# Anti-corruption developments affecting Latin America's mining industry

**Sandra Orihuela**
**Orihuela Abogados | Attorneys at Law**

Despite a slow-down in the global mining industry, Latin America remains a key destination for mining investment, because of the sizeable wealth of its mineral resources, reduced operating costs and incentive-based policies. As a result of the large number of mega-projects it is able to host, the region has been able to maintain the highest mining project-investment average of any other region, registering a median per project investment of $780 million in 2013 (see Engineering and Mining Journal's 2014 Global Annual Mining Investment Survey at www.e-mj.com/features/3674-e-mj-s-annual-survey-of-global-metal-mining-investment.html). During 2014 and 2015, the region continued to attract key mining activity, including optimised drilling, commodity related revenues, important capital raising and considerable exploration budgets (See http://go.snl.com/rs/080-PQS-123/images/SNL-Metals-Mining-Infographic-Latin-America-English.pdf). Foreign-based companies have acquired hundreds of mining properties in Latin America for exploration and extraction, with Mexico securing the largest share of Latin America's 2014 exploration budget, followed by Chile, Peru and Brazil. Total projects by development stage appear to be equally divided among those at the grassroots, exploration, target outline, reserves development and production stages, with a lesser number of projects at the feasibility and preproduction stages. Given the cyclical nature of the industry, mining investment in Latin America is expected to remain large and continuous.

Corruption, however, is a key concern when it comes to doing business in Latin America. Despite a couple of notable exceptions such as Chile and Uruguay, most countries in Latin America score relatively low in the latest ranking of the Corruption Perceptions Index published by Transparency International. Preoccupation for the fight against corruption among Latin American nations, however, has been present for decades, as most countries in the region adopted the Inter American Convention against Corruption between 1996 and 1998. (Peru, Mexico, Uruguay, Argentina, Colombia, Chile, Paraguay, Ecuador and Venezuela ratified the Interamerican Convention against Corruption between 1996 and 1998. See www.oas.org/juridico/spanish/ury.htm.) Because the mining industry remains highly regulated by local governments, it is exposed to an environment that is prone to bribery and corruption created by the familiar mixture of necessity, opportunity and justification. Such is the combination of deep pockets, inadequate infrastructure and public services, weak institutions and insufficient fiscal budgets in rural areas, cultural differences, public officials with low levels of education and ethics, inadequate and untimely sanctions, poor judicial systems and deficient due diligence of local partners. It is arguable, however, that the most crucial corruption risk of doing business in Latin America is the lack of knowledge by business people, executives and local employees of the reach and application of anti-bribery and anti-corruption legislation at their country level and internationally. More importantly, a large majority of them is either not aware or has a blatant disregard for the reach and application of the United States' Foreign Corruption Practices Act (known by its English acronym 'FCPA'), the most widely enforced anti-corruption legislation of the moment.

The FCPA imposes corporate liability, responsibility for third parties and extraterritoriality for corruption related offences, thereby holding entities and individuals criminally and civilly responsible for corruption offences committed outside of the United States. Of critical importance is the increasing intertwine of the FCPA with other US laws that can establish corruption-related offences where FCPA offences are not present, thereby expanding the reach of the FCPA and prosecution of overseas activity that other laws do not reach, such as travel, commerce, mail and wire statutes, anti-money laundering, whistle-blower, fraud, data privacy and other laws. Furthermore, there are several recent developments that should arguably send a strong sign of caution to mining investors doing business internationally, such as the open investigations and hefty penalties involving mining and engineering companies in the last three years. Recent anti-fraud and anti-corruption investigations and penalties include: Alcoa (US), penalty of $384 million imposed in January 2014; Gold Fields (South Africa; NYSE), investigation begun in 2013 and concluded in June 2015; BHP Billiton (Australia; NYSE), penalty of $25 million imposed in May 2015; Kinross Gold Corporation (Canada; NYSE), investigation begun in October 2015; and SNC Lavalin (Canada) investigation begun in February 2015. Other developments include the increasing long-arm jurisdiction of the FCPA particularly by way of an important legal ruling impacting the mining industry; the recent enactment of Canada's Extractive Sector Transparency Measures Act imposing reporting obligations for specific categories of payments; the renewed proposal in the US to bring back section 1504 of the Dodd-Frank Act which seeks disclosure of payments by resource extraction issuers, toppled by enhanced anti-bribery regulations in mineral resource rich countries like Brazil, Peru and Mexico. These are current developments impacting the struggle against bribery and corruption in the mining industry worthy of analysis.

With respect to important legal rulings affecting the mining industry worldwide, but more particularly mining operations in Latin America owing to its large peasant and indigenous population, close attention should be paid to the 2014 ground-breaking decision *United States v Joel Esquenazi and Carlos Rodriguez*, in which the Eleventh Circuit Court of Appeals was the first to review what is an 'instrumentality' under the FCPA, setting a precedent for the inclusion of non-traditional persons within the reach of the FCPA when these are deemed to perform a function that the government of the foreign country may treat as its own. In *Esquenazi*, the Court defined the term 'instrumentality' as 'an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own'. The Court explained that 'what constitutes control and what constitutes a function the government treats as its own are fact-bound questions' and developed separate tests for each of these two key issues, which include, among other factors, whether the foreign government has 'formally designated' anyone to perform a government function.

When analysing peasant or indigenous communities in Latin America under *Esquenazi*, it is important to take into account that any 'formal designation' made by a Latin American government of a peasant or indigenous community may result from the historical perspective of the agrarian and land reforms that reached colossal proportions across the region. Land from the Spanish colonial landowners was distributed among peasant proprietors following civil wars and revolutions throughout the region. Formalisation of this land tenure resulted from the obligation imposed by most Latin American governments upon peasant proprietors to undergo specific administrative procedures and obtain registration before regional and national authorities. Further formalisation results from constitutional reforms in Latin America, which tend to recognise (in Bolivia, Colombia, Ecuador, Mexico, Paraguay, Peru and Venezuela) the multicultural character of these communities and their existence as singular entities with distinct cultural and linguistic attributes and specific rights (see www.upf.edu/dhes-alfa/materiales/res/dhgv_pdf/DHGV_Manual.275-300.pdf).

Some reforms have strengthened the organisation of indigenous communities (in Bolivia, Guatemala and Colombia), creating bodies for public rule empowered to exercise certain levels of authority and self-governance in their territories (see www.culturalsurvival.org/publications/cultural-survival-quarterly/bolivia/notes-field-indigenous-peoples-and-democracy-latin). In addition, direct and indirect government subsidies in favour of peasant and indigenous communities already exist in the form of special taxes, mining royalties, canons, certain tax exemptions, preferential rights to obtain grants and loans, among others. International normative systems, such as the ILO's Convention 169, the Constitutive Agreement of the Indigenous Fund, the United Nations and the OAS further support the formal community designation by incorporating principles and operating guidelines based on the right of participation, the obligation of prior consultation and the protection of cultural rights, among others. (In September 2011, Peru, for example, enacted the Law of the Right of Prior Consultation to Indigenous and Native Communities, which formally recognizes the rights of such population to prior consultation of legislative or administrative measures that may impact upon their collective rights, physical existence, cultural identity, quality of life or development.)

The interpretation of what is an 'instrumentality' under the FCPA appears to be broad enough to encompass a wide spectrum of entities with varying degrees of government ownership or control, or both. While this issue is likely to be ultimately addressed as a question of fact using a totality of the circumstances test with no single dispositive factor, *Esquenazi* nonetheless brings a new outlook when analysing FCPA compliance matters in Latin America from a mining industry perspective. Given the historical problems of cultural and social integration of its diverse population, various Latin American governments have not only formally designated and recognised, but also transferred traditional government functions to, certain groups in their population who often receive government subsidies and have varying degrees of government control. The probable classification of a community leader as a government official under the FCPA would have enormous implications for any mining investor operating in the region. It is a known fact that mining projects are often located in rural areas, in or near surface land often owned by peasant or indigenous communities, and that the development and other needs of the communities located in the direct and indirect area of influence of a mining project often include investment commitments that are part of a project's environmental impact studies. Each of these factors could involve different types of contributions by mining investors to public officials and to peasant or indigenous communities that need to be carefully and properly monitored, classified and registered to avert FCPA implications.

Adding to the concern of the possible classification of a community leader as a government official under the FCPA are certain provisions of Canada's Extractive Sector Transparency Measures Act (ESTMA), which came into force on 1 June 2015 and is designed to complement Canada's existing anti-corruption regime in the Corruption of Foreign Public Officials Act by creating greater transparency over payments made to a government by the extractive sector, including payments made to certain aboriginal governments in Canada and abroad, with the latter subject to a two-year transitional period (see http://laws-lois.justice.gc.ca/eng/acts/E-22.7/page-1.html). The new mandatory reporting standard for extractive companies applies to payments made to foreign and domestic governments at all levels, including aboriginal groups. The ESTMA reporting requirements apply to companies engaged in the development of oil, gas or minerals that are either listed on a Canadian stock exchange or have a place of business in Canada, do business in Canada or have assets in Canada and which meet certain size thresholds. Companies subject to the ESTMA are required to report and publicly disclose all payments, including taxes, royalties, fees and any other consideration for licences, permits or concessions in excess of C$100,000. Non-compliance with the reporting requirements is an offence. Thereby, any director or officer who directed, authorised, assented to, acquiesced in or participated in the non-compliance can also be held personally liable. Canada's new rules are intended to be similar to those being implemented in the European Union (the Extractive Industry Transparency Initiative) and in the US.

In December 2015, the US Securities and Exchange Commission voted to propose rules that would require resource extraction issuers to disclose payments made to the US federal government or foreign governments for the commercial development of oil, natural gas or minerals (see www.sec.gov/news/pressrelease/2015-277.html). The proposed rules, mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, are intended to further the statutory objective to advance US policy interests by promoting greater transparency about payments related to resource extraction. Under the proposed rules, an issuer would be required to disclose payments made to the US federal government or a foreign government if the issuer is required to file annual reports with the Commission under the Securities Exchange Act. The issuer would also be required to disclose payments made by a subsidiary or entity controlled by the issuer. Resource extraction issuers would need to disclose payments that are made to further the commercial development of oil, natural gas, or minerals; 'not de minimis'; and within the types of payments specified in the rules – such as taxes; royalties; fees (including licence fees); production entitlements; bonuses; dividends; and payments for infrastructure improvements. Initial public comments on the proposed rules and responses are expected by mid February 2016. Given that the proposed rules will allow the US to align itself with its Canadian and European counterparts with respect to transparency measures for the extractive industry, it is likely that this time around the international context would support its approval.

Additional trends impacting bribery and corruption in Latin America's mining industry are the efforts by mineral resource-rich countries, such as Brazil, Peru and Mexico to develop anti-corruption legislation and compliance obligations as a response to recent domestic and international pressure to become aligned with worldwide integrity efforts, and to be able to remain attractive to mining investment. The new regulations to Brazil's Clean Companies Act, for example, impose civil and administrative penalties, set specific rules for compliance programmes, set codes of conduct and ethics and add whistle-blower and other integrity requirements, and create a registry of offending companies. The government has also announced new anti-bribery legislative proposals as part of a future 'anti-corruption package', which includes potential new criminal penalties and authority to confiscate property (see www.law360.com/articles/638561/a-comparison-of-anti-corruption-laws-in-us-uk-brazil).

Similarly, some important anti-corruption legal advances took place in the last couple of years in Peru. Law 30,111 (which introduces the imposition of fines for corruption crimes), Law 30,124 (which amends the criminal definition of public official) and Law 30,161 and its regulations (which require a sworn declaration of the income, goods and rent received by public officials and civil servants) were enacted. In addition, various government entities joined efforts to identify and provide information of ongoing legal actions and investigations involving corruption, terrorism, drug trafficking and other alleged crimes of political candidates running for office. Further, an online visitor registration system was introduced, requiring government entities to publish, in real time, the names of visitors of their public employees, contributing to increasing transparency and generating mechanisms of social control in the country. Perhaps the most significant anti-corruption advance for the country has been the political effort led by the Anti-Corruption Commission to gain Peru's accession to the OECD Convention by means of a legislative project aiming to regulate autonomous criminal liability for companies involved in bribery crimes (Draft Law No. 4,054/2014-PE was presented in December 2014). Although this draft bill is still awaiting approval by the Peruvian Congress, the political effort behind it has allowed the country to become a participant country in the OECD Working Group on Bribery in International Business Transactions. In spite of these worthy developments, the country was not able to move forward with important pieces of anti-corruption legislation, already in draft form but delayed in Congress, which address significant anti-corruption matters, such as the imposition of criminal corporate liability; the withdrawal of a statute of limitations for corruption crimes or duplication of the current prescriptive period; the requirement that lobbyists declare whose interests they represent; and regulations to protect whistleblowers and witnesses.

Mexico has not lagged far behind in enacting new anti-bribery measures. In April 2015, Mexico's Congress approved a new anti-corruption law, which creates the National Anti-Corruption System, extinguishes property rights resulting from illicit enrichment, strengthens oversight of public officials, designates a special prosecutor to tackle corruption, gives new powers to Mexico's existing Federal Audit Office and the Public Administration Ministry, and creates a special court to oversee all corruption related issues (see www.elfinanciero.com.mx/nacional/los-puntos-mas-importantes-de-la-ley-anticorrupcion.html). Mexico's Federal Congress, the state legislatures and the Federal District Assembly are expected to issue the required laws and regulations to accomplish these measures.

Given Latin America's political and economic stability, the continuous growing trend in international anti-corruption regulation and enforcement, including the enactment of new legislation in several Latin American countries encouraging parallel investigations and cooperation with their foreign counterparts, mining companies, investors and corporate executives involved in the region need to be aware and better prepared for a stricter playing field, in which anti-corruption and anti-bribery measures will play a key role. Mining investors should be proactive in improving and implementing their compliance programmes, taking into account international and local anti-corruption legislation; conducting preventive and ongoing compliance trainings on-site and in Spanish by knowledgeable legal counsel capable of understanding the international anti-corruption context and educating employees and third parties at all levels – especially high-level management, community and social relations teams, security personnel, local partners (including community leaders), vendors and agents; conducting enhanced and integrity due diligence of its local partners, suppliers and agents; carrying out country and cultural risk assessments; designing and implementing adequate and personalised internal controls able to satisfy the needs, operations and culture of each company; allocating sufficient resources and attention to designing, implementing, monitoring and reviewing internal policies and controls; and more importantly, constantly educating all project stakeholders about the evils of bribery and corruption and the worthiness of doing business freely and competitively.

Orihuela
Abogados | Attorneys at Law

**Sandra Orihuela** **sog@orihuelalegal.com**

1101 Brickell Avenue, 8th Floor
Miami, FL 33129
United States

Tel: +1 305 381-0900
http://orihuelalegal.com