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CORRUPTION IN TIMES OF COVID-19: A REGIONAL PERSPECTIVE ON PUBLIC PROCUREMENT

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CYRUS R. **VANCE CENTER**
FOR INTERNATIONAL JUSTICE



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Corruption in Times of COVID-19: a Regional Perspective on Public Procurement

Executive summary	1
Introduction	2
A Regional Perspective.....	3
1. Argentina Carolina Zang, Zang, Bergel & Vines Abogados.....	3
2. Brazil Luciana Tornovsky and Eloy Rizzo, Demarest Advogados.....	4
3. Chile Pablo Guerrero, Barros & Errázuriz.....	5
4. Colombia Paula Samper Salazar, Gómez-Pinzón Abogados.....	6
5. Costa Rica Vivian Liberman and Juan Carlos Tristán, BLP Legal.....	7
6. Dominican Republic Mary Fernández, Headrick Rizik Alvarez & Fernández.....	8
7. Ecuador Hernán Pérez Loose, Coronel & Pérez Abogados	8
8. Guatemala Alfonso Carrillo, Carrillo & Asociados.....	9
9. Mexico Carlos Del Río and Leonel Pereznieto, Creel, García-Cuellar, Aiza & Enríquez	10
10. Panama Ramón Ricardo Arias, GALA Galindo, Arias & López	11
11. Peru Alberto Rebaza, Hector Gadea, Sergio Mattos and Camilo Clavijo, Rebaza, Alcázar & De Las Casas	12
12. United States of America S. Todd Crider, Simpson Thacher & Bartlett, and Antonia Stolper, Shearman & Sterling.	13
13. Uruguay Marcela Hughes.....	15
14. Venezuela Fernando Pelaéz-Pier.....	15
Lawyers Council recommendations	17
Recommendations to the legal community.....	17
Integrity and anti-corruption recommendations.....	18
References.....	19

Executive summary

The COVID-19 pandemic and resulting economic crisis have led to an unprecedented assertion of power by governments across Latin America and the world. Unfortunately, exceptional or emergency powers intended to expedite crisis response, including as to health services, economic relief, and other critical needs, have also opened up opportunities for abuse that have the potential to significantly setback the fight against corruption. Even though governments have been operating under these exceptions for a relatively short time, in at least 12 of the 14 countries analyzed, there have been allegations of, or announced investigations into, corruption relating to public procurement directly linked to the pandemic response. Indeed, the relaxation of normal monitoring and procurement procedures threatens long-fought-for anti-corruption safeguards.

The reality is that, far from impairing an effective response to crisis, transparency and active monitoring of the allocation of relief funds and procurement activities are critical to an effective use of resources and to preserving public confidence and support in this crisis. Corruption generates or increases distrust of citizens in the government, causing governance problems in a time when complying with governmental edicts can be lifesaving.

Civil society organizations and the media have made public the misuse of resources destined to combat the pandemic, leading to administrative and criminal investigations for corruption. In several countries, corruption cases have resulted in resignations and dismissals of high-level politicians and public officials. The crisis has also presented an opportunity to test the division of powers and checks and balances, both political and judicial. Only in a few countries are the legislative branches acting as an important political

counterweight and monitoring the actions of the executive helping to guarantee good governance and clean public spending. Continued vigilance to uncover potential misallocation of funds and commitment to investigating allegations of corruption as they arise will be essential in each of our societies to signal whether there is real political will to continue this essential struggle against corruption.

Despite efforts in the region, it is clear that the mechanisms to combat corruption are insufficient. Most countries in the region already have serious corruption risks, and the fact that relaxing the provisions of public procurement creates immediate spaces for corruption, shows that there are no efficient means to prevent corruption and that many governments have not developed their anti-corruption commitment to a culture of integrity.

In this report, which provides a regional update as to public procurement in the pandemic, the Lawyers Council for Civil and Economic Rights is calling on the legal community throughout the region, including lawyers in the private sector (both law firms and companies), bar associations, pro bono clearinghouses and law schools, to be vigilant and active in support of anti-corruption efforts relating to COVID-19 and to work in support of civil society actors who are leading the fight for transparency and fairness. The legal community can help in many ways including: filing for release of public records; making public statements on the importance of the continued fight against corruption; publishing articles and op-eds; demanding accountability of government leaders and prosecutors; supporting watchdog organizations; and analyzing laws and bidding procedures to make sure that they comply with basic transparency requirements and integrity standards.

Introduction

On March 11, 2020, the World Health Organization characterized the COVID-19 outbreak as a pandemic. As of May 18, 2020, more than 4.7 million cases of COVID-19 have been reported in 187 countries and regions.¹ On February 26, the pandemic came to Latin America when Brazil confirmed a case in São Paulo.

To limit the spread of the virus, countries across the region have implemented unprecedented actions through executive order and including various regulations and enforcement mechanisms. Particularly in the Global South, where health systems face substantial resource constraints, people are more economically vulnerable, and millions live in densely populated areas, the virus could devastate the developing world and then re-emerge where it was previously brought under control.²

Aside from the health crisis, the pandemic also has a large negative economic impact. According to the International Monetary Fund, the economy in the region is expected to suffer an historic contraction in 2020. The World Bank has predicted that the coronavirus is pushing 40-60 million people into extreme poverty.³ The UN General Assembly recognized in Resolution A/74/L.52, "Global solidarity to fight the coronavirus disease 2019 (COVID-19),"⁴ that due to the unprecedented effects of the pandemic, the poorest and most vulnerable are the hardest hit. Indeed, as this crisis lengthens, early estimates of harm appear likely to substantially understate the costs and resulting human suffering.

In response, governments throughout the region, as in the rest of the world, have sought exceptional or emergency powers to expedite administrative

decision-making, including providing health services, economic relief, and other critical needs. These emergency powers often bypass procurement rules and other standard processes to make exceptional use of public resources, creating imminent risks of increased corruption and waste of public resources in the midst of the response to the pandemic.

Civil society organizations in the region have expressed concern about the corruption risks, as the government's extraordinary powers threaten misuse of funds and setbacks in the fight against corruption. Transparency International (TI) has warned that emergency legislation often allows governments to bypass the usual checks and balances on public spending."⁵ TI's Corruption Perceptions Index 2019 stated that the Americas region has failed to make significant progress in the fight against corruption, particularly as the region faces significant challenges from political leaders acting in their self-interest at the expense of the citizens they serve.⁶ The Inter-American Commission on Human Rights (IACHR) has expressed its concern for the situation of corruption and impunity in the region.⁷ According to the AICHR's Report on Corruption and Human Rights⁸, corruption affects the enjoyment and exercise of human rights and increases inequality.

We believe that maintaining or adapting existing anti-corruption measures or creating new measures where inadequate is crucial to ensure that the government response is effective. While corruption risks always exist, the costs of these risks are higher during the emergency as already limited public resources are syphoned off due to corruption. In times of crisis our civil and economic rights are most at risk, and especially of those among us who are most vulnerable.

A Regional Perspective

1. Argentina | Carolina Zang, Zang, Bergel & Vines Abogados

In response to the COVID-19 pandemic, Argentina's President has issued more than twenty Emergency Decrees and numerous additional executive orders that, among other matters, impose a "preventative and obligatory" period of social isolation and regulate numerous legal aspects of life during this quarantine period. The Chief of Cabinet, acting on specific Executive Power authorization, has issued additional regulations on these matters. The Argentine Congress has been inactive; it hasn't passed any legislation on these matters or reviewed executive decisions under the Emergency Decrees, as mandated by the Constitution. Courts have shown a high level of deference to the executive, showing reluctance to evaluate its actions beyond a permissive "rational basis" standard of review.

In addition, the President has resorted to several dormant emergency powers under existing laws - many of dubious constitutionality- for imposing maximum price regulations and other measures related to the supply of essential goods and services to the market. Local authorities have also followed a similar course.

General procurement regulation has been modified to set aside competitive bidding for the provision of goods and services, allowing no-bid contracts for the provision of supplies needed in the emergency. Also, an executive decision making federal electronic records management non-compulsory under these circumstances has been rightly criticized as unnecessary and as creating a heightened risk of lack of transparency and corruption.

Chronic problems in procurement procedures in Argentina have aggravated the situation. In particular, the use of intermediaries, long payment delays in the context of high inflation, and risk premiums that generally lead to the opaque pricing in public procurement.

Industries, including oil & gas, grain producers, exports, and other activities subject to plummeting commodity prices have been hit particularly hard by the pandemic. The severe economic downturn has led certain local companies to reduce their budget for compliance programs, or delaying the implementation of those programs, increasing potential systemic risks.

Certain recent governmental purchases of food for social programs, medical supplies, and contracts for hotel accommodation of potential patients were subject to media scrutiny and public criticism due to the prices paid, which were higher than the market, and alleged favoritism towards providers with close links to government officials. As a result, certain federal and local public officers were pressured to resign and federal and local authorities have opened criminal inquiries on these cases, which have led to judicial searches and requests for indictments. These actions are promising developments to establish greater accountability.

Professional and civil society organizations have demanded enhanced scrutiny over governmental decisions and actions under emergency circumstances. There is widespread consensus on

the crucial need of a functioning Legislative Power exercising oversight, a more dynamic and less timid court system exercising judicial review of the emergency regulations and more professional and

restrained action by the all governmental offices - particularly the Executive- issuing these type of rules.

2. Brazil | Luciana Tornovsky and Eloy Rizzo, Demarest Advogados

On March 20, 2020, the Brazilian Congress declared a state of public disaster. As a result of such declaration, the Federal Government was formally released from its annual fiscal target and may inject resources in emergency health measures to fight COVID-19. In February, Federal Law No. 13,979/2020 was enacted, waiving public bid requirements for the purchase of equipment and services related to the public health emergency. In addition, on April 6, 2020, the Brazilian President issued Federal Decree No. 10,314/2020, which allows the government to receive donations of goods, services or technology, assuming the costs or conditions established by the donor, aiming to expand donations from private companies and individuals to reinforce the fight against the pandemic.

The Office of the Comptroller General (CGU) created an exclusive channel through which citizens can report suggestions and complaints regarding rendered services or the performance of public officials' actions related to COVID-19, such as lack of hospital supplies or personal protective equipment. CGU also discloses specific federal expenses related to COVID-19. Moreover, the government launched a tool that details purchases made under waivers of public bid requirements due to the pandemic. The measure aims to increase transparency, allow for social monitoring and control and therefore prevent corruption. Likewise, the Ministry of Health created a website

with data concerning hospital capabilities and medical equipment in Brazil.

On March 23, 2020, Brazilian President Jair Bolsonaro signed Provisional Measure No. 928 suspending deadlines for public administration bodies and institutions to reply to requests concerning access to information (an obligation set forth on Federal Law No. 12,527, known as Access to Information Law) and forbids appeals in cases of denied requests. However, the Brazilian Federal Supreme Court overruled such measures, so that public bodies continue to be obliged to respond to requests for public information.

On May 13, 2020, Brazilian President Jair Bolsonaro signed Provisional Measure No. 966, which requires the presence of intent or gross error so that public officials are held liable in the civil and administrative spheres for actions or omissions in public efforts to combat the effects of COVID-19. The constitutionality of Provisional Measure No. 966 is currently being challenged before the Federal Supreme Court.

Civil society organizations have developed initiatives to review governmental actions related to the pandemic. For example, Instituto Ética Saúde, a nonprofit organization of companies and institutions with a commitment to prevent corruption in the healthcare industry, launched an anonymous hotline for the population to report

any abuse or fraud in the healthcare industry (public or private sector) during the pandemic.

Operation Alchemy was launched by CGU, Federal Police, and Public Prosecutor's Office to combat public bid irregularities during the acquisition of books and booklets for the educational campaign

to combat COVID-19. According to the investigations, instead of using federal health resources for effective actions to combat COVID-19, the Municipal Health Secretariat would have acquired booklets whose guidance materials could be obtained free of charge on the Ministry of Health's website.

3. Chile | Pablo Guerrero, Barros & Errázuriz

On January 5, 2020, the Chilean Government issued a one-year "sanitary alert" to face the threat to public health from the COVID-19 pandemic. On March 18, 2020, President Sebastián Piñera announced several measures seeking to prevent the spread of COVID-19 in Chile, which included the declaration of an Exceptional Constitutional State of National Catastrophe, which began on March 19, 2020, for a 90-day period. Such resolutions, among other matters, authorized the institutions from the national health public system to acquire goods and services through "direct contracting", rather than through public bidding processes. Direct contracting is exceptional under Chilean public procurement law, although it applies in cases of emergency, urgency and unforeseen circumstances.

Public procurement in Chile is governed by Law 19,866 of July 2003 and regulations issued thereunder. All public entities (excluding publicly owned companies) must abide by the law when purchasing or renting goods or products. The law created a Public Procurement and Contract Directorate, also called *ChileCompra*, which has issued several recommendations to the public sector for procurement during the pandemic, especially regarding the use of "direct contracting" in accordance with the law. Regarding the latter,

ChileCompra recommends that acquisitions through "framework agreements" be preferred over "direct contracting" and that any decision to use the latter must be duly justified in the resolution that authorized it, which is the general rule for all administrative resolutions in Chile. Moreover, ChileCompra has created a banner in its website (www.chilecompra.cl), allowing the review of acquisitions of goods and services in the COVID-19 pandemic context.

Civil society is active in this regard. Chile Transparente, the Chilean chapter of Transparency International, has published recommendations of best practices on public procurement during the emergency.

The Comptroller General of the Republic is the entity in charge of controlling the legality of all acts from Chilean public entities, including those related to public procurement. During the COVID-19 emergency, the Comptroller General has conducted several investigations, requesting information from the national health system and public hospitals regarding the acquisition of mechanical ventilators, medicines and other supplies, the leasing of private premises to be used as temporary hospitals, the use of public airplanes for the transfer of patients, among others.

4. Colombia | Paula Samper Salazar, Gómez-Pinzón Abogados

President Ivan Duque declared a state of sanitary emergency on March 17, 2020. The President has been acting under the powers of the state of emergency due to the extraordinary situation. These powers allow the issuance of decrees with the force of law, without having to obtain the prior ordinary approval of the Congress.

During the state of emergency, as of the first week of April, the President had issued 72 regulations on key areas such as health, economy, employment, and other basic needs. By law, a state of economic, social, and ecological emergency can last only for thirty (30) days and be extended for two equal periods. However, the government did not immediately extend the state of sanitary emergency, and it ended on Thursday, April 16, 2020. By decree 637 of May 6, 2020, the president established a state of economic, social, and ecological emergency. The decision was justified by the crisis in demand, employment, investment, capital flows and the value of raw materials resulting from the COVID-19 crisis, specifying that measures will be taken to alleviate the economy, within the framework of the powers given to it by the declaration of economic emergency. This decision may last a maximum of thirty 30 days and no more states of emergency may be declared during the remainder of the year.

The exceptional legal clauses used by the government for decision-making arise from the extraordinary powers of the state of health emergency established by Resolution 389 of 2020 and from the state of economic, social, and ecological emergency established by Decree 637 of 2020. The state is carrying out procurement processes by means of legislative decree 440 of

2020⁹ issued by the exceptional powers, through which urgent measures are taken in the field of government procurement, including guidelines for state contracts during the coronavirus pandemic.

As per the checks and balances provided by the Colombian Constitution for the emergency powers, the Constitutional Court automatically analyzes the constitutionality of every measure implemented by the Executive branch.

As part of the extraordinary measure, the President made it easier for local leaders to make use of budget allocations to concentrate resources on attending and reinforcing the actions taken by the national government to deal with the pandemic. Among the powers granted and corruption risks, the state of emergency permits direct contracting, which authorizes local leaders to select vendors and contractors that can agree to prices without any prior control or preliminary supervision. Disciplinary proceedings and investigations have been opened against officials in at least eight departments of the country for allegations of corruption or other irregularities in their functions relating to these purchases.

The media, especially non-conventional media, has taken on a critical role, acting as watchdogs of democracy. The Attorney General's Office has opened investigations of eight territorial entities throughout the country as to possible cost overruns and favoring of contractors. The official in charge of state fiscal control said that in the review of more than 8,100 contracts signed by the mayors and governors, cost overruns eight hundred billion pesos (USD twenty million approx.), were detected.

The Chief Prosecutor asked the Colombian Supreme Court to investigate the role of the Agriculture Minister in the alleged misappropriation of emergency funds. Agriculture Minister Rodolfo Zea and six other people and two

governmental agencies are suspected of having transferred emergency funds to ghost accounts. It is also alleged that emergency loans were granted to big companies instead of farmers whose production was hit by the spread of the disease.¹⁰

5. Costa Rica | Vivian Liberman and Juan Carlos Tristán, BLP Legal

The government of Costa Rica is working under emergency powers. On March 16, 2020, the Costa Rican Executive declared the "National Emergency" status (Executive Decree N° 42227-MP-S). The status will remain in place for the maximum period stated by the National Law on Risk Prevention and Emergency Response. It may also be extended or amended by Executive Decree.

Articles 2 and 80 of the Public Procurement Law and its Regulation, indicate that under the "National Emergency" status, and for purposes of protecting the public interest, the formalities and procedures for public procurement may be partially or totally waived. Under this scenario, the Comptroller General's Office must approve such expedited procurement process within ten business days.

Likewise, articles 29, 31 and 32 of the National Law on Risk Prevention and Emergency Response, stipulate that a "National Emergency" may be declared for the government to quickly obtain sufficient economic, material or financial resources to prevent further damages to people, goods and services. The "National Emergency" allows the government to perform direct procurement of services and supplies, avoiding the customary and

lengthy public bidding process, which we consider is an area of potential integrity risks.

Furthermore, the private sector has been making a significant amount of in-kind and cash donations to the government, which might also be a source of corruption if not adequately monitored. Moreover, the National Commission for Risk Prevention and Emergency Attention may allocate funds and accept donations from public and private entities, which will be part of the National Emergency Fund. This fund will be used to deal with emergencies, prevention, and mitigation.

The Comptroller General's Office and the Audit Office of the Emergencies Commission are in charge of overseeing the appropriate use of the funds. The use of such a Fund might be another source of potential corruption.

The government, through the Comptroller General's Office, is being respectful of the integrity obligations in the decision-making processes. Until the day of publication of this brief, it is not known whether civil society organizations or other sectors are developing initiatives to review government actions related to the pandemic, and, to date, there are no known investigation for corruption in government actions related to the epidemic.

6. Dominican Republic | Mary Fernández, Headrick Rizik Alvarez & Fernández

The government of the Dominican Republic (DR) is acting pursuant to emergency powers granted by Congress through Resolution No. 63-20 dated April 11, 2020. The state of emergency has been in place since March 19. The DR government is acting under a declared state of exception contemplated by Article 265 of the Constitution and Law 21-18, which regulates the state of emergency as a state of exception. Government procurements in the Dominican Republic are governed by Law 340-06, which includes different methods for procurement processes in cases of urgency or emergency.

The DR government has initiated various procurement processes between March 15 and April 2, 2020, which have allegedly been tainted by corruption. These processes were conducted under an emergency process directed by the Ministry of Health and the National Health Service for the acquisition of disinfectants, protection clothing, masks, respirators, and other medical supplies. The total amount for these acquisitions was more than 2,000 million pesos (approximately USD 37 million), of which more than 1,500 million pesos (roughly USD 27 million) were awarded to one company. This company, Tools Resource Enterprises Toreen SRL, was in some cases the only bidder, as the bids were sometimes open for only a

couple of hours, and the delivery date was set for within the next five days.

The press noted the irregularities¹¹ and civil society organizations like *Participación Ciudadana*, the national chapter for Transparency International, also criticized the irregular bidding processes. As a result, the procedures were annulled, and the President created a commission to supervise future bidding processes, by Decree No. 145-20.

Another significant instance of potential corruption was the bid organized by the INAPI, a national institution dedicated to the health and well-being of infants and children. Irregular bidding for food was revealed on national TV by one of the bidders¹², as a result of which, the President, through Presidential Decree 146-20 dismissed the INAPI's employees from the bidding committee, and its Director resigned.

As a result of these instances of alleged corruption, the government on April 14, 2020, announced that the office in charge of procurements was issuing new guidance with minimum requirements for bids during this emergency process. The guidance would include integrity recommendations made by the commission recently designated by Presidential Decree to overview these bidding processes.

7. Ecuador | Hernán Pérez Loose, Coronel & Pérez Abogados

On March 16, 2020, the President of Ecuador issued Executive Decree No. 1017 "Decree of Exception for Public Calamity." The exception powers the President has assumed include the

suspension of certain constitutional rights such as the right of free movement and the right of assembly.

The different public agencies are purchasing needed goods and services to deal with the COVID-19 crisis using expedited procedures under the rules of the public procurement legal regime. The government has not adopted any specific action to prevent or combat corruption associated with the procurement of goods and services by public agencies.

An alleged corruption scandal was uncovered mid-April when the Social Security Institute granted a contract for the provision of masks and other medical goods. The contract had been granted to an unknown company, and the overpricing of the goods was around USD \$10 million. The Controller

General stopped the contracting process, and the General Prosecutor opened an investigation. The news of the overpricing was brought to the public's attention by journalists.

There have been few responses or outcry from civil society as to these and other potential instances of corruption associated with the current crisis. This is likely due to attention being focused on the pandemic and its devastating effects. Many civil organizations have been created or strengthened in response to the crisis, including to assist hospitals, medical centers, and to provide food to people in need.

8. Guatemala | Alfonso Carrillo, Carrillo & Asociados

On March 6, 2020, Guatemala's executive branch declared a state of public calamity, which enables the use of emergency powers. According to Guatemalan law, during the state of public calamity, the government has available broad discretionary powers for decision-making processes in matters that are within its authority, such as public health, education, security, etc. A declaration of public calamity allows the government to act with discretionary powers and limits certain ordinary rights.

The government is conducting procurement processes pursuant to exceptions to normal procurement practices. Guatemalan law provides that when the authorities declare a public calamity state, the government has the power to acquire any good or service that is required to mitigate adverse impacts without complying with the procurement processes outlined in the law. However, the acquisition of any goods or services

must be published in the government's public procurement website: *Guatecompras*.

Due to the pandemic, the Congress of Guatemala authorized a budget expansion of 20 billion quetzales (USD 2.6 billion approx.); however, only 15% to 20% of such funds are being used for COVID/19 mitigation efforts. According to the Ministry of Finance, as of April 8, 2020, the government has spent over 96 million quetzales (USD 12.5 million approx.) in acquisitions of goods to fight the spread of the virus. These acquisitions have been subject to public scrutiny based on the pricing and quality of the supplies purchased.

The government is allegedly publishing the purchase of goods or services on a dedicated website.¹³ Criticism includes lack of up-to-date data, absence of justification to purchase certain medical supplies, and quality of the supplies. There is a significant concern of watchdogs that members

of Congress and other politicians are benefitting from the situation.

There are a few civil society organizations like *Acción Ciudadana* and media that are seeking to monitor the integrity of the government's actions during the crisis – principally by focusing on its spending.

According to the Attorney General's Office, as of April 1, 2020, there have been 25 criminal complaints brought against municipalities for the alleged embezzlement and misappropriation of food that the central government provided for distribution to the most in need due to the pandemic.¹⁴ As these investigations are in the early stages, the prosecutors have not issued any indictment, and no relevant announcement has been made.

9. Mexico | Carlos Del Río and Leonel Pereznieto, Creel, García-Cuellar, Aiza & Enríquez

In Mexico, the Presidential Decree published on March 27, 2020, lays out the emergency powers that the Federal Executive will be working under during the Covid-19 pandemic. This executive order allows for the acquisition by the Federal Ministry of Health of all types of goods and services to fight Covid-19 without conducting a public bid process.

As a result, during the Covid-19 contingency, Mexican Government agencies have been using alternative methods for procurement contemplated by applicable law that make the awarding process more expedient. The Federal Law of Public Sector Acquisitions, Leases and Services allows procurement using -as an exception- either a direct award process or a process requiring the invitation of at least three bidders. Triggering circumstances for such exceptional treatment include health emergencies and force majeure events. State governments have also relied on similar exceptions contained in state legislation to use simplified procurement methods.

Although the conditions for use of expedited procurement procedures have been triggered by

the Covid-19 pandemic, these procedures are not tantamount to a “free-card” to award “no-bid” contracts by the Federal and state governments. For instance, direct award and limited invitation procedures, under federal procurement laws and regulations, require that a properly integrated file be conformed to support the determination, including, for both methods, a market analysis and quotes/proposals from at least three participants. Also, an essential feature of contracts that rely on the Covid-19 exception to support the expedited methodology, is that they must relate to the fight against the Covid-19 pandemic: stretching this interpretation too far may point towards improper conduct.

From a transparency perspective, however, direct award procedures lack the openness of limited invitation procedures, as applicable statutes do not require the former to be published in the open-access “Compranet” e-platform nor the witnessing of the awarding by the internal comptrollership body of the relevant agency. Figures published¹⁵ on the procurement methodology used by the Federal Government through April 14, 2020, suggest that direct awards are preferred (76%) while limited invitations are seldom used (6%); the

remaining 18% corresponds to standard bidding procedures. This trend towards directly awarded contracts is likely to grow, or at least continue, during the Covid-19 pandemic in Mexico.

On May 1, 2020, Mexicanos Unidos Contra la Corrupción y la Impunidad -an active and reputed investigative journalism outfit focused on denouncing corruption- published an article revealing the purchase by the Federal Government of overpriced ventilators from a company that is allegedly linked to the son of a senior Cabinet member. While referring to this article and the allegations in his daily press conference, President Andrés Manuel López Obrador, instructed the Ministry of Public Function to conduct the corresponding investigation. An opposition party senator has also filed complaints before the Ministry of Public Function and the Federal Attorney General's Office (FGR) prompting the investigation into this case. This recent development has highlighted the crucial role of

investigative journalism as an observer of potential corrupt conduct that may be occurring against the backdrop of Covid-19 pandemic in Mexico.

Some civil society organizations in Mexico have been very active. Transparencia Mexicana (Mexican TI Chapter) and Tojil established a follow-up mechanism for plans, programs, and actions to face the COVID-19 health emergency and its economic and social effects. Derechos Humanos y Litigio Estratégico Mexicano designed a digital platform to report acts of corruption related to the COVID-19 and to record the operational failures of medical service providers, both in public and private hospitals.

Despite the safeguards in the system, the prevalence in the use of direct award procedures in the government's procurement activities is a source of risk in relation to corruption and misappropriation of public funds and underscores the importance of vigilance by non-state actors.

10. Panama | Ramón Ricardo Arias, GALA Galindo, Arias & López

The Government of Panama declared the State of Emergency and a series of health measures, starting with several Executive Decrees and Cabinet Council Resolutions from March 13, 2020, onwards. The State of Emergency was declared for purposes of expediting public procurement. A State of Urgency, which could have been declared under the Constitution, has not been declared. As a result, Constitutional rights have not been formally suspended, although there have been complaints of Constitutional rights being violated based on health, home confinement, and security measures.

Under the State of Emergency measures, the Executive Branch is authorized to procure goods

and services directly without having to call on competitive public bids. Under normal circumstances, Panama Government Procurement requires the prior approval of the Comptroller General's Office. Under a State of Emergency, the Comptroller General has authorized public procurement without its prior approval, thus allowing for fewer controls.

As of the date of this report, several cases of alleged abuse have been denounced. The government is, in theory, authorized to apply procurement exceptions only for "emergency use," but it has expanded its direct purchases to all

government procurement (including, for example, advertising contracts).

The main criticism related to procurement has been the lack of transparency. The law requires "online" publication of all government procurement. This provision has been consistently violated during the pandemic under the State of Emergency.

The local chapter of Transparency International, together with other civil organizations and private citizens, have been calling for stricter and more transparent procedures. So far, the Vice Minister of the Presidency has resigned as a result of public protest on the handling the procurement process. Currently, there is also public pressure mounting for the Minister of the Presidency (who is currently the elected Vice President) to resign due to his

responsibility in the mishandling of the procurement processes.

The Attorney General has announced the beginning of an investigation, although the Courts are currently closed. The Attorney General lacks authority to investigate Government Ministers, so his investigation would have to be remitted to the Court for further investigation if a Government Minister is involved and to Congress if the Vice-President is involved. The likelihood of this happening is very low.

A Special Commission has been announced to supervise government procurement, but nothing further has been carried out in relation to the irregularities in public procurement. If the commission is not formed in an independent manner, it is unlikely to be viewed as legitimate and its likelihood of success would be low.

11. Peru | Alberto Rebaza, Hector Gadea, Sergio Mattos and Camilo Clavijo, Rebaza, Alcázar & De Las Casas

The government of Peru is working pursuant to emergency powers. On March 11, 2020, the government issued Supreme Decree N° 008-2020-SA, declaring the Sanitary State of Emergency. Additionally, Supreme Decree N° 044-2020-PCM and further amendments declared the National State of Emergency beginning on March. Note that during the State of Emergency, fundamental rights concerning individual liberty, inviolability of the home, and freedom of transit and assembly may be restricted or suspended.

The government has been issuing Urgency Decrees in economic and financial matters, under the prerogatives entrusted by the Constitution. Further, the government requested Congress to confer special powers to issue Legislative Decrees

as to several issues. On March 26, 2020, Congress granted this request for 45 days.

To speed up the procurement of essential supplies, such as food and medical equipment among others, the government has been using an exception already established in the Public Procurement Act for cases of health emergencies. Hence, national agencies and entities are allowed to directly engage in contracts with private vendors, making the controls and requirements established for regular procedures more flexible.

The government has issued several Urgency Decrees to transfer approximately USD 2,490 million to public entities to undertake actions of prevention and response to the health emergency.

These transfers of substantial sums of money together with the relaxation of specific controls for the acquisition of goods, services, and donations are factors that increase corruption and integrity risks.

Public entities are required to report their purchases both in the Electronic Procurement State System and in the specific Transparency Procurement Portal created for the health emergency.¹⁶ Further, the Ministry of Economy and Finance has launched a transparency portal to make public the distribution and spending of public resources during this period.¹⁷ Similarly, the Peruvian Comptroller's Office has implemented an accountability portal, through which local governments report the use of funds for the acquisition and distribution of essential family

goods, in favor of the most vulnerable population.¹⁸ Finally, the President and his Ministers hold press conferences almost daily, where they explain and justify their decisions.

The media have been scrutinizing state purchases and contracts. PROETICA, the Peruvian chapter of Transparency International, has provided recommendations to guarantee the transparency for public procurement.

The Prosecutor General Office and the State Attorney Office have already reported 380 corruption cases during the National State of Emergency. Note that, due to the mandatory lockdown, Prosecutors are having difficulties in carrying out these investigations.

12. United States of America | S. Todd Crider, Simpson Thacher & Bartlett, and Antonia Stolper, Shearman & Sterling.

The United States federal government has taken unprecedented measures through the executive and legislative branches to mitigate the economic impact of the pandemic, provide health care services to the population, and facilitate obtaining necessary equipment. The U.S. response has been characterized by a lack of centralized coordination and a broad range of compliance with containment efforts, which have varied among 50 states and even among municipalities within states.

Nonetheless, in relation to the federal response, whistleblowers, civil organizations and media organizations have expressed concerns regarding the new opportunities for corruption resulting from the emergency measures.

The United States Congress enacted several statutes in response to the pandemic, including (i)

the Coronavirus Preparedness and Response Supplemental Appropriations Act enacted on March 4, 2020, and the Families First Coronavirus Response Act enacted on March 18, 2020, which provided additional funding to federal health programs; and (ii) the Coronavirus Aid, Relief and Economic Security Act (CARES Act) enacted on March 27, 2020, which provided a USD 2 trillion relief through direct funding for eligible American citizens, allocation of USD 100 billion for hospitals and health providers and USD 500 billion in loans and investments for companies, states and municipalities, as well as providing grants for specific industries.¹⁹ The CARES Act also included emergency assignments for the development, procurement and deployment of medical products.²⁰

At the executive level, on March 13, 2020, the President declared a national emergency as a result of the COVID-19 outbreak in the country. Through the declaration, the head of the Department of Health and Human Services was granted the authority to waive or modify certain requirements in relation to federal health programs in an attempt to speed up the provision of healthcare and testing.²¹ Executive orders were also issued for the purchase of protective equipment under the Defense Production Act,²² and a temporary rule to limit the exports of medical resources was put in place on April 10, 2020.²³

News organizations have claimed that the executive branch has rushed through more than USD 760 million in contracts outside of the usual bidding process,²⁴ and that the emergency declaration vastly expanded the potential for corruption.²⁵ Concerns have been expressed that the President is using the opportunity for his political gain,²⁶ and that corruption could exist as the President and his representatives are constantly speaking with corporate leaders who can position themselves in the front of the line for federal contracts or relief payments.²⁷ A whistleblower also filed an official complaint asserting widespread failure, cronyism, and corruption at the highest reaches of the administration's response to the pandemic.²⁸ News organizations reported that the President's administration retaliated against the whistleblower.²⁹ Although President Trump sought to limit oversight and monitoring of spending under the massive \$2 trillion relief bill, a Pandemic Response Accountability Committee was

mandated. Unfortunately, the risks of corruption appear to have been enhanced as a result of the recent dismissal by President Donald Trump of the Inspector General for the Intelligence Community in retaliation for reporting the whistleblower related to the Ukraine controversy, which led to Trump's impeachment, and of the Inspector General for the Pentagon, who had been selected to lead the Pandemic Response Accountability Committee.

Civil organizations highlighted that there will be new opportunities for corruption as a result of the new federal disbursements.³⁰ Such organizations also suggested the reinstatement of the ousted whistleblower,³¹ urged Congress to put in place anti-corruption measures,³² advocated that transparency, accountability and good governance measures should be an integral part of the legislative bills flowing through Congress,³³ and demanded greater accountability and proper detailed disclosure of financial information from the Government.³⁴

Currently, although no investigations for corruption related to the pandemic have been publicly announced, the House of Representatives has promised oversight. At a minimum, it appears that the broad latitude available to the President and federal agencies to provide relief to corporations and to otherwise deploy the unprecedented relief budget (almost three times larger than the annual U.S. defense budget) will provide ample opportunities for the administration to pick winners and losers in the relief sweepstakes.

13. Uruguay | Marcela Hughes

The Uruguayan government is not working under emergency powers expressly provided in the National Constitution, and it is not using exceptional legal clauses for decision-making. Uruguayan authorities are following the ordinary legislative and administrative proceedings for taking all the appropriate measures in different fields and levels for the proper addressing and monitoring of the pandemic situation. Procurement processes are being conducted according to the general rules, mainly through abbreviated procedures of direct purchases when the amounts involved in each case allows for such specific procedure.

The actions taken by the government to fight the pandemic are all under the ordinary governmental prerogatives regulated by law and Constitution. They, therefore, do not entail particular corruption risks to highlight. In addition, all the transparency and communication measures taken by the government work as an adequate tool for public control over the governmental activity in this particular context. These measures include daily press conferences reporting the number of COVID-19 tests and results; measures taken-to-be taken; official website publication of relevant information;

call services and app with updated information; easy access to the legal/administrative framework for actions and decisions; easy online access to the relevant information on public procurements and purchases.

The government has taken various actions to ensure transparency and public access to relevant information concerning the decisions adopted and those proposed for adoption. Governmental decisions are being adequately justified, even with the participation and control of legislative and administrative bodies. The government's financial activity is also subject to the control of the National Court of Auditors, which ensures another level of control and transparency in this respect.

Civil society organizations and other sectors are participating in the discussions of decisions taken by the government, even with the submission of some proposals with guidelines on both health and economic fields.

As of the date of publication of this brief, there are no investigations for corruption related to the pandemic.

14. Venezuela | Fernando Pelaéz-Pier

Venezuela is ruled by a regime that controls all the institutions except the National Congress. Since Chavez took power in 1999, a process commenced that, in a remarkably brief period, undermined the institutions of democracy and accomplished the control of the instruments of government. As a result, the rule of law is nonexistent and human

rights, civil, economic, and political rights are violated systematically. The judicial power depends upon and is controlled by the regime. As a result of the concentration of the power of the state, the system does not need to work under emergency powers as a result of the pandemic.

Different public agencies and state corporations conduct all government procurement processes. No exceptional regulations have been implemented. The actions taken by the regime are limited to an Emergency Act imposing a lockdown. A Special Board to control and manage the impact of the pandemic was appointed, and specific labor regulations to protect employees were enacted. Suspension of commercial and housing lease payments was passed.

According to the Corruption Perceptions Index of Transparency International, Venezuela ranks in place 168 of 180. Per this Index, Venezuela is the most corrupted jurisdiction in our region. Due to systematic and persistent corruption across the country, any actions taken by the regime, whether or not related to the pandemic represents a corruption risk. As the international press has widely reported it, there has been no investigation of any national or international corruption act, not even as to the most notorious cases committed by public servants and private sector entrepreneurs doing business with the regime, including of multinational corporations such as Odebrecht.

Multilateral and international organizations have reported on the corruption risk in doing business in Venezuela, as well as, on the violation of human rights and the severe humanitarian crisis. Venezuela has the highest hyperinflation in the world, with a minimum salary of the equivalent to 4.00 USD per month, as per the increase enacted on May 1. Venezuela has one of the poorest public medical service infrastructures, and the private

health system has also been severely affected due to the economic crisis.

Civil society, through different NGOs and opposition political parties, has raised its voice to denounce the violations suffered and confronted by the Venezuelan population. Unfortunately, the only consequence has been the persecution of civic leaders, but without a response from the government. Fortunately, several international NGOs and foreign governments have reacted in support of local efforts.

The economic and political crises have generated a massive migration of Venezuelans. It is estimated that over 4 million Venezuelans have left the country, which in turn has created a severe crisis for several countries in the region, which have struggled to absorb the influx of immigrants.

The Venezuelan political crisis will not be solved by Venezuela. It has become a geopolitical problem where the United States, Russia, China, and Cuba play an important role due to different sorts of interests. The drop of oil prices resulting from the COVID-19 crisis, the openly reported USA surveillance of the drug activities controlled by the regime, the humanitarian crisis, the hyperinflation, the impact of the pandemic, and some other factors, despite their high costs in human suffering, might add up to the "perfect storm" to force dialogue and permit a political transition. It is critical that any development toward a political solution should result from dialogue and an understanding between representatives of the opposition and the regime.

Lawyers Council recommendations

Recommendations to the legal community

The struggle for good government and against corruption is a central challenge in the world and transcends political or ideological differences. As professionals trained to uphold the law and committed to the administration of justice, lawyers have a unique role in combatting corruption. The Lawyers Council urges and encourages members of the legal community in the region, including the private legal sector, bar associations, clearinghouses, and law schools, to engage in critical efforts to initiate or reinforce initiatives combating corruption. These efforts might include:

- 1) Utilize public information rights to file requests for release of public records as to governmental decisions made in the context of the pandemic, particularly decisions related to public spending. Demanding accountability of government leaders and prosecutors, analyzing and publishing information about which of and how these resources are being spent is particularly important where governments fail to assure such transparency.
- 2) Make public statements, publish articles and op-eds to defend the progress made in transparency and other mechanisms to prevent corruption, as well as demanding accountability from the government, including calling for inspection, ombudsperson and audit bodies, as well as special prosecutors, to receive the resources required. Additionally, it is important to assure that investigations and prosecutions not related to the pandemic continue to be vigorously pursued.
- 3) Encourage and support citizens to report any corruption or unethical practices. The private legal sector has a legitimate role to support its clients to update corruption risks assessment maps to prevent acts such as bribery and collusion during the emergency.
- 4) Analyze laws, regulations, and bidding procedures to make sure that they comply with international standards, including open government and transparency principles, as well as integrity and anti-corruption standards.
- 5) Support the work of civil society organizations and the media. Supporting watchdog organizations includes not only activating the national, regional, and international mechanisms to guarantee the exercise of freedom of association and freedom of expression, but also providing legal support to specific anti-corruption efforts. The legal community should defend the press, protecting against attacks from governments and other actors.

Integrity and anti-corruption recommendations

In relation to anti-corruption generally and specifically in the context of the pandemic, the Lawyers Council recommends critical policy focus on the following:

- 1) Transparency and Access to Information.** Emergency powers and exceptions to the law do not require or justify rescinding or suspending laws and regulations requiring transparency. On the contrary, transparency and access to information are the most critical components in combating corruption and, especially at this time, it is essential to implement and assure measures of enhanced transparency in accordance with open government practices, including open data, plain and understandable language and accessible location of the information. Governments in the region must provide clear, consistent, and accurate information on decisions made in the context of the pandemic, particularly decisions related to public spending. A specific website for this purpose is recommended. Lawyers should hold government accountable if it fails to assure this basic foundation of good government.
- 2) Integrity and Transparency in Procurement Practices.** To maintain public confidence in the use of the resources allocated to prevent the COVID-19 spread and alleviate the crisis, the governments should put in place tailored mechanisms to monitor contracting and procurement around COVID-19 response effort. Governments, often encouraged by the private sector, will use a crisis to shift from electronic bidding requirements to direct contracting. Crisis response requires rapid decisions but procedures can be adjusted while still assuring integrity in procurement. These mechanisms include controls to: prevent and avoid conflicts of interest; publicize information regarding the ultimate beneficial ownership of the suppliers of the goods and services; update corruption risks assessment maps; conduct a real-time review of the use of the resources by inspection and audit bodies; and provide training for public officials on early warning signs to detect corruption cases.
- 3) Citizen Watchdogs and Whistleblowers.** The governments should encourage citizens to report any corruption or unethical practices, and, to protect responsible citizens, to implement whistleblowing channels, confidentiality and protection, as well as incentive schemes for whistleblowers. Each citizen has a responsibility to be vigilant to help assure a more just and virtuous government and society.

The Lawyers Council expresses its solidarity with those who have fallen ill or who are otherwise suffering as a result of the COVID-19 pandemic. In a time of momentous and tragic events that strain individual and societal resources, it is imperative that lawyers work to preserve hard-earned rights and fragile gains in the struggle against corruption. A crisis of this scale, scope and duration is likely to yield meaningful changes in our societies. It is up to each of us to work to assure that changes in governance should be for the advancement of the common good.

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⁶ CPI 2019: AMERICAS [https://www.transparency.org/news/feature/cpi 2019 Americas](https://www.transparency.org/news/feature/cpi%202019%20Americas)

⁷ Pandemia y Derechos Humanos en las Américas. Resolución 1/2020.

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⁹ The decree establishes:

- Continuity of the bidding processes by virtual public hearings, guaranteeing the freedom of concurrence of the bidders.
- The suspension of terms in administrative sanctioning processes for alleged breach of the contract.
- If public entities need to reverse bidding processes that have been opened in order to give priority to other needs, they may suspend and even revoke them if no proposals have been submitted.
- Governments and Municipalities may acquire their goods and services with priority through the Colombian State's Virtual Store.
- Direct contracting for the acquisition of goods and services related to the pandemic.
- Budget increase for direct purchases. The state entities will be able to acquire goods by large surfaces, not only with a budget limit up to the minimum amount of each institution, but also up to the lowest amount, in order to provide speed and greater execution to public purchases.
- Hiring by manifest urgency. All goods needed to directly mitigate the pandemic may be contracted without any bidding process, through the declaration of manifest urgency of each contracting entity.
- Addition of contracts above 50%. Contracts for the acquisition of goods and services directly related to the pandemic may be added in amounts exceeding 50%.

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