



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

MEXICO: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY
IN INTERNATIONAL BUSINESS TRANSACTIONS**

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A. INTRODUCTION AND GENERAL CONTEXT

1) *Nature of the On-Site Visit*

1. Mexico deposited its instrument of ratification on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on May 27, 1999. The implementing legislation entered into force on May 18, 1999. The Mexican legislation was reviewed under Phase 1 in February 2000 and the on-site visit for the Phase 2 examination took place on February 2-6, 2004. The Working Group on Bribery reviewed the present report and adopted the recommendations on June 22-24, 2004.

2. The Phase 2 examination team from the OECD Working Group on bribery was composed of lead examiners from the Netherlands and Spain as well as representatives of the OECD Secretariat. The meetings took place over the course of five days, with main counterparts being the Federal Ministry of Public Administration (*Secretaría de la Función Pública, SFP*), the Prosecutor General of the Republic (*Procuraduría General de la República, PGR*), the Tax Administration Service within the Ministry of Finance and Public Credit (*Servicio de Administración Tributaria, SAT*) and the Ministry of Foreign Affairs (MFA). The examination team also met with representatives of the private sector, accounting and legal professions, trade unions, civil society, journalists, etc. (see annex 2).

3. Pursuant to the procedure adopted by the Working Group for the Phase 2 self- and mutual evaluation of the implementation of the Convention and the Revised Recommendation, the purpose of the on-site visit was to study the structures in place in Mexico to enforce the laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor Mexico's compliance in practice with the 1997 Recommendation. The visit was also the occasion for Mexico to explain bills amending the implementing legislation, prepared in light of the recommendations made by the Working Group during its 2000 Phase 1 evaluation and with a view to complying with the obligations of the Convention. These bills and other relevant bills are pending before the Parliament and are accordingly subject to modification. The Working Group will review the relevant legislation once it is adopted. In preparation for the on-site visit, Mexico provided the Working Group with answers to the Phase 2 questionnaires together with documentary appendices, which were reviewed and analysed by the examining team prior to the on-site visit. Both during and after the on-site visit the Mexican authorities continued to provide the examining team with follow-up information.

2) *Methodology and Structure of the Report*

4. The Phase 2 Report reflects an assessment of information obtained from Mexico's responses to the Phase 2 questionnaires, consultations held during the on-site visit, a review of the relevant legislation and known case law, and independent research undertaken by the lead examiners and the Secretariat.

5. The Phase 2 Report is structured as follows: the introduction, Part A, explains the background and context with regard to Mexico. Part B analyses the case law on domestic bribery and presents the planned reforms that will have an impact on the fight against bribery of foreign public officials. Part C examines the various factors, which, in the view of the examining team, have a bearing on the effectiveness of the measures available in Mexico for preventing transnational bribery, with an emphasis on awareness raising activities. Part D reviews the functioning of the system for investigating and prosecuting transnational bribery and money laundering offences, with specific reference to features that appear to have a pronounced impact, either positive or negative, on the effectiveness of the overall effort. Part E sets forth the specific recommendations of the Working Group, based on the main conclusions

reached by the lead examiners, as to prevention, detection, prosecution and sanctions. It also identifies those matters that the Working Group considers should be followed up as part of the continued monitoring effort.

6. This report seeks to measure the effectiveness of the mechanisms put in place in Mexico to comply with the specific requirements of the OECD Convention. The present evaluation is carried out within the terms of the objective standards laid down in the Convention, including that of functional equivalence; it must apply the same broad criteria and standards as have been used in other Phase 2 Reports to date. However, it must also take account of the realities of Mexico's internal situation regarding the fight against corruption. Thus, the report seeks to offer Mexico not only an appraisal of its achievements to date, but more importantly, a set of constructive and realistic observations which will assist it in fulfilling its broader commitments as well as those it has specifically undertaken by ratifying the Convention.

7. The examining team is grateful for the active participation of the representatives of the SFP, PGR, SAT and MFA in the Phase 2 examination and for their readiness to explain the national background against which the anti-corruption programmes are developed. This has proved to be of great assistance to the examining team, as it became clear that any objective assessment of the anti-corruption provisions requires an understanding of certain features inherent to the corruption problems facing Mexico.

3) *General Observations and the problem of domestic corruption*

a) *Key economic and social factors*

8. The Mexican economy has undergone profound structural change since 1980. Direct government intervention and participation in the productive economy substantially diminished, notably through a vast privatisation programme. Trade and capital accounts were liberalised and several trade agreements were signed, notably the General Agreement on Tariffs and Trade (GATT) in 1986, the North American Free-Trade Agreement (NAFTA) in 1994 and several others with countries in Latin America,¹ Asia² as well as the European Union.³

9. Mexico's economic performance rebounded following the peso crisis of 1995. GDP growth has been strong, largely due to export growth. Inflation has fallen steadily. The government has introduced fiscal adjustments and has succeeded in curtailing the current account deficit.

10. Services are the most important contributor to national output and employment. But manufacturing plays an essential role, contributing about 20% of GDP and representing over 85% of Mexico's exports. Agriculture's contribution to output has declined but it remains an important source of employment (around one fifth of the workforce). Mining accounted for just 1.2% of GDP in 2002. This last figure, however, understates the importance of oil production in the economy, particularly for the Treasury as well as for foreign trade, with oil exports representing 9% of total exports in 2002.

11. Imports accounted for approximately USD 170 billion in 2002 (30% of GDP). The majority of Mexico's imports benefit from preferential rules, with NAFTA accounting for the greatest share. In particular, the United States supplied over 70% of Mexico's imports and Canada about 2%. Germany and Japan are other important partners. Imported commodities include metalworking machines, steel mill

¹ For example the 'Group of Three', the 'Northern Triangle' and ALADI.

² Mexico was admitted as a full member of the Asia-Pacific Economic Co-operation forum (APEC) in 1993.

³ Mexico signed a Free Trade Agreement (FTA) with the European Union in 2000.

products, agricultural machinery, and electric equipment, car parts for assembly, repair parts for motor vehicles, aircraft, and aircraft parts.

12. In 2002, exports amounted to approximately USD 160 billion, accounting for about 27% of Mexico's GDP (compared to 17% in the early 1990s). Over 90% of Mexico's exports are directed to NAFTA partners. The United States, the principal trading partner, accounted for 89% of Mexico's exports. Canada received 1.7% of Mexico's exports, Latin America 3.5%, the EU 3.3% and Japan less than 0.5%.

13. The re-direction of production towards foreign markets following the peso crisis resulted in an increase of Mexico's market share in world total exports to 2.6% in 2000-01 (compared to 1.4% 15 years earlier). The growing predominance of manufactured goods reduced the vulnerability of export revenues to oil price fluctuations. In 2002, about 55% of exports were produced by the *maquiladora* industry.⁴ These exports were mostly directed to the United States evidencing the growing interdependence between the two economies.

14. The Mexican economy not only opened up to trade, it also promoted Foreign Direct Investment (FDI). Mexico is the second largest recipient of FDI in Latin America. FDI flows accounted for USD 13 billion in 2002 (down from an exceptional high of USD 26 billion in 2001 resulting from the over USD 12 billion acquisition of Banamex by Citicorp). Over the last decade, FDI stock as a percentage of GDP almost doubled to 22.5% in 2002. The tertiary sector, particularly financial services, has attracted most FDI since the late 1990s.⁵ Developed market economies are major investors. The USA and Canada account for more than 70% of these investments⁶ followed by the EU which accounts for over 15%. Outward investment flows represent an annual average of USD 907 million between 1999 and 2001. Outward investment stocks as a percentage of GDP accounted for almost 2% in 2002. Latin American countries are the main recipients.

15. Mexico's growth performance since the restoration of macroeconomic stability has been insufficient to narrow the gap in living standards with other OECD countries. Mexico's GDP per capita is the second lowest among OECD countries⁷ and amounts to about one sixth of that of the United States. Mexico also faces a high rate of unemployment (18% in 2002), despite strong employment generation (total employment in the formal economy rose by roughly 10 million between 1991 and 2002). The country is furthermore confronted with a number of social problems resulting from, *inter alia*, disparities in the distribution of resources (40% of the Mexican population lived below the poverty line in 2000) and a high degree of illiteracy (almost 10% of the population above the age of 15 was illiterate in 2002).

b) *Domestic corruption*

16. Institutionally, the United Mexican States are a republic headed by a President. It comprises 31 states and one federal district, with a political system based on the separation of executive, legislative and judiciary powers. In 2000, the presidential elections ended seven decades of rule by the Institutionalised

⁴ The *maquiladora* industry produces a variety of goods, including vehicles, electrical items, textiles and furniture. They are assembly plants that manufacture finished goods for export (generally owned by non-Mexican corporations) and usually take advantage of a low-cost labour force, and advantageous tariff regulations.

⁵ Former investments were mostly directed towards the manufacturing industry, notably machinery and equipment

⁶ The *maquiladora* industry plays an important role in attracting foreign investment.

⁷ According to OECD data for 2002, Mexico's GDP per capita based on current exchange rate was of USD 6 200. On the other hand, OECD countries' average was of USD 23 000 for the same period.

Revolutionary Party (PRI). The fight against corruption was a central theme of the 2000 presidential electoral campaign. Indeed, analyses show that public institutions suffered from deeply-rooted corruption and little respect for the rule of law, which facilitated the penetration of drug trafficking groups into state structures.⁸ Several participants in the on-site visit, including representatives from embassies of countries Parties to the Convention, highlighted the problems caused by bureaucracy, complexity and lack of clarity of administrative regulations. These factors feed the solicitation of bribes and underline the need for thorough reform of the Mexican legal system.

17. The level of domestic corruption has been well-publicised. According to the 2003 Global Corruption Report published by Transparency International (TI), corruption is a persistent, major, national problem, although it has been recognised that Mexico has made important progress regarding the fight against corruption. Analyses show that the level of corruption varies, depending on the institution and the area of activity.⁹ For instance, the police forces and local labour courts¹⁰ are perceived to be highly corrupt, whereas the Supreme Court is perceived to be free of corruption, an affirmation which was supported by participants to the on-site visit, notably the representatives of OECD member country embassies.

18. Corruption has a serious disruptive effect on Mexico's economic development.¹¹ In the private sector, the *Índice de la percepción de la corrupción de las empresas en México*,¹² based upon a poll of 3 985 enterprises¹³ taken in the 32 states, shows that 65% acknowledged having at least once resorted to corruption on the grounds that it was necessary in order to remain competitive. The most corrupted public sectors were perceived to be public works and construction, armaments and defence, oil and gas, electricity, and telecommunications.¹⁴ Press articles have also estimated that in 2003, 10 cents out of every peso were swallowed up by corruption.¹⁵

19. As a result, one of the government's most important challenges is to reinstate public trust in its institutions. Indeed, opinion polls conducted by TI show that Mexico scored 3.6 out of 10 on the TI Corruption Perception Index for 2003,¹⁶ a score that is slowly improving since the initial publication of the

⁸ See, e.g., L. Shelley, *Corruption and Organized Crime in Mexico in the Post-PRI Transition*, Journal of Contemporary Criminal Justice, vol. 17 No. 3. August 2001. ([www.american.edu/tracc/Publications/Shelley The Post-PRI Transition.pdf](http://www.american.edu/tracc/Publications/Shelley%20The%20Post-PRI%20Transition.pdf))

⁹ For instance, a survey from TI-Mexico indicates that the states with the highest level of corruption are the federal district, the states of Mexico, Puebla and Jalisco, which are also the states with the largest number of companies. In comparison, the State of Colima is considered the least corrupt. (see www.transparenciamexicana.org.mx/indice_nacional_01.html)

¹⁰ The TI Global Corruption Report 2003 also mentioned the high corruption rate of judges in Mexico.

¹¹ Ibid. Last year, as a result of widely perceived corruption by the international business community capital investment flows decreased by 25%.

¹² *Centro de Estudios Estratégicos del Tecnológico de Monterrey* (hereafter CEETM. See www.revistainterforum.com/espanol/articulos/100702soc_costos_corrupcionmx.html). The study indicates that the two most common types of corruption are administrative and political corruption.

¹³ According to data of 2002, there were about 636 526 enterprises in Mexico. (SIEM, see www.siem.gob.mx/portalsiem/)

¹⁴ CEETM.

¹⁵ See article: *El costo de la corrupción en México*, Es Mas, March 16, 2004.

¹⁶ A level of ten indicates a perception of no corruption. This survey measures the level of perceived corruption in the public service in a number of countries by way of polls. (see <http://www.transparency.org/index.html>)

index in 1996.¹⁷ Several participants in the on-site visit noted that citizens, as gatekeeper and guarantor of democracy and its laws, mistrust their legal system and institutions, including the police.

c) *The government's fight against a culture of corruption*

20. The examining team noted evidence of the government's political will and commitment to fight corruption. During the on-site visit, a widely shared view among Mexican participants in the on-site visit was that the government is addressing the root causes that feed a "culture" of corruption. To curtail the damaging effects of corruption on Mexico's economic development, it has developed outreach and communication programmes promoting the prevention of domestic corruption among government, business and citizens. It has also made efforts to promote awareness in all sectors of Mexican society. The Mexican government chose a formalistic approach to handle the fight against corruption, i.e. via the development of multiple programmes, laws, rules and regulations. It has begun with the Programme of Modernisation of Public Administration 1995-2000¹⁸ and later the National Development Plan 2001-06,¹⁹ which sets forth its overall strategy for combating corruption by promoting a culture of transparency and accountability in the public administration and by stressing preventive actions within the federal government.

21. In an effort to involve key players in its fight against corruption in the Administration, an inter-ministerial commission (CITCC)²⁰ was created in 2000 which carried out a quarterly review of each institution's efforts to fight corruption and to promote transparency. The CITCC plays a pivotal role in shaping anticorruption policy. Its aim is to review and coordinate policies and establish guidelines and directives with a view to fostering ethical values in the public service. In doing so, it promotes mechanisms to ensure accountability and transparency in every aspect of public management.²¹ While CITCC mostly deals with domestic corruption, the implementation of the OECD Convention is also part of its agenda. In this respect, the Mexican authorities indicated that the CITCC passed a resolution on June 26, 2003 to develop the measures and actions needed for the prompt implementation of the Working Group's recommendations.

22. As part of a general analysis of the scope of corruption within the Federal Public Administration (FPA), the 1995-2000 Programme identified general shortcomings including the need to improve the status and professional qualifications of public servants. The review also revealed a lack of transparency in the administration due in particular to excessive executive powers, a lack of accountability and ineffective

¹⁷ Furthermore, the Mexican Chapter of TI (*Transparencia Mexicana*) has undertaken a national survey about corruption acts and good government which estimates that from 2001 to 2003, acts of bribery went down from 214 to 101 million. TI Mexicana, www.transparenciamexicana.org.mx/documentos/ENCBG%202003/Encuesta%20Nacional%20de%20Corrupcion%20y%20Buen%20Gobierno%202003.pdf.

¹⁸ *Programa de Modernización de la Administración Pública 1995-2000*, developed under the presidency of Ernesto Zedillo. Its general objectives were "to transform the Federal Public Administration into an effective and efficient organisation to fully meet society's needs, and to fight corruption and impunity by encouraging preventive actions, without neglecting a steady, fast and effective application of corrective measures". (http://zedilloworld.presidencia.gob.mx/PAGES/library/od_publicadmon.html)

¹⁹ <http://pnd.presidencia.gob.mx/index.php?idseccion=6>

²⁰ The Interministerial Commission for Transparency and against Corruption in Federal Public Administration (*Comision Intersecretarial para la Transparencia y Combate a la Corrupcion*, hereinafter CITCC) is integrated by the PGR and representatives of 18 ministries, including of the Ministry of Foreign Affairs, the Ministry of the Treasury and Public Credit and the SFP. See A. Franco-Barrio (General director for policies and studies at the CITCC), *Building a more transparent and honest government in Mexico. Institutional reforms and anticorruption policy*, CITCC, Government of Mexico, June 2003.

²¹ *Ibid*, p.25

oversight by the public and its elected representatives. Finally, the Programme called for a greater promotion of performance, honesty, loyalty, effort and initiative, as well as training opportunities and staff performance evaluation. In 2001, the CITCC identified 2 050 areas for action and 5 328 irregular types of behaviour in 205 institutions of the FPA. Of 292 identified processes targeted for improvement, public procurement, public works, services and inspection accounted for more than half.²² Among other CITCC's achievements is the creation of a Transparency Monitoring Index to evaluate the anti-corruption policies of each federal agency and to assess anticorruption policies with the aim of fine-tuning strategies and objectives.²³

23. Efforts to improve the prevention of corruption at the federal level include a strict policy of asset declaration by public officials,²⁴ which goes beyond the requirements in most OECD countries. More recently, a code of ethics for federal public officials was drawn up in 2002 and is to be transposed by all federal agencies.²⁵ Also in 2002, the *Federal Law on Public Officials' Administrative Responsibilities* reinforces the obligations of public officials and triggers administrative liability in cases of corruption and conflicts of interest.²⁶ For the year 2003, 5 224 administrative sanctions were pronounced against 4 155 public officials, 58 of which concerned corruption or extortion (1%), mainly in the Department of the Interior (13 cases), the Secretariat of Agriculture, Livestock and Rural Development (8 cases), and the PGR (7 cases). The Mexican authorities emphasise that the sanctioning of administrative faults has a beneficial effect by preventing corruption and other serious wrongdoing from materialisation.

24. The Mexican Government stated that special attention is being paid to officials particularly exposed to corruption. Public servants in the areas of public procurement, customs and tax administration,²⁷ are audited and rotated regularly.²⁸ A significant development has been the adoption in April 2003 of the *Civil Service Law (Ley del Servicio Profesional de Carrera en la Administración Pública Federal)*, under the responsibility of the Ministry of Public Administration (SFP). Under the law, in force since April 4, 2004, recruitment is based on equal opportunity and merit from the lowest (entry) levels to the level of director general. The *Regulations of the Civil Service Law* also prescribes regular evaluations of officials' performance, and dismissal upon failure to pass the test after the second time.

²² Following that analysis, the government took concrete actions to redress the situation. It implemented Operational Programmes for Transparency and Combating Corruption in institutions of the FPA – tools that permit the formulation and monitoring of the results and actions that the agencies and entities achieve in promoting transparency and combating corruption (117 in 2001, 155 in 2003). More than 3 000 specific actions for improvement have been put into place as of November 2003, of which 1 885 were “Improving Processes and Services” and “Giving Quality and Transparency to Administration”. They are classified by strategic lines of the National Programme for Combating Corruption and Promoting Transparency and Administrative Development. Regarding transparency in bidding processes, one strategy involved external participation in reviewing the terms of tenders, which has generated a savings of MXN 2 343 billion, principally in PEMEX and the Federal Electric Power Commission (amounting to 0.5% of the total).

²³ Franco-Barrios, p.34.

²⁴ In January 2002, “Declaranet” was launched, an online programme for mandatory declaration by civil servants of their assets; spouse's assets and of any economic dependents. This obligation covers most Mexican public officials.

²⁵ See, e.g., the code of conduct of the Health Ministry: <http://www.salud.gob.mx/unidades/dgces/>. Of the 155 federal agencies or entities that signed an operational programme, 65% have adopted a code of ethics.

²⁶ During the on-site visit, it appeared that the SFP has yet to examine the recent OECD Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service adopted in June 2003, in a view to amend its law, if necessary.

²⁷ SAT has an integrity programme (*Reto de Integridad*) on which its employees are tested on a yearly basis.

²⁸ “Country Chapters of the Ethics Report” PUMA(2000)2/ANN/REV1. See also OECD: “Public spending in Mexico: how to enhance its effectiveness”; Economics Department Working Papers no. 288, 2001.

25. Procurement practices have been modernised to improve transparency in federal tendering through a citizen witness programme²⁹ and the Electronic System of Government Procurement (Compranet). In addition, administrative procedures are being simplified and made more accessible by reducing red tape and by publishing administrative requirements on the internet.³⁰ An automatic approval process has also been introduced for some procedures, providing tacit approval when the administration fails to respond within a pre-established time frame. Several participants including economic counsellors of embassies acknowledged that e-government programmes improved transparency by reducing the personal contact between public officials and citizens and opportunities for unethical behaviour such as bribery and misuse of discretionary powers. A trade union representative nevertheless pointed out the limits of such initiatives: while the use of electronic tools like Compranet or Declaranet is growing every year, the limited number of computers in Mexican households³¹ could hinder significant progress.

26. By means of its anti-corruption campaign, the Government has sought to change the culture which “enables” corruption at all levels of society and to instil a culture of zero tolerance. Despite these efforts, a high-level official declared to the examining team that there still remains a lack of awareness and an endemic “cultural” approach to corruption. According to this official, the government still has a long way to go in its fight against corruption. The examining team also notes that the government’s efforts mainly look to domestic, passive corruption, while the fight against transnational bribery necessitates transborder measures as well.

d) *International involvement*

27. The Mexican authorities have expressed a commitment to combat corruption at the international level. In addition to being a Party to the OECD Convention, Mexico has been a Party to the OAS Convention since June 1997 and signed the Council of Europe’s Criminal Law Convention on Corruption on May 15, 2002. More recently, Mexico hosted the signature of the UN Convention against Corruption on December 9, 2003 in Mérida. On the domestic front, the Mexican government has prepared two draft bills amending the Federal Criminal Code in response to the recommendations and concerns expressed by the Working Group in Phase 1. Also, the Ministry of Public Administration spent MXN 234 482³² on informative materials (pamphlets, publications, posters, etc.) to publicise the Convention’s objectives and recommendations.

28. Mexico’s attention, however, has mainly focussed on the implementation of the Convention in respect of bribes given by foreign companies to Mexican public officials. Mexico tends to view the Convention in terms of the “protection” it offers Mexican companies from corruption perpetrated by foreign companies in Mexico more than in terms of the obligations it imposes on Mexican companies operating abroad. On the other hand, combating bribery by Mexican businesses abroad is largely perceived

²⁹ The Mexican authorities explained that a citizen witness is a person of recognised technical and moral prestige, usually belonging to a non-governmental organisation, who participates as an observer in the bidding process, providing testimony and certifying whether the procedure was transparent and legal.

³⁰ Pursuant to the Freedom of Information Act. The Mexican authorities also indicated that more than half of State governments had now adopted a Law on Transparency and Access to Public Information. Indeed, it was indicated during the on-site visit that companies had difficulties to find out the conditions to be met to settle in, or trade with Mexico.

³¹ At the end of 2001, there were 3.64 million internet users in Mexico, half of which in private firms and more than one third in households. At the end of January 2003, the Mexican government launched the first phase of its project *e-Mexico*, aiming to provide high-speed internet via satellite to 3 200 communities. See: Mexico: Country Profile 2003, *The Economist Intelligence Unit*, pp.21-22. The Mexican authorities have pointed out, however, that communities make available internet access to the public.

³² As of 22 June 2004, MXN 10 equal Euro 0.72 and USD 0.88.

as a limited issue by the Mexican authorities because of the low level of Mexican foreign investments, and the structure and nature of its exports, the USA being the main trading partner of Mexico. While transborder criminality, such as smuggling of people and drug trafficking, are dealt commonly by the Mexico and U.S law enforcement authorities, none of the existing cooperation initiatives address the fight against bribery of foreign public officials.³³

29. Certain economic factors point to an increased involvement of Mexican companies in world markets, thus raising the risk of corrupt practices abroad. For instance, representatives of the export-credit agency, Bancomext, suggested during the on-site visit that the export sector is driving the Mexican economy. This would support the examining team's view that opportunities for Mexican companies to engage in corrupt practices abroad are increasing. According to Bancomext, 31 282 companies export abroad, of which about 12 500 are export-oriented. Approximately 750 represent 88% of Mexico's total exports. Therefore, as a result of the increase of Mexican exports and investments abroad, the exposure of Mexican corporations and their foreign subsidiaries to corruption-prone business transactions is growing. For these reasons, further efforts to prevent, detect and prosecute foreign bribery are necessary.

B. THE OFFENCE OF TRANSNATIONAL BRIBERY: AN EVOLVING LEGAL FRAMEWORK

30. Since the entry into force of Mexico's implementing legislation in May 1999, there have been no cases of transnational bribery, or of trading in influence in respect of a foreign public official. The Mexican authorities nevertheless pointed to an ongoing investigation which indirectly falls within the scope of the Convention concerning allegations of bribery of high-level federal Mexican public officials by a foreign company based in a country Party to the Convention. However, no other information is available at this time due to the confidential nature of the investigation.

31. Therefore, the Mexican authorities provided information on existing case law of domestic bribery to enhance understanding about the possible interpretation of the offence by courts (see annex 1).³⁴ From the information and extracts of case law provided, the examining team noticed the absence of complex or high-level cases involving accomplices, intermediaries or third party beneficiaries, offshore centres, etc. As a consequence, a number of questions raised during Phase 1 on the probable interpretation of article 222 bis of the Federal Criminal Code (FCC) on active bribery of foreign public officials remain, not having been confirmed by case law. Some questions, related to third party beneficiaries and the definition of foreign public officials, are potentially answered by a pending bill.

1) The offence of bribery

a) The amendments to the offence

i) Draft amendments to the offence in section 222 bis of the Federal Criminal Code (FCC)

32. A bill arising out of the evaluation of the Working Group in Phase 1 concerning third party beneficiaries and the definition of foreign public officials and a bill creating an offence of conspiracy were introduced to the Senate in the Fall of 2003. Due to discussions on urgent budgetary bills, deliberation on

³³ Many initiatives have been launched in recent years for the purpose of combating crime between the Mexico/US borders. See, e.g., CIA factbook and the US embassy in Mexico's website (<http://www.usembassy-mexico.gov>).

³⁴ There are few cases of domestic bribery at the federal level. Therefore, the Mexican authorities also refer to state cases, inasmuch as the state offence and the federal offence are similar.

the bills was postponed to the Spring session (March-April 2004). The Senate adopted the bill amending the elements of the offence on April 29, 2004, after the on-site visit. It adopted the amendment proposed by the Government concerning the definition of foreign public officials, but rejected the insertion of an express reference to third party beneficiaries. The bill is now pending before the Chamber of Deputies.

33. Third party beneficiaries: As indicated during Phase 1, article 222 bis does not expressly apply to the case where a benefit is offered, promised or given directly to a third party for the purpose of obtaining or retaining an undue advantage from a foreign public official. The Working Group, despite the assurances given by the Mexican authorities, was uncertain whether this case would be covered, and recommended that this issue be followed-up in Phase 2. The review of case law on domestic bribery is not relevant on this element, because the domestic bribery offence does expressly apply to bribes where the benefit is for a third party (article 222 FCC). The Bill presented to the Congress added the words “on his/her benefit or in benefit of a third party” to Article 222 bis, sections I and II and the examining team considered that this would remove the doubt about the coverage of the situation where the bribe goes directly to a third party. However, the Senate recently rejected this amendment, considering that third party beneficiaries were already covered by the existing text. Should the coverage of third parties remain implicit, the doubts expressed in Phase 1 would remain until case law clarifies the case of bribes given to foreign public officials for the benefit of third parties and of bribes given directly to third parties without transiting through foreign public officials. Whether the coverage of these situations in the future is implicit or explicit, the lead examiners encourage the Mexican authorities to ensure that such coverage is well understood by law enforcement authorities.

34. Definition of foreign public officials: Currently, pursuant to article 222 bis of the FCC, a foreign public official is defined as any person who holds or occupies a public office under the law of the official’s country.³⁵ In its evaluation of Phase 1, the Working Group was concerned that the non-autonomous method of defining foreign public officials could lead to an inconsistent and in some cases inadequate application of the transnational bribery offence. It therefore recommended that this issue be monitored in Phase 2. However, the Mexican authorities anticipated such review by proposing an amendment to article 222 bis. The proposed definition would no longer be expressly linked to the law of the foreign public official’s country:

“a foreign public official is understood to be any person who holds a job, office or commission in the legislative, executive, or judicial branch or in an autonomous public organism of any type or level of government of a foreign State, whether appointed or elected; any person who performs a function for a public authority, organism or company or one that is state-controlled of a foreign country; and any official or agent of an international public body or organisation” (modifications compared to the current definition are highlighted by the Secretariat).

35. The Senate has adopted the new definition and the Mexican authorities are confident that it will be adopted by the Chamber of Deputies in the forthcoming months. The examining team welcomes this bill, and look forward to its adoption in the following months. In any event, as neither the current nor the proposed definitions have been tested by courts, the lead examiners would recommend that the Working

³⁵ “Foreign public official is understood as any person who holds or occupies a public office so considered by the corresponding law in the legislative, executive, or judicial organisms of a foreign State, including agencies or companies that are autonomous or independent or state-controlled, of any type or level of government, or any international public organism or organisation.”

Group follow-up on this issue as case law develops because some potential issues raised in the Phase 1 report would subsist with the new definition.³⁶

36. Creation of a conspiracy offence: So far, as in other civil law countries, the concept of conspiracy is limited to offences against national security (article 141 FCC). Thus, the FCC does not cover the notion of conspiracy as understood in common law. The bill plans to introduce conspiracy in a new article 12 bis providing that “Conspiracy is committed when two or more individuals agree on the execution of an offence and decide to execute it. The conspiracy to commit an offence shall only be punished in the cases expressly foreseen in the Law”, including bribery of a foreign public official (with the creation of a new article 222 ter) and money laundering (new article 400 quater FCC). Conspiracy would not apply to domestic bribery however. Article 222ter provides: “An imprisonment penalty of a month to two years, and a fine from 10 to 200 daily wages shall be imposed to whom conspires to commit the felony set forth in the article 222 bis of this code.” The *travaux préparatoires* (legislative history) for the bill specify that conspiracy can be punished only where the principal offence has not been committed in order to avoid double jeopardy.

ii) The possibility of other amendments to the elements of the offence

37. Since Phase 1, Mexico has ratified the United Nations Convention against Corruption and intends to deposit its instrument of ratification soon.³⁷ The implementation of the UN Convention has implications in several areas of domestic law, and the Mexican authorities plan to create an inter-ministerial task force involving the Ministry of Interior, the PGR, SAT, and the SFP.³⁸ At this stage, the Mexican authorities are not in a position to indicate which laws will be amended, but the laws on victims and witness protection, sanctions and confiscation and also the structure of the bodies in charge of fighting corruption will undergo review. The Mexican authorities plan to finish the implementation of the Convention within two/three years. Thus it is not possible at this stage to know whether section 222 bis of the FCC will be amended, and if so to what extent.

Commentary

With respect to the definition of foreign public officials and the coverage of bribes given to third parties, the lead examiners are of the view that the draft bill as presented by the Government satisfactorily addresses the Phase 1 Recommendations and encourage the Mexican authorities to push for a speedy adoption of the text presented.

b) *The case law on domestic bribery*

38. As indicated above, little federal and state case law exists on bribery offences which could suggest how article 222 bis of the FCC could be interpreted, and none has the weight of binding

³⁶ Such issues include the autonomy towards the domestic definition of Mexican public officials, the coverage of elected persons other than parliamentarians, and the definitions of “autonomous public organisms” and enterprises indirectly controlled by a foreign state.

³⁷ Mexico deposited its instrument of ratification on July 20, 2004, after the Working Group meeting.

³⁸ After the on-site visit, a Presidential instruction dated March 12, 2004 decided on the creation of a sub-commission in that respect, with the following objectives: a) to diagnose compliance by identifying the judicial framework and current administrative programs that operate at the federal executive level; and b) to elaborate an action plan that considers both the legal modifications necessary for the full adoption of the UN Convention, as well as the administrative measures and actions that each Ministry and institution of the Federal Public Administration must fulfil.

jurisprudence.³⁹ In addition, because the definitions of the domestic and transnational offences differ slightly, not all the existing case law is relevant. Finally, the Mexican authorities noticed that the academic commentators have not been sufficiently interested in the topic, despite a variety of forums, workshops and courses that have been held in Mexico. No official internal guidelines have been issued by PGR in order to help law enforcement authorities interpret article 222 bis nor have the courts issued interpretive criteria to construe article 222 bis.

39. The interpretations proposed by the Mexican authorities of certain elements of the offence have not yet been confirmed by case law. Consequently, a number of issues explored in the Phase 1 Review continue to give rise to uncertainty, such as (i) the interpretation of the “purpose of obtaining or retaining for himself/herself or for another party, undue advantages in the development or conducting of international business transactions”; (ii) the interpretation of the element referring to the act or omission of the foreign public official;⁴⁰ (iii) whether a person is liable if he/she bribed a foreign public official whereas he/she was the best qualified bidder (Commentary 4 to the Convention);⁴¹ (iv) whether a person is liable if he/she bribed a foreign public official where the law of the State of the foreign public official permitted or required the advantage (commentary 8); (v) the distinction between facilitation payments (commentary 9) and advantages of low value (commentary 7); (vi) the distinction between trading in influence and corruption; or (vii) the extent of the coverage of complicity. Nevertheless, some questions raised during Phase 1 have been addressed and were more fully discussed during the on-site visit:

40. Intention: Pursuant to article 15 I of the Federal Criminal Code, intent is a prerequisite for liability. In a 2001 judgement,⁴² the Court specified that intent must be specific. It clearly stated that “the intent of such giving or offering must consist in the public official performing or not performing a right or wrong action related to his functions”. Thus, questions could arise where the intent is not specific, for instance, where the briber is not fully aware of the identity of the corrupted foreign public official or of the amount of the bribe, because he/she used an intermediary responsible for allocating the bribes.

41. The examining team is satisfied that the aforementioned 2001 judgement clearly stated that “the penal standard does not require acceptance by the public official”.

42. Offer, promise, or give: Article 222 bis covers anyone who “offers, promises or gives” a bribe, whereas article 222 covers anyone who “spontaneously gives or offers” a bribe. Thus the promise of a

³⁹ In Mexico, the weight of case law is a cross between the civil and common law systems. Generally, as in other civil law systems, case law is not binding. However, if an interpretation is reiterated in five uninterrupted cases by the Supreme Court or collegiate circuit courts, a presumption of validity is established, and binding jurisprudence is generated. Such jurisprudence is binding on the court that established it and on all lower federal and state courts. The Supreme Court may also issue *tesis sobresalientes*, cases of note which have persuasive value, but are not binding on lower courts. F. Avalos: “The Mexican legal system” (2nd edition, 2000), cited by “A guide to researching the law of Mexico at the University of Michigan Law Library”.

⁴⁰ Article 222 bis applies where the foreign public official is bribed “in order that he/she negotiates or refrains from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post or commission” or “in order to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post or commission”. Article 222 on domestic bribery is differently drafted as it applies where the person seeks “to cause any [Mexican] public official to carry out any activity, whether is just or unjust, related to his functions”.

⁴¹ “It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.”

⁴² Ninth Epoch. Instance: First Room. Federal Judicial Weekly and its Gazette Volume: XIV, December 2001. Precedent: 1a./J.99/2001 Page: 7

bribe is a new element of the transnational offence, and the condition of spontaneity is abandoned. The transnational offence thus appears to be broader than the domestic offence. The examining team considers that this difference should be highlighted when the law enforcement authorities receive training on economic offences, so that the transnational bribery offence is fully implemented.

43. Concerning “offers”, in a 2000 judgement related to the offence of domestic bribery in the State of Michoacán,⁴³ the court indicated that since the law provides that the offence is committed by “anyone who gives or offers” a bribe, a mere improper offer is sufficient for the crime to be committed, because bribery is not a crime that requires a result.⁴⁴ A similar solution has been adopted concerning passive bribery under 1985 and 1993 judgements where the courts held that solicitation was sufficient and that the delivery of the bribe was not required.⁴⁵

44. The determination of the date of the crime and its consequences: In a 1985 judgement, the court stated that the passive bribery offence is committed the day the solicitation is made, and that “it cannot be said that if the public official received what was asked for or accepted a promise, he then commits the crime under discussion again, since such action will be a consequence of the former action that completed the [offence], and not an autonomous crime.” Several questions arise from this statement.

45. First, in the case where a person offered a bribe to a foreign public official before the entry into force of article 222 bis, but the actual transfer of the bribe was made after that date, it is not certain whether a court would take into account the offer, and then consider that the offence does not exist (under the principle of non-retroactivity provided for in the Constitution, article 14, §1 and 2) or whether the court could still consider the bribe as the triggering action and thus apply article 222 bis. Second, where the offer occurs abroad and the bribe in Mexico, questions arise concerning the applicability of the territorial jurisdiction over the offence. Third, a rigid implementation of this case law could create statute of limitations problems, if the statute runs from the date of the offer, rather than from the date of the gift or receipt of the advantage.

46. Nature and amount of the bribe: The domestic and transnational bribery offences differ slightly on this point, as article 222 bis applies to the gift, etc. of “money or any other advantage, whether in assets or services”, whereas article 222 section II simply covers “money or any other advantage”. Extracts of case law only refer to “improper benefit”, “a certain amount”, “money or gifts” but the form of the bribe is never clearly mentioned. The information provided by the SFP indicate that the bribe is almost always money, and usually of a low amount.⁴⁶ The examining team considers that improving investigators’ awareness about the different forms a bribe can take (i.e. trips, honours, etc.) could improve the detection and enforcement of the offence.

⁴³ Section II of Article 174 of the Michoacán Penal Code provides for an offence of active bribery of domestic public official similar to the federal offence (article 222 FCC). Ninth Epoch. Instance: Second Collegiate Court, Eleventh Circuit. Federal Judicial Weekly and its Gazette Volume: XII, December 2000. Precedent: XI.2nd.33 P. Page 1376.

⁴⁴ The judgement also states that bribery cannot materialise in the attempt stage. During Phase 1, the Mexican authorities had however indicated that an attempt to bribe could exist in specific cases such as, for instance, the case where an individual deposits funds in a bank account in order to bribe a foreign public official, instructs a third party to offer the funds to the official, but the third party refuses to carry out the instructions. So far, however, there is no case law on this type of case.

⁴⁵ Legislation of Guerrero; Second Collegiate Court; Twenty-First Circuit; Injunction under review 365/92; January 14, 1993; and Seventh Epoch. Collegiate Criminal Court, First Circuit. Federal Judicial Weekly Volume 193-198 Sixth Part, page 46.

⁴⁶ Over the last 6 years, convictions for bribery involved bribes between MXN 60 and 10 000. However, an ongoing case involves a bribe of around USD 80 000.

47. Act or omission of the public official: Articles 222 bis on transnational bribery and 222 on domestic bribery are differently drafted on this point.⁴⁷ Thus, the existing case law has a limited explanatory value, but can nevertheless give ideas of the trends of the future interpretation of article 222 bis.

48. In a 2001 judgement,⁴⁸ the court clearly states that “it is indispensable to demonstrate that the action or omission that [the public official] was asked to perform is connected with the functions he/she is vested with due to the public office conferred on him/her, since it is only this case that endangers due operation of public administration, a legal interest protected against the crime of bribery”.

49. In a 2002 judgement on federal passive bribery,⁴⁹ the court held that “activities related to the public officials’ functions” covered an act which was not directly related to his/her specific functions. In that case, the acceleration of the procedure required by the briber was not part of the functions of the public official, but was nevertheless feasible for the latter. This situation could be similar to the situations covered by point II of article 222 bis.

50. In a 2000 judgement related to the domestic offence in the State of Michoacán,⁵⁰ the court indicates that the fact that the public official could not have done what the bribe was supposed to procure does not exonerate the briber, as bribery is complete upon an improper offer. However, the court further indicates that in that particular case, even if the situation was not exactly the one the briber thought, the public official could have acted in the sense expected by the briber.⁵¹

51. In 1995 and 2003 cases on active bribery,⁵² persons paid public officials so that they would cease acting arbitrarily. The courts held that in these cases, the persons were not liable for bribery. Although the outcome of the case is not arguable (the people paid to be released from illegal detention), the rationale of

⁴⁷ Under article 222 bis, the briber must expect foreign public official to “negotiate or refrain from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post or commission” (I) or “to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post or commission” (II), whereas in article 222 FCC the briber must expect the public official “to carry out any activity, whether is just or unjust, related to his functions.”

⁴⁸ Ninth Epoch. Instance: First Room. Federal Judicial Weekly and its Gazette Volume XIV, December 2001. Precedent: 1a./J.99/2001 Page: 7. Inconsistency of precedent 109/2000-PS.

⁴⁹ Ninth Epoch. Instance: Second Collegiate Criminal Court, First Circuit. Federal Judicial Weekly and its Gazette Volume XV, January 2002. Precedent: I.2o.P.52 Page: 1273.

⁵⁰ Section II of Article 174 of the Michoacán Penal Code provides for the active bribery of domestic public official similar to the federal offence of article 222 FCC: “*Al que dé u ofrezca o prometa dinero, o ventajas pecuniarias a las personas a que se refiere la fracción anterior, para que haga u omita un acto justo o injusto relacionado con sus funciones.*”

⁵⁰ Ninth Epoch. Instance: Second Collegiate Court, Eleventh Circuit. Federal Judicial Weekly and its Gazette Volume XII, December 2000. Precedent: XI.2nd.33 P. Page: 1376”. Injunction under review 269/2000. September 20, 2000.

⁵¹ In that case, a person offered a bribe to an official of the State General Attorney’s Office in order to free his relative. But the detainee had been transferred to the District Attorney. As a result, the briber lacked pertinent information. Nevertheless, the detainee was still in a place where the public official solicited could have acted.

⁵² Ninth Epoch. Instance: Collegiate Criminal Court, Seventh Circuit. Federal Judicial Weekly and its Gazette Volume II, July 1995. Precedent: VII.P.12 P. Page 223: “Bribery. Cases in which the crime of bribery is not committed. If the public officials involved are acting arbitrarily with their behaviour, obviously the fact that the accused offers them money or gifts in order that they cease such behaviour cannot be considered to pursue the aim that they stop doing something legal or illegal related to their functions. This means that materialisation of the crime of bribery under the indicated conditions cannot be validly maintained.”

the courts in the two judgements is worrying if transposed to other situations of bribery as a response to the use of arbitrary power and where the freedom of the person is not endangered.

Commentary

In light of the small number and the nature of the cases on federal bribery that have been decided by the courts, it is not possible to clearly assess how certain elements of the offence of bribery of foreign public officials will be interpreted in practice. The lead examiners therefore recommend that case law be monitored as it develops.

Finally, taking into account the differences existing between the offences of bribery of Mexican public officials and bribery of foreign public officials, the lead examiners encourage the Mexican authorities to develop internal guidelines for the attention of law enforcement authorities highlighting those differences, such as the need to pay stronger attention to intermediaries and third party beneficiaries, the difference in acts for which the public official is bribed, the coverage of the promise of a bribe, the absence of requirement of spontaneity for active bribery to be perpetrated, etc. Courts are also encouraged to issue interpretive criteria on the same subject.

2) *Repression of money laundering*⁵³

52. Introduced in 1990 as a tax crime, money laundering was moved to the Federal Criminal Code in 1996. It is now sanctioned in article 400 bis, regardless of the predicate offence.⁵⁴ The Mexican authorities indicated that 416 investigations relating to money laundering have been initiated since 2000 leading to 77 convictions, most of which relate to drug trafficking. So far, there is no case law regarding money laundering linked to bribery by a Mexican individual or company of a foreign public official. However, during the on site-visit, the PGR mentioned that a case of transnational bribery involving a company from another OECD country suspected of having bribed high-level Mexican public officials had been uncovered. Mexico became aware of this case after it received notification from the Financial Intelligence Unit of the other OECD country of a money laundering investigation. The case is still under investigation by the law enforcement authorities.

53. PGR indicated that they experienced difficulties in prosecuting money laundering. The PGR highlighted the complexity of the offence and the difficulty of proving the illegal origin of the assets laundered. However, PGR also indicated that a recent court decision stated that a conviction for the predicate offence was not a pre-requisite for a conviction for money laundering: well-founded signs of the illegal origin of the proceeds laundered are sufficient, and proof beyond a reasonable doubt of the predicate

⁵³ Mexico underwent FATF review in 2003-04.

⁵⁴ Money laundering is perpetrated where the person, for himself/herself or for the benefit of a third party, “purchases, sells, possesses, warrants, invests, transports or transfers (within Mexico, or from Mexico to outside Mexico, or vice versa) resources, rights or assets of any nature *knowing* that they originated from or represent the product of an illicit activity, with the purpose of concealing, disguising or attempting to conceal or preventing from knowing the origin, ownership, destination or location of those resources, etc. or promoting any illicit activity”. A person found guilty under this article can face 5 to 15 years of imprisonment, a fine from 1 000 to 5 000 days of minimum wage as well as be entitled to pay damages. The same penalty will be imposed to employees and officials of institutions integrating the financial system, when he intentionally assist or cooperate with third party to carry out the above-mentioned activities. The previous sanction will be increased by half, when the accused is a government official in charge of prevention, detection, investigation, prosecution or the judgment of this offence. (article 400 bis)

offence is not necessary.⁵⁵ As a consequence, once the prosecution has demonstrated a certain level of certainty as to the illegal origin of the assets, the burden of proof is reversed and the accused must prove the legitimacy of the origin of his/her assets. PGR nevertheless indicated that when starting an investigation on money laundering, they would systematically investigate all possible related crimes, including bribery. As an example, PGR mentioned that two cases of money laundering began with a primary investigation on money laundering and led to suspicions of bribery.⁵⁶ The Mexican authorities nevertheless indicated that they encountered difficulties in using the reverse onus of proof provision.

54. Another difficulty relates to proving that the defendant knew the proceeds were illegal and that the laundering took place for a specific purpose. To address this difficulty and in order for Mexico to comply with its international obligations, an initiative to amend the FCC and the Federal Criminal Procedure Code (FCPC) was submitted to the Senate in September 2003. This includes a proposal to introduce negligent money laundering in a new article 400 ter of the FCC. Negligent money laundering would sanction persons who, because of their profession, job, position or commission, fail to adopt the necessary means to determine whether the resources, rights or assets are legitimate. This article, if approved, would be a legal innovation in the Mexican anti-money laundering framework, since negligence will no longer be a defence available for such persons. However, as of the date of the on-site visit, the bill had still not been discussed in the Senate. The Bill also foresees the introduction of conspiracy to money launder in a new article 400 quater.

55. A third difficulty is procedural delay due to the requirement to obtain a formal complaint from the Ministry of Finance and Public Credit (SHCP) when the money is laundered through the Mexican financial system (from the 416 preliminary inquiries initiated for the offence of money laundering, during the period from January 2000 to May 15, 2004, 8 accusations were spontaneously submitted by the SHCP, and 72 accusations were submitted by the SHCP, requested by the Federal Public Prosecutor). SHCP explained that money laundering was initially linked to tax crime, but that they have never refused to deliver a formal complaint to PGR where a crime was committed using the financial system.⁵⁷ SHCP also indicated that this procedural link was preserved by Congress as a guarantee that the financial system would be backed by a sound legal, regulatory and supervisory framework. In addition, the intervention of the SHCP (through its FIU) is also beneficial because its staff has greater expertise on tax and fraud offences than PGR as well as having unrestricted access to tax information. On this last point, SHCP indicated that reforms of the financial regulations should allow the FIU to disseminate more information and consult the data bases of criminal units.

56. Concerning training, the Mexican authorities indicated that several officers of the FIU at the SHCP attended training courses related to money laundering and terrorism financing. The Mexican authorities also mentioned that the PGR, through its National Institute of Criminal Science, was also providing training on complex bribery cases to its public prosecutors and federal investigative agents. However, a police representative met on the on-site visit indicated that while Mexico had enough resources at present, more would be needed in the future, with the expected increase of transnational crime.

⁵⁵ Second Collegiate Court on Penal Matters of the First Circuit, Judicial Seminar of the Federation and its Gazette; Ninth Epoch.; Book XII, September 2000. thesis: I.2o P.J./13 Page 629.

⁵⁶ See: "Detection and disclosure of bribery linked to money laundering cases" below.

⁵⁷ However, it was mentioned at the on-site visit that it is not mandatory for the public prosecutor to receive a complaint from SAT in order to commence an investigation, as long as it is transmitted at a later stage (i.e. exercise of the penal action and indictment).

Commentary

The lead examiners congratulate the Mexican authorities for having taken measures to ensure proper training on money laundering and encourage them to ensure that the training and number of staff remains adequate in the future. The lead examiners would also appreciate to be kept informed about the evolution of the potential case of transnational bribery ensuing from the initial money laundering investigation.

The lead examiners are pleased by the overall Mexican legal framework regarding money laundering and support the Mexican authorities in their constant efforts regarding the implementation of various initiatives aiming to correct legal loopholes and to meet more efficiently expected international obligations. Therefore, the lead examiners strongly recommend to Mexico to enact article 400 ter on negligent laundering as soon as possible. Once this article is enacted, it should be subject to a follow-up.

3) *The reform of the liability of legal persons*

Nature of liability and sanctions towards legal persons

57. At the federal level, Mexico introduced criminal sanctions for legal persons in 1999 for offences expressly providing for their application (article 11 of the FCC⁵⁸). Up to now, these include only two offences: bribery of foreign public officials (article 222 bis FCC⁵⁹) and acts or omissions seriously affecting national consumption (article 253 FCC). Criminal sanctions for legal persons do not apply to domestic corruption, money laundering, or accounting offences.⁶⁰ At this stage, there have been no cases in which a legal person has been charged with active bribery or consumption offence. The examining team was thus not able to review their application and effectiveness.

58. The absence of case law contributes to the lack of concern of companies and their lawyers about the applicability of sanctions to legal persons. The business community clearly views the Convention (and its implementing legislation) as mainly focused on the personal liability of individuals. In addition, one lawyer indicated that similar sanctions for legal persons have existed in corporate law for several years but have never been applied. One reason mentioned is that the principal sanction, the liquidation of a legal person, would be unlikely.

59. Two bills proposing amendments on sanctions for legal persons are under discussion by Parliament. A first bill proposes to create criminal liability of legal persons (article 11⁶¹), modifies the

⁵⁸ “When any member or representative of a legal entity or of an association, corporation or enterprise of any kind, excepting State institutions, commits a crime with means provided by such legal person, thus resulting in a crime committed in the name or on behalf of his/her principal or in his/her benefit, the judge, in the cases specifically described by law, may decree the suspension of the corporation or its dissolution, if he/she deems it necessary for reasons of public safety.”

⁵⁹ last paragraph: “When any of the crimes included in this article is committed under the hypothesis of article 11 of the FCC, the judge shall impose the legal entity up to five hundred days of fine and shall decree its suspension or dissolution, taking into consideration the degree of knowledge of the management bodies regarding the bribery in the international transaction and the damage caused or the benefit obtained by the legal entity.”

⁶⁰ As a consequence, the ongoing investigation related to bribery of a high-level Mexican public official by a foreign company based in a country party to the Convention covers only individuals.

⁶¹ Bill: “Whenever any member or representative of a *legal person*, except for State institutions, commits an offence with the resources provided for said purpose by the said legal person, so it results committed under the name, the protection or in benefit of the social representation, the judge *with audience of the legal*

available sanctions, and specifies the applicable procedures.⁶² The second bill proposes to adapt the last paragraph of article 222 bis to the future article 11. The lead examiners consider that in light of the ongoing discussion concerning the amendments to article 11 and 222 bis, the new texts, if any, should be examined by the Working Group on Bribery in due course.

Scope of application

60. Article 11 currently restricts the imposition of sanctions on legal persons to “the cases specifically described by law”, whereas the draft text drops such limitation. The Mexican authorities state that a greater number of cases might result of the approval of the proposed reform. Also, the current article 11 allows a judge discretion to impose a sanction (“may”), while the bill seems to indicate that the sanction is mandatory (“shall”).

Standard of liability

61. Pursuant to current article 11 of the FCC, a legal person cannot be criminally liable *per se* but can be subject to sanctions where several requirements are met, none of which having been tested in court. The representatives of the PGR indicated that those requirements are not amended by the draft law and the introduction of criminal liability: A member or representative of the entity must have been convicted of the transnational bribery offence and he/she must have committed the bribery offence with means provided by the legal entity for such purpose in such a way that the offence was committed in the name, on behalf of, or under the protection of the entity.

62. The draft law specifies that the judge imposes a sentence on the legal person “without prejudice to the responsibility in which the natural persons may have incurred for the offences committed”. The representatives of the PGR nevertheless confirmed that the conviction of the natural person involved would still be necessary, under the principle of “joint liability”. The Mexican authorities explained in Phase 1 that “a member or representative” could be any employee of the legal person. However, the *travaux préparatoires* of the draft law only refer to “natural persons who embody the management instances”.

63. The requirement that the offence be committed “with means provided by the legal person “for such purpose”” also alarmed the examining team, as it seems to indicate that where an ordinary employee bribes a foreign public official, the judge would have to prove the intent or at least authorisation of use of the legal persons’ means by the management instances, and thus their participation, at the very least as inducers or accomplices. This could be difficult to prove and could curtail the scope of application of the sanctions. This would thus explain the restrictive interpretation found in the *travaux préparatoires* concerning the natural persons involved. This condition could also prevent sanctioning a legal person where a second legal person provides the means to bribe a foreign public official in the interest of the first legal person.

representative of the said legal person, shall impose upon sentence to the legal person, previous corresponding procedure, the sanctions foreseen in this Code, without prejudice to the responsibility in which the natural persons may have incurred for the offences committed.” (amendments are in italics)

⁶² This includes the introduction of provisions that allow legal persons to benefit from the same rights as natural persons concerning judicial hearings (i.e. the right to be informed from the preliminary inquiry of penal actions exercised against the legal persons, the possibility to be assisted by a defender and ability to participate in all procedural acts). A new chapter IV on legal persons would be inserted in title twelve of the FCPC dealing with particular categories of offenders. For instance, the proposed article 527 bis FCPC specifies that whenever conditions of article 11 seem to be met, the Public Prosecutor has to exercise penal action against the legal person and the natural person that shall respond for the offence committed.

64. The liability of a Mexican parent company for the acts of its foreign subsidiary appears to be extremely limited in Mexico, because of the condition that means to commit the bribe must be provided by the legal person (here the parent), as the mere authorisation of the parent would be insufficient to trigger its liability. The representatives of PGR mentioned the possibility of charging the natural person and parent with complicity for the bribery perpetrated by the subsidiary, or even the possibility to sanction the parent for the offence of laundering the proceeds of the bribery offence. However, none of these has ever been tested in practice. In the ongoing investigation mentioned in §30 concerning a European company having bribed Mexican public officials, the representative of the PGR indicated that investigations have begun both against individuals and legal persons, and that the European company used legal persons created in Central America for the sole purpose of bribing public officials (further information was not available because of the early stage of the procedure). However, the investigation against the legal person would tend to result in the dissolution of the legal person because of its illicit purpose rather than to sanction a legal person having bribed a public official, since criminal sanctions for legal persons are not foreseen in case of bribery of Mexican public official.

65. The examining team considers that the doubt expressed during Phase 1 about whether the standard of effective, proportionate and dissuasive sanctions is met remains. The Mexican authorities reaffirmed that they were interested in sharing information with the Working Group on the most effective practices concerning the liability of legal persons for the transnational bribery offence.

Legal entities covered

66. Private entities: Article 11 of the FCC currently applies to a “legal entity” or “an association, corporation or enterprise of any kind” except “government institutions”.⁶³ Under proposed article 11, the text would be simplified, by referring to “legal persons”, while covering the same entities.⁶⁴ Thus, the conclusion of the Phase 1 Report that article 222 bis appears to cover any entity with legal personality other than a government institution would remain valid.

67. Public entities: the draft law does not amend this aspect of article 11; state-owned or state-controlled companies would still not be subject to sanctions for bribing foreign public officials.⁶⁵ Thus, the draft legislation does not address the issue raised by the Working Group during Phase 1 on the unavailability of sanctions for state-owned and state-controlled companies. The examining team is concerned by this exclusion, as it considers that the public nature of an enterprise does not prevent it from being involved in international business and competing with private companies. Moreover, this issue is especially acute in the case of Mexico which has a large number of public companies. Indeed, there are about 225 state-owned companies, mostly involved in monopolies such as oil, water, electricity, highways, railways and ports defined in the Constitution.⁶⁶ A number of them also have international activities.

⁶³ According to the Mexican legislation: “*una persona jurídica, o de una sociedad, corporación o empresa de cualquiera clase, con excepción de las instituciones del Estado*”, meaning that a legal person or a company, a corporation or any enterprise no matter its classification, would be covered by this article of FCC, excluding governmental institutions.

⁶⁴ This does not appear to modify the scope of liability, since the current article 11, referring later to the entities mentioned, already refers to “such legal person”. Thus it appears that all private entities were intended to be covered previously, and are still covered with the draft amendment.

⁶⁵ Notwithstanding the absence of liability of public enterprises, public officials working for public enterprises are personally liable for active bribery of foreign public officials.

⁶⁶ Pursuant to article 25(4) of the Constitution, “the public sector will have exclusive responsibility for the strategic areas that are designated in Article 28(4) of the Constitution. The Federal Government shall always maintain the property of, and control over, the organisations which are established for this purpose.” Article 28(4) indicates that the State exercises functions in exclusive manner in the following

68. The Mexican authorities indicated that the unavailability of criminal sanctions for public legal persons is provided for by the Constitution. Thus, the Constitution would have to be amended to allow for such sanctioning. On June 14, 2002, an amendment to the Constitution established “the Government’s liability for damages or harm derived from irregularities in its administrative activities inflicted on the property and rights of private persons”. Also, a draft law would introduce a patrimonial responsibility of the State. The Mexican authorities indicate that with this amendment, state-owned companies would still not be subject to penal sanctions, but would nevertheless be accountable under a different mechanism for any conduct (including criminal behaviour) of their employees. However, this appears to be restricted to the reparation of damages caused by public officials, and to not cover sanctions, as required by Article 2 of the Convention.

Commentary

The fact that the conviction of a natural person is a prerequisite for the sanctioning of a legal person might hinder the effectiveness of such sanction. The lead examiners note in this respect that only one other Party to the Convention has such a requirement. The lead examiners strongly recommend the Mexican authorities to revisit this point during the current legislative process. Furthermore, the lead examiners urge the Mexican authorities to introduce the liability of State-owned or State-controlled enterprises for the transnational bribery offence. Finally, the lead examiners are concerned that for legal persons to be sanctioned, the bribery offence must have been committed with means provided by the legal person “for such purpose”, as it could prevent sanctions in cases where ordinary employees or foreign subsidiaries committed the offence.

4) *The reform of sanctions*

69. Because of the absence of transnational bribery convictions and the limited data on domestic bribery or related economic offences, the examining team could not assess whether sanctions are proportionate, effective and dissuasive.

70. The Working Group recommended in Phase 1 that Mexico increase the fines for natural persons. It also recommended that the levels of fines ordered in respect of legal persons be monitored. In response to the Working Group’s recommendations, the Mexican authorities prepared bills which are expected to be considered by the Congress during its Spring session.

Natural Persons

71. In response to the Working Group’s Phase 1 recommendations, a bill prepared by the Mexican authorities would modify the current level of fines (30-300 times minimum daily wage (“MDW”) for bribes not exceeding 500 times the MDW and 300-500 times the MDW for bribes exceeding 500 times the

strategic areas “postal delivery, telegraphs and radio telegraphy; petroleum and the various hydrocarbons; basic petrochemicals; radioactive minerals and generation of nuclear energy; electricity, and the activities expressly specified by the laws from the Congress of the Union. In addition, entities with majority state-ownership cover national credit companies, ancillary national credit organisations and the national insurance and bonding institutions. Are also covered entities, which carry out their activity in the priority areas stated in Article 28 of the Constitution, particularly those intended to meet the national interests and people’s needs, public trust funds. In 1982, there were 1155 state-owned companies in Mexico in almost every sector of the economy. Privatisation has took off in 1985, but 96% of the whole process has occurred from 1989 to 1992. Regarding the preceding, see, e.g. R. La Porta and F. López-de-Silanes, *The benefits of privatization: evidence from Mexico*, (1999) *The Quarterly Journal of Economics*, 1193, p.1197. On the contrary, the Mexican authorities indicated that when the State privatises companies, it does not retain financial and corporate rights.

MDW) to a pecuniary penalty of 30-300 fine days and 300-1000 fine days, respectively. The bill passed review by the Senate after the on-site visit, on April 29, 2004 and will now go to the Chamber of Deputies for consideration. Fine days are equivalent to the net daily wage of the responsible party taking into account all the incomes of the convicted individual at the time the offence is committed. According to the Mexican authorities, the change from MDW to fine days increases possible penalties because article 29 of the FCC states that fine days take into account the net daily receipts of the convicted person at the time the offence is committed which includes income from employment or any other activity. However, should such person not have any income, a penalty could not be imposed. Consequently, it remains to be seen in practice whether the level of fines would be higher than under current law.

72. Because under the current law as well as under the bill, different monetary sanctions apply depending whether the bribe exceeds a threshold amount (500 times the MDW), the examining team is concerned about the difficulty in quantifying an advantage in respect of intangible bribes (e.g., obtaining a university admission for the son of the person receiving the bribe). Such types of advantages being difficult to quantify in monetary terms, the lower of the two sanctions would be applied.

73. The examining team was somewhat concerned about the large spread (2-14 years) in the range of the imprisonment sanction and whether benchmarks or sentencing guidelines were available to the judge.⁶⁷ The Mexican authorities explained that there are no criteria or sentencing guidelines of how the imprisonment sanction will be applied in practice to bribery cases. Mexican officials from the PGR noted that in determining the sentence, the judge is obliged to consider the elements listed under article 52 of the FCC which include, *inter alia*, the magnitude of the damage caused, the nature of the act or omission and the means employed to execute it. The judge can, however, determine the weight he/she gives to each element, although he/she must motivate his/her decision in the sentence. The examining team did not receive any information or examples about how imprisonment sanctions were applied in practice to bribery cases.

Legal Persons

74. The Mexican Government has proposed a bill which modifies the current sanction of 500 fine days and suspension or dissolution. Under the draft law, the level of the sanction is based on the capital stock of the legal person, the status of its business, the benefit obtained and the seriousness and consequences of the crime committed. The Mexican authorities explain that the level of sanction could range anywhere between 1 to 1000 fine days. However, in view of the fact that the elements that determine the number of fine days are not clearly defined (e.g., the “status” of a company’s business, the “seriousness” of the crime, etc.), and in view of the wide range in sanctions, it is unclear how consequential the sanction would be and thus, whether it is effective, proportionate and dissuasive.

75. While the new basis for calculating the fine is the declared income of the person which in principle would allow for higher monetary sanctions, the examining team is particularly concerned that this new method would create a loophole in the case where a legal person did not properly declare its income, or had no income (e.g. in the case of a vehicle specifically created for the purpose of bribery). However, the Mexican authorities have indicated that a judge can look to all the surrounding facts and circumstances in determining the real income of a legal entity without relying solely on the declarations made on its corporate tax return.⁶⁸

⁶⁷ The bill does not change the level of imprisonment sanctions which is 3 months imprisonment for bribes exceeding 500 times the MDW to 2-14 years imprisonment for bribes exceeding 500 times the MDW.

⁶⁸ The Mexican authorities also state that the complainant can provide information to the authorities leading to a determination of the legal entity’s real income. To this end, cooperation with the competent national or

76. Finally, the Mexican authorities stated that the Government was not currently considering the possibility of civil or administrative sanctions (such as disqualification from public tendering, the practice of other commercial activities or a general exclusion from entitlement to public benefits or aid). Until now, Bancomext has not withheld support for a specific transaction, refused to indemnify a claim, interrupted the disbursement of a loan, denied access to official support or sought recourse in connection with bribery. In addition, in the event of a judgement for bribery, Bancomext would only deny access to support for the specific transaction in question but not for the overall business of the company or individual even if this would be legally possible.⁶⁹ The examining team feels that a denial of any future support for any business activity of the offender for a determined period of time would be a more dissuasive sanction.

Confiscation

77. The second bill proposes amendments to the provisions on confiscation as well. The purpose of this amendment is to add to the existing provision (article 40 of the FCC) the possibility to confiscate assets the value of which is equivalent to the proceeds of an offence, when the latter have disappeared or cannot be located. The examining team welcomes this bill which brings Mexican legislation in line with Article 3(3) of the Convention. The Mexican authorities indicated that they are considering creating specialised law enforcement units dedicated exclusively to investigating the proceeds of crime.

Commentary

With respect to the level of monetary sanctions for natural persons the lead examiners took note of the draft bill and recognise the efforts made by the Mexican authorities to respond to the Phase 1 recommendation. While the aim of the bill is certainly to increase the level of monetary sanctions, its practical application remains to be tested in view of the change in the criteria used for calculating the applicable fine.

In addition, the lead examiners are concerned by the proposed new basis for the calculation of the fine for legal persons which is the declared income of the person. Therefore, the lead examiners encourage the Mexican authorities to reconsider the current proposal in order to prevent possible loopholes. Finally, the lead examiners invite the Mexican authorities to 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.

5) *Judicial Reform*

78. During the course of the on-site visit, several participants stressed the need to thoroughly reform the Mexican legal system. For instance, unnecessary procedural requirements creating a greater workload were mentioned as a flaw in the current system. The multiplicity of law enforcement agencies is also among deficiencies pointed out and which negatively affects the functioning of the whole system, due to mediocre or inexistent coordination and cooperation. Similarly, the police -federal and State- is directly subordinated to the Attorney General's Offices, which could compromise its independence.

international authorities concerning bank account information can be sought or results of tax audits or other means can be used to determine real income.

⁶⁹ See Responses to the 2002 Survey on Measures Taken to Combat Bribery in Officially Supported Exports Credits (as of May 14, 2004) prepared by the OECD Working Party on Export Credits and Credit Guarantees in which Mexico states that in the event of a judgement of bribery, denying access to support for all business (whether before or after the decision to provide support has been made) would be available, but not required or applied in practice.

79. Duplicative legislative provisions at federal and States levels raise concerns: if the States were to introduce the foreign bribery offence in their criminal codes differing from the one contained in the FCC, this could create problems of implementation (e.g., preventing effective and expeditious procedures).

80. Moreover, the citizens' limited trust in the judicial system seriously undermines the reporting of crimes. Indeed, the examining team was told that the scepticism towards the judicial system is key in understanding the low incidence of crime reporting and in the resulting discrepancy between the statistics on crime and cases actually brought to court.⁷⁰

81. During the on-site visit, a PGR representative acknowledged that a more transparent and balanced judicial system was necessary. Among issues that needed to be addressed by a judicial reform, the PGR representative mentioned, for instance, the necessity for a closer and more flexible relationship between police officers and judges, with the possibility for police officers to clarify issues directly with judges rather than through written procedures.⁷¹

82. The commitment to judicial reform has been a priority for the Mexican Government since the mid-1990s.⁷² It is also of high importance in the National Law Enforcement Programme 2001-06.⁷³ The Programme reviews, *inter alia*, the relationship between the judicial branch and the PGR, seeks to reduce possibilities of impunity, and aims at increasing public trust and strengthening the rule of law.⁷⁴ The Programme also presents a schedule for reform:

“It is intended to count in three years on a functional law enforcement structure, and in six years on a complete renewed system. Then, as a result, in 2025, law enforcement will be carried out by excellence quality institutions composed of staff members committed with a career service and solid academic and professional background. This will permit to enjoy an environment that encourages integral development within the Rule of Law.”⁷⁵

83. In addition to the many initiatives already included in the National Development Plan 2001-06 regarding the reform of the Mexican legal system, the Mexican President presented to Congress on March 31, 2004, following the on-site visit, a proposal for substantive changes to the Mexican judicial system. The Mexican authorities indicated that the bill would, *inter alia*, unify federal police agencies,⁷⁶ reform the

⁷⁰ See *Instituto Nacional de Estadística Geografía e Informática* statistics, indicating that 75% of crimes were not reported to the law enforcement authorities in 2001, G. Zepeda Lecuona

⁷¹ A similar recommendation was made in November 2001 by Dr Alejandro Gertz, the then Federal Secretary of Public Safety, in a proposal for a series of judicial reforms. Among these, one suggestion was to enable the police to be a full party to the judicial process (with the possibility of pressing charges) and not merely the public prosecutor's assistant. See López-Portillo, p.2

⁷² See Héctor Fix-Fierro, “*La reforma judicial en México: ¿De dónde viene? ¿Hacia dónde va?*”, *Reforma Judicial. Revista Mexicana de Justicia, Instituto de Investigaciones Jurídicas* (UNAM), No.2, July-December 2003. The author explains that the Zedillo administration (1995-2000) initiated reform which was essentially institutional, conferring more power, authority and visibility to federal courts in general and the Mexican Supreme Court in particular. In order to reach this objective, the Constitution was amended to guarantee the independence and irrevocability of high level court magistrates.

⁷³ See also chapter 7 of the National development plan 2001-06.

⁷⁴ See National Law Enforcement Program, 2001-06, p.18; see also strategic performance and benchmarking of results, p.94.

⁷⁵ Ibid, p.64. English translation provided by the PGR.

⁷⁶ To address this problem, the Government has announced on March 13, 2004, its intention to present to Congress a judicial reform initiative that would notably unify the judicial and preventive police, respectively the aforementioned AFI and the *Policía federal Preventiva*. Having as a main objective the

PGR and permit oral trials.⁷⁷ Major changes are also foreseen in the area of human rights with a proposal to provide for a presumption of innocence in the Constitution, and to officially repeal the death penalty.⁷⁸

Commentary

The lead examiners are pleased that the Project of Reform was presented to Parliament on March 31, 2004 and are confident that, if approved, such legislative changes would address the main concerns regarding the current judicial system. Moreover, the lead examiners support governmental efforts to increase police proactiveness and increase its investigative powers to provide greater autonomy. Finally the lead examiners encourage the Mexican government to maintain its efforts in reaching out to the population in order to instil greater trust in the judicial and administrative systems.

C. AWARENESS AND PREVENTION

I) *Building Awareness*

84. An important part of the Administration's National Development Plan 2001-06 and its National Programme to Fight Corruption and to Encourage Transparency and Administrative Development 2001-06 ("National Programme to Fight Corruption") is a broad, ongoing campaign launched in the latter half of 2002 to increase government and public awareness of the corrosive effects of corruption and to advocate zero tolerance. Primarily targeting domestic corruption, the Plan also includes public awareness about the Convention and the transnational bribery offence under Mexican law. To sensitise the administration, civil society, the media, the private sector and the public at large, the Ministry of Public Administration (SFP) orchestrated a broad information drive addressing the reach of the Convention and its implications for all actors of Mexican society through brochures, meetings, official circulars, fact sheets, information packages, posters, radio spots in 28 major cities, TV commercials and links from more than 500 sites to SFP's website on the Convention.

85. The SFP disseminated information about transnational bribery to a broad constituency primarily through the "Convention Package". The SFP Package contains a brochure on the Convention including how to file an accusation ("*Clear rules, transparent business. Recommendations of the OECD Anti-corruption Convention*"⁷⁹), a brochure on integrity programmes ("*Building a Programme of Integrity, the Role of Codes of Conduct*"), and the link to the SFP website on the Convention (www.funcionpublica.gob.mx/ocde/). The Package also included materials tailored to fit the particular needs of public officials, business, accountants, lawyers, etc.

enhancement of police efficiency, this unification would *inter alia* provide better means regarding investigative procedures, and facilitate coordination. See e.g. article of J.B. Solís: *Ratifica Fox que innovará el sistema de justicia*, www.esmas.com/noticierotelevisa/mexico/349962.html

⁷⁷ Trials are largely based on documents and procedures.

⁷⁸ For further reading on the reform of the judicial system in Mexico, see, e.g., P. Zabata Zubiaga "*El futuro del sistema judicial en Mexico*"; and Héctor Fix-Fierro.

⁷⁹ Contrary to what the word "recommendation" used in the title of the document suggests, the Convention is a binding instrument.

a) *Awareness in the Public Administration*

Awareness campaigns within the Federal Administration

86. In 2002, the Mexican Government organised together with the OECD a conference on “Implementing the OECD Convention against Corruption: Working with the Private Sector”.⁸⁰ The main dissemination programme, however, began in September 2003 when the Transparency Networking Unit of the SFP⁸¹ appealed to a large number of federal agencies and their internal control organs⁸² for help in disseminating information about the Convention within their agencies.⁸³ In a circular, it informed them of Mexico’s ratification of the Convention and its obligations thereunder. It also provided a link to its website on the Convention and included a sample of the Convention Package.⁸⁴ Further, it asked the agencies to press their contractors to adopt codes of conduct and integrity programmes prohibiting bribery.

87. As a result of the SFP’s efforts, a number of federal institutions and agencies asked for Convention packages to be distributed to their officials, and a link to the SFP website on the Convention was inserted in several federal web pages.⁸⁵ Some Ministries also put visible posters in the halls of their buildings, informing employees and visitors about Mexico’s ratification of the OECD Convention and the penal consequences for accepting or offering bribes within and outside Mexico.

88. Concerning the efforts of specific Ministries and agencies, Bancomext has been actively involved in the area of awareness. Bancomext disseminated the SFP package on the Convention via email to its entire database. It also signed a cooperative agreement with the SFP in August 2003 to promote programmes on integrity in the business community. Finally, it included articles on integrity programmes in its magazine and posted information on its website about its integrity programme. It also provided links to the SFP website on the Convention.⁸⁶ However, as in many other administrations, Bancomext has emphasised the Convention’s application to transactions of domestic and foreign companies *in Mexico* and awareness could be strengthened as concerns the existence of the offence of bribery of foreign public officials by Mexican companies.

⁸⁰ The primary objective was to encourage companies to adopt preventive measures, such as adequate accounting standards and internal control systems. The Convention was also discussed, with government representatives, the business community, accountants and lawyers from the Americas’ region.

⁸¹ SFP has established a Transparency Network Unit with the aim of building a culture of integrity, transparency, accountability and shared responsibility and in fostering a better relationship between government and business.

⁸² Including the Inter-secretarial Anti-Corruption Group, the Ministry of Public Administration, the Ministry of Foreign Affairs, the Ministry of Finance and Public Credit, the General Attorney’s Office, public entities that use the highest percentage of the federal budget (Petroleos Mexicanos (“Pemex”), the Federal Power Commission, etc.), the 309 internal control organisms of the SFP and the executive branch.

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⁸⁴ The package sent to administrations contains the brochure on the Convention, a PowerPoint presentation on the Convention, the brochure on integrity programs, short notices on the obligations of different actors to implement the Convention (public officials, companies in general, companies obtaining public contracts, professionals of accounting and lawyers, as well as the civil society in general), as well as information on a virtual course on ethics proposed by the University of Monterrey.

⁸⁵ The site itself is linked to 49 private and public institutions web pages (including seven Ministries).

⁸⁶ See [page](#) presenting Bancomext, and more specifically the [letter](#) addressed by Bancomext to its affiliates on September 5, 2004. (www.bancomext.com/Bancomext/index.jsp)

89. The Ministry of Economy promotes policies to ensure market competitiveness and transparency and assists Mexican companies (mainly SMEs) in developing their business in Mexico and abroad. In view of its broad mandate,⁸⁷ it could play a crucial role in the fight against bribery of foreign public officials in international business transactions. However, the general sentiment is that the Ministry of Economy has not been particularly active in this sphere. Indeed, during the on-site visit, there was no mention of any initiative regarding the promotion or implementation of the OECD anti-bribery Convention.

90. The Ministry of Foreign Affairs has included a link to the SFP website on the Convention. It has also sent the SFP package on the Convention to Mexican embassies in OECD countries, the embassies of other countries having received only general information. The Mexican authorities have also actively promoted the Convention in embassies and Chambers of Commerce of OECD countries in Mexico. As with several institutions mentioned already, the efforts of the Mexican authorities in this area need to focus more on the promotion of awareness concerning obligations under the Convention by Mexican companies investing and exporting outside Mexico. In the course of the on-site visit, the examining team suggested that Mexico should also send information on the Convention to Mexican embassies located in all non-OECD countries in which Mexican companies export or invest, such as China with which trade is growing. Such measures would allow embassy staff to play a role in preventing bribery by Mexican companies abroad, and in turn, raise awareness of Mexican companies that contact them about local markets. In March 2004, after the on-site visit, the Ministry of Foreign Affairs sent the SFP Package to all Mexican Consular Offices and Embassies abroad (other than those in OECD countries that had already received the information packet in August 2003). Further, the consulates and embassies were instructed to inform Mexican companies doing business in such countries as well as local authorities and Chambers of Commerce of Mexico's obligations under the Convention. Economic and commercial officers were instructed to remain vigilant and play a role in the prevention and detection of foreign bribery. The examining team welcomes these initiatives and encourage the Ministry of Foreign Affairs to maintain this level of involvement in the long term.

91. The impression of the examining team was that there is a wide perception in Mexico that the Convention serves primarily to prevent and sanction foreign companies bribing Mexican public officials. Prevention and sanctioning of Mexican individuals and companies bribing abroad seemed to be not well appraised. This may be due to the Mexican Government's strategy, which primarily focuses on sensitising the public administration about corruption which permeates Mexican society, with attention to the transnational bribery offence being only secondary. Indeed, there does not seem to be any specific training on the detection of bribery of foreign public officials in any of the agencies that participated in the on-site visit. A second observation is that this awareness raising campaign has not yet effectively permeated the lower levels of the Administration. Most participants praised the leading role assumed by certain high ranking officials within the Administration, which will help the Federal Administration move towards more prevention and detection, due in large part to the dissemination programme just put in place (September 2003). However, some embassy representatives indicated that while acknowledging the involvement of Ministers and direct collaborators in the fight against corruption, involvement and awareness gradually decrease when going down the administrative echelons.

State and Local Government Awareness and Initiatives

92. The examining team did not meet with any official from the State and local levels to assess the impact of the Federal Government's anti-corruption campaign in raising awareness in the Mexican States and municipalities or of the Federal/Mexican States coordination efforts in this respect. The Mexican authorities nevertheless argued that as part of the general awareness campaign, the federal government

⁸⁷ The Ministry of Economy's internal organisation chart showing the breadth of its activities appears on its website (<http://www.economia.gob.mx/>).

disseminated information about the Convention to each State of the Mexican Federation and its 2 450 municipalities through the three associations that represent them. It appears that as one commercial counsellor of a foreign embassy pointed out, states are still somewhat behind the Federation in their fight against corruption in general. According to some members of the business community and civil society, the “tolerance” level of corruption varies from state to state and different strategies have been adopted to lower instances of petty corruption. Overall, there was the sentiment that while the federal government’s campaign has raised awareness about passive domestic corruption, it has thus far been largely ineffective in changing ingrained attitudes towards corruption in local government, particularly in the judiciary (including the labour courts) and the police where corruption is generally perceived to be endemic and bribes are common.⁸⁸ In addition, there are strong uncertainties as to the filtering down of federal policies and initiatives against bribery of foreign public officials to the State and local levels.

93. The Federal Government has developed cooperation and coordination agreements with the 31 States to strengthen the state’s oversight and review of the public service in an effort to foster transparency, accountability and administrative development and to prevent corruption and mismanagement, primarily concerning the use of federal funds. The SFP’s Sub-Secretariat for Control and Auditing of the Public Administration has conducted a campaign in which it disseminated information about the OECD Convention to the 31 States through the State/Federal Comptroller’s Permanent Commission, which is composed of representatives of the Internal Comptroller Units of the State Governments. After the on-site visit, as part of local government awareness, the PGR has included the topic of transnational bribery in the agenda of the National Conference of Attorney General Offices, in which participate the 31 State Attorney General Offices.

b) *Awareness in civil society*

94. As previously indicated, the fight against corruption was a central theme of the 2000 presidential electoral campaign which greatly contributed to raising the level of awareness about corruption at a grass roots level. More recently, to bolster the awareness raising campaign spearheaded by the Administration, the government has been heavily committed to educating citizens about the cost of corruption in their daily lives. In 2003, it launched a mass media campaign, advocating its policy of zero tolerance towards corruption in posters, billboards, radio and TV broadcasts.⁸⁹ The examining team is satisfied that the media campaign was designed to reach a wide audience. Radio broadcasts made announcements about the OECD Convention and provided telephone hotline numbers for citizens. The introduction of links to the SFP website on the Convention on the federal agencies’ web pages has also contributed to raising awareness about the scope and content of the Convention.

95. In addition to this mass media campaign, the government has developed partnerships with representatives of civil society. The government’s Transparency Networking Unit is linked, *inter alia*, to civil society organisations, unions, as well as academic institutions and universities.

96. Recognising that education is an effective preventive tool, the SFP works with schools and universities in promoting programmes on transparency and ethics. In particular, The *Instituto Tecnológico*

⁸⁸ A 1999 nationwide survey found that only 12% of the population has expressed confidence in the police. See B. Reames “Police forces in Mexico: A profile”, Project on reforming the administration of justice in Mexico, Center for U.S. Mexican studies, May 2003.

⁸⁹ These included “radio seconds against corruption “ (*radiosegundos*), “movie-minutes against corruption” and “movie minutes for transparency” (*cine minutes*) which were broadcast as TV commercials and were shown in 900 movie theatres in 2003 and 1000 movie theatres in 2004, as well as being shown by independent organisations. Further, the government created a Perception Index whereby it identified areas exposed to corruption in order to target such areas.

de Estudios Superiores de Monterrey (ITESM) offers a free virtual course entitled “Ethics as a Profitability Strategy” which is available to students, as well as public officials and business persons interested in promoting integrity programmes inside their organisations. ITESM has also been heavily involved in measuring the level and perception of corruption. However, while the academics met during the on-site visit were aware of the Convention, efforts of academia thus far have focused primarily on domestic corruption rather than raising awareness about the transnational bribery offence committed by Mexican persons or companies doing business abroad.⁹⁰ The SFP should consider that in addition to existing programmes, programmes specifically addressing bribery in international business transactions, including bribery by Mexican individuals or companies of foreign public officials, could be developed in business and law schools.

97. While NGOs are relative newcomers to Mexican society and comparatively small in number, many have been involved in raising awareness about corruption. Grupo Oaxaca, a loose-knit coalition of national and local newspapers, human rights organisations and universities, was pivotal in promoting transparency and openness through its participation in the legislative process leading to the adoption of the Freedom of Information Law.⁹¹ In addition, Transparency International’s Mexican chapter, *Transparencia Mexicana*, actively monitors corruption and publishes reports on perceptions of domestic corruption. Its polls, which have shown consistently high levels of public mistrust of government, have contributed to raising awareness about corruption in Mexican society. While NGOs appear to be playing a growing role in monitoring and reporting about corruption and particularly transnational bribery, a consolidation of their efforts would contribute towards greater awareness of this new offence.

98. The media has been a powerful tool in providing momentum to the government’s awareness campaign. However, while the media has advocated freedom of information, the press appears not to have taken full advantage of the increased transparency resulting from the law. Although press coverage of domestic corruption is common, the Mexican press still appears to have a reactive rather than an investigative approach to reporting cases, the main source of information being what is furnished to the press. One NGO representative noted that this is due to the Administration’s primary focus on uncovering high-profile cases at the expense of more visible cases of petty corruption. As a result, the reporting and investigative roles of the media as “watch-dog” were perceived as limited while slowly improving.⁹² Despite the broad government campaign, none of the journalists with whom the examining team met was aware that transnational bribery was an offence under Mexican law, indicating that the media’s monitoring role may be seriously limited.

c) *Awareness within the private sector*

Business Community

99. Regarding industry-wide initiatives to raise awareness of corruption, the examining team noted the initiative by the Mexican employer’s association, CCE (*Consejo Coordinador Empresarial*), whose members include the business associations CONCAMIN, CONCANACO and COPARMEX. Through various surveys conducted by EGDE (*Encuesta de Gobernabilidad y Desarrollo Empresarial*) and nearly 4000 private entities, CCE has shown that the incidence of corruption between government and business

⁹⁰ SFP works also, *inter alia*, with the *Universidad Iberoamericana*, and the *Universidad Nacional Autónoma de México*.

⁹¹ However, the examining team did not meet with members of Grupo Oaxaca or its monitoring arm LIMAC.

⁹² A coalition of Latin-American investigative journalists known as *Periodistas Frente a la Corrupción* is very active regarding reporting of corruption and protection of its members. The coalition has a chapter in Mexico. For further information, see <http://portal-pfc.org/index.php>.

represents a major problem which negatively affects development and productivity in the private sector. It concludes that a significant number of companies wish to collaborate to eliminate such corruption and 57% were willing to invest resources to eradicate corrupt practices.⁹³ Nevertheless, a CCE representative stated that although the association represents its members before the authorities in the case of a complaint and with the assurance of confidentiality, it has not received any formal complaints to date. In addition, the Mexican authorities stated that the Mexican Stock Exchange (BMV) and risk assessment firms have publicised the Convention among businesses, clients and banks and have emphasised the link between standards of transparency for businesses and the recommendations of the Convention.

100. The government has cemented ties with the private sector in its fight against corruption through the SFP Transparency Networking Unit, which, through an approach of “shared responsibility”, works with the business community in fashioning a culture of transparency and best practices. It provided 15 000 information packages to chambers of commerce and the business community, and asked foreign chambers of commerce and embassies of OECD member States for their support in disseminating information about the Convention. For example, the American Chamber of Commerce, representing about 2000 businesses in Mexico, has worked closely with the SFP in raising awareness about the Convention among its members. In a survey it conducted on how it could best serve its membership, the number one issue was “ethics”, which, according to the Chamber’s spokesperson, would not have been raised a few years ago. Several representatives of the business sector have inserted a link to the SFP website on the Convention on their websites. In addition, federal entities⁹⁴ were asked to assist in providing information about the Convention to their suppliers and contractors. The SFP has also developed integrity programmes with several Mexican companies and has created a virtual course entitled: “*Integrity—a Strategy to Be Profitable*”, concerning best practices.

101. According to one lawyer who met with the examining team, large companies appear to have a higher level of awareness of corruption-related issues than SMEs although awareness is growing among smaller companies. For example, one large company has invited its approximately 50 suppliers, all of which are SMEs, to draw up codes of conduct along the lines of its own which contains guidelines about how to conduct business with suppliers.⁹⁵ During the on-site visit, the level of commitment expressed by participating companies to combat corruption was high. Companies with a US parent and companies subject to US stock exchange rules were more prone to include state their anti-corruption policies in codes of conduct or integrity programmes.

102. In addition to several companies in the private sector, the examining team was able to meet with two of Mexico’s main public companies, Pemex and the Federal Power Commission. Pemex in particular, has had a reputation for lack of transparency. Pemex’s commitment to fight corruption is in accordance with the Administration’s National Development Plan through the state-owned company’s creation of a

⁹³ Interestingly, all of the companies that the examining team met during the on-site visit supported the view that the Mexican law on bribery should not allow for facilitation payments.

⁹⁴ These involved over 60 government purchasers which included the Ministries of Public Safety, Tourism, Economy, Finance and Public Credit, Labour and Social Benefits, Public Administration, Social Development, Foreign Affairs and Public Education, as well as the Federal Power Commission, Federal Telecommunications Commission, National Water Commission, National Commission of the Retirement Savings System, Pemex, etc.

⁹⁵ Another example is Nacional Financiera (NAFIN) which broadly disseminated information about the Convention among its suppliers, employees and clients (mainly SMEs). As part of its strategy, NAFIN created a website (www.nafin.com) which discussed the Convention and its objectives. It established a Call Centre through which its Customer Service Centre called clients to invite them to enrol in the course entitled “Integrity as a Profitable Strategy”. It also apprised their clients about the Convention through internal e-publications, email, letters and their magazine “*Nafinotas*”.

Commission for Transparency. Its website also includes the brochure entitled “*Clear rules, transparent business*” which was drawn up in collaboration with the OECD’s Mexico Centre. However, Pemex has focussed its efforts primarily on reducing opportunities for passive corruption of its employees rather than active corruption by Pemex.

Accounting, Auditing, Legal Professions

103. In the latter half of 2003, as part of its awareness-raising drive, the Mexican authorities held meetings about the Convention with the Mexican Institute of Public Accountants (*Instituto Mexicano de Contadores Públicos de México, A.C. or IMCP*), the Mexican Society of Public Accountants and Lawyers, the Mexican Bar Association and some prominent law firms. The Mexican authorities indicated that in particular, it organised forums and workshops in ethics, transparency and anti-corruption and established a 60-hour course on Transparency and Corporate Government which will be given twice yearly. The SFP also put together a course on “Corruption and Strategies for Combating It” with the Mexican Bar Association and the *Escuela Libre de Derecho* which will begin its third year in September 2004 with approximately 150 participants to date. Such course is also recorded for future broadcasting. The SFP has signed cooperative agreements with the IMCP and the Mexican Society of Public Accountants and disseminated information about the Convention to their members.

104. In its meetings with members of the accounting profession, the examining team noted that there was no specific training offered to accountants on the transnational bribery offence or related economic crimes. In their Professional Ethics course, however, several topics are addressed concerning accountants’ ethical obligations vis à vis corruption, bribery, fraud, and related offences. The Mexican Institute of Public Accountants (with a membership of 20 000 practicing accountants) requires its members to enrol in a mandatory continuing education programme which offers over 200 courses. Courses on detecting fraud through audits have recently been offered and a course on Transparency and Corporate Government was offered in May 2004 with 40 participants. The Mexican Institute of Public Accountants plans to offer such course twice a year. At the moment, there is no requirement to take specific courses such as on transnational bribery or on related economic crimes but the Mexican authorities indicate that the Institute will consider incorporating a section on the bribery of foreign public servants in international business transactions.

105. Insofar as awareness among the legal profession, although Mexican Bar Association membership is not mandatory, it does have national coverage in association with local bars and the Association has promoted the Convention among its members. A partner of a prominent law firm mentioned, however, that there was a need to develop an “agenda” on how to best implement the Convention and that no specific fora have been devoted to the Convention.

Commentary

The lead examiners welcome the efforts by the Mexican authorities to promote a general anti-corruption awareness in all sectors of Mexican society. These efforts attest to the government’s political will to combat corruption through the media, informational and educational campaigns. The lead examiners nevertheless consider that the awareness raising campaigns could be strengthened by ensuring that the federal policies and initiatives are effectively channelled to lower levels of the administration and to the States.

To date, the focus of government initiatives covers domestic active and passive corruption. The lead examiners consider that this is an indispensable launch pad for future awareness raising campaigns focused on the transnational bribery offence.

The lead examiners recommend to the Mexican authorities to develop targeted campaigns towards the agencies most likely to come into contact with companies engaging in business abroad. In particular, the lead examiners feel that institutions such as Bancomext and Mexican embassies could play a more active role in raising awareness among Mexican companies about the Convention.

Awareness raising should not only address the Convention in terms of the “protection” it offers to Mexican companies against foreign companies using bribes to invest in Mexico, but should also focus on the obligations of Mexican companies that invest and export abroad.

2) ***Building a legal framework to prevent corruption***

a) *Prevention by the Public Administration*

106. Mexican anti-corruption policy does not exclusively focus on the administration but seeks to involve the private sector as well.⁹⁶ Notably, the Mexican authorities plan to introduce requirements for participating in public tenders aimed at preventing corruption of Mexican public officials. Draft bills to amend the *Law on Procurement, Leases, and Services by the Public Sector* (LAASSP) and the *Law on Public Works and Related Services* (LOPSRM), were approved by the Senate on November 11, 2003 and are currently under review by the Chamber of Deputies. These measures seek to prevent the inclusion of elements or characteristics in the bidding bases that could exclude certain participants or that are biased towards a particular brand or vendor, situations which may encompass bribery.

107. Apparently, there is no general system of “blacklisting” for companies sanctioned for, or involved in, corruption, in order to exclude them from future public procurements and public works. However, some individual initiatives exist. The Mexican authorities indicated that where the LAASSP and LOPSRM are infringed, the contracting agency⁹⁷ abstains from contracting with the company or individual involved, and that the corresponding list of sanctioned companies may be consulted on the SFP web pages, in the section on penalised suppliers and contractors.⁹⁸ The SFP indicated that the Ministry of Environment has created a list of companies having been involved in cases of bribery or more generally, mismanagement. The list is not a blacklist *per se* (the listed companies or persons are not excluded from future bids), but is given to public servants for information purposes. In one specific case, the Ministry was able to administratively sanction a public servant who favoured a company, but did not have enough evidence to sanction the company itself. Nonetheless, the company’s name was included in the list, as well as a notation of the conflict of interest that existed between the public servant and the company.

108. Additionally, an official communication sent by the SFP Sub-Secretary of Citizen Attention and Normativity⁹⁹ dated September 3, 2003, set forth the requirements of the Convention and petitioned government agencies to promote integrity programs among their contractors and suppliers. For instance, the Health Ministry sent a letter on the fight against corruption to its buyers and suppliers including information on the OECD Convention against bribery, and emphasised that it was important that companies implement integrity programmes based on a code of conduct and inform the Ministry of such

⁹⁶ On February 26, 2001, the President of the Republic signed the National Agreement for Transparency and Combating Corruption with 83 social organisations from the business, labour, academic, and agricultural sectors, societies and associations, political parties and non-governmental organisations.

⁹⁷ The contracting agencies include agencies of the Federal Government, the States and the Government of the Federal District.

⁹⁸ <http://www.funcionpublica.gob.mx/unaopspf/dgasan/indexsan.htm>

⁹⁹ No. SACN/300/148/2003.

implementation. The Ministry of Foreign Affairs' web page concerning purchasing includes an informative note on the Convention for companies from Signatory countries mentioning the responsibilities of the private sector in combating corruption through the adoption of preventive measures such as codes of conduct and best practices.¹⁰⁰

109. These initiatives could have a positive effect in making the private sector more aware of its responsibilities when responding to bribe solicitations, and of the existence of sanctions for both sides to corrupt transactions. The Mexican authorities should carry on with these efforts and assess the implementation and effectiveness of these measures, in the medium term, and should encourage the continuous involvement of the private sector in prevention efforts. However, here again, the examining team noted that the prevention activities in respect of the Convention were essentially directed towards domestic or foreign companies competing for Mexican public procurements.

110. An isolated example of measures specifically aimed at preventing the bribery of foreign public officials exists with Bancomext, the export credit agency. Bancomext implements the 2000 OECD Action Statement on Bribery and Officially Supported Export Credits, pursuant to which all applicants must declare that they have not engaged in corruption and which requires signatories to include a credit agreement clause which allows the agency to deny financial support in the case of bribery.¹⁰¹

111. The examining team also met with the tax authorities (SAT)¹⁰² to determine whether legislation denying the tax deductibility of bribes was an effective preventive measure. Article 31 of the Tax Code specifically disallows the deductibility of expenses by legal persons such as bribes (including gratuities, gifts, entertainment allowances, etc.) under the rationale that bribes are not expenses strictly related to the taxpayer's activity. Article 32 lists non-allowable expenses which include gifts and courtesies, representation expenses, *per diem* or travel expenses when not for lodging, meals, transport, etc., payments for customs services other than fees to custom brokers and expenses incurred by the latter, etc. Article 172 (applicable to natural persons) disallows deductions of expenses that are not strictly necessary for obtaining the revenue on which tax is payable. Article 173 states that non-deductible expenses include consumption in bars or restaurants, payments for custom services other than fees to and expenses incurred by agents, or by entities organised by such agents in the term of the Customs Law, the use or advantage of automobiles, investments in houses for residence, in aircraft or vessels, etc.

112. In addition to auditing tax returns, tax inspectors play a key role in detecting and sanctioning of fraudulent accounting. Because accounting is used as a basis for tax reporting, article 28 of the Tax Code

¹⁰⁰ See: <http://www.sre.gob.mx/adquisiciones/>.

¹⁰¹ Bancomext requires all applicants to declare that "*he has not bribed any official from the country where the export transaction is made and that if he does, Bancomext may deny any further disbursements or call back the credit*", and included a clause in its credit agreements providing that "*If the applicant, or someone in his behalf, bribes an official from the country where the export transaction is made, Bancomext may deny any further disbursements or call back the credit*". The Mexican authorities added that Bancomext considers corruption to be an event of default of the borrower and thus allows the agency to interrupt disbursements and accelerate the credit maturity date.

¹⁰² The *Servicio de Administracion Tributaria* (SAT) is the agency responsible for the collection of taxes and the enforcement of the Tax Code. It is a sub-division of the Ministry of Finance and Public Credit (*Secretaria de Hacienda y Crédito Publico*, SHCP), commonly referred to as the "Hacienda". SAT employs approximately 70 tax auditors that specifically handle international matters such as economic crimes with transnational implications. SAT also has a central Customs Unit which handles tax and trade matters and which has various units throughout Mexico, totalling approximately 280 persons that audit, carry out on-site visits, etc.

obliges all taxpayers to keep accounting records.¹⁰³ Further, as stated in §119 below, some companies and not-for-profit entities must present audited reports for tax purposes. Such reports must be signed by an accountant who is registered with the Mexican Institute of Public Accountants.

113. SAT has recently reinforced its control function in respect of a taxpayer's accounts. As of January 1, 2004, tax inspectors must first verify an external auditor's opinion for tax purposes. Using an Auditor Opinions Assessment System (SIREDA), tax inspectors evaluate the auditor's opinion in terms of tax risk which serves as a basis for their review of the auditor's working papers. Secondly, by means of a desk review, the inspector may request additional information from the taxpayer and, if such information is not provided or is not sufficient to assess the tax situation of the taxpayer, the inspector may proceed with an on-site verification.

b) *Prevention in the private sector*

Accounting and Auditing standards

114. The examining team reviewed Mexico's accounting and auditing standards with the objective of determining whether such standards are adequate for the purpose of detecting bribe payments to foreign public officials and whether the reporting obligations are strong enough to ensure that transnational bribery activity detected in the course of an audit would be reported to the law enforcement authorities.

115. Mexico has relied on the accounting profession, through the Institute of Public Accountants, to develop its own accounting and auditing standards.¹⁰⁴ In addition, the Commerce Code, Commercial Code, Tax Code¹⁰⁵ and Criminal Code¹⁰⁶ also contain provisions applicable to accounting.

¹⁰³ Under Mexico's tax laws, the taxpayer must keep books and records for five years. In the event a taxpayer fails to file a tax return, the tax authorities can inspect accounts over a period of ten years. In conducting its audits, the Mexican tax inspectorate focuses on particular sectors or professions. It also relies on internal procedures providing data on taxpayer behaviour, a particular sector or a group of taxpayers which identify areas where violations are likely to occur. "Big" taxpayers account for approximately 80% of collected tax revenues.

¹⁰⁴ After the on-site visit, the Mexican authorities indicated that as of June 1, 2004, the Mexican GAAP is henceforth issued by the Mexican Council for the Research and Development of Financial Accounting Standards (*Consejo Mexicano para la Investigación y Desarrollo de Normas de Información Financiera*). Its responsibilities will include, *inter alia*, the harmonisation of Mexican GAAP with International Accounting Standards and the harmonisation of accounting standards for banks and financial institutions with Mexican GAAP. As used throughout this report, GAAP refers to Generally Accepted Accounting Principles, or the conventions, rules and procedures necessary to define accepted accounting practices at a particular time and in a particular jurisdiction.

¹⁰⁵ The Tax Code contains important sanctioning provisions. Monetary sanctions range from MXN 180-55 901 for falsifying the financial situation of a company (books, records, financial statements). While such penalties would appear to be low, the Tax Code applies a penalty of 60%-90% of the omitted tax amount to offences involving the use of false documents, the reporting of nonexistent operations or the deduction of amounts attributable to third parties. In addition, the tax authorities can order the closing of the taxpayer's premises for 3-15 days. Article 111 of the Tax Code also imposes a sanction from 3 months-3 years imprisonment for keeping records in two separate books, for using different accounting systems or for hiding, altering or destroying the systems, books and documentation related to entries required under the Tax Code. Tax fraud based on falsified documents, false entries or failing to carry out systems or accounting records is sanctioned under article 108 with a 50% increase in penalties. Basic penalties are 3 months-2 years imprisonment for amounts not exceeding MXN 500 000, 2-5 years imprisonment for amounts between MXN 500 000-700 000, and 3-9 years imprisonment for amounts exceeding MXN 750 000.

116. In Mexico, all entities except independent service suppliers, self-employed persons, etc. and certain regulated entities¹⁰⁷ must keep accounts in accordance with Mexican generally accepted accounting principles (GAAP).¹⁰⁸ Although not expressly stated in the law, this is by virtue of court rulings which point to Mexican GAAP as valid accounting principles and by virtue of the directives of the Mexican Institute of Public Accountants which state that Mexican GAAP is applicable to all companies. In the event any item is not included in Mexican GAAP, then accountants must follow international accounting standards (IAS) and if IAS is silent on such point, then accountants must follow US GAAP.

117. Listed companies and companies regulated by the Mexican Banking and Insurance Commissions¹⁰⁹ must have their accounts audited by an external auditor. In addition, the following companies must present audited reports for tax purposes: (i) companies that either have more than MXN 26 million (USD 2.5 million) in revenues, or more than MXN 52 million (USD 5 million) in assets or more than 300 employees; (ii) state-owned or state-controlled entities¹¹⁰ and (iii) not-for-profit entities that receive donations. Approximately 80,000 companies file an external auditor's opinion for tax purposes every year. Consolidation is required when a company controls more than 50% of a company's shares or if other indicia of control are present.

118. SMEs have the option to produce accounting records under simplified rules other than Mexican GAAP except where tax requirements converge with Mexican GAAP (articles 32 and 32A of the Tax Code). While these companies are not required to undergo an external audit, companies must appoint a statutory auditor who may be a shareholder.¹¹¹ Statutory auditors must present a report to the annual meeting of shareholders concerning the financial situation of the company.

119. Financial institutions such as banking, auxiliary credit institutions, insurance, stock brokerage and other financial intermediaries must prepare financial statements according to specific accounting rules issued by the National Banking and Securities Commission and the National Insurance and Bonds Commission, as the case may be.

120. Pursuant to article 32A(IV) of the Tax Code, all state-owned and state-controlled entities must be audited by an independent external auditor appointed by the SFP. State-owned and state-controlled entities follow Mexican GAAP except where special accounting rules apply. In addition, such entities are audited by the Supreme Auditing Unit of the Federation as well as the Government Auditing Unit. When a

¹⁰⁶ Under article 243 of the FCC, the penalty for falsifying documents is imprisonment of 4 to 8 years and fines of 200-360 days minimum wage for public documents, and imprisonment of 6 months to 5 years and a fine of 180-360 days of minimum wage for private documents.

¹⁰⁷ Regulated entities such as those supervised by the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) must also observe GAAP, modified in some cases by certain specific valuation and presentation rules. Further, public companies must maintain a system of internal accounting controls sufficient to provide reasonable assurance that all transactions take place in accordance with management approval and are recorded in a manner that permits the preparation of financial statements in conformity with GAAP.

¹⁰⁸ Mexican GAAP requires an accounting of all assets, liabilities, revenues and expenses requiring that possible bribe payments be properly accounted for in a company's books, records and financial statements.

¹⁰⁹ Banks and insurance companies follow accounting rules established by the Commissions that regulate them.

¹¹⁰ State-controlled entities are those in which the State has more than 50% interest and in which the State appoints the management board. State control can also occur when the Government owns less than 50% interest in which case the Government monitors the board through a state-appointed representative.

¹¹¹ In addition, pursuant to article 166 of the General Law on Mercantile Societies, all SAs (*sociedad anónimas*) must appoint a statutory auditor, whether or not they are considered to be an SME.

government auditor (“*contraloria*”) detects possible corruption, he/she has the obligation to report it to the Internal Control Organs responsible for corruption within the Administration (SFP).

121. Concerning internal controls, the Securities Market Act requires listed companies to have an audit committee composed of the chairman and directors, a majority of which are independent. The issuer’s statutory auditor is a non-voting member of such committee. All other companies must provide a periodic report to the shareholders’ committee by a “commissary” appointed by such committee. Such report is based on an examination of the financial records of the company and may contain the results of operations, the balance sheets, changes in financial position and the accounting policies. Any shareholder may denounce any irregularities on the part of the board or the company to the commissary. The commissary in turn must denounce such irregularity to the shareholders’ committee and make a proposal for action. The CNBV Division of Enforcement investigates possible violations of securities laws, including books and records and internal controls violations. The Division recommends commission action when appropriate, either in a federal court or before an administrative law judge, and negotiates settlements on behalf of the Commission. While the CNBV has civil enforcement authority only, it works closely with various criminal law enforcement agencies throughout the country to develop and bring criminal cases when the misconduct warrants more severe action. As noted above, willful violations of the books and records provisions subject the company and its officers to criminal prosecution.¹¹²

Corporate codes of conduct

122. The majority of the large state-owned and private companies interviewed had internal codes of conduct or integrity programmes in place. In addition, the National Banking and Securities Commission requires listed companies to disclose “best practices”. One partner of a prominent Mexican law firm stated that SMEs could be expected to follow suit in the future. The examining team was given the opportunity to discuss the codes of conduct of a number of large Mexican companies, and noted that each one condemned illicit payments in general terms. However, few companies made specific mention of the transnational bribery offence in their codes of conduct. These were mainly subsidiaries of companies headquartered in the US implementing corporate-wide policies in response to years of experience under the US Foreign Corrupt Practices Act or companies subject to US stock exchange rules. These companies stated that their codes of conduct were accompanied by compliance programmes. Companies handled corruption-related issues in different ways: for example, one required that contracts with vendors contain a clause prohibiting bribery with a specific reference to the Convention and it set up an ethics hotline and a quarterly auditing process of its vendors and agents to ensure compliance with the terms of the Convention. Another required joint venture partners in foreign jurisdictions to sign a clause prohibiting the payment of bribes to public officials.¹¹³

123. Mexican state-owned companies also took initiatives. Pemex in particular, has had a reputation for lack of transparency. In lockstep with the Administration’s drive for greater transparency and accountability, Pemex has embarked on an ambitious programme in collaboration with the SFP to open up the bidding process and deal directly with suppliers, which has resulted in significant savings. To this end, it has created a new unit for “Projects and Engineering” to handle all the bidding processes and engineering. Pemex’s website points to its commitment to fight corruption in accordance with the Administration’s National Development Plan through the state-owned company’s creation of a Commission for Transparency.

¹¹² See preceding footnote.

¹¹³ The Mexican authorities stated that the Mexican Institute of Public Accountants has assisted private companies in designing internal compliance programs which, *inter alia*, require “due diligence” in deciding whether to do business with foreign consultants and agents as well as periodic review of their engagement by an independent committee.

124. In the view of one partner of a participating law firm, there has been a recent movement among corporate think tanks to adapt “best practices” in European and US-style corporate codes of conduct to Mexican companies. In his opinion, corporate codes of conduct and codes of ethics which specifically prohibit bribery like those that were presented to the examining team by the corporate participants, are prevalent in Mexico.

125. A number of companies’ codes of conduct requires employees to report suspected ethics violations such as bribery and protects employees from retaliation for reports or complaints regarding misconduct that were made in good faith. One state-owned company provided for reporting either overtly to the company’s accounting or treasury departments, or anonymously to an outside firm, ethics committee or via the internet. One subsidiary of a US-based multinational requires newly-hired employees to acknowledge in writing that they will comply with the company’s integrity commitment and to report any possible violations through any one of multiple channels. Violations of an employee’s commitment to integrity or retaliation against another employee for reporting an integrity concern are subject to disciplinary action including termination.

126. It appeared that a majority of companies do not include whistleblowers safeguards in their codes of conduct. However, one subsidiary of a US parent included whistleblower procedures and safeguards in its integrity code and provided direct access to the auditing committee, legal counsel and ombudsperson. Its procedures outlined investigatory mechanisms and various reporting methods such as telephone hotlines, courier and e-mail. However, the lead examining team noted that such subsidiary adopted verbatim the code of its US parent, and was unable to assess whether such procedures were well-adapted to local practices and the specificities of the Mexican business climate.

Commentary

The lead examiners welcome these initiatives and reforms of the Mexican authorities targeting the climate and culture of corruption within Mexican society as a whole and encourage the Mexican authorities to pursue their efforts. They feel that such a strategy can create an environment conducive to cleaner transactions in Mexico, with an incitement to better behaviour and greater transparency in both the public and private sectors, which would indirectly benefit international business transactions.

Building on such pre-existing foundation, the lead examiners recommend that the Mexican authorities develop tools dedicated to the prevention of bribery of foreign public officials directed at Mexican companies exporting and investing abroad. The lead examiners also encourage the Mexican authorities to make the listing of companies having been involved in bribery cases in the framework of Mexican public works or public procurements widely available to all federal (and eventually state) agencies in order to inform them of the potential risk of dealing with these companies, and to consider extending this list to include companies having been sanctioned for bribery of foreign public officials.

Closer collaboration with the private sector in the area of “best practices” concerning anti-corruption policies and whistleblower protection would improve prevention of foreign bribery among Mexican companies doing business abroad. Further, courses and training about transnational bribery for accounting and auditing professionals would contribute towards prevention efforts.

D. INVESTIGATION AND PROSECUTION

127. Mexico has a federal and a state criminal justice system. Crimes with an international aspect such as bribery of foreign public officials are handled at the federal level by the PGR (*Procuraduría General de la República*), which is responsible for investigation and prosecution.¹¹⁴ The judicial police¹¹⁵ is under the direct authority of the prosecutor general. In 2001, the PGR restructured the Federal Judicial Police (*Policia Judicial Federal*), and renamed it the Federal Investigation Agency (*Agencia Federal de Investigación, AFI*).¹¹⁶

128. Since the entry into force of Mexico's implementing legislation in May 1999, there have been no cases of transnational bribery or of trading in influence in respect of a foreign public official. The Mexican authorities stated that this was due not to a lack of awareness or lack of will on the part of the PGR but to the small role played by Mexican companies in international business transactions. As an indication of their willingness to investigate any allegations of corruption, they reported that an investigation had taken place last year when a Nicaraguan newspaper reported that a Mexican company was under investigation in Nicaragua for having bribed the former Nicaraguan President. The PGR contacted the local prosecutorial authorities who denied the allegations. The PGR concluded that there was no cause for action. In addition, the Mexican authorities also pointed to the ongoing investigation which indirectly falls within the scope of the Convention concerning allegations of bribery of high-level federal Mexican public officials by a foreign company based in a country Party to the Convention (see above §30).

129. Concerning domestic active corruption, while awareness and prevention have received significant attention, the same cannot be said for enforcement and prosecution. The National Programme to Fight Corruption mainly focuses on preventive rather than enforcement measures. The examining team noted the low number of domestic bribery cases at the federal level: the PGR provided information on eight criminal procedures concerning federal passive corruption over the past six years.¹¹⁷

130. As it stands, the examining team is uncertain how effective the law enforcement and the criminal justice system are in fighting complex cases of bribery in business transactions. The availability of resources and investigative means for law enforcement is an important concern. Additionally, law

¹¹⁴ Article 21 of the Political Constitution of the United Mexican States holds: "The imposition of criminal penalties belongs solely and exclusively to the judicial authority. The policing of crimes is the responsibility of the Public Ministry and the Judicial Police, which shall be under the authority and the former immediate command. (...) The decisions of the Public Ministry about the non-exercise and ending of penal action, may be challenged by jurisdictional means in the terms that the law establishes."

¹¹⁵ There are two types of police forces at the state and federal level in Mexico: Judicial and Preventive police. The Preventive police amount to more than 87% (about 330 000 agents) of the total Mexican police. It is mostly active in states, cities, and villages, its primary mandate being to maintain law and order. Unlike its judicial counterpart, the Preventive police are not entitled to investigate criminal offences but can assist the Public prosecutor if he/she so requests. For further information, see B. Reames and E. López Portillo, *Datos mundiales sobre los sistemas de justicia criminal 2003*.

¹¹⁶ According to the Prosecutor General's AFI inaugural speech in June 2002, the former *Policia Judicial Federale* was inefficient due to its lack of structure and coordination. It was also known to be more reactive than proactive, undoubtedly affecting the quality of its investigations. Furthermore, the PGR itself has clearly recognised that the *Policia Judicial Federale* was rife with police corruption, giving rise to constant human right violations and impunity, causing, in turn, a lack of trust by citizens in the police. Therefore, the authorities considered as crucial the restructuring as well as a name change, thus hoping to give the AFI a better image in public opinion. However, during the on-site visit, a PGR representative admitted that AFI's image, although better than its predecessor's, is not yet entirely satisfactory.

¹¹⁷ One led to dismissal, one to legal reservation, three are in the completion or trial stages, two ended with a conviction, and one with an acquittal.

enforcement authorities noted two main impediments to the effective prosecution of corruption in general: one relates to detection, and the other relates to obstacles in investigation.

1) Responsible law enforcement authorities: the PGR

131. In 2002, the PGR numbered more than 16 619 public servants (including prosecutors, experts, police officers and auxiliaries).¹¹⁸ Working under the PGR's direction, the AFI assists the PGR in the investigation and prosecution of corruption and money laundering, among other crimes. In 2002, the AFI had more than 4 000 police officers, 1 600 investigators, and 450 forensic experts and other specialists. Pursuant to the *Ley Organica de la Procuraduría General de la República*, effective July 25, 2003, a Specialised Unit within AFI was created to investigate offences committed by public officials or against "the administration of justice". This unit is under the responsibility of the Deputy Attorney General for Specialised Investigation of Federal Crimes. One of its functions is to investigate evidence that may show bribery of Mexican or foreign public officials. With three prosecutors and 40 agents, this unit handled 600 crimes in 2003, most of which involved undue exercise of power and money laundering; however, no cases involved bribery, be it domestic or transnational. In addition to the unit handling offences committed by public officials, the PGR has a specialised unit dealing with economic, financial and tax crimes, including corruption. The PGR is considering creating a unit to specifically handle corruption, but budgetary constraints have thus far thwarted such plans.

132. Since 2001, AFI staff have received extensive training on domestic and international aspects of crime investigation, including intelligence and data analysis, money laundering and fiscal reforms. Nevertheless, police representatives mentioned the need for more resources, including adequate training and suitable technologies, especially for matters concerning transnational bribery. Indeed, at the time of the on-site visit, there was no specific training on bribery of foreign public officials, or on the different stages at which corruption occurs in international transactions,¹¹⁹ or on the difference between bribery of foreign public officials and bribery of Mexican public officials, or on different detection mechanisms, etc. Whatever the current or future institutional framework, greater efforts should be made to sensitise the PGR and the AFI staff dealing with corruption to the specificities of the transnational bribery offence. After the on-site visit, the PGR indicated that it has included a course on bribery in international Business within the study programme of the Training and Professionalisation Institute. The first course emphasising the topic of bribery in international business transactions took place on June 17-18, 2004 and included also money laundering and financial investigations.

Commentary

Given the targeted focus of the Convention, the lead examiners encourage the Mexican government to continue providing training programmes focussed on the specificities of the transnational offence to the PGR and the AFI staff dealing with corruption cases. In this respect, Mexico could benefit from foreign expertise in order to provide better and up-to-date training to its public agents.

2) Detection and proactiveness

133. Despite the campaign against corruption, the number of investigations of corruption cases is quite low, suggesting that systems to detect bribery are weak. In principle, investigation is mandatory for any alleged act of corruption. Pursuant to article 123 of the Federal Criminal Procedure Code (FCPC),

¹¹⁸ In 2002, its budget amounted to approximately MXN 6 billion.

¹¹⁹ For instance, it is important that law enforcement authorities know that corruption can occur not only in the contractual phase, but also later.

immediately upon being aware of the “probable existence of an offence”, the Public Prosecutor or the officers under his/her authority shall take the necessary steps to provide safety and assistance to victims, prevent the concealment or destruction of evidence, instruments or objects used to commit the offence, locate witnesses and prevent the further commission of the offence.¹²⁰ Prosecutors can become aware of the probable existence of an offence of corruption by three different means: either by the persons involved in the corrupt transactions, through information gathering or by persons who discover and report the offence.

a) *Reactive law enforcement*

134. Even though the bribery offence does not require a formal complaint for prosecution, representatives of the PGR indicated that they generally begin an investigation on the basis of a report or a complaint. This reactive approach is regrettable, considering that the transnational bribery offence is usually an occult offence of which the potential victims are not aware, and that a culture favouring the reporting of corruption does not exist in Mexico.¹²¹ Most cases of domestic bribery that reach the trial stage have been reported by persons that refused to take part in a corrupt transaction. Law enforcement authorities therefore appear to heavily rely on denunciations by solicited persons or by the public official who was offered a bribe in order to open an investigation. This situation does not appear to have radically changed, despite efforts by the Mexican authorities to encourage the reporting of crimes by the Administration and the population (see below points b and c).

135. Such a reactive approach considerably weakens the investigatory reach of the PGR.¹²² Doubts about the proactiveness of the PGR are aggravated by the apparently little use of intelligence gathering. For example, it is not clear whether and how information that is obtained through investigations of other crimes is kept and processed for possible investigations on corruption. Apart from a few recent investigations of money laundering allegedly linked to bribery, there is no indication that investigations dealing at the outset with fraud in public tenders, customs, or accounting and auditing, etc., have led to investigations about corruption. Although the AFI was given means and training for intelligence gathering, the examining team felt that these were not used as much as they could be.

136. In addition, the PGR could increase its efficiency by analysing existing cases. This could start with the compilation of cases and processing of the information contained therein (the particularities of the cases, and the reasons for acquittals, etc.). The PGR provided information on eight criminal procedures concerning federal passive corruption over the past six years. However, information on the number and particularities of cases of federal and state corruption adjudicated every year was unavailable. Statistical analysis of cases of bribery of Mexican and foreign public officials could be a useful tool in assessing the effectiveness of investigation and prosecution and in characterising the corruption (i.e., simple corruption vs. complex cases). Analysis of criminal cases could also help the authorities re-evaluate policies and programmes in the areas of prevention and awareness of bribery. So far, this work appears to be undertaken by the SFP only, in the framework of administrative proceedings. The SFP currently receives

¹²⁰ An investigation can be concluded in three ways: either the matter goes to trial or it leads to no action by the prosecutor, due to lack of evidence, or it can be subject to reservation.

¹²¹ It is estimated that in general 75% of crimes are not reported. See: G. Zepeda Lecuona, “*La investigación de los delitos y la subversión de los principios del subsistema penal en México*”, Project on reforming the administration of justice in Mexico, Center for U.S. Mexican studies, May 2003.

¹²² This reactive approach was one of the major flaws of the then-*Policia judicial federal* that the PGR was specifically aiming to address by the creation of the AFI. According to the PGR’s inaugural speech on the creation of AFI in June 2002, the former judicial police was based on reaction and not on investigation and would therefore result in a work based on opportunity rather than on serious investigations.

and processes reports, complaints and information on passive corruption, and therefore addresses only one side of the corruption problem (see simplified administrative reporting system below).

Commentary

The Lead examiners took note of the explanations provided by Mexico with respect to the absence of transnational bribery cases. However, they are of the view that increased attention by the Mexican authorities to the specific issues outlined hereunder will facilitate the detection and investigation of such offences:

- Mexican investigative and prosecution authorities are invited to rely on other detection tools in addition to reports of complainants, such as intelligence gathering and the use of intelligence information as a basis for launching investigations.

- The lead examiners recommend that the PGR (including the AFI) proactiveness be increased, with notably an increased use of information gathering and analytical tools.

- They further recommend that the Mexican authorities assess the effectiveness of existing training on intelligence gathering provided to the AFI to increase its effectiveness.

b) Reporting obligations and training in the public administration

Reporting obligations under the Federal Criminal Procedure Code

137. All Mexican officials are subject to a general reporting obligation pursuant to article 117 FCPC.¹²³ However, this obligation does not appear to be effective as concerns the detection of bribery. For example, the Mexican authorities indicated that no domestic official has ever reported to his/her superiors, the public prosecutor or other public authorities that he/she was promised, offered or given a bribe by foreign nationals or companies even though the campaigns surrounding the OECD Convention point to this specific situation. The examining team feels that the lack of reports under article 117 is partly due to lack of information about its mandatory nature, as evidenced by discussions with public officials during the on-site visit. Further, while criminal sanctions exist for public officials who fail to prevent acts that could be detrimental to the financial interest of a federal institution or does not inform their superiors about it, these sanctions do not appear to be applied in practice.¹²⁴

138. A typical illustration of the Administration's attitude towards the detection of bribery of foreign public officials can be illustrated by the approach of Bancomext (the export credit agency). First, representatives of Bancomext stated that in cases of suspected bribery, the obligation to inform law enforcement authorities applies when *sufficient evidence* of bribery exists. This is inconsistent with article 117, which states that public officials have a reporting obligation upon mere "knowledge of the probable existence of a crime". Bancomext representatives were not aware of any foreign bribery involving a Mexican company despite efforts to develop prevention and awareness among Mexican companies. Again, this may be due to the fact that, like other agencies, Bancomext has promoted the Convention from the point of view of transactions of domestic and foreign companies *in Mexico*. Given Bancomext's importance in promoting exports and its presence in the business community, particularly with SMEs, the

¹²³ "Article 117.- Any person who in the performance of his or her public duties has knowledge of the probable existence of a crime that must be prosecuted *ex officio* is obliged to report it immediately to the Public Prosecutor's Office, delivering all the information he or she may have, and turning over the accused individuals if they have been detained." Bribery is an offence that must be prosecuted *ex officio*.

¹²⁴ Article 214(3) of the Federal Criminal Code; there is no sanction for other cases of non-reporting.

agency could play a more active role in the detection of corruption in addition to the steps already taken.¹²⁵ While the low level of Mexican exports may be a contributing factor, the development and implementation of red flags on bribery, similar to what currently exists in the area of money laundering would improve detection. Similarly, the detection of bribery could be improved if Bancomext staff were provided with the same level of training and methodology as they have successfully employed in the area of money laundering, where cases have been detected. The detection of bribery cases could be improved if Bancomext staff were provided with the same level of training and methodology.

139. Notably, attention could be paid to agents' commissions. In examining a request for official support, Bancomext does not require any details on agents' commissions associated with the transactions of the receivers of the official support.¹²⁶ Consequently, it is not in a position to assess whether the level of commissions is consistent with standard business practice or whether such commission could disguise a bribe to a foreign public official. In addition, no scrutiny is given to requests for export credit guarantees from businesses that operate in areas where corruption is known to be prevalent. Bancomext replied that because over 85 % of Mexican exports are destined to the USA, this precautionary measure was not currently under consideration. Finally, a Bancomext representative indicated that for transactions suspected of involving bribery, the agency would simply reject the request for support, without taking any legal action.

Detection and disclosure of the offence by the tax authorities (SAT)

140. When a tax inspector uncovers possible tax fraud, he must file a claim with the PGR and must transfer all circumstantial evidence which may indicate other crimes such as transnational bribery. The tax inspector is obliged to file and defend an accounting "dictum" containing all account statements, signature cards, etc., which may be challenged by the taxpayer in court. In 2003, there were 140 cases filed for tax fraud by SAT.

141. SAT has issued mandatory guidelines for verifications and on-site visits in a manual available on its internal website to its tax inspectors entitled "*Unique Guidelines for the Auditor*". In addition to the treatment of fees, entertainment expenses, gifts, allowances, etc., there are specific references to "indicators" or techniques used or facts to look for during examinations that would likely lead to the identification of non-deductible bribe payments, although no specific reference is made to foreign bribe payments. These include certain categories of expenses and methods of payments, transactions outside the usual course of business, discrepancies in the books, lack of supporting documents or altered documents, unusual delays in supplying information, etc.

142. After receiving a copy of the OECD Bribery Awareness handbook for tax examiners during the on-site visit, SAT announced that it would take steps to incorporate it into its Guidelines. On April 23, 2004, the General Administration for Large Taxpayers issued the "Examiners' Handbook for Detection of National and International Bribery"¹²⁷ for use by all tax examiners assigned to that unit. However, there was no specific training provided to tax inspectors to raise their awareness and detection skills about indicators of transnational bribery. Further, during the on-site visit, the head of SAT's international taxation unit expressed the need in SAT in general for more human resources with the necessary skills

¹²⁵ Indeed, in the UNICORN Export Credit Agency Anti-bribery Index, which ranks agencies according to their use of anti-bribery measures (i.e. actual practice, as reported in the OECD Working Party's 2002 survey), Mexico underperforms, scoring 6.5 out of a possible 16.5, and ranking 25th out of the 30 agencies under review.

¹²⁶ Responses to the Survey on Measures Taken to Combat Bribery in Officially Supported Exports Credits (as of May 14, 2004); OECD Working Party on Export Credits and Credit Guarantees.

¹²⁷ *Manual del auditor para la detección de cohecho nacional e internacional*

(e.g., language, experience with international matters such as exchange of information and cooperation) to handle economic crimes such as transnational bribery effectively, as well as for an appropriate continuing training programme. After the on-site visit, the Mexican authorities announced the creation of a training course on detection of domestic and transnational bribery to the intention of the General Administration for Large Taxpayers, starting in August 2004.

The introduction of an administrative obligation to report certain suspicious acts

143. In this context, the introduction of an administrative obligation to report suspicions of certain offences (in addition to the general reporting mechanisms available to public officials as citizens) in the Federal Law on Public Officials' Administrative Responsibilities is a welcome initiative, because the administrative procedure provides for whistleblower protection (protection of anonymity). This should increase the frequency of reporting, and consequently improve the detection of bribery but there remain a possibility that public officials may remain reticent to denounce their colleagues because of the absence of witness protection where the proceedings turn to the criminal system.

144. While this administrative reporting obligation can improve the detection of passive bribery, it covers active bribery of a Mexican or foreign public official only in the exceptional case where the briber is a public official. In particular, employees of State-owned and State-controlled companies, which operate in foreign markets, should have a clear obligation to report all cases involving the *active* bribery of foreign public officials they become aware of, and whatever the nationality and/or the function of the briber.

Commentary

The lead examiners recommend that the Mexican authorities remind their public officials of the importance of reporting offences, the probable existence of which they become aware in the course of their duties, pursuant to article 117 of the Federal Criminal Procedure Code. In addition, they recommend that the Mexican authorities consider the introduction of specific sanctions for the non application of article 117 FCPC in general.

In line with the recommendation to develop a specific programme against bribery of foreign public officials perpetrated by Mexican nationals or companies, the lead examiners feel that the administrative reporting obligation for public officials to denounce acts of domestic bribery could be broadened or adapted to cover denunciation of transnational bribery.

The lead examiners welcome Bancomext's consideration of requiring 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. They encourage the agency to develop training and methodology on detection of bribery of foreign public officials.

Due to the important role SAT plays in the detection and prosecution of economic crimes, awareness and training on techniques used to cover up transnational bribery are needed. While tax inspectors appear to receive an appropriate level of training and specialisation with respect to possible cases of passive bribery, it was clear that training on the transnational bribery offence per se was lacking. The lead examiners recommend more targeted training programmes for SAT tax inspectors and in particular, sensitising tax inspectors about the indicators and techniques discussed in the OECD Bribery Awareness Handbook for Tax Examiners.

c) *Reporting by the general public*

Reporting obligations under the Federal Criminal Procedure Code

145. The Federal Criminal Procedure Code (FCPC) sets forth a general reporting obligation for citizens: “Any person having knowledge of the commission of a crime that must be prosecuted *ex officio* is obligated to report this to the Public Prosecutor’s Office or to any official or police agent in the event of urgency” (Article 116). Concerning the offence of bribery of a foreign public official in particular, the SFP brochure entitled “*Clear Rules, Transparent Business: Recommendations of the OECD Anti-corruption Convention*” indicates that a company that suspects that a competitor has breached article 222 bis of the Federal Criminal Code may contact the criminal justice systems of the countries concerned (i.e., the country of the alleged offender, the country where the act occurred, or the country of the reporting company). Where that country is Mexico, a report may be presented to the PGR.

146. It appeared from the discussions that took place during the on-site visit that neither the public nor the private sector participants were aware of this mandatory reporting requirement. Indeed the SFP’s brochure does not indicate that reporting by Mexicans of suspicious acts involving other Mexican nationals is required by law. Moreover, panels’ participants mentioned the overall reluctance of the Mexican population to denounce crimes to the police.¹²⁸ Several reasons were given, from general distrust of the police to the fear of retaliation. Indeed, the Mexican authorities acknowledge that convictions for defamation are frequent.¹²⁹ According to several embassy representatives, because the solicitation of bribes is rarely direct or explicit and thus is difficult to prove, it creates fertile ground for charges of defamation or false statements.

147. While the level of confidence of the citizens (natural and legal persons) in the system of justice and the police must be improved – the Mexican authorities have, in the meantime, chosen to circumvent this obstacle by developing alternative, administrative means by which citizens can denounce improper conduct of Mexican public officials to the SFP rather than to the law enforcement authorities. However, these tools appear to have been developed mainly with a view to improving the detection of domestic corruption.

The simplified administrative reporting system

148. The SFP provides two expedited procedures for citizens (and businesspersons) whereby they can report alleged bribery of Mexican public officials, via internet and hotlines (Sactel programme).¹³⁰ Denunciation can be anonymous. In addition, there are 221 internal control organs within the agencies and entities of the Federal Public Administration easily accessible by the public; any interested citizen or public official can file complaints or reports concerning public officials that fail to comply with their duties.¹³¹ Different means can be used to report suspicious conduct: directly, by telephone, email, post, and mail drop where no internal control organ exists. In addition, special procedures exist for public officials willing

¹²⁸ For example, an entrepreneur who reported to the SFP about a public official having solicited a bribe from him indicated that he would not have gone to the law enforcement authorities.

¹²⁹ Article 118 FCPC indicates that the person receiving a complaint or denunciation has to warn the person about the sanction for false statements.

¹³⁰ This programme supplements a former programme called *¡Ojo Ciudadano!* launched in 1997 with the main objective of encouraging citizens to denounce any criminal behaviour to the law enforcement authorities. See a *synthesis* of this programme on <http://www.coparmex.org.mx>. The National Development Plan 2001-06 indicates that the results were insufficient.

¹³¹ Pursuant to Article 10 of the 2002 Federal Law on Public Officials’ Administrative Responsibilities, all agencies and entities of the Federal Public Administration must create such specific units.

to report suspicions of offences (see below). The report is then processed by the General Directorate for Citizen Attention within the SFP which has investigative powers vis-à-vis Mexican public officials. In SAT for instance, this reporting mechanism was set up in 2001. A SAT representative indicated that there have been an 'important' number of denunciations, mainly from employees of SAT, but also from citizens. However, most of the reports concerned tax fraud rather than corruption. Overall, the CITCC received more than 400 000 complaints and accusations from citizens against public officials' behaviour.¹³² As for irregular behaviour of public servants, more than 9 000 inspections of processing and federal public services were carried out in 2000-04 and 80 operations that surprised corrupt public servants *in flagrante* were performed.

149. A trade union representative welcomed the innovative approach to giving an oversight role to the Federal Public Administration. However, he acknowledged that full participation is needed for such a mechanism to function properly and recognised the challenges posed in changing a culture. He also insisted on the need for assessment to ensure its effectiveness.

150. The Mexican authorities indicated that the General Directorate for Attention to Citizens within the SFP can cross reference and correlate information and develop statistics in order to identify behaviour patterns (including bribery), trends, relative frequencies, geographic location, the public official(s) involved, the particular procedure or Federal Public Administration agency or entity affected and, in general, all other relevant variables.¹³³ Such a tool could be invaluable for developing strategies to improve prevention and detection mechanisms within the Mexican Administration, and for building citizen trust in institutional mechanisms. However, this system does not appear to be fully used in such a strategic way. The Mexican authorities nevertheless stressed that, based on the trends reported by the system, it has been possible to identify the high-risk administrative surroundings in order to improve the processes that support the rendering of services and procedure, making them quicker and more transparent, with clear rules and complete information in advance of the user. They added that the system has also permitted identification and rotation of public servants who repeated illicit actions, or their removal and disqualification.

151. This strategy appears to be mainly developed to launch administrative proceedings, and does not appear to lead systematically to criminal prosecutions. Indeed, the number of administrative procedures against corrupt public officials is much higher than the number of criminal procedures. The Mexican authorities reported that the SFP occasionally informs the PGR about reports they received from private companies or individuals on solicitation of bribes by Mexican public officials, in which case the SFP and PGR may cooperate in the investigation. A practical example of such cooperation presented to the examining team had been initiated as a result of a fortuitous meeting between a solicited entrepreneur and a member of the SFP.

152. The examining team welcome this initiative and consider that Mexico may wish to assess whether the aim of improving the detection of bribery has been met. However, this mechanism is only available for the reporting of alleged offences committed by Mexican public officials. Indeed, it could be used to report allegations of bribery of a foreign public official only when perpetrated by a Mexican public official, and not when perpetrated by Mexican individuals or private companies, as proscribed under the Convention.

¹³² Franco-Barrio, p.34-35

¹³³ An electronic tracking system (Electronic System for Citizen Attention) records in detail all complaints, reports and administrative proceedings regarding violations of public officials and citizens' requests which are not specifically handled by other Ministries. Such data are then pooled and correlated.

The “nonconformity” procedure

153. In the area of public tenders, the Mexican Government has developed a procedure called “nonconformity” to permit suppliers and contractors to inform the authorities about irregularities in public contracting procedures of the Federal Public Administration or about illegal conduct of participating companies. The *Law on Government Procurements, Leases and Services*, and the *Law on Public Works and Related Services* provides as follows: “Interested Parties may file nonconformity with the internal control organ for any action of the contracting procedure that contravenes the legal provisions that govern the subject matters which are the object of this law” (articles 65 and 83, respectively). The report can be submitted in writing or through electronic means within 10 days after the illegal conduct took place or the interested party learned of it. The information can be forwarded to the Rules and Regulations Unit for Procurements, Public Works, Services and Federal Property for verification whether the companies failed to observe legal norms, in which case agencies and entities will abstain from contracting with them. However, this procedure is not available to report bribery of foreign public officials.

General whistleblower protection

154. Persons likely to have information on cases of bribery are usually persons close to the perpetrators, such as employees of the bribing company, or colleagues of corrupted public officials. Mexico has whistleblower protection for public officials in administrative proceedings, but no law or rules protecting whistleblowers in the private sector. During the examining team’s meetings with members of the business community and trade unions, there was a clear consensus favouring a whistleblower protection law, even if a majority of individual companies tended not to include whistleblower protection in their codes of conduct. The Mexican authorities nevertheless pointed out that the Federal Penal Code sanctions all conduct that could inhibit the filing of denunciations for acts of corruption, via the offence of “intimidation” and “threat” (article 282).

155. Some joint initiatives have been developed in the area of whistleblower protection. For instance, an official from the General Directorate for Citizen Attention stated that it had entered into an agreement with transportation carriers, local and international businesspersons to protect complainants who report economic crimes via the internet, by guarantying confidentiality. Likewise, the *Instituto Mexicano de Ejecutivos de Finanzas* is currently drafting recommendations on whistleblower protection.

Commentary

The examining team welcome the introduction of the simplified administrative reporting system and the nonconformity procedure, which could compensate for the absence of direct reporting to law enforcement authorities. However, these mechanisms are only available for the reporting of alleged domestic corruption offences, thereby leaving the general system of reporting to law enforcement authorities (article 116 FCC) as the only channel for reporting suspicions of the transnational bribery offence. The lead examiners therefore strongly recommend that the Mexican authorities integrate transnational bribery into the existing system or alternatively, establish a reporting system specific to bribery of foreign public officials by Mexican nationals or companies.

The lead examiners took note with interest that a whistleblower protection mechanism has recently been implemented within the administrative procedure and that there is an apparent consensus between civil society, business community and government officials for adopting a generally applicable law on whistleblower protection. In this context, the lead examiners recommend that the Mexican authorities consider the adoption of a general whistleblower protection mechanism.

d) *Detection and disclosure of bribery linked to money laundering cases*

156. With its location in the Americas, Mexico is at a strategic crossroads for international trade. At the same time it has been a breeding ground for organised crime, smuggling, drug trafficking and financial crimes. As part of its programme to fight national crime, Mexico put into place mechanisms in 1997 to prevent money laundering which can also be useful tools to deter and detect transnational bribery.¹³⁴ Mexico has an extensive and well-developed financial sector. Mexican financial institutions, pursuant to Mexican financial laws,¹³⁵ are the principal entities concerned with reporting obligations with respect to suspicious transactions (Suspicious Transaction Reports, STR). The key bodies that successively intervene in the treatment of suspicious transactions reports are the Supervisory Commissions¹³⁶, the Ministry of Finance and Public Credit (SHCP) through its financial intelligence unit (FIU)¹³⁷ and the Anti-money laundering unit of the PGR. Based on FATF recommendations, SHCP began identifying and implementing the actions to be taken to improve the legal framework, organisation, processes and information technology.

157. Financial institutions must report any "outstanding", "unusual" and "concerning" transactions (i.e., via STR) to their Supervisory Commission (Chapters IV, V and VI of the General Provisions).¹³⁸ During the on-site visit, SHCP indicated that the obligation to file a report also extends to branches of banks. This includes the Know Your Customer rule and the automatic reporting of any transactions that equal or exceed USD 10 000.¹³⁹ The Supervisory Commission or SAT, after verification, must then

¹³⁴ In 1997, the Mexican Bankers' Association and the Mexican Ministry of Finance and Public Credit issued the "Operating manual for the prevention and detection of transactions of illicit money laundering". This handbook outlined some procedures to follow in order to detect suspicious financial transactions. Widely applicable to the entire banking sector, those self-imposed reporting requirements are now mandatory.

¹³⁵ *Credit Institutions Law, Popular Savings and Credit Law, Pension Funds Systems Law, Investments Societies Law, Stock Market Law, Federal Bond Institutions Law, General Insurance Institutions and Mutualist Societies Law, and General Ancillary Credit Organisations and Activities Law*. In addition, the Federal Customs Law requires from any individual or courier companies to file a declaration form for all international entrance or departure of foreign currency over USD 10 000 (article 9). On January 28, 2004, several amendments to the above-mentioned laws were published. They notably extend the laws to the fight against terrorism financing, and include the extension of the reporting obligations to unlicensed money exchange offices and money remitters.

¹³⁶ They are the National Banking and Securities Commission (CNBV in Spanish, met during the visit), the National Insurance and Bonds Commission (CNSF), the Commission for the Retirement Savings System (CONSAR), and SAT for money remitters and unlicensed foreign exchange offices.

¹³⁷ The Mexican authorities indicated that a wide variety of money laundering methods and techniques appear to be used, both within and outside the financial sector. For this reason, the SHCP is one of the key agencies involved in money laundering investigations. According to this agency, money laundering is the means by which criminals evade paying taxes on illegal income by concealing the source and the amount of profit. They added that they consider money laundering as being in effect tax evasion in progress.

¹³⁸ Official Gazette, *Diario Oficial de la Federación, 14 de mayo de 2004, pp.96-228*, (the first issuance is dated March 10, 1997). The General Provisions issued by SHCP have as main purpose to set forth standard measures and procedures that the entities shall meet to prevent, detect and report transactions that may be related to money laundering and financing of terrorism.

¹³⁹ Pursuant to the General Provisions, information such as the name, address, assets, birth certificate, profession, passport, picture, information about every co-holder of the account, etc. are required. The Mexican authorities explained that following Mexico's adhesion to the FATF in 2000, the General Provisions were amended in November 2000, pursuant to which financial institutions have the obligation to identify natural and legal persons making multiple or fractioned transactions whose total amount equals or exceeds USD 10 000 (USD 3 000 for money transmitters). The financial institutions must also issue "Concerning Transaction Report" if the participation of financial institutions' officers and/or employees is suspected and

transmit the information to SHCP. Intentional non-compliance by financial institutions with such requirements is punishable under article 400 bis of the FCC.

158. When a suspicious report is received, the FIU must first verify the information and then declare whether it is credible and sufficient; an accusation and an official report based on suspicious information must be filed with the PGR, which must conduct a preliminary investigation on money laundering and the predicate offence(s).¹⁴⁰ The FIU has access to a wide range of intelligence and commercial data, but the Mexican authorities consider that it could be more efficient if it had on-line access to some of these databases.

159. In 2002, the FIU began automated filing of transaction reports from the financial sector and instituted a series of integrity checks. In 2003, it received 98 STR from the Stock Exchange, 3 132 from the Foreign Exchange, 4 from developing institutions, more than 15 000 from multiple banking institutions, and 400 from limited purpose stock companies. So far, two reports have led to investigations on corruption as a predicate offence. In the first case, the investigation for corruption was dropped because the laundering activities of the Mexican public official were independent from his official duties. In the second case, a foreign public official was suspected of having laundered in Mexico proceeds of passive corruption that occurred abroad and thus falling outside Mexican jurisdiction. A representative of the FIU indicated that although the quality of the reports has improved over the last years, thanks to computer technology, there is still room for improvement. New rules are under study, notably to codify the reports in order to improve quality and speed processing. The Mexican authorities mentioned that the Supervisory Commissions and the FIU have been very active in preparing the regulations and the handbooks that are the basis for the internal controls and guidelines for financial institutions. The Mexican Bankers Association has also put a comprehensive program of training in place, in which the FIU has participated actively. Similarly, the CNBV has created examiners' manuals which cover money laundering. Further on-site supervision, which occurs at least once a year, currently checks the anti-money laundering controls and policies that institutions have put in place. The Mexican authorities consider that existing measures are generally solid, though some additional improvements could be made.

160. While overall, anti-money laundering measures related to corruption were favourably viewed by the examining team, some areas of concern remain. One concern is the lengthy processing resulting in inefficiencies due to the involvement of different operational bodies in the process. Indeed, the PGR representatives stated that having a two-step review process before a STR reaches the Anti-money laundering unit of the PGR is time consuming. In this respect, FATF already mentioned in its 1999-2000 report that the system could be more efficient if the STR were sent directly to the FIU. In addition, the Mexican authorities indicated that the fight against money laundering could be strengthened by the creation of a more coordinated strategic plan with clear objectives, as well as the development of policy level co-operation and co-ordination, both across government and with the financial sector. Another concern relates to the limited resources within the FIU: only six persons are in charge of reviewing this important bulk of information. SHCP indicated however that the Unit was undergoing restructuring. Finally, there is no systematic analysis regarding this type of offence which could help improve detection.

they must adopt compliance mechanisms and training. The Mexican authorities informed the examining team that the laws or regulations need to be amended to require all financial institutions to identify beneficial owners of accounts.

¹⁴⁰ The Mexican authorities specified that the Federal Public Prosecutor may integrate a preliminary inquiry for the offence of Money Laundering without requiring a previous accusation made by the Secretariat of Finance and Public Credit, since said accusation is only a requirement to indict the corresponding inquiry before a judge.

Commentary

The lead examiners recommend that the processing of STR be accelerated and streamlined and further recommend that the Mexican authorities take appropriate measures to this end. The lead examiners welcome the SHCP's plans to restructure the FIU and recommend a follow-up on this project in order to assess whether the new unit is sufficiently staffed and trained. The lead examiners further encourage the Mexican authorities to undertake strategic analysis regarding the characteristics of the offence of money laundering in order to assess areas for possible improvement in prevention and detection.

e) The reporting obligation of auditors

161. The accounting and auditing professions are self-regulated through the Mexican Institute of Public Accountants, a 20 000 member body composed of 61 chapters which establishes accounting and auditing practices, a Code of Ethics, certification procedures and mandatory continuing education.

162. In the case of a listed company, the external auditor must report any irregularities to the audit committee which in turn has the obligation to report the matter to the board of directors.¹⁴¹ In the event the audit committee fails to report irregularities to the board, the statutory auditor (*comisario*), who is not necessarily a member of the audit committee, can inform the shareholders and the board of directors of such irregularities. In addition, the financial statements of listed companies are made public and the auditor is obliged to annotate his report in respect of any irregularities. Pursuant to a regulation which came into effect on January 1, 2004, tax inspectors must investigate any auditor's note to a taxpayer's financial statements.

163. The CNBV consolidated its listing rules in a Circular issued on March 19, 2003 which, *inter alia*, addresses the independence of external auditors such as mandatory rotation of auditors every five years, a 10% ceiling on revenues attributable to any one client or affiliated companies, conflict of interest rules, etc.

164. The accounting, auditing and legal professions are bound by confidentiality rules which prohibit them from disclosing to law enforcement or supervisory authorities any irregularities which they discover in their client's accounts or in their client's behaviour.¹⁴² According to the legal and accounting representatives that met with the examining team, this effectively excludes accountants, auditors and lawyers from the scope of article 116 of the Federal Criminal Procedure Code which obliges citizens to denounce any suspicious transaction or offence of which they become aware. However, it is the view of the

¹⁴¹ Bulletin 3070 ("Considerations on Fraud that Must be Made in a Financial Statement Audit"), issued by the Mexican Auditing Standards Committee of the Mexican Institute of Public Accountants, effective March 1, 2004, states in its article 55: "When the auditor determines that there is evidence of the possible existence of fraud, he must communicate this situation to the appropriate level of management. This is justified even when the matter can be considered to be inconsequential, such as the case of a minor theft committed by a low-level employee in the entity. A fraud that involves senior management or a fraud (whether caused by senior management or other employees) that causes significant distortion in the financial statements must be informed directly to the board of directors, to the audit committee, or to a similar body."

¹⁴² Bulletin 3070 ("Considerations on Fraud that must be made in a Financial Statement Audit") states in its article 58 that the disclosure of possible fraud to parties other than the entity is required (i) to comply with certain legal and contractual requirements, such as when the audit service has been contracted by a government agency or body; (ii) to a successor auditor (under certain circumstances); or (iii) to respond to a judicial order.

tax authorities (SAT) that article 116 overrides the confidentiality rules applicable to these professions.¹⁴³ The examining team is concerned that in view of this difference in opinion, an accountant, auditor or lawyer would not denounce a possible transnational bribery offence thus jeopardising detection and enforcement.

165. **Disciplinary Sanctions:** The reliance on professional standards raises enforcement issues, particularly in respect of sanctions for violating the rules. Currently, the accounting and auditing professions must abide by the Code of Ethics drawn up by the Mexican Institute of Public Accountants and revised in 2001 to conform to international trends supported by IFAC. Each of the Institute's 61 chapters throughout Mexico is responsible, through its Honour Committee, for applying disciplinary sanctions which include admonition, temporary suspension and expulsion. The decision of the Institute's Honour Committee cannot be appealed. However, sanctions are applicable only to individuals and not to firms.¹⁴⁴ Further, the reasons for such sanction are not made public. The examining team did not have the opportunity to review the level and range of penalties applicable to professional violations, in particular concerning the non-reporting or hiding of bribe payments. The examining team also noted with concern that the sanctions applied to accountants and auditors for violations of the Code of Ethics may not be applied according to common criteria in its 61 chapters. In this connection, the examining team welcomes the Institute of Public Accountant's plans to establish a new, independent, oversight board for the accounting profession to evaluate compliance and promote quality control. However, the scope of the new board has not yet been established, nor has the timing for its implementation.

Commentary

The reporting of accounting fraud is weakened by virtue of confidentiality rules that prevent accountants, auditors and lawyers from divulging any offences uncovered during the course of their representation to the supervisory authorities or police. It was unclear whether article 116 which obliges citizens to report any crimes to the authorities, overrides such confidentiality rule which is the view held by the tax authorities. Nonetheless, representatives of the accounting and legal professions appeared unwilling to report suspected crimes to judicial authorities and the lead examiners are concerned that this would create a weak link in detection and enforcement. The lead examiners are also concerned that disciplinary sanctions by a self-regulating body with 61 chapters throughout the country may result in different standards for assessing violations and applying sanctions and noted that the grounds for such sanctions were not publicly known, thereby limiting the deterrent effect of such sanctions. The lead examiners welcome the Institute of Public Accountant's plans to create an independent board that would oversee compliance and thus promote common standards, although the scope and timing for the board is not yet definitive.

¹⁴³ The Mexican authorities add that when an auditor becomes aware of certain reportable conditions relating to internal controls during an audit including evidence of illegal acts, the auditor has a responsibility under the Federal Tax Code to report such conditions to the Ministry of Finance.

¹⁴⁴ The Mexican authorities have indicated that the Mexican Institute of Public Accountants is undertaking a comprehensive revision of its bylaws and Code of Ethics.

3) *Obstacles to investigating bribery*

a) *Cooperation between the Mexican authorities, and investigative tools*

Cooperation between the Mexican authorities

166. As a number of agencies can be involved in the investigation of the offence of bribing a foreign public official, co-operation with the PGR is essential. On the whole, there appeared to be practical co-operation on a day-to-day working level between the PGR, SAT, and the SFP in detecting and/or investigating domestic bribery and money laundering cases.

167. Hence, SAT assists and coordinates with the PGR in the proceedings initiated by SAT reports or complaints, and reviews the reasons for the non-prosecution of cases. Importantly, SAT can derogate from the formal requirement of requesting bank information through the supervisory authorities and can transmit such bank information to the PGR even if it is not directly related to tax fraud.¹⁴⁵

168. When the SFP informs the PGR of reports received from private companies or individuals on solicitation of a bribe by Mexican public officials, the SFP and PGR may cooperate in the investigation, for instance to organise a simulated user action, by which the solicited person meets the corrupt public official, the conversation or exchange being recorded.¹⁴⁶ The examining team was satisfied that this programme has been used on several occasions, but it is not clear whether this corresponds to a general trend because the number of administrative procedures against corrupt public officials is much higher than the number of criminal procedures.

169. On the other hand, it is not clear if and how other federal or state authorities cooperate with the PGR, nor if and how criminal information is shared between local, state and federal levels of law enforcement authorities.¹⁴⁷

Investigative tools

170. There are no specific provisions concerning investigative techniques in corruption cases in Mexico's federal criminal procedure code. Therefore, the general provisions regarding the investigation of criminal cases apply, as provided for under the FCPC. The range of investigative tools available includes possibilities of arrest and remand in custody, search and seizure and concealed search and seizure, administration of the property of the person charged, etc. The legal framework regarding the use of undercover agents and other entrapment means remains, however, uncertain. As for the interception of

¹⁴⁵ The taxpayer cannot challenge such request in court. However, the "Unique Guidelines of the Auditor" states that SAT may request bank information only when "strictly necessary". A tax inspector said that this occurs in about 10% of the reviews undertaken by SAT. The delay in receiving information varies, depending on whether a request is made for "open accounts" i.e., the Banking Commission will ask all the banks of the country if any accounts for a certain person exist at such bank, in which case the delay can be anywhere from 6-7 months. If a request is made for information on an identified account, then the delay can take from a few weeks to one month.

¹⁴⁶ This allows the PGR to obtain strong evidence of the offence without constituting illicit entrapment, as the meeting is a consequence of a prior solicitation, and not a provocation to perpetrate an offence.

¹⁴⁷ It is worth noting that the planned reform of justice foresees the consolidation of different police forces into one in order to reduce problems of coordination and cooperation. See below on the chapter relating to Judicial reform

communication, its use is constitutionally restricted and requires that a federal judge proceed to a case-by-case analysis before granting the deliverance of this type of warrant.¹⁴⁸

171. Other investigating tools, such as witness protection or the reversal of the onus of proof on the origins of proceeds¹⁴⁹, are available for a limited list of serious offences, such as organised crime or money laundering, to which bribery of domestic or foreign public officials do not belong. Because protection of internal informants has been introduced in administrative proceedings for public officials, the examining team identified the absence of witness protection in criminal proceedings as a potential impediment to a more extensive cooperation between the SFP and the PGR. Indeed, public officials accepting to report and testify in an administrative procedure where they can enjoy anonymity and assurance of no impact on their career, may be more reluctant to do the same in a criminal procedure where no protection is available. The Mexican authorities indicated after the on-site visit that the protection of witnesses would be part of the reform of the judicial system,¹⁵⁰ where the life of the witness is at risk and his/her testimony is fundamental for the trial. The examining team welcomes this bill, and look forward to its adoption.

b) Access to bank information

172. Article 180(2) of the Federal Criminal Procedure Code states that any request made for bank information by the General Attorney, courts, etc. must be made through the relevant supervisory authority (i.e., National Banking and Securities Commission, Insurance and Bonds Commission, National Retirement Savings System Commission).

173. Access to banking information requested through MLA is governed by the particular treaty in force with the country concerned and its specific provisions. As one government official pointed out, the fiduciary duty to keep information confidential is very strict in Mexico. Because requests in this context cannot be made directly to the bank(s) but must be made through the relevant supervisory authority, delays in receiving bank information are commonplace and may have impeded the investigation and prosecution of cases.

174. The examining team met with heads of various units dealing with access to bank information to determine whether domestic investigations or rendering of MLA could effectively be hindered because of delays in lifting bank secrecy. The examining team was told that delays in obtaining bank information have varied anywhere from a few months to two years, depending on the type of information requested and its availability. “Open” requests (e.g., a request for any information on any account of a person that may exist in the banking system) took longer than requests concerning a specific account. Further, the average delay varied depending on which institution makes the request: PGR (five months), SAT (four months) or the money laundering unit (two weeks to one month¹⁵¹). In response to concerns that a request for access to

¹⁴⁸ Under article 16(9) of the Mexican constitution, the interception of private communication is prohibited. A written request highly motivated regarding the specific person targeted by this interception, as well as its purposes, methods and duration must be submitted to the federal judicial authority. The latter will then decide whether or not this authorisation, in light of Mexican laws, legal principles and values, can be granted. It has to be mentioned that interception of communication warrant cannot be granted when electoral, fiscal, civil, administrative, civil and commercial issues are at stake.

¹⁴⁹ Article 29 of the Organised Crime law

¹⁵⁰ Decree concerning the Federal Criminal Procedure Code [and other laws] presented by the Government to the Senate on March 31, 2004. (see “Judicial Reform”)

¹⁵¹ There appear to be divergent views with respect to the average delays declared by the different agencies. According to the PGR representatives, the requests of financial information carried out by the Special Unit for the Investigation of Transactions with Resources from Illicit Origin or Counterfeiting or Alteration of Currency (Money Laundering Unit) are obtained in an average term of three to six months, which therefore

records through a Supervisory commission might result in unnecessary delays, a SAT representative stated that if this step were removed, it would be necessary to go through a court, which would not necessarily be more expeditious. She added that with the existing procedure the supervisory authorities and the client cannot challenge the procedure, which would not be the case with the involvement of a court.

c) *International Cooperation*

175. The examining team met with officials from the PGR, the Ministry of Foreign Affairs and the General Division of Extraditions and Legal Assistance. To date, Mexico has not received any formal MLA request or petition of extradition regarding the offence of bribery of a foreign public official, nor has it made any request for MLA or extradition.

176. Mexico currently has MLA agreements with seventeen countries and extradition agreements with twenty-seven countries.¹⁵² In the absence of an agreement, it does not rely upon the Convention as the basis of requesting MLA but instead relies upon reciprocity. One top-level government official cited lack of evidence from abroad as the main reason for the non-prosecution of offences with links to Mexico and expressed the need to improve existing mechanisms for obtaining information from abroad.

177. A recurrent theme during the on-site visit was the lengthy delays to satisfy MLA requests due to bureaucratic procedures in Mexico. In addition, the same problems encountered in domestic procedures to obtain bank information also occur when rendering MLA.

178. The examining team was also concerned that delays currently experienced in obtaining evidence from certain OECD member countries and other foreign jurisdictions (ranging from 7 months to over one year) could impede the successful investigation and prosecution of transnational bribery: the Mexican authorities stated that investigations on domestic bribery have been thwarted because information was not forthcoming from foreign jurisdictions. In this regard, the Mexican Government is currently discussing ways to improve information sharing with the United States Government with which it has over 200 requests for information and 20-30 pending requests for financial information related to corruption at large. Many of these pending requests were resolved in recent discussions with the US and the resolution of the remaining requests is underway.

179. In the area of international cooperation involving foreign courts, Mexico points to its MLA treaties. Concerning tax, Mexico can share information with foreign tax authorities with which it has entered an Information Exchange Agreement. SAT must also exchange tax information with countries with which it has entered a double taxation and tax evasion agreement. Mexico exchanges information about suspicious payments detected through a tax audit or investigation spontaneously with other jurisdictions.

Commentary

Because witness protection as an investigative tool is already available for a limited number of offences, the lead examiners encourage the Mexican authorities in their proposal to also afford witness protection for investigations of transnational bribery.

diverges from the average delay of “two weeks to one month” mentioned by the SAT representatives during the on-site visit.

¹⁵² Mexico has Extradition treaties with Australia, Bahamas, Belize, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, El Salvador, France, Guatemala, Italy, Korea, Nicaragua, the Netherlands, Panama, Peru, Portugal, Spain, the United Kingdom and the United States of America. Mexico is also a party to the Convention on Extradition, together with Argentina, the Dominican Republic, Ecuador and Honduras.

As an investigation of bribery of a foreign public official will almost inevitably require access to bank information, the lead examiners encourage the Mexican authorities to assess the functioning of the current system, in a view to ensure a prompt and effective access to such information.

More generally, the lead examiners invite the Mexican authorities to reconsider the current practice of providing MLA based on reciprocity in the absence of bilateral agreements, in order to ensure that such practice is not inconsistent with article 9 of the Convention.

E. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

180. Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Mexico. The Working Group further intends to follow up on certain issues.

Recommendations

Recommendations for Ensuring Effective Measures for Preventing Transnational Bribery

181. 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)
- 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)
- 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
- 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)

182. 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)
- 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)
- 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

- 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)

Recommendations for Ensuring Adequate Mechanisms for the Effective Detection, Prosecution and Sanctioning of Transnational Bribery Offences

183. 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 (FCPC), and consider introducing specific sanctions for breaching the obligation under article 117 FCPC; (Convention, Article 3, Revised Recommendation, Article I)
- b) Ensure that the duty to report offences pursuant to article 116 of the FCPC (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 FCPC;¹⁵³ (Convention, Article 8; Revised Recommendation, Article I)
- c) Facilitate the reporting of transnational bribery cases and provide reporting channels equivalent to those available for domestic bribery; (Revised Recommendation, Article I) and
- 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)

184. 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)
- 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
- c) Accelerate and streamline the processing of suspicious transaction reports in respect of suspected money laundering. (Convention, Article 7; Revised Recommendation, Article I)

185. 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)

¹⁵³ The Working Group notes that this is a general issue in many Parties.

- b) Amend article 222 bis of the Federal Penal 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;¹⁵⁴ (Convention, Article 1)
- c) In order to meet the standard of other Parties to the Convention, revise the current provisions on legal persons to:
 - eliminate the prerequisite of the conviction of a natural person,
 - eliminate the prerequisite that the offence must be committed by means provided by the legal entity “for such purpose”, and
 - ensure that State-owned and State-controlled entities are subject to liability under the transnational bribery offence,
 - increase significantly the level of sanctions; (Convention, Articles 2 and 3; Phase 1 Evaluation).
- 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)
- e) Pursue its efforts to introduce witness protection for investigations of transnational bribery within the framework of judicial reform; (Revised Recommendation, Article I)
- 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
- 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)

Follow-up by the Working Group

186. 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
- 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)

¹⁵⁴ The Working Group acknowledges that the bill submitted to the Parliament during the Spring session satisfactorily addresses these issues.

Annex 1 – the offences of bribery of domestic and foreign public officials

Article 222.- domestic bribery	Article 222 bis.- transnational bribery
<p>A public servant or any other person commits the crime of bribery whenever:</p> <p>I. The public servant, per se or through a third party, requests or receives for his/her benefit or for that of a third party, money or any other gift, or accepts a pledge, in order to do or to refrain from doing something, whether is just or unjust, related to his/her functions, and</p> <p>II. Any one who spontaneously gives or offers money or any other gift to any person described in the previous section, in order to cause any public official to carry out any activity, whether is just or unjust, related to his functions.</p> <p>(...)</p>	<p>The same penalties provided in the previous article shall be imposed to whom, with the purpose of obtaining or retaining for himself/herself or for another party, undue advantages in the development or conducting of international business transactions, offers, promises or gives, whether by himself/herself or through a third party, money or any other advantage, whether in assets or services:</p> <p>I. To a foreign public official in order that he/she negotiates or refrains from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post or commission;</p> <p>II. To a foreign public official in order to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post or commission, or</p> <p>III. To any person in order for him/her to go before a foreign public official and require or propose him/her to perform the carrying out or the resolution of any issue related to the inherent functions to the job, post or commission of the last.</p> <p>(...)</p>

Annex 2 – list of Mexican participants

Ministries and other government bodies at the federal level:

Ministry of Public Administration, (*Secretaria de la función publica, SFP*)

- General Auditing Unit
- Government Audit Agency
- General directorate of citizen attention

Ministry of Foreign Affairs, (*Secretaria de Relaciones Exteriores SRE*)

Ministry of Finance and Public Credit (*Secretaria de Hacienda y Credito Publico, SHCP*)

- Tax Inspectorate, independent public auditors
- Privatisation Agency
- Directorate of Customs and Excise
- Fiscal Administrative Service (*Sistema de Administración Tributaria, SAT*)
- Financial Intelligence Unit, (Dirección General Adjunta de Investigación de Operaciones DGAIO)

Attorney General of the Republic, (*Procuraduría General de la Republica, PGR*)

General Auditor of the Republic (*Auditoria superior de la Federacion*)

Civil Ombudsman

Polices forces

Supreme Court of Mexico (*Suprema corte de la nación*)

Mexican Stock Exchange (*Bolsa Mexicana de valores, BMV*)

National Banking and Securities Commission (*Comisión nacional bancaria y de valores, CNBV*)

Commission on Freedom of Expression (*Comisión nacional de derecho humanos, CNDH*),

State and federal district prosecutors

National Bank of Export and credits (Banco nacional de comercio exterior: Bancomext)

Ministry of Economy (*Secretaria de Economía, SE*)

Civil society

Trade Unions

Transparencia Mexicana

Technological Institute of Monterrey

Centro de Estudios Económicos del Sector privado

Economic crime investigative journalist

Mexican Bar association Barra Mexicana Colegio de Abogados

Mexican Institute of public accountants

The Mexican society of public accountants

Employers' Confederation of the Mexican Republic Confederación Patronal de la República Mexicana (COPARMEX)

Confederation of Industrial Chambers of Mexico

Confederación de Cámaras Industriales de los Estados Unidos Mexicanos (CONCAMIN)

Private sector: companies representing the following sectors of activity:

Banking and finances

Telecommunications

Natural resources distribution

Petroleum and Gas

Import/Export

Manufactured goods

Public Works/ Construction