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## Commission on Crime Prevention and Criminal Justice

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Item 6 of the provisional agenda\*

### International cooperation in combating transnational crime

## Establishment of an intergovernmental expert group to prepare a draft model bilateral agreement on disposal of confiscated proceeds of crime covered by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

### Report of the Secretary-General

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\* E/CN.15/2005/1.



## **I. Introduction**

1. In its resolution 2004/24 of 21 July 2004, the Economic and Social Council requested the Secretary-General to convene, subject to the availability of extrabudgetary resources, an open-ended intergovernmental expert group, the composition of which should reflect an equitable geographical representation and a diversity of legal systems, to prepare a draft model bilateral agreement on sharing confiscated proceeds of crime covered by the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988;<sup>1</sup> requested the open-ended intergovernmental expert group, in carrying out its work, to take into account, where appropriate, existing agreements on sharing confiscated proceeds of crime and other relevant instruments developed in multilateral forums; and requested the Secretary-General to submit the results of the meeting of the open-ended intergovernmental expert group to the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Commission on Crime Prevention and Criminal Justice at its fourteenth session for their consideration.
2. The present report is submitted in response to that request.

## **II. Recommendations**

3. The open-ended intergovernmental expert group submits to the Commission on Crime Prevention and Criminal Justice at its fourteenth session and the Conference of the Parties to the United Nations Convention against Transnational Organized Crime the draft model bilateral agreement on the sharing of confiscated proceeds of crime or property for their consideration and action (see annex).

## **III. Organization of the meeting**

### **A. Opening of the meeting**

4. The meeting of the open-ended intergovernmental expert group to prepare a draft model bilateral agreement on disposal of confiscated proceeds of crime covered by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 was held in Vienna from 26 to 28 January 2005. The open-ended expert group held five meetings.
5. The meeting was opened by the Director of the Division for Treaty Affairs of the United Nations Office on Drugs and Crime. In his opening remarks, the Director welcomed the participants and expressed satisfaction at the high number of countries attending the meeting, which indicated the interest of the international community in addressing the issue of the disposal of confiscated proceeds of crime. He also expressed appreciation and gratitude to the Government of the United States of America for its generous contribution, which had allowed the holding of the meeting, as well as for the documentation submitted.

## B. Attendance

6. The meeting was attended by representatives of the following States: Algeria, Angola, Argentina, Austria, Azerbaijan, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, France, Germany, Greece, Guatemala, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uzbekistan, Viet Nam, Yemen and Zambia.

7. Also attending the meeting were observers for the World Bank and the European Commission.

## C. Election of officers

8. The meeting elected the following officers by acclamation:

*Chairman:* Dennis Evans (United Kingdom of Great Britain and Northern Ireland)

*Vice-Chairmen:* Patricia Espinosa Cantellano (Mexico)  
Chong-hoon Kim (Republic of Korea)  
Sergey P. Bulavin (Russian Federation)

*Rapporteur:* Olawale Idris Maiyegun (Nigeria)

## D. Adoption of the agenda

9. At its 1st meeting, on 26 January 2005, the open-ended intergovernmental expert group adopted the following agenda:

1. Opening of the meeting.
2. Election of officers.
3. Adoption of the agenda and organization of work.
4. Presentation by delegates of asset-sharing systems.
5. Preparation of a draft model bilateral agreement on sharing confiscated proceeds of crime covered by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (as well as the International Convention for the Suppression of the Financing of Terrorism).
6. Conclusions and recommendations and adoption of the report of the meeting.

#### IV. Summary of the discussion

10. At its 1st meeting, on 26 January, several representatives made presentations on national systems for sharing confiscated proceeds of crime or property.

11. During the presentations the relevance and the importance of sharing confiscated proceeds of crime or property was generally recognized as a matter of fairness as well as for the role that it could play in fostering and strengthening international cooperation in criminal matters.

12. In their contributions, representatives illustrated in detail how the confiscation of proceeds of crime or property and their disposal were regulated in their respective countries and made reference to specific cases. Some representatives indicated that their countries had specific laws or articles of the code of criminal procedure dealing with the sharing of confiscated proceeds of crime or property, while others pointed out that they did not have specific provisions in their domestic laws, as the matter was dealt with either in the context of administrative procedures or on a case-by-case basis pursuant to ad hoc bilateral agreements.

13. Most representatives indicated that their national systems required final confiscation, obtained on the basis of a judgement, as a precondition for the sharing of proceeds of crime or property and outlined the different means by which confiscation could be obtained. In addition, a case was described in which the return of proceeds of crime or property for the purpose of restitution to victims had been agreed to without a formal confiscation and as the result of negotiation.

14. While some representatives pointed out that, according to their national systems, there must be a formal international agreement in order to proceed with the sharing of confiscated proceeds of crime or property, others indicated that such sharing could also be regulated on the basis of reciprocity.

15. Some representatives informed the meeting that, in their countries, funds or accounts had been established where confiscated proceeds of crime or property were deposited and could be made available for sharing. One representative raised the possibility of contributing the value of confiscated proceeds of crime or property to intergovernmental bodies specialized in the fight against illicit drug trafficking (in the context of the 1988 Convention) or contributing that value to an account that could be designated in accordance with articles 14 and 30, paragraph 2 (c), of the Organized Crime Convention.

16. Representatives also indicated how confiscated proceeds of crime or property were returned or shared according to their national systems and how they had been disposed of in specific cases. In that connection, some participants stressed the need to cover costs encountered by the requested State.

17. Some representatives recalled that, as stated in article 14, paragraph 2, of the Organized Crime Convention, priority consideration should be given to restitution over other asset-sharing modalities.

18. As regards the use of the shared confiscated proceeds of crime or property by the recipient country(ies), the presentations made highlighted differences among various national systems, as one representative specifically underlined that no conditions could be placed on such use, while another described a recent case where

an agreement with the requested State had been reached on how to use the returned funds.

19. The observer for the European Commission made a presentation on the Council's draft framework decision on the execution in the European Union of confiscation orders, highlighting in particular articles 14 and 17 of the draft decision, on sharing of assets and costs, respectively.

20. After the presentations by representatives, the Chairman invited the expert group to consider and discuss the draft model bilateral agreement submitted by the United States.

21. At its 2nd to 4th meetings, the expert group reviewed and amended the draft model bilateral agreement.

## **V. Adoption of the report**

22. At its 5th meeting, on 28 January, the open-ended intergovernmental expert group to prepare a draft model bilateral agreement on disposal of confiscated proceeds of crime covered by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 agreed unanimously on the text of the draft model bilateral agreement as contained in the annex to the present report. It also adopted its report and decided to submit it to the Commission on Crime Prevention and Criminal Justice at its fourteenth session, to be held in Vienna from 23 to 27 May 2005, and to the Conference of the Parties to the United Nations Convention against Transnational Organized Crime at its second session, to be held in Vienna from 10 to 21 October 2005, pursuant to Economic and Social Council resolution 2004/24.

### *Notes*

<sup>1</sup> United Nations, *Treaty Series*, vol. 1582, No. 27627.

## Annex

**Draft model agreement between  
the Government of \_\_\_\_\_  
and  
the Government of \_\_\_\_\_  
regarding the sharing of confiscated  
proceeds of crime or property<sup>1</sup>**

*The Government of \_\_\_\_\_ and the Government of \_\_\_\_\_ (hereinafter referred to as “the Parties”),*

*Recalling* the United Nations Convention against Transnational Organized Crime,<sup>2</sup> in particular its articles 12, paragraph 1, 13 and 14,

*Recalling* also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,<sup>3</sup> in particular article 5, paragraphs 1, 4 and 5,

*Recognizing* that this Agreement should not prejudice the principles set forth in the United Nations Convention against Corruption<sup>4</sup> or the development, at a later stage, of any appropriate mechanism to facilitate the implementation of that Convention,

*Reaffirming* that nothing in the provisions of this Agreement should prejudice in any way the provisions and the principles on international cooperation set forth in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Convention against Transnational Organized Crime, and that this Agreement is intended to enhance the effectiveness of international cooperation envisioned in those Conventions,

*Considering* [reference to a treaty on mutual legal assistance if one exists between the Parties],

*Desiring* to create an appropriate framework for sharing confiscated proceeds of crime or property,

*Have agreed as follows:*

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<sup>1</sup> The present model agreement may be useful for the implementation of other relevant instruments developed in multilateral forums to which the parties to the agreement may also be parties, such as the International Convention for the Suppression of the Financing of Terrorism (General Assembly resolution 54/109, annex) and the Forty Recommendations of the Financial Action Task Force against Money Laundering.

<sup>2</sup> General Assembly resolution 55/25, annex I.

<sup>3</sup> United Nations, *Treaty Series*, vol. 1582, No. 27627.

<sup>4</sup> General Assembly resolution 58/4, annex.

*Article 1*  
*Definitions*

For the purposes of this Agreement:

(a) The terms “proceeds of crime”, “confiscation” and “property” shall be understood as defined in article 2 of the United Nations Convention against Transnational Organized Crime and article 1 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988;

(b) “Cooperation” shall mean any assistance described in articles 13, 16, 18-20, 26 and 27 of the United Nations Convention against Transnational Organized Crime or articles 5, paragraph 4, 6, 7, 9-11 and 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, as well as cooperation between entities foreseen in article 7 of the United Nations Convention against Transnational Organized Crime, which has been given by one Party and which has contributed to, or facilitated, confiscation of proceeds of crime or property.

*Article 2*  
*Scope of application*

This Agreement is intended solely for the purposes of mutual assistance between the Parties.

*Article 3*  
*Circumstances in which confiscated proceeds  
of crime or property [may] [shall] be shared*

Where a Party is in possession of confiscated proceeds of crime or property and has cooperated with, or received cooperation from, the other Party, it [may] [shall] share such proceeds of crime or property with the other Party, in accordance with this Agreement, without prejudice to the principles enumerated in article 14, paragraphs 1, 2 and 3 (a), of the United Nations Convention against Transnational Organized Crime and article 5, paragraph 5 (b) (i), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.<sup>5</sup>

*Article 4*  
*Requests for sharing confiscated proceeds of crime or property*

1. A request for sharing confiscated proceeds of crime or property shall be made within a time limit to be agreed between the Parties, shall set out the circumstances of the cooperation to which it relates and shall include sufficient details to identify the case, the confiscated proceeds of crime or property and the agency or agencies involved or such other information as may be agreed between the Parties.

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<sup>5</sup> It may be necessary to insert a specific provision in the agreement regarding the return of works of art of archaeological objects that have been purchased or exported illegally from their country of origin.

Option 1

[2. On receipt of a request for sharing confiscated proceeds of crime or property made in accordance with the provisions of this article, the Party where confiscated proceeds of crime or property are located shall consider, in consultation with the other Party, whether to share such proceeds of crime or property, as set out in article 3 of this Agreement.]

Option 2

[2. On receipt of a request for sharing confiscated proceeds of crime or property made in accordance with the provisions of this article, the Party where confiscated proceeds of crime or property are located shall share with the other Party such proceeds of crime or property, as set out in article 3 of this Agreement.]

*Article 5*

*Sharing of confiscated proceeds of crime or property*

Option 1

[1. Where a Party proposes to share confiscated proceeds of crime or property with the other Party, it shall:

(a) Determine, at its discretion and in accordance with its domestic law and policies, the proportion of the confiscated proceeds of crime or property to be shared, which, in its view, corresponds to the extent of the cooperation afforded by the other Party; and

(b) Transfer a sum equivalent to that proportion set forth in subparagraph (a) above to the other Party in accordance with article 6 of this Agreement.

2. In determining the amount to transfer, the Party holding the confiscated proceeds of crime or property may include any interest and appreciation that has accrued on the confiscated proceeds of crime or property and may deduct reasonable expenses incurred in investigations, prosecution or judicial proceedings leading to the confiscation of the proceeds of crime or property.]

Option 2

[1. In sharing confiscated proceeds of crime or property in accordance with this Agreement:

(a) The proportion of the confiscated proceeds of crime or property to be shared shall be determined by the Parties on a *quantum meruit* basis or on any other reasonable basis agreed upon by the Parties;

(b) The Party holding the confiscated proceeds of crime or property shall transfer a sum equivalent to that proportion set forth in subparagraph (a) above to the other Party in accordance with article 6 of this Agreement.

2. In determining the amount to transfer, the Parties shall agree on any issues related to interest and appreciation that has accrued on the confiscated



proceeds of crime or property and the deduction of reasonable expenses incurred in investigations, prosecution or judicial proceedings leading to the confiscation of the proceeds of crime or property.]

3. The Parties agree that it may not be appropriate to share where the value of the confiscated proceeds of crime or property is *de minimis*, subject to previous consultations between them.

#### *Article 6*

##### *Payment of shared proceeds of crime or property*

1. Unless the Parties agree otherwise, any sum transferred pursuant to article 5, paragraph 1 (b), of this Agreement shall be paid:

(a) In the currency of the Party where the proceeds of crime or property are located; and

(b) By means of an electronic transfer of funds or by cheque.

2. Payment of any such sum shall be made:

(a) In any case in which the Government of \_\_\_\_\_ is receiving payment, to [*identify the pertinent office or designated account as specified in the request*];

(b) In any case in which the Government of \_\_\_\_\_ is receiving payment, to [*identify the pertinent office or designated account as specified in the request*]; or

(c) To such other recipient or recipients as the Party receiving payment may from time to time specify by notification for the purposes of this article.

#### *Article 7*

##### *Terms of transfer*

1. In making the transfer, the Parties recognize that all right or title to and interest in the transferred proceeds of crime or property have already been adjudicated and that no further judicial proceedings are necessary to complete the confiscation. The Party transferring the proceeds of crime or property assumes no liability or responsibility for the proceeds of crime or property once they have been transferred and relinquishes all right or title to and interest in the transferred proceeds of crime or property.<sup>6</sup>

2. Unless otherwise agreed, where a Party transfers confiscated proceeds of crime or property pursuant to article 5, paragraph 1 (b), of this Agreement, the other Party shall use the proceeds of crime or property for any lawful purpose at its discretion.

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<sup>6</sup> Where the domestic law of a State requires it to sell confiscated proceeds of crime or property and only permits it to share funds, this provision may be unnecessary.

*Article 8*  
*Channels of communication*

All communications between the Parties pursuant to the provisions of this Agreement shall be conducted through [*the central authorities designated pursuant to article [...] of the treaty on mutual legal assistance referred to in the preamble to the agreement*] or by the following:

(a) For the Government of \_\_\_\_\_, by the Office of \_\_\_\_\_;

(b) For the Government of \_\_\_\_\_, by the Office of \_\_\_\_\_; or

(c) By such other nominees as the Parties, for their own part, may from time to time specify by notification for the purposes of this article.

*Article 9*  
*Territorial application*

This Agreement shall apply [*if applicable, designate any territories to which the agreement should be extended for each Government*].

*Article 10*  
*Amendments*

This Agreement may be amended when both Parties have agreed in writing to such amendment.

*Article 11*  
*Consultations*

The Parties shall consult promptly, at the request of either Party, concerning the interpretation, application or implementation of this Agreement, either generally or in relation to a particular case.

*Article 12*  
*Entry into force*

This Agreement shall enter into force upon signature by both Parties or upon notification by the Parties that the necessary internal procedures have been completed.<sup>7</sup>

*Article 13*  
*Termination of the Agreement*

Either Party may terminate this Agreement, at any time, by giving written notice to the other Party. Termination shall become effective [...] months after receipt of the notice. The provisions shall, however, continue to apply in relation to confiscated proceeds of crime or property to be shared under this Agreement.

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<sup>7</sup> This may be upon signature, ratification, publication in a legal gazette or by other means.

In witness whereof, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Done in duplicate at [*location*], this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

For the Government of

\_\_\_\_\_:

[*Signature*] \_\_\_\_\_

For the Government of

\_\_\_\_\_:

[*Signature*] \_\_\_\_\_

\_\_\_\_\_