



U4 Practitioner Experience Note 2017:2

Transforming Brazil's anti-corruption record

Interview with Dr. Sílvio Antonio Marques

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Corruption scandals and the legal anti-corruption framework

In 2009, the Brazilian Federal Public Prosecutor's Office (*Ministério Público Federal*) and the Federal Police started a money laundering investigation linked to a member of the National Congress. The prosecutors did not know it then, but the *Lava Jato* operation ('operation car wash' – because such stations often laundered money) would become Brazil's largest-ever corruption investigation. It would lead to a scandal that downgraded the status of the national oil giant Petrobras in global markets, as the multinational took centre stage in a scheme in which bribes were paid to its officials and politicians by a cartel of construction companies colluding to win oil contracts.

"Increasing capacity and independence of public institutions, particularly law enforcement, are an area of progress for Brazil"

The investigation triggered a large number of criminal inquiries throughout the country and abroad. It influenced the political environment in which the impeachment of President Dilma Rousseff took place, and exposed the embedded culture of corruption in Brazilian politics. As of June 2016, the total assets involved in *Lava Jato* and repatriated to Brazil were approximately €1 billion, a figure that may yet increase. As much as US\$ 1.55 billion is estimated to be recoverable through this operation.

The country's corruption record seems to have worsened even as the country has experienced positive economic developments over the two last decades. From the 1990s to the mid-2000s, millions of Brazilian citizens were lifted out of extreme poverty, human development indicators improved in large parts of the country, and inequality was reduced.

The economy improved – until it tanked under the weight of the global economic slowdown and the string of political corruption scandals. However, the emergence of these scandals highlights an area of progress for Brazil: the increasing capacity and independence of certain public institutions, particularly law enforcement bodies, which have sustained a successful investigative campaign that has touched Brazil's most powerful elites (Arantes 2003).

"Plea bargains and leniency agreements mean defendants must repay to public coffers the losses incurred by crimes they committed"

A case known as *Mensalão* (big monthly payments), for example, began in 2005 and involved the Brazilian Workers' Party – in power at the time but lacking a majority in Congress. The party's strategy to buy support was to make monthly payments of around US\$ 12,000 to various Congress members. Investigated by the Federal Public Prosecutor's Office, the case was taken to the Supreme Court. In 2012, 25 of the 40 original defendants were found guilty. Many of them were members of Congress who, among other penalties, lost their congressional seats (Michener and Pereira 2016).

Most recently, former president Dilma Rousseff and her running mate – current president Michel Temer – have been accused of receiving illegal campaign donations resulting from kickbacks for contracts involving Petrobras. Some of the largest Brazilian private sector companies in infrastructure and real estate (OAS, Camargo Correa, UTC, Mendes Júnior, Galvão Engenharia, Odebrecht, and Engevix) are involved, and several of their top executives are now in prison.

Anti-corruption powers are spread across different institutions in Brazil's federal system (see Box 1). Underlying the country's independent law

enforcement bodies, and supporting a cadre of qualified public prosecutors, judges, and police officers, is a legal anti-corruption framework in line with international good practices. The independence of the prosecution was put at risk in November 2016, when a bill to update the legal framework (signed by two million civilians) was gutted by the congress. This was interpreted as an attempt to curb the independence of law enforcement bodies.

Two elements of the legal anti-corruption framework have been key during the current investigation process: plea bargains (*delação premiada*) and leniency agreements (*acordo de leniência*). Plea bargains, established in Law 9.613/1998 and modified in 2013, offers rewards including sentence reduction for a defendant willing to provide important information and material evidence about corruption crimes committed. This version of a plea bargain can only be applied to criminal cases and rewards the defendant based on the relevance of his or her collaboration to the investigation. Leniency agreements, on the other hand, also require the defendant to provide evidence, but they are applied only in civil courts to crimes against the economy (as provided in Brazil's Law 8.884/1994 and Law 12.846/2013). Such crimes include the formation of cartels to defraud public procurement – hence the relevance of such agreements to the crimes involving procurement at Petrobras.

Provision of information and material evidence is a necessary condition for a defendant to benefit from these two mechanisms. The police or the Federal Public Prosecutor's Office may still have to verify or collect supporting evidence. In the case of both plea bargain and leniency agreements, the defendant must still repay to public coffers the losses incurred by the crimes he/she committed. Both instruments have helped the *Lava Jato* operation gather evidence that would be hard to come by through regular police investigations, given the secrecy involving the deals and the fact that bribe payers and bribe takers share a commitment to silence.

Box 1: The main public bodies leading Brazil's anti-corruption investigations and prosecutions

- **The Public Prosecutor's Office (*Ministério Público*):** This office is responsible for investigations of crimes that may damage the Brazilian state. Crimes that damage the federal government fall under the competence of the Federal Public Prosecutor's Office (*Ministério Público Federal*). Those that damage the government at state and municipal levels are prosecuted by the state-level Public Prosecutor's Offices, although prosecution may revert to the federal level in cases of international money laundering. The Public Prosecutor's Office is staffed with officials whose autonomy and independence are guaranteed by the country's 1988 constitution
- **Federal Police:** This force implements investigations initiated by the Public Prosecutor's Office and also focuses on other serious offences such as transnational organised crime. It is one of three police forces in the country. The other two are civil police and military police. The civil police are subordinate to the executive at state level and participate in criminal investigations, often operating in plain clothes. The military police – subordinate both to the executive at state level and to the national army – provide street policing, traffic regulation, and riot control (Skogan 2013).
- **Council for the Control of Financial Activities (*Conselho de Controle de Atividades Financeiras, COAF*):** The COAF is the country's financial intelligence unit at the Finance Ministry. It is responsible for obtaining financial intelligence on Brazil's natural and legal persons. It has played a significant role in the *Lava Jato* operation, for example by informing the Federal Police about 267 relevant suspicious transactions.
- **The General Comptroller's Office (*Controladoria-Geral da União*):** This office was subsumed under the Ministry for Transparency, Oversight and Control after the impeachment of President Rousseff in 2016, conducts administrative investigations and works on corruption prevention throughout the federal government.
- **Judiciary:** This branch of government has become notorious for the rigor with which it has applied the law to defendants brought to court under the *Lava Jato* operation. The *Petrobras* scandal and subsequent impeachment of President Rousseff have, however, led Brazilians to become divided in their views of law enforcement. Some believe the drive behind the string of corruption investigations is politically motivated, focusing on the Worker's Party in an unbalanced manner and helping the opposition regain power.

- **Other bodies:** The Ministry of Foreign Affairs channels mutual legal assistance requests; the Attorney General's Office (*Advocacia-Geral da União*) works to recover stolen assets; and the Department of Federal Revenue (*Receita Federal*), Brazil's tax authority, conducts administrative investigations that have allowed many cases of illicit enrichment of public officials to be brought to prosecution.

Brazil's current anti-corruption system

What has triggered the last 15 years of anti-corruption and white-collar crime investigation in Brazil?

Several elements contributed. The first is an effort to reform our anti-corruption legal framework, which took place in the past decade or so. I would highlight, for example, Law 9.613/1998, which deals with money laundering and envisages plea bargains. An update on this law in 2014 allowed for plea bargain agreements signed between the Public Prosecutor's Office and defendants to be officially confirmed by a judge during the trial phase, at the moment of signature, rather than later. This provides reassurance to the defendant that the agreement will not be overturned after he/she has provided evidence. This used to be an obstacle to securing collaboration from those involved in a crime.

Penalties also have become more severe. 'The Anti-Corruption Law' (Law 12.846/2013), stipulates the application of several types of penalties to companies involved in corruption, including fines of up to 20 per cent of a company's gross revenue or dissolution of the legal person. For public officials involved in corruption, Law 8.429/1992 may lead to job dismissal, the obligation to return stolen public assets, fines of up to three times the assets embezzled, and other penalties.

The quality and capacity of our public prosecutors and our federal police officers is another important element. Candidates for such posts have to beat thousands of applicants in open meritocratic selection processes. They are the best minds our universities can provide. On top of that, they receive on-the-job training. Other bodies, such as the Department of Federal

Revenue (*Receita Federal*), also have very competent civil servants, and their administrative investigations have helped significantly in recent years.

"The Brazilian population has massively and effectively engaged in the fight against corruption by using social networks"

Domestic pressure has been a blessing. The Brazilian population has massively engaged in this fight. Their engagement, facilitated by social networks, has been spontaneous rather than organised. But had they not engaged, for example to defend the Public Prosecutor's Office and other bodies against interference by politicians, I believe we would not have seen such intensive investigations as observed now.

How do you explain the degree of collaboration that exists between the Federal Police and the Public Prosecutor's Office in regard to anti-corruption? Does this collaboration extend beyond these two bodies?

Some of our laws (for example, Law 7.347/1985) make it mandatory for public bodies to exchange information and inform each other about certain types of crimes. Beyond a legal obligation, we have experienced an unprecedented demonstration of goodwill from authorities involved. Also, these bodies have dealt with so many cases of corruption in the past few years that they have learned the hard way that collaboration is the way forward in these cases.

"Collaboration is the way forward"

However, things do not always run smoothly. There are instances of competition between agencies. In 2013 there was an attempt to strip investigative powers from the Public Prosecutor's Office, something that would have required changing Brazil's Constitution. This attempt to remove investigative powers was supported by the Federal Police, which also conducts investigations, making clear that there is competition. Other

examples include cases in which the Federal Prosecutor's Office dragged its feet in submitting information to the state-level Public Prosecutor's Office, and vice versa. But these are exceptional cases nowadays.

This collaboration involves other bodies, such as the financial intelligence unit, the tax authority, and some Court of Audits offices at state level. But it's not unheard of to have corruption within some state audit offices themselves, and we need to be careful in those cases.

Plea bargains and leniency agreements have a tradition as anti-corruption tools in Brazil. However, both instruments have been controversial: critics suggest they may eliminate the possibility of prosecution, allowing criminals to keep a clean record. Others point to the fact that companies that benefit from these arrangements may participate in public tenders immediately after an agreement is reached. Is it possible to balance such risks with the benefits that these agreements provide?

Criticism is what drives us to improve our laws. But as of today, our version of plea bargain, which has similarities to that in the United States, has been the most effective way of conducting investigation and gathering evidence in corruption cases. Offering the possibility of sentence reduction has been the only way to convince defendants to collaborate and provide material evidence. These mechanisms offer other benefits as well. For example, through our leniency agreements, if the defendant is found guilty, the fines that he/she (or a legal person) is required to pay are significant.

"Offering the possibility of sentence reduction has been the only way to convince defendants to collaborate and provide material evidence"

On top of this, another fee is paid as damage, akin to a restitution to society. These amounts are significant as well. Just one example is the agreement signed in December 2016 with Odebrecht, a Brazilian multinational in the engineering sector: they will repay approximately US\$ 2.5 billion to public coffers over 20 years. As for balancing the risks, although the funds go into

the public coffers, depending on the agreement, the *Ministério Público* may be involved in overseeing how the fine is spent.

Are there any other instruments enshrined in Brazilian law that can help advance investigations?

A draft law on whistle-blowing for people who may not be involved in criminal acts but who may have information about them is currently under discussion in Congress. These people are afraid to provide information. If the law is approved, these whistle-blowers may be offered a reward, as in the United States. This could motivate people who know about corruption but are not involved in it to come forward with information. The problem is that similar legislation has already been presented to the Congress in the past, and has been rejected. However, it can be brought back to congressional debate with a different text.

Impunity in the public sector

Why do investigations of corruption involving senior public officials and politicians in Brazil take so long, when senior executives in the private sector involved in the Lava Jato operation had already been investigated, prosecuted, and sentenced by 2014?

The first defendants heard for the *Lava Jato* operation were afraid to spill the beans on senior political figures. It's always more difficult to collect evidence against senior public officials than against regular civil servants because senior politicians are powerful. They may use their power to influence or intimidate. Brazil also has a special legal protection for senior public officials, referred to as *foro privilegiado*, or privileged jurisdiction. It states that high-level politicians can only be tried for crimes in higher courts. In many cases, this means impunity, because the public official benefits from slow court procedures at the highest level – which eventually leads to the legal expiry of their case. We had several examples like this among cases that reached the Supreme Court in recent years.

As I mentioned earlier, I also believe that the first defendants were not reassured that their plea bargains would be maintained once their case was brought in front of the judge. The fact that such agreements are now

approved by the judge before arriving at trial stage encourages defendants to come forward with a lot more information.

It is also notable that Brazil recently passed an amnesty law (13.254/2016) to motivate individuals who moved funds abroad illegally to bring them back without punishment in order to increase the country's tax receipts. The Department of Federal Revenue of Brazil (*Receita Federal*) stated that up to November 2016, R\$ 50.9 million (approximately US\$ 14.7 billion) had been repatriated within the amnesty framework. This was approved in a context of economic recession but there are no means to verify the origin of the funds repatriated. It may indeed be money linked to corruption. Including politicians or their relatives as beneficiaries of amnesty in this law, something that is currently not envisaged, would present a serious risk of laundering corrupt money by allowing it to be repatriated.

Lessons from Brazil

What lessons do you think Brazil's experience may provide to other countries facing similar problems?

Anti-corruption promoters in other countries can take inspiration from Brazil's efficient legal instruments (although we still have areas where improvement is needed) and the independence of our law enforcement bodies. My experience as part of international networks of prosecutors is that corruption cases do not go very far in many countries because of inefficiencies in their laws and because their prosecutors are not really free to do their jobs.

"Anti-corruption promoters in other countries can take inspiration from Brazil's efficient and independent legal instruments"

Where do you think Brazil still needs to work to advance its fight against corruption?

Brazil needs to review the legal protection afforded by the privileged jurisdiction (*foro privilegiado*). It should be eliminated, or, at minimum, we should reduce the number of officials who benefit from it. Currently, around 22,000 politicians in Brazil enjoy such immunity from protection. This group includes all city mayors, members of Congress, prosecutors, judges, and other officials. We also need solid legislation on whistle-blowing. If we can protect and reward citizens who come forward with information, this can motivate more people to take on oversight responsibilities over the activities of civil servants and public officials.

The career of a prosecutor in Brazil

Investigations in the area of corruption and white-collar crime sometimes present risks for prosecutors and judges. What are the risks for Brazilian prosecutors involved in anti-corruption investigation? What guarantees or protection do they benefit from?

These constraints are a consequence of the job we have chosen. It is impossible for the state to offer private security to all civil servants involved in anti-corruption work in Brazil – there are too many people working in multiple public bodies. In extreme cases, it is possible to request special police protection, even for your family.

You are a member of an international network that fosters collaboration among prosecutors engaged in investigating corruption (the Corruption Hunters Network). Does such membership impact your work in a direct way?

I have personally been able to move forward with investigations in Brazil thanks to the contacts I have established through participation in such networks. An example is the investigation I initiated against Paulo Maluf, a former mayor of the city of São Paulo. At the beginning, we had no evidence to prove his significant involvement in large-scale corrupt activity. By using my network of international contacts, we obtained evidence from more than 60 individuals and ensured cooperation in five countries and one territory where we arranged to break bank secrecy laws (Brazil, USA, Switzerland, France, the United Kingdom, and Jersey – a UK dependency). I managed to freeze more than US\$ 1.7 billion at that time from around 35

defendants involved in the case, including some of the largest infrastructure-building companies in Brazil.

Paulo Maluf was taken to court in Brazil, the United States, and France. There is an arrest warrant for him in the United States and France. For this reason, for the past 10 years he has not left the country because of the risk of being imprisoned and extradited. But there is still no arrest warrant for him in Brazil. So, since our Constitution does not allow the extradition of Brazilian citizens, and a criminal sentence issued by another country cannot be ratified by judges in Brazil, he is still free.

However, up to 2014, through a civil lawsuit we managed to recover US\$ 78 million in assets linked to Maluf and return it to the public coffers. We have evidence needed to recover more of the misappropriated assets and to fine him on the basis of the crime of “administrative dishonesty” (a crime under Brazilian law). We have testimonies from dozens of witnesses and more than 250,000 corroborating bank documents obtained in Brazil and abroad. But recovering these funds depends on the results of two open civil lawsuits that the Ministério Público in Sao Paulo initiated in 2004 and 2009.

"Facilitating contact between judges and prosecutors internationally is crucial in anti-corruption efforts"

Another investigation in which international contacts were helpful was led by my team against Alstom, a company contracted to provide trains to the state of São Paulo. We obtained evidence in Brazil and Switzerland. We identified the involvement of one official from the Court of Auditors in the state of São Paulo. He was later fired. We also froze more than US\$ 90 million in assets in Brazil and Switzerland. In March 2016, Alstom had to pay back US\$ 16 million to the state of São Paulo. This was also a key case, as it allowed the opening of other investigations on cartel formation in the area of procurement of trains for the state.

That is why it is important to facilitate contact between judges and prosecutors internationally. Many are not aware of how their peers are advancing and improving anti-corruption work worldwide, nor do they know whom to contact when they need to initiate mutual legal assistance. If

offered to relevant officials, this type of network and training can bolster collaboration in investigations.

Disclaimer

All views expressed in the interview section of this U4 Practitioner Experience Note are those of the interviewee, and do not necessarily reflect the opinions of the U4 partner agencies, or CMI/U4.

Further reading

- "[The Sum of its Parts: Coordinating Brazil's Fight Against Corruption, 2003-2016](#)" Gordon LaForge, *Innovations for Successful Societies*, February 2017
- "[Leniency Agreements Under Brazil's Clean Company Act: Are They a Good Idea?](#)" The Global Anti-Corruption Blog, posted 19 December 2016

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