

MECHANISM FOR FOLLOW-UP ON THE
IMPLEMENTATION OF THE INTER-AMERICAN
CONVENTION AGAINST CORRUPTION
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FINAL REPORT

(Adopted at the March 25, 2011 Plenary Session)

**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 THIRD ROUND, AND
ON FOLLOW-UP TO THE RECOMMENDATIONS FORMULATED TO THAT COUNTRY
IN PREVIOUS ROUNDS^{1/}**

INTRODUCTION

1. Report Contents

[1] This report presents, first, a review of implementation in the Republic of Guatemala of the provisions of the Inter-American Convention against Corruption selected by the Committee of Experts of the Follow-up Mechanism (MESICIC) for review in the Third Round. Those provisions are Article III, paragraphs 7 and 10, and Articles VIII, IX, X, and XIII.

[2] Second, the report will examine follow-up to the implementation of the recommendations that were formulated to the Republic of Guatemala by the MESICIC Committee of Experts in the previous rounds, which are contained in the reports on that country adopted by the Committee and published on the following web pages: http://www.oas.org/juridico/english/mesicic_II_inf_gtm_en.pdf for the first round, and http://www.oas.org/juridico/english/mec_rep_gtm.pdf for the second round.

2. Ratification of the Convention and Adhesion to the Mechanism

[3] According to the official registry of the OAS General Secretariat, the Republic of Guatemala deposited its instrument of ratification of the Inter-American Convention against Corruption on July 3, 2001.

[4] In addition, the Republic of Guatemala signed the Declaration on the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption on December 19, 2001.

I. SUMMARY OF THE INFORMATION RECEIVED

1. Response of the Republic of Guatemala

[5] The Committee wishes to acknowledge the cooperation that it received throughout the review process from the Republic of Guatemala and, in particular, from the Vice President of the Republic, which was evidenced, *inter alia*, in the response to the questionnaire. Together with its response, the Republic of Guatemala sent the provisions and documents it considered pertinent. The response, provisions, and documents can be found at: www.oas.org/juridico/spanish/mesicic3_gtm.htm

[6] For its review, the Committee took into account the information provided by the Republic of Guatemala in its response of August 13, 2010; the information requested by the Secretariat and the

1. This Report was adopted by the Committee in accordance with the provisions of Article 3(g) and 25 of its Rules of Procedure and Other Provisions, at the plenary session held on March 25, 2011, at its Eighteenth meeting, held at OAS Headquarters, March 21-25, 2011.

members of the review subgroup, to carry out its functions in keeping with its Rules of Procedure and Other Provisions; and the information provided by the State under the terms of the Rules of Procedure and the Review Methodology.

2. Documents received from civil society organizations

[7] The Committee also received, within the time limit established in the schedule for the Third Round, a document from the civil society organization *Acción Ciudadana* (“Civic Action”), the national chapter of Transparency International in Guatemala, drawn up in collaboration with other organizations and submitted by that organization.²

II. REVIEW, CONCLUSIONS, AND RECOMMENDATIONS ON IMPLEMENTATION BY THE STATE PARTY OF THE CONVENTION PROVISIONS SELECTED FOR THE THIRD ROUND

1. DENIAL OR PREVENTION OF FAVORABLE TAX TREATMENT³ FOR EXPENDITURES MADE IN VIOLATION OF THE ANTICORRUPTION LAWS (ARTICLE III (7) OF THE CONVENTION)

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

[8] The Republic of Guatemala has a set of provisions related to the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws, among which the following should be noted:

[9] – The Constitution of the Republic of Guatemala, Article 239 of which enshrines the principle of legality and states that the Congress of the Republic shall have sole authority for decreeing regular and special taxes, adjudications, and special contributions, in accordance with the needs of the state and pursuant to equality and justice in taxation, and for determining the bases for taxation, particularly the following: (...) (b) Exemptions; (...) (e) Deductions, discounts, reductions, and surcharges. This provision also establishes that “hierarchically lower provisions that contradict or distort the legal provisions that regulate the bases for tax collection are *ipso jure* void of effect,” and it adds that “regulatory provisions may not modify those bases and shall merely regulate the administrative collection of taxes and establish procedures to facilitate their collection.”

[10] – The Tax Code, Congressional Decree 6-91, Article 3.2 of which provides that a law must be enacted, in order to award exemptions, cancellations, exonerations, deductions, discounts, reductions, and other fiscal benefits, except as provided for in Article 183, section (r), of the Constitution of the Republic of Guatemala. (That constitutional provision includes, among the functions of the President of the Republic, “exonerate from fines and surcharges those taxpayers incurring therein for not covering their taxes in accordance with the legal terms or through acts or omissions within the administration.”)

[11] Article 62 of the same Code also states that an exemption is the total or partial waiver of compliance with a tax obligation granted by law to the persons subject to it when the conditions

2. This document was received electronically on August 13, 2010, and may be consulted on line at: http://www.oas.org/juridico/spanish/mesicic3_gtm.htm.

3. For the purposes of this report, the MESICIC Committee of Experts defines favorable tax treatment as all exemptions and any deductible items used for the purposes of determining the income tax base, and other treatment that gives rise to favorable reductions in the amount of tax payable by taxpayers.

established in the law are met; Article 63 states that the law establishing exemptions will specify the conditions and requirements to be met for their granting, the taxes it covers, whether total or partial, and, if applicable, the duration thereof; and Article 65 provides that exemptions and favorable tax treatment granted shall be applicable exclusively to those taxpayers who effectively and directly carry out activities, actions, or contracts that are specifically covered by that exemption or benefit and subject to compliance with the legal requirements set out in the legislation granting them.

[12] In addition, Article 69 of this Code states that any act or omission that entails a violation of substantial or formal tax rules shall constitute an offense, punishable by the Tax Administration, provided that it does not constitute a crime or misdemeanor punishable under criminal law,⁴ and, in Article 97, refers to the “exoneration of fines, surcharges, and interest” in the following terms: “The exoneration of surcharges and fines is a function of the President of the Republic, who may authorize the Tax Administration to exercise that power, interest representing surcharges” (sic).

[13] Finally, Article 98 of the Code provides that the Tax Administration⁵ shall be obliged to ensure correct compliance with tax laws, with its powers including (section 3) verifying the content of returns and information through the legal and technical analytical and investigative means that it deems appropriate, in order to clearly establish the tax-generating circumstance and the corresponding amount. This provision adds that for this purpose, it may require the taxpayer and third parties to provide any additional information, including through the use of computer systems, in accordance with the terms of Articles 30ⁱ and 93ⁱⁱ of this Code.

[14] – The Income Tax Law, Congressional Decree 26-92, Article 37 of which provides that the taxable income of all individuals domiciled in Guatemala shall be the equivalent of their net income less the deductions indicated in that same article, including those addressed in section (d), dealing with donations that can be reliably established and granted to the State, municipalities, and their companies, to nonprofit charitable and social-service associations and foundations, to churches and other religious entities and associations, and to political parties; all duly authorized.⁶

[15] The same Law also provides, in Article 38, that taxpayers who choose the regime established in Article 72 thereofⁱⁱⁱ must determine their taxable income by deducting from their gross incomes only those costs and expenses necessary to produce or preserve the source that produces the taxable income, adding the nondeductible costs and expenses and subtracting their exempt income. The provision also states that the costs and expenses necessary for producing or preserving the source that produces the taxable income are those indicated therein, including those in section (a), dealing with the costs of producing and selling merchandise and of providing services; those in section (s), dealing with donations that can be reliably established and granted to the State, municipalities, and their companies, to nonprofit charitable and social-service associations and foundations, to churches and

4. “Tax fraud” is criminalized by Article 358-A of the Criminal Code, which is transcribed below.

5. This provision adds that “for the purposes of this Code, ‘Tax Administration’ shall be understood as meaning the Tax Administration Superintendency or other office or entity of the State assigned by law the functions of administrating, collecting, overseeing, and supervising taxation.”

6. This provision adds that for the deduction of donations received by those entities to proceed, they must be duly incorporated and registered, keep full accounts, be registered as taxpayers with the Unified Tax Register, and submit sworn annual returns with the annexes and requirements set by Article 54 of this Law. It also states that to check the above and verify the use given to received donations for the purposes indicated, they are to be subject to the oversight of the Tax Administration. It further provides that if the donations are shown not to agree with the accounting records of the receiving entity, they will not be accepted for deduction by taxpayer who granted them and, if evidence of tax fraud is found, the corresponding charges will be lodged in accordance with Articles 70 and 90 of the Tax Code.

other religious entities and associations, and to political parties; all duly authorized;⁷ and those in section (t), dealing with professional fees, commissions, reimbursements of deductible and similar expenses for professional services, technical, financial, or other advice, either provided in the country or from abroad.⁸

[16] Finally, Article 39 of the Law in question deals with costs and expenses that cannot be deducted from gross income by the individuals, entities, and estates referred to in Article 38 previously above, including, in section (a), costs or expenses not originating in the business, activity, or operation giving rise to the taxed income, and, in section (b), costs or expenses not supported by the corresponding legal documentation, or not corresponding to the annual tax year in question.

[17] – The Criminal Code, Article 358-A of which defines the crime of tax fraud in the following terms: “The crime of tax fraud is committed by any person who, through simulation, concealment, maneuvers, trickery, or any form of deception causes the Tax Administration to err in the determination or payment of tax obligation, thereby harming or undermining the collection of taxes. – Those guilty of the crime shall be punished by a prison term of between one and six years, to be set by the judge in accordance with the seriousness of the case, and a fine equal to the tax not paid. If the crime is committed by a foreigner, in addition to the applicable punishments, he shall be subject to expulsion from the nation’s territory, to be carried out immediately after the other punishments have been served.”

[18] Article 358-D of the Code also defines the crime of resisting the oversight of the Tax Administration, in the following terms: “The crime of resisting the oversight of the Tax Administration is committed by a person who, after a request from that Administration, with the intervention of a competent judge, hinders the actions and formalities necessary for the oversight and determination of his obligations; refuses to provide books, records, or other accounting documents needed to establish the taxable base for his obligations; or hinders access to a computer system in connection with the records of his accounting operations. – Those guilty of the crime shall be punished by a prison term of between one and six years and a fine equal to one percent (1%) of the taxpayer’s gross income during the monthly, quarterly, or annual period under review. If the crime is committed by employees or legal representatives of a corporate entity, seeking benefits for that entity, in addition to the punishments applicable to those involved in the crime, the corporate entity shall be subject to a fine equal to the amount of tax not paid. Repeat offenses shall cause the irrevocable cancellation of the corporate entity’s business license. – If the crime is committed by a foreigner, in addition to the applicable punishments, he shall be subject to expulsion from the nation’s territory, to be carried out immediately after the other punishments have been served.”

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

[19] The provisions that refer to the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws that the Committee has examined, based on the information available to it, constitute a set of measures for promoting the purposes of the Convention.

7. The provision also contains requirements and conditions for deductions to proceed, which are similar to those set out in Article 37, section (d), of the Tax Code as transcribed in the previous footnote.

8. It adds that “for these purposes, advice shall mean any ruling, counsel, or recommendation of a technical or scientific nature, presented in writing and arising from a detailed study of the available facts or data of a given situation or problem, in order to guide action in specific direction; provided that it is necessary and is intended to create taxable income and that the corresponding retention is made and paid.”

[20] The Committee nevertheless deems it appropriate to express some comments about certain provisions in this regard that the country under review could consider supplementing or adapting:

[21] First of all, the Committee believes it would be useful for the country under review to consider expanding the provisions dealing with the power to “exonerate from fines and surcharges those taxpayers incurring therein for not covering their taxes in accordance with the legal terms or through acts or omissions within the administration” that Article 183, section (r), of the Constitution gives to the President of the Republic.

[22] While not questioning the aforesaid constitutional provision, the Committee believes it would be useful for the country under review to consider adopting, through the means it deems appropriate, general and publicly known criteria for the exercise of the function provided for in Article 183, section (r), of the Constitution, by the President of the Republic, or by the Tax Administration, when it exercises the power in question under the terms of Article 97 of the Tax Code (see recommendation 1.4.a in Chapter II of this report).

[23] In connection with this, it should be noted that the document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, states in some of its sections that:⁹

[24] “According to information provided by the Tax Administration Superintendency (SAT), during the period from January 1 to June 30, 2010, the President of the Republic has exonerated fines and interest owed by seven taxpayers in a total amount of Q. 46,078,094.16, equal to approximately US\$5,759,761.77. In addition, each such resolution contains the phrase, “in addition to other surcharges arising after the date indicated.”

[25] Second, the Committee believes it would be useful for the country under review to consider adopting the measures it deems appropriate so that the Tax Administration can order the return to the State of the value of favorable tax treatments obtained through payments made in violation of the anticorruption laws (see recommendation 1.4.b in Chapter II of this report).

[26] In connection with this, the Committee believes that although Article 358-A of the Criminal Code, which defines the crime of tax fraud, provides for a prison term and fine for individuals who cause the Tax Administration to err in determining or paying a tax obligation, the proposed measure would streamline recovery by the public treasury of the monetary loss caused by such actions.

[27] Third, the Committee believes it would be beneficial for the country under review to consider adopting the measures it deems appropriate to assist the competent authorities in detecting amounts paid for corruption, should they be used in an attempt to obtain favorable tax treatment (see recommendation 1.4.c in Chapter II of this report).

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

9. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” pp. 4, 5, and 6.

[28] The section of Republic of Guatemala's reply to the questionnaire¹⁰ dealing with the results in this area reports that:

[29] "The National Statistics Institute reports that Article III and its subsections generate statistical data, but to date no contact has been made with the institution responsible for the topic to quantify the results of the provision's enforcement."

[30] "Since there are no regulations covering the denial or prevention of favorable tax treatment for payments made in violation of the anticorruption laws, there are consequently no statistical results available."

[31] Bearing this in mind, the Committee will formulate a recommendation to the country under review so that, through the tax authorities responsible for overseeing favorable tax treatment and the other authorities or agencies with responsibilities in that area, it consider the selection and development of procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained with respect to the standards referred to in section 1.1 of this report and to verify follow-up to the recommendations formulated herein (see recommendation 1.4.d in Chapter II of this report).

[32] In connection with this, it should be noted that the document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, states in one of its sections that:¹¹

[33] "No statistical data was found on the results of the use of mechanisms that help prevent and/or punish the obtaining of favorable tax treatment in violation of the anticorruption laws."

1.4. Conclusions and recommendations

[34] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to implementation in the country under review of the provision contained in Article III, paragraph 7, of the Convention:

[35] The Republic of Guatemala has considered and adopted measures for creating, maintaining, and strengthening standards on the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws, as indicated in section 1 of Chapter II of this report.

[36] In light of the comments made in that section, the Committee suggests that the Republic of Guatemala consider the following recommendation:

[37] Strengthen the standards for the denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws. To comply with this recommendation, the Republic of Guatemala could give consideration to the following measures:

- a) Adopt, through the means it deems appropriate, general and publicly known criteria for the exercise by the President of the Republic of the function provided for in Article 183, section

10. Response of Guatemala to the Questionnaire, p. 7.

11. Document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," p. 6.

- (r), of the Constitution, or by the Tax Administration, when it exercises the power in question under the terms of Article 97 of the Tax Code (see section 1.2 of Chapter II of this report).
- b) Adopt the measures it deems appropriate so that the Tax Administration can order the return to the State of the value of favorable tax treatments obtained through payments made in violation of the anticorruption laws (see section 1.2 of Chapter II of this report).
 - c) Consider adopting the measures deemed appropriate to make it easier for the appropriate authorities to detect sums paid for corruption in the event that they are being used as grounds for obtaining such treatment, such as the following (see section 1.2 of Chapter II of this report):
 - i. Manuals, guidelines or directives that will guide them in reviewing those applications, so that they are able to verify that the applications contain the established requirements, to confirm the truthfulness of the information provided, and to determine the origin of the expenditures or payment on which the claims are based..
 - ii. The possibility of accessing the sources of information necessary to conduct those verifications and confirmations, including requests from financial institutions.
 - iii. Computer programs that facilitate data consultation and cross-checking of information whenever necessary for the purpose of fulfilling their functions.
 - iv. Institutional coordination mechanisms that will provide the timely collaboration needed from other authorities, on such aspects as certifying the authenticity of the documents in support of the application of favorable tax treatment.
 - v. Training programs designed specifically to alert officials to the methods used to disguise payments for corruption and to instruct them in ways of detecting such payments in the applications for favorable tax treatment.
 - vi. Channels of communication so that they may promptly report to those who must decide on favorable treatment and warn them of the anomalies detected or of any irregularity that could affect the decision.
 - d) Select and develop, through the tax authorities responsible for processing requests for favorable tax treatment and the other authorities or agencies with competence in that area, procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard and to follow-up on the recommendations made in this report in relation thereto (see section 1.3 of Chapter II of this report).
- 2. PREVENTION OF BRIBERY OF DOMESTIC AND FOREIGN GOVERNMENT OFFICIALS (ARTICLE III, PARAGRAPH 10, OF THE CONVENTION)**
- 2.1. Existence of provisions in the legal framework and/or other measures**

[38] The Republic of Guatemala has a set of provisions related to the prevention of bribery of domestic and foreign government officials, among which the following should be noted:

[39] – The Commercial Code, Congressional Decree 2-70, Article 2 of which states that merchants are those who carry out, on their own behalf and in pursuit of profit, any activities involving the following: (1) Industry for the production or transformation of goods and the provision of services. (2) Intermediation in the distribution of goods and the provision of services. (3) Banking, insurance, and guarantees. (4) Ancillary activities to the foregoing. Article 12 further stipulates that banks, insurers, reinsurance firms, guarantors, reguarantors, financial companies, general deposit warehouses, stock markets, mutualist entities, and other similar bodies shall be governed in their establishment, organization, and operations by the terms of the Code in all matters not in conflict with special laws and provisions.

[40] The same Code also provides, in Article 31, that merchants shall be obliged to keep their accounts in an organized fashion, using the double-entry system and generally accepted accounting principles, and that to that end, they are to maintain the following books or records: (1) Inventory; (2) First-entry or daybook; (3) Ledger or centralized book; (4) Financial statements. The provision also states that accounts may be kept by mechanized procedures, on loose sheets, cards, or any other system, provided that their analysis and oversight is possible, and it further provides that merchants with total assets of less than twenty-five thousand quetzals (Q. 25,000.00) may omit from their accounts the books or records indicated above, with the exception of those required to do so by special laws.

[41] Article 38 of the same Code establishes the rights of shareholders to examine a company's accounts and documents, either by themselves or through appointed delegates; Article 55 states that managers shall be obliged to inform the shareholders, at least annually, of the company's financial and accounting situation, including a report on its activities, the general balance sheet, the profit-and-loss statement, and a breakdown of their remunerations and any other kind of benefits; and Articles 172, 184 and 188, dealing with limited corporations, establish that managers are to be jointly responsible for ensuring that the company's accounts are kept truthfully and in accordance with law; that the company's operations are overseen by the shareholders, by one or several accountants or auditors, or by one or several statutory auditors, in accordance with the corporate by-laws and the terms of the Code; and that the powers of auditors or of statutory auditors include overseeing the company's administration, examining its general balance sheet and other accounting statements to ensure their truthfulness and reasonable accuracy, and verifying that the accounts are kept legally and using generally accepted accounting principles.

[42] The Code also establishes, in Article 371, that merchants' accounts are to be kept by the merchants themselves or by another person, expressly or tacitly appointed, at the company's address or at the fiscal domicile of the taxpayer, unless the commercial registrar authorizes them to be kept at a different location within the country; it also provides that individual merchants with total assets in excess of twenty thousand quetzals, and all commercial companies, are obliged to use accountants to keep their accounts. The provision further states that the books required by the tax legislation must be kept at the taxpayer's fiscal address or at the taxpayer's accountant's office, as duly registered with the General Directorate of Internal Revenue.

[43] The Code also contains the following stipulations: Article 372 states that inventory books, first-entry or daybooks, ledgers or centralized books, and financial statements must be authorized by the Commercial Register; Article 373 states that merchants are to keep their accounts with truthfulness and clarity, in chronological order, without blank spaces, insertions, strike-throughs, or deletions, and that books must not show signs of having been altered by the removal or replacement of pages or any other method; it adds that errors or omissions in keeping books and records shall be

corrected immediately after they are detected, clearly explaining what they entail and indicating or adding the entry as it should have been made; Article 374 indicates that merchants must establish, at the start of operations and at least once per year, the financial situation of their companies, through the general balance sheet and the profit-and-loss statement, which are to be signed by the merchant and the accountant; and Article 375 states that it is prohibited to keep more than one set of accounts for a single company, adding that the violation of this precept causes the invalidation of all the accounts, irrespective of the other applicable responsibilities.

[44] The Code in question finally provides as follows: Article 376 establishes that merchants, or their heirs and successors, shall keep the books and general business records of the company for as long as it is in existence and until the liquidation of all its business and commercial offices; Article 377 states that the books or registers of financial statements are to contain: (1) the general opening balance sheet, and any regular or special balance sheets prepared for any reason; (2) profit-and-loss statements, or the equivalents thereof, corresponding to the general balance in question; and (3) any other statement that, in the merchant's opinion, is necessary to indicate the financial situation; Article 379 states that the general balance sheet must indicate truthfully and reasonably the merchant's financial situation and the results of his operations up to the date in question; Article 380 orders all commercial companies and foreign corporations authorized to operate in the Republic to publish their general balance sheets in the Official Journal at the close of each accounting year, meeting the requirements set by other laws to do so; and Article 381 states that all accounting operations must be duly proven by means of reliable documents that meet the legal requirements, adding that a failure to provide documents shall only be admitted for entries covering simple adjustments, transfers of balances, transfers from one book to another, and corrections.

[45] – The Income Tax Law, Congressional Decree 26-92, Article 46 of which provides: “For fiscal purposes, taxpayers required to keep accounts in accordance with the Commercial Code must meet the obligations set out in that Code as regards the keeping of books, records, financial statements, and numbered receipts. Such taxpayers may also keep their accounts by mechanical or computerized means, provided that those means guarantee the legal and chronological certainty of the operations and allow their analysis and oversight. For the purposes of this Law, these provisions also apply to individuals or corporate entities dedicated to agricultural or livestock activities. Taxpayers not required by law to keep full accounts, with the exception of people who obtain incomes as employees, must keep, at the minimum, a daily record book of cash income and expenditures, and an inventory book, in which they are to record their goods and debts at the start and close of each tax period. Practitioners of the liberal professions are not subject to this provision. Taxpayers required to keep accounts by the Commercial Code or other laws must prepare, and attach to their returns, their general balance sheets, profit-and-loss statements, cash flow statements and, when cost accounting is kept, production cost statements, as of the date of closure of the annual liquidation period. They must also provide additional accounting and fiscal information as required by the Directorate. For tax purposes, they must preserve the information supporting operations related to non-prescribed periods.”

[46] – The Tax Code, Congressional Decree 6-91, Article 94 of which, in dealing with violations of formal duties and the applicable sanctions, states that such violations cover all actions and failures to act that entail noncompliance with formal duties as provided for in the Code and in other tax laws, including among them, the following: No. 4: “Failing to have the accounting books or other obligatory records established in the Commercial Code and the specific tax laws, or failing to keep those books and records up to date. They shall be considered up to date if all operations are registered in the duly authorized and prepared books and records, if necessary, within two (2) calendar months

of having been carried out. SANCTION: A fine of five thousand quetzals (Q. 5,000.00) whenever the taxpayer is subject to oversight. This sanction shall apply without prejudice to the obligation of the taxpayer or person responsible to duly keep the books or accounting records in which the Tax Administration detected the delay.” – No. 5: “Keeping or maintaining books and accounting records in a way or place different from those required by the Commercial Code and the applicable specific tax laws. SANCTION: Fine of one thousand quetzals (Q 1,000.00) each time that the taxpayer is subject to oversight and the offense is detected.”

[47] – The Law on Nongovernmental Organizations for Development, Congressional Decree 02-2003, Article 13 of which states that nongovernmental organizations are required to register with the Tax Administration Superintendency, for registration and oversight, and to keep complete, organized accounts and the necessary records, in accordance with the double-entry system, following generally accepted accounting principles and the applicable provisions of the country’s laws.

[48] Article 15 of this law also states that when donations are received, for whatever purpose, nongovernmental organizations must issue receipts to the donors indicating the reception of their donations, using forms authorized by the Tax Administration Superintendency; and Article 16 provides that, notwithstanding their having their own internal auditing units, nongovernmental organizations (NGOs) are subject to the oversight of the office of the Comptroller General of Accounts and, for that purpose, they must present the information and documents that that office requests from them.

[49] – The Law on Banks and Financial Groups, Congressional Decree 19-2002, Article 57 of which states that banks and companies that make up financial groups must keep an internal control system that is appropriate to the nature and scale of their business, including clearly defined provisions for the delegation of authorities and responsibilities, separation of functions, disbursements of funds, operations accounts, safeguarding assets, and appropriate independent internal and external auditing, together with an administrative unit responsible for ensuring that staff observe those controls, the law, and the applicable provisions.

[50] Article 59 of this law also stipulates that the accounting records of operations carried out by companies subject to its terms must be kept in order and in accordance with the provisions issued by the Monetary Board at the proposal of the Superintendence of Banks and, as applicable, with generally accepted accounting principles and international accounting standards. This provision further states that the Superintendence of Banks is to establish general procedures for the presentation of financial statements and other information by companies subject to its oversight and inspection.

[51] – The Organic Law of the Office of the General Comptroller of Accounts, Congressional Decree 31-2001, of which Article 4(J) stipulates that the powers of that Office include examining the accounts of public works contractors and of any individual or corporate entity that, under the mandate of the State, receives, invests, or manages public funds, or which the State charges with the administration, execution, or supervision of public works or services, as regards public funds.

[52] – Presidential Decree No. 2450 of 1940, which sets out the rules to be observed by accountants and bookkeepers, Article 1 of which states that they are obliged to demand documentation covering the entries and annotations they are required to set down in accounting records and books, and that those documents must be in line with the requirements set by law; Article 12 states that since the sanctions provided for in the law for accountants and bookkeepers are unequivocal, owners or managers of for-profit enterprises shall refrain at all times from bringing influence to bear or taking

any other action toward having them record entries and annotations that are not in line with the provisions set out in the above articles; and Article 17 establishes that the sanctions applicable to failings in accounting books and in the documentation thereof are to be imposed by the General Directorate of Income, pursuant to the reports and minutes of the inspectors of the income tax oversight offices.

[53] – Governmental Agreement No. 206–2004, containing the Regulations to the Income Tax Law, Article 44 of which states that public accountants and auditors and expert accountants registered as such with the Tax Administration are responsible for the accounting operations recorded and for any other documents they certify or issue a ruling on, in accordance with their capacity as a taxpayer's accountant; Article 45 establishes that in cases in which, through their actions, professionals, public accountants and auditors, expert accountants, and entities that provide auditing services may incur in offenses criminalized by the Criminal Code, the relevant certifications are to be presented to the competent judge; and Article 46 states that the Tax Administration is to keep a Register of Accountants, with which all public accountants and auditors and expert accountants authorized to exercise the profession and appear before the Administration are required to register.

[54] – Agreement No. 08-2010 of the Board of the Tax Administration Superintendency, containing administrative provisions on the functions and responsibilities of expert accountants registered with the Superintendency, Article 2 of which defines ‘public accountant and auditor’ as a university-trained professional, belonging to the corresponding Professional College, trained in accounting and auditing matters, and ‘expert accountants’ as individuals with the corresponding university degree, certified by the Ministry of Education, registered with the Tax Administration Superintendency, responsible for keeping and justifying all their clients’ operations, recording in accounting books or other records all operations involving money, goods, and interests, obligations, income and revenue, and costs and expenses, applying the principles or current provisions of accounting techniques.

[55] This Agreement also establishes, in Article 7, the obligations of expert accountants, including, as No. 2, overseeing the authenticity of the data and documents that in the pursuit of their functions as accountants they receive from the people to whom they provide services; it further states that if they detect evidence of deception in the documents received, they must report the fact to the National Civilian Police or to the Public Prosecution Service for the corresponding legal investigation. Similarly, No. 3 sets out the obligation of acting in the pursuit of their functions ethically and in total accord with the current regulations. No. 8 establishes the obligation of observing the correct use of the basic principles and rules of accounting, International Accounting Standards, International Financial Reporting Standards, and the interpretations thereof; and No. 11 establishes the obligation of respecting the confidentiality of information obtained in the performance of their functions, stating that none of that information may be revealed without due and specific authorization, unless a legal or professional right or a duty for doing so exists. Finally, this same rule stipulates that failure to comply with these obligations will cause the automatic suspension of the expert accountant’s registration in the pursuit of his activities.

[56] – The Statute of the College of Public Accountants and Auditors of Guatemala, adopted in 2002, Article 1 of which states that it is to comprise public accountancy and auditing professionals from the various universities legally authorized to operate in the country, incorporated members, and other public accountants and auditors with degrees from foreign universities by whom exercise in the country is provided for in the Law on Obligatory Professional Association; Article 2 states that the association of the aforesaid professionals is obligatory; Article 7 states that the aims of the College include promoting, overseeing, and defending the decent, ethical, and efficient exercise of public

accountants and auditors in all main matters, and preserving discipline and solidarity among its members; and Article 30 stipulates that the Court of Honor is the body responsible for conducting inquiries, issuing the appropriate resolutions, and imposing sanctions when applicable, in complaints accusing any of the College's members of ethical failings, undermining the profession's honor and prestige, or incurring in blatant inefficiency, incompetence, negligence, lack of skill, malpractice, or morally incorrect behavior in the pursuit of that profession.

[57] – The Code of Professional Ethics adopted by the College of Public Accountants and Auditors of Guatemala in 2008, Rule I of which states that it applies to all public accountants and auditors who are active members of the College of Public Accountants and Auditors of Guatemala, regardless of their activities or specialties, and regardless of whether they are in private practice or are employees or officers of public or private institutions; and Rule VI states that public accountants and auditors are obliged to keep professional secrecy and, consequently, for no reason are they to reveal, for their own benefit or that of third parties, facts, data, or circumstances of which they become aware in their professional practice, adding that they are only obliged to reveal information under an order from a competent judge or when so required by applicable law. In Chapter VII, this code also establishes sanctions for those who violate the rules of professional ethics that it contains.

[58] – The Resolution of the Guatemalan Institute of Public Accountants and Auditors of January 22, 2008, Article 1 of which orders the “adoption in Guatemala, as the generally accepted accounting principles referred to in the Commercial Code, the Conceptual Framework for the Preparation and Presentation of Financial Statements and the International Financial Reporting Standards (IFRS) issued by the International Accounting Standards Board (IASB), including the International Accounting Standards (IAS) and the Interpretations”; and Article 5 indicates that the provisions of the resolution are to come into effect optionally for the financial year commencing in January 2008 and obligatorily for the year commencing January 2009.

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

[59] With respect to the provisions related to the prevention of bribery of domestic and foreign government officials that the Committee has examined, on the basis of the information made available, they may be said to constitute a coherent set of measures that are pertinent for promoting the purposes of the Convention.

[60] The Committee, nevertheless, deems it appropriate to express some comments about the convenience of the country under review considering complementing its applicable provisions.

[61] First, the Committee believes it necessary for the country under review to consider adopting, pursuant to its legal system and through the means it deems appropriate, the relevant measures so that “professional secrecy” does not pose an obstacle to accountants informing the competent authorities of acts of corruption that they detect in discharging their duties (see recommendation 2.4.a in Chapter II of this report).

[62] In connection with this, the Committee notes that the Code of Professional Ethics adopted by the College of Public Accountants and Auditors of Guatemala sets out, in Rule VI, the obligation of public accountants and auditors to maintain “professional secrecy,” and that this rule could pose an obstacle to their reporting, to the competent authorities, the acts of corruption that they detect in discharging their duties.

[63] Second, the Committee believes it advisable for the country under review to consider holding awareness campaigns that target the individuals responsible for the entry of accounting records and for accounting for their accuracy, on the importance of abiding by the standards in force to ensure the veracity of those records and the consequences for their violation, and also to consider implementing training programs specifically designed to instruct those who work in the area of internal control in publicly held companies and other types of associations that are required to keep accounting records about ways to detect acts of corruption through their work (see recommendation 2.4.b in Chapter II of this report).

[64] Third, the Committee believes it would be useful for the country under review to consider holding awareness and integrity promotion campaigns that target the private sector, and also to consider continuing to adopt measures such as the production of manuals and guidelines for companies on best practices that should be implemented to prevent corruption (see recommendation 2.4.c in Chapter II of this report).

[65] Fourth, the Committee believes that it would be beneficial for the country under review to consider the adoption of such measures as it deems appropriate to make it easier for the organs and agencies responsible for the prevention and/or investigation of noncompliance with measures designed to safeguard the accuracy of accounting records to detect sums paid for corruption concealed in those records (see recommendation 2.4.d in Chapter II of this report).

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

[66] The section of the Republic of Guatemala's reply to the questionnaire addressing results in this area provides no information in this regard.^{iv}

[67] Because the Committee lacks information that would enable it to offer a comprehensive appraisal of the results in this area, it will formulate a recommendation to the country under review so that, through the organs and agencies responsible for prevention and/or investigation of violations of measures designed to safeguard the accuracy of accounting records and ensure that commercial companies and other types of associations required to establish internal accounting controls do so in the proper manner, it consider the selection and development of procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard and to follow-up on the recommendations made in this report in relation thereto (see recommendation 2.4.e in Chapter II of this report).

[68] In connection with this, it should be noted that the document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, states in one of its sections that:¹²

[69] "There are no specific statistical data covering the measures or sanctions for demanding observance of the provisions related to records and accounting controls for preventing the bribing of domestic and foreign public officials."

2.4. Conclusions and recommendations

12. Document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," p. 16.

[70] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to implementation in the country under review, of the provision contained in Article III, paragraph 10, of the Convention:

[71] The Republic of Guatemala has considered and adopted measures to create, maintain, and strengthen standards for the prevention of the bribery of domestic and foreign government officials, as described in Chapter II, Section 2, of this report.

[72] In light of the comments made in that section, the Committee suggests that the Republic of Guatemala consider the following recommendation:

[73] Strengthen the standards and measures for the prevention of the bribery of domestic and foreign government officials. To comply with this recommendation, the Republic of Guatemala could take the following measures into account:

- a) Adopt, in accordance with its laws and through the means it deems appropriate, the relevant measures so that “professional secrecy” does not pose an obstacle to public accountants and auditors informing the competent authorities of acts of corruption that they detect in discharging their duties (see section 2.2 of Chapter II of this report).
- b) Hold awareness campaigns that target the individuals responsible for the entry of accounting records and for accounting for their accuracy, on the importance of abiding by the standards in force to ensure the veracity of those records and the consequences of their violation, in addition to implementing training programs specifically designed to instruct those who work in the area of internal control in publicly held companies and other types of associations required to keep accounting records, on how to detect acts of corruption through their work (see section 2.2 of Chapter II of this report).
- c) Consider holding awareness and integrity promotion campaigns that target the private sector and consider adopting measures such as the production of manuals and guidelines for companies on best practices that should be implemented to prevent corruption (see section 2.2 of Chapter II of this report).
- d) Consider adopting the instruments necessary to facilitate the detection, by the organs and entities responsible for preventing and/or investigating violations of measures designed to ensure the accuracy of accounting records, of sums paid for corruption, that are concealed in those records, such as the following (see section 2.2 of Chapter II of this report):
 - i. Investigation tactics, such as follow-up on expenditures, crosschecking of information and accounts, and requests for information from financial entities in order to determine if such payments occurred.
 - ii. Possibility of access to the sources of information necessary to perform the above verification and determination tasks, including requesting information from financial agencies.
 - iii. Manuals, guidelines or directives on how to review accounting records in order to detect sums paid for corruption

- iv. Computer programs that provide easy access to the necessary information to verify the veracity of accounting records and of the supporting documents on which they are based.
- v. Institutional coordination mechanisms that enable them to easily obtain the timely collaboration from other institutions to verify the veracity of accounting records and of the supporting documents on which they are based or to establish their authenticity.
- vi. Training programs specifically designed to alert them to the methods used to disguise payments for corruption in those records and to instruct them on how to detect them.
- e) Select and develop, through its organs and entities charged with preventing and/or investigating violations of the measures intended to ensure the accuracy of accounting records and with overseeing that commercial companies and other types of associations required to establish internal accounting controls do so in an appropriate fashion, procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard and to follow-up on the recommendations made in this report in connection therewith (see section 2.3 of Chapter II of this Report).

3. TRANSNATIONAL BRIBERY (ARTICLE VIII OF THE CONVENTION)

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

[74] The Republic of Guatemala has the following provision applicable to transnational bribery:

[75] – Criminal Code, Article 442-bis:

[76] “Active Transnational Bribery. Any person subject to Guatemalan law¹³ who offers a gift or present, or who promises or extends any monetary or other form of advantage, either directly or indirectly, to public officials of another state or international organization, for that official or for another person to act or to refrain from acting in the performance of his functions, to obtain or retain business or other undue advantage of an economic or commercial nature, shall be liable to a punishment of between four (4) and ten (10) years in prison and a fine of between fifty thousand (Q. 50,000.00)¹⁴ and five hundred thousand (Q. 500,000.00) quetzals.”¹⁵

[77] “Any individual who assists, collaborates in, encourages, incites, instigates, promotes, or conspires in the commission of the acts described in the previous paragraph indirectly and who is identified as an accomplice of the aforesaid acts shall be liable to the sanction indicated therein reduced by one third.”

[78] “Should a corporate entity participate in the activities described in the first paragraph, through the people identified in Article 38 of the Criminal Code, seeking benefits for that corporate entity, in addition to the sanctions applicable to the participants in the crime, the corporate entity shall receive

13. Article 4 of the Criminal Code reads as follows: “Territorial scope of criminal law. Except as provided for in international treaties, this Code shall apply to all individuals who commit crimes or misdemeanors within the territory of the Republic or in places or on vehicles subject to its jurisdiction.” Article 5 of the Criminal Code provides: “Extraterritorial scope of criminal law. This Code shall also apply: (...) 3. To offenses committed by Guatemalans abroad, when their extradition is denied. (...) 5. To crimes that, under a treaty or convention, are punishable in Guatemala even when not committed within its territory. (...).”

14. Equal to \$6,250 U.S. dollars at the October 2010 exchange rate (US\$1 = Q8 approx.)

15. Equal to \$62,500 U.S. dollars at the October 2010 exchange rate (US\$1 = Q8 approx.)

a fine of between one hundred thousand quetzals (Q. 100,000.00) and seven hundred and fifty thousand quetzals (Q. 750,000.00,) or of twice the amount of the benefit obtained, whichever is greater, and, in the event of a repeat offense, the irrevocable cancellation of the corporate entity's trading license shall be ordered."

[79] "People who in good faith report the acts described in this article shall be protected by the competent authorities, in accordance with the current legislation."

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

[80] The Republic of Guatemala's provision related to transnational bribery, as provided for in Article VIII of the Convention, which the Committee has examined, based of the information made available to it, may be said to be relevant for promoting the purposes of the Convention.

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

[81] The section of the Republic of Guatemala's reply to the questionnaire addressing results in this area provides no information in this regard.

[82] Because the Committee lacks information that would enable it to offer a comprehensive appraisal of the results in this area, it will formulate a recommendation to the country under review so that, through the organs and agencies responsible for investigating and/or prosecuting the crime of transnational bribery, and for requesting and/or providing the assistance and cooperation provided for in connection with it in the Convention, it consider the selection and development of procedures and indicators, when appropriate and where they do not yet exist, for analyzing the objective results obtained in this area (see recommendation 3.4.a in Chapter II of this report).

[83] In connection with this, it should be noted that the document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, states in one of its sections that:¹⁶

[84] "The Public Prosecution Service was asked for information on the number of transnational bribery complaints filed, and on their results and current situation, during the 2006 to 2010 period. According to the reply given in case file 555-2010, to date the computer system contains no complaints of transnational bribery."

3.4. Conclusions and recommendations

[85] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to the implementation in the country under review of the provisions contained in Article VIII of the Convention:

[86] The Republic of Guatemala has adopted measures on the offense of transnational bribery as provided in Article VIII of the Convention, as described in Chapter II, Section 3, of this report.

16. Document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," p. 19.

[87] In light of the comments made in that section, the Committee suggests that the Republic of Guatemala consider the following recommendation:

- a) Select and develop, through the organs or agencies charged with the investigation and/or prosecution of the offense of transnational bribery, as well as with requesting and/or providing the related assistance and cooperation provided for in the Convention, procedures and indicators, when appropriate and where they do not yet exist, to analyze objective results obtained in this regard (see Section 3.3 of Chapter II of this report).

4. ILLICIT ENRICHMENT (ARTICLE IX OF THE CONVENTION)

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

[88] The Republic of Guatemala does not yet have any provisions criminalizing the offense of illicit enrichment as provided for in Article IX of the Convention.

[89] On this point, in its response to the questionnaire¹⁷ the Republic of Guatemala states, *inter alia*, the following:

[90] “For the criminalization of that offense, the Guatemalan National Congress is working on Bill 3894, “Law against Illicit Enrichment,” which, if passed, would also enable amendments to be made to the Criminal Code, Congressional Decree 17-73, in order to provide for the corresponding penalties. – There are several bills before the Congress of the Republic. This initiative received a favorable ruling from the Legislation Committee on November 17, 2008. Bill 3277 is also before the Congress of the Republic.”

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

[91] As indicated in the previous section, the Committee will issue the relevant recommendation to the country under review, pursuant to its Constitution and the fundamental principles of its legal system, for it to criminalize the offense of illicit enrichment as described in Article IX of the Convention (see recommendation 4.4.1 in Chapter II of this report).

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

[92] The absence of legal provisions prevents an appraisal of the results in this area. In light of this circumstance, the Committee will formulate a recommendation (see recommendation 4.4.2 in Chapter II of this report).

4.4. Conclusions and recommendations

[93] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to implementation in the country under review of the provision contained in Article IX of the Convention:

[94] The Republic of Guatemala has not criminalized the offense of illicit enrichment as provided in Article VIII of the Convention, as indicated in Chapter II, section 4, of this report.

17. Response of Guatemala to the Questionnaire, pp. 18 and 19.

[95] In light of the comments made in that section, the Committee suggests that the Republic of Guatemala consider the following recommendations:

- 4.4.1. Criminalize, pursuant to its Constitution and to the fundamental principles of its legal system, the offense of illicit enrichment as set out in Article IX of the Convention and referring to an increase in a public official's net worth that is significantly excessive compared to his legitimate income during the performance of his functions and which he cannot reasonably justify (see section 4.2 of Chapter II of this report).
 - 4.4.2. Select and develop, through the agencies or bodies that may be responsible for investigating and/or prosecuting the crime of illicit enrichment, and for requesting and/or providing the assistance and cooperation provided for in connection with it in the Convention, procedures and indicators, when appropriate and when they do not exist, to analyze the objective results obtained in this regard and to follow-up on the recommendations made in this report in relation thereto-(see section 4.3 of Chapter II of this report).
- 5. NOTIFICATION OF CRIMINALIZATION OF TRANSNATIONAL BRIBERY AND ILLICIT ENRICHMENT (ARTICLE X OF THE CONVENTION)**

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

[96] The Republic of Guatemala criminalized the offense of transnational bribery as provided for in Article VIII of the Inter-American Convention against Corruption, after the date on which it ratified the Convention, as indicated in Chapter II, Section 3, of this Report.

[97] The Republic of Guatemala has not criminalized the offense of illicit enrichment as provided for in Article IX of the Inter-American Convention against Corruption.

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

[98] The Republic of Guatemala criminalized the offense of transnational bribery as provided for in Article VIII of the Inter-American Convention against Corruption after the date on which it ratified the Convention, and on September 21, 2007, it notified the Secretary General of the OAS of that criminalization, in accordance with the terms of Article X thereof.

[99] Since the country under review has not criminalized the offense of illicit enrichment as provided for in Article IX of the Convention, the Committee will recommend that when it does so, it notify the OAS Secretary General of that decision, in compliance with the terms of Article X of the Convention (see recommendation 5.3 in Chapter II of this report).

5.3. Conclusion and recommendation

[100] Based on the review conducted in Sections 5.1 and 5.2 above, regarding the implementation in the country under review of the provision set out in Article X of the Convention, the Committee offers the following conclusion and recommendation:

[101] The Republic of Guatemala has not criminalized the offense of illicit enrichment as provided for in Article IX of the Convention. Consequently, the Committee recommends that

when it does so, it notify that situation to the Secretary General of the OAS, in compliance with Article X of the Convention.

6. EXTRADITION (ARTICLE XIII OF THE CONVENTION)

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

[102] The Republic of Guatemala has a set of provisions related to extradition, among which the following should be noted:

[103] – Article 27 of the Constitution, which in paragraph 2 *et seq.* provides as follows: “Extradition shall be governed by the terms of international treaties. – The extradition of Guatemalan nationals for political crimes shall not be sought, and in no instance shall they be turned over to foreign governments, except as provided for in treaties and conventions dealing with crimes against humanity or against international law. – The expulsion of a political refugee from the nation’s territory to the country seeking him shall not be ordered.”

[104] – Decree 1575 of 1929, adopting the 1928 Convention of Havana whereby a Code of Private International Law was approved, Article 344 of which states that to enforce international judicial competence in criminal matters, each of the contracting states¹⁸ shall accede to requests made by any of the others for the surrender of a person convicted or prosecuted for offenses in line with the provisions of this Code, subject to the terms of the international treaties or conventions containing lists of criminal offenses for which extradition is authorized.

[105] This Code also establishes, in Article 345, that: “Contracting States shall not be obliged to hand over their own nationals. A nation that refuses to hand over one of its citizens shall be obliged to prosecute that citizen.” Similarly, Article 353 provides that “the fact on which the extradition is based must be considered a crime under the laws of both the requesting and sending states.”

[106] – The Criminal Code, Article 5.3 of which states that the Code applies to offenses committed by Guatemalans abroad when their extradition has been denied; and Article 8 establishes that extradition may only be sought or granted for common crimes, and that extradition under international treaties may only be granted if reciprocity exists. The provision further states that in no instance may extradition be sought or granted for political crimes or for common crimes connected therewith.

[107] – The Law Regulating Extradition Procedures, Congressional Decree 28-2008, Article 1 of which states that extradition proceedings are to be governed by the treaties or conventions to which Guatemala is a party and, in matters not provided for therein, by the terms of the Law; and Article 10 provides that the judicial branch, through the competent jurisdictional agencies, shall be solely responsible for deciding on the admissibility of passive extraditions presented by the Public Prosecution Service, and further states that a refusal to grant passive extradition requires that the State of Guatemala, through the relevant agencies, bring criminal action in those cases in which it is permissible under a treaty, convention, international arrangement, or domestic law.

18. This Convention was signed by Peru, Uruguay, Panama, Ecuador, Mexico, El Salvador, Guatemala, Nicaragua, Bolivia, Venezuela, Colombia, Honduras, Costa Rica, Chile, Brazil, Argentina, Paraguay, Haiti, Dominican Republic, United States of America, and Cuba.

[108] The Law also stipulates, in Article 14, that the state seeking extradition may request the State of Guatemala, through diplomatic channels, for the person sought to be held in preventive custody, provided that it establishes the existence of an arrest warrant and that, within the deadline set in the international arrangement, it presents a formal extradition request. It also states that no alternative to the arrest of persons held in preventive custody shall be applicable as a part of this procedure, and that their detention shall last until either the person sought is extradited or the extradition request is finally ruled inadmissible.

[109] The Law also establishes, in Article 15, that once the request for preventive custody has been received from requesting country, the Ministry of Foreign Affairs must give notice thereof to the Public Prosecution Service within a period of two days, and that the Public Prosecution Service must process it before the competent judicial authority immediately, within a deadline of no more than two days. It adds that if the extradition application contains a request for custody as an urgent measure, the above procedure is to be followed, and it states that the jurisdictional agency receiving the preventive custody request filed by the Public Prosecution Service must rule on it immediately.

[110] Article 31 of the Law refers to active extradition, indicating that the State of Guatemala, through the Ministry of Foreign Affairs and at the request of the Public Prosecution Service, shall issue a request for preventive custody or, if applicable, for formal extradition to the other state, when a judge or court has issued an order for the arrest or capture of the person sought and when the person sought has been convicted and is required to serve his sentence.

[111] Finally, Article 34 of the Law establishes the “preeminence of international treaties dealing with extradition”; it further states that “both active and passive extradition proceedings shall be governed by the terms of this law” and that “nevertheless, if the international treaties dealing with extradition signed and ratified by the State of Guatemala set procedures or formalities that are different from those set out in this law, the treaty provisions shall prevail.”

[112] – The bilateral extradition treaties signed by Guatemala with other IACAC states parties, such as the United States, Canada, and Mexico; and the Montevideo Convention on Extradition, to which Guatemala is a party along with Argentina, Colombia, Chile, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, and the Dominican Republic.¹⁹

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

[113] With respect to the provisions related to extradition that the Committee has examined, based on the information made available to it, may be said to constitute a set of measures for promoting the purposes of the Convention.

[114] Notwithstanding the foregoing, the Committee believes necessary that in light of Article III, paragraph 6, of the Convention, the country under review consider adopting the relevant measures to promptly notify a requesting state whose extradition request in connection with offenses under the Convention is denied on the grounds of the nationality of the person sought, or because the requested state deems that it has jurisdiction, regarding the final outcome of the case brought before its competent authorities as result of that denial (see recommendation 6.4.a in Chapter II of this report).

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

19. The text of these treaties may be seen at: <http://www.oas.org/juridico/mla/sp/gtm/index.html>.

[115] The section of Republic of Guatemala's response to the questionnaire²⁰ addressing results in this area, reports that:

[116] "The INE reports that it has not contacted the agency responsible for extradition matters to quantify the results of enforcing the rules. – The Public Prosecution Service spoke of the request for the extradition of a former president charged with acts of corruption, which was sent to Mexico, was²¹ granted, and is currently at the investigation phase."

[117] The Committee considers that the foregoing information serves to indicate that the country under review has referred to the Inter-American Convention against Corruption in documents dealing extradition requests made by states that are parties to that international instrument.

[118] The Committee considers that although the above information indicates that the country under review has requested that another country extradite a former public official for acts of corruption, it has no additional information to indicate that the country under review made that request, or other extradition requests, to States Parties to the Inter-American Convention against Corruption in connection with the offenses set out in Article XIII thereof and on the basis of that Convention provision. Neither does it have any information on extradition requests served in Guatemala by other States Parties to the Convention in connection with those offenses.

[119] Based on the foregoing, the Committee will formulate a recommendation to the country under review so that, through the agencies or entities charged with processing active and passive extradition requests, it develop procedures and indicators, when appropriate and when they do not exist, to enable it to present information on the use of the Inter-American Convention Against Corruption as the legal basis for the extradition requests it submits to other States Parties, and to base its decisions on such requests lodged with it by those other States Parties (see recommendation 6.4.b in Chapter II of this report).

[120] In addition, the Committee believes it would be beneficial for the country under review to consider using the Inter-American Convention against Corruption for extradition purposes in corruption cases, which could involve, among other measures, the implementation of training programs on the enforcement possibilities it offers, designed specifically for the administrative and judicial authorities with responsibility for this area (see recommendation 6.4.c in Chapter II of this report).

[121] It should be noted that the document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," presented by the civil society organization *Acción Ciudadana* in conjunction with other organizations, notes the following with respect to the results in this area:²²

[122] "There is no specific information on the offenses covered by the Inter-American Convention against Corruption. However, according to information provided by the Ministry of Foreign Affairs in a resolution of August 11, 2010, there have been eight passive extradition requests during the year 2010 to date. Those requests were sent by the United Mexican States, the United States of America, and El Salvador, under which only five individuals have been arrested. – Among the known requests in which the person sought is charged with corruption-related offenses is that of Alfonso Portillo,

20. Response of Guatemala to the Questionnaire, p. 21.

21. In the Spanish-language version the word "se" was replaced with "fue", at Guatemala's request (Errata).

22. Document "Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala," p. 25

who served as President of Guatemala from 2000 to 2004, which was requested by the United States Attorney for the Southern District of New York²³. On March 17, 2010, the Sentencing Court declared the extradition of the former president to the United States to be admissible, to face prosecution in that country for the crime of conspiracy to commit money laundering, based on the Law Regulating Extradition Proceedings, the extradition treaty signed by the United States and Guatemala, and the United Nations Convention against Corruption. – However, the extradition cannot take place until judgment is handed down in the criminal proceedings for embezzlement brought against the former president in the Guatemalan courts.”

6.4. Conclusions and recommendations

[123] Based on the review conducted in the foregoing sections, the Committee offers the following conclusions and recommendations with respect to the implementation in the country under review of the provision contained in Article XIII of the Convention:

[124] The Republic of Guatemala has adopted measures on extradition, as provided for in Article XIII of the Convention, as described in Chapter II, Section 6, of this report.

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

- a) Adopt the relevant measures to promptly notify a requesting state whose extradition request in connection with offenses under the Convention is denied on the grounds of the nationality of the person sought, or because the requested state deems that it has jurisdiction, regarding the final outcome of the case brought before its competent authorities as result of that denial (see section 6.2 of Chapter II of this report).
- b) Develop procedures and indicators, when appropriate and when they do not exist, to enable it to present information on the use of the Inter-American Convention Against Corruption as the legal basis for the extradition requests it submits to other States Parties, and to base its decisions on such requests lodged with it by those other States Parties (see section 6.3 of Chapter II of this report).
- c) Consider using the Inter-American Convention against Corruption for extradition purposes in corruption cases, which could involve, among other measures, the implementation of training programs on the enforcement possibilities it offers, designed specifically for the administrative and judicial authorities with jurisdiction over this area (see section 6.3 of Chapter II of this report).

III. OBSERVATIONS REGARDING THE PROGRESS MADE WITH IMPLEMENTING THE RECOMMENDATIONS ISSUED IN REPORTS FOR PREVIOUS ROUNDS

FIRST ROUND²⁴

[126] With respect to implementation of the recommendations issued to the Republic of Guatemala in the report from the First Round on which it did not supply information with regard to progress in

²³ The word Cork” was replaced with “York”, at Guatemala’s request (Errata).

24. The references to sections that appear in italics in the recommendations and measures transcribed herein, refer to the report from the First Round of Review.

their implementation in its response to Section II of the Questionnaire for the Second Round, or on those for which it supplied information but which the Committee considered in Section IV of the report for that round that they needed additional attention, and on the basis of the information available to it, referring to progress in implementation subsequent to that report, the Committee notes the following:

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

1.1. Standards of conduct to prevent conflict of interest and mechanisms to enforce them

Recommendation 1.1.1:

Strengthen the implementation of laws and systems to regulate conflicts of interest.

Measures suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round:²⁵

- 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).*

[127] In its response,²⁶ the country under review presents information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to measure (a) of recommendation 1.1.1. In this regard, the Committee notes, as steps which contribute to its implementation, the following measures:

[128] – “The Parliamentary Code of Ethics, a legislative bill presented by the Congress of the Republic on May 7, 2007, heard by the plenary on June 4 of that year, and currently pending a decision by the Special National Commission for Transparency. Articles 31 and 32 of the bill prohibit members of Congress from using their positions to promote the success of their private businesses or

25. See pp. 43 and 44 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

26. Response of Guatemala to the Questionnaire, pp. 22 to 24.

for their personal benefit. It also seeks to avoid all actions or behaviors that could benefit third parties or bring undue influence to bear.”

[129] – “In order to enforce Article 45 of the Regulations to the Organic Law of the Office of the Comptroller General of Accounts, Governmental Agreement 318-2003, the Comptroller issued circular No. A-003-2008 on June 2, 2008.²⁷ This circular is addressed to government auditors, and to heads and directors of auditing areas, and it is intended to prevent conflicts of interest of all kinds that might arise in the performance of their duties.”

[130] – “The Public Prosecution Service observes the Law on Probity and Responsibilities of Public Officials and Employees; in addition, in 2009, the Code of Ethics of the Public Prosecution Service, set out in Agreement 28-2009, was adopted.”²⁸

[131] The Committee takes note of the steps taken by the country under review to make progress in its implementation of measure (a) of recommendation 1.1.1, but taking into account that they involve, first, a bill that has not yet been passed into law (dealing with members of Congress) and, in the other two instances, provisions targeting specific agencies (the Office of the Comptroller General of Accounts and the Public Prosecution Service), the goal of the measure – the regulation, for public servants as a whole, of certain situations described in section 1.1.2 of the First Round report that could give rise to conflicts of interest and that, on account of their importance, it would be useful to address by means of detailed and specific treatment – remains pending. For these reasons, the Committee believes it is necessary for the country under review to continue to give attention to measure (a) of recommendation 1.1.1.

[132] In its response,²⁹ the country under review did not present information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to measure (b) of recommendation 1.1.1. The Committee therefore reiterates the need for the country under review to give additional attention thereto.

[133] In its response,³⁰ the country under review presents the following information additional to that analyzed by the Committee in the Reports from the First and Second Round, which it considers related to the implementation of measure (c) of recommendation 1.1.1:

[134] – “The ANAM reports that the Municipal Code was amended to avoid conflicts of interest among employees.”

[135] – “The Ministry³¹ of the Economy provides permanent training for people involved in procurement and contracting. Internally, MINECO has implemented sets of work instructions in all its offices, with regular reviews to set the bases for the effective performance of their duties, which also guarantee the appropriate use of the assigned resources and avoid the emergence of conflicts of interest.”

27. Guatemala supplied this circular on February 10, 2011.

28. Guatemala supplied the text of this Agreement on February 10, 2011.

29. Response of Guatemala to the Questionnaire, p. 24.

30. Response of Guatemala to the Questionnaire, pp. 24 and 25.

³¹ In the Spanish-language version the word “Ministeriro” was replaced with “Ministerio”, at Guatemala’s request (Errata).

[136] – “Regarding measure (c) of the recommendation, with reference to the General Secretariat of the Office of the President of the Republic, between September 2009 and March 2010 there are no records of the Secretariat having been presented a new set of draft amendments to the Regulations to the Law on Probity and Responsibility of Public Officials and Employees; consequently, there have been no substantial changes in connection with them.”

[137] In the progress report³² presented at the sixteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to measure (c) of recommendation 1.1.1. In this regard, the Committee notes the following measure as a step which contributes to its implementation

[138] – “On the form for sworn statements of assets, the Office of the Comptroller General of Accounts included a clause to prevent possible conflicts of interest. It may be seen at http://www.contraloria.gob.gt/i_docs/i_f_deju.pdf; it also includes the presentation of excuses in cases of conflicts of interest in their functions.”

[139] The Committee takes note of the step taken by the country under review to progress with the implementation of measure (c) of recommendation 1.1.1, but taking into account that the design of the mechanisms for resolving the inquiries referred to in that measure is still pending, the Committee considers it necessary for the country under review to continue paying attention thereto.

[140] In its response,³³ the country under review submits information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to measure (d) of recommendation 1.1.1. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[141] – “As a special prohibition for the nominating authorities and to increase the efficiency of the public service, it has been proposed to amend Article 39 of the current Civil Service Law to include a clause whereby relatives within the degrees stipulated by law cannot be appointed to the same Administrative Unit or to related Administrative Units, be they responsible for control and/or oversight, or to appoint persons with private interests that are compatible with projects financed by State funding.”

[142] – “The proposed amendments to the current law are before Congress as bill 4142, and they have been passed by the Legislation and Constitutional Affairs Committee and by the Labor and Social Welfare Committee. The bill is currently awaiting its reading by the plenary of Congress of the Republic, at the first session in the period in which it is placed before that body.”

[143] – “Between September 2009 and March 2010, reports indicate that a bill to amend Congressional Decrees 1748 and 114-97 (Civil Service Law and Law of the Executive Branch) was filed on November 9, 2009, with the legislation clerk; it was heard by Congress on March 4, 2010, and was referred to the Legislation and Constitutional Affairs Committee and by the Labor and Social Welfare Committee for joint analysis and ruling.”

[144] The Committee takes note of the steps taken by the country under review to make progress in its implementation of measure (d) of recommendation 1.1.1, but taking into account that they involve

32. See p. 1 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

33. Response of Guatemala to the Questionnaire, p. 25.

bills that have not yet been passed into law, the Committee believes it is necessary for the country under review to continue to give attention to measure (d) of recommendation 1.1.1.

[145] In the progress report³⁴ presented at the fifteenth meeting of the Committee, the country under review submits information additional to that analyzed by the Committee in the Reports from the First and Second Round, with respect to the implementation of measure (e) of recommendation 1.1.1. In this regard, the Committee notes the following as steps that lead it to conclude that this measure has been satisfactorily considered:

[146] – “The Code of Ethics of Officers and Employees of the Office of the Comptroller General of Accounts was issued by means of Agreement A-159-2008 by the Comptroller General of Accounts on June 9, 2008. (See: http://www.contraloria.gob.gt/i_docs/i_codigo_etica.pdf.)”

[147] – “In September 2008, work began on the implementation of this Code with the organization of awareness and training days on its provisions for staff members from all the offices and departmental agencies.”

[148] The Committee takes note of the satisfactory consideration by the country under review of measure (e) of recommendation 1.1.1, without entering into a detailed analysis of the content of the provision referred to by the State in connection therewith.

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

Recommendation 1.2.1:

Strengthen the implementation of laws and systems to regulate the conservation and proper use of public resources.

Measures suggested by the Committee that was satisfactorily considered within the framework of the Second Round:³⁵

- 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 subsection 1.2.1 of this report.*

Measure suggested by the Committee that require information on its implementation or which required additional attention within the framework of the Second Round:³⁶

34. See p. 2 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

35. See pp. 45 to 47 of this report, at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

36. See pp. 45 to 47 of this report, at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

- 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).*

[149] In its response,³⁷ the country under review offers the following information additional to that analyzed by the Committee in the Reports from the First and Second Round, which it considers related to the implementation of measure (a) of recommendation 1.2.1:

[150] – “During 2010, the Tax Administration Superintendency continued organizing workshops to strengthen values and ethics. The Code of Ethics was distributed, and an informational talk was held. Newly hired personnel sign a letter of commitment toward transparency and ethics.”

[151] – “It should be adopted, since the laws are to be observed by all. In addition, the MP reports that controls can be kept through enforcement of the Law on State Procurement and Contracting and of the Law of Responsibilities.”

[152] The Committee takes note of the need for the country under review to give additional attention to the implementation of measure (a) of recommendation 1.2.1, taking into account that the enactment of the criminal law covering the offense of illicit enrichment, as described therein, is still pending.

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

Recommendation 1.3.1:

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.

Measures suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round:³⁸

- 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*

[153] In its response,³⁹ the country under review offers, *inter alia*, the following information additional to that analyzed by the Committee in the Reports from the First and Second Round, which it considers related to the implementation of measure (a) of recommendation 1.3.1:

37. Response of Guatemala to the Questionnaire, p. 26.

38. See pp. 47 and 48 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

39. Response of Guatemala to the Questionnaire, pp. 30 and 31.

[154] – Various actions undertaken by the Tax Administration Superintendency in the internal control and oversight of all its agencies and offices, together with the creation of an e-mail account for receiving complaints, the continuation of the actions set out in the annual operating plans for 2009 and 2010 for the implementation of the project to standardize policies and procedures for special investigations, and the attention given to complaints between September 2009 and February 2010.

[155] – “...according to the Code of Criminal Procedure, the reporting of any punishable action is obligatory. It should be noted that the Public Prosecution Service has a computer system used to record complaints, with all the information kept in the system for verification purposes.”

[156] The Committee takes note of the need for the country under review to give additional attention to the implementation of measure (a) of recommendation 1.3.1, bearing in mind that the adoption of additional measures for the protection of public servants, in order to encourage them to report, to the competent authorities, the acts of corruption in public functions of which they become aware, as described therein, is still pending.

[157] In its response,⁴⁰ the country under review offers the following information additional to that analyzed by the Committee in the Reports from the First and Second Round, which it considers related to the implementation of measure (b) of recommendation 1.3.1:

[158] – “According to amendments to the Municipal Code, the training of municipal officers or employees is obligatory to strengthen the Municipal Administrative Career and ensure service quality.”

[159] The Committee takes note of the need for the country under review to give additional attention to the implementation of measure (b) of recommendation 1.3.1, bearing in mind that the implementation of the training and outreach programs referred to therein is still pending.

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

Recommendation 2.1:

Strengthen systems for filing declarations of income, assets and liabilities.

Measures suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round:⁴¹

- 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.*

40. Response of Guatemala to the Questionnaire, p. 31.

41. See pp. 48 to 50 of this report, at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

- 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).*

[160] In its response,⁴² the country under review offers, *inter alia*, the following information additional to that analyzed by the Committee in the Reports from the First and Second Round, which it considers related to the implementation of measure (a) of recommendation 2.1:

[161] – Actions for the annual review of sworn statements filed by Tax Administration Superintendency personnel, carried out by that agency.

[162] – “The Department of Human Resources of the General Secretariat of the President’s Office has requested the delivery of certificates of statements of net worth presented to the Office of the Comptroller General of Accounts, in order to oversee the compliance with that obligation by the employees and officers of that agency, provided that it is in accordance with the conditions⁴³ set by law. Similar procedures can be seen within most State agencies.”

[163] – “Within the Public Prosecution Service, under the Law on the Probity and Responsibilities⁴⁴ of Public Officials and Employees, the presentation of sworn statements of net worth is obligatory.”

[164] The Committee takes note of the need for the country under review to give additional attention to the implementation of measure (a) of recommendation 2.1, bearing in mind that the regulations governing the disclosure of the sworn statements to which it refers are still pending adoption.

[165] In its response,⁴⁵ the country under review provides the following information additional to that analyzed by the Committee in the Reports from the First and Second Round, which it considers related to the implementation of measure (b) of recommendation 2.1:

[166] – “As an alternative measure, the SAT is undertaking the optimization of the systems for analyzing the contents of sworn statements of net worth, using the necessary methods and techniques and emphasizing the statements of staff members employed in sensitive areas.”

[167] In the progress report⁴⁶ presented at the fifteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Reports from the First

42. Response of Guatemala to the Questionnaire, pp. 31 and 32.

43. In the Spanish-language version the word “condiciones” was replaced with “condiciones”, at Guatemala’s request (Fe de Errata).

44. In the Spanish-language version the word “responbilides” was replaced with “responsabilidades”, at Guatemala’s request (Fe de Errata).

45. Response of Guatemala to the Questionnaire, pp. 31 and 32.

46. See p. 8 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

and Second Round with respect to measure (b) of recommendation 2.1. In this regard, the Committee takes note of the following measure as a step contributing to its implementation:

[168] – “The progress made in this area has been its inclusion on the forms and the partnerships that can be forged with different agencies of the State in order to check the information set down on the forms.”

[169] The Committee takes note of the step taken by the country under review to make progress with the implementation of measure (b) of recommendation 2.1, but taking into account that the optimization of the systems that analyze the contents of sworn statements of net worth referred to therein is still pending in most State agencies, the Committee believes it is necessary for the country under review to continue giving attention to measure (b) of recommendation 2.1.

[170] In the progress report⁴⁷ presented at the fifteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to measure (c) of recommendation 2.1. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[171] – “The topic of conflicts of interest was incorporated into the sworn statement form by the Office of the Comptroller General of Accounts. The process of reviewing them began, comparing those filed at the start and conclusion of service by former public officials and employees, including mayors. During that process, the following institutions are asked to provide information: General Property Register – Commercial Register – Tax Administration Superintendency – General Directorate of Land Registry and Property Assessment of the Ministry of Public Finance – land registry records of the country’s municipalities – system banks.”

[172] – “Joint efforts are made with the Public Prosecution Service in order to conduct investigations prior to issuing the court order required for officials and former officials under investigation.”

[173] The Committee takes note of the steps taken by the country under review to make progress in its implementation of measure (c) of recommendation 2.1, but taking into account that the standardization of provisions referred to therein is still pending, the Committee considers it necessary for the country under review to continue giving attention to measure (c) of recommendation 2.1.

[174] In the progress report⁴⁸ presented at the sixteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to measure (d) of recommendation 2.1. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[175] – “The form for sworn statements of net worth has been improved (see Recommendation 1.1.c) and it has been placed on the web site of the Comptroller General of Accounts.”

[176] The Committee takes note of the step taken by the country under review to make progress with the implementation of measure (d) of recommendation 2.1, but bearing in mind that the form in question (http://www.contraloria.gob.gt/i_docs/i_f_deju.pdf) still does not require those returning it to submit the information referred to therein, the Committee believes it is necessary for the country under review to continue giving attention to measure (d) of recommendation 2.1.

47. See p. 8 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

48. See p. 8 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

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

Recommendation suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round.⁴⁹

Recommendation 3.1:

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.

[177] In the progress report⁵⁰ presented at the sixteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to recommendation 3. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[178] – “As part of the Institutional Strengthening Policy, efforts have been made to modernize, increase the use of technology, and expand coverage. According to the consulting firm KPMG, in mid-2006 the departments of the Comptroller’s Office had an average efficiency level of 61%. By June 2008, the efficiency level had reached 75%, and it was estimated that if those efforts continued, it would reach 82% by late 2009 (the indicator will be calculated again in mid-2010).”

[179] “Execution has continued of the Post Classification, Wage Regime, and Performance Evaluation Plan, which was launched in April 2009 when the necessary financial resources were available.”

[180] “During 2009, three international financial agreements to support the strengthening of the Office of the Comptroller General of Accounts were finalized, worth a total of US\$8.4 million. A new Document Management System was implemented, allowing easy access to the information held by the institution and improving information storage and protection processes. A memorandum of understanding was signed with the Economics School of the University of San Carlos of Guatemala for an Advanced Specialization Course on Government Auditing, to be taught to members of the institution’s staff between March and September 2010.”

[181] “The institutional strengthening of the Office of the Comptroller General of Accounts during the current administration has received international recognition. In addition, Guatemala’s Office of the Comptroller General of Accounts was selected to host the 20th Regular General Assembly of OLACEFS, to be held in July 2010.”

[182] The Committee takes note of the steps taken by the country under review to make progress in its implementation of recommendation 3, but taking into account that they involve only one of its

49. See pp. 50 and 51 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

50. See pp. 9 and 10 of this report at: <http://www.oas.org/juridico/spanish/gtm.htm>.

oversight bodies (Office of the Comptroller General), the Committee believes it is necessary for the Country under review to continue giving attention to the recommendation.

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 Mechanisms for access to information

Recommendation 4.1:

Implement laws which support access to public information.

Measures suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round:⁵¹

- 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.*

[183] In its response,⁵² the country under review submits information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to the implementation of measure (a) of recommendation 4.1. In this regard, the Committee notes the following as steps that lead it to conclude that this measure has been satisfactorily considered:

[184] – The Law on Access to Public Information, Congressional Decree 57-2008, which covers such issues as receiving requests for information, responding to them within a given time frame, filing appeals if such requests are denied, and imposing sanctions for violations of its provisions.

[185] – The steps taken by various agencies of the State to enforce the Law on Access to Public Information, including the Ministry of Public Finance, the Ministry of the Economy, the Office of the Attorney General of the Nation, the Tax Administration Superintendency (resolutions SAT-S-828-2008 and SAT-S-450-2009), and the Superintendency of Banks.

[186] – “...under the new Law on Access to Public Information, implemented by means of Congressional Decree 57-2008, the Attorney for Human Rights has been given the first annual report on the requests for information lodged with our information unit (sic); a report has also been published on the operations and purpose of the archive and other issues set out in the law referred to by the General Secretariat. This represents significant progress on this point.”

51. See pp. 51 and 52 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

52. Response of Guatemala to the Questionnaire, pp. 33 to 38.

[187] – “The implementation of Information Access Offices, through which the terms of Decree 57-2008 have been put into practice, and which has assured all citizens their right of access to public information and to participation in social auditing and citizen oversight of all officials, public employees, agencies, and institutions that handle, use, manage, or dispose of resources belonging to the State of Guatemala. (Articles 30, 31, and 137 of the Constitution of the Republic of Guatemala, and Articles 1, 9, and 68 of the Law on Access to Public Information).”

[188] – “Access to information about how the budget is handled also requires state agencies, decentralized entities, and autonomous institutions, including the country’s municipalities, companies of any kind with capital composed of a majority of state contributions, and the other agencies that make up the public sector, for the purposes of account consolidation, to make permanently available to the Ministry of Public Finance, over the internet or other magnetic means, their physical and financial execution, using the Integrated Financial Administration System (SIAF) software defined by the Ministry for the purpose in accordance with the uniform budget methodology. – This information must remain available on the web page of the Ministry of Public Finance, for public information.”

[189] – “In compliance with the Law on Information Access, the Presidential Office’s Secretariat of Executive Coordination has provided the information requested of it.”

[190] The Committee takes note of the satisfactory consideration, by the country under review, of measure (a) of recommendation 4.1, without entering into a detailed analysis of the content of the provisions referred to by the country under review in connection therewith.

[191] In its response,⁵³ the country under review submits information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to the implementation of measure (b) of recommendation 4.1. In this regard, the Committee notes the following as steps that lead it to conclude that this measure has been satisfactorily considered:

[192] – The measures adopted by various state agencies to implement the obligation set out in Article 51 of the Law on Access to Public Information, requiring the establishment of training programs on this issue,⁵⁴ such as the Tax Administration Superintendency, the Ministry of Public Finance; the Ministry of the Economy, the ANAM, and the ONSEC.

[193] The Committee takes note of the satisfactory consideration by the country under review of measure (b) of recommendation 4.1, which, by its nature, requires a continuation of efforts with respect to its implementation.

4.2 Mechanisms for consultation

Recommendation 4.2:

53. Response of Guatemala to the Questionnaire, pp. 38 and 39.

54. Article 51 of the Law on Access to Public Information provides as follows: “Training: Obligated entities shall establish permanent updating programs for their public servants on the right of access to public information and on the right of individuals to the protection of their personal identification, through courses, workshops, seminars, and any other teaching method deemed appropriate. – Obligated entities that are not a part of the public administration or of the organization of the State shall be subject to the same obligation.”

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.

Measures suggested by the Committee that was satisfactorily considered within the framework of the Second Round:⁵⁵

- 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.*

4.3 Mechanisms to encourage participation in public administration

Recommendation 4.3:

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.

Measures suggested by the Committee that was satisfactorily considered within the framework of the Second Round:⁵⁶

- 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.*

4.4 Mechanisms for participation in the follow-up of public administration

Recommendation 4.4:

Strengthen and continue implementing mechanisms that encourage civil and nongovernmental organizations to participate in the monitoring of public management.

Measure suggested by the Committee that was satisfactorily considered within the framework of the Second Round:⁵⁷

55. See pp. 52 and 53 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

56. See pp. 53 to 55 of this report, at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

- a. *When appropriate, promote new forms of participation to enable, facilitate or help nongovernmental organizations to develop activities to monitor public management.*

Measure suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round:⁵⁸

- 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.*

[194] In its response,⁵⁹ the country under review offers the following information additional to that analyzed by the Committee in the Reports from the First and Second Round, which it considers related to the implementation of measure (b) of recommendation 4.4:

[195] “At the municipal level, this is established by Article 35 of the Municipal Code.”

[196] The Committee reiterates the need for the country under review to pay additional attention to the implementation of measure (b) of recommendation 4.4, bearing in mind that it addresses the design and execution of the training and outreach programs referred to therein, and the response provides no information on that point.

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

Recommendation suggested by the Committee that was satisfactorily considered within the framework of the Second Round:⁶⁰

Recommendation 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.

Recommendation suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round:⁶¹

Recommendation 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.

Recommendation 5.2:

57. See pp. 55 and 56 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

58. See pp. 55 and 56 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

59. Response of Guatemala to the Questionnaire, p. 44.

60. See pp. 57 and 58 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

61. See pp. 56 and 57 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

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.

[197] In its response,⁶² the country under review presents information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to recommendation 5.1. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[198] – “Within the Public Prosecution Service, several cooperation agreements dealing with training have been signed.”

[199] The Committee takes note of the need for the country under review to continue giving attention to the implementation of recommendation 5.1, bearing in mind that the design and execution of the comprehensive training and outreach program referred to therein is still pending.

[200] In its response,⁶³ the country under review submits information additional to that analyzed by the Committee in the Reports from the First and Second Round with respect to recommendation 5.2. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[201] – “The ONSEC reported⁶⁴ that the Dominican Republic began, well ahead of time, a process to restructure its public agencies; as a part of that undertaking, the Secretariat of the Civil Service responsible for managing that State’s human resources has already acquired the status of a Civil Service Ministry. Given the ties that exist with senior officials, this situation has allowed ONSEC technicians to maintain constant exchanges of information and updates with their Dominican counterparts, in order to obtain knowledge that we can put into practice in Guatemala.”

[202] – “Similarly, funding and technical cooperation has been obtained through collaboration with the Spanish International Cooperation Agency for Development (AECID), which is allowing us to revise and adapt a series of human resource management procedures. Because of this and the training needs of the ONSEC’s staff, agreements have been signed with the School of Economics at the University of San Carlos of Guatemala, within its Postgraduate Studies School, to create a diploma course in human resource management, with the participation of 30 ONSEC technicians. In the⁶⁵ area of higher education, a first-degree course in computer science and human resources management is being developed with Galileo University, with 15 ONSEC technicians participating. Twenty-two ONSEC technicians are participating in a diploma course on human resource management skills at the Technical Institute for Training and Productivity.”

[203] – “The Public Prosecution Service reported the need to strengthen the Office of the Prosecutor for Corruption Offenses.”

62. Response of Guatemala to the Questionnaire, p. 44.

63. Response of Guatemala to the Questionnaire, pp. 44 and 45.

⁶⁴ In the Spanish-language version the word “informró” was replaced with “informó”, at Guatemala’s request (Fe de Errata).

⁶⁵ In the Spanish-language version the word “le” was replaced with “la”, at Guatemala’s request (Fe de Errata).

[204] The Committee notes the need for the country under review to continue giving attention to the implementation of recommendation 5.2, bearing in mind that the determination and prioritization of the specific areas in which cooperation is needed referred to therein is still pending.

6. CENTRAL AUTHORITIES (ARTICLE XVIII OF THE CONVENTION)

[205] The Committee issued no recommendations to the country under review in connection with this provision of the Convention, as it considered that the Republic of Guatemala has complied with Article XVIII through the designation of the Commissioner for Transparency and Against Corruption as the central authority for the purposes of assistance and international cooperation provided for by the Convention.

7. GENERAL RECOMMENDATIONS

Recommendation suggested by the Committee that was satisfactorily considered within the framework of the Second Round:⁶⁶

Recommendation 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.

Recommendations suggested by the Committee that require information on their implementation or which required additional attention within the framework of the Second Round:⁶⁷

Recommendation 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.

[206] In its response, the country under review made no reference to recommendation 7.2. As a result, the Committee reiterates the need for it to give additional attention to its implementation.

Recommendation 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.

[207] In its reply, the country under review made no reference to recommendation 7.3. For that reason, the Committee reiterates the need for it to give additional attention to its implementation.

66. See pp. 58 and 59 of this report at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

67. See p. 59 of this report, at: http://www.oas.org/juridico/spanish/mec_inf_gtm.pdf.

SECOND ROUND⁶⁸

[208] Based on the information available to it, the Committee offers the following observations with respect to the implementation of the recommendations formulated to the Republic of Guatemala in the report from the Second Round:

1. SYSTEMS OF GOVERNMENT HIRING AND PROCUREMENT OF GOODS AND SERVICES (ARTICLE III (5) OF THE CONVENTION)

1.1. Systems of government hiring

Recommendation 1.1.1:

Strengthen government hiring systems in the executive branch

Measures suggested by the Committee

- a. *Adopt appropriate measures to ensure the requisite harmony that the management of different public servant employment systems requires, taking into account, to that end, the principles of openness, equity and efficiency provided in the Convention (see Chapter II, Section 1.1.2 of this report).*
- b. *Adopt appropriate measures to make the provisions on publication of calls for candidates for vacant competitive positions contained in Article 18 of the Regulations of the Civil Service Law consistent with the provisions in that respect set forth in Article 45 of the Civil Service Law, so as to make clear the obligation to observe the time limit set by the latter article for said publication, in addition to the requirement to do so, whatever the case, in the Official Gazette and in another broadly distributed newspaper, without prejudice to the possibility of resorting to such other communication mechanisms as may be deemed appropriate (see Chapter II, Section 1.1.2 of this report).*
- c. *Adopt provisions that require the appointing authority to take into account the order of scores attained by eligible candidates in the competition held in the framework of the merit-based civil service admissions system, in order to select the one who should occupy the position to be filled (see Chapter II, Section 1.1.2 of this report).*
- d. *Adopt appropriate measures to guarantee the effectiveness of the merit-based civil service admissions system by ensuring the use, wherever appropriate, of the competitive examination selection process, in accordance with statutory provisions (see Chapter II, Section 1.1.3 of this report).*

[209] In its response,⁶⁹ the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (a) of recommendation 1.1.1. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

68. The references to sections appearing in italics in the transcribed recommendations and measures refer to the report from the Second Review Round.

69. Response of Guatemala to the Questionnaire, pp. 46 to 48.

[210] – “One of several reasons why amendments are being made to the Civil Service Law, Congressional Decree No. 1748 of May 2, 1968, and its Regulations, Governmental Agreement No. 18-98 of January 15, 1998, is the fact that within the Guatemalan public administration, the three branches of government – executive, legislature, and judiciary – as well as various autonomous or decentralized entities have their own, unrelated human resource management regimes, and this impediment has given rise to the array of different human resource management methods that are found in the public sector. For that reason, the proposed amendments provide for complementarity among the regimes, in order to make better use of human resources within state agencies and to make these instruments mutually complementary; this can be achieved by signing agreements or other inter-institutional support documents that enshrine the principles of cooperation and collaboration while respecting the legitimate exercise by each agency of its own authority. – The proposed amendments to the current law are before Congress as bill 4142, and they have been passed by the Legislation and Constitutional Affairs Committee and by the Labor and Social Welfare Committee. The bill is currently awaiting its reading by the plenary of Congress of the Republic, at the first session in the period in which it is placed before that body.”

[211] The Committee takes note of the step taken by the country under review to make progress with the implementation of measure (a) of recommendation 1.1.1, but bearing in mind that it involves a bill that has not yet been passed into law, the Committee believes it is necessary for the country under review to continue giving attention to the implementation of this measure.

[212] In its response,⁷⁰ the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (b) of recommendation 1.1.1. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[213] – “Regarding the correlation between Article 18 of the Regulations and Article 45 of the Civil Service Law, on the obligation of observing the period set for the publication of vacancies and on their publication in various outlets, such as the Official Journal and another leading daily: this has become a financial problem because of the cost that publishing them represents. Consequently, in accordance with Article 18 of the Regulations, it has been decided to use various media outlets – both spoken and written – which, depending on the public institution in question, has diversified and further expanded their publication.”

[214] The Committee takes note of the step taken by the country under review to make progress with the implementation of measure (b) of recommendation 1.1.1, but taking into account that the standardization of the regulations referred to therein is still pending, the Committee considers it necessary for the country under review to continue giving attention to the implementation of the measure.

[215] In its response,⁷¹ the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (c) of recommendation 1.1.1. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[216] – “With reference to considering the order of the scores obtained by eligible candidates within a competitive process, one of the amendments to the Civil Service Law states that to hold a public

70. Response of Guatemala to the Questionnaire, p. 49.

71. Response of Guatemala to the Questionnaire, p. 49.

position, the hiring authority must appoint, from the list of eligible individuals, the candidate put forward by the ONSEC and not another one. In this, the Office will be responsible for analyzing the tests conducted and for authorizing the best candidate for the vacancy; in one way or another, this is already happening. – The proposed amendments to the current law are before Congress as bill 4142, and they have been passed by the Legislation and Constitutional Affairs Committee and by the Labor and Social Welfare Committee. The bill is currently awaiting its reading by the plenary of Congress of the Republic, at the first session in the period in which it is placed before that body.”

[217] The Committee takes note of the step taken by the country under review to make progress with the implementation of measure (c) of recommendation 1.1.1, but bearing in mind that it involves a bill that has not yet been passed into law, the Committee considers it necessary for the country under review to continue giving attention to the implementation of this measure.

[218] In its response,⁷² the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (d) of recommendation 1.1.1. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[219] – “The implementation of the career plan strengthens the recruitment and selection process, by considering staff employed at the SAT as the first option for filling vacancies and, if agency staff do not apply, use is made of an external process in order to ensure the competitive element; for this, internal competitions have been held to fill vacancies.”

[220] – “The competitive selection process has been implemented within the Ministry of the Economy, respecting the merits and credentials of the participants in the selection process and also encouraging the administrative career provided for in the Collective Working Conditions Agreement.”

[221] – “Regarding the steps toward establishing a merit-based system for entry to public service, another proposed amendment to the Civil Service Law involves the implementation of an Administrative Career Plan, comprising a set of principles, provisions, and procedures that regulate the hiring, rights, and duties of public servants in stable employment within the public administration. It entails allowing the admission of suitable personnel, ensuring they remain in their positions, guaranteeing their development, and promoting their personal realization in public service, based on a regulated structure for the admission, deployment, retention, and promotion of employees based on qualifications, merits, skills, specializations, technological skills, and professionalization.

[222] The Committee takes note of the steps taken by the country under review to make progress in its implementation of measure (d) of recommendation 1.1.1, but bearing in mind that the first two deal solely with two agencies of the executive branch, and that the third addresses a proposed legislative amendment that has not yet been passed into law, the Committee considers it necessary for the country under review to continue giving attention to the implementation of this measure.

[223] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in

72. Response of Guatemala to the Questionnaire, p. 49.

conjunction with other organizations, offers the following comment regarding the implementation of recommendation 1.1.1.⁷³

[224] “No progress has been made with these recommendations. – Currently there are two bills (Nos. 4142 and 3909) that seek to amend the Civil Service Law; however, the recommendations issued by the Committee of Experts are not taken into account.”

Recommendation 1.1.2:

Strengthen government hiring systems in the legislative branch.

Measures suggested by the Committee:

- a. *Harmonize the provisions regarding the qualifications and experience required for entry into the legislative branch with the rules established by the other systems for admission to public service in force in the country that have been examined in this report, thereby ensuring that uniform criteria are applied to such matters. (See section 1.1.2 of Chapter II of this Report.)*
- b. *Expedite the adoption of the Manual of General Procedures and Standards referred to in Articles 4 and 11 of the Regulations of the Civil Service Law of the Legislative Branch, taking into account, to that end, the principles of openness, equity and efficiency provided in the Convention, and include therein rules on aspects concerning the selection procedure to occupy a competitive position as well as on publication, disclosure and voiding of the call for candidates (see Chapter II, Section 1.1.2 of this report).*
- c. *Adopt provisions, in the case of competitive positions, that require an order of preference to be established in registers of eligible candidates, in keeping with their scores in the evaluation, and that the candidate with the best evaluation should be selected (see Chapter II, Section 1.1.2 of this report).*
- d. *Set a maximum time-limit for the provisional, emergency, or temporary appointments referred to in Article 17 of the Regulations of the Civil Service Law of the Legislative Branch (see Chapter II, Section 1.1.2 of this report).*
- e. *Introduce mechanisms to challenge decisions adopted in the selection process (see Chapter II, Section 1.1.2 of this report).*

[225] In the progress report⁷⁴ presented at the sixteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (b) of recommendation 1.1.2. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[226] - “The Manual of General Rules and Procedures is published on Congress’s web page and is being enforced; it may be seen at: <http://www.congreso.gob.gt/uploadimg/MANUALDEPROCEDIMIENTO.pdf>.”

73. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” p. 26.

74. See pp. 9 and 10 of this report at: <http://www.oas.org/juridico/spanish/gtm.htm>

[227] The Committee notes the step taken by the country under review to make progress with the implementation of measure (b) of recommendation 1.1.2, but bearing in mind that the issues related to the selection mechanism for occupying a position in the service through a competitive process and to the publication or dissemination of announcements of competitions and voided calls for candidates referred to in that measure are still pending, the Committee considers it is necessary for the country under review to continue giving attention to its implementation.

[228] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, offers the following comment regarding the implementation of measure (b) of recommendation 1.1.2: “The legislative branch created the Post Functions and Description Manual, which regulates issues that should be covered by the Manual of General Rules and Procedures; thus, progress has been made with implementing this recommendation, but it has not been complied with in full.”⁷⁵

[229] In its response,⁷⁶ the country under review does not present information related to measures (a), (c), (d), and (e) of recommendation 1.1.2. The Committee therefore reiterates the need for the country under review to give additional attention thereto.

[230] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, offers the following comments regarding the implementation of measures (a), (c), (d), and (e) of recommendation 1.1.2: “There has been no progress with the recommendation(s) in question.”⁷⁷

Recommendation 1.1.3:

Strengthen government hiring systems in the judicial branch.

Measures suggested by the Committee:

- a. *Identify in the text of the Civil Service Law of the Judicial Branch the positions that would come under the competitive examination system, or the inclusion of a provision therein to the effect that the competitive examination system shall be deemed to cover all posts not classed as subject to free appointment and removal in accordance with Article 13 of the aforesaid law, without making the foregoing subject to the requirement that they be specifically included in the competitive examination system in the Manual mentioned therein (see Chapter II, Section 1.1.2 of this report).*
- b. *Set a deadline for publication of calls for candidates to fill positions under the competitive examination system referred to at Article 17 of the Civil Service Law of the Judicial Branch, so that this is done sufficiently in advance of the start of selection processes, as well as precisely identify the mechanisms to be used for their disclosure (see Chapter II, Section 1.1.2 of this report).*

75. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” p. 27.

76. Response of Guatemala to the Questionnaire, pp. 51 and 52.

77. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” p. 27.

- c. Introduce a provision, with respect to positions in the competitive system referred to at Article 30 of the Civil Service Law of the Judicial Branch, that makes it a requirement, in selecting the person to occupy the vacant post, to take into account the order of scores obtained by the candidates in the competition (see Chapter II, Section 1.1.2 of this report).
- d. Introduce mechanisms to challenge decisions adopted in the selection processes governed by the Judicial Career Law and the Civil Service Law of the Judicial Branch (see Chapter II, Section 1.1.2 of this report).

[231] In its response,⁷⁸ the country under review does not present information related to measures (a), (b), (c), and (d) of recommendation 1.1.3. The Committee therefore reiterates the need for the country under review to give additional attention thereto.

[232] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, offers the following comments regarding the implementation of measures (a), (b), (c), and (d) of recommendation 1.1.3: “There has been no progress with the recommendation(s) in question.”⁷⁹

Recommendation 1.1.4:

Strengthen government hiring systems in the Office of the Attorney General

Measures suggested by the Committee:

- a. Expedite the adoption of the regulations governing the administrative staff career system provided at Article 59 of the Organic Law of the Office of the Attorney General, taking into account, to that end, the principles of openness, equity and efficiency enshrined in the Convention (see Chapter II, Section 1.1.2 of this report).
- b. Set a deadline for publication of calls for candidates to fill positions in the Office of the Attorney General referred to in Article 76 of the Organic Law of the Office of the Attorney General, so that this is done sufficiently in advance of the start of selection processes, as well as precisely identify the mechanisms to be used for their disclosure (see Chapter II, Section 1.1.2 of this report).
- c. Introduce mechanisms to challenge decisions adopted in the selection processes governed by the Organic Law of the Office of the Attorney General (in addition to that provided at Article 77 to challenge the inclusion of a candidate in the merit list), including decisions on evaluation results and non inclusion of candidates in said list (see Chapter II, Section 1.1.2 of this report).

[233] In its response,⁸⁰ the country under review does not present information additional to that analyzed by the Committee in the Report from the Second Round with respect to measures (a) and (c) of recommendation 1.1.4 and, in connection with measure (b) of that recommendation, it refers to a rule from the “Prosecutorial Career Regulations” that has not been submitted. Consequently, the

78. Response of Guatemala to the Questionnaire, p. 52.

79. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” pp. 27 and 28.

80. Response of Guatemala to the Questionnaire, pp. 52 and 53.

Committee reiterates the need for the country under review to give additional attention to those measures.

[234] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, offers the following comments regarding the implementation of measures (b) and (c) of recommendation 1.1.4: “There has been no progress with the recommendation(s) in question.”⁸¹ In connection with measure (a) thereof, it states:

[235] The Attorney General’s Office issued Agreement No. 12-2007, “Regulations for the Organization and Operation of the Administrative Area of the Public Prosecution Service,” pursuant to Article 251 of the Constitution of the Republic of Guatemala, Articles 10, 11, sections (1) and (2), and Articles 7, 9, and 59 of the Organic Law of the Public Prosecution Service. – It also issued the “Post Classification Manual,” which contains specifications covering all the positions that exist within the Public Prosecution Service. – It should be noted that neither the Regulations nor the Manual that were adopted specifically regulate the administrative personnel career; however, they do address issues of importance for compliance with the recommendation.

Recommendation 1.1.5:

Strengthen government hiring systems in municipalities

Measures suggested by the Committee:

- a. *Adopt, through the appropriate authority, the measures necessary to bring into operation the Municipal Human Resources Advisory Office, created at Article 8 of the Municipal Service Law for the application of said Law, and to supply it with the resources required for that purpose (see Chapter II, Section 1.1.2 of this report).*
- b. *Set a deadline for publication of calls for candidates referred to in Article 27 of the Municipal Service Law, so that this is done sufficiently in advance of the start of selection processes, as well as precisely identifying the mechanisms to be used for their disclosure (see Chapter II, Section 1.1.2 of this report).*
- c. *Adopt provisions that make it a requirement, in the case of municipal service career positions, to bear in mind the order of scores attained by candidates in the competition when selecting who should occupy the position to be filled (see Chapter II, Section 1.1.2 of this report).*
- d. *Set a maximum time-limit for the provisional and emergency appointments referred to in Article 37 of the Municipal Service Law (see Chapter II, Section 1.1.2 of this report).*

[236] In its response,⁸² the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measures (a) and (b) of recommendation 1.1.5. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

81. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” pp. 28 and 29.

82. Response of Guatemala to the Questionnaire, p. 53.

[237] – “According to the National Association of Mayors, it is not enforced; however, Congress is processing a bill for a new Municipal Service Law for its enforcement and for the improved functioning of municipal governments.”

[238] The Committee notes the step taken by the country under review to make progress with the implementation of measures (a) and (b) of recommendation 1.1.5, but bearing in mind that it involves a bill that has not yet been passed into law, the Committee believes it is necessary for the country under review to continue giving attention to the implementation of this measure.

[239] In its response,⁸³ the country under review presents the following information in addition to that analyzed by the Committee in the Second Round report, which is believed to be related to the implementation of measures (c) and (d) of recommendation 1.1.5:

[240] – “The Municipal Service Law is a current, non-positive provision.”

[241] The Committee notes the need for the country under review to give additional attention to the implementation of measures c) and d) of recommendation 1.1.5, bearing in mind that the ranking of the candidates who sat for the competition and the maximum duration of the provisional and emergency appointments to which those measures refer have not yet been established.

[242] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, offers the following comments regarding the implementation of measures (a), (b), (c), and (d) of recommendation 1.1.5. There has been no progress with the recommendation(s) in question.”⁸⁴

1.2. Systems for government procurement of goods and services

Recommendation 1.2:

Strengthen government procurement systems.

Measures suggested by the Committee:

- a. *Adopt appropriate measures to ensure the requisite harmony for the management of diverse procurement systems, so that there is clarity both with respect to the scope of application of the regulations that govern each of them and as regards their concurrent operation, in the cases where provision is made for this, taking into account, to that end, the principles of openness, equity and efficiency provided in the Convention (see Chapter II, Section 1.2.2 of this report).*
- b. *Establish a standard procedure for procurement conducted through the special system of direct purchase provided for in the Law on State Contracting, that applies to all State entities, taking into account, to that end, the principles of openness, equity and efficiency enshrined in the Convention (see Chapter II, Section 1.2.2 of this report).*

83. Response of Guatemala to the Questionnaire, p. 53.

84. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” p. 29.

- c. Define the concepts of national interest or social benefit on which to base the declaration that the respective president of each branch of government is required to issue when this special procurement procedure is used, as well as the classification in that regard that the branch of government, ministry, or entity concerned must adopt (see Chapter II, Section 1.2.2 of this report).
- d. Strengthen the governing organ for government procurement so that its scope is not limited to the central government and its decentralized and autonomous entities, but encompasses all State entities governed by the Law on State Contracting (see Chapter II, Section 1.2.2 of this report).
- e. Adopt, through the appropriate authority, pertinent measures to ensure that municipalities comply with the obligation provided for by Article 8 of the Regulations of the Law on State Contracting to publish information on their procurement activities on the Internet website of the GUATECOMPRAS System (see Chapter II, Section 1.2.3 of this report).
- f. Adopt through the appropriate authority, pertinent measures to ensure that challenges presented by users of the “GUATECOMPRAS” system receive a timely response (see Chapter II, Section 1.2.3 of this report).

[243] In its response,⁸⁵ the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (a) of recommendation 1.2. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[244] – “The ideas on this point set out in the aforesaid memorandum 3680-2009⁸⁶ are ratified, whereby this process will continue to apply under the corresponding governmental regulations and with due transparency. It should be noted that as a result of Congressional Decree 27-2009, which amended the State Contracting Law, on November 30, 2009, the Superintendent of Banks issued Agreement 29-2009,⁸⁷ which contains the Purchasing and Contracting Instructions of the Superintendence of Banks, setting out administrative instructions in addition to the aforesaid governmental rules; this brought about a substantial improvement in the process of procuring the goods and services required for it to function. – There have been no difficulties in the implementation of this point.”

[245] – “In this regard, for the quoting and bidding regimes, the Ministry of the Economy enforces the provisions set out in the State Contracting Law and its Regulations, together with the Ministry of Public Finance’s rules, for the use of the GUATECOMPRAS system.”

[246] – “The Public Prosecution Service makes use of the existing systems.”

[247] The Committee takes note of the steps taken by the country under review to make progress in its implementation of measure (a) of recommendation 1.2, but bearing in mind that those steps refer specifically to only three state agencies and that even with the enactment of Decree 27-2009, amending the State Contracting Law, the harmonization referred to in the analysis on which that measure is based (as regards the second section of Article 1 of the State Contracting Law) is still

85. Response of Guatemala to the Questionnaire, p. 54.

86. Guatemala supplied this memorandum on February 10, 2011.

87. Guatemala supplied the text of this Agreement on February 10, 2011.

pending,⁸⁸ the Committee considers it necessary for the country under review to continue giving attention to its implementation.

[248] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, offers the following comment regarding the implementation of measure (a) of recommendation 1.2:⁸⁹

[249] – “One issue that continues to cause concern is the parallel system for public procurement through trusts and nongovernmental organizations (NGOs) that spend public resources earmarked for physical investment through the mechanism of public works. – The Ministry of Public Finance, in an effort to make procurement operations of this kind public, placed links on its web site for each one of these. In spite of the discourse about increasing the transparency of these resources, however, increasingly frequent use is made of these mechanisms. – According to information provided by the Ministry of Public Finance, the executive branch resources handled through trusts as of April 2010 amounted to Q. 1,218.8 million, equal to 9.2% of total spending; however, there is no information on the trusts set up by other agencies not belonging to the executive branch, such as municipal governments. – Although efforts are being made to increase the transparency of resources allocated through the parallel contracting systems, a ban must be placed on the handling of public resources through those mechanisms, with the exception of special cases under duly established criteria.”

[250] In its response,⁹⁰ the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (b) of recommendation 1.2. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[251] – “Here, the obligatory rules set out in the amendments to the State Contracting Law for all public agencies are complied with.”

[252] The Committee notes the step taken by the country under review to make progress with the implementation of measure (b) of recommendation 1.2, but bearing in mind that even with the enactment of Decree 27-2009, amending the State Contracting Law, the establishment of the standard procedure for contracting through the special mechanisms of direct purchasing referred to in that measure is still pending, the Committee considers it necessary for the country under review to continue giving attention to its implementation.

[253] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, refers to the amendment of the State Contracting Law (Article 43) and notes, with respect to the implementation of measure (b) of recommendation 1.2, that “although the amendments represent significant progress with the special mechanism of direct

88. This provision stipulates: “The terms contained in this Law and the applicable Regulations shall apply on a complementary basis to the provisions of international agreements and treaties in which the Republic of Guatemala is a part, provided they do not contradict them.”

89. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” pp. 29 and 30.

90. Response of Guatemala to the Questionnaire, p. 54.

purchasing, the State of Guatemala has not complied with the implementation of a standard procedure.”⁹¹

[254] In its response,⁹² the country under review does not present information relating to measure (c) of recommendation 1.2. The Committee therefore reiterates the need for the country under review to give additional attention to it.

[255] In its response,⁹³ the country under review presents the following information additional to that analyzed by the Committee in the Report from the Second Round, which it considers related to the implementation of measure (d) of recommendation 1.2:

[256] – “It should be noted that the agency responsible for the oversight of state contracting is the Regulatory Directorate for Contracts and Procurement of the Ministry of Public Finance which, through the State Contracting Law, sets the applicable guidelines for the central government and other state agencies. The modifications made are intended to promote the use of electronic tools, such as GUATECOMPRAS; they are applicable across the board; and they are geared toward obligatory use among all institutions, agencies, nongovernmental organizations, and others, that use and handle state resources. – In turn, the Public Prosecution Service reported⁹⁴ that use is made of the systems already implemented.”

[257] The Committee notes the need for the country under review to give additional attention to the implementation of measure (d) of recommendation 1.2, bearing in mind that even with the enactment of Decree 27-2009, amending the State Contracting Law, the strengthening of the body responsible for state contracting referred to in that measure is still pending.

[258] In its response,⁹⁵ the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (e) of recommendation 1.2. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[259] – “By means of Decree 27-2009, the Congress of the Republic of Guatemala amended Articles 23, 39, 43, and 45 of Decree 57-92, the State Contracting Law, establishing the obligation of publishing, in the GUATECOMPRAS system, the different forms of the procedures regulated by the State Contracting Law: quotations, biddings, special cases, and direct procurement. This obligation also applies to local governments as bodies required to abide by the law (www.congreso.gob.gt). – Through the GUATECOMPRAS system, the municipal governments meet the requirements set by the law.”

[260] The Committee takes note of the step taken by the country under review to make progress with the implementation of measure (e) of recommendation 1.2, but taking into account that even with the enactment of Decree 27-2009, which amended the State Contracting Law, not all the municipalities are meeting the obligation of publishing information on their contracting activities on the web page

91. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” p. 30.

92. Response of Guatemala to the Questionnaire, p. 55.

93. Response of Guatemala to the Questionnaire, p. 55.

94. In the Spanish-language version the word “informó” was replaced with “informó”, at Guatemala’s request (Errata).

95. Response of Guatemala to the Questionnaire, p. 55.

of the GUATECOMPRAS system,⁹⁶ the Committee considers it necessary for the country under review to continue giving attention to its implementation.

[261] In the progress report⁹⁷ presented at the fifteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure (f) of recommendation 1.2. In this regard the Committee notes the following measures as steps which contribute to its implementation:

[262] – “On April 6, 2009, the Ministry of Public Finance, through the Regulatory Directorate for State Contracts and Procurement, issued Resolution No. 30-2009, establishing that challenges under Articles 12 to 14 and mechanisms for entry to the GUATECOMPRAS system can be responded to on a timely basis and, in cases where it is warranted, the Office of the Comptroller General of Accounts can conduct the corresponding investigations and publish them on the web site.”

[263] – “This is strengthened by Decree 27-2009, the amendment to Decree 57-92, the State Contracting Law, which incorporates into Article 35 fixed time frames for responding to challenges, stating that they can be timely and responsible for the obligation at the different stages in adjudication. See (www.congress.gob.gt).”

[264] The Committee takes note of the steps taken by the country under review to make progress in its implementation of measure (f) of recommendation 1.2, but bearing in mind that even with the enactment of the rules referred to in those steps, ensuring that the challenges filed by users of the GUATECOMPRAS system⁹⁸ are responded to in a timely matter is still pending, the Committee believes it is necessary for the country under review to continue giving attention to its implementation.

[265] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, states, regarding the implementation of measures (c), (d), and (e) of recommendation 1.2, that “there has been no progress with the recommendation(s) in question”⁹⁹ and, in connection with measure (f) thereof, refers to the amendment of Article 35 of the State Contracting Law by means of Decree 27-2009.

2. SYSTEMS TO PROTECT PUBLIC SERVANTS AND PRIVATE CITIZENS WHO IN GOOD FAITH REPORT ACTS OF CORRUPTION (ARTICLE III (8) OF THE CONVENTION)

Recommendation 2:

96. A review of the web page of GUATECOMPRAS www.guatecompras.gob.gt revealed that 27 municipalities are still to meet this obligation (based on the most recent figures in the “Municipal Statistics” section of the page, which were used to formulate measure (e) of recommendation 1.2 in the Second Round report).

97. See p. 32 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

98. A review of the web page of GUATECOMPRAS, the information on which was used to formulate measure (f) of recommendation 1.2 in the Second Round report (<http://www.guatecompras.gt/inconformidad/consultaInc.aspx?r=1>), revealed that as of December 15, 2010, there were 673 challenges “under analysis,” and that that total has been accumulating since 2005.

99. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” pp. 28 and 29.

Strengthen systems to protect public servants and private citizens who in good faith report acts of corruption.

Measure 2.1 suggested by the Committee:

- *Adopt, through the appropriate authority, a comprehensive regulation on the protection of public officials and private citizens who in good faith report acts of corruption, including protecting their identities, in keeping with its Constitution and the fundamental principles of its domestic legal system, which could include, among others, the following aspects:*
 - a. *Reporting mechanisms, such as anonymous complaints and identity-protected complaints, to guarantee the personal security and identity confidentiality of public officials and private citizens who, in good faith, report acts of corruption.*
 - b. *Protection measures for those who report acts of corruption that might not be defined as criminal offenses, but which could be subject to administrative investigation.*
 - c. *Protection measures, targeting not just the protection of the physical integrity of whistleblowers and their families, but also the protection of their positions of employment, particularly for public officials and when the acts of corruption could involve their superiors or coworkers.*
 - d. *Mechanisms for reporting the threats or reprisals that informants may face, indicating the authorities responsible for processing protection requests and the agencies responsible for providing such protection.*
 - e. *Mechanisms to facilitate international cooperation in the above areas, when appropriate.*

[266] In the progress report¹⁰⁰ presented at the fifteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Report from the Second Round with respect to recommendation 2. In this regard the Committee notes the following measures as steps which contribute to its implementation:

[267] – “As alternative measures, the State of Guatemala issued Decree No. 28-2008, the Extradition Procedure Regulatory Law, published on May 22, 2008; Congressional Decrees 17-2009 and 23-2009, amending the Law against Organized Crime, the Code of Criminal Procedure, the Criminal Code, and the Extradition Procedure Regulatory Law, published on May 8 and September 3, 2009, respectively; Decree 21-2009, the Law of Criminal Competence in Dangerous Proceedings, published on September 3, 2009, enacting provisions that can be used on a complementary basis.”

[268] The Committee takes note of the steps taken by the country under review to make progress in its implementation of recommendation 2, but bearing in mind that even with the enactment of the provisions covered by those steps, the adoption of comprehensive regulations for the protection of public officials and private citizens who in good faith report acts of corruption referred to in that recommendation is still pending, the Committee believes it is necessary for the country under review to continue giving attention to its implementation. In the aforesaid progress report, the country under

100. See pp. 33 to 36 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

review notes that “the difficulties observed are because we have been unable to enact laws directly addressing corruption cases.”¹⁰¹

[269] In its response,¹⁰² the country under review presents the following information additional to that analyzed by the Committee in the Report from the Second Round with respect to measure 2.1.e of recommendation 2. In this regard, the Committee notes the following measure as a step which contributes to its implementation:

[270] - “The Public Prosecution Service signed the Central American Agreement for Witness Protection.”

[271] The Committee takes note of the step taken by the country under review to make progress with the implementation of measure 2.1.e of recommendation 2, but bearing in mind that it deals with one region in particular, the Committee believes it is necessary for the country under review to continue giving attention to its implementation.

[272] The document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” presented by the civil society organization *Acción Ciudadana*, in conjunction with other organizations, offers the following comment regarding the implementation of recommendation 2:¹⁰³

[273] - “The Regulations to the Law for the Protection of People at Trial and Connected to the Administration of Criminal Justice, Agreement 2-2007 of the Public Prosecution Service Council, were adopted. Agreement 1-2009 of the Public Prosecution Service Council, amending the Regulations, was also issued. However, the enacted rules do not regulate the matters addressed in the recommendations.”

3. ACTS OF CORRUPTION (ARTICLE VI(1) OF THE CONVENTION)

Recommendation 3.1:

Modify the following articles of the Criminal Code as follows:

- a. *Article 439 of the Criminal Code (as amended by Article 118 of Decree 11-2006 of the Congress of the Republic), which classifies solicitation or acceptance of bribes and relates to paragraph Article VI(1)(a) of the Convention, could be modified to include “persons who exercise public functions” as perpetrators of the offense, in addition to the “public servants or employees” provided by that article (see Chapter II, Section 3.2 of this report).*
- b. *Article 442 of the Criminal Code (as amended by Article 119 of Decree 11-2006 of the Congress of the Republic), which classifies offering of bribes and relates to paragraph Article VI(1)(b) of the Convention, could be modified to include “persons who exercise public functions” as recipients of benefits offered or given, in addition to the “public servants or employees” provided by that article (see Chapter II, Section 3.2 of this report).*
- c. *Articles 419, 449 and 451 of the Criminal Code, which criminalize, respectively, Breach of Duty, Extortion, and Illegal Exaction and relate to Article VI(1)(c) of the Convention, could*

101. See p. 35 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

102. Response of Guatemala to the Questionnaire, p. 57.

103. Document “Independent Follow-up Report on the Inter-American Convention against Corruption in Guatemala,” p. 32.

be modified to include “persons who exercise public functions” as perpetrators of the offense, in addition to the “public servants or employees” provided by that article (see Chapter II, Section 3.2 of this report).

[274] In its response,¹⁰⁴ the country under review does not present information regarding recommendation 3.1 and, in the progress report¹⁰⁵ presented at the sixteenth meeting of the Committee, it states: “There has been no progress with this topic. The main difficulty is the legislative process.” Bearing this in mind, the Committee reiterates the need for the country under review to give additional attention to recommendation 3.1.

Recommendation 3.2:

Improve the criminal provisions set out in Articles 2, 3, and 4, of the Law against Organized Crime, which address conspiracy and criminal association and are related to the paragraph (e) of Article VI.1 of the Convention, by extending them to cover all the offenses identified in that article of the Convention (see section 3.2 of Chapter II of this Report).

[275] In its response,¹⁰⁶ the country under review notes, with respect to recommendation 3.2, that “in this case, it could be implemented when these kinds of actions are committed, since the Public Prosecution Service cannot act preventively,” and, in the progress report¹⁰⁷ presented at the sixteenth meeting of the Committee, it states: “There has been no progress with this topic. In the amendments against (sic) the Law against Organized Crime, the articles dealing with conspiracy and illicit association were not addressed.” Bearing this in mind, the Committee reiterates the need for the country under review to give additional attention to recommendation 3.2.

4. GENERAL RECOMMENDATIONS

Recommendation 4.1:

Design and implement, when appropriate, training programs for public 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.

[276] In its response,¹⁰⁸ the country under review presents information additional to that analyzed by the Committee in the Report from the Second Round with respect to recommendation 4.1. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[277] – “INAP provides organizations with values training through the courses on Excellence in Public Institutions, Management with Public Value, Human Resource Management, Transparency in Public Institutions, and Applied Policies; it also conducts diversity and inclusion sessions within the public administration and trains young people involved in political parties. To promote and encourage public participation, INAP has organized: meetings of the National Training System; four diploma courses in public administration; a course in higher strategic studies; two diploma courses in social management; a technical diploma course for quality secretarial functions in the public administration; a diploma course in comprehensive management for disaster reduction, with a

104. Response of Guatemala to the Questionnaire, p. 57.

105. See p. 36 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

106. Response of Guatemala to the Questionnaire, p. 57.

107. See p. 36 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

108. Response of Guatemala to the Questionnaire, p. 58.

sustainable development approach; 12 on-line courses; courses specifically on human relations and teamwork; conferences on quality management models and the Colombian model for quality management in the public sector; a diploma course on institutional strengthening for the Development Council System; certification of municipal financial officers; preparation of administrative procedures forms for authorities; and the master's degree in public administration.”¹⁰⁹

[278] – “The Public Prosecution Service reported¹¹⁰ that plan implementation and design is carried out by the Training Unit.”

[279] “Each of the programs addresses transparency topics through thematic contents; for example, in the course on Transparency in Public Institutions: ethics and transparency, transparency methods and scope, methods of accessing public information, implementation of transparency in public management.”

[280] “The Public Prosecution Service reports that it has a Code of Ethics, which was discussed with its prosecutors.”

[281] In the progress report¹¹¹ presented at the sixteenth meeting of the Committee, the country under review provides information additional to that analyzed by the Committee in the Report from the Second Round with respect to recommendation 4.1. In this regard, the Committee notes the following measures as steps which contribute to its implementation:

[282] – The “training on access to information” and the “GUATECOMPRAS training,” carried out by the Ministry of Public Finance between October 2009 and March 2010, and between September 2009 and March 2010, respectively.

[283] The Committee takes note of the steps taken by the country under review to make progress in its implementation of recommendation 4.1, but bearing in mind that thematic areas dealing with the systems, provisions, measures, and mechanisms addressed in this report are not yet covered by training programs, the Committee believes it is necessary for the country under review to continue giving attention to its implementation.

Recommendation 4.2:

Select and develop procedures and indicators, when appropriate and where they do not yet exist, to analyze the results of the systems, standards, measures and mechanisms considered in this Report, and to verify follow-up on the recommendations made herein. (See Sections 1.1.3, 2.3 and 3.3 of Chapter II of this Report)

[284] In its response,¹¹² the country under review does not present information regarding recommendation 4.2 and, in the progress report¹¹³ presented at the sixteenth meeting of the Committee, it states that “there are no indicators for following up on the IACAC recommendations.”

¹⁰⁹ In the Spanish-language version the sentence “Y la Maestria en Adminsitración” was replaced with “y la maestría en Adminsitración”, at Guatemala’s request (Errata).

¹¹⁰ In the Spanish-language version the word “informó” was replaced with “informó”, at Guatemala’s request (Errata).

111. See pp. 36 and 37 of this report at: <http://www.oas.org/juridico/spanish/gtm.htm>.

112. Response of Guatemala to the Questionnaire, p. 58.

113. See p. 38 of this report, at: <http://www.oas.org/juridico/spanish/gtm.htm>.

Bearing this in mind, the Committee reiterates the need for the country under review to give additional attention to recommendation 4.2.

ENDNOTES

ⁱ Article 30 of the Tax Code was repealed. Article 30-A (added by Article 22 of Congressional Decree No. 20-2006 on 06-07-2006) provides as follows: “INFORMATION REGARDING THIRD PARTIES. The Tax Administration Superintendency, through the higher authority, may require any person or corporate entity to regularly or occasionally provide information on acts, contracts, or commercial relations with third parties that generate taxes, in written, electronic, or other suitable form, provided that they are related to tax matters and are not in breach of professional secrecy or the guarantee of confidentiality established in the Constitution of the Republic, special laws, and the terms of this Code. In all cases, the Tax Administration Superintendency shall receive the information under the protection of confidentiality. (...).”

ⁱⁱArticle 93 of the Tax Code provides as follows: “RESISTING THE OVERSIGHT OF THE TAX ADMINISTRATION. Resistance is any act or omission that hinders or impedes the oversight action of the Tax Administration, after the end of the unextendable period of three (3) days, starting on the day after the taxpayer is notified of a requirement for presenting documents or information of a fiscal, accounting, or financial nature. – Resistance of the oversight of the Tax Administration is also any act or omission that hinders or impedes immediate access to a taxpayer’s books, documents, and files, or to the computer system dealing with tax payments, the inspection or verification of any premises, commercial or industrial establishment, deposit, containers, cash till, and means of transport, in those cases in which the Tax Administration requires immediate access to prevent the alteration or destruction of evidence. – The following are considered acts of resistance: 1. Hindering or hampering the formalities needed for the Tax Administration to determine, oversee, and collect taxes. 2. Refusing to provide information and denying immediate access to books, documents, and files, or to the computer system dealing with tax payments, when needed to establish the taxable base and verify that tax obligations have been met. 3. Refusal by the taxpayer to provide information on actions, contracts, or other commercial dealings or relations with third parties that generate tax. 4. Failing to reconstruct accounting records, or reconstructing them after the deadline stipulated in this Code, following destruction, loss, damage, or property crimes committed against the books, records, documents, files, or computer systems. – SANCTION: Fine equal to one percent (1%) of the gross income obtained by the taxpayer during the most recent monthly, quarterly, or annual period declared in the tax regime subject to oversight. When the form is resistance is one of those that emerge immediately, the sanction shall be doubled. – If compliance with the requirements of the Tax Administration necessitates the intervention of the competent judge, the provisions of resistance to oversight action as defined in the Criminal Code shall be applied.”

ⁱⁱⁱ Article 72 of the Tax Code provides as follows: “Optional regime for tax payments. Corporate entities and individuals domiciled in Guatemala, along with the other institutions and entities referred to in the second paragraph of Article 3 of this Law, which pursue commercial activities, including agriculture, and the corporate entities and individuals listed in Article 44-A, may choose to pay taxes by applying the tax rate of thirty-one percent (31%) to the taxable income determined under Articles 38 and 39 of this Law, and to capital gains. Under this regime, taxes are to be calculated and paid at the end of each quarter, irrespective of the final liquidation of the annual period.”

^{iv} On February 10, 2011, the Republic of Guatemala submitted statistical information which is contained in the chart reproduced in this note. This information has not been analyzed in this report because it was submitted after the deadline set by the Committee for the presentation of information for review (see Section I of this report, “Summary of the

Information Received") but it will be taken into account for the follow-up on the implementation of the recommendations to be carried out during the next round of review.

ON-SITE AUDITS AND APPLICATION OF SANCTIONS FOR NON-COMPLIANCE WITH ARTICLE 94 OF THE TAX CODE WITH RESPECT TO ACCOUNTING BOOKS AND RECORDS		
YEAR	ON-SITE AUDITS	FINANCIAL SANCTIONS
2007	7446	Q 2,153,353.40
2008	5918	Q3,557,263.35
2009	1401	Q1,118,245.00
2010	1610	Q 876,891.14
Totals	16375	Q7,705,752.89

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2008	5918	Q3,557,263.35
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2010	1610	Q 876,891.14
Totals	16375	Q7,705,752.89

Source: Prepared based on information provided by the Department of Mass Processes, Supervision Division, Tax Administration Superintendence. National data for the past four years.