

## SUMMARY<sup>1</sup>

### *“Fighting Corruption in Brazil - Perspectives from the inside”*

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#### **Speakers**

- Paulo Sotero, Director, Brazil Institute, Wilson Center, USA (Chair).
- Beto Vasconcelos, National Secretary of Justice, Federative Republic of Brazil.
- Pierpaolo Cruz Bottini, Criminal Lawyer; Professor, Faculty of Law, University of São Paulo.
- Rodrigo de Grandis, Prosecutor, Brazil’s Ministério Público Federal.

#### **Overview**

Speakers shared their views on specific challenges as well as breakthroughs in the battle against corruption in Brazil. Following an initial round of comments by each of the speakers during which they discussed the institutional and regulatory developments in the fight against corruption in Brazil, panellists engaged in a discussion with the audience, primarily focussed on issues surrounding the *Lava Jato* operation.<sup>2</sup>

#### **Details**

##### **1. Brazil has experienced positive developments in the fight against corruption**

The restoration of democracy in 1985, followed by the enactment of a new Constitution in 1988, ushered in a number of important changes and led to strengthening and/or creation of a number of key institutions tasked with fighting corruption. This includes an independent prosecuting agency (the *Ministério Público* or Public Ministry), as well as a government body that exerts external control over the Judiciary, namely the *Conselho Nacional de Justiça* (National Council of Justice).

Trust in the justice system has grown over the past years due to increased public sector accountability and an enhanced culture of compliance with the Rule of Law within the private sector. In this regard, Brazil is witnessing a rapid expansion of corporate in-house regulatory and compliance departments. ‘All this is good news in a country where until only a few years ago, it was commonly held that the Law only applied to the enemies of those in power; friends of the powerful had guaranteed impunity’, commented the session’s Chair.

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<sup>1</sup> This Summary was prepared for the Bingham Centre by Patricia Regules and does not reflect the views of the Centre.

<sup>2</sup> Lava Jato (translated as car wash) is an ongoing criminal investigation initiated by Brazil’s Federal Police in 2009. Operation *Lava Jato* is allegedly the largest corruption and money laundering investigation in Brazilian history.

The panel remarked that criminal and administrative investigations involving Brazilian multinational oil company *Petróleo Brasileiro S.A.* (often known by its acronym *Petrobras*), showcase qualitative changes in a legal system which has otherwise been historically slow and ineffective. This is particularly so because of the number of investigated persons, quantity of warrants served and apprehensions made, and the level of cooperation among public agencies. However, actions taken as part of the *Petrobras* investigations have raised legitimate questions and concerns regarding the observance of due process, even though a speaker referred to Judge Moro (who leads the prosecution in the *Lava Jato* case involving *Petrobras*) acknowledging that avenues exist for decisions to be challenged with the Supreme Court (*Supremo Tribunal Federal*).

## **2. Legislative and institutional reforms explain some of these changes**

Panellists drew attention to recent changes in the legal framework which have helped the fight against corruption. These include:

- A new Law on organised crime<sup>3</sup>, which panellists saw as the most important piece of legislation regarding corruption in recent years. The Law was enacted in response to social demands for greater transparency following street riots in 2013. This Law defines “*criminal organisation*” and provides public bodies with numerous means of investigating them. Some of these investigative techniques already existed in scattered laws, but were poorly regulated and often led to subsequent procedural nullities.
- Reforms of the anti-money laundering legislation.<sup>4</sup> The new legislation broadens the definition of money laundering to include the proceeds from any criminal activity, and thus makes it easier to charge offenders. More importantly, this Law identifies professional sectors where chances of money laundering are higher, and imposes a number of obligations on them, such as the duty to communicate suspicious transactions. As a consequence of reforms to the anti-money laundering legislation, ‘the public and private sector can jointly identify suspicious activities’, Mr Bottini remarked.
- The enactment of a Law on administrative offences and administrative responsibilities<sup>5</sup>, which does not relate specifically to corruption *per se* but is nonetheless an important instrument of repression of misconduct by public agents.
- The passing of an anti-corruption Law<sup>6</sup> (also called the ‘Clean Company Act’), which among other things establishes leniency deals. Commenting on the relevance of leniency deals, Rodrigo de Grandis expressed that ‘in the future, criminal actions proposed by the *Ministério Público* - will likely lead to a negotiated settlement and to a more consensual justice between the Public Ministry and the accused – this applies especially in more complex corruption cases carried out by organisational structures. There is a very clear trend towards establishing higher levels of negotiation in Brazilian criminal procedures, similar to the American criminal proceedings’, de Grandis said.

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<sup>3</sup> Law 12.850 enacted July 2<sup>nd</sup>, 2013.

<sup>4</sup> Law, 12.683 enacted July 9<sup>th</sup>, 2012.

<sup>5</sup> Law 8.429 enacted June 2<sup>nd</sup>, 1992.

<sup>6</sup> Law 12.846 enacted August 1<sup>st</sup>, 2013.

- The creation of a regulatory framework on conflict of interests for government employees.<sup>7</sup>

In addition to this, panellists also reviewed the most important institutional reforms that have facilitated the prosecution of corruption.

- Brazil's *Polícia Federal* (Federal Police) and *Ministério Público* (Public Ministry) have been granted greater autonomy and independence.
- An antitrust enforcement agency was created (the *Conselho Administrativo de Defesa Econômica* (CADE), or Administrative Council for Economic Affairs), in charge of investigating cartel practice.
- A federal tax-collecting agency, the *Receita Federal do Brasil* was created in 2007.
- Finally, an agency responsible for asset recovery and international cooperation, the *Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional* (Department of Asset Recovery and International Legal Cooperation) was also put in place in 2004.

Regardless of Dilma Rousseff's impeachment, 'Brazil has reached a point of no return in many aspects' expressed Mr Vasconcelos. This is to say that many hurdles and challenges have already been overcome and incorporated into the popular psyche. Any political change(s) is (are) unlikely to overturn institutional advancements.

### **3. Greater investment in technology and more transparency is needed in order to fight corruption**

In spite of current initiatives, Beto Vasconcelos noted that investment in information technology dedicated to facilitating the prosecution of complex crimes is still lacking. Such technologies include big data, data mining as well as processing of large volumes of data that could reveal standard deviations in behaviour of the agent.

There have, however, been some positive developments in this area. This includes the online government portal for transparency, launched in 2004, which facilitates social control over public spending and is a useful tool for public managers. Access to this portal has currently surpassed 16 million visits and 160 million pages visited. 'This shows the importance of releasing data about the government to the public, considering the Brazilian government has always operated on the basis of confidentiality', said Vasconcelos.

## **Questions & Answers**

This session mostly referred to the *Lava Jato*. Specifically, discussions touched on:

- The impartiality of Brazilian Judges. The speakers noted that they do not believe there is a 'promiscuous relationship' between criminal judges and public prosecutors as one person in the audience suggested.

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<sup>7</sup> Law 12.813 enacted May 16<sup>th</sup>, 2013.

- The possibility of pro-active collaboration in criminal investigations on behalf of accused persons under Brazilian Law. Speakers commented that although not envisaged in Brazilian Law, as it is under U.S. Law, there has been a prior case where the accused collaborated with the investigations by recording a private conversation with a former State Governor. The defendant invoked the nullity of procedure based on the contention that evidence was illegally obtained, but a decision remains to be taken on this issue.
- Pre-trial or preventive detention (*prisão preventiva*) as a means of coercively obtaining plea bargains, and procedural guarantees in the post-*Lava Jato* phase. Speakers agreed that they did not see an abuse in pre-trial detentions in Brazil, while warning that all procedural guarantees should remain in place. 'I am concerned about the suppression of due process, by relativising Habeas Corpus and other proposals that are currently being discussed in order to bar defense lawyers and limit challenges to judicial decisions. If these guarantees cease to exist, we will give way to arbitrariness', added Bottini.