



Conference of the States Parties to the United Nations Convention against Corruption

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Experts convened to enhance international cooperation under the United Nations Convention against Corruption

Second meeting

Panama City, 25-26 November 2013

Item 5 of the provisional agenda*

Future action to enhance international cooperation under the United Nations Convention against Corruption

Progress report on implementing the mandates of the expert group on international cooperation

Background document prepared by the Secretariat

Summary

The first open-ended intergovernmental expert meeting to enhance international cooperation under the United Nations Convention against Corruption, established pursuant to resolution 4/2 of the Conference of the States Parties to the Convention was held in Vienna on 22 and 23 October 2012. Discussions at the meeting were devoted, inter alia, to the concept of the liability of legal persons, particularly in the context of the provision of mutual legal assistance, as well as to the agenda, structure and topics of the next expert meeting and its possible further course of action, taking into account the synergies between the expert meeting and the Working Group on International Cooperation, established under the authority of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime. The expert meeting requested the Secretariat to compile information and views from Member States on the issues mentioned above.

The present report provides information on the responses received from Member States regarding the issue of the liability of legal persons. In addition, it provides an overview of the ideas and proposals discussed regarding the available options for the possible further course of action of the expert meeting, for the consideration of the Conference at its fifth session.

* CAC/COSP/EG.1/2013/1.



Contents

	<i>Page</i>
I. Introduction	3
II. Liability of legal persons particularly in the context of mutual assistance in criminal matters: overview of responses from Member States	4
III. Agenda, structure and topics of the second meeting of experts	13
IV. Possible future course of action of the meeting of experts	14
V. Conclusions and recommendations	15

I. Introduction

1. In resolution 4/2, entitled “Convening of open-ended intergovernmental expert meetings to enhance international cooperation”, adopted by the Conference of the States Parties to the United Nations Convention against Corruption (UNCAC) at its fourth session, held in Marrakech, Morocco, from 24 to 28 October 2011, the Conference decided to convene open-ended intergovernmental expert meetings on international cooperation to advise and assist it with respect to extradition and mutual legal assistance and to convene one such meeting during its fifth session and, prior to that, within existing resources, at least one intersessional meeting.

2. In that same resolution, the Conference also decided that the expert meetings should perform the following functions: (a) assist the Conference in developing cumulative knowledge in the area of international cooperation; (b) assist it in encouraging cooperation among relevant existing bilateral, regional and multilateral initiatives and contribute to the implementation of the related provisions of the United Nations Convention against Corruption under the guidance of the Conference; (c) facilitate the exchange of experiences among States by identifying challenges and disseminating information on good practices to be followed in order to strengthen capacities at the national level; (d) build confidence and encourage cooperation between requesting and requested States by bringing together relevant competent authorities, anti-corruption bodies and practitioners involved in mutual legal assistance and extradition; and (e) assist the Conference in identifying the capacity-building needs of States.

3. Pursuant to resolution 4/2, the first open-ended intergovernmental expert meeting to enhance international cooperation under the UNCAC was held in Vienna from 22 to 23 October 2012.

4. The meeting of experts referred, *inter alia*, to the challenges presented by the concept of liability of legal persons, particularly in the context of mutual legal assistance, and the correct identification of the relationship between the natural and the legal person. It was noted that this issue required further analysis, as did a number of bilateral and regional agreements.

5. The experts requested the secretariat to send a note verbale to Member States soliciting information on the concept of the liability of legal persons in the context of the provision of mutual legal assistance. The Secretariat sent to Member States the Note Verbale CU 2013/5 dated 9 January 2013 with the request for submission of relevant information. As of 16 September 2013, the following Member States provided information: Algeria, Australia, Austria, Belgium, Burkina Faso, Denmark, Ecuador, Germany, Guatemala, Lebanon, Morocco, Nicaragua, Portugal, Thailand, Tunisia and the United States of America. An overview of the national responses is presented below under section II.

6. The participants in the meeting also addressed the synergies between the work of the UNCAC meeting of experts and the Working Group on International Cooperation, established under the authority of the Conference of the Parties (COP) to the United Nations Convention against Transnational Organized Crime (UNTOC). Many speakers expressed their preference for organizing joint meetings of the two groups in future, considering that the discussion of similar topics in both groups could benefit from their respective experience with regard to both

conventions and that resources could be conserved. A number of speakers suggested organizing a joint meeting to test the practicability of that approach. Other speakers expressed caution and were of the view that the feasibility of joint meetings should be further assessed. The Chair noted that the authority to take action with regard to combining the meetings of the two groups lay with the conferences of the parties to the two conventions, while the working groups could make recommendations to that effect only for the consideration of the conferences.

7. The meeting of experts requested the Secretariat to send a note verbale to all Member States to seek their views on the agenda, structure and topics of the next meeting. Based on the views of Member States, the extended bureau of the Conference of the States Parties to the UNCAC would decide on the draft agenda for that meeting.

8. The meeting of experts also requested the secretariat to solicit, through a note verbale, as above, views and suggestions from States parties on possible joint sessions of the two groups. The meeting further requested the secretariat to prepare, taking into account the replies received to that note verbale, a document on the possible further course of action, for the consideration of the Conference at its fifth session. The Secretariat sent to Member States the Note Verbale CU 2013/161 dated 2 August 2013 with the request for submission of views and proposals, as described above. As of 16 September 2013, the following Member States brought their views to the attention of the Secretariat: Austria, Cuba, Czech Republic, Israel, Lebanon and the United States. An overview of the national responses is presented below under sections III and IV.

9. The present report has been prepared pursuant to the mandate contained in the report of the first meeting of experts on international cooperation under the UNCAC.¹ It provides information on the responses received from Member States regarding national approaches to dealing with the concept of liability of legal persons particularly in the context of mutual legal assistance. In addition, the present report reflects an overview of the views and proposals under discussion regarding the available options for possible further course of action of the UNCAC expert meeting, for the consideration of the Conference at its fifth session.

II. Liability of legal persons particularly in the context of mutual assistance in criminal matters: overview of responses from Member States

Algeria

10. Algeria reported on the domestic legal framework regulating the liability of legal persons (Law 15-04 of 10/11/2004, modifying the criminal code). Article 51 of the Criminal Code requires for the establishment of such liability that the offence has been committed on behalf of the legal person and that its perpetrator is an organ or representative of the legal person. A particular regime of sanctions is applicable to legal persons in accordance with article 18 of the Criminal Code. The State, local authorities and public legal persons are excluded from the scope of application of

¹ CAC/COSP/EG.1/2012/2.

article 51. Furthermore, the liability of legal persons is also established in other specific laws on the fight against corruption and money-laundering.

11. Provisions on mutual legal assistance are embodied in such laws as the one on the prevention and fight against corruption and can also be applied with regard to legal persons involved in money-laundering activities.

12. The difficulties arising in practice relate to the absence of legislative texts with regard to the liability of legal persons in the requested States; the differentiation between the liability of the legal person and that of the physical person acting in its name, leaving a sort of presumption of liability on the shoulders of directors of legal persons; the traceability of off-shore companies; and the establishment of jurisdiction over multinational companies having various subsidiary legal entities.

13. Algeria also reported on best practices with regard to the traceability of commercial companies suspected of being involved in criminal activities such as the installation of a system of matriculation (fiscal magnetic cards) allowing for the identification of commercial companies; the setting up of a numerical system to exchange in an expeditious manner information among different monitoring authorities (customs, tax, police authorities etc.); and the obligation for companies to preserve administrative and accounting data during a reasonable time.

Australia

14. Australia reported that the national authorities could receive mutual legal assistance requests from any country and could provide assistance to foreign countries under the Mutual Assistance in Criminal Matters Act 1987 (Commonwealth) (the Mutual Assistance Act) in relation to criminal matters and predominantly only in relation to matters involving a “serious offence”. A “serious offence” is one for which the maximum penalty is imprisonment for a period exceeding 12 months or a fine exceeding 300 penalty units (AUD 1,000). Australia can therefore consider requests relating to the investigation of a legal person (corporation or company) which attracts a criminal other than imprisonment.

15. The application of coercive measures under the Mutual Assistance Act, such as the execution of a search warrant, can only be authorized by the Attorney-General in relation to a request for assistance in a criminal matter involving either a natural or a legal person. Australia can use coercive measures under the Mutual Assistance Act to identify, restrain and forfeit the proceeds of crime held by a natural or a legal person in respect of serious offences such as corruption or foreign bribery. Australia can also register non-conviction-based proceeds of crime order against property located in the national territory made in respect of a serious offence from any country.

16. Australia is able to provide assistance for the investigation or prosecution of a natural or legal person where obtaining the evidence does not require the use of compulsory measures, such as a voluntary witness statement or the provision of government records. In a request of this type, the Attorney-General’s Department would engage with the Australian Federal Police or the Australian Securities and Investment Commission (ASIC) to identify any available police-to-police or agency-to-agency mechanisms to provide the requested assistance.

17. In non-criminal matters, steps may be taken under the Mutual Assistance in Business Regulation Act 1992 (Commonwealth) to compel the production of the material sought and requests would be referred to the relevant regulator (generally the ASIC) for consideration.

18. The Mutual Assistance in Business Regulation Act 1992 (Commonwealth) allows for the provision of assistance to foreign regulators, including through coercive powers, for use in the administration or enforcement of business laws in foreign civil investigations and proceedings. Assistance may be provided in relation to both natural and legal persons.

Austria

19. The Austrian Ministry of Justice reported that the Austrian Federal Statute on the Responsibility of Entities for Criminal Offenses (VbVG), which entered into force on 1 January 2006, provides for general criminal liability of legal persons and other entities such as commercial partnerships, private foundations or registered partnerships for all criminal offenses (therefore including for money-laundering), in addition to, and independent from, the liability of the natural persons prosecuted for the same act. The VbVG contains certain safeguards designed to prevent a legal entity from evading the legal consequences of its actions by a significant change in its organizational structures. It also contains detailed provisions on the calculation and application of the fine to be applied in cases of offences for which legal persons are held liable. In addition to international legal frameworks, mutual legal assistance may also be based on this law.

20. According to Section 89m of the Court Organization Act, any interested entity, in terms of the Austrian Federal Statute on the Responsibility of Entities for Criminal Offenses, may request a certificate attesting if the entity has been convicted by a court or not and if there are proceedings pending against it or not. Such certificates are needed by entities in the framework of public tender. The competent authority for issuing such certificate is the Central Office of Public Prosecution for Economic Crime and Corruption (WKStA).

21. According to information provided by the Austrian Bureau of Anti-Corruption (BAK), there are two registers that can be used with regard to the liability of legal persons in the course of mutual legal assistance. The Austrian police authorities make use of the commercial register to identify the executives of a company. This register is publicly accessible. Furthermore, the Central Office for Prosecuting Economic Crimes and Corruption (WKStA) and any Austrian Public Prosecution Office are able to provide information on whether proceedings are pending against a legal entity or whether the entity has already been convicted. There are no special experiences or difficulties known as regards mutual legal assistance in respect to legal persons or other entities.

Belgium

22. The Belgian authorities underlined that the double criminality requirement, which is applicable in the context of international cooperation in criminal matters, is to be interpreted with regard to the criminalization of the conduct underlying the offence for which assistance is sought. In this framework, Belgium stressed the difficulties arising from a MLA request relating to legal persons in a country where

the responsibility of such persons would not be recognized. A solution would be to use as basis for the request the principle of the responsibility of physical persons.

23. Belgium also stressed the problems arising from the impossibility to extradite a legal person, which could, on one hand, allow for an excuse for physical persons involved on the basis of the non-accumulation of responsibilities, and, on the other hand, complicate the implementation of sanctions against a legal person in another State. In this later case, fines could be executed against the assets of the legal person located in Belgium, however, other specific sanctions (such as dissolution, temporary or definitive interdiction of exercising an activity, temporary or definitive closing, publication of the decision, etc.) could only be implemented in the Belgian territory. In view of that, the importance of international cooperation is pivotal. It would be necessary to draft at the European level a convention for the implementation of criminal sanctions against legal persons to complement the existing international framework.

24. The Central Office for the Repression of Corruption (OCRC) reported that it distinguished between MLA requests made for natural and legal persons respectively. Letters rogatory are used in this framework and, due to the experience of OCRC, mutual understanding is established with the police authorities of the foreign countries. Good personal contact is key to overcome difficulties and find quickly solution to unexpected problems. The preparatory work and support of liaison officers also facilitate the contact with the authorities of the foreign countries in order to overcome difficulties. These liaison officers work similarly irrespective of whether the request relates to legal or natural persons. Access to a foreign company's database for the federal police (as in the action Plan 2012-2013) would allow the investigator to directly access the information, saving therefore time and efforts. Such an access should be granted to the Belgian federal police in the coming years.

Burkina Faso

25. The liability of legal persons is addressed in Burkina Faso through article 64, paragraph 2, of the Criminal Code which stipulates the following: "is also considered as author or co-author any legal person with civil, commercial, industrial or financial purpose on whose name on in the interest of whom acts or abstention to act constituting a crime were done by the deliberate will of its organs." Therefore the criminal act must be in the interest of the legal person, and the acts must have been accomplished willingly by its organs.

26. The legal person is liable to penalties such as fines, payment of damages, exclusion of public procurement and closure of the establishment. Difficulties arise in cases where entities do not have legal personality and cannot therefore be considered as legal persons, or with regard to the forced execution of court decisions against legal persons.

27. In relation to mutual legal assistance, Burkina Faso has signed various international cooperation agreements which can be used for cooperation in cases where legal persons may be subject to liability for criminal offences. Such agreements include the General Cooperation for Justice Matters Convention, signed in Tananarive on September 12 1961; the General cooperation for judicial matters Convention between Burkina Faso and Mali of 23 November 1963; and the

Convention on cooperation for judicial matters between the Member States of the Non-Aggression and Defence Agreement, signed on 21 April 1987 in Nouakchott.

Denmark

28. Denmark reported that the Ministry of Justice had conducted a hearing of the Danish Prosecution Service on the subject. Accordingly, the Danish Prosecution Service has informed that no problems were encountered in affording mutual legal assistance for offences for which a legal person may be held liable.

Ecuador

29. Ecuador reported that legal persons of the private sector can be, inter alia, of a civil, commercial, or financial nature. They are regulated by the Civil Code and the Companies, General of Institutions of the Financial System and of Popular Economy and Solidarity. Public companies have their own legal regime. The criminal liability of legal persons has not been incorporated in the current legislation, but its incorporation is foreseen in the future Organic Integral Criminal Code, currently being discussed at the National Assembly.

30. Civil liability is regulated through article 52 of the Criminal Code. If the damage was caused by an act or omission of the State, article 11, paragraph 9, of the Constitution establishes that the State is liable for the damages. This action can be brought against the State.

31. The institutional control with regard to administrative liability is exercised by the Superintendence of Regulation and Control. In relation to public companies and public resources administrated by companies of the private sector, the control is exercised by the Comptroller General.

32. Various measures are possible under the administrative liability scheme such as the intervention, the declaration of inactivity, the dissolution or liquidation of companies, fines, the temporary suspension up to one year of authorization to participate in the stock market, as well as the cancellation of authorization to participate in the stock market, which involves the automatic dissolution of the offending company, etc.

Germany

33. As indicated by the German authorities, the national legal framework ensures that Germany is able to request for and to grant mutual legal assistance in cases concerning legal persons to the same extent as if natural persons were concerned. Actually, mutual legal assistance concerning legal persons takes place very often and, in general, no specific legal or practical obstacles have occurred so far. Due to the federal system, centrally managed nationwide statistics on MLA do not exist. Therefore, the Federal Government has no itemized information available.

Guatemala

34. Guatemala reported on specific legislation against corruption (Decree 31-2012 of 30/10/2012), which modified article 38 of the Criminal Code, introducing the criminal liability of legal persons. These entities are responsible for offences of their directors or managers, executives, representatives, administrators or employees and

can be sanctioned with the same penalties as those for the individual persons. The legal person will be responsible when the offence is committed by omission of control or supervision and the results are in its advantage; and when the offence is committed by decision of its authorized organ.

35. With regard to mutual legal assistance, the public ministry has not yet dealt with any requests of assistance either active or passive, for cases of corruption involving a legal person and there is no previous experience to identify possible difficulties.

Lebanon

36. Lebanon reported on different provisions of the Criminal Code and the Code of Commerce (Decree No. 204 of 24 December 1943) related to the subject. According to article 210 of the Criminal Code, legal persons can be held criminally responsible for the activities of their directors, management staff, representatives and employees when such activities are undertaken on behalf of — or using the means of — these legal persons. The applicable sanctions against legal persons are the imposition of fines, confiscation measures and the publication of the judgement. Cessation of operations and dissolution of the legal person are also possible (arts. 108-110 of the Criminal Code).

Morocco

37. Morocco made reference to substantive and procedural requirements for the provision of assistance in relation to criminal proceedings, as well as challenges encountered by the national authorities in this field.

38. The transmission of letters rogatory through the diplomatic channels is the main tool of mutual legal assistance. However, it is often slow and complex due to many factors such as the lack of qualified practitioners and the difference of languages and procedures used. Therefore the existence of a central authority in charge of the communication of letters rogatory is essential. The Convention on mutual assistance concluded between Morocco and France on 18 April 2008 states that all requests shall be channelled through both central authorities. In case of emergency, the requests — and the answers — shall directly be communicated between the judicial authorities involved.

39. Morocco further stated that many international conventions, such as the United Nations Convention against Transnational Organized Crime, encouraged the establishment of communication channels. Those channels allow for the exchange of information related to criminal acts and their perpetrators. For a better understanding of the request, it is necessary to improve translation facilities by giving the responsibility of such translation to qualified persons.

40. Morocco also highlighted the lack of capacity building programmes on mutual legal assistance matters, as there are neither specific courses in law, judges and police schools nor trainings or conferences with lectures delivered by professionals.

Nicaragua

41. In Nicaragua, criminal liability is established only for natural persons on the basis of the principle “*societas delinquere non potest*”. A legal person cannot

commit illegal acts, as it does not have as such the capacity to act. However, despite this principle, the Criminal Code, in order to prevent impunity for crimes committed by legal persons, established “accessory consequences”, as regulated in article 113. Their nature and content are of criminal nature as they affect directly the legal entity, are embodied in the Criminal Code and are ordered by a judge as a consequence of a crime. Furthermore, article 45 of the Criminal Code regulates the concept of “acting on behalf of another”, when the crime is committed by a person acting on behalf of a legal person.

42. Five types of sanctions against legal persons are in place in Nicaragua: intervention in the firm to safeguard the rights of the employees for the time necessary; closing of the firm, its locals or buildings on a temporary or definitive basis dissolution of the company, association or foundation; suspension of the activities of the company; and prohibition to realize in the future commercial activities similar to those during which the crime was committed. The latter can be temporary or definitive.

43. Nicaragua has positively replied to mutual legal assistance requests involving legal persons. Of the 10 MLA requests received between 2008 and March 2013, 3 were related to legal persons (either exclusively or along with a natural person). One request was made by Guatemala, concerning to money laundering of assets deriving from corruption offenses. This request was executed. Two requests were received from El Salvador, both dated back from 2011 and related to both natural and legal persons for the offense of embezzlement and illicit negotiations. In one of the requests, 53 persons are being investigated (25 natural, and 28 legal) and in the other 57 persons (29 natural and 28 legal). Both requests are partially executed due to the number of persons investigated.

44. The requests were, among others, related to the lifting of bank secrecy and providing specific information on suspicious transactions; submission of reports of the Estate Public Registry on the existence of estates in the name of the legal and natural persons investigated; submission of reports of the commercial register in the name of the legal and natural persons investigated; submission of fiscal reports on tax declarations and other information; and submission of police intelligence reports.

45. Nicaragua reported that, in implementing these requests, there were delays, in certain cases, to lift the bank secrecy where no specific time period was specified in the request, or when it was requested to investigate the Estate Public Registry for a large number of people, as there is no central registrar in the country, but rather 17 throughout the national territory (some of which lacking computerized systems).

46. Nicaragua highlighted as good practices the following:

(a) The creation in 2009 of an International Unit within the Criminal Public Ministry of the Prosecutor-General’s Office (central authority for MLA). This unit centralizes, and follows-up on all MLA requests, active and passive, and supports, together with the anticorruption unit, the efforts to implement international agreements with regard to corruption;

(b) The establishment of direct contacts with central authorities from Mexico, Guatemala, El Salvador, Costa Rica, Honduras and Panama. This facilitates

the implementation of the requests and allows for requesting clarifications or complementing the information needed for the execution of such requests;

(c) The strengthening of inter-institutional cooperation between the Prosecutor-General's Office, as central authority, and the national competent authorities for the implementation of the MLA requests;

(d) The implementation of internal follow-up action on the different actions requested; and

(e) The creation in the Prosecutor-General's Office of a computerized system of information on MLA requests.

Portugal

47. The criminal liability of legal persons is foreseen in Article 11 of the Criminal Code. In addition, Law No. 144/99 regulates the international judicial cooperation in criminal matters. This law applies to the following forms of cooperation: (i) extradition; (ii) transfer of proceedings in criminal matters; (iii) enforcement of criminal judgments; (iv) transfer of persons sentenced to any punishment, or measure, involving deprivation of liberty; (v) supervision of conditionally sentenced or conditionally released persons and (vi) mutual legal assistance in criminal matters. The provisions of this law apply as subsidiary provisions to co-operation in matters pertaining to, first, offences of a criminal nature, during the stage of the procedure conducted before an administrative authority; and, second, offences of a regulatory nature that give rise to proceedings that are subject to review before a court of law.

Law No. 144/99 allows for rendering assistance regardless of the fact that a natural person or a legal person is involved in the request. Therefore, no problems have been faced by Portugal, as requested State, to provide mutual legal assistance in criminal matters where a legal person may be held liable in other jurisdiction.

Thailand

48. Thailand reported on the tasks and responsibilities of the Public Sector Anti-Corruption Commission (PACC) as one of the anti-corruption agencies in the country. Established in 2008 and with its members appointed in October 2011, the PACC has been working with the National Anti-Corruption Commission (NACC) on corruption cases committed by state officials at a lower level than director of a division. The PACC has inquired into facts and summarized the file of cases submitting to the NACC for further investigation. In addition, the PACC has cooperated with related agencies particularly on the prevention and suppression of corruption in natural resources cases, in which legal persons holding shares by foreigners, in association with local officials trespassing to land or issuing illegal land titles, were involved.

49. In terms of international cooperation, the Office of the Attorney-General is the central authority to deal with MLA requests under the Act on Mutual Assistance in Criminal Matters (1992).

Tunisia

50. As reported by Tunisia, the domestic civil law recognizes legal persons as a separate legal category from natural persons. They have rights and duties and are legally responsible for their actions. Their civil liability refers to restitution for the damages caused by them.

51. However, the establishment of criminal liability for legal persons was found to be problematic. A general rule addressing and clarifying the criminal liability of legal persons is yet to be included in the Tunisian Penal Code. This hampers the attempts to develop a firm jurisdictional position on this matter. It is argued that the criminal liability of legal persons runs contrary to the fundamental criminal law principles. First, criminal liability can only be held when the existence of both mens rea and actus reus are proven. The very nature of a legal person prevents the fulfilment of the mens rea condition. Secondly, the sanctions have to be adapted to the criminal offence, with regards to the background of the offender and to the gravity and the circumstances of his/her acts. Incarceration cannot be imposed to a legal entity.

52. Hence, as Tunisia reported, there is a limited recognition of criminal liability of legal persons through the use of fines and administrative sanctions based on specific legal tools such as environment protection acts, competition laws, stock exchange regulations, as well as water and forestry regulations. Legal entities can also be held accountable through the civil liability of their representatives.

53. Tunisia stressed, however, that from a de lege ferenda point of view, the latest developments in criminal law policies and research highlighted the need to ensure the general criminal liability of legal persons through a comprehensive reform of the Tunisian Penal and Penal Procedure codes. To match the UNCAC provisions, the Tunisian criminal justice system should hold criminally accountable for money-laundering legal persons such as banks, financial institutions and foreign companies. Welfare providers, business and industrial entities under State control as well as local governments should also be held accountable for criminal offenses. Legislators should design new criteria for criminal liability, applicable to legal persons. Sanctions specific to legal entities have to be implemented such as the layoff of executives, the company's control transfer to a liquidator, assets freezing, and official publication of the sentence and dissolution of the company.

54. Moreover, Governments and the relevant organizations should endeavour, in conformity with the relevant international conventions, to facilitate international cooperation and mutual legal assistance in the field of anti-corruption to address effectively cases where legal persons are involved in the commission of criminal offences.

United States of America

55. The United States considers the ability to hold legal persons legally accountable for criminal acts an indispensable tool in the prosecution of corruption cases. In fact, the possibility of prosecuting legal persons also leads to effective prosecutions of culpable individuals, because the legal person may decide that its interests are served by fully cooperating against its employees who engaged in unlawful behaviour. Significantly, the United States provides legal assistance for the

prosecutions of legal persons, including corporations, in the same manner as it does for prosecutions of natural persons.

56. The United States also provided examples of cooperation under the UNCAC in corruption investigations and prosecutions of legal person. In the first example, authorities in country X submitted a formal request for legal assistance to the United States for a witness interview in connection with an investigation into a legal entity. The legal entity failed to deliver contracted goods, to the detriment of country X. The U.S. Department of Justice's Office of International Affairs ("OIA") referred the request to the appropriate District for execution. The requested interview was conducted in the United States, with the participation of law enforcement officials from the country X. The request was fully executed.

57. In the second example provided by the United States, authorities in country X submitted a formal request for legal assistance to the United States for bank records in connection with an investigation into a legal entity. The legal entity was suspected of laundering monetary instruments. The request sought the opening of account documents and the transmission of details of all transactions regarding the accounts and statement of accounts. The OIA referred the request to the appropriate District for execution. Records in full execution of the request were obtained in an expedient manner and were sent from the OIA to the central authority of country X.

III. Agenda, structure and topics of the second meeting of experts

58. In response to the aforementioned Note Verbale CU 2013/161 dated 2 August 2013 (see Introduction above), Cuba had no objection regarding the programme and the structure proposed for the next expert meeting. Cuba emphasized, however, the need for further progress on international cooperation, including through paying more attention to the issue of statistics, which should take into account the specificities and interests of each country. In this context, Cuba reminded that at the first expert meeting the participants noted the lack of information provided by States parties on the practical implementation of chapter IV, including statistical information, as part of the UNCAC Review of Implementation Mechanism, which was regarded as an important addition to the information on legislative provisions. The meeting had recommended that States parties consider adopting a common approach on the gathering of statistics² and Cuba fully supported this recommendation. In the view of the Cuban authorities, a common approach regarding the compilation of statistics would result in the sharing of good practices and experiences on the conditions and requirements for more effective responses in the field of international cooperation to combat corruption.

59. Lebanon suggested to devote a segment of the discussions during the second expert meeting to article 57 of the UNCAC on the "Return and disposal of assets", possibly through canvassing some model laws or bilateral or regional agreements and legal principles that govern this highly sensitive matter and that could serve to illustrate best practices. Furthermore, the meeting could benefit from the experience and input of the UNODC in this domain.

² See the report of the expert meeting, CAC/COSP/EG.1/2012/2, para. 41.

60. In line with the mandate contained in the report of the first expert meeting, the Secretariat took into account the aforementioned national responses and prepared a draft annotated agenda for the consideration of the Extended Bureau of the Conference of the States Parties to the UNCAC. In drafting the annotated agenda, consideration was given to the structure and framework of work at the first expert meeting. In addition, it was taken into account that experts requested the Secretariat to continue to brief the meeting on the analysis of information received in the context of the country reviews on the implementation of chapter IV of the Convention. The draft annotated agenda was endorsed by the Extended Bureau of the Conference of the States Parties to the UNCAC at its meeting on 28 August 2013.

IV. Possible future course of action of the meeting of experts

61. In response to the aforementioned Note Verbale CU 2013/161 dated 2 August 2013 (see Introduction above), Austria welcomed the organization of at least one special session dealing with issues relating to international cooperation. This particular session should be attended both by UNCAC and UNTOC experts in order to exchange common experiences and gain further synergy effects.

62. Cuba considered that, taking into account the purpose and the functions of both the UNCAC expert meeting and the Working Group on International Cooperation under the UNTOC, it would be useful to resort to the option of the joint sessions with a view to ensuring a greater degree of comprehensiveness and coherence of the work of the United Nations treaty bodies on international cooperation matters, as well as making best use of human and financial resources available.

63. The Czech Republic reported that it endorsed the proposal of joint sessions of the meeting of experts on international cooperation under the UNCAC and the Working Group on International Cooperation under the UNTOC.

64. Israel supported the idea of combining the UNCAC and UNTOC meetings of experts on international cooperation. Israel was of the opinion that having one joint session on the issue would save time and resources for the participating experts and their governments, and promote coherence in the approach to international cooperation within the United Nations body of treaties.

65. Lebanon was of the view that the joint sessions of the meeting of experts and the Working Group on International Cooperation under the UNTOC would be a good initiative that could foster and enrich the debate on matters of common concern between the two working groups.

66. The United States stated that the first meeting of experts on international cooperation under the UNCAC proved to be a forum for Vienna-based delegates, as opposed to a meeting of expert practitioners of international cooperation. According to the U.S. authorities, the meeting demonstrated their previously expressed concern that with an additional forum for discussions on international cooperation, neither the UNTOC nor the UNCAC expert group would attract the number of expert practitioners necessary to make results meaningful.

67. The United States recalled that the Conference of the States Parties to the UNCAC had already established a Working Group on Asset Recovery, which is an expert group on international cooperation, but focused on a precise element of such cooperation.

68. The United States further stated that the 2012 expert group meeting on international cooperation under the UNCAC spent considerable time discussing extradition and mutual legal assistance, topics that have been discussed at length under the UNTOC Working Group on International Cooperation. Hence, the United States was of the view that no new or noteworthy contribution had resulted from the UNCAC expert meeting and therefore it should not be convened again as a stand-alone meeting. Should there be broad support by others for convening another meeting, the United States argued that it should be convened as a joint session with the UNTOC Working Group on International Cooperation in order to avoid duplication of effort, maximize resources and reduce the burden on those expert practitioners who would participate. Alternatively, international cooperation could be explicitly included in the agenda of the UNCAC Working Group on Asset Recovery.

V. Conclusions and recommendations

69. The responses of the responding Member States on the issue of liability of legal persons touched upon legal approaches, practices and challenges experienced at both the domestic and the international levels. From this point of view, the information provided is useful for assessing issues of implementation regarding both articles 26 and 46, paragraph 2, of the UNCAC.

70. Based on the sample of the reported information, there seems to be no question regarding the possibility to hold a legal person accountable through the general rules of civil responsibility or through administrative regulations. In most cases, multiple forms of liability would apply. It is interesting to note, however, that the majority of the reporting countries have established some form of criminal liability of legal persons. Whereas in the past this was a distinctive feature of a number of common law systems, a definite tendency towards adopting the same approach in civil law countries seems to be emerging.

71. Sanctions generally vary, ranging from the most common variants of pecuniary penalties, forfeiture and publication of an extract of the judgment, to penalties of an administrative nature, including deprivation of business license and temporary prohibitions from engaging in a commercial or other activity and dissolution of the corporate body or cancellation of the legal personality, as well as different combinations of the above.

72. The establishment of criminal liability for legal persons in different jurisdictions through specific legislation or modifications in Criminal Codes seems to have a positive impact on the scope of cooperation which could be provided in the context of mutual legal assistance. Indeed, the absence of rules enabling the treatment of legal persons as perpetrators of criminal offences may create obstacles to international cooperation in relation to offences for which legal entities may be held accountable, to the extent that double criminality is required and assistance is not provided on the basis of reciprocity. In addition, such obstacles to effective

cooperation may be linked to the existence of certain grounds of refusal of MLA requests (e.g., prohibition by domestic law of the requested State to carry out the action requested had it been subject to domestic proceedings — see article 46, paragraph 21(c), of the UNCAC). In any case, the Convention includes a general principle in article 43, paragraph 1, enabling States parties to consider assisting each other in investigations and proceedings in civil and administrative matters relating to corruption. This principle may facilitate cooperation even in cases where the liability of legal persons is only of civil and/or administrative nature.

73. More feedback is likely to be needed in the long run to assess the effectiveness of the implementation of existing regulations on the liability of legal persons, as well as the way that these regulations are interpreted by the courts or applied in mutual legal assistance cases.

74. The expert meeting, as well as the Conference of the States Parties to the UNCAC itself, may wish to consider the information contained in the present report in conjunction with the relevant findings of the country reviews conducted within the framework of the UNCAC Review of Implementation Mechanism.

75. On the issue of the future work of the UNCAC meeting of experts and its relationship with the UNTOC Working Group on International Cooperation, the majority of the responding Member States favoured the option of joint sessions. This is attributed to the overlapping issues of international cooperation under discussion (although the respective provisions of the two Conventions are not identical), as well as the fact that in the majority of Member States the same central authorities and practitioners deal with international cooperation in cases involving corruption and organized crime. Hence, it is argued that for purposes of promoting coherence and making best use of existing resources, synergies through the organization of joint sessions may need to be pursued.

76. It should be noted that at the first expert meeting, the option of joint sessions had been again proposed by many speakers, but other speakers had expressed caution and their preference to more discussions so that an assessment of whether the organization of joint meetings was feasible could be made.³ Other speakers highlighted the close thematic links between the work of the meeting of experts and the Open-ended Intergovernmental Working Group on Asset Recovery, established by the Conference in its resolution 1/4.⁴ In this context, one of the reporting Member States suggested, as an alternative option, to include the topic of international cooperation in the agenda of this Working Group. One of the difficulties that may be encountered, in this regard, is the fact that different modalities of international cooperation are under discussion in the UNCAC expert meeting and the Working Group on Asset Recovery. It should be recalled, in this regard, that extradition and mutual legal assistance are not the subject of discussion in the Working Group on Asset Recovery.

77. In order to facilitate its work and the discussions within its context, the Secretariat is bringing to the attention of the expert meeting the following list of possible options for consideration:

³ See paragraph 7 above. See also the report of the expert meeting, CAC/COSP/EG.1/2012/2, para. 37.

⁴ See CAC/COSP/EG.1/2012/2, para. 38.

(a) Joint sessions of the expert meeting on international cooperation under the UNCAC and the Working Group on International Cooperation functioning under the authority of the COP/UNTOC. If joint meetings are to be held, the agenda should be carefully structured to allow for the discussion of common themes, as well as specific topics relating to each of the instruments.⁵ This option would require a new mandate by the COP to allow for joint meetings on an annual basis;

(b) Continuation of the practice established in 2012 to organize back-to-back meetings of the two working groups within the framework of sessions of the UNTOC and the UNCAC interchangeably. This option would require a new mandate by the COP to allow for annual meetings of the UNTOC Working Group on International Cooperation;

(c) Integration of international cooperation issues within the agenda of the Working Group on Asset Recovery functioning under the authority of the COSP to the UNCAC or organization of back-to-back meetings of the Working Group on Asset Recovery and the UNCAC expert meeting; and

(d) Organization of separate meetings of the two expert groups during the proceedings of the Conferences of Parties they support and on the basis of their respective mandates, but acting complementarily to each other. Namely, the agenda of the meetings of each working/expert group will include a specific session in which the report of the other group will be presented, followed by round-table discussions on cross-cutting issues.

78. The meeting of experts may wish to present to the Conference of the States Parties the aforementioned range of possible courses of action, together with its recommendations, for further consideration and action.

⁵ Ibid., para. 39.