



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

Distr.: Limited
7 September 2021

Original: English

Implementation Review Group
Resumed twelfth session
Vienna, 6–10 September 2021

Draft report

Addendum

V. State of implementation of the United Nations Convention against Corruption

B. Thematic discussion

2. Panel discussion on the implementation of article 53 (measures for direct recovery of property)

1. In her introductory remarks, a representative of the secretariat highlighted that while data from country reviews showed that the vast majority of States allowed for foreign States to directly recover assets in their courts, there was little experience with direct recovery in practice, and comparatively few cases existed. She noted that while there were obstacles to direct recovery, in particular the need to navigate a foreign legal system and the need to hire foreign counsel, direct recovery should be further explored as an alternative or addition to mutual legal assistance. She recalled that the political declaration of the special session of the General Assembly against corruption contained a call on States to share information and good practices and develop further guidance on the direct recovery of property, and she suggested that the topic could lend itself to further discussion and analysis by the Group.

2. The panellist from the Stolen Asset Recovery (StAR) Initiative presented the different options provided under article 53 of the Convention to directly recover assets. He explained that States could either initiate civil action to claim ownership of assets stolen from them or reclaim the value of those assets by seeking to obtain compensation or damages linked to corruption offences. He noted that claims could be based on contractual violations or on tort law. In addition to filing lawsuits, States could opt to make use of their rights as an aggrieved or civil party in criminal proceedings in other States. He highlighted that the benefits of direct recovery included the possibility of circumventing limits posed by the criminal justice system: in contrast to criminal confiscation, lower burdens of proof were required for direct recovery. In addition, direct recovery did not require establishing a link between the assets and the crime but allowed for recovery of the equivalent value, which was particularly useful in cases where it was difficult to establish a link between the corruption offence and the specific assets in question. Civil recovery also made it possible to pursue claims against intermediaries and enablers such as lawyers and banks that facilitated the transactions. While those entities may not have committed



crimes, they could be subject to civil liability. In addition, civil litigation was less likely to be delayed by political interference or inefficient prosecution. The panellist noted that direct recovery could thus replace or complement criminal confiscation, and the panellist encouraged States to make use of the different tools available under the Convention by using creative approaches and combining the avenues of civil and criminal proceedings.

3. The panellist from Brazil presented his country's experience with direct civil litigation to recover assets. He cited examples of cases where Brazilian authorities initiated litigation in foreign courts with the help of lawyers based in those jurisdictions to recover assets that had been lost as a result of corruption, embezzlement or fraud offences committed by Brazilian public officials. The panellist noted that, even though the Convention specifically provided for the possibility of direct recovery through civil litigation, it was a practice that was not well known or well developed in many jurisdictions, which could give rise to judicial uncertainty. That issue could potentially be resolved through more discussion and harmonization of legislation and practices. Even though formal mutual legal assistance requests often seemed to be the more obvious choice for international asset recovery attempts, direct recovery, while potentially more expensive, might prove to be more expedient in certain cases. The panellist explained that, while not yet done in practice, the Office of the Attorney General of Brazil was able, as a matter of courtesy, to assist foreign States in litigating in Brazilian courts. Brazil had signed a memorandum of understanding with Italy for mutual legal representation in legal disputes before each other's courts, which could be made use of upon request by the other country. A similar arrangement was possible on the basis of the statute of the Ibero-American Association of Public Prosecutors, signed in Brazil in 2018 by 10 Attorney Generals in Latin America.

4. The panellist from the United Kingdom spoke about his experience as a private attorney litigating a case in Jersey on behalf of the authorities of Brazil, when Brazil had incurred damages as a result of significant fraud in connection with a local infrastructure project. In parallel with criminal proceedings, the authorities of Brazil had decided to bring civil proceedings in Jersey in an attempt to recover assets that had been channelled to offshore jurisdictions. Although assets had been frozen in the criminal proceedings, no assets had actually been recovered. The Brazilian authorities thus also initiated civil proceedings against the offshore companies that had received the proceeds of the fraud, in which they claimed relief on the grounds that those companies had retained a proprietary interest in the funds involved and, as such, the defendants (a) had knowingly and unlawfully received the funds, and/or (b) had been unjustly enriched. The advantages of conducting those civil proceedings were that the standards of proof and the evidentiary requirements were less strict than in criminal proceedings. The panellist also noted that civil proceedings were usually quicker, that for defendants there was no effective right to remain silent and that claims could also be brought against enabling entities that had not necessarily engaged in criminal behaviour themselves. Moreover, the panellist noted that the civil proceedings had resulted in a number of disclosure orders and freezing orders against assets held in the offshore jurisdiction and eventually in a judgment in favour of the claimant State. The judgment was then enforced partially against cash assets, and liquidators were appointed to recover the remaining balance.

5. The panellist from Germany highlighted the differences in legal systems and standards of proof, the quantification of damages and anti-corruption clauses in contracts as elements to be considered regarding the possibility of recovering assets through civil proceedings. With regard to the standard of proof, he noted that while differences existed between civil law and common law systems, the burden of proof in civil cases was always lower than in criminal proceedings. He also highlighted arbitration as an alternative to the civil courts: while arbitrators had fewer legal powers to compel parties, different rules of evidence existed in arbitration, and arbitrators could sometimes be more flexible than civil judges, up to the point of being able to reverse the burden of proof. With regard to the quantification of damages, the

panellist described differences in and approaches to quantifying damages incurred through acts of bribery. While the amount of the bribe paid usually constituted the minimum amount recoverable in damages, the actual damage incurred could be significantly higher. Depending on the legal system and available claims, restitution, punitive damages, reputational damages or disgorgement could be claimed individually or even simultaneously. When settling cases out of court, foreign States, as the aggrieved party, could leverage their possibilities for, for example, voiding contracts or shortening debarment periods in order to reach a settlement. Finally, he noted that anti-corruption clauses in contracts were a fairly new means of safeguarding contracts from corruption or ensuring easier recovery of damages in cases where corruption was found to be committed. He suggested that the topic would lend itself to future discussions.

6. In the ensuing discussion, speakers expressed appreciation to the panellists for their presentations and the secretariat for proposing the topic of direct recovery. One speaker noted that direct recovery was a method that was severely underutilized despite being a real alternative to mutual legal assistance. He noted that most States allowed for foreign States to initiate civil action in their courts but that a lack of awareness regarding the direct recovery options resulted in it being seldomly used. That speaker suggested that the costs involved might pose impediments for States, and contingency fees or even pro bono acceptance of cases by the highly specialized law firms involved could be a useful incentive for States to rely more strongly on direct recovery as an alternative to asset recovery. In response, the panellist from Brazil explained that the cost of litigation was indeed a matter of concern and that Brazil had entered into cost agreements with law firms. He agreed that contingency agreements for legal fees were useful and noted that the Attorney General of Brazil could litigate in cross-border cases as an alternative to hiring private attorneys, in particular for countries that refrained from direct recovery due to a lack of resources.

7. Another speaker stated that not all States had the same possibilities available to directly recover assets in foreign jurisdictions, a situation that created another obstacle to successful asset recovery, and he suggested that there was a need for more guidance and awareness-raising, as well as debate on a potential standardization of practices.

8. On the question of obtaining evidence in civil proceedings, the panellist from the StAR Initiative explained that States might be able to make use of evidence obtained through criminal proceedings and make use of civil discovery options under domestic rules on evidence collection. He highlighted that claimants could request the production of documents, orders for search of premises or the freezing of assets, the hearing of witnesses and other forms of evidence. Finally, he noted that States might prefer direct recovery over other alternatives to criminal confiscation such as orders for non-conviction-based confiscation or civil forfeiture, or illicit enrichment proceedings, as the latter were not always available or enforceable abroad.