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## **Ad Hoc Committee for the Negotiation of a Convention against Corruption**

Fifth session

Vienna, 10-21 March 2003

Agenda item 3

### **Consideration of the draft United Nations Convention against Corruption**

## **Report on the informal consultations on the revised draft United Nations Convention against Corruption**

### **Addendum**

### **Chapter V**

1. Pursuant to a decision taken at its fourth session, the Ad Hoc Committee for the Negotiation of a Convention against Corruption devoted the informal consultations held from 14 to 20 March 2003 during its fifth session to consideration of chapters II and V of the revised draft United Nations Convention against Corruption, with a view to facilitating further deliberations and action on the provisions contained therein by the plenary.

2. The informal consultations on chapter V, entitled "Preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds", were held from 18 to 20 March 2003. The Chairman of the informal consultations responsible for chapter V of the draft convention, decided to consider the articles in that chapter in the following order: 64, 65, 67, 60, 68-70, 61, 71, 62, 66 and 72. The revised provisions relating to chapter V are contained in the annex to the present document.



## Annex

### Text of chapter V of the revised draft United Nations Convention against Corruption

#### V. Preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds<sup>1</sup>

##### *Article 64 Specific provisions*

1. In accordance with the provisions of this Convention, States Parties shall afford one another the widest measure of cooperation and assistance in preventing and combating transfers of assets of illicit origin derived from acts of corruption and in facilitating the recovery of those assets to the legitimate owners.<sup>2</sup>

*[Subparagraphs (a), (c) and (d) were deleted  
and subparagraph (b) was moved to article 68.]<sup>3</sup>*

2. For the purposes of this Convention, the recovery of assets, including funds, of illicit origin by the affected countries of origin shall be an [inalienable] right insofar as the transferred assets of illicit origin derive from acts of corruption and related offences.<sup>4</sup>

##### *Article 65<sup>5</sup> Detection [and prevention] of transfers of illicitly acquired assets*

1. Each State Party shall adopt such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction:

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<sup>1</sup> For the second reading, at the fourth session of the Ad Hoc Committee, it was decided to consider the articles of chapter V of the draft convention in the following order: 64, 65, 67, 60, 68-70, 61, 71, 62, 66 and 72. The Ad Hoc Committee will follow the same order at the third reading of the draft text. The informal consultations decided to recommend the same order. In the present document, the articles appear in the new order, but without renumbering.

<sup>2</sup> During the informal consultations, a revised text for paragraph 1 of this article was prepared by the delegation of Peru in consultation with other delegations.

<sup>3</sup> During the informal consultations, it was recommended that the content of subparagraphs (c) and (d) be revised and moved to article 74. The new provision should read as follows:

“ States Parties should consider affording one another technical assistance, upon request, in the revision of their respective financial laws, with a view to eliminating any regulatory gaps that might permit the uncontrolled transfer of assets of illicit origin derived from actions of corruption.”

<sup>4</sup> This paragraph was not considered during the informal consultations

<sup>5</sup> During the informal consultations, a revised text was prepared for paragraphs 1 and 2 of this article by the delegation of the United States of America, in consultation with other interested delegations, at the request of the Chairman. A revised text for paragraphs 3 and 4 was prepared by the delegation of Peru, also at the request of the Chairman, based on former paragraphs 2-5. In consequence, paragraph 1 was amended and former paragraphs 2-5 were deleted.

(a) To verify the identity of customers with high-value accounts and take reasonable steps to determine the identity of the beneficial owners, as well as the source, of funds deposited into high-value accounts; and

(b) To conduct enhanced scrutiny of high-value accounts sought or maintained by or on behalf of individuals who are or have been entrusted with prominent public functions and persons or companies clearly related to them. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be construed to discourage or prohibit financial institutions from doing business with any legitimate customer.

2. In order to facilitate implementation of measures provided in paragraph 1 of this article, each State Party, in accordance with its domestic law and using as a guideline relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

(a) Issue advisories regarding the types of individuals, persons or companies to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention, and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular individuals, persons or companies to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those that the financial institutions may otherwise identify.<sup>6</sup>

3. In the context of subparagraph 2 (a) of this article, States Parties shall implement measures to ensure that their financial institutions maintain records, over an appropriate period of time, of transactions carried out, which should contain information relating to the amount of the transaction, the identity and domicile of the participants in the transaction, the legal capacity of anyone participating on behalf of a legal person and, where appropriate, the identity of the true beneficiary of the transfer in question.

4. With the aim of preventing and detecting transfers of illicitly acquired assets derived from offences established by this Convention, States Parties shall implement appropriate and effective measures to ensure that their financial institutions do not grant improper preferential or advantageous conditions to politicians or public officials; and, with the help of their regulatory and oversight bodies, to prevent the establishment of banks or other financial institutions without any physical presence.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for its appropriate public officials and shall provide for appropriate sanctions for non-compliance. States Parties shall also consider taking such measures as may be necessary to permit their competent authorities to share that information with the competent authorities in

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<sup>6</sup> The text of this subparagraph is based on former paragraph 2 of article 68. During the informal consultations, it was recommended that the text be streamlined and moved to this article.

other States Parties when necessary to investigate, claim and recover illicitly acquired assets.<sup>7</sup>

6. Each State Party shall consider adopting such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.<sup>8</sup>

*Article 67*  
*Direct recovery of assets*

Each State Party shall, in accordance with principles of its domestic law:

(a) Adopt such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through conduct criminalized in accordance with this Convention;

(b) Adopt such measures as may be necessary to permit its courts to order those who have committed offences under this Convention to pay compensation, damages or penalties to another State Party that has been harmed by such offences;<sup>9</sup>

(c) Adopt such measures as may be necessary to permit its courts in proceedings to confiscate property acquired through conduct criminalized in accordance with this Convention to recognize another State Party's claim as a legitimate owner of such property prior to ordering confiscation; and

[(d) Adopt such other measures as it may deem necessary to facilitate the recovery of property acquired through conduct criminalized in accordance with this Convention. ]<sup>10</sup>

*Article 67 bis*  
*Mechanisms for recovery of assets through  
international cooperation in confiscation*

1. Each State Party, in order to provide mutual legal assistance pursuant to article [...] [International cooperation for purposes of confiscation] of this Convention with respect to property acquired through or involved in conduct

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<sup>7</sup> Some delegations indicated that they would have constitutional difficulties with this provision and, at the least, it would need to be made non-mandatory. Some delegations also felt that the provision would fit better in either article 6 or article 7, while others were of the view that it should remain in chapter V.

<sup>8</sup> Some delegations indicated that they would have constitutional difficulties with this provision and, at the least, it would need to be made non-mandatory. Some delegations also felt that the provision would fit better in either article 6 or article 7, while others were of the view that it should remain in chapter V.

<sup>9</sup> During the informal consultations, one delegation expressed concern about the content of this subparagraph.

<sup>10</sup> During the informal consultations a revised text of article 67 was prepared by the delegation of the United States, in consultation with other delegations, pursuant to a request by the Chairman. Several delegations expressed a preference for the deletion of this subparagraph. Several other delegations were of the view that it should be retained.

criminalized in accordance with this Convention, shall, in accordance with principles of its domestic law:

(a) Adopt such measures as may be necessary to permit its competent authorities to give effect to a final judgement of another State Party ordering the confiscation of such property or the payment of a sum of money corresponding to such assets;

(b) Adopt such measures as may be necessary to permit its competent authorities to order the confiscation of such property of foreign origin or the payment of a sum of money corresponding to such assets, including property involved in money-laundering offences; and

(c) Consider adopting such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender or title holder cannot be prosecuted by reason of death, flight, absence or immunity or in other appropriate cases.

2. Each State Party, to enable it, at the request of another State Party, promptly to seize, freeze or otherwise preserve property for which there is a reasonable basis to believe that it will be subject to confiscation pursuant to paragraph 1 of this article, shall, in accordance with principles of its domestic law:

(a) Adopt such measures as may be necessary to permit its competent authorities to give effect to a freezing or seizure order issued by a court of competent jurisdiction or competent authority of another State Party;

(b) Adopt such measures as may be necessary to permit its competent authorities to freeze, seize or otherwise prevent the transfer or dissipation of assets upon receipt of a request setting forth a reasonable basis to believe that the property would be named in a confiscation judgement in the requesting State; and

(c) Consider adopting additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such assets.<sup>11</sup>

#### *Article 60*

##### *International cooperation for purposes of confiscation*

1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article [...] [Freezing, seizure and confiscation], paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the

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<sup>11</sup> During the informal consultations, a revised text of article 67 bis was prepared by the delegation of the United States, in consultation with other delegations, pursuant to a request by the Chairman.

requesting State Party in accordance with [articles [...] [Mechanisms for the recovery of assets through international cooperation in confiscation], paragraph (b), and] [...] [Freezing, seizure and confiscation], paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article [...] [Freezing, seizure and confiscation], paragraph 1, situated in the territory of the requested State Party;

[(c) Take such other measures as may be permissible under its domestic law to effect the recovery of such assets.]<sup>12</sup>

2. Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article [...] [Freezing, seizure and confiscation], paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.<sup>13, 14</sup>

3. The provisions of article [...] [Mutual legal assistance] of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article [...] [Mutual legal assistance], paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and estimated value of the property<sup>15</sup> and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law [, including a description of the illegal activity and its relationship to the assets to be confiscated];<sup>16</sup>

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of

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<sup>12</sup> During the informal consultations, the delegation of Algeria proposed to amend subparagraph (c) to read “Take any other measures as may be permissible under its domestic law to effect the return of such assets” and to move it to another location.

<sup>13</sup> During the informal consultations, the delegation of Algeria amended its earlier proposal to read as follows: “The requested State Party shall inform the requesting State Party of the due diligence undertaken in handling the request throughout the duration of the procedure.”

<sup>14</sup> During the informal consultations, the delegation of the United States proposed to replace paragraph 2 of this article with the following text: “Following a request by another State Party having jurisdiction over an offence covered by this Convention, each State Party shall submit a request for provisional measures to its competent authorities, consistent with subparagraph (b) of article 67 bis” [now subparagraph 2 of article 67 bis].

<sup>15</sup> Taken from article 69.

<sup>16</sup> Taken from article 69.

the actions requested and, where appropriate, a legally admissible copy of an order on which the request is based.

[Subparagraph (d) was deleted.]<sup>17</sup>

[Paragraph 4 has been moved.]<sup>18</sup>

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to [this article] [this chapter]<sup>19</sup> and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in [paragraphs 1 and 2 of this article] [this chapter]<sup>20</sup> conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. In addition to the provisions of article [53] [Mutual legal assistance], [paragraphs 9 and 21], cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient or timely evidence or if the property is of a *de minimis* value.

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.<sup>21</sup>

9. The provisions of this article shall [be in conformity with principles of due process and shall]<sup>22</sup> not be construed to prejudice the rights of bona fide third parties.

10. States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to [this article] [this chapter].<sup>23</sup>

<sup>17</sup> During the informal consultations, subparagraph (d) was withdrawn by the delegation of the United States.

<sup>18</sup> During the informal consultations, it was agreed that paragraph 4 should be retained and moved to the preamble or to article 61 or 64. The text of the paragraph is as follows: "States Parties shall execute requests for assistance in the recovery of illicitly acquired assets pursuant to this article as a fundamental purpose of this Convention and to the full extent possible under their domestic law." The text was originally taken from article 70.

<sup>19</sup> Taken from article 72.

<sup>20</sup> Taken from article 72.

<sup>21</sup> Taken from article 70.

<sup>22</sup> Taken from article 70.

<sup>23</sup> Taken from article 72.

*Article 68*

*[Special cooperation provisions]*

1. States Parties shall cooperate with one another for the purpose of expediting the process of execution of judicial decisions, as appropriate, establishing criminal and civil liability in cases of offences covered by this Convention, in accordance with their domestic law.

*[Paragraph 2 was reformulated and moved to article 65, paragraph 2 (b).]*

3. Each State Party shall adopt measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on illicitly acquired assets to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that Party under this chapter.<sup>24</sup>

4. States Parties shall cooperate with other States Parties, through their financial institutions and regulatory and oversight bodies, in the detection [and freezing] of transfers and transactions involving assets, including funds, of illicit origin derived from acts of corruption.<sup>25</sup>

*[Article 70 was deleted.]*

*Article 61<sup>26</sup>*

*[Disposition] [Return] of assets*

1. [Illicitly acquired assets] [Proceeds of crime] or property confiscated by a State Party pursuant to article [...] [Freezing, seizure and confiscation] or [...] [International cooperation for purposes of confiscation], paragraph 1, of this Convention shall be disposed of by that State Party in accordance with the provisions of this Convention, its domestic law [and administrative procedures].

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities [, when acting on the request made by another State Party,] to return proceeds of crime or property confiscated in accordance with the provisions of paragraphs 3 to 5 of this article and with article [...] [International cooperation for purposes of confiscation] of this Convention, taking into account the rights of bona fide third parties.

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<sup>24</sup> During the informal consultations, several delegations indicated that they could not accept the mandatory form of paragraph 3, noting that a non-mandatory form appeared in paragraph 4 of article 53. Several other delegations indicated that they would prefer a mandatory form. A number of delegations supported a compromise which would involve inserting the words “domestic law or” after the words “prejudice to its”.

<sup>25</sup> The text of this paragraph is based on former subparagraph 1 (b) of article 64. During the informal consultations, it was recommended to move it to this location.

<sup>26</sup> During discussions at the informal consultations, a proposal submitted by Switzerland (A/AC.261/15 and Corr.1), at the request of the Vice-Chairman responsible for this chapter, was used as a document of reference in the preliminary consideration of the article as a whole. During the informal consultations it was not possible to complete consideration of the entire article. Paragraphs 2, 4 and 5 were not reviewed.



3. In accordance with article [...] International cooperation for purposes of confiscation and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) [To the extent permitted by its domestic law and if so requested,] give priority consideration to returning confiscated proceeds of crime or property to the requesting State Party, so that it can make restitution to the victims of the crime or return such proceeds of crime or property to their legitimate owners;

(b) [Subject to the exceptions provided for in article [...] [Mutual legal assistance], paragraph [21],] in the case of embezzlement of public funds or of laundering of embezzled public funds, as referred to in articles [...] [Embezzlement, misappropriation, [other] diversion or [misuse] of property by a public official] and [...] [Laundering of proceeds of corruption] of this Convention, when confiscation was executed in accordance with article [...] [International cooperation for purposes of confiscation] of this Convention and on the basis of a final judicial decision in the requesting State Party, return to the requesting State Party confiscated property, as defined in article [...] [Freezing, seizure and confiscation] of this Convention, in a manner to be determined by technical arrangements, on a case-by-case basis, between the States Parties concerned. In such cases, the entire amount of the confiscated property shall be returned, subject to paragraph 5 of this article.

4. When appropriate, States Parties may also give special consideration to concluding agreements or arrangements, on a case-by-case basis, inter alia, on:

(a) Contributing the value of such proceeds or property or funds deriving from their sale or a part thereof to the account designated pursuant to article [...] [Other measures: implementation of the Convention through economic development and technical assistance], paragraph 2 (c), of this Convention or to [intergovernmental organizations specializing in the fight against corruption] [anti-corruption initiatives and programmes];

(b) Allocating or contributing the value of such proceeds or property or funds deriving from their sale or a part thereof to the financing of specific development projects or programmes to the exclusive benefit of the population of the requesting State Party. Such agreements or arrangements may involve specialized intergovernmental organizations;<sup>27</sup>

(c) Contributing the value of such proceeds or property or funds deriving from their sale or a part thereof to the reduction of the multilateral debt of the requesting State Party. Such agreements or arrangements shall be concluded in cooperation with intergovernmental organizations specializing in international debt issues.

5. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in the investigations, prosecutions or judicial proceedings leading to the recovery of illicitly acquired assets prior to returning such recovered assets pursuant to this chapter.

*[Article 71 was deleted.]*<sup>28</sup>

<sup>27</sup> Such contributions shall not be accountable under official development aid.

<sup>28</sup> During the informal consultations, the proposed article 71 was withdrawn by the United States.

*Article 62*

*Return of property to the country of origin in cases of damage to state property*

1. Notwithstanding the provisions of articles [...] [Freezing, seizure and confiscation], [...] [International cooperation for the purposes of confiscation] and [...] [*Disposition*] [*Return*] of assets of this Convention, each State Party shall adopt such measures as may be necessary to enable its central authorities or agencies with relevant responsibilities to return to the country of origin property constituting proceeds of crime that has been obtained to the detriment of that country.

2. In such cases, the property shall not be subject to the system of sharing between the requesting State and the requested State.<sup>29</sup>

[*Article 63 was deleted.*]

[*Article 66*

*Financial intelligence unit*]

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of assets, including funds, of illicit origin derived from acts of corruption and of promoting ways and means of recovering such assets by, inter alia, [appointing or] establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities disclosures of financial information that concern suspected proceeds of crime or are required by national legislation or regulation. If granted permission by the financial intelligence unit providing the information, the recipient financial intelligence unit shall be able to use that information within its territory, in accordance with its national legislation.<sup>30, 31</sup>

[*Articles 69 and 72 were deleted.*]

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<sup>29</sup> Article 62 was not considered during the informal consultations, on the understanding that its content might eventually be reflected in article 61.

<sup>30</sup> During the second reading of the draft text, at the fourth session of the Ad Hoc Committee, some delegations proposed the deletion of this article and pointed out inconsistencies with article 14. Other delegations indicated that the last sentence of the article raised serious concerns about the protection of personal data.

<sup>31</sup> This article was not considered during the informal consultations.