

THE ANTI-BRIBERY AND
ANTI-CORRUPTION
REVIEW

TENTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

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PREFACE

The covid-19 pandemic has had a monumental and disruptive effect on practically all aspects of business, politics, law and daily life in nearly every corner of the globe. For companies conducting cross-border business, and legal practitioners who advise them, corruption remains a substantial risk area. And with national governments engaging in large-scale economic stimulus programmes and contracting on an emergency basis with a wide range of suppliers of critical goods and services, the opportunities for fraud, corruption and abuse are replete. The current global health crisis unfolded onto a world stage that is dynamic and roiling with anti-corruption activity and developments. This tenth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including a new chapter covering Portugal. The comprehensive scope of this edition of the Review mirrors that dynamism.

Over the past two years, countries across the globe have continued to investigate and prosecute a range of corruption cases – many involving heads of state and senior officials – strengthen their domestic anti-bribery and anti-corruption laws, and adopt important new law enforcement policies and guidance documents, though tumultuous international relations, rising economic competition and the effects of the pandemic are combining to threaten international cooperation and the progress of cross-border investigations more generally.

2020 saw French-headquartered Airbus SE reach a US\$3.9 billion coordinated corporate bribery and export controls resolution with authorities in France, the United Kingdom and the United States. The wide-ranging allegations involved alleged bribery of government officials in more than a dozen countries, as well as US export controls-related offences, and now other jurisdictions from Ghana to Malaysia are pressing forward with their own investigations. At the same time, the 1MDB scandal continued to play out, with still further US asset forfeiture actions, criminal charges against a major US Republican fundraiser for allegedly acting as an unregistered foreign agent in an attempt to illegally lobby the Trump administration to drop its probe into the 1MDB corruption scandal and an appeal by former Malaysian prime minister Najib Razak against his convictions on bribery and money-laundering charges and the resulting 12-year prison term. And in Brazil, which has for many years been a hotbed of anti-corruption investigations, President Jair Bolsonaro took the controversial step of ending his country's long-running Car Wash probe, following the resignation of his justice minister who, as judge, had previously presided over the probe.

Given the political turmoil and the global health crisis still confronting us in the remainder of 2021 and into 2022, this book and the wealth of country-specific learning that it contains will help guide practitioners and their clients when navigating the perils of

corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Washington, DC

November 2021

MEXICO

Jonathan Edward Adams and Milka López¹

I INTRODUCTION

In recent years, Mexico has increased its efforts to combat corruption; however, recent surveys still show a lack of sufficient progress to effectively root out graft in comparison to other Latin American countries. The 2021 Capacity to Combat Corruption Index published by Americas Society/Council of the Americas (AS/COA) and consultancy firm Control Risks show the foregoing, where the country with the highest overall score is Uruguay, and Mexico ranked 11th out of 15 Latin American countries.²

As a result of the enactment of the constitutional anti-corruption amendment of May 2015, Mexico's primary anti-corruption body was created, the National Anti-Corruption System, which focuses on providing the legal framework for oversight of public officials and private parties in the anti-corruption and anti-bribery context as well as of the audit and control of public funds. The National Anti-Corruption System coordinates the federal, state and municipal levels to prevent, detect and prosecute corruption offences. The centrepiece of the constitutional anti-corruption amendment was the General Law of Administrative Responsibilities, which now punishes both public officials and private parties, including both individuals and legal entities, for any bribery of public officials, whether at the federal, state or municipal levels, and in the public procurement context or otherwise. This key element and the advent of corporate criminal liability in 2016 have been the most notable anti-corruption developments in Mexico's history.

Although the federal laws to implement the National Anti-Corruption System entered into full force in July 2017, Mexico has been struggling to fully implement these provisions at the federal and state levels. First, at the time of writing, the Federal Court of Administrative Justice, with jurisdiction over serious administrative offences, lacks one of its members and a regional chamber has assumed jurisdiction to sanction acts of corruption. In addition, the appointment of 15 federal anti-corruption judges to the specialised chambers is still pending and, in March 2021, the Justice Commission of the Senate approved a resolution to eliminate these positions under austerity arguments; the approval of the plenary session of the Senate is needed to completely reduce their functions. If approved, this measure will

1 Jonathan Edward Adams is a partner and Milka López is an associate at Baker McKenzie. The authors acknowledge the research assistance of Michelle Puga, law clerk at Baker McKenzie.

2 Brian Winter and Geert Aalbers, 'The 2021 Capacity to Combat Corruption (CCC) Index', accessed 28 August 2021, www.controlrisks.com/-/media/corporate/files/campaigns/ccc/ccc_2021_report_english.pdf.

clearly have a negative effect on the National Anti-Corruption System.³ Second, at the local level, two out of 32 states have not yet appointed the specialised anti-corruption prosecutor.⁴ More importantly, after three years of his term, President Andrés Manuel López Obrador has significantly ignored the National Anti-Corruption System, despite coming to power vowing to lead a sweeping transformation against corruption, impunity and inequality.

Despite these shortcomings, there have been positive developments in Mexico's efforts to combat corruption. In January 2020, the Coordinating Committee of the National Anti-Corruption System passed the National Anti-Corruption Policy, outlining strategic guidelines against corruption.⁵

This chapter provides an overview of Mexico's domestic anti-corruption framework, including criminal, civil and administrative legislation. It discusses the elements of anti-bribery legislation in various contexts, and examines related criminal offences. It closes with a section dedicated to a forecast for legislative developments and other final thoughts.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Criminal law

Criminal liability

Following the constitutional anti-corruption amendment of 2015, in June 2016, the Federal Congress passed an amendment to the Mexican Federal Criminal Code and the National Code of Criminal Procedures,⁶ to establish direct corporate criminal liability for certain white-collar crimes, including bribery. As a result, legal entities are now liable for crimes when (1) the offences are committed in their name, on their behalf, for their benefit, or using means provided by them; and (2) when the entity did not have 'proper controls' in place.⁷ Although some people believe that the lack of proper controls should be an element to be proven by the criminal authorities in prosecution, others believe that, in practice, the commission of a crime is prima facie evidence of a lack of controls, which would need to be rebutted by evidence of a compliance programme. Based on the foregoing, private parties, including both individuals and legal entities, can be criminally liable for bribery of public officials pursuant to the Mexican Federal Criminal Code and most of, if not all, local criminal codes.

3 Gina Hinojosa and Maureen Meyer, 'The Future of Mexico's National Anti-Corruption System: The Anti-Corruption Fight Under López Obrador', August 2019, www.wola.org/wp-content/uploads/2019/08/The-National-Anti-Corruption-System-under-AMLO.pdf.

4 Secretaría Ejecutiva SNA. Conformación de la estructura operativa de los Sistemas Locales Anticorrupción [Composition of the operational structure of the Local Anti-Corruption Systems], 20 August 2021, accessed 28 August 2021, www.sesna.gob.mx/wp-content/uploads/2021/08/Avance_Estructura_Operativa_SLA-20Ago2021.pdf.

5 Política Nacional Anticorrupción [National Anti-Corruption Policy], Executive Secretariat of the National Anti-Corruption System, accessed 27 August 2020, www.sesna.gob.mx/politica-nacional-anticorrupcion/.

6 Federal Official Gazette, 16 June 2016, www.dof.gob.mx/nota_detalle.php?codigo=5441763&fecha=17/06/2016.

7 National Criminal Procedure Code, Article 421.

Bribery of domestic officials offences

Mexico's Federal Criminal Code has provided for bribery of public officials since its first enactment in 1931,⁸ covering bribery of federal and some state public officials. Similarly, state criminal codes prohibit bribery of state and local public officials.

Article 222 of the Federal Criminal Code defines bribery and provides that bribery can be committed both by public officials, who solicit or receive a bribe, and by private individuals, who offer or pay to corrupt a public official. Mexico's Federal Criminal Code prohibits:

- a* public officials from, directly or indirectly, soliciting or receiving unduly for the public official or another person, money or any other benefit, or accepting a promise in exchange for an act or omission in the performance of the public official's functions; and
- b* private parties from promising, offering or giving, to any public official, any benefit in exchange for an act or omission in the performance of the public official's functions.⁹

Definition of domestic public official

The Mexican Federal Criminal Code has a broad definition of 'public official'. This definition includes any individual who has employment, position or charge of any nature in:

- a* the central Federal Public Administration or in the Mexico City Public Administration;
- b* decentralised organisms;
- c* majority state-owned companies;
- d* organisations or entities that have been assimilated to majority state-owned companies; public trusts;
- e* state-owned enterprises;
- f* autonomous constitutional bodies;
- g* federal Congress;
- h* federal judiciary; and
- i* entities that manage federal economic resources.¹⁰

In addition, the relevant anti-bribery provisions of the Federal Criminal Code also apply to state governors, representatives, officials in local legislatures and magistrates in local courts.

Gifts, gratuities, travel, meals and entertainment

Mexican criminal law does not establish quantitative or qualitative limitations on hospitality expenses. In principle, a public official may not receive any gifts, gratuity, meal or entertainment for his or her own benefit. Whether a hospitality expense should be considered bribery will need to be determined on a case-by-case basis, taking into account all the facts and circumstances surrounding the case. There is no *de minimis* exception to the prohibition on gifts to public officials, so all hospitality must be provided to the represented government entity and not to the public official personally.

8 Criminal Code for the District and Federal Territories, www.diputados.gob.mx/LeyesBiblio/ref/cpf/CPF_orig_14ago31_ima.pdf, accessed 27 August 2020.

9 Federal Criminal Code, Article 222.

10 Federal Criminal Code, Article 212.

Penalties

The Mexican Federal Criminal Code establishes the same penalties for both public officials and private parties, including both individuals and legal entities that corrupt public officials. Penalties for public officials and private parties include up to 14 years' imprisonment,¹¹ fines of up to a maximum of 150 day-fines,¹² removal from public office, if applicable, up to 20 years' prohibition from holding public office and debarment from participating in public procurement processes.¹³

Moreover, if the perpetrator is an elected public official or a public official whose appointment requires ratification by the Mexican Congress, penalties can increase by up to one-third,¹⁴ and by up to half if the public official is a member of a police, customs or immigration agency.¹⁵

In addition, if a court determines that an individual used the legal entity as an alter ego, it may impose suspension of the entity's activities or even the dissolution of the entity.¹⁶

Commercial bribery offences

In Mexico, commercial bribery per se is not a crime. However, although in practice we are not aware of it ever having been done, crimes such as fraud, forgery, theft and abuse of trust, which is similar to embezzlement,¹⁷ could be charged in cases of commercial bribery.

Plea agreements

In Mexico, the National Criminal Procedure Code provides for alternative dispute resolution methods for certain low-level crimes, such as settlement agreement, conditional suspension,¹⁸ and summary proceeding.¹⁹ A settlement agreement is an agreement in a criminal case between the defendant and the victim whereby the defendant agrees to fulfil certain requirements in exchange for extinguishing the criminal action.²⁰ Similarly, for a conditional suspension, the defendant agrees on a proposal to repair the damage caused to victims and to fulfil certain requirements.²¹ Finally, with a close resemblance to a plea agreement, Mexico's criminal system provides for an early termination of the criminal prosecution, which can significantly reduce imprisonment penalties for up to a half of the minimum prison sentence.²²

11 Federal Criminal Code, Articles 222.

12 Day-fines are based on the offender's daily personal net income.

13 Federal Criminal Code, Article 212.

14 Federal Criminal Code, Article 212.

15 Federal Criminal Code, Article 213*bis*.

16 Federal Criminal Code, Article 11.

17 Federal Criminal Code, Articles 386, 243, 367, 382.

18 National Criminal Procedure Code, Article 184.

19 National Criminal Procedure Code, Article 185.

20 National Criminal Procedure Code, Articles 186 and 189.

21 National Criminal Procedure Code, Article 191.

22 National Criminal Procedure Code, Article 202.

ii Administrative law

Bribery of domestic officials offences

The General Law of Administrative Responsibilities (GLAR) mainly targets domestic bribery in Mexico. This law punishes public officials and private parties, including both individuals and legal entities, for any bribery of public officials, whether in the federal state or municipal public procurement context or otherwise. Specifically, the GLAR prohibits both:

- a* public officials from, directly or indirectly, soliciting, receiving or attempting to receive unduly any benefit not included in their salary, including money, securities, property, real estate, donations, services and employment, among other things, by reason of their duties, for the public official, their spouse, relatives, or any individual or entity with whom the public official has a professional, labour, or business relationship, or individuals or legal entities related to, regulated by, or supervised by, the public official;²³ and
- b* private parties, including both individuals and legal entities, from directly or indirectly, promising, offering or giving, to one or more public officials, any undue benefit, in exchange for an act or omission in the performance of any public official's functions; or to exert the real or apparent influence of a public official for the purpose of securing or retaining an improper advantage, regardless of the acceptance or receipt of the benefit, or the outcome.²⁴

Definition of domestic public official

The GLAR defines public officials as the individuals who have employment, position or charge, at the federal and state level, as provided in Article 108 of the Political Constitution of the United Mexican States.²⁵ The definition in the Mexican Constitution includes those elected by popular vote; members of the federal judiciary; and any individual that has an employment, position or charge of any nature in the federal Congress, the federal public administration, and the autonomous constitutional bodies.

Penalties

Penalties for public officials include up to 90 days' suspension from their employment in public office, removal of public office, double disgorgement, up to 20 years' debarment from holding public office or participating in public procurement processes, plus damages.²⁶

Both individuals and legal entities can be sanctioned by double disgorgement or, even if there was no proven tangible benefit, sanctions can include fines of up to the equivalent of US\$670,000²⁷ or US\$6 million, respectively; up to 10 years' debarment from participating in public procurement processes; and damages. In addition, sanctions for legal entities may include suspension of the entity's activities or even dissolution of the entity.²⁸

Sanctions can be lowered for private entities when high-level corporate executives choose to voluntarily self-disclose potential violations, cooperate in investigations by providing

23 GLAR, Article 52.

24 GLAR, Article 66.

25 GLAR, Article 3(XXV).

26 GLAR, Articles 78 and 79.

27 Throughout the chapter the exchange rate is 20 Mexican pesos to US\$1.

28 GLAR, Article 81.

relevant information and compensate for damage caused. Aggravating circumstances include knowledge of company executive management of individuals involved in misconduct, but do not voluntarily disclose the underlying conduct.²⁹

Gifts, gratuities, travel, meals and entertainment

In Mexico, gifts to government officials are strictly prohibited by Mexican law, and there is no *de minimis* threshold. Public officials and employees, their spouse, relatives, individuals or entities with whom the public official has a professional, labour or business relationship, or partners or corporations related to, regulated by, or supervised by a public official, are prohibited from soliciting, receiving, attempting to receive, or accepting, gifts, presents or anything of value given because of their official position or from prohibited sources, including anyone who had or has business with the federal government.³⁰ Unsolicited gifts, presents or anything of value, therefore, must be reported and handed over to the relevant authorities.

Commercial bribery

Commercial or private-to-private bribery is not specifically proscribed by Mexican administrative anti-bribery provisions. However, the GLAR sanctions collusion between private parties and defines it as any agreement or arrangement between competitors, in public procurement processes, to obtain any undue benefit or cause loss to the public treasury.³¹

Public official's participation in commercial activities

Public officials are not forbidden from participating in commercial activities or in any other activities while serving as a public official, provided these activities do not conflict with their public functions.

Political contributions by foreign citizens or companies

Article 33 of the Mexican Constitution strictly prohibits foreign individuals and companies from participating in politics in Mexico. The Mexican public is very sensitive to foreign influences in politics, so multinationals would be well advised to steer clear of involvement in this area, including any political contributions.

Administrative and criminal enforcement

For corruption cases under the GLAR, the enforcement authorities are:

- a* the Secretary of Public Administration and local entities at state level;
- b* internal control boards of each government entity;
- c* the Superior Audit Office of the Federation and state superior auditing entities;
- d* the Federal Court of Administrative Justice and local courts;
- e* the Supreme Court of Justice, Mexico City Superior Court of Justice and state courts;
- f* the Federal Council of the Judiciary and corresponding local entities; and
- g* the responsibility units of state-owned productive enterprises.³²

29 GLAR, Article 81.

30 Federal Official Gazette, 12 November 2019, www.dof.gob.mx/nota_detalle.php?codigo=5578665&fecha=12/11/2019.

31 GLAR, article 70.

32 GLAR, Article 9.

Federal judiciary officials are governed by their own regulations, which are similar to the GLAR but enforced by the Council of the Federal Judiciary.³³

Internal control bodies, the Secretary of Public Administration and local agencies are responsible for investigating, settling and ruling on minor administrative offences and serious administrative offences.³⁴ The Superior Audit Office of the Federation and the superior local auditing entities are responsible for investigating and settling serious administrative offences.³⁵ The Federal Court of Administrative Justice and state courts are responsible for ruling on sanctions for serious administrative offences committed by either public officials or private parties.³⁶

For corruption crimes committed by legal entities and individuals, the enforcement authorities are the police, attorney general's offices and general prosecutor's offices, at the federal and state level.³⁷

Defences

Demonstrating the existence of adequate procedures and a compliance structure in place at the time of the commission of the bribery offence can be a mitigating factor for determining sanctions under the Federal Criminal Code and reduce sanctions by up to 25 per cent. In practice, we believe it can also influence the determination on the part of the prosecutor of whether or not the company had 'proper controls' in place, and so could be an affirmative defence to potentially bar any liability at all.

Pursuant to the GLAR, the existence of an adequate integrity policy or a compliance programme is a mitigating factor for reducing sanctions, as long as it has:

- a* a clear and complete organisational and procedures manual that clearly defines the functions and responsibilities of each department of the company, and clearly specifies the chains of command and leadership for each corporate structure;
- b* a code of conduct that is duly published and made known to every person in the organisation and that has systems and mechanisms for effective implementation;
- c* adequate and effective control, monitoring and audit systems that ensure compliance on a continuous and periodic basis throughout the organisation;
- d* adequate whistle-blowing systems both for internal reports and for reporting to authorities, as well as disciplinary processes with clear and specific consequences for those who act contrary to internal standards or to Mexican legislation;
- e* adequate systems and processes for training on ethics standards;
- f* human resources policies to avoid hiring people who could be a risk to the integrity of the company. These policies cannot enable discrimination based on ethnicity, nationality,

33 Acuerdo General del Pleno del Consejo de la Judicatura Federal, que establece las disposiciones en materia de responsabilidades administrativas, situación patrimonial, control y rendición de cuentas. [General Resolution of the Plenary Session of the Council of the Federal Judiciary determining the provisions related to administrative responsibilities, assets situation, control and accountability], 7 December 2018, accessed on 28 August 2021, www.cjf.gob.mx/organosauxiliares/contraloria/resources/legislacion/AGPCJFEDMRASPCyRC_20181207_Sin_Reformas.pdf.

34 GLAR, Article 10.

35 GLAR, Article 11.

36 GLAR, Article 13.

37 National Criminal Procedure Code, Article 20.

gender, age, disabilities, social status, health status, religion, political opinion, sexual orientation, marital status or any other that compromises human dignity or curtails human rights and liberties; and

g mechanisms to ensure transparency and publication of interests (avoiding conflicts of interest) at all times.

III ENFORCEMENT: DOMESTIC BRIBERY

The current administration of President Andrés Manuel López Obrador has launched numerous probes into both public officials and private individuals and legal entities related to corruption and bribery offences. Emilio Lozoya Austin, former Pemex CEO, and Alonso Ancira, director of steel company Altos Hornos de México, are part of an anti-graft probe under suspicion of bribery and money laundering.³⁸

Perhaps the case of utmost importance is the ongoing probe initiated by the Mexican General Prosecutor's Office into former Pemex CEO Emilio Lozoya Austin, for bribery, criminal association and money laundering charges related to US\$10.5 million bribes he allegedly received between 2009 and 2012 from Brazilian construction giant Odebrecht, in exchange for securing government contracts,³⁹ in addition to a purchase of a property allegedly made with bribes paid by steel company Altos Hornos de México.⁴⁰ Since the unravelling of the corruption scandal in late 2016, Mexico was the Latin American country to engage in the lowest level of investigations and enforcement against the alleged participants. Throughout 2017 and 2018, the investigation conducted by the then General Attorney's Office during the administration of former President Enrique Peña Nieto was delayed by Mexico's 2018 presidential elections and stalled until recently. The General Prosecutor's Office reopened the case and issued arrest warrants against Emilio Lozoya and some of his relatives for bribery, corruption and money laundering charges. It was not until 2020, however, that Lozoya was arrested in Spain in February 2020 on Mexican corruption charges and was extradited in July 2020 to stand trial on corruption charges and money laundering linked to Brazilian construction giant Odebrecht. In August 2020, a leaked 63-page deposition from Lozoya revealed details of alleged rampant corruption among high-ranking politicians including former presidents Enrique Peña Nieto, Felipe Calderón and Carlos Salinas de Gortari, cabinet members, opposition lawmakers, political aides, businessmen and a journalist, aimed at providing evidence to prove his innocence of graft charges.⁴¹ Most, if not all, of them have already publicly rejected his accusations. However, these allegations have rocked Mexico's

38 'Alonso Ancira rechazará extradición a México' [Alonso Ancira refuses extradition to Mexico], *Excelsior*, 1 August 2019, accessed 7 August 2019, www.excelsior.com.mx/nacional/alonso-ancira-rechazara-extradicion-a-mexico/1327859.

39 Espino, Manuel, Lastiri, Diana. 'Lozoya, autor material del lavado en Odebrecht: Fiscalía' [Lozoya, perpetrator of money laundering in Odebrecht case: Prosecution Office], *El Universal*, 19 July 2019, accessed 7 August 2019, www.eluniversal.com.mx/nacion/politica/lozoya-autor-material-del-lavado-en-odebrecht-fiscalia.

40 Monroy, Jorge, 'Acusan a Lozoya de cohecho y dos ilícitos más' [Lozoya charged of bribery and two other offences], *El Economista*, 17 July 2019, accessed 7 August 2019, www.economista.com.mx/politica/Acusan-a-Lozoya-de-cohecho-y-dos-ilicitos-mas-20190717-0006.html.

41 Barrera, Adriana 'Ex-chief of Mexico's Pemex accuses former presidents, officials of graft', *Reuters*, 20 August 2020, accessed 24 August 2020, www.reuters.com/article/us-mexico-corruption/ex-chief-of-mexicos-pemex-accuses-former-presidents-officials-of-graft-idUSKBN25G0IT.

political class, adding fuel to the widest-reaching corruption probe in the country's modern history,⁴² and becoming the centrepiece of Lopez Obrador's drive to expose the rampant corruption in past governments before he took office in late 2018.⁴³ Some critics, however, have noted that this probe was likely to help López Obrador as he faces the most difficult moments of his term, when more than 250,000 people have died from covid-19. Covid-19 deaths continue to mount in Mexico, and the economy shrank by over 8 per cent in 2020, the most severe contraction in decades.⁴⁴ The economy is expected to grow by over 6 per cent in 2021.

Amid this widening scandal, a former presidential candidate, Ricardo Anaya, was accused by the General Attorney's Office of allegedly participated in a bribery scheme to approve the energy reform that allowed investment from private companies in the Mexican energy sector.⁴⁵

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Criminal law

Criminal liability

Bribery of foreign public officials is prohibited by Article 222*bis* of the Federal Criminal Code. Both individuals and legal entities are subject to criminal liability for foreign bribery.

Bribery of foreign officials offences

Bribery of foreign public officials is defined as giving, directly or indirectly, anything of value to a foreign public official, to influence him or her to act or refrain from acting in relation to functions inherent to his or her position, for the purpose of obtaining or retaining an undue business advantage in international commercial transactions.⁴⁶

Definition of foreign public official

A foreign public official is defined as any individual holding public employment, commission, or office in the legislative, executive or judicial branch; or in any public entity, including state-owned companies, of a foreign country, and any official or agent of a public international agency or organisation.⁴⁷

42 Montes, Juan and José de Córdoba, 'Former Pemex CEO's Allegations Rock Mexico's Political Class', *Wall Street Journal*, 20 August 2020, accessed 25 August 2020, www.wsj.com/articles/former-pemex-ceos-allegations-rock-mexicos-political-class-11597964209.

43 'Mexican president says money stolen by corrupt officials must be returned', Reuters, 20 August 2020, accessed 25 August 2020, www.reuters.com/article/us-mexico-corruption/mexican-president-says-money-stolen-by-corrupt-officials-must-be-returned-idUSKBN25G2BI.

44 www.bloomberg.com/news/articles/2021-08-25/mexico-posts-solid-second-quarter-growth-on-economy-s-reopening.

45 Mexico: President foe who fled allegedly got \$500,000 bribe, *Washington Post*, 25 August 2021, accessed 28 August 2021, www.washingtonpost.com/world/mexico-president-foe-who-fled-allegedly-got-500000-bribe/2021/08/25/6627f80a-05ef-11ec-b3c4-c462b1edcf8_story.html

46 Federal Criminal Code, Article 222 *bis*.

47 Federal Criminal Code, Article 222*bis*.

Gifts, gratuities, travel, meals and entertainment

Mexican criminal law does not provide for guidance on gifts, hospitality and entertainment for the benefit of foreign public officials.

Penalties

Sanctions for individuals can include fines of up to a maximum of 150 day-fines, up to 14 years' imprisonment,⁴⁸ and up to 20 years' debarment from participating in public procurement processes and from holding public office.⁴⁹ Legal entities can be sanctioned by up to six years' debarment from contracting with any federal public authority, coupled with a fine of up to a maximum of 1,000 day-fines.⁵⁰ Additionally, if a court determines that an individual was effectively using the company as an alter ego, the court may impose the suspension of the company's activities or even its dissolution.⁵¹

ii Administrative law

Bribery of foreign public officials offences

Bribery of foreign public officials is not explicitly prohibited by the provisions of the GLAR.

Definition of foreign public official

There is no definition of foreign public official under Mexican administrative law.

Gifts, gratuities, travel, meals and entertainment

There are no administrative rules governing gifts, gratuities, travel, meals and entertainment for the benefit of foreign public officials.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations

In Mexico, the provisions of the Commercial Code,⁵² the Federal Tax Code⁵³ and the General Law of Business Corporations⁵⁴ require the maintenance of accurate and complete corporate books and records. Publicly traded or listed companies are also subject to laws regarding periodic financial reporting and disclosure, and avoidance of self-dealing and insider trading. Financial institutions are subject to additional laws regarding their fiduciary duties toward the parties whose assets they hold.

In addition, the 'books and records' offences under the Federal Tax Code are as follows:

- a* failing to keep an accounting system;
- b* failing to keep a required book or register, or failing to maintain internal inventory control;

48 Federal Criminal Code, Articles 222 and 223.

49 Federal Criminal Code, Article 212.

50 Federal Criminal Code, Article 222*bis*.

51 Federal Criminal Code, Article 11*bis* and 222*bis*.

52 Commercial Code, Article 16(III).

53 Federal Tax Code, Article 28.

54 General Law of Commercial Companies, Article 158(III).

- c* incomplete, inaccurate or false record-keeping; and
- d* failing to demonstrate the existence of transactions covered by fake invoices.⁵⁵

Sanctions can include fines of up to 75 per cent of the value of the fake invoice.⁵⁶ Furthermore, if individuals or legal entities are also sentenced for domestic or foreign bribery, these fines may increase by up to 150 per cent of the amount of bribes paid.⁵⁷ Taxpayers can be also sanctioned by up to three years' imprisonment for:

- a* keeping a double set of books of accounting records;
- b* concealing part of all the accounting books or records; and
- c* declaring false or inaccurate information concerning accounting, tax or social transactions.⁵⁸

ii Money laundering laws and regulations

The Federal Criminal Code strictly prohibits money laundering.⁵⁹ Sanctions include up to fifteen years' imprisonment and fines of up to a maximum of 5,000 day-fines. The Banking Law governs anti-money laundering efforts in the banking context. The Federal Law for the Prevention and Identification of Transactions with Funds from Illicit Sources (the AML Law), for its part, aims to stop money laundering in the non-banking sectors of the economy. Pursuant to the AML Law, high-risk activities, also called vulnerable activities, are subject to compliance with specific obligations if they exceed specific threshold amounts established by the AML Law. Vulnerable activities include the following:

- a* lottery or gambling activities;
- b* service card, credit card or other prepaid value card transactions;
- c* transactions with travellers' cheques;
- d* consumer loans, guarantees, credit or loans;
- e* construction, development or brokerage services involving real estate;
- f* sale of precious metals, stones or jewellery;
- g* auctions or sale of works of art;
- h* sale of automobiles;
- i* armouring services of vehicles or protection of premises;
- j* professional activities involving the transportation and custody of cash and valuables;
- k* certain professional services;
- l* services of public attestors;
- m* donations;
- n* customs brokerage services;
- o* creation of rights over real estate; and
- p* exchange of virtual assets via electronic platforms.⁶⁰

55 Federal Tax Code, Article 83(I)(II)(IV)(XVIII).

56 Federal Tax Code, Article 84(I)(II)(III)(XVI).

57 Federal Tax Code, Article 84.

58 Federal Tax Code, Article 111(II)(III)(VIII).

59 Federal Criminal Code, Article 400 *bis*.

60 AML Law, Article 17.

Additionally, financial institutions are required to notify and maintain all information and documentation related to the participants and beneficiaries of the transactions involving vulnerable activities.⁶¹

Despite the foregoing, Mexico has been ranked as the 61st riskiest country for money laundering and terrorist financing, among 203 countries, with an overall risk score of 5.09 out of 10, where 10 equals maximum risk, according to the 2020 AML Index recently released by the Basel Institute of Governance.⁶²

iii Prosecution

The Financial Intelligence Unit of the Secretary of Finance and Public Credit, Mexico's anti-money laundering watchdog, is responsible for investigating and prosecuting money laundering and terrorism financing, and overseeing compliance with the obligations set forth in the AML Law. Criminal prosecution requires that the Financial Intelligence Unit exercises its investigative powers and subsequently reports the potential misconduct to the General Prosecutor's Office to initiate the criminal prosecution of money laundering offences.⁶³

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

There is no evidence of actual prosecutions or convictions for foreign bribery and associated offences.⁶⁴

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Mexico is a member of the Organisation for Economic Co-operation and Development (OECD), the United Nations and the Organization of American States. Mexico is a signatory to the OECD Anti-Bribery Convention, the United Nations Convention against Corruption and the Inter-American Convention against Corruption.

VIII LEGISLATIVE DEVELOPMENTS

Relevant developments include the increased prosecution of administrative and criminal white-collar crimes by the General Prosecutor's Office, the Secretary of Public Administration and the Financial Intelligence Unit. In addition, the recent enactment of the Federal Republican Austerity Law that regulates and provides for austerity measures to curtail government spending in an effort to curb social inequality, corruption, greed and to reduce waste of national assets and resources, coupled with increasing efforts against tax evasion and tax fraud, and the launch of a whistle-blowing platform hosted by the Secretary of Public Administration, are of utmost importance. Furthermore, early last year,

61 AML Law, Article 15.

62 Basel AML Index 2021: 10th Public Edition Ranking money laundering and terrorist financing risks around the world, Basel Institute of Governance, September 2021, accessed on 25 October 2021, <https://baselgovernance.org/sites/default/files/2021-09/>

63 Federal Criminal Code, Article 400 *bis*.

64 OECD. Implementing the OECD Anti-Bribery Convention- Phase 4 Two-Year Follow Up Report: Mexico, 12 March 2021, accessed on 28 August 2021, www.oecd.org/daf/anti-bribery/mexico-phase-4-follow-up-report.pdf.

the Coordinating Committee of the National Anti-Corruption System passed the National Anti-Corruption Policy, which outlines forty public policy priorities to guide Mexico in its fight against corruption.⁶⁵

Despite these developments, there have also been shortcomings. As of this writing, the appointment for the 18 federal anti-corruption judges of the Federal Court of Administrative Justice is still pending. In November 2019, President López Obrador's administration proposed three nominees to fill the Third Section of the Federal Court of Administrative Justice's Supreme Chamber vacancies, so that they could evaluate and propose the remaining 15 nominees to fill the regional specialised chamber vacancies. Paradoxically, his administration is seeking to reduce or eliminate these seats as part of its austerity measures.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

The Mexican Data Protection Law has become one of utmost relevance. During the last years, Mexico's data protection watchdog has become very active in pursuing enforcement actions and thus sanctions for non-compliance with the Mexican Data Protection Law has increasingly being applied in Mexico.

In addition, we expect that the recent National Asset Forfeiture Law that overhauls forfeiture of assets proceeding from illicit activities, including those related to organised crime, kidnapping, hydrocarbon, health, human trafficking, corruption, motor vehicle theft, illicit proceeds, and those committed by public officials, would become one of the most relevant laws affecting the response to corruption in Mexico. In practice, civil forfeiture has not existed in Mexico before this law. Under the terms of this new law, forfeiture is not limited to property related to a crime, and the level of evidence required is not clear. Furthermore, there is no statute of limitations, and recovery may be made against estates of deceased suspects.

X COMPLIANCE

As previously mentioned, in Mexico, there is no explicit affirmative defence for adequate procedures to negate corporate liability under the relevant anti-corruption legal framework. The existence of a compliance programme or an adequate integrity policy, however, can act functionally as an affirmative defence in some criminal cases and clearly may act as a mitigating factor for determining sanctions in administrative cases for legal entities, as long as it meets the characteristics described in Section II.iv.

The Secretary of Public Administration published the Model Programme for Corporate Integrity to provide guidance on what constitutes an adequate integrity policy, as follows:

- a* include measures to promote internal standards and accountability in the company, in accordance with national and international commitments;
- b* ensure 'tone at the top' commitment from board of directors and general manager;
- c* require third-party intermediaries and distributors to adhere to the company's compliance policies;

65 Gina Hinojosa and Maureen Meyer, 'Five Years On, What's Still Missing from Mexico's National Anti-Corruption System?', 15 April 2020, www.wola.org/analysis/five-years-anti-corruption-system-mexico/.

- d* ensure that the Code of Conduct is adequately published and communicated to employees. Reference to the standards of the Confederation of Employers of the Mexican Republic is recommended;
- e* apply the Code of Conduct in practice and promote reports of suspicious activities. Implementation by departments if a company has multiple divisions; and
- f* ensure that the anti-corruption policy takes into account the degrees of risk for the country, industry, transaction, commercial opportunity and commercial association. For these purposes, they should rely on the Committee of Sponsoring Organisations of the Treadway Commission Internal Control – Integrated Framework.

Financial organisations should refer to these three guidelines:

- a* the Sole Memorandum for Banks;
- b* the Sole Memorandum for Stock Exchange; and
- c* the Sarbanes-Oxley Act.

Special attention should be paid to the following areas in the company: sales, contracts, human resources and government contacts. The guide also recommends observing the guide for the UK Bribery Act to:

- a* ensure that systems for self-reporting and training are adequate and efficient; and
- b* ensure that human resources department employs policies to avoid the employment of individuals who could become a risk to the integrity of the company.

XI OUTLOOK AND CONCLUSIONS

President López Obrador began his term by continuing his campaign discourse on eliminating corruption. In his daily hour-long press conferences, President López Obrador has frequently called out specific transactions and even named companies that he promises to investigate fully. Claiming that the government procurement processes were in the past marred by corruption, he has suspended many of the rules that have previously governed these processes in favour of having members of his government that he trusts assigning contracts to companies that he perceives as trustworthy. Although this can make for attractive rhetoric, it has already undermined the rule of law.

The President also promised in his inaugural address that he would not persecute former political opponents through corruption investigations, leading many to understand that he was announcing a functional amnesty for past corruption at the same time that he declared that corruption would no longer exist in Mexico. As described above, however, investigations into high-profile corruption cases have been plentiful. In addition to the *Odebrecht* case, the new administration has been aggressive in investigating the *Estafa Maestra* (the ‘master/teacher swindle’) involving over US\$250 million in fraudulent contracting during the former administration. Various investigative journalists have reported that the Secretary of Social Development used a loophole in the procurement rules to award tens of millions of dollars in no-bid contracts to state-owned universities, which then illegally sub-contracted the services to shell companies, some of which they have traced to public officials and related persons. Former Secretary Rosario Robles, who served under former President Peña Nieto, has, as the time of writing, spent two years under arrest without bail, awaiting trial on corruption charges. Last year, the General Prosecutor’s Office requested a 21-year prison sentence for

official misconduct.⁶⁶ Reporters have speculated that these investigations may eventually lead to charges against Mr Peña Nieto. No former president of Mexico since the aftermath of the Revolution (1910–1920) has ever been prosecuted, so this would be momentous.

The United States–Mexico–Canada Agreement (USMCA) entered into force on 1 July 2020, to replace and modernise the 25-year-old North America Free Trade Agreement (NAFTA) into a 21st century, high-standard agreement. The entry into force of USMCA marks a new regional commitment to fighting corruption. Unlike NAFTA, USMCA has a chapter establishing commitments on anti-corruption efforts to benefit the three parties alike, entitled ‘Transparency and Anti-Corruption’. Its main purpose is to prevent and combat bribery and corruption in international trade and investment. As such, it provides a comprehensive framework for preventing and combating corruption. It requires the three parties to adopt, maintain and enforce anti-corruption legislative and other measures as may be necessary to criminalise, under their laws, in matters that affect international trade or investment, the bribery and corruption of domestic and foreign public officials, embezzlement and misappropriation. Additional measures include maintenance of books and records, whistle-blower protection, the promotion of integrity among federal public officials and the active participation of enterprises, civil society, non-government organisations and community-based organisations, in preventing and combating corruption in matters affecting international trade or investment.

66 Fierro, Juan Omar, ‘La FGR pide 21 años de cárcel para Rosario Robles por la “Estafa Maestra”’ [General Prosecutor’s Office requests a 21-year prison sentence for Rosario Robles for ‘Estafa Maestra’], *Proceso*, 26 August 2020, accessed 26 August 2020, www.proceso.com.mx/645251/la-fgr-pide-21-anos-de-carcel-para-rosario-robles-por-la-estafa-maestra.

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