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**“How to Dribble Corruption Risks in Latin America: Learn How to Avoid Faults, Penalty Kicks, and Score Compliance Goals.”**

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**Disclaimer:**

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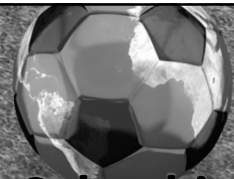
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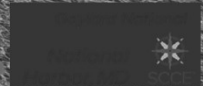
**2019**

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**2019 Corruption Risks in Brazil, Argentina, Colombia, and Mexico: Gain insight into recent corruption headlines and their impact on local anti-corruption laws and the overall culture of compliance**



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**2019**

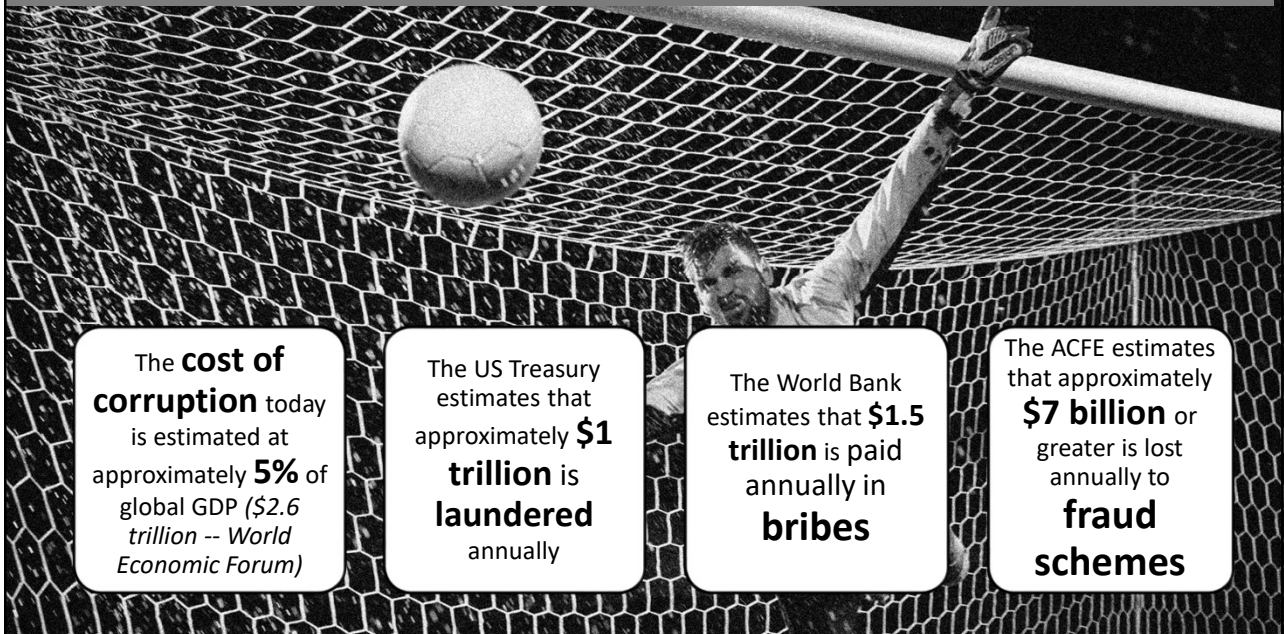
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## Corruption in Latin America



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## Compliance vs. Non-Compliance Match



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## Learning from Mistakes 2019: FCPA Violations

**Lack of a sufficient compliance program**

**Improper relationships with PEPs**

**Bribery** schemes for infrastructure projects

**Lack of Tone from the Top**

**Use of Third Parties to Make Illicit Payments**

**Inadequate Accounting Controls Overseas**

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## Red Card: FCPA Enforcement Index

Year	Number of Companies	Fines
2018	16	\$2.89 billion
2017	11	\$1.92 billion
2016	27	\$2.48 billion
2015	11	\$133 million
2014	10	\$1.56 billion
2013	12	731.1 million

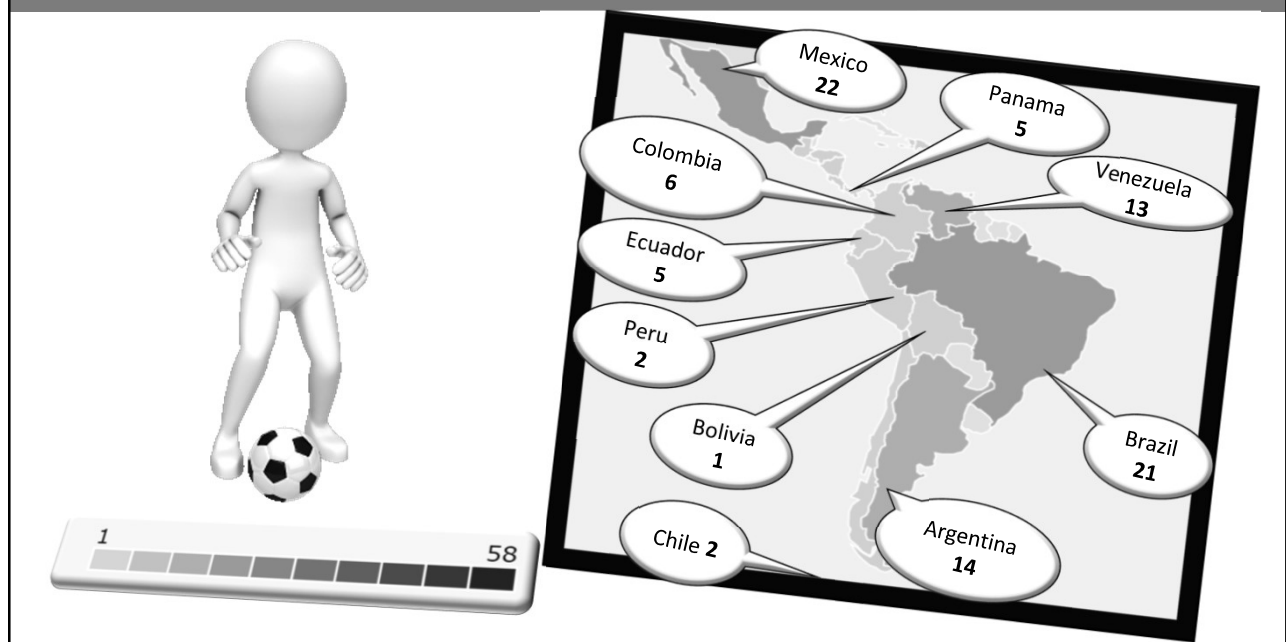


- **44% Percent of Companies that Self-Reported**
- **38 Months – Average Length of FCPA Related Investigations**

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## Number of FCPA Investigations in Latin America



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## Foul Play – Not playing a fair game



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## Practice: Ongoing Developments

Foreign jurisdictions are continuing to expand their enforcement capabilities and laws/regulations.

Additional voluntary disclosures, based on joint efforts and evidence of misconduct being collected.

US sharing information with foreign partners to conduct additional investigations/prosecutions.

Companies are being forced to view compliance requirements from a global perspective.



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## Learning the Ropes: Global Trends

Changing Public Perception of Bribery and Corruption

Awareness of the Importance of Compliance Programs

Comprehensive investigations and regulatory reviews;

Increased punishment of offenders.

Use of Technology

Information Sharing

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## Stats: 2019 Anti-Bribery and Corruption Survey

**80%** expect bribery and corruption risks to increase

**38%** never trained their third parties

**43%** have third parties in high-risk or sanctioned jurisdictions

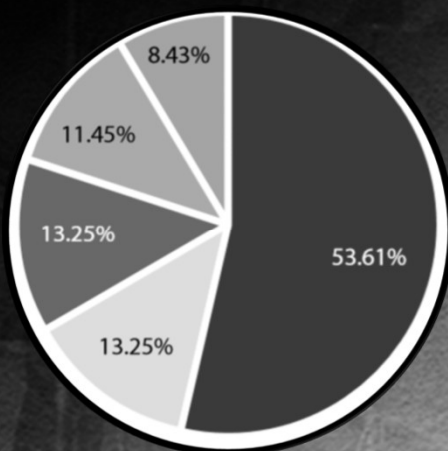
**50%** are doing business in high-risk areas

**56%** of third parties failed to meet organization's standards - reputational or integrity issues

**54%** said that less than ¼ of third parties go through DD

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## What % of your third parties undergo DD?



■ Less than 25 percent  
■ None  
■ About 50 percent  
■ Nearly all of them  
■ More than 50 percent

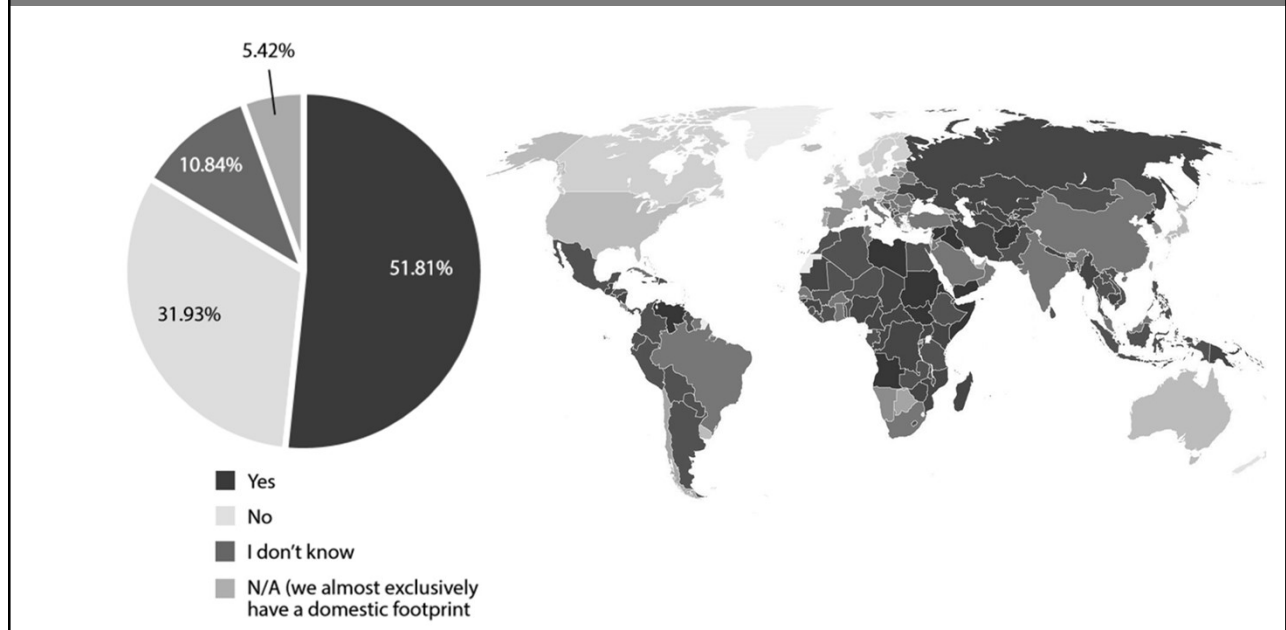
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## How frequently do you train your third parties on ABC?



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## Do you have third parties based in high-risk jurisdictions?



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## Things to Consider in the Course of this Session

Is your compliance program comprehensive and does it assist our organization and its employees in conducting themselves ethically in Latin America?

Is your organizational culture one of ethics and integrity within the enterprise? Does your management lead by example and promote a culture of compliance?

Do you understand and manage third risk parties in your organization?

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**365 Days Later - The role of new governments and their influence in compliance and Anti-Corruption and Bribery regulations and trends in Brazil, Argentina, Colombia, and Mexico and their impact to corporate governance. What you need to know to navigate the global regulatory landscape.**

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## Argentina – Latest news



### ✓ **Investigation into Former President Cristina Kirchner**

- Cristina faces numerous formal investigations into allegations of money laundering and criminal association including the latest Notebook scandal;
  - ◆ Driver kept personal records of bribes paid by several businesspeople to government officials including Kirchner;
  - ◆ Prosecutors estimate nearly \$200 million was exchanged to win public works
  - ◆ Some businesspeople have confessed to those payments;
  - ◆ Kirchner enjoys parliamentary immunity and congress failed to pass an authorization to search her house;
- First Trial started in May 2019 and is expected to last 1 year;
- She announced a vice presidential bid for upcoming Argentina elections;
- Former vice president Amado Boudou was convicted for illicit enrichment and is serving a 4-year prison sentence.

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## Argentina – Regulatory Update



### ✓ **Anti-Corruption Legislation went into force in March 2018**

- ◆ Establishes criminal liability for companies doing business in Argentina;
- ◆ Imposes successor liability;
- ◆ Punishment for violating the law may result in one or a combination of criminal fines, suspension of state benefits, debarment, and dissolution;
- ◆ Exemption of penalties and administrative responsibility: proper internal investigation and existence of a compliance program prior and returned the benefit that was wrongfully obtained;
- ◆ Certain contracts with the Government require the company to have a “Integrity Program” and contain guidelines on how those programs should be implemented.

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## Argentina – Regulatory Update

- ✓ Dedicated Secretary for Public Ethics, Transparency and Fight for Corruption
- ✓ The National Anticorruption Plan (PNA) 2019-2023 - Initiative of the national government in order to plan coordinated and strategically the policies on integrity and fight against corruption of the centralized and decentralized National Public Administration, to be implemented in the next five years.



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## Brazil – Latest news

- ✓ **Operation Car Wash**
  - In the last year, an additional 110 people have been charged, bringing the total number to 438 people
  - Convictions have increased to 244
  - Car Wash Task Force launched 10 new phases bringing total to 57
  - Five of six Brazilian former presidents have been implicated
- ✓ **SBM Offshore N.V**
  - \$347 million settlement with Brazilian authorities
  - \$238 million Settlement with DOJ



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## Brazil – Regulatory Update

### ✓ **Operation Car Wash Leaks**

- Allegations that Judge Sergio Moro repeatedly counseled prosecutor Deltan Dallagnol via Telegram during more than two years of Operation Car Wash;
- In the conversation, then presiding Judge Moro offered advice to prosecutors and passed tips regarding the investigation raising ethics concerns;
- There were also chats raising questions about the quality of the charges that ultimately sent Lula to prison (Petrobras connection & Ownership of the Triplex);
- Concern of politization threat of corruption probes.



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## Brazil – Regulatory Update

### ✓ **Brazil's Clean Company Act 2014**

#### ✓ **State Regulations**

- Rio passed a state law requiring companies contracting with the state to have compliance programs;
- Several states working on similar projects;

#### ✓ **Under discussion: Ten Measures Against Corruption - still ongoing;**

#### ✓ **Plea bargains have remained as an essential tool for Brazilian authorities**

- Recent guidelines published by Prosecutor's Office on procedures necessary to enter into a plea bargain;
- Other Brazilian agencies encouraging whistleblowing and enhancing transparency;
- Minister of Transparency and Chief of the Comptroller General of the Federal Union.



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## Colombia – Latest news

### ✓ CB&I

- Colombia judge requested the arrest and extradition of US engineering executive and former CB&I CEO for their role in the corporate fraud that led to \$2 billion losses for Ecopetrol;
- The modernization project that was initially estimated to cost \$3.3 billion in 2013 ended up costing \$8 billion by 2016;

### ✓ Resignation of Attorney General Nestor Humberto Martinez

- Faced accusations of conflict of interest in the Odebrecht case.

### ✓ US Drug Administration recording conversation exposed corruption in Colombia Judiciary

- Possible clean up in Colombia court system.

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## Colombia – Regulatory Update

- ✓ All seven anti-corruption proposals presented to Congress in 2018 have failed:
  - Three-term limit for senators and representatives;
  - All elected officials must make their assets public;
  - All elected officials must make their voting record public;
  - All levels of government must make their budgets public;
  - Those convicted of corruption must go to prison without parole options;
  - The State must nullify all contracts with individuals or companies convicted of corruption;
  - Reduce congressmen's salary from 40 to 25 times the country's minimum wage.

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## Mexico – Latest news



### ✓ Odebrecht

- The company was cited for financial irregularities and fined \$60 million and it is prohibited from doing business with federal institutions and state government until 2020;
- Emilio Austin, Pemex former president accused of conducting a corruption scheme that involved ghost companies between 2012 and 2016
- Additional charges include tax evasion, bribery, illicit origin and criminal association;
- Austin allegedly used bribes received from Odebrecht to fund the electoral campaigns of the Institutional Revolutionary Party (Partido Revolucionario Institucional – PRI), including Former President Peña Nieto's;
- Additional charges include bribes paid in relation to the sale of steel company Ahmsa;
- Latest arrest issue for Austin was July 4, 2019. His whereabouts are unknown.

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## Mexico – Latest news



### ✓ Walmart

- Settlement with DOJ and SEC \$283 million dollars

### ✓ El Chapo Trial

- The trial against the drug cartel has included numerous allegations of political corruption. Alex Cifuentes, a Colombian trafficker testified that El Chapo paid \$100m in bribes to former President Pena Neto



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## Mexico – Regulatory Update



- ✓ **UMSCA (Replaced NAFTA)**
  - Significant development for anti-corruption enforcement in Mexico. Chapter 27 of Agreement is dedicated solely to anti-corruption National Anti-Corruption System implemented in 2016
- ✓ New Attorney General Alejandro Gertz Manero appointed in January 2019
- ✓ Congress is debating the removal of immunity for all government officials in corruption related cases

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## Political Perspective



### Brazil

- Bolsonaro facing challenges with Lava Jato leaks
- Several of his inner circle have been are under investigation including his son



### Mexico

- Allegation of bribe paid during a fail campaign in 2006
- Commitment to fight corruption is currently being tested



### Argentina

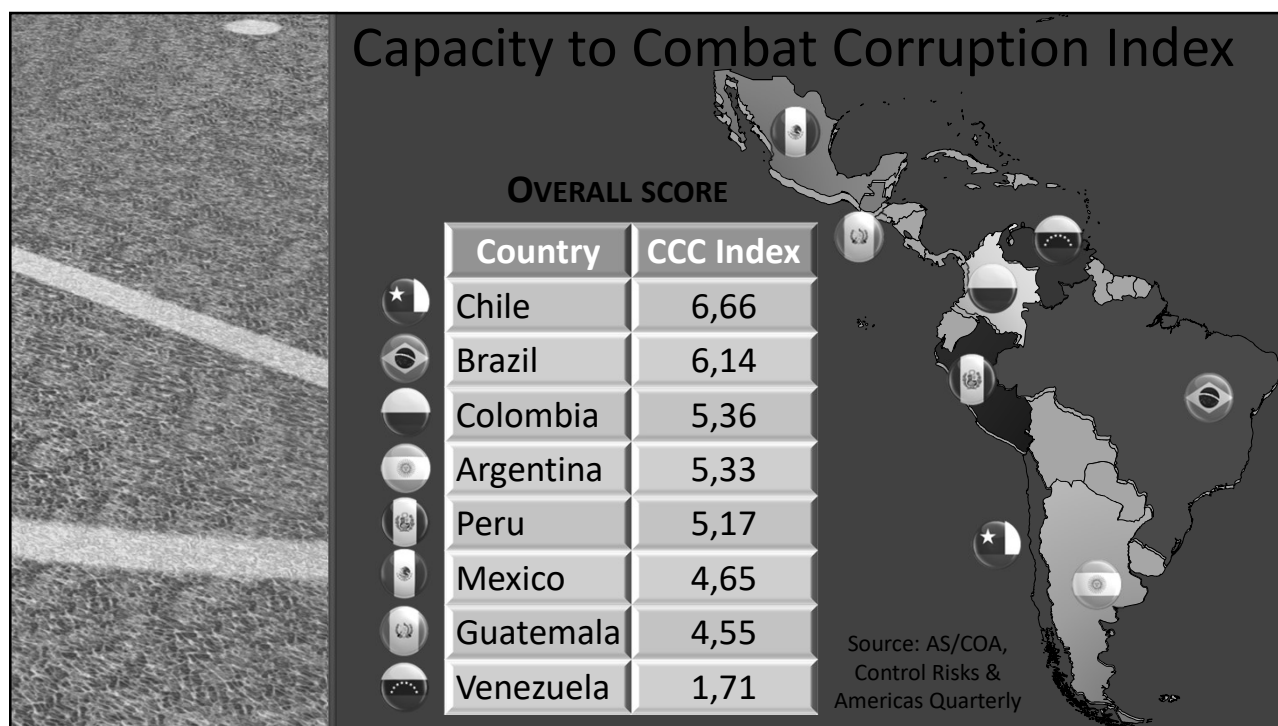
- Upcoming elections



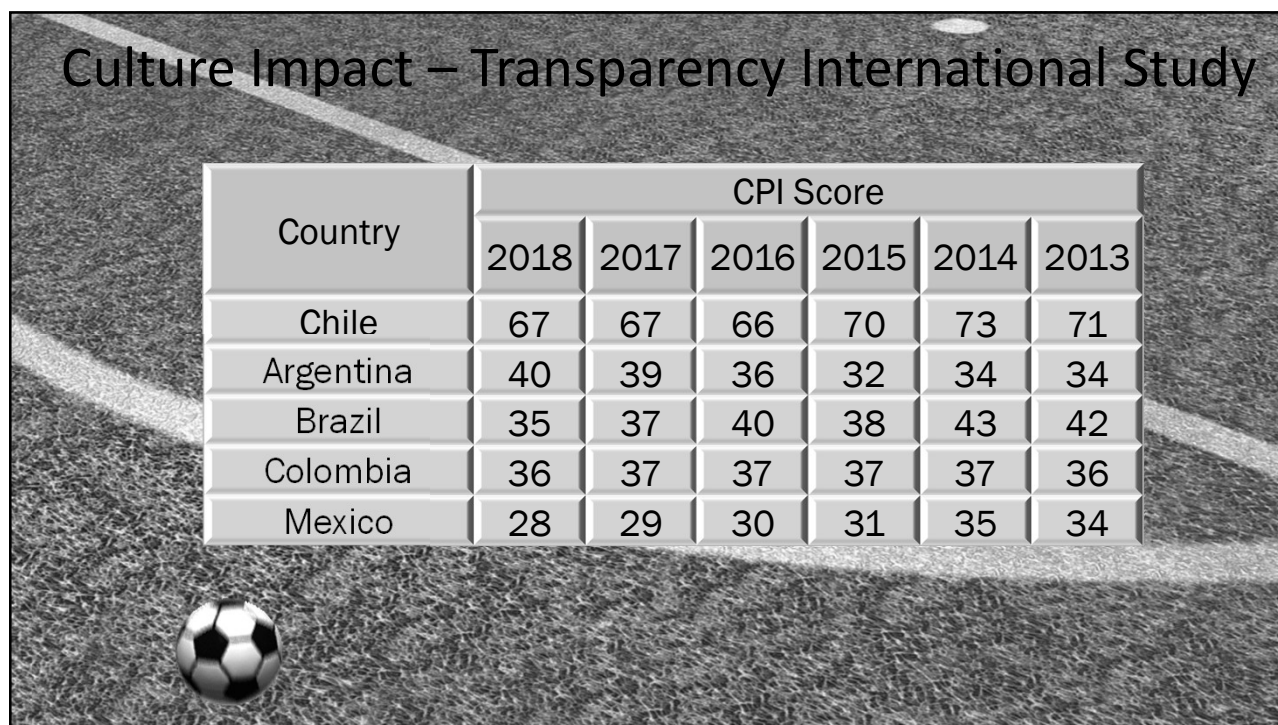
### Colombia

- Ivan Duque has not been able to make much progress with many failed initiatives due to lack of Congress support

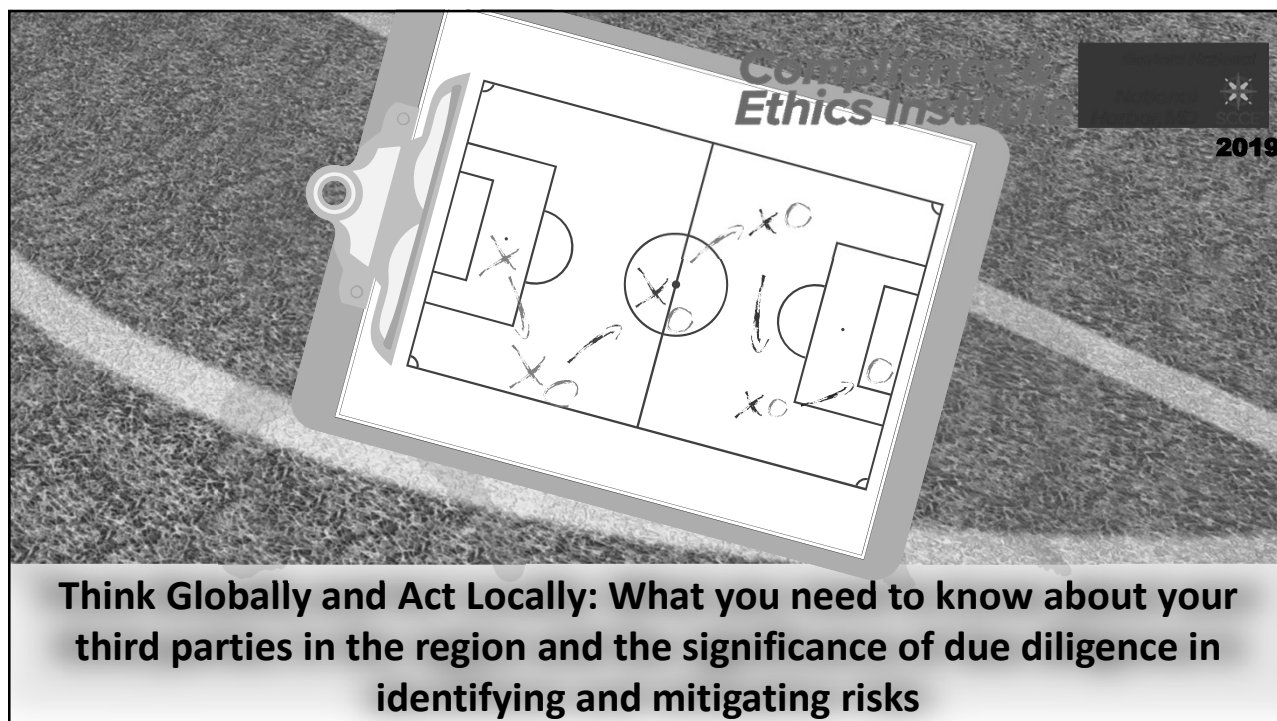
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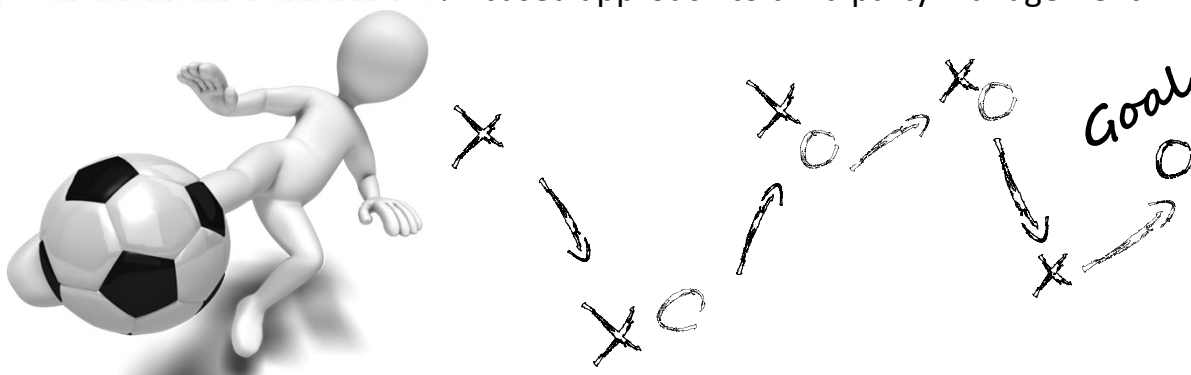


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## Thinking Globally

April 2019, DOJ issued “The Evaluation of Corporate Compliance Programs”:

-  Increased focus in what regards to third party management, which historically have factored into the vast majority of FCPA enforcement actions;
-  The Guidance endorses a risk-based approach to third party management.



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## Thinking Globally



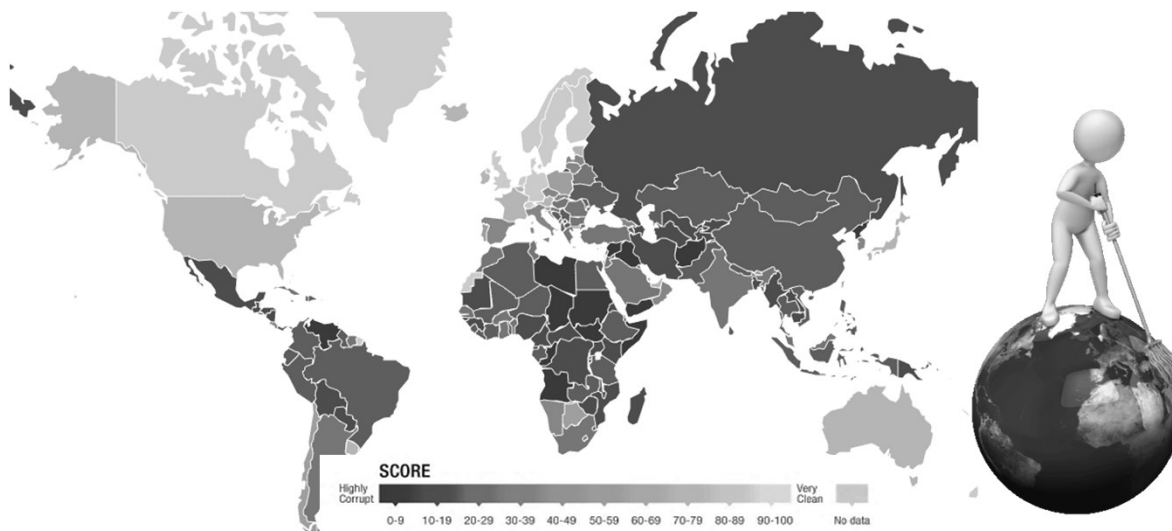
### DOJ will consider whether a company:

- has “appropriate business rationale[s]” for the use of third parties;
- has considered “the compensation and incentives structures” for third parties against compliance risks posed;
- has a compliance program appropriately “designed to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business” and “complex regulatory environment;
- has audit rights to analyze the books and accounts of third-parties, then evaluates *whether the company has exercised those rights in the past*.
- has “engaged in ongoing monitoring of the third-party relationships, be it though updated due diligence, training, audits, and/or annual compliance certifications by the third-party.”
- has terminated a supplier or business partner upon a company’s finding of misconduct, and which were the steps taken to ensure that such third parties cannot be re-engaged without appropriate authorization.

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## Acting Locally

With the new DOJ’s Guidance, multinational companies should be paying more attention to the management of third parties in Latin America.



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## Acting Locally: Getting a better Understanding

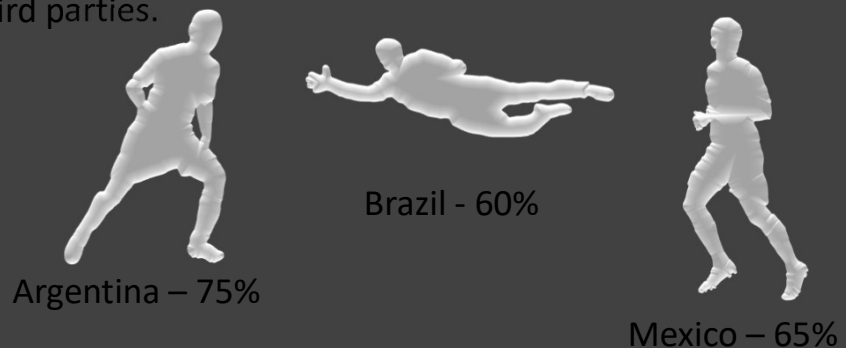
- It's a complex exercise – mostly for compliance professionals.
- Massive land size and population
- 24 nations with different cultures
- Different languages: Portuguese, Spanish, English and French
- And...  
High corrupt environment!!!!



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## Acting Locally: Getting a better Understanding

- An important component of anti-corruption compliance in Latin America is managing the risk of indirect bribery payments.
- Since 1990s, the majority of FCPA actions involving bribery in Latin America included the participation of third parties.



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## Acting Locally: Getting a better Understanding

Despite of the high risk involved, it is a big challenge to avoid the use of third parties when doing business in Latin America:

- Due to complex nature of regulatory regimes in Latin America, companies are forced to seek a third party's expertise;
- In some cases, legal systems require the use of third party, for instance, customs brokers in Mexico ("gestor");
- Interpersonal relationship are sometimes essential to the business opens the door to viable sales channel in a country.

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## Acting Locally: Mitigating the Risks

Third-party issues, such as agency relationships, can be difficult for companies to manage. But as many FCPA resolutions highlight, failing to address these issues both on the front-end and throughout a contractual relationship exposes entities to risks related to conduct by individuals outside of its control.



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## Acting Locally: Mitigating the Risks

- ◆ Request the third party to complete a risk-based questionnaire about its beneficial ownership, license, registration status, history of unlawful activity, business activities etc.;
- ◆ Request references from the third party's customers and business associates;
- ◆ Online searches: international and local denied party lists, sanctions screening, enforcement actions, adverse news – consider the language and key words;
- ◆ Interviews with third party personnel to understand risk profile and include questions about financial controls, company policies, procurement process;

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## Acting Locally: Mitigating the Risks

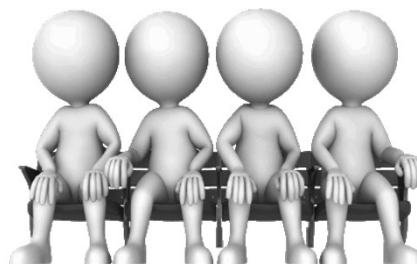
- ◆ Establish and document the reasonableness of third party's fees structure based on market rates. No cash payments clause in the contracts, and in higher risk situations avoid success fees;
- ◆ Execute a written contract with the third party that describes in detail the specific services it will provide, as well as its acceptance to adopt company's compliance policies. Additionally, include detailed reporting requirements/invoicing in the agreement.



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## **Acting Locally: Mitigating the Risks as set by DOJ's New Guidance**

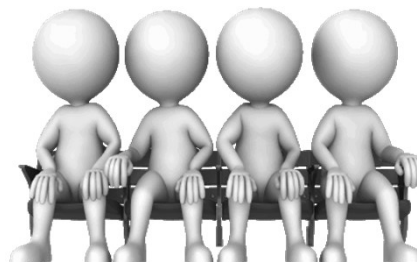
- ◆ Require periodic reviews of third party's books and records;
- ◆ Ongoing monitoring based on the risk profile of each third party;
- ◆ Require prior notice for the third party's contract with government officials as well as minutes meeting;
- ◆ Conduct compliance training of relevant third-party personnel;
- ◆ Document the business justification for use of each third party;



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## **Acting Locally: Mitigating the Risks as set by DOJ's New Guidance**

- ◆ Use of subcontractors and subagents only with Company's prior approval (and proper due diligence);
- ◆ Termination: there must be a clear provision specifying that a company can immediately terminate an agreement, at company's sole discretion if it has reason to believe the third party violated anti-corruption laws;



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## Acting Locally: THIRD PARTY DUE DILIGENCE - Overview

- ◇ A well-designed compliance program should apply risk-based due diligence to its third-party relationships.
- ◇ Third-party due diligence has always been key to a good compliance program. The Guidance makes clear that the DOJ expects this area of risk to be covered consistently and with great focus.
- ◇ Without proper vetting and controls, use of these types of third parties creates risk that they will make improper payments on a company's behalf.



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## Acting Locally: THIRD PARTY DUE DILIGENCE - Overview

- ◇ However, proper anti-corruption due diligence investigation in Latin America is not a straightforward exercise.



- ◇ It is required a lot of contextualization, which, in turn, requires a deep knowledge of the local players, politics and industry dynamics at play in a given jurisdiction. Consulting legal counsel to gain a clearer understanding about the results of due diligence, it's extremely recommendable.

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## Local Records

Any due diligence in Latin America should involve a thorough investigation of the subject in locally available open sources.



- ◇ Has the subject been party to civil, administrative, labor, tax or other legal proceedings?
- ◇ If the subject is a company in a regulated or licensed industry what is the status of its license and/or has it had any issues with the relevant regulator?

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## Local records

A search of more “traditional” sanctions databases may provide information on whether the target of your due diligence has been sanctioned by a global body or a regulator in say, the United States; it may not necessarily yield a result of the company in question has been fined or even banned from public contracting in Mexico or Brazil, for example.



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## Past Negotiations with the Government

- ◇ Has the subject company in your anti-corruption due diligence been awarded a significant amount of government contracts? If so, what were those contracts for?
- ◇ Do the prices seem reasonable compared with the local market? What is the payment structure?
- ◇ When were the contracts awarded and is there a pattern (for example, if a company begins receiving significant government contracts during a particular government, this may indicate it has a relationship with officials in that government or in the ruling political party)?

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## Past Negotiations with the Government

- ◇ What sort of contracts is the company awarded (for instance, are they no-bid contracts and, if so, how common is this practice in that jurisdiction)?
- ◇ Are there any data on the subject's contract compliance rate and how does it compare with other providers for that agency (for instance, the company may deliver the products as requested on 50% of its procurement contracts but this rate may be high compared to other contractors)?
- ◇ Has the company ever had issues involving its status as a government provider (e.g. revocation of status, competitor complaints involving its tender offers, etc.)?

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## Reputation

The target's reputation in the local market is also important to understand.

- ◇ Does it have a reputation for obtaining lucrative government contracts?
- ◇ How is it viewed by its competitors, clients, and providers?
- ◇ What about regulators or industry leaders?
- ◇ Avoid the use of ports that are known for its corrupt environment.

Ideally, this sort of reputational assessment combines a thorough review of open sources (including media, blogs, consumer protection bodies etc.) and confidential inquiries with key individuals in the particular jurisdiction(s).

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