

## SYMPOSIUM ON NEW DIRECTIONS IN ANTICORRUPTION LAW

### THE IMPACT OF CORPORATE LIABILITY ON CORRUPTION IN LATIN AMERICA

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Most Latin American countries are in the process of implementing international anticorruption standards, including standards for combating corporate corruption. Primarily based on the U.S. experience with the Foreign Corrupt Practices Act (FCPA), these international standards for combating corporate corruption are coalescing into a standardized paradigm, which requires states to establish corporate liability regimes that incentivize companies to prevent, self-police, and cooperate with law enforcement authorities in exchange for more lenient sanctions.

Several recent scandals, including the Lava Jato investigation in Brazil; the Odebrecht case in Peru, Colombia, and Ecuador; and the “Notebook Scandal” in Argentina, demonstrate the challenges that Latin American legal communities face in implementing these new rules. In this essay, I focus on how the implementation of corporate liability for corruption specifically applies to family conglomerates—the predominant type of corporation subjected to corruption investigations in Latin America—in contexts of structural corruption.

#### *The Global Paradigm for Combating Corporate Corruption*

International treaties and transnational practices suggest convergence around a model for preventing and prosecuting corporate corruption based on the following features: (a) corporate liability, whether criminal, civil, or administrative;<sup>1</sup> (b) imposition of effective, proportionate, and dissuasive sanctions;<sup>2</sup> (c) independence between individual and corporate liability;<sup>3</sup> (d) incentives for corporations to prevent corruption through the implementation of compliance programs and internal controls;<sup>4</sup> (e) incentives offered to individuals and corporations to supply evidence to prove the offence and/or to recover the proceeds of the crime, in exchange for lenient sanctions or even immunity;<sup>5</sup> (f) protection of cooperating individuals and corporate defendants;<sup>6</sup> (g) the widest

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<sup>1</sup> [Organisation for Economic Co-operation and Development Convention on Combatting the Bribery of Foreign Public Officials in International Business Transactions](#) arts. 2, 8, Dec. 17, 1997, 37 I.L.M. 1, 4 (1998) [hereinafter OECD Convention]; [UN Convention Against Corruption](#) art. 26, *opened for signature* Dec. 9, 2003, 2349 UNTS 41 (entered into force Dec. 14, 2005) [hereinafter UNCAC].

<sup>2</sup> [OECD Convention](#), *supra* note 1, art. 3; [UNCAC](#), *supra* note 1, art. 12.

<sup>3</sup> [OECD Convention](#), *supra* note 1, art. 3; [UNCAC](#), *supra* note 1, art. 26.

<sup>4</sup> Org. for Econ. Co-Operation & Dev., [Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption](#), at III.1–6 (2016) [hereinafter OECD Recommendation]; [UNCAC](#), *supra* note 1, art. 12.

<sup>5</sup> [UNCAC](#), *supra* note 1, art. 37.

<sup>6</sup> [OECD Recommendation](#), *supra* note 4, at III.7; [UNCAC](#), *supra* note 1, art. 32.

possible international cooperation;<sup>7</sup> and (h) favoring nontrial resolutions—settlements or deferred- or nonprosecution agreements—as long as they accord with precedent.<sup>8</sup>

This paradigm seeks to calibrate the enforcement response in a context of scarce investigative resources, the transnational nature of “grand corruption,” and the difficulties of identifying individual wrongdoers within complex, usually multinational corporations that are characterized by decentralization and intricate decision-making processes. As in other legal regimes where corporate wrongdoing can cause substantial harm, corporations are induced to help the government to prevent corruption and cooperate with the authorities in exchange for lenient sanctions. Apart from the disgorgement of profits, debarment from public contracting, and fines, remediation usually includes terminating relationships with the executives and implicated third parties—who typically face prosecution—and taking steps to avoid similar wrongdoing in the future. The system incentivizes prompt resolutions through nontrial agreements: governments save resources for the next case, and may use the collected money in assisting victims and ensuring that powerful wrongdoers are punished.<sup>9</sup> Prompt resolutions help businesses to assess legal and reputational contingencies in a timely fashion, consistent with market exigencies. By contrast, impartial courts rarely test or limit prosecutorial aggressiveness.

The model, originally based on the American experience with the FCPA, has been replicated within member states of the Organisation for Economic Co-Operation and Development (OECD) to reduce foreign bribery—that is, bribes primarily paid by multinational corporations to foreign public officials.

#### *Receiving the Paradigm in Latin America*

Most of the legal institutions required to implement the paradigm were, until recently, absolutely alien to Latin American legal systems. Corporations were not held criminally liable for engaging in corrupt acts and, while civil liability was a potential cause of action, it remained so only in the books. The notion of crediting companies for adopting preventive measures, for self-reporting, or for cooperating with the authorities after wrongdoing did not exist in Latin America. Nontrial resolutions, in the form of negotiated settlements, deferred prosecutions, or declinations, were also exceptional in the region. Where in existence, they were introduced to relieve overcrowded criminal justice systems from adjudicating minor crimes, rather than to obtain evidence against the higher echelons of organized crime conspiracies.

In fact, legal incentives for prosecuting corruption cases used to run in the opposite direction. For decades, corruption investigations were, for the most part, resolved politically, leaving the wrongdoers unpunished. When prosecutors did investigate, they focused almost exclusively on public officials. And in the rare cases where business executives became the targets of investigations, their principals, especially within family companies, typically supported their “loyal” employees who had broken the law for the company’s benefit.

In the last decade, however, several Latin American countries introduced corporate liability regimes for corruption offences. Most of them did so as a requirement for accessing or applying to the OECD (Chile, in 2009; Colombia and Peru, in 2018) or for complying with the OECD Convention on Bribery (Mexico, in 2016, and Argentina, in 2018). All countries faced both international pressure to impose criminal liability and internal resistance against doing so. Chile, Mexico, and Argentina overcame such resistance. In contrast, Peru, Colombia, and Brazil, established administrative and civil liability. Irrespective of the criminal/noncriminal liability regime, Chile, Mexico, and Peru have established “fault-based” regimes, exempting from liability firms that have implemented “an effective compliance program.” Noting that pure “fault-based” regimes may induce cosmetic compliance

<sup>7</sup> [OECD Convention](#), *supra* note 1, art. 9; [UNCAC](#), *supra* note 1, art. 43.

<sup>8</sup> [UNCAC](#), *supra* note 1, art. 30.

<sup>9</sup> Jennifer Arlen & Marcel Kahan, [Corporate Governance Regulation Through Nonprosecution](#), 84 U. CHI. L. REV. 323 (2016).

systems decoupled from business practices, Argentina and Brazil took a different route. They established strict liability regimes, attributing liability to the company for the wrongdoing of employees and third parties, and, rather than excusing firms for having “effective compliance,” crediting their preventative efforts along with their cooperation with the authorities.

### *The Impact on Large Family Business Groups*

The global paradigm against corporate corruption offers positive complementarities with the institutions of liberal market economies where companies, especially multinational corporations, tend to finance themselves by issuing equity (or debt) in capital markets. In these economies, ownership is dispersed in the market and therefore separated from a usually professional and specialized management. Moreover, firms tend to focus in one sector with few or no relationships outside that sector. Competition governs the relationship with other firms within the sector, as well as the selection of suppliers.

Big business in Latin America works quite differently. On average, small and medium enterprises account for 50 percent of the regional GDP, and the remaining 50 percent is equally split between subsidiaries of multinationals and family business groups, usually known as *grupos*. *Grupos* comprise hundreds of subsidiaries, diversified in several sectors but ultimately controlled by a single family. Family shareholders usually double as top managers of the holding and operating companies of the *grupo*. In contexts of macroeconomic instability, credit restrictions, and illiquid capital markets, *grupos* have resorted to a combination of strategies for growth, ranging from vertical integration to capturing rents in sectors sponsored by the government; from exploiting the reputation and influence of the family name with foreign investors to building oligopolies with firms operating in the same sector. Companies belonging to *grupos* account for more than 90 percent of the issuers in Mexican, Peruvian, and Brazilian capital markets—an indication of the relevance of personal relationships and the difficulties foreign investors face in contending with adverse selection and other types of asymmetric information in the region. Behind any of these strategies, hierarchy and influence prevail over impersonal relations and competition.<sup>10</sup>

The investigations launched as a consequence of the plea agreement signed by Odebrecht with the American authorities confirms the point: enforcement authorities in Brazil, Argentina, Peru, Colombia, and Mexico are investigating long-standing cartels composed of the largest local construction companies of each country, which were working either with the acquiescence or under the directives of the President and/or other top-ranking officials of each country.

As the OECD Convention focuses exclusively on foreign bribery, states’ implementing legislation focuses on multinationals, usually publicly held companies, and their activities abroad. However, recently enacted anticorruption frameworks in Latin America also apply domestically, except for Colombia, where corporate liability has been restricted to the crime of foreign bribery. The first important tests of this anticorruption paradigm consist of the aforementioned “grand corruption” cases in several Latin American countries, which have implicated many *grupo* owners in the wrongdoing. Lack of separation between ownership and control largely prevents family business groups from swiftly self-policing and reporting wrongdoing. Rather, shareholders must overcome the conflicting interests of both acting on behalf of the company and complying with the new laws, because the latter may necessitate reporting themselves or a close relative.

It is too early to say how corporate liability for corruption will impact the long-standing entrenched interests between politicians and family business groups that resiliently survived the privatization process of the 1990s.

<sup>10</sup> BEN ROSS SCHNEIDER, [HIERARCHICAL CAPITALISM IN LATIN AMERICA: BUSINESS, LABOR, AND THE CHALLENGES OF EQUITABLE DEVELOPMENT](#) (2013).

However, there are a few positive developments showing that market integrity is pushing against such conflicts of interest through other corporate governance arrangements.

The first salient example comes from the Odebrecht plea agreement with the U.S. Department of Justice. Odebrecht agreed to exclude all family members from the boards and management functions of all companies in the group. To my knowledge, this is the first family-owned “multi-Latina” to have taken such a step. When one of the companies within a *grupo* is in financial trouble, the usual strategy within *grupos* has historically been to divest the family interests from the indebted company and let it go bankrupt. In contrast, Odebrecht seems to be doing the opposite: selling interests in other companies of the *grupo* and restructuring the debts of other business units to capitalize the construction company, so as to ensure that it can pay the sanctions and with the expectation that the remedial steps taken after the plea agreement will allow it to return to the market. A recent restructuring filing made to authorities in Brazil confirms the point.<sup>11</sup>

A second example comes from the Argentine government and the Inter-American Development Bank (IADB). In August 2018, eight school-style spiral notebooks shocked the Argentine society. The notebooks belonged to the driver of a former high ranking official in the Ministry of Planning. The driver meticulously detailed each trip where his boss picked up bags of cash from government contractors and left them for former Argentine presidents Nestor and Cristina Kirchner—sometimes at their apartment. A journalist obtained copies of the notes, which were presented to a local court. Since then, more than 130 business executives and high ranking officials have been indicted. Before the explosion of the scandal, the Argentine government had awarded six public-private participation contracts valued around US\$6 billion. The main shareholders of all awardees were afterwards implicated in the bribery scandal that took place during the previous administration and, as a result, failed to secure private financing for the projects. In an effort to keep with the infrastructure plan, the Argentine government and the IADB established an “integrity framework” as a way to allow companies whose shareholders are under criminal investigation for corruption to continue to bid on these projects. Among other rules, the framework requires shareholders to step down from the management and, in some serious cases, sell or transfer the stock when a shareholder of the borrower faces an “integrity event,” as defined by the framework. Alternatively, shareholders may place their stock in a trust for the benefit of family members, as long as the trustee is a recognized independent professional firm.

Although anecdotal, both examples point towards an indirect consequence of corporate liability on the corporate governance of *grupos*: separation of ownership and control and professionalization of management, both of which are governance features that hitherto were unfamiliar to *grupos*.

### *The Impact on Structural Corruption in Public Works*

The Odebrecht case and the Notebook Scandal in Latin America also represent an interesting test of how the new frameworks of corporate liability will impact niches of structural corruption in the region. Significant scandals are hitting at the heart of longstanding political-business machines corruptly exchanging public works contracts for political support.

The new framework seems to be changing that scenario in a positive direction. The enactment of statutes allowing leniency and plea agreements shifted the dynamic in corruption cases. Current investigations are moving forward at an unusually rapid pace, thanks to the use, in most countries for the first time, of leniency agreements between prosecutors and implicated companies or individuals. As these laws require cooperating defendants to elicit information unknown to the prosecutor, their application often results in an ongoing expansion of the factual basis of the investigation, moving from construction to other sectors, and usually involving a significant number of companies in

<sup>11</sup> Aluisio Alves et al., [Brazil's Odebrecht Files for Bankruptcy Protection After Years of Graft Probes](#), REUTERS (June 17, 2019).

each sector. By way of example, there are more than thirty cooperating defendants in the Notebook Scandal in Argentina, as well as close to two hundred in the Lava Jato investigation in Brazil. In addition to bribery, the information obtained in leniency agreements has triggered investigations into money laundering and antitrust violations. Moreover, foreign prosecutors and regulators have strengthened their cooperation and even created specific task forces to improve the exchange of evidence. For the first time in history, well-known secrets are being documented and sanctioned.

These enforcement actions have also resonated in the compliance practices of transnational actors. The compliance rules of foreign business partners, investors, and lenders based in jurisdictions where anticorruption laws are strictly enforced require that those entities review their relationships with Latin American companies implicated in the investigations. For instance, financial institutions are cautiously reviewing the credit lines granted to the companies whose executives have been charged or indicted. Similarly, foreign business partners have begun to delay payments while exercising audit and termination rights, and international audit firms often require internal investigations and remediation plans before certifying balance sheets. Moreover, companies listed on U.S. exchanges have begun to face investor class action lawsuits. In other words, a combination of enforcement actions derived from the framework set forth in international treaties and transnational compliance practices are putting these political-business machines into a corner.

Expectedly, this important development comes at a significant price. The IADB recently reported that in both Colombia and Peru, investments in public-private partnerships (PPP) projects dropped from around US\$9 billion to less than US\$1 billion in 2016–2017. For reference, the prescandal contracts amounted to 4.2 percent of Peru's GDP and 20 percent of total investment (public and private) in 2018.<sup>12</sup> In Brazil, Lava Jato has reportedly led to a stoppage of public works amounting to US\$27 billion.<sup>13</sup> In Argentina, an ambitious infrastructure plan based on a PPP statute enacted in 2016 was postponed, as awardees of the first projects were unable to obtain private sources of financing, due to their links to corruption investigations.

Accustomed to decades of impunity, company owners initially resisted any substantial change, perhaps reflecting their doubts about the seriousness of the anticorruption push. But alarmed by the lack of credit and the unwillingness of foreign business partners to join forces in new projects, they are slowly understanding that the new paradigm requires them to take responsibility, offer remedial plans to affected stakeholders, estimate contingencies, and inform investors about potential liabilities.

In parallel, governments also need to adjust to the new paradigm. On the one hand, most countries are modernizing their public procurement rules to allow for transparent and competitive bidding processes. On the other, governments are balancing the impact of the investigations, which civil society strongly supports, with the aforementioned adverse economic consequences. Such efforts consist of preserving the contracts, if not necessarily the contractors, protecting innocent third parties, especially workers and suppliers, and guiding companies into the required remedial steps for rehabilitation.

These efforts have been undertaken at a different pace in each country, depending on several factors, including the ideological balance within national legislatures, the interpretation of the new rules by the legal community, the legitimacy of actors who gain prominence under the new rules—e.g., prosecutors and courts—and the traction that campaigns organized by powerful defendants gain in each society. In the long run, however, the new corporate liability regimes likely will help politically willing governments to overcome decades of corruption in public infrastructure.

<sup>12</sup> Roberto de Michele et al., *Effects of Corruption on Public-Private Partnership Contracts: Consequences of a Zero-tolerance Approach*, INTER-AM. DEV. BANK (Oct. 2018).

<sup>13</sup> *Id.*

*Conclusion*

The progress of these mega-enforcement actions is shaking up powerful, long-standing relationships in the region. Grand corruption cases were traditionally above the law and, when it was necessary to address them, were resolved politically. For the first time, high-ranking politicians and business people are being held accountable before courts of law.

As with any other profound legal change, the paradigm for countering corporate corruption is at the center of several legal and political debates. These debates include questions about the legitimacy and constitutional limits of leniency agreements—on which all investigations are predicated—and the political wisdom of inadvertently sparking an investment paralysis. While there is room for improvement in each jurisdiction, it is imperative that civil society actors, particularly the independent press, strengthen their efforts to sustain the anticorruption reforms, in spite of resistance from powerful actors as well as the negative economic consequences countries may need to navigate. Undoubtedly, the benefits in the long run far outweigh these temporary costs.