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THE GUIDE TO CORPORATE CRISIS MANAGEMENT

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Publisher's Note

Latin Lawyer and LACCA are delighted to publish *The Guide to Corporate Crisis Management*. Edited by Sergio J Galvis, Robert J Giuffra Jr and Werner F Ahlers, partners at Sullivan & Cromwell LLP, the fifth edition of this guide brings together the knowledge and experience of leading practitioners from a variety of disciplines and provides guidance that will benefit all practitioners.

We are delighted to have worked with so many leading individuals to produce *The Guide to Corporate Crisis Management*. If you find it useful, you may also like the other books in the Latin Lawyer series, including *The Guide to Mergers and Acquisitions*, *The Guide to Restructuring* and *The Guide to Corporate Compliance,* and our new tool providing overviews of regulators in Latin America.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

CHAPTER 6

Navigating Crises amid Latin America's Anti-Corruption Overhaul

James M Koukios, Ruti Smithline, Gerardo Gomez Galvis and Eduardo Schneider[1]

From newly enacted legislation to ground-breaking domestic and international enforcement actions, the anti-corruption landscape in Latin America has changed dramatically in recent years, and responding to a corruption crisis in Latin America has become far more complicated. The purpose of this chapter is to assist practitioners in navigating certain key complexities involved in managing such a crisis. First, we consider some of the background diversity in corruption risks that companies encounter across the region. Second, we explore some of the most important recent trends in anti-corruption enforcement in the region, including standardisation in anti-corruption legislation and the increase of coordinated enforcement actions and resolutions. Finally, we focus on important ways to mitigate the challenges of navigating and avoiding a cross-border corruption crisis: whether by effectively gathering and sharing information when a problem arises, or by ensuring that compliance programmes are effectively designed and implemented with certain key elements.

Regional diversity in corruption risk

Latin America encompasses a vast geographic area, with many different countries, varied languages and regionalisms. This diversity holds equally true when it comes to corruption risk, as illustrated by Transparency International's Corruption Perceptions Index (CPI). The CPI ranks 180 countries and territories by their

1 James M Koukios and Ruti Smithline are partners, Gerardo Gomez Galvis is of counsel, and Eduardo Schneider is an associate at Morrison Foerster.

perceived levels of public-sector corruption from one (least corrupt) to 180 (most corrupt), and is used by compliance professionals and enforcement authorities as a helpful guide for assessing corruption risk. In 2022, Latin American countries ranged from 14th (Uruguay) and 27th (Chile) on the high end of the scale to 177th (Venezuela) on the low end. The regions four largest economies fall somewhere inbetween: Colombia (91), Argentina (94), Brazil (94) and Mexico (126).

In addition to the CPI, practitioners can also look at enforcement actions brought under the US Foreign Corrupt Practices Act (FCPA) as another rough measure of corruption risk. As measured by the total number of companies and individuals that have been charged by the United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC), enforcement actions have been particularly frequent in Latin America over the past two decade. Indeed, five of the 11 most-named countries in FCPA enforcement actions are located in Latin America, and the number of enforcement actions involving the region has increased at a rapid pace since approximately 2014.

Top 11 countries for FCPA enforcement actions

Country	Region	Number of FCPA enforcement actions*	2022 TI CPI rank
China	Asia	84	65
Venezuela	Latin America	70	177
Nigeria	Africa	48	150
Brazil	Latin America	47	94
Mexico	Latin America	37	126
Indonesia	Asia	32	110
India	Asia	32	85
Ecuador	Latin America	29	101
Iraq	Middle East	28	157
Russia	Europe	22	137
Argentina	Latin America	22	94

* As measured by the total number of companies and individuals charged from March 2004 to 27 December 2022.

But it is not just the perception of risk or the prevalence of FCPA enforcement actions that differs between Latin American countries. The type of corruption risk also varies. Highly regulated or bureaucratic countries, or countries with powerful state-owned enterprises, generally present a higher risk of official bribery, whereas a country with a more free-market system may present a higher risk of commercial bribery. Regional differences in the use of third-party intermediaries

in business transactions or a culture of gift-giving also shape corruption risk. And a company's own business model in the region – for example, whether a company uses third parties in its sales channels or government relations efforts – can also affect corruption risk.

Given this diversity of corruption risk, it is important for anyone responding to, or hoping to avoid, a corruption-related crisis in Latin America to take time to understand the unique factors that may be at play. Understanding the local economy, press, legislation and political landscape are all critical to identifying and responding to corruption risk. To successfully navigate a crisis in the region, language proficiency certainly helps so that matters are not literally lost in translation. Also, an appreciation for the local environment is crucial to understand the legal, social, economic and political aspects that may directly or indirectly impact the potential investigation, resolution and remediation of such a crisis.

The standardising role of multilateral anti-corruption agreements

The array of domestic anti-corruption laws also varies widely between Latin American countries. Since a detailed analysis of each country's laws is beyond the scope of this chapter, we instead focus on the factors that are promoting standardisation in the fight against corruption within the region and, in particular, on the role of multilateral anti-corruption agreements.[2]

Until recently, the United States – through the FCPA – dominated the international anti-corruption enforcement landscape. When the FCPA was enacted in 1977, the United States became the only country in the world with a foreign bribery offence, and companies often viewed paying bribes as an inevitable cost of doing business in certain parts of the world. That outlook began to change 20 years later with the advent of the Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention).[3] The OECD Anti-Bribery Convention requires its Member States to establish a foreign official bribery offence that is criminally enforceable against individuals and either civilly or criminally enforceable against corporations. Among other things, the OECD Anti-Bribery Convention also requires its members to enforce these laws, regardless of national economic interests or

2 This standardisation, however, has not been uniform throughout the region and the fight against corruption in Latin America is often subject to broader political forces. We discuss some of the recent political setbacks in anti-corruption enforcement below.

3 http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

the impact such enforcement may have on international relations, and to cooperate with enforcement efforts by other Member States by providing 'prompt and effective legal assistance'. The effects of the OECD Anti-Bribery Convention on international cooperation in enforcement matters are discussed below.

As a result of the OECD Anti-Bribery Convention, Member States began to adopt laws similar to, and in some cases more expansive than, the FCPA. For example, in 2010, the United Kingdom adopted the UK Bribery Act (UKBA), which mirrored the FCPA in many respects, but went beyond public official bribery and also prohibited commercial bribery. The UKBA has an extremely broad jurisdictional reach and, as a result, companies with a UK nexus must consider the UKBA when doing business in Latin America.

Today, seven Latin American countries, including those with the five largest economies as measured by 2022 GDP – in descending order, Brazil, Mexico, Argentina, Chile and Colombia – are signatories to the OECD Anti-Bribery Convention and must therefore implement a foreign official bribery offence and related enforcement measures. Moreover, OECD Member States are subject to a rigorous peer review process. At regular intervals, member countries are evaluated by two of their peers on the adequacy of their implementing legislation (Phase 1), whether they are applying the legislation effectively (Phase 2) and whether they are enforcing the Convention's requirements (Phases 3 and 4). The OECD review process has driven significant change throughout the Convention's membership, including in Latin America. Indeed, a key driver of Brazil's Clean Companies Act, which entered into force in 2014,[4] was the OECD's insistence in a 2010 Phase 2 follow-up report that Brazil 'promptly' enact legislation to create effective liability of legal persons for foreign bribery. The OECD made clear that, while Brazil had been a signatory to the OECD Anti-Bribery Convention for 12 years, it had not done enough to combat corruption. With the passage of the Clean Companies Act, Brazil finally fell in line with the Convention's standards.

OECD pressure, combined with local factors, has similarly influenced changes in anti-corruption legislation in other countries in the region. For example, on 8 November 2017, Argentina's legislature passed a law targeting corporate corruption. This legislation, which came into effect in 2018, provides for steep fines to be imposed against companies and introduces 'leniency agreements' for companies to resolve corruption-related matters.[5] Argentina's law was enacted in reaction to

4 http://www2.camara.leg.br/legin/fed/lei/2013/lei-12846-1-agosto-2013-776664-publicacaooriginal-140647-pl.html.

5 http://www.boletinoficial.gob.ar/#!DetalleNorma/175501/20171201.

the OECD Working Group on Bribery's 24 March 2017 supplemental report finding that Argentina remained 'in serious non-compliance' with key articles of the OECD Anti-Bribery Convention.[6] Similarly, Peru's Law 30424, which introduced corporate criminal liability for foreign and domestic bribery of public officials, came into effect on 1 January 2018. Companies found guilty of violating Law 30424 face a range of penalties, including fines, debarment from government contracting, suspension of or prohibition on company activities and dissolution. Companies can mitigate responsibility through substantial cooperation, reparation and the existence or implementation of an adequate compliance programme. This legislation was part of Peru's anti-corruption efforts as it sought to become an OECD member.

In addition to requiring the implementation and enforcement of a foreign bribery offence, the OECD has also been a leader in providing guidance for effective anti-corruption compliance programmes. In 2010, the OECD released its 'Good Practice Guidance on Internal Controls, Ethics, and Compliance' (the Good Practice Guidance). The Good Practice Guidance is persuasive to enforcement authorities throughout the Anti-Bribery Convention's membership and is helping to contribute to a common understanding of the elements of an effective compliance programme. Several Latin American Member States have expressly made compliance programmes either an affirmative defence or a mitigating circumstance of their legislation implementing a corporate foreign bribery offence. Compliance programmes are discussed in more detail below.

The chart below is intended as a high-level summary of key aspects of anti-corruption legislation throughout the region.

Summary of anti-corruption legislation in Latin America

Country	Signatory to the OECD Anti-Bribery Convention?	Criminal corporate liability?	Corporate civil liability for foreign bribery?	Compliance programme: requirement, affirmative defence or mitigating circumstance?
Argentina	Y	Y	Y	Mitigating circumstance
Bolivia	N	Y	Y	N/A
Brazil	Y	N	Y	Mitigating circumstance
Chile	Y	Y	Y	Affirmative defence
Colombia	Y	N	Y	Affirmative defence
Costa Rica	Y	Y	Y	Mitigating circumstance

6 http://www.oecd.org/corruption/anti-bribery/Argentina-Phase-3bis-Report-ENG.pdf.

Country	Signatory to the OECD Anti-Bribery Convention?	Criminal corporate liability?	Corporate civil liability for foreign bribery?	Compliance programme: requirement, affirmative defence or mitigating circumstance?
Dominican Republic	N	Y	Y	N/A
Ecuador	N	N	N	N/A
El Salvador	N	Y	Y	N/A
Guatemala	N	Y	Y	Affirmative defence
Honduras	N	Y	Y	N/A
Mexico	Y	Y	Y	Mitigating circumstance
Nicaragua	N	N	N*	N/A
Panama	N	Y	Y	N/A
Paraguay	N	N	N	N/A
Peru	Y	Y	Y	Affirmative defence
Uruguay	N	N	N	N/A
Venezuela	N	Y	Y	N/A

* A bribe payment to a foreign government official is a violation of the Criminal Code, which only punishes the conduct of individuals. There may, however, be 'accessory consequences' to an entity, including dissolution of the company.

The net effect of the OECD's Anti-Bribery Convention is that those countries with the region's largest economies are moving closer together with respect to the foreign bribery offence, enforcement and compliance expectations. Although regional differences must still be considered, this increased standardisation does present some good news for companies doing business throughout the region, as they can adopt compliance procedures and responses that effectively and concurrently address the concerns of multiple enforcement authorities.

We have focused on the OECD's Anti-Bribery Convention, but it is not the only multilateral agreement that is relevant in the region. For example, the United Nations Convention against Corruption (UNCAC) is a multilateral treaty between more than 180 signatory countries, including every single Latin American country.[7] UNCAC requires its signatories to implement several anti-corruption measures that focus on five principal areas: prevention, law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.[8] Similarly, the Organization of American States's Inter-American

7 http://www.unodc.org/unodc/en/corruption/ratification-status.html.

8 http://www.unodc.org/unodc/en/treaties/CAC/.

Convention Against Corruption (IACAC) has the primary purpose of: promoting and strengthening the development of each member's mechanisms needed to prevent, detect, punish and eradicate corruption; and promoting, facilitating and regulating cooperation between its members.[9] IACAC also provides that 'the State Parties shall afford one another the widest measure of mutual assistance' and 'shall foster exchanges of experiences by way of agreements and meetings between competent bodies and institutions'.[10] Every country in Latin America (and the United States) is a signatory to IACAC. Also, the United States-Mexico-Canada Agreement (USMCA), which entered into force on 1 July 2020, and replaced the North American Free Trade Agreement, contains an anti-corruption chapter (Chapter 27) that requires the United States, Mexico and Canada to adopt or maintain anti-bribery legislation and other measures designed to combat corruption, promote integrity among public officials, promote the participation of the private sector and society in anti-corruption efforts, apply and enforce anti-corruption laws and cooperate with each other in anti-corruption enforcement efforts.[11]

While both UNCAC and IACAC are important mechanisms in the fight against corruption throughout Latin America, these agreements historically have lacked the rigorous peer review process of the OECD Anti-Bribery Convention to keep member countries on track and to be held accountable for the enforcement of anti-corruption laws.[12]

The impact of increased international cooperation

The increased international alignment created by the OECD Anti-Bribery Convention and other multilateral agreements has complicated the enforcement environment for multinational companies doing business in the region. Ten or 20 years ago, a practitioner could confidently predict that a domestic corruption scandal in Latin America would be addressed by local authorities and that foreign bribery offences in the region would be investigated and prosecuted by the United States under the FCPA. Over the past five to 10 years, however, the lines between domestic and foreign bribery investigations have blurred as enforcement authorities in several countries are now cooperating with their counterparts within

9 http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp.

10 id.

11 https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/27_Anticorruption.pdf.

12 http://www.transparency.org/news/feature/uncac_review_mechanism_up_and_running_but_urgently_needing_improvement.

and outside of the region. As a result, there has been an uptick in enforcement against companies and individuals both in the United States and throughout Latin America.

As the fight against corruption has become a global initiative, practitioners will find themselves representing companies or individuals that face liability across jurisdictions and on multiple fronts. Perhaps there is no better example than *Lava Jato* (also known as *Operation Car Wash*), a sprawling domestic bribery and money laundering investigation in Brazil that has spawned a massive number of individual and corporate prosecutions across the world. *Lava Jato* began in 2014 as a small-scale probe by the Federal Police in Curitiba into gas service stations suspected of being used for money laundering. The investigation ultimately revealed a massive and systemic corruption scheme by officials of Brazil's national oil company, Petróleo Brasileiro SA (Petrobras), to overcharge contractors in exchange for a cut in the deals. The investigation ensnared more than 100 politicians, including four former presidents and numerous corporations, including nine of Brazil's major construction companies. Although there is no centralised database of the number of cases that were brought at various state and federal levels in Brazil, the Federal Prosecution Service (MPF) reported that, as part of the *Lavo Jato* investigation, it indicted in the State of Paraná alone (where Curitiba is located) 535 individuals resulting in more than 174 convictions that were affirmed by the regional Federal Court of Appeals.[13] The MPF also reported that it made or received more than 1,250 requests for cooperation in investigations to, or by, 62 countries.[14] Outside of Brazil, the *Lava Jato* investigation has touched dozens of countries and implicated numerous companies and scores of politicians, including current and former presidents in Argentina, Colombia, Peru and Venezuela, among others.

One notable aspect of *Lava Jato* is the cooperation and coordination between prosecutors in Brazil and several other jurisdictions, including the Netherlands, Singapore, Switzerland, the United Kingdom and the United States. These jurisdictions have shared both evidence and penalties pursuant to coordinated

13 http://www.mpf.mp.br/grandes-casos/lava-jato/resultados. Between 2019 and 2020, the MPF changed the methodology used to count convictions. In 2019, the MPF counted convictions in the lower courts, but now counts only convictions affirmed by the Court of Appeals.

14 id.

corporate resolutions.[15] The chart below shows FCPA resolutions brought by US enforcement authorities in connection with *Lava Jato* and the countries that shared in the penalties.

Lava Jato-related coordinated resolutions

Company	US resolution date	Total resolution*	US portion*	Other countries
Odebrecht SA/ Braskem SA	21 December 2016	US$3,500 million**	US$350 million	Brazil, Switzerland
Rolls-Royce	17 January 2017	US$800 million	US$170 million	Brazil, UK
SBM Offshore	30 November 2017	US$820 million	US$238 million	Brazil, Netherlands
Keppel Offshore & Marine	22 December 2017	US$422 million	US$106 million	Brazil, Singapore
Petrobras	27 September 2018	US$1,787 million	US$171 million	Brazil***
Samsung Heavy Industries Company Ltd	22 November 2019	US$75 million	US$38 million	Brazil

* Amount agreed at time of settlement and rounded to the nearest million.
** The total resolution amount was ultimately reduced to US$2,600 million based on the company's inability to pay the full resolution amount.
*** US$933 million in disgorgement was also credited to a settlement fund for a securities class action lawsuit.

Coordination between prosecutors across jurisdictions has not been limited to Brazil. Most recently, in August 2023, the DOJ and the SEC, for the first time in coordination with Colombian authorities, announced parallel resolutions with Colombian conglomerate Grupo Aval Acciones y Valores SA (Grupo Aval) and its bank subsidiary, Corporación Financiera Colombiana SA (Corficolombiana), related to allegations that they conspired with the Brazilian construction and engineering conglomerate Odebrecht SA to bribe Colombian officials to win a contract to construct and operate a highway toll road in Colombia.[16] Corficolombiana

15 In this respect, the DOJ has made coordinated resolutions a part of its official policy. In enacting its anti-piling on policy, the DOJ explained that the 'new policy discourages "piling on" by instructing DOJ components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct'. http://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

16 https://www.justice.gov/opa/pr/corficolombiana-pay-80m-resolve-foreign-bribery-investigations; see also https://www.sec.gov/news/press-release/2023-151.

entered into a three-year deferred prosecution agreement (DPA) with the DOJ, agreeing to pay a US$40.6 million criminal penalty for conspiring to violate the FCPA's anti-bribery provisions. The companies also agreed to pay SEC over US$40 million in disgorgement and pre-judgment interest. According to the DPA, up to half of the DOJ's criminal penalty imposed on Corficolombiana may be credited against payments to Colombia's Superintendencia de Industria y Comercio for violations of Colombian law related to the same conduct.

In addition to coordinating corporate resolutions, enforcement authorities have cooperated in other ways. For example, in a large foreign bribery investigation involving Brazilian jet manufacturer Embraer SA, the United States and Brazil reportedly agreed to a division of labour in which the United States charged the company with foreign bribery violations (unlike Brazil at the time, the United States had the ability to bring a foreign bribery enforcement action against the company) while Brazil charged the company's Brazilian executives for related conduct.[17]

This coordination among enforcement authorities can present challenges for companies and practitioners. On the one hand, coordinated resolutions mitigate the risk that a company will pay multiple penalties for the same underlying conduct. On the other hand, it has become increasingly difficult to contain an international anti-corruption investigation to one jurisdiction. Documents and information disclosed to one enforcement authority may be disclosed to another enforcement authority through formal and informal law enforcement information sharing.[18] To obtain self-reporting and cooperation credit in multiple jurisdictions, companies must thus decide which enforcement authorities to report to, the sequence in which they make these reports and the best means to approach the authorities (e.g., whether the company should approach an authority itself or request one authority to help coordinate with other authorities).

17 http://www.wsj.com/articles/brazil-files-bribery-charges-in-embraer-aircraft-sale-to-dominican-republic-1411502236.

18 For example, after disclosing information about its internal FCPA-related investigation to the DOJ, it was reported in 2015 that 'Brazilian authorities had filed a criminal action against eight Embraer SA employees, accusing them of bribing officials in the Dominican Republic in return for a $92 million contract to provide the country's armed forced with attack planes'. Significantly, the complaint was filed 'with help from the Justice Department and the Securities and Exchange Commission'. http://www.wsj.com/articles/embraer-in-talks-with-justice-department-1432120068; see also footnote 17.

While international coordination presents companies with difficult choices, an even more difficult situation arises when countries are not coordinating. A lack of coordination can result in an inability to attain finality as the threat of additional actions by other government entities continues to loom over the company. This lack of coordination can prolong a crisis for years and inhibit a company from moving past the scandal in terms of both reputation and financial impact.

The experience of the family-owned Odebrecht dramatically illustrates this point. In December 2016, Odebrecht and its affiliate Braskem SA, a Brazilian petrochemical company, agreed to a US$3.5 billion global settlement to resolve charges with US, Brazilian and Swiss authorities arising out of alleged schemes to pay bribes to foreign officials around the world.[19] Rather than achieving finality in December 2016 with the announcement of this coordinated resolution, Odebrecht has faced an onslaught of investigations across the region. Indeed immediately after the resolution was announced, there were calls by multiple governments for Odebrecht to explain the corrupt payments in their respective countries, with a number of the countries, including Ecuador and Colombia, opening formal investigations.[20] Odebrecht has since been negotiating individual settlements with countries throughout the region. In 2017, for example, Odebrecht agreed to pay US$220 million in fines to the Panamanian authorities and US$184 million in penalties to the Dominican Republic's authorities.[21] While formal resolutions have not been reached in various other countries, Odebrecht has been formally or de facto banned from participating in government projects (including suspension of current projects) in a number of countries including Argentina, Colombia and Mexico.[22]

Almost seven years after the resolution with the United States, Brazil and Switzerland, Odebrecht has yet to achieve finality as it continues to negotiate separate and uncoordinated resolutions throughout the region. As recently as August 2023, prosecutors in Colombia announced criminal indictments

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19 http://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

20 http://www.reuters.com/article/us-brazil-corruption-latinamerica-idUSKBN14B2BD.

21 http://www.reuters.com/article/us-panama-odebrecht/odebrecht-agrees-to-pay-220-million-fine-aid-panama-probe-idUSKBN1AH57C; http://www.reuters.com/article/us-brazil-corruption-odebrecht-dominican/dominican-republic-ratifies-terms-of-odebrechts-184-million-plea-deal-idUSKBN17L2X1.

22 See, e.g., http://www.reuters.com/article/us-mexico-odebrecht/mexico-bans-government-business-with-odebrecht-for-two-and-a-half-years-idUSKBN1HP2WT; http://www.reuters.com/article/us-argentina-odebrecht-idUSKBN19O2JV; https://andina.pe/Ingles/noticia-odebrecht-banned-from-signing-contracts-with-peru-state-648542.aspx.

against 60 individuals, including dozens of former government officials, on graft charges tied to the Odebrecht corruption scandal. [23] That same month, a report by Colombia's attorney general's office also claimed that Odebrecht still owes the Colombian government approximately US$120 million for damages inflicted by Odebrecht's corruption scheme.[24] The *Odebrecht* case also illustrates, however, that even amid the individual negotiations and settlements there has been an increase in the sharing of information between countries in the region. For example, in the context of the *Odebrecht* investigations, Brazilian authorities reached a deal with Argentine authorities to provide Argentina with information and evidence concerning Odebrecht.[25] The Colombian attorney general's office has also acknowledged that the US government assisted with its investigations into wrongdoing involving Odebrecht and public officials in Colombia.[26]

As coordination spreads throughout the region, more of these jurisdictions may, at the very least, be willing to share information, if not willing to enter into coordinated resolutions. For now, however, the risk for companies for follow-on investigations and prosecutions remains high.

The challenge of competing internal enforcement authorities

In addition to potentially having to engage with enforcement authorities in multiple jurisdictions, companies facing anti-corruption crises in Latin America may also encounter a lack of coordination between domestic enforcement agencies. In Brazil, for example, (before the enactment of Decree 11,129/2022) at the federal level alone, negotiations may involve at least four different authorities: the Comptroller General of the Union (CGU), the MPF, the Union Attorney General's Office (AGU) and the Union Court of Auditors.The number of relevant Brazilian authorities may increase after factoring in state and municipal regulators. For instance, even after reaching several resolutions with federal authorities

23 https://www.wsj.com/world/americas/colombian-prosecutors-to-charge-60-people-with-graft-tied-to-odebrecht-building-scandal-54cf4909.

24 https://www.reuters.com/article/colombia-odebrecht/colombia-says-odebrecht-still-owes-120-million-for-corruption-idUKL1N39Y2RM.

25 https://riotimesonline.com/brazil-news/rio-politics/brazil-argentina-sign-deal-to-share-odebrecht-plea-bargaining-information.

26 https://www.wsj.com/world/americas/colombian-prosecutors-to-charge-60-people-with-graft-tied-to-odebrecht-building-scandal-54cf4909.

in Brazil, the Public Prosecutor's Office of the State of São Paulo has sought to use information from Odebrecht's agreement with the MPF to file charges against the company.[27]

The SBM Offshore (SBM) resolution presents a related challenge, this one involving an enforcement agency's own internal processes. In December 2015, as part of the *Lava Jato* investigation, the MPF indicted SBM and Petrobras executives on charges relating to the bribery of Petrobras officials.[28] After extensive negotiations, SBM signed a leniency agreement with the CGU, MPF, AGU and Petrobras on 15 July 2016 that was set to become effective following ratification by the MPF's Fifth Chamber for Coordination and Review and Anti-Corruption (Fifth Chamber).[29] On 1 September 2016, however, the Fifth Chamber raised a number of concerns regarding the leniency agreement and referred the matter back to the MPF prosecutors in charge of the case for further review.[30] This referral affected the presumed finality of the first proposed agreement and a final settlement was delayed for more than two years, ultimately receiving approval on 14 December 2018.[31]

Similarly, in June 2020, the CGU commenced an administrative enforcement procedure (AEP) against five subsidiaries of the Singaporean infrastructure company Keppel Corporation. The AEP came almost three years after Keppel entered into a US$422 million joint resolution with the US, Singapore and Brazil's MPF. The AEP seems to have been short-lived: on 20 August 2020, Keppel announced that the CGU had suspended the AEP against its subsidiaries,[32] highlighting the lack of finality and certainty that companies may face in resolving multi-country and multi-agency matters.

The lesson from these and other cases is that practitioners must consider all relevant players – both foreign and domestic – when contemplating settlement discussions, since failure to do so may affect the coverage offered by a resolution and could expose a company to additional fines. Practitioners should consider

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27 https://politica.estadao.com.br/blogs/fausto-macedo/sem-acordo-odebrecht-pede-que-justica-nao-receba-acao-contra-alckmin.

28 http://www.conjur.com.br/2015-dez-17/mpf-denuncia-12-pessoas-corrupcao-contratos-petrobras.

29 http://www.mpf.mp.br/pgr/noticias-pgr/mpf-nao-homologa-acordo-de-leniencia-com-a-sbm-offshore.

30 id.

31 https://g1.globo.com/politica/blog/matheus-leitao/post/2018/12/18/camara-do-mpf-homologa-acordo-fechado-com-sbm-offshore.ghtml.

32 https://globalinvestigationsreview.com/article/1230126/brazilian-agency-suspends-anti-corruption-investigation-against-keppel.

which enforcement authorities may have jurisdiction over a matter, local agencies' experience (or lack thereof) in resolving matters, and, in some cases, internal and external political dynamics.

Collateral consequences: debarment and suspension

The use of debarment and suspension from eligibility for contracting with the government or receiving funding from a multilateral development bank (MDB) has been evolving in recent years as a powerful tool to fight corruption. The OECD's 2009 Anti-Bribery Recommendations called on parties to the Anti-Bribery Convention to: 'suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials'.[33] Following this recommendation, signatory countries – including throughout Latin America – recently started to include the potential of debarment and suspension into their anti-corruption laws. For example, Colombia's Transnational Corruption Act includes debarment from contracting with the Colombian government for up to 20 years as a potential sanction.[34] Although not necessarily consistent across the region, other countries, including Argentina, Brazil, Mexico and Peru, have each incorporated the potential for debarment or suspension into their respective anti-corruption laws.

In addition, since 2011, the major MDBs, including most relevant for Latin America, the Inter-American Development Bank and the World Bank Group, signed a cross-debarment agreement. While each MDB maintains its own processes for evaluating when debarment or suspension is appropriate in connection with corruption related to one of its funded projects, the agreement means that a company or individual who is debarred by one MDB (for a term of more than one year) will automatically be debarred by the other MDBs for the same term. As the President of the World Bank announced when the agreement was reached, '[W]ith today's cross debarment agreement among development banks, a clear message on anti-corruption is being delivered: Steal and cheat from one, get punished by all.'[35] As a result of the agreement, the impact of sanctions imposed by one MDB has been greatly enhanced.

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33 https://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Recommendation-ENG.pdf.

34 Ley 1778 de 2016 Congreso de la República - EVA - Función Pública (funcionpublica.gov.co).

35 https://www.iadb.org/en/news/news-releases/2010-04-09/multilateral-development-banks-fight-corruption-with-new-joint-sanction%2C6959.html.

Critically, the form that an enforcement action takes can impact whether a company will face the collateral consequence of suspension or debarment. Debarment systems are not uniform across jurisdictions or MDBs, and not all jurisdictions or MDBs require automatic debarment or suspension even when there are violations of the anti-corruption laws. For example, in some jurisdictions there may be differences between entering a guilty plea versus negotiating a form of leniency agreement. Given the significant implications suspension or debarment can have on a company, a company must consider and seek to mitigate such collateral consequences as part of its strategy in resolving a corruption case.

Recent challenges to enforcement

There have been indications during the past four years that the region has taken a step back with respect to enforcement of some of the anti-corruption measures discussed above. In Brazil and Mexico, for example, anti-corruption enforcement became increasingly politicised following the election of anti-establishment leaders in 2018. For example, since Brazilian President Jair Bolsonaro's election in October 2018, *Lava Jato* was closed,[36] several prominent convictions secured under *Lava Jato* were overturned, and a recent decision by a Brazilian Supreme Court justice, under Luiz Inácio Lula da Silva's new administration, limited the use of information from Odebrecht's leniency agreement and could potentially jeopardise other resolutions.[37] Novonor, as Odebrecht is now known, has since requested that the Supreme Court justice uphold its leniency agreement.[38] Meanwhile, the political establishment in countries such as Guatemala and Peru has fought back against anti-corruption efforts.[39] The covid-19 pandemic did not help either, as several Latin American countries shifted their focus to other priorities, allowing politicians to curb anti-corruption efforts 'without triggering popular outrage or street demonstrations as witnessed in years past'.[40]

It is too soon to tell, however, whether this is a sustained, regional trend or how it will impact any particular case. For example, despite the official end of the *Lava Jato* task force in February 2021, Brazilian prosecutors have continued to pursue *Lava Jato*-related investigations under the auspices of the Special Action Group for Fighting Organized Crime (GAECO), a specialised unit fighting

36 https://www.reuters.com/article/us-brazil-corruption-idUSKBN2A4068.
37 https://www.conjur.com.br/2023-set-18/direito-defesa-decisao-toffoli-precedentes.
38 https://globalinvestigationsreview.com/article/novonor-asks-brazils-supreme-court-keep-odebrecht-leniency-agreement-intact.
39 https://www.as-coa.org/sites/default/files/CCC_Report_2021.pdf.
40 https://www.as-coa.org/sites/default/files/CCC_Report_2021.pdf.

organised crime in Brazil.[41] Also despite the closure of the *Lava Jato* investigation, Brazilian agencies still appear to have an appetite and resources to bring corruption cases involving Petrobras, and Brazilian authorities continue to cooperate with foreign authorities which continue to bring *Lava Jato*-related enforcement actions abroad.[42] Moreover, anti-corruption bills are progressing through the region,[43] and the OECD Working Group on Bribery has noted that the 'Law Enforcement Network for Latin America and the Caribbean, which is part of the OECD-LAC Anti-Corruption Initiative, has become one of the most active WGB regional law enforcement networks'.[44]

Finally, even if Latin American countries reduce their anti-corruption enforcement efforts, US enforcement authorities are likely to step back into the breach and bring cases where there is US jurisdiction. Notably, in March 2023, the DOJ and the SEC released a Spanish-language edition of the Resource Guide to the US Foreign Corrupt Practices Act, Second Edition.[45] This is the first time they have published the guide in a foreign language, indicating their continued continued interest in the Latin America region.

Information gathering and sharing

Any company responding to a potential corruption-related crisis anywhere (including in Latin America) will need to gather facts and information to understand what happened, assess potential exposure to liability and develop appropriate remedial measures. This is true regardless of whether the matter remains internal or becomes a government-facing investigation. How a company goes about investigating a matter and, if necessary, sharing information with stakeholders and enforcement authorities must be thoughtfully considered. Companies must be careful to avoid the pitfalls of myriad often restrictive and

41 http://www.mpf.mp.br/pr/sala-de-imprensa/noticias-pr/lava-jato-passa-a-integrar-o-gaeco-no-parana.

42 https://www.mpf.mp.br/grandes-casos/lava-jato/efeitos-no-exterior.

43 https://www.as-coa.org/sites/default/files/CCC_Report_2021.pdf.

44 https://www.oecd.org/daf/anti-bribery/oecd-working-group-on-bribery-2022-annual-report.pdf.

45 https://www.justice.gov/criminal-fraud/fcpa-resource-guide. This resource guide provides companies, practitioner, and the public with detailed information about the FCPA's statutory requirements, while also providing insights into DOJ and SEC enforcement practices through hypotheticals, examples of enforcement actions and anonymised declinations, and summaries of applicable case law and DOJ opinion releases.

conflicting laws, including data privacy, data protection and labour and employment laws. Practitioners need to ensure that, in responding to a corruption crisis, the company does not expose itself to violations of other laws.

Limitations imposed by data privacy and data protection laws

Data privacy and data protection laws, which prohibit the misuse or disclosure of personal information, are an important consideration when starting an investigation in Latin America. Data privacy regimes, and the restrictiveness of each regime, vary widely between countries. Below is a chart showing which Latin American countries have enacted data privacy laws.

Latin American countries with data privacy laws as at September 2021

Country	Data privacy legislation enacted	Laws with limited data privacy provisions	No data privacy legislation enacted
Argentina	X		
Bolivia		X	
Brazil	X		
Chile	X		
Colombia	X		
Costa Rica	X		
Dominican Republic	X		
Ecuador	X		
El Salvador*		X	
Guatemala*			X
Honduras*			X
Mexico	X		
Nicaragua	X		
Panama	X		
Paraguay*		X	
Peru	X		
Uruguay	X		
Venezuela		X	

* Additional legislation under development or pending before legislature.

Data privacy is a crucial consideration when organising a response team and requires skilful navigation, especially since it can significantly affect costs and legal fees. For example, data privacy concerns might require that the initial phases of an investigation be handled in-country, and personal information might need to be redacted from documents before they are taken out of the country. Practitioners working in the region are advised to retain or consult with both a data privacy lawyer and a vendor equipped to handle cross-border data privacy issues early on in an investigation.

Data privacy issues also create additional challenges for cooperating companies seeking to voluntarily produce documents to foreign enforcement authorities. For example, although heavily redacted documents may not be viewed favourably by enforcement authorities, data privacy laws generally do not contain exceptions for productions made to foreign enforcement authorities. Practitioners representing cooperating companies, therefore, should consider whether any other exceptions may be available (e.g., some data privacy laws have exceptions for litigation defence), whether the company's IT-use policy permits production of the information for purposes of an investigation or whether the company should seek express consent from its employees to produce their personal information. In some circumstances, companies might consider delivering unredacted documents to domestic enforcement authorities for transfer to foreign enforcement authorities through the mutual legal assistance process. This option may be impracticable, however, if the domestic and foreign enforcement authorities are not otherwise coordinating their investigations and could open the company up to unwanted domestic scrutiny.

Conducting witness interviews and making witnesses available

Investigations in Latin America, like any other investigation, will include witness interviews. In addition to *Upjohn*-type warnings, practitioners should consult with local counsel regarding any additional warnings that may be required under local law. Practitioners should also consult with local counsel on any limitations on a company's ability to require its employees to cooperate with an internal investigation or to cooperate with enforcement authorities, which may request to interview employees. Special consideration should be given to requests to conduct such interviews in the United States or at a US embassy, since doing so would subject witnesses to US jurisdiction. In contrast, US enforcement authorities generally cannot interview witnesses in another country without the second country's express approval, usually through a mutual legal assistance request.

The importance of anti-corruption compliance programmes

As in any other region, having a robust, risk-based compliance programme is the best way to avoid a corruption-related crisis in Latin America. An effective compliance programme should be designed to detect and prevent improper conduct. Ideally, the compliance programme will be tailored not only to the company's business but also to the unique aspects of doing business in a particular country. But, as noted above, because global standards are rapidly converging, the core elements of a compliance programme can be designed to address effectively the concerns of multiple enforcement authorities at the same time.

By way of illustration, below is a chart comparing some key elements of the OECD's Good Practice Guidance to the compliance expectations set forth under the anti-corruption regimes in Brazil and Argentina.

Compliance programme element requirements

Requirement	OECD Good Practice Guidance	Brazil Clean Companies Act	Argentina Law 27,401
Tone at the top	Strong, explicit and visible support and commitment from senior management	Commitment of senior management and board members to a compliance programme	May include visible and clear support from senior leadership and management
Articulated policies and procedures	Maintain a clearly articulated and visible corporate policy	Implement policies and procedures applicable to everyone at the company	Must include a code of ethics or conduct or equivalent set of policies
Training requirement	Design measures to ensure periodic communication and documented training for all levels of the company	Conduct periodic training	Must include periodic training
Reporting mechanism	Maintain internal and, where possible, confidential reporting by and protection of directors, officers, employees and, where appropriate, business partners	Implement a reporting channel that is openly and broadly disseminated and anti-retaliation protection for whistle-blowers	May include reporting mechanism and whistle-blower protection
Periodic risk assessment	Conduct periodic reviews of ethics and compliance programmes	Conduct continuous monitoring of the programme and periodic risk assessment	May include periodic risk assessment

Requirement	OECD Good Practice Guidance	Brazil Clean Companies Act	Argentina Law 27,401
Third parties	Establish properly documented risk-based due diligence and appropriate and regular oversight of third parties	Adopt policies and procedures applicable to third parties, including due diligence on third parties	May include third-party monitoring

As shown in the summary of anti-corruption legislation chart in the 'The standardising role of multilateral anti-corruption agreements' section of this chapter, an effective compliance programme serves as a mitigating factor for a corruption offence in several Latin American countries and serves as an affirmative defence in others. Brazil's Clean Companies Act, for example, takes into account a company's compliance programme for purposes of a reduction in sanctions. Similarly, Argentina's anti-corruption statute considers the existence of an effective compliance programme as a mitigating factor when calculating sanctions. In countries such as Colombia and Peru, an effective compliance programme can serve as an affirmative defence.

Conclusion

There have been significant changes in the enactment and enforcement of anti-corruption laws in Latin America over the past few years. Any practitioner working in this region should be aware of these changes, specifically with respect to the undeniable movement toward the standardisation of anti-corruption legislation across countries.

On the one hand, this trend towards alignment helps companies implement global compliance programmes that can adequately meet the expectations of various enforcement authorities. On the other hand, the increased focus on anti-corruption legislation and the growing pressure to enforce these new laws has led to an increase in enforcement actions across the region, putting companies and individuals at increasing risk of liability. At the same time, recent rollbacks in enforcement, combined with the covid-19 pandemic, could lead to uneven enforcement in the coming years. Practitioners should also be aware of the increasing cooperation and information sharing, both within countries in the region and with countries outside of the region – most notably, the United States. Any step or disclosure taken in one country faces the very real risk of being shared with regulators or prosecutors in another jurisdiction.

Finally, in terms of practical considerations when conducting an investigation in Latin America, practitioners should be aware of the multiplicity of regulators with potential jurisdiction as well as local legal, cultural, political and economic

factors that come into play. All of these differences can increase the effectiveness, as well as reduce the time and cost it may take to conduct an investigation and resolve a corruption-related crisis in the region.