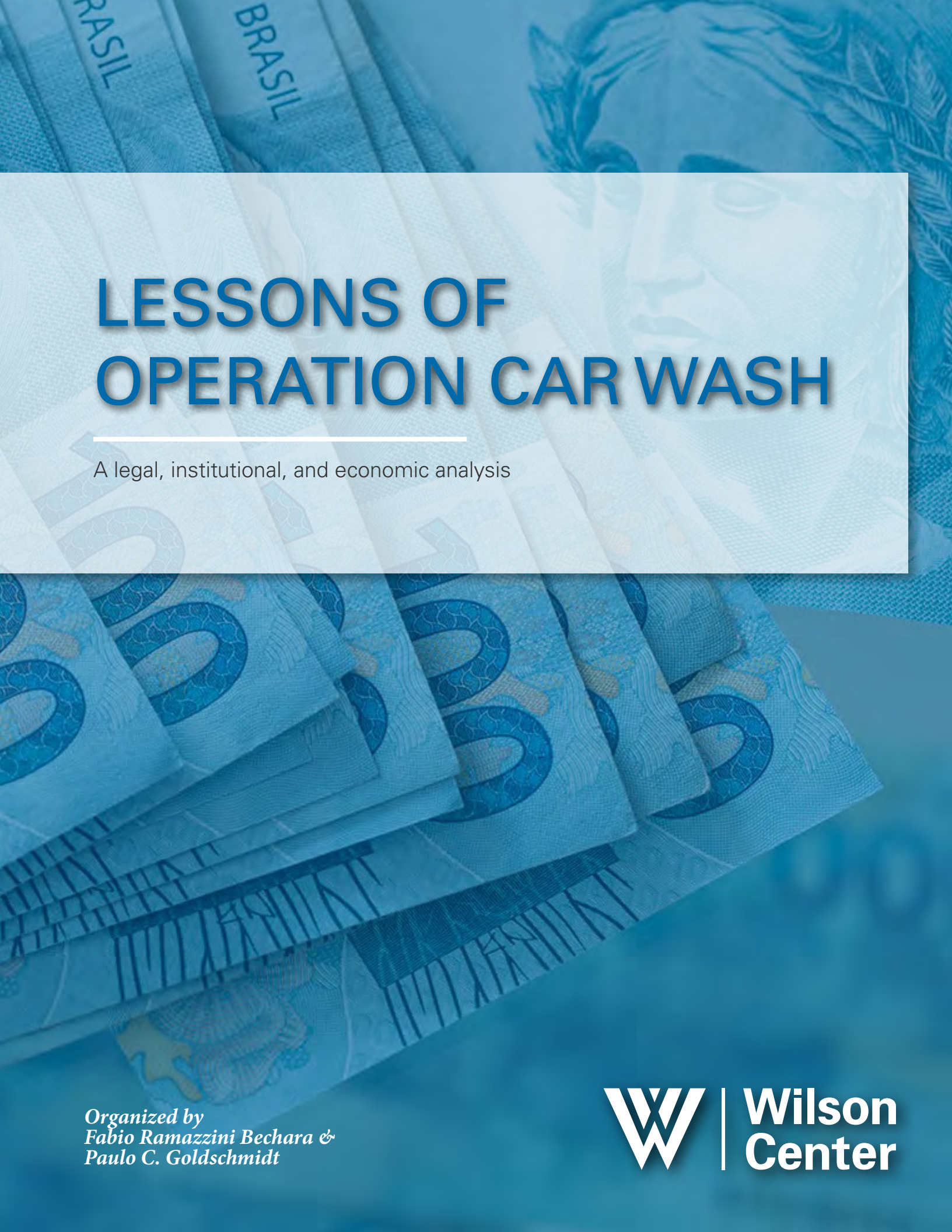

# LESSONS OF OPERATION CAR WASH

A legal, institutional, and economic analysis

*Organized by*
*Fabio Ramazzini Bechara &*
*Paulo C. Goldschmidt*

Wilson Center


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# Lessons of Operation Car Wash:

## A Legal, Institutional and Economic Analysis

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# TABLE OF CONTENTS


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# Preface

Brazilians could barely believe their eyes when they saw the country's Supreme Court announce on television, in October 2012, guilty verdicts against 25 politicians, business executives, and operatives involved in a Congressional vote-buying scheme. Twelve of the 25 individuals convicted received lengthy prison sentences, unprecedented in a nation where the powerful had benefited from a culture of impunity since its formative years as a Portuguese colony.

Less than two years later, in 2014, the federal public prosecutor's office launched an investigation into alleged corruption at the state-owned energy giant Petrobras, exposing a cartel—formed at the highest levels between Petrobras officials and senior executives of Brazil's largest construction companies—designed to skim millions of dollars off of contracts to develop rich offshore oil fields. It was simultaneously a confirmation of the sheer scale of systemic corruption in Brazil and evidence that impunity was no longer guaranteed.

The Petrobras corruption scandal—the largest in Brazilian history—was the genesis of Operação Lava Jato, named after a car wash in Brasilia used initially to launder illicit money obtained by the scheme. But it the operation soon expanded far beyond Petobras. Hundreds of politicians, government officials, and private sector executives were arrested, tried, sentenced, and sent to jail. Among them were former Speaker of Chamber of Deputies Eduardo Cunha, who had launched a successful impeachment against President Dilma Rousseff, and former President of Brazil Luiz Inácio Lula da Silva.

Federal Judge Sérgio Moro, who had worked in the earlier investigation of the vote-buying scheme in Congress, emerged as an early champion of Operation Car Wash, which he turned into a crusade to expose and punish "systemic corruption" in Brazil—with enormous popular support. On Sunday, March 13, 2016, some 3.4 million Brazilians (according to police estimates) took to the streets in 262 cities to protest against the Petrobras corruption scheme. José Arthur Giannotti, a retired professor of philosophy at the University of São Paulo, noted at the time "People asked for the moralization of Brazilian politics."

Yet the legacy of Operation Car Wash is complicated. It has come under scrutiny for its controversial use of plea bargains and pre-trial detentions, and a seeming willingness, on the part of some of the officials involved, to bend the rules in pursuit of convictions, leading to allegations that the probe was being used for political ends.

The massive scandal also had the net effect of discrediting all members of the political establishment, and opened a path for Congressman Jair Bolsonaro, a former army captain who had been pushed out of the military, to mount a successful presidential campaign in 2018. Once elected, President Bolsonaro named Sérgio Moro as his Minister of Justice and Public Security. Arguing that as minister he could take the fight against corruption to a new level, Moro joined the government—but in doing so, he strengthened concerns over the politicization of the operation. The decision marked

the effective end of Lava Jato; although the formal end did not occur until this year. What, then, are the legacy and lessons of Operation Car Wash?

Born from a proposal developed by São Paulo state prosecutor and law professor Fabio Ramazzini Bechara, a Global Fellow of the Wilson Center's Brazil Institute, the following chapters analyze the impact of Lava Jato on systemic corruption and impunity in Brazil. The Wilson Center has been honored to work on this project alongside three leading academic institutions in Brazil: the Fundação Getulio Vargas, Mackenzie Presbyterian Unviersity, and the University of São Paulo.

It will take time and considerable persistence to establish a culture of transparency and accountability in Brazil. Operation Car Was was, at best, a beginning of the process. Yet as the authors of this volume note, it was also a watershed moment for Brazil—and one that set in motion the development of better mechamisms, greater knowlege, and deeper partnerships—in Brazil and abroad—to investigage and prosecute systemic corruption.

***Paulo Sotero & Anya Prusa***
***Washington, DC, November 2020***

# Introduction

This book is about combating corruption in Brazil, especially systemic corruption. It does not deal with petty corruption. Although all types of corruption should be firmly opposed, systemic corruption is far more important than petty corruption in terms of what it represents in the institutional, political, and economic scenarios for the country. The damage imposed on Brazil due to systemic corruption implemented by political forces in the last two decades is of an unprecedented magnitude when compared to any other country in the world.

Systemic corruption may be characterized as "a situation in which major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which most people have no alternatives to dealing with corrupt officials."[1] In this sense, systemic corruption should be viewed as involving practices which are permanent, centralized, and widespread in government activities. A network of corrupt persons acting together and performing different roles follows a common set of norms and rules, normally in an informal scheme. As far as these norms and rules are followed, the perpetrators are rewarded; conversely, the perpetrators are penalized if they fail to follow the norms and rules. In this sense, systemic corruption is much more than individual behavior. This "complex social phenomenon involves shared expectations, internalized beliefs, rules, norms, social bonds and networks, procedures and rituals, as well as mechanisms of generating common strategies, planning, management, logistic control of corrupt transactions, and protection from exposure. Differently from an individual corruption which is normally understood as a deviant or pathological behavior of an individual aimed at abusing powers entrusted to him/her for personal gain, the phenomenon of systemic corruption is an informal pathological institution with parasitical attachment to formal institutions of politics and public administration."[2]

In addition to supporting the continued fight against systemic corruption, the works in this book share another common thread: the use of Operation Car Wash as a central focus for each chapter's specific theme. In general terms, Operation Car Wash may be viewed as a method for uncovering the crimes perpetrated by individuals, public officials, politicians, and private organizations against Brazil public coffers and for submitting these perpetrators to the penalties provided by the law. The fight against these crimes is the main motto of Operation Car Wash. In fact, the numbers behind Operation Car Wash are impressive and show an articulate and precise process of investigation, fact-finding and analysis, and judicial action against perpetrators. Since its beginning in 2014, Operation Car Wash undertook

1 "Glossary," Anti-corruption Resource Center, accessed November 17, 2020, http://www.u4.no/glossary/.

2 Pavol Frič, "Re: What is systemic corruption and can it be analyzed by system dynamics modelling?," September 2016, https://www.researchgate.net/post/What-is-systemic-corruption-and-can-it-be-analyzed-by-system-dynamics-modelling/57ee51e396b7e43dc11127a1/citation/download.

seventy-one phases (or operations) resulting in 119 complaints filed, 116 criminal actions, 165 individuals convicted in both first and second instances[3], forty-nine signed collaboration agreements, and fourteen signed leniency agreements. In its six years of existence, the money Operation Car Was has recovered is also awe-inspiring: R$4 billion ($1.2 billion) recovered and returned to the public coffers, R$2.1 billion ($650 million) obtained in compensatory fines from collaboration agreements, R$12.4 billion ($3.8 billion) obtained from leniency agreements, and R$111 million ($34 million) returned from defendants' voluntary waivers.[4]

With the objective of analyzing the causes and effects of the systemic corruption—particularly the responses of judicial authorities involved in "Operation Car Wash" that strengthened its capacity to deal with this case—a group of professors and researchers from three leading academic institutions in Brazil (Fundação Getulio Vargas, Universidade Presbiteriana Mackenzie, and Universidade de São Paulo) authored this study with the cooperation and support of the Brazil Institute of the Woodrow Wilson International Center for Scholars, in Washington, DC. The subsequent pages seek to better explain the intricacies of Operation Car Wash in order to more fully understand the phenomenon it presents.

This work explores the methodological process developed by Operation Car Wash to combat systemic corruption. The seven chapters that follow comprise different approaches and concerns, from legal to institutional and economic effects, and address many gaps to fill and challenges to overcome.

The first chapter, "Operation Car Wash: What Does That Mean?" by Fernanda Vilares, examines the legal definition and basis for Operation Car Wash in order to better understand its nature. She notes that Operation Car Wash is not only an investigative operation but also an attitude that refuses to accept impunity for wrongful and criminal acts. This chapter demonstrates how the operational aspects of investigations are related to strategies often developed in different contexts, and it stresses the idea of having a plan for conducting the investigations—no matter the tools and the level of control used to achieve the goals. Vilares discusses in particular the so-called "controlled action" tool provided by Brazilian law, which is essentially covert police activity. Even without a formal procedure for its use, the essential elements of this covert activity are shown in the text of the law. It is possible for covert activities to involve several enforcement agencies, and the timing of disclosing the operation is crucial in order to achieve success. However, it is quite difficult to maintain the secrecy of an operation for a long period of time. In addition to exploring the operational aspect, the first chapter also describes the concept of a task force. The aim of a task force is to facilitate cooperation among several enforcement agencies in order to work strategically towards a common goal. In practical terms, a task force is composed of a team of specialists having the material means to achieve a specific objective. The chapter discusses the existing provisions in Brazilian law which enable cooperation between different institutions in the search for evidence against organized crime, providing the for-

3 First-instance courts are where the initial complaints are file and cases are tried; second-instance courts are appellate and higher-level courts. Third-instance courts include Brazil's Superior Court of Justice and Supreme Court.

4 The amount in USD is an estimate and has as basis the conversion rate of the U.S. dollar to the Brazilian real in December 2016.

mal approval for task forces to conduct their investigations. The final aspect discussed in this chapter is the question of whether the establishment of a permanent special group, or even the establishment of a special agency with a mandate to act in corruption investigations, should be considered as a replacement for task forces (which are, by definition, temporary).

The second chapter, "Anticorruption policies in Brazil and Operation Car Wash: Institutional and economic analysis" written by Ligia Maura Costa, Maria Lucia L.M. Padua Lima, and Paulo C Goldschmidt, starts with an overview of the history of the operation, followed by a discussion of the effect of corruption on democracy, the rule of law, and economic growth. The chapter next discusses the roots of corruption in Brazil, pointing out some particular and historically well-established characteristics of the Brazilian scenario, including: outdated legislation, a weak institutional framework, poor access to public information, a lack of transparency, low participation of the general public in combating corruption, and the slow pace of justice. In discussing these questions, the chapter mentions several notorious corruption cases over the past decades involving top-level public officials and politicians who diverted public funds and/or received illegal payments from the private sector in order to take advantage for personal or political reasons. The chapter then discusses the more recent efforts to improve the Brazilian legal system in order to effectively combat corruption. The conversation focuses in particular on solutions to systemic corruption, including the establishment of anti-corruption standards to comply with the international framework. The final part of this chapter examines an analysis of the possible effect of Operation Car Wash on Petrobras' finances. The reason for using Petrobras as an example is twofold: (a) its importance in terms of its size within the Brazilian economy, and (b) the investigations of the company carried out by Operation Car Wash, since 2014. For a company which had been consistently profitable since its creation in 1953, the huge losses shown in the 2014-2017 period raised the question of whether these losses could be related to the actions taken by Operation Car Wash in its investigations of the largest Brazilian company. Many critics of Operation Car Wash have argued that this operation damaged the Brazilian economy. This chapter analyzes the financial results of Petrobras in detail, and in particular the period in which the huge losses occurred; it also examines the impact and possible repercussions of asset impairments in 2014-2017, as a result of the corruption scheme operated inside the company. In order to further discuss the possible causes of the losses, two cases are described in relation to specific situations where Petrobras was involved: Sete Brasil and Comperj. These cases have the merit of permitting a more in-depth analysis of the company's losses, while also providing clues to the possible relationship between the corruption scheme and the financial results obtained by the company in the years following the corruption investigations.

The third chapter, "International legal cooperation in Operation Car Wash" written by Maria Thereza Rocha de Assis Moura and Marta Saad, deals with international legal cooperation among nations to facilitate the investigation of transnational crimes, enabling data gathering for the conviction of perpetrators and permitting the recovery of embezzled assets unduly remitted to foreign countries as part of a corruption scheme. Interna-

tional legal cooperation is a fundamental instrument for the investigation of criminal transnational organizations. It allows for the investigation, prosecution, and execution of sentences, in the interest of a foreign state's criminal jurisdiction, in crimes related to money laundering, corruption, illicit markets, and organized crimes. This chapter presents the main international bilateral agreements Brazil has entered, as well as the multiple multilateral agreements, treaties, and conventions signed with different institutions and addressing situations like organized crime, corruption, the trafficking and smuggling of persons and firearms, terrorism, the trafficking of narcotics and psychotropic substances, and the illicit trade of tobacco products. It also discusses the mechanisms in place in Brazil through which criminal jurisdictional cooperation operates, such as extradition, transfer of prisoners, ratification of a foreign criminal judgment, letter of request, and direct assistance. The authors place special emphasis on the mechanism of direct assistance, and on the role of the Department of Asset Recovery and International Legal Cooperation (DRCI) as the organ responsible for the articulation, integration, and filing of actions across the different levels of government structure. The chapter shows the number of requests made to, and received by, each country with which Brazil has exchanged active cooperation since 2014, as a result of the efforts of Operation Car Wash. The data presented shows a convergent effort of countries of different legal traditions to use reciprocal legal cooperation, mainly through direct assistance and the spontaneous exchange of information among financial intelligence units. The final part of the chapter shows the difficulties that still persist in the field of international legal cooperation due to different procedures, bureaucratic obstacles, the heterogeneous pace of various judicial systems, and issues related to the differing use of specific investigative tools among the different countries that enter into a legal cooperation process.

The fourth chapter, "Criminal cooperation agreements" written by Marcos Zilli, discusses various agreements which played an important, if not fundamental, role in the expansion of the investigations. There were more than forty-eight agreements signed within just the original core of the operation in the Federal Court of Curitiba. The facts revealed by successive agreements significantly broadened the limits of the investigation. More than that, they disrupted other corruption schemes involving other public companies and other spheres of power. Undoubtedly, the success of the operation must be credited, in large part, to the cooperation agreements. However, the negotiation of the agreements highlighted debates about three controversial issues related to voluntariness, especially in cases involving imprisoned employees: first, the limits of the agreed punitive benefits; second, the method of developing negotiations; and third, the treatment of the collaborating defendant and his/her relationship with the other accused defendants. To some extent, these criticisms were absorbed and digested, which led to the legal reform established by Law 13.964/19.

The fifth chapter, "Destination of goods, rights, and values in Operation Car Wash: Critical analysis and improvement perspectives" written by Fábio Ramazzini Bechara and Gianpaolo Poggio Smanio, analyzes the asset-recovering collaboration agreements and convictions in some Operation Car Wash cases, verifies to what extent the destination of goods and values (either determined or negotiated) has complied with the legality standards, identifies the differ-

ent criteria adopted to guide the decisions, and reflects on the coherence of this work and the opportunity for legislative and especially institutional improvement. The data analyzed were extracted from forty-two judged criminal complaints in the context of Operation Car Wash. Among them, forty-one originated in the 13th Federal Criminal Court of Justice of Curitiba. Although it is possible to recognize a textual pattern in the judicial decisions and in the collaboration agreements supported by legislation, it is a fact that some critical issues still exist. For instance, as the authors of this chapter note, there is a need to parameterize and control the discretion of judges and members of the Prosecution Service in defining the destination of the assets. Other remaining issues include the complexity of measuring the damage caused, the evidence standard required to justify the confiscation measures, and the management of the goods and values seized or sequestered.

The sixth chapter, "Main dogmatic aspects of corruption crimes in Brazil related to Operation Car Wash" written by Adriano Teixeira and Raquel Scalcon, aims to present an overview of the legal dogma involved in corruption crimes in Brazil, especially in relation to cases that fall within the scope of Operation Car Wash. Their analysis focuses on cases judged by the two Brazilian superior courts: the Supreme Federal Court (STF) and the Superior Court of Justice (STJ). The dogmatic analysis is restricted to crimes of corruption ***stricto sensu***, that is, passive corruption and active corruption (articles 317 and 333 of the Brazilian Penal Code - hereinafter "CP"), which means, in common law terms, bribery offenses. Thus, other crimes related to corruption—or even included in a broad concept of corruption like the one used by Transparency International[5]—are not discussed, including embezzlement, crimes relating to public bidding, fraud, unfair administration, extortion, etc.[6] The only exception made is related to the offense of money laundering, as it is a special case. The topics presented are pertinent to the main problems of interpretation and application of corruption crimes in Brazil, primarily within (but not limited to) the scope of Operation Car Wash: the concept of public officials for criminal purposes; the concept of an "official act"; corruption and campaign financing; the ***ne bis in idem*** problem of corruption and money laundering. To provide context, this chapter also briefly presents an overview of the anti-corruption legal regime in Brazil and a general narrative of the facts concerning Operation Car Wash.

The seventh and last chapter, "Compliance and responsibility for omission and compliance" written by Marco Aurelio Florencio Filho and Giovani Saavedra, analyses the criminal responsibility of a company's compliance officer and describes this process, including a two-step approach to its critical examination. Initially, the authors examine the dogmatic construction of the institution of omission (failure to act) as a crime, and its application to Operation Car Wash, so that the results of this analysis may be critically compared to the dogmatic legacy of the "Mensalão" corruption case (APn 470), i.e., the criminal responsibility of the compliance

5 "What is Corruption?" Transparency International, https://www.transparency.org/en/what-is-corruption/#.

6 Working with this broad sense of corruption, see Jens Andvig, "Corruption in China and Russia Compared: Different Legacies of Central Planning," in Susan Rose-Ackerman and Henry R. Luce, Eds, International Handbook on the Economics of Corruption (Northampton, Mass: Edward Elgar Publishing, Inc, 2006), 281; Susan Rose-Ackerman, and Bonnie J. Palifka, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge, Mass: Cambridge University Press, 2016), 9; and Jeremy Horder, *Criminal Misconduct in Office: Law and Politics,* Kindle Edition (Oxford University Press, 2018), 83.

officer. The analysis clarifies that, despite the recurring and consolidated use of case law, the material grounds used to determine omission as a corporate crime have yet to be determined. The authors argue that the newness of compliance can only be understood through its interaction with criminal law. Without this context, one risks falling into a paradox: in other words, a scenario in which attempts to protect a corporation by creating the compliance officer position actually increases the risk of criminal accountability, because if the compliance officer fails at their task—to curb opportunities for corruption and provide oversight—they may be treated as the perpetrators of the crime.

There is no doubt that many institutional, economic, and legal developments in Brazil over the past thirty years were aimed at dealing with corruption. Operation Car Wash best encapsulates these developments within a single narrative. Notwithstanding of all these improvements, there remains a long road to be followed, through national and global perspectives, as well towards challenging specific corruption schemes. There is a need for further changes that impact not only public perceptions of corruption, but also the effectiveness of the rule of law, its relationship to development, and the full respect of human rights. Through the chapters and arguments presented in this volume, we aim to contribute to these developments and to clarify some of the many questions that need further exploration.

***São Paulo, September 2020***

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01

# Operation Car Wash: What Does That Mean?[1]

*By Fernanda Regina Vilares*

The facts regarding the criminal investigation that gave rise to Operation Car Wash in Brazil are well known.[1] Therefore, this article is not intended to provide a narrative of these events, but rather to present a legal definition of this phenomenon. The idea is not to discuss procedural issues of the operation, but to understand its nature—with special attention to practical issues.[2] This is not an easy task, not only because the legal issues are different than those in U.S. law, but also because there is no clarity concerning the nature of Operation Car Wash in Brazil. That said, this paper will explore many possibilities, culminating with an initial discussion of what the next steps could be.

There are many references to "Car Wash" as a "corruption scandal" and even a "state of mind."[3] From a legal perspective, it is defined as an "operation" or "task force." Indeed, it can be understood as all of this at the same time. That is the particularity of this phenomenon.

It is important to establish that "Car Wash" is not the corruption scandal ***per se***, although the expression is largely used as a synonym. In reality, the Car Wash operation uncovered a preexisting corruption scheme that had been going on for decades in Brazil. Sergio Moro defined it as "breaking the tradition of impunity for high-level corruption."[4]

Besides, as Jessie Bullock and Matthew Stephenson pointed out, Car Wash transcends the criminal investigations and prosecutions; it can be defined instead as a state of mind against corruption:

> Lava Jato also signifies an attitude or state of mind—one that refuses to accept the impunity of the wealthy and powerful as an immutable fact of life. The Lava Jato Operation has had its share of controversy and criticism, some of which we will touch on below, but at its best, the 'Lava Jato 'Spirit'—the belief that systemic corruption is not inevitable and need not to be tolerated—represents a potentially transformative cultural shift.[5]

In reality, the Car Wash spirit was so strong that, for some people, it was one of the rea-

1 A detailed history can be found in the books referenced in the bibliography.

2 Academics are usually criticized for theorizing without worrying about solving real problems. This paper aims to make a bridge between practical necessities and theoretical concepts in order to understand reality and propose some solutions. In addition to drawing on my own practical experience, several members of the Federal Prosecutor's Office offered feedback. For their huge support, I thank Andrey Borges de Mendonça, Isac Barcelos Pereira de Souza, and Paulo Roberto Galvão de Carvalho.

3 Ana Luiza Albuquerque, "A Lava Jato não é só a operação, mas um estado de espírito, diz professor de Harvard, " *Folha de S. Paulo*, 21 October 2019, https://www1.folha.uol.com.br/poder/2019/10/a-lava-jato-nao-e-so-a-operacao-mas-um-estado-de-espirito-diz-professor-de-harvard.shtml.

4 Sergio Moro, "Sobre a operação Lava Jato," in *Corrupção : Lava Jato e Mãos Limpas*, eds. Maria Cristina Pinotti, et. al. (São Paulo: Portfolio-Penguin, 2019), chapter 5.

5 Jessie W. Bullock and Matthew C. Stephenson, "How should Lava Jato end?" in *Corruption and the Lava Jato Scandal in Latin America*, eds. Paul Lagunes and Jan Svejnar (New York, Routledge, 2020), 213-214.

sons—probably the most significant one—that led to Jair Bolsonaro's presidency.[6] The wrongful acts revealed by the investigations were responsible for this new anti-corruption culture. This connection between the operation and the fight against corruption is so significant that, in Brazil's highly polarized environment, certain parts of the electorate may view criticism of the investigations (even when covering strictly technical and punctual aspects) as a defense of the illegal acts themselves.

That said, there are two specific concepts that must be explored: "operation" and "task force," which will be better described in the following sections.

## I. THE "OPERATION" ASPECT

Semantically, "operation" has many possible meanings. In a practical sense, the Cambridge Dictionary defines it as "an activity that is planned to achieve something,"[7] such as a military or peacemaking operation. This is very similar to how scientific methodology conceives of a "method," which is an action plan formed by arranged steps aimed at carrying out an activity in search of a reality.[8]

Both definitions lead us to the idea of strategy, which is always present in investigations, especially criminal ones. Strategy involves planning: the grouping of actions and resources aimed at achieving a certain objective.[9] It seems, however, that strategy also has a huge connection to smartness, brilliance, or even a judgment of convenience and opportunity, to use a legal expression. Thus, strategy could be defined as a method which comprises sagacity.[10]

It seems that all of these ideas permeate the concept of an "operation" when it is used to define the "Car Wash" operation. But this is still too theoretical. Under U.S. law and several treaties on organized crime,[11] it is common to find references to undercover operations. Gary Marx defined it thusly:

> Undercover work is both covert and deceptive. Unlike conventional police work, which, in a protracted process, tends to move from

6 "Moreover, there are those who believe that anger about corruption fueled political support for the presidential candidacy of Jair Bolsonaro," write Paul Lagunes and Jan Svenjar, *Corruption and the Lava Jato Scandal in Latin America* (New York, Routledge, 2020), 8.

Note: In the opposite direction, Deltan Dallagnol says that "Car Wash" did not support any candidate in the elections and disagreed with the conclusion that the anticorruption fight led to Bolsonaro's election. See: Felipe Bächtold, "PGR acessar dados da Lava Jato seria como banqueiro ver a conta de um cliente, diz Deltan em entrevista à Folha," *Folha de S. Paulo*, 6 July 2020, https://www1.folha.uol.com.br/poder/2020/07/pgr-acessar-dados-da-lava-jato-seria-como-banqueiro-ver-a-conta-de-um-cliente-diz-deltan-em-entrevista-a-folha.shtml?origin=uol.

7 Cambridge Dictionary. Definition of "Operation". Accessed July 3rd, 2020. https://dictionary.cambridge.org/pt/dicionario/ingles/operation.

8 Odília Fachin, *Fundamentos de Metodologia*, 5. Ed. (São Paulo: Saraiva, 2006).

9 Eliomar da Silva Pereira, *Teoria da investigação criminal* (Coimbra: Almedina, 2010).

10 Fernanda Regina Vilares, *Ação controlada: limites para as operações policiais* (Belo Horizonte: Editora D´Plácido, 2017).

11 See, for example, the United Nations Convention Against Transnational Organized Crime (2004): Article 20. Special investigative techniques 1. "If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime."

> discovery of the offense to discovery of the identity of the perpetrator, then to arrest, the investigation may go on before and during the commission of the offense. It may start with the offender and only later document the offense. Discovery of the offender, the offense, and the arrest may occur almost simultaneously…
>
> Intelligence operations use covert and deceptive tactics to gather information about crimes that have already occurred, are or might be planned, or are in progress. The agent´s role tends to be relatively passive, involving observation and questioning, rather than an effort to direct the interaction."[12]

The definition implies that there is a broader plan developed by and between certain agents, which aims to gather elements or wrongdoings to prosecute those who broke the law. This is what happened in Car Wash after law enforcement authorities carried out further investigations following the Federal Police's initial findings, as described in the excerpt below:

> In early 2014, a supposedly routine money laundering investigation by the Brazilian Federal Police was drawn to a gas station in the heart of the capital city of Brasilia. This unassuming gas station, which also ran a car wash business, housed a small office connected to a black-market dollar dealer who was being investigated. Once Public Prosecutors joined the Federal Police and started following the money trail originating from that office, they lifted the lid on a web of corruption of unimaginable proportions.[13]

Although in the United States an undercover or covert operation is not defined by the agency that carries out the investigation, in Brazil it is usually called a police operation. As explained above, this is not a precise expression, since operations are planned and executed by many government agencies in a collaborative work. Nevertheless, it happens before the judicial phase and that is the main reason the "police" is used as an adjective. It is also used to refer to any other complex investigation that starts with an undercover phase and becomes public at a strategic moment.

In Brazil, the term "police operation" is treated almost as a synonym for an efficient criminal investigation and is largely used as a tool to showcase efforts against organized crime.[14] In the absence of a legal definition, it would be relevant to establish its legal boundaries in order to assure the due process of law.

In this context, it is important to mention that Brazilian Law already provides an investigative tool that can be used to achieve this goal. The literal translation would be a "controlled action," although this expression does not fully convey its true nature. One may also call it covert activity or covert police activity.[15]

This typical Brazilian instrument in the fight against organized crime does not have the same legal nature of the so-called "special investigation techniques." Rather, it turns out to be a secret investigation method that can embrace these "special investigation techniques," to the extent that such techniques have the purpose of extracting data from sources of evidence. It is a method which depends

12 Gary Marx, *Undercover: Police Surveillance in America* (Oakland: University of California Press, 1988), 7.

13 Lagunes and Svenjar, xvi.

14 Vilares, *Ação controlada* (2015)

15 Fernanda Regina Vilares, "Ação controlada: existem limites para as operações policiais?" in *Modernas técnicas de investigação e justiça penal colaborativa*, Eds. Eduardo Saad-Diniz, Fabio Casas Diniz, and Rodrigo de Souza Costa (São Paulo: LiberArs, 2015), 39-49.

on the secrecy of its implementation, as described in Article 8 of Law n. 12.850/13.[16]

The essential elements of the covert activity can be extracted directly from the provisions of the law: presupposition (a criminal practice that lasts over time), means of execution (the monitoring of a criminal action combined with a delay of police or administrative intervention), purpose (to obtain sufficient evidence to carry out a criminal indictment), statutory requirements (action practiced by a criminal organization or related to it), and condition to be legally valid (judicial decision), which must be present to enable the use of this investigation method.

However, the statute does not provide a step-by-step procedure concerning the "controlled action." Therefore, it is important that judges and prosecutors apply it in a way that ensures, to the greatest extent possible, all the fundamental rights and guarantees involved in a criminal investigation, respecting the principle of proportionality and every single constitutional provision.[17]

It is important to highlight that delaying does not mean not acting. The lack of action is only temporary, because while agents refrain from intervening in order to keep watching the criminal action and extract evidence, many other investigation techniques are being executed. This is the moment when all the enforcement agencies involved secretly work together until they decide the time is right to disclose the operation and fulfill arrest warrants, forfeitures, and other measures.[18]

Given the above, it is hard to believe that the covert phase of a controlled action or police operation could last for more than six years. Given its natural mechanisms, it has to become public earlier—it is impossible to wait for so long without taking actions, making cooperative agreements, or initiating prosecutions. Indeed, with respect to Operation Car Wash, it is well-known that public agents have taken many actions during the past six years. The Operation Car Wash timeline is available in the official Federal Prosecutor's Office website[19] and shows that there have been seventy phases since 2014, encompassing three different court districts and Superior Courts.[20]

It is possible to state, from a technical perspective, that each phase of Operation Car Wash can be considered a police operation or controlled action. Once the enforcement of warrants reveals a covert investigation and the operation becomes publicly known, one can no longer describe it as a secret strategy. The plan to achieve something—an arrest, evidence of a crime, or some other goal—has been fully implemented, so it is over.

This raises an interesting question: If each phase is a unique operation, what provides the continuity of the phenomenon? One of the possible answers is given by analyzing who leads the operations, which is the subject of the next section.

16 Article 8. The controlled action consists in delaying the police or administrative intervention related to the action practiced by a criminal organization or related to it, since it is kept under observation and monitoring in order to guarantee that the legal measure will take place at the most effective moment for the obtaining of evidence and proof.

§ 1 The delay in police or administrative intervention will be previously communicated to the competent judge, who, if applicable, will establish its limits and report it to the Public Ministry.

17 Vilares, "Ação controlada" (2017).

18 In our detailed study on covert police action, I explored the problems that secrecy in investigation creates to the right of defense and the necessary cautions relating to i. See: Vilares, "Ação controlada" (2017).

19 Ministério Público Federal. Caso Lava Jato: Linha do Tempo. Accessed 3 July 2020, http://www.mpf.mp.br/grandes-casos/lava-jato/linha-do-tempo

20 Note: Wikipedia lists seventy-one phases. See "Fases da Operação Lava Jato, Wikipedia, Accessed 3 July 2020, https://pt.wikipedia.org/wiki/Fases_da_Opera%C3%A7%C3%A3o_Lava_Jato.

## 2. THE TASK FORCE

Just like the concept of "operation," the definition of a task force is not expressly set forth by Brazilian law. It is a concept brought from military practices, such as a temporary group of military units under a common command with the purpose of executing an operation.[21]

More recently, this expression is being used not only in the context of wars between countries, but also (and primarily) in the fight against organized crime. The United States, Italy, and United Kingdom were the precursors of this kind of articulation between agencies that has served as inspiration for many other countries, including Brazil.

The main inspiration is the cooperation between law enforcement agencies to work strategically towards a common goal: to stop and punish the activity of a criminal organization.[22] There are many types of collaboration, entailing different levels of interaction, commitment to the process, and inter-organizational trust. They can range from "intermittent coordination, to temporary task force, to permanent or regular coordination, to coalitions, all the way to network structures."[23] Task forces can be internal, when a government agency mobilizes only its own members and resources; or external, with an inter-institutional approach.[24]

A task force can generally be considered a team of specialists equipped with the material means necessary to achieve a specific, complex objective that demands, for a certain period, the coordination of efforts of one or more national or foreign bodies. It is always a temporary method of organizing and distributing work.[25]

In the beginning, the investigations that led to the Car Wash phenomenon were carried out only by the Federal Police.[26] Nevertheless, as in many other complex investigations, it became necessary to involve other specialists such as Federal Revenue Service and Federal Prosecutor's Office. Thus, the public agencies had to look for legal basis that authorized this collective work.

Brazilian organized crime statute (Law n. 12.850/2013), the same piece of legislation that created the definition of controlled action, contains a provision that enables cooperation between institutions in the search for evidence against organized crime.[27] Isac Barcelos Pereira de Souza states that this kind of collaborative work was carried out even before the law was enacted. However, those early task forces were restricted to national agencies, which makes them different from joint investigation teams.[28]

In the case of the Car Wash operation, the collective investigation started to be formed

21 Januário Paludo, ed., *Forças-tarefas: direito comparado e legislação aplicável - MPF* (Brasília: Escola Superior do Ministério Público da União, 2011).

22 Marcelo Batlouni Mendroni, *Crime organizado: aspectos gerais e mecanismos legais*, 3. ed. (São Paulo: Atlas, 2009), 52.

23 Thomas S. Szayna, et al., *Integrating Civilian Agencies in Stability Operations* (Santa Monica: Rand Corporation, 2009), 116.

24 Paludo.

25 Ibid.

26 Lagunes and Svenjar.

27 Article 3. At any stage of criminal prosecution, the following means of obtaining evidence will be allowed, without prejudice to others already provided for by law:

(…)

VIII - cooperation between federal, district, state and municipal institutions and agencies in the search for evidence and information of interest to criminal investigation or instruction.

28 Isac Barcelos Pereira de Souza, *Equipes Conjuntas de investigação* (Salvador: Editora JusPodivm, 2019).

in a more structured manner and the Federal Prosecutor's Office assumed the leadership of activities.[29] Initially, it all took place in Curitiba,[30] but, over time, the amount of material and connections led to the creation of new task forces in São Paulo, Rio de Janeiro, and Brasília.[31]

Additionally, although their impermanence is fundamental to the concept of task forces, in the Car Wash scenario, the extent of information and new investigation possibilities gave rise to a "never-ending" situation across the entire country.[32] A team formed to fulfill a local, specific, and temporary collective job ended up accomplishing seventy phases or "operations" in many different cities throughout many years.[33]

29 This is not official information, as this leadership was never formalized, but it is a point of view based on the observation of facts. Some narratives also corroborate this view. See, for example, Deltan Dallagnol and Roberson Pozzobon, "Ações e reações no esforço contra a corrupção no Brasil," in *Corrupção: Lava Jato e Mãos Limpas,* Eds. Maria Cristina Pinotti, et al. (São Paulo: Portfolio-Penguin, 2019), Capítulo 4.

Moreover, each law enforcement agency always has its own internal task force, which works in collaboration with the other agencies.

30 It is important to clarify that Judge Sergio Moro, commonly remembered and linked to Operation Car Wash, was responsible for most of the cases of Lava Jato in Curitiba from 2014 to 2018, but he cannot be considered as a member of the task force. His role was restricted to issuing the judicial decisions in the case, which gave him great notoriety.

31 Moro.

32 Diogo Malan refers to the result as "megatrials." See: Diogo Mala, "Megaprocessos criminais e direito de defesa," *Revista Brasileira de Ciências Criminais* 159 (2019): 45 - 67.

33 The number of connected facts and the convenience of having them analyzed together gave rise to a problem of excessive extension of jurisdiction of the courts in those criminal procedures. There were good reasons for that, such as the fact's connection and the task force's knowledge about the case, which led the Supreme Court to validate the operation's extension. See Dallagnol and Pozzobon.

The main takeaway here is that all of the phases and operations mentioned above were planned and executed by a group of institutions, enabled by a statute to undertake the type of cooperative work that is essential when many different skills are necessary to clarify the facts.

## III. CONCLUSION

Operation Car Wash is clearly a legal tool used to fight organized crime. It is comprised of a set of operations or, in Brazilian law terminology, controlled actions. Those phases were boosted by an interagency task force composed of many national agencies led by the Federal Police and Federal Prosecutor's Office. Additionally, each agency can have its own internal force task in order to mobilize energy and resources.

The Car Wash Task Force became a symbol of the fight against corruption. It has become strongly identified with the Federal Prosecutor's Office, which has coordinated the work in practice, even though there is not a legal provision on this issue.

The matter that must be addressed now is the need to formalize the permanent and national nature that the investigation has naturally gained. Perhaps it is time to create a permanent special group (inside or outside the Federal Prosecutor's Office) or even a special agency with a mandate to act in corruption investigations, which would be responsible for all the complex and connected cases in the country. This could provide more transparency, reducing the potential for personal interests and circumstantial material issues to influence investigations. On the other hand, the creation of such an agency could bring other problems, such as information concentration and lack of independence. Of course, any changes must be undertaken in a very balanced process, in

order to assure the maintenance of all the progress in the fight against corruption.[34]

That is the lesson summarized by Jessie Bullock and Matthew Stephenson:

> In that sense, the Operation has been an enormous achievement. And, as noted above, many of the lessons learned during this Operation can and should be transmitted to other prosecutors and law enforcement bodies, so as to increase Brazil's capacity to conduct effective investigations and prosecutions of white-collar criminal conspiracies…
>
> But it would be a mistake to assume that corruption will always be in the national spotlight the way it is now, and it would be a missed opportunity not to mobilize the political and public energy around the Lava Jato Operation into tangible actions—things like better institutionalized transmission of anticorruption expertise among legal professionals, and legislative reform on criminal procedure and money in politics—while this window of opportunity is still open.

Eventual creation of this new anti-corruption unit or agency cannot prevent other task forces from emerging if they are necessary in a particular moment for a certain amount of time, directed to operationalize specific individual covert operations. The legacy of Operation Car Wash on investigation practices is huge and may not disappear. In addition, the great cultural change must result in new and preventive anti-corruption strategies.

34 There is already a project underway at the Federal Prosecutor's Office that would be called National Anti-corruption Unit, but there are many details that must be discussed in order to assure this maintenance of the anticorruption legacy. See: "Nota Pública: Força-Tarefa Greenfield se posiciona sobre a criação da Unidade Nacional Anticorrupção – UNAC," MPF, Accessed 13 July 2020, http://www.mpf.mp.br/df/sala-de-imprensa/noticias-df/nota-publica-forca-tarefa-greenfield-se-posiciona-sobre-a-criacao-da-unidade-nacional-anticorrupcao-2013-unac.

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02

# Anticorruption Policies in Brazil and the Operation Car Wash: Institutional and Economic Analysis

*By Ligia Maura Costa , Maria Lucia L. M. Padua Lima, and Paulo C. Goldschmidt*

In 2008, the Brazilian Federal Police (BFP) began investigating a businessman's complaint related to a money laundering operation involving a federal congressman. The slow investigation was transferred in 2011 to the southern state of Paraná due to the fact that those involved in the process were from that state. Two years later, through the analysis of bank documents obtained during this investigation, the BFP tracked payments from a local gas station in Brasilia whose owner was a well-known *doleiro*—an illegal currency exchanger.

As this BFP investigation was under the jurisdiction of the 13th Federal Court of Curitiba, headed by Judge Sergio Moro, the BFP requested and obtained judicial authorization to breach telephones, email correspondences, and bank transactions of the suspected doleiro. Analyzing this information, BFP tracked numerous and significant payments to several politicians in Brasilia made by the suspected doleiro. The aforementioned local gas station in Brasilia and the laundromats were part of a payment system operated not only by the initial suspect but also by three other doleiros. At that moment in the investigation—March 2014—the BFP from Paraná decided on the name Operation Car Wash, a name that has since became internationally known as synonymous with corruption.

The BFP's monitoring of the doleiros involved in this operation led them to a Petrobras executive who had been appointed to his position by the same politician implicated at the beginning of this money-laundering investigation in 2008. This congressman had also been accused of participating in another federal government corruption scheme several years before.[1]

The support of the Swiss government made it possible for the BFP to trace the Swiss bank accounts of the Petrobras executive. Based on this evidence, the executive was arrested, and after two months in prison he decided to sign a plea bargain deal with Brazilian authorities. His collaboration was an essential factor in unraveling the corruption scheme in the country's largest mixed capital company: Petrobras. As summarized by the Brazilian Federal Prosecution Service (MPF), "in this scheme, which lasted at least ten years, large contractors organized into cartels paid bribes that varied from 1 percent to 5 percent of the total amount of overpriced contracts. These bribes were distributed through the financial operators of the scheme, including doleiros investigated in the first stage of the operation."[2]

1 This corruption case was denominated "Mensalão" and occurred during the first Workers Party (PT) government (2003-2006). This case was related to a vote-buying in Brazilian Congress.

2 Ministério Público Federal. Caso Lava Jato:

It is interesting to stress how important Petrobras is for the Brazilian economy since its creation in 1953, based on a fundamental strategic objective to provide the country with an adequate source of oil and essential derivatives for the country's industrial development. Because this state-owned company was considered a pillar of the Brazilian economy, it was viewed and operated as an important military asset. For many decades, being part of Petrobras was a matter of pride for its employees: meritocracy was the fundamental basis for selecting Petrobras personnel. Even when Petrobras became a mixed capital company in the 1990s (with a consequential organizational renewal), the principle of meritocracy was fully maintained. However, this pattern changed after the rise to power of the Workers' Party (PT) in 2003. From 2003-2016, loyalty to the Party became the most important criteria for filling the managerial positions in state-owned companies. Petrobras was no exception. As a result, the first and second levels in the company's formal structure were filled according to political interests.

Not surprisingly, the above-mentioned Petrobras executive had been recommended for a high-level position in the company by a congressman linked to the government scheme, even though he had been a Petrobras employee since 1975. His plea bargain was the first step in revealing the systemic corruption of the PT governments between 2003-2016—not only in Petrobras, but also in other state-owned companies and institutions run by the federal government. The common denominator of all these cases during the period was the political decision to keep them in power, corrupting Brazilian democratic institutions but without disregarding the goals of personal enrichment.

Entenda o Caso. Accessed 2020. http://lavajato.mpf.mp.br/entenda-o-caso

According to the Federal Prosecution Service, the corruption scheme in Petrobras, and replicated in other public institutions, was formed by four groups of participants: 1) a political unit composed of high-level members of the federal government (essentially the PT and allied parties); 2) an administrative unit formed by some Petrobras officials; 3) a business unit controlled by some Petrobras suppliers; and 4) a financial unit made up of financial operators and front companies.

## I. THE EFFECT OF CORRUPTION ON DEMOCRACY, RULE OF LAW, AND ECONOMIC GROWTH

Like a disease, corruption will always exist. But this fact should not prevent attempts to avoid the disease, nor paralyze efforts to reduce it. Corruption represents a serious threat to the basic principles and values of any government. Combating and overcoming corruption is one of the central challenges of today's societies. Recent scandals in the United Kingdom, United States, France, and other countries show that corruption is a serious problem in practically every state in the world. Yet, the study of corruption is multi-disciplinary. Explored as a political, economic, legal, cultural or moral issue, the study of corruption may range from theoretical models to descriptions of corruption scandals.

Broadly speaking, corruption is comprehended as the misuse of public resources by public officials for private gains. Among the most accepted definitions in the literature, corruption is described as "the abuse of public office for private gain."[3] Corruption comprises a wide variety of behavior,

3 Rose-Ackerman, Susan. 1999. Corruption and Government: Causes, Consequences, and Reform. London: Cambridge University Press.

from bribery and grease money to embezzlement, nepotism, and clientelism; all can be found under the broad definition of "the abuse of public office for private gain." Indeed, it is a definition used by a diverse range of public institutions and NGOs, including the World Bank (WB), the International Monetary Fund (IMF), and the Transparency International (TI), among others. This definition is also consistent with the provisions of the United Nations Convention against Corruption (UNCAC), the only anti-corruption legally binding instrument that is global.[4]

Considered by many scholars as one of the greatest challenges in the modern world, corruption may paralyze good governance, compromise democracy, distort public policies and the rule of law, cause misallocation of public funds and resources, and harm the economic growth.[5] As per Joseph S. Nye's seminal work, corruption is a "behavior that deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains."[6] It arises at the boundaries of the public and private sectors.[7] Corruption may appear in several different forms, meanings, and functions in different circumstances that range from single bribes to the malfunction of entire political, economic, and legal systems.

Fighting corruption is not easy. This is particularly true in the developing world. Many governments are unable or unwilling to pursue anti-corruption campaigns, reforms, and control. No one can deny that the gap is widening between the countries that can control corruption and those that cannot.[8] Corruption is systemic or endemic in many countries. In these societies, corruption becomes customary practice; its punishment may be arbitrary, or the result of political payback. Systemic corruption is dangerous to democracy. To a large extent, systemic corruption is an indicator of a non-efficient state that must be comprehended within a larger theoretical background than that of simply poor governance.[9] In most developing countries, corruption has become systemic. Brazil is no exception to this rule. Table 1 shows the evolution of Brazil in the Corruption Perception Index (CPI) TI.

4 Costa, Ligia Maura. 2018. "Corruption and Corporate Social Responsibility Codes of Conduct: The Case of Petrobras and the Oil and Gas Sector in Brazil". Role of Law and Anti-Corruption Center Journal. 1. Retrieved from https://www.qscience.com/content/journals/10.5339/rolacc.2018.6. doi https://doi.org/10.5339/rolacc.2018.6.

5 Kaufmann, Daniel. 1997. "Corruption: The Facts." Foreign Policy, No. 107. Retrieved from http://www1.worldbank.org/publicsector/anticorrupt/fp_summer97.pdf; Costa, Ligia Maura. 2008. "Battling Corruption Through CSR Codes in Emerging Markets: Oil and Gas Industry." RAE 7(1). Retrieved from https://rae.fgv.br/sites/rae.fgv.br/files/artigos/10.1590_S1676-56482008000100009.pdf; Husted, Bryan W. 1999. "Wealth, Culture, and Corruption." Journal of International Business Studies 30(2), 339-359; Silva, Marcos Fernandes da. 1999. "The political economy of corruption in Brazil". RAE. 39(3), 26-41. Retrieved from http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-75901999000300004.

6 Nye, Joseph S. 1967. "Corruption and Political Development: A Cost-Benefit Analysis." American Political Science Review. 61(2): 417-427, 417. doi: 10.2307/1953254.

7 Rose-Ackerman, Susan. 1978. Corruption: A Study in Political Economy. New York: Academic Press.

8 Costa, Ligia Maura. 2018. "The dynamics of corruption in Brazil". In Corruption Scandals and their Global Impacts, Edited by Omar E. Hawthorne, Stephen Magu, 189-203. Abingdon-on-Thames: Routledge.

9 Cartier-Bresson, J. 1997. "Corruption Network, Transaction Security and Illegal Social Exchange." Political Studies, 45 (3), 463-476, 464.

**Table 1 Brazil : CPI TI**

| BRAZIL | | |
|---|---|---|
| Year | Score Index | Rank/Countries |
| 2019 | 35/100 | 106/180 |
| 2018 | 35/100 | 105/180 |
| 2017 | 37/100 | 96/180 |
| 2016 | 40/100 | 79/176 |
| 2015 | 38/100 | 76/167 |
| 2014 | 43/100 | 69/174 |

Source: CPI 2019 Transparency International[10]

In addition, another significant driving force of corrupt activities in Brazil is bureaucracy and the large number of regulatory and administrative requirements imposed to operate a business in the country. For instance, the World Bank's 2020 Ease of Doing Business Index, which measures countries' regulatory environments to start and operate a business, placed Brazil 124th out of 190 countries.[11]

Generally speaking, democracy is a political system that responds to the highest amount of common demands and protects civil liberties and human rights. Democracy and good governance institutions are necessary for effective anti-corruption measures. Conversely, corruption undermines good governance and democracy. Some scholars argue that corruption may be considered as the most pervasive threat to democracy. The link democracy-corruption has already been analyzed in several studies and is nowadays well-established.[12] Corruption flourishes where democratic foundations are weak and where leaders—often populist leaders—can use it to their exclusive advantage. Corruption is both a symptom and a cause of disruption in democracies.[13] It affects the efficiency and legitimacy of state activities and distorts the criteria by which public policies are selected.[14] As young democracies are more fragile, corruption may drive support for the abandonment of democracy in favor of some other form of government that will be free of the corruption-vice, or at least, one that is expected to be free of corruption.[15] Democracy is much more vulnerable to corruption than other forms of government, and more stable when corruption levels are low than when they are very high. High-level corruption is dangerous to democracy, and particularly dangerous for young democracies. In reality "there are numerous examples of how voters fail to replace their corrupt politicians, and, in some countries, this seems to be the rule rather than the exception," mostly in countries characterized by weak and fragile democratic systems.[16]

10 "Corruption Perception Index 2019". Transparency International, https://www.transparency.org/en/cpi/2019.

11 World Bank. 2019. Doing Business 2020. https://www.doingbusiness.org/en/reports/global-reports/doing-business-2020 (last updated October 2019).

12 Rose-Ackerman, Susan. 1999. Corruption and Government: Causes, Consequences, and Reform. London: Cambridge University Press; Silva, Marcos Fernandes da. 1999. The political economy of corruption in Brazil. RAE. 39(3), 26-41. Retrieved from http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-75901999000300004.

13 Rose-Ackerman, Susan. 1999. Corruption and Government: Causes, Consequences, and Reform. London: Cambridge University Press.

14 You, Jong-sung, and Sanjeev Khagram. 2005. "A Comparative Study of Inequality and Corruption." American Sociological Review 70 (1): 136–57. doi:10.1177/000312240507000107.

15 Heymann, Philip B. 1996. "Democracy and Corruption" Fordham Int'l L. J. 20, 323. Retrieved from https://dash.harvard.edu/bitstream/handle/1/12967838/Democracy%20and%20Corruption.pdf?sequence=1&isAllowed=y

16 Søreide, Tina. 2014. Drivers of Corruption: A brief Review. World Bank Study. Washington, DC: World Bank, 38. Retrieved from https://openknowledge.worldbank.org/handle/10986/20457.

Democratization in Brazil brought optimism for the possibility of solving major problems such as long-lasting inflation and corruption. Democracy was a magic potion; all problems would disappear. Nevertheless, history shows that democracy did not end systemic corruption. The Petrobras corruption probe illustrates high-level corruption in political campaigns and political nominations, affecting the fundamentals of a young democracy. Brazilian democracy faces the question of funding costly political campaigns; campaign contributions are hardly disinterested.[17] At the same time, corruption impaired the foundations of Brazilian democratic institutions, including the executive and legislative powers.

The facts arising from this latest corruption scandal in Brazil show, however, that democracy is important for battling corruption, despite several limits restraints, challenges, and defeats. How does a society become corrupt? The answer to this question is weak institutions, where citizens who violate society's values and institutions face a low threat of punishment and detection. Weak institutions develop ambiguous rules and poor enforcement. Leaders are not accountable for their actions.

Tied into notions of good governance and democracy is the rule of law. In fact, the rule of law is crucial for democracy. Equally as important is the confidence that citizens have in the democratic institutions.

There is no single universally recognized definition of the rule of law. Among the accepted definitions, the United Nations Security Council states that it is:

> …a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[18]

Corruption damages public confidence in democracy and threatens to distort the rule of law. As a set of formal and predictable institutions, the rule of law may be affected by corrupt behavior. In reality, corruption endangers the good functioning of public institutions, disrupts the legislative and judiciary process, affects the principles of legitimacy and legality, introduces a degree of arbitrariness and has a devastating effect in undermining citizens' trust in the institutions. In fact, it compromises the capacity of the system—the rule of law—to prevent corrupt behavior through predictability in the application of the law and the enforcement of penalties.

Empirical literature has consistently found evidence that the presence of corruption has harmful effects on long-term economic growth, deters investment, and increases investment risk.[19] Today, few still believe

17 Kolstad, Ivar, and Arne Wiig. 2016. "Does Democracy Reduce Corruption?" *Democratization* 23, No. 7, 1198-1215. doi: 10.1080/13510347.2015.1071797.

18 United Nations Security Council. The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, Section 3, paragraph 6.

19 Mauro, Paolo. 1995. "Corruption and Growth". The Quarterly Journal of Economics, 110:3, August, 681-712. doi https://doi.org/10.2307/2946696; Tanzi, Vito, and Hamid Davoodi. 1998. "Corruption, Public Investment, and Growth". In The Welfare State, Public Investment, and Growth edited by Shibata H., Ihori T. Tokyo: Springer, 41-60. doi https://doi.org/10.1007/978-4-431-67939-4_4; Guriev, Sergei. 2004. "Red Tape and Corruption". Journal of Development Economics, 73:2 (Apr.), 489-504. doi https://

that corruption "greases the wheels" of developing and least developed countries. Corruption in Brazil turned out to be so deep and widespread that it compromises the country's chance of economic development and growth.[20] By diverting funds, corruption unquestionably hurts Brazilian society. In addition to reducing economic growth, corruption may raise countries' macroeconomic and political instability. Corruption erodes investment and business conditions and reduces collective well-being. It remains one of the main challenges of doing business in the country.

Cartier-Bresson proposed several economic conditions that allow corruption to flourish. First, the existence of natural resources, such as oil and gas, which provide opportunities for government authorities to receive payments. Second, the scarcity of public assets related to demand followed by policies of fixed prices creates opportunities for informal curbing through bribery. Third, low wages of public officers are associated with low-level corruption payments (petty corruption). Fourth, high levels of state intervention, such as protectionism, state-owned or state-control companies, price controls, exchange controls, and import licenses, create opportunities for corruption.[21]

Corruption is a social phenomenon that is not specific to developing countries. Nevertheless, its negative effect appears stronger in developing and least developed countries as it is a major impediment to their progress and economic growth.[22] As per Becker's seminal work on crime and punishment, the calculation favorable to corrupt conduct derives from the economic benefit made by an individual who believes they will not be caught and therefore, will never pay for their crime.[23] It provides a useful framework for designing an optimal law enforcement system against corruption, where rational criminals compare the benefit of violating the law with the possible cost of the violation—the probability and severity of punishment (penalty amount, years in prison, etc.).[24] Corruption is expected to occur when the likely gain is positive.

## BACKGROUND OF CORRUPTION IN BRAZIL:

**Outdated legislation, weak institutional framework, poor access to public information, lack of transparency, low public participation, existence of conflicts of interest, and a slow pace of justice in the judiciary system.**

Understanding the causes of corruption in Brazil starts with an analysis of its roots. Brazilian society has learned to live with corruption, to the point of even considering it part of Brazilian culture. Culture cannot be ignored when discussing corruption in Brazil. Many consider corruption to be the result of a cultural element, grounded in the *jeitinho brasileiro* (little Brazilian way) or the

doi.org/10.1016/j.jdeveco.2003.06.001; Huntington, Samuel P. 1968. Political order in changing societies. New Haven and London: Yale University Press; Leff, Nathaniel H. 1964. "Economic development through bureaucratic corruption". American Behavioral Scientist 8(3), 8-14; Dreher, Axel, and Martin Gassebner. 2013. "Greasing the wheels? The impact of regulations and corruption on firm entry". Public Choice 155(3-4), 413-432. https://link.springer.com/content/pdf/10.1007%2Fs11127-011-9871-2.pdf.

20 Geddes, Barbara, and Artur Ribeiro Neto. 1992. "Institutional Sources of Corruption in Brazil." Third World Quarterly 13:4, 641-661. doi: 10.1080/01436599208420302.

21 Cartier-Bresson, J. 1997. "Corruption Network, Transaction Security and Illegal Social Exchange." Political Studies, 45 (3), 463-476.

22 Costa, Ligia Maura. 2008. "Battling Corruption Through CSR Codes in Emerging Markets: Oil and Gas Industry". RAE 7(1). http://rae.fgv.br/rae-eletronica/vol7-num1-2008/battling-corruption-through-csr-codes-emerging-markets-oil-and-gas-ind.

23 Becker, G. S. 1968. "Crime and Punishment: An Economic Approach." Journal of Political Economy, 76:2 (Mar.-Apr.), 169–217.

24 Ibid.

*malandro* (rascal). In a very bureaucratic society, the jeitinho is a temporary interruption of the rules in order to complete a task. It is a way of getting things done. Some Brazilians are quite proud of the flexibility of the jeitinho brasileiro to expedite procedures. Anyone can take advantage of this "Brazilian way" of doing things. It is perceived as a favor—a favor that will have to be returned one day, in principle.[25]

Nonetheless, "corruption in Brazil has been also mainly related to outdated legislation, a weak institutional framework, poor access to public information, low public participation, lack of transparency, and the existence of conflicts of interest and impunity perpetrated by the judiciary/legal system."[26] Corruption tends to flourish when there is a lack of accountability in the political and legal process, in the performance of civil servants, and in the control of public resources,[27] including in the public procurement process, as the Petrobras corruption scandal illustrates.

Corruption is not new in Brazilian history, and concerns over corruption are in reality a cyclical problem. For over 500 years, patron-client relations have been the norm in Brazil, as powerful elites counted on loyalty from their "clients" in return for favors.[28] Brazil became independent from Portugal in 1822. By the time the country became a republic in 1889,[29] a local oligarchy—known in Portuguese as coronéis—had established a patron-client relationship to generate votes in return for favors from the government.[30] Contrary to popular belief, corruption was also present under the military regime from 1964-1985.[31] The transition to democracy in 1985, when Brazil moved from military rule to a democratic government, nurtured high expectations among Brazilians of improved transparency and accountability.[32] Pledging to fight the maharajahs[33] and corruption, in 1990, Fernando Collor de Mello became the first elected president after more than two decades of dictatorial regime. And in 1992, Brazil became the first country in Latin American to have its very popularly elected president—Fernando Collor de Mello—impeached on charges of corruption, based on his younger brother's accusations of illicit enrichment.[34] Based on these allegations, a Parliamentary Commission of Inquiry (CPI) launched an investigation that concluded:

25 Green, December. 2016. "Corruption in Brazil". In Political Corruption in Comparative Perspective: Sources, Status and Prospects. Edited by Charles Funderburk. London and New York: Routledge, 41-70, 48-49.

26 Costa, Ligia Maura. 2018. "The dynamics of corruption in Brazil". In Corruption Scandals and their Global Impacts, Edited by Omar E. Hawthorne, Stephen Magu. Abingdon-on-Thames: Routledge, 189-203, 192.

27 Silva, Marcos Fernandes da. 1999. "The political economy of corruption in Brazil". Op. cit.

28 Green, December. 2016. "Corruption in Brazil". Op. cit., 68.

29 Costa, Ligia Maura. 2018. "The dynamics of corruption in Brazil". Op. cit., 193.

30 Green, December. 2016. "Corruption in Brazil". Op. cit., 47.

31 Lagunes, Paul F, and Jan Svejnar. 2020. Corruption and the Lava Jato Scandal in Latin America. Abindgon and New York: Routledge.

32 Power, Timothy J. and Matthew M. Taylor. 2011. Corruption and Democracy in Brazil. The Struggle for Accountability. Notre Dame: University of Notre Dame Press.

33 This word became popular to indicate political nominees to government without a real work to be accomplished in the public service, besides receiving a paycheck.

34 Brooke, James. 1992. "Looting Brazil". The New York Times, 8 November 1992, Section 6, 31. Retrieved from https://www.nytimes.com/1992/11/08/magazine/looting-brazil.html?auth=linked-google1tap; Flynn, Peter. 1993. "Collor, Corruption and Crisis". Journal of Latin American Studies. 25, 351-371. doi:10.1017/S0022216X00004697.

> Collor's former campaign fundraiser, Paulo Cesar Farias, controlled an extensive network that facilitated public contracts and influenced government decisions in exchange for kick-backs and 'commissions'. Members of the CPI estimate the total amount of money involved at about two billion dollars.[35]

On 29 December 1992, President Collor was removed from office and charged with corruption. The Supreme Court later exonerated him. At the time of Collor's impeachment, Brazil enacted the Administrative Misconduct Act (Law No. 8,429/1992), imposing financial punishments to public and private agents convicted of corrupt conduct. It is important to point out that the Administrative Misconduct Act does not foresee joint liability of legal entities belonging to the same economic group, which makes recovery of illicit assets a difficult task, in most cases an impossible mission. In 1998, Brazil issued the Law on Anti-money Laundering (Law No. 9,613/1998), which created the financial intelligence unit in Brazil, named the Council for Financial Activities Control (COAF).[36] Anti-money laundering rules were conceived primarily to inhibit drug dealers and possibly some acts of terrorism. Anti-corruption activity was not the main purpose of the legislation, but it has profited enormously. Despite the improvements in the legal system, there was still a long way to go.

Throughout the twentieth century, Brazil has suffered from extremely high interest rates and inflationary burden. Both resulted in bureaucratic governments, restrictions on imports, and spreading corruption. In the beginning of the twentieth-first century, corruption in Brazil continued and quite a few corruption scandals emerged. A number of political promises to battle corruption were made[37]; unfortunately, very little has been achieved in reality. During the 2000s, several important modifications created a better framework for battling corruption in the country, at the domestic and international levels, including the expansion of the powers of the Federal Police, the Federal Revenue Service, and the Federal Prosecution Service. Provisional Measure No. 2,143-31/2001 created the Federal Office of the Comptroller General (CGU) with current institutional framework as per Law No. 10,683/2003. From an international perspective, Brazil ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in 2000. Two years later, it ratified the Inter-American Convention against Corruption (Inter-American Convention). The UN Convention against Transnational Organized Crime (UNTOC) and the UN Convention against Corruption (UNCAC) were ratified in 2004 and 2006, respectively.

Over the few past decades, many of the most notorious corruption scandals in Brazil have involved top-level officials or politicians diverting public funds and/or receiving illegal payments from the private sector in order to obtain or retain business or other improper advantage (see Table 2).

35 Geddes, Barbara, and Arturo Ribeiro Neto. 1992. "Institutional Sources of Corruption in Brazil". Third World Quarterly, 13:4, 641-661, p. 641. doi: 10.1080/01436599208420302.

36 Costa, Ligia Maura, Leopoldo Pagotto and Andrea Mustafah. 2018. "Business environment pillar: Analysis of the institutional evolution in Brazil (2001-2017)". Role of Law and Anti-Corruption Center Journal. 2. Retrieved from https://www.qscience.com/content/journals/10.5339/rolacc.2018.10. doi: https://doi.org/10.5339/rolacc.2018.10.

37 Roett, Riordam. 1978. Brazil: Politics in a Patrimonial Society New York: Praeger, 24; Costa, Ligia Maura. 2018. Ibid., 190.

**Table 2: Selected Brazilian Cases of Corruption from 1987–2008**

| Name of the Case | Report |
|---|---|
| Railroad North-South | Irregularities in public bidding for a $2.5 billion railroad contract were found. The bid was cancelled. |
| Corruption Inquiry Committee | Inquiry committee created to examine irregularities in the disbursement of federal funds to municipalities. Despite accusations of abuse of power, charges were dropped by the president of the lower house. |
| PC Farias | Paulo César Farias was accused of managing a kickback scheme in favor of President Collor. He was convicted. This scandal served as the basis for the impeachment of President Collor in 1992. |
| Regional Labor Court (TRT) | Judge Nicolau dos Santos Neto together with former senator Luiz Estevão, owner of an engineering and construction company, increased the construction costs of the Regional Labor Court in São Paulo of over $100 million. |
| SUDAM | Investigations revealed a scheme of side payments to politicians at the federal agency Amazonian Development Superintendency (SUDAM). |
| Operation Anaconda | Operation "Anaconda" involved lawyers, detectives, and judges who were selling judicial decisions and prison release orders. |
| Operation "Sanguessuga" | Members of the Congress received bribes to write individual budget amendments financing the purchase of ambulances with funds of the Ministry of Health. Seventy-two members of the Congress were involved in this scheme. |
| "Mensalão" (big monthly payment) | During President Lula's first term in office, it was accused that his government paid members of Congress in exchange for legislative support. Members of the government, politicians, and businesspeople were found guilty and some are still in prison. |

*Compiled by the authors*

Many cases of corruption emerged; but not much action to fight them. For instance, the Regional Labor Court (TRT) corruption scandal mentioned in Table 2 hit Brazilian newspapers in the 1990s. It took almost ten years for charges of bribery, embezzlement, and conspiracy to be brought against Senator Luiz Estevão de Oliveira Filho; and ten years more for the Superior Court of Justice (STJ) to confirm, as a final appeal decision, a 31-year prison sentence at the end of 2011. The legal maxim "justice delayed is justice denied" is a universal truth that appears quite alive and spot-on in Brazil. There were no incentives for public and private sectors to avoid corrupt practices.[38] In addition, the slow pace of the judiciary system indirectly permitted the disposal of illicit assets during long lasting judicial procedures. Some cases drag on for years with no end in sight. The result was obvious. Brazilian society perceived the entire system as devious, illegitimate, and corrupt. Impunity was the rule; conviction the exception.

38 Costa, Ligia Maura, Leopoldo Pagotto and Andrea Mustafah. 2018. "Business environment pillar: Analysis of the institutional evolution in Brazil (2001-2017)." Ibid.

Details from another recent scandal reveal likewise how these negative aspects entrenched corruption in the country. The Brazilian corruption scandal known as the Mensalão—big monthly payment—displayed a vote-rigging scheme involving bribery and money-laundering. Several members of Congress have been found guilty of participation in the ruse. Uncovered in 2005, judicial proceedings languished for almost a decade amid appeals, until in 2013 the Supreme Court dismissed the so-called procrastinator appeals and ordered the enforcement of the sentences.

More recently, significant efforts have been made to further improve the Brazilian legal system in order to effectively battle corruption. The Brazilian Penal Code already established that individuals, whether public or private agents, may be imprisoned in punishment for certain corruption-related crimes, including corrupt acts against foreign officials.[39] Until recently, there were few convictions and few instances of imprisonment under this provision of the Penal Code; those that did were primarily cases involving low-level public officials. Brazil had a long-established tradition of impunity for the rich and powerful. However, in 2013, the Brazilian Congress enacted the Brazilian Clean Company Act (Law No. 12,843/2013, regulated by Decree No. 8,420/2014), in response to the growing public demand and political will to regulate, diminish, and prosecute corruption. The anti-corruption legislation is unprecedented in Brazil. In a few words, the key elements of the Brazilian Clean Company Act:

- Applies to any legal entity, Brazilian or foreign, branch or office, with business in the country;
- Prohibits bribes to any public official, foreign or domestic, at any government level;
- Illegalizes facilitation payments;
- Establishes strict liability for legal entities in cases of corruption, in opposition to liability based on fault; and
- Creates administrative and civil sanctions and large monetary penalties.

The Clean Company Act, the Administrative Misconduct Act, and the Law on Anti-money Laundering, are joined by two additional laws: the Law on Clean Rap Sheet (Complementary Law No. 135/2010), which forbids individuals convicted of certain crimes from running for office; and the Law on Access to Information (Law No. 15,527/2011), which enables access to public information, transparency, monitoring of governmental actions and spending, and repression of corruption. Together, these laws were important moves in the fight against corruption.

In summary, Brazil's national and international legal framework to establish anti-corruption standards include: the UNCAC, UNTOC, the OECD Convention, the US Foreign Corrupt Practices Act (FCPA), the Inter-American Convention, the Brazilian Clean Company Act, the Criminal Code, the Code of Criminal Procedure, the Administrative Misconduct Act, the Law on Anti-money Laundering, the new Antitrust Law (Law No. 12,529/2011), and the Public Procurement Law (Law No. 8,666/1993, as amended), the Law on Clean Rap Sheet, and the Law on Access to Information. Brazil has a legal framework to battle corruption that is in compliance with international standards and that criminalizes major offenses on corruption, such as bribery of public officer, solicitation or acceptance of gifts by public officer, abuse of power by public officer for personal gain, detention by a public officer

39 Bribery is a crime since the Brazilian Empire Penal Code of 1830.

of wealth without identified source; bribes, and gifts to constituents.[40] In brief, "by almost all accounts, Brazil has an appropriate spectrum of laws in place to combat corruption."[41] It is clear that this structure made possible a movement towards less impunity in the country.

Brazil's history shows that revelations of corruption have rarely resulted in punishment—until March 2014, when a money-laundering investigation launched by the Federal Police uncovered an intricate corruption network involving Brazil's giant state-run oil company Petrobras. This investigation, code-named Operation Car Wash (Lava Jato in Portuguese), revealed vast amounts of moneys funneled across several countries and resulted in more than 300 indictments and 100 convictions[42]—including the arrest and conviction of Marcelo Odebrecht, the CEO of Odebrecht S.A., which was without precedent in Latin America's corporate scenario[43]. Operation Car Wash has challenged the long Brazilian tradition of impunity for the rich and powerful.

## FROM PETTY CORRUPTION TO SYSTEMIC CORRUPTION:

**The use of large corporations as an instrument for implementing a sustainable corruption scheme for political purposes.**

Recognizing different forms of corruption—whether based on the nature of the illicit act, the institutional location of corrupt actors, or the underlying purposes—is helpful largely to the extent that it enhances our understanding of corruption.[44] Clearly corruption encompasses a wide range of forms, some of which are more commonly used than others. Among the most-used categories are political corruption in contrast to administrative corruption, based on the institutional function of the public officer involved; and grand and petty corruption, based on the amount and size of illicit acts. While grand and political corruption encompass large violations, petty corruption and administrative corruption consist, in most cases, of small, yet frequent infractions. Petty corruption, as opposed to grand corruption, implies regularly breaking the rules rather than altering structures in order to obtain or retain business. Monetary values are relatively low in petty corruption. Grand corruption may involve modifying a bid in order to ensure that a certain company is chosen. Often, forms of corruption will be interlinked through other kinds of crime behaviors. In reality, the dividing line between petty and grand corruption can become blurred.

Grand corruption and political corruption are the greatest unsolved legal challenges. Political corruption and grand corruption take place at the highest levels of the government. They deprive the state of resources

40 Pope, Jeremy. 2000. Confronting Corruption: The Elements of a National Integrity System. TI Source Book 2000. Berlin and London: Transparency International, 284. Retrieved from https://www.transparency.org.nz/docs/2000/Elements-of-a-National-Integrity-System.pdf.

41 Stocker, Frederick T. 2012. Anti-Corruption Developments in the BRIC Countries: A MAPI Series. Arlington, VA: Manufacturers Alliance for Productivity and Innovation.

42 Brazilian Federal Public Prosecutor Office Website. "Big Bases". "Car Wash". "Results". Retrieved from http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.

43 Leahy, Joe. 2015. "Brazil Charges Executives with Corruption". FT Americas Finance, July 24 2015. Retrieve from https://www.ft.com/content/272d4f92-321f-11e5-8873-775ba7c2ea3d.

44 Gerring, John. 1999. "What Makes a Concept Good? A Critical Framework for Understanding Concept Formation in the Social Science". Polity 31(3), 357-94.

as funds are misappropriated from the government budget. Politicians and high-level public officers—presidents, prime ministers, ministers of state—are themselves corrupt. Instead of formulating and enforcing laws and policies to the benefit of the society, they make the state helpless. With grand corruption and political corruption, politicians and high-level public officers deviate from the goal of the country. Widespread political corruption and grand corruption have the effect of rendering the entire system illegitimate. There is a tricky problem at stake. Politicians and high-level public officers do not want to change a system where they are the major embezzlers and beneficiaries. Political corruption and grand corruption are both destructive to the state's ability to implement sustainable policies and to distribute economic resources.

There are industries that are particularly prone to grand and political corruption. The level of technical difficulty, combined with complex financial structures, provides numerous ways of hiding corrupt operations in the oil and gas sector. Petrobras corruption scandal has thrown Latin America into a turmoil like no other corruption scandal. Corruption investigations were not new in Brazil; but so many powerful people facing jail time in the country certainly was.

The analysis which follows aims to offer an idea of the amount of money involved in the Petrobras systemic corruption.

## THE EFFECT OF OPERATION CAR WASH ON PETROBRAS' FINANCIAL RESULTS

As mentioned before, Petrobras was created in 1953 and, since then, had been a highly profitable company. In this history of profits, the year of 1991 was an exception when the company showed a loss of $ 240 million. What happened in that year? The country was facing an inflation rate of 1,100 percent in 1991 and the government decided to freeze domestic oil prices in order to combat inflation. This political decision was quite costly for the company. Brazil's domestic consumption of 1,250 barrels per day meant that the company had to import nearly half of the oil needed to supply the demand. High prices in the international market and frozen prices in the internal market meant the company was losing a lot of money. It is estimated that by August 1991, Petrobras was showing a loss of around $ 2 million per day due to the difference between the import prices the company was paying for the oil and the domestic prices it charged to Brazilian consumers.[45]

Despite the losses in 1991, Petrobras' financial results were soon back to showing positive results. The profitability lasted until 2014, when the company, for three consecutive years, once again showed losses in its financial statements.

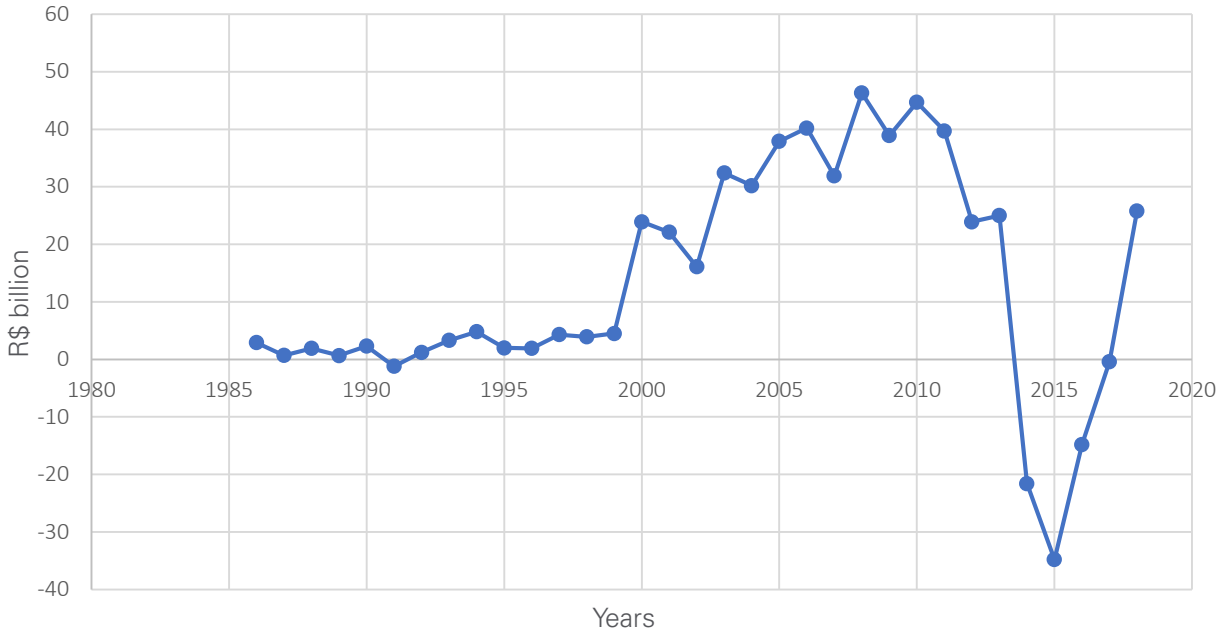
The historical behavior of the company financial results is shown in Graph 1.

From 2014 to 2017, Petrobras reported losses of R$70.8 billion which is equivalent to $20.7 billion (see Table 3).

As Operation Car Wash was disclosed in 2014 (and Petrobras was in the center of the investigations), critics of the operation argued that the losses reported by the company were affected by the investigations. According to some critics, the Federal Prosecution Service investigations made by the Federal Prosecution Service had as con-

45 Paduan, Roberta . Petrobrás: Uma história de orgulho e vergonha.—Editora Objetiva, 2016

**Graph 1: Evolution of Petrobras' Financial Results (1986-2018)**




sequence exposing the company to huge financial losses.

If one looks at the financial results of 2014, for example, it is reported that these losses include both costs directly accepted by the company as part of the corruption scheme as well as costs associated with the impairment of company assets.

**Table 3: Petrobras' Financial Results 2014-2017**

| Year | Losses (R$ billion) | Losses (in US$ equivalent) |
|---|---|---|
| 2014 | 21.6 | 8.12 |
| 2015 | 34.8 | 8.1 |
| 2016 | 14.8 | 4.55 |
| 2017 | (0.4) | (0.1) |
| **TOTAL** | **70.8** | **20.7** |

The corruption losses formally accepted by the company in its 2014 financial statements were established in a very unorthodox manner. Petrobras estimated the cost to be a 3 percent overprice in all contracts signed by the company from 2004 to 2012.

The origins of this "magic figure" are the plea bargain agreements signed by several former Petrobras executives, who were directly and explicitly involved in the corruption scheme inside the company. Based on this "magic number", the company decided to include an extraordinary expense of R$6.2 billion (roughly $2.3 billion) in its 2014 financial statement, thereby "cleaning up" the wrongdoings of the previous nine years. This was the only time Petrobras recognized corruption in its financial statements. In next year's statements, only the 2014 amount was systematically appointed as the result of corruption in the company. We will probably never know the exact figures

for this criminal embezzlement, but some analysts estimate that the real total could reach 20 percent of the contracts signed in that period, which would bring the total loss to about R$43 billion (around $16 billion). Not only is the total amount diverted still unknown, so too is the real destination of all this money, as it remains mostly undisclosed.[46]

But in terms of the consequences for Petrobras financial results, nothing compares with the magnitude of the losses due to impairment applied to the financial statements of the company. From 2014-2017, impairment expenses reached the astronomical figure of R$116.4 billion, equivalent to $36.4 billion (using the exchange rate R$/US$ of the last day of each fiscal year). In just two Petrobras refineries—Abreu e Lima and Comperj—the effect of the impairment in 2014 was a stunning R$30.9 billion ($11.7 billion).

Since these four years (2014-2017) were so atypical in the company's financial results, it seems important to deepen the analysis of the reasons which led Petrobras to show such enormous losses. It is interesting to notice that the company showed a small profit in 2017 of R$377 million. Despite this profit, Petrobras performance was still highly atypical when compared to the financial results of other years.

Table 4 shows the financial results of Petrobras in the period 2014-2018. Since 2018 is the year when the company returned to profits, it makes for an interesting comparison with the "dark years" of 2014 to 2017.

The year 2014 showed a loss of R$21.9 billion. Besides the R$6.2 billion lost due to the write-off of overpayments incorrectly capitalized—an effect of the Operation Car Wash—the company included as expenses the amount of R$44.6 billion for impairment of its assets. With a gross profit of R$80.4 billion, almost R$50.2 billion were included as "unusual" expenses in that year, an amount that represented 62 percent of the gross profit obtained.

The situation was quite similar in 2015. Even without any additional expense recognized as part of the corruption scheme, and with the help of an important improvement of the gross margin to R$98.6 billion, the company presented a loss of R$35.2 billion: the largest negative financial result presented by the company in its entire history. Once more, the villain of this huge loss was the impairment expense, which reached the amount of R$47.7 billion. In just two years, impairment expenses totaling R$92.3 billion were included in the financial results of the company.

The year of 2016 was another difficult year for Petrobras. Sales revenues fell 13 percent compared to the previous year, resulting in a 9 percent reduction in the gross margin. Against the gross margin of R$90 billion, the company declared an additional R$ 20.3 billion reduction due to the impairment of assets in 2016. Even considering this additional impairment expense, the company presented, for the first time in three years, an operating profit of R$17 billion. But this positive operating profit was not enough to cover financial expenses in the period and the company showed a net loss of R$13 billion in 2016.

The situation started to improve in 2017. Sales revenues had a small increase compared to the previous year and gross profit reached R$91.6 billion. The operating profit of the company reached R$35.6 billion, an increase of 108 percent when compared with 2016. There was a reduction in general

46 Only a former second tier Petrobras manager agreed to return to Petrobras, after his plea bargain deal, the amount of R$ 182 million (US$ 60 million) which was deposited in his personal account abroad.

**Table 4: Financial Results (2014-2018)**
*(R$ billion)*

| Year | 2018 | 2017 | 2016 | 2015 | 2014 |
|---|---|---|---|---|---|
| Sales revenues | 349,836 | 283,695 | 282,589 | 321,638 | 337,260 |
| Cost of Sales | -225,293 | -192,100 | -192,611 | -223,062 | -256,823 |
| **Gross profit** | **124,543** | **91,595** | **89,978** | **98,576** | **80,437** |
| **Expenses** | | | | | |
| Selling expenses | -16,861 | -14,510 | -13,825 | -15,893 | -15,974 |
| General & Administrative | -8,932 | -9,314 | -11,482 | -11,031 | -11,223 |
| Exploration costs | -1,904 | -2,563 | -6,056 | -6,467 | -7,135 |
| Research and Development | -2,349 | -1,831 | -1,826 | -2,024 | -2,589 |
| Tax expenses | -2,790 | -5,921 | -2,456 | -9,238 | -1,801 |
| Impairment of assets | -7,689 | -3,862 | -20,297 | -47,676 | -44,636 |
| Write-off overpayments incorrectly capitalized | | | | | -6,194 |
| Other expenses ( revenues) | -21,061 | -17,970 | -16,925 | -18,638 | -12,207 |
| **Operating profit (or loss)** | **62,957** | **35,624** | **17,111** | **-12,391** | **-21,322** |
| Finance income | 11,647 | 3,337 | 3,638 | 4,867 | 4,634 |
| Finance expenses | -20,898 | -23,612 | -24,176 | -21,545 | -9,255 |
| Foreign Exchange and inflation indexation charges | -11,849 | -11,324 | -6,647 | -11,363 | 721 |
| Net Finance results | -21,100 | -31,599 | -27,185 | -28,041 | -3,900 |
| Participation in Investments | 1,919 | 2,149 | -629 | -797 | 451 |
| Employes's participation in profits | | | | | -1 |
| Profit (loss) before taxes | 43,776 | 6,174 | -10,703 | -41,229 | -25,816 |
| Income taxes and social contribution | -17,078 | -5,797 | -2,342 | 6,058 | 3,892 |
| **Net Profit (or loss)** | **26,698** | **377** | **-13,045** | **-35,171** | **-21,924** |

and administrative expenses, as well as in expenses related to exploration, but the main reason for the increase in operating profit was the significantly smaller impairment expenses. The impairment expense was "only" R$3.9 billion (compared to R$20.3 billion in the previous year). This R$16.4 billion reduction in the impairment expense almost completely explains the R$18,6 billion increase in operating profit. The final result for the year was a net profit of R$0.4 billion: the first profit since 2013.

The year of 2018 was the year of Petrobras turnaround. Net profit reached R$26.7 billion, even though the company decided to impair R$7.7 billion of its assets. This amount was almost twice the amount impaired in the previous year. The basic reasons behind such excellent financial results were an increase in sales revenues of 23.3 percent and a reduction in finance expenses of 33.2 percent compared to 2017. The global rise in oil pushed sales revenues and cash substantially higher, thus improving the net finance expenses. With larger cash generation, finance revenues were up 249 percent and finance expenses were down 11.5 percent in that year. In this context, the impairment of R$7.7 billion was not enough to jeopardize the final profit obtained.

Table 5 shows an interesting exercise that measures how different expenses impacted Petrobras results during the period under analysis. The exercise sums up the main expenses to show the relative impact of each, as indicated by their proportion compared to the net results of the company. This is only an exercise since it is not technically correct to sum up amounts of different time periods. Table 5 shows the figures in a decreasing order of expense amount.

**Table 5: Impact of the main expenses in Petrobras' financial results (2014-2018)**

| Main Groups of Expenses | Amount (R$ billion) |
|---|---|
| Impairment Expenses | 124.160 |
| Finance Expenses | 99.486 |
| Other Expenses | 86.803 |
| Selling Expenses | 77.063 |
| General & Administrative Expenses | 51.982 |
| Foreign Exchange Expenses | 40.462 |

As it can be seen, impairment expenses were, by far, the largest group impacting the overall expenses of Petrobras in the five-year period under analysis. It is interesting to note that the second largest group is finance expenses, although this is unsurprising as the company has one of the highest debt/equity ratios among the largest oil companies in the world. With high debts, finance expenses are necessarily high.

But the R$124.2 billion of impairment expenses is a surprising figure. This amount is roughly equivalent to $38.4 billion for the five-year period 2014-2018. Is impairment of assets a common practice in the oil industry? How should we compare the amount impaired by Petrobras to the amounts impaired by other large oil companies around the world?

As a matter of fact, impairments are not uncommon in oil companies. At various points in recent years, other oil companies have impaired their fixed assets in order to show important changes in their operations or in the markets in which they operate. As an example, some relevant impairments of large oil companies are listed below:

- Chevron: $ 10.0 billion in 2019, reportedly because the company was facing a market surplus in oil and gas worldwide, thus impacting its profit margin.
- Repsol (Spain): $ 5.0 billion in 2019, due to the weakening outlook for oil and gas prices.
- British Petroleum (BP): $ 3.0 billion in 2019, due to selling assets in the United States for a value lower than it had in its books.
- Royal Dutch Shell: $ 2.3 billion in 2019, due to a weaker economic outlook.
- Exxon: $ 2.0 billion in 2017, due to the reduction in the value of some of its U.S. gas assets.
- Equinor (Norway): $ 1.4 billion in 2019, related to associated companies, derivatives and inventory hedge contracts and write-downs of inventory.

Although oil companies have been impairing their fixed assets, the total amount impaired by Petrobras in the years 2014-2018 (R$ 124.1 billion, or roughly $ 38.4 billion) is of such magnitude that it deserves a more detailed analysis.

But before making this analysis, it is important to go back to the fundamentals of impairments as a mechanism to reestablish the real economic value of the assets a company holds.

### 6.1 Impairments

The impairment of assets is an accounting principle used by companies in order to ascertain that a company's assets are carried at no more than their recoverable amount. The procedure for applying an asset impairment is established by the International Accounting Standard 36 and is known as IAS 36. The IAS 36 is not a new practice. It was first issued in 1998 and later revised in 2004 and 2008 as part of the International Accounting Standards Board's (IASB) work on the business combinations project.[47]

An impaired asset is an asset that has a market value less than the value listed on the company's balance sheet. When an asset is deemed to be impaired, it will need to be written down on the company's balance sheet to its current market value. An impairment loss should only be recorded if the anticipated future cash flows generated by this asset are considered unrecoverable. When an impaired asset carrying value is written down to market value, the loss is recognized on the company's income statement in the same accounting period.[48]

According to the generally accepted accounting practices (GAAP), assets should be tested for impairment on a regular basis in order to prevent overstatement on the balance sheet. It is important to note that an impairment expense is a non-cash expense. In other words, when an impairment expense is applied to a company's balance sheet, there is no impact on the company's cash flow. Although of different nature and significance, impairments could be compared to the depreciation of an asset: both are expenses that have a non-cash impact on the company's balance sheet. The key difference between depreciation and impairment is that depreciation is expected, whereas impairment is unexpected.

Summing up, the impairment of a fixed asset can be described as an abrupt decrease in its fair value due to physical damage, changes in existing laws creating a

47 Impairment of Assets: A guide to applying IAS 36 in practice—Grant Thornton International Ltd, March 2014

48 Impaired Asset—Investopedia, March 2020.

permanent decrease in its value, increased competition, poor management, obsolescence of technology, etc.[49] In this sense, an asset impairment reach is quite broad: from specific problems with the asset itself, to bad managerial decisions, to uncontrollable external factors such as legal or economical or technological issues, or even investments made in unnecessary assets or with a cost much higher than "normal."

The IAS 36 is a highly regulated norm and specifies in great detail the key definitions of the terms used and the procedure to be followed by companies when impairing their assets.

The key definitions (IAS 36.6) are the following ones[50]:

- Impairment loss: the amount by which the carrying amount of an asset or cash-generating unit (CGU) exceeds its recoverable amount.
- Carrying amount: the amount at which an asset is recognized in the balance sheet after deducting accumulated depreciation.
- Recoverable amount: the higher of an asset's fair value less costs of disposal (also called net selling price) and its value in use.
- Fair value: the price that would be received to sell an asset.
- Value in use: the present value of the future cash flows expected to be derived from an asset or cash-generating unit.

At the end of each reporting period, a company is required to assess whether there is any indication that an asset may be impaired (i.e., its carrying amount may be higher than its recoverable amount). IAS 36.12 lists a non-exhaustive series of indications of impairments:

- External sources
  - Market value declines
  - Negative changes in technology, markets, economy, or laws
  - Increases in market interest rates
  - Net assets of the company are higher than market capitalization.

- Internal sources
  - Obsolescence or physical damage
  - Asset is idle, part of a restructuring or held for disposal
  - Worse economic performance than expected

IAS 36 requires extensive disclosures in respect of the impairment tests performed and impairments recognized. The disclosures are even more extensive for goodwill than for the impairment of other assets. The key disclosure requirements are[51]:

- The amounts of impairments recognized and the events and circumstances that were the cause thereof.
- The valuation method applied and its approach in determining the appropriate assumptions.
- The key assumptions applied in the valuation, including the growth and discount rates used.

### 6.2 Impairments in Petrobras

As mentioned before, the total amount impaired by Petrobrasin the period 2014-2018 was R$124.2 billion.

For impairment testing purposes, the company uses the value in use of its property,

49 "Impairment," www.corporatefinanceinstitute.com. Accessed 11/16/2020.

50 "IAS 36 Impairment of Assets," www.iasplus.com. Accessed 11/16/2020.

51 "Impairment Accounting: The basics of IAS 36 Impairment of Assets," Ernst & Young, 2008 International Financial Reporting Standards update.

plant and equipment, and intangible assets (individually or grouped into cash-generating units—CGU's) as their recoverable amount. In measuring value in use, the company bases its cash flow projections on:

1. The estimated useful life of the asset or assets grouped into the CGU, based on the expected use of those assets;
2. Assumptions and financial budgets, and forecasts approved by management for the period corresponding to the expected life cycle of each different business
3. A pre-tax discount rate, which is derived from the company's post-tax weighted average cost of capital (WACC).

The cash flow projections used to measure the value in use of the CGUs were mainly based on a five-year estimate of the average Brent price in US$ per barrel, and of the average Brazilian real exchange rate related to the U.S. dollar.

As the assets and the CGUs are directly linked to the different operating segments the company operates, it is relevant to observe which operating segments comprise Petrobras business areas. The information related to the company's operating segments is prepared based on items directly attributable to each segment. The measurement of segment results includes transactions carried out with third parties and transactions between business areas, which are charged at internal transfer prices defined by the relevant areas using methods based on market parameters.[52]

The following are the operating segments of the company:

- *Exploration and Production (E&P)*: this segment covers the activities of exploration, development, and production of crude oil, natural gas liquid, and natural gas in Brazil and abroad, for the primary purpose of supplying its domestic refineries and the sale of surplus crude oil and oil products to the domestic and foreign markets.
- *Refining, Transportation and Marketing (RT&M)*: this segment covers the refining, logistics, transport, and trading of crude oil and oil products activities in Brazil and abroad; exports of ethanol; and the extraction and processing of shale, as well as holding interests in petrochemical companies in Brazil.
- *Gas and Power*: this segment covers the activities of transportation and trading of natural gas produced in Brazil and abroad, imported natural gas, transportation and trading of liquid natural gas, and the generation and trading of electricity, as well as holding interests in transporters and distributors of natural gas and in thermoelectric power plants in Brazil, in addition to the fertilizer business.
- *Biofuels*: this segment covers the activities of production of biodiesel and its co-products, as well as the ethanol-related activities: equity investments, production and trading of ethanol, sugar, and the surplus electric power generated from sugar cane bagasse.
- *Distribution*: this segment covers the activities of Petrobras Distribuidora S.A., which operates selling oil products, ethanol, and vehicle natural gas in Brazil, including the distribution of oil products in South America.

A breakdown of the impairments made by the company in the 2014-2018 period shows how each operating segment contributed to the R$ 124.2 billion total (Table 6).

52 Petrobras Annual Report - 2018.

**Table 6: Impairment by operating segments (2014-2018)**

| Operating Segment | Impairment (R$ billion) |
|---|---|
| Exploration & Production | 63.8 |
| Refining, Transportation & Marketing | 52.5 |
| Gas & Power | 6.0 |
| Distribution | 0.4 |
| Biofuels | 0.3 |
| Others | 1.1 |

As  can be seen, two operating segments—Exploration and Production (E&P) and Refining, Transportation, and Marketing (RT&M) were responsible for 94 percent of the total impairments made in the period. This is not surprising since the two operating segments carry a significant portion of Petrobras fixed assets.

In fact, in 2017 the assets of the E&P segment represented 72 percent of the total assets of the company; the assets of the RT&M segment represented 19 percent. Together, they represented 91 percent of Petrobras assets in 2017. Just as a matter of comparison, in 2018, the participation of assets of each segment in the total assets of Petrobras were E&P at 74 percent, and RT&M at 17 percent. Again, the two segments together represented 91 percent of the total assets of the company.

It is interesting to note, however, that the volume of impairments in relation to the assets of each segment were quite different. On average, the assets of the E&P segment are roughly R$424.5 billion. The total impairment of R$ 63.8 billion for this segment represents 15 percent of the segment assets.

On the other hand, the total assets of the E&P segment represent 70 percent of the company's total assets (around R$ 600 billion on average for the 2015-2018 period). In short, the E&P segment, which represents 70 percent of Petrobras' total assets, had only 15 percent of its own assets written off during that period.

In comparison, the numbers for the RT&M segment are quite different. With average assets of R$115 billion, the total impairment of R$ 52.5 billion accounted for approximately 46 percent of RT&M's total assets. In short, the RTC segment, representing 19 percent of the company's total assets, had roughly 46 percent of its own assets written off in the period.

It is also relevant to notice the different nature of the investments made in each of these two segments.

In the E&P segment, the assets are comprised of producing wells, platforms, and floating rigs. The assets, totaling an annual average of R$ 424.5 billion, are distributed among 8,000 wells, 30 floating rigs, and 120 platforms (data from 2017). It is a large amount of equipment of costly unit value, thus explaining the amount of the assets in this segment.

In the RT&M segment, the investments were made basically in the construction of pipelines (around 7,800 km for oil, and 9,200 km for gas), a vessel fleet of 55 ships (some of them chartered), 47 terminals, and 13 refineries (all data from 2017). It is also an impressive investment totaling in average R$ 115 billion.

Could the different nature of the investments made in each segment give any clue of the disproportionate amount of impairments made in each segment? If so, could

this be related to the findings uncovered by the Operation Car Wash in respect to Petrobras corruption scheme?

In order to give an answer to these questions, it is worth remembering some specific episodes raised by the Operation Car Wash in relation to the corruption in Petrobras.

Two cases will be shortly described here: (A) Sete Brasil, and (B) Comperj Refinery. These are only two examples of the findings made by the Operation Car Wash and are not intended to represent the totality of the analysis made by the prosecutors in respect to Petrobras. The Sete Brasil case is related to investments made in the E&P segment, and the Comperj refinery is related to the RT&M segment.

## SETE BRASIL PARTICIPAÇÕES [53]

Sete Brasil Participações (Sete Brasil) was established in late 2010 as a private company having as shareholders: (a) the pension funds of large state-owned enterprises; (b) large Brazilian banks; (c) large construction and contractor companies; and (d) Petrobras. Sete Brasil is titled, in its incorporation documents, as a company specialized in asset portfolio management aimed at oil and gas drilling operations in the Brazilian offshore area, especially those related to the pre-salt oil extraction (ultra-deep waters).

According to the company, the business model it adopted involved strategic partnerships with specialized companies that are experienced in producing and operating drilling mechanisms, with the purpose of developing sustainable local firms (shipyards) in the business operated by the company. These operations included the drill mechanisms of submersibles, jack-ups drill, ships, and semisubmersibles

One of the most important arguments to justify Sete Brasil's creation was based on the idea of developing a national technology, to enable the formation of skilled workers and to improve the local labor market. This argument could make sense, since Petrobras managed to change its in-house, technological capability from a copied-technology user to a leading player in the innovation frontier of ultra-deep-water leadership.

Since its inception, Sete Brasil was convinced it could depend on drilling service contracts from Petrobras. As the new company had no knowledge of either the construction or the operation of drilling platforms, it instead acted as an intermediary between Petrobras and the suppliers and operators of the drilling process. Thus, both the construction and subsequent operation of the drilling platforms were outsourced to specialized companies. The role of Sete Brasil was simply to manage these contracts.

In February 2012, a little more than one year after its creation, the company won the bid to supply 21 oil rigs to Petrobras through a chartering contract. The value of these contracts was $76 billion. In total, the company had received Petrobras orders for 29 rigs contracts (backlog) accounting for more than $89 billion in revenue. These contracts were for a fifteen-year period with a renewal clause, ensuring the certainty of future revenue generation for the company.

According to the business model adopted, Sete Brasil would contract the shipyards to produce the deep-water drilling rigs and, in association with operators, would offer the

53 For more details on Sete Brasil, see Padua Lima, Maria Lucia L.M. and Ghirardi, Jose Garcez—"Global Law: Legal Answers for Concrete Challenges "– Jurua Editorial, 2018

complete package to Petrobras. The shipyards would supply the drilling platforms and Sete Brasil, in partnership with an operator, would be the owner of the equipment.

What is interesting in this business model, is that the shipyards involved in these contracts have as partners or associates some of the largest Brazilian construction companies and contractors: Camargo Correa and Queiroz Galvão were partners in the Atlântico Sul Shipyard; Odebrecht, OAS and UTC were partners in Enseada Shipyard, and Engevix was partner in Rio Grande Shipyard.

Despite these strange partnerships, there were good arguments for the creation of Sete Brasil. It seemed have excellent prospects, considering the enormous potential of the pre-salt reserves. Moreover, it was an opportunity to increase the amount of local content used in the construction of drills and ships, generating additional income and creating thousands of new jobs.

However, the Operation Car Wash saw in the creation of Sete Brasil a well-designed plot by Petrobras executives in coordination with the governing Workers' Party and its political allies to further expand the already-existing corruption scheme within Petrobras . According to prosecutors, Sete Brasil was a pretext for increasing the reach of corruption in the company and the subsequent embezzlement of funds for the ruling party.

The level of promiscuity between the large Brazilian construction contractors and Sete Brasil was evident: the shareholders of the main shipyards were "coincidentally" also the owners of the main construction companies. The results of this scheme were predictable: Petrobras contracted through Sete Brasil the construction of twenty-nine oil rigs, of which thirteen were to be operated by subsidiaries of these large contractors.

The Operation Car Wash task force concluded that two Petrobras executives, together with the treasurer of the Workers' Party, established a bribe equivalent to 0.9 percent of the value of Petrobras contracts intermediated by Sete Brasil. According to the task force, the prices for these contracts were inflated between 11 percent to 24 percent compared to other bids in similar auctions. Lobbyists connected to the suppliers diverted the bribes to the Workers' Party in order to finance political campaigns of candidates belonging to the PT and its allies. A portion of the bribes were sent through irregular means to bank accounts outside Brazil. The task force found that one of the contractors bought an overseas bank just to operate this fraudulent scheme.

It is almost impossible to quantify the amount of money in bribes received through these operations. Just to give an idea of amounts involved in these contracts, the total budget for constructing the 29 oil rigs was estimated between $22 billion and $25 billion. Sete Brasil has officially acknowledged that the bribes reached $224 million, but analysts consider even this huge amount a significant underestimate.

The corruption scandal at Petrobras and associated companies, exacerbated by the oil sector crisis due to the sharp price decline in the international market in 2015, led Sete Brasil to request a judicial settlement in late April 2016.

The total debt of Sete Brasil was estimated at $5 billion, and Brazil's federal government was the largest creditor. Through public banks and government funds, the federal government held about two-thirds of the company's debt. This value was concentrated in Banco do Brasil ($1 billion); Guarantee Fund of the Naval Construction ($1.3 billion); FI/FGTS ($0.7 billion); and Caixa Econômica Federal ($0.5 billion).

In addition to the huge bribes paid, the effect of corruption at Petrobras and Sete Brasil could be also measured by its direct consequences in the Brazilian oil and naval industry: the shipyards have largely halted construction of the oil rigs and thousands of employees have lost their jobs.

In fact, the interruption of contracts by Sete Brasil had a devastating effect on the Brazilian naval industry. According to the Union of Shipbuilding Industry, the number of direct jobs in the sector, which had reached more than 82,000 in 2014, fell to about 50,000 in the first quarter of 2016. This is the tragic side of corruption: recession and other forms of deterioration, which have dominated Brazil in recent years.

Table 7 (below) shows the degree of completion for Sete Brasil's contracts with Petrobras in April 2016.

From the R$63.8 billion impairment made in Petrobras' E&P segment from 2014-2018, R$44.4 billion was related to production oil fields in Brazil, and another R$ 8.1 billion to equipment used in the activities of production and oil drilling.

Could the impairments be associated with bribes paid or the overprice in contracts

**Table 7: Degree of Completion of Sete Brasil contracts**
(as of April 2016)

| Shipyard | Drill | Percent complete (%) |
|---|---|---|
| Brasfels | Urca | 89.96 |
| | Frade | 69.09 |
| | Bracuhy | 39.81 |
| | Portogalo | 17.34 |
| | Mangaratibe | 4.78 |
| Jurong | Arpoador | 84.76 |
| | Guarapari | 74.21 |
| | Camburi | 60.33 |
| | Itaoca | 30.87 |
| Enseada | Ondina | 71.27 |
| | Pituba | 27.45 |
| Rio Grande | Cassino | 52.42 |
| | Curumim | 13.92 |
| EAS | Copaabana | 49.24 |
| | Crumari | 38.11 |
| | Ioanema | 23.38 |
| | Leblon | 13.98 |

signed between Petrobras, Sete Brasil, and the different shipbuilders? The short answer is that it is possible. The fact is, the figures carried on Petrobras assets were inflated by certain (obviously huge) amounts that did not correctly represent the real value of these assets. Petrobras never acknowledged the inflation of these assets. The company explained the write-off of the E&P assets as a consequence of (a) the revision of the assumptions related to the reduction oil prices in the international market; (b) the devaluation of the Brazilian currency relative to the U.S. dollar; (c) an increase in the discount rates due to the "risk Brazil"; (d) expectations of idleness in the drilling rigs' activity; (e) uncertainty with respect to the future construction of ships; and (f) the dismantlement of platforms.

There is nothing wrong with the reasons Petrobras indicated in justifying the impairments made in the E&P segment. In principle, it seems that the company followed all the necessary steps in order to identify the assets that should be impaired, as well as the measurement of their recoverable amount, and the consequent write-off of the amounts in its financial results.

But the reasons indicated by Petrobras may not be the only ones to justify the impairments. There is no doubt that there was overpricing in some contracts, and there is also no doubt that bribes were paid during the execution of these contracts. It is understandably difficult to measure the effects of bribery and overpricing on the company's assets. But since knowledge of these issues is public, the company could reference the existence of these malpractices in explaining its financial results. Unfortunately, we will never know exactly what proportion of the assets impaired were due to the different reasons indicated by Petrobras. Were all the assets acquired really needed for the company's operations, or were some of them acquired only to generate "shady deals" that opened opportunities for making easy money?

The sad fact is that we will never know how much of the impairments could be attributable to corruption, or to bad management decisions, or to market conditions.

## COMPERJ

Comperj is a petrochemical complex located in the State of Rio de Janeiro, hence its name (a short for Complexo Petroquímico do Rio de Janeiro). The construction of the complex started in 2008 and the total cost of the project was estimated at $6.5 billion. It was estimated that the complex would start its operation in 2012. In the original project, the idea was to construct a natural gas plant, two refineries, and a petrochemical plant. After a series of changes to the original project, Petrobras admitted that total costs could reach $30.5 billion. Several internal company documents showed that the total cost could be as high as $47.7 billion.

Comperj is one of the undertakings of Petrobras in which there were payments of bribes as well as the participation of contractors in the form of a cartel, according to the plea bargains and leniency agreements signed by executives at Petrobras and contracting companies as part Operation Car Wash.

In a Non-Prosecution Agreement signed on September 26, 2018, with the United States Department of Justice Criminal Division (DOJ), Petrobras recognized that several of its executives engaged in wrongdoing with respect to certain projects, including the Comperj Complex. The agreement explicitly mentions:

28. The Rio de Janeiro State Petrochemical Complex ("COMPERJ") Project also involved massive corruption and bribery. COMPERJ covered an area of 42 square kilometers and involved multiple large contractors over a period of more than ten years.

29. In connection with the COMPERJ project, Executive 1 and the Petrobras contractors directed corrupt payments to a powerful Brazilian politician who had oversight over the location where COMPERJ was being built, and with whom Executive 1 had a close working relation.

30. Specifically, in or about the first half of 2010, Executive 1 was called to a meeting with the Brazilian politician and two other Brazilian officials who were members of his staff. During the meeting, the officials solicited Executive 1 for money for the politician's re-election campaign fund.

31. Later in 2010, Executive 1 contacted at least six companies that had contracts with Petrobras for the COMPERJ project to attend a meeting with one of the officials in a hotel in Rio de Janeiro. Ultimately, each of the companies that were at the meeting, as well as three large companies that were also working on COMPERJ but were not present at the meeting, paid a total of R$30 million to the Brazilian politician's campaign. Executive 1 admitted to taking part in getting the companies to agree to make the corrupt payments to the politician's campaign.

32. Executive 1, Executive 2, and Manager 1 also each received millions of dollars in bribes from contractors that obtained business from Petrobras in association with the COMPERJ project. In exchange, among other things, Manager 1 leaked confidential information regarding certain projects that was used to review bid proposals, and Executive 1 accelerated the schedule for completing COMPERJ, resulting in procurement commencing, in some cases, without sufficient technical designs, and providing the bribe-paying contractors with lucrative contracting opportunities."[54]

Per the terms of the agreement, the names of the individuals involved in the corruption scheme are confidential.

This agreement cost Petrobras $853.2 million. Of this amount, Petrobras paid $85.32 million to the United States Treasury, $85.32 million to the Security Exchange Commission (SEC) as a civil penalty, and $682.56 million to the Brazilian Treasury.

But long before the Non-Prosecution Agreement was signed, the Brazilian Federal Court of Accounts (TCU) gave a clear indication of the problems related to the Comperj project. The TCU audits the accounts of administrators and other persons responsible for federal public funds, assets, and other moneys, as well as the accounts of any person involved in losses, misapplication, or other irregularities that result in losses to the public treasury.

The Court audited the Comperj accounts, contracts and works between October 2015 and April 2016, and estimated a loss of $12.5 billion for Petrobras. The loss was generated mainly by "reckless management" on the part of the state's administrators, who approved the continued construction of the enterprise despite the fact that it had proved to be "economically unfeasible."

In the TCU report[55], the judge assigned as the case's rapporteur found that the investigation into the construction of the complex in Rio de Janeiro indicated "the occurrence of reckless management by Comperj, characterized by decisions lacking the precautions that would be necessary or

54 Extracted from the Non-Prosecution Agreement signed on September 26, 2018, between the U.S. Department of Justice and Petrobras

55 Secom TCU, "Gestão antieconômica de refinarias pode ter gerado prejuízo à Petrobras," 21 Augusut 2018, https://portal.tcu.gov.br/imprensa/noticias/gestao-antieconomica-de-refinarias-pode-ter-gerado-prejuizo-a-petrobras.htm.

reasonable". This management allowed the advance of an "economically unfeasible" enterprise, which resulted in "billion-dollar loss to Petrobras" quotes the ruling.

The billion-dollar loss estimate cited by the TCU minister includes damage of about US $ 9.5 billion generated specifically by the "reckless management" of those responsible for the state-owned company.

The audit that reached the billionaire loss aimed at "assessing the regularity of the management of the project's works, in the face of the significant increases in cost and time observed". In addition to reckless management, the minister mentions that there was "lack of clarity in disclosing the costs involved" in the undertaking.

TCU's work points to three moments in which key figures made "non-regular" decisions, and which are at the center of the billions lost. The first moment was the approval, by the executive board of Petrobras, of the Basic Petrochemical Unit project at Comperj even without a definition of the conceptual project. The work progressed in this phase despite a risk analysis that indicated a high probability of failure. The report states that "The result of the risk simulation carried out indicated that the chance of completion of the process units within the predicted period (July 2013) was only 5 percent."

Another decision questioned by TCU was the approval of Phase III of the Refinery "Trem 1" Project. At this stage, the project transformed into an integrated program that encompassed three distinct phases. In this case, TCU points out that there was no study that showed the economic feasibility of the integrated program. "The existence of opinions from technical areas with restrictions to the proposal still aggravates the inadequacy of this phase transition," the report indicates.

In addition to these two decisions, the TCU report points to Petrobras delay in reassessing the project in order to correct the error. The report cites the company for "delaying the start of the revaluation of the project, even in the face of the evident existence of unfavorable conditions." According to the rapporteur, "the revaluation only started in February 2015, five years after entering the execution phase, although the calculations indicated the infeasibility of the project long before that."

In view of these facts, the rapporteur's vote suggests barring those responsible from exercising a position in a committee or in a function of trust in the public administration. In addition, the rapporteur suggests "the precautionary freezing of these individuals' assets in order to guarantee the maximum effectiveness of any decision of merit that sentences them to repaying the possible loss they caused to the company." The document also mentions the question of governance within the company. Members of the Board and some executive positions were chosen in function of their political affiliation instead of their specific qualification for the function.

The document recalls that, around 2006, Petrobras planned to invest just over $12 billion to increase the national processing capacity by 1,200,000 barrels of oil per day, which represented an increase of about 70 percent in the total capacity then installed in the country. After ten years, the budget of these undertakings reached $80 billion, of which $30 billion were effectively disbursed. However, only 100,000 barrels per day were added to the capacity of refining in the country.

The summary of the TCU report shows evidence of the corruption and mismanagement practices in Comperj project in several forms: (a) contracts signed without previous risk analysis or even a basic project plan, (b) unrealistic time span for several construction works, (c) suppliers selected without specific qualifications or experience, (d) unnecessary contracts signed, (e) practice of overpricing in several contracts, and (f) lack of effective control in the company's management.

Given all of this evidence, the R$52.5 billion impairment presented in the RT&M segment in the financials for the 2014-2018 period is unsurprising. Comperj project alone was responsible for R$28.8 billion of the total impairment

Petrobras' official statement for the impairments on Comperj used very general terms. The company's Annual Reports from 2014-2018 point to, as causes for impairments: (a) difficulties in project execution due to the necessity of cash preservation, (b) problems in the chain of suppliers and partners due to Operation Car Wash, (c) problems in project planning, and (d) the postponement of expectations of cash generation from the project.

As in the Sete Brasil case presented earlier, we probably will never know exactly how much money was diverted from the company through the Comperj project. There is no doubt, however, that a corruption scheme operated in the Comperj project since its inception. Not only has Petrobras recognized the scheme by signing the non-prosecution agreement with the U.S. Department of Justice, but several plea bargains and leniency agreements were also signed by the parties involved in the scheme.

It is also impossible to know how much of the impairments made were a result of fraudulent contracts. What we do know is that several contracts had overpricing and the contractors acted as an effective cartel, splitting the contracts among the associated members. The cartel fixed the prices of the work to be done and the executives of the company were partners in these contracts. Huge amounts of money were thus diverted from Petrobras coffers. We also know that the impairments of R$ 116.4 billion registered from 2014-2018 are greater than Petrobras' losses during that same period, at R$70.8 billion. If no impairments had been made during those years, Petrobras would have shown profits on its balance sheet in each of the years.

The obvious conclusion of all this analysis is that without the impairments, Petrobras would never have shown negative results in the period from 2014 to 2018. It would have been as profitable company as it had always been since its foundation in 1953. This does not mean that the impairments were not necessary in a capital-intensive company like Petrobras. But what remains unknown is whether some slice of those impairments was used to hide fraudulent actions by the company's executives. In other words, impairments could have been a strategy to cover-up the wrongdoings of Petrobras management, especially from 2003 to 2016, when systemic corruption was spreading inside the company.

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03

# International Legal Cooperation in Car Wash Operation

*By Maria Thereza Rocha de Assis Moura*[1] *and Marta Saad*[2]

## 1. INTRODUCTION

The phenomenon of globalization, with interactions that generate personal, institutional, and commercial relations that surpass the territorial limits of each country,[3] ended up producing new forms of crime: supranational, without borders, hierarchical in structure, sometimes in the form of lawful companies and sometimes in the form of criminal organizations, and with a time-space separation between the actions of people working in the criminal sphere and the social damage caused.[4]

In this context, the activity and mechanisms of international legal cooperation facilitate the investigation of transnational crimes, but at the same time impose and demand considerable effort in the search for compatibility between national sovereignties and the multiplicity of legal systems.[5] In order to achieve the objectives of investigation, countries have come together through integrated international bodies and agencies, and legal cooperation systems.[6]

This was also the case with the so-called Operation Car Wash,[7] which gained the status of the largest police operation against corruption and the widest investigation related to misappropriation of public funds in Brazil.[8]

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3 ARAÚJO, Nadia de (Coord.). Cooperação Jurídica Internacional no Superior Tribunal de Justiça: Comentários à Resolução nº 9/2005. Rio de Janeiro: Renovar, 2010, p. 1.

4 FRANCO, Alberto Silva. Globalização e criminalidade dos poderosos. In: PODVAL, Roberto. Temas de direito penal econômico. São Paulo: RT, 2000, p. 256.

5 IENSUE, Geziela; CARVALHO, Luciani Coimbra de. Cooperação jurídica internacional e Mercosul: um sistema processual estratégico à integração. In: A ordem internacional no século XXI: direitos humanos, migração e cooperação jurídica. IENSUE, Geziela; CARVALHO, Luciani Coimbra de (Coord.). Rio de Janeiro: Lumen juris, 2017, p. 47.

6 IENSUE, Geziela; CARVALHO, Luciani Coimbra de. Cooperação jurídica internacional e Mercosul: um sistema processual estratégico à integração. In: A ordem internacional no século XXI: direitos humanos, migração e cooperação jurídica. IENSUE, Geziela; CARVALHO, Luciani Coimbra de (Coord.). Rio de Janeiro: Lumen juris, 2017, p. 47.

7 The case name, "Car Wash", arises from the use of a chain of gas stations and car washes to operate illicit funds belonging to one of the criminal organizations initially investigated. Although the works have moved on to other directions, the initial name stuck (https://bit.ly/303CW8M. Accessed 13 Jul. 2020).

8 "Operation Car Wash is the largest anti-corruption and anti-money laundering initiative in the history of Brazil. Started in March 2014, with the

With more than six years of duration, and more than seventy distinct investigation phases,[9] Operation Car Wash also surpassed the boundaries of Brazilian territory and became relevant in the international scenario, by using international legal cooperation in evidentiary and asset recovery terms.[10]

What this paper intends to present are the results of international legal cooperation in this period, obtained from open sources of research; as well as the bottlenecks and challenges of the Brazilian legal system, revealed from the findings of the Operation Car Wash practice.[11] The international mechanisms underscored the need for international cooperation that is efficient while respecting individual rights and guarantees which is always a challenge.

## 2. TRANSNATIONAL CRIMINALITY AND INTERNATIONAL LEGAL COOPERATION

Globalization is a complex and multifaceted process, with profound implications in several areas of knowledge and in different sectors of social life.[12] Although positive and negative aspects coexist, there is no forgetting that globalization also ends up serving as a substrate for the flourishing of transnational crime.[13]

In this context, transnational criminality can be understood as the practice of criminal offenses that do not respect national borders. This disrespect can be noted in the methods used in their planning, organization and execution; the extent of the damage generated; or even the ability to move the illicit funds earned in the economic systems ( official or otherwise) of several nations and organizations.[14]

Although the terms are often used interchangeably, organized crime and transnational crime are in fact distinct phenomena, which may or may not coexist. Organized crime may be transnational or not; and transnational crime is not necessarily organized. Even so, the combination of the elements that characterize both criminal modalities occurs quite frequently, a hypothesis called transnational organized crime.[15]

investigation before the Federal Courts in Curitiba of four criminal organizations leaded by dollar exchangers, Car Wash has already pointed out irregularities in Petrobras, the largest state-owned company in Brazil, as well as in large contracts, such as the construction of the nuclear plant Angra 3. Today it has developments in Rio de Janeiro, Sao Paulo and the Federal District, in addition to criminal investigations with the Federal Supreme Court and Superior Court of Justice to investigate facts attributed to persons who are entitled to jurisdictional prerogative. There are still operation teams working in the Regional Federal Appellate Courts of the 2nd (RJ/ES) and 4th (RS/SC/PR) Circuits" (https://bit.ly/32d7U0P. Accessed 13 Jul. 2020).

9 https://bit.ly/2BUdMBk. Accessed 6 Jul. 2020.

10 ALVES, Wilson Mendonça; OBREGON, Marcelo Fernando Quiroga. Os acordos internacionais de cooperação no combate à corrupção no âmbito da operação Lava Jato (Available at: https://bit.ly/3flyqJe. Accessed 28 Jun. 2020).

11 Ministério Público Federal. Caso Lava Jato: Entenda. https://bit.ly/303CW8M. Accessed 13 Jul. 2020.

12 SOUZA, Isac Barcelos Pereira de. Equipes conjuntas de investigação na cooperação jurídica internacional em matéria penal. Salvador: JusPodivm, 2019, p. 25.

13 CASTRO, Tony Gean Barbosa de. Crime organizado transnacional: cooperação jurídica internacional, direito penal internacional e tutela dos direitos humanos. Porto Alegre: Núria Fabris Ed., 2018, fls. 21/22.

14 WEBER, Patrícia Núnez. A cooperação jurídica internacional em medidas processuais penais. Porto Alegre: Verbo Jurídico, 2011, p. 49.

15 SOUZA, Isac Barcelos Pereira de. Equipes

The outlook for criminal prosecution in these cases is more complex, as states frequently end up recognizing the impossibility of investigating the facts alone.[16] Given these challenges, international legal cooperation is a fundamental instrument for investigating the activities of criminal organizations and government officials in the practice of transnational crimes.[17]International legal cooperation in criminal matters has the purpose of allowing the investigation, prosecution, or execution of a sentence, in the interest of the criminal jurisdiction of a foreign state or a supranational organization.[18] It is based on the need for collaboration between countries for the progress of humanity, the protection of respect for human rights via the penal apparatus, and the observance of international due process.[19] Brazil is a signatory to several international instruments aimed at increasing legal assistance in cases related to corruption and other crimes. For the purposes of this analysis, we highlight two: the United Nations Convention Against Transnational Organized Crime (Palermo Convention) and the United Nations Convention against Corruption (Mérida Convention).[20]

Specifically in the case of Operation Car Wash, international legal cooperation played a very important role in determining materiality and perpetration of various crimes, obtaining evidence, and providing mechanisms for the recovery of illicit assets located abroad.[21] The referenced Operation benefited from initiatives at the global level that encouraged the definition of standard models. At the same time, the dynamics of international legal cooperation impose, in addition to functionality in the formulation of requests, legal certainty to safeguard the legitimacy of the results obtained and ensure the rights of those involved in investigating the crime.[22]

Thus, in addition to transactional efficiency,[23] cooperation mechanisms in the internal system need to be increased, and there is still room for evolution in this area.[24]

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16 MENDONÇA. Andrey Borges de. A transferência de processo na persecução transnacional: aplicabilidade no sistema brasilewiro. Tese (Doutorado em Direito) - Faculdade de Direito. Universidade de São Paulo. 2020, p. 25/26.

17 MARQUES, Silvio Antonio. MORAIS, Adriana Ribeiro Soares de. Noções sobre cooperação jurídica internacional. São Paulo: Edições APMP, 2009, p. 51.

18 SOUZA, Isac Barcelos Pereira de. Equipes conjuntas de investigação na cooperação jurídica internacional em matéria penal. Salvador: JusPodivm, 2019, p. 37.

19 WEBER, Patrícia Núnez. A cooperação jurídica internacional em medidas processuais penais. Porto Alegre: Verbo Jurídico, 2011, p. 51.

20 MARQUES, Silvio Antonio. MORAIS, Adriana Ribeiro Soares de. Noções sobre cooperação jurídica internacional. São Paulo: Edições APMP, 2009, p. 51/52.

21 GIACOMET JUNIOR, Isalino Antonio. Cinco anos de operação Lava Jato. Cooperação em pauta: informações sobre cooperação jurídica internacional em matéria penal. Nº 49 - Março 2019 (https://bit.ly/2W0N94E. Accessed 29 Jun. 2020).

22 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 731.

23 ARAÚJO, Nadia de (Coord.). Cooperação Jurídica Internacional no Superior Tribunal de Justiça: Comentários à Resolução nº 9/2005. Rio de Janeiro: Renovar, 2010, p. 1.

24 FRANCO, Alberto Silva. Globalização e criminalidade dos poderosos. In: PODVAL, Roberto. Temas de direito penal econômico. São Paulo: RT, 2000, p. 265.

## 3. INTERNATIONAL LEGAL COOPERATION IN THE BRAZILIAN SYSTEM

International legal cooperation allows states to interact in the enforcement of criminal justice, in specific procedures or processes[25]—which is particularly important in investigating money laundering, corruption, illicit markets, and organized crime.[26] The reciprocal nature of the cooperation makes it possible to obtain uniform treatment related to different matters.[27] In this context of legal cooperation, it is worth analyzing the international documents to which Brazil is a signatory, as well as the instruments of legal cooperation in the Brazilian system.

### 3.1. International documents to which Brazil is a signatory

Brazil has entered into bilateral agreements in criminal matters with several countries: Canada, China, Belgium, Colombia, South Korea, Cuba, Spain, the United States, France, Honduras, Italy, Jordan, Mexico, Nigeria, Panama, Peru, United Kingdom of Great Britain and Northern Ireland, Switzerland, Suriname, Turkey, and Ukraine.[28] It also signed multiple multilateral agreements in criminal matters: a) within the scope of the United Nations; b) with member states of the Community of Portuguese-Speaking Countries (CPLP); c) within MERCOSUR; d) Inter-American Conventions; and e) multilateral agreements on illicit substances trafficking.[29]

Within the scope of the United Nations, we want to highlight the United Nations Convention against Transnational Organized Crime, known as the Palermo Convention, endorsed by Decree No. 5.015, of March 12, 2004; and the United Nations Convention against Corruption, related to Decree No. 5.687, of January 31, 2006. The Palermo Convention has three additional protocols, namely, the Protocol to Prevent and Punish Trafficking of Persons, especially women and children (Decree No. 5.017/2004), the Protocol against the Smuggling of People by Land, Sea and Air (Decree No. 5.016/2004), and the Protocol against Illicit Production and Trafficking in Firearms, their Parts, Components and Ammunition (Decree No. 5.941/2006).

Within the scope of the member states of the Community of Portuguese-Speaking Countries (CPLP), we want to specifically note the Convention of Judicial Assistance in Criminal Matters, signed in the City of Praia, on November 23, 2005, and incorporated into domestic law through Decree No. 8.883 of August 4, 2016.

Regarding the Inter-American Conventions, there is the Inter-American Convention against Terrorism (Decree No. 5.639/05), the Inter-American Convention on Mutual Assistance in Criminal Matters (Decree No. 6.340/08), the Inter-American Convention on International Trafficking of Minors (Decree No. 2.740/98), the Inter-American Convention Against Corruption (Decree No. 4.410/02), the Inter-American Convention Against the Manufacture and Illicit Traffic in Firearms, Ammunition, Explosives, and Oth-

25 WEBER, Patrícia Núnez. A cooperação jurídica internacional em medidas processuais penais. Porto Alegre: Verbo Jurídico, 2011, p. 32.

26 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 730.

27 BAPTISTA, Bárbara Gomes Lupetti. Breves considerações sobre o anteprojeto de lei de cooperação jurídica internacional. Revista da AJUFE. Ano 23 - Número 84 (2° trimestre 2006), p. 67.

28 https://bit.ly/3ffyWII. Accessed 2 Feb. 2020.

29 https://bit.ly/38HM8U0. Accessed 2 Feb. 2020.

er Related Materials (Decree No. 3.229/99), and the Inter-American Convention on Enforcement of Criminal Judgments Abroad (Decree No. 5.639/2005).

Within the scope of MERCOSUR, it is important to note the Protocol of Mutual Legal Assistance in Criminal Matters (Decree No. 3.468, of May 17, 2000) and its Complementary Agreement between the MERCOSUR member states, Bolivia, and Chile (Decree No. 8.331, of November 12, 2014).

Finally, regarding illicit substances trafficking, there is the Convention against the Illicit Trafficking of Narcotics and Psychotropic Substances (Decree No. 154, of June 26, 1991) and the Protocol to Eliminate Illicit Trade in Tobacco Products (Decree No. 9.516, of October 1, 2018).

The treaties and conventions encourage terminological convergence and the communication pattern between countries, reducing the weight and influence due to the diversity in the origin of the systems, and facilitating the desired understanding in the formalization of requests for mutual assistance.[30]

### 3.2. Instruments of international legal cooperation in the Brazilian system

The mechanisms in force in Brazil through which criminal jurisdictional cooperation operates are extradition, surrender to the International Criminal Court, transfer of prisoners, the ratification of a foreign criminal judgment, letter of request, and direct assistance.[31] There are also references to international mutual assistance in criminal matters,[32] spontaneous communication and sharing of evidence, in accordance with domestic laws and international treaties, conventions, agreements and protocols,[33] as well as the transfer of criminal proceedings, the enforcement of a foreign criminal judgment, the European arrest warrant, and the Mercosur arrest warrant.[34]

Requests for international legal cooperation are primarily intended to recover assets, produce evidence, communicate procedural acts, extradition, and transfer cases.

The jurisdiction to process such requests varies. Although it has traditionally been concentrated in the Federal Supreme Court since the 1930s, constitutional jurisdiction in matters of international legal cooperation was shared between the Superior Courts after Constitutional Amendment No. 45 of 2004.[35]

30 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 729/730.

31 WEBER, Patrícia Núnez. A cooperação jurídica internacional em medidas processuais penais. Porto Alegre: Verbo Jurídico, 2011, p. 33.

32 JAPIASSÚ, Carlos Eduardo A.; PUGLIESE, Yuri Sahione. A cooperação internacional em matéria penal no direito brasileiro. In: PAGLIARINI, Alexandre Coutinho; CHOUKR, Fauzi Hassan (Coord.). Cooperação jurídica internacional. Belo Horizonte: Fórum, 2014. p. 213/215.

33 MARQUES, Silvio Antonio. MORAIS, Adriana Ribeiro Soares de. Noções sobre cooperação jurídica internacional. São Paulo: Edições APMP, 2009, p. 52.

34 JAPIASSÚ, Carlos Eduardo A.; PUGLIESE, Yuri Sahione. A cooperação internacional em matéria penal no direito brasileiro. In:PAGLIARINI, Alexandre Coutinho; CHOUKR, Fauzi Hassan (Coord.). Cooperação jurídica internacional. Belo Horizonte: Fórum, 2014. p. 219/223.

35 ARAÚJO, Nadia de (Coord.). Cooperação Jurídica Internacional no Superior Tribunal de Justiça: Comentários à Resolução nº 9/2005. Rio de Janeiro: Renovar, 2010, p. 6 e 19.

The Brazilian Constitution gives the Federal Supreme Court the original jurisdiction to prosecute and try the extradition requested by a foreign state (Article 102, I, g, of the Brazilian Constitution).

The Constitution gives the Superior Court of Justice the original jurisdiction to prosecute and try the ratification of foreign judgments and the granting of authorization of the execution of a foreign judgment to letters of request (article 105, I, i, of the Brazilian Constitution).

Lastly, it gives federal judges the jurisdiction to process and execute a letter of request, after the authorization of the execution of a foreign judgment, and a foreign judgment, after ratification (article 109, X, of the Brazilian Constitution).

The extradition and transfer procedures for sentenced persons are based on Law No. 13.445, of May 24, 2017, governed by Decree No. 9.199, of November 20, 2017. Within the scope of the Ministry of Justice and Public Security, Ordinance No. 217, of February 27, 2018, establishes administrative procedures relating to requests for passive and active extradition and provisional detention for extradition purposes. Ordinance No. 89, of February 14, 2018, establishes the procedures to be adopted in relation to the processing of active and passive requests for the transfer of sentenced persons.[36]

The procedures for ratifying a foreign judgment and granting authorization of the execution of a foreign judgment to letters of request are governed in Title VII of Part II of the Internal Rules of the Superior Court of Justice.[37]

The transfer of cases is an international legal cooperation mechanism that makes it possible to move a criminal proceeding, initiated in one state, to another state also having jurisdiction to prosecute and try that act, whenever the transfer is beneficial to the case.[38] Brazilian law has no specific provision on the subject.

Letters of request, in which a court or tribunal addresses another foreign court or tribunal to request the fulfillment of a judicial act in its territory, have always been the instruments traditionally intended to convey requests for international cooperation in criminal procedural measures.[39]

On the other hand, direct assistance, or international judicial cooperation ***stricto sensu***,[40] consists of cooperation provided by the national authority able to meet external demand, in the use of its legal attributions, forwarded through the Brazilian central au-

36 Justiça e Segurança. Legislação. https://bit.ly/3edRI1H. Accessed 8 Jul. 2020.

37 Superior Tribunal de Justiça. Regimento Interno do Superior Tribunal de Justiça. https://bit.ly/3iOgN6I. Accessed 8 Jul. 2020.

38 TOFFOLI, José Antonio dias; CESTARI, Virgínia Charpinel Junger. Mecanismos de cooperação jurídica internacional no Brasil. In: Manual de Cooperação Jurídica Internacional e Recuperação de Ativos - Matéria Civil. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional, Secretaria Nacional de Justiça, Ministério da Justiça. Brasília, 2008, p. 28.

39 GHELLER, Luciana Laurenti. Mecanismos de cooperação jurídica internacional em matéria penal e auxílio direto. In: I jornada sobre cooperação judicial nacional e internacional. Brasília: Tribunal Regional Federal 1ª Região/ ESMAF, 2014 (Coleção jornada de Estudos ESMAF; 25), p. 134.

40 TOFFOLI, José Antonio dias; CESTARI, Virgínia Charpinel Junger. Mecanismos de cooperação jurídica internacional no Brasil. In: Manual de Cooperação Jurídica Internacional e Recuperação de Ativos - Matéria Civil. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional, Secretaria Nacional de Justiça, Ministério da Justiça. Brasília, 2008, p. 26.

thority.[41] Direct assistance should be used whenever the measure does not give rise to examination of the foreign judgment, so as not to conform to letters of request or, else, in the cases in which greater judicial cognition about the request makes international criminal procedural cooperation more successful.[42]
Direct assistance is supported by the Brazilian Constitution, international treaties and conventions incorporated into the Brazilian legal system, and in Resolution No. 09/2005 of the Superior Court of Justice. The use of this international cooperation mechanism has advantages when compared to letters of request, tending, therefore, to replace them, in view of the greater speed and efficiency for the practice of procedural acts, production of evidence, and other measures.[43]

Notably, when speed is essential—such as in crimes that demand the production of evidence (testimonial or documentary) in other countries, given the often fluid nature of evidence; or that require more forceful measures, such as the sequestration and freezing of assets—direct assistance is the most appropriate way of obtaining evidence.[44]

Direct assistance requests are based, as a rule, on bilateral treaties or agreements (Mutual Legal Assistance Treaties or MLATs*)*.In their absence, the assistance can be provided on the basis of the applicant's guarantee of reciprocity.[45]

The Department of Asset Recovery and International Legal Cooperation (DRCI), created by Decree No. 4.991, of February 18, 2004, acts as the central authority in Brazil, through the coordination and instruction of active and passive requests for international legal cooperation. It is subordinate to the National Department of Justice (Senajus) of the Ministry of Justice and Public Security (MJSP).

Pursuant to Art. 14 of Decree No. 9.662, of January 1, 2019, the Department of Asset Recovery and International Legal Cooperation (DRCI) is responsible for the activities of articulating, integrating and filing actions among the agencies of the Executive and Judiciary Powers and the Public Prosecutors' Office to confront corruption, money laundering and transnational organized crime; and for structuring, implementing and monitoring government actions.

In addition, the DRCI promotes the articulation of the bodies of the executive and judiciary branches and the Public Prosecutors' Office in international legal cooperation in civil and criminal matters, including in matters of extradition, the transfer of sen-

41 WEBER, Patrícia Núnez. A cooperação jurídica internacional em medidas processuais penais. Porto Alegre: Verbo Jurídico, 2011, p. 59/60.

42 WEBER, Patrícia Núnez. A cooperação jurídica internacional em medidas processuais penais. Porto Alegre: Verbo Jurídico, 2011, p. 60.

43 GHELLER, Luciana Laurenti. Mecanismos de cooperação jurídica internacional em matéria penal e auxílio direto. In: I jornada sobre cooperação judicial nacional e internacional. Brasília: Tribunal Regional Federal 1ª Região/ ESMAF, 2014, (Coleção jornada de Estudos ESMAF; 25), p. 145.

44 TOFFOLI, José Antonio dias; CESTARI, Virgínia Charpinel Junger. Mecanismos de cooperação jurídica internacional no Brasil. In: Manual de Cooperação Jurídica Internacional e Recuperação de Ativos - Matéria Civil. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional, Secretaria Nacional de Justiça, Ministério da Justiça. Brasília, 2008, p. 27.

45 TOFFOLI, José Antonio dias; CESTARI, Virgínia Charpinel Junger. Mecanismos de cooperação jurídica internacional no Brasil. In: Manual de Cooperação Jurídica Internacional e Recuperação de Ativos - Matéria Civil. Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional, Secretaria Nacional de Justiça, Ministério da Justiça. Brasília, 2008, p. 26/27.

tenced persons, the transfer of execution of the punishment, and asset recovery.

The DRCI further acts as the central authority, through the coordination and instruction of active and passive requests for international legal cooperation, negotiating international legal cooperation agreements and exercising the role of contact point, liaison, and similar in the international cooperation and asset recovery networks; and acts in procedures related to the action to freeze assets, rights, or cash as a result of a United Nations Security Council resolution.

The DRCI also acts as an intermediary between several international cooperation networks, in order to facilitate even more direct and rapid contact between authorities, in order to resolve issues encountered when carrying out actions, establish joint action strategies, establish joint understandings, and communicate about changes in procedures.[46]

Domestically, international legal cooperation in criminal matters is governed by several ordinances. Inter-ministerial Ordinance No. 501/2012, defines the processing of letters of request and requests for direct assistance, both active and passive, in criminal and civil matters, in the absence of a bilateral or multilateral international legal cooperation agreement, and applies in other cases only secondarily.

Joint Ordinance MP/PGR/AGU No. 1, of October 27, 2015, deals with the processing of requests for international legal cooperation in criminal matters between the Ministry of Justice, the Federal Public Prosecutors' Office, and the Federal Attorney-General's Office.

Ordinance MJ No. 1.876/2006 provides for the processing of requests for international legal cooperation in criminal matters within the scope of the Ministry of Justice. Lastly, Ordinance No. 231, of December 17, 2015, provides for the processing of requests for free legal aid within the scope of international legal cooperation and other measures.[47]

As of the entry into force of Decree No. 8.668, of February 11, 2016, followed by Decree No. 9.662, of January 1, 2019, the DRCI became the proper place for the processing of compulsory measures relating to the extradition and transfer of convicted persons,[48] except with regard to mutual assistance in criminal matters under the Convention on Legal Assistance in Criminal Matters among the Member States of the Community of Portuguese-Speaking Countries and the Mutual Assistance Agreement in Criminal Matters signed between Brazil and Canada, whose Central Authority is the Federal Attorney General Office, through the International Cooperation Department.[49]

The International Cooperation Department of the Federal Attorney General Office (SCI/PGR) is responsible for assisting in matters of international legal cooperation with foreign authorities and international organizations, as well as in the relationship with national bodies concerned with the activities of international cooperation.[50]

The SCI/PGR executes, when appropriate, passive requests for international coopera-

46 Justiça e Segurança Pública. Cooperação Jurídica Internacional em Matéria Penal. https://bit.ly/2ZR642V. Accessed 8 Jul. 2020.

47 Justiça e Segurança Pública. Legislação. https://bit.ly/2ZchVJy. Accessed 8 Jul. 2020.

48 Justiça e Segurança Pública. Cooperação Jurídica Internacional em Matéria Penal. https://bit.ly/2ZWwKz0.Accessed 8 Jul. 2020.

49 Ministério Público Federal. Cooperação Internacional. https://bit.ly/38JVoXC. Accessed 8 Jul. 2020.

50 Ministério Público Federal. Cooperação Internacional. https://bit.ly/38JVoXC Accessed 8 Jul. 2020.

tion in criminal matters; monitors cases in extraditional matters and other compulsory measures (deportation and expulsion); seeks solutions through informal contacts and cooperation networks, for the most diverse legal issues; organizes and complies with requests from foreign authorities and international organizations; works, in collaboration with other bodies, for the smooth progress of international exchange and cooperation in matters specific to the Federal Public Prosecutors' Office; and issues opinions on proceedings ratifying foreign judgments and granting authorization of the execution of a foreign judgment to letters of request.[51]

Requests for international legal cooperation on the criminal level, by means of a letter of request and direct assistance, are received exclusively from government officials—judges, members of the Public Prosecutors' Office, chiefs of police, public defenders—and aim to comply with procedural communication acts (the serving of processes, subpoenas, and notices), investigative or evidentiary acts (testimonies, obtaining documents, breach of bank secrecy, breach of telematic secrecy), or measures of asset constraints, such as freezing of assets or cash abroad.[52]

## 4. INTERNATIONAL LEGAL COOPERATION IN OPERATION CAR WASH

According to data from the Legal Advisory Office of the SCI/PGR,[53] reproduced in the table below, since July 2014 (when the first request for international cooperation within the scope of Operation Car Wash took place), the SCI/PRG received 606 passive requests for legal cooperation in criminal matters from forty countries; and assigned to sixty-one countries some 447 active requests that sought to support investigations or proceedings related mainly to criminal organizations, money laundering, concealment of assets or cash, and corruption.

The countries that submitted the most requests to Brazilian authorities are Peru, responsible for 41.2 percent of requests, and Switzerland, with 36.8 percent of requests. Most of the requests concern the testimonies of suspects, witnesses, victims, or experts in the extrajudicial phase.[54] (See map of cooperation on the following page.)

Within the scope of active cooperation, most of Brazil's requests are sent to Switzerland (31.3 percent) and the United States (12.9 percent), primarily for the purpose of serving processes, obtaining documents subject to financial or fiscal confidentiality, and freezing financial assets.[55]

The relative balance found between the number of active requests, in which Brazil was the applicant, and the passive requests, in which Brazil appeared as the subject of the applications, shows an expansion of an integrated use of international legal cooperation, aimed at collaboration in an anti-money laundering effort.[56]

51 Ministério Público Federal. Cooperação Internacional. https://bit.ly/38JVoXC. Accessed 8 Jul. 2020.

52 Ministério Público Federal. Cooperação Internacional. https://bit.ly/2W02vpJ. Accessed 8 Jul. 2020.

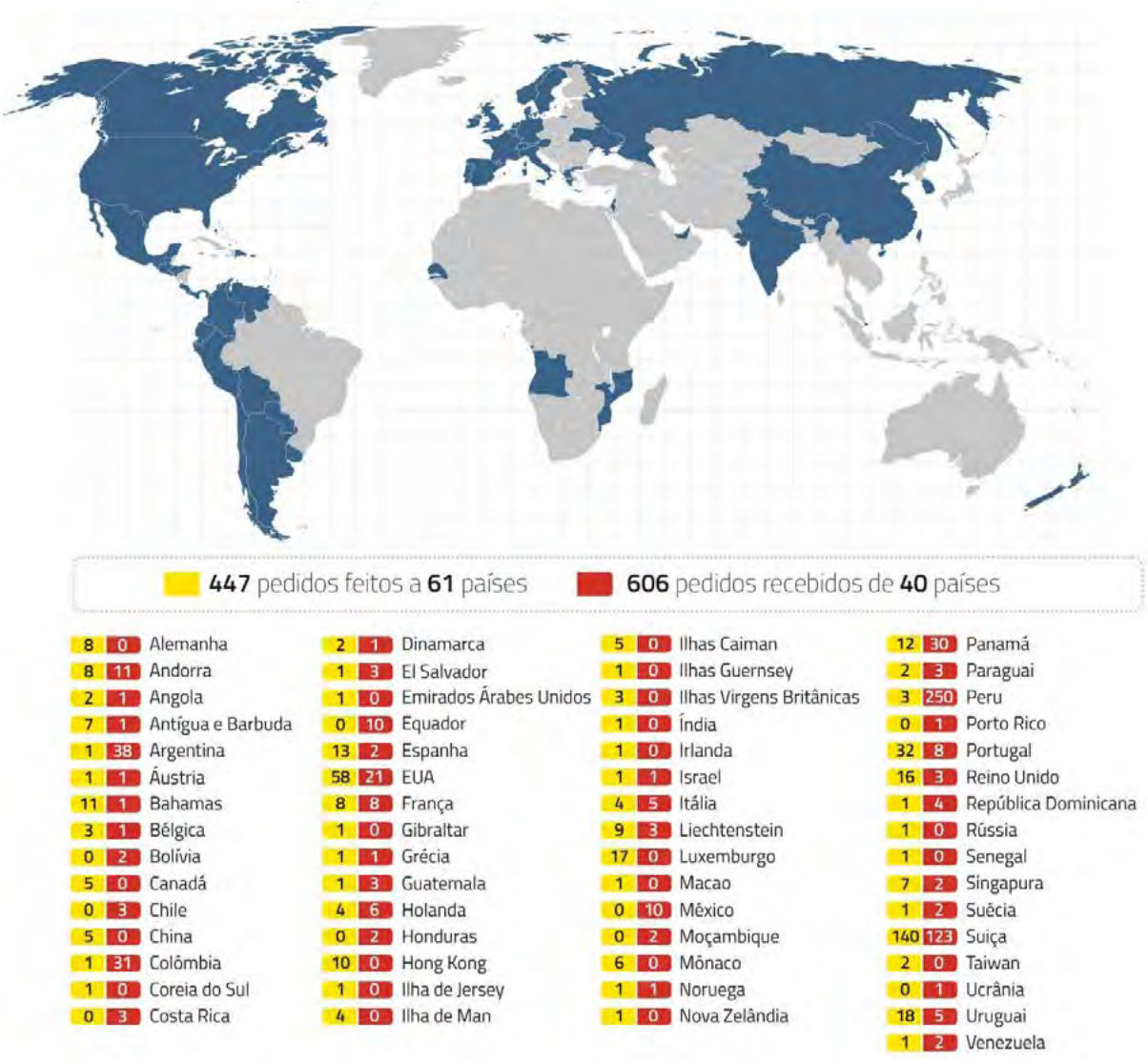
53 Ministério Público Federal. Caso Lava Jato: Efeitos no Exterior. https://bit.ly/31ZH102. Accessed 6 Jul. 2020.

54 Ministério Público Federal. Caso Lava Jato: Efeitos no Exterior. https://bit.ly/31ZH102. Accessed 6 Jul. 2020.

55 Ministério Público Federal. Caso Lava Jato: Efeitos no Exterior. https://bit.ly/31ZH102. Accessed 6 Jul. 2020.

56 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os siste-

## Car Wash Active and Passive Cooperation




**Key** (English translations for the graphic above)**:**

| 447 requests made to 61 countries | | 606 requests received from 40 countries | |
|---|---|---|---|
| Germany | Denmark | Cayman Islands | Panama |
| Andorra | El Salvador | Guernsey Islands | Paraguay |
| Angola | United Arab Emirates | British Virgin Islands | Peru |
| Antigua and Barbuda | Ecuador | India | Puerto Rico |
| Argentina | Spain | Ireland | Portugal |
| Austria | USA | Israel | United Kingdom |
| Bahamas | France | Italy | Dominican Republic |
| Belgium | Gibraltar | Liechtenstein | Russia |
| Bolivia | Greece | Luxembourg | Senegal |
| Canada | Guatemala | Macao | Singapore |
| Chile | Netherlands | Mexico | Sweden |
| China | Honduras | Mozambique | Switzerland |
| Colombia | Hong Kong | Monaco | Taiwan |
| South Korea | Jersey Island | Norway | Ukraine |
| Costa Rica | Isle of Man | New Zealand | Uruguay<br>Venezuela |

*Data includes requests for cooperation made by the Car Wash Task Forces in Curitiba, Rio de Janeiro, and São Paulo, by the Car Wash Working Group at the Office of the General Counsel for the Republic, by the Greenfield Task Force and by the Federal Attorney General Office of Pernambuco. Updated until March 6, 2020.*
*Source: Legal Counsel of SCI/PGR*

In addition, the multiplicity of requests of different natures highlights the diversity of demands and needs that may arise in the scope of a large investigation. Under Operation Car Wash, the data show 400 active requests for legal assistance, analyzed and processed by the Department of Asset Recovery and International Legal Cooperation (DRCI) of the Ministry of Justice and Public Security, had already been sent abroad. Regarding these requests, the indicators show that the vast majority were prepared by the Federal Public Prosecutors' Office, accompanied by other requests from the Federal Police and also from the Federal Courts. The requests made by the Federal Public Prosecutors' Office and the Federal Police are aimed at obtaining breach of bank secrecy, search and seizure, and testimonies of witnesses; or at equity provisional remedy and repatriation of assets located abroad. The Federal Courts' requests are aimed at serving process upon the defendant, summoning, or testimonies of witnesses. There are also requirements for transferring cases from one jurisdiction to another and for the extradition of investigated persons arrested in other countries.[57]

The recovery of assets, the subject matter of several requests, plays an important role in economic crimes, because it prevents the assets from being used as propellants of illicit activities, allows the return of values in favor of society itself, and suffocates illicit activities financially. As a result, asset recovery is provided for in several multilateral treaties and in virtually all bilateral treaties signed by Brazil.[58]

In fact, in the case of economic macro-crime, often institutionalized, as with the facts found in the course of Operation Car Wash, its investigation cannot do without economic repression, which drains the self-financing power of criminal organizations, placing asset recovery at the heart of the criminal prosecution strategy.[59]

According to public information regarding Operation Car Wash, another R$2.1 billion was frozen abroad, in goods and cash, mostly in Switzerland, but also linked to bank accounts held in Monaco, Singapore, Luxembourg, Jersey Islands, Guernsey Islands, and the United States.[60]

The data also indicate the signing of 183 plea bargains, R$607 million returned to public coffers, and R$800 million paid as fines; with recovery expected due to plea bargains, including fines and losses, totaling R$1.5 billion.[61]

The analysis of data from Operation Car Wash, something unprecedented in the Brazilian tradition, shows the convergent effort

mas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 709.

57 GIACOMET JUNIOR, Isalino Antonio. Cinco anos de operação lava jato. Cooperação em pauta: informações sobre cooperação jurídica internacional em matéria penal. Nº 49 - Março 2019 (https://bit.ly/2W0N94E>. Accessed 29 Jun. 2020).

58 MENDONÇA, Andrey Borges de. Recuperação de ativos no exterior e cooperação jurídica internacional. In: SALGADO, Daniel de Resende; QUEIROZ, Ronaldo Pinheiro de; ARAS, Vladimir (Coords). Corrupção: aspectos sociológicos, criminológicos e jurídicos. Salvador: Juspodivm, 2020, p. 708.

59 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 710.

60 Ministério Público Federal. Caso Lava Jato: Efeitos no Exterior. https://bit.ly/31ZH102. Accessed 6 Jul. 2020.

61 Ministério Público Federal. Caso Lava Jato: Resultados. https://bit.ly/321f207. Accessed 6 Jul. 2020.

of countries from different legal traditions to use reciprocal legal cooperation, in an easy and fast way, notably with the use of direct assistance and exchange of spontaneous information between financial intelligence units, Public Prosecutors' Offices, and police authorities.[62]

The evidence gathered in Operation Car Wash by the hundreds of requests, by the variety of objects and procedures, and mainly, by the countless countries with which Brazil cooperated, of different legal traditions, confirm this cooperation initiated from international articulations.[63]

The numbers are really impressive. However, if, on the one hand, the dynamics of these relations facilitate evidence exchange, it may entail, due to a normative and procedural deficit, opacity in the control of the procedures by the interested parties, notably one who is the target of investigation in the cooperation measures, as will be analyzed below.

## 5. CHALLENGES OF INTERNATIONAL LEGAL COOPERATION IN THE BRAZILIAN SYSTEM

Despite the increasing use of international legal cooperation, several bottlenecks persist: the lack of a single law that standardizes international legal cooperation, increasing its proceduralization, removing opacity and allowing control by the parties involved, including the suspect/defendant; the question of the time taken to process common measures and efforts to overcome bureaucratic obstacles; and the solution of any ***bis in idem***, especially in cases of consensual means of conflict resolution, such as cooperation or plea bargain agreement.

Indeed, international legal cooperation in the Brazilian system is governed by varied, non-homogeneous laws. The matter is present, sparsely, in several laws, as in the Brazilian Constitution, the rules of the Law of Introduction to the Civil Code, the Code of Civil Procedure, the Code of Criminal Procedure, and Resolution No. 9 of the Superior Court of Justice; in addition to the Internal Rules of the Supreme Federal Court, among others. There are also numerous laws of international origin, such as multilateral and bilateral conventions, which deal with international legal cooperation between Brazil and some states, as seen above.[64]

International legal cooperation is exercised by states based on bilateral agreements and regional and multilateral treaties, and based on the promise of reciprocity. Brazil is part of a wide range of agreements and treaties, through which it acquires the right to request legal cooperation from other participating states, as well as undertaking to comply with their requests; cooperating, also, through the promise of reciprocity.[65]

There is, however, no legal cooperation law governing the Brazilian state's procedures

62 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 710.

63 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 730.

64 ARAÚJO, Nadia de (Coord.). Cooperação Jurídica Internacional no Superior Tribunal de Justiça: Comentários à Resolução nº 9/2005. Rio de Janeiro: Renovar, 2010, p. 5/6.

65 Justiça e Segurança Pública. Acordos Internacionais. https://bit.ly/3iPnqFM. Accessed 2 Feb. 2020.

internally. There is not a specific and detailed discipline in the proceduralization of the processing that must be followed in the execution of a foreign request. There is not a clear norm as to the treatment that must be given to requests for foreign legal cooperation seeking compliance with measures in Brazil.[66]

In the field of cooperation, under such conditions, the delicate interface of harmonizing domestic law with international commitments is evident, guided by the need to observe fundamental rights in the cooperative environment.[67]

In the matter of proceduralization, the possibility of defense by means of an adversary proceeding—even if deferred—with the necessary secrecy for the success of the requested measure, must be allowed. The production of evidence or the implementation of personal or equity provisional remedies, as soon as the confidentiality necessary for the remedy's success, must be submitted to the adversary proceeding, for purposes of use in the requesting country, in a legitimate manner.

In addition to the issue of proceduralization itself, with minimal guarantees of defensive participation, another issue that surrounds requests for international legal cooperation is related to the time taken to process the measures.

Given the transactional nature of offenses, the sovereign state depends on cooperation[68] to recover assets resulting from the practice of criminal offenses, for example. The main obstacle to the repatriation of Brazilian assets frozen abroad is the delay in processing internal criminal proceedings, since the countries where these funds are located may demand a final judgment by the Brazilian courts as a requirement for the return of the funds. Thus, the conclusion of the legal process within a reasonable timeframe, including elimination of dead time, in addition to being a guarantee for the defendant, is also an efficiency factor in international legal cooperation.[69]

The indicators also show that, in the first five years of Operation Car Wash, "out of all 798 active and passive requests and information on cooperation in criminal matters in the referred investigation, in approximately 467 of these it was already possible to receive restitution remedies or some kind of answer with conclusive information. Of these requests for cooperation, 403 were fully or partially fulfilled; sixteen were restored regardless of compliance, at the request of the requesting authority itself; nine were returned for adjustments; and only thirty-nine were not complied with by the requested authorities.[70]

For agile responses, the effective action of the Brazilian central authority (the DRCI) has been essential, coordinating internally

66 SAADI, Ricado Andrade e BEZERRA, Camila Colares. O papel da autoridade central brasileira para cooperação jurídica: DRCI. Revista Criminal. Ensaios sobre a atividade policial. São Paulo: Editora Fiuza, Vol 10 – jan/abril de 2010, p. 163.

67 CHOUKR, Fauzi Hassan. A Justa Cooperação Penal Internacional Aspectos dos desafios brasileiros na construção normativa e prática. In: CARVALHO, Luciani Coimbra de; IENSUE, Gesiela (Coords). A Ordem Internacional no Século XXI: Direitos humanos. Migração e cooperação Jurídica. Rio de Janeiro: Ed. Lumen Juris, p. 74.

68 MENDONÇA. Andrey Borges de. A transferência de processo na persecução transnacional: aplicabilidade no sistema brasileiro. Tese (Doutorado em Direito) - Faculdade de Direito. Universidade de São Paulo. 2020, p. 33.

69 Ministério Público Federal. MPF apresenta resultados da Operação Lava Jato à ONU. https://bit.ly/3emc4pH. Accessed 28 Jun. 2020.

70 GIACOMET JUNIOR, Isalino Antonio. Cinco anos de operação Lava Jato. Cooperação em pauta: informações sobre cooperação jurídica internacional em matéria penal. Nº 49 - Março 2019 (https://bit.ly/2W0N94E. Accessed 29 Jun. 2020).

with the national requesting bodies, following and monitoring cases with foreign authorities, through close communication and daily clarification of details to speed up measures.[71]

Finally, Operation Car Wash was marked by the systematic use of plea bargain agreements.[72] In these cases, collaborators agree to cooperate with investigations to identify and assist in the recovery of assets that have been misappropriated and kept abroad—a fact that can accelerate the loss of these assets—coupled with close action among the central authorities of the countries, and between the respective investigation and prosecution bodies.[73]

The fact that some requests for legal cooperation concerning the recovery of assets have been handled in cases of plea bargains translates into a substantial reduction in processing time, often without the actual provisional remedy.[74]

However, in cases of plea bargain agreements, when assistance is requested from foreign countries, care should be taken to address the collaborator's possible vulnerability abroad, since they undertake to collaborate and tell the truth before authorities, but they are already being punished in Brazil for the often transnational facts included in the written agreement.

In these cases, the evidence obtained through plea bargain or leniency agreements cannot be presented or used in Brazil and also abroad to the detriment of the collaborating person, except in relation to facts that have not been revealed by them and later proved.

To promote the rationality, coherence, reasonableness, and effectiveness of the legal system, the 5th Chamber of Coordination and Review of the Federal Public Prosecutors' Office issued Technical Note No. 1/2017. The Note establishes that the evidence obtained through a plea bargain cannot be freely used to the detriment of the collaborating person for facts that are the subject of their agreement. Otherwise the collaborator would be under coercion since the collaborator gave up the right against self-incrimination in the agreement signed with Brazilian authorities.

Thus, access and sharing of data, information, and documents, at the international level, could only be achieved through a commitment to observing the conditions agreed between the collaborator and the state, reinforcing the cooperative attitude.

## 6. FINAL CONSIDERATIONS

The considerable number of states involved in the Operation Car Wash requests allows us to infer that there was a combined effort to adhere to international legal cooperation in its most facilitated and swift form. Mainly

71 GIACOMET JUNIOR, Isalino Antonio. Cinco anos de operação Lava Jato. Cooperação em pauta: informações sobre cooperação jurídica internacional em matéria penal. Nº 49 - Março 2019 (https://bit.ly/2W0N94E. Accessed 29 Jun. 2020).

72 https://bit.ly/3iMFbFX. Accessed 6 Jul. 2020.

73 Os dados indicam "confirmação oficial sobre o bloqueio no exterior de cerca de US$ 612 milhões e a repatriação definitiva de US$ 166 milhões. Esses valores recuperados no exterior já representam mais de 50% do total repatriado historicamente mediante mecanismos de assistência jurídica internacional". (GIACOMET JUNIOR, Isalino Antonio. Cinco anos de operação Lava Jato. Cooperação em pauta: informações sobre cooperação jurídica internacional em matéria penal. Nº 49 - Março 2019 (https://bit.ly/2W0N94E. Accessed 29 Jun. 2020).

74 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 711.

by use of the mechanism of direct assistance and in the exchange of spontaneous information among financial intelligence units, Public Prosecutors' Offices, and police authorities.[75] It occurs regardless of the legal tradition of each country.

The quantitative and qualitative data obtained in the context of the Operation show the diversity of demands, purposes, and procedures. In this sense, international legal cooperation represents a useful tool for the most diverse purposes, highlighting the production of evidence and recovery of illicit assets, and the effectiveness of results of the claims in the context of legal cooperation is directly related to the form of articulation used at the international level.

There is still a long way to go in developing what is still a new mechanism, at least at these proportions, in the Brazilian system: from greater legal certainty and proceduralization, to concerns over reasonable duration and attention to dead times, and the need for forms of collaborator protection, so that they can contribute at international levels without exposure to double jeopardy or *bis in idem*.

Only then, will legal cooperation act as an efficient tool and, at the same time, ensure individual rights and guarantees.[76]

75 BECHARA, Fábio Ramazzini; SMANIO, Gianpaolo Poggio; GIRARDI, Karin Bianchini. Cooperação jurídica internacional na Operação "Lava Jato": análise crítica a partir da diversidade entre os sistemas jurídicos nacionais. Revista Brasileira de Direito Processual Penal, Porto Alegre, vol. 5, n. 2, mai.-ago. 2019, p. 710.

76 GIACOMET JUNIOR, Isalino Antonio. Cinco anos de operação Lava Jato. Cooperação em pauta: informações sobre cooperação jurídica internacional em matéria penal. Nº 49 - Março 2019 (https://bit.ly/2W0N94E. Accessed 29 Jun. 2020).

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04

# Plea Agreements in Brazilian Law: The Operation Car Wash Experience

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## 1. INTRODUCTION

Transparency International's[2] most recent Corruption Perceptions Index report, based on surveys of businessmen and specialists, registered an increase in the perception of corruption in the public sector in Brazil, leading to the country's worst ranking since 2012.[3] This same trend had already been mapped by other research institutes. In 2017, for example, a survey carried out by the National Confederation of Industry found 55 percent of interviewees named corruption as the biggest problem in Brazil, second only to unemployment, the great social malaise[4]. It is no wonder that corruption occupied a central place in the debate during the 2018 elections[5].

Corruption is not exclusive to Brazil. However, it has undoubtedly been part of our history. In fact, at various times, it has acted as a true protagonist. The certainty remains that many heroes and villains have been the victims of systemic and historically-rooted corruption. In any case, the history of corruption in Brazil is not marked purely and simply by continuity and durability. There are also moments of rupture, confrontation, and punishment.

Directly linked to this is the so-called Operation Car Wash. It has become an emblematic operation, without precedent in Brazil, aimed at the pursuit of crimes of corruption, criminal organization, and money laundering, among other infractions. The discovery of connections between public companies, large private corporations, and the political party system catalyzed the attention of the media and public opinion. It influenced—and continues to influence—the direction of national politics[6]. In addition to the various

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2 Available at : https://ipc2018.transparenciaint-ernacional.org.br/. Accessed on 19.08.2020

3 According to the report, in 2018, Brazil fell nine positions in the global ranking, which took it to 105th place among 180 countries evaluated. The score, in turn, went from 37 to 35.

4 Available at https://noticias.portaldaindustria.com.br/noticias/economia/desemprego-corrupcao-e-saude-sao-os-principais-problemas-do-pais-dizem-os-brasileiros/. Accessed on 27.11.2019

5 According to figures released by Twitter Brasil, corruption was by far the main topic of conversation, registering much higher numbers than the topics in second and third place: security and education, respectively. See: : https://blog.twitter.com/official/pt_br/topics/company/2018/como-foram-as-eleicoes-2018-no-twitter.html Accessed on 27.011.2019

6 The issue of corruption permeated the political debate during the 2018 elections. Surveys carried out by Twitter during the electoral period indicated an impressive number of 165 million tweets. Corruption was by far the most debated topic ( https://exame.abril.com.br/tecnologia/o-tema-mais-comentado-nas-eleicoes-2018-no-twitter-corrupcao/ Accessed on 19.08 .2020). The relationship between the pursuit of corruption and the political environment is not limited to the effects produced during the electoral process as a product of the erosion of the political class and especially of the political group in the government. Sal-

repercussions at the different degrees of national jurisdiction, the operation has also had an international impact, affecting several countries on different continents[7].

Plea agreements played an important—if not fundamental—role in expanding investigations and prosecutions during Operation Car Wash. In the Federal Court of Curitiba alone, the original nucleus of the operation, more than 49 agreements were signed. These numbers are impressive in themselves and reveal just how much the operation fed off of plea agreements and became indebted to them. The events occurred in such an avalanche, devouring everything and everybody, that the academic environment was given insufficient time for critical thinking before the agreements gained notoriety and multiplied in direct relation to the creativity of its clauses.

An analysis of the plea agreements awarded under Brazilian law includes a time frame based on Operation Car Wash itself. The first phase comprises the legal regulation given by Law 12.850/2013 and its immediate application in the context of the operation. At the time, the agreement represented a great innovation in Brazilian law. With no doctrinal debate, the issues were faced and resolved in the daily activity of the courts. It is a fact that the involvement of those being investigated and the defendants with special prerogatives brought the Supreme Federal Court to the heart of the debate. This particular dynamic of the operation,- which clearly reveals the dimension and gravity of the corruptive schemes, allowed the highest Court, right from the start, to rule on many controversial points. Under the usual circumstances of criminal litigation, this would require a few years.

The way in which plea agreements were applied, especially the great freedom of actors involved to stipulate the terms and conditions of their agreements, received intense criticism by the doctrine. To a certain extent, the criticisms were absorbed by the legislature, which in 2019, through Law 13,964, changed many aspects of the plea agreement, thus initiating what is known as the second phase of plea agreements in Brazil.

Taking this premise into account, this paper begins with a general presentation of the plea agreement. The objective is to clarify the assumptions and requirements that surround the convention and define the roles reserved for negotiating participants as well as the judicial authority. This initial analysis opens the way for an examination of the application of plea agreements in the context of Operation Car Wash. After all, it was by filling in the legal gaps, carried out under the pressure of events, that the clash between the values of prosecution efficiency and safeguarding individual guarantees was revealed with more zeal. The paper ends with a presentation of the amendments to plea agreements brought under Law 13,964, which is accompanied by a critical appraisal on the points that are still in need of improved regulation.

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vatore Sberna and Alberto Vannucci call attention to a kind of counter movement led, mainly, by the affected groups. The objective is to discredit the legitimacy of prosecutions in order to minimize, if not stop, the voters' crisis of reliability and, thus, to ensure the survival of the political group and its power project (Sberna / Vannucci, (2013), 565-593).

7 The internationalization *of Operation Car Wash* gained momentum in 2016 when Odebrecht signed an agreement with the US Department of Justice. Then, the company admitted to paying US$788 million in bribes to authorities in different countries, using American banking institutions. In 2017, 11 countries were named. They were: Angola, Argentina, Colombia, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, Dominican Republic and Venezuela. See: Charleaux, Nexo, (17.11.2017). Available at: https://www.nexojornal.com.br/expresso/2017/02/15/Qual-o-alcance-da-Lava-Jato-na-América-Latina-Europa-e-África. Accessed on 12.10.2019.

## 2. PLEA AGREEMENTS: UNDERSTANDING THE CONVENTION

It was only with the publication of Law 12,850, in 2013, that the outline of the so-called criminal organization was drawn, thus overcoming an old and insistent normative vacuum in the Brazilian criminal system. The Law, which drew its source from the Palermo Convention,[8] defines a criminal organization as an association composed of no fewer than four people who, using some kind of hierarchy, combine their efforts and divide tasks with a view to obtaining an advantage of any kind. To benefit from the advantage, the organization profits from crime carrying a maximum sentence of more than four years or which is of a transnational character[9].

In addition to the definition of criminal organizations for criminal purposes, the law regulates the means of investigation and the gathering of evidence especially aimed at the prosecution of that crime[10]. Among these means, we find the plea agreement. It is an important mechanism for tackling organized crime. After all, the promise and the agreement that formalizes it seek to break the group's internal solidarity and reveal paths of evidence that clarify its structure, the division of responsibilities, and the crimes committed. Thus, under the plea agreement, the person being investigated (thedefendant) takes on another role in the process, that of the collaborator[11]. To this end, he voluntarily renounces his use of the right to silence, accepting, in addition, the commitment to tell the truth about everything he knows regarding the facts being investigated.

To clarify, the plea agreement neither ends the process, nor speeds up steps of the procedure. It is a bargain on evidential collaboration, not guilt. Strictly speaking, even the collaborator's acquittal at the end is not a foregone conclusion. The process is completed under the auspices of the presumption of innocence as well as due legal process. Collaboration, in turn, is not to be

8 Regulated by Decree no. 5015 March 12, 2004

9 Cf art. 1st, para. Law 12.850/13.

10 Indicated in art 3, namely: plea agreement; environmental capture of electromagnetic, optical or acoustic signals; controlled action; access to phone call and telematic records, to registration data contained in public or private databases and to electoral or commercial information; interception of telephone and telematic communications, under the terms of specific legislation; removal of financial, banking and tax confidentiality, under the terms of specific legislation; police infiltration in investigation activity, under art. 11; cooperation between federal, district, state and municipal institutions and bodies in the search for evidence and information of interest to criminal investigation or instruction.

11 It is a ***sui generis*** legal position. The person is not a witness. After all, the state of witness presupposes non-involvement in the criminal act. Furthermore, the collaborator is not subject to the penalties of the crime of ideological falsehood, even though he is obliged, under the terms of the agreement, to speak truthfully of the facts he knows. To lie therefore implies a violation of the agreement and a prohibition in obtaining the benefits agreed therein. See: ***Zilli***, in Ambos (2019), 109 and ***Romero***, in Ambos (2017), 264. The issue is markedly controversial. After all, depending on the status of the case, the collaborator, as defendant, will be subjected to interrogation, at which point he will provide his "testimony" in relation to the facts involving third parties. See also: ***Bittar***, (2011) and ***Leite/Greco*** (2019). In a study on the collaborating defendant in a comparative perspective, Isabel García de Paz highlights the existence of three regulatory models of the figure of the collaborating defendant. In the first, the collaborating defendant appears as a witness and, from this perspective, is obliged to testify as a condition of obtaining the punitive benefit. In the second, the collaborator intervenes by providing several clarifications about the facts and those responsible for them, leaving the judicial authority the option of reducing or excluding penalty. Finally, a mixed model based on aspects of the two previous models; an example of the Italian system. (***García de Paz***, (2005), 3-4).

confused with the agreement that makes it instrumental. The former can manifest itself in numerous ways which reveal important aspects related to organized and related crimes. The agreement, on the other hand, allows for an earlier period for negotiation between the parties, during which points of consensus are established regarding the content of the collaboration and the corresponding benefit among those allowed the concession by the legislator. Having reached a consensus, the agreement is then formalized and presented to the competent court for approval.

The penal benefits range from judicial pardon to the reduction of the penalty of incarceration by up to two-thirds, or the substitution of deprivation of rights by the restriction on rights[12]. If collaboration occurs after the sentence has been delivered, that sentence could be reduced by up to a half. If incarceration has already begun, that sentence may be commuted, even when the person convicted has not yet served the length of sentence required by law[13]. The law also allows for the granting of procedural immunity. This takes the form of a lack of criminal prosecution by the Public Prosecutor, thus benefiting the first collaborator who is not the leader of the organization and provides effective evidence regarding the infraction, of which there was no previous knowledge[14]. The agreements are not without limitations. The advantages and content of the collaboration are set out by law[15]. In addition, the agreement, once formalized, is subject to judicial control. The initial approval—which does not remove authority at the time of the final sentencing—gives the seal of legal effectiveness to the negotiating relationship[16], thus establishing the legal positions of the negotiating parties.

From the collaborator's perspective, the agreement involves a willingness to exercise the right to silence, followed by the obligation to provide effective procedural collaboration[17]. Thus, in addition to confessing the crimes committed, the collaborator provides elements aimed at: identifying the other agents and/or clarifying the details of the criminal structure (repressive collaboration); preventing further infractions being committed and/or locating the victim while preserving integrity (preventive collaboration); or recovering the proceeds or profits derived from the criminal activities[18]. Over and above this, the collaborator is not obliged to cooperate in any way that is detrimental to his right of non-self-incrimination (*nemo tenetur se detegere*)[19]. Therefore, not

12 Cf. art. 4, Caput Law 12.850/13

13 Cf. art. 4, para 5. Law 12.850/13.

14 Cf. art. 4, para 4, I & II Law 12.850/13.

15 Cf art. 4, Caput Law 12.850/13. The relationship to the legal benefit was reaffirmed by Law 13,964/20 with the inclusion of item II, to para 7, art 4.

16 The understanding of the plea agreement as a procedural legal device was affirmed by the STF with judgment HC 127.483/PR. The issue, which until then expressed a jurisprudential statement, became normative. In fact, Law 13,964/19 added art. 3-A, in which it claims that plea agreement is a procedural legal device. Thus, under the agreement, the procedural parties voluntarily adjust the terms of the procedural collaboration - which is provided by the accused (or convicted) - and the corresponding punitive benefit - which is then pursued by the public prosecutor during the trial. The effect of the procedural legal device is to build a new legal relationship between the parties and the proceedings, establishing rights, onuses and powers. Thus, as a juridical device, which is the plea agreement, it establishes procedural commitments, rights and duties between the negotiating parties. Compliance with the terms of the agreement is not to be confused with the legal relationship built, which emerges from the agreement. Compliance involves the stage of fulfilling or executing the agreement. For a more detailed analysis of the procedural legal affairs category, see: ***Rodrigues Jr*** (2004), 51-72; ***Didier Jr./ Nogueira*** (2012), 59-60 and ***Brandalise***, in: Mendes et al (2019), 221.

17 Cf. art, 4, §14 Law 12.850/13.

18 See: Silva (2014), 52.

19 In fact, Nemo tenetur se detegere, as a principle of guarantee encompasses not only the right to

only should the agreement be voluntary, but the negotiation that precedes it must be accompanied with the assistance of a defense attorney[20].

In any case, on top of the clauses agreed upon, the collaborator enjoys rights emanating from his legal situation. This situation is improved by the judicial approval of the agreement, namely: to enjoy the protection measures provided for by law,[21] such as protecting name, status, image and other personal information; to be separated, in court, from co-authors and other participants; to participate in hearings without face-to-face contact with the other accused; to not have their identity revealed by the media, nor be photographed or filmed without their prior written authorization; and to serve time in a penal establishment different from the other prisoners and defendants[22].

The power to offer this ruling lies with the Public Prosecuting body. The arrangement can be either procedural immunity or a six-month suspension (both renewable for a further six months) starting from when the offer of denunciation is made or when the legal process itself started[23].

The defense attorney and the judicial authority are not parties to the agreement. The former assists the collaborating agent due to an irrevocable imperative of technical defense; no obligations are taken on board. The latter controls regularity, legality, and lawfulness. After all, when it comes to obtaining evidence, observance of the rights to personality (intimacy and privacy) is fundamental. The law grants the judge the power of veto. It is a logical consequence to the exercise of control[24].

## 3. PLEA AGREEMENTS IN THE CONTEXT OF OPERATION CAR WASH: CONTROVERSIAL POINTS

### 3.1 Is There Freedom for the Parties to Expand Punitive Benefits?

The various plea agreements entered into in the course of Operation Car Wash have been marked by the expansion of the benefits' limits established by law. The freedom of negotiation enjoyed by the parties was adopted as a premise, with the prevailing interpretation that the legal list of punitive benefits constituted a merely illustrative recommendation. Just some of the examples of benefits established by the parties that do not have a provision in law are: progression from the closed prison regime directly to the open regime[25]; the possibility of serv-

silence, but also several sensitive aspects of preserving intimacy. See: Queijo (2003), 481-482.

20 Cf. §15º of art. 4, Law12.850/13.

21 According to Law 9,807/99, which establishes rules for the maintenance of special protection programs for victims and witnesses. The Law contains a specific chapter for the protection of so-called collaborating defendants (articles 13 to 15).

22 Cf. art. 5, Law 12.850/13.

23 Cf. art. 4, §3 Law 12.850/13.

24 Although Law 12.850/13, art. 4, paras 2 & 6 grants legitimacy to the police authority for the proposition of a plea agreement, the provision is unconstitutional. It does not, in fact, have the legitimacy to remove rights, faculties or powers, simply because it does not assume legal positions that allow disposition. Neither is the agreement able to initiate indictments. According to the constitution this prerogative belongs solely to the Public Prosecutor. It has no interest in establishing a specific punitive response. The question, however, was addressed by the Supreme Federal Court (ADI 5508), which, by a majority, recognized the constitutionality of the police authority's initiative to conduct procedural collaboration agreements. See: http://portal.stf.jus.br/processos/detalhe.asp?incidente=4972866. Accessed on: 12.11.2018. For unconstitutionality, see: ***Bitencourt / Busato***, (2014) 122-124; ***Mendonça*** (2013), 14 and ***Silva*** (2014), 59-60.

25 The plea agreement signed between the Federal Public Prosecutor and Alberto Youssef on September 24, 2014, states: "Clause 5 (...) V. after the full execution of the custodial sentence in a closed

ing the sentence under an open regime, regardless of the number of years of imprisonment imposed by the sentence[26]; the setting of prison regimes not provided for in law[27] ; and the possibility of suspending the process and the statute of limitations[28].

However, the practice adopted by Operation Car Wash was not correct. The legal model adopted does not grant the parties freedom to agree on the benefits. If that were the case, it would not be necessary to specify those benefits in law. The benefits are concessions and they express a criminal policy, which is outlined by the legislator. Neither the prosecutor nor the defendant have the power to change legal limits. In fact, it is the legislator who stipulates the price the state is willing to pay in exchange for greater efficiency through collaborative activity in the pursuit of organized crime.

Thus, the legislature's original intention was much more modest than that consolidated in practice. Plea agreements are not a penal agreement with comprehensive freedom of negotiation. By regulating the procedure for the plea agreement, legislators sought to provide a framework of legal certainty for the channels of expression of the will for those who relinquish the exercise of fundamental rights to provide effective procedural collaboration. The envisioned procedure for the agreement sought to reduce the risks of future invalidation of the evidence from the collaborator, and the cascade effect resulting from the illegality by derivation. Therefore, judicial approval is the starting point for the materialization of the acts of collaboration and the use of elements provided therein for future prosecutions. The negotiation, the formalization of the agreement, and control of judicial approval establish a supposition favorable to the voluntariness of the collaborations and the use of the material provided.

Any remaining doubts that the issue raised were overcome by Law 13.964/19, which changed the legal framework of plea agreements. Now, in the control of legality, it is the judge who must analyze the agreed-to benefits for compliance with those established by law. Moreover, the law expressly declares the nullity of clauses that violate the legal criteria for defining the prison regime before the custodial sentence begins, as well as the rules of each custodial regime and the requirements for regime conversion[29].

### 3.2 Are the Parties Able to Limit Rights Other Than Those Established by Law?

The parties' expansion of the limits of the

regime under the terms of item III of this clause, the progression of the COLLABORATOR directly to the open regime, even without fulfilling the legal requirements, under the terms of art. 4, §5, Law 12.850/2013."

26 As established in the plea agreement signed between the Federal Public Prosecutor and Pedro Barusco on November 19, 2014. "Clause 5 (...) III. The regime(s) and the deprivation of liberty that were originally established in the sentence(s) faced by the COLLABORATOR would be replaced by a custodial sentence for a period of 2 (two) years, starting res judicata with the judgment of the first sentence ... ".

27 As established in the plea agreement signed between the Federal Public Prosecutor and Pedro Barusco (Clause 5, III).

28 The statute of limitations is a matter of public order that conditions the exercise of punitive power-duty. The hypotheses of suspension or interruption of the statute of limitations are provided for by law. There are agreements that set a ten-year period of suspension of the statute of limitations without the provision having any legal support to subsidize any possible use of the analogy. The proposition of the plea agreement signed on September 24, 2014 between the Federal Public Prosecutor and Alberto Youssef, states as follows: (clause 5, VI, §1) Available at: <http://politica.estadao.com .br / blogs / fausto-macedo / wp-content / uploads / sites / 41/2015/01 / acordodela% C3% A7% C3% A3oyoussef.pdf>. Access on 19.01.2018.

29 According to art. 4, §7, Law 12,850/13 with the wording given by Law 13,964/19.

law was not restricted to the inclusion of benefits which were not provided for under the law. In fact, it was not uncommon for agreements to provide for more severe punitive treatment. As an example, we can cite the clauses that provide for a closed custodian sentence, immediately after the approval of the agreement—and therefore, regardless of the conviction[30]. We can also cite the clauses that rule out the possibility of sentence reduction for those who have served preventive detention or house arrest and even those clauses that disallow penalty compensation through work[31].

Regardless of the illegality of such clauses, the fact is that the provision of more restrictive criminal and procedural measures subverts the very logic surrounding plea agreements, that is, the awarding of benefits to those who voluntarily opt to provide effective collaboration to the justice bodies in the fight against criminal organizations.

There are also examples of agreements that provided for clauses in which the collaborator committed to withdraw from any *habeas corpus* filed, as well as clauses that provided for the waiver of the right of appeal against the sentence delivered at the end of the trial[32]. The clauses obviously curtailed important guarantees of fair trial, such as access to justice and the two-tier jurisdiction, not to mention the limitation of the exercise of those rights in relation to future and uncertain events. There were no other reasons that led the STF to annul such legal devices[33].

In view of the position taken by the Supreme Court, the agreements that followed adopted a more sophisticated wording in relation to appeals. The prohibition thereof has been restricted to challenging decisions that did not respect the terms of the agreement entered into by the parties[34]. The issue has not been fully clarified with the changes recently made in the legal framework of turn state's evidence. Only clauses that prevented challenging the decision to ratify the agreement were declared null and void[35].

30 According to clause 5, §6, of the agreement signed with Alberto Youssef: "The Collaborator, will immediately comply with the deprivation of liberty in a closed regime referred to in item III of this clause, immediately after signing this agreement".

31 According to clause 5, §3, of the collaboration agreement signed by Paulo Roberto Costa on August 27, 2014, with the following wording: "§3. The sentence served as a precautionary measure, whether under standard prison or under house arrest, and if under house arrest, either precautionary or criminal, will not interfere with the sentence of up to two years in a semi-open regime established within the sentence. The period of occasional work will also not interfere for the purpose of regime progression".

32 In the agreement signed by Paulo Roberto Costa, we find the following examples: Clause 12: "The defense will desist from all ***habeas corpus*** filed within 48 hours, desisting also from the exercise of procedural defenses, including discussions regarding jurisdiction and nullities. And, in clause 17: "(...) The collaborator also waives the right to appeal against condemnatory criminal sentences handed down in relation to the facts which are subject to this agreement, providing they respect the terms formulated here".

33 Thus was the decision of Min. Teori Zavascki: when the agreement signed by Alberto Youssef was ratified: "In this respect, the terms agreed are generally in line with the Constitution and the laws, except for the commitment made by the collaborator, contained in Clause 10, k, in what may be exclusively interpreted as a waiver, on his part, of a future full exercise of the fundamental right of access to Justice, guaranteed by art. 5, XXV, of the Constitution ".

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35 According to art. 4, §7B of Law 12.850/13, as amended by Law 13.964/19.

### 3.3 Is There Voluntariness in the Agreement Signed by an Imprisoned Collaborator?

A difficult issue emanates from the sensitive situation the imprisoned collaborator is in. The restriction of freedom, in itself, accentuates the vulnerability of those who are the target of persecution. Although it is not appropriate to establish a direct and automatic relationship of commitment to the requirement of voluntariness, it is evident that the condition, in itself, requires greater caution from the judicial authority when exercising legitimate control. This isthe role which materializes when the collaborator is given a hearing. Any association between freedom and consent to the terms and conditions of the collaboration agreement is sufficient to cause contamination, disqualifying that means of obtaining evidence and the elements that may have been collected by it.

In this sense, clauses that establish either the revocation of preventive custody of the collaborator, the concession of house arrest, or even the replacement of incarceration by alternative precautionary measures, in addition to invading the domain covered by the jurisdiction reserve (and over which the parties do not have power of disposal), also raise doubts about the use of prison/freedom as an instrument of coercion with respect to the renunciation of the exercise of the right to silence. However, these clauses cannot be accepted. Agreement with the collaboration is neither a ransom nor preservation of *status libertatis*[36].

## 4. PLEA AGREEMENT AND INNOVATIONS GIVEN UNDER LAW 13.964/19

### 4.1 Regulating the Negotiation Phase of the Agreement

When an agreement has been concluded and submitted to the competent judge for approval, it implies there was a negotiation phase. In regard to this phase, however, the original regulatory framework of plea agreements lacked further detail. The only express proclamations were regarding the non-participation of the judge and the requirement for technical defense assistance[37]. Law 13,964/19 substantially altered the view by including detailed regulations on the initial stage of negotiations, which are projected in the logical precedent of formalizing and confirming the agreement.

The start of negotiations is marked once the proposal to formalize the agreement is received[38]. Although the new provisions are not explicit, it is understood that the legitimacy for the presentation of the proposal is of the person interested in collaborating. It is while indicating the requirements of the proposal that the law alludes to the signature of the interested party and their defense (a formal requirement), the detailed description of the illicit facts of the future collaboration, and the indication of the evidence and elements of corroboration (material requirements)[39]. The requirements can only be met by the interested party.

The submission of a proposal does not automatically establish the start of the negotiation phase, for the simple reason that the proposal could be summarily rejected. If the case is not rejected, the "celebrant"[40] (the

36 See: *Grevi*, in: Conso et al (2012), 410-413.

37 Cf art. 4, §6 Law 12.850/13.

38 Cf. art. 3-B, caput of Law 12.850/13; wording given by Law 13.964/19.

39 Cf. art. 3-C, caput and §4 of Law 12.850/13; wording given by Law 13.964/19.

40 The word "celebrant" was not included in

name given to the presiding official) must sign the terms of receipt and confidentiality[41]. It is this receipt that marks the start of the negotiation phase and a blanket of confidentiality[42]. A duty of confidentiality falls on all participants (collaborator, lawyer, and celebrant). Violation of this implies a breach of trust and good faith, authorizing the end of negotiations[43].

Beyond a logical precedent for the formalization of the agreement, the negotiation phase involves legal situations, rights, and duties, as well as expectations of law that have long required due regulation. Therefore, the receipt of the proposal implies formal acceptance for negotiations to start and thus a legal bond is established between the parties. This is clearly not an enforceable bond when concluding the agreement, nor does it constitute the collaborative legal relationship itself. Above all, it comprises the duties of ethical conduct that guide the negotiations phase. In this way, negotiations can only be concluded once the proposal has been received and just cause established[44]. In addition to the breach of confidentiality, another reason for drawing negotiations to a close would be that the collaboration itself is not in the public interest or of service to the public interest[45].

### 4.2 The Judge's Assessment of the Collaborator's Will

In exercising authority, the judge must consider the formalities surrounding the agreement, the approach taken by the parties during the negotiations, and the content of the established clauses. It is in this context that the new provisions of the plea agreement require the judge to listen in confidence, before granting approval, to the collaborator, accompanied by his attorney. The measure provides the judge with a more accurate assessment of the voluntariness requirement[46]. To this end, records of the plea agreement negotiations can be requested. Undoubtedly, it is important to disclose the processes of construction of the collaborator's will[47].

### 4.3 Impartiality of the Judge

In a clear move aimed at preserving impartiality, Law 12.850/13 declares that the judge will not participate in the negotiations that precede the formalization of the agreement. This assertion, which should be applauded, does not completely rule out all the risks of compromising impartiality. After all, there is no impediment to the accumulation of judicial functions. The judge who rat-

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the original wording of Law 12,850/13 and was introduced by Law 13,964/19. Possibly, it was the solution found to encompass both the police authority and the prosecutor.

41 There is no set deadline, which is a source of uncertainty and legal insecurity.

42 Cf. art. 3-B, §5 of Law 12.850/13, with wording given by 13.964/19

43 As expressly stated in the final part of art. 3-B of Law 12.850/13, as amended by Law 13.964/19.

44 This is what can be inferred from reading the new paragraph 2 of art. 3-B of Law 12.850 / 13, as amended by Law 13.964 / 19. It reads as follows: "If there is no summary rejection, the parties must sign a Confidentiality Agreement to proceed with the negotiations. This will bind the agents involved in the negotiation and prevent

subsequent rejection without just cause ".

45 These are guiding principles of plea collaboration and are expressly indicated by art. 3-A of Law 12,850/13, as amended by Law 13,964/19.

46 The old wording of art. 4 Para 7 of Law 12.850/13 foresaw the collaborator's hearing as a mere act of option for the judicial authority. The new wording makes the act mandatory.

47 Cf. art. 4, §13 of Law 12.850/13, wording given by 13.964/19. *Zilli* (2019), 125-126.

ifies the agreement in its preliminary phase may be the same judge to face the merits of the accusation and the effectiveness of the collaboration provided.

This cumulativeness is a genetic trait of our legal model. The judge intervenes in the preliminary phase of the investigation when dealing with real and personal precautionary measures and subsequently conducts the judgment based on the preparatory investigation. In these two roles, impartiality is not compromised. Jurisprudence has long understood that the causes of impediment are specific and because of this, they do not include the situation of the judge who, after ruling on precautionary decisions during the investigation, comes to face the merits of the case[48].

Although the judge's intervention in the plea agreement is reduced, his or her involvement should provide rationale for the impediment to judge the indictment based on the ratified agreement. The issue touches on the so-called objective impartiality[49] and the theory of the appearance of impartiality[50], the framework of which is being refined by the European human rights system[51]. Indeed, the judge's involvement in the ratification phase allows him access to the terms of the agreement, as well as the summary of the content of the statements to be made by the collaborator. It is first-hand knowledge of the accusations aimed at the collaborators and potential co-defendants. The impact of such initial statements, to some extent, will fill the judge's memory, overloading one of the parties in the effort to deconstruct it. Furthermore, it would be highly unlikely for the controls of legality and lawfulness regarding the approval to be reassessed by the same judicial authority that had authorized the agreement as complete, before the prosecution.

48 Thus: "I - The impediment hypotheses listed in art. 252 of the Code of Criminal Procedure constitutes a numerus clausus. II - Therefore, it is not possible to interpret items I and II extensively in order to understand that the judge who acts in the pre-procedural stage performs functions equivalent to those of a police officer or member of the Public Prosecutor's office. Precedents. III - The convention adopted by other countries of the investigating court has not been adopted in Brazil. Roughly speaking, the magistrate exercises the powers of the judicial police. IV - The judge, when presiding over the investigation, only acts as an administrator - a supervisor, not expressing any value judgment on facts or issues of law that prevent him from acting impartially in the course of the criminal process. V - Art. 75 of the penal code, which adopts the rule of prevention of indictment by the magistrate who authorizes due diligence before the denunciation or complaint does not violate any constitutional provision. VI - Order denied ". (STF, HC 92893 / ES, Min. Ricardo Lewandovski).

49 As Badaró explains: "In short, when the judge assumes a positive judgment regarding the defendant's participation in the criminal facts, in his mind, he will be producing certain pre-judgments about the guilt that will prevent him from deciding, later, with total exemption and impartiality. This situation is particularly sensitive in the event that the same judge (physically) acts in the preliminary investigation phase and then also judges the case ". (Badaró, (2011)).

50 Badaró explains: Therefore, impartiality must also be understood as an idea of general appearance of impartiality. For the jurisdictional function to be legitimately exercised, in addition to the magistrate being subjectively impartial, it is also necessary for society to believe that the trial took place before an objectively impartial judge. A judgment that society believes to have been made by a partial judge will be no less illegitimate than a judgment made before a judge intimately committed to one of the parties. (Badaró, (2011)).

51 Significant is the European Court of Human Rights jurisprudence in the Hauschildt vs Denmark case. At that time, the ECHR understood that the practice of certain acts in the preliminary investigation phase would create room to question the judge's objective impartiality - the judge's objective presumption of equidistance in relation to the case and the parties. See: Badaró, 2011; Zilli, 2017 in Sidi, 395-399 and Sidi, 2017 in Sidi, 475-480.

It was in the midst of this scenario that Law 13.964/19 introduced the role of a judge of guarantees who would be in charge of controlling the legality of the criminal investigation, the decision on real and/or evidential personal precautionary measures, the approval of the collaboration agreement, and the confirmation of charges[52]. Thus, once the charges have been confirmed, the case file would be forwarded to another judge—the case judge—who would be responsible for the trial. The division of jurisdictional activities, according to this conception, would better safeguard impartiality[53]. However, the device suffered a setback due to an injunction granted by the Federal Supreme Court in the context of a direct action of unconstitutionality filed there, which suspended the implementation of the judge of guarantees[54]. At least for now, the possibility for the same judicial authority to act in the two phases of the prosecution remains open.

52 Cf art. 3-B to 3-F of the Criminal Procedure Code, as amended by Law 13.964 / 19. The so-called guarantees judge - who is not to be confused with the judge of the criminal case - will have jurisdiction to control the investigation and safeguard individual rights and guarantees. For a study on the proposal and safeguarding the impartiality attribute see: Zilli (2017) in Sidi.

53 Jacques Camargo observes: "The impartiality of the judge who has direct contact with the complaint, before the process is initiated, must be preserved with a guarantor procedure, which prevents the cumulation of judicial functions in the investigation phase of the fact - judge of guarantees - with the function of judging the merits of the accusation - judge of the criminal case ". (Penteado, (2017), in Vaz, 192).

54 It is argued that the creation of the judge of guarantees would imply a structural change in the judicial process and its organization, in such a way that the initiative would be exclusive to the Judiciary (art. 96 of the Constitution).

### 4.4 Legal-Procedural Status of the Accused Collaborator

A point that has not yet been properly clarified involves the collaborator's legal status. Judicial approval confers the certification of effectiveness to the procedural legal business, thus opening an aspect for collaborative activity. It is at this point that the legal positions consolidate and metamorphose. In addition to being the investigated, the accused, or the sentenced, the individual also becomes a collaborator. If the issue does not demand controversy during the investigative phase, it will undoubtedly be problematic when establishing criminal proceedings. If the provision of evidence regarding the structure of the criminal organization and the identification of responsibilities brings the collaborating defendant closer to the position of witness, it does not remove him from the target position of the formal accusation.

This duplication of positions brings difficulties that affect not only the procedural interests of the "collaborating defendant"[55]— and which, to a certain extent, are equated with the establishment of a list of rights—but also, more importantly, those denounced by the collaborator. After all, these are the people whose legal rights will be affected by the repercussions of the collaborative activity. Therefore, the problem involves the identification of the appropriate procedural moments for the collaborating defendant to exercise their procedural rights—as a defendant—and to fulfill their duties—as a collaborator—also paying attention to the rights of the other defendants[56]. In other words, will the collaborating defendant be heard as a witness or during ques-

55 Art. 5 of Law 12.850/13

56 Badaró (2019); Lopes Jr/Paczek (2019); Callegari/Linhares (2019) and Streck (2019).

tioning at the end of the investigation[57]? Does the collaborating defendant's hearing come before the hearing of the other defendants? What is the order of the presentation of the final arguments?

Even though the "collaborating defendant" and the "defendant" have points of convergence represented by the risk of conviction and by the right of defensive response, both equally register distances. After all, the "collaborating defendant's" immediate interest is to convince the judge about the effectiveness of their collaboration and, therefore, the veracity of the narrative—which involves the other defendants, those being accused. The prospect of obtaining the benefit from collaboration is directly proportional to the risk of conviction of the accused[58]. Therefore, it is natural that the "collaborating defendant" should speak first. It is a logical procedural consequence of the fair trial[59]. However, since exercising the right of defense is also inextricably linked to the defendant, his hearing must occur when questioned, which, in fact, is one of the last acts of the procedural journey. With his interrogation as the backdrop, in addition to anticipating the cross-examination of the accused defendants, the collaborator should observe the possibility that these defendants' attorneys will also ask questions.

To a certain extent this matter was resolved with Law 13.964/19, which expressly ensured the exercise of the full defense of the accused, affirming his right to speak up after the expiry of the period granted to the "collaborating defendant"[60]. The proclamation must be observed throughout the prosecution and especially in the final allegations phase[61].

## 5. CONCLUSIONS

The plea agreement, the procedure of which was regulated by Law 12.850/13, was widely used in the context of Operation Car Wash and was certainly decisive in widening the scope of that criminal prosecution. The various agreements concluded allowed complex structures of corruption, overpric-

57 The procedural reform undertaken in 2008 changed the overall picture of procedures in Brazilian criminal proceedings. The instructional phase is concentrated in a single hearing where evidence of the prosecution and defense will be produced, leaving the defendant's interrogation to the end. The change has reinforced the nature of interrogation as a means of defense.

58 Leite/Greco (2019), 5-6.

59 See: Leite/Greco (2019), 8.

60 Cf. art. 4, 10-A of Law 12.850/13; wording given by law 13.964/19.

61 In a recent judgment, issued at HC 166,373, the STF faced the issue of order in which the final allegations were presented in cases with collaborating and accused defendants. After stating that the legal position of the collaborating defendant could not be fully equated with that of the accused defendants, the STF recognized the nullity of the procedure, determining, consequently, the return of the records to the first instance court in order to respect the successive order of the final allegations: prosecution, collaborating defendant and accused defendants. See: "Decision: The Court, by majority, granted a habeas corpus, to annul the decision of the first instance court, determining the return of the case to the stage of final allegations, which must follow the successive constitutional order , that is, first the accusation, then the informer and finally the informed upon, according to the vote of Minister Alexandre de Moraes, Rapporteur for the judgment, the following ministers were defeated: Ministers Edson Fachin (Rapporteur), Roberto Barroso, Luiz Fux, Carmen Lúcia and Marco Aurelio. Continuing in the judgment and after a proposal made by Minister Dias Toffoli (President), the Court, by majority, decided to formulate a thesis in relation to the topic discussed and voted on in this habeas corpus which had already been judged, Defeated: Ministers Alexandre de Moraes, Ricardo Lewandowski and Marco Aurelio. The trial was then suspended to establish the thesis in a subsequent sitting ". Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=5607116. Accessed on October 28, 2019.

ing of public contracts, and shady financing of electoral campaigns to be identified. It is no exaggeration to affirm that the success of the operation should be credited, for the main part, to the multiple procedural collaboration agreements signed.

Measurement of efficiency cannot be based on statistical criteria. The new means of obtaining evidence designed to confront criminal organizations is based on the logic of a penal award system, and therefore supposes the granting of punitive benefits to agents involved in serious crime. Thus, it is not the number of agreements signed that attests to the institute's seal of efficiency, but rather the greatest possible disclosure of evidence with the least uses of plea agreements.

The lack of a more in-depth debate about the new mechanism, before its wider application, revealed the phenomenon of the normative force of events. In other words, the reiteration of certain practices has established an exegetical line that, on the one hand, distorted the outline designed by the legislator and, on the other, accentuated the regulatory omissions in plea agreements. It was in the midst of this debate that the law governing plea agreements was reformed by Law 13.964/19. The law has filled many of the gaps and clarified many issues. In addition to regulating the negotiation phase, the reform reinforced the principle of legal benefit as well as the importance of judicial control, and ultimately limited the effects of plea agreements. It brings plea agreements closer to the outline originally designed by legislators.

The establishment of benefits not contemplated by the law disregards the nature of the plea agreement as an expression of criminal policy. The benefits are punitive concessions that indicate the price the state is willing to pay for the disclosure of aspects related to criminal organizations; for the identification of those responsible, and for the recovery of products and proceeds from illicit practices. The procedural parties are agents who operate the mechanisms in compliance with pre-defined standards. They do not have the power to dictate new criminal policy standards.

The plea agreement is not a penal agreement. With the exception of the agreement which involves procedural immunity in very specific situations, the other hypotheses of a collaboration agreement do not end the process, nor anticipate its conclusion. They are situations that formalize the division of rights and duties between the parties during the process and should follow its normal course based on the principle of the presumption of innocence, among others. Approval does not bind the judge to the terms of the agreement. It is a factor in the effectiveness of the legal procedure. At the time of the final judgment, the judge must evaluate the collaboration provided in the light of the agreement between the parties.

The agreement can only be approved if made voluntarily. This is not to be confused with spontaneity. Coercion contaminates the agreement and the lawfulness of the evidence provided. The incarceration of the collaborator, although not invalidating the manifestation of will, establishes a situation of greater vulnerability that must be carefully evaluated by the judge. The collaborator's confidential hearing before approval is an important element to gauge voluntariness.

The "collaborating defendant" takes a hybrid position in the procedural journey and the absence of clear regulation regarding his legal status must be filled in by the operator. Waiving the right to silence does

not remove him from the passive pole of the procedural relationship. The obligation to provide collaboration under the agreed terms, in turn, does not revert him to the role of witness. As a target of criminal prosecution—alongside the other defendants—rights inherent to the fair trial are safeguarded. He must therefore be heard when questioned. His statements, after all, affect the interests of others. His hearing, therefore, must precede that of the other named defendants. The same order must be observed when presenting the final arguments. At this point, the reform provided for by Law 13,964/19 is clear acknowledgment of the supremacy of the guarantees of the fair trial and the opposite thereof.

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# Destination Of Goods, Rights, And Assets In Operation Car Wash: Critical Analysis and Perspectives on Improvement

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## 1. INTRODUCTION: RESEARCH CONTEXTUALIZATION

The aim of the paper is to analyze the destination of goods, values, and fines negotiated in the award-winning collaboration agreements as well as in first- and second-instance convictions in criminal lawsuits related to Operation Car Wash, in Curitiba, at 13th Federal Criminal Court of Justice, from 2014 to 2017.

The economic consequences of crime and the respective containment measures have become important issues in the international agenda of several different institutions[3] (see Table 1).

The Financial Action Task Force (FATF) is also important to mentioned as it has instituted forty-nine recommendations[4] in regard to money laundering combat, terrorism financing and other measures to ensure the integrity of the international financial system.

Finally, the National Strategy for Combating Corruption and Money Laundering (ENCCLA), created in 2003, is the main articulation network for arrangement and debate. It is composed of several bodies from the executive, legislative and judicial powers at the federal, state and, in some cases, even local levels, and aims to implement public policies and provide solutions related to the combat of these crimes. The Department of Assets Recovery and International Legal Cooperation (DRCI), associated to the National Secretary of Ministry of Justice and Public Security, operates as ENCCLA's executive secretary, through the DRCI´s General Coordination of Institutional Articulation.[5]

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3 Comploier 2015, 25-27.

4 GAFI. Padrões internacionais de combate à lavagem de dinheiro e ao financiamento do terrorismo e da proliferação: As recomendações do GAFI. February, 2012. http://www.fazenda.gov.br/orgaos/coaf/arquivos/as-recomendacoes-gafi. Acesso em 12/05/2020.

5 ENCCLA. Quem somos? n.d. Accessed: May, 13, 2020. http://enccla.camara.leg.br/quem-so-

**Table 1**

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|---|---|
| Vienna Convention (1988) | Countries shall adopt necessary measures to include in its legislation not only the forfeiture of goods, materials, and instruments used to practice the crime, but also the preventive forfeiture applicable to the proceeds of a crime when it has been mingled with the acquired assets with illicit sources. Decree nº 154/1991. |
| Strasbourg Convention (1990) | Countries cooperate in criminalizing money laundering and establishing legal measures of seizure and forfeiture. |
| Palermo Convention (2000) | International legal milestone of combating organized crime, which determines that the signatories states must adopt measures to implement forfeiture of assets and proceeds of crime related to organized crime. Decree nº 5.015/2004. |
| United Nation Convention against corruption - Merida (2003) | There is a chapter exclusively dedicated to the issue of "Asset Recovery," as well as provisions related to prevention and detection of transfers of the proceeds of crime; measures to direct asset recovery; and mechanisms of asset recovery through international cooperation for confiscation, among others. Decree nº 5.687/2006. |

In the context of Operation Car Wash,[6] it is illustrative to emphasize, considering the patrimonial consequences of the investigations, the following results:

1. 1st Instance of Paraná state: values returned to public coffers (Petrobrás, União etc.): R$4 billion; values established in compensatory fines as consequence of the award-winning collaboration agreements: R$2.1 billion; values established in compensatory fines as consequence of the leniency agreements: R$12.4 billion; values related to the voluntary defendants' waiver: R$111.5 million; values established in the Conduct Adjustment Agreement: R$ 4 million; total amount established as recovery: R$14.3 billion;
2. 1st Instance of Rio de Janeiro state: values established in compensatory fines as a consequence of award-winning collaboration agreements: R$ 945 million; values established in compensatory fines as consequence of leniency agreements: R$145 million; claim for compensatory damages: R$6.21 billion; values recovered destined to payment of the thirteenth salary for 146 retirees and pensioners which were late in Rio state: R$250 million;
3. Supreme Court: total amount established as a result of recovery from collaboration agreements (fines + forfeiture): R$1.5 billion; total amount of fines paid: R$800 million; values returned to public coffers R$607 million.

The patrimonial purpose has demonstrated to be very necessary, especially regarding the "white collar crimes" that comprehend both active and passive bribery: money laundering, procurement fraud, cartelization, tax crimes, and financial crimes, among others.

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6 MPF. Caso Lava-Jato: Ações. 2020a. Accessed: May, 14, 2020. http://www.mpf.mp.br/grandes-casos/lava-jato/acoes.

This purpose, however, is not always satisfactorily achieved due to the difficulty in patrimonial identification or even because of the lack of evidence that relates the patrimony to an illicit act. There are several issues related to this problem, such as the destination of the values, asset management, and the calculation formula concerning the value to be repaired, returned, or compensated.

First, in regard to values destination, there is the controversy related to the creation of the "Car Wash Fund," with an approximate value of R$1.3 billion that corresponds to 50 percent of the R$ 2.6 billion (US$ 682.56 million) paid by Petrobrás to Brazil, and that would be under the responsibility of the Brazilian Public Prosecution Service. The purpose would be to destine the resources received from Petrobrás to combat corruption and support social projects. This provision was established in the agreement signed by Petrobrás in the United States, in which 50 percent of the value negotiated as a compensatory fine would be destined to the shareholders, and the other 50 percent to the creation of the "Car Wash Fund." This attempt was not successful, however. Among all the reasons against it, we emphasize the lack of legal provision, as well as the incompatibility of managing the funds with the Public Prosecution Service's constitutional responsibility for supervising the application of public resources.[7] The agreement was ratified by the 13th Federal Criminal Court of Justice of Curitiba; however, the Supreme Court—in the context of the Non-compliance with a Fundamental Precept Complaint – ADPF 568—in a preliminary decision by Justice Alexandre de Moraes, suspended the agreement. A subsequent decision from another justice, on September 17, 2019, mandated the immediate transfer of the financial resources deposited, duly corrected, to the only account of the National Treasury in order to totally enforce the ratified agreement, including the remuneration of Caixa Econômica Federal[8] for the custody of the amount in escrow-account.[9]

According to Justice Alexandre de Moraes, in the decision that preliminarily suspended the agreement, the assumption agreement:

> [S]ettled between the Paraná's Federal Prosecution Service with Petrobras and ratified by the 13th Federal Criminal Court of Justice of Curitiba, did not respect the fundamental precepts of Separation of Powers, respect to the institutional leadership, and the principles of the unity and functional and financial independence of the Public Prosecution Service as well as the following principles: republican, legality, and the administrative morality, because both parties of the agreement were not legitimate to sign it, its object was illicit and the judicial body was not competent to ratify it...
>
> Consisting in an evident and illicit purpose deviation, the content of the second agreement—ratified by the 13th Federal Criminal Court of Justice of Curitiba—has established several measures not stated in the Non Prosecution Agreement, that only admitted the fine credit to Brazil, without any conditions related to the constitution of a private legal entity or the use of this amount to specific activities…

7 MIGALHAS. Arquivos: Decisão – Petição Nº 5002594-35.2019.4.04.7000/PR. July, 3, 2019. https://www.migalhas.com.br/arquivos/2019/3/art20190308-18.pdf.

8 Caixa Econômica Federal is the third largest bank in Brazil in assets and one of the five largest in Latin America. With headquarters in Brasilia, the institution is linked to the Ministry of Finance and operated as a strategic partner of the federal government in the infrastructure, housing, and sanitation sectors, contributing to the social and economic development of the country. See: CAIXA. About Caixa. n.d Accessed: May 16, 2020. http://www.caixa.gov.br/site/english/About-Caixa/Paginas/default.aspx.

9 STF. ADPF 568. n.d Accessed: July, 14, 2020. http://portal.stf.jus.br/processos/detalhe.asp?incidente=5650140.

> A possible appropriation, by certain members of the Public Prosecution Service of the administration and destination of the economic advantages which were a result of the institution´s acts, not only disrespect the principles of legality, impersonality and administrative morality, but also meant a serious aggression to the strong constitutional profile of the institution, provided in a unprecedented and special way by the Federal Constitution of 1988, where it states its functional, administrative and financial autonomy, excluding attributions of the Executive Power and prohibiting its members of receiving any economic advantages related to the practice of their functions (fees, percentages, etc), as well as prohibiting the practice of party political activities, and, mainly, "receive, for any reason, assistance or contributions from individuals, public or private legal entities."[10]

Hence, Justice Alexandre de Moraes' ruling determined that the amount of the fund—approximately R$2.6 billion—would be divided according to the following rules: R$1.6 billion to education; and R$1.6 billion to the preservation of the Brazilian Amazon.[11]

However, on March 22, 2020, Justice Alexandre de Moraes ratified a proposal to adjust the agreement about asset destination, and determined the immediate transfer of R$1,601,941,554.97 to the Ministry of Health to cover the costs of prevention, contention, combat, and mitigation of the coronavirus (COVID-19) pandemic. On April 7, 2020, at the request of the state of Acre another new proposal was ratified, determining the immediate transfer of R$32,731,487.36 to cover the costs with prevention, contention, combat and mitigation of the COVID-19 pandemic. Similarly, on May 14, 2020,funds were transferred to aid the states of Maranhão, Tocantins, and Mato Grosso.[12]

The second issue refers to the administration of goods, rights, and values seized, sequestered or which forfeiture was determined. These goods, rights, and values are of different natures such as: , pieces of art, vehicles, boats, real estate, and foreign resources, among others. This scenario represents an important obstacle and challenges the institutional framework, because there is no authority responsible for administering and managing these assets.. The assets deteriorate, and there is no safety and predictability in regard to their destination and administration.

A third issue regards the calculation of the values negotiated. For instance, there is the case of ex-senator Sérgio Machado, who signed an criminal collaboration agreement with the Federal Prosecution Service, in which he had agreed to pay a civil compensatory fine of R$75 million, with 80 percent going to the Union and 20 percent to Petrobrás Transporte S/A (Transpetro).

However, the Prosecutor General at that moment, Rodrigo Janot, requested that judge-rapporteur, Justice Teori Zavascki, change the proportion going to each destination to be instead 80 percent of the total amount to Transpetro and 20 percent to the Union. The Justice then sustained that the Law nº 12.850/2013 does not establish specific destination to the proceeds of crime and, therefore, the article 91, II, b, of the Criminal Code can be used by analogy to fulfill this loophole, once it ensures the right of the offended party. Thus, the destination of the compensatory fine was completely destined to the passive subject of the crimes committed by the collaborator, Transpetro.[13]

10 Art. 128, § 5º, II, "f", Federal Constitution.

11 MIGALHAS, 2019.

12 STF, n.d.

13 STF, 2016

Along these lines, we intend to analyze the award-winning collaboration agreements and the convictions in some Operation Car Wash cases, verify to what extent the destination of goods and values determined or negotiated has complied with the legality standards, identify the different criteria adopted that guided the decisions, and reflect about the coherence and opportunity of legislative and—mainly—institutional improvement.

The data[14] that will be analyzed were extracted from forty-two judged criminal complaints in the context of Operation Car Wash. Among them, forty-one were originated in the 13th Federal Criminal Court of Justice of Curitiba:

5083376-05.2014.404.7000; 5083360-51.2014.404.7000; 5083351-89.2014.404.7000; 5083258-29.2014.404.7000; 5026212-82.2014.404.7000; 5083838-59.2014.404.7000; 5007326-98.2015.404.7000; 5023135-31.2015.404.7000; 5023162-14.2015.404.7000; 5036528-23.2015.404.7000; 5037093-84.2015.404.7000; 5039475-50.2015.404.7000; 5045241-84.2015.404.7000; 5030424-78.2016.404.7000; 5030883-80.2016.404.7000; 5063271-36.2016.404.7000; 5015608-57.2017.404.7000; 5021365-32.2017.404.7000; 5024879-90.2017.404.7000; 5023942-46.2018.404.7000; 5017409-71.2018.404.7000; 5037093-84.2015.404.7000; 5013405-59.2016.404.7000; 5023121-47.2015.404.7000; 5056996-71.2016.404.7000; 5022179-78.2016.404.7000; 5023121-47.2015.404.7000; 5025676-71.2014.404.7000; 5025687-03.2014.404.7000; 5025692-25.2014.404.7000; 5026243-05.2014.404.7000; 5026663-10.2014.404.7000; 5047229-77.2014.404.7000; 5012331-04.2015.404.7000; 5029737-38.2015.404.7000; 503651876.2015.404.7000; 506157851.2015.404.7000; 5013405-59.2016.404.7000; 5027685-35.2016.404.7000; 5046512-94.2016.404.7000; and 5014170-93.2017.404.7000.

Only one of the criminal complaints was originated in the 2nd Federal Criminal Court of Justice of Curitiba:

5035707-53.2014.404.7000.

All of the complaints analyzed here have already been judged in first instance. Thirteen[15] of them have already become *res judicata* in relation to all the defendants,

14 MPF. Caso Lava Jato: Resultados. 2020b. Accessed: May, 18, 2020.

15 Criminal complaints that have become res judicata for all the defendants: 5083258-29.2014.404.7000; 5083838-59.2014.404.7000; 5007326-98.2015.404.7000; 5023135-31.2015.404.7000; 5023162-14.2015.404.7000; 5036528-23.2015.404.7000; 5025676-71.2014.404.7000; 5025687-03.2014.404.7000; 5025692-25.2014.404.7000; 5026243-05.2014.404.7000; 5047229-77.2014.404.7000; 5029737-38.2015.404.7000; and 5035707-53.2014.404.7000.

while twenty-nine[16] are available to appeals for at least one of the defendants.

## 2. BRAZILIAN LEGAL REGIME APPLICABLE TO THE ECONOMIC CONSEQUENCES OF CRIMES

The concern with the economic consequences of crimes, regarding repair, compensation, or recovery of the losses, is materialized in some institutes established in the Criminal Code, as well as in the Procedural Criminal Code and in the non-codified legislation.

In the Criminal Code, to the following are particularly relevant: the criminal fine, as a main penalty or as a substitutive for the imprisonment penalty; the pecuniary penalty, as an alternative penalty;, forfeiture, as an effect of the sentences that have become *res judicata*, including extended forfeiture; and damages, as a motive to reduce the penalty, a generic mitigating circumstance, or even a cause to extinguish criminal liability, as a condition to criminal rehabilitation.

In the context of the Procedural Criminal Code, there are compensatory damages to the victim as a condition to the criminal non-prosecution agreement; asset search and seizure; patrimonial precautionary measures (Ribeiro, 2010, 310), such as seizure (Ribeiro, 2010, 310), sequestration (Oliveira, 2009, 279), and the specialization and registration of the legal hypothec (Oliveira, 2009, 311); the precautionary sale of assets (Rios, 2015, 279); and, finally, the possibility that the judge can fix the minimum amount for damages in the sentence.

Article 4 of Law nº 9.613/1998 (BRASIL, 1998), considering the new text derived from Law nº 12.683/2012, addresses patrimonial precautionary measures, precautionary sale of assets, forfeiture and transfer of goods, rights and values that are seized, sequestered and not claimed.

In Article 4º of Law nº 12.850/2013 (BRASIL, 2013) which regulates collaboration, the concern with the patrimonial consequences of organized crime and related crimes is addressed in two different ways: in item IV, as a result of collaboration, when it is verified, "the total or partial recovery of the proceeds of the criminal offenses practiced by the organized crime"; and in the "caput," as an effect of the collaboration, considering the possibility of substituting imprisonment sentence for a restricting rights penalty.

There are many terminologies and designations which are not always used considering the technical accuracy desired. Nevertheless, they reveal the attempt to embrace all the effects generated by a criminal offense, particularly the ones that present an economic aspect.

We have designed a reference board presented below in order to systematize the institutes with economic characteristics established in Brazilian law, emphasizing the reference standards, in Table 2.

16 Criminal complaints available to appeals at least for one of the defendants: 5026212-82.2014.404.7000; 5083351-89.2014.404.7000; 5083360-51.2014.404.7000; 5083376-05.2014.404.7000; 5037093-84.2015.404.7000; 5039475-50.2015.404.7000; 5045241-84.2015.404.7000; 5030424-78.2016.404.7000; 5030883-80.2016.404.7000; 5063271-36.2016.404.7000; 5015608-57.2017.404.7000; 5021365-32.2017.404.7000; 5024879-90.2017.404.7000; 5023942-46.2018.404.7000; 5017409-71.2018.404.7000; 5037093-84.2015.404.7000; 5013405-59.2016.404.7000; 5023121-47.2015.404.7000; 5056996-71.2016.404.7000; 5022179-78.2016.404.7000; 5023121-47.2015.404.7000; 5026663-10.2014.404.7000; 5012331-04.2015.404.7000; 5036518-76.2015.404.7000; 5061578-51.2015.404.7000; 5013405-59.2016.404.7000; 5027685-35.2016.404.7000; 5046512-94.2016.404.7000; and 5014170-93.2017.404.7000

**Table 2**

| Institute | Legal reference | Nature and destination | Economic standards |
|---|---|---|---|
| Criminal Fine | Art. 49 to 58 – Criminal Code. | It is a type of penalty.<br><br>The payment is destined to the Penitentiary Fund. | The criminal fine will be fixed in the sentence and calculated considering a daily fine criterion: minimum of ten and maximum of 360 of the daily fine.<br><br>The amount of the daily fine will be fixed by the judge, but it cannot be lower than one-thirtieth of the highest minimum wage at the time of the offense, or higher than five-times the highest minimum wage at the time of the offense.<br><br>It is necessary that the fine is established in the crime provision in the criminal code, so that it can be applicable. |
| Pecuniary penalty | Articles 43, I, and 45, §§1º e 2º - Criminal Code<br><br>CNJ´s Resolution nº 154/2012<br><br>Justice Comptroller Provision nº 01/2013. | It is one of the alternatives to the penalties that restrict rights.<br><br>The payment is directed to the victim, his/her dependents, to a public entity, or to a private entity with social purposes. | The amount will be fixed by the judge but cannot be less than one minimum wage or higher than 360 minimum wages. The amount paid will be deducted from the possible amount regarding compensatory damages, if the beneficiaries are the same. (art. 45, §1º, Criminal Code).<br><br>In case the beneficiary accepts, the amount can be provided in different forms other than pecuniary. (art. 45, §2º, Criminal Code). |
| Forfeiture | Conviction effect:<br><br>Article 91, inciso II e §§, - Criminal Code.<br><br>Article 7º - Law nº 9.613/98.<br><br>Article 63 - Law nº11.343/2006.<br><br>Penalty:<br><br>Article 43, II, and 45, §3º, - Criminal Code and article 5º, XLVI, b, Federal Constitution. | The forfeiture is a conviction effect applied observing article 91, II, - Criminal Code. It will be in favor of the Union, and observe the rights of the offended and third parties acting in good faith<br><br>However, forfeiture can also have the nature of a penalty, when applied based on articles 43, II, and 45, §3º, - Criminal Code. In this case, forfeiture will be directed to the National Penitentiary Fund. | Conviction effect:<br><br>Forfeiture will address the assets that were used as an instrument of the crime or that constitute proceeds of the crime acquired by the agent by practicing the criminal fact. (art. 91, II, a and b, Criminal Code).<br><br>Penalty:<br><br>The amount of the forfeiture will be limited to what is higher: the amount of the harm caused or the proceeds obtained by the agent in consequence of the crime committed. (art. 45, §3º, Criminal Code). |

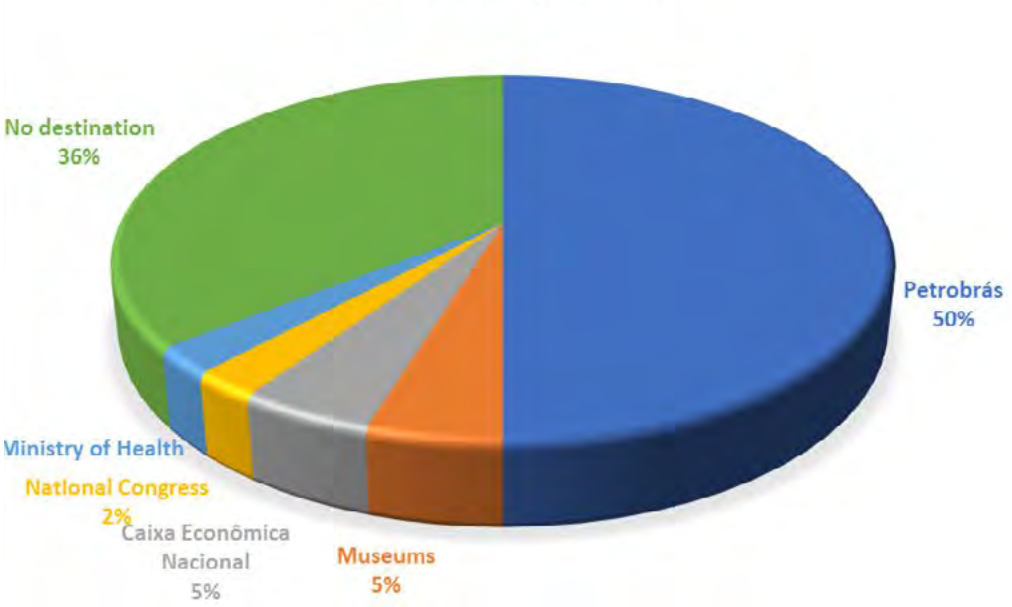
**Table 2 (continued)**

| Institute | Legal reference | Nature and destination | Economic standards |
|---|---|---|---|
| Sequestration | Articles 125 to 133 - Procedural Criminal Code | It is a precautionary measure to maintain the integrity of the real estate that is an object of the forfeiture.<br><br>The amount after auction, will be directed to public coffers, excepting the rights of the victim and third parties acting in good-faith. | The real estate must be a result of the offense, even if it has already been transferred to a third party. (art. 125, Procedural Criminal Code). Thus, the economic limit of the sequestration is the assets obtained as proceeds of the crime. |
| Legal hypothec | Articles 134 and 135 - Procedural Criminal Code | It is a precautionary measure to ensure the compensation of the offended. | The legal hypothec can embrace any of the real estate of the indicted, no matter if it is licit or not. (art. 134, Criminal Procedural Code).<br><br>The standards of the legal hypothec are related to the amount of the civil liability (art. 135, Criminal Procedural Code), that is, the indemnification. |
| Seizure | Articles 136 and 137 – Procedural Criminal Code | This is a precautionary measure to ensure the indemnification of the offended . | The seizure is limited to the indemnification of the damage the offended have been exposed to. |
| Civil Compensatory Fine (Anti-money laundering Act) | Article 4º - Law nº 9.613/98. | Compensatory damages, pecuniary penalties payment, fines and costs derived from the criminal offense | The parameters are established by the goods, rights or values of the investigated or accused or, existing in the name of intermediaries, that are instrument or proceeds of the crimes stated in Law nº 9.613/98 or the antecedent criminal offenses. |
| Precautionary sale of goods | Article 144-A- Procedural Criminal Code.<br><br>Article 4º, §1º, Law nº 9.613/98. | Conservation of the assets seized. | The precautionary sale of assets will occur to preserve the economic value of the assets when they are subjected to any kind of deterioration or depreciation, or when there is any difficulty in maintaining them. |
| Compensatory damages in criminal conviction | Articles 63 and 387, IV, - Procedural Criminal Code | Civil Damages<br><br>The offended, his legal representative, or their heirs can be the beneficiaries of the damages. | The economic standards are related to the harm suffered by the victim, that will be compensated proportionally, considering the real damage. |

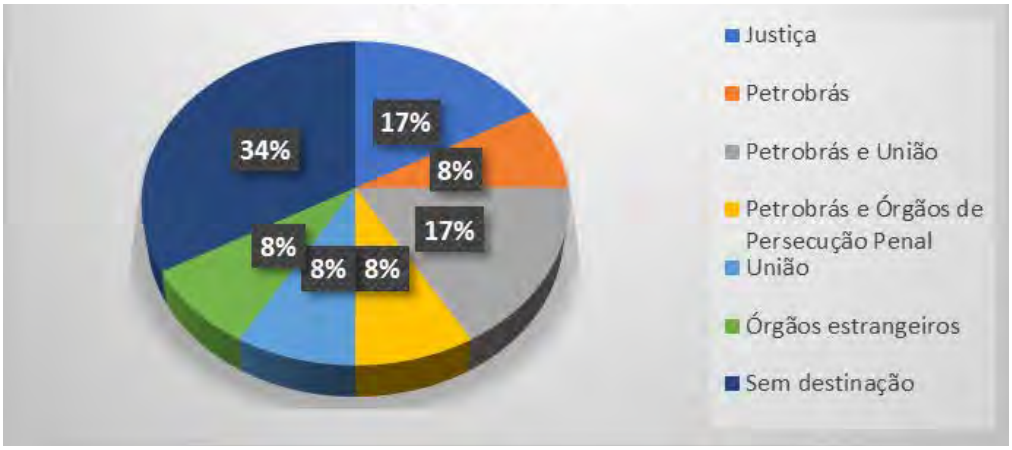
## 3. GRAPHICAL SUMMARY - ASSETS DESTINATION AND CRIMINAL FINES IN LAWSUITS UNDER ANALYSIS IN OPERATION CAR WASH

The following graphics describe the various destinations of the seized assests and criminal fines under analysis in this chapter.

**Graph 1: Asset Destination in Criminal Convictions**




**Graph 2: Asset Destination in Criminal Collaboration Agreements**



# 4. TEXTUAL DESCRIPTION OF THE JUDICIAL DECISIONS AND THE COLLABORATION AGREEMENTS

## 4.1. Collaboration agreements

| Collaborator | Text about the destination of assets in each agreement |
|---|---|
| Alberto Yussef | "The COLLABORATOR confirms his ownership and waives irrevocably and irretrievably his rights in favor of Justice to the following movable or immovable properties because they are products/proceeds of the crime…" (p. 10 - PDF)<br><br>"The real estate comprised of the terraced houses nº 29, 31, 56 and 62, and the parcel of land on which was located the building nº 58, at Campo de São Cristóvão, Rio de Janeiro/RJ, is destined irrevocably and irretrievably by the COLLABORATOR to the Court as a compensatory fine due to the criminal offenses practiced, under the following terms:<br><br>a) While the COLLABORATOR is serving his sentence under the closed regime, according to clause 5ª, III, of this agreement, the real esate will remain seized, under the administration of the competent Court, to which all the rents will be deposited;<br>b) When the period referenced above ends, judicial assessment of the real estate will be executed, as will the calculation of all assets of illicit origins that can be recovered only and exclusively as a result of the information given by the COLLABORATOR in the context of this agreement, and considering that the information are not already known by the criminal prosecution institutions;<br>c) 1/50 (one fiftieth) of the consolidated value of all assets recovered, in Brazil or abroad, will be deducted from the value of the asset, considering the terms of item "b,";<br>d) If the consolidated amount of 1/50 (one fiftieth) of the assets recovered referred to in the line above is equal or higher than the real estate value, the compensatory fine which § 4º of this clause refers will not be required and the COLLABORATOR will be able to destine the real estate mentioned in §4º to his daughters;<br>e) If the consolidated amount of 1/50 (one fiftieth) of the values recovered mentioned in the above items is lower than the real estate value, it will be object of a judicial sale, and, the values obtained will be deducted from the compensatory fine in favor of the COLLABORATOR, the amount proportional to the recovery already mentioned;<br>f) In case the agreement is rescinded due to the conduct of the COLLABORATOR the amount of the assets referred to in § 4º, caput, abovementioned, will be entirely destined to the Court as a compensatory fine, independent of any assets recovered in consequence of the information given." (p. 11/12 do PDF)<br><br>"The amount obtained from the sale of assets whose forfeiture was declared in accordance with this clause will be deposited in the account of the competent court, observing the provision of art. 7º, §1º, Law nº 9.613/98, considering the new text provided by Law nº 12.683/12." (p. 13 do PDF)<br><br>As a condition to the agreement the COLLABORATOR commits himself to inform and waive in Union's favor any right related to the amounts kept in bank accounts and investments in Brazil or abroad, which are identified in his name or in the name of intermediary individuals and legal entities." |

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| Alberto Yussef (continued) | "The COLLABORATOR acknowledges ownership of R$ 1,893,410.00 (one million, eight hundred and ninety-three thousand, and four-hundred and ten reais) and U$ 20,000.00 (twenty thousand U.S. dollars) confiscated from the premises of GFD Investment Ltda. during the process of search and seizure in the context of Operation Car Wash, and irretrievably and irrevocably renounces to them in favor of Justice in accordance with art. 7º, §1º of Law nº 9.613/98, considering the new text provided by Law nº 12.683/12, in regard to asset destination. (p. 13 do PDF) |
| Paulo Roberto Costa | "The collaborator renounces, in the favor of the Union, any right related to assets kept in bank accounts and investments abroad, in any country, including the amounts kept in the Royal Bank of Canada in the Cayman Islands (approximately $2.8 million held under the name of his relatives Marcio and Humberto)and the approximately $23 (twenty three) million kept in Sweden (in bank accounts registered in the names of Marici, Paulo Roberto, and Arianna), directly or indirectly controlled by him, including through offshore and family companies, such as the amounts maintained by the offshore companies AQUILA HOLDING LTD, ELBA SERVICES LTD, GLACIER FINANCE INC, INTERNATIONAL TEAM ENTERPRISE LTD, LAROSE HOLDINGS SA, OMEGA PARTNERS SA, QUINUS SERVICES SA, ROCK CANYON INVEST SA, SAGAR HOLDING SA, SANTA CLARA PRIVATE EQUITY, SANTA TEREZA SERVICES LTD, SYGNUS ASSETS SA, all which he acknowledges as being the proceeds of criminal activity. The collaborator, by signing an attached terms, commits to practice any necessary act in order to allow the repatriation of these amounts for the benefit of the country." (p. 07/08 do PDF)<br><br>"The collaborator commits himself to pay, irretrievably and irrevocably as civil indemnification, in recognition of the damage he caused through several crimes (not only against Public Administration, but also money laundering and others), the amount of R$ 5,000,000.00 (five million reais), to be deposited in the 13th Federal Criminal Court of Justice of Curitiba, within two months of the signing of the agreement, as well as to deliver, as damages, the following assets which he acknowledges as proceeds of crime, or equivalent values: motorboat COSTA AZUL, registered under the name of the SUNSET company (R$ 1.100.000,00); real estate acquired by SUNSET, in Mangaratiba/RJ, registered under nº 20721 (R$3.202.000,00); cash seized in his residence during the process of search and seizure (R$ 762.250,00, USD 181.495,00 e EUR 10.850,00); as well as the vehicle, EVOQUE received from Alberto Youssef (R$300.000,00). The collaborator promptly agrees with reversal of the assets frozen in a Brazilian bank in order to substitute the real estate references above and registered under nº 20721." (p. 08 do PDF) |
| Odebrecht | "The assets, which will be made available to the Department of Justice - DOJ and to the Switzerland's Office of the Attorney General, will be distributed in accordance with the determination of Federal Prosecution Service and the above-mentioned authorities, observing the following criteria:<br><br>a) With regards to the DOJ, the value will be made available in American dollars, in observance with the terms of Appendix 5 and §12 below.I, and it will be paid by June 30th 201, and deducted from the total amount based on the exchange rate on the day of the payment.<br>b) To Switzerland´s Office of the Attorney General, the amount will be made available in francs, in observance with the terms of Appendix 5 and §12 below, and it will be partially paid by the appropriation of assets owned by the COLLABORATOR and confiscated in that country, with the rest paid by 2018 (second year of payment), in the same proportion to the amount that will be made available by the Brazilian Federal Prosecution Service, observing the |

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| Odebrecht (continued) | limit above mentioned. It will be deducted from the total amount, based on the exchange rate on the day of the payment." (p. 08 do PDF)<br><br>"Once the amount destined to other jurisdictions is discounted, according to the agreements signed by the COLLABORATOR with the DOJ and the Office of the Attorney General of Switzerland, as established in §1º and Appendix 5, the total remaining amount will be made available to the Brazilian Federal Prosecution Service in accordance with following terms:<br><br>a) The value corresponding to 97.5 percent (ninety seven percent) of the amount will compensate damages caused by the crimes and illicit conduct that are the object of this agreement, and will be made available to the public entities, public institutions, public companies, public foundations and government controlled companies, observing the provision on article 16, § 3°, of the Law nº 12.846/2013;<br>b) The value corresponding to 2.5% (two and a half per cent) regards asset forfeiture related to the commission of the crimes stated in the Anti-Money Laundering Act, according to art. 7°, caput, I, and § 1°, Lei 9.613/98." (p. 09 do PDF) |
| Antônio Palocci | "The COLLABORATOR promises, irretrievably, to pay in compensation for criminal, civil, tax, and administrative damages that he acknowledges were caused by the various crimes he committed the amount of R$ 37,500,000.00 (thirty-seven million and five-hundred thousand reais), to be debited from the monetary assets which are confiscated after the homologation of the agreement." (p. 09 do PDF) |
| Hamylton Pinheiro Padilha Júnior | "The payment of the civil fine of R$ 70,000,000.00 (seventy million reais) to be destined to the indemnification of the legal assets protected, according to art. 4º, of the Law 9.613/98, and other applicable legislation." (p. 06 do PDF) |
| Delcídio do Amaral Gomez | "The parties agree on the application of a fine (penalty), observing the following terms:<br>a) In case the COLLABORATOR is sentenced to pay the fine which art. 58 of the Criminal Code mentions, it will be limited to the legal minimum.<br>b) The COLLABORATOR commits to paying the value of R$ 1,500,000.00 (one million and five hundred thousand reais), as a compensatory fine, considering the proportion of 80 percent (eighty percent) to Petróleo Brasileiro S/A and 20 percent (twenty percent) to the Union. (p. 08 do PDF) |
| João Antônio Bernardi Filho | "Pay civil fine in the total amount of R$ 3,000,000. 00 (three million reais), to be destined as follows: 80 percent (eighty percent) to indemnify Petróleo Brasileiro S.A. – Petrobrás company; 20 percent (twenty percent) to the criminal prosecution institutions according to art. 4ºof the Law 9.613/98, and applicable legislation." (p. 06 do PDF) |
| Milton Taufic Schahin | "The conviction ruling required payment of a compensatory fine of R$ 7.000.000,00 which includes a six-month grace period to initiate the payment, which must be paid in 24 installments, starting at the end of the grace period." (p. 03 do PDF) |

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| Nestor Cuñat Cerveró | The COLLABORATOR promises to pay the compensatory fine, with payment to begin following the homologation of the agreement, in accordance with the following terms:<br>a) Immediate payment, in accordance with the proportion of 80 percent to Petróleo Brasileiro S/A and 20 percent to Union. The collaborator also renounces all and any right or claim with regards to all balances available in the investment and private pension PGBL accounts presented in Appendix IV, which amount is estimated at R$ 825,000.00 (eighty hundred and twenty-five thousand reais), and denies being the owner or effective comptroller of any other value maintained in Brazilian financial institutions. The collaborator authorizes the court to transfer these amounts to the judicial account indicated by the FEDERAL PROSECUTOR'S OFFICE;<br>b) Immediate transfer of the 10.266 PETR4 shares, which he holds, to Petróleo Brasileiro S/A, without any charge, authorizing the Court to determine that the Settlement and Custody Chamber from BMFBOVESPA and Itaú Securities Broker act as agreed by transferring the property of these securities to the semi-public corporation;<br>c) Payment, of 80 percent to Petróleo Brasileiro S/A and 20 percent to Union, of an amount in reais equivalent, on the exchange conversion date, to the total of the balance deposited under his effective control, in the bank and accounts mentioned in Appendix IV, in London, United Kingdom, conditioned to its unfreezing by the British authorities. The collaborator now renounces any right or claim related to this value and authorizes the direct transfer to the Union, in a judicial account to be indicated by the Brazilian authorities and appointed by the FEDERAL PROSECUTION SERVICE of the total or partial sum unfrozen by the British authorities; a refusal by foreign authorities to return the referred amount to the Brazilian State does not imply a breach of contract for the collaborator;<br>d) Payment, in the proportion of 80 percent to Petróleo Brasileiro S/A and 20 percent to the Union, of the amount in reais that is equivalent, on the exchange conversion date, to the total balances estimated at $495,794.44 (four hundred and ninety five thousand dollars, seven hundred and ninety four American dollars and forty four cents), maintained in a deposit account under his effective control under the name of the offshore company RUSSEL ADVISORS S.A., constituted in Nassau, Bahamas, subject to its unfreezing by the authorities of that country. The COLLABORATOR, now renounces any right or action related to this amount and authorizes the direct transfer to the Union, in a judicial account to be indicated by the Brazilian authorities and appointed by the FEDERAL PROSECUTION´S OFFICE, of the total or partial sum that is unfrozen by the Bahamian authorities; a refusal of the foreign authorities to return the referred amount to the Brazilian State does not imply a breach of contract for the collaborator;<br>e) Payment in the proportion of 80 percent to Petróleo Brasileiro S/A and 20 percent to Union, by January 1, 2017, of R$60 million (six million reais), or, alternatively, if payment is not executed on time, the loss of the real estate located at Rua Nascimento Silva, n.º 351, ap. 601, Rio de Janeiro, registered under n.º 108994 of the 5º Real Estate Registry Office of Rio de Janeiro/RJ, described in the list of assets indicated in Appendix IV, registered under name of the offshore JOLMEY DO BRASIL ADMINISTRADORA DE BENS LTDA., of his property and under his effective control; |

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| Nestor Cuñat Cerveró (continued) | f) Payment in the proportion of 80 percent to Petróleo Brasileiro S/A and 20 percent to the Union, by January 1, 2017, of R$700,000.00 (seven hundred thousands reais) or, alternatively, if payment is not executed on time, the loss of the real estate located at Rua Visconde de Pirajá, 541, ap. 101, Rio de Janeiro/RJ, described in the list of assets in Appendix IV, although it was the object of a gift agreement signed by the COLLABORATOR and Bernardo Cuñat Cerveró. The COLLABORATOR becomes responsible to the enforcement of the third parties acts;<br>g) Payment in the proportion of 80 percent to Petróleo Brasileiro S/A and 20 percent to Union, by June 30, 2017 of R$400,000.00 (four hundred thousands reais), or alternatively, if the payment is not executed on time, the loss of 202 hectares of Serra da Estrela Farm, in Teresópolis/RJ, registered under n.º 6.663 in the 20 Real Estate Registry of de Teresópolis, described in the list of assets in Appendix IV, acquired by Bernardo Cuñat Cerveró with the COLLABORATOR'S resources. The COLLABORATOR becomes liable for the enforcement of third party acts;<br>h) Payment in the proportion of 80 per cent to Petróleo Brasileiro S/A and 20 percent to the Union, by January 10, 2017, of R$2.4 million (two million and four hundred reais) or, alternatively, if the payment is not executed on time, the loss of the real estate located at Rua Prudente de Moraes, 1.256, ap. 702, Rio de Janeiro/RJ, described in the list of assets in Appendix IV, although it was the object of a gift agreement from the COLLABORATOR to Raquel Cerveró. The collaborator becomes, then, liable for the enforcement of the third party;<br>i) Payment in the proportion of, 80 percent to Petróleo Brasileiro S/A and 20 percent to the Union, by January 1, 2017, of R$200,000.00 (two hundred thousands reais) or alternatively, if the payment is not executed on time, the loss of a thousand square meters land, adjacent to the real estate located at Rua Neuza Goulart Brizola, 800, c 2, Itaipava, Petrópolis/RJ, described in the list of assets in Appendix IV;<br>j) Payment in the proportion of, 80 percent to Petróleo Brasileiro S/A and 20 percent to the Union, by January 1, 2018, of R$900,000.00 (nine hundred thousand reais) or, alternatively, if the payment is not executed on time, the loss of the real estate located at Rua Miguel Lemos, 115, ap 304, Rio de Janeiro/RJ, described in the list of his property in Appendix IV." (p. 05/07 do PDF) |
| Pedro José Barusco Filho | "The COLLABORATOR, irretrievably and irrevocably, undertakes to pay, as a civil compensatory fine for the damages he recognizes were caused by the several crimes he had committed against the Justice Administration, Petrobrás and others (crimes against public administration, economic crimes, money laundering crimes, among others), the value of R$ 3,250,000.00 (three million, two hundred and fifty thousand reais), without prejudice of the value possibly established in consequence of the agreement which clause 4 mentions, which will be deposited in judicial account opened by order of the court responsible for the homologation, specifically for this purpose." (p. 06 do PDF)<br><br>"All the monetary values described in this clause, which total the approximate amount of US$ 67,500,000.00 (sixty-seven million and five hundred thousand U.S. dollars), will be deposited in a judicial account opened by the order of the |

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| Pedro José Barusco Filho (continued) | court responsible for the homologation, specifically for this purpose, and it will be destined for the indemnification of the possible damages suffered by the company Petróleo Brasileiro S/A (Petrobrás), as well as for the purposes of the art. 7º, §1º, of the Law 9.613/98, considering the text included by Law 12.683/12." (p. 08 do PDF) |
| Ricardo Ribeiro Pessoa | "The compensatory fine will be fixed at R$ 51,000,000.00 (fifty one million reais) as established in appendix 03." (p. 03 do PDF) |
| Zwi Skornicki | "The COLLABORATTOR confirms ownsership and irrevocably and irretrievably renounces in favor of Justice the following assets and pieces of art as they are the proceeds of crimes." (p. 05 do PDF)<br><br>"Pay civil fine of US$ 23,800,000.00 (twenty-three million and eight hundred thousand U.S. dollars), a sum equivalent to the total balance existing in Swedish accounts held in the name of the offshore companies YORKETOWN INTERNATIONAL LTD (Account n. 511537, Bank DELTA TRUST SUISSE S.A), BELATRIX MANAGEMENT LTD. (Account n. 503474, Bank DELTA TRUST SUISSE S/A), and LYNMAR ASSETS CORP. (Account n. 566642, Bank BANQUE PICTET AND CIE), increased by the amount of US$2,815,475.00 (two million, eight hundred and fifteen thousand, four hundred and seventy-five U.S. dollars) held in name of the offshore company DEEP SEA OIL CORP (Account n. 608000, Bank DELTA NATIONAL BANK AND TRUST COMPANY, in United States of America) and US$2,800,000.00 (two million, eight hundred thousand U.S. dollars) held in name of the offshore company WINDSOR VENTURES INTERNATIONAL INC. (Account n. 607545, Bank DELTA NATIONAL BANK AND TRUST COMPANY, in United States of America), as already exposed in clause 13, item I, "a", "b", "c", "d" and "e", to be destined for the indemnification of the protected assets in terms of the art. 4º of the Law 9.613/98, and applicable legislation. (p. 11/12 do PDF) |

### 4.2. Judicial Decisions

| Lawsuit number | Text about destination in the criminal sentence |
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| 5083376-05.2014.404.7000 | Based on art. 387, IV - Procedural Criminal Code, I set the minimum amount necessary to compensate the damages due to the crime, to be paid to Petrobras, at R$ 29,223,961.00, which corresponds to the amount paid as bribery to the Supply Board and, included as construction costs in the contract, was borne by Petrobrás. The amount must be monetarily corrected until the payment. It is possible to discount the forfeited assets or the collaborator's indemnification from the total amount fixed as damages in case they are not hindered due to forfeiture applied because of other lawsuits. (p. 131 do PDF). |

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| 5083360-51.2014.404.7000 | According to art. 387, IV -Procedural Criminal Code, I set the minimum value necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 5,512,430.00, which corresponds to the amount paid as bribery to the Supply Board and, included as construction costs in the contract, was borne by Petrobrás. The amount must be monetarily corrected until payment. The convicted are liable according their participation in the crimes, and the details exposed in the reasoning and final decision. It is possible to discount the forfeited assets or the collaborators indemnification from the total amount fixed as damages in case they are not hindered due to forfeiture applied because of other lawsuits. (p. 124 do PDF). |
| 5083351-89.2014.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum amount necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 15,247,430.00, which corresponds to the amount paid as bribery to the Supply Board and, included as construction costs in the contract, was borne by Petrobrás. The amount must be monetarily corrected until the payment. The convicted are liable according their participation in the crimes, and the details exposed in the reasoning and decision. (p. 140 do PDF) It is possible to discount the forfeited assets or the collaborator's indemnification from the total amount fixed as damages in case they are not hindered due to forfeiture applied because of other lawsuits (p. 141 do PDF). |
| 5083258-29.2014.404.7000 | According to art. 387, IV – Procedural Criminal Code , I set the minimum amount necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 50,035,912.33, which corresponds to the amount paid as bribery to the Supply Board and, included as construction costs in the contract, was borne by Petrobrás. The amount must be monetarily adjusted until the payment. (p. 144 do PDF). It is possible to discount the forfeited assets or the collaborators indemnification from the total amount fixed as damages in case they are not hindered due to forfeiture applied because of other lawsuits (p. 144 do PDF). |
| 5026212-82.2014.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum value necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 18,645,930.13, monetarily corrected in regard to every payment, considering the date schedule referred to in item 164. This conviction does not apply to Alberto Youssef and Paulo Roberto Costa, who are subject to specific indemnification established in the agreement.<br>It is possible to discount from that amount the forfeited assets, since they are not forfeited in the context of other lawsuits. (p. 109 do PDF). |
| 5083838-59.2014.404.7000 | According to art. 387, IV– Procedural Criminal Code, I set the minimum value necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 54,517,205.85, which corresponds to the amount paid as bribery to the Supply Board (documented as evidence) and, included as construction costs in the contract, was borne by Petrobrás. The amount must be monetarily corrected until the payment. It shall be discounted the amount related to the criminal forfeiture. (p. 66 do PDF). |

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| 5007326-98.2015.404.7000 | Based on art. 91 – Criminal Code, I decree the forfeiture of the real estate (proceeds of a crime) that consists of the apartment nº 601, located at Rua Nascimento e Silva 351, Rio de Janeiro, registered under nº 108994 in the 5th Real Estate Registry Office of Rio de Janeiro state. Following the sale, the proceeds of the sale will be reverted to the victim of the antecedent crimes, that is, Petrobrás.<br><br>I decide not to set a minimum amount for the indemnification for the damage due to the crime because in this decision (without prejudice of the crimes that constitute object of other criminal lawsuits and investigations) is covered by the real estate forfeiture (p. 54 do PDF). |
| 5023135-31.2015.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum value necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 11,700,000.00, which corresponds to the amount paid as bribery to the Supply Board and, included as construction costs in the contract, was borne by Petrobrás. The amount must be monetarily corrected until payment. It shall be discounted from the amount obtained through criminal forfeiture. The liability of Ivan Vernon is limited to R$ 389,606.04, while Pedro Correa is entirely liable. (p. 89 do PDF). |
| 5023162-14.2015.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum value necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 1,474,442.00, which corresponds to the amount received as bribery and that, included in the contact costs, was borne by Petrobrás. The amount shall be monetarily corrected until payment. (p. 96 do PDF). |
| 5036528-23.2015.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum amount necessary to compensate the damages due to the crime, to be paid to Petrobrás, at R$ 108,809,565.00 and US$ 35 million, which corresponds to the amount paid as bribery to the Supply Board and to the Service and Engeneering Board and that, included as construction costs in the contract, was borne by Petrobrás. The amount must be corrected until payment. The convicted are liable relative to the extent of their participation in the crimes, according to the details exposed in the reasoning and final decision. (p. 225/226 do PDF). It is possible to discount the assets or collaborator indemnifications, in case they are not an object of forfeiture in other lawsuits (p. 226 do PDF). |
| 5037093-84.2015.404.7000 | Petrobrás has required the destination of the assets forfeited. Petrobrás, as the victim, has the right to the financial assets and real estate forfeited. In regards to the works of art, the Court's understanding, which this judge intends to maintain, is that it is difficult for the Court to assign an estimated value and sell works of art, hence, only after the criminal forfeiture, they should be destined to a museum, in order to enrich the Brazilian cultural collection. Thus, the pieces of art will be subjected to this specific destination, to be defined separately. All the other assets will be reverted to Petrobrás (p. 32 do PDF). |
| 5039475-50.2015.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum amount necessary to the indemnification of the damages that resulted from the crimes related to the supply contract of the drillship, to be paid to Petrobras, at R$ 123,690,000.00, which corresponds to the amount paid as bribery and borne by Petrobrás, considering it was inserted in the price of the contract. The amount must be corrected until payment. It shall be discounted the amount obtained from the criminal forfeiture. In terms of this indemnification, the convicted are liable (p. 99 do PDF). |

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| 5045241-84.2015.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum amount necessary to the indemnification of the damages derived from the crime, to be paid to Petrobras, are fixed at R$ 46,412,340.00, which corresponds to the amount paid as bribery to the Service and Engineering Board and that, included in the construction contract, was borne by Petrobrás. It is a fact that the smaller part of this amount also remunerated technical services of Milton Pascowitch, but considering that the consulting agreements were used for the purpose of bribery, it became impracticable to differentiate the amounts. The amount shall be corrected until payment. The convicted are liable to the extent they have participated in the crime, according the details on the reasoning and final decision.<br>It is possible to discount the assets or the collaborator indemnifications, if they are not an object of forfeiture in other lawsuits<br>(p. 257 do PDF). |
| 5030424-78.2016.404.7000 | The forfeiture will be reverted in favor of the victim, Petróleo Brasileiro S/A - Petrobrás. According to art. 387, IV, do CPP – Procedural Criminal Code, I set the minimum amount necessary to the indemnification of the damages derived from the crime, to be paid to Petrobras, at R$ 3,120,000.00, which corresponds to the amount received as bribery and that, included in the contract costs, was borne by Petrobrás. The amount shall be corrected until payment. It shall be discounted the amount obtained by the criminal forfeiture. (p. 84 do PDF). |
| 5030883-80.2016.404.7000 | The forfeiture will be reverted in favor of the victim, Petróleo Brasileiro S/A - Petrobrás. According to art. 387, IV – Criminal Procedural Code, I set the minimum amount necessary to the indemnification of the damages due to the crime, to be paid to Petrobras, at R$ 2,144,227.73, which corresponds to the amount received as bribery and that, included in the contracts cost, was borne by Petrobrás. The amount shall be corrected from 07/01/2012 until payment. It must consider the interest rate. It shall be discounted the amount obtained from the criminal forfeiture. (p. 104 do PDF). |
| 5063271-36.2016.404.7000 | It is necessary to estimate the minimum value regarding the indemnification of the damages derived from the crime, according to art. 387, IV – Procedural Criminal Law. It must correspond to the amount of the undue advantage, of R$ 2,700,000.00, corrected since 10/2008 and considering the interest rate of 0.5% per month. The amount will be due to Petrobrás. In the indemnification calculation, the amount effectively forfeited will be discounted [from the total]. (p. 123 do PDF). |
| 5015608-57.2017.404.7000 | According to art. 387, IV – Procedural Criminal Code, I set the minimum value necessary for the indemnification of the damages due to the crime, to be paid to Petrobras, at US$ 4,147,365.54, which corresponds to the amount paid as bribery to the Executive Management of the Service and Engineering Board, which at the time was represented by Roberto Gonçalves and that, included in the construction costs in the contract, was borne by Petrobrás. The amount shall be corrected until payment, observing the interest rate of 0.5% per month.<br><br>Upon confirmation of the forfeiture of the assets in foreign accounts, the indemnification will be cancelled and there will be no more obstacles to reducing the prison sentence (p. 104 do PDF). |

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| 5021365-32.2017.404.7000 | It is necessary to estimate the minimum value to compensate the damages due to the crime, according to art. 387, IV – Procedural Criminal Code. In regards to the crimes narrated in topic II.2.2.2 of the criminal complaint, I set the amount at R$ 85,431,010.22, an amount equivalent to the quantity destined to the Petrobrás Services and Engineering Board core support in the related contracts. In regard to the crimes of topic II.2.3.1, I set it at R$ 150,500.00. In regard to crimes of topic II.2.3.2, I set it at R$ 700,000.00. Finally, in regard to the crimes of topic II.2.3.3, I set it at R$ 170,000.00. These amounts shall be adjusted and include 0.5% interest each month, starting from the date fixed to the last criminal act of each topic already mentioned in the penalty calculation. In the indemnification calculation, values forfeited regarding the apartment shall be discounted. (p. 359 do PDF). |
| 5024879-90.2017.404.7000 | It is necessary to estimate the minimum value to compensate the damages derived from the crime, according to art. 387, IV – Procedural Criminal Code. Although the Petrobrás Internal Investigation Commission indicated a financial loss of US$ 77.5 million, I understand it to be more appropriate to set a more conservative value, which corresponds to the amount of the undue advantage received, or US$ 4,865,000.00. This is the amount of the minimum indemnification, which does not prevent Petrobrás or the Federal Prosecution Service from pursuing additional amounts in civil jurisdiction. The US$ 4,865,000.00 must be converted considering the exchange rate on the sentencing date, and observe the interest rate of 0.5% per month. The amount is due to Petrobrás. In the calculation, values effectively forfeited must be discounted. (p. 71/72 do PDF). |
| 5023942-46.2018.404.7000 | It is necessary to estimate the minimum amount of compensation for the damages due to the crime, according to art. 387, IV – Procedural Criminal Code. Considering the limits of the criminal complaint it is not possible to define a value other than the equivalent of the bribery amount – US$ 24,750,000.00 (equivalent to R$ 93,307,500.00, converted to national currency based on the commercial exchange rate on 06/05/18 of 3.77 per U.S. dollars), which corresponds to approximately 3 percent of the value of contract nº 6000.0062274.10.2, signed with Petrobrás and effectively paid to the convicted Mário Miranda in favor of the business executives from Petrobrás and colluded (technical core); and the amount of US$ 32,000,000.00, paid to political agents (political core) from PMDB and PT (equivalent to R$ 120,640,000.00, converted to national currency based on the commercial exchange rate on 06/05/18, of 3.77 per U.S. dollars), which corresponds, approximately to 5 percent of the value of the referred contract signed with Petrobrás, and effectively paid through the convicted Ângelo Lauria and the black-market money dealer Rodrigo Tacla Duran. These amounts represent the corresponding cost that was transferred to Petrobrás, due to the contract price. Otherwise, the contract might have had a lower value, [a difference] at least equivalent to the mentioned amount. I refer to the minimum indemnification value, which does not prevent Petrobrás or even the Federal Prosecution Service from pursuing higher additional amounts in civil jurisdiction. The amount must be corrected and the interest of 0.5% per month since 10/26/2010 needs to be considered. The amount is due directly to Petrobrás. In the indemnification calculation, the values effectively forfeited must be discounted. (p. 105/106 do PDF). |

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| 5017409-71.2018.404.7000 | It is necessary to estimate the minimum value for the compensation of the damages derived from the crime, according to art. 387, IV – Procedural Criminal Code. Considering the limits of the criminal complaint, it is not possible to define a value other than that equivalent to the value of the bribes, R$ 32.750.000,00. This amount represents the corresponding cost that was transferred to Companhia Petroquímica de Pernambuco - Petroquímica Suape (PQS) and to the Companhia Integrada Têxtil de Pernambuco (CITEPE), both full subsidiaries of Petrobras, due to the contract price. Otherwise, the contract could have had a lower value, [a difference] at least equivalent to the referred amount. This is the minimum indemnification amount, which does not prevent the mentioned subsidiary companies, Petrobras, or the Federal Prosecution Service from pursuing additional amounts in civil jurisdiction. The monetary correction and interest at a rate of 0.5% per month must be added to the amount starting on 04/01/2014. The amounts are due to the subsidiaries abovementioned and/or directly to Petrobras. In the indemnification calculation. the amounts effectively forfeited must be discounted. (p. 113 do PDF). |
| 5013405-59.2016.404.7000 | The pieces of art are deposited in the Oscar Niemeyer Museum, in Curitiba, and will remain there until the decision has become res judicata and the probable seizure becomes definitive to the institution, as their sale in a judicial auction is considered inappropriate (p. 144 do PDF).<br><br>It is necessary to estimate the minimum value to compensate the damages derived from the crime, according to art. 387, IV – Procedural Criminal code. Despite of the requests of the Federal Prosecution Service, there is no other possibility than set it to the amount of the bribery paid or received, that is, US$ 30,418,622.23, 1 percent of the contracts that Grupo Keppel Fels signed with Petrobrás. In regard to bribery equivalent to 0.9 percent of the contracts signed by Sete Brasil, although the agreement is of US$ 185,851,595.34, apparently it was only paid partially, considering that the payments were conditioned on the contract´s enforcement, which had yet to occur. As the part paid is not clear, it is impossible to consider the amount agreed to for indemnification, restricting this decision to the minimum amount referenced above – US$ 30,418,622.23, with no prejudice of higher compensation damages. The claim for fixing damages at double the amount of the bribery has no legal or factual basis. In the indemnification calculation, the forfeited values must be discounted. (p. 145 do PDF). |
| 5023121-47.2015.404.7000 | Considering the legal provision of art. 91, § 2º – Criminal Code, regarding the forfeiture of goods and assets equivalent to the "proceeds of the crime when they have not been found or when they are located abroad," the patrimony of André Vargas, Leon Vargas, and Ricardo Hoffmann, even when there no illicit origins are proven, is submitted to criminal forfeiture until the amount of R$ 1,103,950.12 is reached. It is impractical to identify the assets in the present moment because the precautionary measures of seizure and sequestration are still on course. The identification must be made in separated lawsuit or, as allowed, in the phase mentioned in art. 122 – Procedural Criminal Code (p. 52/53 do PDF).<br><br>Based on art. 387, IV – Procedural Criminal Code, I fix at R$ 1,103,950.12 the minimum value necessary to compensate the damages due to the crimes, to be returned to Caixa Econômica Federal and the Health Ministry. The amount must be corrected until payment. It must be discounted by the amount obtained through criminal forfeiture. (p. 53 do PDF). |

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| 5056996-71.2016.404.7000 | Considering the legal provision of art. 91, § 2º – Procedural Criminal Code, regarding the forfeiture of goods and values equivalent to the "proceeds of a crime when they have not been found or when they are located abroad," the patrimony of André Vargas, Leon Vargas, and Marcelo Simões, even if the illicit origins are not proven, is submitted to criminal forfeiture until the amount of R$ 2,399,850.00 is reached. It is impractical to identify these assets in the present moment. The identification must be made in separated lawsuits or, as allowed, in art. 122 – Procedural Criminal Code.<br><br>According to art. 387, IV – Procedural Criminal Code, I fix at R$ 2,399,850.00 the minimum value necessary to compensate the damages due to the crimes to be reverted to Caixa Econômica Federal. The amount must be corrected until payment. It must be discounted by the amount obtained through criminal forfeiture. (p. 57 do PDF). |
| 5022179-78.2016.404.7000 | It is necessary to estimate the minimum value to compensate the damages due to the crime, according to art. 387, IV – Procedural Criminal Code. Despite the requests of the Federal Prosecution, there is no possibility other than setting it to the amount of the bribery paid or received, that is, R$ 7,350,000.00, to be corrected until the final payment. The request for fixing the amount of damages at double the amount requested as bribery has no legal or factual basis. The indemnification will be prejudiced in case the forfeiture is shown to be effective. Regarding this crime, the victim was not Petrobrás, but the Congress, representing the receipt of the bribery by a component of the Parliamentary Inquiry Commission, an outrage to the dignity of the Parliament. Hence, the forfeiture of the proceeds of the crime and the indemnification must be reverted to the Congress. (p. 125 do PDF). |

## 5. ANALYSIS AND IMPROVEMENT PERSPECTIVES

### 5.1. Decisions and agreements analysis:

In the agreements mentioned above, it is important to emphasize the repeated renunciation of assets as part of civil compensatory fines, and also, in lower numbers, the criminal fine, as in the case of the collaboration agreement signed by the ex-senator Delcidio Amaral. On the other hand, the convictions rendered in the context of the criminal complaints similarly nominated, the consequences with a patrimonial nature were based on article 91 of the Criminal Code, which addresses asset forfeiture; and article 387, IV of the Procedural Criminal Code, which permits the fixation of the minimum value for civil indemnification.

The criteria used to determine the amount of the damages due to the crimes, as well as the extension of criminal forfeiture over the proceeds of crime or licit patrimony were:

- Damage caused to PETROBRAS;
- The amount of bribery paid;
- The bribe amount as a percentage of the signed agreements, which represents the assets diverted.

With regards to asset destination, both in the conviction sentences and in the agreements, there are the following beneficiaries:

- PETROBRÁS, and its subsidiaries;
- Caixa Econômica Federal;
- Museums,
- Ministry of Health

In the context of the judicial decisions and agreements, the reasoning was objective and pragmatic: no major argumentative efforts were made, and it was based essentially on the amount indicated in the criminal complaint and supported by evidence collected during the investigation and the criminal lawsuit.

The definition of the goods, rights, or assets to be seized, sequestered, mortgaged, forfeited, or renounced by the collaborators, as well as the destination of those assets at the end of the lawsuit, as an instrument or proceeds of a crime, presupposes, in first place, a maximum standard of coherence and rationality in delimiting the patrimonial and personal damage caused by the criminal offense.

In Operation Car Wash, as it can be observed in the graphics above, the economic references include the amount paid as bribery, the contractual percentage registered as bribery payments, and the economic losses borne by the victims, including the ones which present reputational nature.

Although there it is not expressly mentioned in the agreements and decisions, it is important to consider some existing standards that contribute to reduce the risk of judicial discretion.

For instance, after the definitive conviction sentence has been rendered, in accordance with article 1º, §§1º e 2º, from CG Provision nº 01/2013, the presiding judge shall enforce the prison sentence or alternative measure (pecuniary penalty), and determine the opening of an exclusive checking account for the specific purpose of handling the pecuniary penalty in the branch of the bank located on the premises of the Court, or, where there is none on site, in a state or federal institution of the jurisdiction.

The withdrawal of the amount will depend, exclusively, on a judicial order, and the account will be supervised monthly by the management unity, by checking the month statement provided to the Court and notifying the Federal Prosecution Service.

In general, the amount is destined to the victim of the illicit act. However, if this is not the case, according to article 2º of CG Provision nº 01/2013, the amount shall be, preferably, destined to a public or private entity with social purpose, previously associated, or to activities that are essential to public security, education, and health—considering they assist important social areas—under the discretion of the management unity.

In addition, the arbitrary and random choice of the beneficiaries of the income associated with the accounts is forbidden:

> Art. 2º. § único. As the arbitrary and random choice of the beneficiaries of the linked account income is prohibited, the managing unity shall prioritize the transfer to finance social projects that:
>
> I - maintain, for a longer time, a significant number of service provider to the community or public entity;
>
> II – act directly in the implementation of punishment, rehabilitation assistance to the sentenced and egresses, assistance to the victims of crimes, and the prevention of criminality, including town councils;
>
> III – provide services of greater social relevance;
>
> IV – present projects feasible to implement, according to their utility and need, following the criteria established in specific public policies.
>
> (CG Provision nº 01/2013 - translated)[17]

17 Original text: Art. 2º. Parágrafo único. Vedada a escolha arbitrária e aleatória dos beneficiários da

It is also prohibited to direct the resources to the Judiciary, regarding personal promotion of magistrates or members of the beneficiary entities, including payments of any kind of remuneration of its members, to political party objectives; and entities that are not regularly constituted, according to art. 3º of the same provision.

The interested entities shall present registration proposals for the management unity at any time, considering the specifications in article 4º of the provision.

In case the amounts are destined to an entity, this entity shall provide accounting reports of everything that was acquired with the resources allocated by the Judiciary branch, based on article 5º of the same provision.

Moreover, there is a possibility that the seized assets are assigned a destination before the decision has become *res judicata*: routing to judicial or police bank accounts, based on the anticipated sale or the appointment of a depositary (the investigated, a public institution or a third party).[18]

There is also anotherimportant reference to consider: the normative instruction n. 02 de 2018 from the Ministry of Transparency and Comptroller General of the Union.[19] According to the instruction, the parameters to calculate the fine established in the Anti-Corruption Act - Law n. 12.846/2013, in order to indemnify the people and entity harmed, will observe two types of rubric:

1. Rubric under the nature of sanction: the administrative fine from the Anti-Corruption Act; and
2. Rubric under the nature of indemnification: the unfair advantage obtained or intended in the context of the relationship with the public administration in general.

The calculation of the fine, in both cases, is compound by three categories of values:

1. The sum of any uncontroversial damages that can be attributed to the collaborator companies;
2. The sum of all bribery paid; and
3. The profit or enrichment that would be reasonable if the illicit act had not occurred.

## 5.2. IMPROVEMENT PERSPECTIVES

### 5.2.1. Management and destination of goods, rights, and values seized, sequestered or forfeited

The Brazilian government, in a project financed by the United Nation Office on Drugs and Crimes (UNODC), in partnership with the Organization of American States (OAS), has contracted the Project of Forfeited Assets in Latin America (BIDAL),[20] which

receita da conta vinculada, caberá à unidade gestora priorizar o repasse para o financiamento de projetos sociais que: I - mantenham, por maior tempo, número expressivo de cumpridores de prestação de serviços à comunidade ou entidade pública; II – atuem diretamente na execução penal, assistência à ressocialização de apenados e egressos, assistência às vítimas de crime e prevenção da criminalidade, incluídos os conselhos da comunidade; III – prestem serviços de maior relevância social; IV - apresentem projetos com viabilidade de implementação, segundo a utilidade e necessidade, obedecendo-se aos critérios estabelecidos nas políticas públicas específicas.

18 SAADI, Ricardo Andrade. Os bens apreendidos e sequestrados em procedimentos penais e o financiamento de atividades educacionais nos presídios. PHD Thesis. –Law School.Presbyterian University Mackenzie. (2011), p. 120.

19 CGU. Respositório: diário ocial da União. May, 16, 2018. https://repositorio.cgu.gov.br/bitstream/1/33688/5/Instrucao_Normativa%20_2_2018.pdf.

20 JUSTIÇA. OEA: Projeto BIDAL. n.d. Accessed: May, 25, 2020. https://www.justica.gov.br/sua-protecao/lavagem-de-dinheiro/projeto-bidal-brasil-1/arquivos-bidal/bidal-proposta-gti-final-1.pdf.

is a technical assistance program that suggests mechanisms to improve the system of identification, localization, and administration of assets with illicit origin under the power of the state.

The project´s report, based on several countries' experiences, aimed to identify the best administration practices for assets with illicit origins and was presented to the National Strategy to Combat Corruption and Money Laundering (ENCCLA). Nevertheless, the proposals presented, such as the adoption of a framework model to management and administration of the assets, the elaboration of a protocol preceded by the previous consideration of the institutional needs, and the plan of use, unfortunately, were not continued.

For instance, the assets which were effectively auctioned, the financial product, the amount in cash, and the auction product, shall be used to cover the costs associated with the maintenance and preservation of these assets. The remaining amounts or assets that can be refunded shall be directed to the victims, if the judicial authority has identified them in the decision. The remaining amounts can be destined to public institutions involved in the fight against corruption, such as the Ministry of Justice, the Prosecution Service, the Judiciary branch, and the Attorney General's Office in Brazil. Finally, the goods whose repair or reform is impossible or excessively burdensome shall be destroyed.[21]

21 MACHADO, Diogo de Oliveira; and SAADI, Ricardo Andrade. Os valores da corrupção: administração de bens apreendidos e confiscados. Revista Direito GV. v. 13 n. 2. p. 484-519. may-aug (2017): 502-503,

### 5.2.2. Civil Assets Forfeiture Complaint

There are more than ten bills of law currently before the National Congress which address the civil assets forfeiture complaint, also known as "extinction of domain complaint," which refers to the "civil forfeiture" from North-American law and the main international documents against corruption, money laundering, organized crime, and drug trafficking among others, in order to affect the possession and ownership of goods, rights, and values of illicit origin (CÂMARA DOS DEPUTADOS, n.d).[22]

This is a very sensitive issue with respect to the Federal Constitution, especially because the standard of evidence required is difficult to disassociate from the verifiable evidence standard in criminal complaints, in which the assets that can be seized, sequestered, or forfeited must have a logical direct or indirect connection with the criminally-relevant conduct.

### 5.2.3. Modifications introduced by Statutory Law nº 13.964/2019

Recently, Law n. 13.964/2019 came into force and, among other modifications, introduced within the Brazilian legal system the institute of extended forfeiture and the possibility of public institutions using assets that are sequestered, seized or forfeited through other precautionary measures, and also, the possibility of designating the assets for a purpose other than the National Penitentiary Fund, including to public museums.

22 See the following bills of law: PL 69/2019; 913/2017; 11172/2018; 11127/2018; 6719/2016; 9054/2017; 246/2015; 3855/2019. See also: CÂMARA DOS DEPUTADOS. Pesquisa simplificada. n.d. Accessed: May, 15, 2020. https://www.camara.leg.br/buscaProposicoesWeb/pesquisaSimplificada.

Hence, the text of the articles 91-A of the Criminal Code (BRASIL, 1940)[23], and articles 124-A, 133 and 133-A of the Procedural Criminal Code (BRASIL, 1941).[24]

23 See Art. 91-A. In case of convictions for offenses to which the law establishes a prison sentence higher than six years in custody, it is possible to be determined the forfeiture of the proceeds of the crime in regard to the assets that correspond to the difference between the value of the convicted patrimony and the one compatible with its licit income. §1º Regarding the forfeiture established at the caput of this article, it is considered as convicted patrimony the assets: I – of his ownership, or that he has domain and the direct or indirect benefit at the time of the criminal offense or received after this date; and II – transferred to third parties without any charges or observing a derisory consideration, since the beginning of the criminal activity. §2º The convicted can demonstrate the inexistence of incompatibility or the licit origins of the patrimony. §3º The forfeiture established in this article must be expressly required by the Public Prosecution Service when presenting the criminal complaint and it must be appointed the difference considered. §4º In the conviction sentencing the judge shall state the value of the difference considered and specify the assets whose forfeiture was determined. §5º The instruments used to practice offenses by the organized crime and militias shall be forfeited in favor of the union or the state, depending of the jurisdiction of the criminal complaint, even though they have not endangered people´s safety, morality or public order, or offered great risk of being used to commit new crimes.

Original text: *Na hipótese de condenação por infrações às quais a lei comine pena máxima superior a 6 (seis) anos de reclusão, poderá ser decretada a perda, como produto ou proveito do crime, dos bens correspondentes à diferença entre o valor do patrimônio do condenado e aquele que seja compatível com o seu rendimento lícito. § 1º Para efeito da perda prevista no caput deste artigo, entende-se por patrimônio do condenado todos os bens: I - de sua titularidade, ou em relação aos quais ele tenha o domínio e o benefício direto ou indireto, na data da infração penal ou recebidos posteriormente; e II - transferidos a terceiros a título gratuito ou mediante contraprestação irrisória, a partir do início da atividade criminal. § 2º O condenado poderá demonstrar a inexistência da incompatibilidade ou a procedência lícita do patrimônio. § 3º A perda prevista neste artigo deverá ser requerida expressamente pelo Ministério Público, por ocasião do oferecimento da denúncia, com indicação da diferença apurada. § 4º Na sentença condenatória, o juiz deve declarar o valor da diferença apurada e especificar os bens cuja perda for decretada. § 5º Os instrumentos utilizados para a prática de crimes por organizações criminosas e milícias deverão ser declarados perdidos em favor da União ou do Estado, dependendo da Justiça onde tramita a ação penal, ainda que não ponham em perigo a segurança das pessoas, a moral ou a ordem pública, nem ofereçam sério risco de ser utilizados para o cometimento de novos crimes.*

24 Art. 124-A. In case of being declared the forfeiture of pieces of art or other assets, which have cultural or artistic value, and there is no determined victim of the crime, it is possible to destine the assets to public museums. Original text: *Na hipótese de decretação de perdimento de obras de arte ou de outros bens de relevante valor cultural ou artístico, se o crime não tiver vítima determinada, poderá haver destinação dos bens a museus públicos.*

Art. 133. Once the conviction has become res judicata, the judge ex officio or if required by na interested party or the Public Prosecution Service, will determine the assessment and the sale in public auction of the assets whose forfeiture was declared. §1º considering the amount appointed, it will be destined to the Public coffers the amount that is not destined to the offended or to a third party acting in good-faith. §2º The value appointed shall be destined to the National Penitentiary Fund, except when there is a different legal provision. Original text: *Transitada em julgado a sentença condenatória, o juiz, de ofício ou a requerimento do interessado ou do Ministério Público, determinará a avaliação e a venda dos bens em leilão público cujo perdimento tenha sido decretado. § 1º Do dinheiro apurado, será recolhido aos cofres públicos o que não couber ao lesado ou a terceiro de boa-fé. § 2º O valor apurado deverá ser recolhido ao Fundo Penitenciário Nacional, exceto se houver previsão diversa em lei especial.*

"Art. 133-A. The judge can authorize, if there is public interest, the utilization of the asset sequestered, seized or submitted to any precautionary measure by the public security institutions established in art. 144 of the Federal Constitution, of the prison system, of the social-educational system, of the National Public Security Force, and the Experts General institute to develop its activities. §1º The public security institution that participates in the investigative actions or repression to criminal offenses that caused the constriction of the assets will be prioritized in its utilization. §2º Except the hypothesis above, once there is

It is important to stress that these modifications were introduced by the Lei n. 13.964/2019 and represent advances, particularly with regard to the possibility of using the sequestered, seized, or forfeited assets, and also the provision for directing assets with cultural or artistic value to museums.

The more obvious this legal authorization is and the better regulated the procedure is with respect to these situations, the stricter the opportunities for discretion will be, both in the plea agreements and the judicial rulings.

Especially in relation to extended assets forfeiture, a measure which is encouraged in international documents against corruption, money laundering, organized crime and terrorism, there is an important issue to note: its extension to licit patrimony and the possible debate concerning its constitutionality, considering the risk of offending the presumption of the innocence principle.

## 6. CONCLUSION

Although it is possible to recognize a pattern in the text of judicial decisions and criminal collaboration agreements, supported by the legislation some critical issues still exist. For instance, these issues include the need to parameterize and control the discretion of judges and members of the Prosecution Service in defining the destination of the assets, the complexity in measuring the damages caused, the evidence standard required to justify constrictive measures, and the management of the goods and amounts seized or sequestered.

The recent modifications in the Procedural Criminal Code, although relevant—as with the allocation of assets with cultural and artistic value to public museums, and the new requirements in criminal collaboration agreements—are not sufficient. The revisions could have gone further. A loophole still exists regarding the management and destination of frozen assets, and in this area the BIDAL Project, as described above, could continue. With regards to the pro-

public interest, the judge can authorize the use for the other public institutions. §3º If the assets which the caput mentions is a vehicle, boat or an airplane, the judge will determine that the traffic authority or the Institution for Register and control the expedition of a provisory certificate of register and licensing in favor of the public institution which is the beneficiary and will be exempt of paying fines and taxes that existed before the asset was made available and that shall be charged from their responsible. §4º Once the criminal decision has become res judicata, and the forfeiture is determined, observing the right of the offended and third parties acting in good-faith, the judge can determine the definitive transfer of the ownership to the beneficiary public institution that has the assets in custody. Original text: *O juiz poderá autorizar, constatado o interesse público, a utilização de bem sequestrado, apreendido ou sujeito a qualquer medida assecuratória pelos órgãos de segurança pública previstos no art. 144 da Constituição Federal, do sistema prisional, do sistema socioeducativo, da Força Nacional de Segurança Pública e do Instituto Geral de Perícia, para o desempenho de suas atividades. § 1º O órgão de segurança pública participante das ações de investigação ou repressão da infração penal que ensejou a constrição do bem terá prioridade na sua utilização. § 2º Fora das hipóteses anteriores, demonstrado o interesse público, o juiz poderá autorizar o uso do bem pelos demais órgãos públicos. § 3º Se o bem a que se refere o caput deste artigo for veículo, embarcação ou aeronave, o juiz ordenará à autoridade de trânsito ou ao órgão de registro e controle a expedição de certificado provisório de registro e licenciamento em favor do órgão público beneficiário, o qual estará isento do pagamento de multas, encargos e tributos anteriores à disponibilização do bem para a sua utilização, que deverão ser cobrados de seu responsável. § 4º Transitada em julgado a sentença penal condenatória com a decretação de perdimento dos bens, ressalvado o direito do lesado ou terceiro de boa-fé, o juiz poderá determinar a transferência definitiva da propriedade ao órgão público beneficiário ao qual foi custodiado o bem."*

bative standards to seize assets, it seems essential to provide less indeterminate and more objective standards to guide the decision-making process. In relation to the damage caused to the victim, whether it is an individual, a public or private legal entity, or even the community (diffuse or determined), articulation and coordination among the different courts and jurisdictions that interact within the justice system is essential in order to reduce the risk of excess punishment and avoid inconsistencies that can affect the debate of the amount to be paid as damages.

Finally, we recognize that there have been improvements in the measures adopted to economically compensate victims for the crimes committed in the context of the Operation Car Wash. However, it is essential to underscore the need for more technological objectivity and precision when determining the parameters surrounding such compensation to ensure greater rationality and consistency.

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06

# Main Dogmatic Aspects of Corruption Crimes in Brazil Related to Operation Car Wash

*By Adriano Teixeira and Raquel Scalcon**

## 1. INTRODUCTION

This paper aims to present the main dogmatic aspects of corruption crimes in Brazil, especially related to cases that fall within the scope of Operation Car Wash. Institutional, strategic,[1] and economic aspects will not be addressed here. Procedural and enforcement issues will also be left out, as our focus is on the interpretation and judicial application of the rules of substantive criminal law concerning corruption crimes.

Our analysis will focus on cases judged by the two Brazilian superior courts: the Supreme Federal Court (STF) and the Superior Court of Justice (STJ). The dogmatic analysis will be restricted to crimes of corruption *stricto sensu*, that is, passive corruption and active corruption as defined in articles 317 and 333 of the Brazilian Penal Code (CP), which in common law terms means bribery offenses. Thus, other crimes related to corruption—or even included in a broad concept of corruption like the one used by the Transparency International[2]—will be left out, including embezzlement, bidding crimes, fraud, unfair administration, extortion, etc.[3] [4] The only exception made is related to the offense of money laundering, as it is a special case.

The topics presented in this article are pertinent to the main problems of interpretation and application of corruption crimes in Brazil, primarily within the scope of the Operation Car Wash, which are: the concept of public officials for criminal purposes; the concept of an "official act"; corruption and campaign financing; and the *ne bis in idem* problem by corruption and money laundering. However, before delving into these topics, it is important to present an overview of the anti-corruption legal regime in Brazil as well as the general narrative and facts concerning the Operation Car Wash.

* The first author was responsible for the topics 1 to 7 and the second author was responsible for the topic 4.

1 Prado, Mariana Mota/Carson, Lindsey. "Brazilian Anti-corruption legislation and its enforcement: potential lessons for institutional design", Journal of Self-Governance and Management Economics vol. 4(1), 2016, p. 36 and following.

2 https://www.transparency.org/what-is-corruption/#define (accessed on 03/06/2020).

3 Working with this broad sense of corruption Andvig, in: Rose-Ackerman (Hrsg.), Handbook, p. 281; Rose-Ackermann/Palifka, Corruption and Government, p. 9; Horder, Jeremy. Criminal Misconduct in Office: Law and Politics (Oxford Monographs on Criminal Law and Justice), OUP Oxford. Kindle Edition, p. 83.

4 Working with a narrow definition Philips, Ethics 1984, 621 (624); D´Andrade, Journal of Business Ethics 1985, 239 (241 ff); Groenendijk, Crime, Law & Social Change 27 (1997), 207 (210, 218); Kindhäuser, ZIS 2011, 461 (463).

## 2. AN OVERVIEW OF THE ANTI-CORRUPTION LEGAL REGIME IN BRAZIL

Anti-corruption rules in Brazil can be divided into criminal and civil-administrative. Private or commercial bribery are not considered specific offenses under Brazilian law. Depending on the facts of the case, such as the use of fraudulent means, acts of commercial corruption may involve other crimes under Brazilian law, but not the offense of corruption in a narrow sense.

### 2.1 Criminal provisions

In general, apart from environmental crimes, legal entities are not subject to criminal liability according to Brazilian law. Therefore, the offences below are only attributable to individuals. Legal entities may, nevertheless, face civil and administrative liability for offering or paying bribes (see below).

#### 2.1.1 Bribery of public officials

In Brazil, the core of bribery offenses is foreseen in two legal provisions: Article 333 CP on active corruption (*corrupção ativa*); and Article 317 CP on passive corruption (*corrupção passiva*). Promising, offering, or paying bribes ("undue advantages") to public agents to cause them to conduct, omit, or delay an official act is defined as the crime of active corruption under Article 333. The solicitation or accepting of such undue advantages by public agents, due to its function, constitutes the act of passive corruption under Article 317.

#### 2.1.2 Influence peddling

Article 332 CP establishes the punishment for someone who requests, demands, charges, or obtains—for himself or for others—an advantage or a promise of an advantage under the pretext of influencing an act practiced by a public official in the exercise of their job function.

#### 2.1.3 Bribery of foreign public officials

In order to implement the OECD Convention on Combating Bribery of Foreign Officials in International Business Transaction, the Brazilian Penal Code has since 2002 contained Article 337-B, which establishes the offense of active corruption in an international commercial transaction: to "promise, offer, or give, directly or indirectly, an undue advantage to a foreign government official, or to a third-party, to cause him to conduct, moot, or delay an official act". Nevertheless, unlike the North American Foreign Corrupt Practices Act (FCPA), this legal provision is not frequently applied in Brazil.

### 2.2 Administrative and Civil Provisions

#### 2.2.1 Clean Company Act

The Clean Company Act (Law n. 12.846/2013), in which entered into force in 2014, imposes strict civil and administrative liability against legal entities involved in acts against national and foreign government administrations, as listed in its Article 5, including bribery ("promise, offer, or give, directly or indirectly, an undue advantage to a government agent, or to a third party related [to the government agent]"). Yet, unlike the Bribery Act UK, there is not an exculpatory defense for the entity to prove that it had in place adequate procedures designed to prevent persons associated with the organization from undertaking such conduct.
A legal provision of this law, widely applied in practice, disciplines the leniency agreement, which can be signed between the entities and the government (Article 16 of the law). This agreement, whose general pre-

requisite is collaboration with investigations and the administrative process, can exempt the organization from certain sanctions and reduce the amount of others.

#### 2.2.2 Administrative Improbity Law

The Administrative Improbity Law (Law n. 8.429/1992) provides for sanctions applicable to public agents in cases of illicit enrichment in the exercise of mandate, position, employment, or function in the direct, indirect, or foundational public administration. Besides the punishment of public agents, the law also includes sanctions against anyone who "induces or participates in the act of improbity or benefits from the act in any manner, directly or indirectly" (Article 3). The civil sanctions, which are applicable to individuals and corporate entities, may include disgorgement of profits and a ban on participating in contracts with government entities for up to ten years.

## 3. OPERATION CAR WASH: GENERAL NARRATIVE OF FACTS

Despite involving numerous specific and diverse cases, Operation Car Wash underlies a general narrative, which is invariably reproduced in the prosecution pieces and often in the correspondent judicial decisions. This narrative can be summarized as follows: a group of contractors met to form a cartel, with the aim of obtaining contracts with the majority state-owned Brazilian oil company Petrobras. A central figure in the scheme was Paulo Roberto Costa, a former Petrobras director, who acted to favor the cartel companies in contracts with the oil company. The kickback fees were collected and distributed mainly by a money changer named Alberto Youssef. The bribes were distributed among parliamentarians from governing coalition parties—the same coalition that appointed and maintained Costa in his position as a director of the company. This distribution of these illicit funds occurred through several means, but especially two: first, through official campaign donations during election cycles; and second, through front companies that simulated contracts with cartel companies, to justify the transit of money from one end (companies) to the other (intermediaries and parliamentarians).[5]

## 4. CONCEPT OF PUBLIC OFFICIALS FOR CRIMINAL PURPOSES

In Brazil, crimes committed by public officials are regulated in Article 327 of the Criminal Code. As in many other legal frameworks, it contains a narrow classification of public officials, which can be found in the main section of the CP's Article 327, and a broader classification (the 'by equivalence' classification). These classifications are mainly used to determine the universe of public officials who may be involved in the commission of crimes against public administration, such as passive corruption, embezzlement, graft, etc. They also indicate members of the public who could be victims of crimes against public administration. There is, moreover, a debate among jurists and in case law about whether public officials by equivalence can be not only the perpetrators but also the victims of crimes against public administration.[6]

Although interpreting Article 327 of the CP does not initially appear to be too difficult, the very broad range of situations involving

5 STF Inq. 3980.

6 See Quandt, Gustavo de Oliveira. "Algumas considerações sobre os crimes de corrupção ativa e passiva. A propósito do julgamento do 'Mensalão' (Apn 470 do STF)", RBCCrim — Revista Brasileira de Ciências Criminais, v. 106, 2014, p. 192 e 195-196.

crimes against public administration has proven the opposite.[7] There are many reasons for the differences in the way that Article is interpreted. First, the language in the main section dates back to 1940 when the Criminal Code took effect (Decree-Law No. 2.848). The fact that it is eighty years old is not inherently a problem. However, extensive changes in administrative structures since then, especially in the 1988 Federal Constitution and the liberalizing Administrative Reforms of 1995 and 1998, have reduced the machinery of government in various areas. This has resulted in a certain mismatch between Article 327 and the reality of Brazilian public administration.[8]

Second, the language in Section 1, Article 327 of the CP defining a public official by equivalence has changed significantly since 1940 (when it was still the "sole paragraph" of article 327). The changes are not examples of good legislative technique, as the bills on which they were based were amended and lost their coherence during the legislative process[9]. The current language employs ambiguous, polysemic, and overly broad terms that, to a large extent, shifts the task of defining the enormous universe of people equivalent to public officials to the Courts.

Third, in Brazil, a person can only commit a series of crimes against public administration if they are a public official. This has led to a sort of case law expansion in the criminal classification of public officials under the broad and controversial flag of "fighting corruption," which could leave room for impunity.

Having said that, we will now take a closer look at CP Article 327. For criminal purposes, the main section classifies public officials as persons who hold a "public position, job, or function," albeit "temporarily" or "without compensation." The Courts therefore define public officials as persons who: (i) hold elective office in the executive or legislature (mayors, governors, presidents; deputies, senators, etc.); (ii) hold unelected public office accessed by public competition (magistrates, police, prosecutors, and a large swathe of Brazilian state bureaucracy); (iii) work in indirect public administration with formal employment registration (at state banks and state-controlled companies, especially those providing public services ); or (iv) are jurors and electoral clerks who only hold their positions temporarily (while they are carrying out their delegated functions) and are not compensated, etc. It is also important to explain that during the events investigated by Operation Car Wash, we also had political agents (holding elected office) or officers and employees of state-controlled companies, namely Petrobras (in public jobs and positions).

Based on these examples, we can say the main section of CP Article 327 basically defines government officials as persons who have an immediate link with the state in any

7 See Scalcon, Raquel. "O conceito penal de funcionário público no direito brasileiro e alemão: uma proposta de interpretação restritiva do termo emprego público em empresas estatais (artigo 327, caput, do CP)". In: Revista de Estudos Criminais, São Paulo, n. 72, 2019, p. 112-114 and Scalcon, Raquel. "A insuficiente definição do conceito penal de funcionário público no direito brasileiro". JOTA, 2019. (<https://www.jota.info/opiniao-e-analise/colunas/penal-em-foco/a-insuficiente-definicao-do-conceito-penal-de-funcionario-publico-no-direito-brasileiro-24042019>).

*8 Ibid.*

9 See Scalcon, Raquel. Campana, Felipe. "O médico que 'atua no SUS' é sempre o funcionário público para efeitos penais? Uma reflexão necessária em tempos de COVID-19". JOTA, 2020. (<https://www.jota.info/opiniao-e-analise/colunas/penal-em-foco/o-medico-que-atua-no-sus-e-sempre-o-funcionario-publico-para-efeitos-penais-22042020>).

of its forms (through direct administration, indirect administration, or forms with their own legal personality, such as state-owned companies, agencies, or foundations of any of the constituted powers). Section 1 of Article 327, on the other hand, defines persons who are equivalent to public officials for the purpose of criminal law, as well as defining the ties between individuals and the state, i.e., ties that are intermediated by external legal entities separate from the machinery of state.[10]

Section 1 defines a person as equivalent to a public official if they work for either a "quasi-governmental" entity or a "company contracted" to "carry out typical activities of public administration." The first definition usually includes people running NGOs that partner with the state and receive state funding to carry out social projects, who are held to be equivalent to public officials. In Brazil, this type of contract commonly exists to assist in managing the national healthcare system (SUS). Because SUS is a universal and decentralized system, it is hard for the state to manage it without assistance from private-sector organizations. The second definition commonly defines persons who manage companies that hold public service concessions as equivalent to public officials. These companies are controlled by private entities but won government bids and therefore have the exclusive right—not facing any competition—to provide a particular public service (e.g., power transmission and distribution, or collective urban transportation). We can see that the criminal definition of a public official, which is essential to the discussion in this article, is incredibly broad in Brazilian law and sometimes imprecise, placing a large burden on the courts to provide a more specific definition. However, the possible errors committed interpreting Article 327 of the Criminal Code on a case-by-case basis will have direct repercussions on the next definition presented in this work, namely the idea of an "official act," which is essential for the discussion around crimes of active and passive corruption.

10 See Scalcon, Raquel. "O conceito penal..., op. cit., p. 124 ss.

## 5. CONCEPT OF "OFFICIAL ACT"

The concept of an official act itself is not much discussed, either in the scientific literature or in case law. In practice it has been widely conceived in Brazil; unlike, for example, the position recently defended by the US Supreme Court[11]. There are two main issues regarding the statutory interpretation of the corruption crimes defined in the Brazilian Criminal Code: first, the implicit presence of the expression "official act" in the crime of passive corruption; and second, a pertinent link between the official act and the specific duties of the respective public office.

11 Namely in the case McDonnel v. United States (McDonnell, 136 S. Ct. at 2367). The government indicted former Virginia governor Robert McDonnell and his wife on bribery charges for accepting over $175,000 worth of loans, gifts, and benefits from a constituent in exchange for arranging meetings, host- ing events, making phone calls, and contacting other government officials. "[A]n official act…, must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official." Under this narrow definition, the acts alleged against McDonnell-arranging meetings, hosting events, making phone calls, and contacting other government officials-were not, without more, "official acts" under § 201(a)(3). About this decision see in: Tompkins, Michael. "Public Corruption". American Criminal Law Review, 56 (3 Annual Survey of WhiteCollar Crime), 2019, p. 1279; Hellman, Deborah. "Understanding Bribery" In: Alexander/Ferzan (org.), The Palgrave Handbook of Applied Ethics and the Criminal Law, Palgrave Macmillan: Cham, 2019, p. 157.

The crime of active corruption (corrupção ativa)—which focuses on the conduct of the briber—is typified in Article 333 CP: "Offer or promise an improper advantage to a public official, to determine him or her to practice, omit or delay an official act." One can see that the law requires a direct connection between the undue advantage offered or promised by the briber and a future official act by the bribee. It can be said that the quid pro quo element is explicitly expressed in the law.

On the other hand, Article 317 CP describes the conduct of the bribee, which constitutes the crime of passive corruption (corrupção passiva), and does not include the expression "official act": "Request or receive, for yourself or for others, directly or indirectly, even if outside the function or before assuming it, but because of it, undue advantage, or accepting the promise of such advantage." Rather than an official act, the law refers to the (public) function of the bribee (the public official). Hence, we have, at a first glance, a looser connection between the conduct of the briber and the conduct of the public official. We can say that, according to Article 317 CP, the quid pro quo element is more indeterminate, or weaker, in comparison to Article 333 CP. This means that in order to punish a public official for passive corruption, one must prove only that the request or reception of the undue advantage has some connection with his function, but the court must not specify that a specific official act was promised in exchange. It is possible then to punish what is called the "sale of good relations."[12]

Nevertheless, there is a propensity in case law, marked mainly in the Collor case (tried by the STF in 1994 (AP n. 307) and maintained in the judgment of AP n. 470) and the well-known "Mensalão" case, of demanding a connection between soliciting or offering the undue advantage and an individualized official act to be performed by the public official also for the crime of passive corruption.[13]

In the Collor case, the prosecution argued that the defendant—a former president who resigned in a failed attempt to stop his impeachment trial by the Brazilian Senate—had requested cash from a company to finance an election campaign for a federal deputy seat. The accusation was considered unfounded because "there was no indication of an official act that constitutes a transaction or trade with the position he held."

In the judgment of the Mensalão case, the requirement of an official act for passive corruption was maintained, but in a more flexible interpretation. The official act under scrutiny was the various congressional votes in support of government projects. However, at the moment of the promise of a bribe—as well as at the moment of the actual payments—it was not always possible to determine, in advance, which votes the members of congress would cast in favor of the government. In other words, it was not possible to speak of a concrete and determined official act, only of the nature of the acts. Thus, the Federal Supreme Court seems to have considered it sufficient, for the crime of passive corruption, to identify a

12 See Quandt, Gustavo de Oliveira. "Corrupção e a compra de boas relações", in: Leite/Teixeira (org.), Crime e Política: corrupção, financiamento irregular de partidos políticos, caixa dois eleitoral e enriquecimento ilícito, Editora FGV: São Paulo, 2017, p. 67; in Germany this topic is discussed under the expression "Klimapflege", see German Federal Court of Justice (Bundesgerichtshof – BGH) St 49, 275, 281; BGH StV 2007, 637.

13 Wunderlich, Alexandre, in: Reale Júnior (coord.), Código Penal Comentado, Saraiva: São Paulo, 2017, p. 926.

potential official act that does not need to be certain, precise, and determined from the outset.[14]

As stated, the requirement for an official act to punish passive corruption was never effectively abandoned by the courts, but rather relaxed. This flexibility is revealed more clearly in the requirement of relevance between the official act and the formal duties of the public official. This is specially shown in cases of politicians whose attributions and powers are broad and, to some extent, indeterminate.

Already in the Mensalão case, the Federal Supreme Court declared that "the official act must be represented in the common sense, as the laypersons represent, and not in a technical-legal sense." For the purposes of the criminal types of Articles 317 and 333 of the Penal Code, it is sufficient that the bribery act falls within the scope of de facto powers inherent to the exercise of the position of the public agent.[15]

The best example of this statutory interpretation is the case of former President Luis Inácio "Lula" da Silva. As part of the "Operation Car Wash" (Operação Lava-Jato), Lula was found guilty by the lower court of accepting R$3.7 million in bribes ($1.2 million) in the form of improvements to a beachfront house, alleged to be his property made by the construction company Grupo OAS—which in turn received lucrative contracts from the state-owned oil company Petrobras. In the judgment of the appeal before the Regional Federal Court of the 4th Region (TRF-4), the Court declared that:

> "The offer of the undue advantage is not required to be linked to the formal activities of the public officials, as long as it is related to his de facto powers. In the case of a political agent, this power is in fact the ability to appoint or maintain public servants in high-level positions in the direct or indirect structure of the Executive Branch, influencing or directing their decisions, as they may serve shady interests, notably financial, as recognized by the STF in criminal action 470. 48. Hypothesis in which the passive corruption perpetrated by one of the accused differs from the standard of the processes already judged related to "Operation Car Wash," not requiring the demonstration of their active participation in each one of contracts. 49. The maintenance of an unlawful fundraising and bribery distribution mechanism does not result in the practice of several crimes of corruption, when the role played by the agent was that of leadership and maintenance, without acting in individual acts of contracting companies, negotiating, payment and distribution/receipt of bribes in each contract."[16]

This flexibility was radicalized in a 2018 ruling by the Superior Court of Justice (STJ), which declared that the merchandising of actions or omissions that do not make up the bundle of formal attributions of the public official can also constitute the crime of Article 317 CP.[17] The facts were rather simple: one of the defendants offered money to

14 Quandt, Gustavo de Oliveira. "Algumas considerações..., op. cit., p. 207.

15 STF, APN 470.

Likewise the German Federal Court of Justice (Bundesgerichtshof – BGH): "According to the established case law of the Federal Court of Justice, an official act exists in any case if the act is one of the official duties of the official and is carried out by him in an official capacity. An official act in breach of one's duty is committed not only by the person who performs an act that falls within the scope of his official duties, but also by anyone who misuses his official position to perform an act that is prohibited by the official regulations and which enables him to take up his official position. " (Eine Diensthandlung liegt nach der gefestigten Rechtsprechung des Bundesgerichtshofs jedenfalls vor, wenn das Handeln zu den dienstlichen Obliegenheiten des Amtsträgers gehört und von ihm in dienstlicher Eigenschaft vorgenommen wird. Dabei begeht eine pflichtwidrige Diensthandlung nicht nur derjenige, der eine Handlung vornimmt, die in den Kreis seiner Amtspflichten fällt, sondern auch, wer seine amtliche Stellung dazu missbraucht, eine durch die Dienstvorschriften verbotene Handlung vorzunehmen, die ihm gerade seine amtliche Stellung ermöglicht.) - BGH, 6 StR 52/20, Beschluss v. 07.04.2020, HRRS 2020 Nr. 650.

16 TRF-4, ACR n. 5021365-32.2017.4.04.7000.

17 Cf. Teixeira, Adriano/Leite, Alaor/Greco, Luís. "A amplitude do tipo penal da corrupção passiva - Comentários ao REsp n. 1.745.410/SP julgado pelo Superior Tribunal de Justiça". Jota 2018, 26.12.2018.

See also: REsp n. 1.745.410.

the other defendants (employees of a concessionaire company), for the use of area to load and unload aircraft at São Paulo International Airport, in order to facilitate the illegal entry of foreigners in Brazil. As soon as the beneficiaries disembarked the aircraft, the employees were responsible for "escorting them" through the restricted areas of the airport, in order to avoid passing through the inspection area of the Brazilian authorities. The premise that supports the prevailing vote is as follows: contrary to what occurs in the crime of active corruption, the crime of passive corruption "does not require proof that the improper advantage requested, received, or accepted by the public official is causally linked to the practice, omission, or delay of an 'official act'."

Notwithstanding, the Supreme Federal Court maintains the requirement for a nexus between the official agent's official act and its pre-established duties and powers. Thus, the Court added in a decision within the scope of the "Car Wash Operation":

> "In this sense, the jurisprudence of this Supreme Federal Court considers that the perfect subsumption of the conduct to crime description requires the demonstration that the favor negotiated by the public officials is in the list of the attributions foreseen for the function that he exercises. [...] It is essential to the configuration of the illicit that the improper advantage requested, received or promised and accepted by the public officials serves as a consideration for the possibility of his / her vitiated performance within the spectrum of attributions of the public function that he or she exercises. Thus, even if the public officials has requested, received or accepted a promise of undue advantage from a third party, if the consideration paid is impossible to perform, as it is outside the attributions of the public function that he exercises or will exercise, the crime is not configured, respecting the postulate of strict legality that, as stated, prevails in the Brazilian Criminal Law, without prejudice to the fact that such conduct finds adequate subsumption in another crime description."[18]

The interpretation of the expression "official act" nonetheless remains ductile, especially in the case of political agents, like members of Congress. In this sense, an "official act" comprehends more than a congressional vote. It includes "the parliamentarian's power to nominate someone for a particular position, or to give him political support to remain in it."[19] This broad understanding of the notion of an official act, especially in cases of political mandate holders, can create problems of interpretation and application of the law, particularly in cases involving campaign financing, which will be analyzed in the next topic.

## 6. CORRUPTION AND CAMPAIGN FINANCING

In Brazil, illicit campaign financing is not itself a crime. However, in specific circumstances, an illegal campaign donation can be considered a bribe. This is the case when an official behavior—a counterpart—by the public officials in favor of the briber is proven. It is in this context that Federal Supreme Court Justice Luís Roberto Barroso stated: "The electoral donation itself is not an illegal act. The indication of passive corruption is not the mere electoral donation, but the performance of the Parliamentarian in favor of OAS (a contractor company), which demonstrates the plausibility of the accusatory thesis that the electoral donations made by this contractor and the requests for electoral donations directed to it are counterpart to the parliamentarian's action in his favor."[20]

18 STF, APn. 1.003. See also STF, AP n. 996.

19 STF, AP n. 996. See also STF, Inq. n. 3980.

20 STF, Inq. n. 4.141.

On the other hand, the question whether legal campaign donations can be considered bribes is more delicate.[21] Brazil has an essentially private campaign financing system. Before the Direct Action of Unconstitutionality (ADI) n. 4.650 judged by the STF, even large corporations could make donations to candidates and political parties. Obviously, private electoral donations are not done unselfishly. At some level, donors seek something in return, whether through certain public policies or concrete measures by the political agent in the future. Up to this point, such an exchange should not—and cannot—be seen as corruption in a legal sense. However, the situation changes if the donor's expectation of something in return becomes more concrete and personal. Then we move into the realm of a quid pro quo,which is at the core[22] of corruption crimes.[23]

21 About this topic in US Law see Hellmann, Deborah. "Liberty, Equality, Bribery, and Self- Government: Reframing the Campaign Finance Debate" in: Kuhner/Mazo (ed.), Democracy by the People: Reforming Campaign Finance in America, Cambridge University Press, 2018, p. 68-69; idem, "A Theory of Bribery", Cardozo Law Review, 2017, p. 1981 ss: "A contribution in excess of current legal limits is, almost by definition, no longer a political act, as it violates the explicit rules of politics. But the contribution within legal limits is not so easy to classify."

22 Schünemann, Bernd. "Die Unrechtsvereinbarung als Kern der Bestechungsdelikte nach dem KorrBekG" In: Dannecker, Gerhard et al. (Org.). Festschrift für Harro Otto. Colônia: Carl Heymanns, 2007. p. 777 ss; Greco, Luís/Teixeira, Adriano, Aproximação a uma teoria da corrupção, in: Leite/Teixeira (org.), Crime e Política: Corrupção, financiamento irregular de partidos políticos, caixa dois eleitoral e enriquecimento ilícito, Editora FGV: São Paulo, 2017, p. 32. See also US Supreme Court McDonnel v. United States, p. 22: "Section 201 prohibits quid pro quo corruption—the exchange of a thing of value for an "official act".

23 Leite, Alaor/Teixeira, Adriano, Financiamento de partidos políticos, caixa dois eleitoral e corrupção, in: Leite/Teixeira (org.), Crime e Política: corrupção, financiamento irregular de partidos políticos, caixa dois eleitoral e enriquecimento ilícito, Editora FGV: São Paulo, 2017, p. 135-165.

This idea seems to have been captured by the STF. In AP n. 996, a case involving a federal deputy and the first Supreme Court conviction under Operation Car Wash, the Court admits that, in theory, a legal donation can be a kickback. However, it rejects that conclusion in the specific case for evidentiary reasons—the defendant was convicted of corruption because the bribe was paid in other ways. The court appears to build a presumption of legality around official legal donations, which can only be dismissed by robust prosecution evidence and arguments. This is clearly expressed in the vote of Justice Gilmar Mendes:

> "I think that, in theory, donations accounted for may even be an undue advantage, for purposes of the penal type of corruption (Article 317 of the CP). The politician cannot make his mandate available to anyone who is willing to pay the price, via [licit or illicit contributions] [...] In conspicuous donation, it is necessary for the candidate to commit himself, in the exercise of his mandate, to practice illegal acts, or to allow illegal acts to be performed, due to the donation. This is because, at least to a large extent, electoral donations serve precisely so that those who support the candidate's program can contribute to its realization. [...] A donation made in the open has a veneer of legality, imposing a special probative burden on the prosecution."

## 7. CORRUPTION AND MONEY LAUNDERING – THE *NE BIS IN IDEM* PROBLEM

In the scope of the Car Wash operation, it is common for imputations to contain crimes of criminal organization ("*organização criminosa*") (Article 2o, Law n. 12.850/2013) and money laundering (Article 1o, Lei 9.613/1998), in addition to crimes of corruption. The problem is that in many charges, the act of receiving and giving the bribe in a

hidden or disguised way is seen as money laundering, although it constitutes the exact description of the crime of corruption itself. This could therefore represent a conflict with the prohibition of material double jeopardy—the *ne bis in idem* principle. This problem can also be seen through the lens of the so-called self-money laundering—money laundering by the perpetrator of the previous crime, which also causes friction with the *ne bis in idem* principle.[24]

In general, the STF (and the STJ) does not exclude the possibility of punishing self-laundering acts, relying on the absence of a legal prohibition. However, in the event that acts of corruption and laundering coincide, the court requires proof of autonomous acts of laundering, in addition to the act of receiving or paying the bribe, in order to punish both crimes (corruption and money laundering).

This position was signed in the judgment of one of the appeals in the "Mensalão" case, by Justice Luís Roberto Barroso:

> "The receipt of bribes constitutes the consummate mark of the crime of passive corruption, in the objective form to receive, being indifferent that it is practiced with element of concealment. Self-laundering presupposes the practice of autonomous concealment of the proceeding of the previous crime (already consummated), not verified in the hypothesis.[25]

This understanding has been confirmed in the judgment of the cases of Operation Car Wash:

> "In the wake of the understanding signed by the Plenary of the Supreme Federal Court at the time of the judgment of AP 470, if even by an intermediary the mere receipt of the benefit resulting from the merchant of the public function is not a conduct apt to configure the crime of money laundering, such a conclusion, for logical reason, it deserves to applied to the conduct of the public officials who receives the undue remuneration."[26]

A similar sense can be found in precedents of the STJ, like this one:

> "Although the typification of money laundering depends on the existence of an antecedent crime, self-laundering is possible—that is, the simultaneous imputation, to the same defendant, of the previous crime and the crime of laundering—, provided that diverse and autonomous acts of that person are demonstrated. That makes up the first crime, a circumstance in which the phenomenon of consumption will not occur."[27]

The establishment of this delimitation criterion—the existence or not of autonomous acts in relation to the receipt of the bribe—should be praised. However, it is expected that the STF and the STJ will endeavor to give more precise outlines to this criterion in future cases, clarifying what exactly such "autonomous acts" would be.

## 8. CONCLUDING REMARKS

With the strengthening of prosecuting bodies, such as the Public Ministry and the Federal Police, several important cases of corruption have been brought to justice in recent years in Brazil, especially after Operation Car Wash. Some of these cases are difficult to solve, not only from the point of view of evidence, but also from the

24 Horta, Frederico/Teixeira, Adriano. "Da autolavagem de capitais como ato posterior coapenado: elementos para uma tese prematuramente rejeitada no Brasil", Revista de Estudos Criminais n. 76, 2019, p. 7-50.

25 STF, AP n. 470 EI.

26 STF, AP n. 996. See also: STF, AP n. 1.003.

27 STJ, AP n. 856.

application of the rules, that is, the interpretation of the norms in light of the concrete case. We are talking about conducts that fall between the legal and illegal realms, especially in cases of political corruption, involving parliamentarians and legal or illegal campaign financing. It is expected that the superior courts, which are gaining ever more frequent contact with these types of cases, will establish a consistent, clear case law that can guide the lower courts and guarantee the observance of the rule of law in Brazil.

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07

# Responsibility for Compliance and Omission in the Car Wash Operation

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## INTRODUCTION

The police operations known as "Lava Jato" and "Mensalão" (AP 470) are two iconic cases that consolidated, for better or worse, new case law specific to situations of economic or "corporate" crimes. The typical definition of a crime, created for homicide and other "traditional" crimes, has evolved to incorporate a new phenomenon: omission, or failure to act, is now a core element in the Economic Criminal Code. This shift is intrinsically linked to another current phenomenon that these two operations helped introduce: the criminal responsibility of the Compliance Officer. This article describes this process and criticize it in two steps: First, we will analyze the dogmatic construction of the institution of omission (failure to act) as a crime, and its application to Operação Lava-Jato (Operation Car Wash), so that the results of this analysis may be critically compared to the dogmatic legacy of the Mensalão operation with respect to the criminal responsibility of the Compliance Officer. By the end of the analysis it should be clear that, despite the recurring and consolidated use of case law, we have yet to succeed in determining the material substrate upon which to determine omission as a corporate crime.

## 1. A BRIEF ANALYSIS OF THE DOGMATIC CONSTRUCT OF THE INSTITUTION OF OMISSION AS A CRIME AND ITS APPLICATION TO "OPERAÇÃO LAVA JATO"

The increasing complexity of modern life, especially in the economic sphere, created an extremely fertile field for crimes that are difficult to determine, especially where criminal accountability is concerned[3]. According to Renato de Mello Jorge Silveira, economic criminal law "has its own peculiarities, reflected in numerous spheres"[4]. Economic crimes are thus the new paradigm for building a modern criminal code, replacing the traditional one based on the crime of homicide.

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3 PIMENTEL, Manuel Pedro. Direito Penal Econômico. São Paulo: Revista dos Tribunais, 1973, p. 4-5.

4 SILVEIRA, Renato de Mello Jorge. Direito Penal Empresarial: a omissão do empresário como crime. Belo Horizonte: D'Plácido, 2016, p. 34.

If the mission of criminal law is to protect legal assets[5], economic criminal law generally starts from a supra-individual basis. Thus it differs from traditional criminal law where the protected entity is generally an individual. Because of this, as a rule, corporate crimes require one to rethink the functionality of criminal law.[6]

According to Roberto Veloso, a risk society displays four main characteristics: 1) the change of dangers in relation to past periods, from natural disasters and plagues to handling nuclear energy and hazardous chemicals, among others; 2) there is a subjective feeling of insecurity, which brings with it a growing popular demand for additional types of crimes (especially those associated with abstract dangers); 3) psychological resistance to unforeseeable circumstances and an increase in infractions related to dereliction of duty and crimes of omission; and 4) greater complexity in relationships of responsibility, verified in modern society[7].

Thus, within this "organized irresponsibility"[8], criminal law experiences at the end of the twentieth century an evolution that starts with widespread use of crimes of danger, blank criminal standards, to primarily, the criminalization not only of specific actions, but also of omission or the failure to act.[9]

According to Cláudio Brandão and Leonardo Siqueira:

> The General Portion of the Brazilian Criminal Code, arising from Law 7,209/84, adopted in general terms the finalist theory of action, as per the positions defended at the time by the individual coordinating this reform. This makes studies on this theory of particular relevance for the interpretation of the laws in the criminal code.[10]

5 ROXIN, Claus. A proteção de bens jurídicos como função do Direito Penal. Porto Alegre: Livraria do Advogado, 2006, p. 39.

6 SILVEIRA, Renato de Mello Jorge. Direito penal supra-individual: interesses difusos. São Paulo: Revista dos Tribunais, 2003, p. 143. According to ROBERTO VELOSO, "Economic Criminal Law is one of the growing areas of Criminal Law, an indication that the corresponding rules and law are occupying spaces heretofore reserved exclusively to other areas of the nation's legal framework. This does not mean that civil or administrative laws and regulations are being revoked, as standards overlap and Criminal Law describes as crimes behaviors other branches already consider infractions. Thus individuals, formerly liable for their behavios only in the administrative or civil spheres, are now criminally liable and subject to prison sentences". (VELOSO, Roberto Carvalho. Crimes tributários. São Paulo: Quartier Latin, 2011, p. 57). According to Renato Segundo Renato Silveira, the "Current moment in Economic Criiminal Law is symptomatic. Numerous criticisms have been made. Many of the areas where friction exists have to do with the structure of this new Criminal Law. The starting point of the analysis states that Economic Criminal Law is supra-individual or, in other words, diffuse. This means there are not necessarily recognizable victims, nor real damage to the protected legal assest. The typical structure being critiqued, and the dubious need to expand the penal handling of these vases, have led to a lot of controversies. Among many positions, one defends that criminal penalties be limited to so-called nuclear Criminal Law, and that these new fields be addressed by others fields of Law. Nevertheless, there is one irrefutable consideration: the development of Economic Criminal Law is the Criminal Law of the powerful. (SILVEIRA, Renato de Mello Jorge. Direito penal econômico como direito penal de perigo. São Paulo: Revista dos Tribunais, 2006, p. 22-23)

7 VELOSO, Roberto Carvalho. Crimes tributários. São Paulo: Quartier Latin, 2011, p. 29-30.

8 SCHÜNEMANN, Bernard. Cuestiones básicas de dogmática juridico-penal y de política criminal acerca de la criminalidad de empresa In Anuário de Derecho Penal y Ciencias Penales. Madrid: Ministério de Justicia, 1988, fascículo II, p. 533.

9 SILVEIRA, Renato de Mello Jorge. Direito Penal Empresarial: a omissão do empresário como crime. Belo Horizonte: D'Plácido, 2016, p. 49.

10 BRANDÃO, Cláudio; SIQUEIRA, Leonardo. Kai. Anticipating guilt due to omission or failure to act:

According to Hans Welzel, the father of finalism, omission and action are species of the genus conduct. Criminally relevant omission assumes the violation of a mandatory law, and also that the expected action is possible and within the full control of the perpetrator. Thus, omission does not mean merely doing nothing, but rather, it means not doing something that the perpetrator could have done and that is subordinate to the final power of an individual.[11] According to Welzel, omission is only relevant in the context of the failure to perform a specific final action by the subject required to do so.

The law describes omissions that are harmful to society (proper crimes of omission), or creates criteria for assigning certain outcomes to an individual who has the duty to avoid them (improper crimes of omission). Guilherme de Souza Nucci states that in the case of proper crimes of omission, a behavior—included in a particular type of crime—involves criminal failure to act, which may or may not lead to a naturalistic outcome. On the other hand, in improper crimes of omission, failure to act consists of violating a duty to act imposed by law, which contributes to the outcome.[12]

As an example, Enrique Gimbernat Ordeig mentions the recurring example of parents (obligation stipulated in law) or the nanny (obligation stipulated in a contract or agreement) who fail to feed a child under their care, resulting in the child's death. In these cases, the law and the contract are the basis for criminal responsibility for improper omission[13], as the duty to act (legal and contractual) exists, as does the possibility to act to avoid the [undesired] outcome.

The Theory of Functions is often used to add material elements to underpin a duty to ensure compliance, whereby the position is based on two criteria: the first is the duty to protect legal assets against any attack whatsoever, and the second is the need for the person holding such position to control any sources of risk that might have existed previously. Thus, the special duty to protect a given legal asset emerges from a legal rule or a phatic assumption. The duty to control a source of risk results from interference or mismanagement, and special trust-based relationships between the individual committing the omission and the legal asset. The position of protection is referenced to all of the risks to which the legal assets within his or her span are exposed, and the duty is the result of the functional relationship between the person committing the omission and the victim. The position of oversight has to do with the duty to oversee and inspect certain sources of risk to which the legal assets are exposed[14].

The duty to act is thus the result strictly of the relationship between the person committing the omission and the legal asset, and may be based on: i) a legal rule; ii) a previous dangerous or risky action; or iii) a special loyalty relationship. Seen through this lens, Article 13, paragraph 2 of the Brazilian Criminal Code has a general equiv-

omission in the legal framework and the enforceability of the Brazilian Criminal Code. In: Católica Law Review. Lisbon, vol. 1, # 3, page 43-70, November 2017, page 54.

11 WELZEL, Hans. Derecho Penal Alemán. Santiago do Chile: Jurídica de Chile, 1997, p. 237-242

12 NUCCI, Guilherme de Souza. Código Penal Comentado. Rio de Janeiro: Forense, 2015, p. 123.

13 GIMBERNAT ORDEIG, Enrique. Estudios sobre el delito de omisión. Buenos Aires: B de F, 2013, p. 133.

14 TAVARES, Juarez. Teoria dos Crimes Omissivos. São Paulo: Marcial Pons, 2012, p. 316.

alence clause that extends omissive criminal responsibility to those who a) are, by law, responsible for care, protection or oversight; b) assumed the responsibility to avoid the outcome in some other way; or c) led to the possibility of the undesired outcome with his or her prior behavior.

According to the majority of the jurisprudence, according to the functionalist theory of action, the material basis for considering the executive as the guarantor of crimes committed in the performance of corporate activities stems from the concept of the corporation as a source of danger for society. According to Heloisa Estellita, "the licit creation of a source of danger implies in the corresponding duty to make sure these dangers do not result in illicit outcomes."[15] In a similar vein, Roberto Carvalho Veloso claims that it is undeniable that a corporation is a risk generator, especially in post-industrial society, and executives sin when they fail to admit the need to control such risks, placing fundamental legal assets, such as health and the environment, in danger.[16]

However, merely holding the position of enforcer (typically the compliance officer) is not sufficient to assign liability for all of the damages resulting from omission in the performance of corporate activity. This is because the very fact that the omissive party has the physical and cognitive ability to act to avoid the outcome is embedded in the very concept of legally relevant failure to act (omission). In other words, the individual in question recognized the illegality and deliberately omitted him- or herself. We offer a concrete example analogous to the situation described above: one cannot punish the CEO of a multinational oil company for wrongful omission if a pipeline burst, unless one can demonstrate that the conscious violation of the duty of care was involved. Such a case has been reviewed by the Federal Supreme Court, which decided to deny a criminal suit with this object[17].

However, we frequently see cases where executives or political leaders are accused and found guilty of crimes of omission, including corruption, committed by others under the allegation that they—the executives or political leaders—had the duty to act to avoid the criminal outcome caused by the corporate activity. This characterizes the undesirable objective criminal responsibility, not admitted within the Brazilian legal framework, as the position of enforcer is merely one of the elements that enable assigning to an individual the outcome of improper omission. It must also involve an actual crime (compliance with the constitutional mandate of legality), the physical-cognitive capacity to act, and the legal nexus of causality stemming from violation of a duty to care or oversee, applied in the theory of objective imputation.

15 ESTELLITA, Heloisa. Responsabilidade penal de dirigentes de empresas por omissão: estudo sobre a responsabilidade omissiva imprópria de dirigentes de sociedades anônimas, limitadas e encarregados de cumprimento por crimes praticados por membros da empresa. São Paulo: Marcial Pons, 2017, p. 117-118

16 VELOSO, Roberto Carvalho. Crimes Tributários. São Paulo: Quartier Latin, 2011, p. 32.

17 "Habeas Corpus. 2. Objective criminal responsibility. 3. Ennvironmental crime as per Article 2 of Law 9,605/98. 4. Harmful event: leak in a Petrobras pipeline. 5. Absence of causal nexus. 6. Responsibility for damages to the environment cannot be directly attributed to the Petrobras executive. 7. The absence of management and operational opportunities to inspect the state of repair of the 14 thousand kilometers of pipeline. 8. No cause and effect relationship configured between the alleged criminal agent and the fact. 8. Differences between the behavior of corporate executives and the company business. 9. The issue of assigning the same risks to both the individual and the legal entity. 11. Known Habeas Corpus." (STF, Habeas Corpus n.º 83.554-6/PR, 2ª Turma, Rel. Min. GILMAR MENDES, J. 16.05.2005)

Where "Operação Lava Jato is concerned, the court that convicted Presidente Luiz Inácio Lula da Silva use as conviction argument the fact that he had the power to choose the c-level positions of one public company, in which the crimes were committed. That fact indicates that this Brazilian court, despite not being able to be characterized as criminal liability by omission, could be characterized as "objective liability", what according Brazilian law system would not be allowed because it would harm the "culpability principle", which is part of the fundamental principles of the Brazilian constitucional.

The Reporting Judge of the Regional Federal Court for the 4th Region claimed that the agents had conspired for the same purpose and were fully aware of the illegality of their actions. The role of the former president was stressed, assigning to him "not only the determination to appoint people to fill key positions, but also criticizing him for failing to act to staunch the criminal activity. On the contrary in fact, rather than stopping such criminal activity, he supported it." The ruling judge justified the conviction because "the appointment of officers to the state oil company was within the span of his political power." The magistrate then reminded all of the foundation used in the Mensalão case, in the theory domain over the facts, already analyzed in this document.[18]

18 According to the ruling: "In fact, agents conspired for the same purpose and were fully aware of the illegality of their actions. The role of the former President was stressed, assigning to him "not only the determination to appoint to key positions, and also criticising him for lacking the will and failing to act to staunch the criminal activity. On the contrary, rather than stopping such criminal activity, he supported it." The appointment of executives to the state oil company was fully within the span of his political power. Company officers such as Paulo Roberto Costa, Renato de Souza Duque, Nestor Cerveró and Jorge Luiz Zelada played a role in keeping the criminal machine in motion. Criminal responsibility of those who do not partake in the final act of corruption, as in this case, is hotly debated in legal doctrine and jurisprudence. For all those judged one must reference the iconic ruling on Criminal Case 470/STF (Mensalão). Based on that precedent, I make use of the considerations made by the Honorable Justice Rosa Weber: When there are several possible agents, one must decide the causal weight or responsibility of each of them for the crime they are charged with. otherwise, it would be impossible to apply the monist theory of article 29 of the Criminal Code. However, the situation is different when it comes to the typical behaviors practiced by a legal entity. Thus it becomes necessary merely to check the bylaws or articles of incorporation or, in the absence of such documents, the factual reality of who had the power of command in the sense of directing corporate activities. In a not very good comparison, when it comes to war crimes, one generally punishes the strategist generals who, from their offices, plan the attacks, and not the lowly soldiers to carry out their orders within the subservience inherent to a relationship of subordination. Likewise in corporate crime, accountability or blame must, as a rule, be placed on the managers, the controlling entity that defines limits and the quality of actions to be performed by others. According to Raul Cervini, 'Por consiguiente, para la imputación es decisivo el dominio por organización del hombre de atrás. Su autoria mediata termina solo em aquel punto en el que 'faltan los presupuestos precisamente en esse dominio por organización" (El Derecho Penal de La Empresa Desde Uma Visión Garantista, Ed. Bdef, Montevideo, 2005, p. 145). Actually the theory of domain over the facts is a result of Hans Welzel's finalist theory. The purpose of criminal conduct lies in whomever has control and has power over the outcome. Thus, in a crime using the corporation, the perpetrator is the manager or managers who could have avoided the outcome. Him (or her) who has the power to desist and change the path of the criminal act is dominant. An order from the person in charge would be sufficient for there to be no criminal behavior. Therein lies the final action. Thus, what must be checked in the case at hand is who had the power to control the organization and decide on committing the crime. If the response is negative, then there is no authorship." (TRF-4. Apelação Criminal nº 5046512-94.2016.4.04.7000/PR. Oitava Turma. Autor: Ministério Público Federal. Réus: Luiz Inácio Lula da Silva e outros. Relator: Des. João Pedro Gebran Neto. Porto Alegre, 24 de janeiro de 2018. DJe, Porto Alegre, 6 fev. 2018, p. 198)

According to the conviction ruling, criminal

responsibility was assigned to the former president as he was responsible for appointing the officers of a given state-owned company and he was responsible for failing to avoid criminal actions. In other words, a clear hypothesis of objective responsibility.

The former president's responsibility to appoint people to certain positions in a state-owned company should not be the basis, in and of itself, for his criminal responsibility. The situation would be different had the former president conspired with the company's employees in the commission of a crime. However, the decision was not based on this.

Regarding the former president's failure to stop the criminal venture, it is curious that, in the convicting ruling, both the charges and the sentence passed by the lower court refers to crimes of commission and not of omission. There is no apparent justification to reprehend the former president's failure to act. Here, there is confusion between the object of the sentence and the ruling. It is important to point out that failure to act, in and of itself, is criminally relevant only if there is a situation characterized as a crime, the possibility of taking action (physically and cognitively), objective causality, and the position as ensurer—the position of having responsibility for compliance. One cannot forget here that all of these elements are required to characterize improper omission. One cannot limit oneself to a typical situation and the position of ensurer, which is what we see routinely in the case of company officers, under penalty of characterizing objective criminal responsibility.

While the so-called Mensalão was underway in Brazil, there was conceptual confusion between the theory of domain over the facts and the imputation due to failure to act. At the time, this theory was used to justify criminal accountability using the argument that certain agents knew of the criminal facts. However, the theory of domain over the facts has the single purpose of differentiating author from participant, and is not intended to expand the scope of criminal accountability. The way the theory was used in the Mensalão case in Brazil characterizes objective criminal responsibility.

When it comes to Operation Car Wash, at a given moment the ruling convicting former President Luiz Inácio Lula Da Silva used the former president's responsibility for appointing the officers of a state-owned company allegedly guilty of illicit acts. Although this is not improper omissive criminal responsibility, it does characterize clear objective criminal responsibility incompatible with the principle of culpability existing in our current criminal legal framework.[19]

## 2. CRIMINAL RESPONSIBILITY OF THE COMPLIANCE OFFICER (CO) DUE TO OMISSION OR FAILURE TO ACT: THE DOGMATIC LEGACY OF "OPERAÇÃO LAVA JATO" AND AP 470 (MENSALÃO)

While compliance has existed in Brazil since the 1990s, it is only in recent years that it has come to the attention of academics and the corporate world in a more consistent way. The reasons for this interest are well known. On one hand, Law 12,683 of July 9, 2012, which amended the Anti-Money Laundering law (Law 9,613 of March 3, 1998), considerably expanded the sectors required to have compliance programs, understood as a set

19 Regarding this topic, see: FLORÊNCIO FILHO, Marco Aurélio. Culpabilidade: crítica à presunção absoluta do conhecimento de lei penal. São Paulo: Saraiva, 2017.

of internal policies, procedures, and controls to prevent money laundering.[20] Furthermore, as we called attention in the previous section, the so-called Operação Lava Jato and AP 470 (Mensalão) also called attention to the debate on the criminal responsibility of compliance officers (CO), and debates on the theory of domain over the facts. Law 12,846 signed on August 1 2013 (also known as the Anti-Corruption Law, Clean Company Law, Administrative Probity Law and "Corporate Probity Law") completed this cycle. To a large extent, it was enacted to implement in Brazil measures already known and enforced in countries such as the United State of America. A greater innovation in compliance was the possibility that compliance programs could have a positive impact on enforcing the law and the objective responsibility of the corporation in the event of corruption practiced in its interest and behalf. This law became better known as a result of the practical case known as Operação Lava-Jato. This operation led to a wave of related domestic and international investigations based on anti-corruption laws, which contributed significantly to greater awareness of the importance of the new law.[21][22]

We could expand the list of examples—such as anti-trust compliance, tax compliance, and other areas of compliance—whose importance has grown in recent years. However, this brief outline of the current scenario is sufficient to exemplify the growing importance and complexity of compliance. Even if compliance has been thoroughly debated from the practical point of view, and slowly companies in all types of businesses in Brazil have found room for compliance, the theme has not yet grown in importance in academic debates. In particular, the theme of criminal compliance needs further definition.

To a large extent, it would not be wrong to state that the emergence of criminal compliance in Brazil is the fruit of a complex process of structural changes in the institutional implementation of criminal control. At first glance, there seems to be no question about this in Brazil: Compliance as a term emerged in the 1990s, a period during which a considerable volume of legal doctrine (confirmed by the intense production of laws in this area during and after this period), marked the start of the expansion of Brazilian criminal law[23]. In fact, while the concept of criminal compliance emerged in Brazil in the nineties, it is only in recent years that the theme has been the object of legal studies. Formally, the concept acquired

20 For the changes introduced by the new law see: Saavedra, Giovani Agostini. Compliance na Nova Lei de Lavagem de Dinheiro. In: Revista Síntese – Direito Penal e Processual Penal. Ano XIII. No. 75. Ago-Set. 2012. Pp. 22-30 e Saavedra, Giovani Agostini. Compliance e Prevenção à Lavagem de Dinheiro: sobre os reflexos da Lei no. 12.683/2012 no Mercado de Seguros. In: Revista de Estudos Criminais. No. 54. Jul./Set. 2014. Pp. 165-180.

21 In this regard, see: Costa, Helena Regina Loba da; Araújo, Marina Pinhão Coelho. Compliance e o julgamento da APn 470. In: Revista Brasileira de Ciências Criminais. Ano 22. No. 106. Janeiro-Fevereiro/2014. Pp. 215-230.

22 Leite, Alaor. Domínio do fato, domínio da organização e responsabilidade penal por fatos de terceiros sobre os conceitos de autor e partícipe na APn 470 do STF. In: Revista Brasileira de Ciências Criminais. Ano 22. No. 106. Janeiro-Fevereiro/2014. Pp. 47-90.

23 In this regard, see: Campos, Marcelo da Silveira. Crime e Congresso Nacional: uma análise da política criminal aprovada de 1989 a 2006. São Paulo: IBCCRIM, 2010. Pp. 188 e ss. "Expression" was deliberately used in quotes and the author's research suggests that, preliminarily, this phenomenon is cyclical and does not seem to be merely a characteristic of this period. Greater or lesser interest in criminal control by the State depends of numerous factors and cannot be easily described in this brief article. This does not invalidate the fact that, since the early nineties, there has been an increase in the State's interest in Criminal Law in many countries around the world, including Brazil. It is also interesting that in this process there has been a growing interest in criminalized corporate and political activity.

legal-criminal importance with the signing of Law 9,613 of March 3, 1998, and National Monetary Council Resolution 2,554 of September 24, 1998. Since then financial institutions and insurers in general have had the duty to report suspect transactions that might be money laundering (the Duties of Compliance), and create internal control systems that avoid the practice of money laundering, and foster the fight against terrorism, among other conducts that could place at risk the integrity of the financial system.

The word "compliance" is a literal translation of being compliant. This simple translation however, hides one of the largest difficulties in conceptualizing the term. It is a relational concept whose meaning has only recently been uncovered by an analysis of the object with which it is related, it being obvious that being "compliant" means complying with something. Compliance establishes a relationship between the "status of compliance" and a certain "behavioral orientation." If this behavioral orientation is a legal standard, one is in the face of legal compliance, whose designation varies depending on the area of law in which the standard to be followed is inserted. This reflection, which initially may appear simple, tries to explain some of the problems of its conceptual limitations: one must define the meaning of (1) "state of compliance," and the normative nature of the (2) behavioral orientation so that one may, at least minimally, kick off reflections on criminal compliance. Thus, compliance is a dynamic state of compliance with normative behavioral guidelines imbued with legal importance due to contract or law. It is characterized by the commitment to create a complex system of internal policies, procedures, and controls that demonstrate the company is making all efforts to "ensure" that it maintains its state of compliance. Given the basic concept, we now define the concept of criminal compliance[24].

To a large extent, the study of criminal compliance blends with the study of economic criminal law, and thus numerous authors attempt to differentiate the spectrum of issues of each of these branches of research[25]. In fact, criminal compliance would not mean anything novel if the concept were restricted to the elements already found in national and international debates of economic criminal law. On the other hand, the emergence of this new phenomenon seems to be linked directly with the emergence of economic crimes and the criminal prosecution of executives and financial institutions. It was only when corporate and financial institution managers were criminally investigated and prosecuted that the need for criminal prevention within these activities became necessary[26].

Thus, the first characteristic associated with the term "criminal compliance" is prevention. Unlike traditional criminal law, where crimes are analyzed *ex post facto* or, in other words, acts of commission or omission that have already directly or indirectly violated a legal asset covered by criminal liability, criminal compliance addresses this same phenomenon from an *ex ante* perspective, or the analysis of internal controls and measures to avoid criminal prosecution of the corporation of financial institution. Precisely because of this, the goal of criminal compliance has been described as a "reduction or

24 Rotsch, Thomas. Grundlagen. In: Rotsch, Thomas (Org.). Criminal Compliance Handbuch. Baden-Baden: Nomos, 2015. P. 37.

25 Rotsch, Thomas, Criminal Compliance, in: Zeitschrift für Internationale Strafrechtsdogmatik, Ausgabe 10/2010, 5. Jahrgang, pp. 614 ss..

26 Ibidem, p. 616.

prevention of compliance risks"[27]. According to the dominant position, insurers and financial institutions must create a compliance officer position with the responsibility to assess compliance risks and create internal controls to avoid or diminish the risks of criminal accountability.

On the other hand, compliance officers have also been created to investigate "potential crimes" within the organization. In the international arena, much has been said about the compliance officer's duties to report potentially criminal acts to the relevant authorities as well as his or her own criminal accountability. Recently in Germany, the Bundesgerichthof (BGH) found a compliance officer guilty because in taking on responsibility for preventing crimes within the organization, the compliance officer is also in the position of ensurer. Thus the compliance officer can be criminally punished for failing to prevent the negative outcome and thus failing in his/her duty to care, protect, and exercise oversight.[28]

Clearly, the emergence of compliance seems to imply a paradox: the goal of compliance is clear: avoid criminal responsibility with a series of internal controls. However, rather than diminishing the chances of criminal accountability, the emergence of compliance has actually created conditions within the corporation or financial institution that identify the chain of criminal accountability, as the manner in which compliance offices are organized puts them in the position of being held responsible for crimes committed in the company. This means that the chances of criminal accountability increase rather than decrease. In other words, the creation of the role of compliance officer, an office that should strive to reduce compliance risks, paradoxically increases them—especially since compliance officers should, according to the majority doctrine, be overseen directly by the board of directors or a similar management body. This clearly puts the corporation's entire management body at risk criminal persecution. [29]

Thus, compliance officers act as guardians of the corporation; their main role is to ensure the organization remains within the limits of legality. Because of this, they are put in the position of ensuring compliance with the duties of compliance. This was first seen by the Regional Federal Court for the 4th region in November 2010: "Thus, one must recognize that marginal transactions where the customers of financial institutions bring funds into the country are atypical, and there remains only the possibility of potential tax evasion which, clearly, presumes the definitive creation of a tax credit, which is not the case, or the punishment of the managers of the clandestine financial institution for infringing Article 16, and for the crime of money laundering for violation of the duties of compliance when perpetrated within the scope of an authorized financial institution."[30]

27 In this regard, see: Coimbra, Marcelo de Aguiar; Manzi, Vanessa Alessi, Manual de Compliance. Preservando a Boa Governança e a Integridade das Organizações, São Paulo: Atlas, 2010, pp. 35 e ss..

28 This decision is BGH Entscheidung von 17.07.2009-5 StR 394/08. For an overview of this decision in Germany, check the references mentioned in note 3 of this document.

29 The paradoxical concept is used here in the meaning given by: Hartmann, Martin; Honneth, Axel. Paradoxien des Kapitalismus. Ein Untersuchungsprogram, in: Berliner Debatte Initial 15 (2004) 1, S. 9.

30 Criminal Appeal n. 5008326-03.2010.404.7100/RS, reporter Paulo Afonso Brum Vaz, published on: 11.19.2010 (our highlights). Some rulings already discuss the possibility of requiring the duties of Compliance from accountants and attorneys. See, for example: "ABSTRACT: CRIMINAL. REQUESTS FOR RECONSIDERATION. MONEY

In our understanding, this position present five main issues:

1. Penalty and proportionality: it appears to violate the principle of proportionality as, in principle, it assigns a more severe penalty to the authorized financial institution (Article 1, Law 9,613/98, 3-10 years and fine), and less severe to the managers of the clandestine financial institution (Article 16 of Law 7,492/86, 1-4 years);
2. Prosecutorial problem: this guideline seems to infringe the fundamental right of *nemo teeter se etagere* (the right to remain silent) in Article 5, item LXIII of the 1988 Brazilian Constitution, which states that one cannot require financial institutions to provide financial information and then punish them based on this very evidence it provided;
3. Objective criminal responsibility: material and not just formal criteria must be created to apply the figure of the ensurer, under penalty of adopting a type of objective criminal accountability that is totally rejected by the best doctrines (These criteria are already demanded in Nuclear Criminal Law, which handles more serious crimes and thus, with far more reason, should be applied to Secondary Criminal Law.);
4. Risk or the danger of harm to the legal asset under care: given the principle of *nullum crimen sine iniuria* (i.e., no crime without injury), here also one must identify the risk and/or danger of omission or violation of compliance duties for the legal asset, as without such offence there is no crime. Furthermore, as seen in the previous chapter, in a manner analogous

LAUNDERING. CRIMINAL RESPONSIBILITY OF THE ATTORNEY AND ACCOUNTANT. NON-EXISTENCE OF THE DUTY OF COLLABORATION. ABSENCE OF OBJECTIVE FACTUAL CIRCUMSTANCES. ACQUITTAL. APPEAL GRANTED. 1. Articles 9 and 10 of Law 9,613/98 do not include accountants or attorneys among the professionals who have the duty to collaborate (compliance) with anti-money laundering measures (customer identification, keeping records and reporting financial transactions with serious indications of money laundering). 2. The Federal Accounting Board does not require accountants to check the veracity of the data they are given by their clients, as correctly absorbed by the honorable Federal Judge Eduardo Gomes Philippsen, in his ruling regarding AP n. 2007.71.04.004606-0/RS. Clearly, this does not mean that an accounting professional can never be held criminally liable. In the judgment of ACR n. 2004.04.01.025529-6, the Reporting Federal Judge ELOY BERNST JUSTO, on 06.28,2007, the Eight Court Group had the opportunity to uphold the conviction for tax evasion of an accountant working in the dedicating accounting department of the IT school involved, as he had direct control of all the tax falsehoods that resulted in a significant tax crime. 3. Furthermore, merely providing legal and accounting counsel by the accused (attorney and accountant) when a company is established and used to hide funds coming from the international drug trade is not sufficient, in and of itself, to justify conviction as the prosecution was not successful in stating in the accusation and proving during the instruction period that the defendant had incurred in the crime described in article 1, item I, paragraph 2, I and II of Law 9,613/98 or, in other words, that he or she knew of the obscure purposes of the alleged legal entity. 4. Therefore, if it is true that attorneys and accountants can also be part of money laundering according to the objective factual circumstances of article 6, item 2, "f" of the United Nations Convention Against Transnational Organized Crime (e.g. payment of professional fees in cash, in fractionated amounts, in jewelry) show that there was subversion of their professional activities, guiding and supporting their clients, either directly or indirectly, in the intent to hide or dissimulate funds from prior crimes, it is also true that these independent professionals cannot be incriminated merely by having contact with the authors of such crimes when the prosecuting entity fails to safety demonstrate, in this case, the aspects that demonstrate awareness of the illegal purposes of the advice provided. 5. Appeal for reconsideration granted. (TRF4, ENUL 2007.70.00.026565-0, Section Four, Reporter Paulo Afonso Brum Vaz, D.E. 06/24/2011)". However, the ruliens on the theme

all precede the new resolution of the Federal Accounting Board that governs the duties of Compliance for this category of professionals. Thus, there remains the possibility that these rulings would have been different had this resolution been available at the time.

to what was said of the executive; and

5. The position of ensurer is not sufficient to assign to the compliance officer, without restriction, all of the damaging results committed during the course of corporate activities as failure to act. The reason for this is that the fact that the omissive party has the physical and cognitive ability to act to avoid the outcome is embedded in the very concept of legally relevant failure to act (omission). In other words, the individual in question recognized the illegality and deliberately omitted him or herself. For example, one cannot punish the compliance officer for willful omission without demonstrating the conscious violation of the duty of care.

Despite these problems, and largely as a result of Operação Lava Jato and AP 470 (Mensalão), the use of inappropriate omission or failure to act is becoming part of the case law when it comes to holding compliance officers accountable. However, surprisingly, there are still no material criteria suitably defined for this type of criminal accountability.[31]

As one can see, the debate is still in its infancy and there remains much to be understood. To this end, the intention of this article is to introduce some aspects of the problem and contribute to the advancement of research on the criminal aspects of compliance. However, what should be clear is that the newness of compliance can only be understood with a dialog with criminal law. Without this, one falls into the risk of the paradox described above and elsewhere: seeking to protect the corporation by creating the figure of the compliance officer increases the risk of their criminal accountability, for if they fail to prevent criminal acts, they may be treated as if they were the perpetrators of the crime.[32]

31 SAAVEDRA, Giovani A. Reflexões iniciais sobre criminal compliance. In: Boletim IBCCRIM. São Paulo: IBCCRIM, ano 18, n. 218, p. 11-12, jan./2011; Silveira, Renato de Mello Jorge; Saad-Diniz, Eduardo. Criminal Compliance: os limites da cooperação normativa quanto à lavagem de dinheiro. In: Revista de Direito Bancário e Mercado de Capitais. Vol. 56. Abril. São Paulo: RT, 2012. Costa, Helena Regina Loba da; Araújo, Marina Pinhão Coelho. Compliance e o julgamento da APn 470. In: Revista Brasileira de Ciências Criminais. Ano 22. No. 106. Janeiro-Fevereiro/2014. Pp. 215-230.

32 SAAVEDRA, Giovani A. Reflexões iniciais sobre criminal compliance. In: Boletim IBCCRIM. São Paulo: IBCCRIM, ano 18, n. 218, p. 11-12, Jan./2011.


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