

# 2023 Network Updates: Latin America

As the Concilium Network prepared to gather for its 2023 Summit in Geneva, Switzerland, several members submitted short summaries on current trends and developments in their respective jurisdictions. Those updates are collected into this document for readers' edification.

## Brazil

Brazil is undertaking several changes to its laws and regulations that pertain to government contracts and relationships, which are anticipated to bring about substantial alterations in its business environment with the public sector. These developments include:

- **New Public Procurement Law:** A comprehensive Public Procurement Law is set to be fully operational by the end of this year. Among the numerous noteworthy changes it brings, it establishes specific conditions under which private entities must institute compliance programs to qualify for government contracts.
- **Cooperation between CGU and BNDES:** The Office of the Comptroller General (CGU), responsible for implementing the Brazilian Anti-Corruption Law (Law n, 12,846/2013), and the Brazilian Development Bank (BNDES) entered into a cooperation agreement that makes compliance programs a prerequisite for private companies seeking credits exceeding 300 million reais.
- **Expanding the Concept of Integrity:** On the tenth anniversary of the enforcement of the Brazilian Anti-Corruption Law (Law 12,846/2016), the CGU signaled an intention to broaden the interpretation of "Integrity" beyond anti-corruption measures, flagging issues such as sustainability, diversity, and human rights.

## Paraguay

The U.S. Office of Foreign Assets Control (OFAC) has deemed the former president and vice president to be significantly corrupt and has designated them (as well as companies in which they have a 50% interest or greater) as sanctioned parties under U.S. law. Former President Horacio Cartes, as well several companies in which he held a significant interest, have been included on the OFAC list. Cartes used to represent many important international brands, such as Heineken, Sheraton, Sbarro, and others. Multinational companies should exercise caution when conducting business with

companies currently (or previously) associated with Mr. Cartes to avoid potential violations of U.S. laws.

Exports to Russia have curtailed appreciably, abiding by sanctions imposed due to the war with Ukraine.

A former attorney general is currently under criminal trial for illicit enrichment, which is a felony under Paraguayan law because a public official is prohibited from increasing his/her patrimony while in in office.

# 2023 Network Updates:

## Asia

### China

- The U.S.-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act was signed into law in the U.S. in August 2023, establishing negotiation requirements for future agreements. A reciprocal piece of legislation was passed by Taiwan's Legislative Yuan July 26th. The first agreement, which concluded June 1st in Washington, D.C., included anti-corruption among several other topics for cooperation.
- Taiwan conducted a major corruption probe in solar-energy and public infrastructure projects in Yunlin County.
- With the increase in military tensions with the PRC, the Taiwan government has increased its oversight of the investment and control issues for companies entering the Taiwan market in what are deemed strategic areas for security.

### India

Continuing a more than decade-long trend, white-collar crime enforcement continues to increase and remains extremely aggressive. While prosecutions around bribery and anti-corruption laws remain steady, there is an increased focus in matters involving corporate fraud, securities law violations, and money laundering. Key developments are listed below:

- **Money Laundering:** The Indian money laundering law – i.e., the Prevention of Money Laundering Act, 2002 (PMLA) – follows the proceeds of crime and predicate offence model and has seen widening use. While this has fueled the number of pre-trial arrests and judicial reluctance to grant bail, the rate at which trials involving money laundering related offences have been concluded remains significantly low.
  - While enforcement actions are at an all-time high, there are critical constitutional challenges on the mandates and powers of the Enforcement Directorate (ED) (which prosecutes offences under the PMLA) that are pending before the Indian courts. It is hoped that these cases will make headway over the next 12–18 months.
  - **Supervisory Authority for Enforcement Agencies:** The Government of India is considering the creation of a new post of Chief Investigation Officer (CIO) to supervise and enable increased synergy between the two central enforcement agencies in India - Central Bureau of Investigations (CBI) and the ED.
- Upon culmination, this move is expected to mitigate the complexities of overlapping investigation mandates, extended-period investigations, and inter-agency competition.
- **Fraud Reporting Obligations:** In contrast with previous norms and practice, statutory auditors for specific classes of corporations have now been mandated by the National Finance Reporting Authority (NFRA) to immediately report fraud to the company's board, audit committee, and/or the Indian government, irrespective of whether they were the first to detect it.
- Previously, India's regulatory authority for accounting standards and self-regulation of auditors had issued a guidance note to clarify that a statutory auditor's obligation to report fraud existed only if they were the first to identify fraud in the course of performance of their duties.
- **Securities Law Enforcement:** The Securities and Exchange Board of India (SEBI), i.e., India's regulatory body for securities and commodities, has amped up its scrutiny of the mutual fund industry to address concerns of frontrunning and poor investment diligence.
- Additionally, SEBI has also taken a keen interest in the activities of digital and social media influencers operating in the business of financial literacy with a view to regulate the same.

# 2023 Network Updates: Europe

## Austria

- Austria, like many other EU member states, has belatedly implemented the EU Whistleblower Directive and brought it into force on 25 February 2023. Since 25 August 2023, Austrian companies with at least 250 employees (and from 17 December 2023, also those with at least 50 employees) are obliged to implement a system for the protection of whistleblowers. The material scope of application goes beyond that of the Directive but is narrow compared to other member states, such as Germany.
- Legislative changes also were made in Austria in 2023 with the enactment of the Corruption Criminal Law Amendment Act. It introduced criminal liability for future office bearers (“candidate for office”) for active and passive bribery; furthermore, the “purchase of office” was criminalized in Sec 265a of the Austrian Criminal Code. The reason for the increased criminal liability was the political case of the "Ibizzia Affair" involving Austria's former Vice-Chancellor. The legislation and the structure of the new offences have been widely criticized in doctrine and jurisprudence on the grounds that they are allegedly inconsistent with the current corruption offences.

## Poland

The current compliance issue in Poland is the so-called “visa scandal.”

The Polish Ministry of Foreign Affairs announced this month that it will end cooperation with all external entities that processed Polish visas – both domestic and Schengen.

This decision stems from reported irregularities involving some applicants supported by visa outsourcing providers, who were able to jump the queue at Polish consulates and get visas outside of the official process. Recently, it came to light that this whole process was most likely a corruption scheme designed to bring in as many people as possible from Asia, India, and the Far East to Poland.

The Ministry of Foreign Affairs did not confirm any illegal behaviour and assessed most of the accusations as inaccurate, even though there is

no sign of any proper investigation being conducted. The government's reluctant position towards clarifying the matter may be linked to the upcoming parliamentary elections in Poland, which will take place in mid-October.

The case is multidimensional. According to various sources, it may implicate several hundred thousand visas issued. It also may affect employers who pressed for easier visa granting due to the lack of labour. Finally, it may affect international agencies that employ foreigners, as it was in their interest to speed up the visa process.

There also is a question about internal security because, in the case of visas issued based on bribe payments, the verification process of foreigners trying to enter the EU undoubtedly was not carried out properly.

# 2023 Network Updates: Europe and United States

### Switzerland

Does legal privilege protect attorney work product drafted in the course of an internal investigation? Not always, as per a recent Swiss case law.

While attorney work product that contains legal advice is protected, work product that merely report facts is not.

As fact-finding is a significant part of an internal investigation, clients and their attorneys should proceed with caution to avoid creating incriminating documents, lest they become godsend evidence to criminal or regulatory authorities.

The following measures are key:

- Sensitive documents – in particular, the results of investigative acts (interviews, collection and review

of documents, timeline of events, etc.) – should remain on the server of the law firm.

- Sharing of documents with the client should be done through a secured platform operated by the law firm.
- Correspondence with incriminating information should be avoided.
- Documents that are expected to end up on the client server should contain legal developments and advice.

Setting clear communication rules from the outset of an internal investigation between the client and the involved law firms is thus essential to safeguard legal privilege to the greatest extent possible.

### U.S.A.

In recent years, the U.S. has experienced a notable shift in trade policies, marked by intensified enforcement measures implemented by U.S. Customs and Border Protection (CBP). Ongoing developments that have made customs a critical compliance area include the following:

- Unprecedented implementation of high special tariffs, including 10- and 25-percent Section 232 duties on aluminum and steel, Section 301 tariffs of up to 25 percent on nearly all goods from China, and a record number of antidumping and countervailing duty cases, which can impose tariffs into the triple digits.
- The long-awaited completion and full implementation of the Automated Commercial Environment (ACE) portal, which gives CBP the tools to run sophisticated searches to find anomalies in import patterns, including the types of HTS misclassifications, undervaluation of entered value, and erroneous country-of-origin declarations that can lead to large underpayments of customs duties.

- New enforcement priorities and increased budgets, particularly with respect to forced labor issues, such as the requirements imposed under the Uyghur Forced Labor Prevention Act.
- Increased use of electronic portals, such as the e-Allegations Program and the Enforce and Protect Act (EAPA) Program, by which members of the trade community can report suspected trade violations to CBP.

These developments signal a new paradigm of increased CBP enforcement, as well as a renewed emphasis on revenue collection, given the much greater tariffs. Companies importing or exporting goods to the U.S., accordingly, must remain vigilant in customs-related matters, including by implementing rigorous and consistently followed customs compliance procedures.

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AND THE NETWORK IS GROWING**

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