An Overview of Business Crime in Latin America

Diaz, Reus & Targ LLP

Michael Diaz Jr.

Carlos F. Gonzalez

The Scourge of Corruption

Late August 2013, Bolivian businessman Humberto Roca was contacted by a Bolivian National Police Colonel named Mario Fabricio Ormachea Aliaga with an offer for making what he called "trumped-up charges" against Roca disappear in Bolivia – Roca, the former head of Aerosur Airlines, was accused by the Bolivian government of Illegal Enrichment and had been forced to flee his country to the United States. Ormachea offered his help in getting the trumped-up charges to disappear in exchange for a $30,000 payment. But if he did not pay, Ormachea threatened that he would continue pursuing the charges against Roca and seek his extradition back to Bolivia where he would face criminal charges and guaranteed jail time. Agents of the U.S. Federal Bureau of Investigation coordinated a videotaping of the exchange of funds between Roca and Ormachea during the extortion attempt, and quickly arrested him. Ormachea is currently serving a jail sentence in a U.S. federal penitentiary after being found guilty in a jury trial.

In February 2014, a massive network of corruption within the Colombian army was exposed. High-ranking military officers siphoned money and took bribes in order to grant lucrative contracts for goods and services. Some of these senior officers took bribes up to fifty per cent of the cost of the contracts they awarded, while other members of the military were taking money intended for military supplies.

In June 2014, Luis Wolkowiez, a Venezuelan businessman, was charged with money laundering and unauthorised currency exchange after being connected with transactions related to the buying and selling of dollars and bolívars. Experts estimate such illegal transactions have become a billion-dollar-a-month industry in South Florida due to currency controls instituted in Venezuela since 2003 that limit the amount of foreign currency Venezuelans are able to purchase from the Venezuelan Government. The scarcity of U.S. dollars in Venezuela created a black, or parallel, market exchange, where U.S. dollars trade for 10 times the official exchange rate. Now, dozens upon dozens of Venezuelans are turning to the civil court system in Miami, Florida, seeking to recover millions lost in fraudulent transfers related to the buying and selling of dollars and bolívars. Meanwhile, others are targets of criminal investigations for various violations of U.S. money laundering laws in operating as money transmitters or MSBs (money service businesses) without a licence.

These cases, like many before them and those currently being investigated, illustrate the sad fact that business crime in Latin America is not limited to low-level public employees. Rather, crimes such as corruption reach even the highest levels of government, military, and law enforcement. And sadly, they are on the rise.

While several Latin American countries have vowed to combat corrupt practices and have enacted legislation to formalise their intentions, meaningful change requires active enforcement as well as the political will and sacrifice to exact it. In the meantime, as Latin American countries begin working to strengthen their enforcement regimes, the greater threat to corrupt practices and their participants is coming from the jurisdiction asserted by courts abroad – specifically in the United States and in the United Kingdom.

Latin America's "Culture of Corruption"

The argument that corruption is merely part of the Latin American culture, and an unavoidable part of doing business in the region, however, holds little sway in advocating that nothing should be done to punish and deter the practice. As Latin American economies increasingly mesh with the rest of the world, important transactions are now rarely conducted exclusively within the confines of any one country.

In drawing generalisations about the region, it is often easy to overlook the specific steps that individual countries are taking to deal with, or respond to, allegations of official corruption. Every country follows a different approach. Their responses to claims of corruption or lax enforcement of anti-corruption law are as varied as each country's unique leadership. Consider the cases of Colombia and Mexico.

Colombia

Colombia is embracing the fight against corporate corruption by adopting anti-bribery provisions to be applied in local business transactions, as well as in international business transactions. Locally, Colombia has enacted Law 1474 of 2011 that mainly focuses on corrupt transactions between Colombian or foreign individuals/companies and Colombian public entities and their employees. Internationally, Colombia joined the "*Convention on Combating Bribery of Foreign Public Officials in International Business Transaction*" (OECD Anti-Bribery Convention) on January 19, 2013 to prevent and deter corruption in international business transactions. [See also the Colombia chapter for in-depth coverage of Colombian business crime laws.]

Mexico

Among a number of anti-corruption measures promised by President Peña Nieto during his campaign, the Mexican government, under his leadership, created the Specialized Unit for Crimes in connection with Acts of Corruption, which reports directly to the Attorney General. This unit is responsible for the investigation and prosecution of local bribery and bribery of foreign public officials. Mexican federal law criminalises conduct both of the public official who accepts a bribe (only in the case of local bribery) and of the individual who promises or pays a bribe. Where there is bribery of foreign public officials, the law states that the judge can impose economic sanctions or order the suspension or dissolution of the legal entity on whose behalf the offence was committed.

Despite all legal efforts, Mexico continues to have an extremely low ranking in international indexes, such as the 2013 Corruption Perception Index published by Transparency International, where the country ranks 106th out of the 177 countries surveyed.

International Perspective

Executives at multinational corporations in the United States and elsewhere are increasingly taking anti-corruption statutes seriously and implementing corporate programmes to ensure compliance with the various applicable regulations. On one front, there is the U.S. Foreign Corrupt Practices Act of 1977 (FCPA), which grants the U.S. Department of Justice and U.S. Securities and Exchange Commission broad jurisdiction to enforce the statute's prohibition against the bribery of foreign officials. The FCPA is often deemed to have extra-territorial reach on the basis of an only minimal U.S. nexus, potentially imposing serious penalties on foreign entities and individuals engaging in bribery conducted *entirely abroad*.

On another front, the United Kingdom enacted its own Bribery Act of 2010, which went into effect in mid-2011, in order to update and enhance its foreign anti-bribery measures. Intended to better address the requirements of the OECD's 1997 Anti-Bribery Convention, the UKBA is now among the strictest legislation internationally on bribery. In particular, the law introduced a strict liability offence under Section 7 of the Act for a corporation's failure to prevent bribery on its behalf. Because the only defence against an allegation of a Section 7 violation is a showing of adequate preventative procedures in place, companies are now required to establish extensive internal programs, including conducting bribery risk assessments and consistently monitoring their business practices.

Like the FCPA, the UKBA has extra-territorial reach for both UK. companies operating abroad, as well as for overseas companies with a presence in the UK. The Act's broad territorial scope means that a foreign company that carries on any part of its business in the UK. could be prosecuted for its failure to prevent bribery, even where the bribery allegedly takes place entirely outside the territory of the UK. Thus, companies with a UK. presence find themselves playing a significant regulatory role. Such quasi-governmental responsibility, however, is hardly surprising given that many multinational corporations have access to financial and informational resources beyond those of some governments. These private entities are, indeed, in the best position to regulate business crimes, especially in light of the sad reality that a government itself plagued by corruption can hardly be expected to adequately control the corrupt practices taking place within its borders. This dilemma is illustrated by the above case of Bolivia, whose top anti-corruption cop is currently locked up in a Miami jail cell on charges of extortion.

Because multi-national corporations must now ensure that their internal anti-bribery programmes comply with a series of applicable regulations, they are having to expand, rather expensively, their compliance procedures to cover a broader range of possible infractions, recognising that even compliance with the FCPA does not ensure that their internal program constitutes adequate procedures as required under the distinct UKBA. Additionally, they must be cognizant of domestic regulations in the specific countries where they conduct business. Companies are therefore best positioned to minimise their risk exposure to civil and criminal liability for allegations of bribery schemes when they can prove rigorous internal compliance programs and proper due diligence, including procedures for inquiry, investigation, and personnel training.

Money Laundering

Money laundering is the direct by-product of other business crimes and is independently criminalised in the U.S. under 18 U.S.C. § 1956. Money laundering garners the greatest attention when it is linked to terrorism or, as in the context of Mexico and Colombia, to the illicit drug market, or more recent concerns that Venezuela's parallel currency market is inextricably intertwined with all of the above, including being flush with corruption money. Because money laundering takes place in many disguises and because few governments have the adequate financial or informational resources to effectively regulate the crime, responsibility has been increasingly shifted onto the shoulders of private parties – specifically, global financial institutions, which are arguably in the best position to monitor financial transactions and detect suspect laundering schemes. They have been burdened, at great expense, with the sort of regulatory responsibility traditionally assumed by government agencies.

Money laundering schemes are certainly harmful to Latin American countries, as they permit billions of dollars of public funds to be channelled abroad and fund terrorist and drug operations in the region. However, legal battles with financial institutions and the imposition of fines could also have unintended consequences as international financial institutions have begun pulling away from otherwise profitable operations in emerging markets. Access to the global financial system and to its instruments and institutions is essential for the continuing development of Latin America and for the financial security of its citizenry. Striking a balance between allocating the responsibility of preventing money laundering onto financial institutions will prove a worthwhile challenge in order to satisfy the region's interest in rooting out business crimes, while simultaneously cultivating a thriving financial market.

Prohibition of Buying and Selling U.S. Dollars with Foreign Currency

Several Latin American countries have strict foreign currency exchange controls. These controls are proven to create a "parallel" or "black" market currency exchange where unlicensed brokers arrange for the transferring of funds in violation of U.S. Federal Code 18 U.S.C. § 1960, as described above. The criminal offence in these transactions involves the violation of the foreign countries' currency exchange laws, which require the approval by the countries' central bank in transaction exchanges over a certain threshold, usually being US $10,000.

Venezuela, for example, is currently amidst a crisis without readily available U.S. currency to meet the demand for currency exchanges by tourists and for residents trying to buy basic essentials – Venezuela imports the majority of its consumer goods. The official system to obtain U.S. dollars in exchange for bolívars, the Venezuelan currency, is through the Commission of Foreign Currency Administration, also known by its Spanish acronym of CADIVI. CADIVI provides access to the preferential dollars at 6.3 bolívars per US $1 for purchasing by state-run companies and certain vital sectors. A second system for tourists and purchasing essential goods and services was created earlier this year, called SICAD, providing an exchange of roughly 12 bolívars per US $1. But, due to the scarcity of U.S. dollars, where the Venezuelan Government averages over 200 days to conduct the exchange, the parallel market continues to thrive in Venezuela with an exchange rate averaging 10 to 12 times the CADIVI exchange.

With the parallel market being the main source of U.S. dollars, it becomes ripe for crimes to occur. When a Venezuelan has bolívars they are looking to exchange for U.S. dollars, they contact a broker who will assist them with finding U.S. dollars. Generally, these brokers have individuals and companies in the United States, mainly Miami, Florida, who are in need of bolívars to help their family members and/or companies who in turn need bolívars to pay for legal commercial transactions occurring in Venezuela. These brokers then charge fees for assisting in the transaction. As we have seen recently in Miami with the arrests of unlicensed brokers and the civil lawsuits filed against them, it appears that brokers are running out of funds and not completing the transactions. They have one party deposit the bolívars in Venezuela, but when it comes time to deposit the U.S. dollars in a bank account they fail to do so, leading to the loss of millions of dollars to innocent victims who have no other viable way to convert their currencies.

Conclusion

The cost of business crimes are enormous, imposing significant burdens on developing states by draining billions of dollars in public funds. Foreign nations, such as the U.S. and the UK., are no longer turning a blind eye on business crimes occurring abroad. Merely enacting laws, however, is not enough – real reform requires enforcement through aggressive high-profile prosecutions. But the requisite enforcement measures can be costly and require investment in the training of competent investigators and prosecutors. The penalties imposed on guilty parties can allow governments to recover some of these costs, but to date there is a noticeable lack of penalties in Latin America in general. One theory is that corrupt practices reach so deeply into governmental institutions that the public officers responsible for combating business crimes are themselves active participants, perhaps receiving bribes in exchange for silence and inaction.

Until enforcement by Latin American governments catches up with the rapid pace of the ingenuity and innovation that characterises business crimes, improved cooperation among the countries in the region, and, more importantly, mutual legal assistance treaties with better-equipped nations, especially the U.S., would be wise.

Foreign investors doing business in Latin America are well advised to review their compliance measures to ensure that their operations meet the requirements of the FCPA, the UKBA, and the local laws where they conduct business. Companies or their individual officers may otherwise find themselves under investigation for criminal activities and face the risk of indictment, extradition, and the potential payment of hefty fines, as well as possible jail time.

Endnote

Global Agenda Council on Anti-Corruption and Transparency 2013, WORLD ECONOMIC FORUM, available at http://www.weforum.org/content/global-agenda-council-anti-corruption-transparency-2013 (last accessed 8/26/2014).

Acknowledgment

The authors would like to acknowledge the assistance of Diaz Reus associate, Marcela Cristina Blanco and Diaz Reus Of Counsel, Ignacio M Alvarez, in the preparation of this chapter.

Michael Diaz Jr.

Diaz, Reus & Targ LLP
Miami Tower at International Place
100 S.E. Second Street, Suite 3400
Miami, FL 33131
USA

Tel: +1 305 375 9220
Fax: +1 305 375 8050
Email: mdiaz@diazreus.com
URL: www.diazreus.com

Global Managing Partner

Michael Diaz, Jr. is the founding and global managing partner of Diaz Reus, where he concentrates his practice in complex U.S. and international commercial litigation and arbitration, asset recovery, white-collar criminal defense, and money laundering and regulatory investigations. He is a Certified Anti-Money Laundering Specialist (ACAMS). Upon graduation from the University of Miami School of Law, Mr. Diaz served as an assistant state attorney in the Miami-Dade County State Attorney's Office from 1986 to 1990 for the Honorable Janet Reno, former U.S. attorney general and then Miami-Dade state attorney. During his tenure as a prosecutor, Mr. Diaz rose through the office to become a division chief, where he primarily investigated and prosecuted homicide and major crimes cases.

From 1990 to 1998, Mr. Diaz became a named partner at an AV-rated boutique litigation firm where he put his considerable trial experience to good use litigating RICO, complex commercial, international money laundering, and public corruption cases in Latin America. In 1998, Mr. Diaz opened his own AV-rated full-service international law firm, growing the firm to include 13 offices on four continents, where he has been engaged in the successful defence and prosecution of some of the most well-known and highly publicised Ponzi schemes, public corruption cases, and fraud and money laundering investigations in Latin America and other regions in the world.

Carlos F. Gonzalez

Diaz, Reus & Targ LLP
Miami Tower at International Place
100 S.E. Second Street, Suite 3400
Miami, FL 33131
USA

Tel: +1 305 375 9220
Fax: +1 305 375 8050
Email: cgonzalez@diazreus.com
URL: www.diazreus.com

Partner

Carlos F. Gonzalez is a trial and appellate lawyer concentrating his practice on complex commercial litigation and white-collar criminal defence, arguing cases before state and federal appellate courts, researching and drafting motions at all litigation stages, and serving as issue-preservation counsel at trial and arbitration hearings. His clients include sovereign states, their agencies and instrumentalities, private and public corporations, financial institutions, and private individuals from Central America, South America, the Caribbean, and the U.S. He is fluent in Spanish, Arabic, and English, aiding in transnational client communication.

Mr. Gonzalez's recent matters include the representation of a class of plaintiffs in their efforts to collect on a $900 million judgment against the Republic of Argentina; a jury trial on behalf of one of Venezuela's top financial regulatory bodies that resulted in a $9 million settlement half way through the proceedings; a multi-million dollar victory on behalf of the Honduran National Soccer Federation in a contract dispute with its former media partner; and the prosecution of a claim against the Republic of Peru for its refusal to pay his client a $5 million reward for information that led to the location and capture of fugitive spymaster, Vladimiro Montesinos, among others.

A graduate of Northwestern University School of Law, prior to joining Diaz Reus, Mr. Gonzalez served as Assistant Public Defender, appellate division, Miami-Dade County Public Defender's Office, litigating dozens of appeals of complex felony offences, and was an associate attorney with White & Case, LLP and Arenstein & Leher, LLP. Mr. Gonzalez is a Certified Anti-Money Laundering Specialist.

DIAZ REUS ATTORNEYS & SOLICITORS

Diaz Reus & Targ LLP (DiazReus) is an entrepreneurial and enterprising emerging markets law firm focused on and dedicated to growing and protecting clients' financial assets and stability. From its Miami, Florida, headquarters to its 13 international offices, strategically located in dynamic business centres throughout Latin America, the Middle East, Asia, and Europe, the firm provides traditional legal services and new business opportunities for global clients including multinational corporations, foreign government entities, public officials, domestic and international banks and other financial institutions, entrepreneurs, and high-net-worth individuals.

Diaz Reus has uniquely tailored itself to help clients resolve legal issues around the globe and around the clock. Experienced attorneys with diverse cultural backgrounds who can communicate with clientele in English, Spanish, Czech, Mandarin Chinese, Shanghainese, Japanese, Russian, Arabic, Hindi, Italian, French, Portuguese, and German ensure that our client goals are fully and thoroughly attained. For more information, please visit www.diazreus.com.