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FEATURED Q&A

Are Latin America's Whistleblower Laws Working Out Well?



In some countries of the region where new laws have been enacted, their effectiveness in promoting whistleblowing is disputed, Julissa Reynoso and Luis Paternina say below. // Images: stockMonkeys.com and adil113 (altered by Advisor staff) via Creative Commons license 2.0.

Q Last year, Mexico enacted sweeping changes to the country's anti-corruption regime, including new whistleblower protections for individuals. Also last year, Argentine authorities extended special benefits to whistleblowers, such as reducing the length of prison sentences, when they report certain types of public corruption. What is the state of whistleblower laws in Latin America and the Caribbean? Are such laws effective ways to encourage reporting corruption and allowing people to speak up when they see wrongdoing? What best practices in protecting whistleblowers need to be replicated, and what flaws in the system should be corrected? Should whistleblowing laws apply differently to the public and private sectors?

A Raquel Florez, global investigations partner, and John Warren, senior associate, at Freshfields Bruckhaus Deringer: "Whistleblowing is not yet widely recognized as a tool for combating corruption across all of Latin America and the Caribbean; there are substantial regional disparities regarding the level of protection afforded whistleblowers. Nonetheless, some countries are taking steps to promote whistleblowing. For example, Colombia's country statement for the 2016 Anti-Corruption Summit in London included a commitment to draft a Whistleblower Protection Bill. These legislative reforms are likely to gain momentum, as they are consistent with global trends in anti-corruption enforcement. For example, there is growing recognition that cooperation from those with knowledge of alleged corruption schemes is vital for enforcement efforts, which has been exemplified by the frequent use of leniency agreements in recent high-pro-

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Opposition Rejects Maduro's Plans for Constitution

Opposition leaders pledged to march on the education ministry today, with rallies planned nearly every other day this week.

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Fire Erupts at Mexican Oil Pipeline

Mexican officials in the state of Puebla said Sunday that firefighters are working to put out the blaze in the town of Nenetzintla, where clashes over illegal fuel thefts killed 10 people several days ago.

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POLITICAL

Brazil Fires Head of Indigenous Affairs Agency

Antonio Costa, who took over Brazil's National Indian Foundation only in January, said that his opposition to political elites and entrenched power was behind his ouster, while government officials cited the need for more efficient management.

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Costa // File Photo: Government of Brazil.

POLITICAL NEWS

Opposition Boycotts Maduro's Plans to Rewrite Constitution

Venezuelan opposition parties on Sunday refused to join President Nicolás Maduro's plan to create an elected assembly to draw up a new Venezuelan constitution, Agence France-Presse reported. Henrique Capriles, head of the center-right Democratic Unity Roundtable, or MUD, formally declared it would not participate in the effort. "We cannot take part in a fraudulent process," Capriles said at a news conference.



Tintori (with flag) led marchers in Caracas on Sunday. // Photo: Twitter (@liliantintori).

"We have a constitution, and the government cannot repeal it by act of force." Maduro has proposed electing half the members of the constituent assembly by voting in sectors that the opposition says are government-controlled, while the rest would be chosen in municipal elections. The government has organized meetings today at the presidential palace to begin the process. Meanwhile, the wife of the jailed Venezuelan opposition leader, Leopoldo López, on Sunday was allowed to visit her husband in prison for the first time in over a month, Reuters reported. Rumors last week that López was seriously ill made international headlines. In a message to supporters via his wife, Lilian Tintori, López urged street demonstrators to keep protesting. "Leopoldo is proud of Venezuela and asks us to keep fighting," she said. Opposition leaders pledged to march on the education ministry today, with rallies planned nearly every other day this week. More than 30 people have died in street protests

over the past month, with more than 1,800 people imprisoned. International pressure is mounting to resolve the crisis. Opposition leader Julio Borges said in a posting on Twitter that he spoke with U.S. Vice President Mike Pence on Friday, Bloomberg News reported. Pence expressed concern about human rights violations and the constitutional rupture in the country. Borges had spoken the same day with U.S. National Security Adviser H. R. McMaster. On Saturday, U.S. President Donald Trump and Peru President Pedro Pablo Kuczynski discussed the situation in Venezuela over the phone, according to the White House. Maduro on Sunday accused international media of carrying out a "campaign" to justify violence in the country that would lead to foreign intervention or a coup d'état, El Universal reported.

Brazilian Gov't Fires Head of Indigenous Affairs Agency

Brazil's Justice Ministry on Friday fired the head of the agency tasked with handling indigenous issues, citing the need for more "efficient management," Agence France-Presse reported. The move came a week after 13 members of one tribe were wounded in a bloody attack by ranchers in a land dispute. However, Antonio Costa, who took over the National Indian Foundation, or FUNAI, only in January, said that his opposition to a planned high voltage power line project that would go through indigenous lands in Roraima was the real reason behind his ouster, Folha de S.Paulo reported. The dismissal was "because I'm honest and I defend the Indian cause against the agribusiness lobby," Costa said, adding that the agency's budget had been cut 44 percent even despite a growing workload. Costa also suggested he was ousted because he refused to give jobs in the agency to dozens of people favored by leaders in Congress who had no experience in indigenous affairs. Lawmakers in Brazil have been considering controversial legislation that would transfer the power to set indigenous reservation boundaries from the country's president to its Congress.

NEWS BRIEFS

China's Alibaba, Argentina Reach E-Commerce Deal

China-based e-commerce giant Alibaba has reached a cooperation agreement with Argentina's government, China Daily reported Sunday. Alibaba will help the administration of President Mauricio Macri introduce the country's wine and other agricultural products into China, as well as help small- and medium-sized businesses in Argentina "make progress" in China, in exchange for an Argentine government commitment to use Alibaba's electronic platforms as its official sales channels, according to the report.

Fire Erupts at Mexican Oil Pipeline, Site of Clashes Over Theft Crackdown

Mexican officials in the state of Puebla said Sunday that firefighters were working to put out a blaze in the town of Nenetzintla, where clashes over illegal fuel thefts killed 10 people several days ago, the Associated Press reported. Authorities have been trying to crack down on illegal pipeline thefts that cost Mexican state oil company Pemex about \$1.5 billion a year. Last Wednesday, gunmen opened fire on army patrols investigating pipeline thefts. Four soldiers and six attackers were killed, according to the report.

Peru Miners Threaten Strike in June

Miners in Peru voted on Friday to approve a national strike in June to protest government labor proposals, Reuters reported. Union officials representing workers at some of Peru's largest mines said the strike is a protest "against the new labor rules that reduce workers' rights," according to the report. The news is a fresh blow for Australia's Freeport-McMoRan, the majority owner of the country's largest copper mine, Cerro Verde, which was hit by a three-week strike in March.

BUSINESS NEWS

First Data Reports Stronger Results in Latin America

New York-based First Data Corporation reported today that strong results in Latin America helped push financial returns into positive territory in the first quarter. The company's Global Business Solutions unit in Latin America posted revenue of \$59 million in the first quarter, up 59 percent compared to the same period last year, driven by strong results in Brazil and Argentina. In its Global Financial Solutions unit, Latin America revenue was \$33 million, up 6 percent, or up 8 percent excluding currency impacts, benefiting from stronger performance in Colombia and Argentina. Overall, the company's consolidated revenue for the first quarter was \$2.8 billion, up 1 percent as compared to the prior year period. One of the world's largest electronic payments processors, First Data serves roughly 6 million merchants and some 4,000 card issuers in 35 countries.

Liberty Global Reverses Declines in Latin America

Denver-based cable T.V. and Internet giant Liberty Global on Sunday said that its Latin America and Caribbean business unit in the first quarter reversed "most" of the customer declines the company suffered in the last quarter of 2016, adding 33,000 organic customers in the period. However, operating cash flow at the company's "LiLAC" unit was down 10 percent year-over-year, an "anomaly" that CEO Mike Fries said was anticipated due to the company's acquisition of Cable & Wireless a year ago. The combined companies added a total of 42,000 recurring revenue-generating subscribers, up 97 percent year-over-year. LiLAC's first-quarter performance was helped by revenue in Chile and Puerto Rico, which grew 7 percent and 3 percent, respectively.

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file corruption prosecutions. A natural next step is to expand beyond encouraging individual defendants to share information to encouraging third-party whistleblowers to come forward. Passing supportive legislation is a necessary, but not sufficient, step for promoting whistleblowing: it is also important to remove obstacles—such as fear of retaliation—that provide practical barriers to whistleblowing. Safeguards to protect whistleblowers complemented by public outreach and the encouragement of corporate awareness and training can help ensure better awareness of reporting mechanisms and accompanying legal protections. Perhaps unsurprisingly, most existing whistleblower laws in the region target the public sector. Public and private sector corruption are, however, often overlapping and mutually reinforcing, for example in relation to public procurement. Best practice would include instituting an overarching culture of compliance and vigilance spanning both sectors."

A **Julissa Reynoso, partner, and Luis Paternina, international associate, at Chadbourne & Parke:**

"In recent years, a number of countries in Latin America have included whistleblower protections for individuals in their new anti-bribery legislation. Last year alone, Argentina and Mexico, two Latin American countries that received low marks from Transparency International's Corruption Perceptions Index, enacted such protections. Nonetheless, there are a number of countries that have not joined this bandwagon or have done so only in a limited way. Where these laws have been enacted, their effectiveness in promoting whistleblowing is disputed. For instance, there have been concerns that Brazil's whistleblower protections, which were passed in August 2013, have been inadequate. Given the suspicion of governments in the region, more might need to be done to turn paper rights into practical results. To be effective, whistleblower laws and policies should protect whistleblowers

from retaliation (i.e. blacklisting, unjustified termination, reduction of pay or prospects of promotion) and incentivize disclosures through offers of financial rewards or immunity from prosecution. These protections and incentives should be available in

“There are a number of countries that have not joined this bandwagon.”

— Julissa Reynoso and Luis Paternina

equal measure to members of the public and private sector so as to ensure that corporations and governments are not defrauded. Whistleblower laws should also be drafted to be as clear and understandable to members of both the public and private sector as possible, as they can only be truly effective if individuals know and understand that such an option is available to them. Ultimately, a broader adoption of such legislation in Latin America and the Caribbean should mutually reduce corporate and governmental corruption, increase trust amongst trade partners and foster economic growth."

A **Gene Smith, president and CEO of Smith Brandon International:**

"Let's be practical: whistleblower protection is a step in the right direction. Too many business communities across the Americas follow the tradition-honored rule of 'that's how we've always done it.' To break some of those hidebound rules and practices, which may include pay-offs or kickbacks, concrete measures have to be defined, set up and implemented. Complications immediately arise when considering the whistleblower: who is this person? What is his or her background, and does that include access to information

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disclosed? What about motive, which could be interest in best practices, concern for the common good, commitment to principles of corporate governance or professional or personal ax-grinding? A soft-landing should be available to the informant who has the fortitude to step forward, who will be forced to adjust to a separate bureaucracy—where the oversight agency and law enforcement may speak a different language and move at an unknown pace, sometimes eager and sometimes reluctant to proceed. That soft-landing should allow for anonymity, at least to some degree; an identified point of contact, to stop the bureaucratic shuffle and the repetition or duplication of reporting; and some legal status that allows for a personal remedy for the whistleblower, who may be betrayed by the system. Mexico has taken steps to protect its whistleblowers with major new legislation, including the establishment of an independent prosecutor. Argentina and Brazil have reduced penalties for whistleblowers who assist in anti-corruption cases. Some new laws may be beneficial; some may need to be tweaked over time. All provisions for whistleblower protection would benefit from review and comparison on what is working and what is not. Meanwhile, a good starting point might be a recent study (2014) on 'Whistleblower Protection Laws in G20 Countries' and its call for 'Priorities for Action' (sponsored by Blueprint for Free Speech, among others)."

A **Alejandro Salas, Americas director at Transparency International:** "Whistleblowing legislation in Latin America and the Caribbean is still in its infancy, though it's moving in the right direction. As grand corruption scandals across the region continue to make the headlines in the region and dominate the day-to-day of our public life, the importance of blowing the whistle on corruption has become a priority. Legislation needs to reflect the realities of society and public life. It is increasingly understood that whistleblowers play an essential role in

exposing corruption, fraud, mismanagement and other wrongdoing that threaten the rule of law. By disclosing misdeeds, whistleblowers have helped save countless lives and billions of dollars in public funds, while preventing emerging scandals and disasters from worsening. But laws have to be properly written, as well as implemented, in order to be effective in encouraging people to speak up when they see wrongdoing. Let's not forget that whistleblowers often take on high personal risk. They may be fired, sued, blacklisted, arrested, threatened or, in the worst cases, assaulted or killed. Protecting them from such retaliation is essential, while also enhancing openness and accountability in government and corporate workplaces. I've met a couple of these brave whistleblowers from both Brazil and Venezuela. Because there was no legal or institutional infrastructure to support them, what they did came at the very high personal cost of affecting their family life. We should not expect everyone to be a hero and sacrifice themselves. It should be a right of citizens to report wrongdoing. All people should have the inherent right to protect the well-being of other citizens and society at large. The absence of effective protection can therefore pose a dilemma for whistleblowers: they are often expected to report corruption and other crimes, but doing so can expose them to retaliation. To help, Transparency International has developed some principles that serve as guidance for formulating new and improving existing whistleblower legislation: 1) accessible and reliable channels to report wrongdoing; 2) robust protection from all forms of retaliation; and 3) mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing."

Editor's Note: Due to an editing error, an earlier version of this edition of the Advisor incorrectly credited Nigel Blackaby as the author of the comment from Freshfields that starts on page 1.

LATIN AMERICA ADVISOR

is published every business day by the Inter-American Dialogue, Copyright © 2017

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Latin America Advisor is published every business day, except for major U.S. holidays, by the Inter-American Dialogue at 1155 15th Street NW, Suite 800 Washington, DC 20005

www.thedialogue.org

ISSN 2163-7962

Subscription inquiries are welcomed at freetrial@thedialogue.org

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