



# General Assembly

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

Sixth session

Vienna, 21 July-8 August 2003

Agenda item 3

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

## Proposals and contributions

### Observations submitted by the Office of Legal Affairs of the Secretariat on articles 79, 80, 81 and 83

1. While the draft provisions contained in the final clauses raise only few concerns, the Office of Legal Affairs of the Secretariat wishes to make some general observations, in particular, relating to draft article 79 on the relationship between the future convention and other international agreements and the opening for signature.

#### Article 79: Relationship to other agreements and arrangements

2. There is still an ongoing debate among the delegations negotiating the draft United Nations Convention against Corruption on whether or not to include an article on the relationship between the future convention and other treaties and, if such an article is included, which of the two options contained in draft article 79 should be retained. Option 1 would seek to ensure the compatibility of the future convention with previous international conventions; option 2 would seek to give precedence to the new convention over previous international agreements.

3. In accordance with customary international law, as codified by the 1969 Vienna Convention on the Law of Treaties,<sup>1</sup> the following principles apply to the application of successive treaties relating to the same subject:

(a) In article 30, paragraph 1, of the Vienna Convention a distinction is made between successive treaties relating to the same matter concluded between the same parties and successive treaties relating to the same matter between different parties. In both cases the principles contained in article 30 are subject to Article 103 of the

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<sup>1</sup> United Nations, *Treaty Series*, vol. 1155, No. 18232.



Charter of the United Nations,<sup>2</sup> which states that the Charter shall have precedence over any other international agreement;

(b) In the case of successive treaties relating to the same matter concluded between the same parties, the principle of *lex posterior derogat priori* applies. Accordingly, when the parties to an earlier treaty are parties also to the later treaty, the earlier treaty, if not terminated or suspended,<sup>3</sup> applies only to the extent that its provisions are compatible with those of the later treaty (art. 30, para. 3). In other words, unless there is evidence of a contrary intention, the parties must be presumed to have intended to terminate or modify the earlier treaty when they conclude a subsequent treaty that is incompatible with the earlier one. It is noted that article 30 of the Vienna Convention refers to successive treaties “relating to the same subject-matter”, which is interpreted as meaning treaties having the same general character. But, when a treaty has a special character with respect to another treaty, in the event of conflict, the *lex specialis* prevails, unless that treaty contains an intention, express or implied, that it should be otherwise;

(c) In the case of successive treaties relating to the same matter between different parties, the rules previously explained apply when the parties to the later treaty do not include all the parties to the earlier one, but only as between parties to both treaties (art. 30, para. 4 (a)). As between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations (art. 30, para. 4 (b));

(d) Pursuant to article 30, paragraph 2, of the Vienna Convention, when a treaty specified that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

4. Parties to a treaty may also decide to regulate the relationship between the provisions of that treaty and those of any other treaty relating to the same matter. Thus, in the draft convention, option 1 of article 79 specifies in paragraph 1 that the “Convention shall not affect the rights and undertakings derived from international multilateral conventions”. In such a case, the future convention would emphasize its “subordination” to other multilateral treaties. According to paragraph 2 of option 1, States parties to the future convention may subsequently conclude bilateral or multilateral treaties on the matters dealt with in the convention “for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it”. Paragraph 3 of option 1 stipulates that earlier bilateral or multilateral treaties on the same subject matter concluded by States parties to the Convention shall apply “if it facilitates international cooperation”. It is noted that the provision contained in paragraph 1 of that option refers to “international multilateral conventions” in general. If that provision envisages multilateral conventions relating to the same subject matter as the future convention, it would be advisable to include such wording in that paragraph, in case option 1 is retained.

5. In option 2 of draft article 79, paragraph 1 stipulates that the “Convention shall prevail over previous multilateral conventions and agreements”. In principle,

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<sup>2</sup> Article 103 reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

<sup>3</sup> Under article 59 of the Vienna Convention, entitled “Termination or suspension of the operation of a treaty implied by conclusion of a later treaty”.

the application of this type of provision creates no problem when all the parties to the earlier treaty are also parties to the treaty in question, since the parties can abrogate or modify the earlier treaty when they conclude a subsequent treaty incompatible with the earlier one. The application of this type of provision is more complex in the case of successive treaties with different parties. In such a case, the later treaty cannot deprive a State that is not a party to it of its rights under the earlier treaty without its consent. Paragraph 3 of option 2 establishes that, if two or more States parties to the future convention have already concluded an agreement on matters dealt with in the convention, they shall be entitled to apply that agreement “in lieu of this Convention insofar as it enhances the effectiveness of its provisions”. Paragraph 2 of option 2 also permits States parties to the future convention to conclude subsequent bilateral or multilateral treaties on matters dealt with in the convention “for purposes of supplementing or strengthening its provisions or in the interest of a more effective application of the principles embodied in it”. However, paragraph 1 does not specify which conventions will have priority over the future convention. Again, if paragraph 1 refers to previous conventions and agreements regarding the same subject matter, for the sake of clarity, it is recommended to specify so in paragraph 1.

#### **Article 80: Settlement of disputes**

6. Draft article 80, paragraph 2, states that if, six months after the date of the request for arbitration, States parties to the dispute concerning the interpretation or application of the new convention are unable to agree on the organization of the arbitration, “any one of those States may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court”.

7. While the provision is acceptable, for the sake of clarity, it may be advisable to add, at the end of paragraph 2, the words “provided that States Parties to the dispute have accepted, at the time of signature, ratification, acceptance, approval or accession, the jurisdiction of the International Court of Justice in respect of such disputes”, assuming that such is the intention of the negotiating parties.

#### **Article 81: Signature, ratification, acceptance, approval and accession**

8. The future convention will be “open for signature from [...] to [...] in [...] and thereafter at United Nations Headquarters in New York until [...]”. In accordance with section 6 of the procedures to be followed by the departments, offices and regional commissions of the United Nations with regard to treaties and international agreements (ST/SGB/2001/7), “all treaties and international agreements deposited with the Secretary-General and open for signature shall remain in the custody of the Treaty Section. Any exceptions to this rule shall be arranged in advance with the Treaty Section.” It is strongly advised that the ceremonial signature period be limited to two or three days. The Legal Counsel has strongly advised against keeping a text open for signature away from Headquarters for more than a few days. The Office of Legal Affairs also notes the positive experience in relation to the High-level Political Signing Conference for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, held in Palermo, Italy, from 12 to 15 December 2000, attracting over 250 signatures and significant worldwide publicity.

9. Moreover, the future convention should not be opened for signature immediately following its adoption, as the preparation of the authentic texts and the certified true copies and the distribution of the certified true copies may take up to six weeks. Those are functions required to be performed by the depositary. The experience of the Office of Legal Affairs suggests that too many difficulties and wasted resources result where a different approach is adopted. In this connection, it is noted that the Treaty Section will need to be provided with camera-ready copies of the convention, as adopted in hard copy and electronic format (Microsoft Word 2000) at the earliest possible opportunity.

**Article 83: Amendment**

10. Draft article 83, paragraph 1, provides that a State party may propose an amendment and “file it” with the Secretary-General of the United Nations, who shall communicate the proposed amendment to the States parties and to the Conference of the Parties to the Convention. The term “file” used in this provision is an expression no longer used. When a State party to the Convention proposes an amendment, such a proposal should be “transmitted” to the Secretary-General for communication to the States parties and to the Conference of the Parties. Accordingly, it is suggested to replace the word “file” with the word “transmit” in the second line of paragraph 1 of article 83. It is also assumed that the reference to the Secretary-General in this article is a reference to the Secretary-General in his capacity as Chief Administrative Officer of the Organization.

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