

The OAS and the fight against corruption in the Americas*

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Corruption has been identified as one of the most serious obstacles and threats for the consolidation of democracy and economic and social development in a number of countries in the Americas. The growing conscience on the severity of this problem, lead the countries of this region, within the framework of the Organization of American States (OAS), on being the first to commit themselves not only from a political point of view, but also a legal one, in order to strengthen cooperation among them to prevent and prosecute corruption.

The essay's purpose is to present the main developments that the Countries of the Americas have made, within the OAS framework, for consolidating cooperation among them for combating corruption. In order to put this issue into context, we will first, refer, in a concise manner to the OAS and some of the characteristics of its Member States. Second, we will mention some of the reasons that have lead inter-American cooperation in this subject to strengthen. Finally, we will expand on the specific developments made in this field up until the present.

1. THE OAS: A COMMUNITY OF PRINCIPLES AND A VARIETY OF REALITIES

The Organization of American States (OAS) is an international organization that brings all of the Nations from the American Hemisphere together. It is comprised of 35 Member States, including the Caribbean nations (the government of Cuba was excluded from participation in 1962). It is, without a doubt, an organization of a political and juridical nature instead of a financial or economic one. It constitutes the only regional setting in which all the countries of the Americas can come together and debate issues of common interest and reach an accord on them. Many of which conclude in legal instruments like Conventions or Resolutions agreed upon by the OAS General Assembly.

The OAS charter was signed in 1948 in Bogota, Colombia, and entered into force in 1951, having been amended on several occasions. The unity of the Countries within the OAS framework primarily resides in a series of shared principles and values like those that guarantee continental peace and security; preserve, promote and strengthen democracy and the rule of law, and promote respect and defend human rights.

After the Cold War, the OAS garnered high importance and received mandates for strengthening the hemispherical dialogue and action in all the relevant issues on the international agenda (i.e. democracy, human rights, transnational organized crime, sustainable development, and trade).

Although these shared values and community of interest related to the aforementioned issues, the Member States of the OAS have very different characteristics among them (geography, population, language, legal systems, social and economic development, and the different levels or grades of their political institutions). This variety of characteristics enrich the political and legal debate in the OAS and, with frequency, it concludes being expressed in one way or another, in legal instruments that are negotiated and adopted, just like those related to the fight against corruption.

2. THREE REASONS TO FIGHT AGAINST CORRUPTION IN THE AMERICAS

During the last few years international interest and concern has risen in regards to the corruption phenomenon. The causes that have incorporated this issue on the international agenda are multiple. Notwithstanding, at its origin are the huge transformations that have shaken the world during the past years: end of the Cold War, the demise of the central controlled planned economies, the rise of new values and realities, technology and communication advancement, and changes in the States' role and the role of civil society institutions in issues of common interest.

Assuming the before mentioned is true, it is convenient to emphasize three reasons for which the fight against corruption is perceived as a collective priority, particularly, in Latin America and the Caribbean.

The first reason relates to the impact corruption has on trade, economic growth and sustained development. Numerous studies have empirically proven that when corruption is high in a country, investment and economic growth will decrease. The Economic and Social Progress Report on Latin America of the Inter-American Development Bank (IDB) in 2000 reiterates the point.

Accordingly the report states that more than half the differences in the levels of income between developed countries and the Latin American countries are linked to the deficiencies in the institutions of the latter. And in those cases that have to do with the enforceability of the law and the control of corruption, Latin America finds itself in a lowest category among other groups of countries, except for Africa. It is evident that this is a great challenge to the region.

The second reason has to do with the need of preserving and strengthening of democracy. The IDB report highlights that only 35% of Latin Americans are satisfied with democracy; that between 85% and 93% consider corruption is getting worse instead of getting better or at least maintaining stable, and many of them consider it the most serious national problem.

Fortunately, the study also reveals that the “low satisfaction rating” with democracy does not necessarily imply a weak backing to democratic principles. On the contrary, it demonstrates that Latin Americans prefer democracy to any other alternative form of government. In any case, those low levels of satisfaction and confidence in political institutions, without a doubt, are of high alert.

The third and final reason is intimately linked to the enormous social costs brought on by this problem. In Latin America poverty not only has risen in absolute terms but it has constituted itself in the region with high levels of disproportion between the wealthy and poor. Accordingly, studies have also proven that the principal victims of corruption are the poor and that in countries where poverty flourishes there are unmeasurable and growing acts of corruption. In this sense the fight against corruption is seen as social justice cause.

3 DEVELOPMENTS WITHIN THE OAS FRAMEWORK

3.1 BACKGROUND

The fight against corruption has been a constant concern of the Organization of American States. The OAS charter itself states that “representative democracy is an indispensable condition for the stability, peace and development of the region” and Member States have recognized corruption constitutes one of the most serious threat to democracy.

That is why, among other instruments, in the “Santiago Commitment to Democracy and the Renewal of the Inter-American System” and in General Assembly Resolution 1159 in 1992 on “Corrupt International Trade Practices”; the Declaration of Managua for the Promotion of Democracy and Development; the San Jose Declaration on Human Rights of 1993 and the Belen do Para Declaration of 1994, the Organization has reiterated its commitment in fighting corruption and modernizing public institutions.

Yet, without a doubt, the Summit process of the Heads of States and of Governments of the Americas introduced with great vigor the treatment of this issue on a hemispherical level. In fact, the first Summit, held in Miami in December of 1994 targeted the issue for the first time. On this occasion, the Heads of States and of Governmentst acknowledged that this problem was of a multilateral nature and, aware of that, they committed themselves to negotiate within the OAS framework, a hemispherical accord. As a result of this decision and after a process of broad analysis and deliberations, the Nations of the Americas adopted in March of 1996 the Inter-American Convention against Corruption.

3.2 THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION: A ROAD MAP FOR COLECTIVE ACTION

The Inter-American Convention against Corruption is, without a doubt, the most important step that has been taken on a hemispherical level in combating this phenomenon. Ultimately, it is regarded as a road map for collective action in the Americas on this subject.

The itinerary designed by the OAS General Assembly for negotiating the Convention, resulted in a process based on participation that lead to an enriched content and concluded in an integral conception on the way corruption must be combated.

First, as such, the two major purposes of the Convention express the before mentioned sentiment, as follows: to promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption; and to promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.

Second, the Convention expressly recognizes, in its preamble and in various articles that this problem can't be solved with repressive or punishing actions once the evil has emerged. On the contrary, precise decisions of a preventive nature are to be taken also. These are directly linked to the modernization of institutions and the elimination of its causes or the conditions that facilitate or instigate its use.

Third, the Convention conceives the fight against corruption as a process and not as a simple result of pointed actions, isolated and without any connection or coordination. On the contrary, a permanent effort is inferred, upon its reading, begun by the countries, which leads to the Convention and continues –in a process of “progressive development”- through the negotiation and adoption of additional protocols contributing to the achievement of the above cited purposes.

Lastly, the Convention, without setting aside State responsibility in eradicating corruption, reveals the importance of action taken by all the actors involved. Especially, it recognizes the need of strengthening the participation of civil society in preventing and combating corruption and it expresses that States will extend to each other broad technical cooperation, exchange experiences and give special attention to the ways and forms citizens participate.

Furthermore, it is worth noting that the Convention constitutes the most important inter-American legal instrument for extraditing those who commit crimes of corruption; in cooperation and assistance among the States in obtaining evidence and facilitating necessary procedural acts regarding the investigation or trials of corruption; and for the identification, search, immobilization, confiscation, and seizure of goods obtained or derived from the commission of the crime of corruption.

In regards to investigating or obtaining information by way of banking or financial institutions, the Convention represents an important step towards avoiding that bank secrecy could be used in aiding and abetting those who commit corruption.

In relations to the issue of asylum, the Convention strikes an equal balance between the values that are protected by asylum and those that combat corruption. During the deliberation process of the project it was attested that the reason for and the essence of asylum couldn't be weakened, but it may not serve as way of eluding or facilitating the avoidance of legal action against those who commit acts of corruption.

Within this context, the content of article XVII is very important stating the following: the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption was committed for political motives or purposes, shall not suffice in and of itself to qualify the act as a political offense or as a common offense related to a political offense.

Finally, another issue that is touched upon by the Convention and worth mentioning has to do with the fight against transnational bribery. Article VIII of the Convention not only marked a huge step, but it also placed the American Hemisphere at the forefront of this issue since regulation and the commitment of punishing this illicit practice was established in an obligatory instrument from a legal point of view like a Convention. This in complete contrast to the timid steps that had been taken up until then within the frameworks of other international organizations.

3.3 DEVELOPMENTS AFTER THE ADOPTION OF THE CONVENTION

Once the Inter-American Convention against Corruption was adopted, the States realized that this treaty was not the final destination, but, to the contrary, the first major step to address this problem collectively. That is why, the OAS General Assembly adopted in 1997 an Inter-American Program of Cooperation in Combating Corruption. And the Heads of States and of Governments during the Santiago de Chile Summit held in 1998, committed themselves in providing, in the OAS, an adequate follow-up to the progress made in said Convention.

In development of these mandates, the OAS has continued working in this field. Within the framework of the Working Group on Probity and Public Ethics, the States have made great progress. They have taken the recommendations that were adopted in a Symposium held in Santiago de Chile in 1998, the results of a special session held by this Group with government representatives, international organizations and private sector and civil society representatives. Also, a questionnaire on the adjustments made to national legislations in regards to the Convention, whose response permitted a thorough diagnostic on the areas that still require progress in the American countries.

The States have also begun to consider an important issue: corporate social responsibility in fighting corruption. On this issue, a hemispherical meeting will take place in 2002, hoping that guidelines and specific plans of action will emerge.

The OAS General Secretariat from its part, in developing the mandates of both the Summit of the Americas and the OAS General Assembly, has been supporting the process of ratification of the Convention, as well as implementing decisions contained in it or related to it.

As a part of this process, in conjunction with the IDB, support has been given to a number of countries in the region in defining the necessary measures for adjusting their criminal legislation to that expressed in the Convention.

Following this same line, a "pilot" program was started in Central America, with the finality of assisting the countries in the region, in adjusting their legal systems to the preventive measures expressed by the Convention.

Additionally, an information system on the Internet and a network of inter-American institutions and experts against corruption has been created.

Likewise, it is working with the Inter-Parliamentary Forum of the Americas, among others, in all that has to do with the role that corresponds to the legislative bodies in political control matters, as well as in their member ethical norms. It has also been participating in an initiative that emerged from the last Ministers of Justice meeting and backed by the Government of Canada, in creating a mutual legal assistance network.

Finally, in conjunction with the Trust of the Americas and other institutions, it has co-sponsored a training initiative for investigative reporting.

As a result of this process, the American States have acknowledged the importance of this Convention as a road map for their collective action against corruption. An example of this is that, comparatively, this treaty was one of the fastest instruments to be signed and ratified. Today we have 29 States who have signed the Convention and 23 have ratified it. The General Secretariat has begun a project to assist those States who

have not done so yet, in ratifying and implementing the Convention. With all the progress made until now, it is possible to imagine that in the near future, this Convention shall be enforceable throughout the entire hemisphere.

3.4 THE FOLLOW-UP MECHANISM FOR THE IMPLEMENTATION OF THE CONVENTION

The Inter-American Convention against Corruption had its lead role. In 1996, when it was adopted, many States were still discussing if this was an issue that should be considered within an international treaty. In fact, in the United Nations and the OECD, attempts to negotiate conventions on this issue failed.

If the viability of international treaties in this field were disputable during this time, the possibility of creating monitoring mechanisms or instruments for evaluating compliance of the treaties by the States was practically unthinkable. In fact, no State or non-governmental organization introduced a formal or informal proposal during the negotiations of the Inter-American Convention, on the creation of some sort of follow-up mechanism, evaluation or monitoring of compliance of the measures that were to be adopted. The idea simply did not exist nor was it introduced at the time.

Eventhough a short time has passed between the adoption of the Convention and the present time, the circumstances have changed considerably. Ultimately and for different circumstances, the OECD Convention adopted a “monitoring mechanism” for the signatory States to it. Also, The Group of States against Corruption (GRECO) of the Council of Europe also adopted an monitoring mechanism regarding its commitment to this field.

The aforementioned lead to the suggestion of creating a follow-up mechanism for the implementation of the Inter-American Convention against Corruption by the States Parties to it.

The issue itself of monitoring international accords is not something new or strange to the OAS Member States. Many countries are part of monitoring mechanisms, for example, in combating money laundering, some of them participate in the OECD process of evaluation. Within the OAS framework, States have adopted monitoring instruments in areas of collective interests. It would be enough to cite the activities of the Multilateral Evaluation Mechanism (MEM) in regards to drug abuse and to the activities of the Consultative Committee foreseen in the Inter-American Convention against the Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related Materials.

Taking into account these new circumstances. The OAS General Assembly in June of 2000, requested of the Permanent Council (body integrated by the Permanent Representatives before the OAS of the Member States) that they analyze the existing mechanisms and develop a recommendation on an appropriate model that could be used by the States Parties.

The Permanent Council, thanks to the efficient and opportune work of the Working Group on Probity and Public Ethics, of a meeting of experts in this field and of the Conference of States Parties held in Buenos Aires, Argentina, in May of 2001, completed it's task. As a result, within the framework of the ordinary session of the General Assembly held in San Jose, Costa Rica, on June 4, 2001, the States Parties, through a declaration, approved the “Follow-up Mechanism for the Implementation of the Inter-American Convention against Corruption”.

Of the approved text, it is worth mentioning the following, first, the objectives that have been defined for the follow-up mechanism, which strike an adequate balance between the necessity of following-up the progress made by the States and facilitating cooperation among them as to assure compliance, implementation and application of the Convention.

Second, the fact that the mechanism was developed within the objectives and principles established in the OAS Charter, for example principles like sovereignty, non-intervention and legal equality of States.

Third, the characteristics defined for the mechanism like impartiality and objectivity in its operation and conclusions, as well as the absence of sanctions.

Fourth, the search for an adequate balance between confidentiality and transparency in its activities is very important through the publication of the rules and procedures of the Committee of Experts, the selection of issues and methodology, the selection of countries and the final report

Fifth, even though the mechanism is of an inter-governmental nature, it has foreseen the acceptance of opinions given by civil society and that the Committee, in its procedural rules, will regulate their participation.

Finally, the follow-up mechanism incorporates its content within those of the OAS charter and the guidelines for the participation of civil society in the activities of the Organization, as well as establish headquarters for the Committee of Experts and that the functions of Secretariat will be offered by the OAS General Secretariat.

The starting of this follow-up mechanism, without a doubt, marks an important moment at a hemispherical level as to insure the effectiveness of the measures that will be adopted in strengthening inter-American cooperation in combating corruption.

This is, in general terms, the road taken so far within the OAS framework in strengthening cooperation among the Nations of the Americas in their fight against corruption. It is clear that the road taken is not complete but, in fact, the road taken is a permanent one, one that starts but never ends and, above all, a road with no return.

The Heads of States and of Governments of the Americas reiterated in their last Summit meeting, held in Quebec, Canada in April of 2001, when they stated their commitment in combating corruption, "acknowledging that corruption undermines core democratic values, challenges political stability and economic growth and thus threatens vital interests in our Hemisphere, we pledge to reinvigorate our fight against corruption. We also recognize the need to improve the conditions for human security in the Hemisphere."