

Recent Latin-American Anti-Corruption Investigations and Cases

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In the last few years, several Latin American countries and the United States have increased their focus on anti-corruption matters. This article will survey some of the most significant recent public anti-corruption investigations and cases which have a nexus with Latin-American countries. The discussion will be divided by the countries involved on these matters.

Argentina

INDICTMENT OF VICE PRESIDENT AMADO BOUDOU

In June, 2014, an Argentine federal judge issued an indictment of the country's serving Vice President, Amado Boudou, for his alleged involvement in the acquisition of a bankrupt printing company that was later used to gain lucrative government contracts to print bank notes and official documents. Boudou is the first Argentinian vice president to be indicted while in office. He has denied any wrongdoing and continues to perform his duties as Vice President, travelling extensively on behalf of the government to various official events, including the 14th annual Doha Forum in Qatar, earlier this year.

PAN AMERICAN ENERGY INVESTIGATION

On April 4, 2014, *Bloomberg News* reported that Argentina's Chabut provincial prosecutor initiated a formal probe of Pan American Energy's (PAE) alleged bribes to local government officials to gain an extension of its oil exploration concession. According to *Bloomberg*, the local prosecutor has asked PAE to submit the same information the company provided to the U.S. Securities and Exchange Commission (SEC) in response to its probe of the company. The SEC is reported to have launched an investigation regarding alleged bribes paid by PAE in 2007 to local officials in Chubut Province, to obtain an extension of the Cerro Dragon oil concession in this province. PAE is 60 percent owned by BP Plc, with the rest held by Bidas Energy, an Argentinean oil company, and China National Offshore Oil Corporation.

RALPH LAUREN NON-PROSECUTION AGREEMENT

On April 23, 2013, the SEC announced a Foreign Corrupt Practices Act (FCPA) non-prosecution agreement with Ralph Lauren Corporation, whereby the company agreed to disgorge more than \$700,000 in illicit profits and interest obtained in connection with bribes paid to Argentine government officials to receive favorable customs treatment for the importation of its products into Argentina. From 2005 to 2009, the company's Argentine General Manager authorized \$568,000 in bribe payments to customs officials through a customs broker to assist in improperly securing clearance of items without proper documentation, obtain clearance of prohibited goods, and avoid customs inspections, in violation of the FCPA. The company was not prosecuted due to its prompt self-reporting of the violations and "extensive, thorough and real-time cooperation with the SEC's investigation." This case shows how a company's self-reporting of a violation and cooperation with the authorities can lead to a more favorable outcome for the company.

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Brazil

PETROBRAS INVESTIGATION

On November 24, 2014, Petróleo Brasileiro SA (“Petrobras”) disclosed in an SEC filing that it is subject to an SEC investigation related to a vast money-laundering kickback scheme. According to the filing, a “cartel” of construction companies is alleged to have overcharged the company for tendered contracts and paid millions of dollars in bribes to company executives and local politicians. In Brazil, local prosecutors also are investigating Petrobras for violations of Brazilian anti-corruption laws and have ordered the detention of a number of individuals related to the probe. The officials have served dozens of search warrants and raided offices of eleven companies suspected of being part of the scheme, including Brazilian multinationals Odebrecht SA, Camargo Correa SA and Constructora OAS SA. On December 4, 2014, *The Wall Street Journal* reported that a former Petrobras manager, Pedro Barusco, agreed to return \$100 million to the Brazilian authorities from his overseas accounts, as part of a plea deal with Brazilian federal prosecutors investigating the Petrobras bribery scheme.

This wide-ranging case has the potential to have a significant impact on Brazil’s government and its political culture. This case is particularly sensitive given that Brazilian President Dilma Rousseff was Chairman of Petrobras at the time when the alleged bribery scheme was operating. As a result of the investigation, Petrobras recently announced that it had to delay the issuance of its third quarter financial results. On December 3, 2014, Moody’s Investors Service announced a downgrade of Petrobras’s baseline credit assessment because of the continuing bribery investigation. On December 8, 2014, a class action was filed against Petrobras in New York City’s federal court, alleging that it has engaged in securities fraud by failing timely to disclose the bribery scheme now under investigation. Ultimately, no matter the outcome of these proceedings, conduct of public business in Brazil will likely be changed by this matter.

ELI LILLY AND COMPANY CASE

On December 20, 2012, the SEC announced that Eli Lilly and Company (Lilly) agreed to pay the U.S. government \$29,398,734, in disgorgement of profits, interest and penalties related to bribes paid to government officials to secure business with the government in four countries, including Brazil, in violation of the FCPA. In the case of Brazil, Lilly, through a third-party distributor, paid approximately \$70,000 to bribe state government officials so that the state would purchase certain Lilly products. According to the SEC, Lilly had a “check-the-box” third-party due diligence compliance program which was inadequate and resulted in the company being liable for the illicit payments made by its Brazilian distributor. As the company knew that the discount it gave to the distributor for the government sales was excessive, it could not avoid liability for the improper distributor payments to the government officials.

Mexico

WALMART INVESTIGATION

In November 2011, Wal-Mart Stores, Inc. (Walmart) disclosed in its SEC filings possible FCPA violations arising from its Mexico operations. It is alleged that Walmart Mexico employees paid multiple bribes, which totaled \$24 million over some years, to expedite permits and licenses to build and operate stores in Mexico. In December 2013, the company

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disclosed that it is under investigation by the U.S. Department of Justice (DOJ) and the SEC for the alleged FCPA violations in Mexico and various other countries, including Brazil, China and India.

While the Walmart investigation is still on-going, in March 2014, Walmart disclosed that, in the past two years, it has spent \$439 million in investigation costs related to this matter. Also, Walmart is estimating that its investigation costs for 2014 and 2015 will total another \$440 million.

One important lesson from this matter is the enormous financial costs that a company faces as a result of FCPA violations that come to light. These costs often end up being as significant as any penalty the company ultimately is required to pay to the U.S. government. Another aspect of the Walmart case worth noting is how this yet-to-be-concluded investigation, has spawned numerous shareholder lawsuits against Walmart. In a case which is pending in the federal court in Arkansas, the court ruled that Walmart must face a pension fund's claims that the company defrauded shareholders by concealing corruption tied to bribes allegedly paid by its Mexican unit to government officials in that country. Walmart also has revealed that it is under investigation for these matters by Mexican federal and local authorities. All of these cases and investigations can greatly expand the potential corporate liability resulting from FCPA violations.

HEWLETT-PACKARD (HP) CASE

In April 2014, Hewlett Packard Company (HP) agreed to pay the U.S. government a fine of \$108 million as part of an FCPA settlement related to bribes allegedly paid to government officials in three countries, Mexico being one of them. In the case of Mexico, the SEC's public release noted that HP's Mexico subsidiary paid more than \$1 million in inflated commissions to a consultant with close ties to officials of Petroleos de Mexico (PEMEX), who funneled at least \$125,000 of the money to the PEMEX officials, in an effort to win a \$6 million software contract with this government-owned company. The SEC found that HP had lacked the internal controls to stop a pattern of illegal payments to win government business in Mexico.

The HP case illustrates the importance of properly vetting consultants to be used for foreign sales activities, as many FCPA cases have arisen from actions of local sales agents. Moreover, the underlying FCPA violations in this case have brought about a recently filed Racketeer Influenced and Corrupt Organizations Act (RICO) civil action against the company. In this novel RICO action, PEMEX is seeking relief from HP, alleging to be the victim of HP's FCPA violations which form the factual basis of the action. It will be interesting to see how this matter progresses, as it could open a new avenue of FCPA-related liability and make it harder for companies to settle FCPA claims with the U.S. authorities.

MEDICAL DEVICE COMPANY FCPA CASE

In October of 2013, a medical device and equipment company agreed to pay the U.S. government a \$13.2 million fine to resolve alleged FCPA violations in Mexico. These violations arose from allegedly improper payments made by the company to doctors and administrators at government-controlled hospitals in, among other countries, Mexico. The SEC release noted that the company's Mexican subsidiary directed a law firm to pay approximately \$46,000 to a Mexican government employee in order to secure the winning bid on a contract, with a resulting profit of \$1.1 million for the company. The company later reimbursed the law firm for the payment and booked it as a legal expense.

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This case shows how the FCPA has been applied to officials of entities “controlled” by a foreign government, as opposed to the government itself. Therefore, when operating in a country such as Mexico, where the government owns and/or controls many commercial entities not normally associated with a governmental function, a U.S. company must undertake appropriate due diligence concerning third parties with whom it will conduct business with and their potential governmental links.

Venezuela

Direct Access Partners Case

This FCPA case arises from an alleged fraudulent scheme involving tens of millions of dollars of illicit kickbacks and other “pay to play” arrangements among Direct Access Partners (DAP) officers and at least one corrupt senior official at Venezuela’s Banco de Desarrollo Económico y Social de Venezuela (BANDES), a state-owned development bank. The criminal indictment filed against Benito Chinae, DAP’s Chief Executive, and Joseph Demeneses, DAP’s Managing Director of its Global Market Group, alleges that these defendants, along with others at DAP, engaged in a bribery scheme whereby they made bribery payments to a BANDES official in exchange for that official’s directing BANDES business to DAP and authorizing BANDES to execute bond trades with DAP.

Aside from the above-mentioned criminal action, on April 14, 2014, the SEC filed a Second Amended Complaint with the U.S. District Court for the S.D. of New York in its civil action against certain former DAP officers, seeking to add Chinae and Demeneses as additional defendants to the case. The SEC alleged that these individuals and others at DAP devised and orchestrated sham arrangements to pay and conceal multi-million dollar kickback payments to shell entities controlled by a government official, with the intention of securing lucrative assignments, such as financial trading business, from the government-owned development bank.

Conclusion

These investigations and cases demonstrate that, despite efforts by Latin-American countries to rid themselves of public corruption, a lot of terrain has yet to be covered before the region will be in better standing in this area. In fact, the majority of countries in the region continue to fare poorly in the Transparency International Index of Perceived Corruption. Among the region’s countries, only three rank in the top fifty countries with the least perception of corruption (Chile and Uruguay tied at No. 21, and Costa Rica at No. 47). Thus, American businesses and individuals planning to undertake business in this region need to be aware of the high level of public corruption, which has merited the attention of the U.S. authorities, as revealed by the number of recent corruption investigations and cases. This awareness should lead to strict anti-corruption efforts on the part of businesses engaged in activities in the region, such as a comprehensive legal compliance program.