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POTENTIAL ANTI-CORRUPTION EFFECTS OF WTO DISCIPLINES

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Acknowledgement

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POTENTIAL ANTI-CORRUPTION EFFECTS OF WTO DISCIPLINES

1. In the context of OECD activities to fight bribery and corruption, the 1999 OECD Ministerial Council requested the Trade Committee to analyse the potential anti-corruption effects of international trade rules. Pursuant to the ministerial mandate, the Trade Committee decided, as a first step, to focus on how present WTO rules may bear on bribery and corruption. The issue of whether or how WTO rules could be improved or made more efficient in contributing to anti-corruption efforts is not addressed here. As was reiterated by Ministers at the 2000 Ministerial, work should however continue and the Committee may decide to address this or other aspects of the potential WTO contribution in the fight against corruption at a later stage.

2. In line with the approved proposal, the analysis groups WTO provisions according to four underlying principles of the multilateral trading system: *non-discrimination; transparency; stability and predictability; and limitations to arbitrary action*. Since these principles are in practice interwoven throughout the WTO texts, particular provisions often contain elements arising from more than one of the principles. In such cases the texts are discussed under each of the relevant principles.

I. Introduction

3. There is no single internationally agreed definition of bribery and corruption. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions views as bribery the act “*for any person intentionally to offer, promise or give any undue pecuniary advantage, whether directly or through intermediaries, to a (..) public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of (..) business*”. This offense is called “active corruption” or “active bribery” in the law of some countries. The concept of bribery also encompasses the “*offense committed by the official who receives the bribe*”, often termed “passive bribery”, as well as “*payments (..) made to induce public officials to perform their functions, such as issuing licenses or permits*”, generally referred to as “facilitation payments”. The Negotiating Conference excluded these aspects from the scope of the Convention, because it considered that criminalisation by other countries was probably not the most practical or effective policy action to “*address this corrosive phenomenon*”. For the purposes of the present analysis, however, and in order to allow a comprehensive evaluation of the potential anti-corruption effects of international trade rules, it is appropriate to use a broader definition, including both “passive bribery” and “facilitation payments”.

4. Corruption and bribery are not issues addressed specifically either by the 1994 GATT Agreement or by any of the other WTO Agreements. In other words, there are no WTO commitments to deter, prevent and combat bribery and corruption at the national or international level. However, a number of WTO provisions can have a bearing on bribery and corruption inasmuch as the latter distort international trade. Corrupt practices that do not violate WTO obligations fall outside the scope of existing WTO disciplines, although this does not imply in any way endorsement of these practices.

5. The following note will discuss selected WTO provisions and analyse their potential anti-corruption effects. In particular, the note will argue that WTO disciplines can, at least theoretically, contribute indirectly to anti-corruption efforts, in the sense that, in enforcing their WTO obligations, Member countries will at the same time reduce the opportunities and motivations for corruption, thus making corruption less likely to occur. Although this obviously mainly concerns corruption in international transactions, the achievement of a more transparent, predictable and less arbitrary regulatory environment can also reduce corruption in domestic transactions.

6. On the other hand, the note does not argue that WTO disciplines as they stand could serve as a basis for challenging corrupt practices in the framework of the WTO dispute settlement mechanism. Apart from anything else, the relevance of the dispute settlement mechanism as a tool against corruption would be limited by two factors : the absence of specific commitments in this area; and the fact that only practices that fall within the scope of existing WTO disciplines, as explained in paragraph 4 above, could be considered. Moreover, if a case were to be made, there would be difficulties relating to evidence alone that would need to be overcome when it comes to dealing with issues of this kind at a multilateral level.

7. It needs to be borne in mind that WTO rights and obligations apply only to states and not directly to individuals, businesses or other private parties. Direct enforcement of present WTO provisions against bribery and corruption, allowing for the WTO dispute settlement mechanism to be enacted, would thus imply some form of government action. That said, it may be noted that in the WTO context the concept of governmental action should not be understood unduly narrowly, since it is not limited to laws and regulations enacted by the government¹. That suggests that governmental co-ordination or blessing of corruption in any form could be construed to bring it within the ambit of WTO disciplines. It may also be worth reflecting on the extent to which the existence of corrupt practices which are simply tolerated by a government could be seen as violations of WTO obligations. Beyond that, to what extent, irrespective of governmental tolerance or co-ordination, could practices of private parties be considered as acts of the State? The International Law Commission in its ongoing work on State responsibility indicates that according to international practice the conduct of government or other public officials acting in their official capacity is attributable to the State “..even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.”² In contrast, the conduct of persons “..not acting on behalf of the State..” is not attributable to the State³. In this logic, the acts of public officials requesting or accepting bribes might, in certain circumstances, be covered by WTO obligations, while the payment of bribes by private enterprises would clearly not.

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1. *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, 31 March 1998, WT/DS44/R. The panel further reminded that “..what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection or endorsement of those actions.”
 2. International Law Commission, Draft Articles on State Responsibility, Article 10. See also Report of the International Law Commission on the work of its twenty-seventh session, 5 May to 25 July 1975 (A/10010/Rev.1)
 3. International Law Commission, Draft Articles on State Responsibility, Article 11.

II. Non-discrimination provisions

8. Non-discrimination rules are central to the multilateral trading system. They provide for effective equality of competitive opportunities between like products and services. Corrupt practices constitute an inherent violation of those rules when they result in discriminatory treatment among like products or services depending on whether the importer or exporter, as the case may be, has accepted to bear the additional cost of a bribe. Some WTO Agreements like the Customs Valuation or the Preshipment Inspection Agreements contain provisions that explicitly require equality of treatment between individual importers or exporters. It might be argued that the aim of putting all individual suppliers of like products on an equal footing is shared by the other non-discrimination provisions in WTO Agreements, even if they literally refer to discrimination directed against the country of origin of the product or service.

GATT 1994

9. GATT Article III provides for national treatment in internal taxation (III:2) and internal regulation (III:4) for imported products. The provision has a limited bearing as it would only concern corrupt practices that entail discriminatory, or less favourable treatment of imported products (e.g. if national treatment is conditional upon payment of bribes), but would be of no use against corrupt practices affecting both domestic and foreign products.

10. At the level of treaty interpretation, an additional problem with the application of Article III in this context might be that, since all countries have formally made bribery of domestic officials illegal, bribery could not easily be characterised as a tax, or even a requirement in the legal sense. However, the tendency in GATT/WTO jurisprudence is to interpret the meaning of the requirement in Article III:4 more functionally than formally. Thus, in the Panel Report on “*EEC-Regulation on Imports of Parts and Components*” the panel found that the expression “laws, regulations and requirements” in Article III:4 included “*not only requirements which an enterprise is legally bound to carry out, . . . but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government . . .*”⁴. In addition, it should be noted that Article III:1 prohibits the application of internal taxation or regulation, within the meaning of Articles III:2 and III:4 in such a manner as to afford protection to domestic production. This reinforces the notion that Article III requires non-discrimination not only in the letter of the law but also in the manner in which the law is applied.

11. Finally, it should be noted that, by virtue of the MFN requirement in GATT Article I, the national treatment obligation must be extended equally and “unconditionally” to all WTO Members. This means that where the producer of one WTO Member has paid a bribe, but the producer of another has refused to do so, or to pay as large an amount, and the result is that the imports of the former are more favourably treated in domestic taxation or regulation, there will have been a violation of Article I. Indeed, in a recent decision, a WTO panel has suggested that any condition imposed on imported products that is unrelated to the products themselves or their end-uses may well violate the Article I MFN obligation⁵.

12. By virtue of GATT Article XIII :1 quantitative restrictions that are allowed notwithstanding the general prohibition of Article XI should in all instances be administered in a non-discriminatory manner. Although this requirement primarily relates to patterns of allocating quotas, it equally applies to the everyday management of such restrictions.

4. *EEC-Regulation on Imports of Parts and Components*, 37 BISD 132, para. 5.20-5.21.

5. *Indonesia-Certain Measures Affecting the Automobile Industry*, Report of the Panel, July 2, 1998, WT/DS54/R, paras. 14.143-.147.

13. By virtue of GATT Article XVII:1(a) the general principles of non-discrimination, as established in GATT articles I and III, should also be observed by state trading enterprises, which include not only government-owned firms but also any firm with a special privilege or status conferred by government.

General Agreement on Trade in Services

14. Under the General Agreement on Trade in Services (GATS) MFN treatment applies to all trade in services between WTO members (GATS Article II), although a Member may maintain MFN-inconsistent measures if it has listed such measures in the Annex on Article II Exemptions. National treatment (GATS Article XVII) applies only where a WTO Member has listed a sector in its schedule. Corrupt practices would come within the ambit of GATS non-discrimination provisions, as the Agreement explicitly covers all “measures” “*taken by central, regional and local governments and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities*” (GATS Article I), “*whether in form of a law, regulation, rule, procedure, decision, administrative action, or any other form*” (GATS Article XXVIII). GATS Article XVII further specifies that a treatment “*.. shall be considered to be less favourable if it modifies the conditions of competition ..*”, as is clearly the case when corruption prevails.

Agreement on Trade-Related Investment Measures

15. The Agreement on Trade-Related Investment Measures (TRIMs) rules out all TRIMs that are inconsistent with GATT Articles III (national treatment) or XI (quantitative restrictions). The extent to which Article III may be relevant for corrupt practices has already been mentioned. Article XI, by requiring the elimination of import quotas except under strictly defined conditions, effectively limits discrimination among like products as well as between imports and local products; however, as in the case of Article III, corrupt practices that are not discriminatory would not be covered.

Agreement on Technical Barriers to Trade

16. The TBT Agreement reaffirms and reinforces the GATT provisions on MFN and national treatment with respect to internal regulation (TBT Articles 2.1, 3.1, 4.1, 5.1.1, 5.2.1, 5.2.5, 7.1, 8.1, 9.1 and Article D of the Code of Good Practice). In particular, TBT Article 5.2.5 requires that “*any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country ..*”, which implies that no bribes (and in particular facilitating payments) should be required for imported products in excess of the normal fees for conformity assessment.

Customs Valuation Agreement

17. The preamble of the Customs Valuation Agreement also acknowledges the importance of the non-discrimination principle, recognising that “*...valuation procedures should be of general application without distinction between sources of supply...*”. The application of the principle to individual sources of supply (as opposed to countries of origin) makes it directly relevant to discrimination between suppliers accepting to pay bribes (and in particular facilitating payments) and those who won't. Although the preambular text does not establish legally binding rights and obligations, it indicates the general philosophy of the Agreement, in the light of which all VAL provisions have to be interpreted.

Preshipment Inspection Agreement

18. Similarly, the preamble of the Preshipment Inspection Agreement (PSI) affirms that preshipment inspection programmes “...*must be carried out without giving rise to .. unequal treatment...*”. PSI Article 2:1 further requires user Members (countries mandating PSI activities) to “.. *ensure that preshipment inspection activities are carried out in a non-discriminatory manner, that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities.*” The focus here too is discrimination against individual exporters rather than exporting countries. Such discrimination may indeed occur on the basis of the amount of facilitating payments that an exporter is to pay. PSI Article 2:14 deals with cases of conflict of interest, such as when a special financial relationship exists between the inspecting and the inspected entity.

Government Procurement Agreement

19. The Government Procurement Agreement (GPA) is a plurilateral treaty, to which some, but not all, WTO members are signatories. Article III:1 and 2 of the GPA requires national treatment and non-discrimination to be provided immediately and “unconditionally” to the products, services and suppliers of other Parties “*With respect to all laws, regulations, procedures and practices ..*”. Article VII:1 of the GPA provides that “*Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.*” In particular, Article VIII(b) establishes criteria for the (non-discriminatory) qualification of suppliers, explicitly excluding criteria not “..*essential to ensure the firm’s capability to fulfil the contract in question*”, while Article X:1 calls for “*fair and non-discriminatory*” selection procedures. While discrimination per se might not be a corrupt practice, the awarding of government procurement contracts on the basis of whether a bribe has been paid rather than on the merits of the bid should probably be considered as discriminatory. Moreover, discrimination in commercial cases of tendering goods and/or services may under certain circumstances be a warning sign of potential corrupt behaviour.

20. GPA Article VI:4 requires that “*Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.*” Furthermore, GPA Article VII:2. requires that “*Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.*” While these articles do not specifically mention corruption, they focus on behaviours which are frequently the result of corruption.

III. Transparency provisions

21. It is commonplace knowledge that bribery thrives under conditions of secrecy or non-transparency in government regulation or administration. The establishment of a more transparent regulatory environment and open administrative practices can affect bribery and corruption in two ways: on the one hand businesses that are well acquainted with their rights and obligations might be less vulnerable to abusive requests; on the other hand, and most importantly, transparency makes corruption less rewarding and more risky by enhancing accountability, easing inside administrative control and allowing outside scrutiny.

GATT 1994

22. From both perspectives, GATT Article X is of considerable significance. Article X:1 requires that "*Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.*"

23. The lack of prompt publication can lead to potential for graft and corruption. This is particularly the case where it is not just an issue of lack of notice but in cases where new, and often burdensome, measures are threatened that have not been made public in any form. Such enforcement prior to, or absent, publication is contrary to GATT Article X:2 requiring that "*No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.*"

General Agreement on Trade in Services

24. A general transparency requirement applies to all trade in services, which however only requires publication of regulations "of general application" and not specific administrative decisions or orders (GATS Article III).

Agreement on Basic Telecommunications

25. A transparency requirement for licensing processes is also introduced by the Reference Paper which was negotiated in the framework of the Basic Telecommunications Agreement. Governments committing to the regulatory disciplines of the Reference Paper undertake to make publicly available all licensing criteria and the terms and conditions of individual licenses. They also commit to communicate, upon request, to the applicant the reasons for denying a licence. The latter provision is particularly relevant in enabling outside scrutiny of corrupt practices in the licensing process.

Agreement on Trade-Related Investment Measures

26. In the past, TRIMs have often been characterised by a lack of transparency, providing scope for arbitrary decisions and corruption with respect to authorisation of inward international investment. Article 6 of the TRIMs Agreement reaffirms the GATT Article X commitment to transparency with respect to investment measures. In addition, special reference is made to measures "*..applied by regional and local governments and authorities within (Members') territories*", which are often more difficult to trace by foreign competitors.

Agreement on Technical Barriers to Trade

27. Bribery and corruption occasionally aim at favouring certain competitors through the design, adoption and implementation of technical regulations, for use both in the area of government procurement and in the context of private transactions. Transparent procedures for adopting technical regulations and assessing conformity of products makes it more difficult to tailor regulations to specific businesses. The TBT agreement reiterates the transparency provisions in GATT Article X, explicitly requiring that “*Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them*”(TBT Article 2.11). TBT Article 5.2.2 further requires that “*the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary ; ..*”

Customs Valuation Agreement

28. The Customs Valuation Agreement Article 12 reaffirms the obligations set forth in GATT Article X. Furthermore, VAL Article 1:2(a) provides that the communication by the customs administration to the importer of certain types of transaction valuations should be in writing if the importer so requests. The requirement of on-record communication may have a preventive effect against bribery and corruption, which are usually encouraged by and call for off-record communication. Similarly, VAL Article 16 provides for the right, upon request, of the importer “*.. to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer’s goods was determined.*” This increases transparency both with respect to the customs officers in charge and to the importer employees engaged in the operation.

Preshipment Inspection Agreement

29. The preamble of the Preshipment Inspection Agreement also acknowledges the importance of the transparency principle, including with respect to private entities (as preshipment inspection entities often are), “*.. recognising that it is desirable to provide transparency of the operation of preshipment inspection entities and of laws and regulations relating to preshipment inspection ...*”. Although it should be noted that the preambular text does not establish itself legally binding rights and obligations, PSI Articles 2:5 to 2:8 reaffirm the transparency obligations of User Members, along the lines of GATT Article X:1, while PSI Article 3:2 does so with respect to Exporter Members.

30. PSI Article 4 provides for an independent review of disputes arising from Preshipment inspection activities upon request from either involved party. The participation of both experts representing the two parties and independent trade experts contributes in making dispute settlement more transparent

Government Procurement Agreement

31. The Government Procurement Agreement contains a series of provisions aimed at ensuring that the tendering procedures are open and transparent to all interested suppliers of parties. In particular, GPA Article XII establishes a detailed list of information that need to be contained in the tender documentation, while GPA Article XIX:1 requires “.. *any law, regulation, judicial decision, administrative ruling of general application, and any procedure (including standard contract clauses) regarding government procurement ..*” to be promptly published. Most importantly, the GPA requires procuring governments and entities to provide upon request additional information on their selection and the rationale behind it : unsuccessful tenderers should be informed of the reasons why they were not selected, their qualification rejected or terminated and of the characteristics and relative advantages of the winning tenderer (Article XVIII.2(b) and (c)); moreover, the government of an unsuccessful tenderer should upon request be provided with “*such additional information on the contract award as may be necessary to ensure that the procurement was made fairly and impartially.*” These provisions should enable outside scrutiny of any corrupt procurement procedures.

WTO work on transparency in government procurement

32. WTO Members have in addition mandated a Working Group to discuss issues of transparency in government procurement practices and to work to elaborate a multilateral agreement on these issues. The Working Group on Transparency in Government Procurement has been charged with developing more specific rules to promote more transparent procurement methods and to enhance the transparency of whatever procurement methods were used in a country. Among the proposed issues to be included⁶ special mention should be made to the requirements that information on procurement rules, practices and opportunities be made widely available to all interested parties; that both decisions on the qualification of potential suppliers and on awarding procurement contracts be perfectly transparent (namely that such decisions be taken strictly on the basis of the evaluation criteria set forth in advance and in accordance with the information on how those criteria would be applied); that *ex post* information on the rationale of the selection and the selected tender be made available; and that appropriate domestic review mechanisms ensure respect of the rules and introduce accountability into the process.

33. Several WTO Members have underlined the relevance of transparency rules in providing a check against arbitrary practices within the procurement regime, and in reducing the incidence of bribery and corruption in procurement practices⁷. These Members have felt that WTO rules on transparency in government procurement could bring about systemic changes that would reduce the opportunities for corruption and invited the Group to focus on those aspects which most easily lent themselves to abuse in the area of government procurement. However, other Members considered that the issue of bribery and corruption was outside the ambit of the WTO and opposed the inclusion of explicit references to the objective of reducing the incidence of bribery and corruption in procurement practices.

6 . See the document *List of the issues raised and points made. Informal Note by the Chair*. Working Group on Transparency in Government Procurement, JOB(99)/6782 of 12 November 1999

7 . See the section “*Fight against bribery and corruption*” in the abovementioned *Note by the Chair*. Specific proposals were also forwarded by Venezuela in a non-paper on *Transparency in Government Procurement and the fight against corruption*, Working Group on Transparency in Government Procurement, JOB(99)481 of 28 January 1999.

IV. Stability and predictability provisions

34. The creation of a stable and predictable environment is one of the main objectives of the multilateral trading system and an important expectation of economic actors. Predictability is central to informed trade and investment decisions. In addition, by reducing the risks incurred, a predictable trading system not only facilitates trade and investment flows, but could also eliminate some of the motivations of firms for corrupt behaviour.

GATT 1994

35. GATT Article II:(b) specifies that imports will be "*.. exempt from ordinary customs duties in excess of those set forth [in the Member's schedule]... [and] all other duties or charges of any kind ...*" It has been argued that corruption should be viewed as a "surcharge" which has much the effect of an additional tariff : "*When a company that wishes to sell a product to a government is required to pay a percentage of the value of that product to a government official in the form of a bribe, there is little difference between that payment and a tariff.*"⁸ Along these lines, where a bribe is required to facilitate the actual importation of a product into a WTO Member country, this could well constitute a violation of Article II.

36. GATT Article VII:4(a) to 4(d) set a framework to determine the currency exchange rates to be used in customs valuation. Such exchange rates should be established under IMF rules or approved by it, or, if such rates do not exist, determined on the basis of commercial transaction rates. This provision contributes to the traders' ability to estimate the customs value in terms of local currency. The provision is reaffirmed in Customs Valuation Agreement Article 9. Likewise, GATT Article VII:5 states that "*The bases and methods for determining the value of products subject to duties ... should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.*"

Customs Valuation Agreement

37. Predictability is also one of the central objectives of the Customs Valuation Agreement. The preamble of the agreement recognises "*..that customs value should be based on simple and equitable criteria consistent with commercial practices ..*" and means, on the basis of the provisions of GATT Article VII, "*.. to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation*". The agreement pursues this objective by establishing specific definitions, rules, procedural requirements and, in particular, a limited number of applicable valuation methods and conditions when a specific valuation method is to be applied. To further enhance predictability, VAL Article 8:2 requires Member countries to determine in their legislation, rather than by means of administrative decrees or decisions, whether freight costs, cargo handling costs and insurance, should be included in the customs value.

8. P. Nichols, "Outlawing Transnational Bribery Through the World Trade Organization", 28 Law and Policy in International Business (1997) 305, at 333..

Preshipment Inspection Agreement

38. Unwarranted administrative delays are often regarded as trade barriers and seem on certain occasions to give rise to facilitating payments aiming at securing more diligent and efficient service. Therefore, the introduction of time limits for the completion of administrative processing enhances predictability and contributes to decrease corruption motivation. Accordingly, Articles 2:15 and 16 of the Preshipment Inspection Agreement provide for mutually agreed inspection dates and require the inspection to be concluded within five working days.

V. Provisions limiting arbitrary action

39. Although discretion and flexibility can be necessary for the effective application of regulation to individual circumstances and to the evolution of societal needs, there remains some scope for abusive or arbitrary use of that discretion that opens the door to corrupt decision-making. Clear rules can limit the possibility of public officials to impose abusive requests and of businesses to ask and pay for unwarranted preferential treatment. Several WTO provisions are intended to clarify rules applicable to international transactions and can thus contribute to reduce arbitrary or abusive administrative discretion.

GATT 1994

40. GATT Article V:3 states that *"Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered."* The provisions against "unnecessary delays or restrictions" and also "other charges" could be construed to prohibit certain corrupt practices in customs administration, as well as the regulation of transportation, which is often heavy and burdensome and thought to be susceptible to corruption in some countries.

41. GATT Article VII:2(a) states that *"The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise and should not be based on ... arbitrary or fictitious values."* "Actual value" is defined in GATT Article VII:2(b) as *"the price at which ... such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions."* These provisions too can be interpreted as proscribing bribery surcharges, which are by definition "arbitrary and fictitious". It can further be noted that a value determined within a corrupt regulatory and administrative environment by no means reflects "fully competitive conditions".

42. GATT Article VIII:1(a) also specifies that *"All fees and charges of whatever character...shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection..."* If bribery in connection with import and export activities can be construed as "charges of whatever character" then Article VIII could be specifically brought to bear in instances of corrupt activities that occur on the occasion of goods being imported or exported. The application of this provision to exportation, could make it relevant not only to trade in goods *per se* but to foreign investment (which may be premised on exporting some or all of the goods produced locally to the home country of the investor and or third countries). It should be noted that Article VIII applies explicitly to a number of areas where corrupt practices are often thought to be or identified as a serious problem, including, *inter alia*, consular

transactions, licensing, exchange control, documents, documentation and certification, and analysis and inspection.

43. Article X:3(a) states that "*Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.*" These include not only border measures, but can be construed to cover a wide range of government interventions that affect the sale of the product in the market of the importing Member. So understood, Article X:3(a) could be seen as in effect a general prohibition on corruption as it affects trade in goods. Simply put, it is difficult to imagine where corruption would not, almost by definition, constitute a failure of the duty to "administer in a uniform, impartial and reasonable manner".

44. Article XI:1 calls for the general elimination of quantitative restrictions in world trade, providing that "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.*" One of the reasons behind the policy stance of GATT against quantitative restrictions is that they are inherently less transparent than tariffs. Quotas leave room for discretionary management in the allocation of import shares while in the case of tariffs such allocation is operated through the market mechanism. Because of this discretion, the public authorities in charge of issuing import licenses could become the target of corruption activities. For those cases where quotas are nevertheless allowed, Members negotiated an Agreement on Import Licensing Procedures designed to impose fair and efficient procedures for licensing. The Agreement establishes disciplines to ensure that import licensing procedures are transparent and administered in a neutral and non-discriminatory manner.

45. GATT Article XVII:1(b) provides that state trading enterprises are required to "*.. make .. purchases or sales (involving either imports or exports) solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.*" This language could be construed to render GATT-illegal corrupt practices as they relate to the purchase and sale activities of state trading enterprises. It is hard to understand how a purchase or sale decision influenced by bribery could be taken to be "solely in accordance with commercial considerations" of the kind spelled out in detail in this provision.

General Agreement on Trade in Services

46. With respect to those sectors for which a WTO Member has made specific commitments in its schedule, the GATS introduces a series of important obligations intended to consolidate a rules-based competitive environment. For instance, Members "*shall ensure that all measures of general application are administered in a reasonable, objective and impartial manner.*" (GATS Article VI:1). Here, the language of course closely follows that in GATT Article X(3), discussed above; as with the parallel GATT obligation, it is hard to imagine how a Member could claim it has "ensured" that measures are administered "in a reasonable, objective and impartial manner" if it has not effectively eliminated bribery and corrupt practices in administration. Moreover, GATS Article VI:2(a) introduces the obligation to ensure that administrative and judicial procedures "*in fact provide for an objective and impartial review*" of administrative decisions affecting trade in services. The words "ensure" and "in fact" clearly suggest that it is not sufficient that a Member simply impose a duty of impartiality on the decision-makers, but rather that they must make such a requirement effective. Moreover, this provision appears to apply to services trade in general, and not simply to those sectors a Member has listed in its schedule.

47. Finally, with a view to further structuring the discretion of government officials as regards qualification requirements and procedures, technical standards and licensing requirements applicable to services trade, GATS Article VI:4 provides for the future elaboration of rules ensuring, *inter alia*, that such requirements are “*based on objective and transparent criteria, such as competence and the ability to supply the service;*”. Until such new rules are in force, every Member shall refrain from requirements contrary to such objective and transparent criteria and which might nullify or impair specific commitments undertaken by that Member. There will almost inevitably be a nullification or impairment of a specific commitment to market access, where, for instance, a bribe is being required in order for another Member’s service provider to benefit from such commitment. It is equally plain that in such a case the application of the measure is not in compliance with “objective and transparent criteria.”

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade

48. The Anti-Dumping Agreement contains a range of evidentiary and procedural requirements for imposition of anti-dumping duties, which attempt to ensure that decisions to impose such duties are made in an impartial and objective manner. These include, notably a requirement of public notice and explanation of determinations (Article 12) and independent judicial review (Article 13). Any corrupt practices within agencies or tribunals administering or reviewing anti-dumping decisions would tend to make them largely worthless as means to ensuring that decisions are genuinely impartial. The principle of effectiveness in treaty interpretation would thus suggest that tolerance of corrupt practices could violate the guarantees of fair procedure established by the Anti-Dumping Agreement.

Agreement on Subsidies and Countervailing Measures

49. One of the central concepts of the Agreement on Subsidies and Countervailing Measures (SCM) is the concept of specificity, which implies that generally available subsidies should not be “actionable”. Subsidies are considered non-specific “*where the granting authority ...establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy .. provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to*”, while objective criteria mean, *inter alia*, criteria “*..which are neutral (and) do not favour certain enterprises over others..*”. The general stance of the SCM Agreement in favour of non-specific subsidies could in practice limit the discretion of public officials to grant subsidies in return for bribes, especially as SCM Article 2(c) requires non-specific subsidies to be generally available *in fact* and introduces a series of criteria to help assess the specificity of benefits which appear as generally available. These are the “*...use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.*”

50. Moreover, the SCM Agreement, similar to the Anti-Dumping Agreement, contains a range of evidentiary and procedural requirements for the imposition of countervailing duties, which amount to, or can only be made sense of, in terms of a general requirement that such duties be applied in an objective and impartial manner.

Agreement on Trade-Related Aspects of Intellectual Property Rights

51. TRIPS Article 41:2 provides that “*Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.*” A corrupt process for enforcement of intellectual property rights is by definition not “fair and equitable” and would almost certainly, if it involves bribery,

be “unnecessarily” costly. Article 42 includes various specific rights connected to due process such as the right to representation by independent legal counsel and a limitation against “*overly burdensome requirements concerning mandatory personal appearances.*” Again, from the perspective of effective treaty interpretation, these rights would be rendered essentially meaningless if a Member were to tolerate corruption in its intellectual property administration.

Agreement on Technical Barriers to Trade

52. One area where possibilities for corruption have been identified is conformity assessment, i.e. the certification by governmental officials or mandated non-governmental bodies that an imported product meets relevant requirements in applicable technical regulations or standards. The TBT Agreement contains a number of provisions that purport to limit significantly the exercise of discretion by officials in conformity assessment, at least to the extent that it creates an obstacle to international trade. Thus, “*conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.*” (TBT Article 5.1.2). In addition, Members must ensure that these procedures “*.. are undertaken and completed as expeditiously as possible ..*” (TBT Article 5.2.1).

Agreement on the Application of Sanitary & Phytosanitary Measures

53. Like the TBT Agreement the SPS Agreement has a number of provisions related to the limitation and structuring of discretion of government officials making decisions about food safety that affect imported products (Annex C). Annex C provisions contains much the same strictures on conformity assessment as are contained in the TBT Agreement.

Customs Valuation Agreement

54. The preamble of the Customs Valuation Agreement states the recognition by WTO Members of “*...the need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values*”. Reducing the room for discretion of customs officials is thus one of the central objectives of the agreement. This objective is pursued through a series of detailed provisions on how to determine the customs value of imported goods (Articles 1 to 8 of the Agreement). However, the opportunity provided under the Introductory Commentary to the Agreement for “*.. a process of consultation between the customs administration and the importer with a view to arriving at a basis of value..*” might on certain occasions increase the discretionary power of the administration and provide some motivation for the business to resort to facilitating payments. In any event, in the absence of appropriate safeguards such consultation risks reducing the transparency of the transaction towards third parties.

Preshipment Inspection Agreement

55. The requirement for uniform administration of applicable regulations, introduced by GATT Article X:3(a), also appears in the Preshipment Inspection Agreement. PSI Article 2:1 states that “*User Members shall ensure uniform performance of inspection by all the inspectors of the preshipment inspection entities contracted or mandated by them.*” The provision should reduce the scope for corrupt activities by preshipment inspection entities, especially as it explicitly refers to individual (as opposed to state) activities.

Government Procurement Agreement

56. The GPA provides for dispute settlement by means of a public challenge procedure. The agreement specifies that members of the court or review body hearing a challenge must be "*secure from external influence during the term of appointment*" (GPA Article XX:6). Bribes paid with a view to obtain a favourable decision on behalf of the court are obviously among the most significant forms of "external influence".

WTO work on trade facilitation

57. Issues of transparency, reduction of arbitrariness and integrity are also central to the discussion on trade facilitation⁹. Trade facilitation elements are contained in several WTO provisions, such as GATT Articles V, VII, VIII and X, as well as the Agreements on Customs Valuation, Import Licensing, Preshipment Inspection, Rules of Origin, Technical Barriers to Trade, and the Application of Sanitary and Phytosanitary Measures. In addition to provisions already described above, mention should also be made to the Agreement on Rules of Origin, which calls for clearly defined and transparent rules of origin, administered in a consistent, uniform, impartial and reasonable manner.

58. Work on trade facilitation was added in the WTO agenda at the 1996 Singapore Ministerial Conference. The WTO Council for Trade in Goods undertook explanatory and analytical work, although very few references were made to the issue of bribery and corruption¹⁰; on the other hand a Trade Facilitation Symposium was held in 1997, where bribery and corruption were among the most important concerns expressed by the participants. In order to fight irregularities and corruption caused by the lack of transparency and predictability, participants to the Symposium suggested, *inter alia*, to publish all laws, regulations and administrative rulings and to implement them only after their publication; to make legislation, procedures and documentation requirements as transparent and simple as possible to avoid misunderstandings and delays, and limit the discretionary powers of officers; to ensure greater uniformity in the application of customs laws, regulations, administrative guidelines and procedures; and to specify and publish all fees and charges levied in order to allow traders to assess more accurately the costs involved in the trading process.

59. Specific reference was made to the automation of border procedures and in particular the use of electronic data interchange (EDI)¹¹. On the basis of simplified and harmonized information requirements, procedures and formalities, automation has not only the potential of reducing errors, avoiding double entry of information, and accelerating information flows, but would also allow for an increasing de-linkage of the movements of goods from controls and duty assessments, where corrupt practices are often observed. Moreover, in border procedures made through EDI, all transactions may be electronically recorded and traceable, thus limiting the opportunities for corrupt behaviour both for businesses and public officials.

9. The importance of trade facilitation in ensuring integrity in customs is reflected in the 1993 Arusha Declaration of the Customs Co-operation Council. See also document TD/TC/WP(99)19 "Issues in the field of trade facilitation" and WTO document G/C/W/113 on the "Checklist of issues" raised in the WTO Trade Facilitation Symposium.

10. An example can be found at G/C/W/143: WTO, 10 March 1999, Communication from the EC to the WTO Council for Trade in Goods, paragraph II (f).

11. As stated by the World Customs Organization, "*automation (including EDI) is a powerful tool against corruption, and its utilisation should have priority.*" (paragraph 7 of the 1993 Arusha Declaration).

VI. Conclusion

60. The review of a wide range of WTO provisions shows that the underlying principles of the WTO system and their enforcement by WTO Members are likely to have a preventive effect against bribery and corruption by reducing the motivations and opportunities for proposing, requesting and accepting bribes. On the other hand, bribery and corruption have not been among the issues specifically addressed by the WTO Agreements. The WTO disciplines discussed above appear to complement and reinforce the international legal instruments specifically elaborated to combat bribery and corruption, such as the OECD Convention. However, a number of proposals to negotiate more explicit references to the problem of bribery and corruption in the framework of the WTO are at present highly controversial among WTO Members.