

CHAPTER 27

ANTICORRUPTION

Article 27.1: Definitions

For the purposes of this Chapter:

act or refrain from acting in relation to the performance of official duties includes any use of the public official's position, whether or not within the official's authorized competence;

foreign public official means an individual holding a legislative, executive, administrative or judicial office of a foreign country, at any level of government, whether appointed or elected, permanent or temporary, paid or unpaid, and irrespective of that person's seniority; and an individual exercising a public function for a foreign country, at any level of government, including for a public agency or public enterprise;

IACAC means the existing *Inter-American Convention Against Corruption*, done at Caracas, Venezuela, on March 29, 1996;

OECD Convention means the existing *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, done at Paris, France, on December 17, 1997;

official of a public international organization means an international civil servant or an individual authorized by a public international organization to act on its behalf;

public enterprise means an enterprise over which a government or governments may, directly or indirectly, exercise a dominant influence;¹

public official means an individual:

- (a) holding a legislative, executive, administrative, or judicial office of a Party, whether appointed or elected, permanent or temporary, paid or unpaid, and irrespective of that person's seniority;
- (b) who performs a public function for a Party, including for a public agency or public enterprise, or provides a public service, as defined under that Party's law and as applied in the pertinent area of that Party's law; or

¹ Dominant influence for purposes of this definition shall be deemed to exist, *inter alia*, if the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise, or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

- (c) defined as a public official under a Party's law; and

UNCAC means the existing *United Nations Convention against Corruption*, done at New York, United States, on October 31, 2003.

Article 27.2: Scope

1. This Chapter applies to measures to prevent and combat bribery and corruption relating to any matter covered by this Agreement.²
2. The Parties affirm their resolve to prevent and combat bribery and corruption in international trade and investment. Recognizing the need to build integrity within both the public and private sectors and that each sector has complementary responsibilities in this regard, the Parties affirm their adherence to the OECD Convention, with its Annex; the IACAC; and the UNCAC.
3. The Parties reiterate their support for the principles contained in documents developed by APEC and G-20 anticorruption fora aimed at preventing and combating corruption and endorsed by leaders or relevant ministers, including the *G20 High Level Principles on Organizing against Corruption*; *G20 High Level Principles on Corruption and Growth*; *G20 Guiding Principles on Enforcement of the Foreign Bribery Offence (2013)*; *G20 Guiding Principles to Combat Solicitation*; *G20 High Level Principles on the Liability of Legal Persons for Corruption*; *APEC Conduct Principles for Public Officials*; and the *APEC Principles on the Prevention of Bribery and Enforcement of Anti-Bribery Laws*.
4. The Parties also reiterate their support for, and encourage awareness among their private sectors of, available anticorruption compliance guidance including the *APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector*; *APEC General Elements of Effective Voluntary Corporate Compliance Programs*; and *G20 High Level Principles on Private Sector Transparency and Integrity*.
5. The Parties recognize that the description of offenses adopted or maintained in accordance with this Chapter, and of the applicable legal defenses or legal principles controlling the lawfulness of conduct, is reserved to each Party's law, and that those offenses shall be prosecuted and punished in accordance with each Party's law.

² For the United States, this Chapter does not apply to conduct outside the jurisdiction of federal criminal law and, to the extent that an obligation involves preventive measures, shall apply only to those measures covered by federal law governing federal, state, and local officials.

Article 27.3: Measures to Combat Corruption

1. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as criminal offenses under its law, in matters that affect international trade or investment, when committed intentionally, by a person subject to its jurisdiction:

- (a) the promise, offering, or giving to a public official, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties;
- (b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties;
- (c) the promise, offering, or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; and
- (d) the aiding or abetting, or conspiracy in the commission of any of the offenses described in subparagraphs (a) through (c).

2. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as a criminal offense under its law, in matters that affect international trade or investment, when committed intentionally, by a person subject to its jurisdiction, the embezzlement, misappropriation or another diversion³ by a public official for their benefit or for the benefit of another person or entity, of property, public or private funds or securities, or any other thing of value entrusted to the public official by virtue of their position.

3. Each Party shall make the commission of an offense described in paragraph 1, 2, or 6 liable to sanctions that take into account the gravity of that offense.

4. Each Party shall adopt or maintain measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for offenses described in paragraph 1 or 6.

5. Each Party shall disallow the tax deductibility of bribes and, if appropriate, other expenses considered illegal by the Party incurred in furtherance of that conduct.

³ For Canada, “diversion” means embezzlement or misappropriation that constitute the criminal offenses of theft or fraud under Canadian law.

6. In order to prevent corruption, each Party shall adopt or maintain measures as may be necessary in accordance with its laws and regulations, regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing the offenses described in paragraph 1:

- (a) the establishment of off-the-books accounts;
- (b) the making of off-the-books or inadequately identified transactions;
- (c) the recording of non-existent expenditure;
- (d) the entry of liabilities with incorrect identification of their objects;
- (e) the use of false documents; and
- (f) the intentional destruction of bookkeeping documents earlier than foreseen by the law.⁴

7. Each Party shall adopt or maintain measures considered appropriate by the Party to protect against unjustified treatment a person who, in good faith and on reasonable grounds, reports to the competent authorities facts concerning offenses described in paragraph 1, 2, or 6.⁵

8. The Parties recognize the harmful effects of facilitation payments. Each Party shall, in accordance with its laws and regulations:

- (a) encourage enterprises to prohibit or discourage the use of facilitation payments; and
- (b) take steps to raise awareness among its public officials of its bribery laws, with a view to stopping the solicitation and the acceptance of facilitation payments.⁶

⁴ For the United States, this paragraph applies only to issuers that have a class of securities registered pursuant to 15 U.S.C. 781 or that are otherwise required to file reports pursuant to 15 U.S.C. 78o (d).

⁵ For Mexico and the United States, this paragraph applies only at the central level of government. For Canada, this paragraph applies to measures within the scope of the *Public Servants Disclosure Protection Act*, S.C. 2005, c.46, as amended.

⁶ For Canada, this subparagraph applies to measures within the scope of the *Public Servants Disclosure Protection Act*, S.C. 2005, c.46, as amended.

Article 27.4: Promoting Integrity among Public Officials⁷

1. To fight corruption in matters that affect trade and investment, each Party should promote, among other things, integrity, honesty and responsibility among its public officials. To this end, each Party shall, in accordance with the fundamental principles of its legal system, adopt or maintain:

- (a) measures to provide adequate procedures for the selection and training of individuals for public positions considered by the Party to be especially vulnerable to corruption;
- (b) measures to promote transparency in the behavior of public officials in the exercise of public functions;
- (c) appropriate policies and procedures to identify and manage actual or potential conflicts of interest of public officials;
- (d) measures that require senior public officials, and other public officials as considered appropriate by the Party, to make declarations to appropriate authorities regarding, among other things, their outside activities, employment, investments, assets, and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials; and
- (e) measures to facilitate reporting by public officials of any facts concerning offenses described in Article 27.3.1, 27.3.2, or 27.3.6 (Measures to Combat Corruption) to appropriate authorities, if those facts come to their notice in the performance of their functions.

2. Each Party shall adopt or maintain codes or standards of conduct for the correct, honorable and proper performance of public functions, and measures providing for disciplinary or other measures, if warranted, against a public official who violates the codes or standards established in accordance with this paragraph.

3. Each Party shall, to the extent consistent with the fundamental principles of its legal system, establish procedures through which a public official accused of an offense described in Article 27.3.1 (Measures to Combat Corruption) may, as considered appropriate by that Party, be removed, suspended, or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

4. Each Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, adopt or maintain measures to strengthen integrity,

⁷ For Mexico and the United States, this article applies only at the central level of government. For Canada, this article applies to measures within the scope of the *Public Servants Disclosure Protection Act*, S.C. 2005, c.46, as amended.

and to prevent opportunities for corruption, among members of the judiciary in matters that affect international trade or investment. These measures may include rules with respect to the conduct of members of the judiciary.

Article 27.5: Participation of Private Sector and Society

1. Each Party shall take appropriate measures, within its means and in accordance with fundamental principles of its legal system, to promote the active participation of individuals and groups outside the public sector, such as enterprises, civil society, non-governmental organizations, and community-based organizations, in preventing and combatting corruption in matters affecting international trade or investment, and to raise public awareness regarding the existence, causes, and gravity of corruption, and the threat posed by it. To this end, a Party may, for example:

- (a) undertake public information activities and public education programs that contribute to non-tolerance of corruption;
- (b) adopt or maintain measures to encourage professional associations and other non-governmental organizations, if appropriate, in their efforts to encourage and assist enterprises, in particular SMEs, in developing internal controls, ethics and compliance programs or measures for preventing and detecting bribery and corruption in international trade and investment;
- (c) adopt or maintain measures to encourage company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programs or measures, including those that contribute to preventing and detecting bribery and corruption in international trade and investment; or
- (d) adopt or maintain measures that respect, promote, and protect the freedom to seek, receive, publish, and disseminate information concerning corruption.

2. Each Party shall endeavor to encourage private enterprises, taking into account their structure and size, to:

- (a) adopt or maintain sufficient internal auditing controls to assist in preventing and detecting offenses described in Article 27.3.1 or 27.3.6 (Measures to Combat Corruption); and
- (b) ensure that their accounts and required financial statements are subject to appropriate auditing and certification procedures.

3. Each Party shall take appropriate measures to ensure that its relevant anticorruption bodies are known to the public and shall provide access to those bodies, if appropriate, for the reporting,

including anonymously, of an incident that may be considered to constitute an offense described in Article 27.3.1 (Measures to Combat Corruption).

4. The Parties recognize the benefits of internal compliance programs in enterprises to combat corruption. In this regard, each Party shall encourage enterprises, taking into account their size, legal structure, and the sectors in which they operate, to establish compliance programs for the purpose of preventing and detecting offenses described in Article 27.3.1 or 27.3.6 (Measures to Combat Corruption).

Article 27.6: Application and Enforcement of Anticorruption Laws

1. In accordance with the fundamental principles of its legal system, no Party shall fail to effectively enforce its laws or other measures adopted or maintained to comply with Article 27.3 (Measures to Combat Corruption) through a sustained or recurring course of action or inaction, after the date of entry into force of this Agreement as an encouragement for trade and investment.⁸

2. In accordance with the fundamental principles of its legal system, each Party retains the right for its law enforcement, prosecutorial, and judicial authorities to exercise their discretion with respect to the enforcement of its anticorruption laws. Each Party retains the right to take bona fide decisions with regard to the allocation of its resources.

3. The Parties affirm their commitments under applicable international agreements or arrangements to cooperate with each other, consistent with their respective legal and administrative systems, to enhance the effectiveness of law enforcement actions to combat the offenses described in Article 27.3 (Measures to Combat Corruption).

Article 27.7: Relation to Other Agreements

Nothing in this Agreement affects the rights and obligations of the Parties under the IACAC; the OECD Convention; the UNCAC; or the *United Nations Convention against Transnational Organized Crime*, done at New York on November 15, 2000.

Article 27.8: Dispute Settlement

1. Chapter 31 (Dispute Settlement), as modified by this Article, applies to disputes relating to a matter arising under this Chapter.

⁸ For greater certainty, the Parties recognize that individual cases or specific discretionary decisions related to the enforcement of anticorruption laws are subject to each Party's laws and legal procedures.

2. A Party may only have recourse to the procedures set out in this Article and Chapter 31 (Dispute Settlement) if it considers that a measure of another Party is inconsistent with an obligation under this Chapter, or that another Party has otherwise failed to carry out an obligation under this Chapter, in a manner affecting trade or investment between Parties.
3. No Party shall have recourse to dispute settlement under this Article or Chapter 31 (Dispute Settlement) for a matter arising under Article 27.6 (Application and Enforcement of Anticorruption Laws) or Article 27.9 (Cooperation).
4. Further to Article 31.4 (Consultations), each Consulting Party shall ensure that consultations include personnel of the consulting Party's government authorities with responsibility for the anticorruption issue under dispute.
5. Further to Article 31.5 (Commission, Good Offices, Conciliation, and Mediation), any discussion held by the Free Trade Commission shall, to the extent practicable, include participation by a Minister responsible for the anticorruption issue under dispute, or their designee.
6. Further to Article 31.8 (Roster and Qualifications of Panelists), the panel shall have expertise in the area of anticorruption under dispute.

Article 27.9: Cooperation

1. The Parties recognize the importance of cooperation, coordination, and exchange of information between their respective anticorruption law enforcement agencies in order to foster effective measures to prevent, detect, and deter bribery and corruption.
2. The Parties shall endeavor to strengthen cooperation and coordination among their respective anticorruption law enforcement agencies.
3. Recognizing that the Parties can benefit by sharing their diverse experience and best practices in developing, implementing, and enforcing their anticorruption laws and policies, the Parties' anticorruption law enforcement agencies shall consider undertaking technical cooperation activities, including training programs, as decided by the Parties.
4. The Parties acknowledge the importance of cooperation and coordination internationally, including the OECD Working Group on Bribery in International Business Transactions, the UNCAC Conference of the State Parties and the Mechanism for Follow-Up on the Implementation of the IACAC, as well as their support to the APEC Anti-Corruption and Transparency Working Group and the G20 Anti-Corruption Working Group.