

**The Role of the World Trade Organization in the International Anti-corruption  
Movement**

**by**

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**ABSTRACT**

Corruption adversely affects various aspects of economic activity, including international trade. As corruption affects international trade in a number of ways, various countries and international organisations have made co-ordinated efforts to effectively control corruption in general and in the context of international trade. Despite the World Trade Organization's role as a body for making and enforcing international trade rules, it has not actively participated in the fight against corruption in the trade arena.

This paper explores why the World Trade Organization has made no anti-corruption initiatives and provides a review of the current role that is played by the organization in the international anti-corruption movement, through its existing framework. The study also includes a review of the different instruments put in place by other organisations and countries that have actively participated in combating corruption in international trade, and whether the World Trade Organization should follow-suit.

**ABBREVIATIONS**

**ANC** - African National Congress

**DOJ** - Department of Justice

**DPCI** - Directorate for Priority Crime Investigation

**DSB** - Dispute Settlement Body

**DSO** - Directorate of Special Operations

**FCPA** - Foreign Corrupt Practices Act

**GATS** - General Agreement on Trade in Services

**GATT** - General Agreement on Tariffs and Trade

**GPA** - Agreement on Government Procurement

**ICE** - Institutio Costarricense de Electricidad

**ILA** - Agreement on Import Licensing

**OECD** - Organization on Economic Co-operation and Development

**PCCA** - Prevention and Combating of Corrupt Activities Act

**PSI** - Agreement on Pre-shipment Inspection

**SADC** - Southern African Development Community

**SAPS** - South African Police Services

**SCM** - Agreement on Subsidies and Countervailing Measures

**SEC** - Securities Exchange Commission

**SPS** - Agreement on Sanitary and Phytosanitary Measures

**TBT** - Agreement on Technical Barriers to Trade

**TPRM** - Trade Policy Review Mechanism

**TRIPS** - Agreement on Trade Related Aspects of Intellectual Property Rights

**UK** - United Kingdom

**UN** - United Nations

**UNCAC** - United Nations Convention Against Corruption

**US** - United States

**WTO** - World Trade Organization

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## **CHAPTER 1: INTRODUCTION**

### **I. Research problem and background**

Corruption has been narrowly defined as “the abuse of public resources for personal gain”.<sup>1</sup> It is regarded as one of the main obstacles to undertaking business in world markets.<sup>2</sup> It has also been described as, among other things, the primary threat to sustainable economic development.<sup>3</sup>

Generally, corruption is said to hamper free trade.<sup>4</sup> In small income countries, in which a large share of government revenue is collected through customs duties, corrupt customs officials reduce trade and deprive the government of a substantial amount of revenue.<sup>5</sup> As trade is the main driving force behind economic growth in these countries, it is easy to see why corruption is a cause for concern in the realm of international trade.<sup>6</sup>

It has been suggested that bribery and corruption became an international issue in the mid 1970’s as a result of the scandals involving pay-offs to foreign government officials by a number of companies from the United States of America (US).<sup>7</sup> In response to these scandals, Congress (the legislature) enacted the Foreign Corrupt Practices Act (FCPA) which criminalized the act of bribing foreign government officials in order to obtain business.<sup>8</sup> Subsequently, US businesses and government officials began to press for the enactment of similar legislation abroad, bilaterally as well as internationally.<sup>9</sup> They pressed for such reforms in forums such as the United

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<sup>1</sup> Dhu Haur Tang „Corruption And International Trade: An Empirical Study On Large East Asian Newly Industrializing Countries And Comparative Politics Of Corruption“ (2010) *UCLA Undergraduate Journal Of Economics* 133.

<sup>2</sup> Anderson Mccoullier as stated by Susanna Thede and Nils-ake Gustafson „The Multifaceted Impact of Corruption on International Trade“ (2012) 35(5) *The World Economy* 651.

<sup>3</sup> „The OECD Fights Corruption“ available at <http://www.oecd.org>, accessed on 4 June 2014.

<sup>4</sup> Eelke de Jong & Christian Bogmans „Does corruption discourage international trade“ (2007) 27 *European Journal of Political Economy* 385.

<sup>5</sup> Ibid at 385.

<sup>6</sup> Dhu Haur Tang „Corruption And International Trade: An Empirical Study On Large East Asian Newly Industrializing Countries And Comparative Politics Of Corruption“ (2010) *UCLA Undergraduate Journal Of Economics* 133.

<sup>7</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 275.

<sup>8</sup> Act of 1977.

<sup>9</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 275.

Nations (UN) and the Organization on Economic Co-operation and Development (OECD), in the fear that the FCPA would create a competitive disadvantage for US business in markets affected by corruption.<sup>10</sup>

During the 1990's, various international organizations began to adopt conventions and other instruments specifically designed to control corruption and bribery in international business, to the exclusion of the World Trade Organisation (WTO).<sup>11</sup> It is suggested that reforms to reduce corruption especially in international business, will require trade law reforms, hence the significance of the role of the WTO in fighting trade-related corruption.<sup>12</sup>

On the one hand, corruption is not an issue that would ordinarily be dealt with by an organization such as the WTO. On the other hand, the WTO has, from its inception, dealt with issues that do not necessarily fall under the traditional subject matter of international trade law. This is particularly because of the connection between such issues and international trade.<sup>13</sup> An example of this is intellectual property rights.<sup>14</sup> Corruption, like intellectual property rights, is an issue that does not, on the face of it, fall under the traditional subject matter of international trade law.<sup>15</sup> However, the connection that exists between corruption and international trade suggests that the WTO should not continue to be a mere onlooker in the international anti-corruption movement.

## II. Aim of the study

This thesis seeks to develop an understanding of the relationship between corruption and international trade and the detrimental effects that corruption tends to have on trade. The relationship between corruption and international trade is neither

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<sup>10</sup>Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 275.

<sup>11</sup> Ibid at 275.

<sup>12</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 12.

<sup>13</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 279.

<sup>14</sup> Ibid at 282.

<sup>15</sup> Ibid at 282.

clear nor unambiguous.<sup>16</sup> This thesis will therefore look to provide clarity on the relationship between the two multifaceted phenomena by looking at some of the theories on how corruption influences international trade.

Furthermore, the thesis will look into the efforts to combat corruption and other illicit practices by various international organizations to date. It will also look into the WTO's failure to include the fight against corruption on its agenda, despite the organizations role in dealing with rules of trade and the connection between corruption and international trade.

Moreover, this thesis will address the question as to whether it is necessary for the WTO to have rules that specifically address corruption because of its impact on international trade. In addressing this question, a number of the WTO agreements will be discussed. This will assist in determining whether the WTO should play a more active role or whether it has sufficient, existing rules that can help members to effectively counter corruption. A number of theories about why the WTO has so far not taken any steps to make rules that explicitly address corruption will also be outlined.

Although corruption does not fall within the traditional scope of issues dealt with by the WTO -an organization primarily aimed at dealing with rules of trade - there seems to be a sufficiently noteworthy linkage between corruption and international trade that could warrant intervention by the WTO.

### **III. Methodology**

The research methodology used in this thesis entails a literature review, relying mainly on primary and secondary sources such as international conventions, treaties, declarations, legislation, case law as well as books and journal articles. Various credible internet sources, working papers and publications will also be considered. The literature in question relates to the issue of corruption as a social evil and the relevant international instruments put in place by various organizations to combat it and the role that the WTO has played in this regard.

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<sup>16</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 1.

#### **IV. Limitations**

Although this study explores some scholarly theories on how corruption influences international trade, the thesis does not provide a detailed economic analysis of the impact of corruption on international trade. Furthermore, the thesis does not look into the theories on how international trade can influence corruption. Moreover, the thesis does not provide an account of the different causes of corruption.

#### **V. Structure**

The thesis is divided into five interrelated chapters; each addressing specific issues. The current chapter is the introduction. Chapter 2 comprises the meaning of corruption, the relationship between corruption and international trade and the various theories regarding how corruption has an impact on international trade. Chapter 3 comprises an account of the need for coherent anti-corruption strategies on several inroads, including nationally and internationally. It also provides an overview of some of the international and national efforts that have taken place to combat corruption to date. Chapter 4 comprises an examination of the role of the WTO and its trade rules in the fight against corruption and their effectiveness thereof. Finally, chapter 5 concludes the thesis and provides some recommendations.

## **C H A P T E R 2: C O R R U P T I O N A N D I N T E R N A T I O N A L T R A D E**

### **I. I N T R O D U C T I O N**

It is widely recognized that effective efforts are necessary to combat and avoid corruption and bribery in all countries in order to ensure an improved international business environment, to enhance fairness and competitiveness in international commercial transactions and also to promote transparent and accountable governance and economic development.<sup>17</sup> The intervention by various international actors in the global anti-corruption movement is therefore unsurprising as there is no country that is immune from corruption.<sup>18</sup>

Just as corruption is linked to political, economic and social factors, it is also linked to trade.<sup>19</sup> However, any such link is neither straightforward nor clear.<sup>20</sup> This chapter seeks to highlight the various theories on the way in which corruption negatively impacts on international trade; the chapter will also look briefly at some claims that corruption may have a positive rather than a negative impact on trade. These theories are worth exploring in order to get a clearer understanding of the link between the two phenomena.

It would therefore follow that an analysis of the relationship between corruption and international trade requires, in the first place, an understanding of the term “corruption”. This chapter will also provide a discussion of the meaning of corruption and some of the various forms that it can take. Furthermore, the reasons why the negative impact of corruption on trade is an important issue, as well as the main concerns that arise with regards to the negative impact of corruption on international trade will be outlined.

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<sup>17</sup> UN Declaration against Corruption and Bribery in International Commercial Transactions, 1997.

<sup>18</sup> „Corruption and Bribery: Trade and Investment impacts0” available at <http://www.controlbae.org.uk> accessed on 1 July 2014.

<sup>19</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005)

6.

<sup>20</sup> *Ibid* at 1.

## II. THE MEANING OF CORRUPTION

There is a vast amount of literature on the meaning of corruption.<sup>21</sup> In most international discussions, corruption has been the concept that has been used to refer to all or most types of integrity violations or unethical behaviour.<sup>22</sup> The working definition of corruption used by Transparency International is „the abuse of entrusted power for private gain“.<sup>23</sup> This definition applies to instances of corruption in both the private and public sector. Public corruption can therefore be defined as „the abuse of public office for private gain“.<sup>24</sup>

Within the context of international trade a distinction is usually drawn between domestic and cross-border corruption. It has been suggested that countries that have serious domestic corruption problems are more likely to be vulnerable to cross-border forms as well.<sup>25</sup> This is because countries with serious domestic corruption problems have corrupt officials and firms that engage in cross-border corruption.<sup>26</sup> Cross-border corruption, of necessity, requires the co-operation of these corrupt officials to facilitate these schemes.<sup>27</sup> Thus, in the absence of corrupt local officials to facilitate these schemes, cross-border corruption would not take place.<sup>28</sup>

A distinction is usually also drawn between demand-side and supply-side corruption. The former refers to an officials request for payment in exchange for his favourable action and the latter refers to the offer of payment by someone who is not an official but is seeking favourable treatment by the official.<sup>29</sup> This form of corruption is referred to as bribery and is the most likely to occur in the context of international trade.

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<sup>21</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 7.

<sup>22</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 4.

<sup>23</sup> Transparency International „What we do“ available at <http://www.transparency.org> accessed on 6 October 2014.

<sup>24</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 4.

<sup>25</sup> Michael Johnston „Cross-Border Corruption: Points of Vulnerability and Challenges for Reform“ in Sahr J. Kpundeh et al (eds) *Corruption and Integrity Improvement Initiatives in Developing Countries* (1998) 14.

<sup>26</sup> *Ibid* at 14.

<sup>27</sup> *Ibid* at 14.

<sup>28</sup> *Ibid* at 14.

<sup>29</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 8.

Corruption can however take various other forms. Some of the most common forms of corruption include Bribery, Favouritism, Nepotism, Embezzlement and Extortion.

Furthermore, corruption can take place at various levels. For instance, corrupt practices of lower level officials and state employees are referred to as bureaucratic corruption or petty corruption whereas corrupt practices of high-level officials and policy-makers are referred to as grand corruption.<sup>30</sup>

Identifying the particular forms and levels at which corrupt practices take place is important for understanding the effect that such practices can have on international trade transactions. This is because different forms of corruption tend to have different effects on trade.

### III. THE IMPACT OF CORRUPTION ON INTERNATIONAL TRADE

As previously mentioned, the link between corruption and international trade is neither clear nor unambiguous.<sup>31</sup> There exists a large amount of literature on the various ways in which corruption can affect international trade, however, the literature and empirical evidence on this topic have mixed results. Some of these theories will be outlined in this chapter.

In much of the corruption literature, border corruption has been identified as having particularly trade restrictive implications compared to corruption in non-border locations.<sup>32</sup> It is easy to see why corruption at the border can have a trade restrictive impact. However international trade transactions involve many activities that do not occur at the border but can be subject to corruption and can subsequently affect the trade outcome.<sup>33</sup> Nevertheless, the primary focus of this chapter will be on bureaucratic corruption by customs and other government officials at the border.

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<sup>30</sup> Ibid.

<sup>31</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 1.

<sup>32</sup> Susanna Thede and Nils-ake Gustafson „The Multifaceted Impact of Corruption on International Trade“ (2012) 35(5) *The World Economy* 653.

<sup>33</sup> Ibid.

Although there are a wide range of theories concerning the ways in which corruption can affect international trade both positively and negatively. This chapter will focus mainly on the negative effects that corruption can have on trade volumes, trade reform and trade liberalization and will provide a brief discussion of each instance.

### **(i) Corruption affects trade volumes**

It has been suggested that corruption may hinder trade flows by making trade transactions more costly.<sup>34</sup> Furthermore, corruption tends to have a detrimental impact on the trade volumes in corrupt countries because honest traders would prefer to do deal with countries that are relatively corruption-free.<sup>35</sup> Similarly, the corrupt agents prefer to do business with corruptible traders and this works to the disadvantage of those who trade honestly.<sup>36</sup> An illustration of this is an instance where a US-power generation company lost a \$320 million contract to a Japanese company in the Middle-east because the American company refused to pay a \$3 million bribe that was demanded by the officials in charge.<sup>37</sup> There have also been reports by international companies based in the UK that they have lost business opportunities to corrupt competitors.<sup>38</sup> Unsurprisingly, firms that are willing to engage in corrupt practices therefore gain a competitive advantage.<sup>39</sup> A recent illustration of this is the scandal over the bribery of foreign public officials by three different subsidiaries of the multinational computing company Hewlett-Packard, for the purposes of gaining lucrative contracts.<sup>40</sup>

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<sup>34</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight Against Corruption* (2005) 11.

<sup>35</sup> *Ibid* at 11.

<sup>36</sup> Susanna Thede and Nils-ake Gustafson „The Multifaceted Impact of Corruption on International Trade“ (2012) 35(5) *The World Economy* 653.

<sup>37</sup> Dana Milbank „Greasing Wheels: How US concerns compete in countries where bribes flourish“ available at <http://www.apnewsarchive.org> accessed on 26 August 2014.

<sup>38</sup> „Corruption and Bribery: Trade and Investment impacts“ available at <http://www.controlbae.org.uk> accessed on 1 July 2014.

<sup>39</sup> Dhu Haur Tang „Corruption And International Trade: An Empirical Study On Large East Asian Newly Industrializing Countries And Comparative Politics Of Corruption“ (2010) *UCLA Undergraduate Journal Of Economics* 134.

<sup>40</sup> Juliette Garside „Hewlett-Packard to pay \$108m to settle scandal over bribery of public officials“ available at <http://www.theguardian.com> accessed on 26 August 2014.

A further illustration that is worth noting is the Strategic Defence Procurement Package, widely known as „The Arms Deal“ which is currently the subject of a judicial commission in South Africa. The arms deal involved, among others, President Jacob Zuma (the then Deputy President) and his financial advisor at the time, Mr. Shabir Shaik.<sup>41</sup> It was alleged that Mr. Shaik arranged for corrupt payments to be made to President Zuma in exchange for his co-operation in promoting Mr. Shaik's business interests.<sup>42</sup> It was alleged that the French company Thomson CSF was sceptical about including Mr. Shaik as their business partner in their bid for arms deal contracts because he did not have any influence on the African National Congress (ANC) leadership. As a result, Mr. Shaik requested President Zuma to meet with the executives of Thomson CSF, to reassure them of Mr. Shaik's good standing with the ANC.<sup>43</sup> Mr. Shaik thereafter became a major shareholder of Thomson's South African company and the company was subsequently granted one of the most lucrative subcontracts awarded to the participants of the arms deal.<sup>44</sup> This contract pertained to combat suites for navy ships.<sup>45</sup> It has thus been suggested that corruption by officials in a trading partner's territory can in some instances enhance rather than hinder export trade in countries where there are foreign firms that are willing to pay bribes.<sup>46</sup>

There have been arguments that corruption has a positive rather than a negative effect on trade volumes, particularly in those countries with low quality institutions, going so far as suggesting that it „greases the wheels of commerce“ because the payment of bribes speeds up the processes thus allowing clients to avoid bureaucratic delays.<sup>47</sup> The argument is therefore that inefficient bureaucracy acts as an unwieldy obstacle that

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<sup>41</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 156.

<sup>42</sup> Ibid.

<sup>43</sup> Andrew Feinstein *After the Party: A Personal and Political Journey Inside the ANC* (2007) 291.

<sup>44</sup> Ibid at 291.

<sup>45</sup> Ibid at 291; It later transpired that a South African company, CCII Systems Operations (Pty) Ltd, had lost the bid to Thomson CSF despite CCII Systems Operations having been the preferred option of the navy.

<sup>46</sup> Dhu Haur Tang „Corruption And International Trade: An Empirical Study On Large East Asian Newly Industrializing Countries And Comparative Politics Of Corruption“ (2010) *UCLA Undergraduate Journal Of Economics* 155.

<sup>47</sup> Eelke de Jong & Erwin Udo *Is corruption detrimental to international trade?* (Unpublished Economics Thesis, Radboud University Nijmegen, 2005) 2.

bribes or so-called „grease money“ can easily overcome.<sup>48</sup> However the grease theory has been tested and no support for it has been found.<sup>49</sup> It has been posited that there is more evidence pointing to corruption being more like sand rather than grease to economic transactions.<sup>50</sup> Proponents of this sand theory argue that the grease theory is only possible as a second best option in a malfunctioning institutional setting, pointing out that, among other things, corruption reduces investment especially in most developing countries.<sup>51</sup>

It has also been suggested that it is the uncertainty associated with corruption that tends to further reduce trade volumes.<sup>52</sup> Moreover, corruption tends to create a culture of inequality in international trade. This is because of its effect of providing a competitive advantage to those traders willing and able to pay the bribes to the disadvantage of the traders who are unwilling to do so.

## **(ii) Corruption hampers trade related reform**

There have been several empirical studies confirming that corruption delays trade reform.<sup>53</sup> The corrupt officials may try to ensure that a corrupt policy framework is put in place and maintained precisely because of its susceptibility to corruption.<sup>54</sup> The procedures sought within that policy framework are those that are designed to maximize the number of steps and approvals required, in order to create as many opportunities as possible for interaction and negotiation between the traders and customs officials.<sup>55</sup>

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<sup>48</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 10.

<sup>49</sup> Ibid at 10.

<sup>50</sup> Fisman & Svensson (2001) as referenced by Nauro F Campos, Ralitza Dimoua, Ahmad Saleh IZA Discussion Paper 5334 *Whither Corruption? A Quantitative Survey of the literature on corruption & growth* (2010) 1.

<sup>51</sup> Rock & Bonnet (2004) as referenced by Nauro F Campos, Ralitza Dimoua, Ahmad Saleh IZA Discussion Paper 5334 *Whither Corruption? A Quantitative Survey of the literature on corruption & growth* (2010) 1.

<sup>52</sup> Eelke de Jong & Christian Bogmans „Does corruption discourage international trade“ (2007) 27 *European Journal of Political Economy* 386.

<sup>53</sup> Eelke de Jong & Erwin Udo *Is corruption detrimental to international trade?* (Unpublished Economics Thesis, Radboud University Nijmegen, 2005) 1.

<sup>54</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 38.

<sup>55</sup> Eelke de Jong & Erwin Udo *Is corruption detrimental to international trade?* (Unpublished Economics Thesis, Radboud University Nijmegen, 2005) 13.

However, it is worth noting that this premise relies on the existence of a link between the lawmakers responsible for the trade policies and those officials who benefit from the corruption.<sup>56</sup> In the absence of such a link, this particular theory has no basis.

Furthermore, since corruption implies a low quality civil service, trade reform is less likely to be pursued or driven by the corrupt officials that are within the bureaucracy.<sup>57</sup>

### **(iii) Corruption impacts on trade liberalization**

It has been suggested that various groups with vested interests that enjoy trade protection are often politically powerful and likely to be successful in resisting trade liberalization.<sup>58</sup> Their influence is strongest in countries with highly corrupt governments that are more susceptible to lobbying and therefore leads to the persistence of higher trade barriers in such countries, at the request of the lobbyists.<sup>59</sup>

There is empirical evidence that corruption can lead to more protectionist behaviour because corruption flourishes amidst low-quality institutions and such low quality institutions are more open to pressure from national groups and economic actors to restrict foreign competition.<sup>60</sup>

Furthermore, high trade barriers create opportunities for requesting illicit advantages in exchange for market access and for more favourable conditions of competition.<sup>61</sup> The effect is that it reduces the regimes willingness to lower its barriers

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<sup>56</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 39.

<sup>57</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 11.

<sup>58</sup> *Ibid* at 11.

<sup>59</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight Against Corruption* (2005) 27.

<sup>60</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 38.

<sup>61</sup> *Ibid* at 38.

in order to protect the extra sources of income that come from bribes. Thus, corrupt officials in general, have little incentive to reduce their trade barriers.<sup>62</sup>

However, the theory that corruption reduces the commitment to trade liberalization assumes that the problem of corruption is only driven by the demand-side.<sup>63</sup> It has been posited that if the supply-side were also considered, there would be no logical reason to assume that trade liberalization would reduce the propensity of traders from exporting countries to continue to offer bribes.<sup>64</sup>

#### IV. IMPLICATIONS OF THE NEGATIVE IMPACT OF CORUPPTION ON INTERNATIONAL TRADE

The negative impacts of corruption on international trade are a particular cause for concern because international trade benefits the world economy as a whole. Trade liberalization stimulates economic growth and efficiency by allowing producers to exploit areas in which they have a comparative advantage over foreign producers and also by reducing their costs.<sup>65</sup> It has been posited that corruption acts as a “hidden tariff” and is therefore a barrier to trade.<sup>66</sup> Impediments to trade limit these benefits of international trade and it would therefore follow that by hindering free trade, corruption (a hidden tariff) has the effect of limiting economic growth and efficiency.<sup>67</sup>

Furthermore, as previously mentioned, in some low income countries, a relatively large share of government revenue is collected through customs duties and as

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<sup>62</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight Against Corruption* (2005) 1.

<sup>63</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 40.

<sup>64</sup> *Ibid* at 40.

<sup>65</sup> Arnold C. Harberger „Trade and Economic Growth, Part I“ available at <http://www.ncpa.org> accessed on 30 August 2014.

<sup>66</sup> Dhu Haur Tang „Corruption And International Trade: An Empirical Study On Large East Asian Newly Industrializing Countries And Comparative Politics Of Corruption“ (2010) *UCLA Undergraduate Journal Of Economics* 134.

<sup>67</sup> Arnold C. Harberger „Trade and Economic Growth, Part I“ available at <http://www.ncpa.org> accessed on 30 August 2014.

a result, the governments of highly corrupt countries are deprived of a substantial amount of revenue by corrupt customs officials.<sup>68</sup>

Moreover, one of the central purposes of international trade is to obtain access to foreign markets in which to do business; however, corrupt practices have the effect of degrading these markets.<sup>69</sup>

A wide range of economic empirical research has shown a direct link between high levels of corruption and low levels of foreign direct investment.<sup>70</sup> This would suggest that foreign investors are deterred from doing business in those markets in which corruption thrives and it would therefore have a detrimental effect on the economies of highly corrupt countries in the long run.<sup>71</sup> This negative impact of corruption on foreign direct investment was thus acknowledged by the former UN Secretary General Kofi Annan who noted that „corruption hurts the poor disproportionately [...] by diverting funds intended for development, undermining a governments ability to provide basic services, feeding inequality and injustice and discouraging foreign investment and aid.”<sup>72</sup>

## V. CONCLUSION

As pointed out in the discussion above, the link between corruption and international trade is not entirely clear and much of the literature on the subject is mixed. There are various forms that corruption can take and as a result the extent to which corruption negatively impacts trade volumes, trade liberalization and the reform of trade rules and practices is dependent on the form it takes and the level at which the corrupt practices take place. There are various international trade implications surrounding corruption and this illustrates that corruption indeed goes far beyond the misbehaviour of the actors involved in as far as it limits the benefits of international

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<sup>68</sup> Eelke de Jong & Christian Bogmans „Does corruption discourage international trade“ (2007) 27 *European Journal of Political Economy* 385.

<sup>69</sup> „How Bribery and Other Types of Corruption Threaten the Global Marketplace“ available at <http://knowledge.wharton.upenn.edu> accessed on 1 September 2014.

<sup>70</sup> Paolo Mauro „Corruption and Growth“ (1995) 110(3) *Quarterly Journal of Economics* 683.

<sup>71</sup> It is worth pointing out that high levels of corruption may be only one of many other factors that contribute to such countries having low levels of foreign direct investment.

<sup>72</sup> United Nations Convention Against Corruption, 2003.

trade by impeding economic growth and efficiency. It is on this basis that the issue of corruption in the context of international trade is a cause for concern.

## **CHAPTER 3: GLOBAL EFFORTS TO COMBAT TRADE-RELATED CORRUPTION**

### **I. INTRODUCTION**

As previously pointed out, there is no country that is immune from corruption and it therefore comes as no surprise that there has been intervention by various international actors across the globe, taking part in the anti-corruption movement.<sup>73</sup> Various international organizations have taken steps to combat and minimize instances of corruption in international business and commercial transactions, to the exclusion of the WTO.<sup>74</sup> However, despite inaction by the WTO the importance of addressing corruption can easily be demonstrated through this global movement that has occurred, to combat corruption.

This chapter comprises an account of the need for coherent anti-corruption strategies on several inroads, including on a national and international level.<sup>75</sup> It will also provide an overview of a number of organisations that have been involved in the anti-corruption movement and some national and international instruments that have been put in place to combat corruption so far.

The international organizations that form the primary focus of this discussion are the United Nations (UN), the Organization for Economic Co-operation and Development (OECD) and the Southern African Development Community (SADC).

The corresponding instruments put in place by these organizations to combat corruption are the UN Declaration against Corruption and Bribery in Commercial Transactions; the UN Convention against Corruption; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

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<sup>73</sup> „Corruption and Bribery: Trade and Investment impacts“ available at <http://www.controlbae.org.uk> accessed on 1 July 2014.

<sup>74</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 275.

<sup>75</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight Against Corruption* (2005) 21.

and the SADC Protocol against Corruption.<sup>76</sup> These are the main instruments that will be focused on in the course of the discussion.

The chapter will also provide a brief overview of the national efforts to combat corruption in different jurisdictions. The primary focus in this regard will be on the Foreign Corrupt Practices Act (FCPA) of the United States; and the Prevention and Combating of Corrupt Activities Act (PCCA Act) of South Africa. Furthermore, this section will outline the various enforcement mechanisms provided for by the relevant Acts in the different jurisdictions.

## **II. INTERNATIONAL EFFORTS TO COMBAT TRADE-RELATED CORRUPTION**

It has been suggested that attempting to fight corruption only within national economies and political boundaries is ineffective.<sup>77</sup> One of the reasons for this is that when national governments attempt to confront the problem of corruption; their efforts are often undermined by a lack of infrastructure and finite resources.<sup>78</sup> Furthermore, corruption in one country can easily become a regional or global issue.<sup>79</sup> This becomes the case, for instance, when economic actors engage in cross-border corruption in order to obtain unfair advantages over their competitors in foreign markets.<sup>80</sup> The domestic competitors could be driven out of business as a result of those corrupt practices.<sup>81</sup> This, therefore, suggests that there is a need to develop anti-corruption strategies on both a national and international level in order to effectively combat corruption.

When corruption became an international issue, numerous organizations responded by adopting conventions and other instruments designed to control bribery

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<sup>76</sup> These have been specifically identified in an attempt to explore the differences in the anti-corruption instruments and their applicability at different levels. The UN instruments are applicable on a near-global level; the OECD Convention is applicable on an inter-regional level and the SADC Protocol is applicable on a sub-regional level.

<sup>77</sup> Michael Johnston „Cross-Border Corruption: Points of Vulnerability and Challenges for Reform“ in Sahr J. Kpundeh et al (eds) *Corruption and Integrity Improvement Initiatives in Developing Countries* (1998) 14.

<sup>78</sup> Ibid at 13.

<sup>79</sup> Ibid at 14.

<sup>80</sup> Ibid at 14.

<sup>81</sup> Ibid at 14.

and corruption in international business.<sup>82</sup> There was a widespread and rapid adoption of anti-bribery and anti-corruption principles by a diverse set of institutions.<sup>83</sup> Among these institutions are the UN and the OECD; both of which have put in place conventions in which fighting corruption in international commercial transactions is the central focus. These instruments will now be discussed below, followed by a brief discussion of the anti-corruption instrument created under the auspices of SADC.

**(i) The United Nations Declaration against Corruption and Bribery in International Commercial Transactions**

The UN declaration against corruption and bribery in international commercial transactions (hereafter referred to as „the UN declaration“) was adopted in 1997.<sup>84</sup> It includes rules and measures that countries can incorporate into their national legislation and implement to combat corruption.<sup>85</sup>

The UN declaration seeks to criminalize the bribery of foreign public officials in an effective and co-ordinated manner, within the territories of member states.<sup>86</sup> Articles 2 and 3 of the UN declaration provide a comprehensive definition of the term „bribery“ stating that it includes the following elements:

“The offer, promise or giving of any payment, gift or other advantage, directly or indirectly, by any private or public corporation [...] to any public official or elected representative of another country as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transaction; [and]

The soliciting, demanding, accepting or receiving, directly or indirectly, by any public official or elected representative of a State

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<sup>82</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 275.

<sup>83</sup> *Ibid* at 278.

<sup>84</sup> UN Declaration Against Corruption And Bribery In International Commercial Transactions, 1997.

<sup>85</sup> Antonio Argandona „The United Nations Convention Against Corruption and Its Impact on International Companies“ (2007) 74(4) *Journal of Business Ethics* 484.

<sup>86</sup> UN Declaration Against Corruption And Bribery In International Commercial Transactions, 1997.

from any private or public corporation [...] from another country of any payment, gift or other advantage, as undue consideration for performing or refraining from the performance of that official's or representative's duties in connection with an international commercial transaction.”<sup>87</sup>

The declaration, although not binding, was a significant step in addressing the issue of corruption.

## (ii) The United Nations Convention Against Corruption

Another significant development by the UN General Assembly was the adoption of the UN Convention against Corruption (hereafter referred to as the „UNCAC“) which came into force on 14 December 2005.<sup>88</sup> The General Assembly acknowledged in the UNCAC that corruption was no longer a local matter but a transnational one that affected all societies and economies thus making international co-operation to prevent and control it, particularly essential.<sup>89</sup> Furthermore, it acknowledged that the adoption of the UNCAC would send a clear message that the international community was determined to prevent and control corruption.<sup>90</sup>

The UNCAC generally covers various facets of corruption.<sup>91</sup> It also particularly addresses corruption in the realm of international business. The UNCAC contributes to the fight against trade-related corruption through a number of provisions. For instance, Article 16 of the UNCAC requires State Parties to criminalize the bribery of foreign public officials in the context of international business.<sup>92</sup> Under this Article states are required to criminalize both the supply-side and the demand-side of bribery.<sup>93</sup> As

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<sup>87</sup> Ibid.

<sup>88</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 25.

<sup>89</sup> United Nations Convention Against Corruption, 2003.

<sup>90</sup> Ibid.

<sup>91</sup> Antonio Argandona „The United Nations Convention Against Corruption and Its Impact on International Companies“ (2007) 74(4) *Journal of Business Ethics* 485.

<sup>92</sup> Ibid.

<sup>93</sup> The bribery of a foreign public official is defined in the UNCAC in the same way as it is defined in the UN declaration.

previously mentioned, the demand-side of bribery refers to an official's request for payment in exchange for his favourable action, whereas the supply-side refers to the offer of payment by someone who is not an official but is seeking favourable treatment by the official.<sup>94</sup> In addition, Article 16 also requires states to criminalize the bribery of officials of public international organizations.<sup>95</sup>

Furthermore, Articles 6 and 36 of the UNCAC require all state parties to ensure the existence of bodies that prevent corruption through the implementation of policies and that combat corruption through law enforcement, respectively. The state parties are required by the UNCAC to grant these bodies the necessary independence to be able to carry out their functions effectively and without undue influence.<sup>96</sup> It has been suggested that this is particularly important for such anti-corruption bodies because there is a need for them to remain independent of the bureaucrats and politicians whom they must often investigate.

It is worth noting that the UNCAC plays a particularly important role in the fight against corruption because it is the only universally legally binding anti-corruption instrument.<sup>97</sup>

### **(iii) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

The OECD took steps to fight corruption at an international level at the initiative of the US State Department.<sup>98</sup> When the State Department officials initiated negotiations on bribery and corruption in the OECD their main objective was for the creation of a binding treaty, however, they eventually settled for a gradualist approach.<sup>99</sup> This is because they realized the need to begin with only a form of „soft

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<sup>94</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 8.

<sup>95</sup> United Nations Convention Against Corruption, 2003.

<sup>96</sup> Ibid.

<sup>97</sup> „Working together to more effectively fight corruption across Asia“ available at <http://www.unodc.org> accessed on 27 September 2014.

<sup>98</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 335.

<sup>99</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 280.

law” such as the OECD recommendations and thereafter work their way up to binding legal instruments.<sup>100</sup>

An ad hoc Working Group on Bribery in International Transactions which comprised of national government experts was established and its work led to a series of recommendations.<sup>101</sup> In 1994, an OECD recommendation called upon member governments to take effective measures against transnational bribery.<sup>102</sup> Thereafter, in 1996 the OECD approved a second recommendation calling on member states to deny tax reductions for foreign bribes.<sup>103</sup> In 1997, the OECD approved a third recommendation which called on members to put in place effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions; in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner.<sup>104</sup> Finally, in 1997 the OECD Anti-bribery Convention was adopted and it entered into force on 15 February 1998.<sup>105</sup> There have since been additional OECD recommendations. This includes the 2009 OECD recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions which contains measures to assist state parties to better detect and prosecute foreign bribery and Good Practice guidelines on internal controls, ethics and compliance<sup>106</sup>.

Like the UNCAC, the OECD Anti-bribery Convention seeks to criminalize the act of bribing foreign public officials and sets out in Article 1(1) what the offence entails as it states that:

“Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether

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<sup>100</sup> Ibid at 280.

<sup>101</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 335.

<sup>102</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery” (2001) 4(2) *Journal of International Economic Law* 281.

<sup>103</sup> Ibid at 281.

<sup>104</sup> OECD Convention on Combating Bribery Of Foreign Public Officials In International Business Transactions, 1997.

<sup>105</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 335.

<sup>106</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 255.

directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”<sup>107</sup>

The convention has been a great success as many of the industrialized countries which are members of the OECD have bound themselves to criminalise and prosecute foreign and international bribery accordingly, as a result of the convention.<sup>108</sup>

The scope of application of the convention is however restricted. Unlike the UNCAC, the OECD Anti-bribery Convention only deals with the supply-side of bribery, or what has been referred to in some countries as „active bribery“ which is the offence committed by the person who promises or gives the bribe, to the exclusion of „passive bribery“, which is the offence committed by the official who receives the bribe.<sup>109</sup> It has been suggested that pursuing the foreign officials who are involved would raise problems regarding jurisdiction and thereafter lead to interferences with the sovereignty of other states.<sup>110</sup>

A key issue of concern however is enforcement.<sup>111</sup> The continuing low number of prosecutions in the majority of states has raised some concerns. Although the convention has required states to criminalize the bribery of foreign public officials, the convention makes no specific provision for enforcement institutions and measures; as a result, making the provisions effective has been a challenge.<sup>112</sup> The OECD does however provide for a peer review process whereby each member state’s policies are examined by the other members.<sup>113</sup>

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<sup>107</sup> OECD Convention on Combating Bribery Of Foreign Public Officials In International Business Transactions, 1997.

<sup>108</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 336.

<sup>109</sup> Commentaries on the OECD Convention on Combating Bribery Of Foreign Public Officials In International Business Transactions, 1997.

<sup>110</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 337.

<sup>111</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 256.

<sup>112</sup> *Ibid* at 257.

<sup>113</sup> „The OECD’s peer review process – a tool for co-operation and change“ available at <http://www.oecd.org> accessed on 4 November 2014.

Article 12 of the convention requires the parties to co-operate in carrying out a systematic follow-up to monitor and promote the full implementation of the convention.<sup>114</sup> This section, therefore, establishes a peer review process.

The peer review mechanism, in general, is conducted on a non-adversarial basis and it is described as a sophisticated way of monitoring and improving compliance with conventions.<sup>115</sup> Within the framework of the OECD Anti-bribery Convention, the Working Group on Bribery is involved in the peer review process. The Working Group assesses the extent to which the principles of the convention have been incorporated into the national legislation of the member states, as well as the extent of their implementation and enforcement.<sup>116</sup> The Working Group thereafter makes findings and recommendations in a report on how the relevant countries can improve implementation of the convention.<sup>117</sup> The countries must then take action in response to the findings and recommendations and make follow-up reports on their progress.<sup>118</sup>

Furthermore, the peer review mechanism has been described as being only a “soft enforcement system” unlike the traditional legal enforcement mechanisms.<sup>119</sup> This could be due to the fact that the monitoring mechanism only has the effect of persuading states to implement the provisions.<sup>120</sup> However, this persuasive effect illustrates that the peer review mechanism performs a very important function in enhancing compliance with the OECD Anti-bribery convention by the member states.<sup>121</sup>

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<sup>114</sup> OECD Convention on Combating Bribery Of Foreign Public Officials In International Business Transactions, 1997.

<sup>115</sup> Fabricio Pagani „Peer Review as A Tool For Co-operation and Change“ (2002) 11(1) *African Security Review* 19.

<sup>116</sup> Ibid at 19.

<sup>117</sup> OECD Working Group on Bribery „Annual Report 2006“ available at <http://www.oecd.org/daf/anti-bribery/38865251.pdf> accessed on 1 December 2014.

<sup>118</sup> Ibid at 10.

<sup>119</sup> Fabricio Pagani „Peer Review as A Tool For Co-operation and Change“ (2002) 11(1) *African Security Review* 21.

<sup>120</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 342.

<sup>121</sup> Fabricio Pagani „Peer Review as A Tool For Co-operation and Change“ (2002) 11(1) *African Security Review* 21.

#### (iv) SADC Protocol Against Corruption

There has also been co-operation in southern Africa, by the Southern African Development Community (SADC), to combat corruption. SADC members agreed to take concrete initiatives, by way of a protocol, to fight corruption at the third Regional Roundtable meeting on Ethics and Governance which took place in Zimbabwe in the year 2000.<sup>122</sup> In August 2001, the SADC Protocol against Corruption (hereafter referred to as „the Protocol“) was signed by the heads of state of the SADC countries at a summit in Malawi; the Protocol eventually came into force in 2005.<sup>123</sup>

The Protocol contributes to the fight against corruption in international commercial transactions by way of Article 6 which requires all SADC members to prohibit and punish the bribery of foreign officials as it states:

“Subject to its domestic law, each State Party shall prohibit and punish the offering or granting, directly or indirectly, by its own nationals, persons having their habitual residence in its territory, and businesses domiciled there, to an official of a foreign State, of any Article of monetary value, or other benefit, such as a gift, favour, promise or advantage, in connection with any economic or commercial transaction in exchange for any act or omission in the performance of that official's public functions.”<sup>124</sup>

Furthermore, Article 4 (1) (d) of the Protocol requires member states to maintain institutions to implement mechanisms for preventing, detecting, punishing and eradicating corruption.<sup>125</sup> However, unlike the UNCAC, the Protocol makes no mention of the required level of independence of any such institution.

Moreover, the Protocol does not provide for a peer review process as in the OECD Anti-bribery Convention. However, Article 11 of the Protocol does provide for a

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<sup>122</sup>Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 414; John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 23.

<sup>123</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 24.

<sup>124</sup> SADC Protocol Against Corruption, 2005.

<sup>125</sup> Ibid.

committee to which the state parties are required to report, on a regular basis, regarding their progress in the implementation of the Protocol.<sup>126</sup> Unfortunately, the committee has not yet been fully established.<sup>127</sup>

It has been suggested that the reality that the SADC region is poor and has limited resources available to develop regional programmes and establish institutions relating to crime combating must be acknowledged when exploring the possibilities of increased international co-operation in the anti-corruption movement.<sup>128</sup>

### III. NATIONAL EFFORTS TO COMBAT CORRUPTION

While attempting to fight corruption only within national economies and political boundaries is likely to be ineffective, the inverse will be true as well.<sup>129</sup> It has thus been posited that international efforts to control transnational corruption will meet with little success unless they are supported by and co-ordinated with effective action against domestic corruption.<sup>130</sup> Furthermore, this broad-based co-operation is considered necessary, not only to ensure effectiveness, but also to ensure consistency and fairness in the trade environment so that firms are able to do business on an equitable basis in various jurisdictions.<sup>131</sup>

It is recognized that all countries share the responsibility to combat bribery in international commercial transactions.<sup>132</sup> It is therefore unsurprising that legal reforms have been taken globally in multiple jurisdictions, in an attempt to fight corruption occurring in domestic and international commercial transactions. A few of these attempts at combating domestic corruption in different jurisdictions will be discussed below.

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<sup>126</sup> Ibid.

<sup>127</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 343.

<sup>128</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 410.

<sup>129</sup> Michael Johnston „Cross-Border Corruption: Points of Vulnerability and Challenges for Reform“ in Sahr J. Kpundeh et al (eds) *Corruption and Integrity Improvement Initiatives in Developing Countries* (1998) 14.

<sup>130</sup> Ibid at 14.

<sup>131</sup> Antonio Argandona „The United Nations Convention Against Corruption and Its Impact on International Companies“ (2007) 74(4) *Journal of Business Ethics* 482.

<sup>132</sup> UN Declaration Against Corruption And Bribery In International Commercial Transactions, 1997.

**(i) Foreign Corrupt Practices Act**

The US has taken initiative in fighting corruption through the Foreign Corrupt Practices Act (FCPA). As previously mentioned, the FCPA was enacted by congress in response to the scandals that occurred in the 1970's.<sup>133</sup> The FCPA, amongst other things, criminalizes the bribery of foreign public officials for the purposes of obtaining or retaining business.<sup>134</sup>

It is suggested that because what constitutes a bribe and a grease payment or a facilitation payment depends on the country and business culture, US firms are placed at a competitive disadvantage.<sup>135</sup> US firms have, therefore, questioned whether the FCPA is an obstacle to conducting business in foreign countries in which there are differing opinions what behaviour is acceptable in the course of business.<sup>136</sup>

Many countries are of the opinion that it is inappropriate to criminalize bribery worldwide because it is embedded so deeply in some cultures.<sup>137</sup> As a result, US firms tend to find themselves in a predicament whereby they must choose between either complying with regulatory requirements of the FCPA or conducting themselves in the manner customary to the particular country in which they are doing business and running the risk of being punished under the Act.

The FCPA, however, does contain a facilitation payment exception which is also known as a grease payment exception.<sup>138</sup> The Act does not criminalize „any facilitating or expediting payment to a foreign official, political party or party official the purpose of which is to expedite or to secure the performance of a routine government action by a

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<sup>133</sup> Act of 1977.

<sup>134</sup> Ibid.

<sup>135</sup> Daniel Wagner „Walmart, the FCPA and America's Ability to Compete" available at <http://www.huffingtonpost.com/daniel-wagner/walmart-the-fcpa-and-amer-b-1463292.html> accessed on 22 December 2014.

<sup>136</sup> Ibid.

<sup>137</sup> Ronald Oman „Transnational Bribery" available at <http://www.american.edu/TED/bribery.htm> accessed on 16 December 2014.

<sup>138</sup> Emily N. Strauss „Easing Out of the FCPA Facilitation Payment Exception" (2013) 93(1) *Boston University Review* 236.

foreign official, political party or party official".<sup>139</sup> The exception is aimed at allowing firms to make certain payments to foreign public officials to perform routine tasks that fall within the ordinary scope of their duties.<sup>140</sup>

Although many US firms hold the view that the inclusion of such an exception is important and necessary for remaining competitive in foreign markets, the global disapproval of facilitation payments can be easily illustrated by the absence of similar exceptions in many of the recent anti-bribery statutes and treaties worldwide.<sup>141</sup>

Since 1977 the FCPA has applied to all US persons and firms and certain foreign issuers of securities. It has been suggested that the legislature in the 1970's was somewhat reluctant to also include the possibility of prosecuting foreign ministers, members of parliament and other foreign and international public officials involved in the corrupt practices, under the Act.<sup>142</sup> However, in 1998 a number of amendments to the Act extended the scope of application so that the anti-bribery provisions also apply to such foreign persons and firms who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the US.<sup>143</sup>

There have only been a small number of cases in which the US has asserted its territorial jurisdiction over foreign nationals and firms, on the basis of violations of the provisions of the FCPA since the 1998 amendments.<sup>144</sup>

A particularly noteworthy example of a case in which the US has exercised jurisdiction over a foreign person under the auspices of the 1998 amendments to the Act is *US v Christian Sapsizian & Edgar Valverde Acosta*.<sup>145</sup> In this case, the Defendant, Christian Sapsizian who was a French citizen and employee of a French company

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<sup>139</sup> Act of 1977; Sections 78 dd-1(b), 2(b) and 3(b).

<sup>140</sup> Ibid.

<sup>141</sup> Emily N. Strauss „Easing Out of the FCPA Facilitation Payment Exception“ (2013) 93(1) *Boston University Review* 236.

<sup>142</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 337.

<sup>143</sup> „Foreign Corrupt Practices Act“ available at <http://www.justice.gov> accessed on 24 September 2014.

<sup>144</sup> These include the following: *US v Christian Sapsizian & Edgar Valverde Acosta* 1:06-cr-20797-PAS-ALL (S.D F.I 2007); and *U.S. v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. 2008).

<sup>145</sup> *US v Christian Sapsizian & Edgar Valverde Acosta* 1:06-cr-20797-PAS-ALL (S.D F.I 2007).

(Alcatel Inc.) was arrested in the US for violations of the FCPA.<sup>146</sup> Mr. Sapsizian offered to pay a bribe to a senior Costa Rican government official who was a member of the board of the Instituto Costarricense de Electricidad (ICE).<sup>147</sup> He offered to pay this bribe so that the ICE would award Alcatel the mobile telephone contract in Costa Rica.<sup>148</sup> In furtherance of this scheme, Alcatel began to transfer money from its US bank account to an Alcatel consulting firm known as Servicios Notariales in Costa Rica.<sup>149</sup> The consulting firm would then be instructed to make the payments to the Costa Rican government official on behalf of Alcatel Inc.<sup>150</sup> On his arrest, Mr. Sapsizian was charged with, among other things, making payments to a foreign official in contravention of the FCPA.<sup>151</sup> He was subsequently sentenced on September 23, 2008 to 30 months in prison and he agreed to pay \$261,500 to the US as part of his plea deal.<sup>152</sup>

The FCPA empowers two enforcement agencies, the Department of Justice (DOJ) and the Securities Exchange Commission (SEC), to impose severe penalties on companies and individuals that violate the provisions of the Act.<sup>153</sup> The DOJ is responsible for civil and criminal enforcement with regards to domestic concerns and foreign companies and nationals, whereas the SEC is responsible for civil enforcement with regards to issuers of securities.<sup>154</sup>

The FCPA was an important development in the US because it denoted a turning point; its robust provisions and onerous sanctions indicated that corrupt practices would no longer be taken lightly. However, the stringent provisions of the FCPA have led many US firms to view the Act as an impediment to doing business in the global market, especially in countries where what might constitute a bribe in the US, is merely

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<sup>146</sup> Shearman & Sterling „US v Christian Sapsizian & Edgar Valverde Acosta“ available at <http://www.fcpa.shearman.com/?s=matter&mode=form&id=123> accessed on 1 December 2014.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid; Mr. Sapsizian was in contravention of section 78dd-1 of the Foreign Corrupt Practices Act.

<sup>152</sup> Ibid.

<sup>153</sup> John Hatchard *Combating Corruption – Legal Approaches to Supporting Good Governance and Integrity in Africa* (2014) 260.

<sup>154</sup> Act of 1977.

viewed as a routine transaction in the course of business.<sup>155</sup> As mentioned above, this puts US firms at a serious competitive disadvantage in these countries because they are unable to engage in certain activities that are considered routine, without the risk of being punished under the FCPA.<sup>156</sup>

## (ii) Prevention and Combating of Corrupt Activities Act

South Africa has also taken steps to fight corruption. It has done so through the Prevention and Combating of Corrupt Activities Act (PCCA Act).<sup>157</sup>

Section 5 of the PCCA Act creates a number of offences with regards to corrupt activities relating to foreign public officials.<sup>158</sup> It specifies that any person who bribes a foreign public official to act personally or influences another person to act in a manner that is, among other things, designed to achieve an unjustified result or to act in a manner that amounts to any other unauthorized or improper inducement to do or not to do anything, is guilty of an offence.<sup>159</sup>

Section 34 of the Act places a duty on certain persons to report the occurrence of corrupt transactions; any such person who fails to report such corrupt activities is also guilty of an offence.<sup>160</sup> The reports anticipated in section 34 must be made to the Directorate for Priority Crime Investigation (DPCI) which is also known as „the hawks“ and is located within the South African Police Services (SAPS).<sup>161</sup> The DPCI therefore plays a particularly important role in the anti-corruption framework in South Africa.

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<sup>155</sup> Daniel Wagner „Walmart, the FCPA and America’s Ability to Compete“ available at <http://www.huffingtonpost.com/daniel-wagner/walmart-the-fcpa-and-amer-b-1463292.html> accessed on 22 December 2014.

<sup>156</sup> Ibid; This demonstrates the importance of ensuring consistency in anti-corruption laws, internationally.

<sup>157</sup> Act 12 of 2004.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Act 10 of 2012.

The DPCI was established by chapter 6 of the SAPS Act to investigate „priority crimes“ and to replace the Directorate of Special Operations (DSO) which was also known as „the scorpions“ and was located in the National Prosecuting Authority.<sup>162</sup>

The disbandment of the DSO and subsequent replacement with the DPCI was, however, challenged in the Constitutional Court.<sup>163</sup> The Act establishing the DPCI was successfully challenged on the grounds that the legislature violated a number of its obligations, including its obligation to maintain an independent anti-corruption unit.<sup>164</sup>

It was contended that the location of the DPCI within SAPS resulted in its lack of independence and meant that the officials of the DPCI were merely ordinary police officers.<sup>165</sup> The DPCI therefore did not enjoy any special job security.<sup>166</sup> Furthermore, there were concerns that the DPCI was not sufficiently independent from political pressure and interference.<sup>167</sup>

The Constitutional Court held that the offending legislative provisions establishing the DPCI were unconstitutional to the extent that they did not secure adequate independence and thereafter compelled parliament to reconsider and amend the legislation establishing the DPCI.<sup>168</sup> In purported compliance with this decision, parliament enacted the SAPS Amendment Act on 14 September 2012.<sup>169</sup>

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<sup>162</sup> Ibid.

<sup>163</sup> *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

<sup>164</sup> Ibid.

<sup>165</sup> Pierre De Vos „Glenister: A monumental judgment in defence of the poor“ available at <http://www.constitutionallyspeaking.co.za> accessed on 24 September 2014.

<sup>166</sup> This apparently became visibly problematic when the Commissioner of Police at the time was found to have acted unlawfully with regards to a lease entered into for new police headquarters; if the DPCI were to investigate any existence of corruption in this regard, the Commissioner could simply fire those involved in the investigation for reasons other than the investigation.

<sup>167</sup> *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

<sup>168</sup> Ibid.

<sup>169</sup> The Amendment Act was however further challenged in *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *In Re: Glenister v President of South Africa and Others* (23874/2012, 23933/2012) [2013] ZAWCHC 189; [2014] 1 All SA 671 (WCC); 2014 (4) BCLR 481 (WCC) on the grounds that it did not remedy the constitutional defects identified by the Constitutional Court in *Glenister 2*. The Constitutional Court held therein that sections 16, 17A, 17CA, 17D, 17DA and 17K (4) - (9) contained in Chapter 6A of the South African Police Service Amendment Act 10 of 2012 were inconsistent with the Constitution and invalid to the extent that they failed to secure an adequate degree of independence for the DPCI.

The importance of maintaining an independent body to combat corruption and organized crime within South Africa was therefore highlighted in this case as it was pointed out that the state had a Constitutional and an international obligation to do so.

#### **IV. CONCLUSION**

Although the WTO has essentially refrained from participating in the anti-corruption movement, it is clear that various other organizations across the globe have acknowledged the importance of working together to identify ways to fight corruption in an effective way, particularly in the realm of international business. A particularly crucial development that has been highlighted on a national and international level, in legal instruments and case law is the importance of maintaining and strengthening independent bodies in every jurisdiction to prevent and combat corruption through the implementation of policies and through law enforcement. While not all the international initiatives have resulted in binding obligations on member states, such efforts have, nevertheless, been necessary to strengthen co-operation with national governments - which is necessary to effectively combat and control corruption on a global scale.

## **CHAPTER 4: THE WTO AND CORRUPTION**

### **I. INTRODUCTION**

As previously mentioned, bribery and corruption became international issues in the 1970's; following which numerous international organizations adopted conventions and other instruments designed to control bribery and corruption in international business, to the exclusion of the WTO.<sup>170</sup>

Although the WTO has taken no action explicitly aimed at reducing corruption and other illicit practices, there are a number of existing provisions in the WTO rules that, although unintended, can be used to help members to counter corruption.<sup>171</sup> This is because corruption is widely recognized by commercial actors within the members' territories as harmful to business opportunities.<sup>172</sup> Most of these provisions do not target corruption specifically, but do so indirectly. These rules, at the very least, have the effect of reducing opportunities for corruption.<sup>173</sup>

Bribery and Corruption loomed large all around the world during the period in which the WTO was formed.<sup>174</sup> This tends to raise the question as to why these issues were not given a prominent place on the WTO agenda given the impact of corruption on international trade. This also raises the question as to whether, if at all, these issues should have been given such a place on the agenda. The reluctance by the WTO to address or condemn the issue of corruption has caused some controversy and is therefore worth exploring and investigating further. While some scholars are of the view that the WTO should include corruption control as part of its legal framework and thus adopt a more hands-on approach in the anti-corruption movement; others are of the view that dealing directly with the problem of corruption is not the business of an

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<sup>170</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 275.

<sup>171</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 8.

<sup>172</sup> Ibid.

<sup>173</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 9.

<sup>174</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 282.

organization such as the WTO.<sup>175</sup> These views will be discussed in more detail in this chapter, as well as some of the WTO rules and practices that have been considered as having the potential to act as corruption counterweights.

## II. THE WTO AND ITS FAILURE TO INCLUDE CORRUPTION AND BRIBERY ON ITS AGENDA

In order to understand the WTO's reluctance to include corruption and bribery on its agenda, it is necessary to, firstly, have an understanding of the purpose and function of the organization and thereafter explore the possible reasons for its failure to do so.

The WTO deals with rules of trade between nations. These rules are contained in the WTO agreements and they are essentially contracts binding governments to maintain trade policies and practices in accordance with the agreed limits.<sup>176</sup> Everything the WTO has done since its formation is the result of negotiations, including these WTO agreements; they have been negotiated and signed by the WTO members.<sup>177</sup>

It has been argued that the complexities of organizing the WTO as well as the heavy workload at the time when it was formed could have complicated any effort to address corruption and bribery.<sup>178</sup>

A significant problem that has also perhaps played a role in the WTO's failure to include corruption and bribery on its agenda is the absence of a true demandeur, that is, an influential private or public actor who is willing and able to initiate a campaign for new international rules, within the organization.<sup>179</sup> It is apparent that many of the actors involved in the debate over corruption and bribery have preferred to take action in different fora and as such, action in the WTO has not been a priority to these

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<sup>175</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 41; Padideh Ala'1 „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 278.

<sup>176</sup> World Trade Organization „Understanding the WTO“ available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm) accessed on 1 October 2014.

<sup>177</sup> Ibid at 9.

<sup>178</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 281.

<sup>179</sup> Ibid at 282.

actors.<sup>180</sup> In contrast to this, the OECD Anti-Bribery Convention and the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (which like corruption and bribery falls outside the traditional subject matter of international trade) were both backed by powerful and aggressive demandeurs.<sup>181</sup> This seems to confirm the view that the success or failure of international rule-making depends to a large extent on the effort of the public and private actors that support the proposed action.<sup>182</sup>

In addition, it is evident that where the policy-makers themselves are corrupt, they are likely to oppose international efforts to address the issue of corruption.<sup>183</sup> An illustration of this is President Suharto of Indonesia, whose government was immensely corrupt and who was later involved in criminal proceedings on charges of corruption.<sup>184</sup> Unsurprisingly, President Suharto was one of the leading voices against WTO action on corruption, during the Singapore Ministerial Conference.<sup>185</sup>

Furthermore, it has been posited that the longstanding tradition of making reciprocal concessions under the GATT and thereafter within the WTO has rendered the organization unsatisfactory as a rule-making body.<sup>186</sup> This is because it is stuck in the quid pro quo thinking that has traditionally dominated tariff negotiations within the organization, even when asked to address important issues such as corruption and bribery, on which new international rules could potentially produce significant mutual benefits.<sup>187</sup> This quid pro quo mentality of WTO members that dominates the negotiations makes it especially difficult to make progress on important issues because everyone wonders how they will be made to pay or what they will get in return.<sup>188</sup>

Moreover, it has been suggested that because the WTO legal system has been held up as such a success, it has raised the bar for international agreements within the

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<sup>180</sup> Ibid at 282.

<sup>181</sup> Ibid at 282.

<sup>182</sup> Ibid at 281.

<sup>183</sup> Daniel L. M. Kennedy & James D. Southwick *The Political Economy of International Trade Law: Essays in honor of Robert* (2002) 189.

<sup>184</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 284.

<sup>185</sup> Ibid at 284.

<sup>186</sup> Ibid at 293.

<sup>187</sup> Ibid at 293.

<sup>188</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 16.

organization to a level that may be counterproductive.<sup>189</sup> This is because it is widely accepted by the members that WTO agreements should be made legally binding and subject to the WTO dispute settlement system as well the remedies associated with this system, that is, compensation and retaliation.<sup>190</sup> As a result, the organizations rule-making procedures offer few, if any, soft law alternatives similar to the recommendations that lead to the creation of the OECD Anti-Bribery Convention.<sup>191</sup>

The WTO members could benefit from adopting a soft law approach to addressing corruption in the context of international trade; for instance, by making a Ministerial declaration against corruption in international trade transactions similar to the Declaration against Bribery and Corruption in International Commercial Transactions which was adopted by the UN in 1997.<sup>192</sup> Such a declaration would demonstrate that the organization will not tolerate corruption in international trade and would have the effect of stressing the importance, to each member, of playing an active role in the anti-corruption movement.

Alternatively the WTO could begin by providing for recommended practices which member states would be encouraged to adopt, as well as guidelines which members could incorporate into their trade policies in an attempt to control corruption in international trade, just as the OECD has done.

Another likely factor contributing to the WTO's disinclination to engage in the anti-corruption movement is the mistaken view that the campaign to eliminate corruption is a "North-South" issue, that is, it is a program imposed by industrialized states governments onto developing states governments.<sup>193</sup> The President of Gabon, Omar Bongo, has even gone so far as to say that „corruption exists only in the minds and cultures of western developed nations“ and alleges that „the word corruption does

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<sup>189</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 293

<sup>190</sup> *Ibid* at 293.

<sup>191</sup> *Ibid* at 293.

<sup>192</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 41.

<sup>193</sup> *Ibid* at 6.

not [even] exist in any language native to Gabon".<sup>194</sup> Many of the legal recommendations for addressing corruption imitate the measures that already exist in the legislation of the industrialized states; the addition of these provisions to the WTO rules may be perceived as another instrument of economic dominance by the developed states over the developing states.<sup>195</sup>

Moreover, questions have been increasingly raised about the true motives and driving forces behind these anti-corruption policies. This increased scepticism has led some to suggest that the international concern with corruption is not attributable to any substantive increase in corrupt practices but rather to the self-interest of Western states because of their interest in gaining greater market penetration.<sup>196</sup>

Apart from the relationship between corruption and international trade, an important reason why the WTO can be seen as having such an important role to play in the anti-corruption movement is its wide membership and the fact that it is one of the few international organizations that have the ability to enforce its obligations.<sup>197</sup>

There have been suggestions that the WTO should introduce new disciplines pursuant to the international anti-corruption movement.<sup>198</sup> Some of these suggestions include making rules that require members to criminalize transnational bribery among the members themselves, as well as assisting other members in the prosecution of bribe payers and bribe takers.<sup>199</sup> However, there exists a legitimate concern that the addition of new issues, such as corruption, puts the clarity of the WTO's mission and goals at risk and also risks overloading its agenda.<sup>200</sup>

In addition to this, it has been argued that the WTO is not an institution inclined to impose a particular moral viewpoint on its members and the fight against corruption

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<sup>194</sup> Ronald Oman „Transnational Bribery“ available at <http://www.american.edu/TED/bribery.htm> accessed on 16 December 2014.

<sup>195</sup> Ibid at 6.

<sup>196</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 11.

<sup>197</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 16.

<sup>198</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 17.

<sup>199</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 17.

<sup>200</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 9.

is considered a moral issue among several of its members, hence its failure to explicitly address the issue.<sup>201</sup>

Moreover, it has been suggested that any existing evidence that suggests that corruption has a negative impact on international trade is not sufficient to warrant a fully-fledged attempt by the WTO to combat corruption through the development of rules that aim to address corruption directly.<sup>202</sup>

### **III. THE ROLE OF GOOD GOVERNANCE NORMS AND EXISTING WTO RULES IN THE FIGHT AGAINST CORRUPTION**

In recent years, policymakers and scholars have come to the realization that corruption is an outcome of inadequate governance.<sup>203</sup> Various governmental policies aimed at fighting corruption have been included as part of the “good governance” criteria put in place by the World Bank.<sup>204</sup> There is no single conception of good governance and therefore no one right answer to achieving it.

Good governance is sometimes used to describe the opposite of corrupt governance.<sup>205</sup> It has been suggested that good governance in a country generally means that there is transparency and accountability in the decision-making and implementation processes, rule of law and that corruption is under control.<sup>206</sup> Good governance policies such as accountability, fair competition and transparency are good for business in general and specifically for trade.<sup>207</sup>

As previously stated, it is suggested that although not directly, the WTO obligates its members to act in ways that reflect the norms of good governance and that

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<sup>201</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 5.

<sup>202</sup> Ibid at 42.

<sup>203</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

<sup>204</sup> Padideh Ala’i „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 259.

<sup>205</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 3.

<sup>206</sup> Ibid at 3.

<sup>207</sup> Ibid at 1.

these norms therefore spill over into the polity of anti-corruption as a whole.<sup>208</sup> Some of the specific good governance norms that have been identified as being fostered by WTO rules include transparency, even-handedness (fair competition) and due process.<sup>209</sup> The OECD lists the WTO disciplines that have potential anti-corruption effects in four categories. These categories represent the underlying principles of the trading system namely, non discrimination, transparency, predictability and limitations to arbitrary action.<sup>210</sup>

Under the WTO rules policymakers are required to act in a fair and predictable manner in order to facilitate transparent trade-related policymaking and to provide due process in such policy-making by allowing individuals to comment on and challenge trade-related regulations before they are adopted.<sup>211</sup> These requirements and obligations have been redefined as anti-corruption counterweights.<sup>212</sup>

One of the purposes of the WTO's multilateral trading system is to facilitate the free flow of trade because it is important for economic development and well being. This entails removing obstacles to trade and ensuring that individuals, companies and governments know what the trade rules are around the world and giving them confidence that there will be no sudden changes of policy, thus ensuring transparency and predictability – both important aspects of good governance.<sup>213</sup> In this sense, the WTO members indirectly diffuse corruption and although it is not a traditional WTO issue, it is an international social evil and a cause for concern even in the realm of international trade. Accordingly, the WTO plays a very important role within the larger framework of the ongoing global anti-corruption movement.<sup>214</sup>

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<sup>208</sup> Abouharb M. Rodwan „The paradox of the WTO: Development, Good governance and Human rights“ available at <http://www.rodabouharb.com> accessed on 18 July 2014.

<sup>209</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

<sup>210</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 16.

<sup>211</sup> Cyrille Fijnaut & Leo Huberts *Corruption, Integrity and Law Enforcement* (2002) 318.

<sup>212</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

<sup>213</sup> World Trade Organization „Understanding the WTO“ available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm) accessed on 1 October 2014.

<sup>214</sup> Padideh Ala'1 „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 259.

A number of rules in the various WTO agreements, in which some of the norms reflecting good governance are promoted and opportunities for corruption are thus reduced, will now be discussed. The agreements that will be the primary focus of the discussion are the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Government Procurement (GPA), the Agreement on Import Licensing (ILA), the Agreement on Pre-shipment Inspection (PSI) and the Trade Policy Review Mechanism (TPRM).

Moreover, the Agreement on Sanitary and Phytosanitary measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on the Implementation of Article VI of GATT (Anti-dumping Agreement) will also be briefly discussed.

#### **(i) General Agreement on Tariffs and Trade**

As previously mentioned, one important element of good governance is transparency, which is also one of the pillars of the multilateral trading system.<sup>215</sup> Transparency in any government is widely viewed as a necessary condition to effectively control corruption.<sup>216</sup> Increasing transparency and reducing arbitrariness in trading nations is one of the *raison d'être* for the WTO.<sup>217</sup> The WTO defines transparency as the degree to which trade policies and practices, and the process by which they are established are open and predictable.<sup>218</sup>

The provisions of Article X of the GATT embody the fundamental principle of transparency. In furtherance of the fundamental principle of transparency, Article X: 1 requires that all trade-related laws, regulations, judicial decisions and administrative

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<sup>215</sup> Ibid at 259.

<sup>216</sup> Peter Langseth UNODCCP (Project CICP-17) *Empowering the Victims of Corruption through Social Control Mechanisms* (2011) 10.

<sup>217</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 9.

<sup>218</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

rulings should be published promptly in order to enable members and traders to become acquainted with them.<sup>219</sup> Article X: 2 goes on to state that none of these measures shall come into force until they have been so published.<sup>220</sup> These provisions reflect the very essence of transparency, ensuring clear disclosures of vital information to traders and members in order to promote participation and also ensuring accountability.

Furthermore, the provisions of Article X of the GATT also embody the fundamental principle of due process. With regards to the principle of due process, governments are required to accord due process rights to market actors and this is made effective through Article X:3 (b).<sup>221</sup> In terms of Article X:3 (b), contracting parties are required to maintain judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review and correction of administrative actions relating to customs matters.<sup>222</sup> This allows traders to lodge complaints and appeals when necessary, perhaps including in instances where there are allegations of the existence of corrupt practices.<sup>223</sup>

The WTO, therefore, contributes to the anti-corruption movement by providing a forum for members where the problems associated with a lack of transparency and due process in administration or implementation of measures (such as rules, judicial decisions or administrative rulings) are acknowledged and effectively addressed.<sup>224</sup> The WTO website confirms this view when it states that the WTO commitments encourage good government.<sup>225</sup>

The jurisprudence of Article X of the GATT as developed by the WTO dispute settlement body (DSB) is relatively wide. There have been several adopted panel decisions involving Article X of the GATT to date. A wide range of countries at

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<sup>219</sup> General Agreement on Tariffs and Trade, Art. X: 1.

<sup>220</sup> Ibid, Art. X: 2.

<sup>221</sup> Ibid, Art. X:3 (b).

<sup>222</sup> Ibid, Art. X:3 (b).

<sup>223</sup> Ibid, Art. X:3 (b); The provisions of Article X were also made applicable to the Agreement on Safeguards, the Agreement on Rules of Origin and the Agreement on the implementation of Article VII of GATT 1994, with regards to trade in goods.

<sup>224</sup> Padideh Ala'1 „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 260.

<sup>225</sup> „10 benefits of the WTO trading system“ available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b00_e.htm) accessed on 4 November 2014.

different levels of economic development have invoked Article X in the DSB, including Argentina, India, Brazil and the United States.<sup>226</sup> It has been suggested that the diversity seems to demonstrate the growing consensus among members, of the importance of transparency in the administration of trade measures.<sup>227</sup> It has also been suggested that Article X of the GATT would be a good starting point for the WTO to address corruption but it would require a broadened scope and greater adherence by members would have to be secured.<sup>228</sup>

Another important element of good governance is fair competition or even-handedness, which is also one of the pillars of the multilateral trading system. This principle of even-handedness is reflected in the non-discrimination rules provided for in Articles I and III of the GATT. The WTO is built on the ideal of non-discrimination and corruption is clearly in violation of this principle because of its tendency to deepen inequality.<sup>229</sup>

Articles I and III of the GATT, namely the most-favoured-nation provision and the national treatment provision, together constitute the non-discrimination rules of international trade in the WTO.<sup>230</sup> Article I prevents members from discriminating between members by requiring them to accord the same advantages, favours, privileges and immunities (with regards to customs duties and charges) to the like products originating in or destined for the territories of all of the other members.<sup>231</sup> This can prevent corruption at the border by preventing customs officials from treating some like products more favourably than others in exchange for the payment of a bribe.

Furthermore, Article III prevents members from discriminating between domestic and foreign like products (with regards to internal taxes and charges) and from

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<sup>226</sup> Padideh Ala'1 „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 268.

<sup>227</sup> Ibid at 269. There have been further WTO cases since the publication of this article, in which the provisions of Article X have been invoked, including Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (DS371); EC – Tariff treatment of Certain Information Technology Products (DS375, 376, 377); US – Certain Country of Origin Labelling Requirements (DS384, 386) and China – Measures Related to the Exportation of Various Raw Materials (DS395, 398).

<sup>228</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 17.

<sup>229</sup> Ibid at 9.

<sup>230</sup> General Agreement on Tariffs and Trade, Art. I & III.

<sup>231</sup> Ibid, Art I.

according treatment less favourable to foreign like products than that which is accorded to the domestic like products; that is to say that all WTO members are to trade on a level playing field.<sup>232</sup>

The importance of ensuring fair competition has been expressed by the Appellate Body in some cases brought before the dispute settlement body. For instance, in *Japan - Taxes on Alcoholic Beverages*, the Appellate Body stated that “Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products”.<sup>233</sup> The Appellate Body reinforced this stance in *Korea - Beef*, in which it further stated that the imposition of a drastic reduction of commercial opportunity to reach, and hence, generate sales to consumers and the resulting establishment of competitive conditions less favourable for foreign products, in comparison to domestic like products, is a violation of Article III: 4.<sup>234</sup> These provisions clearly operate to secure an environment that is in direct contrast to that which is fostered by corruption, that is, one that is characterized by inequality.

## **(ii) General Agreement on Trade in Services**

The principle of transparency is also promoted in Article III of the GATS which requires members to publish promptly, all relevant measures of general application which pertain to or affect the operation of the GATS.<sup>235</sup> This Article is a replication of the provisions provided for in Article X: 1 of the GATT, made applicable to trade in services. Furthermore, Article III requires members to inform the WTO Council on Trade in Services about the introduction of any new laws, regulations or administrative guidelines, or any changes to existing laws, regulations or administrative guidelines that affect trade in services.<sup>236</sup> It is suggested that this oversight by the Council and also the

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<sup>232</sup> Ibid, Art III.

<sup>233</sup> *Japan - Taxes on Alcoholic Beverages* (DS8, 10, 11).

<sup>234</sup> *Korea - Various Measures on Beef* (DS161, 169).

<sup>235</sup> General Agreement on Trade in Services, Art. III.

<sup>236</sup> Ibid, Art. III: 3.

subjection to the dispute settlement mechanism reinforces the preventative potential of such rules, with enforcement powers.<sup>237</sup>

Moreover, administrative transparency is promoted in Article VI:2 (a) of the GATS which requires all members to maintain or institute judicial, arbitral or administrative procedures which provide for the prompt review of and appropriate remedies for administrative decisions affecting trade in services.<sup>238</sup> These transparency provisions can place service providers in a position to resist demands for bribes.

In addition to this, like the GATT, this agreement promotes fair competition by its inclusion of non-discrimination obligations in which it provides for most-favoured-nation treatment in Article II and national treatment in Article XVII.<sup>239</sup> However, the principles under this agreement are handled slightly differently from the GATT.

Article II:1 of the GATS prevents members from discriminating between members by requiring members to accord immediately and unconditionally, to the services and service providers of all members, treatment that is no less favourable than that which it accords to the like services and service providers of any other member.<sup>240</sup> However, unlike the GATT, the GATS members are allowed to maintain measures inconsistent with the most-favoured-nation treatment, thereby effectively discriminating between members with regards to services and service providers, provided that such measures are listed in the Annex on Article II exemptions, as provided for in Article II:2.<sup>241</sup> Members were entitled to list these measures in the Annex on Article II Exemptions until the date of entry into force of the Marrakesh Agreement.<sup>242</sup>

Furthermore, Article XVII requires members to accord to services and service providers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service providers.<sup>243</sup> However, unlike under the GATT, the national treatment

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<sup>237</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 29.

<sup>238</sup> General Agreement on Trade in Services, Art. VI.

<sup>239</sup> General Agreement on Trade in Services, Art. II & XVII.

<sup>240</sup> *Ibid*, Art II.

<sup>241</sup> *Ibid*, Art II.

<sup>242</sup> Peter Van Den Bossche *Law and Policy of the WTO* (2005) 383.

<sup>243</sup> General Agreement on Trade in Services, Article XVII.

obligations under the GATS apply only to the extent that the members have committed themselves to grant such treatment, in respect of specific sectors that they have specified in their Schedule's of Concessions.<sup>244</sup> These commitments are often subject to conditions and qualifications which are also provided for in the Schedules.<sup>245</sup>

### (iii) Agreement on Trade Related Aspects of Intellectual Property Rights

The principle of transparency is also promoted in TRIPS as it contains a blanket transparency provision in Article 63, which among other things requires the publication of all laws, regulations, judicial decisions and administrative rulings in order to enable governments and other right holders to become acquainted with them.<sup>246</sup> This Article also allows members who have reason to believe that their rights under the agreement have been affected, the opportunity to request access to or information on specific judicial decisions and administrative rulings.<sup>247</sup> It has been argued that the culture fostered by TRIPS in requiring the provision of such information could lead to less success in demands for bribes by officials.<sup>248</sup>

Furthermore, like the GATT and GATS, this agreement promotes fair competition by its inclusion of non-discrimination obligations. Article 3 and 4 of the agreement provide for most-favoured-nation treatment and national treatment. Under this agreement the principles are also handled slightly differently from the GATT and GATS.<sup>249</sup> The non-discrimination provisions under TRIPS relate to fair treatment of the nationals of member states, rather than goods or services.<sup>250</sup>

With regards to national treatment, Article 3 requires members to accord to the nationals of other members, treatment that is no less favourable than that which it

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<sup>244</sup> Ibid, Art XVII; Schedule's of Concessions are those documents in which the members' specific commitments are listed and can be accessed on the WTO website.

<sup>245</sup> Peter Van Den Bossche *Law and Policy of the WTO* (2005) 418.

<sup>246</sup> Agreement on Trade Related Aspects of Intellectual Property, Art 63.1.

<sup>247</sup> Ibid, Art 63.3.

<sup>248</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 29.

<sup>249</sup> Agreement on Trade Related Aspects of Intellectual Property, Art 3 & 4.

<sup>250</sup> The term „nationals“ refers to persons, natural or legal, who are domiciled or have a real and effective industrial or commercial establishment in that customs territory.

accords to its own nationals with regard to the protection of intellectual property.<sup>251</sup> However, this obligation is made subject to the exceptions provided for in the Paris Convention (1967), the Berne Convention (1971) and the Rome Convention.<sup>252</sup>

Article 4 which provides for most-favoured-nation treatment places an obligation on members to the effect that any advantage, favour, privilege and immunity (with regard to the protection of intellectual property rights) granted to the nationals of any country must be immediately and unconditionally granted to the nationals of all other members.<sup>253</sup> There are however certain exceptions to this obligation, which are enumerated in Article 4.<sup>254</sup>

#### **(iv) Agreement on Government Procurement**

This agreement applies to the procurement of goods, services or a combination of the two, by public authorities.<sup>255</sup> The WTO has pointed out that this particular agreement promotes good governance in the participating member economies.<sup>256</sup> This is evident where the agreement commits members to certain core disciplines regarding transparency and fairness in the public procurement sector. It is the only agreement that contains provisions directly aimed at fighting corruption to a limited extent. The aim of the agreement is to open up, as much as possible, government procurement markets to international competition and to help eradicate corruption in the public sector.<sup>257</sup> The preamble to the agreement recognizes the “importance of transparent measures regarding government procurement, carrying out procurements in a transparent and impartial manner and avoiding conflicts of interest and corrupt practices, in accordance

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<sup>251</sup> Agreement on Trade Related Aspects of Intellectual Property, Art 3.

<sup>252</sup> Ibid, Art 3.

<sup>253</sup> Ibid, Art 4.

<sup>254</sup> Ibid, Art 4.

<sup>255</sup> „Revised WTO Agreement on Government Procurement enters into force“ available at <http://www.wto.org>, accessed on 8 August 2014.

<sup>256</sup> Ibid.

<sup>257</sup> „Revised WTO agreement to come into force on 6 April 2014“ available at <http://www.wto.org>, accessed on 13 August 2014.

with applicable international instruments, such as the United Nations Convention against Corruption”.<sup>258</sup>

It is widely accepted that procurement processes have the propensity to attract corrupt practices. The reason for this is that the nature of procurement is such that a small number of officials have substantial discretion over the granting of contracts that are worth large sums of money.<sup>259</sup> Therefore, it is the combination of these factors - few officials, broad discretion, complex contracts and large sums of money - that fosters an environment for corrupt practices.<sup>260</sup>

It has been suggested that the temptation for the officials to take a portion of these large sums of money for themselves in such instances is colossal; however, the chances of detecting these corrupt practices are low.<sup>261</sup> Thus, corruption tends to manifest where an official’s authority is combined with an environment of opaqueness and unaccountability such as that of the procurement process.<sup>262</sup> In response to the inclination of government procurement processes to attract corruption, there have been several initiatives to reduce corruption in this sector; the most recognizable instrument among WTO members is the GPA.<sup>263</sup>

A particularly notable provision of the GPA is Article IV: 4 of the agreement which places an obligation on procurement entities to conduct procurement in a transparent and impartial manner that prevents corrupt practices.<sup>264</sup> This provision requires some positive action, on the part of these entities, to prevent corruption and not mere avoidance.<sup>265</sup> This is evidently a step in the right direction for the WTO. This is because it appears to have finally taken a stance in the anti-corruption movement, by

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<sup>258</sup> Preamble GPA.

<sup>259</sup> Krista Nadakaukaren Schefer „Will the WTO finally tackle corruption in Public Purchasing? The revised agreement on Government Procurement“ available at <http://www.asil.org>, accessed on 8 August 2014.

<sup>260</sup> Ibid.

<sup>261</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 10.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup> Agreement on Government Procurement, Art. IV: 4.

<sup>265</sup> Krista Nadakaukaren Schefer „Will the WTO finally tackle corruption in Public Purchasing? The revised agreement on Government Procurement“ available at <http://www.asil.org> accessed on 8 August 2014.

condemning corruption within the realm of public purchasing. Furthermore, it has been suggested that the duty of impartiality imposed by this provision is general in application, thus parties are not to treat any supplier preferentially.<sup>266</sup> Where corruption is detected in a procurement process, the provisions of the dispute settlement mechanism may be invoked on the basis of a violation of the agreement.<sup>267</sup> The agreement has therefore made it clear that corruption in government procurement contracts is at odds with the rules of the agreement.<sup>268</sup>

Nevertheless, the GPA is a plurilateral agreement. This is quite a setback as it means that only a limited number of members are bound by the GPA.<sup>269</sup> The Marrakesh Agreement draws a distinction between the multilateral agreements of the WTO and the plurilateral agreements.<sup>270</sup> The multilateral agreements are accepted as a single undertaking, in that the agreements in their entirety are binding on all members; whereas plurilateral agreements are not binding on all members as they only create rights and obligations for those members who have accepted them.<sup>271</sup>

Several plurilateral agreements have been negotiated and concluded among various WTO members; perhaps the same avenue could be considered, in an effort to control corruption in international trade, by those members with a desire to take a stand against trade-related corruption.

#### (v) **Agreement on Import Licensing**

The Agreement on Import Licensing has defined import licensing as “administrative procedures used for the operation of import licensing regimes requiring

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<sup>266</sup> Krista Nadakaukaren Schefer „Will the WTO finally tackle corruption in Public Purchasing? The revised agreement on Government Procurement“ available at <http://www.asil.org> accessed on 8 August 2014.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> The member countries that are bound by the Agreement on Government Procurement are Armenia, Canada, the European Union (with regards to its 28 member states), Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Chinese Taipei and the United States. At present there are ten member states in the process of acceding to the GPA, namely, China, New Zealand, Montenegro, Albania, Georgia, Jordan, Kyrgyz Republic, Moldova, Oman and Ukraine.

<sup>270</sup> Marrakesh Agreement.

<sup>271</sup> Ibid.

the submission of an application or other document (other than that required for customs purposes) to the relevant administrative body, as a prior condition for importation into the customs territory of the importing member”.<sup>272</sup>

It is suggested that such licensing regimes have the effect of fostering corruption, for instance, where licenses are in limited supply; economic actors are more inclined to make efforts, including illegal efforts such as bribing the relevant officials, to receive them.<sup>273</sup> The provisions in this agreement are indirectly aimed at reducing corruption in the form of bribery of foreign officials.

The provisions seemingly increase transparency and predictability; for instance, in Article 3.3 of the agreement, members are required to publish sufficient information for traders to know the basis on which licenses are granted and/or allocated.<sup>274</sup> Furthermore, according to Article 3.4 of the agreement, where a member grants a possibility for persons, firms or institutions to request exceptions or derogations from the licensing requirements, the member is required to publish such information.<sup>275</sup> This ensures that where there is a suspicion that certain persons, firms or institutions have received a license where no exceptions or derogations from the rules have been published and have therefore received such licenses as a result of bribery or other similarly illicit practices, there is an opportunity for other members to make a violation claim with regards to these transparency provisions within the WTO dispute settlement mechanism.<sup>276</sup>

#### **(vi) Agreement on Pre-shipment Inspection**

The Agreement on Pre-shipment Inspection states that pre-shipment activities are those that relate to the verification of the quality, quantity, price and/or customs

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<sup>272</sup> Agreement on Import Licensing, Art. 1.1.

<sup>273</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 16.

<sup>274</sup> Agreement on Import Licensing, Art. 3.3.

<sup>275</sup> Ibid, Art. 3.4.

<sup>276</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 17.

classification of goods to be exported to the territory of the user member.<sup>277</sup> The inspection takes place in the territory of the exporting country. It has been suggested that the pre-shipment inspection procedures can also be used in a way that fosters petty bribery, for instance, because the inspection officials, to a large extent, have complete authority over the duration and the outcome of the inspections.<sup>278</sup> As a result, bribes can be offered and demanded in order to speed up the inspection or to alter the findings of the quality, quantity, price and classification of the shipment.<sup>279</sup>

The notable corruption counterweight that can be found in this agreement is transparency. The preamble to the agreement places emphasis on the desirability to provide for transparency of the operation of the pre-shipment entities, laws and regulations.<sup>280</sup> In addition to this, Articles 2.8 and 3.2 of the agreement require members to publish their laws and regulations relating to pre-shipment activities.<sup>281</sup> Furthermore, Article 2.6 of the agreement provides that any additional procedural requirements or changes to the existing procedures will not apply to a shipment unless the exporter was informed of the changes at the time when the inspection date was being arranged.<sup>282</sup> Moreover, another provision in the agreement with the potential to reduce corruption is Article 4, which provides for the right to independent review of the inspection results.<sup>283</sup> The object of such reviews is to establish whether in the course of the inspection in dispute, the parties complied with the provisions of the agreement.<sup>284</sup> The review mechanism provided for in the agreement clearly aims to promote a culture of responsibility and accountability in the course of pre-shipment inspections.

However, despite the existence of these provisions, a World Bank research group conducted a study on the impact of pre-shipment inspections on corruption and found that there was less customs fraud in one of the countries that was studied, but no

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<sup>277</sup> Agreement on Pre-shipment Inspections, Art. 1.3.

<sup>278</sup> Krista Nadakaukaren Schefer „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 18.

<sup>279</sup> *Ibid* at 18.

<sup>280</sup> Agreement on Pre-shipment Inspections

<sup>281</sup> *Ibid*, Art. 2.8 & 3.2.

<sup>282</sup> *Ibid*, Art. 2.6.

<sup>283</sup> *Ibid*, Art. 4.

<sup>284</sup> *Ibid*, Art. 4.

significant change in another country that was studied.<sup>285</sup> Therefore, there is still some uncertainty as to whether the provisions of the agreement are in fact capable of reducing corruption.<sup>286</sup>

### (vii) The Trade Policy Review Mechanism

The Trade policy Review Mechanism (TPRM) stipulates that the purpose of the mechanism is to contribute to improved adherence by all members to the rules, disciplines and commitments that were made under the multilateral and the plurilateral trade agreements, by achieving greater transparency in the trade policies and practices of members.<sup>287</sup> The TPRM further expresses that the members recognize the value of “domestic transparency” as it states:

“Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems.”

As previously mentioned, transparency plays a pivotal role in combating corruption. It has been suggested that for the battle against corruption to succeed, there is a need to create a culture that respects transparency because it is the culture of secrecy and lack of information or access to information that allows corruption to take hold and increase.<sup>288</sup>

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<sup>285</sup> Jose Anson, Marcelo Olarreaga & Olivier Cadot World Bank Research Working Paper 3156 *Tariff Evasion and Customs Corruption: Does Pre-Shipment Inspection Help?* available at <http://ssrn.com> as referenced by Krista Nadakaukaren Schefer in „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 20.

<sup>286</sup> Ibid.

<sup>287</sup> Trade Policy Review Mechanism, Part A: (i).

<sup>288</sup> Padideh Ala'1 „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 278.

The WTO allows members to acknowledge and implement certain core values that are directly opposed to the culture of secrecy.<sup>289</sup> The TPRM is the main transparency mechanism of the WTO and has been described as the “looking glass” through which members examine each other’s trade policies and practices.<sup>290</sup>

Part A of the TPRM stipulates that “the function of the review mechanism is to examine the impact of a member’s trade policies and practices on the multilateral trading system”.<sup>291</sup> Since corruption and other illicit practices are de facto barriers to trade in many countries and therefore have an impact on the multilateral trading system, it has been suggested that the reviewers ought to report on corrupt practices.<sup>292</sup> Where the policies and practices of the members appear to distort trade during these reviews, the members can be challenged in a trade dispute.<sup>293</sup> This creates the impression that even corrupt practices that have the effect of distorting trade are included within the scope of practices that can be challenged in a trade dispute.

However, it is apparent that in the past, the reviewers have not considered themselves at liberty to refer to the subject openly as there have only been “subtle, well-disguised references to corruption” in some of the trade policy review reports.<sup>294</sup> Nevertheless, now that various other international organizations are speaking openly about corruption, it is important for the reviewers to feel more confident in raising the issue as well.<sup>295</sup> This is because the TPRM is undeniably a potentially useful tool for the members to investigate and identify any corrupt trade practices taking place in the territories of their fellow members. A number of other international organizations have also made use of similar peer review mechanisms, for instance, the OECD peer review mechanism which has been used by the OECD member states to monitor and ensure compliance with the OECD Anti-Bribery Convention. The WTO could adopt a similar approach under the TPRM and publish any findings of corruption in the course of a

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<sup>289</sup> Ibid at 278.

<sup>290</sup> Sam Laird „The WTO’s Trade Policy Review Mechanism – From Through the Looking Glass” (1999) 22 *The World Economy* 741.

<sup>291</sup> Trade Policy Review Mechanism, Part A: (i).

<sup>292</sup> Donald B. Keesing *Improving Trade Policy Review in the World Trade Organization* (1998) 38.

<sup>293</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

<sup>294</sup> Donald B. Keesing *Improving Trade Policy Review in the World Trade Organization* (1998) 38.

<sup>295</sup> Ibid at 38.

review, in an attempt to put pressure on members to take the necessary steps to combat trade-related corruption in their territories.

### **(viii) Other WTO Agreements**

Essentially all WTO agreements contain transparency requirements, requiring members to publish and notify other members of all measures taken under the various agreements. In addition to those discussed above, there are also transparency requirements provided for in the Agreement on Sanitary and Phytosanitary measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on the Implementation of Article VI of GATT (Anti-dumping Agreement).

The transparency provisions in the SPS Agreement are provided for in Article 7, which requires members to notify all other members of any changes in their sanitary and phytosanitary measures and requires them to provide information on their sanitary and phytosanitary measures in accordance with the provisions contained in Annex B.<sup>296</sup>

The TBT Agreement also provides for transparency requirements in Article 2 which requires members to promptly publish all technical regulations that have been adopted or to otherwise make them available, for the purposes of enabling other members and interested parties to become familiar with them.<sup>297</sup>

The transparency provisions in the SCM Agreement are found in Article 22, which requires members to provide a public notice and an explanation of certain determinations made, to those members who are subject to investigations under the Agreement and to other interested parties known to have an interest therein.<sup>298</sup> Furthermore, Article 25 of the SCM Agreement requires members to notify all other members of any subsidy programme they have put in place.<sup>299</sup>

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<sup>296</sup> Agreement on Sanitary and Phytosanitary Measures, Art. 7.

<sup>297</sup> Agreement on Technical Barriers to Trade, Art. 2.

<sup>298</sup> Subsidies and Countervailing Measures Agreement, Art. 22.

<sup>299</sup> *Ibid*, Art. 25.

Moreover, Article 12 of the Anti-dumping Agreement also requires members to provide a public notice and an explanation of certain determinations made under the agreement, to those members who are subject to anti-dumping investigations.<sup>300</sup>

#### IV. ACCESSION TO THE WTO

As previously stated, there are some WTO rules that seem to “reduce opportunities for corruption”.<sup>301</sup> However, some academics have even gone so far as to suggest that the mere accession and subsequent membership of countries in the WTO will help their governments to push through reforms that may be important for reducing corruption.<sup>302</sup> This is because when countries accede to the WTO agreements they are pressured by the other member states to make changes that ensure that their policies accord with WTO rules, including those that are concerned with or promote norms of good governance.<sup>303</sup>

Furthermore, it is evidenced that the transparency obligations of the WTO extend beyond the text of the WTO agreements as additional transparency and good governance provisions are found in the Protocols of Accession to the WTO.<sup>304</sup> For instance, upon accession, Nepal agreed in its protocol of accession to increase provisions for transparency and public comment, while Georgia promised that from the date of accession, its laws would provide for the right to appeal administrative rulings on matters subject to WTO provisions to an independent tribunal.<sup>305</sup> Another important example is the protocol of accession of the Republic of China. China’s transparency obligations in its protocol of accession included a commitment to enforce only the laws and regulations pertaining to goods, services and intellectual property that are published

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<sup>300</sup> Anti-dumping Agreement, Art. 12.

<sup>301</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 9.

<sup>302</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 9.

<sup>303</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

<sup>304</sup> Padideh Ala’i „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 265.

<sup>305</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

and made readily available to other WTO members.<sup>306</sup> It also included an obligation to establish an official journal for publication of all such laws and to provide appropriate authorities within a reasonable period of time for comment before such measures are implemented.<sup>307</sup> Although studies have concluded that WTO membership might reduce corruption, membership alone is not sufficient.<sup>308</sup> This is because an expectation that the WTO agreements alone could address the bulk of trade-related corruption is highly optimistic; trade-related corruption is a complex phenomenon and requires rules that are far more specific to corruption than the existing WTO rules.

## V. LIMITATIONS OF THE WTO FRAMEWORK IN ADDRESSING CORRUPTION

Although the existing WTO rules that provide for transparency, non-discrimination and due process are considered as counterweights to corruption, it is clear that they cannot do much more than create a trading environment that is less conducive to corruption. This is unsurprising as these WTO rules were drafted without direct consideration of the problem of corruption and this makes them particularly difficult to apply to individual instances of corruption.<sup>309</sup> Furthermore, it is questionable whether these provisions are sufficient to effectively address incidences of trade-related corruption. This is because there is a very limited range of provisions in the WTO agreements that can apply to trade-related corruption and these existing provisions are capable of addressing only a small portion of the corrupt practices that occur in the realm of international trade, that is, mainly customs administration.<sup>310</sup>

There are various practical difficulties that may arise in attempting to use the WTO framework to address individual instances of corruption. For instance, where

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<sup>306</sup> Padideh Ala'1 „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 266.

<sup>307</sup> *Ibid* at 266.

<sup>308</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 10.

<sup>309</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 16.

<sup>310</sup> Krista Nadakaukaren Schefer in „Corruption and the WTO legal system“ (2009) 43(4) *Journal of World Trade* 3.

there is a tendency of customs officials to demand bribes from firms for the purposes of clearing shipments, those firms would not be able to bring a complaint directly to the WTO dispute settlement body (DSB), they would have to request their governments to bring a complaint against the member state in which the customs officials have demanded the bribes.<sup>311</sup> If the government does not consider it to be in the country's interest, economically or politically, to bring such a complaint, it may refrain from doing so. Furthermore, proceedings in the DSB tend to be extremely costly.<sup>312</sup> This raises a concern that even if the DSB was authorized to hear complaints based on trade-related corruption, it is possible that the mechanism would not be utilized by the members.<sup>313</sup> The mechanism would rather be reserved for cases whereby the bribes in question were sufficiently large and frequent to have a political and economic impact on the country that justifies the expenses associated with filing a complaint.<sup>314</sup>

Moreover, it would be difficult to successfully bring a complaint for corruption based on the existing rules in the WTO dispute settlement body. This is because, although a particular instance of corruption might fall under the scope of an existing provision, the WTO may not have the required resources or expertise to address it.<sup>315</sup> This is because the WTO is characterized by people with expert knowledge in international economic law rather than white-collar crimes.<sup>316</sup> As a result, it is questionable whether the WTO could tackle a complaint based on corruption in a meaningful way, on account of this lack of knowledge. Furthermore, it is suggested that the WTO does not currently have sufficiently extensive fact-finding powers to investigate and decide on corruption complaints.<sup>317</sup>

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<sup>311</sup> Article 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes stipulates that the purpose of the DSB is to settle disputes between members of the WTO; not private individuals and firms.

<sup>312</sup> Collette Van der Ven „Should the WTO Outlaw Transnational Bribery?“ available at <http://www.globalanticorruptionblog.com/2014/07/18/should-the-wto-outlaw-transnational-bribery/> accessed on 11 November 2014.

<sup>313</sup> Ibid.

<sup>314</sup> Ibid.

<sup>315</sup> Collette Van der Ven „Should the WTO Outlaw Transnational Bribery?“ available at <http://www.globalanticorruptionblog.com/2014/07/18/should-the-wto-outlaw-transnational-bribery/> accessed on 11 November 2014.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid.

It has been posited that if the DSB is to be used by members to address individual instances of corruption on the basis of the existing WTO provisions, there is, at the very least, a need for these provisions to be strengthened.<sup>318</sup> One suggested avenue is that the WTO should stipulate that the acceptance or solicitation of bribes by government officials, while conducting any duties that fall under the WTO agreements, will constitute an infringement of a WTO obligation.<sup>319</sup> This will have the effect of creating an anti-corruption obligation that is enforceable in the DSB.<sup>320</sup>

## VI. CONCLUSION

As noted in the discussion, the existing WTO provisions clearly set some limits on what bureaucrats and other economic actors in the trading sector can do and how they do it.<sup>321</sup> Although the rules in the WTO agreements seem to have the potential to reduce opportunities for corruption, it is still questionable if these provisions do, in reality, have any impact on corruption. Furthermore, it is clear that despite the existence of these rules it would be quite difficult to bring a dispute based on bribery or corruption in the WTO due to the fact that the rules of the various agreements (except the GPA) were drafted without direct consideration of the issue of corruption. This makes the application of the existing rules difficult in corruption cases thus it is uncertain whether governments would even be allowed to challenge instances of corruption before the DSB. As a result, the WTO has been called upon to recognize the fight against corruption as one of its responsibilities.

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<sup>318</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 16.

<sup>319</sup> *Ibid* at 17.

<sup>320</sup> *Ibid* at 17; Article 3:8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that where there is an infringement of obligations under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a rebuttable presumption that a breach of the rules by a member has an adverse impact on the other members to that covered agreement.

<sup>321</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

It is widely accepted that corruption is an obstacle to international business.<sup>322</sup> However, the linkage between corruption and international trade is not a clear one and it is not always easy to identify. Nevertheless, it is one that exists and cannot be ignored. It is therefore necessary to understand this linkage due to the detrimental impact that corruption can have on international trade. The thesis aimed to develop an understanding of the relationship between the two phenomena, as well as the role that is played by various organizations, especially the WTO, in fighting corruption in international trade. This chapter summarizes the lessons that have been learnt in the thesis.

The thesis explored the various forms that corruption can take, the negative effects that corruption tends to have on international trade and the implications thereof. It also discussed the need for a collaborative approach to fighting corruption on a global level.<sup>323</sup> In this regard, the thesis explored the various instruments that have played a part in fighting corruption in international trade, both on an international level - under the auspices of the UN, the OECD and SADC - as well as on a national level, by countries such as the United States and South Africa.

In addition to this, the thesis discussed the WTO's failure to include trade-related corruption - a de facto barrier to trade - as an issue on its agenda, as well as the possible reasons for this.<sup>324</sup> Trade-related corruption was excluded from the agenda in spite of the fact that the WTO is the central organization that deals with international trade rules and has trade liberalization i.e. the removal of trade barriers, as one of its central goals. Moreover, the thesis included an overview of the existing WTO rules that have the potential to act as corruption counterweights.

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<sup>322</sup> Anderson Mccoullier as stated by Susanna Thede and Nils-ake Gustafson „The Multifaceted Impact of Corruption on International Trade“ (2012) 35(5) *The World Economy* 651.

<sup>323</sup> Michael Johnston „Cross-Border Corruption: Points of Vulnerability and Challenges for Reform“ in Sahr J. Kpundeh et al (eds) *Corruption and Integrity Improvement Initiatives in Developing Countries* (1998) 14.

<sup>324</sup> Kenneth W. Abbot „Rule-making in the WTO: Lessons from the case of corruption and bribery“ (2001) 4(2) *Journal of International Economic Law* 281.

The literature review to a large extent shows that there are mixed views among scholars with regard to the question of whether corruption does, in fact, have a detrimental effect on trade and if so, whether the WTO should make rules that specifically target corruption in international trade. On the one hand, some scholars are of the opinion that reforms to reduce corruption in international business will require trade law reforms, thus it is necessary for the WTO to do more than be a bystander in the international anti-corruption movement.<sup>325</sup> On the other hand, others hold the view that the WTO should refrain from addressing the problem of corruption directly and its involvement in the anti-corruption movement should be limited to indirect efforts.<sup>326</sup>

The one view that appears to be unanimously held by the scholars is that the existing WTO rules cannot do much more than reduce opportunities for corruption by providing for good governance norms.<sup>327</sup> These norms have the effect of creating a trading environment that is transparent, that affords fair conditions of competition and ensures due process.<sup>328</sup>

The WTO rules that provide for these good governance norms can be found in essentially all the agreements that have been negotiated and concluded since the inception of the WTO. Although these rules address corruption indirectly, there are still a number of difficulties associated with attempting to use the WTO framework to address individual incidences of corruption in international trade. In particular, there are various obstacles that could arise if members sought to resolve disputes concerning corruption, within the DSB.

In view of the undeniable existence of a link between corruption and international trade and the undesirable impact on international trade thereof, it is submitted that it is indeed necessary for the WTO to adopt a more hands-on approach to reducing trade-related corruption.

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<sup>325</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 12.

<sup>326</sup> Padideh Ala'1 „The WTO and the anti-corruption movement“ (2008) 6(1) *Articles in Law Reviews & Other Academic Journals* 278.

<sup>327</sup> Swedish National Board of Trade (Project 100-457-05) *Trade and the Fight against Corruption* (2005) 9.

<sup>328</sup> Susan Areil Aaronson M. Rodwan Abouharb NCCR Trade Working Paper 2011/49 *Does the WTO help member states clean up?* (2011).

It is, therefore, recommended that the WTO should play a more active role in tackling trade-related corruption, over and above the existing rules in the WTO agreements. In this regard, the WTO should make a Ministerial Declaration condemning corruption in general, and more specifically, corrupt practices that may occur in the realm of international trade.

Furthermore, the WTO should recommend practices for the members to adopt and guidelines for them to incorporate into their national legislation. This will assist members to control bribe paying and soliciting in their customs administration, and any other corrupt practices that may occur in the sphere of international trade.

Moreover, the WTO should make use of the TPRM rather than the DSB, as a tool to persuade members to take steps specifically aimed at controlling trade-related corruption within their territories. This can be done in the course of the reviews, by monitoring the extent to which the members have made any such anti-corruption efforts and subsequently publishing the findings of the relevant reviews in an attempt to hold the members accountable to their fellow members.

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