



# NORTH AMERICA 2.0

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# TOWARD A NORTH AMERICAN ANTI-CORRUPTION REGIME

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## **Toward a North American Anti-Corruption Regime**

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*Corruptio optimi pessima (Corruption of the best is the worst)*

- Traditional Latin Phrase

*If you have a garden and you want to see things flourish, you have to tend to it.*

- George Shultz, U.S. Secretary of State  
(1982-1989)

The key question posed by those that study the political and economic development of nations is why some countries thrive and some struggle. Over the past 20 years, one of the key explanations to emerge in response primarily turns on governance. Economic theorists Daron Acemoglu and James Robinson, who helped to place the nature of governance at the forefront of the economic debate, argue that countries have either “extractive” or “inclusive” economic and political institutions.<sup>1</sup>

Corruption in public processes and the delivery of public goods is a key by-product of institutions that are not undergirded by broad transparency and accountability.

Good governance is guided by the principles of efficiency and efficacy, as well as the prioritization of the public interest or common good. Institutions that are at the service of citizens reflect good governance of an Administration and its institutions. Effective rule of law designed to hold public figures and institutions accountable is imperative to both strong democracies and good governance; anti-corruption laws and auditing from an external body help promote transparency of public administration activities.

Though democracy implies greater participation in the political process and more inclusive institutions, North America’s recent backsliding on corruption issues demonstrates the democracies are not exempt from such problems of governance. The three countries of North America – Canada, the United States and Mexico – are democracies and each have national anti-corruption laws in place; still, each has struggled with its own corruption challenges. Each country has seen its score decline in the Transparency International’s Corruption Perceptions Index (CPI), which measures corruption based on paid bribes, over the 2015 to 2019 period. Canada is now the 12th “cleanest” country in the world, the United States is number 23, and Mexico number 130. A key question is whether greater cooperation among the countries of North America can make a difference, especially in Mexico, which has particularly struggled on this front. While the CPI offers a useful indicator of the state of play, it often misses the nuances.

Fighting corruption is tough business. Countries must always be vigilant in working to ensure that corruption does not undermine their credibility and the functionality of their institutions. Meaningful national policy efforts must be at the core of any effective anti-corruption initiative. This rule of law must be respected and enforced at the domestic level. Yet, one key trend to emerge over the past decade is some degree of internationalization of anti-corruption initiatives. Countries

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<sup>1</sup> Their influential book on this subject was D. Acemoglu and J. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (New York: Crown Business, 2012).

are sharing case information and findings to a greater degree than in the past. Still, there is room to go further. For example, debarment from participating in public procurement in one country can often mean near automatic debarment in other jurisdictions.

This chapter explores the complex linkage between national and international processes in the anti-corruption space. It first outlines the origins and evolution of the present focus on anti-corruption, including at the international and national levels in the United States and Mexico. Next, it dives into the significant changes in the law and application of Canada's anti-corruption regime over the past decade. Finally, it looks at how enhanced cooperation across North America could meaningfully aid the fight against corruption across the continent.

## **What is Corruption**

Corruption can take many forms, from bribery and nepotism to electoral fraud and theft of public resources. A common definition of corruption is that of Transparency International: *the abuse of entrusted power for private gain*.

Corruption has existed for as long as there have been public institutions. Among the earliest written examples of measures designed to deal with corruption, specifically bribery of public servants, is found in the Code of Hammurabi (1754 BC). Centuries later, many of the great religious texts also condemn corruption of various forms through a moral lens. It would take centuries more before the concept of rule of law would become embedded in how societies govern themselves. Rule of law would in turn create increasing demands for clean and professionalized governance. Indeed, rule of law can provide certainty and stability in the relationship private citizens have with the public authority; it provides certainty that the laws will be applied and legitimately enforced.

## **The United States' Anti-Corruption Regime**

In the United States, a realism about the dangers of corruption goes back to the founding of the country. Article 1, Section 9 of the Constitution, commonly known as the Emoluments Clause, coupled with Article 2, Section 4, which declares "bribery" to be an impeachable offense, can be seen as America's foundational anti-corruption measures. In Federalist Paper #22, Alexander Hamilton is very clear-eyed about the challenge. He stated that

*one of the weak sides of republics, among their numerous advantages, is that they afford too easy an inlet to foreign corruption... (P)ersons elevated from the mass of the community, by the suffrages of their fellow-citizens, to stations of great pre-eminence and power, may find compensations for betraying their trust.<sup>2</sup>*

Such corruption may come in many forms, so these clauses are written broadly.

The United States passed its first anti-corruption measure in 1789, which required the removal of "bribed" customs officers from their posts and made payors liable. The 1872 "mail fraud" statute and its extension in 1952 to cover "wire fraud" have been essential tools in a variety of criminal

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<sup>2</sup> Alexander Hamilton, "The Same Subject Continued: Other Defects of the Present Confederation," The Avalon Project : The Federalist Papers (Yale University, 2008), [https://avalon.law.yale.edu/18th\\_century/fed22.asp](https://avalon.law.yale.edu/18th_century/fed22.asp).



and corruption cases. Similarly, statutes that were conceived to be tools to fight organized crime, broadly defined, including 1946 Hobbes Act and the 1970 RICO Act have proven exceptionally useful in pursuing public officials accused of corruption. Interestingly, fighting corruption has often been a by-product of anti-crime legislation rather than an explicit end in itself. A key exception was the 1977 Foreign Corrupt Practices Act, which is discussed in greater detail below.

The U.S. began to build out a formal operational infrastructure to pursue public corruption in the 1970s. From its creation in 1976, the Public Integrity Section (PIN) of the Department of Justice was respected and effective. In the years since, prosecutions of federal, state and local officials have reached into the multiple thousands.

Prosecutors in the U.S. system have a lot of power. Many ambitious lawyers, often with an eye to future elected office or appointment as a judge, use that power to pursue high-profile cases. The case of former Alaska Senator Ted Stevens, who was initially found guilty of violating federal ethics laws in 2008, is a cautionary tale against vesting too much power in the hands of prosecutors. Stevens was one of the most senior members of the Senate and his conviction came just eight days before he was up for election. He narrowly lost his re-election bid. Yet, in April 2009, the conviction was essentially vacated as Judge Emmet Sullivan delivered a stinging rebuke to Justice Department prosecutors, who were accused of failing to hand over key exculpatory evidence and knowingly presenting false evidence to the jury.<sup>3</sup> The PIN has since been much more careful. The unchecked power of prosecutors, like the unchecked power of politicians, can lead to bad results.

A key innovation in the U.S. anti-corruption system has been the use of “deferred prosecution agreements” (DPAs). In the 1990s, the U.S. prosecutors began using DPAs as a way to address corporate white-collar crime. The theory is that firms that engaged in corruption or malfeasance should be thoroughly restructured in a carefully organized and monitored way rather than convicted and likely destroyed. Most employees, the reasoning goes, had nothing to do with the bad practices and should not pay the price for the corruption of a few. The use of DPAs gained particular favor after the collapse of accounting firm Arthur Anderson following the Enron scandal in the early 2000s. Between 2015-2017, U.S. prosecutors reportedly reached more than 150 DPAs with corporate defendants globally, many accused of offenses under the Foreign Corrupt Practices Act. While some critics see DPAs as upholding the idea of “too big to jail,” the Justice Department argues that it represents an important middle ground between convicting and declining to prosecute.<sup>4</sup> Importantly, the inclusion of DPAs in the anti-corruption toolbox has begun to spread internationally, including to the United Kingdom and Canada.

## **Foreign Corrupt Practices Act and its Internationalization**

Arguably the most significant anti-corruption measure to emerge in the reformist period of the 1970s was the Foreign Corrupt Practices Act (FCPA). Passed into law in 1977, it made bribing a

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<sup>3</sup> Anna Stolley Persky, “A Cautionary Tale: The Ted Stevens Prosecution,” *Washington Lawyer*, (October 2009), <https://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm> - :-:text=It was the culmination of,gifts he received from friends.

<sup>4</sup> “What’s a Deferred Prosecution Agreement?”, *MoloLamkin*, 2018, <http://www.mololamken.com/news-knowledge-18.html>. Peter Reilly, “Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts,” *Arizona State Law Journal* 50, no. 4 (2018): 1113-1170, <https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=2284&context=facscholar>.

foreign public official as a way of “greasing the wheels” a criminal offense. Specifically, the FCPA made it:

*illegal to give, pay, promise, offer, or authorize the payment of anything of value, either directly or indirectly through a third party, to an official of a government or its representative to obtain or retain business, or to secure an unfair advantage.*<sup>5</sup>

Acts that are considered bribery according to FCPA’s scope and therefore constitute a corrupt benefit, include: covering travel and lodging not related to business; hiring a government relative (equivalent to nepotism in the public sector); extravagant gifts; making a charitable contribution as a quid pro quo, benefiting a foreign official; a recommendation from a government official of a third party; and when a third party is not experienced to the field, engages in suspicious activities, or gets paid unusual high commissions, among others.

The Securities Exchange Commission (SEC) is in charge of bringing civil enforcement actions, and the Department of Justice (DOJ) is in charge of criminal prosecutions.

Traditionally, the FCPA has been shaped by the DOJ and SEC perspectives, rather than through legal decisions or interpretations.<sup>6</sup> As such, the DOJ and SEC issue guidance jointly<sup>7</sup> related to, among other things, cooperation and voluntary disclosure of corrupt practices. Extra-territoriality is also relevant concerning bribery provisions. Regarding extra-territoriality in the FCPA, the U.S. government considers that when funds pass through an account in the country, or when emails are sent through servers that are in the U.S., the connection is considered sufficient to expose persons involved to the FCPA, and therefore bring them to U.S. court jurisdiction. So far, there have been many anti-bribery cases in which countries have cooperated with the U.S.<sup>8</sup> The FCPA covers U.S. citizens in the country or abroad, foreign subsidiaries of U.S. entities, U.S. parents’ companies, foreign entities traded at U.S. Stock exchange, and any non-U.S. company whose act goes through U.S. banks or servers (email).

In addition to the anti-bribery provisions, the FCPA also includes specific requirements related to accounting and internal controls. The Act covered all companies required to submit reports to the

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<sup>5</sup> Olivia Mutambi Mpatswe, “An overview of the U.S. Foreign Corrupt Practices Act (FCPA),” *Lexology*, March 7, 2016, <https://www.lexology.com/library/detail.aspx?g=16e0793c-923c-4cf6-bdfa-56f34abefabf#:~:text=The%20FCPA%20is%20a%20United,may%20include%20anything%20of%20value.>

<sup>6</sup> Douglas Jensen & Ashley Williams, “Bribery & Corruption Laws and regulations 2022 | USA,” *Global Legal Insights*, 2021, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/usa>

<sup>7</sup> See FCPA Corporate Enforcement Policy, U.S. Department of Justice, November 29<sup>th</sup> 2017, <https://www.justice.gov/criminal-fraud/file/838416/download>

<sup>8</sup> . Telia Company AB (September 2017): \$965 million USD paid to the U.S., the Netherlands, and Sweden, after an Uzbek government official received \$331 million USD in bribes (see “Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than \$965 Million for Corrupt Payments in Uzbekistan,” U.S. Department of Justice, 2017, <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965>). Société Générale S.A.: \$585 million USD paid to U.S. and French authorities, after bribes were paid to Libyan officials to secure investment from state-owned financial institutions. Another case, Rolls Royce PLC started with a Deferred Prosecution Agreement (DPA) on January 2017, about allegations of bribery to win contracts in Indonesia, Thailand, Russia, China, Nigeria, India, and Malaysia, but didn’t go through; instead, another DPA ended on \$800 million USD paid by Rolls Royce to DOJ, the United Kingdom (the Serious Fraud Office), and Brazil (*Ministerio Publico*), after bribes were paid to state-owned oil companies in Thailand, Brazil, Kazakhstan, Angola, Azerbaijan, and Iraq. See “Lack of Individual Prosecutions in Rolls Royce Bribery Case – Justice not Served,” *Transparency International*, 2019, <https://www.transparency.org/uk/lack-individual-prosecutions-rolls-royce-bribery-case-justice-not-served>.

Securities and Exchange Commission, all companies having a business entity organized in the United States, and all citizens and permanent residents.

Since its first conviction in 1978, the FCPA substantially changed the way American companies did business abroad. The level of bribery emanating for U.S. companies declined significantly. Many would respond to requests for “facilitation payments” by citing the FCPA.

The idea that corrupt behavior abroad could be sanctioned at home was ground-breaking. While the U.S. successfully pushed for the inclusion of bribery in the 1976 OECD Guidelines on Multinational Enterprises<sup>9</sup>, it would take some 15 years after the FCPA became law for a serious international discussion about prohibiting bribery of foreign public officials to begin. Many around the world saw bribery as a normal cost of doing international business. In fact, in countries such as Germany, bribes paid abroad were tax-deductible until the second half of the 1990s.<sup>10</sup> Today, however, international law enforcement cooperation is common.

Signs of what was to come began in 1989. The OECD initiated a comparative review of member countries’ national legislation on bribery of foreign public officials. The G-7 also created the Financial Action Taskforce, which, in time, served as an operational instrument to pursue corruption cases. In 1993, Transparency International was founded and swiftly became an influential force in the fight against corruption.<sup>11</sup>

By the late 1980s and early 1990s, the U.S. business community began to press hard for the creation of an international regime that would outlaw payment of bribes. The FCPA prohibitions were a competitiveness issue as U.S. companies found themselves “out of the game” on many international procurements. Rather than pushing to roll back the FCPA, the U.S. business pushed for disciplines on everyone else. The new Clinton Administration heard their call and began a coherent push for the OECD to manage a process of creating an international convention.

These efforts paid off. In 1994, Ministers from OECD Member States agreed to negotiate an anti-bribery convention. In 1997, 29 OECD Members and 5 non-members signed the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.<sup>12</sup> It entered into force in 1999. The Anti-Bribery Convention is rare in the OECD world in that it imposes binding legal obligations on its members.<sup>13</sup> In addition to the agreement, there is an elaborate administrative and monitoring infrastructure. To date, 37 OECD countries and 7 non-OECD countries have adopted the Convention. These include the U.S., Canada, and Mexico.

Mexico, Canada, and the United States also are members of the *Inter-American Convention Against Corruption*, which pre-dated the OECD Anti-Bribery Convention. While the corruption question had been discussed at Inter-American meetings in 1992 and 1993, it was the Summit of

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<sup>9</sup> Cecily Rose, “International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems,” *Oxford University Press*, (2015): 63.

<sup>10</sup> Carter Dougherty, “Germany takes aim at corporate corruption,” *New York Times*, February 14, 2007, <https://www.nytimes.com/2007/02/14/business/worldbusiness/14iht-scandal.4596099.html#:~:text=As%20recently%20as%201997%2C%20the,by%20German%20companies%20tax%2Ddeductible.&text=Now%2C%20foreign%20corruption%20is%20illegal,companies%20have%20succumbed%20to%20scandal>.

<sup>11</sup> Rose, 63

<sup>12</sup> <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

<sup>13</sup> Rose, 59.

the Americas meeting of Heads of State and Government in Miami in December 1994 that put the hemisphere on the pathway to a Convention. After extensive discussions and analysis supported by the Organization of American States, the countries of the hemisphere signed the Convention in Caracas in March 1996. Virtually all active OAS members have ratified the agreement.

Additionally, on October 14, 2016, the International Standards Organization (ISO) adopted a new norm, ISO 37001, as a global standard to implement an anti-bribery management system. It is designed to prevent, detect, and mitigate bribery. ISO norms tend to create global standards as proof of quality and control of a specific product or field that meets ISO standards. An entity of accreditation, or accredited third party, needs to confirm that an organization's anti-bribery systems meets those standards. Companies can receive certification in best practices for monitoring of anti-corruption practices.<sup>14</sup>

### **Mexico's Anti-Corruption Regime: A Work in Progress**

Societies and habits of governance tend to change relatively slowly, but change they can. Mexico's formal anti-corruption system is less than 5 years old. Yet, considering where the country was on issues of corruption even 25 years ago, its very existence is a sign of tangible progress. Indeed, recent reforms have been adopted in Mexico related to anti-corruption, as fighting corruption was one of the main political promises from Andrés Manuel López Obrador.

From 1929-2000, Mexico was a one-party state. The Institutional Revolutionary Party (PRI) penetrated deeply into social, economic, and labor organizations throughout the country. The old PRI stayed in power principally through clientelism, which included the collection and distribution of "rents" throughout the system. This was a classic example of Acemoglu and Robinson's "extractive" institutional model.

During the oil boom of the mid-1970s, lots of money flowed through the PRI administered infrastructure, which re-set citizens' expectations about what their government was to deliver. President Jose Lopez Portillo (1976-1982) asserted that a key task of the Mexican Government was to "administer the abundance." When oil prices fell and the economy crashed in 1982, the old statist model became completely discredited. So began the long process of ending state control over the economy and society and a gradual modernization of Mexico's institutional framework. Frustration with corruption was a frequent complaint. The North American Free Trade Agreement (NAFTA), which entered into force in 1994, was an important accelerator to the modernization of the economy and the political system. In 2000, Vicente Fox of the National Action Party (PAN) was elected President, ending the old PRI reign.

In addition to pressure from foreign investors to keep corruption within bounds, NAFTA imposed many disciplines that changed the business and governance processes in Mexico. For example, it imposed standards and rules for how customs administration would work. It specified how

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<sup>14</sup> . See "ISO 37001: Anti-Bribery Management Systems," *International Organization for Standardization*, <https://www.iso.org/iso-37001-anti-bribery-management.html>; also Berglin, Lauren, George Stamboulidis, Lauren Resnick, & Shawn Hough, "ISO 37001: Testing the Ability to Implement a Global Anti-Bribery Standard," *Lexology*, December 20, 2017, <https://www.lexology.com/library/detail.aspx?g=c0c48a63-a294-4779-b287-027da2c72ecb>



intellectual property would be treated. It also included an investor-state dispute settlement regime that foreign companies could turn to in the event they felt they were treated unfairly.

The modern era in Mexico brought new scrutiny from an active civil society demanding a tamping down of corruption. Old processes and ways of doing things nonetheless die hard. New challenges also emerged in the first decade of the new millennium, especially with respect to the shocking increases in violence associated with the drug war. Drug money and the functioning of the drug trade has created grave new challenges in the fight against corruption in Mexico.

Nevertheless, with the public growing frustrated with insecurity and corruption, the Government of Enrique Peña Nieto, the first president of the new PRI, pushed forward a package of anti-corruption reforms. Shortly after coming to office in December 2012, Peña Nieto began pursuing his “Pacto por México,” which included the creation of a “National Anti-Corruption System” (SNA).<sup>15</sup> After some hard bargaining, substantial civil society engagement and changes to 14 constitutional articles and 5 general laws and the drafting of 2 new laws, the SNA was approved in 2015.<sup>16</sup> In 2016, the SNA disclosure rules were tweaked, and the enabling regulations were drafted. The System came into force throughout Mexico in July 2017.<sup>17</sup> As Viridiana Rios wrote: “No one doubts that the approved (SNA) is a much more solid institution to identify, prosecute and sanction corruption acts than anything the country had before.”<sup>18</sup>

The new legislation seeks to sanction companies, persons and public officials participating in acts of corruption. These economic sanctions can be up to \$6,220,000 USD. As Luis Alberto de la Peña and Fernando Villaseñor state,<sup>19</sup> companies can mitigate sanctions and penalties if they put in place an “Integrity Policy” by which procedures are created to prevent and report acts of corruption. This integrity policy can reduce the liability of companies if the relevant authority determines the steps taken related to the policy are adequate to fight corruption and are considered an appropriate compliance policy.

Additionally, in order to bring some legal certainty, the law provides several guidelines for companies to follow, including: adopting a procedure manual that reflects the responsibilities and tasks of each area of the company, specifying the leadership of the company; creating and distributing a code of conduct to all the members of the company that can be effectively implemented; implementing and supervising a control system that regularly revises the compliance and integrity standards of the company; creating an adequate internal reporting system within the company and to the competent authorities, including disciplinary procedures for employees acting against companies policies or the law; hosting appropriate programs to train employees about integrity policies; creating human resources policies that prevent hiring employees that could put the company’s integrity at risk, without other forms of discrimination that could be a violation of

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<sup>15</sup> Inaki Albisu Ardigo, “Mexico: Overview of corruption and anti-corruption efforts,” *U4 Anti-Corruption Resource Center* (2019), <https://www.u4.no/publications/overview-of-corruption-and-anti-corruption-efforts-in-mexico>

<sup>16</sup> Viridiana Rios, “Mexico Wins: Anti-Corruption Reform Approved,” *Wilson Center*, July 12, 2016, <https://www.wilsoncenter.org/article/mexico-wins-anti-corruption-reform-approved>.

<sup>17</sup> The details on and updates to the SNA are available at <https://sna.org.mx/>.

<sup>18</sup> Rios.

<sup>19</sup> . Alberto de la Pena, Fernando Villaseñor, “Upcoming Mexico Anti-Corruption Law: What Does it Mean for Companies Doing Business in Mexico?”, *Lexology*, July 10, 2017, <https://www.lexology.com/library/detail.aspx?g=aa721a70-0be9-42fb-939d-9e61c67b5878>.

human rights; and promoting and implementing mechanisms of transparency and publicity of the company's interest.

Here, the Mexican legislature does again legally define corruption. Among the *serious* offenses we find: any form of bribery, embezzlement, misuse of public resources, misuse of information, collusion, abuse of official authority, improper influence, and concealment of conflicts of interest. *Non-serious* administrative offenses include the failure to comply with certain responsibilities of public officials (*e.g.*, cooperating with judicial and administrative proceedings, reporting misconduct, etc.).

Companies can be held liable (as private offenses) for the actions of persons acting on their behalf or being their legal representatives when these persons are involved in serious offenses, or their actions are seeking to obtain undue benefits for the company. The serious administrative offenses private persons can commit are: bribery, illegal participation in administrative proceedings, improper use of relationships and power, misuse of information, wrongful use of public resources, and wrongful recruitment of ex-public agents.

Sanctions are classified by the law, between those directed to individuals and those directed to companies. Sanctions for companies can be up to twice the amount obtained with the benefit. When benefit is intangible, the fine range goes from, approximately, \$4,100 USD to \$6,220,000 USD. Associated fines can be the inability to participate in any public bidding or procurement, leases, services, or projects between 3 months and 10 years; suspension from activities between 3 months and 3 years; legal declaration of the dissolution of the company; and compensation to the government for the damages caused. Sanctions for persons can be up to twice the amount obtained with the benefit. When benefit is intangible, sanctions can range between \$416 USD and \$622,000 USD, in addition to compensating the government for the damages caused and losing eligibility to participate in any public bidding or procurement, leases, services, or projects between 3 months and 10 years. Interestingly, persons may see reduced sanctions between 50% and 70% of their amount if they inform the authority about the illegal conduct before the authority notifies the person about a case against him or her. Any other cooperation afterwards from third persons involved may also receive up to a 50% reduction in sanctions if there is a substantial cooperation with the competent authority. The statute of limitation for serious administrative offense is seven years since the date of the action or omission happened, or the misconduct ceased to occur.

The SNA is also broadly responsible for designing and implementing policies for combatting corruption. It has mechanisms that focus on ensuring transparency, carrying out oversight (including investigations), and prosecution of offenders.

Operationally, the SNA does three things:

1. It sets up a system of checks and balances across the government. In other words, allegations of corruption in one branch can be addressed by other branches of government.
2. It establishes a coordinating committee of key entities involved in the fight against corruption. Crucially, it includes a representative of the Citizen Participation Committee – a key civil society organization – as chair. The remaining members include: the head of the

Ministry of Public Administration (SFP); the head of the Superior Audit of the Federation (ASF); the head of the Special Prosecutor's Office for Combating Corruption; a representative of the federal judiciary council; the president of the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI); and the president of the Federal Court of Administrative Justice.

3. It creates an integrated institutional intelligence network on corruption.<sup>20</sup>

In the time since becoming operational, progress has been made in the fight against corruption. Notably, in September 2019, the Transparency International Global Corruption Barometer for Latin America found that 61% of Mexicans felt its government was doing a “good job” in combatting corruption. This was up from 24% in the 2017 survey.<sup>21</sup> Nevertheless, the system remains a work in progress. A variety of states still have to implement specific reform measures required by the SNA. The Citizen Participation Committee also has raised concerns with the government headed by President Andrés Manuel López Obrador, which came to office in December 2018. Specifically, in August 2019, the Committee sent a letter to the President demanding the appointment of 18 new anti-corruption magistrates that are required by the SNA.<sup>22</sup> Citizen pressure will continue to be essential to keep Mexico’s progress in tackling corruption on track.

### **A Modernization of Canada’s Anti-Corruption Regime**

Canada has a reputation of low levels of corruption and strong governance institutions. Nevertheless, Canada has had its own struggles with corruption both domestically and internationally, which have led to the development of mechanisms and processes for addressing such challenges.

The 1990s was a period of ferment on the anti-corruption front. Governance standards in provinces such as Nova Scotia were tightened as governments across the board sought to balance budgets and be responsive to a restive public’s frustration with patronage and corruption. In 1999, the Parliament of Canada passed the Corruption of Foreign Public Officials Act (CFPOA), thereby implementing the OECD Anti-Bribery Convention.<sup>23</sup> The prohibition on giving benefit to a foreign public official in exchange for an advantage on a given matter was broadly applied Canadian citizens, permanent residents, as well as companies deemed to be operating under the laws of Canada. The CFPOA was a counterpart to the provisions embedded in Sections 119-121 of the Criminal Code outlawing the corruption of domestic public officials, fraud, and the like.<sup>24</sup>

Concern about corruption in Canada moved higher up the policy agenda after 2000 thanks to a number of corruption scandals. Of particular note was the Sponsorship Scandal, which involved

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<sup>20</sup> Ardigo.

<sup>21</sup> Gina Hinojosa, “What’s Happening with Mexico’s Anti-Corruption System?”, *Washington Office on Latin America*, October 28, 2019, <https://www.wola.org/analysis/progress-challenges-corruption-mexico/>

<sup>22</sup> *Letter*, Citizen Participation Committee, August 25, 2019, <http://cpc.org.mx/wp-content/uploads/2019/08/Comunicado-Prensa-CPC-agosto-2019.pdf>

<sup>23</sup> “Corruption of Foreign Public Officials Act (S.C. 1998, c. 34),” Justice Laws Website, October 31, 2017, <https://laws-lois.justice.gc.ca/eng/acts/c-45.2/index.html>

<sup>24</sup> “Criminal Code (R.S.C., 1985, c. C-46),” Justice Laws Website, August 27, 2021, <https://laws-lois.justice.gc.ca/eng/acts/C-46/>

misuse of federal government funds in Quebec. It arguably hastened the departure of Jean Chretien as Prime Minister in 2003 and contributed substantially to the defeat of his successor, Paul Martin.

Yet, 2011 was arguably the year that set Canada on its contemporary course with respect to anti-corruption. In March of that year, Canada was shamed by the Organization for Economic Cooperation and Development (OECD) for its relatively weak framework and limited enforcement actions in combatting foreign corruption. In essence, the CFPOA was passed into law, but Canada had done nothing with it over the previous 12 years.<sup>25</sup> The stinging criticism generated high profile press coverage in Canada and a determination to change.

In October of that year, the Government of Quebec appointed the “Charbonneau Commission,” which uncovered significant governance lapses and corruption in the contracting of public works in the province. This generated non-stop press coverage which further reinforced the urgency of addressing Canada’s corruption problem.<sup>26</sup>

Since that time, tolerance for corruption in Canada and for improper dealings by Canadian firms abroad have steadily diminished. The CFPOA, as passed in 1999, barred bribery of foreign public officials when the act occurs wholly or partially in Canada. Amendments to CFPOA adopted in 2013 imposed a “nationality jurisdiction,” which empowered the Government of Canada to charge Canadian entities and individuals with bribery, regardless of whether the actual illicit payment was made in Canada. It also included “books and records offenses,” which criminalized the falsification of accounts for the purpose of making or hiding bribes. After 2011, Canada also invested resources and began actively prosecuting companies and individuals for violations of the CFPOA.

A persistent criticism of the CFPOA was that it did not bar “facilitation payments.” Facilitation payments are fees paid, typically to low-level officials, to expedite the performance of routine government actions to which the recipient is legally entitled, such as obtaining permits and processing government documents. However, many viewed this as a bribery loophole. On October 31, 2017, the Government of Canada amended the CFPOA to explicitly bar facilitation payments.

While Canada worked to tighten its framework for corruption abroad, it also was making steps to tighten its public procurement framework at home. In 2012, Public Works and Government Services Canada introduced the “Integrity Framework” in an effort to ensure that it would only be dealing with ethical suppliers. While the initial iteration was welcome, amendments in 2014 set off significant concerns among the business community.

Specifically, the 2014 amendments said, in essence, that if a company were convicted of corruption anywhere in the world that they would be barred from doing business with the Government of Canada for 10 years. While the idea may have sounded good, it failed to take into account the realities of how multinationals are structured. Many of these firms operate in different jurisdictions

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<sup>25</sup> “Canada’s enforcement of the foreign bribery offence still lagging; must urgently boost efforts to prosecute,” *OECD*, March 28, 2011, <http://www.oecd.org/corruption/canadasenforcementoftheforeignbriberyoffencesstilllaggingmusturgentlyboosteffortstoprosecute.htm>.

<sup>26</sup> Justice Charbonneau was specifically asked to examine three issues: (1) Examine the existence of schemes and, where appropriate, to paint a portrait of activities involving collusion and corruption in the provision and management of public contracts in the construction industry and to include any links with the financing of political parties; (2) Paint a picture of possible organized crime infiltration in the construction industry; (3) Examine possible solutions and make recommendations establishing measures to identify, reduce and prevent collusion and corruption in awarding and managing public contracts in the construction industry

through separate local companies that are organized and structured under the national laws of the country. The head of Canadian operations would have no real systematic way of knowing if the local company or an executive in an Asian or African country was convicted of corruption. One prominent European company told the author at the time that there were roughly 20,000 separately constituted business units under its corporate banner. A separate concern had to do with whether a conviction met anything like the standards of evidence and due process used in Canada. It is very common for some countries to allege corruption during political battles as a way of trying to bury a company or an individual, regardless of whether any malfeasance took place.

One fascinating dynamic that greatly concerned the companies likely to run afoul of these amendments was the growing trend toward mutual recognition of debarment. At the time, Canada was concurrently working arrangements with several European countries to the effect that debarment in one country would automatically lead to debarment in the others. If companies ended up on the Canadian debarment list for actions that did not take place in or involve Canadians, the consequences would now be substantially amplified.

Facing significant political pressure and the prospect of losing reliable suppliers over bribery acts that took place in jurisdictions as diverse as Russia, Nigeria, and Colombia – and which had no relation to Canada – the government began to consider changes. The process took a year, but mutually agreeable refinements were announced in July 2015.

The other major evolution in the Canadian anti-corruption regime was the adoption in 2018 of what is essentially a Deferred Prosecution mechanism – or what is called a “Remediation Agreement.” As with U.S. DPAs, Remediation Agreements allow companies charged with malfeasance to seek a monitored, carefully overseen restructuring in lieu of prosecution. Efforts toward a Remediation Framework began in earnest at least four years before. The controversy over the Integrity Framework pushed analysts to question where else Canada’s anti-corruption framework needed strengthening. In 2015, an influential group convened by the Institute for Research on Public Policy recommended adoption of a DPA type framework for Canada.<sup>27</sup> It included Anita Anand, then a University of Toronto academic who was elected to Parliament in 2019 and appointed Minister of Public Works and Procurement.

In its final form, the Canadian Remediation process is closer to the United Kingdom’s than the United States’ process. Prosecutors in Canadian Remediation negotiations would have less discretion than in the United States. Similar to the UK, any Agreement is required to undergo judicial review to determine that 1) it is “in the public interest”; and 2) the “terms of the agreement are fair, reasonable and proportionate” before it is allowed to proceed.<sup>28</sup> The Canadian regime is also unique with respect to the extent to which it prioritizes and allows for compensation to be paid to victims of the malfeasance in question. In fact, “help(ing) repair harm done to victims or

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<sup>27</sup> “Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement,” Institute for Research on Public Policy, March 10, 2018, <https://irpp.org/research-studies/finding-the-right-balance/>

<sup>28</sup> Kess Thompson, “The Role of Judicial Oversight in DPA Regimes: Rejecting a One-Size-Fits-All Approach,” *The Global Anticorruption Blog*, <https://globalanticorruptionblog.com/2018/04/16/the-role-of-judicial-oversight-in-dpa-regimes-rejecting-a-one-size-fits-all-approach/>



to the community, including through reparations and restitution” is a key condition of the legislation. As Anthony Cole and Paul Lalonde explain:

*“victims” (as defined) must generally be notified prior to a Remediation Agreement being presented to a court for approval, and the court is required to consider any victim impact statement presented in connection with the approval hearing, as well as to consider whether appropriate provision has been made for “reparations” to victims within the Remediation Agreement. In this regard, it is worth noting that the definition of “victim” under the Criminal Code is very broad, and includes any individual or organization “against whom an offence has been committed...and has suffered or is alleged to have suffered...property damage or economic loss.”<sup>29</sup>*

While Canada adopted the Remediation Framework in 2018, it has yet to be used. In addition to corporate governance and anti-corruption experts, the infrastructure firm SNC Lavalin was an important advocate for a Canadian DPA-type regime. SNC had engaged in bribery and other acts of corruption in the first decade of the 2000s for which they had been charged. From 2012 onwards, the company went through a radical restructuring, replacing most of its management team and all of its board. The company also negotiated a monitoring regime with the World Bank. Yet, the wheels of justice turn slowly.

By 2018, the company was facing the prospect of a trial for acts that, in many cases, took place more than a decade before. If SNC lost, the company faced the real prospect of bankruptcy, break up or being sold off. Consequently, they launched a full court press in pursuit of a Remediation Agreement. In early 2019, the press reported that a Remediation Agreement was not negotiated because the Justice Minister and the Director of Public Prosecutions said no. This was despite lobbying from the company and requests from the Prime Minister’s Office. The SNC Lavalin question became a big political issue for the Trudeau Government that persisted until the October 2019 federal election.

The highly political nature of the SNC Lavalin affair seems to have made the government shy about using the Remediation Agreement framework. As Jennifer Quaid of the University of Ottawa points out, the Canadian Government has yet to implement detailed regulations to make parts of the system work. There also are key areas that need to be clarified in the prosecutors “Deskbook” on how the “public interest” requirements are to be interpreted.<sup>30</sup> Time will tell the

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<sup>29</sup> Anthony Cole and Paul Lalonde, “Government introduces “made-in-Canada” Deferred Prosecution Agreement framework,” *Dentons*, April 11, 2018, <https://www.dentons.com/en/insights/alerts/2018/april/11/government-introduces-made-in-canada-deferred-prosecution-agreement-framework>.

<sup>30</sup> Jennifer Quaid, “What’s ahead for remediation agreements in the SNC-Lavalin aftermath,” *TheConversation.com*, December 12, 2019, <https://theconversation.com/whats-ahead-for-remediation-agreements-in-the-snc-lavalin-aftermath-128104>

extent to which the federal government returns to the Remediation process for handling difficult future issues. As noted below, perhaps a regional approach could be helpful.

### **Towards a North American Anti-Corruption System**

The OECD Anti-Bribery Convention put its signatories on a pathway of “thinking globally and acting locally” (or at least nationally) in the fight against corruption. The question is what the three countries of North America can usefully do at a region-wide level.

In approaching this question, one must recognize that Canada, the United States, and Mexico face different challenges and institutional cultures on the anti-corruption front.

Mexico – which, according to the Transparency International Corruption Perceptions Index, faces the most challenging corruption fight – is trying to make a new anti-corruption system work effectively. More broadly, the challenge in Mexico is to continue to make progress in moving the country away from the old extractive to a newer inclusive model of institutional development.

The United States has the oldest anti-corruption regime of the three countries and has established processes and mechanisms within its public institutions as well as an active anti-corruption bar and network of advocacy groups. Like any country, ensuring that these institutions and processes work well requires constant attention. A key feature of the U.S. system is a tendency “legalize” the resolution of many issues. Once this process is started, prosecutors are granted extraordinary – and often unchecked – power in pursuing cases and seeking “plea deals.” This does not always lead to balanced, credible outcomes.

Canada applies its founding creed of “peace, order and good government” to the anti-corruption question. As a country, it often prioritizes informal mechanisms for addressing corruption and other bad practices. This arguably helps to keep the faith of the citizenry in the system. It also does not empower prosecutors to the same degree as the United States, wanting to ensure that the system is seen as “fair.”

### **The New NAFTA**

Despite some of the difference in approach, the three countries of North America have important, highly similar foundations for anti-corruption cooperation. In addition to each being an adherent to the OECD and Inter-American anti-corruption regimes, they also are signatories to the United Nations Convention Against Corruption and publicly support the G20 and APEC anti-corruption principles and regimes.

On July 1, 2020, Mexico, the United States and Canada saw the entry into force of the “new North American Free Trade Agreement,” known as USMCA in the United States, CUSMA in Canada and T-MEC in Mexico. Chapter 27 of the agreement focused on anti-corruption. Much of the Chapter reiterates the core substance of the OECD, Inter-American, and UN anti-corruption conventions. Article 27.8 states that the three countries may have access to the USMCA dispute settlement system on anti-corruption matters if a party implements a particular measure that is

inconsistent with the commitments in this chapter or fails to properly carry out an obligation under this Chapter to the extent that they affect trade and investment.

Article 27.9 of the Chapter focuses on anti-corruption cooperation. In doing so, it carefully sets forth a number of notional principles and pathways rather than specific commitments. First, the Parties “recognize the importance of cooperation, coordination, and exchange of information between their respective anti-corruption law enforcement agencies.” Second, the Parties “shall endeavor to strengthen cooperation and coordination among their respective anti-corruption law enforcement agencies.” Third, “the Parties’ anti-corruption law enforcement agencies shall consider undertaking technical cooperation activities, including training programs.”

### **A Specific Agenda**

No matter what country it is, anti-corruption measures are complicated and politically sensitive to apply. Yet, the overwhelming evidence suggests ensuring good, clean governance is necessary for both democracy and broadly held economic prosperity to flourish. The North American model of economic integration is built around trade rules and ad hoc political coordination. With virtually no supra-national institutions, the nations of North America would have to directly consent to any sort of cross-border anti-corruption activities.

With that in mind, there are a number of pathways of potential coordination:

1. Regular Review of Each Other’s Anti-Corruption Regimes: The three countries could periodically agree to review the content and application of each other’s anti-corruption regimes. One would think that every two years would be an appropriate cadence. This concept is applied in other policy areas. For example, in 2018, Canada conducted a review of Mexico’s regulatory system on behalf of the OECD Regulatory Policy Committee and with the full consent of Mexico. This work yielded useful recommendations that provided a political foundation for policy refinements. A similar concept could be applied in the anti-corruption area. Perhaps two reports could be produced in these reviews: (1) the formal report; and (2) discrete recommendations for the receipt governments, including areas where technical assistance/ongoing cooperation could be useful.
2. Agree to Maintain Common Debarment Lists: As noted above, one of the growing trends is for countries to share and mutually recognize debarment decisions. A logical step would be for Canada, the U.S., and Mexico not only to share information about ongoing corruption investigations but also to agree, barring extraordinary circumstances, that a debarment for the purposes of government procurement in one country will mean a North America-wide debarment.
3. Coordination in the Development of Deferred Prosecution Negotiations: The U.S. has used Deferred Prosecution Agreements for some time. Canada has had a bumpy start with its Remediation regime, but it is still law. Mexico should consider adopting a DPA regime of its own. There are inevitably going to be cases where companies seeking DPAs will be implicated in more than one North American country. In order to ensure that everyone’s concerns are address and the companies do not face conflicting demands, the three

countries should explore mechanisms that would essentially allow for a North America-wide master DPA applicable in all three countries.

4. Undertake a Dialogue with Mexico's Government and Private Sector on Strengthening the Fight Against Corruption: While the Corruption Perceptions Index is not fully scientific, the gap in scores between Mexico and the other two nations of North America does indicate a problem. While Mexicans will ultimately have to make the fight against corruption work, Canada and the United States have an interest in helping Mexico to improve on this front. In the near term, the United States and Canada should seek a dialogue structured in the spirit of respect and collaboration to discuss where the challenges of corruption are in Mexico and how technical assistance and coordinated action could improve the situation. This dialogue mechanism should be available to any of the countries in response to cases where the scope or intensity of corruption is felt to have region-wide implications. The spotlight is on Mexico today, but it could be on another country tomorrow. The important matter is for the countries to agree on a mechanism for constructive dialogue on extraordinary issues, including the challenge of corruption.