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II. Executive summary

United States of America

1. Introduction: overview of the legal and institutional framework of the United States of America at the federal level in the context of implementation of the United Nations Convention against Corruption

The United States of America ratified the United Nations Convention against Corruption on 30 October 2006 and the Convention entered into force for the United States on 29 November 2006.

The United States is a federal republic and its legal system is based on the common law tradition of England. Under article VI of the United States Constitution, ratified treaties in force, along with federal law, are considered the "supreme Law of the Land".

The implementation by the United States of chapters III and IV of the Convention was reviewed in the first year of the first cycle, and the executive summary of that review was published on 23 March 2012 (CAC/COSP/IRG/I/1/1/Add.6). In addition, the United States anti-corruption framework has been reviewed in multiple rounds of evaluations as part of the Council of Europe Group of States against Corruption (GRECO) and the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption of the Organization of American States. Similarly, the anti-money-laundering and counter-terrorist financing framework of the United States has been assessed by the Financial Action Task Force (FATF) and the Asia/Pacific Group on Money Laundering (APG).

The legislative framework for preventing corruption and recovering assets includes, notably, the Ethics in Government Act, the Civil Service Reform Act, the Inspectors General Act, the Freedom of Information Act, the Federal Acquisitions Regulations, criminal laws against money-laundering and related criminal and civil forfeiture laws, the Foreign Corrupt Practices Act, titles 18 and 31 of the United States Code (USC) and the Bank Secrecy Act (as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act).

The key institutions involved in corruption prevention and asset recovery include the Department of Justice, the Office of Government Ethics (OGE), the Council of the Inspectors General on Integrity and Efficiency (CIGIE), the Offices of Inspectors General (OIGs), the Office of Special Counsel (OSC), the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), the Securities and Exchange Commission (SEC), the Department of the Treasury and that Department's Financial Crimes Enforcement Network (FinCEN).

The present review focuses on measures taken by the United States at the federal level only.

2. Chapter II: preventive measures

2.1. Observations on the implementation of the articles under review

Preventive anti-corruption policies and practices; preventive anti-corruption body or bodies (arts. 5 and 6)

The United States has a comprehensive set of laws, policies and regulations for preventing and combating corruption. Those instruments establish ethics frameworks for preventing conflicts of interest in the public and private sectors, promoting transparency in government operations and protecting the integrity of public procurements and public finances.

The Ethics in Government Act and other relevant rules and policies set out a comprehensive, decentralized ethics programme for the prevention of financial

conflicts of interest in the public sector consisting of enforceable standards of ethical conduct, financial disclosure programmes, training and education and restrictions on gifts, lobbying and other outside activities for public officials who are entering service, holding office or separating from service.

OGE provides overall oversight and leadership of the ethics programme in the executive branch while the heads of agencies and entities lead the implementation of the programme in their respective agency or entity. Ethics committees in each chamber of Congress set ethical rules and standards for Members and staff of Congress.

OGE develops rules and regulations on conflicts of interest and ethics and provides technical assistance in relation to proposed legislation. OGE informs the public and other key stakeholders about its work and the ethics programme through its website and social media tools.

OGE provides expert advice and training to more than 5,000 ethics officials in over 130 executive branch agencies through, inter alia, ethics training, advice and counselling for executive branch employees. OGE evaluates agencies' performance in implementing the ethics programme through the OGE annual questionnaire and programme reviews.

Additionally, OIGs in key agencies, as well as the Government Accountability Office (GAO), conduct audits, evaluations and investigations to prevent and combat waste, fraud and abuse, including corruption. GAO is a member of the International Organization of Supreme Audit Institutions (INTOSAI) and its Governing Board.

CIGIE is an independent entity established within the executive branch to address integrity, economy and effectiveness issues that transcend individual government agencies and to aid in the establishment of a professional, well-trained and highly skilled workforce in OIGs. The above-mentioned prevention bodies are established by statutes and have sufficient budgetary and human resources. However, the Director of OGE serves "at the pleasure of the President" and may be removed from office at any time. Similarly, Inspectors General serve at the pleasure of the President or, where applicable, the head of a designated federal entity. Of the two types of Inspectors General, "establishment Inspector Generals" are appointed by the President subject to Senate confirmation and may be removed or transferred by the President subject to prior written communication to Congress of the reasons for any such removal or transfer. GAO is an independent agency under the United States Congress and is headed by the Comptroller General of the United States, who is subject to removal only for cause. Inspectors General in designated federal entities are appointed by the agency head and may be removed or transferred by the agency head subject to prior written communication to Congress; however, for designated federal entities with a board or commission, the removal or transfer of an Inspector General from a designated federal entity requires the written agreement of two-thirds of the board or commission members.

The United States participates in several international instruments and initiatives related to corruption, such as the Inter-American Convention Against Corruption, the Organisation for Economic Co-operation and Development Anti-Bribery Convention, GRECO, FATF and several of the FATF-style regional bodies, the Open Government Partnership and the anti-corruption working groups of the Group of 20 and the Asia-Pacific Economic Cooperation. The United States also assists other States and civil society in developing and implementing specific corruption prevention measures through the Bureau of International Narcotics and Law Enforcement Affairs of the Department of State and the Governance and Rule of Law Division of the United States Agency for International Development.

Public sector; codes of conduct for public officials; measures relating to the judiciary and prosecution services (arts. 7, 8 and 11)

The recruitment, retention, promotion and retirement of federal civil servants, including Senior Executive Service members, are governed by title 5 of USC, relevant presidential executive orders and other laws and regulations. OPM was created by the Civil Service Reform Act to lead as the primary independent human resources and personnel policy management agency for the federal Government. OPM is responsible for issuing most of the title 5 implementing regulations governing the civil service, including the Hatch Act, and oversees a merit-based hiring process. OPM provides, inter alia, guidance and services to agencies (vetting, personnel background investigations, leadership development and training, etc.) and directly to civil servants.

Federal government vacancies are posted on a central online portal (www.usajobs.gov). Recruitment to civil service is competitive and merit-based, and all applicants or employees are investigated for their suitability for federal employment on the basis of their character or conduct that may have an impact on the integrity or efficiency of the service (Executive Order 10577). Pursuant to Executive Order 13488, individuals in positions of public trust are reinvestigated periodically (e.g. positions with responsibilities involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain (5 Code of Federal Regulations (CFR) § 731.106 (b)). Appeals against employment decisions may be lodged with the Merit Systems Protection Board (MSPB).

There is currently no requirement for civil servants to periodically rotate to different positions, but civil servants may be assigned different responsibilities to prevent conflicts of interest. Pursuant to 18 USC § 208, executive branch employees are prohibited from participating in certain Government matters affecting their own financial interests or the interests of certain persons with whom they have ties outside the Government.

Pursuant to 5 C.F.R §§ 2638.301 and 2638.304, each executive branch agency must carry out a government ethics education programme and each new employee must complete an initial ethics training course.

Article II, section 1, clause 5, and article I, section 2, clauses 2 and 3, of the Constitution outline criteria concerning candidature for and election as President, Representative in the House of Representatives, and Senator in the Senate, respectively. The Federal Election Campaign Act, administered and enforced by the Federal Election Commission, governs public and private financing of candidates, political parties and others in federal elections by, inter alia, setting limits and prohibitions on contributions and their sources and specifying reporting requirements. Detailed campaign finance data are published on the Commission’s Disclosure Portal.

The key ethics rules and laws consist of criminal conflict of interest statutes, civil statutes, and administrative regulations known as the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). Members, officers and employees of Congress are bound by the Code of Official Conduct and the Code of Ethics for Government Service.

Generally, public officials are prohibited from participating personally and substantially in any matter where their financial interests or those of their family members or of other specified persons may directly and predictably be affected (18 USC § 208 (a).

The financial disclosure programme established by the Ethics in Government Act is designed to identify and prevent conflicts of interest. Disclosures may be public (for elected, presidentially appointed Senate-confirmed (PAS) and other senior officials) or confidential (for individuals in risk-sensitive positions as determined pursuant to 5 CFR § 2634.904(a)(1)). Financial interests that must be disclosed include a wide range of interests such as outside positions, assets, income, transactions and liabilities of public officials and their spouses and children. However, if they own a trade or

business, loans given to such trade or business are not required to be reported if the public official and the official's spouse and children are not personally liable for such loans.

If a potential conflict of interest is identified, 5 CFR § 2640 outlines possible remedies, including divestiture of assets, resignation from outside positions, recusal, waiver and blind trusts. Certificates of divestiture and blind trusts must be approved by OGE. Nominees to PAS positions set forth in ethics agreements the steps they will take to alleviate actual or apparent conflicts of interest. Likewise, Members of Congress and candidates, officers and certain employees of Congress must file financial disclosure and periodic transaction reports (5 USC § 101 et seq.), which are published online (sect. 8, Stop Trading on Congressional Knowledge Act of 2012 (STOCK Act)). Failure to file or the filing of a false financial disclosure report is subject to sanctions.

Violations of the Standards of Conduct may be investigated by OIGs and may lead to corrective or disciplinary action. During investigations, OIGs may seek technical support from OGE, including its expertise on ethics laws. Violations of the bribery and conflict of interest statutes are referred to the Department of Justice and may lead to criminal prosecution and/or civil enforcement.

Pursuant to the principles of ethical conduct issued in Executive Order 12674, as modified by Executive Order 12731, and subsequently issued in the Standards of Conduct, executive branch employees "shall disclose waste, fraud, abuse, and corruption to appropriate authorities". The Whistleblower Protection Act of 1989, as amended, provides for protection against retaliation and procedures for redress. OSC receives disclosures of wrongdoing and complaints of retaliation. If, after an investigation, retaliation is established, and if the employing agency does not agree to correct its decision, OSC may pursue corrective action through MSPB. Similarly, any decision of OSC not to investigate a complaint may be appealed to MSPB. However, this Act does not cover non-employees (contractors, special government employees, etc.) or congressional staff. In addition, at the time of the country visit, MSPB had no Board members, a situation that affected its adjudicatory functions.

Appointments to and removals from federal judicial positions are regulated by section 2 of article II of the Constitution. The Judicial Conference of the United States is the main policymaking body of the federal judiciary and operates through a network of committees that advise the Conference on issues including integrity, conflicts of interest and discipline. The Ethics in Government Act applies to members of the federal judiciary and requires the filing of financial disclosure reports. The recusal framework is formally governed by 28 USC §§ 144, 455(a). The Code of Conduct for United States Judges applies to all members of the federal judiciary except members of the Supreme Court.

All federal prosecutors are employees of the executive branch and are subject, with additional appropriate restrictions, to the executive branch ethics programme described above.

Public procurement and management of public finances (art. 9)

Public procurement in the United States is decentralized. Title 41 of USC, the Federal Acquisitions Regulations and other laws and regulations establish detailed procurement rules and procedures. The Office of Federal Procurement Policy in OMB provides overall direction for government-wide procurement policies, regulations and procedures.

Part 6 of the Federal Acquisitions Regulations requires, with certain limited exceptions, the use of competitive procedures and sets thresholds and conditions for the use of micro-purchases and simplified acquisitions (part 13), sealed bidding (part 14), contracting by negotiation (part 15) and other procurement methods. Public advertisement of procurement notices and selection criteria are mandatory in most

cases (41 USC § 1708). An online portal (https://sam.gov/) contains all federal procurement opportunities and awards valued at more than $25,000.

Interested parties, such as actual and prospective bidders, may challenge procurement processes informally with the agency concerned, in a protest to GAO and/or by way of judicial process (Federal Acquisitions Regulations, part 33). Part 9 of the Federal Acquisitions Regulations specify qualifications as well as requirements and procedures for debarment, suspension (e.g. on the grounds of commission of fraud, bribery or other offences in connection with public procurement) and ineligibility of contractors. Suspensions and debarment of contractors are also regulated under the Procurement Integrity Act.

Procurement officials are subject to the ethics programme for the executive branch, as well as additional requirements of the Procurement Integrity Act, such as the prohibition on discussing possible employment with bidders during the conduct of procurement (see generally 41 USC § 423).

Pre- and post-award audits of federal contracts may be conducted by OIGs, internal audit offices, the Defense Contract Audit Agency or non-federal government/private auditors in certain cases. Contract audits may include examinations of internal controls and accounting and financial management systems of the contractor.

The framework of the federal budget process is provided principally by the Constitution and the Budget and Accounting Act of 1921. This Act and the relevant rules of each chamber of Congress ensure transparency at every stage of the budget process.

The Chief Financial Officers Act of 1990, as amended by the Government Management Reform Act of 1994, and the Accountability of Tax Dollars Act of 2002 require executive branch agencies to submit audited financial reports to OMB for consolidation and for preparation of the Financial Report of the United States Government. Under the Government Management Reform Act, GAO is responsible for the audit of the Financial Report using the generally accepted government auditing standards, performing that audit in cooperation and coordination with OIGs and independent public accountants. The Financial Report of the United States Government and the GAO auditor's report are then submitted to Congress and the President as public documents.

The Department of the Treasury also publishes daily, monthly and annual Treasury statements which summarize the revenues and expenditure of the federal Government for a given period. Additionally, the Federal Funding Accountability and Transparency Act of 2006 and the Digital Accountability and Transparency Act of 2014 outline specific financial data that must be published through the www.usaspending.gov website.

The Chief Financial Officers Act, as amended, mandates relevant government agencies to have financial management systems that comply with, inter alia, appropriate accounting principles and standards and internal control standards. Furthermore, OIGs in key agencies conduct audits, programme inspections and evaluations and recommend changes to strengthen control and mitigate risks through semi-annual reports to Congress.

The Federal Records Act, as amended, relevant parts of the Code of Federal Regulations and other guidelines issued by the National Archives and Records Administration (NARA) establish the framework for retention, disposal and transfer of public records, including records related to public procurement and finances. Destruction, concealment and falsification of such records are criminal offences (18 USC §§ 2071, 2073).

Public reporting; participation of society (arts. 10 and 13)

The primary mechanism for accessing documentary administrative information is the Freedom of Information Act (5 USC § 552), under which every person has the right,

enforceable in court, to obtain federal agency records. Congress and legislative branch agencies are exempt from the Freedom of Information Act. The Office of Information Policy of the Department of Justice issues guidance on the Freedom of Information Act to encourage compliance.

Requests under the Freedom of Information Act may be submitted by post or email to the relevant agency, or by using online portals, such as www.foia.gov. Agencies may withhold information if there is a foreseeable harm to an interest protected by the nine exemptions from disclosure (5 USC § 552(b)). However, the Freedom of Information Act requires that agencies segregate such information and release any non-exempt portions of requested records.

A requester may seek court review of the propriety of agency withholdings, and the agency bears the burden of proof to show that its action was justified. As an alternative to litigation, the Office of Government Information Services (OGIS) within NARA may be requested to mediate disputes between requesters under the Freedom of Information Act and requested agencies. The Office of Government Information Services also reviews the compliance of agencies and their related policies and procedures with the Act.

Comprehensive information on the Government of the United States and its services is systematically and proactively posted on a single online portal (www.usa.gov). As part of the Open Government Partnership, the United States is committed to improving in areas such as e-government, open data, public participation and civic space.

The Administrative Procedure Act (5 USC §§ 551 et seq.) requires the publishing of proposed rules and regulations in the Federal Register, and opportunities for the public to comment. Other legislation, such as the Government in the Sunshine Act and Federal Advisory Committee Act, provides mechanisms for public participation in the work of agencies headed by a collegial body (commissions and boards) and of advisory bodies.

OGE publishes reports and data on agency ethics programme compliance, financial disclosures and ethics agreements of presidentially appointed officials, and policy guidance. Similarly, CIGIE publicizes its work and reports of audits, inspections and investigations.

Members of the public can report acts of corruption to local, state and federal law enforcement agencies and OIGs through those bodies' respective websites or hotlines, including anonymously.

Private sector (art. 12)

The United States has taken a number of legislative and policy measures to prevent corruption and conflicts of interest involving the private sector at the federal level.

The formation of companies, transparency of company ownership and management, internal control and risk management measures and other corporate governance issues are regulated by state legislation. At the federal level, corporate governance is primarily regulated by disclosure requirements of the Securities Act, as amended, the Securities Exchange Act, as amended (the Securities Exchange Act, including provisions on prohibited foreign trade practices introduced through the Foreign Corrupt Practices Act), the Sarbanes-Oxley Act and relevant rules promulgated by SEC.

18 USC § 207 provides for either an absolute ban or specified "cooling off" periods for former public officials, depending on the type of activities concerned. Public officials shall disclose entering into any negotiations or arrangements for outside employment. Agency-specific post-employment laws also exist, supplementing the above-mentioned Government-wide post-employment laws.

The Foreign Corrupt Practices Act and relevant SEC rules require all public companies to, inter alia, maintain books and records that, in reasonable detail,

accurately and fairly reflect the companies' transactions and dispositions of company assets and maintain a system of appropriate internal accounting controls.

It is prohibited for a person to knowingly circumvent a system of internal accounting controls, knowingly falsify any book, record or account, or make or cause to be made materially false or misleading statements or omissions to an accountant in connection with an audit or materially false and misleading statements in annual or quarterly reports (sect. 13(a)(b)(5) of the Securities Exchange Act and rules 12b-20, 13a-1 and 13a-13, 13b2-1, 13b2-2 thereunder).

The Department of Justice and SEC regularly raise awareness among private sector representatives about the anti-bribery and accounting provisions of the Foreign Corrupt Practices Act by publishing guidance and organizing conferences and other public events. The Foreign Corrupt Practices Act Corporate Enforcement Policy of the Department of Justice incentivizes corporations to self-report wrongdoing and cooperate with the Department.

The Internal Revenue Code (26 USC § 162(c)(1) and (2)) disallows the tax deductibility of illegal bribes or kickbacks or other illegal payments. "Facilitating payments" to foreign public officials that are lawful under the Foreign Corrupt Practices Act are tax deductible.

Measures to prevent money-laundering (art. 14)

The United States has a comprehensive system designed to prevent and detect money-laundering, although some gaps remain, especially with regard to beneficial ownership transparency and coverage of certain designated non-financial businesses and professions. The 2018 National Money Laundering Risk Assessment shows a strong awareness of existing significant vulnerabilities, including with regard to beneficial ownership transparency, but as the scope of the present review extended to the federal level only, the review did not cover gaps specific to the state or territorial level.[1]

The Bank Secrecy Act is a central legislative instrument for combating money-laundering and contains reporting, risk assessment and record-keeping requirements for financial institutions as defined in 31 USC § 5312(a)(2). Covered financial institutions are required to report suspicious transactions related to a potential violation of a law or regulation (31 USC § 5318(g)). Suspicious activity report filings are available electronically and in real time to law enforcement and supervisory agencies through a nationwide database.

Regulations implementing the Bank Secrecy Act also establish enhanced disclosure requirements in relation to the information that must be submitted to FinCEN by various private businesses, including title insurance companies of beneficial owners involved in major real estate purchases in certain markets, because of the potential risk for corruption-related and other money-laundering. Since May 2018, financial institutions have also been required to collect beneficial ownership information pertaining to certain account holders upon the opening of an account.

The anti-money-laundering requirements of the Bank Secrecy Act can generally be enforced through civil and criminal penalties, injunctions, examinations, and summons authority (31 USC §§ 5321, 5322). The United States employs a risk-based

[1] After the country visit, the United States enacted legislation addressing the lack of disclosure obligations at the time of company formation. Enacted in January 2021 as part of the National Defense Authorization Act, the Corporate Transparency Act requires reporting companies to disclose their beneficial owners when they are formed (or, in the case of non-United States companies, when they register with a state to do business in the United States) and when they change beneficial owners. On 29 September 2022, FinCEN issued a final rule establishing a beneficial ownership information reporting requirement pursuant to the Corporate Transparency Act. The rule requires specified corporations, limited liability companies and other entities created in or registered to do business in the United States to report information about their beneficial owners to FinCEN.

approach; the latest National Money Laundering Risk Assessment was conducted and published in 2018.

Separate anti-money-laundering laws establishing criminal penalties for the carrying out of financial transactions aimed at concealing or promoting criminal activity in certain circumstances also provide specifically for the prosecution of laundering activity in the United States linked to foreign corruption offences and domestic corruption offences (for example, 18 USC, §§ 1956 and 1957). Enforcement can include various civil and criminal penalties and civil and criminal forfeiture (see, for instance, 18 USC §§ 981 and 982). Exposure to certain criminal and civil penalties is believed to have a preventive role, in addition to certain punitive sanctions.

Cooperation and exchange of information take place at the policy, supervisory and law enforcement levels and involve relevant authorities, including at the state and local levels. Under the leadership of the Treasury, the inter-agency Anti-Money-Laundering Task Force, established in 2012, is in charge of assessing the anti-money-laundering framework and implementing necessary legal and operational changes. A law enforcement subgroup advises on money-laundering and terrorist financing risks identified in the course of investigations.

Internationally, FinCEN (as the financial intelligence unit), law enforcement agencies and supervisory authorities can cooperate with foreign counterparts and share, spontaneously or upon request, information regarding money-laundering and terrorist financing. FinCEN exchanges financial information with an average of 100 financial intelligence units annually, on the basis of treaties or through the Egmont Group of Financial Intelligence Units. Federal law enforcement agencies, through international offices, can coordinate and engage directly with foreign counterparts in investigations into money-laundering or predicate offences.

All cross-border transportation of currency and other monetary instruments valued at more than $10,000 is subject to declaration (31 CFR § 1010.340) and civil or criminal sanctions in cases of non-compliance (see, for example, 31 CFR § 1010.840).

Ordering and intermediary financial institutions located within the United States are required to include, for all wire transfers, the originator’s name, account number and address in any transmittal order above $3,000 (31 CFR § 1010.410(f)). Ordering financial institutions are required to verify the identity of the originator and include the beneficiary information with the transmission order.

The United States is a member of FATF and an observer in six FATF-style regional bodies, a member of APG and a cooperating and supporting nation of the Caribbean Financial Action Task Force.

The United States provides technical assistance, training and capacity-building in relation to anti-money-laundering and anti-corruption activities and maintains multi-agency strategic dialogues on illicit finance with partner countries as well as public/private banking-related working groups with countries whose financial systems are particularly entwined with that of the United States.

2.2. Successes and good practices

- Extensive and innovative use of online platforms to increase transparency and improve the efficiency of various corruption prevention measures (arts. 7, 8, 9 and 10)
- The United States actively participates in relevant international instruments and initiatives and assists other States and civil society in developing preventive measures (art. 5, para. 4)
- The regular awareness-raising activities conducted by the Department of Justice and SEC for private sector representatives in relation to the anti-bribery and accounting provisions of the Foreign Corrupt Practices Act and policy measures to incentivize corporations to self-report wrongdoing and cooperate with the Department of Justice and SEC (art. 12, para. 2)

2.3. Challenges in implementation

It is recommended that the United States:

- Provide greater independence to the Director of OGE and Inspectors General by ensuring that they can be removed from their positions only for cause (art. 6, para. 2)
- Consider taking appropriate measures to limit any adverse effect of vacancies in the Merit Systems Protection Board on whistle-blowers and persons seeking the review of an employment decision (art. 7, para. 1, and art. 8, para. 4)
- Consider extending the protections of the Whistleblower Protection Act of 1989 or adopting equivalent measures in relation to non-employees in the executive branch and congressional staff (art. 8, para. 4)
- Strengthen efforts to require appropriate public officials to disclose all liabilities of a non-public trade or business in which they or their spouses or children have an interest (art. 8, para. 5)
- Consider enhancing the effectiveness of OGE, for example, by requiring oversight bodies and officials such as Inspectors General to seek appropriate assistance of OGE in their investigations of ethics violations and in formulating recommendations for corrective action, or by vesting OGE with similar investigative powers (art. 8, para. 6)
- Consider establishing a new agency or entrusting an existing agency with a mandate to perform all federal contract audits (art. 9, para. 1)
- Ensure that Congress and legislative branch agencies are subject to similar freedom of information requirements as provided for executive branch agencies under the Freedom of Information Act (art. 10 (a))
- Continue efforts to adopt a code of conduct for members of the United States Supreme Court (art. 11, para. 1)
- Prohibit the tax deductibility of "facilitating payments" (art. 12, para. 4)
- Consider taking measures to require financial institutions to verify identifying information for occasional customers conducting funds transfers below $3,000 when there is a suspicion of money-laundering or terrorist financing (art. 14, para. 1)
- Create and effectively implement a comprehensive anti-money-laundering/counter-terrorist financing supervision mechanism for relevant non-financial businesses and professions (art. 14, para. 1)

3. Chapter V: asset recovery

3.1. Observations on the implementation of the articles under review

General provision; special cooperation; bilateral and multilateral agreements and arrangements (arts. 51, 56 and 59)

The United States is committed to the recovery and subsequent return of proceeds of corruption offences to countries harmed by corruption, and employs a "whole-of-government" approach to asset return. In particular, the United States regularly applies laws allowing non-conviction-based forfeiture, in addition to criminal forfeiture, in order to enable the United States to recover assets, often in cooperation with foreign jurisdictions. While forfeiture involving foreign corruption can be sought by any federal prosecutor subject to appropriate evidence and venue, the Department of Justice formally established its Kleptocracy Asset Recovery Initiative in 2010 to provide dedicated resources making it possible to litigate more cases, including in rem proceedings in respect of property located in and outside the United States if the property is traceable to criminal acts involving foreign or domestic corruption in, or partly in, the United States. The Initiative also brings criminal forfeiture cases where

appropriate. According to “U.S. Asset Recovery Tools and Procedures: A Practical Guide for International Cooperation”, a key objective of the Initiative is “to recover assets for the benefit of the people of the country harmed by the abuse of public office through transparent and accountable means”.

Through its Kleptocracy Initiative and the Initiative’s predecessor team in the Department of Justice, the United States had, as at July 2019, restrained by United States court order more than $2.6 billion in assets linked to foreign corruption. Also as at July 2019, the United States had successfully obtained by forfeiture and settlement approximately $1 billion and returned or assisted in returning approximately $300 million in assets. A significant proportion of the recovered funds is in the process of repatriation, including over $300 million to Nigeria, approximately $35 million to Equatorial Guinea and several hundred million dollars to Malaysia.[2] Since 2015, the Initiative has brought criminal charges with a view to seeking the forfeiture of assets. Charges are pending against 13 individuals and one legal entity. Nine persons have been convicted and ordered to forfeit assets through money judgments.

In addition, the corruption related-returns secured by the Department of Justice are not limited to cash. In 2015, the United States restrained, ordered the forfeiture of and returned to Brazil the offspring of rare snakes that had been illegally sold to a United States breeder by a government official overseeing a zoo in Brazil with custody over the snakes.

The international sharing of proceeds forfeited through foreign law enforcement cooperation and assistance is also practised by United States authorities and is often based on bilateral asset sharing agreements or asset sharing provisions forming part of mutual legal assistance treaties governing forfeiture, which may cover corruption as well as other crimes. The United States may share such proceeds even when a country does not directly request a portion of assets that have been forfeited in connection with assistance provided to the United States by that country.

The United States has two main asset forfeiture funds into which forfeited proceeds of any crime are deposited pending further disposition. As at 31 December 2018, more than $283 million in forfeited assets had been transferred to 55 countries since 1989 from the fund administered by the Department of Justice, mostly in recognition of forfeiture assistance. In recent years (fiscal years 2013–2015), the Department of Justice has shared $19,714,313 with 18 countries. Since 1994, the Treasury has transferred from its Assets Forfeiture Fund more than $37 million to 29 countries, mostly in recognition of forfeiture assistance. The United States can also accept assets from other countries when it has provided law enforcement or judicial assistance leading to the forfeiture of assets under foreign law. The aforementioned statistics relate to forfeitures involving all types of crimes.

The United States has published multilingual guidance materials on international cooperation in asset recovery cases and has hosted, co-hosted or participated in various forums for asset recovery specialists from around the world, including multiple Arab forums on asset recovery involving the Arab Spring countries, the Ukraine Forum on Asset Recovery following the Dignity Revolution in 2014, and the Global Forum on Asset Recovery in 2017, which focused on the recovery of assets linked to corruption in Ukraine, Nigeria, Tunisia and Sri Lanka.

[2] As at January 2022, the Kleptocracy Initiative and its predecessor team in the Department of Justice had recovered or assisted in recovering more than $1.8 billion in assets and returned or assisted in returning more than $1.6 billion, including $1.2 billion to Malaysia, $311 million to Nigeria in February 2020, $115 million for Kazakhstan, $100 million to Italy, over $26 million to Equatorial Guinea and smaller sums to a number of other countries. Approximately $2 billion in additional assets are currently restrained pending forfeiture litigation in civil and criminal cases. Since 2022, the Kleptocracy Initiative has brought criminal charges against 35 individuals and two legal entities, seeking forfeiture in all but one case, in which the corporation concerned was ordered to pay significant fines.

Disclosure of information to foreign authorities is possible on the basis of judicial orders (Federal Rules of Criminal Procedure 6(e)(3)(E)(iii) and (iv)), through Egmont Group channels, bilaterally through agreements providing for mutual legal assistance or through informal channels, such as direct police-to-police communication or networks such as the Camden Asset Recovery Inter-Agency Network and several other regional asset recovery inter-agency networks in which the United States participates or provides a supporting role.

While United States legislation allows for the provision of mutual legal assistance in the absence of a treaty, the United States has concluded mutual legal assistance treaties with over 80 countries and is an active party to several multilateral treaties.

Prevention and detection of transfers of proceeds and crime; financial intelligence unit (arts. 52 and 58)

The Treasury's Customer Due Diligence Rule, published in 2016 and in full effect as of 2018, enhanced requirements for certain financial institutions covered by the Bank Secrecy Act by obliging them to establish and maintain policies and procedures to identify and verify the identity of customers that are legal entities and of any individual who owns 25 per cent or more of a legal entity opening a new account. Financial institutions subject to the Rule must also put in place policies and procedures for developing customer risk profiles and conducting ongoing monitoring in order to maintain and update customer information on a risk basis. As a general matter, the definition of financial institutions as set out in the Bank Secrecy Act covers certain non-financial businesses and professions such as casinos and dealers in vehicles or precious metals and stones. However, other at-risk non-financial businesses and professions are not subject to anti-money-laundering policy or supervisory measures, most notably real estate agents and intermediaries such as lawyers. A general obligation exists for all trades and businesses to report cash transactions that exceed a value of $10,000.

At the discretion of the Treasury, cash transactions in the real estate sector can be partially addressed – since 2016 – through the issuance of Geographic Targeting Orders (31 USC § 5326), which require financial institutions to identify the beneficial owner of legal persons involved in cash acquisitions of luxury real estate objects in designated United States real estate markets.

All records must be kept for a minimum period of five years (12 USC § 1829b, 31 USC §§ 5311, 5318(l), 5325 and 5326).

Private banking accounts of senior foreign political figures, their immediate family members and close associates, with a value of at least $1,000,000, are subject to enhanced due diligence (sect. 31 USC § 5318 (i)(3)(B)). For politically exposed persons not subject to enhanced due diligence, banks should obtain risk-based due diligence information and provide for appropriate scrutiny and monitoring, in line with the Federal Financial Institutions Examination Council (FFIEC) *Bank Secrecy Act/Anti-Money Laundering (BSA/AML) Examination Manual*. Some financial institutions voluntarily subject domestic politically exposed persons to enhanced due diligence.

FinCEN also provides, on its website, a wealth of information related to compliance with laws and regulations on combating money-laundering and the financing of terrorism. FinCEN can locate accounts and transactions of persons potentially involved in significant money-laundering, and may relay subject and business names, addresses and as much identifying data as possible to a wide range of financial institutions and require those financial institutions to provide real-time responses (sect. 314(a) of the USA PATRIOT Act).

Section 313 of the USA PATRIOT Act prohibits covered financial institutions from establishing, maintaining, administering or managing correspondent accounts in the United States for, or on behalf of, shell banks. Covered financial institutions shall further ensure that any correspondent account for a foreign bank is not being used by

that foreign bank to indirectly provide banking services to a foreign shell bank (31 CFR 1010.6 30 (a)(ii)).

Under the Bank Secrecy Act, United States citizens, residents and legal entities as defined in the Act are required to annually disclose to the federal Government their interests in foreign financial accounts if the aggregate value of the amount in the accounts is $10,000 or more in a year. Failure to do so can result in civil or criminal penalties (31 USC §§ 5321(a), 5322(a) and 31 CFR §103.59(b).

Measures for direct recovery of property; mechanisms for recovery of property through international cooperation in confiscation; international cooperation for purposes of confiscation (arts. 53, 54 and 55)

Foreign States can initiate civil action in United States courts, with the same rights and obligations as other private litigants. United States law does not preclude or prohibit its courts from ordering persons convicted of offences established under the Convention from paying restitution as part of a criminal sentence, including to another State party. Numerous case examples of foreign States litigating in United States courts were presented during the country visit.

A criminal forfeiture order remains preliminary if a third party – which may be a State – files a petition asserting an interest in the property to be forfeited. The court must then conduct an ancillary proceeding in which all potential third-party claimants may challenge the forfeiture by asserting a superior interest in the property and may seek return or compensation (rule 32.2 of the Federal Rules of Criminal Procedure). Notice and claim procedures exist in both civil and criminal forfeiture proceedings and all notices to prospective legitimate owners of property are published on a government website, as well as in any foreign State that may bring a claim of legitimate ownership.

Federal courts can enforce final judgments of forfeiture, including those not based on a criminal conviction, issued in foreign States as if the judgment had been handed down by a court in the United States (28 USC § 2467). A prerequisite for enforcement is certification by the Attorney General that enforcement of the foreign judgment is in the interest of justice. Other considerations when deciding on enforceability relate to finality, non-appealability and whether or not due process was afforded to property holders and third parties in obtaining the foreign judgment.

Property originating from predicate offences to money-laundering committed abroad may be subject to forfeiture (18 USC §§ 982, 1956).

United States courts can order non-conviction-based forfeiture, including in relation to bribery or money-laundering proceedings in which the offender who committed the predicate offence cannot be prosecuted (18 USC § 981).

To preserve the availability of property subject to civil or criminal forfeiture under foreign law, 28 USC § 2467 (d)(3) allows the registration and enforcement of restraining orders issued by a foreign court, or the application for a domestic restraining order on the basis of an affidavit setting forth a reasonable basis to believe that the property to be restrained will eventually be subject to forfeiture proceedings by a foreign nation. 18 USC § 981(b)(4) provides for the temporary restraint of assets on the basis of a foreign arrest or charge of a suspect or defendant for an offence that would give rise to forfeiture had the same offence been committed in the United States. Restraint may be ordered ex parte for up to 30 days with the possibility of extension. At the time of the country visit, the United States had restrained approximately $125 million in assets by enforcing foreign restraining orders.

Assistance in identifying and tracing assets can be provided to other States on the basis of informal channels, such as police-to-police communication and information-sharing networks, in connection with non-compulsory measures. The United States can also obtain evidence on behalf of a foreign State through the application of compulsory measures under 18 USC § 3512.

Mutual legal assistance can be provided pursuant to a bilateral mutual legal assistance treaty or, in the absence of such a treaty, pursuant to the Convention or any other multilateral treaty, or on the basis of comity and reciprocity. Requirements for mutual legal assistance requests are laid out in multilingual guidance material. The United States retains the ability to decline assistance where the matter involved is of a proportionally de minimis nature, for example, where a request for assistance would require the commitment of resources substantially greater than the amount sought. Before declining assistance in such instances, the United States takes into account all aspects of the case in order to determine whether, for example, the case might be part of a larger scheme involving a greater aggregate loss amount or more serious harm. Other grounds for refusal to execute a request are set forth in mutual legal assistance treaties, the Convention and other multilateral treaties.

Consultations with requesting States before and after formal requests are submitted, including with a view to supplementing incomplete mutual legal assistance requests with additional evidence or explanations, are standard procedure and open communication channels are maintained between the Department of Justice and its foreign counterparts. The Office of International Affairs, as the designated central authority for the United States in criminal matters, seeks annual consultations with its largest mutual legal assistance treaty and extradition treaty partners.

Return and disposal of assets (art. 57)

The domestic asset recovery regime permits the transfer of confiscated assets as remission or restoration to a victim that has suffered a financial loss, including a requesting State (18 USC §§ 981(e)(6), 982(b)(1), 21 USC § 853(i)). Confiscated assets may further be returned to a foreign Government which has directly or indirectly participated or assisted in the seizure of criminal proceeds and/or their related forfeiture (18 USC §§ 981(i), 982(b)(1), 21 USC §§ 853(i)(4), 881(e)). In sum, even where there is no victim having suffered a pecuniary loss, United States authorities encourage asset-sharing, which is possible on the basis of bilateral or multilateral asset-sharing agreements or treaties (18 USC § 981(i), 21 USC § 881(e)(1)(E), 31 USC § 9703(h)(2)). The United States may initiate processes to transfer forfeited assets, for the benefit of those harmed by corruption, even in the absence of a request from another State or the assistance of that State in the forfeiture proceedings. All means of asset return are at the discretion of and must be approved by the Attorney General or the Secretary of the Treasury. At the same time, the United States considers itself bound by the provisions of the Convention regarding asset recovery, including the mandatory return provisions of article 57 and the mutual legal assistance provisions of articles 46 and 55.

The United States generally deducts reasonable expenses incurred in seizure or forfeiture proceedings (18 USC § 981(i)).

The United States has concluded numerous agreements and other mutually acceptable arrangements regarding the disposal of forfeited property.

3.2. Successes and good practices

- As demonstrated by the amounts of forfeited assets returned to other States, the United States is strongly committed to asset recovery and return and pursues recovery proceedings in cooperation with foreign competent authorities. Much of this work may be attributed to the Department of Justice Kleptocracy Asset Recovery Initiative, which is augmented by the work of other prosecutors and law enforcement authorities at all levels of government. The United States makes active use of the instrument of civil forfeiture, and criminal forfeiture where possible, and subsequently transfers successfully forfeited assets (art. 51).
- A whole-of-government approach is employed in asset recovery cases, and forensic investigators and accountants, as well as business professionals, support investigations and legal proceedings, often using intelligence information provided by FinCEN (art. 51).

- United States law allows for the ex parte order of the temporary restraint of assets on the basis of a foreign arrest or charge of a suspect or defendant for an offence that would give rise to forfeiture if the same conduct constituted an offence giving rise to forfeiture under United States law (art. 52, para. 2 (c)).

3.3. Challenges in implementation

It is recommended that the United States:

- Extend beneficial ownership transparency requirements to relevant non-financial businesses and professions and apply the Customer Due Diligence Rule to existing accounts (art. 52, para. 1, and art. 14, para. 1).
- Continue the practice whereby the Attorney General and the Secretary of the Treasury exercise discretion in a way that respects the binding obligations established under the Convention, in particular with regard to requests for asset return in cases of embezzlement or laundering of public funds (articles 54, 55 and 57).
- Continue to take measures to strengthen the fight against money-laundering and corruption and take measures pursuant to its legal system to uniformly enforce and implement the provisions of the Convention throughout its jurisdiction.