Overview

During the 4th Session of the Ad Hoc Committee, the Co-Facilitators of Group D Informal Negotiations understood that it was the preference of Member States to take a holistic approach to their analysis of Articles 40, 47, 48 and 49, bearing in mind interlinkages with other provisions in part one of the consolidated negotiating document (CND) as well as Chapter 4 of part two of the CND on International Cooperation. The recommendation was therefore made for deliberations on these provisions to continue throughout the 5th Session.

As such, the Co-facilitators were mandated by the Chair of the Ad Hoc Committee to address Articles 73 and 74 in conjunction with the provisions previously discussed due to their correlation, and to conclude their work by the end of the 5th Session.

A total of three (3) sessions were convened on the 12th, 13th and 19th of April, all of which were open to the participation of Member States and non-member observer States both in person and online through Microsoft Teams, in English only.

In addition, the Co-Facilitators held three (3) bilateral meetings and engaged a small group of eight (8) delegations with opposing views to further explore possibilities for compromise in order to reach consensus.

Summary of Discussions

In respect of the 4th Session, the aim was to identify areas of possible convergence, especially in positions relating to Articles 47 (Real-time collection of traffic data) and 48 (Interception of data).

It was recalled that, during the deliberations on Articles 47, Member States had considered this provision in conjunction with Article 48. Thirty-one (31) delegations called for the deletion of both Articles, while thirty-six (36) proposed the retention of Article 47 and thirty-eight (38) proposed the retention of Article 48.

Taking this into consideration, as well as the expressed view that some national positions on Articles 47 and 48 would also be determined by how these matters are addressed in the context of international cooperation, the Co-Facilitators commenced the discussions on:

- Article 73 (Mutual [legal] assistance in the real-time collection of traffic [data] [information]); and
- Article 74 (Mutual [legal] assistance in the [real-time collection] interception of [content data] [information in electronic/digital form]).
With the exception of one delegation, Member States generally maintained their positions on the either the retention or deletion of the provisions on real-time collection of data and the interception of data, resulting in a stand-still in the informal negotiations.

In addition, it was highlighted that the provisions reflected in Article 73 and 74 were sufficiently covered in Article 61 (4) (e) and Article 61 (4) (f).

In an effort to assist Member States in arriving at a compromise, the Co-Facilitators convened a small group meeting of delegations they perceived to have opposing views to which three (3) specific questions were posed before being presented to the wider Committee for consideration at this third and final informal session. The questions were as follows:

1. Several Member States have indicated that their agreement to include Articles 47 and 48 within the text of this Convention is dependent on the human rights safeguards that are included in the instrument. Could member states indicate what are the safeguards and how they should be reflected in the instrument itself to address their concerns?

2. Do Member States have any suggestion on how else we might bridge what is otherwise a binary choice of including or excluding these articles?

3. What are the thoughts of Member States in respect of a reservation being included in Article 47, 48, 73 and 74?

The feedback received from Member States at the final informal session in respect of these questions is as follows:

Response to Question 1

There were divergent views on whether human rights safeguards were sufficiently addressed in the CND, including in Article 5 (1) on Human Rights and Article 42 on Conditions and Safeguards, due to the intrusive measures in Articles 47 and 48.

Response to Question 2

It was reiterated that the provisions reflected in Article 73 and 74 were sufficiently covered in Article 61 (4) (e) and Article 61 (4) (f). A proposal was therefore made for the latter provisions to replace Articles 73 and 74. However, it was stated that there was value in retaining these provisions in the text.

Response to Question 3

Member States generally shared the view that reservations should be discussed at a later stage of the negotiations once the more substantive provisions of the Convention were finalized.