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The Role of the WTO in the Fight Against Transnational Bribery

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THE ROLE OF THE WTO IN THE FIGHT AGAINST TRANSNATIONAL BRIBERY

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Introduction

The fight against corruption and transnational bribery has been at the top of the political agendas of the major international institutions since 1993. The Organization for Economic Co-operation and Development (“OECD”), the World Bank, the International Monetary Fund (“IMF”) and the United Nations (“UN”), among others, have adopted different conventions to combat corruption. Those conventions, whose provisions are binding for the ratifying countries, basically advocate for the adoption of national rules criminalizing the bribery of foreign officials, mutual cooperation in bribery investigations and a compromise to enforce their national rules. During the last 18 years, the large number of countries who have joined at least one of those conventions invites optimism. Yet, the results obtained in transnational bribery are not as far-reaching as expected. The main reason for this limited success is the absence of an enforcement mechanism in these conventions that compels members to respect the provisions agreed upon and to correct any departures from the established rules. Only one major organization remained voluntarily outside of this anticorruption wave, the World Trade Organization (“WTO”). Incidentally, the WTO is the only organization with an effective enforcement tool to discipline its members, the Dispute Settlement System (“DSS”).

Differing opinions inside the WTO have prevented the organization from openly committing to fight corruption and transnational bribery. Despite the absence of a multilateral agreement in this domain, different provisions in the WTO agreements and especially in the plurilateral Agreement on Government Procurement (“GPA”) clearly indicate the compromise of some WTO members to enhance transparency and eventually prevent corrupt practices.

This predisposition of some countries to move forward and embrace a stronger position to combat corruption may induce other members to adopt similar attitudes. Alternatively, if WTO members decide not to tackle the problem from a policy point of view, some individual members may challenge the practices of some countries before the Dispute Settlement Body (“DSB”) to obtain the result desired.

In this article I discuss different alternatives that WTO members could use to make it more difficult for companies to bribe foreign officials. Unlike other academic articles, this article will focus on how the WTO could combat bribery rather than if the WTO

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should deal with this issue or why the WTO did not progress as much as the rest of the international institutions. Additionally, I argue that certain WTO members under the current legal framework of the WTO could bring a case before the DSB on the grounds of transnational bribery and corruption.

In the first part this article sets out the reasons motivating countries and international organizations to combat corruption and it briefly describes the main international conventions in force. In the second part, this article analyzes the different provisions already in place in the WTO agreements to prevent corruption. The third part suggests policies that WTO members might use to achieve this purpose, namely, (i) increasing the scope and number of participants of the GPA, (ii) initiating talks for the adoption of a multilateral agreement to combat corruption mirroring the current international conventions in place or (iii) abandoning the multilateral approach in favor of bilateral agreements. In part four, a simulation will be depicted where a WTO member decides to challenge the action or inaction of another WTO member confronted with allegations of bribery in its public procurement sector before the DSB. Part five concludes.

1. Bribery, an old evil difficult to defeat

According to the OECD, bribery is:

[…] intentionally to offer, promise or give any undue pecuniary or other advantage, whether 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.¹

Nobody argues that national and international bribery is, in plain words, a bad thing. Indeed, most of the major religious and schools of thought such as Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Sikhism and Taoism have condemned and proscribed corruption.²

However, the propensity to pay officials in exchange for an undue reward is as old as those religions and unfortunately not everybody feels obliged –either morally or legally– to follow these dogmas. One of the first examples of bribery can be traced back to ancient Mesopotamia. Around 1500 B.C., Gimil-Ninurta, a citizen of the city of Nippur tried to obtain a political favor from his mayor by offering him a goat. Sadly for Gimil, the

bribery system was not yet properly implemented and the mayor accepted the goat but ordered Gimil to be beaten.\(^3\)

Three thousand and five hundred years later, bribery does not involve goats anymore.\(^4\) International bribery usually involves sophisticated accounting systems or complex networks, but it maintains the same roots as Gimil’s goat offering.\(^5\) Nowadays, it is not uncommon to find cases of corruption on the front pages of the newspapers affecting not only developing countries, but also some of the most prominent economies in the world. In Europe, Italy\(^6\), Spain\(^7\), Greece\(^8\), England\(^9\) or France\(^10\) have been some of the countries targeted by the media for outrageous examples of corruption. This unfortunate phenomenon is widespread around the globe irrespective of the country or the economic sector. Following the last report issued by Transparency International, companies involved in sectors such as public procurement and construction make use of bribes in almost half of their business operations.\(^11\) By nationality, Russian, Chinese and Mexican companies are seen as the ones who use bribes in their business transactions the most.\(^12\)

Bribes are trade disruptive, politically costly and socially undesirable at all levels. According to the World Bank, as much as $1 trillion is paid every year in bribes worldwide.\(^13\) This non-negligible amount of money is usually translated into higher costs for companies, fewer choices for consumers and more expensive goods for citizens.

\(^3\) Id. at 2.

\(^4\) More precisely, goats are not used as currency anymore, but they may be the objects for which to offer a bribe. As recently as October 2011, several men have been accused in Dubai of bribing border guard to allow them to smuggle cows and goats into the UAE, by-passing the ordinary veterinary checks. More information at Nine accused of bribery in smuggling attempt (November 10, 2011, 10:30 AM) available at http://m.gulfnews.com/news/gulf/uae/crime/nine-accused-of-bribery-in-smuggling-attempt-1.890681.

\(^5\) See Gürtel Case (“Caso Gürtel”), a highly sophisticated network formed by construction companies, politicians and retailers in different sectors in Spain. It is argued that this group of entities paid more than €26 millions in bribes to obtain public procurement contracts and some advantages from several politicians (some of them are facing criminal charges). El Pais, El Caso Gurtel, paso a paso (January 5, 2012, 4:50 PM) available at http://www.elpais.com/articulo/espagna/caso/Gurtel/paso/paso/elpepuesp/20100406elpepunac_3/Tes.

\(^6\) BBC, Italy embroiled in corruption scandal (October 20, 2011, 4:51 PM) available at http://news.bbc.co.uk/2/hi/8685975.stm

\(^7\) The Guardian, Spain’s biggest ever corruption trial gets under way (October 20, 2011, 4:54 PM) available at http://www.guardian.co.uk/world/2010/sep/27/spain-biggest-corruption-trial-marbella

\(^8\) Spiegel Online International, Greek Corruption Booming, Says Transparency International (October 20, 2011, 4:56 PM) available at http://www.spiegel.de/international/europe/0,1518,681184,00.html


\(^12\) Id. at 5.

Even though it is practically impossible to quantify the trade diversion that corruption accounts for in international trade, it is clear that it has an adverse effect and it prevents goods and services from having access to international markets. On the one hand, bribes act as a surcharge on goods or services—what some authors have called a nontariff barrier to trade. On the other hand, bribes may create de facto—inefficient—monopolies, bringing higher prices and lower quality products and services to the market.

Additionally, bribery may jeopardize the prosperous development of the least developed countries. The international aid channeled by organizations like the World Bank might be wasted or improperly used because of the existing corruption practices in the public procurement processes of certain countries (i.e. unfinished hospitals, inadequate roads, absence of renovation of equipment, etc.). Thus, one could think that any effort to combat this form of corruption at the international level should be easy to achieve, since the elimination of bribery benefits both rich and poor countries. However, this was not always the case.

At the national level, the majority of countries in the world have adopted national laws proscribing bribery of national officials in order to guarantee public order and an adequate functioning of public institutions. From the U.S. to India, Indonesia or Saudi Arabia, almost every country has criminalized the giving or taking of bribes for its own officials.

The enactment of these laws partially alleviated the problem caused by bribery in trade, but the problem of bribery of foreign officials remained unsolved until the early 1990s. In other words, until 1993 companies from one country could lawfully bribe domestic officials in a foreign country in order to obtain a public procurement contract or a work license without facing any civil or criminal sanction. This situation, as is shown below, is generally no longer possible, though it is worth mentioning that companies established in countries that have not signed any international convention to combat corruption could a priori bribe foreign officials.

At the international level, bribery and corruption began to attract the attention of the media in the 1970s as a result of the scandals involving payoff of foreign government officials by U.S. companies. In response to those scandals, the U.S. Congress enacted

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14 See Nichols, supra note 2, at 36.
15 This information is extracted from the Conference titled “World Bank Sanctions and Anti-Corruption Efforts” held at the World Bank Headquarters in Washington D.C on October 24, 2011. Information also available at www.worldbank.org/integrity
16 See Nichols, supra note 2, at 18.
17 Id. at 18.
18 In May 2011 at least 154 countries were part of the United Nations Convention Against Corruption (UNCAC), limiting in a great extend the number of companies who can benefit from this “exception”. Furthermore the extraterritoriality jurisdiction that some conventions provide to its members render virtually impossible to detect a bribe and not be entitled to open an investigation.
the Foreign Corrupt Practices Act ("FCPA") in 1977, making it a criminal offence to bribe foreign government officials ("supply side") in order to obtain business.\(^{20}\)

The fear that U.S. companies were at a competitive disadvantage in markets affected by corruption motivated the U.S. administration to seek support to fight bribery of foreign officials globally. Hence, since 1977 the U.S. has sought bilaterally and in international fora to convince its partners to adopt similar legislation.\(^{21}\)

U.S. efforts were fruitful in the mid-90s when international conventions fighting bribery of foreign officials began to mushroom among the most regarded international organizations. In the last 20 years, the main conventions adopted are the following:

- **Convention on Combating Bribery of Foreign Public Officials in International Business Transactions** ("OECD convention").\(^{22}\) In 1997, the OECD adopted this binding Convention requiring the ratifying members to enact national legislation making foreign bribery a crime. Additionally, the convention aims at facilitating international bribery investigations and providing mutual assistance among its members.

- **United Nations Convention Against Corruption** ("UNCAC").\(^{23}\) In 2003, the United Nations adopted this convention (which came into force in 2005) aimed at preventing corruption in public and private sectors, enhancing transparency and promoting the establishment of anticorruption bodies. More importantly it includes a chapter on asset-recovery.

- **Convention on the fight against corruption involving officials of the European Communities** ("EU convention").\(^{24}\) Adopted by the European Union ("EU") in 1997, this convention ensures that member states of the EU take the necessary measures to criminalize active and passive bribery of EU officials and national officials of the EU members.

- **Criminal Law Convention on Corruption.**\(^{25}\) Adopted by the Council of Europe in 1999, it is aimed at preventing bribery of national and international officials in both the public and the private sectors.

\(^{20}\) Id. at 275.

\(^{21}\) It is argued that the US was pressing the rest of the OECD members to adopt a Convention which would ensure that its members criminalize bribery of foreign officials. US officials even suggested that no further progress would be made with some countries in certain policies unless those countries agreed to move forward in the OECD convention. See Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-bribery Convention*, 44 Va. J. Int’l L. 665, 678-679 (2004).

\(^{22}\) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD/DAFFE/IME/BR(97)16FINAL (18 December 1997). Up to date, 38 countries have signed the convention and another country, Russia, has been formally invited to become member of the Convention.

\(^{23}\) United Nations Convention Against Corruption, G.A. Res. 58/4 of 31 October 2003. At the time of this article, 154 parties (it must be read as State or regional economic integration) ratified the Convention, converting this convention in the most widespread in the field of corruption.

\(^{24}\) Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union. Official Journal C 195, 25/06/1997 P. 0002 - 0011.

• **Inter-American Convention Against Corruption** ("OAS Convention"). In 1996 the Organization of American States adopted what some authors considered at that point the most far-reaching convention combating corruption.²⁷

Institutions like the IMF and World Bank have also adopted policies and guidelines designed to combat corruption.²⁸

As indicated, most of the international instruments to combat corruption address active and passive bribery²⁹. However, since the majority of national legal frameworks had already tackled passive bribery (usually public officials are not allowed to accept gifts, payments or any other compensation in return for an illicit use of the public office), the efforts in the negotiations of the different conventions were devoted to the “supply side” of corruption.

In the last decades we have observed a real commitment to reduce the trade diversion caused by corruption. There is a sense that the missed opportunities for companies and the misappropriation of public funds as a result of bribery are hindering the economic success achieved by tariff reduction and market liberalization. However, in this wave of anticorruption efforts, the only institution that has not taken an explicit action against bribery and corruption is the WTO, or has it?

### 2. Institutional provisions in the WTO to combat corruption

Bribery and corruption are highly sensitive issues in the WTO, considered by some countries as moral issues.³⁰ Therefore, any step in the direction of tackling this problem has always been controversial and difficult to approve.

Besides, different political and economic reasons have contributed to the slow pace in adopting anticorruption provisions. Firstly, unlike the OECD Convention where the U.S. government and U.S. companies had a strong interest in bringing the major economies to the table and negotiating the convention, in the WTO there is not a similar “maverick” willing to devote costly political efforts to this purpose.³¹ Secondly, once the OECD Convention was signed, importers and exporters outside the OECD had no incentives to pursue an action in the WTO, given the benefits they could achieve by free-riding those countries who were signatories of the OECD Convention.³² Lastly, the WTO member

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²⁶ Inter-American Convention Against Corruption, OEA/Ser.X/XXXIV.1, CICOR/doc.14/96 rev. 2 (29 March 1996), 35 ILM 72.
²⁹ Active bribe ("supply side") is the offer of a payment to an official in exchange for a favorable action. Passive bribe ("demand side") refers to the official’s request for something in exchange of an illicit advantage.
³¹ See Abbott, *supra* note 19, at 283.
³² *Id.*
driven organization is based on reciprocal concessions, seeing corruption as a non-tariff barrier to trade rather than an issue of mutual interest. Thus, any tradeoff pursuing market access must be quantified and agreed upon beforehand and not based on the uncertain benefits of transnational bribery and corruption.\textsuperscript{33}

Having said that, it is incorrect to say that the WTO has done nothing to prevent transnational bribery and corruption. Even though the WTO has not included a specific provision to deter and combat bribery, it is possible to find provisions in the WTO agreements that seek to prevent corrupt practices by enhancing transparency. In this regard, the clearest examples are the GPA\textsuperscript{34} and the Draft Revision of the GPA. Moreover, it is still possible to find more nuanced provisions limiting the adverse effects of bribery and corruption in the GATT 1994, the Agreement on Technical Barriers to Trade (“TBT”) or the Customs Valuation Agreements (“CVA”).\textsuperscript{35}

2.1. Government Procurement Agreement

According to Transparency International, public works or public procurement is the economic sector with the highest likelihood of corrupt practices.\textsuperscript{36} The value at stake in this sector is substantial, accounting for 15\% of the GDP in OECD countries, and even higher, up to 25\% of the GDP, in developing countries.\textsuperscript{37}

As an initiative to enhance transparency and market access in public procurement, and incidentally to reduce corruption, WTO members agreed to create the GPA. The GPA entered into force in January 1996, with some exceptions. Unlike the GATT 1994, the GPA is a plurilateral agreement that applies only to those Members who have accepted its provisions and, in my opinion, this is precisely its main weakness.\textsuperscript{38}

The preamble of the GPA aims at achieving “greater liberalization” (market access), avoiding “protection of domestic products or services” (non-discrimination) and providing “transparency of laws and regulations regarding public procurement”

\textsuperscript{33} Id. at 286.
\textsuperscript{34} The Plurilateral Agreement on Government Procurement, Jan. 1, 1996, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b) (“GPA”).
\textsuperscript{35} The provisions referred to in those agreements deal with non-discrimination, transparency, stability and predictability. Arguably, it might be defended that provisions (i) prohibiting to charge extra fees for the conformity assessment of a product (Article 5.2.5 TBT), (ii) exempting members to pay extra duties or charges of any kind (Article II:b GATT 1994) or (iii) compelling members to apply their laws in a uniform, impartial an reasonable manner (Article X:3(a) GATT 1994) could be seen as mechanism to deter and minimize transnational bribery and corruption. For more information see Trade Committee OECD, Potential Anti-Corruption Effects of WTO Disciplines, TD/TC(2000)/3/FINAL, Aug. 11, 2000.
\textsuperscript{36} See Transparency International, supra note 11, at 15.
\textsuperscript{38} The parties to the GPA as of 15 September 2011 are: Armenia, Canada, the 27 EU Member States, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Aruba, Norway, Singapore, Switzerland, Chinese Taipei and United States. This list of members and observers is available at http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (last visit on Nov. 4, 2011).
(transparency)\textsuperscript{39}. It is in this objective, transparency, where the GPA offers effective bribe prevention tools.

As an example, Article VI.4 established that:

\begin{quote}
Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.\textsuperscript{40}
\end{quote}

Even though this provision does not mention the word “bribe,” it precludes public officials from accepting “advice” (normally together with a large amount of money) in the drafting of the public tender in such a way to benefit one particular company. This has a clear deterrent effect on the “demand” side more than on the “supply” side, but it prevents transnational bribery anyway.

Furthermore, Articles XVII to XIX seek to ensure transparency in the public tender procedures. For instance, Article XVII sets out

\begin{quote}
Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures […].\textsuperscript{41}
\end{quote}

Members of the GPA have committed to make public the public procurement contracts, to offer a detailed description of the selection process and to provide a review mechanism whereby governments of an unsuccessful tender may seek additional explanation of the fairness and impartiality of the procurement.\textsuperscript{42} Again, these articles do not deal explicitly with transnational bribery, but they make it substantially harder for companies to corrupt the system and remain undetected.

Using the example of the prisoner’s dilemma, we could argue that the decision matrix for a company between “bribe” and “no bribe” changed with the introduction of these provisions. Before the adoption of the GPA, with an opaque public tender, the risk of detection of corrupt practices was negligible and the possibility to have a tender designed for your interests rather feasible. Therefore, the expected profits of bribery largely outweighed the unlikely punishment. Contrarily, in a transparent system, the possibility to award a public contract to someone other than the most competitive company is very difficult (though not impossible). In addition, the review mechanism will enable the “losing” bidders to check whether the tender procedure was subject to any unlawful practice, making the likelihood of detection much higher. As a result, the expected benefits of bribery may not outweigh the consequences to be caught (normally, the cancellation of the contract, a compensation for damages and the prohibition to take part

\textsuperscript{39} See GPA, supra note 34, at preamble.
\textsuperscript{40} Id. at Article VI.4.
\textsuperscript{41} Id. at Article XVII.
\textsuperscript{42} Id. at Articles XVIII and XIX.
in new procurements for a certain period of time).

Additional provisions in the GPA requiring members to report on an annual basis statistics about the procurements awarded and allowing a compensation for the loss or damage suffered by unsuccessful bidders may also reinforce the deterrent effect in transnational bribery. 43

2.2. Revision of the GPA

The desire of the GPA members to broaden the scope of this agreement and to show that corruption is an important problem in public procurement resulted in two revisions of the GPA in 200644 and 2010.45 The Committee in Government Procurement drafted two Revisions of the GPA and in both of them it addressed directly the problem of corruption. This is the first time that the prevention of corruption as such might be an integral part of a WTO agreement, if ultimately adopted.

The preamble of the 2010 revision acknowledges the adverse effects of corrupt practices and it confirms the close relationship between enhancing transparency and defeating corruption. Particularly the preamble states

Recognizing the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as the United Nations Convention Against Corruption.46

If this “recognition” of the perverse effects of corruption will not suffice, Article IV.4(c) of this revision established as a general principle that “procuring entities shall conduct procurements […] in a manner that […] prevents corrupt practices”(emphasis added).47

This is an important step in defining the role of the WTO because it implies that WTO members (or at least the parties to the GPA) now have an active role in “preventing” corruption. Now it is not enough to condemn corruption or to enforce the national anticorruption laws, it is necessary to take action before the corrupt practice actually happens and, as we will see in the next section, failure to prevent corruption could trigger the Dispute Settlement System (DSS).

43 Id. at Articles XIX.5 and XX.7(c).
44 WTO Committee on Government Procurement - Revision of the Agreement on Government Procurement as at 8 December 2006 - Prepared by the Secretariat. GPA/W/297.
45 WTO Committee on Government Procurement - Revision of the Agreement on Government Procurement as at 13 December 2010 - Prepared by the Secretariat. GPA/W/313.
46 Id. at Preamble.
47 Id. at Article IV.4(c).
But one of the problems that GPA members will face once the revision is adopted is the interpretation of the sentence “prevention of corrupt practices”. Neither the 2006 revision nor the 2010 revision defines what corruption is, which practices are involved or what the GPA members have to do to prevent it. The rest of the WTO agreements do not shed any light on these points either.48

Therefore, it is necessary to find out what the GPA members intended by including Article IV.4(c) in the draft and how broadly this concept should be interpreted. A very narrow interpretation could lead to a mere obligation for GPA members to make their procurement rules more transparent. That is not very different from the current obligations. To the contrary, a very broad interpretation could lead to far-reaching obligations whereby GPA members might be obliged, *inter alia*, to create anticorruption bodies to monitor public tenders, to offer full cooperation (and access to sensitive information) in international investigations and to prevent not only transnational bribery but other forms of corruption such as extortion, embezzlement, nepotism or facilitating payments.

A good starting point to ascertain the correct interpretation of this provision is to look at Article 31 of the Vienna Convention of the Law of Treaties (“VCLT”), which provides the general rules to interpret a treaty.49 In this regard, the Appellate Body (AB) has indicated that Article 31 of the VCLT “has attained the status of rule of international customary law. As such, it forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has to apply in seeking to clarify the provisions of the General Agreement and the other ‘covered agreements’”.50 Furthermore, the AB has also stated that the WTO treaty interpretation should follow the general guidance provided by the VCLT.51

Article 31 of the VCLT establishes that “[…] a treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose* […]” (emphasis added). This implies that in order to define the boundaries of the draft Article IV.4.(c) we have to carry out a threefold analysis:

1) The ordinary meaning of this provision
2) The context in which the provision was adopted
3) The purpose and objective for which the provision was adopted

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48 See Marrakech Agreement establishing the World Trade Organization and annexes. Available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm
2.2.1. Ordinary Meaning

Article IV.4(c) reads as follows

A procuring entity shall conduct covered procurements in a transparent and impartial manner that […] prevents corrupt practices (emphasis added).\(^{52}\)

The wording of the provision seems to indicate that GPA members are subject to two different obligations: (i) one relies upon the manner in which the public entity conducts the procurement and (ii) the second concerns the result of this action, to prevent corrupt practices. In other words, GPA members are required to carry out a public procurement in a transparent and impartial way that prevents corruption. GPA members could, a priori, comply with this provision if they take into account all the necessary factors that help to prevent corruption when procuring a public tender (i.e. transparency provisions, non-discrimination provisions, etc.).

As regards the first part of the provision, the fact that the obligation is limited to “conduct” procurements could indicate that this requirement covers only the procurement procedure from the publication of the contract to the award thereof. If we accept this limitation, important stages like the drafting of the terms of reference of the contract or the review mechanism will be left aside. However, it is enough to read the GPA agreement to realize that the obligations of a GPA member include all the steps in the procurement procedure. Consequently, the general principle of preventing corruption foreseen in the revision of the GPA should also encompass all the steps of the procurement.

As regards the second part, the scope of the obligation is unclear. What does it mean to “prevent” corrupt practices? According to Black’s Law Dictionary “prevent” means, “to hinder or preclude. To stop or intercept the approach, access or performance of a thing”.\(^{53}\) Thus, GPA members should conduct their public procurements in such a way that it hinders or precludes corruption. The election of one or another term has substantially different consequences. Whereas imposing an obligation to hinder corruption in public procurement is feasible, to require a country to preclude or stop corruption by any means is practically impossible since there will always be a risk of corruption even if the tender is perfectly implemented.

As we can observe, the wording of the provision is not enough to provide the full meaning of the obligation.

2.2.2. Context

In order to analyze the context, Article 31.2 VCLT establishes that “any relevant rule of international law applicable in the relation between the parties” shall be considered in the

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\(^{52}\) See Revision GPA, supra note 45, at Article IV:4(c).

interpretation of the treaty. As I have indicated before, there are not similar provisions to the draft Article IV.4(c) in the rest of the WTO agreements that provide guidance for limiting the definition of “prevent corruption”.

Thus, to ascertain what relevant rules might apply to the GPA it is important to look at the preamble of the revision of the GPA. In so doing, we observe that GPA members “Recognize the importance […] of carrying out procurements […], in accordance with applicable international instruments, such as the United Nations Convention Against Corruption”. Accordingly, the international rules that might bring more clarification are those that combat corruption, like the UNCAC, the OECD convention, the EU convention or the OAS convention.

Most of these instruments address the problem of transnational bribery with a particular focus on the “supply” side. Additionally, they provide for more transparency in the national laws, more international cooperation and different tools to deter corruption. In any event, for the purposes here, I would argue that the obligation foreseen in the draft Article IV.4(c) of the Revision of the GPA should be limited to prevent corruption in the form of transnational bribery and not other forms of corruption such as extortion, embezzlement, nepotism or facilitating payments.

Extortion, embezzlement and nepotism are forms of corruption that should be dealt with at the national level where countries normally have enacted laws criminalizing them. These offenses are normally punishable when they occur in the territory of a country (regardless of the nationality of the offender and the victim) and the enforcement mechanisms in place should be sufficient to detect and correct these activities. Thus, the GPA should not be granted with so wide a scope as to compel its members to prevent these activities, since other areas of law provide the appropriate tools to do so. As for the facilitating payments, I am of the opinion that these payments should be also eliminated since they constitute another form of corruption, but not under the GPA. Accordingly, the OECD convention states that small ‘facilitation’ payments are not an offence of bribery since these payments are not made “to obtain or retain business or other improper advantage” and thus the OECD Convention does not cover them. The distinction between facilitation payments and bribes is sometimes blurred and its characterization will depend to a great extend on the value thereof. Thus, the greater the value the higher chances to raise a red flag. Besides, if the facilitating payment would seek to obtain an illicit result of the procurement process, then it would fall within the category of bribery and therefore it would be covered by the definition proposed.

Yet, though the definition has been narrowed down, some questions regarding the scope of Article IV.4.(c) remain unanswered. Thus, it is necessary to look at the purpose of this provision.

54 See Vienna Convention, supra note 49, at Article 31.2.
55 See Revision GPA, supra note 45, at Preamble.
56 See OECD Convention, supra note 22, at 15, Commentaries on the Convention.
2.2.3. Purpose

As mentioned above, “prevent” corruption might be interpreted as far-reaching as totally precluding corruption, or less ambitious as hindering corrupt practices.

The dichotomy between hinder or preclude shall be interpreted in favor of the first. To begin, from an economic point of view, the resources that GPA members should assign to totally preclude corruption would be unbearable for some countries. Secondly, from a legal point of view, if a GPA member could bear responsibility for any bribery allegation regardless the mechanisms already put in place by this member, it would bring uncertainty as to what the member should do to avoid breaching this obligation. Thirdly, as the AB of the WTO ruled in EC-Hormones, the principle in dubio mitius has been recognized as a “supplementary means of interpretation”. In applying this principle, the meaning that is less onerous to the party assuming an obligation shall be preferred. Consequently, the obligation foreseen in Article IV.4(c) of the Revision of the GPA should be interpreted as to “hinder” corruption instead of “stop/preclude” corruption.

Therefore, in my opinion, when the revision of the GPA is adopted, its members will not be obliged to eliminate any possibility of corruption in any single public procurement they tender (a goal rather difficult to achieve). They will be, however, obliged to design and to implement a public procurement as if they will intend to eliminate corruption. In particular, members should make it much harder for companies to obtain satisfactory results by bribing foreign officials.

It is obvious that this interpretation still leaves discretion for GPA members but it might be understood as leeway for some countries to adapt their national procurement rules and to allow different levels of protection that will not be in breach of the revision of the GPA.

In conclusion, it is fair to say that the WTO has been committed to fight corruption since the Uruguay Round with the adoption of the WTO agreements. In some areas like public procurement there is enough evidence to conclude that some WTO members are combating transnational bribery as diligently as the rest of the international institutions. The results remain to be seen, but unlike the other institutions, the enforcement mechanism provided in the GPA ensures that parties will not depart from the provisions established in the agreement.

The next section examines different alternatives that WTO members may choose to move forward to combat transnational bribery and corruption and to strike the right balance between the different opinions within the WTO.

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58 Id.
3. What is next? Policy alternatives

As advanced in the introduction, WTO members now face the uncomfortable situation of deciding what direction to take in order to prevent corruption and transnational bribery.

In my opinion, there are three alternatives that may bring satisfactory results: (i) to amend the GPA in an attempt to attract more WTO members, (ii) to adopt soft law regulation (i.e. declaration) which sets out the basis for future actions and (iii) to abandon the multilateral approach in favor of bilateral or regional trade agreements. Next I will present each of these options and argue in favor of amending the GPA, since the benefits of enlarging its scope, its entity coverage and the number of members cannot be outweighed by the benefits of any other alternative.

3.1. Amend the GPA

The GPA was initially aimed at providing market access in the public procurement sector rather than preventing corruption. By pursuing reciprocity and liberalization commitments, developed countries were trying to ensure access to markets with a great potential (those of the emerging countries) but that were traditionally closed to foreign providers for political issues (some of these markets remain still closed to foreign investors in order to protect the national industry).59

With this objective in mind, negotiators drafted a procurement agreement adopting strong rules, strict enforcement and a relatively large entity coverage. Unfortunately, negotiators did not realize that for developing countries the high compliance cost of the GPA, the asymmetric power in the reciprocal negotiations and their reluctance to lose procurement as a policy instrument did not justify the adoption of the GPA.60

Developing countries were not the only ones who did not find enough incentives to join the GPA; some developed countries like Australia considered that the non-discrimination provisions foreseen in the GPA should be applied in a truly MFN basis, with no possibility to depart from this MFN obligation.61 Additionally, critics suggest that the coverage offered by the GPA did not take into account the characteristics of the procurement regimes of some countries where local and non-state authorities are in charge of procuring public tenders or where the state has a predominant weight in the economy.62 In these jurisdictions, there is a danger of circumventing the GPA provisions of ‘government control’ through state enterprises and non-covered local authorities.63

60 Id. at 7.
61 Interview with Remo Moretta, Assistant Secretary, Agriculture & Food Branch, Australian Government Department of Foreign Affairs and Trade. November 9, 2011.
62 See Ping, W., Coverage of the WTO’s Agreement on Government Procurement: Challenges of integrating China and other Countries with a Large State Sector Into the Global Trading System. 10 J. Int’ Econ. L., 887-920.
63 Id. at 898
These specific features of the GPA, or ‘birth defects’, have raised very high barriers that impeded some countries from joining the agreement. The difficulties to overcome these problems were manifested again in the Singapore WTO ministerial meeting in 1996. In said meeting, WTO members agreed to establish a Working Group in Public Procurement entrusted with the task of improving the GPA, but its assignment was limited exclusively to transparency issues. Problems such as market access, coverage entity and non-discrimination provisions, though, were not directly addressed.64

Following these initial steps of the GPA, it is fair to say that the anti-corruption related provisions of the original GPA (i.e. more transparent procurements, challenge procedures, publicity, etc.) did not constitute the main obstacle for WTO members to join the GPA but adequate reciprocal market access commitments did.

By the same token, the explicit anti-corruption provisions included in the draft revision of the GPA should not deter new members from joining the GPA now. Even though the new obligation foreseen in the draft requires GPA members to prevent corruption, this commitment by itself should not pose any threat to WTO members.

Having said that, if WTO members decide that the multilateral approach through the GPA is the best way to combat corruption, the developed countries should be ready to make some concessions at the risk of being free ridden by some developing countries. Up to date, discussions about corruption have been held on the basis of reciprocal concessions rather than pursuing the mutual interest.65 It is essential to change the policy of ‘you get what you pay for’ if we want to enjoy the benefits of a multilateral strong agreement that prevents corruption and ultimately enhances market access and reduces trade diversion.

Therefore, in order to enlarge the number of participants in the GPA and consequently to provide an effective international tool to combat corruption, including the recourse to the DSS, it is necessary to amend the GPA. The draft revision of the GPA provides some guidance, but it does not tackle the real impediments to attract more WTO members.

In my opinion, the following amendments are necessary to provide the right incentives for countries to join:

- **MFN**: this obligation should be applied to all GPA members, or even all WTO members, in all types of procurement each time that a country negotiates and achieves a market concession. In other words, the GPA should mirror the GATT agreement approach (negative list) and not the GATS agreement approach (positive list). The current discretion for Members to make negotiations on the entities and types of procurements contracts that are covered by the GPA

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65 See Abbott, supra note 19, at 286
constitutes a dangerous departure from the MFN obligation. By applying a full-fledge MFN and allowing some countries free-riding the market access achieved by other Members, we will offer an adequate incentive for WTO Members to accept the GPA and accept commitments such as the prevention of corruption.

- Entity coverage: As suggested in the previous amendment, the entity coverage follows a principle of reciprocity rather than a truly MFN obligation. These negotiations may exclude from the scope of the GPA important sources of corruption (i.e. local entities) and render the anti-corruption provisions of the GPA completely useless. Therefore, it is necessary to establish a uniform entity coverage (or limit member’s discretion) to enable all GPA members to compete on an equal footing and ensure that Members do not circumvent the anti-corruption provisions through state trading companies or local procurement authorities.

By adopting these amendments, non-GPA Members will probably deem that the benefits of joining the GPA and enhancing market access outweigh the compliance cost, the obligation to combat corruption and the risk to be subject to the DSS.

Therefore, in my view, the only way to boost the fight against corruption through the GPA is not directly by providing far-reaching anti-corruption tools, but indirectly by offering some irresistible market opportunities, which make it much easier for WTO Members to accept the obligations established in the GPA.

I advocate for this solution because unlike the other two policy alternatives and the other international anti-corruption conventions, the GPA is a plurilateral agreement subject to the DSS and its provisions are enforceable. Thus, in the context of corruption and bribery the outcome of a largely accepted GPA clearly cannot be matched with any other convention.

3.2. Adoption of a Soft Law instrument

A second alternative to combat corruption and reduce international bribery is to adopt a ‘soft’ instrument among all WTO Members, which a priori seems easier to agree upon than to adopt a ‘hard’ instrument like the GPA.

Soft law has been relied upon in the past to resolve some of the insuperable problems in the multilateral trading system. In particular, soft law has been used to reconcile the different views of the members on some issues and to make ‘hard’ WTO obligations more manageable. Furthermore, even the AB rulings are themselves ‘recommendations’ to the DSB and they lack any legal effect if not adopted by the DSB.

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67 Id. at 242.
A non-binding agreement could contribute to providing some guidance in the definition of prevention of corrupt practices, which will enable GPA members to define the boundaries of the draft revision. However, this measure should not be considered as a policy alternative to reduce international bribery and corruption, but rather as a clarification of an existing policy.

Alternatively, WTO members could decide the formation of a working group that explores the possibilities of adopting a common position condemning corrupt practices. In favor of this undertaking, it could be argued that

- **There is political momentum:** Given the limited success predicted for the Doha Round, WTO members may seek a non-binding agreement on corruption. Before Doha, WTO members were considering to pursue agreements in three different areas, such as trade and competition, trade and illicit payments and trade and environment/labor. After the initial talks, WTO members realized soon that developing countries were not prepared for such a commitment in competition (lack of infrastructure, expertise, etc.) and a large majority deemed it inappropriate for the WTO to deal with environmental and labor issues. Thus, illicit payments (i.e. corruption and bribery) might be presented as a valid alternative to reach a common understanding.

- **The policy of ‘naming and shaming’ might be as efficient as an obligation to prevent corruption:** if the non-binding commitment includes the elaboration of annual reports highlighting the countries that fail to comply with the objectives pursued, the ‘bad press’ may be sufficient for some countries to be more diligent in the future. This is the system adopted by the OECD in its convention to combat transnational bribery and according to an expert consulted, the results obtained invite to be optimistic.  

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- **A common understanding may be limited to set the (minimum) level of engagement:** the flexibility provided by a soft law instrument that allows members with different opinions to agree on a set of minimum commitments which do not interfere excessively with its obligations but nevertheless, pave the way for future far-reaching agreements on this issue.

On the other hand, there are some persuasive arguments to conclude that soft law is not the most adequate approach to deal with corruption in the WTO. As I explain hereunder, a soft law approach may be the ideal instrument to deal with an issue for the first time, but it might be not so adequate when the aim is to adopt a stronger commitment. These arguments include:

- **There are a number of international instruments already in place to combat corruption:** the OECD, the UN, the EU, the OAS, all of which provide a forum for discussion. Some of the instruments adopted by these institutions to combat

69 Interview with Melissa Khemani, Anti-corruption analyst, OECD, October 31, 2011.
corruption have been ratified by most of the WTO members. Therefore, a new non-binding resolution adopted under the auspices of the WTO will not offer value-added for WTO members.

- The opportunity for the WTO to make a difference resides in the DSS: As advanced in the preliminary remarks, the WTO can make a difference, as compared to the other international institution, by making available one of the most powerful devices to compel WTO members, the DSS. However, by adopting a non-binding resolution and removing the enforcement mechanism, the WTO will not be different from any other international institution. If countries may depart from complying with an eventual resolution without consequences, the whole purpose of the proposal will vanish.

- The absence of any ‘reward’ disincentives some countries: Pursuing a common interest in eliminating corruption without obtaining a quantifiable return is still difficult to happen in the WTO. Even if countries were willing to abandon the reciprocity concession approach in favor of a common goal (which eventually would reduce trade diversion and create new opportunities), the uncertainties of achieving this goal by a non-binding resolution would deter some countries to make the effort.

If these arguments could be placed in a balance, it is easy to realize that even for those countries eager to move forward, a soft law approach will not offer anything other than what they already achieved either by the GPA, by ratifying some of the other international conventions or by the signature of bilateral agreements.

Therefore, the soft law approach, at least as it has been depicted in this article, it is not a persuasive alternative for WTO members to combat corruption.

3.3. Bilateral agreements and FTA

In the two previous sub-sections, I put forward two alternatives that involve the recourse to the multilateral trading system. Under this sub-section, the third alternative to combat corruption focuses on the regional and bilateral approaches to pursue identical goals.

Many authors have commented on the pros and cons of the regional trade agreements and their relationship with the WTO. This article only discusses whether the bilateral as opposed to multilateral approach is a reasonable alternative for WTO members to combat corruption.

In recent years, the number of regional and bilateral agreements (mostly free trade areas) foreseeing anti-corruption provisions has increased. The US represents one of the clearest examples of this trend. In this regard, the US has included anticorruption

70 See Abbott, supra note 19, at 286.
provisions in its FTAs with Morocco\textsuperscript{72}, Oman\textsuperscript{73}, Peru\textsuperscript{74}, Singapore\textsuperscript{75} and more recently with Colombia\textsuperscript{76} and Panama\textsuperscript{77}. Other examples include different members of the G8\textsuperscript{78}, the EU\textsuperscript{79}, Russia\textsuperscript{80}, some of the East African countries\textsuperscript{81} and China\textsuperscript{82}.

The main reasons these countries prefer the bilateral approach instead of the multilateral approach can be summarized as follows: (i) more flexibility in the negotiations, since the commitments arranged in one area (i.e. corruption) can be balanced with the concessions granted/obtained in another area (i.e. market access in public procurement) and (ii) the expected benefits that result from the negotiation are tangible and quantifiable.

As a matter of example, I will mention the case of Australia, a WTO member who refuses to join the GPA for reasons other than the anticorruption provisions. Australia has signed 6 FTAs with its economic partners and 9 FTAs more are under negotiation.\textsuperscript{83} In the FTA signed with the US (a GPA member), Australia included a chapter in public procurement enhancing transparency (which indirectly prevents corruption and bribery) and ensuring access to each other’s markets.\textsuperscript{84} This chapter mirrored in many instances the wording of the GPA, however Australia preferred to combat corruption and bribery by ensuring some reciprocal benefits through the FTA rather than following the GPA provisions.\textsuperscript{85} Similarly, the US and Europe in addition to the efforts devoted to the GPA, have achieved its anti-corruptions goals through more comprehensive trade agreements with their economic partners where they can pursue individual interest rather than common interest and ultimately avoid the risk of ‘free-riding’ by those countries who are not willing (or in the position) to offer a worth commitment.

\textsuperscript{72} Id. at 50.
\textsuperscript{73} Id. at 52.
\textsuperscript{74} Id. at 53.
\textsuperscript{75} Id. at 54.
\textsuperscript{76} See United State Trade Representative – U.S-Colombia Trade Agreement, available at http://www.ustr.gov/uscolombiatpa/procurement
\textsuperscript{77} See United State Trade Representative – U.S-Panama Trade Agreement, available at http://www.ustr.gov/uspanamatpa/procurement
\textsuperscript{78} The G8 countries adopted an action plan in 2003 to fight corruption and bribery at the international level. The document is available at http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/fighting_corruption_and_improving_transparency_-_a_g8_action_plan.html. See also the Implementation Review of the G8 Anti-Corruption Commitments available at http://www.g8.utoronto.ca/summit/2009laquila/
\textsuperscript{79} See Gordon, supra note 71, at 3.
\textsuperscript{80} Id. at 3.
\textsuperscript{81} See how some East African countries have formed an Association of Anti-Corruption authorities with the purpose of cooperating with each other to eliminate corruption. Available at http://www.eaaaca.org/objectives.htm.
\textsuperscript{82} See the efforts made by China to conclude anticorruption agreements with other countries, available at http://www.china-embassy.org/eng/gdxw/t783230.htm.
\textsuperscript{84} See Australia-United States Free Trade Agreement, at chapter 15 Government Procurement. Available at http://www.dfat.gov.au/fta/ausfta/final-text/chapter_15.html. Similar provisions have been included in the FTA’s signed with Chile, New Zealand, Singapore and Thailand.
\textsuperscript{85} Interview with Remo Moretta, supra note 61.
The problem posed by the FTAs is that the anti-corruption provisions do not form the core of the agreements in which they are added. They are normally subject to the market access negotiations in the public procurement chapter. Even though some countries are gradually including bribery and corruption in their economic agreements, they do so indirectly by inserting transparency-enhancing provisions but there is not a real commitment to combat corruption. Therefore, although the problem of transnational bribery may be alleviated, since more and more countries are seeking to enhance transparency in the public procurement sector, the complex situation created with hundreds of FTAs with different scopes and different entities’ coverage precludes the market from allocating resources adequately. Furthermore, FTAs may provide different enforcement mechanisms that might conflict with each other or simply do not provide mechanism at all, which would render the anti-corruption provisions ineffective.

All in all, I would argue that the bilateral agreements indeed constitute an alternative to combat corruption, although not the best. In many instances FTAs may enable countries to move forward in certain areas of law where the WTO members are not yet in a common agreement (i.e., competition law, labor law, corruption, etc.). However, in terms of corruption, the results that can be achieved with the current FTAs are far from being optimal. If WTO members have a real concern about corruption and transnational bribery, the most effective way to tackle this problem is by amending the GPA to make it attractive for more countries to join.

4. Are we ready to open Pandora’s box?

In the previous sections I discussed the different policies available for WTO members to combat corruption. In this section, I will explore the chances that a GPA member, instead of opting for a policy approach to fight corruption, decides to resort to the enforcement mechanism of the WTO and bring a case against another GPA member before the DSB on the allegations of corruption and transnational bribery. These allegations may encompass multiple situations. Hence, for the sake of simplicity I will set out a scenario that may easily occur in the procurement sector of any single country and from that situation I will analyze whether there are solid grounds to bring a case before the DSB.

4.1. Initial Situation and Assumptions

The situation depicted for this simulation is the following: Companies \( b \) and \( c \) are multinational construction companies operating worldwide. Both companies submit their bids for a public procurement contract in country A. During the tender procedure, \( b \) finds evidence indicating that \( c \) was trying to bribe the officials in country A to obtain an illicit advantage. In \( b \)’s opinion, as a result of the alleged bribe, the officials in country A designed the terms of the tender in such a way to allow \( c \) to obtain the highest score in the project evaluation. Additionally, \( b \) claims that \( c \) also used bribes to obtain information about the project from the officials before the tender was called and during the negotiations, allowing \( c \) to prepare a more accurate bid.
Finally, Company b, after spending large amounts of money and time, persuades the government in country B to challenge this tender procedure in the DSS of the WTO on the grounds of a violation of Article VI.4 of the GPA and Article IV.4.c of the Revision of the GPA. Is this claim likely to succeed before the panel?

Before analyzing this situation, it is necessary to adopt several assumptions to define the legal framework in which all the parties are involved. These basic assumptions are the following:

1. Country A, country B and country C are all WTO members with market economies
2. Country A, country B and country C are all GPA members
3. Company b is established in country B and company c is established in country C.
4. The corruption allegations take place in a procurement tendered by an entity covered by the GPA (it is within country A’s GPA schedule)
5. The value of the public procurement contract exceeds the minimum required by the GPA.

4.2. Analysis

Given these assumptions, the initial research would consist in identifying precedents in the WTO dealing with similar situations. Unfortunately, the existing disputes under the GPA do not shed much light on how the panel would decide in a case of corruption. In the only truly dispute under the GPA, Korea - Measures affecting Government Procurement, the subject matter of the dispute focused on the entity coverage of Korea’s GPA schedule. In this regard, the panel considered that the entity subject to the allegation of conducting a procurement in breach of the GPA was not covered by the GPA and therefore, the panel found no violation as claimed by the US. There were neither corruption claims nor findings in this sense. Therefore the panel’s findings in the Korea case are not be very useful here.

Once the recourse to relevant precedents in terms of corruption is ruled out (WTO precedents remain relevant for other questions of law), it is essential for country B to define what conduct(s) exactly is challenging. It seems obvious that company b pretends that its government challenges the tender because company c was awarded a contract after bribing foreign officials and it should bear responsibility for that.

Nonetheless even if company c’s conduct could be framed as transnational bribery and it may be forbidden by country C’s legislation, country B could not challenge c’s conduct in the DSS. This is because the WTO is an international agreement and only national

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86 The four disputes arisen under the GPA up to date are DS73 Japan - Procurement of a Navigation Satellite (Settled before the panel adopted a report); DS88 – DS95 US – Measures affecting Government procurement (Settled before the panel adopted a report); Panel Report Korea– Measures affecting Government Procurement, WT/DSB/M/84, adopted 15 June 2000.
88 Id, at para. 7.83.
governments, not individuals, are directly subject to its obligations which implies, as the panel noted in the Japan-Film case, that the measures that might be challenged in the DSS refer to policies or actions of governments not those of private parties.\textsuperscript{89}

The panel, in an attempt to broaden the concept of measure and avoid that governments circumvent the rules through private companies, explained that private actions might be deemed governmental “if there is sufficient government involvement in it”.\textsuperscript{90} In other words, country C could be held responsible for the private actions deployed by c if there would be evidence that these actions are directed by the state. Since country C is a market economy, in theory the government does not interfere in the decisions of the companies established in its territory, therefore, country C should not be held responsible for c’s conduct.

However, this does not mean that c’s conduct may be left unpunished. Country B may denounce the situation in other fora where all the countries are members (i.e., OECD, UN, EU if applicable) and seek the enforcement of either country C’s or country A’s anticorruption laws. This is the system currently used in the OECD with satisfactory results.\textsuperscript{91}

Alternatively, country B can challenge country A’s conduct. Unlike with country C, where the action was implemented by private companies, country A may be held responsible for the measures adopted by its own officials because they are acting on behalf of the national (or local) administration. According to the information provided, we can observe at least three infringements caused by country A’s officials, and in my opinion two of them may be challenged before the DSS.

1) National officials of Country A may be in violation of national criminal law for accepting bribes.

As it has been mentioned in section 1, most of the countries in the world have criminalized bribery of national officials. Thus, if bribery allegations are proved, national officials may face criminal charges under the national jurisdiction. Furthermore, the competent authority (i.e. administrative judge) could eventually apply remedies which may include, \textit{inter alia}, the cancelation of the public tender, the compensation to the unsuccessful bidders, etc.

Notwithstanding the positive results this option offers to company b, accepting bribes is not sufficient for bringing a WTO member to the dispute settlement system of the WTO.\textsuperscript{92} In this regard, Article 3.2 of the Dispute Settlement Understanding (DSU) clearly states that the “Dispute settlement system serves to preserve the rights and

\textsuperscript{90} Id. at 10.56
\textsuperscript{91} Interview with Melissa Khemani, \textit{supra} note 69.
\textsuperscript{92} See Schefer, \textit{supra} note 30, at 741.
obligations of Members under the covered agreements”. For the time being, there are no provisions in the WTO agreements that explicitly condemn corruption, therefore, there is neither right nor obligation of Members that might be affected. This situation may change though with the adoption of the Revision of the GPA. But with the current state of legislation there is not room for a claim in the WTO based exclusively on corruption or bribery.

2) The design of the Terms of Reference (ToR) of the public tender violates Article VI.4 of the GPA

Article VI.4 of the GPA states that “entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement”. In the scenario depicted, b claims that because of the bribery offered by c, the officials designed the public tender in a way that benefited c. This allegation fits perfectly in the definition of Article VI.4 of the GPA mentioned above.

If country B has evidence to prove what b claims, country B will have solid grounds to bring country A to the DSS based on the wrongdoing of country A’s officials in formulating the specifications of the public tender. Needless to say, proving these allegations is a very difficult task and the standard required by the panel would be very high.

It is worth mentioning that country B will challenge neither c’s conduct (active transnational bribery) because as I mentioned before individual actions cannot be challenge in the DSS, nor the acceptance of bribes by the officials in country A (passive transnational bribery) which is a matter of national law. Country B will challenge the particular outcome of the illicit payments, that is, the different design of the tender as it should have been, had the bribery never existed. In other words, the preclusion of competition after the entity accepted advice (through bribery) by a firm with commercial interest in the procurement.

Under these circumstances, country B could bring a case against country A for violation of Article VI.4 of the GPA which is one of the covered agreements referred to in Article 3.2 of the DSU. If the violation is ultimately proved, country A shall bring this measure into conformity with the WTO agreement.

Therefore, for this particular scenario transnational bribery and corruption may trigger the DSS and compel country A to comply with the findings of the panel (or AB)

93 See Understanding of Rules and Procedures Governing the Settlement of Disputes at Article 3.2.
94 See GPA, supra note 34 at Art. VI.4
95 Please regard that for the purposes of this article, I have obviated the challenge procedures available in the GPA which may provide with interim measures and compensation (Article XX of GPA) and the consultations previous to the establishment of a panel where parties may reach a common understanding.
3) Country A may bear responsibility for not preventing corrupt practices pursuant to Article IV.4.c of the Revised draft of the GPA

The previous infringement was designed to address a particular provision of the GPA, so the violation of a WTO agreement was likely to exist. The infringement referred to in this section is a more general corruption allegation with a priori no clear violation of any WTO agreement.

As indicated above, company b claims that company c, apart from the previous infringement, bribed the officials of country A to obtain information which enables it to submit and negotiate a better bid. We do not know the nature of this information and if the release of this information may violate a provision a WTO provision. Consequently, if the corruption allegations cannot prove a violation of a WTO provision we could initially think that this action will not be subject to the DSS, as previously suggested.

Nonetheless, Article IV.4.c of the Revision of the GPA may bring a new whole dimension to the corruption allegation. Unlike in the previous infringement, where country B could bring a dispute before the DSB for a violation of Article VI of the GPA based on corruption allegations, but not directly on corruption, the new draft grants the possibility for GPA members to bring another GPA member to the DSS for a failure to prevent corrupt practices while conducting a public procurement.

Article IV.4 of the Revision of the GPA states

A procuring entity shall conduct covered procurement in a transparent and impartial manner that:
(c) prevents corrupt practices.

If Article IV.4.c of the Revision of the GPA is understood as it has been explained in section 2.2 above, corruption will no longer have to result in violation of another provision to find a violation of a WTO agreement because the mere existence of corruption could constitute a violation of the GPA and therefore it may directly open the recourse to the DSS.

If so understood, it means that transnational bribery (c’s conduct) regardless of the result, could raise liability for the country tendering the public contract (country A) under certain conditions (still to be determined). As indicated, the scope of this provision is unlikely to be so broad as to oblige GPA members to prevent in any form whatsoever the existence of corruption in their public procurements. However, legally speaking, with the adoption of the Revision of the GPA it might now be possible to challenge a public procurement in the DSS of the WTO if there are evidence of corruption and the country

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96 Article XVIII of the GPA contains provisions preventing entities from releasing certain information when it might prejudice fair competition between suppliers. The information provided in this case is rather limited and even though it might be possible to claim a violation of Article XVIII, it seems a priori very difficult to sustain a claim of this kind before the WTO.
tendering the contract did not act diligently to avoid the corrupt practices in accordance with Article IV.4.c of the Revision of the GPA.

Without prejudice to the foregoing, some expert voices in International Trade Law, like Professor John Jackson, opine that even if this option could be legally sustained, no member in the WTO would dare to open such a Pandora’s box and start a battle of cross-disputes on corruption allegations with uncertain results.97

Conclusions

The role of the WTO in the fight against corruption and transnational bribery was initially modest in comparison with other international organizations. This does not mean that the WTO remained indifferent to the new wave of anticorruption instruments that proliferated across the globe.

The anticorruption provisions foreseen in the WTO agreements paved the way for some WTO members to commit more strongly than others to combating corruption. As a result, this group of WTO members (GPA members) led the organization in acknowledging that prevention of corrupt practices was not only a legitimate objective but should also be an enforceable obligation. The outcome is Article IV.4.c. of the Revision of the GPA.

If the draft revision of the GPA is ultimately adopted, as it seems from the press release made available after the last Ministerial Conference held in Geneva in December 201198, it is very likely that most of the GPA members will unite forces to require all GPA members and even WTO members to adopt measures against transnational bribery. The reason is simple: GPA members are now exposed to facing a dispute in the WTO if corruption occurs in their public tenders, thus it is in their best interest that all GPA members criminalize transnational bribery in order to prevent companies from acting illegally. Moreover, GPA members will seek not only that transnational bribery be treated as an offence, but also that the national enforcement mechanisms work adequately to deter corruption.

Alternatively, WTO members may also adopt a more individual approach by signing bilateral or regional agreements to prevent corruption. However, as I have argued, only by enlarging the scope, coverage and number of participants in the GPA, will WTO members adopt a strong position to combat transnational bribery with satisfactory results. But in order to incentivize new members to join the GPA, it is necessary to amend the GPA in two ways: (i) by providing a full-fledged MFN clause and (ii) by broadening the entity coverage of the GPA. If these aims are achieved, the benefits of the enforcement mechanism made available in the GPA and the trade opportunities created via market access will render the GPA the perfect forum for combating corruption.

97 Interview with John Jackson, Professor of International Trade Law at Georgetown Law Center, November 18, at 3.30 pm.
In conclusion, by introducing Article IV.4.c in the Revision of the GPA, WTO members have taken a decisive step forward and have basically joined their hands to combat transnational bribery at legal and policy levels. Unfortunately this position affects only those WTO members who joined the GPA. However as indicated, should the GPA be amended to include more WTO members, the organization would offer the most important and efficient mechanism in the world to combat transnational bribery and corruption. For the time being this success will be limited to the public procurement sector, but perhaps in the near future it will embraces all economic sectors. What it is clear is that the WTO is playing and it will play an important role in the fight against transnational bribery.