

Brazil's “Operation Car Wash”: The Latest Chapter

Kelly Kramer

Partner

+ 1 202 263 3007

kkramer@mayerbrown.com

Bernardo Weaver

Partner

+55 11 2504 4604

bweaver@mayerbrown.com

September 20, 2016

Speakers



Kelly Kramer
Washington, DC
+ 1 202 263 3007
kkramer@mayerbrown.com



Bernardo Weaver
São Paulo (T&C)
+55 11 2504 4604
bweaver@mayerbrown.com

Topics for Discussion

1. Origins
2. Petrobras Scheme
3. Change/Expansion in Scope
4. Current Status of Key Political Figures
5. (Proposed) Changes in Legislation
6. Changes in Law Enforcement Techniques
7. Changes in Law Enforcement Behavior
8. Leniency Agreements?
9. The Future

“Operation Car Wash” – Origins

Money laundering



Alberto Youssef
(Black market dollar operator)

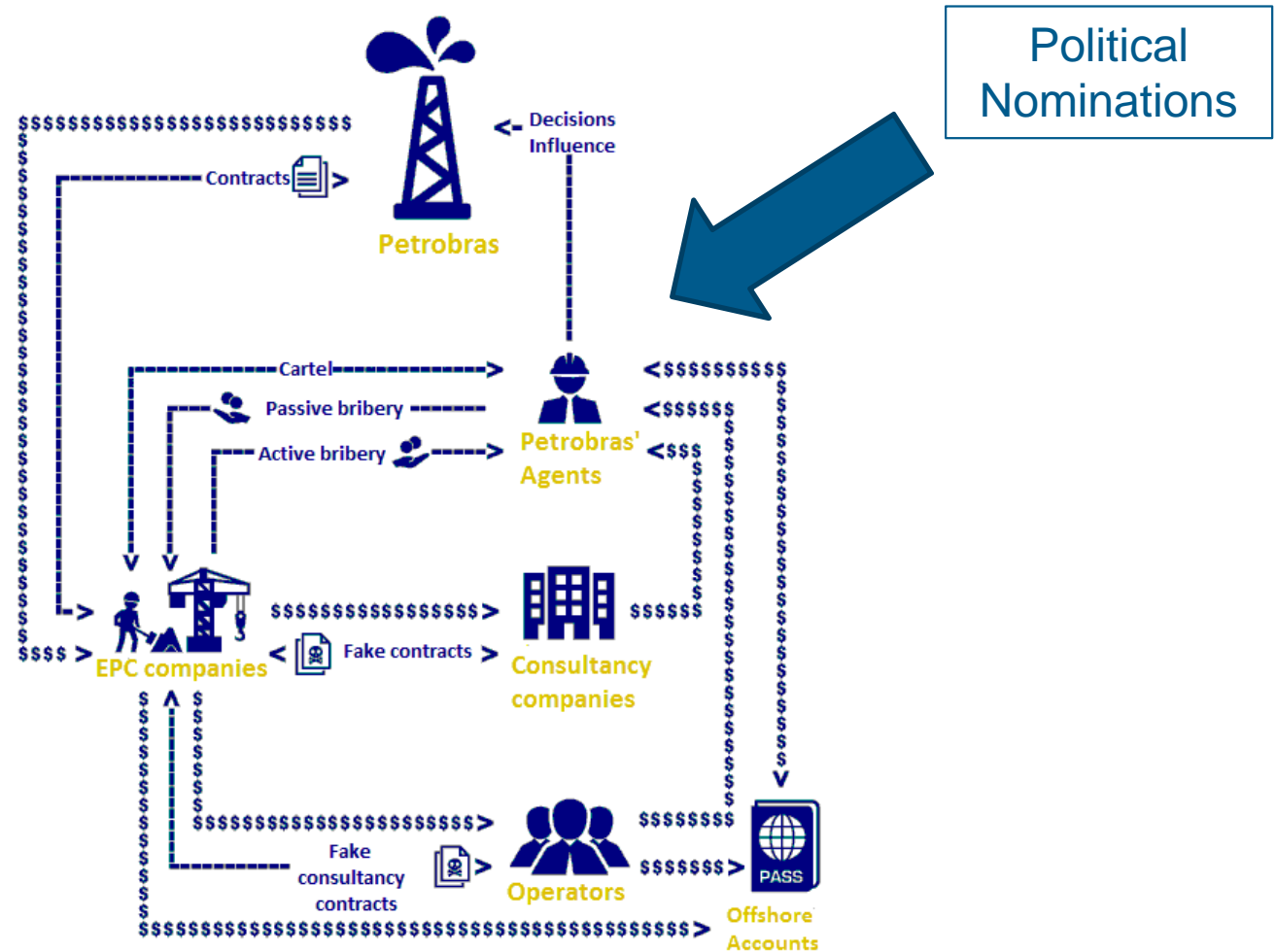


Posto da Torre
Brasília-DF

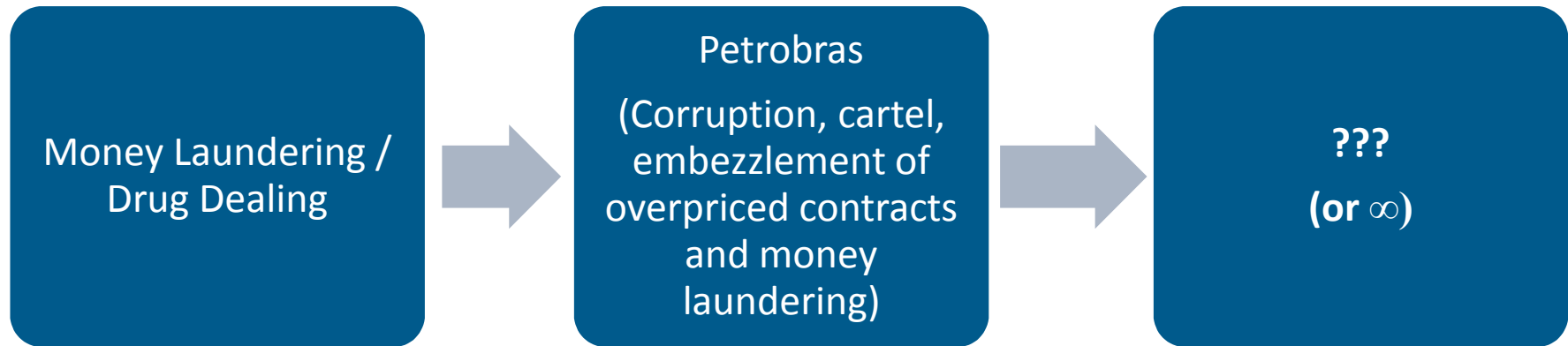


Paulo Roberto Costa
Former Supply Director of Petrobras

“Operation Car Wash” – Scheme



“Operation Car Wash” – Change/Expansion of Scope



Allegations:

- Political slush funds
- Unlawful funding of political campaigns (presidential campaigns)
- Construction companies' affairs in other countries are now under scrutiny (e.g., Peru)
- Obstruction of justice
- Other Government entities (e.g., Eletrobras, BNDES*, Pension Funds*)
- 2014 World Cup and the 2016 Olympics

“Operation Car Wash” – Main Characters: Allegations

Lula – Criminal complaint filed by “Operation Car Wash” Taskforce

Dilma Rousseff – Impeached but currently still eligible to hold office

Eduardo Cunha – Removed from office by his peers and facing prosecution by the “Operation Car Wash” taskforce

High Court Judges – Facing allegations of obstruction of justice

Lula

Deltan Dallagnol
Head of the
Car Wash Task Force
in Curitiba



Lula

Overview

- Investigated for alleged money laundering, organized crime, corruption and obstruction of justice
- Detained for questioning by the Federal Police
- Nominated to be a member of Dilma's cabinet (ministerial status)
 - Special privileges – judged by the Supreme Court
- Removed from Dilma's cabinet by order of the Supreme Court
- Criminal complaint filed for the above allegations, plus others
 - Thwarting the Brazilian political system by creating a kleptocracy



Details of the most recent charges (September 14, 2016):

- 9 counts of corruption: as President, Lula was responsible for the nominations of Renato Duque and Paulo Roberto Costa (former Directors of Petrobras), and for this, he received bribes from OAS (Léo Pinheiro) in exchange for benefits in dealings with Petrobras. Total public funds embezzled amount to R\$ 87 mi (~US\$ 26M)
- 3 counts of money laundering: Lula is alleged of concealing the unlawful origin of R\$ 2,424,990,83 (~US 900K) paid by OAS for the acquisition and reform of an apartment in Guarujá-SP
- 61 counts of money laundering: Lula is alleged of concealing the unlawful origin of R\$ 1,313,747.24 (~US 400K) paid by OAS by means of a fraudulent contract for the storage of office materials



Lula

Nomination to be Chief of Staff

- President Dilma nominated Lula as her new Chief of Staff two weeks after he was brought in for questioning by the Federal Police
- Chief of Staff has ministerial status and grants Lula special privileges (“foro privilegiado”), so he could only be investigated by the Prosecutor General of Brazil and face trial by the Supreme Court
- Because Lula was under investigation in Paraná and in São Paulo, the Supreme Court Justice suspended his nomination due to suspicions of obstruction of justice



Dilma Rousseff

Overview

- Consistently said to have been involved in the Petrobras scheme, but not under investigations for this issue
- Investigated by the Prosecutor General of Brazil for obstruction of justice regarding Lula's appointment as her Chief of Staff
- The impeachment process is (theoretically) unrelated to the "Car Wash Operation"



Dilma Rousseff

Impeachment process – 1st phase

- Former Speaker of the House of Representatives, Eduardo Cunha, files a complaint against Dilma Rousseff
- Charges:
 - Fraudulent adjustment of government accounts by taking loans from state banks
 - Ordered the opening of supplementary credits without Congressional approval
- The House of Representatives voted to move forward with impeachment during Senate session
- The Senate ratified the House of Representatives decision and confirmed the start of the impeachment process, suspending Dilma Rousseff from office



Dilma Rousseff

Impeachment process – 2nd (final) Phase

- 61 of 81 Senators approved Dilma's impeachment on August 31st, 2016 removing her from Office definitively
- But... why?

"Pedaladas Fiscais"???

OR

*"Conjunto da Obra"???
(incl. "Operation Car Wash")*



- Although Dilma was removed from the Presidency, she is still eligible for public office (under dispute at the Supreme Court)

Interim Presidency: Michel Temer

- Vice President Michel Temer took over as interim President following President Dilma's suspension
- Temer was officially sworn in as the New President of Brazil hours after the Senate's definitive approval of Dilma's impeachment
- Temer was mentioned in plea agreements as having benefited from the corruption scheme, but he is not under investigations as of yet
- Temer appointed at least 8 Ministers who are being investigated in relation to "Operation Car Wash" (Dilma had 21)
- Sergio Machado recorded some of Temer's Ministers allegedly discussing ways to hinder the developments of the investigation; they have all since been removed from office



Involvement in “Operation Car Wash”

- Mentioned in several plea agreements for allegedly having benefited from the Petrobras scheme
- Currently facing three criminal complaints:
 - Receiving USD 5 million as kickback payments from the Petrobras scheme
 - Maintaining secret bank accounts in Switzerland; the allegations include that his accounts received money from the Petrobras scheme (his wife, Claudia Cruz, is also facing these charges)
 - Corruption and embezzlement of public contracts in Rio de Janeiro (Porto Maravilha)

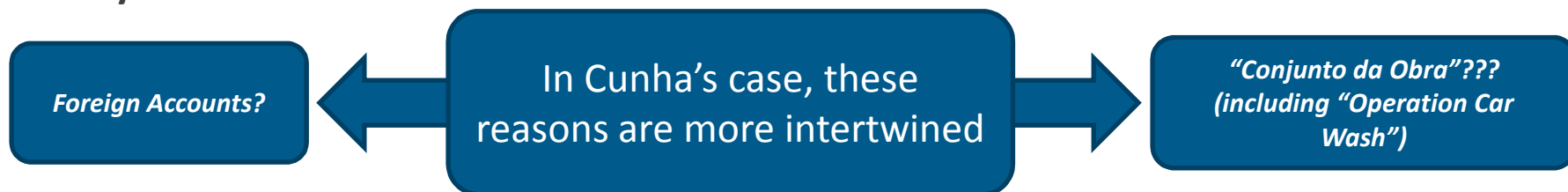


Complaints were filed before the Supreme Court, but after Cunha was removed from Office, the Supreme Court sent the case files to trial courts (including Sergio Moro’s Court in Curitiba)

Eduardo Cunha

Removal from office

- Faced disciplinary proceedings for lying to the Parliamentary Commission of Inquiry (CPI) on Petrobras
 - Denied having offshore accounts, yet Swiss Authorities later released account of which he was the beneficiary
- Cunha allegedly used funds to pay for luxury expenses in Brazil and abroad
- Suspended from his Congressional duties by the Supreme Court under claims that he was hindering the disciplinary committee's work
- Resigned as Speaker of the House in an effort to save his term
- On September 13, 2016, the House of Representatives voted the revocation of his term, with 450 votes against him.
- **Why?**



Investigations Against Judges

- Superior Court Justices Francisco Falcão and Justice Ribeiro Dantas are being investigated for alleged obstruction of justice
 - Falcão allegedly assisted Lula, Dilma and Delcídio do Amaral in appointing Ribeiro Dantas as a Superior Court Justice to thwart “Operation Car Wash”
- Supreme Court Justice Dias Toffoli is said to have been mentioned by Léo Pinheiro (former President of the OAS Group) in his talks with the Prosecutor General of Brazil in relation to a plea bargain
 - This was not confirmed by the Prosecutor General’s Office, and the negotiations with Léo Pinheiro have been suspended



**Francisco
Falcão**



**Ribeiro
Dantas**



**Dias
Toffoli**

(Proposed) Changes in Legislation

Brazilian criminal law is often changed on the eve of specific crime-related events:

- Law No. 7,492/86 – Crimes Against the National Financial System:
 - Legislative response to corporate scandals in the 70s and 80s
- Law No. 8,072/90 – Heinous Crimes
 - Changed after the heinous murder of an actress in 1992
- Law No. 12,737/2012 – Cybercrimes
 - Enacted after intimate photos of an actress were leaked

(Proposed) Changes in Legislation

The Brazilian Anticorruption Law (Law No. 12,846/2013) and the Organized Crime Act (Law No. 12,850/2013 – plea bargaining legal basis) were both enacted on August 1, 2013 following a series of events related to corruption, including:



The Mensalão Trial



The July 2013 Protests



(Proposed) Changes in Legislation

But this is not an exclusively Brazilian trait!



US:

F.C.P.A. x the Watergate Scandal



UK:

Bribery Act x BAE Systems

(Proposed) Changes in Legislation

The Future

- “Operation Car Wash” is so unique that it spurred legislative proposals that seek to (a) harden criminal enforcement; and (b) restrain criminal enforcement:

Hardening	Restraining
MPF’s 10 Measures Against Corruption	Abuse of Authority Bill
Whistleblowing Bill	Proposed Changes to Plea Bargaining Procedure

Changes in Legislation: 10 Measures Against Corruption

- Proposed by the Federal Prosecutor's Office
- 10 Measures Against Corruption are a set of proposed changes to Criminal Law and Criminal Procedure, including:
 - Civil asset forfeiture
 - Higher penalties for corrupt practices
 - Criminalization of slush funds
 - Reform of the criminal statute of limitation rules
 - Restrict use of habeas corpus and appeals
 - Authorized use of unlawful evidence if obtained in good-faith
 - Sting operations
 - Faster enforcement of final convictions



Changes in Legislation: Whistleblower's Reward Program Bill

- Individuals who spontaneously bring forth news of the act of a crime or an act of administrative improbity, and provide authorities with relevant information to successfully trigger an investigation, are entitled to a share of up to 10% of the assets forfeited to the government, as well as compensation for damages
- The whistleblower's identity will be kept secret whenever possible, and he/she will also be entitled to protective measures
- The bill is still in a preliminary stage and could face many changes until a statute is finally enacted



Changes in Legislation - Abuse of Authority Bill

- Senate Bill No. 280 was proposed by its Speaker, Senator Renan Calheiros
 - Criticism due to the author having been mentioned in plea bargains in “Operation Car Wash”
 - Criticized as an attempt to constrain the enforcement agents (policemen, prosecutors and even judges) currently engaged in “Operation Car Wash”, especially those involved in plea bargain dealings
 - Plea bargaining is a key element of “Operation Car Wash”



Changes in Legislation - Changes to Plea Bargaining

- The author of the bill is allegedly concerned with plea agreements signed by individuals under preventive arrest orders, and how information obtained by means of plea bargains is being used by enforcement agencies
- The Bill would only allow for plea agreements of individuals who are not under arrest and would veto the acceptance of criminal complaints based solely on plea agreements
- When the Bill was proposed, the Ministério Público Federal (MPF) informed the legislature that 29% of the plea bargains in “Operation Car Wash” had been signed by defendants under arrest



Changes in Enforcement Techniques

Traditionally:



Police investigate



Prosecutors prosecute after
the Police investigate



Judge conducts trial and
rules on the merits

- Enforcement agencies participation easily identified and separated
- Work done without much exchange of information
- Some coordination between enforcement agencies

Changes in Enforcement Techniques

Nowadays:



Changes in Enforcement Techniques

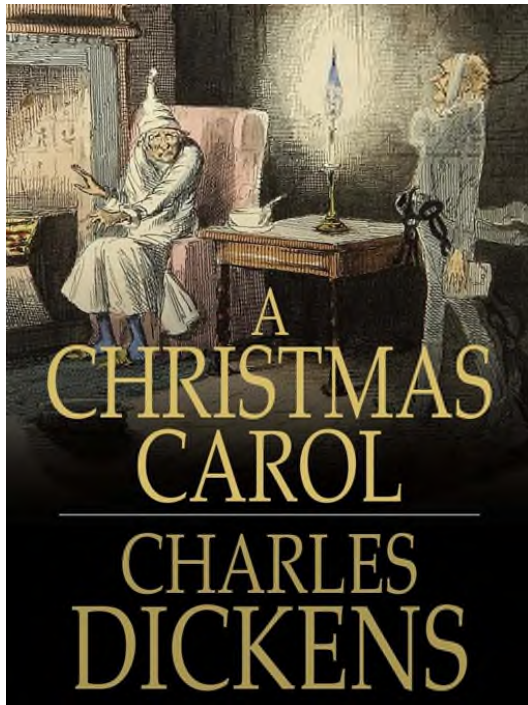
- Corruption is different from other crimes because all parties directly involved are usually pleased with the results – the victim is not directly aware of being victimized
- Once enforcement agencies obtain any evidence of corrupt practices, it is still hard to obtain a conviction since cooperation is traditionally not expected and evidence gathering difficult
- In “Operation Car Wash”, the Organized Crime Act provided obstruction of justice and plea bargaining tools for prosecutors
 - Leveraged defendants to cooperate – such as PRC



Changes in Enforcement Techniques

But why do people talk?

Judge Sergio Moro's theory:



Ghost of Christmas Past =
Remorse
(LESS SCARY)



Ghost of Christmas Present =
Being under provisional arrest
(SCARY)

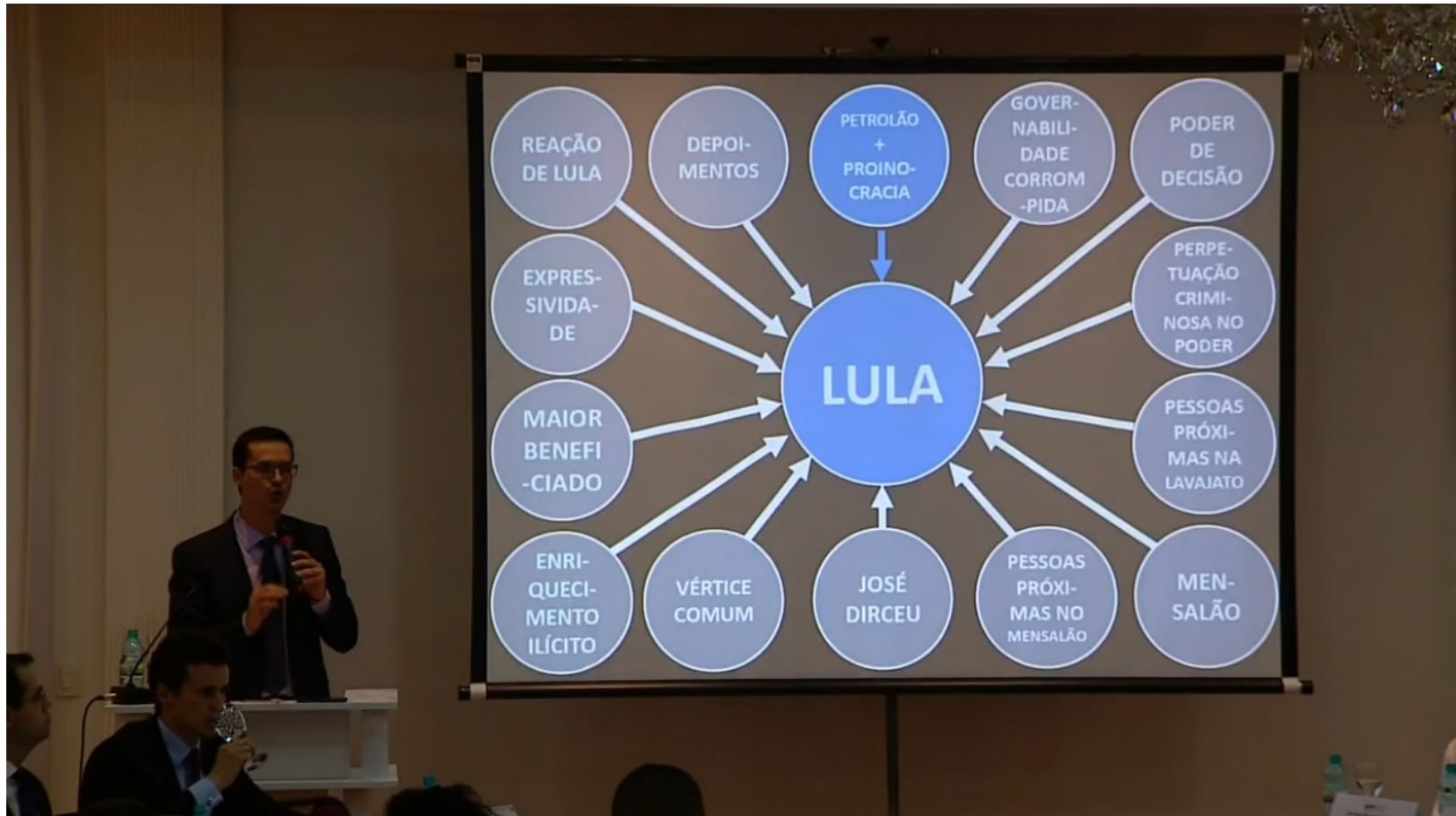


Ghost of Christmas Yet-to-Come =
Being arrested after a conviction
(VERY SCARY)

Provisional and Definitive Arrests

Provisional Arrest ("Ghost of Christmas Present")	Definitive Arrest ("Ghost of Christmas Yet-to-Come")
Ordered to prevent a defendant from further violating the Law and/or to prevent obstruction of an investigation or a trial	Ordered after a conviction is final
From the perspective of enforcement agencies and the Courts	
<ul style="list-style-type: none">• Most enforcement agencies and judges in charge of large police operations advocate for more provisional arrests in large corruption cases• Prosecutors in Paraná have already declared that preventive arrests are an effective way to foster cooperation• Most preventive arrests in "Operation Car Wash" were confirmed by the Higher Courts	<ul style="list-style-type: none">• The Supreme Court used to forbid arrest prior to a final decision – sometimes 4 instances• In February 2016, the Supreme Court reviewed its understanding and allowed the enforcement of a conviction confirmed by an Appellate Court• The Supreme Court is currently re-reviewing its February ruling and could backtrack

Changes in Law Enforcement Behavior



“Operation Car Wash” Task Force Press Conference (complaint filed against Lula)

Changes in Law Enforcement Behavior

Leveraging the public opinion in favor of law enforcement

OUTCRY AND SOCIAL SUPPORT



Galvanize public opinion to increase litigation success rate

Promote their investigative and prosecutorial agendas



Operation Car Wash– Leniency Agreements

- Besides individuals' plea bargaining, companies have also settled with the authorities:
 - Andrade Gutierrez signed a R\$ 1 billion leniency agreement with the Federal Prosecutor's Office;
 - SBM Offshore also celebrated a billionaire leniency agreement with the Federal Prosecutor's Office, the Attorney General's Office and the Comptroller General of Brazil;
 - This agreement was later cancelled by a higher authority within the MPF for having been found too advantageous for SBM.
 - Law Enforcement agencies (notably the MPF) involved in leniency agreements are retaining a share of the values.
 - The Car Wash Task Force has reported that there is only room for one more leniency agreement in Car Wash – OAS and Odebrecht are discussing terms.

Operation Car Wash– The Future

- With regard to corruption, Brazil has become a high-enforcement jurisdiction
 - Corporations are expected to cooperate with law enforcement more intensively
 - Although not mandatory, implementation of compliance mechanisms is highly recommended
 - Fast and effective exchange of information between enforcement and intelligence agencies and the improvement of investigative and prosecutorial techniques (big data) are making it easier to unveil otherwise undiscoverable schemes
- But there are still some issues to be solved
 - Judicial oversight is always possible, but no case-law as of yet
 - Several agencies in charge of anticorruption enforcement



Operation Car Wash - Current Status in the US

- US Department of Justice and Securities and Exchange Commission
 - Petrobras has publicly disclosed that it is under investigation by the DOJ and the SEC, as have a variety of companies that did business with Petrobras
 - Formal and informal assistance to Brazil, such as assistance with tracing bribe proceeds
 - Potential for seizure and forfeiture orders as part of Kleptocracy Initiative
- US Private Securities Claims
 - Petrobras and Braskem have both been sued in class actions and opt-outs for securities fraud
 - Judge Rakoff set the claims against Petrobras for trial in September 2016, but the Second Circuit has stayed the trial pending an interlocutory appeal

Operation Car Wash – Status Globally

- Global operation
 - Companies caught up in the Petrobras investigation face scrutiny in multiple countries (Brazil, Netherlands, Switzerland, US, UK)
 - Reportedly, around \$800 million has been frozen in accounts held by Petrobras 's executives and Petrobras's counterparties' executives
- Switzerland:
 - Active cooperation with Brazil and the US (e.g., evidence of accounts held by Congressman Eduardo Cunha)
 - Regulatory investigations of financial institutions
- Netherlands:
 - Reached \$240 million settlement with SBM Offshore (unresolved exposure in US and Brazil)

THANK YOU

For questions, please reach out to:

Kelly Kramer, Partner

+1 202 263 3007

kkramer@mayerbrown.com

Bernardo Weaver, Partner

+55 11 2504 4604

bweaver@mayerbrown.com