



**Conference of the States Parties
to the United Nations
Convention against Corruption**

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**Open-ended Intergovernmental
Working Group on Asset Recovery**

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**Discussion guide for the thematic discussion on article 52
(Prevention and detection of transfers of proceeds of crime),
article 53 (Measures for direct recovery of property) and
other relevant articles**

Note by the Secretariat

Summary

The present note has been prepared by the Secretariat to guide the thematic discussion of the Open-ended Intergovernmental Working Group on Asset Recovery. The eighth meeting of the Working Group will focus on article 52 (Prevention and detection of transfers of proceeds of crime) and article 53 (Measures for direct recovery of property) of the United Nations Convention against Corruption. The note provides relevant background information on these thematic areas, with a view to enriching the discussion of the Working Group.



I. Introduction

1. In its resolution 1/4, the Conference of the States Parties to the United Nations Convention against Corruption established the Open-ended Intergovernmental Working Group on Asset Recovery and decided that the Working Group was to advise and assist the Conference in the implementation of its mandates on the return of proceeds of corruption.
2. In the same resolution, the Conference defined the functions of the Working Group, including assisting the Conference in developing cumulative knowledge in the area of asset recovery, particularly on the implementation of articles 52 to 58 of the United Nations Convention against Corruption, such as through mechanisms for locating, freezing, seizing, confiscating and returning the instruments and proceeds of corruption; identifying capacity-building needs and encouraging cooperation among relevant existing bilateral and multilateral initiatives; facilitating the exchange of information, good practices and ideas among States; and building confidence and encouraging cooperation between requesting and requested States.
3. The Working Group held its first to seventh meetings annually in Vienna, between August 2007 and August 2013.
4. In accordance with the workplan adopted at the seventh meeting, the Group is to hold at its eighth meeting a thematic discussion on article 52 (Prevention and detection of transfers of proceeds of crime), article 53 (Measures for direct recovery of property) and other relevant articles of the Convention.
5. The present note is aimed at assisting the Working Group in its deliberations and in determining its future activities. It identifies challenges linked to the implementation of related articles and possible responses to deal effectively with those challenges.

II. Thematic discussion on article 52 (Prevention and detection of transfers of proceeds of crime)

A. Background

6. Article 52 of the Convention requests States parties to take measures in order to prevent and detect the transfer of proceeds of crime. Those measures can be divided into two categories: measures to prevent money-laundering (paras. 1 to 4) and measures on financial disclosure (paras. 5 and 6).

Measures to prevent money-laundering (paras. 1-4)

7. Article 52 builds on the prevention measures of chapter II of the Convention, especially those of article 14, paragraph 1 (a), which requires States parties to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions that has requirements for the identity of customers and beneficial owners, record-keeping and the reporting of suspicious transactions, in order to deter and detect all forms of money-laundering. To make the best use of the anti-money-laundering regime in place at financial institutions in supporting asset recovery efforts, article 52 complements the relevant provisions of article 14

by putting an emphasis on a risk-based approach and a focus on individuals who are or have been entrusted with prominent public functions (known as “politically exposed persons”) and their family members and close associates.

8. Under article 52, paragraph 1, States parties are required to take necessary measures, in accordance with their domestic law, to oblige financial institutions within their jurisdiction:

(a) To verify the identity of customers;

(b) To take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts;

(c) To conduct enhanced scrutiny of accounts sought or maintained by or on behalf of politically exposed persons and their family members and close associates.

9. Such enhanced scrutiny must be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer. Pursuant to article 14, paragraph 1 (b), and article 58, the financial intelligence units are the competent authorities to receive the suspicious transaction reports.

10. Under article 52, paragraph 2, in order to facilitate implementation of these measures, States parties, in accordance with their domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, are required:

(a) To issue advisories regarding the types of natural or legal person to whose accounts financial institutions within their jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which particular attention should be paid and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts;

(b) Where appropriate, to notify financial institutions within their jurisdiction, at the request of another State party or on their own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

11. An interpretative note indicates that paragraphs 1 and 2 of article 52 should be read together and that the obligations imposed on financial institutions may be applied and implemented with due regard to particular risks of money-laundering.¹

12. Indeed, not all aspects of a financial institution’s business have the same level of risk. Certain aspects will pose greater money-laundering risks than others and will require additional controls and enhanced scrutiny to mitigate those risks, while others will have a minimal risk and will not need the same level of attention. A risk-based approach requires financial institutions to have systems and controls in place that are commensurate with the specific risks of money-laundering associated with them. That approach, compared with a more prescriptive one, allows the financial institution to better allocate its resources to focus on matters where the

¹ *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (United Nations publication, Sales No. E.10.V.13 and corrigendum), p. 458.

money-laundering risks are highest, which in turn increases the chances of identifying and reporting a suspicious transaction.

13. A risk-based approach is a process involving, first, a risk assessment of business activities; and for that, financial institutions use a risk matrix, which is a chart setting out different risk parameters such as customer risk factors, country or geographic risk factors,² and product, service or transaction risk factors, so that institutions can assess whether a potential client presents a low, medium or high level of money-laundering risk. This risk assessment is then complemented by the implementation of risk-mitigation measures to handle identified risks; such measures could be either simplified, standard or enhanced scrutiny measures.³

14. Article 52, paragraph 2 (a), requires States parties to issue advisories on how to implement risk-based approaches by financial institutions, while paragraph 1 of the same article considers business relationships with politically exposed persons and their family members and close associates to be inherently high risk. Therefore, any accounts beneficially owned or controlled by such persons should be subject to enhanced scrutiny, regardless of other risk factors.

15. Obviously, the status of politically exposed person in itself does not mean that an individual is corrupt. However, business relationships with politically exposed persons represent increased risks due to the possibility that such individuals may misuse their official position, power and influence for personal gain. Such individuals may also use their families or close associates to conceal ill-gotten funds or assets. For that reason, financial institutions need to assess, for instance, the purpose for which the politically exposed person is opening an account or why it is necessary for a senior official to have an account outside his or her home jurisdiction. There are, of course, a number of legitimate reasons for an official to do so. However, the legitimate and economically sound purpose for the account should be evaluated with care.

16. The Convention against Corruption does not provide examples of politically exposed persons or differentiate between national and foreign politically exposed persons. However, article 52, paragraph 2 (b), requires States parties to notify financial institutions of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, which includes politically exposed persons.

17. The concept of politically exposed persons is not intended to cover middle-ranking or more junior officials and normally covers heads of State or government, senior politicians, senior government, judicial or military officials, senior executives of State-owned corporations and important political party officials. Comparable to article 16, on the bribery of foreign public officials and officials of public international organizations, the concept of politically exposed

² The implementation of the relevant provisions of the United Nations Convention against Corruption is one of the factors that might be taken into consideration when financial institutions design their risk matrix. The executive summaries, as well as the country reports made available by respective States parties, prepared in the framework of the Convention's Implementation Review Mechanism are available on the website of the United Nations Office on Drugs and Crime (www.unodc.org).

³ A resource on risk-based approaches is the Financial Action Task Force's series of guidance documents (available at www.fatf-gafi.org/documents/riskbasedapproach).

persons may also cover persons who are or have been entrusted with a prominent function by a public international organization, such as members of senior management, i.e., directors, deputy directors and members of boards or those performing equivalent functions.

18. Article 52, paragraph 1, requires States parties to oblige financial institutions to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts. This is aimed to address accounts opened with a disguised identity and funds whose real source has been concealed, in order to place corrupt money in the financial system without suspicion by using corporate vehicles, sophisticated gatekeepers or “straw men”, including family members and close associates. Although the Convention does not provide a definition of “beneficial owner”, a common understanding is that the concept refers to the natural person who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.⁴ In other terms, financial institutions should not just identify the customer who is the account holder; they should also take reasonable steps to identify the real owner of the funds deposited into the account, which might or might not be the customer himself. If the account was in the name of a corporate entity, for example, financial institutions should take reasonable steps to identify and verify the natural person or persons behind that entity.

19. In accordance with article 52, paragraph 3, of the Convention, States parties are required to implement measures ensuring that their financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of that article. At a minimum, those records should contain information relating to the identity of the customer and, to the extent possible, the beneficial owner.

20. The definition of the time period over which records must be maintained is left to States parties. In practice, the retention period for transaction records (e.g., copies of cheques and wire transfer messages) starts from the date the transaction was conducted, while the retention period for account records (e.g., copies of identification documents such as passports, identity cards and similar documents), starts from the date the business relationship has been terminated (e.g., the closure of account). Given that in several significant cases, the corrupt practices occurred over a very long time, the availability of financial records is essential for subsequent investigations, as well as for asset identification and return.

21. In accordance with article 52, paragraph 4, and with the aim of preventing and detecting transfers of proceeds of offences established in accordance with the Convention, States parties are required to implement appropriate and effective measures to prevent, with the help of their regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group, generally known as “shell banks”. An interpretative note indicates that the term “physical presence” is understood to mean

⁴ See the revised Financial Action Task Force Recommendations of 2012 and directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money-laundering and terrorist financing.

“meaningful mind and management” located within the jurisdiction. The simple existence of a local agent or low-level staff would not constitute physical presence. Management is understood to include administration, that is, books and records.⁵

22. The mind and management behind the shell banks are located in a different jurisdiction, in the offices of an associated entity or even in a private residence. Having the management in a different jurisdiction prevents the regulator of the jurisdiction of incorporation from exercising proper supervision. Clients of shell banks use them primarily for the anonymity and the facilities they provide to disguise the origin of funds and funnel them to other financial institutions. In other words, rarely does money remain deposited in a shell bank for long. For that reason, the same paragraph 4 of article 52 encourages States parties to consider requiring their financial institutions (a) to refuse to enter into or continue a correspondent banking relationship with shell banks and (b) to guard against establishing relations with foreign financial institutions that permit their accounts to be used by shell banks.

23. “Correspondent banking” is the provision of banking services from one bank to another. It is an important segment of the banking industry and entails inherent vulnerabilities because it enables banks located in one State to conduct business and provide services for their customers in other jurisdictions where the banks have no physical presence. By opening a correspondent account, the foreign bank, called a “respondent”, can receive many or all of the services offered by the correspondent bank without the cost associated with being licensed or establishing a physical presence in the correspondent jurisdiction.⁶

Measures on financial disclosure (paras. 5 and 6)

24. Financial disclosure systems have a dual objective. The first objective is to capture financial information such as on assets and income, in order to use such information to detect wealth of a public official that is not in line with stated income and which might be the proceeds of corruption, i.e., unexplained wealth. The same information can be used as intelligence or evidence when investigating and prosecuting a public official for corruption. The second objective of financial disclosure systems is to capture information on interests, commitments and business connections from which may result a potential or manifested conflict of interest. Hence, financial disclosures are important tools for the prevention and detection of corruption. Furthermore, such disclosures contribute not only to an effective anti-corruption effort but also increase the effectiveness of the ability of reporting institutions and other countries to detect the laundering of the proceeds of corruption.

25. Article 52, paragraph 5, requires that States parties consider establishing financial disclosure systems for “appropriate public officials” and provide for appropriate sanctions in case of non-compliance. It tackles the first objective of such systems and complements the provision of article 8, paragraph 5, which requires that States parties endeavour to establish measures and systems requiring public officials to make declarations regarding, inter alia, their outside activities,

⁵ *Travaux Préparatoires ...*, p. 458.

⁶ *Technical Guide to the United Nations Convention against Corruption*, p. 199.

employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

26. It is left to the States parties to determine which public officials would be covered under such systems, how financial disclosure would thereby be made more effective and what type of sanctions could be applied in case of non-compliance. States parties can also adopt more strict or severe measures than those provided for in the Convention, in line with article 65, paragraph 2, and decide to apply the disclosure obligations to family members of public officials and their close associates.

27. Article 52, paragraph 5, further requires that States parties consider taking necessary measures to permit their competent authorities to share financial disclosure information with the competent authorities of other States parties when necessary to investigate, claim and recover proceeds of offences established in accordance with the Convention (see the closely related articles 43, 46, 48, 56 and 57).

28. Along the same lines of encouraging financial disclosure and transparency, article 52, paragraph 6, calls for States parties to consider taking necessary measures to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country, to report that relationship to the appropriate authorities and to maintain appropriate records related to such accounts. As with the previous provisions, if States parties decide to introduce such measures, they also need to provide for appropriate sanctions for non-compliance.

B. Points for discussion

29. The Working Group may wish to consider the following points for further discussion:

(a) Practices and experiences of States parties in dealing with issues related to politically exposed persons, including the identification of national politically exposed persons (list of names or list of functions), relevant national legislation and practices;

(b) Challenges encountered by States parties and financial institutions in identifying foreign politically exposed persons in the light of the lack of official consolidated lists;

(c) Challenges encountered by States parties in guiding and supervising financial institutions in the proper identification of domestic and foreign politically exposed persons;

(d) Challenges encountered by States parties in identifying family members and close associates of politically exposed persons;

(e) States parties' experience in dealing with issues related to risk-based approaches;

(f) States parties' experience regarding document retention issues, including the type of records to be retained by financial institutions, retention periods and retention modalities (physical or digital copies);

(g) Challenges encountered by supervisory authorities when ensuring that banks operating in States parties do not have correspondent banking relationships with shell banks or with foreign financial institutions that permit their accounts to be used by shell banks;

(h) States parties' experience in establishing financial disclosure systems including the range of public officials covered (by rank, area of vulnerability or other criteria), the information to be disclosed, the verification and other procedures and the application of sanctions;

(i) Possibility and challenges of applying financial disclosure measures to family members of public officials and their close associates;

(j) Good practices and obstacles to the international exchange of information contained in financial disclosures and their use to help financial institutions to identify politically exposed persons and exercise appropriate customer due diligence;

(k) Effective ways, including through direct cooperation between agencies responsible for receiving income and asset declarations, as well as between financial intelligence units, for identifying financial accounts in a foreign country, in which public officials have an interest or over which they have signature or other authority.

III. Thematic discussion on article 53 (Measures for direct recovery of property)

A. Background

30. Article 53 concerns measures for direct recovery of assets through civil litigation. This innovative provision departs from the notion that proceeds from corruption should be recovered only by way of confiscation and obliges States parties to recognize in their legal systems the right of harmed States to seek direct recovery through private civil actions of property, compensation or damages. Such civil litigation could be asset-based (claims in rem) or tort-based. It should not be confused with non-conviction-based asset forfeiture and confiscation, which is a measure taken by the State in which the assets are located (the forum State).

31. While much work has been carried out in the framework of the Convention and the Stolen Asset Recovery (StAR) Initiative of the United Nations Office on Drugs and Crime (UNODC) and the World Bank on the recovery of assets through international cooperation and mutual legal assistance in criminal matters, less emphasis has been placed hitherto on recovery through civil litigation. However, the perpetrators of offences established in accordance with the Convention will incur not only criminal but also civil liability (e.g., for damages and compensation).⁷ Indeed, the Convention explicitly refers to civil liability in article 26, paragraph 2, and articles 34 and 35. Moreover, freezing and seizure measures (arts. 31 and 54) can also be taken under civil law.

⁷ The StAR Initiative is in the course of preparing a publication on civil remedies in support of asset recovery.

32. Article 53 is based on modern concepts of international relations and the rule of law, according to which States are not only subjects of international law but also legal subjects in each other's national legal systems. Being a subject of national law, a State has the legal capacity to bear rights and duties, including the right to initiate an action in court to claim ownership of properties or compensation for damage.

33. Therefore, a straightforward way for a State to recover proceeds of corruption located in another State would be to file a civil action as a plaintiff in the courts of that State. Such an action could hold advantages where criminal prosecution is not possible or where the standard of proof is lower in civil cases. Moreover, the plaintiff State would not be dependent on seeking mutual legal assistance but could act even in the absence of legal cooperation.

34. However, such an action presupposes as a first formal requirement that the plaintiff State enjoys locus standi in the courts of the other State. Therefore, article 53 requires States parties to permit other States parties to initiate civil action in its courts to establish title to or ownership of property acquired, directly or indirectly, through corruption offences (art. 53 (a)). Often, domestic procedural law will treat other States like any other foreign legal persons and automatically grant them legal standing. Only where this is not the case, article 53 becomes relevant. Thus, States parties have to review their domestic legislation and, to the extent that their civil procedure law does not do so anyway, they need to ensure that other States parties⁸ and their legal representatives are granted standing.

35. Article 53 (a) does not exempt States parties from the general rules on standing and admissibility, such as having to retain local counsel or the establishment of time limits. However, they must ensure that substantive questions concerning the merits of the case — such as evidence of damage or a close causal relationship between the damage and the alleged conduct — are not mixed up with questions of admissibility of the action in a way that would make it overly burdensome, in practice, to obtain locus standi.

36. Neither does the article per se prevent States parties from making civil actions of other States subject to special rules on jurisdiction, for example, by allocating these actions to a higher court than the ordinary courts of first instance. However, such rules should not curtail procedural rights, such as the right to appeal.

37. According to the wording of article 53 (a), the obligation is limited to civil actions “to establish title to or ownership of property” acquired through a Convention offence. However, if the perpetrator acquired the property not through embezzlement but through a different Convention offence such as bribery, where the assets come from private funds, the plaintiff State may not always be its owner (as recognized in paragraph 3 of article 57). Therefore, taking into account its object and purpose, the provision may have to be read more broadly to allow for standing not only in actions for recognition of ownership or restitution (*rei vindicatio*) but also in other civil actions and in particular in claims for compensation or damages.

⁸ An interpretative note on article 53 clarifies that States parties could, in practice, recognize the claim of a public international organization of which they are members as the legitimate owner of property acquired through conduct established as an offence in accordance with the convention (*Travaux Préparatoires* ..., p. 466).

38. Indeed, article 53 (b) requires States parties to permit their courts to order offenders to pay compensation or damages to another State party that has been harmed by Convention offences. In order to implement this provision, States parties must allow other States parties to stand before their courts and receive damages. This could be achieved in two ways: (a) through civil litigation where the harmed State brings an action as a plaintiff (e.g., under tort law); or (b) as an ancillary question in criminal proceedings where the harmed State party could be allowed to appear as a third party.

39. Many States, for example, the parties to the Council of Europe Civil Law Convention on Corruption, have already established the right of persons to obtain compensation for damage resulting from acts of corruption (see article 1 of the Council of Europe Convention). To the extent that foreign States come under the definition of “person”, the United Nations Convention against Corruption requires no additional legislative change. Only where this is not the case or where there is no established court procedure for claiming damages resulting from corruption-related offences, an ad hoc procedure would have to be established for harmed States parties.

40. Unlike the Council of Europe Convention, the United Nations Convention against Corruption does not specify which types of damage shall be compensated. Therefore, States parties need to decide whether only material damages can be claimed or whether loss of profits and non-pecuniary loss can be as well. The latter can, for example, be related to the loss of trust, reputation and legitimacy of the institutional system. Since non-pecuniary loss is difficult to quantify, compensation might consist of contributions to institutional programmes, anti-corruption capacity-building or similar. Equally, States will have to decide if and to what extent compensation for indirect damage is recoverable.

41. Article 53 (b) does not set out substantive conditions for liability (e.g., a causal link between the corruption-related act and the damage suffered) either. Essentially, subparagraph (b) concerns the procedural aspects of the claim, not its merits. However, the substantive obligation to provide for the availability of damages is contained in article 35, on compensation for damage.

42. Under article 53 (c), States parties must take necessary measures to permit their courts or competent authorities, when having to decide on confiscation, to recognize another State party’s claim as a legitimate owner of property acquired through the commission of a Convention offence.

43. The article thus requires States parties to provide legal standing to other States parties to claim, as a third party in a confiscation procedure, ownership over assets acquired through the commission of a Convention offence. In order to avail itself of this right, the other State has to be aware of such proceedings. Therefore, States parties may consider notifying other concerned States parties of their right to take a role in the proceedings. This could be done pursuant to article 56.

B. Points for discussion

44. The Working Group may wish to consider the following points for further discussion:

(a) States parties' experiences with the application of article 53 in practice, particularly their treatment of States as plaintiffs in comparison with the treatment of domestic and foreign legal persons;

(b) Information on special rules on jurisdiction or standing applicable to foreign States and their implications;

(c) Experiences with retaining domestic legal counsel, in particular whether this requirement has presented an obstacle to States parties bringing an action in the courts of another State party; ways for plaintiff and forum States to ensure that retaining high quality, skilled and specialized domestic legal counsel is both possible and feasible, especially in cases where the former is a least developed country; and the availability of legal aid or pro bono representation;

(d) The scope and definition of civil actions "to establish title to or ownership of property", in particular whether they go beyond recognition of ownership and restitution (*rei vindicatio*);

(e) The meaning of the limitation in article 53 (a) to civil actions "to establish title to or ownership of property" and whether the article should be interpreted more broadly to cover any civil action related to asset recovery, including tort- and contract-based claims;

(f) Restrictive requirements on standing (e.g., requiring evidence of damage or loss) that may be too narrow to be considered to be in compliance with article 53;

(g) The kind of compensation and damages that can be claimed in practice (loss of profits, non-pecuniary losses, indirect damages);

(h) The substantive conditions for obtaining damages and compensation;

(i) Ways to ensure that a concerned State party (such as one affected by bribery) is properly notified at an early stage in order to be in a position to bring an action;

(j) The relative advantages and disadvantages of the direct recovery approach (the harmed State party bringing suit) and the indirect recovery approach (the harmed State party being merely a third party in proceedings) and, in particular, whether direct recovery has cost benefits or risks (legal fees), whether it is speedier and more effective and efficient or whether the lack of law enforcement powers represents a decisive disadvantage.