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Briefing for non-governmental organizations in accordance with resolution 4/6 of the Conference of the States Parties to the United Nations Convention against Corruption entitled "Non-governmental organizations and the Mechanism for the Review of Implementation of the United Nations Convention against Corruption"

Summary

At its fourth session, the Conference of the States Parties to the United Nations Convention against Corruption adopted resolution 4/6 entitled "Non-governmental organizations and the Mechanism for the Review of Implementation of the United Nations Convention against Corruption". In this resolution, the Conference decided that briefings for non-governmental organizations would be convened on the margins of the sessions of the Implementation Review Group (herein after Group) on the outcomes of the review process, including technical assistance needs identified. These briefings would be conducted by the secretariat in cooperation with a member of the bureau and would be based on the reports of the Group, thematic implementation reports and regional supplementary addenda.

The Conference requested States parties and signatories to use the briefings and to draw on the discussions and proposals of its fourth session to continue constructive dialogue on the contribution of non-governmental organizations to the Mechanism. The Conference also encouraged non-governmental organizations to report to it and/or the Group, as appropriate, individually or collectively, on their activities and contributions to the implementation of the recommendations and conclusions of the Group approved by the Conference, including those related to meeting technical assistance needs and advancing capacity to effectively implement the Convention. The briefings would serve to further promote constructive dialogue with non-governmental organizations dealing with anti-corruption issues and help to build confidence in the role and contributions that NGOs can make to the review process. The first briefing for non-governmental organizations in accordance with

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Conference resolution 4/6 was held on the margins of the third session of the Group on 20 June 2012, the second briefing was held on the margins of the fourth session of the Group on 30 May 2013, the third briefing was held on the margins of the fifth session of the Group on 5 June 2014, and the fourth briefing was held on the margins of the sixth session of the Group on 4 June 2015.

The fifth briefing for non-governmental organizations was held on the margins of the seventh session of the Group on 23 June 2016 and was chaired by the Vice-President of the Conference, Andres Lamoliatte (Chile). The Chair delivered introductory remarks, welcoming the decision taken by the Conference to involve non-governmental organizations in the work of the Mechanism.

At the start of the briefing, the secretariat recalled resolution 4/6 and reminded participants to respect its terms. The invitations to the relevant non-governmental organizations contained specific language on expectations and the contributions to be made. A copy of resolution 4/6 was attached to the invitation, in order to fully ensure compliance with its terms. The briefing was to be structured in such a way as to allow participants from non-governmental organizations to make their contributions at the outset. Several non-governmental organizations confirmed their attendance by the deadline and written comments from non-governmental organizations were received in accordance with resolution 4/6 and made available for the briefing. The programme for the briefing was contained in document CAC/COSP/IRG/2016/CRP.3. Three panel discussions were organized in order to facilitate contributions.

The secretariat provided an introduction to the work of the Group based on the following documents: the progress report available to the Group (CAC/COSP/IRG/2016/2); the thematic reports and regional addenda on the implementation of Chapters III (Criminalization and law enforcement) and IV (International cooperation) (CAC/COSP/IRG/2016/5-8); and the oral updates on assessment of performance of the Mechanism and an analysis of technical assistance needs identified in the review process.

Noting that the briefing should provide an opportunity for non-governmental organizations to make contributions on their activities, the Chair opened the floor for interventions.

Speakers encouraged States parties to continue efforts to improve their legislation, measures and mechanisms and noted that the second review cycle provided the opportunity to build on the successes of the first cycle. In urging States to consider ways to increase civil society's participation in the Implementation Review Mechanism, reference was made to the Convention's article 13 which outlines the importance of the participation of society in the fight against corruption.

In the wake of the publishing of the Panama papers, speakers urged Governments to increase efforts to stem money-laundering and enhance transparency and accountability, in particular in public procurement. The prominent role of civil society in the publication of the Panama papers was underscored.

A panel discussion on giving voices to victims in settlements and asset repatriation and through civil action for damages was held and moderated by Susan Hawley from Corruption Watch UK. The moderator outlined how the Convention effectively showed that corruption was not a victimless crime by ensuring that the victims be heard, as outlined in article 32, paragraph 5. The panel focused on how victims can

be identified and discussed the process by which victims, including affected states, can be given greater voice in particular in settlements, but also in court proceedings. The panel also looked at different processes for victim compensation.

The first panellist, Open Society Foundation's Alisher Ilkhamov reflected on how the victims in corruption cases could be individuals as well as the State. The Convention reflected this through articles 35 and 53. The panellist highlighted how the two provisions of the Convention should be read together in compensation cases. Finally, the panellist called for transparent mechanisms to ensure that assets could be accessed by and reach the victims in order for them to be effectively compensated.

The second panellist, Marta Ruda of the Anti-corruption Action Centre in Ukraine, outlined how the repatriation of assets needed to be carried out in a transparent manner. To this end, it was important that assets not be channelled straight into the regular budget of a State, but suggested that the funds instead be placed in a separate account. Any disbursement from this account would be placed under the control of an unbiased, international mechanism, which could include civil society, as well as the States involved. Finally, the panellist noted that the recovered assets should be used both for compensating the victims as well as enhancing the anti-corruption capacity in the national institutions.

Abiola O. Makinwa of the Academy of Public Management, Safety and Law at the Hague University of Applied Sciences, was the third panellist and presented two different cases of procurement where the services had not reached the intended beneficiaries due to corruption. The examples showed how, frequently, victims of public contract cases would not be represented at the settlement negotiations. To remedy this situation, the panellist proposed the inclusion of a sleeping third-party beneficiary clause for contracts with a public impact. Such a clause would determine who would be considered a victim and be triggered only in cases where the contract was found to be tainted by corruption. While the advantage of such a clause would be that victims were given legal standing, the disadvantage could be that it might not be suitable for all types of contracts and that the pre-determined parties might draw greater benefits than other victims.

The fourth panellist, Lilian Ekeanyanwu, Head of the Technical Unit for Governance and Anti-Corruption Reform of Nigeria, underscored that it was important to differentiate between the State on one hand, which was a wider concept, including the population, and the Government on the other which was a regime that came and went. While appreciating the other ideas already put forward, the panellist highlighted that the Convention did not provide a definition of who a victim was or could be. In effect, the State itself could be a victim as could communities. There was also a need to broaden the definition of victims and their compensation in the form of both restitution as well as reparation of damages. The panellist ended by underscoring that there are several types of losses and damages that could be suffered ranging from reputational to financial.

During the ensuing discussion, an example of a hospital never built was given to illustrate how the payment of financial compensations often would not replace the services lost due to corruption. For this reason, speakers noted that empowering victims by ensuring that their views were heard would help re-instil their trust in the system that had failed them.

Several speakers asked whether it would be useful to place conditionalities on the return of assets in order to ensure that the funds were not recycled into corrupt regimes again. While it was agreed that the process of return of assets as well as the process of receiving these assets should be transparent and open to monitoring, outright conditionality could infringe on the sovereignty of the State. It would be more useful to include a pre-agreed use of the assets returned in any settlement or other agreement. By earmarking the funds, it would be harder to re-divert them and easier to monitor their use.

In closing the discussion, the Chair noted that the compensation of victims represented the essence of justice, i.e. repairing the harm that had been caused.

A second panel entitled “Clamping down on the facilitators” was moderated by Rose Sharpe of Global Witness. The panel focused on how UNCAC could help address the role of facilitators and shell companies, which had notably been revealed by the so-called Panama Papers.

As a first step, the panel discussed whether anonymously-owned companies represented a problem for the investigation and prosecution of money-laundering and corruption offences, and if public registries of beneficial ownership could overcome these problems.

The first panellist, Emile Van Der Does De Willebois, a Senior Advisor with the joint UNODC/World Bank Stolen Asset Recovery (StAR) Initiative, confirmed that anonymous companies created significant challenges to the investigation of corruption cases. A study on beneficial ownership transparency entitled “The Puppet Masters — How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It”, published in 2011 by the joint UNODC-World Bank Stolen Asset Recovery (StAR) Initiative, had shown that more than 70 per cent of the cases analysed for the purpose of the study had one thing in common: they relied on corporate vehicles — legal structures such as companies, foundations and, to a lesser extent, trusts — to conceal ownership and control of assets that are the proceeds of corruption. As far as public registries were concerned, the panellist cautioned that their effectiveness depended very much on whether they would be able to verify the information received and enforce the rules on beneficial ownership transparency. This in turn depended on where the registries were to be located. Studies showed that existing company registries had a low record of verification and enforcement. Therefore, it might be better to locate beneficial ownership registries within financial supervisory agencies that had a better track record of enforcement.

The second panellist, Christine Clough, of Global Financial Integrity, explained that her organization looked at the macro issue of illicit financial flows and tried to estimate their size. While a lot more information was needed to make precise estimates, she agreed that anonymously-owned corporate structures facilitated these illicit financial flows. With regard to remedies, the panellist advocated a risk-based approach. Administrative fines for non-compliance might not be enough because that risk might be acceptable for companies.

The third panellist, Josef Redl of the Austrian magazine “Falter”, outlined how his magazine had been involved in the publication of the so-called Panama Papers. In his experience, at the end of a money-trail, there was always an anonymous company. While there were lists of beneficial owners in the Panama Papers, these

were far from complete and usually did not name what was called by the law firms involved the “ultimate beneficial owner”.

In the second part of the discussion, the panel looked at the role of the enablers or facilitators of corruption, and in particular the role of lawyers.

The final panellist, Jane Ellis of the International Bar Association, underlined that while the majority of lawyers observed legal and professional standards, some were prepared to put their service to the client above their legal obligations, and some were simply ignorant of their duties. Therefore, it was essential to educate lawyers properly and raise their awareness that their ultimate obligation was to the law. In that respect she also highlighted that illegal advice was not protected by legal privilege.

Rose Sharpe agreed on the need for education but challenged to some extent the assumption that there was no systemic problem with legal professionals. Her organization had conducted an undercover investigation where they had posed as clients seeking advice from law firms on laundering money, and had been successful in 12 out of 13 cases.

Emile Van Der Does De Willebois and Christine Clough added that with regard to money-laundering, it was important to focus not only on lawyers and bankers as facilitators but also on accountants and other Designated Non-Financial Businesses and Professions (DNFBPs) who were often unaware of their reporting obligations.

In the ensuing discussion, speakers underlined the difficulties in identifying the true, physical beneficial owner, including the problems in legally defining this person. One speaker noted that sector specific licensing agencies might have useful beneficial ownership information. Some speakers mentioned incentives for compliance and ways to sanction non-compliance.

In conclusion, the moderator suggested that UNODC publish a report on the role of facilitators and shell companies and put the issue of beneficial ownership transparency on the agenda of the next Conference of the States Parties to UNCAC.

The third and final panel entitled “Opening up procurement — Transparency and civil society participation in public procurement processes” was moderated by David Banisar of Article 19. The panel highlighted how transparency and civil society participation could help reduce corruption in public procurement and how increased effectiveness of the use of public funds and new transparency laws and technologies were improving processes and public oversight, leading to improved efficiency and accountability.

The first panellist Grzegorz Makowski from the Stefan Batory Foundation, explained how transparency in public procurement can also extend and enhance transparency into other areas of the public sector. Due to the vast sums spent by governments, procurement is an area particularly prone to corruption. In noting that prevention of corruption is as important as fighting it, the panellist suggested that civil society, with its broad knowledge in this area could be an important partner. The panellist further underlined the importance of usage of information and communication technologies for the prevention of corruption.

The second panellist, Alice Gartland from the Open Contracting Partnership, spoke about her organization’s experience in promoting and introducing open contracting

at country level and underlined that open contracting schemes are possible even in sensitive areas such as security and defence. The importance of opening data to public access and ensuring that it is in a user-friendly format was also underscored. The panellist further explained how developing and introducing open contracting data standards would promote transparency in the procurement process.

The third panellist, Baldwin Chiyamwaka a Project Manager at the Open Society Institute, Hivos Malawi, highlighted that even elaborate legal frameworks can be compromised by the weak implementation capacity of the relevant institutions. He shared the experience in establishing institutionalized platforms for cooperation between the civil society and government in preventing corruption in procurement and underlined the role of CSOs which not only facilitate transparency but act as intermediary between government and citizens. The panellist highlighted how an evidence-based approach to procurement reform is critical to strengthening public procurement systems and processes. He noted that CSOs could be able to take the lead in producing such evidence.

Juanita Olaya of the UNCAC Coalition was the fourth panellist and underlined the importance of collaborative action between government and society to build modern procurement systems. She emphasized the importance of involving civil society in the procurement process through various tools, including integrity pacts and open contracting schemes. To this end, the collaborative efforts between public sector, private sector and civil society could bring about the required behavioural change which a legislative amendment alone would not.

In the subsequent discussion, the importance to link open contracting data with transparency in beneficial ownership was underlined as an important element of the efforts to prevent corruption in procurement. Another speaker raised the importance of introducing systems for managing conflicts of interest not only in procurement in particular, but also in government in general.

Several speakers mentioned the potential of ICT to enhance transparency and mitigate corruption risks in procurement. While some speakers noted that the investment in developing such e-procurement systems was deemed by some States as neither affordable nor sustainable, others suggested that the potential benefits of introducing such systems would greatly outweigh any initial costs linked thereto.

In concluding, the panellists emphasized how the second implementation review cycle, presented an opportunity to focus on strengthening integrity in public procurement in line with article 9 of the Convention.