

BRIBE, SWINDLE OR STEAL



Spotlight on Mexico – Daniel Maldonado

[00:00:08] Welcome back to the podcast Bribe, Swindle or Steal. I'm Alexandra Wrage, and today, we're talking about compliance challenges and the current corruption landscape in Mexico. My guest is Daniel Maldonado, and he is a partner at TRACE'S partner firm in Mexico, Sanchez Devanny. He co-chairs the corporate governance and compliance practice group of the firm and advises on complex internal corporate investigations. He's designed and implemented compliance programs and has been a great supporter of the anti-bribery work of TRACE, for which we're very grateful. Thank you for joining me, Daniel.

[00:00:40] Good morning, Alexandra. It's a pleasure for me to join you.

[00:00:43] Thank you. In July 2016, your president approved the laws of Mexico's new national anti-corruption system. Before we dig in a bit, can you summarize the impact of that law in Mexico?

[00:00:55] The national anti-corruption system is an effort that takes great relevance in Mexico because it was primarily pushed by the society in general. So this is a huge achievement for Mexican society because the beginning of the presidency of Mr. Enrique Pena Nieto, he sent to the Congress a bill that, for the perception of the public in general, missed a lot of good points that needed to be included. So with the push of the citizen as a general, finally, 2016 enacted a new framework on anti-corruption preceded by a constitutional reform that was passed in 2015. So I feel what is important for us not to overlook that this is not an initiative from any political party because it's more like an accomplishment from society in general. That's a great achievement and certainly was a major reform at the constitutional level and then secondary legislation was passed. The impact that this will have is a system. It's not that we'll have in Mexico an anti-corruption tsar. It's different from other jurisdictions, so this will include, as the core of the national anti-corruption system, a citizenship committee, which is led nowadays by five individuals that, because of their personal achievements in the past against corruption, were appointed in that role. I think that is the main impact and gains credibility among society in general.

[00:02:31] It sounds like there is real popular support for the new anti-corruption system in Mexico. Is that true of the business community as well?

[00:02:41] I think that for those companies that have a background of compliance, that multinationals above all that are doing business in Mexico, it's true. However, and this is sad to say, we have seen a lot of resistance from other companies that could be either middle-size Mexican, 100% Mexican companies, and from other jurisdictions doing business in Mexico that do not have a background back in their jurisdictions of compliance and at the private sector

level. It's not that that is so true. What we are seeing is multinationals are doing it to pass the voice, to say, "Hey guys, I think that if you're to do business in this country, you need to go up on a level of integrity and ethics. Start building your own compliance programs and doing business as we have done in the past for many years now." We have seen this in our experience as well. When companies, that I have just explained to you, do not have this background in the past because they are from other jurisdictions, and we approach them and say, "You need now to build your programs and so on," they put it as a second place. It's not a priority. So that is what we have seen, unfortunately.

[00:04:06] We see that in a lot of countries where the laws are relatively new. The multinationals who are just much more familiar with compliance programs take more of a leadership role, and then the domestic countries are playing catch up. But would you say it was trending in the right direction, that there is not just growing interest, but growing expertise? One of the challenges, of course, is finding people in the jurisdiction who really understand how to build and roll out a compliance program.

[00:04:34] As we have seen, we believe that with the pass of the secondary legislation on the anti-corruption system, since the law states that you will get credit of having a compliance program, and you will get leniency in the event that any of your employees, directors, owners and so forth gets involved in corruption conduct, you will get credit. I think we need to see this change in mind, and we need to make this change in companies that do not have this background, and they will necessarily move to that way.

[00:05:14] If you are advising, as you do, multinational companies that are coming into Mexico, what would you say are the greatest risks that they face? Every country is a little bit different. Is it very high-level demands? Is it the everyday lower-level demands from police or customs? The shape of corruption is very different from one country to the next.

[00:05:39] That's right. I think Mexico, it's a good hope it's open to foreign investors. We have seen it with, for example, the boosting automotive industry, aerospace that is growing fast in our country, selecting different states in Mexico to place their manufacturing facilities and put a footprint in this country. We have seen that the foreign investment is growing in Mexico, not as fast as in the past, but nevertheless and despite the perception of corruption in our country, it's seen that it's a good place for doing this. Now, to your point, I think that the major challenge for a company that is commencing business in this country will be more at the municipality level rather than a state or federal level. That will depend on the location that you select as a company to be in Mexico. Mexico is a big country, and we have 32 states in Mexico. Not all of them are high-risk or as high as others. What I can say is that it's focalized in certain regions of the country where it's more difficult to do business, whereas, let's say, in the north part of the country - in the state of Nuevo Leon, the state of Chihuahua, the state of Baja California - and the geographical center of the country - Mexico City, Queretaro - the region called Bajio, it is more open for investment. There are administrations at the local level and more business-oriented. However, what keeps to be a great challenge is when you get, for example, a

construction license at the municipality level. If you're going to expand your plant, you will need to face public officials at the municipality level. Then you will see that there might be certain solicitations or improper payments, and obviously you need to be very careful. That will be my comment on that.

[00:07:31] What advice do you have for companies facing those sorts of demands at the municipal level?

[00:07:37] First of all, they need to have their programs in place, training those people that are more likely to face those public officials, appoint the use of third parties because that's what we have seen is the major risk - when companies do not do things directly but rather they appoint third parties to get licenses on their behalf. What I do is to have a compliance program in place, carry out proper training, get your advisers on board to see where are the major challenges when solicitation of improper payments are on your door and how to legally push back on those and send the message to the municipality that you have zero tolerance to that type of conduct.

[00:08:22] That can be so important because they stop asking if they hear no often enough, or many of them do. I want to follow up on your point about third parties, though, because I get different messages on this issue. If you have the right third party, an ethical, law-abiding third party, they can very often help companies navigate through difficult, opaque markets. The problem, of course, is when the company just hands it off to the third party and doesn't follow up on any of that and assumes they'll do whatever is needed. Is it possible or is it common to find third parties to partner with in some of the more challenging regions of Mexico to navigate through municipal licenses, permits, other red tape?

[00:09:12] It's possible because these third parties may have the experience to go through all the paperwork, sometimes cumbersome paperwork, to achieve the final goal of getting a license. You can do it, certainly, but I think you need to take reasonable steps to make sure that they do not engage in this type of conduct, that they have a contract in writing – that's very, very important because that will achieve two goals. One, that you send a message to the third party that you are taking that relationship seriously. Second of all, if in the event that he or she engages or the company you have hired that is working on your behalf gets involved in improper conduct, you will have the leverage to get harmless because of that. In the event of any enforcement from Mexican regulators, you will have proof that you took reasonable steps to avoid that happening in your company.

[00:10:09] Is Mexico doing anything to reduce the level of red tape? In the TRACE Matrix, where we measure bribery risk, one of the four areas that we look at is the level of red tape because, obviously, if you have to interact with the government a great deal, there's more opportunity for a bribe demand. As a part of this new anti-corruption system, is there a movement towards more e-procurement - electronic procurement - a reduction of red tape?

[00:10:36] Yes, definitely. However, you have the three levels of government. In the federal government, the vast majority of paperwork that you need to carry out for the federal government is online. You will see that at the second level of state, some of them have that in place and some don't. At the municipality level, you will see that that is something that will take ages to be completed. Some of them are, as I said before, more business-oriented, and they are aware that the less paperwork and red tape, the less chance that officials and the private sector get involved in corrupt conduct. I think that's a task yet to be seen to be improved and, again, depending on the region or the state in which you're doing business, in this universe of 32 states, you will see that, for example, those states that are in this geographical center of the country, the Bajío region - the Bajío region is more open to business, so you will see that some of their municipalities already have implemented online filings for licenses and permits. But in the rest of the country - the north or Mexico City or the state of Mexico - in some of the regions that there will be difficulties.

[00:11:52] We're finding that moving things onto an electronic basis and taking the personalities of it has a huge impact, so that's great news. What else is Mexico getting right now? Why don't you take a moment to brag about some of the improvements?

[00:12:07] I think the most major accomplishment was the law itself and the citizen committee that I said. Now, what yet is need to be seen is that the implementation and enforcement becomes a reality. One of the things that people in general in Mexico are so angry at is impunity. Impunity levels are high at this point, but we have seen some messages from the government that they will pursue the rule of law and they will prosecute those that have been involved in this type of conduct. Particularly, as we see in the past months we have seen prosecution of governors of the state of Veracruz, the state of Sonora, the state of where Quintana Roo, to send a message that the government is doing homework. I think a lot is to be done yet. What we are doing well is that we have set the basis for the legal frame. However, we need to see an improvement in the strict applicability of the rule of law.

[00:13:13] That's certainly the typical way this unfolds. You have a very grand statement of intention in the form of the law, and then it takes a little longer for enforcement and full implementation. I hope that protection of journalists and promotion of free media is included in that area for improvement. The case that's probably getting the greatest media coverage between Mexico and the United States right now is the WalMart case, which has not yet been settled, although its settlement has been discussed for several years. How is that case perceived in Mexico? One of the details was building a WalMart store in the shadow of Teotihuacan, right at the heart of Mexican heritage. I'm curious if there has been an outcry in Mexico about the case?

[00:14:07] That's certainly – that case moves things here in Mexico. Some other companies that have been in the same situation of WalMart at that time, back in 2012, are starting to see within and make changes in their own organizations, so that was a good thing. However, sadly, back in that time, 2012, they were far away still to have a strong framework on anti-corruption.

At the local level, it had nothing which is very disappointing because you will not see any municipal or state-level official at that time being prosecuted because of this case. Nothing happened. That is exactly what I was referring to before. The level of impunity in Mexico is so high that people in general have lost confidence. However, on the other way, on the private sector, it moves things and companies start to think, "Well, if that happened to WalMart, which is a huge company, a multinational, that can happen to me, obviously," particularly U.S. companies in Mexico. So they started getting worried and put things moving along to get the improvement of the compliance programs and to make proper risk assessments on where in Mexico they were doing business and if they were facing high risk because of this red tape that we just talked about or participate in a public case, et cetera. So certainly, it changed the way in which multinationals see doing business in Mexico.

[00:15:38] It's interesting to see how a case like that can really focus public attention. More recently, of course, we've had Lava Jato in Brazil. Is that resonating in Mexico as well?

[00:15:49] It's sound, but it was not as popular as the WalMart case or the Odebrecht case, because the Odebrecht case actually has ramifications in Mexico, which is being investigated by the regulators in Mexico. However, that's something that keeps people in the public nervous because, although we have seen enforcement and cooperation between Brazil, United States, regulators in Switzerland, in Mexico we haven't seen that yet. Although there are a lot of evidence surrounding the case that potentially involves the participation of public officials or at least officials from the state-owned oil company in Mexico, nothing has happened yet. Definitely, this year, 2018, will be very important for us to see in that case.

[00:16:43] We will watch all of that with the interest in the context of Mexico but the region more generally. As we wrap up, is there anything else that you would like multinationals to know as they consider heading into Mexico to set up operations?

[00:17:00] Yes. I think this is very important for everybody to be aware of. With the amendment of secondary legislation Mexico on anti-corruption, there was also a change at the criminal legislation. For the first time, it is including - and this is enforced since 2016 - that companies, for the first time in Mexico, can be prosecuted because of acts of corruption. Before we had only prosecution of individuals, but now if a company is proved that it's their own budget or efforts participated or encouraged employees, directors, whatever, to participate in acts of corruption, the company could be prosecuted as well. Obviously, the penalties that can be applied are huge in perception because, for the first time, a company can be suspended of doing business. For example, if a company is suspended for doing business for three years, basically you are sentencing that company to die. That's a major, major change. Also, the concept of proper control is introduced in our system. This means that companies need to prove that they took reasonable steps to avoid corrupt conduct in their organization. In the event that they eventually are investigated and prosecuted, and if they cannot prove that they took reasonable steps to avoid that type of conduct, they certainly will get huge fines and these type of penalties, even the dissolution and liquidation of the company. Companies need to be

very careful that, apart from their programs, they need to complete those items that don't necessarily mirror a typical compliance program, for example, in the U.S. - there are minor things that are slightly different - and also to make sure that they exercise proper control and have a body in Mexico that owns the program, the compliance program, and that they properly roll out a policy, train the employees on a regular basis. This is very important, and I would like to stress it. Proper control is a new concept that needs to be taken into consideration.

[00:19:16] That's so important, and even multinationals that have a fairly centralized compliance program, whether in North America or in Europe, they need somebody on the ground who takes full ownership of the program and understands the local challenges but, of course, the local nuances and the law.

[00:19:33] Correct.

[00:19:34] To end on a slightly lighter note, your former president, President Fox, has been trolling the U.S. president pretty significantly on video. How is that going over in Mexico?

[00:19:47] This man is a character. He likes to be in the spot every time. He's funny just to listen to - former President Fox - making this kind of statements. He gets in the ring with his Twitter account and these types of videos, but I think it's not that everybody takes him so seriously nowadays. Let's be honest.

[00:20:13] It's very funny. I recommend that people google it if they're interested.

[00:20:18] That's true.

[00:20:19] On that note, Daniel, thank you so much for your time on this. We're going to have to check back in with you in a few months when some of these cases are a little further along.

[00:20:30] Absolutely. My pleasure of participating in this interview. I'll talk to you soon.

[00:20:36] Thank you.