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US-KENYA STRATEGIC TRADE
AND INVESTMENTS PARTNERSHIP
ANTI-CORRUPTION

KEY ISSUES TO BE CONSIDERED

Prof. Uche Ewelukwa Ofodile (SJD Harvard)

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1.0 Introduction

The link between corruption and global trade is prompting new efforts by states to include explicit anti-corruption provisions in their trade agreements.¹ Increasingly, good governance provisions are appearing in FTAs.² The U.S. pioneered the approach of embedding anticorruption provisions in trade agreements. Good governance chapters in FTAs address a broad range of policy issues not traditionally considered to be within the ambit of trade agreements. WTO agreements do not explicitly address corruption or bribery in trade relations.³ However, WTO agreements address governance issues in a number of ways and particularly through provisions on transparency, procedural fairness (due legal process and access to courts),⁴ reasonable, uniform, objective and impartial administration of measures,⁵ as well as publication and notification requirements.⁶ A full assessment of Kenya's anticorruption laws and policies is beyond the scope of this study.

Although NAFTA included several provisions on transparency, NAFTA did not have a separate chapter on anticorruption. Anticorruption provisions related to government procurement are found in the U.S.-Chile FTA. As noted, anti-corruption provisions are beginning to appear in more and more FTAs.⁷ Since 2003, the U.S. has strengthened the anticorruption provisions of its trade agreements. Stronger anti-corruption provisions applicable to the whole agreement are found in the FTA with Morocco, as well as the FTA with the Central American countries. In October 2020, the U.S. and Brazil signed a new Protocol relating to trade rules and transparency. The protocol updates the 2011 Agreement on Trade and Economic Cooperation with three new annexes comprising "state-of-the-art" provisions on Customs Administration and Trade Facilitation, Good Regulatory Practices, and Anticorruption.⁸ The use of anti-corruption provisions in FTAs has evolved and are still evolving. Anticorruption commitments are becoming stronger and distinct from transparency commitments, and are increasingly included as stand-alone chapters in FTAs.

Chapter 27 of the USMCA is titled "Anticorruption" and "contains the most explicit and detailed set of anti-corruption provisions of any free trade agreement which the United States is a Party."⁹ It is the first time that anticorruption has been addressed in the trade agreement between the U.S., Mexico, and Canada. The anticorruption provisions in the USMCA targets state parties rather than private enterprises. Chapter 27 of the USMCA is very

¹ OECD, *Global Trade Without Corruption*, OECD Publishing, 2017. Available at:

http://www.oecdilibrary.org/governance/global-trade-without-corruption_9789264279353-en

² Transparency International, "Anti-Corruption and Transparency Provisions in Trade Agreements," *Anti-Corruption Helpdesk*, 2017.

³ Schefer, K.N., 'Corruption and the WTO Legal System', *Journal of World Trade*, 43(4), Kluwer Law Online, 2009, pp. 737–770. Available at: [http://phase1.nccrtrade.org/images/stories/publications/IP4/sk.corruption and trade 3.pdf](http://phase1.nccrtrade.org/images/stories/publications/IP4/sk.corruption%20and%20trade%203.pdf)

⁴ Article X: 3 (b); Article VI:2; Article 41:4.

⁵ Article X: 3 (a); Article VI:1.

⁶ Article X:1, X:2; Article III:1; Article 63.1.

⁷ Jenkins, M., 'Anti-Corruption and Transparency Provisions in Trade Agreements', Transparency International, 2017. Available at:

https://www.transparency.org/files/content/corruptionqas/Anticorruption_and_transparency_provisions_in_trade_agreements_2017.pdf

⁸ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules>

⁹ Collmann Griffin, Richard Mojica, and Marc Alain Bohn, *Takeaways from the Anti-Corruption Chapter of the USMCA*.

similar to that in the TPP-11 (Chapter 25) and the Canada-EU Comprehensive Economic and Trade Agreement (“Canada-EU CETA”).¹⁰

Obligations: Overview

In general, USMCA Parties affirm their resolve to prevent and combat bribery and corruption in international trade and investment. The Parties also affirm their adherence to several notable anticorruption treaties including, the 1996 Inter-American Convention Against Corruption (IACAC), the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the 2003 United Nations Convention against Corruption (UNCAC).¹¹ Article 27 of the USMCA imposes three main types of obligation on Contracting Parties: (1) obligations relating to legislative and other measures; (2) obligations relating to administrative measures; and (3) obligations relating to promotional measures.

Legislative Obligations

In FTAs, anticorruption provisions generally mandate the criminalization of corruption, mandate states to establish sanctions regimes and enforcement mechanisms, and also mandate state parties to ensure protection for whistleblowers. Article 27.3 of the USMCA requires State Parties to adopt or maintain legislative or other measures to criminalize: (i) bribery of a public official; (ii) bribery of a foreign public official; (iii) soliciting or acceptance of a bribe as public official; (iv) embezzlement; (v) misappropriation, or another diversion by a public official of property entrusted to the public official; and (vi) aiding or abetting of or conspiracy in the bribery-related offences listed above.

Article 27.3: Measures to Combat Corruption

1. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as criminal offenses under its law, in matters that affect international trade or investment, when committed intentionally, by a person subject to its jurisdiction:
 - (a) the promise, offering, or giving to a public official, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties;
 - (b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties;
 - (c) the promise, offering, or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; and
 - (d) the aiding or abetting, or conspiracy in the commission of any of the offenses described in subparagraphs (a) through (c).

¹⁰ TPP-11, Chap. 25; Canada-EU CETA, Chap. 21.

¹¹ USMCA, Article 27.2(2).

Administrative

Article 27 of the USMCA requires Parties to adopt specific administrative measures to combat corruption. Parties are required to adopt or maintain measures that specifically provide for:

- Sound accounting and auditing standards for enterprises that prohibit recording “off-the-books” accounts, non-existent expenditures, and similar transactions;
- Protections for whistleblowers – i.e., persons who report offenses in good faith to competent authorities – from unjustified reprisal;
- The disallowance of tax deductibility of bribes;
- Adequate procedures for selection and training of individuals for public positions considered especially vulnerable to corruption;
- Appropriate policies and procedures to identify and manage conflicts of interest for public officials;
- Requirements that senior public officials declare outside activities, employment, investments, assets, and substantial gifts or benefits;
- Codes or standards of conduct for the correct, honorable, and proper performance of public officials;
- Procedures for removing public officials accused of corruption-related offenses;
- Measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary; and
- A requirement that no party shall “fail to effectively enforce” its laws adopted or maintained pursuant to the USMCA.

Promotional

Under the USMCA, Parties are also obliged to undertake promotional measures including:

- Raise awareness among public officials of relevant bribery laws;
- Recognize the harmful effects of facilitation payments – i.e., small payments for “routine government actions” of a non-discretionary nature – and encourage enterprises to prohibit or discourage the use of such payments;
- promote the active participation of individuals and groups outside the public sector, such as enterprises, civil society, non-governmental organizations, and community-based organizations, in preventing and combatting corruption in matters affecting

international trade or investment, and to raise public awareness regarding the existence, causes, and gravity of corruption, and the threat posed by it;¹²

- encourage private enterprises to: (a) adopt or maintain sufficient internal auditing controls to assist in preventing and detecting offenses; and (b) ensure that their accounts and required financial statements are subject to appropriate auditing and certification procedures;¹³ and
- take appropriate measures to ensure that its relevant anticorruption bodies are known to the public and shall provide access to those bodies, if appropriate, for the reporting including anonymously, of an incident that may be considered to constitute an offense described in Article 27.3.1 (Measures to Combat Corruption).

Enforcement

Most of the anti-corruption provisions in the USMCA are enforceable.¹⁴ Chapter 31 (Dispute Settlement), with some modifications, applies to disputes relating to a matter arising under the anticorruption chapter. A Party may only have recourse to the procedures set out Chapter 31 (Dispute Settlement) if it considers that a measure of another Party is inconsistent with an obligation under this Chapter, or that another Party has otherwise failed to carry out an obligation under the Anticorruption chapter, in a manner affecting trade or investment between Parties. Procedures set out in Chapter 31 include consultation, conciliation, mediation and the establishment of panels. The applicability of the dispute settlement mechanism to Chapter 27's anti-corruption provisions are not without limits. First, matters arising under Article 27.6 (Application and Enforcement of Anticorruption Laws) are excluded. Second, matters arising under Article 27.9 (Cooperation) are also excluded.

2.0 Key Considerations for Kenya

USMCA's Anti-Corruption Obligations Are Beyond Those in AGOA

AGOA addresses corruption. AGOA eligibility requirements are set out in Section 104 of the AGOA legislation (Public Law 106/200). Under Article 104 (A)(1)(E) of AGOA, the U.S. President is authorized to designate a SSA country as an eligible SSA country if the President determines that the country has as established, or is making continual progress toward establishing – “a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.”¹⁵

U.S. Has Expressed Specific Concerns About Kenya

Over the years, the U.S. has expressed concerns about corruption in Africa in general and in Kenya in particular. In the 2019, the USTR noted that:

Corruption remains a substantial barrier to doing business in Kenya. U.S. firms continue to report they find it difficult to succeed against competitors willing to ignore legal standards or engage in bribery and other forms of corruption. Corruption is widely reported to affect

¹² USMCA, Article 27.5 (1).

¹³ USMCA, Article 27.5 (2).

¹⁴ USMCA, Article 27.8.

¹⁵ 19 U.S.C. §§ 3701-3739 (2006).

government procurement tender processes at both the national and county level. The government has not implemented anti-corruption laws effectively. U.S. firms routinely report direct requests for bribes from all levels of the Kenyan government. The Kenyan government began an anticorruption campaign using the Ethics and Anticorruption Commission (EACC) and Office of the Director of Public Prosecution to open cases against high profile offenders. While some cases brought to light by the EACC have resulted in convictions, no high-profile cases have ended in conviction. Despite efforts to increase efficiency and public confidence in the judiciary, a backlog of cases and continuing corruption – both perceived and real – reduce the credibility and effectiveness of Kenya’s judicial system. While judicial reforms are moving forward, bribes, extortion, and political considerations continue to influence outcomes in court cases. An Employment and Labor Relations Court exists in Kenya, but it is plagued by long delays in rendering judgments. As such, foreign and local investors risk lengthy and costly legal procedures.¹⁶

3.0 Key Recommendations

Corruption negatively affects citizens and foreign investors, undermines sustainable development goals, and is inimical to the general welfare of a nation.¹⁷ Experts agree that the effects of corruption are numerous and touch every facet of a society. Whether anti-corruption provisions in FTA are effective remains a matter of considerable debate, however.¹⁸

Corruption and Corporate Accountability

The USMCA’s chapter on corruption is noticeably silent about investor responsibility and corporate accountability. It is recommended that in an FTA between Kenya and the U.S., the Parties should insert explicit investor liability clauses relating to bribery and corruption. Article 11 of the India-Kyrgyzstan BIT (2019) is an example and provides:

Article 11. Compliance with laws

The parties reaffirm and recognize that:

- (i)
- (ii) Investors and their investments shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.¹⁹

Link Corruption to ISDS

Should Kenya agree to an investment chapter that provides for ISDS, it is recommended that corruption provisions be made an integral part of such a chapter. Specifically, it is recommended that investors that are guilty of corruption and related offenses are permanently barred from using the

¹⁶ USTR, 2019 National Trade Estimate Report on foreign Trade Barriers, 2019.

¹⁷ Press Release, United Nations Office on Drugs & Crime, Eliminating Corruption is Crucial to Sustainable Development (Nov. 1, 2015), <https://www.unodc.org/unodc/en/press/releases/2015/November/eliminatingcorruption-is-crucial-to-sustainable-development.html>.

¹⁸ *US-Brazil anti-corruption pact a step forward, but impacts are limited, practitioners say* (29 Oct 2020). <https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/anti-bribery-and-corruption/us-brazil-anti-corruption-pact-a-step-forward-but-impacts-are-limited-practitioners-say>

¹⁹ <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download>

ISDS mechanism. The EU-Canada CETA does not have an autonomous chapter on anti-corruption. However, Article 8.18 of EU-Canada CETA precludes an investor from initiating an ISDS claim if the investment “has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.” Article 13.4 of the India-Kyrgyzstan BIT, provides:

“An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms.”²⁰

Regulatory Space

Experts believe that Chapter 27 of the USMCA was drafted with the U.S. Foreign Corrupt Practices Act (“FCPA”) in mind. Kenya already has laws on the books to address corruption. Consequently, FTA anti-corruption provisions that include commitments to criminalize corruption, protect whistleblowers, and impose monetary sanctions on those guilty of corrupt activities may not necessarily be intrusive and may not require fundamental changes to Kenya’s laws. Nevertheless, unless carefully drafted, anti-corruption provisions in FTAs have the potential to encroach on domestic regulatory space and may require treaty partners to introduce fundamental changes to their existing law. The USMCA’s administrative and promotional commitments related to anti-corruption may require changes to Kenya’s administrative practices. It is thus recommended that the anti-corruption provisions of any trade deal be carefully drafted so as not to encroach on domestic regulatory space of treaty partners. It is also recommended that Kenyan government assess fully the implications of the anti-corruption chapter on Kenya’s administrative laws and practices.

Review Negotiating Objectives

Kenya’s negotiation objectives relating to anti-corruption are very limited. In view of the myriad issues that anti-corruption provisions in FTA raise for developing countries, it is recommended that the Kenyan government review and update Kenya’s negotiating objectives.

Anticorruption

Kenya (Negotiating Objectives)	United States (Negotiating Objectives)
<ul style="list-style-type: none"> • [E]nforcement of anti-corruption legislation and the exchange of information on anti-corruption cases and initiatives • Secure commitments by the Parties to provide information resources to help small businesses navigate requirements for exporting to each other’s market. 	<p>- Secure provisions committing Kenya to criminalize government corruption, to take steps to discourage corruption, and to provide adequate penalties and enforcement tools in the event of prosecution of persons suspected of engaging in corrupt activities. In particular:</p> <ul style="list-style-type: none"> • Require the adoption or maintenance of requirements for companies to maintain accurate books and records, which facilitate the detection and tracing of corrupt payments;

²⁰ <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download>

	<ul style="list-style-type: none">• Require the establishment of codes of conduct and the development of other tools to promote high ethical standards among public officials;• Require Parties to disallow the deduction of corrupt payments for income tax purposes; and• Encourage Parties to promote the active participation by the public in efforts to combat corruption. <p>- Require measures that address money laundering, recovery of proceeds of corruption, denial of safe haven for foreign public officials that engage in corruption, and protections for whistleblowers.</p>
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