



# **PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN MEXICO**

**October 2011**

This Phase 3 Report on Mexico by the OECD Working Group on Bribery evaluates and makes recommendations on Mexico's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 14 October 2011.

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## TABLE OF CONTENTS

EXECUTIVE SUMMARY .....	5
A. INTRODUCTION .....	7
1. The On-site Visit .....	7
2. Outline of the Report .....	7
3. Cases Involving the Bribery of Foreign Public Officials.....	8
4. Legislative Developments since Phase 2, Including Current Draft Legislation .....	8
B. IMPLEMENTATION AND APPLICATION BY MEXICO OF THE CONVENTION AND THE 2009 RECOMMENDATIONS.....	10
1. Foreign Bribery Offence.....	10
a) Elements of the Foreign Bribery Offence .....	10
i) Third Party Beneficiaries.....	10
ii) Definition of a Foreign Public Official.....	10
b) Jurisdiction, Statute of Limitations, and Completion of a Bribery Offence.....	11
c) Conspiracy to Commit Foreign Bribery.....	13
2. Responsibility of Legal Persons .....	13
3. Sanctions.....	14
a) Sanctions against Natural Persons .....	14
b) Sanctions against Legal Persons .....	15
4. Confiscation of the Bribe and the Proceeds of Bribery .....	16
5. Investigation and Prosecution of the Foreign Bribery Offence .....	17
a) Bodies Responsible for Enforcing the Foreign Bribery Offence .....	17
b) Co-ordination of Relevant Law Enforcement Bodies .....	17
c) Commencement and Termination of Proceedings .....	18
d) Resources .....	18
e) Expertise and Training .....	19
f) Bank Information, Freezing Bank Accounts and Other Types of Seizure.....	20
g) Special Investigative Techniques .....	20
h) Witness Protection .....	20
i) Actual Enforcement of the Foreign Bribery Offence.....	21
6. Money Laundering.....	23
7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes .....	24
a) Accounting Standards and the False Accounting.....	24
b) Role of External Auditing .....	25
i) Awareness and Detection of Foreign Bribery .....	25
ii) Reporting of Foreign Bribery by External Auditors.....	26
c) Corporate Compliance, Internal Controls and Ethics Programmes .....	27
8. Tax Measures for Combating Bribery .....	28
a) Tax Deductibility of Bribes.....	28
b) Detection of Bribery.....	29
c) Sharing of Tax Information.....	30

9. International Co-operation.....	31
10. Public Awareness and the Reporting of Foreign Bribery .....	31
a) Efforts to Raise Public Awareness of Foreign Bribery .....	32
b) Reporting of Foreign Bribery.....	33
c) Whistleblowing and Whistleblower Protection.....	34
11. Public Advantages .....	34
a) Public Procurement .....	34
b) Export Credits .....	35
c) Official Development Assistance.....	37
d) Other Public Advantages .....	37
C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP .....	37
1. Recommendations of the Working Group .....	38
2. Follow-up by the Working Group .....	40
ANNEX 1: PHASE 2 RECOMMENDATIONS TO MEXICO AND WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION IN 2007 .....	41
ANNEX 2: PARTICIPANTS AT THE ON-SITE VISIT.....	44
ANNEX 3: LIST OF ABBREVIATIONS AND ACRONYMS.....	46
ANNEX 4: EXCERPTS OF LEGISLATION .....	47
ANNEX 5: STATISTICS PROVIDED BY MEXICO.....	51

## EXECUTIVE SUMMARY

The Phase 3 Report on Mexico by the OECD Working Group on Bribery evaluates and makes recommendations on Mexico's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments (Anti-Bribery Convention). As well as focusing on key Group-wide (horizontal) issues, particularly enforcement, consideration is given to country-specific (vertical) issues arising from progress made since Mexico's Phase 2 evaluation in 2004, or issues raised, for instance, by changes in the domestic legislation or institutional framework of Mexico.

Fighting corruption is a stated priority of the Mexican government. Mexico has opened its first two foreign bribery investigations. It has also made some improvements to its legislative framework for fighting foreign bribery, such as by amending the foreign bribery offence. However, several deficiencies remain in its laws, and the pace of legislative change has been slow. The Working Group therefore recommends that Mexico enact legislation, without delay, to resolve serious shortcomings in the liability of legal persons. Legislative amendment is necessary to allow for confiscation of the equivalent value of the bribe and its proceeds. The tax non-deductibility of bribes needs to be explicitly clarified. Debarment should also be made available as a sanction for not only domestic but also foreign bribery.

The report further expresses significant concerns over Mexico's criminal enforcement of its foreign bribery laws. Mexico should recognise that investigating and prosecuting bribery criminally is equally important as enforcing other offences such as organised crime and money laundering. The Working Group therefore recommends that Mexico give greater priority to the criminal enforcement of bribery offences. Mexico should ensure that its criminal law enforcement authorities seriously investigate all allegations. These authorities should also be given sufficient resources and the necessary expertise for engaging in complex financial and corporate investigations. When a company or individual has been found to have engaged in domestic or foreign bribery, Mexico should re-examine the briber's tax return for the relevant years to verify whether the bribe payments had been deducted from the briber's taxable income.

Mexico has made efforts to promote awareness, prevention and detection of foreign bribery within the private sector. The report recommends that Mexico continue these efforts, and focus especially on Mexican companies, including SMEs, that are active internationally but are not subject to the jurisdiction of the US Foreign Corrupt Practices Act. Mexican missions abroad and trade promotion agencies should assist and inform internationally active Mexican businesses to combat foreign bribery. Legislation to protect whistleblowers in not only the public but also the private sector is strongly supported by Mexican business and civil society, and should be enacted. Mexico should also amend its Federal Code of Criminal Procedure and other relevant legislation to clarify that an auditor's obligation to report crimes to law enforcement overrides his/her professional obligations towards his/her client.

The report commends Mexico for its considerable efforts and high-level commitment to raising awareness of foreign bribery, especially among tax examiners and the public. Mexico's system for sending and receiving mutual legal assistance has improved since Phase 2, but Mexico could improve the level and speed of its responsiveness in foreign bribery-related cases. Mexico has also shown commendable leadership in fighting corruption-related money laundering in the Financial Action Task Force.

The report and its recommendations reflect findings of experts from Slovenia and Spain and were adopted by the OECD Working Group on Bribery. It is based on legislation and other materials provided by Mexico, and information obtained by the evaluation team during its three-day on-site visit to Mexico City on 17-19 May 2011, during which the team met representatives of Mexico's public administration, judiciary, private sector and civil society. Within one year of the Group's approval of the report, Mexico will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years.

## A. INTRODUCTION

### 1. The On-site Visit

1. On 17-19 May 2011, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Mexico City as part of the Phase 3 evaluation of Mexico's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from Slovenia and Spain as well as members of the OECD Secretariat.<sup>1</sup> Prior to the visit, Mexico responded to the Phase 3 Questionnaire and supplementary questions, and provided translations of relevant legislation, documents and case law. The lead examiners also referred to reports on Mexico under the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption (MESCIC), the 2008 Mutual Evaluation Report by the Financial Action Task Force (FATF MER),<sup>2</sup> and other public information. During the visit, the lead examiners met representatives of the Mexican public and private sectors, legislature, judiciary, and civil society.<sup>3</sup> The Mexican authorities absented themselves from panels with the business sector, civil society, and lawyers and academics.<sup>4</sup> The on-site visit was generally well-attended, though media representatives were invited but did not attend. The lead examiners express their appreciation of the time taken by the Secretary for Public Administration and the Federal Attorney General to meet the examiners. They are grateful to all the participants at the on-site visit for their openness during the discussions and to Mexico for its co-operation throughout the evaluation process.

### 2. Outline of the Report

3. This report is structured as follows. Part B examines Mexico's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results. Part C sets out the Working Group's recommendations and issues for follow-up.

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<sup>1</sup> Slovenia was represented by: Harij Furlan and Maja Veber Šajn, National Bureau of Investigation, and Peter Jenko, General Tax Office. Spain was represented by Professor Íñigo Ortíz de Urbina Gimeno, Faculty of Law, University Pompeu Fabra. Purificación Martín Hernanz of the Spanish Auditing and Accounting Institute did not attend the on-site visit but participated in the Working Group meetings in Paris during which this report was discussed and adopted. The OECD Secretariat was represented by: William Loo and Leah Ambler, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

<sup>2</sup> The Report was jointly prepared by the Financial Action Task Force (FATF) and Financial Action Task Force on Money Laundering in South America (GAFISUD).

<sup>3</sup> See Annex 2 for a list of participants.

<sup>4</sup> See paragraph 26 of the [Phase 3 Procedure](#), which provides that an evaluated country may attend, but should not intervene, during the course of non-government panels.

### **3. Cases Involving the Bribery of Foreign Public Officials**

4. Mexico has significant ties to the international economy, which suggests that a fair number of Mexican enterprises are exposed to the risk of bribing foreign public officials. Mexico has the 12<sup>th</sup> biggest economy among 39 Working Group member countries and ranks 12<sup>th</sup> and 11<sup>th</sup> in imports and exports respectively. International trade is predominantly with North America. However, Asia accounts for approximately 30% of imports, while exports to Central and South America are at comparable levels as those to Europe.<sup>5</sup> A significant number of Mexican enterprises are also internationally active investors. In 2010, Mexico ranked 18<sup>th</sup> out of 39 Working Group members in outward flows of foreign direct investment.<sup>6</sup> The U.S. and Brazil are the main investment destinations. But as of 2009, approximately 14% of outward direct investment was in other countries in Latin America,<sup>7</sup> many of which are perceived to have high levels of corruption. Several very large Mexican business conglomerates and Mexican-based subsidiaries of multinational enterprises are highly active and influential in Latin America, including in corruption-prone industries such as construction and telecommunications. Participants at the on-site visit stated that the bribery of Mexican officials by Mexicans and foreigners is of greater concern. Nevertheless, the danger that some Mexicans may bribe non-Mexican officials is real and should not be overlooked.

5. Despite these risks, there have been few foreign bribery cases in Mexico. Shortly before the on-site visit, Mexico reported two foreign bribery cases that were opened in 2004 and 2005. Neither involves bribery of foreign public officials in Latin America, a briber operating in a corruption-prone industry, or foreign bribery in order to win a business contract.<sup>8</sup> Both investigations are on-going and have yet to produce foreign bribery charges at the time of this report. Given the delay, the limitation periods in these cases could expire as early as 2012, according to Mexico. Delays and a low number of investigations and prosecutions are also evident in the enforcement of the domestic bribery offence in Mexico.

### **4. Legislative Developments since Phase 2, Including Current Draft Legislation**

6. There have been several significant legislative developments since Phase 2. The foreign bribery offence in the Federal Penal Code has been amended in response to the Working Group's recommendations. The maximum fine for legal persons for foreign bribery has been raised. There have also been substantial changes to criminal procedure generally and to the organisation of the criminal law enforcement bodies. At the time of this report, some of these changes are still being implemented in different parts of the country.

7. The Mexican Congress was also considering several bills at the time of this report which, if enacted, would affect the foreign bribery offence. There is no indication when these bills, some of which date back to before Mexico's 2004 Phase 2 evaluation, may be enacted. Consistent with established Working Group practice, this Phase 3 Report will refer to some aspects of these Bills but will not give them the same level of scrutiny as the present law. In assessing Mexico's implementation of the Anti-Bribery Convention, the Working Group will also only take into account legislation that has entered into force. The Working Group will assess any relevant new legislation only if and when it is enacted.

8. Among these current bills, the most notable is the Federal Anti-Corruption Law in Public Procurement (Anti-Corruption Bill) that was introduced to Congress on 2 March 2011. The Bill aims to

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<sup>5</sup> GDP and trade statistics are for 2010 and 2009 respectively. Source: OECD.Stat ([dotstat.oecd.org](http://dotstat.oecd.org)).

<sup>6</sup> OECD International Direct Investment database, IMF and national sources.

<sup>7</sup> 2009 data provided by the Bank of Mexico to the International Monetary Fund.

<sup>8</sup> This report does not include factual details of the two foreign bribery cases due to Mexican laws on the confidentiality of on-going investigations.



provide administrative sanctions for Mexican nationals who bribe Mexican or foreign public officials in public procurement procedures. The Bill contains a foreign bribery offence, corporate liability regime, and range of sanctions that are different from those in the Federal Criminal Code. The Bill also seeks to introduce novel measures presently unknown in Mexico's legal system, such as reductions in penalties for co-operating offenders. If enacted, the law would be enforced by the Ministry of Public Administration (SFP), not Mexico's criminal law enforcement bodies. In sum, the Bill would create a separate legal and enforcement system for foreign bribery that operates in parallel with the existing criminal law regime.

9. The Anti-Corruption Bill is a commendable attempt to strengthen Mexico's foreign bribery framework but there may be questions over its limitations. The Bill does not cover the full range of foreign bribery as required by the Convention. It deals only with foreign bribery committed by Mexican nationals in connection with public procurement (albeit broadly defined to include general acquisitions, leasing, public works, permits, concessions and any service). Furthermore, individuals cannot be punished by incarceration because the Bill is not criminal in nature. However, Mexico states that criminal and administrative proceedings against an individual for the same conduct may be taken concurrently, although Mexico did not provide supporting case law. There could also be issues over the SFP's investigative capacity and co-ordination with law enforcement bodies. Mexico argues that the Bill would cover most foreign bribery cases in practice, and that the SFP has substantial investigative experience. In any event, it would not appear appropriate to resolve these issues in this evaluation, since the Bill is not in its final form. The lead examiners also did not have an opportunity to fully explore these issues with the relevant participants at the on-site visit. In line with established practice, the Working Group will evaluate the Bill if and when it is enacted.

10. The lead examiners are aware of three other Bills before Congress that may also be relevant. A Bill that was introduced to Congress on 11 September 2003 (the 2003 Bill) overhauls the corporate criminal liability framework and introduces an offence of conspiracy to commit foreign bribery.<sup>9</sup> A second Bill dated 26 August 2010 (the 2010 Bill) would alter the provisions on criminal confiscation, the money laundering offence and reporting, and special investigative techniques.<sup>10</sup> After the on-site visit, Mexican authorities informed the lead examiners of a third bill introduced into Congress on 14 April 2011 which deals with corporate liability and confiscation of equivalent value. Mexican officials suggested that the 2011 and 2010 Bills would supersede and render obsolete the earlier 2003 Bill. But for the time being, all three Bills remain before Congress with no stated timetable for their enactment.

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<sup>9</sup> Draft Decree Amending, Supplementing or Eliminating Certain Provisions of the Federal Criminal and Criminal Procedure Codes on the Subject of Operations with Resources of Illegal Origin, Bribery of Foreign Public Officials in International Business Transactions.

<sup>10</sup> Draft Decree Amending and Adding Several Articles of the Federal Criminal Code; Federal Criminal Procedures Code; Federal Organised Crime Act; Federal Fiscal Code; Financial Institutions Law; Securities Market Law; Mutual Fund Companies Law; General Credit Organisations and Auxiliary Activities Law; Popular Savings and Credit Law; Law for the Regulation of Savings and Loan Cooperative Corporations; Credit Unions Act; Retirement Funds Systems Law; and Financial Groups Regulation Act.

## **B. IMPLEMENTATION AND APPLICATION BY MEXICO OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

11. This part of the report considers Mexico's approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from Mexico's progress on weaknesses identified in Phase 2, or from changes to Mexico's domestic legislative or institutional framework.

### **1. Foreign Bribery Offence**

#### *a) Elements of the Foreign Bribery Offence*

12. Mexico's foreign bribery offence is found in Federal Penal Code Article 222bis. Two elements of the offence - third party beneficiaries and the definition of a foreign public official – were amended after Phase 2. They are also the subject of Phase 2 Recommendation 5(b) and Follow-up Issue 6(a).

#### *i) Third Party Beneficiaries*

13. Mexico amended its foreign bribery offence after Phase 2 to expressly refer to third party beneficiaries, but the amendment raises a new issue. The offence now covers bribes given, offered or promised to “a foreign public official or a third party *determined by him*” (emphasis added). The offence thus arguably does not cover bribes given to third party beneficiaries who are not “determined” or designated by the official, *e.g.* when a beneficiary presents him/herself to the briber, or was chosen by the briber rather than the official. This argument is strengthened by comparing with the domestic bribery offence, which expressly covers bribes given or offered to an official “or for the benefit of someone else”. That the foreign bribery offence contains the additional words “determined by [the official]” suggests that it may be narrower than its domestic counterpart.

14. Participants at the on-site visit were divided over whether the amended foreign bribery offence contained a gap in the coverage of third party beneficiaries. On the one hand, several judges did not believe the offence contained a loophole in this respect since the determination of the beneficiary could be implied. On the other hand, one judge opined that the wording was problematic. Another believed that it could be difficult to prove who determined a third party beneficiary. A prosecutor also agreed that the wording could be much improved. This divided opinion suggests that, in cases involving third party beneficiaries, the current offence will give rise to uncertainty until it is either amended or considered by the courts.

15. After the on-site visit, Mexico acknowledged this gap in the coverage of third party beneficiaries and undertook to delete the phrase “determined by [the official]” from Article 222bis.

#### *ii) Definition of a Foreign Public Official*

16. Responding to Working Group recommendations in Phases 1 and 2, Mexico has adopted an autonomous definition of a foreign public official that does not depend on an interpretation of foreign law:

For the purposes of this article, a foreign public official is understood as any person holding a job, position, or commission within the legislative, executive or judicial powers, in an autonomous public organism of any order or level of government of a foreign State, designated or elected; any person exercising a function for a public authority, organism or company with state participation; as well as any officer or agent of a international public organism or organization. (Article 222bis)

17. Mexican officials clarified some issues concerning this definition. The term “autonomous public organism” refers to bodies that are not part of or instructed by the legislative, executive and judicial branches of government. These bodies have autonomous budgets and the power of “self-determination”, but are accountable to regulatory bodies for their activities. An example is the Mexican National Commission of Human Rights. According to Mexico, the definition of “foreign public official” covers all persons who exercise a public function for a foreign country as required by Article 1 of the Anti-Bribery Convention. For example, “a person exercising a function for a public authority” would include employees of a private company contracted to administer a foreign government’s public procurement process,<sup>11</sup> or to operate the country’s prison or public school system. No supporting case law was provided, however.

### *Commentary*

*The lead examiners commend Mexico for responding to the Working Group’s earlier recommendations by amending and improving its foreign bribery offence. The offence now expressly refers to third party beneficiaries and adopts an autonomous definition of a foreign public official. Nevertheless, the lead examiners recommend that Mexico further amend its foreign bribery offence to cover bribes given, offered or promised to a third party beneficiary regardless of whether he/she is determined by a foreign public official. They welcome Mexico’s undertaking to make this legislative amendment. They also recommend that the Working Group follow up the interpretation of a “foreign public official” in Article 222bis as case law develops.*

### *b) Jurisdiction, Statute of Limitations, and Completion of a Bribery Offence*

18. According to a decision on Mexico’s domestic bribery offence (Circuit Court on Criminal Matters, Direct Appeal 337/84, 20 February 1985),<sup>12</sup> the crime of passive bribery is complete once an official solicits a bribe. The official’s subsequent receipt of the actual bribe is not a new offence, but a mere consequence of the earlier solicitation. The same reasoning applies to active bribery, according to Mexican officials. The active bribery offence is complete when an individual offers or promises a bribe. The subsequent sending or giving of the actual bribe in furtherance of the earlier offer or promise does not constitute the same or a separate offence.

19. This analysis of the bribery offence is not unusual, but its application in Mexico leaves Mexico’s foreign bribery offence with limited jurisdictional reach. Mexican judges and prosecutors explained that, once someone offers or promises a bribe to a foreign official while abroad, the foreign bribery offence has been completed extraterritorially. Mexico would not have territorial jurisdiction to prosecute the case, even if the individual subsequently sends the bribe to the official *from Mexico* in furtherance of the earlier offer or promise. The same would apply even if the foreign official ultimately comes to Mexico and the briber gives him/her the bribe *in Mexico*. Federal Penal Code Article 3 states that Mexican law governs continuous crimes which begin abroad and continue in Mexico. However, this provision apparently does not apply to bribery crimes because of the jurisprudence mentioned above.<sup>13</sup>

20. This limited interpretation of the territorial reach of Mexico’s foreign bribery offence is inconsistent with the Anti-Bribery Convention. Article 4(1) of the Convention requires Mexico to establish jurisdiction when the giving, offer or promise of a bribe to a foreign public official occurs in whole or in

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<sup>11</sup> See Commentary 12 of the Anti-Bribery Convention.

<sup>12</sup> Phase 2 Report, para. 45.

<sup>13</sup> This conclusion was confirmed in Mexico’s response to the Phase 3 questionnaire, and by prosecutors and judges at the on-site visit.

part in Mexico. Commentary 25 adds that the territorial basis for jurisdiction to prosecute foreign bribery “should be interpreted broadly so that an extensive physical connection to the bribery act is not required.” These provisions require Mexico to have jurisdiction to prosecute cases in which a bribe is given in or sent from its territory, irrespective of whether the bribe had been offered outside the country earlier. Mexico states that, in these cases, it may exercise nationality or extraterritorial jurisdiction.<sup>14</sup> However, nationality jurisdiction is available only when the offender is a Mexican national. Extraterritorial jurisdiction also has additional prerequisites, *e.g.* dual criminality, lack of double jeopardy, and the defendant being in Mexico. These additional sources of jurisdiction are therefore more restrictive and would not cover all of the cases in which a bribe is offered outside Mexico and later sent from or given inside.

21. The Mexican jurisprudence on the completion of a bribery offence may also have implications for the statute of limitations. Foreign bribery is subject to a minimum three-year limitation period that is extended to eight years if the offence is aggravated. Time runs from when the offence is completed.<sup>15</sup> The case law discussed above suggests that a bribery offence would be completed - and hence the limitation period would begin - when a bribe is offered or promised. Surprisingly, Mexican judges and prosecutors disagreed. In their view, if a bribe is offered or promised to a foreign official and is later sent or given to the official, then the commencement of the limitation period depends on the circumstances of the case. If the entire transaction can be characterised as a *continuous* offence, then the limitation period begins to run with the sending or giving of the bribe, not the earlier offer or promise. Furthermore, if the offence is continuous and a series of bribe payments were made, then the limitation period begins with the last payment in time.

22. The upshot is that, as a result of this jurisprudence, a great deal of uncertainty surrounds the issues of territorial jurisdiction and statute of limitations. The position on the statute of limitations issue described above is inconsistent with the jurisprudence on the completion of a bribery offence. The analysis of the jurisdiction and statute of limitations issues also appears inconsistent: the concept of a continuous offence applies to bribery in the context of the statute of limitations but not nationality jurisdiction. An explanation of these apparent analytical inconsistencies was not given. After the on-site visit, other Mexican officials explained that the continuous offence would apply in the context of nationality jurisdiction. Mexico maintains that there is territorial jurisdiction to prosecute all cases in which the bribe is promised or offered abroad but given or sent from Mexico. But the fact remains, however, that a substantial number of judges and prosecutors at the on-site visit were of the contrary view.

23. On a separate issue, Mexican officials confirmed that the statute of limitations is suspended when a criminal investigation is ongoing. This includes when Mexico requests mutual legal assistance or extradition.<sup>16</sup> The maximum period of suspension is one half of the applicable limitation period, *i.e.* one-and-a-half years for foreign bribery and four years for aggravated foreign bribery.

### ***Commentary***

***The lead examiners are concerned that there is disagreement in Mexico over whether there is territorial jurisdiction to prosecute all cases in which a bribe for a foreign public official is sent from or given in Mexico. Territorial jurisdiction should be available in these cases regardless of whether the sending or giving is preceded by an offer or promise of a bribe made abroad. They are also concerned that Mexican jurisprudence would require the statute of limitations to begin whenever a bribe is offered or promised, even if the bribe is actually given***

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<sup>14</sup> Federal Penal Code Articles 4 and 5.

<sup>15</sup> Federal Penal Code Articles 100-105.

<sup>16</sup> Federal Penal Code Article 110.

*at a later time. They therefore recommend that Mexico review and undertake the necessary changes to rectify any shortcomings.*

**c) Conspiracy to Commit Foreign Bribery**

24. The Anti-Bribery Convention does not require Mexico to enact an offence of conspiracy to commit foreign bribery since there is no corresponding conspiracy offence for domestic bribery.<sup>17</sup> Nevertheless, Mexico's offence of agreeing or preparing to commit a crime (Federal Penal Code Article 13) could conceivably cover conspiracies (FATF MER para. 193). The 2003 Bill would introduce offences of conspiracy to commit foreign bribery and money laundering but it is still before Congress.

**2. Responsibility of Legal Persons**

25. Mexico has not rectified three significant deficiencies with its corporate liability law that were identified in Phase 2 Recommendation 5(c). First, under Article 11 of the Federal Penal Code, a company may be held liable for foreign bribery only if a natural person who is a member or representative of the company has been convicted of the crime. Second, corporate liability arises only if the bribery was committed "with the means of the legal person". This requires prosecutors to prove that the company had known that its resources would be used to bribe a foreign public official, according to judges at the on-site visit. Furthermore, the provision would not cover bribery committed with other resources such as the employee's own funds, even if senior company management knew of or authorised the crime. Third, liability cannot be imposed against state-owned or state-controlled enterprises (SOEs), as Mexican officials confirmed again in Phase 3.

26. Mexico recognises the need to correct at least some of these deficiencies. The 2003 Bill purports to eliminate the conviction of a natural person as a prerequisite for corporate liability. However, there are some doubts over whether the Bill would have this effect if and when it enters into force.<sup>18</sup> According to Mexican prosecutors, the Bill would also create a more elaborate procedural framework for corporate prosecutions not available under the present law. For example, the Bill specifies when the natural and legal persons must have separate legal representation. However, the Bill does not address the other concerns raised in Phase 2. It has also yet to be enacted eight years after its introduction to Congress. In addition, the separate 2011 Anti-Corruption Bill seeks to create a parallel administrative regime for sanctioning companies for foreign bribery. However, the Bill raises other issues which the Working Group will examine in detail if and when the law is enacted (see p. 8).

27. The exclusion of SOEs from the corporate liability regime is a significant shortcoming. There are numerous Mexican SOEs, many of which are extremely large and dominant in both Mexico and abroad. As in Phase 2, Mexico argued that SOEs are of strategic importance to national development, as shown in Article 28 of the Constitution,<sup>19</sup> and thus SOEs should not be subject to a legal regime (such as the Federal Penal Code) that could result in their dissolution. But as the Working Group concluded in Phase 2, SOEs should not be exempt from corporate liability for foreign bribery, especially given the role of SOEs in the Mexican economy. Furthermore, sanctions other than dissolution could be imposed against an SOE. Mexico also argued that SOEs may be liable for damages caused by crimes committed by their employees

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<sup>17</sup> Article 1(2) of the Convention requires Parties to criminalise conspiracy to bribe a foreign public official to the same extent as conspiracy to bribe a domestic public official.

<sup>18</sup> The Phase 2 Report (para. 62) noted that PGR was of the view that, if the Bill was enacted, a conviction of the natural person would still be necessary under the principle of "joint liability".

<sup>19</sup> This provision exempts SOEs in certain industries (e.g. petroleum, electricity) from being considered as monopolies.

and directors. However, this remedy may not be satisfactory in foreign bribery cases, given uncertainties in quantifying damages and identifying victims of the crime.

28. Finally, an issue not dealt with in Mexico's previous evaluations is nationality jurisdiction to prosecute legal persons for foreign bribery committed abroad. Article 4 of the Federal Penal Code provides nationality jurisdiction to prosecute "Mexicans". It is unclear whether this covers legal persons incorporated or headquartered in Mexico.

### *Commentary*

*Mexico's legislative provisions on corporate liability for foreign bribery are substantially deficient and the Working Group's Phase 2 recommendations remain unimplemented. The lead examiners therefore recommend that Mexico amend its Federal Penal Code (CPF) without delay so that legal persons may be held liable for foreign bribery without the prior identification or conviction of the relevant natural person(s), and without proof that the bribery was committed with the means of the legal person. The CPF should also be amended so that corporate liability (and sanctions other than dissolution of a legal person) for foreign bribery may be imposed against all Mexican state-owned and state-controlled enterprises. Mexico should also amend its legislation to establish nationality jurisdiction to prosecute legal persons incorporated or headquartered in Mexico.*

### **3. Sanctions**

29. This section will consider the sanctions against natural and legal persons for foreign bribery, a subject of Phase 2 Follow-up Issue 6(b) and post-Phase 2 legislative developments.

#### *a) Sanctions against Natural Persons*

30. The maximum sanctions against natural persons for foreign bribery depend on whether the value of the bribe exceeds 500 times the minimum wage in the Mexico Federal District, i.e. MXN 29 910 (approximately USD 2 398 or EUR 1 702).<sup>20</sup> If the value of the bribe is equal to or below this threshold, or if it is unascertainable, then the offence is punishable by imprisonment of three months to two years, a fine of 30-300 fine days (*días multa*), and a ban on holding public office for three months to two years. If the bribe exceeds the threshold, then the maximum punishment is 2 to 14 years' imprisonment, a fine of 300-1 000 fine days, and a ban on holding public office for 2 to 14 years. In either case, the offender is also dismissed from public office, if applicable. As an aside, the same maximum penalties apply to domestic bribery (CPF Article 222).

31. In Phase 2, the Working Group was concerned about certain aspects of the concept of fine days and decided to follow up this issue.<sup>21</sup> A fine day is defined as the offender's net daily income (from all sources) at the time of the offence (CPF Article 29). Net income in this context is the individual's gross income minus income tax, pension contributions and other similar deductions, according to Mexican officials. The Working Group noted that an offender without net income could not be subject to fine days.

32. In Phase 3, Mexico explained that, for offenders with no net income at the time of the offence, the fine day would be determined based on the statutory minimum wage (CPF Article 29). However, fines

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<sup>20</sup> Based on a minimum wage in the Federal District of MXN 59.82 as of September 2011 ([www.sat.gob.mx/sitio\\_internet/asistencia\\_contribuyente/informacion\\_frecuente/salarios\\_minimos/default.asp](http://www.sat.gob.mx/sitio_internet/asistencia_contribuyente/informacion_frecuente/salarios_minimos/default.asp)).

<sup>21</sup> The Working Group considered a draft amendment of the foreign bribery offence that introduced fine days.

linked to the minimum wage may be inadequate, as the Working Group noted in Phase 1. For example, the fine would not take into account an offender's means to pay a larger fine. It may also be disproportionately low compared to the bribe paid, e.g. a bribe equal to 500 times the minimum wage would attract a maximum fine of only 300 times the minimum wage. Furthermore, the adequacy of sanctions in practice could not be assessed because Mexico could not provide statistics on the actual fines imposed for domestic bribery, including in cases in which the offender did not have a net income. Mexico hopes that these statistics will become available after the Institutional System of Statistics Information (SIIIE) is implemented by the end of 2011. Finally, uncertainty over when a bribery offence is completed (see p. 11) could affect the calculation of fine days.

#### **b) Sanctions against Legal Persons**

33. Fines days are also an issue for sanctions against legal persons. In 2005, the maximum penalty against legal persons for foreign bribery was raised from 500 to 1 000 fine days. A judge may also suspend or dissolve the legal person if it is deemed "necessary for public safety reasons" (CPF Articles 222bis and 11). The doubling of the maximum fine partially addressed the Working Group's earlier concerns that the sanctions were too low. However, the concerns over fine days described above also apply to legal persons (Phase 2 Report paras. 74-75). For legal persons that do not have a net income at the time of the offence, a fine day based on the statutory minimum wage may be even more inadequate. Furthermore, the calculation of fine days could be especially difficult and uncertain for large multinational enterprises with numerous subsidiaries. Mexican prosecutors explained that the Ministry of Finance, the Federal Tax Administration and the National Banking and Securities Commission could assist in determining the net income of subsidiaries or companies in a consortium that benefitted from a bribe. In practice, this approach has never been applied since Mexico has not prosecuted a company for a criminal offence. But it highlights the complexities and uncertainties of applying the fine day concept to large multinational enterprises.

#### **Commentary**

*The lead examiners are concerned that the concept of fine days may result in sanctions for foreign bribery that are not effective, proportionate and dissuasive in some cases. In general the lead examiners recognise that fine days can be an effective system for sanctioning offenders. However, offenders who do not have a net income at the time of the offence may receive a fine linked to the minimum wage, which may be inadequate. If such an offender is a natural person, then he/she may still be jailed, but this alternative would not be available for a legal person. Suspension or dissolution of a company is theoretically available but unlikely to be imposed since it is disproportionately harsh and public safety may not be at stake in foreign bribery cases. Consequently, a legal person that is not turning a net profit could possibly bribe with impunity.*

*Even when a briber has a net income, the fine day may sometimes be difficult to calculate. A fine day is defined as the offender's net income from all sources at the time of the offence. It is unclear how the concept would apply to a briber who has income at times other than the precise moment when the offence is committed, e.g. a briber who receives irregular income such as bonuses, commissions, or irregular contracts. It may also be difficult and time-consuming to determine a legal person's net income, especially large multinational enterprises with many subsidiaries. Uncertainty over when a bribery offence is completed adds further complications. Statistics on actual fines imposed in domestic bribery cases, which could alleviate these concerns, were not available.*

*The lead examiners therefore recommend that Mexico strengthen the system of fine days to address cases in which an offender does not have a net income at the time of the offence, or if*

*the net income cannot be ascertained. For instance, Mexico could establish a system allowing a court to impose an appropriate fine after the court gives detailed reasons on why the net income cannot be determined. They also recommend that Mexico maintain statistics on the sanctions imposed against natural and legal persons in domestic and foreign bribery cases. The Working Group should also follow up whether sanctions that are imposed in foreign bribery cases are effective, proportionate and dissuasive.*

#### **4. Confiscation of the Bribe and the Proceeds of Bribery**

34. Confiscation raises two main issues. First, Mexico cannot confiscate property of equivalent value or impose monetary sanctions of comparable effect, a deficiency identified in Phase 2. Second, confiscation is relatively rare in practice.

35. Two statutory provisions deal with confiscation in foreign bribery cases. Federal Penal Code (CPF) Article 40 provides for the forfeiture of “instruments of crime, as well as the things being object or product from it”. Federal Code of Penal Procedure Article 182-Q states that “the judicial authority, through sentencing in the corresponding penal process may decide to confiscate assets with the exception of the ones which had been deserted in terms of this code.” A 2009 Law on Asset Forfeiture introduced, among other things, non-conviction based forfeiture. However, the Law does not apply to proceeds from foreign bribery but only those from organised crime, human and drug trafficking, kidnapping, and vehicle theft. The Federal Law on Organised Crime Article 4 also provides for forfeiture but not in foreign bribery cases.<sup>22</sup>

36. A significant deficiency is that these legislative provisions only allow the forfeiture of things or assets that constitute actual instrumentalities, objects or proceeds of crime. When these things or assets are not available for confiscation (*e.g.* because they have been spent), a comparable remedy is not available. The provisions are thus inconsistent with Article 3(3) of the Anti-Bribery Convention, which requires Parties to ensure that the proceeds of foreign bribery, or property of corresponding value, are subject to confiscation, or that monetary sanctions of comparable effect are applicable.

37. Mexico recognises this deficiency but its remedial efforts have yet to bear fruit. The 2003 Bill proposes confiscation of property of equivalent value.<sup>23</sup> The 2010 Bill would amend the CPF and Federal Criminal Procedure Code to provide seizure and confiscation of property of equivalent value. The 2011 Bill also deals with confiscation of equivalent value against private legal persons, according to Mexico.

38. Confiscation in practice also raises questions. Confiscation is discretionary upon conviction; a court is not obliged to so order. It has not been used regularly in bribery cases. Mexico provided statistics which show that, since 2005, 102 items have been seized in 41 bribery investigations. So far, only 14 of these investigations have been concluded, resulting in one item being confiscated. The 2008 FATF MER (paras. 287-289) observed a similar discrepancy between pre-trial seizures and confiscation in money laundering cases.

#### ***Commentary***

*The lead examiners are encouraged that Mexico has prepared draft legislation that would allow confiscation of property of equivalent value. They are concerned, however, that these efforts have languished. They therefore recommend that Mexico ensure that appropriate*

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<sup>22</sup> A criminal organisation is defined as a group of three or more persons who collectively commit a listed offence. Foreign bribery is not on this list (Federal Law on Organised Crime, Article 2).

<sup>23</sup> See also the Phase 2 Report at para. 77.



*legislation is enacted without delay. They also recommend that Mexico clarify that confiscation may be ordered against legal persons, and take steps to ensure that the bribe and the proceeds of bribery are routinely confiscated.*

## **5. Investigation and Prosecution of the Foreign Bribery Offence**

39. Since its Phase 2 evaluation, Mexico's criminal enforcement framework for foreign bribery has undergone considerable changes. More importantly, there are significant concerns over whether Mexico adequately enforces its foreign bribery offence in practice.

### **a) Bodies Responsible for Enforcing the Foreign Bribery Offence**

40. The Office of the Attorney General (PGR) bears overall responsibility for all federal criminal investigations and prosecutions. In August 2004, conduct of foreign bribery cases was given to a specialised unit within the PGR in Mexico City, the Special Prosecutor's Office for the Combat against Corruption within the Federal Public Service (SPOCC). In October 2004, SPOCC was joined with a specialised investigative unit, the Specialised Investigation Unit of Crimes Perpetrated by Public Officials and against the Administration of Justice (SIU). SPOCC prosecutors also have access to experts in the PGR's Office on technical matters.<sup>24</sup> SPOCC and SIU are responsible for foreign bribery cases that are technically complex, occur in more than one state, or involve over roughly MXN 1 million (approximately EUR 60 000 or USD 85 000) in bribes. Foreign bribery cases that do not meet these criteria are handled by the PGR's 32 sub-national offices in the Mexican states and the Mexico City Federal District.<sup>25</sup>

41. The law enforcement bodies of Mexico's 31 state governments, municipal governments, and the Mexico City Federal District are not directly involved in foreign bribery cases. Under Mexico's federal system, state governments may pass criminal laws. None have enacted a foreign bribery offence, though there was a proposal to do so at one point.<sup>26</sup> According to Mexico, state law enforcement officials may arrest a person committing a federal crime (such as foreign bribery) red-handed. The case must then be transferred to the federal authorities.

### **b) Co-ordination of Relevant Law Enforcement Bodies**

42. PGR issues resolutions governing co-ordination between the SPOCC and other PGR units. For example, one resolution mandates SPOCC to prosecute cases of foreign bribery unless they fall within the jurisdiction of the PGR organised crime unit.<sup>27</sup> The PGR's 32 sub-national offices are required to inform SPOCC of cases falling within its jurisdiction. If there is a disagreement over which unit should have conduct of a case, the Special Prosecutor that heads SPOCC has final say.<sup>28</sup>

43. A 2007 Collaboration Agreement governs co-ordination among the PGR and prosecutors from the 31 states, Mexico City Federal District and Military Justice. The Agreement commits these authorities to develop co-operation mechanisms and communications links, to exchange information promptly, and to seize the instruments, objects or proceeds of crime even in the absence of a request. The Agreement also provides for joint Federal/State investigations, with the consent of the relevant Attorney(s) General.

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<sup>24</sup> PGR Resolution No. A/107/04 and A/151/04; Organic Law of the PGR, Article 25.

<sup>25</sup> Regulation under the Organic Law of the PGR, Article 29(III); PGR Resolution No. A/070/03.

<sup>26</sup> See 2007 *Mexico: Phase 2 Follow-Up Report*, pp. 11-14.

<sup>27</sup> PGR Resolution No. A/107/04, Article 5.

<sup>28</sup> PGR Resolution No. A/070/03, Articles 3-5.

**c) Commencement and Termination of Proceedings**

44. The Federal Criminal Procedure Code (CFPP) prescribes rules for commencing and terminating investigations and proceedings. The public prosecutor is obliged to conduct an investigation upon receiving a report that a crime, including foreign bribery, may have been committed (CFPP Article 113). The case is terminated if the facts of the case do not constitute a crime, if the defendant was not involved, if there is an insurmountable obstacle to proving the offence, if the limitation period has expired, or if the defendant acted under circumstances that excluded criminal responsibility (CFPP Articles 137-138). The case may be suspended if there is insufficient evidence to commence proceedings but more evidence may be uncovered later (CFPP Article 131). Court proceedings may also be suspended under certain circumstances (CFPP Article 468). Plea bargaining is not available. Despite these rules which require an investigation to be opened whenever a crime is reported, the actual number of bribery investigations in Mexico is low.<sup>29</sup>

45. Mexican prosecutors and investigators involved in a foreign bribery case are prohibited from considering factors described in Article 5 of the Anti-Bribery Convention. Under Mexican law, international treaties to which Mexico is party have the force of law and are considered to be of a higher legal order than federal or state laws.<sup>30</sup>

**d) Resources**

46. The responsibility of the SPOCC and SIU extend beyond foreign bribery. SPOCC is also responsible for investigating and prosecuting all corruption offences in Federal Penal Code Article 220-224 that meet the criteria described above (i.e. technically complex, occur in more than one state, or involve over roughly MXN 1 million). These offences include not only domestic bribery, but also embezzlement, illicit enrichment, abuse of office etc. SIU's responsibilities are even wider. It is responsible for investigating any crime – not just corruption – committed by a public official. As a result, its caseload in recent years has included non-economic crimes, such as violent and sexual offences. At the on-site visit, the SPOCC and SIU stated that they were involved in some 500 cases.

47. Unfortunately, the SPOCC and SIU may not have sufficient human and financial resources to handle this caseload. The SPOCC has only one Special Prosecutor and three prosecutors. Its budget and actual expenditure have declined between 2008 and 2010. The SIU has 44 investigators (and 65 support staff in mostly administrative positions). Its budget and actual spending steadily declined from 2005 to 2010. The budget increased in 2011 but remained 25% below 2005 levels (before adjusting for inflation). Mexico points out that the SPOCC and SIU may call on the 1 500 prosecutors and investigators from the PGR's sub-national offices for assistance. This adds some flexibility. However, these additional officials are unlikely to have experience in complex, high-value corruption cases, and therefore do not adequately compensate for the shortage of resources at the SPOCC and SIU.

48. These resource levels are similar to those in Phase 2. At that time, the unit in the PGR's Office responsible for corruption offences had 3 prosecutors and 40 agents. The unit handled over 600 cases in 2003, mostly involving undue exercise of power and money laundering, not bribery. The Working Group accordingly recommended that Mexico "ensure that adequate resources be devoted to investigation and prosecution of bribery of foreign public officials" (Phase 2 Report para. 131 and Recommendation 4(a)).

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<sup>29</sup> See section on Actual Enforcement of the Foreign Bribery Offence at p. 17.

<sup>30</sup> Thesis of the Supreme Court of Mexico, P.LXXVII/99, *Amparo en revision* 1475/98; Supreme Court of Mexico, *Judicial Weekly of the Federation and Gazette* 19278 (November 1999).

### *Commentary*

*The lead examiners believe that the SPOCC and SIU do not have sufficient human and financial resources to handle foreign bribery cases. These two units are responsible for the most complex and serious foreign and domestic corruption cases in Mexico. Yet their staffing levels, especially those for the SPOCC, are strikingly low. To add further pressure on resources, the SIU is also responsible for investigating non-corruption crimes committed by Mexican officials. The lead examiners therefore recommend that Mexico take further steps to implement Phase 2 Recommendation 4(a), and devote adequate human and financial resources to investigating and prosecuting foreign bribery cases.*

#### *e) Expertise and Training*

49. The ability of SPOCC and SIU to deal with foreign bribery cases may be further hampered by a lack of relevant experience and expertise. As noted earlier, PGR has only two foreign bribery investigations, both of which are ongoing. Neither involves complex, corporate bribery schemes often seen in foreign bribery cases elsewhere. Domestic corruption investigations usually focus on the corrupt Mexican official, not the briber. There is no experience in criminal corporate investigations. The SPOCC has never prosecuted a company, partly because corporations cannot be liable for domestic corruption or any economic crimes. Experience in complex financial investigations is limited. Mexican officials stated that accounting and auditing experts were available in the PGR's Office. However, PGR could not provide an example of a corruption investigation in which expertise in forensic accounting and information technology was used. The only example that it cited was a relatively simple case in which the evidence consisted mainly of one bribe payment and some bank statements. These observations are largely consistent with the 2008 FATF MER (para. 471) which noted an absence of money laundering convictions resulting from complex financial investigations. The MER (para. 473) also noted that agencies such as the SFP should be involved in drafting and coordinating joint strategies to combat and dismantle corruption. However, the lead examiners note that the responsibility for *criminal* investigations and prosecutions of corruption rests solely with PGR.

50. Concerns over the lack of expertise are exacerbated by the turnover in and restructuring of the investigative police. The Federal Ministerial Police (FMP) was created in 2009 as part of efforts to reform the Federal Investigations Agency (AFI). This transition is still on-going. The AFI itself was established in just 2001 to replace the Federal Judicial Police. Each time the AFI and FMP were reorganised, there was significant staff turnover due to efforts to improve police integrity. Fighting police corruption is undoubtedly a worthwhile goal. But the continuous restructuring of the federal investigative police bodies has also impeded the accumulation of expertise in bribery investigations, thus limiting the ability of the SIU to draw on police expertise in its own cases.

51. The lack of experience and expertise calls for training, some of which Mexico has begun providing. Newly hired police officers and experts attend a course which covers corruption and bribery. Existing investigators and prosecutors have attended a series of courses on financial investigations in 2010, and courses on corruption which, according to Mexico, specifically addressed foreign bribery. However, Mexico could not indicate how many SPOCC prosecutors and SIU investigators attended these courses.

### *Commentary*

*The SPOCC and SIU need to strengthen their capacity to conduct complex financial investigations in foreign bribery cases, especially those involving companies. The examiners are encouraged by the relevant training courses that were recently offered to investigators and prosecutors. They recommend that Mexico continue these efforts and ensure that all SPOCC*

*prosecutors and SIU investigators receive adequate training in foreign bribery and complex financial investigations.*

**f) Bank Information, Freezing Bank Accounts and Other Types of Seizure**

52. Mexican prosecutors reported that they do not have difficulties obtaining bank information. The Credit Institutions Act Article 117 allows prosecutors to obtain secret bank information. The Phase 2 Report (paras. 172-174) noted delays in obtaining such information ranging from a few months to two years. The 2007 Written Follow-Up Report (para. 13) indicated that delays had been halved. In Phase 3, prosecutors stated that delays have been further reduced, citing a recent case in which 3 000 pieces of bank information were obtained in 45 days. Information about an account can be obtained based on just an account number or the name of an individual.

53. Multiple provisions appear to allow the freezing of bank accounts. Federal Criminal Procedure Code (CFPP) Article 141bis permits a judge to order the freezing upon a prosecutor's request, while CFPP Article 181 and Federal Criminal Code Article 40 allow a judge to order the seizure of instruments, objects or proceeds of crime. Mexico could not explain the interaction of these provisions.

54. Statistics show that funds and assets have been seized in actual investigations. For money laundering cases, Mexico provided detailed statistics showing the type and value of assets seized since 2006. For bribery cases, the PGR stated that 99 items were seized in 39 investigations between 2005 and May 2011. But as noted above, most of the seized items remain in the PGR's possession and have not been confiscated as the penal process has not concluded.

**g) Special Investigative Techniques**

55. Special investigative techniques are unavailable in foreign bribery investigations. Wiretapping can only be used in investigations of "serious crimes", which does not include domestic or foreign bribery, but does include offences such as marketing of regular stolen goods, theft of vehicle, and money laundering.<sup>31</sup> The 2010 Bill proposes to make undercover operations and controlled deliveries available in money laundering and organised crime investigations, but not in domestic or foreign bribery cases.

**Commentary**

*Wiretapping, undercover operations and controlled deliveries are important tools for investigating foreign bribery cases, given the often concealed nature of the crime. The lead examiners therefore recommend that Mexico amend its legislation to make these special investigative techniques available in foreign bribery cases.*

**h) Witness Protection**

56. Mexico has implemented Phase 2 Recommendation 5(e) "to introduce witness protection for investigations of transnational bribery within the framework of judicial reform". Legislative amendments in 2009 made prosecutors and the police responsible for the protection of witnesses, including in foreign bribery cases. When an investigation begins, a prosecutor is required to request the police to protect witnesses if there is an objective risk to the witness' physical safety. Once criminal proceedings begin, a

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<sup>31</sup> Federal Criminal Procedure Code Articles 194 and 278ter.

court may order police protection for a witness if there is physical danger to the witness and the witness' evidence is "decisive" to the proceedings.<sup>32</sup>

*i) Actual Enforcement of the Foreign Bribery Offence*

57. Mexico needs to strengthen and give greater priority to the criminal enforcement of its foreign bribery offence. This conclusion is supported by a myriad of factors: the few and protracted bribery investigations, absence of prosecutions and convictions, lack of resources, and limited investigative techniques. Recent government attempts to use administrative law to address this problem are commendable, but the criminal law enforcement framework must still be reinforced at the same time.

58. Mexico's economic profile suggests that it should have some foreign bribery cases. As noted earlier, a considerable number of Mexican enterprises are active in corruption-prone countries and economies, and are thus at risk of committing foreign bribery. Representatives of the Mexican private sector at the on-site visit and economic data confirm this view. At the same time, corporate measures to prevent foreign bribery may be inadequate, especially among SMEs, family-owned unlisted companies, and companies not listed in the U.S. (see p. 27). Despite this combination of factors, Mexico has opened only two foreign bribery investigations. Both cases came to the PGR's attention through foreign authorities and are still under investigation at the time of this report. Neither case involves a Mexican company bribing a foreign public official to obtain a business contract.

59. When foreign bribery cases are opened, the Mexican authorities do not appear to have investigated and prosecuted them with priority and urgency. The PGR became aware of one of the ongoing foreign bribery cases in 2001. The investigation initially concerned money laundering but was expanded to include foreign bribery in 2004. An MLA request was sent to foreign authorities only in 2008 and remains outstanding. The statute of limitations for the case expires as early as December 2012. The second foreign bribery investigation opened in 2005 and an MLA request was sent in 2010. This request, too, remains outstanding. In sum, both foreign bribery cases appear to have languished.

60. There are also relatively few criminal domestic bribery cases. The private sector and civil society representatives at the on-site visit almost unanimously agreed that there is a high incidence of domestic bribery in Mexico. But in their view, very few cases result in criminal investigations and prosecutions. Statistics provided by the Mexican authorities support this view. In 2006-2010, SPOCC investigated on average fewer than three domestic bribery cases per year. Statistics on the number of prosecutions, convictions and sanctions in bribery cases were unavailable. The number of domestic bribery cases that are of low value or complexity, which are investigated by the 32 sub-national PGR offices, were higher. But of these cases, only 28% resulted in prosecutions, which suggests that few cases reach the courts. Data on the number of convictions were again unavailable. These statistics, though incomplete, point to insufficient criminal enforcement of Mexico's bribery laws.

61. Other statistics indicate that this inadequate criminal enforcement of corruption laws has persisted for some time. The Working Group's 2004 Phase 2 Report (para. 129) noted that Mexico had just eight criminal proceedings for domestic passive corruption in the previous six years. Likewise, the 2008 FATF MER (para. 473) stated that "it is also striking to note the absence of convictions for corruption offences, given that corruption is one of the underlying offences most commonly prosecuted in Latin America as a predicate offense for money laundering." Academics have also commented on Mexico's poor

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<sup>32</sup> Federal Criminal Procedure Code Articles 2(V), 3(X), 123 and 253bis; Organic Law of the Attorney General of the Republic Article 4(I)(A)(k).

record of investigations and prosecutions of crimes generally.<sup>33</sup> Many participants at the on-site visit concurred that Mexico's ineffective enforcement of criminal corruption offences has existed for years, and hence crimes such as bribery are frequently committed with impunity. The result is widespread loss of confidence in the ability of the Mexican criminal justice system to deal with corruption, according to many on-site visit participants.

62. One of the causes of this poor enforcement record may be the inadequate priority given to tackling criminal bribery offences. As noted above, SPOCC and SIU seem significantly under-staffed. The SIU's financial budget has steadily declined in recent years. Foreign and domestic bribery are not considered "serious crimes" in the Federal Code of Criminal Procedure (see p. 20). Recent efforts expand the use of special investigative techniques in investigations of other crimes but not bribery. Mexico has given much recent attention to fighting organised crime, drug trafficking and related money laundering. Tackling these crimes is undoubtedly a pressing concern, but it should not come at the expense of enforcing criminal laws on corruption. If allowed to flourish, corruption will undermine the government's efforts to address these other crimes.

63. Another recent development is a shifting of responsibility for fighting bribery from criminal to administrative enforcement bodies. Mexico's Ministry of Public Administration (SFP) is primarily responsible for ensuring the integrity of Mexican public officials. Nevertheless, it is increasingly involved in combating foreign bribery. Its National Programme on Accountability, Transparency and the Fighting of Corruption 2008-2012 refers to foreign bribery and the Anti-Bribery Convention. It has done much to raise awareness of the Anti-Bribery Convention through media campaigns, seminars and public events.<sup>34</sup> The recent Anti-Corruption Bill proposes that the SFP be allowed to impose fines and debarment for not just domestic but also foreign bribery. If passed, the Bill would greatly enlarge the SFP's role in fighting foreign bribery.

64. These efforts expanding the SFP's role are commendable but they do not completely address the concerns over the criminal enforcement of Mexico's bribery laws. On-site visit participants from the private sector and civil society rightly observed that criminal sanctions – especially incarceration – are necessary to deter individuals from committing bribery. The financial sanctions that can be imposed by the SFP may therefore not be enough. The SFP asserted that it has conducted undercover operations and audio and video surveillance, but it has no legal jurisdiction to use other criminal investigative tools, such as search warrants.

### *Commentary*

***The lead examiners have significant concerns over Mexico's criminal enforcement of its foreign bribery laws. Despite a considerable risk that Mexican companies could commit foreign bribery, Mexico has only opened two foreign bribery investigations. Both cases have become protracted and could soon be barred by the statute of limitations. Indeed, problems have also appeared in domestic corruption cases for some time, which may reflect systematic challenges in the criminal investigation and prosecution of corruption cases generally. A***

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<sup>33</sup> Shirk, D.A. estimated that only one in five reported crimes are investigated and prosecuted, and one or two out of every 100 crimes results in a sentence ((2010), "Criminal Justice Reform in Mexico: An Overview", Mexican Law Review, Vol. III, No. 2, pp. 194-195). In another article, Pérez Correa, C. cited a 2001 survey indicating that the prosecutor's office initiated investigations in only 74% of reported cases, and six out of ten investigations were inconsequential ((2008), "Front Desk Justice: Inside and Outside Criminal Procedure in Mexico City", Mexican Law Review, Vol. I, No. 1, p. 6.).

<sup>34</sup> See the section on "Public Awareness and the Reporting of Foreign Bribery" at p. 28.

*recent initiative to enact an administrative law to deal with foreign bribery could detract attention away from the necessary reforms of the criminal enforcement system.*

*For these reasons, the lead examiners recommend that Mexico give greater priority to the criminal enforcement of its bribery laws. In particular, Mexico should take steps to ensure that its criminal law enforcement authorities seriously investigate all allegations of foreign bribery. Also important is raising awareness that investigating and prosecuting bribery is equally important to enforcing other offences such as organised crime and money laundering. Finally, Mexico should maintain statistics on the number of investigations, prosecutions, convictions and sanctions for domestic and foreign bribery.*

## 6. Money Laundering

65. Several Mexican governmental bodies are involved in anti-money laundering (AML). The National Banking and Securities Commission (CNBV), the National Retirement Saving System Commission (CONSAR), the National Insurance and Securities Commission (CNSF) and the Tax Administration Service (SAT) are the financial sector regulators that enforce AML regulations that apply to financial institutions under their supervision. These regulatory bodies receive suspicious transaction reports (STRs) and reports on other financial transactions from financial institutions and other reporting entities. They then forward these reports to the Mexican Financial Intelligence Unit (UIF) located within the Ministry of Finance and Public Credit (SHCP). Money laundering cases are prosecuted by a special unit of the Attorney General's Office (PGR). As with all criminal cases, the PGR directs the Federal Ministerial Police to conduct money laundering investigations. The CNBV, PGR and UIF reported a high level of co-operation and co-ordination among these bodies at both Federal and State levels, including through formal agreements. The CNBV stated that it responds promptly to information requests in relation to corruption offences.

66. Mexico has taken some steps to strengthen its AML system recently. Unlike in the area of anti-corruption, AML has received a surge of additional resources, with the UIF recently expanding its staff by 59%.<sup>35</sup> Twelve training seminars for law enforcement officials on money laundering were held in 2010 alone, although the seminars did not deal with foreign bribery *per se*. The Senate passed a Bill in April 2011 that would require more entities to file STRs.<sup>36</sup> As noted earlier, the 2010 Bill proposes to make special investigative techniques available in money laundering (but not foreign bribery) cases. The 2003 Bill also purports to amend the money laundering offence (Phase 2 Report para. 54). At the international level, Mexico held the FATF Presidency in 2010-2011 and pushed for the better use of AML systems to fight corruption. This led to the publication of an Information Note on Corruption, and an expert meeting on corruption and money laundering.

67. Unfortunately, most AML measures that have been implemented in Mexico do not directly address corruption-related money laundering. In 2011, CNBV issued guidelines to financial institutions on money laundering techniques. The UIF and the tax authorities also jointly published a manual on reporting suspicious transactions in 2009. Neither publication specifically refers to bribery or corruption. Phase 2 Recommendation 2(d) asked Mexico to conduct a "strategic analysis" on the characteristics of money laundering. Studies conducted by the UIF in 2009 and 2010 identified drug trafficking as the main source of money laundering; no reference was made to corruption. The only corruption-related AML measure concerns politically exposed persons (PEPs), i.e. Mexican and foreign public officials, and their family members and associates. Mexican financial institutions must conduct enhanced due diligence when PEPs

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<sup>35</sup> FATF (2010), *Mutual Evaluation of Mexico: First Follow-Up Report*, p. 9.

<sup>36</sup> Federal Law for Preventing and Identifying Transactions Involving Proceeds of Crime.

open accounts. Mexican officials stated that financial institutions must automatically classify foreign (but not Mexican) PEPs as high-risk. The CNBV publishes a list of domestic (i.e. Mexican) PEPs.

68. Statistics suggest that Mexico's AML measures may have had limited impact in detecting bribery. The 2003 Phase 2 Report (para. 159) stated that only two STRs have ever led to investigations of a corruption offence. Neither resulted in prosecution. In Phase 3, the UIF stated that it had referred to the PGR three STRs involving suspected laundering of the proceeds of foreign bribery. None led to an investigation, according to the PGR. In 2004-2010, there was an average of almost 50 convictions per year for money laundering, according to statistics provided by UIF. Yet none of these convictions involved bribery as a predicate offence. The low number of corruption-related money laundering cases is striking, considering that private sector and civil society participants at the on-site visit largely believed that there is a significant level of corruption in Mexico.

### *Commentary*

*The lead examiners are encouraged by Mexico's recent efforts to fight money laundering. Mexican law recognises foreign bribery as a predicate offence for money laundering. Significant resources have been expended to increase UIF staffing levels and to provide important training to law enforcement officials. Mexico has also shown commendable leadership in the FATF in fighting corruption-related money laundering. However, the lead examiners are concerned that Mexico's AML system may have had limited impact in detecting and punishing bribery-related money laundering. They therefore recommend that Mexico develop AML measures that are directly related to bribery, including typologies on the laundering of bribes and the proceeds of bribery. Mexico should also train CNBV officials and reporting entities on money laundering predicated on (domestic and foreign) bribery. UIF officials should also receive further training on detecting bribery-related money laundering cases, and on reporting such cases to law enforcement authorities.*

## **7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes**

69. This section of the Report will first consider Mexico's legislative provisions prohibiting the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, and other conduct described in Article 8(1) of the Convention. Particular attention is given to the inadequate sanctions for such conduct. The report then considers the role of external auditing, especially an auditor's obligation to report foreign bribery, which is an outstanding Phase 2 Recommendation. The section ends with a discussion of post-Phase 2 developments in corporate compliance, internal controls and ethics programmes among Mexican companies.

### **a) Accounting Standards and the False Accounting**

70. Mexico has developed its own accounting standards known as Financial Information Standards (NIF, previously known as Mexican GAAP). The NIF are issued by the Mexican Council for Research and Development of Financial Information Standards, and require financial statements to meet certain qualitative criteria, such as reliability, comprehensibility, truthfulness, sufficiency of information etc. These standards largely meet the requirements of Convention Article 8(1). However, NIF do not have the force of law.

71. According to Mexican authorities, the prohibition and sanctioning of conduct described in Convention Article 8(1) is mainly covered by Articles 83 and 84 (previously 28 and 30) of the Federal Tax Code (CFF). Each subparagraph of Article 83 prohibits a particular type of accounting-related misconduct.



These range from a complete failure to keep accounts to failing to make accounting entries that adequately identify the corresponding transactions. Article 84 prescribes the punishment for each type of misconduct described in Article 83. The provisions apply to both natural and legal persons, according to Mexican authorities. Both Articles are reproduced in Annex 4.

72. The principal concern is that the available sanctions for a breach of these provisions fall short of Article 8(2) of the Convention. The sizes of the fines prescribed in Article 84 are adjusted twice per year. The current maximum fine under these provisions is MXN 69 000 (USD 5 937 or EUR 3 993) (for failing to issue or issuing tax receipts with inaccurate information, an offence that is generally not relevant to foreign bribery). Failure to keep accounts and making inaccurate accounting entries attract maximum fines of only MXN 10 670 (USD 918 or EUR 617) and MXN 4 270 (USD 367 or EUR 247) respectively. Absent aggravating factors, first-time offenders generally receive the minimum penalty, according to Mexican officials. Of greater concern, however, are the maximum sanctions available. Inaccurate books and records are often used to conceal foreign bribery in order to win contracts worth hundreds of millions of dollars and euros. In these cases, the maximum sanctions available under these provisions are not effective, proportionate or dissuasive.

73. Mexican officials referred to additional legislative provisions that may apply to false accounting but which do not, on their own, meet the requirements of Article 8 of the Convention. Articles 16 and 33 of the Commerce Code require all persons involved in commerce to keep an accounting system. The system must permit the identification of individual transactions, require proper documentation, and include control and verification systems. However, a breach of these provisions does not result in sanctions and no public body enforces these provisions. Other offences referred to by Mexican officials contain elements that are not found in Article 8, and hence would not cover all types of misconduct contained in that provision.<sup>37</sup>

74. The enforcement of the accounting offences is not entirely clear. Mexico could not provide enforcement statistics on the main false accounting offences in CFF Articles 83 and 84. However, statistics were available on some of the additional provisions, such as CFF Article 111 and CPF Article 243.

### *Commentary*

*Mexico does not impose effective, proportionate and dissuasive sanctions for misconduct related to accounting as required in Article 8(2) of the Convention. The lead examiners therefore recommend that Mexico amend its legislation to increase the maximum sanctions available. They also recommend that Mexico maintain statistics on the number of investigations and prosecutions of such misconduct, and the sanctions imposed in these cases.*

#### **b) Role of External Auditing**

##### *i) Awareness and Detection of Foreign Bribery*

75. Current Mexican auditing standards are largely identical to international standards, according to representatives of the accounting and auditing profession at the on-site visit. Mexican accounting and auditing standards are set by professional associations such as the Mexican Institute of Public Accountants.

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<sup>37</sup> For example, CFF Article 111 prohibits double bookkeeping and concealing, modifying or destroying accounting records are punishable by imprisonment of three months to three years. The provision does not cover conduct such as the mere making of inaccurate accounting entries in a single set of books. The tax fraud offence (CFF Article 108) applies to false accounting only if the defendant intends to evade taxes. The offence in CPF Article 243 applies to the falsification of *public* documents. It would not cover falsifying a company's internal, unpublished accounts and ledgers.

State-owned and controlled enterprises and private companies are subject to the same auditing standards. Mexico is expected to adopt the International Standards on Auditing (ISA) by 2013.

76. The applicable auditing standards specifically require Mexican auditors to detect fraud. According to Mexico's questionnaire responses, "fraud" is defined as "distortions in the registry of operations and financial information, or intentional theft, or concealment, that have a significant impact on the financial records" of the audited company. An ISA 240 Fraud Questionnaire has been prepared to assist auditors that consists of a list of questions that an auditor should ask him/herself during an audit. Some of the questions are directly relevant to detecting foreign bribery, such as whether there are excessive payments to agents and intermediaries.

77. Less clear is whether auditors in practice routinely seek to detect foreign bribery during audits. At the on-site visit, one auditor did not believe that Mexico had a foreign bribery offence. Representatives of the accounting and auditing profession acknowledged that fraud detection is an element of all audits, but detecting bribery is not the primary objective. They did not appear familiar with the ISA 240 Fraud Questionnaire and stated that not all auditors use the Questionnaire. Some participants believed that auditors would pay particular attention to foreign bribery when auditing a company that is at risk of committing this crime. However, this would occur only because the audited company is subject to U.S. FCPA jurisdiction. Some of the participants appeared unfamiliar with "red flag" indicators of foreign bribery. Overall, awareness of and efforts to detect foreign bribery appear uneven.

78. The Mexican authorities have made some efforts to raise awareness of foreign bribery among accountants and auditors. The SAT organised three conferences on foreign bribery to which accountants and auditors were invited. The accounting and auditing profession has yet to develop courses on foreign bribery, which was the subject of Phase 2 Recommendation 1(d).

### *Commentary*

***As in other jurisdictions, auditing standards in Mexico principally require auditors to detect material inaccuracies in a company's financial statements. However, such inaccuracies could result from foreign bribery. The lead examiners therefore recommend that Mexico take steps to encourage auditors to detect foreign bribery, especially during audits of companies that are at risk of committing this crime. As in Phase 2, they also recommend that Mexico encourage the accounting and auditing profession to develop courses to raise awareness of foreign bribery.***

#### *ii) Reporting of Foreign Bribery by External Auditors*

79. An auditor's obligation to report crimes was a significant issue in Mexico's Phase 2 evaluation. Mexican auditors who discover crimes such as foreign bribery must report the matter to company management. In Phase 2, Mexican auditors stated that their professional obligations of confidentiality precluded them from further reporting foreign bribery to the authorities. The Mexican authorities disagreed. In their view, the general obligation of all individuals to report crimes under Article 116 of the Federal Code of Criminal Procedure (CFPP) overrides an auditor's confidentiality obligations. This led the Working Group to recommend that Mexico ensure that CFPP Article 116 extends to accountants and auditors, and that professional rules on confidentiality do not contradict the CFPP (Recommendation 3(b)).

80. Since then, the disagreement between auditors and the Mexican authorities has intensified. At the Phase 3 on-site visit, accountants and auditors maintained that professional confidentiality obligations precluded the reporting of crimes to the authorities. Several were also of the view that CFPP Article 116 does not apply to foreign bribery, since the crime cannot be investigated *ex officio*. The Mexican authorities strongly disagreed with both points. They also stated that they have had a dialogue with

Mexican auditors on this issue through workshops. However, these efforts have obviously not been sufficient to resolve this issue.

81. It is important to note that there are examples in other contexts in which reporting obligations override an auditor's confidentiality obligations. The Federal Tax Code requires an auditor to report tax evasion by a client to the tax authorities, according to an auditor at the on-site visit. External auditors auditing a state-owned enterprise must report suspected crimes to the Ministry of Public Administration. When auditing financial institutions, an auditor must also report to the regulatory authorities when he/she discovers situations that may affect the client's stability, profitability or solvency. These examples demonstrate that auditor confidentiality is not a sacrosanct principle in Mexico, and may be overridden when justified by the public interest.

### *Commentary*

*The lead examiners consider that Mexico's attempts to implement Phase 2 Recommendation 3(b) through dialogue and workshops with auditors have not been sufficient to resolve the issue of reporting of foreign bribery. They therefore reiterate the Working Group's recommendation in Phase 2, and recommend that Mexico take the necessary measures, including amendment of CFPP Article 116 and other relevant legislation, to clarify that the reporting obligation in this article overrides any professional obligations of an auditor towards his/her client. Mexico should also consider providing legal protection for auditors that make such reports reasonably and in good faith.*

### *c) Corporate Compliance, Internal Controls and Ethics Programmes*

82. The quality of corporate compliance, internal controls and ethics programmes among Mexican companies is uneven. Several on-site visit participants observed improvements in the previous five years. However, progress was concentrated in corporations that are subject to the jurisdiction of the U.S. FCPA. Companies that fall into this category are generally Mexican subsidiaries of foreign parent companies and Mexican companies listed on U.S. stock exchanges.

83. This would leave a significant number of Mexican enterprises with less than robust corporate compliance mechanisms. Mexico is known for some very large corporate conglomerates with business in corruption-prone industries. Many are highly active internationally, including in Latin America, and are listed on Mexican but not U.S. stock exchanges. Another area of concern may be unlisted, family-owned companies. One on-site visit participant described these companies as opaque and likely to have poor corporate compliance measures. Almost all participants agreed that the relatively small percentage of SMEs that are active internationally likely do not have any corporate compliance measures.

84. Some statistics confirm the inadequacy of anti-bribery corporate compliance among Mexican companies. A representative of a business association at the on-site visit cited a study which indicated that Mexican businesses spend approximately 10% of their income on bribes. This figure is comparable to those in a published 2008 survey showing that 44% of 235 surveyed Mexican companies paid bribes, costing roughly 5% of the companies' revenues.<sup>38</sup> While these data refer to domestic and not foreign bribery, they nevertheless suggest that corporate compliance and internal controls in most Mexican companies are ineffective or non-existent.

85. Mexico has tried to improve the compliance culture among its companies. Its national anti-corruption strategy for 2008-2012 specifically speaks of promoting corporate compliance to comply with

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<sup>38</sup> KPMG (2008), *Encuesta de Fraude y Corrupción en México*.

international anti-corruption conventions.<sup>39</sup> The Public Service Administration (SFP) has been active in implementing this strategy. It has held many awareness-raising events and seminars with high-level business representatives, corporate lawyers, and the accounting and auditing profession. These events deal specifically with the Anti-Bribery Convention and the 2009 Anti-Bribery Recommendation, including the Good Practice Guidance on Internal Controls, Ethics, and Compliance. From 2010 to June 2011, 1 580 business representatives attended 15 such events. SFP also prepared pamphlets and brochures promoting the Convention, corporate compliance and anti-corruption measures that were sent to the private sector. It has assembled and distributed a compilation of international tools for companies to fight bribery. Business associations co-operated in many of these efforts. The Ministry of Economy has operated programmes to promote corporate social responsibility, though these initiatives generally do not refer specifically to foreign bribery.

86. Some initiatives to improve corporate compliance have targeted small- and medium-sized enterprises (SMEs) through training, consulting services, and certification schemes. The Ministry of Economy has undertaken to continue to train and inform SMEs on foreign bribery through its Undersecretariat for SMEs and SME Fund. Proposed activities include disseminating electronic and print materials, and promoting the new ISO-26000 Norm. These efforts would be welcome.

87. However, the impact of these numerous initiatives is not entirely clear. Many of the private sector representatives at on-site visit were not aware of the publications that had been disseminated by the Mexican government. Some received the Good Practice Guidance only with the invitation to the on-site visit. More importantly, it is unclear how many companies have actually adopted the measures described in these documents. The Mexican authorities did not make follow-up inquiries to see whether their awareness-raising efforts have led to actual changes in Mexican companies' compliance culture.

### *Commentary*

*The lead examiners recognise that the Mexican authorities have made efforts to promote corporate compliance, internal controls and ethics to prevent and detect foreign bribery. Unfortunately, most Mexican companies, apart from some that are subject to U.S. FCPA jurisdiction, may not have developed effective compliance programmes. The lead examiners therefore recommend that Mexico continue to promote corporate compliance measures. Emphasis should be given to Mexican companies, including SMEs, that are active internationally but are not subject to FCPA jurisdiction. They also recommend that Mexico measure the impact of their efforts, such as by examining the number of Mexican enterprises that have adopted effective corporate compliance programmes in practice.*

## **8. Tax Measures for Combating Bribery**

88. This section deals with the continuing absence of an explicit prohibition of the tax deduction of bribes in Mexico. This is followed by the efforts of Mexican Tax Administration Service (SAT) to detect bribery through tax examinations and to share tax information. SAT's efforts to raise awareness of foreign bribery and to report these cases are discussed in the section on Public Awareness and the Reporting of Foreign Bribery at p. 31.

### **a) Tax Deductibility of Bribes**

89. As in Phase 2, Mexico does not explicitly deny the tax deduction of bribes. In 2010, the Ministry of Finance and Public Credit considered an SAT proposal to enact an explicit prohibition and decided that

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<sup>39</sup> National Programme on Accountability, Transparency and Fighting Corruption 2008-2012, Strategy 3.4.

it was unnecessary. At the time of this report, the Ministry and SAT are considering the adoption of a normative criterion on this issue. Nevertheless, Mexico maintains that deductions of bribes are implicitly prohibited because of principally two provisions. First, an expense is deductible only if it is, among other things, *strictly indispensable* to the taxpayer's activities and is properly documented (Articles 31 and 172 of the Income Tax Law, ITL). Second, a claimed deduction cannot fall within a prohibited category of expenses (ITL Articles 32 and 173). For example, taxpayers that are legal persons or certain natural persons generally cannot deduct courtesies or representation expenses. Gifts are also not deductible, unless the gift is "directly related to the transfer of products or the provisions of services offered to customers in general". This means that a gift can be deducted if it accompanies a sale of goods or services and is given to every purchaser, according to a Mexican official at the on-site visit. Mexico argues that the "strictly indispensable" requirement coupled with the exclusion of gifts effectively precludes the tax deduction of bribes. There is no case law to support this proposition.

90. It is somewhat debatable whether these provisions indeed prevent the tax deduction of bribes. Some bribes are arguably "strictly indispensable" to a taxpayer's income generating activity, *e.g.* when a company operates in a country where business allegedly cannot be done without paying bribes. The prohibition of gifts in ITL Article 32 is helpful, but the term "gift" is undefined, thus adding ambiguity. There are also exceptions to the prohibition against deducting gifts. Gifts given to all customers of the same product or service are deductible. A gift given to a purchaser of a unique product or service can also be deducted, according to a Mexican official at the on-site visit. Most importantly, bribes not in the form of gifts or entertainment would not be caught by this prohibition.

91. Mexico could not provide examples in which it has enforced the non-deductibility of bribes. Two subsidiaries of foreign multinational enterprises were recently fined and debarred from public procurement as sanctions for bribing Mexican public officials. The Mexican authorities could not confirm whether they have verified whether these two companies had claimed the bribe payments as deductions from their taxes. Mexico stated, however, that investigations were on-going at the time of this report.

### *Commentary*

***Mexican tax legislation does not explicitly deny the deduction of bribes, as required by the 2009 Anti-Bribery Recommendation and 2009 Tax Recommendation. To the contrary, bribe payments could conceivably be disguised as certain types of deductible expenses. The lead examiners recommend that Mexico, without further delay, clarify explicitly by law or by any other binding means, that bribes to foreign public officials are not deductible for any tax purposes. They also recommend that, when a company or individual has been found to have engaged in domestic or foreign bribery, SAT re-examines the briber's tax return for the relevant years to verify whether the bribe payments had been deducted from the briber's taxable income.***

### ***b) Detection of Bribery***

92. Since Phase 2, Mexico has prepared a document entitled Strategies for Identifying National and International Bribery. The document consists mainly of a translation of the OECD Bribery Awareness Handbook for Tax Examiners.<sup>40</sup> The Strategies have in turn been included in SAT's audit handbooks or manuals, according to the Mexico authorities. It contains a fairly lengthy description of "red flag" indicators of bribery and the steps that a tax examiner should take to detect bribe payments when conducting a tax examination. The document has been disseminated to tax examiners as part of the

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<sup>40</sup> The Handbook has also been included in the "Strategies of Fiscal Auditing for Tax Examiners" (*Estrategias de Fiscalización del Auditor*) since 2004.

compulsory compliance guidelines in tax examinations. In 2007, the document was provided to 1 994 officials at a training course “Detection of International Bribery in Fiscal Inspections”. The document was updated in 2010 to reflect the 2009 Tax Recommendation and disseminated again to tax officials. In spring 2011, over 3 000 officials watched a two-hour videoconference to promote the updated guidelines.

93. Mexico also states that taxpayers are required to withhold and report payments of commissions, fees etc. to overseas entities. Tax officials analysing these reports could, in theory, detect payments that are in fact bribes to foreign public officials.

94. In practice, these measures have not resulted in the detection of domestic or foreign bribery cases during tax examinations. In 2008-2010, SAT reported to the prosecutor’s office 24 cases of Mexican tax officials taking bribes from taxpayers. The cases came to SAT’s attention because of reports by individuals; none were detected during a tax examination.

### *Commentary*

*The lead examiners commend Mexico’s efforts to prepare and to update the Strategies for Identifying National and International Bribery. The Strategies adopt the OECD Bribery Awareness Handbook for Tax Examiners, which represents best practice in the detection of bribery by tax examiners. The SAT has also made laudable efforts to disseminate the Strategies to tax examiners, including through the innovative use of videoconferencing for this purpose.*

*But despite these efforts, Mexico’s tax authorities have not detected any domestic or foreign bribery cases. This is somewhat peculiar, given that Mexican private sector and civil society representatives at the on-site visit perceive that domestic and, to a lesser extent, foreign bribery are prevalent in the Mexican context. The lead examiners therefore recommend that SAT continue its regular training programmes for tax auditors and examiners. They also recommend that SAT include bribery in their risk assessment and audit. These efforts will focus tax examiners on identifying bribes during the examination of tax returns, and encourage them to carry out relevant compliance checks. Mexico should also analyze why the Strategies have not led to the detection of domestic and foreign bribery cases.*

### **c) Sharing of Tax Information**

95. Mexico shares tax information with foreign countries principally through 39 double taxation agreements (DTAs) and 4 tax information exchange agreements (TIEAs). It is negotiating another 14 TIEAs. These agreements allow the sharing of information with foreign countries for civil and criminal tax purposes but not for non-tax related criminal investigations. Only the agreements with Austria and Switzerland adopt the language on information sharing from paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention. Mexico states that its policy is to include the language from the Model Tax Convention in future DTAs. Mexico has also signed but not ratified the Convention on Mutual Administrative Assistance in Tax Matters and Protocol of the OECD and Council of Europe.<sup>41</sup> Mexico adds that it is useful to share information on payments of commissions, expenses etc. with countries with which it has tax agreements, but it has not done so in practice.

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<sup>41</sup> This Convention and Article 26 of the Model Tax Convention allow a country’s tax authorities to share tax information received from foreign counterparts with its national law enforcement authorities for use in criminal corruption cases if certain conditions are met.

## 9. International Co-operation

96. Mexico provides extradition and mutual legal assistance (MLA) both with and without an applicable treaty. Mexico has bilateral MLA and extradition agreements with 30 and 25 countries respectively. Mexico is also party to the UNCAC and the Inter-American Convention against Corruption. Mexico may provide extradition without a treaty if there is reciprocity and dual criminality.<sup>42</sup> Mexico provides MLA without a treaty despite the absence of a specific legal provision for doing so. This is permitted under the principle of reciprocity in international law and the recognition of sovereignty equality in Article 89(X) of the Mexican Constitution, according to Mexican officials.

97. Mexico provided statistics on the time taken to seek and provide MLA in domestic and foreign bribery cases. The 2004 Phase 2 Report (paras. 177-178) noted significant delays caused by bureaucratic procedures in Mexico and the unresponsiveness of foreign authorities. Since Phase 2, Mexico has sent nine and received nine MLA requests in domestic and foreign bribery cases. About half of these 18 requests have been executed. The time taken to execute the requests depends on the case's complexity. Mexico executed one incoming request to gather a witness statement in one month, while another request to gather multiple statements took 15 months. A third request to freeze and transfer funds from Mexico to a foreign country took 19 months. Outgoing requests to foreign countries have been executed between 4 to 14 months. Of the unexecuted requests, one request to Mexico has been outstanding for 17 months, while one request to a foreign country has been outstanding for more than three years.

98. As noted earlier (see p. 18), Article 5 of the Anti-Bribery Convention is binding under Mexican law. However, Mexican officials at the on-site visit recounted lengthy delay in obtaining MLA in one foreign bribery case. Despite the delay, the officials did not pursue the request through all available channels because of concerns over damaging diplomatic relations with the requested state.

### *Commentary*

*While the lead examiners are encouraged that Mexico has improved its system for sending and receiving MLA, more must be done to respond to MLA requests in a timely and complete manner. Statistics indicate that delays occur in some cases, though there are also examples in which Mexico has provided or received MLA promptly. On the whole, Mexico's MLA framework is functioning but Mexico must continue to improve the level and speed of its responsiveness in foreign bribery-related cases. The lead examiners also commend Mexico for its ability to provide statistics on incoming and outgoing MLA requests and encourage it to regularly update these data.*

*The lead examiners also note that the Working Group lacks a mechanism to obtain information from Parties to the Convention on their experiences in obtaining MLA from an evaluated country, including Mexico. This is a cross-cutting issue requiring the Group's further consideration.*

## 10. Public Awareness and the Reporting of Foreign Bribery

99. This section deals with Mexico's efforts to raise public awareness of foreign bribery and to implement the Working Group's Phase 2 recommendations in this area. Efforts to improve corporate compliance, internal controls and ethics are discussed earlier at p. 27 and will not be repeated here. Awareness-raising efforts by Bancomext, Mexico's export credit agency, are described in the next section

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<sup>42</sup> International Extradition Law, Articles 3, 5, 6, 15 and 16.

on Public Advantages (p. 35). This section will also consider the reporting of foreign bribery, including the absence of a whistleblower law, which was the subject of a Phase 2 Recommendation.

*a) Efforts to Raise Public Awareness of Foreign Bribery*

100. The Mexican authorities have made significant efforts to raise awareness of foreign bribery and the Anti-Bribery Convention. The current national anti-corruption strategy identifies the implementation of the Anti-Bribery Convention as a specific goal.<sup>43</sup> The Public Service Administration (SFP) and the Federal Attorney General's Office (PGR) are the main government bodies responsible for implementing this strategy. As noted earlier, SFP has made efforts to improve corporate compliance, internal controls and ethics (see p. 27). In addition, it has sought to raise awareness among government officials and the public at large through the distribution of literature and information seminars that specifically cover foreign bribery and the Convention.

101. SAT, the Mexican Tax Administration Service, has also engaged in numerous awareness-raising activities. It organised three conferences on foreign bribery in partnership with business and lawyer associations. At the on-site visit, SAT reported that it had disseminated copies of the Convention and the 2009 Anti-Bribery Recommendation. Over 5 million emails were sent to taxpayers reiterating that bribe payments are not tax deductible. More than 20 000 tax officials have received information about foreign bribery via an electronic publishing campaign. Since 2007, brochures, leaflets and posters on the Convention have been distributed to Local Administration of Taxpayer's Services (ALSC), Fiscal Auditing (ALAF), customs offices, and Regional Evaluation Administrations (ARES).

102. Several other bodies have also contributed to awareness-raising. PGR disseminated posters and electronic leaflets on domestic and foreign bribery in 2007-2010. The Ministry of Economy has promoted the OECD Guidelines on Multinational Enterprises on its website. It organised a business integrity workshop in 2011 that was attended by companies, academics and other constituents. Lawyer and business associations organised a workshop in 2011 to promote business integrity among SMEs. One workshop module dealt specifically with foreign bribery.

103. These efforts are impressive but non-governmental participants at the on-site visit agreed almost unanimously that there is still little public awareness in Mexico of foreign bribery. Domestic bribery and corruption understandably attract much more public attention. Nevertheless, increasing public awareness of foreign bribery will be crucial to preventing, detecting and prosecuting this crime. Mexico therefore needs to sustain its awareness-raising efforts.

104. Mexico should also expand its efforts into some key areas. Several activities described above targeted internationally-active Mexican companies and thus partially implements Phase 2 Recommendation 1(a). More could be done, however. For instance, ProMéxico is the federal agency responsible for promoting Mexico's exports, among other things. An additional programme operated by the Ministry of Economy supports exporting SMEs. Yet neither programme currently informs enterprises about the risks of operating in corruption-prone markets abroad. After the on-site visit, ProMéxico and the Ministry of Foreign Affairs instructed their overseas officials to inform Mexican companies abroad about the Convention and the legal consequences of foreign bribery. ProMéxico (with the involvement of the Ministry of Economy and the SFP) is also disseminating information to raise awareness among exporting companies of foreign bribery. But it has not proactively raised awareness among Mexican companies that operate in foreign countries, as suggested in Phase 2 Recommendation 1(b). When Mexican enterprises ask Mexican embassies for help, they receive varying levels of assistance depending on the embassy in

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<sup>43</sup> National Programme on Accountability, Transparency and the Fight against Corruption 2008-2012, Strategy 5.4.



question, according to private sector representatives at the on-site visit. On the whole, the private sector would like more support from Mexican embassies on the issue of overseas corruption. Finally, apart from the SAT's efforts described above, Mexico did not make additional efforts to raise awareness of its foreign bribery policies and initiatives in lower levels of the public administration, States and municipalities (Phase 2 Recommendation 1(c)).

### ***Commentary***

***The lead examiners commend Mexico for its considerable efforts and high-level commitment to raising awareness of foreign bribery. The efforts undertaken to date are an example of good practice in this area. Mexican authorities, especially the SFP and SAT, have proactively reached out to the various stakeholders, including the Mexican private sector, through conferences, seminars, publications and electronic communications. The lead examiners encourage all relevant Mexican authorities to continue these efforts. They recommend that Mexican foreign embassies and government agencies responsible for export promotion proactively assist and inform Mexican businesses with current or potential overseas business operations, on why and how to combat foreign bribery.***

### ***b) Reporting of Foreign Bribery***

105. All Mexican public officials are required to report crimes (including foreign bribery) to the PGR (CFPP Article 117). In practice, officials of the Tax Administration Service (SAT) have not reported cases in which a taxpayer bribed a *foreign* public official, but only cases involving *Mexican* tax officials taking bribes from taxpayers. As noted above, in 2008-2010, SAT reported 24 such cases to PGR. In 2007-2010, the SFP reported 170 cases to PGR, of which 4 concerned domestic bribery and none involved foreign bribery.

106. Private individuals in Mexico are also required to report crimes, including foreign bribery, to law enforcement authorities (CFPP Article 116). Breach of this obligation in and of itself does not result in sanctions. Additional administrative laws require reporting of wrongdoing by Mexican officials, but these provisions are more relevant to domestic corruption cases.

107. Mexico has put in place several measures to facilitate crime reporting by the public, though foreign bribery allegations have not yet been received. The PGR received 111 reports of domestic bribery in 2010 via a toll-free telephone hotline. It also received 15 reports of domestic corruption through an on-line reporting system. The websites of all Mexican embassies and consulates include a link to the PGR on-line reporting system to report crimes, including bribery. Mexican officials suggested that, as this system was established in November 2010, there was insufficient time to observe an increase in reporting levels. The tax authorities (SAT) have also created an e-mail account, an on-line reporting system, and a telephone hotline (accessible anywhere in North America) to receive bribery allegations. To date, 246 reports have been made, of which 15 relate to domestic bribery (but not of domestic tax officials). In addition, the Ministry of Public Administration (SFP) accepts complaints made by telephone, fax, and internet or in person. The internal control bodies of each federal agency and body also have their own mechanisms for receiving corruption reports, though these channels are more relevant to cases of domestic corruption in those bodies.

108. In practice, bribery (both foreign and domestic) may be underreported by the public. As mentioned at p. 21, private sector and civil society participants at the on-site visit believed that there is widespread lack of confidence in the ability of the Mexican criminal justice system to deal with corruption. Consequently, individuals and companies tend not to report bribery cases to the authorities as they believe that the allegations would not be seriously investigated and prosecuted. Companies who discovered that

their employees have engaged in bribery often prefer to deal with the matter internally. The relatively low number of received reports of bribery described above corroborates this view. In response, the government has devised the reporting channels above to encourage reporting. The Mexican President has also personally urged the private sector to report corruption. As a result, companies have become more willing to report corruption to the SFP but not to the criminal law enforcement bodies, according to the private sector representatives at the on-site visit.

#### *Commentary*

*The lead examiners commend Mexico for establishing multiple channels to facilitate the reporting of crimes by individuals. However, these measures will be meaningful only if Mexico addresses the reluctance of its citizenry and businesses to report corruption by improving the criminal enforcement of its bribery laws.*

#### **c) Whistleblowing and Whistleblower Protection**

109. Mexico does not have a specific law to protect whistleblowers. Phase 2 Recommendation 3(d) asked Mexico to consider adopting a law to protect whistleblowers from reprisals. In Phase 3, Mexico maintains that a specific law is unnecessary. In their view, Article 9 of the Federal Law for the Prevention and Elimination of Discrimination (LFPED) protects employees who report foreign bribery in good faith from discrimination and disciplinary action. This position is highly questionable, since the LFPED only protects employees from discrimination, which is defined in Article 4 as any distinction, exclusion or restriction based on certain enumerated grounds such as ethnicity, sex, age, sexual orientation etc. The provision does not recognise reporting foreign bribery as a ground of discrimination.

110. There is support in Mexico for enacting a specific law on whistleblower protection. The Phase 2 Report (para. 154) noted “a clear consensus” in the business community and trade unions favouring a whistleblower protection law. At the Phase 3 on-site visit, several private sector and civil society representatives also supported such a law and agreed that the current law is inadequate. A Bill introduced to Congress on 2 March 2011, would incentivise whistleblowing and protect whistleblowers from reprisals, but the Bill would apply only to public sector employees. Several non-governmental on-site visit participants supported extending the Bill to the private sector.

#### *Commentary*

*The lead examiners consider that Mexico does not provide sufficient protection to whistleblowers in foreign bribery cases. The LFPED does not protect those who report foreign bribery from reprisals. There continues to be support for a whistleblower law among Mexican businesses and civil society. The lead examiners therefore recommend that Mexico enact a specific law to protect whistleblowers in both the public and private sectors.*

### **11. Public Advantages**

111. This section will address mainly the denial of public advantages including debarment from public procurement, which is the subject of Phase 2 Recommendation 5(d). The section will also deal with developments since Phase 2, including the Anti-Corruption Bill that is before the Mexican Congress, and Mexico’s emerging programme on official development assistance (ODA).

#### **a) Public Procurement**

112. Debarment from public procurement is an available sanction for domestic but not foreign bribery. The two present laws that govern Mexican government procurements allow companies and individuals to

be debarred for three months to five years and apply to public procurement at the federal and state levels.<sup>44</sup> On 21 April 2010, the Mexican subsidiary of a French engineering company was debarred for two years for “acting deceitfully” by bribing two Mexican officials to obtain a power generation contract.

113. Mexico’s inability to debar companies because of foreign bribery is inconsistent with the 2009 Anti-Bribery Recommendation. The Recommendation states that Mexico should permit its authorities to suspend, to an appropriate degree, enterprises that have bribed foreign public officials from competition for public procurement contracts. The Recommendation also requires countries – like Mexico – that debar enterprises for domestic bribery to do so equally for foreign bribery.

114. Draft legislation before Congress proposes extending debarment to foreign bribery. The Bill introduced to Congress in August 2010 proposes that companies convicted of foreign bribery be debarred from federal public procurement for three months to five years. The Anti-Corruption Bill would also allow debarment for three months to eight years, though it applies only to some foreign bribery cases (see p. 8).

115. Mexico maintains a blacklist of debarred companies and individuals. Since May 2006, CompraNet (Mexico’s electronic public procurement system) has included a Directory of Sanctioned Suppliers and Contractors that is available on the Internet. The Directory depends on information provided by the internal control organs of various government bodies responsible for imposing procurement sanctions. Individuals and companies convicted of foreign bribery are not automatically added to the list, nor are those that have been debarred by multilateral development banks (MDBs). Mexico stated that entities debarred by MDBs are also debarred from Mexican government procurement only if a contract is funded by an MDB.

#### *Commentary*

*Phase 2 Recommendation 5(d) suggested that Mexico introduce additional sanctions such as debarment from public procurement against legal persons for foreign bribery. Mexico has not implemented this recommendation. Furthermore, debarment is available in Mexico as a sanction for domestic bribery but not foreign bribery, which is contrary to the 2009 Anti-Bribery Recommendation. The lead examiners therefore recommend that Mexico amend its legislation to make debarment available as a sanction in all cases of foreign bribery in the context of international business. They also recommend that Mexico extend its current blacklist to cover enterprises that are determined under Mexican law to have committed foreign bribery.*

#### *b) Export Credits*

116. Mexico has adhered to the 2006 OECD Recommendation of the Council on Bribery and Officially Supported Export Credits. Bancomext, Mexico’s officially supported export credit agency, has a substantial business volume. As of 30 April 2011, Bancomext had USD 3 billion in outstanding loans, though how much of this was officially supported is unclear. Medium and long-term support accounted for 27% and 29% of the total respectively.

117. Bancomext has made some efforts to raise awareness of foreign bribery, which was the subject of Phase 2 Recommendation 1(b). Bancomext informs its clients of the legal consequences of bribery by posting information on its website. Bancomext’s credit agreement requires clients to declare that they have not bribed “any public officer from the country in which it carries out its activity”, up to the date of

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<sup>44</sup> Law of Procurement, Lease and Services of the Public Sector and Law of Public Works and Related Services. An offender may also be fined 50-1 000 times the minimum wage of the Federal District.

execution of the agreement. The declaration thus does not cover bribery that occurs after the agreement is signed.<sup>45</sup> The credit agreement states that the agreement is terminated if the client, or someone on its behalf, bribes “any public officer from the country in which it carries out its activity.” This provision does not, however, apply to bribery of foreign officials from international organisations, or from countries in which the exporter does not operate.

118. There are additional awareness-raising efforts beyond the credit agreement. Bancomext’s website encourages its clients to develop, supply and document appropriate management control systems. Internally, Bancomext provided corporate ethics training to its staff, but the course did not cover foreign bribery. Bancomext explained that its staff are required to report “suspicious activities” to its compliance officer who may in turn raise the matter with the board. Reports are made to law enforcement authorities if Bancomext has “credible evidence” of bribery. Since 2004, Bancomext reported eight cases of suspicious activities to law enforcement authorities, none of which involved foreign bribery.

119. Bancomext states that it debars potential clients that have been involved in foreign bribery. Bancomext will deny or cancel an application for support if the applicant has been convicted of foreign bribery. Support is also refused if Bancomext has reason to believe or has credible evidence that foreign bribery is involved in the transaction for which support is sought. If Bancomext has already provided support when it learns that the subject transaction involved bribery, it will terminate support and seek to recover any disbursed funds. The client need not be prosecuted or convicted before support is revoked. Bancomext added that it refers to debarment lists maintained by MDBs when loans are MDB-funded but it has not debarred a company on this basis.<sup>46</sup>

120. This approach to debarment is commendable, but its effectiveness in practice remains to be seen. Bancomext has never detected a case of foreign bribery or debarred a client because of foreign bribery. The debarment policy described above is not stipulated in any written internal policy document. Whether staff are aware of the policy and adheres to it rigorously is thus questionable. As noted earlier, Bancomext staff have not been trained on foreign bribery-related issues, including debarment. Also uncertain is whether there are procedures to check whether the preconditions for debarment exist. For example, Bancomext does not verify whether an applicant for support has a prior conviction for foreign bribery. Bancomext sometimes provides support for fees or commissions paid by a client to an agent or intermediary who facilitates the export transaction. Yet Bancomext does not review suspicious agent fees or commissions, even though these expenses are often a key indicator of foreign bribery.

### *Commentary*

***Bancomext has adopted a policy of debarring potential clients who have been involved in foreign bribery, but the policy’s implementation could be substantially strengthened. The lead examiners therefore recommend that Bancomext clearly stipulate this debarment policy in writing in a specific section of the lending or guarantee contract. The anti-corruption declaration in Bancomext’s credit agreement should cover all forms of foreign bribery (as defined in the Convention) that occur both before and after the agreement is signed. Bancomext should also train its staff on the policies on and procedures for debarment and reporting, as well as on how to detect foreign bribery. Finally, as noted in Phase 2 Recommendation 2(c), Bancomext should require clients to provide further details of agent commissions and fees, which could assist Bancomext to detect foreign bribery cases.***

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<sup>45</sup> See 2006 Recommendation on Bribery and Officially Supported Export Credits, para. 1(b).

<sup>46</sup> Information taken from Mexico’s Phase 3 questionnaire responses, statements at the on-site visit, and Mexico’s submissions to the OECD Working Party on Export Credits [[TAD/ECG\(2010\)13/FINAL](#)].

c) *Official Development Assistance*

121. Mexico has provided limited official development assistance (ODA) thus far. Mexico states that assistance has been provided within a South-South co-operation framework, mostly as technical co-operation by Mexican officials in the form of policy advice, training, information sharing and research. Recipients of assistance have included countries in Central America and the Caribbean. This included a five-year project with Colombia on anti-corruption.

122. However, Mexico's ODA programme will likely expand in the near future. On 6 April 2011, Mexico enacted the Law of International Co-operation for Development (LICD). The Law deals with ODA projects funded by Mexico, and identifies Central America, Latin America and the Caribbean as priority areas for assistance (Article 24(II)). The Law also establishes an International Programme for Development Co-operation, and creates the Mexican Agency for International Development (AMEXCID) to oversee the Programme.

123. Specific anti-corruption measures have yet to be developed for this emerging ODA programme. LICD emphasises the importance of ensuring full transparency in the management and control of ODA resources (Article 2(III)) but does not prescribe particular anti-corruption measures. At the time of this report, AMEXCID had not been set up, and officials were still considering how to implement the Law. Nonetheless, a Mexican official stated that going forward Mexico would consider international best practices on anti-corruption in ODA. Mexico would also develop rules on debarment if AMEXCID begins to award ODA-funded contracts.

*Commentary*

*The lead examiners are encouraged by Mexico's stated commitment to develop anti-corruption measures in its expanding ODA programme. They recommend that the Working Group follow up developments in this area as Mexico implements its ODA programme.*

d) *Other Public Advantages*

124. The Ministry of Economy operates additional programmes that grant subsidies to private enterprises. These include programmes for SMEs, enterprises in specific sectors such as logistics, information technology, manufacturing and assembly. None of these programmes provide for debarment due to involvement in domestic or foreign bribery.

## C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

125. The Working Group commends Mexico's efforts to raise awareness of the risks of foreign bribery in the private sector. It is also encouraged that Mexico's first two foreign bribery investigations are reportedly underway. However, the Working Group is concerned about the pace at which these two cases have progressed. There are also broader concerns that the priority given to the detection, investigation and prosecution of foreign bribery cases is low compared to other crimes.

126. Furthermore, Mexico has made limited progress in implementing the Working Group's Recommendations from the 2004 Phase 2 evaluation. At the time of its 2007 Written Follow-Up Report,

Mexico had implemented only 10 of the 25 Phase 2 Recommendations.<sup>47</sup> Since then, it has only fully implemented one further Recommendation (5(e)). In particular, Mexico has not implemented the recommendations to correct significant deficiencies in its legislation creating liability of legal persons for foreign bribery, or made efforts to enforce the law.

127. Against this background, and based on the other findings in this report regarding Mexico's implementation of the Convention and 2009 Recommendations, the Working Group: (1) makes the following recommendations to Mexico under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice. The Working Group invites Mexico to report on progress in the two foreign bribery cases that it identified during the Phase 3 evaluation, as part of its regular reports on foreign bribery enforcement actions to the Working Group. The Working Group further invites Mexico to report orally on the implementation of Recommendation 3, 6 and 13(a) within one year of this report (i.e. in October 2012). It further invites Mexico to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. in October 2013).

## **1. Recommendations of the Working Group**

### ***Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery***

1. Regarding the offence of foreign bribery, the Working Group recommends that Mexico amend Article 222bis to cover bribes given, offered or promised to a third party beneficiary regardless of whether the beneficiary is determined by a foreign public official (Convention, Article 1(1)).

2. Regarding territorial jurisdiction and the statute of limitations in cases where a bribe is given or sent to a foreign public official in Mexico after it is offered or promised abroad, the Working Group recommends that Mexico review and undertake the necessary changes to rectify any shortcomings. (Convention, Articles 4 and 6).

3. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Mexico amend its Federal Penal Code without delay so that:

- (a) liability may be imposed without the prior identification or conviction of the relevant natural person(s), and without proof that the bribery was committed with the means of the legal person (Convention Article 2);
- (b) state-owned and state-controlled enterprises can be sanctioned for foreign bribery other than by dissolution of the legal person (Convention Article 2); and
- (c) companies incorporated or headquartered in Mexico can be liable for foreign bribery (Convention Article 2).

4. Regarding sanctions for foreign bribery, the Working Group recommends that Mexico, in cases where an offender does not have a net income at the time of the offence or where the net income cannot be ascertained, establish a system allowing a court to impose an appropriate fine after the court gives detailed reasons on why the net income cannot be determined (Convention, Article 3(1) and (2)).

5. Regarding confiscation, the Working Group recommends that Mexico enact appropriate legislation without delay to provide for confiscation of property of equivalent value and confiscation

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<sup>47</sup> See Annex 1: Phase 2 Recommendations of the Working Group, and Issues for Follow-up.

against legal persons, and ensure that the bribe, the proceeds of bribery or their equivalent are routinely confiscated in practice (Convention, Article 3(3)).

6. Regarding the investigation and prosecution of the foreign bribery offence, the Working Group recommends that Mexico:

- (a) give greater priority to the criminal enforcement of its bribery laws, and take steps to ensure that its criminal law enforcement authorities seriously investigate all allegations of foreign bribery (Convention, Article 5);
- (b) take further steps to ensure that adequate human and financial resources are devoted to investigating and prosecuting bribery of foreign public officials, including by providing SPOCC prosecutors and SIU investigators with adequate training in foreign bribery and complex financial investigations (Convention, Article 5);
- (c) make special investigative techniques available in foreign bribery cases (Convention, Article 5).

7. Regarding mutual legal assistance (MLA), the Working Group recommends that Mexico continue to improve the level and speed of its responsiveness to MLA requests involving foreign bribery-related cases.

8. Regarding money laundering, the Working Group recommends that Mexico develop bribery-related AML measures, including typologies on the laundering of bribes and the proceeds of bribery; train CNBV officials and reporting entities on money laundering predicated on bribery; and train UIF officials on detecting and reporting bribery-related money laundering cases, and on reporting such cases to law enforcement authorities (2009 Anti-Bribery Recommendation IX(i) and (ii)).

9. Regarding false accounting offences, the Working Group recommends that Mexico amend its legislation to increase the maximum sanctions available (Convention, Article 8(2)).

10. Regarding statistics, the Working Group recommends that Mexico maintain statistics on the number of investigations, prosecutions, convictions and sanctions of natural and legal persons for the offences of domestic bribery, foreign bribery, and false accounting (Convention, Articles 3, 5 and 8).

### ***Recommendations for ensuring effective prevention and detection of foreign bribery***

11. Regarding accounting and auditing, the Working Group recommends that Mexico encourage the auditing profession to develop courses on foreign bribery; detect foreign bribery; and take the necessary measures, including amendment of CFPP Article 116 and other relevant legislation, to clarify that the reporting obligation in this article overrides any professional obligations of an auditor towards his/her client (2009 Anti-Bribery Recommendation X(B)(i) and (v)).

12. Regarding corporate compliance, internal controls and ethics programmes, the Working Group recommends that Mexico continue to promote corporate compliance measures, with emphasis on Mexican companies, including SMEs, that are active internationally but are not subject to FCPA jurisdiction, and that Mexico measure the impact of these efforts (2009 Anti-Bribery Recommendation X(C)(i) and (ii)).

13. Regarding tax measures to combat foreign bribery, the Working Group recommends that Mexico:

- (a) clarify explicitly by law or by any other binding means that bribes to foreign public officials are not deductible for any tax purposes, and verify that a taxpayer who has been

found to have committed domestic or foreign bribery has not claimed a tax deduction for bribe payments (2009 Anti-Bribery Recommendation VIII(i)).

- (b) improve detection of domestic and foreign bribery cases by analysing why the Strategies for Identifying National and International Bribery have not led to the detection of cases; continuing its regular training programmes for tax auditors and examiners; and including bribery in risk assessments and audits (2009 Anti-Bribery Recommendation VIII(i)).

14. Regarding awareness raising, the Working Group recommends that Mexican foreign embassies and export promotion agencies assist and inform internationally active Mexican businesses to combat foreign bribery (2009 Anti-Bribery Recommendation X(C)(i); Annex II).

15. Regarding whistleblower protection, the Working Group recommends that Mexico enact specific legislation to ensure that public and private sector employees, and auditors who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities are protected from discriminatory or disciplinary action, and raise awareness of this measure (2009 Recommendation IX(iii), X(B)(i) and (v)).

16. Regarding public advantages, the Working Group recommends that Mexico:

- (a) amend its legislation to make debarment available as a sanction in all cases of foreign bribery in the context of international business, and extend its blacklist to cover enterprises that are determined under Mexican law to have committed foreign bribery (Convention, Article 3(4); 2009 Anti-Bribery Recommendation XI(i)).
- (b) ensure that Bancomext stipulate its debarment policy in writing in a specific section of its lending or guarantee contract; extend the anti-corruption declaration in its credit agreement to cover foreign bribery that occurs both before and after the agreement is signed; train its staff on the policies on and procedures for debarment, reporting foreign bribery, and detecting foreign bribery; and require clients to provide further details of agent commissions and fees (2009 Anti-Bribery Recommendation XII(ii)).

## **2. Follow-up by the Working Group**

17. The Working Group will follow up the issues below as case law and practice develops:

- (a) The interpretation of “foreign public official” as defined in Article 222bis;
- (b) Whether sanctions imposed in foreign bribery cases are effective, proportionate and dissuasive;
- (c) Confiscation of the bribe, its proceeds, or their equivalent; and
- (d) Anti-corruption measures in Mexico’s ODA programme.



**ANNEX 1: PHASE 2 RECOMMENDATIONS TO MEXICO AND WORKING GROUP  
ASSESSMENT OF THEIR IMPLEMENTATION IN 2007**

<b>Phase 2 Recommendation</b>	<b>2007 Working Group Evaluation</b>
<i>Recommendations for Ensuring Effective Measures for Preventing Transnational Bribery</i>	
1. With respect to awareness raising, the Working Group recommends that Mexico:	
a) In addition to the broad awareness raising campaign on corruption in general, undertake targeted actions to raise the level of awareness of the transnational bribery offence and the Convention, focusing on the obligations of Mexican companies that invest and export abroad; (Revised Recommendation, Article I)	Partially Implemented
b) Further develop targeted programmes for the agencies and other governmental bodies most likely to come into contact with companies engaging in business abroad, such as Bancomext and Mexican embassies and strongly encourage such institutions to play a more active role in raising awareness among Mexican companies about the Convention. In this respect, the Working Group acknowledges the initiatives of the Ministry of Foreign Affairs, following the on-site visit, aiming to raise awareness of Mexican embassies and encourages Mexico to pursue its efforts; (Revised Recommendation, Article I)	Partially Implemented
c) Enhance awareness of the transnational bribery offence by ensuring that federal policies and initiatives are channelled to lower levels of the administration, States and municipalities; (Revised Recommendation, Article I) and	Partially Implemented
d) Encourage the accounting, auditing and legal professions to develop a core of specific courses and training to raise the level of awareness and knowledge on the offence of bribery committed by Mexican individuals and companies abroad, and of Mexican multinational companies in particular, in view of their increasing role in international business transactions. (Convention, Article 8; Revised Recommendation, Article I)	Partially Implemented
2. With respect to other preventive measures, the Working Group recommends that Mexico develop specific tools for the prevention of bribery of foreign public officials directed at Mexican companies exporting and investing abroad, and in particular:	
a) Further develop its partnership with business with the aim of identifying and disseminating “best practices” concerning anti-corruption policies to better prevent transnational bribery; (Revised Recommendation, Article I)	Fully Implemented
b) Consider establishing a list of companies having been involved in bribery, including companies involved in transnational bribery and circulating such list to all federal agencies in order to inform them of the potential risk of dealing with these companies, as well as for the possible application of additional non-criminal sanctions, as recommended in recommendation 6, d) (Revised Recommendation Article VI)	Fully Implemented
c) Encourage Bancomext to require details on agents’ commissions when providing support, in view of the fact that such commissions are commonly used to disguise bribes to foreign public officials; (Revised Recommendation, Article II v) and	Not Implemented

d) Undertake strategic analysis on the characteristics of the offence of money laundering in order to assess areas for possible improvement in its prevention and detection. (Revised Recommendation, Article I)	Partially Implemented
<i>Recommendations for Ensuring Adequate Mechanisms for the Effective Detection, Prosecution and Sanctioning of Transnational Bribery Offences</i>	
3. With respect to the reporting of transnational bribery to the appropriate authorities, the Working Group recommends that Mexico:	
a) Ensure that all public officials are made aware of and comply with their duty to report transnational bribery offences pursuant to article 117 of the Federal Criminal Procedure Code (CFPP), and consider introducing specific sanctions for breaching the obligation under article 117 CFPP; (Convention, Article 3, Revised Recommendation, Article I)	Fully Implemented
b) Ensure that the duty to report offences pursuant to article 116 of the CFPP (obliging citizens to report any crime to the authorities) extends to accountants and auditors, and ensure that professional rules on confidentiality do not contradict the CFPP; <sup>1</sup> (Convention, Article 8; Revised Recommendation, Article I)	Not Implemented
c) Facilitate the reporting of transnational bribery cases and provide reporting channels equivalent to those available for domestic bribery; (Revised Recommendation, Article I) and	Fully Implemented
d) Welcoming the consensus existing between the business sector, public officials and civil society, consider the adoption of general whistleblower protection sufficient to protect employees from dismissal or other forms of retaliation in respect of the reporting of foreign bribery. (Convention, Article 5; Revised Recommendation, Article I)	Partially Implemented
4. With respect to other measures to improve detection, the Working Group recommends that Mexico:	
a) Ensure that adequate resources be devoted to investigation and prosecution of bribery of foreign public officials, and consider the setting up of a specialised unit dealing with bribery of foreign public officials; (Revised Recommendation, Article I)	Partially Implemented
b) Ensure that the police and prosecutors become more proactive, in particular by relying on different detection tools in addition to reports by complainants, continue to improve their training, and develop analytical tools and financial investigation techniques; (Revised Recommendation, Article I) and	Fully Implemented
c) Accelerate and streamline the processing of suspicious transaction reports in respect of suspected money laundering. (Convention, Article 7; Revised Recommendation, Article I)	Fully Implemented
5. With respect to investigation, prosecution and sanctioning, the Working Group recommends that Mexico:	
a) Provide internal guidelines for the use of the police and prosecutors – and encourage the judiciary to issue interpretative criteria – that highlight the differences between the offences of bribery of Mexican public officials and bribery of foreign public officials; (Revised Recommendation, Article I)	Fully Implemented
b) Amend article 222bis of the Federal Criminal Code in order to ensure that third party beneficiaries are covered and that the definition of foreign public officials is in line with the autonomous definition of the OECD Convention; <sup>2</sup> (Convention, Article 1)	Fully Implemented

<sup>1</sup> The Working Group notes that this is a general issue in many Parties.

<sup>2</sup> The Working Group acknowledges that the bill submitted to the Parliament during the Spring session satisfactorily addresses these issues.

c) In order to meet the standard of other Parties to the Convention, revise the current provisions on legal persons to:	
<ul style="list-style-type: none"> <li>eliminate the prerequisite of the conviction of a natural person,</li> </ul>	Not Implemented
<ul style="list-style-type: none"> <li>eliminate the prerequisite that the offence must be committed by means provided by the legal entity “for such purpose”, and</li> </ul>	Not Implemented
<ul style="list-style-type: none"> <li>ensure that State-owned and State-controlled entities are subject to liability under the transnational bribery offence,</li> </ul>	Not Implemented
<ul style="list-style-type: none"> <li>increase significantly the level of sanctions; (Convention, Articles 2 and 3; Phase 1 Evaluation).</li> </ul>	Not Implemented
d) Consider the introduction of additional sanctions on legal persons, such as the temporary or permanent disqualification from participation in public procurement and public works, and a general exclusion from entitlement to public benefits or aid; (Convention, Article 3; Phase 1 Evaluation, paragraph 3)	Not Implemented
e) Pursue its efforts to introduce witness protection for investigations of transnational bribery within the framework of judicial reform; (Revised Recommendation, Article I)	Not Implemented
f) Review the current system of access to bank information with a view to ensuring prompt and effective access; (Convention, Articles 5, 9; Revised Recommendation, Article VII) and	Fully Implemented
g) Reconsider the current practice providing mutual legal assistance based on reciprocity in the absence of bilateral agreements, in order to ensure that such practice is consistent with article 9 of the Convention. (Convention, Article 9; Revised Recommendation, Article VII)	Fully Implemented
<i>Follow-up by the Working Group</i>	
6. In light of the small number and nature of cases of bribery at the federal level and the absence of case law concerning bribery of foreign public officials, it is not possible to clearly assess how the Mexican legislation will be applied in practice. The Working Group will therefore revisit the case law in a general way as it develops. This concerns in particular:	
a) The application of the offence to bribes given directly or through the foreign public official to third party beneficiaries and the interpretation of the term “foreign public official”; (Convention, Article 1; Phase 1 Evaluation, paragraph 2) and	Continue to follow-up
b) The application of sanctions with a view to determining whether they are effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, particularly: the basis on which intangible bribes are quantified in respect of natural persons, and the practical application of fines both to natural and legal persons. (Convention, Article 3; Phase 1 Evaluation, paragraphs 3, 4)	Continue to follow-up

## ANNEX 2: PARTICIPANTS AT THE ON-SITE VISIT

### Government Ministries and Bodies

- Attorney General's Office  
(*Procuraduría General de la República, PGR*)
- Ministry of Economy  
(*Secretaría de Economía, SE*)
- Ministry of Finance and Public Credit  
(*Secretaría de Hacienda y Crédito Público, SHCP*)
- Ministry of Foreign Affairs  
(*Secretaría de Relaciones Exteriores, SRE*)
- Ministry of Public Administration  
(*Secretaría de la Función Pública, SFP*)
- Federal Investigation Bureau  
(*Agencia Federal de Investigación, AFI*)
- Federal Preventive Police  
(*Policía Federal Preventiva*)
- Federal Commission of Economic Regulation  
(*Comisión Federal de Competencia Económica*)
- National Banking and Securities Commission  
(*Comisión Nacional Bancaria y de Valores, CNBV*)
- ProMéxico
- State Justice Attorneys  
(*Procuradurías Estatales de Justicia*)
- Colima State Prosecutor's Office
- Campeche State Prosecutor's Office
- Campeche State Comptroller

### Judiciary

- Magistrates and Judges of the Council of the Federal Judiciary (*Juez et Magistrado del Consejo de la Judicatura Federal*)
- Judge of Tax and Administrative Justice Tribunal
- Judge of Circuit of the Council of the Federal Judiciary (*Juez de Circuito del Consejo de la Judicatura Federal*)

### Legislators

- Senate
- House of Representatives

### Private Sector

#### *Private enterprises*

- CEMEX
- FEMSA
- HOMEX
- Kimberly Clark
- Metlife Mexico

### *Business associations*

- Board of Global Enterprises (*Consejo Ejecutivo de Empresas Globales, CEEG*)
- Business Coordinating Council (*Consejo Coordinador Empresarial*)
- Committee for National Productivity and Technological Innovation (*Comité Nacional de Productividad e Innovación Tecnológica, A.C, COMPITE*)
- International Chamber of Commerce México (ICC)
- Mexican Chamber of Construction Industry (CMIC)
- Mexican Association of Importers and Exporters (*Asociación Nacional de Importadores y exportadores de la Republica Mexicana, ANIERM*)
- Mexican Association of Centers for the Development of Small Enterprises

### *Legal profession and academics*

- Autonomous Institute of Mexico (*Instituto Autónomo de México, ITAM*)
- Chadbourne & Parke, S.C.
- Committee on Anticorruption and Money Laundering (*Asociación Nacional de Abogados de Empresa, Coordinador del Comité de Anticorrupción y Lavado de Dinero, ANADE*)
- INACIPE (*Instituto Nacional de Ciencias Penales*)
- Institutional Governance IPADE, Business School
- Mexican Lawyers Bar

### *Accounting and auditing profession*

- Deloitte México
- KPMG México
- Mexican Board for Research and Development of Financial Reporting Standards
- Mexican Institute on Financial Executives (*Instituto Mexicano de Ejecutivos de Finanzas, IMEF*)
- Mexican Institute of Public Accountants (*Instituto Mexicano de Contadores Públicos A.C., IMCP*)
- PricewaterhouseCoopers México

### Civil Society

- Mexican Center for Philanthropy
- Strategy and Investigation of *México Evalúa*
- Social Union of Mexican Businessmen
- Transparency International-Mexico

### ANNEX 3: LIST OF ABBREVIATIONS AND ACRONYMS

AFI	Federal Investigation Agency ( <i>Agencia Federal de Investigación</i> )
AMEXCID	Mexican Agency for International Development ( <i>Agencia Mexicana de Cooperación Internacional para el Desarrollo</i> )
AML	anti-money laundering
CFF	Federal Tax Code ( <i>Código Fiscal de la Federación</i> )
CFPP	Federal Code of Criminal Procedure ( <i>Código Federal de Procedimientos Penales</i> )
CNBV	National Banking and Securities Commission ( <i>Comisión Nacional Bancaria y de Valores</i> )
CPF	Federal Criminal Code ( <i>Código Penal Federal</i> )
EUR	euro
FATF	Financial Action Task Force
FCPA	U.S. Foreign Corrupt Practices Act 1977
GAFISUD	Financial Action Task Force on Money Laundering in South America
ITL	Income Tax Law ( <i>Ley Del Impuesto Sobre la Renta</i> )
LICD	Law of International Co-operation for Development ( <i>Ley de Cooperación Internacional Para el Desarrollo</i> )
MER	mutual evaluation report (FATF)
MLA	mutual legal assistance
MXN	Mexican peso
ODA	official development assistance
PFM	Federal Ministerial Police ( <i>Policía Federal Ministerial</i> )
PGR	Office of the Attorney General ( <i>Procuraduría General de la República</i> )
SAT	Tax Administration Service ( <i>Servicio de Administración Tributaria</i> )
SFP	Ministry of Public Administration ( <i>Secretaría de la Función Pública</i> )
SHCP	Ministry of Finance and Public Credit ( <i>Secretaría de Hacienda y Crédito Público</i> )
SIU	Specialised Investigation Unit of Crimes Perpetrated by Public Officials and against the Administration of Justice
SME	small- and medium-sized enterprise
SOE	state-owned or state-controlled enterprise
SPOCC	Special Prosecutor's Office for the Combat against Corruption within the Federal Public Service
STR	suspicious transaction report
UIF	Financial Intelligence Unit of Mexico ( <i>Unidad de Inteligencia Financiera</i> )
USD	United States dollar

## ANNEX 4: EXCERPTS OF LEGISLATION

### Federal Criminal Code

**Article 11.** When a member or a representative of a legal entity, partnership, corporation or company of any kind, except the institutions of the State, commit a crime using the means that said entities provide him/her for that purpose, in a way that the crime be committed in the name of, or under the protection the entity or for its benefit, the Court shall have the authority, under the cases exclusively specified by the law, to order within the sentence the suspension or the dissolution of the entity if he deem it necessary for the sake of public security.

**Article 40.** The instruments of the crime, as well as the objects and products thereof, will be confiscated if their use is illegal. If their use is lawful, they will be confiscated if the crime was intentional. If they belong to a third party, they will only be confiscated if the third party that has them in its power or has acquired them by any means, falls under any of the categories referred to in Article 400 of this code, independently of the legal character of said third party owning or possessing the foregoing items, or of the relationship of the third party with the offender, if any. The competent authorities will immediately seize the assets subject to confiscation, during the investigation or trial. The terms set forth in this paragraph will be observed regardless of the nature of the instruments, objects or proceeds of the crime. [...]

**Article 100.** The possibility of bringing a criminal action or imposing a penalty is limited according to het following articles.

**Article 101.** The limitation is personal and for it to operate shall be enough the course of time established in the law

The statutory periods shall be duplicated as to the people who are outside the national territory if due to this circumstance it is not possible to build a preliminary investigation, conclude a trial of to execute a penalty.

The limitation shall produce effects whether the defendant invokes it as an affirmative defence or not, the Judges shall apply it by operation of law as soon as they know about it regardless the stage of the action.

**Article 102.** The statutory periods for the limitation of the criminal action shall be continuous; within such periods the crime as well as its derivative crimes shall be considered, the statutory periods shall be computed:

I. From the moment the crime was committed if the crime was instantaneous;

II. From the day the last act of execution was carried out or the mandatory act was not carried out if it was an attempted crime;

III. From the day the last act was carried out if it is an interrupted continuous crime; and

IV. From the cessation of the completion of the permanent crime.

**Article 105.** The criminal action shall be limited by a statutory period equal to the arithmetic mean of the imprisonment punishment set forth in the law for the pertinent crime, but in no case shall be less than three years.

**Article 110.** The statute of limitation to bring the actions shall be interrupted by the proceedings carried out for the investigation of the crime and the criminals, even though that by virtue of not knowing who the criminals are, these proceedings are not carried out as to any specific person.

If the proceedings are halted, the limitation term shall begin again the next day of the last proceeding.

The statutory period shall be also suspended by the request for help in the investigation of the crime or the criminal, by the proceedings carried out to seek in international extradition, and by the request for the surrender of the defendant formally made by the public prosecutor of one State of the Republic to other public prosecutor of other State where the defendant is hiding or is in custody for the commission of the same crime or a different one. In the first case the proceedings carried out by the requested authority shall suspend the term and in the second case the

suspension shall continue until the requested authority deny the surrender or until the legal status of the defendant that provoke the delay for his/her surrender comes to an end.

The suspension of the limitation on the criminal action shall increase only up to a half the statutory periods prescribed in Articles 105, 106 and 017 of this Code.

**Article 222.** Bribery is an offence committed by:

I. A public official who by himself or through an intermediary requests or unlawfully receives for himself or in benefit of someone else, money or any other gift, or accepts a promise, in order to do or stop doing something just or unjust in relation to his attributions, and

II. Whoever spontaneously gives or offers money or any other form of gift to the persons mentioned in the previous fraction so a public official acts or omits an action, just or unjust, in relation to his attributions.

For those found guilty of bribery, the following sanctions will be imposed:

If the amount or value of the gift or promise does not surpass an equivalent of five hundred times the established minimum wage in the Federal District at the time of the crime or if its value cannot be asserted, a sanction from three months to two years in prison will be imposed, together with a fine between thirty to three hundred days as well as destitution and prohibition to hold public office in any capacity from three months to two years.

If the amount or value of the gift or promise surpasses an equivalent of five hundred times the established minimum wage in Federal District at the time of the crime, the sanction will encompass two to fourteen years in prison, a fine of between three hundred and one thousand days, and destitution and prohibition to hold public office in any capacity from two to fourteen years.

Under no circumstance those found guilty of bribery will receive back the money or other gifts given but they shall be used in the benefit of the State.

**Article 222bis.** The sanctions contemplated in the last article will be imposed to any person who in order to gain or maintain unlawful advantages for himself or any other person during the execution or conduction of international business transactions offers, promises, or gives, directly or through others, money or any other form of gift in goods or services:

I. To a foreign public official or a third party determined by him in order for such public official to arrange, or abstain from arranging, the proceedings or the resolution of matters related to the inherent functions of his job, position, or commission;

II. To a foreign public official or a third party determined by him in order for this public official to do the proceedings or achieve a resolution in any matters not related to the inherent functions of his job, position, or commission, or

III. Any person who presents himself before of a foreign public official to require or propose for him to do the necessary proceedings or achieve a resolution in any matter related to the inherent functions of the job, position, or commission of the latter.

For the purposes of this article, a foreign public official is understood as any person holding a job, position, or commission within the legislative, executive or judicial powers, in an autonomous public organism of any order or level of government of a foreign State, designated or elected; any person exercising a function for a public authority, organism or company with state participation; as well as any officer or agent of a international public organism or organization.

When any of the crimes included in this article is committed under the terms mentioned in article 11 of this Code, the judge will penalize the legal person with a fine of up to one thousand days and will have the attribution to decree its suspension or dissolution in consideration to the decree of knowledge by the administrative organs in relation to the bribery in the context of the international transaction and the harm caused or the benefit obtained by the legal person.

## **Federal Code of Criminal Procedure**

**Article 141bis.** A legitimate request and motivated prosecutors, the judge may order one or more of the following protective measures in favor of the victim or offended:

[...]



II. Genuine precautionary measures:

- a) The seizure of property to repair the damage caused by the offense;
- b) The freezing of bank accounts and certificates of shares and securities, and
- c) Seizure or preventive seizure.

These measures shall be reviewable when it is no longer required, or upon the request of the victim or offended.

In particular, the judge may consider in sentencing, as a protective measure, the ban on approaching victims, families, offended, guardians and witnesses, and to maintain any relationship with them.

**Article 181.** The instrumentalities, objects or proceeds of the crime, as well as goods containing fingerprints or traces, or which may be related of the crime, shall be seized to avoid any alteration, destruction or disappearance thereof. Management of seized property shall be concluded in accordance with the applicable law.

Authorities acting in support of the Public Prosecutor shall promptly remit under the latter’s custody, the property mentioned in the above paragraph. The Public Prosecutor upon receipt of such property shall resolve as to the seizure thereof.

[...]

**Article 182Q.** The judicial authority shall be able to issue the forfeiture of the properties by means of the judgment in the corresponding criminal process, with exceptions of those properties where abandoned according to the terms of this code.

**Federal Tax Code**

<p><b>Article 83.</b> The following are considered offences related to the obligation of keeping accounting, as long as they are discovered during the exercise of the verification powers:</p>	<p><b>Article 84.</b> Whoever commits the offences related to the obligation of keeping accounting mentioned in article 83, will have the following sanctions imposed:</p>
<p>I. Not keeping accounting.</p>	<p>I. From MXN 1 070 (USD 8.60 or EUR 5.79) to MXN 10 670 (USD 918 or EUR 617) to that included in section I.</p>
<p>II. Not keeping any book or special record as demanded by the tax laws; not fulfilling the obligations related to inventory valuation or not keeping the control procedure established by the fiscal provisions.</p>	<p>II. From MXN 230 (USD 19.79 or EUR 13.31) to MXN 5 330 (USD 459 or EUR 308) to that established by the sections II and III.</p>
<p>III. Keeping the accounting in a different manner from that established by the provisions of the Code hereby and other laws; to keep it in places other than those established by the provisions hereby.</p>	
<p>IV. Not making the entries corresponding to the operations made; to make them incomplete or inaccurate, or outside the respective terms.</p>	<p>III. From MXN 230 (USD 19.79 or EUR 13.31) to MXN 4 270 (USD 367 or EUR 247) to that specified in section IV.</p>
<p>V. (Repealed).</p>	
<p>VI. Not having the accounting books available for the authorities for the term established by the fiscal provisions.</p>	<p>V. From MXN 650 (USD 55.94 or EUR 37.62) to MXN 8 530 to that specified at the section VI.</p>

<p>VII. Not issuing or delivering receipts for their activities when established by the fiscal provisions, or issuing them without the fiscal requirements.</p>	<p>IV. From MXN 12 070 (USD 1 038 or EUR 698) to MXN 69 000 (USD 5 937 or EUR 3 993) mentioned in section VII. In the case of the taxpayers paying in accordance to the Title IV, Chapter II, Section III of the Income Tax Law, the fine will be of MXN 1 210 (USD 104 or EUR 70) to MXN 2 410 (USD 207 or EUR 139). In case of recidivism, the tax authorities will also be able to preventively close down the taxpayer's establishment for a term of 3 to 15 days. To determine such term, the tax authorities will take under consideration the provisions of article 75 of the Code hereby.</p>
<p>VIII. Microfilming or recording in optic discs or any other media authorized by the Ministry of Finance and Public Credit through general purpose provisions, documentation or information for tax purposes without complying with the requisites established by the related provisions.</p>	<p>VII. From MXN 2 140 (USD 184 or EUR 123) to MXN 10 670 (USD 918 or EUR 617) to that established in section VIII. The fine will apply regardless of whether the documentation microfilmed against the tax provisions has proving value or not.</p>
<p>IX. Issuing fiscal receipts with a name, denomination, firm name, or address different to that of the actual person acquiring the good, hiring the use or temporary use of goods or the use of services.</p>	<p>VI. From MXN 12 070 (USD 1 038 or EUR 698) to MXN 69 000 (USD 5 937 or EUR 3 993) to that specified in section IX in case of a first offence. In the case of the taxpayers paying in accordance to the Title IV, Chapter II, Section III of the Income Tax Law, the fine will be of MXN 1 210.00 (USD 1 042 or EUR 701) to MXN 2 410.00 (USD 207 or EUR 139) for the first offence. In case of recidivism, the sanction will consist in the preventive close down of the taxpayer's establishment for a term of 3 to 15 days. To determine such period, the tax authorities will take under consideration the provisions 75 of the Code hereby.</p>
<p>[...]</p>	
<p>XI. Not complying with the requirements established in articles 31, section I and 176, section III of the Income Tax Law and giving the corresponding receipts, in the case of persons authorized to receive deductible donations.</p>	<p>X. From MXN 700 (USD 60 or EUR 40) to MXN 11 600 (USD 998 or EUR 671) and the cancellation of the authorization to receive deductible donations, to that specified in section XI.</p>
<p>XII. Not issuing or enclosing the documentation covering merchandise in transportation through national territory.</p>	<p>XI. From MXN 470 (USD 40 or EUR 27) to MXN 9 290 (USD 799 or EUR 537), to that specified in section XII.</p>
<p>XIII. Not having in operation or not recording the value of the acts or activities with the general public in the cash register of fiscal verification, or in the electronic equipments and systems for fiscal records authorized by the fiscal authorities, when obligated to do so in terms of the fiscal provisions.</p>	<p>VIII. From MXN 4 900 (USD 421 or EUR 283) to MXN 24 480 (USD 2 106 or EUR 1 416), to that specified in section XIII.</p>

## ANNEX 5: STATISTICS PROVIDED BY MEXICO

### Enforcement Statistics

<b>Domestic and Foreign Bribery Investigations Conducted by SPOCC</b>		
Year	Bribery of Mexican public officials (Federal Criminal Code Article 222)	Bribery of foreign public officials (Federal Criminal Code Article 222bis)
2006	3	0
2007	2	0
2008	1	0
2009	3	0
2010	4	2

<b>Domestic Bribery Investigations and Prosecutions Conducted by the 32 PGR Sub-National Offices</b>						
Year	Number of investigations begun	Number of ongoing investigations	Number of discontinued investigations without sanctions			Prosecutions begun <sup>3</sup>
			NEAP <sup>1</sup>	Suspended	Total	
2006	83	45	19	38	57	21
2007	88	58	22	34	56	19
2008	83	74	36	19	55	27
2009	130	90	27	29	56	45
2010	112	84	36	25	61	29
Total	496	351	140	145	285	141

Notes:

1. 'NEAP' stands for "no exercise of prosecution" (no ejercicio a la acción penal)
2. Suspended, i.e. prosecutor sends the file to Reserve
3. Prosecutors sends the case to court (*consignaciones*)
4. There have not been foreign bribery investigations or prosecutions.

### Statistics on Seizure and Confiscation in Bribery Cases

Year	Type of assets	Number of seizures	Legal status or disposition	Status
2005	Cash/Coin/Currency	2	Custody Of The Judge	On-Going
		3	Custody Of The Public Prosecutor	On-Going
	Objects	2	Custody Of Other Authorities	Concluded
		3	Custody Of The Public Prosecutor	On-Going
		1	Custody Of The Judge	On-Going
	Vehicles	4	Custody Of The Public Prosecutor	On-Going
		1	Custody Of The Public Prosecutor	On-Going
1		Cancellation Of Seizure	Concluded	
2006	Jewellery	2	Custody Of The Public Prosecutor	On-Going
	Objects	2	Custody Of Other Authorities	Concluded
		7	Custody Of The Public Prosecutor	On-Going
	Cash/Coin/Currency	3	Returned To Its Owner	Concluded
		1	Custody Of The Judge	On-Going
		5	Custody Of The Public Prosecutor	On-Going
	Vehicles	1	Returned To Its Owner	Concluded
		1	Custody Of Other Authorities	Conclude
		1	Custody Of The Public Prosecutor	On-Going
2007	Vehicles	1	Cancellation Of Seizure	Concluded
	Cash/Coin/Currency	1	Custody Of The Judge	On-Going
		1	<b>Confiscation</b>	Concluded
	Objects	1	Custody Of Other Authorities	Concluded
1		Custody Of The Public Prosecutor	On-Going	
2008	Cash/Coin/Currency	1	Custody Of The Public Prosecutor	On-Going
2009	Cash/Coin/Currency	4	Custody Of The Public Prosecutor	On-Going
		1	Custody Of The Judge	On-Going
	Vehicles	1	Returned To Its Owner	Concluded
	Objects	3	Custody Of The Public Prosecutor	On-Going
2010	Vehicles	2	Custody Of The Judge	On-Going
	Vehicles	10	Custody Of The Public Prosecutor	On-Going
	Cash/Coin/Currency	1	Cancellation Of Seizure	Concluded
		4	Custody Of The Public Prosecutor	On-Going
Objects	23	Custody Of The Public Prosecutor	On-Going	
2011	Objects	6	Custody Of The Public Prosecutor	On-Going
	Cash/Coin/Currency	1	Custody Of The Public Prosecutor	On-Going
	<b>Total Seizures</b>	<b>102</b>		
	<b>Total Number of Preliminary Investigations</b>	<b>41</b>		