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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 30-39)**

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 States parties under review in the first, second and third years of 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. Examples of implementation are given in boxes 1-9.

* CAC/COSP/2013/1.



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

Measures to enhance criminal justice

1. Prosecution, adjudication and sanctions

1. In the review of implementation of chapter III of the Convention, it was observed that common challenges regarding the implementation of the provisions on prosecution, adjudication and sanctions concerned specificities in national legal systems and limited capacity. For example, in several cases recommendations were issued concerning the proportionality or dissuasiveness of the sanctions. In two cases, it was suggested that differentiating sanctions between persons carrying out public and non-public functions should be considered, although a universal regime applicable to both categories of persons was deemed to be compatible with the principles of the Convention and different legal traditions. There were also issues concerning paragraph 2 of article 30, on immunities and privileges, in several States parties. In one case, immunities were afforded 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, although there was no legal procedure to resolve cases in which requests to suspend immunities remained unanswered. Investigations of members of parliament had been suspended on occasion as a result of the laws on immunity, and recommendations had been issued accordingly. A relaxation of the relevant standards and procedures for lifting immunity was also recommended in two other cases, in which the approval of parliament and a judicial council was needed to investigate members of parliament and judges. In several jurisdictions, immunities were granted at the constitutional level to certain categories of officials, including members of parliament, the Government and the judiciary. In one jurisdiction, parliamentarians were granted functional immunity, which could be lifted if there was “concrete and sufficient” evidence of corruption-related offences. In several States, public officials did not enjoy immunities or jurisdictional privileges, although in two such jurisdictions members of parliament were afforded some forms of immunity (or parliamentary privilege) for opinions expressed in parliament or owing to conduct in the consideration of a parliamentary matter. In another jurisdiction, ministers were granted jurisdictional privilege and were tried in special courts for offences committed during their tenure. Likewise, with regard to acts performed in the holding of their office, members of Government had to be tried by a special court, although they did not enjoy immunity or jurisdictional privileges for acts performed outside the exercise of their office. Further, while members of parliament did not enjoy immunity, their arrest or other deprivation of liberty in a criminal or disciplinary matter (with the exception of felonies or in flagrante delicto cases and when a conviction had become final) required the authorization of the relevant bureau of the legislature. Additionally, authorization by the President of the National Assembly was required for any investigation of a parliamentarian. In two other States parties, the law conveyed immunities to a number of high-ranking officials, but the anti-corruption authority, unlike other law enforcement agencies, was not required to seek permission to investigate certain categories of officials. The absence of immunities or

jurisdictional privileges was established at the constitutional level in one jurisdiction, while in another jurisdiction the Constitution provided immunity only to the Head of 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 preclude subsequent investigations once the officials in question were no longer in service. In another State party, procedures for the lifting of immunity from prosecution for the President, parliamentarians, judges and the public defender were in place, and immunity from investigation was not established. Concern was raised in one case regarding a broad constitutional provision which covered any person acting on behalf or under the authority of the Head of State, and in another regarding pending legislative amendments that could undermine existing provisions on corruption-related offences and the independence of the anti-corruption body. A recommendation was issued in another case to monitor the lifting of immunities and privileges and collect statistics in corruption cases.

2. 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 under the Convention. In that regard, several States followed a discretionary prosecutorial model, which was limited in one State, when the offence had been committed by a public official in the exercise of official duties. In one jurisdiction, corruption investigations and access to bank records required the prior authorization of the prosecutor's office, and a delegation of even partial powers by the Prosecutor-General to the anti-corruption commission was prohibited by law. In another State with discretionary prosecution, when the identity and domicile of the perpetrator were known and there was no legal obstacle to commencing a public prosecution, the prosecutor could only decline the case when "the particular circumstances linked to the commission of the offence" so justified. Moreover, in some jurisdictions the law granted certain rights to complainants and others to review a decision not to prosecute. In one case, prosecutorial discretion had been exercised in order to encourage cooperating defendants to provide relevant information by dismissing or reducing charges or making recommendations to the judge or magistrate concerning sentencing. Among the States that did not apply discretionary prosecution, one State party's 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 place. In other States, the prosecution was governed by the principle of legality and no discretionary legal powers were foreseen. Under the Constitution in one case, the legislature was required to authorize the criminal charge of and proceedings against its members, deputies and senators, and cases showed that the parliamentary practice of granting such authorization had been established as a rule. In one case, concern was raised at the manner in which the Attorney-General exercised discretion to discontinue cases for the protection of the public interest, which, although rarely applied, was considered to present the potential for abuse. Observations were also made as to the discretionary forms of sentencing available outside of judicial oversight. Recommendations were issued in several cases.

3. 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 and in another case at the discretion of parliament, and was mandatory for criminal matters in other States. In one jurisdiction, the removal of accused officials was governed by public service standing orders and applicable regulations that permitted the conditional removal of public officials on half pay pending the outcome of judicial procedures, with a prohibition on their working or leaving the State. In two jurisdictions, legislation provided for the suspension of accused public officials but was silent on removal or reassignment. In a third jurisdiction, there was no legal provision that would permit the removal or resignation of an official whose guilt had not been established in 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 removal from office if guilt was established. Similar restrictions existed in other States, where a suspension from office was possible only after a conviction.

4. While disqualification from holding public office was possible in most States parties, in some jurisdictions the disqualification period was relatively short and was neither permanent nor prohibited a subsequent transfer to another public office. In several jurisdictions, disqualification was not mandatory, but it was available as an additional penalty for criminal offences, and in one jurisdiction would only prohibit future election to the parliament or cabinet. In another jurisdiction, general provisions in the criminal code required the dismissal of a public official for any imprisonment in excess of two years, unless the court deemed that the person was not unsuited to exercise a public function. For periods of imprisonment of less than two years, dismissal was discretionary if the court believed that the person was unsuitable to exercise a public function. Members of parliament or elected officials could not by law be dismissed pursuant to a court decision, although the Constitution provided for the dismissal of parliamentarians who had been sentenced to imprisonment for deliberate crimes. Additionally, persons holding office in 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. In three jurisdictions, the concept of a publicly owned enterprise was not defined in legislation; in another jurisdiction, no procedures had been established for the disqualification of convicted persons from holding public office, which was done by judicial discretion.

Box 1

Examples of the implementation of article 30

In one State party, the rules and practice of the public service commission for recording disciplinary and ethics proceedings and producing transcripts on a timely basis were observed to promote transparency, accountability and consistency and to significantly enhance public confidence in the decision-making processes of the body. The average time period during which disciplinary and ethics cases were disposed of by the relevant tribunal had been reduced in recent years from several years to between three and six months. Moreover, the training of civil servants on matters related to ethics, discipline and good governance, among other

things, drew upon the participation of a wide range of Government ministries, departments and agencies, including the anti-corruption agency, the police, the prosecutor's office, the office of the Auditor General and the Ministry of Finance. The public service commission also conducted regular surveys and studies to assess the impact of its training sessions.

In another State, specific standards and guidelines governing the initiation of prosecutions were in place, and the chief prosecutor and ministry of justice were responsible for monitoring their application. The monitoring of prosecutions was facilitated by an electronic document management system and oversight by the inspector general's office in the Ministry of Justice. Failure to follow such guidelines could constitute a breach of the professional code of conduct or even the crime of abuse of power.

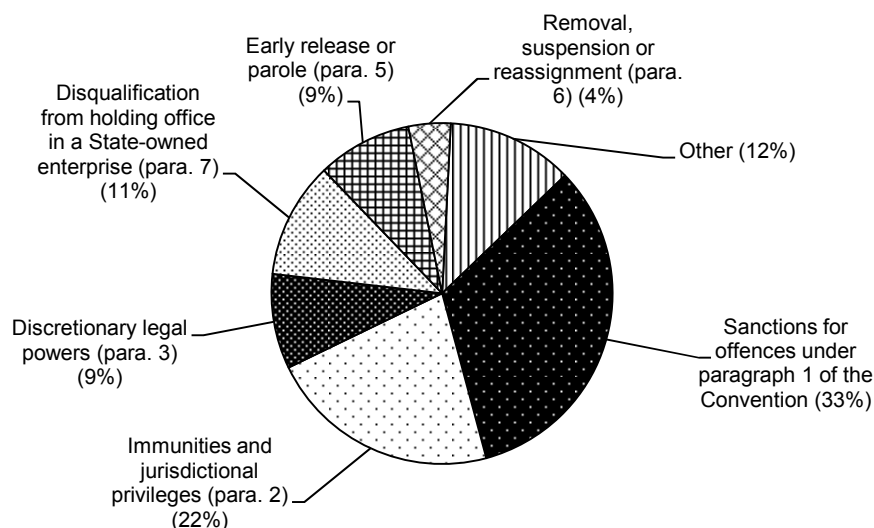
In one case, the fine imposed as a sanction for bribery and commercial corruption was calculated as a multiple of the amount involved in the case.

Challenges related to article 30

5. The most common challenges regarding the implementation of article 30 related to levels of monetary and other sanctions, especially against legal persons, and the harmonization of existing penalties for corruption-related offences (33 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 (22 per cent of cases); consideration of the adoption of measures for the disqualification of convicted persons from holding office in enterprises owned in whole or in part by the State (11 per cent of cases); discretionary legal powers (9 per cent of cases); early release or parole (9 per cent of cases); and the removal, suspension or reassignment of accused persons (4 per cent of cases).

Figure 1

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



2. Freezing, seizure and confiscation

6. Several common issues were observed regarding the implementation of article 31. In several jurisdictions, measures to enable the confiscation of instrumentalities, as opposed to proceeds, of crime (and also property “destined for use” in corruption offences) were not provided for, while in one jurisdiction only instrumentalities were covered in cases other than money-laundering. In four jurisdictions, measures to enable the tracing, freezing or seizure of proceeds or instrumentalities of crime for purposes of eventual confiscation (art. 31, para. 2) were also lacking. Additionally, in one of those jurisdictions, 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 fifth jurisdiction, 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. Similarly, in another case concern was raised as to the permissive wording of the law, which appeared to give courts discretion as to whether property could be confiscated; a need to apply confiscation measures more consistently in criminal cases was observed. Conversely, in another State the additional penalty of confiscation was incurred in cases provided by law or regulation, and also automatically for felonies and misdemeanours punishable by a prison term of more than one year, excluding press offences. One State party’s law on the forfeiture of criminal proceeds applied only to “serious offences”, which excluded most offences under the Convention, while in another jurisdiction only money-laundering offences were covered and forfeiture was achieved as a punishment through the use of fines. In a third jurisdiction, most corruption-related offences fell within the scope of the forfeiture law, with the exception of private sector bribery, and legislation was being prepared to more fully implement the article. In several jurisdictions, it was possible for the financial intelligence unit to place an administrative freeze on assets for between 7 and 30 days. One State party encouraged the use of special investigative techniques in the identification and tracing of property suspected of being proceeds of crime, while another required the presence of a police officer to conduct any search, entry or seizure. In one State party, recent penal code amendments established the mandatory nature of confiscation for all offences; it was recommended that statistics on confiscation should be made publicly available and regularly updated.

7. In most jurisdictions, confiscation extended also 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). In nine jurisdictions, the seizure and confiscation of transformed, converted and intermingled property was either not possible or only partly possible; recommendations were issued to amend the law in order to establish a solid legal basis for such measures. In seven jurisdictions, the confiscation of property corresponding to the value of proceeds of crime was not covered or was limited, in one case because the law was based on the principle of object confiscation and not value confiscation, even though the law provided for the confiscation of proceeds that had been derived from corruption offences. Additionally, in one of those jurisdictions a draft law to counter money-laundering would have provided for the

option of freezing, seizure and confiscation of property of an equivalent value. In two jurisdictions, there was some ambiguity with regard to the coverage of cases of intermingled property, with no provision in one jurisdiction to permit bank interest and income from illegal assets to be confiscated. In five jurisdictions, recommendations were issued that intermingled property should be liable to confiscation up to the assessed value of the intermingled proceeds (para. 5), and that income or other benefits derived from such proceeds should be liable to the measures referred to in article 31 (para. 6).

8. Several States parties faced issues with regard to the administration of frozen, seized and confiscated property. For example, in two cases recommendations were issued to consider strengthening measures for the management of frozen, seized and confiscated property in order to regulate the process more methodically. The reviewing experts reiterated the importance of having in place appropriate mechanisms to regulate the administration of such property. In two jurisdictions, the establishment of a central agency to administer seized and confiscated assets was under consideration. In another jurisdiction, it was not clear to what extent the capacity to administer complex assets that required extensive administration measures, such as businesses, existed once such assets were seized.

9. 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 just over half of the jurisdictions. That 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. Common challenges related to limited capacity, the inadequacy of existing normative measures and specificities in national legal systems. In one case in which 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 the accused did not make such a declaration or the declaration was incomplete, the property was presumed to have been derived from criminal activity. In one case in which the burden of proof was reversed, there was doubt as to whether the provisions could be used in respect of assets that had been dissipated, sold or transferred. In another case, the law covered only assets belonging to a person involved with or having supported a criminal organization. In one State, the provision was permissive. Legislation on unexplained wealth was pending in one jurisdiction.

Box 2

Examples of the implementation of article 31

Conviction

In one State party, any criminal offence allowed for a decision of confiscation of proceeds of crime, even in cases in which the offender was not convicted 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 and, further, was mandatory for instrumentalities of crime.

In another State party, a variety of measures for restraining and confiscating proceeds and instruments of crime was noted, including a non-conviction-based

procedure under which confiscation could be undertaken independently of prosecution; pecuniary penalty orders, which required a person to pay an amount equal to the profits derived from crime; and unexplained wealth orders, which required a person to pay a proportion of his or her wealth when they could not satisfy a court that that wealth had been legitimately acquired. Non-conviction-based in rem forfeiture was also possible in other jurisdictions.

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

One State party had adopted a law on the return of assets of illicit origin of politically exposed persons, which allowed the confiscation, under certain conditions and without a criminal conviction, of assets presumed to be of illicit origin. Non-conviction-based confiscation was possible under certain conditions. Further, financial institutions detecting a suspicious transaction and reporting it to the financial intelligence unit were required, on their own initiative, to freeze the funds involved for up to five days, subject to extension by a decision of the criminal justice authorities.

One jurisdiction had established comprehensive conviction-based and non-conviction-based forfeiture mechanisms, including the potential invocation, at the discretion of the prosecutor and upon conviction for a particularly serious offence, of a seven-year presumption that the assets and property were subject to forfeiture unless their lawful origin could be established by the defendant.

Protective measures prior to judicial proceedings

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

Similarly, in another State party 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 of time.

Management of assets

In one State party, a separate institution dedicated to the management of seized and confiscated assets, especially “complex” assets requiring effective management, had been established. Its operations were self-financed from the sale of confiscated property.

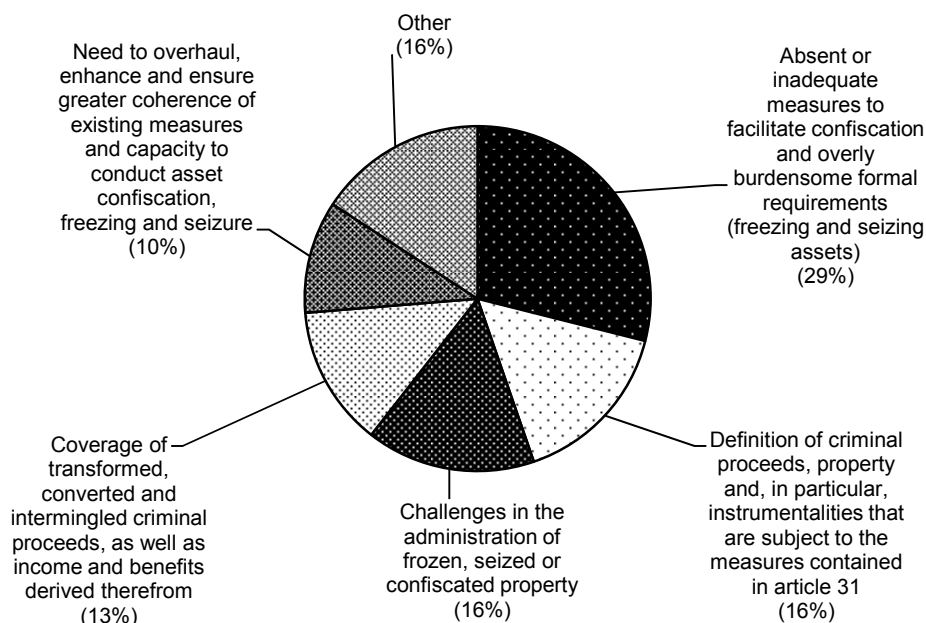
Challenges related to article 31

10. The most common challenges regarding the implementation of article 31 concerned the absence or inadequacy of measures to facilitate confiscation, in particular for identifying, freezing and seizing assets, as well as excessively burdensome formal requirements for freezing financial accounts and challenges in establishing non-mandatory measures to provide that an offender demonstrate the lawful origin of alleged proceeds of crime (29 per cent of cases); the definition of criminal proceeds, property and instrumentalities that were subject to the measures

in article 31 (16 per cent of cases); the administration of frozen, seized or confiscated property (16 per cent of cases); the coverage of transformed, converted and intermingled criminal proceeds, as well as income and benefits derived therefrom (13 per cent of cases); and a considered need to overhaul, enhance and ensure greater coherence of existing measures, frameworks and capacity to conduct asset confiscation, freezing and seizure (10 per cent of cases).

Figure 2

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



3. Protection of witnesses, experts and victims

11. There was wide variation among 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 broad protections were afforded 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 investigations or in court. In several jurisdictions, the protections went further to also include physical protection measures. At the same time, in several jurisdictions no measures had been taken for the effective protection of witnesses and experts. The authorities in several jurisdictions repeatedly noted the absence of witness protection systems as a major weakness in the fight against corruption, noting also as concrete challenges 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. Several recommendations were issued, including to enact comprehensive legislation and systems for the protection of experts, witnesses and victims where those were absent, to give adequate attention to such measures on the ground, for example through sensitizing the police and other 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 parties, no comprehensive witness protection or relocation programmes were in place, but practical measures such as the use of separate courtrooms were taken on a case-by-case basis for special categories of persons. In one jurisdiction, the inclusion of corruption offences in the witness protection system was not automatic; a recommendation was issued to extend such protections in a direct and explicit fashion to witnesses and victims of corruption offences. Similarly, in another jurisdiction, protection measures extended only to the out-of-court protection of witnesses who testified as to specified criminal offences, which excluded most offences under the Convention. Regional agreements on witness protection were in place in some jurisdictions.

12. Regarding the victims of corruption, in five jurisdictions the protection of victims and the provision of funding regarding their protection were not regulated by law, while in others victims of offences fully took part in the proceedings when their identity was known. Specifically, in one of those jurisdictions, the Constitution and criminal procedure code provided for the views of victims to be heard at any stage of the proceedings. In five jurisdictions, the provisions were applicable to victims only insofar as they were witnesses; in two others, recommendations were issued to clarify the role of victims in trials with respect to their position as complainants, victims or witnesses. In one State party, a recent amendment to the criminal procedure code had instituted the designation of a special judge for victims of crime, who could intervene only at the request of victims to ensure consideration of victims' rights in the implementation and enforcement phases of a case. Victim impact statements were admissible as evidence in several States parties to provide details to the court of the harm suffered by victims. In one case, a recommendation was issued to ensure that the status of victims in criminal proceedings was afforded not only to natural persons, but also to legal persons.

Box 3

Examples of the implementation of article 32

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

In another State party, measures to protect witnesses were taken by the prosecutor, judge or court when there were reasons to presume that there was a real danger to the life, health or property of witnesses, relatives or closely related persons. Measures included personal physical guarding by Government bodies and non-disclosure of identity. A programme on the protection of threatened persons was also available. It encompassed personal physical security; the guarding of property; temporary safe 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 put questions to a witness in writing, which would be answered by videoconference, with alteration of the voice and image of the witness and verification by a judge.

In one State party, protections could be extended to family members of victims, witnesses and experts under the witness protection law. Remote hearings were possible to protect witnesses and victims, or anyone under protection who had been declared “anonymous” by the prosecutor. Several agreements with neighbouring countries on the relocation of witnesses were in place.

One State party’s law provided for the establishment of a designated office for the protection of witnesses; the functions, powers and duties of a director for witness protection; the temporary protection of witnesses pending placement under protection; the placement of witnesses and related persons under protection; services related to the protection of witnesses and related persons; and witness services at the courts. The law did not restrict the types of offence that could justify witness protection, and it was reported that 13 witnesses and related persons were under protection in corruption-related cases at the time of the review.

In one State party, police and law enforcement agencies had access to an extensive range of measures to protect witnesses and experts based on the provisions of dedicated legislation, including full witness protection programmes involving permanent relocation, a change of identity, personal and home security measures, the provision of testimony by means of communications technology, and a high degree of confidentiality. Protection arrangements were recorded in writing and taken in full consultation with victims, who were assisted by a specialized witness protection service.

4. Protection of reporting persons

13. As with the protection of witnesses, experts and victims, there was considerable variation among 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 jurisdictions. 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, which were noted as a concern in several cases. In some jurisdictions, related measures were found in the labour or civil service codes. In one jurisdiction, the matter was partly regulated by the anti-corruption law and draft legislation had been introduced; however, there was no comprehensive legislation on whistle-blower protection, and victim and witness protections were not provided to informants, despite an obligation for civil servants to report cases of corruption. Recommendations were issued to enact appropriate legislation in a number of jurisdictions, including to explore the possibility of allowing all citizens to report suspicions of corruption anonymously. In some cases, where no specific whistle-blower protection systems existed, the provisions on witness protection were referred to, although recommendations were issued to explore the possibility of establishing comprehensive protection measures, which were often already under consideration by the national authorities. In one 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 were enacted in labour and administrative laws for the protection of whistle-blowers. A similar confirmation requirement was also observed in another jurisdiction. In one case, in which 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 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 several cases, only public officials, and not private persons, who reported offences were afforded protections; recommendations were issued to consider extending the protections to encourage persons other than public officials to report offences under the Convention. In one jurisdiction where only basic measures protecting the identity of informants and allowing anonymous reporting were in place, the possible consequences of reporting misconduct were noted as a serious concern, and a recommendation to consider instituting appropriate measures was issued. In another jurisdiction, the inclusion of corruption offences in the whistle-blower system was not automatic; a recommendation was issued accordingly.

Box 4**Examples of the implementation of article 33**

Some States parties had enacted measures protecting both public and private sector whistle-blowers and had made details of reports publicly available.

In one case, a draft anti-corruption law, which had then been adopted at the conclusion of the review, provided for a reversal of the burden of proof to protect victims from retaliation measures.

The law of one State party provided protections to both public and private sector whistle-blowers and set out procedures by which employees could report unlawful or irregular conduct. The law prohibited an employer from subjecting an employee to “occupational detriment” on account of having made a protected disclosure, including any disciplinary action, dismissal, suspension, demotion, harassment or intimidation, involuntary transfer or refusal of a transfer or promotion, or the threat of any such action. The extension of the law to cover independent contractors was addressed in proposed amendments. Various companies and Government departments had implemented specific measures to encourage whistle-blowing, including through internal hotlines, many of which were monitored by third parties, and civil society actively promoted whistle-blowing and the establishment of protection mechanisms. A national anti-corruption hotline had been established and statistics relating to reports were centrally collected and published.

In one State party, the law provided special protection against dismissal and other detrimental treatment of workers who made certain disclosures of information in the public interest. According to those provisions, the worker had the right not to be subjected to any detriment by an act or deliberate failure to act by an employer on the ground that the worker had made a protected disclosure. Individuals who believed they had been unfairly treated as a result of whistle-blowing could complain to an employment tribunal, and dismissal for that reason was regarded as automatically unfair. Other forms of detriment were also covered, including a refusal of training or promotion opportunities.

5. Consequences of acts of corruption

14. There was considerable variation among States parties regarding the implementation of article 34. In one jurisdiction, no specific provisions to regulate the matter existed, although general principles of contractual law applied that permitted annulment of a contract on the basis of lack of good faith by at least one of the parties, if the contract was the result of corruption. Similarly, in other jurisdictions general principles of contractual law applied to void contracts that contradicted or circumvented the law, as well as in specific circumstances listed in the legislation. In some States the law stipulated the exclusion from participation in public procurement of individuals who had been convicted of bribery or administratively sanctioned. Conversely, 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. The civil liability of the State and public officials was also provided for in another jurisdiction. In one State, the matter was heard by a court of auditors, which 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 made that investigations and prosecutions should follow such proceedings. In a number of States parties, the matter was regulated by contractual, administrative or public procurement laws, although in one case their application was unclear. While contracts could be rescinded under the procurement law, it was observed that a regulation on concessions was missing. In one jurisdiction, regulatory acts or resolutions issued as a result of corruption offences could be repealed. In another case, the criminal code established various interdictions on the activity of legal persons and the exclusion from public tenders permanently or for a period of up to five years, with related additional penalties for persons convicted of specified corruption offences. The authority to withdraw corporate licences and blacklist companies was not always recognized, but was considered to be a useful measure. One State party had not addressed the matter.

Box 5

Examples of implementation of article 34

In one State party, a forfeiture of the public sector contribution to a convicted official's pension fund was noted as a possible consequence for public officials who engaged in corruption.

In another State party, a public institution affected by a corruption offence was obliged to participate in the penal procedure as a complainant to defend the best interests of the institution.

The greater use of standard terms in procurement contracts designed to allow the Government to rescind contracts, withdraw licences and take other similar remedies where corruption or criminal conduct had occurred was noted as a good practice in one jurisdiction.

In another State party, 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.

6. Compensation for damage

15. All except one of the States had adopted measures to fully or partly implement article 35, although 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 the article. In one case, there appeared to be no specific provisions that guaranteed eligible persons the right to initiate legal proceedings in the absence of a prior criminal case and a recommendation was issued accordingly.

Box 6

Examples of the implementation of article 35

In one State party, a court decision had authorized a non-governmental organization active in the area of corruption prevention to bring a civil action in criminal proceedings relating to corruption offences.

The law in one State party enabled individuals who had suffered financial damage as a result of acts of corruption to pursue compensation from actors involved in such actions when those actors intended or were aware that damage would be inflicted, even if a public authority was complicit in the corrupt process.

II. Implementation of the law enforcement provisions of chapter III

Institutional provisions

1. Specialized authorities

16. While all but one of the States parties had established one or more bodies or specialized departments to combat corruption through law enforcement, often these were newly created and faced common challenges relating to limited capacity and resources for implementation as well as competing priorities. In one State party that had not established a specialized agency, anti-corruption policy was coordinated by the Ministry of Justice and relevant measures were enforced by the Office of the Public Prosecutor. Recommendations were issued in a number of cases to increase manpower and resources for training and capacity-building of the agencies, to strengthen their 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 that field. In one case, a recommendation was issued to consider making the responsibilities, staffing and training of the various law enforcement authorities more focused in order to avoid having overlapping functions. A need for effective inter-agency coordination was also noted in several other jurisdictions. In several cases, observations were made regarding the independence of law enforcement bodies. For example, in two cases corruption investigations or related actions against public officials required the prior authorization of the Government or 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. In the same case,

doubts were raised 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 law on conflict of interest. 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 under the Convention. In one case, concerns were raised as to the selectiveness of the law enforcement body in deciding which cases to pursue, and in another as to the low number of corruption cases instituted relative to the number of allegations. A need to develop statistical indicators so as to be able to establish benchmarks, develop strategies and measure progress of the law enforcement body was also noted. In another case, a recommendation was issued to strengthen the accountability of the judiciary through a 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, with steps under way in one case to secure a constitutional anchor for the agency and in another to create a centralized national crime agency whose mandate would encompass anti-corruption matters.

Box 7

Examples of the implementation of article 36

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

In one case, the establishment and operation of a dedicated agency was specifically noted as the primary reason for success in addressing corruption in the country. The agency had brought cases against former ministers, members of parliament, senior officials, mayors, company directors and one of its own staff. The creation of a separate anti-corruption court, in addition to specialized judges in the Supreme Court, was noted as a positive measure, with plans for additional courts under way.

One State party's anti-corruption body was subject to various oversight mechanisms, including an operations review panel to review delayed cases or cases transferred for prosecution that had not resulted in a charge. The panel could submit recommendations, but had no authoritative powers that could interfere with prosecutorial discretion.

One State party had established 14 specialized anti-corruption courts since 2011. Judges were instructed to hear cases within one year and could be held accountable for non-compliance. Other initiatives that helped to reduce the case backlog were the introduction of pretrial conferences and plea bargaining.

In one State party, the police force had incorporated extensive statistical reporting into their daily operations through a series of key performance indicators, including some related to targeted reductions in the number of disciplinary cases in the police force. The police tracked significant activities in a number of areas on a quarterly and annual basis and reported them to the Ministry of Defence on a quarterly basis, in addition to annual reporting to the public.

The anti-corruption body in one State party had recognized particular problems of corruption in traffic enforcement and upon analysis determined that reducing fines for traffic violations would adequately deter traffic violations while also reducing the incentive and opportunities for corruption. This was found to be the case, notably because members of the public were less inclined to engage in corruption with traffic enforcers when the amounts at risk were minimal.

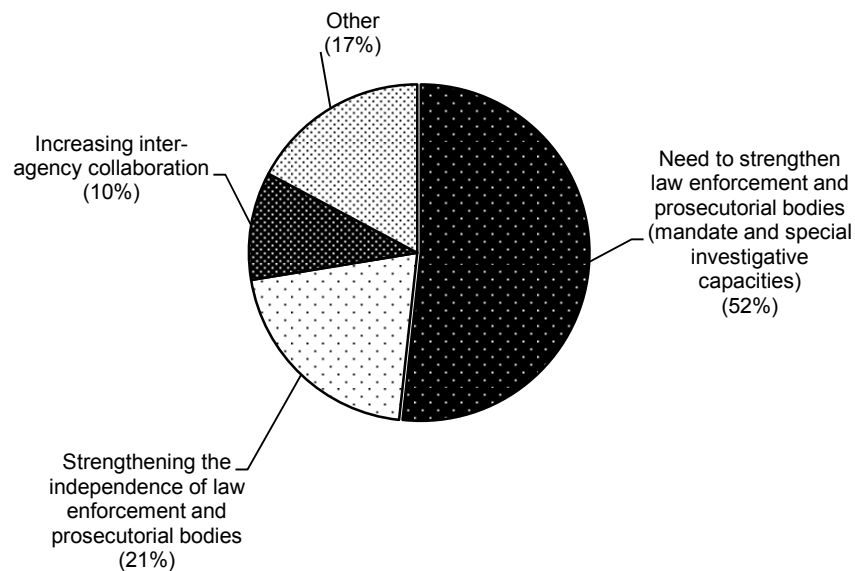
Using funds allocated to foreign development objectives, one State party established specialized agencies and units to pursue cases of overseas corruption, such as illicit flows and bribery, to support developing countries in investigating and prosecuting corruption and to handle particularly complex and serious offences, including offences under the Convention. The dedicated resources and attention to complex crimes and overseas corruption, in particular, were observed as an effective approach to combating corruption through law enforcement.

Challenges related to article 36

17. The most common challenges in the implementation of article 36 related to the strengthening of law enforcement and prosecutorial bodies, in particular their mandate to conduct investigations without prior external approval, enhancing the efficiency, expertise and capabilities of staff and ensuring the existence of specialized law enforcement capacity for offences under the Convention (52 per cent of cases); enhancing the independence of law enforcement and prosecutorial bodies (21 per cent of cases); and increasing inter-agency coordination among relevant institutions, including considering reconstituting their functions and assessing how to make existing systems and operations more effective (10 per cent of cases).

Figure 3

Challenges related to article 36 (Specialized authorities)



2. Cooperation with law enforcement authorities

18. A number of States parties had taken measures to encourage persons who had participated in the commission of corruption offences to cooperate with law enforcement authorities in investigations. Although whistle-blower protections did not always apply to perpetrators who engaged in such cooperation, measures had frequently been implemented to permit collaboration to be considered as a circumstance that would mitigate criminal liability and could be taken into account in sentencing or as grounds for decreasing punishment in situations 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 national legislation on the mitigation of punishment of such perpetrators who assist 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, although in some cases legislation on the mitigation or release from punishment of accused cooperators was pending. Recommendations were issued in several cases to ensure the physical protection of collaborators with the justice system and to provide for the mitigation of punishment or other measures to encourage cooperation with law enforcement authorities. A related issue concerns the concept of “spontaneous confessions”, 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, but were not always considered by the reviewing States parties as fully implementing the requirements of the Convention.

19. With regard to the possibility of granting immunity from prosecution to accused cooperators, a number of States parties had not established the respective measures, although in two cases partial immunity could be granted in bribery cases and in some cases immunity could be granted on a discretionary basis by prosecutors or courts. In one State party where immunity from prosecution was not established, cooperating offenders fell under the definition of witnesses and could be subject to the witness protection measures guaranteeing immunity from prosecution to informants. In another case, the law allowed for immunity to be granted to attempted perpetrators who cooperated effectively with the competent authorities, while cooperating offenders who completed the crime were only entitled to a reduction of their custodial sentence and not an exemption from prosecution. There was an exception to the possibility of granting immunity in one State’s law where the maximum penalty exceeded two years of imprisonment or the offence was committed by a public official. Laws on plea bargaining were in place or being developed in several States.

Box 8

Examples of the implementation of article 37

In one case, the procedure permitting the discharge of a defendant from liability or punishment and the review of punishment of an imprisoned convict as a result of

cooperation with investigative agencies provided that the offender could not be released from liability simply for reporting. The allegations had to be investigated and corroborated and the person had to testify in court before being released from liability. A discharge from liability or punishment and a review of punishment was possible upon issuance of a court order.

In one jurisdiction, the criminal procedure law provided for the conclusion of pre-judicial cooperation agreements with suspects or accused persons, which set out the conditions of their responsibility depending on their actions after the initiation of a criminal case or indictment. An agreement with another State had further been concluded on matters pertaining to the collaboration with law enforcement authorities of persons who had participated in criminal offences.

3. Cooperation between national authorities and between national authorities and the private sector

20. Several States parties had established obligations to report corruption incidents on the part of public officials and, in some cases, by citizens or specific categories of legal persons in the private sector, although anonymous reporting was not always possible. In one case, non-disclosure of suspicions of crimes of the first degree was punishable by up to five years of imprisonment. There were exceptions where no such duty existed for either 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 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 several 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. In two cases, an obligation by the financial intelligence or audit units to report suspicious transactions involving corruption to the anti-corruption authority was absent, and in one of those cases a duty by banks and tax authorities to spontaneously transmit information on suspected corruption was also absent, although prosecutors were entitled to request assistance from banks and financial institutions. Similarly, in another jurisdiction the limited powers of the financial intelligence unit to obtain information and records from public and private sector institutions because of bank secrecy and confidentiality restrictions absent a court authorization in relevant cases were noted as a concern. 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 parties. The most common challenges in that area related to inter-agency coordination and limited capacity for implementation. A reluctance to report on the part of public officials, especially where anonymous reporting was not provided for, and fear of retaliation were observed in some cases.

Box 9

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 those agencies in several jurisdictions.

In one jurisdiction, the reviewing States parties acknowledged the outreach conducted by the anti-corruption commission to civil servants and the private sector and oversight of the legal profession. Lectures to the private sector comprised nearly half of the total workshops held and were also conducted together with civil society. Officials reported that the workshops served as an important safeguard and fostered corruption reporting.

In one State party, a constitutional provision required all spheres of Government to cooperate with each other in good faith by fostering cooperative relations, assisting and supporting one another, consulting on matters of mutual interest and adhering to agreed procedures. Efforts were in an advanced stage to develop a digital system to track cases from an initial complaint through to final disposition.

One State party had established a national coordinating committee against money-laundering, which coordinated the development of anti-money-laundering policy and action. Designated focal points in 16 institutions met quarterly in that context to keep themselves apprised of anti-money-laundering developments.

One State party had appointed an “international anti-corruption champion” to coordinate activities across Government, law enforcement, prosecution authorities and regulatory agencies to ensure a coherent and connected approach to combat national and international corruption. Moreover, specialized agencies and units funded from the foreign development budget of the Government worked closely with regulators, private sector stakeholders and practitioners at various levels in order to frustrate criminal activities at home and abroad in cooperation with foreign law enforcement partners and an overseas law enforcement liaison network.

Various initiatives on corruption prevention were carried out with the private sector in one country, such as integrity pacts, monitoring committees for large projects and integrity pledges. Large national corporations regularly employed integrity officers and had no-gifts policies in place. The anti-corruption commission provided training to the private sector and had seconded officers to large companies.