

An aerial, black and white photograph of a city, likely Mexico City, featuring a large, ornate domed cathedral in the foreground. The city is built on a hillside, with numerous buildings and houses visible. In the background, there are rolling hills under a cloudy sky.

SANCTIONS AS A TOOL FOR ASSET RECOVERY: MEXICO

CIFAR RESEARCH PAPER

KEY MESSAGES

- Mexico has recently established several, new legal frameworks aimed at improving the fight against corruption and the recovery of stolen assets, including on the temporary disqualification of public officials and allowing for extinction of domain.
- While Mexico has sufficient regulatory frameworks for the location, seizure and recovery of assets at the domestic and international levels, until now use of these laws has been sporadic and has only brought modest results.
- Prosecution of transnational corruption originating in Mexico, including the seizure of assets has taken place in the United States, however this has not yet translated into the return of capital back to Mexico.
- Magnitsky legislation has broadened the scope of individuals who can be sanctioned in the US for corruption in Mexico, however few Mexican designations have so far been made under the Global Magnitsky Act and the FCPA and Kingpin Act have been to date more relevant for asset recovery to Mexico.
- Although Magnitsky legislation encourages the engagement of civil society organizations in the designation process, the mechanisms for engagement and the types of evidence required are not entirely clear.

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ASSET RECOVERY AND ANTI-CORRUPTION FRAMEWORK

Mexico regulatory frameworks against large-scale corruption face challenges and, until recently, these were built around a weak legislative basis.

The modern history of the fight against corruption in Mexico dates back to December 1982, when the Federal Government issued the so-called *Fundamentos de la Renovación Moral* (Foundations of Moral Renewal): a law aimed at preventing public servants from doing business with the government during the time they were performing their service.¹ With the exception of minor regulations and laws, enacted in isolation to strengthen the integrity in federal agencies, it took a further three decades before the creation of constitutional changes that made the fight against corruption a permanent, systemic and coordinated activity in the 32 Mexican states. That system is now also not without criticism.

CORRUPTION OVERVIEW

Mexico ranked 130/198 on Transparency International's 2019 Corruption Perception Index, indicating that a high degree of corruption is perceived to take place in the country.² This rank is the lowest of the member states of the Organization for Economic Cooperation and Development and reflects Mexico's position in the fight against corruption within the G20, where the country ranks almost at the bottom of the table, below Brazil and only one point above Russia.³

In 2016, Mexico developed its National Anti-Corruption System (SNA), planned to be the framework through which anti-corruption policy would be established. While having been designed by broad segments of civil

society, today its efficacy is questioned by specialists, academics and government figures, with particular concern that it is disjointed, with a burdensome and inefficient structure, that has in part been captured by local leaders controlling state governments.⁴

Despite these challenges, addressing corruption has remained high on the political agenda. President Andrés Manuel López Obrador (AMLO) won the 2018 national election on the promise of ending the corruption inherited by previous governments. He has, however, tried to operate outside the framework of the SNA,⁵ with the relationship between the presidency and the SNA becoming increasingly distant. As a result, according to some experts, the anti-corruption system is failing to reach the goals it was created for,⁶ with the SNA not meeting the high expectations people had for it and it conversely receiving less and less budget, putting its very existence at risk.

The SNA was designed to be governed by citizens and coordinated through decentralised agencies related to fighting corruption. The SNA has faced criticism though that its introduction has not led to substantive change. In May 2020, a progress report released on the SNA showed that it was failing to meet its goals, with data released by the National Institute of Statistics and Geography showing an increase in the annual cost of corruption per person in Mexico between 2017-2019, from €98 to €166.⁷

Impunity and lack of reporting of corruption are important components in explaining the high rates of corruption in Mexico. According to 2018 data, Mexico tops the list of countries in the Americas in terms of impunity.⁸ Studies show that disinterest in reporting lies

in the fact that victims distrust the authorities and the justice system, while at the same time the methods of reporting put those who wish to report in a vulnerable situation in their companies, in court or with respect to organized crime. Another reason that may explain the low level of complaints is that Mexico suffers from a low rate of convictions relative to reported crimes.⁹

A RECENT FINANCIAL ACTION TASK FORCE REPORT HIGHLIGHTED THAT MEXICAN OFFICIALS FAIL TO PROACTIVELY AND SYSTEMATICALLY INVESTIGATE AND PROSECUTE CASES OF MONEY LAUNDERING, DUE TO CORRUPTION WITHIN THE COUNTRY'S LAW ENFORCEMENT AGENCIES.¹⁰

Furthermore, due to growing crime rates and the highest murder rate in its history, Mexican authorities are overwhelmed and focus more on capturing ringleaders, and less on attacking the financial capabilities of organised crime, or on confiscating the proceeds of their illegal business activities.¹¹ The criminal proceeds of drug trafficking are often laundered through and invested in the legal economy: in real estate, luxury goods and services, as well as impacting society and the political system.¹²

The annual cost of corruption in Mexico amounts to approximately EUR 554 million, according to official sources.¹³ Further studies estimate that between 0.4% and 9% of GDP is lost each year to corruption.¹⁴ The programmatic strategy of the Ministry of Public Administration for 2020 highlights the need to strengthen the mechanisms for the prevention, detection and punishment of illicit conduct, as well as the promotion of the rule of law among public servants.¹⁵

Solely strengthening the punitive approach to fight corruption through expanding criminalisation of fraud, bribery, money laundering and corruption-related human rights violations is, however, not enough. It

has been argued that penalties need to be implemented alongside better provision of public goods and services, increased poverty reduction and addressing inequality, amongst other issues.¹⁶

ASSET RECOVERY OVERVIEW

National investigators specializing in anti-corruption and administrative law have pointed out that there is a serious operational problem of investigation, prosecution and recovery of assets stolen through corruption. This is partly because the responsibility to take action in cases of public sector corruption lies at the federal level. Therefore, constitutional reforms have been suggested to set up corruption and economic investigation units on the state-level, to allow state prosecutors to carry out corruption investigations in a more efficient manner.¹⁷

Several ongoing and high-profile asset recovery cases are open against former governors of Mexico's 31 states, including César Duarte, the former governor of Chihuahua, who has been accused of embezzling up to 6 billion pesos (USD 284 m.), and has properties in the US worth up to USD 200 million. He fled Mexico in March 2018 to the United States, during which time twenty properties were seized. He was known for an extravagant lifestyle, which includes allegations of use of an official helicopter to fly friends and family to his ranch. He was arrested in July 2020 in Miami and faces extradition to Mexico.¹⁸

Another case is that of Tomás Yarrington, the former governor of Tamaulipas who also fled the country and was arrested in Italy in 2017. Some of the assets forfeited in this case include: a US\$ 640,000 condominium, alleged to be the proceeds of corrupt payments received from the Gulf Cartel in exchange for non-interference in their criminal enterprise by public officials and law enforcement; a Pilatus aircraft; a 46,175-acre tract of land in Bexar County, Texas; and a

residence in Port Isabel.¹⁹

A further case is of Javier Duarte, former governor of Veracruz, who was arrested in Guatemala after a six-month search. He is alleged to have misappropriated over 55 billion pesos (USD 2.97 billion).²⁰ He was prosecuted and in 2020 his sentence of nine years in prison was confirmed. An earlier order of confiscation of 41 properties was revoked though, pending further prosecutions.²¹

The Oderbrecht investigations affecting the Americas have also impacted Mexico. Unlike in other countries in the region, three separate federal investigations into the case have stagnated. The lack of progress in the Odebrecht case has been widely discussed in Mexico since late 2016, when the company admitted to U.S., Swiss and Brazilian authorities in a multibillion-dollar settlement, that it had paid USD 10.5 million in bribes to Mexican officials. To date, the only movement on this case in Mexico appears to be the arrest of Emilio Lozoya, the former director of Pemex.²²

An example of a successful recovery however is the return of USD 74 million by the Swiss government to Mexico in 2008 after 12-year investigation into Raúl Salinas de Gortari, brother of former Mexican President Carlos Salinas.²³

Despite these difficulties, Mexico has a number of domestic anti-corruption tools at its disposal, some of which have been adopted only recently. The following section will give an overview of these legal frameworks, which impose financial penalties on the perpetrators of corruption, and of tools that aim to freeze and confiscate the perpetrators' assets.

DOMESTIC TOOLS TO FIGHT CORRUPTION AND ADVANCE ASSET RECOVERY

Even though not without constitutional controversies, Mexico has recently established several, new legal frameworks aimed at improving the fight against corruption and the recovery of stolen assets.

In March 2019, the temporary disqualification or “civil death” of public officials who commit acts of corruption was approved in Mexico. This prevents corrupt officials from working in the civil service for between one and ten years – or in severe cases – for life. It also introduces heavy fines to compensate for damage caused and measures such as domestic asset confiscation and freezing.²⁴

Penalties for public and private sector corruption have also increased. In August 2019, the National Domain Extinction Law was enacted, which allows authorities to confiscate the proceeds of crime without compensation for the legal or beneficial owner. The law deals with assets that are part of investigations into organized crime offenses, drug crimes, kidnapping, vehicle theft and human trafficking. Extinction of Domain must be ordered by a specific Extinction of Domain Judge, and its procedure is regulated by the Federal Law of Extinction of Domain (LFED), under Article 22 of the Constitution.²⁵

Assets seized under the LFED can be directly used by the State for public activities or can be auctioned and covered to capital. This conversion can take place even if assets are still subject to litigation. The main objective of LFED is to remove illicitly acquired assets from criminals and reduce their economic power through directly confiscating assets.²⁶ However, the LFED also requires defendants to disprove an accusation made by the

State and has therefore also attracted some controversy.²⁷ Due to the short time that the law has been in force, as of mid-2020 no detailed report of its achievements or the amounts that have been frozen or recovered under it has been released.

Further, substantial constitutional reforms were carried out in October 2019 to apply penalties of between one and nine years in prison for people who sell or use false invoices, to those who open shell companies to evade tax, or to those who commit acts of tax fraud. The damage to public finances through these means has been estimated as being serious, with tax evasion alone estimated to represent the equivalent of 30% of government annual income.²⁸ Those implicated in these crimes can be subject to pretrial detention and treated as members of organized crime.²⁹

These principles have also been increasingly applied to cases of fuel theft by individuals or ghost companies, which cost the country more than EUR 2.4 million in 2019. Federal prosecution resulted in 562 people sentenced in one year, 332 arrest warrants and the confiscation of 154 real estate properties.³⁰

Federal investigations into money laundering that took place between 2017 and 2018 led to the identification of around 50 suspicious companies in eight Mexican states and more than USD 2 million of suspicious international transactions.³¹

Corruption involving transnational companies in Mexico is also an issue. President Lopez Obrador recently stated that his government will act decisively and

take action against private sector corruption by multinationals. As a result, new legislation was adopted by the Congress, which prohibits companies involved in corruption from participating in public tenders. This legislation was, for example, used in the case of the construction company Odebrecht, which was disqualified from participating in public tenders for three years.³²

The new trade agreement between Mexico, the United States and Canada, known as USMCA, which entered into force on July 1, 2020 also includes integrity measures, with detailed responsibilities for governments and companies of each of the signatory countries.³³ However, although these measures aim to improve the business environment and the assessment of corporate bribery, fraud and corruption risks,³⁴ it has been noted that important aspects remain outside the agreement.³⁵

Asset recovery framework in Mexico (1983-2019)	
National legislation	Focus of legislation
Código Penal Federal. Decomiso, Artículo 24, inciso 18 (1983) y Constitución Política de los Estados Unidos Mexicanos. Decomiso, Artículo 22, 109 (2008)	Confiscation of property obtained by illicit or unexplained enrichment.
Código Penal Federal. Abandono de bienes, Artículo 41 (1983)	Confiscation of assets which are the result of crimes.
Constitución Política de los Estados Unidos Mexicanos. Extinción de Dominio, Artículo 22 (2008).	Confiscation of the assets of organized crime, violent crime, kidnapping, theft of vehicles, human trafficking and illicit enrichment.
Ley Federal de Extinción de Dominio (2019)	

INTERNATIONAL TOOLS TO FIGHT CORRUPTION AND ADVANCE ASSET RECOVERY

US GLOBAL MAGNITSKY LEGISLATION AND MEXICO

The Magnitsky Act passed in the United States in 2012 and later expanded in 2016 is a sanctions mechanism which could aid Mexico in fighting corruption, recovering stolen assets and inhibiting the infringement of human rights.³⁶ The Global Magnitsky Human Rights Accountability Act empowers the President of the United States to impose economic sanctions on citizens around the world who have committed human rights abuses and acts of corruption in their countries.³⁷ Therefore, the Global Magnitsky Act has been dubbed “one of the most innovative and powerful US foreign policy tools in recent memory”.³⁸ Unlike existing national regulatory frameworks in Mexico, including the LFED, Magnitsky-type sanctions can and are implemented before conviction.³⁹ These sanctions could therefore be an opportunity for to fight injustice in Mexico.⁴⁰

One domestic provision that may complement the Global Magnitsky Act is the Mexican Federal Law for the Prevention and Identification of Operations with Resources of Illicit Origin. This law regulates money laundering and aims to protect the financial system and the national economy. It seeks to address the financial structures of criminal organizations and prevent the use of resources for their operations.⁴¹

On September 12, 2017, several civil society organisations led by Human Rights First requested the US Secretary of State and Secretary of the Treasury to use the Global Magnitsky Act to sanction individuals from

15 countries, including Mexico. Mexican citizens were added to the list because of the case of the forced disappearance and killing of 43 students from Ayotzinapa, in the city of Iguala, Guerrero in 2014. This request was however not followed up by the US government.⁴² On August 3, 2018, two Members of the US Congress officially requested the prosecution of a group of six Central Americans accused of corruption in a public letter to US President. The letter requested the designation of a Mexican businessperson, residing in Guatemala, Remigio Ángel González,⁴³ which again has not materialized.⁴⁴

After two unsuccessful requests, the first Mexican designation under the Global Magnitsky Act was implemented in May 2019. Under Executive Order 13818, the Treasury Department designated Roberto Sandoval Castañeda, former governor of the State of Nayarit based on acts of corruption and accepting bribes from organized criminal groups.⁴⁵ In a coordinated move between the US Treasury and the Mexican Government, the US also sanctioned three other Mexican individuals and four Mexican entities under the Global Magnitsky Act because of their links to Sandoval Castaneda. At the same time, the US also sanctioned six Mexican individuals and six Mexican entities linked to drug crimes, designated under the Kingpin Act. All sanctioned individuals are supposedly linked to Mexican drug trafficking organizations including the Cartel Jalisco Nueva Generación (CJNG), “one of the five most dangerous transnational criminal organizations in the world, responsible for trafficking drugs into the United States, as well as for violence and significant loss of life in Mexico”.⁴⁶ Experience from Mexico

shows that the coordination between the US and Mexican authorities within the framework of the Global Magnitsky Act can be successful. Several Mexican individuals were designated due to their involvement in corruption and human rights violations, their bank accounts and properties in the United States frozen and they became ineligible to receive US visas.⁴⁷

There has also been a proposal in the US Congress to use Magnitsky style legislation to focus on facilitating the fight against corruption in Mexico specifically. Bill HR5369 'Supporting Mexico Against Corruption Act', introduced to Congress in December 2019, asks for the imposition of sanctions pursuant to the Global Magnitsky Human Rights Accountability Act to combat corruption and human rights violations perpetrated by officials in the Mexican Government, where credible evidence exists.⁴⁸ The Congressman putting the bill forward stressed the need to increase pressure on fight against corruption, which provides a "safe harbor" for criminal organisations, in light of recent cartel-related violence in Mexico⁴⁹

US GLOBAL MAGNITSKY ACT DESIGNATION IN MEXICO: ROBERTO SANDOVAL CASTAÑEDA

On May 19, 2019, the director of the Financial Intelligence Unit in Mexico and the US Undersecretary of the Office of Terrorism and Financial Intelligence (TFI) announced that as a result of a cooperation with the United States, 42 Mexican individuals accused of money laundering and corruption had had their bank accounts frozen and were registered in the sanctions list issued by OFAC, the so called Specially Designated Nationals and Blocked Persons List. While most of the sanctioned individuals were designated under the Kingpin Act, it was the first time when the Global Magnitsky Act was used to sanction individuals in Mexico.⁵⁰

OFAC designated Roberto Sandoval Castañeda, the former governor of the Mexican state of Nayarit, who is alleged to have engaged in an array of corruption activities, such as the misappropriation of state assets and the receipt of bribes from Mexican drug trafficking organizations, including CJNG. In order to prevent Sandoval Castaneda and his family members from enjoying the illicit benefits of his alleged corrupt activities, OFAC also designated his wife Ana Lilia Lopez Torres, daughter Lidy Alejandra Sandoval Lopez, and son Pablo Roberto Sandoval Lopez. Furthermore, four Mexican entities owned or controlled by Sandoval's family were also designated, including a butchery business, a clothing store, and a real estate holding company.⁵¹

The US Undersecretary highlighted that "our sanctions cut off these corrupt actors from the US financial system, block their assets, disrupt their activities here in Mexico, and provide new leads for Mexican and US law enforcement."⁵² Moreover, the US Secretary of State, affirmed that the sanctions "send a strong message that the United States is committed to fighting systematic corruption in Mexico and supports the people of Mexico in their fight against corruption."⁵³

The head of the Mexican FIU, said that the coordination with the Office of Foreign Assets Control (OFAC) of the US Department of Treasury allowed the blocking of the bank accounts of 42 people, freezing assets of close to USD 3.5 million linked to organized crime.⁵⁴ However, no asset return back to Mexico has been announced yet.

THE KINGPIN AND FOREIGN CORRUPT PRACTICES ACTS

The Global Magnitsky Human Rights Accountability Act is not the only law that allows bilateral cooperation between Mexico and the United States in the area of anti-corruption.

The Foreign Narcotics Kingpin Designation Act, also known as the Kingpin Act, adopted in 1999 in the US prohibits significant foreign narcotics traffickers, their related businesses, and their operatives access to the US financial system and to prohibits all trade and transactions between drug traffickers and US companies and individuals. The Kingpin Act authorizes the President to apply the Kingpin Act on foreign persons or entities when there is suspicion that they play a significant role in international narcotics trafficking.

The Kingpin Act allows the Treasury Department to freeze any assets of the cartels found within the jurisdiction of the United States and to prosecute US Americans who help the cartels with their financial or other operations.⁵⁵ OFAC has designated multiple drug trafficking organizations under the Kingpin Act along with numerous individuals who are alleged to have been responsible for horrific violence in Mexico. As the list of designations updated from May 2020 shows, there are already more than 720 designated national cases.⁵⁶ For example, the US administration used the Kingpin Act to confiscate property of the criminal organization of Beltrán Leyva in the United States in 2008, and assets linked to the CJNG, related to drug trafficking, prostitution, bribery, money laundering and misappropriation of state assets in 2019.⁵⁷

Another US law with extraterritorial impact in Mexico is the US Foreign Corrupt Practices Act (FCPA). Created in 1977, the FCPA prohibits companies in the United States, or any of their subsidiaries, regardless of where their operations and employees are located,

from directly or indirectly giving bribes to public officials abroad for the purpose of obtaining a business benefit. Failure to comply can lead to heavy penalties, ranging from financial fines, to confiscation or a court order to liquidate a company.⁵⁸

A notable case of FCPA application in Mexico was applied on the company WalMart Inc. The world's largest retail organization was charged with paying bribes to Mexican officials in order to obtain a permit to establish its new branch on an archaeological site. After a 7 year-long investigation in a number of countries., the company settled the case with a payment of USD 283 million in 2019.⁵⁹

CONCLUSIONS

Corruption and the violation of human rights in Mexico and worldwide are harmful, pose great cost to society and need to be addressed. According to a projection prepared by the Economic Commission for Latin America and the Caribbean, COVID-19 in Mexico will push 48% of Mexicans into poverty, with extreme poverty increasing to 16%. The search for resources to meet the basic needs of the population will therefore be key.⁶⁰ One of the aspects that are called upon to improve the national situation in the short term will be to increase the efficiency with which corruption is fought. In this task the application of sanctions and the recovery of assets has become increasingly relevant, both in the country's internal and in its foreign policy.

Magnitsky legislation clearly broadens the scope of individuals who can be sanctioned in the US for corruption in Mexico, from private companies and drug-traffickers (FCPA and Kingpin Act) to Mexican public officials and kleptocrats. That represents without doubt an important step. This indicates that the legislation could be useful in the fight against corruption in Mexico. However, Magnitsky legislation, together with other international regulatory frameworks are only effective to the extent that they incorporate clearer criteria of operation, transparency and accountability.

Mexico has sufficient regulatory frameworks for the location, seizure and recovery of assets due to corruption at the domestic and international levels, however, until now they have been used rather sporadically. Existing high levels of impunity within the powerful political elite and a lack of corruption reporting reinforce the low usage and effectiveness of legislative tools to fight corruption. Domestic anti-corruption penalties and legislative tools have only brought modest results in fighting corruption

and returning misappropriated assets to date.

An effective asset recovery policy could help the current Mexican government in its savings and social assistance programme, while strengthening the rule of law, reducing the perception of impunity and strengthening justice. Until today, the most spectacular news of corruption sanctions in the country, such as cases of grand corruption and organized crime, are predominantly limited to the freezing of bank accounts. While asset recovery should be seen as a routine part of a suite of anti-corruption measures, the SNA seems to currently lack any interest in asset recovery. Developing a deeper understanding of asset recovery and links to sanctions mechanisms as an anti-corruption tool is therefore needed.

The few tangible results of the prosecution of transnational corruption, seizures of assets and freezing of accounts in the United States, have not translated into the return of capital back to Mexico so far and the return mechanisms themselves are not transparent. Since binational cooperation in confiscation between Mexico and the United States has been very recent, and with investigative journalism on the subject being very scarce, at the moment it is difficult to understand what factors are acting as the greatest obstacles to the return of seized assets.

Although Magnitsky-type laws make collaboration with civil society organizations possible, the mechanisms for engagement are not clear and depend on national governments. It is therefore highly recommended to enact, in the short term, laws that enable effective collaboration. Similarly, the concrete designation criteria of the Global Magnitsky Act are not clear, and individuals and entities eventually sanctioned, the mechanisms, and timing

of designations seems to correspond to priorities of the US Government, and remains opaque for Mexican civil society. For Mexico to engage in this process, more specificity is needed.

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