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Panel on Giving Voice to Victims in Settlements and Asset Repatriation

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Much has been said but little achieved about the damages gap in anti-corruption enforcement. This is due to the difficulty of getting from Article 35 of UNCAC that deals with a very particular type of victim in very particular circumstances, to the ultimate victims of corruption, namely, the communities, villages, countries that suffer the social, political and economic costs of corruption. This difficulty is exacerbated by the fact that asset recovery in Article 53 UNCAC is directed at STOLEN assets rather than compensation of victims for damages suffered. What options do we have? This calls for creative thinking. Traditional avenues of private actions for compensation by 'victims' of corruption will only in very limited instances materialize because of the challenges associated with the textbook identification of victims under Art 35 UNCAC. These challenges include identifying the person who has suffered damage; proving that damage has been suffered by the identified person and proving causality. i.e., that an identified wrongdoer was the cause of the damage suffered by the identified person.¹

With this in mind I would like to discuss two strategies. But first let us examine these scenarios:

Scenario 1: *A World Bank supported contract is awarded to XYZ Consultancy Services for Completion of Women's Vocational Training Centre in Utopiana Town in Utopia.*

Status: Ongoing investigations for fraud and corruption.

Question: Who is the Victim?

Scenario 2: *MNC acquires multimillion dollar contracts for National ID cards, National Mass Transit system and National Cellphone Network.*

Status: All contracts acquired by bribery of foreign officials and subject of DOJ investigations under the FCPA.

Question: Who is the Victim?

Consider: *The primary punitive mechanism for contracts tainted by corruption involving MNCs are negotiated settlements. Do the 'victims' from our scenarios, i.e. the women of Utopiana / users of national id cards / users of mass transit system / users of national cellphone network have a seat at the negotiating table? No, they do not. Public contracts that have a big impact on the lives of 'victims' are anonymous, faceless and detached from the public they are meant to benefit.*

How can we give victims a voice in this process? Can we get 'victims' a **Seat** at the negotiating table? Can we include **Victim Interests** at the negotiating table? I would like discuss two possibilities: Firstly, to give victims a seat at the negotiating table by introducing ***Sleeping Third Party Beneficiary Clauses*** as

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¹ See generally A. Makinwa, *Private Remedies for Corruption: Towards an international Framework*, Eleven International Publishing, 2013, at pp.371 - 377.

standard clauses in procurement contracts.² Secondly, to include victims interests in the settlements process, by working to ensure that **Agreements to Contribute to Anti-Corruption Initiatives** become a **Standard Line-item** in settlement agreements.³

1. **Getting ‘Victims’ a Seat at the Negotiating Table using Sleeping Third Party Beneficiary Clauses.**

A **Third-Party Beneficiary Clause (TPBC)** is a method of providing a **pre-defined party** that is not a signatory to contract legal standing with respect to settlements or court cases involving the contract under **defined circumstances**. Parties to a contract can extend the right to sue on the contract to parties who have not participated in the negotiation of the contract and who have not signed the contract. In the UK, for example, the *Contracts (Rights of Third Parties) Act 1999* provides for a limited right of action for a person who is not a party to a contract, if the *contract expressly provides* that the third party may enforce a contractual term or where the contract purports to confer a benefit on the third party.

A public contract is funded by public funds to provide a benefit to the public. The typical contract would be a procurement contract. The typical parties would be a government or other development agency on the one hand and a corporation on the other. Where these parties, by way of a third party beneficiary clause, expressly agree to give the ultimate beneficiaries of a public contract a right to sue to, such a third party beneficiary clause will become a party to the contract with **legal standing**.

The idea is to develop a **standard clause** for use in procurement contracts that creates automatic standing for a **pre-defined group of beneficiaries** that is representative of a class in terms of number/ commonality of interest / and adequacy of representation where a certain **defined threshold** is reached. This threshold will be defined **in terms of corruption affecting the contract**. Such a clause would give the defined group standing to sue where the subject matter of the contract is affected by corruption. These beneficiaries would have a **right to sue and a right to be engaged in the sanctioning processes / negotiations** with regards to such procurement contracts that are tainted by corruption.

This proposed clause will be a **sleeping clause**. It will only be triggered into operation when a certain **pre-determined threshold** (agreed to by the parties to the contract) is met. The fact that the clause is only triggered into operation by the attainment of this pre-determined threshold creates an incentive for bidding corporations to comply with anti-corruption rules to ensure that the clause is not triggered into action. **No Corruption = No TPBC**. Such a **Sleeping Third party Beneficiary Clause (STPBC)** can be used to create an environment that encourages compliance with anti-corruption rules in a self-regulatory manner. The target group that will benefit from the introduction of such a clause as a

² See generally A. Makinwa, *Private Remedies for Corruption: Towards an international Framework*, Eleven International Publishing, 2013, at pp.415 – 419.

³ See generally See A. Spalding Guest Post: *Reaching Bribery’s Victims (Part 3)* available at <https://globalanticorruptionblog.com/2014/06/19/reaching-briberys-victims-part-3/>. Spalding, referring to a paper by Andrew Brady, *Restorative Justice for Multinational Corporations* (March 3, 2014). Available at SSRN: <http://ssrn.com/abstract=2403930>), argues that such supplemental agreements benefit the citizens of the bribed government; funds initiatives to remedy past bribery (to the extent possible) and to curb future bribery; reallocates a portion of the penalty money, rather than relying on recovered assets; the money goes to private-sector organizations and programs, rather than the host governments; and the mechanism is authorized under existing US law, requiring no new statutes or regulations. He explains that the US Federal Sentencing Guidelines have been used to this effect in Environmental cases and suggests that they can also be used in anti-corruption cases.

standard clause in their contracting processes are Multilateral Development banks and Development Agencies.

Advantages:

- 1.1 Overcomes the problem of **Legal Standing**.
- 1.2 By linking those who bear the brunt of the negative consequences of corruption to public contracts tainted by corruption, third party beneficiary clauses can **act as a control mechanism** on the actions of government officials and corporations engaged in public procurement by increasing the risk of engaging in corrupt activity. By using a **sleeping third party beneficiary clause** that will only be triggered into operation upon the occurrence of a carefully defined threshold, the specter of direct action by mobilized beneficiary communities can simultaneously (1) encourage behaviour that ensures that the clause is not triggered into operation, as well as, (2) empower victims of corruption in government contracting. The real success of such a clause would occur **where it is never triggered into operation** to the benefit of communities, governments and entrepreneurs. Thus, such a clause operates in a self-regulatory fashion. It provides one more incentive for compliance with anti-corruption laws so that clause is not triggered.
- 1.3 The ultimate **beneficiaries (victims) of the contract have to be identified and described**. This creates an obligation for contracting parties to identify eventual beneficiaries of the contract with sufficient certainty to satisfy the legal requirements of a third party beneficiary clause. In this respect, civil society has the organizing ability and can work hand in hand with government, corporations as well as the communities that ultimately stand to benefit from a public contract, to facilitate the identification and definition of the intended beneficiary.
- 1.4 The process of identification and definition **gives a public contract a public face**. It identifies beneficiaries or representatives of beneficiaries, who in turn are made more aware and are better informed about contracts that could potentially affect their lives. It gives civil society an opportunity to partner with government authorities and corporations to ensure that there is transparency and accountability in government contracting. It enables governments to show that they are willing to be transparent and accountable to their public while contracting on their behalf. It gives corporations the opportunity to demonstrate their willingness to be socially responsible and the possibility to focus their corporate social responsibility efforts in a manner that is directly linked to the financial interests of the corporation. Such a process links all the players that are affected by a public contract and unites their common interests to ensure that the contracting process is transparent, that contracts are duly executed and corrupt activity in the contracting process can be challenged by the ultimate beneficiaries who constitute a motivated and hitherto underutilized resource in the fight against corruption

Disadvantages:

The process of identifying the ultimate beneficiaries will add to costs of public contracting. It is also not a suitable mechanism for all types of procurement contracts, particularly where the ultimate beneficiaries are difficult to classify into a group. Furthermore, the pre-defined party that are included in the third party beneficiary agreement may acquire greater benefits than other 'victims'.

2. ***Including Victim interests at Negotiating Table by encouraging Agreed Contribution to Anti-Corruption Initiatives as a Line- Item in Settlement Agreements.***

To overcome damages gap for victims in anti-corruption enforcement we need to overcome the challenges of proving damage to victims under Art 35. To do this, we can draw on Spalding's proposal⁴, and encourage **Agreed Contributions to Anti-Corruption Initiatives as a standard Line-Item in Settlement Agreements**. This will avoid the challenges of Art 35 UNCAC, yet, at the same time, address the interests of 'victims' by providing a source of funding for the development of mechanisms to empower victims, address impunity, and encourage compliance as well as collective action.

Has this been done before? Two foremost examples are the Siemens / World Bank Integrity Initiative of July 2, 2009. Under this agreement Siemens committed to fund projects and organizations fighting corruption and fraud through Collective Action, education and training with US\$ 100 million over 15 years. A more recent example is the Siemens / European Investment Bank Initiative of March 15, 2013. Siemens committed itself to providing funds, totaling 13.5 million euros over five years to international organizations, inter-governmental organizations, non-governmental organizations (NGOs), business associations, and academic institutions that support projects or other initiatives promoting good governance and the fight against corruption.

A look at the activities that have been generated by these agreements with Siemens, particularly in the area of collective actions, shows that protecting the interests of victims need not only be considered in terms of instituting legal action. It can also be done by integrating funding for activities that directly address the protection of 'victim' interests in the processes of settlements in a restorative manner.

⁴ Ibid.