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## Developments in anti-Corruption Law in Mexico: Ley Federal Anticorrupciones en Contrataciones Publicas

Allie Showalter Robinson

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# DEVELOPMENTS IN ANTI-CORRUPTION LAW IN MEXICO: LEY FEDERAL ANTICORRUPCIÓN EN CONTRATACIONES PÚBLICAS

*Allie Showalter Robinson\**

## I. INTRODUCTION TO ANTI-CORRUPTION LAW AND ISSUES IN MEXICO

FACED with an ongoing battle against corruption, the Mexican government recently adopted the Ley Federal Anticorrupción en Contrataciones Públicas (LFACP), which was published in the *Diario Oficial* on June 12, 2012.<sup>1</sup> The new legislation illustrates the Mexican government's continued commitment to fight corruption. Additionally, the country's commitment coincides with growing international interest in the country's emerging markets as countries everywhere try to "combat[ ] the lingering ill effects of worldwide recession."<sup>2</sup> But, there remain numerous questions about the ability of the LFACP to adequately address the issues of corruption on the national and local level and whether the new legislation will lead to increased investigation and prosecution of incidents of corruption within the country. Furthermore, there exist international concerns about the level of corruption in the wake of the recent Wal-Mart bribery investigation in Mexico. In analyzing the anti-corruption legal developments in Mexico, it is important to consider the legal importance of anti-corruption laws both in Mexico and internationally, the three major international anti-corruption conventions Mexico has joined, and how the changes in the new legislation affect and advance prior Mexican anti-corruption laws and international obligations.

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\* Allie is a second-year student at SMU Dedman School of Law. Before law school, Allie received her Bachelor of Arts in Political Science and Spanish at SMU and worked as a Teach for America seventh grade language arts teacher in Dallas, Texas. She would like to thank her husband, parents, and brother for their love and support during law school.

1. Ley Federal Anticorrupción en Contrataciones Públicas [LFACP] [Anti-Corruption in Public Contracts Law], *Diario Oficial de la Federación* [DO], 12 de Julio de 2012.
2. FREDERICK T. STOCKER, MFRS. ALLIANCE FOR PRODUCTIVITY AND INNOVATION (MAPI), *SURVEYING MEXICO'S ANTI-CORRUPTION LANDSCAPE 2* (2012), available at [http://www.mapi.net/system/files/PA-110\\_0.pdf](http://www.mapi.net/system/files/PA-110_0.pdf) (link to download the document).

## II. LEGAL IMPORTANCE OF COMBATING THE CORRUPTION IN MEXICO

### A. STATISTICS OF CORRUPTION IN MEXICO

Fighting corruption is a stated priority for the Mexican government and the international community.<sup>3</sup> Mexico is the world's fourteenth largest economy in terms of GDP<sup>4</sup> and has shown "positive, albeit low, rates of growth" since 2006.<sup>5</sup> With such a large and connected economy, it is important to note that the National Index of Corruption and Good Governance reported that Mexicans spent around 32 billion pesos based on 200 million identified "acts of corruption" in 2010. That expenditure is equivalent to an average "tax" of 14 percent on each Mexican family's annual income.<sup>6</sup> The report also found "Mexicans paid bribes in more than 10 percent of cases where they were accessing a range of public procedures or services."<sup>7</sup> Mexico ranked 100 out of 183 countries based on the perceived levels of public sector corruption.<sup>8</sup> Furthermore, Mexico's ranking in other important governance indicators has deteriorated between 2003 and 2009, including in Control of Corruption, Government Effectiveness, Voice and Accountability, and Political Stability and Rule of Law.<sup>9</sup> Specifically, the World Bank's Control of Corruption indicator has decreased every year since 2002, and fell from 51.2 in 2002 to 45.5 in 2011. That drop represents a decrease in the overall control of corruption while overall corruption increased.<sup>10</sup> Additionally, APEC statistics show "Mexico ranks in the 25th to 50th percentile, meaning that more than half of the 213 countries surveyed are better at controlling corruption than Mexico is."<sup>11</sup> Furthermore, the World Bank's International Finance Corporation ranks Mexico's economy 48th in terms of ease of doing business.<sup>12</sup>

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3. Organization for Economic Co-operation and Development [OECD], Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Mexico*, 4 (Oct. 14, 2011), <http://www.oecd.org/daf/bribery/internationalbusiness/48897634.pdf> [hereinafter *OECD Phase 3 Report*].
  4. *GDP Ranking Table*, WORLD BANK (2011), <http://databank.worldbank.org/databank/download/GDP.pdf>.
  5. APEC PROCUREMENT TRANSPARENCY STANDARDS IN MEXICO: TIME TO ENGAGE THE PRIVATE SECTOR 10 (Laura B. Sherman & Anna Nadgrodkiewicz eds., 2011) [hereinafter APEC PROCUREMENT TRANSPARENCY STANDARDS].
  6. TRANSPARENCIA MEXICANA, ÍNDICE NACIONAL DE CORRUPCIÓN Y BUEN GOBIERNO: INFORME EJECUTIVO 2010 6 (2011), available at [http://www.tm.org.mx/wp-content/uploads/2011/05/INFORME\\_EJECUTIVO\\_INCBG2010.pdf](http://www.tm.org.mx/wp-content/uploads/2011/05/INFORME_EJECUTIVO_INCBG2010.pdf).
  7. STOCKER, *supra* note 2, at 5.
  8. *Corruption Perceptions Index 2011*, TRANSPARENCY INT'L 1 (2011), <http://cpi.transparency.org/cpi2011/results>.
  9. APEC PROCUREMENT TRANSPARENCY STANDARDS, *supra* note 5.
  10. WORLD BANK, WORLDWIDE GOVERNANCE INDICATORS: COUNTRY DATA FOR MEXICO, 1996-2011 7 (2011), available at <http://info.worldbank.org/governance/wgi/pdf/c141.pdf>. The scale ranges from zero to 100, with 100 being the lowest level of corruption. This decrease from 2002 to 2011, then, represents an increase in the country's ability to control corruption.
  11. APEC PROCUREMENT TRANSPARENCY STANDARDS, *supra* note 5.
  12. World Bank & Int'l Fin. Corp., *Economy Rankings*, DOING BUS., <http://doingbusiness.org/rankings> (last visited Mar. 26, 2013).

## B. WAL-MART BRIBERY SCANDAL

Mexico has also recently gained international attention in the aftermath of the Wal-Mart bribery and corruption investigation that created new concerns for foreign investors about the level of corruption in Mexico.<sup>13</sup> On April 21, 2012, *The New York Times* published a shocking article alleging that Wal-Mart, the country's largest private employer, made regular payments to Mexican officials to expedite the construction of new stores in its campaign for ambitious growth in the country.<sup>14</sup> Specifically, Wal-Mart de Mexico, the largest foreign subsidiary of the store, had been accused of keeping books and records of the payments to the third parties.<sup>15</sup> According to the article, an internal investigation carried out by Wal-Mart "found a paper trail of hundreds of suspect payments totaling more than \$24 million . . . [and] found documents showing that Wal-Mart de Mexico's top executives not only knew about the payments, but had taken steps to conceal them from Wal-Mart's headquarters in Bentonville, Ark[ansas]."<sup>16</sup> The Secretaría de la Función Pública (SFP), in an official press release on April 25, 2012, stated it would begin an investigation through its Órganos Internos de Control (Internal Control Organs) and stated its commitment to the international anti-corruption conventions signed and ratified by Mexico.<sup>17</sup> The shocking front-page story of the alleged Wal-Mart corruption and bribery scandal in Mexico and the United States sent concerns throughout Mexico and the international community.<sup>18</sup> The Wal-Mart scandal became a key issue in the recent Mexican presidential election and resulted in a demand for a full investigation by the then president-elect, Peña Nieto.<sup>19</sup>

Legal authorities in both the United States and Mexico have begun investigations that include Mexico's Comptroller's Office analyzing "a decade's worth of federal paperwork and permits that Wal-Mart de Mexico obtained to open its stores and operate within the country."<sup>20</sup> Although the Comptroller's Office has been criticized in its prior enforcement efforts, the Manufacturers Alliance for Productivity and Innovation (MAPI) Policy Analysis report pointed to two reasons why this investigation may lead to tough consequences for Wal-Mart: 1) Mexico chairs the "Group of 20" economic powers, and specifically co-chairs the anti-corruption panel, so there exists considerable international pressure

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13. See David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A1, available at <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all>.

14. *Id.*; STOCKER, *supra* note 2, at 6.

15. Barstow, *supra* note 13.

16. *Id.*

17. Press Release, SFP Verifica Permisos Federales Para la Apertura y Operación de las Tiendas de la Empresa Walmart de Mexico, Secretaría de la Función Pública (SFP) (Apr. 25, 2012).

18. *See id.*

19. STOCKER, *supra* note 2, at 7.

20. *Id.* at 6.

on the success of the investigation; and 2) if the investigation is not properly handled, the scandal could negatively affect foreign investment in the Mexican economy.<sup>21</sup> It is unknown how the LFACP law will affect the Mexican government's ability to investigate the issue and penalize Wal-Mart. But, it appears the LFACP may be quickly put to use in the aftermath of the scandal's international attention.

### C. IMPORTANCE OF PUBLIC PROCUREMENT IN MEXICO

Because the LFACP deals specifically with Public Procurement, it is also important to understand the significant role of public procurement in the Mexican economy. In 2008, the Ministry of Public Administration stated there were 70,230 registered federal procurement contracts that were worth \$59 billion, and these public sector activities "constituted about 18.4 percent of Mexico's GDP . . . ."<sup>22</sup> The "general rule" is that public procurement be conducted through open competitive tender, and "the legal framework stipulates that public procurements must be governed by criteria such as open access, open competition, equal opportunity for tender participants, and fair dispute resolution in all stages of the process."<sup>23</sup> The high percentage of GDP involved, along with the government's commitment to fairness and openness in the process, demonstrate that procurement is important to Mexico's economy and its handling of corruption issues. A look at international efforts to combat corruption is also important to analyze the potential effects of the LFACP.

## III. BEFORE THE LFACP: ANALYZING EXISTING ANTI-CORRUPTION LAWS AND TREATIES

### A. GLOBAL PERSPECTIVE AND INTERNATIONAL CONVENTIONS

The development of Mexico's anti-corruption laws has occurred simultaneously with the country's participation in a "global anticorruption movement."<sup>24</sup> The global focus on corruption provides an insightful framework for analyzing the LFACP's potential effects on corruption in Mexico and the extent to which Mexico fulfills its commitments to various international conventions. Mexico has signed and ratified three major international anti-corruption conventions: The Organization of American States (OAS) Inter-American Convention Against Corruption (ICAC),<sup>25</sup> the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Offi-

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21. *Id.* at 8.

22. APEC PROCUREMENT TRANSPARENCY STANDARDS, *supra* note 5, at 11-12 (discussing the importance of procurement and procurement procedures in greater details).

23. *Id.* at 15.

24. Lucinda A. Low, *The Anti-Corruption Laws of the United States and Mexico*, 11 U.S.-MEX. L.J. 149, 149 (2013).

25. See Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, available at <http://www.oas.org/juridico/english/treaties/b-58.html> [hereinafter OAS Convention Against Corruption].

cials in International Business Transactions,<sup>26</sup> and the United Nations Convention Against Corruption.<sup>27</sup> The Ley Sobre la Celebración de Tratados is the Mexican legal authority on international law, and the law requires Mexico to “implement a treaty’s provisions through national legislation” after “ratifications, accession, or acceptance.”<sup>28</sup>

The ICAC was the “first international legal agreement for combating corruption,” and it required its members to “take judicial and public policy steps to prevent, detect, sanction, and eradicate corruption.”<sup>29</sup> The law became effective in Mexico on July 1, 1997.<sup>30</sup> Mexico next signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on July 26, 1999.<sup>31</sup> The OECD Convention’s purpose is “to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party’s legal system.”<sup>32</sup> The OECD Convention is largely considered to be the “impetus” for leading the way in anti-corruption legal reform and changing legislation across the world regarding business transactions.<sup>33</sup> The most recent international convention entered into by Mexico was the United Nations Convention Against Corruption (UNCAC) that became binding on the country on December 14, 2005.<sup>34</sup>

Among global developments in anti-corruption measures, the OECD, the Federal Competition Commission (CFC), and the Mexican Institute of Social Security (IMSS) signed the Memorandum of Understanding on the Implementation of the Guidelines for Fighting Bid Rigging in Public Procurement in 2011.<sup>35</sup> As “the third largest public buyer of goods and services in Mexico,” IMSS sought help from the OECD to help them

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26. See Organization for Economic Co-operation and Development [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1, available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf> [hereinafter OECD Convention].
  27. See United Nations Convention Against Corruption, Oct. 31, 2013, G.A. Res. 58/4, 2349 U.N.T.S. 41, available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) [hereinafter UN Convention Against Corruption].
  28. See Ley Sobre la Celebración de Tratados [Law on the Adoption of Treaties], Diario Oficial de la Federación [DO], 2 de enero de 1992; STOCKER, *supra* note 2, at 10.
  29. STOCKER, *supra* note 2, at 10; see OAS Convention Against Corruption, *supra* note 25.
  30. STOCKER, *supra* note 2, at 10.
  31. *Id.* at 11; see OECD Convention, *supra* note 26.
  32. OECD Convention, *supra* note 26, at 14.
  33. Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 485 (2000). The requirement that bribery of foreign public officials was a criminal act in each signatory country was one example of a profound change resulting from the Convention.
  34. STOCKER, *supra* note 2, at 11; see UN Convention Against Corruption, *supra* note 27.
  35. See OECD Secretariat, Memorandum of Understanding on the Implementation of the Guidelines for Fighting Bid Rigging in Public Procurement 9 (Jan. 13, 2011),

adopt best practices in combating corruption in the bidding process.<sup>36</sup> This collaboration in confronting corruption represents an important step towards companies' self-initiated compliance with anti-corruption laws in Mexico.<sup>37</sup> Continued partnerships between companies and international institutions could represent a new attitude toward corruption within the Mexican business community.

Even with Mexico's participation in international agreements to combat corruption, the Mexican and international business communities still have concerns that "adherence to various international conventions designed to combat corruption, domestic and foreign, has been widely viewed as insufficient . . . ."<sup>38</sup> These concerns represent the view that "Mexico has been plagued by significant corruption problems that have posed obstacles for investing and doing business there."<sup>39</sup> The previous president, Felipe Calderón, grew increasingly concerned about the level of corruption, and his administration took steps toward "adopting legislation to combat corruption and ensure adherence to international conventions."<sup>40</sup> From this viewpoint, the LFACP illustrates Mexico's attempt to join the global movements that have emerged over the past decade to take an overall harder position against corruption. Therefore, the LFACP represents needed legal reform in Mexican anti-corruption law.

#### B. THE EXISTING LEGAL FRAMEWORK AND IDENTIFIED PROBLEMS IN PUBLIC PROCUREMENT

Before the enactment of the LFACP, the Código Penal Federal (FCC), Mexico's Federal Criminal Code, punished "certain crimes committed by public officers, such as bribery (*cohecho*), bribery of foreign public officials (*cohecho a servidores públicos extranjeros*)," influence peddling, and bid rigging.<sup>41</sup> Violation of an anti-bribery provision in the FCC can lead to "imprisonment, fines, and dismissal of the involved public official."<sup>42</sup> Several other Mexican laws prohibit bribery of domestic officials, including the Ley Federal de Responsabilidades Administrativas de los Servidores Públicos (the Federal Law of Administrative Accountability of Public Officials), and the Ley Federal de los Servidores Públicos (the

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available at <http://www.oecd.org/competition/abuseofdominanceandmonopolisation/49390114.pdf>.

36. *Id.*

37. *See id.*

38. Carlos R. Valencia Barrera et al., *With Broad New Federal Procurement Anti-Corruption Law, Mexico Strengthens Regulatory Framework*, DLA PIPER (July 10, 2012), <http://www.dlapiper.com/latinamerica/publications/detail.aspx?pub=7226>.

39. STOCKER, *supra* note 2, at 1.

40. Barrera et al., *supra* note 38. The Mexican Federation of Industrial Chambers of Commerce's report illustrates the former president's concern. The report found corrupt payments account for 7 to 9 percent of the Mexican GDP. *Id.*

41. *Legal Update: New Federal Anti-Corruption in Public Contracts Act*, GALICIA (June 11, 2012), <http://www.galicia.com.mx/wp-content/uploads/2011/02/Legal-Update.-New-Federal-Anti-Corruption-in-Public-Contracts-Act-v.1.pdf>.

42. STOCKER, *supra* note 2, at 12.

Federal Law of the Accountability of Public Officials).<sup>43</sup> Additionally, Mexico has enacted a Freedom of Information type of law that functions as another tool in fighting corruption.<sup>44</sup>

Before enactment of the LFACP, in the specific area of public procurement, there were concerns about the legal framework in Mexico. For example, the OECD Collusion and Corruption in Public Procurement Roundtable stated that Mexico's procurement regulations "lack[ed] the incentives to promote competition," and can create extra costs and increase the probability of corruption.<sup>45</sup> The report looked at several occurrences of bid rigging and argued there exist continued concerns about corruption despite Mexican laws mandating "public tendering in government procurement."<sup>46</sup> Additionally, the report raised concerns that there is not enough emphasis on promoting a more competitive environment in the procurement process.<sup>47</sup> Considering these inadequacies of Mexico's public procurement laws, the new LFACP law is a significant addition to Mexican anti-corruption laws.

#### IV. THE NEW ANTI-PROCUREMENT LAW

##### A. CHANGES AND DEVELOPMENTS IN THE NEW ANTI-CORRUPTION LAW

Mexico's obligations under international treaties, the attention of the recent Wal-Mart corruption scandal, and overall statistics and concerns about corruption resulted in the LFACP and additional proposed changes to the *Ley Federal de Responsabilidades Administrativas de los Servidores Públicos*.<sup>48</sup> The LFACP aims to "not only punish individuals involved in corrupt acts, but will also reward individuals who report cases of corruption," while setting out clear procedures.<sup>49</sup> One of the main features of the new law is the scope of its application to "domestic or foreign individuals," legal entities like corporations, and all members of the government, including officials directly or indirectly participating in federal public contracting procedures.<sup>50</sup> The statute makes it illegal for these entities "to give or offer to give, directly or through a third party, to a government official any type of bribe or gift to obtain or retain a privilege or

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43. *Id.* The *Ley Federal de Responsabilidades Administrativas de los Servidores Públicos* "applies general anti-bribery standards to all federal public officials," which includes basically any official "who handle[s] or appl[ies] federal public resources."

44. *Id.* at 13.

45. Organization for Economic Co-operation and Development (OECD), *Policy Roundtables, Collusion and Corruption in Public Procurement* 247 (2010) [hereinafter OECD Policy Roundtables].

46. *Id.* at 248.

47. *Id.* at 253.

48. APEC PROCUREMENT TRANSPARENCY STANDARDS, *supra* note 5, at 11.

49. *Id.*

50. STOCKER, *supra* note 2, at 13-14. The public officials who are accountable are defined in Title Four of the Mexican Constitution, which is further regulated by the Federal Law of Administrative Accountability of Public Officials. See *Constitución Política de los Estados Unidos Mexicanos [C.P.]*, as amended, Título Cuarto, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).



improper business advantage when procuring public contracts with the federal government.”<sup>51</sup> Much like the Foreign Corrupt Practices Act (FCPA) in the United States, the LFACP prohibits “individuals and companies from bribing foreign . . . government officials,” which includes non-Mexican government officials.<sup>52</sup>

Additionally, the new law contains a more expansive definition of the “territorial requirement” than the requirements of the Federal Criminal Code.<sup>53</sup> The act of “federal public contracting” includes “procedures, prior acts, or acts that derive from contracting, entering into, and the execution and performance of contracts dealing with acquisitions, leases, services, and public works and related services, that are undertaken by [various types of] contracting public institutions.”<sup>54</sup> Importantly, liability or sanctions can be imposed even if the “conduct occurs through a third party or the money or gift is not accepted.”<sup>55</sup> The third-party liability addition in the LFACP is interesting considering the potential third-party issues in the pending Wal-Mart case.

Equally important to the scope of the LFACP is the framework for enforcing the law. The law can be enforced by several Mexican agencies, including the Ministry of Public Administration (the Ministry).<sup>56</sup> Additionally, the Anti-Corruption law “regulates the procedure for imposing sanctions and charges the Ministry . . . with the responsibility for conducting investigations and sanctions under the law.”<sup>57</sup> The Ministry may begin investigating an allegation of corruption based on its direction alone, or from “a sworn statement filed by a government entity, public servant or person with relevant knowledge.”<sup>58</sup> Enforcement of the law is a two-step procedure that begins with the initial investigation and concludes with administrative proceedings, and the law grants authorities a broad ability to request information that may otherwise be considered confidential.<sup>59</sup> At the end of the investigation, a party being investigated is given fifteen days to respond and a decision can be made as quickly as forty days “from the closing of the evidentiary phase.”<sup>60</sup> The LFACP also introduced new fines for violations of the law that includes fines ranging between \$5,000 to \$250,000 for individuals, and between \$50,000 to \$10 million for companies, plus the possibility of being disbarred for up to ten years.<sup>61</sup> Additionally, companies who self-report can “receive up to a seventy percent reduction in sanctions.”<sup>62</sup>

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51. STOCKER, *supra* note 2, at 13.

52. *Id.* at 14; see Foreign Corrupt Practices Act, 15 U.S.C.A. § 78dd-2 (West 1998).

53. STOCKER, *supra* note 2, at 14.

54. *Id.*

55. Monica Schiaffino & Rogelio Alanis Robles, *Mexico's New Federal Anti-Corruption in Public Contracts Law*, LITTLER 2 (June 13, 2012).

56. STOCKER, *supra* note 2, at 14.

57. Schiaffino & Robles, *supra* note 55, at 1.

58. *Id.*

59. STOCKER, *supra* note 2, at 14.

60. Barrera et al., *supra* note 38, at 2.

61. STOCKER, *supra* note 2, at 14.

62. *Id.*

An additional component of the LFACP is focused on encouraging companies and individuals to create “policies and procedures for self-regulation, internal controls, and ethics programs in order to promote and develop a compliance culture within their organizations.”<sup>63</sup> These programs stress the importance of the international conventions Mexico has joined. Furthermore, the law “gathers into a single statute . . . the actions or omissions which constitute corruption,” and appears to demonstrate the country’s attempt to compile and simplify the anti-corruption laws.<sup>64</sup> From this view, the LFACP will hopefully lead to less confusion about what compliance looks like for both foreign and domestic individuals and entities. Lastly, an important addition to Mexico’s anti-corruption laws is the clear “legal obligation of public officials to report corruption,” and is representative of a desire to increase the amount of reporting in the country.<sup>65</sup>

#### B. POTENTIAL IMPROVEMENTS TO THE LFACP AND THE NECESSITY OF ENFORCEMENT

Although the LFACP makes numerous additions to Mexico’s anticorruption legal framework, various organizations and legal analysts have raised potential problems with the LFACP. For example, the Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Mexico states numerous shortfalls of the new legislation.<sup>66</sup> One shortfall of the LFACP is that “the law does not cover the full range of foreign bribery as required by the [OECD] Convention” because it only deals with “foreign bribery committed by Mexican nationals in connection with public procurement.”<sup>67</sup> On the other hand, the new legislation does include and cover a broad definition of “foreign bribery committed by Mexican nationals in connection with public procurement.”<sup>68</sup> Although the law introduced new and more stringent fines, individuals still “cannot be punished by incarceration because the Bill is not criminal in nature.”<sup>69</sup> Additionally, the OECD report raised concerns about the investigative powers of the LFACP, the lack of coordination between law enforcement bodies, and the lack of supporting case law.<sup>70</sup> Specifically, the OECD Report noted that when bribery cases are opened “the Mexican authorities do not appear to have investigated and prosecuted them with priority and urgency.”<sup>71</sup> The report stated that “relatively few criminal domestic bribery cases” are reported, and of those reported “only 28 [percent] resulted in prosecution.”<sup>72</sup> The report relied on the fact that there have

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63. *Id.* at 15; *see supra* notes 25-27.

64. Barrera et al., *supra* note 38, at 1.

65. *Id.*

66. *OECD Phase 3 Report, supra* note 3, at 8.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 20.

72. *Id.*

existed only two reported cases of foreign bribery since the publication that occurred in 2004 and 2005.<sup>73</sup> Because those investigations are still ongoing, the new law's effect on increased reporting and sanctioning of bribery is yet to be seen. The results of the report indicate the LFACP's enactment will need to coincide with increased enforcement efforts by the Mexican government and officials for the new legislation to have a significant effect on corruption and bribery in the country.

In a separate analysis of legal mechanisms for preventing and combating corruption, the OAS<sup>74</sup> conducted a visit to Mexico as part of its "peer mechanism" (MESICIC) for analyzing compliance with the OAS Convention.<sup>75</sup> The results of the visit called for the following improvements: strengthening "inter-institutional coordination"; streamlining the time between decisions and the administration of punishments; "strengthening the units responsible for the investigation and prosecution of acts of corruption;" and increasing efforts to issue new regulatory provisions.<sup>76</sup> The MESICIC also recommended strengthening the legal framework by adding to existing legislation the protection of whistleblowers, and this is acknowledged as an area of progress that has been made through the new LFACP.<sup>77</sup> This area of progress is vital in "persuad[ing] the private sector to support anti-corruption efforts, mainly through encouraging reporting acts of corruption."<sup>78</sup> Additionally, APEC conducted a Private Sector Consultation that resulted in agreement that Mexico's procurement regulatory framework "is generally of high quality and more than adequate," but at the same time identified two key problems in the area: "different levels of development between legislation at the federal and state levels; and [t]he need to make timely regulatory changes whenever legislative amendments are made."<sup>79</sup> The two problematic areas stem from the complexities of procurement laws in Mexico and the amount of resources required by individuals and companies to comply with public procurement laws.<sup>80</sup> The report suggests the LFACP will be a meaningful addition to the Mexican legal framework, but will only result in a decrease in corruption if there is simultaneous compliance with the legal framework, increased investigation and prosecution of bribery cases, advertisement of procurement opportunities, open participation, and fair

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73. *Id.* at 7, 18. According to the OECD Phase 3 Report, the two reported bribery cases cited were ongoing at the time of the report and do not involve "complex, corporate bribery schemes."

74. *OAS Anti-Corruption Mechanism Adopts Mexico Report*, ORG. OF AM. STATES, [http://www.oas.org/juridico/newsletter/nl\\_en\\_97.htm](http://www.oas.org/juridico/newsletter/nl_en_97.htm) [hereinafter *OAS Anti-Corruption Newsletter*] (last visited Mar. 26, 2013).

75. MESICIC Committee of Experts, Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) (Sept. 10-14, 2012), available at [http://www.oas.org/juridico/PDFs/mesicic4\\_mex\\_en.pdf](http://www.oas.org/juridico/PDFs/mesicic4_mex_en.pdf) [hereinafter MESICIC].

76. *OAS Anti-Corruption Newsletter*, *supra* note 74, at 1-2.

77. MESICIC, *supra* note 75, at ii, 12.

78. *Id.* at 12.

79. APEC PROCUREMENT TRANSPARENCY STANDARDS, *supra* note 5, at 24-25.

80. *Id.* at 25.

competition.<sup>81</sup>

In conjunction with the LFACP legislation, additional changes will likely be necessary. Interestingly, the newly elected President Peña Nieto knows he needs to emphasize combating corruption due to his party's problematic history with respect to corruption.<sup>82</sup> The emphasis on corruption is necessary because the legal framework appears relatively strong, but problems "persist in the country's enforcement of [the anti-corruption] laws."<sup>83</sup> An example of the President's attention to corruption was seen in his promise to "breach the monopoly of Mexico's state-owned energy giant, Petroleos Mexicano (PEMEX)," due to its estimated \$2 billion loss per year from fuel theft.<sup>84</sup> PEMEX is frequently alleged to have high levels of corruption, and is a great starting point for the new President to address corruption concerns through the LFACP.<sup>85</sup>

#### V. CONCLUSION – THE UNKNOWN EFFECT OF THE LFACP IN COMBATING CORRUPTION IN MEXICO

Mexico is making progress combating corruption through legislative reform and increased compliance with international conventions. But, Mexico still needs considerable improvement in implementing and enforcing the LFACP. Mexico will likely attract a greater number of foreign investors in the future if it is able to effectively enforce the LFACP. Additional legal reform could be necessary, as evidenced by the recommendations made by MESICIC, MAPI, and the OECD, but legal reform is futile without increased enforcement of the law's stricter sanctions. The LFACP is likely to deter future acts of corruption if it is implemented fully on both the local and national level, and there is an overall increase in compliance efforts by companies conducting business in Mexico.

The effect of the LFACP on anti-corruption law in Mexico is not yet known. As the Wal-Mart bribery scandal remains unresolved, Mexico has an opportunity to show the international community that it is committed to strengthening its corruption laws and prosecuting individuals who violate the LFACP. As the statistics concerning the level of corruption in Mexico demonstrate, there is ample opportunity to enforce and utilize the new anti-corruption law in Mexico, but only time will demonstrate whether the LFACP enables Mexico to more adequately fulfill the country's stated commitment of combating corruption.<sup>86</sup>

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81. *Id.* at 25-26.

82. STOCKER, *supra* note 2, at 8-9.

83. *Id.* at 10.

84. *Id.* at 9.

85. *Id.*

86. *See, e.g.,* TRANSPARENCIA MEXICANA, *supra* note 6.



# **Updates**

