considering that it was already shown in this paper that Brazil has the necessary legal framework to fight corruption and comply with Human Rights, missing only the necessary conditions to implement the regulation, it can be conclude that this lack of condition is cause by a corruption in the judiciary. A corrupt court system does not provide the necessary conditions to society fight any other kind of corruption. In this way, society loses

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<sup>46</sup> Ibid.



not only economically, like in the political corruption, it also loses the opportunity to fight against abuses on their fundamental rights.

Judicial corruption usually happens mainly for two reasons: political or economic influence.

Political influence can be through pressure to control budget, since this is another power of the State; through the system of appointing judges; through promises of promotions, jobs for relatives or friends, etc.

In turn, economic influence will be the direct payment of bribes for judges, prosecutors, and employees or officials of the system in order to get some advantage on decisions for one of the parties. It is more widespread corruption. A survey made by Transparency International in 2006 showed that in Latin America over one person in five who had contact with justice had paid bribes.<sup>47</sup>

However, as we have pointed out, in order for a conflict meet a fair solution by courts it is fundamental to keep the impartiality of the judge, which explains why one of the most important principles of judicial administration is the independence of judges and respect for the right to have judges determinate by law and not political indication.

Some possible measures to be taken by companies are to refrain from exercising political influence, which is a corrupt act by itself. Those same measures may be taken also to avoid economic influence in the Judiciary. In addition, it is important to emphasize that a media campaign bringing the public opinion to corrupt actions is always an expressive pressure that makes authorities feel the need to punish the person responsible for corrupt acts, which may intimidate new acts of corruption.

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<sup>47</sup> Available at: [http://www.transparency.org/policy\\_research/surveys\\_indices/gcb/2006](http://www.transparency.org/policy_research/surveys_indices/gcb/2006)

Therefore, business society can prevent judicial corruption supporting the dissemination of judicial, political and private actions in the media. Meanwhile, a campaign in the media should be clear and not extremely sensationalist, so as not to confuse public opinion, which could be reason for violation of the due-process guarantees for the people accused of corruption. This can easy happen if an anti-corruption campaign is manipulated by corrupt regimes for the purpose of gaining political points, or discrediting of their political enemies - again, a political issue.

Once more, it is vital to have independent judges, who not only zealously control anti-corruption investigations and assure full compliance with due-process guarantees, but who are also free to judge cases using their own convictions and legal knowledge.

For that, enterprisers, through associations, may also promote campaigns that pursue a protection of the independence of judges.

In addition, all mechanisms to protect human rights may also help avoid corruption. Campaigns in favor of transparency and access to information, against impunity, in favor of freedom of expression, spreading regulation, among others, contribute to the fight against and to discourage acts of corruption.

Finally, special comments on aid and support of necessary judicial reform can be of great help to fight judicial corruption, but it will be discussed in the next chapter.

### 3.1.3 Avoiding Corruption in Public Procurement process

A suggestion of a measure to be taken against corruption in the bidding process has already been mentioned in the second chapter. It is an advice given by Tina Søreide and Claudio Weber Abramo, at CMI Report from 2008. They mentioned that “One mechanism that can help reduce this risk would be for tender conditions to be subjected to public discussion before the formal call is made.”

However, Brazilian bidding process is already public and a public discussion would be impracticable, since it will involve a huge population and it is not helpful to have people that do not understand what the State is selling discuss the process of sale. Moreover, the idea of expanding, somehow, the publicity of process, maybe a proven debate within the participants of tenders, which can even be published in special TV channel, so that the pursuit transparency, fulfillment of information and knowledge of legislation may be the best alternative for business society to prevent corruption also in those tenders.

A survey made within small and medium sized companies operating in developing countries, shows that to analyze the risk of participating in a public tender, companies should pay more attention to three characteristics that must be present in the process, namely: fairness, transparency and recourse mechanisms.

By Fairness process is understood the procedure that guarantees egalitarian participation of all competent companies, being achieve the best price and quality of proposes. It is what Brazilian legislation demands, but it is not always follow. Calls for bid contain discrete requirements which privileges some specific participant, which remains unnoticed in the file by most of people who analyze the documents. In this stage, maybe a good way to fight corruption would be to send documents to be analyzed by a committee composed of one judge, a technical expert in the market of what is being sold, and a representative of civil society. This “audit” procedure could be followed by any of the participants who manifest interest.

In turn, to check if the tender is transparent, companies have to analyze if, first of all, all participants are receiving the same treatment, then if all procedural steps are based on written and known procedures, without favoring any particular company, especially at the time the contract is signed. So, should be checked if there is any rule written in the process which guarantees that the contract will be sign openly and in the place of the tender, since in a lot of cases the contract is not sign due a corrupt practice of extortion.

Finally, all public procurements system should have a provision that gives the opportunity of contestation, through an independent system of recourse on procedural matters and sign of the contract.

A research shown at “Business Anti-corruption Portal”, gives an idea to companies how in the start assessment of risks related to procurement should they evaluate the possible results of a weak recourse mechanism in no transparent or fair procedures of binding.<sup>48</sup> It is mentioned that a public procurement that has a low level of transparency and fairness and also does not have a formal recourse mechanisms or collective integrity initiatives, may represent a big risk to the company and should be avoided unless the company has narrow knowledge of the connected risk and consequences, or has plans to start integrity pacts or other collective actions to reduce the risks of corruption.

On the other hand, even when a public procurement is considered not fair and/or transparent, but provides recourse measures, either through formal institutions or through collective actions, a bid can be submitted. However, to be well protected and make a concrete case through the recourse mechanism, the company needs to be very careful and document all steps in the process, following all the rules, as already mentioned, to guarantee its rights in the bid. The precise compliance with rules is also fundamental when a tender is transparent and fair but has an absence of a viable recourse mechanism, since companies will not have opportunity to change decisions and need to do everything right at first.

The best situation would be when the process is transparent, fair and has recourse mechanisms. In any case, companies must pay attention in the process of *due diligence* and preparation to engage in a public procurement.

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<sup>48</sup> Available at: <http://www.business-anti-corruption.com/?L=0>

### 3.2 Avoiding Human Rights Abuse

As mentioned previously, CSR consists of the obligation of the business society to pay attention on problems external to them, public problems, such as combating poverty and social inequity, reduction of spatial inequalities of income and wealth, through instruments and actions aimed especially at the “underprivileged society” (*inter alia*, protection of children and women), following rules of Human Rights and environmental protection. All this is possible only after reduction of corruption.

Thus, a socially responsible company will support actions aimed at education for sustainable entrepreneurship, pursuing the preservation of natural resources, making products that do not harm or degrade the environment; promoting social inclusion through the identification of needs and wants of the community, among many other actions that contribute to the well-being of all.

Thus, a *due diligence* process that pursues to avoid Human Rights abuses and guarantee compliance with CSR obligations will involve, first of all, the fulfillment of those rights, which requires a deep knowledge of them, which can be achieved through an extensive process of research of the law involved. In addition, in order for the *due diligence* to achieve its main goal, it should seek a deep understanding of the needs of the society in which the company operates.

Those needs will be affected by the company's activities; therefore, it is also necessary to analyze that impact in the initial procedure.

With that information, rules of law and society needs, the company must have enough elements to develop policies that help the local community, whether those policies are internal to the company or external, under the scope of the influence to be made on governments.

Therefore, we will now point out some elements that have to be considered in this kind of process of *due diligence*. The first element is a broad knowledge of Human Rights rules that business society should have. Then, they should highlight the specific challenges of human rights in the society in which the company will act. Finally, companies have to analyze the impact of their activities and the activities of their business partners on the society in order to find out if they are complying with CSR and what they can do to avoid human rights abuses and complicity.

To fulfill the first element, companies should analyze, at least, international bills of human rights, such as The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights. In addition, they should look at Conventions and National Law of labour relations, such as OECD guidelines, because knowing workers' rights, companies can meet human rights that other social actors demand from them.

After gaining knowledge of Human Rights rules, companies have to analyze the specific challenges of human rights in the society in which they are in, which can be achieved with research of inputs from non-governmental organizations (NGOs) and external country assessments.

It is important to clarify that not all human right deficiencies should be considered, since this will involve State obligations. Only the gaps of Human Rights in the companies' activities should be considered. Companies should pursue actions that their own products or services can achieve. This is the sphere of influence discussed above. For example, a pharmaceutical company has to evaluate its possibilities to help society gain access to medicines, or oil and gas industry should analyze the problems of environmental protection and development of labor capacity and education.

The following step after the company holds all necessary information is to elaborate a human rights policy. This policy will highlight human rights goals and provide guidelines for a company in its area of activity, seeking not only a role in the society but also rights and needs of its own employees.

In order to guarantee implementation and maintenance, this policy has to be supported by programs and objectives throughout the organization, but above all, it should be based on a strong commitment to human rights from the company's senior management, which will ensure that human rights issues are taken seriously and become part of the company's business strategy.

Ideally, companies should assign the overall responsibility for human rights-relevant issues to one person within the organization, centralizing the implementation and administration of the policy, which may guarantee that those issues receive the required degree of attention.

A successful example in Brazil is Copel - Companhia Paranaense de Energia Elétrica, an energy industry that has an Ethical Orientation Committee whose role is to discuss and guide Copel's actions, examine submitted cases, and recommend appropriate sanctions, to ensure that the Company's actions are conducted in accordance with sound principles and to oversee the dissemination and effective application of the Copel Code of Conduct across all sectors of the Company. To ensure its autonomy, the Council is made up of the Company's employees, each representing their respective different professional categories, and is coordinated by a representative of civil society.<sup>49</sup>

The policy should result in the development of a series of internal procedures to ensure its implementation, including adequate control processes for those procedures, audits of

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<sup>49</sup> Information of the committee can be found at:

<http://www.copel.com/hpcopel/english/nivel2.jsp?endereco=%2Fhpcopel%2Fenglish%2Fpagcopel2.nsf%2Fdocs%2F91A36E2462E46BEE0325741A00625782>

human rights complaints mechanisms and internal audits of social and environmental performance. A procedure can cover from a supplier qualification process with a mandatory risk review of customer projects, to a code of conduct that ensures equal opportunity and minority rights, or a checklist and instructions for business operations in sensitive areas.

Furthermore, educational programs for suppliers may be a powerful tool to ensure that risks of complicity are minimized or eliminated and business opportunities are maximized.

A last step to guarantee compliance with Human Rights and CSR obligations after developing a policy and guaranteeing its implementation and maintenance is to assess the policy's results and develop of mechanisms/remedies in case of any failures.

Finally, companies should disclose their actions to the business society to share experience and improve measures. As John Ruggie said in his report: "As companies adopt and refine *due diligence* practices, industry and multi-stakeholder initiatives can promote sharing of information, improvement of tools, and standardization of metrics."<sup>50</sup>

Moreover, to achieve an improvement in the public sector, companies will still have to use trade associations that develop educational campaigns and revolutionary movements for human rights and environmental protection.

It must be noted that the process to ensure implementation of CSR is very similar to the process to avoid corruption, since both require knowledge of the laws, education of employees and awareness of suppliers and stakeholders, development of mechanisms and dissemination of measures adopted.

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<sup>50</sup> Report of 2008 to the Special Representative of the Secretary-General, on Human Rights Council. Pg. 19.



In my opinion, companies that apply a well drafted due diligence process *e* can ensure compliance with CSR and avoid corruption, at least within the organization. However, for a company to achieve the same goal outside its environment, the business society needs to work harder and together with trade organizations, spreading educational campaigns to governments of developing countries and States with a less established framework of such fundamental issues.

## 4 HOW COMPANIES CAN HELP STATE TO TAKE A STEP FURTHER

As John Ruggie used to say: “Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights.”<sup>51</sup> So businesses are the main characters to fight for necessary changes on society, political and judicial system.

Much of what has been said so far demonstrates what kind of measures companies can take within internal projects that might help to prevent corruption and abuse of human rights in their own transactions. However, there are also measures that a transparent and social responsible company may embrace to help civil society and state to generally prevent such abuses.

It was just mentioned that the business society, when work in partnership with the private sector or organizations, such as chambers of commerce or business associations or even with NGOs, can achieve better results. This is because those institutions have the right position to solve the collective action problem and get broad-based private sector support through anti-corruption, anti human rights abuses and anti environmental damages campaigns.

In this part of the paper we will discuss how to start those collective measures, how they can really act in society, which kind of behavior is necessary and how to put it into

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<sup>51</sup> Report made by John Ruggie, in 2008, to the Special Representative of the Secretary-General on Human Rights Council

practice. We will not treat anti-corruption measures and prevention for human rights abuses separately, since the collective projects for both are quite similar.

However, we must first make special considerations on measures that pursue to help judicial reforms, avoiding corruption in the judiciary, since they involve different characteristics and more engagement from Governments and national institutions to achieve a successful project. First, we will discuss general measures to avoid political corruption, corruption in public contracts and bids or general Human Rights and environmental abuses. Then, we will discuss measures to avoid judicial corruption.

#### 4.1 Collective actions to avoid corruption and other abuses

Companies which seek an internal reform achieve, first of all, good corporate governance, which, in turn, makes, for example, bribes harder to give and hard to hide, helping them to reduce corruption, human rights abuses and/or environmental damages at all levels within their transactions.

However, in order to effectively implement a good governance strategy, a genuine commitment from the top of the organization (CEO or owner) is needed, and at least following some basic elements, such as Accountability; Transparency; Participation; Rule of law and Capacity/competence.<sup>52</sup>

A company with good governance, transparency, social responsibility and commitment with the environment will have more moral and strength to convince governments and the civil society to stand up to corruption and human rights abuses, building more competitive markets.

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<sup>52</sup> NORAD, The Norwegian Agency for Development Cooperation, a directorate under the Norwegian Ministry of Foreign Affairs, in its Report of 2000, about Good Governance and Anti-Corruption Action Plan. Available at: <http://norad.no/en/Tools+and+publications/Publications/Publication+Page?key=109368>.

Thus, after building and implementing a good governance policy, in order to start a collective action, companies have to first identify who will take part in the collective action - companies, NGOs, religious groups, business associations, potential trusted partners, to ensure sufficient attention and credibility. It is important to establish that contact, present the company profile, policies and a concept for the collective action; exchange experiences, ask for feedback and recommendations. It is also important to check the seriousness and purpose of the government's supervision departments.

Together, that group can develop workshops, analyze business situation, risk of corruption and/or human rights abuses, benefits of anti-abuse measures and best practice examples. Then, it can draft a line of conduct, outline their intentions and initiatives and plan a campaign, which will be communicated to other potential partners.

However, to ensure effectiveness, it is important not only to put in place campaigns that will prevent overall corruption and abuses, which will be a long-term work, but also to reform and clean up individual transactions, giving support for those who feel that they do not have the resources to stand up to abuses (such as small/medium Enterprises); or those who does not have the necessary information and then believe to have benefits from individual corrupt transactions.

There are four kinds of programs.<sup>53</sup> Some of them are based on the ethical commitments of the participants; the collective action works making pressure on members to maintain their ethics as a matter of honor, dignity. Some other programs have stricter external enforcement mechanisms, established by a formal contract between customers and bidding companies, determining serious sanctions for violations. Some programs pursue certifying business coalitions, which will demand clear compliance from membership as a prerequisite, which is checked by external audits that will certify the Members or exclude

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<sup>53</sup> Espoused by UN Global Compact Portal: <http://www.unglobalcompact.org/AboutTheGC/publications.html>

them. Finally, there are programs that try to spread principles-based initiatives, working to teach and spread anticorruption to civil society and government. Each of the types of programs will have its own set of benefits that have to be mapped across participants, country environments, etc.

The last kind of program, spreading principles-based initiatives, deserves an especial comment, since it can be demonstrate that by informing civil society about their rights, principles and the real market situation, collective action can achieve a great support for their programs of anti-corruption and anti human rights abuses.

Civil society contribute largely to anti-abuse campaigns, and it is actually essential to determine their success or failure, as they are responsible for bringing accountability to governments, pressing for reforms and transparency. Civil society, as a group with no specific political or individual interest, works effectively in the public interest, since they are the most affected by corruption and human rights abuses, and who have genuine interest and attention to public problems. They have the condition to break corrupted networks that just benefit government and industries that receive a large private advantages and high profits for being in the power.

In the process to combat corruption and other abuses, civil society has important roles, such as working as a vigilant. Due to the unique position they occupy, civil society has the ability to monitor the actions of the State and the Private Sector, monitoring implementation of political decisions, public contracts or judgments, ensuring transparency and respect for human rights.

For that, they just need to receive right information regarding their rights, obligations and situation in the system (judicial, political or business), which can be provided by Commercial associations, by collective action.

Finally, but not less important, collective actions associated with civil society can offer vital public services that authorities fail to provide due to a lack of public interest or conscience.

Apart from collective actions and civil society measures, developed countries could also help developing countries to avoid corruption or human rights abuses just legislating in a way that demands their corporations investing abroad to comply with international standards, with the possibility to be held liable in their own country. As John Ruggie said, “There are also strong policy reasons for home States to encourage their companies to respect rights abroad, especially if a State itself is involved in the business venture - whether as owner, investor, insurer, procurer, or simply promoter. Such encouragement gets home States out of the untenable position of being associated with possible overseas corporate abuse. And it can provide much-needed support to host States that lack the capacity to implement fully an effective regulatory environment on their own.”

All those actions together - collective actions, understood as an association between civil society and facilitators, as mentioned above, and the help from developed countries- will not only reduce opportunities for corruption and other abuses, but also may help to increase the impact and credibility of individual action; ensure equal opportunities for competitors , thus encouraging the development of new markets, with new products and services; improve the quality of legal and regulatory systems, which may provide predictability in business transactions in emerging markets.

In the end, everybody would benefit from a transparent, balanced and predictable market.

Giving companies which participate in major projects the chance of having a fair selection process ensures better business opportunities. They also save money formerly paid as bribes.

Consumers are benefited since they get better products and services in a more competitive market and are also able to save money and avoid time-consuming lawsuits.

Civil society and non-governmental organizations get better essential services, such as in health care, education and fair judicial system.

Governments improve their own credibility and can attract more investments from domestic and foreign investors.

#### 4.2 Aid to the justice sector

All the measures mentioned above may contribute to a better judicial system. Anyway, special comments about aid on judiciary reforms needed to fight corruption must be made, since judicial corruption affects a level of society that political corruption does not affect.

Political corruption affects society economically, since it diverts funds originally intended for social projects, education and environment, which causes impoverishment of society, lack of education and low quality of life. Hence, political corruption affects fundamental human rights indirectly.

However, judicial corruption reaches every human not only in their economies, but also directly in their fundamental right to justice and sense from what it is justice, ethics. It may jeopardize society culturally, since can change their concept of balance and fairness, what they should wait from public services or provide by themselves.

More important, judicial corruption deprives society to complain about other kinds of corruption and human right abuses. A corrupt politician will be easily unpunished, he just have to bribe some judge to stay free and not pay for his deviations. For that, judicial corruption is the most seriously way to jeopardize a society.

For those reasons, aid from foreign donors, collective actions and campaigns in general for judicial reforms, to achieve successful results, should, first of all, consider and respect local priorities, culture, listen to local people, the beneficiaries of the aid, as it may not have any financial or political interest, only social interest. In order to be complete and helpful throughout the time, they have also to be flexible, which means having the ability to quickly adapt themselves to changes in the local needs. Such projects should increase the autonomy of local institutions and organizations by giving them the necessary intellectual and material support.<sup>54</sup>

It is a long and hard-work process to carry out a judicial reform. The campaign will not only work to change rules of Law, but also will have to work with sense of justice from society; it will change bad habits and build again trust on legal system. In that scenario, statistics can show positive and negative results from society, in a very short-time of analyzes. So, to be sure of the project' success, it is essential to consider long-terms indicators. Sustainability cannot be measured in a short period of time or solely in relation to the finances of local institutions and organizations.

To better follow and understand local issues and development, donors have to be present locally. If this is not possible, they should consider assistance through a reliable intermediary organizations present in the country, such as those that they own trained and/or others foundations and NGOs.

We are not here disregarding the need for transparency, sustainable commitment and accountability on programs and policies of foreign donors and institutions, to prevent other kinds of corruption and human rights abuses, as advocated and demonstrated so far.

However, specifically on aid for judicial reforms, those items demands, somehow, certain reciprocity to guarantee a successful relationship. For example, as regards transparency, it

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<sup>54</sup> Those ideas have been defended by The International Council on Human Rights, in its Article about “Local perspectives: foreign aid to the justice sector”. Available at: <http://www.ichrp.org/en/projects/104>



is not only the behavior of donors that has to be clear and open in their activities, intentions and procedures. The beneficiaries have to act in the same way, since they will help in the process. They should, therefore, be clear, honest and deliver the right information. The success of the project depends not only on the commitment of donors and the civil society, but also of the government receiving the benefits.

Finally, since both donors and beneficiaries (Government and national institutions) should ground the reform process and assistance efforts in international human rights standards, both should evaluate their performance and analyze if they have been accountable with the main goal of the project, which should be the delivery of aid to the final beneficiary, i.e., those whose rights are at risk and need greater protection.

Following those principles and strategy, donors, national institutions, NGO's, Governments and commercial associations may achieve a successful judicial reform.

## 5 CONCLUSION

In sum, it can be concluded that there is no doubt of the impact that corruption in the public sector, in all its ways can exercise on businesses because of the interaction existing between the States' social obligations and corporate social responsibility and, specially judicial corruption, which can devastate the whole society, not only businesses.

However, great efforts have been made in Brazil by different institutions and government to fight corruption and assert social responsibility. The changes achieved over the last years through regulation reforms, corporation policies, campaigns and monitoring process are significant.

Taking into account all the specificities analyzed regarding anti-corruption policies, I believe a company that seriously follows the steps indicated by scholars and institutions which understand the phenomenon of corruption and human rights abuses, seeking to establish a serious procedure of due diligence and develop policies directed to those problems, may protect its activity and prevent abuses within its sphere of influence, going into the actual conditions to assist in informing and educating the society in which it operates, which could lead to changes in State attitudes.

In Brazil there are enough rules of Law that provide the necessary framework of rights and obligations to support the entire society do fight corruption, prevent human rights abuses and environmental damages.

It must be questioned, however, if the regulations in force today really achieve their purposes. They definitely help, but maybe they are not enough. Do they really prevent human rights abuses or ensure a transparent market? Based on all the issues discussed in

this paper, I believe that only legal provisions are not enough. The whole process to secure a transparent and fair country involves not only legal issues, but also issues of education, proper access to specific information, discussions on cultural behavior and awareness of those issues. It seems not to be enough to just say to a person that she/he has the right to do this or that, without giving them the right support to understand the magnitude of that right or even fight for that.

Disadvantaged people, poor and illiterate people in Brazil are the vast majority. Thus, when they receive information about government corruption, they do not really have enough conditions or even studies to understand such information and how it directly affects their lives.

Collective action against corruption is the best tool that a company and a society can have. But, when the business community is involved in a vicious cycle, will be almost impossible to develop an effective collective activity if they do not receive assistance from people outside of the vicious cycle. The business society in Brazil, even though they may have the understanding about the harmful effects of corruption and human rights abuses, are just used to thinking that the market "is that the way it is", and that "they cannot do much to change", or that "the market works only with the payment of bribes".

In this scenario, I believe the help of multinational corporations, which are used to international standards and have more experience in how transparent and fair markets work, could help break the vicious cycle in Brazil, thus helping the country take further steps on such issues.

Therefore, the international community should be involved in supervising and ensuring that companies involved in Brazilian "cleaning-up" process are, actually, really contributing to improvements and not just learning bad practices.

Still, the institutions in Brazil that carry out studies and campaigns to help businesses and society also need support from the international society, since their work is based on international standards and most of the time they do not find the necessary help on a national level.

Additionally, international aid cannot take into account in their analysis only statistics formed with mathematical information. For example, a case outside of the purpose of this work but that easily illustrates my point of view is the Brazilian social program called "Bolsa Familia". This program supposedly helps Brazilian poor families by providing unemployed mothers a minimum wage if they prove that they are sending their children to school. The World Bank estimates that this program increased the purchase power of Brazilian families. In other words, the program is thought to have helped reduce poverty in the country. However, what the World Bank did not examine is the level of corruption in the program. Many families that do not need the aid receive the benefit. Moreover, this program may be cancelled at any time when a new political party is elected, and, hence, families which quit their jobs only to receive "easy money" will be unemployed and without any assistance. That is to say, the poverty problem is not resolved, it is just postponed.

Thus, international aid, as donors, should be aware of how their measures are being applied and bear in mind that they have to be personally present in the country to monitor programs and policies, to better understand their functionality and effectiveness.

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## **INTERNET RESOURCES**

Business Anti-corruption Portal: <http://www.business-anti-corruption.com>;

Business & Human Rights Resource Center: <http://www.business-humanrights.org>;

Center for International Private Enterprise: <http://www.cipe.org>;

Chr. Michelsen Institute: <http://www.cmi.no>;

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Federal Law No. 8137, of 27 December 1990 (Crimes against the tax order and against the economic relations of consumption);

Federal Law No. 8.429, of 02 June 1992 (Law of Administrative' dishonesty);

Federal Law No. 9.613, of 03 March 1998 (Law of Laundering or concealment of property, rights and values);

Project of Law at the National Congress, No. 7.528/2006, (Treatment of conflict of interests);

Project of Law No. 5.586/2005 (Criminalization of illicit enrichment);

Project of Law No. 3.443/2008 (Autonomy for the crime of money laundering).

OAS – The Inter-American Convention against Corruption, from the Organization of American States, in 07 of October of 2002;

OECD – The Convention on the Bribery of Foreign Public Officials in International Business Transactions, from the Organization for Economic Cooperation and Development, in 24 of August of 2000;

Tripartite Declaration of Principles Concerning Multinational Enterprises;

UN Global Compact;

UNCAC – The United Nations Convention against Corruption, in 15 of June of 2005;

General Assembly Resolution No. 144, at its 53ed session, of 9 December 1998:  
*“Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms”*

## **Annex I – Agent Screening Process (propose by Business Anti-Corruption Portal)**

### **PURPOSE**

The present evaluation procedure has been devised for companies planning to enter into markets via an agent and it is based on an active business code of conduct on corruption and bribery. The use of this procedure can minimise the large number of problems related to corrupt agents and will overall reduce the risk associated with doing business in the country in question.

### **APPLICATION**

The evaluation procedure has been especially devised for SMEs (Small and Medium Enterprisers). In case an SME would outsource the evaluation of agents, the procedure and accompanying instructions may serve as terms of reference.

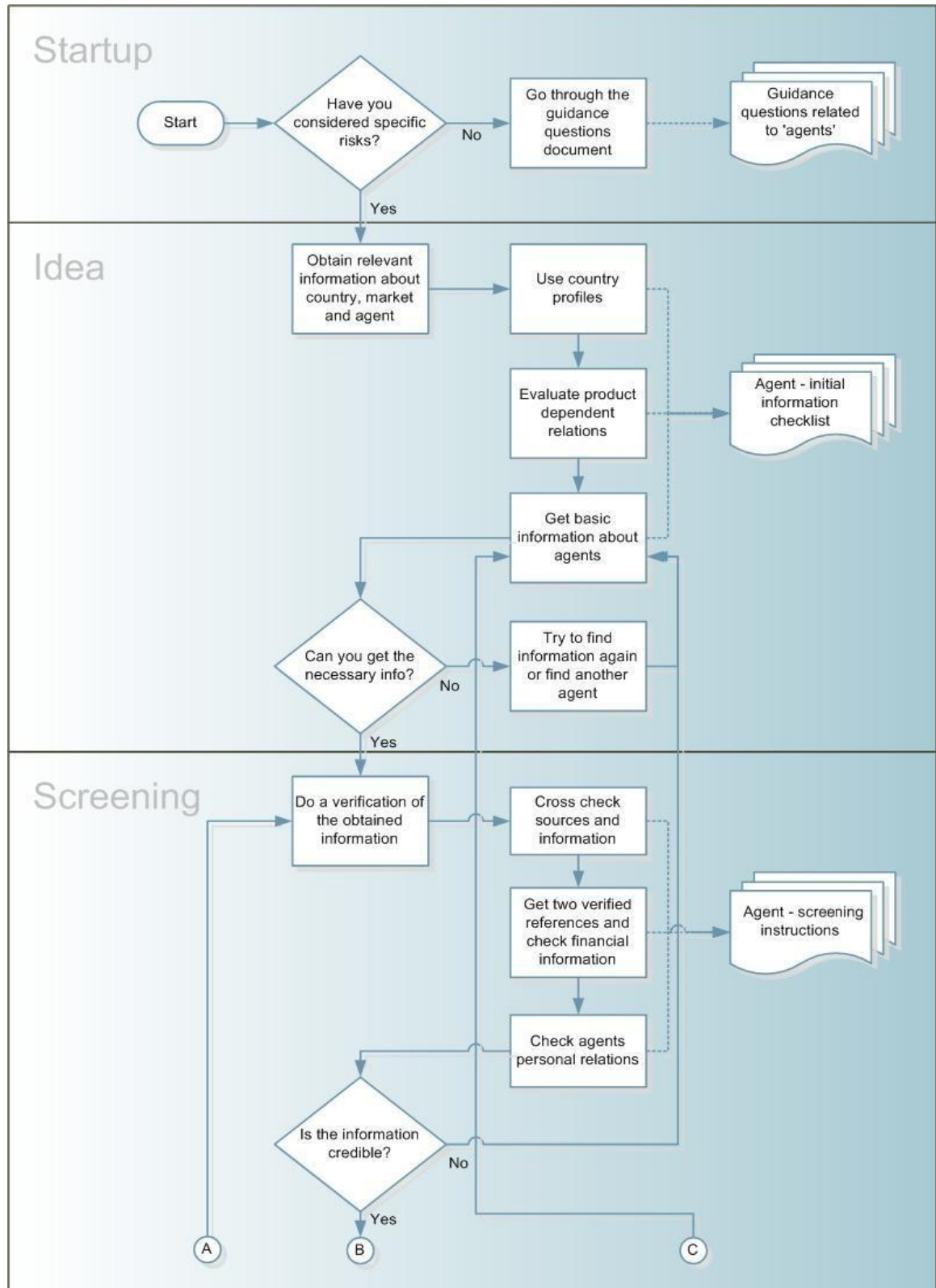
The procedure only covers aspects related to corruption and bribery and should not be used to assess all risks associated with market entry or general business conduct.

The procedure does not address corruption and bribery related to the daily business but focuses alone on risks associated with the selection of an agent and the yearly renewal of the agent contract.

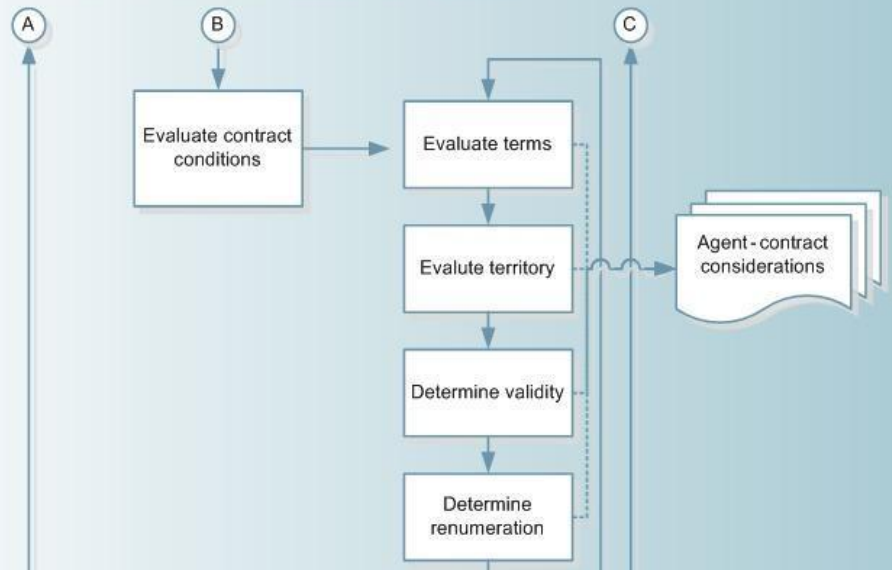
### **RESPONSIBILITIES**

The evaluation should be carried out by the management and/or the person(s) responsible for compliance in cooperation with the management.

## PROCEDURE



# Draft agreement and cross-checks



The protocol should contain a full set of documents in the approval process. It should include the results of the verification, any non compliance areas and should highlight any risks to be addressed by ext. legal and accounting. It should also contain an affidavit (declaration) from the the compliance responsible.

# Approval



Make sure that decision is documented and entered in the protocol

## **Annex II - Contractor Procedural**

### **PURPOSE**

The contractor or subcontractor procedure is intended to help you as a supplier to identify situations where bribery might potentially occur in the phases from the initial offer, the contract negotiation, the signing of the contract and the execution of the delivery. The procedure gives advice on how to deal with these issues in each steps of the process.

The procedure is based on an active anti-corruption programme

### **APPLICATION**

The procedure covers defined the minimum requirement as a contractor/subcontractor when participating in a general project environment. The procedure do not intend to give a full and final solution to any given situation, but is meant as a tool for companies participating in a project. The key parameters will not differ whether you act as a contractor or a subcontractor. You may use the other due diligence tools for protective actions during the execution of the project.

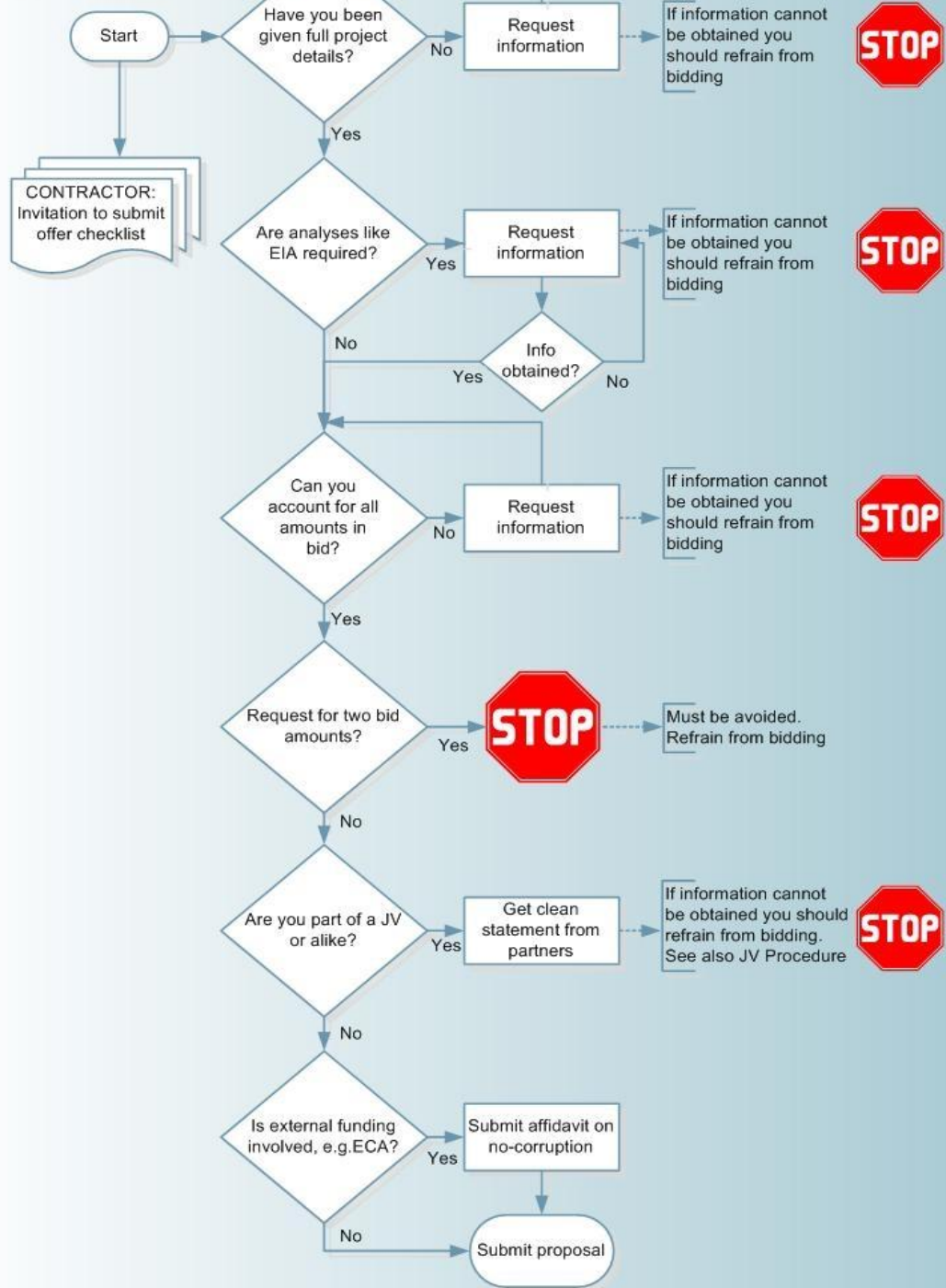
The procedure only covers aspects related to corruption and bribery and should not be used to assess all risks associated with project execution or general business conduct.

### **RESPONSIBILITIES**

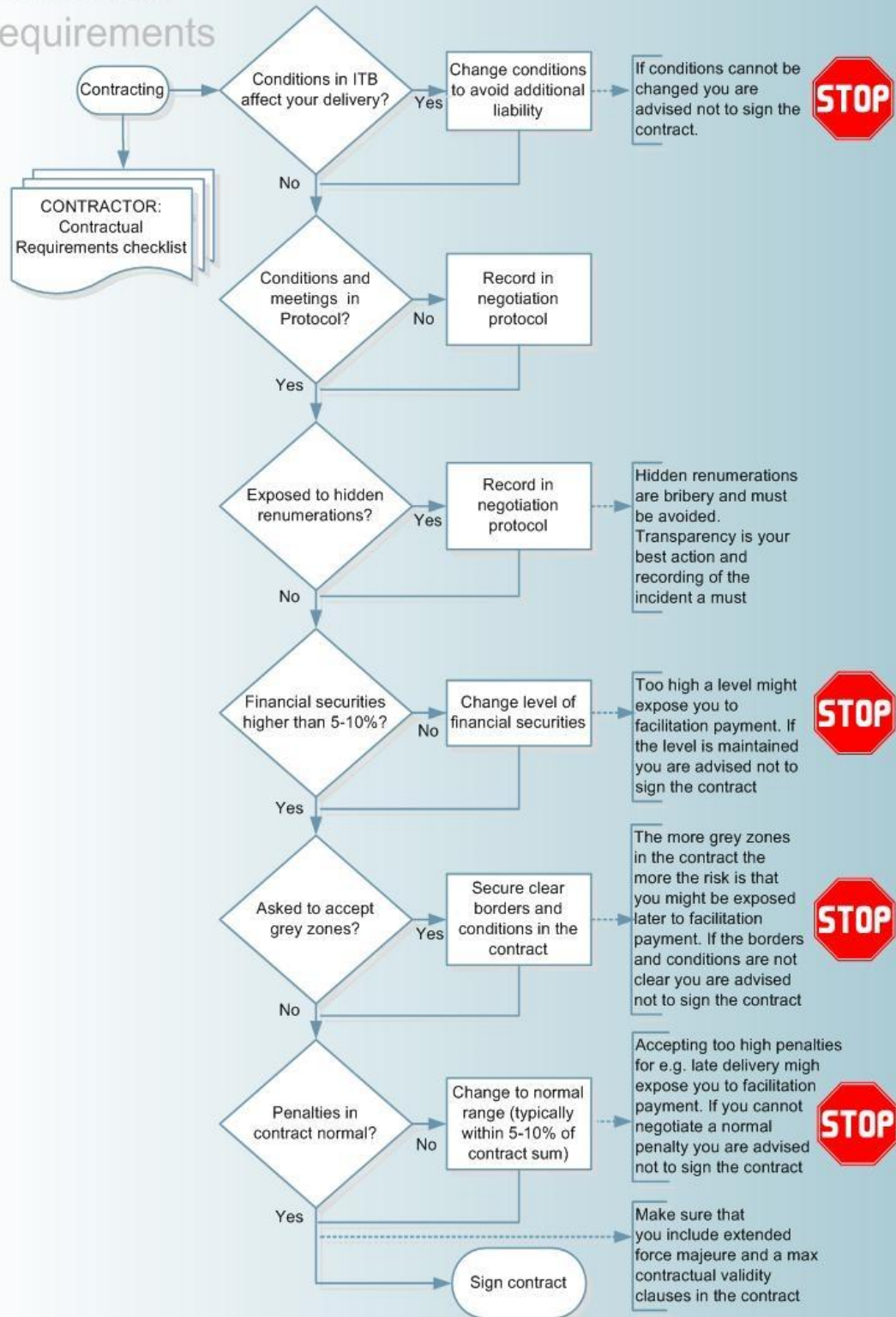
The evaluation should be carried out by the overall project responsible and/or the compliance responsible in cooperation with management.

### **PROCEDURE**

# Invitation to submit offer

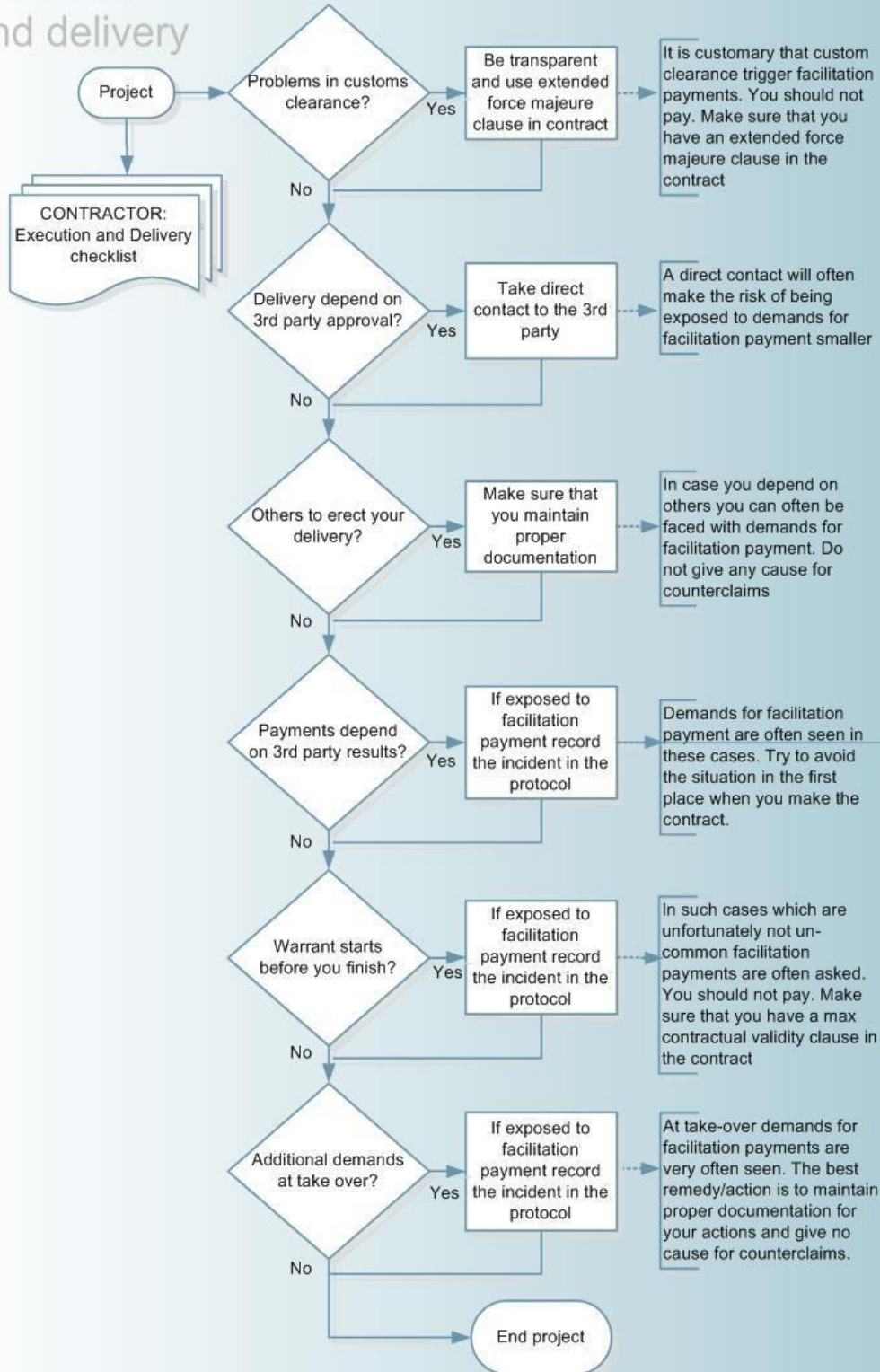


# Contractual Requirements





# Execution and delivery



## Annex III – TI Six Steps Implementation

### BUSINESS PRINCIPLES FOR COUNTERING BRIBERY: SIX STEP IMPLEMENTATION

Step	1	2	3	4	5	6
Action	Decide to adopt a no bribes policy	Plan the implementation	Develop detailed anti-bribery Programme	Implement Programme	Monitor	Evaluate and improve
Primary responsibility	Owner of company / board / CEO	Appointed senior manager / Project Team	Appointed senior manager / heads of department	Appointed senior manager / line managers / support functions / business partners	Ethics / compliance officer Internal and external auditors	Owner of company / board / CEO / audit committee
Process	<p>Obtain commitment to no-bribes policy "from the top"</p> <p>Decide to implement an anti-bribery Programme</p> <p>Decide extent of any public disclosure</p> <p>Appoint senior manager / cross-functional Project Team</p>	<p>Define specific company risks / review current practices</p> <p>Review all legal requirements</p> <p>Write no-bribes policy, develop and write anti-bribery Programme</p> <p>Test / get commitment from senior management / selected employees</p>	<p>Integrate no-bribes policy into organisational structure and assign responsibilities</p> <p>Review ability of service functions to support new Programme</p> <p>Develop detailed implementation plan to include:</p> <ul style="list-style-type: none"> <li>• adapt HR policies</li> <li>• communications</li> <li>• training programmes</li> </ul> <p>Set up issues reporting function</p> <p>Prepare for incidents</p>	<p>Communicate anti-bribery Programme - internal / external</p> <p>Run training courses for all employees and business partners</p> <p>Ensure capabilities are in place of specialist functions up to speed: internal audit, finance, legal department</p> <p>Deal with incidents</p> <p>Review role of Project team</p>	<p>Regular reviews of the system</p> <p>Capture knowledge from incidents</p> <p>Use external verification providers</p> <p>Review use of issues (whistle-blowing) channels</p>	<p>Receive feedback from monitoring</p> <p>Evaluate effectiveness of Programme</p> <p>Develop improvements to Programme</p> <p>Report to management</p> <p>Board review and sign-off on Programme</p> <p>Publish Programme process and results (optional)</p>
Time span	One Month	Three to six months	Three to six months	One year	Continuous	At least annually

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## **REGISTRATION AND ACCOMPANYING DOCUMENTS**

Invitation to Submit Offer Checklist

Contractual Requirements Checklist

Execution and Delivery Checklist

## **FILING**

[Company filing procedure]