UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-21010-CR-JEM

UNITED STATES OF AMERICA

v.

JOEL ESQUENAZI
and
CARLOS RODRIGUEZ,

Defendants. /

GOVERNMENT'S OBJECTION TO DEFENDANT RODRIGUEZ'S PROPOSED INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"

The United States of America, by and through the undersigned counsel, hereby opposes Defendants' Proposed Instruction Regarding "Foreign Official" and "Instrumentality." DE 404.[1] The defendants' proposed alternative instructions on "foreign official" contradict the prior ruling of this Court and the rulings of other courts, and invent new, inappropriate elements not contained in the Foreign Corrupt Practices Act (FCPA). This Court should give the government's proposed instruction on this matter, DE 399 at 18-19, or, should it find that more detailed instruction is required, give the government's alternative instruction, attached hereto as Exhibit A.

Prior Ruling, Government Proposed Instruction, and Consistent Instructions

On November 19, 2010, this Court, in denying the defendants' Motion to Dismiss for Failure to State a Criminal Offense and Vagueness rejected the defendants' argument that state-owned entities were not covered by the term "instrumentality" in the FCPA:

[1] Defendant Esquenazi joins in this objection. DE 405.

> The Court, however, finds that the Government has sufficiently alleged that Antoine and Duperval were foreign officials by alleging that these individuals were directors in the state-owned Haiti Teleco. . . . The Court also disagrees that Haiti Teleco cannot be an instrumentality under the FCPA's definition of foreign official. The plain language of this statute and the plain meaning of this term show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government. See 15 U.S.C. § 78dd-2(h)(2)(A).

DE 309. As a result, the government proposed the following instruction:

> The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.
>
> An "instrumentality" of a foreign government includes state-owned or state-controlled companies, such as certain commercial carriers (*e.g.*, airlines, railroads), utilities (*e.g.*, electricity, gas), and telecommunications companies (*e.g.*, Internet, telephone, television).

DE 399 at 18-19. The first sentence of the government's proposed instruction tracks that definition of "foreign official" in the FCPA. 15 U.S.C. § 78dd-2(h)(2)(A). The second sentence is based on and is similar to the instruction on "foreign official" given in *United States v. Jefferson* and *United States v. Aguilar*, both FCPA cases that went to trial and concerned state-owned and state-controlled entities. In *Jefferson*, the court's instruction read:

> Now the term "foreign official" means any officer or employee of a foreign government, or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. In this case the indictment charges that the then-vice-president of Nigeria, Atiku Abubakar, was a foreign official.
>
> An instrumentality of a foreign government includes a government-owned or government-controlled company, such as commercial carriers, airlines, railroads, utilities, and telecommunications companies: Internet/telephone/television. The indictment in this case charges that the Nigerian Telecommunications, Limited, also known as Nitel, was a Nigerian government-controlled company.

United States v. Jefferson 1:07-CR-209, DE 684 at 75-87 (E.D. Va. July 30, 2009). In *Aguilar*, the court's instruction read:

> The term "foreign official" means any officer or employee of a foreign government (or any department, agency, or instrumentality of that government), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. An "instrumentality" of a foreign government can include certain state-owned or state-controlled companies.

United States v. Aguilar, 2:10-CR-1031(A), DE 511 at 35 (C.D. Ca. May 16, 2011). Because the issues in this case are relatively straightforward—the government has alleged that Haiti Teleco was a state-owned, state-controlled telecommunications company—a simple instruction on this issue in sufficient in this case.

Defendants' Preferred Jury Instruction—Defense Exhibit A

The defendants' proposed preferred instruction, DE 404-1 Exhibit A, contains a sentence that directly contradicts this Court's ruling.

> With regard to the terms "foreign official" and "instrumentality", I now instruct you that a state owned enterprise is not a foreign government instrumentality within the meaning of the Foreign Corrupt Practices Act, and officers and employees of a state owned enterprise therefore are not "foreign officials" under the Foreign Corrupt Practices Act.

In the defendants' accompanying memorandum of law, they argue that there is "nothing in the legislative history or post-enactment history that would support the DOJ's broad legal interpretation that alleged state-owned or controlled enterprises are 'instrumentalities' of a foreign government." DE 404 at 3. In doing so, the defendants ignore that this Court has said that state-owned enterprises *can be* government instrumentalities under the plain meaning of the statute, a ruling echoed since by two separate courts in the Central District of California. *United*

States v. Carson, 8:09–CR-77-JVS, DE 373 (C.D. Ca. May 18, 2011); *United States v. Aguilar*, 2:10-CR-1031(A), DE 474 (C.D. Ca. Apr. 20, 2011).

Defendants' Alternative Jury Instruction—Defense Exhibit B

In the alternative, the defendants propose an astounding instruction that invents four new elements for the FCPA, all of which, under the defendants' proposal, would be required to be proven beyond a reasonable doubt.[2] As drafted, the defendants' instruction has no basis in law or policy.

Under the defendants' formulation, an entity is not an instrumentality of a foreign government unless: first, the "foreign government" (1) directly (2) owns a (3) majority of shares of the business enterprise; second, the "foreign government" itself (4) controls the day to day operations of the business enterprise, (5) appoints key officers and directors, (6) hires employees, (7) fires employees, (8) finances the enterprise through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees, or royalties, (9) approves of contract specifications, *and* (10) awards contracts; third, the entity (11) exists for the sole and exclusive purpose of performing a (12) public function that is (13) "traditionally carried out by the government" that (14) benefits only the foreign government (and its citizens) and not private shareholders (15) *and* does not maximize profits; and, fourth, (16) the employees of the entity are considered to be "public employees or civil servants under the law of the foreign country." DE 404-2 at 21-22.

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[2] The defendants' instruction (and the memorandum in support) are almost entirely copied from instructions recently proposed by the defendants in *United States v. Carson*. 8:09–CR-77-JVS, DE 384, (C.D. Ca. June 30, 2011). Like the defendants here, the *Carson* defendants largely ignore Judge Selna's extensive opinion concerning the factors to be considered in determining whether an entity was a government instrumentality.

This profoundly prescriptive definition with its sixteen required parts is designed solely to define as little of the world as possible as government instrumentalities. Indeed, such a cramped definition would lead to absurd results, even in the United States. Are Federal Deposit Insurance Corporation and the U.S. Postal Service not government instrumentalities because they generate their own revenue? Are those who work at the Nuclear Regulatory Commission and Tennessee Valley Authority no longer government employees because their work is not a "traditional" government function? Does the Federal Reserve cease to be a government instrumentality because the government does not own its shares?

And, as if their definition was not already made out of whole cloth, defendants would also require the jury to "conclude beyond a reasonable doubt that the business enterprise is a part of the foreign government itself." DE 404-2 at 21. This additional gloss comes from a phrase in dicta in *Hall v. American National Red Cross*, 86 F.3d 919 (9th Cir. 1996), which had nothing to do with the FCPA. In any event, the *Carson* court explained, "The Court does not discern any tension between *Hall*'s dicta and the Court's conclusion that state-owned companies could be an 'instrumentality' of a foreign government: some state-owned companies are undoubtedly 'part of the government.'" *United States v. Carson*, 8:09–CR-77-JVS, DE 373 at 10 n. 9 (C.D. Ca. May 18, 2011)

In support of the first element of their definition, the defendants take factors used in other contexts to determine whether entities' governmental status make them mandatory requirements. For example, the defendants quote the "public enterprise" definition of *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the "OECD Convention") as stating that "a government will be considered to exercise a dominant

influence over an enterprise's internal operations, 'when the government or governments hold the majority of the enterprise's subscribed capital.'" DE 404 at 13. In doing so, the defendants disregard that the OECD Convention's commentaries provide this as one example of how an enterprise can be "deemed" a public enterprise, while defining the term generally as "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence." Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179, cmt, art 1, para. 14. Likewise, for the first and second element of their instruction, the defendants cite two alternative prongs of the Foreign Sovereign Immunity Act's definition of "agency or instrumentality of a foreign state"—that an entity be "an organ of a foreign state or political subdivision thereof" (which is chiefly a test of the government's control over an entity) *or* that "a majority of [its] shares or other ownership interest is owned by a foreign state or political subdivision thereof"—and make both mandatory requirements.[3] 28 U.S.C. § 1603(b).

Instead of trying to invent a definition that would cover all circumstances, the courts in *Carson* and *Aguilar* explained that the inquiry into what constituted a government instrumentality depended on many, non-exclusive factors. The court in *Carson* explained,

> Several factors bear on the question of whether a business entity constitutes a government instrumentality, including:
>
> • The foreign state's characterization of the entity and its employees;
>
> • The foreign state's degree of control over the entity;
>
> • The purpose of the entity's activities;

[3] Whether intentionally or not, the defendants' memorandum cuts off before providing a basis for the third and fourth elements they propose and the three final paragraphs of their instruction. This corresponds to page 13, line 13 of the *Carson* defendants' memorandum. *States v. Carson*, 8:09–CR-77-JVS, DE 384 (C.D. Ca. June 30, 2011).

> • The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
>
> • The circumstances surrounding the entity's creation; and
>
> • The foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).
>
> Such factors are not exclusive, and no single factor is dispositive. As applicable here, their chief utility is simply to point out that several types of evidence are relevant when determining whether a state-owned company constitutes an "instrumentality" under the FCPA — with state ownership being only one of several considerations.

Similarly, the court in *Aguilar* explained, that a "non-exclusive list" of factors included whether

> • The entity provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction.
>
> • The key officers and directors of the entity are, or are appointed by, government officials.
>
> • The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.
>
> • The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
>
> • The entity is widely perceived and understood to be performing official (i.e., governmental) functions.

However, given the clear facts in the *Aguilar* case concerning the nature of the Mexican state-owned utility, the court's instruction to the jury on this matter remained brief. *United States v. Aguilar*, 2:10-CR-1031(A), DE 511 at 35 (C.D. Ca. May 16, 2011) ("An "instrumentality" of a

foreign government can include certain state-owned or state-controlled companies.").[4] The same is true here.

To the extent that this Court believes that, in spite of Haiti Teleco's clear ownership and control by the Haitian state, a more fulsome instruction is necessary, the government has attached such an instruction as Exhibit A. The instruction is derived from the opinions issued in *Carson* and *Aguilar* and incorporates non-exclusive factors the courts provided.

Conclusion

The defendants' two proposed instructions concerning the definition of "foreign official" and "instrumentality" misstate the law. The government respectfully requests that its proposed instruction be given to the jury. However, should the Court determine that a more detailed instruction is appropriate, the government requests that its alternative instruction be given.

[4] The defendants claim that paragraph two of their proposed alternative instruction "is the same instruction given to the jury in *United States v. Aguilar*." DE 404 at 9. However, the defendants omit the second sentence of this instruction, quoted above, that "An 'instrumentality' of a foreign government can include certain state-owned or state-controlled companies."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document with the Clerk of the Court and defense counsel using CM/ECF on July 10, 2011.

By: s/ Nicola J. Mrazek
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