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Corporate criminal liability in South America

By Felipe Sottorff Araya

Efforts to fight corporate corruption in South America have taken many forms. As in other regions, government weapons include open contracting and public procurement transparency rules; disclosure of assets and wealth and business interest disclosures; whistleblower protections; and corporate criminal liability. The imposition of criminal liability on business organizations and individuals for offenses committed within their operations represents a change from a historical lack of judicial oversight. This new focus poses a risk to those doing business in South America. In this article, we will provide an overview of the criminal liability of legal entities in South American countries, considering nation-specific legislation as well as Foreign Corrupt Practices Act (FCPA) cases in the United States (US).

Following a decade of relatively constant growth, direct investment (DI) in South America in 2021 was over \$260 billion.^[1] At the same time, individual fines to corporations for violating South American anticorruption laws have sometimes been millions or billions of dollars. In one case, a Brazilian-based building company was fined \$2.6 billion for a bribery scheme involving government officials from 12 Latin American and African countries.^[2]

Only seven South American countries have criminal liability laws

In South America, Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, and Peru all impose criminal liability on organizations. In 2009, Chile became the first South American nation to pass a corporate criminal liability law.^[3] Since then, it has been amended on several occasions, refining its elements, adding more crimes to its embodiment, and effectively tailoring it into a more mature resource against corruption.^[4] In contrast, Colombia's law against corruption only came into effect in January 2022. Though there was already a law on the criminal liability of legal persons, the new law broadened its application.

The laws of these seven countries (Table 1) require businesses to implement control measures (policies, procedures, whistleblower channels, training, risk assessments, and others) to prevent, detect, and report criminal offenses within their organizational structures. At the same time, these laws delegate the traditional function of investigating punishable acts to the organization itself. In case of noncompliance with this obligation, the entity will be exposed to criminal consequences based on the acts committed by its employees and executives. The consequences are severe and may even lead to the organization's dissolution.^[5]

State	Act's name	Date of enactment	Crimes
Argentina	Ley N° 27,401 Ley de Responsabilidad Penal de las Personas Jurídicas	November 8, 2017	Bribery, corruption, incompatible negotiations, illegal enrichment, false balances and reports.
Bolivia	Ley N° 1,390/2021 de Fortalecimiento para la lucha contra la corrupción	August 28, 2021	Bribery, corruption, illegal enrichment, and fraud.
Brazil	Ley N° 12,846 Ley contra la Corrupción	August 13, 2013	Crimes against the economic and financial order, the popular economy, and the environment.
Chile	Ley N° 20,393 de Responsabilidad Penal de las Personas Jurídicas	December 2, 2009	Bribery, corruption, money laundering, terrorism financing, handling of stolen goods, incompatible negotiations, corruption, misappropriation, unlawful administration of assets, water pollution, infringement of sanitary measures due to covid, offenses contained in the guns control law, human trafficking, and cybercrime.
Colombia	Ley N° 1,474: Normas orientadas a fortalecer los mecanismos de prevención, investigación y sanción de actos de corrupción Ley N° 2,195: Ley de transparencia, prevención y lucha contra la corrupción	July 12, 2011 January 18, 2022	Crimes against the public administration, or any punishable conduct related to public assets related to the public patrimony, carried out by its legal representative or its administrators, directly or indirectly
Ecuador	Código Orgánico Integral Penal	February 17, 2014	Human trafficking, fraudulent insolvency, sale of expired medicines, neglect of health services, crimes against consumer rights, crimes against culture, illegal withholding of social security contributions, crimes against the environment and nature, economic crimes.

Peru	Ley N° 30,424: Ley de Responsabilidad administrativa de las personas jurídicas	April 1, 2016	Bribery.
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Table 1. Acts in seven South American countries with corporate liability legislation

A common factor shared by these countries' legal structures lies in certain requirements for triggering the criminal liability of companies: (1) the crime or crimes being committed are in the interest or for the benefit of the company, and (2) the offenses have been committed by persons with the capacity to represent the company or by persons dependent on them.^{[6][7][8]} Other similarities lie in the possibility of adopting criminal compliance programs. Although each country has its own way of naming them (for example, in Chile, they are "offense prevention models," and in Argentina, they are "integrity programs"), the laws of each country list the minimum content of the programs. It is no coincidence that, on this point, the countries share elements such as identifying and evaluating risky processes, establishing policies and procedures, and disseminating and communicating tools (whistleblowing channels). The sources for those particular laws' integrations are the considerations of the guidelines provided by North American agencies, such as the U.S. Department of Justice (DOJ), or legislation, such as in the United Kingdom.

Corporate liability laws in these countries also have important differences. Ecuador is the only country that applies the whole criminal code to companies. In contrast, Argentina, Bolivia, Peru, Chile, and Colombia use closed catalogs of offenses. Notably, in Chile, a bill on economic crimes is currently being processed, which expands the current catalog of offenses (22 offenses) to such a vast number that companies must manage their risks according to the scope of their business. It is also important to be aware of these regulations since penalties can greatly impact businesses. Corporations are called to implement and execute compliance programs or be subject to sanctions that can range from fines of up to US\$20 million, loss of tax benefits, prohibition of a contract with the state, to the loss of legal personality; however, amounts and years may vary from country to country.

One of the greatest complexities in the countries in question is the lack of judicial rulings that allow courts of law to apply the law. For example, in Chile, while legislation is advancing, the resolution of cases has not been able to do so at the same speed. Law No. 20,393 has been in force for more than 10 years.^[9] In the last round of amendments,^[10] modifications to existing offenses, as well as new violations were introduced. With this, prosecuting authorities have had to advance rapidly to conduct investigations in accordance with the cases. The first sentence for criminal liability of an organization in Chile was obtained only recently, and the number of cases in which sanctions have been applied directly to corporations remains low. The company, Corpesca SA, was convicted of paying bribes to a congressman. The court considered that the compliance officer did not have the independence to exercise his position, in addition to having deficient controls for the outflow and registration of money, in breach of the company's compliance program.^[11]

While these countries create a heightened compliance environment for foreign entities, enacting general corporate liability laws has proved difficult for the remaining South American nations. Brazil's legislature, for example, has yet to pass a 2012 bill to amend its Criminal Code to include omnibus provisions on corporate criminal liability.^[12] Nevertheless, the Brazilian Federal Constitution makes two mentions referring to the possibility of liability of collective entities. In its articles 173, §5º and 225, §3º, it states that the law will establish

punishments compatible with the nature of legal entities in crimes against the economic and financial order and the popular economy. Legal entities may also be punished by the law in environmental crimes, and natural and juridical persons will be held criminally and administratively responsible independent of their civil liability.^[13] Further, corporations may be brought to trial for criminal and administrative liability for environmental crimes, independently of their civil liability.^[14]

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