

“PANEL ON COMBATING BRIBERY AND OTHER FORMS OF CORRUPTION AS A MULTINATIONAL CORPORATION”

“MEXICO’S LEGAL FRAMEWORK TO FIGHT CORRUPTION”

Francisco Javier Velázquez Osuna

fvelazquez@goodrichriquelme.com

Attorney at law

Goodrich Riquelme y Asociados, A.C.

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“Mexico’s Legal Framework to Fight Corruption”

According to multiple statistics, indices, and national and international investigations Mexico is considered a country where corruption is an issue. In 2011 “Transparency International”, a non-governmental Organization of global scale, published a *Corruption Perception Index* in which according with assessments and opinion surveys carried out by independent and reputable institutions Mexico is ranked as a non clean country on matters of corruption having an average of 3 on a scale of 0 – 10 (where 0 means that a country is perceived as highly corrupt and 10 means that a country is perceived as very clean¹).

In Mexico the government has made some efforts to curb corrupt practices in the public sector, basically these efforts contemplates a legal frame work in which the corrupt practices like bribery are punishable with several administrative sanctions and the public entities and authorities have the responsibility to show their proper management of public resources. Before this happened, the bribery and corrupt acts were only punishable under the Criminal Law and, given the case, by the Federal Constitution with the *Juicio Político* (a kind of impeachment trial).

The most relevant and innovating law on this matter is the Law Against Corruption in Public Procurement, running after the Government Accounting General Law, Federal Law on Administrative Liability of Public Officials, Federal Law of Transparency and Access to Public and Governmental Information, and the Federal laws on matters of Acquisitions and Public Works, these all having provisions concerning transparency and anti-bribery matters.

¹ <http://cpi.transparency.org/cpi2011/results/>

- NATIONAL EFFORTS

Federal Constitution

The Federal Constitution foresees on its article 110, the possibility to carry out a procedure against certain public officers like deputies, senators, ministers, and governors for violations of the Constitution, federal laws and for the improper management of federal funds and resources. This procedure is called *Juicio Político* (impeachment) and the liability charged to the public officer is judged by the Chamber of Deputies and the Senate; the resulting sanction could be the disqualification or the removal of the public officer, an economic fine, or given the case, criminal sanctions according to the Local or Federal Criminal Code.

Federal Law against Corruption in Public Procurement

A recent effort of the Mexican government was the publication of the Law against Corruption in Public Procurement. Some of the principles of the law are taken from the US the Foreign Corrupt Practices Act (FCPA), the UK Bribery Act and recommendations of the Organization for Economic Cooperation and Development; recently

This law is applicable to any individual or legal, Mexican or foreign persons, and sets liabilities and penalties for violations incurred by reason of their participation in federal procurements and for those that should be imposed on individuals or Mexican corporations, for violations incurred in international business transactions.

The violations mentioned on the law include² among others:

- i. The execution of acts that involves an unfair gain or advantage in federal procurements.

² Article 8 of the Law Against Corruption in Public Procurement.

- ii. Perform acts or omissions that either imply or cause the obtaining of a participation in a federal procurement, without being allowed according to the laws or any administrative resolution.
- iii. Perform acts or omissions with the purpose or effect of evade the requirements or rules set out in federal procurements or simulate their performance.
- iv. Force, without the right to do it, a public officer to sign, execute, destroy or deliver a document or any other good, in order to obtain for himself or a third party an advantage or benefit.
- v. Perform acts that either imply or cause an **improper**³ benefit or advantage in federal procurement contracts.

According to the Section III of the law, the proceedings to impose fines and sanctions can be brought up by a complaint or accusation from:

- a contracting public entity,
- any individual,
- foreign governments and international public organizations or entities,
- by anonymous complaints,
- public officials: they are obliged to file an accusation for any act of bribery they have knowledge of.

The penalties included in the Law against Corruption in Public Procurement are⁴:

- I. To individuals: fines ranged from 1,000 to 50,000 times the amount of the current general minimum daily wage, approximately from US \$5,000.00 to US \$240,00.00 dollars.

³ The term **improper** is not defined in the law or any other related legal instrument in consequence the enforcement of this provision will be at the discretion of judges.

⁴ Article 27 of the Law Against Corruption in Public Procurement.

In the case of federal procurement contracts, the minimum fine will range from 30% to 35% of the amount of the contract, if it was awarded to the party committing an act of bribery.

- II. To legal persons: a fine equivalent to 10,000 to 2'000,000 times the current general minimum daily wage approximately from US \$48,000.00 to US \$9'500,000.00 dollars, or given the case, the disqualification to participate in the federal procurement for a period of not less than 3 months and no more than 10 years.

The law contemplates the possibility to reduce the fines from 50% to 70%, this reductions will be applicable when:

1. No proceedings have been initiated with regard to the acts of bribery;
2. The party is one of all the others involved in acts of bribery and is the first to provide sufficient evidence or information that proves the corruption acts;
3. The person requesting the reduction of fine, cooperates with the authority undertaking the investigations;
4. The person immediately ceases to participate and admits the act of bribery committed.

The publication of the law took place on June 11th 2012, so even though it means an important effort in fighting bribery in Mexico, we still need to see to which degree it is enforced.

Federal Law on Administrative Liability of Public Officials

In 2002, the government published a Federal Law on Administrative Liability of Public Officials; this law foresees the liability and penalties applicable to public officials

in case they breach the principles of legality, honesty, loyalty, fairness and efficiency, of the public service⁵.

Such law also foresees the possibility that any citizen could bring a complaint against public officers when it is considered that a public officer didn't act in accordance to such principles and/or failed with the accomplishment of their obligations according to the authorities granted in the laws. The penalties can range from a public warning to a temporary disqualification (3 months to 10 years) from their office; the application of the penalties has to take into account the severity of the act, the position or office that the public officer held, the amount of benefit, recurrence, the damage or injury caused, among others.

Federal Law of Transparency and Access to Public and Governmental Information

The purpose of this law is to provide all the necessary to guarantee the access of any person to information in possession of the branches of government, autonomous constitutional bodies or with legal autonomy, and any other federal entity. This year the government recognized in a constitutional level the right of access to public information as a constitutional right.

Currently our Senate is discussing some amendments to this transparency law which includes the possibility of creation of a Federal Commission for the Information Access and Protection of the Personal Data to ensure the transparency of public information, and the granting of constitutional autonomy of all the government entities with specific functions on matters of transparency.

The law initiative also foresees the implementation of new authorities to the *Federal Institute for Public Data Access*; this may be better explained with the following chart.

⁵ Article 7 of the Federal Law on Administrative Liability of Public Officers.

Previous authorities	New authorities
Lack of constitutional autonomy	Constitutional autonomy
Five commissioners	Seven commissioners
Force federal states and municipalities	Force federal states and municipalities
Force the branches of government	Force the branches of government
Resolutions which can be challenged by ordinary remedies	Unchallenged resolutions by ordinary remedies

Although, this mentioned effort to amend the transparency law, a relevant aspect that is discussed at length at this time is on the autonomy of the institute.

Government Accounting General Law

This law also contains transparency provisions; 3 weeks ago the Senate approved their amendment on this matter. According to these amendments, the public entities shall publish their expenses online, and any person shall have access to the Superior Audit of the Federation (charged with audit control and evaluation of institutions).

Also, the law will requires to the public entities to place information on internet about the amounts paid by way of aids and subsidies to economic and social sectors, identifying the name of the payee and the amount received; only under this law the sanctions will be applicable when the requirements of transparency in accounting matters are not fulfilled.

In order to apply this updated law, all the federal states have to have an adequate level of transparency, and an accounting harmonization in compliance with the former law, this requirement carries on a delay on the enforcement of the new law because near to 10 federal states have a very serious problems on matters of transparency (simulate some of their expenses or hide some of their incomes) like Oaxaca, Tamaulipas, Chiapas, Querétaro, Michoacán, Coahuila, Hidalgo, Guanajuato, Nuevo León and Zacatecas.

Federal laws on matters of acquisitions and public works

Last but not least, the most recent amendments to federal laws on matters of acquisitions and public works also include issues on transparency with the aim to have a proper and efficient regulation in the use of federal resources regarding acquisitions, leases, public works and services. The relevant issues of the mentioned amendments are related to:

- 1) The creation of an integral system of information.
- 2) The penalties to suppliers, contractors and public officers. The law as amended establish provisions to apply effective penalties for the breach of obligations and criminal acts.
- 3) It is foreseen the disqualification of those vendors and contractors who have more than one rescinded contracts in two or more agencies offices or entities during a period of three years, and the establishment of penalties to contractors that are proportionate to the seriousness of their conducts avoiding excessive sanctions in contravention of the prohibition of the article 22 of the Federal Constitution. In a similar way, the minimum and maximum criminal penalties contained on the Criminal Federal Code for bribery and corruption acts are increased from 3 months to 2 years to 6months to 12 years.

- INTERNATIONAL EFFORTS

World Bank

Within the international sphere, the **World bank** reports on its “*Worldwide Governance Indicators Project*”⁶ an aggregate of individual governance indicators for 215 economies over the period 1996-2011, for six dimensions of governance:

⁶The Worldwide Governance Indicator (WGI) project, 2011,
http://info.worldbank.org/governance/wgi/sc_chart.asp#

- 1) *Voice and Accountability*: Reflects perceptions of the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media.
- 2) *Political Stability and Absence of Violence*: Reflects perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism.
- 3) *Government Effectiveness*: Reflects perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.
- 4) *Regulatory Quality*: Reflects perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.
- 5) *Rule of Law*: Reflects perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.

- 6) *Control of Corruption*: Reflects perceptions of the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests.

According to the World Bank web page: *"These aggregate indicators combine the views of a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. They are based on 30 individual data sources produced by a variety of survey institutes, think tanks, non-governmental organizations, international organizations, and private sector firms."*

The results of that report are as follows (higher values correspond to better outcomes).

MEXICO

Governance Indicator	Sources	Year	Percentile Rank (0-100)	Governance Score (-2.5 to +2.5)	Standard Error
Voice and Accountability	17	► 2011	53.5	+0.09	0.11
	17	► 2010	54.0	+0.12	0.11
	17	► 2009	54.0	+0.14	0.11
Political Stability/Absence of Violence	8	► 2011	25.5	-0.70	0.24
	8	► 2010	22.6	-0.77	0.23
	8	► 2009	22.3	-0.74	0.23
Government Effectiveness	11	► 2011	63.5	+0.32	0.18
	11	► 2010	61.2	+0.17	0.18
	11	► 2009	61.7	+0.19	0.18
Regulatory Quality	10	► 2011	60.7	+0.35	0.17
	10	► 2010	59.8	+0.30	0.17

	10	►	2009	58.9	+0.27	0.17
	17	►	2011	39.0	-0.48	0.13
<u>Rule of Law</u>	17	►	2010	33.6	-0.57	0.13
	17	►	2009	34.1	-0.59	0.13
	15	►	2011	45.5	-0.36	0.16
<u>Control of Corruption</u>	15	►	2010	44.0	-0.38	0.16
	15	►	2009	46.9	-0.33	0.16

90th-100th Percentile
 50th-75th Percentile
 10th-25th Percentile

75th-90th Percentile
 25th-50th Percentile
 0th-10th Percentile

Source: [Kaufmann D., A. Kraay, and M. Mastruzzi \(2010\), The Worldwide Governance Indicators: Methodology and Analytical Issues](#)

From the table above we can conclude that 2 for our 6 indicators suffers a decrease on its averages; it is not surprising that the lower indicators were the ones related to Political Stability and Absence of Violence and Regulatory Quality, since the security polices of our country includes struggles and fights against drug trafficking, especially on the north zone of Mexico.

Organization for the Economic Cooperation and Development

Since Mexico ratified the Convention to combat bribery of foreign public officials in international business transactions in 1999, only one case has been sanctioned in accordance with it, as a consequence, this year our country is rated as a country with “little enforcement”⁷ under the terms of the Convention.

⁷Exportin Corruption? Country enforcement of the OECD anti-bribery Convention progress report 2012, August 2012,
http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio

According to *International Transparency*, in our country there are only two ongoing investigations, which were initiated in 2004 and 2005, both by foreign authorities notice. The investigation initially concerned money laundering but it was expanded to include foreign bribery in 2004⁸.

Wal-Mart case in Mexico

Although there have been numerous national and international efforts to combat corruption and bribery in our country, there are however corruption conducts still. One case that has been well known in our country is the Wal-Mart case⁹. This case starts with the publications of the New York Times relating to certain bribes (approximately 24 million dollars) that presumably the company paid to Mexican authorities to obtain building permissions.

The report¹⁰ states that in September 2005, a lawyer for Wal-Mart Stores Inc. received an email from a former executive of the Mexican subsidiary, Sergio Zapata Cicero, in which he described the payment of bribes for construction of shops across Mexico.

It has been said that although the company found evidence of improper payments of more than \$24 million dollars, the top executives of the company closed the investigation and did not notify U.S. and Mexican officials on the situation.

Apparently with the payments made by the chain in Mexico were to expedite the issuance of building permits and the rates for environmental impact by building construction were reduced. The Wal-mart case is without a doubt a complicated case since it involves a company with more than 2.2 million of workers and near to 10,000 stores around the world.

⁸ Ibid

⁹ Press Release Number 207/12 of the Procuraduría General de la República, April 26th, 2012, <http://www.pgr.gob.mx/prensa/2007/bol12/Abr/b20712.shtm>

¹⁰ See: http://fundacionmepi.org/index.php?option=com_content&view=article&id=426:la-corrupcion-a-gran-escala-caso-walmart&catid=50:investigaciones&Itemid=68

The Federal Prosecution's Office is conducting an investigation and so far no results have been disclosed yet.

The private initiative is waiting for the details of the amendments of the laws on matter of transparency and anti-bribery. In September 26th, the president of the Business Coordinating Council (CCE) published on its web page an announcement which states their optimism respect the new amendments of the legal framework, and they are looking forward to more severe sanctions for these acts¹¹.

¹¹ El sexenio de la rendición de cuentas, September 24th, 2012,
http://cce.org.mx/sites/default/files/La_Voz_CCE/24-09-12/La%20Voz%20CCE%20-%20GGC025%20-%20Rendici%C3%B3n%20de%20Cuentas%20Anticorrupci%C3%B3n.pdf