Whistleblowing to a Latin Tune: The Adaptation Problems of the OECD/FCPA Paradigm in Environments with Disseminated Corruption through the Lenses of the Odebrecht Case in Latin America

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Abstract: This paper discusses the adaptation and feasibility of some of the tools shared by the OECD Convention and the U.S. Foreign Corrupt Practices Act. The article highlights three of them: incentives and protection to whistleblowers, prosecutorial discretion, and different forms of negotiated justice, including plea bargaining. We call these tools the OECD/FCPA paradigm.

We claim that the OECD/FCPA paradigm hardly reconciles criminal punishment needs in Latin American countries. We offer three primary reasons for this inadaptation. The first reason is that most Latin American countries have what the literature calls "disseminated corruption as a point of equilibrium" for grand corruption. In an environment with disseminated corruption (as described in the plea agreement in the Odebrecht case), all actors have incentives to accept or offer bribes. It creates a pragmatic incompatibility with prosecutorial discretion and plea bargaining, as some politicians or businesspersons would suffer anti-bribery enforcement, while many others – including the former's competitors – would not.

The second reason is that the OECD/FCPA paradigm weakens the system of control implemented in many countries, as it reserves the power to a limited number of agencies and prosecutors. Considering environments with disseminated corruption, the concentration of power - and discretion - over a limited number of agents creates the institutional design for the lack of accountability and perhaps collusion.

The third reason is mainly connected to Latin America's political history. We argue that collaboration agreements, whistleblowers, and discretion are prone to magnify certain cases of corruption. Considering the traditional connection between corruption scandals and political instability in Latin America, we argue that the OECD/

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FCPA paradigm offers deleterious tools to political exploitation of anti-bribery enforcement.

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A. Introduction

Why do some corruption cases receive swift and severe punishments, while the evidence of other cases rests for years in the shades of officers' cabinets? Why are some whistleblowers recognized as heroes (and sometimes granted with prizes)? In contrast, others don't see their claims flourish and occasionally don't even receive the physical protection for the threats related to their tips? Why are some wrongdoers so hardly punished while their competitors – both in businesses and politics – keep paying and receiving bribes as if they were immune to the deterrence effects of the punishments that their competitors suffered? Our answer to these questions includes the ideas of disseminated corruption as a state of equilibrium, selective justice, and the potentially more significant political turmoil that urges after corruption scandals created within the contribution of whistleblowers and plea bargaining. Our answers are inspired by the analysis of the Odebrecht case in Latin America.

Odebrecht is a Brazilian holding company that conducted business in multiple industries, including heavy construction, infrastructure, and chemicals. Odebrecht operated in 27 countries, including the United States. Braskem is one of the largest petrochemical companies in the Americas, producing a portfolio of petrochemical and thermoplastic products. Odebrecht controls Braskem. Petrobras is Brazil's national oil company, and the second-largest shareholder of Petrobras, after Braskem.[1]

These companies were involved in a vast corruption scheme. In Brazil, the operation that investigated these three cases — and more than twenty of Odebrecht's Brazilian competitors in the construction — was known as the "Car Wash Operation".[2] In the United States, Odebrecht, Petrobras, and Braskem faced the Foreign Corruption Practices Act - FCPA.

The FCPA is the most important foreign anti-bribery enforcement act in the world.

1 Plea Agreement, United States v. Odebrecht S.A., 16-cr-643 (Eastern District of New York filed 21 December 2016).

2 *Juan Pablo Spinetto and Sabrina Valle*, Petrobras Imposes Ban on Builders in Carwash Probe (Bloomberg, 30 December 2014), https://www.bloomberg.com/news/articles/2014-12-30/petrobras-imposes-ban-on-builders-in-car-wash-probe (last accessed 14 May 2021); *Lisandra Paraguassu*, Brazil's Andrade Gutierrez to pay $381 million fine to settle graft charges (Reuters, 18 December 2018), https://www.reuters.com/article/us-brazil-corruption-andrade/brazils-andrade-gutierrez-to-pay-381-million-fine-to-settle-graft-charges-idUSKBN1OH22U (last accessed 14 May 2021); Reuters, Brazil's Camargo Correa seeks new plea deal over corruption (Reuters, 14 January 2017), https://www.reuters.com/article/brazil-corruption-camargo-correa/brazils-camargo-correa-seeks-new-plea-deal-over-corruption-veja-idUSL1N1F409L (last accessed 14 May 2021).

The FCPA allows for the extraterritorial jurisdiction of the United States. In essence, it means that the United States can enforce against companies or individuals for actions taken out of the U.S. territory. The FCPA was the inspiring model for the Organization of Economic Cooperation and Development Anti-bribery Convention and at least two other important conventions on bribery (the United Nations and the American States Organization).

This paper discusses the adaptation and feasibility of some of the tools shared by the OECD Convention[3] and the FCPA. In this article, we highlight three of them: incentives and protection to whistleblowers, prosecutorial discretion, and different forms of negotiated justice, including plea bargaining.

The article below is divided into four topics. First, we present the OECD/FCPA paradigm and the three tools we analyze in the paper. Second, we offer the idea of corruption as equilibrium. Third, we discuss the tension between multiple institutions' system to tackle corruption with the centralized and discretionary structure, which is mandatory to implement successful whistleblowing and plea bargaining. Last, we explore the role of whistleblowers and discretion on who to prosecute and when, in an environment with disseminated corruption, raising evidence of the political outcomes of the Odebrecht case in Latin America.

B. The FCPA/OECD paradigm and its main tools: a treasure chest or Pandora's box?

The FCPA was enacted in 1977 by Jimmy Carter as a response to international bribery scandals during the Richard Nixon era. For many decades its existence was mainly symbolic, as no or very few cases were enforced under the FCPA until the beginning of the 2000s. A common explanation for the lack of enforcement of the FCPA during its first two decades was that the American industry argued the FCPA created an uneven playing field for U.S. companies in global commerce, which made robust enforcement politically unpopular.

The turning point of the FCPA enforcement would come after the OECD Convention and the dissemination of the idea of foreign anti-bribery enforcement as something to improve local markets and institutions worldwide. According to Rachel Brewster "(…) the [U.S.] executive branch strategically underenforced the FCPA, while Congress and

3 The OECD Convention brings about signatory parties to criminalize – or impose quasi-criminal sanctions to international bribery (also making it a predicate offense of money laundering) and accounting fraud. It establishes the enforcement of anti-bribery laws regardless of potential economic effects. It includes the liability of legal persons for a foreign public official's bribery and the criminal sanction for the legal person if the internal legal system allows it so. The OECD Convention also includes the enlargement of jurisdiction to promote effective responsibility of legal persons, establish statutes of limitations that would enable appropriate investigation and prosecution, mutual legal assistance and increase of international cooperation among the countries, and the possibility of extradition of the wrongdoers connected to international bribery. Finally, the OECD Convention carries a program of systemic monitoring and follow-up of the Convention's implementation. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1999, https://www.oecd.org/corruption/oecdantibriberyconvention.htm (last accessed 14 May 2021).

the President pushed for an international agreement that would bind other countries to rules similar to those of the United States. Afterward, U.S. officials, desiring to maintain industry support for the FCPA, prosecuted both foreign and domestic corporations, thereby minimizing the statute's competitive costs for American companies."[4]

Rachel Brewster argues that the OECD Convention allowed American prosecutors to adopt a neutral enforcement strategy, investigating both U.S. domestic corporations and their foreign rivals alike.[5] According to Rachel Brewster, the treaty legitimized the U.S. prosecutions of international corporations.[6] The OECD Convention also expanded its patterns (a heritage from the FCPA and the US criminal system) to many other countries. While the alleged argument for such expansion involves human rights and the main idea that environments without corruption can improve people's lives, Griffith and Lee include market interests and international politics as factors that expand the FCPA's acceptance and the OECD Convention.[7]

The three procedural routines of the FCPA, expanded by the OECD, prone to cause troubles in the Latin American anti-corruption tradition are whistleblowing, prosecutorial discretion, and plea bargaining.

The OECD Convention recommends that local systems should include a whistleblowing mechanism. Among other prescriptions, the Convention warns that all countries should issue clear instructions on how to recognize indications of corruption and "on the concrete steps to be taken if suspicions or indications of corruption should arise (…)" and "reduce any perception of opacity around corruption reports and investigations."[8] Although the Convention recognizes these problems, there is no specific procedure to completely avoid both suspicion and opacity around whistleblowers, especially in environments with widespread or disseminated corruption.

According to the OECD Convention Commentaries (a structural part of the Convention), "(…) Article 5 recognizes the fundamental nature of national regimes of prosecutorial discretion. It recognizes as well that, in order to protect the independence of prosecution, such discretion is to be exercised based on professional motives and is not to be subject to improper influence by concerns of a political nature."[9]

4 *Rachel Brewster*, Enforcing the FCPA: International Resonance and Domestic Strategy, Virginia Law Review 103(8) 2017, p. 1611-12.

5 Ibid.

6 Ibid.

7 *Sean J. Griffith and Thomas H. Lee*, Toward an Interest Group Theory of Foreign Anti-Corruption Laws, University of Illinois Law Review 2019(4) (2019).

8 OECD, Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption, 2016, https://www.oecd.org/corruption/anti-bribery/Recommendation-Development-
Cooperation-Corruption.pdf (last accessed 14 May 2021).

9 OECD, note 3, p. 14.

Plea bargaining does not appear in the OECD Convention text. However, it reverberates as part of the paradigm as regular enforcement of the FCPA, as the traditional enforcement for criminal sanctions (and the OECD/FCPA paradigm recommends corruption to be punished as crime), and a necessary consequence of the incentives to whistleblowers and prosecutorial discretion.[10]

According to the FCPA Guide, an official document from the U.S. Department of Justice, assistance and information from whistleblowers are considered "among the most powerful weapons in the law enforcement arsenal".[11] The idea is that whistleblowers know the circumstances and individuals involved so they can help the anti-bribery agencies identify potential violations earlier, with better pieces of evidence, and at lower costs of the investigation.

The FCPA system relies heavily on prosecutorial discretion. The discretion exists in which cases to prosecute and how to settle the facts chosen to be enforced. A number of resolutions other than indictment are available to authorities. The attorneys can decline to prosecute or propose a plea agreement, deferred prosecution agreement, under which, to simultaneously file a charging document with the court and non-prosecution agreement. Daniel Pulecio-Boek describes the rise of discretion among Latin American prosecutors and how it doesn't represent a homogeneous improvement in the legal systems.[12]

When conducting investigations, the FCPA places a high premium on self-reporting. Enforcement authorities consider when companies voluntarily and timely disclose the violations of FCPA provisions. These elements are considered when officers negotiate corporate resolutions such as deferred prosecution agreements or non-prosecution agreements. They are also relevant when proposing discounts on financial penalties. The stimulus to self-reporting and voluntary disclosure reveals another important anti-bribery enforcement tool: compliance procedures and self-regulation.

In December 2016, Odebrecht pleaded guilty with the DOJ. Odebrecht admitted making several bribery payments in countries including Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela, running a sophisticated scheme to support it. The illicit payments were kept separate from the company's official accounting and concealed with the aid and authorization of Odebrecht's executives. As per the Statement of Facts attached to the Plea Agreement, Odebrecht "knowingly and willfully conspired and agreed with others to corruptly provide hundreds of millions of dollars in payments and other things of value to, and for the

10 OECD, note 8, p. 44.

11 Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition 2020, https://www.justice.gov/criminal-fraud/file/1292051/download (last accessed 14 May 2021).

12 *Daniel Pulecio-Boek*, The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region, Richmond Journal Global Law & Business 13(1) (2014), p. 67.

benefit of, foreign officials, foreign political parties and foreign political candidates in order to obtain and retain business".[13] In September 2018, Petrobras signed a Non-Prosecution Agreement with the DOJ.

The FCPA enforcement joined the local enforcement of criminal laws in the countries related to corruption practices. The Petrobras and Odebrecht cases lead to hundreds of politicians and high executives' unprecedented imprisonment throughout Latin America and Africa.[14]

13 Plea Agreement, United States v. Odebrecht S.A., 16-cr-643 (Eastern District of New York filed 21 December 2016).

14 "The vice-president of Ecuador, Jorge Glas, became the highest-ranking government official to be convicted in the scandal when he was sentenced in December 2017 to six years in jail. Prosecutors said he took $13.5m (£10.2m) in bribes from Odebrecht. (…)

Colombia charged a former vice-minister for transport and a former senator. The man who ran the election campaign of the former president, Juan Manuel Santos, has alleged it was financed with irregular Odebrecht payments. Mr. Santos, who is a Nobel Peace Prize winner, said he did not authorise any payments or know about them.

Next door in Venezuela, former chief prosecutor Luisa Ortega has fled the country after being sacked. She alleges that President Nicolás Maduro is implicated and that a top court is blocking an investigation. Odebrecht has denied her other allegation - that they paid $100m (£76.5m) to the socialist party's vice-president, Diosdado Cabello. Venezuela has taken unfinished projects away from Odebrecht and blocked the company's bank accounts.

In Peru, four ex-presidents have been placed under investigation. Ollanta Humala and his wife Nadine Herediaare are facing potentially lengthy prison sentences for allegedly receiving payments to fund his presidential campaigns in 2006 and 2011.

Alan García, who served as president from 1985 to 1990 and again from 2006 to 2011, killed himself with a bullet to the head on April 17 as police came to arrest him over claims he took bribes from Odebrecht.

Former President Alejandro Toledo, accused of taking $20m in bribes, is thought to be living in the U.S. and the Peruvian government has put up a $30,000 reward for information leading to his arrest.

Staying with Peru, opposition leader Keiko Fujimori has come under preliminary investigation. The attorney general says a note found on Marcelo Odebrecht's mobile phone implicates her. She denied receiving money from the company.

Panama charged 17 people including government officials, and charged Odebrecht $59m in compensation. A lawyer from Mossack Fonseca - the firm at the centre of the Panama Papers leak - accused President Juan Carlos Varela of receiving Odebrecht donations. Mr Varela denies all wrongdoing.

Mexico summoned a former director of state oil company Pemex and other employees to give evidence over alleged Odebrecht bribes, while the Dominican Republic asked Odebrecht for $184m compensation over the next eight years.

Chile started an investigation and seized documents from the Odebrecht offices, while the firm agreed to pay Guatemala $17.9m in compensation for bribes paid to an official for public work, the attorney general's office said in January.

And Brazilian newspaper O Globo reports (in Portuguese) that 29 countries, including Sweden, the U.S., France and the UK asked Brazil for help with their own Odebrecht investigations." BBC.

How did the countries' legal systems involved in the Odebrecht case have enough evidence of these schemes for the first time? Whistleblower's incentives and protection possibly had a role in this, especially for the tips informed to the U.S authorities under the FCPA. It is much more challenging to control the neutrality of the information that blossomed in Brazil.

We claim that the tools one can find within the OECD/FCPA paradigm mean a treasure chest in many senses. However, they can also represent Pandora's box in a few others. Whistleblowing, discretion, and plea bargaining accomplished goals that were never assembled before in Latin America. They represented a real achievement against corruption and impunity. However, in the following sections, we will present the dispute of these tools in an environment with disseminated bribery and shed light on the objections Latin American countries may represent to the OECD/FCPA paradigm, taking the Odebrecht case as a narrative lead.

C. The reasons why most politicians and companies would always be involved in Latin America.

The presentation of corruption-as-equilibrium exists for decades. In this section, we explore the approach developed by Ray Fisman and Miriam Golden.[15] Their framework about corruption does not restrain corruption origins to cultural biases. However, they do recognize that some countries are stuck in disseminated corruption. The Odebrecht case doesn't say much about petty bribery. Still, it shows the wider political implications of grand corruption and public procurement in many countries of Latin American and at least two countries in Africa.

Contingent behavior means our behavior depends on what others are doing. According to Ray Fisman and Miriam Golden, corruption happens as a result of interactions among individuals.[16] Given the choices others make, no one person can make herself better off by choosing any other course of action. In other words, the contingent behavior theory explores how corruption can be understood in the perspective that people make decisions after considering what they expect others to do.

Some of the classic examples to explain contingent behavior basics are how we dress to a party or at what time we have lunch in a cafeteria. If most people will wear jeans, it is unlikely that one chooses a ball gown. If most people eat at noon, it is doubtful that

Odebrecht case: Politicians worldwide suspected in bribery scandal (17 April 2019), https://www.bbc.com/news/world-latin-america-41109132 (last accessed 14 May 2021).

For continuously updated explanations on the Odebrecht case in Latin America, see Transparency International and Jota website, Odebrecht around the World, https://www.jota.info/tudo-sobre/lava-jato-around-the-world (last accessed 14 May 2021).

15 *Ray Fisman and Miriam Golden*, Corruption: What Everyone Needs to Know, New York 2017.

16 Ibid.

one decides to eat at 2 PM. Likewise, whether a person decides to engage in or denounce corruption is contingent on how they expect others to behave too.

Ray Fisman and Miriam Golden develop this idea when they announce that there are four types of participants in corrupt activities: elected public officials (i.e., politicians), government bureaucrats, businesses, and ordinary citizens.[17] It is easy to identify each of these groups' reasons to engage in corruption, at least superficially. Elected public officials benefit from corruption when receiving bribes from businesses in exchange for government contracts or favorable legislation. They use bribes to increase their wealth and also to support their positions (which include the budget for the next elections and the maneuvers to avoid their opponents from winning). Civil servants benefit from corruption when receiving bribes to deliver public services or neglect to enforce the regulation. Businesses succeed both from profiting from government contracts won through bribery or connections and lower their expenses by avoiding regulation. Ordinary citizens benefit from corruption by taking the public services they should receive without paying bribes (seeing a doctor in a public hospital, for example) or bribing around regulation (avoiding a parking ticket, for example).

The primary conclusions are that these four bribe payers' behavior as groups reveal that corruption is good for them, as businesses and individuals benefit from getting what they need or want, and politics and bureaucrats benefit too. However, when we consider the group's agents separately, as individuals, bribe creates a worse scenario for most of them. In this scenario, citizens are paying for services they are entitled to by law. The gains of some companies represent the losses for the others. All the companies would be better off if they agree to stop paying bribes. The contracts would still come up for bid, but the winners would not have to budget the additional spend on bribery. Ray Fisman and Miriam Golden address the appealing question: Why, then, all individuals and all businesses refuse to pay bribes and start a society free of corruption?

The answer leads us back to the idea of contingent behavior and presents corruption as a *multiple equilibrium* phenomenon. Corruption is stable in two opposite situations: a very clean society and a society with disseminated corruption. In an immaculate community, others' behaviors make the individual's life that wants to bribe very difficult. The risks involved with corruption are higher than the potential gains of being corrupt. Individuals who offer bribes are easily exposed. It is hard to find partners to collude with to steal from public coffers or deviate from government regulation. It's also challenging to find people to covert misbehaves. "The corrupt person swims alone in a sea of honest compatriots", say Ray Fisman and Miriam Golden.[18] In these clean environments, there are higher chances of being caught and probably higher sanctions. The environment pushes corrupt individuals to refrain from their intentions, reinforcing the stable equilibrium of a society free of corruption. This is a virtuous cycle.

17 Ibid.

18 Ibid, p. 7.

In a society with disseminated corruption, other's behaviors help individuals decide that the benefits of corruption exceed those of honesty. Suppose a person systematically finds herself shut out of contracts or essential government services. In that case, individuals resign themselves and accept to collude too, even if they didn't want to do that in the first place. The sense of wrongdoing diminishes. This is a crucial behavioral concept to understand the banality of grand corruption in some societies. It allows the use of a well-disseminated phrase in Latin America that justifies the renewed votes for politicians that are notoriously accused of corruption: "steal, but get things done", "robar pero hacer", "rouba, mas faz". The equilibrium of disseminated corruption brings more people to corrupt practices and, in addition to that, lowers people's willingness to denounce corruption. In a society where corruption is common, few would dare to speak out against it independently. Denunciations can lead to both social disapproval and physical dangers. This is a vicious cycle.

Ray Fisman and Miriam Golden develop a sensitive example of how these opposite equilibriums of corruption happen in daily life, especially for ordinary citizens.[19] (We chose to reproduce the example because it can touch most readers). If everyone pays a bribe to get a doctor's appointment, all individuals conclude that if they want to see a doctor, they'd better do the same, even if they disagree with this practice. On the other hand, in a society where no one pays a bribe to get a doctor's appointment, someone who offers a bribe for more personal attention or better treatment exposes himself to shame, ridicule, and maybe a few months in prison too.

The idea of corruption-as-equilibrium points out that the behaviors we see around us and the choices we make are not necessarily the ones people believe are the best or the ones they believe are morally acceptable. Sometimes, people's decisions are not the decisions they want to make. Susan Rose Ackerman was one of the authors to prove that the vast majority of the population is against corruption in virtually all countries.[20] In this sense, it is clear that Odebrecht case's achievements in Latin America are celebrated by the local citizens (and certainly by the authors of this paper). However, we argue that the theory of corruption-as-equilibrium provides an appealing explanation for why corruption tends to stay as a persistent problem, even if people are mainly against corruption. People get stuck in their position in societies with disseminated corruption. People also get stuck in clean societies. The efforts in shifting from one stable equilibrium to the other are unlikely to rely only or mainly on the FCPA/OECD tools.

The idea of corruption as a second-best strategy is quite appealing for ordinary citizens and officials that deal with petty bribery. The example of the doctor's appointment is appealing in this sense. Corruption is likely to be the second-best strategy for most businesses too. "No company wants to pay bribes; they pay them because they fear that others pay

19 *Fisman and Golden*, note 15.

20 *Susan Rose Ackerman*, Corruption and government: Causes, consequences, and reform, Cambridge 1999.

them instead and take their business", says Griffith and Lee.[21] The Odebrecht case deals with the political elite of all the countries involved.

Ray Fisman and Miriam Golden state that even for politics, it isn't obvious that the corrupt equilibrium is preferred to the honest one: "If you enter politics, would you prefer to earn to compete on an even footing with other candidates via legally funded campaign contributions, or (like everyone else) embezzle from government coffers to finance your re-election bid? Do you want to use your campaign funds to illegally buy votes because that's what your competitors do, or use your money to advertise your campaign on television? We'd argue that the low-corruption equilibrium is better for just about everyone."[22]

The Odebrecht case revealed hundreds of politicians in all the countries mentioned in the FCPA plea agreement. The politicians that had poor social origins or were elected with the pledge to fight against corruption are probably more disappointing than the politicians whose origins were connected with the local elites. The fact that virtually all politicians were involved in the Odebrecht case makes the hypothesis of corruption as equilibrium even more appealing, in the sense that it is unlikely that politicians had the incentives to interrupt the vicious cycle. Of course, there will always be people whose moral patterns are so high that they will never accept being part of any corruption scheme and will receive no price to suppress their beliefs. However, it is unlikely that incorruptible people occupy most of the high political positions in Latin America or Africa during Odebrecht case outbreak.

Even with these constraints, the primary or only recipe for shifting a state of disseminated corruption to a state of cleanliness is the enforcement of appropriate anti-bribery enforcement. The questions we propose in the following sessions are: In places where corruption is all around, does it make sense to concentrate the power to tackle corruption, as required by plea bargaining and discretion? Discretion and whistleblowing can expand the erratic patterns of anti-corruption enforcement. Can these erratic patterns be deleteriously explored by the local corrupt players while keeping a stable corruption structure? We believe the Odebrecht case inspires intriguing answers to these questions.

D. Institutional multiplicity to address corruption in Latin America. And how the OECD/FCPA paradigm weakens it.

In many places, the newspapers renew their headlines with the identical schemes of the previous years, decade after decade. That some countries collect scandals of corruption in their newspaper's front pages is a paradox that joints the disappointing conclusion of an endless malfeasance equilibrium and the successful initiatives of denunciation and enforcement.

Latin America places itself as a peculiar spot in this paradox. For different reasons, countries like Brazil and Colombia present themselves with a robust system of both

21 *Griffith and Lee*, note 7, p. 20.

22 *Fisman and Golden*, note 15, p. 9.

anti-corruption laws, and accountability institutions charged with monitoring, investigating, and sanctioning those involved in corruption.[23] Chile, Uruguay and Costa Rica have similar backgrounds and count with very low corruption levels. The opposite happens in Venezuela, which has one of the worst levels of perceived corruption in recent years.[24]

In Brazil, there is a peculiar strategy for creating a robust system of both anti-bribery laws and accountability institutions that reinforce each other in their mission of monitoring, investigating, and sanctioning corruption. This peculiar strategy is called "institutional multiplicity".[25] We claim that the OECD/FCPA paradigm may represent a threat to the countries whose institutions developed to organize themselves in this structure.

Lindsay Carson and Mariana Mota Prado describe institutional multiplicity as any diversification of institutions performing one particular function, such as the simultaneous existence of multiple forms of punishment and additional sanctions reinforcing each other.[26] As the Odebrecht case, cases involving political corruption could give rise to numerous overlapping penalties for offenders in some countries. The penalties for individuals can potentially include political sanctions (administrative removal from office or censure), criminal sanctions, civil judgments, and the reputational damage from negative media coverage in all these types of enforcement. The penalties for companies can include criminal and civil sanctions, debarment from public contracts, antitrust enforcement against the cartel's formation, or the reimbursement of capital market losses for the companies' investors.

Lindsay Carson and Mariana Mota Prado assume that the overlap of institutional functions in environments with systemic and widespread corruption can "enhance the overall effectiveness of the 'web' of accountability institutions" as it can avoid the self-reinforcing mechanisms of the vicious cycle of corruption.[27] A central challenge in tackling corruption is that actors in positions of power who benefit from the status quo of a corrupt environment regularly have little or no incentive to change the rules of the game. They can even actively sabotage reforms that can make their routines in corruption more difficult.

The OECD/FCPA paradigm concentrates power in institutions and agents that can choose their acts' content – this is discretion – and concentrate the final words about plea agreements. The reduction of the web against corruption opens the system to self-interested actors that can block their risks by conducting their supporters to the limited key positions. The institutional multiplicity strategy is potentially able to overtake the entrenched barriers of environments with disseminated corruption.

23 *Lindsay Carson and Mariana Mota Prado*, Using institutional multiplicity to address corruption as a collective action problem: Lessons from the Brazilian case, The Quarterly Review of Economics and Finance 62 (2016), p. 56.

24 *Robert L. Rotberg*, Corruption in Latin America : How Politicians and Corporations Steal from Citizens, Cham 2019, p. 1-25.

25 *Carson and Prado*, note 23.

26 Ibid.

27 Ibid, p. 56.

Institutional multiplicity leaves the existing institutions intact but provides alternative paths for achieving anti-corruption objectives. In this sense, Lindsay Carson and Mariana Mota Prado state that "(…) potential reformers are not limited to very prominent leaders or other particularly influential and powerful elites".[28] Instead, institutional diversity opens up a mechanism through which any reform-oriented individual can potentially escape the current institutional environment and effectively influence the content, administration, or enforcement of existing rules, at different levels.

The conflict between the OECD/FCPA paradigm and the institutional multiplicity to address corruption appears in the Odebrecht case in a situation familiar to both Mexico and Brazil. Reinaldo Luz and Giancarlo Spagnolo describe how corruption and bid-rigging reveal classic schemes representing both antitrust and criminal offenses in these two countries. Leniency policies (non-criminal) offer immunity to the first cartel members that blow the whistle and self-reports to the antitrust authorities. The policy offering immunity from antitrust sanctions is claimed to be not sufficient to encourage wrongdoers to blow the whistle, as the leniency recipient gets exposed to the risk of corruption conviction. Odebrecht played a role in this situation in Brazil.[29]

In our view, the overlapped role of antitrust and criminal agencies in Brazil and Mexico is to be celebrated. They represent an effective combination of sanctions to harmful practices, although keeping underlying incentives for whistleblowers, as they can benefit from the antitrust leniency. Once again, we have to consider that companies in environments with widespread corruption have very limited incentives to blow the whistle against themselves and are likely to do so in quite specific moments, including when they find themselves facing the risks of a regular antitrust or anti-bribery enforcement.

The FCPA/OECD paradigm reinforces the authors' words that disagree with the overlapping role of antitrust and anti-bribery enforcement. Reinaldo Luz and Giarcarlo Spagnolo claim the situation is a "problem" that requires "legal harmonization, coordination, and co-operation on procedural and substantive issues."[30] Michelle Sanchez-Badin and Arthur Sanchez-Badin call it "dysfunctional enforcement".[31] They add it represented the "weaknesses of the transnational anti-corruption legal apparatus" and "the lack of experience of the local agencies in anti-corruption law" when describing how the Brazilian prosecutor's office didn't have the power to refrain the enforcement of other agencies that "piled on" invoking their legal jurisdiction to apply additional sanctions in the Odebrecht case. These agencies used of the information and evidence provided by previous agreements with other authorities, assuming they were not subject to the agreed terms.

28 Ibid, p. 3.

29 *Reinaldo Luz and Giancarlo Spagnolo*, Leniency, Collusion, Corruption and Whistleblowing, Journal of Competition Law & Economics 13(4) (2017), p. 729-766.

30 Ibid.

31 *Michelle Sanchez-Badin and Arthur Sanchez-Badin*, Anti-corruption in Brazil: From Transnational Legal Order to Disorder, published online by Cambridge University Press 2019.

Considering only the critics above, local authorities in Brazil established measures to guarantee that the facts described by wrongdoers under leniency agreements and criminal plea bargaining don't give rise to new enforcements.[32]

We think that the suppression of institutions and the limitation of the agents able to perform enforcement functions neutralizes the synergy previously created. There is no longer a "web" of accountability. The acceptance of plea bargaining and discretion make some positions soar their powers. Actors who benefit from a corrupt environment can easily map the key positions of the anti-corruption apparatus. These actors can nominate specific individuals to condone the status quo, protect their self-interested nominators, and even isolate the individuals willing to work for change. The benefits of institutional multiplicity, designed and adapted to disseminated corruption environments, may be lost forever.

E. The political dynamics of corruption scandals in Latin America. And how the OECD/FCPA paradigm fuels it.

"Everyone in politics… realizes that if you examine more closely and for long enough, damaging information can be found on almost anyone", says Howard Tumber and Silvio Weisbord.[33] If this statement is correct – as experienced journalists believe it is – we always have a problem with discretion on which cases to prosecute and how to settle the cases chosen to be enforced. These problems are likely to be more prominent in environments with disseminated corruption.

We offer an example of the potential concerns related to discretion in Latin America: On June 19, 2015, billionaire Marcelo Odebrecht, the third-generation scion of the Odebrecht family, was arrested by Brazilian authorities and remained in prison without a trial for nine months. In Brazil, he was sentenced to nineteen years in jail by Judge Sérgio Moro, a leading actor in the Car Wash operation. In December 2016, his sentence was reduced after signing an agreement to cooperate with Brazilian authorities and provide evidence against others. Marcelo Odebrecht was never indicted in the United States.

On November 20, 2019, José Carlos Grubisich, the former chief executive officer of Braskem, was indicted in a U.S. federal court for his role in the bribery scheme involving Odebrecht. Grubisich was charged with conspiracy to violate the FCPA's anti-bribery provisions, the books and records provisions of the FCPA, and money laundering.[34] Grubisich was never indicted in Brazil, although the evidence against him was undeniably available

32 Nota Técnica n. 1/2020, 5ª, Câmara de Coordenação e Revisão do Ministério Público Federal, and Nota Técnica n. 1/2017, 5ª, Câmara de Coordenação e Revisão do Ministério Público Federal.

33 *Howard Tumber and Silvio Weisbord*, Political Scandals and Media across Democracies, American Behavioral Scientist 47 (2004), p. 1034.

34 Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition 2020, https://www.justice.gov/criminal-fraud/file/1292051/download (last accessed 14 May 2021).

since 2016, according to the public transcription of collaborators. The Brazilian prosecutors said to the local press that they had too much evidence from the Odebrecht case and that some defendants' indictment was naturally slower than others.[35]

Although the Brazilian prosecutors have a viable argument, a disseminated analysis is that the U.S. authorities were neutral in providing enforcement against Grubisich. In contrast, the Brazilian authorities had the stimulus to construct a leading case against Marcelo Odebrecht, who could represent a unique symbol of effective enforcement against local elites.

Many questions arise from the contradictions between the U.S. and the Brazilian authorities concerning Marcelo Odebrecht and José Carlos Grubisichi. Why did the jurisdictions treat them so differently? Why did the U.S. not take any action against Marcelo Odebrecht, while receiving an astonishing condemnation of nineteen years in prison in Brazil? Were there not fine shreds of evidence against Marcelo Odebrecht for the U.S. prosecutors? If the evidence against Grubisichi was available since 2016, when would the Brazilian authorities indict him?

These questions raise concerns about using discretion as a tool that can promote both hard enforcement and misleading action. The side effects of discretion represent problems in all societies, but they are likely to express more severe concerns in environments with systemic and widespread corruption. Because of the history of political instability in Latin America, discretion can express additional political worries.

Latin American countries share a history of colonialism. After diverse processes of independence during the XIX century, states were established as presidential democracies. The polarization during the Cold War created conditions for the rise of military dictatorships. According to Aníbal Pérez-Liñán and John Polga-Hecimovich "By 1977 only Colombia, Costa Rica, and Venezuela could be classified as democracies. However, since the democratization of Ecuador in 1978, military intervention and coups d'etat have dropped precipitously".[36] After the democratization process, Latin American countries deal closely with presidential instability: "Between 1978 and 2016, 19 constitutional presidents were removed from office through formally legal mechanisms such as impeachments, declarations of presidential incapacity, or the call for an early resignation (…)."[37] This situation gives rise to the statement that "the 'new' instability in Latin America is characterized by "stable regimes with unstable presidents."[38]

35 *Bruna Narcizo*, Lava Jato sabia desde 2016 de acusação que levou ex-Braskem à prisão nos EUA (Folha de São Paulo, 25 November 2019), https://www1.folha.uol.com.br/mercado/2019/11/lava-jato
-sabia-desde-2016-de-acusacao-que-levou-ex-braskem-a-prisao-nos-eua.shtml (last accessed on 14 May 2021).

36 *Aníbal Pérez-Liñán and John Polga-Hecimovich*, Explaining military coups and impeachments in Latina America, Democratization 24(5) (2016), p. 839-858.

37 Ibid, p. 839.

38 Ibid.

Aníbal Pérez-Liñán and John Polga-Hecimovich develop a unified theory of presidential instability to explain why elected presidents are removed from office through civilian or military action. They point to four key factors as central to predict presidential removal in Latin America: economic development, growth, mass protest, and radicalism. Corruption scandals can fuel both mass protests and radicalism.[39]

Why do some cases of corruption become scandals, and others do not? There are multiple answers to this question[40] but at least two of them arise in our analysis. First: A traditional response is the use of scandals as a political weapon by adversaries. "Quite often, politicians and other elite members advance their own policy goals and careers by hurting their adversaries, and media scandals became increasingly effective for this purpose. Insiders of party politics leaked contentious information to the press, hoping that public outrage would wipe their competitors (inside and outside the party) from the electoral arena. Corporations leaked stories of corruption when public officials pushed requests for kickbacks beyond customary practice. These sources hardly controlled the consequences of scandals once they had spoken, but they learned to use disclosure as a powerful political weapon."[41]

Second: the foreign anti-bribery enforcement (in the Odebrecht case, led by the U.S. and its FCPA) is a new trigger factor for corruption scandals. The Odebrecht case represented the rise of a unique corruption scandal in Latin America, while the Odebrecht and Petrobras cases showed themselves, together, as an unprecedented scandal in Brazil. Political science should be aware of foreign anti-bribery enforcement's role as a new element to give rise to important political outcomes, without the predictability usually expected in the scandals provoked by the domestic triggers.[42] Kevin Davis described how the FCPA authorities have the potential to attract media attention.[43]

The scandals triggered by political opponents have always existed, although foreign international apparatus's scandals are new. The OECD/FCPA paradigm tools do formalize - and can potentially enlarge - the scandals triggered by the political dynamics. These tools are: On one hand, whistleblower's tips and collaboration agreements. On the other hand,

39 Ibid.

40 *Manuel Balán*, Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile, Comparative Politics 43(4) (2011), p. 459.

41 *Aníbal Pérez-Líñan*, Presidential Impeachment and the New Political Instability in Latin America, Cambridge 2007, p. 85.

42 *Andrew Fishman, Natália Viana, and Mariam Saleh*, "Keep it confidential" – The Secret History of U.S. Involvement in Brazil's Scandal Wracked Operation Car Wash (The Intercept, 20 March 2020), https://theintercept.com/2020/03/12/united-states-justice-department-brazil-car-wash-lava-jato-

international-treaty/ (last accessed 14 May 2021).

43 *Kevin Davis*, Between impunity and imperialism: the regulation of transnational bribery, New York 2019.

discretion on which cases to prosecute, how to settle the cases chosen to be enforced, and the perfect timing for that.

The whistleblower can be in different positions. They vary from an accidental observer of the bribery scheme to a member of a big company's anti-bribery compliance section. The role of the whistleblower is structurally different from that of the defendants that make collaboration agreements. The defendant is a wrongdoer that doesn't want to continue performing a role in the bribery scheme and expects a specific reward – the reduction of his own sanctions – for sharing the information he or she possesses against other wrongdoers. Although whistleblowers and defendants are technically different, they perform similar roles in interrupting the culture of silence that traditionally involves corruption.

While the practical benefits for whistleblowers and the incentives for defendants to cooperate in exchange for sanction reduction seem to be necessary, we argue that they reinforce the game played by the classical use of scandals as a political weapon triggered by opponents. The disseminated corruption shown in the Odebrecht case, added up with the local strategies of campaign finance, create the pragmatic result that almost all politicians and virtually all the important companies would always be involved. However, the tips only appear against a few of the politicians and some of the businesses. It is hard to detach whistleblowers' tips and collaborators' information from their survival interests in an environment with disseminated corruption.

The leaked information involving Justice Sérgio Moro and the Car Wash prosecutors in Brazil offered a view of how some criminal issues were set as priorities above others.[44] The banks in Brazil are said to be highly active in exchanging favorable regulation to finance the campaign, structurally connected to the money laundering strategies that were essential to the Odebrecht corruption machine to operate. However, the companies from this sector did not receive any remarkable enforcement.[45]

The leaked information in Brazil also suggests that the leftist political party "Partido dos Trabalhadores" was a particular target, right before the elections favoring Jair Bolsonaro. International jurists shared their opinion about what they considered the unfair procedure conducted by the Brazilian authorities in a public letter.[46] The pretrial arrestment of Keiko Fujimori for 13 months in Peru, under the allegation of connection with the Odebrecht bribery scheme, represented a tremendous loss for the once-influential "Fuerza

44 *Ernesto Londoño and Letícia Casado*, Leaked Messages Raise Fairness Questions in Brazil Corruption Inquiry (The New York Times, 10 June 2019), https://www.nytimes.com/2019/06/10/world/americas/
brazil-car-wash-lava-jato.html (last accessed 14 May 2021).

45 *Marina Rossi et al.*, Como os grandes bancos escaparam da Lava Jato (El País, 22 August 2019), https://brasil.elpais.com/brasil/2019/08/16/politica/1565978687_974717.html?rel=listapoyo (last accessed 14 May 2021).

46 See the appendix.

Popular" that lost dozens of seats in the Congress since 2016, especially while Keiko Fujimori was in jail.[47]

Scandals as a political weapon are not new in Latin America or elsewhere. Aníbal Pérez-Liñán described how "some presidents rejoiced when media scandals weakened the popularity of their predecessors and adversaries (…) In turn, other officials (judges, prosecutors, comptrollers, and solicitors general) advanced their own careers by investigating such accusations and publicizing their findings in the media".[48] Similar conclusions were developed by Fábio Sá e Silva.[49] We argue that the OECD/FCPA paradigm can enlarge these outcomes.

F. Conclusion

The OECD Anti-bribery Convention presents incentives to whistleblower and plea bargaining as essential tools to dismantle corruption schemes. These tools structurally depend on increased levels of discretion.

We describe the incongruence of these tools in environments with widespread, disseminated grand corruption. While the FCPA enforcement's international standards follow patterns that are predictable to international markets, we argue that the local enforcement of these novel tools allows both political exploitation and selective justice. We also argue that the tools of the novel strategies to tackle corruption may weaken traditional systems that are more adapted to environments with disseminated corruption.

G. Appendix

"We, lawyers, jurists, former ministers of justice and former members of Supreme Courts of Justice from various countries, would like to call for consideration the judges of the Supreme Court and, more broadly, the public opinion of Brazil for the serious vices of the proceedings. filed against Lula.

The recent revelations by journalist Glenn Greenwald and staff at The Intercept news site, in partnership with Folha de Sao Paulo and El País newspapers, Veja magazine and other media, have appalled all legal professionals. We were shocked to see how the fundamental rules of Brazilian due process were violated without any shame. In a country where justice is the same for everyone, a judge cannot be both judge and party to proceedings.

Sérgio Moro not only conducted the process partially, he led the prosecution from the outset. He manipulated the mechanisms of the award, directed the work of the prosecutor,

47 *Manuel Rueda and Franklin Briceno*, AP Explains: The arrest of Peru powerbroker Keiko Fujimori (Abc News, 29 January 2020), https://abcnews.go.com/International/wireStory/ap-explains-arrest-peru-powerbroker-keiko-fujimori-68620358 (last accessed 14 May 2021).

48 *Aníbal Pérez-Liñán*, note 36, p. 86.

49 *Fábio de Sá e Silva*, From Car Wash to Bolsonaro: Law and Lawyers in Brazil's Illiberal Turn (2014-1028), Journal of Law and Society 47(S1) 2020, pp. S90-S110.

demanded the replacement of a prosecutor he was not satisfied with, and directed the prosecution's communication strategy.

In addition, it placed Lula's lawyers on the phone and decided not to comply with the decision of a judge who ordered Lula's release, thus grossly violating the law.

Today, it is clear that Lula was not entitled to a fair trial. It should be noted that, according to Sergio Moro himself, he was convicted of "undetermined facts". A businessman whose testimony gave rise to one of the former president's convictions even admitted that he was forced to construct a narrative that would incriminate Lula under pressure from prosecutors. In fact, Lula has not been tried, was and is the victim of political persecution.

Because of these illegal and immoral practices, Brazilian justice is currently experiencing a serious credibility crisis within the international legal community.

It is indispensable that the judges of the Federal Supreme Court fully exercise their functions and are the guarantors of respect for the Constitution. At the same time, we expect the Brazilian authorities to take all necessary steps to identify those responsible for these very serious procedural deviations.

The fight against corruption is today an essential issue for all citizens of the world, as is the defense of democracy. However, in Lula's case, not only was justice instrumentalized for political ends, but the rule of law was clearly disrespected in order to eliminate the former president from the political dispute.

There is no rule of law without due process of law. And there is no respect for due process when a judge is not impartial but acts as head of the prosecution. In order for the Brazilian judiciary to restore its credibility, the Federal Supreme Court has a duty to release Lula and nullify these convictions.

August 12, 2019.

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