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**ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION**



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**AN EFFECTIVE INTERNATIONAL LEGAL INSTRUMENT AGAINST  
CORRUPTION**

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# AN EFFECTIVE INTERNATIONAL LEGAL INSTRUMENT AGAINST CORRUPTION

## I. BACKGROUND

1. In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organized Crime (resolution 55/25,) was desirable; decided to begin the elaboration of such an instrument and requested the Secretary-General to prepare a report analyzing all relevant international instruments and recommendations addressing corruption and to submit it to the Commission on Crime Prevention and Criminal Justice; and requested the Commission, to review and assess the report of the Secretary-General and, on that basis, to provide recommendations and guidance as to future work on the development of a legal instrument against corruption.

2. Pursuant to General Assembly resolution 55/61, the meeting of Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of a Future Legal Instrument against Corruption was held in Vienna from 30 July to 3 August 2001 and recommended to the Assembly, through the Commission on Crime Prevention and Criminal Justice and the Economic and Social Council, the adoption of a draft resolution on the terms of reference for the negotiation of an international legal instrument against corruption. The draft resolution was subsequently adopted as Assembly resolution 56/260 of 31 January 2002.

3. In its resolution 56/260, the General Assembly decided that the Ad Hoc committee should negotiate a broad and effective convention, which, subject to the final determination of its title, should be referred to as the "United Nations Convention against Corruption (UNCAC)." In the resolution, the General Assembly requested the Ad Hoc Committee, in developing the draft convention, to adopt a comprehensive and multi-disciplinary approach and to consider, *inter alia*, the following indicative elements: definitions; scope; protection of sovereignty; preventive measures; criminalization; sanctions and remedies; confiscation and seizure; jurisdiction; liability of legal persons; protection of witnesses and victims; promoting and strengthening international cooperation; preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds; technical assistance; collection, exchange and analysis of information; and mechanisms for monitoring implementation. The General Assembly also requested the Ad Hoc Committee to take into consideration existing international legal instruments against corruption and, whenever relevant, the United Nations Convention against Transnational Organized Crime.

4. The text of the United Nations Convention against Corruption was negotiated during seven sessions of the Ad Hoc Committee for the Negotiation of the Convention against Corruption, held between 21 January 2002 and 1 October 2003. The Convention approved by the Ad Hoc Committee was adopted by the General Assembly by resolution

58/4 of 31 October 2003. The Convention was finally opened for signature at the high-level political signing conference in Merida, Mexico in December 2003.

5. This report provides a brief overview of the developments in the implementation of the UN Convention against Corruption 2003 by the Member States; National Implementation of the UN Convention Against Corruption: Nature of Obligations; implementation of the anti-corruption provisions in the Convention against Transnational Organized Crime; Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice April 2005; summary of the deliberations at the Forty-fourth Session of AALCO held at Nairobi, Republic of Kenya, 27 June to 1 July 2005; and the Secretariat comments.<sup>1</sup>

## **II. DEVELOPMENTS IN THE RATIFICATION OF THE UN CONVENTION AGAINST CORRUPTION**

6. The High-level Political Conference held in Merida, Mexico on 9 to 11 December 2003, opened the UN Convention against Corruption for signing and ratification.<sup>2</sup> The Convention entered into force on 14 December 2005, in accordance with article 68 (1) which reads as follows: "1.This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession."

7. Ecuador became the thirtieth State when it ratified the Convention on 15 September 2005. The Convention has presently 140 signatories and 38 parties.<sup>3</sup> Of the State Parties who have ratified the Convention 12 are AALCO Member States. They are: Arab Republic of Egypt, Jordan, Kenya, Libyan Arab Jamahiriya, Mauritius, Nigeria, Senegal, Sierra Leone, South Africa,<sup>4</sup> Sri Lanka, Uganda, and Tanzania. Many ratifying countries had made a reservation stating that they do not consider themselves bound by

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<sup>1</sup> A comprehensive overview of the UN Convention against Corruption had been prepared by the Secretariat and presented to the 43<sup>rd</sup> Session could be found in the document no. AALCO/43/BALI/2004/S12.see also "Combating corruption: A legal analysis" published by AALCO and released at the 44<sup>th</sup> Session held in Nairobi, 2005.

<sup>2</sup> 111 States were represented at the Conference. Apart from States, observers from United Nations Secretariat units, and other entities and specialized agencies of the United Nations system and intergovernmental or non-governmental organization also attended the Conference. Over 18 experts participated in the conference as observers. Ambassador Dr. Ali Reza Deihim, Deputy Secretary-General, represented the AALCO Secretariat and delivered a statement on behalf of AALCO in the plenary session.

<sup>3</sup> Algeria, Australia, Belarus, Benin, Brazil, Croatia, Djibouti, Egypt, El Salvador, Ecuador, France, Honduras, Hungary, Jordan, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Mauritius, Mexico, Namibia, Nigeria, Paraguay, Peru, Romania, Senegal, Sierra Leone, South Africa, Sri Lanka, Togo, Turkmenistan, Uganda, and United Republic of Tanzania.

<sup>4</sup> While ratifying the Convention, South Africa has made a reservation that "... pending a decision by the Government of the Republic of South Africa on the compulsory jurisdiction of the International Court of Justice, the Government of the Republic does not consider itself bound by the terms of Article 66 (2) of the Convention which provides for the compulsory jurisdiction of the International Court of Justice in differences arising out of the interpretation or application of the Convention. The Republic will adhere to the position that, for the submission of a particular dispute for settlement by the International Court, the consent of all the parties to the dispute is required in every individual case."

the provisions of article 66, paragraph 2 of this Convention, which provides that any dispute between two or more States Parties concerning the interpretation or application of the Convention that cannot be settled through negotiation shall, at the request of one of those States Parties, be submitted to arbitration or to the International Court of Justice.

### **III. NATIONAL IMPLEMENTATION OF THE UN CONVENTION AGAINST CORRUPTION: NATURE OF OBLIGATIONS**

8. The UN Convention against Corruption (UNCAC) obligates Member States to undertake certain obligations, which need to be implemented or incorporated into their respective domestic legal systems. Most of the obligations require State Parties to enact new laws or incorporate/amend the existing laws. The study below intends to cover the four main parts of the Convention, which relate to preventive measures; criminalization; international cooperation; and asset recovery. The attempt here is to provide only the summary of the main requirements under some of the most important provisions under the UNCAC, which provides information on the essential requirements of the article concerned.<sup>5</sup>

9. The objective of the UNCAC, as the Preamble and Statement of purpose declares, is to promote and strengthen measures to combat corruption, both domestic and international. To achieve these objectives, the Convention primarily focus its attention on preventive measures, criminalization and law enforcement, asset recovery measures and international cooperation. In this process, the Convention attempts to set certain minimum standards, which could be used by States within their domestic legal systems and in international cooperation. In short, the Convention:

- Defines and standardizes certain terms that are used with different meanings in various countries;
- Requires States to develop corruption prevention measures involving both public and private sectors;
- Requires States to establish specific offences as crimes and consider other;
- Promotes international cooperation, through extradition, legal assistance, joint investigation etc.;
- Provide for asset recovery;
- Provides for training, research and information-sharing measures;

10. However, the above said obligations, which are enlisted in different provisions of the Convention, do not carry the same level of obligation. The provisions could be classified as ‘Mandatory’ provisions which consist of obligations to legislate; measures that State Parties ‘must consider applying or endeavor to adopt’; and measures that are ‘optional’. If the phrase used in a specific provision is “each State party shall adopt”, the provision is mandatory in nature and the States are bound to legislate. On the other hand, if the phrase used is “shall consider adopting” or “shall endeavour to”, the States are only

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<sup>5</sup> The AALCO Secretariat is envisaging the possibility of preparing a special study which provides a detailed analysis of the obligations (mandatory/obligatory) under the Conventions.

urged to consider adopting a certain measure or to make a genuine effort to make their legal system compatible. Where as in the case of optional provision, the phrase used is “may adopt”. Several articles also contain safeguard clauses which limit the obligations of State parties in case of conflicting “constitutional or fundamental rules”.

#### **A. General Provisions and Obligations**

11. There are some provisions which are generally applicable throughout the Convention.

12. Article 65 of the UNCAC deals with the implementation of the Convention. It states that each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under the Convention. However, a State can adopt more stricter or severe measures than those provided for by this Convention for preventing and combating corruption. Implementation may be carried out through new laws or amendments of existing ones.

13. The second general provision is under Article 30 deals with prosecution, adjudication and sanction. Article 30 paragraph 9 of the Convention reiterates the principle that the description of the offences is reserved to the domestic laws of the State Parties and shall be prosecuted and punished in accordance with that law.

14. Thirdly, some of the terms, which are used in the Convention repeatedly, have been defined under Article 2 of the Convention. While States are not required to incorporate these definition as they stand, but for the purpose of consistency, are encouraged to cover what is required by the Convention.

15. Lastly, the Convention respects and protects the sovereignty of States Parties.<sup>6</sup> Article 4 states that the obligations under the Convention should be carried out in a manner consistent with the principle of sovereign equality and territorial integrity and that of non-intervention in the domestic affairs of other States.

#### **B. Summary of main requirements**

16. The summary of the main requirements/commitments under the Convention as listed below are the mandatory obligations and obligations which the State parties should consider. The mandatory provisions serve as a threshold which States must meet for the sake of conformity. This is provided under article 62, para.1, which states that all States parties “shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation”. The threshold provided under the Convention is the minimum standard to be met by a State party, and a State party could set higher thresholds if necessary.

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<sup>6</sup> Article 4, UNCAC.

**(a) Preventive Measures**

*Preventive anti-corruption policies and practices*

17. Articles 5, 6, 10 and 13 deal with preventive anti-corruption policies and practices that should be implemented by the State parties. Article 5 of the Convention sets out the main goals of preventive measures. It provides a base for article 6 and a preamble to the chapter. According to the Article 5, States parties are required to

- develop and implement or maintain effective anti-corruption policies that encourage society participation, reflect the rule of law, and promote sound and transparent administration of public affairs<sup>7</sup>
- collaborate with each other and relevant international and regional bodies for the pursuit of the above goals<sup>8</sup>.

18. Article 6 requires establishment of an anti-corruption body or bodies in charge of preventive measures and policies.<sup>9</sup> This body shall be granted independence to ensure that it can do its job unimpeded by undue influences and provide it with adequate resources and training.<sup>10</sup> The requirement in this article is not intended to refer to the establishment of a specific agency at a specific level. But what is needed is the capacity to perform the functions enumerated by the article.

19. Recognizing that public confidence and accountability in public administration are instrumental in prevention of corruption, Article 10 requires transparency in public administrations. In accordance with Article 10, States parties are required to

- take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate.

20. In this context, in accordance with Article 13, States parties are required to take appropriate measures to promote the participation of civil society, non-governmental organizations and community-based organization in anti-corruption activities and efforts to increase public awareness about the threats, causes and consequences of corruption.

*Transparency in the public sector*

21. Articles 7, 8 and 9 address in detail questions relative to transparency in the public sector. In order to bring in transparency in public sector, each State Party is required, according to Article 7, to make a strong effort to:

- adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and other non-elected public officials.<sup>11</sup>

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<sup>7</sup> Article 5, paragraph 1, UNCAC

<sup>8</sup> Article 5, Paragraph 4, UNCAC

<sup>9</sup> Article 6 Paragraph 1, UNCAC.

<sup>10</sup> Article 6 Paragraph 4, UNCAC.

<sup>11</sup> Article 7, paragraph 1, UNCAC.

- adopt measures to prescribe criteria concerning candidature for and election to public office.<sup>12</sup>
- take measures to enhance transparency in the funding of candidatures for elected public office and the funding of political parties.<sup>13</sup>
- adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.<sup>14</sup>

22. States are required to promote integrity, honesty and responsibility among their public officials<sup>15</sup> and take note of the relevant initiatives of regional, interregional and multilateral organizations.<sup>16</sup> Article 8 also requires States to endeavour to

- apply codes or standards of conduct for the correct, honourable and proper performance of public functions (paragraph 2).
- Establish measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions (paragraph 4).
- Establish measures and systems requiring public officials to report to appropriate authorities on potential conflicts of interest (paragraph 5).
- Take disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article (paragraph 6).

23. According to Article 9, paragraph 1, States parties are required to establish systems of procurement based on transparency, competition and objective criteria in decision-making, and which are also effective in preventing corruption. In accordance with Article 9, paragraph 2, States Parties are required to take measures to promote transparency and accountability in the management of public finances.

24. Article 11 obligates States to strengthen their judiciary and prosecution services. Accordingly, this Article states that States parties must take measures to strengthen integrity and prevent corruption in the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary. Similar measures may be introduced for the prosecution service, where it enjoys independence similar to the judiciary. The introduction of these measures may require legislation, without prejudice to the independence of the judiciary, depending on the existing framework of each State party.

#### *Preventive Measures in Private Sector*

25. Article 12 deals with measures aimed at preventing corruption in private sector. These articles provide steps towards the achievement of that goal. States parties must take measures to

- prevent corruption in the private sector
- enhance accounting and auditing standards in the private sector

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<sup>12</sup> Article 7, paragraph 2, UNCAC.

<sup>13</sup> Article 7, paragraph 3, UNCAC.

<sup>14</sup> Article 7, paragraph 4, UNCAC.

<sup>15</sup> Article 8, paragraph 1, UNCAC.

<sup>16</sup> Article 8, paragraph 4, UNCAC.



- provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

26. To achieve these ends, Article 12(2) offers several examples of measures:

- (a) Promote cooperation between law enforcement and private entities;
- (b) Promote the development of standards and procedures, such as codes of conduct and good practices guides;
- (c) Promote transparency among private entities;
- (d) Prevent the misuse of procedures regulating private entities;
- (e) Prevent conflicts of interest;
- (f) Ensure that private enterprises have adequate internal auditing controls.

27. In accordance with Article 12(3), States parties must take measures to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention: the establishment of off-the-books accounts; the making of off-the-books or inadequately identified transactions; the recording of non-existent expenditure; the entry of liabilities with incorrect identification of their objects; the use of false documents; and the intentional destruction of book keeping documents earlier than foreseen by the law. In accordance with Article 12(4) States parties must disallow the tax deductibility of expenses that constitute bribes and other expenses that further corrupt conduct.

#### *Prevention of money-laundering*

28. Money-laundering consists of disguise of the illegal origin of proceeds of crime. Article 14 introduces measures aims to prevent money-laundering. It contains two mandatory requirements

- To establish a comprehensive domestic regulatory and supervisory regime to deter money-laundering (para.1 (a);
- To ensure that agencies involved in combating money-laundering have the ability to cooperate and exchange information at the national and international levels (para. 1(b)).

29. In addition, States must consider

- establishing a financial intelligence unit (art. 14(b0);)
- implementing measures to monitor cash movements across their borders (para.2);
- implementing measures to require financial institutions to collect information on originators of electronic fund transfers, maintain information on the entire payment chain and scrutinize fund transfers with incomplete remitter information (para.3);
- developing and promoting global, regional and bilateral cooperation among relevant agencies to combat money-laundering (para.5).

**(b) Criminilization, law enforcement and jurisdiction**

30. The Convention requires the State Parties to take several legislative and administrative steps towards implementation of this Convention. The chapter on “Criminilization, law enforcement and jurisdiction” addresses substantive criminal law requirements and the necessary measures and procedures aimed at effective law enforcement against corruption. Generally, the Convention requires establishment of a number of offences as crimes in their domestic law, either by enacting new laws or by amend the existing laws.

*Criminilization*

31. Active and passive bribery: States parties within their domestic legal system, must establish as criminal offences the following (Article 15),

- active bribery, defined as the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties.
- passive bribery, defined as the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties.

32. Active bribery by foreign public official, or official of an international organization: States parties must establish as criminal offence the promise, offering or giving of an undue advantage to a foreign public official, or official of an international organization, in order:

- (a) to obtain or retain business or other undue advantage in international business; and
- (b) that the official take action or refrain from acting in a manner that breaches an official duty.<sup>17</sup>

33. Embezzlement: State parties are also required to establish as a criminal offence the embezzlement, misappropriation or diversion of property, funds, securities, any other item of value entrusted to a public official in his or her official capacity, for the official’s benefit or the benefit of others.<sup>18</sup>

34. Laundering of proceeds of crime: States parties must establish the following offences as crimes;

- (a) Conversion or transfer of proceeds of crime (para. 1 (a) (i));
- (b) Concealment or disguise of the nature, source, location, disposition, movement or ownership of proceeds of crime (para. 1 (a) (ii)).<sup>19</sup>

35. Subject to the basic concepts of their legal systems, States must also criminalize:

- (a) acquisition, possession or use of proceeds of crime (para.1 (b)(i));

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<sup>17</sup> Article 16(1), UNCAC.

<sup>18</sup> Article 17, UNCAC.

<sup>19</sup> Article 23, UNCAC.

- (b) participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counseling the commission of any of the offences mandated by article 23 (para.1 (b) (ii)).

36. Obstruction of Justice: Under Article 25, States parties must establish the following two criminal offences:

- (a) use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage either to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to offences covered by the Convention (article 25, sub para.(a));
- (b) use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered by the Convention (art.25, sub para. (b)).

37. The criminalization of the acts under these provisions is to be done through legislative and other measures. That is, the criminal offences must be established by criminal law covering all required elements of the offences and not simply by other measures, which would be additional to the proscribing legislation.

38. Other offences, which the States parties must consider implementing in their national legislations, include:

- passive bribery of foreign public officials and officials of public international organizations (Article 16(2));
- trading in influence (Article 18);
- abuse of functions or position, (Article 19);
- illicit enrichment, Article 20;
- corruption in private sector (Article 21);
- embezzlement in private sector (Article 22);
- concealment or continued retention of property acquired in a violation of offenses established in this Convention (Article 24);

39. Another mandatory obligation under the Convention which the States parties must establish as criminal offences includes:

- *Liability of Legal persons:* Article 26 of the Convention requires the establishment of liability for legal entities, consistently with the State's legal principles, for the offences established in accordance with this Convention. This liability may be criminal, civil or administrative.
- *Participation and attempt:* states Parties must establish as a criminal offence the participation as an accomplice, assistant or instigator in the offences established in accordance with the Convention.

#### *Law enforcement measures*

40. Prevention and criminalisation of corrupt practices need to be supported by measures and mechanisms enabling the other parts of the overall anti-corruption efforts:

detention, prosecution, punishment and reparation. This part provides a number of procedural measures that support criminalization. The State Parties *inter alia* must:

- ensure that knowledge, intent or purpose as an element of an offence may be established through inference from objective factual circumstances (Article 28).
- establish long statutes of limitation for offences established by the Convention (article 29).
- ensure that offences covered by the Convention are subject to adequate sanctions taking the gravity of each offence into account (Article 30)
- establish necessary legal framework for freezing, seizure and confiscation for proceeds of crime (Article 31);
- ensure protection of witness, experts and victims (Article 32);
- ensure protection of reporting persons (Article 33);
- address the consequences of corruption (Article 34);
- ensure compensation for damage (Article 35);
- establish specialized authorities, with necessary independence, to combat corruption (Article 36);
- encourage cooperation with law enforcement authority (Article 37);
- encourage cooperation between national authorities (Article 38);
- encourage cooperation between national authorities and the private sector (Article 39);
- ensure appropriate mechanisms to overcome obstacles arising out of bank secrecy laws (Article 40); and
- allow the consideration of an alleged offender's convictions in another State in their own criminal proceedings (article 41).

### *Jurisdiction*

41. It is the intention of the Convention that no serious crimes go unpunished and that all parts of the crime are punished wherever they took place. Jurisdictional gaps that enable fugitives to find safe havens need to be reduced or eliminated. Accordingly, article 42, paragraph 1 of the Convention states that each State party must be able to assert jurisdiction over the offences established in accordance with the Convention when these are committed:

- in its territory;
- on board a ship flying its flag;
- on board an aircraft registered under its laws.

42. States are invited to consider the establishment of jurisdiction in cases where

- their nationals are victimized,
- the offence is committed by a national or stateless person residing in their territory,
- the offence is linked to money-laundering planned to be committed in their territory, or
- the offence is committed against the State (art. 15, para.2).

43. Under article 42, paragraph 3, in cases where an alleged offender is in the territory of a State and the State does not extradite him or her solely on the ground that he or she is their national (see art.44, para.11), that State must be able to assert jurisdiction over offences established in accordance with the Convention committed even outside of its territory.

44. States may already have jurisdiction over the specified conduct, but they must ensure that they have jurisdiction for conduct committed both inside and outside of their territory by one of their nationals. Therefore, legislation may be required.

### **(c) International cooperation**

45. International cooperation is one of the most important requirements to combat corruption, as ease of travel from one country to another provides offenders a way to escape prosecution and justice. Prevention, investigation, prosecution, punishment, recovery and reparation of illicit gains cannot be achieved without effective international cooperation. The State Parties are required to cooperate in criminal matters in extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, and law enforcement, including joint investigations and special investigative techniques.

#### *Extradition*

46. In the case of extradition, States Parties must ensure that offences established in accordance with the Convention are deemed extraditable offences, provided dual criminality is fulfilled (art.44, para.1). If their domestic law allows it, States may grant extradition for corruption offences even without dual criminality.<sup>20</sup>

47. If states parties use the Convention as basis for extradition, they will not consider corruption offences as political offences.<sup>21</sup> States parties that require a treaty basis for extradition

- may consider this Convention as the legal basis for extradition;<sup>22</sup>
- must notify the Secretary-General of the United Nations on whether they will permit the Convention to be used as a basis for extradition to other States parties;<sup>23</sup>
- and do not use the Convention as the legal basis for it, must seek to conclude extradition treaties with other States parties.<sup>24</sup>

48. States parties with a general statutory extradition scheme must ensure that the corruption offences are deemed extraditable.<sup>25</sup> The State party must also endeavour to

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<sup>20</sup> Article 44, para.2, UNCAC.

<sup>21</sup> Art.44, para.4, UNCAC.

<sup>22</sup> Art.44, para.5, UNCAC.

<sup>23</sup> Art.44, para.6 (c), UNCAC.

<sup>24</sup> Art.44, para.6 (b), UNCAC.

<sup>25</sup> Art. 44, para.7, UNCAC.

expedite extradition procedures and simplify evidentiary requirements relating to corruption offences (art.44, para.9).

#### *Mutual legal assistance*

49. The Convention requires States parties to provide/ensure mutual legal assistance:
- in investigations, prosecutions, judicial proceedings and asset confiscation and recovery in relation to corruption offences (art.46, para.1);
  - in investigations, prosecutions and judicial proceedings in relation to offences for which a legal entity may be held liable under article 26 (art. 46, para.2);
  - is not refused by extradition on the ground of bank secrecy (art.46, para.8);
  - Offer assistance in absence of dual criminality through non-coercive measures (art.46, para 9, sub para (b))
  - Provide for article 4, paragraphs 9-29, to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (art.46, paras 7 and 9-20);
  - Notify the Secretary-General of the United Nations of their central authority designated for the purpose of article 46;
  - Consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of this article (art.46, para.30).
50. Other forms of international cooperation the UNCAC requires include: Transfer of sentenced persons; Transfer of criminal proceedings; Law enforcement cooperation; Joint investigations; and Special investigative techniques.

#### **(d) Asset Recovery**

51. Asset recovery is a fundamental principle of this Convention and the State Parties shall afford one another the widest measure of cooperation and assistance in this regard. The State Parties must
- Require financial institutions to
    - Verify the identity of consumers;
    - Take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts;
    - Scrutinize accounts sought or maintained by or on behalf of individuals entrusted with prominent public functions, their family members and close associates; and
    - Report to competent authorities about suspicious transactions.<sup>26</sup>
  - Draw on relevant initiatives of regional, interregional and multilateral organizations against money-laundering;
  - Ensure that financial institutions maintain adequate records of accounts;
  - Prevent the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group.

52. State parties are also required to consider establishing financial disclosure systems for appropriate public officials and appropriate sanctions for non-compliance, and permit their competent authorities to share the information's with authorities in other States Parties when necessary to investigate, claim and recover proceeds of corruption offences.

#### **IV. ANTI-CORRUPTION PROVISIONS IN UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, 2000**

53. This section provides an overview of some of the provisions of the UN Convention against Transnational Organized Crime (TOC), which has similar provisions for criminalizing corruption and money laundering, when compared to UN Convention against Corruption. The main goals of the Convention against Transnational Organized Crime are to eliminate the differences among the national legal system and set standards for domestic laws so that they can effectively combat organized crimes, one of which is corruption. It provides for strong measures allowing law enforcers to confiscate criminal assets and crack down on money laundering to put an end to transnational crime profiting.<sup>27</sup>

54. At the first Conference of Parties to the UN Convention against Transnational Organized Crime, the Secretariat of the Convention had prepared a multi-year programme of work for the coming years. Such a programme of work enabled the Conference to structure its activities in a manner that would permit it to promote and review the implementation of the UN Convention against Transnational Organized Crime in more detailed and in depth manner. For the year 2005, the Secretariat submitted for the consideration of the Conference *inter alia* the implementation of the provisions on Criminilization of the laundering of the proceeds of crime and Measures against Corruption, which are closely related to the UN Convention against Corruption.

##### **(i) Strategic Framework for Action**

55. At the request of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, the Secretariat prepared a multi-year programme of work. Such a programme of work enabled the Conference to structure its activities in a manner that would permit it to promote and review the implementation of this Convention in more detailed and in depth manner. Such a programme may also enable State parties to focus the provisions in more detail while implementing the Convention.

56. On the basis of the above considerations, the Secretariat submitted for the consideration of the Conference the following workplan:

- (a) Second session (2005). Consideration of the implementation of the following articles: 5 (Criminalization of participation in an organized criminal group), 6 (Criminalization of the laundering of proceeds of crime), 7 (Measures against corruption), 10 (Liability of legal persons), 11 (Prosecution, adjudication and sanctions), 12 (Confiscation and seizure), 22 (Establishment of criminal record), 23

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<sup>27</sup> 147 States have signed the Convention and 90 States have either ratified or acceded to it.

(Criminalization of obstruction of justice) and 34 (Implementation of the Convention);

(b) Third Session (2006). Consideration of the implementation of the following articles: 16 (Extradition), 17 (Transfer of sentenced persons), 18 (Mutual legal assistance), 13 (International cooperation for purposes of confiscation), 14 (Disposal of confiscated proceeds of crime or property), 19 (Joint investigations), 20 (Special investigative techniques), 21 (Transfer of criminal proceedings), 27 (Law enforcement cooperation) and 15 (Jurisdiction);

(c) Fourth session (2008). Consideration of the implementation of the following articles: 24 (Protection of witnesses), 25 (Assistance to and protection of witnesses) and 26 (Measures to enhance cooperation with law enforcement authorities)

57. In addition to and in conjunction with the articles mentioned under each session above, the Conference would also consider at each session the implementation of articles 28 (Collection, exchange and analysis of information on the nature of organized crime), 29 (Training and technical assistance), 30 (Other measures: implementation of the Convention through economic development and technical assistance) and 31 (Prevention), as they are relevant to the entire Convention.

### **Criminalization of corruption (Article 8)**

58. The Convention seeks to align national laws in criminalizing acts committed by organized criminal groups. These acts include agreeing with one or more other persons to commit a serious crime for financial or other material gain. They also include organizing, directing or aiding serious offences committed by an organized criminal group.

59. The Convention further criminalizes acts of corruption that aid and abet the rapid growth of organized crime. For the first time in an international convention, companies and corporation become liable for taking part in or profiting from serious crimes involving an organized criminal group as well as for money-laundering activities. The Convention provides for proper punishment for these business entities, which include substantial economic penalties. The Convention also requires each State Party to adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

60. At the Second Session of the Conference Parties to the TOC Convention, it was noted that all reporting States, with the exception of Azerbaijan, indicated that their domestic legislation criminalized active and passive bribery of a public official, as well as participation as an accomplice in bribery offences, as required by article 8. It was also noted that the United Nations Convention against Corruption includes in its article 15 provisions identical to those of article 8 of the Organized Crime Convention on active and passive bribery of public officials, but also extends the range of mandatory corruption offences to active bribery of foreign public officials and officials of public international organizations, as well as to the embezzlement, misappropriation and other diversion of property by a public official. States reviewing their legislation for



compliance with article 8 should therefore consider taking into account the more comprehensive provisions of the Convention against Corruption.

**(ii) Combating Money-laundering**

61. Organized criminal groups garner huge profits and launder them into safe accounts. It remains to be a major challenge to curtail the storage of these profits. Thus the Convention seeks States to set up machinery to regulate financial institutions, outlaw anonymous bank accounts in false names, set up financial intelligence units to collect, analyze and disseminate information about potential money laundering and other financial crimes. This provision would complement the similar provision in the UN Convention against Corruption.

61. At the Second Session of the Conference Parties to the TOC Convention, it was noted that almost all reporting States indicated that they had criminalized the laundering of proceeds of crime in accordance with article 6 of the Convention. Article 6 requires that money-laundering offences be applicable to the “widest range of predicate offences”, including offences provided for under articles 5 (participation in an organized criminal group), 8 (corruption) and 23 (obstruction of justice), offences provided for under the Protocols to which States are parties or are considering becoming parties, as well as all “serious crimes”. Most reporting States indicated that all the offences covered by the Convention were under their law predicate offences to money-laundering.

63. Article 6 further requires that predicate offences include offences committed both within and outside the jurisdiction of the State party in question. Among the reporting States, 25 confirmed that money-laundering offences were applicable to predicate offences committed abroad, under the requirement of dual criminality, that is, that the predicate offence should constitute a criminal offence in both the country in which it was committed and in the country exercising its jurisdiction over the money-laundering offence.

**V. ELEVENTH UNITED NATIONS CONGRESS ON CRIME PREVENTION AND CRIMINAL JUSTICE, 2005**

64. The United Nations Congress on Crime Prevention and Criminal Justice, convened every five years, serves as a consultative body of the United Nations crime prevention and criminal justice programme, which shall provide a forum for, inter alia, identifying emerging trends and issues in crime prevention and criminal justice and submit suggestions, for the consideration of the UNODC, regarding possible subjects for the programme of work. In addition, the Congress has provided a springboard for norm-setting through the development of standards for improved national practice and instruments for more effective inter-country cooperation; action-oriented studies, including world crime surveys and analysis of anti-crime strategies; and technical assistance activities of various kinds.

65. The Eleventh United Nations Congress on Crime Prevention and Criminal Justice was held in Bangkok from 18-25 April 2005. The theme of Eleventh Congress

“Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice” was assigned by the General Assembly, aiming to promote international cooperation in preventing crime and enhancing criminal justice system.<sup>28</sup> The Eleventh Congress was an opportunity to encourage Member States to take concrete steps to prevent transnational organized crime, terrorism and corruption.<sup>29</sup> One of the five<sup>30</sup> items discussed at the conference and two of the substantive items focused by the Congress was “Corruption: threat and trends in the twenty-first century” and “Economic and financial crimes”. Apart from this, six technical workshops were also held and one was on ‘measures to combat economic crimes, including money-laundering’.<sup>31</sup>

66. During discussions in Plenary and Committee meetings and workshops, emphasis was placed on the need for international cooperation in order to combat the new forms of transnational crime and terrorism and the need for implementation of existing conventions and other international instruments in the area of crime prevention, terrorism and corruption.

67. Some of the key issues were related to the effective implementation of the Organized Crime Convention and its Protocols. The 2004 Conference of Parties to the TOC Convention endorsed a work plan for its second session in the following three thematic fields: basic adaptation of national legislation in accordance with the Convention and its Protocols; criminalization legislation and difficulties encountered in implementation of the instruments; and international cooperation and technical assistance to overcome difficulties in the implementation of the Convention and its Protocols.

68. The Eleventh Congress, on the last day unanimously adopted the “Bangkok Declaration”, addressing issues such as trafficking in human beings, money-laundering, corruption, cybercrime, restorative justice, and the root causes of crime.<sup>32</sup> According to that Declaration, entitled “Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice”, Member States reaffirmed their readiness to seek to improve international cooperation in the fight against crime and terrorism at the

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<sup>28</sup> *UN General Assembly in resolution 57/170 of 18 December 2002.*

<sup>29</sup> Ambassador Dr. Ali Reza Dehim, Deputy Secretary-General represented AALCO at the Congress. There were 2,370 participants in the Congress, including many Ministers of Justice and other high-level officials, as well as representatives from 167 non-governmental organizations and 1,135 individual expert observers.

<sup>30</sup> The five substantive items on the agenda of the Congress: Effective measures to combat transnational organized crime; International cooperation against terrorism and links between terrorism and other criminal activities in the context of the work of the United Nations *Office on Drugs and Crime* (UNODC); Corruption: threats and trends in the twenty-first century; Economic and financial crimes: challenges to sustainable development; and Making standards work: fifty years of standard-setting in crime prevention and criminal justice.

<sup>31</sup> Six technical workshops on the following subjects: 1. Enhancing international law enforcement cooperation, including extradition measures; 2. Enhancing criminal justice reform, including restorative justice; 3. Strategies and best practices for crime prevention, in particular in relation to urban crime and youth at risk; 4. Measures to combat terrorism, with reference to the relevant international conventions and protocols; 5. Measures to combat economic crime, including money-laundering; and 6. Measures to combat computer-related crime. *United Nations Press Release*, 14 March 2005, UNIS/CP/509.

<sup>32</sup> UN document A/CONF.203/L.5.

multilateral, regional and bilateral levels, in areas including extradition and mutual legal assistance.

69. The Congress also called on all States that had not yet done so to ratify and implement the provisions of the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. It further called upon donor States and financial institutions to continue to make adequate voluntary contributions for the provision of technical assistance to developing countries and countries with economies in transition in order to help them build capacity to prevent and tackle crime, to apply the United Nations standards and norms in crime prevention and criminal justice and implement the aforementioned conventions and the international drug control conventions.

70. Regarding corruption, the Congress in its Declaration, called on all States that had not yet done so to ratify the United Nations Convention against Corruption. In order to curb corruption, it recognized the need to promote a culture of integrity and accountability in both the public and the private sector. It also emphasized the need to adopt measures to facilitate asset recovery, consistent with the principles of that Convention. The Declaration reaffirmed the fundamental importance of implementation of existing instruments and the further development of national measures and international cooperation in criminal matters, in issues such as cybercrime, money-laundering, trafficking in cultural property, extradition, mutual legal assistance and the confiscation, recovery and return of the proceeds of crime.

## **VI. CONSIDERATION OF THE ITEM DURING THE FORTY-FOURTH SESSION OF AALCO**

71. The item “An Effective International Legal Instrument Against Corruption” was introduced by the Secretary-General in the agenda of the AALCO at its 41<sup>st</sup> Session held in Abuja, Nigeria (2002). This suggestion was in line with the Article 1(a) of the AALCO’s Statutes which provides for exchange of views and information on matters of common concern having legal implications. It was felt that the AALCO could make useful contributions to the negotiations concerning the international convention for preventing and combating corruption.<sup>33</sup> Since then the AALCO Secretariat has been reporting developments in the negotiation of the UN Convention against Corruption. Accordingly, the item was deliberated at the forty-second and Forty third Session held in Seoul (2003) and Bail (2004) respectively.

72. The Forty-fourth Session of AALCO was held in Nairobi, Republic of Kenya from 27 June to 1 July 2005. The President of the Forty-Fourth Session, upon the request of the Secretary-General, released the AALCO Secretariat publication “Combating Corruption: A Legal Analysis”.

73. The Minister of Justice and Constitutional Affairs of Republic of Kenya, in his statement highlighted the five pillared anti-corruption Strategy adopted by the Government of Kenya which consists of the following: enactment of the necessary

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<sup>33</sup> The Resolution adopted at that session urged the Member States to actively participate in the work of the Ad Hoc Committee

legislation to establish a legislative framework; vigorous enforcement of anti-corruption laws through investigation of offences of corruption and economic crimes as well as recovery of corruptly acquired property; identification and sealing of corruption loopholes; national public education aimed at stigmatizing corruption and inducing behavioral change; and implementing macroeconomic and structural reforms to reduce the incidence and demand for corruption by scaling down the role of the public sector and bureaucracy. He was of the view that there was an urgent need to intensify the global solidarity against corruption. In this regard the UN Convention Against Corruption not only makes Corruption an international Crime but also contains elaborate mechanisms for international cooperation in the recovery of stolen assets.

74. Delegates from many AALCO countries and one Observer States presented their views on the topic. During the deliberations, all the Delegates highlighted the urgent necessity for having international anti-corruption instruments and welcomed the adoption of the UN Convention against Corruption. The Member States explained the efforts currently undertaken by them for the ratification of the UN Convention against Corruption. They also explained about their national efforts in combating corruption. Those States, which have already ratified the Convention, enumerated the efforts taken by them to incorporate the objectives of the Convention into their domestic laws, in order to effectively combat corruption. Some delegations proposed the establishment of networking amongst relevant national and regional task forces or offices. One delegation noted that the UN Convention is a very important document and its provisions should be implemented at the national level, which his State has done by passing a law to put on trial officials and ministers for bribery and corruption. Another Delegation proposed that AALCO Secretariat should prepare model legislation on combating corruption, so that the objectives of the UN Convention against Corruption could be implemented at the national level.

## **VII. GENERAL COMMENTS**

1 The United Nations Convention against Corruption is a comprehensive tool and a definite step forward in the international effort to fight corruption. Its adoption marks the larger trend towards greater international regulation of corruption in public and private life. The Convention, from a substance viewpoint, breaks new ground with its provisions on prevention and asset recovery. This Convention provides for law enforcement as well as for preventive measures. It offers technical assistance to help countries implement the preventive tools. Being a United Nations Convention, it has a potentially universal scope of application, different from other existing instruments.

2. However, it may be noted that a number of originally envisaged articles had been deleted or alterations and new insertions are made by the Ad Hoc Committee all along the drafting of the Convention starting from the first to the final draft. This trend was quite noticeable at the fifth and the sixth sessions of the Ad Hoc Committee. It may also be noted that many important provisions had been deleted, and the severity of number of provisions such as the chapter on 'implementing mechanism', 'political funding' etc., had been diluted to a considerable extent to accommodate the divergent views of the member

states and reach compromises among them. This will reflect on the effectiveness of the Convention.

3. Further some of the provisions, especially relating to international cooperation are ambiguous. What type of cooperation is being sought and how would such cooperation be implemented in practice has not been mentioned. Other ambiguous provisions are found calling for the establishment of an adequate supervisory framework for financial institutions, promotion of transparency among private entities, prevention of the misuse of public procedures regulating private entities etc.

4. The Convention may not end corruption, nor is it perfect. However, despite the shortcomings, the finalization of the United Nations Convention against Corruption is indeed a real achievement in the global fight against corruption. It is hoped that the earlier deleted provisions may come back in the form of Protocols to the Convention against Corruption in the near future. The UN Convention has a broader mandate than any previous anti-corruption initiative. Unlike any of its predecessors, the Convention has the potential to create and disseminate a truly global anti-corruption movement that will affect governments and businesses in both developing and industrialised countries. Although it remains to be seen how successful the implementation of the Convention will be, the passage itself is significant because it illustrates the fact that the anti-corruption movement is now worldwide, cross-jurisdictional and here to stay.

5. The Conference of States Parties to the UNCAC is to be convened in the year after 30 countries have ratified the Convention that is within 14 December 2006. However this delay should not prevent the States from implementation of the objectives enshrined in the instrument. The United Nations Convention Against Transnational Organized Crime, as noted above, has very similar provisions and strategy to deal with corruption. The implementation of these provisions by the Conference of Parties of the United Nations Convention Against Transnational Organized Crime would complement the implementation of the UN Convention against Corruption, which entered into force on 14 December 2005.

6. It is also encouraging to note that the UNODC has already started the technical assistance programme, keeping in view the commitment in Chapter 2, Preventive Measures of the UN Convention against Corruption. AALCO is looking forward to establish close relation with the UNODC to initiate joint programmes for promoting wider ratification of the Convention among the Asian-African countries. As regards the Interpretative notes for the official records (*travaux préparatoires*) to facilitate the common understanding of some provisions and terms used in this Convention prepared by the Ad Hoc Committee, it is hoped that the General Assembly would adopt this document. Further, it is hoped that the Asian African countries would be in the forefront in the ratification of the Convention and in enacting implementing legislation.

7. In this context, as mandated by the resolution adopted at the forty-third Session of AALCO, and as a follow-up, the Secretariat has prepared a book "Combating Corruption: A Legal Analysis" which was released at the forty-fourth Session in Nairobi. The intention of this Book was to create awareness among the AALCO Member States and

other Asian and African countries as to what the phenomenon of corruption entails for their national and economic development and attempts to provide the salient features of the international anti-corruption instruments developed at the regional and international level. The study also compiles all the relevant anti-corruption instruments/conventions/resolutions/documents adopted by various international and regional organizations. The Secretariat hopes that this study would be a useful reference book for the Member States in understanding and implementing the anti-corruption instruments.

8. As a follow-up, the Secretariat is currently preparing a compilation of Anti-Corruption legislations of the AALCO Member States to provide a detailed analysis of the obligations envisaged under the Convention. In this regard, the Secretariat once again recalls the resolution adopted at the forty-third and forty-fourth Sessions urging AALCO Member States to send their respective anti-corruption national legislations to the Secretariat. Further, following suggestions made by some of the Member States at the forty-fourth Session, the Secretariat is also considering the feasibility of preparing a Model legislation to assist implementation of the UN Convention.

## ANNEX I

### RATIFICATION STATUS OF INTERNATIONAL AND REGIONAL CONVENTIONS BY ASIAN AND AFRICAN COUNTRIES

140 States have signed the UN Convention against Corruption and 38 States has ratified it. The Convention came into force on 14 December 2005. 147 States have signed UN Convention against Transnational Organised Crime and 115 States has ratified it. 37 States have signed African Union Anti-Corruption Convention and 11 States has ratified it.<sup>34</sup>

**Table I: Ratification status of African Countries**

Signature (S), Ratification (R), Accession (A), and Implementation (I)

Countries	UN Anti-Corruption Convention	UN Transnational Organised Crime Convention	African Union Anti-Corruption Convention
Algeria	S+R	S+R	S
Angola	S	S	-
Benin	S+R	S	S
<b>Botswana</b>	-	S+R	-
Burkina Faso	S	S+R	S
Burundi	-	S	S+R
Cameroon	S	S	-
Cape Verde	S	S	-
Central African Republic	S	A	-
Chad	-	-	-
Comoros	S	A	S+R
Congo	-	S	S
Cote d'Ivoire	S	S	S
Democratic Republic Congo (Zaire)	-	-	S
Djibouti	S+R	-	S
<b>Egypt</b>	S+R	S+R	-
Equatorial Guinea	-	S+R	S
Eritrea	-	-	-
Ethiopia	S	S	S
Gabon	S	-	S
<b>Gambia</b>	-	S+R	S
<b>Ghana</b>	S	-	S
Guinea	S	-	S
Guinea-Bissau	-	S	-

<b>Kenya</b>	S+R	A	S
Lesotho	S+R	S+R	S+R
Liberia	A	A	S
<b>Libya</b>	S+R	S+R	S+R
Madagascar	S+R	S	S+R
Malawi	S	S	-
Mali	S	S+R	S+R
Mauritania	-	-	-
<b>Mauritius</b>	S+R	S+R	S
Morocco	S	S+R	N/A
Mozambique	S	S	S
Namibia	S+R	S+R	S+R
Niger	-	S+R	S
<b>Nigeria</b>	S+R	S+R	S
Rwanda	S	S+R	S+R
<b>Senegal</b>	S+R	S+R	S
Seychelles	S	S+R	-
<b>Sierra Leone</b>	S+R	S	S
<b>Somalia</b>	-	-	-
<b>South Africa</b>	S+R	S+R	S+R
<b>Sudan</b>	S	S+R	-
Swaziland	S	S	-
<b>Tanzania</b>	S+R	-	S+R
Togo	S+R	S	S
Tunisia	S	S+R	-
<b>Uganda</b>	S+R	S+R	S+R
Zambia	S	-	-
Zimbabwe	S	S	S

**Table II: Ratification status of Asian Countries**

Signature (S), Ratification (R), Accession (A), and Implementation (I)

<b>Countries</b>	<b>UN Anti-Corruption Convention</b>	<b>UN Transnational Organized Crime Convention</b>	<b>OECD Anti-Bribery Convention</b>
Afghanistan	S	S+R	N/A
<b>Bahrain</b>	S	A	N/A
<b>Bangladesh</b>	-	-	N/A
<b>Bhutan</b>	S	-	N/A
<b>Brunei</b>	S	-	N/A
Cambodia	-	S	N/A
<b>China P.R.</b>	S	S+R	N/A
<b>Cyprus</b>	S	S+R	N/A



<b>Fiji</b>	-	-	N/A
<b>India</b>	S	S	N/A
<b>Indonesia</b>	S	S	N/A
<b>Iran</b>	S	S	N/A
<b>Iraq</b>	-	-	N/A
<b>Japan</b>	S	S	S, R + I
<b>Jordan</b>	S+R	S	N/A
Kazakhstan	-	S	N/A
<b>Korea, Rep. of</b>	S	S	S, R + I
<b>Korea, D.R.</b>	-	-	N/A
<b>Kuwait</b>	S	S	N/A
Kyrgyz Republic	S	S + R	N/A
<b>Lebanon</b>	-	S+R	N/A
Lao PDR	S	A	N/A
<b>Malaysia</b>	S	S+R	N/A
Micronesia	-	A	N/A
<b>Mongolia</b>	S	-	N/A
<b>Myanmar</b>	S	A	N/A
<b>Nepal</b>	S	S	N/A
<b>Oman</b>	-	A	N/A
<b>Pakistan</b>	S	S	N/A
<b>Palestine</b>	-	-	N/A
<b>Philippines</b>	S	S+R	N/A
<b>Qatar</b>	S	-	N/A
Samoa	-	-	N/A
<b>Saudi Arabia</b>	S	S+R	N/A
<b>Singapore</b>	S	S	N/A
<b>Sri Lanka</b>	S+R	S	N/A
<b>Syria</b>	S	S	N/A
Tajikistan	-	S+R	N/A
<b>Thailand</b>	S	S	N/A
Timor-Leste	S	-	N/A
<b>Turkey</b>	S	S+R	N/A
<b>U.A.E.</b>	S	S	N/A
Uzbekistan	-	S+R	N/A
Vietnam	S	-	N/A
<b>Yemen</b>	S	S	N/A

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