

24 August 2011

Original: English

**Implementation Review Group of the
United Nations Convention against Corruption**

Resumed second session

Vienna, 7-9 September 2011

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

Thematic report prepared by the Secretariat

Summary

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

* This document has not been formally edited.



I. Implementation of chapter III

A. Introduction, scope and structure of the report

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

B. Implementation of the criminalization provisions of chapter III

General observations

Definition of “public official”

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

¹ The present data are based on the country reviews as on 15 August 2011.

Bribery offences

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

5. All of the States parties had adopted measures to criminalize both active and passive bribery of domestic public officials and, in addition, some had taken steps towards establishing as criminal offences the bribery of foreign public officials and officials of public international organizations. Nonetheless, a number of common issues were observed concerning the implementation of these offences. In several States parties, cases of a “promise” of an undue advantage were not explicitly covered or were indirectly covered under related concepts. Two of these States parties had additionally adopted a “conduct-based” approach whereby only the actual exchange was the subject of the offence, while an offer of bribery was not explicitly covered, although in one of these cases the offer could be prosecuted as an attempted crime. Further, for the same State party, an “omission” to act was not criminalized and, additionally, passive bribery was only partly criminalized. Recommendations were issued by the reviewing States parties accordingly. In some cases there were issues involving third parties, such as the coverage of indirect bribery involving intermediaries or in several cases the accrual of benefits to third parties. In a few cases the legislation contained specific exemptions, for example regarding bribery below certain threshold amounts. In one case, the domestic bribery provision required the involvement of at least two people in the criminal conduct and further required an element of “economic benefit”, which was interpreted to cover only pecuniary benefits and not any other undue advantage. A recommendation to broaden the scope of the law was issued accordingly. A similar issue regarding the undue advantage was noted in two States parties, in one case where a “value-based” approach was taken, which punishes bribery only when it involves material advantages, and in another, where it was unclear whether the phrase “any valuable thing” in the national law and “undue advantage” were to be regarded as identical in nature and practice. The reviewing experts further noted that in several States parties legislation had been drafted or introduced to more fully implement the bribery provisions of the Convention.

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

Box 1

Examples of good practice in the implementation of article 16

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

Abuse of power or office and related conduct

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

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

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

Box 2

Examples of good practice in the implementation of article 18

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

9. Most States parties had adopted measures to criminalize the abuse of functions by public officials, though there were some deviations. In one case only the abuse of powers had been criminalized, though legislation was pending to more fully implement the offence. In another case, the relevant legislation criminalized only the illegal act, subject to a minimum threshold amount, and not an omission in the discharge of functions; however, related offences of abuse and excess of authority by non-governmental organizations, businesses or other persons had been

established. A recommendation was issued to enact comprehensive conflict of interest legislation, noting that relevant legislation had already been drafted. As noted above regarding the definition of “public officials”, in one jurisdiction parliamentarians were exempted from the scope of coverage. In another case, the legislation did not mention the purpose of obtaining an undue advantage for the public official or for another person or entity, though the accrual of benefits to third persons was considered to have been indirectly covered. Similarly, in another case the third-party benefit was not explicitly addressed. In one State party, as with the offence of bribery, the offence required the involvement of at least two people in the criminal conduct and otherwise did not fully meet the requirements of the Convention, and a recommendation was issued accordingly. In two cases where the offence had not been established, legislation had been drafted or introduced to implement the article.

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

Box 3

Examples of good practice in the implementation of article 20

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

Private sector offences

Bribery and embezzlement in the private sector

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

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

Box 4

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

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

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

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

Other offences

Money-laundering; concealment; obstruction of justice

13. There was some variation among the States parties with regard to the criminalization of money-laundering. While most States parties had taken measures towards establishing money-laundering as a criminal offence, in several cases there were significant gaps in the implementing law, which covered only part of the conduct described in subparagraphs (1)(a)(ii) and (1)(b)(i) of article 23, and only minor parts of subparagraphs (2)(a) through (e). As a result, while noting that legislation to fully implement the article had been introduced, an “urgent” recommendation was issued to enact appropriate legislation. There were similar issues with regard to the partial implementation of subparagraph (1)(a)(ii) of article 23 in another State party, where also accessory conduct such as counselling for the purpose of committing money-laundering and supporting a person in the commission of the predicate offence to evade the consequences of his or her actions were not criminalized. Here, also a recommendation was issued to broaden the list of predicate offences to include embezzlement in the private sector. In another case, attempted money-laundering was not punishable, though this would have been covered in a pending amendment of the law. Similarly, in another jurisdiction, the predicate offences did not include all the offences stipulated in the Convention, the participation in acts of money-laundering was not criminalized, and provisions on conspiracy, assistance or attempt covered only the commission of money-laundering and not other corruption offences. Gaps in implementation also existed in other States parties, for example in one case with regard to a limitation of the money-laundering offence to only criminal predicate offences and not to conduct such as tax evasion, and in another case concerning an absence of any provision to

criminalize “self-laundering” due to a perceived inconsistency with fundamental principles of national law. Appropriate recommendations were issued by the reviewing experts. In addition, in several cases, issues were encountered with respect to the coverage of predicate offences committed outside the territory of the State party concerned, where in one case the extension was implicit, in another case predicate offences committed outside the State party were not considered predicate offences, and in a third case, dual criminality was required for prosecution of predicate offences committed abroad. Several States parties had adopted an “all crime approach” that did not restrict application of the money-laundering offence to specific predicate offences or categories of predicate offences.

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

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

Substantive and procedural provisions supporting criminalization

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

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

recommendation was issued to clarify the situation. In one case, criminal liability only applied to individuals who governed legal persons and not to entities, due to the prohibition in the criminal code against establishing criminal liability of legal persons. A similar prohibition existed in another jurisdiction, where only administrative liability was established. The range of administrative sanctions generally varied, ranging from administrative penalties, including blacklisting for certain violations, in one case, to monetary penalties in another. In two cases of pecuniary penalties, a specific recommendation was issued to consider increasing the level of monetary sanctions and adding non-monetary sanctions to the list of possible penalties. In several cases, multiple forms of liability were possible. In one case, only civil liability had been established, pending amendments to the penal code that would, if adopted, have covered the criminal liability of both legal and natural persons.

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

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

19. There was considerable variation among the States parties with regard to the length and application of the statute of limitations for offences established under the Convention. One State party had established a minimum period for such offences of 5 years, which extended in some cases to 10 years. The reviewing experts were of the view that 10 years was a sufficiently long time, but that the appropriateness of a 5-year statute depended on the possibility of prolongation or suspension of the statute and its application in practice. In this regard it was noted that several States parties did not provide for a suspension or interruption of the statute. Similarly in another jurisdiction, for offences under the Convention, statute of limitations period was either 10 years (for offences punishable with imprisonment for more than three years) or five years (offences punishable with imprisonment between one and three years). Another State party had established a general statute of limitations period of 5 years, which was disrupted when the defendant committed a new offence, and suspended by the formalization of the inquiry, which normally took up to two years. The statute of limitations period was also extended when the culprit fled the country, but not when the culprit evaded the administration of justice within the borders. A recommendation was issued to introduce a longer statute of limitations that covered every case of justice evasion, irrespective of whether the culprit was within or outside the country. In one case, the statute established a

period of limitations of 20 years if the most severe penalty provided for the offence was fixed-term imprisonment for more than 8 years, and 10 years if the most severe penalty provided was between 2 and 8 years. Two State parties had no statute of limitations in place for corruption offences, because the applicable law did not apply to criminal cases or there was no general statute of limitations.

Measures to enhance criminal justice

Prosecution, adjudication and sanctions

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

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

powers were foreseen. Under the Constitution, the legislature was required to authorize the criminal charge and proceedings of its members, deputies and senators, and cases showed that the parliamentary practice of granting such authorization had been established as a rule.

22. Several States parties had taken measures to implement paragraph 6 of article 30 on the suspension, removal from office or reassignment of public officials accused of corruption offences. Suspension of public officials was possible in several jurisdictions, including in one case by regulations allowing temporary suspension pending trial. In one case, the removal of accused officials was governed by public service standing orders and applicable regulations that permitted the conditional release of public officers pending judicial procedures on half pay, with a prohibition on their working or leaving the State. In another case, there was no legal provision that would permit the removal or resignation of an official whose guilt had not been proven by a court, and investigative bodies could only request the suspension of officials who could interfere with an investigation. It was considered essential, in order to protect victims and witnesses and to ensure the smooth functioning of investigations, to have rules of procedure in place that would allow for suspending the official authority of suspects, including high ranking officials, pending a court decision and their resignation from office if guilt was established.

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

Freezing, seizure and confiscation

24. Several common issues were observed regarding the implementation of this article. In several cases, measures to enable the confiscation of instrumentalities, as opposed to proceeds, of crime were not provided for. In two of these cases, measures to enable the tracing, freezing or seizure of proceeds or instrumentalities of crime for purposes of eventual confiscation (subparagraph 2 of article 31) were also lacking. Additionally, in the third case, there were no detailed rules on confiscation and identification of proceeds or instrumentalities of crime. In this

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

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

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

27. A reversal of the burden of proof for demonstrating the lawful origin of alleged proceeds of crime or other property (as the relevant provision of the Convention was interpreted by several States parties) had not been introduced in most jurisdictions. This was either considered a violation of the principle of the presumption of innocence or inconsistent with the restrictive view taken by the criminal justice system towards any reversal of the burden of proof in criminal cases. Common challenges related to limited capacity, the inadequacy of existing normative measures and specificities in national legal systems. In one case where the law provided for a reversal of the burden of proof, the accused had to make a declaration in writing in order to prove the legal nature of the property and, if not or the declaration was incomplete, the property was presumed to have been derived from criminal activity.

Box 5

Examples of good practice in the implementation of article 31

Conviction

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

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

Protective measures prior to judicial proceedings

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

Similarly in another State party, an investigator could freeze assets for up to 7 days and was then required to request a court order, which could be granted for up to 4 months and was renewable for the same period.

Protection of witnesses, experts and victims

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

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

Box 6

Examples of good practice in the implementation of article 32

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

In another State party, measures to protect witnesses were taken by the prosecutor, judge or court when there were reasons to presume that real danger of life, health or property of witness, relatives or closely related persons. They included personal physical guarding by government bodies and non-disclosure of identity. A programme on the protection of threatened persons was also available, which encompassed personal physical security, property guarding, temporary safe accommodation, change of residence, work place or education establishment and identity change. A specific procedure was established to allow for the interrogation of witnesses by pretrial authorities and courts in secrecy. A defendant could also put questions to the witness in writing, which would be answered by videoconferencing and altering the voice and image of the witness, with verification by a judge.

Protection of reporting persons

30. As with the protection of witnesses, experts and victims there was considerable variation among the States parties with regard to the implementation of this article. Several States parties had not established comprehensive measures to implement the article, though legislation was pending in some cases. Common challenges related to specificities in the national legal systems and the absence of any specific regulation or systems for the protection of whistleblowers, which were noted as a concern in several cases. In one case, the matter was partly regulated by the anti-corruption law and draft legislation had been introduced; however, there was no comprehensive legislation on “whistleblower” protection and victim and witness protections were not provided to informants, despite an obligation for civil servants to report cases of corruption. A recommendation was issued to enact appropriate legislation. In one case where no specific whistleblower protection system existed, the provisions on witness protection were applicable and a recommendation was issued to explore the possibility of establishing a comprehensive system for the protection of whistleblowers, which was also under consideration by the national authorities. In a third case, despite a duty of all citizens to report crimes to the competent authorities, which was encouraged by the establishment of hotlines, the person reporting criminal conduct had to confirm the report formally afterwards. A recommendation was issued to ensure that specific

rules for the protection of whistleblowers in labour and administrative laws were enacted. A similar confirmation requirement was also observed in another jurisdiction. In one case where comprehensive whistleblower legislation had recently been enacted, the law applied to all persons who disclosed information and had already yielded “useful” information, including through anonymous reports, that had resulted in several pending cases; however, the possibly insufficient incentives for whistleblowers were noted and several recommendations were issued to enact regulations relating to back pay and other action to eliminate the effects of victimization, and to raise awareness by employers and among the public. In another case, only public officials who reported and not private persons were afforded protection, which covered both labour and procedural protections. A recommendation was issued to implement an appropriate protection system to encourage persons other than public officials to report offences under the Convention.

Consequences of acts of corruption

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

Compensation for damage

32. All of the countries had adopted measures to fully or partly implement the article, though in several cases there was no established procedure or practice for bringing such cases. The implementing legislation was either civil, criminal or

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

C. Implementation of the law enforcement provisions of chapter III

Institutional provisions

Specialized authorities

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

Box 7

Examples of good practice in the implementation of article 36

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

Cooperation with law enforcement authorities

34. A number of States parties had taken measures to encourage the participation of persons who have participated in the commission of corruption offences to

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

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

Cooperation between national authorities and with the private sector

36. Several States parties had established obligations to report corruption incidents on the part of public officials and, in several cases, concerning citizens or specific categories of legal persons in the private sector, though reporting was not always anonymous. There were notable exceptions, where no such duty existed for either citizens or for citizens and public officials, and appropriate recommendations were issued to encourage such persons to report acts established as offences by the Convention. In addition to reporting requirements, various measures had been established by States parties to encourage cooperation between national authorities and with the private sector, including, in several cases, a duty to cooperate anchored in law or the operation of specialized administrative bodies (inspectorates) in every central public body to collect signals of corruption and inform prosecuting authorities of evidence concerning criminal activities. The measures most often related to financial institutions and, in one case, a recommendation was issued to explore the usefulness of broadening the scope of cooperation between national law enforcement authorities and private sector entities that were not financial institutions. Frequently, inter-agency memorandums of understanding or other networks of cooperation had been established. Initiatives to promote awareness of corruption in the private sector had also been taken in a number of State parties. The most common challenges in this area related to inter-agency coordination and

limited capacity for implementation. A reluctance to report on the part of public officials and fear of retaliation were observed in some cases.

Other provisions

Bank Secrecy, Criminal Record, Jurisdiction

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

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

39. Issues with regard to jurisdiction were noted in a few States parties that did not provide for extra-territorial jurisdiction in corruption matters. In one case, the requirement of double criminality was applied to offences committed abroad by or against a national, but this general principle was not applicable in respect of active and passive bribery of national and foreign public officials and members of Parliament and, additionally, the passive personality principle was limited by the requirement that the acts committed abroad be punishable by imprisonment of more than six months. In two cases, the passive personality principle had not been established, while in three other cases, both the active and passive personality

principles were limited or had not been established. In two of these cases, additionally, the State protection principle was limited or had not been established, and a recommendation was issued accordingly. Several States parties had established measures that prohibit the extradition of nationals or allow such extradition only when applying international treaties and according to the principle of reciprocity, as discussed further in the thematic report on the implementation of chapter IV of the Convention (International cooperation) (CAC/COSP/IRG/2011/CRP.6).
