Working Paper:

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD) Evaluation of Implementation by Mexico

February 25, 2000

This memorandum evaluating the implementation of the OECD Convention by Mexico is submitted on behalf of Transparency International, International Secretariat Berlin, by the TI Working Group on the OECD Convention; Fritz Heimann, Ti-USA, Peter Rooke, TI-Australia and Michael H. Wiehen, TI-Germany.
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I. Formal Issues:

Mexico signed the OECD Convention on Combating Bribery of Foreign Public Officials (Convention) on December 17, 1997. The Convention was ratified by the Mexican Senate on April 22, 1999. The implementing legislation was enacted on April 19, 1999 by the addition of Article 222 bis of the Federal Penal Code (FPC). It entered into force upon its publication in the Diario Oficial on May 17, 1999.

II. Substantive Issues:

This memorandum provides comment on how, and the degree to which, Article 222 bis and other articles of general application in the Federal Penal code, as well as other existing rules, implement the requirements of the Convention. It is based on an analysis provided by Transparencia Mexicana, the Mexican chapter of TI, with the technical assistance of Prof. José Ramón Cossío and Etienne Luquet from the Law Department, Instituto Tecnológico Autónomo de México (ITAM).

In summary, it would appear that the Mexican legislation represents a good faith effort to implement the requirements of the Convention. However, as detailed below, there are specific areas, such as monetary sanctions, jurisdiction and extradition, where clarification would help determine whether the requirements of the Convention have been met.

It is also important to stress that, due to the nature of the Mexican legal system, the actual scope of the legislation will not be clear until specific cases have been brought under it. The Mexican legal system takes a technical and strict approach to the application of criminal law. The Mexican Constitution, Article 14, Paragraph 3, provides that any felony or crime must be established by law and that the conduct of the perpetrator must conform to each specific element of the law. If, for any reason, the conduct does not conform to all of the elements contained in the offense, then there is no crime to prosecute.

The evaluation of the Mexican implementing legislation should be considered in this context.

III. Articles of the Convention:

A. Article 1 - The Offense of Bribery of Foreign Public Officials

Implementation of Article 1 of the Convention
Article 222 bis of the Federal Penal Code makes it a criminal offense for any person to deliberately offer, promise or give, directly or through another, money or other kind of gift, whether goods or services, to:

- any foreign public official to act or refrain from acting on the processing or resolution of any matter related to the functions inherent in his position, office or post;
- any foreign public official in order that the official act or refrain from acting on the processing or resolution of any matter outside the scope of the functions inherent in his position, office or post;
- any person to propose or request that a foreign public official effect the processing or resolution of any matter related to the functions inherent in his position, office or post in order to obtain undue benefit for himself or a third party in an international commercial transaction.

A foreign public official is broadly defined as any person who holds a public office, in the legislative, executive or judicial branches, regardless of the level of government, and including autonomous, independent or state-owned agencies or enterprises, as well as any international public agency or organization.

It would appear that the legislation fully implements Article 1 of the Convention.

Facilitating Payments
Mexico prohibits facilitating payments under domestic law. However, in the absence of legislation to prohibit such payments in the context of foreign bribery, it is unclear how this will be handled.

Complicity in the Bribery of a Foreign Public Official
Articles 13 and 14 of the Federal Penal Code, which are among the rules of general application, provide for accomplice liability, depending on the degree of participation by the offender in the commission of the crime.

Attempt or Conspiracy to Bribe a Foreign Public Official
Article 12 of the Federal Penal Code will cover attempt, defined as action toward accomplishing the crime even if the crime is not consummated or if it is frustrated by any cause outside of the perpetrator's control.

Article 13 of the Federal Penal Code treats conspiracy as a degree of accomplice liability.

B. Article 2 - Responsibility of Legal Persons

Criminal Responsibility of Legal Persons
In Mexico, only private companies are subject to criminal liability and only certain legal representatives of the entity may be held responsible for a felony committed under the company name. State-owned companies are subject to an administrative proceeding provided for in Article 11 of the Federal Penal Code.

C. Article 3 - Sanctions

Criminal Penalties for Natural Persons
Article 222 bis provides for the same sanctions to apply to domestic bribery as for bribery of a foreign public official. For bribes equal or inferior to 500 times the daily minimum wage, offenders may be sentenced to from 3 months to 2 years of jail and a fine equal to 30 to 300 times the daily minimum wage. For larger bribes, the prison term increases to from 2 to 14 years and the fine increases to a range from 300 and to 500 times the daily minimum wage.

While the jail term certainly appears sufficient to meet the Convention's requirements, the potential monetary fines may not meet the standard established in the Convention of "effective, proportionate and dissuasive" penalties.

Sanctions for Legal Persons
Article 222 bis establishes a specific sanction of up to 500 days fine (daily net income of the offender) for legal persons that bribe a foreign public official.

In addition, upon conviction, a judge could also order that an offender, including legal persons, pay monetary compensation to a victim, and could potentially order a significant amount be paid.

Article 222 bis also permits the judge to suspend or dissolve the legal person, taking into consideration the knowledge of the bribery and the profit obtained or the damages caused by the legal person.

Taken together with the rules on confiscation, the penalties could be significant, but further clarification would be helpful.

Confiscation
As noted earlier, Article 222 bis establishes that the same sanctions that apply to domestic bribery will be imposed for commission of foreign bribery. Article 222, Paragraph 7 (domestic bribery), provides that the bribe paid and proceeds of the bribe, whether monetary or otherwise, may be seized.

Civil and Administrative Sanctions
Article 1910 of the Civil Code establishes that anyone who acts illicitly and produces a tort is liable and has the obligation to repair the damage. Therefore, a company that lost a contract because another company secured that contract through bribery of a foreign public official can sue for damages.

D. Article 4 - Jurisdiction

Territoriality Jurisdiction
Mexico has jurisdiction to prosecute Mexicans or non-Mexicans for bribery of a foreign public official if committed in Mexico. A bribe that was planned, authorized, or offered in Mexico but concluded outside the country can be prosecuted in Mexico under the rule of an "instantaneous offense."

Nationality Jurisdiction
Under the general jurisdictional rules of the Federal Penal Code, any felony committed outside Mexican territory by a Mexican against a Mexican or a foreigner will be prosecuted only if all of the following requirements are met:

a. The offender is within Mexican territory or the crime has effects in Mexico. The first test is met if the offender is an employee of a company with a presence in Mexico;
b. The offender has not been tried in the country in which he perpetrated the crime;
c. The crime that is being prosecuted is considered a crime in the foreign country and in Mexico (dual criminality).

Commentary 26 of the Convention provides that the requirement of dual criminality should be deemed to be met if bribery is illegal where it occurs, a condition usually met by domestic bribery statutes. It is not clear from the text whether Mexico will deem the condition of dual criminality to have been met.

As a general matter, the need to meet all three requirements for jurisdiction may limit enforcement of the legislation.

E. Article 5 - Enforcement
Complaints of foreign bribery are made to the Ministerio Público Federal, which is obliged to begin an investigation and determine whether there is sufficient evidence to request that the judge open a criminal trial.

The Ministerio, which depends on the executive for its power, is the only entity responsible for criminal prosecution of such cases. Its discretion is limited by the Mexican Constitution (Art. 14), which provides that decisions whether to prosecute or investigate must be based solely on the merits of the case and not economic or political considerations.

F. Article 6 - Statute of Limitations
The statute of limitations for bribery of a foreign public official is 3 - 8 years, depending on the sanction[1].

G. Article 7 - Money Laundering

Article 400 bis of the Federal Penal Code prohibits money laundering of money or assets that represent the profit of an illegal activity. The term "illegal activity" comprises both domestic and foreign bribery for purposes of the Mexican legislation.

In 1996, the government promulgated the Federal Law against Organized Crime, which increases sanctions for money laundering committed by a participant in organized crime. Mexico is also a member of FATF and has signed co-operation agreements with France and Spain.

H. Article 8 - Accounting

<u>Accounting Standards</u>
The Commercial Code, rather than the Federal Penal Code, addresses accounting issues. It prohibits two sets of books and obliges companies to keep records of every transaction for at least ten years and to publish annually general financial balance statements.

In addition, the Tax Code, Articles 70 to 91B, prohibits (and punishes with significant fines depending on the gravity of the infraction) off-the-book accounts and any alteration to or entry of partial information in accounting records. Article 108 considers tampering with accounting records as tax fraud.

<u>Other Accounting Provisions</u>
Specific laws govern the accounting practices of banks, insurance companies, hedge or mutual fund societies. They provide for severe criminal penalties and fines for any alteration of or fraud in accounting records. For example, under the banking laws (Articles 112 and 133 of the Credit Institutions Law), any employee who enters a false transaction in order to defraud the bank or who forges the accounting books may be criminally responsible. In the Investment Societies Law, which regulates mutual funds, Article 47 provides for a fine from 2500 to 5000 times the minimum wage for forging or omitting the entry of any financial operation.

I. Article 9 - Mutual Legal Assistance

To date, no special measures have been proposed or implemented and this may undermine the enforcement of the Convention.

J. Article 10 - Extradition

Article 222 bis does not cover extradition nor is it clear whether Mexico has extradition treaties with all OECD members or whether bribery is considered an extraditable offense under treaties in effect. If a crime is not covered by a treaty, a request must comply with the provisions of the Law on International Extradition. Dual criminality and reciprocity are among the required conditions and may limit extradition. Further clarification is needed.

Any person who is subject to an extradition proceeding may allege a violation of fundamental Constitutional rights and petition a federal court to deny the request. This would suspend the extradition while pending.

This may in practice constitute a significant barrier to the speedy resolution of meritorious requests for extradition.

COMMENTS ON MEXICAN IMPLEMENTATION OF THE 1997 RECOMMENDATION

1. **Other Measures Taken to Implement the Recommendation**
   No specific measures, other than those described above, have been taken. The government should establish follow up programs in order to ensure enforcement of the legislation.
2. **Criminalization of Bribery of a Foreign Public Official**
   As stated above, Mexico has taken the steps required to criminalize bribery of foreign officials.
3. **Tax Deductibility**
   No changes to the legislation were necessary because Article 22 of the Law on Revenue Taxation prohibits any tax deductibility for bribes given to domestic or foreign officials.
4. **Accounting Requirements, External Audit and Internal Company Controls**
   As stated above, Mexico has legislation that obliges legal persons to maintain adequate books and records. While

the distribution of relevant rules in various codes is not the optimal legal framework, they are useful first steps in deterring and preventing bribery and money laundering.

5. **Public Procurement**

Debarment
Whether a legal person convicted of a crime is able to participate in a procurement is determined by the ruling of the judge upon conviction. Therefore, the situation will vary from case to case.

Enforcement
Competition for public contracts is regulated by the Law on Procurement and Public Works. Articles 95 to 99 allow the parties involved in the bidding to report to the Secretary of the Comptroller if they believe illicit conduct occurred during the process.

The Secretary of the Comptroller must open an investigation of the alleged irregularities and then decide if the contract is void. The parties have a right to a final appeal, before the same department. If a public official participated in the irregularity he may be subject to administrative and criminal sanctions.

6. **International co-operation**
To date, no significant advances have been made in this area.

TI Working Group on the OECD Convention

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Notes and References

1. Rules for the extinction of criminal responsibility, articles 100 to 115 of the Federal Penal Code.