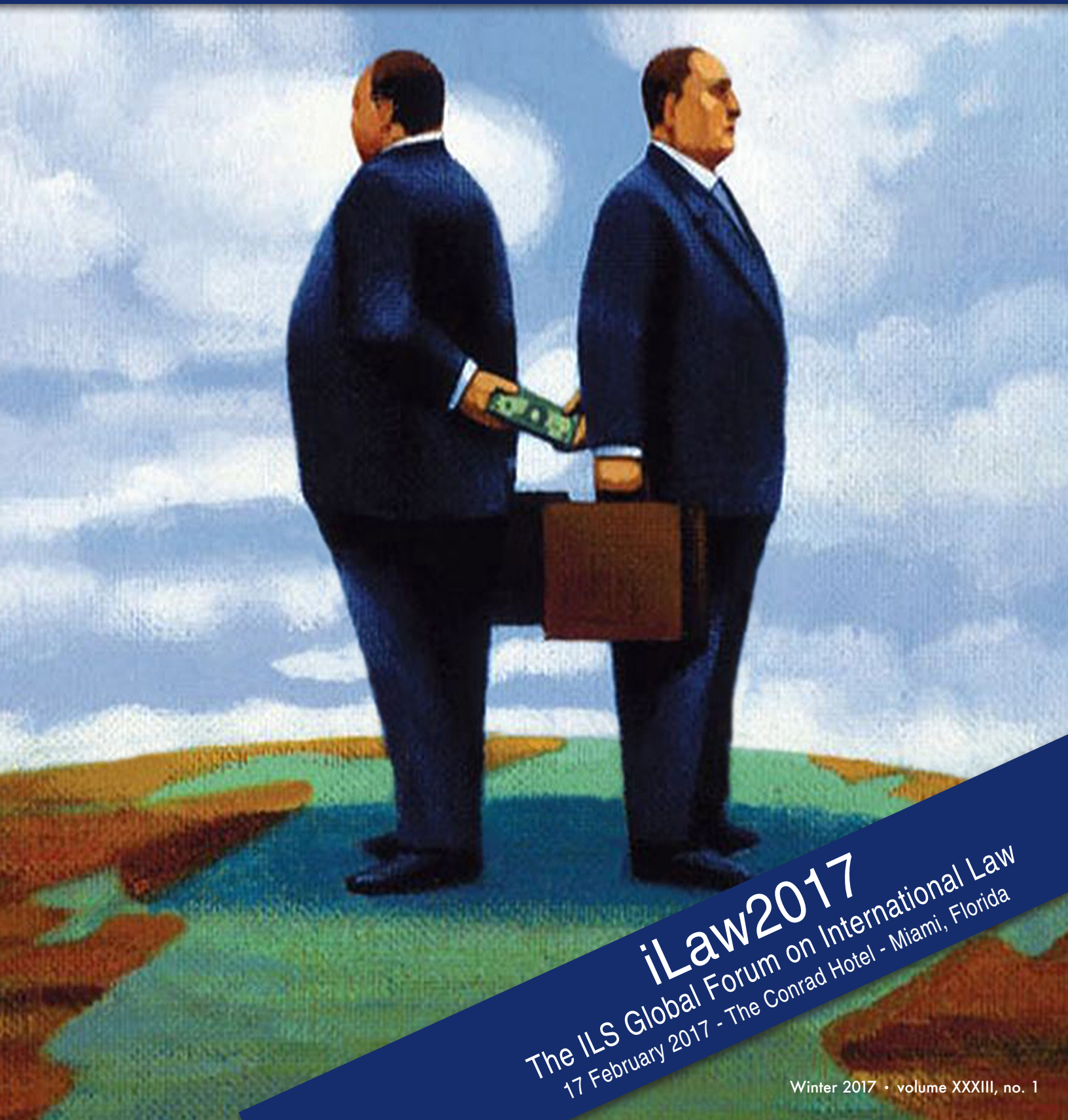
INTERNATIONAL LAW QUARTERLY

www.theILQ.com

Focus on International Internal Investigations



iLaw2017
The ILS Global Forum on International Law
17 February 2017 - The Conrad Hotel - Miami, Florida

Winter 2017 • volume XXXIII, no. 1

Emerging Anticorruption Trends in Latin America

By Joseph J. Mamounas and Marcelo Ovejero, Miami

Former President Dilma Rousseff of Brazil (a katz/shutterstock.com)

Whether fair or not, Latin America historically has been regarded as a region where corruption is deep and pervasive.[1]

Between 2000 and 2001, various Latin American nations ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), adopted under the auspices of the Organization for Economic Cooperation and Development (OECD). The Anti-Bribery Convention requires its signatories to introduce significant anticorruption measures into their legal systems. In Latin America, however, the situation remained unchanged for many years, and it took almost ten years for significant anticorruption efforts to develop in the region.

The purpose of this article is to provide a brief overview of the most recent anticorruption trends in three Latin American countries that, due to their importance for international business, are—and should be—of great interest to practitioners in anticorruption and internal investigations.

Argentina: A New Anticorruption Law on the Horizon

Argentina is one of five Latin American signatories to the OECD's Anti-Bribery Convention.[2] Generally, the Anti-Bribery Convention obliges Argentina to adopt measures to criminalize, investigate and sanction the bribery of foreign officials committed in its territory and abroad, when Argentine nationals are involved.[3] Although it ratified the Anti-Bribery Convention in April 2001,[4] Argentina remains noncompliant with its obligations.[5]

Efforts to change the current situation, though, began after President Mauricio Macri assumed office in December 2015. Indeed, the Macri administration recently submitted to the Argentine Congress a bill (Argentina Bill) intended to address Argentina's compliance with several articles of the Anti-Bribery Convention.[6] Two aspects of the Argentina Bill are relevant for the purposes of this article.

First, the Argentina Bill creates a criminal liability regime for legal entities involved in foreign bribery,[7] thereby fulfilling Argentina's obligation under the Anti-Bribery Convention to establish the liability of legal persons for the bribery of a foreign public official.[8]

The Argentina Bill holds a legal entity criminally liable for the acts of corruption—including the bribery of foreign

Emerging Anticorruption Trends, continued

officials—of its owners, controlling shareholders, directors, officers, agents and even independent contractors, provided that these acts (1) are directly or indirectly committed on the entity's behalf or to advance its interest; (2) have the potential to benefit the entity; and (3) result from the entity's "inadequate control and supervision," which means not having in place a compliance program prior to the commission of these acts.[9] Under the Argentina Bill, a legal entity is subject to a wide array of sanctions that include fines ranging from 10% to 20% of its gross revenue for the fiscal year immediately preceding the commission of the corrupt acts; suspension of its activities, patents or trademarks; prohibition to receive government contracts or benefits; publication of the sentence; and compulsory dissolution.[10]

President Michel Temer of Brazil (Alf Ribeiro/shutterstock.com)

Perhaps the most salient feature of the Argentina Bill is that the legal entity's criminal liability does not derive from the act of corruption itself, but rather from the entity's failure to implement a compliance program designed to prevent the commission of such an act.[11] Liability for the corrupt act pertains only to the individuals who committed it, and it is wholly independent from the legal entity's liability.[12] This omission-based model is followed in other Anti-Bribery Convention countries (e.g., Chile), and notably differs from the commission-based model of the pioneering U.S. Foreign Corrupt Practices Act of 1977, where the legal entity is criminally liable for the act of corruption itself[13] and the existence of a compliance program only impacts the applicable sanction.[14]

One potential issue that Argentina could face if it finally adopts this criminal liability regime is that the Argentina Bill is remarkably vague in its description of the elements a compliance program must contain to defeat the "inadequate control and supervision" standard. The Argentina Bill merely states that a compliance program is adequate when it is commensurate with the risks of the legal entity's activity, the entity's size and its economic capability.[15] The Argentina Bill also lists various elements that a compliance program "may" contain (e.g., a code of ethics, whistleblower protections and third-party due diligence),[16] but it does not indicate whether the presence or absence of some or all of these elements is determinative for liability purposes. Because the adequacy of a compliance program is the main element of the criminal offense, the Argentina Bill could be constitutionally challenged as being vague, and thus as failing to give notice of the legal entity's conduct's illegality.

Second, the Argentina Bill establishes Argentina's jurisdiction over acts of bribery committed abroad by Argentine nationals and legal entities domiciled in Argentina.[17]

Argentina's Penal Code already makes it a crime to bribe foreign officials in connection with an economic, financial or commercial matter.[18] But currently, the Penal Code applies solely to (1) crimes committed, or having effects, in Argentina; and (2) crimes committed abroad

... continued on page 61

Emerging Anticorruption Trends, from page 19

by Argentine officials.[19] In other words, Argentina's Penal Code does not apply to crimes committed abroad by Argentine nationals who are not Argentine officials, i.e., the class of Argentine nationals that—for obvious reasons—could be expected to be more often involved in foreign bribery. At present, therefore, Argentina has jurisdiction to prosecute the bribery of foreign officials when it takes place within its territorial limits, but not when it occurs abroad, except for the rare case where the bribe is offered or paid by an Argentine official.

President Mauricio Macri of Argentina (Manvmedia/shutterstock.com)

The Argentina Bill's jurisdictional proposal not only would cure this peculiar deficiency in Argentine law, but also would make Argentina compliant with its obligation under the Anti-Bribery Convention to exercise jurisdiction to prosecute its nationals for offenses committed abroad.[20]

Brazil: Anticorruption Plea Agreements in Limbo

Brazil's Law No. 12846, more commonly known as the Clean Companies Act (CCA), is considered to be one of the toughest anticorruption regimes in the world, as it imposes strict administrative or civil liability on legal entities for acts of corruption committed in their interest or benefit.[21] To date, however, there has been almost no enforcement of the CCA.[22]

Part of the reason for this dearth of enforcement has to do with the CCA's leniency program. Conceived as a key investigative tool under the CCA, the leniency program basically allows legal entities that violated the CCA to enter into a plea agreement with the Brazilian authorities by offering their cooperation to investigate the violation, in exchange for avoiding possible sanctions and mitigating other ones.[23] In practice, though, application of the CCA's leniency program has met substantial opposition.

The major issue with this program is that it authorizes the executive branch of the government—through its Transparency Ministry—to execute plea agreements with legal entities liable for acts of corruption without the intervention or control of any other public institutions.[24] The exclusion of other public institutions encompasses the Federal Public Prosecutor's Office, which operates independently from the other three branches of government and has the specific mission of investigating and prosecuting criminal and civil wrongdoing against the state,[25] including corruption cases.

As expected, federal prosecutors in Brazil strongly have opposed such unsupervised plea agreements between the government and legal entities that the Federal Public Prosecutor's Office is investigating for corruption.[26] Among other things, the federal prosecutors have pointed out that these agreements have been negotiated by executive branch officials working under the authority of politicians who themselves were believed to be involved in the acts of corruption that motivated the negotiations![27]

The objections of the Federal Public Prosecutor's Office to the CCA's leniency program have had a tremendous impact in the context of the renowned *Operação Lava Jato* (Operation Car Wash). Operation Car Wash is the name given to a federal criminal investigation that has uncovered massive acts of corruption in contracts between the Brazilian state-owned company Petrobras and multiple companies in the private sector. Dozens of high-profile politicians and businessmen have been detained or implicated in the investigation.

In early 2016, the government of former President Dilma Rousseff commenced leniency program negotiations with several companies involved in the Petrobras corruption scandal. The exclusion of the Operation Car Wash prosecutors from these negotiations was so heavily criticized that when President Michel Temer replaced Rousseff after her removal from office via impeachment, the government decided to suspend the negotiations.[28] In May 2016, the Transparency Ministry, responsible for the negotiations, explained that the government would wait for the Brazilian Congress to pass a new law for the CCA's leniency program.[29]

Only a few months later, in July 2016, though, the government resumed plea-agreement discussions with the Operation Car Wash companies without waiting for the enactment of new legislation.[30] Interestingly, this time the government conditioned the execution of the plea agreements on the approval of the Federal Public Prosecutor's Office, among other public institutions.[31] As explained above, there is no such requirement in the current CCA—the government can by itself enter into plea agreements,[32] but in this case evidently believed it prudent not to act unilaterally.

Unfortunately, the government's de facto regime for plea agreements did not contribute to further progress in the Operation Car Wash negotiations. When the government was about to finalize the first plea agreement under the CCA's leniency program in September 2016, the Federal Public Prosecutor's Office objected on the ground that the legal entity involved in the agreement was receiving excessive benefits.[33] Moreover, in October 2016, the head of the Transparency Ministry announced that all plea-agreement discussions pertaining to Operation Car Wash had been halted to allow the federal prosecutors to conclude their investigation.[34]

The bottom line is that plea agreements under the CCA's leniency program, i.e., Brazil's main tool in its combat of corporate corruption, are in limbo.

Chile: Enhanced Standards for Anticorruption Compliance Programs

A reputed international anticorruption practitioner observes that, while most international companies have compliance programs in place, it is often the case that these programs are not vigorously enforced within the company, and as result, the robustness of these programs is not sufficiently tested.[35] In Chile, this issue and its legal implications are at the heart of an ongoing, high-profile matter arising under Chile's criminal statute for legal entities.

In Chile, Law No. 20393 follows an omission-based model for the anticorruption liability of legal entities.[36] As explained before, a legal entity is criminally liable under this model not for the corrupt act itself, but for its failure to implement a compliance program designed to prevent the commission of such an act.[37] Thus, a compliance program and its adequacy are central to criminal liability under Chile's corporate anticorruption statute.

In this regard, a distinctive feature of the Chilean system is that a legal entity may have its compliance program certified by entities authorized and regulated by Chile's insurance regulator.[38] The legal effect of this certification—as well as the legal consequences that an entity issuing an improper certification would suffer—remains unclear.[39] No tribunal has yet ruled on this question, and while some maintain that a certification excuses a legal entity from criminal liability,[40] the Public Prosecutor's Office is of the opinion that a certification merely heightens the state's burden of proof.[41]

The meaning and scope of Law 20393's provisions on the adequacy and certification of a compliance program

are currently being explored in the criminal investigation of Corpesca S.A. (Corpesca). The largest fishing company in Chile, Corpesca is under investigation for alleged violations of Law No. 20393 stemming from the bribery, by Corpesca officials, of Chilean legislators responsible for passing a new statute for the fishing industry.

In a recent arraignment hearing, Corpesca denied the charges against it, and stressed the fact that, prior to the commission of the bribery, it had in place a compliance program that was certified by a prestigious external auditor.[42] The Chilean prosecutors acting in the case countered that Corpesca's program basically was a façade adopted to feign compliance with Law 20393.[43] Specifically, the prosecutors alleged that (1) key Corpesca personnel, including its general manager, were not even aware of the program's existence; (2) employment agreements within the company were not modified to incorporate basic aspects of the program; (3) Corpesca conducted no compliance training for its personnel; and (4) the company's compliance officer was not given the autonomy and resources needed to carry out his mission.[44]

Essentially, the position of the Public Prosecutor's Office is that the existence of a certified compliance program alone is not sufficient to avoid criminal liability under Law 20393—rather, effective implementation of the compliance program is required.[45] While this position does not constitute the law in Chile, it does provide clear guidance on how the statute will be enforced in future cases, and ultimately, on the standards to which companies subject to Chilean jurisdiction will be held until—and if—a court takes a different position on this matter.

The recent anticorruption developments in Argentina, Brazil and Chile show that a more robust anticorruption culture is taking hold in Latin America, with concrete consequences in the legal and economic ends of the spectrum. There is no question that Latin American nations still must implement significant structural adjustments to their legal systems, but the anticorruption environment in the region is changing rapidly. As anticorruption efforts remain a focus of governments and prosecutors globally, further developments should be expected in Latin America, which underscores the need for practitioners to stay abreast of future anticorruption trends in the region.

Joseph Mamounas *is a partner with Holland & Knight and focuses his practice on international arbitration, complex business disputes and corporate fraud and compliance. He represents corporate and individual clients based in the United States, Latin America and Europe, as well as Canada, Asia and Australia, across a variety of industries. He is a member of the firm's Dispute Resolution Practice and is based in Miami, Florida.*

Marcelo Ovejero *is an associate with Holland & Knight and focuses his practice on international arbitration, complex business litigation and internal corporate investigations and compliance. He is a member of the firm's Dispute Resolution Practice and is based in Miami, Florida.*

Endnotes

1 Scheherazade S. Rehman & Frederick V. Perry, *Corruption, Constitutions and Crude in Latin America*, 20 L. & Bus. Rev. Am. 163, 169 (2014).

2 Law No. 25319 art. 1, 6 Oct. 2000, 29506 B.O. 9 (Arg.).

3 *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions arts. 1, 4, 17 Oct. 1997, 37 I.L.M. 1 [hereinafter Anti-Bribery Convention].

4 *See* Organization for Economic Cooperation and Development, *Ratification Status as of 21 May 2014*, OECD, http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last visited 18 Nov. 2016).

5 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Argentina*, OECD 5 (11 Dec. 2014), http://www.oecd.org/daf/anti-bribery/Argentina-Phase-3-Report-ENG.pdf. The OECD Working Group on Bribery conducts on-site visits to the signatory countries "to monitor and promote the full implementation of th[e] Convention." Anti-Bribery Convention, *supra* note 3, art. 12.

6 Poder Ejecutivo Nacional, *Mensaje No. 127*, Argentina.gob.ar (20 Oct. 2016), https://www.argentina.gob.ar/sites/default/files/oa-responsabilidad_penal_personas_juridicas_-_proyecto_pen.pdf [hereinafter Argentina Bill].

7 *Id.* art. 1.

Emerging Anticorruption Trends, continued

8 Anti-Bribery Convention, *supra* note 3, art. 2.

9 Argentina Bill, *supra* note 6, art. 3.

10 *Id.* art. 16.

11 *Id.* at 7 ("In its Article 3, [the bill] proposes to hold legal entities liable for a defect in its internal organization").

12 *See id.* art. 8.

13 15 U.S.C. §§ 78dd1, 78dd2, 78dd3 (2016).

14 *See* U.S. Sentencing Guidelines Manual § 8C2.5(f) (U.S. Sentencing Comm'n 2016).

15 Argentina Bill, *supra* note 6, art. 30.

16 *Id.* art. 31. On this point, the Argentina Bill differs from the laws of other countries using a similar omission-based model for liability of legal entities, such as Chile, whose legislation lists elements that an entity's compliance program "must" contain to avoid liability. *See* Law No. 20393 art. 4, 25 Noviembre 2009, Diario Oficial [D.O.] (Chile) [hereinafter Law No. 20393].

17 Argentina Bill, *supra* note 6, art. 35.

18 Código Penal [Cód. Pen.] [Criminal Code] art. 258 bis (Arg.).

19 *Id.* art. 1.

20 Anti-Bribery Convention, *supra* note 3, art. 4.2.

21 Lei No. 12.846 art. 2, de 1 de Agosto de 2013, Diario Oficial da União [D.O.U.] de 2.8.2013 (Braz.) [hereinafter CCA].

22 *See* Shin J. Kim et al., *Brazil*, *in* Anti-Corruption Regulation 31, 33 (Homer E. Moyer Jr. ed., 2016) ("There have been no conclusive decisions yet on investigations or enforcement proceedings involving foreign bribery in Brazil").

23 CCA, *supra* note 21, art. 16.

24 *Id*.

25 *See* Constituição Federal [C.F.] [Constitution] art. 129 (Braz.).

26 *See* Procuraduria-Geral da República, *Medida Provisória que Trata de Acordos de Leniência é Inconstitucional, Diz PGR*, MPF (26 Apr. 2016, 3:07 PM), http://www.mpf.mp.br/pgr/noticias-pgr/medida-provisoria-que-trata-de-acordos-de-leniencia-e-inconstitucional-diz-pgr.

27 *Id.*

28 Leandro Colon, *Temer Congela Novos Acordos com Citadas na Operação Lava Jato*, Folha de S. Paulo (17 May 2016, 2:00 AM), http://www1.folha.uol.com.br/poder/2016/05/1771923-temer-congela-novos-acordos-com-citadas-na-operacao-lava-jato.shtml.

29 *Id*.

30 As a matter of fact, to this day, the Brazilian Congress has not yet passed new legislation on the CCA's leniency program. *See Projetos de lei Sobre Acordo de Leniência Estão Parados no Congresso*, MPD.org.br, http://mpd.org.br/projetos-de-lei-sobre-acordo-de-leniencia-estao-parados-no-congresso/ (last visited 18 Nov. 2016).

31 *See* Gustavo Uribe & Aguirre Talento, *Governo Temer Prepara Acordo de Leniência com Empresas na Lava Jato*, Folha de S. Paulo (9 Jul. 2016, 2:00 AM), http://www1.folha.uol.com.br/poder/2016/07/1789986-governo-temer-prepara-acordo-de-leniencia-com-empresas-na-lava-jato.shtml; Vinicius Sassine, *Acordos de Leniência com Empreiteiras Investigadas na Lava-Jato Estão Emperrados*, O Globo (19 Sep. 2016, 5:24 PM), http://oglobo.globo.com/brasil/acordos-de-leniencia-com-empreiteiras-investigadas-na-lava-jato-estao-emperrados-20136330.

32 *See supra* p. 4.

33 Sassine, *supra* note 31.

34 Anthony Boadle, *Acordos de Leniência Estão em Suspenso Devido a Pactos de Delação, diz Ministro Jardim*, Reuters Brasil (5 Oct. 2016, 6:04 PM), http://br.reuters.com/article/topNews/idBRKCN1252K2.

35 Juan P. Morillo, *Trends in International White Collar Crime Enforcement*, Int'l White Collar Enforcement, March 2013, at 1, 7.

36 *See* Law No. 20393, *supra* note 16, art. 3.

37 *See supra* p. 2. *See also* Fiscal Nacional del Ministerio Público, *Instrucción General que Imparte Criterios de Actuación Para la Investigación y Persecución Penal de las Personas Jurídicas*, Fiscalia 7, http://www.fiscaliadechile.cl/Fiscalia/instructivos/index.do (last visited 18 Nov. 2016) [hereinafter *Instrucción General*] ("[T]he company's liability does not derive directly from the crime committed by one of its executives or agents, but it is rather a consequence of the noncompliance of the company's direction and supervision duties").

38 Law No. 20393, *supra* note 16, art. 4(4)(b).

39 *See* OECD Working Group on Bribery, *Chile: Follow-up to the Phase 3 Report & Recommendations*, OECD 4 (31 May 2016), http://www.oecd.org/daf/anti-bribery/CHILE-Phase-3-Written-Follow-Up-Report-ENG.pdf ("[M]ore precise clarification of the legal effect of certification would be beneficial").

40 *See* Matteson Ellis, *Anti-Corruption Laws in Chile: Three Things Companies Should Know*, FCPAméricas (19 Dec. 2013), http://fcpamericas.com/english/anti-corruption-compliance/anti-corruption-laws-chile-companies/.

41 *Instrucción General*, *supra* note 37, at 9-10.

42 *See* Matías Balmaceda, *Modelos de Prevención de Papel*, Capital Online (27 Oct. 2016), http://www.capital.cl/capital-legal/2016/10/27/171009-modelos-de-prevencion-de-papel.

43 *See id*.

44 *See id*.

45 *Instrucción General*, *supra* note 37, at 7, 10.