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Agenda item 3

Consideration of the draft United Nations Convention against Corruption, with particular emphasis on articles 40-50 and chapters IV-VIII

Proposals and contributions received from Governments

Austria, Netherlands, Colombia and Mexico: amendments to article 53

Article 53: Mutual legal assistance

It is proposed that options 1 and 2 should be merged and minor amendments made so that the article reads as follows:

*“Article 53
“Mutual legal assistance*

“1. States Parties shall afford one another the widest measure of mutual legal assistance in [criminal and non-criminal]¹ investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention [, as provided for in article [...] [Scope of application], granting, when appropriate, requests originating from authorities that, in accordance with its domestic law, have the power to investigate or try the acts of corruption set forth in this Convention with a view to obtaining evidence and carrying out other acts necessary to facilitate the prosecutions and proceedings pertaining to the investigation or trial of acts of corruption].¹

“2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties,² agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held

¹ Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

² Minor agreed change.



liable in accordance with article [...] [Liability of legal persons] of this Convention in the requesting State Party.

“2 bis. [In accordance with applicable national legislation and the relevant agreements or arrangements that may be in force between them, States Parties shall afford one another the widest measure of assistance in the identifying, tracing, confiscating, freezing and seizing of property obtained or derived from the commission of offences established in accordance with this Convention, of property used in the commission of such offences or of proceeds of such property.]³

“3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

“(a) Taking evidence or statements from persons;

“(b) Effecting service of judicial documents;

“(c) Executing searches and [freezing, and]⁴ seizures [, and freezing]⁵ ;

“(d) Examining objects and sites;

“(e) Providing information, evidentiary items and expert evaluations;

“(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

“(g) Identifying [, freezing] or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

“(h) Facilitating the voluntary appearance of persons in the requesting State Party;

“(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

“[(j) Identifying, freezing and tracing funds of illicit origin derived from acts of corruption;

“(k) Returning such funds to their countries of origin.]⁶

“4. [Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.]⁷

“5. [The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the

³ Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

⁴ Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

⁵ Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

⁶ Text taken from the proposal submitted by Colombia (A/AC.261/IPM/14).

⁷ Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.]⁸

“6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

“7. [Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.]⁹

“8. [States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.]¹⁰

9. [States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.]¹¹

“10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

“(a) The person freely gives his or her informed consent;

“(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

⁸ Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

⁹ Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

¹⁰ Mexico is of the opinion that paragraph 8 can be deleted in the light of the proposal of article 58 on bank secrecy.

¹¹ Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

“11. For the purposes of paragraph 10 of this article:

“(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

“(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

“(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

“(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

“12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

“13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. [Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.]¹² [The central authorities shall be

¹² Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

responsible for preparing and receiving the requests for assistance and cooperation to which this Convention refers.]¹³

“14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. [In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.]¹⁴

“15. A request for mutual legal assistance shall contain:

“(a) The identity of the authority making the request;

“(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

“(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

“(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

“(e) Where possible, the identity, location and nationality of any person concerned; and

“(f) The purpose for which the evidence, information or action is sought.

“16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

“17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures¹⁵ specified in the request.

“18. [Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a

¹³ Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

¹⁴ Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

¹⁵ Minor agreed change.

judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.]¹⁶

“19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

“20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

“21. Mutual legal assistance may be refused:

“(a) If the request is not made in conformity with the provisions of this article;

“(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests;

“(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence,¹⁷ had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

“(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

“22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

“23. Reasons shall be given for any refusal of mutual legal assistance.

“24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. [The requesting State Party may request information on the status and progress of measures taken by the requested State Party to satisfy its request.]¹⁸ The requested State Party shall respond to reasonable requests by the requesting State Party on progress in its handling of

¹⁶ Text taken from the proposals submitted by Austria and the Netherlands (A/AC.261/IPM/4) and Colombia (A/AC.261/IPM/14).

¹⁷ Minor agreed change.

¹⁸ Text taken from the proposal submitted by Mexico (A/AC.261/IPM/13).

the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

“25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

“26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

“27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

“28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne. [The costs of transfer of a witness, expert or other person to the territory of the requesting State Party should be borne by the requesting State Party.]

“29. The requested State Party:

“(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

“(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

“30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.