

## **Part 2**

### **Analytical Report**

# **The Transparency and Corruption Dimensions of 'New Generation' Trade Agreements**

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## I. INTRODUCTION

### A. *Aim and methodology*

This paper intends to identify the major areas of concerns – both from a transparency and anti-corruption perspective – with regard to a ‘new generation’ of trade agreements with a focus on the Transatlantic Trade and Investment Partnership (TTIP), the Comprehensive Economic and Trade Agreement (CETA), and the Transpacific Partnership (TPP).<sup>1</sup>

The structure of the report follows the timeline of a typical trade negotiation. It explores the different phases leading up to the conclusion of a trade agreement, from the political decision to launch negotiations all the way to the ratification of the final text. For each stage it examines the extent of transparency and ensuing risks of corruption.

While the focus is predominantly on TTIP, CETA, and TPP,<sup>2</sup> the analysis is also relevant for future agreements of this kind, since the outcomes of the currently negotiated agreements are likely to also shape the standards and practices of future accords in this area.

The analysis is based on desk research and a set of interviews with relevant TI representatives.<sup>3</sup> The desk research covers information available from official sources of negotiating and the related academic literature.

### B. *What is new about these new trade agreements?*

As the World Trade Organisation (WTO) continues to expand,<sup>4</sup> the political and economic interests within the Organisation have become more diverse and agreements are more difficult to reach. This is particularly true with regards to the differences existing among countries’ regulatory standards, which typically translate into obstacles to trade, known as “non-tariff barriers”<sup>5</sup> Responding to

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<sup>1</sup> Other major trade agreements recently concluded or still under negotiation include the Tripartite Free Trade Agreement (TFTA) signed on 10 June 2015 between 26 countries, parties to COMESA, EAC and SADC, as well as bilateral FTAs between EU – Japan, EU – Mexico, US – China or US – India, as well as the Pacific Alliance in Latin America between Chile, Colombia, Mexico and Peru.

<sup>2</sup> This choice derives from several considerations, such as the different state of advancement of the negotiations, the different nature of the agreements (plurilateral vs bilateral), the availability of some of the negotiating texts. In addition, the media and civil society attention on these three “mega-regionals” has been unprecedented, calling for a study to substantiate or reply to criticisms made to them.

<sup>3</sup> From Chapters in the USA, France, Guatemala, Canada, South Africa, New Zealand, the EU, Ukraine and Germany. For an overview of discussions, see Annex I.

<sup>4</sup> 161 Members since April 2015.

<sup>5</sup> Since 1995, WTO signatories have used the WTO Agreements on Technical Barriers to Trade (TBT) and on Sanitary and Phytosanitary Measures (SPS) to seek to reduce these regulatory barriers by imposing external trade disciplines – backed by a dedicated dispute settlement system (DSS) – on the application of domestic regulatory restrictions to imported goods and services. See Michael Trebilcock & Rob Howse, *The Regulation of International Trade* 145 (Routledge 1999). See also Gabrielle Marceau & Joel Trachtman, *The Technical Barriers to Trade Agreement*, the

these challenges, countries with more similar trade interests have increasingly concluded bilateral, regional, or even plurilateral agreements. The ensuing fragmentation of the multilateral trading system is epitomized by the emergence of a ‘new generation’ of trade agreements, often referred to as “mega-regionals”. These are deep integration partnerships between countries or regions with a major share of world trade and foreign direct investment (FDI). These agreements go beyond what the WTO regime provides. They are currently negotiated or concluded bilaterally, such as TTIP (between the European Union and the United States) and CETA (between Canada and the European Union), or plurilaterally, such as the TPP (among 10 Pacific and Asian countries).<sup>6</sup>

Given the current difficulties to effectively address possible trade barriers related to national regulations, more and more countries are willing to explore such new avenues of international regulatory cooperation. In addition to the commitment to eliminate tariffs – typical of any Free Trade Agreement (FTA) –, countries commit in these new generation agreements to follow a set of common procedures when adopting or revising domestic policies in view of reducing the risk of divergence<sup>7</sup>.

The idea is to not only reduce regulatory barriers but also to improve regulatory coherence, in order to facilitate trade flows. What these agreements have therefore in common is that they build upon WTO agreements but also seek to better coordinate the activity of the respective regulators in the exercise of their regulatory autonomy. They intend to establish cooperation mechanisms that enable the respective regulators to talk to each other directly and regularly. The main objective is to enable policymakers to harmonize their regulations or, more likely, mutually recognize their differing regulations as essentially ‘equivalent’ to domestic requirements. Thus, for instance, an imported product – be it a cosmetic or an automotive component – from country A could be exported to market B even if it only complies with the regulatory requirements of country A.

The main premise of this innovative approach to regulatory cooperation is that the contracting parties share a strong commitment to protecting public health, safety, the environment and economic security, but that they pursue this commitment through different approaches and regulatory outcomes.<sup>8</sup> The development of such a framework for regulatory cooperation raises many important questions, including the widespread concern that regulatory cooperation may

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Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariff and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods, 36 J. World Trade 811-881 (2014).

<sup>7</sup> See e.g. EU Proposal for a Chapter on Regulatory Cooperation, originally published on February 10, 2015 available at [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153120.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf) as amended on May 4, 2015 and available at [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153403.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf) (hereinafter the EU Proposal). For the CETA Chapter on Regulatory Cooperation, see [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>8</sup> For insightful, though partly divergent, accounts of transatlantic regulatory divergences, see e.g. David Vogel, *The Politics of Precaution* 255 (Princeton Univ. Press 2012); J. Wiener et al., *The Reality of Precaution*, Routledge/RFF, 2010.

compromise the principle of regulatory sovereignty and potentially result in fundamental accountability problems.<sup>9</sup>

As recently put by WTO former director general Pascal Lamy, the emergence of this new generation of trade agreements symbolizes the shift from an old world of trade where production systems were national and obstacles to trade were about sheltering the domestic market from foreign competition (through protectionism) to a new world of trade characterised by transnational production along global supply chains of goods and services in which potential obstacles to trade stem from the very legitimate efforts to protect consumers from risks<sup>10</sup>. In his view, this would explain why we are moving from the ‘administration of protection’ to the ‘administration of precaution, security, safety, health and environmental sustainability’. It is only by coordinating regulators’ activity that countries are able to overcome obstacles to trade. Yet, as we move away from the old divide between tariffs and non-tariff measures and we enter into this new, more complex world of trade, we stumble upon a potential clash between trade liberalization efforts and the exercise of sovereign power, in particular in relation to regulatory autonomy, i.e. the freedom to shape policies as they best fit each countries’ preferences.

### *C. Previewing the transparency and anti-corruption dimension*

Given the wider scope of policy areas covered by these trade agreements<sup>11</sup> and their rather intrusive approach to domestic regulatory autonomy, the interests at stake are very broad and diverse, including third party States, private companies, civil society organisations and individual citizens. As a result it does not come as a surprise that demands for transparency are greater than for conventional trade negotiations so as to provide the basis for a more equal and inclusive representation of the many interests involved. Similarly, at the level of implementation, it appears important that all contracting parties ensure transparency and integrity mechanisms when applying these agreements. The same is true at the level of their enforcement. Regulatory transparency and anti-corruption obligations are a pre-requisite not only for effective trade liberalization, the very goal of those trade agreements, but also for enabling them to deliver economic benefits to the whole society as opposed to few selected private interests.

The more the new generation trade agreements address regulatory matters beyond only tariff barriers, the more important it is that they also set good governance standards, through regulatory transparency and anti-corruption provisions. So in a nutshell, transparency in the negotiations of these agreements is an essential condition to ensure that all voices are taken into account. This is true not only at the time of negotiation but also for implementation and enforcement. The following

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<sup>9</sup> See, e.g., A. Alemanno, Aux Parlements de surveiller l’accord transatlantique, *Le Monde*, 24 April 2014.

<sup>10</sup> Pascal Lamy, *Looking Ahead : The New World of Trade*, Jan Tumlir Lecture, ECIPE, Brussels, 9 March 2015.

<sup>11</sup> The TTIP for instances ranges from general provisions in trade in goods and services to more specific chapters on public procurement, rules of origin, technical barriers to trade, food safety and animal and plant health, chemicals, cosmetics, information and communication technology, pharmaceuticals, energy and raw minerals, intellectual property, etc. For a complete list, see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

sections examine these issues in more detail for the different stages of developing and implementing these trade agreements.

## II. TRADE NEGOTIATIONS

Transparency and consultation in the negotiation process are essential for the same reasons as in domestic rule-making. They are a necessary condition that all relevant interests can be articulated and considered, so that one can arrive at decisions that are well-reasoned and deliver the best possible outcomes for society.<sup>12</sup> However, in many cases, rulemaking may privilege certain groups and individuals over others. Yet “those who end up “losing” should at least be able to understand the decisions made by regulators and to feel that their interests were treated fairly and respectfully.”<sup>13</sup>

This section provides an overview of the steps followed by countries when negotiating a trade agreement. It examines their overall transparency and corruption risks. The negotiation of a trade agreement encompasses three major phases: (A) decision to enter the negotiations and definition of the scope of negotiations; (B) the negotiation rounds and (C) conclusion of the agreement.

The consequences of a lack of transparency in each phase of the negotiation process described below can be significant because of the interconnectedness of the whole process: the impact assessment studies that determine the decision to enter negotiations are also used as a basis to define the scope of the agreement. This scope in turn provides the boundaries of the whole negotiation process. Lack of transparency and accountability as well as the absence of (or limited) open stakeholder consultations throughout the negotiation rounds may result in texts largely prepared by ‘insiders’. The later a particular stakeholder gains information about the negotiated texts, the less chances they have to grasp the stakes and to input to the process.

Against this backdrop, it is important to find an appropriate balance between disclosure of negotiation documents and goals vs. confidentiality of negotiations for strategic purposes and inefficient public participation on the other. Although international negotiations are traditionally highly confidential, several organisations and international agreements<sup>14</sup> are increasingly characterised by higher transparency standards and are disclosing more documents related to the negotiation process. The WTO in particular has improved considerably and can serve as a useful benchmark with the mega-regional trade agreements.<sup>15</sup>

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<sup>12</sup> Cary Coglianese, Heather Kilmartin, and Evan Mendelson, “Transparency and Public Participation in the Rulemaking Process: Recommendations for the New Administration,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 4, 2008), <http://papers.ssrn.com/abstract=1292911>

<sup>13</sup> Ibid. p. 926.

<sup>14</sup> In their letter to the EU Commissioner on transparency of negotiations, NGOs point out that the WTO, UNFCCC, WIPO and the Aarhus Convention have more transparent practices than the regional trade agreements.

<sup>15</sup> The WTO has also increased efforts to improve transparency and consultation with the civil society, particularly since 1999. All official WTO documents are unrestricted by principle, except if specific WTO bodies decide otherwise. This includes *inter alia* submissions by parties to negotiations are made public, minutes of all committee meetings. In addition, all official documents are translated into the three official languages, English, French and Spanish. In addition, the WTO Secretariat has pursued efforts to both sensitize the Secretariat and Members about concerns by NGOs, as well as to keep NGOs better informed through regular reports and consultations.

## A. *Launch of Trade Negotiations*

The governments seeking to enter into a trade negotiation announce their intention to work together with the aim of concluding a trade agreement. They may call for expert and stakeholder opinions to decide on the cost and benefits of the project for each parties (i.e. impact assessment and public consultations). Closely related to this, they define among each other the areas to be covered by the Agreement (i.e. scoping). Finally, all parties report back to their national authorities in order to obtain the formal authorization to officially launch negotiations.

Current state of play: There is very mixed transparency regarding the rationale for the trade agreement and the definition of its scope. Governments enter trade negotiations following political motivations, backed by studies that are typically prepared under their authority and at times assigned to external contractors without a competitive selection process.

Canada and the EU as well as the EU and US commissioned joint studies to assess the costs and benefits of CETA<sup>16</sup> and TTIP<sup>17</sup> respectively. The two main studies were led under their direction,<sup>18</sup> and since the disclosure of related documentation is limited<sup>19</sup> it is not clear to what extent meaningful scrutiny by civil society could be exercised.<sup>20</sup> Although this does not necessarily imply

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For further details on transparency rules and practices in the WTO, see Maria Perez-Esteve, “WTO Rules and Practices for Transparency and Engagement with Civil Society Organisations” (WTO Staff Working Paper ERSD-2012-14, September 18, 2012), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201214\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201214_e.pdf)

<sup>16</sup> “Assessing the costs and benefits of a closer EU – Canada economic partnership”, delivered October 2008, was referred to by Canadian and European Leaders as supporting the rationale for launching CETA negotiations. See report at: [http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_141032.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf)

See Canada – EU Summit Statement, 17 October 2008: [http://www.canadainternational.gc.ca/eu-ue/bilateral\\_relations\\_bilaterales/2008\\_10\\_17\\_statement-declaration.aspx?lang=eng](http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2008_10_17_statement-declaration.aspx?lang=eng)

The negotiations for CETA formally began in June 2009, after the governments got the authorization to negotiate. Canada and European Union, “EU and Canada Start Negotiations for Economic and Trade Agreement,” June 10, 2009.

<sup>17</sup>One report on the costs and benefits of TTIP was prepared by a “High-Level Working Group on Jobs and Growth”, chaired by the EU Commissioner for Trade and the U.S. Trade Representative. The final report was issued in February 2013, concluding that “...a comprehensive agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules, would provide the most significant mutual benefit of the various options we have considered.” An additional economic assessment report that also included some stakeholder consultations was delivered by the Centre for Economic Policy Research in March 2013 ([http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf)).

<sup>18</sup> The study on the costs and benefits of a closer economic partnership between the EU and Canada was prepared under the joint direction of the Directorate General for Trade (“DG Trade”) of the European Commission and the Department of Foreign Affairs and International Trade of Canada, and the report on the options for strengthening the EU - US trade relationship was prepared by a working group chaired by the EU Commissioner for Trade and the United States Trade Representative (USTR).

<sup>19</sup> In the context of TTIP, the EU Commission continues to expand public disclosure of all documents related to the studies. For the archive on all documents, including impact assessment studies and related consultations conducted in the context of TTIP negotiations, see [http://trade.ec.europa.eu/doclib/cfm/doclib\\_section.cfm?sec=146&link\\_types=&dis=20&sta=1&en=20&page=1&langId=EN](http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=146&link_types=&dis=20&sta=1&en=20&page=1&langId=EN)

Less information is available online on the precise IA and consultation procedures followed prior to concluding CETA.

<sup>20</sup> The study on the costs and benefits of a closer economic partnership between the EU and Canada does to a certain extent go over existing literature on potential impacts of EU – Canada trade and investment liberalization, five previous studies in particular (cf p. 29). The study finishes with a summary of views gathered from both Canadian and European



a bias in the result of the reports, it leaves open the risk of partiality, tilting in favour of justifying the conclusion of an agreement as desired by the negotiating parties. In both cases, the parties grounded their decision to conclude CETA<sup>21</sup> and TTIP<sup>22</sup> on these studies.

The parties to the TPP did not refer to any specific common study to justify their decision to enter into negotiations. Each country had a different approach with regards to the rationale for negotiating the agreement, offering different figures on their public websites to justify their involvement, without however systematically providing the source of those figures.<sup>23</sup>

Although some stakeholders may sometimes be consulted for the purpose of these studies, no detailed scrutiny over their results exist.<sup>24</sup>

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private sector representatives. The names of the companies were not cited in the responses described in the report. The results of the study were not published in advance with opportunity for stakeholders to scrutinize its results. It was presented to Canadian and EU Leaders at their Summit in October 2008, who relied upon it as such.

<sup>21</sup> Canada and the EU clearly state that “Based on the results of the study and the interest demonstrated by our business communities, and in order to provide crucial impetus to creating a stronger, ambitious and balanced economic partnership, Canada and the EU agree to work together to define the scope of a deepened economic agreement and to establish the critical points for its successful conclusion, particularly the involvement of Canada’s provinces and territories and EU Member States in areas under their competencies.” [http://www.canadainternational.gc.ca/eu-ue/bilateral\\_relations\\_bilaterales/2008\\_10\\_17\\_statement-declaration.aspx?lang=eng](http://www.canadainternational.gc.ca/eu-ue/bilateral_relations_bilaterales/2008_10_17_statement-declaration.aspx?lang=eng)

<sup>22</sup> The President of the United States, European Council President and European Commission President issued a statement on 13 February 2013 to announce the initiation of “internal procedures necessary to launch negotiations on a Transatlantic Trade and Investment Partnership.” They based this decision on the study by the HLWGJG, which recommended the EU and the US to “launch (...) a comprehensive, ambitious agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules.” [http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc\\_150519.pdf](http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf)

<sup>23</sup> USTR lays down many figures on the estimated benefits of the TPP, without quoting the precise source of these estimations. In 2013, USTR did make reference to “...an analysis supported by the Peterson Institute” to substantiate its claims on the economic benefits of the TPP, <https://ustr.gov/about-us/policy-offices/press-office/factsheets/2013/December/TPP-Economic-Benefits> There is no link towards the text of the analysis.

The Chilean Foreign Ministry noted it has conducted assessments of the impacts that the TPP may have on Chile, but the link from the government website towards the results of the impact assessment and consultations is not available <http://www.direcon.gob.cl/tpp/que-es-el-tpp/> and the civil society has complained about the absence of the report, indicating that it might not have been made public at all. See for e.g. <http://www.fundacion.equidad.cl/tpp.html> and <https://www.derechosdigitales.org/8584/tpp-en-chile-un-historial-de-promesas-sin-cumplir/>

New Zealand seems an exception when making reference to a study by the East West Center, portraying the potential benefits of the TPP to its GDP and exports conducted prior to November 2011, when the TPP negotiations were formally launched. See on this <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php> and the study at <http://www.eastwestcenter.org/publications/trans-pacific-partnership-and-asia-pacific-integration-quantitative-assessment>

<sup>24</sup> For instance, the study conducted prior to launching CETA negotiations contains a summary of views gathered from both Canadian and European private sector representatives. The names of the companies were not cited in the responses described in the report. The results of the study were not published in advance with opportunity for stakeholders to scrutinize its results. It was presented to Canadian and EU Leaders at their Summit in October 2008, who relied upon it as such. See “Assessing the costs and benefits of a closer EU – Canada economic partnership”, delivered October 2008. Available at: [http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc\\_141032.pdf](http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf)

In addition, the very same studies typically help governments justify the scope of negotiations for the agreement.<sup>25</sup> Indeed, once countries agree to start a trade negotiation, they begin an informal dialogue to determine the scope of the coming agreement, by also involving impact assessments and public consultations. The EU Commission refers to this stage as a “scoping exercise”.<sup>26</sup>

Best practice: Similarly to what occurs at the national level, independently conducted Impact assessment studies (IAs) should be carried out, include robust consultations and a high level of transparency and be completed before the major decisions that they are meant to inform are taken. These studies should help determine whether a new trade agreement between given countries would be beneficial for trade. And they should provide strong guidance on which provisions, and particularly those with regards to regulatory issues, would be most relevant to be included in the trade agreement<sup>27</sup>. Public consultations over the methodologies employed help safeguard the independence of the IA results and the quality of the analysis<sup>28</sup>.

Risk of corruption: The lack of transparency and full democratic input to the crucial decisions of a government with regard to opening and devising the scope of negotiations may make it easier to give disproportionate consideration to and at the same time hide possible influences by actors with high incentives and bargaining power<sup>29</sup>.

Who would benefit from disclosure of information? All citizens and businesses under the jurisdiction of the countries involved, plus many business partners in third party countries are affected by the agreements.

Recommendation for TI:

***Ensure that the scope and content of agreements be preceded by inclusive assessment procedures***<sup>30</sup>

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<sup>25</sup> Several impact assessment studies are conducted after the initiation of negotiations, or even after their conclusion. For example upon conclusion of the TPP negotiations, USTR asked the US International Trade Commission, an independent executive agency, to evaluate the impacts of the TPP as agreed upon.

<sup>26</sup> See spec. p. 3 [http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149616.pdf](http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf)

<sup>27</sup> Regulatory impact assessment (RIA) studies are generally recommended at the national level to assess the policy alternatives to achieve a given policy objective and the impact of different government action. While no such obligation exists at the international level, it is arguable that the binding consequences of international agreements have similar effects as domestic laws and therefore should undergo similar studies. See for eg. OECD, “Regulatory Impact Analysis: Best Practice in OECD Countries,” 1997, <http://www.oecd.org/gov/regulatory-policy/35258309.pdf> And Stephen Rimmer, Delia Rodrigo Enriquez, and Peter Farup Ladegaard, “Making It Work: ‘Ria Light’ for Developing Countries” (The World Bank, November 1, 2009), <http://documents.worldbank.org/curated/en/2010/05/12536904/better-regulation-growth-governance-frameworks-tools-effective-regulatory-reform-making-work-ria-light-developing-countries>

<sup>28</sup> This issue was brought to our attention by TI New Zealand, see Annex 1. Both the OECD and World Bank principles regarding RIA include public consultations as a step in the RIA process.

<sup>29</sup> On the importance of democratic controls in the negotiation of trade agreements, see Helena Peltonen, “TTIP and CETA: Corruption Prevention - Unsatisfactory (Unpublished Draft),” May 2015.

<sup>30</sup> In the case of CETA, TPP and TTIP, the negotiations are already well underway and different studies have been published, though most after the actual launch of the respective negotiations. However, TI Germany suggested that to ensure appropriate level of scrutiny over the scope of the Agreement, there may be a need for a moratorium of the

- ✓ Trade officials (USTR, DG Trade) should ensure that the Impact Assessment (IA) studies preceding their future trade negotiations be independent and cover the **economic, environmental or social impacts**<sup>31</sup>, either on the economy as a whole or on individual sectors, societal groups or geographic areas, of these agreements<sup>32</sup>.
- ✓ Both the preparatory stage and the outcomes of the IA should entail **scrutiny by stakeholders** from business, NGO, and consumer organisations.
- ✓ The **scope of the future trade agreements** should be determined on the basis of the results of this process.

## ***B. Negotiation Rounds***

Negotiations may take several years, and are generally divided into several “rounds” during which government representatives meet in person, consult with stakeholders, exchange written proposals, and eventually the drafts of the final text. While international treaty negotiations have traditionally been secret, such a policy of opaqueness has been widely called into question by a growing recognition of the deep reach into domestic policy domains that these new generation trade agreements exhibit.

Throughout the negotiations, two types of imbalances of information typically exist<sup>33</sup>: between negotiators and the general public; and between stakeholders with different levels of expertise, resources and access. To address both, disclosure of negotiation information (1) and consultations with stakeholders (2) are essential.

### 1. Disclosure of negotiation information

Given the inherently strategic nature of the negotiations of trade agreements, pleading for full disclosure does not seem a viable option. Yet the traditional approach of strict confidentiality of the information exchanged during the talks does not appear adequate either. The question is therefore to determine which should be the optimal balance between the amount of information to be kept confidential and the amount to be disclosed to the public to satisfy growing heightened expectations for openness and democratic accountability.

Current state of play: We observe greatly diverging approaches to the disclosure of the contents negotiated in a trade agreement. While the EU has shown to be increasingly open to public disclosure – at least in the framework of TTIP –, the US maintains an ambition of full

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present negotiations and for reopening the discussion about the mandate to the EU Commission by the EU Council in order to ensure time and opportunity for better balancing of all interests.

<sup>31</sup> The EU Commission sets that “An IA is required for Commission initiatives that are likely to have significant economic, environmental or social impacts.” [http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap3\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm)

<sup>32</sup> Further details on the EU Commission’s methodology to determine whether an IA is necessary available at [http://ec.europa.eu/smart-regulation/guidelines/tool\\_5\\_en.htm#sdfootnote56sym](http://ec.europa.eu/smart-regulation/guidelines/tool_5_en.htm#sdfootnote56sym)

<sup>33</sup> These imbalances of information were discussed in particular with TI Germany, see Annex 1.

confidentiality, even after the conclusion of an Agreement, both for the text<sup>34</sup> and negotiating documents.<sup>35</sup> In contrast to the US, the EU is currently disclosing its negotiating positions before each round in TTIP. The co-existence of these very different approaches in the context of one and the same trade negotiation process – as is the case in TTIP – can lead to a significant imbalance of information and access between the parties and within the ensuing public debate. Moreover, such an asymmetric transparency practice during the negotiations may undermine the trust in the process.

**Best practice:** It is recommended that the negotiating positions of the parties are disclosed before each round as well as the codified texts negotiated by the parties after each round<sup>36</sup>. Openness of negotiations can make it possible for a broader set of stakeholders to contribute while changes to the text can still be made<sup>37</sup>. In addition, the publicity of negotiations allows for the negotiators to be accountable about the decisions they make, offering a better guarantee of an end product crafted in line with the public interest.<sup>38</sup>

**Risk of corruption:** Despite the prevailing confidentiality policy surrounding the trade negotiations, ‘insiders’ and stakeholders with sufficient resources manage to gain privileged access to information on drafts and positions and as a result are put in the position to contribute more

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<sup>34</sup> In the case of TPP, the text of the agreement was only disclosed a month after its conclusion. Strong criticisms have also been voiced against the secrecy in the negotiations of TTIP. See in particular European Ombudsman, “Letter to the Council of the EU Requesting an Opinion in the European Ombudsman’s Own-Initiative Inquiry OI/11/2014/MMN Concerning Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership (TTIP) Negotiations,” July 29, 2014, <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54634/html.bookmark>; European Ombudsman, “Letter to the European Commission Requesting an Opinion in the European Ombudsman’s Own-Initiative Inquiry OI/10/2014/MMN Concerning Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership (TTIP) Negotiations,” July 29, 2014, <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54633/html.bookmark>. See as well Transparency International et al., “Civil Society Call for Full Transparency about the EU-US Trade Negotiations,” March 14, 2014, [http://www.transparencyinternational.eu/wp-content/uploads/2014/07/foee\\_joint\\_ttip-transparency-call\\_march2014.pdf](http://www.transparencyinternational.eu/wp-content/uploads/2014/07/foee_joint_ttip-transparency-call_march2014.pdf)

<sup>35</sup> TI New Zealand informed us that parties to the TPP would be required to maintain information on the negotiations confidential for 4 years. This is confirmed in letter released by New Zealand as depositary of the TPP Agreement to other parties for signature: <http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP%20letter.pdf>

<sup>36</sup> The WTO discloses a large amount of negotiating documents in preparation of the Ministerial meeting, including Members’ textual proposals and draft decisions to be adopted. See [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/mc10\\_docs\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_docs_e.htm)

<sup>37</sup> Coglianesi notes that at the internal level, notice of proposed rulemaking are often made too late in the regulatory process when the text is already developed, rendering the comments received at that stage unlikely to enhance the quality or legitimacy of rulemaking.

<sup>38</sup> TI New Zealand noted that 90% of the population in New Zealand was said to be against the TPP negotiations, and that this critical position was largely cultivated by the lack of information about the negotiations. See Annex 1.

effectively<sup>39</sup>. This means only some interest groups have the possibility to voice their preferences even though those might not necessarily be in the general public interest<sup>40</sup>.

#### Who would benefit from disclosure of information?

- All citizens and businesses<sup>41</sup> under the jurisdiction of the countries involved, as well as all trading partners in other countries.
- Other domestic institutions, in particular the legislative branch, which is tasked to exercise democratic control over the executive functions of government.

#### Recommendation for TI:

##### *Ask for a common disclosure policy regarding the negotiations*

- ✓ Negotiating parties shall **develop a consistent, mutually agreed disclosure policy to the general public**,<sup>42</sup> to ensure an equal level of transparency by all negotiating parties and build the basis for an equal representation of interests. This might include *inter alia*:
  - **Disclosure of agendas, list of participants and records of meetings by all officials involved in negotiations with stakeholders**, including business organisations, lobby groups and NGOs, to allow for public information of all stakeholders contributing to the negotiations.<sup>43</sup>
  - **Disclosure of the names and professional profiles of trade negotiators especially, when those have held previous positions in lobbying or private**

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<sup>39</sup> The European Ombudsman has noted the risk of ‘insiders’ having privileged access to internal documents of the EU Commission, in comparison with the general public who can only request access to documents through a special procedure. See para. 23 in European Ombudsman, “Decision of the European Ombudsman Closing the Inquiry into Complaint 2232/2011/(RA)FOR against The European Commission,” May 26, 2014, <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/54453/html.bookmark>.

Corporate Europe Observatory also examines the “revolving door” between the private and public sectors which contribute to sharing ‘insider’ know-how from public EU institutions in particular to defend private sector interests. See Corporate Europe Observatory, “The Revolving Door: Greasing the Wheels of the TTIP Lobby,” *Corporate Europe Observatory*, July 15, 2015, <http://corporateeurope.org/revolving-doors/2015/07/revolving-door-greasing-wheels-ttip-lobby>

<sup>40</sup> Transparency international together with other NGOs underline that “The process should also allow for public accountability of the European Commission for the negotiating positions that it takes.” in Transparency International et al., “Civil Society Call for Full Transparency about the EU-US Trade Negotiations.”

<sup>41</sup> TI New Zealand noted that although major corporate industry representatives had access to privileged information on the trade negotiations, many economic actors who would be directly affected by new regulations resulting from the trade agreements were not aware of the contents of the agreements. This impedes such economic actors from fully taking advantage of the benefits which may result for them from these agreements, see Annex 1.

<sup>42</sup> The documents disclosed should serve the purpose of information to the general public and interested stakeholders, without compromising strategic discussions. Therefore, minutes of meetings between negotiating parties and informal exchanges could remain confidential.

<sup>43</sup> This issue was already advocated by Transparency International et al., “Civil Society Call for Full Transparency about the EU-US Trade Negotiations.”

sector, in order to prevent conflicts of interest and excessive practices of “revolving doors”.<sup>44</sup>

- ✓ With regard to documents not proactively disclosed by the negotiating parties, governments should consider each request for information individually on its merits in accordance with domestic legislation, rather than creating blanket rules of non-disclosure.<sup>45</sup>

## 2. Stakeholder consultations

Current state of play: Throughout the negotiation rounds, parties make some efforts to communicate with stakeholders and at times consult with the general public on some of the controversial issues.<sup>46</sup> However, imbalances remain as to which stakeholders enjoy most privileged access. The secrecy surrounding such a privileged access raises suspicions of undue influence and prevents other stakeholders from responding to and feeding contrasting evidence and perspectives into the debate.<sup>47</sup> Moreover, the disparity in expertise on technical trade issues among stakeholders also affects their effective and equal participation.

In the context of TTIP for instance, the EU Commission holds regular stakeholder briefings in the aftermath of each negotiation round as well as “Civil Society Dialogues”.<sup>48</sup> In addition to these periodic meetings, the EU Commission established a permanent “Stakeholder advisory group”, whose members are granted special access to negotiation information. Its purpose is “to provide EU TTIP negotiators with high quality technical and practical advice on areas under negotiation”<sup>49</sup> The minutes of the meetings of this group, as well as the participants to each meeting, are published on the dedicated TTIP website.<sup>50</sup> In a letter to the Commission, several NGOs praised the

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<sup>44</sup> In line with TI’s recommendation to create an “ethical firewall” between lobbyists and the private sector. Transparency International, “Lobbying in Europe: Hidden Influence, Privileged Access,” *Issuu*, April 15, 2015, [http://issuu.com/transparencyinternational/docs/2015\\_lobbyingineurope\\_en](http://issuu.com/transparencyinternational/docs/2015_lobbyingineurope_en). See specially p. 11.

<sup>45</sup> This issue was raised to us by TI New Zealand. The High Court of New Zealand considered New Zealand’s trade minister’s « blanket approach », i.e. systematic refusal to share specific pieces of information on the TPP Agreement without examining each individual request, as unlawful in *Kelsey v The Minister of Trade*, 13 October 2015. [2015] NZHC 2497 Available at <https://www.courtsofnz.govt.nz/from/decisions/judgments>

<sup>46</sup> This was done for instance by the EU on investment protection and Investor-State Dispute Settlement (ISDS). The EU held a wide public consultation asking whether the proposed EU approach “...would achieve the right balance between protecting investors and safeguarding the EU’s and Member States’ right and ability to regulate in the public interest.” Over 150,000 replies were submitted. European Commission, “Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP),” Commission Staff Working Document (Brussels, January 13, 2015), [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf).

<sup>47</sup> The excessive influence of business lobbies was discussed in particular with TI Germany, see Annex 1.

<sup>48</sup> First meeting 16 July 2013: <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11411>

Latest meeting I could find, May 2015: [http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc\\_153510.pdf](http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153510.pdf)

<sup>49</sup> European Commission, “Terms of Reference of Transatlantic Trade and Investment Partnership Advisory Group,” January 27, 2014, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=11459&no=1>.

<sup>50</sup> [http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#transparency](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#transparency). The latest meeting was on 17 September 2015, no minutes available yet.

establishment of such an advisory body, but noted that it is still “far from sufficient to make the process fully transparent”, as “Members of the group will have limited access to the negotiating texts under strict confidentiality rules, and these will remain out of reach for the rest of interested civil society groups and citizens.”<sup>51</sup> The EU Ombudsperson also called for more transparency in stakeholder consultations by the EU Commission.<sup>52</sup> She suggested in particular that the submissions by third parties to the EU Commission be made public, in order for the public to benefit from immediate access to these documents without having to submit formal requests for public access.

The ombudsperson also proposed that the Commission should better implement its policies with regard to confidential documents, ensuring that “confidential TTIP documents, which should not be made public, are indeed not disclosed to any third party.”<sup>53</sup> Despite some efforts by the EU Commission to follow the Ombudsperson’s recommendations, it refused to proactively publish the agenda, participants and records of meetings with stakeholders as it considers such an approach to violate rules of data protection<sup>54</sup>.

Corporate Europe Observatory (CEO), a Brussels-based NGO, estimates that by July 2015 88% of the total lobby meetings held with DG Trade on TTIP took place with corporate actors, while only 9% of meetings were with NGOs, Consumer Organisations and Trade Unions<sup>55</sup>. CEO also points out the common “revolving door” practice between governments or the EU Commission on the one side and the private sector on the other, contributing to an easy rapport and better connections between business and trade negotiators<sup>56</sup>.

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<sup>51</sup> Civil society call for full transparency about the EU-US trade negotiations, 19 May 2014, [http://www.foeeurope.org/sites/default/files/foee\\_tip-civil-society-transparency-call190514.pdf](http://www.foeeurope.org/sites/default/files/foee_tip-civil-society-transparency-call190514.pdf)

<sup>52</sup> European Ombudsman Letter to the European Commission, 29 July 2014 [http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html.bookmark#\\_ftn8](http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html.bookmark#_ftn8)

<sup>53</sup> *Ibid.*

<sup>54</sup> “In line with Regulation 45/2001 and case law, the Commission can only publish the names of persons who have explicitly agreed to this publication, or if one of the other conditions mentioned in Article 5 of Regulation 45/2001 is fulfilled. In the Ombudsman's view, data protection should not be used as an automatic obstacle to public scrutiny of lobbying activities in the context of TTIP. (...) More specifically, rather than relying on Article 5(d) ('consent') of Regulation 45/2001, the Commission could use as a legal basis Article 5(a) of Regulation 45/2001 which provides that personal data may be processed if it is “*necessary for the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in the institution or body*”. The Commission would, as such, be giving effect to the principle of openness and, specifically, to Article 15(1) TFEU which obliges EU institutions, bodies, offices and agencies to conduct their work as openly as possible.”

<sup>55</sup> The remaining 3% were divided between standard setters (2%) and miscellaneous (1%). The dataset of CEO also identifies the sectors which are most prone to lobbying by corporate actors. See Corporate Europe Observatory, “The Revolving Door.” And more specifically [http://corporateeurope.org/sites/default/files/attachments/data-ttip-lobbying-dg\\_trade.xls](http://corporateeurope.org/sites/default/files/attachments/data-ttip-lobbying-dg_trade.xls)

For a further description on lobbying in the EU and the US, and in particular in the TTIP negotiations, see Andreas Dür and Lisa Lechner, “Business Interests and the Transatlantic Trade and Investment Partnership,” in *The Politics of Transatlantic Trade Negotiations: TTIP in a Globalized World*, Globalisation, Europe, Multilateralism Series, 2015, 69–79.

<sup>56</sup> Corporate Europe Observatory, “The Revolving Door.”

Best practice: First, stakeholders should have equal opportunities to contribute to the negotiations.<sup>57</sup> The text of the agreement should be the result of a compromise that balances all interests, large and small.<sup>58</sup> Second, transparency in the consultations with stakeholders also creates stronger pressures for accountability, thus ensuring that the negotiators meet with the same frequency all stakeholders<sup>59</sup>. Similarly to what it proposes in the framework of EU policymaking<sup>60</sup>, Transparency International might call for the establishment of a ‘trade negotiations footprint’. This would require the collection of all inputs received by external stakeholders cross-referenced to related text passages and their development. And the ensuing file must be kept in a public record.

Risk of corruption: privacy and confidentiality in the dialogue with stakeholders allows contact with certain privileged stakeholders to take place without control and with the risk of a considerable imbalance in favour of the more powerful stakeholders and ‘insiders’<sup>61</sup>.

Who would benefit from disclosure of information? All stakeholders, notably those with fewer resources, such as NGOs and SMEs<sup>62</sup>.

Recommendations for TI: Advocating in favour of:

**Achieving well-reasoned agreement after consideration of all relevant interests**

- ✓ **Ensure stakeholder consultations at an early stage**, before the text is too developed and changes to the text are more difficult to agree
- ✓ **Sharing of negotiating documents with all stakeholders on an equal footing**, to ensure same level of information by all stakeholders regardless of their resources and capacities.
- ✓ **Call for disclosure of submissions to negotiations by all stakeholders** (including policy proposals, position papers and supporting documentation) to ensure openness

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<sup>57</sup> For a general overview of benefits of inclusive policy making as well as recommendations on best practice, see OECD, *Focus on Citizens* (Paris: Organisation for Economic Co-operation and Development, 2009), <http://www.oecd-ilibrary.org/content/book/9789264048874-en>. Spec. p. 79

<sup>58</sup> TI Canada warned against the involvement of the general public without any selection of most relevant representatives, as this may leave place to vocal ideological criticisms without necessarily being in the public interest either, see Annex 1.

<sup>59</sup> OECD, *Focus on Citizens*. See especially point 8 p. 79.

<sup>60</sup> Transparency International, “Lobbying in Europe.”

<sup>61</sup> See above, footnote 39.

<sup>62</sup> TI EU noted that certain NGOs in particular had less resources to contribute to the TTIP negotiation process, although their inputs may be valuable, see Annex 1.



about the roots of and pressures on specific negotiation positions<sup>63</sup> (“trade negotiation footprint”)<sup>64</sup>.

### *C. Conclusion of the Agreement*

Once the negotiating governments agree on a text, a third and last phase opens. The text must be signed by all parties and then sent to their respective domestic authorities for approval, known as the “ratification process”. This varies depending on the procedures foreseen in each country, but it generally involves scrutiny of the text by the legislative body, which typically only has the power to either accept or reject it.

Current state of play: Although domestic provisions usually require governments to report to the legislature on on-going international negotiations,<sup>65</sup> Members of Parliament in a number of negotiating parties voiced concern about the limited information received throughout the negotiation process. In their opinion, this might undermine the exercise of their control of the agreement reached by the negotiators.<sup>66</sup> The widespread simplified ratification procedure, as exemplified by the US fast-track authority, which allows for only ‘yes’ or ‘no’ vote, by the legislature does not appear sufficient insofar as it entails a very limited and late involvement.

Best practice: The ratification process must ensure political and democratic control by the legislature of the text negotiated by the executive power. In the EU – similar to the US fast track procedure – national procedures allow for simplified processes requiring only acceptance or refusal of the entire text by the legislative power, without the possibility of suggesting modifications. While such procedures are squarely in line with the principles of democratic control, the legislature should have sufficient access throughout negotiations to effectively contribute to the discussions on the trade agreement.

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<sup>63</sup> In this regard, the European Ombudsman made the following proposal to the EU Commission: “The Commission could consider inviting third parties, such as business organizations and interest groups, who send documents to it in relation to TTIP, to also submit non-confidential versions of those documents that could be made publicly available. The public could thus immediately access such non-confidential versions, notwithstanding the right to request public access to the full version.” European Ombudsman, “Letter to the European Commission Requesting an Opinion in the European Ombudsman’s Own-Initiative Inquiry OI/10/2014/MMN Concerning Transparency and Public Participation in Relation to the Transatlantic Trade and Investment Partnership (TTIP) Negotiations.”

<sup>64</sup> This is in line with TI’s recommendation for a “legislative footprint” for all legislative or policy proposals. Transparency International, “Lobbying in Europe.” See especially page 10.

<sup>65</sup> For instance under the Lisbon Treaty, the European Commission is obliged to report regularly to the European Parliament on the Progress of international trade negotiations (Article 207(3) TFEU) as well as to the Parliament’s Committee on International Trade (INTA). This Committee has the responsibility for matters relating to the establishment and implementation of the Common Commercial Policy (CCP) and its external economic relations. It prepares the positions and decisions on the negotiation and conclusion of trade agreements to be adopted in plenary session. See EP Rules of Procedure, OJ 2011 L116, 1, 90, Annex VII (III).

<sup>66</sup> For example, 130 Members of Parliament of several TPP parties criticized the lack of access they were given with regards to TPP negotiating documents “TPP Legislators for Transparency,” accessed July 21, 2015, <http://www.tppmpsforsparency.org/-data-slide-10>.

Criticisms were also made by Members of the European Parliament, noting the practical difficulties they had to properly scrutinize the negotiated drafts throughout the various rounds of negotiation.

Risk of corruption: Lack of involvement of the legislative bodies in trade negotiations allows the executive branch to have a wide decision-making power and discretion on the outcome of the trade agreements. However executive action without legislative control may lead to abuse of power at the expense of the public interest.

Recommendations for TI:

- Ensure that all domestic institutions – particularly Members of parliament and their advisors – have the **possibility to access negotiating documents** throughout the negotiating process in order to make it possible for them to take a fully informed decision at the moment of the conclusion of the agreement.<sup>67</sup>

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<sup>67</sup> This may be based on the understanding that negotiating strategies and minutes of meetings remain between the parties to ensure frankness of discussions. So this obligation concerns all written drafts discussed by the parties.

### III. TRADE AGREEMENTS

As new generation trade agreements increasingly target regulations and policies enacted by countries in the exercise of their sovereign powers, their reach significantly affects domestic regulatory procedures as well regulatory autonomy. It is against this backdrop that this section presents the rationale for including anti-corruption provisions and strong transparency requirements in those agreements. It first surveys the provisions that currently exist and then discusses those still under negotiation. Finally, it identifies priorities areas and a set of actionable recommendations for TI advocacy on this new category of trade agreements.

#### *A. Rationale for transparency and anti-corruption in the architecture and workings of trade agreements*

##### 1. Good governance arguments

CETA, TPP and TTIP nurture the ambition of reducing obstacles to trade stemming from different regulatory standards by promoting the ambition of regulatory compatibility. Yet, given the wide range of different policy domains and interests affected by the agreements (eg. food safety and animal and plant health, chemicals, cosmetics, medical devices, pesticides, information and communication technology, pharmaceuticals, etc) the international regulatory cooperation mechanisms devised by these treaties must be capable of guaranteeing a fair and equal exchange between all relevant stakeholders.

##### 2. Economic arguments

The WTO leaves Members free to autonomously enact their policies as long as they do not discriminate between domestic and foreign goods. Countless different laws and regulations can therefore be adopted to meet different policy objectives, and all such measures can potentially affect trade. A general understanding of all countries' regulatory environment is therefore very difficult to acquire. Economic literature suggests that robust transparency provisions are important to reduce the cost of trade and thus contribute to further liberalization. Unpredictability and complexity of trade policy raises transaction costs<sup>68</sup>, whereas transparency improves both market awareness (making trade policies better known and understood by foreign suppliers) and predictability of trade policies (by opening the decision-making process).<sup>69</sup> Transparency is also

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<sup>68</sup> Matthias Helble, Ben Shepherd, and John S. Wilson, "Transparency and Regional Integration in the Asia Pacific," *World Economy* 32, no. 3 (March 1, 2009): 479–508, doi:10.1111/j.1467-9701.2009.01170.x.

<sup>69</sup> Iza Lejárraga and Ben Shepherd, "Quantitative Evidence on Transparency in Regional Trade Agreements," *OECD Publishing, OECD Trade Policy Papers*, no. 153 (2013), <http://www.oecd->

associated with an improvement of domestic institutions and the prevention of disputes<sup>70</sup>. On this basis, the inclusion of transparency commitments in regional trade agreements is estimated to amount to an increase in bilateral trade of more than 1%<sup>71</sup>.

Conversely, corruption is estimated to generate trade costs equivalent to those of tariffs<sup>72</sup>. In line with trade agreements' objective of reducing all barriers to trade, corruption should therefore be treated and tackled just like other such barriers.

## ***B. Typology of transparency and anti-corruption provisions***

### **1. WTO**

WTO Agreements contain a wide range of transparency obligations<sup>73</sup>. The only provisions expressly addressing corruption appear in the Government Procurement Agreement (GPA)<sup>74</sup>. GPA is a plurilateral agreement according to which a limited number (17) of WTO members agree to open part of their public procurement market to foreign operators.

Overall, transparency provisions in the different WTO Agreements range from simple obligations of publication of measures affecting trade<sup>75</sup> to obligation to notify draft texts to the WTO<sup>76</sup>. As a by-product to the obligation of notification, Members are entitled to comment on notifications and therefore engage in a dialogue on regulatory measures before these enter into force. To facilitate communication among Members, some Agreements also require the establishment of “enquiry points”<sup>77</sup>. Finally, several review mechanisms allow WTO Members to discuss multilaterally the policy environment of other Members in light of the agreements they fall under<sup>78</sup>.

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[ilibrary.org/docserver/download/5k450q9v2mg5.pdf?expires=1394712244&id=id&accname=guest&checksum=6E6B136858FA28F3992AF6EAA23170FC](http://ilibrary.org/docserver/download/5k450q9v2mg5.pdf?expires=1394712244&id=id&accname=guest&checksum=6E6B136858FA28F3992AF6EAA23170FC). See especially p. 7.

<sup>70</sup> Lejarraga, “Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade.”

<sup>71</sup> Lejarraga and Shepherd, “Quantitative Evidence on Transparency in Regional Trade Agreements.”

The authors further note that “Considering that “comprehensive RTAs typically contain on average a dozen of such commitments, the expected increase in intra-regional trade could be of over 15%.” See p. 5.

<sup>72</sup> James Anderson and Douglas Marcouiller, “Insecurity And The Pattern Of Trade: An Empirical Investigation,” *The Review of Economics and Statistics* 84, no. 2 (2002): 342–52.

<sup>73</sup> For a comprehensive presentation of transparency obligations throughout WTO Agreements, see Robert Wolfe, “Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life” (Staff Working Paper, March 6, 2013), <http://papers.ssrn.com/sol3/Delivery.cfm?abstractid=2229741>.

<sup>74</sup> For an overview of WTO provisions which may contribute to fighting corruption, see Krista Nadakavukaren Schefer, “Corruption and the WTO Legal System,” *Journal of World Trade* 43, no. 4 (August 1, 2009): 737–70.

<sup>75</sup> See Article X of the General Agreement on Tariffs and Trade (GATT).

<sup>76</sup> See for instance articles 2.9 of the Agreement on Technical Barriers to Trade (TBT) and article 7 of the Agreement on Sanitary and Phytosanitary (SPS) Measures, or Article 3.4 General Agreement on Trade in Services.

<sup>77</sup> Cf article 2.9 TBT Agreement, and Annex B.3 SPS Agreement.

<sup>78</sup> See in particular Trade Policy Review Mechanism (TPRM), Annex II to GATT 1994. The aim of the TPRM is in particular “to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.” (para A TPRM)

The GPA includes transparency and anti-corruption in its preamble, with a reference to the United Nations Convention Against Corruption (UNCAC)<sup>79</sup>. The preamble in itself is not considered as binding by the WTO case law, but it does serve to establish the object and purpose of the binding obligations in the body of the agreement<sup>80</sup>. Therefore, despite the absence of a robust framework in the GPA, all provisions are to be interpreted under the general objective of “...avoiding conflicts of interest and corrupt practices”.

The GPA also sets the obligations for procurement entities to prevent corruption and avoid conflicts of interest<sup>81</sup>. This is the first – and only – explicit anti-corruption provision in the WTO framework.<sup>82</sup> However, the WTO GPA is still considered insufficient in its anti-corruption efforts.<sup>83</sup> Indeed, it fails to address corruption in the rest of the procurement lifecycle, particularly when designing selection criteria for suppliers or to recognise it as a reason for terminating the implementation of a procurement agreement. This means the GPA addresses the risks of corruption in the granting of the contract, but does not cover corruption at the “procurement design level and does not address corruption risks during the implementation and operation phases.”<sup>84</sup> In addition, the GPA does not belong to the so called ‘single package’, i.e. the set of Agreements to which all WTO Members are expected to sign to become members of the organization<sup>85</sup>. It is indeed a “plurilateral” (as opposed to a *multilateral* agreement that must be signed by all WTO Members) agreement under the WTO framework and is therefore binding only for the limited number of WTO Members having expressly adhered to it<sup>86</sup>.

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<sup>79</sup> Recital 6 reads :“Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption.”

Article 9 UNCAC is specifically on public procurement and management of public finances.

<sup>80</sup> *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body report, 12 October 1996, WT/DS58/AB/R, and *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, 4 April 2012, WT/DS406/AB/R.

<sup>81</sup> Article IV. 4 of the GPA reads: “A procuring entity shall conduct covered procurement in a transparent and impartial manner that: (a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; (b) avoids conflicts of interest; and (c) prevents corrupt practices.” On this article see Schefer, K. N., “Corruption and the WTO Legal System”. *Journal of World Trade* 43, no. 4 (2009): 737-770.

<sup>82</sup> See for instance Krista Nadakavukaren Schefer, “Will the WTO Finally Tackle Corruption in Public Purchasing? The Revised Agreement on Government Procurement,” *ASIL Insights* 17, no. 11 (April 15, 2013), <http://www.asil.org/insights/volume/17/issue/11/will-wto-finally-tackle-corruption-public-purchasing-revised-agreement>.

<sup>83</sup> TI Ukraine and Corruption Watch South Africa noted in particular that the GPA was in many points less ambitious than national legislations, see Annex 1.

<sup>84</sup> Krista Nadakavukaren Schefer and Mintewab Gebre Woldeesenbet, “The Revised Agreement on Government Procurement and Corruption,” *Journal of World Trade* 47, no. 5 (2013101): 1129–61.

<sup>85</sup> The WTO negotiations apply the principle of ‘single undertaking’, meaning that “Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. “Nothing is agreed until everything is agreed.” [https://www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm)  
During the Uruguay Round, this included

<sup>86</sup> The Agreement currently includes 17 parties, and 10 additional parties are undergoing accession procedures. [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

## 2. Bilateral and regional trade agreements (RTAs)

Over time there has been a growing tendency to include more transparency and anti-corruption provisions in bilateral and regional trade agreements. This has been the case in those concluded by countries such as Canada, Chile, Japan, Korea and the United States<sup>87</sup>. The United States, Australia and New Zealand have been most active in including “WTO-plus” provisions in their trade agreements. These provisions build on the transparency obligations found in WTO Agreements, and contain additional specifications.

The transparency provisions most frequently enhanced are those relating to technical barriers to trade (TBT).<sup>88</sup> More generally, an increasing number of RTAs enlist transparency in their objectives enshrined in the preamble.<sup>89</sup> Transparency is therefore increasingly perceived as an end in itself that enables a “more efficient use of resources and better investment decisions by economic agents”, and that is associated with “broader aspirations of good governance, such as espousing values of democracy.”<sup>90</sup> Another novel feature in RTAs is the inclusion of a horizontal transparency chapter, extending transparency obligations to all areas of the RTA - as is the approach as well in the TPP.<sup>91</sup> Even when horizontal transparency chapters are included, they are complemented by more detailed provisions specific to a certain sector, such as sanitary and phytosanitary measures or trade in services.<sup>92</sup>

Finally, a certain number of RTAs also include anti-corruption provisions, traditionally left out from trade agreements. The United States and Canada are the countries that have most frequently and pervasively included anti-corruption and anti-bribery references,<sup>93</sup> followed more recently by the European Union. These provisions are considered close to “best practices”, covering issues ranging from whistle-blower protection to establishing the criminalisation of bribery, including for enterprises<sup>94</sup>, and also providing for related penalties and procedures to ensure enforcement<sup>95</sup>.

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<sup>87</sup> The analysis from this section is drawn from Lejárraga, “Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade.”

<sup>88</sup> Ibid. p. 21.

<sup>89</sup> Ibid. p. 25.

<sup>90</sup> Ibid. p. 26

<sup>91</sup> see below, p. 22 et seq.

<sup>92</sup> Lejárraga, “Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade.” See especially p. 26.

<sup>93</sup> Ibid. See especially p. 36.

<sup>94</sup> Ibid. spec. p. 35.

<sup>95</sup> Ibid.

### 3. Currently negotiated agreement

Among the three agreements discussed here, only the texts of CETA<sup>96</sup> and TPP<sup>97</sup> are available to date.

Both texts – as well as TTIP drafts presented by the EU – include additional provisions on regulatory transparency, which involve access to draft regulations, in order to enhance both predictability of trade-related policies and inclusiveness of the regulatory process.

To date, only the TPP includes developed provisions on tackling corruption in a specific transparency and anti-corruption chapter. The EU has announced it intends to promote a similar chapter in TTIP. The following sections describe the relevant provisions in more detail.

#### a) CETA

- *Transparency obligations in different CETA Chapters*

Transparency provisions are included in the chapters on technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), government procurement and regulatory cooperation. While the transparency obligations go mostly beyond transparency requirements in the WTO, they apply mainly between the CETA parties (Canada and EU), but do not encourage a better implementation of existing WTO obligations to the benefit of the overall WTO membership. Open stakeholder and public consultations are encouraged (particularly for SPS and regulatory cooperation chapters), but broad non-prescriptive language omits explicit obligations to consult.

- *Anti-corruption provisions*

There is no general provision on anti-corruption. The only provisions regarding 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)<sup>98</sup>.

- *General transparency chapter*

CETA includes a chapter on transparency that enlists the obligations of publication, provision of information upon request, transparency of administrative proceedings and possibility of review and appeal to administrative decisions concerning the application of the Agreement. There is no general

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<sup>96</sup> “Consolidated CETA Text,” September 26, 2014, [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

<sup>97</sup> “TPP Full Text,” November 5, 2015, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>

<sup>98</sup> The lack of ambition with regards to anti-corruption in the CETA text was discussed in particular with TI Germany, see Annex 1. This point is also further developed in Peltonen, “TTIP and CETA: Corruption Prevention - Unsatisfactory (Unpublished Draft).”

obligation to notify measures<sup>99</sup> beyond obligations existing in specific sectors, therefore limiting the horizontal transparency to a simple “right to information”, depending on parties’ own initiative to look for and request this information<sup>100</sup>.

#### b) TTIP

- *Thematic transparency provisions:*

Similarly to what occurs in CETA, the EU proposes to include detailed regulatory transparency obligations in TTIP, building upon the existing WTO obligations. The technical barriers to trade chapter in TTIP<sup>101</sup> requires notification of draft technical regulations and conformity assessment procedures to the WTO and more detailed obligations to take comments to notifications into account<sup>102</sup>. The SPS Chapter<sup>103</sup> however requires notification only to the other party (art. 14), limiting the benefits of transparency to the parties of the agreement. Under the horizontal chapter on regulatory cooperation<sup>104</sup>, the EU proposes to include provisions requiring transparency of early draft texts (article 5, Section II.1), on stakeholder consultations (article 6) and on information and regulatory exchanges regarding regulatory acts (see in particular article 9, Section III)<sup>105</sup>.

- *Anti-corruption provisions:*

No explicit provisions concerning corruption are available as of December 2015. The EU has not yet published its proposed text on government procurement.

- *General transparency and anti-corruption chapter:*

No information is yet available on a potential horizontal transparency and anti-corruption chapter. The EU negotiating mandate recommends the inclusion of a number of transparency provisions that could be included in a horizontal chapter, such as the commitment to consult with stakeholders

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<sup>99</sup> The CETA draft includes an article entitled “Notification and Provision of Information”, but this does not create a specific obligation to notify. It only requires parties to “promptly provide information and respond to questions pertaining to any existing or proposed measure materially affecting the operation of this Agreement, whether or not the other Party has been previously notified of that measure.

A notification or information provided under this Article is without prejudice for the purpose of determining whether the measure is consistent with this Agreement.” (art. X.03, cf p. 452 draft CETA text).

<sup>100</sup>Publication requires information to be publically available, but might involve considerable search costs as the source is not centralized. Notification, as opposed to publication, entails that information is centralized in a same place (eg. notification of measures available on WTO website), making it easier for interested persons to become aware of it.

<sup>101</sup> European Commission, “Technical Barriers to Trade (TBTs) in TTIP,” March 10, 2014, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153025.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153025.pdf)

<sup>102</sup> In particular, the parties are required to send a written reply to comments before the publication of the final text, cf art. 5.2. b. Ibid.

<sup>103</sup> European Commission, “SPS in TTIP,” September 29, 2014, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153026.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf).

<sup>104</sup> European Commission, “Textual Proposal on Regulatory Cooperation in TTIP,” April 2015, [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153403.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf).

<sup>105</sup> For a more detailed analysis of the Regulatory Cooperation Chapter of TTIP, see Alberto Alemanno, “The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 26, 2015), <http://papers.ssrn.com/abstract=2651091>.



in advance of the introduction of measures with an impact on trade and investment, a general publication commitment or transparency regarding the application of trade and investment related measures<sup>106</sup>.

In its new trade strategy “Trade for all”, the EU commission declared it would propose to negotiate ambitious provisions on anti-corruption in TTIP and other coming trade agreements.<sup>107</sup>

### c) TPP

The TPP includes extensive transparency provisions in particular in the Chapters on Technical Barriers to Trade (‘TBT’), Sanitary and Phytosanitary measures (‘SPS’), and Government Procurement. In addition, a dedicated chapter covers transparency and anti-corruption.

- *Thematic transparency provisions*

Both the TBT and SPS Chapters in TPP go beyond the WTO obligations in terms of publication and notification. Since some of the details are very interesting and could potentially be referenced when enhancing future such agreements they are discussed in some more detail in the following.

As both the TBT and SPS Chapters require that notification occurs through the WTO, they contribute to enhance transparency to the benefit of all WTO Members. However, these chapters include provisions that improve transparency exclusively to the benefit of the Parties to the agreement.

The TBT Chapter extends the publication and notification requirements beyond the WTO obligations, ensuring better visibility and predictability of the parties’ trade policy environments<sup>108</sup>. More specifically, TPP parties commit more explicitly to making final technical regulations and conformity assessment procedures publically available together with an explanation of their objectives, of the comments received during the regulatory process and of the revisions made in response to these comments (8.7.14).

Moreover, a specific article intends to improve the inclusiveness of the regulatory process, by encouraging the possibility for “persons of the other Parties to participate in the development of technical regulations, standards and conformity assessment procedures (...)” (art. 8.7.1). Members are encouraged to use “...electronic tools and public outreach or consultations” (art 8.7.2). The TPP parties also ask “non-governmental bodies” to ensure participation of persons of other Parties

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<sup>106</sup> Council of the European Union, “Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America,” June 17, 2013, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

<sup>107</sup> European Commission, “Trade for All: Towards a More Responsible Trade and Investment Policy,” October 2015, [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

This initiative was welcomed by TI Transparency International, “Press Release: EU Trade Deals to Include Ambitious Anti-Corruption Proposals,” October 14, 2015, <http://www.transparencyinternational.eu/2015/10/press-release-eu-trade-deals-to-include-ambitious-anti-corruption-proposals/>

<sup>108</sup> In the WTO TBT Agreement, Members are required to notify only draft measures which are *not* in accordance with the technical requirements of international standards. In the TPP, Members are required to notify measures which are in accordance with the technical content of international standards (8.7.6) and to final texts adopted (art 8.7.12).

in the development of technical regulations, standards and conformity assessment procedures (8.7.3). An additional provision relates to information exchange and “technical discussions”, offering the possibility of “...resolving any matter arising under [the TBT] Chapter” (8.10.2). However, the technical discussions “(...) shall be confidential and without prejudice to the rights and obligations of the participating Parties (...)” (art. 8.10.5).

The SPS Chapter of the TPP expressly pursues several objectives in relation to improving information exchange between parties, in particular to “strengthen communication, consultation and cooperation between the Parties (...) (7.2.c) and to “enhance transparency in and understanding of the application of each Party’s [SPS] measures” (7.2.e). To do so, the Chapter sets a developed institutional framework, with an SPS Committee (art 7.5) and a special mechanism of “Cooperative Technical Consultations” (CTC) (art 7.17), both contributing to improve communication and mutual understanding on SPS matters between Members.

The “technical discussions” and CTC mechanisms allowing TPP Parties to exchange information in the TBT and SPS areas remain confidential and thus risk undermining the multilateral dialogue that takes place in the WTO in the SPS Committee. Indeed, both mechanisms are similar to the “specific trade concerns” in the TBT and SPS Committees of the WTO, which allow Members to raise concern on each other Members at the Committee meetings, thus bringing the issue to the attention of all WTO Members. However, discussions under both the TBT and SPS mechanisms in the TPP remain confidential (art 8.10.5 TBT Chapter, art 7.17.5 SPS Chapter), therefore potentially reducing the benefits of the multilateral mechanism and limiting the dialogue on trade concerns to the only TPP parties.

The TPP Chapter on government procurement includes an article on “ensuring integrity in procurement practices” (art 15.8). It requires all Parties to have in place criminal or administrative measures “to address corruption in its government procurement”. The article specifies that Parties “may include” procedures allowing to render ineligible suppliers which have previously engaged in fraudulent or other illegal public procurement practices. However, the integrity of suppliers is not included in the conditions for participation in a tender.

Article 15.8 also requires Members to eliminate risks of conflict of interest “...on the part of those engaged in or having influence over a procurement.” The TPP government procurement chapter does not follow the suggestion by Transparency International of requesting selected suppliers subscribe to a code of ethics and have on-going business ethics awareness and compliance programmes and an internal control system<sup>109</sup>.

- *General transparency and anti-corruption chapter*

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<sup>109</sup> Transparency International, “Letter on Transparency and Anti-Corruption Chapter in EU – US Free Trade Agreement,” March 7, 2014, [http://www.transparencyinternational.eu/wp-content/uploads/2014/03/2014-03-07\\_TI\\_Letter-to-Karel-de-Gucht-FINAL-doc.pdf](http://www.transparencyinternational.eu/wp-content/uploads/2014/03/2014-03-07_TI_Letter-to-Karel-de-Gucht-FINAL-doc.pdf).

Chapter 26 of the TPP is specifically devoted to “Transparency and Anti-corruption”.

### Regulatory transparency

The chapter enhances transparency by requiring a set of detailed publication obligations. Those include *inter alia* the provision to leave sufficient time for comments and to take those comments into account (art 26.2). Moreover, the chapter inserts transparency obligations into the framework of administrative proceedings (art 26.3) as well as into the review and appeal procedures (art 26.4). It also references the obligation for Parties to share with other Parties information about any proposal or existing measure which “may materially affect the operation of this Agreement or otherwise substantially affect another Party’s interests under this Agreement” (art 26.5.1) either spontaneously (art 26.5.1) or upon request by another Party (art 26.5.2).

### Anti-corruption

When it comes to anti-corruption, the TPP Chapter 26 correctly notes, the TPP “includes the strongest anti-corruption and transparency standards of any trade agreement.”

Parties agreed upon detailed commitments to tackle corruption, affirming their commitment both with regards to APEC Conduct Principles for Public Officials, the APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector, (art 26.6.1) and the United Nations Conventions against Corruption (UNCAC) (art 26.6.4)<sup>110</sup>. While the endorsement of existing anti-corruption instruments is essential to avoid diluting anticorruption efforts through ‘competing’ commitments<sup>111</sup>, the lack of mention of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (‘OECD Convention’) might turn out to be a weakness. Indeed, the OECD Convention requires not only strong commitments by Parties to tackle the “supply side” of corruption (i.e. the “offering, promising or giving any undue pecuniary or other advantage”, art. 1 OECD Convention), but also the establishment of a monitoring mechanism ensuring the implementation of the Agreement. To date, around half of the parties to TPP have not signed the OECD Convention<sup>112</sup>. An engagement to adhere to the OECD Convention and undergo its implementation reviews would therefore be hugely beneficial to ensure wider enforcement of anti-corruption obligations.

Overall, the substantive provisions on anti-corruption largely align with those recommended by Transparency International in its proposal for a dedicated chapter in TTIP<sup>113</sup>. This proposal was shared in March 2014 with the EU Commission and its suggestions range from the criminalisation of bribery to the establishment of whistle-blower protection (art 26.7.6). The TPP also includes articles to promote integrity among public officials (art 26.8) and to engage the private sector and

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<sup>110</sup> To date, Japan and New Zealand are the only parties to the TPP negotiation that have signed but not yet ratified UNCAC.

<sup>111</sup> Kaitlin Beach, “Should the TPP Address Corruption? If So, How?,” *GAB / The Global Anticorruption Blog*, October 2, 2015, <http://globalanticorruptionblog.com/2015/10/02/should-the-tpp-address-corruption-if-so-how/>

<sup>112</sup> Brunei, Singapore, Malaysia, Peru and Vietnam.

<sup>113</sup> Transparency International, “Letter on Transparency and Anti-Corruption Chapter in EU – US Free Trade Agreement.”

civil society in the fight against corruption (art 26.10). While the majority of the anti-corruption provisions included in the TPP are in line with the TI proposal in TTIP, an essential recommendation was eventually not retained: a provision establishing consultations with civil society when undertaking monitoring of implementation of anti-corruption commitments in the OECD and UNCAC contexts.<sup>114</sup>

As noted by USTR<sup>115</sup>, the TPP “includes the strongest anti-corruption and transparency standards of any trade agreement.” However, its real added value as compared to existing anti-corruption instruments remains to be seen. Critics still remain dubious as to the effects that such provisions may have in practice, because of the poor incentives to bring anti-corruption cases forward<sup>116</sup> and because of the exclusion of certain important provisions from dispute settlement, in particular on the enforcement of anti-corruption obligations in internal legislation<sup>117</sup>. It will be eventually up to the parties to rely on its provisions and different enforcement mechanisms in order to render them actionable.

The following section will try to envisage what would be the most relevant avenue for ensuring maximum transparency and tackling corruption in an effective way.

### *C. Enforcement of anti-corruption and transparency commitments – possible pathways*

The inclusion of anti-corruption and transparency commitments in trade agreements is only a first step, which needs to be followed by effective implementation<sup>118</sup>. In the absence of a joint, institutional enforcer – similarly to what occurs in a domestic system –, the implementation of those provisions is left to the will of the parties. And it is far from clear whether states parties (or investors) may have the incentive to challenge other countries should they breach their anticorruption commitments.

Several options for enforcement are envisaged by the new generation trade agreements: dispute settlement between investors and states (1) and between governments (2)<sup>119</sup>. An additional avenue

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<sup>114</sup> Indeed, article 8 of the TI proposal suggested that countries commit to improving accountability of the review process, in particular by establishing “(...) a mechanism for consultation with civil society and the private sector as part of a review process (...)” and by engaging to “ (...) publish the full peer review report and its responses to any deficiencies identified in the report.”

<sup>115</sup> <https://ustr.gov/sites/default/files/TPP-Strengthening-Good-Governance-Fact-Sheet.pdf>

<sup>116</sup> Kaitlin Beach, “A Trade-Anticorruption Breakthrough?: The Trans-Pacific Partnership’s Transparency and Anticorruption Chapter,” *GAB | The Global Anticorruption Blog*, November 23, 2015, <http://globalanticorruptionblog.com/2015/11/23/the-trans-pacific-partnerships-transparency-and-anticorruption-chapter/>

<sup>117</sup> *Ibid.*

This was noted by TI EU in their comments to our first draft. Further on this, see section on enforcement below, particularly on government-government dispute settlement.

<sup>118</sup> See interviews with TI USA and TI Guatemala, see Annex 1.

<sup>119</sup> These two dispute settlement avenues are included in the three agreements because of the trade and investment obligations, which are traditionally separate. Trade treaties create rights and obligations for states, for instance to ensure the same treatment of domestic and foreign economic actors, thus ensuring contributing to reducing trade between

for enforcement that could complement these dispute settlement mechanisms is the establishment of a monitoring facility by an independent body (3).

1. Investor-State Dispute Settlement (ISDS)<sup>120</sup> – additional risks of undue influence?

Investment protection is traditionally included in Bilateral Investment Treaties (BITs) to ensure the protection of investors from unfair or discriminatory treatment (such as discrimination, expropriation without full compensation, denial of justice). Such treaties are considered important to attract investments in particular for countries whose legal and judicial systems are feared to lack sufficient institutional guarantees. Investor-State arbitration is meant to ensure the enforcement of these investment protection provisions, by offering investors the means to seek dispute resolution at the international level, presumed more independent than the domestic courts that may be biased against some parties to the dispute.

The CETA, TTIP and TPP<sup>121</sup> all provide for an investment chapter, which includes an ISDS mechanism to allow investors to seek adjudication beyond the host State's judicial system if they consider that the obligations under the Investment Chapter of the agreements have been breached. These procedures have been highly controversial<sup>122</sup>, particularly because of the imbalance they create between the foreign investors on the one hand and the host State on the other on matters of public interest<sup>123</sup>. The potential impact of investment arbitration is considerable, as domestic

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states. Investment treaties create obligations on states and rights for investors from other states, in order to encourage foreign direct investment through legal guarantees over these investments.

<sup>120</sup> CETA, Chapter 10, Investment, Section 6, Investor-State Dispute Settlement.

TPP, Chapter 9, Investment, Section B, Investor-State Dispute Settlement. <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>

EU Proposal on Investment Court System, see Investment in TTIP, Section 3, Resolution of Investment Disputes and Investment Court System. European Commission, "Investment in TTIP," November 12, 2015, [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf).

<sup>121</sup> However, Australia and New Zealand have excluded the application of ISDS to each other under the TPP. The Agreement of both States in this regard is set forth in a document "associated" to the full text of the TPP by Australia and New Zealand.

See Australia and New Zealand, "Australia – New Zealand: Investor State Dispute Settlement, Trade Remedies and Transport Services," November 2015, <http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF>.

<sup>122</sup> According to the public consultations led by the EU Commission with regard to ISDS in TTIP, NGOs, trade unions and small companies tend to be rather critical about the mechanism, whereas a large majority of business associations and large companies are strongly in favor of it. European Commission, "Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)."

The general legality of the ISDS under EU Law is questioned in Client Earth, "Legality of Investor-State Dispute Settlement (ISDS) under EU Law," October 22, 2015, <http://documents.clientearth.org/wp-content/uploads/library/2015-10-15-legality-of-isds-under-eu-law-ce-en.pdf>.

<sup>123</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

regulations adopted in the public interest by a democratic process can be subject to arbitration by investors when such regulations affect their private interests<sup>124</sup>. Although this problem is not new to investment agreements<sup>125</sup>, it has received unprecedented attention in the context of the TTIP, TPP and to a lesser extent CETA.

The ISDS may raise transparency and integrity concerns both in its scope of application and in the arbitral procedures themselves.

a) Scope of investment protection

Investment protection applies to foreign investors, and a fundamental aspect of this protection consists in ensuring they are not discriminated against, either in comparison with the nationals of the host state (“national treatment”) or with other investors from third countries, that the host State has concluded a BIT with (Most-Favoured-Nation treatment, or “MFN”). This scope raises concerns with regards to the imbalance created by ISDS between national and foreign investors, and poses a risk on the predictability of ISDS<sup>126</sup>

“Forum shopping” by foreign investors

The granting of investment protection – and ISDS in particular – exclusively to foreign investors<sup>127</sup> has been highly criticized.<sup>128</sup> An asymmetric protection is indeed created between foreign investors who can choose between domestic judicial system or the international arbitral tribunal and in contrast to that the situation of domestic investors who can only bring a case at the domestic level<sup>129</sup>. This can create a disadvantage to the domestic investors.<sup>130</sup>

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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 Judith Resnik et al., “Letter to Congressional Leaders on Investor State Dispute Settlement,” April 30, 2015, [http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose\\_ISDS\\_Letter.pdf](http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf).

<sup>124</sup> This question was discussed in particular during a roundtable between experts and OECD Member States, noting the positive effects but also flagging the negative impacts ISDS may have on host countries’ economies and institutions: OECD, “Government Perspectives on Investor-State Dispute Settlement: A Progress Report” (Freedom of Investment Roundtable, Paris, France, 2012), <http://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf>. See especially p. 12-13.

<sup>125</sup> For a criticism on the newly raised concerns on TTIP and ISDS, see Weiler, J., European Hypocrisy: TTIP and ISDS, *European Journal of International Law*, 21 January 2015. <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>

<sup>126</sup> Concerns with regards to the application of ISDS to only foreign investors, as well as the risks related to the MFN obligation were underlined by TI Germany in their comments to the first draft of this paper.

<sup>127</sup> TPP Article 9.1, see definition of “claimant”, and CETA article X.3 definition of “investor”.

<sup>128</sup> This criticism, among others, is raised in response to the EU Commission’s consultation on ISDS. European Commission, “Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP).” See especially p. 34 and 38. This was also raised during OECD discussions on ISDS. OECD, “Government Perspectives on Investor-State Dispute Settlement: A Progress Report.” See especially p. 9 et s.

<sup>129</sup> OECD, “Government Perspectives on Investor-State Dispute Settlement: A Progress Report.” *Ibid.*

<sup>130</sup> Simon Lester argues that if the independence of judicial systems within certain host countries parties to TTIP, TPP or CETA is indeed questionable, then domestic investors would benefit just as much – if not more – from access to an independent arbitral system. Cf Simon Lester, “ISDS as a Way to Avoid Unfair Domestic Courts,” *International*

A possible way to avoid “forum shopping” (between domestic and arbitral jurisdictions) by foreign investors could be to require that foreign and domestic traders and investors are subject to the same (domestic) legal system and are treated equally (principle of non-discrimination). Further the option for foreign investors for initiating an arbitral proceeding should only be available, if

- they are not treated equally to domestic investors;
- the host state has enacted a discriminatory measure against them;
- the domestic courts fail to act in appropriate time (according to international standards); and,
- human rights have been violated.

In addition, a “fork-in-the-road” provision, rendering final the investor’s choice to submit a dispute either before a domestic jurisdiction or before the arbitral tribunal, would avoid the possibility for foreign investors to cumulate legal proceedings.

#### Predictability of procedures for host States

The non-discrimination obligation towards foreign investors, and in particular the obligation of MFN treatment is also subject to debate, as it may result in a much wider commitment for the negotiating party than anticipated<sup>131</sup>. It requires the contracting party to extend the same protections to the investors of the other contracting party as they do to investors under all other investment agreements. Such a clause is justified when the investor is indeed the “weak” party, and the host State may be in a position to discriminate between investors from different origins. However, such an extension of the obligations of all past and future agreements has shown to be excessively burdensome for States whose intent to extend all obligations – and possible interpretations thereof – is questionable<sup>132</sup>. Therefore, the arbitration cases brought by investors to host States under the MFN clause may be considered as very unpredictable<sup>133</sup>.

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*Economic Law and Policy Blog*, March 19, 2015, <http://worldtradelaw.typepad.com/ielpblog/2015/03/isds-as-a-way-to-avoid-unfair-domestic-courts.html>.

<sup>131</sup> CETA, Article X.7, Most-Favoured-Nation Treatment  
TPP, Article 9.5, Most-Favoured-Nation Treatment

<sup>132</sup> For a detailed analysis on this, see United Nations Conference on Trade and Development, ed., *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II (New York: United Nations, 2010).

<sup>133</sup> Negotiating parties to CETA and TPP have limited the extent of the MFN clause from a procedural perspective, i.e. excluding that investors can invoke different arbitral procedures than those in the agreement between their national state and the host State. This is already a notable advancement in favour of host States, who may therefore benefit for further predictability in the cases brought against them. However, the obligations do remain on the substantive rights, allowing investors to invoke any substantial obligation more favourable to them under other agreements (see Markus Krajewski, *Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective* (Brussels: Friedrich-Ebert-Stiftung, EU Office, 2014).

A possible option to prevent the negative effects of such a clause would be to specify explicitly what less favourable *treatment* accorded to the investors would comprise, to ensure better understanding on the protection that should apply to all investors<sup>134</sup>.

b) Transparency, independence, impartiality and costs of arbitral proceedings

ISDS systems are often criticized because of the lack of transparency in the proceedings, the risk of partiality of arbitrators and the high costs of proceedings.

Transparency of the proceedings

Investment arbitration proceedings are generally conducted in secret with little disclosure of on-going cases and private hearings, a practice borrowed from commercial arbitration. However, investment arbitration may have an impact beyond the two parties to the dispute and more generally raise public interest issues such as environmental, labour or human rights issues, thus calling for also broader visibility about the dispute<sup>135</sup>.

These concerns seem to have partly shaped the examined agreements. CETA and TPP both make reference to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration<sup>136</sup>. These rules require that the hearings shall be held in public (article 6.1) and allows submissions by third parties and non-disputing parties to the dispute (article 4 and 5). Such submissions may therefore be made by third party States, experts or NGOs to share their position with the arbitral tribunal. This represents significant progress in expanding the availability of information regarding on-going investment cases. Certain issues still remain subject to interpretation of the arbitrators, such as the possible exceptional cases in which the proceedings should be held in private, or the cases in which arbitrators may exclude participation by third parties or non-disputing parties<sup>137</sup>.

Independence and impartiality of the arbitrators

The appointment of arbitrators on an *ad hoc* basis has raised concerns as to the risk of bias in the nomination of arbitrators.

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<sup>134</sup> See United Nations Conference on Trade and Development, *Most-Favoured-Nation Treatment*. Spec. p. 111 et s. UNCTAD gives the example of the BIT between Egypt and Germany of 2005: “[...] The following shall, in particular, be deemed ‘treatment less favourable’ within the meaning of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed ‘treatment less favourable’ within the meaning of this Article.”

<sup>135</sup> See on this for instance Markus Gehring and Dimitrij Euler, “Public Interest in Investment Arbitration,” in *Transparency in International Investment Arbitration* (Cambridge University Press, 2015), <http://dx.doi.org/10.1017/CBO9781139939577.004>.

<sup>136</sup> Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)

The EU proposed investment chapter also includes these rules within its proposal for an “investment court system”, cf article 18 EU proposal.

<sup>137</sup> Krajewski, *Modalities for Investment Protection and Investor-State Dispute Settlement (ISDS) in TTIP from a Trade Union Perspective*. See spec. p. 6.



Arbitrators are traditionally chosen *ad hoc* by the parties to the proceedings for each individual dispute, as opposed to permanent judges in court systems<sup>138</sup>. Like judges, arbitrators are expected to be impartial towards the parties involved (i.e. with an “equal mental distance” to both parties) and independent from them (i.e. no objective ties with them)<sup>139</sup>.

Although both parties appoint arbitrators, this leaves open the risk of parties appointing persons according to their previous position on similar matters, or their possible involvement in concurrent cases as counsels. The CETA and TPP texts unfortunately retain this practice, with both parties to the dispute appointing one arbitrator and together agreeing on a third arbitrator<sup>140</sup>.

This has sparked a lot of criticisms in the context of TTIP. The EU commission has issued a new proposal for an “Investment Court System” (ICS)<sup>141</sup> to replace ISDS in the context of TTIP<sup>142</sup>. The proposal includes improvements with regards to the independence of adjudicators and the existence of a review procedure. The EU proposes that the judges be appointed by a special Committee for a fixed term (6 or 9 years), and must abide by certain ethics requirements. In particular, they cannot participate in disputes that would “create a direct or indirect conflict of interests” and must “refrain from acting as counsel in any pending or new investment protection dispute” (see art 11 of EU proposal and Annex II). A party to the dispute may challenge the appointment of a judge if it considers there to be a conflict of interest. In addition, a permanent Appeals Tribunal is set up to review the decisions of the tribunal of first instance (art. 10).

As of December 2015 the ICS proposal remains to be approved by both the European Council and the European Parliament before being shared officially with the United States and subject to negotiation between the two parties.

### Costs of arbitration

The high cost of arbitration also raises concerns. As the costs related to investment proceedings has amounted up to USD 40 million in certain cases<sup>143</sup>, the OECD notes that investment arbitration gives an advantage to the financially stronger parties and may deter parties with less resources to launch proceedings<sup>144</sup>.

In addition to the already high costs, a new practice of “third party funding” has emerged in

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<sup>138</sup> Ibid.

<sup>139</sup> On this distinction, see in particular Carl Baudenbacher, “The Independence and Impartiality of Arbitrators: Towards General Standards,” in *Festschrift Für Gerhard Wegen Zum 65. Geburtstag* (C.H. Beck, 2015), 575–89.

<sup>140</sup> CETA article X.25: “One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties.” And TPP article 9.21.1: “Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.”

<sup>141</sup> See European Commission, “Commission Draft Text on TTIP Chapter II - Investment,” September 2015, [http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)

<sup>142</sup> This proposal is still at a draft stage and will be reviewed by the European Council and Parliament before the EU can share it with the United States.

<sup>143</sup> This figure is given by the OECD, who raises concern about the high costs of arbitral proceedings. OECD, “Government Perspectives on Investor-State Dispute Settlement: A Progress Report.”

<sup>144</sup> Ibid. p. 8.

international investment arbitration, possibly contributing to further increase the imbalances in resources spent on legal proceeding. This consists of non-parties paying all or part of the legal costs for one of the parties to a dispute, in exchange of receiving part of the financial gains resulting from the award granted by the arbitral tribunal or settlement between the parties<sup>145</sup>.

On the one hand this can be a useful tool to promote access to justice for parties who would not be able to fund litigation. On the other hand this raises questions about the influence a non-party to a dispute may have on its outcomes. This is particularly problematic as third parties are not subject to the same legal obligations as the parties to the dispute.<sup>146</sup> While there are instances in which third party funders invest for public interest purposes<sup>147</sup>, most often those funders finance the legal proceedings as an investment, and therefore pick the most profitable cases.<sup>148</sup>

In order to mitigate the adverse effects of such third party funding, it has been suggested to adopt guidelines which require for instance the disclosure of financing by third parties, set confidentiality obligations for the funders, and grant the arbitrators discretion to decide whether a third-party funder should be considered as a party to the dispute, if its contributions are significant<sup>149</sup>.

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<sup>145</sup> Edouard Bertrand, “The Brave New World of Arbitration: Third-Party Funding,” *ASA Bulletin* 29, no. 3 (91/01 2011): 607–15.

<sup>146</sup> This is particularly problematic in the case of ethical requirements, on disclosure of conflicts of interests with arbitrators for instance, and of confidentiality requirements which bind the parties. Such consequences as well as other adverse effects are envisaged by the International Chamber of Commerce in ICC France, “Le Financement Des Arbitrages Par Des Tiers Financiers,” May 2014, <https://www.international-arbitration-attorney.com/wp-content/uploads/1projet-de-guide-pratiquesurle-financement-de-larbitrage-par-les-tierstthird-party-funding.pdf>. See also Bertrand, “The Brave New World of Arbitration.”

<sup>147</sup> Kessedjian refers to two cases which are known to have been financed by third party charities: *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID ARB/05/6 and *Philip Morris Brand Sàrl and others v. Uruguay*, ICSID ARB/10/7. See Catherine Kessedjian, “Good Governance of Third Party Funding (Columbia FDI Perspective No. 130),” September 15, 2014, <http://us6.campaign-archive2.com/?u=ab15cc1d53&id=8123d8e310&e=45726e8303>.

<sup>148</sup> The OECD notes that “Third party litigation funding is a new industry composed primarily of institutional investors who invest in litigation frequently in return for a percentage of any recovery on the claim.” OECD, “Government Perspectives on Investor-State Dispute Settlement: A Progress Report.”

Brabandere and Lepeltak point out that the lawyers financed by the third party funder may be influenced by the funder, who pays its fees, rather than focusing on the claimant’s interests. See spec. p 385. Eric De Brabandere and Julia Lepeltak, “Third-Party Funding in International Investment Arbitration,” *ICSID Review* 27, no. 2 (December 1, 2012): 379–98, doi:10.1093/icsidreview/sis017.

<sup>149</sup> These policy options are suggested in particular by Kessedjian. To see the full list of recommendations by the author, see Kessedjian, “Good Governance of Third Party Funding (Columbia FDI Perspective No. 130).”

## 2. Government-Government Dispute Settlement – less controversial but with loopholes<sup>150</sup>

The disputes related to the trade provisions of the agreements are subject to the Government-Government Dispute Settlement. This allows the parties to the agreements to launch arbitral proceedings to settle disputes concerning the interpretation and application of their agreement through international arbitration, thus ensuring enforcement of the commitments.

The CETA and TPP texts provide that the hearings be public, unless otherwise decided by the parties and as long as confidential business information is not violated. Both agreements also allow for participation by third parties and experts, and require that the final report be made public<sup>151</sup>.

The dispute settlement model between governments has not been met with the same extent of controversy as the investor-state dispute settlement process. However, certain parts of the agreements have been excluded from dispute settlement. In TPP in particular, the parties excluded from dispute settlement the obligations to enforce measures to combat corruption as mentioned above<sup>152</sup> as well as those on transparency and procedural fairness for pharmaceutical products and medical devices<sup>153</sup>. These two exclusions limit the enforcement of commitments considerably, as the internal measures taken to implement the anti-corruption commitments will not be subject to adjudication.

## 3. Alternative pathways: enforcement through monitoring of implementation

Enforcement of international commitments can also be ensured through a monitoring mechanism<sup>154</sup>. This monitoring can be provided through different modalities and by different actors. It could take the form of self-evaluation (e.g. WTO trade monitoring reports<sup>155</sup>), peer review (e.g. OECD Working Group on Bribery), a combination of these two (eg. Trade Policy Review Mechanism in the WTO<sup>156</sup>) or it could be facilitated through shadow-reporting by an independent organisation (e.g. TI's "Exporting Corruption"<sup>157</sup> reports; or Global Trade Alert).<sup>158</sup>

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<sup>150</sup> TPP Chapter 28, Dispute Settlement, in "TPP Full Text."

CETA Chapter 33, Dispute Settlement, in "Consolidated CETA Text."

EU Proposal for Government to Government Dispute Settlement in TTIP, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153032.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf)

<sup>151</sup> European Commission, "Government-Government Dispute Settlement (GGDS), EU Textual Proposal," 2015, [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153032.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf)

<sup>152</sup> Article 26.12.3 for instance excludes the application of dispute settlement to article 26.9 concerning the application and enforcement of anti-corruption laws.

<sup>153</sup> Para 26-A.6

<sup>154</sup> For an overview of different types of reviews existing, see [http://archive.transparency.org/global\\_priorities/international\\_conventions/advocacy/monitoring/monitoring\\_mechanisms](http://archive.transparency.org/global_priorities/international_conventions/advocacy/monitoring/monitoring_mechanisms)

<sup>155</sup> [https://www.wto.org/english/tratop\\_e/tpr\\_e/trade\\_monitoring\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/trade_monitoring_e.htm)

<sup>156</sup> [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm11\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm)

<sup>157</sup> [http://www.transparency.org/exporting\\_corruption](http://www.transparency.org/exporting_corruption)

<sup>158</sup> <http://www.globaltradealert.org/coverage>

To date, the examined trade agreements do not foresee monitoring of their implementation. The EU Commission included enforcement through monitoring as a key principle of its new strategy on “Trade for all” issued in October 2015. It commits to report annually on the implementation of the most significant FTAs and carry out more in-depth, ex-post analysis of the effectiveness of EU trade agreements<sup>159</sup>.

As the examined agreements are negotiated outside of the WTO and lack a pre-existing institutional setting, the most feasible and efficient option to follow-up on the implementation of corruption commitments by the parties appears to be an assessment by an independent organisation. While further research might be required to identify the most appropriate methodology for such a monitoring exercise, a few ideas may be taken from existing initiatives.

The **Global Trade Alert** (GTA) is an independent network of experts committed to raise the visibility of discriminatory trade-related measures, regardless of whether they are covered by WTO. Its independent experts research and report about such measures by going well beyond those notified to the WTO. An online form is readily available for anyone wishing to submit a measure for scrutiny<sup>160</sup>. The measures are classified according to a simple traffic light system with *beneficial* (green), with *potential negative trade effects* (amber), and *discriminatory* (red)<sup>161</sup>.

The implementation of the recently-adopted Sustainable Development Goals (SDGs) and financing for development framework (FfD) may provide another interesting monitoring model. Tipping and Wolfe make a detailed proposal of possible monitoring to be carried out in the context of the United Nations High Level Political Forum on Sustainable Development (HLPF) that is meant to start reviews in 2016<sup>162</sup>. The HPLF reviews of implementation will take place at the national, regional, and global level and would essentially be based on an intergovernmental self-assessment and peer review process, with reviews open to participation from civil society. According to Tipping and Wolfe, the existing international institutions working on the interactions between trade, environment and development (such as the WTO TPRM, the WTO Committee on Trade and Environment, the OECD Environmental Policy Review, the OECD Trade committee) could constitute an inter-agency task force, which would serve as a forum to discuss the results from all related reports<sup>163</sup>.

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<sup>159</sup> EU Commission, Trade for All – Towards a more responsible trade and investment policy, October 2015 [http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153846.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf)

<sup>160</sup> <http://www.globaltradealert.org/report-a-measure>

<sup>161</sup> For further on the GTA, see Simon J. Evenett, “Global Trade Alert: Motivation and Launch,” *World Trade Review* 8, no. 04 (October 2009): 607–9, doi:10.1017/S1474745609990061.

For a comparison between this system and the monitoring reports led by the WTO Secretariat, see Robert Wolfe, “Did the Protectionist Dog Bark? Transparency, Accountability, and the WTO During the Global Financial Crisis,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 30, 2011), <http://papers.ssrn.com/abstract=1802783>.

<sup>162</sup> Robert Wolfe and Alice Tipping, “Trade and Sustainable Development: Options for Follow-up and Review of the Trade-Related Elements of the Post-2015 Agenda and Financing for Development” (ICTSD, November 18, 2015), <http://www.ictsd.org/themes/global-economic-governance/research/trade-and-sustainable-development-options-for-follow-up>.

<sup>163</sup> *Ibid.* p. 4.

Monitoring the implementation of anti-corruption commitments in trade agreements would be of great use to ensure independent appraisal of implementation efforts, particularly in areas not subject to dispute settlement.

As mentioned above, the Parties in TPP exclude the enforcement of anticorruption measures in their national legislation from dispute settlement. This could therefore be the subject of a monitoring exercise along the lines of the proposed above. TI already pursues efforts in examining whether international anti-corruption commitments have been effectively enforced in its “Exporting corruption” reports<sup>164</sup>. Building on the existing work and taking into account trade-related corruption could help enhance implementation of anti-corruption commitments in trade agreements.

#### IV. FUTURE AVENUES FOR STRENGTHENING ANTI-CORRUPTION IN TRADE AGREEMENTS

To conclude the analysis several options are considered in the following that could be pursued to expand the anti-corruption commitments in trade agreements.

Such an ambition should not be examined in a vacuum, but against the ‘state of the art’ of the existing anti-corruption international agreements, in particular the United Nations Convention Against Corruption (UNCAC) as well as the OECD Anti-Bribery and other tools such as the OECD Guidelines for Multinational Enterprises which seeks to foster good business practices. The transparency and anti-corruption provisions included in the trade agreements should in no way be considered as competing with these agreements, but rather as mutually enriching, through reiterating and customizing the commitments already made in these agreements for the particular areas of trade and investment. In this spirit, Parties to the currently negotiated trade agreements should commit to these broader anti-corruption instruments if they have not already done so<sup>165</sup>.

There are three possible avenues to make anti-corruption more integral to the international trade agenda<sup>166</sup>: (1) developing a new multilateral anti-corruption agreement under the WTO framework;

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<sup>164</sup> TI prepares yearly an independent assessment of the implementation of the Anti-Bribery convention (“OECD ABC”) complementing the monitoring carried out by the OECD Working Group on Bribery. See [http://www.transparency.org/exporting\\_corruption](http://www.transparency.org/exporting_corruption) and <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm>

In addition, TI USA also carried out an assessment of the implementation of APEC Transparency Standards on Public Procurement, see <http://www.transparency-usa.org/news/publications.html>

<sup>165</sup> The US and Canada are both parties to the OECD Anti-Bribery Convention, but their counterparts in CETA, TTIP and TPP are not all parties. In the EU Croatia, Cyprus, Lithuania, Malta and Romania are not yet parties to the OECD ABC. Out of the TPP Parties Brunei, Singapore, Malaysia, Peru and Viet Nam have not signed the OECD Convention. The UNCAC has a wider set of ratifications. Japan is the only negotiating party to the three mega-regionals to have signed but not ratified the UNCAC.

<sup>166</sup> These three avenues were suggested by Pascal Lamy during discussions for this scoping paper, see Annex 1 on discussions with TI France.

(2) building on the existing plurilateral WTO GPA to deepen anti-corruption provisions in the area of government procurement; or (3) including robust anti-corruption provisions in the bilateral, regional and megaregional agreements.

### 1. A Multilateral Agreement on anti-corruption in the WTO Context

The most promising – yet the most difficult – option to address corruption in the context of trade would be to develop an agreement specifically on anti-corruption within the WTO.

For such an Agreement to be negotiated it would have to be proposed by certain countries Member to the WTO<sup>167</sup>, preferably from a group of countries representative of the overall Membership from both developed and developing countries<sup>168</sup>. For it to be adopted, it would have to be agreed by all 161 Members of the WTO. These formal requirements are made all the more difficult by the current political situation in the WTO. WTO Members have not formally adopted any new multilateral Agreement since 1995<sup>169</sup>, and the Doha Development Round of Negotiations is experiencing significant political difficulties<sup>170</sup>.

Yet, should the political momentum be created for an anti-corruption agreement in the framework of the WTO, the ensuing agreement would be legally binding. As such it would allow any WTO Member to challenge another Member for alleged corrupt practices in front of the WTO Dispute Settlement Body (“DSB”). As one of the rare international bodies to have compulsory jurisdiction with regards to all WTO Members, the DSB could play a key role in ensuring the enforcement of anti-corruption obligations in international trade<sup>171</sup>.

### 2. A Plurilateral agreement on anti-corruption in the WTO context

Another, less ambitious but equally promising option would be to extend the scope of the Plurilateral Agreement on Government Procurement, to better address risks of corruption in government procurement. The GPA as the only current WTO Agreement that addresses the issue of corruption provides a blueprint in this regard. As such it could therefore represent the most relevant forum in the WTO for developing corruption provisions further.

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<sup>167</sup> Indeed, the Secretariat staff does not have the power to take such initiatives. See on this Lamy, P., Can the rules of international trade help fighting corruption? In Scheinwerfer, Themenschwerpunkt: Handel und Weltwirtschaft, April 2015.

<sup>168</sup> Ibid. Lamy, The Geneva Consensus, spec. p. 162

<sup>169</sup> One new multilateral agreement was concluded in December 2013, the Trade Facilitation Agreement. It is still undergoing internal ratification procedures before it can enter into force. For more on this issue, see [https://www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm)

<sup>170</sup> The Doha Development round of negotiations has currently been going on for 14 years since November 2001. For further details, see [https://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](https://www.wto.org/english/tratop_e/dda_e/dda_e.htm)

<sup>171</sup> The OECD does not have a jurisdiction that would enforce the OECD ABC; violations of UNCAC can be brought in front of the International Court of Justice, as long as both parties have accepted its jurisdiction.

By building upon the transparency and anti-corruption provisions of the revised GPA<sup>172</sup>, the new agreement would extend these provisions to cover the entire lifecycle of procurement, in particular by introducing integrity requirements in the selection criteria of suppliers as well as appropriate sanction mechanisms for cases when misconduct occurs in the implementation of the agreement<sup>173</sup>. However, such an enhanced plurilateral agreement would still limit the fight against corruption in trade to the specific cases of corruption in government procurement, without addressing issues that may arise in the context of trade in goods or services between any Member government as a regulator and traders from any other Member country.

Finally, although the ‘plurilateral’ nature of the GPA gives it more flexibility to be revised, the binding nature of such agreement would still remain limited to the signatories of the revised Agreement.

### 3. Transparency and anti-corruption provisions in bilateral, regional, or megaregional trade agreements

While the multilateral trade system remains the preferred framework to conclude a dedicated anti-corruption regime, another alternative option could be found outside of the WTO. At a time of increased bilateral and regional negotiations, notably in the framework of the Mega-regionals, an increasing number of countries are considering to include provisions in their bilateral trade agreements. As illustrated above, the current negotiations on CETA, TPP and TTIP seem to be advancing more quickly than further developments of trade agreements at the multilateral level. As a result progress may be more feasible more quickly outside the WTO.

Yet these new generation agreements do not benefit from the WTO Dispute Settlement System (DSS) for enforcement and apply by definition only to a limited number of countries. However, by setting important international trade rules between major traders, they may be used as models for broader negotiations at a later stage. It is therefore crucial to strategically advocate in favour of the inclusion of strong transparency and anti-corruption provisions in the new generation trade agreements, starting from the mega-regionals. Those would become first milestones, setting standards that could then spill over into the WTO.

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<sup>172</sup>On GPA and its provisions regarding transparency and anti-corruption, see presentation on WTO provisions above, p. 16 et s.

<sup>173</sup> For an example of a comprehensive approach to the entire lifecycle of public procurement, see the OECD Principles for Integrity in Public Procurement, <http://www.oecd.org/gov/ethics/48994520.pdf>