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Ad Hoc Committee for the Negotiation of a Convention against Corruption

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Agenda item 3

Consideration of the draft United Nations Convention against Corruption

Proposals and contributions

Observations submitted by the Office of Internal Oversight Services, the Office of Legal Affairs and the United Nations Office on Drugs and Crime

1. The draft United Nations Convention against Corruption (see document A/AC.261/3/Rev.4, the “draft convention”), provides for international cooperation in the fight against corruption. Essentially, the draft convention envisages such cooperation among States parties. However, it also contains some provisions concerning public international organizations and officials of such organizations that would apply to the United Nations if the draft convention were adopted.

2. The importance of dealing with corruption has been recognized by the General Assembly, which has sought to ensure that the Organization has the means to address fraud and other corrupt activities by its staff members and officials. In that regard, in paragraph 13 of its resolution 47/211 of 23 December 1992, the Assembly requested the Secretary-General to make proposals on seeking criminal prosecution of those who had committed fraud against the Organization. In section III of its resolution 48/218 of 23 December 1993, the Assembly resolved to address cases of alleged fraud in the United Nations. In that and subsequent resolutions, the General Assembly requested the Secretary-General to submit reports on the subject of such fraud and, more broadly, the recovery of misappropriated funds. In his reports, the Secretary-General has identified the possibility of enlisting the assistance of law enforcement authorities at the national level to pursue such cases: indeed, cases where such assistance and cooperation have occurred have been reported to the Assembly in matters as diverse as refugee smuggling in Kenya; obtaining United Nations funds by manipulation of control systems in Switzerland; and theft by



fraudulent travel records in Croatia and the United States of America. However, all too often fraudulent schemes by staff members have gone unprosecuted as a result of the difficulties arising in relation to national laws (see A/48/572, paras. 19-24, and A/53/849, para. 9).

3. Recently, the Organization has had an opportunity to review the provisions proposed in the draft convention relating to public international organizations. In the view of the Office of Internal Oversight Services, the Office of Legal Affairs and the United Nations Office on Drugs and Crime, the proposals would address certain problems that arise in dealing with cases of fraud against the Organization, but do not address the problem associated with fraud or related crimes committed by officials of it. Taking into account the concerns raised by the General Assembly, the Office of Internal Oversight Services, the Office of Legal Affairs and the United Nations Office on Drugs and Crime believe that the proposals can be strengthened in a number of respects to address more effectively the risk of fraud by officials of the Organization.

Establishment of criminal offences

4. The draft convention makes it mandatory for States parties to criminalize the “promise, offering or giving” of a bribe to both public officials and to officials of public international organizations—so-called “active” bribery (arts. 19, subpara. (a), and 19 bis, para. 1). However, under the draft, criminalization of “passive” bribery, namely, the “solicitation or acceptance” of a bribe, is mandatory only when the culprit is a national public official and is optional when the culprit is a foreign public official or an official of a public international organization. It is proposed that the convention make it mandatory for States parties to criminalize passive bribery by officials of public international organizations. That objective can be accomplished by simply breaking into two paragraphs what is now paragraph 2 of article 19 bis, the first of which (new para. 2) would continue to deal as at present with foreign public officials, while the second (new para. 3) would deal with officials of public international organizations (see annex, para. 1, for the proposed new language for art. 19 bis).

5. Draft article 22 requires States parties to establish embezzlement, misappropriation “or other diversion” of property by a public official as criminal offences. Article 22, however, does not address the issue of such corruption by officials of public international organizations, since it restricts the offences to acts of a “public official”, a term that, as defined in article 2, does not include officials of public international organizations.

6. It is understood that article 22 reflects consensus within the Ad Hoc Committee for the Negotiation of a Convention against Corruption and is now closed. It is not proposed at the present late stage to reopen matters upon which consensus has already been reached. However, if an opportunity for further discussion of this article were to arise, it is proposed that the scope of the article be extended to cover the acts of officials of public international organizations. This could be accomplished by inserting into the article the words “or an official of a public international organization” after the words “a public official” (see annex, para. 2, for the proposed language for art. 22). This would automatically bring subsequent concealment and similar acts within the ambit of article 23, thus creating an obligation on States parties to criminalize such subsequent acts.

Recovery of assets and funds

7. It is important both to public international organizations and their member States that such organizations be able to recover any of their funds or other property lost through corruption-related activities. Article 53 provides for various forms of mutual legal assistance with a view to identifying or tracing “proceeds of crime” (para. 3 (g)), identifying, freezing and tracing “funds of illicit origin derived from acts of corruption” (para. 3 (j)) and “returning such funds to their countries of origin” (para. 3 (k)). Moreover, several provisions require States parties to take measures for identification, tracing, seizure, preservation or return of property or funds related to a crime at the request of another State. It is important to public organizations such as the United Nations, and for the Member States that provide its funding, to obtain restitution in respect of property lost as a result of corrupt activities such as bribery or embezzlement. Article 61, paragraph 2, would enable States parties, more generally to recover their funds or other property that are “proceeds of crime”. It is proposed that international organizations be specifically identified with respect to the return of assets (see annex).

Annex

Language proposed by the Office of Internal Oversight Services, the Office of Legal Affairs and the United Nations Office on Drugs and Crime for certain provisions of the draft United Nations Convention against Corruption

Article 19 bis

1. The content of paragraph 2 of article 19 bis could be divided into two separate paragraphs, the first (new para. 2) of which would retain the wording of the present paragraph 2, except for the words “or an official of a public international organization”, which should be deleted. The second paragraph would be a new paragraph 3 requiring the criminalization of passive bribery for officials of public international organizations, as follows:

“[3. States Parties shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by an official of a public international organization, directly or indirectly, of an undue advantage, for 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 duties [in relation to the conduct of international business] [, at least in the case of breach of such duties].]”

Article 22

2. The words “or an official of a public international organization” could be added after the words “a public official”, so that article 22 would read as follows:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official or an official of a public international organization, 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 such official by virtue of his or her position.”

Articles 61 and 67

3. It is proposed that language be inserted in articles 61 and 67 that would allow public international organizations to make requests directly to States parties for return of assets. In article 61, paragraph 2, it is proposed to insert after the words “when acting on the request made by another State Party” the words “or a public international organization”. In article 67, it is proposed that the words “or public international organization” be inserted in subparagraph (a) after the words “State Party” and in subparagraph (b) also after the words “State Party”. In subparagraph (c) of article 67, it is proposed that the words “or a claim of a public international organization” be inserted after the words “State Party’s claim”.