

United States - Mexico Law Journal

Volume 11 Presentations at the Eleventh Annual Conference: Water Law & White Collar Crime

Article 28

3-1-2003

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Recommended Citation

Bruce Zagaris, Carlos Loperena Ruiz, Lucinda A. Low, Leo Romero, Rodrigo Labardini & Alejandro Posadas, Panel Discussion: Mexico and U.S. White Collar Crime Prevention at the Millennium, 11 U.S.-Mex. L.J. 183 (2003). Available at: https://digitalrepository.unm.edu/usmexlj/vol11/iss1/28

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Panel Discussion: Mexico and U.S. White Collar Crime Prevention at the Millennium

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PANEL DISCUSSION: MEXICO AND U.S. WHITE COLLAR CRIME PREVENTION AT THE MILLENNIUM

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PANELISTS**

Lic. Carlos Loperena Ruiz: I had to review some of my basic principles of criminal law, and the Criminal Code of Mexico to look up what the definition of "white-collar crime." I found that they usually compare blue-collar crimes with white-collar crimes, and that blue-collar is supposed to be a violent crime while white-collar is an economic criminal offense. The main white-collar crimes we see are fraud, tax evasion, even money laundering, and some other crimes specifically established in the Mexican statutes. Also, they all call the attention of public opinion. White-collar crimes or finance criminal offences committed by Mexican bankers or former bankers or stock brokers who flee the country, are pursued by Interpol, and eventually are extradited back from foreign countries are not usually tried before a court, but by the newspapers. They are condemned and they are given a life sentence even before coming to trial.

I think that these white-collar crimes are usually punished by public opinion, even if the authorities do not punish them. The individuals are never called "allegedly responsible" by the press. They are always portrayed as criminals who are devastated by the media before they come back to Mexico after a highly publicized extradition process. When they come to Mexico, people see them walking on the streets, going to the most expensive restaurants and going here and there. Therefore, the public opinion in Mexico is really angry with them because they think they are criminals. The Mexican population thinks they are real criminals, and that they are guilty of everything they are accused of, yet does not see them in jail. We need some mechanism to provide a fair way to judge and try them, and also to avoid having these public trials in the media and this devastating public propaganda against the accused. I think that the criminal cases in the media should be limited in some way. We have to prepare and train the journalists not to talk about criminal law as if they were lawyers and judges. This is a problem in Mexico. In the 1980s, Mexicans learned economics through the media because we suffered devaluations. controls, and many other economic problems.

Today, Mexicans speak as if they were criminal lawyers. They know about arrest orders, indictments, and many other things, because all the media is talking about white-collar crimes. Today we have a famous case of a former CEO of Petroleos Mexicanos, PEMEX, who is facing extradition. He came to the United States District Court and wanted to be extradited to Mexico. But, the US court had no petition of extradition. Why? Probably because the Mexican authorities are preparing more accusations and they do not want to extradite him on just one charge but on multiple charges.

^{*} Moderator biography is included at end of panel discussion

^{**} Panelists biographies are included at the end of the panel discussion

Bruce Zagaris: And I guess an interesting element of the media issue is that now the international media is involved, so that even if you were to control or to educate the Mexican media, it would be difficult to reign in the *Houston Chronicle*, the *New York Times* or the *Miami Herald*, because now the international media in these cases are often very aggressive.

Loperena Ruiz: Yes, the media is very difficult to control. It is a matter of human rights. The media damages a person because after the person is accused and judged by the media, he or she comes to the court of law and is acquitted. That person's spouse and children are damaged for their entire lives, yet he or she was acquitted by the court of law. Should we promote some campaign to avoid this destructive way to publish news and so forth? I am not in favor of the criminals, of course. I am in favor of somebody being considered a criminal only after a judgment establishes the legal situation.

Zagaris: Of course, one element of contending with this problem is that some defendants have their own media campaign. I remember in the 1980s, I did a lot of work for Mark Rich. It was for his public relations branch that needed convince not only the US media but also the Swiss government that he should be able to obtain his permanent residency in order to withstand the efforts by the United States to prosecute him.

One other element that is very interesting with respect to the investigation and prosecution of white-collar crimes and that is there are a number of civil prosecutions. For instance, a few weeks ago, in the United States District Court for the Southern District of New York, a case was filed against, among other things, a Swiss law firm and the head of state for the Republic of Azerbijan and some other officials, regarding corruption and money laundering. It was brought under the Alien Tort Claims Act¹ and a number of other statutes. In other central Asian cases of alleged corruption there is RICO, civil RICO.² What happens is that the governments hire US firms when they see that there is money in the US, and they bring these massive RICO actions and they alone can be very difficult in terms of the defendant. Some of these defendants find themselves facing charges in four or five counties simultaneous with the RICO actions. It can be difficult for defendants to face multiple charges in all these countries.

Lic. Alejandro Posadas: I would like to suggest another way to deal with the difficult issues raised about public prosecution. There should be damages available in a civil proceeding to hold the prosecutors liable when they negligently advance a case.

Loperena Ruiz: There is a very famous expression in Mexico that all of us use. After you are prosecuted and you are in prison, after a couple of years you are acquitted. The government says, in Spanish, "Usted, dispense," or, "We are sorry." So what is the liability of the government for these kinds of actions? Traditionally,

^{1.} Alien Tort Claims Act, 28 U.S.C. § 1350 (1994)

^{2.} See, Organized Crime Control Act of 1970, 18 U.S.C. § 831 (1994)

the civil code set forth the liability of the state, and it said if that you cannot hold personally liable the public officer who committed the illicit act, then the government would also be liable from a civil point of view. But now there is a new law about the civil liability of the state that is improving the way you can sue the government for these kinds of actions.

But, what happens to the person who is prosecuted, who is accused in the media or whatever you want, who spends time in high security prison? The government says, "Oh, we're sorry, you were not the one, you were not guilty." What happened with the life of this person? We have the same situation in the case of a very famous homicide in Mexico, not because the dead person was a prominent politician but was a well-known comedian. This case was litigated mainly on TV. The Attorney General in Mexico City litigated the trial. It was a few years ago, June 7 of 1999, I think. A famous comedian was killed in a very violent action, with machine guns and so forth. Professional killers. Then his assistant, another comedian who was on the stage, a girl, and some other people were prosecuted. The police found somebody with a big moustache who had a criminal face, and people thought, of course, he should be a murderer. After, maybe two years of trial and after two years in prison, all of them were acquitted. Then, they appointed a new special prosecutor for the case and nobody has been found guilty, and three or four or five people were in jail all this time. The Commission of Human Rights in Mexico issued a recommendation to the (now-former) Attorney General of Mexico City to withdraw the charges against these people because there was not enough evidence. The Attorney General refused to do so.

Now, I do not know if these people are planning to sue the government for having been in prison for so long without any declaration of criminal liability.

Prof. Leo Romero: Let me just offer a couple of comments. First, sometimes the press does abuse its freedoms. When they do, it is very difficult to hold them civilly liable because of the protections that the press has been given by the United States Supreme Court. However, another abuse to keep in mind occurs when prosecutors leak information about an investigation to the press. Often good judges will try to control that and to make sure that prosecutors are not trying their case in the press. I also know many defense lawyers who find that the only way to combat that tactic is to give the defense version to the press. Generally, when the prosecutor and the defense try their cases in the press, the judge gets involved and decides enough is enough and issues a gag order on both the prosecutor and defense counsel.

The other side of the coin, though, is that often the press that uncovers the white-collar crime. Journalists sometimes dig deeper than official investigators and they often uncover and find trails of evidence that they then bring to the attention of the public, and, therefore, to the attention of the prosecutors, which may lead to criminal prosecutions. So the press is one of those institutions that does some good things, and, of course, it can also commit abuses.

Zagaris: You do increasingly see these civil rights or alien tort claims acts against governments for sometimes improperly prosecuting people and for other civil rights violations of detained persons. That gives an interesting spin to the civil-criminal dichotomy.

Any other final thoughts or questions? Yes, John Rogers?

John Rogers, Mexico City: I have a question regarding a particular type of white-collar crime, fraud or embezzlement in a corporate context, and the approach taken in Mexico versus the approach taken in the US. It seems to me that when a company uncovers embezzlement or theft by employees or officers in Mexico, it is not a simple matter of turning the case over to the prosecutor, or the *ministerio público*.³ The company has to do a lot of the legwork to develop the case, which I think would normally not be the case in the US. Lic. Loperena Ruiz, could you explain why that is necessary, why the evidence has to be developed to a greater degree by the complainant in Mexico before the case is presented to the prosecutor?

Loperena Ruiz: It is supposed that the ministerio público, or the prosecutor, is in charge of the investigation of the crime, even without knowing whether a crime was committed or not or if somebody is criminally liable. However, if the company is interested in getting an indictment against the person who committed the criminal offense against it, they have to look for more and more evidence. The ministerio público will not be as interested in finding the guilty person and finding the proper evidence because the punishment is a fine that affects only private interests. Up to a given amount, they need an accusation filed by the damaged person to prosecute. If the damaged person does not push the ministerio público, and continue to give evidence to the ministerio público, the ministerio público will not be interested in prosecuting the alleged crime. I think that the public prosecutor is more interested in other kinds of crimes, like homicides, theft, or some other crimes. But, in white-collar crime, the company has to provide the evidence because the company wants the person who committed the crime to be punished.

Once, I had a case regarding a crime against a company. The attorney for the company discovered that some employees were stealing merchandise, but before they found there was a criminal action against them, they fired them. Once the employees were out of the company, without any labor dispute, the company filed criminal charges against the employees. The company prepared the accusation with all the available evidence, but it was not enough. Although it was not enough, the ministerio público started a criminal action before a judge, the judge issued the arrest orders, and the accused were put in jail. After two and a half years, the former employees were acquitted because the evidence was not enough. The company said, "well, I am satisfied, because I put them in jail for two and a half years. I am happy because they were punished, although they were officially innocent."

After that, the employees came to a civil lawyer and filed a complaint against the company for a kind of false imprisonment or false arrest. I was given the case to represent the defendant company in the civil action. The former employees claimed, of course, all the damages for being deprived from their source of income and so forth, and also they claimed for pain and suffering, what is called moral damage in

^{3.} Article 2 of the Organic Law of the Attorney General's office establishes that the mandate of the ministerio público is supervising and securing the observance of the constitutional legal order, trying to seek prompt, expeditious and due justice, and overseeing within the limits of his or her powers that human rights are respected. Organic Law of the Attorney General for the Republic (Ley Organica de la Procuraduria General de Justicia de la Republica) Diario Oficial de la Federacion, Capitulo 1, December 27, 2002. Available through http://www.cddhcu.gob.mx/leyinfo/txt/232.txt last visited March 21, 2003.

Mexico. They were in two different courts. Although they had the same action against the same company, they filed in different civil courts in Mexico City. One of the courts acquitted my client because of the statute of limitations. The other said that the statute of limitations had not passed, and then acquitted them because there was not an immediate relation between the accusation before the prosecutor and the imprisonment. The Mexican jurisprudence says the private person filing the accusation is not liable because he or she does not have the power to imprison the person harmed. That is the task of the public prosecutor and of the criminal judge. Since, my client did not put those people in jail, but rather, the public prosecutor and the judge did, my client was not liable and they were acquitted in the trial court as well as in the court of appeals. They did not file the constitutional challenge that we call amparo, so we had the two favorable judgments in two different courts for two different reasons, although the defenses were exactly the same and the complaints were exactly the same. My client was happy, and he said, "I do not know which of the two courts was right and which of the two courts was wrong, but I am free of any liability."

Zagaris: This panel discussion will continue with a presentation by Lic. Alejandro Posadas on the anti-corruption efforts in Mexico followed by comments from the panel and the audience.

Posadas: My discussion will cover anti-corruption issues in Mexico. First, I will touch on the international aspects. Mexico is a party to the Organization for Economic Cooperation and Development (OECD) Convention⁴ and the Inter-American Convention.⁵ Mexico has amended its criminal code in connection with bribery of foreign officials. It is not likely that there will be much action in Mexico in this area simply because problems of domestic corruption will be dealt with before prosecuting companies that bribe foreign officials. There is potential in Mexico for this provision to be enforced at some point in the future because of the network of trade agreements that Mexico has with many Central American and Latin American countries and the European Union. There is important Mexican foreign investment in Central America and many other countries. However, the accounting standards of the OECD Convention are more important than the foreign bribery provision.

Mexico did not make any amendments to its law to implement the accounting standards and obligations. The Mexican fiscal code contains some very strict accounting obligations. Article 1-11 criminalizes the making of off-book records, etc. However, I think that we are not using the potential of the accounting provisions for anticorruption purposes. They are strictly linked with fiscal auditing, or the authority of officials to audit and review for tax evasion purposes. This aspect can be potentially significant in Mexico.

^{4.} Convention on the Organization for Economic Cooperation and Development, opened for signature Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891

^{5.} Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (1996). For a detailed analysis of the Convention, see L. Low, A. Bjorklund and K.C. Atkinson. "The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act." 38 Va. J. Int'l L. 243 (1998)

A corruption experience and perception index was developed this year by the Tecnológico de Monterrey, 6 which reported that 98 percent of companies polled said they had bribed officials, and many of them were high government officials. So this is a potential area for increased enforcement.

It is interesting that when we think about anticorruption efforts in Mexico, as we heard the very good presentation by Lic. Labardini, we hear about the Controloria. But in Mexico, the criminal enforcement relies on the ministerio público under the Attorney General's office. There are other institutions that also participate in these efforts: the Fiscal Attorney General, the Mexican Banking Commission, etc. But only the ministerio público has the power in Mexico to press criminal charges and initiate a criminal proceeding. We should question the role of the ministerio público because it has a very complex role in Mexican law, and is very effective when there is political will to prosecute cases. It can conduct very complex investigations, but generally, by itself, it is not an institution that was created to actively prosecute criminal activities. Especially when it involves potential criminal activities of the same government that is in power.

If we look again at one of these corruption and good government perception indexes, we find in the one that was prepared by the Mexican chapter of Transparency International⁸ that people polled find that the most corrupt service, after things relating to police tickets and things like that, is dealing with the *ministerio público*, and making it pursue a crime. A recurrent theme in Mexico is insufficient evidence when you deal with the *ministerio público* to prosecute an offence. I think that is another challenge in Mexico, that we need to raise not only of the powers of the *ministerio público* to press charges, but also increase its evidentiary gathering powers, too.

This leads me back to whether we should have more institutions competing to work on these problems, or if an independent anticorruption agency would be more desirable. Corruption in Mexico has been traditionally linked with more than simply economic benefit, usually for political advantages. One of the most important corruption cases in Mexico right now is the Pemex scandal that is linked with contributions to political parties. It is interesting to note an institution that was key in the democratic process in Mexico, the Federal Electoral Institute, or *Instituto Federal Electoral*, also gathered most of the evidence.

Two last points very quickly. What is going on currently in universities, in terms of investigating corruption, is very important. Mexico requires a real diagnosis of the problem, at least in terms of legal procedure. We always talk in Mexico about reforming the laws, but we talk very little about the cases, their outcomes and how they affect public policy and conduct. We do not know what the corruption cases are about. We also need a real diagnosis of what is going on in the Attorney General's office in terms of combating corruption. We must have to underscore the relevance of the Freedom of Information Act that was just recently passed in Mexico

^{6.} Business Perception of Government Corruption Index, see http://www.secodam.gob.mx/doctos/indices/indicetc.pdf, last visited March 29, 2003

^{7.} See Lic. Labardini's articles in this volume

^{8.} Mexican Chapter of International Transparency, Encuestra Nacional de Corrupcion y Buen Gobierno, http://www.transparenciamexicana.org.mx/transparencia.html last visited March 21, 2003.

^{9.} See, http://www.ife.org.mx/, last visited 4/8/03

because, up until very recently, if you wanted to locate any judicial decision that had to do with a particular aspect of a legal issue, it was almost impossible to do so because they were not accessible to the public. There were no databases, etc. I think this is something that has to be highlighted and we should watch how Mexican society uses these new information rights.

Zagaris: Thank you very much. Those were excellent comments. Prof. Gordon?

Prof. Michael Gordon, Gainsville, Florida: I have a question about the Foreign Corrupt Practices Act (FCPA)¹⁰ and all of the various Acts that have flowed out of the OECD.¹¹ There was not a lot of activity under the FCPA. We do not have very many cases. Most cases are settled by consent decrees. Outside of the challenges to the FCPA as it stood before it was amended to comply with the OECD convention, have there been any cases that have dealt with those provisions which amended the FCPA, and has there been any reporting of any activity in any of the quite numerous countries that have adopted the convention? In other words, do we have any experience beyond what we had with the original in the 1988 amendments to the FCPA? Do we know about any cases filed under the post-1998 amendments?

Lucinda Low: Most cases are settled rather than litigated. To my knowledge, since the 1998 amendments, the cases that have not been settled have included, first, the ongoing litigation in the Federal District Court in Houston involving the two terminated Baker Hughes executives who were involved in the Indonesian payment scheme. They are alleging, among other things, that this was a case of extortion, so it could be interesting. That case has not been decided. There was just a jury verdict in the government's favor in the Costa Rican case against the coordinator of the payment scheme there, a fellow named King. So that was litigated. In the American Rice case the defendants prevailed at the district court stage, and that case is currently under appeal. So that is the litigation that I am aware of since the 1998 amendments.

In the OECD arena, this year has marked the first cases under the OECD Convention. Those are the Japanese case against Mitsui, the Canadian case involving US Customs officials, and there is a third case in the works in Eastern Europe, but charges have not been publicly filed yet. So that is what I am aware of as far as enforcement activity. As far as I know, there have been no cases in Mexico filed under Article 222-bis.

And my question is, apparently there is one other aspect of Article 222-bis, Subsection 3, which is outside the scope of the OECD Convention, but it is a new offense of trafficking in influence. This is something that the Counsel of Europe Convention requires to be made a criminal offense, but it is not something we have in the US. It is pretty interesting, so if we have any time left, I would like to hear from our Mexican colleagues about that.

Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in scattered sections of 15 U.S.C.). Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (1988).

^{11.} Convention on the Organization for Economic Cooperation and Development, opened for signature Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891

Lic. Rodrigo Labardini: In my case, I do not know exactly, but according to the article 222-bis, that would be forbidden. Unfortunately, since it is a very new provision, I do not think we have enough experience to be able to properly define its limits and contents. But just on its face and from reading article 222-bis, that would be illegal.

Low: Just to clarify, from a US law standpoint, the rule is facilitating payments are an exception to the bribery provisions, but not an exception to the books and records provisions. We have to book them properly and that gets you to foreign law. Remember, you will not find an exception for "facilitating payments," such as in the statute. If you look at the statute, what you need to look for is the exception for payments to secure routine governmental action. The idea behind this exception is that if you are making a payment, and typically it is a fairly small payment although the statute has no monetary threshold, in order to expedite some government action which is not of a discretionary nature, which does not involve the award of a business or the continuation of business, then you may do it. The statute gives some examples. The classic case is the bureaucrat who has to stamp your papers and who has got a stack of papers and yours is at the bottom of the pile, and if you slip him a mordida, or bribe, he will move them to the top of the pile and it will be processed within a week or a day instead of weeks or months. This is often very important for Customs processing, especially if the cargo is perishable. That is one of the specific exceptions, but there can be others. That is the concept.

Labardini: With that in mind, I would say that in accordance with Article 222-bis, I believe that kind of facilitating payment would fall within the prohibited conducts included in the definition of the crime of *cohecho*, ¹² or bribery, because the public official is not really applying him or herself to the task in hand, and would be doing something "just or unjust" related to his/her official duties. In handling paperwork, there is a natural order that should be followed, it is first-come, first-served basis. Basically, we should do the paperwork as it is presented to us.

Low: The OECD Convention permits an exception for facilitating payments. A few countries have included them in their implementing legislation. For instance, Canada has. Mexico has not, as I understand it, nor is it an exception in Mexican domestic bribery laws, in Article 222bis.

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^{12.} See Lic. Labardini's other articles in this volume for a discussion of the concept of *cohecho* (bribery) and that of *dádiva* (gift)

of witnesses for grand jury investigations, prisoner rights, representation of parolees, probation revocation matters, and early release of prisoners on emergency medical problems. His private practice has also included monitoring international tax and enforcement developments in the U.S. and the Caribbean for foreign governments and corporate clients. Since 1985, he has edited the INTERNATIONAL ENFORCEMENT LAW REPORTER, a monthly publication which discusses developments in international criminal and related enforcement law matters. His international tax practice has included counseling twelve governments on developing international financial sector work and tax treaty strategy and negotiations. His bar activities include: chair, Committee on International Tax, Section of International Law & Practice, American Bar Association, 1989-92; Chair, Committee on International Criminal Law, Criminal Justice Section, American Bar Association, 1989-93; member, Executive Committee and Executive Council, American Society of International Law, 1991-93; co-chair, Committee on Public International and Criminal Law, D.C. Bar Assoc.; and President, Washington Foreign Law Society, 1990-91. He has been an adjunct professor of law at the Washington College of Law, American University, Fordham Univ. School of Law in New York, and John Marshall College of Law in Chicago. He received the degrees of B.A., J.D. and LL.M. from George Washington University, the LL.M. cum laude from Stockholm University and the LL.M. cum laude from the Free University of Belgium. He was admitted to the bars of Oregon and Idaho in 1973. California in 1976, and the District of Columbia in 1978.

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Fundamental Principles and Rights at Work, Rules of Procedure for Evaluation Committees of Experts of the North American Agreement on Labor Cooperation (NAALC), and Rules of Procedure for Dispute Resolution (Chapter V) of NAALC. Lic. Labardini is also author of over 30 publications, including the book La Magia del Interprete. Extradicion en la Suprema Corte de Justicia de Estados Unidos: El Caso Alvarez Machciin. Lic. Labardini received the Licenciado en Derecho from the Universidad Iberoamericana in 1986, Masters degrees from the Instituto Tecnologico y de Estudios Superiores de Mexico in 1989, the Graduate Course in American Legal Studies at the Law School, University of New Mexico 1991, and he is a candidate for the S.J.D. from American University and a candidate for the LL.M. from the Universidad Iberoamericana in Mexico City.

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