



EVENT SUMMARY

Dr. Rodrigo Janot on the Role of Plea Bargains in the Fight Against Corruption in Brazil



In 2013, Brazilian prosecutors added a new tool to their arsenal in the fight against corruption: plea bargains. To uncover and stop illegal activity, prosecutors can sign agreements with political agents, business executives, and others involved in alleged crimes. In the four years since, over one hundred and sixty agreements have been announced, and negotiations continue as new allegations surface regarding money laundering, bribery, and obstruction of justice in Brazil.

On Monday, July 17, 2017 at the Wilson Center, Brazilian Attorney General Rodrigo Janot discussed the centrality of plea bargains in the ongoing investigations and prosecution of corruption in Brazil. The Wilson Center's Brazil Institute hosted the lecture as part of its "Rule of Law" Series, co-sponsored by the Washington College of Law at American University.

Janot's presentation covered the role of plea bargains in the Brazilian penal system, including their connection to the corruption investigations underway since 2014 and their impact in combating organized crime. These investigations are part of the larger Lava Jato Operation, an anticorruption initiative that has been groundbreaking by both domestic and global standards.

In 2013, the Brazilian Congress not only defined organized crime, but also delineated the mechanisms of collecting evidence, including plea bargains. According to Janot, the 2013 law (Lei 2850) formalized their use in a manner similar that used in the United States. However, Janot stressed that plea bargains in Brazil are a means of collecting evidence rather than proof of guilt. The law states that no conviction can rest solely on the existence of a plea bargain.

Moreover, the defendant must enter the plea bargain process voluntarily and “spontaneously,” to avoid the appearance of coercion on the part of the prosecution. Janot strongly refuted the claim that plea bargains are coercive. Critics of the practice argue that pre-trial detention and other restrictions on free movement are used to pressure defendants into making plea deals. Janot stated, however, that 85 percent of plea bargains are made with defendants who presented themselves freely.

Under the general framework set forth in the 2013 law, the defendant can pursue a number of objectives: they may seek pardons, reduced sentences, less restrictive conditions for sentence completion, fines instead of imprisonment, and more. Attorneys have significant discretion in shaping the negotiations, so long as the defendant assists in identifying those who engaged in organized crime; reveals the structure, hierarchy, and roles of the criminal organization; helps prevent future infractions; and/or enables the state to reclaim illicit benefits.

Judges are prohibited from participating in these negotiations, allowing for greater independence in hashing out deals. However, a defense lawyer’s presence is mandatory for the express purpose of assisting and protecting the rights of the defendant.

Janot repeatedly stated that the more the defendant collaborates, the greater their ability to negotiate. Less collaboration means less or even no bargaining. Additionally, immunity can be granted, though “no one feels joy in giving immunity to a criminal,” he said.

The final written plea bargain must contain a negotiation report, the possible results of the negotiation, the proposed conditions from the public prosecutor’s office or other agency, the defense’s written acceptance of the terms, and the signatures of all involved.

Janot noted that the prosecution has learned from past mistakes to be more meticulous. He referred explicitly to the large-scale 2003 Caso Banestado investigation, and seemed to allude to Alberto Youssef’s involvement in both that case and the current Lava Jato Operation. In the past (including in the Caso Banestado case), the prosecution remained bound to the plea bargains’ provisions even when defendants broke the terms of the contract. Now, prosecutors avoid requesting reduced sentences as part of these deals, so that they may impose normal sentences if a defendant later violates the terms of the deal.

Though the plea bargains benefit both sides, Janot spoke of a metaphorical Sword of Damocles hanging over the defendant. If they misbehave, the prosecution can revoke the deal and use all evidence provided against them and others, guaranteeing the defendant’s proactivity. However, if the prosecution reneges on the deal, any evidence provided may not be used against the defendant.

Although judges do not play a role in the negotiation of terms, the final deal must be approved by the courts. The Brazilian Supreme Court recently ruled that judges should determine only the plea bargain’s effectiveness in evidence collection, not the appropriateness of the concessions made to the defendant. According to Janot, had this decision been the reverse, it would have sent a message to defendants entering plea bargains that the justice system might not follow through with its

side of the deal. Plea bargains would effectively become impossible as defendants weighed the likelihood of a successful deal against the risk of being seen speaking with authorities.

During the question and answer session that followed Janot's speech, one member of the audience asked if Janot felt it necessary to indict President Temer again before September 15 [when Janot's mandate ends]. Janot responded that he was in no hurry and prioritized the investigation of the facts involved instead of rushing to an indictment. However, if the investigations offered proof of authorship of the crime and proof of the crime's gravity before the last day of his mandate, he would have an obligation to execute his duty and file additional charges against President Temer.

“I had to weight public interest in granting immunity to criminals – and they are indeed criminals... No one feels happy granting immunity to criminals. But that was what was possible.”

Janot affirmed that he would accept the decision of the Commission of Constitution and Justice (CCJ), even if it rejects the indictment (which would mean that Temer could only be prosecuted once he is no longer president). Janot also stated that it was premature to say whether the eleven changes President Temer made to the CCJ's composition constituted “obstruction of justice.” He noted that such substitutions are allowed under law and were predictable given the “political game.”

When asked about his criteria for evaluating a successful plea bargain, Janot emphasized that leniency in sentencing must match the quality of information provided. Defendants must be willing and able to target high-level individuals, and their testimonies must help the public prosecutor's office unravel criminal organizations to their core. In particular, a defendant's testimony is worth immunity if he or she can deliver information on a sitting president, senator, or public prosecutor actively committing a crime. Janot defended his decision to give leniency to the Batista brothers [of multinational meat processing company JBS] in exchange for their help collecting evidence on President Temer, and said he would do so again with a clear conscience.

Janot concluded by noting that his office has worked over the past four years to establish a clear set of best practices, in order prevent criminals from taking advantage of leniency agreements. No prosecutor ever goes into negotiations alone, and no decisions are made in the moment; instead, negotiators always step back from the table and discuss the terms with other members of the Public Ministry who did not participate in the discussion. His office also structures agreements with a variety of behavioral restrictions that encourage the defendants to cooperate.

Note: To elaborate on the distinction Janot drew between plea bargains serving as proof of guilt vs. as mechanisms for obtaining evidence, Judge Peter J. Messitte compared how plea bargains work in Brazil and in the United States. A Senior Judge of the U.S. District Court for the District of Maryland, Messitte noted that both Brazilian and U.S. prosecutors often seek additional corroborating evidence. However, unlike in Brazil, confessions obtained as part of the plea bargain process in the United States can stand alone as proof of guilt, if necessary.

The infographic to the right was provided by the Brazilian Public Ministry, to accompany Dr. Janot's speech at the Wilson Center on July 17, 2017

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CAR WASH CASE RESULTS SO FAR



1765 COURT PROCEEDINGS

844 SEARCH WARRANTS

210 SUBPOENAS TO TESTIFY

207 ARREST WARRANTS

279 MUTUAL LEGAL ASSISTANCE REQUESTS

158 PLEA/COLLABORATION AGREEMENTS

10 LENIENCY AGREEMENTS SIGNED

281 DEFENDANTS CHARGED

WITH CORRUPTION, MONEY LAUNDERING, ORGANISED CRIME, FINANCIAL CRIME, DRUG TRAFFICKING, IN 64 SEPARATE PROSECUTIONS

8 CIVIL SUITS AGAINST 67 PERSONS AND CORPORATIONS

REQUESTING THE RESTITUTION OF **US\$ 4.4 BILLION**

CRIMINAL CHARGES INVOLVING BRIBES

WORTH **US\$ 1.96 BILLION**

US\$ 3.2 BILLION HAD ALREADY BEEN RECOVERED/SECURED

US\$ 0.98 BILLION IN ASSET FREEZES

157 SENTENCES, TOTALLING: 1563 YEARS, 7 MONTHS AND 5 DAYS

data as of 10 July 2017 - exchange rate: USD 1.00 to BRL 3.2644

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