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Anti-Corruption Enforcement and Recent Developments in Latin America

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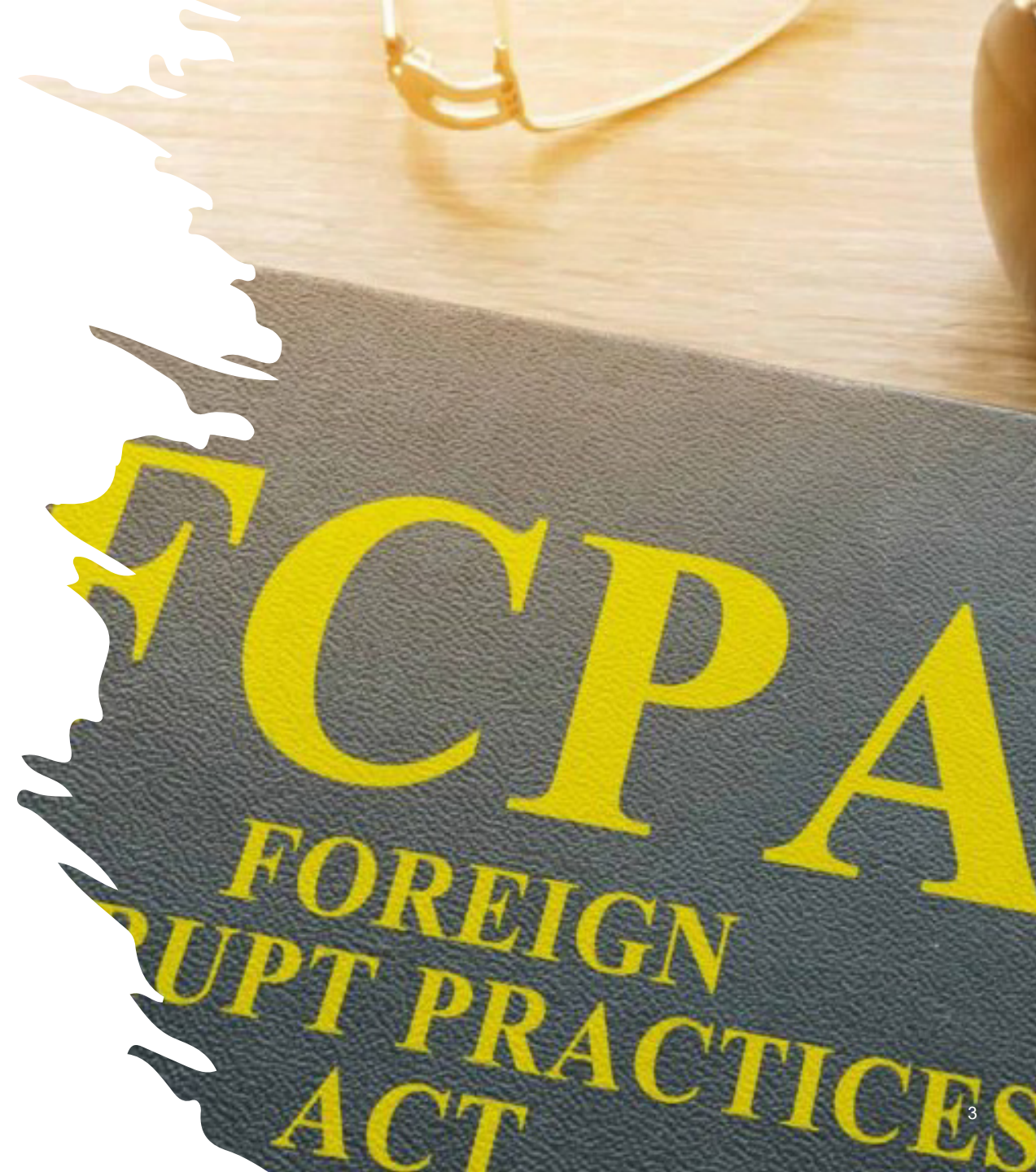
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The U.S. Foreign Corrupt Practices Act

The FCPA was enacted in 1977 in the wake of reports that numerous U.S. businesses were making large payments to foreign officials to secure business. It is enforced by the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”).

- **Anti-Bribery Provisions:** The FCPA prohibits corruptly giving, promising, or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.
- **Accounting Provisions:** The FCPA also requires issuers to maintain accurate “books and records” and reasonably effective internal controls.



Who is Covered by the FCPA?

- **Issuers:** Any company whose securities (including American Depositary Receipts and registered debt) are registered in the U.S. or that is required to file periodic reports with SEC.
 - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the issuer.
 - Issuers must adhere to both the FCPA's **Anti-Bribery** and **Accounting Provisions**.
- **Domestic Concerns:** Any individual who is a U.S. citizen, national, or resident of the U.S. (not just U.S. citizens), or any business organization that has its principal place of business in the U.S. or which is organized in the U.S.
 - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the Domestic Concern.
 - Domestic Concerns must adhere to the FCPA's **Anti-Bribery Provisions**.
- **Other Persons:** Anyone who takes any act in furtherance of a corrupt payment while within the territory of the U.S.
 - “Other Persons” must adhere to the FCPA's **Anti-Bribery Provisions**.

Latin America and the Caribbean

- Current population is approx. **665 million**, or just over **8% of the World's population**.
- The most populous countries are:
 - Brazil (211 million)
 - Mexico (130 million)
 - Colombia (52 million)
 - Argentina (45 million)
 - Peru (34 million)



(Sources: the OECD; WorldOMeter)

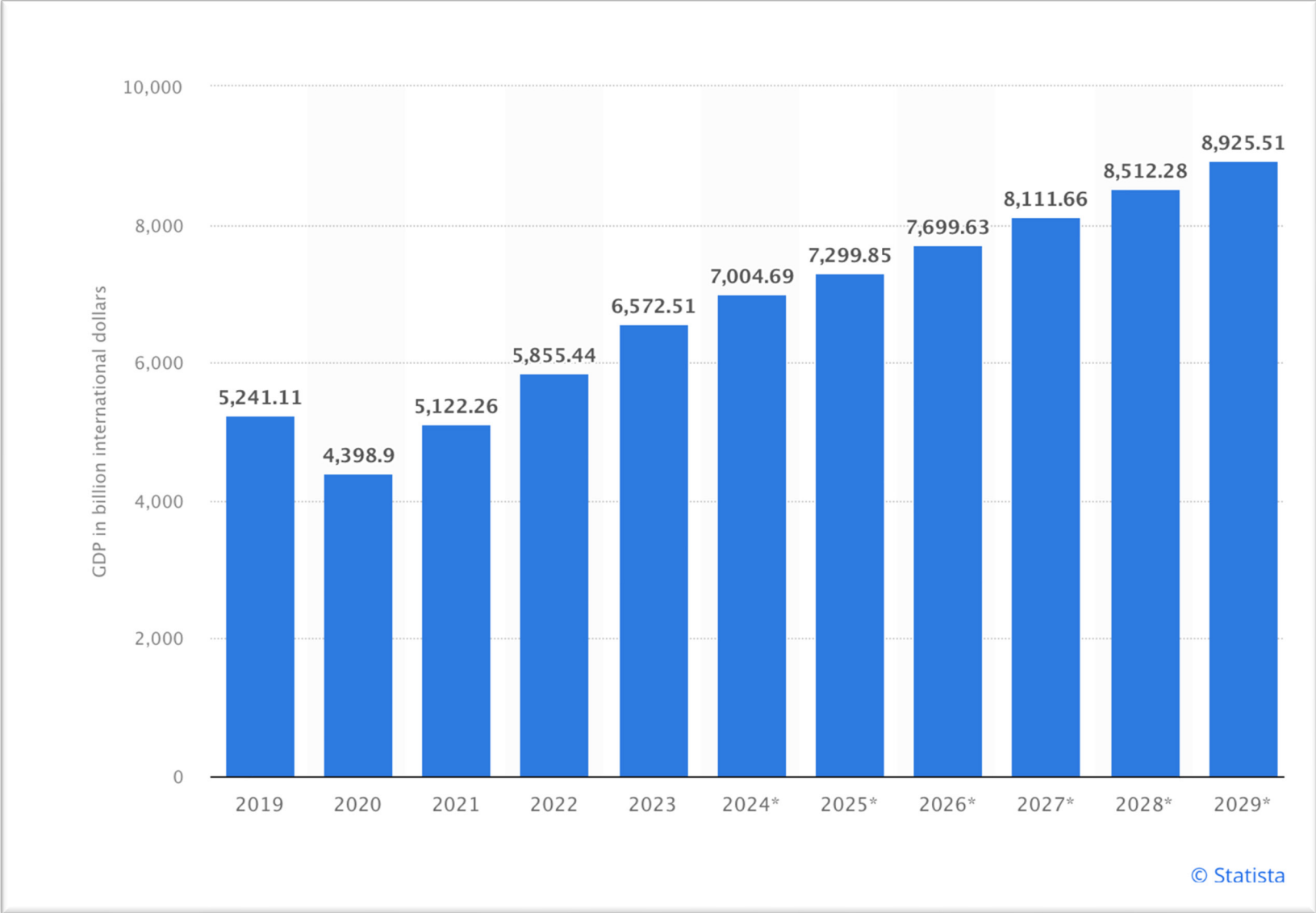


The Latin American Economy

- The Latin America/Caribbean region accounts for a GDP of almost USD 7 trillion.
- In 2022, it was the region that received (in relative terms) the largest foreign direct investment (“FDI”) flows globally – at a rate greater than Europe’s incoming FDI during the Marshall Plan.
- Yet, socio-economic conditions remain challenging in the region, with substantial levels of poverty (29%) and extreme poverty (11.2%).

(Source: OECD)

Latin American and the Caribbean GDP Projections (2019-2029)



Corruption as a Recurring Concern in Latin America

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Corruption is surging across Latin America

Political blowback from a period of intense anti-corruption campaigns is to blame

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CCC INDEX

In Mexico and Brazil, Anti-Corruption Efforts Seem to Have Faded

BY MARINA PERA AND VALERIA VÁSQUEZ | AUGUST 28, 2024

Policies to fight graft are a low priority in both countries and have lost momentum in the region as a whole.

GC GLOBAL COMMENT

The corruption problems sinking Latin America

June 11, 2020 | 0 Comments | BY Edgary Rodríguez R.

Miami Herald

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ANDRES OPPENHEIMER

Corruption is thriving in Latin America, and may keep rising. US fights back | Opinion

By Andres Oppenheimer
Updated February 05, 2024 11:02 AM

The New York Times

OPINION
GUEST ESSAY

Look at Latin America. This Is How Democracies Fail.

April 13, 2023

Anti-Corruption Efforts Continue to Lose Support

- Per Transparency International's **Corruption Perceptions Index**, more than two-thirds of countries in the region score below 50 out of 100.
- In the 2023 **Capacity to Combat Corruption Index**, **Uruguay**, **Costa Rica**, and **Chile** maintained strong anti-corruption scores.
- **Panama** saw the greatest improvement in its score, continuing a two-year upward trajectory
- **Guatemala** experienced the sharpest decline in the Index.
- The region's two largest economies saw sharp declines.
 - **Brazil's** score has continued to drop steadily for the past several years, dropping from 4th out of 15 countries in Latin America in 2020, to 8th in 2023.
 - **Mexico** has continued its fall from 8th in 2020, to 12th by 2023.

Overall ranking

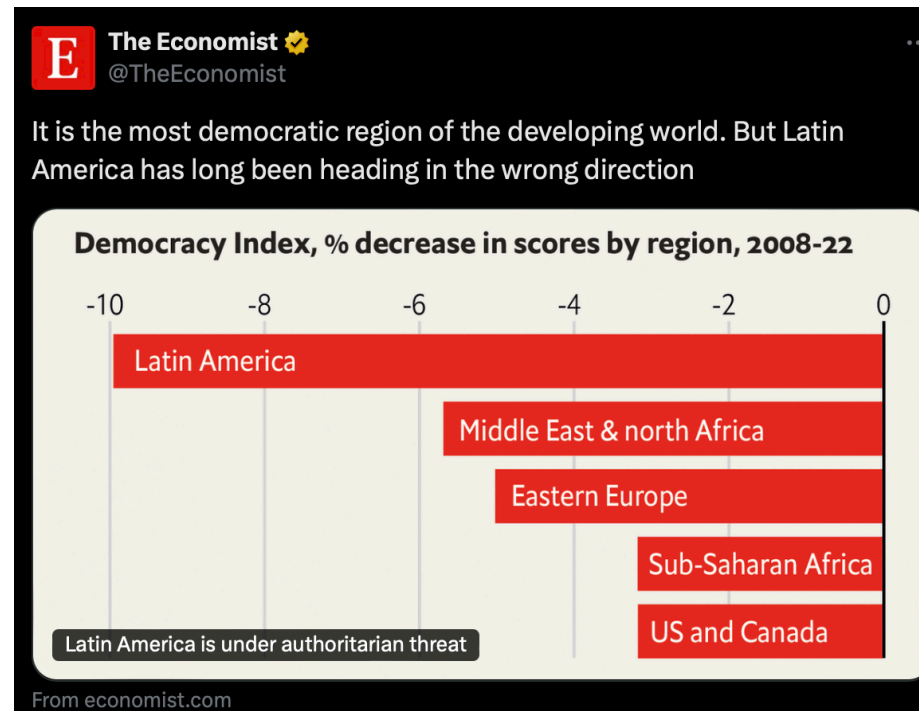
1	Uruguay	6.99
2	Costa Rica	6.76
3	Chile	6.67
4	Peru	5.53
5	Dominican Republic	5.42
6	Panama	5.39
7	Argentina	5.07
8	Brazil	4.83
9	Colombia	4.78
10	Ecuador	4.68
11	Paraguay	4.61
12	Mexico	3.87
13	Guatemala	2.86
14	Bolivia	2.56
15	Venezuela	1.46



Key Anti-Corruption and Enforcement Trends in Latin America and the Caribbean

Anti-democratic slides, particularly in Central America, create significant risks going forward

- Latin America has witnessed the sharpest regression in democracy of any region over the past 20 years and is “heading in the wrong direction.” (*The Economist*.)
- The region’s score in the *Economist Intelligence Unit’s Democracy Index* has declined for eight consecutive years.



Rollout of anti-corruption legislation, with no effective implementation

- Several countries, including Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, and Peru, have passed legislation recently.
- Yet, implementation has stagnated:
 - Mexico's National Anti-Corruption System: almost eight years after its passage, Mexico's **Capacity to Combat Corruption Index** score has continued to decline steadily, with the country receiving the fourth lowest score in the region in 2023.
 - The Argentine National Anti-Corruption Office similarly has failed to gain a foothold.

Widely heralded scandals in the region have largely fizzled, not resulted in major prosecutions

- “Notebooks” or **Cuadernos** in Argentina
- Panama Papers
- Operation Squid or **Operación Calamar** in the Dominican Republic
- Corruption is “surging across Latin America,” due in part to “political blowback from a period of intense anti-corruption campaigns[.]” (**The Economist**)

Corruption continues to be a top-down problem in Latin America

- There is some progress in prosecuting presidents and other senior leaders throughout the region.
- In several countries, corruption charges or related enforcement actions have been brought against former presidents, vice presidents, or their immediate family, including: (1) Argentina, (2) Brazil; (3) Colombia; (4) Dominican Republic; (5) Ecuador; (6) El Salvador; (7) Panama; and (8) Peru, among others.
- In Peru, for example, all but one president elected from 1985 to December 2022 has either been impeached, imprisoned or sought in criminal investigations.’ (**Bloomberg**)
- This trend suggests that while enforcement may be on the rise, corruption is systemic even at the highest levels of government.

Underdeveloped enforcement policies and practices

- Limited voluntary disclosure programs:
 - Some countries have 'effective collaboration' programs or statutory criteria, such as Peru and Ecuador.
- In some countries, prosecutors have limited experience with managing corporate investigations and company-led investigations in collaboration with enforcement agencies.

U.S.-led investigations and enforcement in the region continues

- DOJ and the SEC have brought corruption-related charges against more than 100 individuals and corporations for conduct in, or related to Latin America since 2018.
- **All of the individual prosecutions that DOJ filed in 2023 related to conduct in Latin America.**
 - So far in 2024, roughly half of DOJ's individual FCPA cases relate to misconduct Latin America.
- Significant emphasis on individual cases involving **Petróleos de Venezuela SA (or “PDVSA”)**
 - To date, DOJ has brought charges against more than forty (40) individual defendants for conduct relating to PDVSA.

Growing emphasis on corporate compliance programs

- **Colombia** expanded requirement to adopt “transparency and business ethics programs” in 2021. Must now include a compliance officer.
- Since 2023, **Peru** may credit a ‘prevention model’ if established before the commission of a crime, to reduce criminal penalties by up to 90 percent or even be exempt from corporate liability for corrupt conduct.
- In **Costa Rica**, compliance programs are not required by law, but they can serve as a mitigating factor for any criminal penalties by up to 40 percent.
- In **Chile**, the adoption and effective implementation of ‘prevention models’ may exonerate a company from criminal liability.

U.S. authorities crediting amounts paid to foreign regulators

- DOJ and SEC now regularly credit amounts paid to foreign authorities as part of their corporate settlements. For example:
 - GOL Linhas Aéreas Inteligentes S.A. (GOL)
 - McKinsey & Company
 - Stericycle
 - Corporación Financiera Colombiana S.A. (Corficolombiana)
 - Gunvor

Recent Enforcement Actions involving Latin America

Case Study:

Latin America FCPA Prosecutions in the Commodities Sector



GLENCORE



Commodities FCPA Cases:

Gunvor, S.A.



- On March 1, 2024, **Gunvor S.A.** (Gunvor), an international commodities trading company based in Switzerland, pled guilty and was sentenced to pay over \$661 million to the United States with respect to an FCPA investigation.
- According to court documents, between 2012 and 2020, Gunvor and its co-conspirators paid more than \$97 million to intermediaries knowing that some of the money would be and in fact was used to bribe Ecuadorean officials. In exchange for these bribe payments, high-level Ecuadorian officials helped various state-owned entities, which were acting as front companies for Gunvor, win the rights to a series of oil-backed loan contracts with Petroecuador. This structure allowed Gunvor and its co-conspirators to avoid a competitive bidding process and to obtain contractual terms that it could not have obtained otherwise. Gunvor also received confidential Petroecuador information in exchange for the bribes. In total, Gunvor earned more than \$384 million in profits from the contracts it obtained corruptly from Petroecuador.
- On the same day as the U.S. guilty plea, the Office of the Attorney General of Switzerland announced a parallel resolution of its investigation into Gunvor's misconduct that involved Gunvor paying approximately \$98 million to Swiss authorities.
- On June 11, 2024, Ecuador's State Attorney General's Office announced that Gunvor paid \$93.6 million to Ecuador following a "direct negotiation process" with the country's prosecutors. The size of the settlement matched the maximum amount of funds that U.S. prosecutors agreed to credit to "any separate resolution" that Gunvor reached with Ecuadorian authorities.

Commodities FCPA Cases:

Glencore International A.G

GLENCORE

- On May 24, 2022, Glencore International A.G. (**Glencore**) and Glencore Ltd., both part of a multi-national commodity trading and mining firm headquartered in Switzerland, each pleaded guilty and agreed to pay over \$1.1 billion to resolve the U.S. government's investigations into violations of the FCPA and a commodity price manipulation scheme.
- According to court documents, between approximately 2007 and 2018, Glencore and its subsidiaries caused approximately \$79.6 million in payments to be made to intermediary companies in order to secure improper advantages to obtain and retain business with state-owned and state-controlled entities in the West African countries of Nigeria, Cameroon, Ivory Coast, and Equatorial Guinea. Glencore concealed the bribe payments by entering into sham consulting agreements, paying inflated invoices, and using intermediary companies to make corrupt payments to foreign officials.
- In Nigeria alone, Glencore and its subsidiaries paid more than \$52 million to the intermediaries, intending that those funds be used, at least in part, to pay bribes to Nigerian officials.

Commodities FCPA Cases:

Glencore International A.G (cont'd)

GLENCORE

- In the DRC, Glencore admitted that it conspired to and did corruptly offer and pay approximately \$27.5 million to third parties, while intending for a portion of the payments to be used as bribes to DRC officials, in order to secure improper business advantages. Glencore also admitted to the bribery of officials in Brazil and Venezuela. In Brazil, the company caused approximately \$147,202 to be used, at least in part, as corrupt payments for Brazilian officials.
- In Venezuela, Glencore admitted to conspiring to secure and securing improper business advantages by paying over \$1.2 million to an intermediary company that made corrupt payments for the benefit of a Venezuelan official.
- Separate from the FCPA charges, Glencore settled allegations that it conspired to manipulate two benchmark price assessments for fuel oil products.
- Under the terms of the DOJ plea agreement, DOJ agreed to credit nearly \$256 million in payments that the company makes to the CFTC, to the court in the U.K., as well as to authorities in Switzerland
- Glencore's U.S. settlement was part of coordinated resolutions with the CFTC in the United States, as well as criminal and civil authorities in the United Kingdom and Brazil.
- On August 5, 2024, Glencore settled a parallel investigation with the Swiss Office of the Attorney General, agreeing to a \$152 million penalty/disgorgement.

Commodities FCPA Cases:

Vitol, Inc.



- On December 3, 2020, DOJ announced that **Vitol Inc.**, an affiliate of one largest energy trading firms in the world, agreed to pay a combined \$135 million to resolve the DOJ's investigation into violations FCPA and to resolve a parallel investigation in Brazil.
- According to the company's admissions and court documents, between 2005 and 2014, Vitol and its co-conspirators paid bribes of more than \$8 million to at least four officials at Brazil's state-owned and controlled oil company **Petróleo Brasileiro S.A. – Petrobras** (Petrobras). Vitol paid these bribes in exchange for receiving confidential Petrobras pricing and competitor information.
- Vitol also admitted that from 2011 to 2014, it bribed at least five other Petrobras officials in exchange for receiving confidential pricing information that Vitol used to win fuel oil contracts with Petrobras.
- Vitol also admitted to a second conspiracy to bribe officials in Ecuador and Mexico in order to obtain and retain business in connection with the purchase and sale of oil products. Between 2015 and July 2020, Vitol agreed to offer and pay more than \$2 million in bribes to officials in Ecuador and Mexico.
- In furtherance of this bribery scheme, Vitol and its co-conspirators entered into sham consulting agreements, set up shell companies, and created fake invoices for purported consulting.
- Vitol also agreed to disgorge more than \$12.7 million to the Commodity Futures Trading Commission (CFTC) in a related matter and to pay the CFTC a penalty of \$16 million related to trading activity not covered by the deferred prosecution agreement with DOJ.

Other Recent Enforcement Actions: Telefonica

The image shows the Telefonica logo, which consists of the word "Telefonica" in a stylized, cursive script font. The logo is positioned above a horizontal line.

- On November 8, 2024, **Telefónica Venezolana C.A.**, a Venezuela-based subsidiary of Telefónica S.A., a publicly traded global telecommunications operator based in Spain, agreed to pay over \$85.2 million to resolve a DOJ investigation into a scheme to bribe government officials in Venezuela to receive preferential access to U.S. dollars in a currency auction.
- According to court documents and admissions, in 2014, Telefónica Venezolana (a “a subsidiary and agent of a U.S. issuer”) participated in a government-sponsored currency auction in Venezuela that allowed it to exchange its Venezuelan bolivars for U.S. dollars.
- To ensure its success in the auction, Telefónica Venezolana recruited two suppliers to make approximately \$28.9 million in corrupt payments to an intermediary, knowing that some of those funds would be paid as a “commission” to Venezuelan government officials. To conceal the bribe payments, Telefónica Venezolana covered the cost of the bribes by purchasing equipment from the two suppliers at inflated prices.
- As a result of the scheme, Telefónica Venezuela received over \$110 million through the currency auction, which it used to purchase equipment from the two suppliers it recruited to join the scheme.
- According to DOJ, despite the Company’s cooperation, “in the initial phases of the department’s investigation, Telefónica Venezolana failed to timely identify, collect, produce, and disclose certain records and important information, which affected investigative efforts by the department and reduced the impact of Telefónica Venezolana’s cooperation.”

Other Recent Enforcement Actions: Corficolombiana



- On August 10, 2023, Corporación Financiera Colombiana S.A. (“**Corficolombiana**”), a Colombian financial services institution, agreed to pay over \$80 million to resolve parallel bribery investigations by criminal, civil, and administrative authorities in the United States and Colombia stemming from the company’s involvement in a scheme to pay millions of dollars in bribes to high-ranking government officials in Colombia.
- Corficolombiana is majority-owned and controlled by Grupo Aval Acciones y Valores S.A., a Colombian holding company and issuer in the United States.
- According to court documents, between 2012 and 2015, Corficolombiana conspired with Odebrecht to offer and pay more than \$23 million in bribes to high-ranking Colombian government officials in order to win a contract to construct and operate a highway toll road.
- To carry out the bribery scheme, Corficolombiana caused other entities to enter into fictitious contracts with companies associated with intermediaries that passed along the bribe payments to the Colombian government officials. Ultimately, Corficolombiana earned approximately \$28.63 million in profits from the corruptly obtained business.

Recent Anti-Corruption Actions by Latin American Enforcement Agencies

- On November 13, 2024, a federal appeals court in Argentina upheld a guilty verdict for **former President Cristina Fernandez de Kirchner**. The former president, who served two terms as president between 2007 and 2015 and mostly recently was vice president from 2019 to 2023, was found guilty of defrauding the state and given a six-year prison sentence in December 2022. The case can still be appealed to the Supreme Court.
- On October 21, 2024, **former Peruvian President Alejandro Toledo** was sentenced to 20 years and six months in prison in connection with bribes received from Odebrecht. The conviction is part of a string of cases stemming from Odebrecht's extensive corruption scheme. Former president Toledo's sentence is the latest step in a long-running legal battle that resulted in his extradition from the United States on April 19, 2023. The court convicted Toledo on collusion and money laundering charges in connection with accepting \$35 million in bribes from Odebrecht in exchange for a contract to build a major highway in the South American nation.

Considerations for Investigations in Latin America

- Use of off-company platform and/or ephemeral communications (e.g., WhatsApp, Signal, Telegram)
 - Lack of a clear policy on usage and preservation of communications
 - Access to such communications can pose a significant challenge for investigations
- Strict labor laws that may limit potential employee termination/discipline
- Progressively more robust data protection regimes that can complicate investigations
- More common practice of recording interviews, which may create discovery or access issues

Presenters



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