

# **Rule of Law Challenges in Latin America**

## **Corruption and Judicial Independence**

**18 and 19 April, 2016 | São Paulo, Brazil**

# **Panama Papers: A Game Changer for Prosecuting International Corruption by the United States**

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April, 2016**

# Agenda

- I. A Primer on Panama Papers
- II. The Impact of Panama Papers on Latin American Countries, Particularly Argentina and Brazil
- III. The U.S. Department of Justice is Focused On Combating International Corruption
- IV. Panama Papers' Game-Changing Impact on Prosecuting International Corruption

# A Primer On The Panama Papers

- **The Biggest Whistle-Blowing Event In History**
  - 11.5 million documents: 40 years of internal records of business transactional documents, emails, etc.
  - 240,000 companies implicated, identities will soon be known
  - Mossack Fonseca worked with 14,000 banks, law firms, and other third-party service providers
- **Shell Company in a Nutshell: Secrecy through Bearer Shares**
  - Equity securities wholly owned by whoever holds the physical stock certificate
  - Companies held by bearer shares do not need to register an owner's name

# Panama Papers' Most Significant Impact: Exposure Of Political Figures Across The Globe

- Vladimir Putin's Inner Circle
- Top Chinese Officials' Relatives
- U.K. Prime Minister's Father
- King of Saudi Arabia
- Ukraine President, Petro Porshenko
- Pakistan Prime Minister, Nawaz Sharif
- Iceland's (now former) Prime Minister
- And many more (ICIJ will release all names in May)

# Exposure of Political Figures: Argentina

- Mauricio Macri, Panama Papers revealed that the sitting President was a director of a Bahamas-based company created by his father; currently facing investigation probes
- Néstor Grindetti
  - Finance minister of Buenos Aires (2007-2015) under then-mayor Mauricio Macri, current mayor of Lanus
  - From 2010 to 2013, Grindetti had power of attorney of an Panamanian shell company owned exclusively through bearer shares
- Daniel Muñoz
  - Private secretary and close aid of Néstor Kirchner and Cristina Fernández de Kirchner
  - Co-owned a BVI company through bearer shares with his wife

# Brazil: Petrobras Scandal Deepened

- Panama Papers named 57 politicians and companies that are under investigation in connection with Petrobras scandal
- They collectively opened 107 offshore companies through Mossack Fonseca
- Eduardo Cunha, the speaker of the lower chamber of Congress who led the effort impeaching the sitting President for corruption, is exposed by Panama Papers for receiving bribes linked to offshore companies involved in the Petrobras probe
- Mossack Fonseca is suspected of concealing the ownership of a luxury beachfront apartment, which has been reportedly linked to Lula da Silva, the former President

# U.S. DOJ Is Focused On International Political Corruption

- “[The DOJ] attack[s] corruption at its source – by prosecuting and seizing the assets of the corrupt officials who betray the trust of their people.” Leslie R. Caldwell, Assistant Attorney General, November 19, 2014
- Recently, the DOJ significantly enhanced its ability to investigate and prosecute FCPA cases by adding more prosecutors and special agents; launched the FCPA Pilot Program in April 2016.
- In addition, “[the DOJ is]strengthening [its] coordination with foreign counterparts ...working together to reduce criminals’ ability to hide behind international borders.” Leslie R. Caldwell, Assistant Attorney General, April 5, 2016



# Why is U.S. DOJ Focusing On International Corruption

- Corruption is no longer a domestic malignancy, as Panama Papers confirmed, it has metastasized internationally
- Corruption harms international society economically and politically:
  - It deters investment, distorts fair competition, and increases the cost of doing business
  - It wastes public resources
  - It perpetuates economic inequality
  - It undermines the rule of law and delegitimizes the state
- Currently, U.S. is best equipped to combat international corruption due to its jurisdictional reach and developed legal system; but other countries are catching up:
  - The UK Bribery Act
  - Australia's leading role in combating int'l tax evasion

## However, FCPA Is Not Ideal for Prosecuting Corrupt Foreign Officials

- Lacks sound jurisdictional basis: difficult to prove that part of the transaction took place in the U.S.
- Lacks sound legal basis: the Congress excluded foreign officials who accept bribes from the scope of FCPA
- Using FCPA as the “Specified Unlawful Activity” to prosecute foreign officials for violating money laundering laws has limited success due to these legal infirmities

# Game Changer: DOJ Signaled It Will Take Advantage of Panama Papers

- On April 4, 2016, Peter Carr, a DOJ spokesperson, stated that the DOJ is currently “reviewing [the Panama Papers]” and represented that the DOJ will take very seriously “all credible allegations of high level, foreign corruption that might have a link to the United States or the U.S. financial system”

# Game Changer: Panama Papers is going to be a case that you can see from space

- Political figures and wealthy individuals who are connected to the 240,000 shell companies
- New investigation targets could also arise from the 14,000 Mossack Fonseca business partners:
  - Financial Institutions who requested shell companies for their clients
  - Law firms and corporate service providers who provided related services
- Many existing investigations will likely be strengthened due to newly exposed evidences such as business records and emails (e.g. FIFA investigation)

# Game Changer: Panama Papers Gives U.S. Prosecutors A Proven Jurisdiction Theory

- Many tax havens are U.S. dollar-based economies
- U.S. dollar transactions, regardless of its starting point and destination, pass through the Federal Reserve Bank in lower Manhattan, the Southern District of New York
- The transient passage has been used as the jurisdictional basis for prosecuting foreign corrupt officials

## Game Changer: Panama Papers Give U.S. Prosecutors A Better “Specified Unlawful Activity”

- Under Money Laundering Control Act, it’s a crime to launder money obtained through committing certain specified unlawful activities
- An offense against a foreign nation, including “bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by ... a public official[,]” is a specified unlawful activity. If part of the financial transaction occurs in the U.S. (e.g., the transient passage through lower Manhattan), it is prosecutable in the U.S.
- With increased intensity of prosecuting corrupt officials around the globe and DOJ’s initiative to enhance international collaboration, DOJ will likely invoke “offense against a foreign nation” more frequently instead of relying on the shaky ground of FCPA offenses



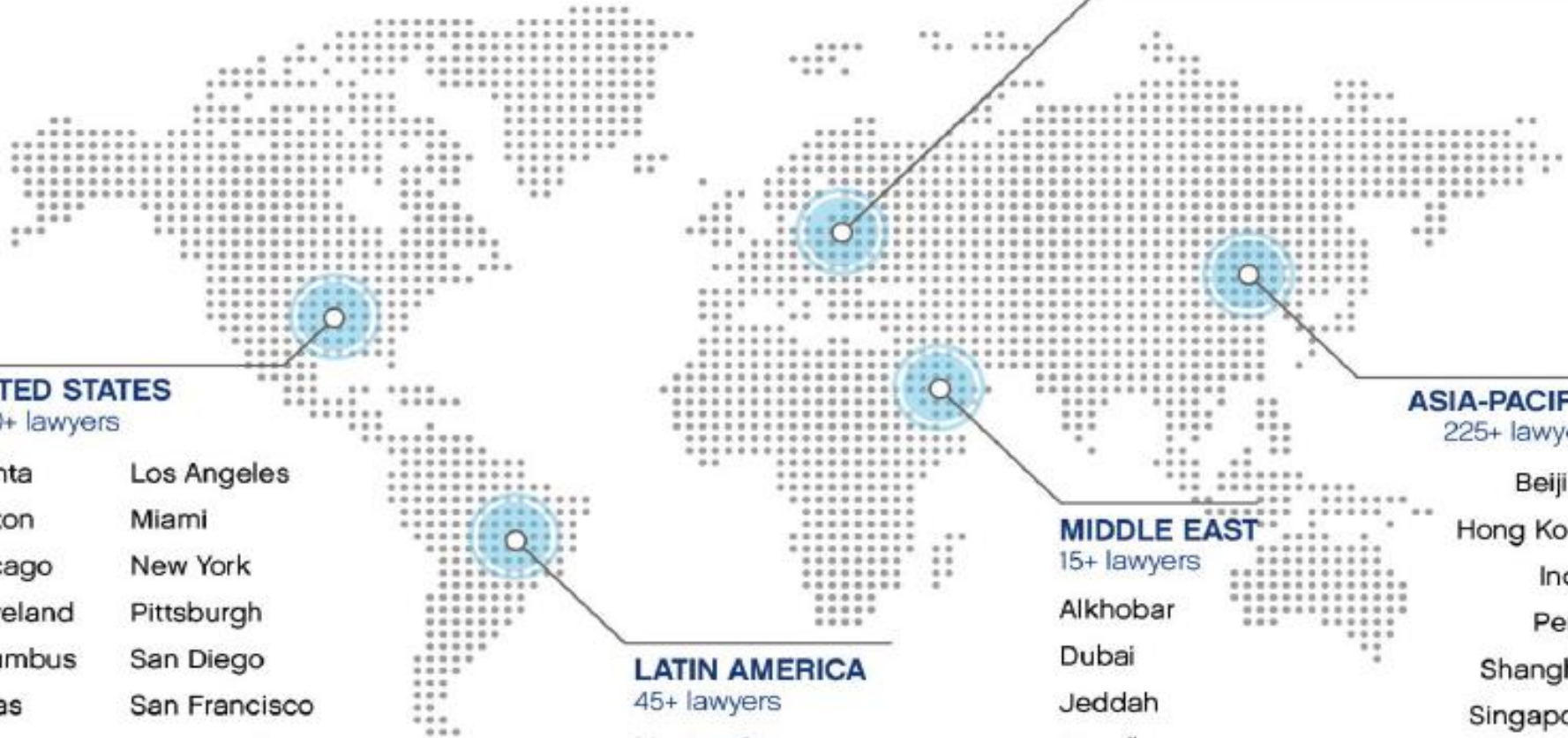
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