

CHAPTER 25

TRANSPARENCY AND ANTI-CORRUPTION

Section A: Definitions

Article 25.1: 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 authorised competence;

administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within the ambit of that administrative ruling or interpretation and that establishes a norm of conduct, but does not include:

- (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good or service of a Party in a specific case; or
- (b) a ruling that adjudicates with respect to a particular act or practice;

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

official of a public international organisation means an international civil servant or any person who is authorised by a public international organisation to act on its behalf; and

public official means:

- (a) any person holding a legislative, executive, administrative or judicial office of a Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;

- (b) any other 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 the Party's law and as applied in the pertinent area of that Party's law; or
- (c) any other person defined as a public official under a Party's law.

Section B: Transparency

Article 25.2: Publication

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or otherwise made available in a manner that enables interested persons and the other Party to become acquainted with them.
2. To the extent possible, each Party shall:
 - (a) publish in advance any measure referred to in paragraph 1 that it proposes to adopt; and
 - (b) provide interested persons and the other Party with a reasonable opportunity to comment on those proposed measures.
3. To the extent possible, when introducing or changing the laws, regulations or procedures referred to in paragraph 1, each Party shall endeavour to provide a reasonable period between the date when those laws, regulations or procedures, proposed or final in accordance with its legal system, are made publicly available and the date when they enter into force.
4. With respect to a proposed regulation¹ of general application of a Party's central level of government respecting any matter covered by this Agreement that is likely to affect trade or investment between the Parties and that is published in accordance with paragraph 2(a), each Party shall:
 - (a) publish the proposed regulation in an official journal, or on an official website, preferably online and consolidated into a single portal;
 - (b) endeavour to publish the proposed regulation:

¹ A Party may, consistent with its legal system, comply with its obligations that relate to a proposed regulation in this Article by publishing a policy proposal, discussion document, summary of the regulation or other document that contains sufficient detail to adequately inform interested persons and the other Party about whether and how their trade or investment interests may be affected.

- (i) no less than 60 days in advance of the date on which comments are due;
or
- (ii) within another period in advance of the date on which comments are due that provides sufficient time for an interested person to evaluate the proposed regulation, and formulate and submit comments;
- (c) to the extent possible, include in the publication under subparagraph (a) an explanation of the purpose of, and rationale for, the proposed regulation; and
- (d) consider comments received during the comment period, and is encouraged to explain any significant modifications made to the proposed regulation, preferably on an official website or in an online journal.

5. Each Party shall, with respect to a regulation of general application adopted by its central level of government respecting any matter covered by this Agreement that is published in accordance with paragraph 1:

- (a) promptly publish the regulation on a single official website or in an official journal of national circulation; and
- (b) if appropriate, include with the publication an explanation of the purpose of and rationale for the regulation.

Article 25.3: Administrative Proceedings

With a view to administering in a consistent, impartial and reasonable manner all measures of general application with respect to any matter covered by this Agreement, each Party shall ensure in its administrative proceedings applying measures referred to in Article 25.2.1 to a particular person, good or service of the other Party in specific cases that:

- (a) whenever possible, a person of the other Party that is directly affected by a proceeding is provided with reasonable notice, in accordance with domestic procedures, of when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issue in question;
- (b) a person of the other Party that is directly affected by a proceeding is afforded a reasonable opportunity to present facts and arguments in support of that person's position prior to any final administrative action, when time, the nature of the proceeding and the public interest permit; and
- (c) the procedures are in accordance with its law.

Article 25.4: Review and Appeal²

1. Each Party shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the purpose of the prompt review and, if warranted, correction of a final administrative action with respect to any matter covered by this Agreement. Those tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.
2. Each Party shall ensure that, with respect to the tribunals or procedures referred to in paragraph 1, the parties to a proceeding are provided with the right to:
 - (a) a reasonable opportunity to support or defend their respective positions; and
 - (b) a decision based on the evidence and submissions of record or, where required by its law, the record compiled by the relevant authority.
3. Each Party shall ensure, subject to appeal or further review as provided for in its law, that the decision referred to in paragraph 2(b) shall be implemented by, and shall govern the practice of, the office or authority with respect to the administrative action at issue.

Article 25.5: Provision of Information

1. If a Party considers that any proposed or actual measure may materially affect the operation of this Agreement or otherwise substantially affect the other Party's interests under this Agreement, it shall, to the extent possible, inform the other Party of the proposed or actual measure.
2. On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any proposed or actual measure that the requesting Party considers may affect the operation of this Agreement, whether or not the requesting Party has been previously informed of that measure.
3. A Party may convey any request or provide information under this Article to the other Party through its contact points.
4. Any information provided under this Article shall be without prejudice as to whether the measure in question is consistent with this Agreement.

² For greater certainty, review need not include merits (*de novo*) review, and may take the form of common law judicial review. The correction of final administrative actions may include a referral back to the body that took that action.

Section C: Anti-Corruption

Article 25.6: Scope

1. The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment. Recognising 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 *APEC Conduct Principles for Public Officials*, July 2007, and encourage observance of the *APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector*, September 2007.
2. The scope of this Section is limited to measures to eliminate bribery and corruption with respect to any matter covered by this Agreement.
3. The Parties recognise that the description of offences adopted or maintained in accordance with this Section, 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 25.7: Measures to Combat 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 that affect international trade or investment, when committed intentionally, by any person subject to its jurisdiction:³
 - (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 his or her 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 his or her official duties;

³ A Party that is not a party to the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, including its Annex, done at Paris on November 21, 1997, may satisfy the obligations in subparagraphs (a), (b) and (c) by establishing the criminal offences described in those subparagraphs in respect of "in the exercise of his or her official duties" rather than "in relation to the performance of his or her 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,⁴ 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 his or her 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 conspiracy⁵ in the commission of any of the offences described in subparagraphs (a) through (c).

2. Each Party shall make the commission of an offence described in paragraph 1 or 5 liable to sanctions that take into account the gravity of that offence.

3. 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 paragraph 1 or 5. In particular, each Party shall ensure that legal persons held liable for offences described in paragraph 1 or 5 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, which include monetary sanctions.

4. 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.

5. 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 any of the offences 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

⁴ For greater certainty, a Party may provide in its law that it is not an offence if the advantage was permitted or required by the written laws or regulations of a foreign public official's country, including case law. The Parties confirm that they are not endorsing those written laws or regulations.

⁵ Parties may satisfy the commitment regarding conspiracy through applicable concepts within their legal systems, including *asociación ilícita*.

- (f) the intentional destruction of bookkeeping documents earlier than foreseen by the law.

6. Each Party shall consider adopting or maintaining measures to protect, against any unjustified treatment, any person who, in good faith and on reasonable grounds, reports to the competent authorities any facts concerning offences described in paragraph 1 or 5.

Article 25.8: Promoting Integrity among Public Officials

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 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 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;
- (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 corruption to appropriate 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 measures, if warranted, against public officials who violate 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 of an offence described in Article 25.7.1 may, where 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 that affect international trade or investment. These measures may include rules with respect to the conduct of members of the judiciary.

Article 25.9: Application and Enforcement of Anti-Corruption Laws

1. In accordance with the fundamental principles of its legal system, neither Party shall fail to effectively enforce its laws or other measures adopted or maintained to comply with Article 25.7.1 through a sustained or recurring course of action or inaction, after the date of entry into force of this Agreement for that Party, as an encouragement for trade and investment.⁶

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 anti-corruption 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 offences described in Article 25.7.1.

Article 25.10: 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 organisations and community-based organisations, in the prevention of and the fight against 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, corruption. To this end, a Party may:

- (a) undertake public information activities and public education programmes that contribute to non-tolerance of corruption;

⁶ For greater certainty, the Parties recognise that individual cases or specific discretionary decisions related to the enforcement of anti-corruption laws are subject to each Party's laws, regulations and legal procedures.

- (b) adopt or maintain measures to encourage professional associations and other non-governmental organisations, if appropriate, in their efforts to encourage and assist enterprises, in particular SMEs, in developing internal controls, ethics and compliance programmes 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 programmes or measures, including those that contribute to preventing and detecting bribery and corruption in international trade and investment; and
- (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 endeavour to encourage private enterprises, taking into account their structure and size, to:

- (a) develop and adopt sufficient internal auditing controls to assist in preventing and detecting acts of 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.

3. Each Party shall take appropriate measures to ensure that its relevant anti-corruption bodies are known to the public and shall provide access to those bodies, if appropriate, for the reporting, including anonymously, of any incident that may be considered to constitute an offence described in Article 25.7.1.

Article 25.11: Relation to Other Agreements

Nothing in this Agreement shall affect the rights and obligations of either Party under any of the following agreements to which it is party:

- (a) the *United Nations Convention against Corruption*, done at New York on October 31, 2003;
- (b) the *United Nations Convention against Transnational Organized Crime*, done at New York on November 15, 2000;
- (c) the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, with its Annex, done at Paris on November 21, 1997; or

- (d) the *Inter-American Convention Against Corruption*, done at Caracas on March 29, 1996.