

# NOTE: EXPLORING THE PROMISE AND POTENTIAL OF A WTO ANTI-CORRUPTION TREATY

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## I INTRODUCTION

Laws criminalizing foreign bribery are under-enforced. Efforts to reduce foreign bribery have resulted in increased awareness of the problems of corruption, widely-agreed-upon treaties, and domestic legislation. Despite this, anti-bribery laws often exist only on the books; they are not actively enforced. A new treaty, negotiated at the World Trade Organization (WTO), could improve enforcement. Despite the recent failure of multilateral trade negotiations at the WTO,<sup>1</sup> the WTO would likely still provide an effective forum for plurilateral agreements. The WTO is an appropriate forum for an anti-bribery treaty because corruption and anti-corruption efforts affect trade, and anti-corruption efforts align with the WTO's goals of promoting transparency and good governance. The proposed treaty could improve enforcement because it would include not only legislative and preventive obligations similar to those in other anti-corruption treaties but also substantive enforcement obligations. And, because it would be negotiated at the WTO, it would come with an international forum for resolving disputes and, therefore, for enforcing enforcement. The enforcement obligations proposed by this note include criteria that have already been used to assess whether states are enforcing anti-bribery laws. These more specific requirements should make compliance clearer and breach more obvious and thus easier to prove. Further, this note addresses which actors would have standing to sue at the WTO. It also suggests possible remedies for breach and discusses how to calculate the level of nullification and impairment for those remedies.

Part II of this note describes why a new anti-bribery treaty is necessary. Part III recommends the WTO as a forum for this treaty. Part IV discusses existing anti-corruption treaties and the substantive requirements of the treaty proposed by this note. Part V addresses which actors would have standing to sue, describes how a claim of breach would proceed, and suggests possible remedies. Part VI concludes.

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1. *Global Trade After the Failure of the Doha Round*, N.Y. TIMES (Jan. 1, 2016), <http://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html>.

## II

FILLING THE INTERNATIONAL ENFORCEMENT VOID: THE NEED FOR A NEW  
ANTI-CORRUPTION TREATY

Though once perceived as the “cost of doing business,” bribery is now seen as detrimental to an efficient global economy.<sup>2</sup> Having a stable and accountable government that can maintain a growing, market-based economy becomes more difficult when government officials receive side payments. Without more vigorous enforcement measures in place, undesirable, yet persistent, abuses of the law will continue unhindered, and crime will continue to pay. Thus, to reduce corruption, the cost of doing business corruptly must be raised.<sup>3</sup> This can be achieved by threatening the supplier of the bribe with sanctions, fines, or criminal prosecutions. Because corruption has been recognized as harmful to the economy, anti-corruption has become the subject of domestic legislation and international treaties.<sup>4</sup>

What the current international anti-corruption program lacks is enforcement. Much of the world seems to agree that corruption is not only morally repugnant but also economically inefficient.<sup>5</sup> Regional and international treaties condemn corruption. Yet these treaties fail to provide an international enforcement mechanism, leaving enforcement solely to the domestic mechanisms.<sup>6</sup> As a result, anti-corruption laws are under-enforced.<sup>7</sup> A new anti-corruption treaty with an enforcement mechanism could improve enforcement and thus reduce corruption. Because the WTO already has a forum for enforcing its rules, it could be an effective organization under which to negotiate this new treaty.

Two existing anti-corruption treaties will be discussed—the United Nations Convention against Corruption (UNCAC) and the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). Both suffer from the same problem—domestic enforcement only.<sup>8</sup> The OECD

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2. See Susan Rose-Ackerman, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, 34 U. PA. J. INT'L L. 447, 454 (2013) (describing corruption as hindering efficient markets).

3. See Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 436 (2007) (assuming that corporations are rational actors that would weigh the costs and benefits of bribery).

4. See, e.g., United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC]; Bribery Act 2010, c. 23 (UK), <http://www.legislation.gov.uk/ukpga/2010/23/contents> [<https://perma.cc/N6XV-YN9M>].

5. Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 321–22 (1997).

6. Rose-Ackerman, *supra* note 2, at 474.

7. See Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84, 93, 106 (2014) (most states parties to the OECD Convention do not enforce, or hardly enforce their foreign anti-bribery laws).

8. Susan Rose-Ackerman, *Introduction: The Role of International Actors in Fighting Corruption*, in *ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE?* 3, 24 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013).

publishes regular monitoring reports, but this “name-and-shame” method of sanctioning signatories does not seem to be especially effective.<sup>9</sup> The degree to which a state is required to enforce its anti-corruption laws is ambiguous, and enforcement levels are correspondingly low.<sup>10</sup> Though states parties have largely complied with obligations to enact domestic anti-bribery laws, they might have an incentive not to enforce them.<sup>11</sup> This is because permitting their corporations and individuals to bribe could help states win business abroad.<sup>12</sup> Rational parties will analyze the cost of bribery in comparison with the rate of detection and behave accordingly. If penalties or chances of detection remain low, rational actors might conclude that crime will pay.<sup>13</sup> Assuming that persons and corporations that contemplate bribing foreign officials are rational actors, they are likely to bribe foreign officials when, as is currently the case, the cost of bribing a foreign official is quite low considering the odds of ever being prosecuted.<sup>14</sup>

Despite incentives to do otherwise, a few states actively enforce anti-bribery laws.<sup>15</sup> These states include the United States, the United Kingdom, Germany, and Switzerland.<sup>16</sup> Most states parties to the OECD Convention do not enforce their anti-bribery laws or enforce them minimally.<sup>17</sup> And the handful of states actively enforcing the anti-bribery laws probably do not compensate for the states not enforcing those laws. For example, though the United States sometimes prosecutes foreign corporations, it mostly prosecutes its own corporations for foreign bribery.<sup>18</sup>

Despite potential for lack of enforcement or uneven enforcement, the situation in which some states actively and broadly enforce treaty obligations while others do not enforce them at all might actually improve enforcement.<sup>19</sup> Treaties allow states that want to enforce the treaty to exercise broader jurisdictional grounds than are typically acceptable.<sup>20</sup> Thus, those states can more easily enforce the treaty for other states parties.<sup>21</sup> As a result, overall enforcement is improved not only because of the enforcing state’s direct actions, but also (at least in the case of foreign bribery) because the enforcing state’s actions encourage other states to increase their own enforcement efforts.<sup>22</sup>

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9. *See id.* at 23.

10. Brewster, *supra* note 7, at 106.

11. *Id.* at 100–01.

12. *Id.*

13. Delaney, *supra* note 3, at 436.

14. *Id.*

15. Thomas J. Bussen, *Midnight in the Garden of Ne Bis in Idem: The New Urgency for an International Enforcement Mechanism*, 23 CARDOZO J. INT’L & COMP. L. 485, 496 (2015).

16. Brewster, *supra* note 7, at 106.

17. *Id.*

18. *Id.* at 107.

19. Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT’L L.J. 297, 301–02 (2015).

20. *Id.* at 317.

21. *Id.*

22. *Id.* at 330.

However, that a few states vigorously prosecute bribery and most others hardly prosecute it at all might be causing more of a twofold problem of both too much and too little prosecution.<sup>23</sup> When a state (often, the United States) brings an anti-bribery case against a corporation, that corporation might at some point admit guilt.<sup>24</sup> This admission could occur as a result of conviction or as part of a settlement.<sup>25</sup> Unlike in U.S. domestic law, there is no bar against double jeopardy in international law.<sup>26</sup> Once a corporation admits guilt in one state, other states can free ride on this admission to reap the rewards of imposing monetary sanctions on this corporation.<sup>27</sup>

Spotty enforcement is not helping anyone, except perhaps corrupt governments who can still get investment from non-enforcing states.<sup>28</sup> A treaty with an international enforcement mechanism could benefit many actors. The economic inefficiencies of corruption would be reduced as corruption is reduced. And this system could benefit those states that do not actively enforce anti-bribery laws due to limited resources rather than limited enthusiasm, because international enforcement obligations would provide political cover for enforcing anti-corruption laws.<sup>29</sup>

### III

#### THE WTO'S INSTITUTIONAL ADVANTAGES AS A FORUM FOR THE NEW TREATY

Transnational anti-corruption efforts can be classified as part of international trade law, because anti-corruption treaties and related domestic legislation affect how trade is conducted.<sup>30</sup> The WTO would therefore be an appropriate forum for a new anti-corruption treaty. It already has an established enforcement mechanism, and its goals align with the aims of reducing corruption. The WTO's goals include reducing barriers to trade.<sup>31</sup> The goals of anti-corruption include "efficient international markets"<sup>32</sup> and economic growth.<sup>33</sup> Indeed, corruption may function as a barrier to trade.<sup>34</sup> Like a tariff, corruption requires an exporting country to pay extra.<sup>35</sup> And corruption can block competition, resulting in a

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23. Bussen, *supra* note 15, at 509.

24. *Id.* at 500.

25. *See id.* (guilt often admitted as part of settlement in the United States).

26. *Id.* at 498.

27. *Id.* at 501.

28. *See id.* at 507.

29. *Id.* at 512.

30. Eric C. Chaffee, *From Legalized Business Ethics to International Trade Regulation*, 65 MERCER L. REV. 701, 705–08 (2014); *id.* at 722–23.

31. *Understanding the WTO: What We Stand For*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_stand\\_for\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm) [<https://perma.cc/WD8V-PZVL>].

32. Rose-Ackerman, *supra* note 8, at 15.

33. Rose-Ackerman, *supra* note 2, at 455.

34. Nichols, *supra* note 5, at 333–34.

35. *Id.*

monopoly for certain favored corporations.<sup>36</sup> Corruption also increases the cost of public works and diverts money from citizens at large to corrupt officials.<sup>37</sup> The WTO promotes transparency and good governance.<sup>38</sup> “[C]orruption is a symptom of a poorly functioning government,”<sup>39</sup> and its source is secrecy.<sup>40</sup> Thus, reducing corruption and increasing transparency go hand in hand.

A formal enforcement requirement and the WTO forum offer many benefits. To deter bribery, not only does the cost of corruption need to be high, but the cost of honesty needs to be correspondingly low; it must be beneficial to behave honestly.<sup>41</sup> The cost of honesty would be low if many states were truly compelled to follow anti-bribery laws. This is an advantage of the WTO. Many states are members,<sup>42</sup> so an individual state would not have reason to suspect that it is in the minority in enforcing its anti-bribery laws. And because the WTO has a preexisting dispute resolution entity—the Dispute Settlement Mechanism (DSM)—at which noncompliant states can be sued, each state can feel confident that other states are enforcing their anti-corruption laws.<sup>43</sup> Furthermore, the WTO wants to make the rules of trade “transparent and predictable.”<sup>44</sup> Anti-corruption obligations will help achieve these goals by eliminating disguised and informal additional costs of trade.

Currently, a multilateral agreement of the entire WTO membership seems unlikely.<sup>45</sup> However, an anti-corruption treaty need not be multilateral; it could be effective as a plurilateral<sup>46</sup> agreement. The treaty proposed here targets the supply side<sup>47</sup> of foreign bribery and, like the OECD Convention, requires the participation of significant exporters to be useful. Because the OECD Convention has an effective membership but an ineffective enforcement mechanism, this treaty could have more or less the same membership as the

36. *Id.* at 335.

37. Paul Sarlo, *The Spaghetti Bowl Revisited in the Context of Corruption: Understanding How Corrupt Countries Could Subvert the WTO's Rule-Oriented System Through Preferential Trade Agreements*, 43 DENV. J. INT'L L. & POL'Y 1, 9–10 (2014).

38. Padideh Ala'i, *The WTO and the Anti-Corruption Movement*, 6 LOY. U. CHI. INT'L L. REV. 259, 260 (2008).

39. Rose-Ackerman, *supra* note 2, at 456.

40. Ala'i, *supra* note 38, at 278.

41. Rose-Ackerman, *supra* note 2, at 460.

42. *Understanding the WTO: Members and Observers*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) [<https://perma.cc/7B57-56SV>].

43. See Brewster, *supra* note 7, at 106 (explaining that when states are not confident that other states are actually enforcing their anti-corruption laws, they are likely to also not enforce anti-corruption laws).

44. Chaffee, *supra* note 30, at 724 (quoting *What Is the WTO? Who We Are*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) [<https://perma.cc/K3TZ-NEQD>]).

45. See *Global Trade After the Failure of the Doha Round*, *supra* note 1 (describing the failure of the Doha Round and the unlikelihood of a multilateral agreement in the near future).

46. That is, a treaty among less than all the members. *Understanding the WTO: Plurilaterals*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm10\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm) [<https://perma.cc/HWP9-6LBW>].

47. The supply side of bribery means the corporations and individuals paying bribes. The demand side means the government officials receiving the bribes. On the supply and demand side of bribery, see Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 11 (2012).

OECD Convention (that is, the significant capital exporters<sup>48</sup> among the WTO membership and certainly less than the entire WTO membership). It is the presence of the WTO's well-respected enforcement mechanism—not an increase in states parties to anti-corruption treaties—that will result in increased enforcement and reduced corruption.

Although the WTO does not directly deal with corruption,<sup>49</sup> it might already be moving toward addressing it. Indirectly, the WTO appears, but does not claim, to be on a path to rejecting corruption.<sup>50</sup> For example, In *US—Gambling*,<sup>51</sup> the United States defended its prohibition against internet gambling partially “on the ground that internet gambling would benefit organized crime and facilitate fraud and corruption,”<sup>52</sup> under the public morals exception.<sup>53</sup> Furthermore, the WTO's Revised Government Procurement Agreement (GPA) seems to recognize that the WTO has the potential to deal with corruption, at least in the state action realm of government procurement.<sup>54</sup> According to the Revised GPA, a state “shall conduct . . . procurement in a transparent and impartial manner that . . . prevents corrupt practices.”<sup>55</sup> The Revised GPA is a plurilateral agreement, not binding on the entire membership, so it should not be interpreted as too strongly supporting the existence of a WTO anti-corruption agenda.<sup>56</sup> But it seems to at least suggest that corruption is a topic the WTO could address.<sup>57</sup>

Various possible roles for the WTO in anti-corruption have been suggested. Before the OECD Convention or the UNCAC, the WTO was recommended as a forum for addressing corruption.<sup>58</sup> It had an enforcement mechanism in place, and its members were major trading states—the very states most likely to be involved in corrupt international transactions.<sup>59</sup> The actions proposed for the WTO were requiring member states to criminalize paying and receiving bribes and to bar slush funds.<sup>60</sup> These proposals have come into existence. The OECD

48. See Brewster, *supra* note 7, at 96 (“[F]or [a supply-side anti-bribery regime] to be effective, . . . [most capital exporting states] need to participate.”).

49. Chaffee, *supra* note 30, at 724.

50. Mark Pieth, *From Talk to Action: The OECD Experience*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE, *supra* note 8, at 151, 153.

51. Panel Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶ 6.558, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).

52. Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE?, *supra* note 8, at 247, 255.

53. General Agreement on Trade in Services art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183.

54. Pauwelyn, *supra* note 52, at 256.

55. Revised Agreement on Government Procurement art. IV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, 1869 U.N.T.S. 508 [hereinafter GPA].

56. Sarlo, *supra* note 37, at 6.

57. Pauwelyn, *supra* note 52, at 256.

58. Nichols, *supra* note 5, at 362.

59. *Id.*

60. *Id.* at 378, 380.

Convention requires states to criminalize paying bribes and to bar slush funds.<sup>61</sup> The UNCAC prohibits receiving bribes.<sup>62</sup> What has not come to pass is an anti-corruption treaty in a forum that provides enforcement.

More recently, in light of the failure to enforce anti-corruption laws, it has been proposed that direct anti-corruption measures are failing; indirect methods of reducing corruption should therefore be used instead.<sup>63</sup> Because the WTO provides for transparency and encourages good governance, it might be the best forum for indirect corruption reduction.<sup>64</sup> The WTO's culture of transparency and due process could help fight corruption, and the organization is well-positioned to promote these goals.<sup>65</sup>

Others have recommended enforcement by different international organizations. Though acknowledging a potential role for WTO involvement in anti-corruption, some have endorsed anti-corruption efforts in other fora. Some suggest delegating anti-corruption efforts to the UN because of the organization's large membership,<sup>66</sup> and others propose creating an entirely new international organization—one with an enforcement mechanism—to specifically target corruption.<sup>67</sup>

A recent proposal for new approaches to reducing corruption supported forming an independent anti-corruption court.<sup>68</sup> This court would be similar to the International Criminal Court (ICC) in that it would also be an international court that steps in when a state is either unwilling or unable to investigate and prosecute certain designated offenses.<sup>69</sup> With independent prosecutors, judges, and investigators, this court would almost certainly enforce anti-corruption laws enthusiastically. But the proposed court has several flaws. A brand new court could be a hard sell. If the ICC itself is any indication, convincing states to acquiesce to a new forum for international judicial supervision is difficult.<sup>70</sup> And the anti-corruption court would have jurisdiction over the demand side, not merely the supply side, thus it would be prosecuting states' officials.<sup>71</sup> This would intrude on sovereignty and might be more insulting to states than an instrument

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61. Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, 8, Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

62. UNCAC art. 15, *supra* note 4, 2349 U.N.T.S. at 154.

63. Ala'i, *supra* note 38, at 278.

64. *Id.* at 260.

65. *Id.* at 278.

66. Bussen, *supra* note 15, at 510.

67. Chaffee, *supra* note 30, at 723–24, 728.

68. Mark L. Wolf, *The Case for an International Anti-Corruption Court*, GOVERNANCE STUDIES AT BROOKINGS 10 (July 2014), <http://www.brookings.edu/~media/research/files/papers/2014/07/international-anti-corruption-court-wolf/anticorruptioncourtwolffinal.pdf> [<https://perma.cc/76VY-2XRC>].

69. *Id.*

70. Matthew Stephenson, *The Case Against an International Anti-Corruption Court*, GAB: THE GLOBAL ANTICORRUPTION BLOG (July 31, 2014), <http://globalanticorruptionblog.com/2014/07/31/the-case-against-an-international-anti-corruption-court/> [<https://perma.cc/8GZC-PCZH>].

71. See Wolf, *supra* note 68, at 5–8.

that targets bribe-paying corporations.<sup>72</sup> Trying to force reluctant states to accept an entirely new decisionmaking body that is powerful and has the ability to intrude on sovereignty could be too much too fast, thereby undermining the willingness of undecided parties to support reform efforts altogether.<sup>73</sup>

In addition to alternative fora, there are other potential problems with the WTO as the forum for a new treaty against corruption. Most fundamentally, the WTO is an entity with a limited sphere of expertise; it does not purport to, nor should it have to deal with all international issues.<sup>74</sup> Even if the WTO decided to enter the anti-corruption arena, corrupt states could use preferential trade agreements (PTAs) to subvert WTO rules and promulgate corrupt schemes.<sup>75</sup> Assuming a new treaty is negotiated and the treaty requires enforcement, the level of enforcement required might be unclear.<sup>76</sup> Thus, in a case before a WTO panel, the complaining party could insist that the treaty has been breached while the defending party could assert that it has met its obligations.<sup>77</sup> Despite these alternative suggestions and potential problems, the WTO forum has the advantages of having a large membership and a well-respected existing dispute resolution mechanism.

#### IV

#### DIFFERENTIATING THE PROPOSED WTO TREATY FROM THE OECD ANTI-BRIBERY CONVENTION AND THE UNCAC

##### A. The OECD Convention

Though it has strong legislation requirements, the OECD Convention has weak enforcement requirements. The OECD Convention is narrow in scope but relatively deep in commitment. It combines hard law and soft law.<sup>78</sup> The OECD Convention is strict when it comes to enacting domestic laws.<sup>79</sup> The language used makes criminalizing the bribing of a foreign government official mandatory.<sup>80</sup> Signatories must criminalize the act of bribing a foreign official—the hard law component.<sup>81</sup> But signatories are left to their own devices to domestically enforce the written anti-bribery laws.<sup>82</sup> The OECD's only power to enforce the treaty obligations is monitoring each state's compliance and issuing public reports—the

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72. Stephenson, *supra* note 70.

73. *Id.*

74. Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U.J. INT'L L. & POL. 711, 716 (1996).

75. Sarlo, *supra* note 37.

76. Brewster, *supra* note 7, at 103.

77. *See id.* at 105 (raising the possibility that there would be no agreement as to what is a breach).

78. Pieth, *supra* note 50, at 153.

79. ABIOLA O. MAKINWA, PRIVATE REMEDIES FOR CORRUPTION 122 (2013).

80. *Id.*

81. OECD Convention art. 1, *supra* note 61, 37 I.L.M. at 4.

82. OECD Convention art. 5, *supra* note 61, 37 I.L.M. at 5.

soft law name-and-shame component.<sup>83</sup>

The OECD Convention is aimed only at bribery's supply side.<sup>84</sup> That is, the individuals and corporations that pay bribes to foreign government officials should, by the terms of the treaty, be criminals in their home states.<sup>85</sup> The treaty does not address the demand side: it says nothing about the foreign government officials receiving bribes.<sup>86</sup> Wealthy, developed countries whose corporations engage in business internationally comprise most of the OECD's membership,<sup>87</sup> thus the supply-side-only design of the OECD Convention targets the actors over which the signatories have the most control.

## B. The UN Convention Against Corruption

The UNCAC seeks to deal with a broad range of corrupt activities for a broad range of signatories, but its commitments are shallow and toothless. The UNCAC is broad in scope, addressing a variety of corrupt activities, but in many ways, it is aspirational. It has 140 signatories.<sup>88</sup> It addresses both supply-side and demand-side bribery.<sup>89</sup> Some of the corrupt behaviors it condemns include private sector bribery, trading in influence, illicit enrichment, and abuse of functions.<sup>90</sup> It emphasizes preventing corruption.<sup>91</sup> And, when corruption is discovered, it permits asset recovery.<sup>92</sup>

Commitments made under the UNCAC might not be as wide-ranging as they seem. Many corrupt behaviors are criminalized, optionally.<sup>93</sup> Optional provisions include abuse of functions, trading in influence, illicit enrichment, private sector bribery, and private sector embezzlement, all of which states parties need merely "consider" criminalizing.<sup>94</sup> Furthermore, to say that the UNCAC applies to both supply-side and demand-side bribery may be an overstatement because criminalizing demand-side bribery is optional under the UNCAC.<sup>95</sup> Asset

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83. Bussen, *supra* note 15, at 494; Pieth, *supra* note 50, at 153.

84. Spahn, *supra* note 47, at 11.

85. See Pauwelyn, *supra* note 52, at 259 (describing demand-side versus supply-side anti-bribery efforts).

86. See *id.*

87. *List of OECD Member Countries*, OECD, <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> [<https://perma.cc/UUG7-TV2Q>] (last visited Nov. 13, 2015).

88. *United Nations Convention against Corruption Signature and Ratification Status as of 1 April 2015*, U.N. OFFICE ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> [<https://perma.cc/G4YJ-EF9R>].

89. UNCAC art. 15, *supra* note 4, 2349 U.N.T.S. at 154.

90. UNCAC Chapter III, *supra* note 4, 2349 U.N.T.S. at 154–63.

91. On prevention, see UNCAC Chapter II, *supra* note 4, 2349 U.N.T.S. at 148–54; *Convention Highlights*, U.N. OFFICE ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html> [<https://perma.cc/PEG5-5HRP>].

92. UNCAC arts. 31, 53, *supra* note 4, 2349 U.N.T.S. at 159–60, 175.

93. Valsamis Mitsilegas, *The European Union and the Rest of the World: Criminal Law and Policy Interconnections*, in *BEYOND THE ESTABLISHED LEGAL ORDERS* 149, 163–65 (Malcolm Evans & Panos Koutrakos eds., 2011).

94. UNCAC arts. 18–22, *supra* note 4, 2349 U.N.T.S. at 155–56.

95. Chaffee, *supra* note 30, at 721–22.

recovery has the potential to deter criminal acts, but the UNCAC's asset recovery is also not as strong as it would appear.<sup>96</sup> Asset recovery is a technically complex endeavor; true expertise is needed to trace the source of assets.<sup>97</sup> Because asset recovery is to be undertaken domestically,<sup>98</sup> it will accomplish next to nothing in states without the resources to successfully recover assets.<sup>99</sup> Though the UNCAC addresses a range of corrupt activities, it has no enforcement mechanism other than monitoring.<sup>100</sup> There is no enforcing court or other body.<sup>101</sup> And even the monitoring process is not "robust."<sup>102</sup>

### C. The New Treaty Proposal

The treaty this note recommends would contain elements of the OECD Convention and the UNCAC as well as additional, unique features. A new treaty negotiated at the WTO should focus narrowly on the supply side (like the OECD Convention), promote prevention (like the UNCAC), include substantive enforcement requirements, and provide for enforcement within the WTO DSM. Thus, for a signatory to both the UNCAC and the OECD Convention, the key differences will be that enforcement obligations are expressly written into the treaty<sup>103</sup> and that the treaty can be enforced in an international forum.

Negotiating this new anti-corruption treaty requires at least the significant capital exporters among the WTO's many members to make a deep commitment. Having an international enforcement forum where they might be sanctioned probably means that WTO members will hesitate to commit to too much. So a narrower commitment, such as criminalizing only the act of bribing a foreign government official, would likely prove more successful than a broad commitment. States and corporations interested in leveling the playing field by preventing competitors from bribing, corporations interested in reducing costs, and states and other actors interested in eliminating corruption on principle might support a new treaty, as they did the OECD Convention.<sup>104</sup> If these supporters of the OECD Convention were hoping that it would result in reduced corruption,<sup>105</sup> they could be disappointed by the low level of enforcement and the likely limited effects of the OECD Convention on reducing bribery. A treaty that promises enforcement could thus be appealing.

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96. Philippa Webb, *The United Nations Convention Against Corruption*, 8 J. INT'L ECON. L. 191, 206–12 (2005).

97. *Id.*

98. UNCAC arts. 53, 31, *supra* note 4, 2349 U.N.T.S. at 159–60, 175.

99. Webb, *supra* note 96, at 206–12.

100. Bussen, *supra* note 15, at 494.

101. Webb, *supra* note 96, at 222–29.

102. *Id.* at 228.

103. *See* Brewster, *supra* note 7, at 93 (current OECD Convention enforcement obligations are ambiguous).

104. *See* Kenneth W. Abbott & Duncan Snidal, *Values and Interests: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. 141, 145–47 (2002) (describing the actors and related interests involved in developing the OECD Convention).

105. *See id.*

In addition to being a narrower and therefore more palatable commitment, criminalizing only supply-side bribery avoids an entirely different problem—*infringing on sovereignty*.<sup>106</sup> Similar to states parties to the OECD Convention, WTO members would need to enact domestic laws prohibiting individuals and corporations from paying bribes to foreign government officials.<sup>107</sup> They would also be required to enforce those laws barring supply-side bribery, as described below. But, what they would not be required to do is criminalize demand-side bribery by proscribing a government official's acceptance of a bribe. Obliging states to criminalize accepting bribes together with enforcing this commitment to impose criminal sanctions on government officials at an international forum would intrude on each state's sovereignty.<sup>108</sup>

In addition to requiring states to criminalize supply-side foreign bribery, this new treaty would prioritize prevention. The goal of the treaty is to reduce corruption; it should therefore not rely on deterrence in the form of greater enforcement to achieve that end. Preventive efforts could help curb corruption, too. A books and records requirement that makes hiding foreign bribery more difficult, like the books and records requirements of the OECD Convention and the UNCAC,<sup>109</sup> would be a helpful preventive effort. Another preventive effort comes from the UNCAC, which recommends encouraging private sector codes of conduct.<sup>110</sup> Corporations could be encouraged to craft internal codes of conduct. Participating in their regulation might motivate corporations to take the anti-bribery laws seriously.<sup>111</sup> A third preventive effort would be awareness-raising. OECD country monitoring reports assert that simple lack of awareness of the crime of foreign bribery impedes enforcement.<sup>112</sup> To ensure that corporations, individuals, and law enforcement personnel are aware of not only the crime of foreign bribery but also the detrimental effects of corruption, each signatory could be obliged to engage in awareness-raising efforts. As an example, a state could run a public service ad campaign.

Furthermore, this treaty would include substantive enforcement requirements. The treaty would mandate that each state not only enact but also enforce anti-bribery laws. States parties would be obliged to comply—in good faith—with certain standards of adequate enforcement. These standards could borrow from some of the indicators of enforcement or lack thereof examined by

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106. Bussen, *supra* note 15, at 511.

107. See OECD Convention arts. 1, 2, *supra* note 61, 37 I.L.M. at 4 (requiring that states parties enact legislation criminalizing foreign bribery on the part of legal or natural persons).

108. Bussen, *supra* note 15, at 511 (recommending against enforcement of passive bribery because it intrudes on sovereignty).

109. OECD Convention art. 8, *supra* note 61, 37 I.L.M. at 5; UNCAC art. 12 ¶ 3, *supra* note 4, 2349 U.N.T.S. at 152.

110. UNCAC art. 12, ¶ 2(b), *supra* note 4, 2349 U.N.T.S. at 151.

111. Delaney, *supra* note 3, at 459.

112. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN PORTUGAL 5 (2013) [hereinafter PORTUGAL PHASE 3], <http://www.oecd.org/daf/anti-bribery/Portugalphase3reportEN.pdf> [<https://perma.cc/CEX5-S6PZ>] (highlighting the lack of awareness).

the OECD when it conducts its country monitoring investigations to assess states' enforcement of the OECD Convention.<sup>113</sup> In this treaty, unlike the OECD Convention, these standards and the good faith requirement would be explicitly set out in the treaty.

First, each state would be obliged to address a majority of the bribery allegations of which it had notice.<sup>114</sup> Addressing one of these foreign bribery allegations could mean anything from a thorough investigation to a prosecution that ends in a settlement agreement to a conviction.<sup>115</sup> Reports of a state's corporation or other national bribing public officials abroad could surface either in the media or as told by a whistleblower. After this type of evidence becomes public or otherwise known to the state, it would have a duty to address the allegation against the offending corporation.

Second, a certain amount of resources would have to be dedicated to prosecuting foreign bribery. OECD reports consider the resources put into investigating and prosecuting foreign bribery as well as the expertise of those involved in investigating and prosecuting foreign bribery.<sup>116</sup> Similarly, this new treaty would oblige states parties to devote resources to investigating and prosecuting foreign bribery and to implement foreign-bribery-specific training for police and prosecutors. Perhaps states could commit to spending the same percent of their law enforcement budget as is spent on domestic bribery on investigating and prosecuting foreign bribery.<sup>117</sup> If domestic bribery is not part of

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113. *Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm> [<https://perma.cc/4GU2-4ZZJ>] (last visited Nov. 15, 2015).

114. See, e.g., PORTUGAL PHASE 3, *supra* note 112, at 21–34 (discussing investigation and prosecution of bribery as an indicator of sufficient enforcement).

115. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN DENMARK 27–28 (2013), <http://www.oecd.org/daf/anti-bribery/Denmarkphase3reportEN.pdf> [<https://perma.cc/F5ZH-BPJA>] (raising concerns that Denmark is closing cases without thoroughly investigating them); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GREECE 19–21 (2012), <http://www.oecd.org/daf/antibribery/Greecephase3reportEN.pdf> [<https://perma.cc/8SNR-WXCW>] (highlighting an instance when Greece did not open an investigation following an allegation).

116. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BELGIUM 32 (2013), <http://www.oecd.org/daf/anti-bribery/BelgiumPhase3ReportEN.pdf> [<https://perma.cc/V3Z3-BWHG>] (noting that Belgium's enforcement of its anti-bribery laws suffers from a "flagrant lack of resources"); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ICELAND 16 (2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Icelandphase3reportEN.pdf> [<https://perma.cc/A5FH-8QDK>] (noting that investigators with more expertise are needed and that specialized training on foreign bribery has not been provided to either the judiciary or the law enforcement personnel); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ARGENTINA 30 (2014) [hereinafter ARGENTINA PHASE 3], <http://www.oecd.org/daf/anti-bribery/Argentina-Phase-3-Report-ENG.pdf> [<https://perma.cc/QE2L-GWGZ>] (specialized judges and prosecutors exist for domestic, but not foreign bribery cases); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN LUXEMBOURG 34 (2011), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Luxembourgphase3reportEN.pdf> [<https://perma.cc/MD4F-U7WV>] (there is an increasing but still small number of foreign bribery specialists).

117. See, e.g., ARGENTINA PHASE 3, *supra* note 116, at 30 (specialized judges and prosecutors exist

the law enforcement budget, a state could devote the same percent of the budget as is spent on another economic crime, such as money laundering. As an alternative, the treaty could establish as a floor a certain default percent of the law enforcement budget that would have to be dedicated to investigating and prosecuting foreign bribery. This would preclude the possibility that a state could cut funding for other economic crimes to avoid funding anti-bribery. States would also be required to take steps for their prosecutors and police to attain an appropriate level of expertise on the crime of foreign bribery. States would have to staff a prosecutor's office and a police unit specializing in foreign bribery, or at least in economic crimes.<sup>118</sup> And training on the crime of foreign bribery and its elements would have to be provided to all prosecutors and law enforcement officials.<sup>119</sup>

Third, like the OECD Convention, prosecutors, police, and judges who work on anti-bribery matters would not be permitted to be subject to political control, nor would prosecutors be allowed to consider economic factors when deciding whether to pursue a particular investigation. The OECD Convention prohibits judges, prosecutors, and police from considering the "national economic interest" when evaluating a foreign bribery case.<sup>120</sup> This treaty would implement the same requirement. The national economic interest seems to be problematic in two situations. The first is when prosecutorial discretion rests on a determination of whether prosecution is in the "public interest."<sup>121</sup> In this case, it is not necessarily clear that the national economic interest should not be part of the public interest.<sup>122</sup> The second is when prosecutors are either actually permitted or are perceived to be permitted to take the national economic interest into account.<sup>123</sup> Both of those examples would be barred by this treaty. Further,

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for domestic, but not foreign bribery cases); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SLOVENIA 9 (2014) [hereinafter SLOVENIA PHASE 3], <http://www.oecd.org/daf/anti-bribery/SloveniaPhase3ReportEN.pdf> [<https://perma.cc/3L8E-733Y>] (prioritizing combating domestic, but not foreign corruption).

118. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BULGARIA 21, 23 (2011), <http://www.oecd.org/daf/anti-bribery/anti-bribery-convention/Bulgariaphase3reportEN.pdf> [<https://perma.cc/KP6H-QFB9>] (explaining that Bulgaria has no specialists for complex economic crimes and is not capable of conducting a complex financial investigation, describing general challenges of conducting complex financial investigation, like a foreign bribery investigation).

119. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED STATES 14 (2010), <http://www.oecd.org/daf/anti-bribery/anti-bribery-convention/UnitedStatesphase3reportEN.pdf> [<https://perma.cc/5TXJ-WSUL>] (noting the specialized training provided to various agencies involved in investigating and prosecuting the Foreign Corrupt Practices Act).

120. OECD Convention art. 5, *supra* note 61, 37 I.L.M. at 5.

121. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SWEDEN 29 (2012), <http://www.oecd.org/daf/anti-bribery/Swedenphase3reportEN.pdf> [<https://perma.cc/3W84-UN87>] (discussing the implications of the "public interest" standard that has not been explicitly stated not to include the national economic interest).

122. *Id.*

123. See, e.g., SLOVENIA PHASE 3, *supra* note 117, at 30 (discussing the perception that prosecutors are allowed to consider economic impact); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD

when engaging in country monitoring for compliance, the OECD examines whether a country's judges, prosecutors, or police are subject to political influence.<sup>124</sup> This new treaty would require both that legal safeguards to independence be put in place and that judges, prosecutors, and police be independent in practice. For example, elected officials contacting law enforcement personnel to discuss particular, ongoing foreign bribery cases amounts to political influence.<sup>125</sup> Moreover, when the police, prosecutors, and judges are under the supervision or control of a political body or are not legally guaranteed independence, they are subject to political influence.<sup>126</sup> Both examples would be prohibited by the new treaty.

Finally, this treaty would come with an already existing enforcement forum—the WTO DSM. Instead of merely monitoring countries that fail to prosecute bribery, the new treaty would allow other countries to enforce their obligations formally and internationally. This would increase incentives to prosecute bribery domestically, because states could feel more confident that other states are actually prosecuting bribery and because they would not want to have these treaty obligations enforced against them in a visible forum.

## V

### WTO TREATY FEATURES: STANDING, BREACH, AND REMEDIES

#### A. Standing

States would be the only group with standing to sue under this new anti-corruption treaty. The WTO Dispute Settlement Understanding (DSU) contemplates only member states having standing to sue and be sued.<sup>127</sup> The states are limited to making claims against state action.<sup>128</sup> Thus, this new treaty would be limited to allowing states to have standing to sue.

One question that arises is what incentive a state would have to sue on corruption grounds.<sup>129</sup> But even without an international forum, states with

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ANTI-BRIBERY CONVENTION IN SOUTH AFRICA 34–35 (2014), <http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf> [<https://perma.cc/H8H2-P7FV>] (though it has been amended, South Africa required prosecutors to consider economic impact in the past).

124. See, e.g., ARGENTINA PHASE 3, *supra* note 116, at 33 (2014).

125. See, e.g., *id.*

126. See, e.g., *id.* at 35–37 (examining whether judges were independent); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN BRAZIL 42–43 (2014), <http://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf> [<https://perma.cc/QJM2-PMMD>] (evaluating the independence of various law enforcement institutions involved in investigating and prosecuting foreign bribery); OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE CZECH REPUBLIC 30 (2013), <http://www.oecd.org/daf/anti-bribery/CzechRepublicphase3reportEN.pdf> [<https://perma.cc/R65L-LT92>] (prosecutor's office subject to political oversight).

127. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

128. Pauwelyn, *supra* note 52, at 261.

129. *Id.*

robust enforcement frequently sue foreign individuals and corporations in domestic courts.<sup>130</sup> These states want other states to obey anti-corruption laws and currently use domestic enforcement to encourage a level, non-corrupt playing field.<sup>131</sup> It thus seems likely that the same enthusiastic enforcer states would use the WTO forum as an additional—perhaps better—platform not subject to domestic jurisdictional restraints for promoting uniformity in the enforcement of anti-corruption laws.

If standing were extended to a wider group of actors, perhaps including private individuals and corporations, it could take a couple of different forms. Private citizens could sue in foreign domestic courts, standing in for their government.<sup>132</sup> Or corruption disputes could follow the model for investment disputes, which permits corporations to bring arbitral proceedings against states.<sup>133</sup> Indeed, a domestic private right of action is supposed to exist already; Article 35 of the UNCAC should have created such a right of action for victims of corruption.<sup>134</sup> Perhaps involving private parties, which are likely to have incentives to sue, especially when they suspect that they have lost business that another party won by corrupt measures, would increase anti-corruption enforcement. But that would require a new tribunal or new procedures in various domestic courts.

Although the WTO does not permit all interested parties to have standing, it does provide an established, often-used tribunal. Whether domestic courts would actually allow the suggested proceedings or whether parties would actually use some new tribunal is unknown. What is known is that parties use and respect the WTO DSM, giving it a strong advantage in enforcing anti-corruption laws.

## B. Breach

Noncompliance with the enforcement requirements could manifest itself in different ways. States parties could breach the treaty by failing to meet any of the preventive, legislative, or enforcement requirements. This section will focus on breaches of the enforcement requirements. To breach the enforcement requirements, a country could fail to address most of the foreign bribery allegations of which it was on notice, or it could fail to address one particularly high profile allegation; a country could provide inadequate enforcement resources, including monetary resources, training, and expertise; or a country could allow consideration of economic factors or allow its police, prosecutors, and judges to be politically influenced.

Almost inevitably, the parties will disagree on whether the action or inaction amounted to a breach. When a claim of breach is brought against a state at the

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130. Bussen, *supra* note 15, at 496.

131. See Brewster, *supra* note 7, at 99–101 (2014).

132. Paul D. Carrington, *Private Enforcement of International Law*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE, *supra* note 8, at 285, 285.

133. *Id.*

134. UNCAC art. 35, *supra* note 4, 2349 U.N.T.S. at 161; MAKINWA, *supra* note 79, at 369–70.

WTO on the grounds of failure to address a foreign bribery allegation, the responding state could deny the claim and offer explanations of why it did not investigate and prosecute a particular individual or corporation. Perhaps it was not a significant case, or simultaneously some other significant case needed more resources. Perhaps the corporation was particularly sympathetic and had recently imposed a new, more stringent code of conduct that had not yet taken hold. As in domestic court cases, whether a breach occurred would be a question of fact for the WTO Panel to resolve.

Furthermore, the substantive enforcement obligations imposed by the treaty will provide guidance as to what constitutes a breach. This might alleviate the problem of figuring out what constitutes a treaty breach in the case of enforcement.<sup>135</sup> For example, a respondent state would breach the treaty if it failed to provide specific foreign anti-bribery training to its police and prosecutors, or if it provided either funding below the default amount required or less funding to foreign anti-bribery laws than to domestic anti-bribery laws. A state would also be in breach of its treaty obligations if it allowed its prosecutors or police to consider the “national economic interest”<sup>136</sup> or if it did not permit prosecutors, police, or judges to act independently and without political control. These claims might be more challenging for a complaining state to prove, given the potentially subtle and difficult-to-detect ways in which police, prosecutors, and judges can factor in the “national economic interest” or take into account political influence.

Complainant states could bring claims based on either patterns of not enforcing the anti-corruption laws or based on a single (likely high-profile) instance of not enforcing the anti-corruption laws. Because proof of lack of enforcement could be difficult in a one-off situation, claims would probably be brought based on patterns of failure to enforce the anti-corruption laws. For patterns of failure to meet the enforcement obligations, breach would likely be easier to prove because several obligations might have been breached. There could be evidence suggesting that prosecutors are taking the national economic interest into account or are subject to de facto political control, such as a high number of allegations involving major national corporations but not a correspondingly high number of investigations or prosecutions of those corporations.<sup>137</sup> But proving this type of claim would nonetheless be challenging, because even indicative evidence would not definitively prove that prosecutors are, in practice, allowed to consider economic factors or that government officials exercise de facto control over foreign bribery cases. However, if the complaining state could prove breach of a more objective standard, such as failing to meet the

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135. See Brewster, *supra* note 7, at 105 (raising the question of how to determine breach and what happens if the parties do not agree about what a breach is).

136. OECD Convention art. 5, *supra* note 61, 37 I.L.M. at 5.

137. See, e.g., OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SPAIN 41 (2012), <http://www.oecd.org/daf/anti-bribery/Spainphase3reportEN.pdf> [<https://perma.cc/RP4X-R9HY>] (questioning prosecutorial independence because of the low number of investigations and lack of prosecutions).

amount of resources threshold, it would still succeed in its claim.

In addition to a claim for breach, states could bring a claim for non-violation. Under the General Agreement on Tariffs and Trade (GATT), states are allowed to bring claims even when treaty obligations have not necessarily been breached.<sup>138</sup> There are three elements to a non-violation claim under the GATT: “(1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.”<sup>139</sup> The claim in a non-violation case is typically that the complaining party had “legitimate expectations of improved market-access opportunities” that were thwarted by the responding party’s actions.<sup>140</sup>

This treaty could echo the GATT and allow non-violation claims. Two examples of situations that could give rise to a non-violation claim under this treaty are as follows. First, under this proposed treaty, countries would have a duty to address a majority of foreign bribery allegations when on notice. Those that do not want to meaningfully address foreign bribery allegations might dismiss allegations out of hand as unreliable or close investigations too quickly.<sup>141</sup> Moreover, they could quickly destroy records of what happened with a closed investigation so that it would be difficult to tell whether the investigation was conducted thoroughly and in good faith.<sup>142</sup> These actions might not amount to a breach of the treaty, but they could thwart legitimate expectations that the complaining country’s corporations would have the chance to compete honestly for foreign government contracts.

Second, states would be required to guarantee the independence of police, prosecutors, and judges, and to bar consideration of economic factors. This could be another area in which states could nominally comply with their obligations while subverting them in practice. A given state could legally guarantee independence while subtly using political influence in practice. In this situation, the available indicators would probably be a series of cases against high-profile companies and individuals that have been closed early or dropped before prosecution.<sup>143</sup> This type of situation leads working groups conducting OECD country-monitoring evaluations to believe that either those responsible for

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138. General Agreement on Tariffs and Trade art. XXIII, ¶ 1(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 187.

139. Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.41, WTO Doc. WT/DS44/R (adopted Apr. 22, 1998).

140. *Id.* at ¶¶ 10.41, 10.61.

141. *See, e.g.*, PORTUGAL PHASE 3, *supra* note 112, at 22–24 (many cases were closed after preliminary investigations and in some cases, no inquiries were made).

142. *See, e.g.*, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN KOREA 11–12 (2011), <http://www.oecd.org/daf/anti-bribery/antibriberyconvention/Koreaphase3reportEN.pdf> [<https://perma.cc/Z3C3-RPYT>] (Korea routinely destroys case records after a certain period of time).

143. PORTUGAL PHASE 3, *supra* note 112, at 28–29 (indicating the Working Group’s concern that there were many cases involving high-profile persons and corporations, none of which have been prosecuted).

investigation and prosecution are considering economic factors or that the same people are being improperly influenced by government officials.<sup>144</sup> There might not be enough evidence to prove that states are breaching their obligations. And perhaps the behavior is sufficiently ambiguous that it would not amount to a breach even with perfect evidence. But if enough cases involving high-profile companies and individuals are dropped or closed before prosecution, a complaining state would at least be able to argue that this state is undermining legitimate expectations.

### C. Remedies

Remediating corruption at the WTO is difficult, and no option is without flaws. Nonetheless, there are several options for remedies at the WTO. Initially, if a Panel or Appellate Body report finds a member state noncompliant, the member state is given a certain amount of time during which it is supposed to bring its actions into compliance.<sup>145</sup> Bringing its actions into compliance in the future should mean that the noncompliant state thoroughly investigates and perhaps prosecutes the next allegation of foreign bribery by a national. The reasonable period of time, which is the time allowed by the WTO for the noncompliant state to bring its actions into appropriate compliance,<sup>146</sup> should therefore be the time it takes for a new, credible allegation to surface plus the time a thorough investigation would take.

If the noncompliant state remains noncompliant after the reasonable period of time, then the complaining country can bring the case back to the WTO and a Compliance Panel can assess remedies.<sup>147</sup> The WTO allows “suspension of concessions” by the complaining state, meaning that retaliation in the form of trade sanctions may be imposed.<sup>148</sup> If the source of the bribery could be proven, that is, whether the instance of bribery could be best categorized as trade in goods or trade in services, then concessions could be suspended in the same sector.<sup>149</sup> Otherwise, concessions could be suspended in any of the agreements.<sup>150</sup>

A difficult issue is how the level of nullification or impairment is to be determined. Remedies must be “equivalent to the level of nullification or impairment.”<sup>151</sup> This means that a state is permitted to retaliate up to the amount by which the noncompliant state’s actions have caused nullification or impairment of the anticipated benefits of trade. That level is calculated by

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144. See, e.g., *id.* (the Working Group was worried that economic or political factors were influencing the prosecutors involved in these cases).

145. DSU art. 21.3.

146. DSU art. 21.

147. DSU art. 22.2, 22.3.

148. DSU art. 22.2.

149. See DSU art. 22.3 (articulating the principle that concessions should be suspended in the same agreement if possible, but can be suspended in other agreements).

150. See DSU art. 22.3.

151. DSU art. 22.4.

assessing the lost trade flows caused by the noncompliant state's actions.<sup>152</sup> Ultimately, it is up to a WTO decisionmaker to decide the amount by which the complaining state has lost trade flows, and, accordingly, the level of retaliation that the complaining state is permitted to impose.<sup>153</sup> Therefore, valuing nullification and impairment is central to imposing remedies.

One possible claim would be that the complaining country was deprived of the opportunity to bid honestly. Then, the way to calculate the level of nullification or impairment is to value the lost opportunity of the complaining country, whose national presumably lost a bid for a project to the respondent country's national. Under the present WTO case law, lost opportunity cannot be used as the measure for nullification and impairment, because it is unknown whether the complaining country would otherwise have won the contract, thus the lost opportunity is merely speculative.<sup>154</sup> However, treaties are allowed to create special rules for dispute settlement that trump the usual rules set forth in the DSU.<sup>155</sup> This treaty could provide that nullification and impairment includes lost opportunity, thus overriding the existing case law only for disputes arising under this treaty. The Compliance Panel would then assume that the complainant country would have won the bid but for the bribery, and evaluate the value of the lost opportunity. The major challenge of this method is valuing lost opportunity. The Compliance Panel could look at the actual benefits that accrued to the company that won the bid as a benchmark, but that does not necessarily represent the lost opportunity. Due to the nature of this remedy—that it represents the lost opportunity from a particular bid—it would be a one-time, lump-sum amount rather than an annual amount. Although valuation would be difficult, this remedy assessment is probably the best fit for the WTO, because it corresponds to the idea of nullification and impairment being the lost trade flows from a violation of WTO law.

Perhaps another solution is to borrow a private contract remedy. Contract price adjustment has been suggested as a corruption remedy.<sup>156</sup> This would adjust the price of the contract tainted by bribery to the non-bribery price of the same contract.<sup>157</sup> A similar assessment could be used to determine the level of nullification and impairment. The disputing parties could offer evidence on the non-bribery price of various contracts and transactions, and the Compliance Panel could then determine the level of nullification and impairment from this amount. One problem with this method is that the remedies at the WTO are

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152. Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 40–42, WTO Doc. WT/DS26/ARB (circulated July 12, 1999).

153. *Id.*

154. Panel Report, *Norway—Procurement of Toll Collection Equipment for the City of Trondheim*, ¶¶ 4.17, 4.20, 4.26, WTO Doc. GPR/DS2/R (adopted May 13, 1992).

155. DSU art. 1.2.

156. Olaf Meyer, *The Formation of a Transnational Ordre Public against Corruption: Lessons for and from Arbitral Tribunals*, in ANTI-CORRUPTION POLICY: CAN INTERNATIONAL ACTORS PLAY A CONSTRUCTIVE ROLE, *supra* note 8, at 229, 242.

157. *Id.*

meant to be based on lost trade flows, and this method values overpayment of contracts but not lost trade flows. It is also difficult to assess the value of similar, honest contracts, because parties can contest what qualifies as a similar contract and can question whether some other example contract was also the result of bribery.

Perhaps for proven systemic failure to comply with anti-corruption enforcement obligations, corporations and persons from the violator's state could be barred from bidding on government projects of other WTO member states.<sup>158</sup> This remedy could be reserved for particularly egregious offenders. But this method also has its downsides. Harsh as it seems, it is easy to circumvent. These companies could simply form new subsidiaries in other locations and use those to bid on projects.

One difficulty with the WTO remedy structure as a whole is that it is purely prospective. Thus, it has the potential to resolve systemic non-enforcement of anti-corruption obligations but cannot remedy a one-off instance of corruption.<sup>159</sup> A state could, therefore, let a few instances of corruption slide without repercussions, as long as it returns to compliance. This problem—the so-called “remedy gap”—is inherent in all WTO disputes.<sup>160</sup> A state can begin violating a WTO agreement and can continue to do so until not only a claim is brought to the DSM but also a decision of noncompliance is made and a subsequent reasonable period of time has passed.<sup>161</sup> At this point, the state could simply come back to compliance and suffer no remedial consequences.<sup>162</sup> Even if the state continues to breach its obligations and is brought to a Compliance Panel that assesses remedies and permits retaliation against the state, the state will be subject to that retaliation only going forward.<sup>163</sup> It does not have to provide compensation for past violations.<sup>164</sup> And the retaliation is only for present noncompliance starting from the end of the reasonable period of time, not for the prior noncompliance that resulted in the adverse ruling in the first place.<sup>165</sup> But, even if no remedy is truly satisfactory, there are other factors that motivate compliance with WTO treaties.

Notably, WTO member states do not exploit the remedy gap as frequently as they could.<sup>166</sup> This is likely because the powerful countries that most influenced

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158. See Nichols, *supra* note 5, at 379 (suggesting that a violating state's corporations be barred from doing business with other WTO members as a minimum penalty).

159. Pauwelyn, *supra* note 52, at 261–62.

160. Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102 (2011).

161. *Id.* at 111.

162. *Id.*

163. *Id.* at 110.

164. *Id.*

165. *Id.*

166. Mark Wu, *Rethinking the Temporary Breach Puzzle: A Window on the Future of International Trade Conflicts*, 40 YALE J. INT'L L. 95, 107 (2015).

the system's structure also receive the most benefit from the WTO's rules.<sup>167</sup> Therefore, these states have an incentive to follow the rules themselves and to wield their power to induce other states to do the same.<sup>168</sup>

Reputational effects likely also influence the behavior of WTO member states.<sup>169</sup> Most cases brought at the WTO settle instead of moving forward to a panel ruling.<sup>170</sup> The WTO, as an international forum for resolving disputes, can "brand violating parties as being uncooperative treaty partners."<sup>171</sup> Because the WTO offers only prospective remedies that might not deter breaches of WTO law, there are likely other factors that encourage compliance with WTO treaties.<sup>172</sup> The vast majority of WTO DSM rulings are in favor of the complaining party, thus the responding party might feel political pressure to settle rather than risk being publicly named a violator of treaties.<sup>173</sup> States that are less embedded in the international trade system feel the most reputational pressure and, accordingly, settle the earliest and most often.<sup>174</sup> They still hope to enter into many future treaties and join other international organizations.<sup>175</sup> Potential treaty partners might not want to enter into an agreement with a bad treaty partner.<sup>176</sup> Therefore, being labeled a violator could have serious repercussions for a state trying to negotiate a new agreement or join an international organization.<sup>177</sup> Meanwhile, states that are embedded in the international trade system are already party to many treaties and belong to many international organizations.<sup>178</sup> Future opportunities for entering into a new agreement are limited.<sup>179</sup> Thus, reputational concerns are not felt as strongly by these states.<sup>180</sup>

It is possible that a country's embarrassment over having a WTO report publicly declare that it is not enforcing its anti-bribery laws would be sufficient to convince it to come into compliance. In that case, remedies would not come into play at all. If reputational concerns can induce settlement, then perhaps they can induce compliance post-report adoption, too.<sup>181</sup>

States might not exploit the remedy gap as much as they could, and

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167. *Id.* at 138.

168. *Id.* at 140.

169. Jiwon Lee & Teresa Wittgenstein, *Weak vs. Strong Ties: Explaining Early Settlement in WTO Disputes* (forthcoming).

170. *Id.* (manuscript at 13).

171. *Id.* (manuscript at 15–16).

172. *Id.* (manuscript at 40).

173. *Id.* (manuscript at 46).

174. *Id.* (manuscript at 55–56).

175. *Id.* (manuscript at 46–49).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.* (manuscript at 46–47) ("An adverse ruling by a panel widely broadcasts to the international audience that the defendant has defected on the agreed on terms of its multilateral trade obligations.").

reputational concerns probably deter breach without need for remedies. Nonetheless, breaches of WTO obligations do happen. But, even if some instances of lack of punishment of corruption cannot be remedied or deterred, remedies that target and deter systemic lack of punishment of corruption will nonetheless reduce corruption. Corruption can never be eliminated, but it can be reduced. If the WTO can achieve reduction, it will have done enough.

## VI

### CONCLUSION

The current international anti-corruption approach has resulted in growing awareness that corruption is a real problem rather than a necessary, if unsavory, transaction cost. It has also improved coordination of domestic legislation; states parties to the UNCAC or the OECD Convention have similar anti-corruption laws. Yet there is still room for improvement. Enforcement levels remain low. Enforcement is presently domestic only, and what it means to enforce the anti-bribery laws of a treaty is unclear.

This note proposed a new treaty as a solution to one part of the enforcement problem. The new, recommended treaty would target a specific corruption problem—supply-side foreign bribery. This would not be the first treaty to target this facet of corruption, but its new features could build upon and improve the existing framework. Not only would legislation be required, but enforcement would be required as well. The treaty would offer guidance on what level of enforcement countries are obliged to reach, eliminating some uncertainty. Furthermore, this treaty would come with the WTO's DSM, so parties could use an international dispute settlement forum to enforce enforcement. The substantive enforcement requirements together with the international forum at which other states can file complaints against a breaching state could make higher levels of enforcement a real possibility. Improving enforcement of supply-side foreign bribery laws is only one aspect of reducing corruption. But decreasing corruption is difficult to do all at once. This proposed treaty could be one more step in the right direction—towards a more uniform, consistent, and effective international anti-corruption regime.