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Use of civil and administrative proceedings against corruption, including international cooperation

1. Background

According to the United Nations Convention against Corruption, each State can exercise its authority to punish corrupt practices through three forms of legal liability: criminal, civil and administrative. The most important difference between them is that punishments in criminal and civil legal actions are applied by judicial courts, while sanctions in administrative procedures are applied by non-judicial bodies.

Even though most countries have historically chosen to combat corruption based on criminal proceedings, civil and administrative proceedings have proven to be a very efficient way of punishing acts perpetrated against the public administration, especially in the last few years. For various reasons, civil and administrative measures have been strengthened in many countries so as to provide national authorities with a modern and effective anti-corruption system. The internal patterns have changed, and criminal proceedings are no longer the sole mechanism available for States to investigate and punish corruption and other related unlawful acts.

The importance of establishing other means of liability, in addition to criminal punishment, has been recognized by multilateral treaties. Regarding the liability of legal persons, the United Nations Convention against Corruption (UNCAC) clearly affirms that penalties can be applied through criminal, civil or administrative proceedings. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) affirms that States shall consider the imposition of civil or administrative sanctions upon a person subject to sanctions for the bribery of public officials, including legal persons. The UNCAC and the OECD Anti-Bribery Convention also refer to the enforcement of civil and administrative penalties to the private sector for not complying with corruption prevention measures. Moreover, according to UNCAC,

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States Parties shall also be allowed to initiate civil actions in foreign courts to seek title or ownership of property acquired through corrupt practices.

The following table illustrates the most essential aspects of each form of liability.[1]

Forms of Liability in Public Legal Actions: Criminal, Civil and Administrative			
	Criminal	**Civil**	**Administrative**
Possible punishments	- Imprisonment - Fines and other monetary penalties - Asset confiscation and restitution	- Fines and other monetary penalties - Asset confiscation and restitution	- Fines and other monetary penalties - Asset confiscation and restitution - Warnings - Revocations/suspensions of licenses or permits
Source of authority	Written laws	Written laws or case law	Written laws or regulations
Burden of proof	Beyond a reasonable doubt or intimate conviction	Probability, more likely than not to have committed the infraction	Highly variable, usually lower than criminal standard
Objectives	Punish, deter, rehabilitate, restore victim's position	Punish, deter, confiscate profits derived from illegal activity, compensate for harm caused	Punish, deter, regulate activities
Enforcers	Prosecutors	Prosecutors, regulators	Regulators
Examples of enforcement agencies	- US Department of Justice - UK Serious Fraud Office	- US Securities and Exchange Commission - UK Serious Fraud Office	- US Securities and Exchange Commission - UK Financial Conduct Authority

2. Why should this matter be discussed?

When conducting civil and administrative proceedings to combat corruption, law enforcement officials may face circumstances in which they need international cooperation. Those cases can lead them to seek assistance in order to locate persons, serve documents, take evidence abroad or identify, trace, freeze and recover proceeds of crime or property acquired through corrupt practices.

International conventions provide a very useful framework for international legal cooperation on civil and administrative matters. UNCAC states that "where

[1] *Source*: Oduor, Jacinta Anyango, Francisca M. U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park, and Oliver Stolpe. 2014. *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*. Washington, D.C.: World Bank, p. 40.

appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption".[2] The OECD Anti-Bribery Convention also establishes that Parties "shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings", and also "for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person".[3]

In practice, however, civil and administrative channels for international cooperation in corruption and asset recovery cases need to be improved. Despite the previously mentioned developments in national anti-corruption systems, countries usually face problems when seeking international cooperation in civil and administrative matters. Corruption cases may therefore remain unsolved because they are based upon civil or administrative proceedings that are dependent upon the assistance and cooperation of other states for their success (see section 6 on the experience of Brazil).

Discussion about this subject is important for the improvement of the international cooperation system in anti-corruption matters, as there is a need to improve cooperation channels in non-criminal matters so as to achieve timely transmission of requests and proper execution of the measures described in Chapters IV and V of UNCAC.

3. What has happened within the UNCAC framework so far?

Discussions on the promotion of international cooperation in civil and administrative proceedings have been taking place especially in the Expert Meetings to Enhance International Cooperation, as well as in the Working Group on Asset Recovery. These discussions have been mandated by resolutions 5/1 and 5/3 of the Conference of the States Parties, which have also mandated the elaboration of a progress report by the Secretariat, compiling national experiences of 27 States parties on dealing with international cooperation in civil and administrative proceedings.[4],[5]

In these meetings, experts repeatedly asked 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. During the last Intergovernmental Expert Meeting, the UNODC Secretariat was requested to "continue to compile information from States parties on international cooperation in civil and administrative proceedings for the detection of corruption offences, with a view to presenting a report on this issue during the sixth session of the Conference of the States Parties".[6]

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[2] UNCAC, article 43(1).

[3] OECD Anti-Bribery Convention, article 9(1).

[4] See www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1401171e.pdf.

[5] www.unodc.org/documents/treaties/UNCAC/WorkingGroups/EMInternationalCooperation/9-10October2014/V1405174e.pdf.

[6] www.unodc.org/documents/treaties/UNCAC/WorkingGroups/EMInternationalCooperation/9-10October2014/V1406834e.pdf.

4. What have other anti-corruption review mechanisms/international forums done so far to enhance international cooperation in civil and administrative matters?

- G20

  According to the current G20 Anti-Corruption Action Plan, countries are committed to "lead by example in recovering and returning the proceeds of corruption" and also "to helping to end impunity for corruption offences by working together to investigate and prosecute corruption offences". To this end, G20 countries will promote "international cooperation, including mutual legal assistance and extradition, consistent with the UNCAC", "including possible assistance in civil and administrative procedures related to corruption".

- MESICIC/OAS

  During the 24th Meeting of the Committee of Experts of the Follow-up Mechanism on the Implementation of the Inter-American Convention against Corruption (MESICIC/OAS), it was agreed that "International Cooperation in Non-Criminal Matters in the Fight against Corruption" would be included in the Work Programme for the year 2014-15 as a topic of collective interest. In that sense, MESISIC/OAS must now discuss the subject with the appropriate methodology.

- 13th United Nations Congress on Crime Prevention and Criminal Justice

  In the Doha Declaration, adopted by the 13th Crime Congress in April 2015, countries committed themselves "to explore ways of affording one another [international] cooperation in civil and administrative proceedings for confiscation purposes".

5. Asset recovery through civil litigation (art. 53 of UNCAC)

Another important means of non-criminal action against corruption that merits further discussion and development is the direct recovery of assets through civil litigation, described by article 53 of UNCAC. 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 or compensation. The same provision also establishes that States parties shall allow harmed States to seek ownership of property or compensation for corruption offences as third party in criminal actions brought by local authorities.

According to the Secretariat of UNCAC (CAC/COSP/WG.2/2014/2), "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). 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."

Although there are pros and cons to civil litigation, on balance they are clearly worth considering. Despite the lower level of emphasis that has been placed on recovery through foreign civil litigation, a considerable number of countries from various regions of the globe have already succeeded when using this tool to recover assets derived from corruption, as can be seen in the Digest of Asset Recovery Cases recently published by UNODC.[7] Civil litigation proved to be an important tool where criminal prosecution is not possible or where the standard of proof is lower in civil cases. Moreover, when bringing a civil litigation directly abroad, the plaintiff State is not dependent on seeking mutual legal assistance based on its local criminal proceedings. It could act even in the absence of legal cooperation. Certain studies indicate that the amount of assets recovered though civil lawsuits in a global perspective are almost the same as that recovered through criminal confiscation.

The current practice, however, has demonstrated that States parties should be more aware of their obligations to implement article 53, taking into consideration particularly the UNCAC review mechanism. When litigating in civil courts abroad, it is generally assumed that the harmed State enjoys locus standi in the foreign courts, which is not always the case. Implementation of article 53 also requires that victim States are allowed to participate as a third party in criminal proceedings. Many States already provide to foreign States, in their domestic procedural law, the same conditions granted to foreign legal persons, which automatically brings legal standing to them. Other States already recognize the right of persons to obtain compensation for damages deriving from corruption. Harmed States would enjoy such right as long as they are considered a “person” for this purpose. In those countries, therefore, no additional measure is required to implement article 53 of UNCAC.

Considering its experience when using measures of direct recovery of assets abroad, in order to recover assets acquired through corruption, Brazil would like to explore and develop discussions, under the framework of UNCAC, on the various aspects related to civil litigation.

6. The Brazilian experience: best practices and challenges

(a) Relevant legislation in Brazil that provides for civil and administrative proceedings against corruption

Law No. 12.846, of 2013, provides for the civil and administrative liability of legal entities for acts committed against the national or foreign public administration. Through administrative proceedings, legal entities can be fined in the amount of 0.1 per cent to 20 per cent of their gross revenues earned during the fiscal year prior to the filing of the administrative proceedings. Through civil proceedings, sanctions may include the loss of the assets, rights or funds representing the advantage or profit directly or indirectly obtained through the wrongdoing, except for the right of the damaged party or of third parties in good faith; partial suspension or interdiction of its activities; compulsory dissolution of the legal entity; and prohibition from receiving incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or government-controlled entities. Brazil can request and provide a broad range of modalities of international

[7] www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf.

cooperation based on this law, including mutual legal assistance for the purposes set forth in article 46, paragraph 3 of UNCAC.

Law No. 8.429, of 1992, also called Law of Administrative Improbity, provides for sanctions applicable to public officials and related legal entities in cases of illicit enrichment. These sanctions may be: the loss of goods or funds illegally added to the person's wealth; full compensation of damage (if applicable); loss of public function; suspension of political rights; fine; prohibition to sign contracts with the public administration or receive fiscal or credit incentives. Brazil can request and provide a broad range of modalities of international cooperation based on this law, such as mutual legal assistance for the purposes set forth in article 46, paragraph 3, and article 48(1)"b", "c" and "f" of UNCAC.

Law No. 8.112, of 1990, establishes the legal regime for the federal public officials and provides for the civil, administrative and criminal liability for acts committed against the public administration, including crimes against the public administration; administrative misconducts; misuse of public funds; damage to public coffers and squandering of the national heritage; and corruption. An administrative proceeding shall be filed to apply those sanctions, and the finding of facts phase may count on evidence obtained via international cooperation with foreign jurisdictions. Brazil can request and provide mutual legal assistance and law enforcement cooperation based on this law, including mutual legal assistance for the purposes set forth in article 46, paragraph 3 and article 48(1)"b", "c" and "f" of UNCAC.

It is worth highlighting that the fight against corruption in Brazil has been enhanced since the entry into force of all the legislation mentioned above and that these sanctions are considered effective and dissuasive. In this sense, international cooperation is a key instrument to collect evidence for the proceedings, apply sanctions for those who have breached the law and ultimately achieve justice.

(b) Example of a successful case that involved international cooperation in administrative matters (art. 43 of UNCAC)

The Office of the Comptroller General (CGU), which is the federal agency responsible for monitoring public assets governance and administrative integrity and for investigating and sanctioning legal entities and individuals for illicit conducts undertaken against Public Administration, initiated an international cooperation process 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 in order to obtain and retain contracts. Part of the bribes had allegedly been paid through intermediary and front Brazil-based companies.

In February 2015, the CGU formally transmitted the legal request to the Brazilian central authority for international legal cooperation — the Department of Assets Recovery and International Cooperation (DRCI), which took the necessary measures before the central authority of the foreign jurisdiction for its execution. The request was made having article 43 of UNCAC as the legal basis, and the assistance requested included the sharing of information obtained by that foreign jurisdiction in what it pertained to the payment of the bribes, including the identification of the Brazilian public officials, as well as the front and intermediary Brazil-based companies through which part of the payments had allegedly been made. Also, all

evidence that could demonstrate the involvement of Brazilian public officials was required, such as bank records, witness statements and incorporation records.

In June 2015, CGU received the requested information, which is currently under analysis for the identification of the individuals and companies involved in the corruption practices and possible filing of administrative proceedings.

(c) Example of a successful case on direct recovery of assets abroad (art. 53 of UNCAC)

In 1992, Nicolau dos Santos Neto, a former Labor Judge from Brazil, was the President of the Labor Regional Court of the Second Region in São Paulo (TRT-SP). In the same year, he conducted a public tender in order to build a new courthouse for the city's first instance courts. Because of suspicious activities related to the construction process, in February 1999 several criminal and civil proceedings were launched against the people involved in the building of the courthouse, including Nicolau dos Santos Neto. During the investigations, law enforcement officials discovered that dos Santos had transferred stolen assets overseas, mainly to the United States of America and Switzerland. An official audit of March 1999 concluded that approximately USD 85 million had been diverted from its legal purposes.[8]

The information, received through mutual legal assistance requests, that dos Santos owned assets in the United States and Switzerland led the Brazilian Government to adopt a different strategy in these countries. Besides sending the aforementioned assistance requests, Brazil started legal procedures in the United States and Swiss Courts to prove it had been victim of the illegal acts carried out by Nicolau dos Santos. Victim status would allow Brazil to repatriate the property acquired by dos Santos as a result of criminal practices carried out during the courthouse construction process.

In 2000, the Brazilian Attorney General of the Union (AGU) followed the instructions of the Brazilian authorities and enlisted the United States and Swiss law firms to legally represent Brazil in the United States and Swiss Courts.

In August 2001 a United States judge recognized Brazil's property right over an apartment located in Miami, Florida, and in mid-2002 the assets derived from the sale of that apartment were deposited in a Brazilian government bank account (USD 700,000).

In 2001, after evaluating the asset recovery probabilities through the mutual legal assistance mechanisms and especially in light of the difficulties in obtaining a final conviction against Nicolau dos Santos in Brazil, the Brazilian authorities decided that Brazil should enter the Swiss criminal procedure as a civil party. As a civil party Brazil was able to intensely collaborate with the Swiss authorities in their criminal proceedings. In 2012 the Federal Court of Switzerland confirmed in a final judgment a judicial order to freeze the assets of dos Santos (USD 7 million).

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[8] MR Machado, Judicial system and corruption in Brazil: A TRT/SP case study (in Portuguese), *Revista Jurídica da Presidência*, vol. 14, No. 103, Brasília, June-September 2012, pp. 273-304, p. 282. Available at: www4.planalto.gov.br/revistajuridica/copy_of_vol-14-n-102-fev-mai-2012/menu-vertical/apresentacao/rjp-103-integral.pdf.

The lack of a final conviction in the Brazilian criminal proceedings would have caused Brazil to lose millions of dollars already frozen, because a final judgement is the traditional requirement every State needs when seeking the repatriation of stolen assets. However, based on the measures of direct recovery of assets adopted abroad, Brazil was able to bring back approximately USD 7.7 million.

(d) Unsuccessful cases

In the context of investigations involving a foreign company that had allegedly bribed public officials of a Brazilian state owned enterprise, the CGU transmitted a legal request to a foreign jurisdiction, aiming at the sharing of the information collected within the investigations initiated by its Public Prosecution Service on the same facts. The evidence would be added to the administrative proceeding initiated by the CGU to investigate the payment of bribes to public officials and fraud in contracts.

The request was based upon UNCAC and was transmitted by the Brazilian central authority for international cooperation to the central authority of that foreign jurisdiction in March 2014.

In May 2014, CGU sent an additional request through the Brazilian central authority for international cooperation, asking for a specific list of evidence, such as copies of contracts and bank records. In June, CGU was given notice that investigations in the foreign jurisdiction had identified the Brazilian public employee who was bribed. It reiterated the request for the sharing of such information.

In the following week, the Brazilian central authority for international cooperation was informed by its counterpart that the requests could not be fulfilled because they referred to an administrative proceeding, and there were no provisions in that country's legislation for the sharing of the information requested. According to the answer received by the Brazilian Government, the cooperation would have to have been requested in the context of a criminal proceeding. Also, it was clarified that an international cooperation request would only be admitted if the requesting authorities were either judges or prosecutors.

Another example was a case in which Brazil requested international cooperation from a State Party to UNCAC, in order to repatriate assets remitted illegally by a Brazilian public official who was convicted in two different proceedings. First, he was investigated and convicted in the framework of Law No. 8.112 of 1990, mentioned above. In this proceeding, the final administrative decision stipulated the obligation to restitute the assets derived from the administrative illicit.

This same citizen was sued under Law No. 8.429 of 1992 (Law of Administrative Improbity), through which the Federal Prosecution Service was seeking for the application of the penalty of confiscation of assets, full compensation of the damage, disqualification from holding public office, civil fines and prohibition from contracting with the government.

Despite all elements and evidence collected in both proceedings, the Brazilian Government was unable to obtain cooperation in order to freeze the assets identified in the foreign jurisdiction as this proceeding was not of a criminal nature.

A final case to be highlighted is that of a person who was prosecuted for tax offences linked to bribery activities and which had assets tracked to another

jurisdiction. Therefore, Brazil presented a request for international cooperation in criminal matters to a State Party to UNCAC. This request was refused because that jurisdiction does not provide cooperation on issues involving tax offences. The Brazilian Government then requested cooperation in civil matters, which was also refused, based on the lack of legal provisions in that country which could lead to an effective cooperation.