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2010

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Ecuador

Bruce Horowitz

Paz Horowitz, Abogados

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Ecuador is a signatory (without reservations) to the Inter-American Convention against Corruption (OAS) of 29 March 1996, ratified by the Ecuadorean Congress, 26 May 1997. From 27 February 2003 to 20 October 2008, the Commission of Civic Control of Corruption (CCCC) served as the central authority, and was responsible for receiving and drafting requests for cooperation and assistance under the OAS. Under Ecuador's new Constitution, which became effective on 20 October 2008, a new branch of government, the Citizens' Participation and Social Control Council (CPCCS) is now in charge of national anti-corruption efforts, but it is still unclear as to whether Ecuador has notified the OAS that the CPCCS has taken over the function of the central authority. On 15 September 2005, the Ecuadorean Congress (without reservations) made it the 30th country to ratify the United Nations Convention against Corruption, thereby permitting the UN Convention to enter into force. Finally, Ecuador is a participant in the Andean Plan of Action Against Corruption (Andean Community Decision 668).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

There are no laws or regulations that specifically prohibit the bribery of foreign public officials.

With regard to the laws and regulations prohibiting the bribery of domestic public officials, and beginning at the top, article 3.6 of the present Constitution of Ecuador (1998) guarantees a 'public administration free of corruption'. The Constitution eliminates the statute of limitations on legal actions and punishments for the giving or receiving of bribes by government functionaries, bribery, extortion, misuse of public funds, and illicit enrichment.

Article 73 of the Comptroller (Inspector General) Organic Law restates the Constitutional provision on statutes of limitations.

Acceptance by a public functionary of a bribe, or of the promise or offer of a bribe is penalised under the Criminal Code of Ecuador, articles 185 to 191. Extortion by a public functionary is penalised under the Criminal Code of Ecuador, article 264. The making, offer or promise of a bribe is penalised under articles 290 and 359.

Article 77 of the Law on Narcotics and Psychotropics (Codification 2004-025) criminalises the act of bribery of government authorities with regard to criminal investigations or legal processes involving drugs.

The Organic Law on the Civil Service and Administrative Careers (Law No. 2003-17) establishes administrative sanctions against public functionaries who accept bribes (articles 10, 27 and 50).

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Not applicable. Although the OAS and UN Conventions establish the obligation to criminalise the bribery of foreign government functionaries, there is still no such legislation in Ecuador. The Attorney General's Office is responsible for applying the general norms for bribery that are found in the Criminal Code, but these norms may not be specific enough to sanction the bribery of a foreign government functionary in a foreign country.

4 Definition of a foreign public official

How does your law define a foreign public official?

Foreign public official is defined in the UN Convention, which is, therefore, the legal definition in Ecuador. There is no other definition in the legislation of Ecuador.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Given the response to question 3, there is no such explicit restriction with regard to foreign officials in a foreign country.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Given the response to question 3, there is no such explicit permission with regard to a foreign official in a foreign country.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

No such prohibition exists. In Ecuador any transfer of funds greater than US\$10,000 must be reported, pursuant to the Law for the Control of Money-Laundering.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Given the response to question 3, there is no such explicit liability with regard to a foreign official in a foreign country.

9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

There are no specific foreign bribery laws.

Update and trends

In October 2008, the previous entity that investigated and presented evidence about public corruption was disbanded pursuant to the Constitution of 2008. Since then very little investigation or prosecution has taken place. With the expected seating of the members of the Citizens' Participation and Social Control Council (CPCCS) around May 2010, corruption cases should again be taken up them.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Given the response to question 5, there is no government agency that is charged with enforcing 'foreign bribery' laws and regulations. However, the Citizens' Participation and Social Control Council (CPCCS) will have the authority to investigate and report on these activities to foreign governments. The members of the CPCCS are presently in the process of being selected based on testing and background, and should be seated by May 2010. Once seated, the CPCCS is expected to prepare and present initial legislation which may include foreign bribery issues.

11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

No.

12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

The Office of the Public Prosecutor has prosecutorial discretion to decide whether to bring a criminal action or not, and the accused can be involved in the investigative process; but no plea agreements or settlement agreements are permitted.

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There are none to describe.

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

If foreign companies are doing business in Ecuador, the general managers or legal representatives of those companies may be prosecuted for any criminal acts committed in Ecuador. Criminal law coverage is territorial (Criminal Code, article 5). The 'commission inside of Ecuador' includes acts or omissions outside of Ecuador that cause effects inside of Ecuador (CC, article 5). However, the limitations of CC article 7 probably limit the coverage of article 5 in the case of the crime of bribery of a government functionary.

15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

There are no such sanctions. Article 7 of the Criminal Code, says that 'an Ecuadorean who [...] commits in a foreign country a crime for which Ecuadorean law has established a punishment of "reclusion

mayor extraordinaria" (which, among other effects includes at least 12 years of imprisonment), and who is arrested in Ecuador, will be sanctioned according to the criminal law of Ecuador'. However, the crimes of bribery lead to criminal sanctions that are of a lesser nature than *reclusion mayor extraordinaria* (article 285, and possibly article 367).

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

While there are no landmark decisions, in late 2009, the owner of a driving school was sentenced to nine months of incarceration for attempting to bribe the head of the Traffic Control Council. The violatory act was recorded following a court order to allow the recording.

Financial record keeping**17 Laws and regulations**

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Law of Companies and the General Law of the Financial System Institutions and their respective regulations are the laws and regulations that require accurate corporate books and records, effective internal company controls, periodic financial statements and external auditing. Public contracting and specific industrial areas may have their own books and records, and auditing requirements. This year the International Financial Report Standards (NIIF) were put into effect for larger corporate entities, and should go into effect for smaller corporate entities in 2010 and 2011.

18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Not applicable.

19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

No.

20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

None. The only sanctions are those that are imposed for bribery under the Criminal Code.

21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

There is no such specific prohibition.

Domestic bribery**22 Legal framework**

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Broadly, the elements are delivery, transfer of, or offer or promise of an undue payment or gift or to take or omit an official action that leads to either an appropriate or inappropriate result.

23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes.

24 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Public officials are natural persons who are employed by any entity of the national, regional or municipal government, or who carry out a public function. The definition includes employees of state-owned or state-controlled companies.

25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Yes, unless the public office and the private consulting work or private enterprise work are within the same area. Judges may not work in private practice or in the private or non-judicial public sector, except for academic teaching. In many governmental entities, codes of ethics prohibit activities that create conflicts of interest.

26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Restrictions are found in the Organic Law on Civil Service and Administrative Careers. The restrictions apply to both the providing and receiving of such benefits.

27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

The law does not permit any type of gift or gratuity.

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

In general, there is no such prohibition. However, under Criminal Code (CC) article 367, there is a specific crime of bribery in order to discredit an industry by altering products, materials or instruments for production.

29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

For bribery of witnesses, court-appointed experts, or interpreters, the sanction is the same as for perjury, plus one additional year if the person being bribed is a farm worker (*campesino*). If the briber is a lawyer, then the lawyer's licence to practice will be permanently withdrawn (CC article 359).

Anyone who bribes a public functionary, a judicial panel member or arbitrator or someone authorised to provide a public service, shall receive the same punishment as that for the functionary, judicial panel member or arbitrator, which, under articles 285 to 287, is anywhere from six months' to three years' imprisonment for what could be considered to be facilitation payments, plus a restitution of twice the payment; and up to eight years and a fine of up to US\$60, plus three times the amount of the bribe (CC article 290)

The same penalties may be imposed on the legal representative or general manager responsible for a company that has violated domestic bribery laws.

30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

During the first year of the current presidential administration, the Anti-Corruption Bureau of the executive branch used hidden cameras to videotape dozens of payments being made to lower court judges and their clerks, some of which appeared to be facilitation payments. Constitutional privacy and legal limitations on the recording of personal interactions without the authorisation of both parties appears to have limited the use of these tapes in criminal proceedings; however, it is clear that the government would prosecute some facilitation payment cases if they could provide sufficient proof, at least against judicial corruption.

31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The aforementioned videotape investigation was the first recent significant investigation of the violation of domestic bribery laws. The executive branch has claimed to have uncovered widespread violations of domestic bribery laws between foreign companies and the national petroleum industry, but no further information has been published.



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