

Corruption and the WTO Legal System

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The World Trade Organization (WTO) has no substantive rules directly addressing corruption in trade relations. There are, however, numerous legal provisions in the various WTO texts that offer indirect support to traders facing corrupt trade administrators. Whether these provisions are sufficient to address the bulk of trade-related corruption is questionable, given the narrow range of corrupt practices that are affected by these, mainly procedural, obligations. This article sets out a framework for further research into the question of how corruption affects trade liberalization, and puts forth a suggestion for how the WTO could take a step towards remedying its avoidance of the topic of corruption while not exceeding its functional scope of regulating trade relations among Members.

1. INTRODUCTION

Imagine the following: you are a producer who is unable to get your goods onto the market of another World Trade Organization (WTO) Member because the bribes demanded by the border patrol to make an accurate assessment of the tariffs you owe are competitively prohibitive. Could your government challenge such corruption at the border as a violation of WTO law? (Ignore the fact that the request for espousal probably would be denied.) The question has never come before the Dispute Settlement Body, and the answer is open. My assessment of the legal provisions of the various WTO agreements that might help in combating corruption suggests, however, that there are ways to challenge the procedural failings that indirectly allow for petty corruption even though a cause of action for a substantive claim is lacking. Answering why the answer is open is another matter, it can help us form some opinions on the extent to which the fight against corruption can effectively take place in the institutional framework of the WTO. The normative question: *should* corruption control be a part of the WTO legal framework, follows naturally.

This paper will first set out a brief statement of the WTO's systemic functions, in order to understand the Organization's avoidance of direct regulation of corruption within Member governments. Next, there is a working definition of corruption and a very brief overview of the various forms of corruption. Parts IV and V then

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look to the texts of the current WTO Agreements to describe where there are already corruption-reducing provisions, whether direct or indirect. Part VI judges the sufficiency of the provisions to address the problem of corruption in trade relations, and Part VII sets forth a framework in which to approach the normative question of whether the WTO ought to more directly attack corruption through its legal provisions, and suggests that a political statement on corruption could be made by the Members. Part VIII concludes.

2. CORRUPTION AS A NON-ISSUE IN THE WTO

2.1. THE WTO AS A SYSTEM

The WTO is an international organization aiming at the progressive liberalization of trade among its 152 Members. The Preamble of the Marrakesh Agreement Establishing the WTO (hereinafter 'Marrakesh Agreement') sets forth that the Members are '*Resolved*, ... to develop an integrated, more viable and durable multilateral trading system' and '*Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system', because they believe that economic (and environmental) well-being is furthered by the methods of trade liberalization incorporated in the WTO system agreements. Tariff reduction, the elimination of quantitative restrictions (QRs) and other non-tariff barriers to trade, and the non-discriminatory treatment of traded goods and services therefore form the primary objectives of the various WTO agreements, with the loftier goals of sustainable development and full employment hovering over these operational goals.

Standing apart from its peer-organizations such as the International Monetary Fund (IMF) or the International Bank for Reconstruction and Development (World Bank), the WTO allows for its combined Membership to lead the Organization's policy-making – a task accomplished through decision-making based on a principle of consensus¹ and backed up by an equal sharing of voting-power.² The Secretariat's advice and research assistance are doubtlessly influential in encouraging the direction of the Organization's program development, but the responsibility for the progressive liberalization and integration of world trade rests with the participating governments.³

Given the 'Member-driven' nature of the Organization's policy-making, it is perhaps surprising that the WTO's working agenda is so narrowly focused on trade liberalization itself: that is, on reducing barriers to trade in goods and services through the lowering of tariffs, the elimination of import and export restrictions, and the strict limitation on

¹ Article IX.1 Marrakesh Agreement Establishing the World Trade Organization (hereinafter 'Marrakesh Agreement') footnote 1 defines consensus to mean that 'no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'.

² Article IX.1 Marrakesh Agreement.

³ The WTO's characterization as 'Member-driven' refers to the fact that legislative, executive, and judicial competences rest with the combined membership and not with an external body. See generally the provisions on decision-making and amending treaty text in the Marrakesh Agreement, as well as those on adopting judicial reports and accepting requests to impose sanctions on violators of the agreements in the Understanding on the Procedures Governing the Settlement of Disputes.

governments' granting of subsidies to domestic industries. Although the great majority of the Members are developing or least-developed countries, the Organization is not first and foremost one dedicated to development. *Assuming* that liberalization will lead to development, the focus of WTO rules remains on the former, even while the Members and institution insist on the centrality of the latter. Failures of the development-from-liberalization assumption are explained-away by references to incomplete liberalization rather than by a hypothesis of mismatch between the working tool and the higher aims of the Organization. Structural and institutional factors that could interfere with the progression – including corruption and weak political institutions – may be blamed for hindering the development of a particular Member, but such factors are not considered a part of the WTO's mandate to remedy.

2.2. WHY THE SILENCE ON CORRUPTION?

Why is there an avoidance of addressing corruption in the WTO?⁴ In the first place, the WTO is not an institution inclined to impose a particular moral viewpoint on its Members (at least not beyond the quasi-'moral' commitment to increasing trading opportunities⁵) – and both the fight against corruption and the demands of human rights are considered 'moral' issues to several of the Members.⁶ Thus, there is no WTO requirement of having a market system domestically, no minimum standards of Members' democratic responsibility towards citizens, and no general scrutinizing of Members' adherence to international obligations outside of the WTO beyond periodic policy reviews. However, there are obligations to offer trading partners a foreseeable, non-discriminatory opportunities to send their goods and services to consumers in the domestic market. The economic theories of trade promise increased welfare from liberalized trade – Members have only to act on their own self-interest to profit. Thus, to the extent corruption might limit liberalization, the guilty Member is hurting itself. Irrational acts seemingly have no place in the functioning of the WTO.

Similarly, Members tend to resist the restriction of domestic regulatory space, particularly when such restrictions necessitate state action to achieve their goals. Corruption control is traditionally a task for national authorities. WTO-driven action on the issue would require that Members implement and enforce rules that prohibit corrupt

⁴ It should be noted here that the WTO's avoidance of the topic is not unlike the general avoidance of the issue of corruption in other international economic law instruments. Bilateral investment treaties, for instance, usually have no corruption-combating provisions either, even though they lead to more opportunities for bribery and/or illicit payments by virtue of increasing the number of transactions. See UNCTAD, *Illicit Payments*, UNCTAD/ITE/IIT/25 at 5, 7 (New York/Geneva: United Nations, 2001). See also *id.* at 8 (table based on Organization for Economic Cooperation and Development (OECD) data illustrating the types of corruption associated with numerous public sector activities).

⁵ Susan Rose-Ackerman talks of economists' reluctance to express values of 'right and wrong' as a reason for the early disregard of corruption as a topic of economic research, but notes that there is a 'typical economists' commitment – one might almost say a moral commitment – to using the price system'. Susan Rose-Ackerman (ed.), 'Introduction and Overview', in *International Handbook on the Economics of Corruption* (Cheltenham, UK/Northampton, MA: Edward Elgar, 2006), xiv–xxviii, xiv.

⁶ India's and Singapore's trade representatives speak about corruption as a 'moral issue', and one that therefore should not be taken up directly by the WTO.

behaviour – rules that are complex and demanding from a technical, administrative, and judicial outlook. As such, it is unsurprising that governments would reject their imposition as sovereignty limiting and burdensome.

Another likely factor in the rejection of anti-corruption rules by the WTO Membership is the mistaken (but widespread) view that the campaign to eliminate corruption is a ‘North-South’ issue. That is, that it is a program imposed by industrialized states’ governments onto developing states’ governments. The resistance of developing state governments to such a presumed motive is understandable, as many of the recommended legal antidotes to corruption mirror what already exists in the legislation of industrialized states. Within the WTO’s already sensitized context of negotiating over national economic advantages and disadvantages, the addition of what could be perceived as another instrument of economic dominance is a difficult task, even without the aforementioned factors to solidify such resistance.⁷

3. WORKING DEFINITION OF ‘CORRUPTION’

3.1. DEFINITION OF ‘CORRUPTION’

There is an enormous literature on the definition of corruption.⁸ The significance of the definition cannot be overestimated, for the definition determines which behaviours fall within the scope of the term and thus influences not only the legality of a particular behaviour but also the measurement of the extent of corruption. To a certain extent, the definition also colours perceptions of the need to combat corruption – reflecting, as it does, cultural or even ethical differences.

For this study, the definition provided by the Overseas Development Institute is good: ‘corruption is ... the “abuse of public office for private gain”, or for the gain of particular groups (e.g., a political party or an informal patronage network)’.⁹ Although corruption may also occur between private actors, the characteristic of public corruption reflects the governmental status of trade regulation affected by the WTO rules.

3.2. TYPES OF CORRUPTION

Even within a particular definition of what corruption is, there are numerous variations on the forms it can take.¹⁰ Although bribery, or the direct offering/accepting

⁷ See also Kenneth W. Abbott, ‘Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption’, *J. Int’l Econ. L.* 4, no. 2 (2001): 275.

⁸ See, e.g., Arthur Shacklock et al. (eds), *Measuring Corruption* (Aldershot: Ashgate, 2006) (a collection of articles on various aspects of the definitional and measurement problems in corruption research); Oskar Kurer, ‘Corruption: An Alternative Approach to Its Definition and Measurement’, *Political Stud.* 53 (2005): 222.

⁹ Verena Fritz, *Corruption and Anti-Corruption Efforts: Research, Policy Highlights and Ways Forward*, ODI Background Note 1 (November 2006).

¹⁰ See, e.g., Fritz, *supra* n. 9 at 2-3 (setting out ‘corruption typologies’); Glenn T. Ware & Gregory P. Noone, ‘The Anatomy of Transnational Corruption’, *Int’l Affairs Rev.* 14, no. 2 (2005): 29 (discussing six basic categories of corrupt behaviour).

of something of value in exchange for an illicit advantage is perhaps the most widely recognized form of corruption that could relate to trade, other forms include embezzlement (the stealing of money or goods from the state by an official) and even nepotism (promoting a less qualified individual based on his or her relationship to/with the person in authority).

Each of these types of corruption may occur on different levels of government.¹¹ Whereas 'bureaucratic corruption', or the corruption of lower officials and state employees is often referred to as 'petty' corruption, corruption of high officials, the political elite, and policy-makers is 'grand corruption'. Extreme forms of grand corruption may be labelled 'state capture' or 'predatory corruption', indicating the capitulation of policy-makers to their individual interests at the cost of their role as public servants.

Corruption researchers also distinguish between demand-side corruption and supply-side corruption. Whereas the former covers an official's request for something of value in exchange for a favourable action, the latter is an offer of a payment by the non-official who desires some advantageous treatment.

4. CORRUPTION-FIGHTING INSTRUMENTS IN THE WTO LEGAL TEXTS

There are no provisions of the WTO treaties that explicitly condemn corruption in trade as a substantive matter.¹² Thus, there can be no direct violation claim on the basis of 'corruption' or 'bribery'.

Yet, because corruption is recognized by commercial actors within Members' territories as harming business opportunities, there are some legal provisions among the WTO agreements that are either intended as instruments to control corruption or that at least could be used to reduce corruption despite the refusal to deeply engage in fighting corruption explicitly. These rules work to promote freer trade, making them compatible – and in some cases, integral – to the liberalization process.

The clearest examples of corruption-fighting tools available to the WTO Members at present are the three treaties regulating the procedures governing certain stages or types of trade: the Agreement on Import Licensing Procedures (ILA), the Agreement on Pre-Shipment Inspection (PSI), and the Agreement on Government Procurement (GPA). All of these agreements aim to make administrative decision-making more predictable and accountable – a procedural solution to the problem of corruption. Under the rubric of 'transparency', each of the agreements provides for Members to ensure that their responsible officials act on publicly available criteria when taking decisions and then be able to offer written explanations for their final choices.

¹¹ See Rose-Ackerman, *supra* n. 5, xiv-xxxviii, xviii-xix; John Joseph Wallis, 'The Concept of Systematic Corruption in American History', in *Corruption and Reform: Lessons from America's Economic History*, eds Edward L. Glaeser & Claudia Goldin (Chicago/London: University of Chicago Press, 2006), 23-62 (discussing 'venal' and 'systemic' forms of corruption).

¹² See *infra* 30-40 and accompanying text. There is current work on a revision of the Agreement on Government Procurement that would change this.

The implicit idea governing such procedures is that officials will not be able to hide behind secretive processes and grant government contracts or licenses on the basis of non-economic considerations – whether protectionist or corrupt. The fact that the decisions can be challenged by losing bidders is meant to solidify the requirements – ensuring that post-hoc review can remedy any failures in the deterrent-effect of such rules. A closer review of these agreements demonstrates the strengths and weaknesses of each as a tool against corruption.

4.1. AGREEMENT ON GOVERNMENT PROCUREMENT

When a government purchases goods or services from private enterprises for use in the public sector, the term used to describe such activities is ‘government procurement’. Although procurement activities absorb a substantial share of government revenues in all countries (Transparency International estimates that an average of 15%–30% of gross domestic product (GDP) is spent on government procurement¹³), in developing countries the percentage of gross national product spent on governmental purchases is higher than in industrialized countries, an estimated average of 25%.¹⁴

Throughout history, procurement processes have been the target of corrupt practices.¹⁵ In part, this is due to the very large sums that change hands. Given the potential gains from even minimal ‘skimming’, the temptation for an official to take a percentage of the transaction costs for herself is correspondingly high: ‘The potential reward for a single contract directed to the right winner can exceed the legitimate lifetime salary earnings of a decision-maker. The temptations are enormous and, ... the risks of punishment are relatively small’.¹⁶

Moreover, as corruption is known to thrive where official prerogative combines with opaqueness and unaccountability, the susceptibility of procurement to corruption is not surprising. Several characteristics of government procurement provide fertile soil for all three of these elements. First, government procurements are frequently a process of multiple-step decision-making, with substantial room for discretion on the part of the decision-maker at each of the steps: determining if there will be a call for tenders or whether potential suppliers will be invited to submit a bid for a project; formulating the

¹³ Transparency International, *Handbook: Curbing Corruption in Public Procurement* (Berlin: Transparency International, 2006), 13.

¹⁴ Glenn T. Ware et al., ‘Corruption in Public Procurement: A Perennial Challenge’, in *The Many Faces of Corruption: Tracking Vulnerabilities at the Sectoral Level*, eds J. Edgardo Campos & Sanjy Pradhan (Washington, DC: World Bank, 2007), 295–334, 295 (the authors also note that Transparency International estimates a loss of USD 400 billion per year to procurement corruption); see also Transparency International, *supra* n. 13 (stating that some countries spend over 30% of their GDP on procurement of public goods and services).

¹⁵ See, e.g., Mohammad Mobabhat Khan, *Political and Administrative Corruption: Concepts, Comparative Experiences and Bangladesh Case* (text available at <www.ti-bangladesh.org/index.php?page_id=373>) (noting that ancient civilizations around the world had criminal sanctions for corruption, and, focusing on India, pointed out that administrative corruption was among the worst); Edward L. Glaeser & Claudia Goldin (eds), *Corruption and Reform: Lessons from America's Economic History* (Chicago: University Chicago Press, 2006) (containing essays of different areas of governmental corruption throughout US history).

¹⁶ Donald Strombom, *Corruption in Procurement, 3:5 Economic Perspectives* (1998) (text available at <<http://usinfo.state.gov/journals/ites/1198/ijee/strombom.htm>>) (speech by former World Bank chief of procurement).

specifications for the offers; collecting the bids; making a final determination on the winning bid; and overseeing the completion of the project.¹⁷ Second, the decision-making process is often largely intransparent, with the government itself determining what type and how much information about the process and resulting decision will be publicized.¹⁸ Finally, there is minimal accountability for most procurement decisions. Even where regulations exist for procurement procedures, there is, for instance, often little motivation to prosecute officials for not strictly following such rules. Additionally, even if prosecution is attempted, absent explicit evidence of bribery, it is very difficult to prove that the official's decision itself led to a diminished quality of supplied goods or services.

In response to the susceptibility of the government procurement process to corruption, several initiatives to reduce the corruption of this sector have been started in different fora, non-governmental as well as national, regional, and multilateral.¹⁹

The GPA is the most immediately recognizable instrument to counter corruption among WTO Member governments. A plurilateral treaty, the GPA applies only to those Members that have accepted its provisions (as of June 2008, forty, including the twenty-seven Member States of the EC²⁰), and only to the extent each has set out in its annexed tables. The broad non-acceptance of the GPA actually speaks for its significance, even while minimizing its actual effects at the present.

The Preamble of the GPA sets out the three main goals of the Parties regarding procurement. First, and very importantly, the GPA looks to open the market for government purchases to suppliers from all Party territories. 'Market Access' is, according to many, the prime aim of the GPA – and, indeed, it is generally cited as the reason that most developing countries refuse to join.²¹

A second, related, goal of the GPA is non-discrimination in the procurement process. The Parties 'recognize' that government procurement laws should not (and should not aim to) discriminate in favour of national suppliers or to the advantage of one country's suppliers over another's. This 'national treatment' obligation and its multilateral

¹⁷ See Ware et al., at 308–317 (listing possible points of corruption at each stage of a procurement).

¹⁸ See Miriam Golden & Lucio Picci, 'Corruption and the management of public works in Italy', in *International Handbook on the Economics of Corruption*, ed. Susan Rose-Ackerman (Cheltenham, UK/Northampton, MA: Edward Elgar, 2006), 457–483, 458 (analyzing procurement under the perspective of officials taking 'advantage of their control over the monopolistic provision of infrastructure goods to engage in rent-seeking').

¹⁹ Transparency International publishes a handbook containing 'Things to Do' boxes to guide procurement officials towards developing corruption-reducing regulations. See Transparency International, *supra* n. 13. Besides NGO interest, regional development banks have also issued procurement regulations to minimize corruption by procurement actors. See, e.g., European Bank for Reconstruction and Development, *Procurement Policies and Rules* (first published in 1992, the most recent is from August 2000). The OECD has a number of publications on the problem of corruption in procurement. See, e.g., OECD, *Bribery in Public Procurement: Methods, Actors and Counter-Measures* (Paris: OECD, 2007); OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (Paris: OECD, 2005); OECD, *Integrity in Public Procurement – Good Practice from A to Z* (Paris: OECD, 2007). The World Bank, too, has devoted research to government purchases. See, e.g., World Bank, *Guidelines: Procurement of Goods and Services by World Bank Borrowers* (Washington, DC: IBRD/World Bank, 2004); World Bank, *Guidelines: Selection and Employment of Consultants by World Bank Borrowers* (Washington, DC: IBRD/World Bank, 2004).

²⁰ The Parties to the GPA as of 1 Jun. 2008 are: Canada, the EC Member States, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Aruba, Norway, Singapore, Switzerland, and the United States. The lists of members and observers are available at <www.wto.org/english/tratop_e/gproc_e/memobs_e.htm>.

²¹ See Eleanor Roberts Lewis, 'LPIB Roundtable on Global Corruption: Remarks', *L. & Pol'y Int'l Bus.* 31 (1999): 210, 212.

corollary, the most-favoured nation (MFN) obligation, are set out as binding rules in Article III GPA, but find reflection throughout the Agreement.²²

The third goal of the GPA is to enhance the 'transparency of laws, regulations, procedures and practices regarding government procurement' and to provide for 'fair' procedures to ensure that the rules on procurement are effective. It is this goal that is of most significance to the reduction of corruption. Interestingly, it was also – seemingly – the least problematic for developing countries in the early days of GPA negotiations.²³

Articles XVII-XX GPA address Transparency. Although in part hortatory (Article XVII begins, 'Each Party shall encourage ...'), and essentially only emphasizing publication of regulations and decisions surrounding the procurement process, the provisions of the transparency articles of the GPA do allow for some degree of external oversight of officials' actions. Not only must a covered governmental entity give a reasoned opinion as to why the winning bid was chosen and the relative failings of the inquiring bidder (XVIII.2), but also, if the reasoning is unconvincing, a losing supplier may bring a legal challenge against the tender decision with the possibility of suspending procurement procedures and/or gaining compensation. Although such measures could only reduce the desirability of corruption if the non-discrimination (particularly the national treatment) obligations are also fulfilled, they are an important part of the overall direction of the GPA to limit corruption in an important economic sector: 'If you can make the government procurement process transparent, you can go a long way towards solving [the corruption] problem'.²⁴

There are continuing negotiating efforts in the procurement area to limit the potential for distortions of the procurement process by government officials. The WTO Ministerial Conference in Singapore established a Working Party in 1996 to further the transparency discipline of the GPA, and attempted to gain support for an initiative on Transparency in Government Procurement (TGP). This initiative would multilateralize the GPA's existing requirements of publication, justification, and review, and by doing so, reduce the opportunities for bribery and corruption in Member territories not now Party to the plurilateral agreement.²⁵

The idea of addressing the topic of corruption directly under the heading of 'transparency', however, appears to be doomed to failure. Although numerous Members have spoken to the relationship between transparency and corruption, the consensus seems to be that, while the former can lessen the latter, they are not coterminous. Indeed, even Members who are eager to further the initiative concede that any conceptions

²² See, e.g., GPA Art. VII.1 GPA (tendering procedures are to be applied in a 'non-discriminatory manner'); GPA Art. VIII(c) GPA (rules on qualification of suppliers are not to be applied 'in order to keep suppliers of other Parties off a suppliers' list'); Art. X.1 GPA (procurement bodies are to select tenderers non-discriminarily); Art. XX.2 GPA (challenge procedures shall be open to all suppliers on a non-discriminatory basis).

²³ Lewis, *supra* n. 21, 212.

²⁴ *Ibid.*

²⁵ See Positive Effects of Transparency in Government Procurement and Its Implementation, WT/WGTGP/W/41, paras 6-7 (17 Jun. 2003) (EC communication on the Agreement on Transparency, noting the corruption-reducing effects explicitly as a reason for pursuing the Agreement).

about bribery and corruption are to be kept separate from obligations to increase transparency.²⁶ The Working Group's Report of 2003 sets forth:

With regard to the issue of the relationship between transparency in government and the reduction of corruption, the view was expressed that corruption existed in all countries, even notwithstanding the application of transparency rules. Nevertheless, transparency rules enhanced the ability of countries to combat this problem. In response, the point was made that, while reducing corruption was a laudable objective for all national governments, it should not be a principal objective, nor should it be built into any possible agreement on transparency in government procurement. (...) [I]t was noted that the rationale underlying a future agreement on transparency in government procurement would not be to reduce corruption. Nor would a future multilateral agreement contain specific provisions on corruption. Rather, the reduction of corruption would be a side-effect of the agreement.²⁷

The failed Cancun Ministerial meeting, however, led to blockages on the Agreement's pursuance, and the entire TGP work was declared a non-topic for the remaining Doha negotiations at the beginning of August 2004.²⁸ Work within the Working Group has therefore stopped for the foreseeable future.²⁹

At the same time, there is another draft of government procurement rules that explicitly addresses corruption. The GPA Revision document of December 2006 ('the Revision'),³⁰ on which Members of the GPA have 'reached provisional agreement',³¹ acknowledges the problem of corruption in procurement activities and addresses it directly. In its Preamble, the Revision connects the principle of transparency with corruption reduction: '*Recognizing* the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner, and of avoiding conflicts of interest and corrupt practices, in accordance with international instruments, such as the United Nations Convention Against Corruption'.³² Although the existing GPA also encourages transparency, the Revision's clear statement on the relationship between transparency and the effort to reduce corruption is novel and significant, as is the invocation of the multilateral convention addressing corruption.

²⁶ See, WTO Secretariat, Report on the Meeting of 10-11 Oct. 2002, WT/WGTGP/M/15 at 9, para. 61 (EC and US delegations in the WTO negotiations on a transparency agreement for government procurement stated that 'bribery and corruption did not need to be dealt with in a transparency agreement'); WT/WGTGP/M/18 para. 38 (Switzerland's delegation did not see fighting corruption as a 'rationale' for an agreement on transparency, even though it would be a positive side effect).

²⁷ Report of the Working Group on Transparency in Government Procurement to the General Council, WT/WGTGP/7, para. 14 (15 Jul. 2003) (footnotes, all of which referred to document WT/WGTGP/M/18, omitted).

²⁸ 'July Decision' of the General Council, WT/L/579, para. 1(g) (2 Aug. 2004) ('Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paras 20-22, 23-25, and 26, respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round').

²⁹ See also Philip Nichols, Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority, Research Paper published in Knowledge@Wharton, 1 Jan. 1998 (also NYU *J. Int'l L. & Pol.* 711 (1996)). Peter Eigen, 'Controlling Corruption: A Key to Development-Oriented Trade', in *Doha and Beyond: The Future of the Multilateral Trading System*, ed. Mike Moore (Cambridge: Cambridge Univ. Press, 2004), 125-145. Kenneth W. Abbott, 'Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption', *J. Int'l Econ. L.* (2001): 275.

³⁰ GPA/W/297.

³¹ WTO, The Plurilateral Agreement on Government Procurement, Negotiations (<www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>).

³² GPA/W/297, Preamble.

It is the condemnation of corruption in the body of the Revision, however, that is most noteworthy. Found in Article V, the obligation to prevent corruption in the actual procurement process is placed together with non-discrimination as a 'general principle' of the agreement.³³ The Members, moreover, are not just to *avoid* corruption, they are to *'prevent'* it – a positive obligation that, given the widely acknowledged extent of corruption affecting procurement decisions today, promises to pose a real challenge if implemented.

The Revision contains further procedural obligations that could indirectly lessen the opportunities for corruption: publication rules;³⁴ required explanations of rules and decisions or changes in practices;³⁵ detailed standards for the content of procurement notices;³⁶ rules to require minimum types of information in tender documents;³⁷ minimum time limits for submissions³⁸ and maximum time limits on administrative decision-making;³⁹ and procedures for a review of challenges by losing bidders.⁴⁰ The overall effect of the Revision, therefore, is one of an acknowledgement of the problem of corruption in procurement, and a willingness to address it directly and effectively.

4.2. AGREEMENT ON IMPORT LICENSING PROCEDURES

Another existing agreement that aims indirectly at reducing corruption in the form of bribery of officials is the ILA. This multilateral agreement explicitly aims to increase transparency in the administration of import licensing,⁴¹ but it goes further by establishing standards for administrative behaviour and decision-making.

The import licensing procedures covered by the ILA are Members' administrative procedures 'used for the operation of import licensing régimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation'.⁴² Such licensing regimes can have the effect of fostering corruption by limiting the supply of a valuable right – and giving the distribution of such rights into the discretion of government officials. As one report notes, 'Licenses in limited supply encourage economic

³³ Article V GPA/W/297 (para. 1 obliges Members to afford national treatment to foreign suppliers, while para. 4 requires Members to conduct procurement proceedings in a 'manner that ... (c) prevents corrupt practices').

³⁴ Article VI.1(a) GPA/W/297 (requiring publication of all laws, regulations, rulings, and procedures relating to the entire procurement process, and the publication of changes to such measures).

³⁵ Article VI.1(b).

³⁶ Article VII.2.

³⁷ Article X.7.

³⁸ Article XI.

³⁹ Article XVI.2 (generally, publication of contract awards within seventy-two days after the decision).

⁴⁰ Article XVIII.

⁴¹ See Agreement on Import Licensing Procedures, Preamble ('*Desiring* to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices').

⁴² See also Art. 1.1 ILA footnote 1 (definition includes not only the issuance of a license but also 'similar' procedures).

actors to make efforts to insure they receive them'.⁴³ Corruption is the term given to those efforts when they are illegal. Although non-automatic licensing procedures are the most obvious source of corruption-induced misbehaviour, the ILA provisions apply to both automatic and non-automatic licensing procedures.⁴⁴

Among its provisions, the ILA calls for Members to publicize their regulations⁴⁵ and to notify the WTO of proposals to adjust the rules.⁴⁶ The rules are quite explicit about just how transparent the licensing procedures are to be: not only is 'sufficient information' required, but this is defined as information that will allow private traders to 'know the basis for granting and/or allocating licenses';⁴⁷ the information is also to include whether 'exceptions or derogations' are permitted to any of the rules, and if so, how to go about requesting such alterations of the rules.⁴⁸ If a trader, therefore, suspects that a competitor received a license due to an official's corruption in situations where no derogations from the rules have been published, there may be room for a claim that the transparency provisions have been violated.

Like the GPA, the ILA emphasizes transparency through standards of behaviour and a review process, all of which are subject to the WTO's dispute settlement mechanism.⁴⁹ The licensing procedures, for instance, are to be prompt – within ten days for an automatic license,⁵⁰ and in thirty days of receipt of the application for non-automatic licenses.⁵¹ Similarly, a trader whose application for a non-automatic import license is denied 'shall, on request, be given the reason therefore and shall have a right of appeal or review'.⁵²

Together, such standards establish a backdrop against which traders can enter a market knowing the legal framework. The knowledge itself should help provide a bulwark against requests for extra payments. The anti-corruption effects are, admittedly, passive rather than active in this respect, but the focus of the ILA on *applied* procedures (rather than on the law as written) should augment such effects.⁵³

⁴³ OECD Working Party of the Trade Committee, Analysis of Non-Tariff Measures: The Case of Non-Automatic Import Licensing, TD/TC/WP(2002)39/FINAL, 9, para. 21 (discussing the phenomenon of 'rent-seeking'). A less restrained author, writing about Nigeria, called import licensing 'the biggest corruption mechanism that has ever been created'. Salihu Yarima, Why Obasanjo Will Never Leave Aso Rock Voluntarily, May 2003 (text available at <www.nigerdeltacongress.com/warticles/why_obasanjo_will_never_leave_as.htm>; visited 4 Jun. 2008).

⁴⁴ Automatic licensing indicates that an import license is given to any trader on fulfilment of minimal requirements, without delay. See Art. 2 ILA; Art. 2.1 ILA states that it is 'import licensing where approval of the application is granted in all cases'. Non-automatic licensing is when the import license is granted either only to particular importers or only at particular times, or when the granting of the license is otherwise within the discretion of the licensing authority. See Art. 3 ILA; Art. 3.1 ILA defines non-automatic import licensing procedures as 'import licensing not falling within the definition contained in paragraph 1 of Article 2'.

⁴⁵ Article 1.4(a) ILA.

⁴⁶ Article 5 ILA (calling for a notification of changes in procedures within sixty days of publishing the information).

⁴⁷ Article 3.3 ILA.

⁴⁸ Article 3.4 ILA.

⁴⁹ Article 6 ILA.

⁵⁰ Article 2.2(a)(iii) ILA.

⁵¹ Article 3.5(f) ILA. There is a sixty-day-after-closing-date limit for applications considered simultaneously. *Id.*

⁵² Article 3.5(e) ILA.

⁵³ The extent to which the ILA has actually achieved a reduction in corruption is questionable, as not all WTO Members have implemented the Agreement fully.

4.3. AGREEMENT ON PRE-SHIPMENT INSPECTION

Pre-shipment inspection procedures are used by governments to ensure the 'quality, quantity, or price of imported goods', mainly for taxation purposes.⁵⁴ The actual inspection is often performed in the country of export by a private company that stands in a contractual relationship with the government.⁵⁵ As of the mid-1980s, pre-shipment inspections began being used to control for understatements of the value of shipments, and so to eliminate tariff evasion.⁵⁶ Although instigated to help control tariff fraud, pre-shipment inspection procedures can also be used in a way that fosters petty bribery. Because inspection officials have significant authority over the duration of the procedure as well as over the results, illicit payments can be demanded or offered to speed up the inspection or to alter the inspector's decision regarding the quality/quantity estimates or the classification of the shipment.

The PSI was introduced into the WTO texts during the Uruguay Round, and has, since 1995, applied to WTO Members' 'activities relating to the verification of the quality, the quantity, the price, ... and/or the customs classification of goods to be exported to [its] territory'.⁵⁷ At its core, the PSI agreement is aimed at reducing illegal activity.

By reducing the discretion of individual officers in several respects, the PSI stands as the third main WTO agreement to reduce the potential for corruption in trade relations. The first notable obligation on PSI governments is transparency, applicable to both importing Members and exporting Members. As is the case with government procurement rules and import licensing rules, governments must publish their relevant laws and regulations.⁵⁸ The PSI specifically sets out that until legislation on inspections is published 'officially', the laws are not applicable to WTO Member traders.⁵⁹ For the importing Member ('user Member'), the transparency provisions can force a Member's pre-shipment inspection body to inform potential exporters of laws and regulations relating to the inspection, and those provisions specify that '[a]dditional procedural requirements or changes in existing procedures shall not be applied to a shipment unless the exporter concerned is informed of these changes at the time the inspection date is arranged'.⁶⁰ Article 5 (Notification) provides for the Member's submission of information on the relevant legal framework to the WTO.⁶¹

Complementing the transparency and notification requirements are the obligations to harmonize pre-shipment inspection standards. Most specifically, the Agreement, without pre-empting specific buyer-seller agreements, fosters harmonization by specifying

⁵⁴ PSI, Preamble.

⁵⁵ José Anson, Olivier Cadot & Marcelo Olarreaga, *Tariff Evasion and Customs Corruption: Does Pre-Shipment Inspection Help?* World Bank Policy Research Working Paper No. 3156, 1 (October 2003) (text available at <<http://srn.com/abstract=636575>>). Anson et al. note that there are only five major pre-inspection companies. *Id.* at n. 1.

⁵⁶ *Id.* at 1.

⁵⁷ Article 1.3 PSI.

⁵⁸ Article 2.8 PSI (user Member requirement); Art. 3.2 PSI (exporter Member requirement).

⁵⁹ Article 5 PSI.

⁶⁰ Article 2.6 PSI.

⁶¹ Article 5 PSI.

that unless otherwise arranged between the parties, the ‘quality and quantity inspections’ are to be performed according to ‘international standards’.⁶²

There are further harmonization-oriented provisions. Paragraph 20 of Article 2 sets forth rules on ‘price verification’ for purposes of assessing the export price of a set of goods. The provisions of that paragraph, consisting of general ‘guidelines’ relating to how prices can be compared and what are acceptable factors to be taken into account in addition to the comparisons, harmonize the approach taken to verification among WTO Members, even if not clearly binding the Members to a particular single standard.⁶³ The relation to corruption is explicit in these price verification rules: Members ‘shall ensure that’ their price inspectors use these guidelines ‘in order to prevent over- and under-invoicing and fraud’.⁶⁴ Fraudulent pricing behaviour, as a form of corruption, can distort trading relations by allowing for the official to reap the benefits of the under- or overpayment of tariffs, licensing fees, or taxes to which the shipment is subject. By harmonizing the pricing policies of WTO governments, such fraud can be reduced at the level of policy implementation.

Implicit harmonization is found in other provisions. It extends from the minimum information all user Members must provide to exporters,⁶⁵ to the prohibition of requests for certain information,⁶⁶ and to the setting forth of guidelines to be used in price verification procedures.⁶⁷

Another corruption-reducing potential of the PSI rests in its establishment of a right of independent review of inspection results.⁶⁸ The Article 4 procedure foresees a three-person panel hearing the complaint and taking a majority decision on whether the inspector or the exporter has complied with the PSI obligations. The Agreement ensures exporters (and importers) of an opportunity to challenge procedures before an international panel that has the authority to issue binding decisions on whether the rules of the PSI have been violated.⁶⁹ Should corruption, therefore, be suspected as having been a factor in the pre-shipment inspection decision, the matter can be challenged on the basis of the PSI for clarification. Although ‘corruption’ as a general claim is hardly to be expected, distortions of the rule-application could be challenged, should the complainant want to do so. Binding the parties involved, such a decision could effectively dampen the likelihood of corruption at the inspection site, as competing exporters would have an interest in preventing undervalue assessments of their competitors. The few countries

⁶² Article 2.4 PSI (n. 2 defines an ‘international standard’ as one ‘adopted by a governmental or non-governmental body whose membership is open to all Members, one of whose recognized activities is in the field of standardization’).

⁶³ See particularly Art. 2 PSI, para. 20(b)-(c) (setting out bases of comparison and ‘generally applicable adjusting factors pertaining to the transaction’).

⁶⁴ Article 2 PSI, para. 20.

⁶⁵ Article 2.6 PSI (‘information shall include a reference to the laws and regulations ... and shall also include the procedures and criteria used for inspection and for price and currency exchange-rate verification purposes, the exporters’ rights ..., and the appeals procedures’).

⁶⁶ Article 2.12 PSI (list of types of business information deemed ‘confidential’).

⁶⁷ Article 2.20 PSI.

⁶⁸ Article 4 PSI.

⁶⁹ Article 4 PSI.

that have actually set up such reviewer bodies suggests, however, that the theoretical corruption-reducing benefits have little chance to come to fruition soon.⁷⁰

Like the GPA and the ILA, the PSI is an instrument with a potential of directly reducing the possibilities of corruption in the trading process. Whether it is used to its full remains to be seen.⁷¹

5. WTO LEGAL PROVISIONS THAT MAY REDUCE THE POTENTIAL FOR CORRUPTION INDIRECTLY

Although the GPA, ILA, and PSI are the WTO instruments that could most directly regulate the opportunities for corruption in trade, several of the legal provisions of the WTO Agreements also lower the potential for trade-related corruption. These provisions give traders rights that, if used, could assist them in resisting demands for illicit payments from officials at the border and in positions of control over the market.

The following sets forth some of the corruption-opportunity reducing tools already available to WTO Members. First are the articles regulating market access – those setting out how tariffs are to be utilized and how QRs and other non-tariff barriers are approached. Next to be discussed are the provisions that reduce the scope for corruption through requiring transparency in the administration of trading regulations. Such transparency provides traders with the right to have information about the importing (or exporting) process that should make them less willing to succumb to requests for bribes as well as reducing the financial advantages of offering bribes. Finally, measures supporting harmonization of trading rules are introduced. These rules reduce the potential for corruption by reducing officials' discretion in defining the regulations to begin with.

5.1. MARKET ACCESS PROVISIONS

The term 'market access' as used in international trade law refers to the principle of bringing goods and services from one territory into commercial circulation in another territory. Market access is important because, quite simply, without access to foreign markets, there can be no international trade. Although market access barriers may be physical (such as geographic distance, oceans, mountains, or deserts) or psychological (such as an inability of the producer to communicate with the potential customer), such barriers have been effectively overcome by technology of transportation and communication. The market access barriers that remain are mainly government-created regulations that intentionally or incidentally block trade. Thus, in the context of the WTO's legal

⁷⁰ Anson et al., *infra* at 8.

⁷¹ A World Bank research group conducted a study on the impact of pre-shipment inspections on corruption and found ambiguous results: less customs fraud in one country studied, more in another, and no significant change in a third. See Anson et al. The Anson et al. paper, however, makes no explicit reference to the WTO's PSI provisions, which should regulate the corruption incentives inherent to the custom officials' treatment of pre-shipment inspection results, leaving unclear the extent to which the Agreement itself influences corruption levels.

framework, securing binding obligations of unhindered market access from the Members is a central goal of the agreements.

The primary function of the market access principles in the WTO system is to liberalize trade for the sake of garnering the benefits of comparative advantage. The potential exists, however, for market access to reduce the opportunities of corruption by offering traders an assured level of entry to the market. Given the right to bring goods or services into a country, a producer should rationally refuse to accommodate demands for extra payments to gain the permission to do so. Several of the WTO agreements' provisions provide for such rights.

5.1.1. *Article II GATT*

As an organization dedicated to lowering trade barriers, Article II of the General Agreement on Tariffs and Trade (GATT) is key, requesting Members to contractually set out their highest legal tariffs for the goods they import.⁷² The individually set tariff 'bindings' then become international obligations, restricting the governments from imposing higher charges on foreign goods than those agreed to in the tariff lists. At present, approximately 99% of the industrial goods tariffs of industrialized countries are bound, and the average tariff rate is in the range of 5%. Developing countries, too, have largely bound their industrial tariffs (over 70% bound), applying average MFN rates in the low-to-mid teen percentages.⁷³ Agricultural tariffs tend to be higher, as such products have historically been heavily protected, but even there, liberalization is deepening.

The main function of tariff bindings in the WTO is to provide foreseeability to exporters, allowing them a stable basis on which to calculate the costs of trading in a Member territory.⁷⁴ A further effect of bindings, however, is that of transparency, and it is the combination of foreseeability and transparency that lends the potential of corruption reduction. Given a maximum legal tariff, it is more difficult for a tariff officer to demand extra payments to allow a product into a territory than it would be if the officer had greater flexibility in determining the tariff ad hoc. As long as the importer knows the maximum rate she may legally be charged, it is unlikely that she will agree to pay amounts in excess of that rate.

To be sure, binding tariffs cannot eliminate small corruption entirely. Border officials can still alter the classification of a good to correspond to a lower tariff category, for example. The greater transparency, does, however, help to limit the financial impacts of such corruption.

⁷² Each Member's tariff schedules, or lists, are to include a record of 'other duties or charges' placed on imports as well as tariffs. Understanding on the Interpretation of Art. II:1(b), paras 1, 3.

⁷³ See the information provided in WTO/ITC/UN, World Tariff Profiles 2006 (Geneva: WTO, 2007) (listing each WTO Member's average bound tariff rate and average MFN applied rate; the bindings are often significantly higher than the applied rate). There are no WTO-generated averages of Members in development-level categories. Personal communication from Eric Ng Shing, Statistical Officer, WTO (4 Jun. 2008).

⁷⁴ Tariff bindings are also the bases for tariff reduction negotiations.

5.1.2. *Article XI GATT*

Another of the most basic provisions of the GATT 1947 is Article XI, setting forth a prohibition on the use of QRs. The prohibition on QRs is relatively clear: 'No prohibitions or restrictions other than duties, taxes or other charges ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party on the importation of any product of the territory of any other contracting party ...'. The same prohibition applies to exports.

Although subject to some exceptions, the provision has had a successful career since 1948, with significantly fewer QRs today than fifty years ago.⁷⁵ Important to the achievement of the WTO's goals of liberalizing trade as a tool for promoting market access for foreign producers, Article XI also reduces the opportunities of national trade officers to profit from the many opportunities of corruption inherent in the administration of QRs. With the removal of QRs comes a significant reduction in the opportunities to illegally sell import (or export) licenses or to allow (at a price) products into the territory without a license.

5.1.3. *Article XIII GATT*

Furthering the basic prohibition on the use of quotas, Article XIII restricts Members' ability to differentially restrict quantities of imports based on the country of origin.⁷⁶ Being fully justiciable, Article XIII thus underlines the producers' rights to equivalent treatment with other producers, which treatment itself is to be publically known (or at least available on request). Again, this fosters the ability of another Member to control the corruption potential of a Member fully in line with the logic of liberalized trade.

5.1.4. *Article 4 Agreement on Agriculture*

The market access provision of the Agreement on Agriculture applies the basic GATT market access provisions to those agricultural products that Members have committed to a list.⁷⁷ Thus, agricultural products are to be subjected to tariffs no higher than the amount set out in the particular Member's schedule, but under scrutiny are also the other market access areas such as QRs and licensing, as well as the non-tariff barriers of state-trading enterprises.⁷⁸

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⁷⁶ Article XIII:1 GATT. Note that the rules regarding QRs are valid for both imports and exports. *Id.* ('No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted') (emphasis added).

⁷⁷ Article 4.1 Agreement on Agriculture.

⁷⁸ Article 4.2 Agreement on Agriculture, and n. 1.

5.1.5. *Articles 2 and 4 Sanitary and Phytosanitary Agreement*

The Sanitary and Phytosanitary (SPS) Agreement offers Members' producers enhanced abilities to avoid demands for illicit payments by limiting the use of health-related standards to ones that are scientifically determined to be 'necessary to protect human, animal or plant life or health'.⁷⁹

5.1.6. *Article XVI GATS*

The corollary to the tariff binding and QR provisions of the GATT, paragraphs 1 and 2, respectively, of Article XVI of the General Agreement on Trade in Services (GATS) enables Members to commit to opening their markets fully or partially to foreign services and service providers. The service sectors to which the obligations apply are those set out in the official 'schedule' of specific commitments for the particular Member,⁸⁰ and the scope as well as the depth of these commitments is the subject of negotiation for progressive liberalization.⁸¹

The rights of market access protected by the GATS schedules affords foreign service providers comparable protection against demands for payments as the parallel GATT provisions do for goods providers. Due to the lack of specificity in defining certain types of services, however, the market access provisions of the GATS leave more room for discretion on the part of officials than would a binding tariff for a product. The potential for continued corruption is, therefore, somewhat heightened in comparison to goods trade, but still reduced over the situation prior to the GATS.

5.2. PROVISIONS ON TRANSPARENCY

The WTO agreement texts contain numerous provisions on transparency. Commonly requiring publication of laws and regulations as well as the availability of judicial review of administrative decisions, such transparency clauses are relevant to reducing the opportunities for engaging in corruption by virtue of giving traders important knowledge about the legal conditions for the market. Although corrupt officials will continue to be able to request bribes from traders in exchange for a financially advantageous declaration as long as any regulatory barriers to trade exist, the scope of corruption is necessarily lowered as tariffs are brought down, as QRs are removed, and as non-tariff barriers are dismantled. The following sketches out those transparency obligations that are most likely to reduce the opportunities for corruption by officials involved in the administration of the trading system of a WTO Member.

⁷⁹ Article 2.2 SPS Agreement.

⁸⁰ Article XX GATS governs the management of the schedules.

⁸¹ Article XIX GATS.

5.2.1. *Article X GATT*

Article X of the GATT sets forth the basic call for transparency in trade regulation. The provision's text calls for WTO members to promptly publish all '(l)aws, regulations, judicial decisions and administrative rulings of general application' that affect their global trading system partners.

Although neither prominent as a focus of scholarly analysis nor as an often ruled-on provision in GATT/WTO litigations,⁸² Article X GATT has the potential for playing a significant role in the efforts to counter low-level corruption. The promise of Article X lies in its core: making domestic trading rules and practices known. Just as the more specific calls for bound tariffs and the elimination of QRs, the encouragement of more general transparency functions to make foreign traders aware of the prevailing conditions of trade in the particular target market, and to thereby limit the extent to which they are subject to arbitrary demands to make illicit payments to officials in charge of implementing trade policies.

5.2.2. *Agreement on Sanitary and Phytosanitary Measures, Annex B*

Article 7 SPS provides that Members are to adhere to the provisions of Annex B regarding their duties of transparency.⁸³ Annex B itself, 'Transparency of Sanitary and Phytosanitary Regulations', aims to make the health regulations of each Member accessible to the interested producers of other Members. The eleven paragraphs of the Annex set out, for example, that Members are to make their health regulations available to other WTO Members⁸⁴ and that each is to establish a central 'enquiry point' for answering questions about the regulations and procedures required for the marketing of products.⁸⁵ Moreover, notification obligations exist for the promulgation of measures that are not 'substantially the same as' an international standard,⁸⁶ allowing for advance knowledge of the new rules in order to allow foreign producers an opportunity to both challenge the change and to adapt to it.⁸⁷

5.2.3. *Agreement on Sanitary and Phytosanitary Measures, Annex C*

Annex C of the SPS Agreement sets out rules for 'control, inspection and approval procedures' of products subject to health regulations.⁸⁸ As a check on procedural

⁸² Friedl Weiss & Silke Steiner, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison', *Fordham Int'l L.J.* 30 (2007): 1545, 1572. See also *id.*, at 1573–1576 (discussing case law of the GATT/WTO regarding Art. X GATT, noting that although it has frequently been invoked, the invocation has mainly been as a secondary claim and therefore rarely addressed in final reports of panels and the Appellate Body).

⁸³ Article 7 SPS Agreement ('Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary and phytosanitary measures in accordance with the provisions of Annex B').

⁸⁴ SPS Agreement, Annex B, para. 1.

⁸⁵ SPS Agreement, Annex B, para. 3.

⁸⁶ SPS Agreement, Annex B, para. 5.

⁸⁷ SPS Agreement, Annex B, para. 5(b).

⁸⁸ SPS Agreement, Annex C. The Annex applies to 'procedures for sampling, testing and certification', and similar measures. *id.*, at n. 7.

arbitrariness, Annex C is of potentially great significance in reducing the opportunities for official corruption at the border. Not only are the procedures to be ‘limited to what is reasonable and necessary’,⁸⁹ but there is also specific language governing the cost of inspections: ‘Members shall ensure ... that: ... any fees imposed for the procedures on imported products ... should be no higher than the actual cost of the service’.⁹⁰ The inspection officials’ behaviour, then, is explicitly limited, and corruption – to the extent it is reported – could become a valid basis for a complaint under this Annex.

5.2.4. *Agreement on Technical Barriers to Trade*

The Agreement on Technical Barriers to Trade (TBT) is similar in its corruption-reducing potential to the SPS Agreement, applying to any non-health standard for goods.⁹¹ Nearly all of the provisions of the TBT Agreement could be regarded as indirectly reducing the possibilities of corruption, as the aim of the Agreement is to ensure that technical regulations and standards are prepared and applied in a way that does not aim at ‘creat[ing] unnecessary obstacles to trade’.⁹² Given that corruption of officials itself adds costs to trading (although the motivation of the perpetrator is not trade-related), the requirements that standards be notified to WTO Members, that new proposals are open to comments, that the charges for inspections are related to the work involved, and that sub-national government measures are also subjected to the Agreement’s rules, the ability of officials to extract extra payments from foreign traders is limited.

5.2.5. *Article 25 Agreement on Subsidies and Countervailing Measures*

Because the granting of subsidies to a particular industry or firm can afford a government a means of altering the conditions of competition in favour of their own national producers, the Agreement on Subsidies and Countervailing Measures (SCM) requires that all subsidies be notified to the WTO.⁹³ The provisions of Article 25 SCM, moreover, set forth an obligation of minimum information within the notification that can make corrupt uses of subsidies more obvious – and thus less likely to occur. Paragraph 25.3 SCM, for instance, requires that governments set forth the ‘policy objective and/or purpose of the subsidy’.⁹⁴ Although clearly, an illicitly offered subsidy can be given a false declaration of purpose, the requirement will allow for external observation of the payments, and potentially, an investigation into the suitability of such payments with the purpose.

⁸⁹ SPS Agreement, Annex C, 1(e).

⁹⁰ SPS Agreement, Annex C, 1(f).

⁹¹ See Art. 1.5 TBT Agreement (TBT provisions do not apply to SPS measures).

⁹² Article 2.2 TBT Agreement.

⁹³ Article 25.2 SCM.

⁹⁴ Article 25.3(iii) SCM.

5.2.6. *Article 6 Agreement on Trade-Related Investment Measures*

The Agreement on Trade-Related Investment Measures (TRIMs) reinforces the general GATT transparency obligations for measures that Members maintain on foreign direct investment.⁹⁵ By requiring that any investment measure coming within the scope of the Agreement is published, Article 6.2 of the TRIMs Agreement can play a role in ensuring that traders are aware of the valid rules of investment. As with other provisions on transparency, this will allow for traders to better resist demands for favours in return for trading opportunities. The effect of the TRIMs Agreement, however, is likely going to be limited in its corruption-fighting potential, as the rules to which it is directed – mainly domestic purchasing requirements and import-export balancing rules – are less likely to be the location of significant corruption in the first place than are other regulations surrounding investment rules.

5.2.7. *Understanding on the Interpretation of Article XVII of the GATT 1994*

Paragraphs 1 and 2 of the Understanding on the Interpretation of Article XVII calls for Members to notify all state-run enterprises or state-granted monopolies to the WTO, indicating as well how these companies are run and how they effect international trade.⁹⁶ Subject to challenges by other Members if not adequately prepared, the provisions of the Understanding on the Interpretation of Article XVII addresses a sector of trade that is highly vulnerable to corruption: ‘governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, ... in exercise of which they influence through their purchases or sales the level or direction of imports or exports’.⁹⁷ As economists have indicated that opportunities for corruption are higher where there are ‘large projects the exact value of which are difficult to monitor’, public commercial enterprises would seem highly susceptible to corrupt practices.⁹⁸ The additional characteristic of these firms as being public in ownership but private in nature increases the likelihood of their being subject to corrupt practices.⁹⁹ Indeed, officials of state trading enterprises and other state-granted monopoly firms have great opportunities for exercising discretion in a competition-free environment, and one that is often shielded from scrutiny by complex regulation and bureaucratic structures. By requiring at least a record of how the affected business is to operate, and by making this

⁹⁵ Article 6.1 TRIMs.

⁹⁶ Understanding on the Interpretation of Art. XVII of the GATT 1994, paras 1, 2.

⁹⁷ *Ibid.*, at para. 1.

⁹⁸ Axel Dreher, Christos Kotsogiannis, & Steve McCorriston, ‘Corruption Around the World: Evidence from a Structural Model’, *J. Comp. Econ.* 35 (2007): 443, 450. The effect of a state-trading enterprise is in this way analogous to the impact of concentrated natural resources in a country. The control over allocating the rights to exploit such resources affords a high degree of discretion to the responsible official, leading to higher incidences of corruption. See A. Ades & R. Di Tella, ‘Rents, Competition and Corruption’, *American Economic Review* 89 (1999): 982.

⁹⁹ *Id.*, at 451 (relying on Treisman in arguing that corruption is lower ‘where the normative separation between ‘public’ and ‘private’ is clearer’). See also Daniel Treisman, ‘The Causes of Corruption: A Cross-National Study’, *J. Public Economics* 76 (2000): 399.

requirement the subject of possible discussion in the WTO, the Understanding's provisions can thereby reduce the scope for corruption in such enterprises.

5.2.8. *Article III GATS*

Article III GATS is the services-trade corollary to Article X GATT. Containing the basic obligation of publishing 'all relevant measures of general application' relating to the cross-border trade in services in its paragraph 1, Article III continues to require that Members update their trading partners on changes to their laws that would affect the market access or national treatment of foreign services and service providers.¹⁰⁰

Beyond the notification requirement, GATS also calls for administrative transparency in the regulatory procedures of a Member.¹⁰¹ To ensure the 'reasonable, objective and impartial' handling of traders,¹⁰² Members are to provide for judicial review of administrative decisions,¹⁰³ for prompt attention to requests for authorizations for providing services,¹⁰⁴ and for feedback on the status of applications.¹⁰⁵ Combined with the warning that service regulations are not to be 'unnecessary barriers to trade',¹⁰⁶ the various obligations work to place foreign services and service providers in a position resist demands for bribery at various points in the trading process – from the initial market access attempts to the licensing procedures – reducing as well the commercial necessity of speed payments. Oversight by the Council for Trade in Services and subjection to the dispute settlement process reinforce the preventative potential of such rules with enforcement powers.

5.2.9. *Agreement on the TRIPs*

The Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs) has a blanket provision on 'transparency', similar to the other multilateral agreements.¹⁰⁷ It also calls particularly for notification of regulations that would violate the national treatment or MFN treatment of foreign intellectual property holders.¹⁰⁸ Again, the informational symmetry fostered by such information could lead to less success in demands for bribes by officials.

More significant in reducing corruption are the procedural obligations of Members in enforcing their intellectual property laws in favour of foreign nationals, found in

¹⁰⁰ Article III.3 GATS.

¹⁰¹ Article VI GATS.

¹⁰² Article VI.1 GATS.

¹⁰³ Article VI.2 GATS.

¹⁰⁴ Article VI.3 GATS.

¹⁰⁵ Article VI.3 GATS.

¹⁰⁶ Article VI.4 GATS.

¹⁰⁷ Article 63 TRIPs. The Council for TRIPs is working with the World Intellectual Property Office (WIPO) to establish a common notification registry. See Art. 63.2 TRIPs.

¹⁰⁸ Articles 3.1 and 4(d) TRIPs (both requiring notification of measures, the former of national treatment exceptions and the latter of measures that are contrary to the MFN obligation of the Member).

Article 41 TRIPs. The provisions of that article require, for example, that Members ensure that the available enforcement procedures are economical in terms of both time and money,¹⁰⁹ and that judicial review of any final decisions can remedy failings in the legal evaluation of an individual's request.¹¹⁰ The preference given to 'reasoned' written decisions,¹¹¹ in particular, could have an impact on judicial corruption, as distorted judicial processes will be more open to scrutiny and, ultimately, oversight by the WTO's own legal review.

5.3. PROVISIONS ON HARMONIZATION

The provisions on harmonization, found in several of the WTO Agreements, are tools that may prove even more important on a daily level than transparency in cutting away at corruption in trade, by virtue of its grant of information to the trader. The provisions set out below reduce the opportunities for corruption at the border or on the marketplace by levelling the relative position of the trader and trade officials, as do transparency provisions. By creating a single standard, however, harmonization goes even further than transparency, as the trader no longer needs to invest in understanding differences.

5.3.1. *Article VII GATT*

A pendant to Article II GATT, Article VII sets up a standard by which border officials should judge the market value of a good for purposes of determining the charges to which it is subject. The uniform valuation measure can, again, reduce the margin of corruption facing importers by providing them with a standard against which official decisions can be evaluated, and potentially checked.

5.3.2. *Article VIII GATT*

Another pendant to Article II GATT, the rules of Article VIII provide that a Member is to limit charges imposed for importation or exportation to the 'approximate cost of services rendered'¹¹² as well as to simplify the paperwork requirements imposed on traders.¹¹³ Although the trade policy grounds for such a rule rest with a fear of protectionism, an anti-corruption potential clearly exists. The provision contains the possibility of establishing a basis on which to make a WTO claim should a Member's authorities demand extra-legal payments for permission to move a good into or out of a territory. The documentation simplification rule, too, may act as a tool to lessen the opportunities of illicit

¹⁰⁹ Article 41.2 TRIPs.

¹¹⁰ Article 41.4 TRIPs.

¹¹¹ Article 41.3 TRIPs.

¹¹² Article VIII: 1(a) GATT.

¹¹³ Article VIII:1(c) GATT. See also Art.VIII:4 GATT (exclusive list of government measures included within the scope of the provision).

official behaviour by clarifying the legal conditions of market entry. Finally, the provision's stipulation that no 'substantial penalties for minor breaches of customs regulations or procedural requirements' could lend support to efforts to ensure that law enforcement acts in a manner compatible with its role as upholders of the rule of law.¹¹⁴

5.3.3. *Agreement on Rules of Origin*

The Agreement on Rules of Origin (ARO), one of the Uruguay Round Agreements, provides for a harmonization of Members' regulations on determining from where a product comes for purposes of affording MFN treatment, distributing import/export rights under QRs or tariff quotas, calculating dumping and subsidy injury or remedial duties, controlling government procurement, and for the compilation of statistical information.¹¹⁵ To a significant extent, the ARO is a transparency-fostering instrument.¹¹⁶ It requires, for instance, that Members publish such rules,¹¹⁷ make prior assessments of the origin of goods if so requested by a concerned individual,¹¹⁸ and allow for judicial review of administrative origin determinations.¹¹⁹ The Agreement goes further, however, by providing for 'consistent, uniform, impartial and reasonable' implementation of the rules of origin by officials responsible.¹²⁰ Such a clause, being justiciable, offers complainants a grounds for challenging corrupt practices that could arise in individual trade transactions whereby a border official would ask for advantages in exchange for declaring a good to have a particular origin.

Moreover, the ARO aims to harmonize the rules of origin of all WTO Members.¹²¹ By its nature, harmonization reduces the informational asymmetry of importer and official at the border, lowering in turn the opportunities for corruption.

5.3.4. *Article 3 Agreement on Sanitary and Phytosanitary Measures*

Article 3 of the SPS Agreement is the provision distinctly directing WTO Members to 'base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist'.¹²² The provision allows for any such harmonized standard to enjoy a presumptive legitimacy in the WTO system, while condemning any

¹¹⁴ Article VIII:3 GATT. The provision goes even further, noting that:

[i]n particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning. *Id.*

¹¹⁵ Article 1 Agreement on Rules of Origin (ARO). Para. 1 of Art. 1 specifies that the Agreement does not apply to preferential rules of origin.

¹¹⁶ See generally, Art. 3 ARO.

¹¹⁷ Article 3(e) ARO.

¹¹⁸ Article 3(f) ARO.

¹¹⁹ Article 3(h) ARO.

¹²⁰ Article 3(d) ARO.

¹²¹ Article 9.1 ARO.

¹²² Article 3.1 SPS Agreement.

stricter standard to the need to be defended on the basis of ‘scientific justification’ or a rigorous national risk assessment procedure.¹²³ The SPS Agreement, then, clearly reduces the discretion of national authorities to impose arbitrary health standards on traded products. Thus, the corruption-pull is weakened for both the legislative process (where politicians are less flexible to grant requests to pass laws that would benefit particular interests) and in the implementation of the laws (where national executives will be limited by international practice).

5.3.5. *Article 2.4 Agreement on TBT*

Like the SPS Agreement, the TBT Agreement strongly encourages WTO Members to adopt and adhere to internationally recognized regulations to facilitate the flow of goods among national markets. Viewing all technical regulations as potentially ‘unnecessary obstacles to trade’, the TBT nevertheless recognizes that some regulations pursue legitimate aims, and so attempts to strike a balance between these effects.

Paragraph 4 of Article 2 TBT sets out that to the extent that relevant international standards exist, WTO Members are to adopt them unless ‘fundamental’ problems would arise from their adoption.¹²⁴ The desire for harmonization is supported by a granting of a presumption that the internationally based national standard complies with the WTO, relieving (partially, at least) the Member of the threat of dispute settlement regarding the appropriateness of such regulation.¹²⁵

The impact of this harmonization-push on corruption is, again, to both reduce the legislative discretion of politicians and to limit corruption in the implementation of such regulations by providing traders with broader experiences with which to challenge demands for illicit bargaining.

5.3.6. *Agreement on Rules of Origin*

The ARO is another of the WTO’s main harmonization agreements. The Agreement sets out basic guidelines on how a future harmonized set of rules of origin, applicable to all WTO Members’ MFN trade relations,¹²⁶ should look.¹²⁷ Thus, the determination of the

¹²³ Article 3.2-3.3 SPS Agreement. See Art. 5 SPS Agreement (setting for the standards and procedures required to fulfil the risk assessment criteria of Art. 3).

¹²⁴ Article 2.4 TBT Agreement: ‘Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards ... would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems’.

¹²⁵ Article 2.5 TBT Agreement (‘it shall be rebuttably presumed not to create an unnecessary obstacle to international trade’).

¹²⁶ Preferential rules of origin (those rules of origin applying to trade with customs union or free trade area partners) are not within the scope of the Agreement. Art. 1.1 ARO.

¹²⁷ See generally, Part IV ARO (titled ‘Harmonization of Rules of Origin’).

origin of a product is to depend on harmonized definitions of where the product was 'wholly obtained' or where it underwent the last 'substantial transformation'.¹²⁸

As the determination of the origin of a product determines the conditions of competition it will face on its target market, the harmonization of the rules of origin is clearly important to trade relations. Official caprice in making such determinations can lead to opportunities for corruption, so the Agreement's call to harmonize such rules to reduce the officials' discretion is a further step to stemming trade-related corruption.

5.3.7. *Article VI GATS*

Paragraph 5(b) of the GATS provision on the rules governing domestic regulation of trade in services sets 'international standards of relevant organizations' to be one measure of the compatibility of a Member's treatment of foreign services and service suppliers. Not absolutely requiring adherence to such standards, the GATS indirectly encourages Member governments to approach a harmonization of regulations by suggesting a higher burden of proof for regulations that do not conform to internationally agreed-on standards. The ability to invoke such standards may lower a trader's willingness to yield to requests for bribes from officials.

5.3.8. *Agreement on TRIPs*

The TRIPs Agreement, being essentially an agreement setting out minimum standards of intellectual property protection, harmonizes such rules at the margin. Although some WTO Members may desire greater protection of intellectual property right holders than the TRIPs provides, many Members do not. Thus, the minimum rules become, particularly among governments reluctant to offer such rights, the harmonized standard.

As with the other harmonization attempts discussed above, the harmonization of intellectual property rights can lead to less trade-related corruption by reducing official discretion in the granting of competitive privileges. A producer of intellectual property, because of the rights protected by the TRIPs, can simply refuse to succumb to requests for extra payments from an official who promises to issue rights protection of that property because the producer is entitled to the right of protection at no cost anyway. The benefits harmonization brings to this constellation is that the rights holder need not gather additional information on the intellectual property protection requirements for different markets, and is thus in a better position to assert her rights.

¹²⁸ Art. 9.1(a) ARO. Art. 9.2(c) sets out that the drafting committee will determine the definitive content of each of these terms.

5.4. OTHER PROVISIONS

5.4.1. *Article XX GATT*

The GATT's provision for excepting market access barriers, discrimination, transparency, or any other rule of the agreement for certain policy reasons may seem to open the door to corruption. Indeed, if the basic principles of the WTO foreclose or at least limit the opportunities for illicit official actions, exceptions would seem to reopen these possibilities. The interpretation given to the introductory paragraph of Article XX GATT, however, significantly limits this danger. The so-called 'chapeau', preceding the list of substantive grounds for removing a Member's obligations under the GATT, notes that the exceptions are available '[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'.¹²⁹ The Appellate Body of the WTO considers this text to require an investigation into how a particular regulation is applied in fact by officials. Thus, even if a Member's law is legitimate in its aim as relates to a public interest, if those responsible for implementing the rule act arbitrarily or unreasonably (such as would be the case in corruption), the exception of Article XX GATT will not be available to excuse such conduct.

At the same time, the exception found in Article XX(d) offers an assurance that Member laws that penalize corruption can be implemented without contravening the GATT obligations of non-discrimination or market access. The exception of paragraph (d) provides that Members may avoid any GATT obligation if such avoidance is 'necessary to secure compliance with laws or regulations which are not inconsistent with' the trade agreement. Although particularly aimed at antitrust laws and intellectual property protections, the provision's text is unlimited by the subject matter of the laws at issue. That anti-corruption laws could fall under its ambit can therefore be assumed. The trade regime is, therefore, neutral towards Member efforts to combat corruption, not preventing them, even if not actively pursuing such a goal.

5.4.2. *Article XVII GATT*

The rules requiring non-discrimination from state-trading enterprises' purchases and sales broaden the scope of the WTO's anti-corruption potential by subjecting such enterprises, or any commercial firm enjoying governmental 'privileges' to the same principles as Members' governments are. Explicitly calling for state-trading enterprises to utilize 'solely ... commercial considerations' in their business decisions, Article XVII lends legal grounds for complaining of corrupt practices in the acquisition of contracts with their nationals to WTO Members.¹³⁰

¹²⁹ Article XX GATT.

¹³⁰ Article XVII:1(b) GATT.

6. ASSESSMENT: A LIMITED IMPACT OF WTO RULES ON CORRUPTION

The aforementioned measures found in the positive law of the WTO are modest instruments in reducing corruption opportunities that at the same time liberalize world trade. Each may contribute to reducing the capacity of trade officials to illicitly profit from producers by providing reliable information about the existing level of barriers. Armed with such knowledge, a potential importer will – theoretically – be able to resist demands for extra payments in exchange for gaining entry for her products.¹³¹ The WTO rules on liberalization can, therefore, contribute to the reduction of opportunities for corruption if wielded purposefully to that aim.

There are two main weaknesses of relying on the WTO trade instruments for corruption reduction. First, existing WTO measures address only a small part of the scope of ‘corruption’. Second, the trade instruments’ potential to lower corruption opportunities necessarily relies on traders’ active resistance towards corruption for any actual effects.

In terms of the first weakness, the WTO measures set out above indirectly address only a narrow segment of behaviour that can be defined as ‘corruption’. Indeed, one could argue that (particularly given the stalemate on negotiations over the TGP and the possibility that the Members will fail to adopt the GPA Revisions) the existing WTO rules can only address the most easily recognized part of even the more narrowly defined ‘trade-related corruption’ – the ‘petty’ corruption of bribery at the border. Although bribery of border guards or inspection officials can, indeed, discourage trade, and programs to eliminate corruption among border officials is a necessary step towards reducing the negative effects of corruption on an economy, from a trade viewpoint, petty corruption is more likely seen as an irritating tax than as a true hurdle to profits to most producers. The willingness of traders to continue to engage in business in countries viewed as highly corrupt testifies to the validity of this perspective.

Moreover, it is such petty corruption that – while not harmless – may be less damaging to the society in which the corrupt officials reside. The payments demanded by an official who otherwise cannot feed, clothe, or provide medical care for a family, for example, may be characterized as a functional equivalent of a redistributive tax, standing in the place of a state’s official protection of its citizens’ human rights.

The case of grand corruption is different. Corruption of decision-makers in the public purchasing sector, for instance, can have much more dire effects on citizens by subjecting populations to products or services from not just economically less competitive companies, but to products which are unsafe and service suppliers which are unqualified. The examples are varied: from the overinvestment in building roads at the cost of maintenance of existing roads because corrupt gains are higher when infrastructure is newly built to the

¹³¹ According to the results of empirical research on firms’ reactions to suspected corruption among competitors, one might doubt that the theoretical benefits of transparency will be fully realized. Soreide remarks, for instance, ‘Given that firms seldom raise their voice to report corrupt suspicions, they are left with two options when operating in challenging business environments: they exit from the market or adjust to local business practices’. Tina Soreide, ‘Corruption in International Business Transactions: the Perspective of Norwegian Firms’, in *International Handbook on the Economics of Corruption*, ed. Susan Rose-Ackerman (Cheltenham, UK/Northampton, MA: Edward Elgar, 2006), 381–417, 401.

collapse of bridges resulting from the selection of unqualified suppliers in a public tender to the granting of mining rights to a company with which an official has a financial interest. Corruption at the highest levels can leave a society stripped of financial and natural resources, subject to unaccountable political leaders, and devoid of the hope of change.

Even putting aside its damaging effects on development and human rights, corruption's negative effects on trade liberalization efforts go much further than the existing provisions of the WTO can address. Hard to detect, corruption of higher trade officials might lead to government policies that harm the wider economy even while ensuring a particular industry (or a single firm or even an individual) a privileged position: protection from commercial competition in return for cash payments is an obvious example, but similar (if not worse) are actions such as exchanging jobs or political support (or even an individual's life) for a judgment favourable to one side of a legal dispute.¹³²

7. SHOULD THE WTO BE INVOLVED IN COMBATING CORRUPTION?

The fact that the WTO is in the business of liberalizing trade – lowering market access barriers and fostering expectations of equal conditions of competition among traders – speaks neither for nor against the Organization's taking a firmer stand on the corruption issue. The answer to the question of whether the WTO should be involved in the corruption-fighting efforts of the other international financial organizations logically rests on the question of how corruption itself affects the achievement of the Organization's goal. The goal must be defined through the political process. Assuming the goal is trade liberalization, the answer to whether the WTO should directly attempt to reduce corruption depends on corruption's effects on liberalization. If one can persuasively claim that corruption has no effect (or even positive effects) on trade liberalization efforts, the current stand-aside attitude of the Organization is justified. If, on the other hand, the research indicates a significant causality between corruption and non-liberalization, the response of the Members should be quite different. The answer to the role of the WTO in corruption-combating thus depends on how corruption impacts on liberalization.

7.1. WHAT DO WE KNOW ABOUT CORRUPTION'S EFFECTS ON TRADE LIBERALIZATION?

The research on corruption's effects on trade liberalization is, like all research on corruption, notoriously difficult and questionable, as the measures of corruption are themselves inaccurate. Perhaps more importantly, however, there is a paucity of research on this particular question. The two recent studies known to this author are a 2002 paper by Lee and Azfar and a 2007 paper by Bandyopadhyay and Roy.¹³³ Although Lee and

¹³² Reports by Transparency International on perceived judicial corruption highlight the extent to which a corrupt judiciary can cripple a society's pursuit of general prosperity and basic justice. Transparency International, *Global Corruption Report 2007*.

¹³³ Young Lee & Omar Azfar, *Does Corruption Delay Trade Reform?* 21 Jun. 2002 (text available at: <www.kdischool.ac.kr/faculty/2002seminar_data/21%20Does%20Corruption%20Delay%20Trade%20Reform%20final.pdf>);

Azfar's results strongly indicate that corruption negatively influences trade liberalization, it is a limited study. It does not, moreover, provide any explanation for the many liberalizations of trade that have occurred in regimes perceived to be highly corrupt. Bandyopadhyay and Roy's paper confirm Lee and Azfar's indicated results through empirical calculations, finding that corruption can lead to more protectionism because low-quality institutions are more open to pressure from national groups to restrict foreign competition. It, however, limits its view of trade openness to tariffs and international taxes, and seems to only look at the corruption from domestic producers. I believe, although I cannot empirically prove, that the relationship between corruption and liberalization is more complex than either of the models can reflect. The following analysis is, therefore, necessarily rudimentary, and will benefit from input in the future.

In addressing the question of whether corruption could influence a country's trade liberalization activity, it is easy to make a hypothesis that the answer is 'yes'. As in the reverse relationship discussed above, it is intuitive that high trade barriers create opportunities for requesting illicit advantages in exchange for market access or equal conditions of competition. Under such an assumption, the effect of public corruption would be to lower a regime's willingness to liberalize its trade in the absence of overwhelming alternatives in order to protect these extra sources of income. Corrupt officials and politicians 'may well ... put in place and [maintain a corrupt policy framework] precisely *because* of its corruption potential'.¹³⁴ The empirical investigations of the problem of 'regime-capture' give credence to these assumptions.¹³⁵ Determining whether this intuition is correct for trade liberalization, however, requires more than pure conjecture, as several considerations warrant account.

First, the openness-equals-less-corruption theory relies on a connection between the lawmakers responsible for trade policy (whether the official legislature or an administrative

Subhayu Bandyopadhyay & Suryadipta Roy, Corruption and Trade Protection: Evidence from Panel Data, Working Paper 2007-022A (May 2007) (text available at <<http://research.stlouisfed.org/wp/2007/2007-022.pdf>>). On page 20, Lee and Azfar state in conclusion, "The results we present here are, as far as we know, the first to show directly that trade regulations are endogenous to corruption and that more corrupt countries delay trade reform". The Bandyopadhyay and Roy paper contains a literature review and a reference to older studies that look at corruption and trade, but mention that the Lee and Azfar paper 'to our knowledge, is the only paper that looks at the effect of corruption on trade policy' rather than the effect of trade on corruption or general effects of corruption. Bandyopadhyay & Roy, 2-3. See *id.*, at 1 (mentioning Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard Univ. Press, 1965) and Gene M. Grossman & Elhanan Helpman, 'Protection for Sale', *Am. Econ. Rev.* 84, no. 4 (1994): 833).

¹³⁴ Toke, Economic Analysis of Corruption at F635.

¹³⁵ I want to acknowledge and thank Nils Herger of the University of Bern/World Trade Institute for his helpful advice and forwarded literature suggestions on the role of regime capture/rent-seeking in the area of financial liberalization which led me to the more general economic literature on the influence of political elites on regulation. For an economic account of the role of capture in developing usury laws in the United States, see Efraim Benmelech & Tobias J. Moskowitz, The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the nineteenth Century, Harvard Economics Department Working Paper at 4 (August 2007) ("The tension between private and public interests provides an explanation and highlights the endogenous relation between financial development and growth"). Benmelech and Moskowitz describe the findings in numerous works of other economists that have looked at the formation of legislation/regulation by affected elites. See, e.g., Stanley L. Engerman & Kenneth L. Sokoloff, 'The Evolution of Suffrage Institutions in the New World', *J. Econ. History* 4 (2005): 891; Edward L. Glaeser & Claudia Goldin, 'Corruption and Reform: An Introduction', in *Corruption and Reform: Lessons from America's Economic History*, eds Edward L. Glaeser & Claudia Goldin (NBER, 2006): 3-22; Randall S. Kroszner & Philip E. Strahan, 'What Drives Deregulation? Economics and Politics of the Relaxation of Bank Branching Restrictions', *Quarterly J. Economics* 114 (1999): 1437; Wallis, 'Constitutions, Corporations, and Corruption: American States and Constitutional Change', *J. Econ. History* 65, no. 1 (2005): 211, 1842-1852.

office, as the case may be) and those benefiting from corruption. Although this is often a close connection – indeed, many corruption regimes suffer from corruption at every level – it is not an unavoidable one. Remember that there are different types and forms of corruption. This can have an influence on the probability of shaping trade policies according to private interests. If, for instance, the corruption is mainly in the form of border officials accepting bribes from foreign traders in exchange for a tariff reclassification, and if these officials are not sanctioned by their supervisors for such bribe-taking, it is unlikely that trade policy made at higher levels of government, often at a location geographically removed from the border where the guards work, will be much affected by the consideration of maintaining the source of such illegal moneys. Of course, if the higher official takes a portion of the bribes, the interests in maintaining such barriers will assume a higher importance. If, alternatively, the main form of corruption is embezzlement or nepotism, then a corrupt government official that can extract value from the increased number of commercial transactions resulting from a liberalization might be just as willing to liberalize trade as an honest official would.¹³⁶

Next, the analysis needs to consider which aspects of trade liberalization are affected by corruption. Here, one could imagine that aspects such as tariff reduction might be viewed differently than liberalization in the form of the acceptance of transparency requirements for government procurement tender processes. Although the former would be perhaps only moderately opposed, if at all (depending on the original tariff level and amount of the reduction), the latter may be strongly rejected, given that the potential gains from corruption are so large and the corresponding risk of detection (let alone of punishment) so small when intransparency can be maintained.

Additionally, note must be made as to the types of corruption that can lead to stalled trade negotiations. Bribery, misappropriation of public funds, and links with organized crime are the most obvious forms to have such a result, while nepotism, judicial favouritism, or manipulation of elections are forms of corruption that are unlikely to have much of an influence on trade regulations at all.¹³⁷ Moreover, if the corruption reaches the level of organized criminal activities, the government may well authorize trade liberalizations in order to increase the profits of particular individuals or groups who themselves control importing or distribution channels.

Further, the assumption that corruption reduces the commitment to trade liberalization efforts depends on viewing corruption as mainly a demand-driven problem. That is, seeing the corruption itself as resting with individuals in the home country requesting/demanding payments in exchange for benefits of market access or advantageous treatment. If the supply-side corruption perspective is taken, there would be no

¹³⁶ As Susan Rose-Ackerman recognizes: 'Powerful groups that lose one source of patronage will search for another vulnerable sector'. Rose-Ackerman, *supra* n. 5, xiv-xxviii, xxxvii.

¹³⁷ See a list of 'commonly recognized forms of corruption' set forth in Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System* (Berlin/London: Transparency International, 2000), xviii (relying on Gerald E. Caiden, 'Toward a General Theory of Official Corruption', *Asian J. Pub. Admin.* 10, no. 1 (1988)); Ware & Noone, *supra* n. 10, 29 (listing bribery, kickback brokers, front companies, bid rigging, official-owned enterprises, and theft from government accounts/abuse of public assets as the six basic forms of corruption in transnational exchanges).

clear basis for thinking that liberalization would lower the foreign actors' propensity to offer bribes. Indeed, there might be the opposite conclusion, assuming that more liberalization translates into more commercial activity and more interactions between foreign traders and domestic officials. A corrupt official, therefore, may actually desire liberalization, and attempt to influence trade policy accordingly.

Finally, experiences with economic liberalizations have illustrated the role that corruption can play in the process of liberalization. When state-owned firms are privatized, for example, numerous new opportunities for corruption emerge. An undervaluation of the sales price and/or sales to related buyers in return for a portion of the profit can be extremely enriching to officials who can make the deal.¹³⁸

Whether rises in corruption levels such as were witnessed in the transition economies in the early 1990s are temporary is possible, but cannot be presumed, as consequent reductions in corruption rely on a state institutional structure capable of combating post-transition corruption. Given the aim of 'small government', 'there is a risk that economic liberalization may reduce further the efficiency and effectiveness of the state'.¹³⁹

7.2. WHAT COULD THE WTO DO NOW?

The answer, therefore, to the question of whether the WTO's approach to corruption is adequate remains unclear. Despite the high probability that corruption does have an effect on *how* trade liberalization is shaped, there is a lack of evidence of whether the liberalization process itself is hindered by corruption to give definite support to an anti-corruption platform in the WTO.

Current research on the relationship between corruption and trade liberalization is not yet advanced enough to give clear indications of the magnitude of the impacts of the former on the latter. Although one can hypothesize on the motivations of corrupt lawmakers and their approach to trade liberalization, observable trade policies of regimes perceived to be corrupt do not clearly reveal anti-liberal tendencies. The many facets of corruption, its ability to adapt to change – indeed, to shape the changes themselves, make generalizations about a causal relationship between corruption and non-liberalization valueless.

A rule-based WTO, however, must make generalizable policies. In view of this, my tentative response to the 'what should the WTO do about corruption' question would be this: both the Ministerial Conference and the WTO Secretariat should make unequivocal statements condemning corruption. Coming from the highest trade official of each Member and from the administrative head of the organization, such a statement would lay out the position that corruption is at odds with the goals of the trading system.

¹³⁸ U4, Causes & Consequences of Corruption, available at <www.u4.no/helpdesk/faq/faqs1.cfm#4> (last visited 22 May 2008).

¹³⁹ *Ibid.*

The Membership should then concretize their opposition to corruption as it affects trade by means of a declaration. Such a soft-law instrument sends an important signal to governments and officials that corruption in trade relations is damaging to the law-based system to which the WTO aims, and yet does not require the WTO to exceed its competences by developing substantive measures directed towards the reduction of corruption in particular transactions. The contents of a declaration could include an acknowledgement that a rule-oriented approach to a trading system that protects expected conditions of competition relies on the honest administration of law in each Member's governmental system, the recognition of the damaging effects of corruption on growth (without needing to mention human rights concerns), a call for importing and exporting countries to address both demands for as well as offers of illicit benefits (so as to spread the task equally between industrialized and developing Members), an incorporation of a program to work together with other institutions in developing corruption-detection and -reduction methods (thus underlining the governments' commitment to becoming active in the field while consciously keeping the locus of the bulk of anti-corruption activities external to the WTO), and an intent to pursue research on the effects of corruption on trade liberalization (thereby establishing an agenda to allow for further rule-making if necessary).

8. CONCLUSION

Corruption is widely believed to be damaging to societies. Condemning corruption, therefore, should not pose political difficulties. The WTO's failure to do so, therefore, is lamentable. Yet, the *likelihood* that corruption negatively influences the trade liberalization agenda of the WTO is not sufficient to warrant a full-fledged attempt by the WTO to develop rules to combat corruption. Norms that already exist in the various WTO legal instruments, particularly procedural requirements that aim at transparency, as well as substantive harmonization and market access provisions afford traders a tool to wield against demands for bribes that distort competition. Further substantive rules to reduce corruption would require a clearer theoretical basis before they could be brought into the WTO treaty system, and that basis does not yet exist outside of government procurement. Until the specificities of the various forms of corruption can be examined for their effects on the multiple aspects of trade liberalization, a general statement of the WTO and its Members calling for a common effort to avoid corruption in trade relations can suffice to signal the organizational interest in an honest pursuit of the rule of law.

Annex

Proposed Draft Declaration of the World Trade Organization's Condemnation of Corruption in Trade Policy and Trade Rules Administration

- (1) *Ministers recall* that corruption of trade administration can deprive governments of legitimate gains from trade, whether through lost tariff revenues or foregone trade relations. It is in the interest of each Member's government, therefore, to eliminate corruption from its own administration.
- (2) *Ministers recognize* the danger that corruption may pose to the liberalization of trade. When corruption distorts policy-makers' decision-making, liberalization efforts may be hampered or prevented in order to protect illicit sources of profits. This is contrary to the underlying goal of the world trading system.
- (3) *Ministers further realize* that corruption in the creation and administration of trade policy can threaten the principles of market access and non-discrimination that the multilateral trading system aims to further. It can thereby impair the expectation of equal conditions of competition available to foreign traders.
- (4) We *recognize* the benefits of transparency in trade policy-making and administration for reducing trade-related corruption. When trade rules are published and known to traders, the opportunities for resisting corruption are minimized. At the same time, traders are responsible for using the knowledge available to them to avoid complicity in illicit transactions.
- (5) Independent review of administrative decisions is important to ensure the enforcement of honest trade rules. Written decisions, complaint procedures with independent review of official rulings, and effective remedies for disappointed traders form a necessary part of national efforts to combat trade-related corruption. Members should ensure that their administrative procedures include such procedural aspects of the rule of law.
- (6) *Ministers acknowledge and appreciate* the efforts of other governmental and non-governmental institutions in developing methods to reduce corruption, and pledge to assist such efforts as relate to the multilateral trading system. We pledge to uphold through effective enforcement our obligations to criminalize corrupt activities of nationals acting outside of our national jurisdictions as set forth in the United Nations Convention against Corruption.
- (7) *Recognizing* that there is widespread corruption in government procurement and its direct impacts on Members' sustainable economic development,

we particularly condemn corruption in this sector. We take notice of the Organization for Economic Cooperation and Development (OECD)/DAC-World Bank initiative on addressing corruption in public procurement, and will strive to implement the results into our national procurement activities. We will also consider how the guidelines can be integrated into the GPA.

- (8) *Ministers affirm* the need for research on the question of how corruption affects trade liberalization. Studies to determine the effects shall be undertaken by the Secretariat, in cooperation with recognized international experts.