GIR INSIGHT

AMERICAS
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Preface

Welcome to the *Americas Investigations Review 2020*, one of *Global Investigations Review*'s special reports. *Global Investigations Review*, for newcomers, is the online home for all those who specialise in investigating and resolving suspected corporate wrongdoing. We tell them all they need to know about everything that matters, wherever it took place.

Throughout the year, *GIR* writes daily news, surveys and features; organises the liveliest events ('GIR Live'); and provides our readers with innovative tools; and know-how products to make life more efficient.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than the exigencies of journalism allow.

The *Americas Investigations Review 2020*, which you are reading, is one of those reviews. It contains insight and thought leadership, from 28 pre-eminent practitioners from the region. Across 11 chapters, and 160 pages, it is part invaluable retrospective and part primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these writers capture and interpret the most substantial recent international investigations developments of the past year, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular topic.

This edition covers Brazil, Mexico and the United States – each from multiple perspectives, and has overviews on the Department of Justice's use of tools that are not the Foreign Corrupt Practices Act; on evidence gathering; and on how to ensure that history does not repeat – the art of learning the right lessons as an investigation winds down.

Among the highlights for this reader:

- a fine discussion of the *Bogucki* case – in which the US Department of Justice has been accused (by a former member of staff) of misusing mutual legal assistance treaty requests to stop the clock on cases;
- news that Airbus's huge settlement led to raids for other companies – notably Avianca;
- finding a worked example of how to learn the lessons at the end of an investigation (featuring hypothetical company 'ZYX Inc');

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- the full breakdown of all corruption related fines and settlements levied in Brazil, complete with graphics; and
- discovering that covid-related corruption is already under investigation in Germany, Italy Serbia and Brazil, and that the new head of Mexico's Federal General Prosecutor's office is over 80 years old (and was chosen for his venerableness in part).

And much, much more.

If you have any suggestions for future editions, or want to take part in this annual project, we would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher, Global Investigations Review
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The State of Anti-corruption Enforcement in Mexico

Leonel Pereznieto and Narciso Campos
Creel García-Cuéllar Aiza y Enríquez

In summary

Anti-corruption enforcement policy in Mexico has shifted notoriously during the two years since the federal administration of President Andrés Manuel López Obrador has been in office. The main focus of enforcement has turned away from the National Anti-Corruption System. In it its place, both the financial intelligence and the prosecutorial infrastructure designed to strike at drug cartels has now been turned against corruption. This approach seemingly highlights the government's preference for effacing corrupt agents and conducts from sectors and activities that it considers of strategic relevance, while taking precedence over the systematic enforcement approach that civil society was hoping for.

Discussion points

- In the Control Risks Capacity to Combat Corruption (CCC) Index 2020, Mexico occupies a sixth place among the eight Latin American countries ranked
- Mexico earns its lowest score in the legal capacity variable of the CCC Index, which focuses on the judicial and prosecutorial elements to combat corruption
- President Andrés Manuel Lopez Obrador (AMLO) was elected on a campaign platform that hinged heavily on the fight against corruption
- The fight against corruption during the AMLO administration has, thus far, been associated with high profile, politically charged prosecutions and less so with a systematic enforcement

Referenced in this article

- The Emilio Lozoya/Odebrecth investigation
- National Anti-Corruption System
- Republican Austerity Law

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Introduction

July 2020 will probably be regarded as a turning point in the fight against corruption in Mexico. The consented extradition by Emilio Lozoya from Spain[1] to face corruption charges brought against him by the Federal General Prosecutor's office (FGR), for alleged corruption while acting as CEO of the state-owned oil company Pemex, marks the trend of anticorruption enforcement policy in Mexico.

Rather than building on the National Anti-Corruption System (SNA) that entered into force on 19 July 2017, corruption is being fought using the two weapons of choice of the Mexico's Federal Executive since it assumed power on December 2018. One is the framework laid out by the National Code of Criminal Procedure, which entered into force nationwide, at both federal and state level, on 14 June 2016. The other is the legal framework supporting the Financial Intelligence Unit (UIF), which is the government agency charged with investigating and conducting administrative enforcement on money laundering.

The background of government officials that head both the FGR and the UIF is very telling about the powerful anticorruption thrust of these agencies.

Mexico's president, Andres Manuel Lopez Obrador, or AMLO as he is popularly known, had the clear vision of nominating an attorney general who had multipartisan support as well as a clean and respected record in law enforcement. This profile for the head of the FGR would ensure the smooth approval by the Mexican Senate for an eight-year term: a nomination that had resulted in Congressional impasse towards the end of the prior administration. AMLO found those attributes in Alejandro Gertz Manero, an octogenarian who served as the public security secretary for Mexico City in the late 1990s and then as the federal public security secretary during the first years of the Vicente Fox administration in the early 2000s. Gertz is known for his diehard prosecutorial style and for favouring traditional law enforcement methods for getting the job done instead of the experimental concepts underlying the SNA.

For the top position at the UIF, AMLO appointed Santiago Nieto, a man who from his position as special prosecutor at the Special Electoral Crimes Prosecution Office (FEPADE) closely followed the trails linking the Odebrecht region-wide bribery scandal and the administration of President Enrique Peña Nieto.[2] Santiago Nieto was abruptly sacked from his position at FEPADE when it apparently became all too evident that he was coming too close to evidence of alleged bribes received by Emilio Lozoya from Odebrecht for funding Peña Nieto's presidential campaign. The reputation that Santiago Nieto built as a firebrand law enforcer was the perfect fit for an agency that would be instrumental for following the money behind corruption and a host of other crimes that AMLO's government vowed to combat fiercely.

It is in this context that the Mexican government has framed its anticorruption strategy. This chapter briefly discusses the demise of the SNA and its replacement by the FGR and UIF stalwarts.

1 http://www.poderjudicial.es/search/openDocument/812d6ea2491ebb89.

2 https://www.nytimes.com/es/2017/08/15/espanol/america-latina/odebrecht-mexico-emilio-lozoya-pemex-corrupcion.html.

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Demise of the National Anti-Corruption System

The SNA derives from the amendments to the Mexican Constitution published on 27 May 2015, which laid out the philosophy of a coordinated nationwide system of federal and state laws and government bodies charged with the anticorruption enforcement.[3] The SNA comprised a myriad new statutes and amendments to existing statutes that set out the legal framework for monitoring, investigating and for the criminal and administrative enforcement on corruption.

While the statutes that comprise the SNA – including the General Administrative Responsibilities Law, which is at its core – have not been repealed, their operation as a 'system' has not come to fruition. An important development brought about by the SNA is a modern legal framework that better defines corrupt conduct and attaches specific liability to it. Another fundamental feature of the SNA was the set-up of a governance body – the Coordinating Committee – formed by the heads of relevant government agencies and by a representative of civil society that would coordinate anti-corruption investigation and enforcement nationwide. Finally, the SNA conceived new enforcement institutions, namely, the anti-corruption prosecutor within the structure of FGR and a chamber of the Federal Administrative Court specialising in hearing corruption cases.

While the modernised legal framework has subsisted, the coordination and enforcement aspects of the SNA have not taken off. The Coordinating Committee has fallen short of the task of ensuring a nationwide implementation of the SNA, which was necessary to ensure a consistent and constant observance of anticorruption laws in the 32 states that form the Mexican Federation. The anti-corruption prosecutor's office has been underfunded and therefore budgetary constraints have hindered the ramp up of the state-of-the-art investigation capabilities that it was once envisioned to have in order to surmount the evidentiary hurdles inherent to acts of corruption. Also, the anti-corruption prosecutor has been the notoriously absent from the flagship corruption investigations that the AMLO administration has launched, including the latest Emilio Lozoya prosecution. The judges for the anti-corruption chamber of the Federal Administrative Court were also never appointed. The latest development that highlights the dysfunctionality of the SNA is a Constitutional 'amparo' procedure brought by a non-government organisation before a federal court in order to have the Mexican Senate designate – as it is its duty – two of the five members of the Civil Participation Committee that have not been replaced since February 2020.[4]

It is fair to say that the SNA, despite its quality, clarity and comprehensiveness, is a complex legal framework that is hard to understand as a whole and even harder to effectively operate and coordinate, especially if underfunded and understaffed. At this juncture, it is not surprising that, given the functional complexities of the SNA, the attorney general of the FGR has opted to put the experimental SNA to one side and pursue corruption using traditional criminal law enforcement procedures and strategies. Gertz has preferred using the

3 https://www.creel.mx/wp-content/uploads/2018/04/GLI_BC5_Mexico.pdf.

4 https://cpc.org.mx/?p=16272.

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tools of the trade that have worked for him in the past, such as prosecuting corruption based on allegations of fraud and organised crime strengthened by evidence of money laundering contributed by the UIF.

New anti-corruption enforcement tools

Corporate criminal liability

Article 11 Bis of the Federal Criminal Code links certain criminal offences, including, specifically, the crime of bribery to the provisions of the National Code of Criminal Procedure, which contemplates criminal enforcement against legal entities. Such corporate liability is independent from the criminal liability that may be found with respect to the individuals involved in the conduct.

Articles 421 through 425 of the National Code of Criminal Procedure set forth the principles pursuant to which liability against legal entities may be determined, including penalties that a judge may order upon a finding of criminal liability; namely fines, disgorgement of assets used in connection with or that result from the criminal conduct, publication of the judgment and dissolution of the legal entities. Upon assessing the harsh consequences that may attach to a legal entity, the judge will have to take into account the extent to which there has been a failure to exercise 'due control' of the relevant entity, the quantum of amounts and its legal nature and annual volume of business, as well as the entity's level of compliance with applicable laws and regulations.

The concept of corporate criminal liability departs from the traditional civil law view that criminal conduct can only be attributed to individuals and that the liability of the company is an obscuring fictional construct. As has been the case with many civil law countries in recent years, Mexico has followed the Anglo–American legal system in implementing the legal framework for punishing bodies corporate for crimes and felonies.

Although up until a couple of years ago Mexican prosecutors were very shy in pressing charges against entities, in recent months federal prosecutors have become more adventurous. As part of the governments aggressive tax collection efforts leveraging the tax reform that entered into force in 2020, which simplifies tax fraud allegations, state attorneys have been quick to name companies as the accused offenders in addition to individuals in management as they had done in the past. It can be expected that anti-corruption prosecutions will be following the same path in the near future.

Deferred prosecution agreements and immunity

Two other novel legal concepts have been introduced into Mexican criminal law and practice by the Code of Criminal Procedure that are also very relevant in the context of the new enforcement trends against corrupt practices.

On the one hand, articles 191 through 200 of the Code of Criminal Procedure contemplate the possibility for the offender of entering into a deferred prosecution agreement. Under certain circumstances stemming from the criminal conduct prosecuted, certain conditions and obligations may be agreed between the criminal offender and the prosecutor, which, if complied with by the former, may suspend criminal liability and may ultimately extinguish it.

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On the other hand, articles 256 through 258 of the Code of Criminal Procedure contemplate the possibility of requesting immunity from prosecution. To this end, the accused must collaborate effectively with information that is essential for the prosecution of a crime that is more serious than the one with which the accused is charged. Also, the accused must agree to appear in the trial conducted against those responsible for the more serious conduct that is prosecuted as a result of the information provided.

The availability of these mechanisms, and specifically the possibility of applying for immunity, are real game changers in the Mexican criminal law system. Whereas before there was very little incentive for defendants to seek an agreement with the prosecution as no bargain struck could be upheld by the court, these new alternatives are being used by prosecutors to prompt whistleblowers that can speak of the culprits of a broader corruption scheme. For example, Emilio Lozoya has been granted immunity in exchange for revealing to prosecutors what is supposed to be useful information. Such information would enhance the investigation into a ring of corruption at top levels of Mexican politics that was allegedly prevalent during the Peña Nieto administration.

Anti-money laundering

The UIF has played a key role in the Mexican government's anti-corruption enforcement policy, leveraging the existing legal framework for the agency.

The UIF was created as a unit of the Ministry of Finance and Public Credit in 2004 as a result of the worldwide drive towards curbing the financing of terrorism, drug trafficking and other unlawful cross-border activities, following the recommendations of the Financial Action Task Force (FATF).[5]

The legal framework of the Mexican financial intelligence unit is very much aligned to the basic FATF standard, with administrative model providing for an financial intelligence unit that receives disclosures from reporting entities, analyses the information and disseminates the results of its analysis to other authorities.

The UIF holds a vast wealth of information about the flow of funds throughout the formal Mexican economy, including suspicious transaction reports by financial institutions and taxpayer's data. This makes the UIF a useful tool for obtaining evidence of tainted funds that support the independent administrative investigations that the UIF conducts or to support the anti-corruption investigations conducted by the FGR.

Anti-money laundering laws and regulations in Mexico are not only applicable to financial institutions but also to activities considered vulnerable for money laundering purposes. Financial institutions (ie, banks, broker dealers, insurers) in Mexico have the obligation, pursuant to their specific regulations, to implement money laundering detection systems that

5 FATF Recommendations, number 29: '[c]ountries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly'.

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ultimately trigger alerts for the UIF about unusual activity or activity that gives rise to concern. Also, the Federal Law for the Prevention and Identification of Transactions Using Unlawful Origin Resources sets forth compliance obligations that must be observed by what are referred to as 'vulnerable activities', as they are prone to be used to launder funds. Such regulated activities include, among others, car dealerships, casinos, the construction industry and jewellery stores – having the obligation to keep records and deliver alerts to the UIF.

The UIF uses the vast amount of data to carry out analysis that can be operational or strategic. Operational analysis is carried out to identify specific targets and follow specific activities to either provide such information to other authorities, such as the FGR, or to impose consequences under the authorities of the UIF, such as the blocking of bank accounts. Strategic analysis is carried out to identify trends and patterns, which could then, in turn, be used to discover specific targets and to strengthen the capabilities of the authorities to investigate wrongdoing.

On the dissemination front, the UIF can carry out spontaneous disclosure of its findings to other authorities or it may also act upon request of collaboration from other authorities, such as the FGR.

As the UIF has taken a more prominent role in the anti-corruption efforts of the Mexican government, it has become more active on its analysis and dissemination roles, working on more operational analysis for specific targets and providing information to other authorities proactively, as has been widely reported in the press.

As outlined, the UIF has the authority to issue administrative orders blocking bank accounts that are related to tainted funds, effectively freezing the amounts deposited. This authority has been more widely used in the past few months and its use has been made public through the press.

Blocking bank accounts may be carried out by the UIF without the involvement of any other administrative or judicial authority. Upon determination from the UIF that an account should be blocked, the financial entities are notified and no funds may be transferred from or to such account. The holder of the account has to follow an administrative process with the UIF to demonstrate the legitimate origin of the funds and clarify any other matter related thereto to unblock the accounts.

A redefinition of corruption?

In addition to diverging from the SNA framework in the enforcement of anticorruption laws, the AMLO administration has also adopted particular views about what types of conducts should be considered corrupt. As part of AMLO's drive to downsize the government in order to reduce its budget and spending, Congress enacted the Federal Republican Austerity Law (the Austerity Law), which entered into force on 20 November 2019.

The Austerity Law is a short statute by Mexican standards – only 30 articles long – that lays out spartan measures for limiting spending by government agencies, including, for example, a prohibition on remodelling government offices or on purchasing private insurance for covering government employees. The Austerity Law, together with a statute enacted earlier in 2019 that caps the salary of government officials, sets forth broad propositions that define the ideal

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conduct of an 'austere government official'. Essentially, any conduct that departs from such broad and ideal standard can be regarded as corrupt and enforced upon in accordance with the Responsibilities Law.

A provision that has raised serious concerns among government officials is one contained in the Austerity Law that prohibits any government employee occupying a senior position from working for any company that such employee may have supervised, regulated or of which he or she may have had privileged information. Pursuant to the Austerity Law, government employees that fit the category must observe the prohibition for a 10-year term. This rule has not only frozen the revolving door that had previously ensured an inflow of top-notch professionals into government, but prompted the departure from office many committed and long-standing public servants that did not want to be severed for a decade from employment in the private sector.

The 10-year employment ban is starting to be enforced in tandem with that which is provided for in article 72 of the Responsibilities Law, applicable to entities that hire government officials. Pursuant to this provision of the Responsibilities Law, anyone that employs a government official that had acted as such during the prior year and who has obtained privileged information while in office, may be held liable for the conduct of 'improper hiring' if the privileged information allows the employer to directly benefit in the market or to directly place itself in an situation of advantage vis-à-vis competitors. Under the Responsibilities Law, the improper hiring misconduct and violation of the 10-year employment ban may be enforced upon using the same mechanisms, procedures and penalties available for punishing clearly corrupt conduct such bribery, influence peddling and use of forged documents.

In parallel, tax compliance has become an area that the current administration has sought to establish a new corruption standard. In the past, enforcement on tax violations was handled by the government under administrative law and white-collar principles and, except for a few high-profile cases, it did not capture much press attention. It is notorious that several prevalent tax evasion practices had not been eradicated by the traditional enforcement system. With the aim of increasing tax collection by cracking down on such evasion practices, the government has been ramping up enforcement against tax violations using the anti-corruption tools and the financial intelligence mechanisms referred to above. The way in which media has covered such tax enforcement procedures has been more akin to the scornful coverage of corruption scandals.

Conclusions

Anti-corruption enforcement policy has shifted substantially since the AMLO administration took office. The complex and detailed procedures of the SNA – which, if properly implemented, could have ensured ongoing anti-corruption enforcement – have given way to a more targeted form of enforcement. The enforcement tools used in this new scenario are more forceful, thus ensuring that the specific policy aims of the administration are furthered through potent blows on the rogue sectors and characters it has identified. By the same token, a consistent and constant anti-corruption enforcement policy, such as the one the SNA aspires to be, remains largely unfinished.

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He was born in Mexico City and obtained his law degree (JD) from Universidad Iberoamericana in 1998. He also has two LLM degrees: one from University College London (1999) and the other from Georgetown University (2000). Leonel was admitted to the New York State Bar in 2001 and remains affiliated.

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From 2013 to 2016, Mr Campos was the assistant secretary for banking, securities and savings at the Ministry of Treasury in Mexico, where he oversaw public policy related to the development, supervision and regulation of the banking sector and the securities market.

Mr Campos has participated as speaker on diverse topics of financial regulation, market development, anti-money laundering, financial inclusion and education at industry events. He has been a professor of law at his alma mater (2000), Instituto Tecnológico y de Estudios Superiores de Monterrey in Monterrey, where he also obtained a master of science in finance (2002).

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