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**Review of implementation of the United Nations
Convention against Corruption**

**Implementation of chapter III (Criminalization and law
enforcement) of the United Nations Convention against
Corruption (review of articles 30-42)**

Thematic report prepared by the Secretariat

Summary

The present thematic report contains information on the implementation of chapter III (Criminalization and law enforcement) of the United Nations Convention against Corruption by 123 States parties under review in the first cycle of the Mechanism for the Review of Implementation of the Convention, established by the Conference of the States Parties to the United Nations Convention against Corruption in its resolution 3/1.

* CAC/COSP/IRG/2016/1.



I. Implementation of the criminalization provisions of chapter III

Measures to enhance criminal justice

1. Prosecution, adjudication and sanctions

1. As in previous editions of the thematic report, common challenges with regard to the implementation of the provisions on prosecution, adjudication and sanctions related to specificities in national legal systems and limited capacity. For example, in several cases recommendations were made concerning the proportionality, dissuasiveness or consistency of sanctions, for instance in respect of provisions in one State party's criminal code that allowed the discretionary conversion of prison sentences of 1-3 years to a fine. In some States parties, recommendations were issued to enhance the effectiveness and level of sanctions and to monitor the imposition of penalties by the judiciary. For example, in one State party, there was a recommendation to ensure consistent court practice in preventing the cumulative application of mitigating and exceptional circumstances that resulted in the imposition of administrative rather than criminal sanctions, and to train judges and prosecutors on sentencing. In some States parties, the adoption of sentencing guidelines was recommended, while in others mandatory minimum periods of incarceration were in place.

2. There were also issues concerning paragraph 2 of article 30, on immunities and privileges, largely a continuation of the trends identified in previous thematic reports. For example, in several States parties, immunities were granted at the constitutional level to certain categories of officials, most frequently the Head of State, members of Parliament, the Government and the judiciary. Mostly, such immunities were functional immunities, applied to acts committed in the exercise of official duties, but did not protect acts outside the scope of such duties. For example, functional immunities were granted to parliamentarians, judicial officers and members of anti-corruption bodies in a number of jurisdictions. The parliamentary privilege typically covered opinions expressed in Parliament or conduct in the consideration of a parliamentary matter. However, issues regarding immunity from investigation of members of Parliament and Government, judges and prosecutors were noted in some States parties where those persons could not be arrested, searched or detained without the approval of Parliament or a judicial council except in cases of *in flagrante delicto*. A reconsideration of the relevant standards and procedures for lifting immunities was recommended accordingly to ensure that investigative action could be taken before immunities were lifted and that procedural immunity would not apply to the pretrial investigation stage. Furthermore, in one State party there was a recommendation to pursue legislation aimed at including corruption among the offences that allowed the use of special investigative techniques against members of Parliament. Recommendations were also issued to reassess the range of persons benefiting from immunities to ensure the effectiveness of law enforcement measures. Thus, in one State party concern was raised about legal provisions addressing the immunity of employees in State-owned companies and staff involved in the privatization of assets, and in another State party about a legal procedure whereby results of investigations were referred only to

the Minister of Justice, who had broad discretion to determine whether the matter warranted further investigation. In several States, public officials did not enjoy immunities for offences under the Convention, although jurisdictional privileges had been established in a number of States parties. A more detailed analysis of the implementation of paragraph 2 of article 30 of the Convention is provided in a previous report on the regional implementation of chapter III (CAC/COSP/IRG/2013/10).

3. Common issues were also encountered with regard to paragraph 3 of article 30, on discretionary legal powers relating to the prosecution of offences under the Convention. These are presented in more detail in a previous report on the regional implementation of chapter III (CAC/COSP/2013/11). In this regard, a number of States followed discretionary prosecution models, which were typically subject to codes, principles or prosecution policies that governed the exercise of prosecutorial discretion. Moreover, in some cases, the law granted certain rights to complainants and others to seek the review of a decision not to prosecute. As noted in paragraphs 19 and 20 below, on article 37 of the Convention, prosecutorial discretion was frequently exercised in order to encourage cooperating defendants to provide relevant information by dismissing or reducing charges or making recommendations to judges concerning sentencing. The criminal justice system of several States parties was based on the principle of legality, and no discretionary legal powers were foreseen, although a few States applied an exception to the principle of mandatory prosecution for *de minimis* offences, such as those punishable by imprisonment for up to three years, which included some corruption offences. Recommendations were issued in several cases, including the recommendation to adopt legislation and guidelines to ensure greater legal certainty in the prosecution of corruption cases.

4. Continuing the trends identified in previous thematic reports, most States parties had taken measures to implement paragraph 6 of article 30, on the suspension, removal from office or reassignment of public officials accused of corruption offences. In some cases, the legislation provided for the suspension of accused public officials but did not permit — or was silent on — removal or reassignment. Recommendations were issued for one State party to strengthen disciplinary proceedings against public officials accused of corruption offences; for another to enhance the efficiency of removal and suspension of public officials; and for others to consider expanding the existing legislation to cover all public officials.

5. Disqualification from holding public office continued to be possible or mandatory in most States parties. In several cases, disqualification was available as an additional penalty for criminal offences. However, in some jurisdictions, the concept of a publicly owned enterprise was not defined in the legislation, or there were no measures providing for disqualification from holding office in such enterprises. The possibility of disqualification did not always extend to all offences under the Convention, and effective implementation of the relevant measures was also sometimes lacking.

Box 1

Examples of the implementation of article 30

Sanctions

One State party had adopted an aggravated punishment structure for bribery depending on whether the public officer was induced to do, or to refrain from doing, what he or she was duty-bound to do. Accordingly, a person could be sentenced to a term of imprisonment from six months to three years for inducing a public officer to do what he or she was duty-bound to do, while the most severe punishment (1-8 years imprisonment) applied for inducing the officer to refrain from performing an official act.

One State party had regulated the formulation of sentences in a detailed manner and imposed a range of custodial, pecuniary and administrative sanctions. The State had adopted prosecution guidelines on sanctions for bribery offences, providing detailed instructions on the application of relevant penalties depending on the gravity of offences. Further, decisions on prosecution were subject to judicial review.

One State party's criminal code contained sentencing provisions ensuring that the gravity of offences was taken into account. Case practice showed that serious sanctions were enforced in corruption cases.

Immunities and jurisdictional privileges

In one State party, only members of Parliament were granted constitutional immunity from prosecution during their term of office, which could be waived or rescinded by Parliament. Members of the Government, judges and the police enjoyed jurisdictional privileges regarding the venue for prosecution.

According to the criminal code in one State party, the President, members of Parliament and members of the Government enjoyed immunity for acts carried out in the course of their official duties. Lifting of immunities was required only for questioning the subject and other coercive measures, and was done by a parliamentary commission.

Discretionary prosecution

Offences under the anti-corruption law of one State party had priority of hearing and benefited from other procedural regulations that supported an effective prosecution and trial.

In one State party, the principle of discretionary prosecution did not apply to offences committed by public officials.

In one State party, an order closing a prosecution case file always had to be justified by the prosecutor. The closing order could be reviewed by the chief prosecutor or rejected by the investigating judge.

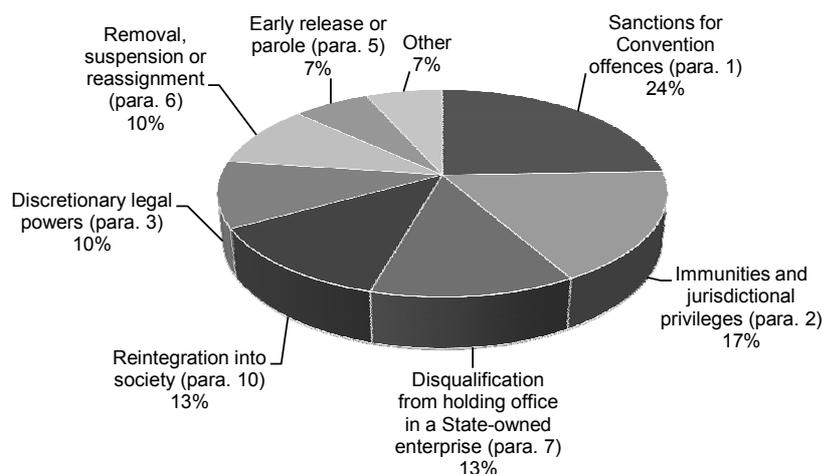
Challenges related to article 30

6. The most common challenges in the implementation of article 30 related to the levels of monetary and other sanctions, especially against legal persons, and the

consistency of sanctioning of corruption-related offences (24 per cent of cases), the balance between privileges and jurisdictional immunities afforded to public officials and the possibility of effectively investigating, prosecuting and adjudicating offences under the Convention (17 per cent of cases), considering the adoption of measures for the disqualification of convicted persons from holding office in State-owned enterprises (13 per cent of cases), the reintegration into society of convicted persons (13 per cent of cases), discretionary legal powers (10 per cent of cases), the removal, suspension or reassignment of accused persons (10 per cent of cases), and early release or parole (7 per cent of cases) (see figure I).

Figure I

Challenges related to article 30 (Prosecution, adjudication and sanctions)



2. Freezing, seizure and confiscation

7. A number of common issues were observed regarding the implementation of article 31, as identified in previous thematic reports. In several cases, measures to enable the confiscation of instrumentalities in addition to proceeds of crime (and of property “destined for use” in corruption offences) were not fully established. For example, in one State party instrumentalities could be confiscated only if they endangered the safety of persons or the public order. In several other cases, measures to enable the tracing, freezing or seizure of proceeds or instrumentalities of crime for purposes of eventual confiscation (para. 2 of art. 31) were also lacking or deficient. For example, in one State party it was recommended, given the complexity of corruption procedures, to extend the time limits for seizure and freezing orders. In some States parties, the law on forfeiture of criminal proceeds applied only to enumerated or “serious offences”, which excluded certain offences under the Convention. In a few States parties, there were limitations as to the types of property that could be confiscated. For example, in one State, confiscation measures were limited to assets belonging to principals or accomplices, and in another State to proceeds owned directly or indirectly by persons convicted of an offence. In several States parties, the temporary administrative freezing of assets by the financial intelligence unit was possible. Laws on the extended confiscation of

assets not directly linked to a specific crime but clearly resulting from similar criminal activities had been established in some countries and were considered to be effective. However, a lack of human and technical capacity to trace, seize and confiscate criminal proceeds and limited resources were reported as posing significant challenges in several countries. Capacity-building for personnel involved in the seizure and confiscation of assets was recommended in one State party where the volume of confiscated property was reportedly low compared with the number of convictions. A need to consolidate fragmented legislation was also observed.

8. In most jurisdictions, confiscation continued to extend to proceeds of crime that had been transformed or converted (para. 4) or intermingled with property from legitimate sources (para. 5), as well as income or other benefits derived therefrom (para. 6); however, the relevant measures did not always apply to all offences under the Convention. Furthermore, in several cases, the confiscation of property corresponding to the value of proceeds of crime was not addressed or was limited, including in one case by a deduction of the expenses for gaining the proceeds of the offence. One State party's law provided for the imposition of an equivalent fine in cases where criminal assets could not be forfeited, with graduated imprisonment penalties upon default. In a number of cases, there were recommendations that intermingled property be liable to confiscation up to the assessed value of the intermingled proceeds (para. 5), and income or other benefits derived from such proceeds be liable to the measures referred to in article 31 (para. 6).

9. Several States parties faced issues with regard to the administration of frozen, seized and confiscated property, which is a continuation of previously identified trends. For example, in several cases recommendations were issued to consider strengthening measures for the management of frozen, seized and confiscated property or to regulate the process more methodically. Recommendations were also issued to consider establishing a specialized body for the administration of frozen, seized or confiscated property. A recommendation was issued for one State party to ensure that complex assets, such as corporate assets, could be effectively managed over time. The reviewing experts reiterated the importance of having in place appropriate mechanisms to regulate the administration of such property.

10. A reversal of the burden of proof for demonstrating the lawful origin of alleged proceeds of crime or other property (as the relevant provision of the Convention was interpreted by several States parties) had been introduced in just over half of the jurisdictions. The finding slightly shifts the balance from the trend identified in previous thematic reports. The relevant evidentiary measure was considered either a violation of the principle of the presumption of innocence or inconsistent with the restrictive view taken by the criminal justice system towards any reversal of the burden of proof in criminal cases. In several States, a rebuttable presumption was established only for certain offences, such as money-laundering and illicit enrichment.

Box 2

Examples of the implementation of article 31

Property subject to confiscation

One State party had established, in addition to conviction-based confiscation, also non-conviction-based confiscation, which allowed property to be confiscated in

exceptional cases in the absence of a conviction, mostly for preventive reasons. The confiscation system was value-based, and a link between the offence and the object did not have to be proved. Moreover, extended confiscation was established for proceeds of organized crime. The procedures for non-conviction-based confiscation (and in some circumstances also those for conviction-based confiscation) provided that third parties who were in the possession of proceeds had to demonstrate that they did not receive the assets gratuitously. Statistics on confiscated assets were available, and a programme was being established to track data on the amount of confiscated assets disaggregated by offence.

Another State party had adopted legislation allowing for the confiscation of assets that could not be tied to a particular criminal offence, but were found by the court beyond a reasonable doubt to constitute proceeds of crime.

In another State party, the criminal code provided for “enlarged confiscation”, which could be applied when the property exceeded the legal income of the offender and originated in a crime committed by a criminal association or was related to money-laundering.

Evidentiary standard

One State party’s anti-money-laundering law provided that a person opposing a confiscation order for an asset had the onus to prove the legal origin of that asset. The anti-corruption law contained the same measure regarding illicit enrichment.

One State party’s law on extended confiscation provided that the court could confiscate material gains for which the prosecutor furnished sufficient evidence for a reasonable belief that such material gain was acquired through the perpetration of a criminal offence, and the perpetrator did not provide evidence that the material gain was acquired legally.

Another State party’s law permitted the court to grant a provisional forfeiture order prior to filing an indictment or a request for forfeiture in civil proceedings, if there were reasonable grounds to assume that the property was likely to disappear or that actions were likely to prevent the subsequent forfeiture of such property.

Protective measures prior to judicial proceedings

One State party had established direct electronic links between the financial intelligence unit, the courts and financial institutions. These links facilitated the provision of information and the prompt seizure or freezing of bank records and transactions.

Management and disposition of assets

In one State party, a national agency was established to ensure the correct management and disposition of seized and confiscated assets for serious criminal offences, including corruption and organized crime. The agency had competence to assist the judicial authorities in the management and custody of seized property and, after a final judicial decision and confiscation of the assets, to administer them and organize their disposition according to institutional or social purposes.

One State party had adopted a “Seized Property Management Act”, which governed the administration of frozen, seized or confiscated property and authorized the Minister of Public Works to manage, administer and dispose of such property.

In another State party, a court-appointed administrator managed the administration of frozen, seized or confiscated property. Procedures were in place to regulate how certain assets were to be held or disposed of, including by means of deposit in a secure account, sequestration, auction, sale and destruction. The anti-corruption law provided for the restitution, on behalf of victims, of misappropriated property or of an amount equivalent to the interest or gain obtained if the property had been transformed.

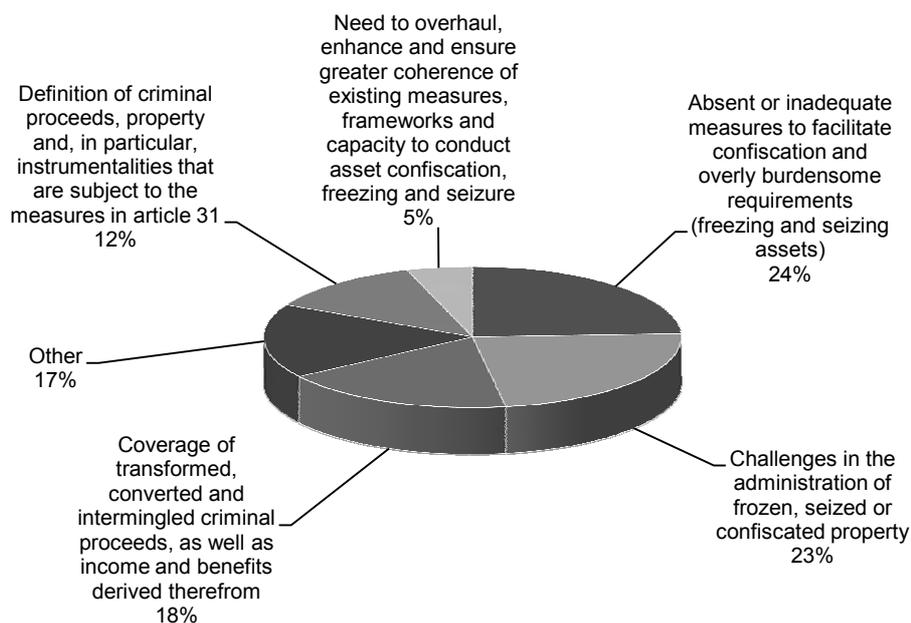
In one State party, seized and confiscated assets were managed by the financial intelligence unit and by judicial authorities under the criminal procedure code. When real estate was confiscated, a judge nominated a guardian to manage the property in accordance with the judicial decision, and a notification was entered in the real estate registry. Movables were seized under court supervision and bank accounts remained frozen, without any disposition or management absent a court order.

One State party's legislation specifically provided for non-conviction-based, criminal and administrative forfeiture. The law further provided that all forfeited property, and the sale proceeds thereof, should be distributed as follows: (a) 50 per cent to the governmental unit(s) whose officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited; (b) 25 per cent to the governmental or prosecution office which instituted the action producing the forfeiture; and (c) 25 per cent to the Government's forfeited property fund.

Challenges related to article 31

11. The most common challenges in the implementation of article 31 related to the absence or inadequacy of measures to facilitate confiscation, in particular for identifying, freezing and seizing assets, as well as excessively burdensome formal or evidentiary requirements for freezing financial accounts, including challenges in establishing non-mandatory measures providing that an offender must demonstrate the lawful origin of alleged proceeds of crime (24 per cent of cases); challenges in the administration of frozen, seized or confiscated property (23 per cent of cases); the coverage of transformed, converted and intermingled criminal proceeds, as well as income and benefits derived therefrom (18 per cent of cases); the definition of criminal proceeds, property and instrumentalities that are subject to the measures in article 31 (12 per cent of cases); and a need to overhaul, enhance and ensure greater coherence of existing measures, frameworks and capacity to conduct asset confiscation, freezing and seizure (5 per cent of cases) (see figure II).

Figure II
Challenges related to article 31 (Freezing, seizure and confiscation)



3. Protection of witnesses, experts and victims

12. As observed in previous thematic reports, there was wide variation among the States parties with regard to the protection of witnesses, experts and victims. In several cases, the protections went beyond the minimal protection of non-disclosure of the identity or whereabouts of witnesses and other persons to also include physical protection measures, such as relocation, surveillance, altered identities, and legal or employment protection. In a number of States, no measures or only limited measures had been taken for the effective protection of witnesses and experts. The authorities in several jurisdictions repeatedly noted, as concrete challenges, that the absence of witness protection systems was a major weakness in the fight against corruption, noting also the significant costs of such systems, the inadequacy of existing normative measures, specificities in the legal system and limited capacity. Some States parties also pointed to the existence of pending legislation. Recommendations were issued in a number of cases, including to enact comprehensive legislation and systems for the protection of experts, witnesses and victims (as well as their associated persons) and to give adequate attention to such measures on the ground, as well as to adopt or enforce, within existing means, witness protection programmes and to strengthen related evidentiary measures. Concern was raised in one State party at the limited channels for witnesses and experts to apply for protection, which had to be done by the prosecution. In some States parties, no comprehensive witness protection or relocation programmes were in place, but practical measures such as separate court rooms or the use of technology for questioning could be taken on a case-by-case basis for special categories of persons. In some States parties, a need to ensure the application of

witness protection programmes to all offences and persons under the Convention, together with awareness-raising, was observed.

13. Regarding the victims of corruption, as noted in previous thematic reports, in a number of States parties the protection of victims and the provision of funding for their protection were not regulated by law, while in other States parties victims fully took part in the proceedings if their identity was known. In a number of cases the provisions were applicable to victims only insofar as they were witnesses. Victim impact statements were admissible in some countries to allow victims to participate in the sentencing of offenders by explaining to the court and the offender how the crime had affected them.

Box 3

Examples of the implementation of article 32

One State party had adopted extensive provisions for the protection of witnesses and cooperating offenders. Protection measures were requested by the public prosecutor, decided on by a central commission and implemented by a central protection service. Protection measures could include security, relocation, provisional or definitive change of identity, and the possibility of testifying by videoconference. Measures could also extend to the person's relatives and to victims insofar as they were witnesses.

One State party's witness protection programme was administered by the police and afforded protection to persons providing evidence or information or otherwise participating in an inquiry, investigation or prosecution. Protection measures could include relocation in or outside the country, the provision of accommodation, change of identity, counselling and financial support to ensure the witness's security or facilitate their self-sufficiency.

Under one State party's witness protection programme, witnesses and their family members were accompanied by the witness protection authority throughout the entire criminal process in order to reinforce their independence and normal living conditions. A separate law on the rights of victims of crime included the right to review indictments, to be informed of proceedings and to express opinions at various stages of proceedings.

One State party had adopted a comprehensive legal framework and a specialized unit for witness protection within the Ministry of the Interior. Witnesses had the right to compensation from the national budget for damages that they or family members suffered owing to the statement given or their appearance. The criminal procedure law contained a range of evidentiary rules to ensure the safety of witnesses, including the possibility of judicial examinations being conducted with the assistance of technical devices such as voice and image distortion.

In another State party, a witness protection agency was established to administer the witness protection programme and determine applicable protection measures. The agency could also request the courts to implement measures during proceedings, including closed sessions, redacting identifying information and using video link, pseudonyms or other measures to suppress the identity of witnesses. Protections were also available to experts, their relatives and other persons close to them. Victims of crime legislation had been established in several States to provide

protective measures and regulate the role of victims in criminal proceedings. For example, in one State party the law provided that victims could participate in judicial proceedings by assuming the role of subsidiary or private prosecutor, or could support indictments with respect to privately prosecuted offences. One State party had further established a victims of crime office and a victims of crime charter, while another State party afforded protection to journalists at risk because of their duties.

In one State party, the code of criminal procedure provided a set of rules on the submission of evidence that were designed to guarantee the safety of witnesses and informants, including the possibility of using audiovisual media in order to ensure the conditions necessary for their protection. The law further allowed victims to submit their views and concerns using modern technical means.

Some States were party to regional agreements on the protection of participants in criminal trials. For example, one State party's witness protection law provided for the international exchange of personal data and the relocation of persons, and the State was party to a witness protection agreement among nine countries in the region.

4. Protection of reporting persons

14. As with the protection of witnesses, experts and victims, there continued to be considerable variation among the States parties with regard to the implementation of article 33, a non-mandatory provision. A number of States parties had not established comprehensive whistle-blower protections, although legislation was pending in several cases. Common challenges related to specificities in national legal systems, limited capacity and the absence of specific regulations or systems for the protection of whistle-blowers. In some cases, there were relevant measures in the labour or civil service codes, but they were not always found to be effective due to their "disparate and vague" application. Recommendations were issued to enact appropriate legislation and strengthen reporting mechanisms in a number of jurisdictions, including as a matter of priority, and to devote adequate resources to whistle-blower protection. In several cases, only public officials who reported, and not private persons, were afforded protections, and recommendations were issued to consider extending the protections. It was also recommended to adopt legislation that placed the burden of proof on the employer to demonstrate that retaliation had not occurred.

Box 4

Examples of the implementation of article 33

Provisions in the criminal code of one State party prohibited an employer from demoting, terminating or otherwise affecting or taking disciplinary action against an employee who reported a possible offence, either before the report took place or in retaliation. In addition, a public sector disclosure law provided a mechanism for public servants to be able to make disclosures of wrongdoing, and an office of the Public Sector Integrity Commissioner was established. The law also protected members of the public from reprisal by their employers for having reported, in good faith, information on alleged wrongdoing in the public sector.

One State party's anti-corruption law protected the identity of reporting persons, placed the burden of proof on the employer and laid down the right of employees to

claim compensation for reprimands resulting from the reporting of offences, in both the private and public sectors.

Another State party's labour law provided for a reversal of the burden of proof in cases of retaliatory dismissal. A hotline for whistle-blowers had been established by civil society and was financed by the State.

One State party's whistle-blower protection law covered all employees in the public and private sector, and did not include a public interest or good faith requirement.

5. Consequences of acts of corruption

15. There continued to be considerable variation among the States parties regarding the implementation of article 34. In a number of States parties, the matter was regulated by contract, administrative or public procurement laws or by provisions in the civil code. For example, some States parties allowed for the annulment or rescission of contracts in the framework of the criminal procedure, as part of the conviction decided by the court. However, in one State party the procedures related to the annulment or rescission of contracts and the withdrawal of licences and similar instruments did not clearly cover cases where the State was not party to such procedures. In most States, the law stipulated the exclusion of candidates who had been convicted of bribery or administratively sanctioned from participation in public procurement. The authority to withdraw corporate licences and dissolve or debar companies, where recognized, was considered to be a useful measure. In some jurisdictions, public management decisions or regulatory acts or resolutions issued as a result of corruption offences could be repealed. Recommendations were issued in some cases to consider broadening the scope of the legislation to encompass other remedial action to address consequences of corruption. A few States parties had not addressed the matter.

6. Compensation for damage

16. Nearly all of the States parties had adopted measures to implement the article fully or in part. The implementing legislation was either civil, criminal or procedural, thus continuing previously identified trends.

Box 5

Examples of the implementation of article 35

The criminal procedure code in one jurisdiction enabled victims to file complaints as plaintiffs in civil proceedings and further provided that the court should also decide upon civil remedies in criminal cases.

One State party's legislation provided that the anti-corruption commission should institute civil proceedings for damages where it was satisfied that a person had been party to corruption and had benefited from it.

One State party had established a procedure on compensation for damages, which could be initiated by a verbal statement of the victim or ex officio.

II. Implementation of the law enforcement provisions of chapter III

Institutional provisions

1. Specialized authorities

17. Among the newly completed country reviews, all except one of the States parties had established one or more bodies or specialized departments to combat corruption through law enforcement, although often these were newly created and faced common challenges related to limited capacity and resources for implementation. Concern was raised in a few jurisdictions at the limited mandate of the anti-corruption body, and recommendations were issued to extend the mandate accordingly. Recommendations were also issued in a number of cases to increase the manpower, resources, training and capacity-building in institutions so that they could effectively implement their mandate and in order to enhance institutional efficiency. A fragmentation of institutional reforms was noted in one case, which, it was observed, contributed to institutional overlap and reduced efficiency in practice, while in another State it was recommended to simplify the legal and administrative framework against corruption. A need for effective inter-agency coordination in view of clarifying roles and responsibilities and harmonizing functions was noted in a number of jurisdictions, in particular between investigative agencies and the prosecution services. In that context, joint training and the deployment of shared personnel and resources among agencies were considered important. In several cases, observations were made regarding the independence of the specialized bodies, including recommendations to review discretionary powers to pursue or dismiss investigations. A need to strengthen capacities to collect and analyse cases and statistics was also noted. With respect to some States, concerns were raised that only a small percentage of completed investigations were prosecuted and that backlogs in the court system constituted a challenge. In that context, several States had taken steps towards creating specialized courts that could hear corruption matters. The existence of those courts was found to significantly contribute to reducing the backlog and increasing the number of completed corruption cases in the criminal justice system. In some cases, a need to strengthen the judiciary's capacity to hear cases involving corruption offences was identified. For example, in one State party a number of recommendations were issued regarding the judiciary, namely, to enhance independence, harmonize salaries, strengthen performance assessments and ensure sufficient resources. Capacity in the public prosecution was also noted as a concern, and steps taken by some States to establish specialized prosecution units to handle corruption cases were considered to be effective. In some cases, legislation had been introduced, or prepared, to strengthen or reorganize the functions and authorities of the law enforcement bodies, or establish dedicated anti-corruption commissions. A more detailed analysis of the implementation of article 36 of the Convention is provided in a previous report on the regional implementation of chapters III and IV (CAC/COSP/IRG/2014/9).

Box 6

Examples of the implementation of article 36

In one State party, in addition to a sufficiently independent and resourced anti-corruption commission, which was also tasked with the recovery of assets, public funds prosecution offices investigated and prosecuted corruption cases before specialized courts that heard corruption and public funds cases. A public funds investigations department had also been established in the police force.

In one State party, a recent strategic restructuring of the police to increase the efficiency and effectiveness of corruption investigations, the conduct of public awareness campaigns to facilitate the reporting of corruption and well-established cooperation and sharing of expertise with the public prosecution service were all positively noted.

In one State party, specialized anti-corruption units had been established in the judiciary, the public prosecution service and the police.

The regional presence of the anti-corruption commission, its constitutional anchor and operational mechanisms, including an electronic, integrated public complaints referral mechanism, were positively noted in one State party.

One State party had established a national crime database and knowledge management portal containing all relevant legislation and case law, information on assets, proceeds of crime, DNA and workflow templates.

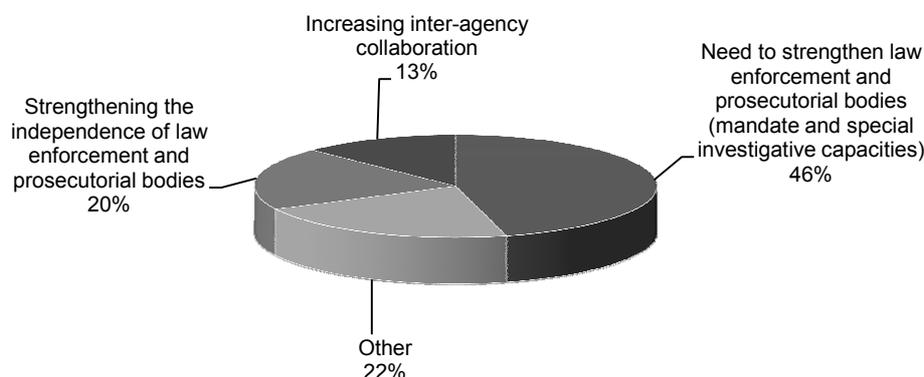
In one State party, the public prosecution had implemented a practice whereby criminal case files could be remotely tracked by supervisors to monitor progress.

In one State party, it was found that the competitive recruitment process and comprehensive training for officers of the anti-corruption commission and police force ensured the availability of highly qualified investigators.

Challenges related to article 36

18. The most common challenges in the implementation of article 36 related to the strengthening of law enforcement and prosecutorial bodies, in particular enhancing the efficiency, expertise and capabilities of staff (46 per cent of cases), enhancing the independence of law enforcement and prosecutorial bodies (20 per cent of cases) and increasing inter-agency coordination among relevant institutions, considering reconstituting their functions, and assessing how to make existing systems and operations more effective (13 per cent of cases) (see figure III).

Figure III
Challenges related to article 36 (Specialized authorities)



2. Cooperation with law enforcement authorities

19. In line with the trends identified in previous thematic reports, a number of States parties had taken measures to encourage the cooperation with law enforcement authorities of persons who participated in the commission of corruption offences. These trends are summarized in more detail in the previous report on the regional implementation of chapter III (CAC/COSP/2013/11). Although witness protections did not always apply to cooperating perpetrators, in most countries measures had been implemented to permit collaboration to be considered as a circumstance mitigating criminal liability and taken into account during sentencing. In several cases, policies or legal provisions to protect or encourage the cooperation of participating offenders were applicable only in bribery, money-laundering and organized crime cases. Recommendations were issued in several cases to ensure the effective protection of collaborators of justice and to adopt or strengthen measures to encourage their cooperation with law enforcement authorities. A related issue concerns the concept of “spontaneous confessions” (or “active regret” provisions), which had been established in several jurisdictions as circumstances warranting mitigation or release from punishment or immunity from prosecution, most commonly for the offences of bribery and trading in influence. However, these were not always considered by the reviewing States parties as fully implementing the requirements of the Convention due to the automatic, mandatory nature of their application and the absence of discretion granted to judicial authorities to assess the level of cooperation of perpetrators in specific cases.

20. Most States parties had adopted measures making it possible to give immunity from prosecution to cooperating accused persons. Typically, immunity could be granted on a discretionary basis by prosecutors or the courts. As noted above, in several jurisdictions concern was raised with respect to the existence of provisions allowing the nearly automatic granting of immunity for persons who self-reported the commission of the crime and cooperated in the investigation of corruption-related offences. Laws or procedures on plea bargaining were in place or being developed in several States and were considered a useful tool, although in one case

the excessive use of plea bargaining to reduce applicable punishments in circumstances where the offender's actions were not linked to any significant cooperation with the competent authorities was noted as a concern. A draft law on settlements in corruption cases had been prepared in one State party, and the adoption of legal amendments that allowed for the possibility of settling corruption cases and of introducing criminal immunity for cooperating offenders were recommended in some cases. In a few cases, it was noted that there was a need to adopt guidelines to ensure the adequate transparency and predictability of out-of-court settlements and plea bargains and a need to maintain statistics tracking the granting of immunity. Moreover, in one State party, it was recommended to extend the discretion to grant immunity to cases where offenders cooperated in the investigation stage.

Box 7

Example of the implementation of article 37

One State party's anti-corruption law permitted the maximum penalty to be halved for any person who facilitated the arrest of one or more perpetrators involved in the offence. The law further provided for immunity from prosecution for any person who made a corruption offence known to law enforcement authorities prior to the launching of an investigation.

In another State party, measures had been established to permit cooperating offenders to avoid prosecution in exchange for providing testimony and other assistance, including the identification of criminal proceeds. Further, plea bargains, reduced sentences, stays of proceedings and the granting of immunity from prosecution took place in cooperation with legal counsel and the courts in order to encourage cooperation. In practice, courts treated cooperation during the investigation or post-arrest phase as a mitigating factor at sentencing.

One State party's law provided for the physical protection and confidentiality of the identities of witnesses, experts, whistle-blowers and cooperating offenders, as well as their families.

In one State party, plea bargaining was reportedly introduced to accelerate cases, shorten the time and costs of proceedings and catch the "big fish". Plea bargaining did not represent an exception to the principle of mandatory prosecution, but only concerned sentencing. Cooperating offenders could be protected in the same manner as witnesses.

In one State party, offenders benefited from a reduction in their sentence in return for their cooperation, but the disqualification from holding public office was maintained.

3. Cooperation between national authorities and the private sector

21. Continuing the trend identified in previous thematic reports, several States parties had established the obligation on the part of public officials and, in some cases, citizens or specific categories of persons in the private sector to report corruption incidents, although anonymous reporting was not always possible. There were exceptions, where no such duty existed for citizens or public officials, and appropriate recommendations were issued to adopt measures to encourage such persons to report offences under the Convention. In addition to reporting

requirements, various measures had been established by States parties to encourage cooperation between national authorities and with the private sector, including, in several cases, a duty to cooperate anchored in law. The measures most often related to financial institutions, and in some cases, recommendations were issued to explore the usefulness of broadening the scope of cooperation and awareness-raising on anti-corruption between national law enforcement authorities and private sector entities, especially non-financial institutions, as well as to take measures to ensure the systematic reporting of corruption cases. The important role of financial intelligence units in gathering information and assisting in the investigation of corruption cases was noted, and recommendations to improve their operations, capacity and mandate were issued in a few cases. Frequently, inter-agency agreements or networks of cooperation had been established. Initiatives to promote awareness of corruption in the private sector had also been taken in a number of States parties. The most common challenges in this area related to inter-agency coordination and limited capacity for implementation.

Box 8

Examples of the implementation of articles 38 and 39

Staff secondments among different Government and law enforcement agencies with an anti-corruption mandate were deemed to foster cooperation and inter-agency coordination and contribute to the efficient functioning of these agencies in several jurisdictions. For example, one State party's institutions cooperated through staff exchanges, sharing of resources, operational synergies and information exchange.

One State party had established an effective system of sharing operational information within the framework of a combined inter-agency group comprising different law enforcement authorities.

In another State party, the different bodies combating corruption were coordinated by an inter-agency committee, chaired by the head of the criminal investigations division of the police, within a framework of a strong culture of cooperation. Regarding the private sector, the police, tax and securities authorities had established a computerized process for the fast, efficient, and secure exchange of information between the police and the financial market.

An integrated platform for agencies to exchange information on anti-corruption matters and the recovery of State assets was being established in one jurisdiction.

One State party had adopted mandatory and voluntary reporting obligations, financial monitoring and outreach activities to raise awareness of corruption matters in the private sector and civil society.

One State's anti-money-laundering law provided for internal coordination among national authorities and required the financial intelligence unit and law enforcement, regulatory and other competent agencies to establish permanent senior-level mechanisms for ensuring information exchange and coordination, including with relevant private sector associations. That State's anti-corruption commission had also signed a cooperation agreement with a number of companies and business associations.

In another State party, an integrity pact had been concluded between the private sector and the Head of State.

A judicial-type financial intelligence unit which was not limited in its investigations by the facts contained in suspicious transaction reports had been established in one jurisdiction. The unit was staffed by prosecutors with powers similar to those of an investigating judge. Moreover, a law on domestic cooperation contained an obligation for spontaneous information-sharing among national authorities.

One State party actively cooperated with the private sector through its high-level reporting mechanism against corruption, in cooperation with the Organization for Economic Cooperation and Development and the Basel Institute on Governance, as well as the Business 20 working group of the Group of 20.

4. Bank secrecy, criminal record and jurisdiction

22. As noted in previous thematic reports, in most jurisdictions there were no significant issues with respect to bank secrecy, even in jurisdictions where bank secrecy rules were in place, although issues with regard to the lifting of bank secrecy were noted in a few jurisdictions. For example, in one State party, the procedure for obtaining bank records, although ex parte, could be subject to legal challenges, thus entailing delay in the disclosure of these records. Similarly, in another jurisdiction concern was raised that the freezing of accounts was suspended by the simple filing of an appeal in the criminal case, and a recommendation was issued accordingly. In one State party, the financial intelligence unit was empowered to lift bank secrecy and freeze accounts only on suspicion of money-laundering, although the entity's mandate extended to corruption offences. In another case, it was recommended that the introduction of a central register of bank accounts be considered.

Box 9

Example of the implementation of article 40

One State party's criminal procedure code allowed the investigating judge to order a credit institution to provide banking information or documents through a simplified procedure. The order could be served on the credit institution electronically, and the credit institution was required to communicate the requested information electronically within the time period indicated in the order. Non-compliance with such an order was punishable by a fine.

Access to banking information was granted in one State party to the anti-corruption commission and the police, as well as to the prosecution by judicial order. Records were directly obtained by the investigating authority through a public records agency, which held a central registry of transaction accounts.

One State party's legislation provided that pursuant to a request by the public prosecutor, the court could order the production and seizure of banking and commercial records, which had to be decided no later than 12 hours after receipt of the request. In emergency cases, the public prosecutor could impose the requested measures without a court order.

23. Several States parties did not take previous convictions into consideration in establishing criminal liability but allowed prior convictions to be taken into account in the sentencing process once liability was established, most frequently in the case

of recidivist criminals or for parole. In one State party, provisions in the criminal code allowed for the recognition of foreign judicial decisions in serious crime cases upon the request of the prosecution, for such aims as the recognition of the status of repeat offenders and the application of security measures or accessory penalties relating to compensation of damages and restitution. In a few cases, the verdicts of foreign courts could be taken into account as provided by international agreements or if they originated within the country's same regional organization. In several cases, the article had not been implemented or there were no laws or practice on criminal record.

24. Issues with regard to jurisdiction were noted in a few States parties, including in some States where the issue was not comprehensively addressed for corruption-related offences. In a number of jurisdictions, the passive personality principle had not been fully established, while in others both the active and passive personality principles were limited or had not been established. In several cases, the State protection principle was limited or absent, and recommendations were issued accordingly. Nationals could be prosecuted only for serious offences in some cases, which excluded certain offences under the Convention. Several States parties had established measures that prohibited the extradition of nationals or allowed such extradition only when applying international treaties and in accordance with the principle of reciprocity, as discussed further in the thematic report on the implementation of chapter IV of the Convention (International cooperation) (CAC/COSP/IRG/2016/8).

Box 10

Example of the implementation of article 42

The mere fact of keeping money stemming from certain predicate offences in a domestic bank account constituted money-laundering in one State party and thus established jurisdiction over the case.