

FRAUD IN MEXICO'S GOVERNMENT PROCUREMENT SECTOR

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## **DEDICATION**

This is for my parents (Rosa and Gerardo), who sacrificed many things so I could travel to Canada to complete this work. To my four brothers (Beto, Christian, Fer and Arantza) and all of my friends back in Mexico and the United States (special mention to Freddy, Luz Esperanza, Alejandra, Fernanda, Adniel, Max, Eloy, Mirian, Vicente and Gaston; who emotionally supported me throughout this whole process).

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**Abstract:**

This thesis analyzes the problem of corruption in the Mexican government procurement system, aiming to provide a mix of legal and policy solutions to combat and prevent it. Comparing the policies and laws that make up the regulatory framework of public procurement in Canada and Mexico, this study seeks to extract the best practices that can improve the Mexican system. This text illuminates how the weaknesses within Mexico's procurement system has provoked the current exploitation of alternative procurement methods (known as "*adjudicación directa*" and "*invitación a cuando menos tres personas*") to embezzle public resources through fictitious contract awards. Although we have seen a tendency towards including requirements for "transparency" and "accountability" into Mexican procurement law, this on its own is insufficient to combat corruption. Consequently, I argue that procurement units have to enhance these transparency policies by disclosing the rationale behind every procurement and contract award prior to the disbursement of the resources; having competition as the maximum principle to fulfill while doing so. This will allow auditing bodies (and Mexican citizens) to scrutinize the rationale behind these disbursements. The Public Function Secretary could oversee this process to validate the legality and the social benefit justifications claimed by the procurement units prior to utilizing alternative procurement methods.

## INTRODUCTION

Corruption in Mexico claims approximately 9% of the country's GDP each year.<sup>1</sup> Between 2007 and 2016, the amount of public debt as a percentage of GDP almost doubled, from 27% to 50.2%, according to data from the Ministry of Finance and Public Credit.<sup>2</sup> The National Commission of Human Rights of Mexico recently pointed to a correlation between corruption and violations of human rights (notably, the rights of education, life and public health). The National Commission has argued that corruption correlates with the right to health in three of their four indicators: less access to health, child mortality and lower life expectancy.<sup>3</sup> Despite the fact that the Health Ministry of Mexico's budget grows year by year, the Commission argues that, in part due to the prevalence of corruption, this increase does not reflect in available health infrastructure nor in other forms of enhancement of access to the right to health care.

The health sector is an area particularly ripe for corruption due to the relatively large amount of government funding that flows to it. Indeed, corruption within the health sector is a problem found in several countries. Taiwanese researchers Mon-Chi and Ming-Hsuan state:

*"For example, according to the Global Corruption Report 2006 published by Transparency International, it is estimated that 5–10% of the budget of Medicare and Medicaid, the two largest [United States'] public healthcare programs, is lost to "overpayment". In Cambodia, more than 5% of the health budget is lost to corruption. In the Philippines, poor and middle-income municipalities report a higher frequency of people being denied vaccines when corruption is rampant. Investigations by Nigeria's Food and Drug Authority found cases of water being substituted for lifesaving adrenaline and of active ingredients in medications being diluted by counterfeiters, triggering drug-resistant strains of malaria, tuberculosis and HIV."*<sup>4</sup>

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<sup>1</sup> Lilia Aguilar Gutiérrez. *Causas y soluciones para la corrupción en México* in Pedro Salazar Ugarte, Francisco A. Ibarra Palafox, Imer B. Flores, *¿Cómo combatir la corrupción?*, 1st ed. (Mexico City, Universidad Nacional Autónoma de México, 2017), at 33.

<sup>2</sup> Manuel Hernández Borbolla. *Corrupción y deuda pública acaparan 20% del PIB de México*, Huffington Post Mexico, (12th July 2017), online: <[http://www.huffingtonpost.com.mx/2017/07/12/corrupcion-y-deuda-publica-acaparan-20-del-pib-de-mexico\\_a\\_23025631/](http://www.huffingtonpost.com.mx/2017/07/12/corrupcion-y-deuda-publica-acaparan-20-del-pib-de-mexico_a_23025631/)>, accessed 14th February 2018.

<sup>3</sup> Daniel Vázquez, Luz Cardona, Horacio Ortiz. *Los Derechos Humanos y La Corrupción en México: Análisis de las tendencias en las entidades federativas entre el 2000 y el 2014* (2017), online: <[http://www.cndh.org.mx/sites/all/doc/OtrosDocumentos/Doc\\_2017\\_036.pdf](http://www.cndh.org.mx/sites/all/doc/OtrosDocumentos/Doc_2017_036.pdf)>, accessed 23rd January 2018, at 25–26.

<sup>4</sup> Lio Mon-Chi, Lee Ming-Hsuan. *Corruption costs lives: a cross-country study using an IV approach* (2015) 31:2 *The International Journal of Health Planning and Management*, at 176.

Corruption can take many forms: bribery, patronage, influence peddling, nepotism, amongst others. All of these forms of corruption are strongly present in Mexico. Moreover, new means have been employed to embezzle public resources via public procurement in the health sector; practices that go far beyond splitting large procurement processes into smaller ones. This thesis aims at denouncing them and proposing reforms to prevent them. Here are the most famous and recent cases of corruption within the Mexican procurement system:

On April 15, 2017, the former governor of Veracruz, Javier Duarte de Ochoa, was arrested while hiding in Guatemala. Two days after requesting and receiving permission from his State's Congress to leave his post, he fled the country in an official aircraft and landed in Guatemala. Afterwards, he was captured in a combined effort between the Guatemalan and the Mexican governments; as well as a timely intervention by Interpol.<sup>5</sup> Duarte has the following charges against him: noncompliance with duties, abuse of authority, organized crime, money laundering, influence peddling and peculate.<sup>6</sup> This case is currently before the First District Court of *Amparo* in Criminal Matters in Mexico City.

The public was firstly informed about this fraudulent activity by *Animal Político* (with the help of the Mexican NGO *Mexicanos Contra la Corrupción y la Impunidad*), with the article "*El caso de las empresas fantasma de Veracruz*" (the case of the shell corporations of Veracruz).<sup>7</sup> In that article, this news portal denounced the award of public contracts to companies that did not deliver the products and services agreed on those contracts. They noted that the government institutions involved in the fraud lacked the supporting documentation to validate compliance with the contracts.

The fraud began in 2010 when the promoters of the *Partido de la Revolución Institucional* (Institutional Revolution Party) collected the signatures of civilians, ostensibly for legitimate purposes but, in fact, used these signatures to create shell corporations on their behalf. The fiscal addresses of

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<sup>5</sup> BBC News. *Javier Duarte, former Mexican governor, extradited from Guatemala* (18 July 2017), online: <<http://www.bbc.com/news/world-latin-america-40639480>>, accessed 17<sup>th</sup> August 2018.

<sup>6</sup> Luis Pablo Beauregard. *Javier Duarte llega a México para ser juzgado por corrupción*, *El País* (18 July 2017), online: <[https://elpais.com/internacional/2017/07/17/mexico/1500303963\\_032946.html](https://elpais.com/internacional/2017/07/17/mexico/1500303963_032946.html)>, accessed 17<sup>th</sup> August 2018.

<sup>7</sup> Arturo Ángel, Víctor Hugo Arteaga. *El caso de las empresas fantasmas de Veracruz*, *Animal Político* (24<sup>th</sup> May 2016), online: <<http://www.animalpolitico.com/2016/05/desaparece-el-gobierno-de-veracruz-645-millones-de-pesos-entrega-el-dinero-a-empresas-fantasma/>>, accessed 18<sup>th</sup> August 2018.

these companies were falsely registered. Once created, the companies were listed as government providers, using the *Registro Único de Proveedores y Contratistas* (Single Registry of Suppliers and Contractors) regulated by the *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (Acquisitions Act) and its bylaw.<sup>8</sup> Subsequently, these shell corporations began to receive public contracts through procurement processes known as "*Adjudicación Directa*" (Direct Award) and "*Invitación a cuando menos tres personas*" (Invitation to at least three people). These are alternative fast-track methods to the standard "*Licitación Pública*" (Public Tender). Through these alternative procedures, the former Governor of Veracruz and his clerk of minions awarded 73 public contracts to 21 shell companies: 16 contracts awarded through the *Adjudicación Directa*, and the rest through the *Invitación a cuando menos tres personas*.<sup>9</sup> The total amount fraudulently paid through these methods was \$645,693,000.00 Mexican pesos (approximately, 45 million Canadian dollars), between the years 2012 and 2013.<sup>10</sup>

Unfortunately, the Javier Duarte de Ochoa case is but the tip of an iceberg. In 2017, the Federal Government was accused of (allegedly) funnelling 7.6 billion Mexican pesos (an approximate of 530 million Canadian dollars) through shell companies. Once again, the news media agency *Animal Político* and the Mexican NGO *Mexicanos Contra la Corrupción y la Impunidad* broke the news of this wide-spread corruption to the public, claiming that between 2013 and 2014, at least 11 federal institutions fraudulently awarded public contracts through alternative procurement methods.<sup>11</sup> According to *Animal Político*, the government used alternative procurement methods to award a total of 70 contracts to 186 irregular private companies. The main difference

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<sup>8</sup> Miriam Castillo, Nayeli Roldán, Manuel Ureste. *La Estafa Maestra: Graduados en desaparecer dinero público*, Animal Político (2017), online: <<https://www.animalpolitico.com/estafa-maestra/>>, accessed 18th August 2017.

<sup>9</sup> *Ibid.*

<sup>10</sup> BBC News, *Javier Duarte, former Mexican governor, extradited from Guatemala*, supra note 5.

<sup>11</sup> According to news reports, the institutions involved included: *Petróleos Mexicanos* (PEMEX - Mexican Oils); *Secretaría de Desarrollo Social* (SEDESOL - Ministry of Social Development); *Fondo de la Vivienda del Instituto del Seguridad y Servicios Sociales de los Trabajadores del Estado* (FOVISSSTE - Housing Fund of the Institute of Social Security and Services of State Workers); *Secretaría de Comunicaciones y Transporte* (SCT - Ministry of Communications and Transportation); *Banco Nacional de Obras y Servicios Públicos* (BANOBRAS - National Bank of Public Works and Services); *Secretaría de Educación Pública* (SEP - Ministry of Public Education); *Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación* (SAGARPA - Ministry of Agriculture, Cattle Raising, Rural Development, Fishing and Feeding); *Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria* (SENASICA - National Service of Health, Safety and Agrifood Quality); *Registro Agrario Nacional* (RAN - National Agrarian Registry); *Secretaría de Economía* (SE - Ministry of Economy); and *Instituto Nacional para la Educación de los Adultos* (INEA - National Institute for Adult Education). See, Castillo, Roldán, Ureste. *La Estafa Maestra: Graduados en desaparecer dinero público*, supra note 8.

between this case and the Veracruz's one mentioned earlier, is that the government did not award the contracts directly to the companies. Instead, they gave the public resources to eight public universities who, in turn, entered into outsourcing contracts. These universities<sup>12</sup> charged 1 billion Mexican pesos. The media investigation concluded that 3.34 billion pesos were embezzled. This case is known as "*La Estafa Maestra*."

The *Auditoría Superior de la Federación* (Superior Audit of the Federation) is currently investigating the "*Estafa Maestra*" case. The Superior Audit of the Federation is an independent legislative body of the Executive branch, which has representation from all the political parties and is in charge of auditing all the Mexican government's expenses.<sup>13</sup> However, the auditing activities of the Superior Audit of the Federation can only bring to light fraud after-the-fact and, currently, does not have the power to take actions to prevent corruption in first instance.

These cases have sparked a debate in Mexico regarding the abusive use of these alternative procurement methods. According to the *Instituto Mexicano para la Competitividad* at least 70% of all government contracts are granted without any competitive bidding process, despite this being a legal requirement.<sup>14</sup> In Mexico, although (apparently) there is a relatively robust

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<sup>12</sup> *Universidad Autónoma del Estado de México* (Autonomous University of the State of Mexico); *Universidad Autónoma del Estado de Morelos* (Autonomous University of the State of Morelos); *Universidad Juárez Autónoma de Tabasco* (Juarez Autonomous University of Tabasco); *Universidad Autónoma del Carmen* (Autonomous University of Carmen); *Universidad Popular de la Chontalpa* (Popular University of The Chontalpa); *Universidad Politécnica del Golfo de México* (Polytechnic University of the Gulf of Mexico); *Instituto Técnico Superior de Comalcalco* (Technical Superior Institute of Comalcalco); and *Universidad Tecnológica de Tabasco* (Technologic University of Tabasco). See, *Ibid*.

<sup>13</sup> "*The Superior Audit of the Federation will be in charge of: I. Further audit income, expenses and debt; the guarantees that, in its case, the Federal Government grants regarding loans of the States and Municipalities; the management, custody and application of funds and resources of the Powers of the Union and federal public entities, as well as audits on performance in the fulfillment of the objectives contained in the federal programs. II. Deliver to the Chamber of Deputies, the last business day of June and October, as well as February 20 of the year following the presentation of the Public Count, the individual audit reports that conclude during the respective period. III. Investigate acts or omissions that imply any irregularity or unlawful conduct in the entry, exit, handling, custody and application of federal funds and resources, among others. IV. Derived from their investigations, promote the responsibilities that are pertinent to the Federal Court of Administrative Justice and the Specialized Prosecutor's Office in Combat against Corruption.*" See, Legislative Information System. *Auditoría Superior de la Federación* (2017), online: <<http://sil.gobernacion.gob.mx/Glosario/definicionpop.php?ID=18>>, accessed 8th May 2018.

<sup>14</sup> Instituto Mexicano para la Competitividad. *Índice de Riesgos de Corrupción: El Sistema Mexicano de Contrataciones Públicas* (2018), online: <[https://imco.org.mx/wp-content/uploads/2018/03/IRCPresentacion\\_06-03-2018.pdf](https://imco.org.mx/wp-content/uploads/2018/03/IRCPresentacion_06-03-2018.pdf)>, accessed 6th March 2018, at 47.

anticorruption legal framework regarding public procurements, the relevant authorities do not apply them and/or enforce them, or they employ the discretion accorded to them within the framework of the law to engage in corrupt activities. Opportunities to limit such discretion have been overlooked: for example, in July 2016 the Mexican government enacted the *Anticorruption Reform* and the National Anticorruption System Act,<sup>15</sup> but did not take this chance to modify the laws regulating government procurement in the country. Although it is fair to say that the current procurement laws do have transparency measures applicable to the whole system, nothing obliges procurement units to disclose the rationale behind their decisions which, as I will argue below, would significantly dampen opportunities for corruption.

To reduce corruption in procurement in Mexico, I argue that, in addition to its verification and auditing powers, the National Anticorruption System should be legally empowered to identify and validate the social benefits sought by the procurements *before* the contracts are granted. In order to do so, the National Anticorruption System will have to incorporate a procurement review body, whose only objective will be the validation of the rationale of the procurement process according to the social benefit sought by them. The Mexican procurement review committee would have the power to oblige procurement units to disclose the rationale behind the award of a contract. For this to happen, the *Secretaría de la Función Pública* (Public Function Secretary) –a body that has been elusive while enforcing the public procurement legal framework- has to suffer a reduction of its unchecked and unlimited discretionary powers with which they approve procurements awards. In the author’s opinion, this will be only possible if the proposed procurement review committee has the characteristics of an intergovernmental body, composed of bodies of the three powers of the Union (legislative, executive and judicial) and, just as the National Anticorruption System proposes, the inclusion of citizen representatives among its ranks.

To help illuminate these claims, I will ground my work in a comparative analysis of the government procurement processes in Canada and Mexico. Specifically, I will analyze how both countries utilize alternative procurement methods: the sole-sourcing contracting (Canada) and the “*adjudicación directa*” (Mexico).

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<sup>15</sup> Official Gazette of the Federation. *Edición Vespertina del Diario Oficial de la Federación del día 18 de Julio de 2016* (Mexico, Interior Ministry, 2016), online: <<https://goo.gl/z6tFPP>>, accessed 18<sup>th</sup> August 2017.

In making this comparative analysis, I do not wish to make the claim that the Canadian approach is without its flaws, nor that it could be merely transplanted to Mexico. This research examines how/why Canada has addressed and prevented corruption in government procurement in a more effective manner, and analyze what Mexico can learn from that.

This thesis consists of five chapters. The first chapter's objective is to define the two most important concepts, namely corruption and government procurement and, further, provide evidence on the extent of corruption in Mexico and discuss its impact on the Mexican population. The second chapter will set out the respective legal frameworks for government procurement in both Mexico and Canada, specifically focusing on the award of contracts through alternative procurement methods. In the third chapter, I will discuss common symptoms of corruption in government procurement, and how they appeared in the most relevant and recent corruption cases in Mexico. The fourth chapter provides an assessment of the solutions provided both by procurement experts and by the upcoming presidential administration and analyze the reasons behind the failed implementation of the National Anticorruption System. In the final fifth chapter, I will argue on possible solutions to corruption within the public procurement sector in Mexico.

## **METHODOLOGICAL APPROACH**

As I have mentioned in the introduction, I chose a comparative approach while analyzing both the Canadian and the Mexican government procurement systems. Canada and Mexico are close trading partners<sup>16</sup> and part of the North American Free Trade Agreement, making comparison of their different approaches to public procurement of high interest. Moreover, Transparency International in their Corruption Perceptions Index ranked Canada as the 9<sup>th</sup> most transparent government, whereas Mexico was the 138<sup>th</sup>.<sup>17</sup> This suggests that Canada's system has many features worthy of consideration from the perspective of reform within Mexico. Moreover, particularly with respect to government procurement, Canada seems to set a gold standard. American researchers Taylor and Bolton, in a comparative analysis of the United States and Canada's public procurement systems, concluded that the Canadian

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<sup>16</sup> According to Statistics Canada, as of February 2019, Mexico was Canada's fourth most important trade partner, reporting 1,531 billion CAD in imports, and 699.6 billion in exports. See, Statistics Canada. *International merchandise trade for all countries and by Principal Trading Partners, monthly (x 1,000,000)* (Ottawa, Statistics Canada, 2019), online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1210001101>>, accessed 24<sup>th</sup> April 2019.

<sup>17</sup> Transparency International. *Corruption Perceptions Index 2018* (2018), online: <<https://www.transparency.org/cpi2018>>, accessed 17<sup>th</sup> March 2019.

system tends to foster fair competition by making the processes as transparent as possible.<sup>18</sup> Vice-Chairman of the Canadian International Trade Tribunal (CITT), Patricia M. Close, argues that Canada, as signatory of the several international and internal trade treaties, made the *"government procurement procedures...more open, transparent, and fair for Canadian as well as for foreign suppliers."*<sup>19</sup> Finally, as Mak points out, the three common methodologies used by the Canadian government to do scoring base selection for solicitation (each used in specific cases) have a direct impact on the awarding phase; the main stage in which corruption presents itself in the Mexican context. They are: Lowest Cost Compliant, Price-per-point, and "Best Value."<sup>20</sup> Particularly, I focused on the last since it aligns with the gaps I identify in the Mexican procurement processes.

As a final methodological approach, I would like to point out, I use the health sector as illustrative of larger problems within Mexico's general procurement system.

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<sup>18</sup> Robert C. Taylor, Lisa M. Bolton. *Overview of Canadian Government Procurement Law* (2006) 42:1 *The Procurement Lawyer*, at 4.

<sup>19</sup> Patricia M. Close. *An Unintended Consequence: The Canadian Domestic Spin-off of Government Procurement Trade Agreements* (2003) 10:3 *Canadian Foreign Policy*, at 118.

<sup>20</sup> Jonathan Mak. *Increased Transparency in Bases of Selection and Award Decisions* (2012) 5<sup>th</sup> International Public Procurement Conference, online: <<http://www.ipppa.org/IPPC5/Proceedings/Part6/PAPER6-10.pdf>>, accessed 15<sup>th</sup> September 2017, at 1481.

## CHAPTER I: DEFINING CORRUPTION AND GOVERNMENT PROCUREMENT

As a starting point it is helpful to define what is meant by corruption. The word, in the opinion of González Llaca, is used far too loosely, resulting in a loss of all the nuances of its meaning.<sup>21</sup> More than that, it has generated a tumult of typologies that, in Morris' opinion, lack theoretical relevance.<sup>22</sup> Morris establishes that the three most basic definitions of corruption are: "*the illegitimate use of public power for private gain,*" "*all illegal or unethical use of governmental activity as a result of considerations of personal or political gain,*" and "*the arbitrary use of power.*"<sup>23</sup> He, succinctly, defines it as a rational act by a public official that deviates from promotion of the common good.<sup>24</sup>

Ayala Espino argues that corruption leaves the State without the sense of what "public" is; that is, a place in which illegitimate privileges and advantages are allowed.<sup>25</sup> Perez Ramírez –while analyzing the ideas of Ayala Espino on corruption- has established that, although the concept has an array of connotations, the most common ones are from the "political" and "bureaucratic" spheres. The main difference between them is that the first type of corruption is committed by elected officials, and the second by designated ones.<sup>26</sup> Pasquino describes political corruption as the depravation of a system by the illegal behaviour of one who occupies a role in the state structure.<sup>27</sup> Nye defines corruption as the "*behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.*"<sup>28</sup> Of the various definitions of corruption, I most favour that of Klitgaard who created the "corruption formula":

"[c]orruption flourishes when someone has [the] monopoly power over a good or service and has the discretion to decide how much you receive and where accountability and transparency are weak." [Therefore,] "to fight

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<sup>21</sup> Edmundo González Llaca. *Corrupción: Patología Colectiva*, 1st. ed. (Mexico City, 2005, Instituto Nacional de Administración Pública, A.C.), at 47.

<sup>22</sup> Stephen D. Morris. *Corruption & Politics in Contemporary Mexico*, 1<sup>st</sup> ed. (Tuscaloosa, University of Alabama Press, 1991), at 1.

<sup>23</sup> *Idem*, at 2.

<sup>24</sup> *Idem*, at 5.

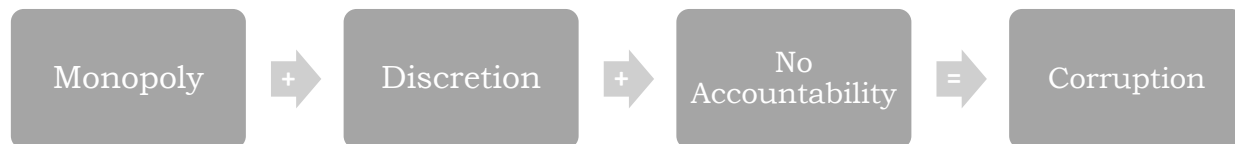
<sup>25</sup> Rigoberto Pérez Ramírez. *Corrupción y costos de transacción en la administración pública* (2016) 5:10 *Iberoamerican Journal of Social and Humanistic Sciences*, at 196.

<sup>26</sup> *Ibid*, at 196.

<sup>27</sup> Norberto Bobbio, Nicola Matteucci, Gianfranco Pasquino. *Diccionario de Política t. A-J*. (Mexico City, 2005, Siglo XXI Editores), at 377.

<sup>28</sup> Joseph S. Nye. *Corruption and political development: A cost-benefit analysis* (1967) 61:2 *The American Political Science Review*, at 419.

*corruption, we must reduce monopoly power, reduce discretion and increase accountability in many ways.”<sup>29</sup>*



Thus, corruption is an act made by whoever holds public power and utilizes it for personal gains, distorting (or suiting) the common interest to his/her personal intentions. Through the use of discretionary powers and avoiding disclosure of the rationale of their allegedly corrupt decisions, public administrators maximize the factors that constitute Klitgaard’s formula, deviating from and blurring the public good’s essence (common interest).

Corruption comes in very different forms. Caiden summarized the most common forms of official corruption.<sup>30</sup> The typologies are not crucial to the current analysis. However, Caiden does identify regional patterns that illustrate corruption’s malleability. For the specific case of Latin America, Caiden’s research notes that many countries in the area still attribute corruption to colonialism since its residues empowered the elites to hold control over privatized public resources, access to public office and bureaucratic formalism.<sup>31</sup> Caiden’s Latin American corruption patterns correlate with the factors in Klitgaard’s formula, since these empowered elites retain power (monopoly) to benefit their close circle of collaborators without needing approval from other government officials (discretion) and without disclosing the rationale behind those decisions (lack of accountability).

Due to corruption’s malleability, its effects vary as well. However, this does not mean that there are not certain similarities between all the “corruptions” around the globe. Caiden does an excellent job of summarizing the four coincidental effects of corruption:

- *“Corruption undermines political decisions, leads to inefficient use of public resources, and benefits the unscrupulous at the cost of the law-abiding;*

<sup>29</sup> Robert Klitgaard. *Fighting Corruption* (2011), online: <<https://www.cesifo-group.de/DocDL/dicereport211-forum6.pdf>>, accessed 8<sup>th</sup> May 2018, at 33.

<sup>30</sup> Gerald E. Caiden. *Corruption and governance*, in Gerald E. Caiden, O.P. Dwivedi, Joseph Jabbara. *Where Corruption Lives*, 1<sup>st</sup> ed. (Bloomfield, 2001, Kumarian Press), at 17.

<sup>31</sup> *Idem*, at 28.

- *Corruption involves the loss of moral authority, weakens the efficiency of government operations, increases opportunities for organized crime, encourages police brutality, adds to taxpayers' burdens, and impacts directly on the poor;*
- *Corruption is something everybody pays for at huge cost, direct and indirect. It is public works developments that people do not want. It is [a] shoddy construction that becomes rapidly obsolete and therefore needs to be redone or buildings that threaten public health and safety. It is public money used to fund inflated contracts or to replace skimmed revenues;*
- *Corruption allows immunity for criminal acts so that the law is for sale to the highest bidder.”<sup>32</sup>*

These combined effects, he argues, soften the state, fostering social indiscipline, ineffective government and obstruction of the national development.<sup>33</sup> Moreover, they prevent incentives to work, and lessen legitimacy from the public institutions.<sup>34</sup>

## **CORRUPTION IN MEXICO**

### **CAUSES**

Morris argues that one of the major causes of corruption in Mexico resides in the extreme centralization of political power in the federal executive power. In other words, all government decisions originate from Mexico City, the country's capital.<sup>35</sup>

After 72 years in power, the Institutional Revolution Party's hegemony ended in 2000 with the election of former president Vicente Fox Quesada. However, the Institutional Revolution Party returned to the presidential chair with the victory of former president Enrique Peña Nieto in 2012. With him, the corporatist features of the Mexican government returned. Modernized corporatism, with the concomitant networks of favouritism and corruption and the involution of the country's partisan system, are factors of great importance in what constitutes the weakest segment of Mexican democracy and, in addition, possibly, its greatest threat: the fragile rule of law and the weak nature of citizen rights.

Two causes of corruption can be discerned. In the first place, the personalist mediation of access to power and resources –referred to by diverse

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<sup>32</sup> *Idem*, at 30-1.

<sup>33</sup> *Ibid*, at 31.

<sup>34</sup> *Idem*, at 32.

<sup>35</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 25.

expressions such as clientelism and caciquismo<sup>36</sup> distorts the principle of equality before the law, molding rights and obligations according to public administrators' own particular necessities (nay, desires) instead of respecting them according on what the Mexican Constitution establishes. While the former represents a political or cultural reference, or a daily attack on the rule of law - and this is the second origin - the recent increase in insecurity and violence has brought a completely new dimension to the problem. The aggressive strategies of organized crime as well as the militarized response of the State have submerged the country in a situation in which the rule of law and citizen rights are permanently at risk. This situation has far-reaching consequences for relations between citizens, political institutions and the State, hence, for the essential functioning of democracy.<sup>37</sup>

The Institutional Revolution Party chooses between its supporters for governmental posts. Therefore, all of the government's designated bureaucracy is in fact composed of bureaucrats under the Institutional Revolution Party's control.<sup>38</sup> Morris illustrates this through the example of the now extinct Ministry of Water and Public Works, a governmental department that had 75% of their employees classified as "*trabajadores de confianza*," and that "whom one knows" was the key to their employment.<sup>39</sup> A modern example is *Petróleos Mexicanos* (Mexican Petroleum), Mexico's public-private company that had the largest quantity of "*trabajadores de confianza*" of the public administration in 2017 (9,917 posts).<sup>40</sup> A "*trabajador de confianza*" is an employee that, by his/her functions and tasks in the organization, has an important responsibility in the development of its activities and its correct operation. In this sense, he/she operates at a high level in the chain of command, above the

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<sup>36</sup> Matsuzato defines "caciquismo" as "*a political regime in which "caciques", local bosses, play the role of intermediary brokers between the central authorities and local communities. These bosses incorporate themselves into a hierarchy comprising a centre, regions and localities, by way of political exchanges of patronage from above and mobilization of votes during elections.*" See, Kimitaka Matzusato. *From Ethno-Bonapartism to Centralized Caciquismo: Characteristics and Origins of the Tatarstan Political Regime, 1900-2000* (2001) 17:4 *Journal of Communist Studies and Transition Politics*, at 43.

<sup>37</sup> Rogelio Hernández Rodríguez, Will G. Pansters. *La democracia en México y el Retorno del PRI* (2012) 52 :4 *Foro Internacional*, at 782-3.

<sup>38</sup> The only exception to this is the designation of José Antonio Meade Kuribreña to various ministries during Peña Nieto's administration since he is not a militant of the party. See, María Fernanda Navarro. *Perfil | Meade, el aspirante presidencial que nunca militó en el PRI*, Forbes México (27<sup>th</sup> November 2017), online: <<https://www.forbes.com.mx/perfil-meade-el-aspirante-presidencial-que-nunca-milito-en-el-pri/>>, accessed 10th May 2018.

<sup>39</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 43.

<sup>40</sup> Sergio Meana. *Pemex contrata más trabajadores... para oficina*, El Financiero (10th August 2017), online: <<http://www.elfinanciero.com.mx/economia/pemex-contrata-mas-trabajadores-para-oficina>>, accessed 10th May 2018.

rest of the workers.<sup>41</sup> In other words, the top-of-the-chain decision makers in public administration (under the Institutional Revolution Party's regime) will always be chosen for those government posts if they align themselves with the presidential party's will. In this sense, they would not act in a way that affects anyone affiliated with their party.

Since the Institutional Revolution Party held a majority in the Congress before the 2018's presidential elections, presidential desires surpassed the alleged separation of powers.<sup>42</sup> Morris called this a "*state-cent[re]d mobility.*" Rather than functioning autonomously, the judiciary, the legislative bodies and the local powers, work as subordinates of the executive branch's will.<sup>43</sup> Under this setting, Morris argues, all public servants surrender their loyalty and their bureaucratic professionalism to the presidential party's will, including engaging in corrupt activities in order to enhance future employment prospects.<sup>44</sup>

This pyramidal setting does not wholly rely on the will of the public administrators. There is a coercive factor that prevents lesser-ranked officials from reporting or participating in investigations.<sup>45</sup> This happened, for example, to the former Specialized Prosecutor's Office for the Attention of Electoral Crimes, Santiago Nieto, fired due to his investigation of the involvement of the infamous Brazilian company Odebrecht in Enrique Peña Nieto's presidential campaign.<sup>46</sup> There is a common perception within the Mexican society that whenever a corruption scandal occurs, only middle managers are cut off from public administration. Another example: then Attorney General of the Republic (Raul Cervantes) promised that his office's investigators were pursuing those

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<sup>41</sup> *Ley Federal de los Trabajadores al Servicio del Estado, Reglamentaria del Apartado B) del Artículo 123 Constitucional*. Article 5, at 1-4.

<sup>42</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 27.

<sup>43</sup> *Idem*, at 44.

<sup>44</sup> *Idem*, at 45.

<sup>45</sup> *Idem*, at 46.

<sup>46</sup> "Santiago Nieto – whose investigations had put the PRI on the defensive – was fired last week for unspecified "code of conduct" violations. Nieto's office had been investigating allegations that the disgraced Brazilian construction company Odebrecht improperly pumped money into the PRI's 2012 general election campaign. In an interview with the newspaper *Reforma*, Nieto said that the campaign's point man for international relations, Emilio Lozoya, had asked the prosecutor to pronounce his innocence in the affair publicly. Lozoya also reminded Nieto that his father was a prominent former PRI cabinet member, the prosecutor said. Shortly after the article appeared, Nieto was forced out." See, David Agren. *Mexican anger over corruption deepens – but will politicians change their ways?*, *The Guardian* (29<sup>th</sup> October 2017), online: <<https://www.theguardian.com/world/2017/oct/29/mexico-corruption-pri-santiago-nieto>>, accessed 10<sup>th</sup> May 2018.

involved in corruption and that he would investigate the president himself.<sup>47</sup> Subsequently, Raul Cervantes is no longer Attorney General of the Republic.<sup>48</sup>

Therefore, given the ecosystem of incentives that does not reward accountability, but in fact, rewards corruption, anticorruption laws are ineffective. Individuals that do attempt to identify and punish corrupt agents quickly lose their position. However, there is a tacit agreement of impunity, meaning that everyone involved in these scandals procures and turns a blind-eye on them with hopes to obtain a particular benefit with it. These illicit networks characterize (sadly) the Mexican government.<sup>49</sup>

## CONSEQUENCES

Morris contends that over different periods, corruption perversely permitted a form of “stability” in Mexico. Taking advantage of the legacy of the Mexican Revolution, the Institutional Revolution Party, a political party that has ruled Mexico for 82 years (76 of them uninterrupted),<sup>50</sup> was embedded as synonym of government in the country. Corruption, in this case, was the key factor that allowed this party to create the partisan institutions that solidify its legitimacy before the voters. A perfect example of this situation is the control that the Institutional Revolution Party exercised over organizations such as the Mexican Confederation of Workers, National Confederation of Peasants (composed by lower economic class’ citizens), and the National Confederation of Chambers of Commerce (integrated by the economic elite).<sup>51</sup>

Through this, the Institutional Revolution Party inhibited political pluralism within the political life in Mexico, tamping down prospects for policy-making contrary to the regime’s will.<sup>52</sup> An example of this is the abuse of the *Amparo* trial by the agrarian elite (protected under the wing of the Agrarian Reform Secretariat) to block land reform measures that helped farmers but, according to them, would affect their businesses.<sup>53</sup> In this setting, the Mexican government conducts policy-making that allows illegitimate bargaining,

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<sup>47</sup> Carlos Benavides. *PGR: vamos por las cabezas de la corrupción*, El Universal (6th December 2016), online: <<http://www.eluniversal.com.mx/articulo/nacion/seguridad/2016/12/6/pgr-vamos-por-las-cabezas-de-la-corrupcion>>, accessed 10th May 2018.

<sup>48</sup> Proceso. *Raúl Cervantes renuncia a la PGR* (17th October 2017), online: <<https://www.proceso.com.mx/507612/raul-cervantes-renuncia-a-la-pgr>>, accessed 10th May 2018.

<sup>49</sup> Carlos Heredia Zubieta. *¿Hacia el fin del pacto de impunidad?*, El Universal (5th January 2018), online: <<http://www.eluniversal.com.mx/articulo/carlos-heredia-zubieta/nacion/hacia-el-fin-del-pacto-de-impunidad>>, accessed 28th September 2018.

<sup>50</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 26-7.

<sup>51</sup> *Idem*, at 25-6.

<sup>52</sup> *Idem*, at 66-7.

<sup>53</sup> *Idem*, at 67-8.

kidnapping public interest in the process.<sup>54</sup> This negotiation substitutes public interest with a factious “public interest” that the civil organizations under Institutional Revolution Party’s payroll generate through their massive participations in elections.<sup>55</sup> In other words, if the Institutional Revolution Party wanted the aid of these organizations, it had to ban any policies that go against their interests.

Morales, Campos, Veloz and Dussauge Laguna contend that corruption is one of the main obstacles preventing Mexico from achieving a fully developed democracy.<sup>56</sup> One of the major components of democracy is accountability and it is this feature most clearly impaired by practices of corruption in Mexico. Armstrong's describes accountability as “*the obligation on the part of public officials to report on the use of public resources and answerability for failing to meet stated performance objectives.*”<sup>57</sup> Dunn argues too that all public servants must be accountable to explain and justify their actions to the public, which is

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<sup>54</sup> *Idem*, at 68-9.

<sup>55</sup> “*The Institutional Revolution Party incorporates mainly the lower sectors through such dependent organizations as the Mexican Confederation of Workers (CTM) and the National Confederation of Peasants (CNC) and segments of the middle class through the National Confederation of Popular Organizations (CNOP). Other groups outside the fold of the official party remain subject to corporatist controls stemming from the government. The three chambers of industrialists and commercial interests, [the] National Confederation of Chambers of Industry (CONCAMIN), [the] National Chamber of Industries of Transformation (CANACINTRA), and [the] National Confederation of Chambers of Commerce (CON-CANACO), for example, are functionally specific organizations sanctioned by the state to represent the interests of business in its dealings with the state. Although exercising far greater autonomy than labour or peasant organizations, these organizations nonetheless conform to the dominant corporatist framework of the system by restricting the number of access points to the government.*” See, *Idem*, at 25-6.

<sup>56</sup> “*Generally speaking, Mexico is experiencing an unprecedented political era, supported and guided by the ideals and values of democracy. However, while our political and electoral life is increasingly becoming open and dynamic, Mexicans have not yet been able to establish those democratic values to the daily management of public resources in the three branches of government and the three levels governing the country. We have consolidated electoral democracy, but we have not succeeded in democratizing the exercise of public authority. Today we understand that democratic governments must be clear about their accountability to the society they serve. However, we have not yet managed to articulate a comprehensive, coherent and complete policy for the governors to inform, explain and justify how they use public money, how they make their decisions, how they respond to errors or failures of policies and programs whose design, implementation and day-to-day management they are responsible.*” See, Lourdes Morales, Mariana Campos, Liliana Veloz, Mauricio Iván Dussauge Laguna. *El Programa Especial de Rendición de Cuentas: Propuestas para el Desarrollo de una Política Pública articulada, coherente y completa* (2014) 17:[2014] *Buen Gobierno*, at 110-1.

<sup>57</sup> Elia Armstrong. *Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues* (2005), online: <<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf>>, accessed 7<sup>th</sup> February 2018, at 1.

the last repository of sovereignty in a democracy.<sup>58</sup> In Mexico, things work the other way around: Democracy (or at least the democratic apparatus that exists in the country) is used to cover traces of corruption. Morris explains that Mexican parties instead of acknowledging the systematic problem of a lack of accountability emphasize instead “*the unsavo[u]ry outcome of “a few bad apples.”*” According to Morris, this narrow scope deviates the attention of the system’s flaws, followed by a limited punishment for malfeasance.<sup>59</sup> Another tactic utilized by the Institutional Revolution Party is to hide the lack of accountability by an incoming administration claiming no association with those that preceded. During the change of administrations, the next president explains to all the country that he has nothing to do with the previous one. Until the democratic transition of the 2000s, both presidents (the outgoing and the incoming) belonged to the Institutional Revolution Party,<sup>60</sup> thus, making their statements with respect to a lack of complicity decidedly unreal. According to a study made by *Consulta Mitofsky*, the muscle of the Institutional Revolution Party resides in its uneducated voters.<sup>61</sup> It is simple to see why this kind of messages still domain political life in Mexico.

The abovementioned strategies have well served the Institutional Revolution Party since they held electoral control over the country for more than 70 years. As Morris states in a later work in the 2000s:

*“Rooted in a structural theory linking corruption to the relative balance of state and social forces, I argued that the dominance of a single political party –the [Institutional Revolution Party]- the informal, meta-constitutional powers of the president, the ban on re-election, the weak submissive legislative and judicial branches, the ineffective workings of federalism, and the government’s extensive corporatist and clientelist controls over society crippled the formal mechanisms of accountability and rule of law, fostering instead a pattern of corruption that actually contributed to the regime’s longevity.”<sup>62</sup>*

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<sup>58</sup> Delmer D. Dunn. *Mixing and Nonelected Elected Officials in Democratic Policy Making: Fundamentals of Accountability and Responsibility* in Bernard Manin, Adam Przeworski, Susan Stoke, ed. 12st, *Democracy, Accountability and Representation* (Cambridge, Cambridge University Press 1999) at 298.

<sup>59</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 74-5.

<sup>60</sup> “*Mexican politics revolves around the sexenio, the six-year presidential term. Dynamics of government spending, bureaucratic conduct, and public policy stem largely from this political cycle, as does corruption.*” See, *Idem*, at 75, 83.

<sup>61</sup> Ángeles Cruz Martínez. *Electores con menor nivel educativo, quienes más votaron por Peña Nieto*, La Jornada (8<sup>th</sup> September 2012), online: <<http://www.jornada.com.mx/2012/09/08/politica/007n2pol>>, accessed 28<sup>th</sup> September 2018.

<sup>62</sup> Stephen D. Morris. *Political Corruption in Mexico: The Impact of Democratization*, 1<sup>st</sup> ed. (London, 2009, Lynne Rienner Publishers), at 1-2.

However, much changed with the electoral reforms of 1994<sup>63</sup> and 1996.<sup>64</sup> The Institutional Revolutionary Party lost its majority in the Congress in 1997 and, three years later, it would lose the presidency as well.<sup>65</sup> In addition, it would lose control over Mexico City in 1997.<sup>66</sup>

These shifts raised the demands of accountability, a situation that did not occur before the 1990s. *Presidencialismo* came to an end.<sup>67</sup> However, corruption morphed, and it appeared in President Fox's administration in the form of the *PEMEXgate* and the *Amigos de Fox* scandals.<sup>68</sup> Moreover, with the return-to-power of the Institutional Revolutionary Party in 2012, all the accountability measures implemented by the National Action Party (the opposition party that ousted the Institutional Revolution Party from the presidential chair in 2000) began to falter. The sole survivor of the National Action Party's measures is the Superior Audit of the Federation.<sup>69</sup>

## **CORRUPTION PATTERNS**

### ***MORRIS' CORRUPTION PATTERN***

Accountability is the way that representative governments measure responsiveness.<sup>70</sup> In Mexico, however, corruption goes unmonitored unless the press uncovers it and brings it to the public's attention. According to Morris, the *sexenio* (that is, the six-year presidential term) works with the elected government using the first year to accommodate their elements within the public administration, who have to adapt and familiarize themselves with their new posts and begin to create the policies to be applied in their six-year run (including the anticorruption measures). Said programs would hold the main stage for the following three years, before changing abruptly during the fifth

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<sup>63</sup> The electoral reform of 1994 consisted in the modification of Article 41 of the Mexican Constitution which eliminated the *consejeros magistrados* (magistrate councillors) and inserted the *consejeros ciudadanos* (citizen counsellors) instead. These new counsellors were not designated by the President but by the parliamentary groups of the Chamber of Deputies. See, Pablo Javier Becerra Chávez. *El sistema electoral mexicano: las reformas de 1994*, in Manuel Larrosa, Leonardo Valdés. *Elecciones y partidos políticos en México, 1994*, 1st ed. (Mexico City, 1994, Universidad Autónoma Metropolitana, Unidad Iztapalapa), at 34-5.

<sup>64</sup> This reform introduced the *Tribunal Federal Electoral* (Federal Electoral Court). See, Pablo Javier Becerra Chávez. *La Reforma Electoral de 1996*, in Manuel Larrosa, Ricardo Espinosa. *Elecciones y partidos políticos en México, 1996*, 1st ed. (Mexico City, 1996, Universidad Autónoma Metropolitana, Unidad Iztapalapa), at 40.

<sup>65</sup> Morris, *Political Corruption in Mexico: The Impact of Democratization*, supra note 62, at 2-3.

<sup>66</sup> *Idem*, at 25.

<sup>67</sup> *Idem*, at 2-3.

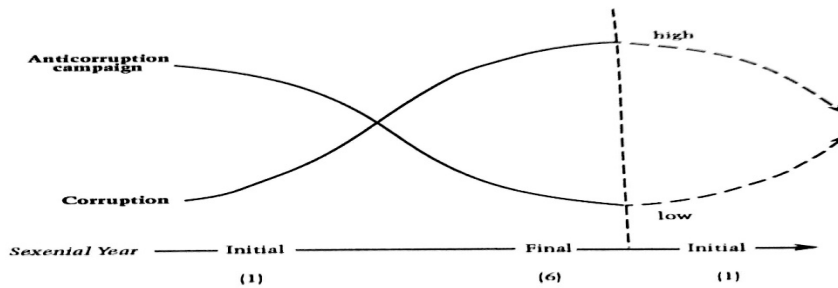
<sup>68</sup> *Idem*, at 29-30.

<sup>69</sup> Manuel Solares Mendiola. *La Auditoría Superior de la Federación: antecedentes y perspectiva jurídica*, 1st ed. (Mexico City, Universidad Nacional Autónoma de México, 2004), at 195.

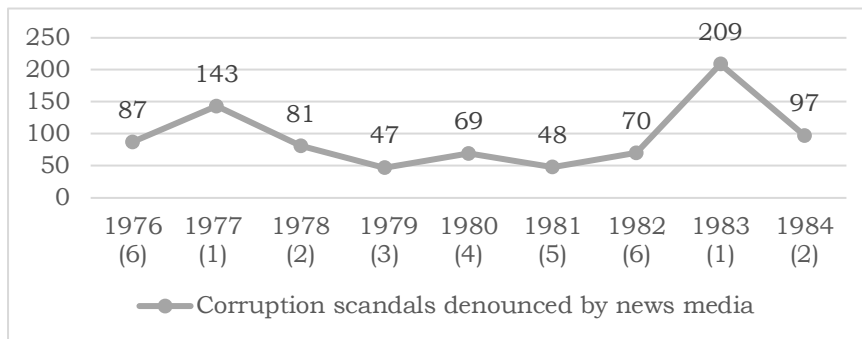
<sup>70</sup> Alexander A. Guerrero. *Against elections: The Lottocratic Alternative* (2014). 42:2 *Philosophy & Public Affairs*, at 137.

year. No new policies are created, but the existing ones receive concerted impetus and increased spending. The vast majority of the time is focused on the coming political transition, which makes public administrators concentrate on increasing their political aspirations. All anticorruption actions plummet in the sixth year. In the Mexican political universe, this is known as the Hidalgo's year. Its motto is "*chin chin el que deje algo*," meaning that the one that leaves money behind is a fool.<sup>71</sup> Morris illustrates the entire anticorruption scheme of the *sexenio* as follows:

72



Through this pattern, the Institutional Revolution Party has lessened the impact of corruption scandals and managed to hold presidential power for more than 70 decades as all inquests are directed towards specific individuals in charge of the corruption acts, not the party itself. This is demonstrated through the following graph of corruption scandals reported by the media collected by Morris:



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This graph illustrates that the Institutional Revolution Party primarily used their first year of each *sexenio* to dissipate all of the accusations made against them before “leaving” the chair for their next imposed president. They

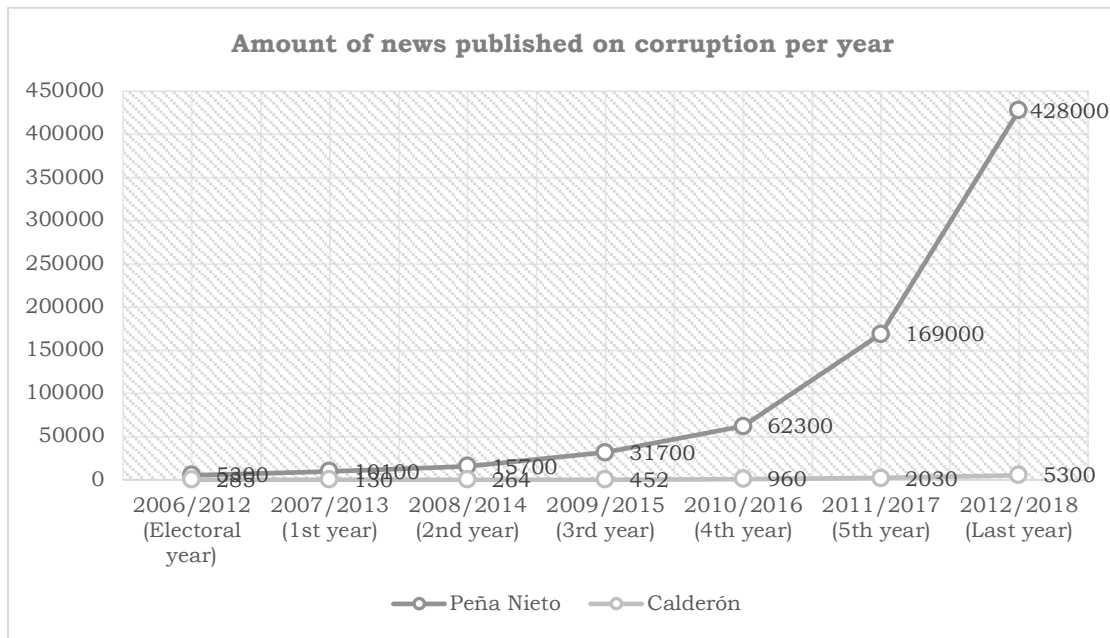
<sup>71</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 83-5.

<sup>72</sup> *Idem*, at 87.

<sup>73</sup> *Idem*, at 90.

were efficient and quick, evidenced by the drop-in news the second year of the *sexenio*.

Did this pattern repeat with the return of the Institutional Revolution Party in 2012? Drawing from Morris’ analysis, I sought news articles dealing corruption topics in Mexico using Google’s search engine. This search was delimited between 2006 and 2011, and 2012 and 2017, which were the years in which president Felipe Calderon and Peña Nieto, respectively, administrated the country. I used the keywords “corrupción” and “México” in that range of time. I obtained the following results:



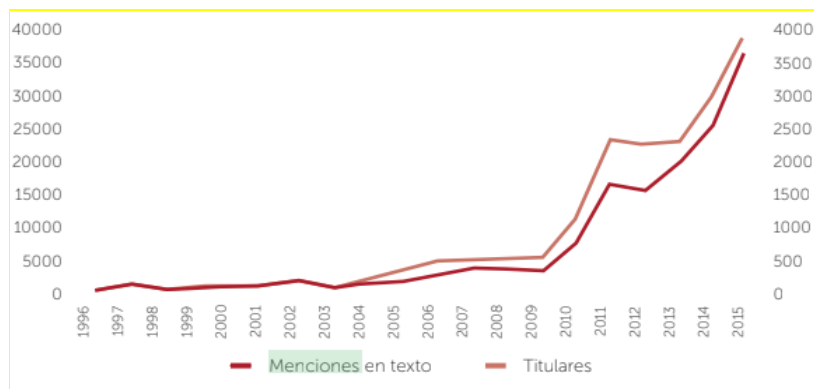
In spite of “a presidential branding juggernaut capable of suppressing investigative articles, directing front pages and intimidating newsrooms that challenge it,”<sup>74</sup> we can see that Peña Nieto’s administration is constantly criticized in the media regarding the reigning corruption in the country. Morris’ identified pattern of corruption has been submerged with a new, enormous scale of corruption. My results here also highlight the essential role of the media as a tool to detect and denounce corruption in Mexico.

**JOURNALISM: CORRUPTION’S WORST ENEMY**

Mexican researcher, Maria Amparo Casar, with data recovered by the organization *Infolatina*, demonstrates that the perception of corruption in the

<sup>74</sup> Azam Ahmed. *Using Billions in Government Cash, Mexico Controls News Media*, The New York Times (25<sup>th</sup> December 2017), online: <<https://goo.gl/tzCWpP>>, accessed 17th May 2018.

media has grown by 5,713% between 1996 and 2015.<sup>75</sup> Casar portrays these data with the following graph, which contains information about the number of occasions in which corruption was the headline of the country's newspapers:<sup>76</sup>



What has caused the skyrocketing of media-reporting of corruption? Aside from the enormous increment of corruption acts during Peña Nieto's administration, former head of the *Comité de Participación Ciudadana* (Citizen Participation Committee) of the National Anticorruption System, Jacqueline Peschard Mariscal, suggests that this is due, in large part, to the rise of investigative journalism in Mexico.<sup>77</sup> The UNESCO defines it as:

*"[U]nveiling of matters that are concealed either deliberately by someone in a position of power, or accidentally, behind a chaotic mass of facts and circumstances - and the analysis and exposure of all relevant facts to the public. In this way investigative journalism crucially contributes to freedom of expression and media development."*<sup>78</sup>

This tool, Peschard's states, revealed the former governors of the states of Veracruz and Quintana Roo, Duarte and Roberto Borge's wrongdoings.<sup>79</sup> These tasks (detecting cases of corruption, investigating who is responsible and those involved, sanctioning and identifying channels of corruption), she adds, should

<sup>75</sup> María Amparo Casar. *México: Anatomía de la Corrupción*, 2nd ed. (Mexico City, Mexicanos Contra la Corrupción y la Impunidad, 2016), at 9.

<sup>76</sup> *Idem*, at 30.

<sup>77</sup> Anabel Clemente. *El periodismo de investigación logra detectar corrupción: Jacqueline Peschard*, *El Financiero* (6th November 2017), online: <<http://www.elfinanciero.com.mx/nacional/el-periodismo-de-investigacion-logra-detectar-corrupcion-jacqueline-peschard>>, accessed 28th August 2017.

<sup>78</sup> United Nations Educational, Scientific and Cultural Organization. *Investigative Journalism* (2012), online: <<https://en.unesco.org/investigative-journalism>>, accessed 22nd June 2018.

<sup>79</sup> "Roberto Borge, who was governor from 2011 to 2016, was arrested in June as he was about to board a plane to Paris. Mr. Borge, 38, will stand trial in Mexico over the sale of state-owned land worth hundreds of millions of dollars. He is one of several Mexican former governors who went on the run after being accused of corruption." See, BBC News. *Mexico fugitive ex-governor Roberto Borge extradited*, online: <<https://www.bbc.com/news/world-latin-america-42564581>>, accessed 22nd June 2018.

be done by the National Anticorruption System.<sup>80</sup> It is also worthwhile reminding the reader that Mexico is the most dangerous country for journalists,<sup>81</sup> and this fact diminishes the chances that more investigative journalists will take the streets in this perilous but necessary labour. Legislative and policy measures are in dire state at the moment, and should be inserted as a priority in the next government's agenda.<sup>82</sup>

As demonstrated in this analysis, journalistic activities are crucial to expose and, later on, sanction corrupt acts made by the Mexican authorities. In a certain way, journalists have replaced the normal institutions of democracy in becoming watchdogs of accountability. However, the media cannot enforce the law and punish those who are in fact guilty of corrupt activities. Maria Amparo Casar debunks the Public Function Secretary's affirmation of strict law enforcement vis-à-vis corruption by showing that, between 2000 and 2013, only in 3.6% of all the cases was the accused punished and, from the 41 governors accused of corruption, only 16 files were open and five were incarcerated.<sup>83</sup>

Journalism is, at the moment, corruption's worst enemy in Mexico. Nonetheless, the battle against the latter (at least in the legal field) does not belong solely in journalists' hands. At this stage, law enforcement should be the next step.

### **LEGAL CORRUPTION ACTS**

Another feature of Mexican corruption is that it often obtains legal validation through conspicuous and biased legislative decisions. Articles denouncing this situation are counted by the dozens, all of them claiming that congresses in Mexico (the federal and the 32 local ones) legislate in favour of some and to the detriment of others. To the surprise of none, lobbying activities that foster this situation are corrupt in themselves and, as Alberto Ricciardi found, political actors use these activities to keep their unregulated status.<sup>84</sup> Thus, public administrators aligned their corrupt acts to the existing laws, thus forestalling

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<sup>80</sup> Clemente, *El periodismo de investigación logra detectar corrupción: Jacqueline Peschard*, supra note 77.

<sup>81</sup> Steven M. Ellis. *Mexico most deadly country for journalists in 2017*, International Press Institute (19<sup>th</sup> December 2017), online: <<https://ipi.media/mexico-most-deadly-country-for-journalists-in-2017/>>, accessed 29<sup>th</sup> June 2018).

<sup>82</sup> At the moment, Mexico's undergoing in a presidential election. Enrique Peña Nieto's government will end the 1<sup>st</sup> of December of 2018. Mexicans choose Andrés Manuel López Obrador as their next president.

<sup>83</sup> Casar, *Anatomía de la Corrupción*, supra note 75, at 67.

<sup>84</sup> Mario Alberto Ricciardi. *Lobbying en México y Argentina: Lo que la transición encontró* (2009), online : <[catarina.udlap.mx/u\\_dl\\_a/tales/documentos/lri/ricciardi\\_ma/capitulo3.pdf](http://catarina.udlap.mx/u_dl_a/tales/documentos/lri/ricciardi_ma/capitulo3.pdf)>, accessed 28<sup>th</sup> September 2018, at 78-104.

any legal accountability for corrupt activities. The Mexican legal framework has a diversity of examples of the matter,<sup>85</sup> the most recent of which can be seen in the Pegasus espionage scandal.<sup>86</sup>

Due to the keenness of representative democracies towards legal positivism<sup>87</sup> and the impact that the word “legality” has in political discourses, the public administration insists that their acts are legitimate as they are legal. This discourse allows them to conduct their corrupt acts legally (but, illegitimately), and away from voter scrutiny. This situation allows the Executive branch’s public administrators to avoid enforcing the legal framework thoroughly. For this to remain viable, public administrators have to conduct their acts with the previous requirement and in total compliance (nay, complicity) with transparency laws. Morris pointed out this situation by arguing that, in Mexico, the separation of powers is meaningless due to the overwhelming presence and the pressure exercised by the Institutional Revolution Party numbers in the legislative bodies.<sup>88</sup>

In conclusion, we can see that Mexican corruption worked under a pre-defined pattern until the current presidential administration. Due to the rise of investigative journalism in the country, the claim that all activities were “legal” stopped being enough to hide corruption activities from public scrutiny. However, the reality is that legislation has been passed by an administration

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<sup>85</sup> One fine example of this is the “secreto fiscal” (fiscal secret). This figure has allowed authorities to condone fiscal credits to certain debtors without disclosing any arguments to legitimate it. See, Issa Luna Pla, Gabriela Ríos Granados. *Transparencia, acceso a la información tributaria y el secreto fiscal. Desafíos en México*, 1st. ed. (Mexico City, National Autonomous University of Mexico, 2010), at 32-41.

<sup>86</sup> “Espionage is not considered an act of corruption, argued the president of the National Institute of Transparency, Access to Information and Protection of Personal Data, Francisco Javier Acuña, a day after the Coordinating Committee of the National Anticorruption System, which is part of the INAI, refuse to ask for explanations about the use of the Pegasus software. Acuña explained during the second ordinary session of the Coordinating Committee of the National Anticorruption System, held on Monday, the warrant was considered inadmissible to request the government information about the alleged espionage suffered by journalists, human rights defenders and activists because that activity is not considered as an act of corruption. The General Law of the National Anticorruption System establishes that the Participation Committee issues the letters rogatory when any act of corruption requires public clarification. In that case, he explained, most of the members of the Coordinating Committee considered that the warrant was inadmissible because the espionage is classified as private communications and not as an act of corruption, for which the competent authority is the Attorney General’s Office of the Republic.” However, the espionage equipment was acquired with public resources and was intended to help law enforcers to localize cartels’ members. By using it to spy on journalists, human rights activists and political rivals, the government of Mexico used a public interest’s asset to their private interests. See, Rafael Montes. “Espionaje no es corrupción”, *INAI explica decisión del SNA*, Milenio (4th July 2017), online: <<https://goo.gl/Rs8A8V>>, accessed 17th May 2018.

<sup>87</sup> Norbert Hoerster. *Legal Positivism Today* (1966), 16:1 Universitas, at 374.

<sup>88</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 27.

that wishes to enable corruption and this largely prevents a thorough application of any anticorruption laws that do exist.

In order to have a thorough anticorruption policy in public procurement activities, the Mexican legal framework has to closely comply with the anticorruption reform enacted in 2015. In other words, the legality and, more importantly, the legitimacy of the public administration's acts need to be legally assessed by authorities independent from them: civil organizations, legislative bodies, etc.

With this said, the following question arises: Exactly which parts of the public procurement legal framework are in need of reform? Before answering this question, we have to define the concept of "government procurement."

### **GOVERNMENT PROCUREMENT**

The United Nations Commission on International Trade Law defines government procurement as "*the acquisition of goods, construction and services by a procuring entity.*" The General Agreement on Tariffs and Trade defines it as "*procurement by governmental agencies of products purchased for governmental purposes and not to commercial resale or intending to use in the production of goods for commercial sale.*"<sup>89</sup> Transparency International defines public procurement as "*the acquisition by a government department or any government-owned institution of goods or services.*"<sup>90</sup> Arrowsmith defines it as "*government's activity of purchasing the goods and services which it needs to carry out its functions,*"<sup>91</sup> which should be conducted in a transparent, competitive manner and at the best price or the most economically advantageous price.<sup>92</sup>

Government procurement has existed since Ancient Rome's times, starting when the city of Pergamum outsourced their tax collection activities to private actors.<sup>93</sup> The procurement sector is, without a doubt, the most important branch of public spending. Government procurement represents

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<sup>89</sup> Gary C. Hufbauer, Ricardo Meléndez Ortiz, Richard Samans. *The Law and Economics of a Sustainable Energy Trade Agreement*, 1<sup>st</sup> Ed. (Cambridge, Cambridge University Press, 2016), at 197.

<sup>90</sup> Susanne Kühn, Laura B. Sherman. *Curbing Corruption in Public Procurement: A Practical Guide* (2014), online: <[https://www.acec.ca/source/2014/november/pdf/2014\\_Anticorruption\\_PublicProcurement\\_Guide\\_EN.pdf](https://www.acec.ca/source/2014/november/pdf/2014_Anticorruption_PublicProcurement_Guide_EN.pdf)>, accessed 26<sup>th</sup> January 2018, at 4.

<sup>91</sup> Sue Arrowsmith. *Public Procurement: Basic concepts and the coverage or procurement rules*, in Sue Arrowsmith, Steen Treumer, Jens Fejø, Lili Jiang, *Public Procurement Regulation: An Introduction*, 1<sup>st</sup> Ed. (Nottingham, Asia Link Europe Aid Co-Operation Office, 2010), at 1.

<sup>92</sup> Sue Arrowsmith. *The Law of Public and Utilities Procurement*, 2<sup>nd</sup> ed. (London, Sweet & Maxwell, 2005)

<sup>93</sup> Paul Emanuelli. *Government Procurement*, 4<sup>th</sup> ed. (Markham, LexisNexis, 2017), at 2-3.

13.18% of the Organization for Economic Co-operation and Development's (OECD) countries GDP, and an average of 30.26% of total governmental expenditures. Mexico and Canada, countries which procurement systems the author choose to compare, spent 5.15% and 13.44%, respectively.<sup>94</sup>

The OECD considers public procurement as the government activity most vulnerable to corruption.<sup>95</sup> An OECD survey of international firm found that bribery was much more pervasive in the procurement than it was in utilities, taxation, and the judiciary.<sup>96</sup>

The general structure of the procurement process is pre-bidding, bidding, and post-bidding.<sup>97</sup> The OECD identified the most common critical risks inside every stage of the public procurement process. The pre-bidding risks are:

- *“The lack of adequate needs assessment, planning and budgeting of public procurement;*
- *Requirements that are not adequately or objectively defined;*
- *An inadequate or irregular choice of the procedure; and*
- *A timeframe for the preparation of the bid that is insufficient or not consistently applied across bidders.”<sup>98</sup>*

In the bidding process, the risks are:

- *“Inconsistent access to information for bidders in the invitation to bid;*
- *Lack of competition or in some cases collusive bidding resulting in inadequate prices;*
- *Conflict-of-interest situations that lead to bias and corruption in the evaluation and in the approval process;*
- *Lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a procurement decision.”<sup>99</sup>*

Lastly, these are the post-bidding process' risks:

- *“The insufficient monitoring of the contractor;*

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<sup>94</sup> Organization for Economic Co-operation and Development. *Government at a Glance - 2017 edition: Public procurement* (2017), online: <<http://stats.oecd.org/Index.aspx?QueryId=78413>>, accessed 19<sup>th</sup> May 2018.

<sup>95</sup> Organization for Economic Co-operation and Development. *Integrity in Public Procurement. Good practice from A to Z*, 1<sup>st</sup> ed. (Paris, OECD Publishing, 2007), at 3.

<sup>96</sup> *Idem*, at 9.

<sup>97</sup> *Idem*, at 21-7.

<sup>98</sup> *“...in particular lack of supervision over the quality and timing of the process that results in: a) Substantial change in contract conditions to allow more time and higher prices for the bidder; b) Product substitution or sub-standard work or service not meeting contract specifications; c) Theft of new assets before delivery to end-user or before being recorded in the asset register; Subcontractors and partners are chosen in a non-transparent way, or not kept accountable.”* See, *Ibid*, at 21.

<sup>99</sup> *Ibid*, at 24

- *The non-transparent choice or lack of accountability of subcontractors and partners;*
- *Lack of supervision of public officials;*
- *The deficient separation of financial duties, especially for the payment.*<sup>100</sup>

What are the legal conditions that generate these risks within the Mexican public procurement system? The next chapter looks at this in detail.

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<sup>100</sup> *Ibid*, at 25

## **CHAPTER II: THE LEGAL FRAMEWORK FOR GOVERNMENT PROCUREMENT**

This section will outline the laws governing public procurement in both Mexico and Canada. The objective is to find the differences between the two legal frameworks, and the reasons behind the transparency and stability of the Canadian approach to regulating procurement procedures. Specifically, for the Mexican legal framework, I will assess what causes the risks detected by the OECD in its study.

### **THE LEGAL FRAMEWORK IN MEXICO**

The two laws governing government procurement in Mexico are the *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (Acquisitions, Leases and Services of the Public Sector Act) and the *Ley de Obras Públicas y Servicios Relacionados con las Mismas* (Public Works and Related Services Act). In addition to these two statutes, the following laws complement the procurement framework:

- Article 134 of the *Constitución Política de los Estados Unidos Mexicanos* (Mexican Constitution);<sup>101</sup>
- *Reglamento de la Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público* (Bylaw of the Law of Acquisitions, Leases and Services of the Public Sector);
- *Reglamento de la Ley de Obras Públicas y Servicios Relacionados con las Mismas* (Bylaw of the Law of Public Works and Services Related to them);
- *Ley General de Transparencia y Acceso a la Información Pública* (General Law on Transparency and Access to Public Information); and
- Administrative agreements, guidelines and other documents.<sup>102</sup>

The analysis will be limited to the use of the alternative procurement methods known as “*Invitación a cuando menos tres personas*,” and “*Adjudicación Directa*,” and to their awarding processes.

### **ARTICLE 134 OF THE MEXICAN CONSTITUTION**

Article 134 of the Mexican Constitution establishes the principles by which Mexican authorities have (in theory) to engage in procurement contracts. These principles are economy, effectiveness, efficiency, impartiality and honesty.<sup>103</sup> The principle of *economy* means that the use of public economic resources

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<sup>101</sup> *Constitución Política de los Estados Unidos Mexicanos*. Article 134, at 141-2. [CPEUM]

<sup>102</sup> The Public Function Secretary has 42 legal documents to regulate their activities. See, Public Function Secretary. *Normatividad* (Mexico City, Public Function Secretary, 2017), online: <<https://www.gob.mx/sfp/documentos/normatividad-21935>>, accessed 25<sup>th</sup> May 2018.

<sup>103</sup> CPEUM, Art. 134, at 141.

must occur rationally, methodically, be planned, and reduce waste.<sup>104</sup> Jinesta states that, to meet the criteria of *effectiveness* and *efficiency*, “public administrations assume that they must be able to meet their goals and objectives, in the best way possible or with effective results, which means an adequate management of the organization, the means and its functions.”<sup>105</sup> With respect of the principle of *transparency*, Zak argues that:

*“It implies that the action of [public administrators] is glass-clear. It constitutes an extension of the principle of publicity, which assumes an active position on the [public administrators]; while transparency focuses on allowing the public power and its actions to be seen by all, without veils or secrets, in a situation that is both passive and active, allowing to see and to show.”*<sup>106</sup>

Finally, the principle of *honesty* refers to the fact that the public servant should not use his public office to obtain any advantage or personal advantage or in favour of third parties. Neither shall they seek or accept compensations or benefits from any person or organization that may compromise their performance as public servants.<sup>107</sup>

The second and third paragraphs of Article 134 are the legal basis that creates the Superior Audit of the Federation and the Public Function Secretary. Moreover, it elevates the “*Licitación Pública*” to a constitutional level, establishing it as the default procurement method in Mexico.<sup>108</sup> The latter paragraph, however, gives the same rank to the “*Invitación a cuando menos tres personas*” and the “*Adjudicación directa*.”<sup>109</sup> The third and fourth paragraphs are the constitutional foundations of the Second Title of the two laws conforming the public procurement legal framework.<sup>110</sup>

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<sup>104</sup> Miguel Pérez López. *Gasto público, fiscalización y administración de recursos económicos públicos* (2010) 22:[2010] Cuestiones Constitucionales Revista Mexicana de Derecho Constitucional, at 216.

<sup>105</sup> Ernesto Jinesta. *Los principios constitucionales de eficacia, eficiencia y rendición de cuentas de las Administraciones Públicas* (2009), online: <<https://goo.gl/Y5scDn>>, accessed at 18th May 2018, at 3-4.

<sup>106</sup> Pablo Zak. *El Principio de Transparencia en la Administración Pública* (2009), online: <<http://www.zak-icg.com/admin/material/archarchivo2.pdf>>, accessed 31th May 2018, at 1.

<sup>107</sup> César de Jesús Molina Suárez. *Derechos y Deberes del Personal al Servicio de la Administración* (2008), online: <<https://goo.gl/5hJ6Jk>>, accessed 31th May 2018, at 2.

<sup>108</sup> CPEUM, Article 134, second and third paragraphs, at 141.

<sup>109</sup> “When the bids referred to in the previous paragraph are not suitable to ensure these conditions, the laws shall establish the bases, procedures, rules, requirements and other elements to accredit the economy, effectiveness, efficiency, impartiality and honesty that ensure the best conditions for the state.” See, CPEUM, Article 134, fourth paragraph, at 141.

<sup>110</sup> Arturo García Cortés. *El Comité de Adquisiciones, Arrendamientos y Servicios de la Comisión Nacional del Agua durante 2010* (2010). Faculty of Political and Social Sciences of the National Autonomous University of Mexico. Thesis to obtain the degree of Bachelor of Political Sciences and Public Administration, online:

## ACQUISITIONS AND PUBLIC WORKS LAWS AND THEIR BYLAWS

In Mexico, article 26 of the Acquisition Law establishes the following three supply selection procedures: 1) *Licitación Pública* (Public bidding); 2) *Invitación a cuando menos tres personas* (Invitation to at least three people); or 3) *Adjudicación Directa* (Direct Award).<sup>111</sup> Article 27 of the Public Works Law establishes the same procurement processes.<sup>112</sup>

“*Licitación Pública*” is the default procedure that the public administration must use to select its contractors, except in certain specified situations discussed below.<sup>113</sup> The Public Function Secretary publishes the calls for public biddings in *CompraNet* and the *Diario Oficial de la Federación* (Official Gazette of the Federation),<sup>114</sup> complying with all the requirements described in article 29 and 31 of the Acquisitions and Public Works Acts, respectively.<sup>115</sup> Effectively, this method consists of an invitation addressed to all possible interested parties so that, subjected to the established bidding bases, they present their offers for consideration.<sup>116</sup> The details of this procurement mode are in the Second Title “*De la Licitación Pública*” of both laws.<sup>117</sup> Once all the proposals are evaluated, the procurement unit will award the contract to the contractor that:

1. Obtained the best result out of the evaluation;
2. Offered the lowest price, as long as it results convenient; and
3. Offered the lowest price that results from the use of the modality of subsequent offers of discounts, as long as the proposal is technically and economically solvent.<sup>118</sup>

As the reader may perceive, the writing of Article 36 Bis leaves a wide margin for discretion. What is the limit that procurement units should respect

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<<http://132.248.9.195/ptd2013/noviembre/0704396/0704396.pdf>>, accessed 26<sup>th</sup> August 2017, at 37.

<sup>111</sup> *Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*. Article 26, at 12. **[LAASSP]**

<sup>112</sup> *Ley de Obras Públicas y Servicios Relacionados con las Mismas*. Article 27, at 13. **[LOPSRM]**

<sup>113</sup> LAASSP, Article 26, at 12. LOPSRM, Article 27, at 12.

<sup>114</sup> LAASSP, Article 30, at 19. LOPSRM, Article 32, at 19.

<sup>115</sup> LAASSP, Article 29, at 17-9. LOPSRM, Article 31, 16-9.

<sup>116</sup> Rogelio Barreto Arellano, Karla Samantha Casique Domínguez, José Enrique Longoria Sánchez, Paloma Nambo Del Río, Liliana Parada Ríos. *Manual de Solicitud, Cotización y Compra de Materiales No Productivos, Cosdelva, S.A. de C.V.* (2010). Higher School of Commerce and Administration "Santo Tomás" of the National Polytechnic Institute. Thesis to obtain the degree of CPA and Bachelor of Commercial Relations, online: <<http://tesis.ipn.mx/jspui/bitstream/123456789/7393/1/CP2010%20B337r.pdf>>, accessed 28<sup>th</sup> August 2017, at VI.

<sup>117</sup> LAASSP, Second Title, at 12-29. LOPSRM, Second Title, at 12-29.

<sup>118</sup> LAASSP, 36 Bis, at 22.

when defining what prices are convenient? What is worse, both bylaws of these laws establish that, if any of the previous cases established by the law do not work, the awarding would be done by sortition (i.e., by lottery).<sup>119</sup> Given the fact that discretion is discussed in Chapter III of this thesis, I will not go into great detail here about its role in government procurement. However, the reader must note that the majority of the legal aspects here allow considerable room for discretionary powers.

In limited cases stated in article 40/41 of the Acquisition/Public Works Act, the “*Licitación Pública*” can be skipped to use the alternative procurement methods known as “*Invitación a cuando menos tres personas*” and “*Adjudicación Directa.*”<sup>120</sup> The use of an alternative procurement method made by the agencies and entities should be justified, according to the circumstances that concur in each case, on the criteria of economy, effectiveness, efficiency, impartiality, honesty and transparency that are appropriate to obtain the best conditions for the State. The accreditation of the constitutional founding criteria on which the justification of the reasons on which the alternative procurement method is used must be in paper and signed by the area manager (or the head of department) of goods and services of the procuring public institution.<sup>121</sup>

There are two interesting aspects in the previous paragraphs. The first comes in the form of the constitutional criteria inserted in Article 134 of the Mexican Constitution. As the reader saw, these principles are in both public procurement laws. However, there is a second characteristic that interest us the most: the enforcement and the accreditation of the criteria. Since this section aims at describing the main legal aspects of the procurement system, I will skip this obvious flaw, which will be detailed in the following chapter. For the time being, I will only point out the existence of this requirement within the text of the Mexican public procurement legal framework.

Under the “*Invitación a cuando menos tres personas*” method, the contracting body discretionally selects three possible suppliers. With a simplified method similar to that of the public tender, these companies present bids to the procurement unit of the convening institution. Regulated by articles 43 and 44 of the Acquisition and the Public Works Acts, these procurement processes can be transformed into an “*Adjudicación Directa.*” Section III and the last paragraph of those articles establish that if the minimum of three

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<sup>119</sup> *Reglamento de la Ley de la Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*. Article 54, at 24. [RLAASSP]

<sup>120</sup> LAASSP, Article 41, at 25-7; LOPSRM, Article 42, 26-7.

<sup>121</sup> LAASSP, Article 40, second paragraph, at 25; LOPSRM, Article 41, second paragraph, at 25.

possible suppliers is not met, but a company did present a bid, the procurement unit can award the contract to said bidder directly.<sup>122</sup>

Neither the Acquisitions nor the Public Works Acts contains a definition of “*Adjudicación Directa*.” According to the Public Function Secretary, it is a procedure that omits the competition principle, and awards the contract to a supplier previously shortlisted by the agency or entity.<sup>123</sup> As with the “*Invitación a cuando menos tres personas*,” the procurement units select, per their discretionary powers, the company to be awarded the public contract. This is the most used procurement process in the country, as we can see in the following graphic:<sup>124</sup>



Whether the procurement is done under “*Licitación Pública*,” “*Invitación a cuando menos tres personas*,” or “*Adjudicación Directa*,” the procurement unit in charge has to develop a market research study.<sup>125</sup> This research verifies if there is an offer/existence of goods and services in the quantity and quality required, if there are suppliers with the capacity to fulfill the hiring needs, and the prices prevailing in the market.<sup>126</sup> This information is extracted from

<sup>122</sup> LAASSP. Article 43, at 28-29. LOPSRM. Article 44, 28-9.

<sup>123</sup> Public Function Secretary. *1.3.3 Direct award (LOPSRM and LAASSP)* (Mexico City, Public Function Secretary, 2017), online: <<https://goo.gl/YGhb94>>, accessed 21<sup>st</sup> August 2017.

<sup>124</sup> CompraNet. *Contratos 2017* (Mexico City, Public Function Secretary, 2017), online: <<https://upcp.funcionpublica.gob.mx/descargas/Contratos2017.zip>>, accessed 10<sup>th</sup> April 2018.

<sup>125</sup> “The market research from the point of view of the State as a consumer, could be conceptualized as the set of measures that a dependency or entity carries out to know the prevailing conditions in a certain sector of goods and services -including public works-, same that determine the characteristics relative to the offer of the same.” See, Manyora Danaé Dorantes Fonseca. *2.4.1.2 Investigación de mercado* (Mexico City, Public Function Secretary, 2017), online:

<[https://www.gob.mx/cms/uploads/attachment/file/199502/2\\_INVESTIGACION\\_DE\\_MERCADO.pdf](https://www.gob.mx/cms/uploads/attachment/file/199502/2_INVESTIGACION_DE_MERCADO.pdf)>, accessed 29 May 2018, at 6.

<sup>126</sup> RLAASSP, Article 41, fourth paragraph, section II, at 5.

*CompraNet*, market actors and the internet.<sup>127</sup> For the case of an “*Adjudicación Directa*,” the market research may be accredited with at least three quotes obtained within thirty calendar days before contracting.<sup>128</sup> The law does not specify where or how these quotes should be extracted. Based on the results of this market research, the entities have to determine which procurement method to select.<sup>129</sup>

The contracting body has to submit a document with the following data to validate the use of any of the alternative procurement methods:

*I. The description of the goods or services subject to the contracting procedure, the specifications or technical data, as well any other information considered relevant by the requesting Area or the Technical Area that explains the purpose and scope of the contracting;*

*II. The terms and conditions of delivery of goods or provision of services;*

*III. The result of the market research;*

*IV. The proposed contracting procedure, stating the exception clause that results applicable to carry out the *Invitación a cuando menos tres personas* or the *Adjudicación Directa*, clearly describing the reasons that gives justification to it;*

*V. The estimated amount of the contract, and proposed form of payment;*

*VI. In the case of an *Adjudicación Directa*, the name of the proposed supplier and its general information, or in the case of invitation procedures to at least three persons based on the assumptions referred to in the fifth paragraph of Article 40 of the Law, the names and general information of the people who will be invited;*

*VII. The accreditation of the criteria referred to in the second paragraph of article 40 of the Law, on which the selection of the exception procedure is based and justified, according to the circumstances that apply in each case, and*

*VIII. The place and date of issuance.”<sup>130</sup>*

This document has to be submitted to the public servant empowered to rule on the validity of the use of an alternative procurement method.<sup>131</sup> In theory and due to its role as the highest authority on government procurement in Mexico, the Public Function Secretary is the one in charge of this process. However, the law does not stipulate anything in this regard, meaning that the only authority capable of commanding the procurement units does not have a

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<sup>127</sup> RLAASSP, Article 28, at 10. *Reglamento de la Ley de Obras Públicas y Servicios Relacionados con las Mismas*. Article 15, second paragraph, at 7-8. **[RLOPSRM]**

<sup>128</sup> LAASSP, Article 42, last paragraph, at 28. RLAASSP, Article 30, last paragraph, at 11.

<sup>129</sup> RLAASSP, Article 13, second paragraph, section II, at 4.

<sup>130</sup> RLAASSP, Article 71, at 31.

<sup>131</sup> *Ibid.*

specific power to act if the market research presents irregularities. Therefore, the validation of the legality of this submission (thus, that of the alternative procurement method) depends on the procurement unit itself. This, although not explicitly spelt out in the Acquisitions or the Public Works Acts, means that the procurement units have large discretionary powers *vis-à-vis* the awarding of contracts.

Continuing with the relevant aspects of the public procurement framework, note that both laws establish methods to challenge procurement decisions.<sup>132</sup> However, it is the Public Function Secretary (answering to the Executive Branch) who settles the controversies raised during the procurement process.<sup>133</sup> If the Public Function Secretary's decision does not satisfy the supplier, the company can complain before the *Tribunal Federal de Justicia Administrativa* (Federal Court of Administrative Justice), as established in article 2 of the *Ley Federal de Procedimiento Contencioso Administrativo* (Federal Law on Administrative Litigation).<sup>134</sup> Given that this tribunal legally belongs to the Executive branch<sup>135</sup> and still depends financially and politically to it,<sup>136</sup> this second instance of legal defence provides little by way independent accountability.

## **GENERAL LAW ON TRANSPARENCY AND ACCESS TO PUBLIC INFORMATION**

Article 70 obliges procurement units to provide “*information on the results on Adjudicación Directa procedures, Invitación [a cuando menos tres personas]<sup>137</sup> and Licitación Pública of any nature, including the Public Version of the respective File and the contracts entered into.*”<sup>138</sup> The documents issued by the procurement units regarding *Adjudicación Directa* processes and the other two procurement methods should include information such as the names of the participants, budgeting tools, financial and physical progresses, quotes, etc.<sup>139</sup>

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<sup>132</sup> LAASSP, Sixth Title, at 41-50; LOPSRM. Seventh Title, at 48-57.

<sup>133</sup> LAASSP, Article 65, at 42; LOPSRM, Article 83, at 49.

<sup>134</sup> *Ley Federal de Procedimiento Contencioso Administrativo*. Article 2, at 3. **[LFPCA]**

<sup>135</sup> Omar Losson Ramos. *Capítulo 4: Tribunal Federal de Justicia Fiscal y Administrativa*, in *La Naturaleza Jurídica de los Tribunales Administrativos del Poder Ejecutivo en México*. Thesis to obtain the Bachelor's Degree in Law with a specialization on Tax Law, University of The Americas of Puebla, online: <<https://goo.gl/qg1z4J>>, accessed 7<sup>th</sup> November 2017, at 2.

<sup>136</sup> This law establishes that the tribunal will depend on the resources assigned by the Executive branch. Moreover, the statute gives power to the President to appoint candidates to be judges of the Superior Hall of this court. *Ley Orgánica del Tribunal Federal de Justicia Administrativa*. Articles 16, section II, and 43, third paragraph, at 8, 24.

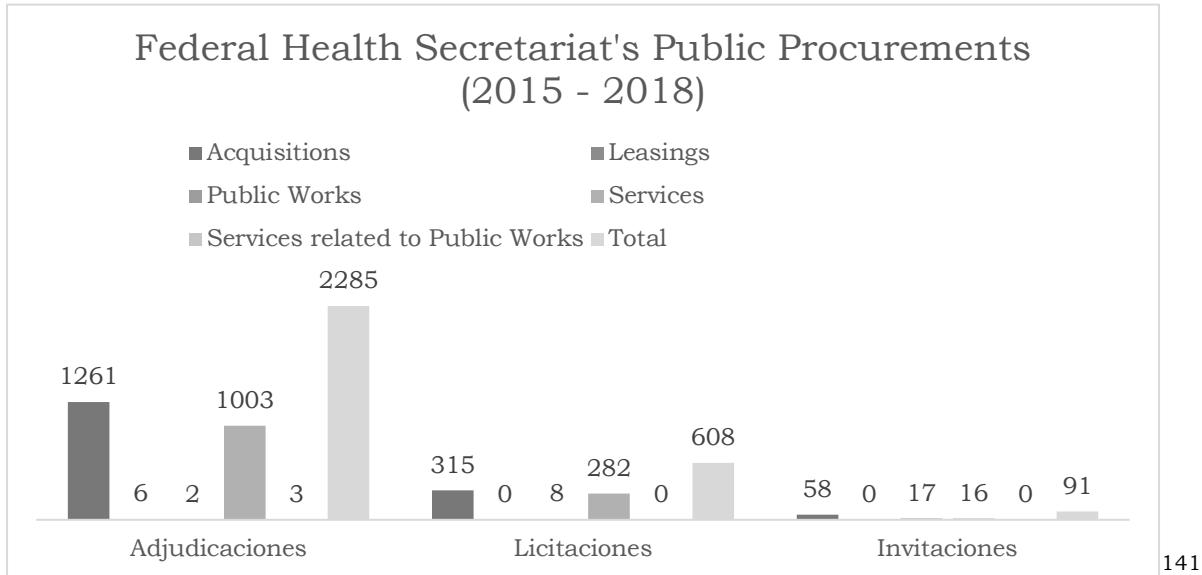
<sup>137</sup> “*Invitación restringida*” is a synonym of “*Invitación a cuando menos tres personas.*”

<sup>138</sup> *Ley General de Transparencia y Acceso a la Información Pública*. Article 70, XXVIII, at 24-5.

**[LGTAIP]**

<sup>139</sup> *Idem*, letters a) and b), at 24-5.

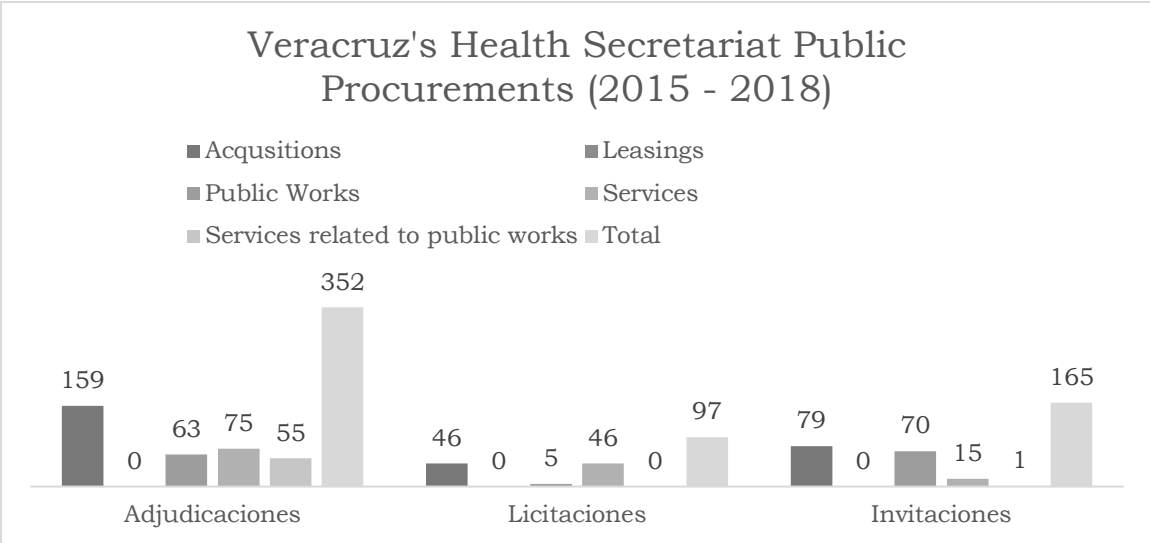
The information should be available in the *Portal Nacional de Transparencia* (National Transparency Platform), specifically, in the *Sistema de Portales de Obligaciones de Transparencia* (Transparency Obligations Portals System).<sup>140</sup> Using this portal to obtain information regarding procurements made by the Federal Health Secretariat, I obtained the following results. They are divided in three categories, each representing one of the three procurement methods existing in Mexico. Each of the bars shows which item category or service did the Health Secretariat acquired:



The platform includes information regarding the procurements made at the local level as well. Here is a graphic with the procurements carried out by the Veracruz's Health Secretariat:

<sup>140</sup> National Institute of Transparency, Access to Information and Protection of Personal Data. *Consulta por Sujeto Obligado* (Mexico City, National Institute of Transparency, Access to Information and Protection of Personal Data, 2018), online: <<http://consultapublicamx.inai.org.mx:8080/vut-web/>>, accessed 30<sup>th</sup> May 2018.

<sup>141</sup> *Ibid.*



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Through the analysis of this data, I noticed two things:

- The added amounts of the contracts awarded per item does not match the total amount shown by the Transparency Obligations Portals System.
- All of the contracts violate the last paragraph of Article 42 of the Acquisitions Act, since the procurement units in charge of them only presented one quote to accredit their market research.

This system is an important tool that guarantees a certain degree of transparency. However, the illegalities revealed appear not to be enough to cancel the procurement processes. In fact, the First Regional Metropolitan Chamber of the Federal Court of Administrative Justice has established that, even if a different authority than the procurement unit of a specific institution starts a procurement process, the authorities are not necessarily obliged to collect the quotes required by Article 42.<sup>143</sup> To this day, the Mexican Supreme Court (the maximum judicial body in the country, in charge of validating the constitutionality of the acts of authority) has not pronounced its position regarding this topic.<sup>144</sup>

<sup>142</sup> *Ibid.*

<sup>143</sup> This is contained in the decision of the trial 5639-17-17-01-4. See, Federal Court of Administrative Justice. *Consulta de Sentencias Públicas* (Mexico City, Federal Court of Administrative Justice, 2018), online: <[http://www.tfja.gob.mx/servicios/consulta\\_sentencia/](http://www.tfja.gob.mx/servicios/consulta_sentencia/)> accessed October 23<sup>rd</sup> 2018, at 23-4, 33.

<sup>144</sup> Supreme Court of Justice of the Nation. *Consulta "Investigación de Mercado" "cotizaciones"* (Mexico City, Supreme Court of Justice of the Nation, 2018), online: <https://sjf.scjn.gob.mx/sifsist/Paginas/ResultadosV2.aspx?Epoca=1e3e1fdfd8fcfd&Apendice=1000000000000&Expresion=%22investigaci3n%20de%20mercado%22%20%22cotizaciones%22&Dominio=Rubro,Texto&TATJ=2&Orden=1&Clase=TesisBL&bc=Jurisprudencia.Resultados&T>

Therefore, the General Law on Transparency and Access to Public Information falls short because, regardless of obliging procurement units to make public all the information relative to the awards of the processes, there are no consequences if this information unveils any sort of illegalities committed during the process. This is due to how the law is drafted. As we can see, Article 70 of the statute requires the authorities to publish the results of the procurement processes.<sup>145</sup> In fact, in the case of the *Adjudicacion Directa*, the law uses the phrase “the quotes considered,”<sup>146</sup> not specifying on the number required to comply with this section. The authority could interpret this as a *carte blanche* to avoid acquiring the three quotes required by the Acquisitions Act. However, in my opinion, the fact that the phrase is written in plural still makes the information published in the transparency system to be incomplete, thus, illegal.

## **CONCLUSION**

As we can see, the Mexican procurement system’s legal framework leaves a wide margin of interpretation to the procurement units regarding the information used to award their contracts. Moreover, and as I will point out while discussing the Canadian procurement system’s characteristics, the Mexican framework does not use the requirements established in international treaties.

I turn now to briefly describe the most relevant aspects of the Canadian government procurement system and will assess how Canada’s government deals with transparency and international trade treaties, and how it binds its procurement requirements to those standards and, as a consequence, attains cleaner non-corrupt outcomes.

## **CANADA**

The Canadian Government has three levels: Federal, Provincial, and Municipal. Given the complexity at each level, this thesis will limit itself to discuss federal public procurement. The Canadian public procurement divides into three categories: a) Federal government procurement; b) Provincial government procurement; and c) Municipalities, Academic institutions, Schools and Hospitals sector procurement.<sup>147</sup> The objective in this section is to briefly describe the pillars in which Canada constructed their public procurement

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<sup>145</sup> LGTAIP, Article 70, Section XXVIII, letters a) and b), at 24-5.

<sup>146</sup> *Idem*, section XVIII, letter b), number 4, at 25.

<sup>147</sup> Robert C. Worthington. *Desktop guide to Procurement Law*, 1<sup>st</sup> ed. (Markham, LexisNexis Canada, 2013), at 502.

system. Moreover, the Municipalities, Academic institutions, Schools and Hospitals sector procurement will be studied due to its relevancy in health procurement.

### **GENERALITIES**

Before going into the specifics of each level, I would like to describe the principles on which Canadians ground their public procurement system.

According to Canadian author Paul Emanuelli, the Canadian public procurement aims at three main objectives: value-for-money, transparency, and trade liberalization.<sup>148</sup> In order to attain them, governments of all levels in Canada opted to harness competition through an open tendering process, committing to do the same with their trading partners through the enactment of trade treaties.<sup>149</sup> Emanuelli argues that these concepts have the characteristic of being implied rules, since they may not be expressly referred within the tender call's text.<sup>150</sup> However, as I will demonstrate, the different legislations that conform the federal public procurement legal framework also incorporate these objectives, literally stating certain legal thresholds that suppliers have to abide.

The principles abovementioned (specially, trade liberalization) gives prevalence to trade treaties as the main source of law within the Canadian Federal public procurement sector.<sup>151</sup> Moreover, the Treasury Board, (body in charge of the accountability of the disbursements made by the Canadian federal government), in its contracting policy, establishes that all the procurements shall be made according to the text of said treaties.<sup>152</sup> The most significant are NAFTA (North American Free Trade Agreement) and the World Trade Organization's Agreement on Government Procurement (WTO-AGP), entered into force in 1994 and 1996, respectively.<sup>153</sup> Both of these treaties have different reaches since NAFTA is not binding for provincial/territorial nor Municipalities, Academic institutions, Schools and Hospitals procurements.<sup>154</sup> However, there is a treaty ruling those procurements as well: the Canadian Free Trade Agreement.<sup>155</sup>

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<sup>148</sup> Emanuelli, *Government Procurement*, supra note 93, at 6.

<sup>149</sup> *Ibid.*, at 6.

<sup>150</sup> *Idem.*, at 7.

<sup>151</sup> Worthington, *Desktop guide to Procurement Law*, supra note 147, at 552-3.

<sup>152</sup> Treasury Board's Contracting Policy. Section 2(d).

<sup>153</sup> Worthington, *Desktop guide to Procurement Law*, supra note 147, at 553.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Idem.*, at 510.

Worthington -another Canadian government procurement expert- states that, regardless of the level of government, competitive bids are the most important pillar within the country's procurement system. This is due to Canada's signing various international and internal trade agreements.<sup>156</sup> This forces all levels of government to undertake the procurement process under an open competition. However, since the provinces and the Federal government are signatories of different treaties (which, of course, comprehend different obligations), certain services, goods and public works are susceptible to different levels of enforcement as well. An example of this is the Municipalities, Academic institutions, Schools and Hospitals sector procurements, bounded by the Canadian Free Trade Agreement, but not by NAFTA nor the WTO-AGP.<sup>157</sup> Under this competitive setting, sellers have rare chances to contribute to the scope of work that will regulate their relationship with the government, and practically zero chances to negotiate with them.<sup>158</sup> Thus, unlike the Mexican procurement system, sole source contracting (see, *Adjudicacion Directa*) are rarely exercised by Canadian governments and, if they are, they are conducted under very restrictive parameters.<sup>159</sup>

How does this competition scope affect the health sector's public procurement? The Canadian Centre for Policy Alternatives Consortium on Globalization and Health states that policies relating to healthcare and to trade liberalization are independent, and their intertwining should not permit distortion to each other's objectives.<sup>160</sup> This Centre's report states that the impact of both NAFTA and the WTO-AGP on health procurement is minimal.<sup>161</sup> As the reader saw in the paragraph above, both of these treaties are not binding to Municipalities, Academic institutions, Schools and Hospitals procurements. Moreover, the Canadian Free Trade Agreement does not pay special focus on the competition of these procurements either; as we can see in Article 312.<sup>162</sup> As Grieshaber-Otto and Sinclair pointed out, the health sector has resorted to public-private-partnerships (or P3s) to acquire services, goods or public works. However, these writers point out that these schemes are

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<sup>156</sup> *Idem*, at 511.

<sup>157</sup> *Idem*, at 512.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Idem*, at 513.

<sup>160</sup> Canadian Centre for Policy Alternatives Consortium on Globalization and Health. *Putting Health First: Canadian Health Care Reform, Trade Treaties and Foreign Policy* (Ottawa, Commission on the Future of Health Care in Canada, 2002), online: <[https://www.policyalternatives.ca/sites/default/files/uploads/publications/National\\_Office\\_Pubs/putting\\_health\\_first.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/putting_health_first.pdf)>, accessed 23<sup>rd</sup> October 2018, at 47.

<sup>161</sup> *Idem*, at ix, 12, 34, 42, 44, 49.

<sup>162</sup> *Canadian Free Trade Agreement*. Article 312, Section 2, letter (c), at 16-7.

deemed as investments and services rather than procurements by NAFTA and the WTO-AGP.<sup>163</sup>

Altogether, it is important to analyze these treaties to describe how Canada uses them to attain value-for-money, transparency, and trade liberalization.

## **NAFTA**

This agreement came into effect in January of 1994. According to Worthington, this is the most important international trade agreement in the Canadian public procurement field.<sup>164</sup>

Chapter 10 of this treaty deals with government procurement. Public Services and Procurement Canada's Supply Manual states that NAFTA:

*"[F]ocuses on achieving greater competition for, and transparency in, government procurement, eliminating the protection of domestic products or suppliers or discrimination among foreign products or suppliers. The "National Treatment" clause and the "Non-discrimination" clause are similar as those found in the WTO-AGP."*<sup>165</sup>

The provisions of NAFTA were brought to legal life in Canada with the enactment of the North American Free Trade Agreement Implementation Act in 1994.<sup>166</sup> Both this treaty and the WTO-AGP establish similar requirements, differing only in the dollar value thresholds set in each other. These similarities are: Non-Discrimination and mandatory competition.

## **NON-DISCRIMINATION**

This principle, as the reader may have noticed, resides within Article 102's text.<sup>167</sup> The CITT confirmed that this is one of the general objectives of NAFTA.<sup>168</sup>

This treaty expounds upon this non-discrimination measure in articles 1001, 1003, 1004 and 1008. The first of the triad establishes the scope of NAFTA regarding government procurement, stating that:

*"No Party may prepare, design or otherwise structure any procurement contract in order to avoid the obligations of this Chapter."*<sup>169</sup>

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<sup>163</sup> Jim Grieshaber-Otto, Scott Sinclair. *Bad Medicine: Trade treaties, privatization and health care reform in Canada* (Ottawa, Canadian Centre for Policy Alternatives, 2004), at 28, 104.

<sup>164</sup> Worthington, *Desktop guide to Procurement Law*, supra note 147, at 571.

<sup>165</sup> *Supply Manual*, Version 2014-2, c 1, s 1.25.5. [Manual]

<sup>166</sup> Emanuelli, *Government Procurement*, supra note 93, at 10.

<sup>167</sup> NAFTA, Article 102, at 3.

<sup>168</sup> *IBM Canada Limited (Re)*, [2003] 54774 CITT (CanLII), online: <<http://canlii.ca/t/1sc40>>, accessed 31<sup>st</sup> October 2018, para. 31

The next two articles establish that there should not be any sort of discrimination based on nationality, residence, foreign affiliation or ownership for a federal government procurement.<sup>170-171</sup> Moreover, the last article requires to ensure that tendering procedures are applied in a non-discriminatory manner.<sup>172</sup>

Any procurement contrary to the abovementioned will be scrutinized (if a complaint is filed) by the CITT,<sup>173</sup> a judicial body with abundant decisions on processes that, supposedly, were configured under discriminatory characteristics.<sup>174</sup>

### **MANDATORY COMPETITION**

In terms of competition, Articles 1008 and 1009 have significant measures that foster it within the procurement system of the parties. The first article states:

*“[E]ach Party shall ensure that its entities:*

*(a) do not provide to any supplier information with regard to a specific procurement in a manner that would have the effect of precluding competition; and*

*(b) provide all suppliers equal access to information with respect to a procurement during the period prior to the issuance of any notice or tender documentation.”<sup>175</sup>*

Moreover, Article 1009 gives further details to prevent hidden discrimination (thus, unfair competition) during the qualification of the bidders.<sup>176</sup>

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<sup>169</sup> NAFTA, Article 1001, Section 4, at 116.

<sup>170</sup> Worthington, *Desktop guide to Procurement Law*, supra note 147, at 556.

<sup>171</sup> *“With respect to measures covered by this Chapter, each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to[.]” “No Party may apply rules of origin to goods imported from another Party for purposes of government procurement covered by this Chapter that are different from or inconsistent with the rules of origin the Party applies in the normal course of trade, which may be the Marking Rules established under Annex 311 if they become the rules of origin applied by that Party in the normal course of its trade.”* See, NAFTA, Articles 1003, section 1; and 1004, at 117.

<sup>172</sup> NAFTA, Article 1008, Section 1, letter (a), at 119.

<sup>173</sup> Worthington, *Desktop guide to Procurement Law*, supra note 147, at 555.

<sup>174</sup> *Spacefile International Corp (Re)*, [2014] 22313 CITT (CanLII), online: <<http://canlii.ca/t/g6rqh>>, accessed 31<sup>st</sup> October 2018, para. 19-20; *Davis Pontiac Buick Gmc (Medicine Hat) Ltd. v. Canada (Public Works and Government Services)*, [2008] 51720 CITT (CanLII), online: <<http://canlii.ca/t/214fb>>, accessed 31<sup>st</sup> October 2018, para. 70-2, 124-8; *IT/net Ottawa Inc. (Re)*, [2003] 54795 CITT (CanLII), online: <<http://canlii.ca/t/1sc5g>>, accessed 31<sup>st</sup> October 2018, para. 28, 46-7, 65.

<sup>175</sup> NAFTA, Article 1008, at 119.

<sup>176</sup> NAFTA, Article 1009, section 2, at 119-20.

According to the CITT, the qualifications required should be generic to the greatest extent possible.<sup>177-178</sup> The same judicial body, in several occasions, has deemed that the absence of this characteristic is enough to cancel a procurement process, ordering a new solicitation and establishing remedies to the parties affected.<sup>179</sup> It is clear that, if proven, the absence of competition would crumble any procurement process in Canada.

This treaty allows the signatories' suppliers to bid into Canadian federal procurements valued over the following thresholds:<sup>180</sup>

	Entities (Departments and Agencies)			Crown Corporations / Government Enterprises		
	Goods	Services	Construction	Goods	Services	Construction
NAFTA						
CANADA/US	32,900	106,000	13,700,000	530,000	530,000	16,900,000
CANADA/MEXICO	106,000	106,000	13,700,000	530,000	530,000	16,900,000

The CITT is in charge of receiving the challenges of any breaches made to the articles of the treaty.<sup>181</sup>

NAFTA establishes that nothing in Section D shall be construed to prevent any Party from adopting or maintaining measures necessary to protect human, animal or plant life or health.<sup>182</sup> Moreover, the treaty establishes which are the health institutions empowered to conduct procurement under this treaty.<sup>183</sup> However, there are no further considerations spelt out with respect to procurement in the health sector.

<sup>177</sup> Worthington, *Desktop guide to Procurement Law*, supra note 147, at 560.

<sup>178</sup> *IT/NET Consultants Inc. (Re)*, [1999] 14620 CITT (CanLII), online: <<http://canlii.ca/t/1sd57>>, accessed 31<sup>st</sup> October 2018, para. 34.

<sup>179</sup> *P&L Communications Inc. v. Canada (Public Works and Government Services)*, [2005] 57640 CITT (CanLII), online: <<http://canlii.ca/t/1scgs>>, accessed 1<sup>st</sup> November 2018, para. 2, 15, 23-4, 30, 41-3; *Canadian Beaver Information Technology Inc. v. Statistics Canada*, [2006] 54241 CITT (CanLII), online: <<http://canlii.ca/t/1sch9>>, accessed 1<sup>st</sup> November 2018, para. 2, 8, 11, 13-4, 17, 24-7, 32, 34-6, 38, 42-4; *Tendering Publications Limited (Re)*, [2002] 46953 CITT (CanLII), online: <<http://canlii.ca/t/1sc2v>>, accessed 1<sup>st</sup> November 2018, para. 36-9; *Luik (Re)*, [2000] 21284 CITT (CanLII), online: <<http://canlii.ca/t/1sd5x>>, accessed 1<sup>st</sup> October 2018, para. 15, 37-8, 46-8.

<sup>180</sup> Kathleen Owens. *Contracting Policy Notice 2017-6 Trade Agreements: Thresholds Update* (Ottawa, Treasury Board of Canada Secretariat, 2017), online: <<https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2017-6.html>>, accessed 2<sup>nd</sup> June 2018.

<sup>181</sup> Emanuelli, *Government Procurement*, supra note 93, at 10.

<sup>182</sup> NAFTA, Section D, Article 1018, number 2, letter (b), at 129.

<sup>183</sup> Canada: Department of National Health and Welfare, Medical Research Council, and the Canadian Centre for Occupational Health and Safety. Mexico: The Ministry of Health, *Centro Nacional de la Transfusión Sanguínea* (National Blood Transfusion Center), *Gerencia General de Biológicos y Reactivos* (Office of General Management for Biologicals and Reagents), *Centro para*

How does Canada seek to fulfill non-discrimination and mandatory competition in its public procurement system? For that, we have to analyze the lines of the North American Free Trade Agreement Implementation Act. Article 4 of this statute states:

*“The purpose of this Act is to implement the Agreement, the objectives of which, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to*

*(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the NAFTA countries;*

*(b) promote conditions of fair competition in the free-trade area established by the Agreement;*

*(c) increase substantially investment opportunities in the territories of the NAFTA countries;*

*(d) provide adequate and effective protection and enforcement of intellectual property rights in the territory of each NAFTA country;*

*(e) create effective procedures for the implementation and application of the Agreement, for its joint administration and for the resolution of disputes; and*

*(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of the Agreement.”<sup>184</sup>*

As we can see, the three objectives that Emanuelli mentioned reside within these provisions. These are the same objectives established by NAFTA in its article 102.<sup>185</sup> By adding them into this statute, Canada makes clear that every federal procurement held under this treaty should be conducted under these objectives without exceptions.

## **WTO-AGP**

In effect since January 1<sup>st</sup>, 1996, this document replaced the General Agreement on Tariffs and Trade’s Code on Government Procurement.<sup>186</sup> Since Canada is a signatory of this treaty, its suppliers *“have the right to bid without discrimination on a broad range of public sector tender calls issued in the*

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*el Desarrollo de la Infraestructura en Salud* (Center for Infrastructural Development in Health), *Instituto de la Comunicación Humana Dr. Andrés Bustamante Gurría* (Dr. Andrés Bustamante Gurría Institute of Human Communication), *Instituto Nacional de Medicina de la Rehabilitación* (National Rehabilitative Medicine Institute), *Instituto Nacional de Ortopedia* (National Orthopedics Institute), *Consejo Nacional para la Prevención y Control del Síndrome de la Inmunodeficiencia Adquirida* (National Council for the Prevention and Control of the Autoimmune Deficiency Syndrome). See, NAFTA, Section D, Annex 1001.1a-1, at 134-8.

<sup>184</sup> North American Free Trade Agreement Implementation Act, S.C. 1993, c. 44, Article 4, at 3.

<sup>185</sup> NAFTA, Article 102, at 3.

<sup>186</sup> Emanuelli, *Government Procurement*, supra note 93, at 8.

signatory nations. (...) In exchange, the Canadian federal government must provide reciprocal non-discrimination to the other signatory's suppliers."<sup>187</sup> The last revised version of the agreement came into effect in 2014, and it included provisions against corruption in the sector.<sup>188</sup>

This treaty includes non-discrimination and transparency as its basic principles.<sup>189</sup> Article VII, numeral 3, establishes the types of bidding procedures applicable to this treaty, these being: a) public tenders, b) selective tenders, and c) restricted bids.<sup>190</sup>

In Canada, the WTO-AGP applies to procurements with a value equal to or greater than yearly revised monetary thresholds.<sup>191</sup> At the time of writing, the thresholds were as it follows:<sup>192-193</sup>

FREE TRADE AGREEMENTS	ENTITIES (DEPARTMENTS AND AGENCIES)			CROWN CORPORATIONS/GOVERNMENT ENTERPRISES		
	Goods	Services	Construction	Goods	Services	Construction
WTO-AGP	237,700	237,700	9,100,000	649,100	649,100	9,100,000

This treaty also required that the signatory nations establish a national forum in which suppliers can challenge breaches of the treaty commitments and the result was the creation of the CITT.<sup>194</sup>

In terms of health procurement, this treaty establishes that nothing in it shall be construed to prevent any Party from imposing or enforcing measures

<sup>187</sup> *Idem*, at 9.

<sup>188</sup> Krista Nadakavukaren Schefer, Mintewab Gebre Woldensebet. *The Revised Agreement on Government Procurement and Corruption* (2013) 47:5 *Journal of World Trade* (Law-Economics-Public Policy), at 1145-61.

<sup>189</sup> Jaime Rodríguez-Arana, José Antonio Moreno Molina, Ernesto Jinesta Lobo, Karlos Navarro Medal. *Derecho Internacional de las Contrataciones Públicas*, 1st. Ed. (San José, 2011, Guayacán Ediciones), at 57.

<sup>190</sup> *Agreement on Government Procurement*, 15 April 1994, 1915 UNTS 31874 (entered into force 1 January 1996) [WTO-AGP], Article VII, paragraph 3, at 14. [AGP]

<sup>191</sup> Emanuelli, *Government Procurement*, supra note 93, at 8-9.

<sup>192</sup> Owens, *Contracting Policy Notice 2017-6 Trade Agreements: Thresholds Update*, supra note 180.

<sup>193</sup> "The federal government defines Crown corporations as those that are 90 per cent or more owned by a level of government." See, Standing Committee on Crown and Central Agencies. *Hansard Verbatim Report* (Regina, Saskatchewan Legislature, 2017), online: <<http://docs.legassembly.sk.ca/legdocs/Legislative%20Committees/CCA/Debates/170502Debates-CCA.pdf>>, accessed 2<sup>nd</sup> June 2018, at 380.

<sup>194</sup> Emanuelli, *Government Procurement*, supra note 93, at 9.

necessary to protect human, animal or plant life or health.<sup>195</sup> The text does not provide any more guidance on this topic.

**INTERNAL AGREEMENTS**

**CANADIAN FREE TRADE AGREEMENT**

The Canadian Free Trade Agreement (CFTA) replaced the Agreement on Internal Trade (AIT), entering into force in July 2017.<sup>196</sup> The AIT will continue to be applicable until all the procurements made under the guidelines of said document are fulfilled.<sup>197</sup> The CFTA is a treaty signed by federal, provincial and territorial governments in Canada, giving all Canadian suppliers the right to bid in procurements sustained under a certain financial threshold.<sup>198</sup> These thresholds are:<sup>199</sup>

	Entities (Departments and Agencies)			Crown Corporations / Government Enterprises		
	Goods	Services	Construction	Goods	Services	Construction
FREE TRADE AGREEMENT						
CFTA	25,300	101,100	101,100	505,400	505,400	5,053,900

Chapter 5 of both treaties deals with all the provisions relating to government procurement deals. Article 500 states that the principal purpose of this treaty is to “*establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers,*”<sup>200</sup> applying the general principles of transparency and non-discrimination.<sup>201</sup> In 2005, the AIT was reformed to allow suppliers to bid to Municipalities, Academic institutions, Schools and Hospitals sector’s procurements as well, covering the whole spectrum of the Canadian government’s levels.<sup>202</sup>

<sup>195</sup> AGP, Article III, Section 2, letter b.

<sup>196</sup> *Manual*, c 1, s 1.25.15., section b.

<sup>197</sup> *Ibid.*

<sup>198</sup> Emanuelli, *Government Procurement*, supra note 93, at 11.

<sup>199</sup> Owens, *Contracting Policy Notice 2017-6 Trade Agreements: Thresholds Update*, supra note 180.

<sup>200</sup> *Canadian Free Trade Agreement*, SC 2017, c 5, Art. 500, at 37. [CFTA]

<sup>201</sup> CFTA, Art. 502, at 37.

<sup>202</sup> Emanuelli, *Government Procurement*, supra note 93, at 19-20.

Just as with NAFTA and the WTO-AGP, CFTA's suppliers can file complaints against the federal government through the CITT.<sup>203</sup>

## **ADMINISTRATIVE STATUTES**

There are several statutes of this nature governing public procurement in Canada. The authors Lunau, Ngo and Beaudoin stated that the Canadian government procurement suffered a major change after the Quebec wing of the Liberal Party of Canada contracting scandal;<sup>204</sup> resulting in a mammoth reform known as the Revised Integrity Framework.<sup>205</sup> The reform consisted in the modification of 50 Canadian federal statutes. However, these authors state that, regarding government procurement, there are four fundamental reforms.<sup>206</sup> Since this is a comparative exercise, I decided to choose three of them due to their similarities with the laws present within the Mexican government procurement legal framework (the ones analyzed in this chapter, excepting the Mexican Constitution). These laws are: The Department of Public Works and Government Services Act, the Access to Information Act, and the Financial Administration Act. Likewise, it is necessary to do a brief assessment of the Supply Manual, due to its role as the guide of Canadian public procurers

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<sup>203</sup> *Idem*, at 14

<sup>204</sup> "The second step was access to more and better data about federal government contract expenditures which was dramatically improved in the aftermath of the 2004 scandal surrounding advertising contract kick-backs to the Quebec wing of the Liberal Party of Canada (Canada, Commission of Inquiry into the Sponsorship Program and Advertising Activities 2005; 2006). In response to this scandal, first, on March 23, 2004, the federal government introduced rules of "proactive disclosure" according to which, beginning in October 2004 details on all contracts above \$10,000 would need to be published on government websites. This increased the number of contracts reported in detail, lowering the old limit of \$100,000 used in the Public Counts. A second tool created in the aftermath of the scandal was the Federal Accountability Act, which came into effect on December 12, 2006, and which has legislative, procedural and institutional facets designed to increase the transparency and accountability of all government spending including contracting. The new Act, along with a new framework for procurement accounting procedures and the requirement for each agency to table an annual report dramatically improved the availability and transparency of many contracting arrangements. The act also introduced other important changes related to contracting, for example, the creation of the Office of the Procurement Ombudsman, which was tasked with addressing perceived fairness issues in the procurement area. The federal government also created a new Management Accountability Framework that laid out the Treasury Board's expectations of management best practices across all areas of government including contracting." See, Michael Howlett, Andrea Migone. *Making the invisible public service visible? Exploring data on the supply of policy and management consultancies in Canada* (2014) 57:2 Canadian Public Administration, at 187-8.

<sup>205</sup> Dan Ciuriak. *Evaluating the Economic Effects of Canada's New Government Procurement Integrity Framework* (2014), online: <<https://goo.gl/QXzuj8>>, accessed 4th November 2018, at 1.

<sup>206</sup> Ronald D. Lunau, Phuong T.V. Ngo, Catherine Beaudoin. *The Federal Accountability Act: Changes to Procurement and Contracting in Canada* (2007) 42:4 Procurement Lawyer, at 5.

to develop their activities. Finally, I will do a brief analysis of the Treasury Board's Contracting Policy.

### **DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES ACT**

Enacted in 1996, this law created the Department of Public Works and Government Services.<sup>207</sup> In terms of government procurement, the most relevant figure established by this act comes in the form of the Procurement Ombudsman; the reason why I choose to analyze this law despite not having many similarities with the Mexican procurement statutes. Its functions are the following:

*“(a) review the practices of departments for acquiring materiel and services to assess their fairness, openness and transparency and make any appropriate recommendations to the relevant department for the improvement of those practices; (b) review any complaint respecting the compliance with any regulations made under the Financial Administration Act of the award of a contract for the acquisition of materiel or services by a department to which the Agreement, as defined in section 2 of the Canadian Free Trade Agreement Implementation Act, would apply if the value of the contract were not less than the amount referred to in Article 504 of that Agreement; (c) review any complaint respecting the administration of a contract for the acquisition of materiel or services by a department; and (d) ensure that an alternative dispute resolution process is provided, on request of each party to such a contract.”<sup>208</sup>*

As we can see, the Procurement Ombudsman role is to recommend and help all of the Federal Canadian departments to enhance their procurement policies and activities. This advisory authority may (since the Minister of Public Works and Government Services is not bound to act on the Ombudsman's recommendation),<sup>209</sup> through the assessment of the complaints presented by Canadian suppliers and remedies, contribute to fulfill the duty of fairness, openness and transparency that the procurement sector seeks.<sup>210</sup> Moreover, the Ombudsman can intervene even after the contract is awarded (30 working days after public notice of the award, to be precise),<sup>211</sup> something that surpasses the CITT's jurisdiction.<sup>212</sup> However, these recommendations cannot be directed towards the cancellation of any contracts awarded by their

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<sup>207</sup> *Department of Public Works and Government Services Act*. Sections 1 and 3(1), at 1-2. **[DPWGSAA]**

<sup>208</sup> DPWGSAA, Section 22(3), at 9-10.

<sup>209</sup> Lunau, Ngo, Beaudoin, *The Federal Accountability Act: Changes to Procurement and Contracting in Canada*, supra note 206, at 6.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Procurement Ombudsman Regulations*. Article 7, section 1, letter (a), at 3.

<sup>212</sup> Lunau, Ngo, Beaudoin, *The Federal Accountability Act: Changes to Procurement and Contracting in Canada*, supra note 206, at 6.

procurement units.<sup>213</sup> In spite of this, just as the Procurement Ombudsman Regulations states, the recommendations could be useful to detect inconsistencies between the procuring department's policies, the policies set in the Financial Administration Act, and the awarding and administration practices that the federal authorities carry out.<sup>214</sup> In the end, the detection of these inconsistencies helps purchasing units to address the problem in future processes.

At the end of each fiscal year, the Procurement Ombudsman is required to report its activities to the Minister of Public Works and Government Services.<sup>215</sup> These reports hold high value within the Canadian public procurement context, which will be assessed when I discuss the Ombudsman's role regarding non-competitive bidding.

The Procurement Ombudsman functions, as well, as a complaint instance for unsatisfied bidders. Differently from the CITT's short time limitations to file a complaint, suppliers and even third parties that are non-signatories to the contract can present complaints before the Ombudsman even after the award of said contract.<sup>216</sup> Nevertheless, as I have mentioned, these decisions are not binding. In fact, there is no way to tell how courts would address any of the Ombudsman's decisions.<sup>217</sup> Moreover, as the CITT ruled in *Agri-sx Inc v The Department of Public Works and Government Services*, the Procurement Ombudsman can be deemed as not relevant in certain procurements. In that case, the CITT stated that the Ombudsman has no jurisdiction to deal with grievances that can occur before a contract is awarded.<sup>218</sup>

The Procurement Ombudsman, just in 2017-2018, investigated 24 complaints. Only four of them met the criteria established in the *Procurement Ombudsman Regulations*.<sup>219</sup> In three of them, the Ombudsman recommended the federal organizations to pay compensations to the suppliers that presented complaints.<sup>220</sup> In one of the cases, after negotiations between both parties, the

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<sup>213</sup> DPWGSA, Article 22.2, section 4, at 10.

<sup>214</sup> *Procurement Ombudsman Regulations*, Sections 4(1), and 5(a), at 2-3.

<sup>215</sup> DPWGSA, Section 22.3(1), at 10.

<sup>216</sup> Lunau, Ngo, Beaudoin, *The Federal Accountability Act: Changes to Procurement and Contracting in Canada*, supra note 206, at 6.

<sup>217</sup> *Ibid.*

<sup>218</sup> *Agri-sx Inc v The Department of Public Works and Government Services*, [2013] 42216 CITT (CanLII), online: <<http://canlii.ca/t/fzlm6>>, accessed 4<sup>th</sup> November 2018, para. 23, 32.

<sup>219</sup> Office of the Procurement Ombudsman. *2017-2018 Annual Report* (Ottawa, Office of the Procurement Ombudsman, 2018), online: <<http://opo-boa.gc.ca/documents/rapports-reports/2017-2018/annuel-annual-2017-2018-eng.pdf>>, accessed 4<sup>th</sup> November 2018, at 28.

<sup>220</sup> *Idem*, at 30-4.

procurer followed the Ombudsman's recommendation and financially compensated a supplier.<sup>221</sup> In other words, the procurement sector could (specifically, the suppliers) see in the Ombudsman an alternative for dispute resolution to the CITT.

### **ACCESS TO INFORMATION ACT**

Before the enactment of the Financial Administration Act, the Crown Corporations (among other Canadian government institutions) in Canada were not required to disclose information about procurement processes.<sup>222</sup> The Access to Information Act changed that by widening the definition of "government institution" to "*a) any department or ministry of state of the Government of Canada, or any body (sic) or office, listed in Schedule I, and (b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act.*"<sup>223</sup>

However, the most important aspect (for the purposes of this thesis) resides in Section 20. In subsection 20(1), the Access to Information Act, first, states that the head of a government institution shall refuse to disclose any record requested that can interfere with contractual or other negotiations of any third party (see, supplier).<sup>224</sup> Afterwards, the statute prescribes an exception regarding that the information of public interest "*clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.*"<sup>225</sup> One of the topics regarded as of public interest is, according to this act, the health sector's contractual information.<sup>226</sup>

Section's 20 transparency requirement is not boundless, however. As established by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, "*when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development.*"<sup>227</sup> Nonetheless, as the

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<sup>221</sup> *Idem*, at 34.

<sup>222</sup> Lunau, Ngo, Beaudoin, *The Federal Accountability Act: Changes to Procurement and Contracting in Canada*, supra note 206, at 6.

<sup>223</sup> *Access to Information Act*. Section 3, at 2.

<sup>224</sup> *Access to Information Act*. Section 20(1)(d), at 20.

<sup>225</sup> *Access to Information Act*. Section 20(6)(b), at 21.

<sup>226</sup> *Access to Information Act*. Section 20(6)(a), at 21.

<sup>227</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII), online: <<http://canlii.ca/t/fpvd1>>, accessed 6<sup>th</sup> November 2018, para. 23.

Supreme Court states, section 25 of the act in discussion does require “*the institution to disclose any part of a record that does not contain material which the institution is authorized not to disclose and which can reasonably be severed from any part that does contain exempted material.*”<sup>228</sup> Thus, no procuring unit is able to hide any information (or partially hide it) by invoking section 20(1).

In conclusion, the entirety (or, at least, the fragments not protected by section 20(1)) of the procurement information should be disclosed by the procuring unit if the same is relevant to public health.

### **FINANCIAL ADMINISTRATION ACT**

With the enactment of this law, the Government of Canada commits to take “*appropriate measures to promote fairness, openness and transparency in the bidding process for contracts.*”<sup>229</sup>

This statute empowers the Governor in Council to fix terms:

“*[T]hat are deemed to be expressly set out in contracts, or classes of contracts, that provide for the payment of any money by Her Majesty or a Crown corporation — or in documents, or classes of documents, relating to such contracts and their formation — including terms: (a) prohibiting payment of a contingency fee by any party to the contract to a person to whom the Lobbying Act applies; (b) respecting corruption and collusion in the bidding process for contracts for the performance of work, the supply of goods or the rendering of services; (c) requiring that a bidder on a contract for the performance of work, the supply of goods or the rendering of services make a declaration that the bidder has not committed an offence under section 121, 124 or 418 of the Criminal Code; (d) respecting the provision of information or records to enable the Auditor General of Canada to inquire in- to the use of funds provided under funding agreements; and (e) requiring the public disclosure of basic information on contracts entered into with Her Majesty for the performance of work, the supply of goods or the rendering of services and having a value in excess of \$10,000.*”<sup>230</sup>

Equally, this law establishes that the contracts by the terms of which payments are required in excess will need the approval of the Treasury Board.<sup>231</sup>

Another aspect of this law is with respect to the punishment of any person who participates in the embezzlements of public moneys.<sup>232-233-234</sup>

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<sup>228</sup> *Idem*, para. 25; *Access to Information Act*, Section 20(5), at 24.

<sup>229</sup> *Financial Administration Act*, Section 40.1, at 42.

<sup>230</sup> *Financial Administration Act*, Section 42, at 43.

<sup>231</sup> *Financial Administration Act*, Section 41(1)(a), at 42-3.

<sup>232</sup> *Financial Administration Act*, Section 80(1), at 67-8.

<sup>233</sup> *Financial Administration Act*, Section 80(2), at 68.

Under the *Ineligibility and Suspension Policy*, the participation of private companies (specifically, their members) could lead to their debarments from any future participation in federal procurements.<sup>235</sup> The Ontario Supreme Court of Justice has only heard one case under this regard, absolving the defendant of the diversion charges filed; due to the vagueness of the phrase “Make Opportunity to Defraud Her Majesty” and the inability of the Crown to prove the defendant’s participation in the embezzlements.<sup>236</sup>

From this, it can be seen that the Act does not specify the tools that the Canadian government has to combat corruption within its procurement system; aside from the punishments abovementioned. This could have been the reason why the provisions of the Act (according to the Ontario Supreme Court) are vague.<sup>237</sup> It may be that the goal of the Act was merely to pronounce anticorruption as a normative goal.<sup>238</sup>

## **GOVERNMENT CONTRACTS REGULATIONS**

The Canadian Government further strengthened the Financial Administration Act’s regulations with the enactment of the Government Contracts Regulations.<sup>239</sup> This requires that, “*before any contract is entered into, the contracting authority shall solicit bids therefor in the manner prescribed by section 7.*”<sup>240</sup> Section 7 requires procuring units to issue a call for bids, or invite suppliers from a supplier’s list when soliciting bids for any procurement contract that does not fit in what is established by section 6.<sup>241</sup> In the next section, the document establishes the exceptions to this requirement:

*“Notwithstanding section 5, a contracting authority may enter into a contract without soliciting bids where a) the need is one of pressing*

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<sup>234</sup> *Financial Administration Act*, Section 154.01(1), at 124.

<sup>235</sup> Under the *Ineligibility and Suspension Policy*, “Canada has an obligation to protect and safeguard the use and expenditure of public funds, to ensure b stewardship and transparency, and to uphold the public trust in relation to its contracts and real property agreements. Unethical business behaviour by suppliers undermines fair competition, threatens the integrity of markets, is a barrier to economic growth, increases the cost and risk of doing business, and undermines public confidence in government institutions.” Section 6 and 7 of this policy sets the circumstances that merit debarment or suspension. See, *Ineligibility and Suspension Policy*. Sections 3(a); 6 and 7, online: <<https://www.tpsgc-pwgsc.gc.ca/ci-if/politique-policy-eng.html>>, accessed 24<sup>th</sup> July 2018.

<sup>236</sup> *R. v. Shum*, [2018] 2981 ONSC (CanLII), online: <<http://canlii.ca/t/hshzn>>, accessed 5<sup>th</sup> November 2018, para. 234-5, 53-8, 65-324.

<sup>237</sup> *Idem*, para. 266-69.

<sup>238</sup> Paul M. Lalonde. *The Internationalization of Canada’s Public Procurement*, in Aris C. Georgopoulos, Bernard Hoekman, Petros C. Mavroidis. *The Internationalization of Government Procurement Regulation*, 1<sup>st</sup> ed. (Oxford, Oxford University Press, 2017), at 300.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Government Contracts Regulations*. Section 5, at 5.

<sup>241</sup> *Government Contracts Regulations*. Section 7, at 6.

*emergency in which delay would be injurious to the public interest; (b) the estimated expenditure does not exceed (i) \$25,000, (ii) \$100,000, where the contract is for the acquisition of architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work, or (iii) \$100,000, where the contract is to be entered into by the member of the Queen's Privy Council for Canada responsible for the Canadian International Development Agency and is for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project; (c) the nature of the work is such that it would not be in the public interest to solicit bids; or (d) only one person is capable of performing the contract.*"<sup>242</sup>

Under this mandate, the possibilities for procurement units to conduct sole-supply contracts are significantly reduced.<sup>243</sup> The Government Contracts Regulations contribute to the already discussed competition setting in the Canadian government procurement, as established by the CITT in the case *Consortium Genivar - M3E - Université d'Ottawa (Re)*,<sup>244</sup> stating that foster competition is the legislative intent behind the regulations.<sup>245</sup> Paul Lalonde collected the data to prove that section 6 is effectively supporting competitive tendering as follows:

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<sup>242</sup> *Government Contracts Regulations*, Section 6, at 5.

<sup>243</sup> Charles Davies. *Competition in Defence Procurement: The popular choice, but not always the right one* (2015), online: <[http://cdainstitute.ca/wp-content/uploads/2012/06/Vimy\\_Paper\\_26.pdf](http://cdainstitute.ca/wp-content/uploads/2012/06/Vimy_Paper_26.pdf)>, accessed 5<sup>th</sup> November 2018, at 8.

<sup>244</sup> *Consortium Genivar - M3E - Université d'Ottawa (Re)*, [2003] 54784 CITT (CanLII), online: <<http://canlii.ca/t/1sc4n>>, accessed 4<sup>th</sup> November 2018, para. 27, 30, 33, 66-7.

<sup>245</sup> *Idem*, para. 27.

**Table 11.1 Method of procurement utilized in awarding contracts above the \$25,000 threshold (2013 data)**

<b>Solicitation procedure</b>	<b>Number</b>	<b>Percent of total number</b>	<b>Value (\$'000)</b>	<b>Percent of total value</b>
<b>Awards pursuant to public notice or invited competitive bids</b>				
Competitive awards				
Electronic bidding	8,311	28.92	4,207,974	31.65
Traditional competitive	14,823	51.58	2,593,938	19.51
Total of competitive awards	23,134	80.50	6,801,912	51.16
Net competitive amendments <sup>27</sup>	N/A	N/A	3,079,065	23.16
Subtotal of competitive awards, including amendments	23,134	80.50	9,880,977	74.32
ACANs	695	2.42	403,715	3.04
Net ACAN amendments	N/A	N/A	581,990	4.38
Subtotal of competitive awards and ACANs, including amendments	23,829	82.92	10,866,682	81.74
<b>Awards not pursuant to public notice or invited competitive bids</b>				
Non-competitive awards	4,910	17.08	1,817,053	13.67
Net amendments	N/A	N/A	610,476	4.59
Non-competitive awards, including amendments	4,910	17.08	2,427,529	18.26
<b>Total of contracts \$25,000 and above</b>	<b>28,739</b>	<b>100.00</b>	<b>13,294,211</b>	<b>100.00</b>

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## **SUPPLY MANUAL**

I will now turn to discuss the Supply Manual, Canada's procurement guide. Due to the manual's volume, this section aims only at extracting the requirements related to sole-sourcing procurement.

The Supply Manual states that the Canadian public procurement divides into three tendering approaches: Open Tendering, Selective Tendering, and Limited Tendering.<sup>247</sup> Just as in Mexican public procurement, the legal framework establishes the Open Tendering as the preferred approach.<sup>248</sup> Sole-source contracting is normally conducted under the Limited Tendering approach.<sup>249</sup>

As the reader may remember, the Government Contracts Regulations stipulate exceptions whereby procurement units can skip soliciting competitive bids.<sup>250</sup> The Manual sets out that for these exceptions to apply above \$25,000 Canadian dollars, purchase units should answer the questions contained in the "Annex 3.1: Treasury Board Questions for Sole Source," and the answers appended to the approval documents and inserted in the procurement file.<sup>251</sup>

Perhaps the most relevant part of the Supply Manual (for the purposes of this thesis) is the Advance Contract Award Notice (also known as the ACAN). The ACAN "is a public notice indicating to the supplier community that a

<sup>246</sup> Lalonde, *The Internationalization of Canada's Public Procurement*, supra note 238, at 309.

<sup>247</sup> *Manual*, c 3, s 3.25.

<sup>248</sup> *Manual*, c 3, s 3.25(b)(i).

<sup>249</sup> *Manual*, c 3, s 3.25(b)(iii).

<sup>250</sup> *Government Contracts Regulations*, Section 6, at 5.

<sup>251</sup> *Manual*, c 3, s 3.15.

department or agency intends to award a good, service or construction contract to a pre-identified supplier, believed to be the only one capable of performing the work, thereby allowing other suppliers to signal their interest in bidding by submitting a statement of capabilities.”<sup>252</sup> If no supplier responds to the ACAN, the procurement unit can continue with the award of the contract.<sup>253</sup> According to the Manual, an ACAN can be issued only when there is sufficient justification for not soliciting bids in accordance with the exceptions of the Government Contracts Regulations.<sup>254</sup> The objectives of the ACAN are:

“[P]rovide a procurement process that is efficient and cost-effective while being fair, open and transparent; provide potential suppliers with the opportunity to demonstrate, by way of a statement of capabilities, that they are capable of satisfying the requirements set out in the ACAN; and respect the principles of government contracting by enhancing fairness, access and transparency.”<sup>255</sup>

The ACAN is crucial within the Canadian procurement system. So much that, in fact, the CITT takes it as the fundamental fact in their decisions regarding sole-sourcing awards. In 33 cases, the CITT determined that 14 complaints were valid, three were valid in part, 13 were not valid, and two were dismissed.<sup>256</sup> In the decisions that found the complaints valid, the Tribunal decided that the awards were not conducted under the provisions of the trade agreements applicable to the cases (in the majority of them, these agreements were the NAFTA and the Agreement on Internal Trade, renamed to Canadian Free Trade Agreement).<sup>257</sup> Therefore, we can say that the ACAN is of delicate

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<sup>252</sup> *Manual*, c 3, s 3.15.5(a).

<sup>253</sup> *Manual*, c 3, s 3.15.5(a).

<sup>254</sup> *Manual*, c 3, s 3.15.5(c).

<sup>255</sup> *Manual*, c 3, s 3.15.5(b).

<sup>256</sup> These cases were extracted from CanLII using a quoted search of the phrase “Advanced Contract Award Notice.” After excluding repeated results, I end up having 33 individual cases. The terms of the decisions were attained by reading the cases one by one. Online: <<https://goo.gl/2DQCKR>>, accessed 5<sup>th</sup> November 2018.

<sup>257</sup> In *Luik v. Department of Public Works and Government Services*, the CITT determined that the Department issued the ACAN unjustifiably given that the person who received the contract directly was not the only existing supplier in the market, which was demonstrated by the challenge presented by Dr. Luik. In addition, the Court argued that due to the wording of the ACAN in which the person who received the contract was described as the best option, suggesting that there were more options besides that person. Moreover, the ACAN was issued in contravention to Articles 506(4)(c) of the Agreement on Internal Trade, and 1008(1) and 1009(2)(a) of NAFTA, since it disqualify Luik without the ACAN mentioning of the restrictions to possible conflicts of interest. See, *Luik (Re)*, [2000] 21284 CITT (CanLII), online: <<http://canlii.ca/t/1sd5x>>, accessed 6<sup>th</sup> November 2018, para. 37-8, 46-8. In *Array Systems Computing Inc. v. Department of Public Works and Government Services*, the Tribunal decided that the Department failed show that the intellectual property rights would prevent the complainant from being able to meet its requirements. The first few words of Article 506.12 of the AIT read: “Where only one supplier is able to meet the requirements of a procurement.” The

manufacture and that, if done in a manner contrary to the provisions of the trade agreements or the Manual, it could harm the public purchase process, causing its possible cancellation and obliging the procurer to financially repair those who challenge it.

Another relevant aspect established by the Supply Manual is the Code of Conduct. Before 2014, the Manual had a special section that established the Code of Conduct for the use of sole-sourcing.<sup>258</sup> However, it was incorporated in sections 3.51 and 4.21. The first section establishes that the integrity regime is contained in both the Department of Public Works and Government Services Act and the Financial Administration Act.<sup>259</sup> The second section is all about the Integrity Provisions and the Ineligibility and Suspension Policy. Under these, the related data to bidders, offerors or suppliers to the government has to be provided as a part of the solicitation process.<sup>260</sup> These requirements are beneficial for the system in terms of transparency and integrity, since the information demanded is sufficient to fully identify the suppliers, contracting agencies and those responsible for them before starting the tendering processes. This, in case of embezzlements or the participation of shell companies in public bids, would facilitate investigation efforts.

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Tribunal is of the view that this requirement is very stringent and, since limited tendering is an exception to the general rule to provide equal access to procurement, there was a significant responsibility on the Department to prove that this condition applies, especially when a supplier, other than the one chosen, maintains that it can meet the requirements. See, *Array Systems Computing Inc. (Re)*, [1996] 7880 CITT (CanLII), online: <<http://canlii.ca/t/1sd10>>, accessed 6<sup>th</sup> November 2018, para. 24

<sup>258</sup> *Manual*, c 3, s 3.15.2.

<sup>259</sup> *Manual*, c 3, s 3.51.

<sup>260</sup> “Bidders, offerors or suppliers that are corporate entities, including those bidding as joint ventures, must provide a complete list of names of all current directors or, for a privately-owned corporation, the names of the owners of the corporation. Bidders, offerors or suppliers bidding as sole proprietors, including sole proprietors bidding as joint ventures, must provide a complete list of the names of all owners. Bidders, offerors or suppliers that are a partnership do not need to provide a list of names. Contracting officers only need to submit the information provided by the bidder, offeror or supplier when requesting an integrity verification. The Integrity Database Services (IDS) will determine whether additional information is required and will ask the contracting officer to contact the bidder, offeror or supplier if needed. If required by IDS, contracting officers must notify the bidder, offeror or supplier and request that a list of names be provided within a recommended 10 business days. Failure to provide the names within the specified timeframe will render the bid, offer or arrangement non-responsive. All bidders, offerors or suppliers must provide, if applicable, a complete list of all foreign criminal charges and convictions pertaining to itself, its affiliates and its proposed first tier subcontractors that, to the best of their knowledge and belief may be similar to one of the listed offences in the Ineligibility and Suspension Policy. This is to be provided using the Declaration form for procurement.” *Manual*, c 4, s 4.21(c).

## **TREASURY BOARD'S CONTRACTING POLICY**

Last but not least, we have the Treasury Board's Contracting Policy. The Treasury Board is responsible for the *"accountability and ethics, financial, personnel and administrative management, comptrollership, approving regulations and most orders-in-council."*<sup>261</sup> This policy works under the provisions established in section 7(1) of the Financial Administration Act, which sets the Treasury Board's responsibilities; being the financial management and the *"review of annual and longer term expenditure plans and programs of departments, and the determination of priorities with respect thereto"*, the most relevant aspects to government procurement.<sup>262</sup> This policy's objective, just as the rest of the Canadian public procurement legal framework, is to carry out procurement in a way that enhances access, competition and fairness and results in best value.<sup>263</sup>

Section 2 of this document establishes that procurement in Canada shall be conducted in a manner that will support long-term industrial and regional development and other appropriate national objectives, including aboriginal economic development.<sup>264</sup> All the levels of governments have to procure according to this, which forces them to generate proper policies to attain developments in the subjects under their responsibility.<sup>265</sup> These policies are the ones that the Procurement Ombudsman assesses before issuing his/her reports.<sup>266</sup>

## **NON-COMPETITIVE CONTRACTING PROCESSES**

Non-competitive contracting processes happen whenever a government authority does not require bidding to procure services or items that it needs. Section 3.15.b of the Supply Manual establishes the situations under which these processes can be used. These situations are: a) pressing emergency, b) estimated expenditure exceeding certain monetary thresholds,<sup>267</sup> c) the nature

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<sup>261</sup> *Manual*, c 1, s 1.30.1(a)

<sup>262</sup> *Financial Administration Act*, section 7(1)(c)(d).

<sup>263</sup> *Treasury Board's Contracting Policy*, Section 1.

<sup>264</sup> *Treasury Board's Contracting Policy*, Section 2(c).

<sup>265</sup> Cathryn Kallwitz. *Aboriginal procurement: past, present, future* (2011) 14:3 Summit Magazine, at 16.

<sup>266</sup> *Procurement Ombudsman Regulations*, Sections 4(1), and 5(a), at 2-3.

<sup>267</sup> "A. \$25,000; B. \$100,000 where the contract is for the acquisition of architectural, engineering and other services required in respect of the planning, design, preparation or supervision of the construction, repair, renovation or restoration of a work; C. \$100,000 where the contract is to be entered into by the member of the Queen's Privy Council for Canada responsible for the Canadian International Development Agency and is for the acquisition of architectural, engineering or other services required in respect of the planning, design, preparation or supervision of an international development assistance program or project; GCRs 6.(b))." *Manual*, subsection 3.15.b.ii.

of the work is such that it would not be in the public interest to solicit bids, and d) only one person is capable of performing the contract.<sup>268</sup>

Notwithstanding the general norm of competitive bidding in Canada, contracting can be done under a non-competitive basis. The Office of the Procurement Ombudsman in 2014 noted that:

*“The 2014 Purchasing Activity Report (PAR) states that in the 2014 calendar year, 4,301 non-competitive contracts with a value higher than \$25,000 were awarded by the Government of Canada, accounting for 16.61 percent of the total number of awarded contracts with a value higher than \$25,000. Spending on non-competitive contracts with a value higher than \$25,000 totaled \$2.2B or 8.24 percent of all contracts with a value higher than \$25,000 awarded by the Government of Canada. [The Office of the Procurement Ombudsman] noted the 2014 PAR did not identify non-competitive contracts with a value less than \$25,000; therefore, the total number and the total value of non-competitive contracts awarded is not publicly available.”<sup>269</sup>*

In the latest report (2016), the numbers are quite similar.<sup>270</sup> These numbers drew the attention of the Office of the Procurement Ombudsman. In a report titled *Procurement Practice Review: Review of Non-Competitive Contracting*, the Office made some recommendations to the Federal Government in terms of their use of non-competitive contracting. After an assessment made to 90 contracts (30 taken from the Agriculture and Agri-Food Canada, Immigration, Refugees and Citizenship Canada, and Statistics Canada, each; and 20 files per department, making them 60),<sup>271</sup> the Office discovered that:

- 58 of 60 files were conducted according to subsection 10.2.6. of the Treasury Board’s Contracting Policy. The contracting entity

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<sup>268</sup> *Manual*, subsection 3.15.b.

<sup>269</sup> Office of the Procurement Ombudsman. *Procurement Practice Review: Review of Non-Competitive Contracting* (Ottawa, Office of the Procurement Ombudsman, 2016), online: <<http://opo-boa.gc.ca/documents/paapp-prorev/2016-2017/ecnc-rncc-eng.pdf>>, accessed 6<sup>th</sup> November 2018, at 7, para. 21

<sup>270</sup> In 2016, the Canadian Federal government awarded 4,424 contracts under non-competitive processes, which represents 15.73% of all the contracts awarded during the year. Moreover, in terms of value, 1,291 million dollars were awarded under the same circumstances (7.59% of the total amount awarded on that year). See, Treasury Board of Canada Secretariat. *2016 Purchasing Activity Report* (Ottawa, Treasury Board of Canada Secretariat, 2018), online: <<https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/contracting-data/2016-purchasing-activity-report.html>>, accessed 6<sup>th</sup> November 2018.

<sup>271</sup> Office of the Procurement Ombudsman, *Procurement Practice Review: Review of Non-Competitive Contracting*, supra note 269, at 7-8, para. 23,5.

(Agriculture and Agri-Food Canada) was able to provide the missing information;<sup>272</sup>

- All the contracts awarded under subsections 10.2.2. to 10.2.5. were totally justified;<sup>273</sup> and
- 59 of 60 files fell within the departments' delegated authority;<sup>274</sup>
- Of the 30 files reviewed at Agriculture and Agri-Food Canada, seven were not awarded in a manner consistent with the TB Contracting Policy.<sup>275</sup>

As a result, the Ombudsman recommended Agriculture and Agri-Food Canada to increase its oversight of non-competitive contracts and associated amendments, particularly in its regional offices, to ensure that procurement practices are consistent with the requirements of the Treasury Board's Contracting Policy.<sup>276</sup>

As the reader may see, without being perfect, the non-competitive contracting that the Canadian Federal government carries out is effective. Moreover, and as the report of the Office of the Procurement Ombudsman points out, its framework is designed to quickly detect and correct inconsistencies in the use of non-competitive processes.

Non-competitive contracting processes include sole-sourcing contracting as one of its methods. Due to the similarities that this scheme has in comparison with the *Adjudicación Directa*, this will be the next aspect of Canadian public procurement to be analyzed.

## **SOLE-SOURCING/SINGLE-SOURCING**

Sole-sourcing is permitted only in certain situations to assure the effectiveness of the procurement.<sup>277</sup> Both the WTO-AGP<sup>278</sup> and NAFTA<sup>279</sup> establish the exceptions under which "limited tendering" can be used. As I mentioned before, these processes are done under very restrictive parameters, which prevents

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<sup>272</sup> "Any use of the four exceptions to the bidding requirement should be fully justified on the contract file or, where applicable, in submissions to the Treasury Board." See, Treasury Board's Contracting Policy, section 10.2.6; See, *Idem*, at 8, para. 27-8.

<sup>273</sup> These exceptions are a pressing emergency, dollar limits, security considerations, when only person or company can do the job. See, *Idem*, at 8-9, para. 29-30.

<sup>274</sup> *Idem*, at 9, para. 31.

<sup>275</sup> "Errors observed included: One file exceeded the \$25,000 delegated authority; Four files from one specific regional office pertained to amendments to non-competitive contracts which were inconsistent with the TB Contracting policy; Two files were initially missing the non-competitive justification." See, *Idem*, at 15, para. 54.

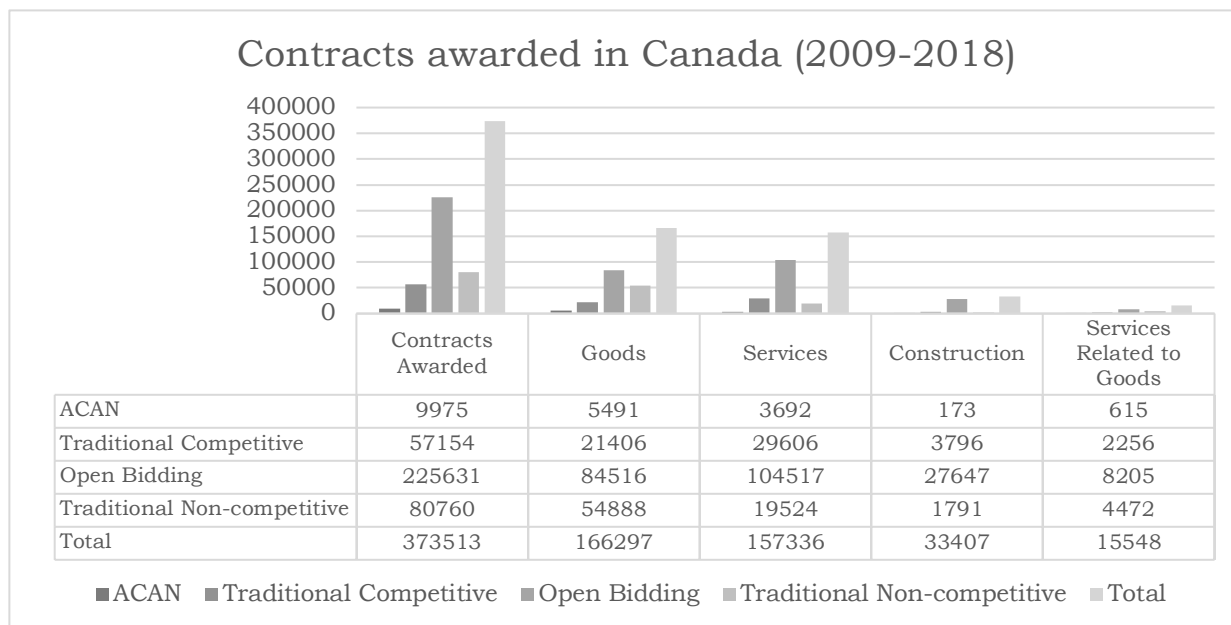
<sup>276</sup> *Idem*, at 15, para. 57.

<sup>277</sup> Paul M. Lalonde, Robert C. Worthington. *Sole source contracting - kill or keep* (2005) 8:7 The Business of Public Sector Procurement, at 6.

<sup>278</sup> WTO-AGP, Art. XV, at 21-3.

<sup>279</sup> NAFTA, Art. 1016, at 220-1.

governments to abuse this procurement modality. This is shown in the following graphic:



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As the reader may see, the ACANs are outnumbered by the other solicitation procedures. It is clear that, as exposed in previous sections, having competition as a norm and having non-competitive contracting under restrictive terms put sole-sourcing contracting as a *in extremis* procuring tool.

However, in the opinion of Worthington, the CITT has held a constructionist posture regarding this method, virtually banishing it from the Canadian procurement's landscape, neglecting the benefits of innovative and rapid procurement;<sup>281</sup> caused by the large sum of complaints rejected by the said judicial body.<sup>282</sup> In the opinion of the author, Worthington's claims are somewhat exaggerated due to the nature of sole-sourcing. We have to remember that these processes are extraordinary, which means that they can only be used in special circumstances (that is the ones established in subsection 3.15b of the Supply Manual).

The 9,975 ACANs issued from 2009 to 2018 just represent 2.67% of the total of the contracts awarded by the Canadian government in said period.

<sup>280</sup> Public Works and Government Services Canada. *Contract History* (Gatineau, Government of Canada, 2018), online: <[https://buyandsell.gc.ca/procurement-data/search/site?retain-filters=1&f%5B0%5D=sm\\_facet\\_procurement\\_data%3Adata\\_data\\_ch](https://buyandsell.gc.ca/procurement-data/search/site?retain-filters=1&f%5B0%5D=sm_facet_procurement_data%3Adata_data_ch)>, accessed 31<sup>st</sup> October 2018.

<sup>281</sup> Lalonde, Worthington, *Sole source contracting - kill or keep*, supra note 277, at 6.

<sup>282</sup> Robert C. Worthington. *Federal Court reins in CITT* (2007). 10:5 *The Business of Public Sector Procurement*; Ottawa, at 18.

Therefore, these awards are suitably uncommon. In other words, it is unthinkable for the CITT to change its posture to favour complaints against the exceptional nature of sole-sourcing. Undoubtedly, acting in said way support competition. On the other hand, the non-competitive awards (that is, a sole-source award without an ACAN in the middle) represent 21.62% of the total. That percentage might be a dark corner that the Canadian government should watch to avoid corruption.

Indeed, since its creation in 1988, the CITT has, in the majority of the occasions, ruled against the utilization of the sole-source contracting, arguing that competition is the default norm.<sup>283</sup> For example, in *Cognos Incorporated (Re) v. Canada*, for example, the CITT stated that the exceptional clause was not satisfied by Public Works and Government Services Canada and Correctional Service of Canada, by not publishing an Advance Contract Award Notice at issue, and not justifying or validating that they were seeking reasonable alternatives or substitutes for the service required.<sup>284</sup> This was a strict interpretation of NAFTA's Article 1016 and XV of the WTO-AGP.<sup>285</sup> This led the CITT to rule that the complaint filed by Cognos Incorporated was valid, and ordered that "*Cognos be awarded one third of the profit that it would have earned if it had submitted a bid to perform the work at a price of one dollar lower than the estimated cost of the proposed contract.*"<sup>286</sup>

In terms of health procurement, both the CFTA and the AIT, establish that health procurements are excepted from sole-source contracting.<sup>287-288</sup>

## **PROCUREMENT REVIEW POLICY**

One of the most important policies of the Canadian Federal government procurement is the Procurement Review Policy which is as follows:

*"The objective of the Procurement Review Policy is to enhance the use of procurement in support of industrial and regional development and other*

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<sup>283</sup> "As has been established in previous Tribunal decisions, competition is the norm under the trade agreements, with limited tendering procedures being the exception. The onus is on the government institutions to establish that the decision to choose a limited tendering procedure is permitted under the applicable trade agreements in the particular circumstances of the case. The Tribunal is not satisfied that PWGSC and CSC have met the conditions of the trade agreements in this instance." See, *Cognos Incorporated (Re)*, 2002 CanLII 46961 (CA CITT), online: <<http://canlii.ca/t/1sc3g>>, accessed 7<sup>th</sup> June 2018, at para 37. **[Cognos v. Canada]**

<sup>284</sup> *Idem*, para. 38-9.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Idem*, para. 50-1.

<sup>287</sup> Laura Eggertson, Marja Hughes. *Unlocking procurement barriers* (2003) 6:2 Summit: The Business of Public Sector Procurement; Ottawa, at 12.

<sup>288</sup> *Agreement on Internal Trade*. Articles 502, Annex 502.1B, letters (a) and (e), at 19, 38; CFTA, Article 504, section 11, letter (h), number (ii), at 41.

*national objectives in a manner that is fully consistent with the government's approved procurement objectives, and with Canada's international commitments within the General Agreement on Tariffs and Trade, NAFTA or other trade rights and obligations.*"<sup>289</sup>

Under these guidelines, "procurement actions should be consistent with and supportive of such national objectives as industrial and regional development, and other national objectives,"<sup>290</sup> which the Treasury Board's Contracting Policy mentions as well.<sup>291</sup> The objective is to enhance the procurement operations, sustaining them in a competitive, fair and accessible manner.<sup>292</sup> This policy is triggered for "procurement[s] [...] for goods and services over \$2,000,000."<sup>293</sup> When that happens, the contracting officer has to submit a procurement strategy to the interdepartmental body (formed by petition of the Treasury Board)<sup>294</sup> known as the Procurement Review Committee,<sup>295</sup> and get the Treasury Board's approval before issuing a bid solicitation.<sup>296</sup> If the threshold rises to \$100 million, the procurement is branded as a Major Crown Project.<sup>297</sup> To get approval, the contracting officer has to comply with section i of Annex 3.5 of the Supply Manual.<sup>298</sup> Without it, the procurement process cannot proceed. Moreover, the Committee has the power to recommend the government to procure certain items to attain the national objectives established in subsection 3.70.,<sup>299</sup> just as it happened in *Array Systems Computing Inc. v. Department of Public Works and Government Services*.<sup>300</sup>

Under this policy, the Canadian government procurement has still another reviewing layer before the award of the contracts.

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<sup>289</sup> *Manual*, c 1, s. 1.30.20.

<sup>290</sup> *Manual*, c 3, s. 3.70., section a.

<sup>291</sup> *Treasury Board's Contracting Policy*, Section 2(c).

<sup>292</sup> *Manual*, c 3, s. 3.70., section b.

<sup>293</sup> *Manual*, c 3, s. 3.70., section c.

<sup>294</sup> Wayne D. Barton, Richard D. Ungar. *Government Procurement in Canada* (1987) 21:1 *George Washington Journal of International Law and Economics*, at 51.

<sup>295</sup> "The PRC consists of a number of federal departments: PWGSC (the chair), the client department, Industry Canada, the regional agencies/departments, Indian and Northern Affairs Canada, Environment Canada, Employment and Social Development Canada, National Research Council, Finance Canada and the Treasury Board Secretariat." See, *Manual*, c 3, s. 3.70., section e.

<sup>296</sup> *Manual*, Annex 3.5., section e.

<sup>297</sup> *Manual*, Annex 3.5., section l.

<sup>298</sup> *Manual*, Annex 3.5., section i.

<sup>299</sup> Arie Reich. *Government Procurement and Bid Challenging in Canada after the Free Trade Agreement* (1991) 18:2 *Canadian Business Law Journal*, at 203-4.

<sup>300</sup> *Array Systems Computing Inc. (Re)*, supra note 257, para. 6

## **FINAL NOTES ON THE CANADIAN PUBLIC PROCUREMENT LEGAL FRAMEWORK.**

Despite that this section is only circumscribed to the Canadian Federal government procurement, the complexity of the framework and the multiple layers of requirements established by it, portrays how difficult is to abuse the Canadian system to embezzle money through procurement.

Having government procurement so tightly related to international trade has put competition as the most important pillar of the system. Although non-competitive processes are permitted, this competitive setting restricts their use to a few exceptional cases.<sup>301</sup>

Under this competitive scope, moreover, the framework allows suppliers to challenge (both before the CITT and the Procurement Ombudsman) awards whenever they feel like they were made under illegal and, more importantly, unfair terms. These terms happen whenever a procuring entity uses non-competitive contracting in cases not stipulated by the law.<sup>302</sup>

The Canadian procurement sector is multilayered but, unlike the Mexican system, the layers form layers of accountability as opposed to layers of discretion. In Canada, the Procurement Ombudsman, the CITT and the Treasury Board's Procurement Review Committee, are vigilant of the way that procuring entities conduct their activities. Moreover, the competitive setting upon which the Canadian procurement is built, gives the suppliers the possibility to denounce and challenge procurement decisions that might be illegal. Through this litigious environment, the Canadian procurement sector has the opportunity to receive feedback.

In terms of transparency, the Access to Information Act gives prevalence to public interest over any third party's information relevant to a procurement process;<sup>303</sup> including public health as one of the topics considered as of public interest.<sup>304</sup> In this sense, no procuring unit can obscure nor obstruct anyone from accessing information regarding procurements made by the Canadian public health sector (regardless of its level).

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<sup>301</sup> *WTO-AGP*, Art. XV, at 21-3; *NAFTA*, Art. 1016, at 220-1; Treasury Board's Contracting Policy, section 10.2.2,-6; *Government Contracts Regulations*, Section 6, at 5.

<sup>302</sup> *WTO-AGP*, Art. XV, at 21-3; *NAFTA*, Art. 1016, at 220-1; Treasury Board's Contracting Policy, section 10.2.2,-6; *Government Contracts Regulations*, Section 6, at 5.

<sup>303</sup> *Access to Information Act*. Section 20(6)(b), at 21.

<sup>304</sup> *Access to Information Act*. Section 20(6)(a), at 21.

## **DIFFERENCES BETWEEN BOTH NATIONAL PROCUREMENT SYSTEMS. THE ESSENCE OF THE RULES GOVERNING EACH SYSTEM**

The main difference rests in the fact that trade agreements rule the Canadian procurement system. Moreover, Canada adopted the provisions established by both NAFTA and the WTO-AGP by inserting and drafting specific sections of its Federal administrative framework to the text of those treaties. On the other hand, Mexico has failed completely to implement the provisions of these two treaties. Whereas Canada enacted the North American Free Trade Agreement Implementation Act, Mexico has no comparable legislation. As I mentioned in the conclusions of my analysis of the Mexican public procurement legal framework, the country only has two Acts unrelated to NAFTA regulating treaties in its catalogue.<sup>305</sup> Therefore, it is accurate to say that Mexico does public procurement excluding international trade and all that goes with it in terms of transparent and competitive procurement processes.

Thus, the Canadian procurement system sustains its activities under a free trade structure (concomitant to the fact that the State is the client and the regulator of said sector),<sup>306</sup> the Mexican approach is more state-centric, as seen in the differences between their complaints systems. In Mexico, procurement decisions can only be challenged before the Public Function Secretary, as established in both the Acquisitions and the Public Works Acts;<sup>307</sup> whereas Canada has the CITT, an independent judicial body. In other words, the superior entity of the Mexican procurement units is the one that decides about the legality of the awards, which can put the integrity of the complaints in peril due to the blurry separation of powers present in Mexico.<sup>308</sup> Canada's approach is not without its critics and writers such as Worthington and Barbara Allen had argued that the CITT can be a barrier for rapid procurement<sup>309</sup> and, moreover, it interrupts in certain administrative tasks such as policy making.<sup>310</sup> Yet, the possibility of challenging procurement decisions in a

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<sup>305</sup> Chamber of Deputies of the Honourable Congress of the Union. *LEYES Federales de México* (Mexico City, Chamber of Deputies of the Honourable Congress of the Union), online: <<http://www.diputados.gob.mx/LeyesBiblio/index.htm>>, accessed 31<sup>st</sup> October 2018.

<sup>306</sup> Emanuelli recovers that both treaties ponder competition as the prevalent characteristic under which government procurement has to be developed. See, Emanuelli, *Government Procurement*, supra note 93, at 9-10.

<sup>307</sup> LAASSP, Article 65, at 41-2; LOPSRM, Article 83, at 48-9.

<sup>308</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 27.

<sup>309</sup> Lalonde, Worthington, *Sole source contracting - kill or keep*, supra note 277, at 6.

<sup>310</sup> Barbara Ann C. Allen. *Unintended Consequences: Procurement Policy and the CITT*, in Khi V. Thai, Gustavo Piga. *Advancing Public Procurement: Practices, Innovation and Knowledge Sharing*, 1<sup>st</sup> ed. (Boca Raton, PrAcademic Press, 2006), at 304.

judicial body assures suppliers that the procuring entity does not perform a dual role as a judge and the jury.

Continuing with the differences between both systems' complaints framework, we see that Mexico does not allow suppliers to challenge limited tendering. Both the Acquisitions and the Public Works Acts exclude the *Adjudicaciones Directas* from being challenged at this instance.<sup>311</sup> This stance was reiterated by the National Supreme Court of Mexico in thesis contradiction (one of the three forms recognized by the law to create constitutional jurisprudence)<sup>312</sup> 363/2009.<sup>313</sup> Under this circumstance, suppliers have to file an *Amparo* before a constitutional tribunal to challenge procurements decisions made in an *Adjudicación Directa* process. However, the law governing the *Amparo* trial does not contain this possibility. It is a jurisprudence of the National Supreme Court of Mexico, which opens the way to present an *Amparo* complaint against these procurement decisions.<sup>314</sup> This lessens access to justice to suppliers, since they will need a lawyer to file a complaint that uses this thesis contradiction in their arguments to avoid that the tribunal declares it as inadmissible.<sup>315</sup>

### **COMPETITION AS A RULING PRINCIPLE OF GOVERNMENT PROCUREMENT.**

Another aspect generated by the different essences governing each system is their different degree of competition. As we have seen, competition is the major

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<sup>311</sup> "The Public Function Secretary will solve the non-conformities that are promoted against the acts of public bidding procedures or invitations to at least three persons indicated below: The call for bids, and the clarification meetings; The invitation to at least three people; The act of presentation and opening of proposals, and the ruling; The cancellation of the tender; The acts and omissions on the part of the convener that prevent the formalization of the contract in the terms established in the invitation to bid or in this Law." See, LAASSP, Article 65, at 41-2; LOPSRM, Article 83, at 48-9.

<sup>312</sup> *Ley de Amparo, Reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*. Article 215, at 64.

<sup>313</sup> Supreme Court of Justice of the Nation. *Contradicción de tesis 363/2009* (Mexico City, Supreme Court of Justice of the Nation, 2009), online: <<https://goo.gl/cp23ju>>, accessed 10<sup>th</sup> November 2018.

<sup>314</sup> Supreme Court of Justice of the Nation. *Tesis: XVI.1o.A. J/22 (10a.)* (Mexico City, Supreme Court of Justice of the Nation, 2012), online: <<https://goo.gl/66iHUq>>, accessed 10<sup>th</sup> November 2018.

<sup>315</sup> The *Amparo* trial is only applicable if the plaintiff has challenged an authority's decision in every legal resource previous to this constitutional legal defense. See, *Ley de Amparo, Reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*. Article 170, section I, third paragraph, at 50. However, as it is detailed in the jurisprudence *Tesis: XVI.1o.A. J/22 (10a.)*, the act has to explicitly mention which legal defense resource is admissible against it. Since both the Acquisitions and Public Works Acts exclude the "*Adjudicación Directa*" from being challenged before the Public Function Secretary, the suppliers could skip all previous litigious stages to present an *Amparo* against a limited tendering decision before a constitutional tribunal.

rule in the Canadian public procurement system. Meanwhile, Mexico does not make a single mention of the concept throughout its legal framework.

### ***THE (RELATIVELY) LACKLUSTER IMPACT OF NAFTA ON THE MEXICAN PROCUREMENT SYSTEM***

During the 1990s, many officials and observers in the hemisphere believed that free trade would remedy ailing economies.<sup>316</sup> As a consequence, Latin American countries signed several free trade agreements. Mexico is signatory of 16 free trade agreements, creating better access to 86 markets.<sup>317</sup> Of all of those treaties, NAFTA is of the most import. However, the impact of NAFTA in Mexico is considerably different from the impact within Canada, who took significant steps to adopt the requirements of NAFTA regarding competitive public procurement into domestic laws and policies. John J. Audley, a senior associate at the Carnegie Endowment for International Peace, argues that:

*"Put simply, NAFTA has been neither the disaster its opponents predicted nor the savior hailed by its supporters. But while NAFTA's overall impact may be muddled, for Mexico's rural households the picture is clear—and bleak. NAFTA has accelerated Mexico's transition to a liberalized economy without creating the necessary conditions for the public and private sectors to respond to the economic, social, and environmental shocks of trading with two of the biggest economies in the world. Mexico's most vulnerable citizens have faced a maelstrom of change beyond their capacity, or that of their government, to control."*<sup>318</sup>

To understand the differential impact of NAFTA as between Canada and Mexico, it is important as Audley notes to understand the divergent origins of free trade in each country. While Canada had a previous agreement with the United States (the Canada-United States Free Trade Agreement-CUFTA), Mexico was a novice when it came to making trade agreements with the U.S. government. However, this was not the first experience that Mexico had in this regard; according to Mexican economist Gazol Sánchez, Montevideo Treaty was Mexico's first free trade agreement. Nevertheless, the agreement was a complete failure, marking the beginning of a sad story for Mexico in terms of free trade.<sup>319</sup>

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<sup>316</sup> John J. Audley. *Introduction*, in John J. Audley, et al. *NAFTA's Promise and Reality*, 1<sup>st</sup> ed. (Washington, Carnegie Endowment for International Peace, 2004), online: <<https://carnegieendowment.org/files/nafta1.pdf>>, accessed 29<sup>th</sup> March 2019, at 5.

<sup>317</sup> Brian Harper. *Chart: Regional Trade Agreements in the Americas* (2018), online: <<https://www.as-coa.org/articles/chart-regional-trade-agreements-americas>>, accessed 27<sup>th</sup> March 2019.

<sup>318</sup> Audley, *NAFTA's Promise and Reality*, supra note 316, at 7.

<sup>319</sup> Antonio Gazol Sánchez. *Libre comercio: tratados y nuevo orden. Un balance* (2016) 13:38 *Journal of Economic Literature*, at 125.

Canada's experience with CUFTA prepared it for the NAFTA negotiations. In particular, Sandra Polaski mentions that the treaty "*led to substantial net job losses in Canada's traded sectors. After about five years, the losses stopped and export manufacturing began to grow again. A decade after the enactment of CUFTA, manufacturing employment recovered to the levels seen before the trade pact and has continued to grow modestly since then.*"<sup>320</sup> Therefore, Canada had a previous ill-fated experience with free trade, and modified its action plan when negotiating NAFTA with Mexico and the United States. Moreover, in both occasions, Canada had acts that inserted the two treaties into its legal framework: the CUFTA Implementation Act<sup>321</sup> and the NAFTA Implementation Act.<sup>322</sup>

One of the worst outcomes flowing from NAFTA for Mexico was the loss of 1.3 million farm jobs.<sup>323</sup> According to economic analyst Kimberly Amadeo, this was due to the following:

*" The 2002 Farm Bill subsidized U.S. agribusiness by as much as 40 percent of net farm income. When NAFTA removed trade tariffs, companies exported corn and other grains to Mexico below cost. Rural Mexican farmers could not compete. At the same time, Mexico reduced its subsidies to farmers from 33.2 percent of total farm income in 1990 to 13.2 percent in 2001. Most of those subsidies went to Mexico's large farms. These changes meant many small Mexican farmers were put out of business by highly subsidized American farmers."*<sup>324</sup>

In a similar way, Mexican suppliers could have been relegated from the government procurement sector in their own country. NAFTA's strict rules (applied on biased terms that favoured American investments)<sup>325</sup> on procurement have hardly benefited local suppliers, exposing them to unfair competition against foreign companies that are much more capable than them to provide the government with services.<sup>326</sup> Meanwhile, the big Mexican companies that were already economically dominant feared losing public contracts to those new international competitors, which led them fix prices between them, creating procurement monopolies in the process.

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<sup>320</sup> Sandra Polaski. *Jobs, Wages, and Household Income*, in supra note 316, at 12.

<sup>321</sup> Canada-United States Free Trade Agreement Implementation Act, S.C. 1988, c. 65.

<sup>322</sup> North American Free Trade Agreement, supra note 184.

<sup>323</sup> Audley, *NAFTA's Promise and Reality*, supra note 316, at 6.

<sup>324</sup> Kimberly Amadeo. *Six Problems with NAFTA*, The Balance (23th January 2019), online: <<https://www.thebalance.com/disadvantages-of-nafta-3306273>>, accessed 29<sup>th</sup> March 2019.

<sup>325</sup> Carla De Pozzio. *El TLCAN y su representación en el femicidio de Ciudad Juárez* (2010), online:

<[https://etd.ohiolink.edu/!etd.send\\_file?accession=bgsu1278010385&disposition=inline](https://etd.ohiolink.edu/!etd.send_file?accession=bgsu1278010385&disposition=inline)>, accessed 24th April 2019, at 24-5.

<sup>326</sup> Jean-Baptiste Velut. *NAFTA's Developmental Impact on Mexico: Assessment and prospects* (2011) 1:[2011] IdeAs, at 13.

Again, egregious examples of this kind of behavior can be found within Mexico's health sector. Between 2003 and 2006, the Federal Economic Competition Commission fined, for a total of 151, 679,345.00 pesos, several pharmaceutical companies and people for establishing, arranging and coordinating bidding between them in the procurement processes for insulins and serums, carried out by the Mexican Institute of Social Security. This kind of collusion made it impossible for other smaller companies to compete, since the prices offered by the monopolies were calibrated to undercut the competition.<sup>327</sup> Similarly, between 2009 and 2013, the Commission fined five companies and seven people with 112 million pesos in total for colluding and causing overpricing in the purchase of condoms and latex probes in the country.<sup>328</sup>

We see that the participation of foreign companies in Mexico spurred one of the factors of Klitgaard's formula: monopolies.<sup>329</sup> NAFTA has a specific section entirely dedicated to regulate monopolies in the three countries.<sup>330</sup> However, we have to remember that Mexico does not have an act dedicated solely to implementing NAFTA's stipulations into its legal framework. Regardless of the existence of the Federal Law of Economic Competition, NAFTA's anti-monopoly requirements remain separated from the Mexican public procurement sector.

Every trade treaty has its winners and losers, but not all victors played by the rules while developing their trading activities under NAFTA. Article 1001 of this treaty establishes the non-discrimination clause, meaning that no procurement should be configured to benefit any local supplier.<sup>331</sup> However, the United States had a controversial card up its sleeve to protect its local companies: *The Buy American Act*. This legislation requires "*every contract for the construction, alteration, or repair of any public building or public work in the United States shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers shall use only: (1) unmanufactured articles, materials, and supplies that have been mined or*

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<sup>327</sup> Federal Economic Competition Commission. *Análisis de Práctica Monopólica Absoluta Colusión en licitaciones públicas de compra de medicamentos para el IMSS* (Mexico City, Federal Economic Competition Commission, 2015), online: <[https://www.cofece.mx/wp-content/uploads/2017/11/HISTORIA\\_IMSS\\_080415.pdf#pdf](https://www.cofece.mx/wp-content/uploads/2017/11/HISTORIA_IMSS_080415.pdf#pdf)>, accessed 30<sup>th</sup> March 2019, at 1-2.

<sup>328</sup> Expansión. *México multa con 112 mdp a 5 empresas del mercado de condones* (20<sup>th</sup> March 2018), online: <<https://expansion.mx/economia/2018/03/20/mexico-multa-con-112-mdp-a-5-empresas-del-mercado-de-condones>>, accessed 30<sup>th</sup> March 2019.

<sup>329</sup> Klitgaard, *Fighting Corruption*, supra note 29, at 33.

<sup>330</sup> NAFTA, Articles 1501-5, at 240-2.

<sup>331</sup> NAFTA, Article 1001, Section 4, at 116.

*produced in the United States; and (2) manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States.*"<sup>332</sup> This law blocked significant opportunities for Canadian companies to participate in American procurement processes carried out by local and state governments;<sup>333</sup> undoubtedly causing the same effect for Mexican suppliers.

Therefore, the impact of NAFTA was to reinforce rather than break-up pre-existing monopolies in Mexico. The lack of law enforcement of internal regulations made small suppliers unable to compete on this new free trade setting; empowering big companies and their role in procurement law altogether. Arguably the abuse of *Adjudicacion Directa* (direct awards) might be interpreted as Mexico's own form of the Buy American Act.

In conclusion, paradoxically, the main objective of NAFTA -opening the Mexican procurement market to Canada and the United States' suppliers- spurred the dominant companies to fix prices and construct bids that small suppliers could not match. NAFTA did not impact Mexican law successfully due to the lack of incorporation of the requirements of NAFTA into domestic legislation and policies, an approach which is in sharp contrast to that of Canada where we see that such adoption has undoubtedly improved the standards for public procurement (see section "NAFTA," at 36-40).

### **MULTILAYERED REVIEW AUTHORITIES**

Another major difference between the two systems is the number of authorities involved in carrying out and reviewing the procurement processes in different parts of them. In Mexico, the authorities involved are:

- The Public Function Secretary; and
- The Superior Audit of the Federation.

Meanwhile, Canada has these authorities:

- The Department of Public Works and Government Services;
- The CITT;
- The Procurement Ombudsman;
- The Treasury Board; and
- The Procurement Review Committee

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<sup>332</sup> United States Code. *Buy American Act*, Title 41, Subtitle IV, Chapter 83, s. 8303.

<sup>333</sup> David M. Attwater. *The Influence of Buy American Policies on Canadian Coverage Under the World Trade Organization Agreement on Government Procurement* (2012) 46:6 The International Lawyer, at 944-5.

The difference (aside from the obvious quantitative aspect) between both systems is the level of legal empowerment that these authorities have. As we saw, the procurement process in Canada is susceptible to be cancelled or repaired if any of its stages was conducted under illegal means. Almost every authority above listed (aside from the Procurement Ombudsman) have legal powers to order either option if a procuring entity committed an illegality in any stage of the process. Moreover, the system allows suppliers, through the CITT complaints' system and the ones presented before the Procurement Ombudsman, to provide feedback on procurement decisions, since their complaints could pinpoint certain mistakes that procuring units commit reiteratively. For example, in the majority of the decisions in which the CITT reversed the use of an ACAN, the procuring units issued it in terms that harmed competition.<sup>334</sup>

Thus, the Canadian system is made up of various layers. Each authority involved in the Canadian procurement watches and acts over the system's contracting in different manners. As I mentioned, in Canada, any procurement that reaches the financial threshold established in section 3.70., of the Supply Manual is to be subjected to the procurement review policy.<sup>335</sup> The law defines the authorities empowered to enforce the policy and the situations in which is legal to do so. In Mexico, such measure does not exist. Neither the Acquisition nor the Public Works Act establish policies that are similar to the Canadian procurement review policy, much less the interruption of a public procurement if it does not meet the parameters of social benefit. Despite the presence of constitutional article 134 -overseeing constitutional bastion of the Mexican public spending- it is only utilized in budgeting matters.<sup>336</sup> There are no rules that establish that a procurement process has to be stopped if there is no consistency between what is acquired and the social policy goal sought by it.

The Procurement Ombudsman. This authority functions as another complaints instance, different from the CITT. However, it only has powers to emit recommendations to the procurers and to issue reports on specific procurement topics. Nevertheless, its labour does nourish the Canadian procurement system with valuable insights that might be used by procuring units while developing their procurement plans. Again, there is nothing comparable within the Mexican public procurement legal framework.

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<sup>334</sup> *Luik (Re)*, supra note 257, para. 37-8, 46-8; *Array Systems Computing Inc. (Re)*, supra note 257, para. 24

<sup>335</sup> *Manual*, c 3, s. 3.70., sections e and l.

<sup>336</sup> Abelardo Aníbal Gutiérrez Lara. *Gasto público y Presupuesto Base Cero en México* (2015) 30:192 *El Cotidiano*, at 13-22.

In Mexico, public procurement has only two layers. The first is governed by the procurement units, in charge of applying both the Acquisitions and Public Works Acts. The whole procurement process is planned, decided and validated by these administrative entities. The second layer is the complaints system which, as we know, does not allow suppliers to challenge procurement decisions regarding the *Adjudicacion Directa*.<sup>337</sup> Moreover, due to the setting of administrative contentious justice in Mexico, the first instance of any litigation against procurement decisions shall be sustained before the Public Function Secretary; an Executive branch's authority.

In theory, the system would be composed of three layers; being the Public Function Secretary in charge of that hypothetical level. However, there is a major political bias that prevents that this secretary carries out its task as the main reviewer of all the public procurement processes in the country; the same political obstacle that I mentioned during Chapter I. Therefore, it is clear to the writer that the Public Function Secretary belongs to the same layer as the procurement units, since they only revalidate whatever those units purport in their procurement plans.

## **CONCLUSION**

It is clear that both frameworks have major differences in terms of their specificity, the accessibility that they provide and, more importantly, the efficiency with which the authorities in charge of enforcing the statutes composing the frameworks work. The Canadian public procurement legal framework, with its multilayered composition, provides both suppliers and procuring units with legal certainty. The statutes clearly define under which circumstances does the government has the possibility to use limited tendering, mandating that procuring entities to conduct their processes and award their contracts with total respect to competition. If any supplier feels that they were injured by an illegal contract award, they could present a complaint before the CITT or the Procurement Ombudsman. Every stage of the Canadian procurement process is highly regulated, and the contracts might be cancelled and the suppliers repaired for the damages that could have been caused.

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<sup>337</sup> *"The Public Function Secretary will solve the non-conformities that are promoted against the acts of public bidding procedures or invitations to at least three persons indicated below: The call for bids, and the clarification meetings; The invitation to at least three people; The act of presentation and opening of proposals, and the ruling; The cancellation of the tender; The acts and omissions on the part of the convener that prevent the formalization of the contract in the terms established in the invitation to bid or in this Law."* See, LAASSP, Article 65, at 41-2; LOPSRM, Article 83, at 48-9.

In Mexico, the story is totally different. Despite having a myriad of laws governing different aspects from its public procurements, the country's legal framework sustains the system under a state-centered basis, encompassed in the Public Functions Secretary. The process is unidirectional and with few opportunities to be reviewed during its course. Therefore, if the process is directed under corrupt means, it is unlikely an administrative body will interrupt it and, moreover, the courts cannot intervene unless and until a specific complaint is filed.

### CHAPTER III: CORRUPTION PATTERNS WITHIN PUBLIC PROCUREMENT.

This section will detail which are the common characteristics that expose government procurement to corruption in Mexico.

Corruption within government procurement is caused by a variety of factors. According to Williams-Elegbe, this governmental activity is highly susceptible to corruption:

*“due partly to the large sums involved, the (usually) non-commercial nature of procuring entities, the nature of the relationship between the decision-maker and the public body, the measures of unsupervised discretion, bureaucratic rules and budgets that may not be tied to specified goals as well as non-performance-related pay and low pay.”*<sup>338</sup>

There is an asymmetry, she argues, of information between the public official and the government, allowing the first to use his/her knowledge to manipulate the procurement advantageously. The influence of discretion plays an important role in the tender and awarding process.<sup>339</sup> Williams-Elegbe outlines the concept of “auto-corruption,” which “occurs when a public official wrongly secures for himself or an associate, the privileges which rightly belong to the public, by bypassing or manipulating the formal procedures necessary for the award of these privileges.”<sup>340</sup>

Aguilar, Gill and Pino state that corruption:

*“flourish when public sector policies generate economic rents, institutions are weak, political and bureaucratic power is exercised for personal gain, society does not forcefully disapprove corruption and voice mechanisms are not strong. **Excessive discretionary power is vested in public officials,***<sup>341</sup> *monopolistic authority, lack of transparency in the functioning of government, [the] absence of effective accountability systems, [the] high cost of getting to public office and low public sector wages also encourage fraud and corruption.”*<sup>342</sup>

From this quote, we can discern two characteristics raised in previous chapters; one explicitly mentioned, and the other one as the cause of several factors mentioned in the same paragraph: discretionary powers and the presumption of legality.

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<sup>338</sup> Sope Williams-Elegbe. *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, 1<sup>st</sup> ed. (Portland, 2012, Hart Publishing), at 25-6.

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> Emphasis added.

<sup>342</sup> Mario A. Aguilar, Jit B.S. Gill, Livio Pino. *Preventing fraud and corruption in World Bank projects: a guide for staff* (Washington D.C., World Bank, 2000), at 2.

## **PRESUMPTION OF LEGALITY**

Before detailing the nexus between the presumption of legality and corruption in Mexico, understanding what is the principle of legality within Mexican legal doctrine is necessary. Mexican researcher Velasco states:

*“[The] actions made by courts and the administrative authorities must conform to a law, that is, to a general, pre-existing rule. This rule is, in first place, a statute enacted by the federal congress or by the state legislatures. However, if an authority hierarchically superior to the author of the act, as in the case of administrative authorities' actions, have enacted regulations or other general rules, then the concrete administrative act must also conform to them, besides complying with statute law.”<sup>343</sup>*

This principle forbids any authority to apply any measure not contained in a statute. Dr. Sitlali Torruco Salcedo further establishes that this principle divides in two tenures: the principle of administrative legality, and the reservation of the law.<sup>344</sup>

For the first, Torruco's definition is practically identical to the Velasco's one: the administrative must adjust its actions to what is provided by the law. Torruco adds that this principle resides in the joint interpretation of Articles 14 and 16 of the Mexican Constitution.<sup>345</sup> These articles set that “no one may be deprived of liberty or their property, possessions or rights, but by trial followed before the courts previously established, in which the essential formalities of [a legal] procedure are complied with and in accordance with the Laws issued prior to the fact”; and that “no one can be bothered in his person, family, home, papers or possessions, but by virtue of a written order of the competent authority, which merges and motivates the legal cause of the procedure. In the procedures followed in the form of a trial in which orality is established as a rule, it will be sufficient to record them in any medium that gives certainty of its content and compliance with the provisions of this [article]”; respectively.<sup>346</sup>

The principle of reservation of law, coined by the German jurist Otto Mayer, is a rule about regulation and about normative production.<sup>347</sup> Chinese legal researchers Haibo and Qianhong state that:

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<sup>343</sup> Gustavo R. Velasco. *The Rule of Law in Mexico* in Coral Gables, Mexico: A Symposium on Law and Government (Miami, University of Miami Press, 1958), at 9.

<sup>344</sup> Sitlali Torruco Salcedo. *El principio de legalidad en el ordenamiento jurídico mexicano*, in Gabriela Ríos Granados. *Reforma hacendaria en la agenda de la reforma del Estado*, 1st ed. (Mexico City, 2009, UNAM Instituto de Investigaciones Juridicas), at 5-6.

<sup>345</sup> *Ibid.*

<sup>346</sup> CPEUM, Articles 14, 6, at 14-5.

<sup>347</sup> Torruco Salcedo, *Reforma hacendaria en la agenda de la reforma del Estado*, supra note 344, at 7.

*“On [...] one hand, reservation of law allows for the constant increase in “quantity” and improvement in “quality” of laws that standardize the relationship between the people and the state, and the people have been endowed with a wide range of public rights that can enable them to seek judicial relief. On the other hand, it also standardizes the relationship of power between legislation and administration, and exerts an effect of “strict reservation of law without exception” on the executive power.”<sup>348</sup>*

In other words, this principle sets a threshold that prevents the Executive power from depriving citizens from freedom or property without the consent of a parliamentary body. The parliament, being the representative of the people, keeps arbitrariness (in theory) out of the public administration.<sup>349</sup> Torruco argues that this is the positive aspect of this principle. Moreover, she proposes that, on the other hand, the negative aspect does not allow intrusion of the Executive power into activities reserved to the will of the Legislative branch; to dictate norms on topics that are exclusive to the latter.<sup>350</sup>

Therefore, the Executive power must act according to the law, and it cannot intervene with the legislative process of topics reserved to a parliamentary body. However, the political reality of Mexico has characteristics that nuance both aspects of the principle of legality. Remembering the state-centered mobility postulated by Morris,<sup>351</sup> all the presidential administrations (excepting the ones from presidents Vicente Fox and Felipe Calderón)<sup>352</sup> have had majorities in the Mexican Congress. Those administrations used their numbers to blur the separation of powers, hence, the negative aspect of the principle of reservation of law. Therefore, they had the possibility to legislate at will, moulding the principle of legality accordingly.

Specifically, in public procurement, the reserve of law principle has been abused in several occasions. One example was the initiative of law presented by Deputies Juan Bueno Torio and Rubén Camarillo Ortega, which intended to dissolve the Compensation Committee and merge the Committee of Acquisitions, Leases, Works and Services, with the Strategy and Investments, the Audit and Performance Evaluation and the Transparency and

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<sup>348</sup> Ye Haibo, Qin Qianhong. *Reservation of law, legislation and human rights protection* (2014), 2:3 China Legal Science, at 94.

<sup>349</sup> *Ibid.*

<sup>350</sup> Torruco Salcedo, *Reforma hacendaria en la agenda de la reforma del Estado*, supra note 344, at 8.

<sup>351</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 44.

<sup>352</sup> Mauricio Rubí. *Peña tendrá más control que FCH y Fox sobre el Congreso*, *El Economista* (21<sup>st</sup> June 2015), online: <<https://www.economista.com.mx/politica/Peña-tendra-mas-control-que-FCH-y-Fox-sobre-el-Congreso-20150621-0112.html>>, accessed 4<sup>th</sup> October 2018.

Accountability committees of *Petróleos Mexicanos*.<sup>353</sup> The deputies presented their initiative on October 11<sup>th</sup> 2012, assigned to the Chamber of Deputies' Energy and Transparency and Anticorruption Commissions. Those commissions presented an extension of 45 days for the beginning of the discussion of the bill.<sup>354</sup> They never discussed the initiative, which forced deputies Bueno Torio and Camarillo Ortega to retire it.<sup>355</sup> In this example, the presidential party used its numbers (and its allies) and its control over the presidency to block this initiative.<sup>356</sup>

Within this context, we can see that the principle of legality is subdued by political powers in Mexico. Remembering that the principle of legality functions as a threshold of public administrators' powers, the fact that the legislative body responds directly to the party controlling the presidential administration makes clear that this principle can be (and has been) moulded at will. This leaves a huge opportunity for corrupt administrators to use this legality and conduct illegitimate administrative acts. This is further protected with the presumption of legality.

Mexican authors Negrete and Acosta establish that:

*“The legality of the administrative act is not presumed as an absolute rule in [an] administrative legislation. This presumption, when the legal norm establishes it, does not immunize the administrative act before the courts; the consequence is practical, and consists in the accreditation of the legality of the act. The burden of proof about the illegality of the act is for those who invoke it.”*<sup>357</sup>

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<sup>353</sup> Parliamentary Gazette. *Gaceta Parlamentaria*, año XV, número 3622-II, jueves 11 de octubre de 2012 (Mexico City, Chamber of Deputies of the Honourable Congress of the Union, 2012), online : <http://gaceta.diputados.gob.mx/Gaceta/62/2012/oct/20121011-II.html#Iniciativa8>, accessed 6<sup>th</sup> October 2018.

<sup>354</sup> The extension was presented on December 20<sup>th</sup>, 2012. This tool is established in the Regulation of the Chamber of Deputies. See, *Reglamento de la Cámara de Diputados*. Article 183, section 2, at 65.

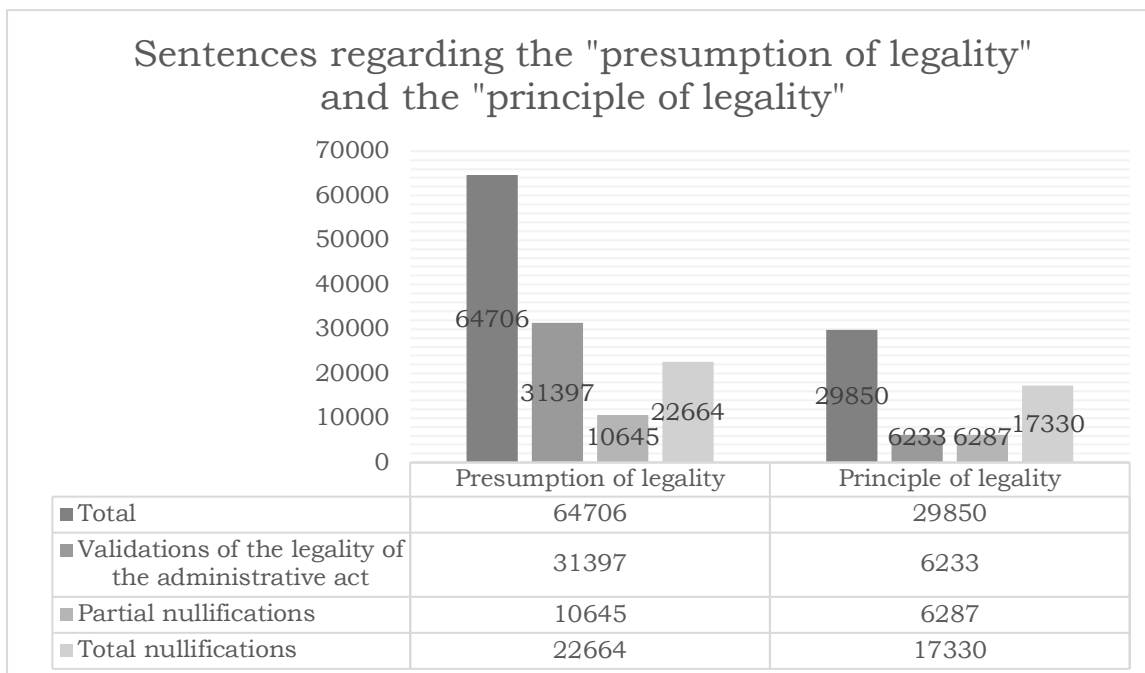
<sup>355</sup> They retire the law initiative on March 7<sup>th</sup>, 2013. The commissions never ruled on the document. See, Parliamentary Gazette, *Gaceta Parlamentaria*, año XV, número 3622-II, jueves 11 de octubre de 2012, supra note 353.

<sup>356</sup> Both the Energy and Transparency and Anticorruption Commissions were presided by members of the Institutional Revolution Party. In both commissions, the Institutional Revolution Party had at least 40% of the voters (40% in the Energy Commission, and 46.2% in the Transparency and Anticorruption). See, Chamber of Deputies of the Honourable Congress of the Union. *Transparencia y Anticorrupción* (Mexico City, Chamber of Deputies of the Honourable Congress of the Union, 2012), online: [https://web.archive.org/web/20121203021312/http://sitl.diputados.gob.mx:80/LXII\\_leg/in\\_tegranes\\_de\\_comisionlxii.php?comt=32](https://web.archive.org/web/20121203021312/http://sitl.diputados.gob.mx:80/LXII_leg/in_tegranes_de_comisionlxii.php?comt=32), accessed 6<sup>th</sup> October 2018.

<sup>357</sup> Gustavo Arturo Esquivel Vázquez. *Reflexiones sobre la presunción de legalidad del acto administrativo en el derecho mexicano* (2008) 58:250 *Revista de la Facultad de Derecho de México*, at 238.

Mexico followed the French model of administrative tribunals, and added them into their judicial tradition.<sup>358</sup> In 1936, the Mexican administrative justice system transformed into a mixed one, meaning that, at first instance, the trials are settled before an administrative tribunal (the Federal Court of Administrative Justice) and a posterior constitutional trial before the Federal Judicial Power.<sup>359</sup> The administrative tribunal belongs to the Executive Power.

The principle and presumption of legality work as trump cards of the public administration while settling a trial before an administrative tribunal. The data extracted from the Tribunal's website by searching the terms “presunción de legalidad” and “principio de legalidad” with a time filter between the January 1<sup>st</sup> 2000 and October 2018, shows the following:<sup>360</sup>



This data demonstrate that even if an affected party recurs to this tribunal to contest an administrative decision, this administrative litigation

<sup>358</sup> Alfonso Nava Negrete. *Derecho Administrativo*, 1<sup>st</sup> ed. (Mexico City, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México, 1991), at 63.

<sup>359</sup> *Ibid.*

<sup>360</sup> Using a quoted search of the phrase “presunción de legalidad” (presumption of legality), the Federal Court of Administrative Justice’s engine search throw 64,706 results that included the concept within the tribunal’s decision. Adding the phrase “se reconoce la validez” (the validity is recognized [by the tribunal]), the results reduced to 31,397. There are 33,309 decisions in which this tribunal failed on the plaintiff’s favour; 10,645 of which were partially nullified. However, these decisions were based on the finding of grave procedural fails committed during the administrative process (irregular notifications, primarily), unrelated to the presumption of legality. See, Federal Court of Administrative Justice. *Consulta de Sentencias Públicas*, supra note 143.

court could repeat the decision patterns established based on the presumption of legality.

Taking into consideration the politically biased legislative activities, it becomes clear that the Mexican government tends to abuse of the presumption and the principle of legality. These critics have appeared not only in Mexico, but in Spain,<sup>361</sup> Colombia,<sup>362</sup> and Chile.<sup>363</sup>

We can see the abovementioned particularity within the Mexican government procurement legal framework in the penultimate paragraph of Article 40/41 of both the Acquisitions and the Public Works Acts. Both laws demand that procurement units must conduct a market research before using either of the alternative procurement methods,<sup>364</sup> a reasonable requirement that forces procurement units to prove that the market does not have enough companies to issue a call for tenders, thus, making a public tender futile. However, the framework does not oblige the public purchasing units to publish the results of these activities. Moreover, it does not disclose any sanctions to the units that do not carry out market research prior to the use of alternative procurement methods, nor an empowered authority to enforce said article. Indeed, only 272 of the 234,665 contracts awarded in 2017 complied with this requirement.<sup>365</sup> In addition, given that there are no stipulations regarding the content that this study must have, it is possible that those that have been conducted are cursory at best. There are no records of public administrators sanctioned under this regard.

In conclusion, we see that both the presumption and the principle of legality are susceptible to be used in corrupt acts. As mentioned before, these concepts shield the legality with which the illegitimate corruption acts are done. Moreover, in the case 986/2015, the Supreme Court of Justice resolved that the absence of the research market does not affect the “*garantía de audiencia*”<sup>366</sup> of the plaintiff.<sup>367</sup> Therefore, it is crucial to reform the legal

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<sup>361</sup> José Sánchez Lambás. *La corrupción y la (enésima) reforma de la justicia de España* (2016) 2 :[2016] International Magazine « Transparencia e Integridad », at 6-7.

<sup>362</sup> Juan Carlos Henao. *Corrupción, política y sociedad* (2018), online: <<http://caracol.com.co/descargables/2018/08/14/5d24b2aea54ad798addef498c7c1e357.pdf>>, accessed 12<sup>th</sup> October 2018, at 16.

<sup>363</sup> Camilo Lledó Veloso, José Pardo Donoso. *Sistema de sanciones por incumplimiento en los contratos públicos de suministro y prestación de servicios: la incerteza como un problema de política pública* (2015) 82:[2015] Revista de Derecho Público, at 64.

<sup>364</sup> LAASSP, Article 40, fifth paragraph, at 25.

<sup>365</sup> CompraNet. *Contratos 2017*, supra note 124.

<sup>366</sup> “The guarantee of an audience established by Article 14 of the Constitution consists in granting the governed the opportunity to defend previously the act of privation of life, liberty, property, possessions or rights, and its due respect imposes on the authorities, among other

framework of public procurement in such a way that these two legal principles do not allow arbitrariness.

## **DISCRETIONARY POWERS**

Discretion is dealt differently in Mexico and Canada. Given space constraints, this section will describe the main characteristics of this concept in each country.

### **MEXICO**

Regarding Mexican discretion. Luis José Bejar Rivera, a Mexican legal researcher, states:

*“The discretionary power of the Public Administration differs from the act regulated in the margin of freedom granted to the public official to dictate and execute the administrative measures; while in the regulated acts, the little or no maneuverability of the official is established as a parameter, in the discretionary act he is granted a reasonable margin of freedom to act in the specific case, according to a series of criteria (also established in the law).”<sup>368</sup>*

The exercise of this freedom must always be in concordance with public interest, the general principles of Administrative Law and the objective of the enabling law.<sup>369</sup> In Bejar’s opinion, there are two types of discretions inserted in the Mexican legal doctrine: an open and a technical-administrative one.

Bejar argues that the first one “transits” through the objective interpretation that the Administration makes of the public interest in the specific case, in an unmanned way, where undetermined legal precepts prevail.<sup>370</sup> With this open discretion, public administrators are not free,

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*obligations, that of that in the trial that follows “the essential formalities of the procedure are met”. These are those that are necessary to ensure adequate defense before the act of deprivation and that, generically, result in the following requirements: 1) Notification of the start of the procedure and its consequences; 2) The opportunity to offer and unburden the evidence in which the defense is created; 3) The opportunity to argue; and 4) The issuance of a resolution that resolves the issues discussed. If these requirements are not respected, it would no longer be possible to comply with the end of the hearing guarantee, which is to avoid the helplessness of the affected.”* See, Supreme Court of Justice of the Nation. *FORMALIDADES ESENCIALES DEL PROCEDIMIENTO. SON LAS QUE GARANTIZAN UNA ADECUADA Y OPORTUNA DEFENSA PREVIA AL ACTO PRIVATIVO* (Mexico City, Supreme Court of Justice of the Nation, 1995), online: <<https://goo.gl/qLqBmf>>, accessed 10<sup>th</sup> October 2018.

<sup>367</sup> Supreme Court of Justice of the Nation. *Amparo en Revisión 986/2015* (Mexico City, Supreme Court of Justice of the Nation, 2015), online: <<https://goo.gl/2fH2ha>>, accessed 10<sup>th</sup> October 2018, at 8, 10, 38-9.

<sup>368</sup> Luis José Bejar Rivera. *El Control de la discrecionalidad en el Derecho Mexicano* (2011) 45:[2011] *Ars Iuris*, at 195.

<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

however, to act as they please. They must still act according to the law, but the methods and outcomes of their acts are not tied to an article of the law.

With respect to the second type, the technical-administrative discretion, Bejar states, that:

*“the norm [that] attributes to the Administration the power to choose the way of acting for the attainment of an goal of public interest, in such a way that the Administration must determine and choose one of the possible ways of action. The Administration uses the technique and this one does not identify a single model of action, but several that are equally effective for the achievement of the public purpose in question. Then, the Administration will have to select one of them attending to what it considers most convenient for the public interest.”*<sup>371</sup>

Whereas the open discretion does not limit public administrators to certain options, the technical-administrative discretion does tie them to a catalogue of druthers. A key example of this rests within the text of articles 75 and 78 of the General Law of Administrative Responsibilities.<sup>372</sup>

The administrative scope of this type of discretion requires that public administrators legally justify the use of said discretion.<sup>373</sup> This legal justification, however, is not something that public administrators decide. Bejar argues that, in fact, the Legislative power holds the possibility of discretion to exist as the creator of the normative act.<sup>374</sup>

One might ask: What type of discretion is exercised during the awarding processes of the Mexican government procurement system? Given the characteristics described by Bejar, we are in front of a clear example of open discretion. As we remember, articles 134 of the Mexican Constitution, and 40 and 41 of the Acquisition and Public Works acts, respectively; establish that, in order to use either the “*Adjudicación Directa*,” or the “*Invitación a cuando menos tres personas*,” the purchase unit on charge of the procurement process has to accredit the constitutional criteria of public disbursements established in these articles.<sup>375</sup> The problem, as mentioned in the previous chapter, comes with the legislative omission on how to certify the presence of the criteria

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<sup>371</sup> *Idem*, at 196.

<sup>372</sup> Both of these articles establish the sanctions from which public administrators can choose to punish other public administrators that are facing administrative responsibilities processes. Article 75 establish sanctions against non-graves administrative faults (admonishments, labor suspensions, dismissals and disqualifications), whereas articles 78 sets the sanctions to grave administrative faults (labor suspension, dismissals, economic sanctions and disqualifications). See, *Ley General de Responsabilidades Administrativas*. Articles 75,8, at 21-2.

<sup>373</sup> Bejar Rivera, *El Control de la discrecionalidad en el Derecho Mexicano*, supra note 368, at 197.

<sup>374</sup> *Ibid.*

<sup>375</sup> CPEUM, Article 134, at 141;

within a public contract award. This flaw means that this open discretion can be easily transformed into arbitrariness, that is, according to Bejar, a discretionary power used without taking public interest into account.<sup>376</sup>

Who ensures that discretionary powers are not, as in the case detailed in the previous paragraph, abused by their holders? Bejar argues that this control is exercised by the contentious-administrative tribunals and the organs of the Judicial Power of the Federation. The tribunals supervise the use of discretion through the federal contentious-administrative, federal ordinary administrative, and the *Amparo* trials.<sup>377</sup> These authorities handle discretionary powers within the limits of these concepts: a) Reasonableness, b) Good faith, and c) Deviation of power.<sup>378</sup> These three concepts are established in Article 51 of the *Ley Federal de Procedimiento Contencioso Administrativo* (Federal Law on Administrative Litigation), in sections IV and V, which state:

*“ARTICLE 51.- It will be declared that an administrative resolution is illegal when one of the following causes is proven:*

*(...)*

*IV. If the facts that motivated it were not carried out, they were different or were assessed in the wrong way, or if it was issued in contravention of the provisions applied or failed to apply the proper ones, as to the merits of the matter.*

*V. When the administrative resolution issued in the exercise of discretionary powers does not correspond to the purposes for which the law confers these powers.”<sup>379</sup>*

This article gives legal power to the Federal Court of Administrative Justice to nullify any discretionary administrative act made without the inclusion of these three concepts. However, this does not mean that, in fact, all these concepts are relevant within the contentious-administrative context, specifically, when the judges make their decisions. The Mexican professor Manuel Lucero Espinosa, cited by Bejar, states:

*“[...] Of these limitations, the first two are considered as causes of illegality [...] reasonableness implies that the administrative act is fair, proportionate, equitable [...] good faith serves as a limitation to the discretionary activity of the Administration, since it is born from the confidence that should prevail in the administrative action so that the act, product of the exercise of discretionary powers, will be illegal when its*

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<sup>376</sup> Bejar Rivera, *El Control de la discrecionalidad en el Derecho Mexicano*, supra note 368, at 197.

<sup>377</sup> *Idem*, at 199.

<sup>378</sup> *Idem*, at 198.

<sup>379</sup> *Ley Federal de Procedimiento Contencioso Administrativo*. Article 51, sections IV and V, at 27.

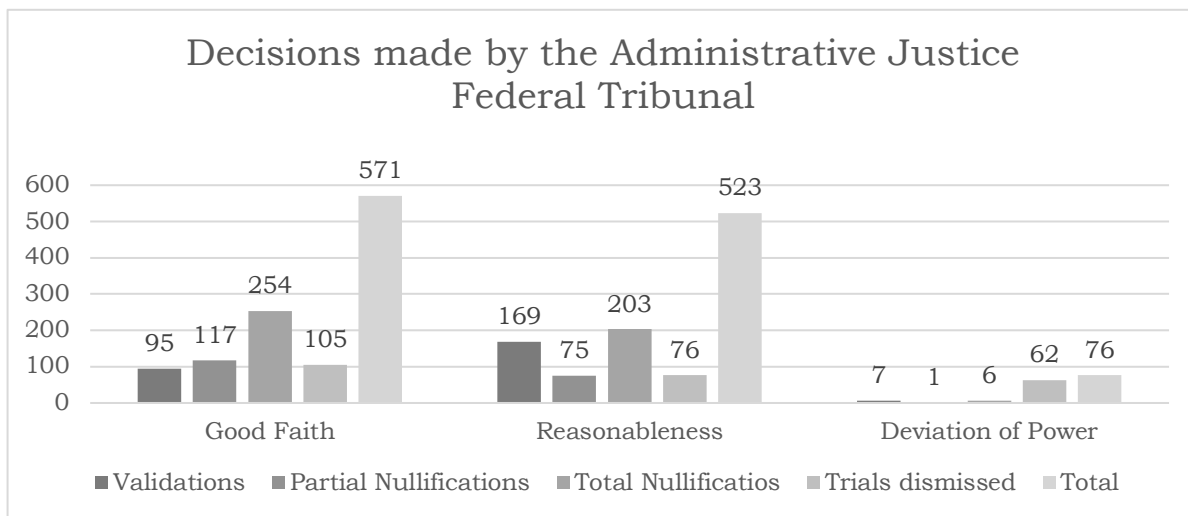
*issuance has been used in bad faith, leading the administrator to deception or to error, which would result in a false or undue justification of the act that would make it illegal.*<sup>380</sup>

Regarding the concept of deviation of power, Bejar cites French researcher Maurice Hariou, who states:

*“The misuse of power is the fact that an administrative authority uses its powers according to the [literality] of the law, but pursuing a different objective than the one granted by the law.”*<sup>381</sup>

Hariou notes a crucial factor in corruption acts within the abovementioned phrase: “according to the literality of the law.” This links discretionary powers with the abuse of the principle and the presumption of legality; concepts discussed in the previous section. Since the Executive branch intrudes in the labours of the Legislative power, the texts of the laws are concocted according to the pretensions of the first, opening the possibility of deviations of power appearing during the use of discretionary powers.

Can we rely on discretion control bodies to regulate the use of this tool? A search I conducted through the Federal Court of Administrative Justice provides some insight:<sup>382</sup>



<sup>380</sup> Bejar Rivera, *El Control de la discrecionalidad en el Derecho Mexicano*, supra note 368, at 204.

<sup>381</sup> *Ibid.*

<sup>382</sup> Using a quoted search of the three concepts alongside the word “discrecionalidad,” I obtained the results shown in the graphic. See, Federal Court of Administrative Justice. *Consulta de Sentencias Públicas*, supra note 143.

We can see that, just as Lucero Espinosa pointed out,<sup>383</sup> the first two concepts, if the public administrator does not take them into account, can be considered as decisive factors by the judges to declare the illegality of an administrative process. In the case of the Deviation of Power, we see that the Federal Court of Administrative Justice barely consider it in its decisions. In fact, the judges that form this tribunal dismissed the complaints that included the concept as their central argument in the majority of the cases. An extract of the decisions made by the Tribunal in such cases suggests why this might be the case:

*“(...) it can be concluded that with regard to the [technical-administrative discretion], the action of the administrative authority must adhere to the legal framework set by the legal norm, which indicates the specific conduct that must be followed in the face of the updating of the hypothesis that the legal provision foresees.*

*On the other hand, [open discretion] gives the authority a margin of free appreciation to determine the form of its action, which allows, as Fraga says, the administration to make a technical assessment of the elements that concur in a certain case.*

*(...)*

*The systematic interpretation of [...], allows to conclude that it contains a discretionary power, by virtue of establishing the parameters in which the administration can make a technical assessment of the elements that concur in a given case.”<sup>384</sup>*

In other words, despite its presence in Article 51 of the Federal Law on Administrative Litigation, there is no certainty that judges would consider the presence of Deviation of Power within the use of their discretionary powers, if these belong to the category of open discretion, being their only requirement to act under the premise of public interest, an undefined concept within the Mexican doctrine. The problem of this lurks within the definition of public interest given by the Mexican legal doctrine. The Mexican legal dictionary defines it as:

*“The set of claims related to the collective needs of the members of a community and protected through the direct and permanent intervention of the State.*

*(...) the public interest is protected by the State, **not only through legislative provisions, but also through a large number of***

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<sup>383</sup> Bejar Rivera, *El Control de la discrecionalidad en el Derecho Mexicano*, supra note 368, at 204.

<sup>384</sup> Region “Centro II” of the Federal Court of Administrative Justice. *EXPEDIENTE: 4611/17-09-01-2-ST* (Queretaro, Administrative Justice Federal Tribunal, 2017), online: <<http://sentencias.tjfa.gob.mx:8080/SICSEJLDOC/faces/content/public/consultasentencia.xhtml>>, accessed 14<sup>th</sup> October 2018, at 10-2.

**administrative measures that make up a permanent activity of the public powers, aimed at satisfying collective needs.**<sup>385-386</sup>

This definition breaks one of the pillars of the Mexican public administration: the principle of legality. By stating that the public interest might be attained through administrative actions that are not contained in a legislation, the Mexican legal dictionary adds on the possibility of discretionary powers used without any positivist restriction. If we consider that the Federal Court of Administrative Justice resorted to this dictionary on 1,795 decisions to clarify certain concepts,<sup>387</sup> the text can be considered a source of law (at least in the Mexican Administrative Law reality). Consequently, there is a high chance that those acts not contained in a law might be considered appropriate to obtain and act according to public interest; validated thereafter by the Administrative Justice Federal Tribunal.

Therefore, it is fair to say the control bodies that Bejar mentions are not enough to watch the correct use of discretion in the Mexican public administration.

## **CANADA**

I now turn to how the Canadian legal doctrine conceives discretionary powers. English Lord Diplock stated one of the best definitions of discretionary powers in the *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*:

*“The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.”*<sup>388</sup>

The Supreme Court of Canada established the general principles under which discretionary powers must be used. These are: (a) good faith, (b) uninfluenced by irrelevant considerations or motives, (c) reasonably, and (d) within the statutory bounds of the discretion.<sup>389</sup>

Good faith, as defined by Justice Rand, means:

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<sup>385</sup> National Autonomous University of Mexico. *Diccionario Jurídico Mexicano* (Mexico City, Universidad Nacional Autónoma de México, 1984), at 167.

<sup>386</sup> Emphasis added.

<sup>387</sup> By using the Tribunal’s search engine, I made a quoted search of the phrase “Diccionario Jurídico Mexicano.” The results were 1,795 decisions in which the judge in turn mentioned the dictionary to clarify a concept. See, Federal Court of Administrative Justice. *Consulta de Sentencias Públicas*, supra note 143.

<sup>388</sup> *Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council*, [1977] A.C. 1014, at para. 79 (C.A.). [**SSES v. Tameside**]

<sup>389</sup> *Boulis v. MMI*, [1974] S.C.R. 875, 26 D.L.R. at 877.

*“(...) carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.”*<sup>390</sup>

On the other hand, *“the expression “bad faith” [is] limited to situations where moral turpitude was present and if “irrelevant motives” and “unreasonableness” were kept separate from it.”*<sup>391</sup>

One good example of bad faith dwells in the text of the *Roncarelli v. Duplessis*’ case.<sup>392</sup> Although the former premier of Quebec Maurice Duplessis was, indeed, legally empowered to revoke Frank Roncarelli’s liquor license, the decision was not based on factors related to the operation of the license. The court decided that Duplessis exercised his discretionary powers arbitrarily and without good faith.<sup>393</sup> Therefore, although legally able, Premier Duplessis used his discretionary powers with “bad faith,” which should not be allowed under any scenario.

The second principle establishes that discretionary powers should be uninfluenced by irrelevant considerations or motives. Grey explains that:

*“This duty appears to cover two types of problems. First, it forbids the non-exercise of discretion for ulterior motives, such as personal gain, dislike, ethnic feeling and so on. Second, and more significantly, it forbids the use of discretion for purposes other than those intended by the instrument that created the discretion. Although the two cases are frequently difficult to distinguish, it is possible to point to examples that are more one than the other.”*<sup>394</sup>

The third principle is the duty to act reasonably. Lord Diplock stated:

*“(...) in public law “unreasonable” as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression, it must be conduct[ed] which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.”*<sup>395</sup>

Therefore, a public administrator acts outside of the scope of this principle whenever he/she uses said discretionary powers in discordance with

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<sup>390</sup> *Frank Roncarelli v The Honourable Maurice Duplessis*, [1959] S.C.R. 121 at 143. **[Roncarelli v Duplessis]**

<sup>391</sup> J.H. Grey. *Discretion in Administrative Law* (1979) 17:1 Osgoode Hall Law Journal, at 115.

<sup>392</sup> *Roncarelli v Duplessis*, supra note 390, at para 61.

<sup>393</sup> *Ibid.*

<sup>394</sup> Grey, *Discretion in Administrative Law*, supra note 391, at 116.

<sup>395</sup> *SSES v. Tameside*, supra note 388, at para. 79.

the “reasonableness” prescribed in a particular statute.<sup>396</sup> However, a question arises: Legally, what is reasonable? As a result, the duty to act reasonably relies heavily on interpretation, which opens the possibility for public administrators to justify the use of their discretionary powers as reasonable, forcing citizens to appeal these decisions in court.

Finally, we turn to the principle known as “*duty not to exceed the statutory bounds of the discretion*.” It is the main principle to counter the abuse of power, since this is the perfect reason to review the use of wrongly exercised discretionary powers; that is, in non-compliance with the statutes that create them. Grey explains that, as a consequence of the rule of law, the use of discretionary powers in non-compliance with a law different from the one that contains them is illegal.<sup>397</sup>

As a final point on discretionary powers, Grey considers the ones that are not attached to a review process. In *Roncarelli v. Duplessis*, Justice Rand established that, in public law, there is no possibility of unreviewable discretionary powers.<sup>398</sup> Grey contrasts this with an argument used in the *Martineau v. Matsqui Institution*, in which the Supreme Court of Canada established:

*“There are, however, ministers and officials who have purely administrative powers that are not subject to judicial review. Such persons must also exercise their powers on a fair and just basis because they are acting on behalf of the public; but they are answerable, not to the Courts, but to their superiors or [...] the appropriate Legislature.”*<sup>399</sup>

In Wade’s opinion:

*“Although the Crown’s lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose, everything depends upon the true intent and meaning of the empowering Act.”*<sup>400</sup>

In this sense, it is vital to establish that the use of discretionary powers should not be only justified in a positivist scope. Public administrators should be obliged to disclose the rationale under which they use their discretionary powers.

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<sup>396</sup> Grey, *Discretion in Administrative Law*, supra note 391, at 118.

<sup>397</sup> *Idem*, at 119-120.

<sup>398</sup> *Roncarelli v. Duplessis*, supra note 390, at para 41.

<sup>399</sup> Grey, *Discretion in Administrative Law*, supra note 391, at 120.

<sup>400</sup> Henry William Rawson Wade. *Administrative Law*, 4<sup>th</sup> ed. (Oxford, Clarendon Press, 1977), at 372.

As described in relation to the Mexican public procurement's legal framework, the use of discretion to fixate possible suppliers characterizes both alternative procurement methods. Therefore, unfettered abuse of discretionary powers exists, fostered by a dry positivist statute that no authority enforces. Under these conditions, the Mexican procurement system does not respond to any of the general principles of discretionary powers purported in *Boulis v MMI*. We are before a system that allows bad faith, unreasonable, influenced and obscure acts done by procurement units.

### **CORRUPTION IN THE MEXICAN GOVERNMENT PROCUREMENT SYSTEM**

Having described two factors that, if unregulated, might cause and foster corruption in any public procurement system on the world, I will now focus on particular aspects that cause this problem to appear in the Mexican public procurement system.

The OECD states that the Mexican procurement flaws reside in the invitation to bids (“[s]ensitive or non-public information disclosed”)<sup>401</sup> to the bidders, and contract management (“[f]ailure to monitor [the] performance of contractor”).<sup>402</sup> However, there is no specific mention of the problems in the awarding of public contracts. Moreover, although the same entity praises Mexico's publicising of procurement information, it does not clarify how this improves contract awarding and if it is provided to all bidders on fair terms.<sup>403</sup>

According to Elliot:

*“...corruption can also lead to losses in tax revenues when it takes the form of tax evasion or misuse of discretionary tax exemptions [...]. By affecting tax revenue or the level of public spending, corruption has adverse budgetary consequences. Thus, **the assignment of public procurement contracts through a corrupt system can result in infrastructure and public services of poor quality.**”<sup>404-405</sup>*

It is clear that corruption is mainly present in the awarding process, although not exclusive to it. According to the OECD:

*“Various types of corrupt acts may exploit these vulnerabilities, **such as embezzlement, undue influence in the needs assessment, bribery of public officials involved in the award process, or fraud in bid evaluations, invoices or contract obligations.** In many OECD*

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<sup>401</sup> Organization for Economic Co-operation and Development, *Integrity in Public Procurement. Good practice from A to Z*, supra note 95, at 24.

<sup>402</sup> *Idem*, at 25.

<sup>403</sup> *Idem*, at 92.

<sup>404</sup> Kimberly Elliott. *Corruption and the Global Economy*, 1<sup>st</sup> ed. (Mexico City, Limusa, 2001), at 114.

<sup>405</sup> Emphasis added.

*countries, significant corruption risks arise from [the] conflict of interest in decision-making, which may distort the allocation of resources through public procurement. Moreover, bid-rigging and cartelism may further undermine the procurement process.”<sup>406-407</sup>*

The OECD states that, generally, the following are the most common risks of the awarding stage:

- *“Conflict of interest and corruption in: a) The evaluation process (e.g. familiarity with bidders over the years, personal interests such as gifts or additional/secondary employment, no effective implementation of the “four-eyes” principle, etc.); b) The approval process: no effective separation of financial, contractual and project authorities in delegation of authority structure;*
- *Lack of access to records on the procedure.”<sup>408</sup>*

Up to this point, as discussed, the awarding phase is the most common area for corruption in Mexico. It is difficult to examine integrity weaknesses in other phases of the procurement process since the Mexican public procurement legal framework does not establish them in their text, and consequently, each government body has its own integrity policy. As this thesis is primarily focused on health procurement (since it is the preferred sector for public embezzlers), I will detail the weaknesses in that sector.

## **WEAKNESSES WITHIN THE HEALTH SECTOR PUBLIC PROCUREMENT**

The OECD has two reports on public procurement practices made by the *Instituto Mexicano del Seguro Social’s* (Mexican Social Security Institute – IMSS). In these reports, the organization has detected certain flaws within the most important health body of Mexico (and Latin America).

### **IMSS**

The IMSS is the largest health provider in Latin America, covering almost 45% of the Mexican population.<sup>409</sup> This institution provides health services to every Mexican who does not belong to the public administration or the military.

The OECD has stated that, in spite of this health body’s decentralization and its role in saving 2.8 billion USD between 2007 and 2010,<sup>410</sup> IMSS lacks

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<sup>406</sup> Organization for Economic Co-operation and Development. *Preventing Corruption in Public Procurement* (2016), online: <<http://www.oecd.org/gov/ethics/Corruption-in-Public-Procurement-Brochure.pdf>>, accessed 26<sup>th</sup> January 2018, at 6.

<sup>407</sup> Emphasis added.

<sup>408</sup> Organization for Economic Co-operation and Development, *Integrity in Public Procurement. Good practice from A to Z*, supra note 95, at 24.

<sup>409</sup> Organization for Economic Co-operation and Development. *Public Procurement Review of the Mexican Institute of Social Security: Enhancing Efficiency and Integrity for Better Health Care*, 1<sup>st</sup> ed. (Paris, OECD Publishing, 2018), at 15.

<sup>410</sup> *Idem*, at 16.

an “*explicit, clear and comprehensive organisation-wide procurement strategy*” that establishes the desired outcomes of all stakeholders involved in the processes. Moreover, there are no indicators that help to assess the overall performance of the procurement units.<sup>411</sup>

Another flaw caused by the decentralized setting on which the IMSS works is the insufficient internal communication. The OECD mentions that IMSS transmits and instructs its employees about new procurement policies through emails and meetings, not providing any guidance to their decentralized units (offices that are outside Mexico City) to implement them.<sup>412</sup>

Lastly and more importantly, the OECD identified a flawed risk assessment within the procurement system.<sup>413</sup> The Public Function Secretary defines risk assessment as “*the systematic process that organisations must undertake to measure and monitor risks related to their operations, using an analysis of the possible factors with the finality of defining strategies and actions to mitigate them and reasonably achieve an organisation’s goals.*”<sup>414</sup> However, as the OECD mentions, this risk assessment was created by the Public Function Secretary, but the IMSS did not tailor it to their procurement needs.<sup>415</sup> In the second report that the OECD published on IMSS, the international organization mentioned that, although the IMSS created risk assessment units, these are not tailored enough to address the challenges that the IMSS has in this area.<sup>416</sup> Moreover, there is no guarantee that these activities are put into practice by the IMSS’ authorities while procuring. In fact, by accessing the Institutional Risk Management Program (one of the tools mentioned by the OECD in its second report) I noted that it has not been used since 2010.<sup>417</sup>

IMSS has tools to combat corruption and to assess risks within their contracting activities. However, these tools are underused (or not used at all)

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<sup>411</sup> *Ibid.*

<sup>412</sup> *Idem*, at 17.

<sup>413</sup> Organization for Economic Co-operation and Development. *Second Public Procurement Review of the Mexican Institute of Social Security (IMSS). Reshaping strategies for better healthcare*, 1<sup>st</sup> ed. (Paris, OECD Publishing, 2018), at 164, 176-90.

<sup>414</sup> Organization for Economic Co-operation and Development, *Public Procurement Review of the Mexican Institute of Social Security: Enhancing Efficiency and Integrity for Better Health Care*, supra note 409, at 79.

<sup>415</sup> *Idem*, at 80.

<sup>416</sup> Organization for Economic Co-operation and Development, *Second Public Procurement Review of the Mexican Institute of Social Security (IMSS). Reshaping strategies for better healthcare*, supra note 413, at 164.

<sup>417</sup> Mexican Social Security Institute. *Evaluación del PARI* (Mexico City, Mexican Social Security Institute, 2018), online: <<http://www.imss.gob.mx/conoce-al-imss/pari>>, accessed 16<sup>th</sup> November 2018.

while procurement units conduct their processes. In fact, by analyzing the contract records of 2017, no reference was found to the risk assessments tools mentioned by the OECD (The Standard Model of Internal Control, the Institutional Risk Management, and the Institutional Development and Control Committee).<sup>418</sup> Therefore, even though these anticorruption policies and mechanisms exist, it appears they do not have a real impact on contract awarding. It is important to elevate these characteristics to the rank of law to make them mandatory for procurement units.

## **ACCOMPLICE AUTHORITIES**

There are tools to combat corruption within Mexican government procurement, but the authorities have chosen not to use these mechanisms. In many cases, low-tier public administrators can suffer consequences if they do not cooperate in corrupt acts. This section talks about both possibilities.

In Klitgaard's opinion, "*a distinguishing characteristic of systemic corruption is that the many parts of the government that are supposed to prevent corruption have themselves become corrupted — budgeting, auditing, inspection, monitoring, evaluation, and enforcement,*" which affects Anticorruption tasks and measures.<sup>419</sup> Within Ganev's corruption risk assessment, public officials hold two relevant spots. These are:

1. *"The value of the resources placed under the public official's control;*
2. *The level of personal discretion of public officials in managing those resources; and*
3. *The degree of accountability for the actions and decisions of public officials.*"<sup>420</sup>

Discretion allows procurement units of government and governmental agencies to select the companies that can participate in restricted bids and selective tenders. However, procurement units should not use their discretionary powers to arbitrarily select which laws to comply with. Indeed, the *Ley General de Responsabilidades Administrativas* (General Law of Administrative Responsibilities) does establish that any omissions that cause misuse of public resources are punishable under this statute.<sup>421</sup> Just as with the Attorney General of the Republic, it is fair to doubt the labour of all

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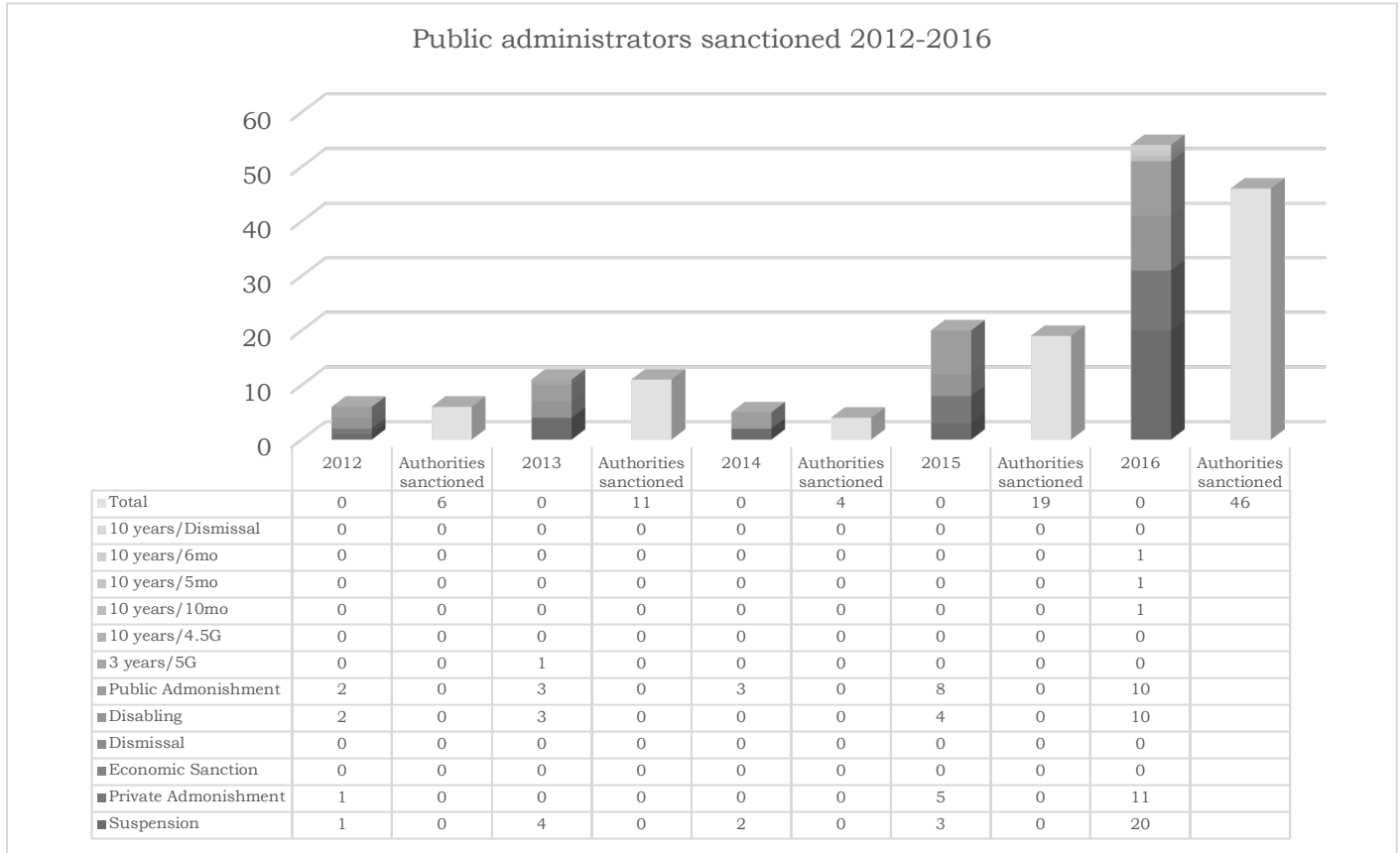
<sup>418</sup> CompraNet. *Contratos 2017*, supra note 124.

<sup>419</sup> Sope Williams-Elegbe. *Public Procurement and Multilateral Development Banks: Law, Practice and Problems*, 1<sup>st</sup> ed. (Oxford, Hart Publishing, 2017), at 172.

<sup>420</sup> Georgy Ganev. *Corruption and economic development in Bulgaria* in Transparency International. *Corruption in contemporary Bulgaria: Analytical overview*, 1<sup>st</sup> ed. (Sofia, Transparency International, 1998), at 56.

<sup>421</sup> *Ley General de Responsabilidades Administrativas*. Article 71, at 20. **[LGRA]**

authorities involved in the administrative responsibilities process.<sup>422</sup> The following data give validity to this skepticism:



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In the hard data of how many bureaucrats were sanctioned, we can see that most of them were liable of acts or omissions that, according to the General Law of Administrative Responsibilities, are not considered as grave.<sup>424</sup> Moreover, many of the Reports of Alleged Administrative Responsibility are likely lost in translation, taking into consideration that four authorities are in charge of the elaboration of these reports.<sup>425</sup> Regardless of the criminal and

<sup>422</sup> "The authority in the Secretariats, the internal control bodies, the Superior Audit of the Federation and the entities of superior control of the federative entities, as well as the units of responsibilities of the productive enterprises of the State, in charge of the investigation of administrative faults." Plus, we have to add to the lot the participation of the Federal Court of Administrative Justice. See, LGRA, Article 3, sections II, IV, XIX, XXVII, at 2-4.

<sup>423</sup> Federal Court of Administrative Justice. *Sistema de Consulta de Servidores Públicos Sancionados del TFJFA* (Mexico City, Federal Court of Administrative Justice, 2017), online: <<http://cesmdfa.tfja.gob.mx/aps/scsps/index.php>>, accessed 8th July 2018.

<sup>424</sup> LGRA, Article 75, at 21-2.

<sup>425</sup> Official Gazette of the Federation. *MANUAL de Procedimientos de la Unidad de Auditoría Interna* (Mexico City, Ministry of the Interior, 2016), online:

administrative penalties that corrupt authorities might face, the investigations are to be initiated by their own internal control bodies.<sup>426</sup> Therefore, the degree of accountability is at a low level.

In a country in which the presidential party subdues the Executive branch to its will, it is almost certain that the public administrators will be protected if they belong to the partisans of said party. This is known as Particracy. Italian researcher Mauro Calise defines this form of government as:

*“(...) a form of government where a party holds monopolistic control over the governmental process, just as presidents and parliaments are supposed to do within their own regimes.”<sup>427</sup>*

Particracy directly affects the chain of command of the Mexican public administration. In this scenario, the interests of a party overcome the duty of the public administrator. Said party appoints the public administrator, so they owe the post to them. This situation corrupts the whole federal level. Moreover, it will prevent all the institutions from one level from collaborating with a different level of administration if it is under the control of another political party.

However, the party that holds control over the Federal level can restrain opposition through the System of Fiscal Coordination. Under this system, the Federation and the states sign fiscal coordination agreements, by means of which the states limit their tax powers in favour of the Federation, in exchange for obtaining a share in federal tax revenues. Currently all states have signed this type of agreement, which has given rise to the two most important taxes (Income Tax and Value Added Tax) that are established and administered by the Federation.<sup>428</sup> By controlling the 80% of the total tax revenue generated in Mexico,<sup>429</sup> the Federal government can coerce states with different political parties to act according to what the Presidential party deems appropriate. A key example of this can be seen in the recent outcry (and its subsequent litigation) by Chihuahua’s governor Javier Corral. According to Governor Corral, the Federal level (governed by President Peña Nieto’s party, the Institutional Revolutionary Party) holds financial resources that corresponded to the *Ramo 33* due to his decision to prosecute the former governor of

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<[http://dof.gob.mx/nota\\_detalle.php?codigo=5440961&fecha=10/06/2016](http://dof.gob.mx/nota_detalle.php?codigo=5440961&fecha=10/06/2016)>, accessed 8th July 2018.

<sup>426</sup> LGRA, Article 3, section II-IV, at 2.

<sup>427</sup> Mauro Calise. *The Italian Particracy: Beyond President and Parliament* (1994). 109:3 Political Science Quarterly, at 444.

<sup>428</sup> José María Serna de la Garza. *Las convenciones nacionales fiscales y el federalismo en México*, 1st ed. (Mexico City, National Autonomous University of Mexico, 2004), at 23.

<sup>429</sup> *Ibid.*

Chihuahua, Cesar Duarte, accused of embezzling 780 million Mexican pesos from Chihuahua's treasury.<sup>430</sup> The governor presented a constitutional controversy<sup>431</sup> against the System of Fiscal Coordination.<sup>432</sup>

Either through complicity or financial-political pressure, the Federal government intervenes in both the state and municipal levels' decision-making. Particracy can and has been used to allow corrupt acts and their perpetrators to be undetected and unpunished. The OECD has denounced this situation in the past.<sup>433</sup> Government procurement is at expense of said situations and, as the OECD pinpointed, its review has to be carried out by an independent body that does not respond directly to the Public Function Secretary.

## **CASES**

I now will turn to examine more specific instances of corruption in the public procurement system. These cases are relevant due to the use of public procurement to embezzle money out of the health sector.

### **LA ESTAFA MAESTRA AND THE DUARTE'S CASE**

I have described both of these cases in the introduction of this thesis. In both, authorities used alternative procurement methods to embezzle resources to

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<sup>430</sup> Government of the State of Chihuahua. *Promoverá Chihuahua controversia constitucional ante negativa de gobierno de EPN a entregar recursos* (Chihuahua, Government of the State of Chihuahua, 2018), online: <<http://www.chihuahua.gob.mx/contenidos/promovera-chihuahua-controversia-constitucional-ante-negativa-de-gobierno-de-epn-entregar>>, accessed 15<sup>th</sup> November 2018.

<sup>431</sup> "It is a trial that is promoted before the Supreme Court of Justice of the Nation to resolve conflicts that arise between federal powers, powers of the states, governing bodies of the Federal District (now Mexico City), or between the federal government orders, state, municipal or of Mexico City, by invasion of powers or by any type of violation of the Federal Constitution, by the aforementioned bodies. It is considered a procedure of control of constitutional regularity." See, Legislative Information System. *Controversia Constitucional* (Mexico City, Secretariat of the Interior, 2017), online: <<http://sil.gobernacion.gob.mx/Glosario/definicionpop.php?ID=57>>, accessed 13<sup>th</sup> November 2018.

<sup>432</sup> Government of the State of Chihuahua, *Promoverá Chihuahua controversia constitucional ante negativa de gobierno de EPN a entregar recursos*, supra note 430.

<sup>433</sup> "In the phase 1 report, the OECD highlighted the importance of addressing obstacles to achieving an appropriate level of independence for EFSEs, for example, by decreasing their subordination to the offices of governors. Not much progress has been reported since the issuance of the phase 1 report in that regard. Legislatures may need to pay more attention to this issue, since the effective implementation of the [National Auditing System] and the [National Anticorruption System] depends on achieving a sufficient degree of independence for internal and external audit institutions, so that they can hold institutions accountable public and governments for their management of public funds and provision of services." See, Organization for Economic Co-operation and Development. *Informe de avances sobre la implementación del Sistema Nacional de Fiscalización de México: Ruta para fortalecer el buen gobierno* (Paris, Organization for Economic Co-operation and Development, 2017), online: <[https://www.asf.gob.mx/uploads/78\\_Estudios\\_sobre\\_la\\_percepcion\\_de\\_la\\_ASF/WEB\\_ASF\\_Progress\\_report\\_SPANISH\\_junio\\_2018.pdf](https://www.asf.gob.mx/uploads/78_Estudios_sobre_la_percepcion_de_la_ASF/WEB_ASF_Progress_report_SPANISH_junio_2018.pdf)>, accessed 9<sup>th</sup> July 2018, at 59-60.

their own purses and, more alarming, to finance the presidential campaign of the current president of Mexico, Enrique Peña Nieto.<sup>434</sup>

The process, in short, was the following: bureaucratic agents of both Veracruz and the Federal government registered shell companies in the Single Registry of Suppliers and Contractors. Then, the procurement units of both levels awarded public contracts to these companies. In the Veracruz's case, the contracts were directly awarded to the companies<sup>435</sup> whereas, in the “*Estafa Maestra*” case, public universities received the contracts, afterwards outsourcing them to shell companies.<sup>436</sup> In both cases, the companies were legally prevented from carrying out the services or delivering the goods established in the public contracts.

What is a shell company? The OECD defines it as “*a company that is formally registered, incorporated, or otherwise legally organized in an economy but which does not conduct any operations in that economy other than in a pass-through capacity.*”<sup>437</sup> Ware, Moss, and Noone Campos pointed out that these fictitious private actors function as tools for money laundering, always disguised as subcontractors.<sup>438</sup> These authors identified what they call red flags of the existence of shell companies in a procurement process:

- *“Previously unknown companies, with no track record of implementing government contracts, serve as subcontractors to foreign or local prime contractors on a project.*
- *A subcontractor company is registered in a secrecy jurisdiction.*
- *Payments are made against invoices to accounts held by companies registered in a secrecy jurisdiction.*
- *The subcontractor company has an opaque ownership structure.*
- *The owners of the subcontractor company are listed as law firms or as incorporation agents, rather than as named individuals; this form of listing may be used to hide the identity of the individuals who benefit financially from the company’s business operations.*

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<sup>434</sup> Raúl Olmos, Valeria Durán. *Red ‘fantasma’ de Duarte trianguló dinero a campaña presidencial en 2012*, Aristegui Noticias (11th January 2018), online: <<https://aristeguinoicias.com/1101/mexico/red-fantasma-de-duarte-triangulo-dinero-a-campana-presidencial-en-2012/>>, accessed 10th July 2018.

<sup>435</sup> Ángel, Arteaga, *El caso de las empresas fantasmas de Veracruz*, supra note 7.

<sup>436</sup> Castillo, Roldán, Ureste, *La Estafa Maestra: Graduados en desaparecer dinero público*, supra note 8.

<sup>437</sup> Organization for Economic Co-operation and Development. *OECD Benchmark Definition of Foreign Direct Investment*, 4<sup>th</sup> ed. (Paris, OECD Publishing, 2009), at 101, 241.

<sup>438</sup> Glenn T. Ware, Shaun Moss, Edgardo Campos, Gregory Noone. *Corruption in Public Procurement: A Perennial Challenge* in Edgardo Campos, Sanjay Pradhan. *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level*, 1<sup>st</sup> ed. (Washington D.C., The International Bank for Reconstruction and Development / The World Bank, 2007), at 304-5.

- *The subcontractor company lacks visible corporate facilities, such as a headquarters building.*
- *The phone number provided by the subcontractor company is a personal residence or an answering service.*
- *Companies winning sizable or recurrent government contracts have opaque ownership structures.*
- *Family members of senior government officials hold ownership or management roles in companies that win government contracts.*
- *Recurrent appearances of government officials at company headquarters.*<sup>439</sup>

Several of these critical points are present within the *Estafa Maestra* and Veracruz's cases. From the 186 companies that participated in the *Estafa Maestra*, 41 were not registered before the Secretary of Economy, only 101 of them had notarized articles of incorporation, 68 did not have property folio, and 108 did not have a fiscal register.<sup>440</sup> In the Veracruz's case, notaries aligned with the Institutional Revolutionary Party skipped legal requirements and registered 21 new companies: the ones involved in the embezzling scandal.<sup>441</sup>

Despite of the situation explained above, these shell companies appear as suppliers in the Single Registry of Suppliers and Contractors. Mexican researchers Campos and Nava state that this register is unreliable since it does not contain basic information of the suppliers such as the names of the shareholders of the companies, or their fiscal and physical addresses. Moreover, the register does not contain any measurements that validate the performance of the suppliers while delivering goods and services.<sup>442</sup>

Another aspect worth mentioning about these cases –notably, about the *Estafa Maestra*– is the poor use of the principle of legality. The Federal government directly awarded contracts to eight public universities, which is permitted by the Acquisitions Act.<sup>443</sup> However, after receiving the contracts, the

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<sup>439</sup> *Idem*, at 305-6.

<sup>440</sup> Castillo, Roldán, Ureste. *La Estafa Maestra: Graduados en desaparecer dinero público*, supra note 8.

<sup>441</sup> Arturo Ángel. *Las empresas fantasma, creadas con irregularidades y por notarios ligados al PRI y a Duarte*, Animal Político (30th May 2018), online: <<https://www.animalpolitico.com/2016/05/entre-los-notarios-que-legalizaron-las-empresas-de-veracruz-hay-diputados-del-pri-e-hijos-de-funcionarios-de-duarte/>>, accessed 11th July 2018.

<sup>442</sup> Mariana Campos, Diana Nava. *Generar más valor en la contratación de obra pública*, in Laurence Patin. *Léase si quiere gobernar (en serio)* (2018) online: <[https://issuu.com/pajaropolitico/docs/libro\\_lease\\_siquiere\\_gobernar\\_vf\\_we](https://issuu.com/pajaropolitico/docs/libro_lease_siquiere_gobernar_vf_we)>, accessed 12th July 2018, at 226.

<sup>443</sup> LAASSP, Article 41, section X, at 26.

universities outsourced the work to shell companies. None of the services or goods were delivered, but the money did go to the so-called providers.<sup>444</sup>

The Acquisition Act states that, to use an “*Adjudicación Directa*” that intend to contract consulting services, studies or research carried out by public or private institutions “*the information that has to be provided to the bidders for the preparation of their proposal, is reserved in the terms established in the Federal Law of Transparency and Access to Government Public Information.*”<sup>445</sup> Using the *CompraNet* server, I was not able to find any contract that disclosed if said legal requirement was fulfilled. According to the General Transparency Law, the following information should be classified as “reserved:”

*I. Compromises national security, public security or national defense and have a genuine purpose and a demonstrable effect;*

*II. It may undermine the conduct of international negotiations and relations;*

*III. It is delivered to the Mexican State expressly with that character or that of confidential by another or other subjects of international law, except in the case of serious violations of human rights or crimes against humanity in accordance with international law;*

*IV. It may affect the effectiveness of the measures adopted in relation to the monetary, currency exchange or financial system policies of the country; may jeopardize the stability of financial institutions likely to be considered systemic risk or the country's financial system, may compromise security in the provision of national currency to the country, or may increase the cost of financial operations performed by regulated entities of the federal public sector;*

*V. May endanger the life, safety or health of a person;*

*VI. Obstruct verification, inspection and audit activities related to compliance with laws or affect the collection of contributions;*

*VII. Obstruct the prevention or prosecution of crimes;*

*VIII. The one that contains the opinions, recommendations or points of view that are part of the deliberative process of the public servants, until the definitive decision is adopted, which must be documented;*

*IX. Obstruct the procedures to establish responsibility to the Public Servants, as long as the administrative resolution has not been issued;*

*X. Affect the rights of due process;*

*XI. Infringe the conduction of court records or administrative proceedings followed in the form of a trial, as long as they have not caused state;*

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<sup>444</sup> Castillo, Roldán, Ureste. *La Estafa Maestra: Graduados en desaparecer dinero público*, supra note 8.

<sup>445</sup> LAASSP, Article 41, section X, at 26.

XII. It is contained within the investigations of facts that the law indicates as crimes and are processed before the Public Ministry, and

XIII. Those that another law expressly defines it, accordingly with the bases, principles and articles established in this Law and do not contravene it; as well as those provided in international treaties.”<sup>446</sup>

Most of the classifications of the law are either too broad or unrelated to the procurement system. Procurement units should disclose the rationale behind the apparent fulfillment of this legal requirement to avoid obscurity while using a legal but tricky process.

In the same vein, the Superior Audit of the Federation found severe contract breaches in all of the contracts awarded in the *Estafa Maestra*. The journalistic team behind this report extracted data that prove that, although the contracts were legally awarded to the eight universities, these higher education institutions were not allowed to subcontract the services pact within them. The following is an example of the remarks made by the Superior Audit of the Federation to one of those schools:

*“With the revision of the mentioned agreements, it was detected that (...) “it is expressly agreed by the parties that the Higher Technological Institute of Comalcalco (ITSC) may not partially or totally enforce the services by another [company], being forbidden to subcontracting; since the ITSC, has sufficient capacity for the provision of the services agreed (...); likewise, the ITSC may not assign the rights and obligations deriving from this specific agreement partially or totally in favour of another individual or entity, with the exception of collection rights, in which case it must have prior consent and in writing from the area responsible for payment in [PEMEX Exploración y Producción].” Notwithstanding the foregoing, the ITSC, to comply with the objectives, sub-contracted six companies, with which it signed two agreements to comply with each one of those signed with [PEMEX Exploración y Producción]”<sup>447</sup>*

Despite the legality of the award of the contracts, it is clear that the subcontracting was not legal under any terms. Since, as Campos and Nava mentioned, the Single Registry of Suppliers and Contractors is unreliable and does not have any assessments of the suppliers’ performance, there was no way to tell if these subcontracted companies thoroughly fulfilled the contracts’ specifications.

All of this leads us to another symptom of corruption described above: accomplice authorities. Both the Acquisitions and Public Works

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<sup>446</sup> LGTAIP, Article 113, at 41-2.

<sup>447</sup> Superior Audit of the Federation. *Auditoría Financiera y de Cumplimiento: 14-6-47T4L-02-1655* (Mexico City, Superior Audit of the Federation, 2016), online: <[https://www.asf.gob.mx/Trans/Informes/IR2014i/Documentos/Auditorias/2014\\_1655\\_a.pdf](https://www.asf.gob.mx/Trans/Informes/IR2014i/Documentos/Auditorias/2014_1655_a.pdf)>, accessed 24<sup>th</sup> August 2018, at 5-15.

Acts oblige possible suppliers to prove their legal existence.<sup>448</sup> The law states that this requirement is crucial to allow companies to participate in the public tenders. Therefore, it is unknown under which parameters the procurement units involved in both the *Estafa Maestra* and the Veracruz's case decided that the shell companies involved in the scandal are legally able to be taken into consideration for the procurements. It is clear that aligned authorities with the whole scam since the beginning conducted the procurement process from zero. In fact, as the *Estafa Maestra* report states, the deans of the educational institutions involved received around 1 billion pesos for their participation.<sup>449</sup>

These cases are the most famous in recent Mexican history in which the government procurement system functioned as an embezzling vessel.

### **YUCATAN UNDER ZAPATA BELLO'S GOVERNMENT**

*Mayaleaks* is a group of journalists of the Yucatan Peninsula dedicated to investigating the areas of opacity in the Executive, Legislative and Judicial branches of the State of Yucatan and its main city councils.<sup>450</sup> They became part of the national transparency scenario by exposing the two most prominent examples of corruption in the history of Yucatan: Rolando Zapata's embezzlements and the hospitals scandals.

*Mayaleaks* reported that the Superior Audit of the Federation criminally denounced the government of the State of Yucatan due to alleged damage to the Federal Treasury that would reach an approximate of 34 million pesos.<sup>451</sup> The Superior Audit of the Federation recorded these embezzlements in three records and remains to wait on what the Attorney General of the Republic does to prosecute those possibly involved.<sup>452</sup> Six government bodies of the State of

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<sup>448</sup> LAASSP, Articles 29, section VII; 45, section IV, at 17, 29; LOPSRM, Articles 31, section XIII; 46, section IV, at 17, 30.

<sup>449</sup> Castillo, Roldán, Ureste. *La Estafa Maestra: Graduados en desaparecer dinero público*, supra note 8.

<sup>450</sup> Mayaleaks. *Qué hacemos* (2016), online: <<https://mayaleaks.org.mx/que-hacemos/>>, accessed 15<sup>th</sup> July 2018.

<sup>451</sup> Mayaleaks. *La Auditoría Superior denuncia penalmente al gobierno de Zapata Bello* (26<sup>th</sup> March 2018), online: <<https://mayaleaks.org.mx/la-auditoria-superior-denuncia-penalmente-al-gobierno-de-zapata-bello/>>, accessed 15<sup>th</sup> July 2018.

<sup>452</sup> Under the expedients 14-A-31000-14-1135 (001 to 003), the Superior Audit of the Federation reported a total of \$33,655,370.32 Mexican pesos. See, Superior Audit of the Federation. *Auditoría Financiera con Enfoque de Desempeño: 14-A-31000-14-1135 GF-1042* (Mexico City, Chamber of the Deputies of the Honourable Congress of the Union, 2018), online: <<https://drive.google.com/open?id=1pkmPMmPbJ6L7okrGJsAUdf33Su2AvZU0>>, accessed 15<sup>th</sup> July 2018, at 1-14. **[Audit 1135]**

Yucatan embezzled monies from the *Fondo de Aportaciones para el Fortalecimiento de las Entidades Federativas* (Fund of Contributions for the Strengthening of the Federative Entities).<sup>453-454</sup> The government has not been able to clarify these disbursement deficiencies.<sup>455</sup> As in the *Estafa Maestra* and the Veracruz's case, the procurement method used was the "*Adjudicación Directa*."<sup>456</sup>

During Rolando Zapata's administration, the government of Yucatan has been one of the worsts regarding public spending activities. With 2.271 billion Mexican pesos of federal resources spent in undetermined circumstances; Rolando Zapata's sits firmly as the 7<sup>th</sup> governor with more wrongly exercised monies of the current federal administration.<sup>457</sup>

The other most prominent scandal in Yucatan's history comes in the form of public works contracts and irregularities in the disbursement of construction resources for three hospitals in the state; two for the municipalities of Tekax and Ticul, and the *Hospital Regional de Alta Especialidad de la Península de Yucatan* (Regional Hospital of High Specialty of the Yucatan Peninsula) in the capital, Merida.

First, the Tekax hospital. Its construction began during former governor Patricio Patrón Laviada's administration. During his tenure, this hospital received a total investment of 51.5 million pesos. The next governor, Ivonne Aracely Ortega Pacheco, required 112.4 million more pesos to the federal government, giving a total of 163.9 million pesos disbursed in this public

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<sup>453</sup> "The resources of the Contribution Fund for the Strengthening of the Federative Entities are intended to strengthen the budgets of the same and the regions to which they belong. For this purpose and with the same restrictions, the Federal Entities may agree among themselves or with the Federal Government, the application of these resources, which may not be used for expenditures of current or operating expenses, except in the cases expressly established. The Federal Entities must submit to the Ministry of Finance and Public Credit a detailed quarterly report on the application of the resources no later than 20 calendar days after the end of the quarter." See, *Ley de Coordinación Fiscal*, Article 47, at 41-2.

<sup>454</sup> The Secretaries of Administration and Finance (SAF); of Urban Development and Environment (SEDUMA); and Public Security (SSP); the Institutes for the Construction and Conservation of Public Works (INCCOPY); Highways Infrastructure (INCAY); and for the Development and Certification of Educational Physical Infrastructure (IDFEY). See, Audit 1135, at 12.

<sup>455</sup> Superior Audit of the Federation. *Auditoría Superior de la Federación – Datos* (Mexico City, Chamber of Deputies of the Honourable Congress of the Union, 2018), online: <<http://www.asfdatos.gob.mx/>>, accessed 15<sup>th</sup> July 2018.

<sup>456</sup> Audit 1135, at 5-6.

<sup>457</sup> Mayaleaks. *Autoridades yucatecas no comprueban el gasto de más de 2,200 millones* (21<sup>st</sup> March 2018), online: <<https://mayaleaks.org.mx/autoridades-yucatecas-no-comprueban-el-gasto-de-mas-de-2200-millones/>>, accessed 15<sup>th</sup> July 2018.

work.<sup>458</sup> According to the Ministry of Health of Mexico, the cost of a 30-bed general hospital oscillates around 53 million pesos.<sup>459</sup> The total investment has surpassed this cost. To this day, and despite an administrative resolution that gave 120 days to disclose the information about all the disbursements made regarding this hospital,<sup>460</sup> the government of Yucatan remains silent and the Tekax's hospital incomplete.

Next, we turn to the Ticul's hospital scandal. On September 21, 2011, former governor Ivonne Aracely Ortega Pacheco proposed a 60-bed hospital for this municipality;<sup>461</sup> a type of public work whose price ranges from 90 to 91 million pesos.<sup>462</sup> It was later modified to a 90-bed setting, and the media has reported that the government of Rolando Zapata is bargaining to reduce it to a 30-bed hospital.<sup>463</sup>

The Chamber of Deputies of the Congress of Yucatan approved the Decree 503, empowering Yucatan's Health Services to tender or conduct any procurement process in order to build hospitals in Merida, Tizimin and Ticul.<sup>464</sup> There is still no real data on how much the government of Yucatan

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<sup>458</sup> Mayaleaks. *Indicios de desvíos en el Presupuesto del hospital de Tekax* (9<sup>th</sup> February 2015), online: <<https://mayaleaks.org.mx/indicios-de-desvios-en-el-presupuesto-del-hospital-de-tekax/>>, accessed 16<sup>th</sup> July 2018.

<sup>459</sup> General Directorate of Health Planning and Development. *Modelos de recursos para la planeación de unidades médicas de la Secretaría de Salud* (Mexico City, Ministry of Health, 2010), online: <<https://drive.google.com/file/d/0B7n6Snhtbae3eWxzc2U0X2hOb2c/view>>, accessed 16<sup>th</sup> July 2018, at 43.

<sup>460</sup> The *Mayaleaks*' report collects all the names of the companies involved in the construction of the Tekax's hospital. Using the search engine of the General Coordination of Transparency and Access to Public Information, I found out that all of the expedients were resolved at the same time and in the same sense. See, General Coordination of Transparency and Access to Public Information. *Resolución de Ampliación de Plazo RSDGPUNAIPE: 041/14* (Mexico City, Unit of Access to Public Information of the Executive Branch, 2015), online: <[http://www.cgtaip.yucatan.gob.mx/files\\_pdf/solicitud/resolucion/SAI\\_R17387\\_resolucion\\_rs\\_dgpunaieAMPLIACION\\_DEL\\_PLAZO\\_04115ACUMULADASsop.pdf](http://www.cgtaip.yucatan.gob.mx/files_pdf/solicitud/resolucion/SAI_R17387_resolucion_rs_dgpunaieAMPLIACION_DEL_PLAZO_04115ACUMULADASsop.pdf)>, accessed 16<sup>th</sup> July 2018, at 1-2.

<sup>461</sup> Mayaleaks. *Hospital de Ticul: Datos relevantes y cronología de hechos* (17<sup>th</sup> April 2015), online: <<https://mayaleaks.org.mx/hospital-de-ticul-datos-relevantes-y-cronologia-de-hechos/>>, accessed 16<sup>th</sup> July 2018.

<sup>462</sup> General Directorate of Health Planning and Development, *Modelos de recursos para la planeación de unidades médicas de la Secretaría de Salud*, supra note 459, at 43.

<sup>463</sup> Mayaleaks, *Hospital de Ticul: Datos relevantes y cronología de hechos*, supra note 461.

<sup>464</sup> Congress of the Free and Sovereign State of Yucatan. *Decreto de autorización para la realización del Programa de Impulso a la Infraestructura y Servicios de Salud de Yucatán a través del esquema de Proyectos para la Prestación de Servicios* (Merida, Congress of the Free and Sovereign State of Yucatan, 2012), online: <<http://www.congresoyucatan.gob.mx/repositorio/transparencia/DECRETO/1-MZO-12%20DEC-PPS-HOSPITAL.pdf>>, accessed 23<sup>rd</sup> November 2018, Article 1 and 2, at 1-2.

has invested in this hospital,<sup>465</sup> and the contracts have yet to be disclosed by the procurement units of the Health Services Department of Yucatan. In May of 2015, the government of Yucatan sued the company in charge of this public work.<sup>466</sup> The hospitals were never finished.

In this case, it is interesting that the Congress of Yucatan stipulated that these contracts were going to be awarded through the scheme of "Projects for the provision of services" instead of doing it under the methods established by the Public Works Act.<sup>467</sup> There are no records that state under what legal circumstances the tenders were conducted or the requirements set into the contracts.

Finally, we turn to the Regional Hospital of High Specialty of the Yucatan Peninsula's irregularities. According to the Internal Control Department of the Ministry of Health of Yucatan, there were anomalies in the awarding process of the contracts for this public work.<sup>468</sup> Anomalies plagued this public work,<sup>469</sup> which is not under any investigation at the moment; being the delivery of non-existent or faulty documentation,<sup>470</sup> and the possible illegality of the

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<sup>465</sup> It is reported that an agreement was signed between the company "Infraestructura Hospitalaria de la Península, S.A. de C.V. (IHP)" and the government of Yucatan. Ivonne Ortega, later on, disclosed that the cost of the construction of the hospital would be 1.173 billion pesos. The director of this company argued that the real cost of the public work was 1.3 billion pesos. All of this information appeared in 2012. At the end of 2013, there is a payment commitment of \$ 948.8 million in the *Registro de Obligaciones Financieras de entidades federativas, municipios y organismos* (Registry of Financial Obligations of federal entities, municipalities and agencies) which is made by the Ministry of Finance and Public Credit. See, Mayaleaks, *Hospital de Ticul: Datos relevantes y cronología de hechos*, supra note 461.

<sup>466</sup> Mayaleaks. *El gobierno anuncia la rescisión del contrato del Hospital de Ticul* (4th May 2015), online: <<https://mayaleaks.org.mx/el-gobierno-anuncia-la-rescision-del-contrato-del-hospital-de-ticul/>>, accessed 16<sup>th</sup> July 2018.

<sup>467</sup> Congress of the Free and Sovereign State of Yucatan, *Decreto de autorización para la realización del Programa de Impulso a la Infraestructura y Servicios de Salud de Yucatán a través del esquema de Proyectos para la Prestación de Servicios*, supra note 464, at 1-2.

<sup>468</sup> Mayaleaks. *Detectan graves anomalías en el Hospital de Alta Especialidad* (21<sup>st</sup> November 2017), online: <<https://mayaleaks.org.mx/detectan-graves-anomalias-en-el-hospital-de-alta-especialidad/>>, accessed 17<sup>th</sup> July 2018.

<sup>469</sup> Mayaleaks, *Detectan graves anomalías en el Hospital de Alta Especialidad*, supra note 468.

<sup>470</sup> "Inconsistencies in the award of the "Licitación Pública" procedures, especially on the dates of the clarification meetings; In the "Invitaciones a cuando menos tres personas" procedures, the technical and economic proposals of the bidders corresponding to nine contracts for 7 million 635 thousand 300 pesos were not disclosed; in 30 "Adjudicación Directa" procedures, for 124 million 895 thousand pesos, the legal and administrative documentation of the suppliers do not exist; requests for requisition of contracted goods and services were not signed or were not delivered to the pertinent authorities; the quarterly reports, submitted to the Leases and Services Acquisitions Committee, did not consider the summary of the conclusion and the general results of the hiring carried out by "Adjudicación Directa;" it was observed that 69 contracts and 22 modifying agreements, for an amount contracted of 351 million, 998 thousand 800 pesos were signed by personnel that did not have the legal powers, or they lacked any of the signatures of the

*Adjudicación Directa* processes done by the procurement unit of the hospital the most important flawed aspects of the myriads of deficiencies discovered through the audit.<sup>471</sup>

As I have pointed out previously, procurement units work with total disregard of the market studies required by both the Acquisitions and Public Works Acts.<sup>472</sup> The hospital's procurement unit, as it is a trend among its peers, only presented one quote to accredit 15 *Adjudicación Directa* processes. From the resting 32 contracts, only five had properly conducted market researches.<sup>473</sup> The Superior Audit of the Federation detailed that, in another sample, the procurement unit did not request quotes for 15 contracts.<sup>474</sup>

Another common factor that procurers have while using the *Adjudicación Directa* process is the inability to prove that their awards are conducted legally. In the audit made by the internal control body of the hospital, from a sample of 30 contracts developed under this awarding procedure, the auditors found that 17 of the contracts did not have documents to prove that the exceptional clause that allowed them to use an *Adjudicación Directa*" (skipping the *Licitación Pública*) existed.<sup>475</sup> The Superior Audit of the Federation ordered the internal control body of the hospital to conduct the investigations necessary to find the culprits of these flaws.<sup>476</sup>

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*participants; at least 25 contracts and six orders, for which a total of 69 million, 609 thousand 500 pesos were pledged, did not have compliance guarantees; deficiencies were found in the elaboration of 21 market researches corresponding to contracts for 162 million, 585 thousand 900 pesos. Mainly, for not considering the information related to the technical conditions of quantity, quality and timeliness of the goods or services that prove that they did not limit free participation; of other eleven contracts for 73 million 178 thousand 400 pesos, market researches are inexistent; the supporting documentation of the payments made for the acquisition of goods and services from seven contracts and a modification agreement, for 22 million, 878 thousand 800 pesos is inexistent." See, Internal Control Body of the Regional Hospital of High Specialty of the Yucatan Peninsula. Auditoría Financiera y de Cumplimiento: 16-1-12NBS-02-0223 (Merida, Health Services Yucatan, 2016), online: <[https://www.asf.gob.mx/Trans/Informes/IR2016b/Documentos/Auditorias/2016\\_0223\\_a.p df](https://www.asf.gob.mx/Trans/Informes/IR2016b/Documentos/Auditorias/2016_0223_a.p df)>, accessed 25<sup>th</sup> November 2018, at 3-34.*

<sup>471</sup> "The applicability of the "Adjudicación Directa" process of 16 contracts, for 113 million, 860 thousand 500 pesos, was not proved; the monthly reports of the contracts, which were sent to the Internal Control Body, did not include the applicability of the exceptions on which the direct awards were based. In addition, they considered contracts formalized in different months than those reported." See, *Idem*, at 12

<sup>472</sup> LAASSP, LAASSP, Article 42, last paragraph, at 28. RLAASSP, Article 30, last paragraph, at 11.

<sup>473</sup> Internal Control Body of the Regional Hospital of High Specialty of the Yucatan Peninsula. *Auditoría Financiera y de Cumplimiento: 16-1-12NBS-02-0223*, supra note 470, at 14.

<sup>474</sup> *Idem*, at 16.

<sup>475</sup> *Idem*, at 17-8.

<sup>476</sup> *Idem*, at 19.

## **THE PATTERNS AND THE KLITGAARD'S FORMULA**

Klitgaard's formula acquires relevancy within the Mexican context, since this the procurement system operates under the three components of this author's theory: Monopoly, discretion and lack of accountability.

Under this protection dome, several methods of corruption developed within the Mexican public administration. Notably, for the public procurement sector, corruption enhanced the creation of monopolies through a discretionary regime, lessening its accountability through the presence of the PRI in the three government powers. This applies to every level of government in the country. To do so, these bureaucrats to a large web of other civil servants who facilitate their wrongdoings. This situation has caused, from 2012 to this year, only 1.9% of all the registered companies have received 80% of all public contracts.<sup>477</sup>

In sum, we can see that Klitgaard's formula is applicable to the phenomenon of corruption within the Mexican government procurement system. In order to reduce it, the Mexican public procurement legal framework needs to be modified in a way that discretionary powers are used always under the vigilant eye of an independent authority that validates the legality of their use. Moreover, the spectrum of discretion needs to be diminished, forcing authorities to select suppliers in a more competitive way.

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<sup>477</sup> Instituto Mexicano para la Competitividad, *Índice de Riesgos de Corrupción: El Sistema Mexicano de Contrataciones Públicas*, supra note 14, at 44.

## CHAPTER IV: MEASURES AGAINST CORRUPTION IN PUBLIC PROCUREMENT

What steps should the Mexican government take to enhance its public procurement system? Unfailingly, while talking about combating corruption, we have to address the concepts of transparency and accountability.

### TRANSPARENCY AND ACCOUNTABILITY

Corruption is commonly perceived as the antithesis of integrity. Integrity is regarded as one of the foundational precepts on which public administration is based.<sup>478</sup> Armstrong describes accountability as “*the obligation on the part of public officials to report on the use of public resources and answerability for failing to meet stated performance objectives.*”<sup>479</sup> Transparency means an “*unfettered access by the public to timely and reliable information on decisions and performance in the public sector.*”<sup>480</sup>

The Programme on Accountability and Transparency (PACT) defines transparency as the mechanism that “*ensures that the accountability processes and procedures are clear, easily understood, and implemented with integrity.*”<sup>481</sup> Grimmelikhuijsen defines the concept as “*the availability of information about an organization or actor that allows external actors to monitor the internal workings or performance of [certain] organization.*”<sup>482</sup>

These definitions are in harmony with Dunn’s concept of accountability<sup>483</sup> and with the mandatory access to information implied by it. Due to the essence of public funds (specifically, their sources), all citizens have the right to know about what the authorities do with their taxes. Therefore, governments should not withhold the precise details of the expenses made with said monies, and should specify the rationale behind them.

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<sup>478</sup> Armstrong, *Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues*, supra note 57, at 1.

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid.*

<sup>481</sup> Piers Cain, Alan Doig, Rachel Flanary, Kimberly Barata. *Filing for corruption: Transparency, openness and record-keeping* (2001) 36:4 Crime, Law and Social Change, at 412-413.

<sup>482</sup> Stephan Grimmelikhuijsen, Gregory Porumbescu, Boram Hong, Tobin Im. *The Effect of Transparency on Trust in Government: A Cross-National Comparative Experiment* (2013) 73:4 Public Administration Review, at 576.

<sup>483</sup> “*All public servants must be accountable, to explain and justify their actions to the public, which is the last repository of sovereignty in a democracy.*” See, Dunn, *Mixing and Nonelected Elected Officials in Democratic Policy Making: Fundamentals of Accountability and Responsibility*, supra note 58, at 298.

The principle of transparency<sup>484</sup> stands alongside the principles of equality, non-discrimination and proportionality- to form the minimum ethical governing standard while allocating taxpayer's money, with competition as its main pillar.<sup>485</sup> Georgieva's definition is, in my opinion, the best on the topic scoped within the public procurement area. She states:

*"The principle of transparency is mainly to do with the amount of information to be provided on orders and procedures, and the publicity of the actions/inactions of the contracting authorities on selection of a contractor. **Some perceptions of this principle are too narrow in defining it and limited only to the advertising of the notice of public instruction and ensuring the necessary minimum level of publicity with regard to procedures.** Transparency is generally viewed as the concept of ensuring openness and publicity at the various stages in a process, to enable participants and supervisory authorities to observe its progress and ascertain that the contract has been awarded and be satisfied (or not) that the process was conducted legitimately and fairly. Other concepts of transparency expand the functions of the principle so as to ensure a competitive environment, the ability to monitor **the implementation of procurement, and also view the principle as an anticorruption measure.**"<sup>486-487</sup>*

As Georgieva notes, commentators commonly define transparency within two approaches: "i) strictly describing its main purposes to ensure non-discriminatory and open treatment in proceedings, or ii) describing the obligations which should be imposed on participants in the proceedings to ensure a proper level of transparency."<sup>488</sup> These two approaches reflect a focus on the stages prior to making an award. However, what happens to transparency after the whole procurement process comes to its end? When all the contracts are awarded, governments relegate transparency and accountability (frequently) to a second plain. At this point, the insufficiency and questionability of the concept -as Georgieva pointed out- become patent. Anticorruption policies

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<sup>484</sup> "It implies that the action of the Administration is seen as through a glass. It constitutes an extension of the principle of publicity which assumes an active position of the Administration, while transparency focuses on allowing the public power and its actions to be seen by all, without veils or secrets, in a situation that is both passive and active, allowing to see and to show." See, Zak, *El Principio de Transparencia en la Administración Pública*, supra note 106, at 1.

<sup>485</sup> Irena Georgieva. *Using Transparency Against Corruption in Public Procurement: A Comparative Analysis of the Transparency Rules and their Failure to Combat Corruption*, 1<sup>st</sup> ed. (Cham, Springer, 2017), at 8.

<sup>486</sup> *Idem*, at 7.

<sup>487</sup> Emphasis added.

<sup>488</sup> *Idem*, at 8.

based on fully defined parameters of transparency and accountability both pre and post award are important.<sup>489</sup>

In Mexico, it is much more difficult to strive for transparency and accountability measures, since competition is not the main focus of our public procurement system. Gilbert Winham and Heather Grant mentioned one good example of this lack of definition of transparency in Mexico. They argue:

*“Mexico's different standards of transparency, due process, and structural safeguards appeared to have serious implications for binational review. Transparency is a key element of the law governing the conduct of Canadian and U.S. administrative bodies. The standard of transparency in Canada and the United States generally requires that the law applicable to an administrative agency be set down in a clear and concise fashion and be accessible to the public. Furthermore, the agency's conduct in performing its duties must be evident in order that its practice can be properly reviewed by a superior body to determine whether the agency fulfilled its duties in accordance with the law. These standards were not inherent aspects of Mexico's preNAFTA unfair trade law administration. Mexico's system was characterized by very general rules and regulations providing [Secretary of Commerce and Industrial Development] with broad discretionary powers to perform its duties. [Secretary of Commerce and Industrial Development]'s broad powers of discretion emanated in part from the fact that limited transparency existed in how [Secretary of Commerce and Industrial Development]'s investigations and determinations of unfair trade practices were actually carried out. Two examples highlight the absence of transparency and its implications for the standard of judicial review under a Chapter 19-like mechanism.”<sup>490</sup>*

The main two tasks in this regard for the Mexican government is 1) to make the reforms necessary to insert competition as one of the main principles of public spending in the country, and 2) define transparency and accountability in terms of the new guiding principles of public spending in the country.

## **COMMON MEASURES AGAINST CORRUPTION**

In this section, I aim to describe some of the most common tools used by governments, as well as others proposed by academics. After each explanation, I will assess the relevance of each measure to the Mexican government procurement system.

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<sup>489</sup> *Idem*, at 5.

<sup>490</sup> Gilbert R. Winham, Heather A. Grant. *Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and beyond* (1994) 3:1 Minnesota Journal of Global Trade, at 23-4.

Williams-Elegbe states that the measures against corruption divide into three groups: administrative, regulatory and social measures.<sup>491</sup> The first relates to the exercise of discretion, the second to mandatory statutes and the last to social scorn.<sup>492</sup>

## **ADMINISTRATIVE MEASURES**

The following anticorruption tools are the most common measures:

- Debarment;
- Integrity pacts;
- Declarations of conflicts of interests; and
- Various levels of approvals prior to the award of the contract.<sup>493</sup>

Since these measures rely heavily on discretion, the laws that establish the use of said powers cannot be inconsistent or too broad, since it could open a window for a myriad of other corrupt acts.<sup>494</sup> This enhances the definition of discretion inserted in *Boulis v. MMI*<sup>495</sup> since it is not only necessary to strictly adhere to the rule that contains discretion, it is crucial to define the reasonability of the law that contains it.

Discretionary powers appear when a procurement unit decides which company is the fittest to deliver the goods, services or public work required by a certain governmental body. In the Mexican government procurement system, the procurement units have to explain and justify such decisions through, for example, their market researches. However, the procurement units have a wide margin of interpretation, due to the lack of policies and articles defining the public spending guiding principles (economy, effectiveness, efficiency, impartiality and honesty) inserted in Article 134 of the Mexican Constitution. Therefore, procurement units have a wide discretion in determining when these principles are met. This legal loophole allows them to adapt the invitations, tender, awards and contracts to favour suppliers of their preference. This is known as bid rigging. Georgieva states:

*“[T]his form is associated with the award of public procurements and infringement of competition rules in the sector; it relates to different forms*

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<sup>491</sup> Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, supra note 338, 27-30.

<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*

<sup>494</sup> Oriona Muçollari. *Anticorruption strategies versus public services and good governance in Albania* (2018) 9:1 Jindal Global Law Review, at 99.

<sup>495</sup> *Boulis v. MMI*, supra note 389, at 877.

*of ‘arranging’ the outcome of a public procurement procedure between the bidders, with or without the consent of the contracting authority.”<sup>496</sup>*

In Mexico, just as the OECD pointed out, the legal framework for procurement does not establish any sort of sanctions to whoever participates in bid rigging.<sup>497</sup> There is a prohibition, however, inserted in (paradoxically) the Federal Law of Economic Competition.<sup>498</sup> In my view, this law is insufficient to prevent bid rigging within the Mexican system.

In sum, there is an urgent need to limit the discretion within government procurement and in turn this will mean other Anticorruption measures more effective.

### **VARIOUS LEVELS OF APPROVALS PRIOR TO THE AWARD OF THE CONTRACT**

In Canada, Chapter 6 of the Supply Manual describes the approval documents required prior to the award of a contract: *“The commodity, the associated risks, the dollar value of a procurement and other factors such as an emergency or the stage in the procurement process will determine the level of approval that contracting officers will need to seek, as well as the associated process that will be followed.”<sup>499</sup>* These documents are the Procurement Plan; the Contract Planning and Advance Approval (CPAA); CPAA Resubmission; Contract Summary; Contract Request; Treasury Board Submission; Contract Amendment Request.<sup>500</sup> Aside from these, the Chapter purports additional reviews to assure contract quality.<sup>501</sup>

In Mexico, the only level of approval resides in the generation of the Annual Plan of Public Works, and one of Acquisitions, Leases and Services.<sup>502</sup> Every governmental body of the country has an Annual Plan, each of them generated with different requirements. Since they only have to deliver these plans to the local delegations of the Public Function Secretary and the law does not establish any requirements with which these units have to develop these

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<sup>496</sup> Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, supra note 338, at 55.

<sup>497</sup> Organization for Economic Co-operation and Development. *Fighting Bid Rigging in Public Procurement in Mexico*, 1<sup>st</sup> ed. (Paris, OECD Publishing, 2013), online: <<https://www.oecd.org/daf/competition/MexicoISSSTEBidRiggingENG.pdf>>, accessed 28<sup>th</sup> November 2018, at 173.

<sup>498</sup> *Ley Federal de Competencia Económica*. Article 53, section IV, at 25. [LFCE]

<sup>499</sup> *Manual*, c. 6, s. 6.5, section a.

<sup>500</sup> *Manual*, c. 6, s. 6.5, section b.

<sup>501</sup> *Manual*, c. 6, s. 6.5, section c; c. 6, s. 10.

<sup>502</sup> LAASSP, Article 21, at 9; RLAASSP, Articles 16, 21, section IV, 22, section IX, and 41, section I, at 6-8, 17; LOPSRM, Article 22, at 10; RLOPSRM, Articles 16, 21 sixth paragraph, 25, 27, section IV, 28, IX, at 8, 10, 12-3, 15.

documents, the authorities have total discretion while drafting them, providing ripe conditions for potential acts of corruption.

The discretion involved in these measures is used differently in each country. While in Canada the discretion plays an important role in the reviewing of the procurement process since its authorities are empowered to pause or cancel the process if they detect any legal flaw or wrongdoing within them, broad legal statutes allow Mexican authorities to use it to create rigged annual procurement plans.

## **REGULATORY MEASURES**

The most common example of relevant regulatory measures, according to Williams-Elegbe, is the “*legal prohibitions against corruption and criminal and civil penalties and forfeitures directed both at the public and private sectors.*”<sup>503</sup> Williams-Elegbe points to the following as tools in this regard:

- Prohibition of bribery;
- Prohibition of conflict of interests;
- Black-listing and white-listing; and
- Procurement transparency, **open competition** and **best value**.<sup>504</sup>

## **OPEN COMPETITION**

Open competition, according to Williams-Elegbe, is one the pillars of a developed procurement system. It lessens favouritism by allowing all the capable companies to compete in tenders.

In Mexico, as I explained, competition is not part of the founding constitutional principles of public spending.<sup>505</sup> The head of the *Comisión Federal de Competencia Económica* (Federal Commission of Economic Competition), Alejandra Palacios, stated that the federal government “*purchase[d] supplies with overpricing of up to 30%, in addition to simulating competition in tenders to give benefits to companies, resulting in acts of corruption between public officials and suppliers.*”<sup>506</sup> Neither the Acquisitions nor the Public Works Acts explicitly establish competition in their texts. Any possible aggrieved party must go before the internal control body of the Federal

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<sup>503</sup> Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, supra note 338, at 15.

<sup>504</sup> *Idem*, at 28-30.

<sup>505</sup> CPEUM, 134, at 141.

<sup>506</sup> Animal Político. *Gobierno federal compra 30% más caro y simula competencia: Cofece* (18<sup>th</sup> July 2018), online: <<https://www.animalpolitico.com/2018/07/gobierno-federal-compra-30-mas-carro-y-simula-competencia-cofece/>>, accessed 25<sup>th</sup> October 2018.

Commission of Economic Competition in order to resolve the alleged absence of competition during a public procurement process.<sup>507</sup> However, the law does not establish how this remedy works or otherwise sets out the formal requirements to present a claim. Moreover, this commission is only able to emit recommendations to the public bodies that engage in illegal non-competitive tenders.<sup>508</sup> It is clear that Mexico has to elevate the principle of competition to a constitutional level to have the impact needed at lower levels of government.

### **BEST VALUE**

Lastly, Williams-Elegbe talks about best value, a.k.a., value for money. As a consequence of competition, this factor helps the government to award a public contract to a company that offers the best services for the lesser price. Without competition, the value for money depends on the will of those who hold procurement discretion. Therefore, it is vital to the system that competition functions as the key to obtain value for money, and that discretion of any procurement unit is exercised in pursuit of that goal.<sup>509</sup>

The Acquisitions and Public Works Acts, mentions the principle of economy as a factor in public procurement,<sup>510</sup> but there is no mention of how to achieve “economy”. In my view, it is urgent that the Mexican government establish competition as the means by which to achieve “economy” or “value for money.”

### **SOCIAL MEASURES**

Social measures are rarely used as the primary tools to combat corruption. Williams-Elegbe states:

*“In public procurement regulation, social tools may attend the use of administrative and regulatory measures. For instance, where a supplier has been convicted of, or otherwise involved in corruption, the infamy that results from such a conviction where it is published in the media will frequently lead to a loss of business and may in some cases signal the end for that company. Likewise, where a firm is disqualified from public contracts as a result of corruption, such a firm may find that its tarnished reputation makes it difficult for it to obtain business elsewhere.”<sup>511</sup>*

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<sup>507</sup> *Ley Federal de Competencia Económica*, Article 39, section XIV, at 19.

<sup>508</sup> LFCE, Article 94, section VII, letter a), at 46.

<sup>509</sup> Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, supra note 338, at 29-30.

<sup>510</sup> LAASSP, Articles 16, last paragraph, 24, 40, second paragraph, at 7, 11, 25; LOPSRM, 16, last paragraph, 24, first paragraph, 41, second paragraph, at 7, 11, 25.

<sup>511</sup> Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, supra note 338, at 30.

In Mexico, it is hard to say if these kinds of measures have been applied. Some could argue that, under the anticorruption banter, the newly elected president Andrés Manuel López Obrador got elected as a result of “a punishment vote” resulting from corruption scandals.<sup>512</sup> However, beyond that there is little evidence that social sanctions act as a deterrent upon those involved in corrupt procurement processes.

### **AN INCOMPLETE SOLUTION: WHY THE NATIONAL ANTICORRUPTION SYSTEM DOES NOT MEET THE NEEDS OF MEXICO REGARDING TRANSPARENCY POLICIES**

The National Anticorruption System “*is an instance of coordination between different federal and local authorities, responsible for the prevention, detection and sanction of administrative responsibilities and acts of corruption, as well as for the control and monitoring of public resources, in which the citizens participate through a Committee.*”<sup>513</sup> Its constitutional basis is article 113 of the Mexican Constitution, which establishes the system’s minimal requirements. These are:

- An Intergovernmental committee composed of anticorruption bodies;<sup>514</sup>
- The creation of Citizen Participation committee;
- The committee’s powers

The committee’s powers are:

- Establish a coordination mechanism;
- Enact corruption detection policies;
- The determination of supply mechanisms;
- Establish bases of coordination between all the authorities involved in the system;
- The preparation of annual reports of progress.<sup>515</sup>

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<sup>512</sup> The Economist. *Tropical messiah: How Andrés Manuel López Obrador will remake Mexico* (21<sup>st</sup> June 2018), online: <<https://www.economist.com/briefing/2018/06/21/how-andres-manuel-lopez-obrador-will-remake-mexico>>, accessed 30<sup>th</sup> July 2018.

<sup>513</sup> National Anticorruption System. *Manual sobre el Sistema Nacional Anticorrupción* (Mexico City, Public Function Secretary, 2016), online: <<http://sna.org.mx/wp-content/uploads/2018/06/ManualSNA.pdf>>, accessed 30<sup>th</sup> July 2018, at 4.

<sup>514</sup> The Superior Audit of the Federation, Special Prosecutor's Office in Fight against Corruption, the secretariat of the Federal Executive responsible for internal control, the president of the Federal Court of Administrative Justice, the president of the guarantor body that establishes article 60. of this Constitution, as well as by a representative of the Council of the Federal Judiciary and another of the Committee of Citizen Participation. See, CPEUM, Article 113, section I, at 108.

<sup>515</sup> CPEUM, Article 113, at 108-9.

The National Anticorruption System is a result of the Anticorruption Reform of 2015. To this end, new legislative powers were given to the congress, contained in Article 73 of the Mexican Constitution, empowering it to:

- *“Issue the laws that regulate the structure and faculties of the Superior Audit of the Federation [...], as well as to issue the general law that establishes the coordination basis of the National Anticorruption System.  
(...)”*
- *Issue the law that establishes the Federal Court of Administrative Justice ... [as] the competent body to impose sanctions on public servants for the administrative responsibilities that the law determines as serious and the individuals who participate in acts related to said responsibilities, as well as how to bring to the responsible to pay a compensation and pecuniary sanctions that derive from the damages that affect the Federal Public Treasury or the assets of federal public entities.  
(...)”*
- *Issue the general law that distributes the powers among the government orders to establish the administrative responsibilities of public servants, their obligations, the applicable sanctions for the acts or omissions in which they incur and those that correspond to individuals linked to grave administrative offenses that to the effect establishes, as well as the procedures for its application.”<sup>516</sup>*

In addition to these new powers, the Legislative branch enacted new laws and reforms that govern the National Anticorruption System. On July 18, 2016, the seven governing laws of the system were published in the Official Gazette.<sup>517</sup> These are the norms:

- *Ley General del Sistema Nacional Anticorrupción* (General Law of the National Anticorruption System);
- *Ley General de Responsabilidades Administrativas* (General Law of Administrative Responsibilities);
- *Ley Orgánica del Tribunal Federal de Justicia Administrativa* (Organizing Law of the Federal Tribunal of Administrative Justice);
- *Reformas a la Ley Orgánica de la Administración Pública Federal* (Reforms to the Organizing Law of the Federal Public Administration);
- *Reformas a la Ley de Fiscalización y Rendición de Cuentas de la Federación* (Reforms to the Inspection and Accountability of the Federation Law);
- *Reformas al Código Penal de la Federación* (Reforms to the Federal Criminal Code);
- *Reformas a la Ley General de Contabilidad Gubernamental* (Reforms to the General Governmental Countability Law); and

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<sup>516</sup> CPEUM, Article 73, Sections XXIV, XXIX-H, XXIX-V, at 67,69,71.

<sup>517</sup> Official Gazette of the Federation. *Edición Vespertina del Diario Oficial de la Federación del día 18 de Julio de 2016*, supra note 15.

- *Reformas a la Ley Orgánica de la Procuraduría General de la República* (Reforms to the Organizing Law of the Office of the Attorney General of the Republic).

Although these changes were the culmination of the Anticorruption policies ignited by the National Development Plan 1995-2000 and the failed political transition from the 2000s,<sup>518</sup> it is quite disquieting that none of the public procurement statutes were reformed. The Mexican government intended to solve this with the publication of the National Anticorruption Policy. However, the document does not mention in-depth action against corruption in the public procurement sector. All it does is to mention the lines of action that the government should follow in order to achieve efficient disbursement.<sup>519</sup>

What about the General Law of the National Anticorruption System? The governing law of the National Anticorruption System dryly purports that the internal control body will inspect all the “[c]ontracts derived from the [Acquisitions Act] and the [Public Works Act].”<sup>520</sup> Any wrongdoings detected through this will be penalized under the terms of the General Law of Administrative Responsibilities.<sup>521</sup> However, the law does not establish any requirements under which these activities will be developed, which translates to more discretion inserted into the system.

Perhaps the most interesting addition that these reforms brought into the public contracting industry was the creation of the *Sistema de Informacion Publica de Contrataciones* (System of Public Information about Public Procurement).<sup>522</sup> This system will have the “public information sent by the competent authorities to the Coordinating Committee at the request of the latter.”<sup>523</sup> The last part of the sentence might have caused discomfort among the readers. As I have demonstrated throughout this thesis, and recalling William-Elegbe’s definition of administrative measures, broad legal drafting provokes more discretion, an aspect that has been abused by public administrators in Mexico. However, in this particular case, discretion decreases due to the pluralism of the Coordinating Committee. This body is formed by authorities of the three branches of the Mexican State and a citizen.<sup>524</sup>

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<sup>518</sup> Linkage Unit with the National Anticorruption System. *Política Nacional Anticorrupción* (Mexico City, Public Function Secretary, 2018), online: <<http://cpc.org.mx/wp-content/uploads/2018/06/PNA-UVSNA-1-1.pdf>>, accessed 1<sup>st</sup> August 2018, at 16-36.

<sup>519</sup> *Idem*, at 121-2.

<sup>520</sup> *Ley General del Sistema Nacional Anticorrupción*. Article 27, second paragraph, section II, at 11. **[LGSNA]**

<sup>521</sup> LGSNA, Article 53, at 19.

<sup>522</sup> LGSNA, Article 49, section VI, at 19.

<sup>523</sup> LGSNA, Article 51, second paragraph, at 19.

<sup>524</sup> CPEUM, Article 113, section I, at 108; LGSNA, Article 10, at 5-6.

Therefore, this is, in fact, a step forward to a truly transparent public procurement in Mexico.

Since most of the corruption scandals in Mexico were uncovered by news reporters using data obtained through the inspection of the Superior Audit of the Federation, we should analyze the role of this auditing body and its place in the whole National Anticorruption System. Aside from its role in the Coordinating Committee,<sup>525</sup> the Superior Audit of the Federation is one of the central authorities of the *Sistema Nacional de Fiscalización* (National Inspection System).<sup>526</sup> The National Inspection System, as the General Law of the National Anticorruption System establishes, is:

*“[T]he set of interinstitutional coordination mechanisms among the holders of the functions of the government application in the different directions of government, with the objective of maximizing the coverage and the impact of the audit throughout the country, based on a strategic vision, the application of similar professional means, the creation of capacities and the exchange of effective information, without incurring duplications or omissions.”<sup>527</sup>*

Analyzing this paragraph, we can see that the activities of the National Inspection System are made in parallel with the auditing efforts of the Superior Audit of the Federation. These actions correspond more to an exchange of information and planning than an actual inspection of the disbursements made.<sup>528</sup> Nonetheless, the tool’s objective of detecting weak points within the government’s public disbursements is valuable to the Mexican public administration. But, paradoxically, according to the OECD, the main problem with Mexico’s system is the inability of the public administration’s internal control bodies to identify risks; moreover, when they did have the expertise to do identify risks, they failed take actions to mitigate them.<sup>529</sup> The OECD blames the problem on the fact that the Superior Audit of the Federation and the Public Function Secretary use different frameworks to conduct internal control and risk management.<sup>530</sup> In order to prevent this from happening, the international body recommends the following:

- *“Integrating individual tasks in relation to internal control and risk management with the institution’s objectives and strategic plans.*

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<sup>525</sup> LGSNA, Article 10, section II, at 5.

<sup>526</sup> LGSNA, Article 37, section I, at 16.

<sup>527</sup> LGSNA, Article 3, section XII, at 3.

<sup>528</sup> LGSNA, Articles 40, 42, 44, and 45, at 17-8.

<sup>529</sup> Organization for Economic Co-operation and Development. *Mexico's National Auditing System - Strengthening Accountable Governance*, 1<sup>st</sup> ed. (Paris, OCDE Publishing, 2017), at 80.

<sup>530</sup> *Idem*, at 78.

- *Linking reward systems (e.g. remuneration, promotion) with the performance of specific and measurable duties within the internal control function.*
- *Incorporating in the individual job descriptions for specific high-risk processes (e.g. procurement, payroll) and concrete obligations in relation to the management and the ownership of controls and risks training and awareness campaigns focusing on clarifying the tasks and the responsibilities within the internal control system between the personnel working at the operational level (“first line of defence”) and those who have no direct operational responsibility, thus being independent from delivery units (“second line of defence”)*
- *Communicating and reporting (e.g. newsletters, website, and posters) specific cases of detected control weaknesses, and actions taken to remedy the situation, including any sanctions applied as well as appraisals and awards related to specific initiatives and actions to improve the control and risk functions.”<sup>531</sup>*

Finally, we have the integration of a citizen external to the public administration as a fundamental part of the National Anticorruption System, specifically, as a member of the Coordinating Committee, and in the form of the Citizen Participation Committee.<sup>532</sup> The objective of the latter is *“to contribute to the fulfillment of the objectives of the Coordinating Committee, as well as to be the instance of connection with the social and academic organizations related to the matters of the National System.”<sup>533</sup>* It will comprise five people who distinguish themselves by contributing in transparency, accountability and anticorruption matters.<sup>534</sup> Within its vast suite of powers, the most important are:

- Participate in the Executive Commission of the National Anticorruption System;
- Enhancement projects; and
- Integrate and foster citizen participation with the National Anticorruption System.<sup>535</sup>

This body works more like a counselling body than a regulator of the anticorruption measures. That is to say, even if said committee detects an act of corruption, the investigation and its possible sanction does not fall within their purview. In fact, it still relies on the sole power of the Public Function Secretary. In other words, the National Anticorruption System is only a

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<sup>531</sup> *Idem*, at 80.

<sup>532</sup> CPEUM, Article 113, section I, at 108; LGSNA, Articles 10, 15, at 5-7.

<sup>533</sup> LGSNA, Article 15, at 7.

<sup>534</sup> LGSNA, Article 16, at 7.

<sup>535</sup> LGSNA, Article 21, at 9-10.

collaborative effort with no tools to prevent or sanction corruption; a fangless creature.

### **A TRUE ANTICORRUPTION BODY: THE CHARBONNEAU COMMISSION**

I will now illustrate another comparative exercise, examining the response of the Canadian government to instances of corruption in Quebec in the form of the Charbonneau Commission.

After the constant political pressure on former premier Jean Charest and the finding of former police chief Jacques Duchesneau,<sup>536</sup> the government of Quebec established a commission to bring all possible corruption scandals to light. The commission acquired the name of France Charbonneau, who would preside over said body. Its mandate was:

*“[That], pursuant to section 1 of the Inquiries Act, a Board of Inquiry be established and the terms of reference be as follows:*

- 1. to examine the existence of schemes and, where appropriate, to draw up a portrait of them that would imply possible collusion and corruption activities in the awarding and management of public contracts in the construction industry, including government agencies and businesses and municipalities, including possible links to political party funding;*
- 2. to paint a picture of possible infiltration activities of the construction industry by organized crime;*
- 3. to examine possible solutions and make recommendations with a view to establishing measures to identify, halt and prevent collusion and corruption in the awarding and management of public contracts in the defense industry; construction and the infiltration of it by organized crime.”<sup>537</sup>*

Subsequently and in response to critics arguing that the Commission was a vacuous promise, the Quebec government granted the Charbonneau commission powers of an inquiry commission and enhanced them further with the enactment of Bill 75, which allowed to conduct searches and seize documents.<sup>538</sup> After this, the results were:

- Allegations of corruption linking the former mayors of Laval and Montreal forced them to resign;
- Several testimonies detailing the bribery scheme within the construction industry;

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<sup>536</sup> Anonymous. *The Charbonneau Commission: a timeline* (2013), 33:[2013] Inroads, at 84.

<sup>537</sup> Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry. *Mandat* (Quebec City, Government of Quebec, 2011), online: <<https://www.ceic.gouv.qc.ca/la-commission/mandat.html>>, accessed 5<sup>th</sup> August 2018.

<sup>538</sup> Anonymous, *The Charbonneau Commission: a timeline*, supra note 536, at 84.

- Gilles Vaillancourt, Gérard Tremblay (former mayors of Laval) and Michael Applebaum (Montreal), were arrested for fraud and corruption.<sup>539-540</sup>

The commission ended its work on November 25<sup>th</sup>, 2015.<sup>541</sup> Why did this body have such an impact within Quebec's Anticorruption spectrum? Did it fulfill its job efficiently? Was the addition of Bill 75 and inquiry commission powers the ingredients to success? An assessment of its frameworks and action may help illuminate the kind of reforms needed in Mexico, albeit adapted to the particular Mexican context.

The four principal legal reforms resulting from the Charbonneau Commission, according to Reeves-Latour and Morselli, were:

*“1) new rules and substantial fine increases for violations of a variety of construction and political regulations;<sup>542</sup> 2) prohibition for a construction firm owner or for a firm to bid on public contracts if previously found guilty or if showing a lack of integrity;<sup>543</sup> 3) penal provisions for public entities that failed to deliver requested documents to anticorruption authorities;<sup>544</sup> and 4) new limitation periods and penal provisions for non-compliance amongst political and business actors with electoral regulations.<sup>545</sup>*

<sup>539</sup> *Idem*, at 86.

<sup>540</sup> Allan Woods, Julian Sher. *Montreal Mayor Michael Applebaum charged with 14 offences*, The Star (June 17<sup>th</sup> 2013), online: <[https://www.thestar.com/news/canada/2013/06/17/montreal\\_mayor\\_michael\\_applebaum\\_has\\_been\\_arrested.html](https://www.thestar.com/news/canada/2013/06/17/montreal_mayor_michael_applebaum_has_been_arrested.html)>, accessed 5<sup>th</sup> August 2018.

<sup>541</sup> Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry. *Actualités* (Quebec City, Government of Quebec, 2015), online: <<https://www.ceic.gouv.qc.ca>>, accessed 5<sup>th</sup> August 2018.

<sup>542</sup> *An Act to amend the Professional Code with respect to disciplinary justice* [2013], SQ 2013, c 12 (CanLII), online: <<http://canlii.ca/t/52mjw>>, accessed 6<sup>th</sup> August 2018; *An Act to eliminate union placement and improve the operation of the construction industry*, SQ 2011, c 30 (CanLII), online: <<http://canlii.ca/t/52mp6>>, accessed 6<sup>th</sup> August 2018; *An Act to prevent, combat and punish certain fraudulent practices in the construction industry and make other amendments to the Building Act* [2011], SQ 2011, c 35 (CanLII), online: <<http://canlii.ca/t/52mpc>>, accessed 6<sup>th</sup> August 2018; *An Act respecting political party leadership campaigns* [2011], SQ 2011, c 38 (CanLII), online: <<http://canlii.ca/t/52mpg>>, accessed 6<sup>th</sup> August 2018; *An Act to provide for the provisional relief from office of an elected municipal officer* [2011], SQ 2011, c 3 (CanLII), online: <<http://canlii.ca/t/52mkn>>, accessed 6<sup>th</sup> August 2018; *An Act to amend the Taxation Act and other legislative provisions* [2013], SQ 2013, c 10 (CanLII), online: <<http://canlii.ca/t/52mjl>>, accessed 6<sup>th</sup> August 2018.

<sup>543</sup> *An Act to amend various legislative provisions concerning municipal affairs* [2012], SQ 2012, c 21, online: <<http://canlii.ca/t/52mlp>>, accessed 6<sup>th</sup> August 2018.

<sup>544</sup> *Integrity in Public Contracts Act* [2012], SQ 2012, c 21 (CanLII), online: <<http://canlii.ca/t/52mlt>>, accessed 6<sup>th</sup> August 2018. [IPCA-2012]

<sup>545</sup> IPCA-2012, *Ibid*; *An Act to amend the Act respecting elections and referendums in municipalities with respect to financing*, (2013), SQ 2013, c 7 (CanLII), online: <<http://canlii.ca/t/52ml5>>, accessed 6<sup>th</sup> August 2018.

*The most striking changes in regulatory practices came in the form of a complete institutional rearrangement of the anticorruption environment. The Anticorruption Act was adopted in 2011 and would create what is now known as Quebec's Permanent Anticorruption Unit, a permanent coordination unit that integrates two construction regulatory agencies, police squads from municipal and provincial levels, a panel of public prospectors, and special teams from Quebec's Revenue Agency and Quebec's Ministry of Municipal Affairs and Land Occupancy.*"<sup>546</sup>

Before the Charbonneau Commission, Quebec lacked three regulatory capacities necessary to combat corruption: 1) shortage of corruption enforcement resources; 2) lack of penalties; and 3) lack of collaboration.<sup>547</sup> This non-punitive structure prevalent in Quebec would not take long to get entangled, reaching and protecting corruption in an organizational and, Reeves-Latour and Morselli argue, a cultural manner. This deficiency retained enforcement of non-compliant and unlicensed construction firms across Quebec. Moreover, it prevented a heavy shift regarding fines and penalties.<sup>548</sup>

Another aspect that empowered the Charbonneau Commission was Bill 75, abbreviation for the Act to confer certain powers of inspection and seizure on the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry. It granted sweeping powers to search and seize any property if the commissioner found that a raid would assist in the commission's investigations.<sup>549</sup> This measure has to be approved by an advocate or a peace officer, which has to draw a memorandum of the seizure.<sup>550</sup> However, there is no constancy on how many times this power was used, nor the legal circumstance under which it was used.<sup>551</sup>

In its final report, the Charbonneau Commission issued 60 recommendations,<sup>552</sup> the most important being, in the author's mind, the

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<sup>546</sup> Maxime Reeves-Latour, Carlo Morselli. *Fighting corruption in a time of crisis: Lessons from a radical regulatory shift experience* (2018) *Crime, Law and Social Change* 69:3, at 315-6.

<sup>547</sup> *Idem*, at 355.

<sup>548</sup> *Idem*, at 357.

<sup>549</sup> *An Act to confer certain powers of inspection and seizure on the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, SQ 2012, c 17, s 3 (CanLII), online: <<http://canlii.ca/t/52mlj>>, accessed 6<sup>th</sup> August 2018. [Bill 75]

<sup>550</sup> Bill 75, s 4, 6 and 7.

<sup>551</sup> Linda Gyulai. *Unclear if and how Charbonneau investigators used sweeping powers to search and seize*, *Montreal Gazette* (25<sup>th</sup> November 2015), online: <<https://montrealgazette.com/news/local-news/unclear-if-and-how-charbonneau-investigators-used-sweeping-powers-to-search-and-seize>>, accessed 6<sup>th</sup> August 2018.

<sup>552</sup> International Centre for Criminal Law Reform and Criminal Justice Policy. *Of the Report of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry* (2015), online: <[https://icclr.law.ubc.ca/wp-content/uploads/2017/06/9503929\\_001\\_EN\\_Rapport\\_final\\_CEIC\\_Tome3.pdf](https://icclr.law.ubc.ca/wp-content/uploads/2017/06/9503929_001_EN_Rapport_final_CEIC_Tome3.pdf)>, accessed 6<sup>th</sup> August 2018, at 135-42.

creation of an independent authority to oversee public contracts and the enhancement and the enhancement to whistleblowers' protection. Moreover, the final report does a great job pointing out the abject disconnect between the diverse norms that conform the legal frame in the matter.

### **INDEPENDENT AUTHORITY**

The Charbonneau Commission identified the following weaknesses with respect to the awarding and management of public contracts in the construction industry:

- “[T]he autonomy allowed public contracting authorities in applying the methods and rules for awarding contracts provided for by statute and regulation;
- [T]he lack of sufficient internal expertise with some public contracting authorities, or even a team of professionals able to evaluate the work required and the tenders received in response to a call for tenders;
- [T]he possibility for elected officials, particularly at the municipal level, to influence the awarding of a public contract, which is likely to create favouritism; and
- [T]he absence of genuine market analyses to identify signs of malfeasance.”<sup>553</sup>

There was a sentiment that individual contracting authorities lacked the capacity to apply or enforce governmental standards. To avoid this, the Commission an expertise centralization, using the already existing *Secretariat of the Conseil du trésor*, the *Ministère des Transports* and the *Ministère des Affaires municipales et de l’Occupation du territoire*.<sup>554</sup> In other words, the province of Quebec would not face any more bureaucratic expenses. These measures would give the provincial government the advantages of:

- “[C]onstituting a centre of expertise in the analysis and verification of public procurement that could support all public contracting authorities;
- [E]nsuring, in conjunction with the *Unité permanente anticorruption (UPAC)*, a continuation of the investigative and analytical activities intended by the establishment of the Commission;
- [E]nsuring permanent monitoring of the processes for awarding and managing public contracts, thereby reducing the attractiveness of collusion and corruption schemes.”<sup>555</sup>

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<sup>553</sup> *Idem*, at 68.

<sup>554</sup> *Ibid.*

<sup>555</sup> *Idem*, at 69.

## **PROTECTION OF WHISTLEBLOWERS AND FOSTERING CITIZEN PARTICIPATION**

The Charbonneau Commission considered whistleblowers a key component for unveiling corruption cases. Any sort of retaliation against them is harmful for an Anticorruption system. The pre-existing Quebec legal framework did provide protections for whistleblowers;<sup>556</sup> nevertheless, the Commission deemed pertinent to insert the following into the already existing protections:

- "[A]nonymity for all whistleblowers, regardless of the agency to which they report;
- [A]ssistance to whistleblowers in their efforts;
- [F]inancial support, when required."

The Commission was empowered to require the Quebec government to adopt legal reforms that allowed citizens to prosecute fraudsters on behalf of the government, inspired by the United States' False Claims Act.<sup>557</sup> The Commission's final report establishes that there are arguments under which employing this foreign model could be harmful, particularly, 1) giving a private party the right to sue on behalf of the government, 2) the risk of abusive or frivolous actions, and 3) amounts paid to the relator. The Commission then says that all of these measures are possible since: 1) A similar tool exists within the text of section 312.1 of the *Act respecting elections and referendums in municipalities*, 2) the US' experience has not been flooded by frivolous actions, and 3) compensations to whistleblowers.<sup>558</sup>

Similarly, the Charbonneau Commission exhorted the Quebec government to adopt legal reforms that allow citizens to participate in debates regarding public contracting at a municipal level. Its goal is to make every single municipal council meeting public, as established in the Cities and Towns Act and the Municipal Code of Quebec. With this measure, the Charbonneau Commission attempted to improve transparency and oversight in the awarding of construction contracts.<sup>559</sup>

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<sup>556</sup> AC-A, c III, s 26-35.1.; *Act respecting labour standards*, CQLR c N-1.1 [2017], c V, s 122.7, online: <<http://canlii.ca/t/5344j>>, accessed 7<sup>th</sup> August 2018.

<sup>557</sup> International Centre for Criminal Law Reform and Criminal Justice Policy, *Of the Report of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, supra note 562, at 118-20.

<sup>558</sup> *Idem*, at 120-1.

<sup>559</sup> *Idem*, at 122.

## **DIFFERENCES BETWEEN THE NATIONAL ANTICORRUPTION SYSTEM AND THE CHARBONNEAU COMMISSION**

The obvious and, in the author's opinion, the most relevant differences between these two anticorruption bodies is the inquiry powers. Plain and simple: the Charbonneau Commission was born with a similar objective to that of the National Anticorruption System. However, political pressure made Quebec's legislators empower the Charbonneau Commission as an inquiry commission; legally able to prosecute any wrongdoings committed within the construction industry.

As the reader may remember, an important aspect of any government with transparency aspirations is political will.<sup>560</sup> The fact that the National Anticorruption System lacks these kinds of powers makes one doubt the purpose of the tool altogether. Was it a truly honest effort against corruption or a protocolary populist move? The fact that members of the National Anticorruption System were politically biased in the previous electoral journey<sup>561</sup> suggests that the latter explanation is more likely. As a consequence, it seems that the National Anticorruption System will remain only as a consultant body until a new legislative body with enough political takes the reins of the anticorruption agenda.

A second difference is the scope under which corruption is dealt with in each anticorruption body. As Recanatini states, there are four traditional approaches to anticorruption: "*prevention, including education and public awareness; investigation of corruption cases; prosecution of corruption cases; and policy, research and coordination.*"<sup>562</sup> From all the above explained, we can tell that the Charbonneau Commission and the National Anticorruption System belong to the last two categories.

The Charbonneau Commission was an anticorruption body aimed at preventing, detecting and prosecuting corruption acts within Quebec's construction industry. As we see, the jurisdictions and objectives are concise

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<sup>560</sup> Oscar Diego Bautista. *Componentes para un Sistema Nacional Anticorrupción desde un enfoque ético* (2015), online: <<http://ri.uaemex.mx/bitstream/handle/20.500.11799/58230/cuaderno%2018%20componentes%20para%20un%20sistema%20anticor.pdf?sequence=1&isAllowed=y>>, accessed 10th October 2018, at 13.

<sup>561</sup> Benjamin Hill. *La muerte del Sistema Nacional Anticorrupción*, El Financiero (16<sup>th</sup> January 2018), online: <<http://www.elfinanciero.com.mx/opinion/benjamin-hill/la-muerte-del-sistema-nacional-anticorrupcion>>, accessed 7<sup>th</sup> August 2018.

<sup>562</sup> Avinash Dixit. *Anticorruption Institutions: Some History and Theory*, in Kaushik Basu, Tito Cordella. *Institutions, Governance, and The Control of Corruption*, 1<sup>st</sup> ed. (Cham, Palgrave MacMillan, 2018), at 27-8.

and specific, which gave this commission a determined field to work with. After the prosecution took place, the commission directed its efforts to identify the flaws within the construction industry's framework and the laws and policies that permitted schemes of corruption, and how to reform them.<sup>563</sup>

The National Anticorruption System, on the other hand, is not a prosecutor of the wrongdoings committed within the public procurement sector; in spite of the Special Prosecutor's Office in Fight against Corruption, one of the institutions that forms the National Anticorruption System, being empowered to conduct such processes.<sup>564</sup> However, the constitutional text creates a gap by empowering only the internal control bodies to denounce corruption acts before the Special Prosecutor.<sup>565</sup> Remembering that these bodies belong to the Executive Power branch, just as the procurement units do, it is easy to understand why the OECD pointed to this as a flaw.<sup>566</sup> Within this framework, it is possible for authorities to turn a blind eye against corruption.

With respect to the leadership of both anticorruption bodies, the Charbonneau Commission was presided over by judge France Charbonneau, a wide-known Quebecoise lawyer with a vast expertise in the area of criminal law, specifically, in the area of organized crime. Having participated as a legal counsel in the "Carcajou" squad's case<sup>567</sup> and the Commission of Inquiry charged with investigating the Sûreté du Québec,<sup>568</sup> there was no doubt that Charbonneau was the perfect candidate for the role. Meanwhile, and since its creation, the National Anticorruption System has not had a leader appointed. Since 2015, the Mexican senators have yet to decide on who is going to be in charge of the Special Prosecutor's Office in Fight against Corruption.<sup>569</sup> In fact,

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<sup>563</sup> International Centre for Criminal Law Reform and Criminal Justice Policy, *Of the Report of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*, supra note 562, at 9-53.

<sup>564</sup> CPEUM, Article 109, section III, at 104-5.

<sup>565</sup> CPEUM, Article 109, section III, penultimate and last paragraphs, at 105.

<sup>566</sup> Organization for Economic Co-operation and Development, *Mexico's National Auditing System - Strengthening Accountable Governance*, supra note 539, at 78-80.

<sup>567</sup> During the Quebec's Biker War, France Charbonneau was feared as the toughest Crown attorney. She was in charge of bringing down the Hell's Angels' (one of the biker gangs involved in the conflict) leader, Maurice Boucher. See, Monique Muise. *Quebec Corruption Steep Learning Curve*, The Edmonton Journal (5<sup>th</sup> November 2011), online: <<https://www.pressreader.com/canada/edmonton-journal/20111105/288398465515342>>, accessed 8<sup>th</sup> August 2018.

<sup>568</sup> Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry. *Notes biographiques* (Quebec City, Government of Quebec, 2015), online: <<https://www.ceic.gouv.qc.ca/la-commission/notes-biographiques.html>>, accessed 9<sup>th</sup> August 2018.

<sup>569</sup> Zorayda Gallegos. *México crea una Fiscalía anticorrupción, pero aún no tiene quién la dirija*, El País (20<sup>th</sup> April 2017), online:

and to the surprise of none, this has been occasioned by the Institutional Revolutionary Party and their agenda to establish a person of their preference in such a position. This was called by the media as the “*Fiscal Carnal*” scandal.<sup>570</sup> It seems that, at least until the next legislature, the Special Prosecutor's Office is going without a person leading it.

Finally, both anticorruption bodies have different degrees of harmony within legal frameworks with which they work. What caused discord within the National Anticorruption System's statutes and concord in the Charbonneau Commission? The answer lies in their working methods.

The Charbonneau Commission started without its inquiry powers. As a consequence of the political pressure and France Charbonneau's requests, this anticorruption body gained the powers to seize documents and conduct searches.<sup>571</sup> Through these sequestering powers, the Commission gained insights on the methods used by the construction sector's corrupt criminal cells. Afterwards, with evidence of the flaws of the existing framework, it made 60 recommendations to the government of Quebec to address the major problems within the construction industry.

Once again, Mexico has a much different story in this regard. Given the fact that the Special Prosecutor has been without a person in charge and that the Citizen Participation Committee's members rotates positions within their five-year mandate,<sup>572</sup> the National Anticorruption System has not acted at all during its three years of existence. All that the System has produced in these past three years are five reports and no criminal nor administrative procedures.<sup>573</sup>

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<[https://elpais.com/internacional/2017/04/19/mexico/1492622772\\_187247.html](https://elpais.com/internacional/2017/04/19/mexico/1492622772_187247.html)>, accessed 9<sup>th</sup> August 2018.

<sup>570</sup> Raúl Rodríguez Cortés. *La crisis legislativa tiene una causa: el fiscal carnal* (6th September 2017), El Universal, online: <<https://goo.gl/k9vqyE>> accessed 2<sup>nd</sup> September 2017.

<sup>571</sup> Anonymous, *The Charbonneau Commission: a timeline*, supra note 536, at 84.

<sup>572</sup> LGSNA, Article 11, 16, last paragraph, 19, and Fourth transitory article, third paragraph, at 6-7, 9, 22.

<sup>573</sup> This past May, even the Public Function Secretary call for a consolidation of the National Anticorruption System. In this sense, it seems that the National Anticorruption System has spent three years organizing itself rather than researching and prosecuting corruption. See, Public Function Secretary. *Llama SFP a impulsar de manera decidida la consolidación del Sistema Nacional Anticorrupción* (Mexico City, Public Function Secretary, 2018), online: <<https://www.gob.mx/sfp/prensa/llama-sfp-a-impulsar-de-manera-decidida-la-consolidacion-del-sistema-nacional-anticorrupcion?idiom=es>>, accessed 8<sup>th</sup> August 2018.

## EXPECTATIONS AND PROPOSED SOLUTIONS FROM AN INCOMING GOVERNMENT

We now turn to an assessment of the coming administration's transparency proposals. This past July 1<sup>st</sup>, Andrés Manuel Lopez Obrador (AMLO) won the election on his third presidential campaign. The key to his victory, many analysts state, was to portray himself to the voters as an agent of "true change."<sup>574</sup> Although almost every presidential candidate in Mexico has similarly promised to deal with corruption during his/her campaign,<sup>575</sup> AMLO's proposals are worthy of study. Andrés Manuel López Obrador, said:

*"If the President is corrupt, the governors are going to be corrupt, same as with the municipal presidents. If the President is honest, they will have to be honest... the governors, the municipal presidents, whoever they are, they will not allow corruption."*<sup>576</sup>

Andres Manuel's has managed to convey the message he will be a non-corrupt leader. As law professor John Ackerman states, corruption in Mexico is not rooted in the country's culture, it comes from the top-down, caused by the reigning oligarchy composed of the elites of the private sector and political actors.<sup>577</sup> It is premature to compare AMLO's incoming administration with the current one on an ethical level. However, the Mexican society has seen in him a long-needed turn of gears regarding corruption, and the politician has responded with future actions that talk about his ethical probity (i.e., halving the wages from all public administrators in the country).<sup>578</sup>

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<sup>574</sup> Ana Gabriela Rojas. *López Obrador gana las elecciones en México: 3 claves que llevaron a AMLO a arrasar en las presidenciales*, BBC News Mundo en México (2<sup>nd</sup> July 2018), online: <<https://www.bbc.com/mundo/noticias-america-latina-44678664>>, accessed 9<sup>th</sup> August 2018.

<sup>575</sup> Ana Lozano made a compilation of the most famous slogans utilized by presidential candidates of modern Mexico. She argues that every one of them promised two things in protocolary fashion: combat poverty and corruption. See, Ana Lozano. *Frases y lemas de políticos que no debemos olvidar...*, SDP Noticias (13<sup>th</sup> September 2017), online: <https://www.sdpnoticias.com/nacional/2017/09/13/frases-y-lemas-de-politicos-que-no-debemos-olvidar>>, accessed 4<sup>th</sup> August 2018.

<sup>576</sup> José Chávez Santana. *Cero corrupción promete AMLO*, El Sol del Centro (2<sup>nd</sup> June 2018), online: <<https://www.elsoldelcentro.com.mx/local/cero-corrupcion-promete-amlo-1732088.html>>, accessed 4<sup>th</sup> August 2018.

<sup>577</sup> CGTN America. *John Ackerman discusses the Mexican election results* (2018), online: <<https://www.youtube.com/watch?v=uXJed9itta0>>, accessed 4<sup>th</sup> August 2018.

<sup>578</sup> By constitutional mandate, no public administrator can have a bigger wage than the one that the president has. See, CPEUM, Article 127, second paragraph, section II, 139. As a measure of austerity, Andres Manuel Lopez Obrador proposed to reduce his monthly wage to 108 thousand pesos (the half of what Peña Nieto perceives). Currently, 22,570 government employees perceive more than what Andres Manuel Lopez Obrador is going to receive as the president of Mexico. See, Rafael Montes, Eduardo de la Rosa. *22,570 empleados superan salario que ganará AMLO*, Milenio (18<sup>th</sup> July 2018), online:

Aside from this political message, what are the main proposals of AMLO's incoming administration to combat corruption, more specifically, the one within the public procurement sector? Regarding public tenders, the Nation's plan states:

- *“Austerity, total autonomy and full citizenship of the organs that fight against corruption, promotion of transparency and justice.*
- *Favour the social, solidary and cooperative economy in government contracting.*
- *Set administrative and criminal responsibilities for breach of public tenders or simulations.*
- *Mandatory programs of social witnesses and citizen comptrollers in all public purchases and with a gender perspective.*
- **Prohibition of direct awards.**
- *Obligatory nature of public bidding exercises and open competitions for all types of acquisitions.*
- *Public tenders online and with social control for all types of purchase and contracting, including Public-Private Partnerships*
- *Creation of CONTRATANET.*
- **Public purchases will meet the criteria of efficiency, transparency, quality, environmental and social responsibility.**
- *National products and services will be prioritized in public procurement, particularly those coming from the popular and solidarity economy and from micro, small and medium productive units.”<sup>579-580</sup>*

In another section named “Public Procurement,” the document states four main measures to “strengthen monitoring and control mechanisms to eradicate corruption in government tenders and procurement, and achieve greater efficiency in public spending”:<sup>581</sup>

- Eradicate the participation of shell companies.
- Verification of market prices.
- Random participation of citizen watchers.
- Centralize the purchases of basic and recurrent supplies.<sup>582</sup>

The document does not go into much detail regarding these objectives. Therefore, I will solely focus on the highlighted objectives of the first section, and then a thorough assessment of the specific section on Public Procurement.

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<<http://www.milenio.com/politica/22-570-empleados-superan-salario-ganara-amlo>>, accessed 4<sup>th</sup> August 2018.

<sup>579</sup> Proyecto 18. *Proyecto de Nación 2018-2024* (2017), online: <<https://drive.google.com/file/d/11B0aNBuVpHB7GDVXhCKdYvVKw7D7Ta-x/view>>, accessed 9<sup>th</sup> August 2018, at 46-7.

<sup>580</sup> Emphasis added.

<sup>581</sup> *Idem*, at 48.

<sup>582</sup> *Idem*, at 49-50.

## **PROHIBITION OF THE “ADJUDICACION DIRECTA”**

First, the coming administration is planning to prohibit “*Adjudicacion Directa*” processes. It is easy, due to the embezzlement schemes used throughout the Peña Nieto’s administration, to see why the next president is eager to eliminate this instrument from the public procurement legal framework. According to Arrowsmith, a non-transparent procedure does not have any place in a government that aims to minimize corruption as much as it can.<sup>583</sup> However, it is dangerous to prescind from the tool altogether, since certain situations are fit to be resolved by direct awards (*i.e.* procurement made under the circumstances of a natural disaster). The director of Mexican Transparency - the national chapter of Transparency International- considers that the measure is risky.<sup>584</sup> Therefore, it is unlikely that the Mexican government will get rid of these procedures completely.

Instead, I believe that what is important is to sharply delineate the circumstances when this type of procurement process is legitimate. I have argued throughout this thesis that having competition as one of the public procurement’s pillars in any country has generated favourable dividends. Particularly, in Canada, we could see that the competition imbued in the system provokes that the non-competitive processes are the least used while procuring.<sup>585</sup> Mexico, *au contraire*, favours the use of these processes due to the absence of the principle of competition in the Mexican constitution.

If the new government wants to reduce embezzling through the use of the *Adjudicación Directa*, the most efficient way to diminish their use is to elevate the principle of competition to a constitutional level; making it one the founding criterion of public disbursements.

## **NEW FOUNDING CRITERIA IN PUBLIC DISBURSEMENTS**

Let us turn now to review AMLO’s proposal that public purchases meet the criteria of efficiency, transparency, quality, environmental and social responsibility. As the reader probably noticed, this proposition aims at the core principles of public spending contained in the Mexican constitution,<sup>586</sup> but the principles of honesty, effectiveness, economy and honesty do not appear

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<sup>583</sup> Sue Arrowsmith. *Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization* (2003) 37:2 *Journal of World Trade*, at 293.

<sup>584</sup> Zorayda Gallegos. *López Obrador y su utópica propuesta contra la corrupción*, *El País* (9<sup>th</sup> Jun 2018), [online: <https://elpais.com/internacional/2018/06/05/mexico/1528152744\\_392051.html>](https://elpais.com/internacional/2018/06/05/mexico/1528152744_392051.html), accessed 10<sup>th</sup> August 2018.

<sup>585</sup> Public Works and Government Services Canada, *Contract History*, *supra* note 280.

<sup>586</sup> CPEUM, Article 134, 141-2.

anymore. However, AMLO's Nation Plan does not mention if any constitutional reform to article 134 is going to be made when he takes power. Regardless of the actions that the coming president is willing to take, it is disappointing to see that the principle of competition is not included within this list. This likely means that value for money is going to remain a matter of discretionary judgment on the part of the procurement units existing throughout the system.

Aside from the abovementioned, it is intriguing to consider what the incoming presidential administration has in mind with the inclusion of environmental and social responsibility. Controversial as it may seem,<sup>587</sup> the inclusion of these aspects into the Mexican government procurement unveils an enhancement impetus coming from AMLO's team, especially when we talk about environmentally responsible procurement, also known as green procurement.<sup>588</sup> However, this kind of criteria do nothing to mitigate against possible acts of corruption.

### **SHELL COMPANIES**

The third proposed reform of AMLO's incoming administration is to eradicate the participation of shell companies in the government procurement system. His Nation's plan establishes the following:

*"In the calls for any public tender, a permanent requirement that must be met by the participants will be presenting their last two tax declarations, as well as an 'opinion on compliance with obligations', issued by the Tax Administration Service. If, because it is a newly created company, it cannot comply with this requirement, in order not to limit its free participation, this information will be requested on a personal level, by the members that comprise it. An additional requirement will be the declaration 3 of 3 of the participants, if they are natural persons, or of their partners if they are legal persons."<sup>589</sup>*

The 3 of 3 declaration is a citizen initiative that obliges public administrators to make patrimonial, conflict of interest and fiscal

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<sup>587</sup> Trybus considers that the imbuing social considerations into public procurement since it compromises the primary objective of this activity and it overcomplicates the procedures making them susceptible of legal mistakes or violation that can be traduced into costly litigation. In contrast, Tatrai believes that there is a false assumption of social consideration being implemented through a legislative setting. In fact, he says, this is achievable through "a certain ethical attitude, clear legal background and explicit policies." See, Gustavo Piga, Tünde Tatrai. *Public Procurement Policy*, 1<sup>st</sup> ed. (New York City, Routledge, 2016), at 11-2, 14-5.

<sup>588</sup> "The purchase of products and services which have less impact on the environment and human health compared with competing products or services that serve the same purpose." See, Francesco Decarolis, Marco Frey. *Public Procurement's Place in the World: The Charge towards Sustainability and Innovation*, 1<sup>st</sup> ed. (Rome, Servizio Italiano Pubblicazioni Internazionali, 2014), at 1.

<sup>589</sup> Proyecto 18, *Proyecto de Nación 2018-2024*, supra note 579, at 49.

declarations.<sup>590</sup> All these requirements are set in order to validate the legal existence and capacity of the companies who wish to compete in any call for tenders. However, this measure does not have any direct means by which to prevent the creation of these companies in the first instance nor the involvement of public administrators in such companies. The existence of these kind of enterprises, as Bohorquez explains, is not illegal by itself. They become “shell companies” whenever they get involved in illicit activities.<sup>591</sup> However, due to the staggering number of such companies,<sup>592</sup> the author believes that it is healthy to question the easiness with which Mexicans can create a company, and the facility with which these companies can be registered in the Register of Public Contractors.

### **VERIFICATION OF MARKET PRICES**

Next, I address the issue of the verification of market prices. To carry out this assignment, the government will share information with the *Procuraduría Federal de Protección al Consumidor* (Federal Procurator for Consumer Protection), “to have reference points (current and historical) that enable to decide on the best price and the best conditions of purchase.”<sup>593</sup> This is a measure that will combine greatly enhance the market researches done by the procurement units. Through it, AMLO’s government could be trying to reduce discretion and non-enforcement with which the procurement units have dealt with the aforementioned research tasks; although the document does not clarify the motive behind this proposal. However, it is of concern that no legal reform is proposed supporting this change and thus it will still be left to the discretion of procurement units to decide if they require the assistance of the Federal Procurator for Consumer Protection or not. Moreover, as Guillen Uyen and Matute Mejía point out, this type of procedures can be applied to the procurement of goods, excluding services and public works from the equation due to the unfitting nature of the procedure in these kinds of procurements.<sup>594</sup>

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<sup>590</sup> Iniciativa Ciudadana Ley 3de3. *What is the citizen’s initiative Ley3de3 (3 out of 3)?* (2016), online: <<http://www.ley3de3.mx/es/what-is-the-citizens-initiative-ley3de3-3-out-of-3-2/>>, accessed 10<sup>th</sup> August 2018.

<sup>591</sup> Gallegos, *López Obrador y su utópica propuesta contra la corrupción*, supra note 584.

<sup>592</sup> Belén Saldivar. *SAT ha identificado a 5,390 empresas fantasma*, *El Economista* (19<sup>th</sup> July 2018), online: <<https://www.eleconomista.com.mx/economia/SAT-ha-identificado-a-5390-empresas-fantasma-20180719-0110.html>>, accessed 10<sup>th</sup> August 2018.

<sup>593</sup> Proyecto 18, *Proyecto de Nación 2018-2024*, supra note 579, at 49-50.

<sup>594</sup> Jorge Guillén Uyen, Genaro Matute Mejía. *Mecanismo de detección de corrupción en compras del estado: Sistema de precios testigo como política pública* (2014), 36:[2014] *Pensamiento y Gestión*, at 138, 152-53.

## **CITIZEN PARTICIPATION**

AMLO's government suggests that it will invite any interested citizen or NGO to watch and audit all the procurement processes in all of their phases. The selection of interested parties will be random and on short notice.<sup>595</sup> However and once again, the document does not detail the means to enact this idea.

## **CONSOLIDATED PURCHASES**

The Nation's plan describes this policy as:

*“Purchase inventories of public agencies will be reviewed in order to identify the goods or services that are replicated from one to another, in order to concentrate the acquisition of these through only one, and thus avoid duplicate purchases or waste of the same.”*<sup>596</sup>

Carlos Urzúa, the person whom AMLO designated as his government's Secretary of Finance, has said that this measure consists of empowering the Official Office of the Treasury and Public Credit to watch and approve all the procurements made by the Federal Government, just as the internal control bodies do. However, this does not mean that the latter is going to disappear. It actually means that the existing are going to lose their rank and be substituted by the Official Office.<sup>597</sup> He has stated that the majority of the resources that AMLO's austerity plan will come from this strategy in particular. Moreover, he argues that there are approximately 1,300 procurement units. This number will decrease to only one (the Official Office) if this policy is in fact implemented.<sup>598</sup>

According to Brezovnik, Oplotnik and Vojinović, the multiplicity of contracting authorities is one characteristic of the decentralization of public procurement, and their funds availability depends on their degree of fiscal decentralization.<sup>599</sup> Such a situation is present in Mexico, although the country lacks the degree of fiscal decentralization needed to procure adequately at the municipal level. As Romo de Vivar Mercadillo and Gómez Monge point out, the development of decentralization in the municipal level is uneven and the

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<sup>595</sup> Proyecto 18, *Proyecto de Nación 2018-2024*, supra note 579, at 50.

<sup>596</sup> *Idem*, at 50.

<sup>597</sup> Areli Villalobos. *Hacienda centralizará compras públicas para atajar corrupción, advierte Carlos Urzúa*, *Proceso* (6<sup>th</sup> July 2018), online: <<https://www.proceso.com.mx/542008/hacienda-centralizara-compras-publicas-para-atajar-corrupcion-advierte-carlos-urzua>>, accessed 13<sup>th</sup> August 2018.

<sup>598</sup> Noticieros Televisa. *Carlos Urzúa, futuro secretario de Hacienda, en la mesa de Despierta - Despierta con Loret* (2018), online: <<https://www.youtube.com/watch?v=4xiJnhvuBZY&t=872s>>, accessed 14<sup>th</sup> August 2018.

<sup>599</sup> Boštjan Brezovnik, Žan Jan Oplotnik, Borut Vojinović. *(De)Centralization of Public Procurement at the Local Level in the EU* (2015) 11:46 *Transylvanian Review of Administrative Sciences*, at 40.

outcomes are better in metropolitan municipalities due to their dynamism and capacity to generate their own resources.<sup>600</sup> Mexico has a total of 2,457 municipalities in its territory.<sup>601</sup> From that spectrum, there are 74 metropolitan areas.<sup>602</sup> Therefore, there are a huge number of municipalities that suffer a lack of resources and, more importantly, the institutional integrity necessary to generate and oversee them.

Centralized procurement has produced positive outcomes in the past. In Russia, according to Detkova, Podkolzina and Tkachenko, centralized procurement is more transparent due to the increase degree of oversight that it faces. In fact, they argue, the enhance competition and reduce the final price of the procurements. However, they assert that, without raising monitoring and enforcement, this strategy is futile.<sup>603</sup>

From all of AMLO's proposals against corruption in public procurement, the centralization idea has, in the author's opinion, the best potential to tackle this problem. Nevertheless, the measure has to be applied cautiously, avoiding unduly invading local governments' sovereignty and powers, which can cause paternalistic administrations dependent upon the federal government, just as it happened with the Institutional Revolutionary Party before 2000.<sup>604</sup>

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<sup>600</sup> Manuel Ricardo Romo de Vivar Mercadillo, Rodrigo Gómez Monge. *Descentralización fiscal, capacidades administrativas y recaudación del impuesto predial en los municipios de México: Una aproximación teórica* (2016), 35:[2016] *Economía y Sociedad*, at 157, 64,7.

<sup>601</sup> National Institute of Statistics and Geography. *División Territorial de México* (National Institute of Statistics and Geography, Mexico City, 2017), online: <<http://cuentame.inegi.org.mx/territorio/division/default.aspx?tema=T>>, accessed 1<sup>st</sup> April 2018.

<sup>602</sup> Consorcio para el Estudio de Zonas Metropolitanas. *Aumenta a 74 el número de Zonas Metropolitanas en México* (2018), online: <<https://centromet.mx/aumenta-a-74-el-numero-de-zonas-metropolitanas-en-mexico/>>, accessed 12<sup>th</sup> August 2018.

<sup>603</sup> Polina Detkova, Elena Podkolzina, Andrey Tkachenko. *Corruption, Centralization and Competition: Evidence from Russian Public Procurement* (2018) 41:5-6 *International Journal of Public Administration*, at 416, 26-8.

<sup>604</sup> Morris, *Corruption & Politics in Contemporary Mexico*, supra note 22, at 68-9.

## **CHAPTER V: SOLUTIONS**

This final chapter will be dedicated entirely to establishing how to combat corruption in the Mexican government procurement sector through reforms to its legal framework.

### **KEEP THE NATIONAL ANTICORRUPTION SYSTEM ALIVE**

According to Fernández Martínez and Jaime, the National Anticorruption System has four principal threats: 1) Discarding, 2) Subordination to political interests, 3) Minimization, isolation and weakening of its operation, and 4) Weakening of the implementation of anticorruption scaffolding in the states.<sup>605</sup> The author wishes to point out that, although flawed, the present National Anticorruption System is completely necessary to confront corruption in Mexico. Therefore, the incoming government has to avoid (as much as possible) its abrogation.

### **CONSTITUTIONAL REFORMS**

There are two constitutional articles whose reforms are indispensable for the creation of real anticorruption reforms in Mexico: Articles 113 and 134. The first gives the basic structure of the National Anticorruption System, and the second one establishes the founding criteria of public disbursement. They will be addressed in order of relevance.

#### **ARTICLE 134**

As I have mentioned throughout this text, competition is not addressed by the Mexican Constitution nor any of the procurement laws. Therefore, it is important for the system to be developed with a view to fostering competition. It would help to deflate two aspects of Klitgaard's corruption formula: monopoly and discretion.<sup>606</sup> Mexico has to include this principle in the text of article 134. The expected benefits are:

- Value for money without discretion;
- Reduction of procurement monopolies;
- Price reduction;<sup>607</sup>
- Enhancement of accountability.

The most important aspect attached to these benefits is the detachment that discretion would have from the determination of value for money. As

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<sup>605</sup> Marco Antonio Fernández Martínez, Edna Jaime. *Efectivo el aparato institucional de combate a la corrupción*, in Laurence Patin. *Léase si quiere gobernar (en serio)*, supra note 442, at 181-5.

<sup>606</sup> Klitgaard, *Fighting Corruption*, supra note 29, at 33.

<sup>607</sup> Tomáš Hanák, Petra Muchová. *Impact of Competition on Prices in Public Sector Procurement* (2015) 64:[2015] *Procedia Computer Science*, at 729-35.

Williams-Elegbe state, competitive procurement systems are essential to achieving value for money;<sup>608</sup> while Racca, Cavallo Perin and Albano state that competition is the best tool to generate it.<sup>609</sup> In the Mexican procurement system, the principle of economy acts as value for money. However, taking into consideration that competition is necessary to generate value for money, having the principle of economy by itself within the constitutional founding criteria of public disbursements falls short (theoretically and pragmatically) while providing the Mexican procurement units with the best guidance for awarding contracts. As I have mentioned before, Mexico needs to elevate the principle of competition to a constitutional level.

In Canada, the competition principle permeates all government procurement, as mandated by international trade agreements to which the country is signatory.<sup>610</sup> The Supply Manual mentions it as one of the default settings under which government contracts can be awarded<sup>611</sup> and value for money can be obtained.<sup>612</sup> There is no need, at least pragmatically, to elevate this principle to a constitutional level.

In fact, worsening matters further, the authorities that the national constitution mentions<sup>613</sup> are not specified within the public procurement's legal framework. Therefore, this activity is left at the will of the procurement units; administrative authorities that are not legally empowered to determine the value for money.<sup>614</sup>

In light of these considerations, the author's proposal to reform article 134 is as follows:

*"The economic resources available to the Federation, the states, municipalities and territorial demarcations of Mexico City, [have to be disbursed under the principles of efficiency, efficacy, competition, transparency, environmental and social responsibility] to meet the objectives for which they are intended. [All the authorities involved in these exercises have to disclose the risks and opportunities related to the disbursements made, explaining the rationale and its relation to each one of the principles hereby established.]*

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<sup>608</sup> Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures*, supra note 338, at 29-30.

<sup>609</sup> Gabriella M. Racca, Roberto Cavallo Perin, Gian Luigi Albano. *Competition in the execution phase of public procurement* (2011) 41:1. *Public Contract Law Journal*, at 92

<sup>610</sup> Worthington, *Desktop guide to Procurement Law*, supra note 147, at 552-3.

<sup>611</sup> *Manual*, c 3, s 3.10., section b.

<sup>612</sup> *Manual*, c 9, s 9.60.20, section d.

<sup>613</sup> CPEUM, Article 134, para. 2, 5; at 141.

<sup>614</sup> *Ley Federal de Presupuesto y Responsabilidad Hacendaria*, Articles 85, section I; 110, at 54-5, 66-7 [LFPRH]; *Ley de Coordinación Fiscal*, Article 49, section V, at 44.

(...)

*Acquisitions, leases and disposals of all types of goods, provision of services of any nature and the contracting of a work performed, will be awarded or carried out through [open competition] public tenders, which will be open publicly, in order to assure that the State has the best conditions available in terms of price, quality, financing, opportunity and other relevant circumstances. [Before the award of the contracts, the procuring authority has to disclose the rationale of the said award to the Secretariat of Finance and Public Credit, the Federal Commission of Economic Competition, the Superior Audit of the Federation, and to the National Anticorruption System; in order to accredit that all the objectives, principles and social considerations of public disbursement were met. No contract award can take place without the approval or the assessment of the authorities abovementioned.]*

*When the bids referred to in the previous paragraph are not suitable to ensure these conditions, the laws shall establish the bases, procedures, rules, requirements and other elements to accredit the [efficiency, efficacy, competition, transparency, environmental and social responsibility] that ensure the best conditions for the state.”*

The principal change resides in the first and fourth paragraph of article 134. Of all the concepts explored above, I conclude that efficiency, efficacy and transparency are uniquely worthy of constitutional protection. The term “honesty” is too subjective to be efficiently measured. I have mentioned that, in reality, the principle of economy is a consequence of the principle of competition, making the first a subordinate to the latter and, therefore, redundant. The same applies to the principle of quality set out in AMLO’s Nation Plan.

The principles of environmental and social responsibility set out in AMLO’s Nation Plan would also be useful innovations in the procurement system. However, I deem that the most relevant to our purposes is the principle of social responsibility. Trybus argues that social responsibility requirements, for public procurement may result in costly litigation. However, there are certain situations in which they can be used.<sup>615</sup> Piga and Tatrai argue that public procurement should have the following specific priorities under the rubric of social responsibility:

- [P]romoting ‘employment opportunities’
- [P]romoting ‘decent work’
- [P]romoting compliance with ‘social and labor rights’
- [S]upporting ‘social inclusion’ and promoting social economy organizations

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<sup>615</sup> Piga, Tatrai, *Public Procurement Policy*, supra note 587, at 12.

- [P]romoting ‘accessibility and design for all’
- [T]aking into account ‘ethical trade’
- [S]eeking to achieve wider voluntary commitment to ‘corporate social responsibility’ (CSR)
- [P]rotecting against human rights abuse and encouraging respect for human rights
- [P]romoting SMEs [Small and Medium Enterprises].<sup>616</sup>

However, they acknowledge that these requirements require discretion and can be misused.<sup>617</sup> Trybus states that they can “*reduce competition and create an unnecessarily complex and burdensome procurement processes.*”<sup>618</sup> Clearly, we are dealing with a measure that, if touched by political interests, could conflict with the attainment of value for money. Nonetheless, I consider that, with the due participation of the Federal Commission of Economic Competition, this aspect has the potential to become a bastion against monopolies within the procurement sector. In fact, the Federal Commission of Economic Competition can rule on the “*the call, the bidding rules, the draft contracts and the other relevant documents that allow the Commission to know the intended transaction,*” 30 days prior the publication of the call and before the presentation of bids.<sup>619</sup> Thus, the Federal Commission of Economic Competition is able to ensure that the constitutional mandate of competition is enforced, once it is enshrined in Article 134.

The third paragraph of the proposed reform aims at forcing procurement units to disclose their justifications while awarding contracts. Constitutionally enshrining a requirement of transparency in this way will ensure that independent authorities validate the stated rationales laid out in Annual Procurement Plan. Discretion will be taken from the procurement units, and that value for money will be determined by open competition; an aspect that the Federal Commission of Economic Competition will confirm.

By adding these reforms into the constitution, all of the current hindrances to competition within the public bidding processes and the alternative procurement methods would be replaced by legal provisions that foster competition in procurement.

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<sup>616</sup> *Idem*, at 13.

<sup>617</sup> *Idem*, at 15.

<sup>618</sup> *Idem*, at 18.

<sup>619</sup> *Ley Federal de Competencia Económica*, Articles 98, second and third paragraphs; 99, at 49-50.

## **ARTICLE 113**

This article establishes the basic structure of the National Anticorruption System, identifying the authorities that compose this anticorruption body. This section aims at including more authorities into the National Anticorruption System. The question is: What authorities? The following is an assessment of the pertinent control organisms that stand out for their absence in the National Anticorruption System and that, in the opinion of the author, would usefully contribute to the work of this anticorruption agency.

## **PROCUREMENT REVIEW COMMITTEE**

The principles established in Article 134 of the Mexican Constitution are only applied within the context of budgeting activities.

Because it is about public purchases and because the Secretariat of Finance and Public Credit's Senior Officials are under the mantle of the Executive Power, I argue that these social development assessment tasks are best carried out by an independent authority. This is necessary given the political pressures exerted on the executive, as happens with local auditing bodies.<sup>620</sup> Therefore, an independent authority must be created, tasked with validating the social goals pursued in procurement processes: A Procurement Review Committee. This measure takes complete inspiration from the Canadian Procurement Review Policy. However, the author does have certain comments on how to adequately mould this tool into the Mexican system.

As I explained in Chapter II, the procurement review committee is nonexistent within the Mexican public procurement framework. The only authorities entitled to validate the call for bids and awards are the procurement units. The Public Function Secretary does function as a hierarchically superior entity to the procurement units but, as we know, it has responded to political interests more than to the transparency and accountability maxim that the procurement system needs. Therefore, the creation of a new authority, independent from the executive branch, is vital, in order to have legitimate studies regarding the social impact that public procurement has to have.

The questions that arise here are: Is it feasible, in terms of legislative effort and time, to generate a pertinent legal framework for this new authority? What is the existing institutional base with which this novel assessment body would work? The answer relies on the National Anticorruption System. Instead of generating it from scratch, the Mexican Procurement Review Committee

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<sup>620</sup> Sin Embargo. *Solapan transas auditorías locales* (1st May 2018), online: <<https://www.sinembargo.mx/01-05-2017/3157726>>, accessed 5<sup>th</sup> August 2018.

could harness from this established institution. In fact, it could be composed by the members of the National Anticorruption System.<sup>621</sup>

The following section contains an explanation of which authorities would be authorized to review the public procurement process and the phase in which it would act: pre-bidding, bidding or in the post-bidding stage.<sup>622</sup>

### **CITIZEN PARTICIPATION COMMITTEE AND THE PUBLIC FUNCTION SECRETARY**

First off, we have the original authority in charge of the validation of the procurement requests in Mexico: The Public Function Secretary. In addition, and in order to have an intergovernmental body of procurement social impact assessment, I will analyze the possibility of adding the Citizen Participation Committee to the formula.

The Public Function Secretary has as one of its main objectives to inspect the use of federal public expenditure and its consistency with the budgets of expenditures of the federation.<sup>623</sup> Regarding public procurement, this institution is in charge of *CompraNet* which, as the reader may remember, is the online portal where the Mexican government publishes all information relevant to public procurement.<sup>624</sup> Although, as it is established in the *Ley Orgánica de la Administración Pública Federal* (Organizing Law of the Federal Public Administration), the Public Function Secretary oversees all the phases of the procurement process,<sup>625</sup> its control over which procurements are published (or not) on *CompraNet* makes it the perfect control body to repel corruption even before the issuance of the call for bids. However, one might ask: Under what circumstances would the Public Function Secretary prevent the publication of a procurement process? Who is going to be in charge of said determination?

The abovementioned concerns can be addressed through the involvement of the Citizen Participation Committee of the National Anticorruption System.

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<sup>621</sup> The Superior Audit of the Federation, Special Prosecutor's Office in Fight against Corruption, the secretariat of the Federal Executive responsible for internal control, the president of the Federal Court of Administrative Justice, the president of the guarantor body that establishes article 60. of this Constitution, as well as by a representative of the Council of the Federal Judiciary and another of the Citizen Participation Committee. The author finds alarming that the Secretariat of Finance and Public Credit is missing from the institutional structure of the National Anticorruption System. See, CPEUM, Article 113, section I, at 108.

<sup>622</sup> Organization for Economic Co-operation and Development, *Integrity in Public Procurement. Good practice from A to Z*, supra note 95, at 21-7.

<sup>623</sup> *Ley Orgánico de la Administración Pública Federal*. Article 37, section I, at 36. **[LOAPF]**

<sup>624</sup> LAASSP, Article 2, section II, at 2-3; LOPSRM, Article 2, section II, at 2-3.

<sup>625</sup> LOAPF, Article 37, at 36-9.

Per Article 21, section VIII, of the General Law of the National Anticorruption System, the Committee has the power “to propose to the Coordinating Committee, through its participation in the Executive Committee, mechanisms that allows the society to participate in the prevention and reporting of administrative offenses and acts of corruption.”<sup>626</sup> As I explained while discussing AMLO’s citizen participation proposal, there are authors that argue that the best way to ensure public participation is through e-procurement.<sup>627</sup> AMLO proposed *CONTRATANET* as the substitute to the existing *CompraNet*. However, his Nation Plan does not explain which would be the relation between *CONTRATANET* and the citizen participation. In fact, there is no discussion of the implications and motives behind its creation.<sup>628</sup> Hence, the Committee has to use its legal powers to propose to the Coordinating Committee the linkage between the coming e-procurement platform and its activities.

What would be the tasks of the Citizen Participation Committee once they are included in the Procurement Review Committee? Just as in the Canadian Procurement Review Committee, the objective of the Mexican version would be “to enhance the use of procurement in support of industrial and regional development and other national objectives in a manner that is fully consistent with the government’s approved procurement objectives.”<sup>629</sup> In which way could it attain the abovementioned goal? Are there enough legal and policy tools to, within the statutory boundaries of discretion, allow this novel authority to reliably determine the validity of the procurements purported by the procurement units to seek the social development sought by them? Yes, and it has the form of the sexennial document called *Plan Nacional de Desarrollo* (National Development Plan).

The *Ley de Planeación* (Planning Law) states:

*“The National Development Plan will specify the national objectives, strategy and priorities of the integral, equitable, inclusive, sustainable and tenable development of the country, it will contain provisions on the resources that will be assigned for such purposes; it will determine the instruments and those responsible for its execution, it will establish the policy guidelines of a global, sectoral and regional nature; its forecasts will refer to the whole of the economic, social, environmental and cultural*

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<sup>626</sup> LGSNA, Article 21, section VIII, at 10.

<sup>627</sup> Parisa Haim Faridan. *Innovation in Public Management: Is Public E-Procurement a Wave of the Future? A Theoretical and Exploratory Analysis*, (2015) 38:9 *International Journal of Public Administration*, at 656, 60.

<sup>628</sup> Proyecto 18, *Proyecto de Nación 2018-2024*, supra note 579, at 47.

<sup>629</sup> *Manual*, c 1, s. 1.30.20.

*activity, and it will govern the content of the programs that are generated in the national system of democratic planning.”<sup>630</sup>*

It should be stressed that this document is different from AMLO’s Nation Plan, which consists in a document containing his campaign proposals. However, and since he won these past elections, he and his team are going to be responsible for developing the National Development Plan for the next sexennial term. Whatever the objectives (as long as they are generated in concordance with the Mexican Constitution), the Citizen Participation Committee would have to assess all the procurements purported by the procurement units under what is established in the National Development Plan. Once again, just as it happens within the Canadian procurement context, the process would not continue without the legal validation of the Citizen Participation Committee.

All of the abovementioned would be sustained during the pre-bidding stage. With the combined efforts of the Citizen Participation Committee (in charge of validating the procurement proposal) and the Public Function Secretary (responsible for publishing the biddings), corruption could be tackled even before it reaches *CONTRATANET*; the portal that is set to replace *CompraNet*.

This measure would not only be fit to work against corruption in the pre-bidding stage, however. Remembering that e-procurement is the primary tool to enhance citizen participation within the procurement sector,<sup>631</sup> the Citizen Participation Committee could involve itself in review tasks even when the contracts are public in *CONTRATANET*’s platform; during the bidding process. On the other hand, the Public Function Secretary is in charge of watching, coordinating, supervising and creating the norms under which the internal control bodies develop their audits;<sup>632</sup> at all stages of procurement. As such, the conditions would allow this duo to perform procurement review tasks during the award of the contracts. In other words, they would have the power to review the appropriateness of the procurement by assessing the following:

- The legality of the award (i.e., the sufficing of the exceptional clauses of the alternative procurement methods);
- The capacity of the winning bidder to deliver the services pact in the public contract;

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<sup>630</sup> *Ley de Planeación*. Article 21, fifth paragraph, at 8.

<sup>631</sup> Parisa Haim Faridan, *Innovation in Public Management: Is Public E-Procurement a Wave of the Future? A Theoretical and Exploratory Analysis*, supra note 627, at 656, 60.

<sup>632</sup> LOAPF, Article 37, sections I-IV, at 36.

- That procurements respect the authorized budget and the expenditures calendar;<sup>633</sup>
- The legality of the call for bids;<sup>634</sup>
- The fulfillment of the constitutional expending criteria; and
- The legal compliance with what is established as requirements of a public contract.<sup>635</sup>

With the participation of the intergovernmental procurement review body, the uncontrolled discretion with which the procurement units have ruled the bidding phase of the procurement process would disappear.

The Citizen Participation Committee could also review the Annual Procurement Plan. Even before the pre-bidding process, the Citizen Participation Committee could detect suspicious procurement proposals. If during the assessments the Committee notices a purchase intention which is not rationally connected to the policy objective sought, it can alert the other authorities involved in the procurements review.

## **SECRETARIAT OF FINANCE AND PUBLIC CREDIT'S SENIOR OFFICIALS**

The OECD states:

*“[Senior Officials] are responsible for coordinating the way in which the secretariats plan, program, budget, spend and control public spending. This office reports directly to the corresponding secretary and is considered the center of all administrative tasks of a secretariat. [Senior Officials are] divided into different general directions: information technology, budget and organization, human resources, material resources, procurement and general services. Each [Senior Official] is linked to the rest of the secretariat through administrative coordination.”<sup>636</sup>*

When a procurement needs to make an expense, it submits a request to its administrative coordination to submit a request to the Senior Official of the secretariat in question. Once accepted by the Senior Official, the General Management is obliged to follow the instructions of the request. The payments are made by the Treasury of the Federation or by the secretaries themselves if the Treasury transfers the funds to them.<sup>637</sup>

Every year, the *Secretaría de Hacienda y Crédito Público* (Secretariat of Finance and Public Credit) registers the Budget of Expenditures of the Federation in the Integral System of Federal Financial Administration. Each

<sup>633</sup> LAASSP, Article 25, at 11; LOPSRM, Article 24, second paragraph, at 11.

<sup>634</sup> LAASSP, Article 29, at 17-9; LOPSRM, Article 31, at 16-9.

<sup>635</sup> LAASSP, Article 45, 29-30; LOPSRM, Article 46, at 30-1.

<sup>636</sup> Organization for Economic Co-operation and Development. *Estudio de la OCDE sobre el proceso presupuestario en México* (2009), online: <<http://www.oecd.org/mexico/48190152.pdf>>, accessed 14<sup>th</sup> August 2018, at 93.

<sup>637</sup> *Idem*, at 93, 5.

Secretary of state assigns personnel to access and operate the system. The incomes and expenditures are monthly registered. The system divides the entire budget of the secretaries in 12 and gives access only to the corresponding programmed part of the current month.<sup>638</sup> This system is the tool used by the Senior Officials to request funds for their secretaries.

Comparing this to the powers of the Canadian Procurement Review Committee, we see that they are similar in the way that procurements require approval from Senior Officials.<sup>639</sup> As one can see, Senior Officials are key within the Mexican public expenditure. Consequently, it is logical to have an institution with such a power within the National Anticorruption System.

Moreover, and just as I mentioned while discussing the possible role of the Citizen Participation Committee in procurement review tasks, the Public Works Act provides the Secretariat of Finance and Public Credit the option of involving itself in social procurement assessment, using the National Development Plan to do so.<sup>640</sup>

Analyzing the abovementioned, we can see that Senior Officials fit perfectly for procurement review tasks in every phase of the process. Since they have the power to cut the funds with which the procurement units work, its participation within the labours of the Mexican Procurement Review Committee is what will give this novel body the weight necessary to stop the procurement process if it does not receive the validation from the other authorities that form the Committee.

## **SUPERIOR AUDIT OF THE FEDERATION AND INTERNAL CONTROL BODIES**

Since its creation in 2000, the auditing carried out by this legislative body has been crucial to detect misappropriations of public spending and lesser irregularities. However, due to the nature of its labours, their oversight always detects embezzlement after the fact. As the Law on Inspection and Accountability of the Federation establishes, this auditing organism will monitor the *Cuenta Pública* after each fiscal year.<sup>641</sup> Moreover, their recovering success rate is deplorable.<sup>642</sup> It is clear, then, that this body should be the last stage of the anticorruption policy, not the initiation of it.

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<sup>638</sup> Gutiérrez Lara, *Gasto público y Presupuesto Base Cero en México*, supra note 336, at 18.

<sup>639</sup> *Manual*, Annex 3.5., section i.

<sup>640</sup> LOAPF, Article 31, sections I, XIV, XXX, at 17-9.

<sup>641</sup> *Ley de Fiscalización y Rendición de Cuentas de la Federación*. Article 6, at 5. [LFRCF]

<sup>642</sup> Manuel Ureste. *28 mil mdp sin comprobar y solo 1.2% recuperados: las 7 claves del informe de la ASF*, Animal Político (November 1st 2017), online:

The role that the Superior Audit of the Federation would have within the context of the proposed Mexican Procurement Review Committee can be extracted from the text of the Law on Inspection and Accountability of the Federation. Before auditing, the annual audit program has to be approved and published online.<sup>643</sup> The Law on Inspection and Accountability of the Federation then obliges all public entities assist the Superior Audit of the Federation to execute its functions in the best way possible.<sup>644</sup> Failure to comply to it will result in sanctions, according to the General Law of Administrative Responsibilities.<sup>645</sup> Moreover, the law obliges internal control bodies to co-operate with the Superior Audit of the Federation, arguing that a coordination must be organized in order to ensure an adequate flow of information.<sup>646</sup>

Thus, the Superior Audit of the Federation could require all the procurement units to submit their Annual Procurement Plans, coordinating itself with their internal control bodies to supply all of the supporting data relevant to them.<sup>647</sup> This would allow the Superior Audit of the Federation to foresee, detect any wrongdoings, and address them in its annual audit plans.

### **PURPORTED REFORM**

Just as with the National Anticorruption System, the Mexican Procurement Review Committee needs a constitutional basis to work properly. As I proposed, Article 113 will be the one modified to include the Committee to the anticorruption labours. The reformed article would be the following:

*“Article 113. The National Anticorruption System is the instance of coordination between the authorities of all the levels of government empowered in the prevention, detection and sanction of administrative responsibilities and acts of corruption, as well as in the control and control of public resources. For the fulfillment of its object, it will be subject to the following minimum bases:*

*(...)*

*[III. The Procurement Review Committee of the System must integrate the Citizen Participation Committee, the Public Function Secretary, the Senior Officials of the Secretariat of Finance and Public Credit, and the Superior Audit of the Federation; with the objective of validating and evaluating public procurement processes in all of their stages.]”*

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<<https://www.animalpolitico.com/2017/11/auditoria-superior-resultados/>>, accessed 5th April 2018.

<sup>643</sup> LFRCF, Article 6, at 5.

<sup>644</sup> LFRCF, Article 9, at 5.

<sup>645</sup> LFRCF, Article 11, at 6.

<sup>646</sup> LFRCF, Article 24, at 13.

<sup>647</sup> LFRCF, Article 17, section XI, at 9.

Since the sole constitutional reform would not bring the effects desired by itself, normative modifications of lower ranked laws are due.

## **STATUTORY REFORMS**

To complement the constitutional reforms proposed above, public procurement and anticorruption statutes have to be modified. The legal reforms aim at:

- Giving cohesion to the tasks of the Mexican procurement review committee with the existing legal and institutional framework;
- Making mandatory the processing of data and documents that the law requires, but does not oblige the responsible authorities to deliver or generate them;
- Empowering the authorities of the Procurement Review Committee to stop the procurement process if it does not meet the constitutional disbursement criteria, the legal requirements established in the Acquisition Act or the Public Works Act; and
- Giving independence to the National Anticorruption System.

The laws to be reformed are the Acquisitions and Public Works Acts, the Organizing Law of the Federal Public Administration, Law on Inspection and Accountability of the Federation, Federal Budget and Fiscal Responsibility Law and the General Law of the National Anticorruption System.

### **ORGANIZING LAW OF THE FEDERAL PUBLIC ADMINISTRATION AND GENERAL LAW OF THE NATIONAL ANTICORRUPTION SYSTEM.**

Before the National Anticorruption System's Procurement Review Committee can do its transparency tasks within the sector, Mexican lawmakers have to modify the Organizing Law of the Federal Public Administration and the General Law of the National Anticorruption System, in order to create this new authority. First off, the Organizing Law of the Federal Public Administration has to contemplate it. These are the proposed reforms to this law:

*“Article 37. The Public Function Secretariat is in charge of the following subjects:*

*(...)*

*III. Monitoring, in collaboration with the authorities that integrate the Coordinating [and Procurement Review] Committees of the National Anticorruption System, the compliance with the internal control, inspection rules, [and founding disbursement criteria] as well as advice and support the internal control bodies of the dependencies and entities of the Federal Public Administration;*

*(...)*

*XIII. Collaborate within the framework of the National Anticorruption System, the National Inspection System, [and the National Procurement*

Review Committee] *in the establishment of the bases and principles of necessary coordination, that allow the better fulfillment of the responsibilities of its members;*

(...)

XV. [Monthly] *inform [all of the Committees of the] National Anticorruption System, as well as the Federal Executive, about the result of the evaluation regarding the management of the dependencies and entities of the Federal Public Administration and of the Attorney General's Office, as well as the result of the review of the income, management, custody and exercise of federal public resources, and to promote before the competent authorities, the actions that proceed to correct the irregularities detected;*<sup>648</sup>

By including the system within the tasks of the Public Function Secretary, the National Procurement Review Committee would then be inserted as an integral part of the institution's framework, thus, brought to legal life.

However, the most important reform to give legal life to the National Procurement Review Committee resides in the General Law of the National Anticorruption System. The objectives sought by this reform is to legally define what is the National Procurement Review Committee, which authorities integrate it, and what its objectives are. Here is the proposed reform:

*Article 24. The National Procurement Review Committee has the objective of contributing, in terms of this Law, to the fulfillment of the objectives of the National Anticorruption System, as well as being validation of procurement within the abovementioned organism.*

*Article 25. The National Procurement Review Committee is an intergovernmental unit composed of the following authorities:*

- I. *National Anticorruption System's Citizen Participation Committee;*
- II. *The Senior Officials of the Secretariat of Finance and Public Credit;*
- III. *The Public Function Secretary; and*
- IV. *The Superior Audit of the Federation.*

*Article 26. The Committee of Citizen Participation will have the following attributions:*

- a. *Approve its internal regulations;*
- b. *Prepare its annual work program;*
- c. *Approve the annual report of the activities carried out in compliance with its annual work program, which must be public;*
- d. *Participate in the Executive Committee in terms of this Act;*
- e. *Access without any restriction, to the information that other departments of the National Anticorruption System generate;*

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<sup>648</sup> LOAPF, Article 37, sections III, XIII, and XV, at 36-7.

- f. *To comment and make proposals, through its participation in the Executive Committee, on national policy and comprehensive policies that foster development and enhancement of public procurement activities;*
- g. *Propose to the Coordinating Committee, through its participation in the Executive Committee, for its consideration:*
  - i. *Projects of inter-institutional and intergovernmental coordination bases in matters of public resources control and control, prevention, control and dissuasion of administrative faults and acts of corruption, especially on the causes that generate them;*
  - ii. *Projects to improve the instruments, guidelines and mechanisms for the supply, exchange, systematization and updating of the information generated by the competent institutions of the various levels of government in the matters regulated by this Law;*
- h. *To propose, through its participation in the Executive Committee, indicators and methodologies for the measurement and monitoring of the phenomenon of corruption, as well as for the evaluation of the fulfillment of the objectives and goals of the national policy, the integral policies and the programs and actions implemented by the authorities that make up the National System;*
- i. *To comment and validate the annual procurement plans of all the entities of the Federal government; and*
- j. *Promote collaboration with institutions in the field, with the purpose of developing research on public policies for the prevention, detection and combat of corruption or administrative offenses.*

## **ACQUISITIONS AND PUBLIC WORKS ACTS**

The main objective of these reforms is to reduce the use of the alternative procurement methods established in these laws.

As I mentioned while discussing AMLO's proposal to forbid the use of "Adjudicaciones Directas," there is a high risk of doing so. As Bohorquez, I have doubts about the appropriateness of a measure that could stop the government from, for example, emergency procurements, since they could financially trouble the coming presidential administration (and the ones thereafter).<sup>649</sup> Instead, I propose to modify both the Acquisitions and Public Works Acts to regulate alternative procurement against as follows:

*"Article 40.- In the cases provided for in Article 41 of this Law, [...] may choose not to carry out the public tender procedure and enter into contracts through the [alternative procurement methods, as long as they get proper validation from the National Procurement Review Committee for the said purposes.]*

*The selection of the procedure of exception made by the agencies and entities should be based and justified, according to the circumstances that concur in each case, in criteria of [efficiency, efficacy, competition, transparency, environmental and social responsibility] that are*

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<sup>649</sup> Gallegos, *López Obrador y su utópica propuesta contra la corrupción*, supra note 584.

*appropriate to obtain the best conditions for the State. The accreditation of the criteria [should be done by the National Procurement Review Committee.]*

*In any case, people with immediate response capacity will be invited, as well as with the technical, financial and other resources that are necessary, and whose commercial or professional activities are related to the goods or services object of the contract to be celebrated. [Interested companies will have to be assessed and cleared by the National Procurement Review Committee.]*

*In these cases, the head of the area responsible for hiring, no later than the last business day of each month, will send to the internal control body in the agency or entity in question, a report on the contracts entered into during the month immediate previous calendar, accompanying a copy of the [document containing the validation of the National Procurement Review Committee.]*

*In the case of the invitation procedure to at least three persons based on fractions III, VII, VIII, IX, first paragraph, X, XI, XII, XIV, XV, XVI, XVII and XIX of article 41 of this Law, the brief to referred to in the second paragraph of this article, must be accompanied by the names and general information of the persons who will be invited; in the case of direct awards, in all cases the name of the person to whom it is proposed must be indicated; in both procedures, the result of the market research that served as the basis for their selection must be accompanied. [In order to proceed with alternative procurement methods, the National Procurement Review Committee has to validate the market research in question. The absence or the invalidation of the mentioned research will annul the procurement in its entirety. Any authority that continues with the purchase in spite of the situations foreseen in this paragraph will be sanctioned in accordance with the provisions of the General Law of Administrative Responsibilities.]*

*To the contracting procedures for invitations to at least three persons and direct award, the character referred to in sections I, II and III of article 28 of this Law shall apply”.*<sup>650</sup>

In the author’s opinion, these reforms would directly tackle the excess of discretion imbued within the usage of the alternative procurement methods. Moreover, the intergovernmental aspect of the committee directly prevents the political influence that the Executive branch inserts into the procurement system. The accreditation of the constitutional founding criteria would not be settled by the procurement units themselves, but by vigilant authorities whose only purpose is to cleanse and prevent corruption within the system.

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<sup>650</sup> LAASSP, Article 40, at 25. Because the wording of this article is practically the same as that contained in article 41 of the LOPSRM, the author considers it redundant to transcribe and modify such legal provision.

Both the Acquisitions and Public Works Acts can be modified to enhance citizen participation. The Citizen Participation Committee would be directly in charge, per their legal powers established in the General Law of the National Anticorruption System,<sup>651</sup> to provide citizens the possibility to participate in procurement review activities. As I mentioned in previous pages, the best way to ensure citizen participation is through e-procurement. In Mexico, *CompraNet* is the e-procurement tool that the government has. However, both concepts are separated from each other in the country. Therefore, and in the expectation that the system will be replaced by *CONTRATANET* by the following administration, here are some reform proposals that would permit citizen participation through e-procurement in Mexico:

*“Article 2.- For the purposes of this Law, the following shall be understood as:*

*(...)*

*II. CompraNet: the electronic governmental public information [and citizen participation] system on acquisitions, leases and services, integrated among other information, by the annual programs in the matter, of the dependencies and entities; the unique record of suppliers; the register of social witnesses [and monitors]; the registration of sanctioned providers; the calls for bids and their modifications; the invitations to at least three people; the minutes of the meetings of clarifications, of the act of presentation and opening of proposals and of failure; the testimonies [and validations] of social witnesses [and monitors]; the data of the contracts and the modifying agreements; direct awards; the resolutions of the nonconformity instance, and the corresponding notifications and notices. This system will be for free consultation [and participation] and will constitute a mean by which contracting procedures will be developed.*

*(...)*

*[XIII. Social monitors: citizens and non-governmental organizations that the Citizen Participation Committee, per its powers contained in the General Law of the National Anticorruption System,<sup>652</sup> selects to collaborate in procurement review tasks.]*

*(...)*

*Article 21. The dependencies and entities will make available to the general public, through CompraNet and its Internet page, no later than January 31 of each year, its annual program of acquisitions, leases and services corresponding to the fiscal year. in question, with the exception of information that, in accordance with the applicable provisions, is reserved or confidential in nature, in the terms established in the Federal Law on Transparency and Access to Government Public Information. [Before publishing them, the dependencies and entities have to send them to the*

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<sup>651</sup> LGSNA, Article 21, section VIII, at 10.

<sup>652</sup> *Idem*, section IX, at 10.

National Procurement Review Committee to get its validation. The Committee has the responsibility to include the participation of social witnesses and monitors during this process.]

*The acquisitions, leases and services contained in the aforementioned program may be added, modified, suspended or canceled, [only with the express consent of the National Procurement Review Committee], who must inform the Public Function Secretary and update, on a monthly basis, the program on CompraNet.*<sup>653</sup>

It is important that the validations made by the social witnesses and monitors have real legal consequences. In its current state, the law does not assure the inclusion of their participations. In fact, the selection it is contingent to the will of the Public Function Secretary,<sup>654</sup> an authority that, as I have repeated constantly throughout this thesis, presents heavy political influence due to its belonging to the Executive branch. It is vital that the citizen participation avoids univocal studies and embraces intergovernmental settings instead.

#### **LAW ON INSPECTION AND ACCOUNTABILITY OF THE FEDERATION AND THE FEDERAL BUDGET AND FISCAL RESPONSIBILITY LAW.**

Mexican public disbursement is divided into programmable expenses and non-programmable expenses. Non-programmable expenses will not be subject of study of this section since they concern disbursements that are not linked directly to the operation of the federal government.<sup>655</sup> Therefore, only programmable expenditures fall under the purview of this thesis.

Programmable expenditures are divided into functional, administrative and economic expenditures. The functional expenditure *“groups the expenses according to the socioeconomic objectives pursued by public entities, this is in accordance with the purpose for which the expenditure is intended.”*<sup>656</sup> The administrative category *groups expenditures according to “the administrative units through which the allocation, management and surrender of the public financial resources is made, and establish[es] the institutional and sectoral basis for the elaboration and analysis of fiscal statistics, organized and aggregated, through their integration and consolidation.”*<sup>657</sup> Finally, we have the economic classification which *“records the resources that go to current expenditure and capital expenditure.”*<sup>658</sup> Gutiérrez Lara states:

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<sup>653</sup> LAASSP, Articles 2, section II; 21, at 2-3, 9.

<sup>654</sup> LAASSP, Article 26 Ter, at 13-5; LOPSRM, Article 27 Bis, at 13-5.

<sup>655</sup> Gutiérrez Lara, *Gasto público y Presupuesto Base Cero en México*, supra note 336, at 13.

<sup>656</sup> *Idem*, at 14.

<sup>657</sup> *Ibid.*

<sup>658</sup> *Idem*, at 16.

*“The Ministry of Finance and Public Credit defines ordinary expenditure as an expenditure that the public sector makes and that does not have as counterpart the creation of an asset, but rather constitutes an act of consumption; that is, the expenses that are destined to the hiring of the human resources and to the purchase of the goods and services necessary for the proper development of the administrative functions. This type of expense is used to carry out ordinary activities or to provide services on a regular and permanent nature, of conservation and minor maintenance. In addition, it includes expenditures destined to research and development, because they do not produce concrete benefits and are generally not incorporated in the physical assets of the agencies and entities.”*<sup>659</sup>

On the other hand, capital expenditures are the “allocations for the creation of capital goods and conservation of existing ones, the acquisition of real estate and securities, as well as resources transferred to other sectors for the same purposes, which contribute to increasing and preserving the physical or financial assets of the nation.”<sup>660</sup>

For the 2018 fiscal exercise, 2.16 billion Mexican pesos are destined to ordinary expenditure.<sup>661</sup> However, total capital expenditures are unknown, since the *Presupuesto de Egresos de la Federación* (Budget of Expenditures of the Federation) is not explicit while disclosing this kind of disbursements. Nonetheless, this is due to the prevalence that ordinary expenditure has in the country which subdues capital expenditure into a micro secondary place; suppressing public investments and the public construction sector in Mexico.<sup>662</sup> Nevertheless, capital expenditure grew in these last couple of presidential administrations. In fact, Gutiérrez Lara argues, the objective of both Calderon and Peña Nieto’s terms was to redirect spending from ordinary expenditure to capital expenditures.<sup>663</sup> Carlos Urzúa promised this will remain the government’s mission during his administration.<sup>664</sup> In fact, one of his proposals to reduce ordinary expenditure consists of consolidating public procurement which, in his opinion, will stop duplicate purchases and waste.<sup>665</sup>

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<sup>659</sup> *Ibid.*

<sup>660</sup> *Ibid.*

<sup>661</sup> *Presupuesto de Egresos de la Federación para el Ejercicio Fiscal 2018*. Article Tenth Transitory, at 39.

<sup>662</sup> Jesús Garza. *El nuevo gobierno y la economía*, *El Financiero* (5<sup>th</sup> July 2018), online: <<http://www.elfinanciero.com.mx/monterrey/el-nuevo-gobierno-y-la-economia>>, accessed 16<sup>th</sup> August 2018.

<sup>663</sup> Gutiérrez Lara, *Gasto público y Presupuesto Base Cero en México*, supra note 336, at 29-30

<sup>664</sup> Garza, *El nuevo gobierno y la economía*, supra note 662.

<sup>665</sup> Maribel Ramírez Coronel. *Al rescate de las compras consolidadas*, *El Economista* (15<sup>th</sup> July 2018), online: <<https://www.economista.com.mx/opinion/Al-rescate-de-las-compras-consolidadas-20180715-0034.html>>, accessed 15<sup>th</sup> August 2018.

Programmable expenditure is concentrated in ordinary expenditure.<sup>666</sup> Since programmable expenditure represent between 75 and 80%,<sup>667</sup> and represents the pillar with which the government aims to attain national development,<sup>668</sup> the Mexican public procurement system has to undergo in social development assessment tasks to prevent these expenditures from being diverted or wasted.

Due to all of these facts mentioned above, is unavoidable to purport reforms to both the Law on Inspection and Accountability of the Federation, and the Federal Budget and Fiscal Responsibility Law.

First off, the author wishes to address the powers of the National Procurement Review Committee to assess Annual Procurement Plans as a part of the Public Count. For that, the Law on Inspection and Accountability of the Federation has to be reformed. Here is the proposal:

*“Article 14.- The auditing of the Public Count is intended to:*

*I. Evaluate the results of financial management:*

*a) The execution of the Revenue Law[,] the exercise of the Expenditure Budget[, and the Annual Procurement Plans;] to verify the form and terms in which the revenues were collected, obtained, [disbursed] and administered; verify that the resources from financing and other obligations and loans were contracted, received and applied in accordance with the approved budget; and review that expenditures were exercised in the concepts and authorized items, including, among other aspects, the contracting of services and public works, acquisitions, leases, subsidies, contributions, donations, transfers, contributions to funds, trusts and other financial instruments, as well as any long-term payment scheme or instrument.”<sup>669</sup>*

This reform will empower the Superior Audit of the Federation to audit the annual procurement plans. As the OECD points out, one of the risks of the post-bidding process is the lack of monitoring of performance of the contractors.<sup>670</sup> With this, the Superior Audit of the Federation would have the

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<sup>666</sup> Center for Public Finance Studies. *El Gasto Público en Inversión, 2009-2017* (Mexico City, Chamber of Deputies, 2017), online: <<http://www.cefp.gob.mx/publicaciones/nota/2017/notacefp0112017.pdf>>, accessed 14<sup>th</sup> August 2018, at 2.

<sup>667</sup> Gutiérrez Lara, *Gasto público y Presupuesto Base Cero en México*, supra note 336, at 13-4, footnote 1.

<sup>668</sup> Latin American and Caribbean Economic System. *Las compras públicas como herramienta de desarrollo en América Latina y el Caribe* (Caracas, Press and Dissemination of the Permanent Secretariat of SELA, 2014), online: <[http://www.sela.org/media/264708/t023600006235-0-di\\_16-compras\\_publicas.pdf](http://www.sela.org/media/264708/t023600006235-0-di_16-compras_publicas.pdf)>, at 10.

<sup>669</sup> LFRCF, Article 14, at 7.

<sup>670</sup> Organization for Economic Co-operation and Development, *Integrity in Public Procurement. Good practice from A to Z*, supra note 95, at 25

legal possibility to verify that the expenses incurred by the procurement units coincide with the ones stipulated in the annual procurement plans. In other words, this reform (in combination with the ones mentioned above) would allow the National Procurement Review Committee to study all the procurement phases. However, this is not enough to prevent the growth of during the procurement processes ordinary expenses.

In order to reduce ordinary expenses to happen in the Mexican public procurement system, I argue that the following reforms to the Federal Budget and Fiscal Responsibility Law are ideal for said purposes:

*“Article 16.- The Income Law and Budget of Expenditures of the Federation will be elaborated based on quantifiable economic policy objectives and parameters, accompanied by their corresponding performance indicators, which, together with the general economic policy criteria and objectives, strategies and annual goals, in the case of the Federal Public Administration, should be consistent with the National Development Plan and the programs that derive from it, and will include at least the following:*

*[I. The constitutional criteria established in Article 134 of the Political Constitution of the United Mexican States;]*

*II. The general lines of economic policy;*

*III. The annual objectives, strategies and goals;*

*IV. The projections of public finances, including the financial requirements of the public sector, with the assumptions used for the estimates. The projections will cover a period of 5 years in addition to the fiscal year in question, which will be reviewed annually in subsequent years;*

*V. The results of public finances, including the financial requirements of the public sector, covering a period of the last 5 years and the fiscal year in question;*

*VI. The annual goal of the financial requirements of the public sector, which will be determined by the financing capacity of the federal public sector, and*

*VII. The maximum limit of the current structural expenditure for the fiscal year, as well as projections of this limit for a period of 5 additional years.*

*The general criteria of economic policy will explain the fiscal policy measures that will be used to achieve the objectives, strategies and goals, as well as the actions that correspond to other policies that directly impact the performance of the economy. Likewise, the future fiscal costs of the initiatives of law or decree related to the general lines of policy referred to in this article, together with proposals to address them, should be set forth.*

*In the criteria referred to in the previous paragraph, the most relevant risks faced by public finances in the short term, accompanied by proposals for action to address them, will also be exposed.*

(...)

*Article 25.- The annual programming and budgeting of public expenditure shall be carried out with support in the preliminary projects prepared by the dependencies and entities for each fiscal year, and based on:*

*I. The policies of the National Development Plan and the sectoral programs;*

*II. The public expenditure policies determined by the Federal Executive through the Secretariat;*

*III. The evaluation of the progress made in the fulfillment of the objectives and goals of the National Development Plan and the sectoral programs based on the Performance Evaluation System, the goals and physical and financial advances of the previous fiscal year and those intended for the fiscal year following;*

*IV. The medium-term macroeconomic framework in accordance with the general economic policy criteria referred to in article 16 of this Law;*

*V. The public sector financial program prepared by the Secretariat, and*

*VI. The interrelation that exists with the agreement agreements with the private and social and coordination agreements with the governments of the states.*

*The preliminary draft will be prepared by the units responsible for the dependencies and entities, estimating the costs to achieve the quantitative and qualitative results foreseen in the goals as well as the necessary indicators to measure their compliance. [This preliminary draft should be sent to the National Procurement Review Committee.]*

*In the resulting expenditure provisions, the type and source of resources that will be used must be defined.*

*Article 26.- The preliminary projects of the entities will include a cash flow that must contain:*

*I. The provisions of their income, including in their case the net indebtedness, the subsidies and the transfers, the initial availability and the final availability;*

*II. The provisions of ordinary expenditure, physical investment, financial investment and other capital expenditures[. These provisions are to be approved by the National Procurement Review Committee];*

(...)

*Article 50.- Expenditure executors may enter into multi-year contracts for public works, acquisitions, and leases or services during the fiscal year provided that:*

*I. Their celebration represents an economic advantage or that their terms or conditions are more favorable;*

*II. The term of the contract and that it will not adversely affect economic competition in the sector in question;*

*III. They identify the corresponding ordinary or investment expense;*

*IV. The expenditure is apportioned at the year's prices both for the corresponding fiscal year and for subsequent ones; and*

*[V. The National Procurement Review Committee validates the said procurement settings.]*

*(...)*

*Article 59.- Entities will require authorization from the [National Procurement Review Committee] only to make the following external budgetary adjustments:*

*I. In the case of entities that receive subsidies and transfers:*

*a) Transfers of resources from investment expenditure and public works to ordinary expenditure;*

*b) Transfers that imply increasing the total regularizable budget of personal services of the entity;*

*c) Changes to non-compensated budget calendars;*

*d) The modifications that affect the balances of primary and financial operation;*

*e) The modifications to the subsidies that they grant with charge to budgetary resources; and*

*f) Additional expenditures charged to surplus income.*

*(...)*

*Article 61.- Executors of expenditure, in the exercise of their respective budgets, shall take measures to rationalize the expenditure destined to administrative and support activities, without affecting the fulfillment of the goals of the programs approved in the Expenditure Budget.*

*(...)*

*Said program shall be of mandatory observance for all agencies and entities, including those referred to in article 5 of this Law, and shall consider at least the following aspects:*

*I. Establish mechanisms to [monthly] monitor the evolution of resources destined to ordinary expenditure;<sup>671</sup>*

With these reforms, the National Procurement Review Committee (through the Public Function Secretary and its legal powers inserted in the Federal Budget and Fiscal Responsibility Law)<sup>672</sup> would have the legal possibility to intervene in public procurements that involve significant amounts of ordinary expenditure. Moreover, these reforms do not include any substantial intrusions to the procurement units' budgetary autonomy.<sup>673</sup>

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<sup>671</sup> LFPRH, Article 16, 25-6, 50, 59, 61, at 13, 22-3, 39-40, 42-4.

<sup>672</sup> LFPRH, Article 3, at 7.

<sup>673</sup> Budgetary autonomy implies the capacity of the constitutional body to determine for itself the economic amounts necessary to comply with the powers conferred by the constitution, to

However, the National Procurement Review Committee would have a vote on the justification of the procurements that seek to attain a social benefit. Therefore, the process would not be stopped by procedural matters, but by decisions incompatible with the social benefit sought by these procurements. In doing so, the author expects that the dry, duplicated or redundant ordinary expenses in which the procurement units incur (*i.e.* government operation, such as salaries, office supplies, transportation, office rental, etc.)<sup>674</sup> will be reduced. In other words, the investments made in operational efficiency of procurement units would not be superfluous.

### **FEDERAL LAW FOR PROTECTION OF THE CONSUMER**

One of the major problems detected in the use of alternative procurement methods resides in the lack of compliance with the obligation of conducting a market research (three separate studies) before undertaking these processes. As the law establishes, this is a *sine qua non* requirement.<sup>675</sup> However, in reality, the units omit to conduct these investigations in a complete manner due to the lack of specificity of the government procurement legal framework.

The solution to this problem, however, does not fall within the public procurement legal framework. In fact, it is not in the hands of the National Procurement Review Committee. Instead, the author wishes to address this topic through the consumer's protection law. *"The purpose of this law is to promote and protect the rights and culture of the consumer and to seek equity, certainty and legal security in the relations between suppliers and consumers."*<sup>676</sup> As I mentioned, AMLO's Nation Plan include this topic as crucial to end corruption within the sector.<sup>677</sup> Nonetheless, the document mentions that the measure would not need any legal reforms. I do not consider this viable nor logical. Hence, here is the reform necessary to oblige the procurement units to conduct their market research in a transparent and complete manner; which would empower the Federal Procurator for Consumer Protection to participate in the National Anticorruption System:

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manage them independently in accordance with their purpose, and to supervise them through their own bodies and procedures. See, Higher Inspection Body of the Federation. *Aproximación al concepto de autonomía técnica y de gestión* (Mexico City, Superior Audit of the Federation, 2016), [online: <https://www.asf.gob.mx/uploads/78\\_Estudios\\_sobre\\_la\\_percepcion\\_de\\_la\\_ASF/InsInvJurco.mp.pdf>](https://www.asf.gob.mx/uploads/78_Estudios_sobre_la_percepcion_de_la_ASF/InsInvJurco.mp.pdf), accessed 24<sup>th</sup> August 2018, at 103.

<sup>674</sup> Dainzú Patiño. *El gobierno de Peña se excede en gasto público*, *Expansión CNN* (27<sup>th</sup> July 2018), online : <https://expansion.mx/economia/2018/07/27/el-gobierno-de-pena-se-excede-en-gasto-publico>, accessed 26<sup>th</sup> August 2018.

<sup>675</sup> LAASSP, Article 40, fifth paragraph, at 25.

<sup>676</sup> *Ley Federal de Protección al Consumidor*. Article 1, second paragraph, at 1. [LFPC]

<sup>677</sup> Proyecto 18, *Proyecto de Nación 2018-2024*, supra note 579, at 49-50.

*“ARTICLE 24. The Office of the Procurator has the following attributions:<sup>678</sup>*

*(...)*

*[XXVII. Contribute, in accordance with the provisions of the Law of Acquisitions, Leases and Services of the Public Sector, with the generation of market studies necessary to carry out procedures of *Invitación a cuando menos tres personas* and *Adjudicaciones Directas*. The procurator has to send the outcomes of these contributions to the National Procurement Review Committee.]*

To enhance the participation of the Federal Procurator for Consumer Protection within the public procurement sector, the Acquisitions Act has to go through more legal reforms than the ones initially purported in this section. Here are the said reforms:

*“Article 26. (...)*

*(...)*

*Prior to the commencement of the contracting procedures foreseen in this article, the agencies and entities must carry out a market study from which the conditions that prevail in the same, with respect to the good, lease or service object of the contract, for effect to look for the best conditions for the State. [This research has to be done with the collaboration of the Federal Procurator for Consumer Protection.]*

*Article 40. (...)*

*(...)*

*In the case of the *Invitación a cuando menos tres personas* based on sections III, VII, VIII, IX, first paragraph, X, XI, XII, XIV, XV, XVI, XVII and XIX of article 41 of this Law; the brief to referred to in the second paragraph of this article, must be accompanied by the names and general information of the persons who will be invited; in the case of *Adjudicaciones Directas*, in all cases the name of the person to whom it is proposed must be indicated; in both procedures, the result of the market research that served as the basis for their selection must be accompanied. [The collaboration of the Federal Procurator for Consumer Protection in the elaboration of the market research is a mandatory requisite. Any procurement made without it, is automatically cancelled.]<sup>679</sup>*

With these reforms, the procurement units are obliged to conduct their market investigations in a complete manner. Since establishing positivist legal requirements would limit the market research, I consider that the participation of the Federal Procurator for Consumer Protection is crucial to attain investigation that are reliable and sufficient to validate the use of alternative procurement methods and their exceptional clauses.

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<sup>678</sup> LFPC, Article 24, at 8-10.

<sup>679</sup> LAASSP, Article 40, fifth paragraph, at 25.

As I mentioned while discussing AMLO's proposal regarding the public procurement sector's market research, it is incomplete without any legal reforms; a situation that would have left the participation of the Federal Procurator for Consumer Protection at the hand of the procurement units. In the reforms that I am proposing, the absence of the participation of the Federal Procurator for Consumer Protection would invalidate the procurement process altogether. In this way, the procurement units that do not accredit the existence of exceptional clauses that allow them to use alternative procurement methods would not be able to award the contracts through these procedures; obliging them to recur to the *Licitación Pública* instead.

**REGLAMENTO INTERIOR DE LA SECRETARÍA DE HACIENDA Y CRÉDITO PÚBLICO (INTERNAL BYLAW OF THE MINISTRY OF FINANCE AND PUBLIC CREDIT).**

As I mentioned while discussing AMLO's Nation Plan, the most important measure against corruption within the public procurement sector was the consolidation of the procurements; which consists in subordinating all of the procurement units to the Official Office of the Treasury and Public Credit. Moreover, this measure will empower this Office to watch and approve all the procurements made by the Federal Government, just as the internal control bodies do.<sup>680-681</sup> In the proposal, the upcoming administration specifies that the centralization of the public procurement system will rely on the empowerment of the Official Office of the Treasury and Public Credit Secretary.<sup>682</sup> However, it is questionable to argue that such an idea does not need legislative modifications to materialize. The said amendments are, due to the enormous influence of political parties within the Executive branch, imperative to impress transparency into the Official Office's proposed actions.

Article 8 of the *Reglamento Interior de la Secretaría de Hacienda y Crédito Público* (Internal Regulation of the Ministry of Finance and Public Credit) contains the powers of the Official Office of the Treasury and Public Credit.<sup>683</sup> Within them, we can find that this authority does have the consolidation power argued by Carlos Urzúa.<sup>684</sup> It does not, however, include anything related to the public procurement process.

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<sup>680</sup> Villalobos, *Hacienda centralizará compras públicas para atajar corrupción, advierte Carlos Urzúa*, supra note 597.

<sup>681</sup> Noticieros Televisa, *Carlos Urzúa, futuro secretario de Hacienda, en la mesa de Despierta - Despierta con Loret*, supra note 598.

<sup>682</sup> *Ibid.*

<sup>683</sup> *Reglamento Interior de la Secretaría de Hacienda y Crédito Público*. Article 8. **[RISHCP]**

<sup>684</sup> *Idem*, section III.

Concentrating all of the public procurements in the Official Office of the Treasury and Public Credit Secretary will reduce an approximate of 2,500 offices -all of them having discretionary powers- to only one. Extending the Official Office's consolidation powers is not only more than needed to reduce discretion within the public procurement sector, but an opportunity to exercise complete control over what the procurement units acquire and the conditions under which they carry their acquisitions.

The reforms are the following:

*“ARTICLE 8.- The Senior Official shall have the following faculties:*

*(...)*

*III. Establish accounting systems for federal revenues, movements of funds and federal public debt; as well as consolidate the statements of operations [and procurement processes] results related to the aforementioned concepts in coordination with the administrative units of the Secretariat responsible for these functions;*

*IV. Provide administrative support to the units of the Secretariat to program, budget, organize, control and evaluate their activities with respect to their own public expenditure; help with them in the planning, coordination and evaluation of the operation of the parastatal sector coordinated by the Secretariat; [to consolidate and approve every procurement made by Federal government entities;] and assist the Secretary in these functions with respect to the entities of the sector whose direct object is different from that of financial intermediation;”<sup>685</sup>*

The third transitory article establishes that *“all provisions opposing the present are repealed.”<sup>686</sup>* Every federal government entity has its own internal regulation. Moreover, every one of these legal documents establish the existence of an Official Office empowered to procure on behalf of the federal government entity. By adding the proposed reforms, all of the other Official Offices have to respond to the Treasury and Public Credit's one since their powers contravene to that of the latter.

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<sup>685</sup> *Idem*, sections III-IV.

<sup>686</sup> RISHCP, Third transitory article.

## CONCLUSION

There are several reasons for the corruption present within the Mexican public procurement sector. Lack of competition, unconnected legal frameworks, political influence within award decisions, etc. The root cause of all of these issues is the abuse of discretionary powers, a tool created to ease administrative processes, enabling public administrators to choose between more than one possible course of action.<sup>687</sup> However, the abuse of these powers and, specifically, the non-enforcement of the exceptional clauses established in the Mexican public procurement legal framework has put them under public scrutiny, endangering its existence and their benefits.

Contrary to what the in-coming administration of Lopez Obrador argues, the enforcement of the anticorruption legal framework needs legislative adjustments to properly work towards the objective of reducing corruption within the whole Mexican public administration. Specifically, in this thesis I dealt with the lack of connection between the Anticorruption Reform of 2015 and the public procurement legal framework. The area, in its current state, leaves large margins of discretion with which procurement units can award (and have awarded) public contracts in an irregular manner.

The Public Function Secretary, charged with enforcing the public procurement legal framework, responds, has not worked to serve the public interest but instead the political and private interests of the ruling political party. The monopoly of discretion in the award of public contracts is the main cause of the precarious situation of the Mexican public procurement. Since pluralism is absent from these decisions, the money stipulated in the contracts is at the mercy of the Federal government procurement units, all them dependent to an Executive Power invaded by partisan influences. To date the existence of the Superior Audit of the Federation has not been enough to stop embezzlements during the award stage.

In this thesis I propose the creation of the National Procurement Review Committee, an intergovernmental body formed by authorities of the Legislative and Executive branches, and civil organizations. I also propose the consolidation of the Protection to the Consumer framework with the National Anticorruption System. This new authority will have the objective of validating all matters related to the award and execution of the public contracts. Such assessment would be mandatory and the National Procurement Review Committee would have the power to ban, pause or cancel the procurement process at any of its three phases if any irregularities arise.

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<sup>687</sup> *SSES v. Tameside*, supra note 388, at 1016.

As I have argued, *ex post* criminal prosecution is insufficient to stop corruption in the Mexican procurement sector. This is evident due to the alarming deficiencies within enforcement on the part of Attorney General of the Republic. The best example is the lack of evidence collected by the Attorney General in the Duarte's case.<sup>688</sup> Moreover, the lacklustre recovering activities of the Superior Audit of the Federation are not an encouraging indicator of administrative prosecution either.<sup>689</sup> Rather than attempting to tackle corruption after the problem has occurred the system needs to be reformed to inhibit and diminish any opportunities for corruption in the first instance.

Inspired in the Canadian procurement review committee, but adapting it to the political and public administration context of Mexico, I believe that the National Procurement Review Committee could tackle corruption in the country's public procurement prior to possible embezzlements. By forcing the procurement units to disclose the rationale of each of its procurement plans and requests, the Mexican procurement system would enter into the spectrum of discursive ethics. Under this scope, the legal validations of the procurement would not rely solely on a literal enforcement. More than that, it would mean that the appropriateness of the services contracted is subjected to an independent assessment, and if they do not hold any relation to the social benefit sought by them, cancelled at any stage of the procurement process. Through this, the use of alternative procurement methods will definitely decrease and it would return the "*Licitación Pública*" to its throne as the default procurement process in Mexico.

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<sup>688</sup> Dennis A. García. *PGR sin pruebas de delincuencia organizada contra Javier Duarte*, La Jornada (22nd August 2018), online: <<http://www.jornada.com.mx/ultimas/2018/08/22/acepta-pgr-que-reclasifico-delito-contra-javier-duarte-4993.html>>, accessed 18th September 2018.

<sup>689</sup> This auditing body has been only able to recover 1.21% of all the 29,869 million pesos embezzled by the government in 2017. See, Manuel Ureste. *28 mil mdp sin comprobar y solo 1.2% recuperados: las 7 claves del informe de la ASF*, Animal Politico (1st November 2017), online: < <https://www.animalpolitico.com/2017/11/auditoria-superior-resultados/>>, accessed 26th October 2018.

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- *An Act to amend the Act respecting elections and referendums in municipalities with respect to financing*
- *An Act to amend the Professional Code with respect to disciplinary justice*
- *An Act to amend the Taxation Act and other legislative provisions*
- *An Act to amend various legislative provisions concerning municipal affairs*
- *An Act to confer certain powers of inspection and seizure on the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry*
- *An Act to eliminate union placement and improve the operation of the construction industry*
- *An Act to prevent, combat and punish certain fraudulent practices in the construction industry and make other amendments to the Building Act*
- *An Act to provide for the provisional relief from office of an elected municipal officer*
- *Buy American Act*
- *Canadian Free Trade Agreement*
- *Constitución Política de los Estados Unidos Mexicanos*
- *Department of Public Works and Government Services Act*
- *Financial Administration Act*
- *Government Contracts Regulations*
- *Ineligibility and Suspension Policy*
- *Integrity in Public Contracts Act*
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