

# ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

## ANTI-CORRUPTION AND TRANSPARENCY PROVISIONS IN TRADE AGREEMENTS

### QUERY

What examples are there of anti-corruption, transparency or related provisions being included in trade agreements - and how successful have they been?

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### SUMMARY

Despite being built on the underlying principles of transparency and non-discrimination, the global trade system overseen by the WTO regime has limited purview over so-called “deep provisions” in trade agreements, such as governance issues.

In the absence of measures at WTO level to improve transparency and reduce bribery in international trade, the U.S. has pioneered the approach of embedding anti-corruption and transparency provisions into its bilateral trade agreements over the last 15 years.

There is now some consensus around best practice anti-corruption and transparency provisions for inclusion in trade deals, such as explicit references to international anti-corruption conventions, commitments to criminalise active and passive bribery, non-criminal sanctions for firms where they are not subject to criminal liability, and whistleblower protection.

While headway has been made on mainstreaming anti-corruption principles into trade agreements, the effectiveness of such anti-corruption provisions remains open to question. Especially in regional trade agreements lacking an established mechanism such as the WTO’s Dispute Settlement Body, implementation and enforcement of a state’s anti-corruption obligations relies on robust measures being taken at national level.

Nonetheless, evidence suggests that there is a strong business case for the inclusion of anti-corruption and transparency provisions in trade agreements. Moreover, recent scholarship even contends that of all the instruments available to external actors to curb corruption in their development and trading partners, free trade agreements may be one of the most effective (Mungiu-Pippidi et al 2018).



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## 1 BACKGROUND

For the last six decades, non-discrimination and transparency have been core underlying principles of agreements governing world trade. This is apparent in the various multilateral World Trade Organisation (WTO) deals which have consistently attempted to remove obstacles to trade, particularly in the areas of customs and public procurement (Clifford Chance 2015). Despite this, it is only in the past 15 years that dedicated anti-corruption provisions have begun to play a significant role in efforts to improve non-discrimination and transparency in trade regimes. The new emphasis on anti-corruption has been most apparent in bilateral and regional trade agreements (collectively referred to as RTAs),<sup>1</sup> which have started to go beyond WTO norms to address a range of policy areas not traditionally considered to be within the purview of trade deals (OECD 2015; Lejárraga 2014). There are two major reasons for this.

Firstly, as membership of the WTO has grown,<sup>2</sup> reaching consensus on a global, multilateral level has become increasingly problematic as some countries resist “deep provisions” into new policy areas felt to restrict their sovereignty (Lamy 2015), such as the so-called Singapore issues.<sup>3</sup> As a result, countries have gone beyond the strictures of the WTO system to conclude RTAs further integrating their economies (Alemanno and Karttunen 2016). RTAs, often struck between states with similar interests and values, have gone deeper into areas like investment, competition, labour, environment and governance where there is no consensus among WTO members (WTO 2006).

Secondly, the changing nature of global trade means that the remaining obstacles to trade are no longer high tariffs but rather non-tariff measures (NTMs), such as a lack of regulatory coherence across jurisdictions (WTO 2012). Consequentially, most recent trade deals are primarily concerned with establishing common (or at least mutually intelligible) procedures and policies to reduce the risk of divergence in rules and regulations that could obstruct the liberalisation of trade (Transparency International

2016). This means that modern RTAs now commonly address regulatory areas such as environmental and labour standards, and, with ever greater frequency, transparency and anti-corruption provisions.

Indeed, as a more recent generation of trade agreements has sought to harmonise regulations set by national governments (Lamy 2015), there has been greater potential for the inclusion of strong anti-corruption and transparency provisions (Alemanno and Karttunen 2016). Such opportunities to table sensitive issues surrounding governance, accountability and transparency as part of the negotiations arise from two phenomena. On one hand, there is the desire of some countries with high incidences of corruption to establish trade relations (OECD 2016), and on the other hand the intention of other governments to use negotiations not only as a vehicle to improve their market access but also a means of reducing market opacity (Lejárraga 2013). Revealingly, over 40% of RTAs concluded since the millennium have incorporated anti-corruption and anti-bribery commitments which have no precedent under the WTO regime (Lejárraga 2014).

Until very recently, the apparent political capital invested in robust anti-corruption commitments in mega-trade deals (see Malmström 2016) was interpreted by some observers as part of a more general trend towards global action on corruption leveraged through trade policies, with some even speculating that the WTO could adopt anti-corruption provisions enforceable through the WTO Dispute Settlement Body (Beach 2015a). However, analysis by the OECD suggests that while the kinds of transparency provisions included in recent RTAs clearly lend themselves to adoption by the multilateral WTO regime, such a “multilateralisation” of anti-corruption provisions is more problematic due to the lack of coherence with existing WTO agreements and the absence of a critical mass of support for these measures among WTO members (see figure 1). Moreover, as of January 2017, crumbling political support for mega-trade deals altogether renders anti-

<sup>1</sup> The WTO does not differentiate between a bilateral and a regional trade agreement, all the additional trade agreements between WTO members are referred to as RTAs. (Mo 2012)

<sup>2</sup> As of January 2017, 164 countries were WTO member states.

<sup>3</sup> The EU was pushing for the three of the ‘Singapore issues’ (investment, competition, and transparency in government procurement) to be included in the Doha Development Agenda, but had to abandon these at the Cancun WTO Ministerial. (Woolcock 2007)

corruption progress on the multilateral front seem rather improbable.

Figure 1. Source: Lejarraga 2014

Factors facilitating multilateralisation	Transparency	Anti-corruption
Critical mass, incl. developing countries	●	○
Coherence with WTO agreements	●	○
International standards	○	●
High degree of homogeneity	●	●
Non-discriminatory (non-excludable)	●	●
Liberal ROO or lack of ROO	●	●
Third-party MFN or extension benefits	NA	NA
Firm commitments (not best-endeavour)	●	●
Enforceable via dispute settlement	●	●
Co-operation on implementation	●	●
Significant trade creation effect	●	–
Favourable political economy	●	–

Note: ● High, ○ good and ○ limited potential for multilateralisation. "NA" denotes not applicable, and "–" not assessed in OECD studies.

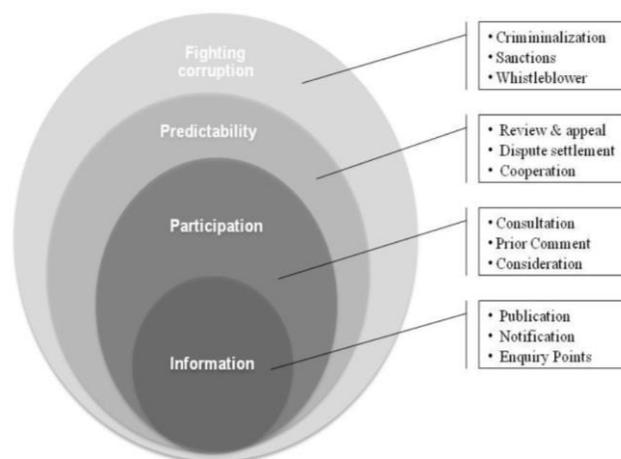
This query evaluates attempts to embed transparency and anti-corruption provisions into bilateral and regional trade agreements. As the following section demonstrates, transparency and anti-corruption provisions in trade agreements can take different forms depending on the rationale behind their inclusion.

### Transparency

When discussing transparency measures in trade deals, it is helpful to distinguish between four distinct phases; the decision to enter trade negotiations, the negotiation process, the conclusion of an agreement and its ongoing implementation (Transparency International 2016). Each phase contains unique integrity risks and necessitates different transparency requirements; measures to ensure adequate stakeholder consultation during negotiations will be very different to transparency provisions intended to

govern trade disputes once a trade agreement is in operation. An OECD study (see figure 2) proposes a taxonomy of transparency in trade agreements, grouping trade-related transparency into four areas of policy action: making relevant information available, opening decision-making processes to scrutiny from (foreign) stakeholders, fostering predictability and fairness in the applications of rules, and fighting corruption and bribery.

Figure 2. Source: Lejarraga 2013



The risks of undue influence during trade negotiations are a serious and controversial matter (Johnson 2015). This answer, however, focuses on transparency provisions in the trade agreements themselves which are designed with the fight against corruption in mind, rather than considering governance and transparency challenges during the process of trade negotiations

It is also worth noting that though “transparency” has a very specific meaning in the context of trade regimes (as discussed in the section on the WTO), this query is primarily considered with transparency in the sense of “being open in the clear disclosure of information, rules, plans, processes and actions” (Transparency International 2015).

### Anti-corruption

Broadly speaking, anti-corruption provisions in trade agreements are either targeted at state parties or private enterprises (Zaveri 2013). Measures aimed at state parties obligate them to take anti-corruption measures at national level, particularly the ratification of anti-corruption conventions. Recent RTAs have also included provisions to mandate the criminalisation of

corruption, establish sanctions regimes and enforcement mechanisms, as well as ensure protection for whistleblowers (Lejárraga 2013). Provisions addressing private enterprise can include specific clauses depriving corrupt transactions or investments of the standard protections provided for in the agreement (Lejárraga & Shepherd 2013; Tushe 2014).

### **The business case for transparency and anti-corruption provisions in trade agreements**

There is a strong case to be made for transparency and anti-corruption provisions to be included in trade deals. The World Customs Organisation estimates that its 180 member countries lose at least US \$2 billion in customs revenues each year due to corruption (OECD 2016). Corruption at the border is also damaging for private enterprise, functioning as a hidden tariff which distorts resource allocation and generates inefficiencies, severely undermining the benefits of negotiated trade agreements (Lejárraga 2013). Where tariffs are hidden or unpredictable, companies cannot account for them in investment decisions or profitability calculations, and such uncertainty has been shown to be highly deterrent to trade (Lejárraga 2013).

Transparency is crucial to reducing information asymmetries in unfamiliar markets; it underpins the ability of companies to fully understand the conditions and constraints for entering and operating in a given market (OECD 2016; Lejárraga and Shepherd 2013). Given that complicated reality of modern customs systems (each WTO member is on average a party to 13 separate trade agreements),<sup>4</sup> transparency can help alleviate unpredictability and complexity of trade regimes, thereby lowering transaction costs (Helble, Shepherd, and Wilson 2009). Finally, transparency is associated with better quality of domestic institutions and the prevention of trade disputes, as it minimises the opportunities for discretionary behaviour such as rent-seeking and arbitrary decisions (Lejárraga 2013).

It is, therefore, no surprise that trade agreements with extensive transparency mechanisms are found to be have a greater positive effect on trade flows than those with shallow commitments to transparency

(Lejárraga & Shepherd 2013). A study of the Asia-Pacific Economic Cooperation (APEC) countries, for instance, found that improving trade-related transparency could raise inter-APEC trade by approximately US\$148 billion or 7.5% of baseline trade in the region (Helble, Shepherd & Wilson 2009). Other studies estimate that each additional transparency commitment negotiated in an RTA to be associated with an increase in bilateral trade of more than 1% (Lejárraga & Shepherd 2013). Given that comprehensive RTAs generally contain around a dozen transparency-related provisions, the expected increase in intra-regional trade could be over 5% (Lejárraga & Shepherd 2013).

Where transparency and anti-corruption provisions are embedded into trade agreements, firms can operate and compete in foreign markets with greater confidence they will receive fair treatment from public officials and agencies (Lejárraga 2014). Improving the transparency of the trading environment is thus an important complement to traditional means of reducing barriers to trade, such as lowering tariffs.

### **The anti-corruption potential of free trade agreements**

A recent review commissioned by the European Parliament finds evidence that trade agreements have the potential to disrupt corrupt patterns of behaviour in economies characterised by privileged connections rather than fair competition (Mungiu-Pippidi et al 2018). In fact, the authors argue that in countries marked by a high incidence of corruption, the impetus for an improvement in governance is unlikely to emerge domestically, as these states are typically caught in a vicious cycle in which effective constraints on corruption, such as judicial independence, freedom of the press and an active civil society, are suppressed. This makes it improbable that regulatory approaches to curb corruption will succeed in corrupt settings; corrupt elites shape regulations to support their rent-seeking behaviour and will not enforce legal measures that threaten this behaviour.

In such scenarios, other inhibiting factors of corruption, such as trade openness, and fiscal and procurement transparency, become more significant.

<sup>4</sup> Each WTO member is on average a party to 13 separate trade agreements. Customs officials can therefore struggle to assess the same product different depending on its origin (WTO 2012).

Crucially, these second types of constraint are more easily influenced by external actors, such as donors and trading partners. Indeed, of all the external instruments at the disposal of these actors<sup>5</sup> – development assistance, diplomacy and international trade – Mungiu-Pippidi et al (2018) contend that trade agreements are the most effective in terms of bolstering factors which hinder corruption. In other words, indirect measures to strengthen competition and undermine monopolistic practices are likely to be more effective than direct anti-corruption interventions.

Mungiu-Pippidi et al (2018) theorise that free trade agreements can reduce corruption in two respects.

First, the removal or reduction of tariffs diminishes the influence of domestic rentier companies over national politics. In highly-corrupt settings, a small number of firms may exert undue influence over the state apparatus, or even have captured it. These firms are then able to manipulate the regulatory state to maintain or expand their market domination, all the while embedding corrupt practices into the system. With the elimination of tariffs, the authors argue that new, competitive companies will enter the market and may displace firms whose business model relies on corruption or at least cosy relations with government officials (Mungiu-Pippidi et al 2018).

Second, by reducing non-tariff barriers which unduly benefit such rentier companies, transparency provisions in trade agreements can level the playing field, contributing to a fairer business environment.

## 2 TRANSPARENCY AND ANTICORRUPTION UNDER THE WTO REGIME

In the WTO system, the rationale for the inclusion of transparency provisions is not to enhance public accountability or citizen oversight. Rather, the multilateral trading system operates on the basis of diffuse reciprocity, and transparency in the sense of

“disclosure” is a policy tool to promote systemic stability by building trust between different WTO member states (Wolfe 2013). The WTO defines transparency as the “degree to which trade policies and practices, and the process by which they are established, are open and predictable” (WTO 2016a). As such, “transparency” mechanisms in the WTO system mainly relate to provisions on the publication of information, prior notice of and consultation on new rules, notification requirements and measures to ensure impartiality and provide opportunities to appeal rulings (Wolfe 2013).

Over and above these basic measures, RTAs are increasingly introducing instruments which deepen existing commitments to transparency at the multilateral level (WTO-plus), as well as expanding transparency provisions to policy areas which have no precedent in WTO agreements (WTO-beyond) (Lejárraga 2013). These regional and bilateral arrangements are considered in section 3.

### WTO Transparency Mechanism

The WTO’s Transparency Mechanism is a means of enhancing the organisation’s oversight of member states’ bilateral and regional trade talks, as it requires countries negotiating RTAs to notify the WTO Secretariat before any deal comes into force (WTO 2016b). The WTO defines notification as “a transparency obligation requiring member governments to report trade measures to the relevant WTO body if the measures might have an effect on other Members” (Wolfe 2013).

Since the adoption of the Transparency Mechanism, the WTO Secretariat makes a factual presentation of any proposed trade agreement, systematically evaluating its liberalisation and regulatory aspects (WTO 2006). Despite its name, the Transparency Mechanism is solely about the notification process of trade negotiations to the WTO,<sup>6</sup> and does not establish transparency as a good governance principle for trade agreements.

<sup>5</sup> See a 2017 Helpdesk answer on influencing governments to take action against corruption using non-aid means: <https://knowledgehub.transparency.org/helpdesk/influencing-governments-on-anti-corruption-using-non-aid-means>

<sup>6</sup> The WTO’s Regional Trade Agreements Information System (RTA-IS) publishes information on all agreements which have been notified to the WTO. See: <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>

## WTO Trade Facilitation Agreement

Of more relevance to the fight against corruption is the 2013 WTO [Trade Facilitation Agreement](#) (TFA). The TFA is intended to reduce barriers to trade, with a particular emphasis on streamlining border transactions and increasing the transparency of customs procedures. Under the agreement, all WTO member states have committed themselves to the reduction of corruption at ports of entry, and the agreement includes provisions for richer countries to assist poorer states with implementation (Brown 2014). Van der Ven (2014a) argues that the TFA can help tackle trade-related bribery in three ways:

- Given that the agreement requires state customs agencies to provide information about a good's tariff classification and origin prior to any border transaction, there may be fewer opportunities for false tariff classifications (a major source of bribery in trade).
- As the TFA encourages countries to establish single-custom windows, this could reduce the opportunity for bribery simply by virtue of reducing the number of interactions with customs officials.
- Finally, as firms covered by FCPA and the UKBA are increasingly reluctant to pay bribes, officials in some cases impose spurious "fees" or "duties" which can then be pocketed. The TFA requests that WTO member states improve oversight of import and export fees, which may remove discretion and impunity for officials to demand, or companies to offer, "fees" in return for favourable treatment (c.f. Sherman 2014).

At the 2016 OECD Integrity Forum, the Secretary-General of the OECD asserted that the TFA would increase predictability, accountability and transparency in international trade, and had the potential to reduce transaction costs by around 12-18% (Kompanek 2016). This positive effect is estimated by the OECD to be stronger for low- and middle-income countries than for OECD countries (Kompanek 2016).

## WTO's Government Procurement Agreement

The only WTO provisions expressly addressing corruption appear in the [Government Procurement Agreement](#) (Schefer 2009). This plurilateral agreement, initially signed by eighteen parties, commits signatories to open part of their public procurement market to foreign operators (Lo 2015). The Agreement now covers 47 WTO members, and covers an estimated annual total of \$1.7 trillion in procurement (Anderson and Müller 2017).

The GPA establishes external oversight of national procurement systems by making them subject to scrutiny by the WTO Committee on Government Procurement and through the WTO's binding dispute settlement system (Mungiu-Pippidi et al 2018).

The GPA mentions the need for transparency and anticorruption in its preamble, with a reference to the United Nations Convention against Corruption (UNCAC) (Transparency International 2016). Even so, the preamble is non-binding, and the text of the GPA restricts itself to hortatory language encouraging procurement bodies to conduct procurement in a transparent fashion in order to avoid conflicts of interest and corrupt behaviour (Grier 2014). Moreover, while the agreement covers corruption risks in the decision to award a contract, it does not address corruption risks during the drawing up of the tender, or during implementation and operation (Schefer and Woldesenbet 2013). Recent revisions to the GPA include innovative proposals on e-procurement as a means of improving the 'transparency of laws, regulations, procedures and practices regarding government procurement' (Mungiu-Pippidi et al 2018).

## Anti-corruption and the WTO system

Notwithstanding these recent steps to improve transparency, the WTO regime has no substantive rules addressing corruption or bribery in trade relations. Even the legal provisions across WTO agreements which extend support to firms confronted by corrupt public officials do not tackle corruption risks directly (Lejárraga 2013). Some scholars argue in favour of the WTO either passing provisions which explicitly define bribery as a criminal act (Nichols 1997), or obligating member states to sign a declaration against corruption (Schefer 2009).

The general consensus appears to be, however, that the WTO has limited ability to tackle corruption in international trade (Van der Ven 2014b). The two main obstacles are the difficulty of trying to interpret the “failure to suppress bribery” as an actionable violation of international trade law (Van der Ven 2014a), and the fact that the WTO’s sanctioning and enforcement mechanism, the Dispute Settlement Body, only permits member states to sue other member states; individuals and companies can neither bring complaints or be directly penalised (Van der Ven 2014b). Further concerns have been raised about the capacity of the WTO to adjudicate transnational bribery given that its staff are specialists in international economic law rather than financial criminal investigation (Van der Ven 2014b).

While WTO agreements can help promote good governance, they are unlikely to become its primary vehicle. Bilateral and regional trade agreements, on the other hand, have increasingly started to include explicit anti-corruption provisions into their agreements.

### 3 TRANSPARENCY AND ANTI-CORRUPTION PROVISIONS IN REGIONAL AND BILATERAL TRADE AGREEMENTS

Over the last two decades, it has become common for some states to enshrine the principle of transparency in the preamble of their bilateral and regional trade agreements. In addition, some trade agreements have begun to include a “horizontal” chapter on transparency, which extends transparency obligations to all policy areas of the trade agreement in question. For instance, it has become standard practice for U.S. trade agreements to include specific anti-corruption and anti-bribery commitments into these cross-cutting transparency chapters (Lejárraga 2013). The fact that anti-corruption measures are integrated into the transparency chapter indicates that the fight against corruption is considered by the U.S. to be an important means of strengthening the trade policy transparency agenda (Lejárraga 2013).

Following the U.S. example, the European Union and Canada have started to embed the fight against

corruption into their bilateral trade agreements (Lejárraga 2013). Other states, such as Chile, Japan and Korea have likewise included passages in their RTAs acknowledging the importance of measures to curb corruption, although these tend to be much less specific than in the U.S. deals, simply pledging to prevent corruption in international trade (Lejárraga 2013). Other RTAs have also been more circumspect in their use of anti-corruption provisions: the Trans-Pacific Strategic Economic Partnership,<sup>7</sup> for instance, only considers corruption risks in public procurement (Clifford Chance 2015).

The kinds of anti-corruption provisions included in U.S. free trade deals are generally considered to be best practices, and cover a range of issues including (Lejárraga 2013; Beach 2015a):

- Adherence to and implementation of international conventions on anti-corruption and bribery;
- National legislation defining both active and passive bribery as a criminal offence;
- Sanctions and procedures to enforce criminal penalties;
- In jurisdictions where criminal responsibility is not applicable to firms, the existence of dissuasive non-criminal sanctions (such as fines or debarment) for engaging in corrupt activity;
- Whistleblower protection.

A final consideration would be the inclusion of the kind of debarment provisions used by multilateral development banks (see Jenkins 2016). Some experts argue that trade agreements should include as standard provisions stipulating that countries may debar firms found guilty of corruption from competing for public contracts in either the home and/or host country (Beach 2015b). Explicit references to debarment mechanisms in trade agreements, even in permissible rather than mandatory language, could pre-empt legal action by corrupt firms alleging that a country which has blacklisted them has engaged in discriminatory behaviour.

The procurement chapter of the U.S. - Colombia trade deal, for instance, requires each party to maintain procedures to declare firms that have engaged or fraud or illegal actions in relation to procurement

<sup>7</sup> Between Brunei Darussalam, Chile, Singapore and New Zealand

ineligible from participation in procurement processes “indefinitely or for a stated period of time” (U.S. Senate 2013; Office of the U.S. Trade Representative 2010a). Similarly, the final Trans-Pacific Partnership text states that countries “may include” procedures rendering suppliers which have engaged in fraud ineligible for future contracts (Alemanno and Karttunen 2016). There is, however, little evidence of this kind of provision being used in practice.

As well as provisions requiring state parties to the trade agreement to address corruption, other kinds of anti-corruption measures can deprive a transaction or investment affected by corruption of the normal protection foreseen in the trade agreement (Clifford Chance 2015). This is discussed in the final section on enforcement mechanisms.

## US

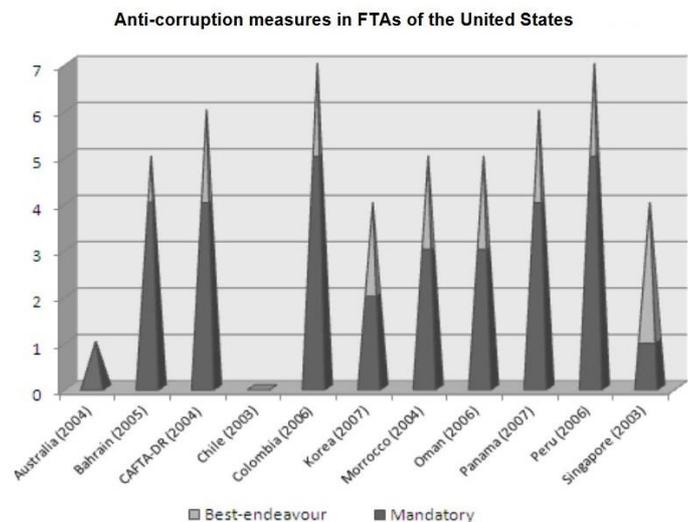
Driven largely by a concern to level the playing field for U.S. firms operating in markets with significant bribery risks yet subject to the FCPA, the United States has led the way in including commitments to combat corruption in international trade into its bilateral trade agreements (Clifford Chance 2015). Though this has been stated U.S. government policy for around 15 years, the use of such anti-corruption provisions has evolved over time (Export.Gov 2016).

The U.S. first began introducing anti-corruption provisions into its trade deals with Singapore (2003) and Australia (2004), which contained minimal measures in the transparency chapter. The trade deal with Chile (2003) included anti-corruption provisions related to government procurement, but none in the transparency chapter (Office of the U.S. Trade Representative 2016). Since then, anti-corruption commitments have become progressively stronger, and the agreements signed with Morocco and Central American countries (DR-CAFTA) contain anti-corruption provisions in the transparency chapters which apply to the whole agreement.

The DR-CAFTA, for instance, includes transparency provisions which mandate the establishment of designated contact points, publication of all laws and procedures related to matters covered by the agreement, notification of partners of measures which may affect the operation of the agreement,

administrative proceedings, as well as review and appeal mechanisms. The DR-CAFTA agreement also includes a stated principle to eliminate bribery and corruption in trade and investment and a series of dedicated anti-corruption provisions, requiring that parties adopt or maintain legislation defining both active and passive bribery as criminal acts, ensure appropriate penalties, cooperate in international fora and encourage whistleblower protection (Office of the U.S. Trade Representative 2010b). A later [U.S. trade deal with Korea](#) incorporated mandatory whistleblower protection measures (Office of the U.S. Trade Representative 2010c), while other recent U.S. trade agreements ([Colombia](#), [Peru](#) and [Panama](#)) have introduced measures providing for non-criminal sanctions for enterprises which are not subject to criminal penalties (Lejárraga 2013).

**Figure 3. Source: Lejárraga 2013**



Moreover, the United States now includes “GPA equivalent” measures, (such as a provision on *Ensuring Integrity in Government Procurement Practices*) in all its trade agreements (Woolcock 2007). Finally, in 2013, the U.S. signed the [Agreement on Transparency in Matters Related to International Trade and Investment](#) with Mongolia, which constituted the first stand-alone transparency agreement the U.S. has concluded independently of broader trade deals (Office of the U.S. Trade Representative 2017). The *Agreement* is notable in that it includes financial services and contains dedicated anti-corruption measures.

It is also worth noting that the United States has trade-related development aid schemes, such as the [African Growth and Opportunity Act](#), which link preferential market access for certain low-income countries to improvements in governance such as the implementation of the OECD Anti-Bribery Convention (AGOA Info 2017).

## The European Union

Until a few years ago, EU trade agreements generally limited themselves to provisions relating to transparency of regulatory and procurement procedures. However, the EU has become steadily more supportive of the inclusion of anti-corruption provisions in trade deals. In 2011, a communication from the European Commission on fighting corruption identified bilateral trade relations as a key mechanism for promoting anti-corruption measures and good governance more generally in the Union's external policies (Dolan 2013).

Furthermore, the [2015 Trade for All strategy](#) pledged to include "ambitious" anti-corruption and transparency provisions in all future bilateral trade deal negotiations (Johnson 2015). The Commissioner for Trade has stated that these provisions should apply to all matters covered by a given trade agreement, rather than just specific sectors (Malmström 2016). The Trade for All strategy envisions using trade agreements as a means of (a) monitoring domestic reform in relation to the rule of law and governance and (b) establishing consultation mechanisms in contexts of systemic corruption (European Commission 2015). For instance, the EU now requests its trading partners to put in place anti-money laundering legislation as part of negotiations around financial services (Malmström 2016). Finally, under the current Generalised Scheme of Preferences Plus (GSP+), the EU offers improved access to the European common market to countries which ratify and implement the UNCAC (European Commission 2015). However, unlike U.S. trade agreements, EU trade deals have yet to address whistleblower protection.

General, non-binding provisions encouraging the mutual opening of procurement markets are to be found to varying degrees in the series of Euro-Mediterranean Association Agreements signed

between 1995 and 2002 (Woolcock 2007). The Trade, Development and Cooperation Agreement (TDCA) with South Africa, which came into force in 2004 provides more detail on transparency in public procurement, but requires intervention by the Cooperation Council to be effective (Woolcock 2007). Article 90 of the TDCA also states that the parties undertake to cooperate in the fight against money laundering based on Financial Action Task Force (FATF) standards (European Commission 1999).

The EU-Chile trade agreement goes further, as Article 139 requires Chile to de facto comply with the GPA's transparency provisions (Woolcock 2007). Article 79 additionally commits both parties to "ensure the highest standards of integrity" in customs to reflect "the principles of the relevant international conventions" (European Commission 2002). Finally, the agreement has a very brief cross-cutting chapter on transparency (articles 190-192), which mandate the establishment of contact points, cooperation in international fora in trade and publication of regulations, procedures and rulings which may impact the trade agreement (European Commission 2002).

The 2011 trade agreement with Korea states in the preamble that parties are "resolved to promote transparency as regards all relevant interested parties, including the private sector and civil society organisations", but there is no cross-cutting chapter on transparency or mention of the word corruption (European Commission 2011a). The few transparency provisions present are sector-specific. For instance, the chapter on pharmaceutical products requires each party to be transparent about "improper inducements" conducted by pharmaceutical companies and makes fleeting reference to the OECD Convention on Combating Bribery of Foreign Officials. The trade deal also expands both parties' existing transparency commitments under the GPA to include public works concessions and so-called 'build-operate-transfer' contracts (European Commission 2011b).

In 2014, the EU concluded an Association Agreement with Georgia as part of the Deep and Comprehensive Free Trade Area initiative (European Commission 2014). In the preamble, the parties commit themselves to the rule of law, good governance and the fight against corruption. Article 17 obliges both

sides to effectively implement the UNCAC, while chapter 8 on public procurement states that “all contracts shall be awarded through transparent and impartial award procedures that prevent corruptive practices” (European Commission 2014).

It is worth noting that the Association Agreement is more than simply a free trade agreement, as it explicitly intends to foster political dialogue and govern the disbursement of EU structural funds in Georgia. Section 7 of the Association Agreement therefore provides a great deal of detail on legal and administrative measures to prevent fraud and corruption in connection with the implementation of EU funds. Among other things, the Agreement states that Georgia is obliged to bring its regulatory framework into line with the [EU Convention on the Protection of the European Community’s Financial Interests](#). This stipulates measures providing for:

- effective, proportionate and dissuasive criminal penalties;
- the criminal liability of heads of business;
- definitions of passive and active corruption;
- anti-money laundering measures;
- sanctions for legal persons.

## Mega-trade deals

### TPP

The final text of the now moribund Trans-Pacific Partnership agreement is novel in that it contains an entire chapter devoted to anti-corruption enforcement. The TPP agreement makes explicit reference to the *APEC Conduct Principles for Public Officials*, the *APEC Code of Conduct for Business* and the *UNCAC*, although it does not refer to the *OECD Anti-Bribery Convention*, which around half of the TPP parties have yet to sign.

In line with these conventions, chapter 26 requires signatories to enact or maintain laws criminalising the offer or solicitation of an “undue advantage” by government officials (Clifford Chance 2015). It also stipulates that they must comply with international accounting and auditing standards to prevent fraudulent activity (Robbins 2016). It further encourages TPP member states to take additional

measures to prevent bribery and support companies to disclose incidents of bribery such as integrity training<sup>8</sup> and whistleblower protection (Robbins 2016). Article 26.10 broke new ground for trade agreements in that it commits signatory states to take measures to promote the active participation of the private sector and civil society organisations in the fight against corruption in international trade and investment, although it falls short of mandatory consultations with civil society when monitoring anti-corruption commitments (Clifford Chance 2015).

Crucially, the majority of Chapter 26’s obligations are subject to TPP’s dispute settlement system, which can be resorted to where a state has acted in a manner “inconsistent with an obligation.” Potentially, this would mean that a country could be held to account if it failed to adopt the foreseen anti-bribery legislation, although the dispute settlement mechanism cannot be used to challenge inadequate enforcement of anti-corruption laws or failure to prosecute or convict under its domestic anti-bribery legislation (Beach 2015a). Furthermore, although article 26.9 of the chapter requires members to effectively enforce anti-corruption laws, it does not specify what “effective” enforcement entails (Clifford Chance 2015). Moreover, TPP provisions related to private sector corruption are written in hortatory rather than prescriptive language, and the agreement does not require the criminalisation of private offences (Baker, McKenzie, Wong and Leow 2016).

Finally, Article 15.8 of the agreement relates to integrity in public procurement, and requires parties to establish criminal or administrative measures “to address corruption in its government procurement.” Notably, it also provides scope for countries to debar firms with have engaged in fraudulent procurement practices, although integrity of suppliers is not included in the conditions for participation in a tender (Alemanno and Karttunen 2016).

### CETA

The EU’s Comprehensive Economic and Trade Agreement with Canada includes a general horizontal chapter on transparency which applies to the whole

<sup>8</sup> TPP encourages a range of measures to promote integrity among public officials, such as training of staff, management of conflicts of interest, requiring officials to make public declaration of their investments and assets or gifts received (See Australian Department of Foreign Affairs and Trade 2016)

agreement, outlining the customary obligations to publish the laws, regulations, procedures and administrative rulings on matters which CETA covers (European Commission 2016). There are additional transparency provisions in the chapters on technical barriers to trade, sanitary and phytosanitary measures, government procurement and regulatory cooperation. Open stakeholder and public consultations are encouraged, but there is no explicit obligation to consult. Furthermore, there is no general anti-corruption provision. The sole provisions on anti-corruption are in the chapter on investor-state dispute settlement (investors may not submit claims if their investment has been made through corruption) and government procurement (requiring procurement entities to prevent corrupt practices) (European Commission 2016).

### Assessing the effectiveness of anti-corruption provisions in trade agreements

Ascertaining the effectiveness of anti-corruption provisions in terms of national implementation and enforcement is difficult as assigning causation for domestic reform to free trade agreements alone or isolating their impact from other background factors can be problematic. There are some examples of the effectiveness of such provisions in U.S. trade deals, though these successes may also be attributable to the considerable leverage the U.S. has over its trade partners.

The U.S. Trade Representative notes that, as a result of the Colombia-U.S. trade deal, the Colombian authorities issued a decree ensuring transparency in pharmacological evaluation and health registry through the online platform of the National Vigilance Institute for Food and Medicine (Republica de Colombia Ministerio de Salud y Proteccion Social 2012). The deal also meant that the Colombian government passed measures granting U.S. suppliers rights to non-discriminatory treatment in bidding on procurement opportunities offered by a broad range of Colombian government agencies (Office of the U.S. Trade Representative 2014).

Likewise, as a result of the DR-CAFTA agreement, Honduras eliminated the discriminatory requirement

that foreign firms act through a local agent in order to participate in public tenders, while Guatemala committed to using an internet-based open procurement system to ensure full transparency in procurement actions, as well as amending its procurement law to provide arbitration for firms to dispute awards of tenders (Office of the U.S. Trade Representative 2011). Finally, the Dominican Republic passed legislation to ensure that procuring entities conduct procurement in a transparent and non-discriminatory manner (Office of the U.S. Trade Representative 2011).

Some observers suggest that international anti-corruption instruments, be it the UNCAC or provisions in a trade agreement, serve essentially as “myth systems”, aspirational texts rather than functional obligations (Llamzon 2015). By providing an economic incentive, trade agreements requiring signatories to ratify anti-corruption conventions or enact de jure anti-bribery measures can encourage and accelerate the diffusion of good governance and transparency norms in international trade (Lejárraga and Shepherd 2013).

## 4 ENFORCEMENT MECHANISMS FOR ANTI-CORRUPTION PROVISIONS IN TRADE AGREEMENTS

Despite the legitimacy they lend to international anti-corruption efforts, the real value of anti-corruption provisions in trade agreements nonetheless lies in their enforcement at national level. Bilateral and regional trade deals do not benefit from the WTO Dispute Settlement System for enforcement, and they often rely the ability of each party to hold the other(s) accountable through the use of diplomatic and political pressure to influence a sovereign state’s enforcement choices. As such, the effectiveness of anti-corruption provisions in trade agreements depends on political will and countries’ existing anti-corruption infrastructure (Brown 2014).

Even where dispute settlement mechanisms exist, experts point to the poor incentives for bringing anti-corruption cases,<sup>9</sup> as well as the exemption of key

<sup>9</sup> Most experts doubt that investors or states parties would have the incentive to bring claims when other countries fail to live up to their anticorruption commitments (Beach 2015a). While less bribery would benefit the trade bloc as a whole, it may not be a salient issue for any individual investor or state.

provisions regarding the domestic enforcement of a country's anti-corruption obligations as outlined in the respective trade agreement (Beach 2015a; Alemanno and Karttunen 2016). In the absence of a joint, institutional arbitration or enforcement body, the implementation of anti-corruption provisions in trade agreements is dependent on the good will of each party. Even in developed countries, the failure to enforce foreign bribery legislation such as the OECD Anti-Bribery Convention has led to what some experts have called "pernicious protectionism" (Brown 2014). As such, while anti-corruption provisions in free trade agreements can complement and reinforce existing anti-corruption conventions, they have limited leverage to support enforcement.

That is not to say there are no options for enforcement. In particular, two kinds of dispute settlement mechanisms may be pertinent: those between investors and governments (ISDS) and between sovereign states (GGDS). A third means of possible enforcement would be the establishment of an independent body to monitor implementation (Alemanno and Karttunen 2016).

### *Investor State Dispute Settlement*

Many trade agreements like [NAFTA](#), [TPP](#) and the [EU-Canada CETA](#) offer certain protections to foreign traders and investors similar to those provided by bilateral investment treaties (Robbins 2016). These permit investors to seek restitution outside of the host state's judicial system where that state has not complied with its treaty obligations (Robbins 2016). Although prior to the TPP, no trade or investment agreement has obligated host states or foreign firms to comply with anti-corruption standards, arbitration panels have in some instances adjudged corruption to be crucial in determining liability, which has led some to speak of a "common law of anticorruption principles" (Young 2016). Corruption has generally been considered a defence against liability, whereby states admit that public officials engaged in bribery

during the drawing up of the initial contract, rendering the contract void or illegal so that there is no valid contract for the ISDS to enforce.<sup>10</sup> The existing legal regime in this area suggests that investments proven to have been tainted by corruption are divested of protection, providing a strong disincentive for supply-side corruption but little motivation for states to stamp out corrupt practices (Zaveri 2013).

However, some observers note a shift in jurisprudence suggesting that a novel combination of anti-corruption provisions with ISDS mechanisms can offer new tools for anti-corruption enforcement (Young 2016). Recourse to investor-state dispute settlement mechanisms, which have proven to be "an emerging space for enforcing international norms" (Young 2016), could therefore offer a potential avenue of enforcing domestic implementation of anti-corruption provisions.

Conceivably, arbitration panels could rule that failure to prevent corruption among public servants is a violation of a state's obligation to provide "fair and equitable treatment" to foreign firms (Young 2016). A tribunal in the [EDF \(Servs.\) Ltd. v. Romania](#) case noted that a "request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant" under the investment treaty, and some speculate that a prohibition of bribe solicitation could come to be increasingly interpreted as a legally binding obligation (Robbins 2016).

In this way, cross-cutting anti-corruption chapters in trade deals could convince arbitration tribunals to hold both states and investors more accountable for offering or demanding bribes (Robbins 2016). However, ISDS systems are highly controversial, due to the imbalance they can create between the foreign investors and the host state in matters of public interest (Client Earth 2015).<sup>11</sup>

<sup>10</sup> See the cases [World Duty Free v. Kenya](#), and [Metaltec v. Uzbekistan](#). Yackee (2012) has pointed out that this "corruption defence" might in fact encourage public officials to engage in corruption and/or dissuade governments from passing domestic anti-corruption legislation.

<sup>11</sup> Among the most frequent concerns raised regarding the ISDS process are the privileged access by foreign investors to these courts, without similar rights for other nations, NGOs or domestic investors; the threat that democratically prepared laws and regulations be challenged by private entities, with a possibly "chilling effect" on the right to regulate; the lack of legal precedent rules and appeal mechanisms controlling consistency in arbitral decisions; the confidentiality of proceedings, which leave space for abuse; and the private quality of arbitrators, who do not have to pledge to exercise their duties in the service of the public and often have experience in practicing in the private law firms representing the foreign investors (see Resnik 2015).

### ***Government-Government Dispute Settlement***

While GGDS is subject to less criticism, provisions subject to government-governments dispute settlement (GGDS) mechanisms have not yet included obligations to combat corruption, considerably limiting the enforcement of these commitments (Alemanno and Karttunen 2016). Were such measures subject to adjudication by dispute settlement, states could launch arbitral proceedings to settle disputes concerning the implementation of anti-corruption pledges. This would have a significant impact on state sovereignty and is likely to be fiercely contested by state parties.

### ***Monitoring mechanism***

Despite the inclusion of enforcement through monitoring as a key principle of the EU's Trade for All strategy, to date no trade agreement has foreseen monitoring of anti-corruption implementation (Alemanno and Karttunen 2016). Conceivably, however, enforcement of international commitments made in trade agreements could be ensured through an independent monitoring mechanism. This could take the form of self-evaluation (e.g. WTO trade monitoring reports), peer review (e.g. OECD Working Group on Bribery), a combination of these two (eg. Trade Policy Review Mechanism in the WTO) or it could be facilitated through shadow-reporting by an independent organisation (e.g. TI's "Exporting Corruption" reports; or Global Trade Alert) (Alemanno and Karttunen 2016). Given that RTAs fall outside the scope of the WTO and lack an existing institutional setting, some argue that the most feasible and efficient monitoring option would be assessments conducted by an independent organisation (Alemanno and Karttunen 2016).

Whatever form it might take, monitoring the implementation of commitments in trade agreements could provide independent appraisal of implementation efforts, which would be especially relevant for areas not subject to dispute settlement such as anti-corruption.

## **5 ANNEX 1: TI RECOMMENDATIONS ON TRANSPARENCY AND ANTI-CORRUPTION IN TRADE AGREEMENTS**

A Transparency International scoping paper (Alemanno and Karttunen 2016) made the following recommendations to improve transparency and anti-corruption during the implementation and operation phase of trade agreements:

### **Transparency**

#### ***Improve regulatory transparency to the benefit of all stakeholders***

##### *Access to information*

Ensure that trade agreements reiterate the obligation to notify draft regulations to the WTO, and not solely to other negotiating parties to the agreement, in order to reinforce implementation of WTO obligations and to ensure the benefits of transparency accrue to the entire multilateral trading system and its stakeholders.

#### ***Transparency for the investment protection framework***

##### *Level the playing-field between national and foreign investors*

To avoid "forum shopping" (between domestic and arbitral jurisdictions) by foreign investors the agreements should include the following requirements:

- That foreign and domestic traders and investors are subject to the same legal system and are treated equally (Principle of non-discrimination)
- That the ability of foreign investors to commence an arbitral proceeding is carefully circumscribed and requires that:
  - They are subject to discriminatory treatment from the host State
  - The host State has enacted a discriminatory measure against them
  - The domestic courts fail to act in appropriate time (according to international standards)
  - human rights have been violated.
- In addition, a "fork-in-the-road" provision, rendering final the investor's choice to submit a dispute in front of a domestic jurisdiction or the arbitral tribunal, would

avoid the possibility for foreign investors to cumulate legal proceedings.

### **Transparency in dispute settlement**

#### *Guarantee transparency of arbitral proceedings*

- Ensure the incorporation of UNCITRAL transparency rules.

#### *Adopt guidelines on transparency in funding of arbitral cases*

Advocate in favour of guidelines on transparency in funding of arbitral hearings, requiring for instance the disclosure of financing by third parties, and granting the arbitrators discretion to decide whether a third-party funder should be considered as a party to the dispute, if its contributions are significant. In addition, the control of the funders on the proceedings and particularly on the legal strategy should be limited, to keep the interests of funders and litigants well separated.

See also the Asia-Pacific Economic Co-operation (2012) [Model Chapter on Transparency for RTAs/FTAs](#).<sup>12</sup>

### **Anti-corruption**

#### ***Integrating ambitious anti-corruption framework in all trade agreements***

Include a general commitment to fight corruption, with explicit reference to both the UN Convention against Corruption and the OECD Anti-Bribery Convention, inviting all non-parties to join the two conventions. The role of anti-corruption provisions in trade deals is to tailor these commitments to the area of trade and investment, rather than offer competing definitions or interpretations of corrupt practices.

Reinforce integrity and ethics requirements for suppliers in government procurement, by including integrity as one of the conditions to be awarded a tender and ensuring high standards of integrity throughout the tender contract.

#### ***Reinforce guarantees for effective enforcement of anti-corruption provisions***

Submit all anti-corruption provisions to dispute settlement, including those on enforcement of national anti-corruption legislation.

Call for more transparency in the reporting on implementation of anti-corruption commitments, in particular by establishing consultations with civil society in the monitoring of implementation of anti-corruption commitments by the OECD Working Group on Bribery and UNODC.

#### ***Set up strong anti-corruption measures that meet global standards***

- Include enforceable anti-corruption provisions in all the chapters of a trade agreement that are potentially exposed to corruption.

## **6 ANNEX 2: ACRONYMS**

**APEC** - The Asia-Pacific Economic Co-operation

**CETA** - The *Comprehensive Economic and Trade Agreement between Canada and the European Union*

**DR-CAFTA** - The Dominican Republic-Central America Free Trade Agreement between the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.

**FATF** – The Financial Action Task Force

**FCPA** – The Foreign Corrupt Practices Act

**GGDS** – Government-to-Government Dispute Settlement

**GPA** – The WTO’s Government Procurement Agreement

**GSP** – The European Union’s Generalised Scheme of Preferences

**ISDS** – Investor-State Dispute Settlement

**NAFTA** – The North American Free Trade Agreement

**NTMs** – Non-Tariff Measures

**OECD** – The Organisation for Economic Co-operation and Development

**RTAs** – Regional Trade Agreements

**TDCA** – The Trade, Development and Co-operation Agreement between the European Union and South Africa

**TFA** – The WTO’s Trade Facilitation Agreement

**TPP** – The Trans-Pacific Partnership

<sup>12</sup> The chapter includes recommendations for provisions on public consultations, publication of resources, notifications regarding implementation, and review and appeal mechanisms.

**TTIP** – the Transatlantic Trade and Investment Partnership  
**UKBA** – the United Kingdom Bribery Act  
**UNCAC** – The United Nations Convention Against Corruption  
**WCO** – The World Customs Organisation  
**WTO** – The World Trade Organisation

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