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Anti-Corruption Institutions and Best Practices in the Americas
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Introduction

While all American states have committed themselves to international anti-corruption standards, the perception of corruption in the region has remained relatively stable over the years. This has been the case irrespective of drastic macroeconomic reforms, from import substitution industrialization to massive privatizations and deregulation and, in some countries, a recent return to more protectionist policies and a considerable presence of the State in the economy.

In the following pages I briefly describe the situation of governance and corruption in the Americas, as well as the most important anti-corruption institutions created in the last two decades. By assessing some of the experiences that took place when putting those institutions into practice, I later discuss the extent to which they are adequate to deal with the – sometimes prevalent – informal institutions they are supposed to defeat.

1 Corruption and informal institutions in the Americas

In the last 15 years, all American countries have formally committed themselves to the international anti-corruption standards set by the Inter-American Convention against Corruption (IACAC) and, more recently, the United Nations Convention against Corruption (UNCAC). The most advanced economies of the region have, in addition, ratified the OECD Convention against the Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).

Notwithstanding the virtual stability of formal democratic regimes in the region, many states have failed to consistently uphold or enforce the rule of law. As a result, many citizens, particularly the poor and members of ethnic or racial minorities, do not enjoy basic rights. Many countries in the region have suffered from serious “democratic governance” problems, which have usually resulted in policy failure, severe institutional crisis and periods of governmental paralysis. Political representation is often jeopardized by informal institutions such as _clientelism_ and _patronage_, which heavily influence the possibility of long-term, inter-temporal agreements on programmatic issues.

The degree of “democratization” of each country is fairly well reflected by its citizens’ perception of corruption. According to all available rankings, perception of corruption in the region has remained relatively stable over the last decade (see Figure 1). Following Michael Johnston’s classification of “syndromes of corruption”, three main groups of countries can be identified in the continent. The first group of countries can be defined as “influence markets”, where corruption is characterized as the influence bought by private interests from well-institutionalized public agencies, usually through well-established
political parties. This group is composed of countries that have always ranked highly in the perception of corruption indexes, like the United States, Canada, Chile and, to a certain degree, Uruguay and Costa Rica. A second group, closer to what Johnston calls “elite cartels” is composed by Brazil, Colombia, Peru and Argentina. In these countries, which can still be defined as “consolidating” democracies, corruption is characterized by networks of elites functioning in collusion, which stave off the strengthening of political and economic competition. Finally, most Central American countries, as well as Ecuador, Venezuela, Bolivia, and Paraguay in South America, can be associated to what Johnston calls “oligarch and clans”. In these societies, institutions are much weaker and, therefore, powerful actors (oligarchs and clans) use both public and private means – sometimes including violence – to secure property rights and economic interests (Johnston, 2005).

Corruption is undoubtedly one of the informal institutions that undermines democratic efforts in the region. Informal institutions have been defined as “socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels” (Helmke and Levitsky, 2006:7). There is an increasing amount of literature and empirical research that is trying to understand the coexistence of and the interaction between formal and informal institutions. In some settings, informal institutions may complement efficient formal rules. For example, competitive elections are an effective mechanisms of assuring democratic accountability only if voters weigh politicians’ past behavior when casting their votes. Where such practice is absent, as it is in many Latin and Central American countries, elections are unlikely to bring about the kind of governmental responsiveness that they were designed to ensure. Informal institutions can also substitute inefficient formal rules or ineffective formal institutions. For example, this was the case in rural northern Peru in the late 70s, where, due to the inadequate police protection and ineffective courts system citizens were suffering. They decided to create informal self-defense patrols and an informal system of courts to defend their communities and resolve local disputes (Helmke and Levitsky, 2004:729).

However, systematic corruption competes with formal institutions. Corruption “structure(s) incentives in ways that are incompatible with the formal rules: to follow one rule, actors must violate another. Competing informal institutions trump their formal counterparts, generating outcomes that diverge markedly from what is expected from the formal rules” (Helmke and Levitsky, 2006:15, 16). Central and South America are full of examples where, in some markets and for certain periods of time, impunity from breaking the law coexists with the consistent enforcement of informal rules of illegal money and power exchange – with “informal” punishment ranging from social sanctions to market exclusions, physical threatening, or death. Similarly, particular informal conventions such as clientelism and patrimonialism very often subvert the rule of law, market, and electoral institutions (O’Donnell, 1996).

The following section attempts to analyze the interaction between some of the most adopted anti-corruption measures in the Americas and the informal institutions they are supposed to overcome. Given the limited scope and extension of this paper, the topics were selected somewhat arbitrarily among those that I consider the most relevant regarding anti-corruption reform in the Americas.

2 The new institutional anti-corruption landscape

2.1 Preventive measures

2.1.1 Anti-corruption bodies

Both under the UNCAC (Art. 6) and the IACAC (Art. III.9), States Parties are required to establish anti-corruption bodies responsible for the design and implementation of anti-corruption preventive measures. Most countries in the region have established such bodies. While in some cases these bodies exercise purely preventive capacities, in others they have been granted the ability to carry out investigations, enforce administrative sanctions and initiate criminal complaints.
Generally, anti-corruption agencies are responsible for performing risk analysis, monitoring and coordinating the implementation of the national and local anti-corruption strategies, as well as for action plans, reviewing and drafting relevant legislation and ethics regulations. For example, they draft codes of conduct for public officials, assist in the training of public officials, issue guidance, provide advice on matters related to government ethics and facilitate cooperation with the civil society and other relevant actors. Sometimes, they are also tasked with monitoring public officials’ possible conflicts of interest or managing their asset disclosure regimes.

While the establishment of anti-corruption bodies throughout the region is itself significant, these bodies are usually dependent on the Executive Power. In very strong presidentialist systems like many in the region, this usually implies these bodies’ lack the necessary autonomy and independence required by the international anti-corruption conventions. To serve their purpose, anti-corruption agencies should be able to carry out their functions without political interference and guided by the principles of impartiality, objectivity, fairness, accountability, financial autonomy, and clearly defined procedural rules. Although specific research is needed, anecdotal evidence points toward the opposite: most anti-corruption agencies in the region have been portrayed as political instruments of the executives, either to cover the incumbents or embarrass members of the opposition parties.

Against such a backdrop, two experiences are worth mentioning. Firstly, the Peruvian experience after the Fujimori regime. A whole anti-corruption structure was established, composed of preventive bodies, specialized police investigative units, prosecutor offices, courts (of both first instance and appeals) and, a specialized office of state lawyers entrusted with asset recovery duties. After a transitional euphoria and the initial achievement of having recovered around 175 million US dollars from Switzerland, the USA and the Cayman Islands (Jorge, 2008), these anti-corruption bodies have not been very active and, in the views of many observers, their efforts were somehow captured by the Peruvian subsequent politics.

Second, the recent experience of Bolivia should be highlighted. Under the leadership of left wing President Morales, this country underwent a process of constitutional reform that incorporated the non-applicability of statutory limitations to corruption offences and added a Ministry of Transparency and Anti-corruption to the Cabinet. The Ministry is handling most anti-corruption related matters – from prevention to investigation – and, when possible, representing the State in civil and criminal matters before the courts. Although many observers point out the political use of the new Ministry, the country is leading the regional statistics in prosecutions, convictions, and asset recovery success.

2.1.2 Public sector transparency and efficiency

Anti-corruption conventions require State parties to adopt measures in order to ensure that their public sectors are governed by the principles of meritocracy, efficiency, and transparency (UNCAC, Art. 7; IACAC, Art. III.1). In this sense, a professional bureaucracy helps to limit the adoption of opportunist policies and strengthens the actors’ confidence to fully comply with their civic commitments. An impartial and independent bureaucracy can act as a brake on arbitrary actions, safeguarding legal certainty and effective and efficient government action. Moreover, an adequate functioning bureaucracy prevents public policies from being captured by corporate interests.

Per contra, in most countries of the region public officials are hired, promoted, and fired on the grounds of patronage and clientelism not merits. In many Central and South American countries, a change in the administration entails a change in the whole State apparatus (Iacoviello, Zuvanic, and Rodríguez Gusta, 2010). As Figure 2 shows, there is a clear correlation between the bureaucracy’s level of autonomy (which is itself dependent on the proceedings set for hiring personnel and managing its work) and its capacity. Chile and Brazil are good regional examples of functioning bureaucracies with opposite management models. While the Chilean bureaucracy is governed by private sector rules – incentives tied to performance evaluations – the Brazilian bureaucracy is still stick to the traditional Weberian formalistic civil
service. Apart from these two examples, access to the civil service in the rest of the region is less meritocratic and more related to personal and political connections.

A similar relationship may be established between the system of electoral competition and corruption. Political parties can compete on the basis of programmatic policy appeals or on the basis of clientelism. When politics are programmatic, voters judge politicians on the grounds of policy outcomes. In contrast, when clientelism reigns voters tend to do so over the basis of their ability to distribute and deliver specific benefits and incentives (Jones, 2010). Figure 3 shows that, with the exception of Chile and Uruguay, the dominant bonding mechanism between political parties and voters in Central and South America is clientelism, which, with few exceptions is linked to high, very high or even endemic levels of corruption. In fact, in many countries, bureaucratic positions are usually granted as a reward to middle rank members of political parties that have efficiently distributed clientelistic benefits among voters.

2.1.3 Audit and oversight bodies

Audit institutions over public finances and budget, or oversight bodies, are long standing, well institutionalized entities in many Latin American countries. Most of them are constitutionally independent. The renewed international interest in fighting corruption made some countries enlarge these bodies’ traditional ex-post auditing functions by additionally putting them in charge of managing and monitoring asset declarations and/or other specific “anti-corruption audit” tasks (like performing as expert witnesses or prosecutorial advisors, or conducting routine ex-post tasks, etc.).

When provided with due autonomy from the executive branch and adequately trained in public management processes, these entities play a key role in preventing and detecting corruption. In this sense, their main strength is their constitutional independence. Moreover, if these institutions are well respected by the wider public – as they are in Bolivia, Chile or Brazil – their involvement in the fight against corruption proves to be positive. Of course, leadership is essential for turning formal independence into real checks and balances.

The flipside of these institutions is that they are usually modeled in the tradition of the “administrative bureaucracies”: they are very much stuck to old management ideas and, more often than not, resist the inclusion of new audit techniques or explore more flexible and dynamic ways of inter-institutional cooperation.

Furthermore, the contribution of these audit bodies in terms of budget transparency is blurry. For example, the 2009 Latin American General Index of Budget Transparency (IGTP), a study that measures the level of budget transparency in Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Peru, the Dominican Republic and Venezuela, has perceived disapproving perceptions in all countries of the region except for Costa Rica.

2.1.4 Active transparency and access to information

Transparency strengthens democratic governance and permits the scrutiny of public acts. In accordance with international standards, active transparency, involving a voluntary and active surrender of information from the state to members of society, should be incorporated into government programmes and initiatives (UNCAC, Art. 10; IACAC, Art. III.4). However, active transparency requires strong political commitment. Although this tends not to be the rule in the region, countries like Brazil, Bolivia, Chile, and Peru have implemented initiatives directed at increasing the amount of information available to people, thus encouraging the public scrutiny of public services. Access to information policies and programmes has been strongly developed throughout the region, and most countries have specific laws on the matter. While many of these laws remain in the books, the Brazilian leadership in the “open government” initiative, which involves active transparency but also emphasizes citizens’ participation by encouraging and facilitating their use of the disclosed information, is of great importance taking into account how influential the biggest economy of the subcontinent may be.
2.1.5 Civil society participation

Under the anti-corruption conventions, State Parties are also required to promote the active participation of the citizenship in the fight against corruption (UNCAC, Art. 13; IACAC, Art. III.11). Social control discourages corrupt practices and helps building a culture of legality. Some countries in the region have implemented programmes aimed at strengthening the civil society and their ability to demand accountability from the public sector, especially at the local level. In addition, countries like Argentina, Bolivia, and Peru have adopted initiatives to strengthen citizens’ participation through public hearings, public audits, and other accountability mechanisms.

Another important focus in this regard is the creation of quality citizens. Public awareness is fundamental in the promotion of a culture of legality, as well as in moving away from socially accepted harmful behaviors. In recent years, many countries in the region – such as Colombia, Brazil, Mexico, and Peru – carried out public awareness campaigns.

However, while civil society organizations are usually very active in areas such as campaign financing, access to public information, public awareness, citizen monitoring, and legislative reform, the progress made in terms of anti-corruption measures is more a result of these organizations’ leading role than a consequence of a proactive State attitude.

2.1.6 Private sector

International standards require State Parties to increase transparency in the private sector by enhancing accounting and auditing standards, and by effectively sanctioning the failure to comply with such measures. While these standards were formally adopted by all countries, the region suffers from large levels of tax evasion, flight capital, smuggling and other practices which hamper competition. This is not surprising if we take into account that Latin American countries inherited the Spanish economic system of mercantilism, a closed economic system that did not only prohibit competition but also established a monopolistic trade policy between Spain and its colonies. Historical studies have noted that smuggling of non-Spanish goods as well as evasion of export and import duties was at least double the amount of legal exchanges. These market mechanisms were built upon a foundation of restricted access to the market and lack of transparency. At the time of their independence, the Latin American nations had little or no experience with any other modes of exchange. By contrast, in what later became the United States, market access and accountability were crucial to the new political system. In the economic sphere at the independence era, access to the market was crucial, and it was assumed that the State had to play a constructive, interventionist, and transparent role that would benefit the broad public interest (Tulchin, 2012).

Today’s Latin American business groups are mainly composed of large domestic groups and multinational companies. Domestic business groups are usually “cross sector” groups. A small number of large groups – with dozens of subsidiaries and no obvious technological or productive connection among them – account for large shares of the GDP in most countries. Family ownership and management is another enduring characteristic of corporate governance in Latin America. In the early 2000s, over 90% of the 33 of largest groups in Latin America were family-owned and managed (Schneider, 2010).

The engagement of the private sector in the fight against corruption in the region is not a result of State’s encouragement but of foreign legal constrains. In recent years, foreign direct investment has substantially increased in the region (Figure 4), with most inflows coming from OECD jurisdictions. In other words, investments are made by companies subjected to the OECD Convention implementing legislation.

The engagement of the private sector in the prevention of corruption is employed at three different levels. First, at the firm level, subsidiaries of multinational companies are increasingly investing in anti-bribery compliance programmes. Of course, there is still a great deal of hypocrisy and cosmetics in the implementation of ethics codes (Jorge, 2012) but there is an increasing interest in behavioral change
within the companies. As a recent survey of 460 foreign companies operating in Latin America found, “The anti-corruption environment throughout the region is showing some signs of improvement from a corporate compliance perspective. 85% of respondents say their company’s management has taken steps to protect the organization from corruption risk, up from 77% in 2008. 51% say their company has lost business to competitors that have made illicit payments, down from 59% in 2008. 75% are aware of an offender being prosecuted for making or receiving illicit payments, up from 69% in 2008. These slight changes, in the aggregate, suggest overall improvement and trends to watch” (Miller & Chevalier, 2012).

Second, anti-bribery compliance is more regularly extended to the value chain – suppliers, distributors, agents, business partners and other third parties dealing with the company. As companies in OECD jurisdictions are increasingly sanctioned for the behavior of third parties operating on their behalf, they not only tend to include termination clauses and audit rights in their contractual relationship but they also provide their local third parties with training and compliance tools.

Finally, we find the collective action level: in many markets compliance might result in competitive disadvantages if competitors do not play by the same rules. To cope with this dilemma, as well as with typical “free rider” paradoxes, companies around the world are incipiently engaging in “collective action” initiatives, where an important part of the market players commit themselves to transparency and anti-corruption measures. These initiatives have proven especially useful when several companies face the same persistent problems, such as incongruities in the procurement process or solicitation of facilitation payments. In these contexts, they find it useful to engage in a collective solution with or without the participation of the government and other stakeholders. These agreements may take different forms and enforcement levels. In Mexico, for example, there is an established tradition of having civil society “witnesses” and public hearings for most public procurement processes. In some of them, potential bidders commit themselves to respect certain ethical rules which usually do not go beyond the applicable law but act as a reminder and as a collective commitment to prevent “prisoners dilemmas” and “free ridding” paradoxes.

### 2.2 Criminalization and prosecution

#### 2.2.1 Detecting corruption

International standards promote several mechanisms to bring corrupt deals to light so that they can be publicly scrutinized, and eventually prosecuted and sanctioned. For instance, independent media is encouraged to train investigative journalists and civil society organizations and individuals are encouraged to denounce the corrupt acts they confront or witness in their daily life.

A recent study shows, however, that corruption scandals are not triggered by these mechanisms, which, along with the work of anti-corruption agencies, are usually reactive – rather than proactive. According to Balan (2011) most corruption scandals in Latin America appeared to be triggered by the dynamics of competition among political actors within parties or factions that are part of the government coalition. Government insiders have incentives to leak damaging information about other political actors in order to gain power within the government (“leap-frog”) or either exit the government coalition (“jump-ship”). The argument has been recently evaluated in Chile and Argentina, two political systems that have important differences. While Chile is considered among the cleanest countries in the region, Argentina is perceived as one of the most corrupt. In spite of this remarkable difference, in both cases the study reached the same conclusion: corruption scandals seem to be more a “byproduct” of political competition than a result of the efforts of politically independent sources such as NGOs or investigative journalists which are only the channels through which scandals reach the wider public (Balan, 2011).
2.2.2 Prosecuting corruption

On the whole, all American countries comply with the criminalization of corruption acts required by the various international instruments. However, the role of law enforcement agencies and the judiciary in controlling corruption has been extremely weak and ineffective. As a result, acts often go unpunished in most of the region. Despite innumerable complaints, criminal investigations seldom result in convictions. When they do, convictions are usually reached after long periods of judicial limbo, thus neutralizing any symbolic deterrence effect that criminal law is supposed to play. Furthermore, the nature of judicial appointments and impeachments, on the one hand, and the lack of performance evaluations and other horizontal controls over the judiciary, on the other, provide reasons to believe that, in many countries, the leverage offered by corruption investigations is used by judges and prosecutors to develop their own careers, and increase their bargaining power with political actors by a timely management of such investigations.

For years, international donors attributed the low performance of the judiciary to the complexities of investigating corruption. The promoted solution was the establishment of specialized prosecutorial authorities. While in most countries there is some sort of “economic crime” or “organized crime” specialization in the investigative realm, only a few countries have created specialized anti-corruption prosecutorial authorities: Peru, Panama, Guatemala and Honduras. Many countries preferred a random distribution of cases among regular prosecutors than concentrating all corruption cases in one or two specialized prosecutors that might misuse the entrusted monopoly. In this regard, the experiences of Chile and Argentina are worth mentioning. Both countries have created specialized units formed by lawyers and forensic accountants with the aim of providing support to prosecutors. While in Argentina the prosecutor must use the specialized unit’s assistance, in Chile the Attorney General may, in cases of extreme complexity or social or economic repercussion, decide that a given case needs specific assistance.

Conclusion

While some progress has been made, the anti-corruption policies adopted in South and Central America have so far been fairly ineffective. Most of them were adopted following international recommendations, without taking into account local realities and political dynamics. As a result, prevalent informal institutions such as clientelism, patronism and corruption captured and neutralized new institutions and subvert new policies. This was possible partly because citizens have not held public officials and private sector leaders accountable for their acts. Corruption has been tolerated – as illegal exchanges between privileged individuals – mainly because civil society has been unable to establish and comprehend the relationship between corrupt transactions and their daily life. As a consequence, accountability has not been demanded.

In recent years, one step that civil society organizations and the media have started to take is to shed light on the fact that, in democracy, obscure palace deals among corrupt individuals have direct consequences over health, education, housing, transportation, and other basic rights. This is a path worth exploring further in order for citizens to gradually recognize the relationship between rules violation, corruption, and their quality of life. This in turn will result in increasing accountability demands to both public officials and private sector leaders. Ultimately, any major change will rest in the hands of the citizens.
References


Annex

Figure 1. Perception of corruption in LAC (2000-2010)

![Perception of corruption in LAC (2000-2010)](image)

Source: International Transparency

Figure 2. The bureaucratic connection: a typology

![Bureaucratic connection typology](image)

Source: Iacoviello, Zuvanic and Rodríguez Gusta (2010). Scale 1 to 100.

Figure 3. The electoral connection: programmatic vs. clientelist politics and corruption

![Electoral connection chart](image)

Source: Jones (2010)
Graph 4: Foreign direct investment inflows by region. Latin America and the Caribbean (billions of dollars)

Source: Economic Commission for Latin America and the Caribbean (ECLAC), on the basis of official figures and estimates as at 16 April 2012.