

## THE EXPERTS ROUNDTABLE: A HEMISPHERIC APPROACH TO COMBATING CORRUPTION\*

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\* Co-hosted by Transparency International, the American University, Washington College of Law, and the Inter-American Bar Association, on November 11 and 12, 1999.

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## I. EXPERTS ROUNDTABLE CONFERENCE PARTICIPANTS

*Nancy Zucker Boswell*, Managing Director of Transparency International (“TI”)-USA, presented an overview on the progress of implementation based on the results of the TI Americas Anti-Corruption monitoring program.

*Ambassador Miguel Ruiz Cabañas*, General Director for North American Affairs, Mexican Foreign Ministry, described how consensus was reached to create a mutual evaluation mechanism in the context of the control of drug trafficking.

*Ambassador Roberto Casellas*, Advisor, International Affairs, *Secretaría de Contraloría y Desarrollo Administrativo* (“SECODAM”-Mexico), addressed the concerns of participating countries in the negotiation of the Organization for Economic Co-operation and Development (“OECD”) Convention and its monitoring process and how they were overcome.

*Peter Csonka*, Division of Crime Problems, Council of Europe discussed the mutual evaluation program of the Group of States against Corruption (“GRECO”) and how it plans to address the wide range of issues covered by the COE Convention.

*Michael Davies*, Canadian Council for International Business, discussed the importance to the private sector of anti-corruption reform and the need for consistent, predictable rules.

*Selma Estrada*, Director, Honduran Office of Administrative Probitiy, discussed how multilateral cooperation can benefit domestic efforts to reform.

*Victoria Figge*, former Director, Panamanian Financial Analysis Unit, provided a perspective on how the Caribbean Financial Action Task Force (“CFATF”) monitoring process has functioned from the perspective of a participant country.

*Marcus Faro de Castro*, Chair of the Department of Political Science and International Relations at the University of Brasilia, discussed the impact of corruption on human rights.

*Jorge García-González*, Director, OAS Department of Legal Cooperation, explained the OAS-International Development Bank (“IDB”) project to promote implementation of the Convention’s

criminal law provisions.

*Claudio Grossman*, Dean of American University, Washington College of Law and Chairman, Inter-American Human Rights Commission, served as Chairman of the Roundtable and set the stage for the principal discussants for each topic and facilitated the general discussion after each presentation. Claudio Grossman also presented how the Inter-American system for the protection of human rights operates to secure compliance with relevant international standards.

*Daniel Kaufmann*, Division Manager, World Bank, presented an overview of the impact of corruption in the Americas.

*Eduardo Roche Lander*, Comptroller General of Venezuela, presented Venezuela's experience with implementation of the Convention and anti-corruption reform.

*Lucinda A. Low*, Member, Council of the Inter-American Bar Association, provided an overview of the provisions of the Inter-American Convention against Corruption.

*Roberto MacLean*, former Justice of the Supreme Court of Perú, described the problem of corruption and judicial systems.

*Jennifer McCoy*, Director, Latin American and Caribbean Program, Carter Center, discussed mutual cooperation among the Council of Freely Elected Heads of Government.

*Roberto de Michele*, Poder Ciudadano, described implementation of the Convention and anti-corruption reform in Argentina.

*Stanley E. Morris*, former Director, United States Treasury Financial Crimes Enforcement Network, lead the discussion of the best practices and common characteristics identified in the first day's presentations.

*Mark Pieth*, Chair, OECD Working Group on Bribery, discussed the monitoring program for the OECD Convention on Combating Foreign Bribery. Six OAS members are signatories to the Convention.

*Ambassador Carlos Portales*, Permanent Representative of Chile to the OAS, discussed the Chilean experience on implementation.

*Ambassador Beatriz M. Ramacciotti*, Permanent Representative of Perú to the OAS and Chair of the OAS Working Group on Probité and Public Ethics, described the Working Group's Program to Im-

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plement the 1999 OAS Resolution on Strengthening Probity in the Hemisphere.

*Herman Schwartz*, Professor, American University, Washington College of Law, elaborated on supervision mechanisms for multilateral agreements on freedom of expression.

*Luis Carlos Ugalde*, Member, *Transparencia Mexicana* and Chief of Staff of the Mexican Embassy, described how implementation of the Convention has fared in Mexico.

*Fried van Hoof*, Chairman, Netherlands Institute of Human Rights and Professor, Utrecht University, presented processes for ensuring compliance with human rights commitments in the European context.

*Raul Vinuesa*, Professor of Law, University of Buenos Aires, discussed the scope of the Convention.

*Calvin Wilson*, Executive Director, Caribbean Financial Action Task Force, discussed the CFATF model for evaluating compliance with anti-money laundering measures. The discussion considered how the model facilitates participation by countries despite financial constraints.

*Gustavo Zafra*, Dean of the *Universidad Javeriana of Colombia*, discussed the Convention's standards for public procurement.

## II. INTRODUCTION

BY CLAUDIO GROSSMAN<sup>1</sup>

Corruption has devastating financial effects on economies. It distorts the provision of social services; causing contracts to be awarded to substandard providers and causing inflated costs and cost overruns in government enterprises. It destroys confidence in a country's financial system, which, in turn, deters investment. It widens the gap between the rich and the poor.

Official corruption is much more than just a financial problem, however. It is a violation of human rights. It perpetuates discrimination by providing greater public benefits to those who have the

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1. Dean, the American University, Washington College of Law.

money to offer bribes or “grease money.” It prevents the full realization of economic, social, and cultural rights because resources are not distributed fairly and effectively. By distorting the free will of the people, it often leads to the infringement of civil and political rights—such as the right to a fair trial and the right to vote.

In the Western Hemisphere, corruption has undermined legitimate institutions and economic development. The problem has become so pervasive that leaders of the hemisphere called for a hemispheric approach to combating corruption at the 1994 Miami Summit of the Americas. The first step in meeting this objective was the drafting of the 1996 Inter-American Convention against Corruption. The Convention calls on parties to develop more effective mechanisms to prevent, detect, and punish corruption and to cooperate in the enforcement of the Convention itself. While seventeen nations have ratified the Convention and some progress has been achieved, experts agree that to succeed in the implementation of the Convention's goals, all countries in the region must ratify the Convention and work toward the development of domestic and regional norms and procedures to ensure compliance.

The American University, Washington College of Law was privileged to host the “Experts Roundtable: A Hemispheric Approach to Combating Corruption” to address just this issue. In cooperation with cosponsors Transparency International and the Inter-American Bar Association, the Washington College of Law succeeded in assembling an impressive group of academics, jurists, diplomats, and attorneys from the region and around the world. The Roundtable examined the effects of corruption in the hemisphere, outlined a “hemispheric approach” to the problem, and discussed ways to increase the number of ratifications of the Convention as well as to improve adherence to its provisions. A principal conclusion of the unanimous “Findings, Considerations, and Recommendations” of the Experts Roundtable was the need for a multilateral monitoring mechanism to promote implementation and enforcement of the Convention, through the conduct of regular peer review evaluations.

The “Findings, Considerations, and Recommendations” established by the Experts Roundtable will help to forge the path for the end of corruption in the Americas. The recommendations were submitted to Heads of State and Organization of American States

(“OAS”) Ambassadors. They were also formally presented to the OAS Working Group on Probity at its January 2000 meeting and, since then, a range of OAS Ambassadors have responded favorably. A discussion of multilateral follow-up mechanisms was on the agenda for the Working Group’s March 2000 Special Meeting on Enhancement of Probity and the Fight Against Corruption in the Hemisphere. It is hoped that the Working Group will recommend that the OAS General Assembly call for the adoption of a monitoring mechanism at its June 4-6 meetings in Windsor, Canada. Such action will infuse new energy into the process of implementing the Convention and will pave the way for even further concrete reforms at the Third Summit of the Americas in 2001.

The papers that follow reflect the general spirit of the Roundtable meeting and serve as an introduction to the issue of corruption and possible responses to it. The papers also provide a feeling of the diversity of perspectives that were available at the Roundtable meeting. The Program Design outlines the background on the issue and sets forth the Roundtable agenda. The foregoing is followed by Lucinda Low’s paper on the scope of the Convention; Ms. Low is a member of the Council of the Inter-American Bar Association. In the next paper, Ambassador Beatriz Ramacciotti, Permanent Representative of Peru to the OAS, explains the Inter-American Program against Corruption. Nancy Zucker Boswell, managing director of Transparency International-USA, follows with her perspective on the role of civil society in combating corruption.

Next, Stanley Morris, former director of the United States Treasury Financial Crimes Enforcement Network, discusses mutual evaluation in his paper. This is followed by remarks by Ambassador Claude Heller, Permanent Representative of Mexico to the OAS. Highlighting the importance of learning from the experiences of other multilateral institutions, a short piece by Peter Csonka on the Council of Europe’s GRECO program is included. Mr. Csonka is from the Division of Crime Problems of the Council of Europe. Calvin Wilson, Executive Director of the Caribbean Financial Action Task Force, describes another model from this hemisphere. Next, a piece by Victoria Figge, former director of the Panamanian Financial Analysis Unit, is included, entitled “Best Practices in Multilateral Implementation.” The final piece is the “Findings, Considerations, and Recommendations” that resulted from the Roundtable.

It will take the cooperation of experts, civil society, governments, and corporations to achieve the Roundtable's ultimate goal—the elimination of corruption in the Western Hemisphere. I hope that the Roundtable and its aftermath, part of which is embodied here, will succeed in fostering that cooperation.

### III. PROGRAM DESIGN

PREPARED BY TRANSPARENCY INTERNATIONAL

#### A. BACKGROUND

At the 1994 Miami Summit of the Americas, the leaders of the hemisphere agreed that corruption was undermining legitimate institutions and economic development, and they called for a hemispheric approach to combating it. In 1996, OAS members accomplished the first step in meeting this objective when they concluded the Inter-American Convention Against Corruption. The Convention calls upon parties to develop more effective mechanisms to prevent, detect, and punish corruption and to cooperate in its enforcement.

In light of the limited number of signatories to the Convention and the number of countries that have ratified or implemented the Convention, in June 1999, the OAS General Assembly instructed the Permanent Council to consider “specific measures to encourage ratification and implementation of the Convention.”

Accordingly, the American University, Washington College of Law, the Inter-American Bar Association, and Transparency International convened a meeting of experts from throughout the Western Hemisphere to identify approaches to spur progress on implementation of the Inter-American Convention Against Corruption. The Roundtable was expected to develop recommendations to help carry out the OAS Resolution.

#### B. THE ROUNDTABLE AGENDA

As background for the discussions, the Roundtable started with presentations on the negative impact of corruption in the Hemisphere, the requirements of the Convention, the current status of its

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implementation, and the programs planned by the OAS Working Group on Probity and the Legal Secretariat.

The Roundtable then moved to a discussion of what specific further steps should be taken to stimulate action across the hemisphere to achieve a consistent and effective legal and regulatory environment to fight corruption. Recent multilateral initiatives to address various aspects of corruption, money laundering, and bribery adopted follow-up monitoring programs in order to secure achievement of their goals. Presentations were made on follow-up programs for anti-corruption, anti-bribery, anti-money laundering, and other agreements in which OAS members already participate, within and outside the hemisphere. An effort was made to identify a "hemispheric approach" outlining specific steps that signatories could take together to ensure consistency and progress in implementing the Convention throughout the hemisphere. Participants evaluated the various approaches presented and considered their compatibility with Inter-American Convention Against Corruption and the unique concerns of the nations of the Western Hemisphere in reaching the Roundtable's ultimate "Findings, Considerations, and Recommendations."<sup>2</sup>

#### C. OBJECTIVE

The objective of the Roundtable was to identify and address the issues that may arise in establishing a hemispheric approach to promoting and monitoring implementation and enforcement of the Convention and to develop recommendations for the OAS Permanent Council to consider for adoption by the General Assembly at its thirtieth regular session in 2000. The Roundtable hoped that its action would re-energize the process so that concrete progress can be reported at the Third Summit of the Americas in 2001.

#### D. ISSUES

Past discussions of oversight or monitoring of agreements in the Western Hemisphere have been quite sensitive, raising concerns ranging from sovereignty to more practical concerns of cost. Furthermore, past actions of the United States, particularly in its anti-drug efforts, have created suspicions regarding the United States'

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2. *See infra* Part XII.

intentions in a monitoring system. Nevertheless, there is widespread consensus that multilateral agreements do not have effective oversight and seldom meet the goals of their drafters. Indeed, every other recent anti-corruption initiative has provided for a rigorous monitoring follow-up program. Accordingly, the Roundtable strove to develop recommendations that addressed the unique aspects of the Convention and the justifiable sensitivities of many nations in the hemisphere.

#### IV. THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION: OVERVIEW AND STATUS AT THREE YEARS SINCE ITS INCEPTION

BY LUCINDA A. LOW & JACQUELINE DE GRAMONT<sup>3</sup>

##### A. INTRODUCTION

On March 29, 1996, the thirty-four-member Organization of American States ("OAS") approved the Inter-American Convention Against Corruption ("OAS Convention" or "Convention").<sup>4</sup> The OAS Convention was the first instrument to establish an international legal framework aimed at eliminating bribery and corruption of government officials. Twenty-one of the thirty-four OAS Member States signed the Convention at the March 29 meeting in Caracas, Venezuela. To date, twenty-six OAS Member States have signed the Convention and seventeen have ratified it. By participating and promoting the creation and adoption of this first regional instrument under the auspices of the OAS, Latin American countries have taken a leadership role in the international fight against corruption in the public sphere.

Since then, on December 17, 1997, twenty-eight Member States of the OECD and five non-Member State observers to its Working

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3. Lucinda A. Low is a member of Miller & Chevalier, Chartered, a member of the Council of the Inter-American Bar Association, and a director of Transparency International U.S.A. Jacqueline de Gramont is an associate at Miller & Chevalier, Chartered, in Washington, D.C.

4. Inter-American Convention Against Corruption, *opened for signature* Mar. 29, 1996, *reprinted in* 35 I.L.M. 724 (1996) [hereinafter OAS Convention].

Group on Bribery in International Business Transactions, including six OAS Member States, signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention").<sup>5</sup> At the time of this writing, eighteen countries have ratified the OECD Convention, which entered into force on February 15, 1999.

In addition, on November 4, 1998, the forty Member States of the Council of Europe and eight observer states approved the text of a convention on corruption entitled the Criminal Law Convention on Corruption ("Council of Europe Convention").<sup>6</sup> Twenty-one states signed the Council of Europe Convention on the day it opened for signature. At this writing, no states have ratified the Convention. Lastly, the European Union has adopted its own anti-corruption convention.<sup>7</sup> This convention criminalizes the "deliberate action of whosoever promises or gives . . . an advantage of any kind" to an EU or any Member State's official.<sup>8</sup>

Of these four international instruments, the OAS Convention is the most ambitious in its attack on public corruption. The OECD Convention is narrowly targeted on the supply side of transnational bribery and closely associated offenses or conduct, for example, money laundering and accounting. The Council of Europe and European Union Conventions, although broader than the OECD Convention in that they cover domestic and foreign official bribery from both the supply and demand sides, retain a focus on criminalization.<sup>9</sup> Only the OAS Convention, on the other hand, focuses on preventive measures

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5. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *opened for signature* Dec. 18, 1997, *reprinted in* 37 I.L.M. 1 (1998). Among OAS Member States, Canada, Mexico, and the United States have ratified the OECD Convention and have enacted implementing legislation. Argentina, Brazil, and Chile have signed but not yet ratified the OECD Convention.

6. Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, Council of Europe, Europ. T.S. No. 173.

7. See European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, 1997 O.J. (C 195) [hereinafter EU Convention].

8. See *id.* art. 3.

9. The Council of Europe has also adopted a Civil Law Convention on Corruption (provisional version Sept. 9, 1999).

in addition to criminalization. As such, it represents a more comprehensive approach to the problem of public corruption.

This paper provides an overview of the OAS Convention and the status of its ratification and implementation three years after its inception. First, this paper presents the substantive provisions of the Convention. Second, this paper examines the current ratification and implementation status of this important regional instrument, and discusses the obstacles to ratification encountered in at least three countries. Finally, this paper describes several recent positive developments at the OAS level. This last section also addresses the need for future initiatives—in particular, stronger institutional support mechanisms—to achieve the ultimate goal: turning the provisions of the Convention into a reality at the domestic level to reduce or eliminate corruption in the region.

#### B. OVERVIEW OF THE OAS CONVENTION

The OAS Convention took effect on March 6, 1997, following the deposit of notices of ratification by Paraguay and Bolivia. The Convention seeks to promote the development and strengthening of legal mechanisms in signatory countries to “prevent, detect, punish and eradicate” official corruption and to facilitate cooperation among the signatories to combat official corruption.<sup>10</sup> The Convention consists of twenty-eight Articles. The first twenty contain the substantive provisions of the Convention; the final eight address signature, ratification, reservations, and similar matters. Articles I-V contain general provisions, including definitions of key terms used in the Convention, and important provisions regarding scope (Article IV) and jurisdiction (Article V). Articles VI-XII set forth the obligations of states with respect to their domestic laws, while Articles XIII-XX deal with international corruption, enforcement, and other agreements between State Parties.

The Convention can thus be divided into two spheres—domestic and multilateral. Certain articles concentrate on the domestic measures on both the “supply” and the “demand” sides that State Parties need to institute to fight corruption. Other articles target multilateral

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10. See OAS Convention, *supra* note 4, art. II. The Convention does not address private commercial bribery or corruption.

cooperation to aid national authorities in enforcement of these domestic measures. In both the domestic and multilateral spheres, the OAS Convention sets forth different levels of obligation. Certain articles are binding on State Parties, others are conditional, still others are subject to progressive development, and a fourth category are aspirational only. Some of the binding commitments are self-executing, while others require the Member States to pass new laws, in particular, criminal laws.

The paragraphs that follow review first, the mandatory domestic measures of the Convention, next, the aspirational domestic measures, and finally, the multilateral measures. Then jurisdictional issues, penalties, and multilateral obligations are reviewed.

### 1. *Mandatory Domestic Measures*

The mandatory domestic provisions of the OAS Convention represent a comprehensive assault on bribery. They require State Parties to criminalize both domestic and foreign bribery and to enact measures to combat the “illicit enrichment” of government officials. The provisions on domestic bribery are aimed at both the person offering a bribe and the recipient (active and passive bribery); the foreign bribery provisions, appropriately, focus on the offeror alone. The recipient is the focus of the illicit enrichment provision.

In Article VI, the Convention identifies a number of activities that it categorizes as “acts of corruption” and, therefore, fall within the scope of the Convention.<sup>11</sup> Article VII of the Convention requires, without qualification, State Parties “that have not yet done so” to criminalize the specific acts of corruption listed in Article VI(1). Those acts of corruption include: (1) the solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions,<sup>12</sup> of any article of monetary value, or other

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11. *Cf. id.* art. XII (providing that for the Convention to apply, no harm to state property need be caused by these acts).

12. The terms “government” or “public official” and “public function” are defined in Article I of the Convention. A “public official” is “any official or employee of the State or its [agencies/entities], including those who have been selected, appointed, or elected to perform activities in the name of the State or service of the State, at any level of its hierarchy.” *Id.* As discussed below, there is some confusion between the English and Spanish versions as to whether the nar-

benefit, such as a gift, favor, promise, or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; (2) the offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise, or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions; (3) any act or omission in the discharge by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party; (4) the fraudulent use or concealment of property derived from any of the acts referred to in this article; and (5) participation in the commission or attempted commission of, or any collaboration or conspiracy to commit, any of the acts referred to in this article.<sup>13</sup>

A separate article of the Convention, Article VIII, focuses on foreign, or transnational, bribery. Under this Article, a State Party agrees to prohibit and punish the offering or granting, directly or indirectly, by its nationals, residents, and businesses domiciled there, to a government official of another state, of any article of monetary value, or other benefit, such as a gift, favor, promise, or advantage, in connection with any economic or commercial transaction, in exchange for any act or omission in the performance of that official's public functions.

The obligation the Convention imposes on states to criminalize foreign bribery is limited by a potentially significant condition, however: a State Party's obligation to enact foreign bribery measures is "[s]ubject to its Constitution and the fundamental principles of its legal system."<sup>14</sup> Thus, states may use this "escape clause" to avoid im-

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rower word "agencies" or the broader word "entities," which could include state-owned enterprises, is used. "Public function" means "any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its [institutions], at any level of its hierarchy." *Id.*

13. *See id.* art. VI(1)(a)-(e).

14. *Id.* art. VIII. This limitation is primarily directed to those countries that do not exercise jurisdiction over their national resident or acting outside their territory. *See Organización de los Estados Americanos, Informe Anual del Comité Jurídico Interamericano a la Asamblea General (Elementos para la preparación de legislación modelo con respecto al enriquecimiento ilícito y el soborno transnacional*

plementing Article VIII without having to take a reservation to the Convention. Among those State Parties that do make foreign bribery an offense, it will be considered an “act of corruption” for purposes of the Convention, thus triggering the treaty obligations of State Parties. States that have not criminalized foreign bribery are nonetheless required, “insofar as [their] laws permit,” to cooperate with other State Parties in the enforcement of other states’ foreign bribery laws.<sup>15</sup>

The third principal tool of the Convention focuses on illicit enrichment of public officials. Under Article IX, State Parties agree to establish as an offense “a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.”<sup>16</sup> Like the foreign bribery offense contemplated in Article VIII, the obligation of states to do so is subject to their Constitutions and fundamental legal principles.<sup>17</sup> Also like Article VIII, illicit enrichment under Article IX will be considered an “act of corruption” for purposes of the Convention among those State Parties that do make it an offense, which means the international obligations imposed by the Convention will be applicable. Those states that have not criminalized illicit enrichment are required, “insofar as [their] laws permit,” to cooperate with other State Parties in the enforcement of other states’ laws.

When State Parties adopt legislation criminalizing foreign bribery and illicit enrichment, they must notify the Secretary-General of the Organization of American States, which will, in turn, notify the other State Parties.<sup>18</sup> Those crimes will be considered acts of corruption for purposes of the Convention thirty days after that notification.<sup>19</sup>

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(CJI/RES.I-1/97)), sec. III(e) (Apr. 17, 1997) [hereinafter “Juridical Committee Report”].

15. OAS Convention, *supra* note 4, art. VIII.

16. *Id.* art. IX.

17. *See id.* The Convention included this reservation at the insistence of the United States because of constitutional problems posed by the criminalization of unjust enrichment. *See* Part IV.C *infra*.

18. *See* OAS Convention, *supra* note 4, art. X.

19. *See id.*

## 2. Aspirational Domestic Measures

In addition to the binding commitments in Articles VII-IX, State Parties agree in other provisions of the Convention to consider other measures of good governance and other anti-corruption provisions, including the establishment of additional offenses.

Article XI of the Convention enumerates four additional “acts of corruption” that State Parties agree to consider criminalizing under domestic law in order to promote uniformity among the Member States and to further the purposes of the Convention. These acts, which are subject to progressive development, are: (1) the improper use of information by government officials; (2) the improper use of state property by a government official; (3) the attempt by any person, directly or indirectly, to obtain illicit benefits for himself or any other person; and (4) the diversion of state property for personal benefit.<sup>20</sup>

Once a State Party establishes any of these acts as a criminal offense, it will be considered an act of corruption for purposes of the Convention and will trigger the international obligations of the State Parties under the Convention. State Parties that do not enact such laws are required, consistent with their domestic laws, to assist other State Parties with respect to those offenses.<sup>21</sup>

Under Article III, which contains the “softest” measures in the hierarchy of the Convention, State Parties agree to consider preventive measures to “create, maintain, and strengthen” their domestic laws. These preventive measures fall into four primary areas. First, State Parties agree to consider measures relating to transparency and accountability in government procurement and functions. In particular, State Parties agree to consider measures relating to the government procurement and government hiring processes to ensure their “openness, equity, and efficiency,” and similar measures relating to the government revenue collection and control systems that “deter corruption.”<sup>22</sup> State Parties also agree to consider systems for registering the income, assets, and liabilities of certain public officials and,

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20. *See id.* art. XI(1)(a)-(d).

21. *See id.* art. XI(2)-(3).

22. *See id.* art. III(5)-(6).

where appropriate, to make that information public.<sup>23</sup>

Second, State Parties agree to consider measures to create, maintain, and strengthen ethics rules applicable to public officials. In particular, these include: standards of conduct for the “correct, honorable, and proper fulfillment of public functions”; standards to prevent conflicts of interest; standards to “mandate the proper conservation and use of resources entrusted to government officials”; and standards to require government officials to report acts of corruption to the appropriate authorities.<sup>24</sup>

Third, State Parties agree to consider measures to create, maintain, and strengthen prophylactic safeguards against corrupt activities by private concerns. In particular, State Parties agree to consider laws that deny favorable tax treatment for expenditures made in violation of the State Parties’ anti-corruption laws.<sup>25</sup> They also agree to consider mechanisms to ensure that publicly-held companies and similar organizations “maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts.”<sup>26</sup>

The fourth set of preventive measures is diverse. State Parties agree to consider measures to protect public servants and private citizens who report acts of corruption (“whistleblowers”), including protection of their identities, in accordance with the basic principles of State Parties’ domestic legal systems.<sup>27</sup> Finally, State Parties agree to consider measures to advance the anti-corruption effort, including anti-corruption oversight bodies, programs to encourage broader involvement in the effort, and further measures that account for the correlation between “equitable compensation and probity [honesty] in public service.”<sup>28</sup>

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23. See OAS Convention, *supra* note 4, art. III(4).

24. See *id.* art. III(1)-(3).

25. See *id.* art. III(7).

26. *Id.* art. III(10).

27. See *id.* art. III(8).

28. See OAS Convention, *supra* note 4, art. III(9), (11)-(12).

### 3. *Jurisdiction and Penalties*

The delineation of the activities to be criminalized is one critical part of the Convention. A second part that affects its scope is the jurisdictional provisions. Here, the Convention aspires to be inclusive and accommodating of the differing principles of personal jurisdiction applicable in Member States, while giving primacy to the principle of territoriality. The Convention requires that State Parties adopt measures to establish their jurisdiction over Convention offenses (a) committed in their territory, and (b) when the alleged criminal is present in their territory, but not extradited to another state due to nationality.<sup>29</sup> In addition, State Parties may adopt measures to establish jurisdiction over those offenses committed by their nationals or residents, whether or not those crimes were committed inside their territory. The Convention also explicitly preserves the established rules of criminal jurisdiction of State Parties under their domestic laws.<sup>30</sup> In requiring criminalization of the array of acts just reviewed, the Convention does not specify the penalties that State Parties must impose for their violation.

### 4. *Multilateral Obligations*

The Convention's multilateral framework consists primarily of mandatory obligations to cooperate and assist other State Parties in the prosecution of foreign and domestic corruption. Some of the recommended actions are general, for example, to "foster exchanges of experiences by way of agreements and meetings."<sup>31</sup> Others, such as the extradition provisions, are specific and quite important to effective enforcement.

The extradition provisions are set out in Article XIII. They apply only to the "acts of corruption" established by the State Parties as offenses in accordance with the Convention.<sup>32</sup> Under Article XIII, the Convention extends existing extradition treaties among State Parties to include the offenses established under the Convention. State Par-

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29. *See id.* art. V(1), (3).

30. *See id.* art. V(4).

31. *Id.* art. XIV(2).

32. Thus, they would include any of the acts specified in Articles VI, VIII, IX, or XI.

ties further undertake to include these offenses in any future extradition treaties.<sup>33</sup> The Convention can also serve as a self-executing extradition treaty among the State Parties that have not concluded extradition treaties with one another, or which do not condition extradition on the existence of such treaties.<sup>34</sup>

The Convention emphasizes cooperation among State Parties in the pursuit of the Convention's anti-corruption goals. In addition to the specific requirements of cooperation already mentioned under Articles VIII and IX, under Article XIV, State Parties agree to "afford one another the widest measure of mutual assistance" in preventive, investigative, and enforcement efforts, "[i]n accordance with their domestic laws and applicable treaties."<sup>35</sup> The mutual assistance article thus looks to existing treaties and domestic laws to define the content of the State Parties' obligations, rather than enlarging them, as the extradition provision does.

In two potentially very important provisions, the Convention prohibits the use of bank secrecy laws or the allegedly political nature of an act of corruption as a basis for refusing to cooperate with other State Parties.<sup>36</sup>

The Convention specifically provides for cooperation among the State Parties in the seizure and forfeiture of assets connected with "acts of corruption," both domestic and foreign. Under Article XV, State Parties agree to provide each other "the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses" established in accordance with the Convention.<sup>37</sup> Article XV suggests that State Parties may want to transfer all or part of properties or proceeds to other State Parties if doing so would assist in an underlying investigation or proceeding.

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33. See OAS Convention, *supra* note 4, art. XIII(2).

34. See *id.* art. XIII(3)-(4).

35. *Id.* art. XIV.

36. See *id.* arts. XVI, XVII.

37. See *id.* art. XV.

### C. RATIFICATION AND IMPLEMENTATION STATUS

The adoption of the OAS Convention by twenty-six countries represents a major achievement. Ratification and implementation, however, have faced a number of obstacles. This Section describes those obstacles and the efforts underway to overcome them.

Under the Convention, the ratification of only two countries was necessary for the Convention to enter into force.<sup>38</sup> The Convention met this standard within a year of its adoption. However, progress in ratification by all of the countries that signed the treaty has been slow. To date, although twenty-six countries have signed the Convention, only seventeen countries have deposited their instruments of ratification with the OAS.<sup>39</sup> The reasons for not ratifying the Convention vary from country to country, but include absence of a deadline for ratification, internal procedural hurdles, constitutional concerns over certain provisions, and, perhaps most importantly, concern over the lack of institutional support for implementation and enforcement, discussed below.

Unlike the OECD and Council of Europe Conventions, the OAS Convention does not provide for any institutional oversight or support for its implementation by State Parties.<sup>40</sup> This is a considerable gap, especially when the scope of the Convention is considered. What should the priorities be among all the areas addressed by the Convention? How should criminal laws be drafted or amended to en-

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38. See OAS Convention, *supra* note 4, art. XV.

39. The Convention permits countries to take reservations when ratifying it, provided such reservations are not incompatible with the "object and purpose of the Convention." See *id.* art. XXIV. To date, only Panama has taken a reservation in which it states that it does not consider itself bound to seize or forfeit property under Article XV to the extent that such actions violate Article 30 of the Panamanian Constitution.

40. The OECD Convention provides that monitoring shall be done within the framework of the OECD Working Group on Bribery in International Business Transactions. The current terms of reference of the OECD Working Group on Bribery that are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. Under the Council of Europe Convention, the Group of States Against Corruption ("GRECO") is the institutional structure charged with monitoring the implementation of the Convention. Ratifying states automatically become a member of GRECO on the date the Convention enters into force.

sure that maximum benefit is derived from the cooperation mechanisms of the Convention? When is harmonization possible or desirable? How should enforcement efforts be prioritized, and are there common capacity-building issues? These are all questions that an institutional support mechanism could help resolve. However, the OAS Members did not focus on the adoption of an institutional support mechanism during the negotiations of the Convention.

The monitoring mechanism in the OECD Convention has been important in gaining the support of many countries for that agreement, and may explain why the OECD Convention has achieved broader adherence than the OAS Convention in a shorter time frame. The monitoring process established under the OECD Convention includes: (1) self-evaluation of implementing legislation by reference to a detailed OECD questionnaire; (2) peer review of those responses; (3) on-site review of enforcement by a team of experts drawn from participating nations; and (4) consideration of their reports at plenary meetings. The adoption of a monitoring mechanism and other components of "institutional support" will help ensure not only the ratification but also the implementation of the OAS Convention.

#### D. CONCLUSION

The OAS Convention is a path-breaking instrument in the development of international standards to combat public corruption, the provision of mechanisms for holding violators accountable, and the establishment of a comprehensive preventive work program. Both panelists and audience participants during a recent workshop on the OAS Convention presented at the Inter-American Bar Association's XXXV Conference in Mexico City reiterated that the key goal now is to turn the provisions of the Convention into a reality at the domestic level, where they will affect behavior and effectively address the problem of corruption. The provision of institutional support on the part of the OAS, in conjunction with assistance of the Inter-American Development Bank, will provide a beneficial source of information and technical advice in the area of criminology, especially to those countries that are just starting their implementation process. To turn the full range of the Convention's provisions into reality at the domestic level, however, the development of more formal, broader, and sustained institutional support mechanisms are likely to

be necessary.

V. STRENGTHENING PROBITY AND PUBLIC  
ETHICS IN THE OAS FRAMEWORK:  
IMPLEMENTATION OF THE INTER-AMERICAN  
PROGRAM OF COOPERATION TO FIGHT  
CORRUPTION

BY AMBASSADOR BEATRIZ M. RAMACCIOTTI<sup>41</sup>

A. GENERAL FRAMEWORK

The purpose of this presentation is to present the most important activities that are underway at the principal regional political forum, the Organization of American States ("OAS"), on the subject of probity, public ethics and the fight against corruption. Prior to an in-depth discussion of the subject, I would like to point out by way of introduction that we recognize that corruption, as our Heads of State and Government reaffirmed in the Summits of the Americas, in Miami in 1994 and Santiago in 1998, represents one of the most serious threats to the consolidation of democracy and to the social and economic development of our countries. For this and other reasons, we at the OAS are convinced that the subjects of probity and its counterpart, corruption, must be addressed and discussed at all levels. We must be aware of the dimensions of the problem, and not just because it has become a concern at different levels and sectors, but also so that we are prepared to act on short-, medium-, and long-term strategies and to take concrete actions at institutional and personal, domestic and international levels.

It is first necessary to note that at the OAS, the fight against corruption takes place within a broader political framework, given the problems we are experiencing and the challenges that our societies must face in the future decades. Corruption, the fight against drugs, terrorism, violence, and poverty in its various forms are not isolated

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41. Permanent Representative from Perú to the OAS and President of OAS Working Group on Probity and Civic Ethics.

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issues, and they cannot be handled independently in the context of a society marked by globalization and interdependence. On the contrary, these problems are interrelated and require an integral approach, based on a humanistic and democratic vision, with clear values and principles focused on the human being.

I do not mean to say that addressing each of these specific challenges requires a specific technical and legal approach with predetermined strategies and actions. However, an essential premise is the need for an integral approach and a basic consensus that allow us to address these issues collectively, cooperatively, and efficiently. With respect to corruption, the governments of the hemisphere are well aware of the damaging ramifications of this illicit phenomenon. In the political context, corruption produces a progressive decrease in the legitimacy of the system, in our case the democratic system, and of our public institutions, which generates distrust and a lack of confidence in the integrity of public administration. At the social level, corruption demoralizes our citizens and our civil society, and creates conflict between this sector and the government. Corruption acts as a disincentive to honest work, and impedes social advancement that is based on individual merit. Corruption increases inequalities by diverting public funds destined for social development to the enrichment of private interests. At the economic level, corruption increases the cost of public services, generates administrative obstacles, reduces government income, encourages unjustified public expense, increases fiscal budget deficits, permits unfair competition, increases the cost of products, and causes market distortions.

To address, therefore, the concrete challenges of anti-corruption reform, we believe that multilateralism is an essential means of fighting corruption, with examples such as the Summits of the Americas and other regional initiatives undertaken by the OAS and Inter-American Development Bank. In addition, information exchange through seminars, roundtable discussions, and workshops, such as today's important event in an academic environment, at the American University, Washington College of Law, is essential. We are convinced that this is the right way, the permanent exchange of ideas, opinions, and potential measures to be adopted and implemented, with the goal of facilitating the coordination of policies and varied courses of action, in a fruitful collaboration of governments and civil society organizations, in order to work together with com-

mon objectives and strategies.

#### B. THE OAS AND THE FIGHT AGAINST CORRUPTION

In the context of its larger commitment to work to strengthen democratic institutions, the rule of law, free markets, and fundamental human rights protections, the OAS has made consistent progress since the beginning of the 1990s in the fight against corruption, reinforced by the specific mandates established at the Summits of the Americas. The basic starting points that have oriented this work are the following: (1) the necessity to analyze the problem and design a hemispheric integral strategy to fight corruption; (2) the need to simultaneously address individual conduct and systemic issues, in other words the problem of systemic characteristics that encourage illicit behavior; (3) the fight against corruption is a process that requires a consistent effort, and decision-making at different levels; and (4) that all of us have responsibilities in the fight against corruption and the strengthening of probity and public ethics: governments, the private sector, civic society, and international organizations.

The Inter-American Convention against Corruption, adopted in Caracas in 1996, is without a doubt, the most important step taken in this hemisphere in the fight against corruption. The Convention represents the political commitment of governments to face the phenomenon and the consensus for a collective strategy. It is an objective framework that assists countries in advancing simultaneously in various fundamental areas. The Convention, taking into account the four previously-mentioned starting points, contains two major objectives and courses of action. First, domestically, the requirement that States develop sufficient mechanisms to prevent and punish corruption. Second, internationally, the promotion and facilitation of cooperation among State Parties so that we work from a shared process, a joint strategy, and not through isolated, uncoordinated action. To that end, the Convention contains definitions concerning acts of corruption, national legislation, preventive measures, and even transnational bribery, illegal enrichment, bank secrecy, extradition, legal and judicial assistance, and guidelines for progressive development.

To date, seventeen of the thirty-four OAS members have signed the Convention. In addition, the Convention allows for accession by other countries. Taking the Convention as the point of reference for

the actions that governments should undertake, in association with civil society, as well as for the areas of international cooperation, the next step taken in the OAS was the adoption, by the General Assembly in Lima in 1997, of the "Inter-American Program for Cooperation in the Fight against Corruption," with the ultimate objective of implementing the Convention. This program encompasses four thematic areas: legal, institutional, coordination among international organizations, and relationships with civil society.

Some of the measures that we would like emphasize are, for example, the following. First, actions that will ensure the complete ratification of the Convention by Member States and even other countries, such as observer countries to the OAS (currently forty), as the vehicle for a clear and verifiable commitment to fight corruption. Second, the implementation and enforcement in national law of the criminal prohibitions on corrupt practices, including specific crimes such as transnational bribery. To that end, we are compiling domestic laws, conducting comparative studies, and designing model laws (Inter-American Juridical Committee, in the areas of international bribery and illegal enrichment), with the goal of harmonizing internal laws to the extent possible and facilitating legal and judicial cooperation.

Third, another important area is the promotion of ethical values, probity in public service, and in general, codes of conduct for public officials, not only through formal means, such as training workshops, but also informally. Fourth, we must also advance with determination in the modernization of public administration, within the context of the modern state, with institutions and rules that simplify procedures and requirements and are consistent with the development of our social and economic life. We must establish transparency in public administration through effective systems for hiring and promotion of government officials, based on merit and incentives for productivity, and through clear and precise disciplinary systems and internal control mechanisms. Fifth, another fundamental aspect of the program is the participation of civil society.

Governments should work with professional and labor associations, non-governmental organizations ("NGOs"), and the press, to create a means for controlling corruption and promoting ethical values. Citizen participation is essential in the fight against corruption.

Finally, another important aspect is the need for coordination of the projects and initiatives that are being developed by the varied international agencies and organizations involved in the issue. The OECD, the Council of Europe, the UN, the IDB, the World Bank, the International Monetary Fund ("IMF"), and others are following the issue and undertaking concrete programs. We should establish a consultation system to reinforce our anti-corruption strategies, avoid duplication of efforts and evaluate the possibility of carrying out joint projects.

Within the context of the Inter-American Program, specific actions are underway, including the following: (1) workshops and conferences on the dissemination and implementation of the Convention. Among them, it is worth highlighting the "Symposium on Strengthening Probity in the Hemisphere" held in Chile in 1998; (2) the creation of an online "Inter-American Network against Corruption," with the most important legal instruments on the issue (Convention, Declarations, Resolutions, institutions, and national experts) and with ongoing incorporation of information on anti-corruption activities in the hemisphere; and (3) a cooperation agreement with the IDB to undertake anti-corruption projects, including for example the analysis of whether countries' criminal laws conform to the requirements of the Convention, with the goal of identifying and suggesting the necessary modifications.

Likewise, in the "Working Group on Probity and Public Ethics," reactivated in 1999 by the Permanent Council, members are planning activities to move forward on the Inter-American Program, in the spirit of the Convention. Among the activities contemplated are: first, moving forward on actions towards the prompt ratification of the Convention by all member states of the OAS and accession by observer countries; and second, facilitating holding regional and sub-regional courses and seminars designed to promote both the Convention's preventive measures and Inter-American cooperation to combat corruption, bringing not only government officials but the private sector and civil society to the table.

These seminars should address topics such as: (1) mechanisms to simplify administrative functions and eliminate arbitrary procedures, licenses, and regulations; (2) conditions that permit the abuse of power and the lack of accountability, and the mechanisms necessary

to create accountability; (3) systems for the execution projects with international funding; (4) parameters and controls for the exercise of public functions (codes of conduct); (5) financial contributions to political parties; (6) effectiveness of government oversight institutions (e.g., comptrollerships); (7) systems for making information available to citizens, to facilitate public participation in the fight against corruption; (8) promote that the government, through diverse means, and with the support of civil society, undertakes to carry out training courses in efficient and clean public management, create codes of conduct, and design oversight mechanisms with active public participation—all of this will help to develop a culture of integrity; (9) strengthen the “Inter-American Network against Corruption,” not only focusing on governmental actions but also actions by non-governmental actors, such as Transparency International; and (10) move forward in the coordination of actions with other hemispheric and international organizations (IDB, World Bank, OECD, UN, etc.)

### C. FINAL REFLECTION

At the OAS, we are working intensively to address this problem that, as a systemic problem, cannot be resolved solely with sanctions or punitive measures. It requires decisions such as the modernization of institutions, the eradication of the causes of corruption and of the conditions that facilitate and ease the way for corruption, and the strengthening of probity and public ethics. With the elements of the Inter-American Program, we must build our citizens’ confidence, by assuring the efficient, transparent, and effective management of public affairs, of national institutions, and of governments and our officials, at every level.

As we begin the new millennium, we should take this opportunity to reflect together, at every level, on the challenges that corruption poses for our societies, in the context of the larger set of complex and interrelated challenges. We must address them with common values, principles, and strategies if our hope that this new millennium is characterized by a return to humanism is to be achieved—in other words, that the millennium brings an ever stronger possibility that every human being, man, woman, and child, can have the possibility of living in peace, democracy, and increasing material and spiritual development and well-being. This is what we desire, and this is what

we are trying to build.

## VI. A HEMISPHERIC APPROACH TO COMBATING CORRUPTION: THE ROLE OF CIVIL SOCIETY

BY NANCY ZUCKER BOSWELL<sup>42</sup>

### A. INTRODUCTION

Since its founding in 1993, Transparency International ("TI") has given voice to civil society's demand for anti-corruption reform. TI national chapters have contributed to the significant progress that has been achieved, first, in raising awareness at the highest political levels about the damage caused by corruption, and second, in securing consensus on common standards of governance and accountability that can enhance economic, social, and political development.

In recent years, many of those common standards have been codified into multilateral anti-corruption conventions that provide a framework for systemic reform. However, translating conventions from diplomatic prose to practical reality is difficult in any context and even more so when the subject matter is corruption. The task may be even more difficult when there is a widely-held view that, despite a plethora of laws, corruption persists because of inadequate enforcement and impunity.

This challenge was considered by the more than 1600 delegates from 134 countries who participated in the 9th International Anti-Corruption Conference held October 10-15, 1999 in Durban, South Africa. In his remarks to the delegates, UN Secretary-General Kofi Annan proposed two guiding principles:

First, we must recognize that corruption is a problem that transcends national borders and is beyond the power of any single nation to address on its own.

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42. Managing Director, Transparency International-USA.

Second, “[p]rogress in the years ahead will require unprecedented levels of cooperation and collaboration among peoples of different cultures, religions, and values.”

These principles were recognized as early as 1994, when the leaders of this hemisphere met at the Miami Summit of the Americas<sup>43</sup>. They recognized that corruption was undermining sustainable economic growth, equitable development, and political stability in the region and that combating it was beyond the power of any single nation. They called for a “hemispheric approach.”<sup>44</sup> Their boldness in bringing the issue of corruption out in the open and their unity in defining a regional agenda inspired the conclusion of the OAS Inter-American Convention Against Corruption<sup>45</sup> (“Convention”) less than two years later.

The OAS Convention, concluded in 1996, was the first hemispheric approach to corruption. This groundbreaking agreement was the first comprehensive regional framework of measures to “prevent, detect, punish, and eradicate” official corruption.<sup>46</sup>

Its rapid conclusion reflected the consensus among government leaders, the private sector, and citizens across the hemisphere that addressing bribery and corruption should be a top priority. However, the negotiators of the Convention failed to explicitly provide for a follow-up mechanism to ensure the continued hemispheric cooperation that the leaders had envisaged.

Consequently, when the heads of state met again at the 1998 Summit in Santiago, less than one dozen nations had ratified the Convention and there were few examples of implementation. The leaders tried to re-energize the process by calling for a symposium to

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43. In the words of the OAS Office of Summit Follow-up website, “the Summit of the Americas process is an institutionalized set of meetings at the highest level of government decision-making in the Western Hemisphere. The purpose of the meetings is to discuss common issues and seek solutions to problems shared by all the countries in the Americas, be they economic, social, military or political in nature.”

44. Plan of Action, Summit of the Americas, para. 5, Miami, Fla., Dec. 9-11, 1994.

45. Inter-American Convention against Corruption, May 29, 1996, 35 I.L.M. 724.

46. *Id.* art. II, sec. 2.

restart the implementation process and for increased public participation.

But in the absence of an ongoing, systematic, and participatory mechanism to promote progress, there has been little action. A report compiled by TI chapters across the Americas provides a snapshot of regional progress to date on implementation of key provisions of the Convention. While there is evidence that some steps have been taken, the results overall are disappointing:

Only twenty-six OAS members have signed and half have not ratified the Convention. Neither the United States, Brazil, nor Canada has ratified;

Until the entry into force of the OECD Convention Against Bribery of Foreign Public Officials ("OECD Convention"),<sup>47</sup> only the United States had criminalized transnational bribery. This year, Canada and Mexico enacted legislation, but action is still pending in other signatories in the region (Argentina, Brazil, and Chile);

Of the important preventive measures called for in Article III, only a half dozen countries have codes of conduct for public officials, and, of those, not all have conflict-of-interest standards;

Fewer than half require *public* disclosure of assets and, of those, some apply only to certain officials or certain types of assets;

Less than a dozen countries have transparency provisions in their procurement laws, and even those are not uniform, comprehensive, or readily-available to the public;

Finally, there is too little access to information, which is required for effective monitoring and democratic participation. While many countries provide citizens a right to information, few have effective procedures to permit citizens to actually obtain information and fewer still provide for regular and timely publication of information or public hearings.

The Experts Roundtable is a civil society initiative devoted to consideration of how to make the next stage of a "hemispheric approach" effective. The challenge is how to secure prompt ratification and effective implementation and enforcement as well.

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47. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18 1997, 37 I.L.M. 1 (1998).

Experience in other fora makes it clear that moving expeditiously from many commendable *national* initiatives to a *region* where the rules are transparent, consistent, and predictable, will require unprecedented levels of cooperation among governments and with civil society.

### *1. Cooperation Among Governments*

There is ample evidence of a new degree of cooperation among governments. At the OECD, members adopted the OECD Convention, a critical element of the transnational cooperation that is needed to stop illicit payments that flow across borders from the industrialized world into developing nations. Effective restrictions on OECD-based companies, which account for over seventy percent of world exports and over ninety percent of foreign direct investment, will support anti-corruption efforts in this hemisphere and others in which they do business.

Parties to the OECD Convention recognized the need for a coordinated, institution-based approach to follow-up and agreed to participate in a cooperative, peer review process to ensure consistent implementation. The six OAS members (Argentina, Brazil, Canada, Chile, Mexico, and the United States) that are signatories to the OECD Convention must participate in that process and will have their implementing legislation reviewed.

There are other similar peer review processes, such as the Group of States Against Corruption at the Council of Europe ("GRECO"), the Caribbean Financial Action Task Force, and the Inter-American Drug Abuse Commission Mutual Evaluation Mechanism. Asia Pacific Economic Coordination ("APEC") member economies have called for rigorous peer review to promote action on transparency and good governance commitments that are the centerpiece of their post-crisis reform efforts. APEC-member economies include five OAS members, Canada, Chile, Mexico, Peru, and the United States.

There is a clear and growing consensus that effective follow-up can be achieved with a peer review process supported by all parties, and many OAS members are already participating in such processes. Consideration should be given to such a process in this hemisphere in order to foster a regional, legal, and regulatory environment that maximizes resources, attracts investment, and restores confidence in

public institutions.

Since the conclusion of the Convention, Transparency International has urged the creation of a follow-up mechanism to promote concrete progress because of its concern that without such a cooperative, institutional mechanism, reform will be slow and uneven.

The OAS is the logical forum for a regional follow-up effort since it has the institutional framework and can marshal the financial and human resources that the process will require. There are many reasons why it is needed:

First, implementing the Convention requires numerous changes in each nation's laws and practices, and numerous agencies and ministries will be responsible for enforcement. A multilateral body can provide technical expertise and a coordinating function.

Second, the level of domestic political support for enforcement may also vary. An agreed-upon institutional process can assure continuity and enhance public confidence. The track record for implementation of conventions *generally* is not reassuring, with many signed and then left to wither. Specific steps and timetables are needed to counter the understandable skepticism that conventions are nothing more than paper promises.

Third, in this field, action is more difficult and peer pressure more important because countries will watch each other; progress in one country may spur reform in another whereas failure to act may be used by a neighbor to justify doing nothing.

Finally, effective follow-up is particularly critical for fighting corruption, since corrupt officials as well as companies and their agents have a vested interest in the status quo.

## *2. Cooperation with Civil Society*

Civil society has been the driving force in overcoming the status quo, particularly in the fight against corruption. Civil society pressure has ousted corrupt leaders from office and landed corrupt corporate officials in jail.

Even reform-minded governments and institutions need strong allies for sustainable reform. Governments cannot implement the Convention alone. There must be broad public support and the involvement of business, legal, and accounting professionals.

There are several ways to accomplish this. First, civil society has an important oversight role. The TI National Chapters Progress Report provides the information that civil society needs to make an assessment of actual progress on implementation so that it can hold governments accountable. Currently, the report provides a snapshot of progress. As legislation is enacted, it will assess the quality of that legislation and, ultimately, the extent of its enforcement.

Second, a government-to-government peer review process will be more effective if it is open to input from the private sector and civil society. A process that only provides for governments to monitor each other behind closed doors will have limited results. Officials may have other priorities that impede their willingness to criticize non-compliant governments. Without oversight, there may be a tendency to accept the least common denominator. There are reasons why certain parts of the process may require some degree of confidentiality, but there should be a presumption of transparency. A transparent process that permits public oversight provides a more effective catalyst for action.

Third, civil society and the private sector in particular have valuable insights and expertise. At the OECD, for example, TI contributed its expertise on selected issues, such as accounting and auditing, during the negotiation of the Convention. TI has made submissions on aspects of the monitoring process, and TI national chapters have been providing their analysis of domestic implementing legislation.

The OAS deserves credit for the steps it has taken to increase the participation of civil society in policy formulation and programs. For example, the OAS was a key supporter of the November 1997 meeting on "The Role of Public Participation in Development and the Eradication of Poverty," which brought together civil society and government representatives to formulate recommendations to the preparatory bodies of the Santiago Summit. TI also provided recommendations to the November 1998 OAS Symposium on Strengthening Probity in the Hemisphere. Recently, the OAS formulated procedures for civil society group registration and participation in official OAS meetings. However, more needs to be done to broaden opportunities at the national and local levels and to provide the necessary access to information to make such participation meaningful.

Finally, the Experts Roundtable is a clear example of the positive

impact that civil society participation can have. The recommendations of the Roundtable will be submitted to the OAS and will enhance the prospects that the promises made in Miami in 1994 will be tangible reforms by the time leaders meet again at the next Summit of the Americas in 2001. Working together, civil society and governments can forge an effective hemispheric follow-up process that will turn these promises into reality.

## VII. MUTUAL EVALUATION SYSTEMS: AN APPROACH TO ENSURING PROGRESS IN IMPLEMENTING INTERNATIONAL AGREEMENTS

BY STANLEY E. MORRIS<sup>48</sup>

### A. INTRODUCTION

The "Experts Roundtable: A Hemispheric Approach to Combating Corruption" met to discuss an issue of great importance and immediacy in the region. The challenge the experts confronted goes further than re-energizing action on the Inter-American Convention Against Corruption. The globalization of trade and investment requires signatories to all such multilateral efforts to not only adopt the best policies but to carry them out consistently. This helps ensure a more predictable legal and regulatory environment for law enforcement officials as well as private investors and avoids creating competitive disadvantages among the signatories.

In such areas as corruption, financial crimes, money laundering, bribery, and procurement fraud, where money flows across borders, it is not enough merely to agree to internationally accepted standards. They must be implemented consistently, effectively, and fairly by all nations.

This was a key priority for representatives of over one hundred

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48. The author was the former Director of the United States Treasury Department's Financial Crimes Enforcement Network and headed the United States delegation to the FATF. He has served as an expert FATF evaluator for Italy and Australia, coordinated the FATF evaluation of the United States, and was a Council of Europe evaluator of Cyprus. He has been a consultant to the Council of Europe and is a Director of Transparency International-USA.

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countries attending the recent ninth International Anti-Corruption Conference in Durban, South Africa. The "Durban Commitment to Effective Action Against Corruption" declares that "monitoring will be a vital element to promote consistency and cooperation."

As the Experts sought to develop recommendations appropriate for the Inter-American Convention Against Corruption, they considered the experience of nations in this hemisphere and elsewhere who have adopted monitoring systems. The Financial Action Task Force ("FATF") system for money laundering has become the model for the Caribbean Financial Action Task Force and the Council of Europe. The OAS is developing a modified version as part of the Summit of the Americas' initiative to deal with the drug issue. The Organization for Economic Cooperation and Development ("OECD") has also established a system based on FATF to promote consistent and effective enforcement of the OECD Anti-Bribery Convention. This Convention requires signatories, including the six OAS members, Argentina, Brazil, Canada, Chile, Mexico, and the United States, to participate in the monitoring process. The system has been in effect since the Convention's entry into force in February 1999.

This paper focuses on the goals of such systems and provides a summary of the key elements of the FATF process on which they are modeled.

## B. THE GOALS OF MUTUAL EVALUATION

There are at least four goals served by a mutual evaluation system: (1) to increase knowledge among signatories; (2) to promote progress and consistency; (3) to identify and address problems with compliance; and (4) to build momentum for corrective action. To achieve these goals, successful mutual evaluation efforts must pay careful attention to concerns regarding each nation's sovereignty and establish mutual respect among the officials from each nation involved in the process.

### *1. Increasing Knowledge*

The complexity of many international problems has led to increasingly complex international arrangements to address them. For example, to address the issue of money laundering, the G-7 created a

FATF to develop international standards. The forty recommendations of the FATF require action by Central Banks, Finance, Justice and Interior Ministries as well as the private financial sector. Thus, for ten years the twenty-six nations that make up the FATF have met four times a year to share experiences and monitor progress through a program of mutual evaluation. While the United States and Canada were originally the only members from the Western Hemisphere, recently Mexico, Brazil and Argentina have joined the Task Force. Representatives from all of the appropriate ministries attend these sessions.

Each nation reports annually on its progress towards implementing the agreement, and these self-assessments are summarized by a small Secretariat and distributed to all participating nations. Meetings permit discussion of both problems and successes in implementation. This increases the participants' knowledge and expertise and helps surface ideas for innovative approaches. On-site expert evaluations also identify important issues, which expand the understanding of the problem and the way various nations are attempting to address it. Identifying innovative approaches that have succeeded in other countries also provides the government representatives involved in the process with tools to be used within their own nation.

A separate annual meeting is held to focus exclusively on how money launderers are attempting to circumvent FATF actions. This examination of money-laundering patterns and trends is attended by law enforcement experts from around the world who bring recent cases and experiences to help the FATF determine where it is succeeding and failing.

## *2. Promoting Progress and Consistency*

There is no substitute for comprehensive, regular, and candid assessments of the status of implementing international agreements. Views as to their priority may vary with changes in political leadership. There are too many international agreements that simply sit gathering dust in international libraries because no follow-up monitoring mechanism was created. Furthermore, agreements such as the Inter-American Convention address a series of complex issues, requiring action by many different government agencies. Some may have higher day-to-day priorities. Regular monitoring of progress

helps keep the issue at the top of the agenda. Finally, the monitoring process permits an assessment of overall implementation as well as the status of individual nations' progress and this helps promote consistency in legal and regulatory regimes, ultimately providing greater predictability to law enforcement officials and private investors.

### 3. *Identifying Problems*

The examination process will inevitably reveal problems in the substance or pace of implementation. Consequently, a comprehensive review can identify where the shortcomings occur, who is in the best position to remedy them, and what should be the priorities for reform. The fact that every nation is going through the process, and every evaluation identifies successes and failures, permits the officials who have primary responsibility in the nation for the initiative to broaden attention to the problem. For example, during the mutual evaluation of Costa Rica, officials from that nation encouraged the Caribbean Financial Task Force to be very rigorous in order to provide a better understanding of the problem within their government. In addition to identifying problems of compliance within nations, mutual evaluation also permits an opportunity to assess the overall picture; for example, whether corruption or money laundering is increasing or decreasing and how is it being carried out. This, in turn, permits an assessment of what adjustments are needed to address the changing character of the problem.

### 4. *Achieving Corrective Action*

The process of mutual evaluation can serve to strengthen the role of those officials who are attempting to increase the priority for reform within the government. In the author's experience as an expert FATF evaluator for Italy and Australia, a Council of Europe evaluator for Cyprus, and coordinator of the FATF evaluation of the United States, in every case, officials of the country being evaluated candidly identified problems. The evaluation was seen as an opportunity not to avoid criticism but instead to encourage corrective action.

Regular progress reports and on-site evaluations help maintain the momentum for change. Even the natural and healthy competitiveness between nations can serve to stimulate progress. It is interesting to note that countries criticized for weak anti-money laundering re-

gimes have used the mutual evaluation process to achieve reform and correct impressions. Switzerland served as an early President of the FATF; Panama and the Cayman Islands have been leaders in the Caribbean Financial Action Task Force, and Cyprus has played a key role in the development of the Council of Europe's program.

The challenge for the nations participating in the mutual evaluation system is to maintain its credibility. If the processes are seen as fair and decisions are reached through consensus, then the results of the efforts will have increased credibility. Public pronouncements will have the weight of all participating nations and this is critical to the success of the endeavor.

### C. CONCLUSION

I hope that this brief background will be of use to the Experts Roundtable as it develops recommendations for ensuring progress in the implementation and enforcement of the Inter-American Convention Against Corruption. While several organizations have moved to adopt the concept of mutual evaluation, it is clear that no one system fits all needs and differences must be respected. For example, the FATF monitors compliance with its detailed forty recommendations. The Council of Europe and Inter-American Conventions are quite broad, while the OECD Anti-Bribery Convention is narrowly focused. Thus, any monitoring system will have to fit the unique circumstances of the situation. Based on past success, however, monitoring systems are increasingly prevalent and recommended for consideration in implementing international agreements.

### D. AN EXAMPLE OF THE MUTUAL EVALUATION SYSTEM

Different approaches have been taken over the years to promote progress in carrying out multilateral treaties and agreements. Mutual evaluation is increasingly turned to because it serves as a way to promote and monitor progress, while it minimizes the need for new, permanent, and perhaps costly bureaucracies. It engages many more professional experts with credibility and expertise to address complex issues.

While the concept of mutual evaluation has existed for some time, recent experience in the anti-money laundering area is probably the most useful for understanding the concept and processes. Essentially,

mutual evaluation in this area has the following characteristics. First, representatives from all signatory countries meet regularly to discuss issues and review progress on implementing an agreed upon set of recommendations.<sup>49</sup> Each country is required to submit regular progress reports that are discussed in the meetings. Shortcomings and successes receive equal attention. Second, on a regular basis, a team of three to four experts from different professional backgrounds is drawn from each of the participating nations to conduct an in-depth, on-site evaluation of a nation's progress. This is important because simply examining laws and reports cannot assess actual compliance. Preliminary questionnaires are completed by the nation to serve as an aid in better focusing a three to four day on-site assessment visit. A member of the Secretariat also is included on the team to ensure consistency and assist in the final drafting of a report.

Third, the review teams speak with public and private officials involved in implementing the agreement or who have a useful vantage point upon which to judge progress. A draft report is shared with the host nation, which has the opportunity to discuss its content before a final product is produced for review by all participating nations. Due to the potential sensitivity of the evaluation report, only a carefully drafted summary is made available to the public. The full report, however, is available to all participants. If shortcomings are identified, the evaluated nation will report at subsequent meetings on steps taken to address them. Finally, periodic evaluation serves to maintain momentum for the implementation of the agreement as well as to increase knowledge and understanding.

In sum, as every nation goes through the process, there is mutual respect and consideration by all participants involved. The key to the success of mutual evaluation is that each nation is equal at the table, the evaluations are conducted by experts, and each participating nation agrees to abide by the same procedures.

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49. A small Secretariat (3-4 people) is responsible for providing logistics, continuity, and materials, but the primary work of the organization is carried out by the government representatives who attend the meetings.

## VIII. COMMENTS BY THE PERMANENT REPRESENTATIVE OF MEXICO TO THE OAS

BY AMBASSADOR CLAUDE HELLER<sup>50</sup>

I first want to thank you for your kind invitation to make a few brief remarks on an issue that is occupying an increasingly prominent place in the international agenda. Not a day goes by without the media reporting on an issue linked to corruption, a phenomenon that crosses borders, contaminates political systems, and weakens institutions. No country is exempt from the corrosive effects of corruption. All too often, the problem of corruption is erroneously perceived as a disease of the developing world. In this, as in all issues, double standards must be avoided. In all our nations, the recognition of the negative impact of corruption on economic, social, and political development has led to legislative and institutional reforms designed to foster greater transparency and accountability. At the same time, civil society has played a vital role in promoting change and awareness of the problem; but much remains to be done.

Allow me to take this opportunity to refer to what, in my view, should be a fundamental element of the Inter-American agenda and to underline, in that regard, the value of multilateral cooperation in our efforts. The democratization of political life in the Americas, the renewed confidence in the multilateral approach to deal with problems that transcend national frontiers, the progressive consolidation of the Rule of Law, and the demands of an increasingly interdependent international environment explain in large measure the new dynamism in Inter-American relations.

An overview of today's hemispheric agenda reveals the many issues with a transnational impact on which multilateral approaches are being developed and implemented: drug control, the promotion and protection of human rights, the fight against impunity, natural disaster prevention, terrorism, the illicit production and trafficking of firearms, are just a few of the more prominent ones. The proliferation of international instruments, new intergovernmental bodies, and cooperation mechanisms to address common problems, is a reflection

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50. Permanent Representative of Mexico to the OAS.

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of an increasing recognition of the role of international cooperation in any effective strategy.

It is evident that the multilateral approach is not a substitute for national efforts, but rather, a necessary complement. Although the primary responsibility in addressing a particular problem rests on each State, isolated national efforts, by themselves, are insufficient. The limits of multilateral action have been evident when imposition and confrontation have been chosen over dialogue and negotiation. This has been the case, for example, in the fight against drugs, where widespread rejection of existing unilateral measures has led to a new effort based on the recognition of the benefits of cooperation over confrontation. The Multilateral Evaluation Mechanism, recently approved by the Inter-American Drug Abuse Control Commission ("CICAD"), brings together all the Member States of the OAS in a collective effort whose main objective is to strengthen cooperation as the only way to effectively address a common problem of great magnitude.

Because of its transnational dimension, effective action against corruption must combine national efforts with multilateral strategies. In the Americas, the legal framework for multilateral efforts is based upon the Inter-American Convention, ratified to date by seventeen of the thirty-four Member States of the OAS. The low number of ratifications, to date, is a matter of great concern. Full ratification and implementation of this important instrument has to be a priority objective. The OAS, through its Inter-American Cooperation Program on Combating Corruption, and agencies such as the Inter-American Development Bank, are playing important roles. In this regard, I would like to underline the urgent need for full ratification of this pioneer Convention, whatever its limitations may be, before the Inter-American community can move forward on further important new steps.

In the new dynamics of Inter-American relations, the question raised by this Seminar, on what constitutes an effective multilateral approach, is a useful one. Whether one is speaking about fighting corruption, or addressing any issue in the Inter-American agenda, experience has demonstrated that several basic conditions must be met.

The multilateral approach must build a strong consensus based on

a set of mutually-agreed principles, procedures, and objectives. Common understanding of all of the actors involved on the nature of the problem and on the fundamental premises that will guide any multilateral effort to address it is an essential first step. The multilateral approach should also be fully compatible with the principles of International Law in order for it to be both juridically and politically legitimate. Without ignoring the asymmetries between States in our Hemisphere, the multilateral approach must involve all States on an equal footing, with each assuming the same rights and responsibilities. It must be applicable to all States, without exception. In addition, the multilateral approach must be credible and seek to build mutual trust. It must, therefore, be transparent, impartial, and equitable. Finally, the multilateral approach must be geared toward strengthening cooperation as the only effective way to address common problems. It should, therefore, exclude confrontational approaches that undermine joint efforts. It is not just a question of publishing lists and rankings with great media impact, that often oversimplify the nature of a very complex issue, reinforce prejudices, and generate artificial distinctions between good and bad. On the contrary, it must encourage cooperation to correct that which does not work.

The legitimacy and credibility of any multilateral approach rests necessarily on the acceptance by everyone involved of the basic rules of the game. As we work toward strengthening our national capabilities and multilateral strategies against corruption, the lessons learned in other fields can contribute toward the effectiveness of these efforts. Only true partnership based on a common understanding of the issue at hand and on clearly identified objectives has the possibility of success in the Inter-American community in the years to come.

## IX. MAKING ANTI-CORRUPTION TREATIES WORK: COMMENTS ON THE COUNCIL OF EUROPE'S ANTI-CORRUPTION WORK

BY PETER CSONKA<sup>51</sup>

### A. INTRODUCTION

The Council of Europe is relatively well known for its role in protecting human rights, mainly because of the judgments of our European Court of Human Rights. However, and this is perhaps less known to the general public, our organization has also been very dynamic in the legal field. So far, 175 international treaties and agreements and a countless number of recommendations and other pieces of soft law have been concluded within the Council. Many of these instruments deal with international cooperation in legal matters. I would like to stress, in particular, that we have developed a comprehensive network of legal instruments that form the basis of today's European cooperation against crime. These instruments include extradition, mutual legal assistance, execution of judgments, transfer of prisoners, and one of the latest treaties, the Criminal Law Convention on Corruption, deals specifically with the problem of corruption. Launched at the nineteenth Conference of European Ministers of Justice, in Malta in 1994, the Council of Europe's activities against corruption received considerable attention at the second Summit of Heads of State and Government in October 1997, where it became a top priority for our organization and our Member States.

### B. IN GENERAL

Several features characterize the Council of Europe's approach to the fight against corruption. First, our approach is multidisciplinary. Corruption is a prism with many sides and requires action of different types, for example legal and non-legal. Legal measures should include criminal, civil, and administrative law measures. Second, our approach incorporates a monitoring mechanism. The credibility of instruments against corruption depends upon an appropriate system

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51. Administrator, Economic and Organized Crime Unit and Directorate of Legal Affairs, Council of Europe.

for evaluating compliance with the obligations arising therefrom. All Council of Europe instruments are linked to the monitoring mechanism provided by the agreement known as the Group of States Against Corruption ("GRECO").

Third, the Council of Europe's approach is ambitious. Corruption is a serious and complex problem. It evokes in citizens profound feelings of distrust, unfairness, and inequality; thereby undermining their faith in the foundations of society, provoking a waste of scarce public resources, and increasing the cost of public services. It is a vehicle for organized criminal groups to infiltrate political institutions and the legal economy and to launder dirty money. Our efforts are directed, therefore, to raising public life standards, without leaving gaps through which corrupt practices may survive or reappear. The Council of Europe seeks to tackle all forms of corrupt behavior in order to preserve the integrity and impartiality of public administration and the social fabric. Fourth, our approach is comprehensive. We are developing an integrated set of instruments of different types, with a view to building up a network of standards that will render corruption more difficult and costly. Finally, our approach is flexible. Countries are given the time and the means to adapt to new international standards, to choose the instrument to sign, to apply soft law or, through a system of reservations and declarations, to postpone acceptance of some commitments.

### C. OVERVIEW OF THE CRIMINAL LAW CONVENTION ON CORRUPTION

The Criminal Law Convention on Corruption was adopted in November 1998 and opened for signature in January 1999. Presently, thirty countries have signed and two have ratified it. It is important to note that it is open to the accession of Council of Europe Member States and of non-member States that participated in its drafting, such as the United States, Japan, Canada, and Mexico. Becoming a party to the Convention implies automatic submission to GRECO's monitoring procedures.

From a substantive point of view, this Convention is one of the most comprehensive treaties in the field of corruption. It covers a large range of corruption offenses, including: active and passive corruption of national, foreign, and international public officials; active

and passive corruption of members of national, international, and supranational parliaments or assemblies; active and passive corruption of judges and staff of domestic, international, or supranational courts; active and passive private corruption; active and passive trading in influence, involving national and foreign public officials, laundering of corruption proceeds, and corruption in auditing.

In addition, the Convention deals with substantive and procedural law issues, such as jurisdiction, sanctions and measures, liability of legal persons, establishing specialized authorities for the fight against corruption, co-operation among authorities responsible for law enforcement and control, and protection of witnesses and persons cooperating with the judicial authorities. Finally, it provides for enhanced international cooperation in the prosecution of the corruption offenses defined thereon, in particular, regarding extradition, mutual judicial assistance, and the exchange of spontaneous information.

One of the main characteristics of this Convention is its broad scope, which reflects the Council of Europe's comprehensive approach to the fight against corruption as a threat to democratic values, the rule of law, human rights, and social and economic progress. This is clearly reflected in the range of offenses covered by the Convention. The Council of Europe Convention imposes, like the OECD and European Union Conventions on corruption, an obligation to establish as criminal offenses the bribery of foreign and international public officials, judges, and members of parliament. The elements of these offenses are identical to those pertaining to the bribery of domestic officials or members of parliament. The Council of Europe Convention, however, is notably broader, in that it also covers the passive side of bribery and public officials and parliamentarians of all countries, regardless of whether they are Council of Europe Convention Member States or Contracting Parties to the Convention.

Moreover, the distinctive approach of the Council of Europe Convention can be more clearly appreciated by referring to its provisions dealing with some additional offenses, which are completely ignored by the other Conventions, such as active and passive bribery in the private sector and trading in influence.

D. OVERVIEW OF THE AGREEMENT ESTABLISHING THE GROUP OF STATES AGAINST CORRUPTION—A MONITORING MECHANISM

On May 5, 1998, the Committee of Ministers of the Council of Europe, at its 102<sup>nd</sup> Ministerial Session adopted a resolution permitting the setting up of the GRECO, in the form of a Partial and Enlarged Agreement.

GRECO aims at improving the capacity of its member States to fight corruption by following up, through a dynamic and flexible process of mutual evaluation and peer pressure, compliance with their undertakings in this field and, in particular, with the twenty Guiding Principles for the fight against corruption. GRECO also strives to assure that there is effective implementation of our Criminal law Convention and other international legal instruments to be adopted.

GRECO is open to the participation of member States and non-member States of the Council of Europe on an equal footing. Indeed, an effective fight against corruption requires broad international participation to eliminate this blight on society. Some non-European countries, like the United States, Canada, and Japan, have been highly active in the drafting of the GRECO Agreement. This role was recognized by the Agreement's preamble and by the privilege extended to them to become members of GRECO, on an "equal footing" with Council of Europe member States. I would like to take this opportunity to launch a strong appeal to these countries, and especially to the United States, to join GRECO as soon as practicable.

GRECO aims to provide a flexible, dynamic, and efficient mechanism for compliance with undertakings in the field of corruption. It defines a master-type procedure, which can be adapted to the different instruments under review. Becoming a Party to the Criminal Law Convention or other instruments will entail, automatically, the obligation to participate in GRECO and to accept monitoring procedures defined under the GRECO system.

In order to carry out its tasks, GRECO will conduct evaluation procedures for each of its members. For each evaluation round, GRECO will start by selecting specific provisions on which the evaluation procedure will be based. It will visit the countries concerned, for the purpose of seeking information concerning its law and practice. After receiving comments by the member undergoing

the evaluation, GRECO will adopt a report stating to what extent that country is fulfilling its international undertakings. It may address specific recommendations to member countries with a view to improving its domestic laws and practice. If appropriate, a public statement will be issued when a member remains passive or takes insufficient action in response to GRECO's recommendations.

According to GRECO's Statute, GRECO becomes operational as soon as fourteen States join. At present, 23 countries have joined GRECO, and the first Sessions of GRECO took place in September and November 1999 in order to finalize GRECO's rules of procedure. We hope, and expect, that GRECO will rapidly become a permanent forum for debating and improving, through mutual evaluation and peer-pressure, anti-corruption policies and measures throughout Europe and beyond.

## X. THE MUTUAL EVALUATION PROCESS OF THE CARIBBEAN FINANCIAL ACTION TASK FORCE

BY CALVIN WILSON<sup>52</sup>

The Caribbean Financial Action Task Force ("CFATF") is an organization of states of the Caribbean basin that have agreed to implement common counter-measures to address the problem of criminal money laundering. The Mutual Evaluation Program is a crucial aspect of the work of the CFATF as it is one of the mechanisms by which the Secretariat ensures that member State compliance is fulfilled. Through this monitoring mechanism, the wider membership is kept informed regarding developments in each Member Country that has signed the Memorandum of Understanding. For the individual member, the Mutual Evaluation Program presents a valuable opportunity for an objective assessment by a team of experts of the anti money laundering framework as it exists at the time of the visit.

The Mutual Evaluation Exercise is not a trial, but rather a constructive consultative dialogue between professionals, be they bank supervisors/regulators, legal officers, members of the Defense Force, or Police and Customs Departments. The aim is to assist the Member State to improve its anti-money laundering framework so that the

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52. Executive Director Caribbean Financial Action Task Force

legislation, administrative procedures, programs, and policies are in compliance with the forty FATF and nineteen CFATF recommendations.

The Program seeks to give due recognition where the standard benchmarks are met, but with a view to securing improvements where necessary; identifies weaknesses that have been detected; and, makes recommendations where they are found to exist. The mutual evaluation process entails the completion of a questionnaire on implementation followed by a mission to each of the Member Countries by a team of experts, one each in the fields of Law, Finance, and Law Enforcement; and led by the Director or Deputy Director of the Secretariat.

Through a range of interviews with officials in both the private and public sectors, the team attempts to glean a precise picture of the country's anti-money laundering framework at the particular time. Crucial to this undertaking is the need for a national agency, within the Member State, headed by a coordinator, who could be a legal officer with no ministerial responsibility, who will be responsible for the coordination of the mutual evaluation process.

It is necessary for all Government departments and agencies, as well as those private sector organizations that will be called upon to participate in the evaluation, to inform all related officials of the nature, rationale, and importance of the exercise. The CFATF experience has been that Members, by virtue of the Mutual Evaluation Report, have been able to implement improvements in their legislation, regulations, and international obligations through the recommendations of the Examiners.

## XI. BEST PRACTICES IN MULTILATERAL IMPLEMENTATION

BY VICTORIA H. FIGGE<sup>53</sup>

First of all, I wish to thank Messrs. Grossman, Ferrand, and Schloss for their kind invitation to participate in this important event; and, particularly, Mr. Stanley Morris, my colleague, for his role in

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53. Partner, BERG (Latin America) Inc., Panama; former Director of the Panamanian Financial Analysis Unit

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this invitation. It is indeed an honor to participate and I trust that I shall be able to give you my insight in the different discussions that will take place. Panama, as a member of the Caribbean Financial Action Task Force, was subject to a Mutual Evaluation in 1996. Our experience was quite interesting. The process started when the Secretariat of the CFATF sent a questionnaire that inquired whether the country was complying with the forty Recommendations of the FATF and requested copies of appropriate legislation.

At the time, I co-chaired the Presidential High-Level Committee on Money Laundering Prevention (“Committee”) of Panama, which was mandated to design the Drug Related Anti-Money Laundering Policy, write its laws and suggest these to the President and oversee, on his behalf, its implementation. This committee consisted of professionals selected by the President of the Republic from both the private and the public sector, namely, bankers, lawyers and Colon Free Zone businessmen and their counterparts in the public sector.

The Committee reviewed the aforementioned questionnaire and sent it to the Secretariat of the CFATF. After some months we were advised that three CFATF professionals would come to Panama to do an on-site evaluation. The Committee was advised to accommodate the three evaluators and make sure that they had access to all relevant facilities from both the private and the public sectors. The CFATF professionals visited the Banking Commission, now the Superintendent of Banks, the General Attorney’s Office, the Drug Prosecutors Office, several banks, and the Colon Free Zone Administration, as well as the Colon Free Zone Users Association. To my knowledge the CFATF professionals were received cordially and all questions were answered.

A few months later, we received the draft of the CFATF’s findings, which was again discussed and reviewed at the High Level Committee, and certain observations and clarifications were returned by us. During the following plenary meeting, Panama’s evaluation was presented and it was certified that we complied with the forty recommendations of the CFATF.

In my opinion, this type of evaluation process—by professionals from peer countries—is the best way to ensure that a country is progressing in anti-money laundering legislation and its implementation. During its evaluation, Panama received important feedback from the

CFATF and they also learned from us. There was no punitive feeling, but rather a feeling of full cooperation and understanding. The findings were not published on the Internet, nor were the findings the subject of newspaper headlines worldwide.

At the conclusion of the evaluation process, Panama was fully motivated to continue improving. If you compare the foregoing evaluation process to the unilateral evaluation process, the "Certification System" applied to all countries by the United States of America, there are several obvious points to consider: (1) unilateral versus multilateral; (2) punitive versus cooperative; (3) political versus technical; and (4) public versus private.

I just want to leave you with the foregoing ideas and impressions, so that you may consider a similar type of multilateral evaluation when every country has ratified and implemented the Inter-American Convention Against Corruption. I strongly believe that the private sector should be involved in stimulating governments to ratify and implement the Inter-American Convention Against Corruption. In this era of globalization, the private sector should institute transparent policies to assist in the evaluation of companies and they should play a fundamental role in helping their government in the right direction. The private sector has played an important role in the decision making process in Panama, which contributed to our successful adoption of new laws, especially in the area of money laundering prevention and detection.

## XII. FINDINGS, CONSIDERATIONS, AND RECOMMENDATIONS<sup>54</sup>

### A. FINDINGS

1. Corruption remains a serious problem in all nations, affecting all parts of society. While some progress has been made, much more needs to be done if lasting progress is to be accomplished.

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54. The conference participants, at the conclusion of the Experts Roundtable Conference, drafted these "Findings, Considerations, and Recommendations."

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2. Corruption has many damaging aspects, including political and economic competition.
3. Corruption is a national and transnational problem and to address it requires national action and collective, multilateral action as well.
4. The Inter-American Convention against Corruption is an important and innovative multilateral instrument for addressing the issue of corruption in the Western Hemisphere.
5. All countries should sign, ratify and fully implement the Convention.
6. The ratification of the Convention and enactment of laws are not sufficient; steps must be taken to ensure their real application and enforcement.
7. Different models for multilateral cooperation have been developed, both inside and outside of the region, that provide valuable principles and practices consistent with international law that are relevant to the fight against corruption.
8. Unilateral assessments are not constructive. Multilateral approaches are preferable; these should be based on consent, mutual respect and the general principles of international law.
9. Notwithstanding the absence of ratification of the Convention by some states, there are other international obligations relevant to the issue of corruption, such as international human rights norms and agreements on financial cooperation.
10. Civil society and the private sector have a central role to play in the struggle against corruption and in promoting transparency and integrity.
11. Freedom of expression has a critical part in the struggle against corruption.
12. Regular and timely publication of information as well as a right of access to information are critical tools for combating corruption. Regular use of the Internet and other mediums can play a valuable role.
13. There is a need for effective coordination among the various multilateral efforts to combat corruption being undertaken by the OAS, OECD, COE, IMF, World Bank, IDB, UN, etc. In

their evaluation of states' anti-corruption reform efforts, multilateral organizations should take the progress achieved into consideration.

#### B. CONSIDERATIONS FOR SUCCESSFUL MULTILATERAL COOPERATION

1. Successful efforts to promote compliance with multilateral agreements require cooperation and commitment from the nations involved, including clear goals and a comprehensive strategy.
2. There should be flexibility in developing an approach and it should be tailored to the unique needs of the region, each nation, and the subject matter.
3. All members of such a multilateral group must participate as peers.
4. Full participation should be contingent upon acceptance of the international obligations involved.
5. Discussions should be constructive and actions taken by the group must strengthen the process and not be punitive or vindictive.
6. Decisions should be arrived at through consensus and all procedures should be viewed as being fair and universally applied. There is an important role to be played by objective, fair and technically sound expertise.
7. There must be a careful balance between confidentiality and transparency.
8. There should be the fullest possible involvement of civil society and the private sector.
9. Multilateral organisms such as the World Bank, OAS, IDB, and bilateral donors should provide technical and financial assistance necessary for countries to achieve full implementation of the Convention.

#### C. RECOMMENDATIONS

1. All member states of the OAS should promptly sign, ratify, and fully and effectively implement and enforce the Conven-

tion. All member states of the OAS should develop programs designed to raise public awareness of the impact of corruption and to increase the participation of civil society and the private sector in promoting probity and public ethics. The OAS should promote these objectives.

2. OAS member states should promote multilateral cooperation in the fight against corruption. State parties of the Convention should create a multilateral monitoring mechanism to promote implementation and enforcement of the Convention. The mechanism should draw on models in the hemisphere and beyond, taking into account the considerations above, including participation on an equal footing by all state parties to the Convention.
3. The functions of this mechanism would include the exchange of information, the development of technical cooperation, and the conduct of regular evaluations of the parties' effective implementation of the Convention, through a peer review process. Evaluation teams should be composed of experts proposed by state parties to the Convention and should perform in a fair, objective and technically sound fashion.
4. The mechanism should operate on a consensus basis with the fullest respect for all participants. The evaluation of implementation and enforcement should be fair and objective.
5. Parties to the Convention should create a permanent secretariat with technically qualified staff and adequate budget.
6. The evaluation of compliance should be open and transparent taking into account legitimate needs for confidentiality.
7. Adequate procedures of consultation with the private sector and civil society should be devised and implemented in order to ensure appropriate input and communication.
8. Progress should be reported annually to the OAS General Assembly and to the public.
9. Multilateral organizations such as the World Bank, OAS, and the IDB, as well as bilateral donors, should provide technical and financial assistance necessary for countries to achieve these objectives.