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Anti-Corruption Laws in Colombia: Lessons from the Case of Odebrecht and Corficolombiana

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Abstract: This article critically examines Colombia's anti-corruption legal framework through the lens of the Odebrecht and Corficolombiana scandal surrounding the "Ruta del Sol 2" infrastructure project. Although Colombia has formally adopted robust anti-corruption laws aligned with international standards – particularly those promoted by the OECD – this study reveals serious shortcomings in their enforcement and practical application. By contrasting Colombia's response to the scandal with that of the United States, the article illustrates how U.S. authorities were far more effective in uncovering critical facts, imposing penalties, and securing compensation, despite the events occurring abroad. In Colombia, by contrast, institutional weaknesses, lack of prosecutorial independence, and political interference significantly undermined legal responses. Drawing on legal analysis and case documentation, the article identifies structural and interpretive challenges within Colombia's anti-corruption statutes, such as legislative instability, inconsistent implementation, and limited capacity to prosecute powerful actors. The analysis also addresses the limitations of punitive and administrative tools against corporate actors and explores the failure of asset recovery mechanisms. Ultimately, the article argues that while Colombia's anti-corruption laws are formally comprehensive, they remain politically constrained and institutionally fragile, raising important concerns about legal transplants and rule-of-law reforms in contexts marked by entrenched elite impunity. The paper concludes with lessons for comparative anti-corruption governance and legal reform in Latin America.

Keywords: anti-corruption law; legal enforcement; Colombia

1 Introduction

One of Colombia's major infrastructure projects in the past years was "Ruta del Sol 2". It consisted of the rehabilitation, construction, and operation of the most significant part

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of a highway connecting Bogota, the country's capital, with the Caribbean coast. The public bid for the project was awarded in 2009 to the Consortium Ruta del Sol ("Consol"), integrated by the Brazilian company Odebrecht, and by Colombian companies Episol, a subsidiary owned and controlled by Colombian company Corficolombiana, and CCS Constructores. Consol and another consortium led by the Spanish company OHL were the two last contenders in that public bid. Some years later, it was proved that Odebrecht and Corficolombiana bribed the Colombian Deputy Minister of Transportation to obtain the contract. They paid said public servant \$6,5 million U.S. dollars to be the selected consortium. To comply with his commitment, the Deputy Minister disqualified the consortium led by OHL for a formality, so their economic offer was not open during the bidding process. Later on, during the investigations for corruption, the offer of the disqualified consortium was opened: it was \$100 million U.S. dollars less than the one presented by Consol (Robledo 2023). As a consequence, the contract was not awarded to the proponent with the best economic offer, and the project had an over cost of 100 million U.S. dollars. All Colombians ended up paying for those acts. Fifteen years later, the rehabilitation and construction of that highway have not advanced and are far from being finished.

This case shows one of the most terrible effects of corruption: a private party obtaining benefits at the sacrifice of public interest.¹ In the end, public resources, contributed by all Colombians, were spent paying a \$6,5 million U.S. dollars bribe and \$100 million U.S. dollars in extra profits for the companies that corrupted the public servant. It was more expensive for all, except the ones that benefited from the corrupt act.² Furthermore, since, as a consequence of the corruption acts, the selected consortium was unable to finish and removed from executing the contract, the Colombian government had to start a bidding process again, with all the costs that it implies.

In the past decades, after the adoption of the 1991 Constitution, Colombia has enacted the majority of the legal framework to fight public and private corruption.³ The

1 See: Newman Pont and Ángel Arango (2017) 'Sobre la corrupción en Colombia: marco conceptual, diagnóstico y propuestas de política', Cuadernos de Fedesarrollo 56, 222 and Ortiz Benavides (2013). 'Efectos de la corrupción sobre la calidad de la salud y educación en Colombia 2004–2010', Tendencias, 13/1, 9–35.

2 Bribing is, as Rose-Ackerman argues, an essential aspect of corruption. See: Rose-Ackerman (1975). "The economics of corruption." *Journal of Public Economics*, 4(2), 187–203.

3 See, among others, Law 80 of 1993 that contains the legal framework for government procurement; Law 190 of 1995 that establishes regulations aimed at preserving morality in public administration and sets provisions to eradicate administrative corruption; Law 970 of 2005 that law approving the United Nations Convention against Corruption, Law 1712 of 2014 that creates measures for transparency and the right to access national public information., Law 1,474 of 2011 that creates the Anti-corruption Statute that aims to strengthen mechanisms for preventing, investigating, and penalizing acts of corruption and enhancing the effectiveness of public management control; Law 1778 of 2016 that establishes regulations regarding the responsibility of legal persons for acts of transnational

purpose of this article is to assess whether these laws and policies are sufficient and adequate in addressing and punishing massive corruption cases, as the one involving Odebrecht and Corficolombiana. To achieve that goal, this paper is divided in five parts. The first part presents the relevant facts of the case. Part II introduces the applicable legal framework and the tools it provides to sanction the perpetrators of corrupt acts. Part III goes through the sanctions imposed on the individuals and legal entities involved in the case by Colombian and U.S. authorities. Then, part IV analyzes the application of anti-corruption legal norms to the case. Finally, part V provides some conclusions.

2 The Odebrecht and Corficolombiana Partnership: Anatomy of a Scandal

Corficolombiana is a company dedicated to providing financial services. It is a subsidiary of Grupo Aval and the biggest financial corporation in Colombia. Despite being public, this corporation is majorly owned and controlled by the richest person in Colombia: Luis Carlos Sarmiento Angulo.⁴ Between 2008 and 2015, Corficolombiana partnered with Odebrecht, a construction company from Brazil, to participate in different infrastructure projects.⁵

In 2009, the National Agency of Infrastructure of Colombia started bidding for the construction, operation, and rehabilitation of a 328-mile highway: Ruta del Sol 2. As mentioned in the introduction, Odebrecht, Episol, an owned and controlled subsidiary of Corficolombiana, and another Colombian company presented a proposal organized in a consortium known as Consol. It has been probed that the companies part of the consortium paid the Colombian Deputy Minister, Gabriel García Morales, to obtain the contract (United States of America v. Corficolombiana S.A., D.Md., D.C., 2023). This public official tailored the terms of the bidding process, making it impossible for other competitors to fulfill them. The contract was awarded to Consol after disqualifying the remaining competitor for failing to comply with the discretionary experience

corruption and introduces other provisions related to the fight against corruption; Law 2,195 of 2022 that adopts provisions aimed at preventing acts of corruption, strengthening the coordination among state entities, and recovering damages caused by such acts in order to promote a culture of legality.

4 Although Luis Carlos Sarmiento is sometimes in the second or third place on the list of the richest in Colombia, after 2011, when Julio Mario Santodomingo died, he has been more than 10 years on the first place. See: Caparros (2023). ‘Los más ricos de Colombia 2023: por qué disminuyeron sus fortunas’, <https://forbes.co/2023/04/05/editors-picks/los-mas-ricos-de-colombia-2023-por-que-disminuyeron-sus-fortunas>, accessed 19 Apr., 2024.

5 Examples of such are “Ruta del Sol”, “Ruta del Sol Sector II” and “Ocaña-Gamarra Extensión”. For more, see: United States District Court for the District of Maryland 2023, United States of America v. Corporación Financiera Colombiana S.A., Information, D. Md. PJM-23-262. DC.

requirement.⁶ The bid closed to the maximum price bidders could have charged since Consol was the only bidder in the auction.

For the execution of the contract, Consol incorporated two companies: one to operate the project and the other to build the highway that they named “RDS 2”. Odebrecht held 61.2 % equity interest in both companies, while Episol maintained 33 %. Despite the percentages, Corficolombiana maintained direct influence over the financial and accounting operations of RDS 2, which included nominating and appointing the contract administrator and employees responsible for monitoring the compliance framework (SEC 2023).⁷

In June 2012, RDS 2 asked the National Agency of Infrastructure to add to the Ruta del Sol 2 contract the rehabilitation of a road between Puerto Berrio and Cisneros since it was close to the one being built. Nevertheless, the Director of this agency rejected the request, arguing that this road was included in the designs of another



⁶ For more cases in which the bidders are disqualified for discretionary formal requirements see: Velez Navarro, Joaquín (2016), ' Licitaciones fracasadas: la incapacidad del derecho frente al imperio de la forma' in Helena Alviar García (Ed.). *Nuevas tendencias del derecho administrativo*. (Bogotá: Ediciones Universidad de los Andes).

⁷ Securities and Exchange Commission, *Order instituting Cease-And-Desist proceedings pursuant to Section 21C of the Securities Exchange Act of 1934, making findings, and imposing a Cease-And-Desist Order* (File No. 3–21559, 2023).

project that would be tendered. However, he offered Consol to propose rehabilitating a road between Ocaña and Gamarra that crossed the Ruta del Sol 2 highway. The following image shows the initial project, which goes from San Roque to Puerto Salgar, and the new rehabilitation, the road that crosses it in Aguachica:

The road rehabilitation between Ocaña and Gamarra was not even mentioned in the scope of the initial contract signed between the Agency and Consol. The Colombian Government Procurement Statute, Law 80 of 1993, points out that any modification or addition to government contracts is restricted and should only be done when the circumstances make it strictly necessary to guarantee public services and good provision.⁸ The reason behind this rule, as the Council of State (the higher court on administrative matters) has established, is to prevent corruption and safeguard principles such as free competition, transparency, and equality (Council of State 2019). Therefore, according to the law, a new public tender should have been initiated for awarding the Ocaña to Gamarra Road. This was even mentioned by the Colombian National Comptroller, who pronounced: “If the object of a concession contract is to build, maintain, and operate a highway between points A and B, it is clear that any facility not included within that highway, such as an extension to a geographic point C, cannot be agreed upon nor executed as an addition to the original contract.” (Campos et al. 2021).

The proposal to rehabilitate Ocaña-Gamarra presented by RDS 2 on behalf of Consol was not approved immediately by the Agency. Thus, in 2013, a senior executive from Odebrecht consented to reward two intermediaries with a success fee to ensure the endorsement and hastening of the Ocaña-Gamarra extension project. This agreement included the authorization to pay Colombian government officials as bribes. An executive from Corficolombiana consented to this bribery arrangement and authorized the disbursement of bribes through RDS 2. Corficolombiana confessed that the payments for obtaining the Ocaña-Gamarra addition were made to a high-ranked government officer from the Santos government referred to as “Colombian Official Number 3”. (United States of America v. Corficolombiana S.A., D.Md., D.C., 2023). The partnership paid around \$3.4 million U.S. dollars for such purposes, and the corruption scheme was successful since the Colombian government approved the Ocaña-Gamarra addition without initiating a new public bidding process in March 2014.

Furthermore, the Odebrecht and Corficolombiana partnership paid former congressman Otto Bula to lobby and bribe other politicians and government officials. Among others, “Bula bribed a member of the Senate Budget Commission responsible for approving the contract renegotiation.” (Campos et al. 2021). Consequently, it was possible to modify “the original contract by adding toll plazas and increasing tolls by 15

⁸ Republic of Colombia, Law 80 of 1993.

percent. The contract was renegotiated 10 times, new works were added, and the total cost increased by 29 percent to \$1.25 billion” (Campos et al. 2021).

Besides, Odebrecht and Corficolombiana, directly and through RDS 2, made illicit campaign donations to the candidates with the best chances of winning the 2014 Colombian presidential campaign: Oscar Ivan Zuluaga and president Juan Manuel Santos, who was running to get reelected (CNN en Español 2017; Tovar Sandino 2023).⁹

The amount of money paid by Odebrecht, Corficolombiana, and RDS 2 to bribe Colombian public officials to obtain the contracts, additions, and other benefits is around \$28 million U.S. dollars (Office of Public Affairs 2023).¹⁰ When the bribe was authorized, Odebrecht’s Division of Structured Operations “registered, managed, and made the payment through a network of shell companies, off-book transactions, and off-shore bank accounts.” (Campos et al. 2021).¹¹ On the other hand, to justify the expenses made for the bribes, Corficolombiana created fictitious contracts and invoices and approved payments for work that was already paid and performed or that lacked supporting documentation (Securities and Exchange Commission 2023).

In 2016, after being dismantled in Brazil for a corruption scheme that operated throughout Latin America, Odebrecht, though 77 former and current executives, decided to collaborate with the United States Department of Justice, and Swiss and Brazilian authorities.¹² In these agreements, Odebrecht confessed to paying over 700 million dollars in bribes in Latin America, including 11.6 million dollars in collusion with Corficolombiana in Colombia. (United States of America v. Corficolombia S.A., D.Md., D.C., 2023).

⁹ In 2017 the Prosecutor General’s Office informed the National Electoral Council (CNE) in a letter that it has evidence and documents proving that Odebrecht financed expenses in the 2014 presidential campaigns of both expresident Juan Manuel Santos and then-candidate Óscar Iván Zuluaga. In 2023, Gabriel Jaimes, the deputy prosecutor before the Supreme Court, disclosed that Odebrecht allegedly contributed 3,540 million pesos to Juan Manuel Santos’s presidential campaign and 3,045 million pesos to Óscar Iván Zuluaga’s presidential campaign.

¹⁰ Office of Public Affairs (2023). ‘Corficolombiana to Pay 80 M to Resolve Foreign Bribery Investigations’, <https://www.justice.gov/opa/pr/corficolombiana-pay-80m-resolve-foreign-bribery-investigations>, accessed: May 9th of 2024.

¹¹ See Campos, Nicolás., Engel, Eduardo., Fischer, Ronald D., and Galetovic, Alexander (2021), ‘The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case’, 35/2, 171–190.

¹² Odebrecht case involved bribe payments in 12 countries: 10 in Latin America and 2 in Africa. It was the largest corruption case ever prosecuted under the US Foreign Corrupt Practices Act. See: Campos, Nicolás., Engel, Eduardo., Fischer, Ronald D., and Galetovic, Alexander (2021), ‘The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case’, *Journal of Economic Perspectives*, 35/2, 171–190., and Campos, Nicolás., Engel, Eduardo., Fischer, Ronald D., and Galetovic, Alexander (2019), ‘Renegotiations and Corruption in Infrastructure: The odebrecht Case’ <https://ssrn.com/abstract=3447631>, accessed 25 Apr. 2024.

As a result of these confessions, the General Prosecutor and the Superintendence of Industry and Commerce in Colombia started various investigations. Which tools does Colombian law provide to these and other authorities to sanction the companies and individuals responsible for significant corruption cases as the one just presented? Were these sanctions applied to this situation? Those questions will be answered in the following sections.

3 Tools to Fight and Punish Corruption: the Colombian Legal Framework

Colombia has adopted and implemented different laws and policies to fight corruption since the enactment of the 1991 Colombian Constitution. Some measures responded to significant corruption cases, such as the Anti-corruption Statute (Law 1474 of 2011). This law was passed after the “Carrusel de Contratación,”¹³ Bogotá’s most significant corruption case in recent decades. On the other hand, some reforms have been adopted due to international pressure, such as in the Anti-Bribery Convention. This legal instrument was integrated into the Colombian legal system through Law 1778 of 2016. If Colombia had not enacted that convention and adjusted the legal system to its requirements, it would not have been possible for the country to access the Organization for Economic Cooperation and Development – OECD.

The laws and policies to fight corruption in Colombia aim to attack this problem from different angles, first, using preventive measures. Among others, Law 80 of 1993 and Law 1150 of 2007 contain the main rules for government procurement. They determine a strict procedure to be followed in any public tender and mandate that the principle of transparency should guide those processes. Also, Law 412 of 1997 determines different measures to prevent corruption and defines certain corruption acts. Law 190 of 1995 imposes specific duties on public servants, such as publicizing their assets and tax declarations before taking office.

13 The “Carrusel de la Contratación” was a corruption case that was revealed on June 25, 2010 when a conversation implicating Bogotá Mayor Samuel Moreno, his brother Iván Moreno, and Bogotá’s comptroller Miguel Angel Moralesrussi in negotiating bribes for city contracts was exposed. The investigation revealed that nine major projects, including TransMilenio Phase III, were awarded through illegal commissions. Lawyer Álvaro Dávila acted as an intermediary between the Nule corporate group and the Moreno brothers. From December 2007 to June 2010, Samuel and Iván Moreno, along with others, conspired to commit public administration crimes. See Escallón (2014), ‘Reacción del Estado colombiano frente al carrusel de la contratación en Bogotá: ¿eficacia o discurso?’, *Derecho Público*, 32, 12–26.

A second way in which the government attacks corruption is through deterrence. The Criminal Code, Law 599 of 2000, contains different crimes that penalize demeanors considered as corruption, even though there is no legal definition of the term committed by public servants or individuals.¹⁴ Title XV of this code contains crimes against public administration. Other crimes can be considered private corruption, such as using privileged information. The highest penalty for corruption-related crimes is embezzlement, up to 22 years in prison. For bribery, the penalty goes from 6 years and eight months to 22 years if a public servant commits it. For the individuals, the penalty could go from 4 to 9 years. In addition to prison, the punishment for those crimes can be fines and inability to perform public functions, participate in any public procurement process, or contact any state authority or agency. Law 2014 of 2019 forbade intermediate penalties, such as house arrest or home confinement, for individuals convicted of bribery and other crimes against the public administration.¹⁵

Additionally, and this is a particularity of the Colombian legal system, public servants can be subject to a second sanction imposed by what is known as the disciplinary regime. The “*Procuraduría General de la Nación*” is an independent administrative public authority whose primary duty is to sanction public servants, or individuals on specific occasions,¹⁶ for any breach of the disciplinary regime. All the forbidden conducts are contained in the Disciplinary Code, Law 1952 of 2019, and the punishment can be suspension or removal from office, fines, disqualification to perform any public function, and participation in public procurement and contract with any state agency or public authority.

Before enacting the Anti-corruption Statute, all the measures and sanctions to deter were directed mainly towards individuals. Colombia has never had criminal liability for legal persons, and there was no administrative process to sanction them before 2011. The only way to admonish a legal person implicated in corruption cases in that period was through Article 91 of the Code of Criminal Procedure – Law 906 of 2004, which authorizes the suspension or closure of a legal person created or used to commit crimes. That article, as it was understood, could not be used to sanction a legal person used to commit just one or some crimes since it only applies when the legal entity is fully dedicated to committing wrongdoings. Article 34 of the Anti-corruption Statute, nonetheless, broadened the scope of said measure by establishing that the suspension and closure “shall be applied to legal persons that had sought to

¹⁴ Republic of Colombia. Law 599 of 2000. Articles 397–412.

¹⁵ Republic of Colombia. Law 2014 of 2019. Article 4.

¹⁶ Individuals are subject to the disciplinary regime when they supervise a government contract, perform public duties or administrate public resources. See: Republic of Colombia. Law 1952 of 2019. Article 70.

benefit from the commission of crimes against the public administration or any punishable conduct related to public assets, carried out by their legal representative or their administrators, directly or indirectly.” Additionally, the new legislation authorized the Superintendence of Corporations to impose fines to legal persons when, “with the consent of its legal representative or any of its administrators or with their tolerance, they participated in the commission of a crime against the public administration or the public assets”.¹⁷

Moreover, the Anti-corruption Statute created a new cause of disqualification for participating in public bids and celebrating contracts with any governmental agency or authority for 20 years for any individual condemned for crimes against the public administration. The disqualification, under the article, extends to the legal persons in which those individuals are shareholders, their headquarters, affiliates, and subsidiaries. The exception is public corporations since anyone condemned could disqualify them by buying shares in the stock market.

Although the Anti-corruption Statute strengthened the sanctions against legal persons who were used for public corruption misconduct, more than the existing legislation was needed to pass the standards of the OECD. This organization considered the fines too low and the measures weak for punishing legal persons involved in major corruption cases. Law 1778 of 2016, which implemented the OECD Antibribery Convention, aimed to solve that by increasing the fines for bribery cases 100 times: The maximum fine went from 2.000 minimum wages to 200.000, now amounting to approximately 665 million U.S. dollars. Likewise, it created a specific administrative procedure for punishing legal persons in transnational bribery cases. When they benefit from said conduct, the sanctions for the legal persons are fines, disqualification to participate in public bids and contracts with government entities for 20 years, and a prohibition from receiving subsidies from the government for 10 years.

Law 104 of 2019 expanded the scope of the disqualification for participating in public bids and contracting with public entities even more. The 20-year term becomes permanent for individuals who benefited from a prosecutorial agreement or were convicted for committing crimes against the public administration, other felonies established in the Anti-corruption Statute, and the crimes established in the legal conventions against corruption ratified by Colombia. Permanent disqualification extends to legal entities, while their legal representatives, administrators, controlling shareholders, and board of directors members are part of the legal entity. The original article contained an exception for public companies. Nonetheless, this part of the norm was sued before the Constitutional Court. The Court held that the norm was unconstitutional since it only referred to “controlling” shareholders and not any

17 Republic of Colombia. Law 1,474 of 2011. Article 34.

of them, so the differentiation made by the legislator was unjustified (Colombian Constitutional Court 2003). Thus, the disqualification extends to any legal person. Notwithstanding, the legal entity can participate again in public bids and contracts with the State if it removes the convicted person from her position. The disqualification also applies, as a preventive measure, when a criminal judge suspends the legal person by applying article 91 of Law 906 of 2004.¹⁸

The sanctions on legal persons were toughened by Law 2,195 of 2022. Among the significant changes, article 2 enabled all Colombian superintendencies¹⁹ to start administrative proceedings against any legal person if the following circumstances occur:

1. That there is an enforceable criminal conviction, or prosecution agreement, against any legal persons, directors, or employees for the commission of crimes against public administration, the crimes enshrined in the Anti-corruption Statute, or any punishable conduct related to public assets.
2. That the legal person or the Colombian branch of a foreign company benefited or sought to benefit, directly or indirectly, from the commission of the punishable conduct committed by its administrators or other employees.
3. That the legal person or the Colombian branch of a foreign company consented to or tolerated the commission of the punishable conduct by action or omission, considering the application of its respective risk controls.

If that is the case, the superintendencies can impose fines of up to 200.000 minimum wages, disqualify the legal person from participating in public bids and contracts with the public entities permanently, ban it from receiving State subsidies for 10 years, and remove the administrators or other employees that tolerated or incurred in the misconducts.

In addition to the criminal, disciplinary, and administrative sanctions mentioned in the former paragraphs, there is another tool to punish corruption acts under Colombian law: breaches of antitrust laws. In this regard, Law 155 of 1959 forbids any

¹⁸ Republic of Colombia. Law 2014 of 2019. Article 2.

¹⁹ In Colombian administrative law, a Superintendency is a governmental agency that operates within the executive branch, under the supervision of a ministry or administrative department. These agencies are responsible for administrative tasks such as inspection, supervision, control, and enforcement through administrative acts, which are subject to review by the administrative justice system. Additionally, Superintendencies have the authority to impose administrative sanctions. Some Superintendencies, such as the Superintendence of Societies, the Superintendence of Industry and Commerce, the Financial Superintendence, and the National Health Superintendence, also have jurisdictional functions, acting as judges, but still operating within the executive branch. Consequently, they are subject to the full application of due process (Meza et al. 2022).

agreement or practice that, directly or indirectly, limits free competition or aims to maintain inequitable prices. Decree 2,153 of 1992 determines the acts that are contrary to free competition. As per article 47 # 9 of said decree, acts whose primary purpose is to engage in bid collusion or whose actions result in manipulating contract awards, distribution, or proposal terms are against free competition. The fines to be imposed can go up to 100.000 minimum wages or 150 % of the profits gained by the offender from the act that breached antitrust laws if the last value is higher.²⁰

In summary, individuals committing crimes against the public administration can be subject to imprisonment, fines, and disqualification for participating in public bids and contracting with the government. Public servants can also be suspended or removed from office if there is a breach of the disciplinary regime, which includes performing different corruption acts. As for legal persons can be fined, disqualified from participating in public bids and celebrating contracts with any public entity or authority, banned from receiving state subsidies, and forced to remove the administrators or employees that incur or tolerate the corruptive acts. Additionally, if the legal person is used to commit crimes, their legal status can be suspended or canceled.

4 Outcomes of the Case: A Comparison of the Sanctions Imposed in Colombia and the United States

As it was said before, Odebrecht, through some high-ranked executives, collaborated with several authorities and faced sanctions in different jurisdictions for the corruption scheme that operated in part of Latin America. Some of those officers, such as former CEO Marcelo Odebrecht, were sent to prison, and the company had to pay fines both in Brazil and the United States. What were the consequences of the conduct that was performed in Colombia? Were the tools presented in the last section used and effective for punishing the companies involved and the primary offenders?

When the Odebrecht scandal exploded, Colombian authorities started different investigations. The General Prosecutor indicted the Deputy Minister of Transportation, Gabriel Garcia Morales, for receiving the bribe to award the Ruta del Sol 2 contract. On the other hand, the chief executive officer of Corficolombiana, José Elías Melo, and top executives from Odebrecht in Colombia were indicted for paying bribes to obtain said contract. In 2018, a Colombian penal judge sentenced the former

20 Republic of Colombia. Decree 2,153 of 1992. Article 4.

Deputy Minister of Transportation to 5 years in prison for receiving bribes; former Senator Otto Bula to 5 years and a half in prison for having collaborated with the corruption arrangement; and the CEO of Corficolombiana to 11 years in prison for paying the bribes totaling 6.5 million dollars regarding the “Ruta del Sol 2” contract. Afterward, three businessmen who facilitated the illicit payments and former senators Antonio Guerra and Bernardo Elías were condemned for collaborating with the criminal enterprise. The senator’s sentence was 13 and 14 years of prison, respectively. As of today, only José Elías Melo has been convicted from the side of Corficolombiana. No other high executive or major shareholder from this company has been condemned for the bribes paid, nor from Episol or Consol (Cuestión Pública, n.d.). Likewise, the government has condemned no one for receiving the \$3.4 million bribe for securing the Ocaña-Gamarra addition to the contract. We still ignore who “Colombian Official Number 3” is. The only sanction imposed for that addition to public servants has been for a breach of the disciplinary regime. In 2022, the Procuraduría General removed and disqualified for performing public duties the Director of the National Agency of Infrastructure (for 10 years) and the other three officers for adding that road extension. According to the Procuraduría, adding the Ocaña-Gamarra highway to the initial contract was impossible because it was not related to its scope and, thus, violated public procurement laws.

Of all the measures that the government has to sanction legal persons involved in corruption acts that were presented in the last section, the only one that has been used is to sanction breaches of antitrust laws. The Superintendence of Industry and Commerce opened an investigation against two Odebrecht companies in Colombia, Corficolombiana and Episol. As a result of that proceeding, in December 2020, the Superintendence found that the mentioned companies violated article 47 of Decree 2,153 of 1992 since they altered the circumstances for awarding a government contract: Ruta del Sol 2. For those violations, the legal persons involved were fined as follows: each of the Odebrecht companies for approximately \$25 million U.S. dollars; Corficolombiana for almost \$16 million U.S. dollars; and Episol for \$9,5 million U.S. dollars (SIC 2020). The Superintendence also fined the former Deputy Minister of Transportation and José Elías Melo for cooperating and facilitating the violations to free competition.

In a significant development, in August 2023, the director of the National Agency for Legal Defense requested the Ministry of Foreign Affairs to seek international evidence in the case. This was a crucial step in enabling the Superintendence of Corporations to initiate the administrative process for transnational bribery against Corficolombiana (Ramírez 2023). However, this initiative was ultimately unsuccessful as the actions in the case did not meet the criteria for transnational bribery. It

was clarified that since Corficolombiana is a Colombian company and the public servants involved in the case were also Colombian, the crime was bribery and not transnational bribery, as later explained by the Superintendence of Corporations to the director of the Agency.

Corficolombiana was only involved in the conduct executed in Colombia. Even though one could think these acts are only subject to Colombian law, that was not the case. Grupo Aval, the holding company of Corficolombiana, is listed on the New York Stock Market. Therefore, it is subject to U.S. laws that fight corruption, namely, the Foreign Corrupt Practices Act of 1977 (FCPA). In addition, it is under the U.S. Securities and Exchange Commission (SEC) inspection. As a result, the U.S. Department of Justice and the SEC opened the corresponding proceedings to investigate the acts of Grupo Aval and Corficolombiana in Colombia – specifically, their conspiracy to violate an antibribery provision of the FCPA.

Amidst the first investigation, Corficolombiana and the United States Attorney's Office for the District of Maryland entered a three-year Deferred Prosecution Agreement (DPA) in August 2023. The company decided to collaborate with U.S. authorities since court documents confirmed that “between 2012 and 2015, Corficolombiana conspired to offer and pay more than \$23 million in bribes to high-ranking in order to win a contract to construct and operate a highway toll road known as the Ocaña-Gamarra Extension” (Office of Public Affairs 2023). On the DPA, the company recognized its role in the significant foreign bribery scheme. These conducts violate Section 78dd-1, title 15, of the FCPA. The company is paying a criminal penalty of \$40.6 million U.S. (United States of America v. Corficolombiana S.A., D.Md., D.C., 2023). dollars for that. The Department of Justice, however, “agreed to credit up to half of that criminal penalty against money that the company and its subsidiary, (...) Episol, paid to Colombia's [Superintendence of Industry and Commerce], for violations of Colombian laws related to the same conduct, so long as the company and Episol drop their appeals of the [Superintendence] resolution.”(Office of Public Affairs 2023). Besides, the criminal penalty was reduced by 30 %, taking into consideration that the company engaged in various remedies comprising:

“(i) conducting a root cause analysis of the conduct identified during internal investigations and promptly taking actions to enhance its corporate governance and controls at joint venture entities, as well as improving its oversight of non-controlled joint ventures and investments; (ii) overhauling its compliance program; (iii) enhancing its third-party intermediary risk management process; (iv) implementing a robust process for reporting and investigating allegations of misconduct; (v) establishing a disciplinary process overseen by a cross-functional ethics committee; (vi) conducting testing of its anticorruption compliance program; and (vii) engaging in a periodic review of and updating of its anticorruption compliance program”.(Office of Public Affairs 2023).

On the other hand, Corficolombiana committed to cooperating with all the United States criminal investigations related to the mentioned case. This pledge included:

“(i) timely providing the facts obtained through the company’s internal investigation; (ii) making numerous detailed factual presentations that distilled certain key factual information; (iii) producing documents that the government may not otherwise have had access to in ways that did not implicate foreign data privacy laws; (iv) providing sworn testimony from Colombian criminal and administrative proceedings of relevant witnesses whom the government could not independently interview; (v) proactively identifying information previously unknown to the government; and (vi) collecting and producing voluminous relevant documents and translations, including documents located outside of the United States”.(Office of Public Affairs 2023).

Finally, Corficolombiana agreed to improve its compliance program and periodically report the steps taken to the U.S. Department of Justice. In consideration for all the cooperation and remedies implemented, the mentioned Department agreed to (i) defer the term for any prosecution against Corficolombiana for the conducts being investigated and (ii) not initiate any criminal or civil case against this company, its subsidiaries, or joint ventures during the term of the agreement. (United States of America v. Corficolombiana S.A., D.Md., D.C., 2023).

As per the second case opened in the U.S., the SEC issued a cease and desist order in August 2023.²¹ In this document, the SEC it was alleged that Corficolombiana violated Section 30A of the Securities Exchange Act of 1934, which prohibits corrupt trade practices by issuers, such as paying money to a foreign official to influence his or her acts or decisions or secure an improper advantage (Securities Act of 1934). Additionally, the SEC asserted that Grupo Aval violated two provisions of this Act. First, Section 13(b)(2)(A) requires reporting companies to make and keep book records and accounts accurately, in reasonable detail, and reflect fairly their transactions and dispositions of their assets. Second, Section 13(b)(2)(B) fails to establish and uphold an internal accounting control system that ensures reasonable assurance that transactions are carried out and access to assets occurs only by management’s general or specific authorization. (Securities Act of 1934). The preceding reason was that the bribe payments to intermediaries were approved based on invoices that lacked supporting documentation or by using contracts for services that were vaguely described and typically handled internally rather than by third parties (SEC 2023).

21 A cease and desist order is an order by an administrative agency that requires certain practices specified to stop. See: Legal Information Institute, https://www.law.cornell.edu/wex/cease_and_desist_order, accessed: 6th May of 2024.

For those allegations, the SEC ordered Grupo Aval and Corficolombiana to cease and desist from committing or causing any further violation of the cited sections and to pay over \$40 million U.S. dollars, distributed as follows: \$32.139.731 million in disgorgement and \$8.129.558 million in prejudgment interest (SEC 2023).

5 An Assessment of the Colombian Laws to Fight Corruption Through the Results on Odebrecht and Corficolombiana

The anti-corruption laws in Colombia seem, at first sight, strong, dissuasive, and adequate to punish significant corruption cases such as the Odebrecht and Corficolombiana ones. The country has adopted and implemented legislation and policies following international organizations' best practices and standards, such as the OECD (Transparencia por Colombia 2023). The later legislative changes were not just suggested but a requirement to access this international organization. The new framework provides different tools to several authorities to sanction individuals and legal persons. The sanctions are dissuasive and proportional from a comparative perspective (Padua Lima and Clarindo Goldschmidt 2020). Although before entering into the OECD, the measures and penalties to be imposed on legal persons needed to be revised, the legislative changes taken since 2011 have strengthened the government's tools to handle and punish these persons.

Despite that, in the paper, the legislation presented is robust and has been amended following the best international standards; the sanctions imposed in the case analyzed show that the Colombian legal framework is limited to fighting and punishing major corruption cases for several reasons. After scrutinizing how the countries involved handled the situation, the U.S. authorities discovered the most significant findings of the corruption scheme. The effectiveness of the SEC and the Department of Justice in opening and advancing the proceedings and the possibility of being sanctioned by these authorities persuaded the companies and their shareholders to cooperate. This collaboration revealed facts, like all the illicit additions, that would not have been discovered. In contrast, as of today, many of the foremost perpetrators of the scheme remain unknown and unpunished in Colombia. For instance, the mentioned "Colombian official number 3", who received one of the highest bribes, has not been prosecuted or sentenced. The Colombian authorities have not been capable of making the perpetrators cooperate, and even though the dissuasive tools are available, they have not been used. Many critical issues are still unclear in Colombia, whereas the U.S. has been able to gather essential information even though the case did not occur there. Therefore, it will be hard to dismantle and

punish significant corruption cases until the Colombian authorities do not use the tools provided effectively and persuasively.

The over costs of the project plus all of the damages suffered for not having executed it correctly and on time, as having to start a new public tender, have also not been compensated or recovered. The U.S. authorities received more compensation for the corruption scheme than the Colombian government, even though the case occurred in the South American country. The best way to recover part of what was lost due to corruption acts is through the companies that participated in them since they usually have more capital than the individuals involved. In the case being examined, both Grupo Aval and Corficolombiana are two of the biggest and wealthiest corporations in the entire country. Nonetheless, even though there are different administrative processes to sanction the companies, the Colombian authorities other than the Superintendence of Industry and Commerce have yet to start any investigation. In the U.S., quite the reverse, the proceedings have been sufficiently compelling to obtain part of the compensation.

Various reasons explain the lack of results in Colombia, even though it counts with the proper mechanisms to sanction this type of case. First, since many of the anticorruption laws are relatively recent, public authorities still need to grapple with their interpretation and practical application, and the lack of established precedents and case law leads to uncertainty. Equally, since the laws are punitive, their applicability is limited on time because they cannot be applied retroactively.

Second, after the Anticorruption Statute was enacted, the laws and policies on the subject have undergone numerous changes. While amendments aimed to improve this legal framework, the constant modifications have disrupted proper implementation and created confusion about when they apply. Besides, frequent changes mean that authorities must continually update their understanding of the law. This adaptability burden has hindered effective enforcement. The changes have also created overlaps and contradictions between the laws, affecting efficiency.

A third reason is related to the economic and political power of the people affected by the investigations. Nestor Humberto Martínez, the General Prosecutor of Colombia when the scandal exploded and the investigations started, was the former personal lawyer of Luis Carlos Sarmiento, the main shareholder of both Corficolombiana and Grupo Aval. This generated an enormous conflict of interest in the case, and even though the Prosecutor delegated it, several irregularities have occurred throughout the investigations. Among others, the person in charge of surveilling the contract, Jorge Enrique Pizano (a vital witness of the case), informed the Prosecutor General when he was a lawyer of Corficolombiana of a possible bribing scheme. After these facts were revealed using a recorded conversation between them, Pizano and his son were found dead in their country house, poisoned with cyanide (BBC News World 2018). It is still unclear if it was a suicide or not. Additionally, the designated

Prosecutor for the case, Daniel Hernandez, faces severe allegations for threatening witnesses, delaying the investigation, and wrongly requesting the capture of high-ranked officials from Odebrecht who were able to leave Colombia because of that mistake (Gómez 2023). Regarding the witnesses, it has been said that Hernandez approached and threatened former Congressman Otto Bula, so he did not denunciate or mention Nestor Humberto Martinez and Luis Carlos Sarmiento in his testimony.

In summary, while Colombia has made significant strides in combating corruption through legislative efforts, the effectiveness of these laws remains a work in progress. Addressing the challenges mentioned before, for example by providing clearer guidelines, harmonizing provisions, and ensuring stability, will be crucial for enhancing their impact and promoting transparency. Moreover, whilst the most powerful people can influence the institutions in charge of prosecuting and punishing the cases, the legal framework will remain inefficient, or at least in the major cases in which they are involved.

6 Conclusions

At first glance, Colombia's anti-corruption laws appear robust, dissuasive, and well-equipped to tackle major corruption cases. The country has diligently adopted and implemented legislation and policies in line with international best practices, as recommended by organizations such as the OECD and as a reaction to notable corruption schemes. Notably, some of these legislative changes were not merely suggestions but prerequisites for Colombia's accession to the OECD. The resulting legal framework provides various and sufficient tools for authorities to sanction both individuals and legal entities. These sanctions are designed to be dissuasive and proportional when compared internationally. However, despite these efforts, the reality on the ground reveals limitations in the Colombian legal system's ability to effectively combat and punish major corruption.

In analyzing how two countries handled this same situation, the contrasting outcomes between Colombia and the United States stand out. The authorities in the U.S. successfully uncovered critical details of the corruption scheme, thanks to the effectiveness of agencies like the SEC and the Department of Justice. The threat of sanctions compelled the companies involved and their shareholders to cooperate, leading to the revelation of previously hidden facts. In stark contrast, many key perpetrators remain unidentified and unpunished in Colombia. Even the notorious "Colombian official number 3," who received substantial bribes, has not been identified. While dissuasive tools exist within Colombian law, they have not been effectively utilized. Critical issues persist, and the U.S. managed to gather essential information despite the case not occurring on its soil. Until Colombian authorities

wield these tools persuasively, dismantling and punishing major corruption cases will remain a challenge.

Additionally, despite the project's cost overruns and damages resulting from improper execution and delays, compensation and recovery have been inadequate. Surprisingly, the U.S. government received more compensation for the corruption scheme than Colombia did. Recovering lost funds necessitates targeting the corporations involved, as they typically possess greater capital than individual wrongdoers.

The reasons behind Colombia's lack of results on this are multifaceted, including the relative novelty of anticorruption laws, ongoing challenges in interpretation and application, the limited applicability of punitive measures, and the influence of people involved in the case.

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