DEVELOPMENT OF DRAFTING UNITED NATIONS CONVENTION AGAINST CORRUPTION

INTRODUCTION

1. In its resolution 55/61 of 4 December 2000, the United Nations General Assembly, recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime (resolution 55/25,)[1] was desirable; decided to begin the elaboration of such an instrument in Vienna at the headquarters of the Centre for International Crime Prevention of the Office for Drug Control and Crime Prevention; requested the Secretary-General to prepare a report analysing all relevant international instruments, other documents and recommendations addressing corruption and to submit it to the Commission on Crime Prevention and Criminal Justice; and requested the Commission, at its tenth session, to review and assess the report of the Secretary-General and, on that basis, to provide recommendations and guidance as to future work on the development of a legal instrument against corruption.

2. In the same resolution, the General Assembly requested the Secretary-General to convene, upon completion of the negotiation of the United Nations Convention against Transnational Organized Crime and the related protocols, an intergovernmental open-ended expert group to examine and prepare, on the basis of the report of the Secretary-General and of the recommendations of the Commission at its tenth session, draft terms of reference for the negotiation of the future legal instrument against corruption.

3. In its resolution 55/188 of 20 December 2000, the General Assembly reiterated its request to the Secretary-General, as contained in resolution 55/61, to convene an intergovernmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of the future legal instrument against corruption, and invited the expert group to examine the question of illegally transferred funds and the return of such funds to the countries of origin. Furthermore the General Assembly decided to establish an ad hoc Committee for negotiating of such an instrument.

4. In its resolution 2001/13 of 24 July 2001, entitled "Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning such funds", the Economic and Social Council requested the intergovernmental open-ended expert group referred to in the General Assembly resolution 55/61 to consider, within the context of its mandates, the following issues, *inter alia,* as possible items of work to be included in the draft terms of reference for the negotiation of a future legal instrument against corruption: (a) strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, including the laundering of funds derived from acts of corruption, and promoting ways and means of enabling the return of such funds; (b)

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[1] The Convention was adopted on November 15th, by GA/Res/55/25, and signed by 123 countries and the European Union at Palermo, Italy, between 12-15 December 2000. By June 2001, two further countries had signed the Convention and one (Monaco) had ratified it. It will come into force on the 90th day after being ratified by the 40th country to do so. See Convention articles 6-9, 13 and 14. It should be noted that several articles of this Convention deal with corruption and related matters such as money-laundering, which have yet to be implemented.[15] The major limitation of the instrument in its application to corruption is that it only applies where corruption which is "transnational in nature" involves the activities of an "organized criminal group". See articles 2 and 3.

developing the measures necessary to ensure that those working in banking systems and other financial institutions contribute to the prevention of the transfer of funds of illicit origin derived from acts of corruption, for example, by recording transactions in a transparent manner, and to facilitate the return of those funds; (c) defining funds derived from acts of corruption as proceeds of crime and establishing that an act of corruption may be a predicate offence in relation to money-laundering; and (d) determining the appropriate countries to which funds, referred to above, should be returned and the appropriate procedures for such return.

5. Pursuant to General Assembly resolution 55/61, the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of a Future Legal Instrument against Corruption was held in Vienna from 30 July to 3 August 2001 and recommended to the Assembly, through the Commission on Crime Prevention and Criminal Justice and the Economic and Social Council, the adoption of a draft resolution on the terms of reference for the negotiation of an international legal instrument against corruption. The draft resolution was subsequently adopted as Assembly resolution 56/260 of 31 January 2002.

6. In its resolution 56/260, the General Assembly decided that the ad hoc committee established pursuant to resolution 55/61 should negotiate a broad and effective convention, which, subject to the final determination of its title, should be referred to as the "United Nations Convention against Corruption".

7. In the resolution, the General Assembly requested the ad hoc committee, in developing the draft convention, to adopt a comprehensive and multidisciplinary approach and to consider, *inter alia*, the following indicative elements: definitions; scope; protection of sovereignty; preventive measures; criminalization; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation.

8. The General Assembly also invited the ad hoc committee to draw on the report of the Intergovernmental Open-Ended Expert Group, on the report of the Secretary-General on existing international legal instruments, recommendations and other documents addressing corruption (E/CN .15/ 2000/3 and Corr.1), as well as on the relevant parts of the report of the Commission on Crime Prevention and Criminal Justice on its tenth session, 1 and in particular on paragraph 1 of Economic and Social Council resolution 2002/13 as resource materials in the accomplishment of its tasks.

9. The General Assembly requested the ad hoc committee to take into consideration existing international legal instruments against corruption and, whenever relevant, the United Nations Convention against Transnational Organized Crime; decided that the ad hoc committee should be convened in Vienna in 2002 and 2003, as required, and should hold no fewer than three sessions of two weeks each per year; requested the ad hoc committee to complete its work by the end of 2003.[2]

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[2] The resolution was recommended by the expert group established by GA/Res/55/61 in accordance with the mandate created by that resolution and resolution 55/188. The expert group also took into consideration a resolution of the tenth session of the Commission for Crime Prevention and Criminal Justice setting out possible terms of reference dealing with the transfer of funds of illicit origin derived from

10. Parallel to the negotiations within the United Nations, the Organization of American States, the Council of Europe, European Union, the Organization for Economic Co-operation and Development have made useful contributions towards the development of regional legal regimes for effective control of corruption. An Inter-governmental group, known as Global forum, has held two Ministerial level meetings so far to contribute to the efforts of the United Nations. The AALCO Secretary-General was invited to attend Global Forum II, which was held in The Hague in May 2001. During his stay there, he met several Ministers of Justice of AALCO Member States who suggested that the AALCO should be involved in this negotiating process.

11. It may be recalled that the AALCO's Legal Advisers Meeting held in New York on 20th November 2001, considered the topic of Corruption. The discussions focused on the on-going negotiations within the United Nations. It was felt that the AALCO should consider taking up such an item at its forty-first session.

12. Taking into consideration the foregoing developments, the Secretary-General proposed for inclusion of an item entitled "An Effective International Legal Instrument Against Corruption" in the provisional agenda of the AALCO's 41st Session. This suggestion was in line with the Article 4(d) of the AALCO's Statutes which provides for exchange of views and information on matters of common concern having legal implications. It was felt that the AALCO could make useful contributions to the negotiations concerning the international convention for preventing and combating corruption. In order to facilitate consideration of this topic, the Secretariat prepared a **Preliminary Study** which highlighted the progress made within the United Nations. The initiative taken by the Secretary-General was welcomed and the item was discussed at the AALCO's 41st Session. The Resolution adopted at that session urged the Member States to actively participate in the work of the Ad Hoc Committee.

13. Keeping in view the substantive negotiations in the Five Sessions of the Ad Hoc Committee, AALCO's involvement at this juncture would be timely and useful. A review of the negotiations in the Ad Hoc Committee is provided in this document. Furthermore, brief information about the work done in the Global forum and the report on the AALCOs participation in the drafting of the African Union Convention on Combating Corruption has been annexed to this report.

14. In the following, the reference has been made to the different views and opinions of the geographical groups and States delegations in order to indicate the development of the drafting UN Convention Against Corruption first in the inter-governmental open-ended Expert Group, held from 30 July to August 3, 2001, in Vienna and the Meetings of the Ad Hoc Committee until its fifth Session held in March 2003.[3]

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corruption and the return of such funds. See E/2001/30, Draft Resolution II, titled: "Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and returning such funds".

[3] The First session was held from 21 January to 1 February 2002; The Second session was held from 17 June to 28 June 2002; The Third session was held from 30 September to 11 October 2002; The Fourth session was held from 13 January to 24 January 2003; The Fifth session was held from 10 to 21 March 2003; The Sixth session is proposed to be held from 21 July to 8 August 2003.

A. SUMMARY OF THE DISCUSSION HELD IN THE INTER-GOVERNMENTAL OPEN-ENDED EXPERT GROUP

15. The representative of Egypt, speaking on behalf of the Group of 77 and China, stressed that the terms of reference for the legal instrument should include, broad definitions, including all aspects relating to public and private corruption; a broad scope of application; exchange of information that would facilitate tracing of funds and transfer of funds of illicit origin connected with corruption in order to ensure the repatriation of those funds, forfeiture and confiscation of the proceeds from corruption and the possibility of shifting the burden of proof and banking secrecy, and the rendering of technical assistance, especially to developing countries.

16. The European Union stressed that criminalization and sanction models should respect human rights and fundamental freedoms.

17. The representative of Morocco, speaking on behalf of the Group of African States, stated that the scope of application should include all forms of corruption. The definitions should address the concept of corruption in the broadest sense possible. Penal sanctions should be supplemented by disciplinary, administrative and civil law sanctions, and stressed the need to strengthen cooperation between law enforcement agencies, the reinforcement of mutual legal assistance and the bridging of differences in legal systems.

18. The representative of Jordan, speaking on behalf of the Group of Asian and Pacific States, endorsed the statement made by the representative of Egypt on behalf of the Group of 77 and China and expressed that the scope of application of the new convention must be responsive to the concerns of all States, particularly on the sensitive issue of sovereign equality, territorial integrity and non-interference in the domestic affairs of States.

19. The representative of Japan stated that his country could not fully associate itself with the statement made by the representative of Jordan on behalf of the Group of Asian and Pacific States, insofar as that representative had endorsed the statement of the representative of Egypt on behalf of the Group of 77 and China.

20. Some delegations pointed out that the new convention should be developed with appreciation for differing legal systems.

21. Some delegations were of the view that the new convention should be a broad-based instrument encompassing all forms of corruption. In particular, some delegations made reference to the need to cover public and private, active and passive corruption, trafficking in influence, international bribery, improper use of state property, obstruction of justice and abuse of power. According to some other delegations, the new convention should apply to domestic, foreign and international civil servants, as well as to politicians. Some other delegations expressed the view that there should be a definition of those performing a "public function", to whom the new convention should also extended. Other delegations advised caution, because attempting to broaden the approach excessively was fraught with many conceptual, legal and policy-related difficulties. That discussion not withstanding, there was broad support for a comprehensive and multidisciplinary approach in developing the new convention.

22. In the view of some delegations, criminal law measures against corruption would need to include the reversal of the burden of proof and the lifting of bank secrecy. Other delegations voiced concern regarding the reversal of the onus of proof, as that would run contrary to constitutional principles or international obligations and would thus be difficult to envisage.

23. Prevention was perceived by some delegations as including the promotion of integrity, transparency and good governance. Specific preventive measures could include development of codes of conduct or ethics, an effective and impartial civil service, effective systems for financing political parties, establishment of independent oversight bodies, free and transparent media, transparent public procurement rules, effective regulation of financial systems, denial of tax deductibility of bribes, an independent judiciary and the effective implementation of the rule of law. In order to be effective, prevention should address the social and economic factors that were associated with corruption.

24. Many delegations emphasized the importance of effective mechanisms for monitoring the implementation of the new convention. For some delegations those mechanisms should be regional or multilateral. Other delegations expressed concern regarding the appropriateness of regional and multilateral mechanisms, as they had a bearing on sovereignty matters, and preferred national monitoring mechanisms.

25. Many delegates welcomed the development of an anti-corruption tool kit and suggested that it should address areas such as ethics, education of youth, civil service reform and asset recovery. Other delegations stressed that there was no single model of a system to fight corruption and that the inception and implementation of appropriate measures should take into account the diversity of legal systems and traditions of States.[4]

26. Based on the proposals submitted by 26 countries at its informal preparatory meeting, hosted by the Government of Argentina in 2001[5], the Ad Hoc Committee started its negotiations at its first session in January 2002.

B. REPORT OF THE AD HOC COMMITTEE FOR THE NEGOTIATION OF A CONVENTION AGAINST CORRUPTION ON ITS FIRST SESSION, HELD IN VIENNA FROM 21 JANUARY TO 1 FEBRUARY 2002

27. The representative of the Philippines, speaking on behalf of the Group of 77 and China, noted that no country was completely free from corruption and stressed the great importance attached by the members of the Group of 77 and China to the task faced by the Ad Hoc Committee. The Group underscored the importance of creating an effective and binding international legal instrument against corruption that embodied a comprehensive approach and a monitoring mechanism. Such an instrument must establish an internationally binding legal framework encompassing prevention, detection,

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[4] A/AC.260/2 dated 8 August 2001.

[5] The Informal Preparatory Meeting proceeded to review a draft consolidated text prepared by the Secretariat, with a view to eliminating possible duplication and exploring the compatibility of the various proposals. The purpose of the review was to produce a text of the draft convention that would facilitate the work of the Ad Hoc Committee. The product of the review was considered by the Ad Hoc Committee as the basis for its work at its first session, together with other proposals submitted by delegations during the negotiation process. (A/AC.261/2 dated 21 December 2001.

criminalization, investigation, prosecution and penalization of perpetrators, remedies, rehabilitation and monitoring mechanisms. Likewise, the instrument should address international cooperation and technical assistance among States in their efforts to tackle the problem of corruption. Attention should be given to broadening definitions covering private and public corruption. It was also vital that the new instrument strengthen international cooperation as well as the institutions and the capacity of States to fight corruption, while respecting the sovereignty of States. Moreover, particular attention should be paid to the provisions on exchange of information, lifting banking secrecy in cases where corruption was detected, criteria for determining the country of origin of illicit assets, tracing the transfer of funds of illicit origin, forfeiture and confiscation of proceeds from corruption and shifting the burden of proof. The representative stated that the Group of 77 and China attached great importance to the issue of repatriation of assets of illicit origin. In that connection support was expressed for the proposal by Peru regarding the organization of a seminar in June 2002 to deal with the problems of repatriation of assets of illicit origin.

28. The representative of Spain addressed the Ad Hoc Committee on behalf of the States Members of the United Nations that are members of the European Union and the European Commission. Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia and Turkey also associated themselves with the statement. The representative of Spain stressed the interest of Member States of the European Union in fighting corruption, which was indicated by the proposals several of them had made for the draft convention. The members of the European Union emphasized that the convention should contain both preventive and law enforcement measures, striking a balance between the two types of provisions. They also advocated setting a high global standard, at a level compatible with the principles of existing anti-corruption instruments. In connection with criminalization, the representative stated that account should be taken of existing international legal instruments and that criminal offences and penalties should respect the fundamental principles underlying Member States' legal systems. In that context, he recalled the reservations of the European Union on illicit enrichment. As regards law enforcement measures, it was pointed out that the future convention should cover active and passive corruption in the public sector and corruption of both national and foreign civil servants, including international civil servants. Active and passive corruption in the private sector, as well as trading in influence and accounting offences, should also form part of the negotiations. The States members of the European Union were of the view that the new instrument should cover criminalization of the laundering of proceeds of corruption and should contain provisions on seizure and confiscation as well as international cooperation in that regard. The representative stressed that the important issue of return of illegally acquired assets should be addressed. The provisions of the United Nations Convention against Transnational Organized Crime should be used as the basis for drafting several key elements of the future convention. The European Union was of the view that the future convention against corruption should include binding preventive measures that should reflect the key principles of good governance, integrity and transparency. It was also important to include, in line with the United Nations Convention against Transnational Organized Crime, mechanisms to provide technical assistance to developing countries and countries with economies in transition, as well as the establishment of a monitoring mechanism, which should be effective and flexible.

29. The representative of the Sudan, speaking on behalf of the Group of African States, stated that the scope of the future convention should include all forms of corruption, at the national and international levels, and should include corruption in the public sector as well as in the private sector. The new instrument should also reflect the issues of prevention, detection, investigation, punishment and eradication of corruption, as well as means to facilitate the bridging of differences in legal systems. The Members of the African Group attached particular importance to preventing and combating money-laundering and the transfer of funds of illicit origin, as well as to returning illicit funds to the countries of origin. The representative reiterated the importance of effective participation of least developed countries in order to guarantee a truly universal character for the convention and called for voluntary contributions to enable all least developed countries to participate on an equal basis and throughout the negotiation process.

30. The representative of Venezuela, speaking on behalf of the Group of Latin American and Caribbean States, recalled that during the Intergovernmental Open-Ended Expert Group several elements were identified by the Members of the Group of Latin American and Caribbean States for possible inclusion in the new convention, among them measures to prevent and fight the transfer of funds of illicit origin and the laundering of proceeds derived from corruption, as well as measures to facilitate the repatriation of such funds. The representative reiterated the need for the binding provisions of the future convention to be complemented by measures of technical assistance in order to allow uniform application. It was underlined that the future convention should contain preventive measures as well as provisions on broad international cooperation and mutual assistance. The importance of the involvement of civil society and of the private financial institutions was also underlined.

31. Many representatives expressed the view that the future convention against corruption should be binding, effective, efficient and universal and that it should be a flexible and balanced instrument that would take into account the legal, social, cultural, economic and political differences of countries, as well as their different levels of development. The need to have a convention with clear, precise and realistic provisions that were concretely applicable at the national level was advocated repeatedly.

32. Many representatives also stressed that the future convention should have a multi disciplinary and comprehensive approach and should not only be considered as a criminal law instrument, but should also strike a balance between preventive and law enforcement measures.

33. Some representatives pointed out that the new convention should be developed with full respect for the principles of sovereignty, territorial integrity and non-interference in the internal affairs of States.

34. Further, it was pointed out that the United Nations Convention against Transnational Organized Crime contained many provisions that encompassed useful solutions and represented significant achievements, reached by consensus. To the extent possible, the new convention should make full use of those provisions in order to facilitate and expedite the process of negotiation.

35. Several participants indicated that one of the goals of the future convention should be to strengthen the national capacities to fight corruption and enhance international cooperation to prevent, detect, control and eradicate corruption. The view was expressed

that the new instrument should focus on international cooperation and, in particular, international judicial cooperation and should not try to tackle corruption at the national level.

36. According to several representatives, the new convention should be a broad-based instrument encompassing all forms of corruption. In particular, reference was made to the need to cover public and private, active and passive corruption, trafficking in influence, international bribery, improper use of state property, obstruction of justice and abuse of power. According to some representatives, the new convention should apply to domestic, foreign and international public officials, whether appointed or elected.

37. The importance of producing clear and precise definitions, in particular of the concepts of "corruption" and "public official", was underlined in many statements. In order to avoid discrepancies in the implementation of the convention, the proposal was to arrive at an autonomous definition of "public official", a definition that did not refer to the domestic law of States. Some delegates emphasized that definitions might vary from chapter to chapter.

38. Prevention was highlighted as a key element of the new instrument. Many representatives stressed the need to strike a balance between prevention and enforcement measures. Some pointed out that those measures should be based on the promotion of integrity, transparency, good governance, fairness and equality before the law. Further, some delegates were of the view that preventive measures would include development of codes of conduct or ethics, an effective and impartial civil service, effective systems for financing political parties; establishment of independent oversight bodies, free and transparent media, transparent public procurement rules and effective regulation of financial systems; denial of the tax deductibility of bribes; promotion of an independent judiciary; and effective implementation of the rule of law. Many delegates expressed the view that, in order to be effective, prevention should address the social and economic roots of corruption. Many representatives also stressed the importance of both the involvement and participation of civil society in preventing corruption and the promotion of public awareness.

49. Several representatives underlined that the preventive measures of the future convention should be binding in order to be effective, while some representatives indicated that those measures should not be of a binding nature and should be tailored to national situations.

40. In relation to criminalization, many representatives stressed the importance of uniform criteria for criminalizing corruption. The need to foresee the liability of legal entities, as well as of establishing appropriate criminal, civil and/or administrative sanctions, both for natural and legal persons was also advocated during the discussion. In the view of some representatives, criminal law measures against corruption would need to include the reversal of the burden of proof and the lifting of bank secrecy. According to some delegates, criminalization of illicit enrichment was also necessary. However, some delegates voiced concern regarding the reversal of the onus of proof, as that would run contrary to constitutional principles or basic principles of domestic law or international obligations and would thus be difficult to envisage.

41. Many speakers were of the view that it was essential that the future convention against corruption address in an effective manner the question of the transfer of assets of

illicit origin and the need to develop adequate mechanisms and measures to ensure the recovery of such assets. Several representatives highlighted the complex questions related to that problem and in particular the issue of tracing of funds, the identification of the legitimate beneficiary of funds or assets of illicit origin and the question of title over those funds or assets.

42. The importance of effective mechanisms for monitoring the implementation of the new convention was emphasized in many statements. It was also pointed out that such mechanisms should have clear and precise tasks and obligations and should be truly effective. According to some representatives, several existing international legal instruments provided useful sources of inspiration in that regard.

C. REPORT OF THE AD HOC COMMITTEE FOR THE NEGOTIATION OF A CONVENTION AGAINST CORRUPTION ON ITS SECOND SESSION, HELD IN VIENNA FROM 17 TO 28 JUNE 2002

43. The Ad Hoc Committee for the Negotiation of a Convention against Corruption held its Second Session in Vienna from 17 to 28 June 2002, during which it held 18 meetings.

44. There were several important and delicate issues that the Ad Hoc Committee considered at its second session, one of which was the question of asset recovery, and the Chairman expressed his pleasure at the success of the efforts to hold the technical workshop on that issue during the second session. The question of asset recovery was one of the fundamental aspects of the Convention which would also serve as an indicator of the political will to join forces in order to protect the common good.

45. A one-day technical workshop on asset recovery was held on Friday, 21 June 2002. Moderator outlined the hypothetical case which was used as the basis for the workshop, in which a corrupt government leader had transferred proceeds of corruption to other countries. Following a change of government, his successors sought to retrieve those proceeds.

46. Willie Hofmeyr of South Africa discussed the two recovery options open to the new government: procedures based on establishing that the assets were the proceeds of crime and procedures which sought their recovery as a form of damages in civil law. A dismissal of criminal charges would make criminal recovery unlikely unless such procedures could be reinstated. Legal and practical problems associated with tracing and seizure were discussed. Should proceedings be successful, the property could be recovered in a number of ways: (a) by a court judgment in the jurisdiction where the assets were located; (b) through a judgment in the country seeking their return and recognized by the other jurisdiction; or (c) by a judgment compelling the former leader or others in possession of the assets to return them, enforceable on contempt of court. Civil recovery offered some advantages, including a lower evidentiary threshold and the legal construct of attachment of liability to the assets, regardless of transfers. Disadvantages included the unavailability of criminal measures such as search and seizure and the high costs of foreign civil proceedings. Furthermore, for many countries, civil forfeiture was a procedure of a relatively novel nature and not currently permissible. The fact that most currently known cases involved civil recovery could be seen as an indication that cooperation needed for criminal cases was lacking.

47. Bruno Dalles of France discussed the tracing, freezing and seizing of assets. The laws of some countries only provided assistance and remedies for the proceeds of drug trafficking. That state of affairs could evolve thanks to the ratification of international instruments such as the United Nations Convention against Transnational Organized Crime. In France the judicial authority could directly seize assets that were the proceeds of the offence or in some offences the entire estate of the offender. Issues raised by the hypothetical case included questions of diplomatic immunities or the immunity of heads of State, which would have existed when the funds were transferred. It was necessary to keep that issue in mind in every reflection regarding the fight against corruption. Assets not directly derived from corruption might still be targeted on the basis of a broad definition of offences relating to fraud, conflict of interest or violations of rules related to disclosure or international transfers of capital. Once assets were hidden, efficient tracing required the establishment of databases on movable and immovable property, as was the case in France with the database of bank accounts. Without tracing, seizure and confiscation were not possible. He indicated that the draft convention represented an opportunity to address many problems and recommended more extensive limits on bank secrecy, the ability to target the entire estate of those involved and not just assets directly derived from an offence, and the inclusion of tax evasion as an underlying offence upon which recovery proceedings could be based.

48. Jose Carlos Ugaz of Peru outlined his involvement in recent attempts to recover assets transferred by the former Alberto Fujimori-led government, noting that, while the scenario used in the workshop was hypothetical, the experiences of Peru were not. A major problem was the fact that corruption had penetrated virtually every element of the former Government, neutralizing all of the substantive and procedural safeguards that would normally have applied to prevent corruption and the illicit transfers. That made taking action to prevent or recovery transfers while the corrupt regime was in power virtually impossible, and increased the difficulty of doing so later on because the corruption made some of the activities technically legal and rendered safeguards such as record-keeping and transaction-reporting mechanisms unreliable or inoperative. Recovery could be made easier by reforms such as international standards for evidence, the removal of bank secrecy, the establishment and use of financial intelligence units and greater reliance on the transfer of assets by those in possession of them, even where voluntaries was in question owing to the application of court orders or the threat or existence of criminal proceedings.

49. Pascal Gossin of Switzerland discussed the situation of countries that commonly were the recipients of requests for assistance seeking recovery, from the perspective of Switzerland. Considering the hypothetical case, Switzerland would conduct a step-by-step procedure. If assistance was prima facie admissible, assets could as a provisional measure, be traced, seized and kept frozen until the requesting country issued a confiscation judgment regarding the said assets. The request and all necessary requirements would then have to be accepted by a Swiss authority before the recovery could be effected. Proceedings would have to be initiated in the requesting country and would have to meet the procedural standards equivalent to those in the European Convention for the Protection of Human Rights and Fundamental Freedoms or in the International Covenant on Civil and Political Rights, adopted by the General Assembly on 16 December 1966. The crimes in question would have had to be not of political or military nature, or simple tax evasion, and an equivalent crime would have to exist under Swiss law (dual criminality). Bona fide third parties and individual victims could

challenge the recovery request, inasmuch as they had a link to Switzerland (residence or acquisition of property rights in Switzerland). If the full requirement for recovery were not met, the Swiss State could nevertheless grant the recovery request but under certain conditions (e.g., respect of human rights) or try to confiscate the assets according to the Swiss law against money-laundering. Lessons learned from recent recovery requests included the need for transparency on the part of the countries involved (exchange of information between recipient countries, e.g., within the framework of task forces), the absence of political motives for recovery and the need in some cases for a scheme for ultimate distribution or disposal of funds.

50. Haydee B. Yorac of the Philippines turned to the question of preventing the initial transfer of proceeds of corruption. She discussed the hypothetical case and the problems faced by her own Government in seeking to recover funds transferred by the regime of former President Ferdinand Marcos. She agreed that prevention was desirable, but noted that it was very difficult in cases such as those of Peru and the Philippines, where institutions and officials at the highest levels had been corrupted. Domestic criminal justice institutions could not be used while such regimes were in office, and often for some time afterwards while reforms were implemented. Corrupt officials also often destroyed essential evidence.

51. Kuniji Shibahara of Japan noted that many preventive elements were based in the laws and financial systems of other countries and could be used even while corrupt Governments were still in power. Those included the identification of suspicious transactions, prohibitions on anonymous transactions and bank accounts and the keeping of records to support subsequent tracing efforts. There was a general trend towards acceptance of preventive and deterrent measures.

52. Penelope-Ann Mammatah of Ghana noted that in west African countries, many basic money-laundering offences and controls had not been incorporated into national laws. She discussed those which were seen as necessary or beneficial, including stronger accounting standards, an end to bank secrecy, the reporting of bank earnings and deficits, powers to compel disclosure of assets, mandatory financial disclosures of public and private transactions, the establishment of financial intelligence units, general regulation and self-regulation of the banking and financial industries and better institutional cooperation. The lack of specialized skills and knowledge on the part of judges and prosecutors was also a problem in developing countries and training was needed, including in the use of computers and information systems, to search for assets and transaction records.

53. In the discussion that followed each of the presentations, further issues were raised. Those included problems associated with *locus standi*, the identification of parties and the roles of individual victims in civil proceedings; whether requested countries should have a role in distributing proceeds or simply transfer them back en masse, leaving distribution to the requesting countries; limitation periods for civil actions and how those could be avoided; the different standards of proof in civil and criminal cases and whether "double jeopardy" restrictions precluded the use of both civil and criminal measures in a specific case; problems associated with diplomatic or sovereign immunities; the perception that recovery efforts were politically motivated in cases of high-level corruption; and issues arising where assets were found in the possession of bona fide third parties. A number of possible measures were suggested by panelists or delegates, including: controls on the use

of anonymous or "shell" companies; subjecting the proceeds of high-level corruption to forfeiture and recovery whether or not a crime existed when they were generated; subjecting the proceeds of tax evasion to recovery; enhancing the powers of other countries to block transfers where corruption made the source country unwilling or unable to do so; and the question of whether the convention should contain a single unified recovery scheme or create a range of options.

54. Furthermore, additional comments were also made focusing on: (a) the need to address the problem of tracing and seizing illicit proceeds to transferees after the death of a corrupt official where no criminal prosecution was possible; (b) the need to establish more uniform criteria for evidentiary standards with respect to freezing and seizure of assets of illicit origin, including perhaps a model statute for such matters; (c) the need to establish uniform standards for asset sharing between cooperating countries with respect to seized assets of illicit origin; and (d) the possibility of making greater use of rewards for information leading to the return of assets of illicit origin or using civil qui tam litigation whereby private citizens or "whistle-blowers" could sue corrupt officials and others who defrauded the Government on behalf of the State and then be rewarded with a portion of the assets of illicit origin recovered on behalf of the State.[6]

D. REPORT OF THE AD HOC COMMITTEE FOR THE NEGOTIATION OF A CONVENTION AGAINST CORRUPTION ON ITS THIRD SESSION, HELD IN VIENNA FROM 30 SEPTEMBER TO 11 OCTOBER 2002.

55. The Ad Hoc Committee for the Negotiation of a Convention against Corruption held its Third Session in Vienna from 30 September to 11 October 2002, during which it held 20 meetings.

56. The Chairman mentioned some of the issues that would require delegations to demonstrate a spirit of cooperation. Without wishing to prejudge the negotiations on the question of whether to include corruption in the private sector in the draft convention, he recalled that some States had recently adopted legislation intended to offer protection against private malfeasance. That legislation provided for the creation of oversight mechanisms for professions such as auditing or the reinforcing of mechanisms that had proved inadequate. He also noted that there seemed to be agreement among ministers of finance of various countries on the establishment of efficient common standards in relation to the oversight of certain forms of conduct by corporations, which had a direct relevance to public confidence.

57. The Chairman stated that the Ad Hoc Committee should pay special attention to the issue of prevention, debating in depth the nature of measures to be agreed upon and taking into account differences in legal and cultural systems while maintaining the standards required to be effective against and to have a real impact on corruption. He invited the Ad Hoc Committee to ensure that the relevant provisions on criminalization were sufficiently broad and covered the full range of acts of corruption.

58. The representative of Argentina, speaking on behalf of the States members of the Group of Latin American and Caribbean States, expressed the interest of the Group in discussing the issues of definition, prevention and criminalization of corruption with

[6] A/AC.261/7 dated 5 July 2002

respect to both the public sector and the private sector. He noted that, in view of the linkage between the two sectors, adopting a "limited" approach would adversely affect the implementation of the future convention. He also mentioned that the members of the Group would prefer an autonomous definition of "public official", a definition, that is, that did not refer to the domestic legislation of States parties. A uniform definition would simplify the application of the future convention.

59. The representative of Argentina stated that the members of the Group of Latin American and Caribbean States supported the idea of including in the draft convention a provision for a code of conduct to ensure the correct, honourable and proper conduct of public officials, as well as provisions on the obligation of public officials to make a sworn statement regarding their financial situation, on transparency in the funding of political parties and on the criminalization of trading in influence.

60. The representative of Argentina stressed that the members of the Group of Latin American and Caribbean States deemed it of the greatest importance to find a way, despite the difficulties involved, to include in the draft convention a provision on criminalization of the illicit enrichment of public officials.

61. The Minister of Foreign Affairs of Nigeria drew attention to the Protocol against Corruption that had recently been adopted by the Southern African Development Community, the draft Convention against Money-Laundering of the Economic Community of West African States, which was at an advanced stage of preparation, and the draft Convention on Preventing and Combating Corruption of the African Union.[7]

E. REPORT OF THE AD HOC COMMITTEE FOR THE NEGOTIATION OF A CONVENTION AGAINST CORRUPTION ON ITS FOURTH SESSION, HELD IN VIENNA FROM 13 TO 24 JANUARY 2003

62. The Ad Hoc Committee for the Negotiation of a Convention against Corruption held its fourth session in Vienna from 13 to 24 January 2003, during which it held 20 meetings.[8] It based its consideration of those articles on the consolidated text contained in documents A/AC.261/3/Rev.1/Add.1 and A/AC.261/3/Rev.2 with particular emphasis on articles 2 (remaining definitions), 3,4,20,30, 32-39 and 40-85 and on proposals and contributions made by Governments (A/AC.261/L.153 Some of them AALCO's Member States such as Egypt, India, Lebanon, the Libyan Arab Jamahiriya, Pakistan, the Republic of Korea, Thailand, Turkey and Yemen).

63. On 13 January, the Chairman recalled the good progress achieved at its first three sessions, during which the first reading of the draft United Nations Convention against Corruption had been completed and the second reading had been started. He called upon delegations to remain flexible, be innovative, be ready to compromise and make extra efforts to complete the second reading at the fourth session.

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[7] A/AC.261/9 dated 26 November 2002.

[8] The Fourth session of the Ad Hoc Committee for the Negotiation of a Convention against Corruption was attended by representatives of 116 States, observers for United Nations Secretariat units, United Nations bodies and research institutes, specialized agencies and other organizations of the United Nations system, institutes of the United Nations Crime Prevention and Criminal Justice Programme network, intergovernmental organizations (AALCO) and non-governmental organizations.

64. The Chairman also called upon the Ad Hoc Committee to find the most appropriate solution relating to the criminalization of private sector corruption, while noting the concerns of some delegations of the developed countries about the unintended effect of placing unwarranted, undue and unwanted restraints on trade and the ability of private sector entities to pursue their activities for the benefit of national economies and international development.

65. The Chairman also drew attention of the Ad Hoc Committee to the mechanism for monitoring implementation of the future convention, keeping in mind the principle, which had been already established in the United Nations Convention against Transnational Organized Crime. There was consensus that implementation needed a mechanism with the mandate and the ability to focus on and address specific issues that might arise, ensure a frank and open exchange of views, and serve as a forum where requirements and difficulties encountered in implementation could be dealt with. The difference centered on how this objective could be achieved. Through this Convention or through the Conference of the Parties to the Convention? Later we would see that the majority of the developing countries believed that the most appropriate mechanism could be envisaged by a Conference of the Parties to the convention to monitor and follow up implementation of its provisions.

66. The representative of Cuba, speaking on behalf of the Group of Latin American and Caribbean States, stated that international cooperation was essential for success in the comprehensive and multilateral fight against corruption and that the future convention should therefore include rules providing legal support to prevent the creation of safe havens for criminals. He also mentioned that extradition and mutual legal assistance, which included both judicial and administrative cooperation, should be binding and, where applicable, transferring persons. He emphasized the importance of preventing and combating the transfer of illicitly acquired assets, including the illicit proceeds of corruption, as well as returning them to their countries or origin.

67. The Representative of AALCO realized that it was no longer appropriate to make general statement as the Ad Hoc Committee was making its effort to reach consensus by establishing Working Group reconciling positions and finding compromises. Furthermore, the expressed views of the AALCO Member States on certain issues were divergent. Last but not the least none of Member States, by that date, had conveyed their comments to the Organization.[9]

Issues controversial in drafting United Nations Convention Against Corruption

During the discussion in Inter-governmental Open-Ended Expert Group:

68. It was noted that the United Nations Convention against Transnational Organized Crime contained many provisions that encompassed useful solutions and represented significant achievements reached by consensus. To the extent possible, the new convention should make full use of those provisions in order to facilitate and expedite the process of negotiations.[10] So far there are two main approaches taken by States in the

[9] A/AC/261/L.172, 23 January 2003 and A/56/403 The Report of United Nations Secretary General, 25 September 2001.

[10] In late 2000, the General Assembly adopted the United Nations Convention against Transnational Organized Crime, several articles of which deal with corruption and related matters such as money-

context of negotiating the Convention. The first considers the agreements reached under the Convention against Transnational Organized Crime (TOC) as the latest state of the art and therefore as a point of reference also for all the provisions under a future Convention against Corruption. Others see the TOC Convention rather as a point of departure on which a future Convention should be built, however, at the same time going beyond it. Currently, the first view seems to be shared by most delegations, in particular regarding the Chapters on adjudication, sanctioning, jurisdiction and international judicial co-operation.

69. Some delegations were of the view that the question of identification of the legitimate beneficiary of funds or assets of illicit origin, as well as the question of title over those funds or assets would need to be addressed. Economic and Social Council resolution 2001/13, as regards the issues of strengthening international cooperation and promoting ways and means of enabling to return of such funds[11], defining funds derived from acts of corruption and proceeds of crime, as well as establishing criteria for the determination of countries to which funds should be returned and the appropriate procedures for such return, was seen to constitutes useful basis for the deliberations on this matter. The most controversial aspects of the negotiations are the chapters on asset recovery and the monitoring of the future Convention's implementation. As far as the first is concerned, specific efforts have been made to enhance a common understanding of the various issues involved by organizing technical workshops. Such issues include the terminology used; the methods of recovery (criminal/civil); to whom the assets should be returned to; who should be deciding the compensation of eventual victims; and, who is to be considered "the victim".

70. Other issues, which will, need further in depth discussion include the definition of corruption, the term "public servant" as well as the question if and to what extent private sector corruption should be covered under the Convention. In addition, defining the concepts of whistleblower, informant and witness will present a challenge to the Ad hoc Committee.[12]

71. After the submission of the draft United Nations Convention Against Corruption, in the debate that followed, one main questions raised was whether there should be a common definition or whether it should be left to States to define corruption, according to their criminal law. Another important issue dealt with the definition of a "public official": how broad or how narrow should it be, namely if there should be an "autonomous definition" or whether it should be left up to the individual states to define this in their national laws. Also, an option of a combined approach was discussed, suggesting to have a general definition to set the standard and leave the option of further details to the countries.

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laundering, which have yet to be implemented. The major limitation of the instrument in its application to corruption is that it only applies where corruption which is "transnational in nature" involves the activities of an "organized criminal group". See articles 2 and 3

[11] Including the laundering of funds derived from acts of corruption and by developing the measures necessary to ensure that those working in banking systems and other financial institutions contribute to the prevention of the transfer of funds of illicit origin derived from acts of corruption, for example, by recording transactions in a transparent manner, and to facilitate the return of those funds; also by establishing that an act of corruption may be a predicate offence in relation to money-laundering.

[12] Briefing on the ongoing negotiations of a Convention against Corruption, Dimitri Vlassis, Secretary to the Ad Hoc Committee for the Negotiation of a Convention against Corruption, Report on the Second United Nations Interagency Anti-Corruption Co-ordination Meeting, 1-2 July, 2002 ODCCP Vienna.

72. Regarding the definition of "corruption" the major concern was on how broad the scope should be. Another option suggested was to have no definition at all and approach the issue by a list of acts of corruption to criminalize (indirect definition). In that connection, what should be listed first, the definition of corruption or acts to be criminalized? Was the Convention mainly an international cooperation tool (strong on international cooperation provisions) or a standard setting tool (not necessarily criminal law)?

73. Furthermore, to what extend should private sector corruption be included? Many countries would like to include corruption within the private sector, but several others were not yet convinced.

74. The draft text of the Convention has a large section on prevention. Moreover, the question regarding the threshold of when criminal law has to be applied needs consideration. Also, a code of conduct for public officials was proposed as an annex to the Convention. However, it has not been agreed to refer to the UN code of conduct directly in the relevant draft provisions, thereby incorporating it into the text.

75. The question focused on whether "International Organization Officials", should be considered as "Public Officials", and the scope of "privileges and immunities". It must be noted that the "shall", "should" clause in the Convention, in regard to the language used, is binding. On the other hand, the "subject to…" formulation is an escape clause.

76. Another point of discussion was whether military personnel were to be considered as public officials. Some countries interpreted it to cover military personnel some did not. There is also a draft article on funding of political party.

77. So far, it is difficult to determine how binding the instrument will be. It will depend on the final formulation. Probably national laws on administrative procedure and civil service regulations might have to be reviewed. There is a process of development of national law through international law. Regarding reservations, they can be registered as long as they do not oppose or contradict the purpose of the new convention. In the Transnational Organized Crime Convention until now there have not been any reservations.[13]

78. The effective monitoring of implementation of such conventions (including the relevant OECD, OAS and Council of Europe Conventions) is essential to underpin efforts being made by the agencies represented to fight corruption at the country and the grass roots levels. The conclusion of a comprehensive UN Convention against Corruption that can serve as a constructive point of reference for their efforts to assist the State Parties, is a matter of high relevance.

79. As far as the Chapter on monitoring of the implementation is concerned, various proposals are being discussed. Austria and the Netherlands in their proposal elaborated further on the concept of a conference of the state parties, already applied in the TOC Convention, by adding an operational secretariat consisting of personalities renown for

[13] See, Report on the First United Nations Interagency Anti-Corruption Co-ordination Meeting, (4-5 February 2002) ODCCP, Vienna. pp. 6-9.

their integrity. In contrast, the proposal of Norway suggests a system of peer review, including sanctions for non-compliance.

F. REPORT OF THE AD HOC COMMITTEE FOR THE NEGOTIATION OF A CONVENTION AGAINST CORRUPTION ON ITS FIFTH SESSION, HELD IN VIENNA FROM 10 TO 21 MARCH 2003

80. The Ad Hoc Committee for the Negotiation of a Convention against Corruption held its fifth session in Vienna from 10 to 21 March 2003, during which it held 20 plenary meetings and 10 parallel meetings of informal consultations.[14]

81. As the Ad Hoc Committee was to begin the third and final reading of the draft Convention, the Chairman emphasized that the time had come to forge agreements, reach consensus and close the deliberations on the various articles.

82. The Executive Director stated that the time had come to develop a road map that would enable the Ad Hoc Committee to complete its task by the end of 2003. He suggested that certain signposts be included on the road map, such as agreement on the articles on criminalization, agreement on most of the definitions and consolidated agreement on the chapter on international cooperation.

83. The representative of Brazil,[15] stated that political considerations should not become conditions for implementing provisions of the future convention. He called upon the Ad Hoc Committee to consider certain elements emphasized at its previous sessions by the Group of 77 and to make every effort to complete its work by the end of 2003. He drew the attention of the Ad Hoc Committee to the following points regarding the logistics of the final phase of the negotiations of the draft convention: (a) parallel meetings should be avoided as much as possible; (b) during the discussion of a contested article in a working group, the plenary should not be in session or should only consider matters predominantly agreed upon; (c) a flexible approach should be followed regarding the discussion of chapters; (d) interpretation in all official languages of the United Nations should be provided when critical articles were being considered; and (e) the documents should be correctly translated.

84. The representative of Brazil further mentioned that a great deal of attention should be given to the draft articles regarding definitions, scope and criminalization, strengthening of international cooperation, technical assistance and recovery of assets of illicit origin. He stressed that preventive measures should be largely advisory or optional, while the provisions on both criminalization and international cooperation should be mandatory, subject to domestic law. He also emphasized that the provisions on international cooperation and the return of assets should be applicable to both criminal and non-criminal investigations, including civil and administrative inquiries. He stated that provisions on various measures, including measures involving international cooperation, extradition and mutual legal assistance, should be strengthened in the draft convention, so that no offences covered by the future convention would be treated as political offences. With regard to definitions, he said that the definition of "public official" in the draft

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[14] Representatives of 114 States, observers for UN Secretariat units, specialized agencies, intergovernmental organizations and non-governmental organization, attended the fifth session. Amb. Dr. Ali Reza Deihim, Deputy Secretary-General, represented the AALCO Secretariat.

[15] Speaking on behalf of the Group of 77 and China,

convention should include a wide range of functionaries at all levels of hierarchy. He also stated that the Group of 77 supported the criminalization of private sector activities affecting the public interest and the provision of cooperation between those States which had criminalized illicit enrichment and those which had not. The Group of 77 and China preferred the formulation "offences covered by this Convention" to the formulation "offences established by States Parties in accordance with this Convention". With respect to article 50 on jurisdiction, he insisted that the right of a State to establish its jurisdiction over an offence as an "affected State" should be included. He also mentioned that the meaning of final judgement or final conviction should be construed as a "legally enforceable judgement", as in the *travaux preparatoires* of the Organized Crime Convention.

85. The representative of Brazil emphasized the importance the issue of returning assets to the country of origin as the country's inalienable right. He stressed the need to establish effective international provisions on the seizure of assets acquired by means of corruption and their recovery by the country of origin. He called upon the Ad Hoc Committee to include a chapter on the recovery of assets, including provisions on preventive measures, cooperation and recovery mechanisms, so that the future convention would facilitate the expeditious recovery and return of assets derived from corruption. With regard to the monitoring mechanism, he stated that it should not be intrusive in nature and should respect the sovereignty of States.

86. The representative of Greece[16] stated that the States members of the European Union fully understood the concerns of many delegations about the problem of the transfer of funds and assets of illicit origin derived from acts of corruption. He expressed satisfaction with the substantial progress made at the fourth session of the Ad Hoc Committee, including on the issue of the return of funds, which was of great political importance for the European Union. He called on delegations to demonstrate spirit of cooperation, especially regarding the issue of preventive measures. He emphasized that prevention was indispensable to balance the future convention. He underlined the necessity to formulate provisions that would be workable and effective, equitable and acceptable to all parties.

87. The Cuban[17] representative noted that the increase of corruption in the era of globalization required the scope of the future convention to cover both the public and the private sectors. He expressed the concern of the Group of Latin American and Caribbean States about the current wording of article 4 *bis*, which was optional. While being aware of the differences in legal systems: the cultural diversity and the different stages of development of States, which should be taken into account when drafting the preventive mechanisms, he stated that those differences should not be a reason to weaken the fulfilment of the objectives of the future convention.

88. The representative of Cuba emphasized that it would be indispensable to specify in the draft convention as many acts of corruption as possible that States Parties should establish as offences, in order to provide sufficient legal basis for international cooperation. He then drew the attention of the Ad Hoc Committee to the flexible proposal

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[16] Greece was speaking on behalf of the European Union, as well as the acceding countries (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) and the associate countries (Bulgaria, Romania and Turkey).

[17] Cuba was also speaking on behalf of the Group of Latin American and Caribbean States.

by the Group of Latin American and Caribbean States on criminalization of illicit enrichment. He then clarified that the text in the proposal would not impose an obligation to criminalize illicit enrichment and, at the same time, would leave open the possibility of international cooperation. He highlighted the need to preserve the principle of the Presumption of innocence. He emphasized the importance of the recovery of assets of illicit origin derived from acts of corruption. He also underlined the need to have a broad and comprehensive chapter on the recovery of assets, including prevention, cooperation, recovery mechanism and disposition, as well as the general principle of return of assets to the countries concerned. He also stressed that the mechanisms for monitoring implementation should be agile, effective, non-discriminatory, transparent, proportional and impartial, without generating any excessive cost or diverting funds earmarked for programmes involving cooperation and technical assistance.

89. The representative of the Syrian Arab Republic[18] called upon the Ad Hoc Committee to resolve the issue of the recovery of assets, so that those countries which had lost significant assets through corrupt practices would have an opportunity to recover those assets and use them for the benefit of their people.

Consideration of the Draft UN Convention against Corruption at the fifth Session

90. At its 79th to 98th meetings of the fifth session, the Ad Hoc Committee considered articles 19-50, 1-3, 50 bis-59 and 73-77, in that order. It based its deliberations on the consolidated text contained in document A/AC.261/3/Rev.3 and on proposals and contributions made by Governments.[19] Further, the Ad Hoc Committee convened informal consultation from 14 to 20 March 2003 to consider Chapter II and V of the revised draft Convention with a view to facilitating its further deliberations and action on the provisions contained in those chapters. In the informal meetings the Ad Hoc Committee considered articles 4 bis, 5, 5 bis, 6, 6 bis and 7(Preventive Measures) and article 64, 65, 67, 60, 68-70, 61, 71, 62, 66 and 72 (Prevention and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds)

91. The Ad Hoc Committee provisionally approved the following: article 1, paragraph (a); article 2, paragraphs (t), (h), U) and (k); article 19 (subject to the resolution of an issue relating to the definition of "public official" contained in article 2, paragraph (a»; article

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[18] Syrian Arab Republic was also speaking on behalf of the Arab States, emphasized that all Arab States.

[19] At the fourth session of the Ad Hoc Committee, the Chairman had requested all regional groups to appoint representatives to form a group that would be asked, beginning at the fifth session of the Ad Hoc Committee, to ensure consistency within the text of the draft convention and between all the language versions of the draft convention. The Secretary announced the following appointments to the consistency group: the Group of African States had decided to appoint the representatives of Algeria, Cameroon and South Africa; the Group of Asian States had decided to appoint the representatives of China and Pakistan, with the representatives of Oman, Saudi Arabia and the Syrian Arab Republic alternating in the third position available to the Group; the Group of Eastern European States had decided to appoint the representatives of Poland and the Russian Federation; the Group of Latin American and Caribbean States had decided to appoint the representatives of Colombia and Mexico; and the Group of Western European and other States had decided to appoint the representatives of France and Spain, with the representatives of Australia and the United States of America alternating in the third position available to the Group. The Secretary also informed the Ad Hoc Committee that the consistency group would be assisted in its work by editors and translators from the translation section for each official language of the United Nations, as well as by a member of the secretariat of the Ad Hoc Committee

22; article 33 (except paragraph 2 (b)); article 38; article 38 bis; article 38 ter; article 40 (subject to a decision on whether to retain the expression "offences covered by this Convention" or substitute it with the expression "offences established in accordance with this Convention"); article 42 (except paragraph 3 and subject to a decision on whether to retain the expression "offences covered by this Convention" or substitute it with the expression "offences established in accordance with this Convention"); article 42 bis; article 43 (subject to a decision on whether to retain the expression "offences covered by this Convention" or substitute it with the expression "offences established in accordance with this Convention"); article 43 bis (subject to a decision on whether to retain the expression "offences covered by this Convention" or substitute it with the expression "offences established in accordance with this Convention"); article 44; article 45; article 46; article 48; article 48 bis; article 49; article 50; article 51 (subject to a decision on whether to use the expression "Offences covered by this Convention" or retain the expression "offences established in articles […] of this Convention" in paragraph 2 and except paragraphs 3 and 4); article 53 (except paragraphs 3 (j) and (k) and 9); article 54; article 55; article 56; article 59; article 73; article 74; and article 75.

92. As regards definition of "public official", the debate still revolved around how broad this definition should be and whether the future Convention should contain an "autonomous" definition or whether the definition should be left to national law. As regards the definition of "corruption", the debate centered on how broad this definition should be. As regards private sector, most States expressed a strong preference for a convention that would cover corruption in private sector.[20]

93. Some important articles deliberated in the formal and informal meeting of the Ad Hoc Committees are highlighted below. **Article 61** of the draft Convention deals with **"disposal of confiscated proceeds of crime or property".** This article should be considered in the light and in conjunction with article 71 and to some extent article 72. Article 71 deals with **'disposition of illicitly acquired assets'**, **in accordance with domestic law.** When acting on the request of another State Party, the requested State shall, as regards the confiscated proceeds:

1. (a) give priority consideration to transferring to the victims of the crime or to the legitimate owners;
   (b) to be used to support anti-corruption initiatives;
   (c) sharing with foreign authorities assisting in combating corruption;
   (d) to be deducted for reasonably incurred expenses.

2. To adopt necessary measures for consideration of other State Party's claim and to share confiscated assets with foreign authorities.

94. Article 72 (additional provisions) refer to this point that in case of making conditioned taking any measures to the existence of a relevant treaty, this Convention shall be considered as sufficient basis. Besides, the States shall consider concluding bilateral or multilateral agreements.[21]

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[20] This is a repetition of the same view in the previous sessions. See, Dimitri Vlassis, "The Negotiation on the UN Convention against Corruption", *Forum on Crime and Society*, Vol.2, no. 1, 2002, p. 158.

[21] Article 72 was deleted during the second reading at the fourth session of the Ad Hoc Committee because of its similarity with article 60 and 74.

95. The main issue in these three articles (61,71 and 72) is the acceptable formula for disposition of the illegally acquired, frozen, transferred or confiscated, seized assets or proceeds derived from acts of corruption. Several delegations expressed the view that the disposition of recovered assets should be left to the decision of that State Party to which the assets have been returned.[22] Other delegations were trying to set out rules and provisions for such measures.

Article 61 has two options:

96. Option 1, submitted by Austria and Netherlands, refers to the disposal of confiscated proceeds of crime or property according to the domestic laws and administrative procedures of the requested States. Sub-para (a) and (b) speak about contributing the value of such proceeds (property, funds) to a designated account and sharing with other States parties.

97. Option 2, submitted by Mexico, restricts the sharing of the proceeds of crime to the adoption of legislative or other legal provisions and when this would not entail damage to the property. Furthermore, the decisions with respect to confiscation should be a final judgement.

98. Most of developed countries were in favour of option 1, while most developing countries favoured option 2. The Primary perception of the developed countries was that article 61 refers to the recovery by the States, embezzled properties and proceeds of organized crimes and thus they favoured option 1.

99. One serious problem, in particular for the developing countries, was the issue of sharing of expenses and its acceptable proportion. Some developing countries believed that the costs of recovery should be borne by the requested State except some reasonable expenses. For these delegations the word "sharing" was ambiguous and non-acceptable as it gave an impression that it was concerning the parting of stolen property or illicitly acquired assets or its proceeds between requesting and requested States. Mutual assistance for the purpose of this Convention should be understood to mean rendering such services without claiming any particular expense sharing.

100. Few delegations observed that no Convention could provide for every detail. It should be left to the respective domestic law to decide whether it was necessary forming a Task Force. The USA delegation while defending the proposals, which could go beyond the language of Transnational Organized Crime Convention (TOC), pointed out that one category or fixed procedure for assets recovery was not to be found. This should be developed by the domestic Courts. The objective of sharing was not to limit the right of the requesting State. To him this has been a useful tool, although he was flexible on that regard.

The second difference was on the scope of articles 61 and 71.

[22] On the question whether assets would include funds such as embezzled Public Funds, many delegations such as Australia, responded positively.

101. Some delegations were of view that the scope of article 61 was broad, encompassing the proceeds of the crime of corruption. On the other hand, other delegations were of the opinion that article 71 had a limited scope, namely State and public illicitly acquired assets, thus excluding the recovery of assets acquired from other crimes including private corruption.

102. France defended recovery of all kinds of illicitly acquired assets. However, in his view, another formulation of the draft should be proposed. The other difference was the role of the States in the identification of the victims of damages, namely who was the victim or owner? Few supported the idea that the illicitly acquired assets should be delivered to the requesting State. This State has the responsibility to identify the real victim or real owner(s).

103. The delegation of Pakistan pointing out that in some cases the identification of the victim(s) or owner(s) was a very complex one. The claimant is not the judge of the Court. Therefore it should be left to the requesting State. The others believed that there was a need to involve the requested State too. The term of restitution, proposed by some delegations, were criticized by others, arguing that in some cases the though restitution was effected, justice was not rendered.

104. **Article 76** of Chapter VII **Mechanism for monitoring implementation** of the Convention, was one of the most debated item. This article speaks about a systemic follow-up programme through Conference of the State Parties to the Convention and if necessary by establishing any subsidiary body (bodies). The main objectives for providing an monitoring mechanism is to improve the capacity of the State Parties to combat corruption, to encourage the State Parties to take legislative and administrative measures to that end and to promote and review the implementation of the Convention.

105. Three positions were witnessed during the discussions in the Fourth and Fifth Session. Most of the European countries were supporting a language beyond of TOC. They defended the establishment of a monitoring system, according to which the implementation and appliance by the Convention could be evaluated. This system should be cost effective, devoid of duplication, and efficient. One group among the European countries was supporting the elaboration of such system, the criteria upon which the system should operate, and the subsidiary body (bodies) required in the Convention.

106. The delegation of UK pointed out the necessity of an effective follow-up mechanism, without which, the Convention will exist only in paper. Austrian delegation maintained that monitoring mechanism is paramount and pointed out that Norway's and Algeria's approach had some merits. However, he expressed that the monitoring system should not deter the States from joining the Convention; nonetheless it should be an effective, equitable, cost effective tool, not diverting the funds from training and mutual cooperation involving civil society, geographical distribution. The second group among European countries such as Finland, while speaking in favour of an applicable follow-up, highlighted that the elaboration of criterion and mechanism for implementation of the Convention at this stage, when, even the number and the kind of the States Parties to that are not clear is ambitious and premature. To them, it was recommendable to leave it to the Conference of States Parties.

107. The delegation of U.S. pointed that Convention should not be a collection of hallow words and articles. It should establish a mechanism for the Member States to provide them with needed information handling it with confidentiality, showing the constructive and political will of the States to implement the Convention. The language of the article should not be complicated and incurring burden. Australia felt that the monitoring mechanism should be effective but not burdensome, flexible enough and not deterrent for ratification.

108. On the other side were many developing countries, divided in two groups. The first group asserted in favour of provision for a Commission or Committee as subsidiary body of the Conference of the State Parties for evaluation, implementation and cooperation, as well as technical assistance in the Convention, as it was proposed by Egypt and Peru.[23] Nonetheless, even this group[24] was stressing that the structure of such system should be determined by the Conference of the States Parties rather than being reflected in the Convention, at this stage.[25] The delegation of Thailand while underscoring the appropriateness of having an effective and practice system of monitoring drew the attention to the fact that our approach should not scare the States from ratifying the Convention.

109. The monitoring mechanism should not make any obstacle instead of promoting of cooperation. The developing countries prefer having universal cooperation and it would be hard to join a convention, which provides a monitoring body as an obstacle to universal cooperation. The Delegation of Islamic Republic of Iran viewed that the Conference of States, Parties could elaborate the required details, and it should not impose high costs upon States, nor unfair sanctions, and therefore expressed support for the language in TOC respectively few nuances particular for this Convention. The Delegation of China pointed out that in the previous session though consensus was not reached, majority was for retaining the text of TOC. The Conference of States Parties may elaborate on the procedural as well as supplementary matters. The Delegations of Russian Federation and Thailand supported this suggestion.

110. Among the developing countries there was another group, which felt that this Convention could be a useful and effective document, but should be formulated as one, which the States could ratify it. Therefore it should not be obligatory beyond the language of TOC. Since 1994 many conventions or protocols have been adopted, which had not envisaged any expert body as monitoring body.[26] This group was considering such subsidiary body, as a mechanism to intervene in the domestic affairs. Secondly, this convention is not like Non-proliferation Treaty (NPT), which through its special

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[23] Peru, proposed that the Conference of States' Parties should be the one to follow-up with the mandate to: making assessments as regards the attainments of the Convention's objectives; the inalienable right of recovery of the illicit assets; Making preliminary assessments concerning the implementation of envisaged measures; The language of the article should be flexible, not rigid, observing efficiency, not another financial burden for the Secretariat showing effectiveness. It should not have the supervisory role, which is a matter within the jurisdiction of every State. Therefore he supported the language of TOC.

[24] e.g. Cameroon

[25] The Colombian delegation pointed out that Palermo Convention had outlined a fairly good approach. Besides to that this was first stage we favour having a subsidiary body, but its structure is prerogative of conference of State parties and not ad hoc Committee.

[26] Benin e.g.

mechanism could check the States practices. Thirdly, such body could be politicized.[27] Everything would depend on the report of such body, which due to its deficiency or imprecise report could produce a lot of serious questions, *inter alia*, the composition of this body and its faculties. "We should not make a hasty decision". Fourthly, regardless of its financial implications, no State can accept sanctions, which is not rather a rebuttal mechanism, interference and troubling. The main remarks of Israeli delegation in this regard were as follows:

- support for cautions and practical approach;
- reticent to about the kind of follow-up system and to accept a new body for that objective namely how and when to achieve the objectives of the convention;
- The first responsibility for combating the corruption rests upon the States. The main work should be done in the country and secondly through international cooperation;
- The creation of a body and shifting the responsibility to the UN, which is a political institution, is not acceptable. The Convention should not be involved with the political issues; and
- Any formulation going beyond the language in TOC would be a step further, which is not recommendable.

Summing up

Common points

- An effective monitoring system, which has the ability to somehow react to any non-compliance with the Convention.

Different views

a. a system should be elaborated and set out by the Conference of States Parties without any intervention in the domestic affairs.
b. a system with its general characters, functions, mandate should be reflected in the Convention, making the Convention an effective document.

[27] Indonesia expressed it opposition to the title of Chapter VII, because it could be prone to political intervention in the internal affairs of the others. He favoured the title of 'follow-up' instead of 'monitoring'.

GENERAL COMMENTS

I. Corruption is an evil, which pose serious threat to the development of a country. Establishing a legal framework at the national and international levels to combat corruption is not an easy task. While many States have already embarked upon a national strategy to deal with corruption, the issue as a transnational crime poses many challenges. The different legal systems do not have the same notion about establishing "criminality" regarding corruption as a crime. The lack of effective cooperation in sharing of information and investigation, the complications in judicial assistance, bank secrecy regulations etc., are just few examples which pose problems of great magnitude. Against this background, the United Nations effort to draft an international convention to combat corruption is a welcome initiative and deserves full support.

II. The draft UN Convention against Corruption seems to provide a comprehensive tool and a definite step forward in the international effort to fight corruption. It marks the larger trend towards greater international regulation of corruption in public and private life. The Ad Hoc Committee entrusted with the drafting of the Convention has completed the second reading of the draft articles in January 2003. The outcome of the third reading, which is expected to be completed by 8 August 2003, will be crucial in determining whether the Convention will be little more than a useful framework for enhanced international co-operation in anti-corruption enforcement or a real breakthrough in globalizing anti-corruption action across a broad agenda. Though the States participating in the Ad Hoc Committee have reached consensus on various issues, there still remain some outstanding issues like definition of corruption, asset recovery, monitoring mechanism etc., where they are finding it difficult to arrive at a consensus. It is hoped that the AALCO Members participating in the negotiations will strive to find a way forward and thus help in reaching consensus.

III. Keeping this in view, the AALCO Secretariat has identified some key issues essential for the successful outcome of the Convention, as well as to ensure that the current draft UN Convention against Corruption is an effective and comprehensive legal instrument. It is suggested that during the discussion in the AALCOs 42nd Session focused attention could be on: definition of Corruption, offences covered by the Convention, measures for enhancing international co-operation, asset recovery and mechanisms for monitoring implementation.

IV. Foreseeing the diplomatic conference for the adoption of the Convention against Corruption, to be held in late 2003 in Mexico, it merits considering that a special expert meeting of the AALCO Member States is convened after the Sixth Session of the Ad Hoc Committee.

ANNEX I

DISCUSSION IN THE GLOBAL FORUM ON FIGHTING CORRUPTION AND SAFEGUARDING INTEGRITY

The Global forum is an Intergovernmental forum engaged in the process of promoting a legally binding instrument against corruption. Its first meeting was hosted by the USA in Washington on 24 to 26 February 1999. The Meeting adopted the "Guiding Principles for fighting corruption and safeguarding Integrity among Justice and Security Officials".

Global forum II was hosted by the Government of the Netherlands from 28 to 31 May 2001. More than 100 Ministers of Justice, Senior Officials from different Departments representing 142 Countries as well as representatives of Intergovernmental and non-governmental organizations attended the Hague Meeting. Ambassador Dr. Wafik Z. Kamil, Secretary-General represented AALCO at this Meeting.

The discussions in the first three days of the Hague Meeting was held in five workshops which included: Integrity and governance (workshop I); Law enforcement (Workshop II); Customs (Workshop III); Corruption, transition and development (Workshop IV) and Government and business sector (Workshop V). The final day of the Meeting was held at the Ministerial level.

The discussions in the forum were focused on the basic objectives of exploring the ways and means to put an end to corrupt practices and developing systems based on good governance and integrity. It was recognized that because of many-faceted nature of corruption, it would be desirable to follow multi-disciplinary approach to deal with it.

The Ministerial Meeting adopted a Declaration, which besides setting out the summaries of the discussions in the five workshops also contained a general review of the key issues, and strategies to combat corruption at all levels. The Declaration stressed that integrity in administration was crucial to the achievement of good governance and the law enforcement instruments were crucial to deal with public and private corruption. It recognized that an international instrument such as the proposed United Nations convention against corruption could bridge the gaps between national legal systems. It considered essential to provide technical support to countries to enact legislations and build institutions to implements them. The inclusion of clear definitions of corrupt practices in the national criminal law, sufficient powers of investigation and enforcement, monitoring mechanism for co-operation and mutual legal assistance were some of the elements of an effective legal instrument. It stressed the need for involvement of civil society, private sector and the media in developing and implementing effective national and international anti-corruption strategies.

The Global Forum welcomed the decision of the General Assembly of the United Nations to commence negotiations on the elaboration of an effective legal instrument against corruption, independent of the United Nations corruption against Transnational Organized Crime and hoped that the results of the global forum process would be taken into account in those negotiation. **It also welcomed the initiative of the Government of the Republic of Korea to host Global forum III in May 2003**.

ANNEX II

SUMMARY OF THE DELEBERATIONS AT THE 41ST SESSION OF AALCO

The item "**International Legal Instrument Against Corruption"** (AALCO/XLI/Abuja/2002/S.11) was introduced by **Amb. Dr. Wafik Z. Kamil, Secretary-General** at the 41st Session of AALCO held in Abuja.

The **Delegate of Islamic Republic of Iran** said that the proposal of the AALCO Secretary-General was a timely and useful initiative which could provide a window of opportunity for the Member States to be informed of the matters of common concern, and if possible, to harmonize their positions on the different parts of the draft convention which were under consideration in the Ad Hoc Committee.

The future convention, in his view, should contain certain compelling features which he summarized as follows:

1. The convention must include a broad definition of corruption encompassing all forms of this crime with a view to criminalizing them and taking effective measures for their prevention and punishment
2. The convention should also focus on the preventive measures.
3. The convention must provide an international binding legal framework for detention, investigation, criminalization, prosecution, while taking into consideration the differences in legal systems and bridging them.
4. In order to criminalize corruption in all its forms, the major vehicle assisting the transfer of funds of illicit origin should be specifically targeted.
5. Similar to the provisions on international cooperation contained in the UN Convention against Transnational Organized Crime, the convention against corruption should provide for a range of measures regarding administrative and mutual legal assistance among state parties for any investigation, prosecution and judicial proceeding in cases involving corruption.
6. The convention must also entail regulations against the application of bank secrecy or privacy provisions which indeed impede or hinder criminal investigation or other legal proceedings relating to corruption, money-laundering or related illicit practices.
7. The Convention should additionally provide for technical and operational assistance to developing countries with a view to strengthening their institutional capacity to enforce anti-corruption measures as well as investigating and prosecuting the offences specified in the convention.
8. In drafting the provisions of the convention, which was primarily aimed at fostering international cooperation, care must be taken that the integrity of domestic legal systems were not compromised.

The **Delegate of the Republic of Korea** viewed that the efforts of the OECD and the UN, especially the work of the Ad Hoc Committee for the Negotiation of a Convention against Corruption had taken these efforts against corruption to a higher, global level. The establishment of the Ad Hoc Committee and the discussions within it show the commitment of the international community to fight all aspects of corruption by all means possible, including prevention, criminalization, international cooperation and the return of

funds of illicit origin. His delegation believed that the work of the Ad Hoc Committee would greatly contribute to the international efforts to combat corruption and hoped that it would be able to complete the negotiation process by the end of 2003.

Speaking about the steps taken by his Government to combat corruption, he said that Korea has ratified the OECD Anti-Bribery Convention, and has enacted domestic laws concerning corruption such as the Act on Prevention of the Bribery of Foreign Public Officials in International Business Transactions (1998) and the Act on the Prevention of Corruption (2001), which established an Independent Commission against Corruption.

He said that the Global Forum on Fighting Corruption and Safeguarding Integrity (Global Forum III) and the IXth International Anti-Corruption Conference (IACC) would be held in Seoul, Korea in May 2003. He believed that holding these two meetings together at the same venue would let them interact more actively and bring more meaningful rewards. He hoped that all members of the AALCO would be able to participate in these two important events next year.

The **Delegate of Thailand** expressed full support for the current negotiations to develop an international legal instrument against corruption and felt that the draft Convention should attempt to strike a balance between preventive and law enforcement measures. He welcomed the idea to use the United Nations Convention against Transnational Organized Crime as a basis for further discussion, where appropriate, especially in the area of international cooperation. He urged member countries of AALCO to be consistently represented in and contribute to the work of the Ad Hoc Committee meetings in order to ensure that views, experiences, legal norms and practices of the countries in these regions were heard and duly incorporated in the convention, as well as with a view to ensuring and achieving a truly universal character of this convention.

The **Delegate of People's Republic of China** welcomed the elaboration of an international legal instrument against corruption pursuant to resolution 55/61 of the General Assembly of the United Nations. He suggested that since the United Nations Convention against Transnational Organized Crime set up effective domestic preventive regime and has won general support of the international community, the proposed draft convention against corruption should take into account the experiences gained in respect of that convention.

The **Delegate of Indonesia** speaking about his country's efforts, he said that although Indonesia was facing many challenges, it has already embarked upon a national strategy to deal with corruption. As a follow-up of the adoption of the International Code of Conduct for Public Officials and the United Nations Declaration Against Corruption and Bribery in International Transactions, Indonesia has issued Law No. 28/1999 concerning Good Governance and Free from Corruption collusion and Nepotism, Law No. 31/1999, Law No. 20/2001 on Combating Corruption and Law No. l5/2002 Concerning Money Laundering. In addition, an Investigation Committee on Public Officials Wealth has been established which obliged the Public Officials to report their wealth and its sources. While reiterating his country's active contribution towards the conclusion of the United Nations Convention Against Corruption, he urged AALCO Member States to promote co-operation in combating corruption through bilateral as well as multilateral arrangements.

The **Delegate of Nigeria** welcomed the efforts of the AU to draft an international Convention on Corruption aimed at the eradication of corruption in Member States of the Union. He urged AALCO to make similar prouncement itself on the matter as it deliberates on this item. He said that at the national level, the present Administration in Nigeria had initiated policies and established institutions to tackle the problem of corruption. The "Corrupt Practices and Other Related Offences Act, 2001" passed last year, was now in operation. A National Commission, headed by a respected retired judge of the Court of Appeal, is empowered to investigate and prosecute all individuals, whether in or out of government, for contravention of the provisions of the law. He mentioned that the ECOWAS sub-region of which Nigeria is a member was poised to foster lasting co-operation in the area of combating corruption within the sub-region. He commended similar effort to all members of AALCO.

The **Delegate of Tanzania** associated himself with the views expressed by other delegations. He drew attention to the forthcoming meetings convened under the auspices of the African Union (AU) to negotiate a draft AU Convention on combating corruption namely the Meeting of senior experts. He urged the African Member States to prepare sufficiently and participate in those meetings actively. He felt that it would be useful for AALCO to monitor AU's work and enrich its study on this topic.

The **Delegate of India** stressed that the proposed International Convention on Corruption to address the following issues, among others: Firstly, the proposed convention should focus on international cooperation, particularly judicial co-operation in the investigation of cases involving corruption and should develop ways and means to tackle the transnational aspects of corruption. Secondly, it should define corruption in a comprehensive manner and its scope of application should also be equally broad. It should not only cover the corrupt activities in government and public sector but also all those private sector activities which impinge on the public interest.

The proposed Convention must follow the dictum of "crime does not pay" and should clearly spell out the methodology of tracing the funds originating from corruption and repatriation of such funds to the countries of origin. Further, transparency in the transactions of people in power would go a long way in reducing corruption. The proof of guilt should not be a precondition for according the necessary facilities for investigation of bank accounts and other documents.

The **Delegate of Uganda** while appreciating that legislation on corruption on the international scene was long overdue, she wished to raise some concerns which were as follows:

(i) Definition: corruption can have different definitions for different States depending on the levels. Should it be a concept, a context or simply a corporate terminology should it focus on just civil servants or private sector as well?

(ii) Does it not depend on the size of investments? What about the requirement for secrecy? Some issues of corruption are tied to political inclination wholly depending on the suspect's relationships with the government of the day.

Comments received from the Government of **Malaysia.**

1. Malaysia supports the conclusion of a comprehensive and internationally legally binding instrument against corruption encompassing all the aspects currently proposed in the draft Convention.
2. Malaysia is playing an active role in the deliberations of the Ad Hoc Committee on the draft Convention.
3. In relation the AALCO Secretariat's proposal that this item be placed on the agenda of the AALCO's 41st Session and that the Secretariat should follow the negotiations at the Ad Hoc Committee and prepare a further study on the proposed Convention, it is proposed that, depending on the views expressed by other AALCO Member States, Malaysia may consider supporting it.
4. Malaysia supports the conclusion of a comprehensive and internationally legally binding instrument against corruption encompassing all the aspects currently proposed in the draft Convention.
5. Malaysia is playing an active role in the deliberations of the Ad Hoc Committee on the draft Convention.
6. In relation the AALCO Secretariat's proposal that this item be placed on the agenda of the AALCO's 41st Session and that the Secretariat should follow the negotiations at the Ad Hoc Committee and prepare a further study on the proposed Convention, it is proposed that depending on the views expressed by other AALCO Member States, Malaysia may consider supporting it.

ANNEX III

AFRICAN CAMAPIGN AGAINST CORRUPTION

Corruption has existed ever since antiquity as one of the worst and, at the same time, most widespread forms of behaviour. Over time, socio-economic, cultural, religious as well as historical and geographical circumstances have greatly changed public sensitivity to such behaviour. In some periods of history, certain "corruption" practices were actually regarded as permissible, or else the penalties for them were either fairly light, or generally not applied. In Europe, the French Napoleonic Code of 1810 may be regarded as a landmark at which tough penalties were introduced to combat corruption. The arrival of the modern State-administration in the 19th century made public officials misuse of their offices a serious offence against public confidence in the administration's probity and impartiality.

No system of government and administration is immune to corruption. In some cases silence over corrupt activities is merely the result of citizen's resignation in face of widespread corruption. The survival of the State is at stake in such extreme cases of endemic corruption.

Even countries of Western, Central and Eastern Europe have been literally shaken by huge corruption scandals and some consider that corruption now represents one of the most serious threats to the stability of democratic institutions the functioning of the market economy and globalization process.

Intensive campaign should be undertaken to ensure that misappropriated funds deposited in foreign banks are repatriated to the countries of origin. The bank accounts of the late Mobutu Sese Seko are frozen in Switzerland. Nigeria has initiated proceedings aimed at recovering the staggering sums of money misappropriate by Sani Abacha. In the recent years, many African States have adopted strong measures to combat corruption. The democratization process that swept through the continent with better structured opposition parties on the political scene and independent media have sometimes helped reveal corruption at a high level. As many commissions of inquiry and audits as possible should be set up and codes of conduct adopted to avoid the daily confusion between State assets and personal affairs.

Initiatives were taken within the framework of regional cooperation among African countries to combat illicit behavior during trade transactions and to end illegal transfers of money among African states. In 1996, under the patronage of the Commonwealth, representatives of 15 African countries met at the Cape and discussed the necessary measures to take to halt money laundering. In 1997, the Customs Service of all ECOWAS States met in Senegal to define a common strategy for cooperation to combat trade related fraud. Measures were taken to combat banking secrecy in countries of the North though some of them continue to protect products of corruption.

Since the inception, the Organization of African Union (OAU) has adopted a number of important declarations and decisions relating to the need to observe the principles of good governance, the primacy of law, human rights, popular participation by African peoples in the process of good governance and democratization. In the 19th Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR)

held in Ouagadougou, Burkina Faso in April 1996, adopted a Plan of Action against Impunity. Furthermore, the 64th Ordinary Session of the Council of Ministers held in Yaounde, Cameroon in July 1996, adopted a Resolution endorsing the Plan of Action of Ouagadougou against Impunity.

On 14th August 2001, the South African Development Community (SADC) comprising of the following States, Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe signed the Protocol against Corruption. The other initiative has been the Decision (pursuant to the Decision to combat impunity and corruption adopted in 1998 in the 34th Ordinary Session of the Assembly of Heads of State and Governments) to consider preparation of OAU Convention on Combating Corruption, under the aegis of OAU/AU.

DRAFT AFRICAN UNION CONVENTION ON PREVENTING AND COMBATING CORRUPTION

For the preparation and deliberation on the Draft African Union Convention on Preventing and Combating Corruption, two Experts Group Meetings and a Ministerial Meeting was convened. Dr. Ali Reza Deihim, Deputy Secretary-General, represented Asian African Legal Consultative Organization (AALCO) in the Second Expert Meeting and the Ministerial Conference.

A. First Experts Meeting

The First of which, attended by forty two Member States, a number of African Organizations as well as observers, was held at the UNECA from 26 to 29 November 2001 to consider the Draft OAU Convention on Combating Corruption. The Secretary-General of the OAU indicated that the decision to hold such meeting was taken by the Assembly of Heads of State and Government in Burkina Faso, in June 1998. He urged the delegates, to ensure that the Draft Convention provided a continental framework of principles and institutions on the conduct of public officials and the minimum standards of transparency, in the management of public affairs. He also stressed the need to address the issue of international cooperation in combating corruption in Africa.

The initial Draft Convention had been prepared as a background document to assist Government Experts' and speed up the process of elaborating an OAU Convention on Combating Corruption in the process of formulating the Draft Convention references were made to the then Draft SADC Protocol Against Corruption which was adopted by the SADC Summit, the 1996 Inter-American Convention Against Corruption, the African Principles on Combating Corruption adopted by 15 African countries in 1999 under the auspices of the Global Coalition for Africa. The Draft Convention has also taken into account a Draft OAU Convention Against Corruption prepared and submitted to the Secretariat by the Federal Democratic Republic of Ethiopia, as well as the OECD Bribery Convention and the stability pact for South Eastern Europe.

Title

There was debate with regard to the Title of the Draft Convention. Some States suggested that the Title should be the "African Convention". It was suggested that the

African Convention was all encompassing. However, other States were of the view that in line with other documents and precedents, the Title should remain as OAU Convention. It was finally agreed that the Title should read as follows: **"Draft OAU/AU Convention on Combating Corruption."**

Preamble

After intensive discussions amongst Member States, a consensus was reached as regards the Preambular paragraphs.

Article 1: Definitions

The definition of "confiscation" and "corruption" was adopted without amendment. With regard to the "Private Sector" several amendments were proposed. However, after intensive discussions, the definition was retained as it was.

There was discussion with regard to the need to widen the definition **"Public Official"**. Several Member States thought that the definition in the SADC Protocol could be adopted, which would introduce the idea of parastatals, local authorities, etc. After a lengthy debate a consensus was reached to retain the original text.

Article 2: Objectives

After discussions clause (1) was amended to add the words "by each State Party" after Africa.

Article 3: Principles

In discussing Article 3 on "Principles", one delegation underlined the importance of fostering respect for the public good and the public interest.

Article 4: Acts of Corruption

After a lengthy discussion of this Article, the meeting agreed that it would not be possible to list all the acts of corruption. Concerning a recommendation to delete the word "entity" this was not accepted by the meeting and the original formulation was retained. Whilst considering clause (d), some delegates expressed the view that embezzlement should not be included in the definition as it offended the provisions of national law under the civil law system. Other delegations expressed the view that the diversion of state resources was an important aspect of corruption that could not be left out. At the end of a lengthy debate, and a failed attempt at consultations, the meeting decided that Article 4 (d) should be bracketed and referred to the Ministers. Furthermore, the meeting decided that the word "products" should be replaced by "proceeds", through out the Convention.

Article 5: Legislative and Other Measures

The cross-reference to Article 3 in the "chapeau" was slightly amended to read "Article 2" whilst clause 2 was adopted with a slight amendment to underline the need for independence of the anti-corruption agencies.

Article 5 clause 3: A debate ensued on whether to retain the term "internal accounting" or "national accounting". At the end of the debate, it was decided to retain "internal accounting" which seemed to give a wider definition and take care of the concerns of Federal States.

Article 5 clause 4: It was decided that for the sake of consistency, legislative measures should all be enumerated first and then the other measures.

Article 5 clause 5: A lengthy debate ensued on whether the identities of complainants could be concealed. At the end of the debate, it was decided that Burundi, Nigeria and Uganda should consult and come up with a formulation. The clause was amended by deleting the reference to complainants. However, the delegation of Senegal indicated that it did not go along with the consensus reached because the protection of witnesses posed a problem for concern on clause 5.

Article 6: Laundering of the Proceeds of Corruption

This new Article was adopted without amendment

Article 7: Public Service

Article 7 clause 1: A lengthy debate ensued on the following issues: Whether a cut off point should be set or this should be applied to all the civil servants; if the declaration of assets and resources should be made at the initial stage; or if the declaration should be made at the initial stage and on a continual basis; At the end of the discussions, it was decided to adopt clause 1 with amendments to cater for the various issues raised.

Article 7 clause 2: A delegation proposed that clause 2 should be deleted because State Parties would be unable to implement it. In this regard, some delegations indicated that Committees of Ethics were already established within their Ministries and Government Departments. Another delegation suggested that the clause should be merged with clause 5.

Article 7 clause 3: This clause was replaced by a new formulation and adopted.

Article 7 clause 4: It was adopted with a slight amendment and since the new formulation took care of the provisions in clause 6, it was decided to delete **clause 6. Clause 5:** was adopted without amendment but was merged with clause 2 as indicated earlier. **Clause 7:** was adopted with a slight amendment to include the fact that the implementation of this provision was subject to domestic law.

Article 8: Illicit Enrichment

Clause 1: After discussions it was agreed that the clause would be adopted with only a slight amendment to change "Government official" to "Public official" in order to streamline the language used throughout the document. With regard to clause 2, there was lengthy debate about whether or not this clause should be retained considering that in some countries illicit enrichment was not recognized as an aspect of corruption. This clause was deferred for later discussion together with the issue of embezzlement. Subsequently, it was bracketed and referred to the future meeting of the Ministers.

Article 9: Private Sector

Clause 2: Was slightly amended to remove the word "legally protect" and replaced it with "and respect".

Article 10: Civil Society

After some discussions, paragraph 1 was amended to read as follows: **"allow and encourage the full participation of the media and Civil Society at large in the fight against corruption".**

Article 11: Jurisdiction

Clause 1(b), was amended to add **"outside of its territory" between "national" and "or".** A new clause (d) was suggested and formulated to provide that **"When the offence, although, committed outside its jurisdiction, affects the vital interests of the State Party, or the deleterious harmful consequences or effects of such offences impact on the State Party."**

Article 12: Minimum Guarantees of a Fair Trial

After a lengthy debate, this Article was adopted without amendment.

Article 13: Extradition

This Article was adopted with some slight amendment.

Article 14: Confiscation and Seizure of Proceeds and Instrumentalities of Corruption

The Meeting decided that the word "products" should be replaced by "Proceeds" in the entire Convention.

Article 15: Bank Secrecy

This Article was adopted with slight amendments.

Article 16: Cooperation and Mutual Legal Assistance

Clause 2 was adopted with a slight amendment.

Article 17: International Cooperation

Article 17 clauses 1 and 3 were adopted with a slight amendment to include other corrupt practices and to widen it to include all countries and not just the developed ones.

Article 18: National Authority

This Article was adopted with a minor amendment to clause 4, to provide that the national anti corruption authorities or agencies shall be allowed the necessary independence and autonomy, to be able to carry out their duties effectively.

Article 19: Relationship with Other Agreements

This Article was adopted without amendment.

Article 20: Follow-Up Mechanism

Regarding clause 2, after a lengthy debate the word "independent" was replaced by "impartiality". Subsequently, a new Sub-article 3 was added to stipulate that "Members of the Board shall serve in their personal capacity". The rest of the clauses were adopted with amendments to ensure that the Board was focused on its advisory role in the fight against corruption.

Final Provisions

Articles 21 to 26 were adopted with slight amendments.[28]

The Offences covered by this draft convention are as follows:

(a) Active and passive bribery by public officials or any other persons (article 4 para a/b) the latter reference covers, judges, mayors, ministers, the members of parliament, the staff of international institutions etc.
(b) Active and passive bribery in private sector (article 4 (e)
(c) Illicitly obtaining benefits through any acts or omission in the discharge of duties (article 1 (c) (abuse of power or improper benefits)
(d) Trading influence (article 4(f)
(e) Illicit enrichment (article 4 (g) and Article 8) the definition has been given in Article 1 (para 1 (6).
(f) Use or concealment of proceeds derived from abovementioned corruptive acts (Art.4 (h)).
(g) Money laundering, laundering of the proceeds of corruption (article 6).
(h) Illicit funding of political parties (article 10).
(i) The diversion of public property (article 4(d).)
(j) Participation as principal, co-principal, instigator, accomplice or accessory, conspiracy… to commit these offences.

B. Second Experts Meeting[29]

The Second Meeting was held at the ECA in Addis Ababa, Ethiopia, from 16 to 17 September 2002 to finalize the Draft Convention on Combating Corruption and attended by forty two member States and the representatives of the Intergovernmental and non-governmental organizations.

[28] For the full report see document "Expt/OAU/Conv/Comb/Corruption/Rpt.1 (1)" Report Of The Experts' Meeting To Consider The Draft OAU/AU Convention On Combating Corruption".
[29] The Second Expert Meeting was held in Addis Ababa from 16 to 17 September, 2002.

As the Second Meeting served as a follow up to the first meeting, the main objective was to prepare a consensus draft Convention in order to submit it to the Ministerial Meeting while avoiding as far as possible new round of debate and discussions. This was the reason, why the chairman did not show great enthusiasm when in particular the observers tried to bring new ideas or amendments to the already adopted articles. Nonetheless several delegations made few proposals which would be briefly mentioned.

With regard to Article 4.1 (d), the debate on the question was essentially on the scope of offences covered by the clause. In this connection, it was indicated that the clause did not cover, among others, persons in the private sector who commit acts of corruption. Some delegations expressed the view that the diversion of funds belonging to the State by a public official was not an act of corruption as such and, therefore, Article 4.1 (d) should be deleted. Other delegations were of the view that it was important for the Convention on Combating Corruption to address this issue as an act of corruption and, therefore, Article 4.1(d) should be retained. It was observed that the divergent opinions in the debate were attributed to the different legal systems.

It was suggested that a change in the title of the Convention to read "Draft AU Convention on Combating Corruption and Related Offences" would address the concerns expressed by the delegations, thus covering "illicit enrichment" and "diversion of funds" as related acts of corruption. At the end of the debate, the title was adopted as amended, and Article 4.1(d) was maintained with a slight amendment to include in addition to public officials, any other person working in the private sector.

C. Ministerial Conference on the Draft African Union Convention on Preventing and Combating Corruption

Following the presentation of the report of the Experts' Meeting by its Chairman, the Ministerial Conference was convened for consideration and adoption of the Draft African Union Convention on preventing and combating corruption. The Ministerial meeting examined the draft Convention, Article by Article. The debate centred on the need to adopt a short title that embraced both the prevention and combating dimensions of the corruption problem.

In discussing Article 12 (1) and (2), delegates were of the opinion that the undertaking of State parties should be to fully engage in the fight against corruption, with the full participation of civil society and the media. Furthermore, State Parties should create an enabling environment for the media and Civil Society to conduct their activities without hindrance. The need to popularize the Convention with the participation of the media and civil society was also emphasized. Article 12 (1) was amended in this regard. The two clauses were therefore adopted as amended.

Delegates discussed Article 13. A small group was constituted to recast sub paragraph 1 (d) to provide greater clarity. It was adopted as amended.

In discussing Article 15, delegates expressed concern that, while the proposed formulation could encourage some State Parties to make politically- motivated requests for extradition, it could also be involved by accused persons to resist or refuse extradition. This Article was thus adopted as amended with a slight amendment to clause 6. Some

delegates underlined the fact that persons charged but not convicted could not be extradited in their legal systems and therefore suggested that Article 15(5) be deleted. Others argued that this was possible in their systems and therefore clause (5) should be maintained. The meeting finally decided that the text would be maintained as it was. A new clause (c) was added to Article 16 regarding the repatriation of proceeds of corruption.[30]

The Draft Convention was placed on the Agenda of the Executive Council of the AU, held from 3-7 March 2003 in N'djamena, Chad, for consideration. It is anticipated that the Draft Convention shall be put before the Assembly of Heads of State and Government scheduled to be held in early July 2003 in Maputo, Mozambique, for final adoption.

[30] For the full text of the report see: Min/AU/Conv/Comb/Corruption/Draft Rpt.1 (II).

ANNEX IV

Proposed organization of work at the Sixth (last) Session of the Ad Hoc Committee Negotiating UN Convention against Corruption to be held in Vienna from 21 July to 8 August 2003

Draft Provisional Agenda

1. Opening of the sixth session of the Ad Hoc Committee
2. Adoption of the agenda and organization of work
3. Consideration of the draft United Nations Convention against Corruption.
4. Finalization and approval of the draft United Nations Convention against Corruption.
5. Draft resolution on the adoption of the Convention for consideration and action by the General Assembly at its fifty-eighth session.
6. Adoption of the report of the Ad Hoc Committee on its sixth session.

Proposed organization of work

Date (2003)	Time	Item	Title or description
Monday, 21 July	10 a.m. – 1 p.m.	1	Opening of the Sixth session of the Ad Hoc Committee
		2	Adoption of the agenda and Organization of work
		3	Consideration of the draft United Nations Convention Against Corruption, with Particular emphasis on art.1, Paras (b) and(c); art.2, paras (a)-(c), (g), (g bis), (i),(1), (p) and (v); art.3; and art.4.
	3-6 p.m.	3	Continuation of the dis-cussion: art.1, paras. (b) and (c) art. 2, paras. (a)-(e),(g), (g bis), (i),(1),(p) and (v); art.3; and art.4
Tuesday, 22 July	10 a.m.- 1 p.m.	3	Continuation of the dis- cussion: art.1, paras. (b) and ©; art.2, paras. (a)-(e),(g), (g bis), (i), (1),(p) and (v); art.3; and art.4
	3-6 p.m.	3	Continuation of the discussion; chapter II
Wednesday, 23 July	10 a.m – 1 p.m. and 3-6 p.m.	3	Continuation of the discussion: chapter II
Thursday, 24 July	10 a.m. – 1p.m. and 3-6 p.m.	3	Continuation of the discussion: Chapter II
Friday, 25 July	10 a.m. – 1 p.m. and 3-6 p.m.	3	Continuation of the discussion: arts.19, 19 bis, 21 23-26, 28, 32 and 33, para.2 (b), and arts.34 and 37
Monday,28 July	10 a.m. – 1 p.m. and 3-6 p.m.	3	Continuation of the discussion; arts.19, 19 bis, 21, 23-26, 28, 32 and 33, para 2 (b),and arts 34 and 37
Tuesday,29 July	10 a.m.- 1 p.m.	3	Continuation of the discussion: arts.19, 19 bis, 21, 23-26, 28, 32 and 33, para.2 (b), and arts.34 and 37
	3-6 p.m.	3	Continuation of the discussion: art.39; art.42, para 3: Art.50 bis; art.51, paras.2-4); And art.53, paras.3(j) and (k), and 9.

Wednesday, 30 July	10 a.m.-1 p.m. and 3-6 p.m.	3	Continuation of the discussion: Chapter V.
Thursday, 31 July	10 a.m. – 1 p.m. and 3-6 p.m.	3	Continuation of the discussion: chapter V
Friday, 1 August	10 a.m. – 1 p.m. and 3-6 p.m.	3	Continuation of the discussion: Chapter V.
Monday, 4 August	10 a.m.- 1p.m. and 3-6 p.m.	4	Continuation of the discussion: Chapter VII
Tuesday, 5 August	10 a.m.- 1 p.m. and 3-6 p.m.	4	Continuation of the discussion: Chapter VII
Wednesday, 6 August	10 a.m.- 1 p.m. and 3-6 p.m.	4	Continuation of the discussion: other outstanding Matters
Thursday, 7 August	10 a.m. –1 p.m.	4	Continuation and conclusion of the discussion: preamble and final clauses
Friday, 8 August	10 a.m. – 1 p.m.	5	Draft resolution on the Adoption of the Convention For consideration and action By the General Assembly at its Fifty-eighth session
	3-6 p.m.	6	Consideration and adoption of the report of the Ad Hoc Committee on its sixth session

ANNEX V

AN ANALYTICAL STUDY OF THE DRAFT UNITED NATIONS CONVENTION AGAINST CORRUPTION

The Ad Hoc Committee for the Negotiation of a Convention against Corruption completed the second reading of the UN Convention against Corruption at the fourth session in January 2003. The third reading of the draft Convention was initiated at the fifth negotiating session of the Ad Hoc Committee in Vienna 10-21 March 2003 and is expected to be completed in the six negotiating session to be held on 21 July to 8 August 2003 with a target for signature of the convention in Mexico late in 2003.

The draft UN Convention against Corruption has been divided in to eight Chapters spread into 85 articles. An overview of the main content of the important provision of the draft Convention is highlighted below. The analysis is mainly based on the revised draft Convention after the second reading **(document no. A/AC.261/3/Rev.3, 5 February 2003)**. Comments and proposals made by the participating Member States are mainly based on the above document, though reference were also made to the consideration and deliberations on certain articles in the fifth negotiating session.[31]

1. PURPOSE

The main purpose of this Convention is to promote and strengthen: measures to prevent, combat and eradicate corruption in all forms; international cooperation in the fight against corruption; and ethical conduct, the rule of law, transparency, accountability and good public and private governance.

2. DEFINITIONS (USE OF TERMS)

(a) Public Official

The draft Convention defines a 'public official' (art. 2 (a)) to include any person holding a legislative, executive or administrative or military office in a State Party, whether appointed or elected and any other person performing a public function for the State Party as defined in the domestic law of the State Party.

(b) Public function

The draft Convention defines "public function" (art.2(b)) as any temporary or permanent, paid or unpaid activity performed by a natural or legal person in the name of State or in the service of the State or its agencies, enterprises, bodies or institutions, including mixed institutions, at any level of its hierarchy.

(c) Foreign public official

The draft Convention defines a "foreign public official" (art.2(c)) to include any person holding a legislative, executive or administrative or military office of a foreign

[31] See Part F of the brief for a detailed account of the deliberation at the fifth negotiation session of the Ad Hoc Committee.

State, whether appointed or elected and any other person performing a public function for the State Party as defined in the domestic law of the State Party.

(d) Official of a public international organization

The draft Convention defines "official of a public international organization" (art.2(d)) to mean an international civil servant or any other person who carries out equivalent functions for a public international organization. China in its submission expressed a preference for a more restrictive definition, limited to international civil servants.

(e) Public international organization

The draft Convention defines "public international organization" (art.2(e)) to mean an intergovernmental organization.[32]

(f) Assets or Property

The draft Convention defines "assets or property" (art.2(f)) to mean assets of every kind, whether corporal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.

(g) Proceeds of Crime

The draft Convention defines "proceeds of crime" (art.2(g)) to mean any property right or privileges derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with this Convention.

(h) Freezing or Seizure

The draft Convention defines the terms "freezing or seizure" (art.2(h)) to mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority and for a renewable period of not more than six months.

(i) Confiscation

The draft Convention defines the term "confiscation" (art.2(i)) to mean the permanent deprivation of property by order of a court or other competent authority including delivery, as appropriate.[33]

(j) Predicate offence

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[32] Most of the participants in the Ad Hoc Committee considered that it was not necessary to include a definition of "public international organization", since the term was well understood in international law. However, if the definition is felt necessary, the option available in 1969 Vienna Convention on the Law of Treaties was preferred.

[33] The member States decided to delete subparagraph (i) of option 2 at the fifth session.

The draft Convention defines the term "predicate offence" (art.2(j)) as any offence as a result of which proceeds have been generated that may become the subject of an offence in accordance with this Convention.

(k) Controlled delivery

The draft Convention defines the term "controlled delivery" (art.2(k)) to mean the technique of allowing illicit or suspect consignments (according to US, mostly money) to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.[34]

(l) Definition of "corruption"

The current text on the definition of corruption in Article 2(l), which is the product of an informal working group, reads:

> Notwithstanding the acts of corruption generally recognised in various legal jurisdictions, the use of the term "corruption in this Convention shall include such acts as are provided in this Convention and are criminalised pursuant to Chapter III, whether attributed to a public or private official, and any other acts that the State Party may have criminalised or defined as acts of corruption under its domestic law or may so criminalise or define in the future.
>
> Nothing herein shall limit the future criminalisation of further acts of corruption or the adoption of measures to combat such acts.[35]

(m) Recovery of assets

The draft Convention defines the term "recovery of assets" (art.2(p)) to mean the procedure for the transfer or conveyance of all property or assets, their proceeds or revenue, acquired through acts of corruption covered by this Convention from the receiving State Party where the assets are located to the affected State Party, even if they have been transformed, converted or disguised.

(n) Affected State Party

The draft Convention defines the term "affected State Party" (art.2(v)) to mean any State Party that has suffered or is suffering losses to public treasury assets.

At the fifth session of the Ad Hoc Committee the participating Members decided to delete the definitions for suspected transaction; legal person; transfer of assets derived from acts of corruption; recovery of assets; illicit enrichment; conflict of interest; money-laundering; private official; effective collaborator; affected State Party; illicitly acquired assets; requested state; and requesting state (from Article 2 (m) to (o) and 2 (q) and (u) and 2 (x) and (y).

3. SCOPE OF APPLICATION OF THE CONVENTION

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[34] Subparagraph (i) of option 2 was deleted at the fifth session.

[35] This text is based on the proposal from Botswana and Pakistan, and is restrictive in nature.

Article 3 states that the Convention shall apply to the prevention, investigation and prosecution and recovery of assets and proceeds derived from corruption and other criminal acts related specifically to corruption and to the confiscation and return of assets and proceeds derived from corruption, irrespective of whether they involve public officials or have been committed in the course of business activity. The Convention, however, shall not apply to cases in which act of corruption is committed in one State, the alleged criminal is a national of that State and is presently in the territory of that State.

4. OFFENCES COVERED BY THE CONVENTION

(a) Corruption by public officials (Article 19)

The draft Convention requires each State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- promise, offer or giving to a public official directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; and
- solicitation of or acceptance by public official directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refine from acting in the exercise of his her official duties.

Further, the draft Convention requires each State Party to apply code or standards of conduct for the correct, honorable and proper performance of public functions (Article 7). In this regard, the State Party shall take account of the relevant initiatives of regional, interregional and multilateral organizations, such as the International code of Conduct for Public Officials that appears in the annex to General Assembly resolution 51/59 of 12 December 1996.

(b) Corruption in private sector (Article 32)

The draft Convention requires each State Party to [consider adopting] adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally [by major entities] [in the course of business activity] [and when public interests are affected]:

- the promising, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works for, in any capacity, a private sector entity, for the person himself or herself or for another person or entity, in order that he or she act or refrain from acting in breach of his or her duties in relation to an economic, financial or commercial transaction, which results in harm to that entity of the private sector; and
- the solicitation or acceptance, directly or indirectly, of any undue advantage by any person who directs or works for, in any capacity, a private sector entity, for the person himself or herself or for another person or entity, in order that he or she act or refrain from acting in breach of his or her duties in relation to an economic,

financial or commercial transaction, which results in harm to that entity of the private sector.[36]

(c) Corruption by foreign public official or international civil servant (Art. 19 *bis*)

The draft Convention require each State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- the promise, offering or giving to a foreign public official or an official of an international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties;[37] and
- the solicitation or acceptance by a foreign public official or an official of an international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties.

Some delegations in the Ad Hoc expressed concerns about the potential effects of this article on expanding jurisdiction beyond that based on the principle of territoriality. Other delegations were of the view that any problems of that nature could be dealt with in the appropriate article. Some delegations expressed the view that the article might not be necessary, as the conduct it intended to cover could be punished under article 19 (corruption by national public officials).

(d) Illegal funding of political parties (Article 10)

Recognizing that corruption in political party funding is a worldwide problem, the draft Convention require each State Party to adopt, maintain and strengthen measures and regulations concerning the funding of political parties. Such regulations and measures should serve to prevent conflicts of interest; preserve the integrity of democratic political structures and processes; proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and incorporate the concept of transparency into funding of political parties by requiring declaration of donations exceeding a specified limit.

Views expressed by the delegations continued to diverge in this article, with number of delegations suggesting its deletion. Several delegations, questioned whether negotiation of such a provision would be practical in the context of the future convention, given the enormous variations in political systems. For those reasons, a number of

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[36] Saudi Arabia has proposed an amendment to article 32 in the fifth session which read: "Each State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences, any act of corruption covered by this Convention when committed intentionally by any person who owns, directs or works in any capacity for a private sector entity".(A/AC.261/L.179). Japan, China, South Korea and many other countries expressed the view that the combat against corruption is the primary responsibility of the Member States and this Convention should not make any obstacle in the way of commercial and economic relations.

[37] Japan, at the fifth session, has proposed amendment to paragraph 1 of article 19 (A/AC.261/L.185). Algeria wanted that the proposal would end with "official duties" in the seventh line of the proposed text. Mexico supported the proposal, as it was extending the extraterritorial jurisdiction.

delegations felt that the text should be placed in square brackets to signal the need for the Ad Hoc Committee to decide whether to retain the article. One delegation, further, suggested that, if this article were retained, it would necessitate a definition of the term "political party".

(e) Money-laundering (Art.33)

The draft Convention require each State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) (i) the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
(ii) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
(b) Subject to the basic concepts of its legal system:
(i) the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
(ii) participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article;
(iii) the acquisition, possession, use, administration, custody, disposal, exchange, conversion, surrender as a surety, transport, transfer, investment, alteration or destruction of property that derives from or is the proceeds of crime if a person who is so obliged by virtue of his or her profession, position, post or commission does not take the necessary measures to ascertain the lawful origin of such property.[38]

This article shall be applicable to the widest range of predicate offences and shall include as predicate offences all offences established in accordance with this Convention. However, some delegations expressed concern about the broad range of predicate offence envisaged by this article and the scope thereof. They felt that only serious predicate offences should be covered. On the other hand, other delegates expressed their preference for a broad range of predicate offences.

(f) Trading in influence (art.21)

The draft Convention require each State Party to establish as criminal offences, when committed intentionally:

- The promising, offering or granting, directly or indirectly, of any undue advantage in order to induce a public official or any other person to abuse his or her real or supposed influence with a view to obtaining from an administration or a public authority of the State Party any undue advantage or [any favourable] decision for the original instigator of the act or for any other person;

[38] Croatia, Germany and US have proposed an amendment to article 33.2 (b) in the fifth session. A/AC.261/L.189.

- For a public official or any other person, the soliciting or accepting, directly or indirectly, of any undue advantage for himself or herself or for another person, through the abuse of his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party any undue advantage or [any favourable] decision for himself or herself or for any other person, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.[39]

(g) Embezzlement, misappropriation diversion or misuse of property by a public official (art. 22)

The draft Convention require each State Party to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation, diversion or the misuse by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.[40]

(h) Concealment of movable property or funds (art. 23).

The draft Convention require each State Party to establish as criminal offences, when committed intentionally, the concealment, [retention,] possession or transmission of movable property or funds or the serving as an intermediary in the transmission [or retention] of such property or funds, when the person involved is aware that such movable property or funds are the result of one of the offences established in accordance with this Convention.[41]

(i) Abuse of functions [power] (art.24)

The draft Convention require each State Party to establish as criminal offences, the abuse of his or her functions or position by performing or failing to perform an act in the discharge of those functions by a public official, international civil servant or a person who performs public functions, for the purpose of obtaining illicit benefits for himself or herself or for a third party.[42]

(j) Unlawful enrichment (art. 25)

Subject to its Constitution and the fundamental principles of its legal system, each State Party shall take necessary measures to establish under its laws as an offence the illicit enrichment or a significant increase in the assets of a government official that he or

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[39] Chile, in the fifth session, has proposed an amendment to paragraph (a) of article 21. (A/AC.261/L.188).

[40] Azerbaijan, Egypt, India, Iran Islamic Republic of), Nigeria, Pakistan, Syrian Arab Republic, Thailand, Turkey, Uganda, Ukraine and United Arab Emirates has proposed a new article entitled "Embezzlement of property in the private sector" (Art. 32 *bis*) at the fifth session.

[41] Mexico, Pakistan and Yemen, in the fifth session of the Ad Hoc meeting has proposed a new formulation of this article (A/AC.261/L.187). Many delegations were of the view that this article should be deleted, as the matter was covered by or the concept should be treated in conjunction with article 33 (Money Laundering).

[42] Croatia, in the fifth session proposed has amendments to article 24 (A/AC.261/L.185).

she cannot reasonably explain in relation to his or her lawful earnings during the performance of his or her functions. [43]

(k) Improper use of classified or confidential information (art. 26) [44]

There were two formulations of this article proposed by Mexico (Option 1) and Colombia (Option 2) for consideration of the Ad Hoc Committee. This draft article require each State Party to establish as criminal offences the improper use by a public official or a person who performs public functions, for his or her own benefit or for that of a third party, of any kind of classified or confidential information that that official or person who performs public functions has obtained because of or in the performance of his or her functions.[45]

(l) Improper benefits (art.28)

The draft Convention require each State Party to establish as criminal offences of corruption the collection, directly or indirectly, by a public official or a person who performs public functions, of any article of monetary value in undue quantities or in quantities exceeding those established by law, as a tax or contribution, surcharge, revenue, interest, salary or remuneration.

5. PREVENTIVE MEASURES

Chapter II, Preventive Measures, require each State parties, to the extent appropriate and consistent with its legal system, to consider to implement those preventive measures set out in this Convention by legislative, administrative or other appropriate measures (Article 4).[46] The Convention also foresees the establishment of national anti-corruption bodies such as a national anti-corruption agency or ombudsman or a specialized body with necessary independence, material means and specialized staff for effectively carrying out their duty (art. 5 *bis*). Further, article 61 of the Convention provides for the disposal of confiscated proceeds of crime or property.

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[43] The delegations of the Russian Federation, the Member States of the European Union and others expressed their strong wish to delete this article. At the fifth session, Algeria, Colombia and UK and Northern Ireland proposed an amendment to article 25 and suggested deletion of subparagraph (1) and (2) of this article. (A/AC.261/L.183)

[44] Many delegations expressed their preference for reflecting that concept in this article is incorporated in a revised version of article 29 and not in a separate article. Some delegations were of the view that there was no need for the establishment of a separate offence on the issue.

[45] The formulation presented here is based on the proposal of Mexico. Some delegations expressed preference for this option as the basis for further work, expressing the view that some elements of option 2, such as the identification of a period of time after separation from service, could be usefully incorporated into a subsequent revised formulation. The Vice-Chairman with responsibility for this chapter of the draft Convention asked the delegations of Algeria, Colombia and Mexico to engage in consultations with a view to producing a consolidated draft text in order to facilitate a decision of the Ad Hoc Committee on whether to retain this article.

[46] During the deliberation on this article at the first session of the AD Hoc Committee, many delegations were of the view that the provision of article 4, if retained, should be made more mandatory and less restrictive by deleting the words “to the extent appropriate” and “to consider”.

6. MEASURES TO ENHANCE INTERNATIONAL CO-OPERATION

Chapter IV of the draft Convention provides for promoting and strengthening international co-operation for the effective law enforcement. Article 50 *bis* require State Parties to cooperate in criminal matters and assist each other in investigations into administrative offences, as sell as in civil and administrative proceedings.[47] The Convention provides for international cooperation in extradition, transfer of sentenced person, mutual legal assistance, transfer of criminal proceedings, law enforcement and joint investigation (Article 51 to 56).[48] Further, Chapter V of the draft Convention proposes a comprehensive set of provisions seeking to ensure effective international co-operation for the purposes of seizure, confiscation and disposal of funds derived from acts of corruption.

In the case of extradition, article 51 provides that offences established in accordance with the Convention shall be extraditable offence in any extradition treaty existing or to be concluded between or among the parties. For the purpose of extradition none of the offences set forth in this Convention shall be considered a political offence.[49]

In the case of transfer of sentenced person, article 52 provides that States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty in order that they may complete their sentences there.[50] As regards mutual legal assistance, article 53 provides that the State parties shall afford one another the widest measure of mutual legal assistance in criminal and non-criminal investigations, prosecutions and judicial proceedings.

7. MECHANISMS FOR MONITORING OF IMPLEMENTATION

An effective Monitoring Mechanism is every important for the implementation of the Convention as experience with other international anti-corruption instruments shows that without a clear and effective monitoring mechanism such instruments are unlikely to achieve their stated objective.

Chapter VII of the Convention provides for mechanism for monitoring implementation. Article 76 provides that a Conference of Parties to the Convention shall be convened not later than one year following the entry into force of the Convention to improve the capacity of States to combat and eradicate corruption and to promote and review the implementation of this Convention. The Convention also envisages subsidiary or technical body authorized for the supervision and review of the effective implementation of the Convention (Art. 76 *bis*) and the submission to that body of reports by States Parties of national measures to implement the Convention as provided in article 76 *ter*.[51]

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47 Thailand has made a proposal at the fifth session (20 March 2003, A/AC.261/L.200), for the continued work on art. 50 bis.

48 Article 57 (other cooperation measures), was deleted at the fifth session of the Ad Hoc Committee.

49 Article 51 was adopted by at the fifth session of the Ad Hoc Committee.

50 Article 52 was adopted by at the fifth session of the Ad Hoc Committee.

51 Five options are suggested on the formulation of Article 76 *bis*, proposed by Turkey, Egypt, Peru, Austria and the Netherlands and Chile respectively.

DRAFT UNITED NATIONS CONVENTION AGAINST CORRUPTION

Title	*Offences covered*	*Measures and Sanctions*	*International Cooperation*	*Prevention*	*Monitoring Mechanism*
Draft United Nations Convention Against Corruption.[52] (*The Ad hoc Committee completed the first and second reading of the draft Convention in the second and fourth sessions. The third reading began in the fifth session held from 10-21 March 2003 and is expected to be completed in the sixth session to be held in from 21 July to 8 August 2003)*	This Convention shall apply to the prevention, investigation and prosecution of corruption[53] and criminal acts related specifically to corruption (art. 3), involving: **1.** Active and passive corruption of national public official (art.19) **2.** Active and passive corruption in private sector (art. 11 and art. 32). **3.** Corruption by foreign public official or international civil servant (art.19*bis*). **4.** illegal funding of political parties (art.10). **5.** Money-laundering (art.33). **6**. Active and passive trading in influence (art.21). **7.** Misappropriation of property by a public official (art. 22) and Diversion of property by a public official (art. 27) **8.** Concealment of movable property or	Each State party shall to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public official (art. 36).[54] (*This article was deleted after the second reading*) See also art. 30 and 31. The liability of legal person may be criminal, civil or administrative and will be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (art. 38).	*Extradition*: Yes Offences established in accordance with the Convention shall be extraditable offence in any extradition treaty existing or to be concluded between or among the parties. [For the purpose of extradition none of the offences set forth in this Convention shall be considered a political offence] [55] (art. 51). *Mutual legal assistance*: Yes. The State parties shall afford one another the widest measure of mutual legal assistance in criminal and non-criminal investigations, prosecutions and judicial proceedings	The Convention foresees the establishment of national anti-corruption bodies such as a national anti-corruption agency or ombudsman or a specialized body with necessary independence, material means and specialized staff for effectively carrying out their duty (art. 5 *bis*). See also art. 39.	A Conference of Parties to the Convention shall be convened not later than one year following the entry into force of the Convention to improve the capacity of States to combat and eradicate corruption and to promote and review the implementation of this Convention (art.76).

[52] See UN GA Ad Hoc Committee Document nos. A/AC.261/3/Rev.1; A/AC.261/3/Rev.1/Corr.1; A/AC.261/L.131/Add.1; A/AC.261/L.131/Add.2 and A/AC.261/3/Rev.1/Add.1.

[53] "Corruption" shall mean engaging in or inducing acts that constitute improper performance of duty [or abuse of a position of authority], including acts of indirectly promised, offered or requested, or following acceptance of an advantage directly given, whether for oneself or on behalf of another, (art. 2 (m) (There is no agreement on the scope of this definition), A/AC.261/3/Rev.1, at p. 6.

[54] This is the first option of the three options available under this article.

[55] As to the retaining of the words in square brackets, diverse views were expressed after the first reading, A/AC.261/3/Rev.1/Add.1, at p. 14.

	funds (art. 23). **9.** Abuse of functions [power] (art.24). **10.** Unlawful enrichment (art. 25). **11.** Improper use of classified or confidential information (art. 26). **12.** Improper benefits (art.28)		(art. 53)		

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DRAFT AFRICAN UNION CONVENTION ON COMBATING CORRUPTION

Title	***Offences covered***	***Measures and Sanctions***	***International Cooperation***	***Prevention***	***Monitoring Mechanism***
Draft African Union Convention on Preventing and Combating Corruption[56]	**1.** Active and passive bribery of domestic public servants (art. 4 (a) and (b). **2.** Active and passive bribery in private sector (art. 4 (e). See also art.11 **3.** Illegally obtaining benefits through any acts or omission in discharge of duties (art. 1 (c) (abuse of power or improper benefits) **4.** Trading in influence (art.4 (f)). **5.** Illicit enrichment (art. 4 (g) and art. 8). The definition has been	Each State party shall adopt legislations and other measures to prevent, detect, punish and eradicate the acts mentioned in article 4 paragraph 1 of the Convention and undertakes to create, maintain and strengthen internal accounting, auditing and follow-up systems. The State parties also undertake to strengthen national control measures in	*Extradition*: Yes Offences established in accordance with this Convention shall be deemed to be included in the internal laws as crimes requiring extradition and such offences shall be included as extraditable offences in extradition treaties	The Convention foresees the establishment, maintenance and strengthening of independent national anti-corruption authorities or agencies (art. 5 (3) and adopt measures to ensure that the national authorities or agencies are specialized in combating corruption and related offences, and that they are allowed necessary independence and autonomy to effectively carry out their duties (art.20	The implementation of the Convention shall be monitored by an Advisory Board on Corruption (the Board), whose functions includes: **1.** promote and encourage the adoption and application of anti-corrupt measures; **2.** collect and document information's; **3**. advice governments;

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[56] Ministerial Conference on the Draft African Union Convention on Combating Corruption, 18-19 Sept. 2002, Addis Ababa, Ethiopia, Min/Draft/AU/Conv/Comb/Corruption (II) Rev.5.

	given in art.1 (6). **6.** Use or concealment of proceeds derived from above mentioned corruptive acts (art. 4 (h)). **7**. Money Laundering, laundering of the proceeds of corruption (art. 6) **8.** Financing political parties using funds acquired through illegal and corrupt practices (art. 10). **9.** The diversion by a public official or any other person, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies (art.4 (d). **10.**Participation as principal, co-principal, instigator, accomplice or accessory, conspiracy…to commit these offences.	setting up and operation of foreign companies (art. 5).	existing between or among them (art. 15). *Cooperation and mutual legal assistance*: Yes The Convention foresees that the parties shall provide each other the greatest possible cooperation and assistance in dealing immediately with requests from appropriate authorities (art. 18). Further, to prevent corrupt officials from enjoying ill-acquired assets, the Convention encourages freezing of foreign accounts and facilitating the repatriation of stolen or illegally acquired monies to the countries of origin (art.19 (3).	(4) and (5).	**4.** submit report to the Executive Council of the African Union on the compliance status of the State Parties to this Convention (art. 22).