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**International cooperation in civil and administrative
proceedings for the detection of offences under the
Convention, including for the identification, freezing
and confiscation of assets derived from such offences**

International cooperation in civil and administrative proceedings for the detection of offences established in accordance with the United Nations Convention against Corruption

Note by the Secretariat

Summary

In its resolutions 5/1 and 5/3, the Conference of the States Parties to the United Nations Convention against Corruption encouraged States parties to the Convention to afford one another, when feasible, international cooperation in civil and administrative proceedings for the detection of corruption offences, as well as for the identification, freezing and confiscation of assets derived from offences covered by the Convention respectively, and requested the secretariat to invite States parties to provide information, to the extent possible.

The present document has been prepared pursuant to the mandates contained in those resolutions of the Conference, and it seeks to complement the information compiled in document CAC/COSP/EG.1/2014/2 on the basis of new information received. It also seeks to substantively consolidate relevant information provided by States and to offer additional related material, to facilitate consideration of the matter

* CAC/COSP/EG.1/2015/1.



by States parties. In particular, attention is drawn to the nature of international cooperation in administrative and civil matters under the Convention and comparative reference is made to other treaties on related matters. The document further addresses specific areas in which international cooperation in administrative or civil matters may be relevant, notably with a view to enforcing seizing or freezing and confiscation measures, pursuing civil remedies, ensuring the liability of legal persons and enabling cooperation in the framework of other special administrative proceedings.

I. Introduction

1. In paragraph 2 of its resolution 5/1, the Conference of the States Parties to the United Nations Convention against Corruption encouraged States parties to afford one another, when feasible, international cooperation in civil and administrative proceedings for the detection of corruption offences, in accordance with article 43, paragraph 1, of the Convention. In this regard, the Conference requested the secretariat to invite States parties to provide information on such proceedings in order to identify the scope of mutual legal assistance that could be provided in relation to such proceedings, for submission to the open-ended intergovernmental expert meeting to enhance international cooperation under the Convention to be held during the sixth session of the Conference of the States Parties.

2. Furthermore, in paragraph 4 of its resolution 5/3, the Conference encouraged States parties, *inter alia*, to afford one another, when feasible, international cooperation, including mutual legal assistance as appropriate, in civil and administrative proceedings for the identification, freezing and confiscation of assets, in accordance with article 43, paragraph 1, and article 46, paragraph 3, of the Convention. It also requested that the secretariat invite States parties to provide information on such proceedings, for submission to the Working Group on Asset Recovery, in order to identify the scope of assistance that could be provided in relation to such proceedings.

3. Pursuant to the above-mentioned mandates by the Conference, a progress report was prepared by the Secretariat¹ containing responses of 27 Member States to the issues identified above, bearing in mind that the two aforementioned mandates of the Conference concerned aspects which benefit from joint consideration, for discussion during the open-ended intergovernmental expert meeting to enhance international cooperation held in Vienna from 9 to 10 October 2014. In this report it was noted that additional information from a wider sample of Member States was needed to assess the added value of cooperation among States parties in civil and administrative matters relating to corruption, and it was suggested that the secretariat solicit information from States parties and signatories to the Convention that had not yet responded and seek updates on information already provided.

4. In this regard, the United Nations Office on Drugs and Crime (UNODC) sent to States parties note verbale CU 2015/170/DTA/CEB/CSS and received information on international cooperation in civil and administrative proceedings for the detection of corruption offences and for the identification, freezing and confiscation of assets, in accordance with article 43, paragraph 1, and article 46, paragraph 3, of the Convention from fifteen States parties. Together with information provided at the time of the preparation of document CAC/COSP/EG.1/2014/2, UNODC received information from the following 41 States: Argentina, Armenia, Australia, Austria, Bahrain, Belgium, Bosnia and Herzegovina, Brazil, Colombia, Czech Republic, Dominican Republic, Ecuador, El Salvador, Germany, Greece, Guatemala, Haiti, Israel, Italy, Kenya, Kuwait, Lebanon, Lithuania, Mauritius, Mexico, Morocco, Myanmar, Panama, Paraguay, Peru, Philippines, Portugal, Romania, Saudi Arabia,

¹ CAC/COSP/EG.1/2014/2. Furthermore, late national responses by three States, not reflected in that document, were made available on the website of that meeting.

Slovenia, Spain, Switzerland, Tajikistan, Tunisia, United States of America and Venezuela (Bolivarian Republic of).

5. The present report seeks to complement the information compiled in document CAC/COSP/EG.1/2014/2 on the basis of new information received. It also seeks to substantively consolidate relevant information provided by States and to offer additional related material, in order to facilitate consideration of the matter by States parties. In particular, attention is drawn to the nature of international cooperation in administrative and civil matters under the Convention and comparative reference is made to other treaties. The document further addresses specific areas in which international cooperation in administrative or civil matters may be relevant, notably with a view to enforcing seizing or freezing and confiscation measures, pursuing civil remedies, ensuring the liability of legal persons, and enabling cooperation in the framework of other special administrative proceedings.

II. International cooperation in civil and administrative proceedings for the detection of offences established in accordance with the Convention, including for the identification, freezing and confiscation of assets derived from such offences

General considerations

6. In accordance with their legal systems, States parties to the Convention have adopted several measures, involving criminal as well as administrative and civil proceedings, to achieve the purposes of the Convention as stipulated in its article 1. Pursuant to its article 43, paragraph 1, the Convention distinguishes cooperation among States parties in criminal matters (in accordance with arts. 44 to 50) and (where appropriate and consistent with their domestic legal system) mutual cooperation in investigations of and proceedings in civil and administrative matters relating to corruption. This provision should be read in conjunction with article 46, paragraph 1, and article 51, requiring States parties to afford one another the widest measure of cooperation and assistance in investigations, prosecutions and judicial proceedings in relation to corruption offences and for the return of assets pursuant to Chapter V of the Convention.

7. During the negotiations of said provisions, delegations stressed the importance of including civil and administrative law measures in addition to criminal provisions and “considered that such an approach would provide a higher probability of efficiency and effectiveness [of international cooperation], because of the multifaceted nature of corruption and the need to address those issues under diverse legal systems. In that connection, some delegations made reference to the need to include in the new convention civil and criminal liability, remedies and sanctions, in addition to relevant preventive measures.”²

² United Nations, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, 2010, p. 41.

8. The explicit reference in article 43, paragraph 1, to international cooperation mechanisms in civil and administrative matters for preventing and combating corruption may be deemed as a significant development.³ Civil litigation has always had a considerable and complementary role to criminal proceedings, in particular given its focus on compensation, which is also essential in the area of preventing and repressing conduct related to corruption. Considering the characteristics of and challenges surrounding criminal investigations and trials, “many practitioners view the option of the civil process as a viable alternative in certain circumstances to address corruption, especially in cases where criminal prosecution cannot be pursued (e.g., cases of death, absence, immunities or general inability to bring defendants before the criminal court).”⁴

9. Given the transnational elements of corruption-related offences, notably in complex cases involving considerable pecuniary amounts, the frequent choice for civil and administrative measures at national level naturally entails the need for enhancing international cooperation in these matters. Equally, a flexible approach is required in analysing requests for assistance from countries with different legal systems or which have made different choices in handling certain types of corrupt activities. Such an approach should involve proper and direct consultations and the willingness to acquire knowledge about the legal and institutional frameworks of both the State seeking cooperation and the State of which cooperation is sought, before any decision on refusing cooperation.

10. An area that may require particular attention is that of the standard of proof required for purposes of criminal, civil or administrative procedures in different jurisdictions. While evidentiary thresholds vary considerably across legal systems, and normally depend on the seriousness of the consequences attributed to liability, it should be observed that terminological differences may be at the origin of confusion among practitioners, for example, about the precise scope and nature of orders of foreign courts or the nature of national confiscation schemes.

Voluntary nature

11. In the absence of specific treaties, attention should be drawn to the voluntary nature of mutual cooperation mechanisms in civil and administrative matters aimed at ensuring the success of proceedings related to combating corruption. For this purpose, countries may seek to extend cooperation on the basis that requested cooperation would not be contrary to the fundamental principles of their legal system. Even in cases of use of different legal modalities, the objectives pursued and the underlying conduct being legally addressed in accordance with the Convention against Corruption would be similar. For that purpose, it may be useful to draw attention to article 46, subparagraph 3(i), indicating that mutual legal assistance may be requested for “any type of assistance that is not contrary to the domestic law of the requested State Party”.

³ United Nations, *Technical Guide to the United Nations Convention against Corruption*, 2009, p. 139.

⁴ *Ibid.*, pp. 139-140. See also UNODC/World Bank Stolen Asset Recovery Initiative, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets*, 2015. The considerably high percentage of asset recovery cases, which used civil remedies exclusively or in addition to criminal proceedings, among the cases reviewed for the purpose of this study is noteworthy.

12. Under the United Nations Convention against Transnational Organized Crime, in its article 18, paragraph 9, States are explicitly allowed to afford mutual legal assistance in the absence of dual criminality when they deem it appropriate. Therefore, in such cases they have discretion to refuse assistance. Under article 46, paragraph 9, of the Convention against Corruption, however, States parties shall examine requests for mutual legal assistance in the absence of dual criminality taking into account the purposes of the Convention, and while they may decline assistance, where consistent with the basic concepts of their legal system they shall render assistance that does not involve coercive action, except for requests involving matters of a de minimis nature. Mutatis mutandis and on a voluntary basis, States parties may consider affording cooperation in civil and administrative proceedings consisting of non-coercive measures and which are not contrary to their domestic law, even if not explicitly foreseen.

13. International cooperation in administrative matters may have, as appropriate and on condition that national law does not provide otherwise, parallels to forms of informal assistance that may be useful in asset recovery in many ways, including for the preparation of civil or criminal law measures.⁵ Some States referred to informal assistance as covering any provision of assistance without the need for a formal mutual legal assistance request. This type of practitioner-to-practitioner assistance may be useful for the non-coercive production and gathering of evidence. The participation in international judicial networks, which was mentioned by some States, may be helpful for seeking solutions to concrete cases presenting challenges for cooperation.

14. In its response, Kuwait indicated that it could, in principle, provide any kind of assistance covered by the Convention against Corruption, and even any kind of assistance beyond the scope of application of the Convention if it would not contradict national law, underscoring that it had concluded many bilateral treaties, also on civil matters. With a view to illustrating the relevance that procedural aspects and a minimum similitude among national legal orders may assume for the execution of assistance requests, Lithuania stated that action could be taken in relation to administrative cases if it would not contravene its Constitution, domestic laws as well as its fundamental principles of criminal procedure and provided that they could also be carried out in a domestic administrative case. By the same token, Austria reported that cooperation would be possible to a higher degree with other States members of the European Union. Israel indicated that its 1998 International Legal Assistance Law, which regulates both civil and criminal matters, indicated that any form of assistance requested may be performed to the same extent and subject to the same safeguards as would apply had the crime involved occurred in Israel, and the assistance should be performed in the particular manner requested, as long as this did not violate national law.

⁵ On informal assistance and its relationship with mutual legal assistance, see, in more detail, UNODC/World Bank Stolen Asset Recovery Initiative, *Asset Recovery Handbook: a Guide for Practitioners*, 2011, pp. 123-137. Spain reported that its Intelligence Centre against Terrorism and Organized Crime (CITCO), which worked as an Asset Recovery Office (ARO) with all States members of the European Union as well as the 16 Ibero-American countries that constitute the asset recovery network of the Financial Action Task Force of Latin America (GAFILAT), had increased its exchange of information towards the tracing and identification of property and assets, of natural or legal persons, under investigation by police units in any of the cooperating countries.

15. Also illustrating a flexible approach, El Salvador referred to a judicial decision of its Supreme Court of Justice in 2013, in the case of a request from Egypt, in which the Court determined that assistance be provided in the absence of legal basis with the expectation of reciprocity. With regard to article 43 of the Convention, Lebanon recognized the absence of national laws regulating international cooperation, but indicated that any such cooperation remained subject to bilateral or multilateral treaties and the principle of reciprocity.

16. Mexico also indicated its flexibility in cooperating with other States parties and providing mutual legal assistance in investigations and proceedings linked to corruption offences, without requiring dual criminality or the existence of a bilateral treaty. The United States indicated that it could provide assistance to counterparts in administrative and civil proceedings for the detection of corruption offences on a case-by-case basis.

Treaty basis

17. The Czech Republic indicated that it could afford international cooperation in civil and administrative proceedings in fighting corruption on the basis of bilateral and multilateral agreements of legal cooperation and of European Union legislation enabling mutual cooperation in civil matters among the States members of the European Union.

18. Brazil provided information about two cases in which it obtained cooperation in administrative matters on the basis of article 43 of the Convention against Corruption. In the first example, the Office of the Comptroller General (CGU) initiated an international cooperation proceeding after being given notice of investigations taking place in a foreign jurisdiction regarding the payment of bribes to Brazilian officials by a company from that jurisdiction. The assistance, requested in February 2015, included the sharing of information obtained by that foreign jurisdiction on the unlawful conduct under investigation, as well as evidence of the involvement of Brazilian public officials and Brazil-based front and intermediary companies, such as bank records and witness statements. CGU received the requested information in June 2015, and an analysis is under way for possible filing of administrative proceedings against the individuals and companies identified. The other example presented by Brazil referred to a mutual legal assistance request, also based on article 43 of the Convention, within the scope of an enforcement action for administrative malfeasance, aiming at seizing assets and obtaining bank records abroad. After eight months the request was completely fulfilled and resulted in the freezing of considerable amounts of money. By using the identification of several bank accounts through the documents obtained through that cooperation, the competent prosecutor plans to formulate similar requests to three other countries. Brazil also provided information about three unsuccessful requests for cooperation, explained in other parts of this document.

19. It should be noted, for comparative purposes, that some treaties cover cooperation in criminal, administrative or civil matters. For example, article 1, paragraph 3, of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 2001 has extended its scope to cover “proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being infringements of the rules of

law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters”.⁶ The Inter-American Convention on the Taking of Evidence Abroad of 1975 regulates the production of evidence in criminal, civil or “contentious-administrative” cases. Furthermore, some treaties have been negotiated to improve international judicial cooperation in civil and commercial matters, such as the Hague Conventions on Civil Procedure and on the Taking of Evidence Abroad.⁷

20. Other treaties and agreements have been dedicated to mutual administrative cooperation in the areas of customs and taxation, with the main purpose of favouring the exchange of information. It may be noted that tax and customs violations may be helpful with the detection and investigation of certain acts of corruption. Several legal instruments have been adopted in the framework of the World Customs Organization,⁸ including the 2003 International Convention on Mutual Administrative Assistance in Customs Matters, not yet in force. Moreover, the Council of Europe and the Organization for Economic Cooperation and Development have jointly developed the Convention on Mutual Administrative Assistance in Tax Matters, adopted in 1988 and amended in 2010.⁹ Among other measures, these treaties foresee collection and transfer of tax (on behalf of requesting States), service of documents, recovery of tax, including precautionary measures for the payment of tax claims, simultaneous examinations and the presence of representatives of one contracting State in tax examinations in another contracting State. Several States have celebrated bilateral agreements on customs cooperation and mutual assistance in customs matters as well as in tax matters.

Seizure or freezing and confiscation of assets

21. International cooperation is essential for the successful recovery of assets that are hidden in foreign jurisdictions, e.g. to trace these assets, gather necessary evidence, in particular as relates to their illicit origin, implement provisional measures, enforce judgments and orders, and confiscate proceeds of corruption. The seizing or freezing of assets plays a fundamental part in the asset recovery process, and various States emphasized the importance of civil or administrative proceedings for that purpose.

22. Several responses of States parties focused on issues around the freezing or seizure and confiscation of assets derived from corruption offences, including reference to measures under national law as well as related regional and international cooperation. Some States indicated the possibility of resorting to

⁶ See also article 3, paragraph 1, of the European Union Convention on Mutual Assistance in Criminal Matters, 2000.

⁷ See, *inter alia*, the Convention of 1 March 1954 on civil procedure, and the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and under the auspices of the Hague Conference on Private International Law.

⁸ Available at: www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/wco-and-international-instruments-on-mutual-administrative-assistance.aspx.

⁹ Several other regional legal instruments exist on mutual assistance in tax matters, such as the SADC Agreement on Assistance in Tax Matters, the CEMAC Convention on mutual administrative assistance in tax matters, the European Union Council Directive on administrative cooperation in the field of taxation 2011/16/EU, amended by Directive 2014/107/EU as regards mandatory automatic exchange of information in the field of taxation, the Nordic Convention on Mutual Administrative Assistance in Tax Matters, and the SAARC Limited Multilateral Agreement on Avoidance of Double Taxation.

administrative freezing orders and their ability to enforce such orders issued by foreign courts, in particular as temporary, precautionary measures pending criminal, civil or other forms of non-conviction-based confiscation orders. However, most respondent States indicated that their action on the freezing or seizure and confiscation of property would be limited to international judicial cooperation in criminal matters, without prejudice to the informal exchange of information among administrative authorities, for example financial intelligence units, or on the basis of bilateral or multilateral treaties.

23. Kuwait indicated that, while non-conviction-based forfeiture was not covered under Kuwaiti law, and foreign confiscation orders were not directly applicable, it could accept evidence in national proceedings, for the purpose of confiscation, in order to decide on the confiscation of assets of illicit origin. In such proceedings, of a criminal nature, if nobody claimed ownership of the assets, the General Prosecutor could decide on their repatriation; if, however, someone would claim ownership of the assets, a judicial authority would have to decide on the merits of the confiscation. Kuwait indicated that the death of the accused did not prevent the forfeiture of the relevant assets, still by decision in criminal proceedings. Furthermore, Kuwait informed that foreign States could also file civil lawsuits in Kuwait for the purposes of asset recovery.

24. Besides the traditional criminal justice freezing or seizure orders, non-conviction-based freezing orders have become more common. Various countries provided information on national non-conviction-based confiscation schemes, and some European countries informed in particular of the adoption of Directive 2014/42 of the European Parliament and of the Council, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, which foresees non-conviction-based confiscation to be introduced in all States of the European Union as a residual hypothesis, where conviction-based confiscation is not possible as a result inter alia of illness or flight of the suspected or accused person.¹⁰

25. Italy provided information about its system foreseeing “preventive measures on assets”, introduced in 1982 and currently regulated by Legislative Decree No. 159/2011, which promoted a shift of focus from criminals to their assets, in a system that has been consistently considered as respectful of due process and other fundamental rights.¹¹ In addition to confiscation following criminal conviction, national law provided for non-conviction-based confiscation, or *actio in rem*, which can be applied, under certain conditions, even in the absence of a criminal conviction, to the assets of those persons, inter alia, suspected of belonging

¹⁰ Other decisions in the framework of the European Union, mentioned by Romania, were the Framework Decision 2001/500/JHA on money-laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; Framework Decision 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property; Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders and Framework Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.

¹¹ See references to decisions of the European Court of Human Rights in “The Italian experience in the management, use and disposal of frozen, seized and confiscated assets” (CAC/COSP/WG.2/2014/CRP.3, annex).

to mafia organizations or of having committed one of the serious crimes listed by the law (including money-laundering). The status as a suspect required a lower standard of proof — of considerable probability of guilt — than that required for criminal conviction, but was sufficient for the criminal judge to ascertain the existence of “sufficient clues” of one of the offences listed. Such proceedings, before a criminal jurisdiction, could be initiated where the accused was not found guilty “beyond any reasonable doubt”, or the proceeding was terminated due to the death of the defendant or to the application of statutes of limitation. The Court might also order the seizure and confiscation of assets of those suspects mentioned above, who, directly or indirectly, would be found to own or have at their disposal for any purpose, when the value of their assets would appear to be disproportionate to their income, as reported in their income tax return, or to their economic activity, or when it could be reasonably argued, based on available evidence, that said assets were the proceeds of unlawful activities. Italy also provided examples of successful cooperation in the enforcement of such orders on assets located abroad (with Austria, France, Spain, Switzerland and the United States) that resulted in the recovery of seized or frozen assets for purposes of confiscation, on different grounds.

26. Among those cases, Italy referred to agreements signed with Switzerland with a view to sharing in equal parts assets confiscated by Swiss authorities in response to requests made by Italian judicial authorities. While two of those agreements concerned the confiscation of assets of individuals convicted for drug trafficking and money-laundering, one agreement concerned a non-conviction-based confiscation in the course of preventive proceedings related to an individual suspected of money-laundering and financing of illegal activities of a known criminal organization. In a case of cooperation with Spain, Italy mentioned the execution of a non-conviction-based confiscation order related to an Italian citizen, which resulted in the competent Spanish court ordering the registration in the “Register of corresponding properties” of the prohibition of sale of a property in Spain. In a case of cooperation with France, a non-conviction-based confiscation order was executed for the seizure and sale of an apartment (and sharing of the amounts obtained through such sale between the two States). It was noted that in granting the enforcement of the confiscation order, the competent French court clearly valued a parallel criminal conviction, finding that the non-conviction-based confiscation order in the specific case could be seen as based on a criminal verdict, that the illicit origin of the confiscated apartment had been widely proved, and that the confiscation would be carried out under French law, as “criminal confiscation”.

27. While providing information on its confiscation schemes, Australia indicated that its criminal asset confiscation scheme was further strengthened by its provisions on “unexplained wealth”, designed to target organized crime figures who make large profits from their crimes but distance themselves from the direct commission of the offences, thus aiming at similar objectives as the Italian model. Israel indicated that despite the fact that its national law explicitly considered non-conviction-based forfeiture proceedings as a criminal matter, the freezing and forfeiture of assets was explicitly possible in Israel on the basis of a request by a foreign judicial authority, either in a criminal or a civil procedure.

28. Romania indicated that the only procedure of a civil and administrative nature relating to acts of corruption and acts assimilated to corruption available in the

country was the one laid down in Law 176/2010, on integrity in exercising public functions and offices.¹² This legal framework also regulated the functions of the National Agency of Integrity, an independent institution with administrative powers regarding the confiscation of assets. This agency may notify and bring to the attention of an investigation commission an evaluation report, establishing that the origin of part of the assets belonging to a person under investigation could not be justified. The law defined the categories of persons that could be investigated under this proceeding, *inter alia*, the President of the country, members of the Government, members of the Parliament, public servants, and magistrates. After an investigation procedure, of an administrative nature, the commission might, in case of litigation, notify the Court of Appeal, which would settle judicially the confiscation of assets in accordance with civil procedure. The investigating commission might also opt for classifying the case, if it found that the origins of the assets were justified, or suspending and transmitting the case to the relevant prosecutor's office, if it found that criminal offences were connected to assets of which the origin could not be justified. As explained by Romania, this mixed administrative and civil procedure was not directly linked to the perpetration of an identified corruption offence, but to the unjustified nature of acquired wealth by certain categories of persons. Other than this procedure, the Romanian legal system does not foresee cases of civil confiscation, but only of criminal confiscation. As a consequence, the only requests for international judicial cooperation in civil matters that the competent authority in Romania could respond positively to would be in matters covered by its National Agency of Integrity law.

29. Peru also referred to requests for the confiscation and recovery of assets found in banks located in Luxembourg, Mexico, Panama and Switzerland. In particular, Peru mentioned two requests for the enforcement of non-conviction-based confiscation of assets in two bank accounts in Switzerland, whose beneficiaries are Russian citizens. Peru also informed that a process is under way for the establishment of an Asset Recovery Office as part of the central authority.

30. The United States indicated that at the request of prosecutors, courts might order a temporary renewable 30-day restraint of assets located in the country based on evidence of an arrest or charge in a foreign jurisdiction in anticipation of filing a non-conviction-based confiscation proceeding against the property. While the United States was able to enforce foreign confiscation-related restraining orders pursuant to mutual legal assistance requests, the crime for which the property was to be restrained and ultimately forfeited had to be one that would have been subject to confiscation under United States law, had the underlying acts taken place in its territory. If the foreign jurisdiction did not have a forfeiture-related order against the asset, the United States could, based on its own confiscation authority, initiate a domestic action towards criminal confiscation or "non-conviction-based" (civil) confiscation.

31. More recently, administrative freezing orders — distinct in nature to freezing orders imposed in execution of Security Council resolutions — have been issued in

¹² Law 176/2010 of 1 September 2010, amending and supplementing Law 144/2007 on the establishment, organization and functioning of the National Agency of Integrity (NAI), as well as amending and supplementing other normative acts, also amended by Law 116/2013.

execution of legal acts of the European Union¹³ as well as of a few individual countries¹⁴ against all assets of former heads of State and their associates, independently of their licit or illicit nature, with the purpose of preventing access to such assets, their use or dissipation, for a limited period of time. Given their precautionary nature, these administrative freezing orders are typically limited in time, which requires States seeking the recovery of assets to produce sufficient evidence to meet the threshold for a criminal or non-conviction-based freezing order, and the initiation of mutual legal assistance procedures for such purpose, before the expiration of the administrative freezing orders.¹⁵

32. Noting that the combination of administrative freezing measures and criminal seizure increased the effectiveness of efforts against money-laundering and other serious predicate offences, Belgium provided information on the possibility for its Financial Intelligence Processing Unit to oppose the execution of a transaction for up to five days from the notification, and to seek extension of the — initially administrative — freezing order with the competent prosecution authority.

Civil remedies

33. Another avenue for an effective strategy to combat corruption is based on the assumption that those persons bearing responsibility — of any degree — for corruption are likely to also incur civil liability. The Convention against Corruption makes reference to civil liability, remedial action, compensation for damage and any measures to address consequences of corruption in articles 26, 34, 35 and 53. Without prejudice to the role of criminal investigations and proceedings in preventing and repressing corruption, such proceedings can be complemented or in specific cases substituted by civil remedies and private lawsuits. A 2015 publication of the joint UNODC and World Bank Stolen Asset Recovery Initiative, titled *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* sheds light on a plethora of civil litigation measures available to States for the recovery of assets.

34. This study outlines how States in many instances have turned to civil lawsuits in order to overcome difficulties faced in asset recovery cases by way of a criminal conviction and confiscation acts, non-conviction-based confiscation or administrative confiscation. Confiscation and several other coercive measures widely available in the

¹³ These administrative orders can refer either to European Union regulations imposing freezing measures which are directly applicable in its member States or to additional measures taken at the domestic level.

¹⁴ For example, see the Freezing Assets of Corrupt Foreign Officials Act, 2011, of Canada, which allow for the administrative freeze of property for up to five years, which can be extended, upon an official request from the victim foreign State by offering evidence that a person has misappropriated property of the foreign State or acquired property inappropriately by virtue of their office or a personal or business relationship; and the Act on the Restitution of Illicit Assets, 2010, of Switzerland, which governs the freezing, forfeiture and restitution of assets of politically exposed persons or their close associates in cases where a request for mutual legal assistance in criminal matters cannot produce an outcome owing to the failure of State structures in the requesting State in which the politically exposed person exercises or exercised office, and which includes the possibility of freezing assets for up to ten years until a legally binding decision on their forfeiture is made. See also, in more detail, UNODC, *Digest of Asset Recovery Cases*, 2015, pp. 39-52.

¹⁵ See Report of the Second Session of the Arab Forum on Asset Recovery, 2013, available at: http://star.worldbank.org/star/sites/star/files/afar_ii_report_english_final.pdf, paras. 37-42.

context of criminal proceedings, covered by traditional mechanisms of mutual legal assistance in criminal matters, may be ineffective to speedily trace, freeze, forfeit and recover considerable assets, depending on the stage of the investigation. This may be due to inherent characteristics of those measures, including higher standard of proof requirement, slow mutual legal assistance processes in cases of transnational investigations, and especially in cases of death or flight of the defendant. While non-conviction-based confiscation, which requires evidence that the property is the proceeds or an instrumentality of crime, and administrative confiscation (possible in some jurisdictions without judicial action, based on executive or parliamentary order) are not widely available or recognized, civil lawsuits based on private law, by which a plaintiff claiming losses as a result of a defendant's actions requests a legal or equitable remedy, have proven to be a promising avenue in many cases. Civil remedies may include several types of actions, including proprietary claims (in many jurisdictions including for the repayment of bribes), actions based on the invalidity of contracts or the ability of the State to rescind the contract, actions based on breach of contract, tort claims or claims for compensation of damages (free standing or as part of the criminal actions), or unjustified enrichment. Further, non-conviction-based forfeiture is in many jurisdictions structured as a civil procedure.

35. Thus, civil action may help to avoid the higher standard of proof, as well as procedural obstacles such as immunities, in criminal prosecutions. It may also divert the focus of the litigation from the connection between the asset and the perpetrator's misconduct to the damage caused by someone's conduct. In jurisdictions that do not recognize the criminal liability of legal persons, civil action against legal entities may represent an avenue for making them effectively responsible for acts on their behalf and to their benefit. Notwithstanding that, civil litigation may also complement criminal or administrative liability, which is more punitive in nature. In many cases, civil remedies require evidence that makes international cooperation necessary.

36. The Philippines provided information on its domestic measures on civil forfeiture requiring civil liability of both natural and legal persons. El Salvador provided information on judicial measures of a civil nature on the recovery and management of assets of illicit origin or destination, including those derived from acts of corruption.¹⁶ Brazil mentioned the possibility of initiating civil procedures on administrative malfeasance on the basis of its law 8.429/1992, which included illicit enrichment, and so as to give effect to an order issued by a foreign court in cases of monetary sanctions different from forfeiture and annulment or rescission of a contract. Brazil also referred to a request to repatriate assets illegally remitted by a Brazilian public official, condemned in two different proceedings: one administrative proceeding under its law 8.112/1990, whose final decision stipulated the obligation to reconstitute the assets derived from administrative misconduct; and the other civil proceeding filed under the Law on administrative malfeasance, in which the Federal Prosecution Service sought confiscation of assets, full compensation for the damage, disqualification from holding public office, civil fines and prohibition from contracting with the public administration. Despite the evidence collected in both procedures, Brazil indicated that it was not successful in obtaining cooperation

¹⁶ *Ley especial de extinción de dominio y de la administración de los bienes de origen o destinación ilícita, 2013.*

to restrain the assets located in the foreign jurisdiction on the grounds that the proceedings had not been of a criminal nature.

37. Brazil also provided information on a case involving prosecution for tax offences in which, after having a mutual legal assistance in criminal matters request refused because the requested jurisdiction could not provide cooperation involving tax offences, it sought international cooperation in civil matters, which was also refused based on the lack of national legal provisions in the requested State which could lead to an effective cooperation.

Other proceedings

Liability of legal persons

38. Difficulties of cooperation may arise with regard to requests for the production of evidence to be utilized in proceedings against legal persons for charges of corruption, in particular when the requesting and requested States have followed different approaches to establish liability of a criminal, civil or administrative nature, in accordance with article 26 of the Convention.

39. Some States referred to the possibility of cooperating with other States in administrative cases related to the liability of legal persons for corruption offences. Brazil provided information on procedures based on civil and administrative liability for acts against the — national or foreign — public administration (Law 12.846/2013), and of the possibility to give effect to orders of foreign courts resulting in monetary sanctions other than forfeiture, the annulment or rescission of a contract and the sanction of publishing the administrative conviction in the media, in the location of the corporation's activities and on its website.

40. Germany referred to its system of administrative liability of legal persons under the 1987 Regulatory Offences Act, which made entities responsible for a wide range of corruption offences. Such liability might be established by a "responsible person" of the legal person (which includes a broad range of senior managerial stakeholders), provided that either the legal person's duties were violated through the commission of the offence or that the entity was or should have been enriched as a result of the offence. Offences committed by lower level personnel of the legal person might also entail liability of the legal person if the duties of the legal person were violated and the offences were the result of a failure by a responsible person to faithfully discharge supervision duties. Germany also informed that, in addition to the resulting pecuniary administrative fines, if deemed insufficient to respond to specific acts of corruption perpetrated, government bodies might take other measures, such as the judicial dissolution of legal entities based on the German Stock Corporation Act or the Limited Liability Companies Act, or the ban or disqualification of such legal persons from the awarding of public contracts on the basis of public procurement law.

Special administrative procedures

41. Given the higher evidentiary threshold required in criminal proceedings, administrative proceedings leading to administrative penalties and to compensatory measures may also, in certain cases, satisfy some of the objectives of reducing the harms caused by corrupt activities. Several countries contemplate complementary systems of criminal and administrative sanctions. However, countries may be

confronted with requests for cooperation in respect of unlawful conduct, which being a criminal offence in the requesting State may be deemed an administrative offence in the requested State. For instance, given that States have chosen different modalities to establish the unlawfulness of conduct in accordance with certain non-mandatory provisions of the Convention such as article 20 (Illicit enrichment), the cooperation among them in terms of producing evidence for use in respective proceedings of a different nature may offer challenges.

42. Brazil referred to a case in which it was not successful in requesting, on the basis of the Convention, to obtain evidence abroad to be used in an administrative proceeding initiated to investigate the payment of bribes to public officials and fraud in contracts. The foreign counterpart had explained that the request could not be fulfilled because it referred to an administrative proceeding and the country's legislation contained no provision for the sharing of the information requested, which had been obtained in a criminal proceeding. The counterpart had also clarified that while the requested cooperation would have to be requested in the context of a criminal proceeding, the requested international cooperation could have been admitted had the requesting authority been either judges or prosecutors.

43. El Salvador mentioned proceedings foreseen in the Law on Governmental Ethics, the Law on Illicit Enrichment, and the Law on Acquisitions and Contracts of the Public Administration, which established administrative proceedings in cases of corruption that might culminate in sanctions of a pecuniary nature, of disqualification from public office, or of suspension or revocation of a public concession, or debarment from doing business with the State. Brazil and Colombia provided information about the wide range of attributions of their Comptroller General Offices, including in matters related to international cooperation and freezing or seizure, confiscation and return of assets.

44. Australia provided information on the powers conferred by the 2006 Law Enforcement Integrity Commissioner Act to investigate corrupt practices, which might constitute a criminal offence, contravention of a civil penalty provision, as well as conduct that could be the subject of disciplinary proceedings or grounds for terminating the person's appointment or employment. The powers of the Commissioner included coercive measures, for purposes of being informed on relevant matters and obtaining the truth of an allegation, and thus, as appropriate, refer corruption issues to a law enforcement agency for investigation. However, if someone would be coerced to produce evidence that might incriminate the person, the information would not be admissible in criminal proceedings.

45. In addition, Brazil, El Salvador and Haiti referred to procedures of administrative (quasi-judicial) examination of accounts, which might bring consequences for public agents for the violation of administrative rules on public finances. Spain also provided information on its institutional and legal framework for public procurement aimed at ensuring the transparency of markets, free competition and tools to avoid and repress money-laundering and trace suspicious transactions, with an important role played by the Court of Auditors in examining public budgets and their execution. Mexico referred to its Internal Regulations of the Tax Administration Service, indicating that this Service could, on the basis of reciprocity, provide assistance to supervisory or regulatory authorities of countries with which a treaty had been celebrated, and that information shared in this manner could only be used for fiscal purposes.

46. Some countries made reference to disciplinary proceedings against public officials. Such responsibility is specifically mentioned in article 30, paragraph 8, of the Convention, which determines that individual criminal responsibility for offences established in accordance with the Convention shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants. Portugal indicated that the disciplinary or ethical, moral and professional responsibility of civil servants was sanctioned, independently from the investigation of corruption criminal offences. However, Portugal indicated that, currently, international cooperation in the field of administrative proceedings relating to corruption was not foreseen in its domestic system. Brazil further referred to the possibility of giving effect to an order issued by a foreign court also in the case of administrative sanctions.

47. Saudi Arabia indicated that its judiciary punished all offences provided for in the Convention under the legislation that corresponded to the provisions of the Convention, and that Islamic sharia legislation gave legal authority to the prosecution of perpetrators of all Convention crimes not provided for in a specific regulation. Notwithstanding that fact, Saudi Arabia stated that the discretionary penalty (*ta'zir*) was part of the legal policy in Islam, and that this penalty could be imposed for disciplinary offences that fell under the category known in Islam jurisprudence as “legal policy”, which was flexible. In addition, Saudi Arabia noted that it was not necessary to have a specific legislation that defined the crime and the associated penalty under the category of discretionary penalties.

III. Conclusions

48. The responses of Member States provided useful information on their approaches to dealing with international cooperation in civil or administrative matters for the detection of corruption offences. A number of States confirmed that, in matters related to combating corruption, they were only able to afford international cooperation in criminal matters, not extending such cooperation to civil and administrative proceedings. Several of the respondent States, however, indicated relevant legal frameworks and proceedings at the national level with regard to civil and administrative measures, and a certain degree of flexibility so as to carry out mutual assistance in proceedings in civil and administrative matters relating to corruption.

49. The option presented to States parties of using civil and administrative avenues for international cooperation in corruption and asset recovery cases might be strengthened with efforts of compilation and dissemination of national laws on civil and administrative proceedings as well as of further exchange of experiences. If States gain a broad and common understanding of the scope and modalities of international cooperation that may be provided in relation to those proceedings by each State party, they may, where such proceedings are not already in place, be more inclined to establish similar proceedings nationally, or, where already available, more frequently undertake international cooperation in civil and administrative matters to meet the purposes of the Convention.

50. On the basis of the responses of States, it was possible to note a variety of proceedings at domestic level, and the still insufficient dialogue with other States on

the current scope of international cooperation in civil and administrative matters related to the Convention. States may wish to consider:

(a) The variety of national approaches and whether such variety poses challenges to successful transnational investigations and proceedings requiring cooperation, notably where coercive measures would be sought, or where dual criminality could be at stake;

(b) The current scope of cooperation and whether it should be enlarged, including progress on specific issues, *inter alia*, with a view to ensuring across jurisdictions the effective liability of legal entities, or to ensuring the success of administrative proceedings against, for example, public officials;

(c) The effectiveness of their legal regimes in providing for civil and administrative consequences of corruption in contractual relationships;

(d) The possibility of enhanced cooperation in civil and administrative matters at the “pre-mutual legal assistance” stage, in which the competent authority would not yet have all the necessary elements to elaborate a request for mutual legal assistance in criminal matters, as appropriate;

(e) The enforcement of foreign confiscation orders without a prior criminal conviction, under certain circumstances, and notably making such circumstances known to other States parties.
