

Working Group B: Promoting Honesty in Governance: Developing the legal profession's role in combating corruption and ensuring access to justice

Corruption – A Persistent Challenge

Recently, it appears that the issue of corruption has made headlines with increasing frequency throughout the region – serving as continual reminders of the challenges communities, organizations, prosecutors and policy-makers face in confronting this issue. While corruption allegations involving international business organizations tend to capture most of the global headlines, petty, political and grand corruption across the sectors of the executive, judiciary and legislative branches of the government, as well as in the military and other security forces, continue to be sources of concern to varying degrees throughout Latin America.

International organizations as varied as the UN, the IMF, the World Bank and the OECD, have identified corruption as one of the single most significant obstacles worldwide to advancing economic growth, social development and human rights. Corruption has been found to severely impair investment and growth; but, perhaps most significantly for the legal profession, it can seriously erode the legitimacy and accountability of political actors, breed cynicism and undermine the institutions on which lawyers rely to exercise their profession and administer justice. Furthermore, corruption has increasingly been identified as disproportionately affecting populations in positions of vulnerability, which have been the focus of the Vance Center's efforts to access to justice throughout the region.¹

Another critical dimension of both the causes and effects of corruption is the extent to which a country can be considered to benefit from strong institutions establishing "rule of law." The World Justice Project has done landmark work to measure how the benefits of rule of law are experienced in everyday situations by populations around the world, helping to identify specific strengths and weaknesses in a country's legal institutions and enabling a better informed approach to policy-making to address rule of law concerns.² A particular challenge in addressing corruption issues is that successful enforcement of the anti-corruption laws relies on the very strength of the legal institutions establishing the effective rule of law, which is undermined by corrupt practices.

¹ For useful sources that elaborate the costs and effects of corruption, and in particular its impact on vulnerable sectors and economic growth, please see the following:

International Council on Human Rights Policy, Corruption and human rights: Making the connection, <http://www.u4.no/recommended-reading/corruption-and-human-rights-making-the-connection/downloadasset/2329> (last visited November 30, 2015).

Frédéric Boehm and Johanna Joerges, Costs of Corruption: Everyone Pays – And the Poor More than Others, Division State and Democracy Supporting the Implementation of the UN Convention against Corruption (UNCAC), <https://www.giz.de/fachexpertise/downloads/gtz2008-en-german-uncac-project-costs-of-corruption.pdf> (last visited November 29, 2015).

Office of the United Nations High Commissioner for Human Rights, The Negative Impact of Corruption on the Enjoyment of Human Rights, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Corruption/OHCHR.pdf> (last visited November 29, 2015).

Transparency International, The Impact of Corruption on Growth and Inequality, http://www.transparency.org/whatwedo/answer/the_impact_of_corruption_on_growth_and_inequality (last visited November 29, 2015).

U4 Anti-corruption Resource Centre, Expert Answer: Literature review on costs of corruption for the poor, <http://www.u4.no/publications/literature-review-on-costs-of-corruption-for-the-poor/downloadasset/3165> (last visited November 29, 2015).

² World Justice Project, Rule of Law Index 2015, <http://worldjusticeproject.org/rule-of-law-index> (last visited November 30, 2015).

A Proliferation of Anti-Corruption Strategies

And, yet, the fact that cases of corruption and anti-corruption efforts should increasingly be in the headlines can also be taken for a sign that the approach of legal systems and cultures of compliance in many countries are undergoing dramatic changes. Examples of the different strategies governments, civil society organizations and other private actors have pursued to meet the unique challenges corruption poses have proliferated in the region. In this sense, the demand for change channeled through mass social demonstrations has worked as a catalyst for legislative and enforcement reforms, as seen in the case of Brazil³ and Mexico⁴. These public demands for change have become important drivers of the anti-corruption movement in the region and shape the extent to which political actors are willing to undertake the challenges of reform.

In addition to local efforts in each country, the international investment and the growing trend of cross-border cooperation among policy-makers and prosecutors have significantly increased the extra-territorial impact that laws prohibiting foreign corruption have had on corrupt practices throughout the region. Cross-border enforcement of anti-corruption regimes has become a new normal that now significantly affects and provides context for domestic initiatives.

We hope working group participants will come prepared to share examples most relevant in their countries, but some categories of strategies it may be instructive for the working group to consider include:

- *Legislative proposals:* In Mexico, a general reform of existing anti-corruption legislation is being undertaken at the federal and local levels following the creation of a National Anticorruption System (*Sistema Nacional Anticorrupción*).⁵ Similar reforms have been undertaken in other jurisdictions with the participation of civil society organizations: for example, in Brazil, the Anti-Corruption and Compliance Committee of the Brazilian Institute of Business Law (IBRADEMP), made up of more than 20 legal professionals from different backgrounds, actively reviewed the draft anti-corruption legislation, identified sections needing improvement and submitted written reports suggesting changes to Congress.⁶
- *Enforcement efforts:* Prominent recent examples have included (a) in Brazil, Operation Car Wash⁷ and Operation Zealots⁸ (relating to alleged solicitation of bribes by Brazilian tax authorities), (b) in Argentina, the creation of a specialized expert unit under the supervision of the federal Supreme Court (*Cuerpo de Peritos del Poder Judicial de la Nación, Especializados en*

³ Paula Ramon, Poor, middle class unite in Brazil protests, CNNMexico (July 24, 2013)

<http://www.cnn.com/2013/06/28/world/americas/brazil-protests-favelas/> (last visited November 30, 2015).

⁴ Jo Tuckman, Mexico on the brink: thousands to protest over widespread corruption and student massacre, The Guardian (November 20, 2014), <http://www.theguardian.com/world/2014/nov/20/mexico-protests-anti-government-anger-violence-students-president> (last visited November 30, 2015).

⁵ Miguel Ángel Gutiérrez Salazar, El Sistema Nacional Anticorrupción y el rediseño del régimen de responsabilidades administrativas en México,

<http://biblio.juridicas.unam.mx/revista/HechosyDerechos/cont/28/art3.htm> (last visited November 30, 2015).

⁶ Carlos Ayres, How Lawyers Can Contribute to New Anti-Corruption Laws,

<http://fcpanamericas.com/english/brazil/lawyers-contribute-anti-corruption-laws/#sthash.c8NCjP5i.dpuf> (last visited November 30, 2015).

⁷ Will Connors and Paulo Trevisani, Brazil 'Carwash' Shrugs Off Notoriety Tied to Petrobras Scandal, The Wall Street Journal (June 21, 2015), <http://www.wsj.com/articles/brazil-carwash-shrugs-off-notoriety-tied-to-petrobras-scandal-1434930402> (last visited November 30, 2015).

⁸ Paulo Trevisani, Brazil Probes Alleged Corruption Among Tax Officials, The Wall Street Journal (April 7, 2015), <http://www.wsj.com/articles/brazil-probes-alleged-mass-tax-fraud-1428439915> (last visited November 29, 2015).

Casos de Corrupción y Delitos contra la Administración Pública),⁹ and (c) in Colombia, the creation of a specialized unit to prosecute corruption within tax administration and other selected agencies (*Agencia del Inspector de Tributos, Rentas y Contribuciones Parafiscales*).¹⁰

- *Preventive measures/systems*: In Chile, ChileCompra, a public electronic system for public procurement based on an Internet platform, has earned a worldwide reputation for excellence, transparency and efficiency. It serves companies, public organizations as well as individual citizens, and is by far the largest business-to-business site in the country, involving 850 purchasing organizations.¹¹
- *Transparency efforts*: Innovative efforts focused on increasing transparency of public institutions have included (a) in Colombia, a website that compiles information on public spending and contracts (*Portal de Transparencia Económica*)¹², (b) in Argentina, recent efforts to make affidavits of assets of public officials and candidates for office readily available to the public (“Declaraciones Juradas Abiertas”¹³, which is an NGO/private sector initiative, as well as the official “Oficina Anticorrupción” website¹⁴), and (c) at a regional level, the *Red Latinoamericana por la Transparencia Legislativa*, which seeks to promote best practices in transparency across Latin America.¹⁵
- *Lobbying*: Transparency International has recently sought to raise awareness of issues related to legislative lobbying, calling for transparency, integrity and equal participation.¹⁶ Chile and Peru now have laws specifically focused on lobbying activities, while Brazil addresses lobbying through other laws.¹⁷
- *Supra-national initiatives with local focus*: The United Nations assisted in the establishment of the International Commission Against Impunity in Guatemala (CICIG), which has many of the attributes of an international prosecutor, but operates under Guatemalan law, in the Guatemalan courts, and follows Guatemalan criminal procedure. CICIG carries out independent investigations into the activities of illegal security groups and clandestine security structures. Among other issues, it currently is investigating a large number of executive and judiciary corruption cases.¹⁸

⁹ Luciana Bertoia, Supreme Court creates group of experts to help probe corruption, *The Buenos Aires Herald* (October 22, 2014), <http://cdn-herald.planisys.net/article/172788/supreme-court-creates-group-of-experts-to-help-probe-corruption> (last visited November 29, 2015).

¹⁰ Unidad Administrativa Especial Agencia del Inspector General de Tributos, Rentas y Contribuciones Parafiscales, Misión, Visión y Objetivos Estratégicos, http://www.itrc.gov.co/~itrcgovc/itrc/?page_id=42 (last visited November 30, 2015).

¹¹ Chile Compra – Sistema de Contratación y Compras Públicas, Plan Estratégico 2002-2004, http://www.chilecompra.cl/index.php?option=com_phocadownload&view=category&download=656:strategic-plan-public-procurement-system-2002-2004&id=35:balances-y-plan-es-estrategicos-chilecompra&Itemid=608 (last visited November 30, 2015).

¹² <http://www.ptc.gov.co/WebsitePTE/>

¹³ <http://interactivos.lanacion.com.ar/declaraciones-juradas/#pd=0>

¹⁴ <http://www.anticorrupcion.gov.ar/>

¹⁵ <http://www.transparencialegislativa.org/>

¹⁶ <http://lobbyingtransparency.net/>

¹⁷ Luiz Alberto dos Santos, Lobby Regulation, Transparency and Democratic Governance in Latin America, <http://www.oecd.org/gov/ethics/LOBBY%20REGULATION%20TRANSPARENCY%20AND%20DEMOCRATIC%20GOVERNANCE%20IN%20LATIN%20AMERICA%20Luis%20Alberto%20Dos%20Santos.pdf> (last visited November 30, 2015).

¹⁸ Comisión Internacional contra la Impunidad en Guatemala (CICIG), Comunicado de Prensa 085 – Octavo Informe de Labores,

What role should lawyers play in the fight against corruption? How can the Vance Center support these efforts?

Among social institutions, the legal profession undoubtedly has a central role in designing and implementing anticorruption initiatives, at the same time as lawyers are also often involved in many, if not most, pervasive practices of corruption. Lawyers, often bound by ethical obligations under national laws, regularly hold the positions in the judicial, executive and legislative branches that are subject to risks of corruption. In private practice, lawyers are also often in the position to act as critical intermediaries interacting with government agencies on behalf of clients or advising clients in their compliance practices. In particular, with the increasing enforcement of laws across the region focusing on companies' maintenance of appropriate compliance programs and practices, lawyers' role in designing and helping to implement those programs has taken on significant importance. As policy-makers, prosecutors or representatives of clients seeking redress against corrupt acts, lawyers can be the social agents with the most direct opportunity to make an impact against corruption.

Bar associations have increasingly engaged in developing anti-corruption efforts and in exploring how changes in the legal profession can bolster these efforts. For example, the ABA's Rule of Law Initiative has developed anti-corruption and public integrity programs that help lawyers in other countries develop legal frameworks that bolster institutions' capacity to prevent and sanction corruption. And, in April 2010, the International Bar Association (IBA), in cooperation with the Organisation for Economic Co-operation and Development (OECD) and the UN Office on Drugs and Crime (UNODC), launched the Anti-Corruption Strategy for the Legal Profession, focusing on exploring the role lawyers can play in fighting or aiding corruption. Two reports¹⁹ published by this IBA initiative, and two others²⁰ sponsored by other organizations, have considered these issues in depth. In addition, the IBA has adopted a very helpful Anti-Corruption Guidance for Bar Associations.²¹

The working group will focus on discussing the most effective ways in which lawyers can facilitate and strengthen anti-corruption efforts in each of the participants' jurisdictions. The goal of the discussions is to generate specific objectives, with realistic timetables, identifying how the Vance Center can leverage the expertise and experience of the New York City Bar Association and its network of lawyers, law firms and pro bono partners throughout the region in facilitating these efforts. Issues for discussion will include:

- Public perception of the legal profession as bulwarks against, or participants in, corrupt practices in communities;

<http://www.cicig.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=662&cntnt01returnid=1556> (last visited November 29, 2015).

¹⁹ IBA, OECD & UNODC Anti-Corruption Strategy for the Legal Profession, Anti-Corruption Compliance and the Legal Profession – The Client Perspective (October 2013),

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=16DEE9FE-4488-41AD-BB46-E8CCF9D2B056>

(last visited November 29, 2015); Risks and Threats of Corruption and the Legal Profession: Survey 2010,

<http://www.oecd.org/corruption/anti-bribery/46137847.pdf> (last visited November 29, 2015).

²⁰ Arnold & Porter LLP (for Fundación Universidad de San Andres), The role of lawyers in the fight against corruption – A Summary Report, <http://www.trust.org/contentAsset/raw-data/af585d7d-6a7f-4c65-9b5c-3b5534118c74/file> (last visited November 29, 2015); U4 Anti-corruption Resource Centre, Expert Answer: Integrity issues related to lawyers and law firms, <http://www.u4.no/publications/integrity-issues-related-to-lawyers-and-law-firms/downloadasset/3494> (last visited November 29, 2015).

²¹ International Bar Association, Anti-Corruption Guidance for Bar Associations (Adopted on 25 May 2013), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=28e7aaa2-9447-4758-8f54-8209c334481d> (last visited November 29, 2015).

- Role for bar associations to participate in projects of legislative reform and what interests or conflicts the legal profession may have in doing so;
- How can domestic bar associations advance practices or ethical standards likely to make an impact on corrupt practices;
- Reconciling lawyers' duty of confidentiality with other duties related to the knowledge of corrupt activities;
- Role of law firms in assisting clients in the development and implementation of anticorruption policies and further educating clients of extraterritorial and domestic compliance requirements and practices;
- Increasing expectations of clients that law firms themselves maintain their own compliance programs;
- Legal profession's role in increasing awareness (among lawyers and clients alike) of corruption and the international and domestic legal framework applicable to corrupt activities;
- Opportunities for domestic and international pro bono representation likely to make a meaningful impact in increasing transparency and accountability; and
- Opportunities for incorporating anticorruption education in the curriculum of law schools and bar association training programs.

We encourage all participants to read this discussion note before attending the working sessions scheduled for Thursday, December 3 and Friday, December 4 and to review the cited source materials to the extent possible. In particular, we would strongly encourage participants with understandable time constraints to focus on the following materials in preparation for the working group discussions:

- For a report on the current status of legislation and other regulations applicable to lawyers with respect to corruption in certain jurisdictions, please see Arnold & Porter LLP (for Fundación Universidad de San Andres), The role of lawyers in the fight against corruption – A Summary Report, <http://www.trust.org/contentAsset/raw-data/af585d7d-6a7f-4c65-9b5c-3b5534118c74/file>
- Regarding the particular risks posed by corruption in the legal profession, please see:
 - IBA Anti-Corruption Strategy for the Legal Profession, Risks and Threats of Corruption and the Legal Profession: Survey 2010, <http://www.oecd.org/corruption/anti-bribery/46137847.pdf>
 - U4 Anti-corruption Resource Centre, Expert Answer: Integrity issues related to lawyers and law firms, <http://www.u4.no/publications/integrity-issues-related-to-lawyers-and-law-firms/downloadasset/3494>
- Regarding the efforts that lawyers and bar associations can undertake to play a more active role in the fight against corruption, please see: International Bar Association, Anti-Corruption Guidance for Bar Associations, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=28e7aaa2-9447-4758-8f54-8209c334481d>
- For a deeper insight on the impact of corruption in the enjoyment of human rights, a key issue in improving other objectives to which the Vance Center has long been committed, please see: International Council on Human Rights Policy, Corruption and human rights: Making the connection, <http://www.u4.no/recommended-reading/corruption-and-human-rights-making-the-connection/downloadasset/2329>