

MECHANISM FOR FOLLOW-UP ON THE
IMPLEMENTATION OF THE INTER-AMERICAN
CONVENTION AGAINST CORRUPTION
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REPUBLIC OF GUATEMALA

FINAL REPORT

(Adopted in the plenary session held on September 30, 2005)

**COMMITTEE OF EXPERTS OF THE MECHANISM FOR FOLLOW-UP ON
THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST
CORRUPTION**

**REPORT ON IMPLEMENTATION IN THE REPUBLIC OF GUATEMALA
OF THE CONVENTION PROVISIONS SELECTED FOR REVIEW IN THE FRAMEWORK
OF THE FIRST ROUND¹**

INTRODUCTION

1. Legal-institutional framework²

From a centralized view of the state (1965 Constitution), there has been an evolution to the current supreme legal framework of the Republic of Guatemala in Central America (the 1985 Constitution), which enshrines “the primacy of the human person as the subject and purpose of social order” (Preamble), as a response to humanist trends of thought.

Guatemala has a republican, democratic, and representative form of government (Article 140 of the Political Constitution). It follows the classical model of the separation of powers, whereby the people delegate their sovereignty to the following branches: Legislature (unicameral) composed of deputies elected by nontransferable universal suffrage for a renewable period of four years (Articles 157 to 172). Executive, composed of a President of the Republic and a Vice President, elected for a non-extendable period of four years by the nontransferable votes of the citizenry. The president appoints his ministers, vice ministers, and secretaries (Articles 182 to 202). Judiciary, with a Supreme Court of Justice elected by the Congress of the Republic, from a shortlist prepared by a Nominations Committee composed of lawyers, law-school deans, and judge-electors (Articles 203 to 222).

A number of oversight bodies exist, including: The Office of the Comptroller General of Accounts, the mandate of which is to oversee revenues, expenditures, and, in general, all financial interests of state agencies, municipalities, decentralized and autonomous entities, and any person receiving funds from the state or making public collections (Articles 232 to 236 of the Political Constitution); the Public Prosecution Service (*Ministerio Público*), responsible for prosecuting offenses on behalf of the state (Article 251); and the Office of the Attorney General of the Nation, the function of which is to advise and consult with state organs and entities, and to represent the state (Article 252).

The new constitutional model introduced three new mechanisms for exercising legal and political control over the state’s actions. The first of these is the Supreme Electoral Tribunal, responsible for all matters relating to the right to vote, political rights, political organizations, electoral authorities and agencies, and the electoral process (Article 223 of the Political Constitution); the Constitutional Court, a

¹ This report was adopted by the Committee in accordance with the provisions of Article 3(g) and 26 of its Rules of Procedure and Other Provisions, at the plenary session held on September 30, 2005, at its eighth meeting, held at OAS Headquarters in Washington D.C., United States, September 26 to 30, 2005

² Guatemala’s updated response to the questionnaire, pp. 1-2.

At the request of Guatemala, its response to the questionnaire, together with the corresponding annexes and complementary information thereto, as well as the documents sent by non-governmental organizations in accordance with the *Rules of Procedure and Other Provisions*, can be found on the following webpage on the Internet: www.oas.org/juridico/Spanish/corresp.htm

permanent court, the basic function of which is to uphold the constitutional order (Article 268 to 272); and the Attorney for Human Rights (Ombudsman), as a commissioner of the Congress of the Republic, responsible for defending basic freedoms (Articles 274 to 275).

In terms of its administrative division, the Republic's territory is divided into departments and these, in turn, into municipalities; however, the right to adopt other forms of administrative subdivisions, in accordance with economic, social, and cultural criteria, exists (Article 224 of the Political Constitution). As an operational body, the National Council for Urban and Rural Development serves to organize and coordinate public administration and it has offices in each department and region of the Republic (Articles 225 and 226).

One of the state's guiding principles is its recognition of municipal autonomy, with municipalities responsible for, *inter alia*: (a) electing their own authorities, (b) obtaining and allocating their resources, and (c) taking charge of local public services, organizing the territory under their jurisdiction, and pursuing their own goals.

Finally, as regards the financial and tax regimes: the Congress of the Republic has the power to decree taxes, duties, and special contributions (Article 239 of the Political Constitution). "Social justice" is also the foundation of the Republic's economic and social regime, whereunder the state is obliged to direct the national economy to make good use of natural resources and human potential, to increase wealth, and to achieve full employment and the equitable distribution of national income (Article 118).

2. Ratification of the Convention and adherence to the Mechanism

According to the official registry of the OAS General Secretariat, Guatemala ratified the Inter-American Convention against Corruption on June 4, 1996, and deposited its instrument of ratification on July 3, 2001.

In addition, Guatemala signed the Declaration on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption on December 19, 2001.

I. SUMMARY OF THE INFORMATION RECEIVED

1. Response of Guatemala

The Committee would like to note the collaboration received from the Republic of Guatemala throughout the process of analysis and, in particular, from the Commission for Transparency and against Corruption, evidenced, *inter alia*, in its response to the questionnaire and in the constant willingness to clarify or complete its contents. The Republic of Guatemala sent the provisions and documents it considered pertinent, a list of which is attached to this report, along with its response.

For its analysis, the Committee took into account the information provided by Guatemala up to January 31, 2005, and the information requested by the Secretariat and the members of the subgroup for analysis, to carry out its functions in keeping with its Rules of Procedure and Other Provisions.

2. Documents received from the non-governmental organization “Acción Ciudadana”

According to the schedule established by the Committee at its Sixth Regular Meeting, it received documents sent by the national chapter of Transparency International in Guatemala, “Acción Ciudadana”³.

II. REVIEW OF THE IMPLEMENTATION OF THE SELECTED PROVISIONS BY GUATEMALA

1. STANDARDS OF CONDUCT AND MECHANISMS TO ENFORCE COMPLIANCE (ARTICLE III, PARAGRAPHS 1 AND 2 OF THE CONVENTION)

1.1. CONFLICTS OF INTEREST

1.1.1. Existence of provisions in the legal framework and/or other measures and enforcement mechanisms

The Republic of Guatemala has a set of provisions related to the standards of conduct, among which special note should be made of the following:

- Constitutional provisions applicable to public servants in general, such as those set out in the following Articles of the Guatemalan Constitution: Article 107 whereby state workers are at the service of the public administration and never at the service of any political party, group, organization or individual; Article 108 whereby relations between the state, its decentralized or autonomous entities, and their workers are governed by the Public Service Law, except when the rules and laws of the individual entities apply; Article 112 whereby no-one may hold more than one paid public job or office, with the exception of those who provide their services at teaching centers or health or welfare institutions and provided their schedules are compatible; Article 113 whereby Guatemalans have the right to secure public office or employment and, in achieving that, attention will only be paid to reasons based on merit, capacity, suitability and honesty; and Article 156 whereby no public, civil or military officer, official or employee is obliged to obey orders that are blatantly illegal or involve the commission of an offense.

- Constitutional provisions applicable to senior public servants, such as those set out in the following articles of the Constitution of the Republic: Article 164 which indicates which individuals are prohibited from holding the office of deputy; Article 186 which establishes prohibitions regarding candidates to the Presidency and Vice Presidency of the Republic; and Articles 215, 233, 251 and 273 which, respectively, provide for a Nominations Committee to appoint the Supreme Court Judges, the Comptroller General of Accounts, the Director of Public Prosecutions and the Attorney for Human Rights (Ombudsman).

³ These documents were received by e-mail and airmail on 31 January 2005.

- Legal provisions applicable to public servants in general,⁴ to prevent conflicts of interest, such as those contained in the Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002): Article 1 whereby, in defining its object, it contemplates the creation of rules and procedures to ensure transparency in the exercise of public administration and ensure strict observance of constitutional and legal provisions when exercising public state functions; Article 6 which stipulates principles of probity; Article 16 which sets out the reasons for disqualifying certain individuals from public office or employment; Articles 18 and 19 which establish restrictions on public officials and employees.

- Legal provisions applicable to the majority of public servants,⁵ such as those contained in the Public Service Law (Decree No. 1748), stipulating the rules governing relations between the Administration and its servants; Articles 64, 65 and 66 which stipulate, in the order in which they appear, obligations, general restrictions and special restrictions on public servants. Articles 75 to 79 of the regulations to this Law (Executive Order No. 18-98) contain other rules (at the regulatory level) imposing restrictions on public servants.

- Legal provisions applicable to public servants in the employment of the Executive Branch,⁶ such as those contained in Article 4 of the Law of the Executive Branch (Decree No.114-97), which states that the State's supreme goal is the common good and that the functions of the Executive Branch must be exercised in pursuance thereof, in keeping with principles such as transparency and probity. Certain regulatory provisions also apply to public servants employed by the Executive Branch. These can be found in Executive Order No. 197-2004 on "Ethical Standards of the Executive Branch,"⁷ which contains standards intended to prevent conflicts of interest, such as those foreseen in Article 5 of the Law of the Executive Branch concerning integrity and transparency; Article 6 on the use of privileged information; Article 9 stipulating the duties of those public servants; Articles 10 and 11 on the independence of the Executive and party-based favoritism; Article 12 on conflicts of interest and abuse of authority; and Article 13 on decorum and public conduct.

⁴ Pursuant to the provisions of Article 4 of the Law on Probity and Responsibilities of Public Officials and Employees, the responsible subjects are all those individuals entrusted with public functions, be they permanent or temporary, remunerated or *pro bono*, particularly "dignitaries, authorities, public officials and employees who, by popular election, appointment, contract or any other form of ties provide services to the state, its agencies, municipalities, corporations and decentralized and autonomous entities" (Article 4, section (a)). "This provision also covers individuals who provide their services to any Guatemalan state entity abroad" (last paragraph of said article). Unconstitutionality was ruled as regards the observation of the private citizens identified in Article 4, sections (b), (c), (d) and (e); file 573-2003 of the Official Journal dated 27 October, 2003.

⁵ For the purposes of this law, pursuant to the provisions of Article 4, a public official or employee is "an individual who holds a position in Public Administration by virtue of an appointment, contract or any other service he is legally bound to provide or through which he is obliged to provide his services or undertake work personally in exchange for a wage, under the permanent dependence and immediate direction of the Public Administration." The Legislative and Judicial Branches have their own Public Service laws.

⁶ Pursuant to the provisions of Article 5 of the Law of the Executive Branch, this Branch covers Ministries, Presidential Secretariats, divisions, departmental governments and bodies which come administratively or hierarchically under the Office of the President of the Republic. The Temporary Commissions, Temporary Committees of the Office of the President of the Republic and the Specific Cabinets also come under the Executive Branch.

⁷ In accordance with the provisions of Article 1 of Executive Order No. 197-2004, the Ethical Standards of the Executive Branch must be heeded by all officials, employees and advisers of the Executive Branch without affecting the provisions contained in other standards.

- Constitutional provisions applicable to public servants in the employment of the Legislative Branch⁸, such as those contained in Article 98 of the Organic Law of the Legislative Branch (Decree No. 44-86), which provides that no Deputy present at the time of voting may be excused from voting, unless he/she has a personal interest in the business or a relative of that person, under the terms of the law, has any personal interest therein; in which case that person may be excused from so doing and must explain to the Plenary prior to the vote, the reasons for abstaining therefrom; and 156, which stipulates that no employee of the Congress, in accordance with the Political Constitution of the Republic, shall be obliged to obey blatantly illegal orders or orders that imply the commission of an offense. Article 25 of the Public Service Law of the Legislative Branch (Decree No. 44-86)⁹ also contains legal provisions designed to prevent conflicts of interest that apply to employees of the Legislative Branch.

- Legal provisions applicable to public employees of the Judicial Branch, such as those contained in the Law of the Judicial Branch (Decree No. 2-89)¹⁰, Chapter II, Articles 122 to 134, establishing impediments, exemptions or disqualifications for judges, arbitrators and experts, secretaries and ancillary staff, and attorneys and party representatives; and Article 26 of the Law of the Judicial Branch (Decree No. 48-99)¹¹, which stipulates restrictions regarding the nomination authorities to that Branch and Article 39 which stipulates restrictions on employees and officials of that Branch.

- Further provisions to prevent conflicts of interest apply to public employees of the Judicial Branch. Chapter II, Articles 4 to 11 of Agreement No. 7-2001, on "Ethical Standards of the Judicial Branch,"¹² stipulate the essential ethical values and principles for the administration of justice; Article 18 establishes basic duties for public officials and employees; Chapter IV, Articles 20 to 25 stipulate standards on the impartiality and independence of public officials and employees; Chapter V, Articles 26 to 31 refer to banned political activities, duties and private interviews; Chapter VII, Articles 35 to 39 deal with influences and relations with the community, and particularly worthy of mention are the first three articles of this chapter which refer to conflict of interests; influence-peddling in lawsuits; decorum and public conduct, respectively.

⁸ In conformity with the provisions of Article 2 of the Organic Law of the Legislative Branch, this Branch is comprised by the Deputies of the Congress of the Republic and technical and administrative personnel.

⁹ Pursuant to the provisions of Article 1 of the Public Service Law of the Legislative Branch, this law regulates the labor rights and obligations of this Branch vis-à-vis its personnel; Article 2 of the law states that "for the purposes of this law, an employee of the Legislative Branch is an individual who holds an administrative position by virtue of appointment, contract or any other legal tie, through which he is obliged to provide his services under the appropriate terms in exchange for a salary, under the ongoing dependence and immediate direction of the Board of Directors of that Branch, or of the appropriate authority, exercising the administrative function."

¹⁰ This law regulates the jurisdictional and administrative functions of the Judicial Branch. In conformity with the provisions of Article 52 thereof, the former correspond fundamentally to the Supreme Court of Justice and the lower courts, and the latter correspond to the Office of the President of the Judicial Branch and the administrative departments and divisions that come under that Office.

¹¹ According to Article 1 of the Public Service Law of the Judicial Branch, this law governs labor relations between the judiciary and its employees and officers. It is also enforced with respect to judges and magistrates, as applicable, in accordance with the provisions of the Judicial Career Law.

¹² Pursuant to the provisions of Article 1 of Agreement No. 7-2001, the Ethical Standards of the Judicial Branch shall apply to the actions of all judges, officials and employees of that Branch, notwithstanding any provisions contained in other rules.

- Legal provisions applicable to certain public servants, designed to prevent conflicts of interest, such as those contained in Article 41 of the Organic Law of the Tax Administration Superintendence – SAT (Decree No. 1-98), which establishes prohibitions on the Tax Administration Superintendent, Intendents and other personnel of the SAT; Article 22 of the Organic Law of the Office of the Comptroller General of Accounts (Decree No. 31-2002), which establishes prohibitions on the Comptroller General and other staff employed by that Office; Article 138 of the Law on Elections and Political Parties, which sets out the impediments to being a member of the Nominations Committees; Articles 6, 7, 8 and 9 of the Financial Supervision Law (Decree 18-2002), which establish eligibility requirements for the Superintendent of Banks, impediments, incompatibility with other posts and general incompatibility, respectively; Articles 3 and 4 of the Code on Notaries (Decree No. 314), which establish prohibitions on exercising and holding office as a notary; Articles 45 and 46 of the Municipal Code which establish prohibitions on Mayors, Trustees and Councilors; Article 50 of the Law Creating the Guatemalan Army, setting out the reasons for loss of military rank, which include serious ethical misconduct, and Article 57 providing for Boards of Honor as a mechanism for enforcing standards of ethical conduct.

- Other provisions designed to prevent conflicts of interest exist. Article 12 of the Law on State Contracting (Decree No. 57-92) establishes impediments on being members of the Bidding Boards; Article 80 sets out prohibitions on bidding, and Article 82 deals with non-compliance with obligations.

The Republic of Guatemala also has mechanisms for enforcing those standards of conduct, notably:

- Article 154 of the Guatemalan Constitution states that officials are vested with authority and are legally accountable for their official conduct and that they are subject to the law and never above it; Article 155 provides for the joint and several civil and criminal liability of public officials and employees who infringe the law.

- Article 4 of the Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002) provides that anyone who fails to comply therewith shall be punished in accordance with the legislation in force; Articles 8, 9, 10 and 13 refer, in the order in which they appear, to their administrative, civil, criminal and joint and several liability; and Article 14 provides that the Congress of the Republic, the Public Prosecutions Service; the Office of the Attorney General of the Nation; the Office of the Comptroller General of Accounts and the authorities that nominate the different bodies of the State, municipalities and their corporations and decentralized and autonomous entities are responsible for upholding that law.

- Article 74 of the Public Service Law (Decree No. 1748) establishes sanctions in order to ensure good discipline among public servants and to punish any violations of the law or other breaches which they might commit during their service. Article 80 of the Regulations to this Law (Executive Order No. 18-98) stipulates the procedure applicable for sanctions and removal from office.

- The sanctions foreseen in the laws governing certain public servants, such as the disciplinary measures established in Article 31 of the Public Service Law of the Legislative Branch (Decree No. 44-86); regulation of disciplinary measures established in Articles 54 to 71 of Title V of said Law; and the disciplinary measures established in Article 40 of the Organic Law of the Tax Administration Superintendence – SAT (Decree No. 1-98).

- The Criminal Code (Decree No. 17-73) contains specific provisions on criminal sanctions for improper behavior related to conflicts of interest, such as Exercising Public Functions Prior to Receiving Approval (Article 426); Extension of Public Functions (Article 427); Abandonment of Office (Article 429); Illegal Appointments (Article 432); Usurpation of Authority (Article 433); and Graft (Article 449).
- The agencies and entities authorized to enforce those standards of conduct, such as the Public Service Office and the various control bodies, referred to in Chapter II, Section 3 of this report.

1.1.2. Adequacy of the legal framework and/or other measures and enforcement mechanisms

The constitutional and legal provisions in relation to standards of conduct aimed at preventing conflicts of interest, and mechanisms for their enforcement, which the Committee has examined by means of the information made available to it, make up a harmonious body of pertinent measures for promoting the purposes of the Convention.

Nevertheless, the Committee believes that it is appropriate to make some observations regarding the advisability of developing and complementing certain legal provisions on the standards and mechanisms referred to.

The legal instrument with the broadest scope regarding standards of conduct for preventing conflicts of interest is the Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002), given its direct relationship with the issue and because it is applicable to all public employees. This law clearly aims to create, preserve and strengthen those standards, as set out in Article III of the Inter-American Convention against Corruption, and it is clearly relevant for attaining those purposes. The following comments, however, should be made:

- Although Articles 18 and 19 of this law contain prohibitions aimed at preventing conflicts of interest, no specific mention is made of provisions for cases where the interests of public servants conflict with those of the entity they serve, such as those derived from their connection with a professional or union association, or a non-governmental organization. The country under review would therefore be well advised to consider the possibility of complementing the existing provisions and specifically regulating any such cases that may arise. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 1.1., paragraph (a) of this report).
- This law does not specifically contain standards to prevent conflicts of interest upon the termination of public functions, such as banning anyone who exercised them from handling cases in which they were recently involved by reason of their official functions. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 1.1., paragraph (b) of this report).
- Nor does this Law foresee any mechanism for answering queries by public servants on possible cases of conflicts of interest, or adopting measures to enable them to quickly remedy conflicts of interest detected, such as an exemption or self-disqualification mechanism. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 1.1, paragraph (c) of this report).

It should be noted in relation to the first of the above-mentioned observations, that one of the documents provided by the non-governmental organization “*Acción Ciudadana*”¹³ states that “...even though Articles 18 and 19 contain different examples where a conflict of interest can be detected, no reference is made to the most common situation: having an interest (in the form of shares or securities for instance, indicating ownership or investment) in companies, organizations or entities which are regulated by public servants.”

Regarding the second observation, although the Committee has found that laws other than the above-mentioned one contain provisions to prevent conflicts of interest upon termination of public functions, these only refer to the restriction on disseminating privileged information after the person has ceased to exercise those functions (Public Service Law, Article 64 [4]; and the Anti-Money Laundering Law, Article 36).

Regarding the third observation, the Committee notes the remark in one of the documents supplied by the non-governmental organization “*Acción Ciudadana*”, which states that “... there should be a list of remedies for situations where conflicts of interest are detected.”¹⁴

Given the foregoing, the Committee feels that the Republic of Guatemala should consider strengthening the implementation of laws and systems regarding the standards and mechanisms referred to.

The Committee wishes to acknowledge Guatemala’s desire to further this process, as reflected in its reply, which states that “the Guatemalan Public Service is in the process of a reform, based on diagnoses by civil society organizations and multisectoral consultation, taken up by the Executive Branch through the Presidential Commission for the Reform, Modernization and Strengthening of the State and its Decentralized Entities – COPRE.”¹⁵

In accordance with the foregoing, the Committee considers appropriate to encourage Guatemala to further the process to reform the Civil Service Law so that it regulates certain aspects related to conflicts of interest that have not yet been developed in the legislation in force. The Committee will make a recommendation in that regard (see recommendation in Chapter III, subsection 1.1., paragraph (d) of this report).

The Committee also finds that the efforts of the country under review to strengthen the mechanisms to prevent conflicts of interest are reflected in the fact that the Law to guarantee the impartiality of the Nominations Committees, the passage of which on 2 March 2005 was reported by that country¹⁶, and contains rules on the subject regarding the make up of important agencies of the State such as the Supreme Court of Justice, the Court of Appeals, the Head of the Comptroller General of Accounts, the Head of the Public Ministry and the Prosecutor General of the Republic and the Supreme Electoral Tribunal.

¹³ Document: “Review of the Law on Probity and Responsibilities of Public Officials and Employees, Decree 89-2002, Proposed Amendments and other standards on Prevention and Control of Conflicts of Interest”, p. 21.

¹⁴ Document: “Review of the Law on Probity and Responsibilities of Public Officials and Employees, Decree 89-2002, Proposed Amendments and other standards on Prevention and Control of Conflicts of Interest.”, pp. 24-25.

¹⁵ Guatemala’s updated response to the questionnaire, p. 10

¹⁶ Document of the reply by the country under review to the comments of the subgroup and the preliminary draft report prepared by the Secretariat (P.2), indicating the following webpage:

www.congreso.gob.gt/gt/mostrar_ley.asp?id=12794

Furthermore, bearing in mind that in its reply¹⁷ the country under review stated that the Code of Ethics of the Office of the Comptroller General of Accounts is awaiting final approval, and given the usefulness of the Code as a means of preventing conflicts of interest in such an important oversight entity, the Committee is of the opinion that the Republic of Guatemala should consider adopting appropriate measures, through the appropriate authority, to expedite approval of the Code. It will therefore make a recommendation on this (see recommendation in Chapter III, subsection 1.1., paragraph (e) of this report).

1.1.3. Results of the legal framework and/or other measures and enforcement mechanisms

According to Guatemala's response,¹⁸ the oversight bodies and the Judicial Branch keep statistics on the scope of their competence and these were given in the reply to the results of general standards of conduct, noting that "the only statistics the Public Service Office (ONSEC) has are those on cases processed by it (processing of requests for justified or unjustified dismissal, etc.)." See Annexes for further information, in particular as regards the results of the Judicial Branch.

The Committee considers that the information on the Office of the Comptroller General of Accounts given in the response¹⁹ reflects that this oversight body has imposed economic sanctions for failure to abide by the applicable laws, including the Law on Probity and Responsibilities of Public Employees (Decree No. 89-2002), and has lodged complaints. However, that information is not sufficiently broken down to be able to determine exactly to which standards of conduct for preventing conflicts of interest it refers.

The Committee considers that the information on the Judicial Branch²⁰ reflects that both the Judiciary Discipline Board and the Disciplinary Regime Unit of the Judicial Branch, establish fines for their employees, but feels that the above comment also applies here, in other words that the information is not sufficiently broken down to be able to determine exactly to which standards of conduct for preventing conflicts of interest the information refers.

The response also gives information on penalties imposed by the Public Criminal Defense Institute²¹ on public defenders and defense lawyers' assistants, among others, and states that the General Supervisory Office of the Public Prosecution Service has processed 572 complaints lodged against its employees, and also that between January and November 2004, the Professional Responsibility Office of the National Police (ORP), reported a total of 1,895 complaints about actions of National Civil Police officers for 46 different reasons. Although this information, like the information contained in the annexes referred to in the response, reflects, as in the previous cases, the development of investigation activities and penalties imposed by oversight bodies in charge of ensuring that standards of conduct are fulfilled to prevent conflicts of interest, the Committee reiterates what has already been said, to the effect that the information is not sufficiently broken down to be able to determine exactly to which of those standards it refers, with the exception of the information corresponding to the ORP, which gives the number of complaints received, the majority of which refer to behaviors legally defined as offenses.

¹⁷ Guatemala's updated response to the questionnaire, p. 4.

¹⁸ Guatemala's updated response to the questionnaire, p. 10.

¹⁹ Guatemala's updated response to the questionnaire, pp. 4-5.

²⁰ Guatemala's updated response to the questionnaire, p. 5 and annexes referred to therein.

²¹ Guatemala's updated response to the questionnaire, p. 7 and annexes referred to therein.

One of the annexes to the reply²² indicates that a Training Program is run by the Office of the Comptroller General of Accounts, and one of the subjects covered by it is the prevention of conflicts of interest. The Committee wishes to acknowledge the country under review for its efforts in this direction.

Lastly, given that the Committee does not have additional information to enable it to evaluate the results of the standards and mechanisms in this area, the Committee will make recommendations in this regard (see general recommendations in Chapter III, subsections 7.2 and 7.3 of this report).

1.2. STANDARDS OF CONDUCT AND MECHANISMS TO ENSURE THE PROPER CONSERVATION AND USE OF RESOURCES ENTRUSTED TO GOVERNMENT OFFICIALS

1.2.1. Existence of provisions in the legal framework and/or other measures and enforcement mechanisms

The Republic of Guatemala has a set of provisions regarding the standards of conduct referred to, notably:

- Article 237 of the Political Constitution which provides that confidential or other expenses, or any expense that cannot be or is not subject to inspection, cannot be included in the General Budget for State Income and Expenditure. It adds that this provision applies to the budgets of any body, institution, corporation or decentralized or autonomous entity.

- Article 1 of the Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002) which, in defining its purpose, provides for measures to prevent resources, property, funds and public securities from being diverted to the detriment of the interests of the State, and to prevent people in the service of the State and other individuals or companies that manage, administer, safeguard, collect or invest funds or public securities, from obtaining any personal gain or illicit enrichment therefrom; Article 17, section (f), whereby anyone who is negligent or careless in the custody, use or destination of public property shall be administratively accountable; and Article 18, which establishes restrictions on public officials and employees, some of which are intended to ensure the conservation and proper use of public resources.

- Articles 1 to 4 of the Organic Law of the Office of the Comptroller General of Accounts (Decree No. 31-2002), regulates matters concerning the legal nature, scope of competence, objectives and attributions of the said entity; Article 5 conceives governmental oversight as the set of principles, organs, standards and procedures that govern and coordinate the exercise of internal and external governmental oversight; and Article 6 provides that the Office of the Comptroller General of Accounts shall regulate matters regarding the technical activities to be exercised by the internal audit units of State agencies, institutions and entities, and, in order to exercise subsequent or concurrent oversight, will also design and implement a comprehensive governmental audit system to examine and evaluate the administrative, financial and management activities of the agencies, entities and persons within the scope of its competence²³.

²² Document "Office of the Comptroller General of Accounts", p. 3.

²³ According to Article 2 of the Organic Law on the Office of the Comptroller General of Accounts, "The Office must externally inspect all assets and liabilities, duties, income and expenditure and, in general, any financial interest of state agencies, autonomous and decentralized entities, municipalities and their corporations, and any

- Articles 7 to 16 of the Regulations to the Organic Law of Office of the Comptroller General of Accounts (Executive Order No. 318-2003), cover governmental oversight; Articles 44 to 48 cover government auditors, stipulating in Article 45 that they shall carry out their functions with absolute independence and shall not be subject to retaliation or harassment for legitimately exercising those functions²⁴.

- Technical standards adopted by the Office of the Comptroller General of Accounts in carrying out its functions, approved in accordance with Internal Agreement No. 09-2003: General Standards for Internal Control; Governmental Auditing Standards; and Internal Governmental Auditing Standards.

- The provisions contained in Article 4 of the Organic Budget Law (Decree No. 101-97)²⁵ providing that any public servant who handles funds or securities belong to the State, or who carries out senior management or management functions, shall be accountable to his immediate superior at least once a year regarding the fulfillment of the purposes for which the public resources entrusted to them were used, and for the form and results of their application; and the subsequent Articles that regulate such aspects as the budgetary system, the budgetary regime of State agencies, evaluation of budgetary execution, the integrated governmental accounting system, the treasury system and the public credit system.

- The Law on State Contracting (Decree No. 57-92) and its Regulations (Executive Order No. 1056-92) which contain standards regulating the purchase and sale and contracting of goods, supplies, works and services required by State agencies, decentralized and autonomous entities, executing units, municipalities and state or municipal corporations.

- The Tax Code (Articles 28, 30 and 96, among others) also contains provisions on the preservation and proper use of public resources; as does the Organic Law of the Tax Administration Superintendence (Articles 1, 3 and 5, among others); and the Municipal Code (Articles 53, 88 and 137, among others).

The Republic of Guatemala also has mechanisms for enforcing the standards of conduct referred to, notably:

- Article 155 of the Political Constitution whereby public officials and employees shall be subject to joint and several civil and criminal liability for infringing that law.

other institution within the non-financial public sector, of any person, entity or institution that receives state funds or makes public collections; of non-financial companies in which the State has a share, under any denomination, as well as corporations in which these have an interest. The management of the receipt, investment or administration of public funds by public works contractors or any national or foreigner acting on behalf of the State shall also be subject to inspection. Public sector entities which by law are subject to other oversight bodies are excepted therefrom. The Office of the Comptroller of Accounts must also ensure that probity, transparency and honesty, as well as the quality of public spending, prevail in public administration.”

²⁴ Pursuant to the provisions of Article 13 of the Organic Law of the Comptroller General of Accounts, the government auditors are appointed and removed by the Comptroller General of Accounts in conformity with the Public Service Law.

²⁵ In accordance with the provisions of Article 2 of the Organic Budget Law, state agencies, decentralized and autonomous entities, any type of corporation in which the State has an interest, and other public sector institutions, are subject to application of that Law.

- The provisions on responsibility and sanctions contained in the different laws and applicable to anyone who infringes standards designed to conserve public resources, such as Articles 4, 8, 9, 10 and 13 of the Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002); Article 74 of the Public Service Law (Decree No. 1748; Articles 38 to 42 of the Organic Law of the Office of the Comptroller General of Accounts (Decree No. 31-2002); Articles 80 to 88 of the State Contracting Law (Decree No. 57-92); and Article 40 of the Organic Law of Tax Administration – SAT (Decree No. 1-98).
- The Criminal Code (Decree No. 17-73) contains specific provisions for punishing unlawful conduct related to public resources, such as Embezzlement of Taxes (Article 358 “C”); Misappropriation of public funds (Article 447); Embezzlement (Article 446); Fraud (Article 450); Illegal Levies (Article 451); and Illegal Charges (Article 452).
- The integrated public management systems provided for in the “Integrated Financial Administration and Government Auditing System project (SIAF – SAG),” whose goals include the oversight, publication and transparency of public resources management, as described in the response of the country under review and in a document attached thereto²⁶, and are as follows: Integrated Administrative Systems: Contracting and Procurement (GUATECOMPRAS), warehouses, state property, human resources, administrative organization; Integrated Financial Administration System (SIAF): Budget, accounting, treasury and public credit; Integrated Accounting System (SICOIN-WEB), Debt Management and Analysis System (SIGADE) and Project Management System (SIGEPRO); Government Auditing System (SAG): Internal and External Oversight; National Public Investment System (SNIP); Project Management System; Tax Administration System (SAT); E-Government; Fiscal Transparency Portal.
- The agencies and entities responsible for enforcing the standards of conduct referred to, such as the Office of the Comptroller General of Accounts and the different oversight bodies, which will be referred to in Chapter II, section 3 of this report.
- There are also provisions related to the mechanisms for the conservation and proper use of public resources in Article 229 of the Code of Civil and Merchant Procedure (Decree Law No. 107), which establishes summary trials for ruling on the civil responsibility of public officials and employees.

1.2.2. Adequacy of the legal framework and/or other measures and enforcement mechanisms

The standards and mechanisms on the conservation and proper use of public resources examined by the Committee based on the information available to it are relevant for promoting the purposes of the Convention.

Notwithstanding the foregoing, the Committee deems that the Republic of Guatemala should consider strengthening the implementation of laws and regulatory systems regarding those standards and mechanisms.

²⁶ Guatemala’s updated response to the questionnaire, p. 12; and document “Integrated Financial Administration System and Government Auditing System Project (SIAF – SAG).

First, bearing in mind that Article 1 of the Law on Probity and Responsibilities of Public Officials and Employees mentions that one of its goals is to prevent persons in the service of the State and other individuals or corporations who handle, administer, care for, collect or invest funds or public securities from obtaining a personal gain or illicit enrichment therefrom, the Committee considers that this law would be complemented by criminalizing illicit enrichment as an offense by the country under review. The Committee will make a recommendation in that regard (see recommendation in Chapter III, subsection 1.2., paragraph (a) of this report).

The Committee wishes to acknowledge the willingness of the country under review to further its work in that direction, which is evident by the existence of various bills that seek to make illicit enrichment as a criminal offense.²⁷

Second, the Committee, taking into account, as mentioned in section 1.1.2. of this report, that the country under review stated in its response²⁸ that the Code of Ethics of the Office of the Comptroller General of Accounts is pending final approval, and given the usefulness of that Code, not only to prevent conflicts of interest, but also as a means of conserving public resources, since it is aimed at employees of such an important entity for its control, the Committee also proposes that in relation thereto, the Republic of Guatemala consider, through the appropriate authority, adopting the appropriate measures for issuing that Code, and will make a recommendation to that effect (see recommendation in Chapter III, subsection 1.1., paragraph (e) of this report).

1.2.3. Results of the legal framework and/or other measures and enforcement mechanisms

The response by the Republic of Guatemala²⁹ states that “the implementation of tools for transparency, efficiency and oversight that has taken place as part of the state’s modernization process has substantially improved the mechanisms and procedures for information oversight and access, as can be seen in the statistics and information furnished in this questionnaire. Efforts are currently underway to improve the enforcement of those tools and to publicize them across the nation, particularly within the municipalities.”

It goes on to refer to the information documented in the following annexes: “Work Report 2003” and “Management Report 2004” of the Office of the Comptroller General of Accounts, and provides the following data on that entity:

²⁷ In the response of the country under review to the comments made by the members of the review subgroup and to the preliminary draft report prepared by the Secretariat (p.3), Guatemala notes that “the Committee for Transparency and against Corruption discussed and prepared in consensus with representatives of civil society organizations, the Public Prosecution Service, the Interior Ministry, the General Secretariat, and the Office of the Comptroller General of Accounts, the legislative bill that reforms Decree 17-73 of the Congress of the Republic (Criminal Code). The bill, submitted to the legislature by the President of the Republic, aimed, *inter alia*, to classify the crimes of illicit enrichment and failure to submit a sworn statement of net worth was examined by this organ on July 13, 2005, and assigned Registry Number 3277.” At the review subgroup meeting, Guatemala also noted that another legal initiative exists with respect to this area.

²⁸ Guatemala’s updated response to the questionnaire, p. 4.

²⁹ Guatemala’s updated response to the questionnaire, pp. 13-14.

“During 2003, 463 penalties for violations of the Law on Probity and Responsibilities of Public Officials and Employees were imposed and paid, in an amount totaling four hundred and seventy-two thousand, four hundred quetzales (Q 472,400.00); 160 violations of the Law of the Court of Accounts and the Law of the Office of the Comptroller General of Accounts in the amount of one hundred and fifty-two thousand, nine hundred quetzales (Q 152,900.00); and 259 violations of the Law on State Procurement and Contracting in the amount of eight hundred and twelve thousand, two hundred quetzales (Q 812,200.00).”

“During 2003, the Trials Section conducted 936 economic/coercive trial actions, in the amount of thirty-four million, five hundred and twenty-one thousand, six hundred quetzales (Q 34,521,600.00). It also carried out 3,190 account trial activities worth nine billion, six hundred and forty million, eight hundred and seventy-five thousand, eight hundred quetzales (Q 9,640,875,800.00). A further 14,805 sundry activities accounted for forty-five million, six thousand, nine hundred quetzales (Q 45,006,900.00).”

The Committee considers that the above information shows that the Office of the Comptroller General of Accounts has been active in overseeing the laws referred to therein, as well as matters concerning accounts proceedings which warrant recognition. Moreover, the fact that it has a Training Plan should be acknowledged³⁰.

The response also mentioned³¹ that “the State Contracts and Procurement System (GUATECOMPRAS) is an Internet-based electronic market that the state of Guatemala uses to buy goods and contract services. Its goals include developing a framework of transparency, with clear and stable rules in order to secure the trust of domestic and foreign suppliers, streamline purchasing operations, avoid risks, and eliminate losses in operations carried out by the state. This system is audited by civil society, which monitors its appropriate use and the complaints of irregularities lodged by users and suppliers. Only one year after its implementation, the system has been put into place by the various public entities and by more than 50% of the country’s municipalities; more than 3,000 users have received training; and, as of November 2004, 5,200 contracts worth a total of Q638 million had been awarded under conditions of transparency.”

Based on the above information and the importance of the State Contracting and Procurement System (GUATECOMPRAS) to which it refers, the Committee feels that the country under review should consider taking steps to complete its implementation. The Committee will make a recommendation to that effect (see recommendation in Chapter III, subsection 1.2. paragraph (b) of this report).

The Committee also deems it important to bear in mind within this paragraph of the report, a document which the country under review attached to its response, which was sent by the Ministry of Foreign Affairs to the Presidential Transparency and Anti-Corruption Commissioner,³² which contains information on a communiqué by the United Nations Verification Mission in Guatemala (MINUGUA) and in two of its paragraphs states that:

“The UN Mission considered it valid to insist on the need to handle the funds collected transparently. However, it added that this argument must not be used as a pretext to hamper the move to increase taxes or justify their evasion.”

³⁰ Document “Office of the Comptroller General of Accounts”, p. 3.

³¹ Guatemala’s updated response to the questionnaire, p. 14.

³² Document No. 004056 of the Ministry of Foreign Affairs of Guatemala, 20 May 2004.

“Within this context...the Mission considers that this administration’s efforts to fight corruption and demonstrate transparency and responsibility in the handling of public funds are relevant”

Based on the above information, the Committee deems that it would be useful to encourage the country under review to continue to adopt measures to ensure that funds collected are handled transparently, and the Committee will make a recommendation to that effect (see recommendation in Chapter III, subsection 1.2, paragraph (c) of this report).

The Committee also considers it advisable for Guatemala to extend awareness of the electronic tools designed to improve oversight of and access to financial and bookkeeping information via the various electronic systems described in sub-section 1.2.1 of this report. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 1.2., paragraph (d) of this report)

Lastly, considering that the Committee lacks additional information with which to make a comprehensive evaluation of the results of the standards and mechanisms in this area, it will make recommendations in this regard (see general recommendations in Chapter III, subsections 7.2 and 7.3 of this report).

1.3. MEASURES AND SYSTEMS REQUIRING GOVERNMENT OFFICIALS TO REPORT TO APPROPRIATE AUTHORITIES ACTS OF CORRUPTION IN THE PERFORMANCE OF PUBLIC FUNCTIONS OF WHICH THEY ARE AWARE

1.3.1. Existence of provisions in the legal framework and/or other measures and enforcement mechanisms

The Republic of Guatemala has a set of provisions on the standards of conduct and mechanisms referred to, notably:

- Article 457 of the Criminal Code provides that public officials or employees who, by the virtue of their position become aware of the commission of an offense and who knowingly fail to or delay making the corresponding report to the appropriate judicial authority, shall be fined between one hundred and one thousand quetzales.

-Article 298 of the Code of Criminal Procedure (Article 298) provides that anyone who in the performance of their functions becomes aware of the commission of an offense, with the exception of those that require a petition, complaint or authorization in order to be prosecuted, must report such offenses without delay, and Article 299 provides that the reporting of such offenses shall, as far as possible, contain a circumstantial narrative of the events, indicating those who participated therein, who were affected thereby and who were witnesses thereto; elements of proof, the events leading up to it and the known consequences.

- The provisions governing the duty of public servants to report actions, such as those set forth in Article 8 of Executive Order No. 197-2004 on “Ethical Standards of the Executive Branch,” whereby if public officials and employees and advisers of the Executive Branch who, by virtue of their position, become aware that a colleague, collaborator or subordinate has committed an inappropriate or dishonorable act, they must take legal steps before the appropriate organs; Agreement No. 7-2001 on “Ethical Standards of the Judicial Branch,” provides that when an administrator of justice or any other employee becomes aware

that an inappropriate or dishonorable act has been committed by a colleague or attorney, he must take appropriate steps; and Article 30 of the Organic Law of the Office of the Comptroller General of Accounts (Decree No. 31-2002), which provides for the obligation of government auditors to report to the appropriate authority the commission of possible offenses discovered in the performance of their functions³³.

- Article 6 of the Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002) states among the principles of probity set forth in paragraphs (g) and (k) thereof, respectively, measures “supporting efforts to detect instances of corruption through the implementation of mechanisms to encourage their being reported;” and “establishing administrative procedures that facilitate the reporting of acts of corruption.”

- Article 1 of the Law for the Protection of Persons Involved in the Conduct of Judicial Proceedings and Persons Linked to the Administration of Criminal Justice (Decree No. 70-96), states that the essential objective of the protection service is to provide protection for officials and employees of the Judicial Branch, the civil security forces and the Public Prosecution Service, as well as for witnesses, experts, consultants, supporting complainants and other persons exposed to risks for their involvement in criminal proceedings³⁴; and Article 8 which provides for the benefits covered by this service³⁵.

1.3.2. Adequacy of the legal framework and/or other measures and enforcement mechanisms

The standards and mechanisms on measures and systems for requiring that public officials report to the appropriate authorities acts of corruption committed in the performance of their public functions, examined by the Committee based on information at its disposal, are relevant for the promotion of the purposes of the Convention.

Nevertheless, the Committee considers that the Republic of Guatemala should consider strengthening the existing mechanisms in this area.

In order to do so the Committee considers that it would be useful to encourage public servants to comply with their duty to report such cases and adopt and implement additional protective measures for persons reporting such acts, thus safeguarding them from the threats or retaliation that might be directed at them on account of having complied with that obligation, to complement any that may already exist to protect people involved in a criminal proceeding. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 1.3., paragraph (a) of this report.

³³ Article 30 of the Organic Law of the Office of the Comptroller General of Accounts refers to “possible crimes against the assets of agencies, institutions, entities and persons subject to oversight.”

³⁴ Article 1 of the Law for the Protection of Persons Involved in the Conduct of Judicial Proceedings and Persons Linked to the Administration of Criminal Justice, also provides that “Journalists who require this because their duty to inform puts them at risk shall also be covered.”

³⁵ Article 8 of the Law for the Protection of Persons Involved in the Conduct of Judicial Proceedings and Persons Linked to the Administration of Criminal Justice, provides that the protection service shall include: a) Protection for the beneficiary, with security personnel; b) Change of beneficiary’s place of residence, which may include housing, transportation and sustenance expenses; c) Protection, with security personnel, of the beneficiary’s residence and place of work; d) Change in the beneficiary’s identity; e) Any other benefits deemed advisable by the council.

The Committee considers that:

There are provisions such as those contained in the “Ethical Standards of the Executive Branch” and in the “Ethical Standards of the Judicial Branch,” which see the obligation to file a report not only in relation to acts classified as offenses, but also in relation to inappropriate or dishonorable acts learned of by virtue of their position, which is relevant for promoting the purposes of the Convention, since such acts might also be acts of corruption.

Notwithstanding the foregoing, even though there are provisions that contain protection measures that could be applied to persons who report acts of corruption, such as those contained in Article 8 of the Law for the Protection of Persons Involved in the Conduct of Judicial Proceedings and Persons Linked to the Administration of Criminal Justice, those provisions are basically aimed at people involved in a criminal proceeding and do not cover public servants when they report inappropriate or dishonorable acts which, though they may not be defined as criminal offenses, might be classified as acts of corruption. On the other hand, the protection measures provided for therein are intended to afford effective protection from any reprisals they might incur as a result of performing that duty.

The Committee considers that the suggestions made will also contribute to the effectiveness of the principles of probity set forth in Article 6, paragraphs (g) and (k), of the Law on Probity and Responsibilities of Public Officials and Employees, and recognizes the willingness of the country under review to make progress in the direction indicated, which is evident in its response, in which it refers to the existence of an initiative, the “Model Law on the Protection of Persons who Report Acts of Corruption, “which is pending discussion, to complement the framework of protection for persons who lodge such complaints”.³⁶

1.3.3. Results of the legal framework and/or other measures and enforcement mechanisms

The response by the Republic of Guatemala on this matter³⁷ furnishes information on criminal behavior connected with corruption and reported to the Office of the Prosecutor for Corruption between 2001 and 2003, such as Embezzlement, Abuse of Authority, Fraud and Illegal Charges and Levies; as well as in connection with Money Laundering, reported to the Office of the Prosecutor for Money Laundering in 2003 and during the first quarter of 2004. It also refers to the statistics of reports filed and processed by the different disciplinary bodies.

The Committee considers that the above information shows that reports have been filed with the appropriate authorities on the acts of corruption referred to in the Convention for the purposes of bringing these acts to the attention of the authorities. However, the Committee notes that the information has not been sufficiently broken down so as to allow differentiation between the reports filed by public officials and those filed by the general public.

In another part of the response on this subject, the country under review reported specific projects underway to facilitate the lodging of complaints and to fight corruption within the public entities, one of which is the implementation of an Anti-Corruption Commission of the Judicial Branch; the Strengthening of the Complaints System; the Letterbox Project in all the offices of the Executive

³⁶ Guatemala’s updated response to the questionnaire, p. 17.

³⁷ Guatemala’s updated response to the questionnaire, p. 16.

Branch, as well as the e-mail and hotline system; and the “Anti-corruption Telephone Line” accessible over the telephone or the Internet, run by the Office of the Comptroller General of Accounts.

The Committee wishes to acknowledge the country under review for its endeavor to offer public officials new ways of lodging complaints about acts of corruption, taking into account moreover the recent issuance of standards on the subject, and it considers that it would be useful to implement training programs for public officials on those standards, as well as programs to disseminate the methods referred to, in order to encourage their use. The Committee will make a recommendation to that effect (see recommendation in Chapter III, subsection 1.3., paragraph (b) of this report).

Lastly, considering that the Committee lacks additional information to enable it to make a comprehensive evaluation of the standards and mechanisms in this area, it will make recommendations in this regard (see general recommendations, Chapter III, subsections 7.2 and 7.3 of this report).

2. SYSTEMS FOR REGISTERING INCOME, ASSETS AND LIABILITIES (ARTICLE III, PARAGRAPH 4 OF THE CONVENTION)

2.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of provisions on the systems referred to, notably:

- The Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002), which states in Article 20 that the Sworn Statement of Net Worth is a statement of assets, interests and obligations that public officials are required to submit, under oath, to the Office of the Comptroller General of Accounts, as a prerequisite to holding such position or employment and, upon separation therefrom, as a prerequisite for the corresponding termination papers to be issued. The law stipulates that this obligation applies to all persons referred to in Article 4, section (a) of this law³⁸, with the exception of those whose monthly salary amounts to less than eight thousand quetzales (Q8,000.00)³⁹, and who do not manage or administer public funds. It also applies to all public officials and employees who work at customs stations, border posts, in the General Migration Directorate, ports and airports in the country, or have been temporarily assigned to those places.

Articles 21, 22, 23, 26, 27 and 28 of said Law which state, respectively, the confidentiality of the Sworn Statement of Net Worth⁴⁰; the times and periods of their presentation; the requisites and minimum

³⁸ Pursuant to the provisions of Article 4 (section a.) of the Law on Probity and Responsibilities of Public Officials and Employees, these include all persons invested with permanent or temporary, remunerated or pro bono public functions, particularly: “public dignitaries, authorities, officials and employees who, by popular election, appointment, contract, or through any other form of ties, provide services to the state, its bodies, municipalities, corporations, and decentralized and autonomous entities.” The inclusion of individuals contained in sections b, c, d, and e, of that article, was declared unconstitutional, as set forth in file 573 – 2003, Official Journal dated 27 October 2003.

³⁹ This sum amounts to approximately ONE THOUSAND U.S. DOLLARS (\$ 1,000), as mentioned on p. 4 of the document “Independent Follow-Up Report to the Implementation of the Inter-American Convention against Corruption,” presented by the NGO “Acción Ciudadana”.

⁴⁰ Article 21 of the Law on Probity and Responsibilities of Public Officials and Employees, provides that the “information provided by public officials in their sworn statements of net worth must be taken as provided under guarantee of confidentiality; the publication thereof in any form is prohibited and it can only be audited as part of a judicial proceeding.”

content of the information that must be provided⁴¹; cases where they must be expanded upon; responsibility for failing to submit the statement; and persons exempt from presenting it.

Article 24 of said Law, which provides that once the Statement of Net Worth has been presented, the Office of the Comptroller General of Accounts may verify it by obtaining any reports it deems necessary and taking whatever steps that are necessary; and if a public official ceases to hold a position, the aforementioned Office must establish the procedure to be followed if the verification shows that the information provided was not accurate.

Article 29 of said Law stipulates that when the Sworn Statement of Net Worth is presented as a result of a public official leaving his or her position or employment, the Office of the Comptroller General of Accounts of the Nation shall make a comparative study of the assets and liabilities that the obligee included in his/her different statements, in order to determine whether there is any case of any illicit enrichment or any other act that might incur legal liability.

- The forms for presenting the Sworn Statement of Net Worth (form DJP-1), issued by the Office of the Comptroller General of Accounts in keeping with the provisions of Article 23 of the Law on Probity and Responsibilities of Public Officials and Employees, indicating the information that must be supplied by the declarer.

- Article 42 of the Organic Law of the Tax Administration Superintendence – SAT (Decree No. 1-98) stipulates that in addition to complying with the obligations under the Law on Probity and Responsibilities of Public Officials and Employees all SAT personnel must present to the Board of the SAT, prior to commencing employment and annually thereafter, a comparative statement of net worth, indicating the cause of changes in their assets, in accordance with the guidelines set out in that agency's employment regime.

⁴¹ Article 23 of the Law on Probity and Responsibilities of Public Officials and Employees, provides that the Sworn Statement of Net Worth be submitted on printed forms provided by the Office of the Comptroller General of Accounts and must contain at least the following information:

- a) Full name, personal identification information, tax identification number, positions as members of boards and/or councils in corporations, companies and associations; permanent address of the declarer;
- b) Full name and personal identification of the spouse or companion, and their dependent children;
- c) Statement of sums earned by him/her and his/her spouse or companion and their dependent children in the past year;
- d) Identification of current and savings accounts in Guatemala and abroad, if applicable, held by the declarer, his/her spouse or companion, or their dependent children;
- e) Up-to-date detailed list of property and interests belonging to the declarer, his/her spouse or companion and their dependent children. Data must be provided on the following as a minimum: real estate and personal property, funds, securities held and loans received. The assets must be described and identified in full. In the case of real estate, it is not necessary to give the declared value to the corresponding fiscal authority. It is sufficient to give the estimated value. The estimated value of personal property may be given. In no case will the values assigned to real property be used for fiscal or tax purposes;
- f) Detailed list of outstanding amounts due or owed by the declarer, his/her spouse or companion and their dependent children. In the case of monies due, debts and other liabilities, their amount, nature and the name of the creditor or beneficiary must be given; and,
- g) Information on the existence of a current marital status or common law relationship between permanent companions. The Sworn Statement of Net Worth must specify that the assets and income declared are the only ones possessed by the declarer, either personally or through an intermediary, at the date on which the statement was made.

2.2. Adequacy of the legal framework and/or other measures

The standards in relation to the systems for the declaration of income, assets and liabilities that the Committee has examined, based on information available to it, are pertinent for promoting the purposes of the Convention.

Nonetheless, the Committee is of the view that it would be useful for the Republic of Guatemala to consider strengthening the existing systems in this area.

First, the Committee finds that according to Article 21 of the Law on Probity and Responsibilities of Public Officials and Employees, the information on sworn statements is provided by public officials under guarantees of confidentiality and the making public thereof is prohibited. Taking into account that the Convention refers specifically to systems for making such registrations public “where appropriate,” the Committee considers that the Republic of Guatemala should, in accordance with the fundamental principles of Guatemalan legislation, consider regulating the conditions, procedures and other aspects under which it would be in order to make public such statements and will make a recommendation on the matter (see recommendation in Chapter III, section 2, paragraph (a) of this report).

Second, bearing in mind that Article 29 of the Law on Probity and Responsibilities of Public Officials and Employees provides that when the sworn statement of net worth is presented when a public servant leaves his or her position or employment, a comparative study will be made of the assets and liabilities that the obligee included in his/her different statements, in order to determine the existence of illicit enrichment. The Committee considers that this law would be complemented by criminalizing illicit enrichment as an offense. The Committee, as already stated in section 1.2.2 of this report, acknowledges the efforts of the country under review as reflected by the existence of various draft legislation to make such behavior a criminal offense. Hence it will make a recommendation to that effect. (See recommendation in Chapter III, subsection 1.2., paragraph (a) of this report).

Third, the Committee notes from the provision contained in Article 29 of the Law on Probity and Responsibilities of Public Officials and Employees that there is clearly the intention to use the statements to detect possible cases of illicit enrichment, but believes that the country under review should also consider using them as a means of preventing conflicts of interest when appropriate, bearing in mind that they contain information that would facilitate this, such as the information sought in paragraphs (a) and (f) of Article 23, regarding first the position of the declarer as a member of a board or council and/or partner in corporations and associations; and second, the detailed list of amounts due to or owed by the declarer, his/her spouse or companion and dependent children, and, if requested in the case of amounts due, debts and other liabilities, that their amount and nature and the name of the creditor or beneficiary be given (see recommendation in Chapter III, section 2, paragraph (b) of this report).

Furthermore, the Committee deems that, given the optional nature of oversight by the Office of the Comptroller General of Accounts, regarding the information declared in the statements presented upon entering office (Article 24 of the Law on Probity and Responsibilities of Public Officials and Employees), and also taking into account that article 21 of the aforementioned law provides that this information can only be verified in a judicial proceeding the Republic of Guatemala consider harmonizing and strengthening the provisions for verifying the content of those statements so that the entity will have systems that will enable it to carry out checks that fall under its competence in a timely manner, using methods such as sampling, goal-setting and timelines for that purpose. The Committee will make a recommendation to that effect (see recommendation in Chapter III, section 2, paragraph (c) of this report).

Lastly, the Committee finds that in the forms issued by the Office of the Comptroller General of Accounts for the presentation of statements, by virtue of the provisions of Article 23 of the Law on Probity and Responsibilities of Public Officials and Employees, declarers are not asked for all the minimum information required by the standard, so there is nowhere for them to “declare the sums earned by them and their spouses or companions and dependent children in the past year” (paragraph (c) of said Article). Moreover, the Committee considers it advisable that those forms request information on all assets held abroad, which would be consistent with requiring that this be done in the case of current and savings account, and with the provision contained in the last paragraph of said Article, which states that the “the sworn statement of net worth must specify that the assets and income declared are the only ones owned by the declarer, either personally or through an intermediary, at the date on which the statement was made.” Taking these considerations into account, the Committee will make a recommendation (see recommendation in Chapter III, section 2, paragraph (d) of this report).

The Committee points out that in some of the documents provided⁴² the non-governmental organization “*Acción Ciudadana*” has also referred to the confidential nature of sworn statements of net worth, suggesting that the restrictions on access to the information contained in them be eliminated. It has recommended that illicit enrichment be made a criminal offense, and that statements should also be used to prevent conflicts of interest. It has also stressed the fact that verification of the information contained on the statements presented upon entry to a post is optional, and has emphasized the inconsistencies between the information from declarers on the forms designed for submitting statements and required under Article 23 of the Law on Probity and Responsibilities of Public Officials and Employees.

2.3. Results of the legal framework and/or other measures

On this matter, the response from Guatemala⁴³ notes that the following information was received from the Office of the Comptroller General of Accounts:

“The Probity Section, during 2003, received 4,707 requests for first statements of assets and debts; 1,086 requests for additional information; 631 second statements; 1,083 dossiers with suggested penalties; 417 dossiers received with penalties assessed; 19,529 items of correspondence received; 48,134 items of correspondence sent; and summonses served on 244 individuals for various reasons. The suggested penalties totaled ninety-three million, five hundred and ninety-four thousand quetzales (Q 93,594,000.00). Additionally, the dossiers received by the Section with penalties assessed totaled four hundred and fifty-two thousand, one hundred quetzales (Q 452,100.00).”

The country under review also supplied information on the number of statements presented between 1997 and 2004 and reported that “the improvement of the legal framework, together with the favorable disposition of the current authorities, has led to a substantial increase in the submission of first statements, updates and final declarations, as can be seen in the enclosed statistics.”

⁴² Documents “Independent Report on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption,” Pages 3 to 10; and “Analysis of the Law on Probity and Responsibilities of Public Officials and Employees, Decree 89-2002, of the Proposed Amendments and other standards on the Prevention and Control of Conflicts of Interest”, pp. 25-35.

⁴³ Guatemala’s updated response to the questionnaire, p. 19.

The Committee considers that the above information shows that the Office of the Comptroller General of Accounts has been active in developing a system for declaring net worth. However, the Committee considers that it does not have sufficient information to enable it to determine the level of compliance with the obligation by individuals required to submit statements, as it does not have information on the total number of individuals. Nevertheless, as mentioned by the country under review in its response, the figures provided show an increase in the number of statements presented in the last two years, which in itself warrants recognition.

Lastly, since the information is not sufficiently broken down to enable the Committee to make a comprehensive evaluation of the results of the standards and mechanisms on this subject, it will make recommendations in this regard (see general recommendations in Chapter III, subsections 7.2 and 7.3, of this report).

3. OVERSIGHT BODIES FOR THE SELECTED PROVISIONS (ARTICLE III, PARAGRAPHS 1, 2, 4 AND 11 OF THE CONVENTION)

3.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of standards with respect to the high-level oversight bodies responsible for performing the functions necessary to ensure that the measures described in Article III, paragraphs 1, 2, 4, and 11 of the Convention are fulfilled. The following bodies should be mentioned in particular:

- The Public Prosecution Service which, pursuant to Article 1 of its Organic Law (Decree No. 40-94), conducts criminal prosecution and directs investigations on actionable offenses. Its highest authority is the Prosecutor General of the Republic and it has a Sectional Anti-Corruption Prosecutor's Office which, as provided for in Article 1 of its Rules on Organization and Functions (Agreement No. 01-2000), is in charge of the investigation, criminal prosecution and criminal proceedings of all offenses committed by officials, public employees and individuals in relation to public administration and all crimes against the economy of the country and the tax and customs regimes. The Public Ministry also has the support of the National Civil Police, pursuant to Article 21 of the aforementioned Organic Law and Article 10 of the Law of the National Civil Police (Decree No. 11-1997).

- The Office of the Comptroller General of Accounts which, pursuant to the provisions of Article 2 of its Organic Law (Decree No. 31-2002), exercises external oversight of the assets and liabilities, interests, income and expenditure and, in general, any financial interest of state agencies, autonomous and decentralized entities, municipalities and their corporations, and any other institutions comprising the non-financial public sector; any person, entity or institution that receives funds from the state or collects funds on behalf of the state; non-financial companies in which the state has an interest of any kind, as well as companies in which they have an interest.⁴⁴ In accordance with the provisions of Article 34, paragraph (f), of its Organic Law, it must also promote participation by citizens through public observation or other mechanisms to strengthen the transparency, probity and credibility of public management. Articles 20 to 30 of the Law on Probity and Responsibilities of Public Officials and Employees, also give it attributions regarding Sworn Statement of Net Worth.

⁴⁴ Article 2 of the Organic Law of the Office of the Comptroller General of Accounts adds that the handling of public funds on behalf of the state by contractors of public works and any national or foreigner, who receives, invests or administers public funds, is also subject to oversight. The Office of the Comptroller General of Accounts must also see that public administration and public spending are exercised with probity, transparency and honesty.

- The Court of Accounts which has the exclusive purpose, according to the provisions of Articles 42 and 45 of the Law of the Court of Accounts (Decree No. 1126), to hear cases involving proceedings to obtain payment of debts on behalf of the state treasury, the municipalities, autonomous entities and decentralized institutions.⁴⁵

- The Ministry of Public Finance which in accordance with the provisions of Article 35 of the Law of the Executive Branch (Decree No. 114-97), must abide by and enforce matters relating to the state's legal fiscal regime, including the collection and administration of fiscal revenue, management of internal and external financing, budgetary execution and the registration and oversight of state assets.

- The Public Prosecution Service, which in accordance with Article 252 of the Political Constitution, provides advisory and consulting services for state bodies and entities, and whose organization and operation are governed by its organic law (Decree 67-2002).

- The National Public Service Board and the National Public Service Office which, in accordance with the provisions of Article 9 of the Public Service Law, are the high-level bodies in charge of applying that law.⁴⁶

Article 14 of the Law on Probity and Responsibilities of Public Officials and Employees (Decree No. 89-2002), indicates that the following institutions are the lead agencies responsible for monitoring the Law: the Congress of the Republic; the Public Prosecution Service; the Office of the Attorney General of the Nation; the Office of the Comptroller General of Accounts; and the authorities in charge of the different state agencies, municipalities and their decentralized and autonomous entities.

3.2. Adequacy of the legal framework and/or other measures

The Republic of Guatemala has a set of standards with respect to the high-level oversight bodies responsible for performing the functions in carrying out the provisions described in Article III, (1), (2), (4) and (11) of the Convention. These standards cover those provisions bearing in mind that there are oversight bodies that have general or specific jurisdiction on the matter. On the basis of the information made available to it, the Committee notes that the Republic of Guatemala has, in this regard, the standards it requires in order to promote the purposes of the Convention.

Nevertheless, the Committee feels that it would be useful in the first place for the country under review to consider strengthening existing institutional coordination mechanisms and promote new mechanisms to this end, when appropriate, taking into account that by virtue of the provisions contained in the Law on Probity and Responsibilities of Public Officials and Employees for instance, there are overview bodies that carry out similar functions and whose common objective is to combat corruption. The Committee will make a recommendation on this (see recommendation in Chapter III, section 3 of this report).

⁴⁵ The sums owed referred to in this paragraph are those resulting from a verdict of guilty in the case of accounts, fines and delays in paying tax liabilities. According to the provisions of Article 55 of the Law of the Court of Accounts, in order to bring a suit for accounts, first of all there must be an audit file with unresolved objections, handled and formulated by the Office of the Comptroller General of Accounts.

⁴⁶ Article 11, 13 and 19 of the Public Service Law, regulate the composition, organization and functions of the National Public Service Board, as the executive body in charge of enforcing it, and the functions of its Director and Deputy Director.

3.3. Results of the legal framework and/or other measures

The response received from the Republic of Guatemala on this⁴⁷ states that “The above sections contain the statistical results of the Public Prosecution Service, the Office of the Comptroller General of Accounts, and the different named disciplinary bodies.”

Since the statistical results referred to in the sub-paragraph quoted above from the response received from the country under review have already been analyzed and commented on in previous sections of this report, the Committee refers to what was said in those sections (see subsections 1.1.3; 1.2.3; 1.3.3; and 2.3 of this report).

Finally, considering that the Committee does not have additional information other than that referred to above that might enable it to make a comprehensive evaluation of the results achieved by each individual oversight body, compared with each of the provisions provided for in Article III (1), (2), (3), (4) and (11) of the Convention, considered individually, the Committee will make recommendations in this regard (see general recommendations in Chapter III, subsections 7.2 and 7.3 of this report).

4. MECHANISMS TO ENCOURAGE PARTICIPATION BY CIVIL SOCIETY AND NONGOVERNMENTAL ORGANIZATIONS IN EFFORTS TO PREVENT CORRUPTION (ARTICLE III, PARAGRAPH 11 OF THE CONVENTION)

4.1. GENERAL PARTICIPATION MECHANISMS

4.1.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of provisions and measures with regard to the mechanisms referred to, notably:

- Article 28 of the Political Constitution provides for the right to petition; Article 29 provides that all individuals shall have free access to the courts and to state offices and agencies, to pursue legal actions and assert their rights in accordance with law; Article 30 provides that all acts of the administration are considered public; Article 31 provides that all individuals have the right to know what is said about them in archives and files; Article 98 states that the communities have the right and the duty to participate actively in the planning, implementation and evaluation of health programs; Article 173 provides that major policy decisions should be submitted to a referendum by all citizens; and Article 280 provides for a referendum to reform the Political Constitution.

- Article 1 of the Law of Urban and Rural Development Councils (Decree No. 11-2002), states that the Councils have been set up in order to organize and coordinate public administration through the formulation of urban and rural development policies, and also to coordinate land planning, promote organization and encourage the population to participate in the country’s overall development, by creating a National System of Urban and Rural Development Councils.

- Article 2 of the General Law on Decentralization (Decree No. 12-2002) states that decentralization is a process through which the Executive Branch transfers decision-making, competence, functions and funding for national public policies to the municipalities and other State institutions and legally

⁴⁷ Guatemala’s updated response to the questionnaire, p. 21

organized communities, with the participation of the municipalities, by implementing municipal and local policies under the aegis of the broadest possible citizens participation in the public administration, the prioritization and execution of works projects, the organization and provision of public services, and the maintenance of social oversight over the government's activities and the use of state resources.

- Article 2 of the Municipal Code (Decree No. 12-2002) provides that the municipality is the basic unit of organization of a state's territoriality and is the means whereby citizens can take an active part in public affairs; Article 17 empowers citizens to participate actively and voluntarily in the formulation, planning, implementation and evaluation of public, municipal and community policies.

Articles 1, 10, 11 and 19 of the Law on Social Development (Decree No. 42-2001), Articles 2, 9, and 53 of the Regulations of the Councils for Urban and Rural Development (Executive Order No. 461-2002); and Articles 3 and 34, paragraph (f) of the Organic Law of Office of the Comptroller General of Accounts (Decree No. 31-2002) also contain provisions regarding these mechanisms.

4.1.2. Adequacy of the legal framework and/or other measures

Based on the information available to it, the Committee noted that the Republic of Guatemala has standards and measures such as those indicated in the previous paragraph, on the participation of civil society and non-governmental organizations in public activities which, in principle, are intended to encourage or to have a direct or indirect effect or to facilitate anti-corruption efforts.

Nonetheless, and bearing in mind the classification referred to in the methodology for analyzing implementation of Article III [1]⁴⁸ of the Convention, the Committee will comment on each paragraph and make specific recommendations on this in the last chapter.

4.1.3. Results of the legal framework and/or other measures

Guatemala's response on the subject⁴⁹ mentions in one of its paragraphs that citizen participation in consulting and overseeing the business of government, facilitating access to information, and accountability efforts to social auditing have been designed on the basis of the decentralization process.

The paragraph goes on to mention that although the existing laws are not explicit regarding participation in the fight against corruption, they do allow a comprehensive strategy of prevention and oversight, ranging from policy and investment project design to oversight of matters of public interest at all stages in the process.

In turn, the Presidential Secretariat for Planning and Programming (SEGEPLAN) has been working, since 2003, on the creation of a Network for Transparency and Quality in Public Investment, comprising non-governmental organizations that specialize in social auditing and anticorruption efforts, along with relevant government agencies. Several non-governmental organizations have developed anticorruption projects, and they maintain cooperation arrangements with oversight bodies; this is the case with the national chapter of Transparency International, *Acción Ciudadana*, and the Coalition for Transparency and the Public Works Monitoring System (SIMOP), which have entered into agreements with the Public

⁴⁸ Methodology for analyzing implementation of the Convention provisions selected as a part of the first round of analysis, Chapter V, D, (SG/MESICIC/doc.21/02).

⁴⁹ Guatemala's updated response to the questionnaire, pp. 22-23.

Prosecution Service, the Anticorruption Prosecutor's Office, the Office of the Comptroller General of Accounts, the Interior Ministry and the National Police, the Probity Commission of the Congress of the Republic, Guatecompras, and the Commissioner for Transparency and against Corruption.

Finally, the creation and launch of an Anticorruption Commission, providing for citizen participation, was designed and placed before the Coordination Office for the Modernization of the Justice Sector.

The Committee considers that the foregoing information shows that the country under review has experience of involvement by citizens and civil society organizations in efforts to prevent corruption, and that the public offices to which this information refers have created opportunities for this involvement within the framework of the agreements referred to therein.

4.2. MECHANISMS FOR ACCESS TO INFORMATION

4.2.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of provisions and measures regarding the mechanisms referred to, notably:

Article 28 of the Political Constitution whereby residents of the Republic of Guatemala have the right to direct, either individually or collectively, petitions to the authorities, which are then required to process them and resolve them in accordance with law, and it goes on to state that administrative matters must be settled within a maximum period of thirty days.

Article 29. Free Access to the Courts and State Agencies: All individuals shall have free access to the courts and to state offices and agencies, to pursue legal actions and to assert their rights in accordance with law.

Article 30 states that all acts of the administration are considered public. Interested parties have the right to obtain reports, copies, reproductions or certifications upon request and to access any records they may wish to consult, except when military or diplomatic matters related to national security or information provided by individuals under a guarantee of confidentiality are involved.

Article 31 of the Political Constitution states that all individuals have the right to know what is said about them in archives, files, or any other form of state records, and the use made of that information, together with the right to correct, rectify, and update it.

Article 17 of the Municipal Code (Decree No. 12-2002) provides that the rights and obligations of the neighbors of the municipality include being regularly informed by the municipal government of the results of municipal policies and plans and accountability, as provided for by the law; Articles 38, 60 and 62, respectively, provide that Municipal Council meetings are public and must provide full information on their activities and that all neighbors are entitled to obtain copies and certifications that accredit the agreements of the Municipal Councils, their prior history and may consult the archives and financial and accounting records, under the terms of Article 30 of the Political Constitution of the Republic.

Article 139 of the Municipal Code provides that the existing offices, records, documents and files in the municipality are public and may be examined and consulted by anyone, and certifications obtained, under the terms of Article 30 of the Political Constitution.

4.2.2. Adequacy of the legal framework and/or other measures

The standards and measures regarding access to information that the Committee has examined, based on the information available to it, are relevant for promoting the purposes of the Convention.

However, in addition to complying with the provisions of the standards and measures referred to, the Committee is of the opinion that the Republic of Guatemala should consider strengthening the mechanisms designed to provide a right of access to government information to all persons and ensure the timely processing of requests for information in the possession or control of public institutions, to facilitate appeals when requests are denied, by making available mechanisms for resolving such appeals on a timely basis, providing also for sanctions in the case of failure to comply with the obligation to supply information. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 4.2., paragraph (a) of this report.

The Committee wishes to acknowledge the willingness of the country under review to further its work in that direction, which is evident by the existence of various bills that develop the right of access to information.⁵⁰

The non-governmental organization “*Acción Ciudadana*” stated in one of the paragraphs of the document “Independent Report on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption in Guatemala,”⁵¹ referred to by the country under review in its response, that in Guatemala “...there is no specific law that regulates and facilitates access by civil society and non-governmental organizations to information in the possession or control of public institutions. Instead there are constitutional provisions that guarantee the right to petition and to make administrative actions public (*see annex 2.1*). Nonetheless, without the pertinent development of these provisions through a regular unitary law, the existing precepts for access to public information will tend to be general, partial and irregular (*see annex 2.2*).”

4.2.3. Results of the legal framework and/or other measures

Guatemala’s response to this,⁵² states that “no statistics are available, except through consulting the electronic communications media for disseminating official information as described in question 3(b) of this questionnaire, and in the institutional legal annex.”

The electronic communications media for disseminating official information referred to by the country under review in the previous paragraph, are the integrated public administration systems provided for in the “Integrated Financial Administration System and Government Auditing System project (SIAF-SAG),” whose goals include oversight, publication and transparency of public resources management, as

⁵⁰ Updated response by Guatemala to the questionnaire, Page 23 and the Response to the comments of the Subgroup and to the draft preliminary report prepared by the Secretariat, Page 4, which informs the existence of the following bills: Bill 2624 submitted February 20, 2002; bill 2594 submitted December 5, 2001; bill 2641 submitted April 9, 2002; bill 2339 submitted September 20, 2000; bill 3165 submitted February 9, 2005, and bill 3266 submitted June 1, 2005.

⁵¹ Document “Independent Report on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption”, p. 11.

⁵² Updated response by Guatemala to the questionnaire, p. 23

described in the response by the country under review and in a document attached thereto⁵³ and listed in subsection 1.2.1 of this report.

At the same time, the Committee wishes to emphasize Guatemala's endeavor to disseminate information of public interest through new communications technologies. This circumstance reflects the country's efforts to modernize its systems and it would be well advised to consider implementing training and dissemination programs in this area in order to increase understanding among civil servants and the citizenry alike and to optimize the use of the available technology. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 4.2, paragraph (b) of this report).

Lastly, considering the information the Committee's lacks additional information broken down in such a way as to enable it to make a comprehensive evaluation of the standards and measures on this matter, it will make recommendations in this regard (see general recommendations in Chapter III, subsections 7.2 and 7.3 of this report).

4.3. MECHANISMS FOR CONSULTATION

4.3.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of provisions and measures regarding the mechanisms referred to, notably:

- Article 173 of the Political Constitution whereby major policy decisions must be submitted to a referendum by all citizens; and Article 280 provides for a referendum to reform the Political Constitution.
- Article 17 of the Municipal Code (Decree No. 12-2002) empowers citizens to participate in consultations pursuant to law; Article 38 provides that the Municipal Council can resolve to call an open lobbying session on matters of importance, through its authorized representatives; and Article 63 states that local residents should be consulted on matters of importance, and that the Municipal Council, with the vote of two thirds (2/3) of its total members, may agree upon such consultation in accordance with the modalities indicated in Articles 64, 65 and 66 of the Code⁵⁴.

⁵³ Updated response by Guatemala to the questionnaire, p. 12; and document "Integrated Financial Administration System and Government Auditing System project (SIAF-SAG).

⁵⁴ Articles 64, 65 and 66 of the Municipal Code provide for the following:

ARTICLE 64. Consultation at the request of neighbors. Neighbors are entitled to ask the Municipal Council to hold consultations on matters of general interest that affect all the neighbors in a municipality. The request must be signed by at least ten percent (10%) of the neighbors registered on the municipality's electoral roll. The results will be binding if less than twenty percent (20%) of the neighbors registered on the electoral roll participate in the consultation and the majority votes in favor of the matter consulted on. ARTICLE 65. Consultations with the indigenous communities or authorities of the municipality. When the nature of an issue affects in particular the rights and interests of the indigenous communities of the municipality or their own authorities, the Municipal Council will hold consultations at the request of the indigenous communities or authorities, and will apply criteria in keeping with the customs and traditions of those communities. ARTICLE 66. Modalities of those consultations. The modalities of the consultations referred to in Articles 64 and 65 of this Code, *inter alia*, may be applied as follows: 1. Consultation on a ballot designed technically and specifically for the case, stating in the invitation the matter to be dealt with and the date and places of the consultation. 2. Application of criteria of the communities'

- Article 1 of the Law on Urban and Rural Development Councils (Decree No. 11-2002) indicates that the Councils are set up to organize and coordinate public administration through the formulation of urban and rural development policies and land planning and to encourage the population to become organized and participate in the country's integral development, making up a National Urban and Rural Development Councils System; and Article 2 of its Regulations (Intergovernmental Agreement No. 461-2002) states that this System makes it possible to establish a harmonious dialogue between the different cultures and the active participation of the different communities to help strengthen national unity.

- Article 4 of the General Law on Decentralization (Decree No. 12-2002) provides that the guiding principles of the process and the decentralization policy of the Executive Branch include dialogue, negotiation and cooperation on matters of substance within the process.

- Article 1 of the Law on Social Development (Decree No. 42 – 2001) whose object is the creation of a legal framework that permits implementation of legal proceedings and public policies to promote, plan, coordinate, execute and follow up on government and state actions to foster the social, family and human development of individuals and their environment, with particular attention given to groups with special needs; Article 10 whereby one of the State's obligations is its responsibility, through the Executive Branch shall plan, coordinate, execute, and, as appropriate, promote the measures necessary to coordinate and support in an effective and efficient manner the actions and activities of all the organized sectors of society, in order to ensure the full observance of the principles of this law and to fulfill the purposes thereof for the benefit of the development of the people; and Article 11 on public policies, whereby full integration and participation by civil society as a whole will be fostered in order for its objectives to be achieved.

4.3.2. Adequacy of the legal framework and/or other measures

The standards and provisions in relation to the mechanisms of consultation that the Committee has examined, based on the information available to it, are pertinent for pursuing the purposes of the Convention.

However, the Committee deems it advisable that the country under review consider strengthening the existing mechanisms in order to enable consultation with interested sectors with regard to the design of public policies and the drafting of bills, decrees and resolutions by the different State agencies; in addition to strengthening the system of Development Councils and existing mechanisms, and developing other suitable means of facilitating public consultation in areas other than those already considered. Bearing these considerations in mind, the Committee will draft the appropriate recommendations (see recommendations in Chapter III, sub-section 4.3, paragraphs a. and b. of this report).

4.3.3. Results of the legal framework and/or other measures

Guatemala's response to this,⁵⁵ states "See annex Report by SEGEPLAN."

own legal system in relation to the case. The results will be binding if at least fifty percent (50%) of the neighbors on the electoral roll participate in the consultation and if the majority votes in favor of the matter consulted on.

⁵⁵ Updated response by Guatemala to the questionnaire, p. 24.

One of the paragraphs of the annex to which the country under review referred in its response⁵⁶, states that “in general terms, the transversal policies are already being prepared in consensus with society. This is the case of the Poverty Reduction Strategy (ERP) 2004 – 2015, validated in the Development Councils, as well as the policy on Social Development and Population, in which government entities and the state university Universidad de San Carlos de Guatemala (USAC) participated and some nongovernmental organizations issued opinions;” and it goes on to mention other examples of citizen participation.

According to that same annex⁵⁷ “What is needed, in any case, is to improve these incipient mechanisms and, at the same time, include all public policies where they have not yet been applied, particularly sectoral ones. It is also fundamental to develop this type of policy more at the local or community level, since this is the level that guarantees participation and social consensus...”

Another of the annexes to the response, a document on the Judicial Branch⁵⁸, reports on the development of consultation on undertaking diagnosis of the Branch as part of the modernization process.

Lastly, in view of the fact that the information available to the Committee is not broken down in such a way as to enable a comprehensive evaluation to be made of the results of the standards and measures on this matter, it will make recommendations in this regard (see general recommendations in Chapter III, subsections 7.2 and 7.3, of this report).

4.4. MECHANISMS TO ENCOURAGE PARTICIPATION IN PUBLIC ADMINISTRATION

4.4.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of provisions and measures regarding the mechanisms referred to, notably:

- Article 2 of the Municipal Code (Decree No. 12-2002) provides that the municipality is the basic unit of organization of the state’s territorial organization and the immediate forum for citizen participation in public affairs; Article 17 empowers citizens to participate actively and voluntarily in the formulation, planning, implementation and evaluation of public, municipal and community policies; and Article 56 states that the Municipal Council will acknowledge the community city halls or auxiliary city halls as entities that represent the communities, particularly with respect to decision-making and that they constitute a direct link with the municipal government.⁵⁹

- Article 1 of the Law on Urban and Rural Development Councils (Decree No. 11-2002) stipulates that those Councils should be set up to organize and coordinate public administration through the formulation of urban and rural development policies and through land planning, and they should encourage the population to become organized and participate in the country’s comprehensive development by setting

⁵⁶ Document “Information for the Commission on Transparency – SEGEPLAN, pp. 1-2.

⁵⁷ Document “Information for the Commission on Transparency – SEGEPLAN, p. 2.

⁵⁸ Document “Judicial Branch”, pp. 3-4.

⁵⁹ Article 56 of the Municipal Code provides that the appointment of community mayors or auxiliary mayors will be issued by the municipal mayor based on the designation or election made by the communities in accordance with their principles, values, procedures and traditions.

up a National Urban and Rural Development Council System⁶⁰; Article 2 the Regulations to the law (Intergovernmental Agreement No. 461-2002) states that this System enables all the country's inhabitants to participate actively in decision-making for the organization, coordination and planning of the integral development of its communities, municipalities, departments, regions and the nation.

- Article 10 of the Law on Social Development (Decree No. 42-2001) stipulates that the actions that the Executive Branch should encourage as the body responsible for planning, coordinating, executing and following government actions to foster national, social, family and human development, should include coordination and effective support for the actions and activities of all organized sectors of society, in order to validate the principles and fulfill the purposes of this law to foster the development of the population; and Article 19 establishes a procedure for formulating the National Social Development and Population Program and Policy, which includes organized civil society among the sources from which suggestions and observations on the subject should come.

- Article 4 of the General Law on Decentralization (Decree No. 12-2002) includes citizen participation among the guiding principles of the Executive Branch's decentralization policy and process; Article 17 defines it as a process through which an organized community, with economic, social and cultural goals, takes part in the planning, execution and oversight of national, departmental and municipal government administration, in order to facilitate the decentralization process.

- Article 3, paragraph (b) of the Organic Law of the Office of the Comptroller General of Accounts (Decree No. 31-2002) states that as one of the objectives of this entity is to support the design and implementation of citizen participation mechanisms to strengthen the transparency, probity and credibility of public management and of the accountability process as means of fighting corruption, embezzlement, influence peddling, misappropriation of funds and diversion of funds; and Article 34, paragraph (f) attributes to its Directorate of Ethics and Morals the function of promoting citizen participation through public oversight or other mechanisms for strengthening the transparency, probity and credibility of public management.

4.4.2. Adequacy of the legal framework and/or other measures

The standards and provisions with respect to the above-mentioned mechanisms that the Committee has examined, based on the information made available to it, are pertinent for promoting the purposes of the Convention.

Nonetheless, the Committee considers it advisable for the Republic of Guatemala to continue to implement mechanisms that would encourage governmental and nongovernmental organizations to participate in public management.

⁶⁰ Articles 4, 6 and 8 of the Law on Urban and Rural Development Councils, refers to the functions of the Urban and Rural Development Councils, the National, Regional and Municipal scope, including provisions aimed at promoting effective participation by the population in identifying and solving their problems in their different areas. Article 10 of this Law provides, among the functions of the Municipal Council, promoting the participation of neighbors in identifying local needs, formulating proposals for solutions and prioritizing their execution. Article 10 thereof foresees the creation of Local Development Councils by an Assembly of Neighbors and an Executive Committee, and Article 11 sees the Assembly of Neighbors as its highest ranking body in which all its members have the right to speak and to vote.

The Committee considers that specific mechanisms should be foreseen to promote this participation and thus complement the existing ones with other instruments that would foster more broad-based participation in fields other than those already provided for. The Committee will make a recommendation to this effect (see recommendation in Chapter III, subsection 4.4., paragraph (a) of this report).

The reason for this is that the Committee realizes that the participation mechanisms provided for in the Municipal Code refer to municipal issues; and those contained therein and mentioned in subsection 4.4.1 of this report (Law on Urban and Rural Development Councils; Social Development Law and the General Law on Decentralization), are restricted to the specific areas covered by the provisions of those laws.

The Committee feels it important to mention the following statement⁶¹ made by the nongovernmental organization “*Acción Ciudadana*” in the document entitled “Independent Report on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption in Guatemala”:

“In Guatemala there is no specific law that contains mechanisms for consultation with and participation by civil society in order to prevent, detect, punish and eradicate corruption. Instead there are several laws and standards that contain mechanisms to enable citizens in general to participate, the most important being the System of Development Councils, regulated by the Law on Urban and Rural Development Councils and its regulations, the General Law on Decentralization and its regulations and the Municipal Code...”

Further, bearing in mind that Article 3, paragraph (b) of the Organic Law of the Office of the Comptroller General of Accounts stipulates that one of the entity’s objectives is to support the implementation of citizen participation mechanisms to strengthen the transparency, probity and credibility of public management and accountability, as means of fighting corruption, embezzlement, influence peddling, misappropriation of funds and diversion of funds, the Committee believes that the country under review should consider promoting the creation, through that entity, of those mechanisms for citizen participation, when appropriate. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 4.4., paragraph (b) of this report).

Lastly, based on information gathered by the Committee’s Secretariat by virtue of the contents of the methodology on reviewing implementation of the provisions selected⁶², the Committee notes that the country’s legislation contains certain articles which were generally referred to in an OAS Rapporteur’s report⁶³ on Freedom of Expression as “contempt laws,” which might have the effect of restraining civil society and nongovernmental organizations’ participation in efforts to prevent corruption.

⁶¹ Document “Independent Report on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption”, p. 18.

⁶² Methodology on implementation of the provisions of the Convention selected for review during the first round of analysis, Chapter VI (SG/MESICIC/doc.21/02).

⁶³ Report of the Special Rapporteur for Freedom of Expression 2000, Chapter III. This report may be consulted on the OAS website.

The Committee considers that the relevant paragraphs of that report⁶⁴ should be looked at and that it is important to clarify that they affect not only Guatemala but other countries of the American Hemisphere, and that in the case of the country under review, the articles of the Criminal Code listed below are considered “contempt laws”:

“Article 411. Anyone who offends the dignity and decorum, or threatens, insults or slanders any of the Presidents of the state agencies, shall be punished with a term of imprisonment ranging from one to three years.

“Article 412. Anyone who threatens, insults or slanders or in any way offends the dignity and decorum of an authority or official during or as a result of his functions, shall be punished with a term of imprisonment ranging from six months to two years.

“Article 413. Anyone accused of insulting a public official or authority, if the reason for the accusation is proven to be valid in the case of events concerning the exercise of his functions will be absolved if the accusation is proven to be valid.”

The Committee wishes to point out the desire of the State under analysis to take steps to repeal the “contempt laws,” which is reflected in the decision adopted on 14 June 2005 by the Constitutional Court of Guatemala which temporarily suspended the legal definition of contempt (*desacato*) as a criminal offence⁶⁵. For that reason the Committee considers that Guatemala should be encouraged to take steps to repeal the contempt laws. The Committee will draft a recommendation to this effect (see recommendation in Chapter III, sub-section 4.4., paragraph c. of this report).

4.4.3. Results of the legal framework and/or other measures

Guatemala’s response to this,⁶⁶ states that “The respective information is given in detail in the previous two subsections.”

Given that the information referred to by the country under review in the paragraph of its response transcribed below, which was analyzed and commented on in two sections in this report, the Committee, refers to the contents of those sections (see sections 4.2.3 and 4.3.3 of this report).

The Committee deems it necessary to mention that one of the documents supplied by the NGO “*Acción Ciudadana*” entitled “Government Oversight and Citizen Participation,” reports on a diagnosis in which officials of the Office of the Comptroller General of Accounts and representatives of civil society participated, which states, among other things, that one of the strengths of that entity is its staff training programs.⁶⁷ The document also states that training cannot and should not be just for the public sector, although training activities such as those undertaken at the municipal level may be key. Finally, the document adds “and it adds that “if the strategy is to encourage civil society (organizations and citizens) to participate, it is essential that the Office of the Comptroller of Accounts promote an ongoing

⁶⁴ Ibid, p. 12.

⁶⁵ Information obtained from the website indicated by the country under review in its reply to the comments of the subgroup for analysis and the preliminary draft report of the Secretariat (P. 11), cited below:

http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=PREN-126S

⁶⁶ Updated response by Guatemala to the questionnaire, p. 25.

⁶⁷ Document “Government Oversight and Citizen Participation”, p. 25.

information and dissemination process with language and content that are accessible to the non-specialist majority.”⁶⁸

Based on information obtained from the website of the Office of the Comptroller General of Accounts⁶⁹, the Committee notes that this entity has effectively developed a training program for public officials and employees which is worthy of recognition.

Nevertheless, the Committee feels that it would be useful for the country under review to consider designing and implementing programs directed at civil society to disseminate the mechanisms for promoting participation in public management and, where appropriate, to train and to make available the tools that civil society and the nongovernmental organizations in order to use those mechanisms adequately. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 4.4, paragraph (d) of this report).

Lastly, since the Committee does not have information broken down in such a way as to enable it to make a comprehensive evaluation of the standards and measures in this area, it will make recommendations in this regard (see general recommendations, Chapter III, 7.2 and 7.3. of this report).

4.5. MECHANISMS FOR PARTICIPATION IN THE FOLLOW-UP OF PUBLIC ADMINISTRATION

4.5.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of provisions and measures related to the mechanisms referred to, notably:

- Article 17, paragraph (h) of the Municipal Code (Decree No. 12-2002) provides among the rights and obligations of neighbors, for the creation of a municipal citizen’s commission for social auditing; and Article 135 states that to facilitate social auditing, the municipal council will share the information on the declaration of municipal budget income and expenditure with the Municipal Development Council every three months; and it goes on to say that the information will be available to the communities through the community mayors or auxiliary mayors and the general population, using the means at their disposal.

- Article 5, paragraph 4 of the General Law on Decentralization (Decree No. 12-2002) states that one of the objectives of decentralizing the Executive Branch is to facilitate citizen participation and social oversight of public management; and Article 19 provides that the organized communities will be empowered to conduct social audits, in accordance with the law, on decentralization programs implemented in their respective locations and in those in which they participate directly, either in the municipal, departmental, regional or national area; and it adds that, where appropriate, it will ask the Comptroller General of Accounts to conduct the appropriate audit, the results of which must be communicated to the organized communities within thirty days starting from its date of conclusion.

⁶⁸ Document “Government Oversight and Citizen Participation”, p. 51.

⁶⁹ Website indicated in the reply by the country under review to the comments of the review subgroup and the preliminary draft report of the Secretariat (p. 12), which is cited below: <http://www.contraloria.gob.gt/Home.htm>

- Article 20 of the Regulations of the General Law of Decentralization (Intergovernmental Agreement No. 312-2002) states that, notwithstanding any mechanisms that were legally established to make them accountable to their authorities, associations and the committees, they may address the target entities of decentralized competences requesting information on the implementation of plans and programs, in order to evaluate compliance with the law and lodge any complaints to the competent bodies; and Article 21 provides that the work programs and budgets of the decentralized competencies must state the objects and concrete results aimed at, in order to make public administration transparent so as to facilitate social auditing.

- Article 34, paragraph (f) of the Organic Law of the Office of the Comptroller General of Accounts entrusts its Directorate of Ethics and Morals with promoting citizen participation through public oversight and other mechanisms to strengthen the transparency, probity and credibility of public management.

4.5.2. Adequacy of the legal framework and/or other measures

The standards and measures regarding the mechanisms referred which were examined by the Committee, based on the information made available to it, are pertinent for promoting the purposes of the Convention.

Nonetheless, the Committee considers that it advisable to continue implementing mechanisms to encourage governmental and nongovernmental organizations to participate in monitoring public management.

This is due to the fact that the Committee understands that the consultation mechanisms provided for in the Municipal Code refer to municipal issues; and that those provided for in the following laws that are mentioned in that Code, in subsection 4.5.1 of this report (General Law on Decentralization and its Regulations), are restricted to the specific areas overseen by the provisions of those laws. The Committee will make a recommendation encouraging the country under review, when appropriate, to promote additional forms of participation to facilitate and help nongovernmental organizations to develop activities for monitoring public management (see recommendation in Chapter III, subsection 4.5, paragraph (a) of this report).

The Committee also considers it useful for the Republic of Guatemala to consider designing and implementing programs to disseminate mechanisms to participate in and follow up public management, and to train civil society and nongovernmental organizations and provide them with the tools to use those mechanisms properly. The Committee will make a recommendation in this regard (see recommendation in Chapter III, subsection 4.5., paragraph (b) of this report).

The Committee considers it important to note the following in view of the statement made by the nongovernmental organization “*Acción Ciudadana*” in one of the paragraphs of the document entitled “Independent Report on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption en Guatemala”:⁷⁰ “Capacities, abilities and social skills should be strengthened in order to organize, manage, check, monitor and evaluate public management ...”.

⁷⁰ Document “Independent Report on the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption”, p. 30.

4.5.3. Results of the legal framework and/or other measures

Guatemala's response to this,⁷¹ states that "The corresponding information is set out in the two previous sections."

Since the information referred to by the country under review in the paragraph transcribed from its response was already reviewed and commented on in the corresponding sections of this report, the Committee shall refer to them (see sections 4.2.3 and 4.3.3 of this report).

As the information available to the Committee is not sufficiently broken down to enable a comprehensive evaluation to be made of the results of the norms and measures on this matter, it will make recommendations in this regard (see general recommendations in Chapter III, subsections 7.2 and 7.3 of this report).

5. ASSISTANCE AND COOPERATION (ARTICLE XIV OF THE CONVENTION)

5.1. MUTUAL ASSISTANCE

5.1.1. Existence of provisions in the legal framework and/or other measures

The Republic of Guatemala has a set of measures in this area: the bilateral agreements it has entered into with other States, listed in its response⁷² and the international instruments referred to therein and in the annex "Classification of the National Legislation provided by Guatemala",⁷³ such as the Inter-American Convention on Mutual Assistance in Criminal Matters and the United Nations Convention against Corruption⁷⁴; as well as the legal provisions referred to in its response and the annex thereto, such as those contained in the Organic Law of the Public Prosecution Service (Articles 87 and 88) and in the Law of the Executive Branch (Article 38).

5.1.2. Adequacy of the legal framework and/or other measures

The provisions listed by the Republic of Guatemala in its response and in the annex thereto "Classification of the National Legislation provided by Guatemala", are capable of attaining the purposes of the Convention of promoting and facilitating mutual assistance among the States Parties, and may serve its specific purposes with respect to the investigation and prosecution of acts of corruption, to the extent that they are useful for this purpose.

5.1.3. Results of the legal framework and/or other measures

The response by the Republic of Guatemala,⁷⁵ states that "According to information requested from the Public Prosecution Service, the Office of the Comptroller General of Accounts and the Ministry of Foreign Affairs, no request regarding assistance as provided for in the Convention has been made or received."

⁷¹ Updated response by Guatemala to the questionnaire, p. 25.

⁷² Updated response by Guatemala to the questionnaire, pp. 25-26.

⁷³ Document "Classification of the National Legislation provided by Guatemala", pp. 93-106.

⁷⁴ This Convention is pending ratification.

⁷⁵ Updated response by Guatemala to the questionnaire, p. 53.

The Committee wishes to emphasize that it is important for Guatemala's existing provisions on mutual assistance, as well as the Inter-American Convention against Corruption itself, to apply to specific cases of acts of corruption. It is thus necessary for the persons responsible for applying them to have a good understanding of those provisions. The Committee will therefore make a recommendation in this regard (see recommendation in Chapter III, section 5, subsection 5.1 of this report).

5.2. MUTUAL TECHNICAL COOPERATION

5.2.1. Existence of provisions in the legal framework and/or other measures

The response by the Republic of Guatemala on the subject⁷⁶ notes that "The different state agencies and oversight bodies have entered into agreements on cooperation and institutional strengthening with various states and bilateral and multilateral organizations, some of which are mentioned in the annexes and in this questionnaire."

The annex "Judicial Branch Modernization Process"⁷⁷, comments on the cooperation received by that body from entities such as the World Bank, the IDB and the UNDP, to develop the process.

The annex "Report of the Office of the Comptroller General of Accounts 2004"⁷⁸, comments on the cooperation received by that body from entities such as the US Agency for International Development - USAID; the German Technical Development Cooperation - GTZ; the Swedish International Development Cooperation Agency - ASDI; and the Spanish Agency for International Cooperation - AECI, to implement the training program in the municipalities on how to use and handle the Municipal Financial Management Manual.

One of the paragraphs in the response by the country under review⁷⁹ states that "The Public Prosecution Service has signed Amendment No. 2 to the Financial Year 2000 Letter of Cooperation for the drug-related prosecutors' program, of January 19, 2000, between the Public Prosecution Service of Guatemala and the Government of the United States, in order to support projects designed for technical support, operations, and modernization plans."

5.2.2. Adequacy of the legal framework and/or other measures

The Committee considered it positive that the Republic of Guatemala, as noted in its response, has signed technical cooperation agreements intended to contribute to the fight against corruption, and linked for that purpose with international bodies and cooperation agencies and other States Parties of the CICC, which are deemed pertinent for the purposes foreseen by the Convention in this area. However, the Committee considers that the country under review should identify and prioritize specific areas in which the Republic of Guatemala considers that it needs the technical cooperation of other States Parties in order to strengthen its capacity to prevent, detect, investigate and punish acts of corruption. Bearing this in mind, the Committee will make a recommendation in that regard (see recommendation in Chapter III, section 5, subsection 5.2 of this report).

⁷⁶ Updated response by Guatemala to the questionnaire, p. 26.

⁷⁷ Document "Judicial Branch", p. 3.

⁷⁸ Document "Management Report of the Office of the Comptroller General of Accounts 2004", pp. 10-11.

⁷⁹ Updated response by Guatemala to the questionnaire, p. 26.

5.2.3. Results of the legal framework and/or other measures

Bearing in mind the information given by the Republic of Guatemala in its response, with respect to the technical cooperation programs it has developed in relation to the fight against corruption, the Committee believes it only remains to encourage Guatemala to continue with its cooperation efforts in this field, and will make a recommendation to that effect (see recommendation in Chapter III section 5, subsection 5.3 of this report).

6. CENTRAL AUTHORITIES (ARTICLE XVIII OF THE CONVENTION)

6.1. Existence of provisions in the legal framework and/or other measures

In its response to this,⁸⁰ the Republic of Guatemala indicated that it designated the Transparency and Anti-Corruption Commissioner as the central authority for the purposes of the Inter-American Convention against Corruption. The General Secretariat of the OAS was duly informed of this designation.

6.2. Adequacy of the legal framework and/or other measures

The Committee considers that, in accordance with the information provided by the country under analysis in its response, the appointment of the Transparency and Anti-Corruption Commissioner as the central authority for channeling both the mutual assistance and the mutual technical assistance envisaged under the Convention, are deemed to be adequate for achieving those purposes.

6.3. Results of the legal framework and/or other measures

According to Guatemala's response in this regard,⁸¹ its central authority has neither made nor received any requests regarding the assistance and cooperation referred to in the Convention.

III. CONCLUSIONS AND RECOMMENDATIONS

Based on the review in Chapter II of this report, the Committee offers the following conclusions and recommendations regarding implementation by Guatemala of the provisions of Articles III, paragraphs 1 and 2 (standards of conduct and mechanisms to enforce them); III.4 (systems for declaring income, assets and liabilities); III.9 (oversight bodies, solely with respect to the exercise by such bodies of functions related to compliance with the provisions contained in Article III.1, 2, 4 and 11 of the Convention); III.11 (mechanisms to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption); Article XIV (Assistance and Cooperation); and Article XVIII (Central Authorities) of the Convention, which were selected in the context of the first round.

⁸⁰ Updated response by Guatemala to the questionnaire, p. 27.

⁸¹ Updated response by Guatemala to the questionnaire, p. 28.

1. STANDARDS OF CONDUCT AND MECHANISMS TO ENFORCE COMPLIANCE (ARTICLE III, PARAGRAPHS 1 AND 2 OF THE CONVENTION)

1.1. Standards of conduct intended to prevent conflicts of interest and enforcement mechanisms

The Republic of Guatemala has considered and adopted measures to establish, maintain and strengthen standards of conduct aimed at preventing conflicts of interest and mechanisms to enforce them, as described in section 1.1 of Chapter II of this report.

In view of the comments made in this section, the Committee suggests that the Republic of Guatemala consider the following recommendation:

Strengthen the implementation of laws and systems to regulate conflicts of interest. In order to comply with this recommendation, the Republic of Guatemala could consider taking the following measures:

- a. Regulate potential conflicts of interest and apply these measures to all public servants. Given their importance, these cases should be treated specifically and in greater detail (see Chapter II, subsection 1.1.2 of this report).
- b. Establish adequate restrictions for people leaving a public post, such as forbidding them to handle cases in which they were involved while performing their public functions or cases connected with entities with which they were recently linked through their former public post.
- c. Design and implement mechanisms with verifiable indicators that serve to resolve issues raised by public servants regarding their own possible conflicts of interest, and adopt measures to enable situations involving conflicts of interest detected, such as an exemption or self-disqualification mechanism, to be settled without delay.
- d. Further the process to reform the Civil Service Law so that it regulates certain aspects related to conflicts of interest that have not yet been developed in the legislation in force.
- e. Adopt, through the appropriate authority, the Code of Ethics of the Office of the Comptroller General of Accounts. (This recommendation also applies to Chapter III, section 1.2. of this report, taking into account the contents of Chapter II, section 1.2.2. thereof).

1.2. Standards of conduct to ensure the proper conservation and use of resources entrusted to government officials in the performance of their functions and enforcement mechanisms

The Republic of Guatemala has considered and adopted measures intended to establish, maintain and strengthen standards of conduct designed to ensure the conservation and proper use of resources entrusted to public officials in the performance of their functions, as indicated in section 1.2 of Chapter II of this report.

In view of the comments made in this section, the Committee suggests that the Republic of Guatemala consider the following recommendation:

Strengthen the implementation of laws and systems to regulate the conservation and proper use of public resources. In order to comply with this recommendation, the Republic of Guatemala could consider taking the following measures:

- a. Encourage the adoption of legislation that criminalizes illicit enrichment as an offense, taking into account that there are various existing legal initiatives in this regard (see Chapter II, subsection 1.2.2 of this report). (This recommendation also applies to Chapter III, section 2 of this report, taking into account the contents of Chapter II, subsection 2.2. thereof).
- b. Adopt the appropriate measures to conclude the implementation of the State Contracting and Procurement System (GUATECOMPRAS).
- c. Continue to adopt whatever measures are deemed appropriate so that the funds collected are handled transparently (see Chapter II, subsection 1.2.2 of this report).
- d. Extend awareness of the electronic tools designed to improve oversight of and access to financial and bookkeeping information via the various electronic systems described in sub-section 1.2.1 of this report.

1.3. Standards of conduct and mechanisms concerning measures and systems requiring government officials to report to appropriate authorities acts of corruption in the performance of public functions of which they are aware

The Republic of Guatemala has considered and adopted measures intended to establish, maintain and strengthen standards of conduct and mechanisms concerning measures and systems requiring public officials to report to appropriate authorities acts of corruption in the performance of public functions of which they are aware, as noted in section 1.3 of Chapter II of this report.

In view of the comments made in this section, the Committee suggests that the Republic of Guatemala consider the following recommendation:

Strengthen the mechanisms the Republic of Guatemala has to require public officials to report to the appropriate authorities acts of corruption of which they are aware. To comply with this recommendation, the Republic of Guatemala could give consideration to the following measures:

- a. Adopt and implement additional protective measures to encourage government officials to report to appropriate authorities acts of corruption in the performance of public functions of which they are aware.
- b. Implement training programs for public servants in relation to standards on the responsibility of public officials to report acts of corruption of which they are aware; and to disseminate the means available to them in order for them to comply with that obligation.

2. SYSTEMS FOR REGISTERING INCOME, ASSETS, AND LIABILITIES (ARTICLE III, PARAGRAPH 4 OF THE CONVENTION)

The Republic of Guatemala has considered and adopted measures intended to establish, maintain and strengthen systems for registration of income, assets and liabilities of persons who perform public functions in certain posts as specified by law and for making public those registrations, where appropriate, as noted in section 2 of Chapter II of this report.

In view of the comments made in that paragraph, the Committee suggests that the Republic of Guatemala consider the following recommendation:

Strengthen systems for filing declarations of income, assets and liabilities. In order to comply with this recommendation, the Republic of Guatemala could consider taking the following measures:

- a. Regulate the conditions, procedures and other aspects under which sworn statements of net worth could be made public, in accordance with the fundamental principles of Guatemalan legislation.
- b. Optimize the analysis systems contained in the sworn declarations of net worth, in order for them to also serve as a useful tool to detect and prevent conflicts of interest, as appropriate, in addition to serving as an adequate instrument for detecting possible cases of illicit enrichment.
- c. Strengthen provisions on verification by the Office of the Comptroller General of Accounts, of the content of the declarations presented upon entry and established in Article 24 of the Law on Probity and Responsibilities of Public Officials and Employees, and bring them in line with the provisions of Article 21 of that law, to provide that entity with systems that enable it to promote and carry out the appropriate verification.
- d. Adapt the forms on which sworn statements of net worth are presented, to require declarers to comply with the minimum requisites on supplying information under Article 23 of the Law on Probity and Responsibilities of Public Officials and Employees, and the information required under the last paragraph of this law, whereby declarers must state that the assets and income declared are the only ones they possess (see Chapter II, subsection 2.2 of this report).

3. OVERSIGHT BODIES FOR THE SELECTED PROVISIONS (ARTICLE III, PARAGRAPHS 1, 2, 4 AND 11 OF THE CONVENTION)

The Republic of Guatemala has considered and adopted measures intended to establish, maintain and strengthen bodies in charge of overseeing the exercise of functions related to compliance with the provisions selected for analysis in the first round (Article III, paragraphs 1, 2, 4 and 11 of the Convention), as noted in section 3 of Chapter II of this report.

In view of the comments made in that paragraph, the Committee suggests that the Republic of Guatemala should consider strengthening the work of the oversight bodies regarding the functions exercised in relation to compliance with the provisions contained in Article III (1), (2), (4) and (11) of the Convention, as appropriate, in order to ensure the efficacy of the oversight, providing them with the resources necessary for performing their functions; striving to give them the greatest political and social

support; and strengthening the mechanisms that ensure the institutional coordination and ongoing evaluation and follow-up of their actions, as well as promoting new mechanisms for that purpose, as appropriate.

4. MECHANISMS TO ENCOURAGE PARTICIPATION BY CIVIL SOCIETY AND NONGOVERNMENTAL ORGANIZATIONS IN EFFORTS TO PREVENT CORRUPTION (ARTICLE III, PARAGRAPH 11 OF THE CONVENTION)

The Republic of Guatemala has considered and adopted measures to establish, maintain, and strengthen mechanisms to promote the participation of civil society and nongovernmental organizations in efforts to prevent corruption, in accordance with section 4 of Chapter II of this report.

In view of the comments made in that paragraph, the Committee suggests that the Republic of Guatemala consider the following recommendations:

4.1 General participation mechanisms

No recommendations were considered in this section.

4.2. Mechanisms for access to information

Implement laws which support access to public information. To carry out this recommendation, the Republic of Guatemala could give consideration to the following measures:

- a. Encourage the adoption of comprehensive access to information legislation that would, among other things, regulate the process for receiving requests so they can be acted upon without delay, and the process for appeals in the event of those requests being refused and for sanctions to be applied in the event of failure to supply information, taking into consideration the various legislative initiatives in this regard.
- b. Implement training and dissemination programs dealing with mechanisms for facilitating access to public information, in order to help civil servants and citizens understand them and to optimize the use of the technology available for that purpose.

4.3. Mechanisms for consultation

Complement existing mechanisms on consultation, establishing procedures, when appropriate, to allow for making public consultations prior to designing public policies and prior to the final adoption of legal provisions. To carry out this recommendation, the Republic of Guatemala could give consideration to the following measures:

- a. Strengthen existing mechanisms to enable those sectors to consult matters regarding the design of public policies and the formulation of bills, decrees and resolutions within the sphere of the different State agencies.
- b. Strengthen the System of Development Councils and existing mechanisms and develop suitable mechanisms in areas other than those that already exist.

4.4. Mechanisms to encourage participation in public administration

Strengthen and continue to implement mechanisms to encourage civil society and nongovernmental organizations to participate in public management, and continue to take steps to eliminate laws that could discourage such participation. The Republic of Guatemala might consider adopting the following measures in order to comply with this recommendation:

- a. Establish additional mechanisms to the existing ones to strengthen participation by governmental and nongovernmental organizations in anti-corruption efforts.
- b. Where appropriate, promote the creation, through the Office of the Comptroller General of Accounts, of mechanisms for citizen participation, pursuant to the provisions of Article 3, paragraph (b) of the Organic Law of the Office of the Comptroller General of Accounts.
- c. Continue to take steps to eliminate “contempt laws” contained in articles 411, 412 and 413 of the Criminal Code.
- d. Design and implement programs to disseminate the mechanisms for encouraging civil society and nongovernmental organizations to participate in public management and, when appropriate, provide them with training and the necessary tools to apply those mechanisms.

4.5. Mechanisms for participation in the follow-up of public administration

Strengthen and continue implementing mechanisms that encourage civil and nongovernmental organizations to participate in the monitoring of public management. To carry out this recommendation, the Republic of Guatemala could give consideration to the following measures:

- a. When appropriate, promote new forms of participation to enable, facilitate or help nongovernmental organizations to develop activities to monitor public management.
- b. Design and implement programs directed at civil society to disseminate mechanisms for monitoring public management and provide civil society and nongovernmental organizations with the training and necessary tools to apply those mechanisms.

5. ASSISTANCE AND COOPERATION (ARTICLE XIV OF THE CONVENTION)

The Republic of Guatemala has adopted measures in relation to mutual assistance and technical cooperation, in accordance with the provisions of Article XIV of the Convention, as described and analyzed in Chapter II, section 5 of this report.

In view of the comments made in that section, the Committee suggests that Guatemala consider the following recommendations:

- 5.1. Design and implement a comprehensive dissemination and training program for authorities and officials, so they become familiar with and can apply the mutual assistance provisions to enable them to investigate and prosecute the acts of corruption provided for in the Convention and in other treaties signed by the Republic of Guatemala.

- 5.2. Identify and prioritize specific areas in which the Republic of Guatemala considers that it needs the technical cooperation of other States Parties in order to strengthen its capacity to prevent, detect, investigate and punish acts of corruption.
- 5.3. Continue its efforts to exchange technical cooperation with other States Parties regarding the most effective ways and methods for preventing, detecting, investigating and punishing acts of corruption.

6. CENTRAL AUTHORITIES (ARTICLE XVIII OF THE CONVENTION)

The Republic of Guatemala has complied with Article XVIII of the Convention by designating the Transparency and Anti-Corruption Commissioner as the central authority for the purposes of international assistance and cooperation provided for in the Convention.

7. GENERAL RECOMMENDATIONS

Based on the analysis and contributions that appear throughout this report, the Committee suggests that the Republic of Guatemala give due consideration to the following recommendations:

- 7.1 Design and implement, when appropriate, programs to train civil servants responsible for implementing the systems, standards, measures and mechanisms considered in this report, for the purpose of guaranteeing that they are adequately understood, managed and implemented.
- 7.2 Select and develop procedures and indicators, when appropriate, that make it possible to verify follow-up on the recommendations made in this report, and report back to the Committee, through the Technical Secretariat, in this regard. For the purposes indicated, Guatemala could consider taking into account the list of the most widely used indicators, applicable in the inter-American system, that were available for the selection indicated by the country under analysis, which has been published on the OAS website by the Technical Secretariat of the Committee, as well as information derived from the analysis of the mechanisms developed in accordance with recommendation 7.3 which follows.
- 7.3 Develop, when appropriate and where they do not yet exist, procedures for analyzing the mechanisms mentioned in this report, as well as the recommendations contained herein.

8. FOLLOW-UP

The Committee will consider the periodical reports from the Republic of Guatemala on progress in implementing the foregoing recommendations, in the context of its plenary meetings, in accordance with the provisions of Article 30 of the Rules of Procedure.

In addition, the Committee will analyze the progress made in implementing the recommendations made in this report, in accordance with the provisions of Articles 31 and, wherever appropriate, Article 32 of the Rules of Procedure.

ANNEX
TO THE REPORT ON IMPLEMENTATION IN THE REPUBLIC OF GUATEMALA OF THE
CONVENTION PROVISIONS SELECTED FOR REVIEW IN THE FRAMEWORK OF THE
FIRST ROUND

The Republic of Guatemala submitted, along with its response, annexes in electronic format containing the following provisions and documents:

A. LEGAL ANNEX

I. - Political Constitution of the Republic de Guatemala

II. CIVIL SERVICE SYSTEM

- a. Civil Service Law
- b. Regulations to the Civil Service Law
- c. Civil Service Law of the Judicial Branch
- d. Civil Service Law of the Legislative Branch

III. LAWS ON FINANCIAL ADMINISTRATION AND CONTROL

- a. Organic Budget Law
- b. Law on Probity and Responsibilities of Public Officials and Employees (Decree 89-2002)
- c. Partial Unconstitutionality of the Law on Probity and Responsibilities of Public Officials and Employees concerning persons subject to control

IV. STATE PROCUREMENT AND CONTRACTING SYSTEM

- a. Integrated Financial Administration and Oversight and Government Auditing System project (SIAF-SAG)
- b. Report by the Ministry of Public Finance (SIAF)
- c. Law on State Contracting
- d. Regulations to the Law on State Contracting
- e. Guatecompras (Governmental and Ministerial Agreements)
 - RESOLUTION N° 100-2004
 - Intergovernmental Agreement 80-2004

V. STATE AGENCIES AND OVERSIGHT BODIES

1. Public Prosecution Service (website of the Public Prosecution Service)

- a. Legal Framework of the Public Prosecution Service
- b. Organic Law of the Public Prosecution Service (Decree No. 40-94)
- c. Regulations of the Office of the State Anti-Corruption Attorney
- d. Responses by the Public Prosecution Service to the follow-up questionnaire

2. Office of the Attorney General of Accounts (website of the Office of the Attorney General of Accounts)

- a. Legal and Regulatory Framework of the Office of the Comptroller General of Accounts
- b. Program on Morals and Ethics
- c. Organic Law of the Office of the Comptroller General of Accounts (Decree 31-2002)
- d. Regulations to the Organic Law of the Office of the Comptroller General of Accounts (AG. 318-2003)

- e. Report of the Office of the Comptroller General of Accounts 2004

- f. Statistics of the Directorate of Probity

3. Judicial Branch (website of the Judicial Branch)

- a. Supreme Court of Justice
- b. Process to Modernize the Judicial Branch
- c. Anti-Corruption Project
- d. Law of the Judicial Branch (Decree 2-89)
- e. Ethical Standards of the Judicial Branch (Agreement 7-2001)
- f. Response by the Judicial Branch to the Questionnaire

4. Legislative Branch (website of Congress)

- Organic Law of the Legislative Branch (Decree 63-94)

5. Executive Branch (website of the Executive Branch)

- a. Law of the Executive Branch (Decree 114-97)
- b. Ethical Standards of the Executive Branch (Intergovernmental Agreement 197-2004)
- c. Presidential Commissioners:
 - Transparency and Anti-Corruption Commissioner
 - COPRE
 - NATIONAL INSTITUTE OF PUBLIC ADMINISTRATION - INAP-
<http://www.inapgt.com>

6. Superintendence of Tax Administration - SAT (website of the SAT)

- Organic Law of the Superintendence of Tax Administration (Decree 1-98)

VI. CRIMES INVOLVING CORRUPTION

- a. Code of Criminal Procedure
- b. Criminal Code
- c. Anti-Money Laundering Law
- d. Anti-Narcotic Drug Law
- e. Law against Smuggling and Customs Fraud

VII. LOCAL POWER, DECENTRALIZATION AND CITIZEN PARTICIPATION

- a. Law on Elections and Political Parties (Reforms Decree 10-04)
- b. General Law on Decentralization (Decree 12-2002)
- c. Regulations General Law on Decentralization (Gov. Agreement. 312-2002)
- d. Law on Urban and Rural Development Councils (Decree 11-2002)
- e. Regulations to the Law on Development Councils (Gov. Agreement. 461-2002)
- f. Municipal Code (Decree 12-2002)
- g. Law on Social Development (Decree 42-01)

VIII. OTHER LAWS AND RULES RELATED TO THE PROVISIONS OF THE CONVENTION

- a. Code of Private International Law
- b. Code of Civil and Merchant Procedure
- c. Law on Protection, Habeas Corpus and Constitutionality
- d. Law on Financial Supervision
- e. Organic Law of the Guatemalan Central Bank
- f. The Tax Code
- g. Law Creating the Guatemalan Army
- h. Organic Law of the Diplomatic Service
- i. The Notary Code
- j. Law of the Human Rights Commission of the Congress of the Republic and of the Attorney for Human Rights
- k. Law on Appeals against Administrative Decisions
- l. Law on Protecting Persons in Trials and Persons Related to the Administration of Criminal Justice
- m. Law on Banks and Financial Groups
- n. Law on Environmental Protection and Enhancement
- o. Judicial Career Law
- p. General Regulations to the Judicial Career Law
- q. Law of the Court of Accounts
- r. Regulations of Inventories of Real Estate belonging to the Public Administration
- s. Law of the Criminal Defense Public Service
- t. Law of the National Civil Police

B. CLASSIFICATION OF NATIONAL LEGISLATION

C. MISCELLANEOUS ANNEXES

- a. Statistics of the Public Prosecution Service
- b. Statistics and procedure of the Disciplinary Regime Unit of the Judicial Branch
- c. Report by SEGEPLAN
- d. Judicial Branch's Response to the Questionnaire
- e. Letter from MINUGUA
- f. Statistics of the Professional Responsibility Office (ORP) of the National Civil Police (PNC)
- g. Statistics and Procedure of the Board of Judicial Discipline

- h. Statistics of the Public Criminal Defense Institute
- i. Probity Figures 1997-2004
- j. Electoral Law and Political Party Reform
- k. Development Council Consulting
- l. NGO Anti-Corruption Projects

D. REFERENCE DOCUMENTS FROM THE LEGAL ANNEX

- a. Response by the Public Prosecution Service
- b. Management Report by the Office of the Comptroller General 2004
- c. Report of the Office of the Comptroller General 2003
- d. Legal Framework for Citizen Participation and Public Accountability
- e. Fiscal Transparency
- f. Preliminary Bills
- g. Report by the Ministry of Public Finance - SIAF
- h. Standards of conduct for the proper, honorable and adequate fulfillment of public functions

- Heeding the request of the Committee's Technical Secretariat, the Republic of Guatemala also sent a copy, in electronic format, of the form for presenting the Sworn Statement of Net Worth (Forma DJP-1).