



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

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Review of the implementation of the United Nations Convention against Corruption: criminalization and law enforcement and international cooperation

Implementation of chapter III (Criminalization and law enforcement) of the United Nations Convention against Corruption

Thematic report prepared by the Secretariat

I. Introduction

1. In its resolution 3/1, the Conference of the States Parties to the United Nations Convention against Corruption adopted the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (contained in the annex to that resolution), as well as the draft guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft blueprint for country review reports. The guidelines, together with the blueprint, were finalized by the Implementation Review Group at its first session, held in Vienna from 28 June to 2 July 2010.
2. Pursuant to paragraphs 35 and 44 of the terms of reference of the Implementation Review Mechanism, the present report has been prepared in order to compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the country review reports, organized by theme, for submission to the Implementation Review Group, to serve as the basis for its analytical work.
3. The present report contains information on the implementation of chapter III (Criminalization and law enforcement) of the Convention by States parties under review in the first year of the first review cycle of the Mechanism. It is based on

* CAC/COSP/2011/1.



information included in the country review reports that had been completed, or were close to completion, on 15 August 2011.

II. Implementation of the criminalization provisions of chapter III of the Convention

A. General observations

Definition of “public official”

4. A cross-cutting issue related to the implementation of chapter III concerns the scope of coverage of the term “public official”. For example, in the case of one State party, members of Parliament were not considered public officials, thus limiting the implementation of several corruption offences with respect to parliamentarians, including domestic and foreign bribery and abuse of functions. Recommendations were made by the reviewing States parties to extend the scope of the relevant offences and provide for appropriate sanctions for parliamentarians. In the case of the same State party, the definition of “foreign official” did not explicitly include persons exercising public functions for a public enterprise. In another jurisdiction, the anti-corruption legislation did not contain any explicit definition of the term “public official”, which was only defined indirectly by reference to other concepts. In a third case, the definition of “public servant” did not cover the main categories of persons enumerated in the Convention. With respect to the offence of abuse of functions, in particular, it was noted that in one jurisdiction, prosecutions often resulted in acquittals, as the established court practice excluded liability for a wide range of persons that did not fall under the term “officials”, and the need for a new criminal law approach was identified.

B. Bribery offences

Bribery of national and foreign public officials and officials of public international organizations

5. All of the States parties had adopted measures to criminalize both active and passive bribery of domestic public officials. In addition, some had taken steps towards establishing as criminal offences the bribery of foreign public officials and officials of public international organizations. Nonetheless, a number of common issues were observed concerning the implementation of those offences. In several States, cases involving the “promise” of an undue advantage were not explicitly covered or were indirectly covered under related concepts. Two of those States parties had additionally adopted a “conduct-based” approach whereby only the actual exchange was the subject of the offence, while an offer of bribery was not explicitly covered; in one of those cases, however, the offer could be prosecuted as an attempted crime. Further, in the same State, an “omission” to act was not criminalized, and passive bribery was only partly criminalized. Recommendations were issued by the reviewing States parties accordingly. In some cases, there were issues involving third parties, such as the coverage of indirect bribery involving intermediaries or (in several cases) the accrual of benefits to third parties. In a few cases, the legislation contained specific exemptions, for example regarding bribery

below certain threshold amounts. In one case, the domestic bribery provision required the involvement of at least two people in the criminal conduct and further required an element of “economic benefit”, which was interpreted to cover only pecuniary benefits and not any other undue advantage. A recommendation to broaden the scope of the law was issued accordingly. A similar issue regarding the undue advantage was noted in two States parties: in one case, where a “value-based” approach was taken, which punishes bribery only when it involves material advantages; and in another, where it was unclear whether the phrase “any valuable thing” in the national law and “undue advantage” were to be regarded as identical in nature and practice. The reviewing experts further noted that in several States, legislation had been drafted or introduced to more fully implement the bribery provisions of the Convention.

6. A majority of States parties had not adopted specific measures to criminalize both active and passive bribery of foreign public officials and officials of public international organizations. In particular, the relevant conduct had not been criminalized in five cases, with legislation pending in one of them, and it had only been criminalized with respect to active bribery in two others. Recommendations were issued, as required, to adopt specific measures to explicitly cover foreign public officials and officials of public international organizations. In one case, there was no specific reference to third-party beneficiaries in the active bribery provision, although jurisprudence was provided to cover that scenario.

Box 1

Example of good practice in the implementation of article 16 of the Convention

In one State, the foreign bribery law went beyond the requirements of the Convention and also covered cases where the bribe was not intended to “obtain or retain business or other undue advantage in relation to the conduct of international business” (art. 16, para. 1).

C. Abuse of power or office and related conduct

Embezzlement; trading in influence; abuse of functions; and illicit enrichment

7. While all of the States parties had established measures to criminalize the embezzlement of public funds, common issues encountered related to the scope of the property that was the subject of the offence. In two cases, immovable assets were outside the scope of the offence, as a person could only embezzle property that was in his or her possession. In another case, the national legislation covered only property, monies or securities belonging to the State, to an independent agency or to an individual, thus limiting the scope of coverage to private funds entrusted to an individual public official but not to an organization. A recommendation was issued to modify the law so that it could also be applied to such cases. In three cases, there were limitations or discrepancies concerning the accrual of benefits to third parties. One of those jurisdictions further criminalized only misappropriation and conversion, not embezzlement and diversion.

8. Trading in influence had not been established as a criminal offence in several States parties. In one of those cases, the adoption of implementing legislation had

been considered, but eventually the concept of trading in influence was considered overly vague and not in keeping with the level of clarity and predictability required in drafting a criminal law. A recommendation was issued to reconsider the possibility of introducing appropriate legislation. Where relevant legislation was in place, there were certain deviations from the scope of the Convention. For example, in one case the offence established was broader than in the Convention, but it was required that the conduct be carried out for the purpose of economic benefit and, with regard to the passive version of the offence, the person influenced must be a public official. In another case, only the passive version had been established as an offence. In several jurisdictions, legislation had been drafted or introduced to criminalize trading in influence. In one case, the relevant law also covered trading in influence with respect to foreign public officials, though there was no specific reference to third-party beneficiaries.

Box 2

Example of good practice in the implementation of article 18 of the Convention

In one State, the applicable legislation on trading in influence was observed to cover all material elements of the offence and in addition, neither the influence peddler nor the person whose influence was sought had to be a public official. It was understood that the influence could be real or merely supposed, and the undue advantage could be for the perpetrator or for another person. The offence appeared to be completed whether or not the intended result was achieved, and a separate offence was fulfilled if the person whose influence was sought actually carried out the act requested as a result of the improper influence.

9. Most States parties had adopted measures to criminalize the abuse of functions by public officials, though there were some deviations. In one case, only the abuse of powers had been criminalized, though legislation was pending that would more fully implement the offence. In another case, the relevant legislation criminalized only the illegal act, subject to a minimum amount, and not an omission in the discharge of functions; however, related offences of abuse and excess of authority by non-governmental organizations, businesses or other persons had been established. A recommendation was issued to enact comprehensive conflict-of-interest legislation, and relevant legislation had already been drafted. As noted in the discussion in paragraph 4 above, regarding the definition of “public officials”, in one jurisdiction parliamentarians were exempted from the scope of coverage. In another case, the legislation did not mention the purpose of obtaining an undue advantage for the public official or for another person or entity, though the accrual of benefits to third persons was considered to have been indirectly covered. Similarly, in another case the third-party benefit was not explicitly addressed. In one State, as with the offence of bribery, the offence required the involvement of at least two people in the criminal conduct and did not fully meet the requirements of the Convention, and a recommendation was issued accordingly. In two cases where the offence had not been established, legislation had been drafted or introduced to implement the article.

10. Illicit enrichment had not been established as a criminal offence in the majority of States, but legislation was pending in several cases. Objections to

enacting relevant legislation commonly related to the considered constitutionality of such legislation. In one case where illicit enrichment had not been criminalized, a similar effect was achieved by way of a legal requirement that all public officers should submit asset and income declarations and could be asked to explain any asset increases described in their disclosures. Noting a reporting rate of 99.5 per cent on such disclosures, a recommendation was issued to include stricter sanctions in the declaration requirements, such as forfeiture of undeclared property. One State party was also piloting the submission of such declarations before considering it a legal requirement. In the same case, there were issues with respect to the property that was the subject of the illicit enrichment laws, and a recommendation was also issued to consider unifying and streamlining the process of income and asset declarations.

Box 3

Example of good practice in the implementation of article 20 of the Convention

In one State, a comprehensive provision on illicit enrichment had been enacted and it was reported that two cases were pending in court at the time of the country visit.

D. Private sector offences

Bribery and embezzlement in the private sector

11. Less than half of the States parties had adopted measures to criminalize bribery in the private sector; in two other cases, relevant legislation had been introduced. In one case, the law limited bribery in the private sector to a breach of obligations “in the purchase or sale of goods or contracting of professional services”, although it was noted that other cases of bribery in the private sector would be covered under other provisions of the penal code. In another case, the relevant conduct was criminalized notwithstanding the fact that the act, favour or disfavour was not done or given in relation to the business or affairs of an employer. In a third case, the relevant provisions did not expressly include the proviso that the offence be committed “directly or indirectly”. In addition, non-governmental organizations and foundations were covered to the extent that they engaged in “economic, financial or commercial activities”.

12. Many States parties had criminalized embezzlement in the private sector. In one case, however, the provision did not expressly refer to embezzlement in the course of economic, financial or commercial activities and only indirectly covered various elements of such criminal conduct. A recommendation was issued to adopt a specific provision that more precisely reproduced the offence established in the Convention. In three cases, immovable assets were excluded from the scope of the national law and an appropriate recommendation was issued. In another case, measures to more fully implement the article were still under discussion at the time of the country review.

Box 4

Examples of good practice in the implementation of articles 21 and 22 of the Convention

In one State, the relevant law went further than the Convention in that a breach of duty was not required to establish bribery in the private sector.

In another State, the offence of embezzlement in the private sector was broader than in the Convention, as it did not contain the condition for the offence to be committed “in the course of economic, financial and commercial activities”.

In another State, the extent to which the penalty for the offence of private sector embezzlement was aggravated depended on the value of the embezzled asset, and the penalty was further aggravated if the offender “received the asset upon deposit imposed by law, by reasons of occupation, employment or profession, or as a tutor, trustee or court custodian”.

E. Other offences

Money-laundering; concealment; and obstruction of justice

13. There was some variation among the States parties with regard to the criminalization of money-laundering. While most States parties had taken measures to establish money-laundering as a criminal offence, in several cases there were significant gaps in the implementing law, which covered only part of the conduct described in article 23, paragraph 1, subparagraphs (a) (ii) and (b) (i), of the Convention and only minor parts of paragraph 2 of that article. As a result, while legislation to fully implement the article had been introduced, an “urgent” recommendation had been issued to enact appropriate legislation. In another State, there were similar issues with regard to the partial implementation of paragraph 1, subparagraph (a) (ii) of article 23; in that State, accessory conduct, such as counselling for the purpose of committing money-laundering and supporting a person in the commission of the predicate offence to evade the consequences of his or her actions, had not been criminalized. In that case, a recommendation was issued to broaden the list of predicate offences to include embezzlement in the private sector. In another case, attempted money-laundering was not punishable, though it would be covered in a pending amendment of the law. Similarly, in another jurisdiction, the predicate offences did not include all the offences stipulated in the Convention, the participation in acts of money-laundering had not been criminalized and provisions on conspiracy, assistance or attempt covered only the commission of money-laundering and not other corruption offences. Gaps in implementation also existed in other States parties — in one case, with regard to a limitation of the offence of money-laundering to only criminal predicate offences and not to conduct such as tax evasion and, in another case, concerning the absence of any provision to criminalize “self-laundering”, owing to a perceived inconsistency with fundamental principles of national law. Appropriate recommendations were issued by the reviewing experts. In addition, in several cases, issues were encountered with respect to the coverage of predicate offences committed outside the territory of the State concerned: in one case, the extension was implicit; in another case, predicate

offences committed outside the State were not considered predicate offences; and in a third case, dual criminality was required for the prosecution of predicate offences committed abroad. Several States parties had adopted an “all crime approach” that did not restrict application of the money-laundering offence to specific predicate offences or categories of predicate offences.

14. In several States that had established concealment as a criminal offence, there were issues with respect to the continued retention of property. Legislation had been drafted or introduced in some jurisdictions to fully implement the article.

15. Obstruction of justice had been established as a criminal offence (or was covered in the penal code with respect to all required elements of the offence) in most States. In two cases, issues related to the scope of coverage over conduct intended to interfere not just with the giving of testimony but with the production of non-oral evidence in a relevant proceeding. In addition, in one of those cases, the relevant law covered only conduct interfering with the true testimony of witnesses, not experts, and did not explicitly regulate the specific means of obstruction of justice (such as physical force, intimidation, offering or giving of an undue advantage). Similarly, in two other cases, the specific means (use of physical force, threats or intimidation) to induce false testimony or the production of evidence were not fully covered.

F. Substantive and procedural provisions supporting criminalization

Liability of legal persons; participation and attempt; knowledge, intent and purpose; and statute of limitations

16. All of the States parties had adopted measures to establish the liability of legal persons for offences covered by the Convention, though there was considerable variation concerning the type and scope of such liability and the extent of coverage. Common challenges related to the inadequacy of existing normative measures and specificities in national legal systems. Thus, a number of States parties had established some form of criminal liability of legal persons for corruption offences, with certain exceptions or limitations in some cases. For example, in one jurisdiction the scope of application of the criminal liability provisions for legal persons was narrowed by an exception for public entities, including publicly owned companies. In two cases, the liability was limited to certain offences or conduct, such as money-laundering (in the one case) and to money-laundering and bribery of national and foreign officials (in the other case), with a further restriction that the offences in question must have been committed directly and immediately in the interest of the corporate body. In another case, certain offences were excluded from the scope of coverage, such as passive bribery of public officials, embezzlement in the public and private sectors, abuse of functions and obstruction of justice. In two cases, there was lack of clarity as to whether legal persons were included in the scope of the relevant law or whether their liability was otherwise excluded, as the interpretation had not been generally agreed upon or clarified by the courts; a recommendation was issued to clarify the situation. In one case, criminal liability applied only to individuals who governed legal persons and not to entities, as the criminal code prohibited the establishment of the criminal liability of legal persons. A similar prohibition existed in another jurisdiction, where only administrative

liability had been established. The range of administrative sanctions generally varied, ranging from administrative penalties, including blacklisting for certain violations, to monetary penalties. In two cases of pecuniary penalties, a specific recommendation was issued to consider increasing the level of monetary sanctions and adding non-monetary sanctions to the list of possible penalties. In several cases, multiple forms of liability were possible. In one case, only civil liability had been established, pending amendments to the penal code that, if adopted, would cover the criminal liability of both legal and natural persons.

17. All of the States parties had adopted measures to criminalize participation in, and attempting to commit, the offences enumerated in the Convention, though the scope and coverage of the provisions varied. In one State, the preparation of an offence (subparagraph 3 of article 27) was not specifically criminalized because that would not be in accordance with basic principles of the national legal system. Similarly, in another case the preparation of a crime (conspiracy, abetting or proposal of the same) was punishable only for money-laundering offences, not corruption. In several States, legislation to more fully implement the article was pending or had been drafted.

18. All of the States parties had adopted measures to establish knowledge, intent and purpose as elements of the offences enumerated in the Convention that could be inferred from objective, factual circumstances. In most cases, those measures were included in the criminal procedure code, the criminal or penal code or evidentiary or case law. In one case, no reference had been made in the implementing law to the mental state of the offender, and further clarification was sought by the reviewing experts.

19. There was considerable variation among the States parties with regard to the length and application of the statute of limitations for offences covered by the Convention. One State party had established for such offences a statute of limitations setting out a minimum period of 5 years, which in some cases could be extended to 10 years. The reviewing experts were of the view that 10 years was a sufficiently long period and that the appropriateness of a statute of limitations setting out a 5-year limit depended on the possibility of prolongation or suspension of the statute and its application in practice. Several States parties did not provide for a suspension or interruption of the statute of limitations. Similarly, in another jurisdiction, for offences covered by the Convention, the statute of limitations set out a limit of either 10 years (for offences punishable by imprisonment for more than 3 years) or 5 years (for offences punishable by imprisonment for 1-3 years). Another State party had established a general statute of limitations setting out a period of 5 years, which would be disrupted if the defendant committed a new offence, and suspended by the formalization of the inquiry, which normally took up to two years. The period set out in the statute of limitations could also be extended if the culprit fled the country, but not if the culprit evaded the administration of justice within national borders. A recommendation was issued to introduce a longer period in the statute of limitations that would cover every case involving the evasion of justice, irrespective of whether the culprit was within or outside the country. In one case, the statute of limitations set out a period of 20 years if the most severe penalty for the offence was fixed-term imprisonment for more than 8 years, and a period of 10 years if the most severe penalty was between 2 and 8 years. Two State parties had no statute of limitations in place for corruption offences because the

applicable law did not apply to criminal cases or there was no general statute of limitations.

G. Measures to enhance criminal justice

Prosecution, adjudication and sanctions

20. 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, there were issues concerning paragraph 2 of article 30, on immunities and privileges, in several States. In one case, immunities were accorded to certain categories of public officials, including commissioners of government agencies, in the respective constituting laws of the agencies. A suspension of immunities by Parliament was needed to investigate those officials, though there was no legal procedure to resolve cases where requests to suspend immunities remained unanswered. Investigations of members of Parliament had been suspended previously because of the laws on immunity, and recommendations were issued accordingly. In another case, immunities were granted at the constitutional level to several categories of officials, including members of Parliament and members of the constitutional court, though measures had been taken to reduce the categories and the scope of application. In a third case, parliamentarians were granted functional immunity, which could be lifted if there was “concrete and sufficient” evidence for corruption-related offences. In several States, public officials did not enjoy immunities or jurisdictional privileges, though in one State members of Parliament were accorded immunity (or parliamentary privilege) for opinions expressed in Parliament or owing to conduct in the consideration of a matter. The absence of immunities or jurisdictional privileges was established at the constitutional level in one case, while in another case the Constitution provided immunity only to the President of the State. In one jurisdiction, the supervising court could take a decision on the lifting of immunity at the end of the investigative stage, and a recommendation was issued that decisions on the lifting of immunities should not prevent investigations from being conducted once the officials in question were no longer in service. In another State, concern was raised over pending legislative amendments that could undermine existing provisions on corruption-related offences and the independence of the anti-corruption body.

21. Common issues were also encountered with regard to paragraph 3 of article 30, on discretionary legal powers relating to the prosecution of persons for offences covered by the Convention. Several States followed a discretionary prosecutorial model. In one case, the investigation of corruption and the gaining of access to bank records required the prior authorization of the prosecutor’s office, and the delegation of even limited powers by the prosecutor general to the anti-corruption commission was prohibited by law. In one of the States that did not apply discretionary prosecution, the criminal justice system was based on the principle of mandatory prosecution, whereby the prosecutor could waive prosecution only in cases of petty criminality or if it would be “unreasonable” to charge the offender, and applicable guidelines for prosecutors were in effect. In another State, the prosecution was governed by the principle of legality, and no discretionary legal powers were foreseen. Under the Constitution, the legislature was required to

authorize the criminal charge and proceedings of its members, deputies and senators, and cases showed that the parliamentary practice of granting such authorization had been established as a rule.

22. Several 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. Suspension of public officials was possible in several jurisdictions, including in one case by regulations allowing temporary suspension pending trial. In one case, the removal of accused officials was governed by public service standing orders and applicable regulations that permitted the conditional release of public officers pending judicial procedures on half pay, with a prohibition on their working or leaving the State. In another case, there was no legal provision that would permit the removal or resignation of an official whose guilt had not been proved by a court, and investigative bodies could only request the suspension of officials who could interfere with an investigation. It was considered essential, in order to protect victims and witnesses and to ensure the smooth functioning of investigations, to have rules of procedure in place that would allow for suspending the official authority of suspects, including high-ranking officials, pending a court decision and their resignation from office if guilt was established.

23. While disqualification from holding public office was possible in some States, in one case the disqualification period was relatively short and disqualification was neither permanent nor prohibited a subsequent transfer to another public office. In another case, general provisions of the criminal code required the dismissal of a public official punished by a period of imprisonment in excess of two years, unless the court deemed that the person was not unsuited to attend to a public function. For periods of imprisonment of less than two years, dismissal was permissive if the court believed that the person was unsuitable to attend to a public function. Members of Parliament or elected officials could not by law be dismissed pursuant to a court decision, though the Constitution provided for the dismissal of parliamentarians who had been sentenced to imprisonment for deliberate crimes, and persons holding office in private enterprises owned in part or in whole by the state could not be dismissed on the basis of a conviction. Any suspension or dismissal was recorded in the personnel file of a public official and known to authorities considering recruitment in the future. Dismissal from office was possible in cases of simple or aggravated passive bribery, simple or aggravated abuse of office and any violation of official duty. In one jurisdiction, the concept of a publicly owned enterprise was not defined in the legislation; in another case, no procedures had been established for disqualifying convicted persons from holding public office.

Freezing, seizure and confiscation

24. Several common issues were observed regarding the implementation of article 31, on freezing, seizure and confiscation. In several cases, measures to enable the confiscation of instrumentalities, as opposed to proceeds, of crime were not provided for. In two of those cases, measures to enable the tracing, freezing or seizure of proceeds or instrumentalities of crime for purposes of eventual confiscation (paragraph 2 of article 31) were also lacking. In a third case, there were no detailed rules on confiscation and identification of proceeds or instrumentalities of crime. In that jurisdiction, the seizure of goods other than bank accounts further

presented difficulties in practice, owing to the high standard of proof required, which resembled a prima facie case. In a fourth case, the reviewers expressed reservations that the regulation of seizures and freezing of property could be done by reference to the civil procedure code and recommended considering addressing the matter in a uniform manner to avoid its fragmentation in different legislative pillars and to limit possible questions of interpretation. In one case, most of the offences under the Convention fell within the scope of the law, with the exception of bribery in the private sector, and legislation was being prepared to more fully implement the article.

25. In several jurisdictions, confiscation extended also to proceeds of crime that had been transformed or converted (paragraph 4 of article 31) or intermingled with property from legitimate sources (paragraph 5), as well as income or other benefits derived therefrom (paragraph 6). In two cases, the seizure and confiscation of transformed, converted and intermingled property was partly possible, and a recommendation was issued to establish a solid legal basis for such measures by amending the law accordingly. In three cases, the confiscation of property corresponding to the value of proceeds of crime was not covered, as the law was based on the principle of object confiscation and not value confiscation, even where the anti-corruption law provided for the confiscation of proceeds of crime that had been derived from corruption. In addition, in one of those cases a draft law to counter money-laundering would have provided for the option of freezing, seizure and confiscation of property for an equivalent value. In two cases, there was some ambiguity regarding the coverage of cases of intermingled property in one of those jurisdictions; there was no provision to permit bank interest and income from illegal assets to be confiscated. In another case, recommendations were issued that intermingled property be liable to confiscation up to the assessed value of the intermingled proceeds, and income or other benefits derived from such proceeds be liable to the measures referred to in article 31.

26. Several States parties faced issues with regard to the administration of frozen, seized and confiscated property. For example, in one case, a recommendation was issued to consider strengthening measures for the management of frozen, seized and confiscated property in order to regulate the process more methodically and not limit it to cases where the property was perishable. The reviewing experts reiterated the importance of having in place appropriate mechanisms to regulate the administration of such property.

27. 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 not been introduced in most jurisdictions. That was considered to be 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. Common challenges related to limited capacity, the inadequacy of existing normative measures and specificities in national legal systems. In one case where the law provided for a reversal of the burden of proof, the accused had to make a declaration in writing in order to prove the legal nature of the property and, if not or if the declaration was incomplete, the property was presumed to have been derived from criminal activity.

Box 5

Examples of good practice in the implementation of article 31 of the Convention

Conviction

In one State, any criminal offence allowed for a decision of confiscation of proceeds of crime, even in cases when the offender was not convicted as a result of criminal capacity or was exempt from criminal liability. The possibility also applied to legal persons, even if an individual perpetrator could not be identified or convicted. Confiscation of proceeds was also possible against persons on whose behalf or advantage the offence was committed; such confiscation was mandatory for instrumentalities of crime.

In one State, confiscation was conviction-based and considered an accessory sanction of the crime; however, if no sanction could be imposed, the confiscation could be upheld in the absence of a criminal conviction.

Protective measures prior to judicial proceedings

In one State, the criminal procedure law allowed for freezing, seizure and confiscation prior to the filing of judicial proceedings where such action was based on an investigation or prosecution.

Similarly, in another State, an investigator could freeze assets for up to seven days and was then required to request a court order, which could be granted for up to four months and was renewable for the same period.

Protection of witnesses, experts and victims

28. There was wide variation among the States parties with regard to the protection of witnesses, experts and victims. In particular, in one State, the right of victims and witnesses to receive adequate protection in the course of criminal proceedings was recognized and afforded broad protections at the constitutional level. Some States had enacted legislation or other practical measures to afford the minimal protection of non-disclosure of the identity or whereabouts of witnesses and other persons being heard during pretrial investigation or in court. In some cases, the protection went further, including physical protection measures. In several cases, however, no measures had been taken for the effective protection of witnesses and experts. The authorities in several jurisdictions stated that the absence of witness protection systems was a major weakness in the fight against corruption; the significant costs of such systems, the inadequacy of existing normative measures and limited capacity were described as challenges by some; others pointed to the existence of pending legislation. Several recommendations were issued, including recommendations to enact comprehensive legislation and systems for the protection of experts, witnesses and victims where such legislation and systems were absent, to give adequate attention to such measures on the ground, for example through sensitizing the police and law enforcement agencies, and to strengthen measures to protect the identity of informants in order to alleviate concerns that the names of witnesses could be traced. In a number of States, no comprehensive witness protection or relocation programmes were in place, but practical measures, such as separate courtrooms, were used on a case-by-case basis for special categories of persons.

29. Regarding the victims of corruption, in one case the protection of victims and the provision of funding regarding their protection were not regulated by law; in others, victims of offences participated fully in proceedings. In one of those cases, the Constitution and criminal procedure code provided for the views of victims to be heard at any stage of the proceedings. In another, a recommendation was issued that the role of victims in trials, in particular their position as complainants, victims or witnesses, should be clarified.

Box 6

Examples of good practice in the implementation of article 32 of the Convention

In one State, the right of victims and witnesses to receive adequate protection in the course of criminal proceedings was recognized at the constitutional level and regulated by different normative sources. In addition, a law on witness protection existed, though it had only been applied in exceptional cases. Protections and support measures also covered family members, and legislation was pending to extend the protection to complex protection cases posing exceptional risk.

In another State, measures to protect witnesses were taken by the prosecutor, judge or court when there were reasons to presume that there was real danger to the life, health or property of witnesses, relatives or closely related persons. Those measures included personal physical guarding by government bodies and non-disclosure of identity. A programme for the protection of threatened persons was also available; it encompassed personal physical security; property guarding; safe temporary accommodation; change of residence, workplace or educational institution; and change of identity. A specific procedure was established to allow for the interrogation of witnesses by pretrial authorities (and courts) in secrecy. A defendant could also pose questions to the witness in writing that would be answered by videoconferencing, whereby the voice and image of the witness would be altered, all of which would be verified by a judge.

Protection of reporting persons

30. As with the protection of witnesses, experts and victims, there was considerable variation among the States parties with regard to the implementation of article 33, on protection of reporting persons. Several States parties had not established comprehensive measures to implement the article, though legislation was pending in some cases. Common challenges related to specificities in the national legal systems and the absence of any specific regulation or systems for the protection of whistle-blowers, which were considered to be matters of concern in several cases. In one case, the matter was partly regulated by the anti-corruption law, and draft legislation had been introduced; however, there was no comprehensive legislation protecting whistle-blowers, and the protection of victims and witnesses was not extended to informants, despite an obligation for civil servants to report cases of corruption. A recommendation was issued to enact appropriate legislation. In one case where no specific system existed for protecting whistle-blowers, the provisions on witness protection were applicable, and a recommendation was issued to explore the possibility of establishing a comprehensive system for the protection of whistle-blowers, which was also under consideration by the national authorities. In a third case, despite a duty of all

citizens to report crimes to the competent authorities, which was encouraged by the establishment of hotlines, the person reporting criminal conduct had to confirm the report formally afterwards. A recommendation was issued to ensure that specific rules for the protection of whistle-blowers in labour and administrative laws were enacted. A similar confirmation requirement was also observed in another jurisdiction. In one case where comprehensive whistle-blower legislation had recently been enacted, the law applied to all persons who disclosed information and had already yielded “useful” information, including through anonymous reports, that had resulted in several pending cases; however, the possibly insufficient incentives for whistle-blowers were noted and several recommendations were issued to enact regulations relating to back pay and other action to eliminate the effects of victimization, and to raise awareness by employers and among the public. In another case, only public officials who reported — not private persons — were afforded protection, which covered both labour and procedural protection. A recommendation was issued to implement an appropriate protection system that would encourage persons other than public officials to report offences covered by the Convention.

Consequences of acts of corruption

31. There was considerable variation among the States parties regarding the implementation of article 34, on consequences of acts of corruption. In one case, no specific provisions to regulate the matter existed, though general principles of contractual law applied that permitted annulment of a contract on the basis of the lack of good faith of at least one of the parties, if the contract was the result of corruption. Similarly, in another jurisdiction, general principles of contractual law applied to void contracts that contradicted or circumvented law or good morals and in specific circumstances listed in the legislation. The legislation stipulated the exclusion of candidates from participation in public procurements who had been convicted of bribery and further provided that contracts would be ineffective in respect of the candidates if concluded as a result of a legally non-conforming application of the law. Similar restrictions existed with respect to the participation of legal persons in concessions. In a third case, the penal code established an obligation to “repair” the civil consequences and damages of corruption once there had been a criminal conviction, and an annulment of the contract, concession or other legal instrument was considered part of such reparation of damages. In one jurisdiction, while the civil law contained comprehensive regulations on voiding transactions, the notion of contract rescission as a result of corrupt acts had not been reflected in national law. In another case, the matter was heard by a court of auditors that had no administrative capacity to intervene in a given case but had a mandate to review or consider corruption and other matters brought to its attention and could issue disciplinary, financial and criminal penalties. A recommendation was issued that investigations and prosecutions should follow such proceedings. In one State, the matter was regulated by the contract and public procurement laws, though their application was unclear. While contracts could be rescinded under the procurement law, it was observed that a regulation on concessions was missing.

Compensation for damage

32. All of the States parties had adopted measures to fully or partly implement article 35, on compensation for damage, though in several cases there was no established procedure or practice for bringing such cases. The implementing

legislation was either civil, criminal or procedural, and in one case the matter was addressed in the anti-corruption law, which covered only part of the cases foreseen in article 35.

III. Implementation of the law enforcement provisions of chapter III of the Convention

A. Institutional provisions

Specialized authorities

33. While each of the States parties had established a body or specialized department to combat corruption through law enforcement, in many cases it had been newly created and faced challenges related to limited capacity and resources for implementation, as well as competing priorities. Similar recommendations were issued in a number of cases to increase manpower and resources for training and capacity-building, to strengthen the presence in the regions and provinces, to increase political support and to continue efforts to combat corruption through independent law enforcement bodies focusing, in particular, on addressing implementation challenges in this field. In one case, recommendation was issued to consider focusing the designation of responsibilities of the various law enforcement authorities, their staffing and training due to overlapping functions. In several cases, observations were made regarding the independence of those bodies. For example, in two cases, the investigation of corruption or related action against public officials required the prior authorization of the Government or the prosecutor's office. In one of those cases, additional concerns were raised because a high-ranking official of the agency had been appointed by the Government and also as to the independence of contractors and staff members of the agency who could hold office outside the agency and were not subject to any conflict-of-interest law. In the second case, while it was noted that the anti-corruption law prohibited influencing or interfering in the operation of the agency, a recommendation was issued to also consider establishing related criminal sanctions and to increase the mandate of the agency to investigate all offences covered by the Convention. In another case, a recommendation was issued to strengthen the accountability of the judiciary through consistent and strict application of all legal and disciplinary means to sanction corruption. In some cases, legislation had been introduced or prepared that would strengthen or reorganize the functions and authorities of the law enforcement body.

Box 7

Example of good practice in the implementation of article 36 of the Convention

In one State, the anti-corruption law contained a unique provision that prohibited a decrease in the anti-corruption agency's budget from the previous year's budget and further required the agency's corruption-related recommendations to public sector institutions to be implemented. Moreover, a three-sided agreement among the agency, government and civil society was in place for collaborating efforts against corruption, and civil society also held a seat on the advisory council of the agency.

Cooperation with law enforcement authorities

34. A number of States parties had taken measures to encourage persons who had participated in the commission of corruption offences to cooperate in investigations. Although whistle-blower protection did not always apply to cooperating perpetrators, measures had been frequently implemented to permit collaboration to be considered as a circumstance mitigating criminal liability and to be taken into account when adjudicating punishment or as grounds for reducing punishment where perpetrators had attempted to prevent or remove the effects of an offence. In the latter case, recommendations were issued to consider providing for the possibility of non-punishment of perpetrators of corruption offences who spontaneously and actively cooperated with law enforcement authorities and also to consider expanding the scope of domestic legislation on the mitigation of punishment of such perpetrators who assisted law enforcement authorities in investigating offences committed by other persons involved in the same case. In several cases, no explicit policies or legal provisions were in place to either protect or encourage the cooperation of persons who had participated in the commission of corruption offences or provide for the mitigation of their punishment; in one case, legislation on the mitigation or release from punishment of accused cooperators was pending. Recommendations were issued in several cases to include the physical protection of collaborators of justice in future legislation and to provide for the mitigation of punishment. One related issue concerned the concept of “spontaneous confessions”, which had been established in two jurisdictions as circumstances warranting mitigation or release from punishment but were not considered by the reviewing States parties as fully implementing the provisions of the Convention.

35. With regard to the possibility of granting immunity from prosecution to accused cooperators, the majority of States parties had not established the respective measures, although in one case partial immunity could be granted in bribery cases and in another case such immunity could be granted on a discretionary basis by prosecutors. A draft law on plea-bargaining was being developed.

Cooperation between national authorities and with the private sector

36. Several States parties had established obligations to report corruption incidents on the part of public officials and, in several cases, concerning citizens or specific categories of legal persons in the private sector, though reporting was not always anonymous. There were notable exceptions where no such duty existed for citizens or for citizens and public officials and appropriate recommendations were issued to encourage such persons to report acts that had been established as offences pursuant to 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 that was anchored in law or the operation of specialized administrative bodies (inspectorates) in every central public body to collect signs of corruption and inform prosecuting authorities of evidence concerning criminal activities. The measures most often related to financial institutions and, in one case, a recommendation was issued to explore the usefulness of broadening the scope of cooperation between national law enforcement authorities and private sector entities that were not financial institutions. Frequently, inter-agency memorandums of understanding or other 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. The most common challenges in this area related to inter-agency coordination and limited capacity for implementation. Reluctance on the part of public officials to report and fear of retaliation were observed in some cases.

B. Other provisions

Bank secrecy, criminal record and jurisdiction

37. In most jurisdictions, bank secrecy did not present significant issues, even in cases where bank secrecy rules were in place, although issues with regard to the lifting of bank secrecy were noted in a few jurisdictions. Most notably, in one case, it was difficult for investigators to obtain the lifting of bank secrecy, as particularly high standards of proof were required by the supervising judge. In addition, concerns were noted about the lengthy treatment of requests for the lifting of bank secrecy by judges and the subsequent provision of information by the banks concerned, and a recommendation was issued to adopt suitable measures to facilitate the practical implementation of the standards on the lifting of bank secrecy. Delays in the lifting of bank secrecy were also observed in another case, as the procedure was regulated by court authorization at the request of the prosecutor. However, in one jurisdiction where judicial permission was not required, such delays were not noted; in addition, the law established the obligation of credit institutions to provide information as required. In another jurisdiction with bank secrecy rules in place, the rules did not pose major difficulties and were limited by the duty to collaborate in accordance with the requirements of the public interest. In practice, that meant that banks and other financial institutions should facilitate access to data and precedents as required. In one case where bank secrecy rules were in place, the prosecutor's office had the authority, in investigations against civil servants for offences committed in the exercise of their functions, to order the disclosure of the suspect's current accounts and balances as a whole, not only the disclosure of specific transactions related to the issue under investigation.

38. In several jurisdictions, previous convictions in another State could not be taken into account with regard to corruption offences, whereas provisions existed in relation to other offences, such as money-laundering (in one case) and the offences of trafficking in humans, drug trafficking and acts of terrorism (in another). In a few cases, article 41, on criminal record, had been implemented by reference to other international legal instruments, such as the European Convention on the International Validity of Criminal Judgments and the convention on mutual assistance in criminal matters between the community of Portuguese-speaking countries. In one case, the criminal law contained a rule stipulating that courts should take into account verdicts of foreign courts regarding alleged offenders in cases established by international agreement. In some cases, article 41 had not been implemented or there were no laws or practice on criminal record.

39. Issues with regard to jurisdiction were noted in a few States that did not provide for extraterritorial jurisdiction in corruption matters. In one case, the requirement of double criminality was applied to offences committed abroad by or against a national, but that general principle was not applicable with respect to active and passive bribery of national and foreign public officials and members of

Parliament; moreover, the passive personality principle was limited by the requirement that the acts committed abroad must be punishable by imprisonment for a period of more than six months. In two cases the passive personality principle had not been established, while in three other cases both the active and passive personality principles were limited or had not been established. In two of those cases, the state protection principle was limited or had not been established, and a recommendation was issued accordingly. Several States parties had established measures prohibiting the extradition of nationals or allowing such extradition only when applying international treaties and according to the principle of reciprocity, as discussed further in the thematic report on the implementation of chapter IV of the Convention (International cooperation) (CAC/COSP/2011/3).
