The Mañana Syndrome?
Mexico Delays Implementing the OECD Anti-Bribery Convention

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Mexico recently received a poor bill of health with respect to fighting foreign bribery. A recent OECD Working Group report assessed the implementation of Mexico's commitments under the OECD Anti-Bribery Convention and highlighted "deficiencies" and "shortcomings" in implementing the Convention's requirements. While it acknowledged "some improvements to [Mexico's] legislative framework for fighting bribery" and Mexico's "efforts to promote awareness, prevention and detection of foreign bribery within the private sector," it paints overall a picture of delay. This was the OECD's third such report.

These results are significant as OECD Working Groups do not conduct such country reviews very often – only once every several years for each country. Moreover, Mexico's results are in direct contrast to the progress that other countries are currently making (see discussions on Brazil and Turkey).

Why Mexico's Compliance with the OECD Anti-Bribery Convention is Important

Mexico has significant influence in the regional and global economy, including in countries known for corruption risk. A more robust effort by Mexico to confront foreign bribery could have a significant and positive impact.

Mexico has the 12th largest economy of the 39 OECD Working Group countries. Not only is it a major trading partner with the United States, its trade with Asia now accounts for about 30% of its imports. Its companies also make significant investments abroad – it ranks 18th out of the OECD Working Group countries in outward foreign direct investment. Several large Mexican-based multinationals, operating in high-risk sectors like telecommunications and construction, are influential in other Latin American countries like Brazil and Argentina.

At the same time, Mexico has scored high on Transparency International's Bribe Payers Index (BPI). In the last report, it ranked 26 out of 28 countries. The BPI ranks 28 of the largest economies (measured by exports and FDI) by the propensity of their companies to bribe while operating abroad.

Notable Shortcomings

The OECD report showed a number of shortcomings, including the following:

Corporate Liability. Article 2 of the OECD Convention provides: "Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official."

Mexico's current law is deficient in three ways. First, a company can only be held liable for foreign bribery if an individual who is a member or representative of the company has been convicted of the crime. Second, a company can only be held liable if the bribery was committed "with the means of the legal person," meaning that the company had to have known that its resources would be used to bribe a foreign official. The act would not be covered if the employee used his or her own funds. Third, liability cannot be imposed against state-owned or state-controlled companies.

Sanctions. Article 3(1) provides: "The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties." Current sanctions are calculated pursuant to the wrongdoer's net income. This leaves a gap for those who do not have a net income at the time of the offence or those for whom a net income cannot be ascertained. This deficiency extends to corporations as well – "a legal person that is not turning a net profit could possibly bribe with impunity."

Third Party Beneficiaries. Article 1(1) requires signatories to prohibit bribes "to a foreign public official, for that official *or for a third party*." While Mexico has amended its law to expressly refer to third party beneficiaries, payments to these individuals are only subject if the individuals are "determined by" the foreign official. Thus, if the third party beneficiary was chosen by the briber and not the official, the payment arguably would not be subject. Moreover, it might be difficult to prove who "determined" the third party beneficiary. The current law thereby leaves a loophole.

Enforcement. The Working Group noted that, even though Mexico has initiated two foreign bribery cases, they were initiated more than six years ago. Neither case has produced any charges. They appear to be delayed. And there has been no other and more recent enforcement activity.

Definition of Foreign Official – An Area of Progress

It is promising that Mexico responded to the OECD Working Group's previous 2004 recommendations by amending the definition of "Foreign Official" to comply with the Convention's requirement. The new definition is broad, encompassing individuals who work for state-owned companies and international organizations. The definition provides:

> For the purposes of this article, a foreign public official is understood as any person holding a job, position, or commission within the legislative, executive or judicial powers, in an autonomous public organism of any order or level of government of a foreign State, designated or elected; any person exercising a

> function for a public authority, organism, or company with state participation as well as any officer or agent of a international public organism or organization.

We hope this signals a change in momentum toward greater compliance with the requirements of the OECD Anti-Bribery Convention. As Mexican anti-corruption attorney Juan Carlos Partida Poblador from the Rubio Villegas law firm says, "Mexico's rapid integration into the global economy and the importance that our country subscribes to organizations like the OECD mean that pressure will continue to build on our government to come into compliance with international obligations."

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