

CHAPTER 28

ANTI-CORRUPTION

Article 28.1 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 or foreign public official’s position, whether or not within the official’s authorised competence;

“Anti-Bribery Convention” means the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* done at Paris on 17 December 1997;

“confiscation” means the permanent deprivation of property by order of a court or other competent authority, and includes forfeiture, where applicable;

“foreign public official” means any natural person 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, irrespective of that individual’s seniority; and any natural person exercising a public function for a foreign country, at any level of government, including for a public agency or public enterprise;

“freezing” or **“seizure”** means temporarily prohibiting the transfer, conversion, disposition, or movement of property, or temporarily assuming custody or control of property, on the basis of an order issued by a court or other competent authority;

“official of a public international organisation” means a civil servant of a public international organisation or any natural person authorised by a public international organisation to act on its behalf;

“property” means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in those assets;

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

“public official” means:

¹ “Dominant influence” for the 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.

- (a) any natural person 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 natural person's seniority;
- (b) any other natural person 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 law in that Party; or
- (c) any other person defined as a "public official" under a Party's law; and

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

Article 28.2 **Scope**

1. This Chapter shall apply to measures to prevent and combat bribery and corruption relating to any matter covered by this Agreement.
2. Each Party affirms its resolve to prevent and combat bribery and corruption in matters affecting international trade or investment.
3. Each Party recognises the need to build integrity within both the public and private sectors and that each sector has complementary responsibilities in this regard.
4. Each Party recognises the importance of regional and multilateral initiatives to prevent and combat bribery and corruption in matters affecting international trade or investment, including the United Nations, the OECD, the WTO, and the Financial Action Task Force, and commits to work jointly with the other Party to encourage and support appropriate initiatives to prevent and combat that bribery and corruption.
5. The Parties recognise that their respective competent anti-corruption authorities have established working relationships in many bilateral and multilateral forums, and that cooperation under this Agreement can enhance the Parties' joint efforts in those forums and help produce outcomes that prevent and combat bribery and corruption in matters affecting international trade or investment.
6. Each Party affirms its commitments in the Anti-Bribery Convention and the UNCAC.

7. The Parties recognise that the description of offences adopted or maintained in accordance with this Chapter, and of the applicable legal defences or legal principles controlling the lawfulness of conduct, is reserved to each Party's law, and that those offences shall be prosecuted and punished in accordance with each Party's law.

Article 28.3

Measures to Prevent and Combat Bribery and Corruption

1. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as criminal offences under its law, in matters affecting international trade or investment, when committed intentionally, by any 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 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 official duties;
 - (c) the promise, offering, or giving to a foreign public official or an official of a public international organisation, 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 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 offences described in subparagraphs (a) to (c).
2. 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 any of the offences described in this Article:
 - (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.
3. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as a criminal offence under its law, in matters affecting international trade or investment, when committed intentionally:
- (a) the embezzlement, misappropriation, or another diversion² by a public official for the benefit of the public official or for the benefit of another person, of any property, public or private funds or securities, or any other thing of value that the public official has been able to access by virtue of the public official's position; and
 - (b) by any person subject to its jurisdiction, the participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counselling the commission of an offence established in accordance with subparagraph (a).
4. Each Party shall adopt or maintain measures as may be necessary in accordance with its laws and regulations to establish as criminal offences, in matters affecting international trade or investment, when committed intentionally, by any person subject to its jurisdiction:
- (a) the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illegal origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of that person's action;
 - (b) the concealment or disguise of the true nature, source, location, disposition, movement, or ownership of, or rights with respect to, property, knowing that such property is the proceeds of crime;
 - (c) the acquisition, possession, or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; and
 - (d) participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and counselling the commission of any of the offences established in accordance with subparagraphs (a) to (c).

² For greater certainty, "diversion" means embezzlement or misappropriation that constitutes the criminal offences of theft or fraud under a Party's domestic law.

5. Each Party shall make the commission of an offence described in paragraphs 1 to 4 liable to sanctions that take into account the gravity of that offence.
6. Each Party shall adopt or maintain measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for offences described in paragraphs 1 to 4. In particular, each Party shall ensure that legal persons held liable for offences described in paragraphs 1 to 4 are subject to effective, proportionate, and dissuasive criminal or non-criminal sanctions, which include monetary sanctions.
7. Neither Party shall allow a person subject to its jurisdiction to deduct from taxes expenses incurred in connection with the commission of an offence described in paragraph 1.
8. Each Party shall adopt or maintain measures enabling the identification, tracing, freezing, seizure, and confiscation in both criminal and non-conviction-based proceedings of:
 - (a) proceeds, including any property, derived from the offences described in paragraphs 1, 3, and 4; and
 - (b) property, equipment, or other instrumentalities used in or destined for use in those offences.
9. The Parties recognise 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;
 - (b) to the extent facilitation payments may be permitted, ensure the solicitation, payment, or acceptance of those payments are not used to secure a material advantage in matters affecting international trade or investment; and
 - (c) take steps to raise global awareness of the harmful effects of facilitation payments, including through regional and multilateral initiatives, with a view to stopping the solicitation, payment, and acceptance of those payments.
10. Each Party shall ensure that any statute of limitations applicable to any criminal offences described in this Chapter allows an adequate period of time for the investigation and prosecution of the offence.

Article 28.4
Persons that Report Bribery or Corruption Offences

1. Each Party shall, as it considers appropriate, adopt or maintain measures to ensure that its competent authorities which are responsible for the measures under Article 28.3 (Measures to Prevent and Combat Bribery and Corruption), or the enforcement of those measures, are known to the public.
2. Each Party shall adopt or maintain publicly available procedures for a person to report to its competent authorities, including anonymously, any incident that may be considered to constitute an offence described in paragraphs 1, 3, or 4 of Article 28.3 (Measures to Prevent and Combat Bribery and Corruption) or an act described in paragraph 2 of Article 28.3 (Measures to Prevent and Combat Bribery and Corruption).
3. Each Party shall adopt or maintain appropriate measures, in accordance with its laws and regulations, to protect against or provide remedy for discriminatory or disciplinary treatment of any person considered appropriate by the Party who, on reasonable belief, reports to the competent authorities any suspected incident that may be considered to constitute an offence described in paragraphs 1, 3, or 4 of Article 28.3 (Measures to Prevent and Combat Bribery and Corruption) or an act described in paragraph 2 of Article 28.3 (Measures to Prevent and Combat Bribery and Corruption).³

Article 28.5
Promoting Integrity among Public Officials

1. To prevent and combat bribery and corruption in matters affecting international trade or investment, each Party should promote, among other things, integrity, honesty, and responsibility among its public officials. To this end, each Party shall endeavour, in accordance with the fundamental principles of its legal system, to 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, and the rotation, if appropriate, of those individuals to other positions;
 - (b) measures to promote transparency in the behaviour 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;

³ For greater certainty, this paragraph is without prejudice to each Party's right to adopt or maintain additional requirements for the making of such a report provided these requirements do not have the effect of unjustifiably limiting a person's access to protection or remedy.

- (d) measures that require senior and other appropriate public officials 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 acts of bribery and corruption to competent authorities, if those acts come to their notice in the performance of their functions.
- 2. Each Party shall endeavour to adopt or maintain codes or standards of conduct for the correct, honourable, and proper performance of public functions, and measures providing for disciplinary or other procedures, if warranted, against a public official who violates the codes or standards established in accordance with this paragraph.
- 3. Each Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused or convicted of an offence described in this Chapter may, if appropriate, 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, and to prevent opportunities for corruption, among members of the judiciary in matters affecting international trade or investment. These measures may include rules with respect to the conduct of members of the judiciary.

Article 28.6

Participation of Private Sector and Civil Society

- 1. Each Party shall take appropriate measures to promote the active participation of individuals and groups outside the public sector, such as enterprises, civil society, non-governmental organisations, and community-based organisations, in preventing and combatting bribery and corruption in matters affecting international trade or investment and to raise public awareness regarding the existence, causes, and gravity of and the threat posed by that bribery and corruption. To this end, a Party may:
 - (a) undertake public information activities and public education programmes that contribute to non-tolerance of bribery and corruption;
 - (b) adopt or maintain measures to encourage professional associations and other non-governmental organisations, if appropriate, to

encourage and assist enterprises, in particular SMEs, in developing internal controls, ethics and compliance programmes, and codes and standards of conduct for preventing and detecting bribery and corruption;

- (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 programmes, including those that contribute to preventing and detecting bribery and corruption; and
- (d) adopt or maintain measures to respect, promote, and protect the freedom to seek, receive, publish, and disseminate information concerning bribery and corruption,

in matters affecting international trade or investment.

2. Each Party shall endeavour to encourage private enterprises, taking into account their size and structure, to:
 - (a) adopt or maintain sufficient internal auditing controls and compliance programmes to assist in preventing and detecting acts of bribery and corruption in matters affecting international trade or investment; and
 - (b) ensure that their accounts and required financial statements are subject to appropriate auditing and certification procedures.

Article 28.7

Application and Enforcement of Measures to Prevent and Combat Bribery and Corruption

1. In accordance with the fundamental principles of its legal system, neither Party shall fail to effectively enforce the measures adopted or maintained to comply with Articles 28.3 (Measures to Prevent and Combat Bribery and Corruption) to Article 28.5 (Promoting Integrity among Public Officials), 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.⁴
2. Each Party retains the right for its law enforcement, prosecutorial, and judicial authorities to exercise discretion with respect to the enforcement of its measures to prevent and combat bribery and corruption. Each Party retains the right to take *bona fide* decisions with regard to the allocation of its resources with respect to that enforcement.

⁴ For greater certainty, the Parties recognise that individual cases or specific discretionary decisions related to the enforcement of anti-corruption law are subject to each Party's own domestic law and legal procedures.

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 offences described in paragraphs 1, 3, and 4 of Article 28.3 (Measures to Prevent and Combat Bribery and Corruption) and the acts described in paragraph 2 of Article 28.3 (Measures to Prevent and Combat Bribery and Corruption).

Article 28.8 **Relation to Other Agreements**

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

Article 28.9 **Cooperation, Consultation, and Dispute Settlement**

1. The Parties shall make every effort through dialogue, exchange of information, and cooperation to address any matter that might affect the operation or application of this Chapter.
2. Chapter 31 (Dispute Settlement), as modified by this Article, shall apply to disputes relating to a matter arising under this Chapter.
3. 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 the other Party is inconsistent with its obligations under this Chapter, or that the other Party has otherwise failed to carry out its obligations under this Chapter, in a manner affecting international trade or investment between the Parties.
4. Neither Party shall have recourse to dispute settlement under this Article or Chapter 31 (Dispute Settlement) for a matter arising under Article 28.7 (Application and Enforcement of Measures to Prevent and Combat Bribery and Corruption).