

## SYMPOSIUM ON NEW DIRECTIONS IN ANTICORRUPTION LAW

### ANTICORRUPTION IN BRAZIL: FROM TRANSNATIONAL LEGAL ORDER TO DISORDER

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While the United States has had almost fifty years of experience with anticorruption law involving transnational enforcement, Brazilian anticorruption enforcement has not yet celebrated its first decade. In the notorious Car Wash case, however, Brazil is wrestling with the largest anticorruption investigation ever. The Car Wash case has resulted in numerous claims brought by a host of domestic agencies and foreign governments, many of which lack experience in anticorruption law. This essay argues that the Car Wash case reveals the weaknesses of the transnational anticorruption legal apparatus in Brazil. At both the national and transnational levels, the lack of coordination and the existence of competition among different levels of authority have undermined the main pillar of the regime: the collaboration agreements and the corresponding protection granted to whistleblowers. The Car Wash case illustrates how the current transnational anticorruption legal regime fails to promote order over disorder.

#### *Transnational Linkages*

The Car Wash case started with investigations conducted by the Brazilian authorities targeting a money laundering scheme being run through a prosaic car wash service. The investigators discovered that large Brazilian contractors had organized a cartel to defraud Petrobras, the Brazilian state-owned oil company. The cartel, by means of money laundering schemes, bribed Petrobras' officers to engage in certain actions or omissions during the bidding processes. Part of the kickbacks went to funding political campaigns and to improper personal benefits for the leaders of the main political parties. Soon, investigations expanded, revealing similar schemes in a number of other state-owned companies and projects with public financing. Those schemes involved highly-placed officials in Brazil, including the last three presidents, as well as in other countries. The dramatic expansion of investigations<sup>1</sup>—which from a modest “car wash” investigation came to embroil public and private domestic elites, and to create spill-over effects in almost fifty jurisdictions—is due to two transnational processes that involve Brazil: (1) the world-wide standardization and transplantation of anticorruption law;<sup>2</sup> and (2) the significant increase of

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<sup>1</sup> The case started on March 17, 2014 with twenty-eight arrests, nineteen raids, and eighty-one searches and seizures. To date, 306 people have been arrested in the Car Wash operation, and the estimate of losses on Brazil associated with the underlying offenses are around US\$15 billion. Detailed information about the Car Wash case is available in Portuguese at <http://www.mpf.mp.br/grandes-casos>.

<sup>2</sup> [TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE](#) (Gregory C. Shaffer ed., 2013).

Brazilian outbound foreign direct investment (FDI), starting in the 2000s, mainly into other Latin America countries.<sup>3</sup>

Brazil historically had few laws on anticorruption, and those it did have focused on the criminal responsibility of individuals. As part of the transnational legal process of anticorruption regulation, Brazil joined the Organisation for Economic Co-Operation and Development Anti-Bribery Convention in 2000, the Inter-American Convention Against Corruption in 2002, and the UN Convention Against Corruption in 2005. These international agreements reflect the transnationalization of anticorruption legal tools and procedures, effectively spreading the standards of the U.S. Foreign Corrupt Practices Act (FCPA).<sup>4</sup> In August 2013, as a response to corruption in the government, Brazil enacted an Anti-Corruption Law (ACL) and a Law on Fighting the Organized Crime, transplanting two legal tools into the Brazilian system: the possibility of collaboration agreements between the criminal authorities and suspects, and of leniency agreements with civil effects.

By creating mechanisms for the government to impose administrative punishment on companies that benefited from acts of corruption, the ACL provided new tools to authorities in the Brazilian legal system. Along with allowing the government to punish companies for corrupt practices, ACL provided incentives for corporate compliance and for the voluntary disclosure of information by defendants. The ACL also innovated by allowing extraterritorial application, thus reaching companies that engaged in corruption abroad. The Law on Fighting Organized Crime (LFOC), on the other hand, anticipated the benefits of collaboration by giving investigating criminal authorities the ability to reach settlement agreements with defendants. Under that law, leniency agreements with companies should favor the identification of others involved in the offense and should enable the gathering of evidence relevant to the investigation.

Other Latin American countries also engaged with the transnational anticorruption regime starting at the end of the 1990s—a time when Brazilian FDI was increasing in these countries. The Car Wash operation gave new momentum to Brazil and other countries in the region to implement the above-mentioned international agreements in their domestic laws. In addition, the case also compelled the authorities to enter into cooperation agreements with other jurisdictions. To date, the Car Wash case in Brazil has produced more than 184 collaboration agreements, thirty leniency agreements, and 743 international requests for cooperation.

If the magnitude of the Car Wash case is a result of the enforcement of new laws in Brazil and other developing countries, it was also boosted by the unrestrained use of information and evidence. Multiple concurrent authorities at the domestic and transnational levels have disregarded the legal protections contained in the collaboration agreements, impairing their objectives and the protection of whistleblowers. In our view, the transplant of FCPA-model institutions without an adequate institutional environment, and without coordination among multiple jurisdictions, has led to dysfunctional enforcement of anticorruption laws. The investigations involving the Odebrecht group—one of the largest and most transnationalized corporate groups in Brazil—well exemplify the dysfunctions that have contributed to its recent judicial reorganization. The next section discusses this dysfunction.

<sup>3</sup> Michelle R. Sanchez-Badin & Fabio Morosini, *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)*, in RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH 218 (Fabio Morosini & Michelle R. Sanchez-Badin eds., 2017).

<sup>4</sup> Lucinda A. Low et al., *The “Demand Side” of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn’t Enough*, 84 FORDHAM L. REV. 563 (2015).

*Dysfunctionalities at the National Level in Dealing with a Transplanted Legal Regime*

The transplant to the Brazilian legal system of the practice of “plea bargaining” and “leniency agreements” has faced two main challenges: (1) the nonexistent legal culture for transactions on criminal matters;<sup>5</sup> and (2) disputes between institutions responsible for their negotiation and implementation.<sup>6</sup> That combination has promoted a sense of disorder.

In Brazil, as in most countries with a continental law tradition, the rule of compulsory criminal proceedings prevails. Under this rule, the Federal Public Prosecutor’s Office (FPO) has no discretion whether to prosecute crimes or not. The prosecutor is thereby prevented from taking into consideration opportunity costs, convenience, or criminal policy when deciding which actors to charge with offenses. Although LFOC allowed some flexibility to that rule, part of the law community resisted. These lawyers consider any transaction with a defendant to be a violation of that general principle. On their view, the state should discourage unethical prosecutorial conduct, including betrayal of the state by failing to prosecute offenses to the fullest extent. Further, criminal law encompasses the right of non-self-incrimination and the right to remain silent, which collaboration agreements call into question.

As a result, the transplanted FCPA model of voluntary disclosure faced its first challenge in the Brazilian system when it confronted the ingrained mindset of the legal operators. Even six years after the new law was enacted, several agreements signed under the new anticorruption legal framework have been challenged in court. This experience has brought uncertainty to the implementation of the new laws and, most importantly, has generated a sense of contempt for the authorities negotiating the voluntary agreements, as well as for the protection granted to the whistleblowers in the agreements.

That scenario has been aggravated by the dispute between concurrent authorities about who should negotiate and implement such agreements. The Brazilian Constitution of 1988, a blueprint of the redemocratization movement, values the idea that competing authorities check and control each other. This multistakeholder institutional arrangement has been actively mobilized in the recent anticorruption investigations, promoting a prodigious overlap of sanctions and penalties applied by different state agencies. For example, the companies that were willing to collaborate with the FPO, in exchange for reduced sanctions, soon found that several other agencies “piled on,” all invoking their own legal jurisdiction to apply additional sanctions. Even worse, the competing agencies make use of the information and evidence provided by previous agreements with other authorities, while assuming that they are not subject to the agreed terms, in disregard of the protection granted to the whistleblowers.

The numerous legal actions against Odebrecht by national agencies illustrate the dysfunction of the transplanted anticorruption system. Odebrecht and its executives first entered into agreements of collaboration and leniency with the FPO in December 2016. In these agreements, Odebrecht pled guilty to engaging in cartel practice, corruption, and other crimes, handing over evidence and renouncing its constitutional right of non-self-incrimination. Under this agreement, Odebrecht agreed to pay compensation of R\$3 billion (Brazilian currency). As part of the settlement, the FPO softened the criminal penalties on the executives, and the FPO withdrew all lawsuits against Odebrecht.

<sup>5</sup> Since June 2019, the media has published intercepted communications among the officials leading the Car Wash operations. The content of the communications shows that the authorities involved are inexperienced with the new system of collaboration. See [Secret Brazil Archive](#), THE INTERCEPT (2019).

<sup>6</sup> According to the Organisation of Economic Co-operation and Development, “whistleblowing procedures are presently hampered by concurrent competences and parallel systems for similar offences, which make it difficult to protect whistleblowers effectively. Most OECD countries have dedicated whistle blower protection laws while Brazil does not.” See Org. for. Econ. Co-Operation & Dev., [Economic Surveys Brazil](#) (Feb. 2018).

Shortly after, in a new judicial lawsuit against Odebrecht based on the Administrative Improbability Act, the Federal Attorney General's Office (FAGO) requested that all its assets and revenues be blocked, based on the same facts reported and acknowledged in the agreement negotiated with the FPO. Surprisingly, the FAGO relied on the declarations of guilt and evidence obtained in that previous agreement, failing to honor the benefits that it granted to Odebrecht and its executives in return. FAGO claimed that the previous agreement was not binding on it. A third motion was brought by the Office of the Comptroller General (OCG), based on the ACL. In July 2018, Odebrecht finally signed a second agreement, this time with both the FAGO and the OCG, committing to pay an additional R\$2.7 billion, in exchange for the withdrawal of the lawsuits and asset blocking, as well as of the administrative proceedings.

Petrobras objected to the settlement of those lawsuits, claiming that its damages were even greater than the amounts negotiated in the first and second collaboration agreements. The Federal Accounting Tribunal (FAT), which supervises the cost-effectiveness of contracts with federal public entities, then initiated a new administrative procedure. The FAT has threatened to impose on Odebrecht the penalty of not being able to contract with the public administration, in addition to applying new sanctions and charging new fines.

Further, the Brazilian Antitrust Agency applied other penalties to the cartel. Odebrecht signed an antitrust adjustment agreement of R\$578 million, and there are still other numerous pending cases in this agency. Finally, Brazil is a federal state, and agencies at the state and municipal levels that are analogous to FPO, FAGO, OCG, and FAT are starting their own administrative actions, lawsuits, and claims for additional sanctions and fines. Needless to say, these nonfederal actors have also relied on the information previously provided by Odebrecht in the abovementioned collaboration agreements.

The Odebrecht case provides evidence that the policy of encouraging collaboration, while proven to be a powerful anticorruption instrument in other countries, has been vitiated by the inability of Brazil and its agencies to provide legal certainty for its whistleblowers. The “piling on” of national agencies aggravates the situation, imposing double jeopardy on companies and individuals that agreed to collaborate, increasing their punishment, and negating their right to a “fresh restart.” Although there has been public acknowledgement of all these problems, no concrete action has been taken towards a more harmonious enforcement of the law.<sup>7</sup>

#### *Dysfunction of Extraterritoriality in Multijurisdiction Cases*

Until recently, the United States dominated the international anticorruption enforcement landscape, either acting as the sole authority or leading coordinated actions with foreign authorities. The recent increase of local anticorruption investigations beyond the United States has increased the pressure to develop a more sophisticated system of cooperation among authorities from different jurisdictions. The experience of Odebrecht dramatically illustrates the underdevelopment of such transnational mechanisms of coordination. In the Car Wash case, investigations have unfolded in forty-nine other jurisdictions. However, there is very limited consensus on the propriety of exercising extraterritorial jurisdiction in anticorruption cases.

The first collaboration agreement signed by Odebrecht with the Brazilian FPO was, in fact, conducted with the involvement of the U.S. Department of Justice (DoJ), as well as Swiss authorities. Odebrecht was considered to be under the jurisdiction of the FCPA because it had made decisions related to the corruption scheme in U.S. territory. Odebrecht committed to pay a fine of US\$2.6 billion for its offenses. According to the agreement, this sanction considered Odebrecht's ability to pay, allowing the payment to be made over twenty-three annual installments, with adjustments. The first payment—10 percent of the total amount—would be due to the U.S. Treasury in June 2017;

<sup>7</sup> By November 2019, the Brazilian Supreme Court is expected to rule on the binding effects towards other public entities of a collaboration agreement settled with the FPO. *Repercussão Geral no REx 1.175.650 – PR*, Justice Alexandre de Moraes.

the 82.1 percent due to the Brazilian authorities would be paid in installments starting on December 31, 2021; and the remaining amount would be payable to Swiss authorities thereafter. This sequencing of the investigation and implementation of the plea agreement supposedly reflected the standard transnational anticorruption legal ordering.

The dysfunction, however, happened after, as other states opened parallel and successive investigations. In the plea agreement, Odebrecht confirmed its bribery action in other eleven countries—Angola, Argentina, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela. Shortly after the parties signed the plea agreement, the DOJ, acting within its discretion, shared all information gathered from the agreement with the third countries mentioned in the corruption schemes. The immediate transnational circulation of the first plea agreement signed by Odebrecht and associated information suggests that, as had happened at the Brazilian national level, there is insufficient protection of the terms negotiated by the whistleblowers in multijurisdictional cases.

One consequence of this is that Odebrecht has been individually negotiating other settlements with countries throughout the region since December 2016. In 2017, for example, Odebrecht agreed to pay US\$220 million in fines to the Panamanian authorities and US\$184 million to the Dominican Republic's authorities. In countries with which Odebrecht has not yet reached an agreement, it has been formally or de facto banned from participating in government projects. This includes Argentina, Colombia, Mexico, and Peru. In this setting, the incentives for Odebrecht to negotiate new agreements are diminishing, and its ability to pay is being incrementally undermined.

In this chaotic scenario, the payment of 10 percent of the fine to the United States is the only compensation that is certain to be paid. Considering the request for judicial reorganization by Odebrecht in June 2019, the next installments of the fine to be paid to Brazilian authorities bear a high risk of default. This situation raises the question of effective compensation for damages to the victims directly affected by the various acts of misconduct. The affected countries in Latin American may be unable to seize assets to compensate their damages. This situation suggests that there is an insufficient legal order to ensure comprehensive coordination among affected authorities.<sup>8</sup>

In this international dimension of the case, we see dysfunction in the way authorities in multiple jurisdictions asserted jurisdiction over the same facts, and in their limited understanding of the need for better transnational coordination. Such coordination needs to respect the terms of the voluntary collaboration agreements, as well as to promote mechanisms to avoid double jeopardy and to favor the ordering of creditors for a fair compensation of damages.

The Car Wash case took its first steps during a moment of optimism about the transnational legal order on anticorruption. After five years, its legacy has been muddied by the dysfunctional way it is has played out within many of the countries involved. In addition, the Car Wash case has wrought political turmoil throughout the region and has caused economies to shrink, weakening the most transnationalized local companies. The prevailing feeling at this point is that transnational legal anticorruption regime has fallen short in its aim of promoting order over disorder.

<sup>8</sup> Low et al., *supra* note 4, at 587.