Notes on Asset Recovery in the U.N. Convention Against Corruption

Guillermo Jorge[1]

1. Introduction

The idea of creating a global system for recovering proceeds from corruption is a relatively new legal issue. Although some scholars roughed out vague legal mechanisms for helping developing countries to repatriate proceeds from corruption in the late eighties,[2] it was not until the end of the nineties that the international community, leaded by the G7[3] and the United Nations[4] signaled repatriation of proceeds from corruption as an objective to be globally addressed, meaning that the legal obstacles should be better handled through international and co-operative, rather than local and unilateral, policies. A simple comparison between the financial aid received by developing countries and the bribes paid to foreign public officials explains the economic rationale for strengthening

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[1] LLM, Harvard Law School, 2003; Abogado, Buenos Aires University, 1995.

[2] Reisman, M., "*Harnessing International Law to restrain and recapture indigenous spoliation*", 83 Am.J.Int'l L. 56 (1989); Kofele-Kale, Ndiva, "*International Law of responsibility for economic crimes. Holding Heads of State and other high ranking state officials individually liable for acts of fraudulent enrichment*", London, New York: Kluwer Law International, 1995.

[3] "*Actions against Abuse of the Global Financial System*", Report from G7 Finance Ministers to the Heads of State and Government, Okinawa, July 21, 2000: "*International money laundering has often been used by government officials to assist the clandestine diversion of public assets. The vulnerability of government institutions to such crime can be especially substantial in countries with emerging democratic systems and developing or transitional economies. We agree that it would be useful if we could take stock of existing legal tools and the agencies that administer them in each of our countries that would be available to identify, trace, and seize such laundered assets, as a first step to enhancing international cooperation on this issue*".

[4] United Nations, General Assembly, Res. 54/205, Jan. 27, 2000, "*...calls for (...) increased international cooperation, inter alia, through the United Nations system, in devising ways and means of preventing and addressing illegal transfer, as well as in repatriating illegally transfer of funds to their countries of origin, and calls upon other countries and entities concerned to cooperate in this regard*".

international efforts to repatriate proceeds from corruption: in 1997, both figures were estimated in $80 billion.[5]

As usual, real cases provided the insights for imagining the first approaches. Along with the democratic wave started in the mid eighties, several cases of ex-dictators that have plundered their countries exposed a constant: ill-gotten funds were legally managed by the major global players in private banking and hidden, not only behind banking secrecy jurisdictions, but also through complex corporate vehicles, figureheads and legal privileges. Legal efforts to recover corruptly obtained assets were made, among others, by the Philippines against the deposed dictator Fernandind Marcos,[6] by Haiti against the Duvalier family,[7] by the Nigeria against Sani Abacha,[8] and by the Zairian Government after dictator Mobutu died.[9]

The legal proceedings of the aforementioned cases revealed irreconcilable disparities among different legal systems for asset recovery purposes. Problems arose in the most diverse legal areas: privileges and immunities of public officials, effective preventive measures for immobilizing assets, legal value of evidence obtained abroad,

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[5] The figure for bribes was estimated by Hawley, Sue, "*Exporting Corruption: privatization, multinationals and bribery*", June 2000, at www.globalpolicy.org/nations/corrupt/corner.htm and quoted by OECD, "*Behind the Corporate Veil. Using corporate entities for illicit purposes*", OECD: Paris, 2001, at 21. The figure for financial aid is found in Hertz, N., "The silent takeover: Global capitalism and the death of democracy", William Heinemann, London, 2001, at 65.

[6] The litigation of this case started in 1986 and included criminal proceedings in the Philliphines, injunctions in two U. S. Disctricts (862 F2d 1355 (9th Cir. 1988)(en banc), cert. denied, 490 US 1035 (1989) and 806 F2d 344 (2nd Cir 1986); decisions over banking secrecy and money laundering charges in Switzerland (see Swiss Supreme Court, Judgment of 1 July 1987, at La semaine judiciare (1987), 609). After 17 years of litigation, part of the Marcos' associates assets are, until now, deposited in a scrow account, pending a criminal conviction in the Philippines.

[7] The litigation of this case includes criminal proceedings in Haiti and France and mutual legal assistance proceedings rendered by UK Courts.

[8] This case included civil actions in Nigeria and the UK and money laundering charges in Switzerland.

[9] A summary of the legal proceedings of all the above-mentioned cases, with special mention of the participation of U.S. Banks can be read in: US Senate, Minority Staff Report for Permanent Subcommittee on Investigations, "*Hearing on Private Banking and Money Laundering: A case study of opportunities and vulnerabilities*", November 9, 1999, available at, http://www.senate.gov/~levin/issues/psireport2.htm

authority for executing foreign confiscation orders, divergences on third parties' rights in confiscation proceedings, disposition of proceeds of crime, and so on.

Therefore, right after the cold war, a slow but continuous process of legislative harmonization was launched with the objective of unifying legal criteria for dealing with transnational asset recovery. OECD policy-makers envisaged money laundering as the concept around which harmonization should be sought.

Criminalization of money laundering and making financial institutions private goalkeepers of the system constituted the basis of the process of harmonization.

However, even money laundering does not mean the same thing in every place. In the United States, for instance, money laundering was originally conceived of as a repressive way to disempower criminal enterprises operating within the country. In Switzerland, money laundering was conceived as a preventive device for avoiding misuses of the Swiss financial system by foreign criminals.

In any case, given the fact that jurisdiction over money laundering crimes was everywhere tied to the territory through which the money has passed through, policy makers centered the global assets forfeiture strategy on it.

The trend was re-affirmed after the success obtained in a recent Swiss-Peruvian case. In 2000, several Swiss banks, complying with their anti-money laundering duties, reported and automatically froze accounts held by Vladimiro Montesinos, former Chief of Intelligence of the Peruvian Government. The banks were alerted by press releases that Montesinos was sought by Peruvian authorities for corruption-related offences. The Swiss prosecutor to whom the suspicious reports were forwarded informed the Peruvian Government that she had frozen US$77 million and that if the Peruvian Government

proved that the monies had been illegally obtained, a repatriation proceeding would be easy to conduct under Swiss legislation. Less than one year was needed for the National Bank of Peru to receive the money. Compared to the 18 years of the still ongoing litigation in the Philippines case against Marcos, the Swiss money laundering strategy case proved to be a total success.

2. Asset recovery mechanisms envisaged by the U.N. Convention Against Corruption

The recovery and repatriation of proceeds from acts of corruption is one of the main objectives declared by Art 1 of the Convention.[10] A whole chapter, Chapter number V, deals with the transferring, laundering and recovering of such assets. Art 60.4 of the current draft explicitly obligates Parties to consider the execution of requests for assistance in the recovery of ill-gotten assets "*a fundamental purpose*" of the Convention and Art 64.2 makes asset recovery "*an inalienable right*" of the country of origin. Though toothless, these declamations underscore the importance of the issue.

The Draft gives special room to what has been called "a profit-oriented approach to criminal law",[11] as opposed to a more traditional "suspect-oriented" perspective. The inclusion, at a global level, of a criminal-law approach oriented towards the confiscation of instrumentalities, proceeds and profits of crime, implies the development and adaptation of several legal concepts and procedures. Such a work has partially been done in the nineties through global anti-corruption and anti-money laundering international and

[10] Revised Draft United Nations Convention Against Corruption, General Assembly A/AC.261/3/Rev.4, May 12, 2003 [hereinafter, the Draft or the Draft Convention], art. 1.

[11] See Stessens, Guy, "*Money Laundering. A new International Money Laundering Model*" London: Cambridge University Press, 2000, at 82.

regional bodies[12] and the mechanisms adopted by the U.N. Convention is harvesting such rich experiences.

Schematically, the recovering of illegally obtained assets is always preceded by three stages: 1) investigative measures to trace the assets; 2) preventive measures to immobilize the assets (freezing, seizing); 3) confiscation. Only once these three stages have been completed is the recovery of the proceeds of crime possible.

Legal proceedings for complying with the aforementioned stages may be instituted in the jurisdiction where the corruption-offence took place (asset recovery through international cooperation), in the jurisdiction where the assets are located (asset recovery through confiscation following a money laundering conviction or, in some jurisdictions through civil proceedings), or in both places simultaneously. We will now examine in detail the basic requirements of each alternative.

I. Asset recovery in criminal proceedings

a) From the corruption offence to the assets: Recovery in criminal proceedings through international cooperation

[12] Regarding corruption, see the Inter-American Convention Against Corruption (OAS, 29.03.96); Protocol, adopted by the Council of Europe on 27 September 1996, to the Convention on the Protection of the European Communities' financial interests; Second Protocol, adopted by the Council of Europe on 19 June 1997, to the Convention on the Protection of the European Communities' financial interests; Convention in the fight against corruption involving officials of the European Communities or Officials of Member States of the European Union, adopted by the Council on 26 May 1997; Joint Action of 22 September 1998; Civil Law Convention on Corruption, 9 September 1999; OECD-Revised Recommendation of the Council on combating bribery in international business transactions of 23 May 1997; OECD-Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997; United Nations, General Resolutions 51/59 and 51/191. Regarding Money laundering, see the work done by the Financial Action Task Force at www.fatf-gafi.org , the recommendations issued by the Basel Committee on Banking Supervision at http://www.bis.org/publ/bcbs85htm, the CICAD Model laws at www.oas.org . The banking industry has also taken self-regulating anti-money laundering steps, see the Wolfsberg principles on both private and corresponding banking at www.wolfsberg-principles.com .

The traditional way of recovering assets located outside of the jurisdiction where the corruption offence took place is through mutual legal assistance. The criminal investigation takes place wherever the corruption-related offence occurred, usually where the corrupt public official holds office. When the proceeds have been deposited abroad, the investigation asks for cooperation for the foreign countries both to obtain evidence for trial and to secure the property with a view towards future confiscation. In general, after a criminal conviction is obtained in the requesting country, the requesting country issues a confiscation order and asks the requested country to enforce it.[13]

Until now, the requirements for obtaining evidence abroad (witnesses, documents), securing the evidence obtained (seizing, freezing), and forfeiting such assets (confiscation) have depended on bilateral mutual legal assistance treaties[14] with an incomplete coverage of the world.

A prosecutor facing a non-cooperative jurisdiction may either give up or take unilateral measures[15] that usually violate foreign laws or somehow affect the sovereignty of the non-cooperative jurisdiction. As a result, the non-cooperative jurisdiction will not

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[13] Exceptionally, when the domestic laws of the requested country does not allow its authorities to enforce a foreign confiscation order, the requesting country must ask the requested country authorities to issue a confiscation order.

[14] With the exception of the 1990 Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the proceeds from crime (ETS 141) and the 1959 European Convention on Mutual Assistance in Criminal Matters, assistance in other regions of the world is provided, at best, by bilateral treaties with reduced coverage of the world. Absent a treaty, States can request and provide assistance on "reciprocity" basis, a non-enforceable promise that is not always fulfilled.

[15] The most common unilateral measures used by U.S. prosecutors were directed to obtain evidence protected by banking secrecy laws in foreign jurisdictions. Examples of such measures were a) subpoenas against a domestically-based entity having some relationship to the foreign-based entity holding the evidence (*In Re Grand Jury Proceedings (Bank of Nova Scotia)*, 722 F.2d 657 (11th Cir. 1983), *appeal following remand*, 740 F.2d 817 (1984), *cert. denied*, 469 U.S. 1106 (1985); *United States v. Chase Manhattan Bank, N.A.*, 584 F. Supp. 1080 (S.D. N.Y. 1984); *Vanguard Intern. Mfg., Inc. v. United States*, 588 F. Supp. 1229 (S.D. N.Y. 1984); b) subpoenas *ad testificandum* against a non-resident when he is temporarily in the United States (See *In Re Grand Jury Proceedings* (Field), 532 F 2d 404 (5th Cir), cert. denied, 429 US 940 (1976)); c) compelling an account holder to direct his/her foreign bank or corporation to disclose to the prosecutor matters protected by foreign secrecy laws. The Third Restatement [of?] has recently incorporated "*the availability of alternative means of securing information*" criteria as a mandatory factor to consider before issuing a unilateral subpoena.

only raise diplomatic protests but, more importantly, it will reinforce its sovereignty by enacting stringent regulations.[16]

The Draft Convention deals in a very detailed way with the tension between sovereignty and cooperation. By establishing international cooperation as the means through which asset recovery must be pursued, the Draft has specifically[17] rejected unilateral measures affecting sovereignty of other parties. The Convention provides a framework to be used by those countries which lack a bilateral agreement (Art 53.9 to 53.29) when seeking international cooperation for offences criminalized in the Convention.

A global agreement on a list of corruption-related offences as well as predicate offences for money laundering purposes will also avoid problems related to the dual criminality requirement. In the area of corruption, dual criminality has obstructed two types of investigations: fiscal offences, when international cooperation is sought from a financial haven, where tax evasion and record-keeping fiscal offences are not crimes but administrative faults; and illicit enrichment, which is used by many developing countries as a substitute for proving bribes or other undue advantages taking by public officials, but

[16] This was the case with various tax havens of the Caribbean basin that, facing U.S. unilateral measures, moved from civil bank secrecy liability to criminal secrecy laws and from territorial jurisdiction to personal jurisdiction over bank officials in order to avoid subpoenas issued when traveling to the U.S. See Paget-Brown, Ian, "*Commercial Law of the Cayman Islands*", British West Indies: Cayman Island Publishers (1985).

[17] Article 4 of the Draft, suggestively entitled "Protection of sovereignty," reinforces this idea by establishing that "*Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that reserved exclusively for the authorities of that other State by its domestic law"*. According to sub-section c) of Art 4, the Draft assigned "fundamental" value to this provision to the extent that "*any article contrary to it shall be disregarded*". In addition, almost all obligations of signatories are subjected to "the fundamental principles of the[ir] domestic law".

has not been criminalized by European countries and the U.S. on the grounds that the inversion of the burden of proof that the crime implies[18] is constitutionally prohibited.

Common grounds for criminalization will avoid controversial issues regarding dual criminality for any stage of cooperation (tracing, securing, confiscating). Although art. 53.22 states that parties can not refuse cooperation on the *sole* ground that the offence is also considered to involve fiscal matters the UN Convention does not include fiscal offences, allowing parties which does not consider fiscal evasion a criminal offence to refuse assistance on the grounds of dual criminality.

The inclusion of illicit enrichment (art. 25), on the other hand, has been vigorously opposed by European countries and the Russian Federation. This is now, however, a problem of criminalization: if the crime is finally adopted, mutual assistance must be provided unless its application was specifically reserved; otherwise, the excepted crime will remain a matter for existing or future bilateral agreements.

Another worthwhile topic would be a global definition of what will be considered a "fishing expedition". Until now, while some jurisdictions are willing to look for evidence on behalf of other countries, other domestic laws restrict international assistance to those elements specifically requested. In corruption cases, where funds are disguised through complex corporate structures, an investigation may only prove –through witnesses or documents- a connection with a city where the assets might be located, but

[18] Illicit enrichment is usually defined as a significant increase in the assets of a government official that she or he cannot reasonably explained in relation to her or his lawful earnings during the performance of her or his duties. Many developing countries have established the crime of "*illicit enrichment*" as a substitute for the difficulty of proving corruption offences.

critical details, such as the name of the corporation holding an account, the account number, or the branch of the bank, are in most cases difficult to find out.[19]

The Draft Convention (Art 60.3.) seeks to eliminate this ambiguity by specifying in detail what a requesting country needs to specify in order to obtain cooperation from another party. The location of the property to be seized, frozen or confiscated must be identified only "to the extent possible". In addition, the Convention prescribes a number of preventive measures aiming at speeding up administrative channels of information on financial statements in order to guarantee a more effective cooperation.

b) From the assets to the predicate offence: Recovery through money laundering investigations

The system described above assumes a criminal investigation in which the goal is to discover and capture the proceeds of a crime whose factual circumstances are known. In money laundering terms, such a system presupposes the predicate offence as the starting point of an investigation and its purpose is to unveil the laundering operation in order to be able to hunt down the proceeds.

This may and usually is not the case. On the contrary, it is very unlikely one would become aware that a given public official is the beneficial owner of an account in a secrecy jurisdiction.

[19] The concept of fishing expeditions can also vary within a country. Swiss courts, for instance, will subject each case to a balancing test between the weight of the criminal offence and the impact of the execution of the order in Switzerland. See Swiss Supreme Court, judgments of July 1 1987, *La semaine judiciaire* 1987, 609; March 26, 1990, *JT (Suisse)* 1993, IV, 22 and 21 December 1992, *La semaine judiciaire* (1993) 337. As a result, while in many cases assistance is refused on the grounds that the information provided by the requesting country is not enough, in a few extreme cases, such as the famous Italian "clean hands operation", Swiss authorities accepted a vague connection of the defendant with Switzerland (a flight ticket) and ordered all the financial institutions to look for accounts of which the defendant might be the beneficial owner.

During the nineties, an extensive anti-money laundering campaign sought legislative harmonization among basic money laundering features:

a) the extension of the predicate offences from drug-related offences to any economic crime, including corruption-related offences.

b) the definition of a common group of gatekeepers -mainly financial institutions- charged with a bunch of duties that includes:

i) identification of customers (KYC);

ii) due diligence standards for determine relationships [e.g. politically exposed persons; risky business; business proceeding from risky geographical areas];

iii) record-keeping of such relationships to allow law enforcement a paper trail;

iv) a system for the gatekeepers to report suspicious or unusual transactions to a special centralized unit [Financial Intelligence Units];

c) a system for Financial Intelligence Units to filter the reports and pass the selected cases to law enforcement agencies for prosecution; and

d) a system for Financial Intelligence Units to exchange information with their foreign peers.

The Financial Action Task Force, the global anti-money laundering standard setter, has recently reported that more than 130 counties have already implemented the aforementioned systems.[20]

Those jurisdictions reluctant to implement such systems have been, since 2000, politically and economically pressured to do so by FATF Members, in the framework of

[20] See http://www.fatf-gafi.org/40RecsReview_en.htm at 7.

the denominated “non-cooperative countries and territories” initiative. In three years, 75% of the jurisdictions have adopted comprehensive anti-money laundering systems.[21]

Basically, a comprehensive anti-money laundering system allows law enforcement agencies in the country where the proceeds from corruption were deposited to start a criminal investigation. In other words, the same investigation might be started from the other side of the tangle.

A money laundering investigation would succeed if a link between the assets reported as suspicious and its criminal origin is clearly established. In a transnational case, this requirement will be pursued through international cooperation. However, it is worth noting that proving the criminal origin of laundered assets does not require proof of the facts and circumstances of the predicate offence but rather on its “criminal origin”. As the Swiss Supreme Court stated, “making the effectiveness of money laundering dependent on the outcome of foreign criminal procedures, would be an impediment for combating illegal transfers.”[22]

The Draft Convention heavily relies on this approach. Art 65.1.(a) require Parties to advise their financial institutions on how to identify current and former foreign public officials, their relatives and associates and to increase due diligence standards for such relationships, primarily by checking the sources of the funds.[23]

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[21] The list of “non cooperative” jurisdictions, as March 2003 is as follows: Cook Islands**,** Egypt, Guatemala, Indonesia, Myanmar, Nauru, Nigeria, Philippines, St. Vincent and the Grenadines and Ukraine. See the FATF countermeasures for non-cooperative Countries and Territories Statement at http://www.fatf-gafi.org/pdf/PR-20010622_en.pdf

[22] Swiss Supreme Court: Judgment of September 21, 1994, La semaine judiciare (1995) 308

[23] These provisions follow a soft-law derivation of the know your costumer rule, the “politically exposed persons” standard that has first recommended by the Basel Committee on Banking Supervision [“Customer Due diligence for Banks”, October 2001, available at http://www.bis.org/publ/bcbs85htm.] and adopted by Switzerland in July 2003 [See *Ordinnance de la Commision Federale des Banques relative aux devoirs de diligence des banques et des negociant en valeurs mobilieres en materie de blanchiment*

The Convention also seeks to strengthen controls over private and correspondent banking, two segments of the financial industry though which ill-gotten fortunes are usually laundered (art 65.4). Until now, these issues were only addresses by isolated jurisdictions, soft law standards[24] and self-regulatory standards of the Wolsfberg Group, a private club of the major players on private banking.[25] This will be therefore the first binding international instrument dealing with these crucial matters.

c) The strength of simultaneous investigations

Far from being competing or mutually exclusive perspectives, the above described approaches are complementary modes for carrying out successful corruption investigations. The combination of both approaches allows law enforcement agencies to untangle complex investigations from both sides of the ball. Given the fact that they are concerned with different crimes, both investigations can be carried out in a parallel way, strengthening the flows of information in extremely complex financial transactions. At the end, both investigations will need some information kept in the other jurisdiction. In the Swiss-Peruvian case against Montesinos, for instance, even though the case started

d'argent, de financement du terrorisme et de relations d'affaires avec des personnes politiquement exposees, available at http://www.ebk.admin.ch/e/regulier/index.htm]. In June, 20, 2003, the FATF approved the 3rd Review of its Forty Recommendations. Recommendation 6 establishes that financial institutions must have appropriate risk management systems to determine whether the customer is a politically exposed person; obtain senior management approval for establishing relationships with such customers, take reasonable measures to establish the source of wealth and funds and conduct enhanced ongoing monitoring of the business relationship.

[24] FATF Recommendation 7, as June 20, 2003, establishes that financial institutions should, among other obligations, gather information about respondent institutions to fully understand the nature of the respondent's business and to determine from publicly available information the reputation of the institution and the quality of supervision, including whether it has been subjected to money laundering or terrorist financing investigations; obtain senior management approval before establishing a correspondent relationship and document the respective responsibilities of each institution [See http://www.fatf-gafi.org/pdf/40Recs-2003_en.pdf].

[25] See Wolfsberg Anti-Money Laundering Principles for private banking and Wolfsberg Principles for correspondent banking at www.wolfsberg-principles.com.

being a Swiss money laundering investigation, the information sent to the Peruvian authorities allowed them to accelerate the criminal investigation for the corruption-related offences and, at the end, a switch to the traditional approach took place when the Peruvian authorities issued a confiscation order and asked Switzerland to sent the money back to Peru. This could not have happened, however, without the information having been first reported by the Swiss banks.

The combination of both approaches also increases the likelihood of success in contexts of a low degree of judicial independence, where corruption investigations face political interference by the suspected public officials or their superior in the political party structure. Since foreign authorities' duties are not interfered with by the public official charged with investigating the corruption offence, a suspicious transaction report can be the initial step to unbind a corrupt Government that has packed the national courts with venue over corruption crimes, as is the current case in many Latin American and African countries.

d) Details on confiscation procedures

Having reviewed different strategies for asset recovery investigations, we will examine now what happens once the assets are traced and secured. Confiscation procedures present legal dilemmas that vary according to different legal systems. The Draft Convention does not prefer any special type of confiscation (Art 42). It will be therefore useful to review the main differences that legal systems might present regarding confiscation proceedings:

i) Whether the legal system allows a "property" or "value" confiscation system, or both.

Confiscation can operate *in rem* or *in personam.* The former is called a property-based system and it operates over the property related to (either used in or acquired with the profits from) the crime for which the defendant is convicted, regardless its ownership. The later is called a value-based system; it operates *in personam*, meaning that a confiscation order can be enforced only against property owned by the offender, but not necessarily related to the crime.

In planning a transnational investigation, knowing which system is used by the jurisdictions involved in the case is of great importance for deciding which to look for the exact property obtained through the crime or for any property owned by the defendant.

Most of the jurisdictions where money laundering is a crime provide for a confiscation system. Within OECD countries, Italy and Spain are the only two jurisdictions that have only property-based systems. The remaining members allow both types of confiscation, though in many civil law countries *in personam* systems are subsidiaries of *in rem* systems. While in common law countries "value-based" confiscation is the prevailing system [Australia, Ireland, Hong-Kong, New Zealand, Singapore, United Kingdom, United States], in civil law countries "property-based" confiscation is the principal method of confiscation. Austria and the Netherlands, civil law countries where a "value-based" system of confiscation prevails, are the only exceptions to that rule.[26]

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[26] Cf. FATF, *Evaluation of laws and systems in FATF Members dealing with asset confiscation and provisional measure*s, available at http://www.fatf-gafi.org/pdf/CONFISC_en.pdf.

ii) Whether a conviction is required

Criminal forfeiture is usually conceived of as a criminal sanction accessory to the principal punishment (fine or prison). Under this concept, the transfer of property can only be ordered after conviction. Some jurisdictions, however, also allow for confiscation outside criminal proceedings, as either civil or administrative procedures. Provided certain conditions exist [probable cause to believe that the property represents the proceeds or instrumentality of a crime, impossibility to locate the defendant for a specific period of time] the United Kingdom, the United States, Austria, Germany and Ireland allow different civil or administrative confiscation proceedings regardless whether a conviction was obtained in a criminal court.[27] Whether both systems can function simultaneously without violating double jeopardy is a question to which the courts of the aforementioned jurisdictions are constantly confronted with. [28]

iii) Standards of evidence and Burden of Proof

The standard of evidence to obtain a confiscation order is the same standard applicable to the sentencing hearing in each country, usually the most stringent available [proof beyond a reasonable doubt]. Those jurisdictions that allow civil forfeiture require less stringent standards of evidence, usually a preponderance of the evidence, for these proceedings.

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[27] Cf. FATF, *Evaluation of laws and systems in FATF Members dealing with assets confiscation and provisional measures*, available at http://www.fatf-gafi.org/pdf/CONFISC_en.pdf.

[28] In *US v. Ursery* 116 S. Ct. 2135 (1996) the Supreme Court ruled that civil forfeiture is not "punishment" for double jeopardy purposes. For a discussion on double jeopardy and the consequences of the US civil-criminal forfeiture systems see Steiker, Carol, "*Punishment and procedure: punishment theory and the criminal-civil procedure divide*", 85 GEOLJ 775 (1997). For a discussion about human rights and confiscation systems, see Stessens, G, *supra*, at 60-82.

The burden of proving that the assets derive from crime is placed on the prosecution. However, given the difficulty of such proof, most countries allow some type of shifting of the burden. Generally speaking, once the Government has reached an intermediate standard (lower than the standard for criminal conviction but higher than the standard required for preventive measures) the burden shifts to the defendant. Subject to different rules, this is the case of United Kingdom, United States, Germany, France, Hong Kong, Italy, Denmark, Belgium, Austria, Greece, Ireland, New Zealand, Singapore and Switzerland.[29]

v) Link between conviction and confiscation

In theory, in "property-based" confiscation systems, confiscation orders can only be issued against property that has been proven to be related to the already convicted crime. However, where the system permits the burden of proof to be reversed, the lower standard placed on the prosecution sometimes inhibits the defendant for proving the legitimate origin of property, when it comes, e.g., from other crimes. In such cases, property related to crimes other than those for which defendant has been convicted, can be confiscated, regardless whether the system is "property" or "value"-based.

vi) Third-party rights

All legal systems provide some rules to protect *bona fide* rights of third parties. As a general rule, while "value"-based confiscation systems - where any property of the defendant can be subjected to forfeiture- tend to relax third party rights, "property"-based

[29] Cf. FATF, *Evaluation of laws and systems in FATF Members dealing with assets confiscation and provisional measures*, available at http://www.fatf-gafi.org/pdf/CONFISC_en.pdf.

system -where confiscation is allowed *in rem,* tend to give stringent protection to third parties.[30]

II. Asset recovery through civil proceedings

The asset recovery provisions of the UN Convention are mainly related to the criminal law systems we have already reviewed. There are, however, a couple of provisions requiring parties to establish civil or administrative proceedings either to recover assets or to assist criminal proceedings.

Art 67, titled "Direct Recovery of assets" directs parties to allow another party to participate in legal proceedings to demonstrate ownership of assets located in its territory either by presenting evidence or ownership or by presenting a final judgment of another jurisdiction establishing ownership. Civil proceedings must be also instituted by parties in order to determine ownership prior to ordering confiscation.

Art 45 deals with the civil remedies parties must institute for compensating persons or entities who suffered damage as a result of an act of corruption. In addition, Art 44 obligates parties to adopt measures to address consequences of corruption, such as annulations of contracts or withdrawal of concessions.

Finally, Art 42.8 establishes an interesting civil proceeding for helping confiscation actions. It mandates parties to empower their courts to order the availability of banking, financial or commercial records. This might be an interesting instrument for assembling incomplete pieces of complex financial puzzles.

[30] Stessens, G., *supra*, at 76-79.

As a matter of fact, in the Nigerian case against Abacha, English courts granted a Bankers Trust injunction, an interlocutory discovery order obligating Banks to disclose the records of the Abacha family without notice to their clients. Such civil actions require a strong basis for thinking that the money in the third party bank is the claimant's money; that the claimant gives an undertaking for damages and expenses to which the bank is put (which may be a sworn statement when the claimant is a Government); and that the documents disclosed by the bank are used only for the purpose of tracing the money and for no other purpose. When the plaintiff is a State, sworn undertakings usually suffice. These civil proceedings are quick ways of obtaining useful evidence for parallel criminal actions.

III. Disposal of Confiscated Assets

The U.N. Convention also seeks to set up general rules on what to do once proceed from acts of corruption has been confiscated.

This is a sensitive issue. Confiscation systems were born tied to the criminalization of money laundering and money laundering, in turn, was first imagined as a way to combat drug trafficking and organized crime. In such a context, confiscated proceeds usually came from victimless crimes and were therefore destined to increase the budget of the law enforcement agencies who participated in the case. Asset-sharing, first regulated in the US, was internationalized by FATF, Recommendations 38 and 39, and followed by OECD countries in the light that it provides a good financial incentive for strengthening international cooperation. In regulating the disposal of confiscated assets in transnational cases, international anti money laundering instruments have avoided

conflicts of laws on this matter by given priority to the domestic law of the country where the confiscation order had been enforced (*locus regit actum* doctrine). [31] Although almost all jurisdictions recognized some kind of third parties rights over confiscated assets, they differ on which system –third parties disposal or assets sharing- prevails over the other. As a result, competing claims usually arises among victims seeking compensation, new Governments looking for recovering public funds and other States looking for sharing assets that were confiscated with the help of their law enforcement agencies.[32]

Although the system will be subjected to the domestic laws of signatories, the U.N Convention aims at finishing these situations by establishing guidelines for disposing confiscated assets. Proposals vary on whether an asset-sharing system or compensation of victims, including States should prevail.[33] In any case, signatories will be obligated to regulate both asset-sharing and compensation systems.

3. <u>Conclusion</u>

The Draft U.N. Convention Against Corruption may not signified a conceptual revolution on asset recovery but rather the fullest possible extension of ideas and legal practices coined along the last 15 years. It will be the first binding legal instrument in putting together unilateral steps already taken by some OECD jurisdictions and by other

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[31] Most OECD Countries allows international asset-sharing procedures usually subjected to conditions established in mutual legal assistance agreements. Some jurisdictions restrict sharing and receipt of assets to cases where assistance is pursuant to a request of freeze/seize or confiscate assets and it does not extend to situations where the only assistance provided is of investigative character. See FATF Evaluation of laws and systems in FATF Members dealing with asset confiscation and provisional measures, paragraph 37.

[32] In the case of Marcos, for instance, a class of 10.000 victims of torture and other human rights violations that were seeking compensation in the US sought an injunction against the Philippines from entering into "agreements" with the Estate of Ferdinand Marcos to transfer to the Philippines assets of the Estate that the Philippines asserts were looted from the Philippines treasury. See 94 F.3d 539, 9th Cir (1996).

[33] See the different options stated for art 61.

regional organizations. It will also incorporate anti-money laundering criteria that have been addressed only by financial institutions, in non-enforceable agreements.

This is a challenging goal, not only because countries from the most diverse legal traditions will agree on a set of common practices which proved to be effective among OECD Countries, but more importantly because the Convention adequately deals with the tension between international cooperation and sovereignty. Three years of negotiations have served to create a consensus on the necessity of cooperating in the fight against corruption.

For developed countries, where the rule of law system is highly effective, the enactment of legislation in compliance with the Convention will mean major financial centers will be prepared to help developing countries in tracing and confiscating assets.

For developing countries, international cooperation in the fight against corruption will generate greater possibilities for consolidating independent judiciaries.

This does not mean that the provisions will be effective. Effectiveness, as usual, will depend upon individual jurisdictions, courts and civil societies. However, the instrument will provide a consolidated framework in which there is no longer room for the legal obstacles that until now have obstructed anti-corruption efforts.

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PAGE ONE

U.S. Battles Europe to Narrow A Treaty Banning Corruption

By BOB DAVIS
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON -- The U.S. and Europe are battling over an ambitious global treaty to ban corruption, largely because Europe wants the pact to cover businesses and the U.S. wants it restricted to governments.

The conflict comes at a time when the U.S. and Europe are redefining their relationship after the deep splits of the war in Iraq. Many European officials remain dubious about the U.S. commitment to multilateral accords, especially after the Bush administration rejected international pacts on global warming and a war-crimes court. U.S. officials suspect that Europe wants to tie down the U.S. in a web of agreements that would limit Washington's power.

In that atmosphere, the corruption accord has taken on significance both for its subject matter and for its symbolism. Should the negotiations collapse, it will be another signal that the U.S. and Europe will have trouble working together even on issues of mutual interest. That same uncertainty surrounds the stalemated global trade talks, which are languishing because of U.S. and European differences over agriculture and intellectual property.

The U.S. position represents a striking turnaround from several years ago, when the Clinton administration pressed a reluctant Europe to crack down on bribes. The U.S. has long campaigned against foreign corruption, starting with the Foreign Corrupt Practices Act in 1977, which barred bribes to foreign officials.

But negotiators for the Bush administration object to the broad, sweeping nature of the proposed pact, which goes well beyond illicit payments to bureaucrats. Among the provisions being debated are prohibitions on bribery, favoritism, false documents and other corrupt practices -- among businesses as well as government agencies -- and requirements that political parties disclose their sources of financing. Nations would grade each other on their compliance with the provisions of the accord.

The U.S. wants the convention to be limited to subjects such as government corruption and recovery of stolen assets by the likes of Iraq's Saddam Hussein. Only such a limited pact could be finalized by an August deadline set for the negotiations, U.S. negotiators say. European Union nations privately accuse the Bush administration of trying to dilute the pact. They snicker that the U.S. has made ad hoc alliances with China, Russia and other nations that are notoriously weak on corruption to oppose new disclosure rules on political parties. U.S. officials say the Europeans make similar pacts.

Bush Justice Department spokesman Bryan Sierra says the U.S. "remains committed to the fight against corruption." U.S. officials criticize the provisions Europeans seek as too vague, too unsettled legally or simply impractical. They especially object to European plans to include business corruption in the pact, saying that many practices viewed as corrupt in government aren't improper in business, and that business customs differ among countries. Giving a salesman a gift worth $200 may be customary in Asia, for instance, but could be considered a bribe in the U.S.

The negotiations, being held in Vienna under the auspices of the United Nations, have largely been ignored by businesses that could be affected. That's likely to change as discussions over what's called the U.N. Convention Against Corruption -- "convention" is U.N.-speak for treaty -- enter the final rounds.

"It's problematic," says William Reinsch, president of the National Foreign Trade Council, a Washington-based trade group of large exporters. "People in other countries could sue American companies in court elsewhere claiming that [U.S. companies'] actions contravened the convention, even if that doesn't contravene U.S. law." People who lose business deals, he worries, could use the treaty to sue their rivals for alleged corrupt practices.

The International Monetary Fund and World Bank, among others, have argued that corruption has become a serious impediment to economic development. The Bush administration says it wants to base economic aid, in part, on a country's willingness to end bribery, patronage and nepotism.

If the Bush administration gets blamed for breaking up another international effort it could boost the ability of Democratic rivals to portray the White House as obstructionist. "The technique of embracing something and watering it down is something this administration uses to look good," says Leon Fuerth, who was Vice President Gore's chief foreign-policy adviser. Bush officials say they are acting in good faith. If the treaty is "so broad, so novel, so pie-in-the-sky, it can't be effective," says a U.S. official who also worked in the Clinton administration.

Although U.N. conventions are generally approved by consensus, the U.S. and Europe invariably take lead roles. Their agreement is critical for a treaty to succeed; developing nations often won't sign on to a treaty if it isn't binding on the world's wealthiest nations. Before a U.N. convention becomes law in the U.S., it must be ratified by a two-thirds vote of the Senate. Other nations also need parliamentary approval.

European negotiators say businesses sometimes make illicit payments among themselves and that those corrupt business practices should be barred. The pact would bar bribes paid from one business to another and limit the lobbying activities of former government officials, among other provisions. U.S. negotiators counter that that's too broad. A small-business owner, for instance, may hire his cousin for an important job because of family relations; if a U.S. government agency tried that, it would be barred as nepotism.

The U.S. and Europe also split over whether political parties should be included. A European proposal would require countries to bar political parties from financing campaigns with illegally obtained funds and to disclose large donations. The U.S. says that funding issues are too complex for the pact because political systems vary so widely.

Generally, the U.S. has tried to make the provisions of the convention less restrictive. An October 2002 U.S. proposal would require nations to have anticorruption regulations but without specifics. The rules would only have to be "consistent with fundamental principles" of domestic law and other provisions of the U.N. convention. "In reality, a country isn't obliged to do anything," says a European negotiator, who says that China is backing the U.S. approach. The U.S. says it's willing to negotiate further.

The U.S. spent decades lobbying European nations to change their laws so foreign bribes couldn't be deducted as business expenses. At Clinton administration urging, the Organization for Economic Cooperation and Development, which includes the U.S. and European nations, adopted a strong antibribery treaty in 1999. The Clinton administration looked at a U.N. convention as a next step toward banning government corruption world-wide, but the Bush administration objected to many provisions in an initial draft pact in 2002.

Write to Bob Davis at bob.davis@wsj.com

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Hyperlinks in this Article:
(1) mailto:bob.davis@wsj.com

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July 19, 2003

PRELIMINARY COMMENTS ON PART III [CRIMINALIZATION, SANCTIONS AND REMEDIES, CONFISCATION AND SEIZURE, JURISDICTION, LIABILITY OF LEGAL PERSONS, PROTECTION OF WITNESSES AND VICTIMS AND LAW ENFORCEMENT] OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, VERSION 4

Lucinda A. Low
Miller & Chevalier Chartered

Introduction

This paper comments preliminarily on the provisions of Part III of Version 4 of May 12, 2003 of the Draft United Nations Convention Against Corruption.[1] Although the most detailed focus of the discussion herein will be on the provisions dealing with trading in influence (Article 21), private sector bribery (Article 32), and whistleblower protection (Article 43 bis), an attempt will be made to touch on other significant articles as well, including illicit enrichment, jurisdiction, the domestic and transnational bribery offenses, immunities, improper benefits, and collateral consequences.

In general, Part III attempts to criminalize a wide array of corrupt practices. In its scope and approach, it is more consistent with the OAS and CoE (Criminal Law) Conventions than the OECD Antibribery Convention, although its provisions appear to go beyond even the wide scope of those conventions. And as others in this Working Group have pointed out (see, e.g., the analysis prepared by Margaret Ayres) some of the proposed offenses are exceedingly broadly conceptualized at present and the scope of their full application is unclear.

Part III articulates an array of potential obligations, from the mandatory (e.g., "shall adopt"), to the permissive ("shall consider adopting", or other formulations. Although states apparently may take reservations to the Convention's provisions without limitation, that does not mean that it makes sense to have all of the offenses be mandatory. Some of the offenses appearing in the Draft Convention are not widely accepted by states, and as to those, it is appropriate to consider a softer implementation obligation, even recognizing the scope of covered offenses is important to the scope of the mandatory cooperation provisions in Part IV.

The provisions of Part III of the Draft Convention also contain a wide array of qualifiers to the criminalization obligations, from none, to those limited to consitutional constraints, to those limited by a broader array of legal constraints. While some of these qualifiers are necessary given the variety in national criminal legal systems, it will be important to standardize and limit these qualifiers as much as possible.

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[1] Revised draft United Nations Convention against Corruption, A/AC.261/3/Rev.4, to be considered at the Sixth Session of the Ad Hoc Committee for the Negotiation of a Convention against Corruption in Vienna, 21 July-8 August 2003 (hereinafter the "Draft UN Convention" or "Draft Convention")

Virtually all of the offenses require intent; the Draft Convention (Article 38 ter) does allow intent to be inferred from circumstances, however, as discussed below.

The jurisdictional provisions of Article 50 cut across all the prescribed offenses and thus merit careful study.

Article by Article Discussion

- **Article 19: Bribery of National Public Officials:** This is the offense of domestic bribery. It is defined in a way that is basically consistent with other conventions that include this offense. A key issue here is the scope of definition of public official in Article 1. It will be important to include legislative and military officials (both are bracketed at present) and clarify the applicability to persons performing public functions. Especially if private sector bribery is ultimately excluded, it will be important to have a definition of state owned or mixed enterprises which is fairly broad in scope.[2] There also appears to be an issue whether an autonomous definition of public official will apply or not. US law and the OECD Convention adopt an autonomous approach; the absence of such an approach in the CoE Criminal Law Convention is one basis on which the ABA opposed US ratification of this Convention. Although this article is consistent with other international conventions in its basic formulation, it must be pointed out nonetheless that its scope is narrow: it does not encompass authorizations, and it is limited to action or inaction in the exercise of official duties.

- **Article 19 bis: Bribery of Foreign Public Officials or Officials of Public International Organizations:** This article is basically parallel, on the supply side, to the domestic bribery provision. The same issues that apply with respect to the definition of public official in Article 1 arise here from the definition of "foreign public official" in Article 1. There is an obtain or retain business qualifier not present in the domestic bribery article that is consistent with the US FCPA and other international conventions and is unobjectionable. There is a non-mandatory demand side provision (non-mandatory presumably because of the jurisdictional reach issues that arise in attempting to criminalize the activities of officials who are not one's own).

- **Article 21: Trading in Influence:** This could be an extremely controversial provision to the extent it reaches, as the CoE Criminal Law Convention appears to do, into the realm of lobbying. However, this article is written in non-mandatory terms and, except for the "favourable decision" language discussed below, appears to be qualified sufficiently in the concept of the offense so as to make it a subject of less concern than its CoE counterpart.

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[2] If if were thought desirable to catch former state-owned that had been privatized, or partially privatized enterprises where the government retained some equity or provided some financial support but did not have majority ownership or control, this could be accomplished through the definition of public official.

The obligation is to "consider adopting" trading in influence measures. These measures are defined in (a), the supply side provision (there is a parallel demand side provision in (b)), as "[t]he promising, offering or giving, directly or indirectly, to a public official or any other person of any undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or a public authority of the State Party any undue advantage or any favourable decision for the [original instigator of the act[the offender[or for any other person, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result".

In terms of U.S. law, it should be noted that the FCPA and domestic bribery legislation, 18 USC Section 201 as well, contain an "influence" prong in addition to the action/inaction in relation to duties prong, so that benefits given to an official, either directly or indirectly, that are given corruptly in order to obtain influence over an official action or decision, can violate the FCPA or domestic bribery standards, provided the acts occur in a business context. In addition, general principles of US criminal law with respect to intent crimes lead to the same result as provided in the final clause of this draft, that is, the crime can be considered completed irrespective of result causation, since it is an intent crime. The only seriously troubling language of this provision appears to be the absence of any qualifier on "favourable decision" to reflect the same concept as the preceding "undue advantage" language". It might be preferable simply to eliminate the word "favourable" so that the language would read "undue advantage or decision", or, "undue advantage, action, or decision." Since this clause as currently drafted only applies to "public officials" and not "foreign public officials" it would appear not to apply in the transnational as opposed to the purely domestic context.

- **Article 22: Embezzlement, Misappropriation, or Other Diversion of Property by a Public Official:** This article would appear to be non-controversial.

- **Article 23: Concealment:** Ditto.

- **Article 24: Abuse of Functions:** Ditto.

- **Article 25: Illicit Enrichment:** This is an offense that raised constitutional issues for the U.S. in the context of the OAS Convention because its apparent shifting of the burden of proof to the defendant to prove lawfulness of income. The US did not have to take a reservation to the relevant provision of the Inter-American Convention upon ratification because of an "escape clause" built in to the article, but it did make a declaration relative to the provision that noted other ways of approaching this issue in U.S. law, including through the "net worth method of proof" procedure in U.S. tax law. The draft offense in the UN Convention is very similar to that contained in the OAS Convention. The drafters have not yet decided whether this provision is to be mandatory or optional. The obligation will in any event be "subject to the constitution and fundamental principles" of each State Party's legal system (which would seem to reduce if not eliminate the need to make the provision optional), so the U.S. can invoke this escape clause much in the same way it did in the OAS Convention context. It may wish to consider making a declaration

similar to what was done in that context.

- **Article 26: Improper Use of Classified or Privileged Information:** No issues noted.

- **Article 28 [Article 27 is deleted]: Improper Benefits:** This is an interesting and possibly new measure for the international corruption convention arena (such measures exist in national laws, however) that would criminalize the direct or indirect collection by a public official "of any article of monetary value in undue quantities or in quantities exceeding those established by law, as a tax or contribution, surcharge, revenue, interest, salary, or remuneration, for his or her own benefit or for that of a third party." It would thus seem to be targeted at informal and often extortionate assessment practices by public officials, most abused in the security area. The entire language is bracketed at present. If it is retained, and it may be a real contribution to the field to do so, it needs to be tightened up in a couple of important respects: "undue quantities" as a disjunctive to "quantifies exceeding those established by law" may raise the risk of unjustified criminal claims against public officials from persons who believe their tax assessments are excessive. The "third party" language at the end is important, but should not include the government.

- Articles 29-31: Deleted or moved.

- **Article 32: Corruption in the Private Sector:** From the text of the Draft Convention, it appears that it is as yet unresolved whether this should be a mandatory or permissive provision, or whether it should be retained at all. It is also apparently an open question whether it would apply in the domestic as well as the international spheres. To the extent private sector bribery became a mandatory obligation it might require the adoption by the U.S. of new federal legislation criminalizing purely private sector bribery. Currently, 37 states apparently have some form of commercial bribery legislation, although this may not include many key commercial states such as New York and California. Federal prosecutors can use existing authorities, such as mail and wire fraud statutes, and interstate travel in aid of racketeering, to reach some commercial bribery, as was the case in the recent Salt Lake City Olympics prosecutions, so there is an argument that the end can be reached through alternative means, but this may not be enough depending on how this provision comes out in the final negotiations. Moreover, given the lack of state uniformity and universality of obligation, it is difficult to argue that existing federal authorities, coupled with state laws, are sufficient to reach all commercial bribery.[3]

  It is not only from a U.S. federalism perspective that this provision raises concerns, however. Perhaps the more important question at the negotiating table is whether this issue should be addressed at this time. Many would argue that public sector bribery

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[3] For publicly-traded companies, the books and records and internal control provisions of the FCPA, which apply in the domestic as well as the international context, provide a means of controlling private sector bribery by "issuers". The provisions of Sarbanes-Oxley applicable to the governance of issuers are likewise not limited to public sector bribery.

should be the priority issue because of the public harm that ensues. Given that many countries have yet to effectively implement and enforce public sector bribery statutes, expansion to private sector bribery may dilute and hamper effective enforcement further. We are aware in saying this that a number of countries, e.g., in Eastern Europe, already criminalize private bribery, and that the CoE Criminal Law Convention calls for it to be criminalized as well, although a country may take a reservation to this obligation. We also recognize that in some countries' eyes, extensive privatization has made the control of private sector bribery a key priority. We are also aware that in the EU, there is a movement to require states to criminalize private sector bribery. However laudable the goal of eliminating private sector bribery, there remains the question of whether it is the right step at this time, when so much remains to be done to address the problems of public sector corruption. We would therefore encourage the exploration of less expansive means for covering privatized entities: would it be possible, for instance, to cover entities privatized within a certain time period, say 5 or 10 years? Alternatively, a broad definition of mixed enterprises might accomplish this goal (i.e., not simply cases where the state owns or controls an entity but where it participates to any extent in the equity, management, or funding of the enterprise, or where the entity performs public functions).

- **Article 33: Laundering of the Proceeds of Corruption:** See Schroth Comments on this Article. I would only note that the inclusion of corruption-based money laundering offenses is consistent with the approach taken in other international conventions.

- **Article 34: Accounting Offenses:** See Comments of Margaret Ayres, expressing concern as to the breadth of this provision. It does not appear to be bracketed.

- **Article 37: Obstruction of Justice:** No concerns noted.

- **Article 38: Liability of Legal Persons:** This is extremely important. It should be noted that the Draft Convention article does not required states to establish corporate criminal liability, as opposed to the principle of corporate liability, but allows the liability to be criminal, civil or administrative in character. The OECD's formulation as to corporate sanctions ("effective, proportionate and dissuasive") is picked up here and seems to have become the preferred international formulation.

- **Article 38 bis: Participation and Attempt:** Under this formulation, criminalization of participation would be mandatory, while criminalizing attempts and preparation for offenses would be optional. It is not entirely clear why this is so, but probably stems from differences in national laws currently.

- **Article 38 ter: Knowledge, Intent or Purpose as Elements of an Offense:** This article, as noted in the introduction, would allow for intent to be inferred from circumstances. This is consistent with the U.S. "willful ignorance" standard" that is used in many criminal contexts, including corruption and money laundering. It would be useful to go beyond this and develop a specific standard of third party liability that would

include willful ignorance.

- **Article 39: Specialized Authorities:** No comments noted.

- **Article 40: Prosecution, Adjudication, and Sanctions:** This article contains a number of important concepts, including that sanctions (including early release or parole) should take into account the gravity of an offense, the disqualification of offenders from holding public office, and removal or suspension rights.

  Perhaps the most troublesome provision is paragraph 2, which deals with the issue of immunities. As currently written, it requires only that states "maintain, in accordance with [their] legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, for effectively investigating, prosecuting and adjudicating offenses established in accordance with this Convention". It thus appears to give states virtually unfettered discretion regarding immunities. In recent years, it has become increasingly obvious that immunities are a significant barrier to prosecution in many countries and are being manipulated so as to shield even former officials from suit (for example, by giving them figurehead positions in international organizations after they leave national office that confer continued immunity). While there is obviously some legitimate need for immunity from prosecution for sitting officials in order to enable them to perform their duties, these provisions would seem to go too far. This concern is reinforced by the reservation in favor of domestic law contained in paragraph 9 of this article. Consideration should therefore be given, if the "balance" concept is retained, to adding language that would preclude continued immunity once an official leaves office for activities conducted while in office, even if the official subsequently secures another position which carries immunities, or other anti-abuse language.

- **Article 40 bis: Statute of Limitations:** No comments noted.

- **Article 42: Freezing, Seizure and Confiscation:** Discussed by Peter Schroth. I agree with his concern about the "destined for use" language in paragraph 1(b) of this Article, and that it should be deleted. I do not agree with his comment regarding bank secrecy in paragraph 8. Paragraph 9, dealing with demonstration by an offender of the lawful origin of the alleged proceeds of crime, would seem to raise the same issues as the illicit enrichment article unless the "offender" (not a defined term) is meant to refer to someone who has been convicted of an offense. If it is not, then there should be an escape clause that parallels that in Article 25 of the Draft Convention for illicit enrichment (the current clause is written in optional terms ("may consider") and is subject to principles of domestic law and with the nature of judicial or other proceedings, so it is a less stringent standard). The saving of the rights of bona fide third parties in paragraph 10 is extremely important.

- **Article 42 bis: Bank Secrecy:** The inclusion of this provision is extremely important, in my view. It is also useful to recall that the presence of similar provisions in the OAS

Convention were one of the main reasons that Convention gained support of United States.

- **Article 43: Protection of Witnesses, Experts and Victims:** This article is written in mandatory terms and is very important.

- **Article 43 bis: Protection of Reporting Persons:** This is a whistleblower protection provision. However, it is written in considerably weaker, non-mandatory, terms than the preceding article: "shall consider….appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds". This article should be strengthened. Given the hostility to whistleblowing in many countries, this type of provision is unlikely to be effective. The Convention should recognize the need to strengthen incentive for whistleblowing, in light of the difficulty of uncovering corruption offenses. "Reasonable grounds" in particular suggests an objective standard which could result in second guessing the decision of a person who has acted in good faith; it should be deleted or retained only in the disjunctive.

- **Article 44: Consequences of Acts of Corruption:** This is a very important article that appears to break new ground in international anticorruption conventions. It deals with the obligation of states to address consequences of corruption, including through the annulment or rescission of contracts, withdrawal of concessions, or other similar instruments that may have been tainted by corrupt practices. It is written in mandatory terms, but states are directed to give due regard to the rights of third parties acquired in good faith—a key qualification—and the obligation is subject as well to fundamental principles of the state's domestic law. Inclusion of this type of provision could provide a significant deterrent to corrupt practices in international and domestic business. It would not be likely to require any change to U.S. law. Its retention, as qualified, should be supported.

- **Article 45: Compensation for Damages:** Discussed by Margaret Ayres. Note that this does not have a "fundamental principles" qualification, in contrast to certain other articles, only a "principles" qualification.

- **Article 46: Measures to Enhance Cooperation with Law Enforcement Authorities:** This provision requires states to encourage voluntary disclosures by persons who have participated in the commission of an offense, requires states to consider mitigating the punishment of persons who have provided substantial cooperation, and even of providing them with immunity. This would not require any changes to US law, although there is a strong argument that current policies of US enforcement officials do not provide adequate incentives for voluntary disclosures since it is impossible to predict the extent to which penalties will be reduced. Moreover, the granting of immunity, a practice in some areas of federal enforcement, is not generally used in this area.

- **Article 47: Cooperation Between National Authorities:** This Article encourages cooperation between national authorities, including the provision of information on a

country's own initiative. This is a good idea.

- **Article 48 bis: Cooperation Between the Private Sector and National Authorities:** This article seems to be focused particularly on encouraging financial institutions to cooperate with enforcement authorities. This is consistent with the policing role that anti-money laundering laws have forced such institutions to take in recent years. There is no reference to privacy here, which may be questioned. (See comments of Peter Schroth.)

- **Article 49: Criminal Record:** No comments noted.

- **Article 50: Jurisdiction:** In general, the proposed provisions regarding jurisdiction, which would apply to all of the offenses established in this part of the Convention and are therefore of broad significance, are consistent with those established in other conventions. They reflect concepts of territoriality, nationality, habitual residence, and the protective principle (against the state).

  A couple of concerns arise, however: first, there seems to be some interest in qualifying nationality jurisdiction based on sovereignty; and second, all of the provisions except perhaps those of paragraph 2(c) seem to require that the entire offense be committed within the state for it to have jurisdiction. This may be unrealistic and inappropriate in relation to offenses such as transnational bribery that typically do not occur entirely in a single jurisdiction. This article reaffirms the principle of ut dedere ut judicare with respect to nationals, consistent with other conventions. It contains a provision (in paragraph (5)) dealing with the possibility of multiple states having jurisdiction, but does not go beyond the provisions of the OECD Convention in this arena. Even though concerns about adequate enforcement exist, it may not be too early to begin to articulate standards of primary interest, which should govern priority of prosecution, to avoid multiple proceedings internationally.

Conclusion

The ambitions of the Draft Convention to cover the anticorruption universe are apparent from Part III. Particularly troublesome are the attempt to address private sector bribery, trading in influence, the breadth of accounting offenses, some of the confiscation provisions, and the establishment of private rights of action for damages.

MEMORANDUM

To: ABA Working Group on the Proposed UN Convention against Corruption

From: Lisa Landmeier
Nisa Gosselink

RE: Comparison of Mutual Legal Assistance provisions

Date: 7/8/03

This memorandum compares the language of the mutual legal assistance provisions of the draft UN Convention against Corruption with similar provisions in the OECD and OAS Conventions. The relevant provisions appear at Art. 53 of the UN Convention, Art. 9 of the OECD Convention and Art. XIV of the OAS Convention.

The revised draft of the UN Convention against Corruption differs from both the OECD and OAS Conventions. These differences are due, in large part, to the length of the mutual legal assistance provision in the UN Convention. The UN Convention addresses the "process and procedure" of mutual legal assistance in much greater detail than either the OAS or OECD Conventions.

Congress will likely ratify this Convention subject to conditions similar to those in the ratification of the OECD and OAS conventions. The US ratification of the OECD Convention provided that when the US received a request for assistance from a country with which it had bilateral treaty for mutual legal assistance, that treaty would provide the basis for responding to the request.[1] In other words, any bilateral treaty in force would supercede the OECD Convention. Ratification of the OAS Convention contains similar language.[2]

General Obligation:

- OECD, Art. 9(1): Parties are obliged, "to the fullest extent possible" to provide "prompt and effective legal assistance" to each other in connection with criminal and non-criminal proceedings and criminal investigations that relate to any offenses within the scope of the Convention.
- OAS, Art. XIV(1) requires state Parties to accord each other "the widest measure of mutual assistance" in processing requests from competent authorities investigating and prosecuting acts of corruption covered by the Convention.
- UN, Art. 53(1) requires Parties to accord each other the "widest measure of mutual legal assistance" in connection with proceedings related to offenses covered by the Convention.

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[1] Lucinda A. Low and Michael Burton, The OECD, OAS, and Council of Europe Antibribery Conventions: New International Standards and Their Implications, Sept. 14-15, 2000, at 41.
[2] Id.

Common Provisions:

- The obligation to provide legal assistance is conditioned on conformity with a Party's domestic laws, relevant treaties and other international arrangements.
- Both the OAS and OECD Conventions allow Parties to refuse to cooperate based on national sovereignty. Neither recognizes national security as a reason but US ratification of both contained a "public policy" clause allowing refusal to cooperate where the assistance sought would prejudice its essential public policy interests, including cases where there is specific information that a senior government official of the requesting nation who will have access to the information is engaged in a felony (including facilitating drug production or distribution).[3] UN Convention, Art. 53(21)(b) allows the requested Party to decline to cooperate if execution would "prejudice its sovereignty, security, public order or other essential interests."
- OECD, Art. 9(3) and UN Convention, Art. 53(8) provide that Parties may not decline to provide mutual legal assistance based on bank secrecy. This premise is also in the OAS Convention, but limited in that it only applies "in accordance with the Requested State's domestic laws . . . ." In the OECD, its effectiveness is not limited in any way.
- OECD, Art. 9(1) and UN Convention, Art. 53(16) provide that Parties may request additional information from the Party requesting assistance if necessary for the execution of the request. The OECD provides that these requests shall be made without delay. The OAS Convention does not address this issue.

Unique Provisions:

- OAS, XIV(2) requires Parties to provide each other "the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating, and punishing acts of corruption." Specific examples of such "technical cooperation" include exchange programs between competent authorities and citizen participation in anticorruption efforts.
- OECD, Art. 9(2): where a party conditions mutual legal assistance on the existence of dual criminality, the OECD Convention deems this requirement fulfilled as to covered offenses. Although the OAS Convention does not address this issue, it obliges each Party to criminalize covered offenses. UN Convention, Art. 53(9) allows Parties to decline to cooperate in the absence of dual criminality, however, a Party may provide assistance at its discretion irrespective of whether the conduct constitutes an offense under the requested Party's domestic law.
- OAS, Art. XVII limits the Parties' ability to exercise the political offense exception to mutual legal assistance cooperation by stating that the mere allegation of a tie between the corrupt act and politics in and of itself is insufficient for invoking the exception.
- UN Convention, Art. 53(5) and (6) allow Parties to transmit relevant information to other Parties without prior request and provides for the confidentiality of that information if necessary. However, the receiving Party may disclose exculpatory information with prior notice to the transmitting Party.

[3] Id.

- UN Convention, Art. 53(10): a State Party may request the transfer of a person detained or in jail in another state if that person freely gives his/her informed consent, the authorities of both Parties agree and subject to conditions specified in Arts. 53(11) and (12). The safe conduct of the transferee expires when that person meets the criteria outlined in Art. 53(27).
- UN Convention, Art. 53(13) and (14) provide that each Party shall have a designated authority which shall receive and process all requests for mutual legal assistance as well as content required in a request for mutual legal assistance.
- UN Convention, Art. 53(18) allows an individual one state to be heard as a witness or expert by another state through video conference if it is not possible or desirable for the person to appear in the requesting state.
- UN Convention, Art. 53(19) prohibits the use of requested material for purposes other than those stated in the request without the prior consent of the requested Party.
- UN Convention, Art. 53(20) allows the requesting Party to require the requested Party to keep the fact and substance of the request confidential.
- UN Convention, Art. 53(22) prohibits refusal to cooperate on the sole ground that the offense also involves fiscal matters.
- UN Convention, Art. 53(23) provides that Parties shall give reasons for any refusals to cooperate.
- UN Convention, Art. 53(24) specifically provides that the requested Party shall execute the request as soon as possible and take account of deadlines suggested by the requesting Party. It also provides for the requesting Party to make reasonable requests as to the progress of the measures taken by the requested Party and for the requested Party to reply.
- UN Convention, Art. 53(25) allows postponement of mutual legal assistance if such assistance would interfere with an ongoing investigation, prosecution or judicial proceeding.
- UN Convention, Art. 53(26) requires the requested Party to consult with the requesting Party prior to refusing to provide assistance pursuant to Art. 53(21) to determine if such assistance may be granted subject to terms and conditions.
- UN Convention, Art. 53(28) addresses costs which are generally borne by the requested Party. If there are substantial or extraordinary costs, the Parties shall consult.
- UN Convention, Art. 53(29) provides that the requested Party shall provide copies of government records available to the general public and may, at its discretion, provide copies of records not available to the general public.