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Review of the 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 available as of September 2021 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.

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I. Scope and structure of the report

1. The present thematic report contains a compilation of the most relevant information on successes, good practices, challenges and observations contained 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 Convention by States under review in the second cycle of the Implementation Review Mechanism. It is based on the information included in the 57 executive summaries and country review reports that had been completed as at 20 September 2021. The report focuses on existing trends and examples of implementation and includes tables and figures depicting the most common challenges and good practices.[1]

3. The structure follows that of the executive summaries; certain articles and topics that are closely related are thus clustered together. Regional differences are reflected as appropriate.[2] The report is complemented by the report by the Secretariat on the implementation at the regional level of chapters II and V of the Convention (CAC/COSP/2021/7), in which further analysis on the issues of asset declarations, financial disclosure systems and prevention of conflicts of interest in the public sector (art. 7, para. 4, art. 8, para. 5, and art. 52, paras. 5 and 6) and beneficial ownership identification (art 14, para. 1 (a), and art. 52, para. 1), disaggregated by regional groups, is provided. Further related information, such as on financial disclosure obligations and on anti-money-laundering, can be found in the thematic report prepared by the Secretariat on the implementation of chapter II (CAC/COSP/2021/5).

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

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

[1] In line with the outcome of the discussions of the Implementation Review Group, the thematic report and the reports on implementation at the regional level will no longer be anonymized; countries used as illustrative examples of good practices have been identified throughout the report.

[2] The present report is based on 19 completed reviews for the Group of African States, 17 for the Group of Asia-Pacific States, 10 for the Group of Western European and other States, 6 for the Group of Latin American and Caribbean States and 5 for the Group of Eastern European States.

Figure I
Challenges identified in the implementation of chapter V of the Convention, by article

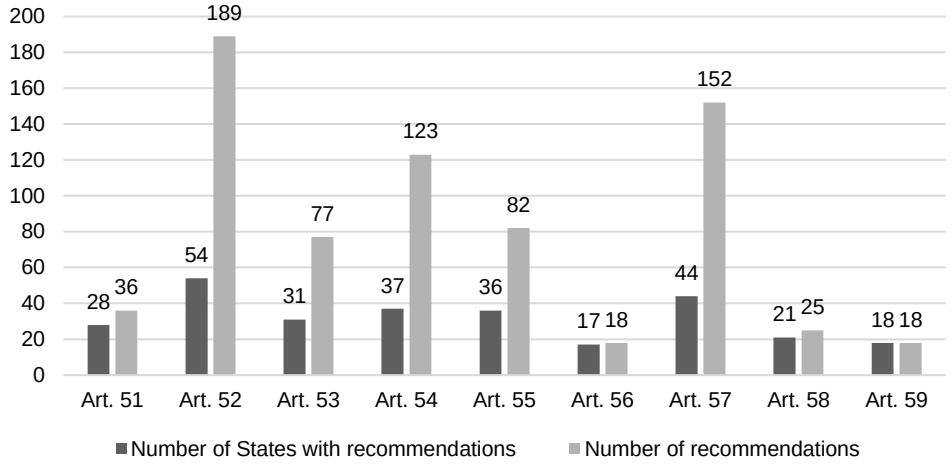

Table 1
Most prevalent challenges in the implementation of chapter V of the Convention

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	28	36	Inadequate legislation and/or procedures for mutual legal assistance; insufficient institutional arrangement and ineffective inter-agency coordination; complicated asset recovery procedures; lack of capacity of competent authorities
Article 52	54	189	Challenges in the identification of foreign and domestic politically exposed persons and beneficial owners; no requirement to report foreign interests; inadequate issuance of advisories; ineffective financial disclosure system; ineffective prohibition of shell banks; lack of resources of competent authorities
Article 53	31	77	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 the legitimate owner of property in foreign confiscation proceedings
Article 54	37	123	No direct enforcement of foreign confiscation orders or exclusion of certain Convention offences; no or insufficient mechanisms for preservation of property for confiscation; no or limited non-conviction-based confiscation; no measures to freeze or seize upon an order or request by a foreign State
Article 55	36	82	Lack of effective mechanisms to give effect to a foreign order or obtain a domestic order for search, seizure or confiscation; no obligation to give, before lifting any provisional measure, the requesting State an opportunity

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)*
			to present its reasons in favour of continuing the measure; Convention could not be used as treaty basis
Article 56	17	18	Insufficient measures and lack of authority for the spontaneous transmission of information; transmission of information regarding proceeds of certain categories of offences to only a limited range of countries
Article 57	44	152	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	21	25	Lack of emergency freezing powers for financial intelligence units; inadequate allocation of resources, independence and insufficient capacity of financial intelligence units, including in the area of inter-agency and international cooperation
Article 59	18	18	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 Convention, by article

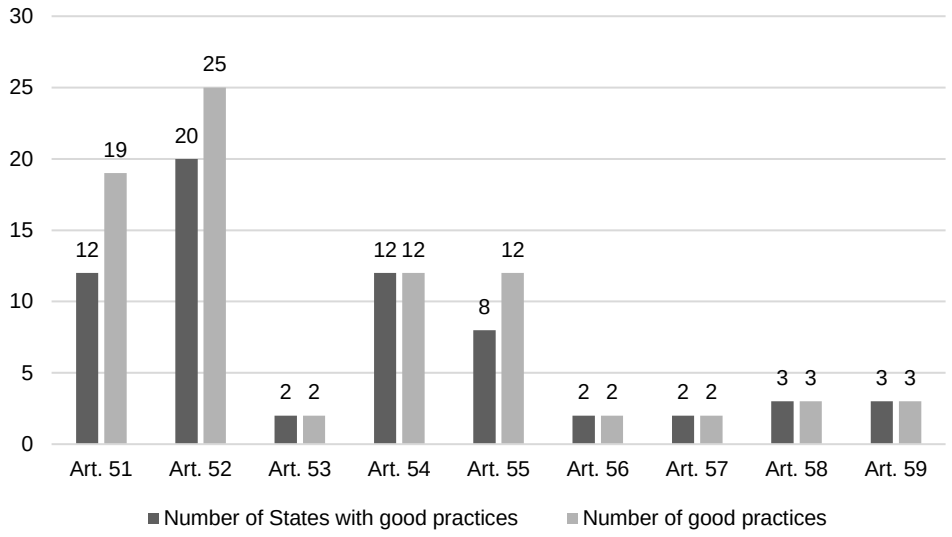

Table 2
Most prevalent good practices in the implementation of chapter V of the Convention

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	12	19	Active engagement in the development and promotion of international cooperation; robust institutional arrangements, including sound inter-agency coordination; issuance of guidance for asset recovery
Article 52	20	25	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 courts of another jurisdiction to establish title to or ownership of property acquired through a corruption offence, or to claim compensation or damages when harm is caused by such an offence
Article 54	12	12	Establishment of non-conviction-based confiscation or ability to enforce foreign non-conviction-based confiscation orders; proactive issuance of freezing orders; establishment of specialized asset recovery units
Article 55	8	12	Infrastructure to facilitate successful asset recovery, such as guidance, specialized units or bank registers; close cooperation and consultations between requesting and requested States; use of the Convention as a legal basis for mutual legal assistance
Article 56	2	2	Spontaneous sharing of information with a wide range of counterparts; placement of overseas liaison officers to facilitate information-sharing
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; 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 Convention

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

1. General provision (art. 51)

5. Almost all States had relevant frameworks or arrangements for asset recovery (art. 51), but relevant measures at the regulatory, institutional and operational levels varied significantly.

6. At the regulatory level, several States had enacted a dedicated legislative instrument, while others could apply various procedures prescribed in different sources of domestic legislation, such as the laws governing criminal procedure, mutual legal assistance, anti-money-laundering or anti-corruption, or the recovery of assets. In the latter case, where the procedures were governed by different legislation, some States could provide mutual legal assistance in relation to asset recovery to designated foreign States only 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. One State did not have specific provisions referring to the concept of asset recovery or return as a fundamental principle of cooperation.

7. Most States did not make cooperation for the purposes of confiscation conditional on the existence of a treaty but could provide such assistance on the basis of reciprocity, domestic legislation, or both. In many States, the Convention or regional treaties were directly applicable, and some States had successful experience with the direct application of the Convention, including on asset return. For example, Armenia could not only directly apply the Convention as a legal basis, but could also apply the laws of the requesting State in providing mutual legal assistance, on the basis of an international agreement. Although several States indicated that the Convention could be used as a legal basis for cooperation, they referred to the burdensome requirements of additionally designating States under domestic legislation for such cooperation or the difficulties of such application of the Convention in practice given the absence of clear domestic policy and procedure.

8. In addition to legislation, States relied on guidance provided by requested States when seeking assistance. Seven States had already formulated or were about to develop an asset recovery guide, while another six States 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 guidance documents was identified as a good practice to facilitate the asset recovery process. In addition, the United Kingdom of Great Britain and Northern Ireland placed specialists and liaison magistrates and prosecutors in other countries to facilitate asset recovery. South Africa posted liaison police officers abroad to facilitate mutual legal assistance and mandated its asset forfeiture unit to provide guidance to States seeking to recover assets, regardless of whether a mutual legal assistance request had been submitted.

9. At the institutional level, States differed in whether they used a centralized or a decentralized approach. A small number of States had designated or were in the process of establishing a dedicated entity for the recovery of assets, while others engaged multiple agencies for that purpose. However, it was identified that inter-agency coordination posed practical challenges in many States.

10. 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 reported a considerable number of successful cases, some States indicated that they had never received a request in relation to asset recovery despite the fact that possible legal avenues were available in their jurisdictions (see section D, on article 57, below,

for more information). Almost 20 per cent of States indicated that they had never formally refused an asset recovery-related request.

11. In terms of regional trends, 80 per cent of the States of the Group of Eastern European States, more than half of the States of the Group of African States and the Group of Asia-Pacific States and 40 per cent of the States of the Group of Western European and other States received recommendations.

2. Spontaneous transmission of information (art. 56)

12. Almost all States allowed for the spontaneous transmission of information, although some of them indicated that such transmission needed prior approval. A number of States stipulated the respective legal basis in their anti-money-laundering, mutual legal assistance or anti-corruption legislation, while several others provided for such transmission pursuant to bilateral or multilateral treaties, including the Convention. Several States also referred to memorandums of understanding between their financial intelligence units and foreign counterparts on the matter. Nauru reported that, if such a formal agreement had not been concluded, it could still disclose information on the basis of an ad hoc agreement. In many cases, such transmission was subject to confidentiality requirements. States without specific legislation either had existing practice on the spontaneous transmission of information or indicated that there was no legal prohibition of such practices. Nevertheless, in three States, spontaneous information-sharing was not possible.

13. Another trend identified was the spontaneous transmission of information through practitioners networks or platforms. Most States empowered their financial intelligence units to exchange financial intelligence without prior request by virtue of their membership in the Egmont Group of Financial Intelligence Units. Furthermore, more than half of States could proactively share information through law enforcement channels or asset recovery networks, such as the International Criminal Police Organization (INTERPOL), the Camden Asset Recovery Inter-Agency Network and regional asset recovery inter-agency networks.

14. Almost 80 per cent of States in the Group of Asia-Pacific States and about 50 per cent of the States in the Group of African States received recommendations on the spontaneous sharing of information.

3. Bilateral and multilateral agreements and arrangements (art. 59)

15. Almost all States had agreements or arrangements to enhance international cooperation undertaken pursuant to chapter V. Ghana had concluded 160 bilateral treaties, whereas another State reported that no bilateral treaties or agreements on criminal matters had yet been concluded. The United Kingdom highlighted the data-sharing agreements and memorandums of understanding used by its law enforcement agencies in international cooperation, while a number of others referred to the memorandums of understanding for cooperation concluded by their financial intelligence units or anti-corruption agencies.

16. Compared with other regional groups, a higher percentage of the States of the Group of Latin American and Caribbean States and the Group of Asia-Pacific 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 (arts. 52 and 58)[3]

1. Prevention and detection of transfers of proceeds of crime (art. 52)

17. All States had taken a variety of measures for the prevention and detection of transfers of proceeds of crime. A risk-based approach was 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 (art. 52, para. 1). Sanctions could be applied in several States for non-compliance with those requirements. Furthermore, all but two States had measures in place for the determination of the identity of beneficial owners. In that regard, Nauru had adopted the Beneficial Ownership Act and established a dedicated authority to collect relevant information. However, some States had encountered challenges in the identification of beneficial owners in practice, in particular in relation to complex legal structures. Some States had not defined "high-value accounts" but could apply enhanced customer due diligence when a higher risk of money-laundering was identified.

18. 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 such persons. However, States differed in defining the scope of 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 including only one in their definition of politically exposed persons. In addition, the scope of the definition of family members and close associates was not clear in several States, and some States could not include family members and close associates in the ambit of enhanced scrutiny. However, in Bolivia (Plurinational State of) and Cuba, legal entities in which a politically exposed person held a controlling position, was a shareholder or a beneficiary or had a financial interest were also subject to enhanced scrutiny.

19. The majority of States had issued advisories or guidelines for reporting entities, including financial institutions, to apply enhanced scrutiny (art. 52, para. 2). Those advisories or guidelines were generally issued by the financial supervisory authorities, financial intelligence units or law enforcement bodies. In addition, a number of States obliged their financial institutions to exercise enhanced due diligence with regard to business relations and transactions with persons from high-risk jurisdictions. About half of the States of each regional group, except the Group of Western European and other States, received recommendations on their implementation of this provision.

20. All States 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 and ranged from 5 to 25 years. Some States also prescribed different maintenance periods for various records, depending on the sensitivity of the information. The maintenance requirement always starts at the termination of the business relationship or completion of the transaction. Only a small number of States from the Group of African States and the Group of Asia-Pacific States received recommendations in relation to the implementation of this provision.

21. Most States had measures in place intended to prevent the establishment of banks that had no physical presence and were not affiliated with a regulated financial group (shell banks), in line with article 52, paragraph 4, of the Convention. In many

[3] Given the close links between article 52 and article 14 (on measures to prevent money-laundering), as well as article 8, paragraph 5 (in relation to financial disclosure systems), readers may wish to refer to the relevant information in the thematic report prepared by the Secretariat on the implementation of chapter II (Preventive measures) of the Convention (CAC/COSP/2021/5).

States, financial institutions were obliged to refuse entering into relationships with such shell banks. More than two thirds of States also reported on their measures to prohibit the continuation of a correspondent banking relationship with such institutions, or with other foreign financial institutions that permitted their accounts to be used by shell banks. Half of the States of the Group of Latin American and Caribbean States and about one third of the States of the Group of Asia-Pacific States received recommendations in this regard.

22. The majority of States had in place financial disclosure systems for appropriate 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 high-level officials or persons holding public positions considered vulnerable to corruption. A number of States also required selected public officials to declare the assets of their close family members, such as spouses and children. Several States required a wide range of assets to be declared, including financial interests, directorships, shareholdings, investment property, public appointments, income and liabilities.

23. Some variation could be observed regarding the effectiveness of financial disclosure systems. With regard to the frequency of submission, some States obliged their public officials to submit financial disclosure statements upon assuming and leaving office, while a number of other States required such submissions to be made every few years, whenever a substantial change occurred or when the income surpassed a specified threshold. Variation was also identified in relation to the verification of the information submitted. Some countries designated a central agency to verify all declarations, while a number of others authorized different bodies to verify declarations submitted by different categories of public officials. 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-compliance with respect to financial declarations, including disciplinary and criminal sanctions such as fines, deduction of salary, imposition of taxes on the undeclared portion of income and imprisonment. However, the enforcement of those sanctions was always found to be a challenge in practice.

24. In relation to the public accessibility of asset declarations, some States required declarations to be submitted in paper form and remain sealed unless a criminal investigation was opened. A small number of States provided asset declarations to the public in part, in summary form or through a public register or a dedicated website, while some other States granted access to the declarations only to law enforcement authorities, or made the declarations accessible only upon request or consultation or subject to approval.

25. Only a small number of States could share such information with foreign competent authorities, subject to further conditions. In one State, the public official concerned had to be informed of whom the information would be shared with and be given an opportunity to object within 14 days, while two other States indicated that such information could only be shared when a domestic investigation had been opened or in criminal proceedings.

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 declaration, while two States prohibited public officials from opening, operating or controlling a foreign bank account without the approval of relevant authorities. Most States received recommendations under this provision.

27. All States in the Group of Latin American and Caribbean States and the Group of Eastern European States and almost 80 per cent of the States in the other regional groups were found to have challenges in their implementation of article 52, paragraphs 5 and 6.

2. Financial intelligence units (art. 58)

28. All States had financial intelligence units responsible for receiving, analysing and disseminating to competent authorities reports of suspicious financial transactions (art. 58), although deficiencies existed with regard to the independence or operational capacity of some units. In almost 70 per cent of States, the financial intelligence units were members of the Egmont Group of Financial Intelligence Units. Half of the States that had not acquired membership in the Egmont Group for their national financial intelligence unit were in Africa.

29. Some variation existed regarding the functions of the financial intelligence units. Some units performed mainly administrative functions, while others had additional investigative mandates. Moreover, the financial intelligence units in some States 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. With regard to regional trends, a range of challenges were identified, in particular in States of the Group of African States, the Group of Eastern European States and the Group of Latin American and Caribbean States (see table 1 above).

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

1. Direct recovery of property (art. 53)

30. In the vast majority of States under review, foreign States could initiate civil action to establish title to or ownership of property (art. 53, para. (a)) or claim compensation or damages for harm caused by a Convention offence (art. 53, para. (b)) on the basis of domestic substantive law. However, few States cited experience with foreign States litigating in their jurisdictions: in one fifth of the States of the Group of African States and the majority of the States of the Group of Western European and other States, foreign States had initiated civil action in domestic courts. However, to the knowledge of the authorities in the majority of States, no precedent existed.[4]

31. Algeria and Burkina Faso had established explicit jurisdiction over civil actions brought by other States parties to the Convention regarding compensation or the recognition of property rights over property acquired through acts of corruption. In two additional States, jurisdiction for foreign States had been established but was conditional upon the recognition of the foreign State. In one of those States, the foreign State needed to be recognized by the Head of State, but the domestic procedures for that process remained unclear to the review team.

32. In many States, legislation granted locus standi to legal persons, the definition of which included States. In States where no 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 to observe domestic civil procedure, 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 four States did foreign States have no possibility to sue for

[4] For a more detailed analysis of the implementation of article 53, see the report by the Secretariat on the implementation at the regional level of chapter V (Asset recovery) (CAC/COSP/IRG/2021/8).

compensation or damages; in two of those, there was also no way to recognize another State's claim of legitimate ownership. Two of those States limited locus standi to foreign individuals, organizations or entities, but excluded States from filing a civil suit. One State instead referred States to their rights as victims in criminal proceedings.

33. In addition to civil litigation, prior legitimate ownership could often be determined and/or compensation be ordered in criminal proceedings through filing civil claims in criminal court or joining civil suits with pending criminal proceedings. In Greece, where foreign States could either litigate claims through civil proceedings or file them as part of the criminal trial, criminal courts were allowed to defer minor material claims to civil courts, but a tendency had evolved whereby courts allowed State entities to participate as civil plaintiffs before a criminal court in corruption proceedings. The reviewers of Fiji identified the possibility of pecuniary penalty orders, including in cases of unexplained wealth, as a potential additional means of seeking compensation for damages.

34. Consistent with the trend of not differentiating 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)). Means in this regard included the possibility of filing civil claims in criminal proceedings to initiate ancillary proceedings over confiscated assets; the possibility for the court to award property to a prior legitimate owner by way of exempting their property from confiscation or ordering its return upon confiscation; and providing prior legitimate owners with the right to appeal confiscation orders.

35. Owing to the absence of explicit legislation, cases and practical experience, it usually remained unclear as to what was required domestically to establish a State's good faith and/or prior legitimate ownership in criminal or restitution proceedings. One of the States that described specific mechanisms for the recognition of foreign States' claims, Italy, allowed for restitution to victims, when no doubt about the ownership existed, 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 Ireland, 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 the proceeds of crime, could apply for the transfer of their property. In Saudi Arabia, victims or their representatives and heirs could initiate criminal proceedings to have their legitimate ownership recognized. In turn, for a number of States, there was no domestic means for foreign States to have their legitimate ownership recognized in confiscation proceedings, with two States stating that legislative reform in that regard was under way.

36. 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 Mauritius, when the owner of property was unknown or could not be found, a notice was published in two daily newspapers with a wide circulation in an effort to locate possible bona fide third parties. Five States, all from the Group of African 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.

37. While only two States of the Group of Western European and other States and about half of the States of the Group of Asia-Pacific States received recommendations on article 53, two thirds of the States of the Group of Eastern European States, the Group of African States and the Group of Latin American and Caribbean States received recommendations to specify in the law, or ensure in practice, mechanisms for the implementation of the three modalities of recovery laid out in article 53.

2. Recovery of assets through international cooperation in confiscation (arts. 54 and 55)

(i) Confiscation through adjudication of money-laundering offences (art. 54, para. 1 (b))

38. The legislation in the vast majority of States provided for the confiscation of property of foreign origin through criminal proceedings and convictions for money-laundering in accordance with domestic law. Only five States were found to be unable to confiscate such property by adjudication of an offence of money-laundering or similar offences, while an additional State had jurisdiction only over predicate offences committed by its own citizens but not those committed by foreigners.

(ii) Confiscation without a criminal conviction (art. 54, para. 1 (c))

39. The majority of States had taken measures to allow for confiscation without a criminal conviction, either through confiscation in rem during criminal proceedings, or through civil forfeiture. Several States had the options of non-conviction-based confiscation in cases where a person absconded or died, as well as of civil forfeiture in cases of serious crime or property considered tainted.

40. The scenarios allowing for non-conviction-based confiscation ranged from the death or flight, and sometimes the mere absence or unknown identity, of the accused, to the very broad descriptions of “other appropriate cases”, “any other reason whatsoever” and “adequate grounds” for confiscation or forfeiture. Italy 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”; heirs to the property were excluded from third-party protection rights in those cases. Similarly, in addition to allowing confiscation in cases where conviction was statute-barred, in Germany, assets could be confiscated if seized on the suspicion of serious crime, such as money-laundering, in cases where there was no proof of a specific offence but where the court was satisfied that the proceeds were of 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 asset. Likewise, Kenya allowed for the forfeiture of unexplained assets determined by a court to have been acquired through acts of corruption or economic crime, and Ghana allowed its independent anti-corruption commission to initiate non-conviction-based forfeiture proceedings regarding assets illicitly acquired by public officials and anchored that right in the Constitution. Similarly, Myanmar had introduced an administrative procedure whereby the anti-corruption authority could order confiscation without any involvement of judicial authorities in cases of illicit enrichment or the death, absconding or unknown identity of an accused. Fiji could use its recently introduced criminal offence of unexplained wealth in combination with non-conviction-based ex parte forfeiture orders to increase the efficiency of asset recovery.

41. Almost a quarter of States had not established non-conviction-based confiscation or forfeiture, while five States limited it to proceeds or instrumentalities of “serious crime-related activity”, money-laundering, illicit enrichment or non-corruption offences. One State reported that it had considered but rejected the introduction of non-conviction-based confiscation, while two States could not order confiscation in the absence of a domestic criminal conviction, but in certain cases could execute foreign non-conviction-based confiscation orders. Roughly half of the States of the Group of African States, the Group of Eastern European States and the Group of Asia-Pacific States, four fifths of the States of the Group of Latin American and Caribbean States and one State of the Group of Western European and other States received recommendations to consider the introduction or expansion of a non-conviction-based confiscation regime.

(iii) Enforcement of foreign confiscation orders and foreign requests for confiscation (art. 54, para. 1 (a), and art. 55, para. 1)

42. While several States had never received requests for the execution of a foreign confiscation order, confiscation orders issued by a court of another State could be enforced or given effect in most States. The vast majority of States 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. The exequatur rendered the order enforceable as or like a domestic confiscation order. Ireland 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. States members of the European Union were obliged to mutually recognize and execute, without further formality, both freezing and confiscation orders. Three States of the Group of African States, four States of the Group of Western European and other States, one State of the Group of Latin American and Caribbean States and three States of the Group of Asia-Pacific States also permitted the direct enforcement of foreign non-conviction-based confiscation orders. One of those two Asia-Pacific States allowed for the enforcement of foreign non-conviction-based orders without any domestic exequatur proceedings, which was noted by the reviewers as a potential threat to the domestic rule of law and a possible obstacle to the enforcement by other States of requests sent by that State.

43. Five States could enforce foreign confiscation orders, including non-conviction-based orders, only when they related to cases of money-laundering (and sometimes the financing of terrorism) and, in one State, related predicate offences. One of those States 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. Malaysia 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. In Nauru, measures available under international cooperation went beyond those available domestically: authorities were in a position to enforce foreign confiscation, seizure or freezing orders, or make an order on the basis of a foreign request, while domestic interim measures required a conviction or indictment.

44. Three States could not enforce foreign confiscation orders and a domestic confiscation order had to be obtained. In several States, it remained unclear whether the possibility of a domestic order existed in lieu of giving effect to foreign orders or what the required procedure would entail, often owing to a lack of experience or any requests being received. In turn, several States, including the Cook Islands and Fiji, had the option of either directly enforcing a foreign order or obtaining a domestic one on the basis of the foreign confiscation request. In Liechtenstein and Mauritius, 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 both States, search, seizure or even confiscation was then possible within 24 hours.

45. Recommendations were issued to a third of the States of the Group of African States, half of the States of the Group of Asia-Pacific States and the Group of Eastern European States, four fifths of the States of the Group of Latin American States and one State of the Group of Western European and other States relating to the ability to give effect to foreign orders, to not limit that ability to certain predicate offences or to consider extending it to non-conviction-based orders.

(iv) Enforcement of foreign freezing or seizure orders or interim measures based on foreign requests (art. 54, para. 2, and art. 55, para. 2)

46. Most States could execute freezing or seizure orders issued by a foreign court or sometimes even by another competent authority, could freeze or seize assets upon

request from another State, or could do both. Legal bases for cooperation included treaties, bilateral agreements, domestic legislation or reciprocity. Execution was possible either directly, sometimes after a domestic exequatur decision based on domestic evidentiary standards, or indirectly through the issuance of a corresponding domestic order. In Algeria, Belgium, Egypt, Germany and Thailand, the reviews explicitly established that the same set of measures and procedures available for asset recovery in domestic criminal proceedings were available for international cooperation.

47. 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 restricted assistance to the issuance of a search warrant. In a few States, usually common-law jurisdictions, 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 on the basis of a request from another State.

48. Several States did not require diplomatic channels for mutual legal assistance requests regarding freezing or seizure of assets, and accepted informal cooperation such as police-to-police cooperation or cooperation between financial intelligence units or asset recovery offices. Portugal described a situation in which, during an initial investigation based merely on an informal request, possible property of the accused had been discovered in two other States; the information was forwarded to the requesting State. Nigeria described successful cooperation with the United States through informal modes of communication such as email and telephone, which had led to the successful forfeiture of assets in the United States.

49. 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 and 2), many States indicated that no requests to enforce foreign orders had been received to date or that they had 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 and 2, could not be assessed in some States.

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

(v) Additional measures for preservation of property (art. 54, para. 2 (c))[5]

51. Several States (Armenia, Australia, Bolivia (Plurinational State of), Cook Islands, Cuba, Greece, Ireland, Liechtenstein, Senegal, South Africa and Uruguay) could issue domestic freezing or preservation orders proactively, without a request or foreign court order, on the basis of media reports or a foreign arrest, criminal investigation or charge. In Ghana, where an electronically submitted foreign seizure request sufficed, the financial intelligence unit could issue an account freezing order with a duration of up to 7 days without a court order, and authorized law enforcement authorities could freeze or seize property without a court order for up to 14 days. In Peru, 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 had been amended.

[5] As the management of seized or confiscated assets was reviewed under the first cycle and is not covered by the scope of second-cycle reviews, and in order to allow for more in-depth analysis of the implementation of other provisions, the measures voluntarily reported by States on asset management were excluded from the present report, but will be included in future editions.

52. Roughly two thirds of the States of the Group of Asia-Pacific States, half of the States of the Group of Eastern European States, a third of the States of the Group of African States and one State each from the Group of Western European and other 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.

(vi) Prerequisites and content required for mutual legal assistance requests (art. 55, paras. 3 and 4)

53. 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 a proportionality review in practice, information about the non-appealability of an order or the time limit for carrying out the request. After consultations, authorities in Palau could take action on the basis of foreign requests even if they did not meet the minimum requirements. One State 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 two States reserved the right to hear persons potentially affected by the enforcement matter, such as the convicted person or any person having rights in the property. A few States required translation of the request into one of their official languages, with one State requiring that the translation be verified by a certified court interpreter.

(vii) Grounds for refusal of mutual legal assistance requests (art. 55, paras. 4 and 7)

54. Almost all States listed grounds for the refusal of incoming mutual legal assistance requests. Many States could provide assistance regardless of the value of the property, while some States listed or took into account a de minimis value or the imposition of an excessive burden on the requested State's resources as possible reasons for refusal. 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. One State, if it did not receive the requested additional information within a reasonable period of time, would provisionally close the case and reopen it upon receipt of the information. Three States of the Group of African States and three States of the Group of Asia-Pacific States explicitly indicated that no request for cooperation regarding the recovery of assets had ever been denied.

55. 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. Problems with dual criminality requirements arose in States that had not adequately criminalized basic offences such as bribery or had not established liability for participation in criminal offences or liability of legal persons, which would lead to a denial of mutual legal assistance requests given the domestic non-criminalization of underlying offences. Additional grounds for refusing requests were potential prejudice or threat to the requested State's public order, sovereignty, security or fundamental principles of law; possible risk to the safety of any person or to human rights; 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 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.

(viii) Consultation with requesting party (art. 55, para. 8)

56. All but nine States indicated that consultations with a requesting State 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. States had specific legislation on this issue, applied the Convention directly, included provisions in all their bilateral treaties or, in the case of roughly one third of States, could consult as a matter of practice, such as on the basis of a policy of providing the widest measure of assistance possible. The States consulting as a matter of practice received the recommendation to make statutory amendments in that regard.

57. Consultations were considered mandatory in States where the Convention was self-executing. Where consultations were not mandatory or common, at the very minimum, notice was given to the requesting State prior to the lifting of any provisional measures. Malaysia ensured that consultations were held even when circumstances allowed for the refusal of the request, and Mauritius 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. Mauritius also conducted regular formal and informal meetings with the diplomatic representatives of foreign requesting States to address issues regarding submitted mutual legal assistance requests. Australia, Mauritius and Mexico encouraged foreign authorities to submit draft requests for review prior to submitting the formal request to ensure that all necessary information was included. Indonesia used senior official meetings with States from the same region as a platform for discussion and coordination, while Panama could allow the competent authorities of the requesting State to participate in the execution of a request.

D. Return and disposal of assets (art. 57)

58. 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 or no requests had been received or made.

59. In most States, assets became the property of the State when confiscated, but could subsequently be returned to or shared with the requesting State (art. 57, paras. 2 and 3), although some States required an ad hoc agreement with the requesting State to allow for the sharing of property or its value. In one State where no such agreement had been entered into, it remained unclear how the responsible authority would exercise its discretion.

60. Some provisions on the return or disposal of assets were in place in most States, although 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. Only one State, from the Group of African States, was found to have legislation stipulating the mandatory transfer to the requesting State of any amount recovered in terms of a final and binding foreign confiscation order, albeit “subject to any agreement or arrangement with the requesting State”. In several States, confiscated property could be returned by direct application of the Convention. In all other States, return was usually at the discretion of the competent authorities, while those States in which the Convention was applicable directly indicated that discretion was bound by article 57, paragraph 3 (a). The United Kingdom 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 asset-sharing agreements, but authorities were guided by compensation principles that helped identify cases where compensation to victims of economic crime in other countries and the swift return of funds to affected countries, companies or people was called for.

61. Two States of the Asia-Pacific Group of States could return assets only on the basis of bilateral treaties or arrangements and would otherwise retain any confiscated assets. In some States, asset return was foreseen only for certain offences, under narrowly defined procedural circumstances or at the discretion of the relevant minister. Four States had a legal basis for returning seized assets but none for the return of confiscated assets. One of those States relied on asset-sharing agreements to transfer confiscated property, one State refrained from confiscation to be able to return seized objects, and no procedure for the return of confiscated assets could be clarified for the other two States. The States members of the European Union applied a differentiated European Union internal framework for the return of confiscated assets, which foresaw 50/50 sharing by default over a certain threshold, while another State had bilateral treaties with four other States according to which recovered property would be shared in equal parts. Four States reported that amendment bills were being prepared to allow for the return of assets to a requesting State and ensure the implementation of article 57.

62. In all but three States, the applicable legislation provided for the protection of the interests of bona fide third parties in recovery and return proceedings (art. 55, para. 9, and art. 57, para. 2). Italy 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 Solomon Islands, assets could be returned solely upon sufficient demonstration of a reasonable basis for ownership by the requesting State. Germany required the compensation, from public funds, of injured parties if they could show that they could not obtain full satisfaction of their claim through the enforcement of a title. Legislation in the Cook Islands and Oman stipulated that seized items must be returned to those who had lost possession as a result of an offence. In that regard, the Cook Islands had set up a confiscated assets fund to satisfy the claim of a foreign jurisdiction in respect of confiscated assets based on a treaty or an asset-sharing agreement.

63. All States of the Group of Latin American and Caribbean States and the Group of Eastern European States, all but one State of the Group of Asia-Pacific States, roughly two thirds of the States of the Group of African States and a third of the 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, demonstrating the significant gaps in the area of asset return.

64. Most States could deduct reasonable expenses incurred (art. 57, para. 4). Several States would usually return assets in full without any deductions, and three States reported deducting expenses only in exceptional cases or sharing them on the basis of reciprocity. In turn, one State requested coverage of all costs associated with mutual legal assistance requests by the requesting State.

65. Most States 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 Kenya, taxpayers had been identified as victims of underlying corruption offences, and the funds returned to the country were invested in social projects benefiting society.

E. Outlook

66. The present report reflects the analysis of 57 completed executive summaries and more detailed information provided in the country review reports. The secretariat will continue the analysis as more data become available from completed country reviews.