

Context and purpose

The UN Convention against Corruption (UNCAC) was adopted in 2003 and entered into force in December 2005. It is the first legally-binding anti-corruption agreement applicable on a global basis. To date, 154 states have become parties to the convention. States have committed to implement a wide and detailed range of anti-corruption measures that affect their laws, institutions and practices. These measures promote prevention, criminalisation and law enforcement, international cooperation, asset recovery, technical assistance and information exchange.

Concurrent with UNCAC's entry into force in 2005, a "Conference of the States Parties to the Convention" (CoSP) was established to review and facilitate required activities. In November 2009 the CoSP agreed on a review mechanism that was to be "transparent, efficient, non-intrusive, inclusive and impartial". It also agreed to two five-year review cycles, with the first on Chapters III (Criminalisation and Law Enforcement) and IV (International Cooperation), and the second cycle on Chapters II (Preventive Measures) and V (Asset Recovery). The mechanism included an Implementation Review Group (IRG), which met for the first time in June-July 2010 in Vienna and selected the order of countries to be reviewed in the first five-year cycle, including the 26 countries (originally 30) in the first year of review.

UNCAC Article 13 requires States Parties to take appropriate measures including "*to promote the active participation of individuals and groups outside the public sector in the prevention of and the fight against corruption*" and to strengthen that participation by measures such as "*enhancing the transparency of and promote the contribution of the public in decision-making processes and ensuring that the public has effective access to information; [and] respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.*" Further articles call on each State Party to develop anti-corruption policies that promote the participation of society (Article 5); and to enhance transparency in their public administration (Article 10).; Article 63 (4) (c) requires the Conference of the States Parties to agree on procedures and methods of work, including cooperation with relevant non-governmental organizations.

In accordance with Resolution 3/1 on the review mechanism and the annex on terms of reference for the mechanism, all States Parties provide information to the Conference secretariat on their compliance with the Convention, based upon a "comprehensive self-assessment checklist". In addition, States Parties participate in a review conducted by two other States Parties on their compliance with the Convention. The reviewing States Parties then prepare a country review report, in close cooperation and coordination with the State Party under review and finalize it upon agreement. The result is a full review report and an Executive Summary, the latter of which is required to be published. The Secretariat, based upon the country review report, is then required to "compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the technical review reports and include them, organized by theme, in a thematic implementation report and regional supplementary agenda for submission to the Implementation Review Group". The Terms of Reference call for governments to conduct broad consultation with stakeholders during preparation of the self-assessment and to facilitate engagement with stakeholders if a country visit is undertaken by the review team.

The inclusion of civil society in the UNCAC review process is of crucial importance for accountability and transparency, as well as for the credibility and effectiveness of the review process. Thus, civil society organisations around the world are actively seeking to contribute to this process in different ways. As part of a project on enhancing civil society's role in monitoring corruption funded by the UN Democracy Fund (UNDEF), Transparency International has offered small grants for civil society organisations (CSOs) engaged in monitoring and advocating around the UNCAC review process, aimed at supporting the preparation of UNCAC implementation review reports by CSOs, for input into the review process.

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Every effort has been made to verify the accuracy of the information contained in this report. All information was believed to be correct as of October 2011. Nevertheless, ACIJ and the UNCAC Coalition cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

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Introduction

Argentina ratified the United Nations Convention against Corruption (UNCAC) on 28 August 2006, after its approval on 10 May 2006 by Law 26097.

This report reviews Argentina's implementation and enforcement of selected articles in Chapters III (Criminalization and Law Enforcement) and IV (International Cooperation) of the UNCAC. The report is intended as a contribution to the UNCAC peer review process currently underway covering those two chapters. Argentina was selected by the UNCAC Implementation Review Group in July 2010, by a drawing of lots for review in the first year of the process. An earlier draft of this report was provided to the government of Argentina.

Transparency International (TI) provided support to Asociación Civil por la Igualdad y la Justicia (ACIJ), an NGO specialising in anti-corruption, to monitor and contribute to the official UNCAC review of Argentina's implementation of selected articles in Chapters III and IV of the UNCAC. The articles that receive particular attention in this report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), illicit enrichment (Article 20), money laundering (Article 23), liability of legal persons (Article 26), statute of limitations (Article 29), freezing, seizure and confiscation (Article 31), witness protection (Article 32), whistleblower protection (Article 33), compensation for damages (Article 35), bank secrecy (Article 40), jurisdiction (Article 42) and mutual legal assistance (Article 46).

Section I of the report is an Executive Summary, with the condensed findings, conclusions and recommendations about the review process and the availability of information; as well as about implementation and enforcement of selected UNCAC articles. Section II covers in more detail the findings about the review process in Argentina as well as access to information issues. Section III reviews implementation and enforcement of the Convention, including key issues related to the legal framework and to the enforcement system, with examples of good and bad practice. Section IV covers recent developments and Section V elaborates on recommended priority actions.

The preparation of this report began in December 2010, when ACIJ began collecting information and regulations. We also requested access to the government's official self-assessment checklist. On 11 January 2011, this was forwarded to us in digital format by the Anti-Corruption Office (*Oficina Anticorrupción*, OA), along with an explanatory note regarding the process of assessing the implementation of the UNCAC in the country.

I. Executive summary

The research for the report included a survey of the legal framework and an analysis of law enforcement statistics. Based on the findings, ACIJ has identified and commented on reasons that the Argentine system has failed to fully adopt the applicable UNCAC standards.

Assessment of the review process

Conduct of process

The following table provides an overall assessment of transparency, country visits and civil society participation in the UNCAC review of Argentina.

Table 1: Transparency and CSO participation in the review process

Did the government make public the contact details of the country focal point?	No
Was civil society consulted in the preparation of the self-assessment?	No
Was the self-assessment published online or provided to CSOs?	Provided
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	No
Was civil society invited to provide input to the official reviewers?	No
Has the government committed to publishing the full country report?	No

OA is the Argentine focal point but this information was not published by the government and was obtained upon request. Although OA invited ACIJ and other NGOs to a meeting to provide information about the different steps in the self-assessment and review process, civil society was not given an opportunity to provide information or otherwise be in contact with the reviewers. OA had said that the Argentine government agreed to have a country visit by the review team but it did not take place because in the end both parties preferred to have meetings in Vienna. OA's reason was that they did not have time to organise the visit, and there were reportedly timetable difficulties.

Although the government did not commit to publishing the full report, the OA authorities stated that it would not be a problem to make public the final document.

Availability of information

Securing information for the report was relatively complex because it is scattered and generally not published on the official OA website. To access it, it was in some cases necessary to make formal requests to public offices. Here the OA's cooperation should be highlighted; it responded quickly and effectively to ACIJ's requests. In some cases, however, information was incomplete or outdated, especially with regard to statistics and information on judicial and administrative cases. In contrast, information on certain policies and legislative reform projects could be accessed easily and quickly.

Some information was available through the recent reviews of Argentina conducted by the OECD Working Group on Bribery regarding compliance with the OECD Anti-Bribery Convention in a Phase 2 Follow-up report published in September 2010¹ and by the Follow-up Mechanism of the Inter-American Convention against Corruption in a Third Round report adopted in September 2009.²

Implementation and enforcement

The following summarises the report's findings as to implementation and enforcement in Argentina.

1. Legal framework

With respect to the criminalisation of conduct enumerated in the UNCAC, Argentina generally satisfies its obligations by criminalising offences such as bribery of national and foreign officials, unjust enrichment, and money laundering. Thus, from a legal point of view, Argentina meets the legislative requirements of the UNCAC by criminalising behaviours related to corruption.

However, the Phase 2 report of the OECD Working Group on Bribery of September 2010 expressed concerns about the scope and content of the foreign bribery offence contained in the Argentine Criminal Code.

In addition, ACIJ has found serious shortcomings in Argentina's implementation of UNCAC Articles 23, 26, 32, 33 and 40.

- a. Anti-money laundering legislation (UNCAC Article 23): The Financial Intelligence Unit (FIU) does not conduct sufficient analysis of suspicious transactions reports about money laundering. This is because the FIU has problems regarding resources and access to information. Also, the quality of the information forwarded to the FIU has not been sufficient to allow for effective prosecution of money laundering.
- b. Liability of legal persons (UNCAC Article 26): With regard to codification of the liability of legal entities, neither the Argentine Penal Code nor any supplementary rules impose criminal liability on corporations, companies, civil associations, and/or foundations for wrongful acts they may commit. However, the judicial system does contemplate civil and administrative punishments for these bodies. Civil penalties include monetary fines, suspension, or cancellation of their capacity for action

¹ OECD Working Group on Bribery, Phase 2 Follow-up Report on Argentina, adopted 2 September 2010, <http://www.oecd.org/dataoecd/38/4/46057339.pdf>

² Inter-American Convention Against Corruption Committee of Experts, Report on Implementation in Argentina 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, adopted 18 September 2009, http://www.oas.org/juridico/spanish/mesicic_III_inf_arg.pdf

if they violate exchange rules (Law 19359, Article 8), customs (Law 22415, Article 888), supply (Law 20680, Article 8), or competition laws (Law 25156, Article 47).

- c. Freezing seizure and confiscation (Article 31): The Argentine Penal Code does not live up to UNCAC standards, such as providing for forfeiture of substitute goods as the proceeds of crime (Article 31, paragraphs 4 and 6). Nor does it provide for expanded possibilities, such as confiscation or civil forfeiture.
- d. Protection of witnesses and whistleblowers (UNCAC Articles 32 and 33): There is no specific protection of witnesses, experts, and whistleblowers in relation to crimes of corruption. There is a law regarding witness protection embodied in the Ministry of Justice's "National Programme for Protection of Witnesses and Persons" (Law 25764) but the law conditions protection on danger to the physical integrity of the person.
- e. Bank secrecy (Article 40): Under Argentine law (Law 21526), bank secrecy cannot be used as a justification to refuse to provide information during a criminal investigation. However, it does pose a serious obstacle during preliminary investigations by the Anti-Corruption Office, the internal and external audit offices (Sindicatura General De La Nacion, SIGEN) and the National General Audit, *Auditoría General de la Nación* or AGN), and public prosecutors. It also makes it more difficult to preventively freeze assets obtained illegally.

2. Enforcement system

Almost all the provisions of the UNCAC that ACIJ was asked to analyse have been adopted into national law, but the problem lies in the effective enforcement of these provisions in individual cases. Thus, attention should be focused especially on efforts by the judiciary and public prosecutors to create incentives to investigate. This calls for dismantling all sorts of delaying tactics; ensuring the necessary legal tools; and providing adequate human and material resources, or ordering that corruption cases are given greater priority. It also calls for eliminating, to the extent possible, opportunities for discretion that conspire against effective investigation and prosecution of these cases; and providing better training for employees and officers so that they can make better decisions and undertake more effective criminal investigations. The complexity of investigations and difficulties of obtaining evidence are not addressed under the current system.

- a. Role of OA: The OA, a public entity established as part of the executive branch, is responsible for compliance with all international anti-corruption standards ratified by Argentina, and for the development and coordination of programs combating corruption in the national public sector (Law 25233, Article 13). During its early years, it enjoyed outstanding success, driving and taking an active part in cases involving public officials suspected of corruption. However, it has recently been criticised for failure to conduct open and transparent public trials, because of a lack of civil society participation in the selection of its officers and its low performance in prosecution.³ Nor is it guaranteed independence,⁴ as outlined in Article 36 of the UNCAC, because it is subordinate to the national executive.⁵
- b. Low rate of prosecution and sentencing: The most important and serious deficiencies were found in the investigation and prosecution of cases involving corruption in state institutions. At the federal level, the rate at which cases are brought to public trial is low, and consequently there is not much investigation of incidents involving government officials, and few convictions.
- c. The role of judges in corruption investigations: In many cases there is inconsistent handling of investigations, which sometimes seems to be politicised and self-interested.⁶
- d. Lack of specialised training, expertise, research tools and investigative techniques: The problems are compounded by insufficient training of judicial officers and employees on how to approach an

³Articles about the project to amend the law about the Anti-Corruption Office with regard to the selection system of its officials: <http://sincorruptcion.wordpress.com/2011/03/31/proyecto-para-reformar-la-oficina-anticorruptcion/>; <http://sincorruptcion.files.wordpress.com/2011/03/proyecto-oa.pdf>

Articles published in La Nación newsletter regarding the low performance in prosecutions:

<http://www.lanacion.com.ar/1356425-un-sistema-perfecto-de-impunidad>

<http://www.lanacion.com.ar/1373662-hay-desinteres-por-vigilar-al-poder>

⁴ <http://www.lanacion.com.ar/1092926-designan-a-los-titulares-de-la-oficina-anticorruptcion-y-de-la-sigen>

⁵ "Reform and strengthen oversight bodies through measures such as public and transparent selection mechanisms, appointment, promotion and removal of civil servants, continuous evaluation and monitoring of their actions, political and social support, greater autonomy of internal audit units and independence of the Anticorruption Office" from the Final Report of the Follow-Up Mechanism of the Inter-American Convention Against Corruption, approved on 19 September 2009, page 31. It can be found here: http://www.oas.org/juridico/spanish/mesicic_III_inf_arg.pdf

⁶ Report "The judicial paralysis on the corruption cases" made by ACIJ, published in

http://www.elhardin.com.ar/paneles/acij/v2/programas/adjuntos/La_paralisis_de_la_Justicia_frente_a_los_casos_de_corruptcion.pdf

investigation and deal with the complexity of corruption crimes. There is no court-mandated program for organised training activities or program updates.

- e. Lack of adequate recruitment process and training for experts: In this regard there are particular concerns about the delay in the work of the Supreme Court's corps of accounting experts.⁷
- f. Lack of resources and congestion in courts: the courts are overcrowded with minor cases, straining their capacity. They are also burdened by the number of cases that involve the use of procedural tools, such as requests for annulments and/or appeals.
- g. Weaknesses in the area of anti-money laundering: The FATF–GAFI (Financial Action Task Force) issued a report in which Argentina's capacity to prevent money laundering is questioned.⁸ The report notes the lack of judicial or administrative investigations of such acts, considering the number of suspicious transaction reports noted by FIU; the lack of controls to which organisations such as mutual societies, cooperatives, and certain exchange houses are subject; the informal registration of certain operations that should pass through the banking system; the lack of effective regulation of money deliveries, debit and credit cards; the lack of efficiency in reporting suspicious operations that financial bodies should submit to the FIU; the lack of effective FIU powers to analyse and process the information it receives and translate it into preliminary investigations and legal decisions; and the difficulties in obtaining timely judicial orders to access tax information and the secret annexes of disclosures of assets. All these elements corrode the capacity of the Argentine state to punish and prevent practices related to money laundering.
- h. Lack of action by, and coordination with, other agencies: There is limited action by other relevant offices, notably specialised bodies for the detection and investigation of possible acts of corruption, such as the Prosecutor's Office of Administrative Investigations (Fiscalía de Investigaciones Administrativas, (FIA)⁹ or the FIU, in the prosecutor's office. There is also little coordination between public and private agencies in the collection, exchange and analysis of tax, property and banking information regarding people suspected in corruption cases. The absence of judicial mechanisms to access this information in timely fashion delays the investigation of these crimes.
- i. Mutual legal assistance: Most requests are rejected or not answered, in many cases because of basic errors in the procedure governing applications, ignorance of the law, or lack of detail in the order. It is important to note that other countries do not collaborate with the Argentine authorities; in many cases, the justification is that laws prohibiting disclosure of tax and bank information prevent the answering of such requests.
- j. Lack of accountability measures: there is a lack of measures and monitoring systems to evaluate the work of officials and make recommendations to improve processes and transparency in decision-making (in public procurement, for example), or to monitor the judicial system regarding the progress of investigations into alleged corruption, etc.
- k. Lack of incentives: Moreover, real and effective incentives to pursue corruption cases involving (former) government officials and large and prestigious companies are inadequate or lacking. There is little incentive to ensure that such cases are investigated, prosecuted and sentenced within a reasonable time.
- l. Lack of statistics: Another deficiency in the corruption prosecution system is the lack of updated and complete statistics detailing the number of administrative, civil and criminal cases, which are broken down into different categories, such as type of crime or stage of progress.

It would also be appropriate to examine the performance of preventive management bodies (such as SIGEN, the Unit of Financial Information or UIF, and the FIA) to enable them to carry out their duties, providing them – as well as the OA – with greater functional and financial independence from hierarchical constraints.

⁷ Report "The corruption cases in the view of the accounting proof" made by ACIJ, published in http://www.elhardin.com.ar/paneles/acij/v2/programas/adjuntos/INFORME_PERITOS.pdf

⁸ The report can be found in this website: <http://www.fatf-gafi.org/dataoecd/51/5/46336120.pdf>

⁹ Article published in La Nación newspaper about the limited action of the Fiscalía de Investigaciones Administrativas (FIA)

<http://www.lanacion.com.ar/1373661-el-kirchnerismo-debilito-varios-puestos-clave>; Report "The judicial paralysis on the corruption cases" made by ACIJ, published in

http://www.elhardin.com.ar/paneles/acij/v2/programas/adjuntos/La_paralisis_de_la_Justicia_frente_a_los_casos_de_corrupcion.pdf;

also see article published in Clarin newspaper regarding the order given by the General Attorney about the impossibility for the FIA to participate in some types of judicial cases (the ones that it does not promote): <http://edant.clarin.com/diario/2008/11/17/opinion/o-1804294.htm>

Recommendations for priority actions

Considering the above, ACIJ considers it a priority for the judicial, legislative and executive branches of government to take effective measures, within the scope of the authority granted them by the Constitution, to overcome the shortcomings in the application of the rules related to corrupt practices. To this end, it may be of interest to work in three areas: those of the OA, the judiciary and public prosecutor, and the legislature.

1. **Legal framework:** While the laws of Argentina are, in very large measure, well adapted to the provisions of the UNCAC, there are still some areas where it is necessary for the legislature to take action.
 - a. Liability of legal persons: the national legislature should pass legislation to introduce criminal liability of legal persons for wrongful acts committed in their name by managers and businessmen. While criminal, civil or administrative liability are alternatives provided by the UNCAC, only criminal liability is likely to provide a sufficient deterrent and ensure effective international cooperation with respect to offences for which legal persons should be held responsible. Moreover, Argentina currently has no effective liability of legal persons at all.
 - b. Witness and whistleblower protection: it is important to expand the witness protection program created by Law 25764, and also give wide coverage to the complainants, witnesses, whistleblowers, and experts involved in investigations or prosecutions for acts of corruption.
 - c. Criminal procedure reform: the rules of criminal procedure should provide that the Attorney General, as head of prosecution, should be able to decide, within the framework specified by law, which facts should be considered and which should be set aside. This would restructure the workload in the courts and would streamline the judicial selection system, so that human and material resources would be directed towards socially important cases.
2. **Enforcement system:** the judiciary and the Public Prosecutor Against Corruption should take a leading role in the fight against corruption, supported by other agencies and entities. To that end, the following reforms are recommended:¹⁰
 - d. Role of OA: revitalise the role of the OA, ensuring its independence and expertise and redefining its functions. This could include emphasising its role in prevention and monitoring, including gathering data and statistics and coordinating data processing, with the Office of Administrative Investigations taking a leading role in monitoring and investigation.
 - e. Speedier appointment of judges: make a strong political decision to expedite the activities of the Council of Judges. It is also important to implement transparent criteria for evaluating qualifications, and make prompt decisions about the candidates who qualify. It is also crucial that the Ministry of Justice acts promptly upon receiving the communication from the Council of Judges about its selection, following consultations. Finally, it is essential that the executive branch devotes time to correcting the large number of court vacancies, and submits its proposals to be endorsed by the Senate. In short, it requires coordinated work between the different public bodies involved in order to streamline the appointments.
 - f. Training and resources: Train the judiciary and public prosecutor and facilitate their closer work with professional and specialist advisers. Provide adequate resources for expert bodies assisting the judiciary and law enforcement authorities, as well as transparent and impartial selection mechanisms for the experts. It is also necessary to teach judges and the public prosecutor new investigation techniques, including those which focus on economic crime.
 - g. Additional systemic reform: Ensure rapid responses to judicial requests for information from public institutions, and strengthen internal audits by prosecution services and the judiciary.
 - h. Strengthen transparency and accountability: In order to make the judicial process transparent in accordance with the mandate of UNCAC Article 13, it is necessary for prosecutors and judges to endorse the involvement of civil society in monitoring the courts. The purpose of monitoring the performance of the judiciary and prosecutors is to generate greater incentives, increase the accountability of judges and prosecutors, and spark a public commitment among citizens to combat the scourge of corruption.
 - i. Coordinated strategy: It would also be appropriate for the judicial authorities and prosecutors to develop a coordinated strategy for the prosecution and punishment of crimes related to corruption

¹⁰ In 2009, Clarin newspaper published an article about some things that had to be done in the judiciary area to tackle corruption in Argentina. The article was entitled "The changes suggested by judges and specialists" and can be found here: <http://edant.clarin.com/suplementos/zona/2009/11/29/z-02051135.htm>

and judicial recovery of assets lost by the state because of these crimes, in accordance with Article 39 of the UNCAC.

- j. Incentives: It is crucial to design effective incentives to create a new awareness about the role of public officials and their public mission, and underline the fact that public office is not a place to become rich by means of public money. In order to create that awareness, it is essential that the whole of society strongly believes in the power of law and of the judiciary. Of course, ethics education is an important element in responding to this challenge.
- k. Anti-money laundering: It is fundamental to empower the FIU as a vital body to prevent, conduct preliminary investigations, and analyse suspicious transactions reports. It is also necessary to improve the control systems to which organisations such as mutual societies, cooperatives, and certain exchange houses are subject; and to ensure the informal registration of certain operations that should pass through the banking system. Finally, it is essential that the FIU, the judiciary and public prosecutors work together in the area of anti-money laundering.
- l. Judicial and administrative statistics: To understand the real situation in corruption matters, it is crucial to have updated and complete statistics detailing the number of administrative, civil and criminal cases, which are broken down into different categories, such as type of crime or stage of progress.
- m. Bank secrecy: It is necessary to amend the law in order to allow the Anti-Corruption Office, the internal and external audit offices (SIGEN/AGN), and public prosecutors to access bank information during preliminary investigations.
- n. Freezing seizure and confiscation: It is essential that Congress amends the Penal Code to accord with the UNCAC standards, such as providing for forfeiture of substitute goods as the proceeds of crime.

II. Assessment of review process for Argentina

A. Conduct of process

The OA is the Argentine focal point but this information was not published. However, both the Ministry of Foreign Affairs and the OA responded promptly to our requests for information to determine the country's contact point in relation to the review process.

ACIJ also made a formal request to the authorities suggesting the possibility of NGO inputs to the self-assessment process. OA thereafter invited some NGOs and public officials to a meeting to discuss the self-assessment and review process. ACIJ and the TI National Chapter, Poder Ciudadano, attended this consultation with CSOs, asked questions about the process, and made suggestions for the official report (such as suggesting a focus on anti-money laundering, judicial statistics, and the implementation of UNCAC principles in criminal prosecutions). We also reiterated the need to open the process to other CSOs specialising in anti-corruption issues, and to the general public. We explained that this would allow citizens and civil society organisations to offer suggestions, questions, information and documentation to enrich the final report.

The self-assessment itself was provided to ACIJ by OA as a result of a formal access-to-information request.

However, civil society did not have an opportunity to provide information to the reviewers. OA said that the Argentine government agreed to a country visit by the review team, composed of experts from Panama and Singapore. But this did not take place. Instead, the government agreed to maintain contacts with the evaluators through video-conferencing and a personal meeting in Vienna. The government seems not to have previously considered the possibility of holding meetings in Argentina to complete the evaluation process. It seems the country visit did not take place for reasons of cost and difficulties in reconciling timetables.

Even though the government has not yet committed to publishing the full report, the OA believes that there will be no difficulty in making public the final document. ACIJ has asked OA to ensure the widest possible dissemination of and publicity for the final documents in this evaluation process. We believe that, given that it is a consensual document, there will be no government objections to doing so.

B. Availability of information

Information was relatively difficult to access because it was scattered, and was not generally published on the official websites. In some cases, it was necessary to make formal access-to-information requests.

At other times, however, the information found was incomplete or outdated, especially with regard to statistics and information on judicial and administrative cases. This is due in large part to the fact that state organs compile the information based on different criteria than those established by the Follow-Up Mechanism on Implementation of the UNCAC. Nevertheless, easy and quick access was available to everything on collection norms and legislative reform projects, as long as it was known in advance which document or standard was being sought.

III. Implementation and enforcement of the UNCAC

A. Key issues related to the legal framework

Under the Argentine legal system, any international instrument ratified by the state enjoys supra-legal status in the regulatory hierarchy (Section 75.22 of the Constitution). Therefore, the criminal law must conform to the standards set by the UNCAC. For this reason, the Penal Code complies with most of the provisions of the UNCAC.

1. Areas showing good practice

In general, and as stated earlier, from the regulatory standpoint and with regard to the points that ACIJ investigated, Argentina meets the standards specified in the UNCAC.

UNCAC Articles 15, 16, 17, 20, 23: Domestic bribery, foreign bribery, embezzlement, illicit enrichment and laundering of the proceeds of corruption. The Penal Code criminalises the bribery of domestic and foreign government officials, both active and passive (UNCAC Articles 15(a), 15(b), 16), embezzlement and misappropriation of public goods (UNCAC Article 17), illicit enrichment of public officials (UNCAC Article 20) and money laundering linked to any previous wrongful act (UNCAC Article 23).

In a report in September 2010¹¹, the OECD Working Group on Bribery found deficiencies in the Argentine legal framework for criminalizing foreign bribery and welcomed a report from Argentina about the recent introduction in Congress, on 11 May 2010, of a series of draft bills proposing amendments to the Criminal Code which could serve to address its recommendations for improvement. However, the Working Group noted that at that point Argentina had still not effectively implemented its recommendations, and requested Argentina to report back to the group within one year on the progress of this legislation.

¹¹ However, the OECD Working Group on Bribery Phase 2 Report on Argentina of September 2010 (page 4) said: "During Argentina's Phase 2 review, the Working Group on Bribery expressed concerns about the scope and content of the foreign bribery offence contained in the Argentine Criminal Code. These included the need for an autonomous definition of a foreign public official (*Recommendation 4*), provisions for liability of legal persons (*Recommendation 5*) and nationality jurisdiction in foreign bribery cases (*Recommendation 6*). The Working Group also made recommendations in relation to ensuring that legal persons are subject to effective, proportional and dissuasive sanctions for foreign bribery, including monetary sanctions and extending grounds for debarment (*Recommendations 9(a), (d)*)". The report can be found here: <http://www.oecd.org/dataoecd/38/4/46057339.pdf>. On the other hand, the Follow-Up Mechanism of the Inter-American Convention Against Corruption, has considered: "...With regard to making a provision through which Argentina has established the criminal offense relating to transnational bribery under Article VIII of the Convention, the Committee has examined it and it can be observed that it is appropriate to the purposes of the Convention...". But this mechanism has also asserted that it was necessary to consider adopting appropriate measures to apply appropriate sanctions to companies domiciled in the Argentine territory to engage in the conduct described in Article VIII of the Convention. Final Report approved on 19 September 2009, page 16. The report can be found here: http://www.oas.org/juridico/spanish/mesicic_III_inf_arg.pdf

UNCAC Article 29: Statute of limitations: The Penal Code also provides a statute of limitations on the specific action for crimes related to public administration (UNCAC Article 29).¹² In the abstract, the statute of limitations is adequate, but there is the recurring problem that judges have to declare the termination of criminal actions because the period of limitation ends before the case has finished. Usually, the period of limitation is not enough because judges and prosecutors because of the length of the preliminary investigation. And, this in turn is due to the enforcement authorities lacking adequate training and specialisation.

2. Areas with deficiencies

UNCAC Article 26: Liability of legal persons (corporations) Regarding the responsibility of legal persons or corporations, neither the Argentine Legal Code nor any complementary rule provides for the legal responsibility of businesses, societies, civil associations, or foundations for illicit acts they may commit. However, the legal system does contemplate civil and administrative punishments for these entities. Civil penalties include monetary fines, suspension, or cancellation of their capacity for action if they violate exchange rules (Law 19359, Article 8), customs (Law 22415, Article 888), supply (Law 20680, Article 8), or competition laws (Law 25156, Article 47). These rules are not effective because they are not being well applied by the administrative agencies. Two bills are currently being considered in Congress to establish the criminal responsibility of legal persons or corporations for all types of crimes.

It should be noted that in civil matters, whichever legal entity is responsible for the acts and the damages caused is obligated to repair that damage, in accordance with the provisions of the Argentine Civil Code. The problem with this is that, in order to bring a civil lawsuit against a legal person regarding a corruption offence, it is first necessary to file a criminal complaint leading to conviction. Since a legal person is not criminally liable, it is very difficult to make them civilly liable for these acts.

UNCAC Article 32: Protection of witnesses; Article 33: Protection of reporting persons. There is no specific protection of witnesses, experts, and whistleblowers in relation to crimes of corruption. There is a law regarding witness protection embodied in the Ministry of Justice's "National Programme for Protection of Witnesses and Persons" (Law 25764). Although primarily aimed at witness protection in cases of drug trafficking, terrorism and kidnapping for ransom, this law also provides for the possibility of witness protection in other cases relating to organised crime or institutional violence. Protection is granted only when requested by the prosecutor or trial judge, and it requires the director of the National Programme to find that there is a danger to the physical integrity of the beneficiary, and that protection is important to the judicial investigation in progress. Consequently, only in exceptional circumstances can a person who has reported or witnessed acts of corruption benefit from protection under this law. The programme does not, therefore, meet the standard of protection required by the UNCAC, which calls for effective protection. Since the law conditions protection on danger to the physical integrity of the person and does not take into account the possibility of harm to their personal situation, work, or family, protection measures tend to be related only to physical protection of the beneficiary but do not involve other areas of life. Also, the possibility of protection is not considered while the investigation is in the hands of non-judicial agencies. An OECD Working Group on Bribery Phase 2 report of September 2010 noted that, "In relation to the detection and reporting of foreign bribery, Argentina has not adopted specific measures to protect public and private sector whistleblowers".

UNCAC Article 31: Freezing, seizure and confiscation. The Argentine Penal Code provides mechanisms for seizure and confiscation of property obtained through unlawful conduct, and the reparation of criminal damage. However, Article 23 of the Argentine Penal Code does not live up to UNCAC standards, such as the requirement to provide for forfeiture of substitute goods as the proceeds of crime (UNCAC Article 31, paragraphs 4 and 6). Nor does it provide for expanded possibilities, such as confiscation or civil forfeiture.

¹² In general, the statute of limitations works in this way: the judicial cases finish because the processing time is greater than the maximum penalty for the crime under investigation. The statute of limitations is interrupted when the defendant commits another crime, when he is called to the first preliminary statement, when the prosecutor requests elevation to trial, when it reaches trial phase and during sentencing. Also, the limitation period can be suspended if a defendant is a public officer while still working for the state. In this case, the suspension is valid until two years after the public officer ends his work for the state (Criminal Code, articles 59, 62, 63 and 67).

In 2003, a reform of Article 23 of the Argentine Penal Code introduced forfeiture of the “proceeds or benefit of the offenses”. Unfortunately, this reform is limited to “things or profits that are the product or profit of the offense”, and does not provide the ability to seize assets of equal value, as required by Article 31 of the UNCAC. Moreover, in contrast to some European countries, there is no procedure to establish a civil-law standard of proof to determine forfeiture of the proceeds of a crime following conviction.

UNCAC Article 35: Compensation for damages. It is important to highlight that the Argentine legal system allows filing of a civil action as part of the penal process or as an independent action in civil court. However, in the latter case, the civil action is suspended until the criminal sentence is imposed. We consider it necessary to reform the Civil Code to eliminate this condition. Moreover, the current Civil Code regulation severely limits the possibility of civil actions because these always depend on the existence of a criminal action.

UNCAC Article 40: Bank secrecy. According to Argentine law (Law 21526), bank secrecy cannot be used to block judges during a criminal investigation. However, it does pose a serious obstacle during preliminary investigations by the Anti-Corruption Office, the internal and external audit offices (SIGEN/AGN), and public prosecutors. It also makes it more difficult to preventively freeze assets obtained illegally.

B. Key issues related to enforcement

1. Background and overview of the criminal law system

The criminal offences covered by the UNCAC are adjudicated by judges and federal prosecutors located in the city of Buenos Aires and throughout the country. The investigation of a crime is initiated by a complaint lodged by public or private parties; in the latter case, there must be a motion by the public prosecutor’s office, as the agent of public action. This step is essential for the court to initiate the investigation. The judge, as director of the process, is responsible for the presentation of evidence with the aim of uncovering the truth. He may, at his discretion, delegate the investigation to prosecutors.

Cases of corruption in public administration are investigated by a special agency in the public prosecutor’s office: the Prosecutor’s Office of Administrative Investigations (*Fiscalía de Investigaciones Administrativas*, FIA). This prosecution agency carries out preliminary investigations into acts of corruption and may collaborate with the prosecutor in court cases, or assume the prosecutorial role if the prosecutor does not move forward with the investigation.

Once the investigation is complete, the prosecutor or judge may deem that sufficient grounds exist to link a person to the crime. The judge will then summon the accused, or the defendant may make a statement in his defense. The judge must then decide how to proceed, ordering a dismissal (ending the process) or an indictment, or determining that the case lacks merit (if more evidence is needed to decide on procedural grounds). The judge may also order the detention of the accused if there are grounds to believe that he will try to evade justice or obstruct the investigation. The accused or the prosecutor may appeal these decisions, which will then be resolved by the various federal appeals courts.

The preliminary investigation phase is concluded when the judge considers the investigation complete and submits the case to the prosecutor to file an injunction with the court. Subsequently, the defense may object, leaving the final decision to the judge.

The trial is the next step in the procedure. It is done orally in federal trial courts composed of three judges, by a different prosecutor from the one involved in the investigation. After a public trial, these courts have the final word regarding the guilt or innocence of the accused. The decision of the court of appeal may be further appealed to the National Criminal Cassation Chamber. This is a collegial court responsible for reviewing the judgments of federal trial courts, and is the highest court for interpreting federal criminal laws in Argentina.

It is only possible to appeal a ruling by the Criminal Cassation Chamber to the Supreme Court of Justice when its interpretation of the Constitution, international treaties, or federal laws is directly contested. In that instance, and if it meets a stringent set of requirements, the Court will hear the relevant issues and reach a final interpretation of the provisions in dispute.

2. Statistics

The statistics show gaps in the prosecution of corruption cases. First, few of the investigations of alleged corruption initiated each year involving national public officials lead to prosecutions.¹³ Even fewer reach the sentencing phase.

Statistics on administrative cases (data collected from Unidad de Información Financiera (UIF)¹⁴)

Suspicious transactions reports about money laundering (in Spanish, R.O.S.): (2010).

Status	Amount
Cases resolved in FIU	551
Under analysis	5,598
Cases sent to public prosecutor, attorney or judge	846
Total	6,995

Suspicious transactions reports about money laundering (in Spanish, R.O.S.) and other reports (in Spanish, I.O.F) sent to the public prosecutor's office.

Year	Amount
2007	160
2008	303
2009	233
2010 (first half)	72
Total	768

¹³ La Nación newspaper asserts "The statistics show with official numbers prepared by the Supreme Court of National Justice: for example, in 2009 207 cases started that involved corruption acts, 11 of them went to trial and only one ended with a conviction". The article can be found here: <http://www.lanacion.com.ar/1371400-quedan-impunes-cada-vez-mas-causas-sobre-corrupcion>

¹⁴ <http://www.uif.gov.ar/ESTADISTICAS.html>

Statistics on judicial cases (Data collected from the Office of Research and Statistics of Public Prosecutions Criminal Political Treasury¹⁵ (2008 and 2009)

	Prosecutions Only criminal cases initiated	Convictions	Acquittals	Dismissals	Pending Only criminal cases sent to trial
Bribery of foreign public officials (Article 16)	2 (2009 – City of Buenos Aires)	0	N/A	N/A	0
Bribery of national public officials (passive) (Article 15(b))	N/A	0	N/A	N/A	0
Bribery of national public officials (active) (Article 15(a))	85 (2009 – City of Buenos Aires)	1 (2009 – provinces)	N/A	N/A	3 (2009 – City of Buenos Aires)
	22 (2009 – provinces)				7 (2009 – provinces)
	22 (2008 – City of Buenos Aires)	4 (2008 – provinces)			1 (2008 – City of Buenos Aires)
	51 (2008 – provinces)				8 (2008 – provinces)
Embezzlement, misappropriation, or other diversion by a public official (Article 17)	82 (2009 – City of Buenos Aires)	1 (2009 – provinces)	N/A	3 trials suspended (2009 – provinces)	6 (2009 – City of Buenos Aires)
	55 (2009 – provinces)				6 (2009 – provinces)
	31 (2008 – City of Buenos Aires)	4 (2008 – provinces)		2 trials suspended (2008 – provinces)	2 (2008 – City of Buenos Aires)
	65 (2008 – provinces)			14 (2008 – provinces)	
Illicit enrichment (Article 20)	7 (2009 – City of Buenos Aires)	0	N/A	N/A	1 (2009 – City of Buenos Aires)
	5 (2009 – provinces)				
	34 (2008 – City of Buenos Aires)				1 (2008 – provinces)
	22 (2008 – provinces)				
Money laundering, corruption-related (Article 23)	6 (2009 – City of Buenos Aires)	1 (2010 – provinces)	N/A	N/A	0
	42 (2009 – provinces)				

¹⁵ <http://www.mpf.gov.ar/index.asp?page=Organigrama/Coordinacion/coordination3.html>

Bribery of foreign public officials (Article 16)	2 (2007) 1 (2008)	N/A	N/A	N/A	N/A
Illicit enrichment (Article 20)	26 (2007) 26 (2008)	N/A	2 (2007) 1 (2008)	7 (2007) 2 (2008)	N/A

Data collected from Anti-Corruption Office (OA) statistics¹⁶ (2007 and 2008)

	Prosecutions Only criminal cases initiated	Convictions	Acquittals
Bribery of Foreign Public Officials (Article 16)	2 (2007) 1 (2008)	N/A	N/A
Illicit enrichment (Article 20)	26 (2007) 26 (2008)	N/A	2 (2007) 1 (2008)

We have already reported that it was very difficult to obtain statistical information on foreign bribery by public officials, bribery by national public officials (active and passive), embezzlement, misappropriation or other diversion by a public official, money laundering and illicit enrichment. It is expensive because the agencies that gather and generate this type of information (judiciary, Ministry of Justice, etc.), do not have organized and updated information on corruption crimes. Moreover, the data is not grouped by type of crime, but in theoretical or academic categories, such as “crimes against public administration” (for example, statistics from the national judiciary).

If we take the case of statistics on money laundering, it can be seen that the FIU (UIF) is a body for the monitoring and prevention of such crimes. It processes a large number of suspected money laundering cases. However, the statistics do not reflect cases that have been sent to prosecutors and/or the judiciary. This may be because the prosecution and/or the judiciary are not processing cases involving money laundering, or because the statistics are incorrect.

It should also be noted that the FIU has analysed numerous reports on suspicious transactions. It might therefore be thought that the FIU has serious problems processing these types of issues. With the large number of reports, it would be difficult to reach a rapid and effective conclusion on whether money laundering had occurred. There is an insignificant number of prosecutions and convictions relative to the cases that are processed.

These statistics, though incomplete and somewhat outdated, have the virtue of representing the legal situation regarding investigations, prosecutions and punishments of corruption acts, referenced earlier.

A few of the most relevant and well-known corruption cases currently being prosecuted or prosecuted in the past in the federal courts are discussed below. The work on this section was prepared with the assistance of several lawyers.¹⁷

The first case of interest is the case of “Ministerio de Relaciones Exteriores, Comercio Internacional y Culto s/ denuncia”. The parties are: CBK Power Company, whose main shareholders are: (i) an Argentinean company, Industrias Metalúrgicas Pescarmona S.A. (IMPESA), and (ii) an American company, Edison Mission Energy (“EME”). This case began in 2006 and the principal charges are that members of IMPESA were accused of bribery for paying US \$14,000,000 to public officials of the Philippines in order to

¹⁶ [http://www.anticorruccion.gov.ar/documentos/Arg%20est%202004-2008%20\(Enriq%20Illicito-Sob%20Trans\).pdf](http://www.anticorruccion.gov.ar/documentos/Arg%20est%202004-2008%20(Enriq%20Illicito-Sob%20Trans).pdf)

¹⁷ The Argentine lawyers and paralegals that assisted ACIJ with this chapter of the review, on a pro bono basis, are: Roberto H. Crouzel, Julieta Bontempi, Tatiana De Tommaso, Lucía Degano and María Noel Ferrer, from Estudio Beccar Varela; María de la Paz Miatello and María Laura Rosa Vilardo, from Estudio Pérez Alati & Asoc.; and Manuel Beccar Varela, from Estudio Fernandez Alonso, Beccar Varela & Richards.

obtain approval from the Philippine government for an agreement executed between IMPSA and Napocor, related to hydroelectric energy. Section 258bis of the Argentine Criminal Code establishes that bribery of foreign public officials will be punished with one to six years of imprisonment and absolute disqualification for the exercise of public functions. Although the information is confidential, we were informed that the case is still being investigated by the Court.

There have also been several cases of alleged bribery of public officials in Argentina, according to publicly available information. The majority of these cases involve joint prosecution of both active and passive bribery of public officials -- both parties to the alleged bribery are generally prosecuted.

One of the most important **bribery** cases is that of “Cantarero, Emilio y otros s/ cohecho”. The parties involved are a former president of Argentina, seven ex-senators, an ex-public official of Congress, an ex-chief of the Intelligence Secretariat and an ex-minister of labour. The prosecution started on 22 August 2000 and the principal charges relate to a labour-law reform passed by the Argentine Congress in 2000. In order to pass the law, several senators were allegedly bribed and a formal investigation was initiated. One of the senators reportedly admitted later that year that his vote had been purchased. Years later a parliamentary secretary reportedly admitted that he received over AR\$ 4,000,000 (approx US\$ 1 million) and delivered them to a senator, who then distributed it among other senators. The aftermath of this case included the resignation of vice-president Carlos Alvarez on 6 October 2000. The case is currently at trial stage. The public hearing will start on 22 November 2011.

In another important case “Galeano Juan José s/Malversación de caudales públicos y otros” involving **embezzlement, misappropriation or other diversion by a public official** the prosecution was brought in 2000 and the principal charges relate to various alleged irregularities committed by a former federal judge in charge of overseeing the instruction (investigation) period of an inquiry into the AMIA terrorist attack. Regarding the embezzlement charge, the chairman of the SIDE (Argentine intelligence agency) allegedly diverted US \$400,000 from said office in order to pay the wife of one of the defendants in the terrorism case to change his testimony. The case is still under investigation.

On **illicit enrichment**, there is the case “Gostanian, Armando; Menem, Carlos y otros s/Enriquecimiento Ilícito”, in which the parties are an ex-president of the Argentine Mint, an ex-president of Argentina and the ex-president's brother. The prosecution of this case began in 2001. The principal charges are that the president of the Argentine Mint (“Casa de la Moneda”) increased – allegedly in an unjustified manner – his assets by more than US\$ 11 million during his period in office. Two of the defendants (the ex-president and his brother) have been acquitted. The ex-president of the Mint is still under investigation, and the Court has established a freeze on his assets in the amount of US\$ 2 million.

Finally concerning **money laundering**, according to the information that is publicly available, there have been only a few prosecutions of money laundering in Argentina during the ten years of existence of Law 25246, which is the basis of the anti-money laundering system in Argentina. This is confirmed by the GAFI-FATF in its “Mutual Evaluation Report on Argentina”, dated 22 October 2010, in which it states that “(...) *During the on-site visit, the evaluation team received evidence of only four cases of prosecution for money laundering (...) and none has yet resulted in an indictment (...)*”¹⁸

The Argentine Financial Intelligence Unit (FIU) is the government agency in charge of collecting, processing and transmitting information for the prevention of money laundering and terrorism financing in Argentina and stated in a news report on 27 December 2010, posted on its website (www.uif.gov.ar), that there have not been a “significant number of convictions”. In fact, the first and only conviction for money laundering in Argentina occurred in December 2009 and became effective in December 2010 (case “ALTAMIRA, Jorge Guillermo y otros p.ss.aa infracción ley 23737...”; N° A-5/09- Tribunal Oral en lo Criminal Federal N°2, Córdoba).

¹⁸ The report can be found at the following link: <http://www.fatf-gafi.org/dataoecd/3/60/46695047.pdf>

3. Areas showing good practice

a. *The Office of Coordination and Monitoring of Crimes against the Public Administration*

A positive development, reflecting UNCAC Article 36, was the creation of the Office of Coordination and Monitoring of Crimes against the Public Administration (OCDAP) in the public prosecutor's office (Resolution PGN 86/09). Among its main tasks, the following can be highlighted: (a) monitoring cases in progress and organising a database; (b) proposing prosecution strategies and developing action protocols; (c) reporting on the state of affairs in different areas of the country; (d) proposing to the Attorney General the implementation of necessary inter-institutional actions necessary to facilitate and speed up investigations; and (e) advising the Attorney General on the adoption of institutional measures in its field. OCDAP, as a multidisciplinary office, will emphasise collaboration with prosecutors in cases of crimes against the public administration, in order to provide them with additional tools and place them in a better position to investigate and prosecute corruption allegations.

b. *Improvement of the selection system for members of the Supreme Court of National Justice*

Another important advance for judicial independence was the reform of the selection system for judges making up the Supreme Court of National Justice (CSJN) and the change in its members. In 2003, the executive branch (Decree PEN 222/03) established a new selection mechanism – specifically for the Supreme Court – that incorporated requirements of professional competence, gender representation, and professional ethics. It established a system of extensive consultation and public hearings in the selection process in order to give greater legitimacy and publicity to the naming of members of the judiciary.

This year, all judges were appointed using this mechanism. It has proven very useful for citizens to know the people who are ultimately responsible for resolving the country's major social and institutional conflicts. Also beneficial has been the resulting debate about the democratisation of the judicial branch, and the attempt to diminish the power and discretion of the executive branch when filling vacancies on the Supreme Court.

c. *OA as a repository for disclosures by public officials*

The OA makes an effort to annually compile financial disclosures by public employees who work closely with the executive branch.

In this regard, the implementation of a computerised system for the presentation of those affidavits is very important. This technological tool has facilitated the procedure for those involved, all of whom must submit statements to be analysed and processed. Its implementation has permitted more effective and rapid verification by supervisory bodies of the increase or decrease in the assets of civil servants during their time in public office. Similarly, it permits the detection of the presence of conflicts of interest for those holding public office.

d. *Bills on responsibility of legal entities and access to information*

As has been mentioned, in Argentina the responsibility of legal entities has yet to be established by law. However, with the firm intention of complying with the international obligations regarding implementation of legislative measures imposed by the UNCAC, a group of national deputies, along with the executive branch, have presented bills to implement UNCAC Article 26 into law. The bill presented by the deputies was favorably received by the corresponding legislative committee, but must still go before the full House of Representatives. The bill drafted by the executive branch must still make the rounds of the respective committees.

Regarding access to public information (UNCAC Article 13.1.b), there exists public awareness of the need to improve the mechanisms that permit civil society and civil society organisations to petition for public information. In this regard, with the aim of optimising a mechanism of access and guaranteeing the exercise of this fundamental right, various national law-makers have presented to Congress distinct proposals to be embodied in a law regulating access to information. In fact, one bill has already been approved by the Senate, and requires only House of Representatives approval for it to become law.

At present, access to public information is granted by Decree PEN 1172/2003, but public offices diverge in regard to its interpretation and application. These disputes have therefore ended up in the courts. It would

be very opportune if Congress were to adopt a law like the one being debated, thereby settling the question and effectively guaranteeing implementation of the UNCAC.¹⁹

e. *The participation of NGOs in investigations of acts of corruption*

While the rules of legal procedure do not explicitly provide for the participation of civil society in corruption cases, ACIJ has found that various courts within the jurisdiction of the Federal Correctional and Criminal Courts have ruled in this area by directly referring to the provisions of the UNCAC. It is worth remembering that since its ratification, the UNCAC has been part of Argentine law and takes precedence over the rules governing criminal proceedings (Article 75.22 National Constitution).

Therefore, despite the resistance of a large part of the judiciary, ACIJ has been able to view and monitor the progress of cases related to corrupt practices in public administration and involving public officials.

4. Areas with deficiencies

Many of the deficiencies in the treatment of UNCAC-related crimes are related to shortcomings in the judiciary and the public prosecutor's office. The OA, as the public body charged with enforcing compliance with the UNCAC in Argentina, is charged with designing a strategy to verify application of the UNCAC. However, because its functions are defined by the executive branch, it is not fully able to intervene in state affairs. The legislative and judicial branches are not restricted in this way.

However, at all levels, but primarily in the executive and judicial branches, there is no perceived institutional priority placed on tackling corruption cases. There are no oversight mechanisms in the executive branch, which decreases the effectiveness of efforts to prevent or dismantle corrupt practices in public contracting.

No incentives exist to motivate employees who witness these practices to denounce or report them, nor are there appropriate mechanisms to protect them if they do make complaints. Administrative agencies have significant discretion and low transparency, and there are no effective mechanisms to make civil servants who are suspected of corruption liable to public scrutiny, nor are there systems in place to ensure public accountability by public officials for their work.

a. *The role of judges in corruption investigations*

The first set of problems includes inconsistent handling of cases motivated by the particular interests of the very people charged with moving them forward, as well as a failure to adequately train these actors to conduct an efficient investigation.²⁰

The federal court determines which cases are considered most relevant, including those related to serious human rights violations, drug trafficking, organised crime and, as previously mentioned, acts of corruption. These investigations concern powerful people with many vested interests. As a result, a culture has developed in which many judges, using their power over the fate of the subjects involved in such cases, see a chance of private gain from a particular management strategy.²¹

Many of those interviewed by ACIJ over the years have said it is common for judges to use these cases as political bargaining chips to stop impeachment proceedings, obtain promotions, or gain other advantages. As an indication of this phenomenon, one federal judge stated that, in the most important institutional processes and in most courts, it is difficult to move from the investigation stage to trial, because to retain a

¹⁹ "...Our country still owes the enactment of a National Law on Access to Public Information that can be applied in different branches of government. During these years, the progress on access to information were in relation to the implementation of Decree 1172/03, where it has been taken further action to make the right effective, and not in the discussion and adoption of new regulations at the national level ..." This topic was also introduced in the Final Report of the Follow-Up Mechanism for Inter-American Convention Against Corruption, approved on 19 September 2009, page 33. It can be found here: http://www.oas.org/juridico/spanish/mesicic_III_inf_arg.pdf

²⁰ Clarin newspaper has compiled some of the crucial points that explain why a corruption case takes a lot of time in preliminary investigation. The article has had the headline, "Corruption: because of judicial failures, a judicial case takes 14 years" and can be found here: <http://edant.clarin.com/suplementos/zona/2009/11/29/z-02051130.htm>

²¹ Report "The judicial paralysis on corruption cases" made by ACIJ, published in http://www.elhardin.com.ar/paneles/acij/v2/programas/adjuntos/La_paralisis_de_la_Justicia_frente_a_los_casos_de_corrupcion.pdf

case is to retain power. Cases that do come to trial are less significant in terms of public interest (possession of drugs, small-scale dealers, forgery, etc.). The same source noted that the work of judges in charge of the Federal Trial Court is considered to be of lesser importance.

Judges on the cases with greatest impact rarely delegate leadership of the investigation to the prosecutor, despite being authorised to do so under Article 196 of the Criminal Procedure Code.

From the point of view of the judicial branch, as explained previously (Section I. C), no priority is assigned to the investigation, prosecution, and punishment of people involved in cases of corruption.²²

In addition, the inability to achieve positive results in the fight against corruption is partly due to the lack of training provided to legal personnel in breaking up, investigating and judging these actions. This problem is accentuated profoundly in the judiciary, where investigations can last more than ten years without arriving at a definitive resolution of the case. During this time, investigators collect evidence without really understanding why or what it will do to help the case. Also, in the process of evidence collection, much time is lost due to the failure of public agencies to actively collaborate with judicial authorities.

The lack of training, or updated training, of legal personnel, along with the overcrowding of courts with cases that take years to investigate, and the delaying tactics used by the parties to block the progress of investigations, generate procedural delays which – in the eyes of the public – are perceived as a declaration of impunity for those suspected of corruption.

Examples of ACIJ's findings can be found in the following three areas:

▪ ***b. Delay in the appointment of judges, the system of substitutions, and the hearing of cases***

Significant problems exist with regard to the appointment of judges in Argentina's federal judicial system.

The Council of Judges, the president, and the Senate take part in the process of appointing federal judges. This is regulated by the Constitution and Law 24937 (modified by Law 26080).

In the Council of Judges, a public competitive application process takes place in which the candidates provide their professional and academic qualifications, take an exam (in general, resolving a practical case from the branch of law that the position refers to, for example penal, civil, commercial, etc.), and go through a series of interviews. Using these, the Council of Judges ranks them according to merit and picks a shortlist of candidates. Three top candidates are chosen based on the results obtained throughout the process, as it is assumed that they are the best qualified. This list is sent to the president so that, in accordance with his/her powers under the Constitution, he/she appoints a federal judge for that term. Following this, the Senate lends its consent to this presidential decision. The Senate's consent seals the naming of the new judge.

The entire process takes an unacceptable amount of time, in light of the fact that, when a court lacks a judge, its cases must be dealt with by another judge who meanwhile must also still sit on his or her own court. Thus cases heard by courts with vacancies are delayed, and the court's work accumulates. The situation also generates an additional workload for judges, causing overwork and exhaustion.

The appointment process for a new judge takes a long time due to a variety of factors. Among them are the many competitions faced by candidates throughout the appointment process (for example, the appointment of juries that evaluate the exam and the candidates' previous experience and qualifications; the rankings; and the shortlist); the way in which the Council of Judges functions in regard to mechanisms for selecting candidates; the representation of the institution that sometimes generates paralysis in the judicial selection processes, etc.

In order to temporarily resolve the problem of judicial vacancies, a system of substitute judges has been established. This means that, when a court lacks a judge, a judge from the same jurisdiction (who already has a court under his/her direction) is supposed to be designated to assume the responsibility of carrying on the work of the court with the vacancy. In some cases, however, the substitutes chosen to cover these

²² Clarin newspaper refers to this in its article, "Judicial efficiency and independence", which can be found here: <http://edant.clarin.com/diario/2009/09/03/opinion/o-01991054.htm>

positions have been secretaries (that is, experienced judicial functionaries who have not, however, gone through the appointments process set by the Constitution and corresponding laws). This situation must be criticised from the point of view of legality and the legitimacy of appointments.

According to a report in the newspaper *La Nación*:

“More than 20% of the national and federal courts are vacant; the majority are waiting for an appointment by Cristina Kirchner (President of the Nation), who has 153 applications to resolve (she must elect her candidate from the list that is provided by the Council of Judges) and in 87 of the cases her decision has been delayed for more than six months. Another 41 vacancies are in the Council (of Judges), which is processing the applications.”

The article continues:

“Regarding the delays in filling the vacancies in the criminal justice system, the most scandalous case is the responsibility of the Council of Judges. It is a request for the filling of vacancies of four federal judges, where the principal cases of corruption are. It is more than five years old. It was overturned and reopened; the Council is suspected of unclean dealings (including a criminal trial that Judge María Servini de Cubría conducted and closed last year) and in the Council no one has suggested what to do with it. Meanwhile, at the disposal of the Federal Chamber, one of the vacancies was filled by Judge Norberto Oyarbide; another, Judge Sergio Torres, and the other two, Marcelo Martínez de Giorgi, who is a substitute.”²³

c. The lack of sufficient trial courts²⁴

In 2003, trials for crimes against humanity during the period of the military dictatorship (1976-1983) were reopened. Many of these constituted *mega-trials*. These files, as in the majority of corruption cases, are certainly ample and complete. By this, we mean the amount of proof accumulated and the complexity of the facts, for various reasons, and their probative value, as well as the multiplicity of witnesses and parties, including indictments and complaints.

This commendable success (the reopening of the trials for crimes committed from 1976-1983) means an increase in the workload in the federal criminal and correctional court system, specifically for Oral Courts. For that reason, oral debates have been postponed in very complicated trials – such as corruption cases and crimes against humanity – due to the material impossibility of continuing them. This leads us to believe that a possible solution would have been the creation of new Federal Oral Courts (FOC).

In addition, these delays are augmented in the most complicated cases of corruption, those whose resolution continues to be postponed until the conclusion of the trials of crimes against humanity, which, according to the judges, occupy the majority of hearing time.

The problems related to trials of crimes against humanity are detailed in the referenced report authorised by the Commission for the Coordination and Expedition of Trials of Crimes Against Humanity in the CSJN (updated 16 June 2010), which once again presents the existing shortcomings in the FOC. Among the difficulties mentioned in the report are the lack of resources and personnel and the aforementioned lack of judges in the Oral and Federal Trial Courts (TOF); it states that, “currently, a significant number of judges have not been named and the burden of trials in the courts that are in progress is excessive and delays the development of the trials.” Since the reopening of the *mega-trials* and the start of new investigations, judges have been confronted with a worsening situation due to the lack of resources.

So, while the federal criminal and correctional court system is increasingly overloaded and resources are not commensurate with the amount of work for which they are responsible, it will be very difficult to expedite procedures in these courts or to finalise the process in already-completed investigations.

This without a doubt affects corruption trials, since, in addition to the enormous delays already faced, they now face another set of cases that the judicial system is not prepared to handle.

²³ <http://www.lanacion.com.ar/1355550-fuerte-reclamo-de-los-jueces-por-las-vacantes-en-tribunales>

²⁴ Report “When the trial never starts”, by ACIJ, published at:

http://www.elhardin.com.ar/paneles/acij/v2/programas/adjuntos/Cuando_el_juicio_oral_no_llega_nunca.pdf

Although the six Federal Trial Courts have been assigned the trials for crimes against humanity as well as important corruption cases from the 1990s, it is unlikely that these will be completed in the near future.

▪ ***d. A step back with respect to access to information***

Although the right of access to public information is amply supported through its recognition in the Argentine Constitution, at the national level only Decree 1172/2003 exists to regulate access to public information from the executive branch. It is necessary to adopt a specific and comprehensive law that ensures clear rules for its exercise and enables applicants to present requests to all the various state agencies and public records holders. The law on access to public information should establish clear mechanisms for requesting and receiving information from the executive, legislative and judicial branches and create an effective enforcement authority, short deadlines for provision of this data, and specific exceptions for restricting information, among other relevant aspects.

The lack of a law on access to information is an outstanding gap in Argentina. It has been postponed repeatedly since late 2005, when a project that had been partially approved by the House of Representatives, and prepared with a high degree of participation by various social actors, lost parliamentary status.

Various bills are currently before the national legislature, including some that are in the process of enactment by Congress. It is urgent that members of Congress and Senators coordinate their work to definitively adopt the law this year.

Meanwhile, and even despite the existence of Decree 1172/2003, many public bodies dependent on the executive refuse to provide public information to citizens, journalists, civil society organisations, and governmental oversight agencies. They shield themselves with, among other things, the Law for the Protection of Personal Information. This is detrimental to access to information of relevance for the public, that would permit institutional and citizen oversight of the functioning and decision-making relevant to the running of the country.

Thus the lack of a permanent and prominent public policy in the fight against corruption at all levels of society, and in all institutions, enhances the lack of social awareness of the true impact that these practices have on public property, the exercise of rights, and the consolidation of the democratic and republican system of government.

e. UNCAC Articles 23: laundering of proceeds of crime.

Although Argentina has implemented UNCAC requirements on money laundering through Law 25246, national and international public opinion is quite concerned about the Argentine situation in practice. The FATF–GAFI (Financial Action Task Force) issued a recent reporting which Argentina’s capacity to prevent money laundering is questioned²⁵. The report notes the lack of judicial or administrative investigations of such offences, considering the number of suspicious transaction reports; the lack of controls to which organisations such as mutual societies, cooperatives, and certain exchange houses are subject; the informal registration of certain operations that should pass through the banking system; the lack of effective regulation of money deliveries, debit and credit cards; the lack of efficiency in reporting suspicious operations that financial bodies should submit to the UIF; the lack of effective UIF powers to analyse and process the information it receives and translate it into preliminary investigations and legal decisions; and the difficulties in obtaining timely judicial orders to access tax information and the secret annexes of disclosures of assets. All these elements corrode the capacity of the Argentine state to punish and prevent practices related to money laundering.

To these must be added all the deficiencies related to prosecution of corruption cases, including corruption-related money laundering. As an example of this, the first conviction for such offences was obtained in the province of Córdoba in December 2010, ten years after the adoption of money laundering regulations.

²⁵ The report can be found at <http://www.fatf-gafi.org/dataoecd/51/5/46336120.pdf>

Despite these serious drawbacks, it should be emphasised that, as a result of the scathing FATF–GAFI report,²⁶ Congress is currently discussing new money laundering legislation to correct some of the legal problems that ACIJ has set out above. Also, the FIU is working on the implementation of new procedures and an increase in human resources to monitor compliance with rules relating to suspicious transaction reporting (Resolution UIF 104/2010).

- ***f. UNCAC Article 46: mutual legal assistance***

The lack of response from mutual legal assistance (MLA) hinders the prosecution of crimes of corruption. In fact, most requests are rejected or not answered, in many cases because of basic errors in the procedure governing applications, ignorance of the law, or lack of detail in the order.

Moreover, the mechanisms of administrative cooperation are not used efficiently. Many public officials continue to use judicial cooperation to obtain information that could be obtained more quickly using administrative means (through bodies such as Interpol or the Egmont group).

Finally, it is important to note that other countries do not collaborate with the Argentine authorities; in many cases, the justification is that laws prohibiting disclosure of tax and bank information prevent the answering of such requests.

IV. Recent developments

It should be noted that the draft revised Criminal Procedure Code being considered by the Chamber of Deputies provides for greater participation by the public prosecutor's office in investigations. This would prevent participants in the judicial system from using investigations as a bargaining chip; on the other hand, it has drawn objections regarding the constitutionality of placing an investigation into the hands of a judge. Still others believe this reform would still not provide a complete solution to the problem, as prosecutors could engage in the same negative behavior as judges. Furthermore, given their lack of experience in investigating cases, prosecutors could be overwhelmed by the task.

Following the report issued by the FATF-GATI regarding the situation in Argentina on the prevention and punishment of counterfeit money laundering, other national agencies looked at ways of readjusting certain mechanisms and actions in such cases.

In this regard, Resolution 11/2011 of the Unit of Financial Information (UIF) complies with the recommendations of GAFI concerning the prevention of money laundering by public officials. It defines the category of Politically Exposed Persons (PEPs) and prescribes measures to be taken with respect to them. PEPs are people who possess a level of political importance that requires major transparency in their work. In this category, the UIF officials included foreigners at the national, provincial, and municipal levels who carried out functions in the country; union officials; and members of chambers of commerce (including families of employees).

The payrolls and other transactions of Politically Exposed Persons (PEPs) should be processed by individuals who are obliged to report transactions that are susceptible to concealing either money laundering or the financing of terrorist activities. These individuals include staff from banks, notaries, and financial companies. When they prepare suspicious transactions reports, they should state whether a PEP is involved. Monitoring the sources of funds used to conduct business reinforces the transparency of official duties, contributing to respect for the authority of public officials.

Another important issue involves Resolution 30/2011, which is oriented towards the adoption of measures and preventive procedures for money laundering. Through this new resolution, the UIF seeks to define the measures and procedures that will apply to legal entities that receive donations or contributions from third parties, with the aim of preventing, detecting, and reporting the acts, omissions, or operations that may arise or be linked to those who commit crimes related to money laundering.

²⁶ The report can be found at <http://www.fatf-gafi.org/dataoecd/51/5/46336120.pdf>

Those obligated to submit these reports are legal entities that receive donations or third-party contributions of more than US \$50,000. Also included here are corporations that do not have legal entity status, but have the money to fund them.

In order to act according to the current regulations (which of course include international regulations), these individuals should be able, among other things, to produce manuals that contain the mechanisms and procedures to prevent money laundering and the financing of terrorism, taking into account the details of their activity. They should also train their staff and appoint a compliance officer, together with other measures. With this and several more lists of steps, the UIF seeks to advance the fight against money laundering and terrorist financing. If the obligated individuals play their part, they will begin to see progress in this area.

Another novel idea to highlight is a bill, backed by a group of deputies, which would create a bicameral committee in Congress to control government corruption. The committee would evaluate the regulatory system, administrative regulations, and public policies on preventing and combatting corruption; verify the adaptation of the practices of state agencies to existing anti-corruption standards; and propose legal reforms to combat and prevent corruption. It would also comment on bills relating to the subject, and propose to the national executive and the provinces measures to overcome the aforementioned deficiencies. Finally, according to the bill, the committee will be able to collaborate with relevant international and regional organizations in the promotion and formulation of effective measures and practices to prevent corruption. This bill represents an outstanding initiative in the fight against corruption. Such a committee in the legislative branch would constitute a relevant agency at the national level to analyse and design state policies for the prevention and punishment of corrupt practices.

V. Recommendations for priority actions

ACIJ considers that the Argentine state, through coordinated efforts by the different branches of government and with the active collaboration of civil society, must be willing in the short term to design a strong, combative and sustained strategy against corruption.

A. Legal framework

While ACIJ noted that the laws of Argentina are, in very large measure, well adapted to the provisions of the UNCAC, there are still some areas where it is necessary for the legislature to intervene. It is important that the legislature act promptly to consider bills related to the criminal liability of legal persons and to reform the system for the protection of witnesses, victims, experts and whistleblowers. Access to information legislation should also be adopted.

In addition, and as mentioned above, it is necessary that the rules governing criminal procedure provide that the public prosecutor, as head of the prosecution, should be able to decide within the framework specified by law which facts should be considered and which should be set aside. This would restructure the workload in the courts and would streamline the judicial selection system so that human and material resources would be directed towards socially important cases. At the same time, it is important to expand the witness protection program created by Law 25764 in order to give wide coverage to the complainants, witnesses, and experts involved in investigations or prosecutions for acts of corruption.

It is also necessary that the legislature revise the updated Code of Criminal Procedure to include procedural criteria that would permit judges and attorneys to decide on which cases to expend more effort, and which to dismiss, based on pre-established objective criteria. Other reforms should decrease opportunities to appeal and delaying tactics during the investigation, so as to concentrate efforts on achieving a public trial.

B. Enforcement system

1. Revitalise the role of the OA

First, it is important to revitalise the role of the OA as a state agency that oversees the effective implementation of anti-corruption rules. This could be useful from the point of view of its institutional location: the OA is outside the executive branch and is regulated by a law (rather than an administrative decision). The possibility should be considered of making the OA part of structure that ensures its independence, as required by UNCAC Article 36. It should also be ensured that the highest positions in the organisation are occupied by professionals who are expert on issues of corruption and are committed to ethics and the rule of law, and that the appointment and removal process is transparent and devoid of political conditions.

Along these lines, it would be interesting to consider the possibility of redefining the functions of the OA to emphasise its character as a body for prevention and monitoring, rather than investigation. It may be more useful for the Office of Administrative Investigations to take a leading role in monitoring and investigation, given its direct contact with judicial investigations. At the same time, while the OA is responsible for ensuring compliance with international and national standards for the prevention and punishment of corrupt practices, it must develop policies related to the implementation of a permanent evaluation mechanism to enforce these rules. Activity should include a focus on the design of government policies in this area, and proposing laws and lines of work focusing on preventive action. In this sense, it is vitally important to have complete statistics – including current, complete, and disaggregated corruption data from the agencies responsible for administrative oversight (for example, SIGEN and FIA), legislative oversight (AGN), and the national judiciary and that of each of the provinces. Only after the state of corruption cases being investigated by different agencies has been diagnosed can preventive strategies be designed and penalties imposed.

It is also vital that the OA establishes patterns of coordination with different government offices that collect and process data (for example, property records, tax, central bank, etc.) and inspection bodies that assess the processes and outcomes of different state agencies, in order to have useful information in a timely manner to carry out research and analysis of the behaviour of public officials. It is important to stress that this would require a law governing its operation, so that no public official could use administrative tricks to refuse collaboration or submission of required data.²⁷

2. The judiciary and the Public Prosecutor Against Corruption

As mentioned, it is necessary that the judiciary and prosecutors – at both the national and provincial levels – take a **leading role** in the fight against corruption.

For this it is important, first, to have judges, prosecutors, officials, and employees who are trained and educated on issues related to the investigation of economic crimes and correct strategies and management practices. The latter is important because practical anti-corruption rules are most often lacking in the realm of public administration. In order to intensify the efforts of the judiciary and the public prosecutors, it would thus be important to train and update the skills of judges, prosecutors, officers, and employees in investigative techniques, crimes against public administration, economic delinquency, technology and all other tools that can be used to improve corruption investigations. Along these lines, it would be useful to create support offices that can offer collaboration and technical assessment to the judiciary, and to incorporate new professional specialties into the staff of courts and prosecutors' offices.

It is also very important that judges and prosecutors **work with professionals and specialists** who can advise them on banking, accounting and tax issues to be able to more effectively direct their investigations.

Moreover, it is vital that expert bodies created within the framework of these institutions, and expected to provide expert opinions on such cases, have the resources necessary to carry out their duties in a timely manner. It is also essential that the mechanisms for the selection of the professionals involved in these

²⁷ This recommendation was also suggested in the Final Report of the Follow-Up Mechanism for Inter-American Convention Against Corruption, approved on 19 September 2009, page 32. It can be found here: http://www.oas.org/juridico/spanish/mesicic_III_inf_arg.pdf

activities are transparent, and to provide safeguards ensuring impartiality and independence sufficient to substantiate the seriousness of their findings. This applies to all judicial expert bodies.

It is necessary that the highest authorities in these bodies can generate tools to **ensure public collaboration** in the rapid response to judicial requests. It is important that the judiciary and the public prosecutor can easily access the databases of public institutions where essential information for corruption case investigation can be found, as provided for in Article 38 of the UNCAC.

In addition, it is important for judges and prosecutors to be **aware of the procedural conduct of defendants and lawyers**, especially the tactics employed in order to delay or hinder investigations. It is essential that these actors be motivated to reject (to the extent procedural norms permit) any type of approach that, disguised as a defense argument, would be oriented to obstruct justice.

This could also be useful in **generating incentives and a system of accountability**, along with the intensification of internal audits in the judiciary and prosecutor's office. It would act as a means of evaluating how judges and attorneys perform their tasks: if – and to what degree – and they comply with institutional objectives. In this manner, they could be compelled to optimise the course of lawsuits.

From another point of view – and with the aim of creating incentives for legal actors to ensure rational and effective investigation of cases involving corruption – it is very important that both the prosecution and the judiciary strengthen their **internal audits**. This would aim to verify the extent to which prosecutors and judges meet the corporate goals of the bodies to which they belong and, specifically, how they operate in relation to cases of corruption.

Within the judiciary, this task should be coordinated by the Council of the Magistracy, a body responsible for objectively evaluating the actions of judges and, if necessary, disciplining them for violations or removing rogue judges from office. On the other hand, it is vital that judges assume their role as directors of the process, so that when strategies proposed by lawyers for people suspected of acts of corruption are not conducive to a reasonable defense, all the arguments and resources that might delay the process are disposed of according to law.

For this, it is necessary to have a diagnostic tool that requires public offices to report the existence of judicial and administrative investigations of cases of corruption; devise a system of reports and statistics that reflect the quantity *and* quality of state investigations; and strengthen coordination and collaboration to include access to data, records, documents, and information linked to public contracting, the property status of officials, banking, etc. The diagnosis would be important in the design of a permanent evaluation mechanism regarding the different aspects of the anti-corruption fight at different levels of government. The fundamental pillars of this would be maintenance of **statistics and reports**; coordination between government agencies to share information; mechanisms for rapid and easy access to records, data, and public information about key decisions and procedures where corrupt practices usually develop; training of government employees; transparent, open, and participatory systems of selection and removal of public employees; educational and training plans in which corruption is included as one of the major themes in the study of rights and obligations of citizens; mechanisms for the protection of people who report and denounce acts of corruption; unity of the various supervisory bodies; monitoring of the progress of legal cases in which those suspected of corruption are being investigated; and improving the channels to denounce these acts.

It is vital to speed up the appointment system for judges carried out by the Council of Judges, including speedy handling of the lists sent to the executive branch by the Council. It is also important to ensure transparent criteria for efficiently evaluating and shortlisting candidates. Once selections have been made, to ensure vacancies are filled, the executive branch should swiftly submit its choices for endorsement by the Senate. In short, coordinated work between the different public bodies is needed to streamline the appointments.

In order to make the process transparent in accordance with the mandate of UNCAC Article 13, it is necessary for prosecutors and judges to **endorse the participation of civil society in conducting monitoring of the court system**. The purpose of monitoring the performance of the judiciary and prosecutors is to generate greater incentives, increase the accountability of judges and prosecutors, and spark a public commitment among citizens to combat the scourge of corruption. To reach these goals, it is necessary to endorse the involvement of CSOs to monitor these cases. It is also essential that the state and civil society organisations are able to work together to generate collective awareness of the social and

institutional degradation brought about by corrupt practices, and to promote action to prevent corruption and encourage citizens to denounce cases of corruption when they seriously suspect such acts.

Finally, it would be appropriate for the judicial authorities and prosecutors to develop a **coordinated strategy** for the prosecution and punishment of crimes related to corruption and judicial recovery of assets lost by the state because of these crimes, in accordance with UNCAC Article 39.

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