



Closing the Net on Financial Crime

Navigating anti-money laundering
and corruption legislation in Latin
America

Virtual Round Table Series
Latin America Working Group 2017

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The fight against money laundering has been a global effort for 30 years now, since developed nations began to recognise the increasingly sophisticated methods used by criminals and terrorists to legitimise their earnings.

The group of G-7 nations were the first to respond by creating an international body dedicated to the fight against money laundering, namely the Financial Action Task Force (FATF). Since then the FATF has grown to 37 member countries with a number of associate groups attached, one of which is the Financial Action Task Force of Latin America.

Latin America has long been associated with money laundering and corruption, given its problems with drug trafficking, poverty and civil unrest. The spotlight was only intensified by the Panama Papers 'Scandal' that hit in 2015.

Bodies such as the FATF have sought to develop a framework of recommendations for governments to follow in order to combat the money laundering threat, although it has been slow going.

In recent years though, the more progressive Latin American countries have made serious efforts to step up their fight against money laundering and corruption, with some high profile results. The backing of international bodies such as the FATF, plus supra-national organisations like the US Department of the Treasury's Financial Crimes Enforcement Network (FinCEN), has been crucial to the fight.

Brazil, for example, has developed its own anti-money laundering and corruption legislation, which it has used to prosecute Operation Car Wash since 2014.

The investigation was designed to dismantle tax evasion schemes, money laundering activities and other crimes against the Brazilian financial system. So far, it has led to hundreds of arrests (of top ranked politicians and businessmen), the downfall of Petrobras and contributed to the eventual impeachment of former President Dilma-Rousseff.

US and UN money is also being used to set up aggressive anti-corruption commissions with police powers, designed to attack the root of the corruption problems in the poorest of Latin American states such as Guatemala and Honduras.

The result of this progressive activity, is that doing legitimate business in the region has become more difficult. There is a new raft of legislation to comply with and much greater scrutiny of corporate activities. Companies operating in Latin America must take steps to ensure all their staff are aware of new anti-money laundering policies and trained to implement them effectively.

Failure to do so can lead to significant fines or prison times for responsible individuals, particularly directors and top executives.

In this inaugural IR Global Virtual Series for Latin America, we focus on recent developments in AML and corruption legislation. We have chosen a small group of respected experts from four countries in the region to discuss the topic, debating legislative changes and the influence of foreign policies with the aid of examples. We also consider the steps Latin American countries are taking to improve their image with the rest of the global community.



THE VIEW FROM IR

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Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.



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Neil Montgomery is Managing Partner of Montgomery & Associados. He is a dual national (British/Brazilian) whose multidiscipline expertise, responsiveness and pragmatism offer a client experience second to none.

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Neil is a former associate of English law firm Richards Butler (now Reed Smith), having worked in the Shipping and International Trade & Commodities and Corporate Finance Departments in London.

Neil lectures on Doing Business in Brazil at the renowned Brazilian business school Fundação Getúlio Vargas – FGV) and he is the author of several published articles on Brazilian corporate and international law, arbitration, insurance and reinsurance and competition law.

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In addition, he is officer of the International Bar Association (IBA), American Bar Association (ABA) and the Society of Trust and Estate Practitioners (STEP) and is regularly engaged in conferences of issues of related to his practice of those institutions.

Javier also collaborates with the World Bank and International Finance Corporation with their Doing Business report and has been engaged for speaking in World Bank, STEP, IBA, ABA conferences on issues related to his practice.



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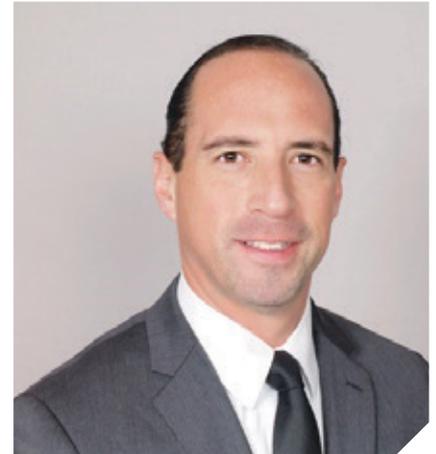
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Bob's practice focus includes federal trial and administrative matters involving asset seizures and forfeitures, health care fraud and abuse, criminal fraud and money laundering and criminal or civil matters involving customs laws and regulations.

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Luis F. Ortiz is an of counsel partner at the Ortiz, Hernandez & Orendain law firm based in Mexico doing anti-bribery preventive and investigative work in Mexico, Africa, Central and South America.

He has a solid international tax practice background and is a pioneer in Mexico on anti-corruption and anti-money laundering compliance, risk assessments and investigations.

Luis has recently been ranked in Chambers & Partners, named leading lawyer on anti-corruption and compliance. His firm was awarded 'most innovative firm'. He has also carried out anti-corruption training for the Superior Audit Office in Mexico, the Labour Ministry, major pharma distributors and dozens of multinational corporations doing business in Mexico and LATAM.

Luis has been active at the International Bar Association's anti-corruption committee and has lectured in several countries and universities. This includes TED Talks, the American Conference Institute, the Mexican Bar Association and the Mexican Financial Experts Institute where he led the anti-corruption committee until 2016.

QUESTION 1

Is there any specific anti-bribery or money laundering legislation in your jurisdiction that international clients should be aware of?

Brazil –Neil Montgomery & Eduardo Tunchel (M&A) In Brazil we do have legislation for both types of activity. Under the Anti-Money Laundering Act (AML), there is Law No. 9,613 from 1998, as subsequently amended by Law No. 12,683 in 2012.

Under the act, money laundering is defined as the actions of concealing or disseminating assets or funds, obtained through illicit activities or means, with the purpose or intent of dispersing that money into the economy as if it had originated from licit activities.

In terms of penalties, money-laundering is punishable by 3-10 years of imprisonment and a fine imposed on individuals. Money laundering offences can only be committed by individuals under Brazilian law, so it is usually the management of companies that are held criminally liable.

The AML also provides that certain corporate entities must inform the Financial Activities Control Council (COAF) about any suspicious activities that could be characterised as money laundering. These entities include financial institutions, banks, stockbrokers and credit card companies.

Administrative penalties may also be imposed on entities or individuals, with a maximum of double the transaction value or profit obtained from the transaction.

Corporate entities violating the AML may have operations cancelled, while convicted managers can be forbidden from being appointed again for up to 10 years.

In terms of anti-corruption practices, we do have a more recent law called the Brazilian Clean Company Act (CCA), Law No. 12,846, enacted in 2013.

The CCA does not impose criminal penalties on companies. However, the Brazilian Criminal Code and other Brazilian laws establish criminal offences for actions relating to corruption. The CCA applies to business entities and to other types of corporate entities, either formally incorporated or not, and regardless of their organisational form or corporate type.

The Brazilian Clean Company Act is a strict liability statute, which means that liability under its provisions is established merely by demonstrating that a director, officer, employee or other agent committed an illicit action to the benefit of the liable entity.

Under the act it is an offence to promise, give or offer an undue advantage to a public official, or a third person connected to that official. Financing or subsidising an illicit act or using another person or entity as an intermediary is also an offence, as is obstructing or interfering with the investigation or audit of a public agency.

Fines may be up to 20 per cent of the company's annual gross revenues, anywhere between 6,000 and 60 million Reals. The fine can never be lower than the benefit obtained by the company and the act holds parent and affiliated companies, subsidiaries, and members of the same consortium in a given public contract, jointly and severally liable.

The CCA states that the penalties arising out of the strict liability may be mitigated by the existence of adequate procedures to prevent bribery, such as compliance policies. It also authorises the execution of leniency agreements with companies that have been accused of violating its provisions and that self-report and cooperate in the relevant investigations and administrative proceedings. Such agreements may reduce the amount of the fine imposed by up to two-thirds.

Argentina –Javier Canosa (JC) The enactment of an Argentinian anti-money laundering law came about in 2000, after a request from the International Monetary Fund (IMF), which was a precondition to certain credit facilities.

A lot of water has passed under the bridge since then, and we have seen a huge amount of extra regulations in the last decade, requesting manuals, procedures for banks, financial institutions, gambling companies, art dealers, insurance companies, stock exchanges, brokers and accountants. It is noteworthy, that there are currently no AML-related obligations for lawyers.

We have had an inflation of AML regulation in Argentina, but, in fact, very few practical findings. Besides the huge corruption scandal involving the former secretary of public works hiding USD10 million in a convent, very little has been found.

After the 2015 presidential election, we have a new political party in the administration. President Macri has appointed a new professional authority called the Financial Information Enforcement Authority (financial information unit) and cooperates with international regulatory bodies, such as the Egmont Group. He has also formed new bilateral relationships with the US-based Financial Crimes Enforcement Network (FinCEN), and these changes are slowly altering the paradigm in Argentina.

In the past decade, it was just about collecting documents and filing suspicious activities reports; they reported almost everything. Now the authorities want subjects to file reports selectively, with a deeper risk analysis; only reporting the really suspicious activities.

As an example, in 2011 there was a problem between the US and Argentina, linked to how we used information delivered to Argentina by FinCEN for political purposes. They provided sensitive information to Argentina about a politician, but Argentina just published the information without investigating. Having wealth overseas can cause bad publicity for an officer, but, in fact, there was no violation of the law.

The US authorities decided to stop exchanging information with Argentina following that issue, until last year. We are now in full compliance with the global Financial Action Task Force (FATF) guidelines and are now exchanging lots of information with the US.

Argentina has also been pursuing full OECD member status and AML legislation is an important factor in that.

In terms of corruption, Argentina has not been very well regarded in the past according to transparency indices, but, in the future we will see more smart regulation, which is less cumbersome than in the past. We have a professional and up-to-date authority in Argentina, which is slowly improving.

US –Bob Targ (BT) We have new FinCEN rules in the US recently, that require disclosure by financial institutions of all offshore entities they deal with. This is deemed to be in response to the Panama Papers, but has in fact been in play for quite some time.

There has been an absolute explosion in Latin America, The Caribbean and the US of entities designed to be the opposite of transparent. FinCEN has imposed new requirements that require drilling down to the 25 per cent Ultimate Beneficial Ownership (UBO) level. This law has been practically imposed even more substantively by banks and institutions with many going down to the 10 per cent level.

Anyone using the US banking system is going to get a tremendous amount of UBO scrutiny and it's absolutely essential that anyone attempting to do business here is prepared to make full disclosures, or the bank won't open the account.

Politically-Exposed Persons (PEPs) are using offshores, and we also have an explosion of Office of Foreign Asset Control (OFAC) designations in the US against nations, individuals, criminal and commercial organisations, including Venezuelan judges, Russian and North Korean organisations.

It is very important that none of these sanctioned individuals are disguising their true identity or offshore interests to conduct business.



Gary Davidson, Latin America committee member, pictured at the IR Annual Conference 2017 in Berlin

The Department of Justice has transferred well to the current administration, and is emphasising investigations into corruption via the Foreign Corrupt Practices Act (FCPA) as well as OFAC and PEPS.

Any international clients with interests in the USA should be aware of these developments.

Mexico –Luis Ortiz (LO) Mexico has been in a state of constant activity regarding our legislation. We have enacted the second part of our anti-money laundering (AML) law which was created in 2013 and is now fully in force. Mexico is really interested in following up with international cases and there is a lot of cooperation going on with US and European authorities. We have cartels, soccer players and artists involved in AML and we are taking part in detailed investigations alongside the US Treasury Department (FinCEN).

The AML law covers 15 high risk activities. Those who carry out those types of activities must submit a monthly notice to the tax authorities to let them know who their clients are, in full compliance with the FATF guidelines. Mexico is being reviewed by the FATF right now and we will have a final report in a few months.

We used to have just one article to implement (AML 400BIS), dealing with the criminal aspect of money laundering, but the new AML law prevents and coordinates action nationwide.

In the anti-corruption area, we have an entirely new system We used to have a Federal law of procurement that dealt with corruption, but now we now have a system of seven laws dealing with bribery and all sorts of issues with public office.

There is now a catalogue of serious civil offences matching with criminal offences. They will be prosecuted and investigated from the administrative area of the government, and, should they find enough evidence for corruption, they can submit the file for criminal prosecution.

The offences include, bribery, unlawful participation in administrative procedures, influence peddling, use of false information, obstruction of powers, collusion, wrongful exercise of public funds and improper hiring of public officials.

Following a risk-based approach, the administration has issued an integrity manual, highlighting how corruption should be addressed in corporations, which follows FCPA guidance, UK bribery guidance and OECD guidelines.

QUESTION 2

How do foreign extra-territorial anti-bribery and anti-money laundering laws affect investments or transactions in your jurisdiction?

Brazil –M&A Foreign extra-territorial anti-bribery and anti-money laundering laws may have a considerable impact on investments and transactions in Brazil, especially in cases involving corporate entities with subsidiaries in Brazil, but headquartered in the USA, UK and other countries subject to such countries' anti-corruption laws.

There is influence where those companies have business partners (e.g., agents, distributors, suppliers, etc.) located in Brazil or where Brazilian companies are issuers of securities traded on the US securities and exchange market.

Multinational companies have started to adopt Codes of Conduct establishing anti-corruption practices for the company and how its employees, directors and shareholders should act. Breaching any of the Code of Conducts' provisions may cause employees/directors to lose their jobs/benefits, as well as be held liable for any other crimes.

Additionally, US and European countries have been demanding that anti-corruption/bribery provisions be included in agreements and transactional documents when contracting with Brazilian companies, as well as provisions detailing how such obligation can be audited and confirmed. Breaching such contractual provisions may result in the innocent party terminating the agreement with cause.

Further, criminal due diligence and compliance with companies' Codes of Conduct are routinely conducted by the buying side before deciding to enter into any M&A transactions or investment deals, since the target company's AML liability is not changed or terminated with the change of control/ownership.

Argentina –JC It's a significant piece of the due diligence on target companies, to ensure the deal is free of any illicit activity. I would say both AML and anti-bribery are the new normal and large companies need to have programmes and systems in place, particularly those with public exposure. Reports should be filed in real time, while a member of the board should be in charge of AML audits, instructions to the employees and compliance manuals.

US –BT With respect to foreign investment flowing into the US, everybody needs to be aware of the recent geographical targeting orders imposed by FinCEN. In many of the major metropolitan areas they have asked for back up information on real estate purchases, requiring the source of funds to be disclosed when a wire transfer or cash payment is made.

Anyone doing real estate investments in the US should be prepared to fully disclose the corporate structure, legitimacy of funds, individuals involved and source of funds.



Neil Montgomery pictured at the IR Annual Conference 2017 in Berlin

In terms of monies outflowing from the US, there are less tax shelters around the world than there were 15 years ago. Anyone looking to take advantage of more lax laws than the US has, will find most jurisdictions adhering to FATF standards, with new AML laws being passed all the time. People in the US shouldn't automatically assume that sending an investment offshore means it won't be properly reported back home.

Mexico –LO The Ministry of Administration is encouraging local and foreign investors to follow international best practices in a proposed 2017 Ethics and Integrity Manual; it explicitly states the FCPA as a best practice to follow. Foreign investors will also have to deal with new aggressive investigations into anti-money laundering by the Finance Intelligence Unit (UIF), plus know your customer (KYC) procedures for international corporations already residing in Mexico.

As an example, US citizens often come to retire in Mexico and buy property. The authorities require them to know who they are buying the land from, but the buyer also needs to disclose where the money to buy is coming from.

Mexicans also like to buy real estate in Florida, but the filters are tough. It requires the Mexican banking system to check where the money is coming from, whether that's inbound or outbound. For real estate transactions there are also cash limits, as there are for investment in jewels, arts, luxury cars and boats.

There is a strong influence from the FCPA and other controls.

QUESTION 3

Could you provide some examples of the application of domestic and foreign anti-money laundering legislation in your jurisdiction?

US –BT There are several examples where the US is jumping offshore to impose its AML jurisdiction. One good example is the Federation de Internationale de Football (FIFA) case, where soccer federation representatives were arrested and indicted due to bribery associated with the sale of media rights for the World Cup qualifying games.

The US got jurisdiction over the FIFA case, because many of the payments were made by wire transfers through correspondent banks using the Federal Reserve system in New York. We represent one of the individuals charged in the Eastern District of New York.

Elsewhere we see extensive use of the Office of Foreign Asset Control (OFAC), to designate foreign entities and individuals. We currently represent the Rosenthal family of Honduras in their OFAC case, plus we represent political figures and other individuals who have been designated by OFAC or are under criminal investigation in Venezuela and people linked to drug cartels or illegal currency exchanges in Mexico, Guatemala, El Salvador and Columbia,

OFAC is a potent weapon which takes the individual out of the world financial system. Most companies or jurisdictions, will not do business with an OFAC-listed person.

In terms of respecting foreign AML laws in the US, we just recently had a Federal Judge in Florida authorise the extradition of Former Panamanian President Ricardo Martinelli of Panama, who is accused of taping his business rivals and abusing anti-corruption legislation in Panama.

Mexico –LO We have had dealings with former governors extradited to the US, some from Mexico and some from Guatemala and Panama. They need to face Mexican law and US law for various offences from book and record keeping offences through to illicit monies travelling via the US Federal Reserve system.

There are also various bribery scandals in Mexico, including oilfield services company Oceanografía, which was the subject of a wide-ranging fraud investigation by the Mexican authorities.

Ten years ago, the US and Mexico didn't have the same level of cooperation that they do right now. US corporations doing business in Mexico, now more than ever, need to keep their books and records in place, because of false tax invoicing and sham tax transactions. We have defended those individuals who have been accused of doing that.

US –BT Many of you might be aware of the entity in Guatemala called the Comisión Internacional Contra la Impunidad en Guatemala (CISIG). It is a crime corruption commission, created with US and UN funding and given wide ranging investigative and police powers. There have been attempts to duplicate it in Honduras because of its effectiveness in curbing corruption.

The Guatemalan President recently caught a lot of flak for trying to shut it down.

Brazil –M&A Currently Brazilian authorities are conducting two major police operations investigating corruption and money laundering crimes, namely Operation Car Wash and Operation 'Zelotes'.

Operation Car Wash was initiated in 2014 with the purpose of dismantling tax evasion schemes, money laundering activities and other crimes against the Brazilian financial system. Due to the search and seize warrants issued as well as the collaboration agreements with investigated individuals, the initial scope of the investigations grew to enormous proportions and enabled the arrest of top executives from Petrobras and other world-renowned companies such as Andrade Gutierrez, Odebrecht, OAS, Braskem and Camargo Corrêa. Operation Car Wash is the largest anti-bribery and money laundering investigation in world history.

Operation Zelotes, in turn, was initiated in 2015 with the purpose of investigating decisions enacted by members of the Federal Taxpayers' Council, who were suspected of having been paid bribes by companies facing administrative tax claims. Together, such decisions amount to BRL19.6 billion worth of taxes not paid to the public treasury due to manipulated trials.

In view of the facts discovered during Operation Zelotes, US investors filed a class action against Banco Bradesco, a Brazilian bank, suing for damages with the Courts of New York, claiming that the bank disclosed false information and also failed to properly disclose relevant information.

Argentina –JC We have had a lot of communication with the Brazilian authorities, receiving information from the parties there. The problem we have had is that we cannot guarantee to Brazil that the individuals that have made an agreement with the Brazilian authorities, will not be prosecuted in Argentina. As such we have had problems in obtaining information from Brazil. The exchanges we have with the US are much better, so I would expect joint investigations in the not so distant future.



Neil Montgomery, pictured at the 2017 IR Annual Conference in Berlin



Members pictured at the 2017 IR Annual Conference in Berlin

QUESTION 4

What factors should an international company in your jurisdiction take into account when establishing a compliance policy to prevent money laundering or bribery?

US –BT Advising international companies to have AML is not sufficient any more. It has to be raised under the heading of corporate governance, which includes far more than just gold standard AML policies and procedures.

Compliance training, audit and an unwavering commitment to enforce them is crucial, as is thorough training around OFAC, FCPA, PEPS and anti-corruption legislation.

If a company is doing these kind of cross-border transactions, they must develop and incorporate communication into their relationships with financial institutions, so they are aware. They should also be developing relationships with law enforcement agencies, using outreach programmes and seminars to connect with regulators.

This is good sound corporate governance practice that we have implemented with a regional bank in Central America, a huge agriculture company, a duty free operation and a large aircraft leasing operation in Latin America.

Brazil –M&A A comprehensive and well-documented anti-corruption policy and training program can minimise the risk of charges under the Brazilian Clean Company Act or mitigate the penalties in an enforcement action. Since Brazilian law does not provide objective criteria when creating and establishing a compliance policy, most Brazilian companies tend to rely on compliance programs based on the FCPA and the UK Anti-Bribery rules.

Further to potentially mitigating liabilities and sanctions, establishing a compliance policy has also the immediate benefit of preventing corruption and money laundering activities, since such programs encourage managers, directors, employees and agents to understand and realise the potential risks and liabilities arising from illegal activities.

Additionally, companies with well-established compliance policies are well regarded by the Brazilian market and perceived as reliable, trustworthy and ethical. Companies with structured compliance programs tend to have a larger market value when compared to those without such policies.

QUESTION 5

How has your jurisdiction acted to improve its image following high profile corruption and secrecy scandals in Latin America such as the Panama Papers or Petrobras?

Brazil –M&A For the first time in decades, top ranked politicians and executives are going to jail in Brazil. There was a lot of immunity before, so that's the most apparent and visual aspect of all the law enforcement efforts that have been implemented. We have seen the impeachment of President Dilma, while the new President Michel Temer is also in trouble. There has been a second indictment against him from the attorney general for obstructing justice and discussing bribes with prominent businessmen.

Law enforcement agents filmed his special assistant Rodrigo Loures accepting a suitcase packed with 500,000 Reals from an executive, at a pizzeria in São Paulo.

The press has given extensive coverage to all these operations, and law enforcement agents have managed to track down funds that were laundered overseas. Foreign countries are collaborating and the money is coming back to Brazil. For the first time in a long while, Brazilian politicians, business people and entrepreneurs are afraid of the law enforcement that their actions could trigger.

Argentina –JC Argentina is an early adopter of Common Reporting Standards (CRS) and we are looking forward to exchanging tax information with the US. Our President was mentioned in the Panama Papers and voluntarily submitted his tax affairs for investigation. He was found to be tax compliant.

We are looking forward to OCED membership, a free trade agreement with the South American trade bloc Mercosur, and exchange of information with as many jurisdictions as possible. We don't have any more blacklists, but a white list of jurisdictions, effective in the exchange of financial and tax information.

US –BT We managed to elect a very controversial individual as US President, so we are doomed to suffer through three years of Senate House investigations, and Special Prosecutor Investigations, all looking into Russian involvement in our election and related business corruption. The US's image has taken a huge hit, so anyone pointing a finger overseas should look inwards first. There is not much we can do about that until the next election cycle, or until these investigations are concluded.

Mexico –LO Well right now, as I said earlier, we are going through an interesting time for new AML legislation.

We are entering a period of maturity in which companies and individuals need to start reporting who their clients are to Federal authorities. It's providing them with vital information to undertake further investigations or start prosecutions.

Mexico is working well with international authorities and giving them all the information they need to collect files or do international prosecution work to extradite drug lords or famous people seen in the papers recently.

We are also starting investigations with information provided by the US Department of Justice (DoJ) or Securities Exchange Commission (SEC) to prosecute Mexicans receiving money from people based in the US, in contravention of corruption laws. We have had a very good response from banks and corporations which have started their own robust compliance programmes, implementing a risk-based approach.

The Mexican anti-corruption system is national and organised across three levels of power. The best thing about this situation, is that we have a civil society commission recognised by law that can criticise proposals from Congress. It is very active in representing the civil society in the government's anti-corruption efforts.

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