

# Re-Building a Complex Partnership:

The Outlook for U.S.-Mexico  
Relations under the Biden  
Administration





**By Max Kaiser**

## U.S.-Mexico Cooperation on Anti-Corruption: Opening a New Chapter



**The beginning of the Biden administration offers the United States and Mexico the opportunity to open a new chapter in their relationship, one based on the joint fight against corruption.**

### Key Policy Recommendations

- Attack corruption, from the electoral processes, to the individual exercise of power, in all its forms.
- Create a true culture of integrity in public service.
- Strengthen the independence and effectiveness of the institutions involved in the fight against corruption.
- Establish effective channels for collaboration and coordination between both countries, to achieve concrete results.
- Establish effective policies to involve organized civil society, academia, and the private sector in the fight against corruption, as long-term allies.



The beginning of the Biden administration offers the United States and Mexico the opportunity to open a new chapter in their relationship, one based on the joint fight against corruption. Millions of Mexicans and Americans would benefit enormously from a closer, more open, more permanent and more effective relationship on this issue. In fact, that new chapter already exists, within the text of the USMCA, the renegotiated and modernized version of the NAFTA,<sup>1</sup> and the Biden administration should not fail to seize the opportunity to use it.

For the first time, the relationship between both countries has a formal reference in the fight against corruption. For decades, this complex relationship between the two countries, with such different legal and political systems, lacked a common basis for understanding the phenomenon of corruption. The new version of the treaty contains this formal basis. It is an innovative and demanding legal reference that establishes complex and far-reaching obligations for the three signatory countries.

This chapter was negotiated and closed during the administrations of Enrique Peña Nieto in Mexico and Donald J. Trump in the United States, and it remained intact during the final modifications to the agreement under Andrés Manuel López Obrador (AMLO). As of January, the new administration of Joseph Biden will be in charge of applying the principles of Article 27 of the Treaty, on the U.S. side, and that of AMLO on the Mexican side. The challenge is great for both. It is difficult to find commonalities in the styles of the two presidents, and the relationship may be distant at first, since President López Obrador was one of the last leaders from around the world to recognize Biden's triumph.

For the Biden administration, this is a clear opportunity to establish a new type of relationship with the Mexican government, one based on integrity and transparency, instead of obscure and secret political agreements. The new U.S. administration will be overwhelmed by cases and investigations of corruption, derived from the ending administration, and they will have the chance to put politics aside and make justice prevail, to regain people's trust in government. For President López Obrador's administration, it is the last chance to show that all those campaign promises to fight corruption were not just hollow electoral strategies. Every week, a new scandal of corruption erodes people's aspiration of a new type of government. Cases involving close relatives to the president, and every other case, remain unsolved. Most are not even investigated. Several baseless accusations have been made public by the president to target political enemies, who end up stepping down from crucial institutions or become silent. Every time a media platform or a civil society organization discovers a new case of corruption, they become a target of unsubstantiated accusations by the president, and even the focus of attention for fiscal and criminal authorities.

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In this text, I will try to leave aside the analysis of the political context of both countries, and focus on specific excerpts from Article 27, to explain its meaning and significance.

However, it is important to first consider the enormous differences in the starting points of the two countries in this relationship. The "Rule of Law" concept is understood and lived very differently on both sides of the border that divides these nations.

According to the 2020 Rule of Law Index,<sup>2</sup> in the "Absence of Corruption" category, the United States is ranked 19th out of 128 countries, with a score of 0.74, while Mexico is ranked 121st, with a score of 0.27. In



the "Order and Security" category, the United States is ranked 28th out of 128, with a score of 0.81, while Mexico is ranked 121st in this same category, with a score of 0.53. In the "Criminal Justice" category, the United States is ranked 22nd with a 0.63 score, while Mexico is ranked 119th with a 0.30 score.

Another index that makes evident the enormous differences between both countries is the "Global Competitiveness Report 2019" of the World Economic Forum.<sup>3</sup> In the global ranking, the United States is in 2nd place in the world, while Mexico ranks 48th. But the enormous disparities are more evident in the specific pillars that make up the index. In the "Institutions" pillar, Mexico ranks 98 out of 141, while the United States ranks 20. In the sub-index that makes up this pillar, called "Incidence of Corruption," Mexico ranks 116 out of 141, while the United States ranks 22. In the sub-index "Judicial Independence," Mexico is ranked 103, while the United States is 25.

Finally, there is Transparency International's famous Corruption Perception Index,<sup>4</sup> in which the United States is ranked 23 out of 180 countries with a score of 69, while Mexico is ranked 130 with 29 points.

Thus, the distinctions between both countries in culture of legality and the experience of an effective rule of law are abysmal. Therefore, the first great task of the new U.S. government is to create the conditions and tools necessary to pull its business partner and neighbor to a more complete, deep, and sustainable culture of legality, which does not depend on the will of the ruler in turn, and that becomes a common demand of society. However, this is only possible if the U.S. government permanently shows its discipline and congruence around a culture of service to the public, accountability, and adherence to the rule of law.

## A Common Agenda

A new free trade agreement between the two countries will do little to revive both economies if investors see corruption as the driving force. This is because corruption generates enormous levels of uncertainty: it is a game without clear rules, which cannot be enforced, which depends on uncertain and changing factors, and which generates enormous risks for those who decide to get involved. Corruption, by its very nature, generates privileged groups that alter fair competition in different markets: those with influence win, not those with the best product or service to offer. Investment flows and grows when investors trust that the rules of the game are the same for everyone, that there are autonomous authorities that apply them fairly, that those who violate them are punished, and that this is not modified by the simple political alternation in power.

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President López Obrador made his entire electoral campaign around a single issue: the fight against corruption. It was an issue that crossed every speech and public policy promise. In particular, the end of impunity with respect to a group he called "the mafia of power." During the first two years of his government, concrete results in the fight against corruption were practically non-existent. There is not a single case of high-level corruption that has obtained a conviction, a single network of corruption dismantled, or a single peso of deviated budget that has been recovered. And yet, in addition to the unpunished corruption scandals of the previous government, there are already multiple corruption scandals of this government, involving people close to the president and even relatives of the first circle. The institutions in charge of investigating and sanctioning corruption have had their budgets cut and have been attacked by the president and his party. The National Anti-Corruption System established in the Constitution, which was created by the push of a large social movement, is under political attack.



On the side of the new U.S. government, the document named "The Biden Plan to Guarantee Government Works for the People"<sup>5</sup> outlines five strategic lines:

- I. Reduce the corrupting influence of money in politics
- II. Return integrity to the department of Justice and other executive branch decision making
- III. Restore ethics in Government
- IV. Rein in Executive Branch financial conflicts of interest
- V. Hold the lobbied and lobbyists to a higher standard of accountability

This was the focus of Joseph Biden's campaign: to regain the people's trust in their government. It is recognized by this plan that there is enormous damage to the prestige of public service and government action, and therefore the need to generate concrete actions that show real conviction in the fight against corruption.

**Because of the urgency of the issue, the anti-corruption agenda of both governments should focus on five common pillars:**

- 1) Attacking corruption, from the electoral processes, to the individual exercise of power, in all its forms;
- 2) Creating a true culture of integrity in public service;
- 3) Strengthening the independence and effectiveness of the institutions involved in the fight against corruption;
- 4) Establishing effective channels for collaboration and coordination between both countries, to achieve concrete results; and,
- 5) Establishing effective policies to involve organized civil society, academia, and the private sector in the fight against corruption, as long-term allies.

## **Corruption Affects Both Countries; They Both Need to be Part of the Solution**

Article 27.2, entitled "Scope," would seem obvious and even unnecessary, since both countries are major players in the various international forums where trade, business, security, rule of law, and corruption are discussed. Both countries use these forums to make public their commitment to the principles of democratic, transparent, law-abiding government that fights corruption and punishes those who commit corrupt acts. That is why this section would seem to be a simple formality. But it is not. On the side of the United States, it has a global reputation for renouncing mandatory international conventions, with the argument of the sovereignty and sufficiency of its legal system. On the other hand, while Mexico is internationally known for its formal adherence to international norms and principles, its inability to make them effective in reality is also infamous. Thus, the section of the agreement that confirms its adherence to the United Nations Convention against Corruption and the OECD's Convention against International Bribery is critically important. It not only creates an obligation to adapt both legal systems to these conventions in institutional, substantive, and procedural terms, but to do everything necessary to make them effective in reality:



Article 27.2:

2. The Parties affirm their resolve to prevent and combat bribery and corruption in international trade and investment. Recognizing 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 OECD Convention, with its Annex; the IACAC; and the UNCAC.

3. The Parties reiterate their support for the principles contained in documents developed by APEC and G-20 anticorruption fora aimed at preventing and combating corruption and endorsed by leaders or relevant ministers, including the G20 High Level Principles on Organizing against Corruption; G20 High Level Principles on Corruption and Growth; G20 Guiding Principles on Enforcement of the Foreign Bribery Offence (2013); G20 Guiding Principles to Combat Solicitation; G20 High Level Principles on the Liability of Legal Persons for Corruption; APEC Conduct Principles for Public Officials; and the APEC Principles on the Prevention of Bribery and Enforcement of Anti-Bribery Laws.

4. The Parties also reiterate their support for, and encourage awareness among their private sectors of, available anticorruption compliance guidance including the APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector; APEC General Elements of Effective Voluntary Corporate Compliance Programs; and G20 High Level Principles on Private Sector Transparency and Integrity.

The opportunity for both governments in this area is to comprehensively review their respective legislations in order to definitively adapt them to the Conventions, principles, and international agreements. Afterwards, they will have to create or redesign the appropriate public institutions to enforce these laws, to be able to make concrete progress in the fight against corruption.

## Beyond Bribery

Bribery has become a misnomer for the concept of corruption, and various instruments with an international scope (such as the FCPA) focus on this form of corruption and leave aside many others that also affect commerce, business, the economy, and relations between countries. Article 27.3.2 is very innovative in this sense because it finally recognizes the diversion of resources and embezzlement by a public servant as offenses that affect business, which must be investigated and duly sanctioned:

*27.3.2. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as a criminal offense under its law, in matters that affect international trade or investment, when committed intentionally, by a person subject to its jurisdiction, the embezzlement, misappropriation or another diversion<sup>3</sup> by a public official for their benefit or for the benefit of another person or entity, of property, public or private funds or securities, or any other thing of value entrusted to the public official by virtue of their position.*

On the other hand, although bribery was already a widely studied and investigated criminal offense, the first part of 27.3 also has important innovations around this type of crime. I highlight three very transcendent ones.

First is the recognition that bribery is a behavior that has at least two actors: one who offers and one who accepts, or one who demands and one who agrees. A private actor and a public one.



The second innovation is that it is no longer simply a matter of the exchange of money or economic benefits, but it is typified with a broader concept such as "undue advantage," which makes it easier to investigate and punish bribery.

And third, the inclusion of the concepts of "aiding and abetting" and "conspiracy" as legal concepts that make it possible to include in the investigation and punishment those who are part of the corruption network as facilitators, accomplices, or leaders.

*Article 27.3 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).*

With regard to this section of the Treaty, both governments now have an incentive to generate new strategies for the prevention, investigation, and punishment of the different types of corruption that were not in the sights of national authorities, and legal instruments with international scope.

## **Integrity in Public Service**

Finally, we have a formal and common referent regarding the principles that are intended to inspire public service in both countries. Three words stand out in Article 27.4: Integrity, Honesty, and Responsibility. These are the basic principles that both countries will henceforth presume to be the foundation of the exercise of public service. But they are not simply good wishes or generic concepts because they are grounded in concrete obligations and instruments. I would like to highlight four that I consider the most relevant.

The first is the proper selection and training of public servants as an essential measure to prevent corruption. In other words, for both countries, the process of incorporating good public servants into the government, and their proper training, is essential to ensure that they are, and they remain, trustworthy.

The second is the obligation to make the behavior of public servants transparent in the performance of their duties, and, as an effective tool for this, the obligation of public servants to declare their assets and interests.



The third is the obligation to have adequate measures to identify and properly manage possible conflicts of interest of public servants.

And fourth, the obligation of the treaty's member countries to have effective procedures for removing public servants who commit acts recognized as corruption in the treaty.

*Article 27.4:*

*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, in accordance with the fundamental principles of its legal system, adopt or maintain:*

*(a) measures to provide adequate procedures for the selection and training of individuals for public positions considered by the Party to be especially vulnerable to corruption;*

*(b) measures to promote transparency in the behavior 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 public officials, and other public officials as considered appropriate by the Party, 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;*

*(...)*

*3. Each Party shall, to the extent consistent with the fundamental principles of its legal system, establish procedures through which a public official accused of an offense described in Article 27.3.1 (Measures to Combat Corruption) may, as considered appropriate by that Party, be removed, suspended, or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*

The challenge and opportunity here is to create a true culture of service to the public, based on responsibility and integrity, and with this, gradually regain the public's confidence in government activity.

## **Civil Society as an Ally in the Fight Against Corruption**

Perhaps the most innovative aspect of Article 27 is numeral 5, which recognizes the importance of partnerships with organized civil society and the private sector in the fight against corruption. Not only are they recognized as actors in the fight against corruption, but the State's Parties to the Treaty are also obliged to promote the active participation of civil society and the private sector in preventing and combating corruption. Thus, this section provides an opening to design a new relationship between the State and society, to contain the common enemy of corruption with impunity:

*Article 27.5: 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 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.*



The North American partners have an opportunity here to generate a new alliance with their populations to produce a collaborative relationship between the public and private sectors that will be beneficial for everyone.

## The Missing Piece: The Integrity of the Companies

Corruption does not only arise and manifest itself on the side of the government. Throughout the different sections of the treaty, we find wide recognition of the active participation of the private sector in the problem. And so, the importance of their participation in the solution is recognized. The text could have been stronger, broader, and more demanding. Perhaps because of the enormous differences that exist between Canada and the United States, with respect to Mexico, in the evolution of the concept of compliance, only this recognition of the importance of these systems was left. However, the text leaves a wide margin to interpretation in favor of the development and importance of these measures, and to turn it into a new mandatory business standard among the treaty's member countries.

*27.5. 4. The Parties recognize the benefits of internal compliance programs in enterprises to combat corruption. In this regard, each Party shall encourage enterprises, taking into account their size, legal structure, and the sectors in which they operate, to establish compliance programs for the purpose of preventing and detecting offenses described in Article 27.3.1 or 27.3.6 (Measures to Combat Corruption).*

The great opportunity that this section generates for both governments is to turn compliance into a true tool for fighting corruption, in order to generate a business culture based on responsibility and integrity, which engenders confidence in the relationship between the public and private sectors, and also in the relationship of both with the public. Impressive work undertaken by the World Economic Forum in this regard should be studied to seek practical applications for North American businesses.

## No More Impunity and Inefficiency

Paragraph 6 is a strong call for the effectiveness and proper implementation of measures to combat corruption. Having good laws is no longer enough. It makes a formal call for not failing to enforce laws effectively, and even offers cooperation between countries to improve effectiveness:

*Article 27.6: Application and Enforcement of Anticorruption Laws 1. In accordance with the fundamental principles of its legal system, no Party shall fail to effectively enforce its laws or other measures adopted or maintained to comply with Article 27.3 (Measures to Combat Corruption) through a sustained or recurring course of action or inaction, after the date of entry into force of this Agreement as an encouragement for trade and investment.<sup>8</sup> 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 anticorruption 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 offenses described in Article 27.3 (Measures to Combat Corruption).*



The challenge that this section presents to both governments is to put efficiency above discourse, or to put it another way, results above good intentions. For years, the subject of corruption has been discussed and analyzed in Mexico. Laws and institutions have been reformed and created, and it is time to put them to work to dismantle corruption networks, recover assets, and generate real prevention mechanisms.

## Corruption as an Epidemic that Transcends Borders

A major principle of Article 27 of the Treaty is the recognition that corruption is not a simple national disease, but rather a complex global epidemic that requires collaboration and coordination among different nations and their specialized authorities.

*Article 27.9: Cooperation 1. The Parties recognize the importance of cooperation, coordination, and exchange of information between their respective anticorruption law enforcement agencies in order to foster effective measures to prevent, detect, and deter bribery and corruption. 2. The Parties shall endeavor to strengthen cooperation and coordination among their respective anticorruption law enforcement agencies.*

***"Giving concrete results in the fight against corruption, through collaboration and coordination, can generate enormous political benefits for both administrations."***

The North American governments must build a real relationship of productive collaboration, which generates more than just bilateral meetings where generic agreements are expressed, with little practical sense. Giving concrete results in the fight against corruption, through collaboration and coordination, can generate enormous political benefits for both administrations.

## Final Words

Every four years in the United States, and every six years in Mexico, hope is reborn to make things new, different, and better. Those of us who are part of organized civil society find energy again and again to propose a better way of exercising power that is more just, with more integrity, and is more democratic. Through unrelenting insistence, we have achieved enormous changes in the institutions of both countries. We are far from satisfied, and we will continue to be as critical as necessary, but we will always be ready to generate proposals and alternatives.



## Endnotes

- [1] USMCA [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/27\\_Anticorruption.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/27_Anticorruption.pdf)
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