



UNODC

United Nations Office on Drugs and Crime

PILOT REVIEW PROGRAMME: UNITED STATES OF AMERICA



*Review of the Implementation of Articles 5, 15, 16, 17, 25,
46 paragraphs 9 and 13, 52 and 53 of the United Nations
Convention against Corruption*

Reviewing Countries: Poland and Sweden

A. Introduction

Article 63 of the United Nations Convention against Corruption (UNCAC) establishes a Conference of the States Parties with a mandate to, inter alia, promote and review the implementation of the Convention. In accordance with article 63 paragraph 7, the Conference shall establish, if it deems necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.

At its first session, held in Jordan in December 2006, the Conference of the States Parties agreed that it was necessary to establish an appropriate and effective mechanism to assist in the review of the implementation of the Convention (resolution 1/1). The Conference established an open-ended intergovernmental expert group to make recommendations to the Conference on the appropriate mechanism, which should allow the Conference to discharge fully and efficiently its mandates, in particular with respect to taking stock of States' efforts to implement the Convention. The Conference also requested the Secretariat to assist parties in their efforts to collect and provide information on their self-assessment and their analysis of implementation efforts and to report on those efforts to the Conference. In addition, several countries already during the session of the Conference expressed their readiness to support on an interim basis a review mechanism which would combine the self-assessment component with a review process supported by the Secretariat.

The "Pilot Review Programme", of which this report forms part of, was established to offer adequate opportunity to test possible means for implementation review of the Convention, with the overall objective to evaluate efficiency and effectiveness of the tested mechanism(s) and to provide to the Conference of the States Parties information on lessons learnt and experience acquired, thus enabling the Conference to make informed decisions on the establishment of the appropriate mechanism for reviewing the implementation of the Convention. The Pilot Programme is an interim measure to help fine-tune the course of action. It is strictly voluntary and limited in scope and time.

The methodology used under the Pilot Review Programme was to conduct a limited review of the implementation of UNCAC in the participating countries using a combined self-assessment / group / expert review method as possible mechanism(s) for reviewing the implementation of the Convention. Throughout the review process, members of the Group engage with the individual country in an active dialogue, discussing preliminary findings and requesting additional information. Where requested, country visits are conducted to assist in undertaking the self-assessments and/or preparing the recommendations. The teams conducting the country visits will be composed of experts from two prior agreed upon countries from the Group and a member of the Secretariat.

The scope of review is articles: 5 (preventive anti-corruption policies and practices); 15 (bribery of national public officials); 16 (bribery of foreign public officials and officials of public international organizations); 17 (embezzlement, misappropriation or other diversion of property by a public official); 25 (obstruction of justice); 46 (mutual legal assistance), particularly paragraphs 13 and 9; 52 (prevention and detection of transfers of proceeds of crime); and 53 (measures for direct recovery of property)

B. Process

The following review of the U.S.'s implementation of the United Nations Convention against Corruption is based on the self assessment report received from the U.S at <http://www.ustreas.gov/press/releases/docs/nmls.pdf>, publicly available reports from other review mechanisms (FATF and GRECO) and the outcome of the active dialogue between experts from the U.S. and experts from Sweden and Poland. No country visit was performed during the course of this UNCAC pilot review programme process.

C. Executive summary

The U.S. has adopted the measures required in accordance with UNCAC Articles 5 (preventive anti-corruption policies and practices); 15 (bribery of national public officials); 16(1) (active bribery of foreign public officials and officials of public international organizations); 17 (embezzlement, misappropriation or other diversion of property by a public official); 25 (obstruction of justice); 46 (mutual legal assistance), particularly paragraphs 13 and 9; 52 (prevention and detection of transfers of proceeds of crime); and 53 (measures for direct recovery of property). The U.S. appears to have not fully adopted the voluntary provisions of UNCAC Article 16(2), which suggest the consideration of criminalizing the passive bribery of foreign public officials and officials of public international organizations.

D. Implementation of the United Nations Convention against Corruption

1. Ratification of the Convention

The Convention was signed by the U.S. on 9 December 2003. It was subsequently ratified and deposited with the United Nations on 30 October 2006. (See UN Document C.N.1133.2006.TREATIES-47 [Depositary Notification].)

2. The US legal system

Pursuant to Article II(2) of the United States Constitution, the UNCAC was approved by the United States Senate on 15 September 2006, pursuant to Senate Resolution 150906/109-6. (As noted in D.1, *supra*, the ratification documentation was then deposited with the U.N. on 30 October 2006.) Article VI of the United States Constitution states that such ratified treaties, along with federal law, constitute the “supreme Law of the Land.” The UNCAC therefore ranks high among the laws of the U.S.

Primary responsibility for the criminalization and enforcement aspects of the UNCAC lays with the Justice Department, which has a dedicated unit within its Criminal Division in Washington, D.C., the Public Integrity Section that specializes in enforcing the nation’s anti-corruption laws. The promotion and implementation of the prevention provisions of Chapter II is carried out by a number of government entities through a variety of systems and programs.

The Justice Department’s Public Integrity Section was created in 1976 to consolidate into one unit the Justice Department’s responsibilities for the prosecution of criminal abuses of the public trust by government officials. The Section currently has 29 attorneys working full-time to prosecute selected cases involving federal, state, or local officials, and also to provide advice and assistance to prosecutors and investigators in the 94 United States Attorneys’ Offices around the country. The Criminal Division supplements the resources available to the Public Integrity Section with attorneys from other sections within the Criminal Division – including the Fraud, Organized Crime and Racketeering, Computer Crimes and Intellectual Property, and Asset Forfeiture and Money Laundering sections, to name just four – and from the 94 U.S. Attorneys Offices.

The United States federal judicial system is broken into 94 separate districts, 93 of those districts is assigned a senior prosecutor (called the United States Attorney, who is an official of the Department of Justice) and a staff of prosecutors to enforce federal laws in that district. (One U.S. Attorney serves in two districts.) Those offices, in addition to the Public Integrity Section, also enforce the United States anti-corruption laws.

The Department of Justice has also dedicated increased resources to combating domestic public corruption. The Federal Bureau of Investigation, for example, currently has 639 agents dedicated to investigating public corruption matters, compared to 358 in 2002. Using these resources, the Department of Justice aggressively investigates, prosecutes, and punishes corruption of and by public officials at all levels of government (including local, state, and national public officials), in all

branches of government (executive, legislative, and judicial), as well as individuals from major United States political parties.

For example, the Justice Department has recently convicted one former Member of Congress of substantial public corruption charges, and has indicted a sitting Member of Congress on significant corruption and other charges. The Department has also recently convicted two former state governors of bribery offences, and has conducted a large-scale bribery investigation into the activities of a well-known Washington, D.C. lobbyist. To date, that investigation has netted a total of 11 bribery-related convictions. Those convictions have included a guilty plea by the former Deputy Secretary of the Department of the Interior and the jury conviction of a former official of the United States General Services Administration, among others.

Statistically, the Justice Department has increased its enforcement efforts against public corruption in recent years. Over the five-year period from 2001 to 2005 (the most recent period for which data is available), the Department charged 5,749 individuals with public corruption offences nationwide and obtained 4,846 convictions. Compared with the previous five year period (1996-2000), these figures represent an increase of 7.5 percent in the number of defendants charged and a 1.5 percent increase in the number of convictions.

Beyond these domestic efforts, The United States works internationally to build and strengthen the ability of prosecutors around the world to fight corruption through their overseas prosecutorial and police training programs. Among other things, the United States sends experienced U.S. prosecutors (called Resident Legal Advisors or RLAs) and law enforcement officials to many countries to provide anticorruption assistance through seminars and hands-on consultations.

Some of this training occurs on a bilateral basis, and some occurs at the various International Law Enforcement Academies (ILEAs) in various regions of the world including Europe, the Americas, Asia and Africa. That assistance involves the development of specialized prosecutorial and investigative units, anti-corruption task forces, anti-corruption commissions and national strategies, internal integrity programs, and training on how to investigate and prosecute corruption.

For example, in 2006, the U.S. Justice Department’s police training unit, ICITAP, in partnership with the U.S. Department of State, provided 94 Public Integrity, Accountability, and Anti-Corruption training sessions in 13 countries. Additionally, the Department’s prosecutorial training unit, OPDAT, has 40 Resident Legal Advisors working in 27 different countries to train their foreign counterparts in anti-corruption prosecutions. OPDAT also organizes and implements bi-lateral and regional conferences on anti-corruption prosecution around the world.

3. Review of implementation of selected articles

3.1. Article 5

Preventive anti-corruption policies and practices
“1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
“2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
“3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.
“4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant

international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.”

a. Summary of the main requirements

In accordance with article 5, States Parties are required: (a) To develop and implement or maintain effective anti-corruption policies that encourage the participation of society, reflect the rule of law and promote sound and transparent administration of public affairs (para. 1); and (b) To collaborate with each other and relevant international and regional bodies for the pursuit of the above goals (para. 4). Article 5 does not introduce specific legislative requirements, but rather mandates the commitment of States Parties to develop and maintain a wide range of measures and policies for the prevention of corruption, in accordance with the fundamental principles of their legal system. Under article 5, paragraph 1, the requirement is to develop, implement and maintain effective, coordinated measures that: (a) promote the participation of the wider society in anti-corruption activities; and (b) reflect the principles of: (i) the rule of law; (ii) proper management of public affairs and public property; (iii) integrity; (iv) transparency; and (v) accountability. These general aims are to be pursued through a range of mandatory and optional measures outlined in subsequent articles of the Convention. Article 5, paragraph 4, requires that, in the pursuit of these aims, as well as of general prevention and evaluation of implemented anti-corruption measures, States Parties collaborate with each other as well as with relevant international and regional organizations, as appropriate and in accordance with their fundamental principles of law.

b. Findings and observations of the review team concerning article 5

The United States Constitution establishes the rule of law for the nation. The Constitution regulates government power through separation of powers among the branches of federal government with a system of checks and balances. It also reserves to the individual States significant powers. The Constitution provides for the creation of laws, for equality before the law and for a system of formal justice. At the federal level in the U.S., the laws passed by Congress and subsequent implementing measures that support adherence to the terms and spirit of article 5 of the Convention are extensive.

In particular, the U.S. has adopted a detailed preventive legal regime¹, which provides for the participation of society, the management of public affairs and property, preventive financial management systems, detailed integrity compliance systems, laws preventively restricting the administrative powers of judicial and executive officers, procurement controls, limitations on receipt of gifts and travel benefits, conflict of interest laws, laws promoting transparency, and accountability, and numerous other related provisions.

One of the notable ways the Federal government promotes transparency is through a transparent system for providing the public with access to government information. The Freedom of Information Act (FOIA) was enacted in 1966 and generally provides that any person has the right to request access to Federal agency records or information. All agencies of the executive branch of the United States Government are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the nine exemptions and three exclusions of the FOIA. This right of access is enforceable in court, and it is supported at the administrative agency level by the "citizen-centered and results-oriented approach" of a presidential executive order.

¹ The texts of the laws, statutes, and regulations cited in this report are available on the Internet: the text of provisions cited in the United States Code (U.S.C.) can be found at <http://straylight.law.cornell.edu/uscode/>; the text of provisions cited in Public Laws (P.L.) can be found at <http://thomas.loc.gov/bss/d110/d110laws.html>; the text of provisions in the Code of Federal Regulations (C.F.R.) can be found at www.gpoaccess.gov/cfr/index.html; and the text of citations to Office of Management and Budget Circulars can be found at www.whitehouse.gov/omb/circulars/index.html.

A significant amount of government information is available without having to submit a request simply by accessing (www.usa.gov), the Government's official web portal. Launched in 2000 (then under the name FirstGov.gov), the portal is an interagency initiative administered by the General Services Administration's Office of Citizen Services and Communications. U.S.gov is a centralized place to find comprehensive information from U.S. local, state, and Federal government agency websites. It utilizes a search engine and an index of web-accessible government information and services so that users can find what they need.

In the Legislative Branch, proceedings of the House of Representatives and the Senate are televised pursuant to rules established by both Houses of Congress. As a result of these rules, in 1979 the cable television industry as a public service created C-Span, a private, non-profit company whose mission is to provide public access to the political process through the live broadcasting of Congressional and other governmental proceedings.

The Federal government has also increasingly utilized the Internet to promote the participation of society in government processes and decisions. For example, Regulations.gov (www.Regulations.gov) is the public face of the Federal government's eRulemaking Initiative. The eRulemaking Initiative facilitates public participation in the Federal regulatory process by improving the public's ability to find, view, and comment on Federal regulatory actions. Regulations.gov was launched in 2003 and serves as a secure, robust electronic rulemaking repository, enabling Federal departments and agencies to post all rulemaking documents for public access and comment. Regulations.gov allows the public to communicate with a broad spectrum of government agencies whose regulations touch countless aspects of their daily lives. More than 35 partner departments and agencies participate in the eRulemaking Initiative, one of the most far-reaching Federal E-Government programs.

In the area of promoting integrity, all three branches of government have issued codes of conduct and provide employees with education and training on these codes. In the Federal executive branch, the Office of Government Ethics (OGE) has promulgated regulations requiring that all executive branch employees, regardless of rank, receive training on the ethics laws and rules as part of their in-processing as new government officials. Additionally, each employee who files a financial disclosure report (senior officials and employees and other in positions with higher risks for potential conflicts of interest) must also receive ethics training annually. As part of its program oversight role, OGE verifies during its ethics program review that all employees required to receive training are indeed trained and that the training was conducted in accordance with requirements set forth in regulations.

As part of their preventive strategy, the U.S. also has an aggressive prosecution approach, with high numbers of resulting corruption cases. Relevant to this preventive strategy, the U.S. focuses on prosecutions for actions involving violation of preventive rules, such as asset disclosure violations and other similar violations of preventive controls.

Beyond these examples, the U.S. has a complex and detailed preventive legal system in place, which includes, but is not limited to, the following provisions of law:

Laws or other measures that promote the participation of society:

- U.S. Constitution, 1st Amendment Right to Petition
- Administrative Procedures Act 5 U.S.C. 551 et. seq. (in part provides the public with notice and the opportunity to comment on substance of proposed rules and regulations)
- Federal Advisory Committee Act 5 U.S.C. app. [5 U.S.C.A. app. 2] (structural and procedural requirements for approximately 1000 Federal advisory committees with substantial numbers of members of the public)

Laws and other measures that reflect proper management of public affairs and public property

(1) Public Property:

- Title 40 United States Code (laws dealing with Public Buildings, Property and Works)
- Title 41 United States Code (laws dealing with Public Contracts)
- Title 41 Code of Federal Regulations (regulations concerning Public Contracts and Property Management)
- Title 48 Code of Federal Regulations (regulations concerning Federal Acquisition)
- 18 U.S.C. § 641 (criminal code provisions on misuse of public money, property and records)

(2) Financial:

- U.S. Constitution, art. I, § 9, cl. 7
- Title 31 United States Code (laws dealing with Money and Finance, including such acts as:
 - Anti Deficiency Act (P.L. 97-258)
 - Federal Managers Financial Integrity Act (P.L. 97-255)
 - Chief Financial Officers Act (P.L. 101-576)
- OMB Circular A-11 Preparation and Submission of Budget Estimates and Execution of the Budget (guidance to agencies from the Office of Management and Budget)
- Title 31 Code of Federal Regulations (regulations concerning management of federal receipts and disbursements)

Integrity systems:

- Ch. 11 of Title 18, United States Code (bribery and criminal and civil conflicts of interest statutes) [18 U.S.C. §§ 201-219]
- 5 U.S.C. App § 501 et. seq. (outside activity and compensation restrictions)
- 5 C.F.R. Part 2635, Executive Branch Standards of Ethical Conduct (code of conduct) (www.usoge.gov/pages/laws_regs_fedreg_stats/oge_regs/5cfr2635.html)
- 5 C.F.R. Part 2638, Subpart G – Executive Agency Ethics Training Programs
- Rules of the House of Representatives Numbers 23-26 (code of conduct) (www.rules.house.gov/ruleprec/110th.pdf)
- Senate Code of Official Conduct, Rules 34 to 43 of Rules of the U.S. Senate (<http://rules.senate.gov/senaterules>)
- Code of Conduct for United States Judges (www.uscourts.gov/guide/vol2/ch1.html)
- Code of Conduct for Judicial Employees (www.uscourts.gov/guide/vol2/ch2a.html)
- Code of Conduct for Federal Public Defender Employees (www.uscourts.gov/guide/vol2/ch2b.html)

Statutes that are applicable to the conduct of public officials and thus integrity (Title 18, United States Criminal Code:

- Sec. 286 - Conspiracy to defraud Government with respect to claims
- Sec. 287 - False, fictitious or fraudulent claims
- Sec. 371 - Conspiracy to commit offence or to defraud the U.S.
- Sec. 431 - Contracts by Members of Congress
- Sec. 432 - Officer or employee contracting with Member of Congress
- Sec. 433 - Exemptions with respect to certain contracts
- Sec. 641 - Public money, property or records
- Sec. 666 - Theft or bribery concerning programs receiving federal funds
- Sec. 1001 - False statements
- Sec. 1341 - Mail fraud—frauds and swindles

- Sec. 1342 - Mail fraud– fictitious name or address
- Sec. 1343 - Fraud by wire, radio or television
- Sec. 1344 - Bank fraud
- Sec. 1345 - Injunctions against fraud
- Sec. 1346 - Definition of “scheme or artifice to defraud”
- Sec. 1905 - Disclosure of confidential information.

Restrictions regarding the judicial branch and executive branch administrative decision makers:

- Judicial discipline, 28 U.S.C. § 372(c)
- Practice of law by justices and judges, 28 U.S.C. § 454
- Disqualification of a justice, judge, or magistrate, 28 U.S.C. § 455
- Ex parte communications with administrative agencies, 5 U.S.C. § 557(d)

Restrictions regarding procurement activities:

- Procurement integrity, 41 U.S.C. § 423
- Interest of Member of Congress, 41 U.S.C. § 22

Statutes (non-criminal) involving gifts and travel:

- Gifts to federal employees, 5 U.S.C. § 7353
- Gifts to superiors, 5 U.S.C. § 7351
- Foreign Gifts and Decorations Act, 5 U.S.C. § 7342
- Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2458a
- Acceptance of travel and related expenses from non-federal sources, 31 U.S.C. §1353
- Acceptance of contributions, awards and other payments, 5 U.S.C. § 4111

Other conflicts (criminal and non-criminal) related to employment, whistle blowing, and political activities:

Criminal:

- Expenditure to influence voting, 18 U.S.C. § 597
- Coercion by means of relief appropriations, 18 U.S.C. § 598
- Promise of appointment by candidate, 18 U.S.C. § 599
- Promise of employment or other benefit for political activity, 18 U.S.C. § 600
- Deprivation of employment or other benefit for political contribution, 18 U.S.C. § 601
- Solicitation of political contributions, 18 U.S.C. § 602
- Making political contributions, 18 U.S.C. § 603
- Solicitation [for political purposes] from persons on relief, 18 U.S.C. § 604
- Disclosure [for political purposes] of names of persons on relief, 18 U.S.C. § 605
- Intimidation to secure political contributions, 18 U.S.C. § 606
- Place of solicitation [of political contributions], 18 U.S.C. § 607
- Absent uniformed services voters and overseas voters, 18 U.S.C. § 608
- Use of military authority to influence vote of member of Armed Services, 18 U.S.C. §609
- Coercion of political activity, 18 U.S.C. § 610

Non-criminal:

- Anti-nepotism law, 5 U.S.C. § 3110
- Relatives of Justice or judge, 28 U.S.C. § 458
- Recommendations for employment by Members of Congress, 5 U.S.C. § 3303

- Restrictions on dual pay, 5 U.S.C. § 5533
- Whistleblower protection, subchapter 11 of chapter 12, Title 5, U.S.C.
- Political activities (Hatch Act), subchapter 111 of chapter 73, Title 5, U.S.C.
- Tax treatment for sales of property in order to comply with conflict of interest requirements, 26 U.S.C. § 1043

Provisions Governing More than U.S. Public Officials:

- Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1

Transparency and Accountability:

- Freedom of Information Act, 5 U.S.C. § 552
- Electronic Government Act, ch. 36 of title 44, United States Code
- Government in the Sunshine Act 5 U.S.C. § 552b
- Federal Records Act 31 U.S.C. § 3101
- U.S. Constitution, art. I, §5, published proceedings of Congress
- Rules 5, 6 and 11 of the U.S. House of Representatives (notice, open hearings, televised proceedings, press gallery) (www.rules.house.gov/ruleprec/110th.pdf)
- Rules 26 and 33 of the U.S. Senate (notice, open meetings, televised proceedings, press gallery) (<http://rules.senate.gov/senaterules>)
- Judicial rules of procedure, including the Federal rules of criminal procedure and civil procedure (www.uscourts.gov/rules)

Examples of oversight by one branch of government over another (preventive checks and balance):

- Congressional oversight over use of appropriations by executive and judicial branches (art. 1, § 9 of the Constitution)
- Constitutional power of the Executive to prosecute criminal or civil misconduct by an official of any branch (art. II, § 1 of the Constitution)
- Constitutional power of Senate to confirm Presidential appointees to executive branch and to the federal courts (art. II, § 2)
- Constitutional power of the Congress to impeach, try and remove the President and any Federal Judge or Justice (art. I, §§ 2 and 3)
- Constitutional power of the Federal judiciary to judge the Constitutionality of federal laws and of the manner of their execution (art. III, § 2)

Examples of oversight within branches:

- Inspectors General within agencies of the executive branch – Inspector General Act of 1978, 5 U.S.C. app. [5 U.S.C.A. app. 3]
- Office of Government Ethics for executive branch agency ethics programs – 5 U.S.C. app. § 401 et. seq.
- Peer oversight of Members of Congress (Constitution art. I, § 5) and rules of each house to establish appropriate committees for that purpose
- Judicial Conference Committee on Conduct and Disability for federal judges

Examples of oversight by public:

- Appeals of agency decisions 5 U.S.C. § 701 et. seq.
- Competition in Contracting for procurement 31 U.S.C. §§ 3551-3556
- Challenges by disappointed bidders in procurements Part 33 of Title 48, C.F.R.
- *Qui Tam* proceedings 31 U.S.C. § 3730.

Taken together, these institutions, policies, laws, regulations and procedures demonstrate the existence of a comprehensive anti-corruption preventive policy in the U.S.

The U.S. has adopted the measures with a view to attain continued compliance with UNCAC Article 5

3.2 Article 15

Bribery of national public officials

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

“(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

a. Summary of the main requirements

In accordance with article 15, States Parties must establish two offences: active and passive bribery of national public officials:

States Parties must establish as a criminal offence, when committed intentionally, the promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties (art. 15, subparagraph (a))². The required elements of this offence are those of promising, offering or actually giving something to a public official. The offence must cover instances where no gift or other tangible item is offered. Thus, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary. The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization. Some national legislation might cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the official’s duties.

States Parties must establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties (art.15, subpara. (b)). This offence is the passive version of the first offence. The required elements are soliciting or accepting the bribe. The link with the influence on official conduct must also be established. As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly. The mental or subjective element is only that of

² It is reiterated that for the purposes of the Convention, with the exception of some measures under chapter II, “public official” is defined in article 2, subparagraph (a). An interpretative note indicates that, for the purpose of defining “public official”, each State party shall determine who is a member of the categories mentioned in subparagraph (a) (i) of article 2 and how each of those categories is applied (A/58/422/Add.1, para. 4).

intending to solicit or accept the undue advantage for the purpose of altering one’s conduct in the course of official duties³.

b. Findings and observations of the review team concerning article 15

Active Bribery

The principal United States statutes prohibiting bribery of a national public official, consistent with UNCAC Article 15(a), are Title 18, United States Code, section 201(b)(1) and (c)(1)(A) ("Bribery of Public Officials and Witnesses"). U.S. federal law enforcement authorities may, however, depending on the facts and circumstances of a given case, use many other federal criminal laws to punish the conduct described in Article 15(a). Those laws include, but are not limited to, Title 18, United States Code, sections 371 (conspiracy to commit an offence against the United States), 599 (promise of appointment by candidate), 210 (offer to procure appointive public office), 1961-63 (racketeer influenced and corrupt organizations, or RICO), 1341 (mail fraud), 1343 (wire fraud), and 1346 (scheme or artifice to defraud another of the intangible right to honest services), among many others. Finally, and consistent with the U.S. federalist system of government, the various states also have enacted their own laws prohibiting the conduct described in Article 15(a).

Passive Bribery

The principal United States federal statutes prohibiting passive bribery of a national public official, consistent with UNCAC Article 15(b), are Title 18, United States Code, section 201(b)(2) and (c)(1)(B) ("Bribery of Public Officials and Witnesses"). Additionally, U.S. federal law enforcement authorities may, depending upon the facts and circumstances of a given case, use many other federal criminal laws to punish the conduct described in Article 15(b). Those laws include, but are not limited to, Title 18, United States Code, sections 371 (conspiracy to commit an offence against the United States), 211 (acceptance or solicitation to obtain appointive public office), 1961-63 (racketeer influenced and corrupt organizations, or RICO), 1341 (mail fraud), 1343 (wire fraud), 1346 (scheme or artifice to defraud another of the intangible right to honest services), and 1951 (extortion under colour of official right), among many others. Finally, and consistent with the U.S. federalist system of government, the various states also have enacted their own laws prohibiting the conduct described in Article 15(b).

The U.S. has adopted the measures required in accordance with UNCAC Article 15

3.3 Article 16

Bribery of foreign public officials and officials of public international organizations
“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
“2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the

³ See art. 28, which provides that “Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances”

solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

a. Summary of the main requirements

Under article 16, paragraph 1, States must establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business. Article 16 does not require that bribery of foreign public officials constitute an offence under the domestic law of the concerned foreign country.⁴

Article 16, paragraph 2, requires that States Parties consider establishing as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. This is the mirror provision of article 15, subparagraph (b), which mandates the criminalization of passive bribery of national public officials.

b. Findings and observations of the review team concerning article 16

Article 16(1)

The U.S. Foreign Corrupt Practices Act (FCPA), Title 15, United States Code, section 78m et seq., establishes as a criminal offence the conduct described in UNCAC Article 16(1). The full text of the FCPA can be found at <http://www.usdoj.gov/criminal/fraud/docs/statue.html>. Additionally, U.S. federal law enforcement authorities may, depending upon the facts and circumstances of a given case, use many other federal criminal laws to punish the conduct described in Article 16(1). Those laws include, but are not limited to, Title 18, United States Code, sections 371 (conspiracy to commit an offence against the United States), 1341 (mail fraud), 1343 (wire fraud), 1961-63 (racketeer influenced and corrupt organizations, or RICO), and 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), among many others.

Enforcing the United States Foreign Corrupt Practices Act (FCPA) is reported to be a significant priority for the Criminal Division of the United States Department of Justice. Since 2001, the Criminal Division’s Fraud Section has substantially increased its enforcement of this law prohibiting bribery of foreign public officials. In the last two years, FCPA enforcement has hit historic highs. These prosecutions involve both individuals and companies from a broad range of industries involving bribery in a broad range of geographical locations.

In addition to those law enforcement efforts, the Justice Department’s senior law enforcement officials have conducted outreach to the United States business community in speeches, interviews and otherwise, to reinforce the message that bribery is not only a crime but is also bad for business. Finally, the Justice Department has dedicated additional resources to enforcing the FCPA, including

⁴ As noted in chapter I of the Convention against Corruption, “foreign public official” is defined as “any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise” (art. 2, subpara. (b)). The “foreign country” can be any other country, that is, it does not have to be a State party. State parties’ domestic legislation must cover the definition of “foreign public official” given in article 2, subparagraph (b) of the Convention, as it would not be adequate to consider that foreign public officials are public officials as defined under the legislation of the foreign country concerned. An official of a public international organization is defined as “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization” (art. 2, subpara. (c)).

dedicating full-time prosecutors and FBI agents to FCPA enforcement. Cumulatively, these efforts have had the effect of increasing awareness of the FCPA among businesses and individuals doing business overseas.

The U.S. has adopted the measures required in accordance with UNCAC Article 16(1)

Article 16(2)

Although UNCAC Article 16(2) is non-mandatory, United States federal law enforcement authorities, depending upon the facts and circumstances of a given case, could potentially punish the conduct described in Article 16(2) under various theories of United States federal criminal law, including but not limited to the honest services, wire, and mail fraud statutes (Title 18, United States Code, sections 1341, 1343 and 1346) as well as the conspiracy statute (Title 18, United States Code, section 371). For example, using such methodologies, the U.S. has successfully convicted several international officials in federal courts in New York for conduct involving the passive acceptance of bribes in procurement matters.

However, passive bribery of international and foreign public officials is not *specifically* criminalized under U.S. federal law, even though covered by these other more general statutes.

The U.S. appears to have only partially adopted the voluntary provisions of UNCAC Article 16(2)

3.4 Article 17

Embezzlement, misappropriation or other diversion of property by a public official
“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.”

a. Summary of the main requirements

States Parties must establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position. The required elements of the offence are the embezzlement, misappropriation or other diversion by public officials of items of value entrusted to them by virtue of their position. The offence must cover instances where these acts are for the benefit of the public official or another person or entity. The items of value include any property, public or private funds or securities or any other thing of value. This article does not “require the prosecution of de minimis offences” (A/58/422/Add.1, para. 29).

b. Findings and observations of the review team concerning article 17

The primary anti-embezzlement statute applicable to officials of the United States federal government is Title 18, United States Code, section 654 (officer or employee of United States converting property of another). Other anti-embezzlement laws include Title 18, United States Code, sections 641 (embezzlement of public money, property or records by any person); section 645 (embezzlement by federal court officers); and section 666 (theft or bribery concerning programs receiving federal funds). In addition to those laws, the United States has several other criminal laws that could potentially be used to punish the conduct described in Article 17, including, but are not limited to, Title 18, United

States Code, sections 371 (conspiracy to commit an offence against the United States), 1341 (mail fraud), 1343 (wire fraud), and 1346 (scheme or artifice to defraud another of the intangible right to honest services), among many others, depending upon the facts and circumstances of a given case. Finally, consistent with the United States federalist system of government, individual states also have laws prohibiting the conduct described in Article 17.

The U.S. has adopted the measures required in accordance with UNCAC Article 17

3.5 Article 25

Obstruction of justice
“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
“(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;
“(b) The 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 the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.”

a. Summary of the main requirements

Under article 25, States must criminalize the use of inducement, threats or force in order to interfere with witnesses and officials whose role would be to produce accurate evidence and testimony. The first offence relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. States Parties are required to criminalize the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of offences established in accordance with the Convention (art. 25(a)). The obligation is to criminalize the use both of corrupt means, such as bribery, and of coercive means, such as the use or threat of violence.

b. Findings and observations of the review team concerning article 25(a) and (b)

Use of inducement, threats or force to interfere with witnesses or officials

The United States has a range of federal laws criminalizing obstruction of justice, including laws that punish the conduct described in Article 25(a). Those laws include Title 18, United States Code, sections 201(b)(3) (bribery to influence testimony of a witness); 1512 (tampering with a witness, victim or an informant, including by force, threats or intimidation); 1503 (influencing or injuring a court officer or juror in a federal judicial proceeding); 1505 (obstruction of proceedings before departments, agencies and committees); 1511 (obstruction of state or local law enforcement); 1510 (obstruction of criminal proceedings, including bribery); and 1519 (destruction, alteration, or falsification of records in federal investigations and bankruptcy). Consistent with the United States federal system of government, individual states also have laws criminalizing the conduct described in Article 25(a).

Interference with actions of judicial or law enforcement officials

The United States has several federal laws criminalizing obstruction of justice, including laws that

punish the conduct described in Article 25(b). Those laws include Title 18, United States Code, sections 1503 (influencing or injuring a court officer or juror in a federal judicial proceeding, including by use of force, threats or intimidation); 1505 (obstruction of proceedings before departments, agencies and committees); 1511 (obstruction of state or local law enforcement); and 1510 (obstruction of criminal proceedings, including bribery). Consistent with the United States federal system of government, individual states also have laws criminalizing the conduct described in Article 25(b).

The U.S. has adopted the measures required in accordance with UNCAC Article 25

3.6 Article 46

Mutual legal assistance
“1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
“...”
“9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;
“(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;
“(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.
“...”
“13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central Authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.
“...”

a. Summary of the main requirements

The Convention against Corruption requires States Parties: (a) To ensure the widest measure of mutual legal assistance for the purposes listed in article 46, paragraph 3, in investigations, prosecutions,

judicial proceedings and asset confiscation and recovery in relation to corruption offences (art. 46, para. 1); (b) To provide for mutual legal assistance 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); (c) To ensure that mutual legal assistance is not refused by it on the grounds of bank secrecy (art. 46, para. 8); (d) To apply paragraphs 9 to 29 of article 46 to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (art. 46, para. 7)

Article 46, paragraph 9, allows for the extension of mutual legal assistance in the absence of dual criminality, in pursuit of the goals of the Convention, including asset recovery. An important novelty is that States Parties are required to render assistance if non-coercive measures are involved, even when dual criminality is absent, where consistent with the basic concepts of their legal system (art. 46, para. 9 (b)). An example of such a measure even in the absence of dual criminality is the exchange of information regarding the offence of bribery of foreign officials or officials of international organizations, when such cooperation is essential to bring corrupt officials to justice (see the interpretative note contained in document A/58/422/Add.1, para. 26, relating to art. 16, para. 2, of the Convention). Further, the Convention invites States Parties to consider adopting measures as necessary to enable them to provide a wider scope of assistance pursuant to article 46 even in the absence of dual criminality (art. 46, para. 9 (c)). States Parties need to review carefully existing laws, requirements and practice regarding dual criminality in mutual assistance. In some instances, new legislation may be required.

The UNCAC requires the designation of a central authority with the power to receive and execute or transmit mutual legal assistance requests to the competent authorities to handle it in each State party. The competent authorities may be different at different stages of the proceedings for which mutual legal assistance is requested. Article 46, paras. 13 and 14 requires States Parties to notify the Secretary-General of the United Nations of their central authority designated for the purpose of article 46, as well as of the language(s) acceptable to them in this regard.

b. Findings and observations of the review team concerning article 46

UNCAC Article 46(9)

The United States is also authorized to provide mutual legal assistance by statute, 28 USC §1782 (Assistance to foreign and international tribunals and to litigants before such tribunals). U.S. law does not impede assistance in the absence of dual criminality, where the assistance does not require coercive action. The United States also retains the ability to decline to provide assistance in situations where the matter involved is of a de minimis nature, or where the assistance sought is available through other means, such as informal police cooperation. The United States is authorized by its treaty power under Article II, section 2, of the United States Constitution to negotiate bilateral and multilateral treaties to seek and to provide mutual legal assistance. Those treaties constitute additional legal authority to engage in international cooperation.

UNCAC Article 46(13)

The U.S. has notified the Secretary-General that the central authority for such requests for mutual legal assistance is “the Department of Justice, Criminal Division, Office of International Affairs.” (C.N. 1133.2006.TREATIES-47.) The Code of Federal Regulations, 28 C.F.R §0.64-1, also generally designates the Office of International Affairs of the Justice Department to act as the central authority for mutual legal assistance pursuant to treaties.

The U.S. has adopted the measures required in accordance with UNCAC Articles 46(9) and 46(13)

3.7 Article 52

Prevention and detection of transfers of proceeds of crime

“1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

“2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

“(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

“(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

“3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

“4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

“5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

“6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate

records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.”

a. Summary of the main requirements

Without prejudice to article 14, States Parties are required to take necessary measures, in accordance with their domestic law, to oblige financial institutions within their jurisdiction: (a) To verify the identity of customers; (b) To take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts; and (c) To conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. These provisions must be seen in the context of the more general regulatory and supervisory regime they must establish against money-laundering, in which customer identification, record-keeping and reporting requirements feature prominently

In order to facilitate implementation of these measures, States Parties, in accordance with their domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, are required: (a) To issue advisories regarding the types of natural or legal person to whose accounts financial institutions within their jurisdiction will be expected to apply enhanced scrutiny; the types of accounts and transactions to which particular attention should be paid; and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; (b) Where appropriate, to notify financial institutions within their jurisdiction, at the request of another State party or on their own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify; (c) Ensure that financial institutions maintain adequate records of accounts and transactions involving the persons mentioned in paragraph 1 of article 52, including information on the identity of the customer and the beneficial owner; and (d) Prevent the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group.

States Parties are also required to consider: (a) Establishing financial disclosure systems for appropriate public officials and appropriate sanctions for non-compliance; (b) Permitting their competent authorities to share that information with authorities in other States parties when necessary to investigate, claim and recover proceeds of corruption offences; (c) Requiring appropriate public officials with an interest in or control over a financial account in a foreign country: (i) To report that relationship to appropriate authorities; (ii) To maintain appropriate records related to such accounts; (iii) To provide for sanctions for non-compliance.

States Parties may also wish to consider requiring financial institutions to: (a) To refuse to enter into or continue a correspondent banking relationship with banks that have no physical presence and that are not affiliated with a regulated financial group; and (b) To guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

b. Findings and observations of the review team concerning article 52

Paragraph 1

The United States has a well-developed system of laws and regulations designed to prevent and detect the transfer of proceeds of crime. These laws include Title 31, United States Code, section 5318(i)(3), which contains requirements for the identification of the beneficial owner of funds deposited into private banking accounts and for conducting enhanced scrutiny of such accounts of senior foreign political figures. An overview of the anti-money laundering strategy of the United States, including the various programs, agencies and authorities that the United States brings to bear to combat money laundering, is available in the self assessment report at <http://www.ustreas.gov/press/releases/docs/nmls.pdf>. In particular, the United States Department of

the Treasury – the principal regulatory body within the United States with responsibility for implementing preventative anti-money laundering laws – through its bureau, the Financial Crimes Enforcement Network (FinCEN), has promulgated numerous rules and regulations, pursuant to United States federal laws, setting forth substantial anti-money laundering, due diligence, and record-keeping procedures applicable to a wide range of United States financial institutions. Those regulations, which are contained within Title 31, Part 103, of the United States Code of Federal Regulations (CFR), can be found at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=6e498efac761fe8c33b993c50400c46c&rgn=div5&view=text&node=31:1.2.1.1.6&idno=31>.

Among other things, the regulations set forth requirements to identify and verify the identity of customers (31 CFR sections 103.121-103.123) and to establish anti-money laundering compliance programs, including special due diligence requirements related to correspondent accounts and private banking accounts (Subpart I). In particular, 31 CFR 103.178 requires determination of beneficial owners of private banking (i.e., “high value”) accounts and enhanced scrutiny of such accounts maintained for current or former senior foreign political figures, their family members and associates, and monitoring the accounts in order to detect suspicious transactions. Although this regulation does not apply to accounts held by United States public officials, in accordance and consistent with United States domestic law, accounts held by those officials are subject to the same risk-based anti-money laundering and due diligence requirements as other accounts within the United States.

Beyond this regulatory regime, section 326 of the USA PATRIOT Act imposes statutory customer verification requirements on financial institutions. Sections 311 and 312 of the Act further impose beneficial owner verification requirements, especially for residents of countries “of concern,” as designated by the U.S. Treasury Department, due to recognized money-laundering issues. The 4 January 2006 “Final Rule” regulating these provisions of law also requires banks to determine whether foreign accounts have a “senior political figure” as the beneficial owner.

Paragraph 2

The United States government issues advisories from time to time both to the public and to financial institutions regarding the laws and regulations designed to prevent and detect the transfer of proceeds of crime. The United States Treasury Department’s Financial Crimes Enforcement Network, or FinCEN, has a public website that provides a wealth of information regarding FinCEN’s work and applicable United States anti-money laundering laws and regulations, including matters relating to the regulations regarding the types of customers and accounts that are subject to enhanced scrutiny, and related recordkeeping requirements. FinCEN’s website can be found at: <http://www.fincen.gov/index.html>. Additionally, the United States Federal Financial Institutions Examination Council, an inter-agency United States government entity, periodically publishes the Bank Secrecy Act/Anti-Money Laundering Examination Manual for financial institutions, which sets forth in substantial detail the requirements contained in the various anti-money laundering laws and regulations of the United States. That manual can be found at http://www.ffiec.gov/pdf/bsa_aml_examination_manual2006.pdf. The relevant sections of the United States Code of Federal Regulations (CFR) can be found at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=3b0a24b11745317eda06befe8eaea219&c=ecfr&tpl=/ecfrbrowse/Title31/31tab_02.tpl.

In 2001, the Federal Banking Agencies and the State Department also issued a “Guidance on Enhanced Security for Transactions that May Involve the Proceeds of Foreign Corruption,” with detailed advisories on general procedures for tracking the accounts of “senior foreign political figures” (i.e. PEPs), as well as their families and business interests. However, some have noted that these advisories do not include specific, concrete information from the authorities on the actual names of such senior foreign political figures, nor do they include advisories for tracking the accounts of specific U.S. senior political figures.

Paragraph 3

The United States has a robust system of laws and regulations designed to prevent and detect the transfer of proceeds of crime. Among other things, the regulations set forth requirements regarding records to be maintained (Subpart C, Part 103 of Title 31 of the United States Code of Federal Regulations). In general, financial institutions are required to maintain records pertaining to customers and accounts referred to in the above discussion of Article 52(1), containing information relating to identity of customers and beneficial ownership of accounts (as well as all other records) for at least five years. Additionally, financial institutions are examined regularly to ascertain compliance with these requirements.⁵ Section 319(6) of the USA PATRIOT Act adds additional statutory record-keeping requirements for transactions involving foreign banks.

Paragraph 4

There are several U.S. laws designed to prevent and detect the transfer of proceeds of crime. Those laws include 313(a) of the USA PATRIOT Act, which added a new subsection (j) to Title 31, United States Code, section 5318, prohibiting “covered financial institutions” (defined in Title 31, United States Code of Federal Regulations, section 103.175(f)(2) as any one of a number of specific U.S. financial institutions, including all types of depository institutions and securities broker-dealers) from providing correspondent accounts in the United States to foreign banks that do not have a physical presence in any country (otherwise known as foreign “shell banks”). Section 313(a) of the Act also requires those financial institutions to take reasonable steps to ensure that correspondent accounts provided to foreign banks are not being used to provide banking services indirectly to foreign shell banks. These statutory requirements are implemented in Title 31 CFR section 103.177. In addition, the establishment of shell banks is not permitted in the U.S., either at the federal or state level, and the banking regulators continuously monitor for, and issue public advisories regarding, any entity engaged in unauthorized banking activity (including shell banks). Taken together, these requirements fully comply with Article 52(1)-(4).⁶

Paragraph 5

The United States has a detailed system of laws and regulations designed to increase transparency, including a system of required financial disclosures by appropriate public officials that includes appropriate sanctions for non-compliance. The principal laws governing financial disclosure by senior United States government officials are located at Title 5, United States Code Appendix, sections 101-11. These laws require all senior officials of the federal government – including the President of the United States, Vice President of the United States, Members of Congress, Federal Judges and approximately 20,000 other senior government officials – to file a personal disclosure report. Copies of those reports are available upon request to anyone in the world, including foreign governments. Failure to file, or filing a false financial disclosure report, is subject to applicable administrative, civil or criminal penalties. Additionally, United States law requires financial disclosure on a confidential basis for public officials in the executive branch who do not hold senior positions but who do hold positions with a higher risk of conflict of interest. (Title 5 United States Code Appendix, section 107 and Title 5, United States Code of Federal Regulations, Part 2634, Subpart I.) Although those reports are not available to the public due to United States privacy laws, under certain circumstances they can be made available to federal law enforcement authorities and could, in theory, be provided to a foreign

⁵ The relevant sections of the United States Code of Federal Regulations (CFR) can be found at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=322da2439cd6d8e26c761950312d83d1&rgn=div5&view=text&node=31:1.2.1.1.6&idno=31#31:1.2.1.1.6.3>

⁶ The relevant sections of the United States Code of Federal Regulations (CFR) can be found at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=6e498efac761fe8c33b993c50400c46c&tpl=/ecfrbrowse/Title31/31cfr103_main_02.tpl.

country on a case-by-case basis pursuant to a mutual legal assistance request.⁷

Paragraph 6

Pursuant to Title 31, United States Code of Federal Regulations, Part 103, Subpart C, sections 103.24 and 103.32, persons subject to U.S. jurisdiction having a financial interest or control over a foreign account are required to report that relationship to the Commissioner of Internal Revenue and to maintain records related to such accounts for five years. In addition, the United States has a robust system laws and regulations designed to increase transparency, including a system of required financial disclosures by appropriate public officials (referred to in the analysis of paragraph 5 above). Among other things, senior government officials are required to provide a description of, and the value of interests in property held by the official (and specified family members) for investment or the production of income when the value of interest is above a certain minimal threshold. This includes beneficial interests in trusts and estates (over \$1,000); deposits in banks or other financial institutions (over \$5,000); and accounts or other funds receivable (over \$1,000). The law makes no distinction between assets held inside or outside the United States, and thus includes foreign financial accounts consistent with Article 52(6). The filer must also report the source and amount of investment and non-investment income in excess of \$200, regardless of whether the source of that income is within or outside of the United States. Financial disclosure reports of this nature are required upon entry into a senior position, annually and at the termination of service in the position. Copies of those reports are available upon request to anyone in the world, including foreign countries. Failure to file, or filing a false financial disclosure report, is subject to applicable administrative, civil and or criminal penalties.

The U.S. has adopted the measures required in accordance with UNCAC Article 52

3.8 Article 53

“Measures for direct recovery of property
“Each State Party shall, in accordance with its domestic law:
“(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
“(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and
“(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.”

a. Summary of the main requirements

Article 53 requires States Parties: (a) To permit another State party to initiate civil action in its courts to establish title to or ownership of property acquired through corruption offences (subpara. (a)); (b) To permit their courts to order corruption offenders to pay compensation or damages to another State party that has been harmed by such offences (subpara. (b)); (c) To permit their courts or competent

⁷ Title 5 of the United States Code of Federal Regulations is available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=b02cffc533406b29e3d9c951473de880&c=ecfr&tpl=/ecfrbrowse/Title05/5tab_02.tpl. A complete compilation of United States government ethics laws, including Title 5, United States Code Appendix, is available at http://www.usoge.gov/pages/laws_regs_fedreg_stats/comp_fed_ethics_laws.pdf.

authorities, when having to decide on confiscation, to recognize another State party's claim as a legitimate owner of property acquired through the commission of a corruption offence (subpara. (c)). The implementation of these provisions may require legislation or amendments to civil procedures, or jurisdictional and administrative rules to ensure that there are no obstacles to these measures. Article 53 focuses on States Parties having a legal regime allowing another State party to initiate civil litigation for asset recovery or to intervene or appear in domestic proceedings to enforce their claim for compensation.

b. Findings and observations of the review team concerning article 53

United States law (whether constitutional, statutory or otherwise) does not preclude or prohibit foreign governments from initiating, as parties to a United States civil action, civil lawsuits in United States courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with the Convention, consistent with United States constitutional principles of due process and other principles and practices of United States law.

Indeed, the U.S. Supreme Court has "long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do." (*Pfizer v. Government of India* (1978) 434 U.S. 308, 318-319.) Using these long recognized principles, UNCAC States parties have appeared as parties in asset recovery related litigation in U.S. courts. As an example, in *Philippines v. Pimental* (2008) 128 S. Ct. 2180, the U.S. Supreme Court authorized the Government of the Philippines to appear in a matter indirectly related to asset recovery, and recognized in its reasoning the significant international policy interest manifested in treaties providing for international co-operation in recovering forfeited assets, such as the United Nations Convention against Corruption. Similarly, in *Republic of Haiti v. Crown Charters, Inc.* (S.D. Fla 1987) 667 F.Supp. 839, the U.S. courts authorized the Republic of Haiti to sue as a civil plaintiff to recover property misappropriated by former president Jean-Claude Duvalier.⁸

Moreover, 28 USC 2467 authorizes recognition of foreign confiscation orders whenever they are based on a treaty (which presumably would include the UNCAC) that provides for confiscation assistance. Temporary Restraining Orders (TROs) can also be issued pursuant to 18 USC 983(j) to preserve property that is subject to a foreign confiscation judgement.

United States law (whether constitutional, statutory or otherwise) also does not preclude or prohibit United States courts from ordering persons who have been convicted of offences established in accordance with the Convention from paying restitution as part of a criminal sentence, including to another State Party, consistent with United States constitutional principles of due process. Nor does United States law prohibit the submitting and litigating claims to be the legitimate owner of property that is the subject of United States confiscation proceedings related to the commission of an offence established in accordance with the Convention. Provisions of U.S. law governing procedures for such claims include, among others, Title 18, United States Code, sections 983 and 982 (via reference to Title 21 United States Code, section 853), and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (particularly, but not limited to Supplemental Rule G).

The U.S. has adopted the measures required in accordance with UNCAC Article 53.

⁸ See also *Banco Central Del Paraguay v. Paraguay Humanitarian Foundation, Inc.* (S.D.N.Y. 2006) 2006 WL 3456521, and related proceedings, where courts authorized the Central Bank of Paraguay to file suit as civil plaintiff to recover funds as an assignee of two insolvent banks that it had taken over on conversion and other grounds; and *Republic of Liberia v. Bickford* (S.D.N.Y. 1992) 787 F.Supp. 397, where the court found that the interim government of Liberia had standing to bring a civil claim for conversion.

4. Summary findings of the review team concerning the implementation of the relevant Convention articles by the U.S.

1. How have the selected articles mentioned above been implemented in the legislation?

The U.S. has legislatively adopted the measures required in accordance with UNCAC Articles 5 (preventive anti-corruption policies and practices); 15 (bribery of national public officials); 16(1) (active bribery of foreign public officials and officials of public international organizations); 17 (embezzlement, misappropriation or other diversion of property by a public official); 25 (obstruction of justice); 46 (mutual legal assistance), particularly paragraphs 13 and 9; 52 (prevention and detection of transfers of proceeds of crime); and 53 (measures for direct recovery of property). The U.S. has not adopted the voluntary provisions of UNCAC Article 16(2), which suggest the consideration of criminalizing the passive bribery of foreign public officials and officials of public international organizations. However, as a practical matter, other more general provisions of U.S. criminal law appear to cover this conduct. In that respect, it can be said that the U.S. has partially adopted the requirements of UNCAC Article 16(2).

2. How have the articles mentioned above been implemented in practice?

As this country review did not include a country visit, the expert reviewers were unable to determine how the law was implemented in practice.