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Coordinating the Enforcement of Anti-Corruption Law: South American Experiences*

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Abstract: One of the most pressing challenges in anti-corruption law is whether and how to coordinate enforcement across multiple agencies, that is to say, under conditions of institutional multiplicity. One approach is modular enforcement, which involves dividing responsibility for enforcement among multiple institutions that are able, but not required, to coordinate their activities. The relatively impressive performance of Brazil's anti-corruption agencies around the beginning of the twentieth century has been attributed to this kind of institutional modularity. We examine whether other similarly situated countries adopted the Brazilian approach. Specifically, we compare the extent to which the modular approach to anti-corruption enforcement was reflected in the national anti-corruption institutions of Brazil and five other South American countries as of 2014. We find little evidence that Brazil's neighbors adopted the modular approach and suggest a variety of political, intellectual and institutional factors that may limit the attraction of institutional modularity outside the Brazilian context. Our analysis also demonstrates the value of an approach to comparative legal analysis which extends beyond the judiciary and the police to cover the full range of institutions involved in law enforcement.

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A. Introduction

Is there a single best way to regulate political corruption? There is a strong consensus around the idea that an anti-corruption regime should include legal prohibitions on bribery, embezzlement and money laundering in relation to public officials.[1] There is no equivalent consensus around how to organize enforcement of those prohibitions. Inspired by the Brazilian experience, an emerging view favors dividing responsibility for enforcement among multiple institutions that are able, but not required, to coordinate their activities. We refer to this as the "modular" approach to anti-corruption enforcement. The proposal that other countries—and especially other developing countries—should adopt this model is appealing because it avoids traditional concerns about borrowing formal legal arrangements from the Global North that might function very differently in the context of the Global South. Accordingly, we examine the extent to which the modular approach to anti-corruption enforcement has taken hold in six South American countries. Our findings suggest that its viability is context-specific, meaning that whether the model has been implemented in any given country is explained by a range of political, intellectual and institutional factors.

At one time, the conventional wisdom was that responsibility for each stage in the process of anti-corruption enforcement should be concentrated in a single institution. The inspiration was Hong Kong's famously successful Independent Commission against Corruption (ICAC), which has exclusive responsibility for investigation of bribery and related offences. The integrated model of enforcement is perceived to have had limited success.[2] Integrated anti-corruption agencies are said to be prone to political influence, have difficulty attracting sufficient human and financial resources, and struggle to secure cooperation from other branches of government.[3]

1 UNCAC has 170 parties, including every country in the Western hemisphere, and so its text seems like a reasonable proxy for an international consensus on the legal definition of corruption. UNCAC does not define the term "corruption" explicitly but it does refer to a variety of activities which by implication are to be regarded as forms of corruption. UNCAC requires its parties to criminalize bribery and misappropriation of funds in relation to public officials as well as laundering of the proceedings of those activities (Articles 15–17, 23). The parties to UNCAC are also asked to "consider" criminalizing bribery and embezzlement in the private sector, trading in influence, abuse of functions, illicit enrichment, and concealment in relation to public or private officials (Articles 18–22, 24). On the scope and limits of the international consensus on how to define corruption see *William Twining*, Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context, International Journal of Law in Context 1 (2005), pp. 5–40.

2 *P. Meagher*, Anti-Corruption Agencies: A Review of Experience, The IRIS Discussion Papers on Institutions and Development, Paper No. 04/02 (2004); *J. Johnsøn, H. Hechler, L. De Sousa, and H. Mathison*, How to monitor and evaluate anti-corruption agencies: guidelines for agencies, donors, and evaluators (U4 Issue Paper No. 8), Bergen 2011.

3 *Meagher*, note 3; *Alan Doig, David Watt, and Robert Williams*, Why do developing country anti-corruption commissions fail to deal with corruption? Understanding the three dilemmas of organisational development, performance expectation, and donor and government cycles, Public Administration and Development 27 (2007), pp. 251–259.

A new paradigm is emerging. In some countries, multiple institutions are responsible for investigating corruption. Brazil offers a good example of this kind of institutional multiplicity. There, at least five distinct institutions, including the police, the public prosecutor, ad hoc legislative committees and various auditing bodies, have the authority to investigate corruption offences. In one famous case, allegations of corruption in the construction of a courthouse led to an investigation by an auditing body, the establishment of an ad hoc parliamentary committee, a Senate decision to expel one of its members, civil and criminal proceedings, and interventions in civil proceedings in Switzerland and the United States.[4] The Brazilian anti-corruption institutions often operate independently, but on several occasions they have combined forces quite effectively to pursue specific enforcement actions as well as to formulate and implement broader enforcement strategies. The structure of this "web of accountability" has been credited with inducing significant improvements in the performance of Brazil's anti-corruption institutions over the past three decades.[5]

Proponents of the Brazilian model celebrate the multiplicity of institutions involved in anti-corruption enforcement as a way of compensating for the shortcomings of individual institutions and inducing healthy competition.[6] They are especially optimistic about the possibility that reliance on multiple enforcement institutions will limit the ability of self-interested officials to use their influence to undermine the overall anti-corruption effort. At the same time, proponents of the new model encourage the development of mechanisms that permit, but do not require, enforcement institutions to work together to pursue common goals. The result is what we call a "modular" institutional design, in which multiple functionally interchangeable institutions can either coordinate or operate independently as appropriate. In principle, the option of coordination should mitigate the familiar risks associated with dividing functions among multiple enforcement institutions, namely, conflict, duplication of effort, and failure to capture the benefits of specialization. At the same time, the possibility of independent action guards against capture and preserves the benefits of institutional competition.

Prado and Carson claim that the Brazilian approach to anticorruption enforcement (which they refer to as a combination of "institutional multiplicity" and "institutional

4 *Kevin Davis, Guillermo Jorge, and Maira R. Machado*, Anti-corruption law in action: cases from Argentina and Brazil, Law and Social Inquiry 40 (2015), pp. 664-699 and *Maira R. Machado and Luisa Ferreira (eds.)*, Estudos sobre o Caso TRT, São Paulo 2014.

5 *Sérgio Praça and Matthew M. Taylor*, Inching Toward Accountability: The Evolution of Brazil's Anticorruption Institutions, 1985–2010, Latin American Politics and Society 56 (2014), pp. 27–48. The intense and sustained efforts to investigate corruption involving Petrobras, the national oil company, supports this assessment.

6 *Mariana M. Prado and Lindsay Carson*, Brazilian Anti-Corruption Legislation and its Enforcement: Potential Lessons for Institutional Design, International Research Initiative on Brazil and Africa Working Paper 9, Manchester 2014; *Timothy J. Power and Matthew M. Taylor (eds.)*, Corruption and Democracy in Brazil: The Struggle for Accountability, Notre Dame 2011; *Praça and Taylor*, note 5.

malleability") can be implemented in other developing countries.[7] They acknowledge the reasons to be skeptical that transplanted legal institutions will perform in the same way when transplanted from one context to another.[8] Prado and Carson argue that their proposal transcends these concerns because it offers a meta-principle that is compatible with a variety of specific institutional arrangements and can be implemented in many different environments.[9] The present study responds to their call for cross-country research on the topic by exploring the viability of modular anticorruption enforcement in five of Brazil's neighboring countries.

In the next section we describe the process of enforcing anti-corruption law, in functional terms, and why modular design might be an optimal way of reconciling the advantages and disadvantages of coordination among institutions. We then identify a number of factors that might influence the design of the anti-corruption institutions adopted in any given country. Next, we examine whether and to what extent modular institutional design has been implemented in anti-corruption enforcement in six South American countries: Argentina, Bolivia, Brazil, Colombia, Paraguay and Peru. All of these countries face similar external pressures to develop coordinated legal responses to corruption. At the same time, the countries vary in terms of economic, social, political and institutional characteristics that might bear upon the performance of modular enforcement. For each country, we describe the institutions responsible for enforcing anti-corruption law, the coordination mechanisms they have developed, and factors that have hampered the development of those mechanisms. Our analyses are based on separate studies for each country that involved documentary research as well as 33 in-depth interviews and dozens of informal conversations with high and medium ranked public officials and law enforcement authorities in each country. Rather than focusing on a single anti-corruption institution, the analysis aims to cover all of the institutions involved in enforcing anticorruption norms.[10]

7 *Prado and Carson*, note 6, pp. 22–25.

8 *Kevin E. Davis*, Legal Universalism: Persistent Objections, University of Toronto Law Journal 60 (2010), pp. 537–553; *David Nelken*, Comparative criminal justice: making sense of difference, Thousand Oaks 2010, chapter 5.

9 On the potential value of meta-principles in understanding the relationship between law and development see *Kevin E. Davis and Mariana M. Prado*, Law, Regulation and Development, in: Bruce Currie-Alder et al. (eds.), International Development: Ideas, Experience and Prospects, New York 2014, p. 216.

10 The idea of covering multiple institutions across several branches of government that enforce multiple legal norms using a variety of types of legal proceedings may be unusual in comparative law but is accepted as best practice in cross-country studies of anticorruption institutions. See *Jeremy Pope*, Transparency International Source Book 2000, Confronting Corruption: The Elements of a National Integrity System, Berlin 2000; *Scott Mainwaring*, Introduction: Democratic Accountability in Latin America, in: Scott Mainwaring and Christopher Welna (eds.), Democratic Accountability in Latin America, Oxford 2003; *Matthew M. Taylor and Vinicius C. Buranelli*, Ending up in Pizza: Accountability as a Problem of Institutional Arrangement in Brazil, Latin American Politics and Society 49.1 (2007).

B. Coordination, competition, and modularity in enforcement of anticorruption law

I. Multiplicity of enforcement agencies

Defined in functional terms, enforcement of anti-corruption law, like other forms of law enforcement, is a process that involves several distinct activities: monitoring, investigation, adjudication (which includes prosecution, defense and decisionmaking), imposition of sanctions, and publicity.[11]These activities represent stages of a single process in the sense that the outputs generated in earlier stages, such as monitoring or investigation, can serve as inputs in later stages, such as investigation or adjudication.[12] There are, of course, many other institutional processes besides law enforcement that serve to prevent political corruption, including the application of internal bureaucratic rules, electoral rules, and rules governing public procurement. Our analysis, however, focuses on the enforcement of legal prohibitions.

In many countries, enforcement of anti-corruption law involves multiple agencies. Not only are different agencies involved at each stage in the enforcement process, multiple agencies are often involved within each stage (our focus is on this second phenomenon). Moreover, individual actors or units within agencies often act quite independently. Evaluations of anti-corruption institutions frequently identify lack of coordination among and within enforcement agencies as one of the greatest impediments to success in combating corruption.[13]

11 *Taylor and Buranelli*, note 10; *Power and Taylor*, note 6, p. 13; and *Prado and Carson*, note 6 identify the stages of the accountability process as "oversight, investigation and punishment". See also *OECD*, Specialised anti-corruption institutions review of models, Paris 2008. We have modified Taylor and Buranelli's scheme by adding the concept of publicity of enforcement and dividing the category of "punishment" into two: adjudication and implementation of sanctions. This last move has a number of analytical and practical benefits, including the possibility of shedding light on the process by which the imposed sanction is executed and monitored, a process which is frequently neglected by legal institutions, policy makers and scholars.

There are at least three reasons why we added the concept of publicity of enforcement. First, to the extent that offenders care about their reputations, publicity of enforcement operates as a form of punishment. Second, information about past enforcement activity might influence the extent to which actors are deterred from offending in the future by providing a basis for their predictions about future enforcement practices. Third, as we shall see, sharing of information helps enforcement agencies to coordinate their activities.

Finally, our definition of adjudication combines two decisions that are distinguished by *Klaus Günther*, Responsabilização na sociedade civil [Responsibility in Civil Society], in Novos Estudos CEBRAP, São Paulo 2002, n. 63, p.105–118; namely, the decision which affirms that an actor has violated a norm and the decision which, focusing on a different set of elements (economic capacity, amount of harm, etc.) determines the appropriate sanction/remedy to impose.

12 *Power and Taylor*, note 6, pp. 13–14.

13 The United Nations Convention against Corruption cites coordination in several of its articles (6.1.a, 42.5, 48.1.e, 48.1.f, 62). The OAS Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC) questionnaire has a specific item for countries to self-assess "when pertinent, the coordination mechanisms used to harmonize its

II. Coordination defined

We define coordination as *working together to achieve a common goal*.[14] Our focus is on coordination among the agents participating in particular stages of the process of enforcing anti-corruption law. In these contexts, coordination can involve working together to achieve common goals that are defined either broadly, as in, 'vigorously prosecute all allegations of grand corruption,' or narrowly, as in, 'freeze the Swiss bank accounts maintained by the Minister of Public Works'.

Our definition of coordination suggests that interactions can vary along two dimensions: the extent to which enforcement agents have common goals and the extent to which they work together. We consider each of these dimensions in turn.

Along the first dimension, imagine a 'state of nature' in which agents act wholly independently, possibly even in competition. Our two-dimensional framework captures the fact that in this setting the agents' enforcement strategies may or may not contribute to achieving a common goal.[15] At one extreme are scenarios in which agents pursue perfectly complementary strategies. Suppose for example, that different prosecutors launch separate civil and criminal proceedings against the same defendant. If the evidence introduced in one proceeding can be used in the other proceeding, thereby reducing the costs of investigation in the later case, the two proceedings will complement one another.

functions with those from other control organizations or public powers and to obtain the support of other authorities and the citizen, to the strict fulfillment of its functions" (Section 1, C, XI, p. 9, from 4th round questionnaire). OAS reports regularly recommend that countries improve their coordination in one or more areas. The same applies for OECD reports that welcome the establishment of coordination chambers and recommend steps to ensure cooperation between national and international organizations (for an example, see "Phase 3 Report on Brazil by the OECD Working Group on Bribery," p. 34).

14 After surveying the relevant literature *Geert Bouckaert, B. Guy Peters, and Koen Verhoest*, The Coordination of Public Sector Organizations: Shifting Patterns of Public Management, Basingstoke 2010, pp. 14–19, offer the following definition:

…coordination in a public sector interorganizational context is considered to be the instruments and mechanisms that aim to enhance the voluntary or forced alignment of tasks and efforts of organizations within the public sector. These mechanisms are used in order to create a greater coherence, and to reduce redundancy, lancunae and contradictions within and between policies, implementation or management... (16)

This definition is broader than ours in at least two respects. First, it extends to an "agreement, even if tacit, of the actors that they will not harm each other's programmes or operations." (20) These forms of "negative" coordination fall outside of our definition. Second, the Bouckaert et al. definition includes processes that eliminate the divisions between agencies. We characterize such measures as forms of integration rather than coordination.

15 For our purposes an agency's "enforcement strategy" for a given period means the entire set of enforcement decisions made during that period—which activities to monitor, which cases to investigate, what sanctions to impose, where to pursue collection efforts, how to distribute the proceeds of collection, whether to report individual case files or just summary statistics, etc.

At the other extreme are scenarios in which agents pursue enforcement strategies that *conflict* with one another. The paradigmatic case is one in which multiple agencies pursue enforcement actions against the same defendant for the same misconduct but one proceeding delays the other, as when civil proceedings are stayed pending disposition of a criminal case. The agencies may also seek incompatible sanctions. For example, one agency may wish to provide leniency in order to induce cooperation while the other agency may seek a severe sanction. Alternatively, the defendant may have limited funds and a government agency may seek to impose a fine while private plaintiffs seek compensation.

In many settings enforcement agents have progressed beyond the state of nature and actually work together across jurisdictional boundaries. Working together involves sharing resources and information. It need not, however, involve pursuing the same goals. Different branches of a ministry of justice or an agency might share a building or a computer system or the services of a set of police investigators or managerial oversight without pursuing the same goals. For now, we set these cases aside and focus on cases in which enforcement agents work together for the purpose of achieving a common goal, and our definition of coordination is limited accordingly. Indicia of coordination are: acknowledgement of common goals; sharing of information required to pursue the common goals; provision of information about the effects of actions (feedback); adjustment of actions or objectives in response to feedback; and adoption of rules or processes for assigning activities among various actors.

Coordination is facilitated by the existence of *coordination mechanisms*. These include organizations or social networks that establish channels for information flows and opportunities for face-to-face interaction, as well as protocols for making decisions or formulating rules. Those organizations, networks or protocols can be established through hierarchical commands or adopted by explicit or implicit agreements, all of which may or may not be legally binding.[16]

III. Optimal coordination

Is coordination among enforcement agents necessarily desirable? As noted above, international observers regularly complain about lack of coordination in enforcement of anti-corruption law, implying that coordination is always preferable.[17] As a purely theoretical matter, however, the value of coordination is ambiguous.

16 In addition to "hierarchies" and "networks", *Bouckaert, Peters, and Verhoest*, note 15, chapter 3, lists quasi-markets as possible sources of coordination mechanisms. Our study has not revealed any examples of quasi-markets being used to influence the behavior of anti-corruption enforcement agencies.

17 See note * supra.

The behavior of enforcement agents is typically evaluated in terms of fairness, efficiency or legitimacy.[18] Uncoordinated action by multiple enforcement agents poses risks along all these dimensions, risks that might well be mitigated by coordination.

Consider the fairness criterion. Theories of proportionality and equal treatment under the law suggest that it is unfair to allow the enforcement process to impose too great a burden on defendants, either in absolute terms or relative to the burden borne by other defendants. One concern is that the sanctions that result from the enforcement process, whether imposed by a single regulator or a combination of agencies, will be unfairly harsh. A second concern stems from the fact that regardless of the sanctions imposed, enforcement processes themselves can be burdensome for defendants. At some point the burden imposed on a particular defendant might be so great that it is unfair. Coordination might involve agencies working together to limit the burden experienced by defendants.

Coordination might also enhance efficiency. Efficiency is measured by the cost of the resources devoted to achieving any given goal. Coordination can promote efficiency by avoiding duplication of efforts aimed at common goals. It can also involve ensuring that efforts aimed at common goals are undertaken by the agent able to perform at the least cost.[19]

Finally, consider the relationship between coordination and legitimacy. Legitimacy is often used as a general term of commendation which indicates that a particular authority's normative actions are perceived as compatible with prevailing norms of appropriate conduct. Legitimacy is widely believed to inspire trust and a sense of moral obligation to obey.[20] The literature on point suggests that the legitimacy of enforcement agencies will be influenced by the extent to which their actions are compatible with fairness and efficiency, as well as the extent to which they comply with applicable laws, how accountable they are

18 Several commentators on earlier versions of this essay have suggested that enforcement agencies should also be evaluated in terms of their "effectiveness." We consider evaluations of fairness, efficiency and legitimacy to be ways of breaking up the broader question of "is it effective?" Or equivalently, "does it work well?" Although we acknowledge the importance of the concept of effectiveness in the legal domain, we also recognize its limits as a way of depicting the functioning of enforcement institutions. For a discussion of the limits of the concept of effectiveness as a criterion for evaluation of the criminal justice system, see *Maira Machado*, Similar in their differences: Transnational legal order addressing Money laundering in Brazil and Argentina, Law and Social Inquiry 37.2 (2011), pp. 358–60.

19 Some agencies may be able to access resources more cheaply than others. Or some agencies may have better technology, meaning that they can deploy resources more productively. Over time productivity will tend to vary as agencies learn—from their own experiences, research and experiments as well as those of other agencies. Productivity will also tend to vary as the actors targeted by regulation learn about its effects and how to mitigate them.

20 *Max Weber*, Economy and Society, Berkeley 1918/1968; *Tom R. Tyler*, Why People Obey the Law, Princeton 1990; *D. Johnson, E. R. Maguire, and J. B. Kuhns*, Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean, Law & Society Review 48 (2014).

to people affected by their actions, and their effectiveness in achieving combatting crime.[21] Therefore, to the extent that coordination contributes to fairness and efficiency it might also promote legitimacy.

Despite the potential benefits of coordination, there are several reasons why it is not guaranteed to enhance fairness, efficiency or legitimacy. First, working together can be costly (and thus inefficient). The communication required to achieve coordination requires expenditures of both social capital and material resources. The associated costs might outweigh any savings associated with coordination and compromise efficiency. There is also the risk that by stifling competition, coordination will compromise agencies' incentives to maximize productivity and limit their opportunities to learn from divergent enforcement strategies.[22] A second potentially problematic aspect of coordination is that although it involves working together to achieve common goals, those goals need not be socially desirable. In principle, enforcement agents might work together to implement unfair, inefficient or illegitimate enforcement strategies. Third, by providing opportunities for actors outside of formal organizational structures to participate in decisionmaking, coordination can blur responsibility for actions and thereby undermine accountability.

IV. The case for institutional modularity

The optimal level of coordination evidently depends on the applicable normative criteria as well as context-specific factors such as the costs of coordination, the value of institutional competition and the objectives of the agents in question. This raises the possibility that the optimal institutional arrangement is one which is sufficiently flexible to allow for varying degrees of coordination.

A system which incorporates multiple enforcement agents that are able but not required to coordinate with one another—in other words, where there is high *potential* for coordination—fits this description.[23] We call this kind of system a modular one because for any given function it relies on multiple functionally interchangeable units (modules) that are capable of operating either independently or in combination with one another.[24] In the business context, modular organizational design has been recognized as a way of capturing the

21 *J. Tankebe*, Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy, Criminology 51 (2013); *Johnson, Maguire, and Kuhns*, note 21.

22 *Prado and Carson*, note 6, p. 8. See also *Paul B. Stephan*, Regulatory Competition and Anticorruption Law, Virginia Journal of International Law 53 (2012) (discussing benefits of international competition in anticorruption enforcement).

23 *Prado and Carson*, note 6 ("Creating institutional structures that allow—but do not require—otherwise independent entities to coordinate when feasible and beneficial can encourage efficient and effective inter- and intra-institutional collaboration while protecting organizational autonomy.").

24 We use the term institutional modularity to refer to the combination of what Prado and Carson call institutional multiplicity and institutional malleability.

benefits of coordination while reducing communication costs and preserving flexibility.[25] In principle, modularity should have the same implications in public sector organizations such as anti-corruption enforcement agencies.

For example, a modular enforcement system might have three different agencies with the power to monitor government procurement, four agencies capable of investigating suspicious transactions, and three agencies with the authority to prosecute wrongdoers in any one of three different fora. The agencies performing each function would be capable of operating independently, and even pursuing different objectives if they have legitimate disagreements about how best to serve the public interest. At the same time they would be capable of coordinating their activities when necessary to enhance efficiency, fairness or legitimacy.

This is not to say that institutional modularity in anti-corruption enforcement is unambiguously optimal. If the costs of coordination are prohibitive and hierarchical oversight of enforcement institutions is weak, then independence may be optimal. In a divided society characterized by fundamental disagreements about the objectives of anti-corruption enforcement, tolerance of institutional conflict may be the only legitimate approach because it best reflects the range of views among the affected population. If corruption is a pressing problem and resources are scarce, then coordination, or even outright integration, may offer compelling advantages in terms of efficiency.

V. Institutional modularity in Brazil

Do any anti-corruption institutions actually operate in a modular fashion? According to Carson and Prado, Brazil's anti-corruption institutions, at least at the federal level, more or less correspond to our description of a modular system. Brazilian anticorruption agencies appear to embrace both the overall objective of combatting corruption and the idea of coordinating their efforts in order to enhance effectiveness. At the same time, they are capable of operating independently when that seems necessary.[26] These are the key elements of the modular approach to anticorruption enforcement. The only exception is at the adjudication stage, where the judiciary has exclusive authority and creates bottlenecks.

The modular approach seems to be working in Brazil. In recent years there have been several successful enforcement actions involving high-ranking public officials. In fact, Praça and Taylor suggest that the success of Brazilian anticorruption institutions now may

25 See generally, *Raghu Garud, Arun Kumaraswamy, and Richard Langlois (eds.)*, Managing in the modular age: architectures, networks, and organizations, Hoboken 2009. The concept of modularity is also used to describe products such as computer systems, and the processes used to design them. Some commentators argue that modular products and processes should lead to modular organizational designs. See *Ron Sanchez and Joseph T. Mahoney*, Modularity, flexibility, and knowledge management in product and organization design, Strategic Management Journal 17.S2 (1996); *Carliss Y. Baldwin and Kim B. Clark*, Managing in an Age of Modularity, Harvard Business Review 75.5 (1997).

26 *Prado and Carson*, note 6; *Praça and Taylor,* note 5.

be a self-reinforcing phenomenon. They claim that over the past thirty years, interactions across anticorruption institutions have spurred incremental institutional changes that have often, though not always, led to improvements in performance.[27]

In the following sections we extend Carson and Prado's analysis of Brazil to five other South American countries and examine whether modular anti-corruption institutions have emerged in those countries.

C. Anti-corruption law enforcement in South America

In this section we examine the extent to which institutional modularity is a characteristic of anti-corruption enforcement in five South American countries. Our working hypothesis is that the design of anti-corruption agencies—like other public agencies—will be influenced by a mix of historical factors, including: the influence of political actors who see anti-corruption institutions as weapons that can be used against themselves or others;[28] economic constraints on technology, social capital, human capital, and financial resources;[29] ideas about best practices in law enforcement;[30] or policymakers' desires to enhance social status and legitimacy or to achieve the comfort of conformity.[31] We presume that the factors that influence the design of anti-corruption institutions may be foreign as well as domestic, and can emanate from actors in the Global South as well as the Global North.[32] For instance, local officials might adopt international best practices such as Hong Kong-style integrated anti-corruption agencies because they hope to enhance their status in the eyes of foreign peers, or simply to conform.[33] To be clear, we see no reason to presume that the institutions that emerge in any given context will be optimal for the society as a whole.

27 *Praça and Taylor*, note 5.

28 *Agnes Batory*, Political Cycles and Organizational Life Cycles: Delegation to Anticorruption Agencies in Central Europe, Governance 25.4 (2012). See also *John R. Heilbrunn*, Anticorruption Commissions: Panacea or Real Medicine to Fight Corruption?, Washington, D.C. 2004.

29 See *Doig, Watt, and Williams*, note 3.

30 *Jacqueline Ross*, The Place of Covert Policing in Democratic Societies: A Comparative Study of the United States and Germany, American Journal of Comparative Law 55 (2007).

31 *Ryan Goodman and Derek Jinks*, Socializing States: Promoting Human Rights Through International Law, New York 2013.

32 *Máximo Langer*, Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery, American Journal of Comparative Law 55 (2007).

33 This list of potential influences on the design of anti-corruption institutions is inspired by the extensive literature on factors that influence the creation and design of new regulatory agencies. See *Cecilia Martinez-Gallardo and Maria V. Murillo*, Agency under constraint: Ideological Preferences and the Politics of Electricity Regulation in Latin America, Regulation & Governance 5 (2011) (stressing policymakers' ideology as a determinant of regulatory design); *J. Jordana, D. Levi-Faur, and X. Fernandez*, The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion, Comparative Political Studies 44.10 (2011) (both foreign and domestic influences are important); and *Mariana M. Prado*, Implementing independent regulatory agencies in Brazil: The contrasting experiences in the electricity and telecommunications sectors, Regulation

With these considerations in mind, we have selected for comparison countries that vary in, among other ways, the extent to which corruption is regarded as a pressing social problem as well as overall levels of political competition, institutional and economic development. These factors might all affect the attractiveness of institutional modularity, as opposed to pure independence, coordination or integration. It is worth noting, however, that all of the countries in our study, like other South American countries, have a roughly similar legal heritage.[34] This fact, together with their geographic proximity and linguistic ties, suggests that the countries' policymakers are likely to be subject to similar social influences.

I. Post-colonial legacies

Two features of South American history have shaped the interaction of anti-corruption institutions. The first is a particular understanding of the concept of separation of powers that was prevalent during the formative years of Latin American legal systems and still permeates institutional practices. In this view, the state is broken down into separate branches, or "powers", each responsible for performing a basic function. The main branches are those charged with rule-making (legislature), rule execution and administration (executive), and rule application in the context of specific disputes (judiciary). The principle of separation of powers is understood strictly, implying that each branch of government has its own exclusive sphere of competence.[35] This idea does not sit well with the idea that agencies located in different branches of government might have common objectives, and thus interests in coordination.[36]

& Governance 6 (2012) (focusing on intellectual and political influences on institutional design in Brazil).

34 This claim should not be overstated. Latin American legal systems are similar in the following respects: their private law can be traced back to Roman law as well as various Continental jurisdictions and, except for Brazil, their constitutional norms have been influenced strongly by the US Constitution (*Kleinheisterkamp*, Development of Comparative Law in Latin America, http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199296064.001.0001/oxfordhb-9780199296064-e-009 (last accessed on 1 July 2021)). They also appear to be linked by influential social networks that sometimes lead them to adopt reforms at around the same time (Langer 2007). At the same time different countries have been influenced in different ways by different European legal systems and many norms have been developed indigenously. See *Jan Kleinheisterkamp*, Development of Comparative Law in Latin America, The Oxford Handbook of Comparative Law (1st edn), Edited by Mathias Reimann and Reinhard Zimmermann. 2006 and *Mariana Pargendler*, The Rise and Decline of Legal Families (October 1, 2012). American Journal of Comparative Law, Vol. 60, No. 4, 2012 (Brazilian corporate law influenced by the laws of several common law and civil law jurisdictions and adapted to fit local needs).

35 *John H. Merryman and Rogelio Pérez-Perdomo*, The Civil Law Tradition, in: An Introduction to the Legal Systems of Europe and Latin America (3rd ed.), Stanford 2007, p. 16 and ff.

36 For a more general account of the obstacles imposed by a formalist view of the separation of powers, see *José R. Rodriguez*, The Persistence of Formalism: Towards a Situated Critique beyond the Classic Separation of Powers, The Law and Development Review 3.2 (2010).

The second significant historical feature is the region's experience with authoritarianism. The mid-nineteenth century, prior to the establishment of constitutional systems, was characterized by a high dispersion of territorial power. In many areas political power was concentrated in the hands of local caudillos, charismatic leaders who usually based their power on force rather than legitimacy. The hallmarks of the *caudillo* model of governance were frequent recourse to institutional violence to resolve power disputes and, very much related, a top-down approach to law creation and application.[37] These were prominent features of South American politics throughout the twentieth century. This tradition favors the imposition of ideas in a top-down fashion, rather than as a consequence of a bottom-up debate that includes civil society, and so may discourage collaborative approaches to rule creation and application.[38] The top-down approach has arguably survived the return to democratic stability that has occurred during the past 30 years.[39]

Authoritarianism in South America—with the exception of Colombia—has also contributed to selective enforcement of laws.[40] Until very recently, powerful offenders enjoyed almost absolute immunity.[41] The few clear exceptions in the region have been related to gross violations of human rights in the periods of transition to democracy, and even there enforcement has been imperfect. Brazil granted and maintained amnesty for all crimes committed during its military regime' and Argentina, despite convicting the highest authorities of the military government in an exemplary trial, was not able to advance criminal cases against any other agents involved in gross human rights violations until after 20 years of enforcement of "impunity laws".[42] More recently, convictions of high-ranking officials based on corruption charges have been extremely exceptional in most countries in the region, and in some countries no such convictions have ever occurred. Civil and administrative actions are even less common.[43]

37 *Eric Wolf and Edward C. Hansen*, Caudillo Politics: A Structural Analysis, Comparative Studies in Society and History 9.2 (1967), p. 169 and ff.

38 *Miguel Schor*, Constitutionalism Through the Looking Glass of Latin America, Texas International Law Journal 41.1.

39 *Philip Oxhorn*, Social Inequality, Civil Society, and the Limits of Citizenship in Latin America, in: Susan Eva Eckstein and Timothy P. Wickman-Crowley (eds.), What Justice? Whose Justice?, Berkeley 2003, p. 47 and ff.

40 *Jo-Marie Burt*, Desafiando a la impunidad en tribunales nacionales: juicios por derechos humanos en América Latina, in: Félix Reátegui (ed.), Justicia Transicional. Manual para América Latina, Comisión de Amnistía del Ministerio de Justicia de Brasil 2011, pp. 309–340 and 2–53.

41 Ibid.

42 Ibid; *Catalina Smulovitz*, I can't get no satisfaction: Accountability and Justice for Past Human Rights Violations in Argentina, Paper prepared for the Project: Comparing the Effectiveness of the Accountability Mechanisms in Eastern Europe and Latin Americal jointly organized by El Colegio de México and the United Nations University in association with Oxford University Buenos Aires (2008).

43 In Brazil, for example, imprisonment statistics indicate 768 people serving sentences or in pre-trial detention for corruption (active and passive) in December 2012. See *Maíra R. Machado.* Crime e/ou improbidade? Notas sobre a performance do sistema de justiça em casos de corrupção.

II. Pressures to innovate

The transition to democracy that has marked the past thirty years of South American history has been accompanied by unprecedented efforts to establish the rule of law and enforce human rights. During this period South American countries have also become more involved in global and regional integration mechanisms. In the 1990s, inspired by the New Public Management, most countries also received international assistance aimed at increasing the efficiency of their bureaucracies. This assistance often pointed toward the creation of specialized public sector agencies.

Perhaps as an outgrowth of these trends, since the beginning of the 21st century the countries in our study have been active participants in the global anticorruption movement. All of the countries have been members of the OAS Anticorruption Convention for more than a decade and of UNCAC for an average of seven years. Argentina and Brazil were among the first non-OECD countries to sign the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention").[44] Colombia acceded to the OECD Convention in 2013 and Peru is reviewing its legislation with the purpose of becoming a member. Argentina and Brazil are members of the Financial Action Task Force ("FATF"), the leading intergovernmental organization concentrating on money laundering and terrorist financing, and all the countries are members of the FATF regional body, GAFISUD.

All of these international bodies, and especially the OECD and FATF, have mechanisms designed to place pressure on member states to implement the recommendations those bodies make and the obligations the members have assumed. Donor institutions such as the World Bank, USAID and UNODC have funded projects with the objective of strengthening the anticorruption institutional framework throughout Latin America, including in all the countries in our study. International bodies have explicitly identified lack of coordination

Revista Brasileira de Ciências Criminais, vol. 112, jan.2015, p. 189-211 (last accessed on 1 July 2021). High ranking officials from Lula administration are also serving prison sentences as a result of the *Mensalao* case. In Argentina, the latest available data shows that only around 3% of corruption cases end with a conviction, and that criminal proceedings on corruption charges last an average of 14 years, whereas proceedings on all other offences last on average one and a half years (CEJA, 2010). Only two high ranking Government officials were actually convicted on corruption grounds in recent years. Criminal prosecutions on corruption charges can remain open for around 10 or 15 years without relevant progress, which can turn them into pressure tool for political purposes. In the case of Bolivia, an important number of convictions were held in recent years against local city mayors. Out of 23 mayors convicted, 10 have been of the Government party (MTILCC 2014). Besides, former senator and President of the national oil company YPFB has been imprisoned on corruption grounds.

44 Argentina signed on February 8, 2001 and Brazil signed August 24, 2000. Bulgaria, another non-OECD party, signed on December 22, 1998. See *OECD*, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status, http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last accessed on 1 July 2021).

among anticorruption institutions as a problem in almost all of our countries.[45] These external actors have created significant material inducements for countries to create new legal rules and institutions in a wide range of areas related to anticorruption law, including access to information, asset disclosure, regulation of conflicts of interest, criminal procedure (immunities; statute of limitations, leniency agreements), and regulation of money laundering.

III. The multiplicity of anti-corruption institutions

In our six countries, every branch of government has a role in anticorruption enforcement. Those roles do not necessarily correspond to the traditional division of powers. There are several examples of agencies that perform multiple functions, including some which go beyond the traditional ones. There are also many instances in which responsibility for a particular function is distributed across multiple agencies. Additionally, many of the countries in our study have created anticorruption agencies that do not fit neatly into the conventional tri-partite division of powers. Several of those agencies, such as Financial Intelligence Units and specialized anti-corruption agencies, have been created within the past two decades as a result of the influence of pressure from external actors such as the Financial Action Task Force or donors.

There are also important divisions of responsibility within agencies. This is especially true for public prosecutors. In all the countries in our study, prosecutors belong to the Public Ministry (*Ministerio Publico*), a large agency with offices in multiple cities and several specialized units. It is not uncommon for more than one prosecutor to have jurisdiction over an anticorruption matter. For example, one may have jurisdiction over matters that take place in a particular territory and the other may have jurisdiction over particular types of misconduct. In the case of the Argentine Ministerio Publico, for instance, the *Fiscalía de Investigaciones Administrativas*, a specialized anticorruption prosecution office, might have shared jurisdiction with the public prosecutor in charge of the case on the grounds of territorial competence.[46] To treat "the Prosecutor" as a unitary actor would obscure these important divisions and the resulting opportunities for conflict, competition, complementarity or coordination within the Ministerio Público. Indeed, in many cases it would be appropriate to think of each prosecutor as a separate agency with his or her own

45 OAS MESICIC reports for all the six countries studied consistently recommend that they strengthen coordination between anti-corruption institutions, whether by improving procedures, sharing information, creating joint courses, drafting laws or training employees. See, for example, the following OAS MESICIC 4th review reports: Argentina (pp. 13, 32, 40, 49); Bolivia (pp. 32, 57); Brazil (p. 15); Colombia (pp. 33, 45, 56); Paraguay (pp. 14, 41); and Peru (pp. 27, 45). These recommendations date back to the first OAS report in 2006. Our review of the reports since that time suggests that most of the countries have adopted certain types of coordination mechanisms and that the number of recommendations that coordination be strengthened has decreased significantly.

46 Law 24.946, article 46.

restricted but autonomous domain. The controversial but widely endorsed idea of "internal independence" of prosecutors supports this view.[47]

Our analysis only covers national institutions. Sub-national anti-corruption institutions also play important roles in combating corruption and may diverge in significant ways from their counterparts at the national level.[48] We exclude sub-national institutions for both practical reasons and in order to facilitate cross-country comparison. Adding sub-national institutions to the analysis is an important topic for future research.[49]

1. Legislature

Legislative chambers are not only in charge of legislating but also of monitoring the acts of the other branches of government. This monitoring is usually conducted through the work of subordinate institutions such as Auditors General (in Argentina) or legislative committees. Legislators can also request reports from executive/administrative agencies or ministries.

In all of the countries studied, Special Parliamentary Investigative Committees (SPICs) can be created ad hoc to investigate specific instances of corruption.[50] These committees do not formally participate in adjudication or the imposition of sanctions. They are only empowered to prepare reports which are made public and sent to other institutions for further investigation and adjudication. Although they are used exceptionally and possess limited powers, SPICs have had a lot of visibility, showing the potential of boosting public awareness of corruption cases—e.g., the SPIC created in Bolivia in 2013 to investigate corruption in the privatization of former state-owned companies carried out between 1989 and 2000; or the SPIC created in Argentina in 2000 to investigate "illicit activity involving money laundering", which shed light over corruption structures in the country in a highly conflictive political, institutional and social context which soon after led to the widest crisis since the return of democracy.

In Brazil, the Tribunal de Contas da União (TCU), which is formally part of the legislative branch but enjoys considerable autonomy, plays a unique role in overseeing

47 *Observatorio Colombiano de la Administración de Justicia*, Independencia en Juego. El caso de la Fiscalía General de la Nación (2001–2004), Bogota 2005, p. 40.

48 This is especially true in countries like Brazil, where state and local government have great autonomy from the federal level and some states and cities rely more on their own incomes than from federal, which technically makes federal anti-corruption institutions incompetent to act. Interview 22.

49 For discussion of state-level anticorruption institutions in Brazil see *Fiona Macaulay*, Federalism and State Criminal Justice Systems, in: *Power and Taylor*, note 6, pp. 218–249.

50 In Brazil, legislatures at all three levels of government frequently create SPICs. Some of these have led to prominent corruption cases. See, for example, the TRT Case discussed in *Machado and Ferreira*, note 4, and *Davis, Jorge, and Machado*, note 4.

the fiscal activities of the federal government.[51] The TCU has branches throughout the country and a staff of roughly 2,400.[52] It is presided over by a group of ministers who make determinations after receiving information from its staff. The TCU not only monitors fiscal activities but also conducts investigations (called audits), adjudicates the legality of government actions, imposes sanctions and makes recommendations for reform. The sanctions include damages, fines, debarment of private firms (for a period of three to five years) and, for officeholders, bars on holding high positions in the civil service. The TCU may also report public officials involved in misconduct to the electoral courts, which are then required to bar them from running for any sort of elected office. Financial sanctions ordered by the TCU are enforced by the federal attorney general (AGU) and the judiciary. Determinations of responsibility and sanctions imposed by the TCU can be appealed to the judiciary.

2. Executive

In most of our countries, several agencies within the executive branch engage in anti-corruption enforcement. These include the police, specialized anti-corruption agencies, FIUs, auditors and disciplinary bodies. Some agencies perform multiple functions and agencies with the same name in different countries do not necessarily perform the same functions.

In the traditional model, the most important law enforcement agency in the executive branch is the police force, which focuses on the investigation stage of the enforcement process. In the past two decades, many police forces have become more professional and have created internal units for specialized tasks such as investigation of complex or economic offenses and anticorruption activities. It is worth noting that some countries have multiple police forces. For instance, in Colombia and Paraguay there is a judicial police force, under the jurisdiction of the Public Prosecutor, which complements the work of the Executive branch's police force. In Brazil, police forces are divided into military and civil branches and only the civil branch is responsible for investigations overseen by the public prosecutor and judges. For their part, Bolivia and Peru have both created special anticorruption police units, which work at the request and under the supervision of the prosecutors.[53]

In addition to police, every country in our study has a specialized anti-corruption agency located in the executive branch of the national government. The functions of these agencies vary. In Argentina, the Anticorruption Office is empowered to design preventive measures, educate officials about their legal obligations, monitor public officials' asset dis-

51 Speck, Bruno. "Auditing Institutions". In: Power, Timothy; Taylor, Matthew Taylor (Org.). Corruption and Democracy in Brazil: The Struggle for Accountability, South Bend 2011.

52 *Prado and Carson*, note 6.

53 The division of tasks between police forces and prosecutors has recently generated a strong debate in Brazil. Since 2008, the controversy has been the subject of constitutional litigation before the Federal Supreme Court (RE 593727). As of December 2014, there was no decision. Available at: http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2641697 (last accessed 1 July 2021).

closures and conflict of interest declarations, conduct investigations, appear in court acting as criminal plaintiff ("*querellante*") to prosecute corruption offenses and, when acting as "*querellante*", appeal judicial decisions. In Paraguay, the recently created Anticorruption National Secretary is empowered to coordinate and monitor anticorruption and transparency policies, promote strategies to prevent corruption, receive reports and distribute them to enforcement authorities, and assess transparency and anticorruption measures implemented by state agencies. In Peru, the *Comisión Nacional Anticorrupción* (CAN) coordinates the efforts of the different public agencies empowered to prevent, investigate, prosecute or punish acts of corruption and its members consist of representatives of those agencies. CAN's decisions are not binding on the Public Prosecutor or the Judiciary. In Colombia, the *Secretaría de Transparencia*[54] has a mandate to advise and support the President in the development and implementation of a transparency and anti-corruption policy, including through the development of preventive anticorruption tools, coordinating execution of the transparency policy, and analyzing internal control reports. For its part, after a long period of political instability and social unrest, with the election of President Evo Morales (the first President of indigenous origin in the country's history) in the beginning of the century, Bolivia carried out multiple institutional reforms, including the creation of a Ministry of Institutional Transparency and Fight against Corruption (MTILCC). The main functions of this Ministry include: formulating and implementing policies on the fight against corruption; proposing draft regulatory standards for eliminating corruption; promoting citizen education programs; presenting charges for acts of corruption; and coordinating the investigation, follow-up, and monitoring of acts of corruption and judicial proceedings against such acts. Strictly speaking Brazil does not have an anti-corruption agency, but the federal government does have the Controladoria General da União (CGU) (Office of the Comptroller General) which engages in both monitoring and investigation aimed at misuse or misappropriation of federal government funds.

Every country in our study also has an FIU located in the executive branch. For the purposes of anti-corruption enforcement they serve primarily to help detect instances of laundering of the proceeds of corruption. Some FIUs are empowered to do more than just to monitor and report suspicious activity to prosecutors. In Argentina, for instance, the FIU can also appear in court itself and push investigations forward when acting as a criminal plaintiff ("*querellante*").

Aside from the police and FIUs, there are other agencies in the executive branch that play a role in enforcing anti-corruption norms. For instance, organizations located in the executive branch, including state-owned enterprises, typically include units charged with conducting "internal audits". These units may or may not be subject to centralized oversight. In Argentina the units that play this role are overseen by the *Sindicatura General de la Nación* (SIGEN). Among other functions, it is empowered to create and apply internal control norms, to supervise the application of those norms by the internal audit units, moni-

54 Decree No. 4637, December 9, 2011.

tor compliance with the applicable accounting standards, oversee the proper functioning of the internal control system, etc.[55] The Paraguayan General Audit of the Executive Power performs similar functions.[56] In Peru by contrast, each of the Ministries in the executive branch has an *Oficina General de Administración* (OGA), a unit which is in charge of monitoring the administrative supply services, accounting and treasury, budget control and personnel. The OGAs work in coordination with the *Contraloría General de la República* reporting to it the irregularities they find, so that the *Contraloría* can proceed in accordance with its powers. In Colombia, each state entity has an internal control office and there is no centralized agency to which they must report. These offices are responsible for overseeing the internal control systems. Moreover, each agency has a disciplinary office that controls the behavior of the public officials and has the power to punish them, if it is the case. The *Procuraduria General de la Nación* is independent of other branches of government and can, when it deems necessary, displace the internal disciplinary offices in the investigation and punishment of the acts of public officials. In Bolivia and Paraguay, "transparency" (in the case of Bolivia) or "anti-corruption" (in the case of Paraguay) units have been created in ministries and several agencies of the Executive, whether autonomous or not. These units not only promote transparency, but also receive and analyze complaints, and coordinate the information flow with the Prosecutor's office, in the case of Paraguay and with the Ministry of Transparency and the Fight against Corruption, in the case of Bolivia.

Corruption on the part of public employees can be investigated, adjudicated and sanctioned through administrative processes, meaning without the involvement of any branch of government outside the executive (though administrative decisions are subject to judicial review). These processes are generally rather decentralized. In administrative disciplinary proceedings in Brazil's executive branch the investigators and adjudicators are not individuals who specialize in those tasks, but rather are public employees, who may or not have special training.[57] To avoid the selection of peers of the defendant, a program has been launched to locate adjudicators in other states who participate in the proceedings by videoconference. The system is overseen by a branch of the CGU, the Corregedoria Geral da União (CRG), which plays a quasi-regulatory role by training public officials in its application, coordinating proceedings and establishing common norms.[58] In Argentina, by contrast, the system is more decentralized but is implemented by specialized staff. Administrative proceedings (*sumarios administrativos*) must be initiated in the jurisdiction where the event occurs, by the *oficina de sumarios* for the relevant area, and permanent staff lawyers are responsible for the proceedings.[59] The Treasury Attorney's Office (*Procu-*

55 Argentine Law No. 24.156.

56 Executive Decree No. 10883/07.

57 Interview 01.

58 In Brazil there are also central corregedorias with similar powers for the judiciary and the Ministerio Publico.

59 Argentina, Decree No. 467/99, Reglamento de Investigaciones Administrativas.

ración del Tesoro de la Nación) also has jurisdiction in certain cases involving high ranking officials.[60] Moreover, the office of the specialized anticorruption prosecutor (the *Fiscalía de Investigaciones Administrativas*) must be notified of the initiation of every administrative proceeding in order to enable it, if it deems appropriate, to take action as a plaintiff.[61]

Anticorruption enforcement also benefits from the work of a variety of actors that do not specialize in law enforcement. For instance, in-house legal departments and human resources offices play important roles in educating public officials about their duties and the strictures imposed by law and codes of conduct.[62] Meanwhile, regulatory agencies responsible for areas such as securities, banking, legal persons and public procurement engage in monitoring and investigation that can help to uncover cases of corruption.[63] In the case of countries in which public services have been privatized, agencies that supervise private suppliers of public services are also important sources of information. For example, in Argentina special agencies monitor provision of electricity, gas and water by private companies. These agencies are empowered to produce reports and transmit findings of illegal practices to the Ministerio Público or the Judiciary.[64]

3. Judiciary

In most of the countries in our study there are multiple courts in which corruption cases can be adjudicated. This is because courts' jurisdiction is typically defined by the type of proceeding (criminal, civil,[65] or appeal from an administrative determination) and where

60 Argentina, Decree No. 1462/94.

61 Argentina, Decree No. 467/99, Reglamento de Investigaciones Administrativas.

62 In Brazil, each agency within the federal government has a cadre of legal consultants who advise public officials, among other things, about the legality and probity of actions and contracts. In the Executive, these consultants are part of Consultoria Geral da União, a unit of AGU responsible for assigning federal lawyers to different Ministries.

63 For example, in Argentina monitoring activities are also performed by the National Securities Commission (CNV, which monitors all publicly traded companies), the Central Bank (BCRA, which monitors financial institutions) and the General Justice Inspectorate (IGJ, which is in charge of monitoring all private, not listed companies based in the City of Buenos Aires), and the National Insurance Superintendency (SSN, which regulates and monitors insurance companies).

64 In Colombia, this role is played by *Superintendencia de Servicios Publicos.*

65 All of the countries have federal laws that criminalize corrupt practices—most of them are found in each country's Criminal Code—only some have specific provisions that impose civil liability for such acts. In the case of Brazil, Improbity Law (1992) creates civil liability for three sets of unlawful acts: illicit enrichment, acts against the principles of the public administration, and acts that cause damage to the public treasury. Illicit enrichment did not constitute a criminal offence but the other two categories of unlawful acts capture conduct that might also be criminal. See, among many others, *Sivio Antonio Marques*, Improbidade Adminstrativa: ação civil e cooperação jurídica internacional, São Paulo 2010. In the rest of the countries in our study, illicit enrichment has been criminalized, pursuant to a mandatory provision of the OAS Convention against Corruption. In addition, in all of the countries general civil proceedings can be used to obtain compensation for harm caused by corruption. While there is no country with a civil court that specializes in

the misconduct occurred. One country in our study, Peru, has a court that specializes in adjudication of criminal cases involving corruption of public officials and Bolivia is in the process of implementing a law creating similar specialized courts.

4. Prosecutors

In Argentina, Bolivia, Brazil, Peru and Paraguay, the institution responsible for public prosecutions, both civil and criminal, is an autonomous agency which belongs to neither the Executive nor the Judiciary, called the Ministerio Público. In Colombia, the *Fiscalía General de la Nación*, which has a prosecutorial role belongs to the Judiciary—although it has administrative and financial autonomy—while the *Ministerio Publico*, which comprises both prosecutors (*La Procuraduría General de la Nación*) and an ombudsman (*Defensoría del Pueblo*), is an autonomous agency that does not belong to either the Executive or the Judiciary. In Argentina, the *Ministerio Público* comprises both prosecutors (*Ministerio Público Fiscal*) and public defenders *(Ministerio Público de la Defensa*). In the two federal countries, Argentina and Brazil, the states have their own Ministerio/Ministério Público, which are also autonomous.

Most of the countries have established specialized units within the Ministerio/Ministério Público to prosecute cases involving corruption of public officials. In some cases, like in Paraguay, these offices both conduct the investigation and represent the public at trial. In other cases, they only provide investigative services for prosecutors who require specific assistance in areas in which the prosecutors have no specific training (usually, forensic accounting, financial analysis and international asset tracing). Argentina has both types of specialized units. Specialized prosecutorial offices may intervene based on objective criteria, such as whether the amount of money embezzled exceeds a certain figure, or more subjective criteria, such as the social harm or institutional impact of the case.

After the collapse of the Fujimori regime in 2000, Peru re-organized the agencies responsible for prosecution of corruption offences. More recently, Bolivia followed suit. The resulting institutional framework is quite different from that of the other countries in our study, as those prosecutors only deal with corruption cases. In the case of Bolivia, corruption investigations addressed the Ministerio Público itself, leading to the intervention of many prosecutorial offices and the removal of some prosecutors. Both countries had also established "asset recovery units", though they are not located in the prosecutor's office but within the Executive, within the Ministry of Justice in the case of Peru, and within the Ministry of Transparency and the fight against Corruption in the case of Bolivia –with auspicious initial results, as around 117 million dollars have been recovered since its opening.[66] Argentina has recently created an Asset Recovery Unit within the *Ministerio*

adjudicating anticorruption cases, there are two examples of specialized anticorruption courts that deal with both civil and criminal cases.

66 Interview with the Director of Bolivia's Asset Recovery Unit (2015).

Público Fiscal, with the task of providing specialized advice and resources to prosecutors in charge of the investigations.

5. Auditors general and contalorías

Most of the countries in our study have agencies that are independent of any of the traditional branches of government which are responsible for overseeing fiscal management of public bodies and state-owned enterprises. In Bolivia, Brazil, Colombia, Peru and Paraguay they are called *contralorías/controladorias* (Colombia also has an independent Auditor General responsible for overseeing the national and subnational contralorías). In Argentina, this auditing function is divided between internal auditors of the Executive Branch (the *Sindicatura General de la Nación*) and an external body, the Auditoria General, which belongs to the legislative branch, although it is functionally autonomous.

6. Civil society and private firms

In most countries, civil society has played a crucial role in 'monitoring the monitors': holding public hearings when appointments are being made to key supervisory positions; advocating for the adoption of recommendations issued by monitoring agencies; and publicizing conflicts of interest on the part of key enforcement officials. In countries such as Argentina and Brazil, NGOs' capacities have been enhanced by transparency and access to information laws.[67] NGOs can also play a role in educating government officials, private firms, and the general public about anticorruption norms. There are even examples of governments partnering with NGOs to publish educational materials and even to monitor compliance with settlement agreements in prominent cases. In Colombia, for example, the mission of the *Comisión Nacional Ciudadana para la Lucha contra la Corrupción* is to allow civil society to contribute to monitoring of policies, programs and actions created and implemented by the national government in the prevention, control and punishment of corruption.[68] Bolivia has recently gone a step further. Based on the constitutional principle of "participation and social control", it passed a law regulating the creation of self-organized civil society groups that exert a close control over the public administration especially over

67 Interviews 21 and 22 highlights efforts from Transparência Brasil and IFC/Amarribo in Brazil. The same can be said of Argentina, where an Executive Decree on Freedom of Information allowed any citizen to request public information available on any issue. This procedure has been specially used by civil society organizations, which, even though the Government's openness heavily decreased over the years, managed to produce some valuable reports on the basis of the information received. In one of Argentina's major corruption scandals, the prosecution of a tainted contract between the National Bank of Argentina and IBM ended up with a settlement agreement under which 4 of the defendants accepted their responsibility and committed to return illicitly acquired gains. Two Argentine NGOs (ACIJ and CIPCE) were appointed as monitors of the settlement agreement.

68 Ley No. 1474 (2011), art. 66.

those goods and services that affect each group directly. In the last two years, more than 750 groups had registered. Contracts have been terminated and sanctions have been applied as a consequence of evidence provided by these groups.

Private firms also play a role in enforcing anticorruption laws. The practice of holding corporations liable for corruption, which is widespread in the United States and represents a growing trend in other OECD countries, is now reaching South America. In some countries, corporations can be held criminally liable, as in Colombia[69] (and under proposed legislation in Argentina and Peru),[70] while in Brazil they can be held liable through civil and administrative proceedings.[71] Together with the introduction of leniency provisions, these enforcement practices create incentives for firms to cooperate with enforcement agencies and establish or strengthen anticorruption compliance programs.

69 Colombian Law 1474, article 34. Chile also permits criminal liability of companies for corruption offenses. See Law 20393.

70 The Argentine law is available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/295000-299999/296846/norma.htm; the Peruvian law is available at https://busquedas.elperuano.pe/normaslegales/ley-que-regula-la-responsabilidad-administrativa-de-las-pers-ley-n-30424-1370638-1/ (last accessed 1 July 2021).

71 Brazilian Law 12846/2013.

Table 1 summarizes how various enforcement activities are distributed across public institutions in our six countries.

	Table 1 - Distribution of enforcement activities across institutions					
	Monitoring	**Investigation**	**Prosecution**	**Judgement**	**Sanctioning**	**Education**
Argentina	Oficina Anticorrupción; Unidade de Informácion Financiera; Auditoria General de la Nación; Sindicatura General de la Nación	Oficina Anticorrupción; Unidade de Informácion Financiera [UIF]; Fiscalìa Nacional de Investigaciones Administrativas; Procuradoría de Criminalidad Económica y Lavado de Activos [PROCELAC]; Polícia Federal; Ministério Público; Poder Judicial	Ministério Público	Poder Judicial	Poder Judicial	Oficina Anticorrupción
Bolivia	Ministerio de Transparencia; Assemblea Legislativa Plurinacional; Unidad de Auditoria Interna; Unidad de Transparencia (in some Ministerios); Controlador General del Estado; Unidad de Inteligencia Financera [UIF]	Ministerio de Transparencia; Tribunales y Juzgados Anticorrupcion; Fiscales especializados; Judiciário; Fiscal General del Estado; Policia Boliviana (Min. de Gobierno); Assemblea Legislativa Plurinacional; Unidad de Auditoria Interna; Controlador General del Estado (in case of fortunes)	Ministerio de Transparencia (as civil part); Tribunales y Juzgados Anti-corrupcion; Fiscales especializados; Fiscal General del Estado	Judiciário	Judiciário	Unidad de Transparencia

	Table 1 - Distribution of enforcement activities across institutions					
	Monitoring	**Investigation**	**Prosecution**	**Judgement**	**Sanctioning**	**Education**
Brazil	Controladoria Geral da União [CGU-CRG and SFC]; Corregedorias, COAF/MF; Comitês de Ética e Comissão de Ética Pública [CEP]; Tribunal de Contas da União [TCU]	Comitês de Ética e Comissão de Ética Pública [CEP]; Controladoria Geral da União [CGU-CRG and CGU-SFC]; Judiciário; Ministério Público [MP]; Polícia Civil; Polícia Federal [DPF]; Comissão Parlamentar de Inquérito [CPI]; Corregedorias; COAF/MF; DRCI/MJ; Conselho Nacional de Justiça [CNJ]; Conselho Nacional do Ministério Público [CNMP]; Tribunal de Contas da União [TCU]	Ministério Público;	Judiciário;	Controladoria Geral da União [CGU-CEIS]; Judiciário; Ministério Público [MP]; COAF/MF; Advocacia Geral da União [AGU-DPP & AGU-DPI]; Conselho Nacional de Justiça [CNJ]; Conselho Nacional do Ministério Público [CNMP]	Comitês de Ética e Comissão de Ética Pública [CEP]; Controladoria Geral da União [CGU-STPF]; COAF/MF; DRCI/MF; Tribunal de Contas da União [TCU-ISC]
Colombia	Unidad de Información y Análisis Financiero [UIAF]; Contraloría General de la República; Superintendencia de Industria y Comercio; Procuraduría General de la República; Superintendencia Financiera; Auditoría General de la República	Unidad de Información y Análisis Financiero [UIAF]; Contraloría General de la República; Poder Judicial; Ministério Público; Polícia Nacional; Policía Judicial	Ministério Público	Poder Judicial; Procuraduria General de la República	Poder Judicial	Programa Presidencial de Lucha Contra la Corrupción; Comisión Nacional Ciudadana de Lucha contra la Corrupción; Comisión para la Moralización;

	Table 1 - Distribution of enforcement activities across institutions					
	Monitoring	**Investigation**	**Prosecution**	**Judgement**	**Sanctioning**	**Education**
Paraguay	Secretaría Nacional Anticorrupción [SENAC]; Secretaria de Prevención de Lavado de Dinero [SEPRELAD]; Contraloría General de la República	Secretaría Nacional Anticorrupción [SENAC]; Secretaria de Prevención de Lavado de Dinero (SEPRELAD); Unidad de Delitos Económicos y Anti-Corrupción del Ministerio Público; Poder Judicial; Ministério Público; Polícia Nacional	Ministério Público	Poder Judicial	Poder Judicial	Secretaría Nacional Anticorrupción [SENAC]; Sistema de Gestión de Ética del Poder Ejecutivo Nacional
Peru	Consejo Municipal; Consejo regional; Controladoria General de la Republica	Procuradoria Anti-corrupcion; Poder Judicial [sistema anti-corrupcion]; Fiscalias especializadas en corrupcion; Congreso de la Republica; Ministerio Publico; Policia Nacional; Consejo regional; Controladoria General de la Republica	Procuradoria Anti-corrupcion; Fiscalias especializadas en corrupcion; Ministerio Publico	Poder Judicial: Sistema Anti-corrupcion	Poder Judicial: Sistema Anti-corrupcion	Consejo Municipal; Controladoria General de la Republica;

IV. Coordination mechanisms

It should be clear by this point that formal responsibility for anticorruption enforcement in our six countries is divided among multiple agencies or units within agencies. The next step is to determine how those agencies or units interact with one another, and in particular, the extent to which they coordinate their activities. We treat the existence of coordination mechanisms, both formal and informal, as indicia of coordination. We define the concept of a coordination mechanism broadly to include all sorts of patterns of communication and methods conducive to the achievement of a common goal. We include both interagency and intraagency coordination mechanisms.

As explained above, we focus on mechanisms that enable coordination among agencies or units performing the same function. For example, agencies involved in monitoring might

agree on which types of data will be collected by each agency; investigative agencies might create common databases; or prosecutors might agree on the sequence of proceedings. There are, of course, other forms of coordination that involve agencies responsible for different functions. Agencies that monitor might agree with agencies that investigate on the types of incidents monitors should flag for investigation (and then follow through by transferring information about those incidents on a regular basis). Or investigators might communicate with prosecutors to ensure that investigative reports cover all legally relevant facts and are comprehensible to prosecutors and judges.

In general, we find that Brazil and Peru have the most highly developed and formal sets of coordination mechanisms, but the two countries have adopted rather different approaches to achieving coordination. Peru has created specialized agencies for each stage in the enforcement process. This tends to facilitate coordination among actors performing the same function. Brazil, by contrast, typically has multiple agencies performing any given function but has created many formal mechanisms to support inter-agency coordination. Brazil has also created numerous intra-agency coordination mechanisms.

1. Coordination of monitoring

A critical part of the enforcement process is collection of data. It is common to distinguish two kinds of data collection: monitoring and investigation. The distinction begins with the objectives. Monitoring is designed to collect data on legitimate activity as well as misconduct,[72] while investigation is aimed exclusively at uncovering misconduct. However, the two concepts overlap and the labels are not necessarily applied consistently. Monitoring can be focused in areas where misconduct is believed to be highly likely and wide-ranging fishing expeditions can be labeled investigations.

Monitoring plays a prominent role in anticorruption enforcement. This includes data collection by agencies charged with maintaining registries of interests in land or corporations, as well as institutions charged with auditing expenditures by public entities. International anti-corruption conventions (as well as other instruments) strongly encourage states to establish two types of monitoring mechanisms specifically for the purposes of combatting corruption:

1) an asset disclosure system for public officials, through which public servants, usually on an annual basis, make sworn declarations detailing their own and their close families' patrimony and business interests. These systems, on the one hand, prevent potential conflicts of interests and, on the other, monitor changes in wealth.
2) a system for designated financial institutions and other gatekeepers, in both the public and private sector, to report about large cash transactions, suspicious transactions and

72 International anticorruption instruments describe monitoring activities as "preventative measures" (e.g., UNCAC, Chapter II, arts. 8.5; 14). While this paper exclusively focuses on enforcement, we also include forms of monitoring that serve as direct sources of information for investigations of corruption.

cross-border movements of currency to a centralized financial intelligence unit (FIU) with a view to identifying efforts to launder proceeds of corruption.

Given the variety of agencies involved in monitoring potentially corrupt activities, it is not uncommon for several different agencies to "own" separate pieces of relevant information. For example, the FIU might have information about financial transactions and the public registry might contain information about the beneficial owner of the private company. Assembling all the pieces of the puzzle into useful information and transmitting it to investigators requires coordination.

In Brazil, the *Secretaria Federal de Controle Interno*, a part of the Controladoria Geral da União (CGU), is responsible for finding information about possible corrupt practices held by other agencies of the federal government and determining which enforcement agency, including both disciplinary bodies and prosecutors, should receive the information.[73]

In Paraguay, the *Contraloría General de la República* is in charge of receiving and assessing public officials' assets declarations and a coordination mechanism has been devised by a memorandum of understanding with the *Ministerio Público* in order to facilitate and expedite corruption investigations. However, coordination is scarce in practice. The widespread lack of coordination for anticorruption purposes gave place to the creation of a new specialized coordinating agency within the Executive Power (the SENAC), with the main objective of strengthening the existent but still weak Paraguayan monitoring mechanisms.

In Argentina, both the National Anticorruption Office, in charge of monitoring public officials' declarations of assets, as well as the FIU, in charge of monitoring suspicious transactions reported by anti-money laundering gatekeepers, have strengthened their monitoring capacities by obtaining instant access to existing databases—eg., different public registries. In the case of the FIU, it was institutionally strengthened, both in terms of budget expansion and resources allocation. They also coordinate their monitoring. For example, the National Anticorruption Office performs enhanced monitoring over "politically exposed persons", which is a category defined by the FIU. However, political permeability has increased in recent years in these and other monitoring agencies in Argentina, and control activities have been subject to high levels of criticism because of its use as a political pressure tool, and in light of the emergence of corruption scandals involving high level state authorities in which no red flags had been raised.

2. Coordination of investigation

Unlike monitoring, investigation typically involves in-depth analysis of a relatively small number of incidents of suspected wrongdoing. Investigations are often triggered by analysis of the results of monitoring. For example, findings of unjustified increases may trigger criminal or administrative investigations for illicit enrichment. Similarly, an FIU might

73 Interview 01.

confirm a suspicious transaction report and pass it on to a prosecutor for further investigation. Anti-corruption investigations can also be triggered by information from other sources, such as tips from insiders or reports published by investigative journalists. Some investigations have narrow aims, such as specific public officials or transactions. Others aim at entire government projects, programs or departments.

Coordination among investigating agencies promises to enhance efficiency by not only avoiding duplication of effort but also taking advantage of complementary skill sets. Investigation of corruption demands the use of special techniques. On the one hand, like investigations aimed at organized crime, investigation of corruption may require surveillance, the use of informants, undercover agents, sting operations, or wire tapping, all techniques that require judicial authorization if the evidence gathered is to be introduced in court proceedings.[74] On the other hand, since corruption usually involves complex economic transactions, forensic analysis and information processing technology are usually required. Coordination is valuable if no single agency possesses all of these technical capabilities.

Coordination also helps to ensure that the results of investigations are useful at subsequent stages of the enforcement process, in terms of form, substance, and manner of production. In Brazil, for instance, the MP and the Police have had difficulty understanding and using reports produced by the CGU and TCU, on account of both their language and focus.[75]

In Peru, the existence of specialized anticorruption prosecutor's offices and criminal courts limits the need for interagency cooperation in investigation. In the other countries in our study a variety of forms of cooperation have emerged.

In the past decade Brazil has created a number of task forces to undertake joint investigations. Many of the most famous corruption cases in Brazil in last decade were brought to light by investigative task forces involving agencies such as the CGU, the DPF, the MPE, the MPF, the Banco Central, and the COAF.[76] The number of investigative taskforces in Brazil has increased dramatically in recent years, from two in 2006 to more than thirty in 2011.[77] Most involve the Federal Police, the Ministério Público, the CGU and the TCU.[78] These taskforces usually are established on a case-by-case basis.[79] There are, however, a few examples of longstanding taskforces, such as the *Força Tarefa Previdenciária*, in which the Federal Police, the Social Security Ministry and Public Prosecutors work together on fraud cases related to pension funds.[80] A striking feature of the Brazilian scheme is that the CGU contains a body, the *Diretoria de Operação Especiais*, dedicated to planning

74 Interview 07.
75 Interview 14.
76 Interview 01.
77 Interview 09.
78 Interview 01.
79 Interview 02.
80 Interviews 07 and 11.

the creation of task forces that involve the CGU and other agencies. The NAE – *Núcleo de Ações Estratégicas* – concludes the deals with other institions.[81] Another body known as the DRCI, which is located in the Ministry of Justice, helps Brazilian enforcement authorities coordinate with foreign authorities.

Brazil has also developed internal coordination mechanisms. For instance, in the CGU, the Executive Secretary is responsible for coordinating and "making the bridge between the Minister's office and the other areas". For example, in the case of an audit involving potential misconduct on the part of public employees, both SFC (Internal Control) and Corregedorias will deal with the case. The Executive Secretary's role is to facilitate communication between those units (in practice this only occurs in relatively complex cases).[82]

Our other countries have task forces aimed at specific types of fraud. For example, following a longstanding practice, the Argentine General Prosecutor has created task forces for the prosecution of fraud and corruption cases in areas such as the social security system and programs for provision of pharmaceuticals, or for tax fraud. Currently all these areas fall within the mandate of a new specialized office on economic crime and money laundering within the Public Ministry called PROCELAC. PROCELAC has multidisciplinary teams and can provide technical assistance in especially complex cases. It can also act as a prosecutor and direct certain types of investigations. In Paraguay, the Judicial Support Office for the Judgment of Economic Crimes and Corruption plays a similar role, although it is restricted to providing technical support.[83]

Creating an organization like a task force or an integrated investigative agency is not the only way of coordinating investigations. Sharing information is less demanding but also qualifies as a form of coordination. The most sophisticated information sharing mechanisms are electronic databases to which police, prosecutors, and investigative magistrates all have access. As one interviewee from Brazil puts it, "if we didn't integrate the databases, they are not effective […] if the Police with my database does not know that CGU has another database that if merged to mine can bring significant improvements for my task".[84] Several of our interviewees in Brazil emphasized that these kinds of databases must be accessible and publicized in order to be effective coordination mechanisms. In the countries we studied it was common to find enforcement officials who were not aware of databases that could be useful to their work.[85] However, within the Executive, Bolivia has recently integrated 13 databases to which prosecutors also have access for investigative purposes. Although it is still too early to tell, users claim that this initiative led to improvements in asset declaration analysis and asset recovery proceedings. In all of the countries we studied,

81 Interview 01.
82 Interview 16.
83 Interview 08.
84 Interview 11.
85 Interview 11.

scarcity of material and human resources remain obstacles to the development of integrated databases and other information-sharing mechanisms.[86]

3. Coordination in prosection

In the classic adversarial model the process of adjudication involves three actors: the defendant, a plaintiff or prosecutor, and an independent tribunal (which may comprise a combination of professionals and laypeople). The plaintiff or prosecutor initiates the proceedings by alleging that the defendant has violated one or more legal norms. The tribunal makes the legal determination but is otherwise passive, leaving it to the parties to initiate proceedings and gather evidence. By contrast, in the inquisitorial model the members of the tribunal may initiate proceedings and gather evidence independently of the parties.[87] Accordingly, the roles of prosecutors vary considerably across countries, and within countries, between civil, criminal and administrative proceedings.

In South America, civil proceedings generally follow the adversarial model, although in many countries they are more inquisitorial than in common law jurisdictions. In the criminal realm, for centuries the inquisitorial approach was dominant but at the end of the twentieth century a wave of criminal procedure reform swept the region. In the course of those reforms all of the countries in our study adopted more adversarial systems and, with the exception of Argentina,[88] established a strict separation between prosecution and adjudication.[89] Around the same time, other reforms allowed victims of crime to become parties to criminal proceedings as criminal plaintiffs ("*querellantes*" and "assistentes de acusação", in Brazil).[90] Argentina has gone even further in the direction of allowing multi-

86 Databases represent a huge challenge identified and tackled by Brazilian enforcement officials since the creation of ENCCLA - National Strategy against Corruption and Money Laundering. See Interviews 5 and 11.

87 For more on these ideal types see *Mirjan Damaska*, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, University of Pennsylvania Law Review 121 (1973), pp. 506-589. For other conceptions of the adversarial/inquisitorial distinction see *Máximo Langer*, The Long Shadow of the Adversarial and Inquisitorial Categories (November 27, 2013) in: Markus D. Dubber & Tatjana Hörnle (eds.), Oxford Handbook of Criminal Law, Oxford, 2014, p. 887.

88 Under Argentina's Federal Criminal Procedure Code the *juez de instrucción* is in charge of the investigative phase of acriminal case (art. 26), although he/she can delegate such responsibility to the prosecutor (article 196). In December 2014, adversarial Federal Criminal Code was approved by Congress. It is still uncertain when the new code will be fully implemented.

89 Brazil is considered to have adopted a "mixed" model as judges remain competent to require documents such as a "previous convictions sheet", require the participation of witness ("condução coercitiva") and even "control the content of the technical defense, avoiding merely formal reactions", *Fabio Ataide*. Colisão entre poder punitive do Estado e garantia constitucional da defesa, Curitiba 2010, p. 381.

90 Argentina, Criminal Procedural Code, art. 82; Bolivia, Criminal Procedural Code, art. 78; Peru, Criminal Procedural Code, art. 107; Paraguay, Criminal Procedural Code, art. 69; Colombia, Criminal Procedural Code, art. 32; Brazil, Criminal Procedure Code, art. 268.

ple prosecutors. Argentine law permits the National Anticorruption Office and the FIU to exercise "querellante's" rights, even in the same case. Administrative proceedings in the region adopt a variety of models; in some cases the proceedings are largely inquisitorial, while in other cases they are more adversarial, with prosecution and adjudication being performed by different divisions within the same agency.

Coordination in prosecution can avoid duplication of effort when multiple prosecutors launch proceedings aimed at the same conduct. There also opportunities to benefit from bringing together prosecutors with complementary expertise. Finally, coordination can help to avoid conflict when prosecutors disagree about issues such as when to gather evidence or release information about the case to the media.

Coordination mechanisms in this context have to overcome the obstacles posed by legal norms – or the interpretations that have been given to those norms. Among the most important norms of this sort are the ones that guarantee the "internal functional independence" of prosecutors.[91] In Argentina, for instance, the appointment of specialized prosecutors of the PROCELAC to assist the prosecutors in charge of politically sensitive investigations led to internal quarrals and allegations that such appointments were made by the head of the *Ministerio Público Fiscal* in order to model and limit prosecutions –i.e. excluding high rank state authorities from the investigation's scope. Indeed, as this paper is being written the head of the PROCELAC faces criminal charges for attempting to divert a money laundering investigation against the President. Another particularly important legal norm is the legality principle, which requires prosecutors to prosecute every offense that comes to their attention and, in some cases, to abide by legislatively prescribed sanctions. As strict compliance with this principle is practically impossible, some countries have, in the past two decades, allowed prosecutors some discretion to either not prosecute (Peru,[92] Bolivia[93], Paraguay[94], Colombia[95]), or to settle charges (Argentina[96]) when dealing with minor offenses, or when the harm has been repaired, etc. Nonetheless, the principle certainly reduces South American prosecutors' discretion to take steps such as refraining from prosecution because a defendant has been subjected to non-criminal sanctions.[97]

Coordination mechanisms also have to overcome prosecutors' natural interests in status and power, which pull in the directions of competition and conflict rather than cooperation. These may lead prosecutors to regard the work of other colleagues on the same case

91 Interview 14.

92 Peru's Criminal Procedure National Code, article 2.

93 Bolivia's Criminal Procedure Code, article 21.

94 Paragauy's Criminal Procedure Code, article 19.

95 Colombia's Criminal Procedure Code, articles 23/24.

96 Argentina's Federal Criminal Procedure Code, article 76 bis.

97 A new wave of "modern" bureaucrats have attempted to apply "resulted oriented management" to enforcement agencies, but the impact of this trend is more visible in procedures for resource allocation than in decision-making related to the setting of enforcement objectives or the selection of targets for prosecution.

as an "invasion" rather than a contribution to achievement of a common goal. This is how the intervention of specialized prosecutors is often seen by "ordinary" prosecutors in Argentina—in the best-case scenario, when no political motivation is suspected. The historical resistance to coordinate with the specialized anti-corruption prosecutor in charge of the *Fiscalía de Investigaciones Administrativas*, which ended up with his resignation in 2009 soon after he observed his intervention was not backed by the General Prosecutor, can be seen in that light.

Most efforts to coordinate prosecution of anti-corruption cases are aimed at intra-institutional cooperation. An issue of particular concern is duplication of effort by prosecutors pursuing civil and criminal proceedings targetting the same corrupt acts.[98] In Brazil, prosecutors have developed a variety of mechanisms for coordinating these kinds of efforts, including "lending" evidence from one process to the other, requiring evidence to be shared between units responsible for civil and criminal proceedings, or even producing evidence just once for use in both civil and criminal proceedings. These practices still face strong resistance stemming from factors such as "cultural stratification" between criminal and civil law and institutions[99] and the constitutional principle of functional independence of the members of the MP.[100] Similarly, the Federal Attorney General's Office (AGU) has created the *Grupo de Atuação Pro-Ativa,* a unit dedicated full time to the enforcement of anti-corruption and improbity sentences.[101] Similar steps have been taken in Paraguay, where the *Ministerio Público* is responsible for both prosecuting cases involving both corrupt acts of public officials and illicit enrichment. A specialized Anticorruption Unit is in charge of the investigation and prosecution of allegations of corruption. That unit is in turn divided into eleven sub-units which appear to coordinate successfully. In Argentina, these types of coordination mechanisms, involving both the *Ministerio Público* and the Judiciary, have been attempted for cases involving crimes against humanity, but not for corruption cases. The Argentine Supreme Court has only recently created a specialized body of forensic experts for the investigation of corruption, but it is meant to support the work of investigative magistrates and courts not prosecutors.

We have found only a few examples of inter-institutional coordination mechanisms in prosecution. These involve administrative proceedings in Brazil, criminal cases in Argentina that have been prosecuted by different state agencies working together,[102] and criminal cases in Bolivia, where the Ministry of Transparency and the Fight Against Corruption can intervene in the criminal proceeding with or without becoming a party. Coordination has been difficult in practice in this country, whereby the Ministry of Transparency is seen by judges and prosecutors as a political actor, making politically driven investigations

98 Interview 12 and 14.
99 Interview 12.
100 Interviews 12 and 14.
101 Interview 13.
102 Interview 13.

and accusations. The Ministry has also advanced criminal proceedings against prosecutors on the grounds of their reluctance to investigate specific instances of alleged corruption. Finally, the strengthening of specialized anti-corruption investigative units and the enhancement of inter-institutional coordination has been a recurring goal of projects financed by international donors in Paraguay.

4. Coordination in adjudication

We define adjudication as the production of an authoritative determination of whether a specific actor has violated a specific norm and of what legal sanctions, if any, ought to be imposed. There are several potential benefits of coordination in adjudication. First, it can enhance efficiency by avoiding duplication of effort. This typically can be accomplished by avoiding concurrent proceedings and ensuring that determinations made in previous proceedings are taken into account by tribunals in subsequent proceedings. Coordination can also be designed to ensure that issues are resolved by tribunals with appropriate expertise. Yet another goal may be to prevent defendants from being subjected to multiple proceedings, which might be considered unfair. Finally, coordination may be aimed at avoiding proceedings that lead to inconsistent results, a situation that arguably calls into question the legitimacy of the legal system.

The countries in our study generally have legal rules that serve to coordinate criminal and other types of proceedings. These rules fall into three categories. First, the fundamental principle of *ne bis in idem* bars multiple criminal proceedings against the same defendant arising out of the same facts.[103] Second, there are rules to ensure that criminal proceedings are resolved before civil proceedings arising out of the same facts.[104] Third, findings of fact in criminal cases are universally treated as conclusive in civil proceedings.[105] Findings from prior civil proceedings do not have a comparable effect in criminal proceedings, presumably because the burden of proof in criminal proceedings is higher.[106] However, when the decision in the criminal trial depends on specific findings in the civil proceeding, such as regarding a commercial bankruptcy or the validity of a marriage, there can be no criminal conviction until the civil proceeding has concluded.[107]

103 All countries studied here have adopted both OEA and UN Conventions on Human/Civil and Political Rights. Bolivia, Colombia and Paraguay have explicitly established the "ne bis in idem" rule at their national constitutions, while in Argentina the rule have “constitutional status” in view of the adoption of OEA Convention. In Peru the rule is established at the Criminal Procedure Code, while in Brazil “ne bis in idem” is not explicitly defined at legislation or the Constitution. According to the Brazilian Supreme Court, the OEA convention – and therefore the ne bis in idem rule - is below the Constitution and above the national legislation (STF/RE 466.343).

104 Argentina Civil Code Article 1101; Bolivia, Criminal Code, art. 39.

105 Argentina, Civil Code Articles 1102 and 1103. Brazilian Civil Code 2002, Article 935.

106 Argentina, Civil Code Article 1105; Bolivia, Criminal Code, art. 40.

107 Argentina, Civil Code Article 1104.

Aside from these rules concerning criminal proceedings, and an analogous set of rules giving tax proceedings priority over other proceedings,[108] there is little coordination in adjudication. In some countries, efforts have been made to ensure that determinations in administrative proceedings are reported to prosecutors or to the judiciary.[109] The general principle, however, is that criminal, civil, administrative, legislative and fiscal proceedings are all independent of one another. As a consequence, a single corrupt act may lead to separate proceedings in both criminal and civil courts, disciplinary proceedings before some sort of administrative body, a special legislative inquiry, and an audit.

5. Coordination of sanctioning

When adjudication results in a determination that legal sanctions ought to be imposed, additional steps have to be taken to implement the sanctions. The nature of those steps and the actors responsible for undertaking them will depend on the sanctions selected. For natural persons the classic sanctions are incarceration and economic sanctions such as fines, penalties, damages or forfeiture. In the case of incarceration, someone has to apprehend individuals, provide a means of restricting their liberty and protecting their health, safety and other individual rights while they are incarcerated. In the case of economic sanctions the typical steps in the process are seizing or otherwise asserting control over property in which the defendant has an interest, selling the property, and distributing the proceeds in some fashion. This can all be quite complicated when the defendant has interests in assets located in multiple jurisdictions, other parties hold interests in the assets, or the proceeds are to be distributed among multiple claimants (such as victims of crime or law enforcement agencies that assisted in the enforcement process). Participants in this stage

108 In Brazil, tax law offers a rich example of how jurisprudence, doctrine and legislation had to work for a decade to define coordination rules between criminal and administrative proceedings. In the tax domain, criminal proceedings depend heavily on the communication received from the administrative proceeding (tax law). In other words, typical criminal law institutions (police, public prosecutor, judiciary) don't have direct access to tax cases where criminal jurisdiction might apply. In view of that, the pattern in tax cases is due to systematic monitoring of the tax environment, tax law institutions are the ones to start administrative proceedings regarding violations of tax law. In several cases, where there are falsifications and fraud involved, criminal courts also have jurisdiction of the same facts. Legislation from the sixties require tax authorities to communicate the public prosecutor when they believe the case also encompass a breach of criminal law (Law 4729/65, article 7). Before the coordination rules were established in the nineties, the "independence of the spheres" in the tax domain meant that tax authorities should send copies of the relevant documents to criminal authorities and maintain its own proceeding, regardless of what happened in the criminal spheres – as they were independent (Law 9430/96, article 83). Contradictory decisions and duplicity of sanctions were very frequent. The coordination rule established that tax authority should only communicate the violation after the conviction in the administrative proceeding exactly to avoid parallel proceedings. This rule was interpreted as a condition not only to the criminal proceeding but also to the tax crime in itself – the idea is that there is no "tax evasion" before a tax authority explicitly says so.

109 Interview 03.

of the enforcement process may enjoy considerable amounts of discretion over how to perform their responsibilities.

In the context of anti-corruption proceedings, in some jurisdictions the classic repertoire of sanctions has been expanded to include loss of various legal privileges. These types of sanctions include denial of the right to enter, remain or do business in a particular country, bars on entering into contracts with certain government agencies or bars on holding public office. These kinds of sanctions may or may not be pronounced in the same adjudicative process as other sanctions.

Coordination in sanctioning mainly involves actors responsible for imposing sanctions taking one another's actions into account. Sometimes the other sanction has a mitigating effect, as in cases where an agency deducts a previously imposed fine from its own fine to ensure that the cumulative penalty is not excessive. This kind of coordination helps to ensure that the combined sanctions are consistent with shared objectives such as retribution or deterrence. There are also cases in which the other agency's sanction serves as an aggravating factor. For example, debarment often involves an agency sanctioning an actor precisely because they have been sanctioned by some other agency. Similarly, civil society may use tactics of naming and shaming to impose reputational costs on firms that have been sanctioned by public actors. This kind of coordination can be an efficient way of enhancing the potency of anticorruption law when public institutions are ineffectual.

Several of the countries in our study have created registries or databases designed to help government agencies identify debarred firms. These include the Cadastro Nacional de Improbidade, Cadastro de Empresas Inidôneas e Suspensas in Brazil, the Public Procurement System and the CONTROLEG II in Bolivia, and the system used by the Public Procurement Directorate of Paraguay.

6. Coordination with the private sector

An interesting new trend in Colombia and Peru is the expressed desire of anti-corruption authorities to achieve coordination not only among the different relevant public institutions but also with the private sector. Recent initiatives are directed at both involving the private sector in preventive mechanisms (both at the company level and through public-private initiatives) and bringing the private sector closer to the enforcement authorities (e.g. through special channels to report misconduct). In Bolivia, discussionswith the private sector are taking place within the framework provided by the "National Council against Corruption", a public-private partnership that is composed of 6 public institutions and 30 civil society organizations.. Brazil has already taken such a step, by introducing leniency agreements partially based on the effectiveness of compliance programs and the cooperation from the private sector. The law, which entered into force in 2014, is currently being tested in high profile cases. Argentina is quite delayed in this respect. Although a new Criminal Code bill prepared by a Committee appointed by the President incorporates corporate criminal liability and leniency clauses directed at incentivizing public-private cooperation (corporate

criminal liability is only established for money laundering and terrorist financing to date, not for corruption), it has not been debated in Congress, and it is uncertain whether it will be taken up at all. Only minor, isolated signs suggest so far that the criminal system will follow such path, i.e. the National Anticorruption Office has settled criminal charges with a company after negotiating an agreement including the company's establishment of an anticorruption compliance program.

D. Brazil as an exceptionally hospitable setting for modularity?

There is little evidence that the modular approach to anticorruption enforcement is viable outside the intellectual, political, institutional, economic context of Brazil. It has not caught on in the other countries we have studied. At least one country, Peru, has opted for a more integrated model. Other countries have multiple anticorruption institutions performing the same function, but none of them has developed coordination mechanisms as effective as those in Brazil. This is despite the fact that lack of coordination is widely viewed as a key impediment to improvement of anti-corruption enforcement. The general view is that although all of the countries we have studied have made progress in dealing with cases of low-level 'adminstrative' corruption, coordination problems have impeded progress in tackling high level political corruption. In short, Brazil appears to be exceptional when it comes to implementation of institutional modularity in anti-corruption enforcement.

This is consistent with the fact that Brazil's public service, at least at the federal level, is generally regarded as exceptional for the region. Brazil has established a merit-based system for recruitment and promotion of employees while other Latin American bureaucracies are seldom characterized by regularized and impersonal procedures and employment decisions based on technical qualifications and merit. With the exception of Brazil, the other countries in our study suffer from tremendous difficulties in creating a stable and professional civil service.[110] The professionalization and depoliticization of the Brazilian bureacracy is consistent with the fact that political interests have had less influence on anticorruption enforcement in Brazil than in any of the other countries we have studied.

In Peru, the issue seems to be that modularity is not clearly superior to the prevailing alternative. Peru's current set of anticorruption institutions were redesigned after the fall of the Fujimori regime to respond to corruption committed during the Fujimori era. The Peruvian model favors integration; all the actors responsible for a given function are typically located in a single agency. Peru achieved a fair amount of success in prosecuting high-ranking officials from the Fujimori regime, and so there is no obvious reason for them to reject their current model.

110 *Laura Zuvanic, Mercedes Iacovello and Ana Laura Rodríguez Gustá*, The Weakest Link: The Bureaucracy and Civil Service Systems in Latin America, in: Carlos Scartascini, Ernesto Stein, and Mariano Tommasi M., (eds.), How Democracy Works: Political Institutions, Actors, and Arenas in Latin American Policymaking. Inter-American Development Bank, 2010, p. 147.

The experiences in Argentina and Bolivia illustrate the significance of political factors. Although Argentina often has multiple anticorruption agencies performing any given function, political influence has prevented them from achieving the kind of independence that is the hallmark of a modular regime. Many high-ranking members of the executive branch, including the President, the Vice-President and a good number of ministers, have been implicated in corruption scandals. Perhaps unsurprisingly, the problem of corruption has been conspicuously absent from the government's rhetoric. The absence of direction from the top together with the fear of acting contrary to the interests of top officials has led anticorruption officials to keep a low profile, even when there is no indication that a specific political leader will be implicated. Investigations and prosecutions of high-level officials tend to move forward only when political protection from the top has been withdrawn; defendant public officials tend to be subject to investigation and trial only after they have left office, or near the end of a political cycle. There have also been anticorruption initiatives aimed at lower-level officials, involving, e.g., the social security system or the healthcare system for retired people. Targets have included schemes that undermined public policies at the core of the Government's agenda (e.g. the reform of the armed and security forces). Even in these cases the tendency to do the job quietly, i.e. to avoid public attention, has inhibited coordination.

In Bolivia, the situation is somewhat different. Some anticorruption agencies have achieved independence, but they have divergent objectives. The creation of the Ministry of Institutional Transparency and Fight against Corruption, an entire state department devoted solely to promotion of transparency and prosecution of corruption, made a strong anticorruption statement in a country with almost no precedents of corruption prosecutions. As a result, the enforcement and implementation of anti-corruption laws and policies is dominated by the executive. On the one hand, this puts anti-corruption rhetoric at the center of the public debate and promotes institutional commitment to transparency and the fight against corruption. On the other hand, the risk of strategic political use of anti-corruption policies by the Executive can generate resistance and inhibition from agencies associated with other branches of the government. Specifically, in many instances the political use of the anti-corruption framework by the executive and public authorities within its domain causes prosecutors and judges to withdraw and refrain from cooperating. Possibilities for coordination, particularly between law enforcement and monitoring authorities, are therefore reduced.

Paraguay illustrates yet another challenge to implementing institutional modularity: coordination mechanisms require time and experience to develop. Officials in the specialized anticorruption agency emphasize that conditions for joint work cannot be created be artificially; there must be something more than just a document.[111] Building bonds of trust among different agencies and officials is a gradual process. Experience is essential,[112]

111 Interviews 01 and 15.

112 Interview 02.

but once experience has been gathered, inter-institutional relations must be formalized in order develop a stable institutional practice founded on more than just personal ties.[113] In Paraguay, coordination mechanisms exist mainly on paper. In the last two decades, at least three national anti-corruption programs have been designed and implemented. Sponsored by international actors such as the UN and USAID, these programs have achieved many results in terms of norms creation and institutional redesign, but they still have not succeeded in building effective anti-corruption practices. Paraguay now has a complete legal and institutional anti-corruption framework but lacks major enforcement experience. Coordination is therefore restricted to formal agreements with no practical implications. Most instances of cooperation occur between between public officials who were previously linked by bonds of trust.

Colombia is also revising its domestic legislation in order to comply with the OECD Convention, of which it became a member in 2013. Anti-corruption efforts are oriented to the enhancement of competition, the involvement of the private sector, protections and rewards for whistleblowers, and public-private partnerships to tackle corruption in a collective fashion. Most of these initiatives are, however, so recent that there is yet not much data to evaluate. Before this recent trend, the issue of corruption in Colombia was practically ignored as it was closely associated with the violence the country experienced in conflicts with drug barons and paramilitary organizations.

E. Conclusions

It is an article of faith among many comparative law scholars that it is possible for legal systems to learn from one another. If there is a single area in which cross-country learning is likely to be valuable it is in the regulation of political corruption, which left unchecked poses a fundamental threat to the efficacy of the state. This provides a powerful motivation for examining whether anti-corruption laws and enforcement mechanisms that have performed well in one legal system can be adopted in other systems.

Since there has been a significant amount of convergence in substantive anti-corruption law this study has focused on comparing the ways in which those laws are enforced. There is no good reason to believe that the formal characteristics of individual countries' enforcement institutions are important determinants of their performance. Therefore, like most modern studies of comparative law, we have concentrated on the functional characteristics of the regimes we have studied. We are particularly interested in characteristics likely to affect performance measured in terms of fairness, efficiency, and legitimacy.

The specific countries and institutional characteristics we have analyzed were selected on the basis of a theoretical hunch. There are good reasons, corroborated by recent experience in Brazil, to believe that the potential for inter-institutional coordination, which we distill into the concept of institutional modularity, will be a determinant of the perfor-

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mance of anti-corruption enforcement institutions. Accordingly, our analysis has focused on institutional modularity in national anti-corruption institutions in Brazil and several of its neighboring countries.

The most challenging and potentially novel feature of this analysis was the effort to canvass the full range of institutions, at least at the national level, that play a role in enforcing anti-corruption norms. This was necessitated by our conviction that it is important to define enforcement broadly to include monitoring, investigation, adjudication, sanctioning and publicity. That premise forced us to examine not only the judiciary and the police, but also a range of institutions that are not often the subjects of comparative legal analysis, and especially not in combination. Our results show that the same functions or combinations of functions are often performed by different institutions in different countries. In the area of anti-corruption law enforcement at least, we are now convinced that a cross-country analysis limited either to a particular area of law, say civil, criminal or administrative law, or to a particular set of institutions, such as the courts and police, carries a serious risk of being misleading. Future research may reveal that our decision to exclude sub-national institutions anti-corruption institutions from our analysis raises similar concerns. We suspect that these insights are relevant to research in other areas of law enforcement.

Our cross-country comparison also reveals that, for better or worse, Brazil's neighbors have not converged on highly modular anti-corruption enforcement regimes. There is no single best explanation for why we have failed to observe functional convergence. Political interference, resource constraints, the absence of a depoliticized meritocratic bureaucracy, limited experience, the availability of arrangements with comparable appeal – all of these factors appear to cause institutional divergence. Many of these factors are likely to be difficult to overcome in the short term. This set of findings would be troubling if we were convinced that institutional modularity was the uniquely optimal approach to anti-corruption enforcement. However, the indications from Peru that other institutional arrangements might offer comparable performance suggests that pessimism would be premature. A definitive assessment of the merits of institutional modularity in enforcement of anti-corruption law will require more in-depth analysis of the performance of modular regimes and their alternatives.