

Analysis of the Implementation of Chapter 27, "Anti-corruption" of the USMCA in Mexico.

ROUNDTABLE DIALOGUE
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CYRUS R. VANCE CENTER
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LAWYERS COUNCIL
for CIVIL & ECONOMIC RIGHTS

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INTRODUCTION

Corruption in Mexico, as in other countries in Latin America, is a major challenge to development, the enjoyment of civil and economic rights, and equality. It leads to human rights violations and prevents authorities from fully functioning.

The Lawyers Council for Civil and Economic Rights (Lawyers Council), a program of the New York City Bar Association's Cyrus R. Vance Center for International Justice, is working to address this challenge. The Lawyers Council, comprised of leading lawyers from across the Americas, is convinced that corruption is one of the most serious threats to the rule of law.

A corrupt system leads to human rights violations, impunity, violence, and insecurity. A society cannot thrive without the rule of law, essential for protecting civil and economic rights and economic development.

The Lawyers Council produces the Latin American Anti-Corruption Assessment, a regional study that maps legal efforts to prevent and combat corruption. The assessment found that Mexico has a solid legal framework for fighting corruption but that the authorities' implementation, capacity, and independence are lacking.

Corruption has had a significant impact on governments and public spaces in Mexico. It is one of the largest and most complex problems facing the country. Therefore, the fight against corruption has become a growing priority on the public agenda.

The United States-Mexico-Canada Agreement (USMCA), which replaced the North American Free Trade Agreement (NAFTA), includes an anti-corruption chapter. Chapter 27 of the USMCA requires the Parties to adopt or maintain certain standards to prevent and criminalize corruption. The Parties also agreed to "prevent and combat bribery and corruption in international trade and investment."

The content of Chapter 27 includes legislative, administrative, and promotional measures. The Chapter contains provisions for adopting or maintaining anti-corruption standards, encouraging anti-corruption organizations and campaigns, training public officials, cross-border cooperation, and the participation of the private sector and civil society.

Despite these efforts, corruption remains a serious problem in Mexico. The Lawyers Council believes it is essential to maintain or adapt existing anti-corruption measures and create new measures where current provisions or practices are inadequate. The private sector also has a role in deterring corruption by maintaining internal auditing controls and ensuring that their financial management practices are subject to appropriate auditing and certification procedures.

The Lawyers Council believes that the legal profession has a heightened responsibility to fight corruption. Lawyers should advise their clients against improper actions and support



anti-corruption efforts by civil society, non-governmental organizations, and community-based organizations.

This policy brief reflects the discussion of an in-person dialogue in Mexico City on the implementation of Chapter 27 of the USMCA in Mexico. It identifies challenges and guidelines in the fight against corruption in Mexico. The brief concludes with a call to action for the legal community to support the implementation of anti-corruption mechanisms in Mexico.

The co-coordinating institutions hope that this initiative will help lawyers to identify specific paths for the systemic improvement of anti-corruption legislation and its implementation in Mexico, as well as for the discussion in the public agenda, considering the change of administration in 2024. The initiative also seeks to serve as a call to action to the legal community to guide their efforts to improve the implementation of anti-corruption efforts and strengthen the capacity and independence of anti-corruption authorities.

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BACKGROUND

Negotiation of Chapter 27 of the USMCA

The negotiation of the USMCA was a challenge, given the underlying tension that stemmed from the 'U.S.' threat to exit the agreement. The challenge turned to ensure that previous negotiations could be replicated in the new agreement without leaving aside the necessary changes to adapt it to the reality and context of the three signatory countries.

Some risks identified during the negotiations were particularly hard to tackle, such as the lack of consistency in the fight against corruption.

Negotiators knew that certain practices would have to be discussed and agreed upon to align the anti-corruption policy among the three countries. Thus, international cooperation and joint work between agencies highlighted the importance of mechanisms for collaboration and communication of anti-corruption efforts, particularly regarding the progress and significance of Mexico's recently established National Anti-Corruption System. Participants also outlined the challenges and opportunities in terms of institutional communication.

Another relevant item discussed during negotiations concerned the possibility of triggering 'USMCA's dispute resolution mechanisms under breaches to Chapter 27.

MAIN CHALLENGES IN THE FIGHT AGAINST CORRUPTION

One evident issue concerning 'Mexico's current situation involves the lack of governmental willingness to fight corruption effectively. Instead, there is the issue of anti-corruption agencies simulation. The Mexican heavy-regulated legal framework has characteristics that make the fight against corruption even more complex. For example, while under standard practices, only public officials involved in public funds or other risk areas should file asset and interest declarations, in Mexico, a public servant (more than one and a half million) is constrained to file them, which affects the verification of the information and the enforcement integrity measures.

➤ The legal community can support revising anti-corruption policies in light of effective enforcement. Monitoring and legal guidance can play a transcendental role.

The work possibilities of the National Anti-corruption System go beyond issuing reports or gathering the heads of anti-corruption agencies to share their achievements. There is a perceived lack of will and understanding among the institutions, such as the State's citizen participation committees; some are still closely linked to the governors, and others lack the tools and resources to promote change. The weight of a presidential discourse that rejects transparency in the hands of *neo-liberal* and privileged groups and considers the anti-



corruption system a useless invention of former administrations has produced a lack of political will to operate and strengthen the National Anti-corruption System. The President has even suggested dismantling the anti-corruption system to save some money.

The legislation in Mexico is one of the best in Latin America, but the implementation of the laws is declining; factional groups are operating the System, and there is a lack of autonomy and independence among the designation of anti-corruption bodies.

Some factors contributing to the 'country's implementation obstacles relate to the lack of sufficient funding for agencies fighting corruption. Also, the alienation of the State from civil society actors and the rejection of transparency by the Executive Power has impeded the proper implementation of the National Anti-corruption System.

➤ The international legal community must play an important role in supporting the efforts of the national legal community to include the anti-corruption policy as part of the priorities in the public agenda.

Officials are mostly linked to corruption schemes, but the role of the private sector and their commitments and obligations on anti-corruption matters are priorities that have been put on the back burner. The reparation of the damages caused by acts of corruption also opens an interesting discussion, as the legal framework was not created for that.

Proven business integrity and compliance programs need to be implemented, including anti-corruption clauses that, when violated, can be subject to prosecution. This gives emphasis and importance to this type of mechanism. Corruption should be understood as a perverse business parallel to the rule of law and as the cause of inefficiencies in government and companies.

➤ The legal community can support efforts for business integrity programs to become mandatory and for the private sector to assume anti-corruption as a fundamental principle.

NON-TRIAL RESOLUTIONS AND OPPORTUNITY CRITERIA

Non-Trial Resolutions ("NTRs") are a procedural mechanism that could promote the dismantling of major corruption cases. With this, the ill-gotten gains that arise from corruption acts could be returned, and the procedural issue can be declined. The discussion revealed risky aspects derived from the biased way the current government handles the cases.

Paradoxically, 'Mexico's main challenge in this regard relates to the lack of well-designed legislation to allow corruption cases to be securely navigated to an NTR. 'Mexico's *opportunity criteria* are expressly not applicable regarding crimes committed against the



public interest. However, the opportunity criteria regarding corruption cases may be justified as we understand the public interest to imply dismantling major corruption cases.

Incentives for cooperation with the justice system should be generated to comply with the OECD recommendations. The NTRs can provide certainty to the companies and allow the State to have the capacity to compensate for acts of corruption. It has been detected that most cases are coming out with reparatory agreements, which can be considered NTRs, while the opportunity criteria are different.

- The legal community should discuss NTR and the opportunity criteria to determine whether the current legal framework defines scope and limits adequately.

In Mexico, there is a discussion about reparations, as only public institutions benefit from asset recovery, not the victims. Since the networks are not being dismantled, that money goes back to feed the existing corruption networks within the institutions.

- Combined work between civil society and the legal community is needed to find robust mechanisms for tracking money to break cycles of corruption.

Criminal liability on anti-corruption matters of legal persons has serious problems in Mexico. The autonomous liability model written in the national code has no reference in the substantive codes of the states; that is to say, the conducts are not homologated.

Another point is that there are very serious criteria where criminal judges from lower and upper Courts say that since no specific statute of limitations is created for legal entities, all corruption crimes are subject to a one-year statute of limitations, which is absurdly short. The other problem is that when the figure of criminal liability of legal persons was created, it was said that they would be liable only for the crimes in a catalog that had to be issued, but not all states have such a catalog. The federal code does have a catalog of crimes.

- It is necessary to promote the existence of a catalog of corruption crimes in all Mexican states, as well as the standardization of conduct and legal terms.

CHANGES RESULTING FROM THE BIDEN ADMINISTRATION'S ANTI-CORRUPTION POLICY

One observable change is the work on anti-dollar laundering laws. The new administration has focused a lot on those tools and antitrust activities. Chapter 27, which did not exist before, represents a paradigm shift in U.S.-Mexico relations and opens the door to a new regional and Latin American relationship.



Implementing the Biden policy may mean that there will be more money, more coordination, and an added element of intelligence in the fight against corruption. One example may lie in Richard 'Nephew's appointment as 'Biden's Global Anti-Corruption Coordinator.

- Given the changes in the new Biden administration, civil society, the legal community, and academia can potentially become involved in a coordinated approach to the anti-corruption work supported by Chapter 27.

On the other hand, international cooperation and formalization of information to investigate and prosecute are perceived as complex for the Mexican case and other South American countries. However, there are signs of cooperation and mutual communication between the prosecutor offices in Mexico and the U.S.

Nevertheless, the staff reduction of the international section of Mexico's Attorney General's Office complicates optimal and efficient communication with the DOJ and other agencies. A significant percentage of the work in this area is focused on Mexico's relations with the United States.

- The legal community can support advocacy for strengthening international cooperation necessary to advance in resolving specific cases affecting the three treaty member countries.

WHISTLEBLOWERS, A PENDING ISSUE IN THE ANTI-CORRUPTION AGENDA

The Mexican State has a major pending issue concerning corruption whistleblowers: the lack of protection and the approval of laws. There are currently no effective mechanisms to protect whistleblowers, and the ones available at the Ministry of Public Administration are still under development. As a result, whistleblowers cannot be guaranteed effective protection in Mexico, which is fundamental for investigating and prosecuting corruption.

- The national and international legal community must support coordinated actions to promote whistleblower protection legislation in Mexico.

Another issue is the reporting mechanisms. In Mexico, citizens have over a hundred platforms to file administrative and criminal complaints. The Executive Secretariat of the National Anti-corruption System (SESNA) is working on a single mechanism to interconnect the platforms. However, this effort would not mean eliminating the variety of public reporting platforms.

Other pending issues include the need to disseminate the figure of the "anonymous whistleblower" since it is completely unknown, acknowledge the rights that whistleblowers



have, and recognize that the black box of reports is large and, as shown by official statistics, 90% of the complaints are related to personal quarrels.

There is also the challenge that power groups are inhibitors of whistleblowing. To promote the whistleblower culture, it is necessary to understand that in most 'cultures' whistleblowers are treated badly, so it will be required to reverse that perspective and to work on proving to them that there will be no retaliation.

A debate in Mexico over awards mechanisms for whistleblowers is needed to promote cooperation and incentives.

- The national legal community can support efforts to raise awareness and disseminate whistleblowing mechanisms.

CONTROL OF RISK AREAS IN THE PRIVATE SECTOR

Companies have worked on having specific integrity policies, including codes of conduct and policies to limit gifts. The importance of conveying a continuous message about ethical principles was discussed in the session.

There is a pressing need to guide companies doing business in Mexico regarding the expectations of government agencies concerning their anti-corruption guidelines and processes. Given the lack of general policies, finance, insurance, and health regulation can become a guiding light for the rest of the companies. Attention should also be brought to underlying the benefits of effective organizational controls.

- Given the fundamental role of the private sector in preventing and combating wrongdoing, the legal community can support strengthening compliance areas.

THE ROLE OF THE ANTI-CORRUPTION PROSECUTOR'S OFFICE

The dialogue served to examine the role of the Prosecutor's Office and the challenges it faces. As part of the National Anti-Corruption System, the Anti-Corruption Prosecutor's Office has a place but does not lead. The most denounced crime is embezzlement, and the second is the exercise of the illicit use of public service. This brings to the table the need to better define the crimes. For example, the difficulty of proving bribery was mentioned during the discussion. The issue is the importance for the legal community to think about combatting grand corruption cases, networks, and not only basic crimes.



As for the complaints, the data presented by the complainers are weak, and thus no evidence can be constituted. This is very convenient for the corrupt since the lack of evidence does not allow investigations to move forward. There are good complaints from institutions and internal control bodies, but there are no well-elaborated citizen complaints, and the processes are very complex for the citizens.

- The legal community can lead a discussion to improve the definition of corrupt practices in the law.

One of the benefits of the adversarial system is that there are alternative justice mechanisms; not everything is punitive. Reparatory agreements are part of these alternatives, and it is necessary to continue exploring them beyond continuing along the path of long trials. These agreements must be transparent and available to the public to avoid the perception that this is settled outside the law.

One of the insights from the conversation includes that Mexican regulations are not designed for grand corruption. There are no mechanisms to combat it, nor sufficient expertise, neither on the part of whistleblowers nor on the part of public officials in the administration of justice.

- The legal community can lead efforts to use alternative justice mechanisms to dismantle grand corruption.

The Anti-Corruption Prosecutor's Office was recently created in Mexico, while its U.S. counterpart is over 150 years old. There is a lack of institutional strength, and international cooperation would be helpful to support the prosecutions. This support includes understanding how other prosecutions work and finding mechanisms to cooperate.

The issue of organized crime exceeds the capacities of the Anti-Corruption Prosecutor's Office and complicates some investigations. Money laundering is the most sophisticated part of many corruption cases, requiring further coordination efforts.

- The legal community can lead the conversation to create the necessary tools to deal effectively with grand corruption cases.

FINAL CONSIDERATIONS

Although the obligations of the States are very clear in Chapter 27 of the USMCA, it is not clear whether these obligations –which involve various preventive measures, the establishment of criminal offenses, and anti-corruption compliance—are being fulfilled. In other words, Mexico is committed to adopting its regulatory framework, but it is unclear whether this means complying with it.

This poses a problem. State Parties can't resort to the dispute resolution mechanism of the lack of compliance with the rules of Chapter 27 in the abstract. According to article 27.8, a Party may only have recourse to the dispute settlement if it considers that a measure of



another Party is inconsistent with an obligation under Chapter 27 or that another Party has otherwise failed to carry out an obligation under Chapter 27 in a manner affecting trade or investment between Parties. Chapter 27 limits the scope as no Party shall have recourse to dispute settlement for a matter arising under Article 27.6 (Application and Enforcement of Anti-corruption Laws) or Article 27.9 (Cooperation). The Panel formed to hear disputes shall have expertise in anti-corruption.

A lack of political will to effectively combat corruption was detected in Mexico. In the case of the National Anti-corruption System, legislation exists, but the Executive Branch lacks political will, making its operation ineffective. There is a lack of institutional capacity for processing information, for example, that relates to asset and interest declarations.

The Coordinating Committee of the National Anti-corruption System has great potential that can still be taken advantage of; it can guide the legislation on the missing elements, establish protocols and regulations, standardize procedures, promote tools such as the National Digital Platform that focuses on the control bodies of the Coordinating Committee's instances.

Definitively, the USMCA seeks to ensure that actors and States have certainty regarding protecting their investments and international trade. Undoubtedly, the disparity between the three State parties in terms of their anti-corruption systems puts on the table the need to address gaps and shortcomings, especially in countries such as Mexico, without leaving any country unprotected. Given this, the treaty offers the objectives without including the procedures and therefore invites each country to consider its legislation and to address and strengthen its legislation in this area.

There is a good window of opportunity for the international and Mexican legal community to support specific efforts to fight against corruption, strengthening the legal framework and its implementation, focusing on finding ways to investigate, prosecute, and prevent grand corruption, and promoting cooperation.

The Lawyers Council for Civil and Economic Rights (Lawyers Council), a program of the New York City Bar Association's Cyrus R. Vance Center for International Justice, reaffirms its commitment to support these efforts to consolidate the rule of law in Mexico and the region.



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■ The **Lawyers Council for Civil and Economic Rights** brings together private practice law professionals in the Americas to support the rule of law, combat corruption, and support the work of civil society. The membership of the Lawyers Council consists of lawyers who have distinguished in private practice in their respective countries and have demonstrated constant civic commitment in their careers. The **Cyrus R. Vance Center for International Justice** manages the Lawyers Council.

■ The Vance Center promotes global justice by engaging legal professionals around the world to support the work of civil society and an ethically active legal profession. It is a non-profit program of the New York City Bar Association that brings together leading law firms and other partners around the world to promote international justice initiatives and provide pro bono legal representation to civil society organizations that fight for social justice.

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