WHITE & CASE

Fall 2022

Latin America Focus

Outlook for 2023: Amid turmoil, opportunities

Contents

Latin America 2023: Amid turmoil, opportunities

What a difference a year makes.

In our inaugural edition of *Latin America Focus*, produced by the Latin America Group at White & Case in the autumn of 2021, we offered scant good news. COVID-19 had thumped Latin American business harder than it had companies anywhere else, contracting Latin America's 2020 economies by nearly 7 percent, compared to a global average contraction of 3 percent. Latin America also was riding a rollercoaster of mounting populism and resource nationalism in 2021, and feeling the uncertainty that accompanies such trends.

Despite the then-present challenges, in that edition we highlighted a number of reasons to anticipate a LatAm resurgence in 2022, including an expected investment push into the region in certain sectors; the search for yields in emerging markets, commitments to mitigate climate change by global natural resources and energy companies; and the technology-driven push to digitize an increasingly global world economy.

How inspiring it has been to see most of this resurgence flower throughout the year since.

In this Fall 2022 edition of *Latin America Focus*, partners in our Latin America Group have written articles based on their personal experiences in the trenches and on market research that look forward to 2023 and together reveal the continuation — and perhaps acceleration — of many of the same global megatrends that propelled selective investment growth in the region in 2022.

Chief among these megatrends is Latin America's forceful digitalization efforts. The region's large, young and habitually connected population, the current global financial equity investor liquidity and related resilient M&A activity and its booming fintech industry are effectively working together to position Latin America as a gigantic growth market for the tech sector over the next five years. In the tech hotbeds of Brazil, Chile, Colombia and Mexico, the number of tech startups has nearly tripled in the past five years, and across Latin America, technology transactions accounted for more than 40 percent of M&A deal value through the first half of 2022.

Not far behind the technology deal growth is the global energy transition; already Latin America's abundant wind and solar energy sources bolster its economy, attracting investment and creating new job opportunities. Still a major global player in oil & gas, the region looks well placed to emerge as a key global producer of green hydrogen. And as the energy transition picks up pace, carbon markets are starting to emerge across the region, teasing a future wherein Latin America stands as an innovative hub of carbon market activity and low-carbon development for the benefit of the entire world.

To be sure, challenges remain in both energy and tech: National hydrocarbons companies in the region, which account for a massive slice of hydrocarbon production there, continue to prioritize energy security over energy transition. Latin American countries (Brazil perhaps excepted) lag behind their North American and European counterparts on investment in digital infrastructure and addressing the digital divide between rich and poor. Despite the fintech boom, Latin Americans still have relatively little access to banking services and secure online payment gateways. Latin American countries also lag on developing intermediary liability frameworks and related consumer protections that offer security and certainty to digital platforms and their users.

The White & Case Latin America Group has produced this publication to provide market insights from our practical experiences and proprietary research that could be valuable to senior decision-makers eyeing the region for opportunities. I hope that you enjoy reading these insights and will contact us if there are any topics that you would like us to cover in future editions of *Latin America Focus*.

Carlos Viana
Partner
Latin America Group Leader
Editor of *Latin America Focus*
White & Case

"Latin America is closely aligned with global megatrends and 2023 will likely see the continuation—and perhaps even acceleration—of these trends in the region

Is Latin America the next frontier for technology M&A?

In a region suffering from global trade dislocations, inflation, higher interest rates and complex political cycles, dealmakers remain cautiously optimistic that the transition to digital services across the region will create significant M&A opportunities in the technology sector, as partner **Rodrigo Dominguez** shows.

Historically, transactional activity in Latin America has been driven by energy and infrastructure transactions. In the past two decades, the region experienced significant growth as most of its largest economies enjoyed political stability and adopted market-friendly policies that attracted significant foreign direct investment. Commodities played an important role in this growth. Latin America is home to some of the world's most abundant reserves of metals and minerals. The region also has vast reserves of oil & gas, which fueled major infrastructure investments throughout the region. As a result, Latin America is more connected and prosperous than ever before.

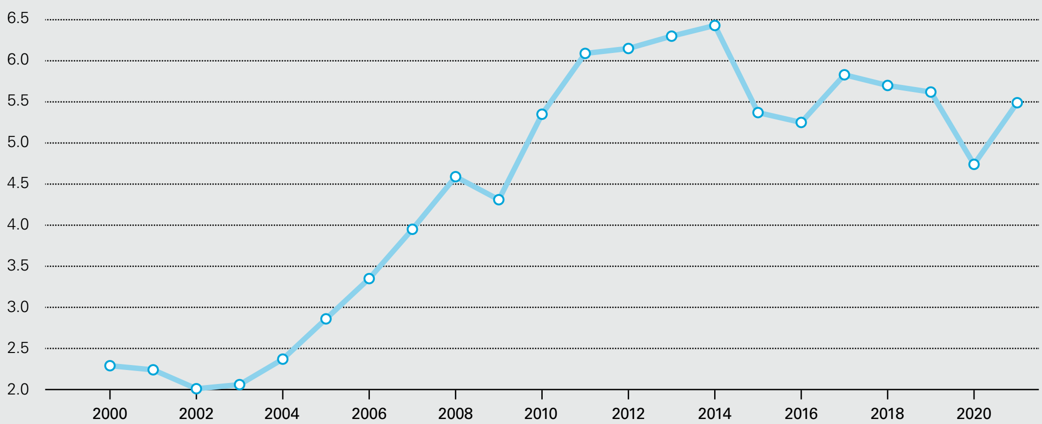
Dealmakers watching the region will certainly remember the commodities boom in Brazil, the infrastructure and real estate frenzy in Mexico and Colombia, and the inflow of foreign direct investment that positioned Peru and Chile as dominant regional players.

In the past 20 years, these countries developed robust industries and attracted trillions of dollars in foreign investment while making strides to reduce poverty and expand access to infrastructure.

Broadening the scope of opportunities

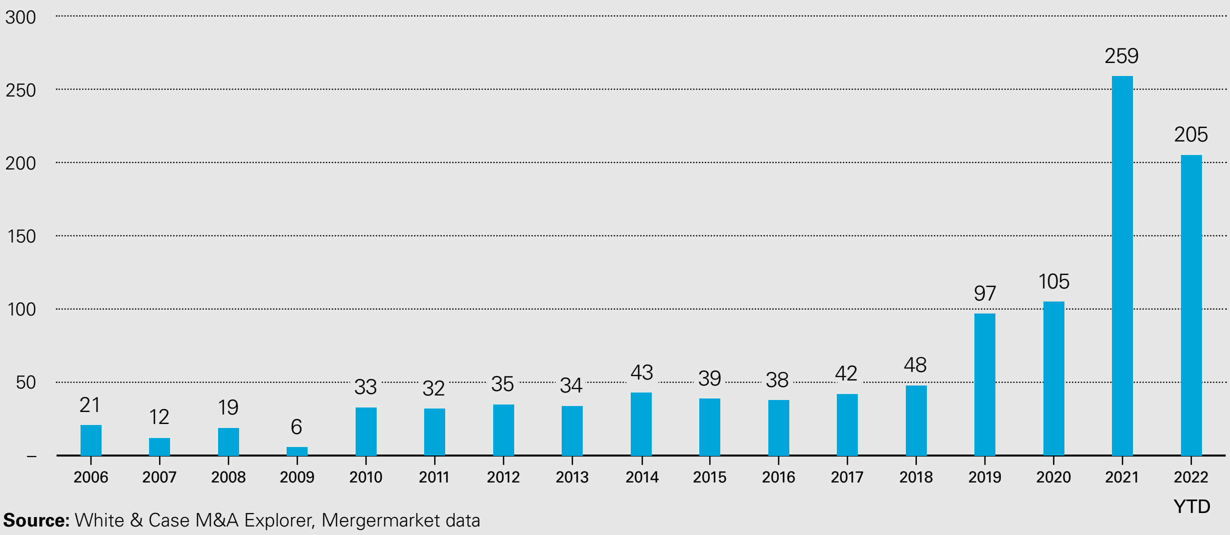
Fast-forward to the 2020s, opportunities appear to be broader than energy and infrastructure, with technology becoming a critical part of economic growth in the region. Before the pandemic, Latin America was already on its way to becoming a hotbed for technology startups. Fueled by a rapidly expanding middle class and an influx of foreign investment, the region saw a boom in new businesses specializing in everything from e-commerce to digital media. The pandemic exacerbated this growth as consumers moved dramatically

GDP (current US$)—Latin America & Caribbean



Source: World Bank national accounts data, and OECD National Accounts data files

Technology M&A volume in Latin America



Source: White & Case M&A Explorer, Mergermarket data

US$5 billion

By 2021, fintech investments in the region totaled US$5 billion, up from US$2 billion in 2020

toward online and digital services. This surge of entrepreneurial activity was particularly evident in countries like Brazil, Chile, Colombia, and Mexico, where the number of tech startups has nearly tripled in the last five years.

In the first half of 2022, technology transactions in Latin America accounted for approximately 42 percent of regional deal value. As we continue to emerge from the COVID-19 pandemic, the technology sector is likely to experience high deal volume as new technologies and digital services continue to evolve into the region.

Why is Latin America an attractive region for technology investors?

What makes Latin America an attractive destination for technology investors? First and foremost, the region boasts a large and young population that is increasingly connected to the global economy. Secondly, many Latin American countries such as Mexico, Chile, Colombia and Brazil, have enacted favorable policies toward entrepreneurs, making it easier for new business to get off the ground. A loose economic policy around the world and access to cheap capital during 2020 and 2021 provided a significant boost to valuations, prompting an unprecedented uptick of M&A activity in this sector. The combination of low interest rates and a surging U.S. Dollar made it easier for U.S. investors to acquire or invest into Latin America targets at a faster pace.

With its vast potential for growth and innovation, Latin America is poised to become a major player on the technology landscape. For one, the region is home to a number of fast-growing tech companies that continue to be attractive acquisition targets for larger multinationals. Moreover, Latin America is an increasingly important market for many global tech companies, and acquiring local firms is a good way to gain a foothold in the region. Finally, many Latin American countries have been implementing legal reforms that make it easier for foreign companies to do business in this segment, which has also boosted M&A activity. As a result, it is no surprise that Latin America has emerged as a leading destination for tech startups and technology M&A activity, and is now one of the most active regions for tech M&A. This trend shows no signs of slowing down.

The fintech sector provides an excellent example. Banking services in the region have traditionally focused on conventional brick-and-mortar banking, which generally excludes a large portion of the population. Regional startups seized the opportunity to service this sector with impressive results by providing clever and disruptive solutions such as mobile payments, access to electronic payment platforms and micro-financing to the broader population. In 2018, fintech investments in the region

> “
> **With economies that are still largely cash-based, M&A activity in the fintech sector will remain strong in the years to come as investors seize opportunities to build up equity positions in great companies with an enormous growth potential**

hit a record high of US$2.5 billion, nearly double the 2017 figure. By 2021, fintech investments in the region totaled US$5 billion across 120 deals, up from US$2 billion and 82 deals in 2020. This growth was driven by a number of factors, including, at the macro level, low rates and a strong dollar, and at the country level the increasing availability of online banking and mobile payment services, the expanding middle class, and the region's young population. Fintech companies are also benefiting from supportive government policies in many countries.

Fintechs are the driver of change

As fintechs continue to proliferate in Latin America, they are significantly changing the way people manage their finances. From digital banks to peer-to-peer lending platforms, they are providing new and innovative solutions to meet the needs of Latin America's growing population. With economies that are still largely cash-based, we anticipate M&A activity in this sector to remain strong in the years to come. Financial and institutional investors will seize the opportunities to build up equity positions in great companies with an enormous growth potential, presumably at much lower valuations than just a few months ago, as a result of tightening of monetary policy. We also expect banks to engage in defensive M&A across the region to improve their technology platforms and serve a much younger demographic that is hungry for faster, better and cheaper banking services. At the very least, banks will seek to retain their market share and client base.

There is similarly growing demand for telecommunications and media sector services. Many companies in this sector have been looking to M&A opportunities to consolidate and expand their reach. The digital infrastructure and internet service provider segments are experiencing a high volume of M&A transactions by strategic and financial investors alike. The 2021 transactions involving AT&T, Telefonica and DirectTV are the clearest examples of dealmaking activity in this segment. According to public sources, there were 148

US$6.57 billion

In H1 2022, transactions in the telecommunications and media sectors amounted to an aggregate amount of US$6.57 billion

Source: Market data

announced deals in the media sector in the first half 2022, for an aggregate amount of US$6.57 billion.

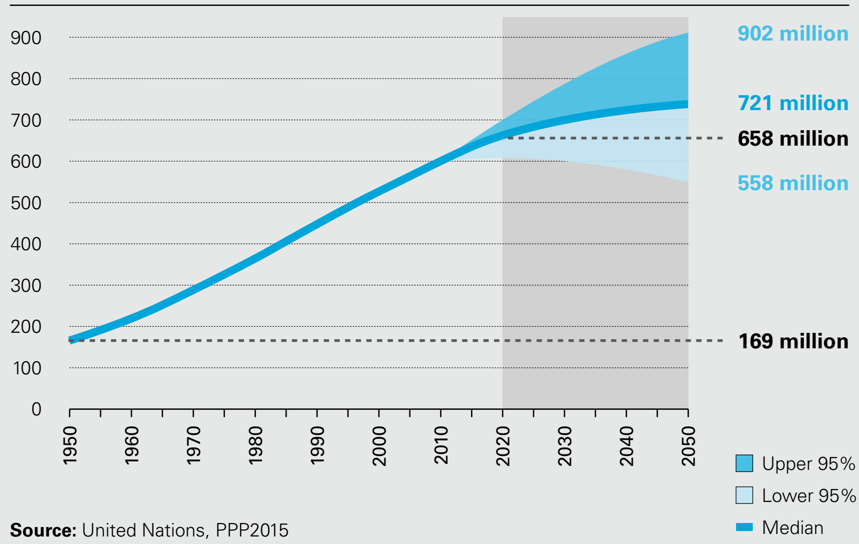
Consumer demand is driving strong M&A opportunities throughout the technology sector in Latin America. The shift to digitally enabled experiences and services is also stimulating investment across the different segments of the sector. The first half of 2022 saw a strong volume of growth capital, financing and M&A transactions, which provided significant amounts of fresh capital to some of the most successful technology companies in the region. This new trend has placed well-capitalized companies at the forefront of the M&A regional market, as they can now seek to deploy some of that capital through strategic M&A transactions at much more competitive valuations. High-quality startups are now better positioned for inorganic growth via M&A.

On the other hand, smaller or less-capitalized startups are having a harder time accessing fresh capital due to higher interest rates and stricter and more disciplined investment guidelines for private equity and venture capital funds. These less fortunate companies will likely become acquisition targets or seek for financing sources with tighter terms at much lower valuations, and in some cases, open the door for opportunistic and distressed M&A transactions.

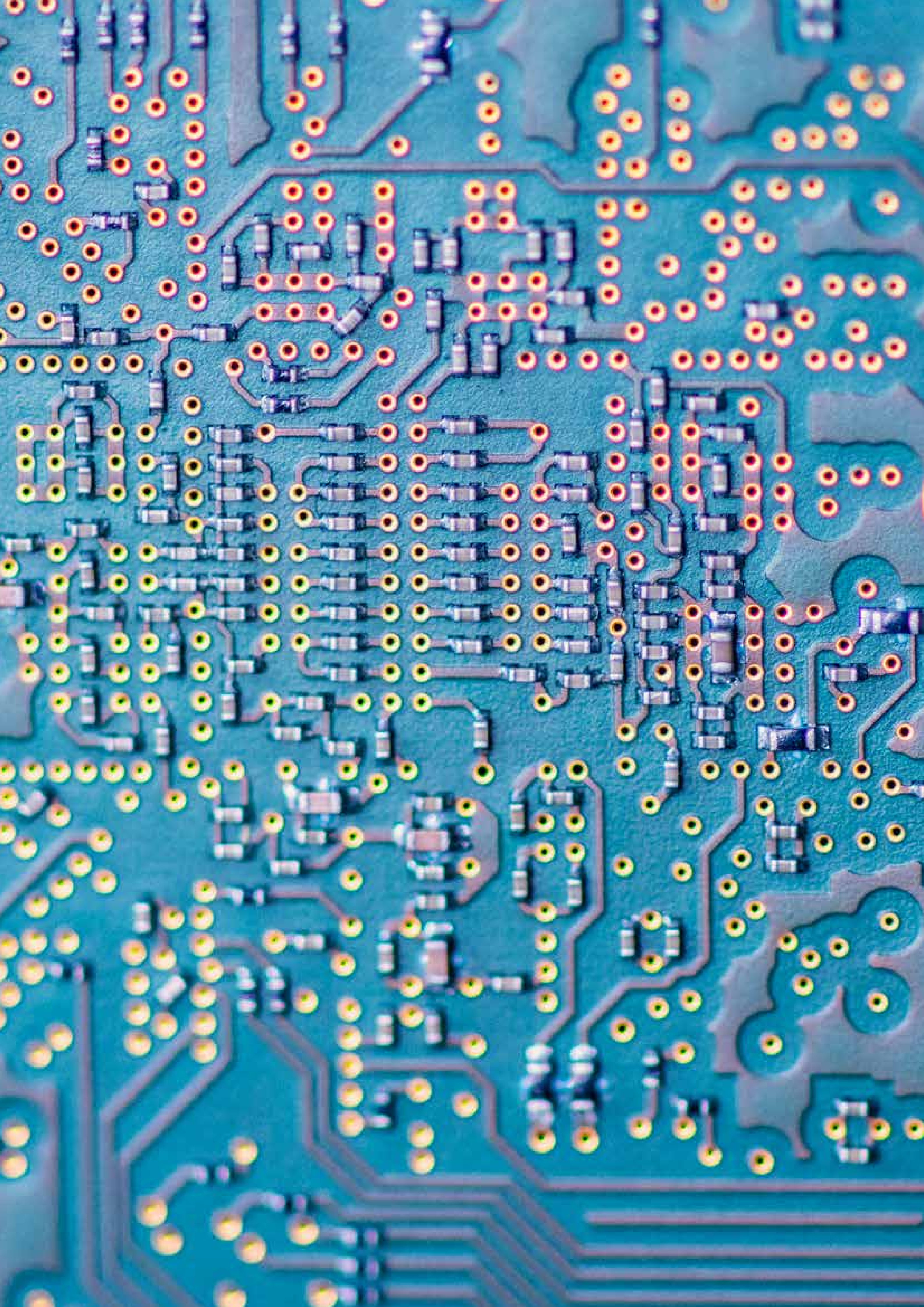
Amid uncertainty, opportunity

In a regional market adapting to its new post-COVID-19 reality, which is shaped by global supply chain disruptions, inflation, higher interest rates, and new political cycles rethinking economic policies, dealmakers remain cautiously optimistic that the regional transition to digital services will create significant M&A opportunities, particularly in the technology sector. The current economic environment will create attractive opportunities for venture and private equity funds to pursue M&A through the remainder of 2022. Other well-funded startups that seek to remain competitive and keep up the growth rates demanded by their investors are also perceiving the opportunity and engaging in significant strategic M&A activity under less pressure and at more realistic and sustainable valuations. Stronger market participants certainly have the means to navigate current uncertainties, including the risk of an economic slowdown. M&A professionals remain vigilant for those opportunities as they explore this vibrant and exciting segment of the Latin America economy.

Latin America: Population, 1950 – 2050



Source: United Nations, PPP2015



Intermediary liability frameworks for digital platforms in Latin America still a patchwork

Brazil leads the way with regulation, Argentina and Colombia follow court-established principles, while Mexico lags behind. White & Case partners **Julian Lamm**, **Enrique Espejel** and **Aalok Sharma**, and associates **Thelma Petrucci** and **Isabella Llano** discuss differing regulatory approaches to intermediary liability frameworks across Latin America.

Digital platforms and other information intermediaries, such as Facebook, Instagram, Snapchat, TikTok and Twitter have shaped and transformed the way we communicate, connect, and do business. Just before the turn of the 21st century, digital platforms began offering a new space for people to interact and widely share their opinions and ideas – expanding freedom of expression rights globally and, according to a UNESCO report, in Latin America in particular. But while the United States and the European Union (EU) continue to introduce and reform legislation to keep up with the technology, governments across Latin America are largely yet to pass similar legislation. Such inaction creates uncertainty in the region, both for companies that provide digital platforms and their users.

To prioritize the growth of digital services and protect free expression rights in this space, US and EU legislators enacted special legal regimes that offer digital platform providers with protections from liability for the content posted by users on their platforms (i.e., user-generated content). Reflecting the constitutional commitment to free speech, the US Congress enacted Section 230 of the Communications Decency Act (CDA) with broad immunity for digital platforms with respect to user-generated content on their platforms and a platform's content moderation decisions. The EU established a "safe harbor" regime under the E-Commerce Directive, with a more limited concept of immunity: once a digital platform provider becomes aware of illegal user-generated content, it must act expeditiously to remove that content, or it may face liability.

The importance of digital platforms has increased exponentially since these laws were passed. The coronavirus pandemic has amplified the importance of digital platforms in all aspects of our economy and society, and our ever-dominant reliance on digital platforms has become the source of new risks and challenges.

> **Legislators around the world are grappling with how interventions to moderate content may cut across fundamental rights to free expression and access to information**

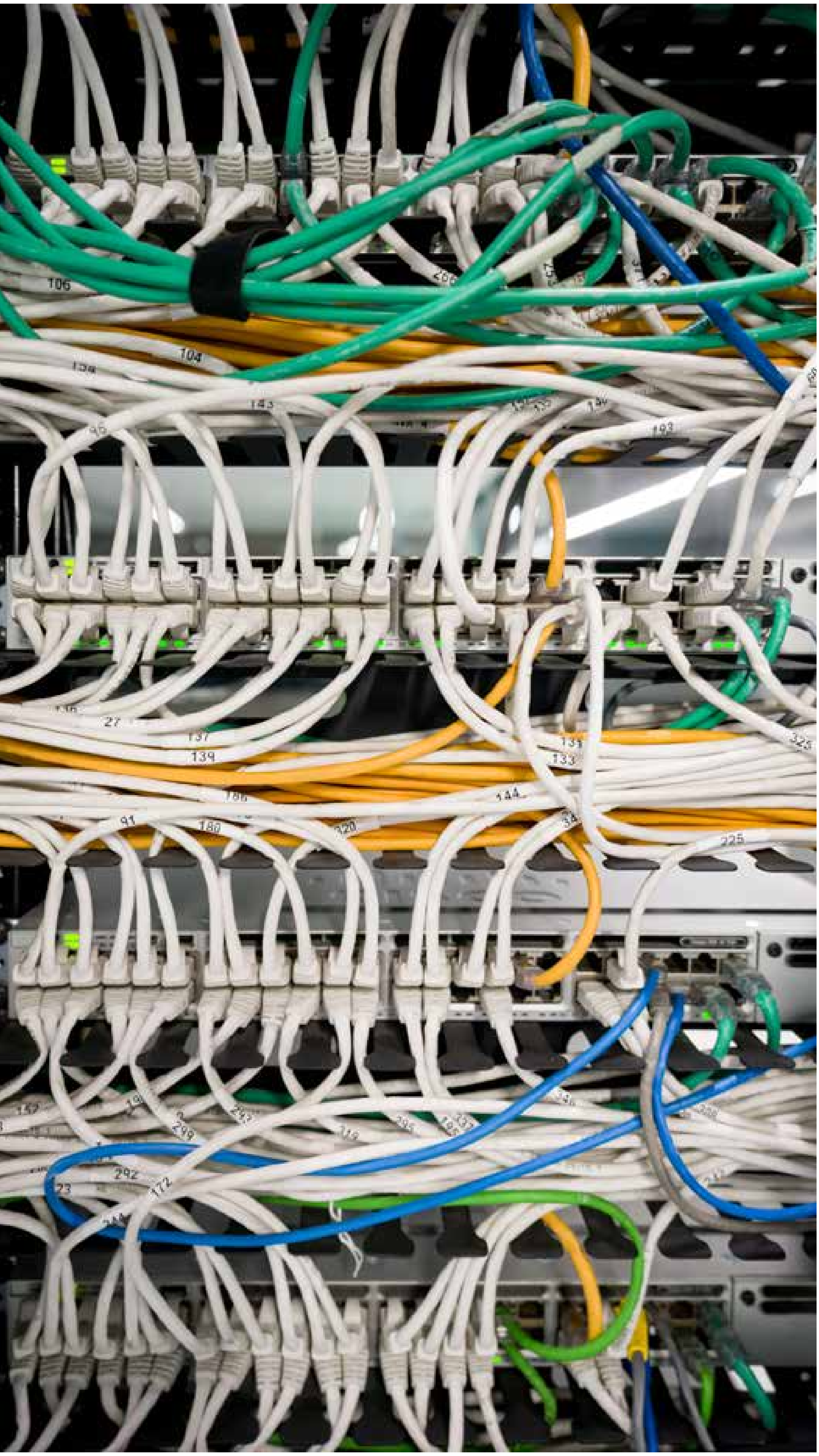
30% to 50%

A large portion of the overall population in Latin America is still underbanked, ranging from 30% to 50% across major countries

Source: Market data

Legislators around the world are now revisiting legal regimes relevant to digital platforms – grappling with how they must detect and intervene against content such as hate speech, misinformation, or harassment, and how such interventions against content may cut across fundamental rights to free expression and access to information. For example, the US Congress has proposed reforms of CDA Section 230, with more than 20 proposed bills in 2021 alone, to distance itself from the largely blanket immunity it currently grants digital platforms. The European Parliament recently approved the draft text of the Digital Services Act (DSA), which establishes a harmonized, EU-wide framework for intermediary liability and imposes new obligations on digital platforms with the aim to "better protect consumers and their fundamental rights online."

Surprisingly, while other regions are reforming and updating their rules to keep up with evolving technologies, Latin American countries continue to stay largely silent when it comes to legislating in this space, even though the number of people using the internet across Latin America surpassed 500 million in 2021. It was not until 2014 that Brazil became the first—and only—country in the region to offer a comprehensive law covering the obligations and liabilities of digital platforms. While



there have been several legislative proposals on intermediary liability in other Latin American countries, these proposals have largely failed. The rest of the region has only seen a patchwork of narrow sectoral laws or judicial legislation largely reliant on general civil, criminal, intellectual property, and consumer protection laws that for the most part predate the existence of digital platforms. This has resulted in an inconsistent and piecemeal approach to intermediary liability throughout Latin America – which brings operational uncertainty for digital platforms providing global products and services.

Brazil: A pioneer for intermediary liability regimes in Latin America

Brazil is the only country in Latin America that has enacted a comprehensive intermediary liability regime. In 2014, it adopted the "Marco Civil da Internet" (the Brazilian Internet Bill of Rights), which established principles, rights, and obligations for internet use. The Marco Civil creates a strong "safe harbor" regime guided by judicial oversight.

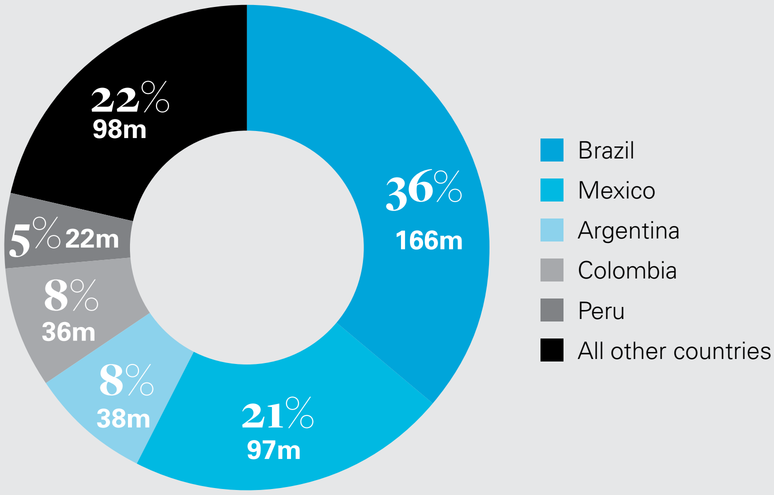
In general terms, digital platforms can only be liable for user-generated content on their platforms if they fail to comply with a court order requiring them to remove content within the specified timeframe. The law has also been interpreted to protect digital platforms from liability when they engage in content moderation consistent with the terms and policies presented to users. Interestingly, the safe harbor principle of the intermediary liability regime was found to be unconstitutional by a lower court, with a pending appeal to the Brazilian Supreme Court, but it still remains in effect despite the lower court's ruling.

In addition to the Marco Civil, there has been a recent increase in legislative and executive proposals focusing on the digital platforms' ability to moderate content. The two most prominent proposals – Bill 2630/2020 (known as the "Fake News Bill") and the Federal Executive Branch's Provisional Measure No. 1.068/2021 (the "Executive Provisional Measure") – presented diametrically opposite compliance obligations.

As first proposed, the Fake News Bill would impose, among other things, moderation obligations on

Brazil, Mexico, Argentina, Colombia and Peru account for more than three quarters of all internet users in Latin America

As of January 2022, selected countries



Source: Statista

500+ million

Internet users across Latin America in 2021

Source: Market data

digital platforms as it pertains to "misinformation," and a transparency requirement, similar to that of the DSA, requiring digital platforms to publish regular reports on content moderation. The Executive Provisional Measure, on the other hand, aimed to limit digital platforms' ability to moderate content without first obtaining a court order. The measure was quickly rejected by the Brazilian National Congress and struck down by the Federal Supreme Court as unconstitutional. The future of the Fake News Bill is also uncertain, given the political climate and recent election.

Despite the uncertainty of these proposals, it remains clear that the future of intermediary liability and digital platform obligations is in flux given the Congress' and the Federal Executive's desire to introduce reforms.

Argentina & Colombia: Establishing intermediary liability principles through case law

Argentina has yet to pass comprehensive legislation regarding intermediary liability and, apart from a few early proposals on narrow sectoral laws, appears far from legislating a full-scale framework in this space. Legislative bills on content moderation have been considered over the years, but none have been ratified, and there is no current legislative proposal on debate for a broad intermediary liability regime.

The Argentine courts have nevertheless stayed busy filling the legislative gap. In 2014, the Supreme Court of Argentina effectively created a "safe harbor" regime that borrows components from the Brazilian and EU approach. *In Rodriguez, Maria Belen Rodriguez v. Google, Inc.*, the court ruled that digital platforms cannot be held liable for user-generated content unless they have "actual and effective knowledge" of the content, and thereafter fail to diligently block or remove it.

The Supreme Court's approach differs based on the nature of the content: a mere notice or demand for removal received by a digital platform is sufficient to establish actual and effective knowledge for clearly unlawful content (e.g., child pornography, content facilitating crimes, and racial prejudice). For other content, such as defamation and trademark violations, a court or administrative authority's takedown order is required to establish knowledge. Although the latter requirement aims to protect digital platforms from having to undertake difficult analyses that require weighing countervailing fundamental rights under local law, it leaves open substantial gray areas as to what constitutes clearly unlawful content, therefore opening the door for long-lasting litigation. The Supreme Court's 2014 decision is not an outlier; the court reaffirmed this legal standard in 2017 and again in 2021. Although Supreme Court decisions in Argentina are not binding precedent in the same way as in the common law countries, lower courts in Argentina usually take them into consideration when adjudicating matters across the gamut of digital platforms.

The Colombian legislature similarly has yet to pass legislation addressing intermediary liability, and there are presently no relevant bills up for formal debate. However, given the implications on fundamental rights of free expression and access to information, the Constitutional Court has had the opportunity to consider and has found, on numerous occasions, that digital platforms are not responsible for user-generated content on their platforms.

Colombian case law has arisen in the context of constitutional actions known as tutelas – a unique and expedited form of litigation seeking to cure an alleged breach of fundamental rights – where petitioners usually do not seek damages, but rather injunctive orders (e.g., to remove or re-instate content on a platform). In the context of such matters, the Constitutional Court established the following principles: first, courts (rather than digital platforms) should determine the legality of content; second, digital platforms should comply with a state authority's order seeking the removal of content from their platforms in a timely manner; and third, there is no general obligation for digital platforms to pre-screen or proactively monitor content on their platforms. While the Colombian judiciary is yet to consider these principles in the context of a claim for damages, one would expect them to translate equally in that context.

In the absence of legislation codifying intermediary liability, litigation will continue to test the bounds of prior precedents. The future of this court-based intermediary liability framework will also remain less certain without its codification, given things like the ever-evolving nature of digital

Intermediary liability frameworks across Latin America: A snapshot

Mexico: Far from embracing a uniform intermediary liability framework

Mexico lags behind in establishing intermediary liability principles.

Legislation:
- No comprehensive intermediary liability law.

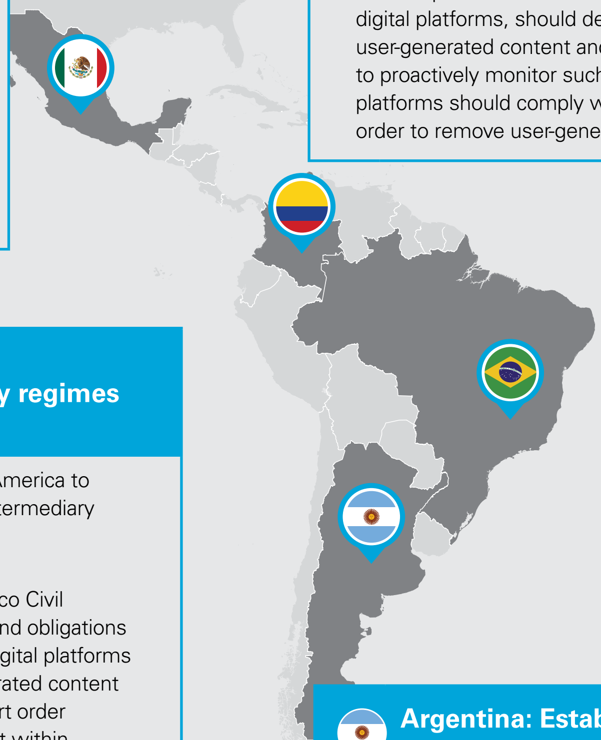
Current legislative position:
- The USMCA imposes on its signatories an express limitation from "adopt[ing] or maintain[ing] measures" that conflict with the intermediary liability principles under CDA Section 230. This provision is set to apply to Mexico starting in July 2023. Whether Mexico actually passes legislation to align with these principles is yet to be seen, given the USMCA provides that "a Party may comply with this Article through its laws, regulations, or application of existing legal doctrines as applied through judicial decisions.

Colombia: Testing the bounds of prior precedents

Colombia is yet to pass comprehensive legislation addressing intermediary liability and there are presently no bills up for formal debate.

Legislation:
- None.

Current legislative position:
- The Constitutional Court has, on numerous occasions, found that digital platforms are not directly responsible for user-generated content on their platforms. Generally, courts, rather than digital platforms, should determine the legality of user-generated content and there is no obligation to proactively monitor such content. Digital platforms should comply with a state authority's order to remove user-generated content.



Brazil: A pioneer for intermediary liability regimes in Latin America

Brazil is the only country in Latin America to have enacted a comprehensive intermediary liability regime.

Legislation:
- In 2014, Brazil adopted the Marco Civil establishing principles, rights, and obligations for internet use, under which digital platforms can only be liable for user-generated content if they fail to comply with a court order requiring the removal of content within the timeframe specified therein.

Current legislative position:

In addition to the Marco Civil, the two most prominent proposals presented diametrically opposite compliance obligations:
- The "Fake News Bill" imposes moderation obligations on digital platforms and requires regular reports on content moderation.
- The "Executive Provisional Measure" aims to limit digital platforms' ability to moderate content without first obtaining a court order.

Argentina: Establishing intermediary liability principles through case law

Argentina is yet to pass comprehensive legislation regarding intermediary liability.

Legislation:
- None.

Current legislative position:
- In 2014, the Supreme Court of Argentina effectively created a "safe harbor" regime with components from the Brazilian and EU approach in which digital platforms cannot be held liable for user-generated content unless they have "actual and effective knowledge" of the content, and fail to remove it. Although not binding precedent, the Supreme Court decisions are taken into consideration by lower courts.
- The Supreme Court reaffirmed this legal standard in 2017 and again most recently in 2021.

Source: White & Case

platforms, the possibility of a change in domestic circumstances (as we've seen with misinformation in the COVID-19 pandemic), or a change in the make-up of courts can abruptly change the status quo.

Mexico: far from embracing a uniform intermediary liability framework

Despite Mexico's economic influence in the region, it lags in establishing intermediary liability principles. A controversial draft bill attempting to regulate social media was proposed by a Mexican senator in 2021, but faced significant public resistance and did not pass. No other bills on intermediary liability or online content moderation have since been proposed. Moreover, unlike Argentina and Colombia, Mexico is, somewhat surprisingly, yet to have a seminal case from its Supreme Court establishing intermediary liability rules in the absence of specific legislation.

The United States-Mexico-Canada Agreement (USMCA) may soon provide more certainty. Already, as a result of the USMCA, a notice-and-takedown system was introduced into Mexico's Federal Copyright Law in July 2020. Importantly, the USMCA also imposes on its signatories an express limitation from "adopt[ing] or maintain[ing] measures" that conflict with the intermediary liability principles under CDA Section 230 – namely, that digital platforms are not to be held liable for user-generated content published on their platforms (with limited exceptions); and, any action voluntarily taken in good faith by digital platforms to moderate its platform from harmful or objectionable content. This provision is set to apply to Mexico starting in July 2023– three years after the agreement enters into force.

658
million
The total population of Latin America & Caribbean in 2021
Source: Statista

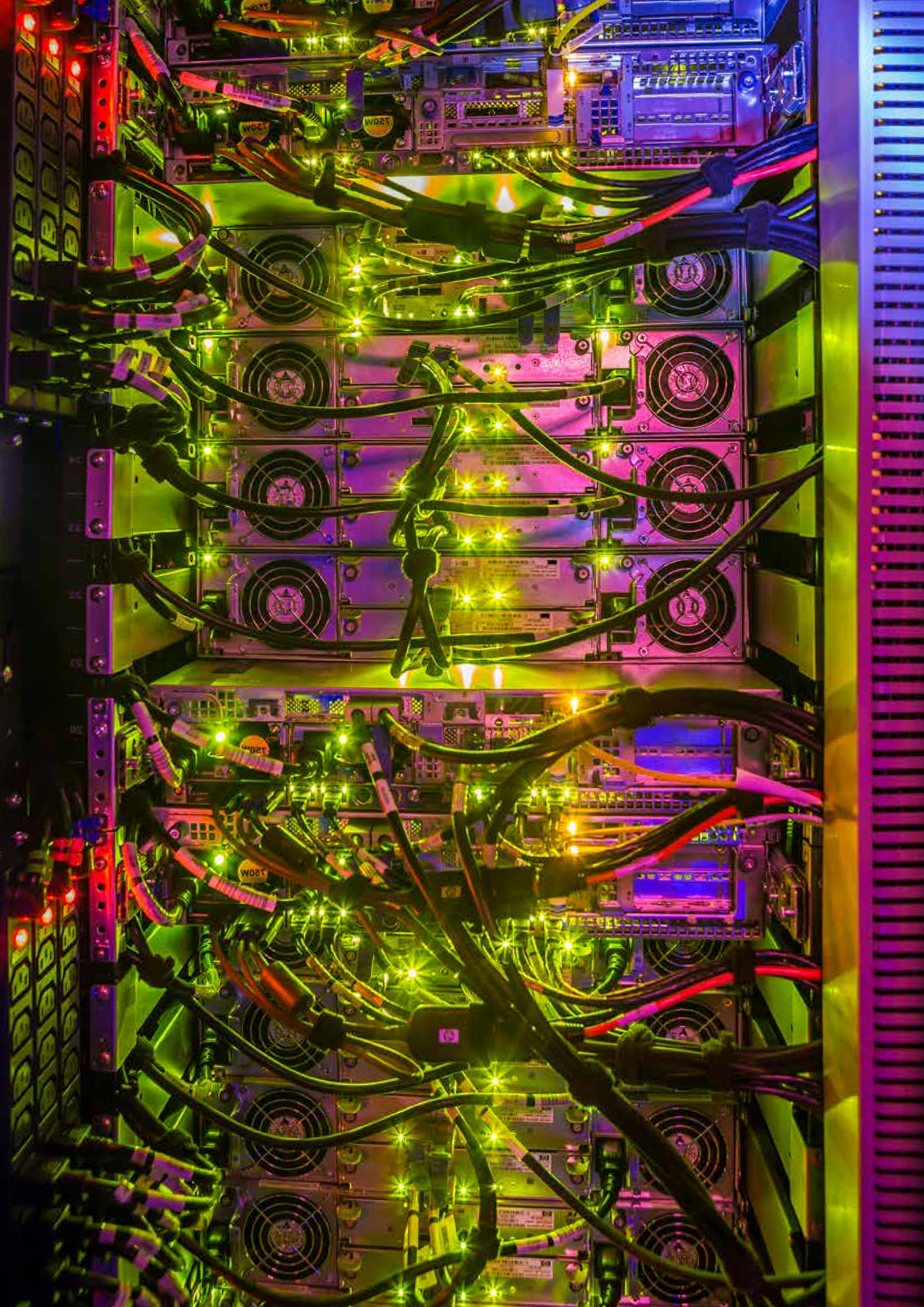
Whether Mexico actually passes legislation to align with these principles is yet to be seen, given the USMCA provides that "a Party may comply with this Article through its laws, regulations, *or application of existing legal doctrines as applied through judicial decisions.*" At a minimum, the USMCA provides greater future certainty that either legislation (should Mexico go the route of Brazil) or judicial decisions (should it follow Argentina and Colombia) will need to align with the principles of intermediary liability that are generally favorable to digital platforms and free expression.

Peru: Possibly following Brazil with an intermediary liability framework

At the end of 2021, the Peruvian Congress introduced a bill that, among other things, would introduce an intermediary liability regime, shielding digital platforms from liability for user-generated content. If approved, the bill, as currently drafted, would make it clear that digital platforms are not required to pre-screen or proactively monitor user-generated content that is transmitted, stored, or referenced on their platforms. A digital platform would only be obliged to remove user-generated content if it receives a court order to do so, and could not be held liable for user-generated content unless it failed to comply with such the order. The newest version of the bill was introduced in June 2022, and it is not expected to pass earlier than December 2022. Its success largely depends on the political will of the Peruvian Congress.

With the exception of Brazil, countries in Latin America are still far behind their North American and European counterparts, which have established, and are now working to amend, laws that provide intermediary liability frameworks, guidelines, and obligations. The absence of intermediary liability frameworks in Latin America has resulted in a lack of certainty, which can prove detrimental to both digital platforms and internet users. While courts in some Latin American countries have tackled the absence of legislation by establishing general rules and principles of intermediary liability in relation to search engines or social media, the development of new forms of technology and new interactive spaces, like the metaverse, may leave a renewed void that could take years, if not decades, to close through the judiciary.

> **"Surprisingly, while other regions are reforming and updating their rules around digital platforms to keep up with evolving technologies, Latin American countries continue to stay largely silent when it comes to legislating**



Five ways in which fintechs can lead the way in compliance best practices across Latin America

Partners **Michael Garcia** and **Maria Beguiristain** discuss why Latin American fintech companies are uniquely placed to pioneer new and better approaches to compliance across the region.

The past two years have witnessed an explosion in technology-focused businesses in Latin America and an unprecedented rise in venture investment in the region. Across LatAm, there has been a particular rise in unicorns—startups valued at more than US$1 billion, with twenty entering the market in March 2022 alone. The demand for digital interconnectedness and the needs of the underbanked LatAm market have catalyzed this technological boom and contributed to its varied specialization.

Technological growth has been fueled by a lack of financial services for certain consumers in the traditional financial sector, an increased demand for digitized financial services in the wake of COVID-19 and increased regulation that enhances the transparency and security for investors using these platforms.

The technology unicorns in Latin America range from e-commerce delivery platforms to digital banks and property-management systems. One particular area of growth is in fintech, which comprises technology, such as computer programs, used to support or enable banking and financial services, including digital lending, payments, blockchain and digital wealth management. Within LatAm, payments and remittances currently remain the largest fintech sector, with 25 percent of the fintech market; however, other areas are experiencing important growth, including digital loans and crowdfunding. These fintech and other technology-based businesses are springing up in many countries across the region, including Argentina, Brazil, Chile and Mexico.

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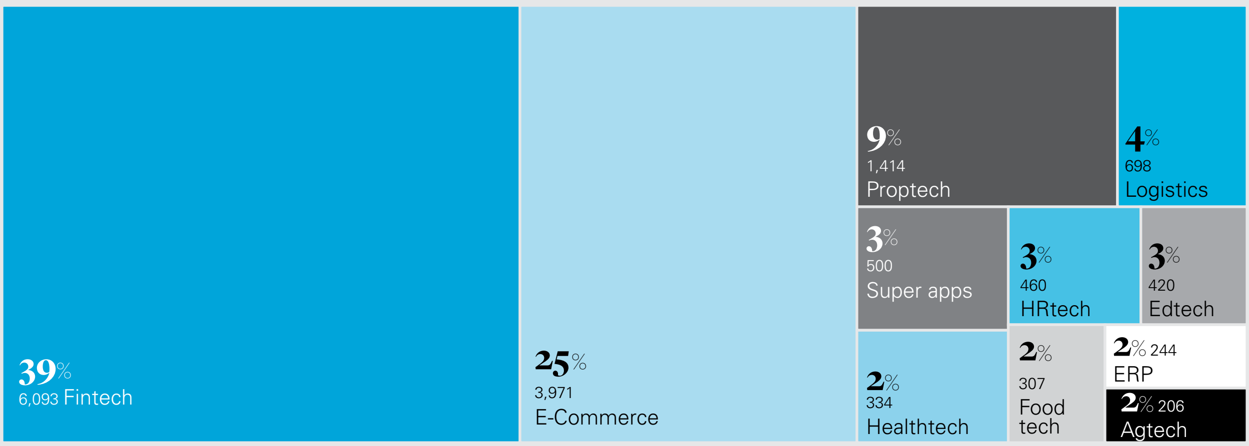
Unicorns—startups valued at more than US$1 billion—entered the market in Latin America in March 2022 alone

Source: Market data

Top sectors for venture capital investment in Latin America

US Dollars, percentage of the total capital invested



Source: LAVCA. Data as of December 31, 2021.

US$2.8 billion

LatAm startups raised US$2.8 billion in Q1 2022

Source: LAVCA

LatAm's fintechs are entrepreneurial in nature, with aspirations to unlock their growth potential globally. With innovation and widespread accessibility at their core, fintech businesses can reach anyone and everyone, providing technology that levels the playing field and opens up the previously underserved markets. And with the ability to serve untapped markets through technology, LatAm's fintechs can be scaled globally and are well positioned to experience significant growth.

Entrepreneurial businesses often face challenges as they keep up with the pace of high growth. While growing market share is prioritized, critical functions such as compliance may not be sufficiently prioritized and may be at risk of lagging behind. In LatAm, the risk is even greater because the enforcement of anti-bribery and anti-corruption laws has been inconsistent. However, the region's fintechs should not look to the past, but instead focus on the future, recognizing that they are on a path to the international stage, where having a strong compliance program provides strategic advantages and supports sustainable growth. In creating such a program, fintechs will help shape the compliance culture in LatAm by importing best practices and relying on technology to innovate compliance processes.

Leadership is key to culture

LatAm's fintech leaders should embrace a culture of compliance. Strong leadership is more than adopting a code of conduct with core values such as transparency, integrity, ethics and signing the cover message. It requires engagement with team members and making the values as important as the most critical business KPI. Entrepreneurial fintechs have an advantage in engaging with team members. Their leaders are connected to team members through the use of technology, which makes them more present and accessible than ever. With minimal investment upfront, leaders can establish a lasting foundation to build a compliance program and avoid the time, commitment and resources that may be required to embrace belatedly a culture of ethics and transparency.

Planning for success

While establishing a tone from the top is fundamental, implementing a compliance program requires crafting and designing policies, procedures, systems and controls designed to prevent or detect conduct that is unlawful, contrary to policy or inconsistent with corporate values. Fintechs are well positioned to execute these programs, as they often work in cross-functional teams on a project basis. Implementing a compliance program should be no different and have the same priority as the most promising or product-development initiative. The compliance-project team should involve all relevant functions, reflecting the fact that compliance is a shared responsibility. The compliance-project team should develop plans to implement the compliance program, report progress to the board (or similar corporate body) and be held accountable for implementation of the program.

Accelerate learning by importing knowledge

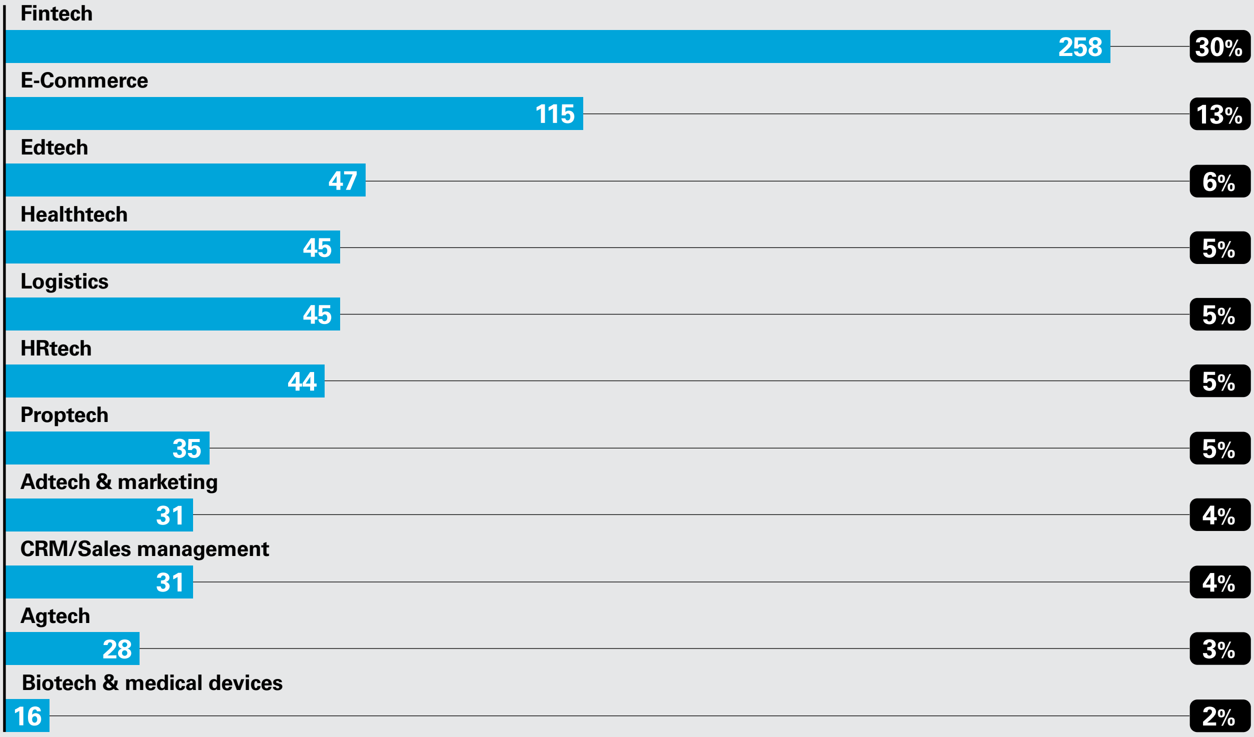
LatAm's fintechs may face challenges to building a compliance team with experience in the industry and region. As a result, they should adopt a global approach to attracting team members, taking advantage of the modern work landscape to invest in compliance resources and hire professionals with industry experience from other regions. Making the right investments in leadership and management will foster development within the compliance function, allowing for team members to grow and take on additional responsibility as the business grows. It also will provide credibility to the compliance function at a critical stage of development.

Resourcing for a lasting impact

Fintech firms should be willing to invest in their compliance program, realizing that the benefits are long term. A LatAm fintech will require capital to grow, which may mean accessing capital in international markets, being the target of an acquisition, or becoming a listed company. Indeed, in 2021, venture investment in the LatAm market alone reached US$15.7 billion, which is more than the venture investment during the entire past decade across

Fintech tops the charts for venture capital investment in Latin America by number of transactions

Number of deals, percentage of the total volume of transactions



Source: LAVCA. Data as of December 31, 2021.

the region and three times as much as the previous record of US$4.9 billion in 2019. Growth pathways will almost certainly involve an evaluation of the compliance program during due-diligence processes conducted by lenders, investors, underwriters or acquirers that apply international standards to the company's program. And with the SPAC market, the path to becoming a listed company has become accelerated. Having strong compliance programs will not only facilitate the diligence process, it will expand the pool of potential lenders, investors and suitors and otherwise strengthen the company's negotiating position.

A strong program and culture of compliance can add other benefits as well. Today's investors have begun to analyze a company's performance and make business decisions based on an increasing number of ethical considerations. A company's ethical behavior impacts shareholder market perceptions and investor decisions regarding which companies to target.

US$15.7 billion

In 2021, venture investment in the LatAm market alone reached US$15.7 billion

Source: LAVCA

In businesses with a poor compliance culture, employees may act in a way that exposes the company to the risk of breaches and subsequent damages. Compliance breaches can be costly, not just due to potential damages, but also because of the risk of reputational damage. Accountability, transparency and ethics can make a company more reliable and, as a result, more attractive to today's investors.

Having a strong compliance program also can provide protections from enforcement. In a region where enforcement currently varies, it may not seem like a benefit, but as fintech companies expand their reach, they expose themselves to the possibility of cross-border investigations in all those countries where they do business or have customers. An effective compliance program can be used as a defense in many jurisdictions. And fintechs will be well prepared as the enforcement landscape in LatAm evolves. Within the past ten years, LatAm countries have enacted laws to combat corruption, with enforcement likely to follow. As one example, Brazil's passage of the Clean Company Act, in effect since 2014, led to unprecedented corruption and fraud investigations. Many individuals and companies that had previously operated without scrutiny suddenly became embroiled in large scandals and subsequently faced hefty civil and criminal sanctions. Following Brazil, other Latin American countries passed laws to meet international anti-corruption standards. For example, the region saw Colombia's Transnational Corruption Act and Argentina's Law 27.401. Argentina, Mexico, Peru, Ecuador and Costa Rica now provide for corporate criminal liability for bribery of domestic public officials and, in some countries, corporations can be liable for related conduct such as money laundering, commercial bribery and bribery of foreign officials. By situating themselves on the cutting edge of compliance in these countries, fintech companies can meet the demands of a modern business prepared for any changes that may come.

Innovation drives efficiency

Fintechs also may hold the key to unlocking new and better approaches to compliance. With technology at their core, fintechs can leverage their expertise to develop new processes, procedures and controls that drive efficiency, maximize resources and focus on risk. Some technology giants already have announced their own anti-corruption and transparency initiatives, often leveraging tools such as cloud computing, data visualization, AI and machine learning, among others, to detect and deter corruption. These projects demonstrate that technology will be at the forefront of fighting corruption in the future. For example, the use of data can illuminate hidden patterns and relationships that may be of concern. Similarly, employing cloud computing, data visualization, AI and machine learning can help aggregate and analyze enormous and complex amounts of data, exposing red flags that would have otherwise gone unnoticed with traditional methods.

In sum, the rapid rise of the Latin American fintech industry has attracted hefty investment in the area, resulting in the creation of a few unicorns, with more investors expected to flock to the market. The region's regulators are slowly catching up, although both the rules and their enforcement still vary country to country. LatAm fintechs can help make the region's tech sector more attractive to investors by formulating and adhering to strong compliance programs that include responsibility sharing among all employees and that employ a variety of new technologies to better meet the burden of due diligence and risk assessment.

43%

of venture capital funding raised in Latin America in Q1 2022 went to fintech startups

Source: LAVCA

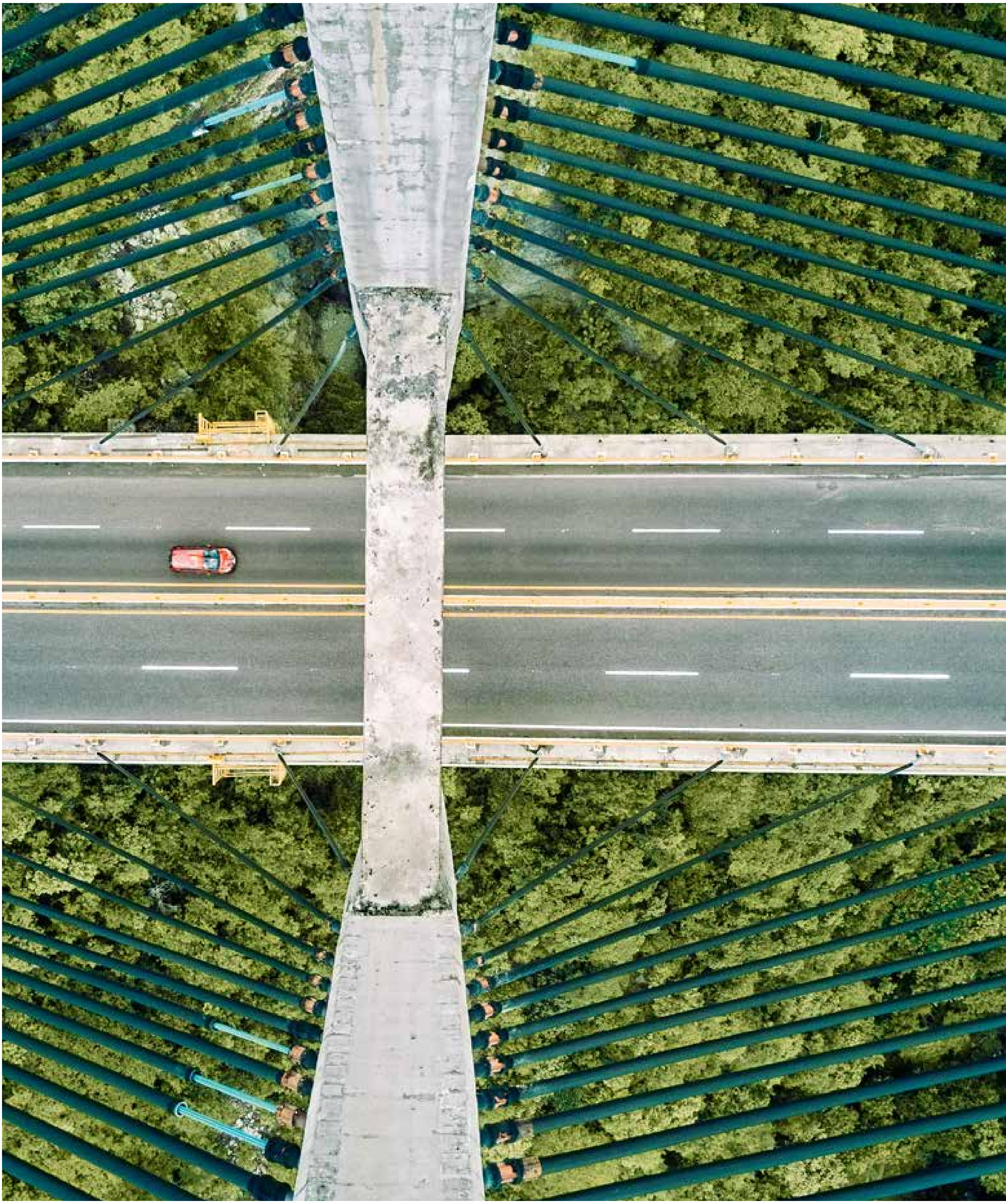
Five ways in which fintechs can lead the way in compliance best practices across Latin America

With innovation at their core, fintech businesses embracing strong compliance programs can secure strategic advantages on the path to the international stage.

1. Foster a compliance culture from top-down by taking advantage of existing transparent connections between leadership and team members through the use of technology, making leadership more present and accessible than in more conventional business models.
2. Make full use of interconnectedness across business functions to design and craft policies, procedures, controls and systems to prevent unlawful conduct. Compliance is a shared responsibility.
3. Utilize the benefits of the modern work landscape by importing expert knowledge from compliance professionals hired from other regions.
4. Assimilate compliance best practices in every new geographical market, as compliance programs can be used as a defense in many jurisdictions.
5. Leverage technology—cloud computing, data visualization, AI and machine learning—to innovate compliance processes and detect red flags that otherwise would have gone unnoticed with traditional screening methods.

Source: White & Case

"With innovation at their core, fintech businesses recognize that a strong compliance program provides strategic advantages on the path to the international stage



Growth of carbon markets in Latin America

Latin America increases involvement in compliance and voluntary carbon markets activity: partner **Taylor Pullins** highlights how the region has the potential to emerge as a leading hub for innovation.

The accelerating climate change crisis has shifted the investor focus onto how companies incorporate ESG factors—environmental, social and governance—into their business strategy. Investors are putting companies under increased scrutiny for their environmental impact and especially greenhouse gas (GHG) emissions. That interest, along with commitments by countries to international pledges such as the Paris Agreement to reduce GHG emissions, has led to growing participation in carbon markets from businesses seeking to meet climate-related targets or offset certain climate-related impacts. Although it's not without challenges, this is a time of tremendous opportunity for companies and countries alike. Carbon markets represent an increasingly useful solution for reducing GHG emissions and driving investment in energy transition and low-carbon technologies.

Three factors distinguish Latin America as a potential leader in the field: its adoption of carbon markets at the national and subnational level; government incentives promoting low-carbon technologies; and existing energy infrastructure. The region is also abundant in natural resources. Experts predict that the development of advanced carbon marketplaces in Latin America could lead to significant revenue generation as global revenues from carbon pricing continue to soar. Moreover, expansion of carbon markets in the region would increase the global competitiveness of the supply of credits, further encouraging the development of carbon markets globally.

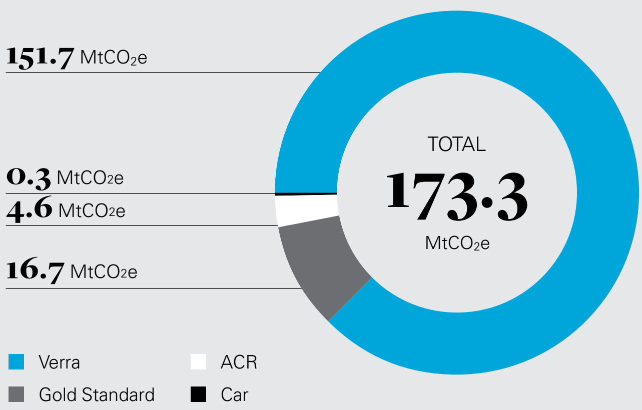
The international climate regime has shifted in recent years from a top-down approach (based on mandatory emissions commitments) to a system driven largely by voluntary pledges from both governments and private actors. Latin America's existing carbon landscape includes both voluntary carbon markets and markets for purchasing credits for regulatory compliance purposes. According to a 2021 McKinsey report, based on the existing market infrastructure in Latin America, both forces are expected to drive continued growth of carbon markets in the region.

Strong momentum in Latin American carbon markets

Regulatory frameworks within Latin America vary by country. The region has the second-highest number of subnational jurisdictions with a pledge to achieve net-zero emissions, with 209 cities and five regions making such a pledge. As of 2021, the region also has four federal carbon taxes, three subnational carbon taxes and one national emissions trading system (ETS). Colombia, Chile and Mexico lead through their comprehensive and tailored carbon marketplaces, while Brazil and Argentina are gathering data to implement effective strategies. These frameworks have strong support from key international organizations.

Colombia, Chile and Mexico are at the forefront of the development and advancement of carbon markets. These countries have established both carbon taxes at national and state government

2010 – 2021 Carbon credit issuances ($MtCO_2e$) in Latin America by standard



Source: Trove Intelligence. Data drawn from Verra, Gold Standard, ACR and CAR. "Status and trends of compliance and voluntary carbon markets in Latin America" report, IETA levels, and voluntary carbon marketplaces at the national level. In addition, Colombia is in the process of developing an ETS. Carbon taxes remain a popular instrument for emissions reductions in Latin America, in part because the revenues raised by carbon taxes can achieve a variety of national environmental, social and economic goals. For example, in Colombia, the revenue from the country's carbon tax flows to the Sustainable Colombia Fund, an initiative to support sustainable projects in areas affected by violent conflict. Similarly, Argentina and Brazil are capitalizing on the momentum and have begun implementing carbon-pricing instruments (CPIs).

Certain international bodies are demonstrating a commitment to expanding carbon markets in Latin America. A notable example is the World Bank's Partnership for Market Readiness (PMR), with its commitment to provide technical assistance to 23 countries to design and deploy CPIs, including direct assistance to Argentina, Brazil, Chile, Colombia, Costa Rica, Peru and Mexico. This global platform has provided information obtained through country-specific studies to instruct governments on successful tactics for carbon market implementation. For Colombia, for example, PMR has conducted an evaluation of ETS system design, an impact assessment of an ETS on sectoral competitiveness, and a study on design options for a mandatory GHG reporting program. An increasing number of international organizations are taking notice of the abundant opportunities in Latin America and have pledged to work alongside lawmakers to expedite the process.

20%

Latin America is the world's second largest provider of voluntary credits, with slightly less than 20% of the total global credit supply coming from the region in 2020 and 2021

Source: "Status and trends of compliance and voluntary carbon markets in Latin America" report, IETA

Regulatory and implementation efforts in carbon markets by country

While carbon markets are expanding throughout Latin America, there are variations across countries in the region in terms of market design and project development.

MEXICO

Following the introduction of the 2012 General Climate Change Law (GCCL), Mexico established a carbon tax in 2013 for sources with emissions exceeding a standard set for natural gas, with the value of the tax capped at 3 percent of the value of the resource. Mexico also established MexiCO2, a voluntary exchange that provides carbon credits to companies that develop environmentally friendly projects, which can be used to offset costs from the carbon tax. In 2019,

Carbon market and pricing initiatives in Latin America implemented or under consideration/development

Mexico

Three Mexican states have a carbon tax in operation, with another one taking steps to develop this policy.

Mexico has both a carbon tax and an ETS in operation. Offsets are allowed under both instruments. Offset protocols are under development for the ETS.

Peru

Peru recently signed the under the framework of Article 6 of the Paris Agreement with Switzerland.

Chile

Chile has a carbon tax in place that includes offsets. The government is also considering the implementation of a compliance carbon market.

Costa Rica

Joint Crediting Mechanism activities in Costa Rica.

Colombia

Colombia has a carbon tax with an offsets component in place and is developing an ETS.

Brazil

Brazil has undertaken studies to consider Carbon Pricing Instruments (CPI). Legislation is being discussed focusing on a domestic voluntary carbon market.

Argentina

Argentina has a carbon tax in operation.

- Carbon tax in operation
- ETS in operation
- Carbon tax under consideration/development
- ETS under consideration/development
- TPS under consideration/development
- Use of offsets for CPI

Source: "Status and trends of compliance and voluntary carbon markets in Latin America" report, IETA

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Three factors distinguish Latin America as a potential leader in carbon markets: its adoption of carbon markets at the national and subnational level; government incentives promoting low-carbon technologies; and existing energy infrastructure

amendments to the GCCL gave Mexico’s environmental authority, the Secretariat of Environment and Natural Resources (SEMARNAT), the mandate to establish an ETS program. It would operate for three years, two years in the pilot phase and one to transition into the fully operational ETS, scheduled to begin in 2023. Industrial and energy plants that declared emissions of more than 100,000 metric tons of CO_2-equivalent between 2016 and 2019 are taking part in the pilot phase, totaling approximately 300 facilities and representing approximately 45 percent of national emissions. The pilot program has no economic impact on regulated entities and looks to test system design and build capacity in emissions trading, as well as to generate a reference value for emission allowances and offsets in the operational phase.

BRAZIL
Brazil’s National Climate Change Policy law was established in 2009 and introduced the concept of a Brazilian Market for Emission Reduction. Recently, the country’s Ministry of the Environment made notable advances in developing a voluntary carbon market by establishing the Forest+ Carbon Program in 2020 and the National Payment Policy for Environmental Services in 2021. In May 2022, Brazil’s president signed Federal Decree No. 11.075/2022, announcing a plan to create a national carbon market. The plan assigns Brazil’s Ministries of the Environment and Economy the responsibility for proposing “Sectoral Plans for the Mitigation of Climate Change,” to effectively set sector-specific goals for emissions reduction. Sectors that include electric energy, urban public and cargo transport, manufacturing and durable consumer goods, chemicals, paper and cellulose, mining, civil construction, and health services and agriculture can register their carbon footprints in the new registry. Sectors can present proposals for establishing the emission reduction curve within 180 days (i.e., by November 2022, but with the deadline extendable for another 180 days), considering the long-term climate neutrality objective informed by Brazil’s Nationally Determined Contribution under the Paris Agreement. In addition to the regulatory path, Bill 528/21, which is being debated in Brazil’s Congress, is intended to establish the legal framework for the Brazilian Market for Emission Reduction.

COLOMBIA
Colombia has several carbon pricing mechanisms. In 2016, it adopted a carbon tax of approximately US$5 per metric ton of CO_2 that covers fossil fuel emissions. The system allows companies to avoid paying the tax by purchasing carbon offsets from projects within Colombia. The government also launched the Colombian Voluntary Carbon Market Platform the same year with the aim of attracting investors. Notably, the marketplace has been subject to concerns regarding the integrity of some carbon credits.

In 2018, Colombia adopted its climate change policy, the National Climate Change System (SISCLIMA), by decree, mandating the adoption of an ETS, the National Program of Greenhouse Gas Tradable Emission Quotas. This program, currently in the developmental stage, will create a system of carbon allowances and allocations, and contains crediting provisions granting allowances for voluntary GHG reductions that are verified and certified through the proper channels.

CHILE
Chile has adopted several policies relating to the pricing of carbon. In 2017, it introduced a tax on carbon emissions, which has been levied at a rate of US$5 per metric ton of CO_2. Chile’s carbon tax is widely considered too low, and the government has announced plans to set a higher tax or explore other options. Chile released a long-term national energy strategy released in 2021, setting the objective of a tax of US$5 per metric ton of CO_2 starting in 2030, and other proposals have suggested a carbon tax of US$40 per metric ton of CO_2.

Chile’s new legal framework on climate change came into force in June 2022 and includes measures to achieve net carbon neutrality by 2030. The law requires Chile’s Ministry of the Environment to create an emissions mitigation plan with limits for each economic sector, and to specify GHG emission limits for a range of sources, based on a system of emission standards set by technology, sector or activity. Regulated entities that perform better than the standard for their sector will be required to have their surplus emission reductions certified, which may then be sold to and used by other regulated entities for compliance with their respective emissions standards.

Recent trends driving carbon markets in Latin America
Among the many factors driving the expansion of carbon markets, perhaps one of the most critical is the growth of low-carbon technologies financed and developed throughout Latin America. While governments across the region have offered incentives for production of renewable energy, not all carbon markets include renewable energy projects. As a result, while renewable energy projects remain a leading source of carbon credits, especially in voluntary markets, governments will need to incentivize other low-carbon technologies, such as carbon

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Carbon pricing instruments (CPIs) in force worldwide in 2021

Source: “Status and trends of compliance and voluntary carbon markets in Latin America” report, IETA

> Latin America has the potential to emerge as a leading hub of compliance and voluntary carbon market activity and low-carbon innovation in the region

capture, utilization and storage (CCUS), to increase the supply of high-quality credits in the region.

There is substantial CCUS potential in Latin America due to existing oil & gas development and additional production sources because oil & gas reservoirs offer geologic carbon storage potential. Due to high implementation costs and a scarcity of incentives, CCUS has yet to achieve commercial-scale success in the region. There is, however, optimism around coupling a carbon tax or offset credits with regulatory support to aid in promoting adoption of CCUS. Further, the oil & gas industry's prolonged presence in Latin America gives the region another critical advantage: a long record of reservoir characterization providing data for assessing suitable hydrocarbon reservoirs for geological CO2 storage.

Several companies are already pursuing Latin America's CCUS potential by piloting CCUS projects. Petrobras announced it is developing a new carbon sequestration project that will re-inject carbon dioxide into the subsea reservoir in Brazil's Libra oil field, to be implemented in 2024; and Ecopetrol will pilot a CCUS project in 2023 with the goal of capturing 1 million metric tons of CO2 from its refineries and storing the emissions at a gas-depleted reservoir.

Additionally, there is significant opportunity for the supply of carbon credits in connection with reforestation projects or avoided deforestation (REDD+) due to significant forest resources in the region. Carbon credits associated with REDD+ projects have a strong presence in Latin America. REDD+ projects providing carbon credits have been highlighted for the potential economic benefit they can provide to the often-marginalized communities that steward these forests.

There are challenges to be noted with respect to the monitoring and verification of carbon credits associated with such projects in Latin America. Credits generated from reforestation or avoided deforestation projects are subject to criticism for lack of regulatory oversight and relying on imprecise calculations with the potential to result in inaccurate accounting of these carbon credits. This uncertainty can jeopardize regional climate goals and the reliability of carbon markets generally. Market participants looking to rely upon carbon credits associated with REDD+ projects should conduct independent diligence and exercise caution in relying upon the verification of these credits.

Overall, there has been an increase in participation in Latin American carbon markets due to both the expansion of compliance and voluntary carbon markets, and ambitious climate goals established globally by governments and private actors, with the hydrocarbon industry leading the energy transition efforts in the region. Similarly, participation by oil & gas companies in emissions reduction will likely influence the advancement of future carbon markets in the region. Recent announcements by Latin American oil & gas companies suggest that demand will continue to surge for carbon credits. For example, Ecopetrol recently announced it is aiming for net-zero carbon emissions by 2050, targeting a 50 percent reduction in scope 1, 2 and 3 emissions from a 2019 baseline. Additionally, Ecopetrol sold its first million barrels of "carbon-neutral" oil (i.e., oil from which the emissions from the production, extraction and transportation are offset by carbon credits generated from renewable energy projects). As Latin American companies continue to advance their emissions reduction efforts, the growth of carbon markets in the region is likely to accelerate.

Tremendous potential for voluntary carbon market activity and innovation

Latin America has the potential to emerge as a leading hub of compliance and voluntary carbon market activity and low-carbon innovation, including expansion of REDD+ projects and accelerated CCUS investment in the region. The region's efforts to regulate GHG emissions demonstrate that carbon pricing has an important role to play in driving decarbonization in the region. As additional jurisdictions in Latin America move toward the implementation of carbon markets, market participants must educate themselves on the operation of carbon market mechanisms. Partnerships with and investment in private companies leading in the low-carbon technology space are likely to spur further development of carbon markets.

The future of US-Latin America trade relations: What can we achieve in the next few years?

From the Washington Consensus of the 1990s to the Biden administration's recently proposed Americas Partnership for Economic Prosperity, policymakers seem to have lost some ambition. Rather than lamenting what could have been, **Gregory Spak**, **Francisco de Rosenzweig**, **Earl Comstock** and **Brian Picone** offer an analysis of why previous failed initiatives may offer a way forward for trade in the Americas.

The Washington Consensus

The late 1980s and early 1990s were a time of change and hope for many Latin American countries. The region moved toward openness in their societies and economic policies, some of which became enshrined in new laws and constitutional reform. But expectations outpaced performance, and what followed was economic instability, short-term cycles of hyperinflation, recession and increases in public debt. Policymakers—and the International Monetary Fund (IMF)—searched for ways to stabilize the region and continue the trajectory toward open economies and societies.

The Washington Consensus was an economic, social and political approach to the problem, and it gained support among governments, development agencies, and institutions such as the IMF and World Bank. Economist John Williamson is credited with coining the term in 1989 when he described a list of ten policy reforms that he argued were universally agreed upon by US and regional policymakers as the most preferable to be implemented in Latin America.

Williamson's list of reforms distanced itself from the long-accepted policies of inflation tolerance and import substituting industrialization, and instead focused on "macroeconomic discipline, outward orientation and the market economy," with a particular emphasis on economic liberalization. The ten reforms included: fiscal discipline; reordering of public expenditure priorities; tax reform; liberalizing interest rates; creating competitive exchange rates; liberalizing trade; liberalizing inward foreign direct investment; privatization; deregulation; and legal security for property rights. While there has been much criticism and interpretation of this approach over the years, many describe the Washington Consensus as paradigm-shifting.

Since then, the term "Washington Consensus" has come to refer more generally to the international development strategies focusing on the goals of privatization, macro-stability and liberalization. It has also grown to develop an association with market fundamentalism, a concept that markets solve most economic problems on their own if left alone.

In the 1990s, almost all of the Central and South American countries adopted nearly all ten of the original reforms of the Washington Consensus. Some proponents of the approach have cited inflation control, increases in foreign investment, and increased fiscal stability as positive results of the implemented reforms.

71%

US trade with Latin America is dominated by trade with Mexico, approximately 71% of US trade with the region

> **While the Washington Consensus policies resulted in seven years of economic growth in the 1990s, the years that followed brought about a period of recession and stagnation**

Today, the Washington Consensus is generally regarded as having failed. Its policies did not improve poverty or employment rates in the region. Countries that followed the policies saw limited growth: From 1990 to 2002, Latin America had only a 2.4 percent average annual growth rate, with many countries experiencing a net decline in income per capita.

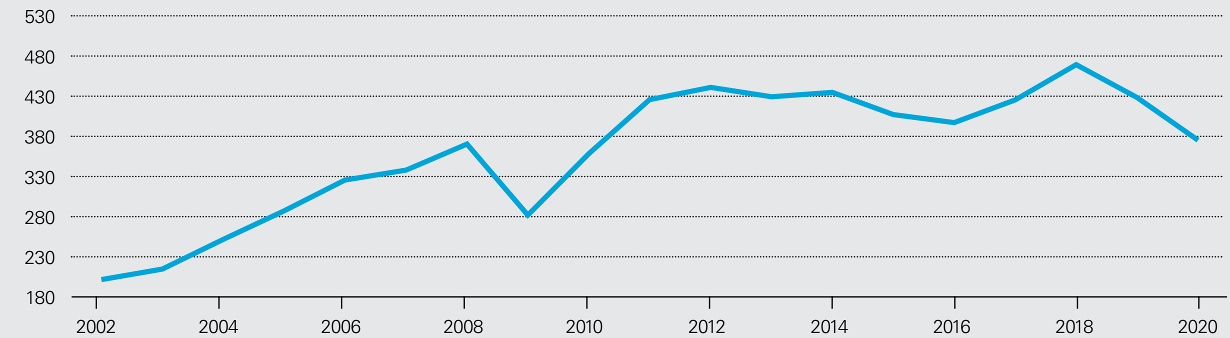
While the Washington Consensus policies had resulted in seven years of economic growth in the 1990s, the years that followed brought about a period of recession and stagnation. Countries in the region developed some of the worst wealth and income distribution disparities in the world, with the broad perception that any advancements were benefiting the elite few rather than society at large. As a result, disillusionment with the Washington Consensus spread, with some critics attributing the failure to US policymakers' lack of understanding of international development and developing countries, as well as the narrow development objectives that focused on increasing GDP.

The rise and fall of the FTAA

Trade played an important role in the notion of a more open Latin America on the principles of the Washington Consensus: It was no coincidence that support for a Free Trade Area of the Americas (FTAA) developed in the early 1990s. The first Summit of the Americas in Miami in 1994—the first post-Cold War meeting of American heads of state—signaled a joint effort to connect the economies of all the countries in the Americas into one free trade zone. As part of the FTAA agreement, barriers to trade and investment between the 34 countries in the region (excluding Cuba) were to be eliminated progressively, with a plan of making significant progress in the FTAA by 2000 and completing negotiations by 2005.

Despite an initial draft agreement in 2001, the project ultimately failed in 2005 at the Fourth Summit in Mar del Plata. As with any complex negotiating process, it would be difficult to pinpoint the reasons for failure, but there were certainly a number of difficult issues. Disagreements over controversial issues such as subsidies for agriculture and protections for intellectual property stalled the talks initially. Also, in the aftermath of the September 11, 2001 terrorist attacks on the United States, the US agenda was less focused on negotiations with Latin America. Some Latin American leaders expressed skepticism over the Bush administration's War on Terror and the invasion of Iraq. New leaders such as Hugo Chavez of Venezuela rose to power in the late 1990s and early 2000s, pursuing a more nationalist approach focused on greater autonomy in policy formulation. These and other forces led to a disappointing result: After years of negotiations, technical training, and general optimism in creating

United States imports from Latin America and the Caribbean, 2002 – 2020



Source: ECLAC on the basis of U.S. Census Bureau Dataweb.

a hemispheric free trade zone, the process came to an abrupt end.

If support for a comprehensive, hemispheric FTAA waned, enthusiasm for trade liberalizing agreements among smaller groups of countries within the hemisphere seemed to grow. The North American Free Trade Agreement (NAFTA) of 1994 committed the US, Canada and Mexico to a process of integration that was broad in scope. Through the MERCOSUR, the countries of the Southern Cone of South America (except Chile) formed their own FTAA that promised to go further toward a customs union. In the meantime, individual countries, such as Mexico, seemed to have embraced a policy of signing FTAs with individual countries or groups of countries, many of which saw an agreement with Mexico to be a prelude to increasing relations with the NAFTA countries. In this sense, the countries of the Western Hemisphere contributed to the explosion of regional and other preferential trading agreements developing—somewhat paradoxically—after the creation of the World Trade Organization and the commitment to multilateralism. (See graph below.)

Has the Biden administration made an impact so far?

The Biden administration has expressed interest in deepening economic cooperation among countries in the Americas, but this has yet to translate into meaningful trade outcomes. So far, the administration has prioritized resolving disputes with the European Union, reasserting US trade leadership in Asia-Pacific following the US withdrawal from the Trans-Pacific Partnership, and managing US trade and competition with China. The administration has not approached trade relations in the Americas with the same urgency, focusing on other regional challenges such as migration and immigration policy.

Moreover, and consistent with its predecessor, the administration has expressed skepticism about the benefits of free trade agreements (FTAs), particularly for US workers and the manufacturing sector. There is, therefore, little optimism that the US will pursue new bilateral or regional FTAs with Latin American partners—much less reinvigorate the hemispheric FTAA—in the near future. Instead, the administration has shown a preference for narrower, less binding arrangements and bilateral dialogs, even with close allies and trading partners such as the EU, the UK and Japan.

Enter the Americas Partnership for Economic Prosperity (APEP)

On June 8, 2022, at the Ninth Summit of the Americas, the Biden administration announced that it would seek to negotiate the APEP with countries in the Western Hemisphere. Representatives of 15 countries in the region, including Argentina, Brazil, Colombia, Mexico and Peru, attended the summit. The proposed scope and structure of the APEP would resemble that of the Indo-Pacific Economic Framework (IPEF) that the Biden administration is pursuing with Indo-Pacific countries, covering supply chains, clean energy, infrastructure and a small subset of trade issues, among other topics. The Biden administration intends to hold initial consultations with like-minded partners in the region over the coming months, with the goal of reaching agreement on the scope of the APEP and launching formal negotiations this autumn,

The Biden administration's five pillars of the APEP

1. Sustainable and inclusive trade:

"To better cooperate on customs facilitation, advance transparency and good regulatory practices, pursue high standards on the digital economy, responsibly support emerging technologies, build resilience in our energy and food supply chains, advance strong labor and environment standards, and incentivize corporate accountability and a race to the top to foster regional economic development."

2. Reinvigorating regional economic institutions and mobilizing investment:

The US proposes to work with partners "to pivot our public institutions and financing mechanisms to leverage far greater levels of private investment." This would involve "reinvigorat[ing] the hemisphere's regional economic institutions, such as the Inter-American Development Bank, including through reforms to drive climate ambition, social inclusion and private sector development…and ensure international financial and economic institutions adequately prioritize the region."

3. Making more resilient supply chains:

The US seeks to "work to create resilient supply chains," while prioritizing workforce development and taking steps to ensure that supply chains are "transparent and free of exploitative labor conditions."

4. Updating the basic bargain:

The US wishes to "explore how to broaden participation in the formal economy, including tax and anti-corruption measures, as well as cooperation and infrastructure investments in areas such as migration, education, health, unemployment and retirement, childcare and women's economic empowerment."

5. Creating clean energy jobs and advancing decarbonization and biodiversity:

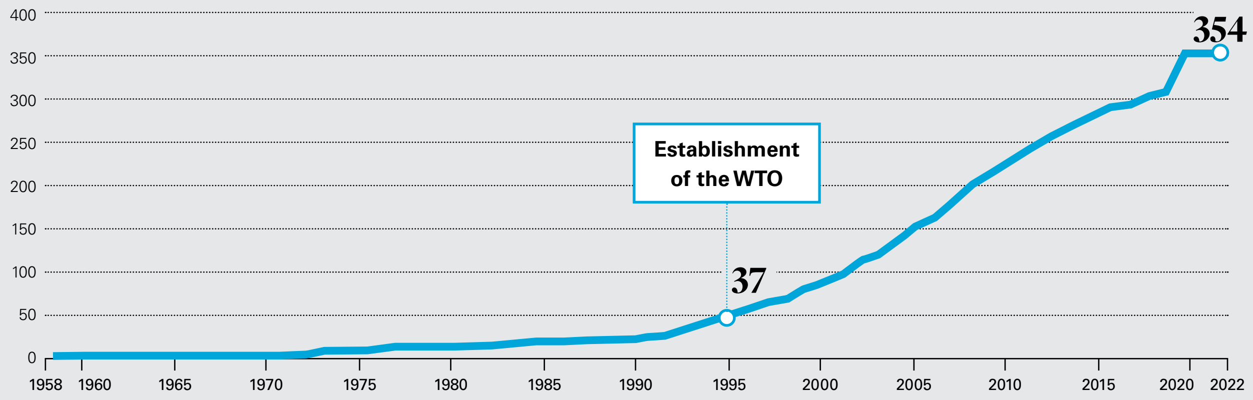
The US seeks to work with partners "to accelerate clean energy technology, more sustainable forest conservation and management, and low-emission and resilient agricultural practices." It also seeks to "deepen cooperation on technologies and best practices, mechanisms to increase public and private investment, and explore technical assistance to advance quality infrastructure and programming."

June 8 2022

The new Americas Partnership for Economic Prosperity (APEP) was announced on June 8, 2022 at the Ninth Summit of the Americas

Regional Trade Agreements (RTAs), 1958 – 2022

Cumulative number of RTSs in force



Source: WTO, Regional Trade Agreements Information System (RTA-IS)

and later opening the process up to other countries in hopes of garnering widespread support.

The APEP is not expected to involve tariff liberalization or other market access commitments, and the administration has indicated that it does not intend to submit it to Congress for approval. Administration officials have also proposed that the APEP use a flexible structure, allowing countries to choose the pillars they want to join, as opposed to requiring them to assume obligations under all five.

However, the administration has not yet announced whether any countries have agreed to participate in the initial consultations, and Latin American countries do not appear to be receiving the proposal with enthusiasm.

Rationale and prospects for the APEP

China has rapidly expanded economic ties with Latin America over the past two decades, becoming South America's largest trading partner, and has become a major source of foreign direct investment and lending in the region. These trends have increased the pressure on the administration to develop an economic and trade agenda that solidifies the US role as central in the region.

The APEP was modeled on the IPEF, with similar economic and geopolitical considerations. Among

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Regional Trade Agreements were in force as of March 2022

its objectives is the desire to counter China's growing influence in a region of critical importance to the US—the adoption of trade rules that reflect current US priorities—without committing the US to a comprehensive FTA.

The Biden administration also views the APEP as an opportunity to promote higher labor and environmental standards in the region, in line with recent trade agreements such as the US-Mexico-Canada Agreement (USMCA). But given the domestic political constraints placed on its scope, it will be challenging to ensure that the APEP appeals to a wide range of Latin American countries and has meaningful commercial benefits. The US has provided few details regarding the APEP's specific objectives, making it difficult to gauge the progress.

Key challenges and considerations for the negotiation of the APEP include:

- **Balancing inclusivity with high ambition.** The Biden administration wants to secure widespread participation in the APEP, while also ensuring that it includes high-standard commitments in politically sensitive areas such as digital trade, labor and the environment. Given the differing levels of development and divergent policy approaches in the region, this will be difficult to achieve. The administration has proposed to allow APEP participants to self-select the pillars they will join, which could broaden membership in the overall framework while allowing like-minded countries to pursue high-standard outcomes. However, the limited participation approach could greatly reduce the commercial significance of the APEP to a small group of like-minded countries that have already undertaken similar commitments to existing FTAs.

- **Exclusion of market access.** The decision of the US to exclude market access from the APEP will make it harder to achieve broad participation and high-standard commitments. In past trade agreements, the promise of duty-free access to the US market has been critical for securing commitments on labor, the environment, digital trade and other sensitive issues. Developing countries in Asia-Pacific are questioning the benefits of participation in the IPEF based on the same exclusion, and Latin American leaders are certain to follow suit. Though several countries in the region already enjoy preferential access to the US market through existing FTAs, these partners are unlikely to accept new trade obligations in the APEP absent clear and commensurate new benefits.

The Biden administration has indicated that it intends to make development financing available to participating countries as an incentive for participation in the APEP. However, few details are currently available on how these financing commitments would operate, the types of entities and projects that would be eligible, the amount of funding the US would make available, and conditions that may be attached. It is unclear whether the promise of new development financing would provide a sufficient incentive for countries to undertake new trade commitments. It is not clear how development financing would encourage countries to participate in the APEP's trade pillar, since countries themselves choose the pillars in which they participate.

- **Enforceability and effectiveness.** Market access commitments, which are excluded from the APEP, play an essential role in the enforcement of trade agreements: WTO and FTA dispute settlement mechanisms allow a complaining party to suspend market access concessions (typically by raising tariffs) where a dispute settlement panel finds that the respondent party has violated its obligations. Though the US intends for benefits other than market access, such as development financing, to attract participants to the APEP, such benefits are untested as a means of enforcing or encouraging compliance with trade commitments.
- **Durability of the APEP.** The Biden administration does not intend to seek congressional approval of the APEP, instead treating it as an executive agreement. While this approach avoids the delays and challenges associated with securing congressional approval, it raises questions as to the durability of US support for the APEP. Congress and future administrations may feel less committed to an executive agreement than one that is approved through the legislative process that requires bipartisan support and codifies certain trade commitments into law. Some negotiating partners may therefore question whether the US will remain committed to the APEP in the long term.
- **Geopolitics.** Given China's role as a major trading partner and source of investment in the region, many Latin American countries may wish to avoid the perception that the APEP is designed to counter or contain China, the region's major trading partner and investor. This may influence participation and the types of obligations that can be incorporated into the APEP, and may require flexibility on the part of the US.

Modest first step rather than a final destination

The US business community, including the National Foreign Trade Council, has expressed hope that the APEP will include binding and commercially meaningful commitments in areas such as customs and trade facilitation and digital trade, promoting deeper economic integration in the region. Such commitments could provide important commercial benefits by allowing more efficient movement of goods across borders, facilitating the continued growth of electronic commerce, and enabling international data transfers that are critical for many services industries and, increasingly, for the manufacturing sector. For these outcomes to be possible, the US will need to make a compelling case that the arrangement offers tangible benefits to regional partners with varying levels of economic development, beginning with a clarification of the APEP's objectives and concessions.

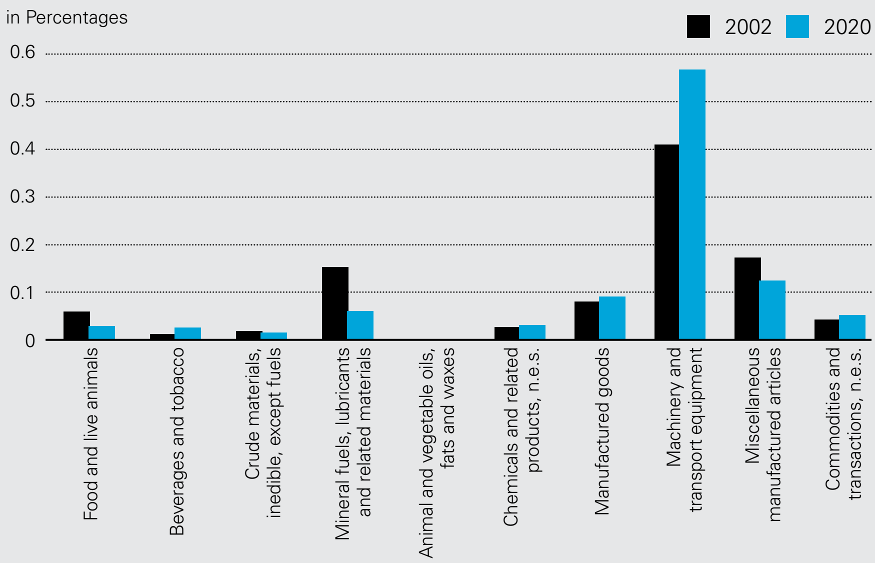
The administration may need to recalibrate certain expectations, including whether standards and enforcement mechanisms derived from the USMCA are achievable in the context of an agreement that lacks market access commitments. It will also need to work with partners to find creative solutions for dispute settlement and the legal architecture of the APEP. Until the obligations and benefits are clarified, many partners in the region are likely to view the APEP as a modest first step toward more formal and comprehensive trade arrangements, rather than a final destination.

14.7%

Mexico is one of US top three trade partners, accounting for 14.7% of US total trade in 2021

Source: ECLAC

United States imports from Latin America and the Caribbean, by major industry category, 2002, 2020



Source: ECLAC on the basis of U.S. Census Bureau Dataweb.

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