
PROTECTING AID FUNDS IN UNSTABLE GOVERNANCE ENVIRONMENTS:
TOWARDS AN INTEGRATED STRATEGY

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# Some Comparative Reflections on International Anti-Corruption Initiatives

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

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

3) Although the European Union, as the world’s largest single aid donor, is better structured than most national governments to sustain multi-year

programme commitments, it too is facing escalating pressures to reallocate resources from long-run altruism to more immediately pressing and politically urgent priorities. Moreover, the underpinnings of multilateral trust and confidence in effective administration of public resources are coming under severe scrutiny in Brussels, as in other parts of the OECD. German public opinion is disenchanted with the prior record of massive long-term aid programmes direct to the eastern Lander since reunification; the Greek government has now been exposed as guilty of massive and sustained deception in the management of EU cohesion funds; Italians from the north are veering in the direction of succession due to their mistrust of state spending patterns in the south; similar issues of distrust closed British public perceptions of the European integration project, etc.

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

5) The US Foreign Corrupt Practices Act of 1977 was a landmark step on the way to co-ordinated anti-corruption legislation. It imposed criminal penalties for engaging in foreign bribery. It was a product of the post-Watergate and post-Vietnam era, and was influenced by congressional and corporate desires to distance Washington from the kind of abuses uncovered by enquiries into ITT

and so forth. Those international businesses at risk of expropriation because of distrust generated by the misconduct of some of their peers were among the supporters of this legislation. But by the 1980s most US-based multi-nationals were unhappy with the law, on the grounds that full enforcement of it would handicap them in competition with European and Japanese competitors who were not subject to the same legal constraints. Moreover, the return of the Republicans to office and the revival of Cold War polarisation mean that the will to enforce such legislation weakened, and national security arguments could be invoked to justify non-compliance, especially by defence companies.

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

7) The end of the Cold War, and the return of the Democrats to the White House, paved the way for more effective international action against corruption in the 1990s. In the western hemisphere, with all countries other than Cuba classified as democracies, the Clinton administration launched the Miami Summit process intended to create a "Free Trade Area from Alaska to Tierra del Fuego".

Within that region successful economic co-ordination could be corporate-led, but rule-governed. The 1996 OAS Inter-American Convention Against Corruption should be understood in that context. It was soon followed by the 1997 OECD Convention on Bribery of Foreign Public Officials in International Business Transactions. This phase of liberal internationalism culminated with tan extension from the regional to the global level, with the 2000 UN Convention against Transnational Organised Crime, and the 2003 UN Convention against Corruption.

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

9) <u>The OAS Convention</u>

After achieving a peak in self-confidence in 2001, with the ratification of the Santiago Charter on Democratic Rights, the OAS has reverted to type thereafter.

It was marginalised by Bush after September 11th and in 2005 the "fast track" authority required for US endorsement of the Free Trade Area of the Americas was allowed to lapse. A Washington-promoted Secretary General from Costa Rica was forced to resign within days of taking office, and returned to San Jose in handcuffs to face corruption charges there. The rise of Chavez produced a "Bolivarian Alternative" to dominance by Washington, and the member states of ALBA follow Caracas rather than Foggy Bottom as regards policies towards multi-national corporations and corporate corruption. More generally, a reaction against 1990s "neo-liberalism" has encouraged a return of state interventionism in various economies, including a great public acceptance of "rent-seeking" styles of policy-making. The OAS has also been challenged by the rise of Unasur (under the leadership of Lula's Brazil) and was discredited by Obama's reluctance to fully uphold the Democratic Charter in the case of Honduras.

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

11) Since 2001 there has been a “follow-up mechanism” in operation to review whether member states are enacting effective measures in line with OAS Convention requirements. 28 out of 34 signatory states have joined this mechanism, which has two parts. The signatory parties meet annually to deal with issues arising at the political level. There is also a body of technical experts that meets every six months, with the backing of the OAS Department for Legal Affairs. This follow up mechanism is voluntary, and it organises periodic reviews of country performance and issue areas. Priority is given to the review of countries that present themselves voluntarily for review, after which other members are reviewed in sequence according to the dates of ratification of the Convention. Each country review is conducted by experts selected by two other state parties. Review consists of a self-assessment by the state in question, followed by a civil society response, and ending with a formal report from the Committee of Experts. Four to six countries are reviewed at each of the bi-annual meetings. The idea behind this voluntary peer review process is to prompt convergence around best practice by activating the anti-corruption constituencies in each state system. The resulting country reports are published ion its website by the OAS Secretariat together with Committee of Expert progress reports on the implementation of the whole Convention. Although this is all likely to encourage gradual positive development it has also been criticised as too slow, too poorly funded, and hampered by an insufficiency of experts.

12) <u>OECD Convention</u>

This was adopted in 1997 and entered into force in 1999. In addition to the participation of all 30 OECD member states it includes six non-members (Argentina, Brazil, Chile, Bulgaria, Estonia, and Slovenia). It is the most focussed of the major anti-corruption conventions, aimed at addressing “the supply side of bribery by covering a group of countries accounting for the majority of global exports and foreign investment”. The 36 member states have undertaken to co-operate to establish criminal sanctions for those who bribe foreign public officials in international business transactions. Such states are also required to treat the

concealment of the proceeds of corruption as a money laundering offence (with certain limited exceptions). They also need to prohibit accounting practices that allow or disguise such bribery, and signatories agree to bear the costs of follow-up monitoring of these commitments.

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

13) GRECO – Council of Europe {Group of States Against Corruption] With 39 members this regional peer-group arrangement also requires examination. On May 18 2010 the Portuguese Parliament's Corruption Oversight Commission, headed by former Justice Minister Vera Jardim met a GRECO team preparing a report on Portugal's anti-corruption efforts that will be received evaluated by the authorities at the end of 2010. While the work of the justice system will be reviewed it Vera Jardim stressed that party financing does not fall within GRECO's scope. These peer review processes are conducted in camera.

14] There are also other regional initiatives, including the Anti- Corruption Plan for Asia-Pacific [ADB-OECD]; the African Peer Review Mechanism of NEPAD; and the anti-corruption provisions of the Cotonou treaty of 2005, which applies to 79 former European colonies.

15) UN Convention Against Corruption

This was adopted by the UN General Assembly in 2003 and acquired 140 signatories by the time it closed in 2006. Of these almost half are not "signatory parties". The convention is open to all regional economic organisations as well as UN member states. The secretariat is provided by the UN Office o Drugs and Crime Control in Vienna. The 71 articles of the convention over preventive measures, criminalisation, technical co-operation, an asset recovery framework,

provisions for international co-operation on investigations, prosecutions, and extraditions, and a monitoring and implementation mechanism.

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

Annex

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

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