

**G8 ASSET RECOVERY INITIATIVE
PRINCIPLES AND OPTIONS FOR DISPOSITION AND
TRANSFER OF CONFISCATED PROCEEDS OF GRAND CORRUPTION**

I. INTRODUCTION

The G8 States are committed to effective implementation of the United Nations Convention Against Corruption (UNCAC), including the effective identification, restraint, and recovery of the proceeds of corruption.

In keeping with this commitment, on May 11, 2004, the G8 Justice and Home Affairs Ministers issued a Ministerial Declaration on Recovering the Proceeds of Corruption designed to identify specific steps that G8 members would take to provide assistance to other States in the recovery of illicitly acquired assets and to ensure that G8 countries have laws and procedures to detect, recover and transfer proceeds of grand corruption. Among other concrete actions, that Ministerial Declaration announced the following initiative:

Create G8 Best Practices for Modalities of Disposition and Return. The G8 will work through the Lyon/Roma group to generate best practices, including through a review of experiences to date, so that when illicitly acquired assets are returned, they are administered with transparency and effectiveness. Such guidelines will identify a range of options with model language for potential agreements.

In committing to address disposition and transfer of confiscated assets,¹ the G8 recognized that there has been a range of approaches to the transfer of confiscated assets between States in grand corruption cases, and that it made sense to examine this sensitive issue in light of those experiences and the different circumstances in which the issue of disposition and return may arise. By addressing these difficult issues in a practical manner, this paper seeks to provide greater transparency, predictability, and effectiveness in the disposition and transfer of confiscated assets. Recognizing different legal systems and approaches among G8 Member States, this paper suggests principles and options to consider, but does not offer prescriptive guidance.

This paper also reaffirms the commitment to disposition and return of assets, including in embezzlement cases, as articulated in Article 57 of the UNCAC. Recognizing that States share a special responsibility for the careful treatment of confiscated proceeds, under Article 57 of the UNCAC, States Parties accept certain obligations for the disposition and return of confiscated

¹ Any references to "assets" in this document may include proceeds of the sale of confiscated assets, where appropriate.

proceeds of grand corruption. As clearly set forth in paragraph 1 of that article, appropriate measures for implementation of those obligations necessarily must be governed by the provisions of the UNCAC itself and relevant domestic law. Consequently, this paper discusses not whether assets should be transferred, but how transfers could be accomplished consistent with the Convention, including, where appropriate, pursuant to voluntary agreements executed in accordance with paragraph 5 of Article 57. The objective of this paper is to facilitate immediate implementation of both the letter and spirit of the UNCAC and not to prejudice the work of the anticipated Conference of Parties to the UNCAC.

This paper addresses only the issue of disposition and transfer following the execution of a final confiscation based on a final judicial decision ordered either in the requested or requesting State against property located outside the state seeking asset recovery assistance. Accordingly, for the purposes of this paper, it is assumed that all prior right, title and interest has been extinguished and that the property is entirely within the control of the state transferring assets. While States may use additional mechanisms for the recovery of property in the absence of a confiscation judgment, such as those set forth in article 53 of the UNCAC, such mechanisms are beyond the scope of this paper and are not addressed here. This paper also is limited to the discussion of disposition and transfer of assets in grand corruption cases, such as those involving high-level officials or large-scale misappropriation of public assets.

Of course, the issue of disposition and transfer of illicitly acquired assets is necessarily dependent upon the ability of states to locate, restrain, and confiscate illicitly acquired assets. For that reason, other elements of the G8 Asset Recovery Initiative address mechanisms for enhancing coordination and cooperation and strengthening legal structures for detection, restraint, and confiscation.

II. GENERAL PRINCIPLES FOR DISPOSITION AND TRANSFER IN GRAND CORRUPTION CASES

In light of the clear UNCAC objectives of combating corruption and recovering the proceeds of corruption for the benefit of the citizens of nations victimized by kleptocracy, certain overarching principles should govern, subject to national law, the disposition and return of confiscated assets in cases of grand corruption. The following principles are not intended as mandatory or binding on G8 states. In suggesting these guiding principles, G8 States also recognize and reaffirm the necessity of compliance with the UNCAC and the national law of the States concerned.

Principle 1: Transparency. States must ensure transparency and accountability in the transfer and administration of confiscated assets.

The stated purposes of the UNCAC would be frustrated if the circumstances under which assets are transferred were not clear, if their administration is inconsistent with principles of

transparency and accountability, or if the transfer was not made in an open manner.² The extraordinary efforts needed for the successful recovery of the proceeds of grand corruption must be accompanied by diligence to ensure that the criminal proceeds once confiscated are not again misappropriated or misused. Such protections should include appropriate measures to prevent corruption in the transfer and administration of assets, and could also include means for providing feedback and reporting on the use and administration of confiscated assets. Where possible, use of robust accountability systems already established for development assistance programs may be useful in helping track assets and minimize administrative burdens for promoting transparency and accountability.

Principle 2: Presumption of Transfer. Wherever possible and appropriate, without prejudice to other victims, assets recovered in grand corruption cases should benefit the people of the nations harmed by the underlying corrupt conduct.

Under the UNCAC, mandatory transfer of assets will only be required in cases involving embezzlement of public assets in which an order of confiscation has been issued in the requesting country and enforced in the country transferring assets. However, even in cases of corruption offenses other than direct embezzlement of state assets, in recognition of the severe consequences of grand corruption, States should make every effort to ensure that the assets confiscated, less extraordinary costs and without prejudice to individual victims, should be transferred for the benefit of the country that suffered the corruption. To that end, jurisdictions confiscating the proceeds of foreign corruption should be encouraged to take an expansive view of the need to restore confiscated corruption proceeds to countries harmed by grand corruption.

Principle 3: Case-Specific Treatment. Disposition of confiscated assets must be considered in a case-specific manner.

Embezzlement, government contract fraud, bribery, extortion, and kickbacks in exchange for important extraction or distribution rights each cause societal harm and damage to democratic institutions through the corruption of senior officials, but they may also produce different particularized harm to different individuals or populations. In addition, the extent to which a state receiving transferred assets has established transparent government institutions or a capacity for the absorption and administration of transferred assets may have implications for the

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Article 1 of UNCAC states:

The purposes of this Convention are:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery ;
- (c) To promote integrity, accountability, and proper management of public affairs and public property.

manner in which the assets are transferred. As a result, a fixed template should not govern the disposition and return of assets in all cases. As envisaged by the UNCAC, there should be a case-by-case approach.

Principle 4: Remedial Objectives. Serious consideration should be given to encouraging actions which fulfill UNCAC principles of combating corruption and repairing the damage done by corruption.

The preamble and purpose of the UNCAC emphasize both the devastating impact of grand corruption and the need for a comprehensive effort to confront it. Consistent with the stated objectives of the UNCAC and the remedial purpose of asset recovery, consideration should be given to ways in which the disposition and return of confiscated assets could visibly strengthen anti-corruption institutions and remedy the societal effects of grand corruption. In addition, as acknowledged in Article 57, there may be circumstances in which priority consideration should also be provided to identifiable victims. Such consideration may be most appropriate in cases in which the victim and the extent of harm are expressly set forth in the final order of confiscation.

Principle 5: Consistency and Coordination. Wherever possible and appropriate, relevant development agencies should be consulted to ensure awareness of the transfers, avoid duplication of services, and encourage consistency with the identified needs of the people of the country receiving confiscated assets.

Coordination with existing national programs and foreign assistance programs can facilitate the effective and efficient use of transferred assets by avoiding duplication of programs, promoting consistent objectives, and reducing administrative burdens. Particularly in cases in which the State transferring assets is also a donor of assistance to the country receiving transferred assets, coordination between finance, law enforcement, and development agencies will help maximize the support provided to ensure that expectations on effective use can be achieved. Similarly, ensuring consistency with national and local community-identified needs of the country may enhance effectiveness of the use of transferred assets.

Principle 6: Encourage Use of an Agreement. An agreement or arrangement should be considered in a case-specific manner detailing the terms of the transfer and, where appropriate, ensuring the transparent and effective use and administration of transferred assets.

Even where not required by the law of either state, a voluntary international agreement or arrangement between the transferring and receiving States governing the terms of the transfer should be considered provided that it is not inconsistent with the law of either of the States concerned. Under Article 57 of the UNCAC, such voluntary agreements or arrangements may

be considered on a case-by-case basis. Not only can such an agreement or arrangement avoid misunderstandings between the states involved in the disposition of the assets, but it can also help resolve potential disputes between different institutions within the state receiving assets concerning the terms of the transfer. Moreover, under many legal systems the supremacy of an international agreement can help overcome obstacles that may otherwise interfere with the proper disposition of restored confiscated assets. Such arrangements can also provide reassurance that the assets will be used for public benefit and will not be at risk of embezzlement. In countries that have been victims of corruption by public officials, this reassurance is vitally important. It shows that corruption can be successfully resisted, and that the investment of effort and time by public officials engaged in the fight against corruption (sometimes at considerable personal risk) is worthwhile. Agreements or arrangements regarding the transfer of assets should include mechanisms to ensure transparency in the transfer and administration of confiscated assets. Inclusion of extraneous provisions aimed at unrelated policy objectives may hamper effective collaboration between the state transferring assets and the state receiving transferred assets.

Principle 7: Preclusion of Benefit to Offenders. The disposition of confiscated assets should not benefit persons involved in the commission of the offence.

In accordance with the objectives of the UNCAC and recognizing that through execution of a final order of confiscation all prior right, title and interest is extinguished, under no circumstances should the persons involved in the commission of offenses resulting in the confiscation benefit from or have a further opportunity to claim a right to the transferred assets.

III. CONCLUSION

In their 2004 Declaration, the G8 Ministers unequivocally expressed their desire that efforts to recover the proceeds of grand corruption become more successful. This paper sets out principles regarding the disposition and transfer of confiscated assets in cases of grand corruption. The annex to this paper further elaborates possible options for implementation of these principles. Again, this paper and its annex are meant only to address those cases where all prior right, title and interest in the property has been extinguished and the property is entirely within the control of the State that is transferring assets. No prejudice to the rights of legitimate owners is intended or implied.

ANNEX

MODALITIES FOR DISPOSITION AND TRANSFER

Bearing in mind the fundamental principles and obligations for the return of assets under the United Nations Convention Against Corruption (UNCAC), as well as the principles articulated in this Paper, States may wish to consider the following mechanisms when transferring confiscated proceeds of corruption. These mechanisms are merely illustrative and draw on past experiences in this area. No prejudice to the rights of legitimate owners is intended or implied. These mechanisms are intended for use only where mutually agreed.

A. General Provisions

To clarify the status of the assets being transferred and foreclose the possibility of re-litigation of claims, agreements or arrangements concerning the disposition of confiscated assets should, to the extent acceptable to both State Parties concerned, include the following general provisions:

1. An express acknowledgment that the assets have been confiscated pursuant to a final judicial decision in the requested State. If national law of the requested State so provides, such an acknowledgment may be accompanied by a statement that all prior right and interest has been extinguished in the requested state.
2. A prohibition against disposition or disbursement of transferred assets that would benefit the perpetrators of the offenses giving rise to the confiscation. This provision may specify individuals and corporate entities by name.
3. A statement specifying that all right and interest passes to the receiving state and that the transferring state assumes no liability upon the transfer of the assets.
4. An acknowledgement that the extraordinary costs incurred by the transferring state leading to the confiscation, have been deducted.
5. A mechanism for reporting both to the public and to the transferring state on the use and ultimate disposition of the transferred assets.

B. Procedural Approaches

Parties may wish to consider one or more of the following procedural structures to facilitate the disposition and transfer of the proceeds of grand corruption:

1. Unrestricted Transfers: States can transfer confiscated assets with no preconditions or restrictions on the use of the assets. Unrestricted transfers may be particularly appropriate in cases involving embezzled assets that can be directly restored to their prior legitimate owners, such as a specific State dependency, especially where transparency, accountability and oversight are well established prior to the transfer.
2. Special Administrative Bodies or Funds: States seeking the transfer of assets may wish to consider creation of a special administrative body or fund for the receipt of confiscated assets in order to facilitate the efficient and transparent disposition of recovered criminal proceeds. Such a body could include (a) a strict public accounting and asset management procedure through which the acquisition and release or expenditure of assets can be tracked, (b) clear procedures for disposition of assets, such as through multi-agency deliberations, and (c) enumeration of the types of uses authorized. Additional provisions may include (d) procedures for civil society participation, such as through the submission of proposals for the use of transferred assets or advance public notice of intended uses with periods for public comment. This approach facilitates deference to the state receiving assets on the ultimate disposition of transferred assets, while providing additional assurances of accountability and transparency through public accounting and civil society participation in decision making.
3. Specification of Uses: In some cases, States may decide to enter into agreements or arrangements that specify particular uses for transferred assets. This approach may provide a mechanism for successor governments to quickly and demonstrably show the benefits of combating corruption. Under this approach, the assets would ordinarily be transferred directly to the receiving state for administration in accordance with the agreement or arrangement.
4. Bilateral Bodies: In some cases, States may agree to the establishment of a bilateral body to consider and make recommendations or decisions regarding the most appropriate uses of transferred assets. This approach may be most helpful in cases in which several assets are expected to be transferred, but the transfers are expected to occur at different times due to different ongoing legal proceedings concerning the recovery of different assets.

5. Non-Binding Agreed Preferential Uses: Another flexible mechanism would be to establish a list of preferred uses rather than a binding list of specific end uses. Such initiatives could include support for implementation of preventive good governance measures or anti-corruption institutions, in keeping with the underlying principles of the UNCAC. Thus, through this procedure, States can provide a clear, public declaration concerning the intended use of confiscated assets, while retaining flexibility in how such assets are disbursed.
6. Indirect Transfers: In some cases States may agree that confiscated assets be transferred through third party intermediaries for the benefit of the citizens of the receiving state. Under this indirect approach, recovered assets could be transferred in trust to a public international organization, non-governmental organization, or other third party charged with using the assets for the benefit of the citizens and residents of the State harmed by misconduct of corrupt officials. This approach may be most appropriate in cases in which the state receiving assets has substantial development needs and little infrastructure for the delivery of such services or when relationships between States are not close.
7. Transfer in Multiple Tranches: Under any of these approaches, States may agree to the transfer of confiscated assets in separate tranches. The installment transfer of recovered assets may be useful to increase trust and accountability between States or in cases in which a nation has been plagued by a succession of high-level, corrupt officials.