United Nations CAC/COSP/IRG/2020/6

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

Distr.: General
7 October 2020

Original: English

Second resumed eleventh session
Vienna, 16–18 November 2020
Agenda item 4
State of implementation of the United Nations Convention against Corruption

Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption

Thematic report prepared by the Secretariat

Summary

The present report contains a compilation of the information on successes, good practices, challenges and observations identified during the second cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption, focusing on the implementation of chapter V (Asset recovery) of the Convention.

V.20-05695 (E) 281020 291020

I. Scope and structure

1. The present thematic report contains a compilation of the most relevant information on successes, good practices, and challenges identified, as well as observations made, in the executive summaries and country review reports, in accordance with paragraphs 35 and 44 of the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption.

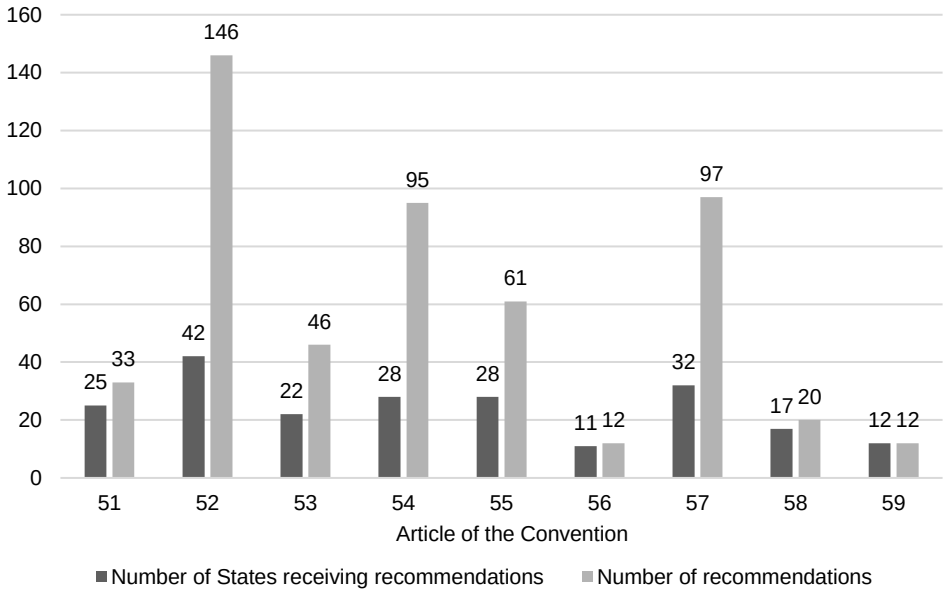
2. The report contains information on the implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption by States parties under review in the second cycle of the Implementation Review Mechanism. It is based on information included in the 44 executive summaries and country review reports that had been completed as at 9 September 2020. The report focuses on current trends in and examples of implementation, and includes tables and figures showing the most commonly encountered challenges and good practices. Regional differences have been reflected as appropriate.[1]

3. The structure of the present report follows the structure of the executive summaries and thus groups certain articles and topics that are closely related in clusters. Further related information, such as on financial disclosure obligations and on anti-money-laundering, can be found in the thematic report on the implementation of chapter II, on preventive measures (CAC/COSP/IRG/2020/3/Rev.1).

II. General observations on challenges and good practices in the implementation of chapter V of the United Nations Convention against Corruption

4. The following figures and tables provide an overview of the most prevalent challenges and good practices in the implementation of chapter V.

Figure I
Challenges identified in the implementation of chapter V of the United Nations Convention against Corruption



[1] The present report builds on 18 completed reviews for the Group of African States, 11 for the Group of Asia-Pacific States, 8 for the Group of Western European and other States, 4 for the Group of Latin American and Caribbean States and 3 for the Group of Eastern European States. Thus, the number of recommendations and good practices identified may not be as representative for some regional groups as it is for others.

Table 1
Most prevalent challenges in the implementation of chapter V of the United Nations Convention against Corruption

Article of the Convention	*Number of States receiving recommendations*	*Number of recommendations issued*	*Most prevalent challenges in implementation (in order of article of the Convention)*
Article 51	25	33	Complicated asset recovery procedures; inadequate legislation and/or procedures for mutual legal assistance; insufficient inter-agency coordination; lack of capacity of competent authorities
Article 52	42	146	Identification of foreign and domestic politically exposed persons and beneficial owners; reporting of foreign interests; inadequate issuance of advisories; effectiveness of the financial disclosure system; prohibition of shell banks; lack of resources of competent authorities
Article 53	22	46	Lack of mechanisms or legal basis for foreign States to establish title or ownership of property, be awarded compensation or damages or be recognized as legitimate owners of property in foreign confiscation proceedings
Article 54	28	95	No or limited non-conviction-based confiscation; no or insufficient mechanisms for preservation of property for confiscation; no measures to freeze or seize in response to an order or request by a foreign State; no direct enforcement of foreign confiscation orders or exclusion of certain Convention offences
Article 55	28	61	Lack of mechanisms to give effect to a foreign order or to obtain a domestic order for search, seizure or confiscation; no obligation to give, before lifting any provisional measure, the requesting State party an opportunity to present its reasons in favour of continuing the measure; Convention could not be used as treaty basis
Article 56	11	12	Insufficient measures and lack of authority for the spontaneous transmission of information; transmission of information only regarding proceeds of certain categories of offences and only to a limited number of countries
Article 57	32	97	Insufficient legislative or other measures for the return of proceeds to requesting States; no regulation of costs or means of deducting expenses in the course of mutual legal assistance proceedings; no protection of the rights of bona fide third parties in return proceedings
Article 58	17	20	Lack of emergency freezing powers for financial intelligence units; inadequate allocation of resources and insufficient capacity of financial intelligence units, including in the area of inter-agency and international cooperation
Article 59	12	12	Insufficient ability to use the Convention as a treaty basis; lack or shortage of bilateral or multilateral agreements or arrangements

Figure II
Good practices identified in the implementation of chapter V of the United Nations Convention against Corruption

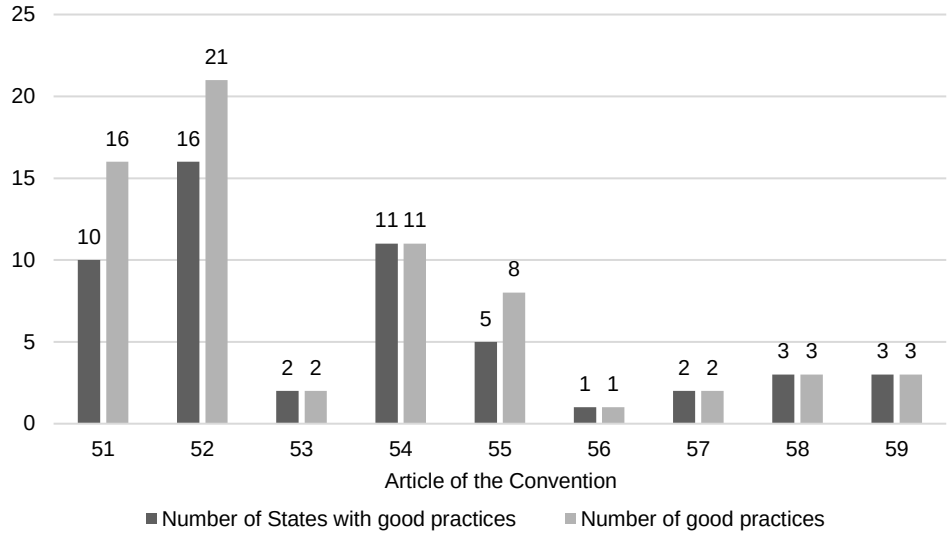


Table 2
Most prevalent good practices in the implementation of chapter V of the United Nations Convention against Corruption

Article of the Convention	*Number of States with good practices*	*Number of good practices*	*Most prevalent good practices (in order of article of the Convention)*
Article 51	10	16	Active engagement in the development and promotion of international cooperation; robust institutional arrangements for and issuance of guidance on asset recovery
Article 52	16	21	Definition of politically exposed persons includes domestic politically exposed persons; establishment of registry of bank accounts or of beneficial owners; sharing of financial intelligence with other States; effective asset declaration system
Article 53	2	2	Foreign States treated like any other legal person when initiating civil action in the courts of another jurisdiction to establish title to or ownership of property acquired through a corruption offence, or to claim compensation or damages for harms caused by such an offence
Article 54	11	11	Capacity to provide international cooperation in asset recovery measures in both conviction-based and non-conviction-based proceedings; low evidentiary and formal requirements for the enforcement of a foreign or issuance of a domestic freezing, seizure or confiscation order; establishment of specialized asset recovery units
Article 55	5	8	Close cooperation and consultations between requesting and requested State; use of the Convention as a legal basis for mutual legal assistance; placement of specialist advisers in priority countries to assist with mutual legal assistance

Article of the Convention	*Number of States with good practices*	*Number of good practices*	*Most prevalent good practices (in order of article of the Convention)*
Article 56	1	1	Spontaneous sharing of information with a wide range of counterparts
Article 57	2	2	Return of property to bona fide third parties; establishment of confiscated assets fund for victim compensation
Article 58	3	3	Close cooperation with foreign financial intelligence units; a report issued by the financial intelligence unit can be incorporated into a judicial proceeding as evidence
Article 59	3	3	Use of various networks and agreements to facilitate international cooperation; use of the Convention as a legal basis or direct application of the self-executing provisions of the Convention

III. Implementation of chapter V of the United Nations Convention against Corruption

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

5. With regard to the framework or arrangements for asset recovery (art. 51), States tended to use two divergent approaches in establishing their legislative framework for the recovery of assets. Several States had enacted a single or dedicated legislative instrument. Others could apply various procedures prescribed in different domestic laws, such as laws governing criminal procedure, mutual legal assistance, anti-money-laundering or anti-corruption, for the recovery and return of assets. In the latter case, where the procedures were governed by different laws, some States could only provide mutual legal assistance in relation to asset recovery to designated foreign States or in relation to limited underlying offences, or subject to the strict application of dual criminality requirements, which were identified as challenges. In a number of States, the asset recovery regime was found to be in the early stages of development.

6. Most States did not make cooperation for the purposes of confiscation conditional on the existence of a bilateral or multilateral treaty, but could provide mutual legal assistance on the basis of reciprocity, domestic legislation or both. In many States, the Convention against Corruption or regional treaties were applicable directly, which often enabled the direct application of self-executing provisions. Some States had experience with successful cases involving the direct application of the Convention, including in relation to asset return. In several States, while the Convention could be used as a legal basis for cooperation, the States had to additionally designate under their domestic legislation the States with which cooperation could be undertaken, which in some cases did not include all States parties to the Convention. Two States that could directly apply the Convention referred to the difficulties encountered in such application owing to the absence of clear domestic policy and procedures. Five States received recommendations regarding the direct application of the Convention or the inclusion of all States parties under their domestic mutual legal assistance regimes.

7. In addition to legislation, States relied on guidance provided by requested States when seeking assistance. Five States had already formulated or were about to develop an asset recovery guide, while another five had issued or were in the process of finalizing guidelines for the provision of mutual legal assistance. Some States had also developed model forms for mutual legal assistance requests. The issuance of these guidance documents was identified as a good practice to facilitate the asset

recovery process. With a view to building internal capacity, one State was in the process of developing an internal procedures manual laying out the steps and procedures to follow in the execution of international cooperation requests. One State placed specialists in other countries to advise on criminal justice and asset recovery and deployed liaison prosecutors to priority countries to assist with, inter alia, mutual legal assistance.

8. At the institutional level, States parties differed by using either a centralized approach or a decentralized approach. A small number of States had designated or were in the process of establishing a separate entity for the recovery of assets, while others engaged multiple agencies as the institutional arrangement for asset recovery. In the latter arrangement, overlapping of asset recovery mandates of different agencies and inter-agency coordination posed practical challenges in many States. One country had created a specialized asset recovery task force to provide a coordinated and integrated approach, and that was identified as a good practice.

9. At the operational level, States varied in their experiences of dealing with mutual legal assistance in relation to asset recovery. While a number of States had reported a considerable number of successful cases, some States indicated that they had never received a request in relation to asset recovery, although possible legal avenues were available in their jurisdictions (see sect. D below for more information). Eight States indicated that they had never formally refused a request related to asset recovery.

10. In terms of regional trends, about half of the States of the Group of African States, the Group of Asia-Pacific States and the Group of Western European and other States, as well as all States of the Group of Eastern European States, received recommendations, including on, inter alia, enhancing measures in relation to international cooperation and asset recovery and strengthening institutional arrangements and the capacities of practitioners in this area.

11. Almost all of the States reviewed allowed for the spontaneous transmission of information that might lead to a request made in accordance with chapter V of the Convention (art. 56). A number of States stipulated the respective legal basis in their legislation relating to anti-money-laundering, mutual legal assistance or anti-corruption, while several others provided for such transmission pursuant to bilateral or multilateral mutual legal assistance treaties or on the basis of the Convention. Several States also referred to memorandums of understanding concluded between their financial intelligence units and foreign counterparts for the proactive transmission of information. On many occasions, such transmission was subject to confidentiality requirements. In one State, guidance for proactive information-sharing was provided in its mutual legal assistance guidelines. States without specific legislation on the spontaneous transmission of information nonetheless had an existing practice of providing assistance without prior request.

12. In addition to having specific legislation or practices, the spontaneous transmission of information through practitioners' networks or platforms was another trend identified. Most States empowered their financial intelligence units to exchange information without prior request by virtue of their membership in the Egmont Group of Financial Intelligence Units, as a platform for the secure exchange of financial intelligence. Furthermore, almost half of the States reviewed could use law enforcement channels or asset recovery networks to proactively share information. Channels provided by the International Criminal Police Organization (INTERPOL), the Camden Asset Recovery Inter-Agency Network and regional asset recovery inter-agency networks had played a significant role in facilitating such transmission, and were relied on for asset recovery in general. Nevertheless, in one State, spontaneous information-sharing was not possible owing to the lack of a legal basis.

13. One quarter of the States under review received recommendations on the spontaneous sharing of information, in particular in relation to strengthening measures for the proactive disclosure of information on proceeds of offences

established under the Convention or to sharing such information with a wider range of foreign States.

14. All States had ratified multilateral or bilateral agreements or had made relevant arrangements to enhance international cooperation undertaken pursuant to chapter V (art. 59). While one State had concluded 160 bilateral treaties on criminal matters, another State had not yet concluded any such bilateral treaties or agreements, which was identified as a challenge. One State highlighted data-sharing agreements and memorandums of understanding used by its law enforcement agencies in international cooperation, while a number of others cited memorandums of understanding concluded between specialized agencies, such as financial intelligence units or anti-corruption agencies, and their foreign counterparts.

15. Over a third of States of the Group of Asia-Pacific States, as well as roughly a quarter of States of the Group of Western European and other States, the Group of African States and the Group of Latin American and Caribbean States received recommendations in relation to concluding bilateral or multilateral agreements or arrangements.

B. Prevention and detection of transfers of proceeds of crime; financial intelligence unit (articles 52 and 58)[2]

16. All States parties had taken a variety of measures for the prevention and detection of transfers of proceeds of crime (art. 52). Risk-based approaches were widely used by States in their anti-money-laundering regimes. Almost all States had, to varying degrees, requirements in their anti-money-laundering laws or other financial legislation to conduct customer due diligence in line with article 52, paragraph 1. A small number of States also applied administrative sanctions, or criminal sanctions under certain circumstances, for violations of customer due diligence requirements. Furthermore, all but two States had measures in place for the determination of the identity of beneficial owners, including in relation to funds deposited into high-value accounts, to which enhanced due diligence was always applied. However, some States had encountered challenges in the identification of beneficial owners in practice, in particular in relation to complex legal structures. Some States that had not defined what constituted a “high-value account” could also apply enhanced customer due diligence when a higher risk of money-laundering was identified on the basis of the type of client, commercial relationship, product or operation.

17. Almost all States had measures in place for conducting enhanced scrutiny of accounts sought or maintained by or on behalf of politically exposed persons and their family members and close associates. Some States also provided screening tools for reporting entities to identify politically exposed persons. However, States differed in defining the scope of what constituted politically exposed persons: some applied the same standards for both domestic and foreign politically exposed persons, while others distinguished between foreign and domestic politically exposed persons by excluding domestic politically exposed persons from the definition of politically exposed persons or by providing a definition or a list of domestic politically exposed persons. The latter approach, in turn, led to challenges in the determination of foreign politically exposed persons. The different approaches may be attributed to the different opinions of States on the risks posed by domestic versus foreign politically exposed persons. In addition, the scope of what constituted family members and close associates was not clear in several States, and some States could not even include family members or close associates within the ambit of enhanced scrutiny on politically exposed persons.

[2] Readers may also wish to refer to the relevant information regarding the implementation of articles 8 and 14 contained in the thematic report on the implementation of chapter II (Preventive measures) of the Convention (CAC/COSP/IRG/2020/3/Rev.1).

18. The majority of States parties had issued advisories or guidelines for reporting entities, including financial institutions, to apply enhanced scrutiny (art. 52, para. 2). Those guidelines were generally issued by the financial supervisory authorities, financial intelligence units or law enforcement bodies. In addition, one State mentioned that its financial intelligence unit could issue a warrant to reporting entities for the monitoring of clients, while a number of others obliged their financial institutions to exercise enhanced due diligence with regard to business relations and transactions with persons from high-risk jurisdictions. However, more than one third of States parties, mostly of the Group of African States and the Group of Asia-Pacific States, received recommendations regarding the notification to financial institutions of the identity of particular natural or legal persons to whose accounts such institutions would be expected to apply enhanced scrutiny.

19. All States parties had legislation that provided for the maintenance of adequate records of accounts and transactions by financial institutions (art. 52, para. 3). The maintenance period varied among States, ranging from 5 to 15 years, or even up to 25 years, depending on the sensitivity of the information. Only a limited number of States of the Group of African States and the Group of Asia-Pacific States received recommendations in relation to the implementation of this provision.

20. Most States parties had measures in place intended to prevent the establishment of banks that had no physical presence and that were not affiliated with a regulated financial group (art. 52, para. 4). In many States, financial institutions were obliged to refuse entering into relationships with such shell banks. More than two thirds of States parties also reported their measures on prohibiting the continuation of correspondent banking relationships with such institutions, or with other foreign financial institutions that permitted their accounts to be used by banks that had no physical presence and that were not affiliated with a regulated financial group. A higher number of recommendations were issued for States of the Group of Asia-Pacific States and of the Group of Latin American and Caribbean States.

21. The majority of States had in place financial disclosure systems for certain levels of public officials (art. 52, para. 5). However, the categories of officials subject to disclosure obligations and the scope of assets subject to declaration varied. For example, some States extended the disclosure obligation to all public officials, while several others confined it to leaders, ministers or other senior officials. In addition, some States required personnel holding public positions considered especially vulnerable to corruption, in particular those handling procurement, public contracting or finance, to declare assets. A number of States also included close family members, such as spouses and children, of selected public officials in the list of those subject to disclosure requirements. Several States required a wide range of assets to be declared, including financial interests, directorships, shareholdings, investment property, public appointments, income and liabilities. Asset disclosure requirements in some States applied equally to foreign properties and interests, whereas in other States, foreign assets were excluded. In addition, some States opted for a system focusing on the disclosure of interests rather than merely on assets.

22. Some variation could be observed regarding the effectiveness of the financial disclosure systems, in particular in relation to the frequency of submission and verification of asset declarations. Some States obliged their public officials to submit financial disclosure statements every few years and upon leaving office, while a number of other States additionally required such submissions to be made immediately after a public official assumed office or whenever a substantial change occurred. Challenges were identified concerning the verification of the information submitted, including the absence of a comprehensive verification regime, a lack of electronic filing systems, inadequate resources and capacity constraints. In practice, only a limited number of States could use electronic tools for submission and verification. In addition, less than half of the States provided sanctions for non-compliant financial declarations, including false declarations, such as fines, the deduction of salaries, the imposition of taxes on the undeclared portions of the assets or imprisonment. Moreover, the enforcement of such sanctions was found to be a

challenge in practice, in particular where there was no effective verification or reporting system in place.

23. Another variation in States' implementation of this provision relates to the public accessibility of asset declarations. For instance, some States required declarations to be submitted in paper form and to remain sealed unless a criminal investigation was opened. One State reported that the previous disclosure was not retained once a new one was submitted. A small number of States provided asset declarations to the public in part, in summary form or through a public register, while other States granted access to the declarations only to law enforcement authorities, or made them accessible only upon request or subject to approval. For instance, in two States, declarations were not available online but could be consulted in the constitutional court or upon request. Another State provided for members of the public to inspect the information upon lodging a good-faith complaint with the ethics commissioner and paying a fee. Two States made publicly available only declarations made by senior officials, such as the President and Vice-President.

24. Only a few States could share such information with the competent authorities in other States parties when necessary to investigate, claim and recover proceeds of corruption offences. In that connection, in one State, the public official involved had to be informed of the person with whom the information would be shared and had to be given an opportunity to object within 14 days, while two other States indicated that information contained in the declarations could be shared with foreign authorities only when a domestic investigation was opened or in criminal proceedings.

25. With respect to regional differences, challenges were identified in all States of the Group of Eastern European States and roughly half of the States of the other regional groups. There were only two good practices identified, one in a State of the Group of African States and one in a State of the Group of Asia-Pacific States.

26. A limited number of States had measures in place to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts (art. 52, para. 6). Although some States had legislation requiring such reporting, implementation was found to be rather difficult. As an alternative to fulfilling this provision, two States required their public officials to declare their worldwide income, assets and accounts in their tax declarations, while another State prohibited public officials from opening, operating or controlling a foreign bank account without the approval of the anti-corruption commission. Most States received recommendations in relation to their implementation of this provision.

27. Regarding regional trends, all States parties of the Group of Latin American and Caribbean States, and half of the States parties of the other regional groups were identified as having faced challenges in implementing this provision.

Box

Largest number of good practices identified were in relation to article 52

The establishment of a beneficial ownership register in a number of States, in particular European Union member States, was identified as a good practice, while the inclusion of both domestic and foreign politically exposed persons in the definition of politically exposed persons in some States of the Group of African States and the Group of Eastern European States were also commended. In addition, a good practice was identified in one country whose anti-corruption law required financial declarations of public officials to be submitted to the anti-corruption agency along with supporting evidence that could prove the actual existence of assets and liabilities, including evidence of the income tax of a natural person in the previous tax year.

28. All States had financial intelligence units responsible for receiving, analysing and disseminating to competent authorities reports of suspicious financial transactions (art. 58). Those financial intelligence units were generally autonomous or independent, and in over three quarters of the States, the financial intelligence units were members of the Egmont Group. Seven out of the ten States that did not acquire Egmont Group membership for their financial intelligence units were members of the Group of African States. There was also a range of challenges reported, in particular by States of the Group of African States and the Group of Asia-Pacific States, including the inadequate allocation of resources to and limited capacity of the financial intelligence units, and a lack of internal coordination and international cooperation.

29. Some variation existed regarding the functions of the financial intelligence units. Some units had both administrative and investigative mandates, while others mainly performed administrative functions. In that regard, one State indicated that its financial intelligence unit was housed within the national crime-control agency and accredited staff within law enforcement agencies had direct access to the database maintaining suspicious transaction reports. Moreover, the financial intelligence units in some States parties had the power to take interim measures in emergency cases, such as freezing assets or suspending transactions for up to 48 or 72 hours, or even 7 or 14 days in urgent situations. In one State, the financial intelligence unit was obliged to inform a judge of such interim measures within 24 hours. Recommendations were issued in a number of cases in which financial intelligence units did not have such powers.

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

30. Foreign States could initiate civil action to establish title to or ownership of property in almost all States under review (art. 53, para. (a)). Compensation or damages for harm caused by a Convention offence (art. 53, para. (b)) could in most States be obtained through civil litigation, whereas in some States, prior legitimate ownership could also be determined and/or compensation could be ordered in criminal proceedings. Several States allowed for the filing of civil claims in criminal court or for the joining of civil suits with pending criminal proceedings. One sixth of States of the Group of African States and two thirds of States of the Group of Western European and other States reported that foreign States had initiated civil action in their courts, and two States of the Group of African States had established explicit jurisdiction over civil actions brought by States parties to the Convention regarding compensation for or the recognition of property rights over property acquired through acts of corruption.

31. In many States, legislation granted locus standi to legal persons, the definition of which included States. One State limited locus standi to foreign individuals, organizations or entities, but excluded States from filing a civil suit. In turn, foreign States could be considered victims and granted corresponding rights in criminal proceedings. In States where no such regulation existed, primarily in common law countries in all regions, foreign States were usually entitled to pursue contract or tort claims under the general principles of civil litigation. Several States referred to the need for domestic civil procedure to be observed, including the hiring of local counsel, the demonstration of a legitimate interest or the payment of a deposit prior to a lawsuit being heard. In only two States did foreign States have no possibility to sue for compensation or damages; in one of those two, there was also no way to recognize another State's claim of legitimate ownership.

32. Consistent with the trend of no differentiation between States and other legal persons, many States referred to the general rights of victims or bona fide third parties

in criminal proceedings as sufficient measures to permit courts or competent authorities to recognize another State party's claim as a legitimate owner of property when having to decide on confiscation (art. 53, para. (c)). In one State, article 53 (c) had not been implemented, while in another State, domestic legislation existed but did not extend to foreign States. Owing to the absence of cases and practical experience, it usually remained unclear what was required domestically to establish a State's good faith and/or prior legitimate ownership in criminal or restitution proceedings. Of the States that described specific mechanisms for the recognition of foreign States' claims, one State, when no doubt about the ownership existed, allowed for restitution to victims at any stage of the recovery proceedings, even when no claim of ownership had been made, during the investigation phase or when confiscation was non-conviction-based. In another State, pending or intended civil litigation could be taken into account when deciding on a confiscation order, and a foreign State, upon showing that the property was not proceeds of crime, could apply for the transfer of their property. In one State, not only victims but also their representatives and heirs could initiate criminal proceedings with the aim of having their legitimate ownership recognized. In a number of States, there was no domestic means for foreign States to have their legitimate ownership recognized in confiscation proceedings, with one State stating that a legislative reform in this regard was under way.

33. Only a few States described specific ways of giving notice to prospective victims or legitimate owners of property to allow them to demonstrate their ownership during asset recovery proceedings. In one State, when the owner of property was unknown or could not be found, a notice needed to be published in two daily newspapers of wide circulation in an effort to locate possible bona fide third parties. Four States required publication in the gazette of notices of confiscation or restraint orders to notify any party with a prospective interest in the property involved.

34. While only two States of the Group of Western European and other States and about one third of the States of the Group of Asia-Pacific States received recommendations on article 53, two thirds each of States of the Group of Eastern European States and of the Group of African States and three quarters of States of the Group of Latin American and Caribbean States were recommended to specify in the law, or ensure in practice, recovery mechanisms for injured parties to establish title or ownership of property, and to be awarded compensation or damages for injuries through domestic proceedings, or to adopt measures to allow for another State's claim of legitimate ownership to be recognized during confiscation proceedings.

35. The majority of States had taken measures to allow for confiscation without a criminal conviction (art. 54, para. 1 (c)), either through confiscation in rem as part of the criminal proceedings, or through civil forfeiture proceedings, with civil forfeiture having the advantage of a lower burden of proof. Several States had the options of non-conviction-based confiscation in cases where a person absconds or dies, or of civil forfeiture in cases involving serious crime or property considered as being tainted.

36. The scenarios allowing for non-conviction-based confiscation ranged from the death or flight of the defendant, and sometimes the mere absence or unknown identity of the offender, to the very broad description of "other appropriate cases", "any other reason whatsoever" or "adequate grounds" for confiscation or forfeiture. One State had established mandatory confiscation for persons considered "generally dangerous", including persons suspected of defrauding public funds, persons considered to be "habitual bribers" or persons "used to living with the proceeds of illegal activities". Confiscation proceedings could be initiated in that State even after the death of a suspect, with the heirs to the property not being awarded third-party protection rights. Similarly, in addition to allowing the confiscation in cases where conviction was barred by a statute of limitations, in one State, assets could be confiscated if seized on the basis of the suspicion of serious crimes, such as money-laundering, in cases where there was no proof of a specific offence but the court was satisfied that the proceeds were of a criminal origin. If the court established that there was a major disparity between the value of the assets and the legal income of the accused, the

burden of proof was shifted to the accused regarding the legitimate origin of the assets. Likewise, another State allowed for the forfeiture of unexplained assets determined by a court to have been acquired through acts of corruption or economic crime, and one State allowed its independent anti-corruption commission to initiate non-conviction-based forfeiture proceedings regarding assets illicitly acquired by public officials and anchored that competence in its constitution.

37. Almost a quarter of States parties had not established non-conviction-based confiscation or forfeiture, while four States limited such confiscation or forfeiture to proceeds or instrumentalities of a "serious crime-related activity" or to cases of money-laundering or illicit enrichment. Half of the States of the Group of African States and the Group of Asia-Pacific States, three quarters of States of the Group of Latin American and Caribbean States and one State each of the Group of Eastern European States and the Group of Western European and other States received recommendations to consider the introduction or expansion of a non-conviction-based confiscation regime.

38. While beyond the scope of the second cycle reviews, in relation to article 54, paragraph 2 (c), several States reported on measures in place for the management of seized assets. Approaches varied. In some cases, law enforcement, tax or finance authorities handled the management, preservation and sale or usage of seized and confiscated assets; in other cases, there were dedicated asset management agencies or units.[3] One State explicitly included property seized or confiscated in the course of international cooperation under the authority of its agency, and another State had centralized the provision of mutual legal assistance in asset recovery cases and the management of seized assets in one institution. Moreover, asset management in one State explicitly included an assessment of the quality of the assets and a determination of steps needed for their preservation, such as making sales and investments and paying the proceeds into a trust fund. While two States highlighted practical and budgetary challenges, the specialized asset management department of the prosecutor's office in another State faced challenges due to the limited scope of its jurisdiction, which covered only money-laundering and financing of terrorism cases. Three States of the Group of African States had the option of appointing a trustee, asset manager or *curator bonis* in charge of preserving or protecting the property and its value, including by becoming a party to any civil proceedings affecting the property, providing for proper insurance or taking care of a seized or confiscated trade or business, including its employees. Some States had regulations in place for the sale or disposal of perishable property, and one State also allowed for the sale of the assets if maintenance costs exceeded the assets' value.

39. Roughly half of the States of the Group of African States, the Group of Asia-Pacific States, the Group of Eastern European States and the Group of Latin American and Caribbean States were recommended to introduce or strengthen existing mechanisms for the preservation of property pending confiscation. At the time of the review, consideration was being given to the establishment of a central asset management office by one State of the Group of African States and two States of the Group of Asia-Pacific States.

40. While several States indicated that no requests for execution of a foreign confiscation order had been received yet, confiscation orders issued by a court of another State party could be given effect in most States (art. 54, para. 1 (a)). The vast majority of States across all regions required exequatur proceedings in the form of registration, review and validation of enforceability by domestic authorities, usually the court, or sometimes the central authority or attorney general. Within the European Union, member States were obliged to mutually recognize and execute, without further formality, both freezing and confiscation orders. Three States of the Group of African States and three of the Group of Western European and other States also

[3] For an overview of information on asset management collected under the first cycle, see *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd edition (Vienna, 2017), pp. 133–137.

permitted the direct enforcement of foreign non-conviction-based confiscation orders. One State applied a mixed approach, allowing for direct enforcement of confiscation orders from States with which a treaty existed, while requiring an exequatur procedure for orders from other States, which in turn had to be designated under domestic legislation. Four States could enforce foreign confiscation orders, including non-conviction-based orders, only when they related to cases of money-laundering, and, in the case of one State, related predicate offences. One of those States, in all other cases, could obtain a domestic order instead. Similarly, two States limited enforceable confiscation orders to those issued on the basis of an underlying "serious offence" according to the receiving State's domestic legislation. One of those two States accepted a certificate issued by an appropriate foreign authority stating that a foreign forfeiture order was in force and was not subject to appeal as sufficient proof for the registration of the foreign confiscation order, whereas the other State had announced amendments to ensure the possibility of enforcing foreign orders for other offences.

41. Three States parties could not enforce foreign confiscation orders either directly or through domestic authorities giving effect to them, and a domestic confiscation order had to be obtained. One State had the possibility of either directly enforcing a foreign order or obtaining a domestic one on the basis of the foreign confiscation request. In two States where foreign orders were directly enforceable, domestic confiscation proceedings would often be opened in parallel in order to accelerate the process, with the foreign request being attached to an affidavit and used as evidence. In one of those States, search, seizure or even confiscation was then possible within 24 hours. Most States could confiscate property by adjudication of an offence of money-laundering without distinguishing the origin of the property.

42. Recommendations were issued to 10 States relating to the ability to give effect to foreign orders, to not limit this ability to certain predicate offences or to consider extending it to non-conviction-based orders.

43. Most States could execute freezing or seizure orders issued by a foreign court, or sometimes even by another competent authority, or could freeze or seize assets upon the request of another State. Execution was possible either directly, sometimes after a domestic exequatur decision on enforceability based on domestic evidentiary standards, or indirectly, through the issuance of a corresponding domestic order (art. 54, para. 2 (a)–(b)). As with confiscation orders, six States limited the ability to give effect to search and seizure orders to only those involving certain underlying offences, such as money-laundering and bribery, or those considered "serious" under the requested State's domestic legislation; one of those States could in addition give effect to search and seizure orders only from specified States. Another State limited cooperation to requests under its anti-money-laundering act, and one State restricted assistance to the issuance of a search warrant. In a few States, the taking of measures regarding the execution of requests for interim measures was at the discretion of the domestic authorities. Two States, while being able to obtain and execute a domestic search or seizure order based on a foreign order, had no mechanism in place to freeze or seize property upon a request from another State.

44. Five States could issue domestic freezing orders proactively, without a request or foreign court order, sometimes on the sole basis of media reports, or a foreign arrest or criminal charge. One State, in which an electronically submitted foreign seizure request sufficed, afforded its financial intelligence unit the power to issue an account freezing order for up to seven days without a court order, and authorized law enforcement authorities to freeze or seize property without a court order for up to 14 days. In another State, if a request for legal assistance did not meet the legal requirements, the competent authority could nevertheless take interim measures to avoid irreparable harm until the request was amended.

45. Several States did not require diplomatic channels for mutual legal assistance requests regarding the freezing or seizure of assets, but accepted informal cooperation, such as police-to-police cooperation or cooperation between financial intelligence

units or asset recovery offices. In several States, the same set of measures and procedures available in domestic criminal proceedings, including those relating to the tracing, freezing, seizure and confiscation of property, were available for international cooperation.

46. Sixteen States received recommendations under article 54, paragraph 2, and article 55, paragraphs 1–2, to bring their systems into line with the Convention regarding the execution of foreign requests or orders for seizure or freezing.

47. While most States had regulations in place to facilitate the execution of mutual legal assistance requests for search, seizure or confiscation (art. 54 and art. 55, paras. 1–2), many States indicated that no requests to enforce foreign orders had been received to date or that there was little experience in general with respect to mutual legal assistance requests, including for the recovery of assets. Thus, the implementation of article 55, paragraphs 1–2, could not be assessed in some States. Of the States that had received requests, one State reported that during an initial investigation based merely on an informal request, possible property of the offender had been discovered in two other States, and the information had been forwarded to the requesting State party. Another State described successful cooperation with another State party through informal modes of communication, such as email and telephone, which had led to the successful forfeiture of assets in the requested State.

48. All but one State had domestically regulated the content required for mutual legal assistance requests (art. 55, para. 3), and the rendering of assistance was subject to domestic procedural law or bilateral or multilateral agreements or arrangements (art. 55, para. 4). The content required for requests included information to satisfy the dual-criminality requirement, or, in practice, a proportionality review, information about the non-appealability of an order or the time limit for carrying out the request. Two States required a statement specifying the measures taken by the requesting State to give appropriate notice to bona fide third parties and to ensure due process, while another State reserved the right to hear the sentenced person in the enforcement matter. Two States required translation of the request into one of their official languages, with one of those States requiring that the translation be verified by a certified court interpreter. Another State allowed for the request and accompanying documents to be expressed either in the language of the requesting party or the requested party.

49. All but three States listed grounds for the refusal of incoming mutual legal assistance requests (art. 55, paras. 4 and 7). Many States could provide assistance regardless of the value of the property, while some States listed a de minimis value of the property or the imposition of an excessive burden on the requested State's resources as possible reasons for refusal. One State executed requests despite a de minimis value of the property, but, in turn, imposed additional cost requirements on the requesting State. Sufficient evidence was needed by most States in order to execute a mutual legal assistance request, but States would generally ask the requesting State to present such evidence prior to lifting provisional measures or refusing assistance. Two States of the Group of African States and two of the Group of Asia-Pacific States indicated that no request for cooperation regarding the recovery of assets had ever been denied. One State, when not receiving requested additional information within a reasonable period of time, would provisionally close the case and reopen it upon receipt of the information, while another State chose to reject a request if requested additional information was not received within an established time frame.

50. Other reasons cited by States for the refusal of requests included an inability to prosecute the underlying offence in the requested State, whether for lack of dual criminality, a conflict with a domestic investigation, prosecution or judicial proceeding, an undue delay by the requesting State or the expiration of the statute of limitations in the requesting or requested State. Additional grounds for refusing requests were possible prejudice or threat to the requested State's public order, sovereignty, security or fundamental principles of law; excessive burden on the resources of the requested State; possible risk to the safety of any person; and the

prosecution of offences of a political character or prosecution considered discriminatory against a person's race, gender, religion, nationality or political views. Violation of the *ne bis in idem* principle was grounds for refusal where asset recovery proceedings were considered punitive in nature. One State could refuse requests if the foreign decision had been issued under conditions that did not offer sufficient guarantees with regard to the rights of the defence, and another State could refuse assistance if the underlying evidence had been acquired through a criminal offence, or if the proceedings had violated basic human rights or the rule of law.

51. All States but eight indicated that consultations with a requesting State party would take place prior to the lifting of any provisional measure and that the requesting State would be given an opportunity to present its reason in favour of continuing the measure (art. 55, para. 8). States either had specific legislation on this issue, applied the Convention directly, or, in the case of 12 States, could consult as a matter of practice, such as on the basis of a policy of providing the maximum amount of assistance possible. Those 12 States were recommended to make statutory amendments in this regard.

52. In States where the Convention was self-executing, consultations were considered mandatory by the authorities. Two other States included a provision on consultations in all their bilateral treaties, and one of those States ensured that consultations were held even when circumstances would allow the refusal of the request. In two of the States that indicated that consultations were not mandatory or common, notice was given to the requesting State prior to the lifting of any provisional measures. Another State referred to a letter of refusal as the last resort, and as a matter of practice always wrote to requesting States, identifying potential grounds for refusal and requesting the issuance of a new or supplementary request. The same State conducted regular formal and informal meetings with the diplomatic representatives of foreign requesting States to address issues regarding submitted mutual legal assistance requests. A few States encouraged foreign authorities to submit a draft request for review prior to submitting the formal request in order to ensure that all necessary information was included. One State reported that discussions had been held with another State party over a number of months in relation to the form and content of a particular order, resulting in its successful registration. Another State used senior official meetings with States from the same region as a platform for discussion and coordination, while another State could allow the competent authorities of the requesting State to participate in the execution of a request.

D. Return and disposal of assets (article 57)

53. In line with the trend observed in previous thematic reports, few States had practical experience with the return of sizeable amounts of assets, while most States indicated that no return had taken place so far, usually because no requests had been received or made.

54. Provisions on the return or disposal of assets were in place in most States, although in some States asset return was foreseen only for certain offences, under narrowly defined procedural circumstances or at the discretion of the relevant minister. One State could only return confiscated assets on the basis of a bilateral treaty or arrangement and would otherwise retain any such assets. Only three States had a legal basis for returning seized assets. One of those States relied on asset-sharing agreements to transfer confiscated property, one refrained from confiscation in order to allow for the return of seized objects, and with regard to the third State, the procedure for the return of confiscated assets could not be clarified. In several States, confiscated property could be returned by direct application of the Convention, while the domestic legal bases for international cooperation in criminal matters could be found in the acts on mutual legal assistance, criminal procedure or proceeds of crime, or sometimes in acts to combat corruption, money-laundering or the financing of terrorism. Four States reported that amendment bills were being prepared to allow for

the return of assets to a requesting State and to ensure the implementation of article 57.

55. In most States, assets became the property of the State when confiscated, but could subsequently be returned to the requesting State (art. 57, paras. 2–3). In all but two States, the applicable legislation provided for the protection of the interests of bona fide third parties in recovery and return proceedings (arts. 55, para. 9, and 57, para. 2). One State allowed for the direct transfer of confiscated assets to a victim in a foreign State, even without a request by that State or a criminal conviction. In another State, assets could be returned solely upon sufficient demonstration of a reasonable basis for ownership by the requesting State. Legislation in two States stipulated that seized items must be returned to those who had lost possession as a result of an offence. One of those States had provisions in place regarding payments to be made from a confiscated assets fund to satisfy claims made by a foreign jurisdiction in respect of assets confiscated on the basis of a treaty or an asset-sharing agreement. Another State required the compensation of injured parties if they could show that they could not obtain full satisfaction of their claim through the enforcement of a title.

56. Whereas legislation in most States foresaw the possibility of asset-sharing agreements for confiscated assets, mechanisms for victim compensation and the protection of bona fide third parties, the mandatory and unconditional return in cases of embezzlement of public funds or the laundering of those embezzled funds (art. 57, para. 3 (a)) was not foreseen under domestic legislation in any State. Instead, return was usually at the discretion of the competent authorities, while those States in which the Convention was applicable directly indicated that that discretion was bound by article 57, paragraph 3. One State had specifically referenced the scenarios of article 57, paragraph 3, in its asset recovery guide for requests under the Convention, whereas for other cases it relied on standing or ad hoc asset-sharing agreements, but authorities were guided by compensation principles that helped to identify cases in which compensation to economic crime victims in other countries was appropriate, and swift action to return funds to affected countries, companies or people was called for. The member States of the European Union applied a differentiated European Union internal framework for the return of confiscated assets that foresaw 50/50 sharing by default over a certain threshold, while a State of the Group of Latin American and Caribbean States had bilateral treaties with four other States according to which recovered property would be shared in equal parts.

57. All States of the Group of Latin American and Caribbean States and the Group of Eastern European States, roughly two thirds of States of the Group of African States and the Group of Asia-Pacific States, and a quarter of States of the Group of Western European and other States received recommendations regarding the return of assets, with a particular focus on mandatory return in cases of embezzlement of public funds.

58. Most States parties could deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposal of confiscated property (art. 57, para. 4). Whereas in one State, a portion of the confiscated assets was to remain in the possession of that State and the sharing of property was only possible when the recovery was the result of judicial cooperation, several States usually returned assets in full, without any deductions being made. Two States indicated that expenses were deducted only in exceptional cases; in one of those States, to date, assets had always been returned in full, and the other State negotiated the amount of expenses of a substantial or extraordinary nature with the requesting State.

59. Most States parties could conclude, on a case-by-case basis, agreements or arrangements for the final disposal of confiscated property, and a few States had concluded such agreements or arrangements, leading to the successful or partial return of assets to the requesting State (art. 57, para. 5). In one State, the taxpayers had been identified as victims of the underlying corruption offences, and the funds returned to that State were invested in social projects benefiting society.

IV. Outlook

60. The present report reflects the analysis of 44 completed executive summaries and the more detailed information provided in the country review reports. As more data becomes available from completed country reviews, a more comprehensive analysis of trends will be made and additional nuances will be identified in future iterations of the thematic reports and regional addenda, with a view to keeping the Implementation Review Group informed of successes and challenges identified in the course of the reviews.