

Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume II: Global Investigations
around the World

Fourth Edition

Editors

Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Part I

Regional Overviews

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North America Overview

John D Buretta and Allison Eisen¹

In late 2018, Canada, Mexico and the United States entered into the aptly named United States-Mexico-Canada Agreement. This Agreement, which imposes obligations on signatory countries to enforce anti-corruption laws, signalled the beginning of a renewed effort to coordinate prosecution efforts across North American borders. The winter of 2018 also saw a convergence at the doorsteps of the United States District Court for the Eastern District of New York of investigative matters spanning the United States, Canada and Mexico. As federal prosecutors were preparing for trial against the famed Mexican drug cartel leader Joaquín Archivaldo Guzmán Loera, also known as El Chapo, other prosecutors in the District were preparing for an extradition battle over Meng Wanzhou, a Chinese national and Huawei executive arrested in Canada on a US federal warrant seeking her extradition to the United States on charges of bank fraud, theft of trade secrets and sanctions evasion. These two matters, among others discussed below, reflect the expanding multilateral nature of enforcement actions in North America, and shed further light on authorities' ability to gather evidence, seek extradition and otherwise coordinate with authorities around the world. A nuanced understanding of the progress, and playbook, on North American corporate enforcement continues to be critical.

The United States-Mexico-Canada Agreement

In late 2018, each country in North America agreed to abide by the United States-Mexico-Canada Agreement, a tripartite treaty that contains an entire chapter on anti-corruption enforcement and compliance.² The treaty imposes a range of obligations on signatory countries, effectively to enforce anti-corruption laws and to enact legislation in support of

1 John D Buretta is a partner and Allison Eisen is a member of the litigation department at Cravath, Swaine & Moore LLP.

2 Kara Brockmeyer, Andrew M Levine, Marisa R Taney and Victoria L Recalde, 'NAFTA Replacement Adds Anti-Corruption Provisions', *FCPA Update*, Vol. 10, No. 4 (November 2018).

anti-corruption efforts.³ The agreement obliges each country to enforce its anti-corruption laws adequately through active prosecution, and provides clear, uniform definitions for terms, such as illicit enrichment and embezzlement.⁴ Importantly, the treaty also requires co-operation between the United States, Mexico and Canada, both in sharing resources and experience and in the exchange of information to prevent, detect and deter bribery and corruption.⁵ The agreement further extends to promote integrity, honesty and responsibility among public officials of the signatory nations.

Co-operation between the United States and Mexico

Recent cross-border interactions

Conviction of Joaquín Archivaldo Guzmán Loera

In perhaps the most high-profile conviction of a Mexican citizen by the United States in recent memory, in February 2019, Joaquín Archivaldo Guzmán Loera (known as El Chapo) was convicted by a federal jury in Brooklyn of being a principal leader of a continuing criminal enterprise – the Mexican organised crime syndicate known as the *Sinaloa* cartel – on charges that included 26 drug-related violations and one of conspiracy to commit murder.⁶ The case of El Chapo was investigated by the US Drug Enforcement Agency (DEA), Immigration and Customs Enforcement and the Federal Bureau of Investigation, working in close consultation with their counterpart authorities in Mexico.⁷

Building the case against El Chapo necessarily required extensive co-operation between authorities in the United States and Mexico. The *Sinaloa* cartel was built on border crossings – cartel members smuggled narcotics from Mexico to wholesale distributors in the United States, then transported billions of illicit dollars back across the border to the Sinaloa area of Mexico – so marshalling evidence required monitoring activity and gathering evidence that spanned a significant geographical range.⁸ Throughout the 2000s, officials from both countries worked to build a case against El Chapo, from money laundering to murder charges, and worked for years to pinpoint his exact location.⁹ On 22 February 2014, Mexican Marines, with co-operation from US government agencies, arrested El Chapo in Mazatlán, Mexico.¹⁰

Following the second of El Chapo's two escapes from prison, Mexican officials, sharing intelligence with their US counterparts, together engaged in a manhunt and recaptured

3 United States-Mexico-Canada Agreement, Article 27.

4 Id.

5 Id.

6 US Department of Justice [DOJ] press release (12 February 2019), 'Joaquín "El Chapo" Guzmán, Sinaloa Cartel Leader, Convicted of Running a Continuing Criminal Enterprise and Other Drug-Related Charges' <<https://www.justice.gov/usao-edny/pr/joaquin-el-chapo-guzman-sinaloa-cartel-leader-convicted-running-continuing-criminal>>.

7 Id.

8 Id.

9 Noah Hurowitz, 'Inside the Trial of El Chapo', *Rolling Stone* (4 November 2018) <<https://www.rollingstone.com/culture/culture-features/el-chapo-trial-guzman-brooklyn-court-sinaloa-cartel-751035/>>.

10 Randal C Archibold and Ginger Thompson, 'El Chapo, Most-Wanted Drug Lord, Is Captured in Mexico', *The New York Times* (22 February 2014) <<https://www.nytimes.com/2014/02/23/world/americas/joaquin-guzman-loera-sinaloa-drug-cartel-leader-is-captured-in-mexico.html>>.

him.¹¹ Despite a history of publicly stating that El Chapo would serve out his sentence in Mexico, the Mexican government subsequently agreed to extradite the cartel leader to the United States to face charges in the Eastern District of New York.¹² The extradition process was not without conflict, however. Mexico outlawed capital punishment in 1975 and has remained steadfast in its refusal to extradite suspects who face the death penalty in the United States.¹³ US officials agreed to take the death penalty off the table.¹⁴

Following his extradition on 19 January 2017, El Chapo was due to stand trial in the United States, which would prove to be another testament to the advanced co-operation between Mexican and US authorities.¹⁵ The evidence presented at El Chapo's trial included testimony from 14 co-operating witnesses, narcotics seizures, weapons, ledgers, text messages, videos, photographs and intercepted phone recordings.¹⁶ The co-operation of witnesses was crucial to building the case against El Chapo. This was particularly true of Vicente Zambada-Niebla, a high-ranking member of the cartel and the son of El Chapo's cartel partner, who was extradited from Mexico to the United States and provided critical testimony about the inner workings of the criminal enterprise.¹⁷

Following El Chapo's conviction, DEA Acting Administrator Uttam Dhillon stated that the 'success of [the] case is a testament to the strength of [the United States'] relationship with Mexican counterparts'.¹⁸ The strength of this relationship was tested at each stage of the enforcement action, from building the case until conviction at trial.

Past cross-border investigations with Mexico

Although El Chapo's trial and conviction may present the most high-profile example, sustained co-operation between US and Mexican authorities has been evident in corporate investigations during the past few years, and may well expand as Mexico enhances its enforcement tools and efforts.

In December 2016, the US Department of Justice (DOJ) secured guilty pleas from six individuals – four businesspersons employed by Hunt Pan Am, a Houston-based company that provides aircraft maintenance and related services, and two former Mexican government

11 Azam Ahmed, 'El Chapo Case Draws Mexico Closer to U.S.', *The New York Times* (11 January 2016) <<https://www.nytimes.com/2016/01/12/world/americas/el-chapo-case-draws-mexico-closer-to-us.html?module=inline>>.

12 Azam Ahmed, 'El Chapo. Mexican Drug Kingpin, Is Extradited to U.S.', *The New York Times* (19 January 2017) <<https://www.nytimes.com/2017/01/19/world/el-chapo-extradited-mexico.html>>.

13 Emily Edmonds-Poli, David A Shirk, 'Extradition as a Tool for International Cooperation: Lessons from the U.S.-Mexico Relationship', *Maryland Journal of International Law*, Volume 33, Issue 1, 215, 226 (2018).

14 Id.

15 Azam Ahmed, 'El Chapo. Mexican Drug Kingpin, Is Extradited to U.S.' – see footnote 12.

16 US DOJ press release, 'Joaquín "El Chapo" Guzmán, Sinaloa Cartel Leader, Convicted of Running a Continuing Criminal Enterprise and Other Drug-Related Charges' – see footnote 6.

17 Jason Meisner, 'Witness Against "El Chapo" Given 15 Years in Prison in Chicago for Key Role in Trafficking Cocaine, Heroin for Cartel', *Chicago Tribune* (30 May 2019) <<https://www.chicagotribune.com/news/breaking/ct-met-el-chapo-witness-mexican-cartel-sentencing-20190529-story.htm>>.

18 US DOJ press release, 'Joaquín "El Chapo" Guzmán, Sinaloa Cartel Leader, Convicted of Running a Continuing Criminal Enterprise and Other Drug-Related Charges' – see footnote 6.

officials – in a cross-border bribery scheme.¹⁹ The criminal proceeding, which was investigated by US Immigration and Customs Enforcement and the Internal Revenue Service, involved corrupt payments paid to Mexican foreign officials who had responsibility for maintaining Mexico's aircraft, in violation of the US Foreign Corrupt Practices Act. In exchange for the payments (which were made to and from bank accounts in Texas, owned by Hunt Pan Am and the government officials) the government officials awarded contracts for aircraft maintenance and parts to Hunt Pan Am.²⁰

The US Securities and Exchange Commission (SEC) has likewise pursued cross-border investigations with Mexico, including in a matter using satellite imagery of land in Mexico as evidence against a Mexican company and its employees. In March 2017, the SEC announced that Mexico's largest homebuilder, Desarrolladora Homex SAB de CV (Homex), 'had agreed to settle charges that it reported fake sales of more than 100,000 homes to boost revenues in its financial statements during a three-year period'.²¹ Later that year, the SEC announced related charges against four of the company's former executives, each of whom was a Mexican citizen residing in Mexico.²²

The SEC alleged that Homex improperly recognised billions of dollars of revenue by 'systematically and fraudulently report[ing] revenue from the sale of tens of thousands of homes annually that it had neither built nor sold'.²³ The SEC's complaint contained satellite images of land in the Mexican state of Guanajuato showing 'housing units which Homex claimed to have built or sold, and for which it had recorded sales and reported revenue', but had clearly not been built.²⁴ Melissa Hodgman, Associate Director of the SEC's Enforcement Division, noted that the SEC 'used high-resolution satellite imagery and other innovative investigative techniques to unearth that tens of thousands of purportedly built-and-sold homes were, in fact, nothing but bare soil'.²⁵

Although Homex is based in Mexico, the SEC claimed jurisdiction because the company's stock had been listed on the New York Stock Exchange.²⁶ The SEC's announcement of the settlement noted that it 'appreciates the assistance of the Mexican Comisión Nacional Bancaria y de Valores',²⁷ a regulatory agency that supervises Mexican financial entities. The

19 Foreign Corrupt Practices Clearinghouse, Stanford Law School <<http://fcpa.stanford.edu/enforcement-action.html?id=643>>.

20 US DOJ, Justice News, 'Four Businessmen and Two Foreign Officials Plead Guilty in Connection with Bribes Paid to Mexican Aviation Officials' (27 December 2016) <<https://www.justice.gov/opa/pr/four-businessmen-and-two-foreign-officials-plead-guilty-connection-bribes-paid-mexican>>.

21 US Securities and Exchange Commission [SEC], 'SEC Charges Mexico-Based Homebuilder in \$3.3 Billion Accounting Fraud' (3 March 2017) <<https://www.sec.gov/news/pressrelease/2017-60.htm>>.

22 Complaint, *Securities & Exchange Commission v. Gerardo de Nicolas Gutierrez*, Case No. 17 CV 2086 (S. D. Cal. 2017).

23 Complaint, *Securities & Exchange Commission v. Desarrolladora Homex S.A.B. DE C.V.*, Case No. 17 CV 432 (S. D. Cal. 2017).

24 *Id.*

25 SEC press release, 'SEC Charges Mexico-Based Homebuilder in \$3.3 Billion Accounting Fraud' (3 March 2017) <<https://www.sec.gov/news/pressrelease/2017-60.html>>.

26 Matt Egan, 'Mexican company faked the building of 100,000 homes: SEC', *CNN Business* (3 March 2017) <<https://money.cnn.com/2017/03/03/investing/mexico-homex-fraud-fake-home-sales/index.html>>.

27 SEC press release, 'SEC Charges Mexico-Based Homebuilder in \$3.3 Billion Accounting Fraud' (3 March 2017) <<https://www.sec.gov/news/pressrelease/2017-60.html>>.

Mexican government announced that it carried out the investigation jointly with the SEC and imposed its own penalties against Homex and some of its officials in addition to the penalties imposed by the SEC.²⁸ Mexico's National Banking and Securities Commission fined the company US\$1.2 million.²⁹

Mexico's enhanced corruption enforcement

During the past year, Mexico has made a concerted effort to enforce its existing criminal code to combat corruption. President López Obrador, who was elected in 2018, ran on a campaign of taking on the 'mafias of power' and shifting away from what has traditionally been viewed as relatively lax enforcement of Mexico's corruption laws.³⁰ Following López Obrador's election, the Senate enacted a new law that created a Chief Prosecutorial Office and appointed Alejandro Gertz Manero, a former attorney general of Mexico, to fill the role of chief prosecutor.³¹ Gertz Manero announced in May 2019 that his office would begin building criminal corruption cases that had sat dormant in the previous administration.³² At the time of López Obrador's election, more than 300,000 investigations – a disproportionate number of which related to bribery and corruption of elected officials – had been backlogged.³³

Thus far, both López Obrador and Gertz Manero have made progress. In June 2019, the López Obrador administration froze assets and issued arrest warrants in connection with the sale of a fertiliser plant from a state-owned Mexican oil and gas company (Pemex) to one of Mexico's biggest multinational companies (AHMSA).³⁴ Efforts like these may well expand as further progress is made. Additionally, 18 anti-corruption magistrates are to be appointed to the Federal Tribunal for Administrative Justice, which has exclusive jurisdiction over grave administrative offences such as embezzlement and money laundering.³⁵ Further implementation of Mexico's National Anti-Corruption System – a framework for a tougher and more comprehensive approach to battling corruption – is also planned.³⁶

28 Sanctions to the Homex issuer, Government of Mexico <<https://www.gob.mx/cnbv/prensa/sanciones-a-la-emisora-homex?idiom=es>>.

29 Richard Marosi, 'Mexico's Homex faces accusations of massive fraud from the SEC, but the case has stalled', *Los Angeles Times* (2 March 2018) <<https://www.latimes.com/world/mexico-americas/la-me-homex-sec-20180302-story.html>>.

30 Martha Mallory, 'Mexico joins the anti-bribery enforcement bandwagon', *The FCPA Blog* (12 June 2019) <<https://www.fcpcbog.com/blog/2019/6/13/mexico-joins-the-anti-bribery-enforcement-bandwagon.html>>.

31 Luis Dantón Martínez Corres, 'Mexico enforcement agencies eye "low hanging fruit"', *The FCPA Blog* (5 March 2019) <<https://www.fcpcbog.com/blog/2019/3/5/mexico-enforcement-agencies-eye-low-hanging-fruit.html>>.

32 Brandt Leibe et al., H1 2019 Latin American Enforcement Observations, King & Spalding (8 August 2019) <<https://www.kslaw.com/blog-posts/h1-2019-latin-america-enforcement-observations-2>>.

33 '300,000 incomplete investigations, anarchy and extravagant spending in AGO', *Mexico News Daily* (7 May 2019) <<https://mexiconewsdaily.com/news/300000-incomplete-investigations/>>.

34 Martha Mallory, 'Mexico joins the anti-bribery enforcement bandwagon' – see footnote 30.

35 Gina Hinojosa and Maureen Meyer, WOLA Report: The Future of Mexico's National Anti-Corruption System (7 August 2019) <<https://www.wola.org/analysis/report-anticorruption-lopez-obrador-mexico/>>.

36 Id.

Expansion of Mexico's anti-corruption laws

In August 2019, the Mexican government passed the National Law for Dominion Extinction, which will allow the federal government to transfer ownership of any type of property derived, or presumptively derived, from illegal activities without indemnity or payment to the owner.³⁷ The country simultaneously expanded the definition of the type of conduct that could trigger asset forfeiture to include corruption, both by corporate entities and public servants as private persons.³⁸

In December 2018, the federal-level Citizen Participation Committee presented a proposal for a National Anti-Corruption Policy, with 60 priority strategies for combating corruption through investigations, awareness, civil involvement and access to public service.³⁹ The Committee has also advocated for whistleblower protections and greater autonomy for institutions involved in identifying official misconduct.⁴⁰

With the renewed energy and focus on anti-corruption enforcement in Mexico, it is likely that corporations operating in Mexico will begin to face greater scrutiny from Mexican officials. If the current trajectory holds, corporations should expect Mexico to join the United States and Canada as a significant player in corporate anti-corruption efforts.

Co-operation between the United States and Canada

Recent cross-border interactions

Extradition of Meng Wanzhou

A matter that is currently unfolding – the arrest by Canadian authorities of a prominent Chinese national at the behest of the United States – has garnered widespread media attention. Meng Wanzhou, the chief financial officer, deputy chairwoman of the board of Chinese multinational technology company Huawei and daughter of Huawei's chief executive officer and founder, was arrested on 1 December 2018, at Vancouver International Airport, at the request of the DOJ on multiple federal criminal charges, such as bank fraud, trade secrets theft and sanctions evasion.⁴¹ Meng is currently awaiting a hearing, scheduled for January 2020, on her possible extradition from Canada to the United States.⁴²

Meng and her attorneys have vigorously disputed the charges, and called her arrest politically motivated. Lawyers for Meng also announced that they were suing the Royal Canadian Mounted Police (RCMP), the Canadian Border Services Agency and the Canadian federal

37 Carlos Leo Varelas, 'Compliance Alert: Mexican government grants itself right to seize and sell "unexplained" corporate assets', *The FCPA Blog* (16 August 2019) <<https://www.fcpablog.com/blog/2019/8/16/compliance-alert-mexican-government-grants-itself-right-to-s.html>>.

38 Luis Dantón Martínez and Juan José Paullada, 'Practice Alert: Mexico expands asset forfeiture to anti-corruption enforcement', *The FCPA Blog* (16 July 2019) <<https://www.fcpablog.com/blog/2019/7/16/practice-alert-mexico-expands-asset-forfeiture-to-anti-corr.html>>.

39 Gina Hinojosa and Maureen Meyer, WOLA Report – see footnote 35.

40 Andrew Levine, et al., 'Anti-Corruption Enforcement in Mexico: A Possible Turning Point?', Program on Corporate Compliance and Enforcement at New York University School of Law <https://wp.nyu.edu/compliance_enforcement/2019/08/12/anti-corruption-enforcement-in-mexico-a-possible-turning-point/>.

41 Julia Horowitz, 'Huawei CFO Meng Wanzhou arrested in Canada, faces extradition to United States', *CNN Business* (6 December 2018) <<https://www.cnn.com/2018/12/05/tech/huawei-cfo-arrested-canada/index.html>>.

42 Jill Disis, 'Huawei executive Meng Wanzhou claims US and Canada unlawfully detained her', *CNN Business* (21 August 2019) <<https://www.cnn.com/2019/08/21/business/huawei-meng-wanzhou-extradition/index.html>>.

government for breaching Meng's constitutional rights during her detention but prior to her arrest.⁴³

Canada has faced significant backlash from China as a result of Meng's arrest, including the detention of Michael Kovrig, a former Canadian diplomat, and Michael Spavor, a Canadian businessman, under suspicions of spying and stealing state secrets; Canadian shipments to China of goods worth billions of dollars have also been blocked.⁴⁴ In addition, following the arrest of Meng, China quickly retried two Canadian citizens, who had been sentenced to jail for drugs smuggling, and sentenced both to death.

Kinross gold FCPA enforcement action

Co-operation between the United States and Canada on anti-corruption matters also continues. In March 2018, for example, the SEC announced a settled action against the Canadian corporation Kinross Gold Corporation for US Foreign Corrupt Practices Act (FCPA) books and records, and internal controls violations 'arising from the company's repeated failure to implement adequate accounting controls of two African subsidiaries'.⁴⁵ Kinross Gold had acquired a number of African subsidiaries in 2010 as part of a US\$7.1 billion transaction and, according to the SEC, understood at the time that those subsidiaries 'lacked anti-corruption compliance programs and internal accounting controls'. The SEC alleged that, despite this awareness, Kinross Gold failed to implement adequate controls for more than three years, even though multiple internal audits had alerted the company to the control deficiencies.⁴⁶ Moreover, the SEC alleged that even after Kinross Gold implemented various internal controls, it failed to maintain them.⁴⁷ Without admitting or denying the findings, Kinross agreed to a cease-and-desist order, a penalty of US\$950,000 and undertakings to report on its remedial steps for a period of one year.⁴⁸ Kinross Gold stated that it received a declination from the DOJ.⁴⁹

Conviction of Robert Barra under the Corruption of Foreign Practices Act

Canada has recently enhanced enforcement of its own evolving anti-corruption laws. Prosecutions based on Canada's Corruption of Foreign Public Officials Act (CFPOA), the equivalent of the US FCPA, had been rare until recently. In 1998, 2004 and 2011, Canada was criticised by the Organization for Economic Co-operation and Development (OECD)

43 Dan Bilefsky, 'Meng Wanzhou's Cushy Bail Is Raising Hackles in Canada', *The New York Times* (4 March 2019) <<https://www.nytimes.com/2019/03/04/world/canada/huawei-canada-meng-wanzhou.html>>.

44 'Meng Wanzhou: Huawei CFO seeks halt to extradition after Trump comments', *The Guardian* (8 May 2019), <<https://www.theguardian.com/technology/2019/may/09/meng-wanzhou-huawei-cfo-seeks-halt-to-extradition-after-trump-comments>>.

45 SEC press release, 'Kinross Gold Charged With FCPA Violations' (26 March 2018) <<https://www.sec.gov/news/press-release/2018-47>>.

46 Id.

47 Id.

48 Id.

49 Richard L Cassin, 'Canadian gold miner resolves FCPA charges', *The FCPA Blog* (26 March 2018) <<https://www.fcpcbog.com/blog/2018/3/26/canadian-gold-miner-resolves-fcpa-charges.html>>.

for not meeting its OECD anti-corruption obligations.⁵⁰ In 2013, the CFPOA was amended to add a books and records offence, expand jurisdiction based on nationality, and increase the maximum penalty for convicted individuals.⁵¹

In January 2019, however, following only the second trial under the CFPOA, Robert Barra, a US citizen, was convicted in the Ontario Superior Court of Justice of agreeing to bribe a foreign public official.⁵² The convictions in *R v. Barra and Govindia* arose from the same facts as a 2014 case, *R v. Karigar*, the first case in which an individual – Nazir Karigar, a Canadian – was sentenced to imprisonment for an offence under the CFPOA (he received three years in jail).⁵³ Barra, a former executive of the biometrics company Cryptometrics US, was charged in a conspiracy involving bribing various Air India employees, and a number of Indian government officials, to ensure that Cryptometrics was awarded a contract with Air India to instal facial recognition software at airports.⁵⁴ The complaint alleged that Barra ‘was a co-Chief Executive Officer of Cryptometrics US, which he controlled’ and that ‘Cryptometrics US provided the required funding for Cryptometrics Canada’s operations’.⁵⁵

Shailesh Govindia, an Indian citizen, was also convicted. Govindia argued that he was not subject to the jurisdiction of the Canadian courts because, at the time of his conduct, he was unaware that the Canadian laws would apply to him. The court rejected this argument, finding ‘that a Canadian court did have jurisdiction and that there was a substantial connection to Canada’ and that Govindia’s mistake of law was not a valid argument.⁵⁶

That Canada used the CFPOA to charge a US citizen who was the executive of a US company for offences that occurred at least in part in New York may represent the beginning of a new era for Canadian enforcement of its bribery laws. The DOJ had long been aware of the allegations regarding Cryptometrics – as early as 2007, ‘someone called Buddy sent an email to the fraud section of the US DOJ advising that he had information about US citizens paying bribes to foreign officers’.⁵⁷ The DOJ assisted the RCMP in the investigative efforts that led to Govindia’s conviction in Canada.⁵⁸

50 Global Affairs Canada, ‘Bribery and corruption’ <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/corruption.aspx?lang=eng>>.

51 Id.

52 Lawrence E Ritchie, et al., ‘Canadian prosecutors secure two more convictions in foreign corruption case’, *Osler* (24 April 2019) <<https://www.osler.com/en/blogs/risk/april-2019/canadian-prosecutors-secure-two-more-convictions-in-foreign-corruption-cas>>.

53 ‘*R v. Barra*: A timely but qualified success for Canada’s corruption of foreign public officials regime’, *Dentons* (8 March 2019) <<https://www.dentons.com/en/insights/articles/2019/march/8/r-v-barra-a-timely-but-qualified-success-for-canadas-corruption-of-foreign-public-officials-regime>>.

54 *R v. Barra and Govindia*, 2018 ONSC 57.

55 Id.

56 Govindia was aware, throughout the negotiations, that his meeting was with a Canadian company. *R v. Barra and Govindia*, 2018 ONSC 57.

57 Id.

58 John Bray, ‘Paying Bribes: How Not to Win Business’, *Forbes* (27 February 2014) <<https://www.forbes.com/sites/riskmap/2014/02/27/paying-bribes-how-not-to-win-business/#614f70157e04>>.

Trends in cross-border investigations

Corporate frauds

On 19 September 2018, Canada's Criminal Code was amended to establish a Remediation Agreement (the equivalent of a deferred prosecution agreement in the United States), which may signal an increased focus on enforcement of the CFPOA with regard to corporations. This new tool will allow voluntary agreements between prosecutors and organisations accused of committing crimes, which the Canadian government hopes will provide an incentive for companies to rectify their wrongdoing, while avoiding some of the negative consequences of a criminal conviction.⁵⁹ Canada's Global Affairs department has described the new tool as 'available for use by prosecutorial authorities – at their discretion, in the public interest and in appropriate circumstances'.⁶⁰ Accordingly, Canada's new Remediation Agreement may allow the country to resolve its investigation regarding embattled engineering giant, SNC-Lavalin, which has been involved in an ongoing foreign bribery investigation.⁶¹

Competition protection enforcement in the digital economy

The co-operation between the United States and Canada is not limited to criminal actions and securities enforcement. US–Canadian co-operation with regard to antitrust and consumer protection matters has evolved into a robust bilateral enforcement regime. Following the August 1995 Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (the Agreement), the two nations have closely coordinated on common consumer protection matters.⁶² The Agreement sets forth seven obligations for each nation:

- notification about enforcement activities in the other's interests;
- co-operation in enforcement and information exchange;
- coordination in enforcement initiatives;
- avoidance of conflicts;
- consultations to resolve concerns regarding the agreement;
- maintenance of confidentiality; and
- use of principles of comity.⁶³

59 Government of Canada, Remediation Agreements and Orders to Address Corporate Crime <<https://www.canada.ca/en/departement-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html>>.

60 Global Affairs Canada, 'Bribery and corruption' – see footnote 50.

61 See, e.g., Joanna Harrington, 'SNC-Lavalin case shows why we should review Canada's foreign corruption laws', *National Post* (27 February 2019) <<https://nationalpost.com/pmn/news-pmn/snc-lavalin-case-shows-why-we-should-review-canadas-foreign-corruption-laws>>.

62 Government of Canada, Agreement between the Government of Canada and the Government of the United States of America on the application of positive comity principles to the enforcement of their competition laws <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01269.html>>.

63 Debra A Valentine, 'Cross-Border Canada/U.S. Cooperation in Investigations and Enforcement Actions', US Federal Trade Commission (15 April 2000) <<https://www.ftc.gov/public-statements/2000/04/cross-border-canadaus-cooperation-investigations-and-enforcement-actions>>.

Though these obligations had been in effect for more than 20 years, in 2017 both countries recommitted to strengthening North American co-operation in competition law enforcement in the digital economy.⁶⁴ Since this agreement, both countries have made strides towards improving antitrust enforcement in the digital space. Canada unveiled a new Digital Charter, designed to maintain a competitive online marketplace, increased fines and penalties to encourage global digital leaders to promote compliance, increased global enforcement coordination, and hosted a global summit to discuss competition policy in the digital era.⁶⁵

The US Federal Trade Commission likewise recently launched a Technology Task Force, which is dedicated to monitoring competition in US technology markets, and Congressional leaders have taken an interest in understanding competition in the digital marketplace.⁶⁶

Given these trends, and the standing Agreement between the United States and Canada, it is likely that corporations will see increased co-operation between the two countries on digital antitrust enforcement in the coming years.

64 Government of Canada, 'Competition Bureau reinforces ties with U.S. and Mexican competition authorities' (20 November 2017) <https://www.canada.ca/en/competition-bureau/news/2017/11/competition_bureaureinforcestieswithusandmexicancompetitionautho.htm>.

65 Dominic Thérien, et al., 'The New Commissioner of Competition Requests Changes to Address Digital Economy Challenges', *Mondaq* (4 June 2019) <<http://www.mondaq.com/canada/x/816628/Data+Protection+Privacy/The+New+Commissioner+Of+Competition+Requests+Changes+To+Address+Digital+Economy+Challenges>>.

66 Peter J Levitas, et al., 'Antitrust Scrutiny of High-Tech: What Does it Really Mean?', *Arnold & Porter* (15 August 2019) <<https://www.arnoldporter.com/en/perspectives/publications/2019/08/antitrust-scrutiny-of-hightech>>.

Appendix 1

About the Authors

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John D Buretta is a partner in Cravath's litigation department and a former senior official at the US Department of Justice (DOJ). He has represented global companies, boards of directors, audit committees, senior management and general counsels of public and private companies, law firms, and former US and foreign government officials with respect to internal investigations, criminal defence, regulatory compliance and related civil litigation matters. He has handled matters involving the Foreign Corrupt Practices Act (FCPA), anti-trust laws, securities fraud and disclosure regulations, money laundering and anti-money laundering controls, trade sanctions, export controls, cyber intrusion and tax compliance, and has appeared for clients before numerous US enforcement agencies. Mr Buretta served for 11 years in the DOJ, including supervising the Criminal Division, where he oversaw nearly 600 prosecutors in international investigative matters involving corporate fraud, the FCPA, insider trading, healthcare fraud, money laundering, the Bank Secrecy Act, trade sanctions, asset forfeiture, cybercrime, intellectual property theft and public corruption. He currently serves as an independent monitor in separate appointments by the DOJ and US Department of Transportation.

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