

## ***Lava Jato* beyond Borders**

### **The Uneven Performance of Anticorruption Judicial Efforts in Latin America**

*Ezequiel Gonzalez-Ocantos and Viviana Baraybar Hidalgo*

#### **Abstract**

This essay uses an original database to trace the regionalization of the *Lava Jato* case, following revelations by judicial authorities in the United States in December 2016. It also investigates variation in the progress of national investigative efforts. Corruption investigations inevitably target powerful political and business elites. As a result, the permissiveness of the political environment is crucial to explaining why some chapters of *Lava Jato* have been able to make more progress than others. This essay acknowledges the relevance of such constraints, but also draws attention to the importance of judicial agency. We argue that the quality of anticorruption investigations is not entirely endogenous to the presence of a favorable political environment; certain choices and prosecutorial strategies can effectively expand narrow limits of political possibility, and help build momentum when there is none. More importantly, even when conditions allow for more independent prosecutorial efforts, judicial actors still need to be willing and able to overcome the many technical obstacles that characterize this type of inquiry. Securing high-quality evidence in information-poor environments, building relations with myriad national and international players, and leveraging media cover are all crucial to guaranteeing progress. We analyze the role of judicial agency in the cases of Ecuador and Peru, where investigators managed to secure a number of crucial victories, and in Mexico, where the investigation failed to deliver results. The essay thus contributes to the scholarly literature on the judicialization of grand corruption.

**Keywords:** Corruption, judicial politics, Latin America, *Lava Jato*, Odebrecht.

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**Ezequiel Gonzalez-Ocantos** is an Associate Professor in the Department of Politics and International Relations, and Professorial Fellow of Nuffield College, University of Oxford. <ezequiel.gonzalez@nuffield.ox.ac.uk>

**Viviana Baraybar Hidalgo** is a graduate student in the Department of Politics and International Relations at Nuffield College, University of Oxford. <viviana.baraybarhidalgo@nuffield.ox.ac.uk>

Like never before, courts across Latin America are beginning to investigate, and in some cases punish, grand corruption. This regional anticorruption judicial crusade<sup>1</sup> started in Brazil in 2014, when the Lava Jato case first gained public notoriety. Since then, Brazilian judges and prosecutors have shed light on the intricacies of a large-scale money laundering, bribery, and illegal campaign-financing scheme involving all major political parties as well as some of the country's most prominent business leaders. As a result of these investigations, courts have issued a litany of indictments and prison sentences against members of the economic and political establishments. Most notably, courts convicted President Lula Da Silva for his participation in the bribery scheme and barred him from launching a new presidential bid in 2018.

Lava Jato not only is unique in terms of its scope and effectiveness within Brazil; it also is unprecedented in terms of its regional implications. According to the BBC, the Lava Jato investigation has uncovered "the largest foreign bribery case in history."<sup>2</sup> Judges and prosecutors across the region so far have revealed that between 2001 and 2016, *Odebrecht*, a construction company at the heart of the Brazilian bribery scheme, also paid millions in bribes to politicians and political parties in eight other Latin American countries. In most countries affected by Lava Jato, the political repercussions have been far-reaching. In fact, several national chapters of the investigation directly or indirectly have contributed to the downfall of sitting presidents, or to the indictment, arrest, and conviction of former presidents and their closest aides. The intensity and effectiveness of the investigations, however, vary considerably outside Brazil. What explains the uneven progress of criminal investigations linked to Lava Jato across Latin America? Why did some judicial efforts outside Brazil evolve into spectacular anticorruption crusades, whereas others so far have failed to deliver?

From a research design perspective, a comparative study of the effectiveness of Lava Jato outside Brazil is uniquely suited to exploring the factors that led to the investigation and punishment of corrupt political elites. A plea-bargain agreement struck between construction giant Odebrecht and U.S. attorneys in December 2016 shocked the region. The testimonies of top company executives revealed a truly transnational bribery scheme that implicated high-level politicians in Argentina, Colombia, the Dominican Republic, Ecuador, Mexico, Panama, Peru, and Venezuela. Given the source of the allegations, judges and prosecutors across Latin America had little room to ignore them and were immediately forced to open local chapters of Lava Jato. Indeed, because of the strength and salience of this external shock, we see some level of judicialization in all countries mentioned in U.S. official

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<sup>1</sup> We borrow the term "crusade" from Matthew Taylor, "Getting to Accountability: A Framework for Planning & Implementing Anticorruption Strategies," *Daedalus* 147, no. 3 (2018): 65.

<sup>2</sup> Linda Pressly, "The Largest Foreign Bribery Case in History," *BBC* (April 20, 2018), <https://www.bbc.com/news/business-43825294> (accessed April 19, 2019).

documentation. In addition, judges and prosecutors have had to deal with fairly analogous crimes and case facts, and to grapple with comparable evidential challenges. Moreover, all of them have had the chance to leverage unparalleled opportunities for transnational cooperation and ride the coattails of the internationally acclaimed Lava Jato brand. These common characteristics allow us to craft a systematic, multinational comparison of very similar and contemporaneous anticorruption efforts in order to assess how agentic and systemic factors play out in a variety of national contexts, leading to higher or lower levels of success. The research design also allows us to engage in careful within-case analysis of national judicialization processes over a relatively brief period of time (December 2016–December 2018). This makes it easier to trace any existing links among a series of explanatory variables and judicial outcomes (or their absence).

The goal of this essay is to highlight the role of judicial agency and contingency in the spread of the Lava Jato investigation outside Brazil. The analysis seeks to show that the success of these criminal prosecutions depends greatly on the presence of inspired and experienced judicial “leaders,” who are capable of securing evidence in typically low-information environments and able to protect the investigations from outside political attacks. Without downplaying the obvious impact of national political configurations and the relative power of those subject to the investigations, we argue that contingent creativity by judges and prosecutors is crucial because it makes the attribution of individual criminal responsibility possible by enabling the disruption of investigative routines that are ill-suited for cases of macro-criminality involving powerful defendants and opaque evidence trails. Indeed, the comparative record suggests that in places where judges and prosecutors showed skill and commitment to striking unprecedented institutional plea-bargain agreements with Odebrecht, and thus obtained the necessary incriminating evidence, national chapters of Lava Jato made quick progress. Similarly, where judicial actors were willing and able to use the media as a source of political cover, investigative efforts proved more robust.

The essay proceeds as follows. First, we discuss why corruption cases are marred by political and technical challenges, and therefore require creative, courageous, and skillful investigators. This is true regardless of the permissiveness of the political environment. Second, we present an overview of the Odebrecht scandal and its diffusion across Latin America. This section relies on original data gathered from official and journalistic sources to describe the relative progress of the Lava Jato case in eight Latin American countries. The focus is on punitive measures such as indictments, convictions, and international travel bans. Third, we describe in some detail the trajectory of Lava Jato in countries with different outcomes. The objective is to illustrate and provide an account of the range of variation observed in the dependent variable. Specifically, we discuss the fate of Lava Jato in Ecuador and Peru, where investigations quickly evolved into spectacular anticorruption judicial

crusades, and Mexico, the least successful case among the democracies in the sample.<sup>3</sup> The law in all three countries allows for a relatively high degree of prosecutorial selectivity. Furthermore, investigative efforts in the three countries were highly centralized, often under close supervision from attorneys general. Finally, the case selection allows us to probe the explanatory performance of variables associated with judicial capacity, creativity, and leadership in contexts with very different political opportunity structures.

## Structure and Agency in Anticorruption Crusades

Anticorruption crackdowns such as elite purges, intense judicialization episodes, or aggressive bureaucratic reforms are relatively rare. There is, nevertheless, a lively debate in the literature between optimists and pessimists around the question of whether they fundamentally disrupt corrupt ecosystems.<sup>4</sup> In the case of anticorruption judicial crusades, for example, some scholars suggest that widespread investigations and trials are an unparalleled source of information about corruption that allows voters to effectively coordinate punishment.<sup>5</sup> Others, by contrast, suggest that elites simply adapt in the face of greater prosecutorial risk, “acquiring knowledge and skills which make it more difficult to discover and punish their actions.”<sup>6</sup> In addition, as corrupt elites try to temper the judiciary’s punitive zeal, judges and prosecutors can easily fall prey of politicization efforts that undermine the effectiveness and prestige of

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<sup>3</sup> We exclude Venezuela because it is not a “relevant” negative case. See James Mahoney and Gary Goertz, “The Possibility Principle: Choosing Negative Cases in Comparative Research,” *American Political Science Review* 98, no. 4 (2004): 653-669.

<sup>4</sup> Donatella Della Porta and Alberto Vannucci, “Corruption and Anti-Corruption: The Political Defeat of ‘Clean Hands’ in Italy,” *West European Politics* 30, no. 4 (2007): 830-853; Anne Van Aaken, Lars Feld, and Stefan Voigt, “Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-eight Countries,” *American Law and Economics Review* 12, no. 1 (2010): 204-244; Eric Chang, Miriam Golden, and Seth Hill, “Legislative Malfeasance and Political Accountability,” *World Politics* 62, no. 2 (2010): 177-220; Claudio Ferraz and Federico Finan, “Electoral Accountability and Corruption: Evidence from the Audits of Local Governments,” *American Economic Review* 101, no. 4 (2011): 1274-1311; Timothy Power and Matthew Taylor, *Corruption and Democracy in Brazil* (Notre Dame, IN: University of Notre Dame Press, 2011); Bo Rothstein, “Anti-Corruption: The Indirect ‘Big Bang’ Approach,” *Review of International Political Economy* 18, no. 2 (2011): 228-250; Salvatore Sberna and Alberto Vannucci, “‘It’s the Politics, Stupid!’ The Politicization of Anti-Corruption in Italy,” *Crime, Law and Social Change* 60, no. 5 (2014): 565-593; Matthew Taylor, “Getting to Accountability: A Framework for Planning & Implementing Anticorruption Strategies,” *Daedalus* 147, no. 3 (2018): 63-82; and Minxin Pei, “How Not to Fight Corruption: Lessons from China,” *Daedalus* 147, no. 3 (2018): 216-230.

<sup>5</sup> Chang et al., “Legislative Malfeasance and Political Accountability.”

<sup>6</sup> Della Porta and Vannucci, “Corruption and Anti-Corruption.”

<sup>7</sup> Alessandro Pizzorno, *Il potere dei giudici. Stato democratico e controllo della virtù* [The power of the judges: Democratic state and the control of virtue] (Bari: Laterza, 1998).

the courts.<sup>7</sup>

When trying to identify the conditions that facilitate anticorruption crackdowns or reforms, political scientists tend to focus on system-level dynamics. For example, electoral incentives,<sup>8</sup> external economic or military shocks,<sup>9</sup> international pressures,<sup>10</sup> or changes to the electoral system<sup>11</sup> are all thought to affect the incentives, capabilities, and opportunities for political corruption, sometimes encouraging politicians and other elites to actively disclose, punish, and curb the incidence of graft.

Such system-level explanations provide useful insights into the macro-political conditions that make it possible for anticorruption crackdowns to gain momentum and stand a chance. They have less to say about the processes and capabilities that enable anticorruption agents to translate opportunity into actual outcomes in the form of, for example, high levels of prosecutorial success or the effective implementation of transparency-enhancing reforms. To accomplish this, we need to complement system-level explanatory factors with a careful consideration of the role of contingency, leadership, and choice. In this sense, a few studies of the *Mani Pulite* operation in Italy point to judicial acumen, courage, creativity, and prior experience with cases of macro-criminality as key driving forces behind one of the most ambitious anticorruption judicial crusades in recent memory. Donatella Della Porta and Alberto Vannucci see the roots of the Italian “judicial revolution” in prior changes to the judiciary’s institutional identity: “In the 1970s and 1980s, especially in the struggle against terrorism, mafias and corruption, a new generation of judges began to exercise a ‘substitutive function’ with respect to a weak and divided political class, thus increasing its own *esprit de corps*.”<sup>12</sup> Similarly, Salvatore Sberna and Vannucci explain that “Italian judges started to perceive themselves as charged by a civic mission of responsibility towards society and community.”<sup>13</sup> This new conception of the judicial role, coupled with smart decisions taken at the start of the investigation, largely explain the success of *Mani Pulite*: “As soon as the first politicians and entrepreneurs in

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<sup>8</sup> Barbara Geddes, *Politician’s Dilemma* (Berkeley, CA: University of California Press, 1994), and Manuel Balán, “Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile,” *Comparative Politics* 43, no. 4 (2011): 459-478.

<sup>9</sup> Bo Rothstein, “Anti-Corruption: The Indirect ‘Big Bang’ Approach,” *Review of International Political Economy* 18, no. 2 (2011): 228-250, and Beatriz Magaloni, *Voting for Autocracy* (New York: Cambridge University Press, 2006).

<sup>10</sup> Ben Ross-Schneider, “Organized Business Politics in Democratic Brazil,” *Journal of Interamerican Studies and World Affairs* 39, no. 4 (1997): 95-127, and Barbara Stallings, “International Influence on Economic Policy: Debt, Stabilization, and Structural Reform,” in *The Politics of Economic Adjustment*, ed. Stephan Haggard and Robert Kaufman (Princeton, NJ: Princeton University Press, 1992).

<sup>11</sup> Daniel Gingerich, *Political Institutions and Party-Directed Corruption in South America* (New York: Cambridge University Press, 2013).

<sup>12</sup> Della Porta and Vannucci, “Corruption and Anti-Corruption,” 845.

<sup>13</sup> Sberna and Vannucci, “‘It’s the Politics, Stupid!’” 582.

jail—deliberately put by the Milanese judges into a prisoner’s dilemma-like situation—started to collaborate with judges, the whole mechanism was set in motion. The amount of information gathered by the prosecutors on illegal activities of political actors grew exponentially, with a domino effect.”<sup>14</sup>

One key lesson from the Italian case is that savvy and experienced anticorruption agents often can defy and expand the limits of political possibility, and quickly manufacture momentum for otherwise unpopular or politically inexpedient causes. The evolution of Mani Pulite also suggests that, even when political opportunity structures appear favorable to the anticorruption cause, not all judicial actors are equally capable of exploiting them. This is because, in addition to eliciting intense political scrutiny, corruption cases are incredibly complex from a technical point of view. Criminals leave behind very opaque evidence trails and use the state apparatus to mount sophisticated cover-ups. Corruption crimes also tend to be transnational in nature, involving the use of figureheads in multiple countries, secret off-shore accounts in safe financial havens, and intricate asset-ownership structures. The mechanisms used to camouflage and launder the proceeds of corruption are indeed extremely convoluted.<sup>15</sup> Uncovering these schemes requires highly technical financial investigations and makes legal assistance among jurisdictions imperative. In addition, grand corruption cases often target defendants in important positions, which creates incentives and opportunities for using corruption to distort the investigative process at various stages.<sup>16</sup> The political figures under investigation also may rely on special benefits, including parliamentary immunity, to block the disclosure of evidence,<sup>17</sup> enlist skilled lawyers who are well-versed in the use of stalling tactics, and exploit their institutional prerogatives to weaken the legislative framework that governs criminal prosecutions.<sup>18</sup>

Under such conditions, judges and prosecutors at the forefront of anticorruption crusades often have a hard time finding the kind of incriminating evidence that would allow them to challenge powerful political and business

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<sup>14</sup> Ibid., 576.

<sup>15</sup> Maíra Martini, *Fighting Grand Corruption*, Transparency International (2015), [https://www.transparency.org/whatwedo/answer/fighting\\_grand\\_corruption\\_challenges\\_and\\_successes](https://www.transparency.org/whatwedo/answer/fighting_grand_corruption_challenges_and_successes) (accessed May 20, 2019), and Eva Joly, “Coping with High-Profile Judicial Cases: Experience of Prosecutors from Asia and the Pacific, and from Europe,” in *Effective Prosecution of Corruption*, ed. Asian Development Bank (Manila, Philippines: Asian Development Bank, 2003).

<sup>16</sup> Anti-Corruption Resource Center, *Tracking the Progress of Grand Corruption Cases*, U4 Expert Answers Series (2009), <https://www.u4.no/publications/tracking-the-progress-of-grand-corruption-cases-best-practices-and-indicators> (accessed May 20, 2019).

<sup>17</sup> Bernard Bertossa, “Difficulties Encountered by the Judiciary: A Summary of Key Issues,” in *Asian Development Bank*, ed. Effective Prosecution of Corruption (Manila, Philippines: Asian Development Bank, 2003).

<sup>18</sup> Joly, “Coping with High-Profile Judicial Cases.”

elites. Moving against prominent members of the establishment with suggestive clues rather than “smoking guns” is definitely not advisable, as it can expose judicial actors to all kinds of political, professional, and personal attacks that are difficult to survive. More than in any other type of criminal investigation, punitive outcomes therefore depend on judges and prosecutors’ ability to secure the flow of incontrovertible evidence. Importantly, this high-quality knowledge is likely to generate new information. For example, new discoveries can alter the strategic calculus of key witnesses contemplating whether to confess or sign a plea-bargain agreement. They also provide political cover for committed investigators, who now have the perfect pretext not to abandon their lines of inquiry, and the necessary push for reluctant ones, who now have fewer excuses to turn a blind eye toward corruption cases.

In addition to some degree of luck and serendipity, prosecutorial success calls for the presence of professionalized judicial actors who are capable of overcoming these challenges by adopting new behavioral routines attuned to the specificities of corruption investigations. This usually involves securing political insulation via strategic alliances with a variety of actors, including the media, the mass public, and other judicial authorities, and engaging in creative interpretations of existing criminal procedures to find ways to overcome the evidentiary lacunas that plague these cases. Overall, judges and prosecutors need to be prepared to act in unconventional ways, often without the aid of clear, pre-established behavioral templates.

First, judges need to be prepared to exercise high degrees of prosecutorial selectivity, not just because of the sheer scale of the crimes, but also because balancing carrots and sticks is usually the only way of obtaining incriminatory evidence. As Sergio Moro pointed out in his now famous discussion of the Mani Pulite operation, it is very difficult to proceed without the collaboration of those involved. Indeed, the Milanese prosecutors soon concluded that “corruption involves someone who pays and someone who gets paid; if both shut up we won’t ever find out.”<sup>19</sup> According to Moro, getting a criminal to confess in exchange for benefits “is in fact collaborating with the law and with the application of the laws of a country.”<sup>20</sup> But the use of carrots is not as straightforward as it seems. Some judicial actors are simply not willing to offer these benefits as a matter of principle. Investigators need to temper their prosecutorial zeal, a decision that may run against their professional ethos or deeply ingrained views about what the law requires from them as members of the judicial branch. Furthermore, these moves need to be planned and executed with great care. Trading immunity for information via plea-bargain agreements is often unpopular and can lead to serious accusations of bias or unlawful behavior. In fact, plea bargains and offers of immunity provide the

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<sup>19</sup> Quoted in Sergio Moro, “Considerações sobre a operação Mani Pulite” [Considerations about Operation Mani Pulite], *Revista CEJ* 8, no. 26 (2004): 58 (our translation).

<sup>20</sup> *Ibid.*

perfect ammunition for those who wish to cast doubt on the impartiality of the investigators.

Second, investigators need to nurture relations with third parties, including companies and foreign institutions that possess critical information about corruption networks. Judges and prosecutors are not always well-versed or used to these practices, which involve venturing into the world of international relations, finance, and penal cooperation.<sup>21</sup> Crucially, in order to build and maintain these new associations, investigators must do more than just issue formal information requests in the form of letters rogatory. For example, due to the transnational nature of the crimes, the “smoking guns” that enable prosecutorial success usually come from abroad. Unfortunately, domestic judicial authorities cannot directly compel foreign banks or prosecution services to hand over information about corruption. Instead, investigators must work hard behind the scenes to establish bonds of trust that make comprehensive cooperation agreements possible. This is the best way to secure productive information exchanges rather than formalistic responses from their counterparts in other countries. Crafting these types of cooperation agreements with foreign banks, prosecutors, or companies also requires a great deal of creativity in the interpretation of domestic law and international anticorruption conventions in order to make the evidence that results from these efforts admissible in court. Any political or procedural mistake incurred while navigating these uncharted territories can prove fatal, as it may alienate crucial information sources or trigger byzantine battles over admissibility.

Finally, investigators need to leverage very specific experiences, technical skills, and resources in order to succeed. Routine experiences usually are not very useful; the skills developed during regular criminal investigations cannot be directly transferred to corruption cases. The only relevant experiences tend to be those associated with more exceptional, out-of-the-ordinary cases of macro-criminality, including human and drug trafficking, money laundering, and systematic human rights violations. On the one hand, these experiences help develop the kinds of technical skills necessary to reconstruct and trace complex criminal organizations backed by state power, such as accounting, business, and banking skills. On the other hand, these experiences nurture political skills and prepare investigators to deal with intense pressures and scrutiny. It is not uncommon that during anticorruption investigations, judges and prosecutors must “go public,” leveraging the media to protect themselves and their investigative efforts. In so doing, investigators must know how to outfox establishment figures trying to halt the cases and be prepared to play on the margins of the law. For example, judges and prosecutors may need to rely on unorthodox tactics to disclose key pieces of evidence that help them undermine the credibility of their attackers.

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<sup>21</sup> Bertossa, “Difficulties Encountered by the Judiciary.”

This discussion suggests that prosecutorial success, in part, is a function of judicial values and skills. In this sense, anticorruption judicial crusades share many similarities with other judicialization processes against high-ranking state officials that look into complex criminal enterprises. For instance, Ezequiel Gonzalez-Ocantos shows that the diffusion of very specific “legal preferences” associated with the standards and practices of international human rights law, as well as the disruption of standard, but inadequate, investigative routines enabled judges and prosecutors in some Latin American countries to launch successful and sustained waves of trials against military officers who were responsible for human rights violations.<sup>22</sup> By contrast, in countries where judges did not modify their legal preferences or acquire new technical capabilities, human rights prosecutions failed spectacularly. Similarly, Francesca Lessa shows that in the case of transnational human rights crimes, such as the infamous *Operación Cóndor* launched by South American dictatorships in the 1970s, it is crucial to design unprecedented efforts that place a premium on cooperation across jurisdictions.<sup>23</sup>

### **The Internationalization of Lava Jato**

*Operação Lava Jato* (Operation Car Wash) started in March 2014 as a money-laundering case in Brazil, but quickly evolved into a much larger investigation that revealed a transnational bribery scheme. The turning point for the internationalization of Lava Jato came in December 2016, when Odebrecht, a construction company at the heart of the case, struck a plea-bargain deal with authorities of the United States. The testimonies that resulted from this agreement between the company and the prosecutors came to be known as “the end-of-the-world confessions” because they revealed a corruption scheme of unparalleled scope. It emerged that the company had offered kickbacks to public officials in a variety of countries and financed several electoral campaigns in exchange for preferential treatment in the allocation of large construction projects. According to U.S. Department of Justice documentation, between 2001 and 2016, Odebrecht “paid approximately \$788 million in bribes in association with more than 100 projects in 12 countries, including Angola, Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru and Venezuela.”<sup>24</sup> The company “funded an elaborate, secret financial structure that operated to account for and disburse corrupt bribe payments to, and for the benefit of foreign officials,

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<sup>22</sup> Ezequiel González-Ocantos, *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America* (New York: Cambridge University Press, 2016).

<sup>23</sup> Francesca Lessa, “Operation Condor on Trial: Justice for Transnational Human Rights Crimes in South America,” *Journal of Latin American Studies* 51, no. 2 (2019): 409-439.

<sup>24</sup> United States Department of Justice, Odebrecht Plea Agreement (New York: United States Department of Justice, 2016), 7.

foreign political parties, foreign political party officials and foreign political candidates.”<sup>25</sup> At the heart of the scheme was the Divisions of Structured Operations, a special unit within Odebrecht that was responsible for bribe payments and money laundering. U.S. authorities estimate the company spent approximately \$439 million outside Brazil, securing a return of around \$1.4 billion.<sup>26</sup> Table 1 shows the distribution of bribes across Latin America, and the estimated cost of bribes per country.

Table 1. Estimated Cost of Bribes per Country and Returns on Investment

Country	Total bribes paid (millions US\$)	Return to the company (millions US\$)	Return per 1 US\$ in bribes
Argentina	35	278	7.94
Colombia	11	50	4.54
Dominican Republic	92	163	1.77
Ecuador	33.5	116	3.46
Mexico	10.5	39	3.71
Panama	59	175	2.97
Peru	29	143	4.93
Venezuela	98	N/A	N/A

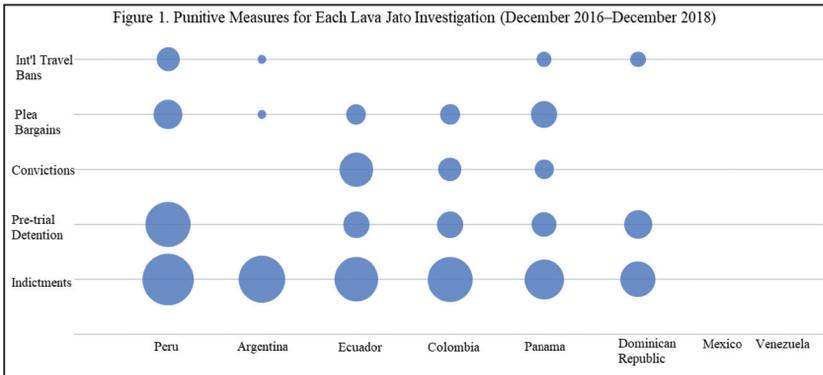
Source: United States Department of Justice, DOCKET NO. 16-CR-643 (2016), <https://www.justice.gov/criminal-fraud/fcpa/cases/odebrecht-sa> (accessed November 1, 2018).

Within days of the dramatic revelations, judges and prosecutors in all eight Latin American countries jump-started their own chapters of Lava Jato. In some cases (e.g., Argentina), the testimonies obtained by U.S. prosecutors resonated with existing corruption investigations, whereas in places such as Mexico, Venezuela, and Colombia, local judicial actors began working from scratch. Using newspaper reports, we traced the progress of these judicialization efforts between December 2016 and December 2018. We counted the number of indictments, preventive imprisonments, convictions, and international travel bans per country, with the goal of establishing the scope of the investigative efforts as well as the number of punitive measures taken during this period. Figure 1 shows what we found. Before looking at the figures in detail, it is important to place them in perspective. While in many of the countries the investigations led to unprecedented revelations, their scope and effectiveness invariably pales in comparison to those of the Brazilian chapter of

<sup>25</sup> Ibid., 7-8.

<sup>26</sup> Ibid., 16.

Lava Jato. For example, between March 2014 and March 2018, Brazilian judicial authorities struck 187 plea-bargain agreements. During this period, the two circuit courts in charge of the case, one in Curitiba and another in Rio de Janeiro, handed down 160 convictions. Seventy-seven of those convictions were upheld by a higher federal court.<sup>27</sup>



In most of the eight countries in the dataset, investigative efforts are quite broad and far-reaching: thirty-four indictments were issued in Peru, twenty-eight in Argentina, twenty-five in Ecuador, twenty-six in Colombia, twenty in Panama, and sixteen in the Dominican Republic. In Argentina, Ecuador, and Peru, these included indictments against former presidents and vice presidents. Peru stands out as the country with the largest number of preventive prison measures (twenty-six) and international travel bans (seven). Judicial authorities in Ecuador, Colombia, Panama, and the Dominican Republic also made use of these tools, but to a lesser extent. Interestingly, in Colombia, Panama, and most notably, Ecuador, Lava Jato already has led to convictions. In Colombia and Ecuador, convictions have affected local businessmen and high-profile politicians, including former ministers and congressmen, and in the case of Ecuador, a former vice president. Three out of fourteen convictions in Ecuador consist of relatively minor prison sentences and are the outcomes of plea-bargain agreements. In Panama, all the convictions are of this kind, which means the numbers are not as impressive as in the other two cases. Finally, it is worth noting that Mexico and Venezuela stand in stark contrast to this first group of countries, with zero indictments, let alone preventive prison decisions or convictions.

<sup>27</sup> Redação Jota, “Os 4 anos da Operação Lava Jato em números” [The 4 years of Operation Lava Jato in numbers] *Jota* (March 16, 2018), <https://www.jota.info/justica/os-4-anos-da-operacao-lava-jato-em-numeros-16032018> (accessed April 19, 2019).

## Explaining Variation

The plea-bargain agreements made public by U.S. authorities in December 2016 accused high-profile Latin American politicians and businessmen of participating in a transnational bribery scheme. In some countries, the testimonies implicated incumbents or officials close to the sitting president. In others, the testimonies focused primarily on members of the opposition or previous administrations. This is an important distinction because the type of suspect either narrowed or expanded prosecutors' room to maneuver at the start of the process. The political sensitivity of this kind of criminal corruption case is of the highest order, so when investigations target the incumbent and his/her inner circle, judges and prosecutors are more likely to face pressures, encounter informational roadblocks, and risk their professional futures if they prove too keen. In addition, incumbents can rely on their appointees in the judicial system (e.g., attorneys general) to moderate the impact of judicial activism. By contrast, the political space for investigating high-level politicians is much greater when these figures are no longer part of the administration. The space is even greater when they belong to the opposition. Under this circumstance, allies of the president in the judicial branch can be easily tempted to weaponize the investigations to delegitimize political opponents. Even if this does not happen, judicial actors eager to curry favor with the government may have incentive to overact their investigative zeal.

In what follows, we leverage the cases of Ecuador, Peru, and Mexico, which offer variation in the type of suspects initially targeted by the investigations, to analyze how these political factors condition the success of anticorruption investigations. Interestingly, the evidence seems to suggest that, while the political environment can indeed catalyze or obstruct progress, judicial agency and contingency still play a role. The presence of skillful and creative judicial actors who managed to forge effective transnational investigative partnerships with Odebrecht and Brazilian prosecutors, and thus guaranteed the flow of reliable information, remains an important explanatory factor, regardless of whether the investigations affected incumbents or members of the opposition.

### *Ecuador*

Shortly after President Correa was inaugurated in 2007, he expelled Odebrecht from Ecuador and cancelled a series of ongoing contracts on the grounds that the company had failed to successfully complete a major hydroelectric power plant. According to U.S. prosecutors, Odebrecht subsequently paid around US\$33.5 million in bribes to several high-ranking members of the Correa administration to mend fences with the government and gain permission to return to the country. In 2010, Odebrecht promised to repair the faulty hydroelectric power plant, to which the government responded by lifting all

sanctions against the company. The prosecutors also shelved an investigation that targeted its top executives.<sup>28</sup>

When information about the bribes became public in 2016, President Correa was still in power and the race to succeed him already was in full swing. Moreover, Correa's candidate, Lenin Moreno, won the election that took place in early 2017. Despite the clear risks that Lava Jato posed for the ruling party, and the fact that all general prosecutors in charge of the case had been close to *correísmo* (beliefs and policies of Correa), the local chapter of the investigation quickly gained momentum and delivered unprecedented results in the fight against corruption.

In a statement to a congressional committee on January 6, 2017, weeks after the scandal erupted, then General Prosecutor Galo Chiriboga stated: "Do you know what we know about the Odebrecht case? Do you? I do. I know who the corruptor is: Odebrecht. We already know that. So we have made some progress. We already know who the corrupts are. Now we must investigate who benefited from Odebrecht's illegal dealings."<sup>29</sup> In the following days, investigators began to gather evidence at the company's headquarters in Guayaquil.<sup>30</sup> A few months later, prosecutors already had a sense of the structure of the clique responsible for the bribery scheme, which included (1) Jorge Glas, Correa's vice president and Moreno's running mate; (2) Carlos Polit, comptroller general under Correa; and (3) Jose Dos Santos, a local Odebrecht executive.<sup>31</sup> By April 2017, there was enough evidence to imprison former Electricity Minister Alecksey Mosquera and his uncle, Marcelo Endara, both accused of participating in the bribery scheme. Most notably, in December 2017, the *Corte Nacional de Justicia* convicted Jorge Glas and several businessmen linked to the case. Other lines of inquiry are ongoing.

After President Moreno was sworn in, he quickly distanced himself from his predecessor and party leader, Rafael Correa, in order to become his "own man." It is therefore entirely possible that the momentum behind the investigation during 2017 was the result of the greater political space

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<sup>28</sup> Redacción *El Comercio*, "10 claves para entender el caso Odebrecht en Ecuador" [10 key points to understanding the Odebrecht case in Ecuador], *El Comercio* (June 2, 2017), <https://www.elcomercio.com/actualidad/claves-caso-odebrecht-ecuador-sobornos.html> (accessed April 19, 2019).

<sup>29</sup> *Ibid.*

<sup>30</sup> AFP-Redacción, "Galo Chiriboga ofreció disculpas por el "yo sí sé" sobre caso Odebrecht" [Galo Chiriboga apologized for the "I do know" about the Odebrecht case], *El Universo* (January 10, 2017), <https://www.eluniverso.com/noticias/2017/01/10/nota/5990440/galo-chiriboga-ofrecio-disculpas-declaraciones-sobre-caso-odebrecht> (accessed April 19, 2019).

<sup>31</sup> Redacción *El Universo*, "Las claves para entender el caso de sobornos de Odebrecht en Ecuador" [The key to understanding the Odebrecht bribery case in Ecuador], *El Universo* (November 1, 2017), <https://www.eluniverso.com/noticias/2017/11/01/nota/6461932/claves-entender-caso-sobornos-odebrecht-ecuador> (accessed April 19, 2019).

afforded by this realignment. The changing political environment certainly meant that prosecutors suddenly faced fewer constraints to move against the previous administration. The two general prosecutors in charge of the case, Galo Chiriboga and Ricardo Baca, both had close links to the political establishment, and such connections and political experience likely allowed them to quickly identify the benefits of adapting to the new balance of power within the ruling coalition. They may have even received informal encouragement from allies of the president to weaponize the inquiry against their now rivals, although nothing in the public record suggests this is the case. A more convincing explanation, however, is one that also considers the impact of prosecutorial strategies on the outcome of the investigation. Indeed, Ecuadorian investigators demonstrated high levels of commitment to the case and impressive skills to secure high-quality information flows. In particular, the prosecutorial team stands out for striking a comprehensive deal with Odebrecht almost immediately. Furthermore, as we discuss below, despite a more permissive political environment following Moreno's about-face, the investigation has not been without risks. In this context, prosecutors' ability and willingness to leverage media cover, often playing on the margins of the law, was at times critical.

As early as January 10, 2017, General Prosecutor Chiriboga confirmed contacts with Brazilian Prosecutor Rodrigo Janiot to obtain new evidence about the bribing scheme.<sup>32</sup> This indicates that the authorities immediately adopted a transnational approach to the case, one which continued in the following months. In fact, according to several reports, the Ecuadorian chapter of Lava Jato was heavily reliant on the assistance of judicial actors based in Panama, Brazil, Andorra, and the United States. These collaborative links, which included multiple international trips by Ecuadorian officials, were instrumental in allowing prosecutors to trace how the money flowed from Odebrecht's accounts into Ecuador. To complement these efforts, prosecutors also brokered an agreement with Odebrecht that traded immunity for company employees in exchange for additional revelations. These efforts proved very successful: the testimony of Jose Dos Santos, one of Odebrecht's top executives in Ecuador, provided the "smoking gun" that led to the indictments of Vice President Glas and Comptroller General Polit. For example, Santos handed over incriminating video and audio recordings of his meetings with several high-ranking members of the Correa administration.<sup>33</sup> Immediately

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<sup>32</sup> AFP-Redacción, "Galo Chiriboga ofreció disculpas por el "yo sí sé" sobre caso Odebrecht" [Galo Chiriboga apologized for the "I do know" on the Odebrecht case].

<sup>33</sup> Redacción *El Universo*, "Versión de José Santos, delator de Odebrecht, ante la Fiscalía de Ecuador" [Testimony of José Santos, informant in the Odebrecht case, before the Ecuadorian prosecutor], *El Universo* (September 29, 2017), <https://www.eluniverso.com/noticias/2017/09/29/nota/6405502/santos-glas-pidio-1-millon-campana> (accessed April 19, 2019).

after securing Odebrecht’s cooperation, Ecuadorian prosecutors made strategic use of article 491 of the criminal code, which allows investigators to strike plea-bargain agreements with individuals under investigation.<sup>34</sup> The imminent arrival of “smoking guns” from Brazil following Dos Santos’s confessions changed the strategic calculus of local witnesses. Specifically, it helped secure the confessions of lawyers Jose Terán and Carlos Pareja, responsible for paying most of the bribes in Ecuador, and of businessmen Gustavo Massuh and Kepler Verduga, owners of the companies and off-shore accounts used in the money-laundering operation. All of these pleas were in place by October 2017 and were the main pieces of evidence behind the convictions handed down later in the year.

The work of the prosecutorial team has received praise, most notably from Cesar Montúfar, a political science professor at Universidad Andina, who joined the case as a private claimant and was initially very critical of the investigation. Quite understandably, Montúfar suspected that the general prosecutor was determined to stall the local chapter of Lava Jato due to his close ties to *correísmo*. Montúfar even filed charges against General Prosecutor Chiriboga, accusing him of splitting the case into several lines of inquiry to prevent any progress.<sup>35</sup> In an interview conducted after Glas’s conviction in December 2017, however, Montúfar acknowledged that “the charges were solid and categorical. The Prosecutor’s Office did a very good job preparing the evidence. This demonstrates professionalism.”<sup>36</sup>

An important feature of the Ecuadorian chapter of Lava Jato is that we have access to much information about the progress of the investigation via the press and official statements. In other words, levels of secrecy and opacity are much lower than in other cases (e.g., Mexico, see below). There is evidence to suggest that this open public relations strategy helped investigators to insulate the inquiry from political pressures and carved out a space for prosecutors to do their job. For instance, in January 2018, Ricardo Baca, who succeeded Chiriboga as general prosecutor, leaked a recording of a conversation between José Serrano, member of the ruling party and president of the National Assembly, and Carlos Polit, former comptroller general under Correa, in which these two heavyweights discussed their plans to get rid of Baca and thus stop the investigation. The recordings revealed that,

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<sup>34</sup> Criminal Code of Ecuador, [https://www.justicia.gob.ec/wp-content/uploads/2014/05/código\\_organico\\_integral\\_penal\\_-\\_coip\\_ed.\\_sdn-mjdhc.pdf](https://www.justicia.gob.ec/wp-content/uploads/2014/05/código_organico_integral_penal_-_coip_ed._sdn-mjdhc.pdf) (accessed April 19, 2019).

<sup>35</sup> Redacción *El Universo*, “Exfiscal Galo Chiriboga asegura que investigó los casos Odebrecht que le correspondieron” [Former prosecutor Galo Chiriboga says he investigated the relevant Odebrecht cases], *El Universo* (November 16, 2018), <https://www.eluniverso.com/noticias/2018/10/16/nota/7002758/exfiscal-galo-chiriboga-asegura-que-investigó-casos-odebrecht-que> (accessed April 19, 2019).

<sup>36</sup> César Montúfar, “El fiscal Carlos Baca ha hecho lo que debía” [Prosecutor Carlos Baca acted as he should], *El Telégrafo* (December 17, 2017), <https://www.eltelegrafo.com.ec/noticias/politica/3/el-fiscal-carlos-baca-ha-hecho-lo-que-debia> (accessed April 19, 2019).

despite changing national political dynamics following Moreno's election, there still were prominent figures determined to put an end to Lava Jato. After all, Moreno's administration and his party's congressional delegation were still made up of individuals with links to the previous government, whose loyalties had not necessarily changed. While Baca's actions were not strictly legal, "going public" with evidence collected during the inquiry was crucial to abort the plot and temporarily protect his ongoing anticorruption efforts. This was a high-risk strategy. Indeed, the breach of conduct eventually cost Baca his job, a development that further underscores the risks involved in pursuing the inquiry despite changing political dynamics. But Baca's actions likely breathed new air into Lava Jato at a time when the tolerance of the political establishment appeared to be running out, and the case was losing steam after delivering a series of spectacular results the previous year. In fact, following the leak, President Moreno turned against Serrano, and the National Assembly impeached him before turning its eye on Baca.<sup>37</sup>

### *Peru*

Peru offers a different context to further probe the importance of judicial agency in anticorruption crusades. When the scandal broke out in December 2016, it mainly affected members of the opposition and individuals associated with past administrations. As a result, judicial actors enjoyed greater degrees of freedom throughout, and this certainly had an impact on the scope and effectiveness of the inquiry. But as the investigation gained momentum and started to threaten a wider range of powerful political elites, judicial agency was key to protecting the case from obstructive maneuvers, maintaining momentum, and thus securing further progress. In addition, the Peruvian case is instructive because it shows that, even under relatively favorable political conditions, prosecutorial mistakes or unwillingness to trade immunity for information can prove extremely disruptive. This within-case "variation" in effective judicial leadership further illustrates the importance of agency and choice in these processes.

Initially, the Peruvian chapter of Lava Jato focused primarily on officials responsible for three main infrastructure projects: a segment of the Inter-Oceanic Highway built during Alejandro Toledo's administration (2001–2006); an electric trainline built during Alan García's administration (2006–2011); and a coastal infrastructure initiative sponsored by the regional government of El Callao. But the investigations quickly moved beyond the relatively narrow scope of the first revelations. Prosecutors soon established that Odebrecht illegally had financed the presidential campaigns of Ollanta Humala, president between 2011 and 2016, and Keiko Fujimori, leader of the

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<sup>37</sup> *Televisa*, "Cesan al Vice-Presidente de Ecuador por Corrupción" [Vice President of Ecuador suspended for corruption], *Televisa* (March 9, 2018), <https://noticieros.televisa.com/ultimas-noticias/cesan-presidente-congreso-ecuador-corrupcion-odebrecht/> (accessed April 19, 2019).

opposition party currently in control of Congress. In addition, the inquiry also contributed to President Kuczynski's (2016–2018) downfall by uncovering evidence of his links to Odebrecht. All in all, the mega-corruption case has affected every single elected president since the return of democracy in 2001, as well as some of the most powerful political figures in the country. It is by far the largest Lava Jato chapter outside Brazil.

Following the December 2016 revelations, a team of prosecutors made quick progress along several lines of inquiry. By December 2017, exactly one year later, they had issued seventeen preventive prison measures, identified sixty-four bank accounts and fifty off-shore companies used in the bribery scheme, reviewed more than two thousand suspicious wire transfers, and conducted searches at fifty different addresses.<sup>38</sup> While the courts are yet to hand down convictions, several high-profile politicians have had to serve time in jail. For example, Alan García's former communications deputy minister, opposition leader Keiko Fujimori,<sup>39</sup> and former governors Felix Moreno (Callao)<sup>40</sup> and César Álvarez (Ancash)<sup>41</sup> are under arrest. In addition, former President Ollanta Humala and his wife, Nadine Heredia, spent time in pre-trial detention.<sup>42</sup> National and international arrest warrants also have been issued against former president, Alejandro Toledo,<sup>43</sup> who currently lives in the United States. Finally, former presidents Alan García<sup>44</sup> and Pedro Pablo Kuczynski

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<sup>38</sup> Figures released by the Public Ministry. See [https://www.mpfj.gob.pe/equipo\\_especial/logros/](https://www.mpfj.gob.pe/equipo_especial/logros/) (accessed April 19, 2019).

<sup>39</sup> Jacqueline Fowks, "Un juez peruano impone 36 meses de prisión preventiva a Keiko Fujimori" [A Peruvian judge puts Keiko Fujimori in pre-trial detention for 36 months], *El País* (November 1, 2018), [https://elpais.com/internacional/2018/10/31/actualidad/1541025312\\_125314.html](https://elpais.com/internacional/2018/10/31/actualidad/1541025312_125314.html) (accessed April 19, 2019).

<sup>40</sup> Mario Mejía, "Dictan 18 meses de prisión preventiva a Félix Moreno por Caso Odebrecht" [18 months of pre-trial detention for Félix Moreno for the Odebrecht case], *El Comercio* (January 1, 2019), <https://elcomercio.pe/politica/dictan-18-meses-prision-preventiva-felix-moreno-caso-odebrecht-noticia-603293> (accessed April 19, 2019).

<sup>41</sup> Laura Urbina, "César Álvarez: amplían por seis meses prisión preventiva en su contra" [César Álvarez: Pre-trial detention extended for six months], *El Comercio* (January 15, 2019), <https://elcomercio.pe/peru/ancash/cesar-alvarez-amplian-seis-meses-prision-preventiva-noticia-597541> (accessed April 19, 2019).

<sup>42</sup> Jacqueline Fowks, "Ollanta Humala y su esposa, Nadine Heredia, salen de la cárcel después de nueve meses" [Ollanta Humala and his wife, Nadine Heredia, leave prison after nine months], *El País* (May 1, 2018), <https://elpais.com/internacional/2018/05/01/america/1525131193391353.html> (accessed April 19, 2019).

<sup>43</sup> Redacción *RPP*, "Interpol confirma la orden de captura y alerta roja por Alejandro Toledo" [Interpol confirms Alejandro Toledo's arrest warrant and red alert], *RPP* (May 8, 2017), <https://rpp.pe/politica/judiciales/interpol-confirma-la-orden-de-captura-y-alerta-roja-por-alejandro-toledo-noticia-1049295> (accessed April 19, 2019).

<sup>44</sup> Redacción *EC*, "Alan García tiene impedimento de salida del país por 18 meses" [Alan García barred from leaving the country for 18 months], *El Comercio* (December 3, 2018), <https://elcomercio.pe/politica/alan-garcia-impedimento-salida-pais-18-meses-noticia-578557> (accessed April 19, 2019).

were handed international travel bans. Kuczynski eventually was placed in pre-trial detention for ten days in April 2019, following a request to leave the country.<sup>45</sup> And most tragically, when a similar pre-trial detention order was issued against García, the former president committed suicide.

According to article 474 of the Code of Criminal Procedures, prosecutors are permitted to strike plea-bargain agreements in cases of macro-criminality, including illicit associations, terrorism, money laundering, cyber-crime, crimes against humanity, and human trafficking. Prosecutorial progress in the Peruvian chapter of Lava Jato partly can be explained by the productive and extensive use of this tool.<sup>46</sup> For example, after the authorities captured businessman Gil Shavit in April 2017, they traded immunity for information. This agreement was instrumental in determining that Odebrecht had paid US\$4 million in bribes to former Callao governor Felix Moreno.<sup>47</sup> Moreno subsequently was arrested. More importantly, Peruvian prosecutors signed cooperation agreements with Odebrecht, promising immunity for its top executives in exchange for information. But the relationship with the company was fraught with difficulties and mutual mistrust, in some occasions leading to the interruption of critical information flows. In particular, prosecutors' instinctive punitive drive, as well as their fear that they could be accused of passivity and bias in the face of incriminating evidence, had to be tempered before they could secure a lasting agreement.

In stark contrast to the Ecuadorian case, coordination problems among members of the Peruvian investigative team initially led to difficulties in reaching a comprehensive cooperation agreement with Odebrecht. Until July 2018, the investigation was assigned to two separate groups, with contrasting views on how to deal with the issue of immunity and different strategies regarding international cooperation. One was the *asset-laundering* prosecution team, led by Rafael Vela. This team had fewer resources but obtained the best results because it managed to establish a good working relationship with anticorruption prosecutors in Brazil and had a more productive relationship with key witnesses. Even so, progress was limited by the relatively narrow

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<sup>45</sup> Redacción *Gestión*, “Poder Judicial ordena la detención preliminar de Pedro Pablo Kuczynski” [Judiciary orders the arrest of Pedro Pablo Kuczynski], *Gestión* (April 10, 2019), <https://gestion.pe/peru/politica/judicial-ordena-detencion-preliminar-ppk-nndc-263776> (accessed April 19, 2019).

<sup>46</sup> On the use of plea bargains in Peru, see a recent report by Ernesto de la Jara Basonbrío, “Esto es la Colaboración Eficaz en el Perú” [Plea bargains in Peru], Institute of Legal Defense (n.d.), <https://revistaideele.com/ideele/sites/default/files/archivos/colaboracion%20eficaz506.pdf> (accessed April 19, 2019).

<sup>47</sup> Redacción *Gestión*, “Odebrecht: Coima de Félix Moreno se obtuvo de los sobrecostos de la obra Costa Verde Callao” [Odebrecht: Félix Moreno's bribe was obtained from the cost overruns of Costa Verde Callao], *Gestión* (February 20, 2019), <https://gestion.pe/peru/politica/odebrecht-coima-felix-moreno-obtuvo-sobrecostos-obra-costa-verde-callao-nndc-259212> (accessed April 19, 2019).

scope of the team's area of responsibility: it could focus only on illicit campaign contributions, not kickbacks for public work contracts.<sup>48</sup> A second group of investigators, led by Hamilton Castro, made up the *anticorruption* prosecution team in charge of the remaining aspects of the case. This team had more resources but failed to make significant progress due to Castro's reluctance to grant immunity to those willing to help the investigation. For example, Jorge Barata, a leading Odebrecht executive in Peru, had worked with the anticorruption team since December 2016. But instead of granting him full immunity, the anticorruption team considered him only a "candidate" to become an effective collaborator.<sup>49</sup> The lack of faith in Barata, and prosecutors' decision to spend several months testing his good intentions, limited the flow of information. This all changed in July 2018, when a new attorney general, Pedro Chavarry, removed Hamilton Castro from the case and created a unified team led by prosecutors Rafael Vela and José Domingo Pérez, both highly favorable to trading immunity for information.<sup>50</sup> In what follows, we provide details of this fascinating saga, and its effects on the outcomes of the investigation.

In January 2017, the company expressed willingness to collaborate in exchange for immunity for its top executives. The asset-laundering team welcomed this overture. Rafael Vela and Alonso Peña Cabrera, head of the international cooperation division of the Public Ministry, quickly negotiated a narrow plea-bargain agreement with Jorge Barata and two Brazilian executives, including Marcelo Odebrecht. In the deal signed on June 8, 2017, Peruvian prosecutors agreed to refrain from bringing charges against Odebrecht executives. This was because Brazilian authorities refused to cooperate if this could lead to violations of due process, including double jeopardy (i.e., prosecuting executives in two jurisdictions for the same crime).<sup>51</sup> The agreement allowed access, among other things, to the official video of the confession that Marcelo Odebrecht made in Curitiba on May 15, 2017. It also allowed for a second interrogation of Marcelo Odebrecht in November 2017, with a focus on the money funneled to Keiko Fujimori's campaign coffers.

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<sup>48</sup> Gustavo Gorriti, "Entre el Silencio y la Confesión" [Between silence and confession], *IDL-Reporteros* (February 22, 2018), <https://idl-reporteros.pe/columna-de-reporteros-327/> (accessed April 19, 2019).

<sup>49</sup> Gustavo Gorriti, "Hablaste, te fregaste" [You talked, you're screwed], *IDL-Reporteros* (June 14, 2018), <https://idl-reporteros.pe/hablaste-te-fregaste-1/> (accessed April 19, 2019).

<sup>50</sup> Redacción *El Comercio*, "Fiscalía de la Nación unifica el equipo especial del Caso Lava Jato" [Office of the public prosecutor unifies the special team of the Lava Jato case], *El Comercio* (July 21, 2018), <https://elcomercio.pe/politica/pedro-chavarry-unifica-equipo-especial-lava-jato-equipo-anticorruccion-noticia-538328> (accessed April 19, 2019).

<sup>51</sup> Gustavo Gorriti, "¿Quieres la Información? Firma Primero" [Do you want the information? Sign first], *IDL-Reporteros* (June 12, 2017), <https://idl-reporteros.pe/quieres-la-informacion/> (accessed April 19, 2019).

Similarly, in February 2018, Barata testified about the donations that Odebrecht made to Ollanta Humala's campaign in 2011. All of these cases fell under the jurisdiction of the asset-laundering team.

Unfortunately, the prosecutors discovered that Barata strategically had withheld information from Hamilton Castro. Castro, who was in charge of the other line of inquiry, felt betrayed<sup>52</sup> and decided to open a formal investigation against Barata. This was in line with his ongoing scepticism about the trustworthiness of the witnesses, and his initial reluctance to offer immunity. The move inflicted incalculable damage on the relationship between Peruvian prosecutors and Odebrecht and led to the complete freeze in the collaborative venture in July 2018. Moreover, it also jeopardized the admissibility of the testimonies and evidence that Barata and other collaborators had provided thus far to the other group of investigators. This is because the charges filed by Castro clearly violated the terms of the agreement.

The fallout with the Brazilian construction giant motivated the general prosecutor to remove Castro and fourteen of his closest aides from the team,<sup>53</sup> and to unify the prosecutorial team. As a result, Peruvian investigators now had more uniform views about how to handle the relationship with the company. The new lead prosecutors quickly repaired the relationship, and in August 2018, signed a second cooperation agreement. This time they did so with the company, not with specific individuals. The company agreed to pay reparations to compensate the state for its involvement in corrupt dealings (US\$50 million) and reaffirmed its intentions to guarantee the flow of information. For example, the company disclosed payments to César Alvarez, the former governor of Ancash, and thus strengthened the prosecutors' case against him. In exchange, the prosecutors promised to shelf the investigation against Odebrecht's top executives and refrained from opening any new case against the company. This was an unprecedented move in Peruvian judicial history, one that shows a high degree of innovation and creativity on the part of the new group of prosecutors. But the prosecutorial team did not stop there. It continued to work on a third and more ambitious agreement, which was finalized in December 2018 and signed in February 2019. This agreement is yet to yield significant results, but it is widely expected that it will guarantee access to key information contained in company servers that were managed by the extinct Division of Structured Operations, as well as extensive cooperation from top Brazilian executives. In exchange for this new collaborative relationship, the company has been able to extract a high price, one the prosecutors were unwilling to pay when they first

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<sup>52</sup> César Romero, "La caída del equipo especial: lo que se oculta detrás de la salida de Hamilton Castro" [The fall of the special team: What is behind the departure of Hamilton Castro], *La República* (August 12, 2018), <https://larepublica.pe/politica/1296441-caida-equipo-especial-oculta-detras-salida-hamilton-castro> (accessed April 19, 2019).

<sup>53</sup> Gorriti, "Hablaste, te fregaste" [You talked, you're screwed].

contacted the company in January 2017: total immunity.

The year-long Peruvian saga is illustrative of the difficulties involved in brokering effective relationships and building trust with key actors involved in mega-corruption schemes, even when the political environment is not necessarily an obstacle to prosecutorial progress. Judicial leadership, creativity, and choice are still important explanatory factors. In the Peruvian case, two factors conspired against a more productive relationship with Odebrecht. First, the prosecutors were dealing with a company based abroad, and with key informants also abroad, a situation that added an additional layer to the already complex process of negotiating plea-bargain agreements. For example, prosecutors had to remain mindful of the importance of avoiding double jeopardy, even if cases unfolded under different national jurisdictions. Not all of them were prepared to do so. Prosecutors had to learn by doing, as this was a highly unusual set of circumstances. This is similar to the ongoing Lava Jato case in Argentina. Argentine investigators also struggled to balance the company's request for total immunity in Argentine courts with restrictive national legislation on plea-bargain agreements. For months, prosecutors were unable to strike a cooperation agreement and secure vital evidence, resulting in very little progress beyond a series of initial indictments. This changed when a new negotiating team displayed greater creativity and flexibility in the interpretation of national legislation on plea bargains, leading to a cooperation agreement with Brazilian judicial authorities.<sup>54</sup>

Second, members of the Peruvian investigative team had to negotiate among themselves to harmonize the punitive zeal of some with the pragmatism of others. For example, the Peruvian press reported clashes between Hamilton Castro, lead prosecutor between December 2016 and July 2018, and the general prosecutor, over the extent to which Peruvian authorities should and could trade immunity for information. The clashes culminated with the aforementioned fallout between the prosecutorial team and the company (and Castro's departure). This severely stalled the progress of the case, indicating that individual-level variables, such as personal values and priorities, matter a great deal in determining the fate of anticorruption judicial efforts.

Despite the difficulties, Peruvian prosecutors have made impressive progress, measured in terms of indictments, convictions, and the recovery of stolen assets. Their high degree of professionalism and effectiveness is partly explained by the personal characteristics of some of the members of the team assigned to the case. This is also in line with the view that leadership and creativity are crucial to explaining success in anticorruption judicial investigations. As already discussed, Lava Jato had some particularities which

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<sup>54</sup> Progress notwithstanding, the Argentine investigation is more decentralized, which creates additional obstacles. For example, judges and prosecutors assigned to specific instances of the Lava Jato inquiry still need to agree to the implementation of immunity provisions included in the general deal reached with Brazilian authorities.

made progress difficult at key junctures. Nevertheless, like the prosecutors and judges responsible for Italy's Mani Pulite, Peruvian judicial actors brought to the Lava Jato case a wealth of prior experience in the investigation of macro-criminality, which clearly helped them to navigate uncharted waters. Hamilton Castro was previously part of a team that discovered and repatriated the money that Vladimiro Montesinos, Fujimori's corrupt aide in the 1990s, had stashed in Switzerland. Prosecutors Rafael Vela and Domingo Pérez, who took over from Castro in July 2018, also have impressive records in the field of macro-criminality. For example, Vela was the prosecutor in charge of the special team assigned to cases of organized crime in the Lima circuit. He also worked for a special anticorruption court with a complex docket that includes a wide range of difficult cases.<sup>55</sup> Similarly, Pérez has been a member of prosecutorial teams in courts that deal with corruption and money laundering. Furthermore, his resume includes the investigation of extremely salient cases such as the *Moqueguazo* in 2008, for which he requested a thirty-five-year prison sentence against a former governor, and the *Petroaudios* case.<sup>56</sup> In other words, he is not a stranger to cases that require judicial authorities to clash with powerful political elites.

The prior experience of the two prosecutors, Vela and Pérez, with politically charged cases likely helped them to deal with mounting pressures to stop the investigations once these started to touch a wider range of powerful figures in the second half of 2018. Until then, the Lava Jato inquiry had focused mainly on relatively peripheral members of the political class, chiefly those associated with past administrations. When the prosecutorial team trained its eyes on Keiko Fujimori, leader of the party in control of the Congress and with links to high-profile judicial authorities, including the general prosecutor, things changed quite dramatically. In an effort to undermine the negotiations for a comprehensive plea-bargain agreement with Odebrecht, General Prosecutor Pedro Chávarry decided to fire Vela and Pérez on New Year's Eve 2018.<sup>57</sup> What followed was an impressive display of media savvy on the part of the embattled prosecutors. By going public, Vela and Pérez managed to engineer support among the mass public for what until that day had been relatively

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<sup>55</sup> For Vela's CV, see <http://www.usmp.edu.pe/derecho/nuestra-facultad/cvs/20172/VELA%20BARBA%20RAFAEL%20ERNESTO.pdf> (accessed April 19, 2019).

<sup>56</sup> Redacción *RPP*, "Conoce la carrera de José Domingo Pérez, el fiscal que investiga a Alan García y Keiko Fujimori" [The career of José Domingo Pérez, the prosecutor investigating Alan García and Keiko Fujimori], *RPP* (December 22, 2018), <https://rpp.pe/politica/judiciales/jose-domingo-perez-conoce-la-carrera-del-fiscal-que-pide-36-meses-de-prision-preventiva-contr-keiko-fujimori-noticia-1159773> (accessed April 19, 2019).

<sup>57</sup> Redacción *El Comercio*, "Pedro Chávarry remueve a fiscales Vela y Pérez del Equipo Especial del Caso Lava Jato" [Pedro Chávarry removes prosecutors Vela and Pérez from the Lava Jato special team], *El Comercio* (January 1, 2019), <https://elcomercio.pe/politica/pedro-chavarry-remueve-fiscal-jose-domingo-perez-equipo-especial-lava-jato-noticia-nndc-593029> (accessed April 19, 2019).

obscure judicial actors, and to secure the backing of important political groups. This public support became particularly visible on January 2, 2019 (three days after they were fired). A huge group of protesters marched toward the *Ministerio Público* (Public Ministry) to demand Chavarry's resignation.<sup>58</sup> This was reinforced by the *Junta de Fiscales Supremos* (Board of Supreme Prosecutors), which explicitly asked for Chavarry's resignation. These developments forced him to reinstate Vela and Pérez and to resign only a few days later. Rather than being a function of systemic political support for the investigations, the survival of the Lava Jato team and the continuing momentum behind the investigation are therefore the results of robust judicial leadership in the face of adversity and a creative public-relations strategy.

### **Mexico**

Mexico is a clear example of the group of countries where Lava Jato targeted incumbents. That the investigations touched people close to Los Pinos goes a long way toward explaining the absolute failure of the case. While this chapter of the corruption scandal involved members of at least two administrations, it proved particularly damaging for the more recent Peña Nieto government (2012–2018).<sup>59</sup> Toward the end of the Fox *sexenio* (2000–2006), Odebrecht signed two contracts with the state-owned oil giant PEMEX to modernize an oil refinery in Minantitlán. The project finished in 2013, costing 66 percent more than originally expected. In the plea-bargain agreement signed between Odebrecht and U.S. prosecutors, company employees admitted paying US\$10.5 million in bribes to Mexican officials between 2010 and 2014. The company did not disclose the names of its Mexican counterparts but explained that it transferred around US\$4.5 million between 2010 and 2012, and an additional US\$6 million between 2013 and 2014, when Peña Nieto already was in power.

Long before this information was released in December 2016, the *Auditoría Superior de la Federación* (Superior Audit of the Federation, ASF) had issued warnings to successive administrations about possible irregularities in the contracts, but these warnings did not lead to a serious investigation. Once the plea bargains were made public in the United States, by contrast, inaction was no longer an option. In fact, the *Procuraduría General de la República* (Attorney General's Office, PGR) opened a formal investigation as early as January 2017. As is common practice in a country characterized

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<sup>58</sup> Redacción *El Comercio*, “Caso Chávarry: así fue la marcha que llegó hasta el Ministerio Público” [The Chávarry case: This is how the demonstration that reached the public prosecutor's office happened], *El Comercio* (January 3, 2019), <https://elcomercio.pe/lima/sucesos/plaza-san-martin-manifestantes-marcharan-exigir-renuncia-pedro-chavarry-vivo-noticia-593855> (accessed April 19, 2019).

<sup>59</sup> Angelika Albaladejo, “Mexico's Odebrecht Investigations Stalled by Politicization,” *InSightCrime* (June 13, 2018), <https://www.insightcrime.org/news/brief/mexico-odebrecht-investigations-stalled-politicization/> (accessed April 19, 2019).

by rampant impunity in criminal cases against high-level state officials, the investigation was kept in total secrecy. Before leaving the PGR in October 2017, former attorney general, Raúl Cervantes, stated that the investigation had been completed, but his successor never agreed to discuss progress in public, claiming that the fact-finding was ongoing.

It is entirely possible that the absence of information about the Mexican investigation in our dataset is a function of the extreme level of secrecy and bureaucratic opacity with which the PGR normally operates. A more likely explanation, however, is that the authorities never took the case seriously, and indeed failed to activate productive lines of inquiry. The reason is rather simple: they knew they were likely to find evidence that could incriminate the president or his closest aides, and therefore stalled the case. According to the *New York Times*, this is exactly what happened: the ruling PRI blocked the case in order to avoid another scandal on the eve of the 2018 presidential race.<sup>60</sup> Further evidence of the presence of a political firewall around the president is the sacking of prosecutor Santiago Nieto in October 2017. In his role as special prosecutor for electoral crimes, Nieto had opened an investigation that ran parallel to the PGR case. He believed that Emilio Loayza Austin, former PEMEX CEO, took bribes from Odebrecht to fund Peña Nieto's presidential campaign in 2012. Loayza was one of Peña Nieto's closest campaign advisers around the time that Odebrecht allegedly paid the bribes. When Santiago Nieto asked the PGR for the banking records gathered as part of the main Lava Jato inquiry, the government ordered his removal. The PGR's mishandling of the case emerges as an even more likely explanation, if we also consider that Mexican civil society actors were able to obtain a number of "smoking guns" that implicated the suspects. For example, the NGO, *Mexicanos contra la corrupción y la impunidad* (Mexicans against Corruption and Impunity), obtained a court document in Brazil in which an Odebrecht executive explained that Loayza had requested US\$5 million in bribes in 2014.<sup>61</sup> It also had access to the testimony of three additional sources that claimed Loayza received at least US\$10 million in bribes. Other documents uncovered by Mexican journalists indicate that the total amount of bribes is probably higher than the figure estimated by judicial authorities in the United States. We did not come across any evidence that the PGR engaged in similar transnational efforts to collect incriminating evidence.

While the government tried to save face by banning Odebrecht from future public contract bids, the results of the Mexican chapter of Lava Jato are extremely disappointing. The absence of meaningful progress is not surprising,

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<sup>60</sup> Azam Ahmed, "Mexico Could Press Bribery Charge: It Just Hasn't," *New York Times* (June 11, 2018), <https://www.nytimes.com/2018/06/11/world/americas/mexico-odebrecht-investigation.html> (accessed April 19, 2019).

<sup>61</sup> See a recent report by Mexicanos Contra la Corrupción, <https://contralacorrupcion.mx/web/lanegrarelacion/la-negra-historia-de-odebrecht.html> (accessed April 19, 2019).

given the close links between the PGR and the presidency, and the fact that the case had the potential to directly implicate President Peña Nieto. It is important to note, however, that even under more favorable political conditions, say, with Peña Nieto out of power or with an investigative focus on previous administrations, it is still unlikely that the Mexican judicial system would have been able to perform better. This is because of the generalized absence of investigative capacity among PGR officials and judicial actors. Previous scholarship suggests that the behavior of Mexican judicial actors is structured by bureaucratic routines and a professional ethos not conducive to the kind of competence, zeal, and creativity required by cases of macro-criminality.<sup>62</sup> These cases cannot be successfully investigated following the same behavioral templates applied in regular criminal cases. In order to make breakthroughs, investigators must go an extra mile and defy their formal “terms of reference.” As a result, impunity rates in Mexico are rampant for most of these crimes, including other cases of grand corruption, drug-trafficking, human-trafficking, and systematic human rights violations.<sup>63</sup>

The opacity of the Mexican investigation is a good example of how routine behavioral patterns can be extremely counterproductive in complex criminal cases such as Lava Jato. Reflecting on this problem and its responsibility for the failure of human rights prosecutions in the early 2000s, Human Rights Watch suggests that “a culture of secrecy prevails, for the most part, in the work of Mexican judges.”<sup>64</sup> The problem is not just one of lack of political will, but one of inadequate judicial role conceptions and legal cultures: “part of the problem is that many judges still believe that access to information and transparency belong [*sic*] to common law judicial systems and are [*sic*] incompatible with Mexico’s legal system.”<sup>65</sup> One casual but telling indicator of this culture of secrecy is that in Mexico it is incredibly hard to get hold of court rulings or other relevant judicial documents. Moreover, as a researcher, it is nearly impossible to gain access to lower-court officials. When asked to reflect about the way Mexican investigators had handled the Lava Jato case, Brazilian judge, Sergio Moro, attributed failure to this culture of opacity, and contrasted it with his decision to make all information about the Brazilian chapter of Lava Jato public, even when this behavior triggered accusations of activism. In his view, publicity offers “protection against any type of obstruction of justice.”<sup>66</sup> The behavior of prosecutors in Ecuador and Peru at critical moments during the Lava Jato inquiry lends additional support to Moro’s view.

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<sup>62</sup> González-Ocantos, *Shifting Legal Visions*, and Gabriela Ferreyra, “The Michoacanazo: A Case-Study of Wrongdoing in the Mexican Federal Judiciary,” *Mexican Law Review* 8, no. 1 (2015): 3-31.

<sup>63</sup> González-Ocantos, *Shifting Legal Visions*, 232-234.

<sup>64</sup> Human Rights Watch, *Lost in Transition: Bold Ambitions, Limited Results for Human Rights under Fox* (New York: Human Rights Watch, 2006), 48.

<sup>65</sup> *Ibid.*

<sup>66</sup> Angelika Albaladejo, “Mexico’s Odebrecht Investigations Stalled by Politicization,” *InSightCrime* (June 13, 2019), <https://www.insightcrime.org/news/brief/mexico-odebrecht-investigations-stalled-politicization/> (accessed April 19, 2019).

## Conclusion

In this essay, we traced the regionalization of Lava Jato, and the uneven progress of national investigative efforts between December 2016 and December 2018. Corruption investigations inevitably target powerful political and business elites. As a result, the permissiveness of the political environment is crucial to explaining why some chapters of Lava Jato have been able to make more progress than others. This study acknowledges the relevance of such constraints, but also draws attention to the importance of judicial agency. We argue that the quality of anticorruption investigations is not entirely endogenous to the presence of a favorable political environment; certain choices and prosecutorial strategies can effectively expand narrow limits of political possibility and help build momentum when there is none. More importantly, even when conditions allow for more independent prosecutorial efforts, judicial actors still need to be willing and able to overcome the many technical obstacles that characterize this type of inquiry. For example, securing high-quality evidence in information-poor environments, building relations with myriad national and international players, and leveraging media cover are crucial to guaranteeing progress. We analyzed the role of judicial agency in the cases of Ecuador and Peru, where investigators managed to secure some crucial victories, and in Mexico, where the investigation failed to deliver results.

While suggestive, our findings are limited in a number of ways, pointing to the need for additional comparative research on Lava Jato. First, the analysis is based entirely on media reports and other secondary sources. We currently do not have access to key documents such as plea-bargain agreements, which may reveal important aspects of the negotiations between investigators and key witnesses. We also are yet to conduct extensive interviews with the main protagonists. Interviews can provide an invaluable window into the motives and values of those in charge of the investigations, a key aspect of our argument about judicial agency. For example, how do prosecutors view the controversial issue of immunity? What moral, professional, and legal challenges do they identify?

Second, while the characteristics of Lava Jato allow for a relatively controlled comparison across the three countries, there are still a number of institutional variables that we have not explored in much detail. The case studies suggest that, in addition to investigators' willingness to grant immunity in exchange for information and their skills to broker such agreements, other factors have conditioned the success of the negotiations with Odebrecht. For example, it is likely that differences in the degrees of freedom afforded by legislation on plea bargains across countries has played a role. To be sure, as the Peruvian and Argentine examples demonstrate, there is always room for interpretation, but the range of viable interpretations is usually conditioned by the letter of the law. Similarly, the level of centralization of the investigative effort also seems relevant. The three main cases discussed in this study all

display a high level of centralization, although within-case variation in the unity of the Peruvian investigative team is quite telling in this respect. Further comparative work that considers countries where centralization is very low (e.g., Argentina), might shed additional light on the impact of this factor.

