

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION ORIGINS AND NEGOTIATION PROCESS

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I. BACKGROUND

In a world of relative turmoil produced by radical changes in the Post-Cold War era, there are new opportunities and incentives to engage in corrupt practices. The assumption that “free markets” and non-interventionism are the remedy against corruption is challenged by recent experience. It now appears that each socio-political and economic system produces its own version of corruption and that no system is completely corruption-free.

The problem of corruption is systematic rather than individual. It occurs in monopolistic or oligopolistic situations, in which one or a handful of companies control a given market. The state may wish to engage private companies to perform specific tasks, provide services or carry out public works. To the extent that only a very small number of companies are practically able to carry out the work, the ground is fertile for corrupt practices, i.e. overcharging, low quality work, delays, etc.

In addition, very wide discretionary powers in the hands of individuals or organizations may generate temptations and incentives for corruption. Whenever there are few or no mechanisms of “checks and balances”, people have plenty of opportunities to take undue advantage of their power. Another contributing factor is the lack of transparency, which reduces the ability to control those in positions of authority. This lack of transparency may be caused by factors ranging from secrecy in banking to dictatorial regimes disallowing the questioning of authority.

Most of the time, corruption entails a confusion of the private with the public sphere or an illicit exchange between the two spheres. In essence, corruption-related activities involve public officials acting in the best interest of private concerns regardless of, or against, the public interest. Abuses of public office to secure unjust advantage may include any planned, attempted, requested or successful transfer of a benefit as a result of unjust exploitation of an official position.

While planning and developing anti-corruption strategies and policies, it is essential to begin from determining the extent of the harmful effects of corrupt practices. In many countries, particularly developing countries and countries with economies in transition, corruption hampers social, economic and political progress. Public resources are allocated inefficiently and the population’s distrust of political institutions rises. Consequently, productivity becomes lower, administrative efficiency is reduced and the legitimacy of political order is undermined. In addition, projects are left incomplete and economic development is impaired, which, in turn, leads to political instability, as well as poor infrastructure, education, health systems and other social services.

On the other hand, the phenomenon of corruption has also detrimental effects in developed countries by undermining ethical principles, rewarding those willing and able to pay bribes for their own benefit and perpetuating inequality. The result is that individuals who wish to conduct their affairs honestly are demoralized and lose faith in the rule of law. Moreover, competition is distorted and the quality of products and services tends to deteriorate. National budgets are severely depleted and rules and regulations designed to enhance social responsibility of corporations and other businesses are undercut and undermined.

II. EARLY WORK OF THE UNITED NATIONS AGAINST CORRUPTION

The United Nations Crime Prevention and Criminal Justice Programme began exploring whether the ground was fertile for action against corruption at the international level at a time when it was deemed adventurous even to mention the word “corruption”.

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True to its tradition that prevailed from its establishment and is at the root of many of its successes, the Programme approached the issue from the technical rather than the political perspective.

In December 1989, working in close cooperation with the (then) Department of Technical Cooperation for Development of the Secretariat, the Programme organized an interregional seminar, which was hosted by the Government of The Netherlands in The Hague. Following a thorough review of the impact of corruption on good governance, public administration and the judiciary, the seminar produced a set of comprehensive recommendations. It is interesting to note that the seminar prefaced its recommendations on certain special considerations, which were cast as overarching conditions for effective action against corruption, or in other words, as essential elements of an enabling framework and environment for such action to have meaning. The participants in the seminar recognized the importance of democratic institutions, a free press, the rule of law, the independence of the judiciary and the creation of a political, administrative and social-economic environment in which the public and civil service can operate without improper interference. The recommendations of the seminar covered considerable ground, ranging from the need to embrace economic and development strategies, to the requirement of putting in place a broad range of preventive and law enforcement measures, and including the establishment of independent specialized bodies to implement or oversee the implementation of policies and measures against corruption. In the area of international cooperation, the seminar called for improved mutual legal assistance and extradition, as well as confiscation of illicit proceeds, and stressed the importance of technical cooperation in this sphere. The seminar also proposed the preparation of an international code of conduct for public officials and a United Nations programme to promote compliance with that code. It should be noted that the seminar provided the opportunity for the Crime Prevention and Criminal Justice Programme to present a first draft of a manual on practical measures against corruption on which it had been working and receive valuable comments.

In August 1990, the Programme organized the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. One of the resolutions that received the most support and passed unanimously was resolution 7 on action against corruption, which was inspired by the recommendations of the seminar and called for the preparation of a draft international code of conduct for public officials and the finalization and publication of the manual on practical measures against corruption.

Action against corruption featured prominently among the priorities established for the United Nations Crime Prevention and Criminal Justice Programme by the Versailles Ministerial Conference that revamped the Programme in 1991. It was also among the issues that the Commission on Crime Prevention and Criminal Justice decided to pursue when it was established in 1992. Under its guidance, the Programme developed the International Code of Conduct for Public Officials, which was adopted by the General Assembly by its resolution 51/59 of 12 December 1996. The General Assembly recommended it to Member States as a tool to guide their efforts against corruption. Further in its resolution 51/191 of 16 December 1996, the Assembly adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, annexed to that resolution, and requested the Economic and Social Council and its subsidiary bodies, in particular the Commission on Crime Prevention and Criminal Justice, to examine ways, including through binding international legal instruments, to further the implementation of the Declaration, to keep the issue under regular review and to promote the effective implementation of that resolution. It should be noted that the Declaration is generally regarded as the precursor of the OECD Convention against the bribery of foreign public officials.

III. THE NEGOTIATION PROCESS

The question of a convention against corruption was raised for the first time in connection with the negotiations for the United Nations Convention against Transnational Organized Crime. The Ad Hoc Committee that carried out those negotiations debated whether corruption should be covered by that Convention. The view that prevailed was that corruption was too complex and broad an issue to be covered exhaustively by a convention dealing with transnational organized crime. However, it was also evident to all negotiators that that Convention would not be complete without provisions on corruption, because corruption was both a criminal activity in which organized criminal groups often engage and a method used by those groups to carry out other criminal activities. The Ad Hoc Committee agreed on the inclusion of limited provisions on corruption in the United Nations Convention against Transnational Organized Crime on the understanding that a separate instrument would be envisaged to cover corruption in an appropriate manner. The United Nations Convention against Transnational Organized Crime, which was adopted by the

General Assembly in resolution 55/25 of 15 November 2000 and entered into force on 29 September 2003, includes provisions related to corruption. The Convention envisages criminalization of active and passive bribery involving a public official (Article 8 para. 1) or a foreign public official or international civil servant (Article 8 para. 2), as well as of participation as an accomplice in corruption-related offences (Article 8 para. 3). In addition, States Parties are required to adopt measures designed to promote integrity and to prevent, detect and punish the corruption of public officials (Article 9). The article criminalizing corruption includes also a basic definition of public officials, essentially deferring to national law.

Following the successful conclusion of the negotiations for the United Nations Convention against Transnational Organized Crime and its three Protocols, and the establishment of the new Ad Hoc Committee, the issue of fully realizing the commitment taken during those negotiations to pursue the development of an independent instrument against corruption came to centre stage. At the beginning, there was some brief debate about whether the new instrument should be a separate convention, or the objective could be as effectively achieved through the development of a protocol to the United Nations Convention against Transnational Organized Crime. The argument about the multifaceted nature of the problem of corruption necessitating a separate and comprehensive approach proved to be convincing enough that the question was laid to rest at the early stages of the debate.

However, Member States wished to time the beginning of the new negotiation process in a way that would ensure sufficient preparation, both on the part of their substantive services and agencies, and on the part of the Secretariat that would support those negotiations. Member States also wished to ensure that the negotiation process would be based firmly on shared objectives and a clear understanding about the scope of the objective to be achieved, precisely in view of the broad nature of the phenomenon of corruption and, most importantly, because of the rather nebulous character of the terminology employed to describe the phenomenon. Corruption was a term used in different contexts to embrace different, sometimes widely divergent concepts and had not acquired the certainty that is demanded invariably in a legal context, or more importantly, in the context of making international law. At the same time, Member States wished to ensure that the expertise and experience gained, as well as the spirit achieved during the negotiation process for the United Nations Convention against Transnational Organized Crime would be fully preserved and built upon. These attributes were considered of the utmost importance and as guarantees for the success of the new endeavour that the international community was about to embark upon.

In view of all these considerations, debate at the Commission on Crime Prevention and Criminal Justice revolved around devising a preparatory process that would satisfy all concerns and create an environment that would be conducive to pursuing the new negotiations on a sound basis.

In its resolution 55/61, the General Assembly established an Ad Hoc Committee for the Negotiation of a Convention against Corruption. That resolution also outlined a preparatory process designed to ensure the widest possible involvement of Governments through intergovernmental policy-making bodies. The Centre for International Crime Prevention (CICP) was asked to prepare an analysis of existing international legal instruments for the Commission on Crime Prevention and Criminal Justice, whose central theme in 2001 was the issue of corruption. The resolution also called for the convening of an open-ended intergovernmental group of experts, which was asked to draft terms of reference for the negotiation of the new instrument, taking into account the analysis of existing legal instruments and recommendations prepared by the Secretariat and the views and comments of the Commission. The Group was asked to submit its recommendations to the General Assembly, through the Commission and the Economic and Social Council, for approval.

There was an interesting development that merits special mention. At the time that the General Assembly was considering resolution 55/61, Nigeria, on behalf of the Group of 77 and China, proposed to the Second Committee of the General Assembly a draft resolution on the illegal transfer of funds and the repatriation of such funds to their countries of origin. As originally proposed, the draft resolution was calling for the negotiation of a separate instrument on this subject. Through negotiations at the General Assembly, the two resolutions were brought in line and the Intergovernmental Expert Group mentioned above was asked, by General Assembly resolution 55/188, to examine the issue of illegal transfer of funds and repatriation of such funds when considering the draft terms of reference for the negotiation of the new convention against corruption. This new mandate placed the issue of asset recovery squarely within the framework of the new convention.

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Pursuant to General Assembly resolution 55/188, the (then) Centre for International Crime Prevention of the United Nations Office on Drugs and Crime began studying the issue and seeking input from Member States, other entities of the United Nations system and other international organizations, in order to comply with the request of the Assembly to the Secretary-General to submit a report on this matter. Over the last three years, the Centre submitted three reports on this issue to the General Assembly and carried out a study to assist the Ad Hoc Committee charged with the negotiations of the new Convention against Corruption.

In elaborating these reports and the study for the Ad Hoc Committee, we found that the issue was as complex as it was crucial. In fact, the complexities surrounding it could not be underestimated. These complexities derived as much from the nature of the activities that produce the illicit wealth, as from the difficulties associated with the authors of these activities and their position of power. Such complexities were compounded by corollary factors, such as gaps in domestic legislation, perceived deficits in legitimacy of processes initiated to establish facts and determine culpability and, last but not least, deficiencies in international cooperation.

One of the key conclusions in the reports of the Secretary-General was that notwithstanding difficulties or complexities, the dimensions of the problem demanded joint and conclusive action by the international community. For this action to be effective, the international community must embark on sustained efforts to forge consensus. Such consensus needs to be based on a common understanding of the constituent elements of the issue, a common perception and appreciation of its impact on national efforts towards development and on the international quest for globalization beneficial to all, and finally agreement on the international aspects of the problem that require genuine and meaningful cooperation.

The sensitive and complex nature of asset recovery became evident during the tenth session of the Commission on Crime Prevention and Criminal Justice, in 2001, when it negotiated a draft resolution, which later became Economic and Social Council resolution 2001/13. While maintaining the matter as one of the key issues to be covered by the new Convention, the debate on the draft resolution produced an evolution of the terminology employed to approach the question. The new resolution spoke of transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and the return of such funds.

The Intergovernmental Expert Group met in Vienna from 21 to 30 July 2001 and recommended, by means of a draft resolution, terms of reference for the negotiation of the new convention regarding both substance and procedure. The Commission approved the draft resolution at its resumed session in September 2001 and, following approval also by the Economic and Social Council, the General Assembly adopted it as resolution 56/260 on 31 January 2002.

In that resolution, 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".

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.

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, as well as on the relevant parts of the report of the Commission on Crime Prevention and Criminal Justice at its tenth session, and in particular on paragraph 1 of Economic and Social Council resolution 2002/13 as resource materials in the accomplishment of its tasks.

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.

The Assembly also 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 and requested the Ad Hoc committee to complete its work by the end of 2003 according to a schedule to be drawn up by its bureau. Finally, the Assembly accepted with gratitude the offer of the Government of Argentina to host an informal preparatory meeting of the Ad Hoc Committee established pursuant to resolution 55/61, prior to its first session.

The Informal Preparatory Meeting took place in Buenos Aires from 4 to 7 December 2001. In preparation for that meeting, CICP asked Governments to submit proposals they wished to make in relation with the new convention. The purpose of the Informal Preparatory Meeting was to consolidate any proposals made by Governments, in order to pave the way for the work of the Ad Hoc Committee. The meeting had before it 26 proposals, submitted by countries of all regions of the world. Some of these proposals contained full texts for the draft convention, while others offered more general observations and comments regarding the content of the new instrument or the methodology of the negotiation process. The multitude and wealth of the proposals were evidence of the interest of countries from all regions and their willingness to be actively engaged and involved in the negotiation process. These elements augured well for the comprehensiveness and quality of the final product of the negotiation process. They also offered a guarantee of the universal nature of the new instrument, a key component of its effectiveness, acceptance and success. The Informal Preparatory Meeting consolidated all textual proposals in a single document, which the Ad Hoc Committee could use as the basis of its work.

The Ad Hoc Committee commanded the attention of Governments, international organizations and the civil society throughout its work; and for good reason. Doubtless, its task was demanding: to deliver to the world a broad, comprehensive, functional and effective international instrument to fight corruption. The pressure was considerable: success would mean turning the page in international cooperation and the establishment of new standards by which the international community will be measuring its performance in crucial sectors; failure would essentially condemn all relevant efforts for a considerable time.

The General Assembly gave the Ad Hoc Committee clear and broad terms of reference, and asked it to complete the negotiation process by the end of 2003. This deadline was doubly significant.

Firstly, it carried an important political message; the international community was intent upon showing that it meant business. There was no room for drawn out negotiations, but the product was needed urgently.

Secondly, this deadline was to serve as yet another tangible proof that significant, groundbreaking new legal instruments can be produced in the United Nations within a pre-determined and reasonable time frame. The same goals had been achieved by the previous Ad Hoc Committee on the negotiation of the United Nations Convention against Transnational Organized Crime and its three Protocols, and there was no reason why the positive experience could not be repeated

The principal strengths of the Ad Hoc Committee were: (a) the very good spirit prevailing among delegations; (b) the experience those delegations had gained by negotiating the United Nations Convention against Transnational Organized Crime; (c) a strong expanded bureau; and (d) a fully participatory process, manifested by high levels of attendance and a good mix of negotiators and practitioners making up delegations.

The Ad Hoc Committee made every possible effort to comply with the mandate it received from the General Assembly and develop a broad, effective and comprehensive convention. At the core of the negotiating process was the desire of all delegations to find an appropriate balance in the new instrument, in order to make sure that adequate and proportionate attention was devoted to prevention, criminalization, international cooperation and asset recovery.

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From the very beginning of its existence, the Ad Hoc Committee added one unwritten rule to its rules of procedure. All its members demonstrated that they would be guided by a spirit of cooperation, understanding, flexibility and consideration for differing positions. That spirit was fundamental not only to the achievement of consensus, but to the safeguarding of the quality of the instrument that it was entrusted with developing. Indeed, the Ad Hoc Committee explored all avenues for reaching consensus, taking into account the concerns of all States, but keeping a watchful eye at all times on certain key qualities of the new Convention. The Ad Hoc Committee wished to make sure that the new instrument would be truly universal, functional, ratifiable and implementable.

Consensus in issues as complex as those covered by this Convention required certain key components.

First, good knowledge of the issues and an equally good understanding of the implications that provisions of the draft Convention might have. The solutions that the Ad Hoc Committee would find for the various provisions of the Convention could have implications for domestic regulatory regimes or for national capacities to deal with particular aspects of the problem, or they could have implications for other provisions of the new Convention and for the way it would operate as an instrument of international cooperation.

The detailed discussion that took place and the very balanced mixture of delegations, which were enriched by practitioners and seasoned negotiators, were proof that that knowledge and understanding were abundant in the Ad Hoc Committee.

Second, a good understanding of national positions and the concerns that drive them, coupled with sensitivity for these concerns and the desire to find ways to accommodate them. The new Convention needed to heed all concerns if it aspired to be a universal instrument.

The extensive debate that the Ad Hoc Committee held, over three readings of the draft text, provided every opportunity for all delegations to listen to each other and comprehend the reasons for each other's positions.

Third, and closely related to the second point above, a willingness to modify national positions and explore every possibility of meeting each other in the middle of the road. It was of crucial importance to be inspired through and by the development of new international standards in order to bring about changes or modifications at the national level, when those were necessary to improve international cooperation.

The Ad Hoc Committee began its work in January 2002. It held seven sessions and completed the negotiations successfully on 1 October 2003. It is important to note that the Ad Hoc Committee was an open-ended body and was consistently attended by a very high number of delegations (a total of over 130 delegations took part in the process).