

BACKGROUND PAPER

**GOVERNANCE *and* THE LAW**

# **Contestability and changes in tolerance towards corruption: The formation of an elite-citizen coalition in Mexico**

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# **Contestability and changes in tolerance towards corruption: The formation of an elite-citizen coalition in Mexico**

Samantha Lach\*

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## **1. Corruption in Mexico: gauging the scale of the problem**

“A politician who is poor is a poor politician”, the Mexican saying goes, portraying how embedded the culture of corruption is in the country. Yet, even though corruption and rent-seeking are often seen as effective ways to sustain deals in a system with poor accountability and weak contract enforcement, the tolerance towards this *modus operandi* has changed in recent years. According to a national poll carried out by Grupo Reforma, Mexicans believe that the biggest problem plaguing the country is corruption, placing it well-ahead of insecurity, unemployment and violence (Grupo Reforma, 2015). This perception is also picked up by international instruments. In 2015, the country obtained a failing score of 35 (out of a 100) in the Corruption Perceptions Index, published by Transparency International. The index ranks Mexico in 95<sup>th</sup> place out of 165 countries, and last among OECD nations. Beyond perceptions, the issue of corruption and its magnitude appear to be taking a toll in terms of growth, security, and equity in the country.

Even though estimating the cost of corruption is complex, there is agreement that corruption in Mexico is a costly problem. As a percentage of GDP on an annual basis, estimates range from 2 percent (INEGI, 2013), and 5 percent (Casar, 2015), to as high as 9 percent, according to the International Finance Corporation (Naim, 2015). By manipulating public resources in exchange for rents, corruption can lead to market distortions, deviating resources from their most productive use, with a toll on innovation, productivity and growth (World Bank, 2017). Indeed, corruption around the world is found to deter investment—by about 5 percent, as suggested by cross-country estimates<sup>1</sup>—

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<sup>1</sup> Mauro (1995) finds that investment in corrupt countries is nearly 5 percent lower than in countries that are relatively free of corruption. Wei (2000) finds that investing in a country that is relatively corrupt, vis-à-vis an uncorrupt one,

and hike up the price of doing business. In Mexico, the bribes that need to be paid out by entrepreneurs for obtaining a new government permit can amount to 4.5 percent of the contracts' total worth (World Bank, 2010).<sup>2</sup> This may be an underestimation. As reported by the World Economic Forum, on average, corruption around the world can increase the cost of doing business by up to 10 percent (WEF, 2013). Corruption inhibits entrepreneurship. About 65 percent of entrepreneurs in Mexico report having missed a business opportunity due to unduly competition (where competitors use political influence or handouts) according to a report by the Mexican Institute for Competitiveness (IMCO, 2015a). Per the same report, nearly half of business leaders in Mexico report being requested bribes from public officials in exchange for contracts or opportunities. Simultaneously, 57 percent of these same businesspeople concede to having employed go-betweens (“*gestores*”) that have access to information or political connections, to intervene with authorities on their behalf.

Corruption also has a direct impact on welfare and how prosperity is shared, through its effect on fiscal policy, both in terms of how revenues are collected, and in how they are spent in the provision of public goods and services. First, corruption interferes with raising the resources necessary to invest in human capital or infrastructure, as well-connected individuals and firms avoid paying applicable taxes through political influence and under-the-table agreements. Tax evasion in 2012 in Mexico was estimated at 26 percent, representing about 3.1 percent of GDP (Fuentes-Castro, 2013).<sup>3</sup>

In addition, corruption can take a toll in the service delivery itself, as public sector officials divert public resources, demand bribes or abuse their functions. As discussed in World Development Report (WDR) 2017 *Governance and the Law*, in clientelistic settings, benefits are exchanged in return for political support (World Bank, 2017), weakening the commitment to long-term development objectives and reducing the power of elections as an accountability mechanism. Clientelism takes place when the relationship between public officials and voters becomes distorted, such that, instead of a dynamic where public officials are the agents of voters (who can sanction agents), the former “buy” the latter’s vote in exchange for (usually) short-term benefits. In other cases, public officials become responsive to groups, such as the providers of public services, who are key for their political survival. Favoring the interests of these groups can have detrimental effects on the delivery of key services such as education, health, or infrastructure, as providers wield their influence, withholding effort (e.g. through absenteeism) or engaging in low-quality provision.

In the Global Competitiveness Index, Mexico ranks in 125th place out of 140 countries in terms of diversion of public funds, with a score of 2.3 out of 7 (WEF, 2015). A 2014 study based on data from the Secretariat of Education’s census suggests that the government spends millions a year on ‘ghost’ teachers (teachers who do not show up to work but collect a salary) and ‘ghost’ (nonexistent) schools

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corresponds to an additional 20 percent (“private”) tax on investment. More recently, Sadig (2009) suggests that an increase of a percentage point in corruption levels in a host country lead to a decline in FDI inflows of about 11 percent.

<sup>2</sup> This figure lies considerably above the 1.2 percent average for Latin America and the Caribbean (World Bank, 2010).

<sup>3</sup> Tax evasion in the study is measured as the difference between the potential collection and the one observed.

(IMCO, 2014). According to data from Mexico’s Federal Supreme Audit Office (AFS in Spanish), in 2015 the lack of sanctions for acts of corruption costed the country 86 billion dollars—as attributed to public funds diversion, under-spending and waste, and unduly public payments (Casar, 2015). Between 2007 and 2010, the average cost of a bribe or a “*mordida*” (bite) for Mexican households increased by nearly 20 percent (from 138 pesos to 165 pesos), according to *Transparencia Mexicana* (2010).<sup>4</sup> What is more, as highlighted by Casar (2015) corruption constitutes a regressive tax. In 2010, Mexican households spent on average 14 percent of their income on corruption, while for low-income households the same expense represented 33 percent of their income, as reported by *Transparencia Mexicana* (2010). The relative power of groups who benefit from this *modus operandi* make difficult to denounce their behavior—and exit from this perverse cycle less likely to occur.

Of foremost importance in the case of Mexico, corruption is linked to impunity. It is no coincidence that the country ranked second last in the Global Impunity Index (UDLAP, 2015). Entrenched corruption prevents institutions from effectively and impartially performing their role. When the institutions coopted by corruption extend to those in charge of public safety and administering justice, the results can be critical. In Mexico, criminal organizations have challenged the collective agreement on the institutional use of violence, which allows the state to enforce rules. The breakdown in the *Weberian* state’s monopoly over the legitimate use of violence weakens the ability to provide public safety. According to data from INEGI, Mexico’s national institute of statistics, between 2007 and 2014—some of the most damaging years in the fight against drug trafficking—over 164,000 people were victims of homicide (Breslow, 2015).<sup>5</sup> This figure, as Breslow points out, is parallel to that of civilian deaths from violence in Iraq over a period more than one and a half times as long.<sup>6</sup> Recent evidence suggests that the link between corruption and conflict is positive and statistically significant. A 2015 cross-country study by the Institute for Economics and Peace finds the presence of a “tipping point” in the relationship between corruption and peace (IEP, 2015). According to this study, in a context of low levels of corruption, a rise in corruption has a small effect on peace; but after a certain threshold, small increases in corruption can lead to significant worsening of the peace.

Corruption further locks in this cycle of impunity, undermining institutions’ commitment to fulfill their function. As the perception of corruption in the judicial and law-enforcers increases, trust in these intuitions declines (IEP, 2015). According to a 2015 survey, 90 percent of Mexicans interviewed believe that the police is highly corrupt—such mistrust, in turn, gives way to high underreporting rates (*ibid*). Institutions in charge of investigating and prosecuting crime lose effectiveness if the perception is that their judgements are influenced or rendered void. Between 1998 and 2012, only seven rulings were issued out of 444 criminal cases that were filed for corruption by the Federal Supreme Auditor to the Attorney General (PGR in Spanish) (Casar, 2015). What is more, issued rulings do not

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<sup>4</sup> The report also identified that corruption acts in the use of public services provided by federal, state, and municipal authorities as well as by concessions managed by particulars, increased from 197 million in 2007 to 200 million in 2010.

<sup>5</sup> Certainly, as Breslow is quick to point out, not all documented homicides in Mexico are directly linked to organized-crime/drug war; distinguishing between them and other homicides, however, is difficult to determine.

<sup>6</sup> Iraq Body Count documents 157,060 – 175,751 civilian deaths from violence in Iraq between 2003 and 2015 (Iraq Body Count, n.d.).

necessarily mean that sanctions were levied. Corruption weakens credibility; as individuals are unable to trust that institutions will carry out their functions objectively. Between 2000 and 2013, 41 Mexican governors faced 71 corruption scandals; of these, 16 were investigated and only four were found guilty (Montes, 2015).

Lack of transparency abets impunity. The disappearance of 43 Ayotzinapa students in September 2014 in the state of Guerrero, and the consequent irregularities into the investigation of the case<sup>7</sup> reflect serious deficiencies in the ability of the criminal justice system to fulfill its function. Impunity extends to the inability to protect freedom of the press, which has a key role to play in holding public officials accountable. Despite the enactment of several measures—special laws to federalize crimes against journalists, a special prosecutor and protection mechanisms—Mexico remains one of the most dangerous places for journalists worldwide (Freedom House, 2015; 2016).<sup>8</sup> In Veracruz, a particularly unsafe state for reporters, the organization Article 19 has documented the murder of 17 journalists since 2000 (Article 19, 2015).

Allegations of conflict of interest and favoritism in the country have reached the federal level, as notably in the case of the “white house” scandal. In November 2014, a report by a team of reporters led by journalist Carmen Aristegui brought attention to the fact that President Peña Nieto and his family were residing in a multi-million dollar house registered under a subsidiary of Grupo Higa, an active government contractor, in an apparent conflict of interest (Cabrera and others, 2014).<sup>9,10</sup> A month later, it came into light that back-then finance minister, Luis Videgaray, had also acquired a house from Grupo Higa at preferential interest rates, prior to assuming office in 2012 (Montes, 2014). Following an investigation in August 2015<sup>11</sup>, the case was declared closed and the President, his wife and the minister exonerated (Malkin, 2015). Independently from whether a conflict of interest existed or not, part of the reason, as pointed out by scholars, why the investigation found no evidence of wrongdoings is that such conflicts of interest lack clear regulation in the Mexican legal system.<sup>12</sup> In the

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<sup>7</sup> As found by the 2015 investigation from the Interdisciplinary Group of Independent Experts (GIEI in Spanish), which points to “irregularities, inconsistencies, and/or gaps in State authorities’ investigation into the events”, as reported by the Inter-American Commission on Human Rights in Mexico (IACHR, 2015).

<sup>8</sup> Also see 2015 report of 20 human rights organizations, showing little improvement in the protection of journalists since the protection law (*Ley Federal de Protección a Personas Defensoras de Derechos Humanos y Periodistas*) was created in Mexico in June 2012 (ISHR, 2015).

<sup>9</sup> According to the Aristegui report, subsidiaries of Higa had won bids of more than \$500 million dollars in contracts when Peña Nieto was governor of the State of Mexico, and continue to have active contracts with the federal government. One of its subsidiaries was part of the consortium that won (as a single bidder) a multi-billion dollar contract to build a high-speed train in Mexico—a project that was revoked a couple of days before the Aristegui report went public.

<sup>10</sup> A spokesman for the President, in response to the report, informed that Grupo Higa had acquired the house on behalf of Peña Nieto’s wife, Angelica Rivera, which she had been paying for.

<sup>11</sup> To probe into the matter, the President appointed Virgilio Andrade as head of the Secretary of Public Function, position which had been vacant for the previous two years. In August 2015, the SPF reported having found no evidence of wrongdoings. Following Mr. Andrade’s resignation in July 2016, a new head assumed the agency in January 2017.

<sup>12</sup> For instance, the finance minister’s house was bought prior to his assuming office, while still a member of Peña Nieto’s transition team—and thus not a subject of administrative offenses under the regulation in force at the time. As discussed below, this is one of the changes proposed by the 3de3 bill, which sought to broaden those subject of offenses to include members of transition teams and political candidates, among others (Interview, Pablo Montes, April 21, 2016)

meantime, public mistrust ensues, not in the least when the contractor's name surfaced among those Latin Americans using offshore arrangements in the Panama Papers, released in April 2016 (Estevez, 2016). Around the same time, in March 2016, Ms. Aristegui was dismissed from MVS radio, the network where she had hosted one of the country's most popular shows, in an act that was viewed by some of her fellow journalists and press as retaliation (Archibold, 2015).

This is the context that Mexico's citizen's law initiative sought to change. Under the setting of corruption and impunity described, a group of different organizations and civil society developed a legislative proposal called *Ley* seeking to prevent, investigate and sanction cases of corruption. The bill takes its name, "*tres de tres*" (three out of three), from a subsection of one of its proposed laws, which demands that all members of Congress and public officials disclose three statements: (1) on taxes, (2) assets, and (3) potential conflicts of interest. Another key aspect of the bill, as discussed further below, is that it put forward an explicit definition of what corruption is—currently lacking in the Mexican legal system—to facilitate its sanctioning. The bill establishes tools to improve prosecution and emphasizes a harmonized system to aid in the fight of corruption networks. The proposal needed 120,000 citizen signatures to be considered by Congress. In March 2016, the Senate received over 291,000. By the time the proposal was accepted into the Senate floor and discussed in April 2016, more than 643,000 citizen signatures were supporting the bill.

The citizen's bill looks to embed and make enforceable commitment mechanisms into the legislation in order to make public and private actors more accountable. The mechanisms would prevent and sanction corruption, allowing institutions to become more effective at performing their functions. The pursuit, however, was not without perils. On one hand, several elements—including constitutional change, broad alliances, and shifts in preferences—made possible the search of this bill, and its subsequent influence on national anticorruption legislation. On the other, powerful interests make worthy adversaries, and there was a risk that the anticorruption civic mobilization would end up as dead letter.

This paper uses some of the main elements of the World Development Report 2017 framework to analyze how the initiative came to be. First, it looks to investigate the origin of the constitutional changes that gave birth to the figure of citizen's bill in the first place, illustrating how a change in rules, a "form", eventually led to an increased space of contestability. It also looks to document how the coalition between civil society organizations, academia, the private sector and citizens came together around this rallying point, and how the bill grew from online platform to a full-on legislative proposal. Afterwards, it provides a brief analysis of the elements of the bill that were ultimately incorporated into the legislation of the national anticorruption system. In parallel, it looks to shed light on questions, such as, did political parties attempt to block a constitutional change with the potential to affect their interests? What role did elite organizations play in the civil society coalition? How much of the coalition's bill made it into the national anticorruption legislation? What are the mechanisms through which these laws purpose to fight corruption? The methodological approach followed in the paper

consisted of in-depth interviews with key stakeholders and a detailed review of publicly available information.<sup>13</sup>

The rest of the paper is structured as follows. Section 2, next, discusses some of the elements of WDR 2017, which are used to frame the analysis. It then sets up the context leading up to the initiative, notably the legislative changes that allowed the figure of citizen's bill to come to the fore. Section 3 looks at the path of the citizen's bill: its evolution from online platform, through massive crowdsourcing to full-blown national anticorruption bill. It also explores some of the most distinctive elements that the bill proposes to fight corruption. Section 4 provides an analysis of the incentives behind how the coalition around the initiative was built, and the unlikely alliance of actors involved—citizens, business associations, civil society organizations, academia, and legislators themselves. Section 5 concludes with a discussion of the entry points that led to the development of the bill—and its incorporation into the national legislation on corruption—in terms of shifts in incentives, preferences and contestability.

## 2. Constitutional change

### 2.1 Is corruption inescapable?

As discussed in World Development Report 2017, effective institutions help countries' sustain economic growth and achieve equitable and peaceful societies (World Bank, 2017). The distribution of power (and how it interacts with bureaucratic capacity and norms) plays a critical role in how effective those institutions are. While power asymmetries are not harmful per se, they can lead to negative outcomes when they are manifested in capture, clientelism, and exclusion. Corruption is related to all three. In *clientelistic* settings, public servants and officials may barter political support for short-term benefits; while influential groups often have the ability to *capture* policies and make those policies serve their interests. Furthermore, the reason why these actors are able to use—and sustain—power for personal gain is often because other actors (such as the potential beneficiaries of services) are *excluded* from the policy arena, unable to hold the former accountable, further locking in these perverse cycles.

Is corruption inescapable? Corruption is a way of sustaining agreements that is usually built into governance interactions, on a continuum between a system in which rules are applied according to personal status and one in which they are applied systematically and impersonally (Fukuyama, 2016; Mustaq Khan, 2016). Corruption in most cases represents an equilibrium, where the incentives for stakeholders are aligned in such a way that there is a tendency to revert to such equilibrium. “Good” policies are often difficult to introduce and implement because certain groups in society, who gain from the status quo, may be powerful enough to resist the reforms needed to break the political equilibrium. And yet, even though the distribution of power often appears immutable, history presents plenty of examples in which societies have improved rules, institutions, and processes that have helped

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<sup>13</sup> See Annex for interview questionnaires.

them get closer to reaching their development goals. Change happens by shifting the *incentives* of those with power, reshaping *preferences and beliefs*, and by increasing *contestability*—who is included (or excluded) from the policy arena. These changes are often brought about through bargains among elites and/or through greater citizen engagement.<sup>14</sup>

This paper argues, as illustrated in further detail below, that the constitutional change that led to the existence of citizens’ initiatives in Mexico—a reform that could be labeled as “form” at the time—led, over the years, to help create a space of increased *contestability*, allowing the policy tool to become powerful. This coincided with shifts in society’s *preferences* in terms of tolerance to corruption, whereby the upper echelons in the private sector became more invested in abating corruption in doing business, and citizens’ discontent was ripe. The latter was likely influenced by the role of the media, which (armed with transparency laws) contributed to disclose the magnitude of corrupt practices, particularly at high levels of government. As the initiative gained strength, and, with the backing of a commitment to open government practices, it culminated in a very public debate. This discussion, where the names of which congressman or other refused to disclose their statements—and then afterwards, who voted for and against the bill—became part of the public knowledge. This visibility contributed to modify *incentives*, increasing the political cost of not passing the reform. These dynamics—in *contestability*, *preferences* and *incentives*—came together such that a bill emanating from civil society could have significant impact on a piece of major legislation in Mexico. While setbacks were suffered along the way, and not all battles won, this course of events appears to represent a step towards a rules—rather than deals—based governance equilibrium in the country.

## 2.2 The origins and enablers of political reform

Several elements led up to the development of the 3de3 citizen’s bill, including the constitutional changes that allowed citizens’ initiatives to exist in the first place. As detailed in Box 1 and the timeline presented below, prior to the 2000s, citizens’ initiatives were not a part of the legislative system in Mexico, where the right to present bills to Congress was reserved for legislators and the Executive. After some initial steps in 2005 and 2009, citizens’ initiatives were eventually approved—and regulated—as part of the Political Reforms in 2011–2012. The process to present initiatives remains, however, troublesome, with a minimum number of signatures of 0.13 percent of the nominal list of voters (approximately 120,000 signatures) required to present an initiative.

### Box 1.

#### Citizens’ initiatives: the (long) journey of constitutional change

Prior to the 2000s, citizens’ initiatives were not a part of the legislative system in Mexico. The right to present bills to Congress was reserved for constituted entities of public representation (the Executive, legislators, state legislators). The first draft decree to reform Article 71 of the Mexican Political

<sup>14</sup> As discussed in WDR 2017, they may also be pushed forward by international actors whose efforts can influence the ability of domestic groups to advocate for reforms.

Constitution, on the right of citizens to present initiatives of law, was presented by a Senator from the *Partido de la Revolucion Democratica* (PRD) (an opposition party) in 2005.<sup>15</sup> The matter is picked up again in President Felipe's Calderon Decalogue of political reforms, presented to Congress in 2009, which included incorporating the figure of citizens' initiatives among other reforms such as independent candidatures.<sup>16</sup>

Over a year later, in April 2011, the Senate approved a draft decree to reform several provisions of the Constitution regarding reforms in the political arena. In August 2012, the Chamber of Deputies (lower house) passed the Political Reform, which included changes to Article 71 regarding citizen candidatures. The Chamber lowered the minimum number of citizens' signatures required to present initiatives, from 0.25 percent in the Senators' original draft to 0.13 percent, to facilitate the exercise of the right. The recognition of this citizens' right, however, meant little without the secondary legislation needed to provide the "rules of the game". In February 2014, the lower house finally approved reforms to several laws to regulate the requirements needed to present citizens' initiatives, including their pass through Congress. In April 2014, the Senate approved the legislative project that regulates the figure of citizens' initiative, and returned it to the lower house, which passed the bill to approve citizens' initiatives.

#### *The process to submit citizens' initiatives*

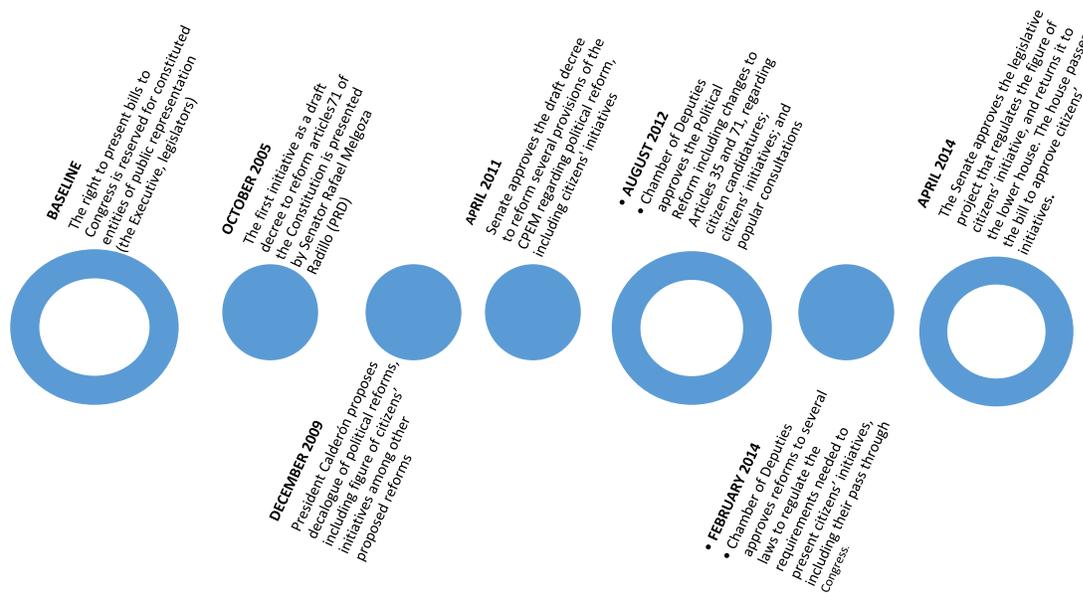
Citizens have the right to initiate laws or decrees when they represent at least 0.13 percent of the nominal list of voters. Once the initiative is presented to the president of the lower or upper house, the president of the board of the house turns it over to the National Electoral Institute (INE in Spanish) to verify the signatures of the voters submitting the bill. If the percentage required is met, the president of the board turns the initiative to the appropriate commission for its analysis and legal opinion, and to follow the ordinary legislative process. In this process, the president of the appropriate commission is to summon the designated representative from the citizens group to present the content of the proposal to the commission.

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<sup>15</sup> The draft decree presented by PRD Senator Rafael Melgoza Radillo would add on to articles 35 and 71 of the CPEUM on the matter of participative democracy, specifically introducing the figures of plebiscite, referendum, and citizen's initiatives.

<sup>16</sup> Other proposed changes referred to incorporating second rounds, the reelection of local authorities and legislators; and preferential initiatives for the Executive; some of these proposals were picked up by the political reform.

**Figure 1. Timeline: Citizens' Initiative Constitutional Reform**



*Source:* Author's elaboration.

It could be argued that the figure of citizens' initiatives opened a door to exert pressure on political parties in Mexico, by extending the right to initiate laws to members outside the political arena. Indeed, the reforms in the legislation eventually led to a space of increased contestability. The lag, however, begs the question of whether powerful interests resisted such change. The lengthy process that this constitutional reform, among others, followed could in fact suggest an intentional slowdown from elite actors in the political sphere. On the other hand, pressure from civil society may have played a counterweight to induce the approval of this and other changes in the context of the political reform. The protest vote campaign of 2009 calling on voters to nullify ballots, for instance, brought to the forefront the widespread disenchantment with the political system.<sup>17</sup>

Nonetheless, while the political reforms that started in 2011-2012 were eventually approved, and while they did lead to a more open system, it is not lost that they did so in a restricted way. In the case of the citizens' initiative, for example, this is reflected in the high number of signatures required to present the bill, and the cumbersome steps required to submit them. The burdensome steps to submit a signature—requiring filling out a form by hand and then mailing it, without an electronic alternative, despite available technology, and depending on the (often unreliable) postal service—could be interpreted as a deliberate way of obstructing the process, as pointed out by Pablo Montes, researcher from IMCO in interview for this note. The minimum number of signatures is also high, considering

<sup>17</sup> While the 2009 campaign did not have a large effect on the electoral results; it contributed to highlight the issue of citizens' dissatisfaction; and member of the campaign were invited to attend legislative forums discussing the 2011-2012 political reforms.

it is half of what is needed to register a political party in Mexico (0.13 percent of the nominal list of voters vs. 0.26 percent<sup>18</sup>). Additionally, the process of what happens to the initiative once it is presented to the house by a citizen representative, including how it is to be defended, remains largely undefined. Legislators retain the choice to respond or not to the citizens' initiative—in the case of 3de3, they decided to do so, likely a result of how mediatized the matter had become—but they have the legal option not to do so. In this sense, it could be argued that, while slowly allowing change, the influential actors in this sphere also made sure to build in locks to provide immunity, in case it becomes necessary.

The 3de3 bill proposal came into being in the context of Mexico's efforts to enact an anti-corruption reform. These efforts began in 2012 as current President Enrique Peña Nieto assumed office; gathered momentum around the time the series of conflict of interest close to the President broke out in 2014 (see white house scandal above); and led to the creation of the National Anticorruption System (SNA in Spanish) in 2015—the secondary legislation of which would follow a year later, in the spring of 2016. This is the legislation that the 3de3 bill sought to influence.

In 2012, President-Elect, Enrique Peña Nieto, presented an initiative for an anticorruption commission. The interest to put forward anticorruption measures at the beginning of his presidency could be interpreted as a mark to wipe the slate clean. This could have been motivated because Peña Nieto's victory marked the return of the *Partido Revolucionario Institucional* (PRI)<sup>19</sup>, largely associated with corruption in the eyes of the public. The initiative was part of the *Pacto por Mexico* (pact for Mexico) agreement, signed by the three main political parties following the administration's inauguration at the end of 2012. Yet, while reform on other topics moved forward as part of the agreement, the anticorruption one lingered in the lower house, following its approval by the Senate in 2013. Members of the opposition, the *Partido Accion Nacional* (PAN), and *Partido de la Revolucion Democratica* (PRD) disagreed with the original proposal submitted by members of PRI and its long-term ally, *Partido Verde* (PVEM). One of the main points of contention referred to the creation of a national anticorruption system—favored by members of PAN—over a 'commission', as outlined in the original proposal, which, critics argued, would lack autonomy and prosecuting powers.

In February 2015, Congress finally approved the anticorruption reforms, which were ratified by the Senate. The legislators agreed on the creation of a system (over a commission), and in May 2015, the National Anticorruption System was created by constitutional reform. The approval of the SNA marked significant progress, such as on the relevance of its coordinating role across different government levels (municipal, state, and federal), among other dispositions (see details of the timeline and the reforms approved in Box 2). The reform, though, was criticized for lacking more bite.

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<sup>18</sup> COFIPE, Article 24

<sup>19</sup> PRI was in power in Mexico for 71 years, from 1929 until President Vicente Fox, from PAN was elected in 2000. The victory of Enrique Peña Nieto heralded PRI's return to the presidency after two terms (12 years) of PAN presidencies, with President Vicente Fox and President Felipe Calderon.

Moreover, the approved legislation would mean little before the secondary laws required to regulate the system were passed. These secondary laws were the ones which the 3de3 bill sought to influence.

## **Box 2.**

### **The legislative path of Mexico's National Anticorruption System**

In November 2012, President-Elect Enrique Peña Nieto presented an initiative for an anticorruption commission. The proposal would also broaden the faculties of the Federal Institute of Access to Information (*Instituto Federal de Acceso a la Informacion a la Información*, IFAI); as well as create a citizen entity to monitor the use of public funds in government advertising. The initiative (which would modify articles 22, 73, 79, 105, 107, 109, 113, 116 and 122) was subsequently presented to the Senate by members of the PRI and PVEM parties. Initially, it was considered that the anticorruption commission would replace the Secretariat of the Public Function (*Secretaria de la Funcion Publica*, SFP).<sup>20</sup> The anticorruption commission proposal was part of the accountability, transparency, and corruption section of the *Pacto por Mexico* agreement, signed by the three main political parties following Peña Nieto's inauguration.<sup>21</sup>

In December 2013, the Senate approved the anticorruption reform; including a thorough revision of the secondary legislation. Members from the PRI party submitted a proposal to implement the tenants from the *Pacto*. Yet, for over a year the initiative lingered in the lower house as members of PAN and PRD expressed disagreement with the PRI's proposal. One of the main contention points referred to the implementation of a national anticorruption system, which was favored by members of PAN, instead of a 'commission' as delineated in the initial proposal, which, its critics argued, could lack autonomy and prosecuting powers.

In October 2014, the PAN party released its proposal, which pushed for the creation of a system over a commission. The legislators agreed on the creation of an anticorruption system; as well as on keeping the Secretariat of the Public Function active. In February 2015, the lower house approved the anticorruption reforms. The initiative is turned over to the Senate, and in May 2015, the National Anticorruption System (SNA) is created through Constitutional Reform, to be ratified by the Mexican States. The decree refers to amendments required by the Constitution in order to enable Mexico's Congress to legislate secondary anticorruption laws, without which the system would be ineffectual. Congress had a year to pass the general laws and legislative reforms required to regulate the system. This is the legislation that the 3de3 bill sought to impact.

In April of 2016 the Senate performed a formal analysis of the regulation laws of the SNA, including the 3de3 initiative. The ordinary session of Congress, however, closed on April 30 without passing the bill. In May 31 2016, two days after the constitutional deadline to publish the secondary legislation

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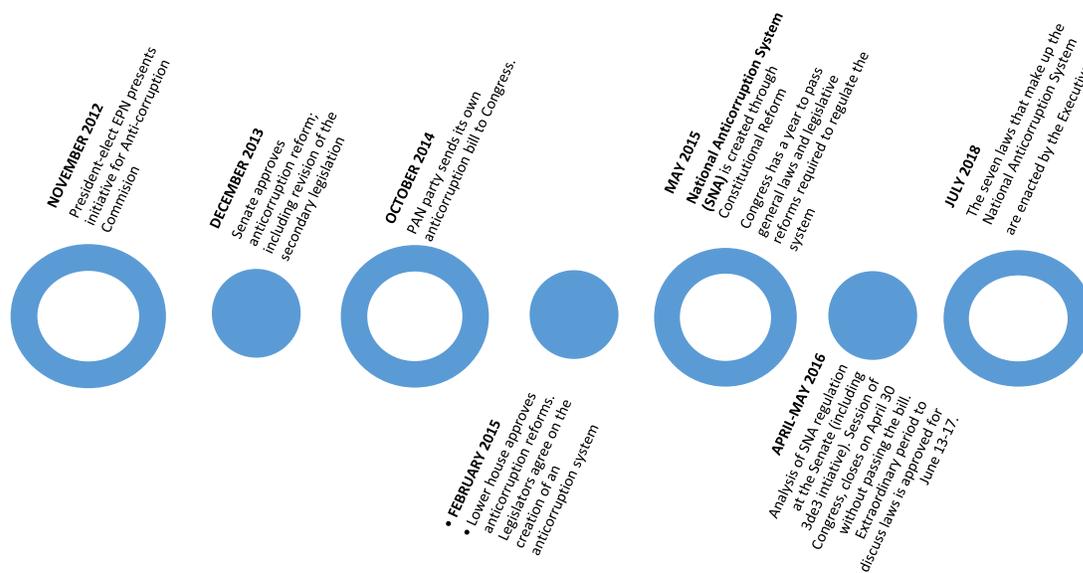
<sup>20</sup> The SFP had been inactive since 2009, when President Calderon announced its closedown as part of the austerity measures enacted in the aftermath of the 2008/2009 financial crisis.

<sup>21</sup> This agreement, which sought to break political gridlock, was signed by Mexico's three main political parties (PRI, PAN and PRD) on December 2012, following President Peña Nieto's inauguration.

was up (May 28), the permanent commission of Congress approved an extraordinary period to discuss the anticorruption laws to take place, a month later, on June 13-17.

In June 15, just after the Senate was approving the General Law of Administrative Responsibilities, revisions to articles 29 and 32 were passed. President Pena Nieto exercised his veto asking the legislative body to address existing concerns with the revisions. In July 18, the seven laws that make up the National Anticorruption System were enacted.

**Figure 2. National Anticorruption System: the timeline**



*Source:* Author's elaboration.

After the ordinary session closed on April 2016 without passing the bill, Congress approved an extraordinary period to discuss the anticorruption for June 13-17 (after the elections scheduled to take place in fourteen states in June 5 had passed). Just after the Senate had passed the General Law of Administrative Responsibilities, revisions to two articles, 29 and 32, were approved. Following discontent with the revisions, President Pena Nieto exercised his veto regarding Article 32 (but not Article 29), asking the legislative body to address existing concerns. In July 18, the seven laws that make up the National Anticorruption System were enacted. During this act, President Pena Nieto asked the public for forgiveness for the indignation caused by the information released on the white house in 2014 (President's Office, 2016). Furthermore, he reiterated his commitment to fight corruption and his belief that that the success of the SNA would help rebuild trust in institutions.

### 3. The 3de3 citizen’s law initiative

#### 3.1 From online platform to national anticorruption bill

The 3de3 law initiative started out as an online campaign called “*legislador transparente*” (transparent legislator) in February 2015. This campaign encouraged citizens to request that lawmakers make three statements public—on taxes, assets and conflicts of interest. The crowdsourcing platform was co-created by *Transparencia Mexicana* (the Mexican chapter of Transparency International), and the Mexican Institute for Competitiveness (IMCO); an anticorruption civil society and public policy research organizations, respectively. While both organizations had been promoting transparency and anticorruption best practices for years, the conflict of interest and corruption scandals that shook the country in late 2014—and the ensuing lack of citizen trust—catalyzed a fertile ground for this initiative, which sought to “rebuild citizen trust through the commitment and transformation of the political class”.<sup>22</sup> The website broke ground with four legislators: two senators and two deputies (Animal Politico, 2015).<sup>23</sup>

In April 2015, the campaign was expanded to target candidates in the approaching July 2015 midterm elections, using the ballot box as leverage to incentivize candidates to comply. The campaign was joined at this time by organizations representing the private sector, with the Business Coordination Council (CEE in Spanish) and the Mexican Employers’ Confederation (COPARMEX in Spanish) urging contending candidates to disclose their statements, as a way of showing their commitment to fight impunity and corruption (Rodríguez, 2015). After the election, the campaign was expanded to make an appeal for all first-level government officials to submit their statements, that is: the cabinets (at the federal, state and municipal levels), the holder of the Executive, and the federal and local legislators.<sup>24</sup>

Pressure grew on the candidates running for office in July 2015, as citizen participation picked up steam. Nine out of nine elected governors in that year stepped up to the plate, making their statements public on the platform (IMCO, 2015b). In the words of Eduardo Bohorquez, Director of *Transparencia Mexicana*, “these governors *had* to do it, as it had become politically unviable not to. An act as simple as asking for ‘three out of three’ became something powerful.” Interviewed for this note on April 2016, Mr. Bohorquez recounts how the 3de3 campaign took into account lessons from citizen report-card initiatives around the world. “A focus on reporting without institutional response is not enough; while such campaigns may become popular in social media, they often fail to produce change. A key element to succeed—he explains—lies in shortening the information-action link as much as possible; this is reflected in the ‘3de3’ simple but powerful hashtag.” The emphasis on the response, Mr. Bohorquez continues, is a key element behind the success: “as a citizen, you ask for something

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<sup>22</sup> <http://tresdetres.mx/#/>

<sup>23</sup> One senator and one deputy from PRD, and another pair from PAN. See Animal Politico (2015) for more details.

<sup>24</sup> Eventually, the initiative combined the two different platforms ([www.candidatotransparente.mx](http://www.candidatotransparente.mx) and [www.legisladortransparente.mx](http://www.legisladortransparente.mx)), into a single website that was relaunched in October 2015: [www.3de3.mx](http://www.3de3.mx)

concrete, the 3de3, and you actually obtain a change: the legislators make their statement public. There is an actual institutional response to the civic action for the first time in a long while; it becomes a tipping point.”

Notwithstanding the extensive participation of citizens in the platform—which drew tens of thousands of daily visits to see if candidates had disclosed their financial information<sup>25</sup>, thousands of public officials have yet to disclose their statements. Progress, however, continues. The number of public officials who had published their 3de3 as of May 2016 amounted to 436. In January 2017, this figure had doubled to 887, including one member of the federal cabinet<sup>26</sup>, 24 governors (out of 32), 31 senators (out of 128), 125 federal deputies (out of 500), and 70 mayors (out of more than 2400).

Over time, the original petition campaign grew into something much larger. As the initiative gained momentum, it became plausible to seek to influence with it the laws of the National Anticorruption System (SNA). Enacted in 2015, the system’s legislation was scheduled for discussion in spring 2016 (see Box 2 above). The initial organizations involved in the platform were joined by others who had also been working on corruption and transparency issues, such as the *Centro de Estudios Espinosa Yglesias* (CEEY), which brought with it its participatory methodology, as recounted by Enrique Cardenas, its Executive Director, in interview for this note. A group of individuals from research institutions, civil society organizations, the private sector, including academics and intellectuals, started to come together to support what would become an entire anticorruption bill. Among the more than 70 organizations supporting the initiative are: *Centro de Investigación y Docencia Económicas* (CIDE), ITESM, *Mexico Evalua*, *Ciudadanos por la Transparencia*, *Consejo Civico*, *Causa en Comun*, and *Accion Ciudadana frente a la Pobreza* (Ley3de3, n.d.)

Taking advantage of the recent constitutional change allowing the figure of citizen initiatives (see Box 1), and the buzz of the 3de3 campaign, it was emphasized that the bill be put forth as a citizens’ law proposal to influence the SNA legislation. This would increase its chances to have a real impact on the Senate’s discussion. “While civil society often participates in forums with the legislators, these interactions seldom go beyond the perfunctory photo op. Once the forum is over and the matter is taken up to the Congress’ commissions—where there is no civil society representation—the legislators proceed as usual, and the civil society proposal is laid behind”, indicates Pablo Montes, researcher from IMCO. He continues, “rather than expressing an opinion from civil society, the idea was to have a seat at the table, to become a legislating actor with the political weight of the citizens’ signatures as back up”.

One hundred and twenty-thousand signatures supported by valid voter IDs were required to submit the proposal. Efforts ensued to mobilize citizen participation. Members of the organizations involved used their social capital to broadcast 3de3 on every media channel available. “It was a monumental effort”, representatives from IMCO, *Transparencia Mexicana*, and CEEY observed. For the most part,

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<sup>25</sup> Max Kaiser, Anticorruption Director at IMCO, interviewed by AS/COA (Zissis, 2016).

<sup>26</sup> José Calzada, the Secretary of Mexico’s Agriculture Ministry, SAGARPA

the initiative used the organizations' own resources and staff; while some of the companies belonging to the business associations made donations in kind. For instance, Cinopolis, one of the largest cineplex chains in Mexico donated in-theater screen time to broadcast information on the initiative. Collection locations became available to drop off the filled-out signature sheets, which could be downloaded from the *3de3* website. A drugstore chain made drop-off points available in its stores. Other locations sprung up, from university campuses to local coffee shops, ran by volunteers, tallying over 200 throughout the country. The savvy social media campaign took advantage of Twitter, Facebook, YouTube and Periscope to obtain support. The *#YaFirme3de3* (I signed *3de3*) hashtag encouraged converting page views into action. Radio anchors and celebrities, including movie star Diego Luna and soccer player Rafael Marquez, made public their support for the bill.

As the *3de3* initiative opened the door to the discussion at the Senate, it became possible to strive to influence the legislation of the entire anticorruption system. Some of the organizations from academia that came on board, such as the *Red por la Rendición de Cuentas* (Network for Accountability) from CIDE, had an extensive trajectory of doing research on the anticorruption reform, and the system of laws that would have to be enacted to make the new anticorruption system effective. They brought their expertise and proposals on the SNA with them.<sup>27</sup> When the *3de3* representatives were asked to the discussion table in the Senate to discuss the initial *3de3* law proposal, they were ready to submit a proposal for all secondary laws. The coalition thus expressed its wish to participate in the discussion of *all the secondary laws* being discussed as part of the SNA. The opposition parties, PAN and PRD, who had already expressed public support for the *3de3* coalition, consented. The PRI-PVEM members then acquiesced as well. “It would have raised eyebrows if the incumbent party had refused to have the civil society coalition participate; particularly in light of the subject matter of anticorruption and transparency of the bill, with the political weight of the citizens’ signatures, and with the support of the opposition”, remarked Mr. Montes.

In this sense, while the bill took its catchy media name from the proposed mandatory disclosure of the three statements, the legislative initiative went much further. The *3de3* disclosure requirement is a fraction of a law within the anticorruption bill proposed by the civic coalition. Drafted by attorneys and experts on the subject, the law proposal contained systemic measures to improve accountability, including clear sanctioning of acts of corruption, towards the effective implementation of the SNA. The bill defines 10 types of corruption—including bribes, abuse of office, influence peddling, embezzlement, and misuse of privileged information, among others—that constitute serious administrative offenses.<sup>28</sup> By explicitly defining corrupt conducts, and identifying who is to be considered responsible in each case, it eliminates gaps in the current legislation. It also provides tools to facilitate its prosecution and sanctioning; and provides coordination mechanisms to harmonize the

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<sup>27</sup> Many of these organizations had been working on advocating on the SNA legislation to ensure its effectiveness; they had also been promoters of the Transparency Law, enacted in February 2014 (Transparency International, 2014). They were thus convened by the initial promoters of the initiative, *Transparencia Mexicana*, IMCO and CEEY, to come on board to the coalition with their knowledge and proposals on the SNA regarding accountability, fiscal coordination, among others.

<sup>28</sup> See Section 3.2 below for more details on the mechanisms of the initiative to fight corruption.

whole system. The group thus ended up submitting a legislative proposal to influence the secondary laws for the implementation of the *entire* National Anticorruption System—where the so-called 3de3 law (or General Law of Administrative Responsibilities) is one of seven laws required for its implementation. The opposition parties backed up the bill, which went forward into the negotiations at the Senate as a civil society/PAN-PRD bloc.

The coalition's members were invited to attend and provide counsel to the legislature, as the laws were discussed at the Senate in April 2016. Eduardo Bohorquez emphasizes the country's public commitment to open government practices as a key aspect for the uncharacteristically open discussion to civil society that took place at the Senate. "Mexico chaired the Open Government Partnership Global Summit in 2015, as promoted by President Enrique Peña Nieto", he points out. After these international commitments, he continues, "the legislators had to agree to have open sessions, particularly on the subject of transparency and corruption", which led to an important exercise of "co-creation of policy". Indeed, when the bill was first delivered to the Senate, it was broadcast on Periscope.

Yet, the path was not without obstacles. All members of PRI and PVEM failed to show up to the Senate's first technical work meeting to discuss the bill (Guerrero, 2016). The PRI's head in the Senate, Emilio Gamboa Patrón widely criticized the bill, arguing that certain provisions in the proposed law could lead to witch hunts (Guerrero and Gonzalez, 2016). Indeed, the roadblocks started before the bill made it to the Senate. Members of the civil society coalition received tipoffs from legislators friendly to the initiative that some factions in the Senate were trying to fast track the secondary legislation, before the minimum signatures to submit an initiative were met. This significantly shortened the period that civil society had anticipated to collect the signatures—although in the end the deadline was (more than) met.

The bill from the 'bloc'—the civil society coalition plus PAN and PRD—was discussed vis-à-vis counterproposals from PRI-PVEM during April 2016. Holding a legislative majority, the PRI-PVEM alliance, were at that point, willing to accept about 80 percent of the coalitions' proposals for the package of laws. One of the main points of contention referred precisely to the 3de3 disclosure, which in the PRI-PVEM's version of the bill, should not obligatorily public. Another topic of discord referred to the two laws proposed outside of the administrative scope—the legislation of a new prosecutor office specialized in fighting corruption, and reforms to the Federal Penal Code—which were absent in the PRI-PVEM's proposal. The civil society coalition responded to the PRI-PVEM proposal with optimism, agreeing with the substantive content of the presented draft decree. Nevertheless, as explained in the coalition's response to the Senators, "all of the seven laws are required for the system to be effective." This included the changes to the penal law regarding crimes of corruption, and making explicit the competencies of the new prosecutor's office in charge of corruption. The coalition's response emphasized, "Without these two additional reforms, the system

would be born incomplete.”<sup>29</sup> The coalition released a video call to encourage citizens to request the opening of the extraordinary session of the Senate, and to have it approve the entire package of laws needed to implement the anticorruption system, without delay (RRC, 2016).

One of the main concerns of the members of the civil society coalition was that the laws would not be approved before the ordinary period of congress ended in April 2016. This was less out of fear that the formal constitutional deadline would be missed—which happens rather often—but rather because an election period was coming up in June 2016. Over 1,300 public offices were to be voted in the country in June 5th for governors, mayors and local deputies posts in fourteen states. If the laws were not approved before the elections, the incentives of the opposition parties to approve them could change. The ordinary session of Congress, however, closed on April 2016 without passing the bill. An extraordinary period was approved to discuss the anticorruption laws, although not before the elections had passed, for June 13-17.

The bill appeared to move forward in this extraordinary period until a new setback emerged. In the early hours of June 15th, as the Senate was approving the General Law of Administrative Responsibilities (*Ley 3de3*), revisions to two articles, 29 and 32, were introduced. The revision to Article 29 sought that the obligation to make statements public would hold only as long as it did not affect people’s private life, making the requirement less mandatory, and granting public officials a way to waive out. Moreover, in what was considered a “poisonous dart”, a revision to Article 32 instituted that, in addition to public officials, every private person or business receiving public resources would be required to disclose the three statements (Cardenas, 2016). This was ill-received by the private sector and members of civil society, who argued that such actors are already supervised by the government, and sanctioned in the proposed law. As indicated by Enrique Cardenas, this requirement would mean that not only government contractors but millions of people—scholarship recipients, beneficiaries of social programs, pensioners, among others—would be required to present their statements, which would make the system inoperable, ultimately nullifying it (*ibid*).

The vote for Article 29 was “individual”, making it possible to see how Senators voted: mainly, PRI-PVEM—consistent with their position throughout the discussion—refused the mandatory disclosure of public statements, while PAN and PRD voted for making the statements absolutely public. The maximum publicity of statements, however, was defeated.<sup>30</sup> On the other hand, the rather unrealistic revision to Article 32 was introduced through an “economical” (anonymous) vote, making it impossible so see who voted for it—suggesting some likely bargaining between political parties.

Following discontent with the revisions, President Pena Nieto met with congress and business sector leaders. The Executive exercised his veto regarding Article 32, asking the legislative body to address

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<sup>29</sup> The coalition’s formal response to Senators Pablo Escudero Morales and Raúl Cervantes Andrade, presenting the PRI-PVEM package of laws is available at: <https://www.scribd.com/doc/310829567/Respuesta>

<sup>30</sup> Maximum publicity of statements was defeated with 59 votes (58 of those from PRI) against versus 51 votes (50 of those from PAN and PRD) for. See *Ley3de3* (2016) for a breakdown of the vote, including by the other parties, as well as the abstentions and non-votes.

existing concerns. The (unfeasible) revision that would compel all private persons and corporations to present their statements was duly removed. However, the President did not veto the revision to Article 29, meaning that the requirement for public officials to make their statements public was left in the approved legislation as less compulsory than what the coalition was after. In July 18, the seven laws that make up the National Anticorruption System were enacted.

### 3.2 The content of the bill: How will the new system fight corruption?

The 3de3 legislative proposal ended up influencing the entire secondary laws of the National Anticorruption System. The coalition had initially set out to pursue an administrative law, which included a section on the mandatory disclosure of the three statements for public officials. The bill then expanded to present to the Senate a series of proposals for the design of the *entire* SNA legislation. With a few exceptions—most notably the sought-after unambiguous public disclosure of public officials’ statements—the majority of the legislative changes proposed by the bloc were approved in the enactment of the National Anticorruption System in July 2017.<sup>31</sup>

The legislative package proposed by the coalition and approved by the legislature contemplate seven secondary laws to regulate the National Anticorruption System (see Box 4). These include three new laws: (1) the *General Law of the National Anticorruption System*; (2) the *General Law of Administrative Responsibilities* (‘3de3’ law); and (3) the *Organic Law of the Federal Court of Administrative Justice*; as well as reforms to two existing ones: (4) the *Organic Law of the Federal Public Administration*, and (5) the *Federal Law of Auditing and Accountability*. In addition to those five administrative laws, the bill pushed for reforms to the penal law, namely to the *Organic Law of the Attorney General*, in order to create a (6) *Special Anticorruption Prosecutor* (a new department specialized in fighting corruption), and for reforms to (7) the *Federal Penal Code*.

#### Box 3.

##### The National Anticorruption System

The National Anticorruption System is to be in charge of enforcing anticorruption efforts across all government levels: federal, state and municipal, in coordination with the competent authorities. The system has the responsibility to prevent, detect and penalize administrative responsibilities and corruption practices. It is made up of four primary agencies, in addition to a Coordinating Committee. The four agencies are: the Secretariat of Public Function; the Federal Supreme Audit Office; a newly created Special Anticorruption Prosecutor; and the Federal Court of Administrative Justice. The Secretariat of Public Function in this way remained active; while the appointment of its Secretary

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<sup>31</sup> See IMCO (2016) for an outline on the coalition proposals that were incorporated into each law, and the ones that remain pending.

becomes the only position at the secretary level where the Senate has to ratify the President's appointment.

The National Anticorruption System is to be managed by a Coordinating Committee made up by the heads of the four agencies, in addition to the head of the Judiciary Council, and the head of the *Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales* (INAI), and presided by a representative from the Committee of Citizenship Participation. This citizen committee will be formed by five individuals with no political party affiliation. The presidency of the Coordinating Committee will be rotated among each of these five citizens.

The law is scheduled to enter into force in July 2017. Mexico's 32 states have until that time to homologate their responsibility laws. In the meantime, the current legislation in terms of responsibilities is to be applied. During this period, the citizen committee will be selected, as well as the other dispositions necessary for the functioning of the system.

The secondary legislation emanating from these reforms seeks to clearly designate under which cases and instances public servants could be sanctioned. Specifically, the General Law of Administrative Responsibilities (Law 3de3) clarifies acts of corruption, establishes clear guidelines and responsibilities of public service, broadens the scope of who is subject of being sanctioned (incorporating actors such as candidates, transition teams, and union leaders), establishes sanctions of public servants and a 'black list' of who has been penalized, as well as sanctions for private individuals and corporations. In addition, it creates a platform to denounce acts of corruption and mandates protection for witnesses and whistleblowers. In terms of disclosing of statements, the law requires public officers to disclose information, including public versions of two of the three statements: namely, on taxes and potential conflicts of interest (although it would be possible to waive this obligation through the 'personal information' provision of Article 29).

Overall, the coalition's bill pushed for a holistic system of checks and balances. The five administrative laws have the potential to clear up and identify what constitutes offenses and penalties in the administrative structure, while the changes to the penal law allow their sanctioning and prosecution. The legislative changes proposed by the coalition seek to prevent, sanction, and correct corruption through three main mechanisms. These are: improving clarification, providing tools, and enhancing coordination (see box 3).

**Box 4. Mechanisms to fight corruption:  
Improving clarification, providing tools, and enhancing coordination**

*Clarification*

In the existing framework, even though corruption was defined in the penal code (as fraud or bribery, for example), it was conspicuously absent in the administrative legal system. Although the *concept* of corruption existed in the administrative legislation, the *crime* of corruption did not. The proposed

legislation thus set out a code of conduct to clarify what a public official can and cannot do. It outlines what constitutes a severe administrative corruption offense, and how it is to be sanctioned such that it simplifies its ruling by a judge.

The legislation proposed defines corruption on the basis of 10 types of illegal behavior that constitute serious administrative offenses, following the United Nations best practices. It also establishes penalties for these behaviors and provides guidelines for their sanctioning in particular cases. These range from being removed from public office to permanent restriction to hold such positions, as well as compensatory and punitive damages.

The enactment of the SNA established that private individuals representing companies could be subject of sanction for engaging in serious administrative offenses. The bill, proposes the mechanisms through which these actors are to be investigated, and which sanctions would be applied, (for instance, which cases call for the dissolution of companies, or for the payment of damages). In addition, the proposed law broadens the scope of those who are subject of administrative offenses to include candidates of political parties, union leaders that manage public resources, and elected officers, as well as transition teams between changing administrations. It also includes the forfeiture of assets (*extincion de dominio*) as a penalty to be applied to unlawful enrichment (and not only applicable for crimes such as kidnapping or organized crime).

#### *Tools*

To facilitate the investigation of administrative offenses, the legislation provides tools to detect pertinent information. These include procedural rules that increase the investigatory and prosecutorial power of the institutions in charge. For example, regarding the disclosure of the three statements in the 3de3 subsection, it allows the suspension of bank or fiscal secrecy privileges to enable the investigation of a party subject of illegal enrichment, as well as to intervene communications and to provisionally suspend public officers while under investigation.

The bill recognizes citizen participation mechanisms as a tool against corruption, and establishes mechanism to protect whistleblowers. It establishes mechanisms to provide safe channels, bestowing investigating entities with the faculties to protect denouncers and witnesses.

Regarding the private sector, it provides mechanisms to incentivize the adoption of integrity measures, providing criteria to help authorities distinguish firms that have (or lack) adequate compliance practices. It helps companies avoid corruption by setting out control mechanisms, and provides incentives for companies to support the investigation of corruption in their midst, such as reduced penalties for coming forward and collaborating.

#### *Coordination.*

The system looks to harmonize the different legal and government instances dealing with corruption. The administrative norms establish who, what charges, and which penalties and sanctions, while the criminal laws ensure that penalties are enforced, for instance, that the individual charged is actually sent to jail.

As ‘general’ laws, the norms established by the bill would apply throughout the country—at the state, municipal and federal levels—helping to synchronize rules to fight corruption networks in the country. Furthermore, the bill contemplates making public a National Registry of Sanctioned Public Servants, i.e. a corrupt officials “black list”. Within the existing legislation, if a sanctioned public official crosses a municipality line, he or she may be reemployed, as there are no records of their disqualifying. This list will ensure that sanctions are enforced across state and municipal borders.

In the existing legislation, incentives lack alignment in terms of who is in charge of investigating. For instance, internal controllerships of governmental agencies are responsible for investigating their supervisors. Rather than leaving the responsibility to check up on their supervisor in subordinates’ hands—and this without the proper tools—the bill emphasizes that these are tasks for the Auditor. The bill also provides a system of checks and balances to protect the rights of those individuals under investigation, and to prevent investigative authorities from abusing their faculties. The administrative courts, in charge of resolving cases of corruption, are to play a key role in this process.

The proposed laws aim to prevent and fight corruption thus by the clear establishment of administrative offenses, by simplifying the judges’ task to sanction them; by providing a coordinating system between institutions; but also by raising the cost of being corrupt, and by making changes to the criminal code such that punishments are actually carried out. “As the system operates, it will start to provide incentives to denounce acts of corruption; thus fostering changes in behavior”, explains Enrique Cardenas, the Director of the *Centro de Estudios Espinosa Yglesias* (CEEY), in interview for this note. He continues, “If a good system is built, it can create the incentives to fight against corruption,” although, “It is clear it is a long term process.” However, “these initiatives set a precedent for civil society to demand more clarity”, Dr. Cardenas indicates.

The system as a whole appears to be well endowed to fight corruption, going beyond establishing rules (“form”), and looking to create, instead, changes in behavior. For instance, increased monitoring alone can simply lead to resorting greater lengths to hide illicit enrichment—failing to prompt a change in the behavior of corruption. However, the proposed changes to the legislation make *lying* about corruption an actual crime. If, in addition, the legislation succeeds in making real the threat of sanctioning—that is, if the system of laws, courts, and prosecutors works in a coordinated and effective way such that the threat of punishment from that crime is credible—it is expected that this will lead to a change in behavior.

The legislative reform is considered to be significant. Despite the fact that the section relative to making statements public ended up as less mandatory than in the original proposal, the approved reform package is still “an unprecedented achievement, one that changes the logic of how the fight against corruption is conceived”, as expressed by Mr. Montes, in interview for this note, who estimates that approximately 95 percent of the proposed seven laws were approved. He explains how one of the main obstacles to fight corruption in the country refer to the numerous obstacles to the

collaboration between institutions, for example, in terms of sharing information, where processes often become stuck. The changes in the legislation eliminate many of these obstacles to improve coordination, such as in the form of databases of shared information. More faculties were granted to the corresponding organizations in order to improve their efficacy. The Federal Supreme Auditor, for example, was not allowed to conduct investigations regarding federal resources pertaining to the states; it could not perform investigations in real time; and it faced obstacles to investigate corruption acts occurred in the past, all of which are addressed with the reform.

The root of impunity in Mexico, as indicated by Juan Pardinás, General Director of IMCO, began with the way in which laws were drafted—full of gaps and loopholes through which politicians could escape without facing consequences (Pardinás, 2016). The approved package of laws, Mr. Pardinás continues, allows Mexico to have a more solid legal framework to face corruption. As Cardenas points out, “[with these reforms] we have an institutional framework that organizes a system with tools, with mechanisms to prevent corruption, and to investigate and sanction the behavior of public servants and private people that is considered corrupt” (Cardenas, 2016).

As WDR 2017 suggests, formal law is not enough to shape behavior. Despite being good news for Mexico, as Mr. Pardinás points out, approving a law does not mean changing reality. Now it is important for the system to be applied. “These laws are a blueprint of sorts, over which the edifice of institutions must be built (Pardinás, *ibid*).” While progress is positive, the implementation phase has yet to go. Mexico’s 32 states have a year to homologate their responsibility laws, until July 2017, when the law will enter into force. During this time the organizations necessary for the application of the system are being put in place. As suggested by Mr. Montes, one of the next issues will be to see, if once that institutions have been given more faculties, if the new faculties are matched by sufficient budgetary resources to carry out their function.

The National Anticorruption System is to be managed by a Coordinating Committee presided by a citizen representative. The Citizen Participation committee will be formed by five individuals with no political party affiliation, designated by a Selection Committee (in turn made up by members of academia and civil society).<sup>32</sup> The citizen representative committee will preside the table where the Anticorruption Prosecutor and the other heads of the pertinent agencies will meet (see Box 3). The presidency of the table will be rotated among the five citizens who—even while their functions will primarily be administrative—will possess the authority to evaluate and propose public policies.

#### **4. An elite-citizen initiative?**

While the 3de3 initiative has mobilized over half a million people—which is even more impressive considering that many Mexicans err on the skeptical side of political action—it would be imprecise to categorize it as a bottom-up citizen movement. It is unlikely that the more than 643,000 citizen that supported the bill would have come forth on their own without the logistic and media support that

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<sup>32</sup> <http://comisionsna.mx/>.

the leadership of these organizations brought on. Even the branding itself of the bill, for instance, around a simple conveyable message that still strikes at the heart of the issue—3de3 vis-à-vis the ‘General Law of Administrative Responsibilities’ mouthful—contributed to the rallying. These organizations helped facilitate the process of submitting the signatures, raising awareness, and bringing to the public the essence of the legislation, which could have otherwise stayed as a likely-to-wither legislative exercise.

On the other hand, the coalition is not an elite-elite alliance either. Many of the groups that conform the coalition clearly fall into the definition of elites in the sense that they have the capacity—surely more than unorganized citizens—to influence policy design and implementation (WDR, 2017), e.g. the prominent think tanks and research institutes. Even though they are not members of the ruling party per se, these organizations constitute actors whose interests cannot be ignored—certainly the case of the business associations—thus falling into the category of ‘non-ruling elites’. And yet, the 3de3 coalition is not only an elite-elite agreement. The crowdsourcing brought palpable citizen participation reflected in more than half a million signatures. Volunteers recall how citizens stayed at the collection centers long after filling out the form to submit their signature, venting their discontent about corruption and the hope that this bill would make a difference. Without this active citizen participation, the legitimacy of the bill—validated by the legal figure of citizen’s initiative—would vanish. This alliance is, thus, a good example of an elite-citizen bargain.

In several occasions, the ruling coalition and opposing elites in Mexico have found common ground against other polarized interests.<sup>33</sup> This common ground, according to theory, makes sense when the cost of losing to the opposition is smaller than the potential destabilization impact, say of mass mobilization (WDR, 2017). The 3de3 alliance, however, is actually breaking that mold. In a way, it could be argued that elites are crossing long-established lines, in what could be dubbed an “elite split”. According to the WDR 2017, “During splits, elite groups will attempt to co-opt citizens, as larger followings will increase their bargaining position. Here, the interaction between citizens and elites becomes key, particularly in the development of social movements”. Connecting civil society organizations to the left, and private sector interests on the right, this alliance is bringing together organizations that are further apart in the political spectrum than the norm, in order to collaborate in a common initiative. This somewhat unlikely alliance, is legitimized, through crowdsourcing, by active citizen participation: non-elites rallying with non-ruling elites, in a common quest to fight corruption. “That was the magic of the coalition. To connect the different worlds we all had to break a cognitive inertia: civil society members, academics, business leaders, and citizens”, remarks Mr. Bohorquez, from *Transparencia Mexicana*. On the other hand, he emphasizes “the civic innovation component in this alliance set this experience apart, it makes this laboratory a replicable model.”

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<sup>33</sup> In 2006, the CCE, for instance, lend financial support to a slandering television campaign in favor of PAN and against left-wing Presidential runner, Andres Manuel Lopez Obrador (then PRD)—which was condemned by the Federal Electoral Institute as political positioning beyond the business council’s scope of action.

The common ground of fighting corruption thus became a unifying interest, a rallying point, so to speak, as it affects all actors. In a twist, while the SNA already contemplated enabling the sanctioning of the private sector, making individuals liable for engaging in corruption, the 3de3 bill takes this provision further, establishing outlines for the investigation of such charges, and how sanctions would be applied. Interestingly, private sector companies were still interested in endorsing the anticorruption bill (as reflected in the participation of the business chambers in the alliance) even if it meant ‘tying their own hands’, so-to-speak. The reason behind this, researchers from IMCO suggest, is that, for the most part, when companies engage in acts of corruption it is mainly due to extortion from the authorities; and the anticorruption bill would lead to ease of doing business and reduced costs. On the other hand, had sterner legislation been proposed—such as criminal liability for companies, for instance—the business sector would likely not have been as supportive, as Mr. Bohorquez from *Transparencia Mexicana* points out. This voluntary hand-tying of the business leaders backing up the bill, however, helped enlarge the accountability space to fight for the bill.

The bill also had unquestionable backup from the ruling elites inside the Senate, particularly from opposition parties PAN and PRD, but also from members of the incumbent party, PRI. The support to the bill from the opposition was reflected, for instance, in the agreement to allow the coalition to present a proposal for the entire secondary legislation of the system. The support from the opposition for the coalition’s proposal certainly fits the image of a political move, riding on the capital of the civil society initiative, positioning themselves apart from PRI (and its recent corruption scandals). On the other hand, Mr. Bohorquez also emphasizes that “the government is not monolithic, and there are reformers within.” Indeed, he mentions, “some of the most audacious individuals in the process are in the incumbent government. Without their support, the bill would not have made it as far.”

The bill has been approved, incorporating a substantive amount of the coalitions’ proposals, in what will hopefully lead to a more effective anticorruption system. This is to be seen, as the system comes into force in July 2017. Regardless, this initiative represents a historic moment in the country, with civil society and elites coming together to fight against corruption in a formal legislative process. Institutionalized environments tend to lower the costs of losing, decreasing polarization and making change more likely. The increasingly institutionalized environment—reflected in the 2012 amendment that allowed citizen initiatives, as well as the open government commitments—was a key element in making this development possible.

While the 3de3 coalition is not a citizen’s movement, it could be argued that the exercise to date marks progress in vertical accountability (elite-citizen) in Mexico’s transition from a developmental-dominant to a developmental competitive elite-bargain. “While elite bargains are better at creating spaces for horizontal accountability, vertical accountability becomes more important at later stages of development as elite and citizen interests diverge and citizens become more vocal and organized” (World Bank, 2017).

## **5. Driving change: the where, when, who and why**

In an unprecedented course of events, a bill emanating from civil society had profound impact on a piece of major legislation in Mexico: the regulatory laws of the national anticorruption system. Three levers for change encouraged the dynamic that led to this process, namely, a space of increased citizen contestability, shifts in society's preferences regarding tolerance to corruption, and an increase in the cost of political inaction. These elements intertwined with a powerful elite-citizen coalition, if not to break, at least to throw off balance the existing political equilibrium.

In the first place, the coalition took advantage of a previously enacted change in “form” to activate a mechanism of contestability: that is, the constitutional change that granted citizens the right to present bills in Mexico. Such reform was not without obstacles. It followed a slow path of approval, suggesting an intentional slowdown from political actors to prevent the potential entry to outside members, vis-à-vis mounting pressure from civil society. Once it was actually adopted, insurance mechanisms were put in place—for instance, legislators retained the choice to respond or not to these initiatives. The cumbersome process to submit citizen signatures to present bills has also been interpreted as a deliberate way of putting checks on the process. Nevertheless, a legal reform that could have been labeled as mere form at the time, ultimately was activated by a civil society coalition and used to contest the legislation being discussed around a theme of national importance—the country's anticorruption system. The figure of citizen initiative was not the only legislative change that led to this opened space. The country's public commitment to open government practices—Mexico chaired the Open Government Partnership from 2014 to 2015—appears as another key element behind the uncharacteristically open discussion with civil society that took place at the Senate, in the frame of the 3de3 movement. This would fit with the idea that a formal legal change that opens up space for contestability leads to its realization—more *de facto* inclusion in the policy arena, if it coincides with a change in social preferences.

If the opened-up accountability space is the “where”, the scandals around corruption and conflict of interest that shook the country in 2014 contribute to explain the “when”. The ensuing lack of citizen trust was fertile ground for the development of the coalition, coinciding with increased support from business leaders, voicing their unwillingness to conduct business under the prevailing setting of corruption. Changes in preferences sometimes help jump-start coordination toward a better equilibrium (World Bank, 2017). Preferences here, indeed, appeared to shift towards a lower tolerance to corruption. The media likely played a role in this area, as it contributed to disclose the magnitude of corrupt practices. However, the media's role could not be understood without taking into account the freedom of information started a decade earlier and reformed later in 2014, which contributed to make much of the reporting possible.<sup>34</sup> On the other hand, while transparency laws can help information become public, ultimately, what is disclosed—and what is not—tends to be influenced

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<sup>34</sup> Known as the Federal Transparency and Access to Governmental Public Information Act, this law was approved in 2003. Together with the related state-level laws approved between 2003 and 2008, and the creation of the Federal Institute for Access to Information and Data Protection (IFAI, now INAI), they contributed to set up a legal framework around transparency. This is another example of how “form” begets function; where the full impact of a change in rules is sometimes felt years later, as the policy tool is activated and becomes more powerful.

by political economy considerations, namely, elite bargains and who gains from making information visible to audiences (WDR 2017, Ch. 8).

The “who”, as discussed in the previous section, has to do with the formation of the coalition. Bargains among elites and greater citizen engagement can help bring about change. The 3de3 coalition is a clear illustration of an alliance between both. The most successful periods of peaceful institutional change in history typically involve a coalition between a section of the elite and citizens (Fukuyama, 2016). Business leaders, prominent think tanks, research institutes—non-ruling elites, with the ability to influence the design and implementation of policy—came together with the active participation of citizens, whom, on the basis of a formal constitutional figure, helped legitimized the legislative proposal. The coalition also included civil society organizations, as well as ruling elites themselves—both from the opposition and the incumbent government, who championed the initiative from within. In and of itself, this bargaining between elites and increased citizen participation can be seen as a mark of progress in vertical accountability in Mexico.

Why did the ruling elites join the game? Why did many public officials agree to disclose, voluntarily, their three statements during the initial 3de3 platform campaign; why did members of congress vote to incorporate most of the proposed legislation—when both measures could imply “trying their own hands”, as it were? The answer likely has to do with the impact that the initiative, and the changes in society’s preferences had in shifting their incentives. As the online platform, and then the coalition around the bill, grew stronger, and more public, the cost of not joining in, of not disclosing statements, of not passing the reforms became higher until a tipping point was reached. The open debate, backed by transparency laws, which made public the names of which congressmen did not agree to disclose their statement, and then, of who voted for and against the bill, likely contributed to increase the political cost of not passing the reforms, and providing the incentives to go forward with the legislation. Visibility can lead to accountability, contributing to shift incentives.<sup>35</sup>

Only time will be able to shed light on the actual impact that this citizen-elite coalition will have on curbing anticorruption in Mexico. So far, the scope of what has been achieved appears to be non-trivial. Interestingly though, there seems to be a discrepancy between the success of the coalition in affecting the legislation and the public perception of what was achieved. The focus of the media at the time of the discussion at the Senate was on the fact that the 3de disclosure—which was a fraction of a law within the package of laws proposed—had not passed as pushed for by the coalition (remaining less mandatory than what was advocated for in the proposed bill). The fact that the *majority* of the legislative changes proposed by the civil society bloc were actually incorporated into the enactment of the National Anticorruption System was much less publicized.

Why? Part of the answer could have something to do with the incentives *within* the coalition. As pointed out by Mr. Montes, at the time of Senate discussions some members of the coalition were

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<sup>35</sup> It is not a coincidence that the setback vote of June 15 2017, introducing the amendment to Article 32 that would make the law inoperable, was an economical—that is, an anonymous—vote; away from the public eye.

more willing to sacrifice the point of contention regarding the 3de3 disclosure, in the light that most of the other proposals were reflected in the bill to be approved. For others, the 3de3 mandatory public disclosure was crucial, not in the least because (in addition to its relevance for the anticorruption system) of its importance as a symbol of citizen participation. The 3dd3 public disclosure was the clear, conveyable message around which awareness was raised and participation rallied. In an ironic turn of events, while the 3de3 helped get the essence of the legislation on the table, the fact that that specific fraction of the bill did not pass as intended, ultimately made hailing victory complex.

This paper used some of the elements of the WDR 2017 to analyze how shifts in contestability contributed to conduct change driven by an elite-citizen coalition in order to move forward anticorruption efforts in Mexico. Since corruption is first and foremost a problem of commitment, enforcing credible commitment mechanisms that are instilled in how institutions work can improve accountability to citizens. More accountable institutions, in turn, help rebalance power, leading to a virtuous cycle. On the contrary, if individuals are unable to trust that institutions will carry out their function transparently and impartially, credibility is undermined. The approved legislation appears to have bestowed the national anticorruption system with adequate tools and incentives to prevent, investigate and sanction corruption. Despite setbacks, this appears to be a positive step towards a rules-based governance equilibrium in Mexico.

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## Interviews

Interview with Eduardo Bohorquez, Director, *Transparencia Mexicana*, phone interview, April 26, 2016.

Interview with Enrique Cardenas, Executive Director, *Centro de Estudios Espinosa Yglesias* (CEEY), phone interview, April 19, 2016.

Interview with Pablo Montes, Researcher, *Instituto Mexicano para la Competitividad* (IMCO), phone interview, April 21, 2016.

\_\_\_\_\_IMCO offices, Mexico City, October 12, 2016.

## Annex

### Questionnaire – April 2016

1. How did the constitutional change that allow the figure of citizen initiative come to pass?
2. Were there any efforts from political parties to stop this reform?
3. How did the initiative begin? Who were the leading actors?
4. What was the strategy? How was the initiative financed?
5. How did the initiative grow from online platform to bill proposal?
6. The coalition was originally going for the General Law of Responsibilities (3de3) and then it ended up looking to influence several other laws. How did the initiative become a proposal that looked to influence the National Anticorruption System?
7. What role did the organizations play in the bill being presented as a citizen initiative?
8. What distinguished the coalition's proposal? How did the coalition come to negotiate as a "bloc" with the opposition parties?
9. The constitutional changes proposed by the bill look to make private sector actors more accountable. This movement put together diverse actors at the table, including private sector organizations. Is there a conflict of interest?
10. What elements of the proposal, if any, faced more backlash?
11. Why would senators agree to have an open discussion (open parliament), with the presence of civil society?
12. What is the reach of the bill, were it to be approved? What would be the next challenges?
13. How will this law change corruption? Through which mechanisms?
14. In the framework of the SNA, what was the relevance of going after a "system" over a commission?

15. Has the initiative faced any resistance? What sort? Have you felt any pressure to withdraw the proposal?
16. What role, if any, did the white house scandal play in this turn of events?

#### **Follow-up Questionnaire – October 2016**

1. How would you describe the progress reached with the initiative, in terms of what was implemented in the National Anticorruption System?
2. What are the main differences from the National Anticorruption system with the bill proposal?
3. Were there any more joint actions from the PAN/PRD/civil society bloc?
4. What happened with Article 32? Was it utilized to shift the focus of the discussion?
5. What is the figure of Citizen Participation Committee in the National Anticorruption System? How much weight will it have?