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Inter-American Convention Against Corruption Comments on the First Version of Draft Questionnaire and Methodology

10 May 2002

Pursuant to Article 33 of the Rules of Procedure and Other Provisions of the Committee of Experts of the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption and the Guidelines for the Participation of Civil Society Organizations in OAS Activities, CP/RES. 759(1217/99), Transparency International (“TI”) and its chapters in the Americas respectfully submit the following comments to the Secretariat regarding the draft questionnaire and methodology.

TI commends the Secretariat for its preparation of a comprehensive draft questionnaire. It will be critical, as this process moves forward, for the States Parties to ensure that the Secretariat has the necessary additional resources, both human and financial, to assist the Committee of Experts in reviewing responses and in conducting follow-up visits in a timely manner.

The credibility of the Follow-Up Mechanism will also depend on completing each “round” promptly so that a report can be made at the next Summit of the Americas on the status of States Parties’ implementation of key Convention commitments.

Finally, we appreciate the opportunity to review the draft questionnaire and to provide comment. This collaborative process promotes more effective follow-up and, thus, greater progress in the fight against corruption. Civil society can provide candid, independent and objective information on the practical impact of laws and other preventive measures. In order to carry out this valuable function, it will be necessary for civil society to see the States Parties’ responses to the questionnaires in time to submit comments for consideration by the experts. This will also enable civil society to work with government at the national level to promote effective reform.

General Observations

It would be useful to clarify that the terms “public officials,” “public servants,” and “those who perform public functions” have the same meaning and comprise persons elected or appointed and at all levels of government.

To ensure that the scope of “public service” is as broad as possible, all entities that receive public funds – regardless of how autonomous or “private” they may be, should be considered included in the questionnaire coverage.

It would also be useful to clarify that references to “members of civil society or nongovernmental organizations” also include the private sector.

We agree that statistics from the past five years can enhance understanding of how standards and mechanisms are applied in practice. Providing the number of cases and their outcome can help illustrate how mechanisms and standards operate in practice.

The following points relate to the specified provisions of the questionnaire and suggest clarifications or additional questions that might be posed.

Chapter One, Section One: Conflicts of Interest

2(b) “Specific entities” should also include audit and procurement, in light of their responsibility. This question should also inquire whether there are special standards for those public officials with a higher level of authority.

3.1 In this provision and elsewhere, clarify whether “standards” in a legal framework are statutory or set by administrative bodies.

3.2(c) Is there a standard that permits or requires divestiture prior to assuming office of those interests that may pose a conflict?

Do officials have to certify the truth of their disclosures and be subject to sanctions for misrepresentation?

3.2(c),(d)

3.3(c),(d) Disclosure of background and economic interests to the public is an effective measure to detect and prevent conflicts of interest prior to and during the performance of public duties. The questionnaire should ask whether there is public disclosure at each stage.

In light of the potential influence of political contributions on those who “aspire to” public office, the questionnaire should ask whether campaign contributions and expenditures are made public.

4.1(c) This question should inquire whether officials have “any interest” in a legal entity.

4.1(i) Inquire whether standards prevent officials from receiving benefits that could not only adversely affect but could be perceived to adversely affect the performance of public functions.

4.2 Mechanisms to enforce conflict of interest standards must provide for transparency in the decision-making process, including public access to

information and the identity of decision-makers. Are there such requirements and do they include timely publication of information and databases on budgets and public spending?

Chapter One, Section Two: Conservation and Proper Use of Resources

- 2.b** Are there unified norms governing public contracting and the use of funds in general? Is information on public procurement and procurement procedures centralized and publicly available? Are there requirements such as for neutral specifications, publication of tenders and awards, and appeal processes?
- 3.a** How and to whom are public officials to account for use of assets, public resources, etc.?
- 4.d** How are “acts of public corruption” defined and is conviction required before seizure of assets?
Is there a private right of action permitted to a private individual damaged by the adverse impact due to a conflict of interest?

Chapter One, Section Three: Measures and Systems Requiring Public Officials to Report

- 2.c** What situations would qualify as requiring “confidentiality” or “special secrecy” to justify failure to report acts of public corruption?
- 4.b** Is there an obligation to make public reports of acts of corruption?

Chapter One, Section Four: Common Features

- a** Do mechanisms to enforce conflict of interest standards include designating an official in each government agency to teach, advise and promote compliance with standards of conduct? Are resources adequate?

Chapter Two: Systems for Disclosing Income, Assets, and Liabilities

- a** In light of the critical importance of public disclosure, a separate question should seek to clarify how the determination is made regarding “where appropriate” to make disclosure public. It should also ask for the rationale for not making disclosure public.
- c** “Specific agencies” should also include audit and procurement, in light of their special responsibility. This question should also inquire as to whether there are special standards for those public officials with a higher level of authority.
- h** Clarify whether this refers to the public gaining access to information and under what conditions would the content be confidential.
- j** Do the regulations require, not merely contemplate, a supervisor regularly seeking an explanation of a substantial increase in assets and beginning an

investigation? What are the criteria and sanctions for proving illicit enrichment?

- k Do officials have to certify the truth of their disclosures and be subject to sanctions for misrepresentation?

Chapter Three: Oversight Bodies

- 3 How are “citizens who perform public duties” defined?
- 5 Are there channels (ombudsman) to receive complaints and is there protection against retaliation?

Are there ethics counselors, inspectors general, ombudsman, internal auditors and hotlines within each government agency? If so, what authority, autonomy, and resources do they have?

Chapter Four: Participation by Civil Society

- 1 Does national law apply to all branches of government (executive, legislative and judicial) as to publication of information and mechanisms for civil society participation?
 - 1.a It would be useful to have citations to or copies of all regulations referred to in the civil society section.
 - 2.a Under what circumstances would information be “protected by law” from public disclosure.
 - 2.h Is there an obligation for those who administer state resources to publish regularly budgets, salaries, fee schedules, information on procurement and privatization and other expenditures of public resources?
 - 2.i Is there an obligation to publish executive orders, legislators’ votes, and judges’ decisions?
 - 3.b Is there an obligation to hold public hearings prior to appointment of senior public officials, including judges?
 - 4.c Are there standards that require private persons to report political contributions? Is there a *de minimus* threshold above which such contributions must be reported?
 - 4.f What protection is provided to civil society for actions to prevent public corruption?
 - 4.k What restrictions are there on media coverage of corruption allegations and what protections enable the media to operate without intimidation? Request details on cases of liable suits brought in corruption cases in last five years.

