

III ANCORAGE-NET MEETING

Protecting Aid Funds in Unstable Governance Environments Towards an Integrated Strategy

Organization:



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SOME COMPARATIVE REFLECTIONS ON INTERNATIONAL ANTI-CORRUPTION INITIATIVES

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1) Unrequited transfers of funds from donors to beneficiaries represent discretionary spending for what may be broadly termed, “altruistic” purposes, and therefore always compete with self-interested or commercial alternative uses of the same resources. The claims of altruism are only defensible if there is good reason to believe that the ostensible purposes of these gifts is being served; that self-interested intermediaries are not capturing these flows for their own purposes; and that the beneficial results are being achieved in an effective and efficient manner, without taking undue risks or promoting too much of the way of harmful side effects.

2) Fraud, corruption, and the misappropriation of aid funds - whether taxpayer-financed or the product of voluntary initiative – is always to be deplored both on ethical grounds and because when it is suspected or uncovered it destroys the trust needed to sustain the aid relationship. The UN target that developed countries should devote 0.7% of their GDP per year to the eradication of world poverty, and the meeting of other Millennium Development Goals constitutes a noble and altruistic aspiration, but one that requires a high level of trust and coordination, and that involves diverting a massive volume of public resources from other potential uses (the implied annual transfer would be in excess goals are both extremely desirable and wildly ambitious, as well as somewhat conflicting and imprecise. So it is only with the most convincing monitoring and the most careful management of implementation processes that this collective effort can be promoted and maintained over time. The recent global financial crisis, and current and prospective fiscal contractions make it even more challenging to ring-fence these commitments.

3) Although the European Union, as the world’s largest single aid donor, is better structured than most national governments to sustain multi-year programme commitments, it too is facing escalating pressures to reallocate resources from long-run altruism to more immediately pressing and politically urgent priorities. Moreover, the underpinnings of multilateral trust and confidence

in effective administration of public resources are coming under severe scrutiny in Brussels, as in other parts of the OECD. German public opinion is disenchanted with the prior record of massive long-term aid programmes direct to the eastern Lander since reunification; the Greek government has now been exposed as guilty of massive and sustained deception in the management of EU cohesion funds; Italians from the north are veering in the direction of succession due to their mistrust of state spending patterns in the south; similar issues of distrust closed British public perceptions of the European integration project, etc.

4) So if even within and between EU member states the confidence required for horizontal resources transfers is weakening, the task of defending the structure of would poverty alleviation commitments is truly challenging. This is not just about demonstrating the effectiveness of anti-corruption procedures, since there are also questions about the realism of the goals that have been set; the perverse incentives that may accompany unrequited transfers de-motivating beneficiaries; and the priority to accord to poverty eradication as opposed to other pressing but competing international objectives, such as the mitigation of climate change. Hence what we are examining at this conference is only one limited component in a larger undertaking. But if that component fails, the rest of the international aid enterprise becomes untenable. So the emerging system of international anti-corruption agreements and conventions merits close and critical inspection.

5) The US Foreign Corrupt Practices Act of 1977 was a landmark step on the way to co-ordinated anti-corruption legislation. It imposed criminal penalties for engaging in foreign bribery. It was a product of the post-Watergate and post-Vietnam era, and was influenced by congressional and corporate desires to distance Washington from the kind of abuses uncovered by enquiries into ITT and so forth. Those international businesses at risk of expropriation because of distrust generated by the misconduct of some of their peers were among the supporters of this legislation. But by the 1980s most US-based multi-nationals

were unhappy with the law, on the grounds that full enforcement of it would handicap them in competition with European and Japanese competitors who were not subject to the same legal constraints. Moreover, the return of the Republicans to office and the revival of Cold War polarisation mean that the will to enforce such legislation weakened, and national security arguments could be invoked to justify non-compliance, especially by defence companies.

6) However, the existence of the 1977 law did also start bringing pressure on non-US jurisdictions to match America's "best practice", at least on paper, while also licensing various prosecutors and law firms to activate its provisions, at least in the most flagrant cases. In addition, international monitoring and NGO activism was stepped up, most notably with the founding of "Transparency International" a global civil society organisation which now has around 100 national chapters and is devoted to promoting a binding international framework for monitoring and addressing problems of cross-border as well as within – country corruption. Transparency mobilised legal and bureaucratic expertise and linked together previously dispersed national advocacy groups. It took care to remain on good terms with international development agencies and financial institutions such as the World Bank, and to present itself as a supporter of responsible globalisation rather than an anti-corporate ginger group. Many MNCs were employing compliance officers who welcomed Transparency's call for clear rules of conduct.

7) The end of the Cold War, and the return of the Democrats to the White House, paved the way for more effective international action against corruption in the 1990s. In the western hemisphere, with all countries other than Cuba classified as democracies, the Clinton administration launched the Miami Summit process intended to create a "Free Trade Area from Alaska to Tierra del Fuego". Within that region successful economic co-ordination could be corporate-led, but rule-governed. The 1996 OAS Inter-American Convention Against Corruption should be understood in that context. It was soon followed by the 1997

International Business Transactions. This phase of liberal internationalism culminated with tax extension from the regional to the global level, with the 2000 UN Convention against Transnational Organised Crime, and the 2003 UN Convention against Corruption.

8) By 2010 this upsurge in regional and global efforts to regulate and discipline the corrupting potential of accelerated transnational business integration has been superseded by other priorities. After 2001 most regulatory effort was shifted to monitoring the money flows associated with international terrorist activities, and – as in the Cold War – security priorities were held to justify laxity over many forms of corruption, provided they could be presented as helpful to the West’s so-called “war on terror”. Then after the world financial “sudden stop” of autumn 2008, very different issues of international regulatory co-ordination and joint action came to the fore, as the corporate giants of global financial liberalization proved capable of gross malfeasance sufficient to destabilize the entire international market economy. Nevertheless, the institutional arrangements set in motion in the 1990s have remained in place and have gradually turned from on paper promises to specific structures and explicit enforceable commitments. The gap between early rhetoric and current practice remains huge and the pace of institutionalization is slow and fitful. What follows are some preliminary and impressionistic comments on the current “state of play” in this area, with particular emphasis on the global framework emerging under the UN Convention.

9) The OAS Convention

After achieving a peak in self-confidence in 2001, with the ratification of the Santiago Charter on Democratic Rights, the OAS has reverted to type thereafter. It was marginalised by Bush after September 11th and in 2005 the “fast track” authority required for US endorsement of the Free Trade Area of the Americas was allowed to lapse. A Washington-promoted Secretary General from Costa Rica was forced to resign within days of taking office, and returned to San Jose

in handcuffs to face corruption charges there. The rise of Chavez produced a “Bolivarian Alternative to dominance by Washington, and the member states of ALBA follow Caracas rather than Foggy Bottom as regards policies towards multi-national corporations and corporate corruption. More generally, a reaction against 1990s “neo-liberalism” has encouraged a return of state interventionism in various economies, including a great public acceptance of “rent-seeking” styles of policy-making. The OAS has also been challenged by the rise of Unasur (under the leadership of Lula’s Brazil) and was discredited by Obama’s reluctance to fully uphold the Democratic Charter in the case of Honduras.

10) But, although the OAS as a brand of liberal internationalist Constitutionalism, may be under siege, not all the more specific initiatives with which it is associated are equally affected. The Inter-American Court, and the Commission for Human Rights retains more credibility than much of the rest of the inter-American system. So what about the Anti-Corruption Convention? 27 member states have signed and ratified the convention, and seven (small Anglophone Caribbean) members have acceded to it. Cuba is the only non-participant. The 28 articles of the Convention established what states should do in the areas of prevention, criminalization, international-co-operation, and – most critically – asset recovery. So signature is not just an empty formality. When the Peruvian spymaster and bagman of the Fujimori regime, Vladimir Montesinos, sought political asylum in Panama, he was denied it on the grounds that providing a safe haven for the corrupt would be a clear breach of the Convention. Moreover, of the \$230 million in Peruvian assets held overseas that were frozen as a result of corruption allegations, almost all has been repatriated to Peru under the terms of the Convention.

11) Since 2001 there has been a “follow-up mechanism” in operation to review whether member states are enacting effective measures in line with OAS Convention requirements. 28 out of 34 signatory states have joined this mechanism, which has two parts. The signatory parties meet annually to deal

with issues arising at the political level. There is also a body of technical experts that meets every six months, with the backing of the OAS Department for Legal Affairs. This follow up mechanism is voluntary, and it organises periodic reviews of country performance and issue areas. Priority is given to the review of countries that present themselves voluntarily for review, after which other members are reviewed in sequence according to the dates of ratification of the Convention. Each country review is conducted by experts selected by two other state parties. Review consists of a self-assessment by the state in question, followed by a civil society response, and ending with a formal report from the Committee of Experts. Four to six countries are reviewed at each of the bi-annual meetings. The idea behind this voluntary peer review process is to prompt convergence around best practice by activating the anti-corruption constituencies in each state system. The resulting country reports are published on its website by the OAS Secretariat together with Committee of Expert progress reports on the implementation of the whole Convention. Although this is all likely to encourage gradual positive development it has also been criticised as too slow, too poorly funded, and hampered by an insufficiency of experts.

12) OECD Convention

This was adopted in 1997 and entered into force in 1999. In addition to the participation of all 30 OECD member states it includes six non-members (Argentina, Brazil, Chile, Bulgaria, Estonia, and Slovenia). It is the most focussed of the major anti-corruption conventions, aimed at addressing “the supply side of bribery by covering a group of countries accounting for the majority of global exports of foreign investment”. The 36 member states have undertaken to cooperate to establish criminal sanctions for those who bribe foreign public officials in international business transactions. Such states are also required to treat the concealment of the proceeds of corruption as a money laundering offence (with certain limited exceptions). They also need to prohibit accounting practices that allow or disguise such bribery, and signatories agree to bear the costs of follow-up monitoring of these commitments.

This is not a subject I have investigated directly, but my impression is that the OECD has set a higher standard of compliance, and a more effective (if somewhat discreet) system of mutual monitoring and peer review than can be said of the OAS or UN counterparts.

13) GRECO – Council of Europe With 39 members this regional peer-group arrangement also requires examination.

14) UN Convention Against Corruption

This was adopted by the UN General Assembly in 2003 and acquired 140 signatories by the time it closed in 2006. Of these almost half are not “signatory parties”. The convention is open to all regional economic organisations as well as UN member states. The secretariat is provided by the UN Office on Drugs and Crime Control in Vienna. The 71 articles of the convention cover preventive measures, criminalisation, technical co-operation, an asset recovery framework, provisions for international co-operation on investigations, prosecutions, and extraditions, and a monitoring and implementation mechanism.

15) At the Lisbon conference I plan to report on developments under the second Conference of Signatory Parties (in Jordan, in 2007) and the third (in Doha in December 2009) and discuss both the potential and the limitations of this most ambitious and international anti-corruption initiative.

Annex

Redgob Note on December 2009 Doha Conference UNCAC: Toothless, but with potential?

UNCAC: Toothless but with potential?

Event:

3rd Conference of the State Parties to the UN convention against corruption, Doha, Qatar 9-13th November 2009.

Significance:

First international framework agreed to on implementing UNCAC and as such is an important step towards creating an international governance and deterrence network to support the struggle against corruption in its various forms. The components link international and internal aspects of corruption. However the actual outcomes of the meeting's negotiations give clear indication of the lack of real political to act in an open, transparent and participatory manner with groups outside of the states parties, in both private and civil spheres which would be in line with the G20s statement.

Analysis:

Context and History: In its third session the CoSP to UNCAC has moved the debate on from the convention to actually achieving a consensus between the state parties on the creation and function of a mechanism by which states can then be assessed on their implementation of UNCAC.

Previous meetings of the CoSP have been characterised back the lack of consensus, and lack of agreement on a mechanism. The issue of asset recovery was deemed politically, an unsavory topic and which has gained greater prominence at this governance level in part thanks to the work of STAR on raising the profile and amount of research on this issue.

The impact of the global crisis and the effects on public opinion on banking secrecy, unapplied due diligence, and their combined devastating effects have brought the topic of asset recovery back on the agenda of the COSP on UNCAC, it has also brought to the table a certain sense of urgency to at least being seen to be doing something about corruption in its numerous facets.

Process and Outcomes: As envisaged the negotiations around the review mechanism were painstaking, slow in particular because of the nit-picking over every detail of rolling text and resolutions. On many issues including asset recovery, traditional UN procedures were not followed.

1. Questions about the quorum; disagreements about decision-making over next CoSP brought up by the EU,
2. Questions of content; many of the resolutions were not readily available in working languages of the UN before being adopted, China objected even after agreements had been made.

3. The issue of inadequate notice was particularly raised by countries who were excluded from the informal/closed working groups on asset recovery, which was adopted without many state parties being aware of the content, being aware that it had been adopted such as Chile, who felt not only left out but that the process was highly non transparent, not fully negotiated, and therefore lacked credibility which some felt may have been the intention.
4. Resolutions that were adopted were incomplete and lacked amendment.

Process on these issues made the negotiations seem inadequate, paltry, and demonstrated to non-state actors the real intention of key players; to achieve a mechanism regardless of content, and to push the debate on asset recovery a bit further down the line without actually having to commit to either.

Broadly speaking there was a **divide between countries in terms of rationale and action**.

1. In one camp there were those to gain international respect for their efforts so far on implementing UNCAC. This group also contained countries who openly were in favour of an effective review mechanism. (EU countries, South Africa, Australia etc)
2. In another were those who would potentially most to lose, and against imposition of an effective review mechanism. (Blocker countries- China, Russia, Iran, Egypt, Cuba etc)
3. Then were the state parties for whom the mechanism was not a key issue, or even knew much about it other than the need for funding to cover expenses incurred by a in country review of UNCAC implementation. (Small developing countries)
4. Finally were those who had prioritised a particular aspect of the negotiations: Prevention, Technical Assistance and Asset Recovery. This prioritization was done according to the realities of in country corruption and emphasized the specifics of internal corruption rather than the international facilitation of those flows. (developing countries in need of judicial/political/police/industrial reform)
5. Most Latin American countries behind closed doors backed the Chinese position.

The production of resolutions agreed to in haste without widespread information indicates the way that engagement be conducted: between certain international heavy weights with either most to gain and also most to lose from the different parts of implementing the convention, this engagement will be done on their terms.

The future structure of the review cycle will be as follows and as adopted in resolution L9: The first review cycle 2010-15 will cover Ch III – criminalization and law enforcement, and Ch IV – international cooperation. The second 5 year review cycle will cover Ch II – Preventative Measures and Ch V – Asset Recovery. This ‘gradual’ process is meant to increase learning, implementation, acceptance etc. According to Jack Blum (TJN-US) this is top politically “kick the can further down the road” without actually doing anything.

The ideal review mechanism – a set of tools for assessing to what extent countries have moved towards adopting the convention – should have included: 1) A peer review mechanism that was transparent, inclusive and participatory 2) Mandatory publishing of full reports available publically, 3) Meaningful

participation of civil society at the: review, assessment and reporting levels. 4) In-country visits.

However, what was agreed somewhat different:

1. Mandatory public publishing of executive summaries, full report availability to other member states to be a opt in.
2. Civil society would be included in specific parts and would be chosen by the government under review; self assessment and desk review
3. According to DFID there is much potential in the ambiguity of the wording, however this reading of the review mechanism is overly optimistic when China and Russia and other 'blocker' countries and their negotiation style is taken into account.
4. Country visits are a opt out. Implementation review group is to be of unlimited size; potentially unmanageable for the task in hand.

This weak review mechanism does not ensure that governments are pressed to fulfill their obligations under UNCAC. According to DFID this was the "best deal we could have got" but commentators and other delegates the EU in particular Sweden gave away the extent to which the EU countries would back down. It was however made clear that China and Russia plus others were instructed to come back with a specific kind of mechanism and this, for them, has been broadly achieved.

Resolutions: Preventative Measures: The discussions on preventive measures were met with a myriad of objections from Egypt, Russia and China despite having been ongoing for the last year or two.

1. Emphasis on PPPs is to align public procurement with convention article 9. Addressing in particular the areas of repeated vulnerability in these processes.
2. Importance of country, sector, industry specific adaptation.
3. Other actors to continue working on business principals in order to prevent/deter corruption
4. Judicial and public sector reform are key areas to be included a preventative measures.
5. Many delegations did not know resolutions were to be put forward and agreed to on asset recovery or the review mechanism. For many developing countries the issue was of funding, rather than content. Prevention and technical assistance were deemed more important.
6. Emphasis on the role of the private sector, procurement, examining of PPPs rather than so much on the reform of the civil sector or promotion of public reporting.
7. What actually constitutes deterrence and prevention, ambiguity over wording could allow action in both negative and positive directions.

Resolutions: Technical Assistance: The outcomes of the debates over the role, strength and scope of technical assistance were concluded with resolution, proposed by the US: including a call for state parties to promote public and private partnerships in order to leverage resources for advancing technical assistance efforts.

1. *Asset recovery through civil forfeiture is limited to technical assistance, and not as an actual tool for achieving the recovery of assets.*
2. *Whilst there is no direct mention of the legal gap, between state and citizen, i.e. victim of corruption, the resolution does leave some space for business and CSR*

to take a lead role on codes of conduct for business around, investment, due diligence etc.

3. *The case needs to be made that whilst MLA and technical expertise is open to states this technical assistance tools are not broadly available to citizens. Cases which lack either political will on either side of an MLA request will get only so far through government-government channels and procedure which requires criminal convictions as a starting point.*
4. *Support on this basis is clearly needed within the broader international architecture of asset recovery as it is currently being developed (see STAR report on this topic)*

Resolutions: Asset Recovery: Weak statement on asset recovery that failed to advance key issues. It did not press signatories to comply with convention mandates on misuse of corporate vehicles and non-conviction based forfeiture.

1. *No acceptance of the “operational and legal impediments” associated with asset recovery when based on government reciprocity and criminal proceedings are not possible, legitimate, or credible.*
2. *Privileges position of STAR and warns of “duplication” with other networks already in place*
3. *Asset recovery is an issue of technical assistance:*
 - i. *Not something that is inherently problematic as demonstrated by WB “success” cases of Peru, Kazakhstan Philippeans.*
 - ii. *Non-conviction based forfeiture is moved from being a mechanism for asset recovery to being an aspect of technical assistance that will be made available to countries through “knowledge networks” again World Bank to have privileged position.*
 - iii. *“preservation of assets during the pendency of foreign proceedings” levelled as an issue for technical assistance, and not something that is deemed inherently problematic*
4. *Emphasis on development “impact” and effects of asset recovery. This will require greater deliberation over the “what next” repatriation and governance and management of assets.*
5. *Many delegations had a general acceptance that politics was more than likely to stall any real action on this*

Issue of Funding: Funding was a important aspect of these negotiations with Venezuelan delegate putting into words what many others felt “the mechanism is not important for us, it is important for them, funding is important for us, it is not for them, I would be unsurprised if many groups began using consensus as

Funding from the regular UN budget

- i. *Same pot as UNICEF, UNDP etc, allocation to be re-negotiated every 2 years. States would have o support this.*
- ii. *G77 + China because of its strong negotiating power could block mechanism through funding channel*
- iii. *Objected to by the US pushed for by G77 + China*

Assessed contributions

- i. *Only state parties to pay, contributions would be scaled.*
- ii. *No mechanism survives this, as countries fail to pay, fall into arrears,*

Voluntary contributions

- i. *Free of condition and influence would not be observed through voluntary contributions, funding steers decisions and outputs of the review*
- ii. *Cannot be used as a stand-alone financing*
- iii. *Unreliability reduces*

Outlook

The meeting and its outcomes presented a framework through which to link the internal and international aspects of the anti-corruption convention. In doing so it highlighted the inherent problems associated with attempts at intra-national governance on this issue. (Intra-because not every country has signed the convention therefore cannot be seen as global)

The strategic approach adopted by the 'likeminded' group of states within the context of achieving consensus demonstrated just how far they were willing to back down. This was unfortunate as the review mechanism and statements on prevention, technical assistance, and asset recovery were weak. However they provide a potential – but not definite – platform from which strategies involving non-state actors can move forward.

Time frame of 2 and 5 years for the different resolutions and review mechanism to take place means that Civ Soc and private sector groups have time to re-group and re-invigorate debates over transparency, legitimacy and political expediency.

Conclusions

The governance framework is now in place what remains is acknowledgement of the inherent issues associated with it. Although this leaves UNCAC toothless for the next 2 years at least the process of review and the inter-governmental working groups may provide a useful tool for opening up these debates into the public realm. The monitoring and reporting done by: in-country experts, academics, NGOS and the press on these issues will remain fundamental if UNCAC is to grow any teeth in the future and if governments are actually going to be pressed to match the