Blogs
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Last month, attorneys from around the world descended upon Buenos Aires to tango with criminal justice and anti-corruption experts at the International Bar Association's 22nd Annual Transnational Crime Conference.

Conference highlights included remarks from distinguished

members of the Argentine government, including the Minister of Justice and Human Rights, President of the Financial Information Unit, and Supreme Court President. These officials focused their comments on criminal justice reforms in Argentina, the role of regulators and the judiciary in establishing and inspiring confidence in the rule of law, and the hope that such efforts would improve Argentina's reputation in the global fight against graft and corruption. Panelists and attendees also discussed similar efforts across the globe, cross-border cooperation, and collateral issues to consider when representing clients subject to international anti-corruption inquiries or enforcement actions. Of note were discussions regarding the following: ***Evolving Mechanisms for Detecting and Penalizing Corruption***

1. *Increased use of money laundering statutes and administrative remedies.*

Although most anti-corruption laws around the world criminalize the *payment* of bribes to government officials, the *receipt* of bribes (passive bribery) is conspicuously absent from laws like the U.S. Foreign Corrupt Practices Act ("FCPA"). As a result, beneficiaries of bribes have traditionally escaped FCPA liability. However, panelists noted, recent years have seen an increase in anti-money laundering prosecutions and civil administrative actions targeting profits from corrupt dealings that otherwise fall outside the reach of traditional anti-bribery paradigms. Using money laundering statutes, U.S. prosecutors were able to prosecute officials working for Venezuela's state-owned energy company, Petroleos de Venezuela, S.A., who accepted bribes from several U.S. executives (themselves prosecuted under the FCPA). Panelists noted that more than €2 billion in anti-money laundering fines were assessed globally in 2018 alone, calling banks not yet penalized for money laundering issues "the exception and not the norm." Another new norm is the decoupling of predicate offenses (i.e., conduct generating illegal proceeds) from allegations that such proceeds were in fact "laundered," allowing prosecutors to bring intentional *and* negligent money laundering cases. Panelists also warned that lawyers were being targeted more than ever as negligent money launderers, based on the sources of client payments. Relatedly, panelists noted that prosecutors around the world are increasingly using civil asset forfeiture and other administrative remedies to discourage corruption. Ireland, for instance, has used criminal asset forfeiture as a tool against corruption for at least 22 years, finding that confiscating the benefits of illegal activity provides an immediate deterrent from that activity. U.K. Unexplained Wealth Orders, which debuted in the last half decade to combat the impression that the U.K. is a safe haven for ill-gotten gains, allow regulators to seize amounts over £50,000 that they *suspect* to be proceeds of a crime if owners cannot explain the source of those assets. In the Netherlands, the Authority for the Financial Markets ("AFM"), like the SEC, is empowered to supervise and investigate players in the country's financial markets and may assess administrative penalties which are difficult to contest in court. In Switzerland, suspicious activity reports ("SARs") call attention to transactions with questionable origins. Between 2012 and 2017, panelists said, the value of assets subject to SARs has quintupled. And in France, where the territorial reach of the anti-corruption law is limited, authorities look to other compliance regimes (e.g., health and safety regulations, export controls) to scrutinize potentially corrupt acts.

2. *The rise of corporate criminal liability and evolution of corporate cooperation credit.*

Thanks to the passage of Argentine Law 27.401 last year, Argentina has joined countries such as Australia, Mexico, Singapore, the United Kingdom, and the United States (to name a few) in establishing corporate

criminal liability, whereby legal persons (i.e., companies) may be prosecuted for corrupt acts undertaken either directly or indirectly for their benefit. (Note: the Brazil Clean Companies Act provides for civil and administrative penalties for companies engaged in corrupt conduct, but criminal liability is limited.) Along with corporate criminal liability has arisen the concept of cooperation credit, whereby companies may mitigate eventual charges, penalties, and other consequences by "cooperating" in government investigations into their own wrongdoing. Although cooperation credit is now a well-known and (relatively) defined commodity in the U.S., the scope and value of cooperation credit in other jurisdictions is still a work-in-progress. Although the U.S. Department of Justice all but expects companies to disclose factual findings from internal investigations to earn cooperation credit, the U.K. Serious Fraud Office ("SFO") prefers companies to delay internal investigations until the SFO's own investigations are complete in order to avoid "trampling the crime scene." Similarly, panelists advised against engaging in any internal investigation in Argentina without first contacting the Argentine authorities, due to uncertainty over the value of post-investigation notifications and to fend off accusations of evidence manipulation. In Brazil, where internal investigations were considered relatively pointless prior to the availability of cooperation credit, the calculus is more complicated still – since individuals are subject to criminal prosecution and companies are subject to civil and administrative oversight, the cooperation process involves multiple authorities and penalty scales. And while a new law in France allows prosecutors to reward companies for cooperation with deferred prosecution agreements ("DPAs") (common in the U.S.), the parameters of DPA benefits are undeveloped and the French judiciary seems reluctant to adopt them. ***International Cooperation in Evidence Collection and Prosecution*** It is now nearly impossible to investigate large corruption schemes without the participation of authorities in multiple jurisdictions. And, due to the U.S.'s recent "anti-piling-on" stance, whereby the U.S. shares penalties recovered from individuals and entities investigated and prosecuted for wrongdoing with jurisdictions that took part in those investigations and prosecutions, authorities in other countries are incentivized more than ever to work together. While panelists generally agreed the U.S. would likely play a leading role in any corruption investigation with any *hint* of a nexus to the U.S., panelists were adamant that authorities in other jurisdictions are no longer just peripheral concerns – investigation and cooperation strategies must account for the expectations and demands of multiple agencies at once. And, panelists concluded, counsel should now understand that, more often than not, information is being shared across jurisdictions. With respect to "Operation Car Wash" ("Lava Jato"), for instance, which began as a money-laundering investigation into Petrobras (Brazil's national oil company) and has been dubbed by some as the "biggest corruption scandal in history," panelists noted significant cooperation between U.S. and Brazilian law enforcement. Cooperation between the U.S., Argentina, and other Latin American countries has also increased. Although panelists acknowledged that evidence seized by law enforcement (or in connection with civil proceedings) in one country generally cannot be shared with other jurisdictions absent a formal request, they noted that the invocation of Mutual Legal Assistance Treaties ("MLATs") was also on the rise. In fact, Swiss prosecutors have been known to proactively solicit MLAT requests from foreign authorities, allowing them to share information otherwise protected from disclosure under bank secrecy laws. In so doing, the Swiss authorities facilitate prosecutions without having to bring charges themselves. ***Looking Forward*** Based on panel discussions and audience comments, it seems relatively certain that creative prosecution theories will continue to arise, and cross-border cooperation will continue to grow, increasing exposure under U.S. law and the laws of many countries around the world. Transnational corporations should heed these trends and ensure the laws of all relevant jurisdictions receive due consideration when assessing their compliance programs, as well as their procedures for responding to regulatory inquiries.

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