

Provisions of Concern
Revised Draft United Nations Convention Against Corruption
Fifth Session Vienna, March 10-12, 2003

Stated Purposes:

1. “To promote [propagate] [encourage] and strengthen measures to prevent [detect] combat [and eradicate] [more efficiently and effectively] corruption [in all its forms] [and criminal acts and other offenses related specifically to corruption]”...
2. “To promote, [encourage] facilitate and support international cooperation in the [prevention of and] fight against corruption, including the return of the proceeds of corruption [to their countries of origin] [to their original sources]”
3. “To promote integrity, ethical conduct [the rule of law, transparency and accountability] and good public and private governance [good management of public affairs].” (Art. 1 (a)-(c)).

Corruption Defined:

Either:

1. “...engaging in acts that constitute improper performance of duty [or abuse of a position of authority], including acts of omission, in expectation of an advantage or to obtain an advantage, directly or indirectly promised, offered or requested, or following acceptance of an advantage directly or indirectly given, whether for oneself or on behalf of another”.
OR
2. “Notwithstanding the acts of corruption generally recognized in various legal jurisdictions,...corruption in this Convention shall include such acts as are provided in this Convention and are criminalized pursuant to Chapter III, *whether attributed to a public or private official*, and any other acts that the State Party may have criminalized or defined as acts of corruption under its domestic law or may so criminalize or define in the future.

Nothing herein shall limit the future criminalization of further acts of corruption or the adoption of measures to combat such acts.” (Art 2(i))¹

Scope of Application:

The Convention shall apply, except as otherwise stated, to the prevention, investigation and prosecution of [and recovery of assets and proceeds derived from] corruption and [other] criminal acts related specifically to corruption [and to the confiscation and return

¹ According to fn 35, “there were two distinct approaches towards the definition of ‘corruption’ in the informal working group. One approach was to provide a general definition of corruption as a concept and the other approach was to refer to corruption only as a term to be used in the text of the future convention.”

of assets and proceeds derived from corruption, irrespective if they involve public officials or have been committed in the course of business activity.² (Art. 3.1)

It shall not be necessary for the offenses set forth in the Convention to result in damage or harm to state property for purposes of implementing the Convention. (Art. 3.2).

The Convention shall NOT apply to cases in which:

1. An act of corruption is committed in one State;
2. The alleged criminal is a national of that State and is present in the territory of that State; AND
3. No other State is entitled to exercise jurisdiction. Art. 3.3).

Protection of Sovereignty:

State Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention [and non-interference] in the domestic affairs of other States. (Art. 4.1 -- not fully agreed upon yet -- thorough consideration will be undertaken at 3rd reading of draft convention)

Nothing in the Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law. (Art. 4.2)

This provision is a fundamental provision and any provision of any article contrary to it shall be disregarded.

Preventive Measures:

Each State Party agrees, to the extent appropriate and consistent with its legal system, *to consider to implement* those preventive measures set out in this Convention by legislative, administrative or other appropriate measures.³

Establish preventive anti-corruption policies (Art. 5.1-5.4)

Such policies should enable the participation of [civil society] [public involvement] [the participation of citizens] and reflect the principles of the rule of law, [good governance] [good management of the public service] integrity, transparency and [accountability].

² Some delegations expressed the view that this paragraph, especially its last phrase, might be construed as pre-empting the scope of the articles on criminalization or otherwise making assumptions about issues that had not yet been determined. (Fn 63).

³ During the discussion of the proposal many delegations were of the view that the provision of article 4 was sufficient to meet the concerns that this proposal intended to satisfy. Other delegations were of the view that if the article was retained, it should be made more mandatory and less restrictive by deleting the words “to the extent appropriate” and “to consider”. (Fn 72)

Establish (independent) preventive anti-corruption bodies (Art. 5)

To prevent [and detect] [and identify] [and contribute to the detection of] corruption by such means as:

Implementing policies above;

Oversight and coordination of policies;

Providing contact points to which any natural or legal person may report information concerning acts of corruption [with an appropriate guarantee of confidentiality];

Increasing and disseminating info. about corruption prevention;

Establishing institutional bodies to set public auditing standards emphasizing performance auditing.

Public Sector Safeguards:

Each State Party *shall*, in accordance with the fundamental principles of its domestic law, *endeavor to* adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest by requiring public officials:

[Where appropriate] to declare [upon taking office and periodically thereafter] their financial interests [assets, debts] and sources of income ; AND

Where appropriate, to [make public the information contained in such declarations]. (Art. 6.3).

Public Procurement and Public Financial Management:

Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish procurement rules, with appropriate threshold values, based on transparency, competition and objective criteria in decision-making. (Art. 8.1).

Such rules shall include the availability in each State Party of an effective system of appeal to ensure legal recourse and remedies in the event that the rules established pursuant to this paragraph are not followed. (Art. 8.1(d)).

Each State party shall in accordance with the fundamental provisions of its legal system, take all relevant measures to promote [ensure] adequate powers of remedy in the case of failure to comply with the requirements established in accordance with this paragraph. (Art. 8 (2)(c)).

Public Reporting:

Each State Party shall take such measures as is necessary to ensure transparency in their public administrations, especially with regard to their organization, functioning, and decision-making processes. (Art. 9.1).

Adoption of regulations or procedures allowing members of the general public to obtain, where appropriate information on the organization, functioning and decision-making of their public administrations and on decisions and legal acts that concern members of the public.; (Art. 9.2(a).

Publish periodic reports, including reports on the ‘risks’ of corruption in their public administrations. (Art. 9.2 (c)

Judiciary:

Each State Party shall take measures to strengthen the integrity and to prevent opportunities for corruption among members of the judiciary [in the exercise of their functions]. Such measures may include rules and procedures with respect to the conduct of members of the judiciary. (Art. 9.1 bis).

The same shall apply in regard to the public or state prosecution service in those State Parties where it does not form part of the judiciary. (Art. 9.2 bis).

Private Sector: (Article 11)

Each State Party *shall endeavor*, in accordance with the fundamental principles of its domestic law, *to prevent corruption involving the private sector*. (Art. 11.1).

Development of standards and procedures designed to safeguard the integrity of ‘relevant private entities’, including:

Codes of conduct for correct, honorable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest; (Art. 11.1(b))

Supervisory framework for financial institutions based on principles of transparency, accountability and sound corporate governance and with appropriate capacity for int’l cooperation on cross-border financial transactions; (Art. 11.1(c))

Public procedures regarding subsidies and licenses granted by public authorities for commercial activities to prevent abuse and misuse; (Art. 11.1(e))

Promotion of transparency among private entities, including measures regarding identity of legal and natural persons involved in the establishment and management

of corporate entities and holders of the capital and shares of corporate entities; (Art. 11.1(d))

Imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure (to prevent conflicts of interest); (Art. 11.1(f))

Accounting Standards for the Private Sector:

Each State Party shall take necessary measures, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following offenses:

Off-the-book accounts;

Off-the-book or inadequately identified transactions;

Recording non-existent expenditures;

Entering liabilities with incorrect identification of their objects;

Using false documents. (Art. 12.1 (a)-(e)).

Each State Party shall establish effective, proportionate and dissuasive *civil, administrative or criminal penalties*, for the omissions and falsifications referred to above. (Art. 12.2).

Each State Party shall take such measures to ensure that:

Private entities, taking into account their size, have sufficient internal accounting controls to assist in preventing and detecting acts of corruption; AND

The accounts and required financial statements of such private entities are subjected to appropriate auditing and certification procedures. (Art. 12.3).

Participation of Society:

Each State Party *shall promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, to raise public awareness* regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be enhanced by:

Increased transparency of and promoting the contribution of the public to decision-making processes;

Ensured and effective public access to information;

Protection of persons who have reported to competent authorities in good faith and on reasonable grounds any incidents that may constitute an offense in the Convention;

Public information activities that contribute to non-tolerance of corruption, and public education programs; (Art. 13.1(a)-(d)).

Each State Party shall NOT obstruct the freedom to seek, receive, publish and disseminate information concerning corruption, subject to certain necessary legal restrictions (e.g., respecting rights or the reputations of others; protection of national security; to preserve public order or public health or morals). (Art. 13.2).

Part III -- Criminalization, Sanctions and Remedies, Confiscation and Seizure, Jurisdiction, Liability of Legal Persons, etc.:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses, when committed intentionally: (Art. 19).

Bribery/ corruption of national public officials; (Ibid)

Bribery of foreign public officials or officials of an international organization; (Art. 19 bis)

Trading in influence -- (the promising, offering or granting, directly or indirectly, of any undue advantage in order to induce a public official or any other person to abuse his or her real or supposed influence, with a view to any undue advantage. (Art. 21).

Embezzlement, misappropriation, diversion or misuse of property by a public official; (Art. 22)

Concealment, retention, possession or transmission of movable property or funds (Art. 23);

Public official abuse of functions (Art. 24);
Illicit enrichment of public officials (Art. 25);

Improper use by a public official or a person who performs public functions of any kind of classified or confidential information obtained because of or in the performance of such function for their own benefit or the benefit of a third person (Art. 26);

Improper benefits obtained by a public official or a person who performs public functions -- (e.g., any article of monetary value in undue quantities or in quantities

exceeding those established by law, as a tax, contribution, surcharge, revenue, interest, salary or remuneration). (Art. 28).

Corrupt Acts Subject to Sanctions:

Non-disclosure by a public official; (Art. 29.1)

Non-divestment by a public official. (Art. 29.2).

Corruption in the Private Sector:⁴

Each State Party shall [consider adopting] adopt such legislative and other measures as may be necessary to establish as ‘**criminal offenses**’ when committed *intentionally* by [major entities] [in the course of business activity] [**and when public interests are affected**]⁵: (Art. 32)

Promising, offering or giving directly or indirectly of an *undue advantage* to any person who directs or works for, in any capacity, a private sector entity, for the person himself or for another person or entity, in order that he act or refrain from acting in breach of his duties [in relation to an economic, financial or commercial transaction, *which results in harm to that entity of the private sector*]; (Art. 32.1(a))

Soliciting or accepting directly or indirectly of any *undue advantage* by any person who directs or works for a private sector entity, for the person himself or for another person or entity, in order that he act or refrain from acting in breach of his or her duties [in relation to an economic, financial or commercial transaction, *which results in harm to that entity of the private sector*] (Art. 32.1(b))

Each State Party shall also consider adopting legislative measures to ensure that high-level officials of a private sector institution are punished with the penalties foreseen for the crime of **embezzlement** by public officials under similar circumstances whenever:

The private sector institution concerned is conducting a financial activity; OR

The acts committed by such private sector officials ‘affect public economic interests’ (e.g., banks, private finance institutions operating in the areas of borrowing and utilization of money, assets or instrumentalities belonging to private persons, etc.) (Art. 32.2)

Laundering of proceeds of corruption (Art. 33);

⁴ FN 159 indicates that some delegations expressed serious misgivings about retaining this article and attempting to establish a global legally binding treaty obligation to criminalize purely private sector corruption.

⁵ FN 160 indicates that a number of delegations indicated that the scope of this article would need to be limited by some link to the public interest.

Accounting Offenses -- Creating or using an invoice or any other accounting document or record containing false or incomplete information or unlawfully omitting to make a record of a payment (Art. 36);

Obstruction of Justice (Art. 37);

Liability of ‘Legal Persons’ (for participation in offenses established in Convention):

Subject to legal principles of the State Party, the liability may be criminal, civil or Administrative (Art. 38.2)

It shall be without prejudice to the criminal liability of the natural persons who have committed the offenses. (Art. 38.3).

Each State Party shall ensure that legal persons held liable are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. (Art. 38.4).

Prosecution, Adjudication and Sanctions:

Nothing in the Convention shall affect the principle that *the description of the offenses established in accordance with this Convention and of the applicable legal defenses or other legal principles controlling the lawfulness of conduct is --*

Reserved to the domestic law of a State Party and that such offenses shall be prosecuted and punished in accordance with that law. (Art. 40.9).

Consequences of Acts of Corruption: (on third parties)

State Parties shall adopt measures to address consequences of corruption, taking into account the legitimately acquired rights of third parties.

States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any further remedial action. (Art. 44).

Compensation for Damages:****(PRIVATE CAUSES OF ACTION)***

Each State Party ***shall adopt*** measures, in accordance with fundamental principles of domestic law, *to ensure that entities or persons who have suffered damages as a result of an act of corruption have the right to initiate proceedings against those responsible for that damage in order to obtain compensation.* (Art. 45).

Cooperation Between National Authorities:

Each State Party *shall take* necessary measures *to encourage cooperation* between public authorities, as well as between public officials, and its authorities responsible for investigating and prosecuting criminal offenses. Measures may include: (Art. 48).

Informing other authorities where there are ‘reasonable grounds’ to believe that any of the criminal offenses established in the Convention have been committed::

Criminalization of corruption involving a public official;

Criminalization of corruption in the private sector; AND

Criminalization of money-laundering of proceeds of corruption (Art. 48(a))

OR

Providing upon request, to the latter authorities all necessary information.
(Art. 48(b))

Cooperation Between the Private Sector and National Authorities:

Each State Party shall take necessary measures to encourage cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of criminal offenses under the Convention. (Art. 48.1 bis).

Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of a criminal offense. (Art. 48.2 bis).

Jurisdiction:

A State Party can establish jurisdiction over an offense listed in the Convention when:

The offense is committed [in whole or in part] in the territory of that State Party;

OR

The offense is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time the offense is committed. (Art. 50.1(a) and (b)).

A State Party may *also* establish jurisdiction, subject to principles of sovereignty, when:

The offense is committed against a national of that State Party; OR

The offense is committed by a national of that State party or by a stateless person who has his or her habitual residence in its territory; OR

The offense is one of those connected with the laundering of proceeds of corruption, and is committed outside a State Party's territory with a view to the commission of the offense (criminal money laundering of corruption proceeds) within its territory; OR

The offense is committed against the State Party. Art. 50.2 (a)-(e).

International Cooperation:

The competent authorities of State Parties exercising jurisdiction over offenses covered by the Convention and State Parties conducting an investigation, prosecution or judicial proceeding in respect of the same [or related] conduct shall consult one another with a view toward coordinating their actions. (Art. 50 bis).

Extradition:

These provisions are triggered when the offense for which extradition is sought is punishable under the domestic law or both the requesting State Party AND the requested State Party. (Art. 51.1).

However, notwithstanding Paragraph 1, State Parties whose law so permits may request the extradition of a person for any of the offenses established in the Convention that are NOT punishable under the domestic law of the requested State Party. (Art. 51.2)

Implementation of Convention:

Each State Party shall take all necessary measures (including legislative and administrative) in accordance with domestic law, to implement the obligations under this Convention. (Art. 78.1).

Each State Party *may adopt more strict or severe measures* than those provided for by this Convention. (Art. 78.2).

Overall Impressions of Draft Convention Against Corruption:

The Draft Convention is another attempt at reinforcing the need for global governance rather than domestic governance with international cooperation. Claims respecting State sovereignty aside, the Draft Convention's extradition and competent authority cooperation provisions would seem to erode the notion of State Sovereignty over time. The Draft Convention is essentially a framework directive (in the EU image) which each State Party is to implement consistent with their domestic laws. There is a question as to whether the Convention can be implemented consistently from State to State, since each State Party can decide for itself whether to adopt more strict or severe measures than those provided for in the Draft Convention.

The Draft Convention also seeks to regulate industry and company specific conduct that has otherwise been subject to voluntary standards initiatives in the U.S, or otherwise addressed through domestic regulatory action only when necessary (not a priori).

The Draft Convention focuses on public sector corruption involving public officials and private sector persons or entities. However, it also addresses purely *private sector* corruption when private interests are affected. This may be a response to the recent Wall Street improprieties that have had an adverse impact upon the investing public (individual retirees), as well as to the adverse impacts of foreign currency arbitrage on international capital markets (Hong Kong, Korea, etc.). In this regard, the Draft Convention provides for a private cause of action in the event an actionable offense causes harm to members of the public.

The Draft Convention emphasizes the need for civil society participation in addition to government regulation and encourages public transparency not only of public officials but also private entities. Also, States would be required to facilitate the release of information to the public. In effect, civil society would be utilized as a watchdog to track solely public or private transgressions as well as relationships between public and private officials; whistleblowers would be protected. In addition to State actions against individuals or entities deemed to have committed an actionable offense, the Draft Convention would also provide for private causes of action for monetary damages to be brought by those injured by the perpetrators of those offenses.

Specific Issues of Contention:

There are two issues in contention that present potential problems for US companies:

The first issue concerns the establishment of a private right of action in the event an actionable offense causes harm to members of the public. Article 45 of the UN Draft Convention Against Corruption ensures that entities or persons have such a right. A review of U.S. law reveals that no private right of action is currently provided for harm caused by corruption. The Foreign Corrupt Practices Act, the federal RICO statute, the federal Sarbanes Oxley statute nor the OECD General Practices Against Corruption allow individuals or entities to file suit in U.S. courts for damages caused by corrupt practices. Agreeing to the language of Article 45 as currently drafted would likely create a treaty obligation to establish a cause of action for individuals or entities, foreign or domestic, to file suit for such claims, thereby rendering U.S. companies vulnerable in a way that they currently are not. Additionally, an Article 45 obligation would effectively usurp the authority vested by federal statute within the SEC and the Department of Justice to determine offenses and would, instead, give such power to third parties (individuals and organizations) who may have ulterior motives.

Despite being unable to cite any relevant statute or case history of private rights of action in the U.S., the State Department (incorrectly) continues in its belief that Article 45 will *not* require any substantial changes to U.S. law. State's position rests on the discretionary nature of the Draft Convention. According to a footnote in the preparatory work of the Draft Convention, it is left to each state to decide whether existing domestic law complies with the Draft Convention. The State Department argues that since U.S. courts provide sufficient openness for individuals to file an action for damages, U.S. domestic law meets the requirements of Article 45. It is arguable,

however, that although the U.S. will not be compelled to make any changes to domestic law, the U.S. government's ratification of the Draft Convention would expand causes of action to include *individuals*. Were this to occur, it would likely trigger a series of Alien Tort-like suits for damages which could have devastating effects on company reputations and stock market values.

For example, the loser of a government procurement contract competition could file suit against the company ultimately awarded the contract in order to tarnish that company's public reputation. This would impair its ability to compete for future contracts. Also, a group of foreign nationals economically 'damaged' as the result of more efficient U.S. competitors operating within their borders could file a non-meritorious suit against those U.S. companies alleging that they obtained their competitive advantage by committing corrupt practices. Even if the claims were unfounded, the legal expenses for defense and the damage to reputation would be costly.

The second issue concerns the potential for asymmetric and overzealous implementation of the UN Draft Convention Against Corruption by different ratifying treaty parties. Given the discretionary nature of the convention, there is no guarantee that nations will interpret and implement its provisions with the same understanding. This would not only expose companies to different legal standards within different countries relating to the same treaty provisions, but it would also allow plaintiffs to forum-shop by selecting the jurisdiction with the most stringent implementing laws. U.S. courts might establish a precedent by throwing out frivolous suits commenced by individuals, but such action does not protect U.S. companies from being hauled into the courts of other treaty parties who may be more receptive to such suits. Therefore, even if the State Department can ensure that the Draft Convention will not change U.S. law, it cannot ensure the protection of U.S. companies from suits in foreign courts which may not provide the same degree of flexibility, impartiality and integrity found in U.S. courts.

It is beyond question that economic benefits may be secured by combating corruption worldwide. However, the U.S. government's ratification of this convention could prove problematic for U.S. businesses.