PREPARED TESTIMONY
of
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Before the
Subcommittee on the Western Hemisphere
Committee on Foreign Affairs
United States House of Representatives

"Understanding Odebrecht: Lessons for Combating Corruption in the Americas"

Chairman Sires, Ranking Member Rooney, and Members of the Committee:

Thank you for the opportunity to appear before you today for this hearing: "Understanding Odebrecht: Lessons for Combating Corruption in the Americas."

My name is David L. Hall, and I am a partner at the law firm of Wiggin and Dana LLP. Prior to joining Wiggin and Dana, I served as an Assistant United States Attorney with the Department of Justice for 23 years. I am also a retired naval intelligence officer, having served in the Navy for thirty years, active and reserve.

Opening Remarks

On December 21, 2016, Odebrecht S.A. and its petrochemical unit Braskem S.A., each entered a guilty plea in the Eastern District of New York to one count of conspiracy to violate the Foreign Corrupt Practices Act ("FCPA").[1] In the charging Information, the government alleged that Odebrecht conspired to "corruptly provide hundreds of millions of dollars in payments and other things of value to … foreign officials, foreign political parties, foreign political party officials and foreign political candidates to secure an improper advantage" and to influence those officials and parties "in order to obtain and retain business in various countries around the world."[2] The U.S. Government estimated that Odebrecht conspired to pay approximately "$788 million in bribes in association with more than 100 projects in twelve countries, including Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru and Venezuela." The global investigation into this scheme has ensnared almost a third of Brazil's government ministers; two former presidents of Brazil; the vice-president of Ecuador; a former vice-minister for transport and a former senator in Columbia; two ex-presidents in Peru, and over seventy executives at Odebrecht, among others. Odebrecht agreed to pay a criminal penalty of $2.6 billion and Braskem agreed to pay a penalty of over $632 million.[3]

The Odebrecht bribery conspiracy was astonishing in scale. And it not a one-off event, nor did it result from the actions of a few rogue employees or officials. It could hardly have been more

[1] The respective plea agreements are available at https://www.justice.gov/opa/press-release/file/919916/download; https://www.justice.gov/opa/press-release/file/919906/download.
[2] In addition to the plea agreements, the Odebrecht charging Information (available at https://www.justice.gov/opa/press-release/file/919911/download) contains an extensive factual recitation of the scope and nature of the Odebrecht bribery scheme.
[3] *Supra* notes 1 & 2.

systematic and sustained. The company actually created what was essentially a bribery department, known ominously as the "Division of Structured Operations," for the specific purpose of executing the corrupt scheme. This division of the Company acted like any traditional criminal conspiracy by operating in secret -- including using codenames and bespoke software and communications systems. Yet, in others ways, it acted like a traditional business division, using spreadsheets and payment management platforms, to track and manage the payment of bribes around the world.

The Division of Structured Operations also engaged in extensive money laundering, paying bribes by funneling money through a variety of offshore entities, utilizing smaller banks located in countries with strict banking secrecy laws, including Antigua and Panama. Using these funds, Odebrecht would rig bids, influence public projects for its own benefit, avoid repercussions from problems encountered on construction projects, and secure public contract work around the world. As the scheme grew, members of the conspiracy actually purchased a branch of an Austrian bank located in Antigua. Using this captive branch, corrupt officials could open an account and receive payments directly.

The Odebrecht Investigation

The scheme began to come to light in 2014 after allegations of money laundering revealed that money dealers operating out of gas stations and car washes were working on behalf of an executive at Petrobras, a petroleum corporation largely owned by the government of Brazil. Brazilian law enforcement initiated Operation Car Wash (Lava Jato) and discovered that Petrobras directors had been overpaying on contracts to fund kickbacks that were deposited in a secret slush-fund controlled by those directors. By following the path of the money, investigators discovered that that slush fund was used to bribe the politicians who had appointed the Petrobras directors to their positions and to fund their own election campaigns.[4]

The investigation would eventually implicate those at the highest levels of Brazil's government. In 2018, former President Luiz Inacio Lula da Silva started serving a 12 year prison sentence following his 2017 conviction for corruption and money laundering.[5] On March 21, 2019, former President Michel Temer was arrested on bribery charges relating to $472 million in kickbacks related to construction projects.[6]

A key factor in the success of investigators in identifying the depth and breadth of this corrupt scheme was a recent change in Brazilian law, allowing prosecutors to offer leniency in exchange for a defendant's cooperation. This new tool, combined with an increased use of "preventive detentions," which kept suspects in custody pre-trial, allowed investigators to elicit cooperation

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[4] *See* Mimi Whitefield, *Brazil Engulfed in a Corruption Scandal with Plots as Convoluted as a Telenovela*, available at https://www.miamiherald.com/news/nation-world/world/americas/article171222962.html.
[5] https://www.cnn.com/2017/07/12/americas/brazil-lula-da-silva-conviction/index.html; https://www.cnn.com/2013/08/05/world/americas/luiz-inacio-lula-da-silva-fast-facts/index.html
[6] https://www.nytimes.com/2019/03/21/world/americas/michel-temer-arrested-prisao.html; https://www.reuters.com/article/us-brazil-corruption/brazils-former-president-michel-temer-arrested-source-idUSKCN1R21JW

from suspects, including conducting sting operations such as one that captured a recording of a corrupt senator offering to arrange a jailbreak.[7]

As the nature of the corrupt scheme was revealed, investigators uncovered evidence that Odebrecht, Latin America's largest construction firm, had been involved in Petrobras' contract over-pricing and kickback scheme. In June 2015, Brazilian law enforcement arrested Odebrecht's CEO Marcelo Odebrecht, along with three other high level executives. In March of 2016, Marcelo Odebrecht was sentenced to 19 years in prison for paying more than $30 million dollars in bribes to Petrobras executives.[8] Subsequently, Marcelo Odebrecht cooperated with prosecutors in an effort to reduce his sentence.

The Brazilian Federal Police continued to investigate Odebrecht and, despite efforts to destroy or conceal evidence, gained access to an e-mail account used by an Odebrecht executive who worked in the Division of Structured Operations, which lead to a trove of hard copy spreadsheets detailing the Division of Structured Operation's activities. By following the investigative threads that started in a car wash, Brazilian authorities were able to discover a global network of corruption.[9]

Despite the magnitude of this scheme, its connections to the United States were, by comparison, relatively limited. As set forth in the charging Information, some of the entities used by the Division of Structured Operations were "established, owned and/or operated by individuals located in the United States," certain members of the conspiracy conducted meetings on U.S. soil, and some payments were disbursed from U.S. based bank accounts. Significantly, Odebrecht owned 50.11% of the voting shares and 38.1% of the total shares of Braskem S.A., a petrochemical company headquartered in Sao Paulo, Brazil. Shares of Braskem were traded on the New York Stock Exchange and Braskem was required to file annual reports with the SEC. Braskem was, thus, an "issuer" as defined by the FCPA and, unsurprisingly, did not disclose the benefits it received from participating in the Odebrecht bribery scheme to its investors or to U.S. regulators.

Global Changes in Combating Corruption

Significantly, and unlike many FCPA cases prosecuted in the United States, the Odebrecht case originated from an investigation outside of the United States conducted by foreign authorities. Typically, FCPA prosecutions and enforcement actions arise out of investigations initiated and conducted by U.S. law enforcement. This makes sense historically, given the leadership of the United States in the fight against global corruption – starting with the enactment of the FCPA.

But, in the past, the United States often stood alone in its anti-corruption efforts. Other nations did not have or enforce similarly robust anti-corruption laws. Compounding this problem,

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[7] *See* Dilma Rousseff Luiz Inácio Lula da Silva, *Operation Car Wash: Is this the biggest corruption scandal in history*, available at https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history.

[8] *See Brazil Petrobras scandal: Tycoon Marcelo Odebrecht jailed*, available at https://www.bbc.com/news/world-latin-america-35753774.

[9] *See* Michael Smith, Sabrina Valle, and Blake Schmidt, *No One Has Ever Made a Corruption Machine Like This One* available at https://www.bloomberg.com/news/features/2017-06-08/no-one-has-ever-made-a-corruption-machine-like-this-one.

cooperation from the international community was often limited as those countries sought to protect their own companies from the reach of U.S. extraterritorial jurisdiction.[10] Given the United States' aggressive position on anti-corruption, some believed that the FCPA placed U.S. companies at a disadvantage in global commerce, compared to international competitors that were not similarly constrained in behavior, and that did not bear the financial burden of FCPA compliance and record keeping requirements. Thus, concluded the critics, the FCPA – as laudable as its goals are -- has disadvantaged U.S. business in global markets.[11]

This might be changing. The Odebrecht case itself implies as much, given the extensive anti-corruption effort exerted by a multitude of foreign nations. In addition, anti-corruption laws are changing in many other nations. For example, India recently amended its Prevention of Corruption Act to target bribe-givers, who could previously only be prosecuted indirectly through the Act's abetting provisions.[12] Thailand has amended its anti-corruption laws, bringing the country's anti-corruption regime in line with the 2003 UN Convention Against Corruption.[13] In 2015, South Korea enacted its Improper Solicitation and Graft Act, which specifically prohibits certain categories of gifts to "public officials."[14] France's newly passed Sapin II bill brings that country's anti-corruption regime closer in line with that of the U.S. and the U.K.[15]

If these trends continue, it is good news for U.S. businesses as the global playing field will become more level.

Continuing the Fight

There is much the United States can do to take advantage of this momentum. For one thing, it can continue enforcing the FCPA against foreign companies as well as domestic ones. A review of the largest FCPA penalties imposed by the U.S. government shows that the majority of the largest fines have actually been imposed against non-U.S. companies.[16] In pursuing these types of enforcement actions, the United States can hope to induce foreign companies to implement and enforce robust anti-corruption policies and, thus, play by the same set of rules as U.S. companies.

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[10] *See* International Business Transactions Committee the Association of the Bar of the City of New York, *The FCPA and its Impact on International Business Transaction*, available at https://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf. (noting the difficulty in securing cooperation from other countries, and discussing the possible factors which can shape a country's anti-corruption policies).

[11] *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 Va. L. Rev. 1611, 1628 (2017) (discussing the reactions to the passing of the FCPA and its potential effect on businesses abilities to compete internationally).

[12] Calvin Chan & Jun Yi Ho, *Significant Updates to India's Anti-Corruption Law*, available at https://www.reedsmith.com/en/perspectives/2018/10/significant-updates-to-indias-anti-corruption-law.

[13] *Anti-Corruption in Thailand: new amendment strengthens rules on corporate bribery*, available at https://www.nortonrosefulbright.com/knowledge/publications/90774c33/anti-corruption-in-thailand-new-amendment-strengthens-rules-on-corporate-bribery.

[14] Catherine E. Palmer, Daiske Yoshida & Junyeon Park, *Expansive Korean Anti-Corruption Law Comes into Force*, available at https://www.lw.com/thoughtLeadership/LW-korean-anti-corruption-law-comes-into-force.

[15] Alexandre Bailly & Xavier Haranger, *Sapin II Law: The New French Anticorruption System*, available at https://www.morganlewis.com/pubs/sapin-ii-law-the-new-french-anticorruption-system.

[16] Brewster, s*upra* note 9, at Table 1.

Still, the degree of difficulty faced by U.S. law enforcement and regulators in investigating clandestine conspiracies on foreign soil is high. This is why it is so important that foreign governments are increasing their efforts in anti-corruption enforcement. We could be at a pivotal moment giving rise to a unique opportunity to increase cooperation with foreign anti-corruption authorities. Using the Odebrecht case as a framework, we can see what the U.S. role in assisting anti-corruption enforcement internationally might look like.

As a threshold matter, the United States can assist other nations in implementing an effective anti-corruption regime by enacting robust anti-corruption laws. The United States can encourage this in a number of ways including providing assistance in drafting legislation and developing effective enforcement mechanisms. The United States can also directly assist foreign authorities in anti-corruption investigations and enforcement. Again, the Odebrecht case provides a good example of how international law enforcement cooperation can be mutually advantageous. What started as a money laundering investigation involving car washes and gas stations turned into the largest international corruption case in history. Foreign law enforcement agencies exhibited a high – and highly commendable – degree of competence and tenacity in this investigation. U.S. law enforcement authorities, accustomed to taking the lead in this type of investigation, can themselves benefit from working with such skilled partners. The United States can also assist by providing training on how to conduct effective corruption investigations. As illustrated by Odebrecht's bespoke software platforms used to manage its Division of Structured Operations and its efforts to destroy or conceal evidence, cutting edge investigative tactics will be vital in pursuing sophisticated anti-corruption prosecutions in the future. The United States is in a position to use its knowledge and resources to help foreign law enforcement agencies analyze international commercial and banking transactions, and help unravel the tangled pathways that bribes can travel.

By working with other countries to enforce their own anti-corruption policies, the U.S. also increases the likelihood of success in domestic prosecutions under the FCPA. As the Odebrecht case demonstrated, it is possible that a corrupt scheme originating abroad might use the U.S. banking system, involve U.S. based partners, or otherwise implicate companies subject to U.S. laws and regulations. But the best evidence of these U.S.-based criminal activities might actually be located overseas. The best way to gather this evidence is to have U.S. investigators and prosecutors on the ground in foreign countries developing relationships with their foreign counter-parts. This sort of integration can be accomplished by expanding the scope of attaché programs such as those of the Justice Department, the FBI, and the Department of Homeland Security.

The United States has long been at the forefront of prosecuting anti-corruption cases, and is now presented with a new opportunity to partner effectively with foreign governments in enforcing anti-corruption laws. Thus, the Odebrecht case might – with a little luck –portend the beginning of more effective and fairer global anti-corruption law enforcement.

Thank you for your attention.