

### TRANSNATIONAL ILLICIT DRUG TRAFFICKING IN BRAZIL: ADDRESSING GOOD PRACTICES FOR CONFISCATION OF PROCEEDS AND INTERNATIONAL COOPERATION

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#### I. INTRODUCTION

According to its Constitution, Brazil is a democratic republic in which the rule of law prevails. Brazilian legislation boasts modern statutes criminalizing drug trafficking and money laundering, fair tools to deprive perpetrators of their unlawful proceeds and provisions granting the deployment of advanced investigation techniques against organized crime, all of them largely compliant with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. However, daily news reports bear testimony of the increasing role of Brazilian criminal syndicates in the global cocaine business and the general perception of insecurity in the country.

The purpose of this paper is twofold. The first section attempts to contextualize the fight against drug trafficking in Brazil. It outlines the country profile as an aggressive consumer and transit-point of illicit drugs, the statutory response to this problem and some of the legal, institutional and practical barriers faced by national authorities to confront the illegal drug trade. The second section, limited to the scope of *transnational* drug trafficking, is intended to draw underlying problems and possible solutions concerning two focus points: the confiscation of proceeds and international cooperation related to drug smuggling.

#### II. OVERVIEW OF THE FIGHT AGAINST DRUG TRAFFICKING IN BRAZIL

##### A. Current Situation of Illicit Drug Trafficking in Brazil

Despite the socioeconomic advances experienced during the two past decades, violence rates in Brazil have never been higher<sup>1</sup>. Many of the factors contributing to this multi-causal phenomenon are widely known: the infamous inequality, the lethality and corruption of the police, the urban militias, the combination of spatial segregation, weak state presence and territorial disputes over “squatter” neighborhoods and overcrowded penitentiaries. Notwithstanding the lingering cultural and human development issues attached thereto, it is ubiquitously understood that an important part of this scenario is linked to drug trafficking operated by local organized crime groups.

Due to its porous land borders with the world’s top three cocaine-producing countries (Colombia, Peru and Bolivia) and its long coastline on the Atlantic, Brazil emerged as an obvious transit-point for drug trafficking towards the East. The heightened availability of cocaine in the country skyrocketed the local drug market over the last decade, making it the second biggest consumer of cocaine, the world’s leading consumer of crack – cocaine’s cheapest and most addictive derivative – and increasingly of marijuana and ecstasy<sup>2</sup>.

The escalation of the domestic drug demand in Brazil changed deeply the profile of the country’s criminality. Once confined to territorial disputes in penal facilities, the *comandos* (gangs involved with drug trafficking) gained control of the narcotics supply, corrupted the system and its agents and spread into the outskirts, creating a criminal network that operates outside and inside prisons<sup>3</sup>. Nowadays, besides smuggling and distributing drugs, the *comandos* commit violence throughout the country and control many aspects of life in *favelas*<sup>4</sup>. Their sizeable criminal portfolio includes racketeering, extortion, corruption and

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<sup>1</sup> Fórum Brasileiro de Segurança Pública, *Anuário Brasileiro de Segurança Pública 2017* (São Paulo, pubd online 2017) <[http://www.forumseguranca.org.br/wp-content/uploads/2017/12/ANUARIO\\_11\\_2017.pdf](http://www.forumseguranca.org.br/wp-content/uploads/2017/12/ANUARIO_11_2017.pdf)> accessed 20 March 2018.

<sup>2</sup> United Nations Office on Drugs and Crime (UNODC), *World Drug Report 2017* (Vienna, pub'd online 2017) <<http://www.unodc.org/wdr2017/en/topics.html>> accessed 20 March 2018.

murder, as well as a huge market of firearms smuggling, responsible for 50 per cent of the weapons accessible today within the Brazilian territory<sup>5</sup>.

The “marijuana polygon” in the arid Northeast of Brazil, the country’s sole drug-producing area, meets only a slight part of the local demand for cannabis. Almost all the illicit substances are imported. The main gateway connects Bolivia’s cocaine and Paraguay’s marijuana to the major cities in the Southeast and the southwestern tri-border region (Brazil, Paraguay and Argentina), entering the country whether by land, plane or boat cruises through the tropical wetland area of Pantanal. From Peru and Colombia, the vast inhabited lands and waters of the Amazon forest are a staging ground for the distribution of cocaine, notably via the northern tri-border region (Brazil, Peru and Colombia), a major hub for local drug smuggling. All it takes is to fly into one of Amazonia’s many clandestine landing tracks or to cross the boundary rivers.

The *comandos* also share control of the suppliers and routes related to the cocaine exported overseas. Three of them – the hegemonic First Command of the Capital (*Primeiro Comando da Capital - PCC*), the Red Command (*Comando Vermelho*) and the Northern Family (*Família do Norte*), based respectively in the States of São Paulo, Rio de Janeiro and Amazonas – have stretched their power over the borders and already took over part of the drug trafficking in Bolivia, Paraguay and Peru. As noticed in the UNODC World Drug Report 2017, Brazil has been the single most frequently mentioned country of departure of cocaine shipments to Europe, Africa and Asia over 2010-2015. The main direct destinations are the Iberian Peninsula and the ports of Rotterdam (Netherlands) and Antwerp (Belgium), whereas a second route uses the West African countries of Nigeria, Guinea, Guinea Bissau and Ghana as transit points, from which the cocaine is dispatched to Spain and Italy. The use of drug mules and twin-engine airplanes for exporting cocaine still exists, but undeniably most of the drugs smuggled from Brazil are concealed inside containers shipped to Africa and Europe, profiting from the rising commerce with the European Union and the corruption of port agents on both sides of the Atlantic<sup>6</sup>.

## **B. Legal Framework**

Historically, Brazilian legislation has been very influenced by the United Nations conventions on drugs. The country’s official commitment to “eradicate” supply and demand of illegal narcotics led to the adoption of a prohibitionist approach on the matter, placing drug trafficking and drug consumption under the same criminal justice umbrella and engendering massive incarceration.

The 11,343 Drug Law, enacted in 2006, covers nearly all regulations related to drug abuse and drug trafficking in Brazil, including procedural and health policy provisions. The new law intended to make a definitive distinction between drug consumption and drug dealing: the former, comprising the possession, storage, transportation or cultivation of illicit substances for personal use, was depenalized and subject to social-educational measures, while the latter, related to the import, export, preparation, production, manufacture, sales, offer, storage, transport, prescription or delivery of illicit substances for consumption or supply, was subject to a harsher punishment of imprisonment from 5 to 15 years. It also contains rules about controlled delivery, covert operations, incentives for collaboration with the justice system and asset recovery.

Money laundering is dealt with by Law 9,613, as amended by Law 12,683, enacted in 2012. All the illicit conduct referred to by the FATF<sup>7</sup> Recommendations are sanctioned with imprisonment from 3 to 10 years, regardless of the predicate offence involved. It provides extensive measures for freezing, seizing and forfeiting illicit proceeds, instruments and their equivalent value, as well as licit property aiming to compensate victims for crime-related damages.

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<sup>3</sup> MIRAGLIA, Paula, *Drugs and Drug Trafficking in Brazil: Trends and Policies* (Washington, Center for 21st Century Security and Intelligence, Latin America Initiative, pub'd online 2016) <<https://www.brookings.edu/wp-content/uploads/2016/07/Miraglia-Brazil-final.pdf>> accessed 20 March 2018.

<sup>4</sup> “Favelas” are squatter settlements characterized by simple housing, less-than-average access to public services, high population density and informal property rights.

<sup>5</sup> Viva Rio, *Arms Control* (Rio de Janeiro, pub'd online 2011) <<http://www.vivario.org.br/en/human-security/arms-control/>> accessed 20 March 2018.

<sup>6</sup> Carta Capital, *Os Caminhos da Cocaína que Sai do Brasil para a Europa* (São Paulo, pub'd online 2017) <<https://www.cartacapital.com.br/internacional/os-caminhos-da-cocaina-que-sai-do-brasil-para-a-europa>> accessed 20 March 2018.

<sup>7</sup> Financial Action Task Force.

A last legal instrument of paramount importance for the struggle against large-scale drug trafficking is Law 12,850, enacted in 2013, which addresses organized crime in Brazil. It criminalizes the participation in and the funding of organized crime groups and regulates in detail the deployment of advanced investigative techniques, such as controlled delivery, audio and video surveillance, undercover operations and collaboration agreements. Along with Law 9,296, enacted in 1995 and related to communications interception, Law 12,850's provisions are applicable on a subsidiary basis to drug trafficking operated by criminal syndicates.

### C. Obstacles to Countering Illicit Drug Trafficking in Brazil

Highlighting the factors that withhold effective enforcement of drug trafficking in Brazil is no easy task. From the legal response perspective, the lack of objective criteria to determine which amount of illicit substance pertains to “personal use” has become a giant loophole for police and judicial discretion. Despite the intended improvements of the 2006 Drug Law, the “war on drugs” culture remained the same among the criminal justice actors, leading to a 123 per cent rise of incarcerations linked to drug trafficking<sup>8</sup>, most of them related to low-level criminals with no connection with organized crime. Likewise, 44 per cent of the prison population consists of pre-trial detainees, feeding a vicious cycle that only strengthens recruiting and coercion in overcrowded penal facilities run by *comandos*<sup>9</sup>.

The double jurisdiction applicable to drug trafficking offences – federal courts, when there are sufficient grounds to believe that a specific drug dealing involves substances directly smuggled into the country or out of the country, or state courts, in the residual cases – makes it almost impossible to enforce a national anti-drug policy. As a result, most arrests and convictions in Brazil do not target traffickers strategically, threaten the *comando* regime or affect the violent criminality surrounding drug rings.

As for the practical challenges, there are more than plenty. Drug and arms trafficking, police corruption and brutality, intergang warfare and absence of the state in vulnerable urban areas are interwoven in Brazil. One feeds on the other, perpetuating violence, marginalization, territory control and counter-violence. The cheap supply of illicit substances, especially crack, has ensnared thousands of addicts among the poor, forcing them to work for traffickers in order to acquire drugs.

From the institutional point of view, the police lack expertise in collecting financial evidence, as well as appropriate personnel and minimum structure for forensics. The tiny military contingent in Amazonia and Pantanal does not stand a chance to oversee Brazil's 12,000 kilometers of wild jungle, swamps and rivers. Furthermore, overpopulated incarceration facilities favour the management of prisons by *comandos*, while the judicial system, overwhelmed with an average of 10,000 cases per judge, struggles against inefficiency and high impunity rates among white-collar criminals.

## III. KEY FOCUS POINTS: CHALLENGES AND POSSIBLE SOLUTIONS

Notwithstanding all the harsh drawbacks aforementioned, one must permanently seek ways to overcome adversity. The present section intends to address uncomplicated solutions, raised from the experience acquired by the Brazilian National Prosecution Service in actual investigations, to bypass challenges at the fronts of asset recovery and international cooperation related to transnational drug trafficking. The highlighted barriers are objectively listed and followed by an operational proposal to overcome them, as well as a real-case example of success.

<sup>8</sup> Organization of American States (OAS), *The Drug Problem in the Americas* (Washington, pub'd online 2013), <<http://www.oas.org/documents/eng/>> accessed 20 March 2018.

<sup>9</sup> Instituto Sou da Paz, *Relatório da Pesquisa Prisões em Flagrante na Cidade de São Paulo* (São Paulo, pubd online 2012), <[http://www.soudapaz.org/upload/pdf/justica\\_prisoeflagrante\\_pesquisa\\_web.pdf](http://www.soudapaz.org/upload/pdf/justica_prisoeflagrante_pesquisa_web.pdf)>, accessed 20 March 2018.

### **A. Deprivation of Property Related to Transnational Drug Trafficking in Brazil**

#### 1. Barriers Related to the Identification of High-Value Targets: Criminal Organizations Leaders, Gatekeepers and Politically Exposed Persons (PEPs)

Proposal:

- Before opening the investigation, gather comprehensive background information about known targets, including family members, nominees, power-of-attorney holders, 'straw men' and their companies. Submit the output to the Financial Intelligence Unit (FIU) in pursuit of suspicious/currency transaction reports. With the results, identify the account holders involved in the suspicious transactions, beware of PEPs, employees and gatekeepers (accountants, notaries, solicitors etc.). Track their possible liaisons with the targets and initiate the investigation against the potentially responsible parties.

*\* After the seizure of \$200,000 hidden in a speedboat on the Amazon River, a financial investigation unveiled the links between the money seized and lawyers hired by incarcerated members of the Northern Family Cartel. It eventually gave rise to the launch of Operation "L.M.", allowing the identification of the main suppliers of cocaine in the northern tri-border region and the heads of the Northern Family, as well as the forfeiture of assets belonging to 173 of its members. One year later, a thorough linkage analysis based on the evidence seized in the investigation led to the strike of a second Operation. Charges were dropped and the case awaits trial.*

#### 2. Barriers Related to the Adherence to a Culture of Promoting Money Laundering Investigations and Seeking Asset Recovery

Proposal:

- Launch a parallel money laundering investigation as soon as the predicate offences' perpetrators are pinpointed. Attempt to estimate the value of the proceeds and start tracing assets acquired after the crime was committed, whether under the names of the perpetrators or under the names of the third-parties mentioned in subheading 1. Cross-check the results with suspicious and currency transactions reported by the FIU. Assess the money laundering risks in accordance with regional patterns of drug trafficking and formulate hypotheses from typologies described in FATF and FATF-Style Regional Bodies, bearing in mind red flags of concealment and disguise, unusual transactions or operations without economic rationale. To (in) validate the hypothesis, use all information available, including open source, tax and financial intelligence.

- Prioritize initiatives in favour of big, promising cases with active media coverage and engagement of society.

- Begin by allocating the returned assets to the benefit of the branches reluctant to adhere to the new paradigm.

*\* Operation "V." attempted to dismantle a criminal organization dedicated to the trafficking of amphetamine to North America and Europe. The money laundering probe was set forth from day one; it brought up not only evidence of many typologies of concealment, but also data related to unexpected trafficking modi operandi and the identity of conspirators in the United States and Venezuela. Freezing warrants were enforced simultaneously in four countries. The accused were all convicted of drug trafficking and money laundering.*

#### 3. Barriers Related to the Expertise to Conduct Money Laundering Investigations and Seeking Asset Recovery

Proposals:

- Designate specific law enforcement branches, prosecution offices and courts to deal with money laundering cases.

- Create an inter-institutional Asset Recovery Office responsible for tracing, seizing and managing stolen assets.

- Put into action an ambitious capacity-building programme with basic contents on money laundering

and asset recovery aiming at police officers, prosecutors and judges throughout the country.

*\* In 2006, after realizing that most prosecutors and judges lacked the expertise to assess financial crime and money laundering cases, the Brazilian Federal Justice Council decided to entitle specific courts in each State to deal with such matters. Positive outcomes arose after years of struggle, but they eventually changed the culture towards white-collar criminality and spread basic operational know-how on economic crimes among the Federal Justice community. Nowadays, specific courts are being designated to deal with international cooperation, a matter still unknown to most practitioners.*

#### 4. Barriers Related to the Existence of and Access to Public Registries

Proposals:

- Implement a permanent working group among the agencies involved directly or indirectly in the phenomenon of crime, setting a timeline to accomplish predetermined tasks, a methodology to assess the results and new goals to be reached every year.

- Adopt an aggressive plan of gathering, structuring, exchanging and mining data available in dispersed public and private registries.

*\* The National Strategy for Fighting Money Laundering and Corruption (ENCCLA) was set forth in Brazil after 2004 and nowadays benefits from the participation of more than 50 federal and state-level agencies. Among its dozens of achievements, ENCCLA has drafted the current money laundering and organized crime legislation bills, published guidelines and manuals, created databases and enhanced coordination among rival agencies. Most of the databases available to the Federal Prosecution Service today have been shared from other agencies.*

### **B. International Cooperation Related to Transnational Drug Trafficking in Brazil**

#### 1. Barriers Related to the Diversity of Legal Traditions, Terminology and Measures to Ensure Punishment (Due Process, Dual Criminality, Reasonable Cause, Mandatory Refusal)

Proposal:

- In order to build trust, avoid miscommunication and prevent refusal of assistance, establish informal contact as a starting point in any request related to countries with relevant cultural or legal differences. It offers a good opportunity to learn about the justice systems involved, better understand each other's requirements and act as a prelude to a subsequent formal Mutual Legal Assistance Request (MLAR). Informal contacts comprise connections with counterparts, liaison magistrates, police attachés, FIU liaison officers and focal points in international cooperation networks. If distrust is an issue, practitioners can address the implications of providing information on a merely theoretical basis, prior to any discussions of substance on the matter.

*\* In 2014, as a result of Operation "M. P.", warrants of arrest, search and seizure and asset freezing were enforced simultaneously in Brazil, Italy, Portugal, Germany, Spain, Serbia, Montenegro and Peru. They targeted the exploitation of cocaine routes by a joint-venture formed by the Brazilian First Command of the Capital and the Calabrian Mafia 'Ndrangheta. 1.3 tons of cocaine and 10 vessels were seized during the arrests. The evidence collected also uncovered bank accounts in Singapore related to the corruption of officials investigated in the infamous "Car Wash" probe in Brazil.*

*Informal contacts were essential to ensure the coordination among all countries under Brazil's guidance, notably with Serbia, in light of the profound language and legal tradition barriers between the two jurisdictions. The enforcement of freezing orders in Singapore was also a challenge; due to its both Common Law and Eastern grounds, different charges had to be dropped in Brazil, two new requests of assistance were drafted and unexpected evidence was required to match the Singaporean Law. The criminals were convicted in Brazil and Italy and the freezing order in the Car Wash probe is still being enforced.*

#### 2. Barriers Related to the Timely, Full and Valid Execution of Requests of Assistance

Proposals:

- When the case reaches beyond domestic borders, it is crucial to immediately focus on international cooperation. Making proactive, early contact may aid in diagnosing potential challenges, obtaining additional information and making strategic decisions. It also gives the foreign jurisdiction the opportunity to prepare for its role in providing cooperation.

- Since formal MLARs are time-consuming and resource-intensive, appeal first to the available informal assistance channels. Usually, they are fit for all non-coercive measures, such as intelligence gathering, obtaining public records and locating assets or persons.

- Multilingual forms can be a way to expedite the exchange of informal assistance and document it.

- Most drug trafficking cases use Interpol-channeled documents. Make sure that their chain of custody is spot on and that the documents obtained will be admissible in court as evidence; if not, submit an MLAR.

- Envisage the creation of an international cooperation unit within your agency. It is helpful to execute urgent requests, review MLAR drafts, control follow-up efforts and ensure capacity-building.

*\* The International Cooperation Unit of the Brazilian Prosecutor General's Office was established in 2015. Its many tasks encompass the management of international cooperation networks and informal contacts, the review of active requests drafted by Brazilian authorities, the oversight of the execution of passive requests in Brazil – as well as their direct execution, in urgent or sensitive cases – and the supervision of each and every international assistance case in the interest of the Federal Prosecution Service. It accomplished a lot after one year: 2,236 follow-up cases were opened, 560 informal requests were granted, 113 missions abroad were completed and four Memoranda of Understanding were signed, among others.*

*A good example of the difference made by the International Cooperation Unit can be found in the extradition request of V. A. M., a well-known Paraguayan drug dealer. Pursuant to Interpol's request of provisional detention for the purpose of extradition, V. A. M. presented a Brazilian birth certificate and claimed not to be eligible for extradition, according to the Brazilian Constitution. His deception manoeuvre almost succeeded, had not the Unit been previously informed about the Paraguayan request, proactively checked his nationality and started an inquiry to solve the deadlock. The Prosecutor-General presented evidence about the falsehood of his Brazilian birth certificate to the Supreme Court before he could be released and V. A. M. was extradited months later.*

### 3. Barriers Related to Coordinating the Deployment of Advanced Investigation Techniques

Proposals:

- If the assistance requested involves the deployment of advanced investigation techniques, use a step-by-step process in which the outcome obtained pursuant to one request is used to support the next one. It helps making important decisions at each stage and adopting corrective measures in a timely fashion.

- Videoconferences, face-to-face meetings and instant message groups are important tools to ensure coordination. They should aim at the identification of the executing authority, the definition of execution parameters and the anticipation of possible obstacles to overcome.

- Due to jurisdictional matters, consider creating joint investigation teams to deal with cases involving the execution of controlled deliveries, electronic surveillance or covert operations.

*\* In 2015, the Netherlands requested assistance to conduct a controlled delivery of cocaine supposed to be shipped from a Brazilian port in a three-day time frame. Many flash videoconferences were run to coordinate the measures among the border control and customs authorities involved in both jurisdictions. In order to prevent causing a stir at the harbour, the original request of installing a GSM tracking device was abandoned in favour of the infiltration of Brazilian and Dutch policemen to monitor the cargo in each territorial sea and attend to the chain of custody from one tip to the other. Brazilian and Dutch warrants were granted in time and the drugs shipped reached the Netherlands under full surveillance, allowing the identification of high-value targets, the seizure of the cocaine smuggled and the arrest of port authorities and several members of the gang.*

4. Barriers Related to the Identification of Relevant Information about Domestic Cases Abroad

Proposal:

● Transnational crimes always leave leads on both sides. Enforce and foster spontaneous disclosures, intelligence sharing and proactive discussion.

*\* As a member of the Network of Anti-drug Prosecutors in Iberoamerica (RFAI), Brazil has recently joined the “Bogotá Protocol”, an intelligence sharing platform related to drug trafficking through container shipments. It has delivered great results and proven to be a hallmark of success in preventing and combating trafficking inside containers, thus the slight broadening of its scope to include air cargo shipments and joint investigation teams. Other countries have applied to join the Protocol, such as Belgium and the Netherlands.*