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FCPA Risks for Renewable Energy in Latin America

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Recent Renewable Energy Developments in Latin America

The renewable energy market[1] in Latin America is booming, and the region's natural resources make it one of the most attractive areas in the world for investment. Latin American countries, including Brazil, Mexico and Chile, have been recognized as some of the top global renewable energy markets. Between 2010 and 2015, $80 billion was invested in green energy in Latin America, excluding large-scale hydropower.[2] Further regulatory and policy developments, such as the deregulation of national energy markets and the desire to meet the goals of the Paris Climate Accord, have only increased this trend.[3] Prior to the onset of the COVID-19 pandemic, 2020 had been a banner year for renewable energy development in Latin America. Experts predict that in 2020, Mexico will see 11 new wind farms begin operation, representing a $1.6 billion investment.[4] In Brazil, approximately 3.2 GW of unsubsidized solar projects have been permitted and are currently in development.[5] Not to be outdone, Colombia recently announced that there are 9.47 GW of solar projects currently underway.[6] While the COVID-19 pandemic has upended the global

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[1] For the purposes of this note, "renewable energy" refers to wind, solar, geothermal and biofuels. While hydropower has historically been an important energy source in the region, the wind and solar development markets have been far more dynamic in recent years.

[2] "Renewable Energy Market Analysis: Latin America," *International Renewable Energy Agency* (IRENA) (2016).

[3] "Latin America and the Caribbean Announce Ambitious New Renewables Target," IRENA (Dec. 10, 2020), https://www.irena.org/newsroom/articles/2019/Dec/Latin-America-and-the-Caribbean-Announce-Ambitious-New-Renewables-Target.

[4] "There Is Room to Raise Private Investment in Clean Energy," *CE Noticias Financieras English* (Mar. 28, 2020), https://tinyurl.com/y8nut9xt (subscription required).

[5] Pilar Sanchez Molina, "A 20-Year Power Supply Deal for 238 MW of Solar in Brazil," *PV Magazine* (Mar. 4, 2020), https://www.pv-magazine.com/2020/03/04/a-20-year-power-supply-deal-for-238-mw-of-solar-in-brazil.

[6] Jose Rojo Martin, "Solar Aspires to Capture Colombia's Energy Future with 9.47GW Pipeline," *PV Tech* (Apr. 16, 2020), https://www.pv-tech.org/news/solar-aspires-to-capture-colombias-energy-future-with-9.47gw-pipeline.

economy—including the renewable energy market globally[7] and in Latin America—the region's economic, political and geographic characteristics suggest that wind and other renewable power sources will have an increasingly important role to play in its energy mix.

However, this opportunity is not without risks. Continuing government involvement in project finance, partial government ownership of utilities, and the importance of major construction, mining and industrial companies as institutional consumers of renewable energy all pose potential Foreign Corrupt Practices Act (FCPA) compliance problems for foreign companies looking to invest in the region. These risks have been made all the more notable by the unique conditions posed by the ongoing pandemic.[8]

Renewable Energy and Foreign Investment Opportunities

Much of Latin America's renewable energy development relies on partnerships with foreign companies. For example, some of the larger solar plants in Colombia are being developed by foreign companies such as Chicago-based Invenergy, Spanish developer Diverxia, and an Anglo-Colombian partnership between Cubico and Celsia.[9] In Chile's Atacama desert—uniquely suitable for large-scale solar power as one of the most irradiated areas of the world—Miami-based Atlas Renewable Energy is investing $450 million in a massive 854 MW solar plant, and Spanish developer Ibereolica Renovables and Italian energy giant Enel are each developing solar projects that will generate approximately 500 MW. In 2018, foreign backers invested nearly $6.9 billion in renewable energy projects in Latin America.

Like much of the rest of the global economy, Latin America's renewable energy industry has been hard hit by COVID-19. Brazil and Mexico are expected to be particularly challenged, as the rapid depreciation in their respective currencies could lead to a sharp increase in the cost of projects already in development.[10] Time will tell whether this slump will be short-lived, and Latin American governments are seeking to breathe life back into their economies. Governments across Latin America also remain committed to their ambitious decarbonization goals,[11] and the clean skies in

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[7] *See, e.g.,* "With Much of the World's Economy Slowed Down, Green Energy Powers On," *New York Times* (June 30, 2020), https://www.nytimes.com/2020/06/30/business/renewable-energy.html?searchResultPosition=6.

[8] *See generally* Natalie Kitroeff and Mitra Taj, "Latin America's Virus Villains: Corrupt Officials Collude With Price Gougers for Body Bags and Flimsy Masks," *New York Times* (June 20, 2020), https://www.nytimes.com/2020/06/20/world/americas/coronavirus-latin-america-corruption.html.

[9] *Id.*

[10] "Covid-19 to Wreck Economics of New Solar, Wind Projects," *PV Magazine* (Apr. 1, 2020), https://www.pv-magazine.com/2020/04/01/covid-19-to-wreck-economics-of-new-solar-wind-projects.

[11] *See* Valerie Volcovici, "Latin America Pledges 70% Renewable Energy, Surpassing EU: Colombia Minister," Reuters (Sept. 25, 2019), https://www.reuters.com/article/us-climate-change-un-colombia/latin-america-pledges-70-renewable-energy-surpassing-eu-colombia-minister-idUSKBN1WA26Y.

the region's cities—prompted by factory closures and reduced car traffic—are showing that a future with clean air is indeed possible.[12]

Finally, despite the opportunity it presents, renewable energy does face political opposition in the region. For example, Mexico's president Andrés Manuel López Obrador used a recent press event at La Rumorosa Wind Farm in Baja California to decry wind farms as "visual pollution" and to declare that the government will not grant permits to new projects that impact the environment.[13] Whether this is political posturing or marks a genuine change in government policy remains to be seen.

FCPA Risks

Although the Latin American region offers a unique business opportunity for renewable energy investment, companies must also be aware of FCPA risks.

First, despite the deregulation of much of the region's electricity industry over the past several decades, governments remain major players in the sector. Government-run development banks have been an important component in project finance, and these government-backed loans are often conditioned on the developer hiring local contractors or manufacturers.[14] Arrangements where contracts require foreign companies to hire preferred local contractors should ring compliance alarm bells, as without proper supervision these preferred local operators may present FCPA risks.

Of course, organizations should be proactive about managing relationships with all third parties in Latin America. In recent years, companies have faced significant FCPA exposure due to the conduct of third parties that they hire to facilitate their operations.[15] This is especially significant in Latin America, where the success of a project may depend on relationship building and local contacts. Companies looking to develop renewable energy projects in Latin America would be well advised to consult with counsel experienced in FCPA matters to develop adequate compliance programs governing these projects well in advance of taking any significant project steps.

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[12] Luis Felipe López-Calva, "Back to Cleaner?: Covid-19, Lockdowns, and Pollution in LAC Cities," *United Nations Development Programme* (May 27, 2020), https://www.latinamerica.undp.org/content/rblac/en/home/presscenter/director-s-graph-for-thought/back-to-cleaner---covid-19--lockdowns--and-pollution-in-lac-citi.html.

[13] Mariana Morales Urbina, "The Future of Green Energy in Mexico," *Mexico Business* (Mar. 10, 2020), https://mexicobusiness.news/energy/news/future-green-energy-market-mexico.

[14] *See* IRENA at 17.

[15] *See, e.g.,* US Department of Justice Press Release No. 19-167: Two Businessmen Charged with Foreign Bribery in Connection with Venezuela Bribery Scheme (Feb. 26, 2019), https://www.justice.gov/opa/pr/two-businessmen-charged-foreign-bribery-connection-venezuela-bribery-scheme (in which individuals were charged with violating the FCPA for facilitating bribes to Venezuelan government officials); indictment, *United States v. Armengol Alfonso Cevallos Diaz and Alarcon*, No. 19-20284-RS (S.D. Fla. May 9, 2019) (charging two individuals with conspiracy to violate the FCPA for their part in a scheme to bribe Ecuadorian officials).

Raising further FCPA compliance risks is the fact that many power utilities in the region are themselves at least partly owned by the government. State-owned electricity and other energy companies dominate energy markets throughout the region; it is almost impossible to do energy-related business in Latin America without dealing with government officials.[16] For example, the Brazilian government has a majority stake in Eletrobras, one of the country's largest electricity companies, while some of the company's shares are also traded on the New York Stock Exchange.[17] Depending on the precise structure of the utility in question, the utility could be a bribery target, an agent facilitating bribes or an issuer regulated by the FCPA—or all of the above simultaneously. These concerns are not unfounded. In 2018, Eletrobras itself had to pay a $2.5 million fine to the Securities and Exchange Commission for violating the books and records provisions of the FCPA.[18]

Complicating matters further, the definition of a government official under the FCPA is quite broad, extending to employees of minority-owned government ventures and joint ventures with private companies.[19] This can lead to compliance problems in places foreign investors might not expect. For example, the Mexican Constitution requires that power transmission and distribution be handled by the government, although this dictate was significantly relaxed by constitutional amendments in 2014.[20] Under the FCPA, as a result, employees of Mexican power utilities would be considered government officials. Similarly, officials at energy utilities founded by their respective governments and never fully privatized would also be covered by the FCPA.[21]

Finally, some of the region's largest consumers of renewable energy are major construction, mining and industrial companies—many of which are also state owned. The revelations from Operation Car Wash (Operação Lava Jato) in Brazil, the Cuadernos (Notebook) Scandal in Argentina and other anticorruption probes in Latin America have revealed these industries as some of the region's

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[16] *See generally* Latin American Power Overview: Outlook, Financial Performance, Regulatory Risk and Investments, *Fitch Ratings* (Sept. 2019) (finding that companies operating in Latin America, with the exception of Chile, suffer heightened regulatory risk due to the central government's involvement in the energy sector), https://your.fitch.group/rs/732-CKH-767/images/Fitch_10086090.pdf?mkt_tok=eyJpIjoiTXpsaFl6QTBNMlExWlRJMCIsInQiOiJwVHBVZjVncDZoT29zcFZTM0JadVlcL1VjaWN1dDM2bnJHR3phU1lJSkpkVU5qNlE5OXB6MXgxSmE4ejRzcjJIVHhIZWJEaXZBYm92amtFYW81UUZObmc9PSJ9.

[17] "Centrais Eletricas Brasileiras SA," *Reuters*, https://www.reuters.com/companies/ELET6.SA.

[18] Richard L. Cassin, "Eletrobras Pays $2.5 Million to Resolve FCPA Offenses," *FCPA Blog* (Dec. 26, 2018), https://fcpablog.com/2018/12/26/eletrobras-pays-25-million-to-resolve-fcpa-offenses.

[19] *See* 15 U.S.C. §§ 78dd-1-78dd-3.

[20] *See* José Ramón Cossío Díaz and José Ramón Cossío Barragán, The Rule of Law and Mexico's Energy Reform: The New Energy System in the Mexican Constitution, James A. Baker III Institute for Public Policy of Rice University (2017), https://www.bakerinstitute.org/files/11669.

[21] *See, e.g.,* "About Eletrobras: History," *Eletrobras*, https://eletrobras.com/en/Paginas/History.aspx.

worst offenders.[22] For instance, Braskem,[23] a partly state-owned Brazilian petrochemical company, is the largest customer of a proposed expansion to the Serra do Mel solar farms in the Brazilian state of Rio Grande do Norte (currently being developed by French developer Votalia). Braskem was at the center of the largest corruption scandal in Latin American history. In 2016, Braskem and one of its parent companies, Odebrecht S.A., agreed to pay $3.5 billion to regulators in the United States, Brazil and Switzerland to settle bribery charges.[24] Braskem pled guilty to conspiracy to violate the bribery provisions of the FCPA and paid a total criminal penalty of $632 million.[25]

Further, many of the region's largest state-owned oil companies are involved in energy production and distribution—either directly through subsidiaries or indirectly through a web of trading arrangements. Petrobras, the partially Brazilian-state-owned oil giant, owns several subsidiaries dealing in materials used for energy production. In 2018, Petrobras agreed to pay over $850 million to the Department of Justice to settle FCPA claims arising out of the company's payment of millions of dollars' worth of bribes to Brazilian politicians.[26] Other state petroleum giants with similar involvement in energy trading—such as PEMEX in Mexico[27] and PetroEcuador in Ecuador[28]—have become embroiled in similar corruption scandals, reflecting that Latin American energy trading remains a corruption hotbed.[29]

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[22] *See* "Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020," *Wilmer Cutler Pickering Hale and Dorr* (Jan 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.

[23] Pilar Sanchez Molina, "A 20-Year Power Supply Deal for 238 MW of Solar in Brazil," *PV Magazine* (Mar. 4, 2020), https://www.pv-magazine.com/2020/03/04/a-20-year-power-supply-deal-for-238-mw-of-solar-in-brazil.

[24] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

[25] *Id*.

[26] US Department of Justice Press Release No. 18-1258: Petróleo Brasileiro S.A.—Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations.

[27] Robbie Whelan, "Secret Recordings Describe Extensive Bribery at Mexico's Pemex," *The Wall Street Journal* (Oct. 11, 2019), https://www.wsj.com/articles/secret-recordings-describe-extensive-bribery-at-mexicos-pemex-11570804717.

[28] US Department of Justice Press Release No. 20-75: Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials (Jan. 23, 2020), https://www.justice.gov/opa/pr/miami-based-businessman-pleads-guilty-fcpa-and-money-laundering-violations-scheme-involving.

[29] *See generally* "Foreign Corrupt Practices Act Enforcement in the Energy Sector," *Wilmer Cutler Pickering Hale and Dorr* (Mar. 7, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190307-foreign-corrupt-practices-act-enforcement-in-the-energy-sector.

Reducing Corruption Risk in Latin American Renewable Energy Investment

Fortunately, businesses considering—or indeed already involved in, investing in or developing—renewable energy projects in Latin America can take several concrete steps to protect themselves from FCPA compliance risks. Moreover, investors should bear in mind that in addition to the FCPA, local anticorruption laws have in recent years been more vigorously enforced by countries across Latin America as they begin to combat corruption in earnest.[30] Further, anticorruption probes have become increasingly international in scope, as various regulators work across international boundaries to combat international corruption.[31] Some steps that companies can take to mitigate these risks include:

1. **Involve counsel early and often:** As alluded to above, counsel skilled and knowledgeable in the FCPA can help guide businesses through the process of financing and building green power projects in Latin America and then selling the generated power in the market while steering clear of regulatory risk. They will also be able to help develop functioning compliance programs and spot any risks associated with the partners and government agencies businesses work with on the ground. Early involvement and continuity of communication with FCPA counsel will help reduce or eliminate larger, more resource-intensive concerns.
2. **Ensure that internal compliance controls are robust:** Adequate internal controls are crucial in preventing bribery from occurring in the first place, and spotting and ending it quickly if it does occur. FCPA lawyers can help craft these policies as businesses seek to invest in Latin America. Even where Latin American operations already exist, FCPA counsel should be engaged on an as-needed basis for in-depth evaluation on the adequacy and function of preexisting policies to ensure they are sufficiently robust. This process may include on-site interviews, document collection and review, analysis of the relative maturity of a program as compared with industry peers, and recommendations for closing any gaps in the policies and programs.
3. **Closely monitor local agents and third parties:** A consistent theme in FCPA investigations and enforcement actions is liability stemming from a lack of control of agents or third parties on the ground in foreign countries.32 If a business employs local agents to help it navigate the often complex process of gaining approval and building renewable energy projects in Latin America it must maintain adequate control over their activities, including by requiring them to acknowledge FCPA compliance requirements and

[30] *See* "Combating Corruption in Latin America: Congressional Considerations," Congressional Research Service (May 21, 2019), https://fas.org/sgp/crs/row/R45733.pdf.

[31] *See* "Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020," *Wilmer Cutler Pickering Hale and Dorr* (Jan 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.

[32] *Id*.

to agree to abide by compliance policies. Bad behavior on their part can quickly turn into FCPA liability for the investor or developer.

WilmerHale has deep experience in renewable energy development issues, and works with a broad network of top Latin American law firms in FCPA investigations and enforcement matters across Latin America. The WilmerHale attorneys are available to provide timely guidance on the issues raised in this client alert.

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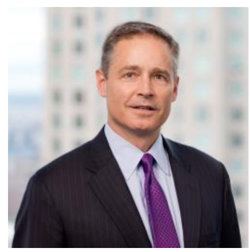

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