An Update on Anti-Corruption and Compliance Trends in Latin America

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What are recent anticorruption and compliance trends in Latin America?

Latin American ("Latam") countries are generally perceived to have a high level of corruption and tolerance for this practice, as if it were part of local business environments. The average score for Latin American countries in the 2016 Transparency International Corruption Perceptions Index was 44 out of 100; scores below 50 indicate governments are failing to tackle corruption. Latam companies, in turn, do not perform well, as indicated by the Bribe Payers index:

	Corruption Perception Index **TI, 2016**	**Bribe Payers Index** **TI, 2011**
Brazil	40 (79/176)	14/28
Mexico	30 (123/176)	26/28
Argentina	39 (95/176)	23/28
Uruguay	71 (21/176)	*Not on list*
Colombia	37 (90/176)	*Not on list*

Chile	66 (24/176)	*Not on list*
Peru	35 (101/176)	*Not on list*

However, legislation and institutions in Latam regarding enforcement of anticorruption policies have been improving considerably over the past decade. This reflects not only institutional developments arising from specific local circumstances, but also the broader global context in which coordination of efforts to fight corruption has increased markedly. National laws of countries outside the region with strong links to Latam – especially the US – and international treaties have been addressing the need to fight corruption on a global level and to punish acts of corruption beyond national frontiers.

International Commitments

	Inter-American Convention Against Corruption **(IACAC)** **1996/1997***	UN Convention Against Corruption **2003/2005***	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions **1997/1999**
Mexico	1996/1997**	2003/2004**	1999
Brazil	1996/2002**	2003/2006**	1999
Argentina	1996/1997**	2003/2006**	2001
Uruguay	1996/1997**	2003/2007**	Non OECD member
Colombia	1996/1999**	2003/2006**	2013 (non OECD member)
Chile	1996/1998**	2003/2006**	2001
Peru	1996/1998**	2003/2004**	Non OECD member

* adoption / entered in force

** signature / ratification or deposit

What are some recent developments?

In addition to focusing on acts of corruption committed abroad, the global trend includes increasing punishment of private-sector legal entities that benefit from corruption, going beyond the traditional approach – common to many countries – of focusing punishment on individuals.

Although legislative initiatives to address this vary from country to country, there is an increasing tendency to submit private-sector legal entities to more rigid liability standards, in which sanctions may be applied irrespective of guilt and may result from the application of criteria such as lack of due care and/or the fact that the entity in question benefitted from the relevant illegal acts.

Legislation enacted throughout the region has also been strengthening the investigative tools and powers of authorities. This has led to the adoption of instruments not traditionally used in civil law countries – for example, leniency agreements and plea bargain – both of which played a central role in recent enforcement activities. Awareness-raising and training efforts are widespread. Finally, institutions are being developed, adapted and improved.

Can you comment on developments in Brazil?

Brazil is to a large extent leading this process, at least with regard to impacts and results.

This is owing primarily to *Operação Lava Jato* ("OLJ"). It is true that OLJ has been subject to criticism, but this is only natural given its nature and the impact it has been having in Brazil. The successes of OLJ result chiefly from the use of novel methods to obtain evidence. Among these is the plea bargain, which has had a central role in the operation since its inception.

The relevant developments in the local legal landscape can be traced back to 2002, when the Criminal Code was amended to criminalize payments of bribes to foreign officials. A year later, a network of public agencies at different levels was organized in the so-called *Estratégia Nacional de Combate à Corrupção e à Lavagem de Dinheiro – ENCCLA* (National Strategy to Combat Corruption and Money Laundering). The ENCCLA is a forum in which several national authorities articulate their actions, exchange experiences and discuss public policies. In 2003 the Criminal Code was again amended to increase the punishment for corruption which can now result in up to 12 years of imprisonment.

Improvements to investigative methods are more recent. These were the result of Law No 12,850/13 (which focused on the persecution of criminal organizations); and included a detailed regulation of plea bargaining with individuals involved in crimes.

Also in 2013, the Clean Company Act was enacted – Law No 12,846/13. This Act created administrative and civil sanctions applicable to legal entities involved in corruption. Following developments in foreign law and international commitments undertaken by Brazil, this law was enacted with the specific purpose of making not only individuals liable for acts of corruption, but also legal entities.

The Clean Company Act does not subject corporations to criminal liability – under Brazilian law liability exists only in relation to crimes against the environment; but it establishes harsh administrative and civil sanctions, together with rules providing for strict liability that include acts performed in the interest or for the benefit of the relevant legal entity. Before the Clean Company Act corporations could be penalized with civil sanctions for corruption based on the Public Probity Act – a statute focused on punishing public agents but that could collaterally reach private parties – and with administrative sanctions established in different public bid laws – including disbarment; however, these laws were not focused on punishing corporations for corruption and did not encompass strict liability rules.

The strict liability rule makes it easier for authorities to sanction corporations and transfers to private legal entities a part of the burden for preventing the risk of corruption through effective compliance and integrity programs. Indeed, under the Clean Company Act the existence of such programs can mitigate sanctions.

The Clean Company Act also instituted a leniency program to which companies involved in corruption acts can apply in order to obtain a reduction in sanctions in exchange for cooperating with authorities. No leniency agreement has been reached under these rules since the enactment of the law.

At the Federal level, the authority in charge of negotiating leniency agreements is the *Controladoria Geral da União* ("CGU"). In July 2016, CGU announced that it had reached an agreement with SBM, a Dutch company involved in payments of bribes through middlemen to Petrobras' officials. CGU acted jointly with the Federal Prosecutors Office ("MPF"). SBM agreed to cooperate with ongoing investigations, to pay USD 149.2 million and to grant Petrobras discounts of USD 179 million on existing contracts.

However, the agreement was not ratified within the MPF – apparently because the cooperation offered by SBM was seen as insufficient and because it contained a clause discharging SBM of any additional payment for damages to Petrobras. To date the agreement has not become effective.

Within the OLJ, the MPF has executed approximately 10 leniency agreements with corporations, including joint agreements with other authorities – such as the ones regarding Rolls Royce, Odebrecht and Braskem. Under these agreements companies agreed to make monetary payments, to cooperate fully with investigations and to improve their compliance mechanisms. In some cases, the agreements include the possibility for individuals to join the leniency agreement in order to obtain benefits regarding criminal prosecution.

The legal basis for these leniency agreements is not the Clean Company Act, which grants authority only to administrative agencies involved in applying the respective administrative sanctions. The MPF uses a loose interpretation of different statutes and

international treaties to justify its powers to execute leniency agreements with corporations.

The extent of the effects of these agreements is a matter of debate. In principle, they cover sanctions under the Public Probity Law; other authorities have openly disputed whether they have any effect in relation to the administrative sanctions of the Clean Company Act and public bid laws. Companies that have executed agreements with the MPF are facing indemnification claims and administrative proceedings from other authorities, including the CGU and the Court of Accounts. This tends to decrease the effectiveness of this important investigation tool.

Deficiencies in the drafting of the Clean Company Act and lack of cooperation among authorities – in a context in which high level officials of certain authorities involved in the enforcement of the laws described above are also suspected of criminal conduct – have created a challenging legal environment in Brazil with a high level of uncertainty. This could turn against the recent success of Brazil in fighting corruption and generate collateral damage to the enforcement of antitrust laws, another area in the country in which the use of leniency agreements has been highly successful.

Perhaps you could touch on some of the other Latam countries?

Notable developments are also occurring elsewhere, some of them fueled by the results of Brazilian investigations and cooperation among authorities.

Mexico

Mexico is facing real change. The country has just approved a National Anticorruption System, set through a Constitutional Amendment (2015), ordinary legislation (2016) and secondary legislation (2017), which entered fully into force in July 2017. It is composed of authorities from all levels of government to prevent, detect and sanction administrative responsibilities, acts of corruption and control of public resources, coordinating efforts against corruption. Compliance programs and business integrity policies are now required. Foreign bribery and domestic bribery were already considered in the legislation; both individuals and corporations are liable for bribery. Anticorruption leniency is not in the legislation so far.

Argentina

The Argentine Criminal Code punishes bribes and corruption. A recent amendment also set forth the offense of bribery of foreign public officials. Companies are still not liable on the issue of bribery, although a recent draft bill from October 2016 reinforces corporate criminal liability for cases of corruption; at the time of writing, Parliament is still debating this bill. Civil matters may be settled without a trial, but criminal cases cannot be resolved through plea agreements. Notwithstanding, a new piece of law sets forth leniency programs and plea bargains in anticorruption investigations; it does not exclude trials, but reduces terms of imprisonment.

Uruguay

Uruguay has had a basic anticorruption law since 1998, which includes rules regarding domestic and foreign bribes and international cooperation. There have been rules of conduct for public officials since 2003 regarding gifts and hospitality issues. The Criminal Code was amended 5 years ago to increase penalties on a special group of politicians, judges and civil servants.

Colombia

The issue of corruption has recently come to the forefront of Colombia's political agenda. The AntiCorruption Statute was enacted in 2011, introducing liability for legal persons, transnational bribery, whistleblowing duties of auditors, new investigative techniques to fight transnational crimes and sanctions related to public contracting. The Criminal Code and the Criminal Procedural Code were largely reformed, and a governmental policy to fight corruption was enacted. Two types of investigations can be conducted in the context of a foreign bribery case: criminal investigations against natural persons and administrative investigations against legal persons involved.

The Anticorruption Statute of 2011 created several new bodies to improve the fight against corruption: the National Moralization Commission and the National Citizens Commission for the Fight against Corruption, which monitors governmental efforts. The Secretariat of Transparency is also beefing up and developing a Register of Enterprises Active in Compliance and Anti-Corruption. Finally, Colombia faces the same challenges as Brazil with respect to fragmentation, coherent action and lack of clarity because of the large number of agencies with potential jurisdiction over foreign bribery investigations.

Chile

A number of corruption cases were investigated in 2015 involving fraud, influence peddling and bribery by the Penta Group, a conglomerate of firms active in various sectors. Subsequently, Chile created the Presidential Advisory Council on Conflicts of Interest, Trafficking of Interest and Corruption (*Consejo Asesor Presidencial contra los Conflictos de Interés, el Tráfico de Influencias, y la Corrupción*) in 2015.
The *Consejo* consists of 16 professionals of different backgrounds – no political leaders or business leaders are allowed. The Council issued a report containing 236 proposals to improve the arrangements concerning prevention of corruption, conflicts of interest, financing politics to strengthen democracy, market confidence, and integrity, ethics and citizen rights.

Although the recommendations are non-binding, they are being adopted gradually through administrative measures and draft legislation. One of the bills, presented for discussion to Congress in June 2015, seeks to strengthen anti-corruption regulations, particularly by increasing penalties and by including commercial bribery as a criminal offence. This project was recently approved by the Chilean House of Representatives and is currently being discussed at the Senate. In April 2016, a new law on the

financing of political campaigns was enacted. The law prohibits contributions by corporate entities to political parties and campaigns and establishes further restrictions on political campaign expenses, among other regulations.

Brazil's Operation Car Wash (OLJ) seems to have affected Chile. Two individuals with links to OAS, one of the companies implicated under OLJ, reportedly made irregular financial contributions to the presidential campaign of Bachelet and Ominami in 2013. OAS' goal was to conquer market share by influencing local politics.

Peru

Peru has passed new legislation that shall become effective in 2018 and bring changes such as corporate liability for active bribery and the consideration of compliance programs for the purpose of liability mitigation. Within the executive branch, significant anti-corruption measures were enacted together with the creation of the Anticorruption High-Level Commission.

What is the impact of these developments on multinational groups doing business in Latam?

Impacts for multinational groups with business in Latam include:

- International coordination is increasing, and the investigative toolkit is getting more sophisticated (cooperation with specific national authorities should always be evaluated vis-à-vis impacts on other jurisdictions);
- Exposure for directors and officers is increasing and sanctions for legal entities are becoming harsher;
- Necessity of improving and increasing compliance programs, including monitoring conduct and defining how to address eventual wrongdoing;
- Challenging legal landscape in view of overlapping national legislations, potential conflicts between new and old rules and lack of institutional coordination;
- Local training and awareness-raising are imperative;
- Proactive transparency measures in relationships with public officials should be adopted.

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