

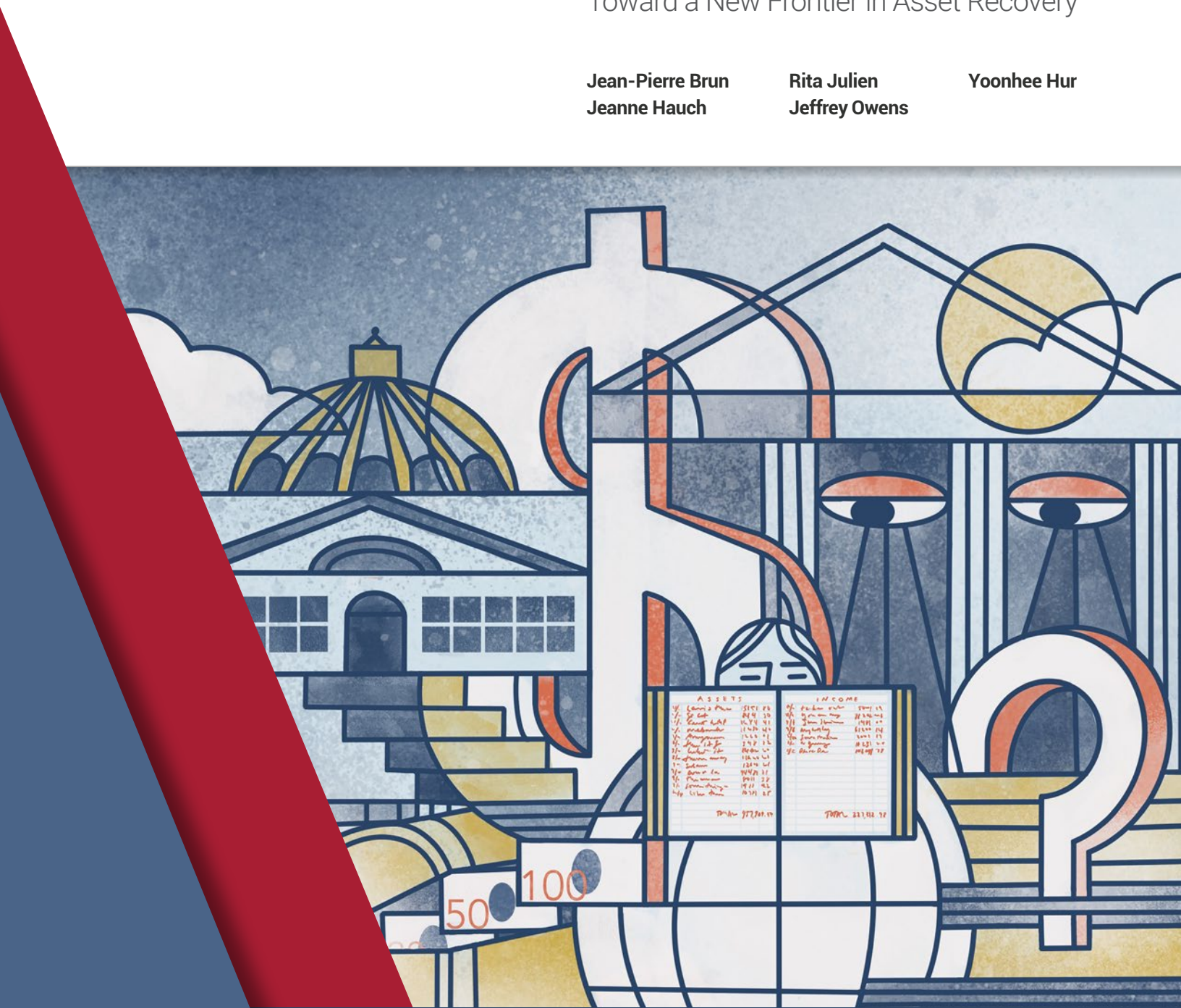
# Unexplained Wealth Orders

Toward a New Frontier in Asset Recovery

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Stolen Asset Recovery Initiative

The World Bank • UNODC



UNODC  
United Nations Office on Drugs and Crime



THE WORLD BANK  
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# Contents

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<b>Abbreviations .....</b>	<b>6</b>
<b>About the Authors .....</b>	<b>7</b>
<b>Acknowledgments .....</b>	<b>8</b>
<b>Executive Summary .....</b>	<b>9</b>
<b>Introduction .....</b>	<b>12</b>
I.1 Purpose of This Study .....	12
I.2 Audience .....	13
I.3 Overview of Chapters .....	13
<b>Context of Unexplained Wealth Orders (UWOs) .....</b>	<b>16</b>
1.1 Overview of UWOs .....	16
1.2 How UWO Systems Can Bolster Asset Recovery Efforts .....	18
1.3 Comparing UWOs and the Offense of Illicit Enrichment .....	23
1.4 Identifying and Explaining the Rationale for UWOs .....	25
<b>Development of UWO Frameworks .....</b>	<b>32</b>
2.1 UWO Systems by Country .....	32
2.2 Alternatives to UWO Systems .....	38
2.3 Main Elements of Existing UWO Systems .....	41
<b>Operational Aspects of Unexplained Wealth Orders .....</b>	<b>56</b>
3.1 UWO Procedures .....	56
3.2 Coordination of Enforcement Authorities and Frameworks within a Country .....	67
3.3 Cooperation and Coordination Internationally .....	74

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<b>Key Considerations for Designing National UWO Systems .....</b>	<b>82</b>
4.1 Choices for Elements of Prospective UWO Systems .....	82
4.2 Political and Institutional Considerations to Maximize Effectiveness of a UWO System .....	87
4.3 Specific Steps toward a UWO System .....	88
<b>Due Process and Procedural Safeguards .....</b>	<b>92</b>
5.1 Considering Legal Challenges to UWO Systems .....	92
5.2 Key Legal Safeguards for UWO Systems .....	94
<b>Conclusion and Recommendations .....</b>	<b>100</b>
6.1 Key Recommendations for Establishing a UWO System .....	100
<b>Appendix A: Case Studies and Related Information .....</b>	<b>104</b>
A.1 United Kingdom .....	104
A.2 Kenya .....	107
A.3 Australia .....	110
A.4 Ireland .....	113
A.5 Mauritius .....	115
<b>Appendix B: Additional Information .....</b>	<b>120</b>
B.1 Who May Seek a UWO? .....	120
B.2 Links to Authorizing Legislation .....	121
B.3 Amounts Recovered by Ireland's Criminal Assets Bureau .....	123

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# Figures

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<b>Figure 2.1.</b> UK: Flowchart of UWO Procedures and Outcomes .....	34
<b>Figure 2.2.</b> Kenya: Anti-Corruption Commission v. Stanley Mombo Amuti (2020) ....	36
<b>Figure 3.1.</b> Mauritius: Process for Unexplained Wealth Order .....	60
<b>Figure 3.2.</b> Mauritius: Timeline of Unexplained Wealth Order in a Simple Case .....	65
<b>Figure A.1.</b> Mauritius: Timeline of UWO issuance in simple case one .....	116
<b>Figure A.2.</b> Mauritius: Timeline of UWO issuance in simple case two .....	116
<b>Figure A.3.</b> Mauritius: Timeline of complex UWO case .....	117

# Tables

---

<b>Table 2.1.</b> Different Definitions of Unexplained Wealth .....	48
<b>Table 2.2.</b> Thresholds for Unexplained Wealth Order (US Dollar Equivalent) .....	49
<b>Table 3.1.</b> Who Investigates and May Seek an Unexplained Wealth Order .....	59
<b>Table 3.2.</b> Consequences of Failure to Respond to a UWO .....	63
<b>Table 4.1.</b> Sampling of Cases: Period of Time over Which Unexplained Wealth Amassed .....	86
<b>Table B.1.</b> Who Investigates and May Seek an Unexplained Wealth Order .....	120
<b>Table B.2.</b> Amounts Recovered by CAB by Category, Ireland, 2015–20 .....	123

# Boxes

<b>Box 1.1.</b> Relationship to Evidence of a Crime: Conviction-Based, Non-Conviction-Based and UWO Remedies .....	20
<b>Box 1.2.</b> The <i>Hajiyeva</i> Case (UK 2018): A Typical Scenario .....	21
<b>Box 1.3.</b> UWO Resulted in Leads toward More Unexplained Wealth .....	22
<b>Box 2.1.</b> UK: Definition of “Reasonable Cause to Believe” .....	33
<b>Box 2.2.</b> Mauritian Unexplained Wealth Order: Conditions and Standard .....	36
<b>Box 2.3.</b> Text of Singapore Law .....	39
<b>Box 2.4.</b> UK Case: Link to “Serious Crime”: <i>Nat’l Crime Agency v. Hussain &amp; Ors</i> [2020] EWHC (Admin) 432 (Eng.) .....	41
<b>Box 2.5.</b> Kenya Case: Link to Corruption or Economic Crime: <i>Kenya Anti-Corruption Comm’n v. Amuti</i> [2017] e.K.L.R. (H.C.K.), Formerly High Court Civil Suit No. 448 of 2008 (O.S.) .....	41
<b>Box 2.6.</b> UK Case: Defining a Politically Exposed Person in the Context of an Unexplained Wealth Order: <i>Hajiyeva v. Nat’l Crime Agency</i> [2020] EWCA (Civ) 108 (Eng.) .....	42
<b>Box 2.7.</b> Requirements for a Link with Crime—UK, Australia, and Kenya .....	43
<b>Box 2.8.</b> UK Case: Main Respondent Was Not Beneficial Owner and Other Family Members “Held” Property in Their Own Rights: <i>Nat’l Crime Agency v. Baker &amp; Ors</i> [2020] EWHC (Admin) 822 (Eng.) .....	44
<b>Box 2.9.</b> UK Case: Challenges with Respect to Showing Income Insufficient in the Case of Legal Entities Held by Trustees: <i>Nat’l Crime Agency v. Baker &amp; Ors</i> [2020] EWHC (Admin) 822 (Eng.) .....	45
<b>Box 2.10.</b> Kenya: Temporal Scope for “Unexplained Assets” .....	46
<b>Box 2.11.</b> Australia Case: “Holding” of Property Determined by Control—Re Application under Section 20A of the Proceeds of Crime Act 2002; ex parte Comm’r of Australian Federal Police [2017] WASC 114 [57]. .....	49
<b>Box 2.12.</b> Kenya Case: Beneficial Ownership through Proxy Family Members— <i>Ethics and Anti-Corruption Comm’n v. Abachi &amp; Ors</i> [2021] e.K.L.R. (H.C.K.), Civil Suit No. 15 of 2019 (Kenya). .....	49
<b>Box 2.13.</b> Definitions of How Property Must Be “Held” .....	50

<b>Box 2.14.</b> Two Approaches to Avoid Double Counting .....	51
<b>Box 3.1.</b> Detecting Unexplained Wealth as a Basis for a UWO .....	57
<b>Box 3.2.</b> Examples of Disparity of Wealth Giving Rise to “Reasonable Suspicion” .....	61
<b>Box 3.3.</b> Australia: Requirements for a Section 20A Restraining Order .....	62
<b>Box 3.4.</b> Common Bases for Presumptions .....	66
<b>Box 3.5:</b> Use of Income and Asset Declaration Forms in UWO Proceeding: Kenya: <i>Ethics and Anti-Corruption Comm’n v. Abachi &amp; Ors</i> [2021] e.K.L.R. [59], [81], [83] (H.C.K.), Civil Suit No. 15 of 2019 (Kenya) .....	72
<b>Box 3.6.</b> Kenya’s Proposed Lifestyle Audit Bill of 2021 .....	73
<b>Box 3.7.</b> UK: Cases of UWOs with Regard to Property within the Enforcing Jurisdiction .....	77
<b>Box 5.1.</b> Safeguards against Self-Incrimination in UK Unexplained Wealth Order Law .....	95
<b>Box 5.2.</b> Successful Respondents Recoup Legal Fees: <i>Nat’l Crime Agency v. Baker &amp; Ors</i> [2020] EWHC (Admin) 822 (Eng.) .....	97

# Abbreviations

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<b>ACECA</b>	Anti-Corruption and Economic Crimes Act (Kenya)
<b>AFP</b>	Australian Federal Police
<b>ATO</b>	Australian Taxation Office
<b>CAB</b>	Criminal Assets Bureau (Ireland)
<b>CACT</b>	Criminal Assets Confiscation Taskforce (Australia)
<b>DPP</b>	Director of Public Prosecutions (Australia)
<b>EACC</b>	Ethics and Anti-Corruption Commission (Kenya)
<b>ECHR</b>	European Court of Human Rights
<b>EEA</b>	European Economic Area
<b>EU</b>	European Union
<b>EWHC</b>	(Ch.) England and Wales High Court (Chancery Division)
<b>FATF</b>	Financial Action Task Force
<b>FCA</b>	Financial Conduct Authority (UK)
<b>FIAA</b>	Foreign Illicit Assets Act (Switzerland)
<b>GGIRA</b>	The Good Governance and Integrity Reporting Act 2015 (Mauritius)
<b>HMRC</b>	His Majesty's Revenue and Customs (UK)
<b>ICAR</b>	International Centre for Asset
<b>IFO</b>	Interim freezing order
<b>IRSA</b>	Integrity Reporting Services Agency (Mauritius)
<b>JFAC</b>	Joint Financial Analysis Centre (UK)
<b>MCMATM</b>	Multilateral Convention on Mutual Assistance in Tax Matters
<b>MLA</b>	Mutual legal assistance
<b>MRA</b>	Mauritius Revenue Authority
<b>NCA</b>	National Crime Agency (UK)
<b>NCB</b>	Non-conviction-based [confiscation]
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PEP</b>	Politically exposed person
<b>PoCA</b>	Proceeds of Crime Act (Australia and UK)
<b>PULSE</b>	Police Using Lead System Effectively (Ireland)
<b>SARS</b>	South African Revenue Service
<b>SFO</b>	Serious Fraud Office (UK)
<b>StAR</b>	Stolen Asset Recovery Initiative
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNCAC</b>	United Nations Convention against Corruption
<b>UNOD</b>	United Nations Office on Drugs and Crime
<b>UWO</b>	Unexplained wealth order
<b>VAIDS</b>	Voluntary Assets and Income Declaration Scheme (Nigeria)
<b>ZIMRA</b>	Zimbabwe Revenue Authority

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# Executive Summary

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Recovering the proceeds of corruption is a topic of increasing worldwide interest. With international media and global policy forums—like the G-20<sup>1</sup> and the Financial Action Task Force—paying more attention to kleptocracy and its facilitation by financial institutions and other professional service providers, the discrepancy between amounts stolen and actual recoveries is an issue of mounting concern. Recovering the proceeds of crime is part of the United Nations (UN) Sustainable Development Goals, but the tools that governments have at their disposal to effect those recoveries are not yielding the desired results. Several countries have in recent years introduced the unexplained wealth order (UWO) as a tool to improve recoveries of the proceeds of crime—particularly kleptocracy. While it is too early to be able to draw any definite conclusions as to its effectiveness in curbing corruption, the UWO contains novel ideas that are worth examining in more depth.

A UWO is a civil court order that can assist countries in investigating or confiscating assets that are incommensurate with a person's known sources of income. Typically what is required is to show a manifest discrepancy between legitimate earnings (as evidenced by for example, tax statements or declarations of income and assets) and certain specified assets.

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“A UWO is a civil court order that can assist countries in investigating or confiscating assets that are incommensurate with a person's known sources of income.”

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Once that discrepancy has been demonstrated, the person concerned will generally have to prove to the satisfaction of the court the legal origin of those assets. Unlike other asset recovery tools (criminal confiscation and non-conviction-based confiscation) a UWO does not require establishing a link between the asset and a crime, a requirement which often proves an insurmountable obstacle in trying to confiscate a person's

ill-gotten wealth for a variety of reasons, such as that it requires the cumbersome process of mutual legal assistance to obtain evidence of that link or proof that the asset was illegitimately acquired long ago. A UWO reduces, or even eliminates, such barriers.

Some jurisdictions, including Australia, Kenya, Mauritius, and the United Kingdom (UK), have adopted and implemented UWO systems.<sup>2</sup> In the UK, the UWO is an investigative measure that allows certain authorities to compel the respondent to produce information on the origin of certain assets. In other jurisdictions, the UWO system encompasses both the ability of certain authorities to compel the production of information as well as the ability of courts to confiscate any wealth that is not explained to the satisfaction of the courts.

By its nature, a UWO is probably closest to illicit enrichment provisions, which typically also require a comparison between known legitimate sources of wealth and

the assets of a person (often a public official) and put the onus on that person to show the legal origin of the assets (there are national variations). The important difference between the two is that whereas a UWO is a civil measure—a person targeted by a UWO is not found guilty of a crime—illicit enrichment is most often a criminal offense, punishable by imprisonment. Consequently, illicit enrichment provisions are always subject to all due process requirements applicable to criminal offenses, and UWOs are not. Some jurisdictions, however, have opted for exclusively noncriminal consequences under their illicit enrichment systems. In these cases, of course, the line between UWOs and illicit enrichment becomes blurred or nonexistent.

That said, given the effect on a person's right to property, UWOs are themselves also subject to review by a judge. In addition, the prohibition on self-incrimination implies that whatever the respondent produces in response to a UWO cannot be used in a criminal case against that person—although if the person deliberately provides false information, that may constitute a crime.

While UWOs are still being explored and tested, countries that have principled objections to the adoption of illicit enrichment offenses precisely because of due process concerns may wish to examine how UWOs could complement their existing tools for going after the proceeds of crime and corruption. Of course, UWOs are only useful as a tool if they add something extra—it is thus important to analyze the reasons for which an asset recovery system is not delivering before deciding on the introduction of a UWO system. As noted, one of the big advantages is not having to prove a link with a crime—but if a jurisdiction's system for asset confiscation does not rely on having to make that link (for instance because that jurisdiction's system is equivalent-value based) then a UWO system may not solve the problems. Finally, as with all asset recovery tools, a UWO would be only as effective as the will and capacity to implement it.

## Notes

- 1 The Group of Twenty (G-20) consists of 19 countries (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russian Federation, Saudi Arabia, South Africa, Türkiye, United Kingdom, and United States) and the European Union.
- 2 See section 1.1.2. below for other examples, such as Barbados, Trinidad and Tobago, and Zimbabwe. Moreover, other jurisdictions, without having a formal UWO system, use the concepts of unexplained wealth, unjustified resources, or disproportionate assets with legitimate sources of income to shift the burden of proof for confiscation when assets are owned or controlled in specific circumstances (offenses committed in the context of criminal organizations, close family, or business relationships with offenders). If the defendants do not justify or explain the legitimate origin of these assets, the presumption of illicit origin allows the court to order their confiscation even if the link with a crime is not proved by prosecutors. Some of these systems (for example Colombia, Ireland, Singapore, and Switzerland) are briefly described in section 2.2 as alternatives to UWOs.



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# Introduction

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Persistent corruption and the insufficient results of asset recovery efforts compel countries to search for more effective ways to counteract the loss of much-needed resources. The importance of asset recovery to international development is highlighted by the United Nation's (UN's) Global Sustainable Development Goals, which include significantly reducing illicit financial flows and returning stolen assets, as well as substantially reducing corruption and bribery in all its forms.<sup>1</sup> The Paradise Papers, the Panama Papers, the Luanda leaks, and the Pandora Papers, among others, have provided growing evidence of efforts to launder and conceal the proceeds of crime and corruption.

Due to the complexity of these schemes, it can be challenging and costly for capacity-constrained developing countries to rely on traditional follow-the-money approaches to investigate them. To diversify the asset recovery toolbox, a small number of countries have begun to explore a newer tool—the unexplained wealth order (UWO). The UWO is typically an investigative and confiscation procedure that requires certain persons to show how they obtained certain property once authorities have shown it to be incommensurate with their lawfully obtained income and assets. It may apply to any person, including legal persons, or specifically target politically exposed persons (PEPs). If the concerned person does not justify the legitimate origin of the assets, confiscation may be ordered, even if a link between the asset and a crime is not established.

## I.1 Purpose of This Study

The purpose of this study is to provide policy makers with an overview of UWO systems by placing them in the context of other asset recovery tools and drawing lessons for countries contemplating the introduction of UWO-type legislation. While the design and implementation of UWO systems are very much in a state of evolution, they may fill a gap in asset recovery systems. UWO systems, like other legal tools, depend on other legal and institutional aspects in each jurisdiction. If a country considers implementing a UWO system, it should form part of a more comprehensive whole of policies and must be adapted to the specific legal context. For example, countries that have established a strong forfeiture system based on value confiscation or civil confiscation, not requiring prosecutors to show a link between assets and a crime, may not need UWOs as much as other countries that have not.

Amid growing interest in both developed and developing countries, different definitions and designs of UWOs are emerging. While many countries already possess a well-stocked toolbox of instruments (such as civil confiscation, illicit enrichment offenses, civil lawsuits), the UWO may offer another avenue to take away the proceeds of corruption or other crimes. Thus, it is worthwhile to survey the landscape to better enable national policy makers to ascertain whether and where this asset recovery tool would have a place in their own national context. Of course, given the diversity of legal systems, a practice or strategy that has worked in one jurisdiction may not work in another. Likewise, an investigative technique like the UWO that is permitted in one jurisdiction may not be permitted—or may have different procedural requirements—in another. Nonetheless, examples from other jurisdictions may be fruitful points of comparison when contemplating improvements to one's own system.

This study details key considerations in designing UWO systems and sheds light on their use and the challenges of implementation. It also highlights how UWOs may assist financial centers in working with developing countries to recover assets. It concludes that a wisely designed UWO system may present a promising approach in ongoing efforts to recover the proceeds of corruption, money laundering, and tax crime.

While this publication provides some legal analysis of the issues, the intent is to raise rather than resolve key issues that will come up when considering UWO legislation. No specific approach is advocated, although some better practices are highlighted. The issues surrounding UWOs are too complex, country-specific, and diverse for a one-size-fits-all solution. The goal is to provide options based on the experience of countries that have been implementing UWO systems, so that policy makers and practitioners may seek the solutions best suited to their contexts.

The study also recognizes that some jurisdictions have established illicit enrichment offenses, as encouraged (but not mandated) by article 20 of the United Nations Convention against Corruption (UNCAC), by criminalizing “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.” While UWOs are civil orders, illicit enrichment offenses allow authorities to investigate and courts to impose criminal conviction and confiscation where defendants cannot explain how an increase in their wealth is based on legitimate transactions. Illicit enrichment offenses are based on a concept that is like UWOs, since both mechanisms require a defendant to demonstrate that assets are legitimate. But establishing such criminal offenses is challenging and sometimes impossible in many jurisdictions for constitutional reasons, including the principles linked to the right to silence, protection against self-incrimination, and presumption of innocence. The Stolen Asset Recovery Initiative (StAR Initiative) and others have published studies examining the main issues and challenges of these illicit enrichment offenses.<sup>2</sup> The present study will only focus on unexplained wealth legislation that is not based on these criminal offenses.

## I.2 Audience

This study aims to provide guidance to policy makers around the globe on deciding if a UWO system is needed and how to establish it in their jurisdiction. It is also expected that case examples and discussions on implementation challenges will be useful to lead practitioners.

## I.3 Overview of Chapters

Chapter 1 provides an overview of what a UWO is, and how it compares with and complements an asset recovery framework by providing another method to target proceeds of crime, and then analyses the rationale for a UWO system.

Chapter 2 focuses on a more in-depth analysis of the design of UWO systems, specifically those of Australia, Kenya, Mauritius, and the United Kingdom (UK) and compares them with some jurisdictions with similar elements, namely Colombia, Ireland, Singapore, and Switzerland and then distills the main elements of the design of a UWO system, such as who and what is covered, and what must be proven and by whom.

Chapter 3 identifies the main operational questions raised by the implementation of UWOs in practice, including the procedural steps and stages of the UWO process; coordination of frameworks and enforcement authorities (especially tax authorities); and international cooperation.

Chapter 4 draws lessons from existing UWO systems to provide countries that are interested in designing their own system with key considerations to address, discusses the role of political will and proper resourcing and coordination among enforcement

agencies, and finally touches on what steps a country could undertake to introduce a UWO system in an effective way.

Chapter 5 discusses the due process and procedural safeguards that are essential to a UWO system, as demonstrated by various legal challenges, including review by a judicial officer; prohibition on use of statements in UWO proceedings in criminal proceedings; limitation on the use of disclosed information and disclosure to third parties; protection of innocent third parties; independent oversight by parliament or another body of the UWO framework; possible time and value related limits; and recoupment of legal fees for respondents when a UWO is denied in cases where authorities acted unreasonably.

Chapter 6 offers recommendations to jurisdictions considering setting up their own UWO systems.

## Notes

- 1 Global Sustainable Development Goals, Targets 16.4 and 16.5.
- 2 Lindy Muzila et al., *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (Washington, DC: World Bank, 2012); Andrew Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (Basel, Switzerland: Basel Institute on Governance, 2021).



# 1 Context of Unexplained Wealth Orders (UWOs)

## *Among Asset Recovery Tools*

### 1.1 Overview of UWOs

Over the past decade, the media has increasingly focused on the fact that proceeds of corruption in developing countries often end up in rich countries in the form of business interests, bank accounts, palatial homes, yachts, jewels, and other personal luxury items.<sup>1</sup> As corruption has become subject to greater public scrutiny, recovering its proceeds has moved up the global political agenda.<sup>2</sup> Asset recovery generally involves various criminal, civil, and administrative confiscation systems or private civil actions. Despite global efforts, holding wrongdoers accountable and recovering the value of assets derived from corruption remains far from obvious, very time consuming, and fraught with legal and practical pitfalls. This study concentrates on one asset recovery tool, the UWO.

#### 1.1.1 What Is an Unexplained Wealth Order?

While there are variations, most unexplained wealth orders (UWOs) are based on the same concept: the authorities do not have to prove that assets are derived from a crime; confiscation is rather based on the discrepancy between a person's legitimate income or wealth and the observed wealth of this person. The mechanism may apply to any person, though it sometimes focuses on politically exposed persons (PEPs) and, as stated by legislation in some countries, persons with some suspected (for example, on reasonable grounds) links to crime. Depending on the relevant legislation, this connection can be demonstrated by the conviction of the defendant or his or her close family members or associates or by more tenuous circumstantial evidence showing involvement in suspected criminal activities or close relationships with their suspected actors.

The term UWO is used to refer to different concepts in different places. Some countries have systems that are functionally equivalent to the other named "UWO" systems that use different terms. This "unexplained wealth" is subject to investigative or court action or both, requiring the respondent to provide a satisfactory explanation of how the wealth was legally obtained. Failing such an explanation, authorities are empowered to seek confiscation. If no explanation at all is given, often the authorities benefit from presumptions of illicit origin that facilitate confiscation.

In countries that have established a UWO, this tool is based on a civil rather than a criminal action, and hence standards of civil procedure usually apply. In some countries, the action includes its own recovery power that allows the authorities to confiscate, to the extent it cannot be explained, the property in question or require the individual to pay the difference, while in other countries the UWO is only an investigative tool to

gather evidence and is a first step that may lead to a separate civil confiscation measure. There the UWO itself is not the civil recovery order but rather is the investigative order. For example, in the UK, if there are “reasonable grounds” to believe that a person—who is either a foreign PEP or is suspected on “reasonable grounds” of being involved in serious crime (present or past)—holds property (of a certain value, specifically, more than £50,000 [US\$60,200]<sup>3</sup>) and whose lawfully obtained income would have been insufficient for obtaining the property, the order obliges this person to provide specified information (for example, a statement, with accompanying documentation) about how they obtained the property.<sup>4</sup> If they fail to do so, the property is presumed to be subject to confiscation in a civil recovery action in which the prosecution still needs to show by the applicable standard that the asset should be confiscated.<sup>5</sup>

Other UWO frameworks (including Australia and Mauritius) contain both an investigative component and provisions allowing courts to order the confiscation of unexplained wealth. In this case, a UWO is another type of confiscation added to established criminal or civil confiscation statutes. The investigative component can be followed by an order to pay the portion that is unsatisfactorily explained. In Mauritius, while “UWO” refers only to the order for the confiscation of property, it is preceded by a request for information regarding any suspected unexplained wealth, giving the respondent the chance to provide his or her explanations. If the respondent does not answer the request, the enforcement agency must ask a judge for a “disclosure order,” potentially leading to a UWO. Finally, there are some countries, such as Kenya, that have in place a tool that is functionally equivalent to a UWO even if that terminology is not used.

In terms of modalities, the UWO is most often value based. For example, in Australia, it refers to “an order requiring the person to pay an amount equal to so much of the person’s total wealth as the person cannot satisfy the court is not derived or realised, directly or indirectly, from certain offences.”<sup>6</sup> Thus, the UWO may be enforced against property that has been restrained or potentially against other property using civil debt recovery powers (similar to other types of value-based confiscation orders). Mauritius law also provides for payment of its monetary equivalent.<sup>7</sup>

UWOs are different from other non-conviction-based remedies (NCBs). There are four main differences: (a) the UWO trigger is different—unexplained wealth rather than proof that an asset is derived from a criminal activity; (b) which party bears at least some evidential burden is different—with the UWO respondent bearing the burden to make a *prima facie* case at the least that the property is derived from legal income; (c) the standards for the burdens of production and proof are different from NCBs—generally a lower burden on the authorities for UWOs; and (d) if a link to crime is needed, as it is for some types of UWOs, it can be weaker and more indirect than for a NCB confiscation. While similar to “illicit enrichment offences,” UWOs are generally civil and do not require a criminal conviction (see section 1.3 below).

### 1.1.2 Where Are UWOs Found?

In 2017, when the UK introduced its UWO law, only a handful of countries had enacted UWO-type legislation, including Australia, Kenya, and Mauritius. Recently, interest in UWOs has increased. In 2018, Zimbabwe enacted a UWO framework similar to the UK model.<sup>8</sup> In 2019, Trinidad and Tobago established a new UWO framework with a two-step “preliminary” UWO (an order to explain) followed by a potential UWO (an order to pay the unexplained amount), similar to Australia’s federal approach.<sup>9</sup> In 2019, Barbados introduced a UWO framework in its Proceeds and Instrumentalities of Crime Act 2019-17.<sup>10</sup> Some are calling on Canada or on all Organisation for Economic Co-operation and Development (OECD) countries to implement UWOs.<sup>11</sup> In Kenya, its “unexplained assets” law was on prominent display in 2020, as the Supreme Court upheld the use of this law to recover millions from a former public official who could not explain his cars, cash, and immovable property.<sup>12</sup> These developments indicate serious and continuing interest in

the UWO mechanism. Moreover, some other countries—Colombia, Ireland, Singapore, and Switzerland—have in place alternatives to UWOs based on similar concepts.

When the UK enacted its UWO in 2017, it opened up one of the richest target environments, in light of London's role as a financial center and a desirable place to enjoy a lavish lifestyle. Once the UK began enforcing the UWO law, the UK court system started developing a small but growing body of case law on the topic of UWOs, which may inform policy makers and practitioners elsewhere. In both the UK and Kenya, the introduction of UWOs faced headwinds on grounds that shifting onto the respondent a burden to put forth some evidence to explain the wealth is allegedly inconsistent with due process. Nonetheless the mechanism was upheld by the courts as those particular UWO laws contain various important substantial and procedural safeguards, such as review by a judicial officer. This will be discussed more comprehensively in chapter 5.

## 1.2 How UWO Systems Can Bolster Asset Recovery Efforts

This section discusses the legal avenues for asset recovery, an overview of the process, and how UWOs fit in.

### 1.2.1 The Asset Recovery Process and Its Legal Avenues

To understand how UWOs can support the asset recovery process, it is important to compare them with the traditional legal avenues of asset recovery. These avenues are not exclusive and should be pursued in parallel, if possible, because it is impossible to predict which ones will succeed and it would be difficult to start over at a later date. These main avenues are the following:

- Domestic criminal prosecution and conviction-based confiscation, followed by a mutual legal assistance (MLA) request to enforce an order abroad, if needed;
- NCB confiscation, followed by an MLA request to enforce an order abroad, if needed;<sup>13</sup>
- Private civil actions (such as misappropriation, tort, breach of contract, and civil unjust enrichment), including formal insolvency proceedings;<sup>14</sup>
- Administrative confiscation; and
- Various other avenues, such as taxation of illicit profits, criminal fines, and compensation orders.

Each legal avenue has its advantages and disadvantages and may be available or not available in each jurisdiction.<sup>15</sup> In practice, the most frequently used asset recovery remedies are conviction-based confiscation and NCB confiscation.<sup>16</sup> In both UWO and traditional cases, there are evidentiary hurdles that affect asset recovery outcomes.

#### **Multistep asset recovery process**

**Investigative phase.** Successful asset recovery is a multistep process. It often begins with an investigative phase in which intelligence and evidence are collected, and assets are traced. Authorities try to determine whether an offense has taken place, whether a perpetrator can be identified, and whether the proceeds (for example, cash, property, and assets) of the offense can be identified and located.<sup>17</sup> Precisely what is investigated depends on many factors, including whether the system is conviction-based or non-conviction-based (a distinction discussed further below). Because the proceeds of corruption are almost invariably moved from one jurisdiction to another, cooperation may be sought from other jurisdictions.

**Freezing or seizing assets.** As soon as assets are identified as suspected proceeds of crime (or, in some cases, “instrumentalities” to commit a crime), investigators may file a request to a court that the assets be frozen or seized, especially if there is a concern that the assets can be moved or destroyed.<sup>18</sup>

**Judicial phase.** Next, there is a court process or judicial phase. The evidence from the investigation is analyzed and referred for review before a judge, who will assess whether there is enough persuasive evidence, and whether due process safeguards have been observed throughout the proceedings.<sup>19</sup> This may result either in lifting the temporary order freezing the assets or in orders for confiscation to the state.<sup>20</sup> Confiscation may be property-based or value-based. Property-based confiscation means the property is the proceeds of crime and a link between those assets and the offense is required. Value-based confiscation permits the determination of a value of the benefits of the offense and any asset, regardless of origin, belonging to the defendant can be confiscated up to that value.<sup>21</sup>

**Enforcement of the order and return of the assets.** If a court orders the restraint, confiscation, or seizure of assets, the next step is enforcement of the order. Once the order is enforced, procedures regulate asset return—the use or disposal and return of the assets.<sup>22</sup> Under United Nations Convention against Corruption (UNCAC) articles 54, 55, and 57, the assets should be returned to the requesting jurisdiction, if prior ownership is established.<sup>23</sup> Countries have established different ways to return assets.<sup>24</sup> Concerns may emerge about the funds again falling into corrupt hands.

Conviction-based asset recovery systems have low recovery rates.<sup>25</sup> Failures result at three main junctures: (a) problems in establishing the nexus between a convicted person and the property in question, (b) the nexus required between the property and a given offense, and (c) the evidentiary standards and burden of proof.

Not only is there the difficulty of establishing a nexus between the property and a given crime, but there is additional difficulty if the property resulted from multiple crimes, producing “long-term accumulations of wealth.”<sup>26</sup> In addition, a conviction usually cannot be obtained where the main suspect has died, fled overseas, or enjoys immunity from prosecution.<sup>27</sup>

Moreover, meeting the higher burden of proof to obtain a criminal conviction may be increasingly challenging as crime has globalized, since evidence-gathering must cross many borders to follow the money. Legally, cross-border investigations may hit walls where mechanisms for international cooperation between law enforcement agencies fall short, and where the definition of the crime in one jurisdiction differs from that in another—a potential lack of dual criminality.<sup>28</sup>

Some increased recovery is achieved by NCB confiscation, often described as being in rem, meaning it is an act taken against the property derived from criminal activities. As a result, it is not necessary to prove a criminal case to the highest standard of proof (“beyond a reasonable doubt” in common law systems or by “intimate conviction” in civil law systems). Still, the authorities must prove a direct link between the property and a criminal activity, and this is often a challenge. In addition, many jurisdictions do not offer NCB remedies.

## **1.2.2 Potential Added Value of UWOs**

### ***Shifting the burden of production onto the respondent***

The main legal innovation of UWOs as compared with existing proceeds-of-crime measures is, broadly speaking, that UWO measures shift the burden of producing evidence onto the respondents to explain their wealth, if authorities establish a discrepancy between a respondent’s wealth and her lawfully obtained income. In addition, in some systems, the UWO procedure may, in effect, shift the burden of proof onto the respondent if the law enables courts to decide whether to confiscate the wealth when

the respondent's explanation is nonexistent or not convincing. Even when the burden of proof in the confiscation part of the process remains on the authorities, having respondents bear the burden to put forth evidence to explain the origin of their wealth comes with great advantages. Much of the information is likely to be within the control of the defendant and difficult for the prosecution to obtain. Removing this hide-and-seek challenge often significantly increases the chances of proving a confiscation case. However, if proper due process safeguards are not put in place, it can introduce risks. Moreover, rules about the interaction of the UWO system with other existing confiscation systems are necessary to avoid overlap. For example, in Mauritius, the UWO law takes precedence over all other confiscation procedures. In Australia, there is also substantial overlap with other asset recovery proceedings, in which case a subtraction is made, as explained in section 2.3.6 of this study.

### ***Reducing the burden on the authorities***

With UWOs, authorities do not have to link assets with a crime to confiscate them. A link may need to be made from a person to crime, but the required link is generally weak (or, in the UK, for example, not required at all in the case of certain PEPs). This is why UWOs are considered a useful addition to confiscation, going further than typical proceeds of crime laws. The UWO's differences in terms of required evidence of a crime compared to conviction-based and other NCBs are illustrated in box 1.1.

### ***Eroding international cooperation blockages***

Asset recovery is often stymied by deficits in international cooperation, and UWOs may assist in this respect.<sup>29</sup> Barriers to asset recovery include onerous and stringent requirements to the provision of MLA; excessive banking secrecy; lack of NCB asset confiscation procedures; and overly burdensome procedural and evidentiary laws.<sup>30</sup> Even where a country has NCB forfeiture, barriers may nevertheless result from the fact that other countries do not have the same systems and therefore may not recognize MLA requests related to NCB forfeiture; alternatively, if other countries also have NCB forfeiture, they may have different legal standards that apply under their respective systems, rendering international cooperation challenging.<sup>31</sup> Operational barriers include difficulties in identifying focal points to make MLA requests and a lack of publicly available registries,

#### **Box 1.1. Relationship to Evidence of a Crime: Conviction-Based, Non-Conviction-Based and UWO Remedies**

<b>Conviction-based confiscation</b>	Person and property/asset = Crime → Confiscation of property
<b>Non-conviction-based confiscation</b>	Property/asset = Crime → Confiscation of property
<b>Unexplained wealth order</b>	Person ≈ Crime → Presumption of criminal origin → Confiscation of property/asset <b>OR</b> Person ≠ Crime (e.g., in UK, in cases of PEPs) → Presumption of criminal origin → Confiscation of property

While the link required for UWOs is weaker, confiscation legislation can also be designed to provide for presumptions of the criminal origin assets or to require the defendant to prove that the property is legitimate. If so, the advantage of UWOs over confiscation is reduced for prosecutors.

Source: World Bank staff. Note: PEP = politically exposed person; UWO = unexplained wealth order.

## Box 1.2. The *Hajiyeva* Case (UK 2018): A Typical Scenario

**2006:** The wife of an official of Azerbaijan settled in London, UK.

**2006–16:** It was observed that she had spent over £16 million (US\$19.3 million<sup>a</sup>) at the luxury department store Harrod's and had purchased a house nearby for £11 million (US\$13.2 million), expenditures out of keeping with her husband's official salary in the home country. The house was owned by a British Virgin Islands company linked to both her and her husband.

**2016:** These facts did not go unnoticed by the UK authorities, as her husband was an official at a state-owned bank and had been convicted in 2016 of various charges including misappropriation and fraud. In addition to 15 years' imprisonment, he was ordered to pay US\$39 million. All potential sources of legitimate income were insufficient to acquire the property.

**2017:** The new UWO legislation was introduced as part of the revised anti-money-laundering law under the Criminal Finances Act of 2017.

**2018:** UK authorities obtained an unexplained wealth order requiring her to provide evidence of the legitimate origin of her assets. Her (unconvincing) response was used as part of the evidence in a civil confiscation case to obtain an order for seizure of more than £20 million (US\$24 million) in property.

Source: *Hajiyeva v. Nat'l Crime Agency* [2020] EWCA (Civ) 108 (Eng.). Note: UWO = unexplained wealth order.

a Unless otherwise stated, all USD figures throughout the report are rounded estimates based on the United Nations Treasury Operational Rates of Exchange, using the exchange rate date of December 31, 2022, accessed February 10, 2023, <https://treasury.un.org/operationalrates/OperationalRates.php>.

such as company registries, land registries, registries of nonprofit organizations, and other databases.<sup>32</sup>

UWOs may help address the barriers of access to evidence and poor international cooperation, sufficient for investigators to meet the necessary evidentiary burden. Put differently, when the information to meet the burden appears to exist, but there are legal and operational barriers to accessing it, UWOs may assist by shifting the burden of producing evidence onto respondents, requiring them to provide the relevant information that is presumably more readily at their disposal.

### ***Filling gaps and increasing the impact of asset recovery***

UWOs have the potential to fill gaps in the asset recovery arsenal and provide another method to target proceeds of corruption. While the number of UWOs obtained may not be high, the impact of even a small number can be significant as the value of each may be high. For example, in the United Kingdom, the value of assets per UWO investigation is estimated in the range of £5–20 million (US\$6–24 million), on average, leading to the recovery of £10 million (US\$12 million).<sup>33</sup> Without being able to resort to a UWO, recovery of assets in certain cases could take many years or even be impossible because standards could not be met for other methods of conviction or non-conviction-based asset recovery. Box 1.2 illustrates such a scenario.

In another UWO case, in 2020, the UK's High Court ordered a business person linked to notorious criminals to turn over more than £10 million (US\$12 million) in property, land, cash and other assets.<sup>34</sup> Box 1.3 illustrates how the respondent's response to the UWO was key to further progress in the matter.

In another example, in Kenya, the Court of Appeal in 2019 affirmed a confiscation under a UWO of K Sh 41 million (US\$332,800) against a public official suspected of corruption.<sup>35</sup>

**Box 1.3. UWO Resulted in Leads toward More Unexplained Wealth**

**Facts:** Through an unexplained wealth order (UWO), the UK National Crime Agency (NCA) compelled the respondent to provide information concerning unexplained wealth in the form of certain real properties and companies. The respondent complied, filing a lengthy response and reams of documentary evidence, including a 76-page witness statement and 127 binders of documentary evidence.

**Outcome:** The NCA was able to use the evidence generated by the UWO to identify a larger property portfolio than previously known. Eventually the respondent settled the case, ceding to the NCA 45 valuable properties, cash, and assets worth in total approximately £9.8 million (US\$11.8 million).

Source: *Nat'l Crime Agency v. Hussain & Ors* [2020] EWHC (Admin) 432 (Eng.).

Moreover, UWO systems in financial centers are already having a positive influence in some developing countries in unanticipated ways beyond UWO asset confiscations and the identification of stolen assets. For example, publicity surrounding the UK's UWO system spurred developments in Nigeria and Kenya. In Nigeria, after enactment of the UWO in the UK, the media reported a wave of frantic attempts to declare income and assets to officials in Nigeria under the Nigerian Voluntary Assets and Income Declaration Scheme (VAIDS), possibly out of fear of not being able to explain in the UK if the wealth had not previously been documented. The uptick in activity reportedly crashed the reporting hotline.<sup>36</sup> This means Nigeria may collect more overdue tax revenue and bring previously noncompliant taxpayers back into the tax net, hopefully in a sustainable way. It could also provide useful information on overseas assets and income of Nigerians. Some have called for Nigeria to consider enacting its own UWO system.<sup>37</sup> In addition, Kenya has made high-level diplomatic efforts to benefit from the UK's UWO system.<sup>38</sup>

**Adding value in both civil law and common law systems**

So far the discussion has focused on common law systems. In recent years, UWOs have been introduced in common law and mixed systems, and not as such in civil law systems. The reasons these countries do not prioritize such reforms depend on national circumstances.

But more generally, confiscation in many civil law systems remains most often related to criminal conduct and is based on the conviction of the defendant. Reversing the burden of proof and drawing consequences from legal presumptions when a defendant cannot justify that assets are legitimate are often done in the context of criminal legislation on illicit enrichment, corruption, money laundering, tax fraud, or organized crime.

Similarly, while UWOs in common law countries provide a legal tool to overcome stringent rules on admissibility of evidence and protection against self-incrimination, they look less crucial in civil law countries where prosecutors, examining magistrates, and finally judges can consider any fact, statement, or document as circumstantial evidence based on general principles such as the "manifestation of truth" or the "intimate conviction."

None of these reasons, however, makes it impossible or useless to establish UWOs in civil law as well as common law systems. The foundations of the UNCAC, the case law of the European Court of Human Rights, the Financial Action Task Force (FATF) standards, and European Union (EU) directives have encouraged countries to introduce NCB remedies in accordance with their constitutional principles. As a result, civil law jurisdictions like Germany, Italy, and Switzerland, as well as several Latin American countries (including Colombia) have established NCB remedies in their legislation. These countries could also enhance their NCB system by introducing UWO legislation.

UWOs still have the potential to add value in both systems. When a defendant cannot explain the possession of assets in the context of a corruption or money laundering investigation, an investigative UWO may still be useful to formalize the statements of defendants about their assets and compare those official statements with the investigator's findings, thus supporting confiscation. For example, if a public official controls many valuable unexplained assets, not held in his or her name, and it has been impossible to marshal admissible evidence to convict him or her or the official's cronies of a crime, the ability to demand that the PEP or his or her crony explain the origin through a UWO is very useful. Similarly, if high-ranking organized crime figures are using proxies to hold and manage wealth and neither they nor their proxies can be directly linked to a crime, using the indirect links permitted under a UWO can lead to confiscation.

Nonetheless, in many countries (especially in South America), additional legislation was introduced to allow prosecutors to use presumptions in confiscation proceedings and to shift this burden of proof, or to ensure that some burden is borne by the respondent as in UWOs. (For example, see the discussion of Colombia in section 2.2.2.) In these countries, the benefit of adding UWOs to the existing asset recovery framework has to be calculated. This calculation would have to consider that, beyond the standard of proof, other key distinctions between UWOs and NCB confiscation include the trigger of the process (unexplained wealth for UWOs rather than suspicion or evidence of criminal activity) and who bears an evidentiary burden (the respondent in UWOs, often the prosecutor in NCB, unless the law provides otherwise).

## 1.3 Comparing UWOs and the Offense of Illicit Enrichment

UWO legislation and the offense of illicit enrichment have similarities. *Illicit enrichment* is defined by article 20 of the UNCAC as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income,”<sup>39</sup> referring to wealth of unknown, and thus suspicious, origin. However, there are also differences, which indicate that a UWO framework would not necessarily be redundant in a country with an illicit enrichment offense.

### 1.3.1 Illicit Enrichment Offenses Contrasted with UWO Systems

According to the UNCAC, each state “shall consider” establishing “illicit enrichment” “as a criminal offence, when committed intentionally.” While illicit enrichment usually qualifies as a criminal offense, occasionally it is a civil action. Currently about 98 countries have some form of illicit enrichment law on the books,<sup>40</sup> 78 of which are classified as criminal. Courts in many countries have upheld these laws.<sup>41</sup>

Both UWO systems and illicit enrichment offenses focus on unexplained increases in, or discrepancies between, lawfully obtained income, wealth, and assets and the total wealth and assets a person holds. The penalties for each, however, are different. While the UWO systems generally lead to a civil recovery mechanism (monetary penalties or asset confiscation), illicit enrichment offenses may lead to “a combination of fines, incarceration, and forfeiture of the proceeds of the crime,” “administrative and civil sanctions, which include termination of employment, prohibition from holding elected office, and restrictions on the right to stand for office and to vote.”<sup>42</sup> To be clear: both can result in confiscation and ultimately the recovery of stolen assets or of damages by the injured party.

An illicit enrichment offense usually shifts the burden of proof onto the defendant or respondent, similar to the way a UWO framework places the burden to provide information on the respondent, yet it does so during criminal proceedings. For this reason, certain jurisdictions have declined to enact illicit enrichment offenses because they

maintain that process contravenes the due process guarantees of their systems.<sup>43</sup> Such offenses are seen as leading to a more direct confrontation with certain fundamental rights, such as the presumption of innocence and protection against self-incrimination.

Less commonly, some jurisdictions have opted for exclusively noncriminal consequences under their illicit enrichment systems. In these cases, of course, the line between UWOs and illicit enrichment becomes blurred or nonexistent.<sup>44</sup>

Another difference is that illicit enrichment offenses often concentrate on public officials, whereas UWOs may cover any person with unexplained wealth. However, this difference does not always hold true, as illicit enrichment offenses may also cover a broader range of persons.<sup>45</sup>

### 1.3.2 Interaction of Illicit Enrichment Offenses and UWO Laws in the Same System

Where policy makers distinguish between illicit enrichment and UWOs, they should consider how UWO systems and illicit enrichment offenses can coexist within the same legal system. As noted, many jurisdictions have already codified an illicit enrichment offense, including a number of developing countries.<sup>46</sup> A review of the elements of illicit enrichment offenses can inform the design of UWO systems. Illicit enrichment offenses modeled on the UNCAC definition contain five main components: “(1) a public official who (2) during the relevant time period (3) experiences a significant increase in assets (4) knowingly and (5) without justification.”<sup>47</sup>

For illicit enrichment, the intentional component required by the term “knowingly” distinguishes this offense from UWO systems, which generally do not require a criminal intent element. In some cases, where an element of intent is included in the wording, it is not necessarily a separate element for the state to establish (for example, intent can be presumed if the person is found to have wealth that is disproportionate to income).<sup>48</sup>

Can both an illicit enrichment offense and UWOs have a role to play in the same legal jurisdiction? The UK posed similar questions in its 2016 “Action Plan for Anti-Money Laundering and Counter-Terrorist Finance.”<sup>49</sup> The UK decided to adopt its UWO approach as the preferred means for targeting unexplained wealth, in part owing to concerns over the potential due process infringements of illicit enrichment offenses.<sup>50</sup> Moreover, when the UK UWO results in the presumption that property is “recoverable,” this presumption technically stems from noncompliance with the order rather than from any suspected illicit enrichment.<sup>51</sup>

If policy makers are weighing both tools, one question concerning overlap is whether the UWO system should target (or not) the same public officials as those already covered by the illicit enrichment offense. It is common to have overlapping laws covering the same offensive conduct. If the jurisdiction allows an overlap in the personal scope, then the question will arise as to—in any given case of a public official with unexplained wealth, who is covered by both systems—how the two tools should be coordinated (for example, which of the two tools should prevail or whether both should simultaneously apply). Options include that the UWO could operate as a fallback in cases where certain elements of the illicit enrichment offense (for example, intent, where relevant) cannot be established. Moreover, the UWO could be used in other cases such as organized crime where there are suspected links with crimes not involving public officials, as illicit enrichment offenses tend to apply almost exclusively to officials. Finally, in countries with prosecutorial discretion, it may be that criminal prosecution is deemed too harsh a tool for a particular case but a UWO is considered appropriate.

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## 1.4 Identifying and Explaining the Rationale for UWOs

Given the existence of numerous asset recovery tools, each interested country should assess the effectiveness of their inventory of tools and whether a UWO system would be a suitable addition, in terms of complementing other existing tools. This section presents the main policy rationales for UWO systems, notes the risks, and suggests some recommended steps in the assessment process. If a UWO system seems warranted, the analysis in the next chapters compares different UWO frameworks and identifies some of the common considerations and elements that policy makers may wish to address in designing a framework appropriate for their own legal system.

### 1.4.1 Boost Asset Recovery by Reinforcing Investigations and Confiscation Systems

One purpose of UWOs—in particular, for noncriminal non-conviction-based approaches—is to remedy any ineffectiveness of existing asset recovery tools by establishing the legal basis for obliging parties to disclose the origin of their identified assets. UWOs also address the challenges in proving that assets are linked to corruption by allowing courts to use unsatisfactory responses as presumptions or as circumstantial evidence of the illicit origin of the property.

Countries may find an empirical analysis useful. To gain traction for potential reforms, governments could estimate revenues from certain criminal activities and compare those amounts with the (smaller) amounts recovered under existing systems. Australia, Mauritius, and the UK conducted such analyses, a process which led to the conclusion that sharper tools were needed.<sup>52</sup> In Australia, a key reason put forward in favor of UWOs included that UWOs do not rely on prosecutors being able to link the wealth to a criminal offense.<sup>53</sup>

The UWO framework in the UK was put in place as part of a larger package to provide further capabilities and powers to recover the proceeds of crime; tackle money laundering, tax evasion, and corruption; and combat the financing of terrorism.<sup>54</sup> These legislative changes came after careful consideration and public debate over whether the UK's current mix of tools was effective in this effort.<sup>55</sup> Moreover, UWOs may become attractive to policy makers in developing countries, especially as the corrosive effects of corruption on these countries takes a particularly high toll.

### 1.4.2 Support the Integrity of Major Financial Markets

In the UK, one consequence of insufficient asset recovery was that the country was at risk of being perceived as a haven for corrupt individuals and their assets. The UK recognized this as a threat to the integrity and reputation of its financial markets.<sup>56</sup> Moreover, if billions of illicit funds are funneled into purchases of valuable real estate in London, for example, this in turn adversely affects law-abiding UK residents, as it distorts an already expensive property market, putting pressure on the budgets of people who struggle to afford housing.<sup>57</sup>

### 1.4.3 Counter Specific Reputational Risk for a Financial Center

Perceptions that a jurisdiction is a haven for illicit wealth can deter investment. For example, in Mauritius, there were concerns over the impact of reputational damage on investment, as evidenced by the fact that the UWO was contained in a 2015 Act with the overarching aim to promote a culture of good governance and integrity reporting.<sup>58</sup>

#### **1.4.4 Prevent Criminals from Taking Advantage of Challenges with Regard to International Cooperation among Authorities**

As noted regarding the UK's assessment of shortfalls in asset recovery, the most common cause was the lack of full cooperation from other jurisdictions, particularly in cases involving foreign PEPs, where their outsize influence could hamper investigations.<sup>59</sup> The continuing influence of even absent PEPs or former PEPs often means that the jurisdiction where the evidence is located will be reluctant to cooperate fully. In the UK, one driving concern for implementing a UWO system was a high concentration of corrupt foreign officials and their proceeds, with persistently inadequate legal tools. This situation accordingly shaped the scope of the UK UWO system to include increased scrutiny of such PEPs.

#### **1.4.5 Create Uniformity of Laws within a Federal System**

Another justification for UWOs is to eliminate safe havens within a federal state where assets can be moved. One rationale in Australia was that the existence of a UWO in one Australian jurisdiction (for example, Western Australia and the Northern Territory had already implemented UWO systems<sup>60</sup>) and its absence in others created greater difficulties “in identifying and confiscating assets which may be located in, or moved between, various jurisdictions.”<sup>61</sup> As a federal state, it was advisable to have federally consistent UWO laws.<sup>62</sup> A 2018 amendment to Australia's UWO law aimed to address precisely these issues.<sup>63</sup> Developing countries with federal systems may have similar considerations.

#### **1.4.6 Hold Higher-Ups Accountable**

In both Australia and Ireland, organized crime (for example, “motorcycle clubs” or “serious and organized crime groups”) were driving concerns for UWO-type systems.<sup>64</sup> Those who profited most from the crimes, often the leaders, grew increasingly sophisticated and able to distance themselves from the crimes committed: “Their foot soldiers were caught and convicted, while they remained safe and out of reach of the legal system.”<sup>65</sup> Stronger law enforcement tools, such as UWOs and reinforced civil confiscation procedures, were needed to confront the increasing power, sophistication, and violence of organized crime.<sup>66</sup>

#### **1.4.7 Develop Synergies from Other Recent Innovations**

Some information-related barriers have been lowered in recent years, as a result of increased-transparency initiatives at the international level.<sup>67</sup> Measures that would have been unthinkable perhaps just a decade ago are now widespread, such as the automatic exchange of certain financial and tax information. As a result of international diplomatic and economic pressure to adopt various exchange of information laws and agreements, many historical bastions of banking secrecy have loosened restrictions. Moreover, calls for beneficial ownership registries are becoming louder.<sup>68</sup> Many of these transparency measures followed the 2008–09 financial crisis, when governments' budgetary needs and public support coincided to create unprecedented political will, driven by popular anger at the resulting austerity while widely publicized leaks revealed high net-worth individuals and multinational enterprises escaping their share of the burden.<sup>69</sup>

While there are still numerous challenges to implementation of information exchange, especially in developing countries, and much progress is still needed for registries, the UK's assessment nevertheless concluded that UWO legislation could capitalize on developments thus far.

### 1.4.8 Take Care to Prevent UWO Abuse

Finally, every option entails risks as well as potential benefits, so each jurisdiction must contemplate the main risk of UWOs. Given that the authorities may need only a small amount of evidence (“reasonable suspicion”) to get to the next stage of placing a burden to produce evidence onto the respondent to explain their wealth, the UWO tool could be subject to abuse, if authorities use it in cases where it is not truly merited, for example to sully the name of a political opponent. While potential abuse is undeniably a risk for UWO systems, that point does not distinguish UWOs from other similar tools. There are two main ways to reduce this risk. First, substantive and procedural safeguards must be built into the system, such as requiring the application for a UWO to be made to an independent judicial officer and allowing for appeals. These safeguards are the topic of chapter 5. Second, the most fundamental prerequisite to all laws is the strength of the legal and political institutions in a given country (see section 4.2).

The benefits of UWO systems depend on implementation. Moreover, if the chief problem in a country is not lack of laws but rather lack of implementation, UWOs are unlikely to move the needle on asset recovery. If there is a lack of political will to recover assets, few skilled personnel, or inadequate resources, UWOs may not improve the situation.

### 1.4.9 Concluding Thoughts

Countries may ponder these imperatives and factors when they consider whether a UWO system is needed in their context. For countries that answer affirmatively, the next section describes UWO systems in several countries and analyses the systems’ main elements.

## Notes

- 1 See, for example, International Consortium of Investigative Journalists, *Luxembourg Leaks: Global Companies’ Secrets Exposed* (2014); *Panama Papers: Exposing the Rogue Offshore Finance Industry* (2017); *Paradise Papers: Secrets of the Global Elite* (2017); *Luanda Leaks* (2020), accessed April 26, 2020, <https://www.icij.org/>.
- 2 See, for example, the efforts of numerous international organizations, such as the United Nations, the Organisation for Economic Co-operation and Development (OECD), the G-20, the World Bank and its Stolen Asset Recovery Initiative (StAR), the Financial Action Task Force (FATF), and the International Centre for Asset Recovery (ICAR). These efforts include, among others, the United Nations Office on Drugs and Crime (UNODC), United Nations Convention against Corruption, General Assembly Resolution 58/4 of 31 October 2003; G20 Seoul Summit 2010, Annex III, *G20 Anti-Corruption Action Plan, G20 Agenda for Action on Combating Corruption, Promoting Market Integrity, and Supporting a Clean Business Environment*; OECD, *Effective Inter-Agency Co-operation in Fighting Tax Crimes and Other Financial Crimes—Third Edition* (Paris: OECD Publishing, 2017).
- 3 Unless otherwise stated, all US dollar equivalents throughout the report are rounded estimates based on the United Nations Treasury Operational Rates of Exchange, using the exchange rate date of December 31, 2022, accessed February 10, 2023, <https://treasury.un.org/operationalrates/OperationalRates.php>.
- 4 UK, Proceeds of Crime Act 2002, as amended by the Criminal Finances Act of 2017 and the Economic Crime Transparency and Enforcement Act 2022, sec. 362B, accessed January 4, 2023, <https://www.legislation.gov.uk/ukpga/2002/29/chapter/2/crossheading/unexplained-wealth-orders> [hereinafter UK, Proceeds of Crime Act 2002, as amended].
- 5 *Id.* at sec. 362C.
- 6 Australia, Proceeds of Crime Act 2002, Compilation No. 51 includes amendments up to Act No. 13, 2021, sec. 179A [hereinafter Australia, Proceeds of Crime Act 2002, as amended].
- 7 Mauritius, The Good Governance and Integrity Reporting Act 2015, Act 31/2015, *Government Gazette of Mauritius* No. 122 of December 10, 2015, as amended by Act No. 13 of 2019, Act No. 5 of 2020, and Act No. 15 of 2022, sec. 16(1) [hereinafter Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended].
- 8 Zimbabwe, Statutory Instrument 246 of 2018, Presidential Powers (Temporary Measures)

- (Amendment) Regulations, 2018, Chapter IIIA, Section 37A-37O; Zimbabwe, Parliament, Money Laundering and Proceeds of Crime Amendment Bill, H.B. 4, 2019.
- 9 The Civil Asset Recovery and Management and Unexplained Wealth Act, Act No 8 of 2019 (2019), accessed December 14, 2022, <https://www.ttparliament.org/publication/the-civil-asset-recovery-and-management-and-unexplained-wealth-act-2019/>. See also "Fact Sheet on the Civil Asset Recovery and Management Unexplained Wealth Bill," *Trinidad and Tobago Government News*.
- 10 Proceeds and Instrumentalities of Crime Act 2019-17 (2019), secs. 135–39, accessed December 14, 2022, <https://barbadosfiu.gov.bb/wp-content/uploads/2019/10/Proceeds-Instrumentalities-of-Crime-Act-2019-17.pdf>.
- 11 Martin Kenney, "Canada Can Learn from U.K. on How to Crack Down on Money Laundering," *Toronto Star*, July 8, 2019, <https://www.thestar.com/opinion/contributors/2019/07/08/canada-can-learn-from-uk-on-how-to-crack-down-on-money-laundering.html>; "Unexplained Wealth Orders: Should Canada Adopt the UK's Weapon against Money Laundering and Foreign Political Corruption?", *Global Investigations Review*, March 13, 2019, <https://globalinvestigationsreview.com/article/1188700/unexplained-wealth-orders-should-canada-adopt-the-uk%E2%80%99s-weapon-against-money-laundering-and-foreign-political-corruption>; Hamid Sharif, managing director, Compliance, Effectiveness and Integrity, Asian Infrastructure Investment Bank, "OECD Nations Should Criminalize the Unexplained Wealth of Politically Exposed Persons," *Global Anticorruption Blog*, December 5, 2018, accessed February 20, 2020, <https://globalanticorruptionblog.com/2018/12/05/oecd-nations-should-criminalize-the-unexplained-wealth-of-politically-exposed-persons/#more-12575>.
- 12 *Amuti v. Kenya Anti-Corruption Comm'n* (2020) e.K.L.R. (S.C.K.), Petition No. 21 of 2019.
- 13 NCB remedies do not exist in all jurisdictions.
- 14 Jean Pierre Brun et al., *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (Washington, DC: Stolen Asset Recovery Initiative (StAR) of the World Bank and UNODC, 2015).
- 15 See Jean-Pierre Brun et al., *Asset Recovery Handbook: A Guide for Practitioners*, 2nd ed. (Washington, DC: World Bank, 2021), <https://star.worldbank.org/resources/asset-recovery-handbook-guide-practitioners-second-edition> [hereinafter ARH2] at 14–19 for a discussion of the important topic of considerations guiding each option.
- 16 See ARH2, chap. 1.
- 17 See, for example, Mat Tromme, "Waging War against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with the Rule of Law," *Duke Journal of Comparative and International Law* 29, no. 2 (Spring 2019): 165–234 at 175–76; ARH2 at 8–11.
- 18 ARH2 at 8–9.
- 19 *Id.*; Tromme, "Waging War against Corruption in Developing Countries" at 176.
- 20 Tromme, "Waging War against Corruption in Developing Countries" at 181.
- 21 ARH2 at 9–10.
- 22 *Id.* at 10–11.
- 23 See United Nations Convention Against Corruption, October 31, 2003, arts. 54–57; United Nations Convention against Transnational Organized Crime, November 15, 2000, arts. 13–14.
- 24 ARH2 at 268–70, 307–22.
- 25 See, for example, Kevin M. Stephenson et al., *Barriers to Asset Recovery* (Washington, DC: World Bank Group, Stolen Asset Recovery [StAR] Initiative, 2011) [hereinafter *StAR Barriers to Asset Recovery* 2011]; Council of Europe, *Reversal of the Burden of Proof in Confiscation of the Proceeds of Crime: A Council of Europe Best Practice Survey* (Best Practice Survey No. 2), PC-S-CO (2000) 8 Rev (Strasbourg, May, 25, 2000) at 4–5.
- 26 See Ben Clarke, "Confiscation of Unexplained Wealth: Western Australia's Response to Organized Crime Gangs," *South African Journal of Criminal Justice* 15, no. 1 (2002) at 69 (and sources cited therein).
- 27 See Theodore S. Greenberg et al., *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, DC: World Bank, 2009) at 1 [hereinafter *StAR A Good Practices Guide for NCB Asset Forfeiture* 2009] and Tromme, "Waging War against Corruption in Developing Countries" at 177.
- 28 See ARH 2 at 15; Larissa Gray et al., *Few and Far: The Hard Facts on Stolen Asset Recovery* (Washington, DC: World Bank and OECD, 2014) at 41, <https://openknowledge.worldbank.org/handle/10986/20002>; Tromme, "Waging War against Corruption in Developing Countries" at 177.
- 29 See, for example, *StAR A Good Practices Guide for NCB Asset Forfeiture* 2009; *StAR Barriers to Asset Recovery* 2011.
- 30 *StAR Barriers to Asset Recovery* 2011 at 3.
- 31 *StAR Barriers to Asset Recovery* 2011 at 67 ("Even where NCB confiscation is accepted, international cooperation in these cases can be challenging because the systems vary significantly, both in the identification of the court (civil or criminal) and in the procedural and substantive elements, such as the standard of proof (balance of probabilities, beyond reasonable doubt, or intimate conviction)").
- 32 *StAR Barriers to Asset Recovery* 2011 at 3, 92–93.

- 33 Fact sheet: Unexplained Wealth Order Reforms, Government of the UK (March 4, 2022) at 4, accessed January 3, 2023, <https://www.gov.uk/government/publications/economic-crime-transparency-and-enforcement-bill-2022-overarching-documents/factsheet-unexplained-wealth-order-reforms-web-accessible>.
- 34 Nat'l Crime Agency v. Hussain & Ors [2020] EWHC (Admin) 432 (Eng.).
- 35 Amuti v. Kenya Anti-Corruption Comm'n (2019) e.K.L.R. (S.C.K.), Civil Appeal No. 184 of 2018.
- 36 See, for example, Paul Olanitan, "Unexplained Wealth Orders...Why Nigerians Should Take Careful Note of This New UK Law," *Prompt News Online*, February 11, 2018, accessed February 18, 2020, <https://promptnewsonline.com/unexplained-wealth-orderswhy-nigerians-take-careful-note-new-uk-law/>; see also Francis Ndubuisi, "Nigerians with Property in UK Panic over New Law," *This Day*, February 12, 2018, accessed April 20, 2020, <https://www.thisdaylive.com/index.php/2018/02/12/nigerians-with-property-in-uk-panic-over-new-law/>.
- 37 Rahmon Olalekan Yussuf, "Anti-Money Laundering Framework in Nigeria: An Umbrella with Wide Leakage," *Journal of Law, Policy and Globalization* 66 (2017) at 172–77.
- 38 Duncan E Omondi Gumba, "Kenya Must Do More Than Just Find the Money," Institute for Security Studies blog, June 18, 2019, accessed February 20, 2020, <https://issafrica.org/iss-today/kenya-must-do-more-than-just-find-the-money> ("On another front in Kenyatta's diplomatic offensive, top security officials travelled to London in 2018 in a bid to repatriate unexplained wealth held in the UK by Kenyans. 'Kenya wants to exploit the UK's 'unexplained wealth' legislation to recover the money,' said Kenya's Director of Public Prosecution Noordin Haji.").
- 39 UNCAC, Article 20; see also, for example, Organization of American States (OAS), Inter-American Convention against Corruption (IACAC), Article IX; African Union (AU), African Union Convention on Preventing and Combating Corruption (AUCPCC), Article 8; Lindy Muzila et al., *On the Take* at table 2.1 and at appendix A.
- 40 Andrew Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (Basel, Switzerland: Basel Institute on Governance, 2021) at 44–45.
- 41 *Id.* at 120–52.
- 42 StAR *Criminalizing Illicit Enrichment* 2012 at 53–55.
- 43 See, for example, US, Senate, Congressional Record, Vol. 146, No. 100, S7809 (2000) ("The offense of illicit enrichment as set forth in Article IX of the Convention, however, places the burden of proof on the defendant, which is inconsistent with the United States Constitution and fundamental principles of the United States legal system."); Canada, Inter-American Convention against Corruption (B-58), Signatories and Ratifications (1996), Statement of Understanding of Article IX, Illicit Enrichment, accessed January 5, 2023, [https://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_B-58\\_against\\_Corruption\\_signatories.asp](https://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption_signatories.asp) ("As the offence contemplated by Article IX would be contrary to the presumption of innocence guaranteed [sic] by Canada's Constitution, Canada will not implement Article IX").
- 44 See, for example, StAR *Criminalizing Illicit Enrichment* 2012 at 2 (mentions examples such as Romania and Brazil); Leonid Antonenko, "Why Ukraine Should Abandon Efforts to Criminalize Illicit Enrichment," Atlantic Council blog, March 18, 2019, accessed April 21, 2020, <https://www.atlanticcouncil.org/blogs/ukrainealert/why-ukraine-should-abandon-efforts-to-criminalize-illicit-enrichment/> (discussing the example of Romania, where illicit enrichment is not criminalized but rather is "subject to disciplinary, civil, and tax liabilities" such as "los[ing] title to disputed assets that are being seized in civil court"). For the most recent research on the topic, see Dornbierer, *Illicit Enrichment* at 23, 44–45 (discussing that, while the vast majority of illicit enrichment laws are criminal in nature, some are civil or administrative in nature).
- 45 Dornbierer, *Illicit Enrichment* at 48–49 (citing Lithuania: Law on the Approval and Entry into Force of the Criminal Code 26 September 2000 No VIII-1968 (as amended 21 November 2017 No XIII-791) (Lithuania), Article 189(1); Bolivia: Ley De Lucha Contra La Corrupción, Enriquecimiento Ilícito e Investigación De Fortunas "Marcelo Quiroga Santa Cruz" (Ley No 004 from 31.03.2010) (Bolivia), Artículo 28. Dornbierer adds, "though this regime comes with an extra condition, namely that if a private person is targeted, it requires a prosecutor to additionally show that the illicit enrichment 'affected' the assets of the state.").
- 46 See StAR *Criminalizing Illicit Enrichment* 2012 at xiii. See also Dornbierer, *Illicit Enrichment* at 44–45.
- 47 Jeffrey R. Boles, "Criminalizing the Problem of Unexplained Wealth: Illicit Enrichment Offenses and Human Rights Violations," *New York University Journal of Legislation and Public Policy* 17, no. 4 (2014) at 852–853. See also StAR *Criminalizing Illicit Enrichment* 2012 at xiii and at 13.
- 48 Dornbierer, *Illicit Enrichment* at 119.
- 49 UK, Home Office and HM Treasury, "Action Plan for Anti-Money Laundering and Counter-Terrorist Finance," April 2016, accessed January 5, 2023, <https://www.gov.uk/government/publications/action-plan-for-anti-money-laundering-and-counter-terrorist-finance>.
- 50 See UK, Home Office and HM Treasury, Action Plan at para. 2.33; Olivia English, "Unexplained Wealth Orders or an Illicit Enrichment Offence?, *Lexology*, Bright Line

- Law, May 23, 2019, accessed February 25, 2020, <https://brightlinelaw.co.uk/unexplained-wealth-orders-or-an-illicit-enrichment-offence/>.
- 51 Dornbierer at 28–29, 79.
- 52 See, for example, Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, August 2009, at 7–33 (Chapter 2 offered an “[o]verview of serious and organised crime in Australia,” including some of the data collected on the problem; subsequent chapters then addressed how existing legislation had been grappling with this problem and whether new approaches were needed); UK, Home Office, “Criminal Finances Bill—Unexplained Wealth Orders, Impact Assessment,” June 20, 2017, at 4 (“Evidence Base”), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621205/Impact\\_Assessment\\_-\\_UWOs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621205/Impact_Assessment_-_UWOs.pdf). The UK conducts regular impact assessments. For a more recent assessment of UWOs, see, for example, UK Home Office, “Reforms to Unexplained Wealth Orders (Economic Crime Bill 2022),” March 12, 2022, at 3 (“Evidence Base”), <https://bills.parliament.uk/publications/45474/documents/1584>.
- 53 See, for example, Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry* at 101 (see para. 5.23), 106–7 (para. 5.29), 109 (para. 5.50), 110 (paras. 5.52, 5.53), 114 (para. 5.66, last bullet point).
- 54 This is the description of the Criminal Finances Act 2017 provided by the Home Office in the UK on the official Gov.UK website, Criminal Finances Act 2017, accessed April 6, 2020, <https://www.gov.uk/government/collections/criminal-finances-act-2017>.
- 55 The government carried out studies and actively engaged civil society. See, for example, UK Home Office, “Criminal Finances Bill—Unexplained Wealth Orders, Impact Assessment”; UK, National Crime Agency, *How We Work—How We Tackle Illicit Finances*, accessed July 6, 2020, <https://nationalcrimeagency.gov.uk/what-we-do/how-we-work/how-we-tackle-illicit-finances>.
- 56 UK Home Office, “Criminal Finances Bill—Unexplained Wealth Orders, Impact Assessment.”
- 57 See, for example, Transparency International UK, *Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market*, March 2017, at 1, Key Findings; see also Louise Story, “Inside the Towers of Secrecy,” *New York Times*, February 19, 2015, <https://www.nytimes.com/times-insider/2015/02/19/inside-the-towers-of-secrecy/> (similar for US).
- 58 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 11. By comparison, Mauritius did not express concerns related to *foreign* corrupt officials, as the UWO in Mauritius applies only to citizens of Mauritius.
- 59 See, for example, UK Home Office, “Criminal Finances Bill—Unexplained Wealth Orders, Impact Assessment.”
- 60 See Western Australia—Criminal Property Confiscation Act 2000 (WA); Northern Territory—Criminal Property Forfeiture Act 2002 (NT).
- 61 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, August 2009, at 111 (see paras. 5.56–5.57).
- 62 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry* at 108–11.
- 63 See Australia, Unexplained Wealth Legislation Amendment Act 2018, No. 126, 2018, An Act Relating to the National Cooperative Scheme on Unexplained Wealth, and for Related Purposes, <https://www.legislation.gov.au/Details/C2018A00126>.
- 64 Australia, Parliamentary Joint Committee on the Australian Crime Commission, at 108–11. In Ireland, see, for example, Booz Allen Hamilton report for U.S. Department of Justice at 3.2.2 Ireland/Background, 122–23 [hereinafter BAH Report].
- 65 See BAH Report at 123.
- 66 In Ireland, the violence helped facilitate the passage of the enhanced proceeds of crime legislation. See, for example, BAH Report at 122–23.
- 67 See, for example, G20, *Seoul Summit Document*, 2010, at para. 39, accessed April 23, 2020, <https://www.oecd.org/g20/summits/seoul/Seoul-Summit-Documents.pdf>; OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes*, <http://www.oecd.org/tax/transparency/>.
- 68 See, for example, FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (Paris: FATF, 2012–2019), [www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html), Rec. 24–25; UK, Federico Mor, *Registers of Beneficial Ownership* (House of Commons Library, Briefing Paper 8259, August 7, 2019).
- 69 International Consortium of Investigative Journalists, *Luxembourg Leaks; Panama Papers; Paradise Papers*.



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# 2 Development of UWO Frameworks

## *Variations among Countries and Main Elements of Their Design*

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As discussed in chapter 1, UWO systems aim to detect unexplained wealth and, at some stage, shift the burden to produce evidence to explain the discrepancy between legitimate sources of income and apparent wealth onto a given respondent. Apart from that, there is significant diversity in UWO systems. Section 2.1 of this chapter presents overviews of selected UWO systems—those of Australia, Kenya, Mauritius, and the UK, each of them unique. Section 2.2 then describes some alternative systems with similar elements—namely, Colombia, Ireland, Singapore, and Switzerland. Because these systems make use of presumptions and other features common to UWOs, their experience provides context. This chapter aims to present these variations and their key characteristics to allow for easy comparison.

After tracing the outlines of certain UWO systems, section 2.3 analyses in more depth the specific designs and elements of the UWO, concentrating on the choices made and their implications. The aspects examined include the scope of persons covered (all, only citizens, those with links to crime, PEPs, natural or legal persons or both), the temporal scope (time limits, retroactivity, and ex post facto issues), the property covered (value thresholds and the relationship of person, property, and crime), the territorial scope, and the elements and standards of proof.

### 2.1 UWO Systems by Country

This section examines the laws in several countries in their entirety to discern the features that have been chosen by various countries and their implications. Four systems are outlined in detail: (a) the UK, (b) Mauritius, (c) Kenya, and (d) Australia. The approach to unexplained wealth under UK law has been followed by other countries, such as Zimbabwe and Barbados, which enacted very similar provisions; similarly, Trinidad and Tobago enacted provisions resembling the approach under Australia's federal law.

#### 2.1.1 The UK UWO System

While this study has already mentioned some features of the UK UWO law, it is helpful at this juncture to have an overview of its origins, provisions, and legal consequences.<sup>1</sup> The UK law originated as part of the 2016 Action Plan to counter money laundering and terrorist financing risks. Under the 2017 Criminal Finances Act, the UWO was introduced as a civil power and an investigative tool issued by the High Court. Its signature feature is that, upon satisfaction of certain criteria, a burden of production of evidence is shifted to the holder of the assets, who must explain the source of the funds used to obtain those assets (among other information connected with the assets, as requested in the order).<sup>2</sup>

As noted in the following, some significant amendments to the law were made in 2022.

In the UK, “a UWO is an investigation tool under part 8 of the Proceeds of Crime Act [PoCA] intended to assist in building evidence. It is specifically designed to support the building of a case for civil recovery under part 5 of PoCA, but can also be used for other reasons both criminal and civil (provided there is a legal basis for using such information).”<sup>3</sup> As an investigative tool, it falls into the same category as production orders, search and seizure warrants, and account monitoring orders. “A UWO provides an enforcement authority with the ability to require an individual or company to provide specific documents or information in order to establish whether the asset(s) in question have been legitimately obtained. As such, it provides an alternative means of obtaining information and allowing for the consideration of action against persons and their property about whom little information is available.”<sup>4</sup>

When specific criteria are met, an application to the court can be made by an enforcement authority—such as the National Crime Agency (NCA), His Majesty’s Revenue and Customs (HMRC), the Financial Conduct Authority (FCA), the Director of the Serious Fraud Office (SFO), or the Director of Public Prosecutions (DPP).<sup>5</sup> First, the UK UWO law applies to two categories of respondents: (a) foreign politically exposed persons (PEPs) who are not from the UK or European Economic Area, EEA), or their family or close associate; and (b) persons for whom there are “reasonable grounds for suspecting that ... the respondent is, or has been, involved in serious crime” or that “a person connected with the respondent is, or has been, so involved.”<sup>6</sup>

In addition, it applies to “any property” if the court is satisfied that there is reasonable cause to believe that the respondent holds the property, that the value of the property is greater than £50,000 (US\$60,200), and that “there are reasonable grounds for suspecting that ... the known sources of the respondent’s lawfully obtained income would have been insufficient” for the respondent to obtain the property.<sup>7</sup> The requisite link to crime is

### **Box 2.1. UK: Definition of “Reasonable Cause to Believe”**

For criminal conviction, proof beyond a reasonable doubt is required. For civil confiscation, proof on a balance of probabilities is required. For the UWO, the High Court requires reasonable cause to believe that (a) the respondent holds the property, (b) the value of the property is greater than £50,000, and (c) there are reasonable grounds for suspecting that lawful sources of income are insufficient to account therefor.

“A test of ‘reasonable cause to believe’ is not the same as discharging a burden of proof, whether to the civil or criminal standard. But it does require objectively reasonable grounds for the stated belief.”<sup>a</sup>

“Reasonable grounds for believing a primary fact, such as that the person under investigation has benefited from his criminal conduct, or has committed a money laundering offence, do not involve proving that he has done such a thing, whether to the criminal or civil standard of proof.”<sup>b</sup>

“The test is concerned not with proof but the existence of grounds (reasons) for believing (thinking) something, and with the reasonableness of those grounds. Debate about the standard of proof required, such as was to some extent conducted in the courts below, is inappropriate because the test does not ask for the primary fact to be proved. It only asks for the Applicant to show that it is believed to exist, and that there are objectively reasonable grounds for that belief.”<sup>c</sup>

Thus, there must exist some objective basis for the suspicion based on facts, information or intelligence.

Note: EWCH = England and Wales High Court (Chancery Division).

a UK, Nat’l Crime Agency v. Baker & Ors [2020] EWHC (Admin) 822 [25] (Eng).

b UK, Nat’l Crime Agency v. Baker & Ors [2020] EWHC [25] (Eng) (quoting Assets Recovery Agency (ex parte) (Jamaica) [2015] UKPC 1 [19], [2015] 85 WIR 440).

c UK, Nat’l Crime Agency v. Baker & Ors [2020] EWHC [25] (Eng) (quoting Assets Recovery Agency (ex parte) (Jamaica) [2015] UKPC 1 [19], [2015] 85 WIR 440).

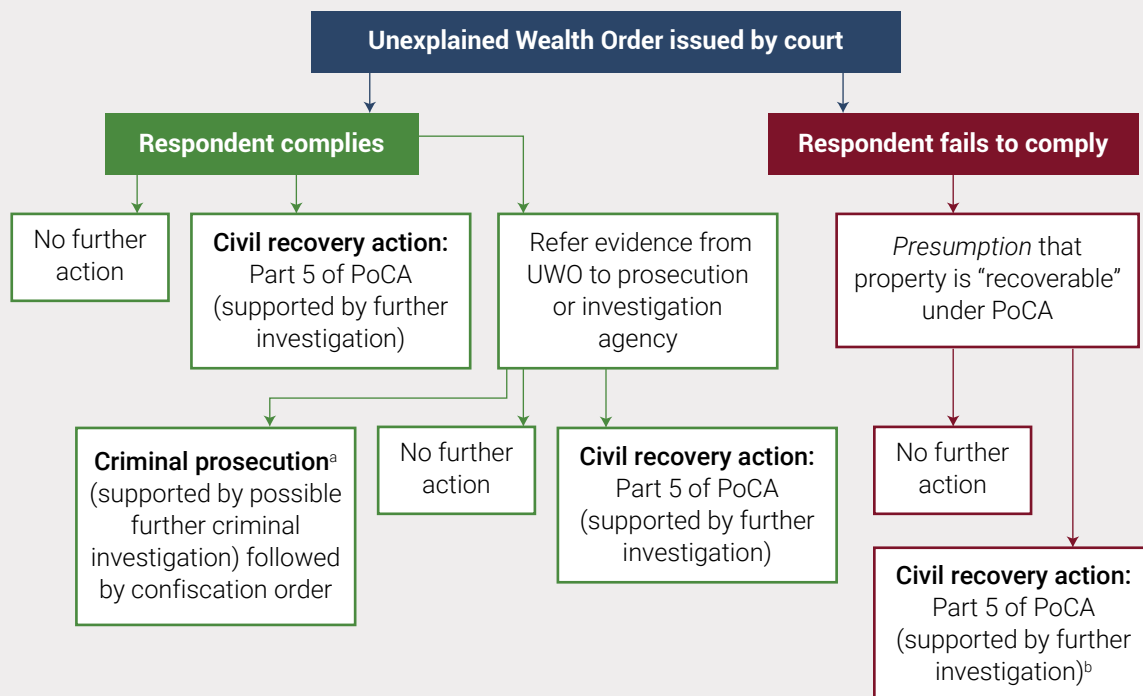
“reasonable grounds” to believe—weaker than for other orders, as box 2.1 illustrates with its definition of reasonable cause to believe under UK law.

In the UK generally, there is no specific time limit on when a UWO can be sought, as it is an investigative tool and not a basis for an order of confiscation.<sup>8</sup> In a case where the evidence produced by a UWO leads eventually to a civil confiscation order under the UK’s NCB confiscation law, the civil statute of limitations provides that proceedings must be brought within 20 years from the date on which the cause of action accrued, meaning when the unexplained wealth was acquired.<sup>9</sup>

Once issued, the UWO requires respondents to explain their lawful ownership of the property and the means by which it was obtained. In particular, respondents must provide a statement as to the nature and extent of their interest in the property, explain how they obtained the property, set out the details of the settlement if the property is held by trustees, and provide other information or documents regarding the property.<sup>10</sup> From the perspective of the authorities there are two notable advantages: (a) there is no need to prove that the respondent committed a crime or received proceeds; and (b) unlike a production order where the authorities need to specify categories of documents, such as bank statements or correspondence and specific time frames, the UWO requires the respondent to identify whatever categories, documents, and materials can explain the origin of the wealth.

If the respondent fails to comply with the requirements of a UWO—does not respond or responds inadequately—without any reasonable excuse, the property is presumed to be recoverable under any subsequent civil recovery action.<sup>11</sup> If civil recovery proceedings

**Figure 2.1. UK: Flowchart of UWO Procedures and Outcomes**



Source: Developed for this publication. Note: Under PoCA, section 304, “recoverable” property is defined as property obtained through unlawful conduct. PoCA = Proceeds of Crime Act; UK = United Kingdom; UWO = unexplained wealth order.

a See, however, UK, Proceeds of Crime Act 2002, as amended, sec. 362F, regarding restrictions on using statements obtained under UWOs in criminal proceedings.

b Respondent can provide evidence to rebut the presumption that their property is recoverable in the civil recovery proceedings.

are commenced, the respondent can provide evidence to rebut the presumption that their property is recoverable in those proceedings (figure 2.1).

Moreover, while the information revealed through the UWO can be used in a separate civil recovery process, under PoCA,<sup>12</sup> any statements made in the course of the UWO proceeding cannot be used against the respondent in a criminal proceeding.<sup>13</sup>

Finally, a respondent commits a separate offense when the statement that is provided is materially false or misleading, with a maximum penalty of two years' prison, or a fine, or both, depending on the case.<sup>14</sup>

Recently, the UK amended the UWO law to address perceived deficiencies that may have been disincentives to the use of the UWO tool.<sup>15</sup> First, the amendments extended the grounds for obtaining a UWO to include when a court is satisfied that there are reasonable grounds for suspecting that "the property has been obtained through unlawful conduct."<sup>16</sup> This provides an alternative ground to showing that known sources of the respondent's lawfully obtained income would have been insufficient for the respondent to obtain the property.

Second, where the property is held by a corporate entity, the law now provides that a UWO may also be sought against the "responsible officers" of that entity, such as directors, partners, and those acting as such, even if they don't "hold" the property.<sup>17</sup> The reforms are designed to facilitate seeking UWOs against property held in trust and other complex ownership structures such as opaque foundations.<sup>18</sup>

Third, the law extends the period for which properties may be frozen and certain other time periods pursuant to a UWO while enforcement authorities investigate the alleged sources of wealth.<sup>19</sup> This change removes some barriers to the use of UWOs by increasing the time available to law enforcement to review material provided in response to a UWO.<sup>20</sup>

Finally, the new legislation changes the cost rules to protect law enforcement from incurring substantial legal costs following an adverse ruling.<sup>21</sup>

### 2.1.2 The Mauritius UWO System

The form and operation of Mauritius's UWO law differ from the UWO of the UK. The basis for the Mauritius UWO law is the Good Governance and Integrity Reporting Act of 2015.<sup>22</sup> First, to implement the UWO system, the law established two new specialized agencies, the Integrity Reporting Services Agency (the Agency) and the Integrity Reporting Board. This creates a two-tier review process before a UWO can be applied for before the Judge in Chambers. Second, the law authorizes only confiscations from Mauritian citizens and of their property. Despite this limitation, the Agency can serve a statutory request for information on any person<sup>23</sup>—Mauritian or non-Mauritian—and the court can determine whether a non-Mauritian's property, which is either the source or partly the source of funds of a Mauritian's property, is "unexplained wealth."<sup>24</sup> Third, no link to crime is required.

The procedure generally starts with the Agency, which receives reports of suspected unexplained wealth from law enforcement, civil regulatory authorities, or "any other person."<sup>25</sup> Then the Agency carefully investigates the reports, seeking to corroborate the information. Next, the Agency may request that a person explain the source of any suspect funds used to acquire, possess, or control any property.<sup>26</sup> If no reply is received, the Agency is mandated to apply to a judge for a disclosure order and, if the order is not complied with, the property is automatically deemed to be unexplained wealth.<sup>27</sup> If a reply is received, after the Agency completes its inquiries, the Agency sends a report to the independent and impartial Integrity Reporting Board, which decides what action shall be taken and whether an application for a UWO shall be made to a judicial officer.

If the Agency applies for an unexplained wealth order to a judicial officer (the Judge in Chambers), it must specify reasonable grounds to suspect that a person has acquired

unexplained wealth. “Unexplained wealth” includes property that is disproportionate to a person’s emoluments and other income and that cannot be satisfactorily accounted for. All kinds of property are covered, but the unexplained wealth must be worth more than MUR 10 million (US\$227,800) (or MUR 2.5 million [US\$57,000] in the case of cash seizures during a criminal investigation) and have been acquired within the last seven years (see box 2.2). Under the Mauritian law, the burden is shifted—it rests on the respondent to show on a balance of probabilities that any property is not unexplained wealth.<sup>28</sup>

If the judicial officer concludes that the respondent has unexplained wealth, the judicial officer shall make a UWO or an order for the payment of its monetary equivalent. In addition, a person commits a separate offense when the disclosure that is provided is false, malicious, or vexatious and is liable on conviction to fines and imprisonment up to one year. This provision also applies to persons who falsely report that others have unexplained wealth.<sup>29</sup>

### 2.1.3 The Kenya “Unexplained Assets” System

The system in Kenya differs from those of Mauritius and the UK. Kenya’s “unexplained assets” law falls under its Anti-Corruption and Economic Crimes Act (ACECA) of 2003, which was affirmed by Kenya’s highest court in 2020.<sup>30</sup> Only the anti-corruption authorities in Kenya (currently the Ethics and Anti-Corruption Commission; EACC) have the power to investigate and initiate recovery proceedings on the basis of unexplained assets.<sup>31</sup> The EACC is composed of certain law enforcement and policy officers as well as lawyers.

The Kenyan law requires reasonable suspicion of corruption or economic crimes and shifts the burden of proof to the respondent. First the EACC must demonstrate that the respondent has assets whose value is disproportionate to his or her known legitimate sources of income for which no satisfactory explanation has been given. Once the EACC has discharged this obligation to the satisfaction of the court, the burden shifts to the respondent to satisfy the court that the assets were acquired other than as a result of corrupt conduct.

The procedure starts by the EACC observing a “disproportion” between a person’s assets and “his known legitimate sources of income” and “reasonably suspect[ing] [the person] of corruption or economic crime.”

#### Box 2.2. Mauritian Unexplained Wealth Order: Conditions and Standard

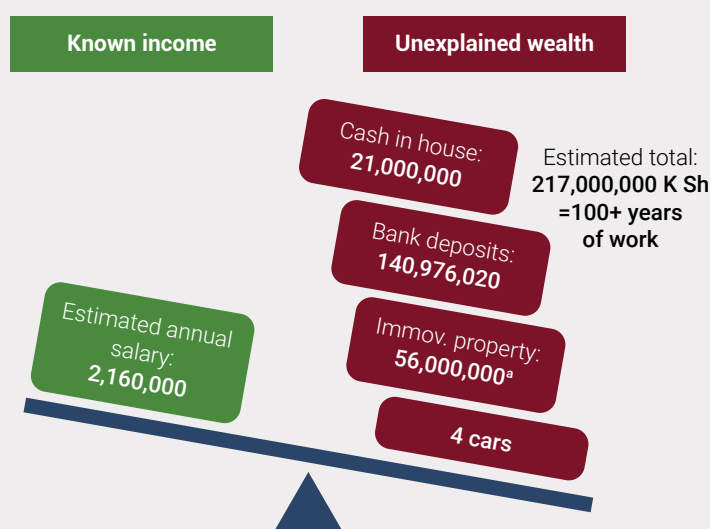
Elements—To meet conditions for an unexplained wealth order, the wealth or property must meet the following criteria:

- Disproportionate to emoluments and other income;
- Cannot be properly accounted for;
- Worth more than MUR 10 million (US\$227,800) or MUR 2.5 million in the case of cash seizures (US\$57,000); and
- Acquired within past seven years.

Standard of proof: Respondent to establish, on the balance of probabilities, that property is *not* unexplained wealth.

Source: Developed for this publication.

**Figure 2.2. Kenya: Anti-Corruption Commission v. Stanley Mombo Amuti (2020)**



Source: Developed for this publication. Note: Monetary amounts are in Kenyan shillings (K Sh).

<sup>a</sup> Estimations based on facts reported in 2011 decision; see cases for details on any amendments to figures.

Figure 2.1 illustrates how the first trigger (of showing unexplained assets possessed by a government official) was met in a recent landmark case in Kenya.<sup>32</sup>

The EACC must then issue a notice requiring the person to explain. The notice must contain (a) the time period of investigation when the person was suspected of corruption; (b) a list of the suspect properties and when they were acquired; and (c) the notice requiring an explanation of the manner in which the property was acquired. The person must “furnish, within a reasonable time specified in the notice, a written statement” about the “property specified” “stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance, or in some other manner, and what consideration, if any, was given for the property.”<sup>33</sup> If the person does not furnish a statement, the EACC may still proceed, as that is treated as not having satisfactorily explained.

If, after this investigation, and after affording the person “a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income,” the EACC is still not satisfied with the explanation and still holds the view that the person has unexplained assets, the EACC must apply to the court to seek forfeiture of the unexplained assets.<sup>34</sup>

At this stage, the EACC bears the burden of proof. EACC must adduce evidence that the respondent has unexplained assets, with respondent having the right to challenge the evidence and cross-examine witnesses. The standard is a balance of the probabilities. Once the court is satisfied that the EACC has met its burden, the burden shifts to the respondent to explain.

If at the conclusion of the civil confiscation proceeding, the court is not satisfied on a balance of probabilities that all the assets were acquired “otherwise than as the result of corrupt conduct,” it may order payment of that equivalent amount.

The statute prohibits the use of information obtained from the suspect in response to the notice in criminal proceedings, thus safeguarding against self-incrimination.<sup>35</sup> However, the record (outcome) of the civil proceeding is admissible in evidence in criminal proceedings.

#### **2.1.4 The Australia UWO System**

In 2010, Australia introduced a UWO into its 2002 proceeds of crime law with its Crimes Legislation Amendment (Serious and Organized Crime) Act 2010 (the Commonwealth Act), which has a requirement that in certain circumstances a burden is shifted to the respondent to show that the wealth does not come from certain offenses.<sup>36</sup> Australia’s UWO applies to the extent that a “person cannot satisfy the court [that the person’s wealth] is not derived or realised, directly or indirectly, from certain offences,”<sup>37</sup> hence indirectly linking the wealth to proceeds of crime in all cases. Trinidad and Tobago has adopted a law very similar to that of Australia. While Australia has a federal system and some UWO systems are applicable in different states, this discussion focuses on the national system.<sup>38</sup>

The Australian law can be applied against any person, regardless of political status, and the responsibility to initiate proceedings is vested in the Commissioner of the Australian Federal Police and the Commonwealth Director of Public Prosecutions, or their delegates. There are three stages of the UWO order: restraint, preliminary, and final. The procedure often begins with an application for an “unexplained wealth restraining order,” to preserve the property. To obtain an unexplained wealth restraining order the court must be satisfied that there are reasonable grounds to suspect that the person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired, and either that the person has committed certain offenses or that any part of their wealth has been derived from certain offenses. The judge can decline the application for a UWO restraining order if they are satisfied that there are no reasonable grounds to suspect that the

person's unexplained wealth exceeds \$A 100,000 (US\$67,600) or decides it is not in the public interest.<sup>39</sup> Once the threshold is met by the authorities at the restraint stage, the proceeds-of-crime authority is not required to prove that the suspect has committed an offense or that any part of the suspect's wealth has been derived from certain offenses in order to obtain a preliminary UWO.

The next step is the preliminary UWO (although as a practical matter it often occurs simultaneously with the restraint UWO). The authorities applying to a court must satisfy the court that an "authorised officer" has "reasonable grounds to suspect that a person's \*total wealth exceeds [that which] was \*lawfully acquired."<sup>40</sup> The preliminary UWO compels a person into court for a hearing where the court will decide if a UWO will be issued. Once the prosecution shows reasonable grounds to suspect that the respondent's total wealth exceeds their lawfully acquired wealth, the burden shifts to the respondent to produce evidence to convince the court that the unexplained wealth does not stem from certain offenses. If the court "is *not* satisfied that the whole or any part of the person's \*wealth" does not stem from certain offenses, the court will reach the final stage and will issue the UWO.<sup>41</sup>

With respect to the final order, the judge can exercise discretion to decline the order if the value is below \$A 100,000 (US\$67,600) or if they decide a UWO is not in the public interest.<sup>42</sup> If the UWO is issued, it will require payment of the unexplained wealth or its equivalent value.

## 2.2 Alternatives to UWO Systems

There are relatively few jurisdictions that have a UWO or very similar system. That said, the boundary between these systems and others can be very fine in some cases (for example illicit enrichment laws that are civil in nature). Some other systems have features that are similar to UWO laws. In addition to Ireland, the three examples of Singapore, Switzerland, and Colombia will be highlighted here to illustrate the wide range of laws in different countries and their hybrid nature.

### 2.2.1 Enhanced Proceeds of Crime Law—Ireland

Ireland's Proceeds of Crime Act of 1996<sup>43</sup> is a non-conviction-based recovery system with similarities and some functional equivalence to UWO systems in that the burden of production shifts to the person possessing the wealth. One difference is that to obtain confiscation, prosecutors must show that the property is derived from a criminal activity. In addition, the court has to be satisfied that there are reasonable grounds to believe that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime.

Thus, Ireland's confiscation system does not require a criminal conviction beyond reasonable doubt, but it does still require proof that assets are proceeds of crime. As a result, it differs from UWOs, which aim to identify and confiscate assets for which the defendant does not show evidence of their legitimate origin.

The similarity with unexplained wealth systems results from shifting the burden of producing evidence to the defendant: once a *prima facie* case provides reasonable grounds to believe or suspect the illicit origin of property, the court may impose a requirement on the respondent to file a sworn statement explaining the sources of income up to the last 10 years that account for possession or control of the property.<sup>44</sup> The sworn statement is not admissible against the respondent in criminal proceedings (except perjury). But failure to respond or to provide convincing evidence that explains the legitimate possession of property, together with other circumstantial evidence, will help prosecutors justify and obtain NCB confiscation. This Irish system was regarded as ground-breaking at the time it was enacted around 1996, attracting visitors from

Australia and European and African countries, among others, to study how it operated. Ireland created a special law enforcement task force, the Criminal Assets Bureau (CAB), to oversee the recovery of proceeds of crime and unpaid taxes. The process for confiscation generally starts with the CAB requesting the court to temporarily freeze the property based on the belief that it is proceeds of crime and that its value exceeds €5,000 (US\$5,300).

## 2.2.2 Additional Alternatives to UWOs—Singapore, Switzerland, and Colombia

These three systems are much farther afield but analogous as they target the same problem of unexplained wealth.

### Box 2.3. Text of Singapore Law

11. The CDS Act is amended by inserting, immediately after section 47, the following section:

Possessing or using property reasonably suspected to be benefits from drug dealing, etc.

47AA.—(1) Any person who possesses or uses any property that may be reasonably suspected of being, or of in whole or in part, directly or indirectly, representing, any benefits of drug dealing or benefits from criminal conduct shall, if the person fails to account satisfactorily how the person came by the property, be guilty of an offence.

(2) Any person who commits an offence under subsection (1) shall be liable on conviction—

(a) if the person is an individual, to a fine not exceeding \$150,000 [US\$111,400] or to imprisonment for a term not exceeding 3 years or to both; or

(b) if the person is not an individual, to a fine not exceeding \$300,000 [US\$222,700].

Source: Republic of Singapore, *Government Gazette*, Serious Crimes and Counter-Terrorism (Miscellaneous Amendments) Act 2018, No. 51 of 2018, accessed February 20, 2020, <https://sso.agc.gov.sg/Acts-Supp/51-2018/Published/20181231?DocDate=20181231>.

### Singapore

In 2018, Singapore enacted a variation on a criminal UWO.<sup>45</sup> It contains elements of an illicit enrichment offense, a proceeds-of-crime measure, and an unexplained wealth order. Singapore's Section 47AA<sup>46</sup> creates a *criminal offense* when a person cannot satisfactorily explain the origin of certain "property." Unlike illicit enrichment offenses based on the UNCAC, its personal scope covers not just public officials but "any person," including legal entities. Like some UWO systems, the Singapore approach obliges a respondent to explain the possession of assets, when certain preliminary conditions are fulfilled. The main requirement is that the authorities must show that the property is "reasonably suspected" of resulting (wholly or partly and directly or indirectly) from "drug dealing or other serious offences" (including corruption), committed in Singapore or abroad. There is no minimum threshold for the value of the property. "It bears noting as well that the test of a 'reasonable suspicion' is significantly lower than the civil standard of burden of proof on a balance of probabilities."<sup>47</sup> The legal consequences are fines of over US\$100,000 and imprisonment of up to three years.<sup>48</sup> Box 2.3 contains the text of this law.

### Switzerland

In reaction to the discovery of several hundred million US dollars in Swiss banks from Ferdinand Marcos (removed from power in the Philippines in 1986) and millions from leaders of other countries during the Arab unrest of 2011, Switzerland recognized the need to adopt a more proactive approach to the "illicitly acquired assets of foreign politically exposed persons."<sup>49</sup> Thus, over the years, it developed an asset recovery and asset return practice, which was partially codified in the Foreign Illicit Assets Act (FIAA) of December 18, 2015.<sup>50</sup> The personal scope of the FIAA applies to "foreign politically exposed persons" and "close associates."<sup>51</sup> The aim is "to address situations where foreign leaders have, in all probability, enriched themselves by misappropriating assets through corrup[tion] or by other felonies and by transferring them to other countries."<sup>52</sup>

The Swiss Act provides for three functions: (1) freezing assets to support future cooperation within the framework

of mutual legal assistance proceedings, (2) confiscation in the event that mutual legal assistance efforts fail, and (3) restitution of assets confiscated through application of the FIAA. In the event that mutual legal assistance proceedings do not succeed, the confiscation function in section 4 of the act is similar to UWO systems, in that it does not require a criminal conviction and it applies a “presumption of the illicit origin” of the assets under certain conditions, which places the onus onto the foreign PEP or his or her associates.<sup>53</sup> According to article 15,

(1) There shall be a presumption that assets are of illicit origin where the following conditions are fulfilled:

- a. the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person;
- b. the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office.

(2) An increase shall be considered inordinate where there is a significant disproportion, inconsistent with ordinary experience and the prevailing circumstances in the country, between the income legitimately earned by the person with the power of disposal over the assets and the growth in that person’s wealth.

(3) This presumption shall be reversed where it has been demonstrated with overwhelming probability that the assets in question were acquired legitimately.<sup>54</sup>

If this presumption is *not* overcome, and if it is combined with two other conditions—namely, that the assets “are subject to the power of disposal of a foreign [PEP] or a close associate of that individual, or of which those individuals are the beneficial owners” and “have been frozen by order of the Federal Council in anticipation of their confiscation”—then the legal consequence is that the “Federal Administrative Court shall order the confiscation of assets.”<sup>55</sup>

## Colombia

As in Switzerland, Colombia’s confiscation legislation shows that civil law countries can establish asset recovery systems that are at least partly based on concepts that are also used in UWOs—namely, shifting the burden of proof on defendants once a *prima facie* case of unjustified assets is established and allowing confiscation in the absence of a criminal conviction. Several other countries in Latin America have enacted similar legislation.

Colombia’s asset recovery system—referred to as “*extinción de dominio*”—is a non-conviction-based procedure. In 2002, legislators enacted Law 793 of 2002,<sup>56</sup> which created an action in rem where the state could apply to a court for asset forfeiture independently of a criminal process. This law was adopted largely in response to challenges confronted under its earlier laws under which the seizure and forfeiture of assets were not entirely independent of criminal prosecutions.<sup>57</sup> Notably, in this law, one of the grounds for such an action was an “unjustified increase in wealth, at any time, for which no legal origin is provided.”<sup>58</sup> Considering the reversal of the burden of proof to explain this unjustified increase in wealth, studies have sometimes referred to Colombia’s approach to asset recovery as an unexplained wealth order system,<sup>59</sup> although in reality it is quite different from the UWOs that are the main topic of this study.

In 2014, Law 793 of 2002 was repealed and replaced with Law 1708 of 2014.<sup>60</sup> Among other changes, it established specialized courts and prosecutors and increased the number of grounds for forfeiture. Notably, a change was made to the “unjustified increase in patrimony” ground for forfeiture: it referred to assets that “are part of an

unjustified increase in assets, when there are elements of knowledge that allow us to reasonably consider that they come from illicit activities.” In this way, an unexplained increase in wealth by itself is no longer sufficient, as authorities now also need to show, albeit at a low evidentiary standard, some link between the assets and illicit activity.

**Box 2.4. UK Case: Link to “Serious Crime”: *Nat’l Crime Agency v. Hussain & Ors* [2020] EWHC (Admin) 432 (Eng.)**

**Facts:** The National Crime Agency (NCA) alleged “reasonable suspicion”<sup>a</sup> that a respondent was a “professional enabler”<sup>b</sup> and “serial money launderer”<sup>c</sup> for a number of individuals involved in organized crime, and provided evidence that he repeatedly supplied funds and a residence to gang members, funded their monetary confiscation orders, and often accompanied them to their criminal trials. Some of the properties at issue in the unexplained wealth order (UWO) were used as gang members’ addresses.

**Ruling:** The court found that the respondent was reasonably suspected of involvement in serious crime and granted the UWOs.

a Nat’l Crime Agency v. Hussain & Ors [2020] EWHC (Admin) 432 [10] (Eng.).

b *Id.* [102].

c *Id.* [102].

The current Colombian system proceeds in two main steps. First, there is a pretrial investigation phase during which the prosecutor’s office identifies and traces assets and seeks evidence sufficient to establish one of the grounds for forfeiture. It then decides to file either a resolution (essentially ending the process, involving an official notification by the judge that the property will continue to belong to the person; however, the file can be reopened if new information surfaces) or a domain forfeiture claim.<sup>61</sup> Second, there is a trial phase where a “dynamic burden of proof” applies, which places the burden on the party that is best suited to prove a given element. In this process, the prosecutor’s office must establish that one of the grounds for forfeiture is met and that the respondent is not a bona fide third person. The respondent must prove that these two points are false, essentially showing the lawful origins of the property.<sup>62</sup>

## 2.3 Main Elements of Existing UWO Systems

Our focus now shifts back to UWO systems. Moving from the national systems to the different elements of the scope of the UWO systems—personal, temporal, property, and territorial—allows for informative comparisons, as do the procedures and standards of proof. Each is addressed in turn, all with the objective of elucidating design options and evaluating common practices, to be highlighted in chapter 4.

### 2.3.1 Persons Covered

#### **Link to crime**

While the motivation for UWO systems is to target ill-gotten gains, not all UWO systems require a link to crime. The Mauritius law does not require any criminal link and the UK law does not require one in the case of foreign PEPs.

When systems add specifications requiring a link with suspected criminal activity, it is usually a link that is either indirect or with a lower evidentiary standard or both. The UK system has two prongs, one for PEPs and another for non-PEPs. The non-PEP prong of the UWO law specifies persons who are “suspected” on “reasonable grounds” of involvement in “serious” crime (thus a lower threshold than the civil burden of proof “on

**Box 2.5. Kenya Case: Link to Corruption or Economic Crime: *Kenya Anti-Corruption Comm’n v. Amuti* [2017] e.K.L.R. (H.C.K.), Formerly High Court Civil Suit No. 448 of 2008 (O.S.).**

**Facts:** It was noted that a respondent had various high-value assets, disproportionate to his salary, which was his only declared source of income during the period. These included funds that were found to be received from the contractors and suppliers of the public agency at which respondent was employed, and thus suspected to be bribes.

**Ruling:** As a civil recovery proceeding, the unexplained wealth order (UWO) could proceed on the basis of conduct in relation to property without identification of any particular unlawful conduct.

the balance of probabilities”). Similarly, Kenya requires that the authorities “suspect” the respondent of “corruption or economic crime.” See boxes 2.4 and 2.5.

The UK’s other prong targets foreign (meaning non-UK, non-European Economic Area, EEA) PEPs. Importantly, in this case, there is no requirement for reasonable grounds to suspect a link with crime. All that matters is status—that the person is a foreign PEP with unexplained wealth. Box 2.6 illustrates a court ruling in a case where foreign PEP status was contested.

The UK law was drafted this way because a considerable barrier to asset recovery in the UK was reported to be the difficulties in obtaining information and evidence in cross-border cases of non-EU foreign public officials, due to the lack of full cooperation of other jurisdictions. The emphasis was placed on foreign PEPs because UK legislators considered that, in the case of PEPs in the UK or in other EEA countries, this barrier did not exist; that is, the existing exchange of information and MLA agreements and practice between EU and EEA countries provide a sufficiently robust system for gathering information and evidence.<sup>63</sup>

In Mauritius, by comparison, the personal scope of the UWO system is in some ways broader and in some ways more limited than the others. It is broader in that, based on its wording, there is technically no required link to crime and narrower in that it applies only to Mauritian citizens. On the basis of its underlying purpose, though, the Mauritius act is intended to apply to property “suspected of being the fruits of crime.”<sup>64</sup> The primary target respondents are people whose wealth was acquired illicitly and not people who acquired their property legitimately but merely did not keep good records. The conditions include (a) the “disproportionate” nature of the property as compared to income and (b) that it cannot be “satisfactorily accounted for,” without requiring a suspected link with certain crimes.<sup>65</sup>

**Required link between person and crimes—which crimes?** When the law requires a link between a person and crimes, the question arises as to which crimes and does it cover only crimes serious enough to warrant a certain severity of punishment. In exploring these nuances, the UK refers to “serious crimes,” whereas Australia refers, more broadly, to “offences.” To define the crimes covered, they refer—either explicitly (in the UK) or implicitly (in Australia and Ireland)—to other acts, such as the Serious Crime Act 2007 in the UK or the Crimes Act 1914 in Australia, or to the body of case law. All the UWO-type systems appear to cover a broad range of offenses, rather than setting a threshold for the severity of the crimes covered—except that, in Australia, a “foreign indictable offence” is subject to a threshold—namely, that the offense would be punishable by 12 months imprisonment or more.

**What about foreign offenses?** UWO systems typically cover foreign offenses. Intersecting with the territorial scope, if the alleged criminal activity was carried out abroad (for example, corruption in a foreign country), the UWO would apply only if the behavior would constitute a crime in both the UWO-issuing state and in the foreign state (known as *dual criminality*) and if the crimes are of a certain kind (as with Kenya’s corruption or economic crime requirement).

### **Box 2.6. UK Case: Defining a Politically Exposed Person in the Context of an Unexplained Wealth Order: *Hajiyeva v. Nat’l Crime Agency* [2020] EWCA (Civ) 108 (Eng.)**

**Facts:** Respondent’s husband served as chairman of the board of the International Bank of Azerbaijan, an institution in which the Ministry of Finance was a majority shareholder. Respondent argued that the husband was not a politically exposed person (PEP) because (a) the state’s shareholding in the bank was not sufficient to prove the bank was a state-owned enterprise, and (b) he had not been entrusted with “prominent public functions.”<sup>a</sup>

**Ruling:** The court ruled that (a) state ownership of a majority of shares of the bank and control over the bank made it a state-owned enterprise, noting that the standard was broad, and (b) because the husband was a member of the management body of the bank, he had been entrusted with prominent functions. The court concluded that the husband was a PEP and by extension the respondent was as well.

a *Hajiyeva v. Nat’l Crime Agency* [2020] EWCA (Civ) 108 [20] (Eng.).

For example, the UK and Australia cover property if suspected of deriving from a foreign offense, provided that the conduct is criminalized both in the UWO-issuing state and in the foreign state. Box 2.7 illustrates some variations.

### ***Which persons—citizens or all?***

Countries may choose to cover all persons or only their own citizens. Most countries with UWOs cover all persons. Among the countries studied, only Mauritius limits the personal scope based on citizenship. While it permits seeking information from non-Mauritians, UWO confiscation applies only to Mauritius citizens. This raised both questions and concerns. For example, the Integrity Reporting Board considered a case of dual nationality, a person who was both Mauritian and French, and decided that the act should apply, as the additional French citizenship does not change the fact that the person is indeed a Mauritian citizen.<sup>66</sup>

Another question may arise in the case of married couples, one of whom is a citizen and one of whom is not. As some parliamentarians asked: could the couple hold all

## **Box 2.7. Requirements for a Link with Crime—UK, Australia, and Kenya**

### ***UK***

The Unexplained Wealth Order (UWO) provisions cover “serious crime.” For this definition, the UK refers to another UK act, the Serious Crime Act 2007,<sup>a</sup> which covers numerous offenses, such as drug trafficking, money laundering, fraud, offenses in relation to public revenue (that is, certain tax crimes), bribery, and organized crime.<sup>b</sup> It also covers serious crimes committed outside of the UK and in that case requires dual criminality.<sup>c</sup>

### ***Australia***

In Australia, the UWO applies where the court is not satisfied that all or part of the unexplained wealth does not stem from certain “offences,” covering four to five categories (sec. 179E(1)(b)). Most important, dual criminality is also required: (1) “an offence against a law of the Commonwealth” (unlike the UK, the act itself does not explicitly refer to another Australian act where this is defined, but this same term—“an offence against a law of the Commonwealth” or “offences against laws of the Commonwealth”—is found in, for example, the Criminal Code Act 1995<sup>d</sup> and the Crimes Act 1914, and includes theft, fraud, and tax evasion, among numerous others);<sup>e</sup> and (2) “foreign indictable offence,”<sup>f</sup> defined in the act as “conduct that constituted an offence against a law of a foreign country” and “if the conduct had occurred in Australia would have constituted an offence punishable by at least 12 months’ imprisonment.”

### ***Kenya***

The respondent must be “reasonably suspect[ed] of corruption or economic crime” by the anti-corruption authority (the Ethics and Anti-Corruption Commission), which must have observed a “disproportion” between a person’s assets and his “known legitimate sources of income.”<sup>g</sup>

a UK, Proceeds of Crime Act 2002, as amended, sec. 362B(9)(a).

b UK, Serious Crime Act 2007, accessed February 23, 2020, <http://www.legislation.gov.uk/ukpga/2007/27/contents>.

c See, for example, UK, Serious Crime Act 2007, sec. 2(5) and sec. 2(7).

d Australia, Criminal Code Act 1995, Compilation No. 98 (includes amendments up to Act No. 60, 2015), accessed April 9, 2020, <https://www.legislation.gov.au/Details/C2015C00254>.

e Australia, Crimes Act 1914, Compilation No. 118 (includes amendments up to Act No. 93, 2017), sec. 15GE(2), accessed April 9, 2020, <https://www.legislation.gov.au/Details/C2017C00297>.

f Australia, Proceeds of Crime Act 2002, as amended, sec. 337A.

g Kenya, ACECA, secs. 2, 26, 55.

property under the name of the noncitizen spouse and escape the law this way? If the couple is eligible to purchase property under the Non-Citizens (Property Restriction) Act, does this exclude that property from UWOs?<sup>67</sup> This would deviate not only from the aim of UWOs, but also from other anti-crime measures in Mauritius, such as its Asset Recovery Act, Dangerous Drugs Act, Financial Intelligence and Anti-Money Laundering Act, or Prevention of Corruption Act, none of which differentiate between citizens and noncitizens, and from the way related international obligations are drafted, such as in the UNCAC.<sup>68</sup>

**Whether legal persons are covered.** Another aspect of the personal scope of UWO systems is whether the system covers both natural persons and legal persons. In the UK, for example, the notion of “persons” expressly includes “any body corporate, whether incorporated or formed under the law of a part of the United Kingdom or in a country or territory outside the United Kingdom.”<sup>69</sup> This is necessary, even if complicated to apply. If legal persons were not included, a large loophole would constrain the UWO law. Moreover, it is helpful where investigators encounter difficulties in linking the property directly with the suspected beneficial owner, who is the natural person actually suspected of involvement with crime. In this case, the “respondents” can also be other “persons”—including legal entities, such as the shell companies or foundations, presumably set up by the suspected beneficial owner—that “hold” the property and that are, for example, “connected” with the beneficial owner. See section 2.3.3 (on the “holding” requirement). The meaning of “connected” may go beyond close family members and associates to also include relationships via trust settlements and partnerships.<sup>70</sup> However, there are limits, and mere familial ties will not suffice if other evidence indicates the contrary. Box 2.8 demonstrates a scenario where the respondent’s family members successfully demonstrated that the assets were not “held” by the respondent but rather by them on their own.

Merely ensuring that legal persons are included as subjects of UWOs has not been sufficient to permit use of the UWO tool against them in some cases. Admittedly, when pursuing a UWO against a legal entity, such as a private foundation registered in Panama,<sup>71</sup> challenges can arise with respect to the “holding” and “income” requirements.<sup>72</sup> Meeting the “income” requirement means showing that the legal person’s income was insufficient to acquire the property held by that legal entity. Aspects of the *Baker* case highlighted in box 2.9 illustrate the point that this may be very difficult, unless a UWO law were to be drafted to anticipate the obstacles.

Recently the UK addressed this problem of the difficulty of demonstrating income when the respondent holds the property as a trustee or something similar. The 2022 amendments to the Proceeds of Crime Act are designed to help in this respect in two ways: (a) by adding an alternative prong so that, rather than being required to show that the property could not have been obtained with respondent’s lawful income, the authorities are permitted to instead show that “the property [was] obtained through unlawful conduct”;<sup>73</sup> and (2) by

**Box 2.8. UK Case: Main Respondent Was Not Beneficial Owner and Other Family Members “Held” Property in Their Own Rights: *Nat’l Crime Agency v. Baker & Ors* [2020] EWHC (Admin) 822 (Eng.)**

**Facts:** The National Crime Agency (NCA) obtained unexplained wealth orders (UWOs) against several properties allegedly held through complex corporate arrangements by RA, a former official of Kazakhstan who had been convicted of crimes and had died several years prior. The wife and son of RA contended that they were the rightful beneficial owners of some of the properties because (a) they had been legally separate from RA for many years; (b) RA’s ill-gotten gains had been confiscated many years before; (c) the wife and son had legitimate wealth of their own with which they had acquired the subject properties; and (d) they were legitimately using corporate financial vehicles, which although complicated were legal.

**Ruling:** The court dismissed the UWOs, agreeing with all of those points made by the respondents and granting them large sums to reimburse their legal fees. The court also opined that the mere use of complex offshore structures did not constitute grounds to imply wrongful purposes.

**Box 2.9. UK Case: Challenges with Respect to Showing Income Insufficient in the Case of Legal Entities Held by Trustees: *Nat'l Crime Agency v. Baker & Ors* [2020] EWHC (Admin) 822 (Eng.)**

The *Baker* case involved various legal entities and transactions across different jurisdictions (for example, Panama, British Virgin Islands). The UK National Crime Agency (NCA) attempted to target both the legal entities (for example, Manrick Private Foundation, a private foundation in Curaçao, and Villa Magna Foundation, a private foundation in Panama), and the president of some of those entities, Mr. Baker, with the aim of uncovering the ultimate beneficial owners of various properties (held via these dispersed legal entities) and how the funds were obtained to acquire these properties. It was suspected that the properties were acquired to launder the illegally obtained funds of the late Mr. Rakhat Aliyev, a Kazakhstani national, who had been convicted of crimes.<sup>a</sup> One main contention by the NCA was that neither Mr. Baker himself, as president of some of the entities, nor the entity itself (for example, Villa Magna) had sufficient known, lawfully obtained income to acquire the properties, so the income must have come from elsewhere (presumably, unlawful sources).

One issue was the holding requirement: this element could not be established in a satisfactory way because, although Mr. Baker was president of certain entities, this position did not necessarily provide him with any “legal or beneficial interest in the property,” nor had he been involved with its purchase.<sup>b</sup>

Another issue was the income requirement: by extension, because he did not “hold” the property, it follows that the income requirement also cannot be met with respect to Mr. Baker.<sup>c</sup>

The “income” requirement was also a challenge with respect to UWOs issued to the legal entities. For example, a legal entity (such as Manrick in Curaçao) could obtain a legal interest in the property, but could not be the ultimate beneficial owner. Because of the link between the holding requirement and the income requirement, it seemed, according to the court, this meant that, when applying the “income requirement” to “trustees etc.,” the NCA could look only at the extent of the legal ownership (without assuming the entity had full legal and beneficial interests in the property) and “ask whether the known sources of lawfully obtained income would have been insufficient for the purpose of enabling it to obtain the *legal interest* in the property” (emphasis added).<sup>d</sup>

a Nat'l Crime Agency v. Baker & Ors [2020] EWHC (Admin) 822 [67] (Eng.).

b Nat'l Crime Agency v. Baker & Ors, Court of Appeal (Civil), Carr, J., June 17, 2020 (Ground 2).

c *Id.*

d *Baker & Ors* [2020] EWHC [207].

permitting authorities to issue UWOs to either the respondent or, if the respondent is a legal entity, to “a person who is a responsible officer of the respondent” regardless in that case whether the officer “holds” the property in question.<sup>74</sup>

### 2.3.2 Temporal Scope

As regards the temporal scope of UWO systems, most often it is unlimited, in that the law applies to property acquired at any time before or after enactment of the UWO law. For example, in Australia, there is no temporal limit as to when the assets were acquired, as the definitions cover property owned, effectively controlled, or disposed of at any time.<sup>75</sup>

Temporal limits also depend on the type of UWO. If the UWO is an investigative power only, essentially a procedural tool, it would not contain its own limitation, but rather the limitation period, if any, would be determined by the substantive law that could form the basis for an order. For example, in the United Kingdom there is no specific time limit on when a UWO can be sought, as it is an investigative tool and not a basis for an order of confiscation.<sup>76</sup> In a case where the evidence produced by a UWO leads eventually to a civil confiscation order under the UK's NCB confiscation law, the civil statute of limitation provides that proceedings must be brought within 20 years from the date on which the

cause of action accrued,<sup>77</sup> meaning when the unexplained wealth was acquired.

Some countries with UWOs that are both investigative tools and bases for an order of confiscation have specific time limits on how far back the authorities can reach. For example, Mauritius has a seven-year limit. In its original form, the law excluded property acquired seven years before the law was enacted or seven years before a request for information. One reason for choosing this time period is that banks in Mauritius are required to keep certain records for a minimum of seven years.<sup>78</sup> The idea is that, after a period of seven years, it may become more difficult for the respondent to gather the information necessary to explain the property since it may no longer be able to request records from its bank.

Recently, the Mauritius law was amended, after the Integrity Reporting Board had indicated concern that the second time limit, running from the time a request for information was filed, was “capable of unsatisfactory consequences”: “As the seven-year period runs from the date of the application for a UWO, the owner of property may be able, by dragging his feet in responding to a statutory request under section 5, to place property outside the time limit for making the application.”<sup>79</sup> The 2017 annual report of the board indicated that the seven-year limit had blocked investigations; of approximately 35 cases involving suspected unexplained wealth,<sup>80</sup> action could not be taken in 8 cases on this ground.<sup>81</sup> Therefore, recently the legislation was amended to provide that if the agency serves a statutory request (the first step in the process) within seven years of a property’s acquisition, the clock stops ticking, and the UWO can be sought without a time limit.<sup>82</sup>

In Kenya, there is some limitation; however, it is not a fixed number of years, but rather is tied to when the alleged criminal conduct took place: that is, when the person is reasonably suspected of corruption or economic crime. The authority to seek UWOs is vested in the anti-corruption authority (currently the EACC) and the “unexplained assets” must have been acquired as the result of the suspected corruption or economic crime. The temporal limit is defined as “unexplained assets” acquired “at or around the time the person was reasonably suspected of corruption or economic crime” whose value is “disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.”<sup>83</sup> Thus, if the alleged corruption reaches back quite far, the respondent is obligated to explain the origin of the assets during that specified time period. A case example is in box 2.10.

In Mauritius, the board extended the limit: “In some of these cases the property in question had been acquired within the seven-year time limit but the source of the funds used to acquire this property could be traced back beyond the seven-year time limit.”<sup>84</sup> Coupling both limits could unduly restrict the application of the law in practice, as it can be assumed in some cases that property is purchased with funds that have accumulated over many years (especially considering the act applies, in general, to properties worth MUR 10 million [US\$227,800] or more).

### **Box 2.10. Kenya: Temporal Scope for “Unexplained Assets”**

The law applies to “unexplained assets” acquired “at or around the time the person was reasonably suspected of corruption or economic crime” whose value is “disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.”

In *Amuti v. Kenya Anti-Corruption Comm’n* (2019) e.K.L.R. [64] (C.A.K.), Civil Appeal No. 184 of 2018, the court required the anti-corruption authority to identify a “set time period for the investigation of a person,” for which the respondent is obliged to explain the assets acquired. In this case, for example, the respondent was initially required to explain his wealth for a 16-year period (from 1992 to 2008), which was subsequently narrowed to a 10-month period (September 2007 to June 2008) for the court proceedings, after the respondent’s explanations were deemed unsatisfactory by the anti-corruption authority for that period in particular.

In another case, the court specified that the notice must state the time period of the investigation. See *Murungaru v. Kenya Anti-Corruption Comm’n et al.* (2006) e.K.L.R. (H.C.K.), Miscellaneous Civil Application No. 54 of 2006.

### 2.3.3 Property Aspects (Value Threshold, Relationship of Person/Property/Crime)

#### **Material scope**

As regards the material scope of UWO systems, it is relevant to consider (a) the notion of “property” or assets covered, (b) thresholds for the value of the property, (c) the notion of “holding” the property, and (d) the scope of the underlying crimes covered (for (d), see Box 2.7 above).

#### **Notion of “property” or assets covered**

All systems seem to adhere to an all-encompassing notion of property. That is, the UWO system covers all kinds of assets, of every description, movable or immovable, tangible or intangible. This is welcome, as otherwise whatever asset the law did not apply to would create a potential loophole: criminals will adapt and invest in whichever assets are not covered.

While all property is covered, unexplained wealth is defined differently in different countries, as table 2.1 illustrates.

#### **Whether a threshold value is required**

One way in which the systems differ is the threshold for the value of property that should be met before the UWO can apply. As examples, the thresholds are, in Mauritius, MUR 10 million, in general (US\$227,800), or MUR 2.5 million (US\$57,000) in cases where cash is seized during a criminal investigation; in Australia, an optional threshold of \$A 100,000 (US\$67,600) of unexplained wealth (optional because the court has the discretion to decline to issue an order when the amount of unexplained wealth falls below this threshold<sup>85</sup>); in the UK, £50,000 (US\$60,200); Kenya has no threshold. Table 2.2 summarizes the thresholds.

In most cases, the threshold applies to the value of the property targeted, but in Australia the threshold applies to the amount that appears to represent unexplained wealth—that is, the value of property the person holds *minus* any known lawfully obtained wealth.

#### **Relationship between the person or respondent and the property—“holding”**

In addition to a broad definition of the property or assets to which these systems apply, there is a broad understanding of how that property is held by the respondent (the holding requirement). What matters is control as well as ownership, as illustrated by box 2.11.

Moreover, the systems in Australia and Kenya even cover property that has been sold, consumed, or gifted (box 2.12), thus also covering asset flows that are capable of repetition yet often evading detection. For example, cash given each week by a corrupt official to his family and immediately spent on dining out and entertainment would be covered. This is key because use of proxies and rapid dissipation of assets through high living are rampant.

Such provisions capture not only assets currently held but also other key indicators of excessive wealth such as opulent spending or lifestyles. The wording for “holding” varies among jurisdictions as set out in box 2.13.

All the formulations go beyond mere direct ownership in the respondent’s own name, by incorporating “control.” They cover property held directly or indirectly to look through shell companies and trusts. For example, in the *Hajiyeva* case (UK, 2020), the property in question was valuable London real estate held through a company incorporated in the British Virgin Islands; although this company formally owned the property, the respondent was the beneficial owner, and therefore “held” this property under UK law.<sup>86</sup>

**Table 2.1. Different Definitions of Unexplained Wealth**

Country	Definition	Sources
<b>Australia</b>	<p>“Unexplained wealth”</p> <ul style="list-style-type: none"> <li>• Person’s <b>total wealth</b> exceeds the value of the person’s <b>wealth</b> that was <b>lawfully acquired</b></li> <li>• Discretion for court if <b>UW amount &lt; \$A 100,000</b> (US\$67,600)</li> <li>• Property owned, effectively controlled, disposed of, or consumed</li> <li>• “Derived” from proceeds of crime</li> <li>• Any person</li> </ul>	PoCA 2002, sec. 179B, sec. 179G.
<b>Kenya</b>	<p>“Unexplained assets”</p> <ul style="list-style-type: none"> <li>• Assets (a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and (b) value is <b>disproportionate to known sources</b> of income at or around that time and for which there is <b>no satisfactory explanation</b>.</li> <li>• Assets: includes those held in trust or on behalf of person; acquired from person as gift or loan without adequate consideration</li> <li>• Person suspected of corruption or economic crime</li> </ul>	ACECA 2003, sec. 2(1), sec. 55(7).
<b>Mauritius</b>	<p>“Unexplained wealth”</p> <p>Any property</p> <ul style="list-style-type: none"> <li>• Under ownership of a person to an extent <b>disproportionate</b> to his <b>emoluments and other income</b>;</li> <li>• the ownership, possession, custody or control <b>cannot be satisfactorily accounted for</b>; or</li> <li>• held by a person for another person</li> <li>• &gt; <b>MUR 10 million</b> or MUR 2.5 million if cash (US\$227,800 or US\$57,000)</li> <li>• Mauritius citizen</li> </ul>	GGIRA 2015, sec. 2.
<b>UK</b>	<p>“Unexplained wealth”</p> <ul style="list-style-type: none"> <li>• <b>Known sources</b> of the respondent’s <b>lawfully obtained income insufficient</b> to enable respondent to obtain the <b>property</b>.</li> <li>• “Known” sources of income (for example, job, assets) reasonably ascertainable</li> <li>• Value &gt; <b>£50,000</b> (US\$60,200)</li> <li>• Holding requirement</li> <li>• Foreign PEP or person connected with serious crime</li> </ul>	PoCA 2002, sec. 362B(3).

Note: PEP = politically exposed person; UW = unexplained wealth.

**Table 2.2. Thresholds for Unexplained Wealth Order (US Dollar Equivalent)**

Australia	Kenya	Mauritius	UK
\$A 100,000 (optional) (US\$67,600)	None	MUR 10 million (US\$227,800); (cash) MUR 2.5 million (US\$57,000)	£50,000 (US\$60,200)

Source: Original table for this report

**Box 2.11. Australia Case: “Holding” of Property Determined by Control—Re Application under Section 20A of the Proceeds of Crime Act 2002; ex parte Comm’r of Australian Federal Police [2017] WASC 114 [57].**

**Facts:** The police applied for an unexplained wealth order against a couple, Mr. P (a declared drug trafficker) and Ms. N (his wife), seeking to restrain assets held not only in the names of P and N but also two companies, Company DN and Company DNA. The police asserted that there was reasonable suspicion that all these assets were controlled by Mr. P and Ms. N based on evidence of interrelationships, including that Ms. N was the sole director of Company DN and a director of Company DNA; Ms. N was the sole shareholder of Company DNA; Mr. P and Ms. N were the sole employees of Company DN; Ms. N and Mr. P were beneficiaries of the DN Family Trust; and one of Mr. P’s bank accounts consumed funds from Ms. N’s bank account.

**Ruling:** The court entered the restraining orders against all assets, concluding that they were all controlled by Mr. P and Ms. N.

**Box 2.12. Kenya Case: Beneficial Ownership through Proxy Family Members—*Ethics and Anti-Corruption Comm’n v. Abachi & Ors* [2021] e.K.L.R. (H.C.K.), Civil Suit No. 15 of 2019 (Kenya).**

**Facts:** The respondent was a top official at the Ministry of Finance who was suspected of illegally authorizing payments of government funds to fictitious foreign companies and reaping personal profit. His visible assets appeared disproportionate to his legitimate sources of wealth. The anti-corruption agency sought an unexplained wealth order on those bases and alleged that certain companies held by his wife and other relatives were in truth property of respondent.

**Ruling:** The court held that respondent was the beneficial owner of the companies on the grounds that (a) documents indicating his ownership interest were found at his house, (b) his wife stated the assets had been purchased solely by him, and (c) a director of one of the trustee companies similarly stated that assets in the name of the company were actually owned by respondent.

### 2.3.4. Territorial Scope

Regarding the territorial scope of the UWO system, from the analyses above, they can all be described as global as regards (a) the crimes (committed in the UWO-issuing state or abroad); (b) the persons (applying to anyone, irrespective of citizenship or nationality, with the exception of Mauritius); and (c) the property (located in or outside the state or held indirectly, including through, for example, offshore companies). The broadly formulated laws allow for flexibility to address the infinite variations of situations that can exist and the ease with which people and assets move. The limit is that obviously the

**Box 2.13. Definitions of How Property Must Be “Held”**

**UK:** “Holds,”<sup>a</sup> “whether or not there are other persons who also hold the property,”<sup>b</sup> and including where the respondent “has effective control over the property,” “is the trustee of a settlement in which the property is comprised,” “is a beneficiary (whether actual or potential) in relation to such a settlement.”<sup>c</sup>

**Mauritius:** “Ownership, possession, custody or control,” “held by a person for another person to an extent which is disproportionate to the emoluments or other income of that other person.”<sup>d</sup>

**Australia:** “Owned by the person at any time,” “under the [effective control of the person at any time” or “that the person has disposed of (whether by sale, gift or otherwise) or consumed at any time.”<sup>e</sup>

**Kenya:** “Has,”<sup>f</sup> including property of others “held in trust” or “acquired from the person ... as a gift or loan without adequate consideration.”<sup>g</sup>

a UK, Proceeds of Crime Act 2002, as amended, sec. 362B(2)(a), accessed January 5, 2023, <https://www.legislation.gov.uk/ukpga/2002/29/chapter/2/crossheading/unexplained-wealth-orders> (“The High Court must be satisfied that there is reasonable cause to believe that—(a) the respondent holds the property”).

b UK, Proceeds of Crime Act 2002, as amended, sec. 362B(5)(a).

c UK, Proceeds of Crime Act 2022, as amended, sec. 362H (regarding “Holding of property: trusts and company arrangements etc”).

d Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 2, <https://www.irsam.mu/legislation/>.

e Australia, Proceeds of Crime Act 2002, as amended, sec. 179G(1), accessed January 5, 2023, [http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol\\_act/poca2002160/](http://www6.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/poca2002160/).

f Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 55(7), accessed July 30, 2020, <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202003> (“For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds—(a) are held in trust for the person whose assets are in question or otherwise on his behalf; or (b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.”).

g *Id.*

crime or the person needs to have some nexus to the enforcing jurisdiction, consistent with usual jurisdictional standards.<sup>87</sup>

### 2.3.5 Elements and Standards of Proof for UWOs

All the UWO systems provide for at least some shifting of a burden to produce evidence onto the respondent, while the elements of the cause of action vary,<sup>88</sup> as does the exact nature and wording. For example, under the UK UWO law, the authorities must satisfy the court that there are “reasonable grounds” or “reasonable cause to believe” the requirements of the UWO are fulfilled (thus much lower than a criminal standard),<sup>89</sup> meaning that in the UK, beyond establishing the income and wealth discrepancy, the relevant “enforcement authorities” must satisfy the court that: “there is reasonable cause to believe that (a) the respondent holds the property, and (b) the value of the property is greater than £50,000” (US\$60,200)<sup>90</sup> and that either “the respondent is a politically exposed person” (PEP) or is reasonably suspected of involvement in serious crime.<sup>91</sup> Once these requirements are met, the order is issued to the respondent, who must explain, among other things, “the nature and extent of the respondent’s interest in the property” and “how the respondent obtained the property.”<sup>92</sup>

The federal-level UWO law in Australia also requires authorities to provide “reasonable grounds” “to suspect that the person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired.”<sup>93</sup> The order will be issued where the court is *not* satisfied—by the respondent—that part or all of the unexplained wealth does not stem from certain “offences.” Thus, the respondent must show by a balance of the probabilities that the wealth is of lawful origins or not from offenses.<sup>94</sup> In Kenya if at the conclusion

## Box 2.14. Two Approaches to Avoid Double Counting

**Australia—a mathematical approach:** In calculating the amount of unexplained wealth a person is ordered to pay, “the court must deduct an amount equal to ... the value, at the time of making the order, of any property of the person forfeited under ... a ‘forfeiture order.’”<sup>a</sup>

**Mauritius—a legal hierarchy approach:** The Integrity Reporting Board, which is responsible for evaluating whether an application for UWOs should be made,<sup>b</sup> will “in case of concurrent jurisdiction with an enforcement authority, prevail in relation to any action relating to the confiscation of property.”<sup>c</sup>

a Australia, Proceeds of Crime Act 2002, as amended, sec. 179J.

b Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 8(1).

c Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 8(2).

of the civil confiscation proceeding, the judge is not satisfied by a balance of the probabilities that all the assets were acquired “otherwise than as the result of corrupt conduct,” he or she may order payment of that equivalent amount.<sup>95</sup>

In Mauritius, applications under the UWO Act constitute civil proceedings, and the onus lies on the respondent to establish, on a balance of probabilities, that any property is not unexplained wealth.<sup>96</sup> The Case Studies section of the appendix helps illustrate the operation of the legal standards.

Thus, there is quite a degree of variation in elements and standards, although in each system the respondent must produce at least some evidence to explain the origin of the wealth.

### 2.3.6 Avoiding “Double-Counting”—Protections against Overlap

If the UWO system creates new grounds for requiring information and its own recovery order, it may overlap with other statutes. Theoretically, the different proceedings could operate at the same time: for example, a UWO to confiscate property and a civil recovery proceeding against the same property.<sup>97</sup> Logic dictates that the same property arguably should not, or cannot,

be recovered or confiscated twice, and based on fairness, a person should not have to pay the monetary equivalent of a property and have the same confiscated.

In Australia and Mauritius, for example, the term “UWO” refers to an order to confiscate the property in question or an order to pay an amount equal to the value of unexplained wealth. This order should be coordinated with existing asset recovery mechanisms. Approaches to coordination include a mathematical approach (for example, Australia) or a legal hierarchy approach (for example, Mauritius). See box 2.14 for a summary.

#### **Legal hierarchy approach**

Under a legal hierarchy approach, if more than one forfeiture proceeding is instigated in respect of the same property, either (a) one of the agencies “shall” prevail over the others or (b) one type of forfeiture system will prevail over the others.

#### **Mathematical approach**

Under a mathematical approach, if more than one forfeiture order is issued with respect to the same property, the value of the outstanding forfeiture order can be subtracted from the unexplained wealth order.

Each approach has benefits and limits. On the one hand, one benefit of the approach in Mauritius may be that it avoids some duplicate efforts of different authorities in respect of the same property and, therefore, may save resources. This could be useful in capacity-constrained countries. On the other hand, this legal hierarchy applies only to the enforcement authorities within the same country; it cannot avoid an overlap with a foreign forfeiture order.

## Combined approach

For this reason, subject to the legal system in any given country, a combined approach could be considered: where simultaneous action in respect of the same property is undertaken by more than one authority within the same jurisdiction, some rule of priority or legal hierarchy can ensure coordination, whereas simultaneous action in a foreign jurisdiction can be taken into account using the mathematical approach or, otherwise, has to be coordinated by means of mutual legal assistance.<sup>98</sup> As discussed in section 3.3, mutual legal assistance is one of the key building blocks of any successful asset recovery system.

## Notes

- 1 See detailed information in UK Home Office, Code of Practice Issued under Section 377 of the Proceeds of Crime Act 2002, June 2021 at 47–53, “Unexplained Wealth Orders,” accessed April 5, 2022, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/996540/June\\_21\\_-\\_Code\\_of\\_Practice\\_377\\_Investigations\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/996540/June_21_-_Code_of_Practice_377_Investigations_.pdf); and UK, “Fact Sheet: Unexplained Wealth Order Reforms,” March 4, 2022, accessed January 3, 2023, <https://www.gov.uk/government/publications/economic-crime-transparency-and-enforcement-bill-2022-overarching-documents/factsheet-unexplained-wealth-order-reforms-web-accessible>.
- 2 UK, Criminal Finances Act 2017, chap. 22, part 1: Proceeds of Crime, chapter 1: Investigations (2017), accessed August 16, 2018, <https://www.legislation.gov.uk/ukpga/2017/22/contents/enacted>; UK Home Office, Circular 003/2018: Unexplained Wealth Orders, February 1, 2018, <https://www.gov.uk/government/publications/circular-0032018-criminal-finances-act-unexplained-wealth-orders/circular-0032018-unexplained-wealth-orders>.
- 3 UK, Code of Practice at 48, accessed January 4, 2023, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/996540/June\\_21\\_-\\_Code\\_of\\_Practice\\_377\\_Investigations\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/996540/June_21_-_Code_of_Practice_377_Investigations_.pdf).
- 4 UK, Code of Practice at 48.
- 5 UK, Proceeds of Crime Act 2002, as amended sec. 362A(7).
- 6 UK, Proceeds of Crime Act 2002, as amended, sec. 362B(4).
- 7 UK, Proceeds of Crime Act 2002, as amended, sec. 362B(2)(a), (2)(b), and (3).
- 8 The analysis is valid for England and Wales; however, it could differ under limitation laws in effect in Scotland and Northern Ireland. Note that the United Kingdom has no statute of limitations in criminal law.
- 9 UK, The Limitation Act of 1980 (as amended), secs. 27A and 27B, United Kingdom Public General Acts, <https://www.legislation.gov.uk/ukpga/1980/58/section/27AB>.
- 10 UK, Proceeds of Crime Act 2002, as amended, sec. 362A(3) and (5).
- 11 UK, Proceeds of Crime Act 2002, as amended, sec. 362C(1) and (2).
- 12 UK, Proceeds of Crime Act 2002, part 5, accessed January 4, 2023, <https://www.legislation.gov.uk/ukpga/2002/29/part/5>.
- 13 UK, Proceeds of Crime Act 2002, as amended, sec. 362F(1).
- 14 UK, Proceeds of Crime Act 2002, as amended, sec. 362E(1) and (2).
- 15 UK, “Fact Sheet: Unexplained Wealth Order Reforms”; UK, Proceeds of Crime Act 2002, as amended by the Economic Crime Transparency and Enforcement Act 2022, accessed January 4, 2023, <https://www.legislation.gov.uk/ukpga/2022/10/part/2>.
- 16 UK, Economic Crime Transparency and Enforcement Act 2022, at secs. 47–48, amending sec. 362B(3) and sec. 396B(3).
- 17 *Id.* at secs. 45–46, amending sec. 362A and sec. 396A.
- 18 UK, “Fact Sheet: Unexplained Wealth Order Reforms” at 2.
- 19 UK, Economic Crime Transparency and Enforcement Act 2022, at secs. 49–50, amending sec. 362DA, sec. 362DB, sec. 396DA, and sec. 396DB.
- 20 UK, “Fact Sheet: Unexplained Wealth Order Reforms” at 2.
- 21 UK, Economic Crime Transparency and Enforcement Act 2022, at secs. 52–53, inserting a new sec. 362U and sec. 396V (titled “Unexplained Wealth Orders: Costs of Proceedings”). See also UK, “Fact Sheet: Unexplained Wealth Order Reforms” at 2.
- 22 Mauritius, The Good Governance and Integrity Reporting Act 2015, Act 31/2015, *Government Gazette of Mauritius* No. 122 of 10 December 2015, as amended by Act No. 13 of 2019, Act No. 5 of 2020, and Act No. 15 of 2022 (also known as “GGIRA”).

- 23 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 5(1).
- 24 Although the Agency cannot confiscate foreign-owned unexplained wealth, there are some possible approaches in cases where straw men are suspected—for example, if a Mauritian respondent receives “loans” from a foreign national to acquire property. The respondent can be asked to obtain an explanation from the lender of how he acquired the funds and provide the Agency with an affidavit response or the enforcement authority can write to the lender directly and ask him to explain how the property was acquired. Failure to explain satisfactorily means the funds the respondent received are unexplained wealth and the Agency can obtain an order for payment of its monetary equivalent from the respondent.
- 25 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 9(1) and (2).
- 26 *Id.* at sec. 5(1)(a).
- 27 *Id.* at sec. 5(1)(b) and sec. 13.
- 28 *Id.* at sec. 3(5).
- 29 *Id.* at sec. 20.
- 30 Kenya, Anti-Corruption and Economic Crimes Act (ACECA), No. 3 of 2003, as amended, sec. 55 (Forfeiture of Unexplained Assets), accessed January 2, 2023, <https://eacc.go.ke/default/wp-content/uploads/2018/06/aceca.pdf>, also available at <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202003> [hereinafter Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended]; *Amuti v. Kenya Anti-Corruption Comm’n* (2020) e.K.L.R. (S.C.K.), Petition No. 21 of 2019.
- 31 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 26(3) and sec. 55.
- 32 For the evolution of the case, see, for example, *Kenya Anti-Corruption Comm’n v. Amuti* (2011) e.K.L.R. (H.C.K.), Civil Suit No. 448 of 2008; *Kenya Anti-Corruption Comm’n v. Amuti* (2011) e.K.L.R. (C.A.K.), Civil Application No. 39 of 2011 (application for an injunction pending the hearing and determination of an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (Rawal, J.) dated February 4, 2011); *Ethics and Anti-Corruption Comm’n* (The legal successor of Kenya Anti-Corruption Commission) *v. Amuti* (2015) e.K.L.R. (C.A.K.), Civil Appeal No. 213 of 2011; *Amuti v. Kenya Anti-Corruption Comm’n* (2019) e.K.L.R. (C.A.K.), Civil Appeal No. 184 of 2018; *Amuti v. Kenya Anti-Corruption Comm’n* (2020) e.K.L.R. (S.C.K.), Petition No. 21 of 2019.
- 33 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 26.
- 34 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 55.
- 35 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 30.
- 36 Australia, Proceeds of Crime Act 2002, as amended, part 2-6 (Unexplained Wealth Orders) secs. 179A–U, January 2, 2023, <https://www.legislation.gov.au/Details/C2022C00269>.
- 37 Australia, Proceeds of Crime Act 2002, as amended, sec. 179A.
- 38 At the state and territory level in Australia, Western Australia was the first to introduce a UWO in 2000 under its Criminal Property Forfeiture Act 2000 (WA), followed by the Northern Territory in 2003 under its Criminal Property Forfeiture Act 2002 (NT). Since then, UWO regimes have been enacted in Queensland, South Australia, New South Wales, Victoria, Tasmania, and the Australian Capital Territory.
- 39 Australia, Proceeds of Crime Act 2002, as amended, sec. 20A(4).
- 40 *Id.*, sec. 179B.
- 41 *Id.*, sec. 179E(1) (emphasis added).
- 42 *Id.*, sec. 179E(6).
- 43 Ireland, Proceeds of Crime Act of 1996, accessed January 4, 2023, <https://www.irishstatutebook.ie/eli/1996/act/30/enacted/en/html>.
- 44 Ireland, Proceeds of Crime Act of 1996, sec. 9(b).
- 45 Daniel Chia and Yanguang Ker, “Unexplained Wealth Order’ Comes to Singapore,” Morgan Lewis, January 25, 2019, <https://www.morganlewis.com/pubs/unexplained-wealth-order-comes-to-singapore>; Republic of Singapore, *Government Gazette*, Serious Crimes and Counter-Terrorism (Miscellaneous Amendments) Act 2018, No. 51 of 2018, <https://sso.agc.gov.sg/Acts-Supp/51-2018/Published/20181231?DocDate=20181231>.
- 46 It inserted the new section 47AA of the Corruption, Drug Trafficking and Serious Crimes (Confiscation of Benefits) Act (CDS Act).
- 47 Chia and Ker, “Unexplained Wealth Order’ Comes to Singapore.”
- 48 *Id.*
- 49 Switzerland, Foreign Illicit Assets Act (FIAA) of 18 December 2015, Open-ended Intergovernmental Working Group on Asset Recovery, UNCAC, Vienna, August 25–26, 2016, accessed April 14, 2020, <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1605154e.pdf>.
- 50 Switzerland, Federal Act of 18 December 2015 on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA), accessed April 14, 2020, <https://www.admin.ch/opc/en/classified-compilation/20131214/index.html>.
- 51 *Id.*, art. 2 (“Definitions”).

- 52 Switzerland, FIAA, Open-ended Intergovernmental Working Group on Asset Recovery at 2.
- 53 *Id.* at 2–3.
- 54 Switzerland, FIAA, art. 15 (“Presumption of illicit origin”).
- 55 *Id.*, art. 15 (“Conditions and procedure” for the confiscation of assets).
- 56 Colombia, Law 793 of 2002, accessed March 17, 2022, <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6954>.
- 57 In Colombia’s responses to a questionnaire by the European Committee on Crime Problems, Colombian authorities described “dilatory stratagems” during “the investigative procedure and trial,” which undermined the effectiveness of the law. See Council of Europe, Request by Colombia to be invited to accede to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), GR-J(2003)24 (Nov. 2003).
- 58 Law 793 of 2002, (sec. 2), accessed March 17, 2022, <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6954>.
- 59 See, for example, Transparency International UK, “Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and Other New Approaches to Illicit Enrichment and Asset Recovery (Transparency International UK, London, March 2016); BAH Report at sec. 3.1.1.; Natasha Reurts, “Unexplained Wealth Laws: The Overseas Experience,” *Lexology*, March 2017, accessed May 20, 2019, <https://www.lexology.com/library/detail.aspx?g=f0b95885-e89e-4c07-8184-bedccbfbd71c>.
- 60 Colombia, Law 1708 of 2014, Diario Oficial No. 51945—11 de febrero de 2022, accessed March 17, 2022, [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_1708\\_2014.html#1](http://www.secretariassenado.gov.co/senado/basedoc/ley_1708_2014.html#1). For amendments, see, for example, Law 1849 of 2017.
- 61 Colombia, Law 1708 of 2014, sec. 29(4).
- 62 For more details, see Colombia, Law 1708 of 2014, secs. 8 and 13; David Filomena, *El Proceso de Extincion de Dominio, Cartilla explicativa enfocada en las conductas relacionadas con los cultivos de uso ilícito* (Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, March 2020).
- 63 See, for example, UK Home Office, Criminal Finances Bill—Unexplained Wealth Orders, Impact Assessment, June 20, 2017, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621205/Impact\\_Assessment\\_-\\_UWOs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621205/Impact_Assessment_-_UWOs.pdf) (“In October 2015, the Government published the National Risk Assessment for Money Laundering and Terrorist Financing (NRA), identifying a number of risks . . . and areas where the regimes that combat those threats could be strengthened. . . . The Criminal Finances Act is a core part of our approach to achieving that objective. . . . This measure [concerning non-EEA PEPs] reflects the concern about those involved in grand corruption overseas laundering the proceeds of crime in the UK; and the fact that it may be difficult for law enforcement agencies to satisfy any evidential standard at the outset of such an investigation given that all relevant information may be outside of the jurisdiction.”).
- 64 Integrity Reporting Board, “First Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board” (Annual Report 2017, submitted January 3, 2018) at 9 (Out of 21 statutory reports referred to it in its first year of operation, according to the Board, “The Board has yet to have referred to it any report in respect of property that is suspected of being the fruits of crime. The Act is plainly designed to apply to such property and the Board understands that the reporting requirements imposed by Section 9 (1) of the Act are not yet being fully observed.”).
- 65 One uncertainty stems from how these two conditions are written; namely, that these seem to be *alternatives*, rather than cumulative conditions. The Board recommended that this section of the Act be clarified. Integrity Reporting Board, “First Annual Report” at 10.
- 66 Integrity Reporting Board, “First Annual Report” at 11.
- 67 See, for example, Mauritius, Parliamentary Debates (Hansard), Sixth National Assembly, First Session, December 2, 2015, No. 42 of 2015, accessed April 9, 2020, <https://mauritiusassembly.govmu.org/Documents/Hansard/2015/hansard4215.pdf> at 128; Mauritius, Parliamentary Debates (Hansard), December 3, 2015, No. 43 of 2015, at 72–73; Mauritius Labour Party, Position Paper No. 1, November 2015, at 46, accessed April 9, 2020, <https://ionnews.mu/wp-content/uploads/2015/11/PT-Position-Paper-on-GGIR.pdf>.
- 68 *Id.* at 126–29; Mauritius, Parliamentary Debates (Hansard), December 3, 2015, No. 43 of 2015, at 72–73; Mauritius Labour Party, Position Paper No. 1 at 46.
- 69 UK, Proceeds of Crime Act 2002, as amended, sec. 362H(5).
- 70 See, for example, UK, Proceeds of Crime Act 2002, as amended, sec. 362B(9) (citing the broad notion of “connected” persons under the Corporation Tax Act 2010 at sec. 1122).
- 71 *Nat’l Crime Agency v. Baker & Ors* [2020] EWHC (Admin) 822 [67] (Eng.).
- 72 See, e.g., *Id.* [131], [139], [171].
- 73 UK, Economic Crime Transparency and Enforcement Act 2022, at secs. 47–48, amending secs. 362B and 396B, accessed January 4, 2023, <https://www.legislation.gov.uk/ukpga/2022/10/part/2>.
- 74 *Id.* at secs. 45–46, amending secs. 362A and 396A.

- 75 Australia, Proceeds of Crime Act (as amended), secs. 14D, 179G.
- 76 The analysis is valid for England and Wales; however, it could differ under limitation laws in effect in Scotland and Northern Ireland. Note that the United Kingdom has no statute of limitation in criminal law.
- 77 The Limitation Act of 1980 (as amended), secs. 27A and 27B, United Kingdom Public General Acts, <https://www.legislation.gov.uk/ukpga/1980/58/section/27AB>.
- 78 Mauritius Labour Party, Position Paper No. 1 at 46 (bank records must be kept for seven years. Furthermore, a Notary's right of action to recover fees due to him shall be barred after seven years).
- 79 Integrity Reporting Board, "First Annual Report" at 11.
- 80 Integrity Reporting Board, "Second Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board" (Annual Report 2018, submitted March 1, 2019) at 7.
- 81 *Id.* at 11.
- 82 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended.
- 83 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 2(1)(a) and (b); see also sec. 26 (Statement of suspect's property).
- 84 Integrity Reporting Board, "Second Annual Report" at 11.
- 85 See, for example, Australia, Proceeds of Crime Act 2002, as amended, sec. 179B(4).
- 86 *Hajiyeva v. Nat'l Crime Agency* [2020] EWCA (Civ) 108 [3]–[4] (Eng.).
- 87 With a regime similar to UWOLs, Ireland, for example, rather than being unconditionally global in scope, caters in its law for these practical realities or constraints: the scope is global as regards property but with certain conditions attached, namely that, if the property is situated *outside* the state, then the respondent should be domiciled, resident or present *in Ireland* and all or at least part of the criminal conduct should have occurred in Ireland. Ireland, Proceeds of Crime Act 1996, as amended, sec. 1. Moreover, in cases where property is suspected to be the proceeds of criminal conduct that occurred *outside* of Ireland, then the property should be situated *inside* Ireland.
- 88 "Elements" are what exactly the court must find to issue an order. "Standard of proof" refers to by what degree of certainty they must find it.
- 89 UK, Criminal Finances Act 2017, Explanatory Notes, Overview of the Act, at 14, No. 64 ("It is not necessary to prove to the criminal standard that the respondent, or other persons, are involved in such offences."); and UK, Proceeds of Crime Act 2002, as amended, sec. 362B(3) ("there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property").
- 90 UK, Proceeds of Crime Act 2002, as amended, sec. 362B(2).
- 91 *Id.* at sec. 362B(4).
- 92 *Id.* at sec. 362A(3).
- 93 Australia, Proceeds of Crime Act 2002, as amended, sec. 179B.
- 94 *Id.* at sec. 179E(3).
- 95 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 55(6).
- 96 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 3(5).
- 97 See, for example, Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 3(3) ("This Act shall be in addition to, and not in derogation from—... the Asset Recovery Act.") and sec. 3(4) ("Nothing in this Act shall affect the power of a Court to order the confiscation of any property in pursuance of its power under any other enactment.").
- 98 See, for example, Australia, Proceeds of Crime Act 2002, as amended, sec. 338 ("**foreign forfeiture order** has the same meaning as in the [Mutual Assistance Act.] "**Mutual Assistance Act** means the *Mutual Assistance in Criminal Matters Act 1987*." [Bold in original].

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# 3 Operational Aspects of Unexplained Wealth Orders

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Where UWO laws and procedures are in place, the next question becomes how the authorities implement them. A country considering adopting a UWO system needs to understand the procedural steps and their legal consequences at each stage. This section details procedures and then addresses coordination of enforcement authorities both within a country and outside of the country (international cooperation).

## 3.1 UWO Procedures

How the UWO procedure is structured is relevant for ensuring both an impartial process (to curtail potential abuses and to protect rights; see chapter 5) and an efficient process. The existing legal infrastructure and policy imperatives will inform the parameters for each country.

### 3.1.1 Detection of Unexplained Wealth

It is important to have the ability to identify appropriate targets for UWOs and the powers to investigate the suspect's wealth prior to any unexplained wealth action being initiated. This can be accomplished through a combination of one or more of the following: (a) allowing for use of material generated in criminal investigations to be used in support of unexplained wealth proceedings; (b) tailoring existing proceeds of crime investigative powers to the unexplained wealth context; or (c) developing stand-alone investigative powers for unexplained wealth (as in, for example, Mauritius).

Unexplained wealth proceedings are different from other proceeds of crime powers in this respect because the investigator needs to examine not only illicit sources of income but also lawful sources of income to be able to build a complete financial profile of a suspect. A significant amount of investigative work is often required before unexplained wealth proceedings can responsibly be started to meet the evidential requirements and also to be able to assess whether information being provided by the suspect in the course of proceedings is truthful. For example, in Australia these investigative powers will generally continue to be used throughout the proceedings to supplement and test evidence adduced through the preliminary UWO process and to support the calculation of a final UWO.

One may wonder how investigators structure their investigations to detect unexplained wealth in the first place, to piece together the "reasonable suspicion" often needed, as compared to other similar investigations. Detecting unexplained wealth uses traditional techniques plus some financial analysis tools common in tax investigations. Box 3.1 summarizes key sources for UWO investigations.

### Box 3.1. Detecting Unexplained Wealth as a Basis for a UWO

A variety of sources of information and red flags may alert authorities including the following:

- Known addresses of person = **prime real estate, mansions, penthouses**, and so forth
- Home or apartment at which person frequently stays (he or she may not be the owner of record)
- Other **luxury assets**: cars, boats or yachts, watches, or other visible clothing or accessories
- **Lifestyle and consumption/gifts** (for example, travel, expensive schools)
- **Social media** (although not UWOs, see *Obiang* and *Abbas* cases<sup>a</sup>)
- News media and other publicly available information (for example, **investigative reporting** of data leaks; **research** by nongovernmental organizations such as Transparency International, Global Witness—see *Baker* case<sup>b</sup>)
- **Irregular bank deposits** or other transactions (for example, suspicious activity reports or suspicious transaction reports submitted to financial intelligence units; see *Amuti* case<sup>c</sup>)
- Irregular purchases (for example, inflated sales prices) of land or property
- **Land and property registries** (see 2020 IRSA Annual Report in Mauritius<sup>d</sup>)
- **Other registries**: company registries, vehicle registries, securities exchange commissions, insurance records
- Reports from **other law enforcement and government agencies** (for example, tax authorities); counterparts in other jurisdictions (assuming laws exist for the exchange of information)
- Reports from the **public or whistleblowers** (see 2020 IRSA Annual Report in Mauritius<sup>e</sup>)

Note: IRSA = Integrity Reporting Services Agency; UWO = unexplained wealth order.

- a Obiang: Transparency International France, “Definitive Conviction of Teodorin Obiang in France Sends Strong Message, Allows Asset Restitution to Equatorial Guinea” (news release, July 30, 2021), accessed December 13, 2022, <https://www.transparency.org/en/press/teodorin-obiang-conviction-asset-recovery-equatorial-guinea-france>; Abbas: US, Department of Justice, “Nigerian Man Sentenced to over 11 Years in Federal Prison for Conspiring to Launder Tens of Millions of Dollars from Online Scams” (news release 22-233, November 7, 2022) (indicating Abbas bragged on social media about his lavish lifestyle), accessed December 13, 2022, <https://www.justice.gov/usao-cdca/pr/nigerian-man-sentenced-over-11-years-federal-prison-conspiring-launder-tens-millions>.
- b Baker: UK, Nat’l Crime Agency v. Baker & Ors [2020] EWHC (Admin) 822 (Eng.) (citing a report by Global Witness throughout ruling).
- c Amuti: Amuti v. Kenya Anti-Corruption Comm’n [2020] e.K.L.R. (S.C.K.), Petition No. 21 of 2019 (discussing the deposits in Amuti’s various bank accounts); Amuti v. Kenya Anti-Corruption Comm’n [2019] e.K.L.R. (C.A.K.), Civil Appeal No. 184 of 2018.
- d Mauritius, Integrity Reporting Board, “Fourth Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board” (Annual Report 2020, submitted July 15, 2021), accessed December 13, 2022, <https://www.irsa.mu/wp-content/uploads/2021/10/IRSA-Annual-Report-2020.pdf>.
- e Mauritius, Integrity Reporting Board, “Fourth Annual Report.”

With regard to investigative mechanisms, a UWO investigation can rely on some of the same methods used by tax investigators to show that unexplained wealth is *prima facie* evidence of the proceeds of crime. UWOs expand on that method beyond the realm of the tax laws. Methods used by tax authorities are often based on reports of assets and expenses. For example, in the UK in serious cases of tax fraud, tax investigators compile “capital statements,” which “may show that the taxpayer has apparently spent more than he or she has had in income.”<sup>1</sup> In the United States, tax authorities have developed “net worth” analyses. In other jurisdictions (including South Africa and Zimbabwe), tax agencies use “lifestyle audits.”

**UK “capital statements”**

In the UK His Majesty’s Revenue and Customs (HMRC) authorities have a long-established practice in cases of suspected tax evasion, of preparing “capital statements.” These statements involve a meticulous “detailed accumulation of information about capital worth, income of all sorts and expenditure,” to reveal whether the taxpayer has spent more than declared. The idea is that “if personal and private expenditure taken with the movement in assets results in a sum greater than total income, the deficiency is assumed to be business profits omitted from the accounts and used by the proprietor or directors in the absence of any satisfactory explanations.”<sup>2</sup>

**U.S. “net worth” method**

Similarly, in cases of suspected tax evasion, in the United States, the “net worth” method is used by the Internal Revenue Service. This method also has a long history and has been accepted by courts and tax scholars alike.<sup>3</sup> The process involves five steps to amass circumstantial evidence: “(1) calculation of net worth at the end of a taxable year, (2) subtraction of net worth at the beginning of the same taxable year, (3) addition of non-deductible expenditures for personal, including living, expenditures, (4) subtraction of receipts from income sources that are non-taxable, and (5) comparison of the resultant figure with the amount of taxable income reported by the taxpayer to determine the amount, if any, of underreporting.”<sup>4</sup>

**“Lifestyle audits” in South Africa and Zimbabwe**

Another mechanism used by some tax authorities that can be applied to UWOs is a “lifestyle audit.” For example, “lifestyle audits” have been used in the context of auditing taxpayers by the South African Revenue Service (SARS) in South Africa and by the Zimbabwe Revenue Authority (ZIMRA) in Zimbabwe. SARS will conduct these audits of taxpayers in general—that is, it targets not only public officials, but also private persons such as high-net-worth individuals. However, there must be a reason to start such an audit—generally only “if there are reasonable grounds to suspect non-compliance or tax crimes.”<sup>5</sup> Red flags that raise suspicions may come through information published in the media, from reports of suspected tax fraud filed by members of the public or from other tip-offs, or from cases in which a taxpayer’s assets clearly exceed income declared in tax returns. Once alerted, SARS may pursue a lifestyle audit, under which it “will seek to establish the net assets of the taxpayer at the beginning of the tax year and compare that to the net assets at the end of the tax year.” This study further discusses lifestyle audits in the context of mandatory income and asset disclosure programs (see section 3.2.3).

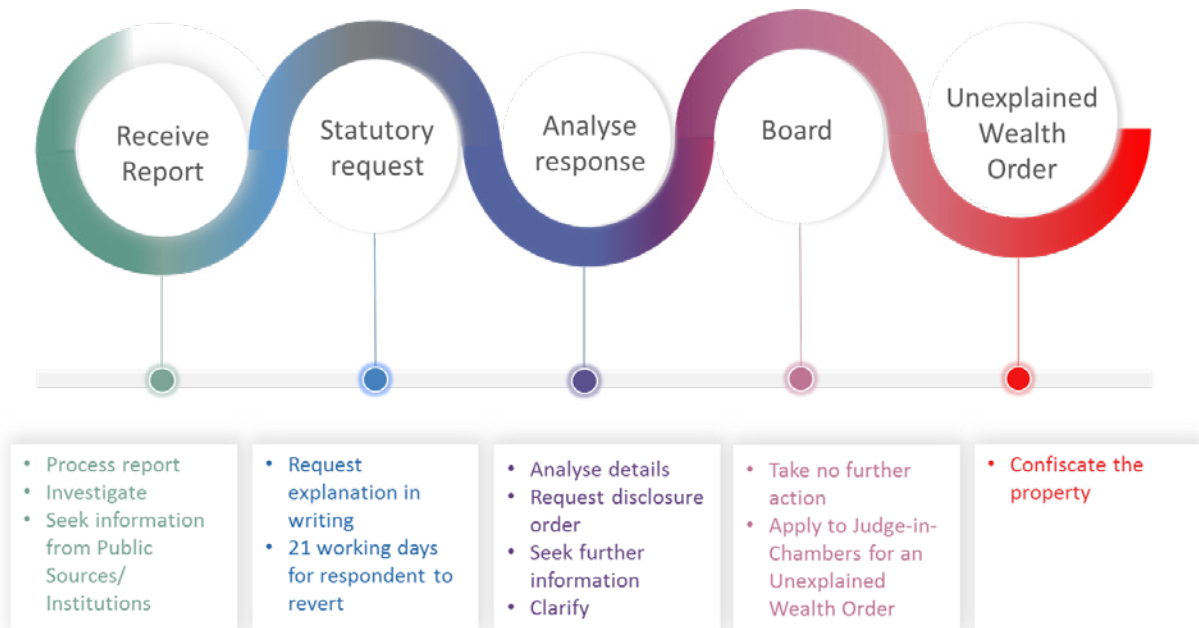
**3.1.2 Initiation of the UWO Process****Who may seek an order?**

After detecting and investigating suspected unexplained wealth, an empowered authority usually starts the UWO process by seeking an order to request information from the person in question, the “respondent.” The law gives responsibility to specified existing authorities (be it just one or a list of designated authorities), or a combination of several authorities (for example, establishing an agency that combines the powers of existing agencies), or to a newly created specialized agency. This institutional set-up for investigating and pursuing UWOs is crucial to the system’s operational success. In Australia and in the UK, to initiate an order for information, certain designated authorities have to apply to a court (for example, in the UK, so far, it has been the National Crime Agency, but could also be, for example, the revenue authorities<sup>6</sup>). In Kenya, the anti-corruption authorities (EACC) can issue a notice (requiring a “statement of suspect’s property”) without going to court.<sup>7</sup> Table 3.1 illustrates these different institutional set-ups for UWOs.

**Table 3.1. Who Investigates and May Seek an Unexplained Wealth Order**

Country	Investigator	Sources
<b>Australia</b>	<p>“Proceeds of crime authority”:</p> <ul style="list-style-type: none"> <li>• Australian Federal Police (AFP)</li> <li>• Director of Public Prosecutions</li> </ul> <p>In practice, AFP-led Criminal Assets Confiscation Taskforce: Australian Criminal Intelligence Commission.</p> <ul style="list-style-type: none"> <li>• Australian Taxation Office</li> <li>• AUSTRAC (Australian Transaction Reports and Analysis Centre)</li> <li>• Australian Border Force</li> </ul>	<p>Australia, Proceeds of Crime Act 2002, sec. 179B (preliminary UWO), sec. 179M (UWO), sec. 338.</p>
<b>Kenya</b>	Ethics and Anti-Corruption Commission	Kenya, ACECA, sec. 55(2).
<b>Mauritius</b>	<p>Newly established specialized agencies: two-tier investigation/review process:</p> <ul style="list-style-type: none"> <li>• Integrity Reporting Services Agency</li> <li>• Integrity Reporting Board</li> </ul>	<p>Mauritius, GGIRA, sec. 4(1) (establishing the IRSA), sec. 7(1) (establishing the Integrity Reporting Board).</p>
<b>UK</b>	<ul style="list-style-type: none"> <li>• National Crime Agency (NCA)</li> <li>• His Majesty’s Revenue and Customs</li> <li>• Financial Conduct Authority</li> <li>• Director of the Serious Fraud Office or</li> <li>• Director of Public Prosecutions</li> </ul> <p>In practice: NCA</p>	<p>UK, Proceeds of Crime Act 2002, sec. 362A(7).</p>
<b>Trinidad &amp; Tobago</b>	<ul style="list-style-type: none"> <li>• Chairman of Board of Inland Revenue</li> <li>• Comptroller of Customs and Excise</li> <li>• Commissioner of Police</li> </ul>	<p>Trinidad and Tobago, The Civil Asset Recovery and Management and Unexplained Wealth Act, Act No. 8 of 2019, sec. 58(1).</p>
<b>Zimbabwe</b>	<ul style="list-style-type: none"> <li>• National Prosecuting Authority</li> <li>• Zimbabwe Revenue Authority</li> </ul>	<p>Zimbabwe, Money Laundering and Proceeds of Crime (Amendment) Act 2019, sec. 37A.</p>

**Figure 3.1. Mauritius: Process for Unexplained Wealth Order**



Source: Mauritius, Integrity Reporting Board, “Fourth Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board” (Annual Report 2020, submitted July 15, 2021), at 13, accessed December 13, 2022, <https://www.irsam.mu/wp-content/uploads/2021/10/IRSA-Annual-Report-2020.pdf>.

In Mauritius, the law containing the UWO system established two new specialized agencies, the Integrity Reporting Services Agency (IRSA) and the Integrity Reporting Board.<sup>8</sup> To request information from the respondent, the IRSA may itself directly issue a written request to the respondent; the IRSA may do so either on its own initiative (that is, as a result of its own investigations) or upon receipt of a written report from certain authorities, such as the Commissioner of Police or the Director-General of the Mauritius Revenue Authority, or from any person who specifies “reasonable ground to suspect that a person has acquired unexplained wealth.”<sup>9</sup> Mauritius reports that other “persons”—that is, the general public—have been very active in such reporting, though not all with the best of motives. Thus, independent and rigorous evaluation of such reports is essential. Figure 3.1 illustrates the process in Mauritius.

### ***What grounds can be used to seek an order?***

The preliminary standard for a UWO is usually some level of “suspicion” of unexplained wealth (see also section 2.3.5). For example, in Australia, when applying to the court for a preliminary UWO, the authorities must satisfy the court that there are “reasonable grounds” to suspect that a person has unexplained wealth.<sup>10</sup> An authorized officer must swear by affidavit that he or she suspects that the person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired and must include the grounds for that suspicion.<sup>11</sup> The UK standard is similar—reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income are insufficient for the purposes of enabling the respondent to obtain the property—however, it has more requirements, including a link to serious criminal activity or PEP status.<sup>12</sup> In Mauritius, the authority must have “reasonable ground to suspect that a person has acquired unexplained wealth.”<sup>13</sup> Box 3.2 provides two concrete examples of disparities giving rise to UWOs.

### Box 3.2. Examples of Disparity of Wealth Giving Rise to “Reasonable Suspicion”

#### Kenya case

*Ethics and Anti-Corruption Comm’n v. Abachi & Ors* [2021] e.K.L.R. [59] (H.C.K.), Civil Suit No. 15 of 2019 (Kenya).

**Facts:** Public official respondent had real estate, vehicles, and funds valued at more than K Sh 80 million (US\$649,400) during a period when his gross monthly was less than K Sh 64,000 (US\$519).

**Ruling:** A sudden increase in wealth and the respondent’s failure to provide explanation of the source of wealth provided the basis for a finding that assets were not acquired other than as a result of corrupt conduct and a declaration that those assets be forfeited to the government.

#### Australia case

*Re Application under Section 20A of the Proceeds of Crime Act 2002; ex parte Comm’r of Australian Federal Police* [2017] WASC 114 [62], [63].

**Facts:** The value of assets under the respondent’s control was more than \$A 3.5 million (US\$2,364,900) whereas his declared income for the relevant period was less than \$A \$500,000 (US\$337,800).

**Ruling:** Evidence was sufficient for a restraining order because the court was not satisfied that the unexplained wealth did not stem from offenses.

### 3.1.3 Preservation of the property during proceedings

UWO systems often are, and should be, coupled with the authority to issue interim freezing orders at the outset of the procedure. Of course, such orders should also be lifted as quickly as possible upon compliance and satisfactory explanations from the respondent. Freeze orders have implications for the timeline of a case.

#### UWOs and asset freezes

It will often be the case that the initiation of a UWO will increase the risk of dissipation or movement of the assets through alerting the asset holder. Thus, in practice, it is likely that UWOs will be issued alongside interim freezing orders (as the UK’s cases have shown thus far) in nearly all cases. The applications are generally made *ex parte*, meaning that only the authorities are represented before the court (as would be the case in a search warrant application, for example).

Many UWO systems permit freezes. For example, in Australia, applications for restraining orders may be made under section 20A of PoCA to prevent potential dissipation of the property,<sup>14</sup> as shown in box 3.3.

Similarly, in Mauritius, authorities were concerned about preventing the “dissipation of the unexplained wealth” or the movement of the assets “outside the reach of the Court”<sup>15</sup> and thus enacted provisions to apply for a request “prohibiting the transfer, pledging or disposal of any property.”<sup>16</sup> In the initial version of the law, the protection came too late in the procedure, as the freeze could “only be sought after the owner of the property has failed to give a satisfactory explanation of his wealth.” Thus, on being alerted by the agency’s statutory request, there was nothing to stop respondent from attempting to place his wealth outside the reach of the court.<sup>17</sup> In 2020, the law was amended to close this loophole.<sup>18</sup> Thus, interim asset-freezing requests are now available upon a proper showing at the time of first notice to the respondent.

### **Implications of freeze of assets on time lines**

Once an interim asset freeze is in place, time limits become an acute issue, because blocking the ability to deal in an asset for an unreasonable time could interfere with a respondent's right to property and other due process rights. Thus, the authorities typically will face strict deadlines to move forward or drop the case. For example, in the UK, until recently, if the authorities had obtained an interim asset freeze in the context of the investigative UWO, and the respondent had formally "complied" with the UWO investigative order, the authorities were required to pursue further legal action within 60 days to obtain a separate legal basis on which to continue to freeze the asset.<sup>19</sup> In cases where large amounts of data could be received in response to a UWO, prompting new lines of inquiry, the 60-day deadline was perceived as potentially too short. Recently, the UK enacted a provision for the court to extend this limit so as to grant up to two 63-day extensions on the asset freeze if the court was satisfied that the enforcement agency was "working diligently and expeditiously" and that the extension was reasonable under the circumstances.<sup>20</sup> Thus the maximum could be up to 186 days.<sup>21</sup> This additional time allows further opportunity to review and test material produced in response to a UWO. If the time limit expires, the freeze will be lifted, and the respondent will be free to move their asset. Thus, the authorities must digest and act on the information in the respondent's response, or come up with other evidence and present it to a judicial officer. This subsequent action could be a civil confiscation proceeding or a criminal action or possibly some administrative measures.

The respondent, to which the discussion turns in the next section, will likely contest the freeze and also be called upon to explain the origin of the assets.

### **3.1.4 Obligations of the Respondent**

What then are the obligations of the respondent? Assuming the preliminary standard has been met and the order or request for information has been issued, the next question is, what must the respondent do. Generally speaking, the respondent is legally required to provide certain information related to how, when, and with what resources the respondent obtained the property, or unexplained wealth, in question.

On the practical side at this stage, there should be clear instructions as to what, how, to whom, and within what time frame the respondent must supply the information requested. For example, must the respondent submit a written statement, along with specified documents, to a given authority (often a court) or appear in person in court, or both? In Mauritius, the respondent must reply "by way of affidavit within 21 days" unless the Director of the Agency specifies a longer period.<sup>22</sup> In Kenya, the issuing anti-corruption authority can require the respondent to furnish a written statement "within a reasonable time" specified in the notice, listing the property and the times at which it was acquired, with what means (purchase, gift, or so forth), and for what consideration.<sup>23</sup>

#### **Box 3.3. Australia: Requirements for a Section 20A Restraining Order**

- A proceeds of crime authority applies for the order;
- There are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired;
- Affidavit requirements of the authorized officer are met;
- The court is satisfied that the authorized officer who made the affidavit holds the suspicion stated in the affidavit on reasonable grounds;
- There are reasonable grounds to suspect either or both of the following:
  - That the person has committed an offence against a law of the Commonwealth, foreign indictable offence or State offence with federal aspect; and/or
  - That at least part of the person's wealth was derived or realised, directly or indirectly, from [such an offence].

The property in question can either be specified property or all property of the suspect. The order can specify that the Restraining Order covers property that is acquired by the suspect after the court makes the order.

Source: Proceeds of Crime Act 2002, as amended, sec. 20A.

In one case from the UK, under the circumstances of COVID-19 protocols, the respondents were requested to reply to the UWO “by way of a video statement and production of documents.”<sup>24</sup> Another question is the mode of submission—submitted in physical form or electronically, or both. The answer may be evolving, accelerated by the circumstances of the pandemic,<sup>25</sup> since electronic submissions and online proceedings have increased. This may pave the way to more electronic submission processes in the future, which could lead to efficiency gains (provided that the requisite security safeguards are in place).

A related issue, especially with regard to legal persons, is to whom may the UWO inquiry be addressed. Merely naming the legal person may limit enforcement options. As noted previously, the UK recently addressed this issue in its 2022 amendments to the UWO laws. Under the legislative amendments, the UWO investigative tool can require a “specified responsible officer”—including directors, officers, and managers—to provide a statement or documents, whether or not they “hold” the property that is the subject of the UWO.<sup>26</sup> This means that a named natural person could be held liable for failing to comply with the order, a significant change.

As for the substance, there are two possibilities: (a) the respondent does not reply or otherwise formally comply or (b) the respondent replies or complies.

### **No response at all**

If the respondent simply does not respond without reasonable excuse within the deadline provided, severe consequences follow in all systems. For example, in the UK, if the respondent does not respond, the consequence is that the property is automatically presumed to be “recoverable property”<sup>27</sup> and can be the subject of a civil forfeiture proceeding. Mauritius also has a presumption of unexplained wealth. Presumptions of this kind are common and are discussed in detail in section 3.1.6. Moreover, depending on the circumstances, the person may be held in contempt of court or face other serious consequences. In Kenya, failure to comply with the notice of unexplained assets could result in a forfeiture order and is also a criminal offense subject to a fine and up to three

**Table 3.2. Consequences of Failure to Respond to a UWO**

Country	Consequence	Sources
<b>UK</b>	Property is automatically presumed to be “recoverable property.”	PoCA, sec. 362C.
<b>Mauritius</b>	Property deemed unexplained wealth.	GGIRA, sec. 5(1)(b), sec. 13, sec. 16.
<b>Kenya</b>	Property deemed subject to forfeiture, plus liability for a criminal offense subject to fine and/or up to three years’ imprisonment.	ACECA, sec. 55 and sec. 26(2).
<b>Australia</b>	Property presumed unexplained wealth (derived or realized from offenses).	PoCA, sec. 179E.

Source: Original table for this report. Note: ACECA = Anti-Corruption and Economic Crimes Act; GGIRA = The Good Governance and Integrity Reporting Act; PoCA = Proceeds of Crime Act; UWO = unexplained wealth order.

years' imprisonment.<sup>28</sup> Table 3.2 compares the systems and presumptions, which are discussed further in section 3.1.6.

### ***Response with misleading or false information***

Another type of noncompliance is the respondent providing information within the deadline, but it is misleading or false. In the UK, a new criminal offense was established specifically for this purpose. In other words, providing false or misleading information in response to a UWO is a new stand-alone offense, subject to possible fines and imprisonment.<sup>29</sup> Similarly, in Mauritius a person commits a separate offense when the disclosure is false, malicious, or vexatious and is liable on conviction to fines and imprisonment up to one year.<sup>30</sup> Moreover, in many jurisdictions, offenses may already exist for providing false or misleading information to a court, which could be applied to UWO cases.

## **3.1.5 Consequences of an Unconvincing Response**

### ***Respondent complies with the order***

If the respondent provides information in the manner and time frame requested, the authorities then must assess the information and determine a course of action. There are three possible scenarios. First, the respondent satisfactorily explains their wealth. If the respondent is able to satisfy the court, authority, or agency as to the lawful origins of the property, then the process is terminated and any interim freezing orders should be lifted expeditiously.<sup>31</sup> Second, the respondent meets a "burden of production," thus perhaps placing the burden of proof back on to the authorities. In some systems, if the respondent submits credible evidence of the origin of the wealth without it being conclusive, then the burden will again rest on the state to prove that the wealth is unexplained. In other systems, the respondent bears the burden of proof. Third, the respondent puts forth evidence not satisfactory to explain the wealth and thus does not rebut the initial showing of the authorities, leading to further steps toward a UWO.

In the third case, there are variations among UWO systems including the following:

- Further separate proceedings: the enforcement authority applies to pursue further "enforcement or investigatory proceedings," such as separate civil forfeiture proceedings.<sup>32</sup>
- Second tier review: The enforcement authority refers the cases for a second-tier review (for example, by IRSA to the Integrity Reporting Board) to determine whether to apply to a court to confiscate the property.<sup>33</sup>
- Direct proceedings for a recovery order: The "preliminary UWO" in Australia brings the respondents directly before the court and requires them to provide further information and enables the court to determine whether the UWO (order to pay) should be issued; if the court is not satisfied by respondent's explanation that the wealth was obtained lawfully, it may issue a UWO requiring the person to pay the amount it deems unsatisfactorily explained.

### ***Time frames in the context of UWO procedures***

UWO systems contain time lines both for the respondents and the authorities, as well as documentation requirements, which may differ in cases where asset freezes are in place, as noted previously. The contours of these timelines are design considerations with practical relevance, including (a) the deadlines for both sides, (b) any consequences of not adhering to them, and (c) what documents are required and how they are provided.

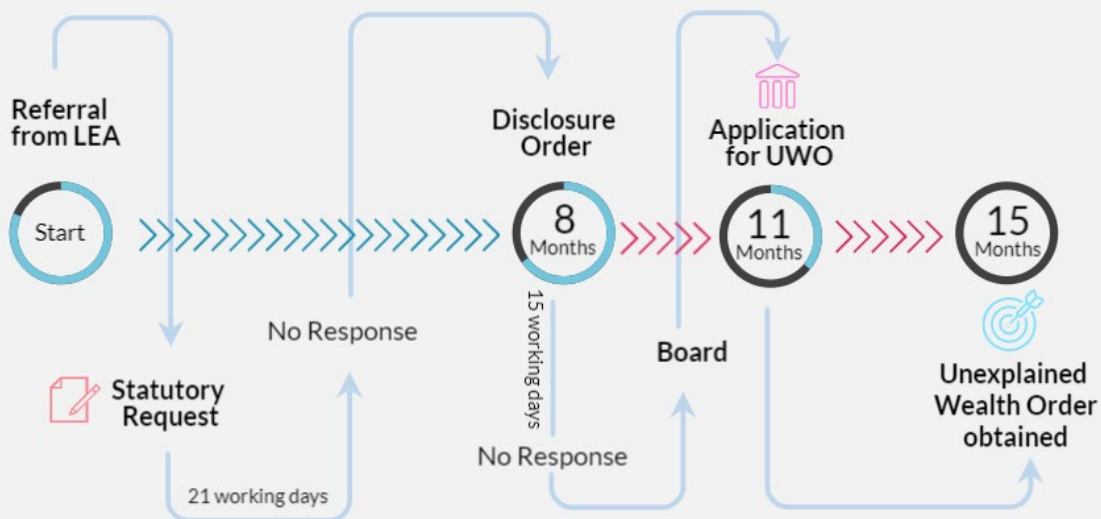
Aside from the strict deadlines discussed earlier in cases where assets are frozen (section 3.1.3), in cases not subject to an asset freeze, UWO systems generally contain some time limits; however, some do not. In Mauritius, there is no statutory time limit

on IRSA in its process of reviewing the information submitted by respondents (though, at the first inquiry phase, there has also generally not been a freezing of the assets;<sup>34</sup> a factor that reduces the need for a strict time line at that stage). The time frame to case completion depends on many factors, including (a) the complexity of the case (which roughly corresponds to the value of the property in question—the more at stake, the more likely the respondent has access to high-powered lawyers and can obfuscate issues and devise elaborate ploys); (b) the quality of the referral (other agencies can omit critical information needed to support a statutory request); (c) the workload of the court; (d) the ease with which the court grants postponements; and (e) the respondent's circumstances (in or out of custody). For example, in Mauritius, a simple case may take around 15 months to obtain the UWO, whereas a complex case may require four years or more. Figure 3.2 illustrates the progress of a simple case for Mauritius.

In the UK UWO system, if the respondent is formally found to comply (or purport to comply) with the UWO, the ball is back in the authorities' court, so to speak, to determine any further investigative or enforcement action within 60 days unless the authorities obtain an extension.<sup>35</sup>

Moreover, a separate and stringent "extension" provision could be included in a UWO system to enable parties (the authorities or the respondent) to apply for extensions of time when circumstances would justify such extensions. Each case is different and aiming for an ideal inflexible schedule may be counterproductive. It would then be up to the judicial officer to determine if an extension is granted. Some procedural systems provide for extensions for good cause (especially with regard to evidence located abroad), so those general provisions may kick in for relief if needed, unless specifically excluded.

**Figure 3.2. Mauritius: Timeline of Unexplained Wealth Order in a Simple Case**



Source: Mauritius, Integrity Reporting Services Agency. Note: LEA = law enforcement agency; UWO = unexplained wealth order.

### 3.1.6 Role of Rebuttable Presumptions in UWOs

In a legal sense, a presumption is an inference of the truth drawn from a defined set of circumstances. Thus, if a party establishes the defined set of circumstances, the party against whom the presumption exists has the burden of presenting proof to rebut it (as the examples in box 3.4 illustrate) but usually does not bear the ultimate burden of proof.

Often in confiscation cases, once the relevant government agency has alleged that the property or assets are proceeds of crime and produces circumstantial evidence to make out a *prima facie* case, the burden shifts to the respondent to rebut the presumption. If the respondent provides a rebuttal that satisfies the court, the burden will shift back again. The weight of the presumption will make it much more difficult for a respondent to rebut the presumption with a simple assertion as to the lawful source and use of the asset. Instead, the respondent will have to produce evidence. Generally, with regard to UWOs, similar provisions apply although without needing to show a direct link between property and crime, since that link is allowed be much more tenuous under UWO systems. Rebuttable presumptions are a crucial component of UWO systems. The four major UWO systems highlighted here (Australia, Kenya, Mauritius, and the UK) all use presumptions.

#### Box 3.4. Common Bases for Presumptions

- **Possession.** Under this presumption, assets found in the possession of a person at the time of the offense, or shortly before or after the commission of the offense, are considered to be either the proceeds or an instrumentality of the offense.
- **Associations.** This presumption has been applied in organized crime cases in which assets belonging to a person who has participated in or supported a criminal organization are presumed to be at the disposal of the organization and can be confiscated.<sup>a</sup> The inclusion of this enhancement helps attack the economic base of entrenched criminal groups.
- **Transfers of assets.** The law can impose a presumption under which transfers to family and close associates or any transfers below market value are not legitimate.<sup>b</sup> The titleholder would have to prove that the asset was the subject of an arm's-length transaction that involved payment of fair market value.<sup>c</sup> If not rebutted, the court will invalidate the transfer.
- **Nature of the offense.** This presumption is usually linked to conviction for a class of particularly serious offenses, such as trafficking in substantial quantities of drugs, major forms of corruption or fraud, racketeering, or organized crime. Upon conviction for such an offense, a rebuttable presumption is raised, and the assets accumulated during a certain period before and after the commission of the crime are presumed to be the proceeds of crime and subject to confiscation.<sup>d</sup>

Source: Jean-Pierre Brun et al., *Asset Recovery Handbook*, 2nd ed. (Washington, DC: World Bank) at 202–3.

- In 2005, Switzerland's Federal Supreme Court ruled that former Nigerian dictator Sani Abacha, his family, and associates constituted a criminal organization and ordered the confiscation and return of US\$458 million of Abacha-related assets using these provisions (Switzerland, Federal Department of Foreign Affairs (FDFA) 2016, 18–20). See also the Swiss Criminal Code (CC 311.0), art. 72: "The court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal organization. In the case of the assets of a person who participates in or supports a criminal organization (art. 260ter), it is presumed that the assets are subject to the power of disposal of the organization until the contrary is proven" (Sept. 21, 1937 [status as of Sept. 1, 2017], <https://www.admin.ch/opc/en/classified-compilation/19370083/201709010000/311.0.pdf>).
- In Thailand, transfers of property to family members are presumed to be dishonest (Anti-Money Laundering Act, B.E. 2542 [1999], secs. 51–52).
- In Colombia, the party attempting to rebut the presumption must also prove that the transaction actually occurred (that is, the party had sufficient income to purchase, and the selling party received the funds).
- See, for example, in the United States, 21 U.S.C. § 853(d), which provides that property acquired during the course of a drug offense is presumed to be drug proceeds.

Especially in grand corruption cases that are often difficult to prove but very important from a public policy perspective, presumptions are a critical tool. Public officials—particularly those who have a long tenure in public service—have had extensive opportunity to embezzle and conceal funds and are often able to influence witnesses and thwart investigations into their assets. In this context, relieving the prosecution of the burden to establish that unexplained wealth is linked to specific instances of illegal conduct greatly enhances the possibility of obtaining a confiscation judgment and can be accomplished while retaining due process safeguards.<sup>36</sup>

In any case, practitioners must use presumptions prudently. Any chronic abuse of the tools available in a confiscation system can bring the entire system into disrepute.<sup>37</sup> For example, using presumptions to confiscate all the assets of a person who has committed a relatively minor crime could raise questions about the integrity of the confiscation system and could adversely affect the rights of third parties such as non-complicit family members.

## 3.2 Coordination of Enforcement Authorities and Frameworks within a Country

This study has shown that a wide variety of government authorities may be involved in implementing UWO systems. Not only criminal investigators, prosecutors, and judicial officials, but also specialized agencies, ethics authorities, tax authorities, and those charged with international cooperation at ministries of justice and other ministries. While it is common in asset recovery systems to engage diverse parts of the government, the constellation of actors called upon for UWOs is especially broad.

Naturally, the issue arises how these counterparts will coordinate with each other and how to promote efficiency and to minimize friction and interagency rivalry. Among the players in UWO systems, two types of authorities may play a particularly useful role: tax authorities and those responsible for verification of income and asset declarations of public officials. This section explores not only ways to maximize the benefits of coordination with these authorities, but also how to do so within the wider network of authorities in a country.

### 3.2.1 Interagency Cooperation in the Context of UWOs

In addition to the proper resourcing, the proper organization of law enforcement agencies proves helpful. This includes capacity and organization both within a given agency and among different agencies. Within an agency, technological tools offer promising potential to reduce costs in the long run through improved productivity. For example in 2016, the UK announced its first steps toward the establishment of a Joint Financial Analysis Centre (JFAC) with new “software tools and techniques” and a “proactive acquisition of data.”<sup>38</sup> Though not a UWO system, the similar proceeds of crime system in Ireland shows that a key component was access to a robust comprehensive database, the Police Using Lead System Effectively (PULSE) database, with information on all citizens’ criminal, traffic, tax, property, customs, social welfare, and consumer credit records.<sup>39</sup>

For a UWO system to achieve its objectives, there must be mechanisms in place among agencies for efficient and regular cooperation, especially for the ability to share information as permitted by law, including with tax authorities, in a timely and secure manner. In some cases, the law must be changed to enable this (see “Information sharing with tax agencies” in section 3.2.2). The tax authorities, any financial intelligence unit, the police, the motor vehicle administration, and land agency, for example, given their different mandates, may each have different, relevant information that represents a crucial piece of the puzzle necessary for connecting the bigger picture toward a UWO.

This topic of interagency cooperation has been the subject of comprehensive studies,<sup>40</sup> such as the Vienna University publication focusing on Africa that resulted from the Tax and Good Governance Project 2015–18<sup>41</sup> and OECD reports.<sup>42</sup>

### ***Australia's local and federal coordination***

Australia has two layers of cooperation that apply to its unexplained wealth order system. First, the establishment in 2011 of the Criminal Assets Confiscation Taskforce led by the Australian Federal Police ensures cooperation and the sharing of expertise between agencies at a national level. The taskforce is a multidisciplinary, multiagency task force responsible for the investigation and litigation of proceeds of crime matters (including UWOs). Taskforce members include the Australian Federal Police, Australian Taxation Office, the Australian Criminal Intelligence Commission, the Australian Transaction Reports and Analysis Center, and the Australian Border Force.<sup>43</sup> The second level of cooperation is between the commonwealth and states and territories through the National Cooperative Scheme on Unexplained Wealth,<sup>44</sup> introduced in 2018, to better coordinate between the UWO systems at the commonwealth level and at the level of states and territories through information sharing for seized assets available to participating jurisdictions.<sup>45</sup>

### ***Mauritian model of specialized agencies***

The Mauritian model is quite different from the Australian one, starting with the fact that IRSA's personnel are not drawn from law enforcement but rather tend to have backgrounds in financial services or accounting with an emphasis on integrity and independence. To maintain its independence from the executive branch, IRSA is not subject to operational oversight (although it must of course submit to financial oversight). As the UWO law is a heavy hammer, policy makers wanted to ensure good governance and impartiality, using the two-tier structure of IRSA and the Integrity Reporting Board to prevent abuse. IRSA has no formal ties to any other agencies and depends on goodwill for its interagency cooperation, which is reported to work smoothly. Other agencies perceive a benefit to cooperation with IRSA, especially in certain kinds of matters which often could end up being mired in lengthy and uncertain criminal proceedings, for example narcotics cases (where witness intimidation is prevalent).

### ***Ireland's multidisciplinary task force***

In the context of proceedings similar to UWOs, Ireland's Criminal Assets Bureau (CAB) created an entirely new multidisciplinary agency, bringing together the skills and personnel of the agencies in one place to recover the proceeds of crime, including not only police and prosecutors, but also tax and social welfare agencies. The CAB attacks the proceeds of crime not only by way of civil NCB forfeitures but also by taxing these and recovering any falsely claimed social welfare payments from the respondents who own or control such property.

Finally, just as in the case of the judiciary, in the creation of specialized agencies, it is important to ensure that their statutory duties cannot be undermined in surreptitious ways, by means of granting political officials the powers to appoint or remove those running the agencies or controlling the budget. Their independence must be safeguarded.

## **3.2.2 Coordination with Tax Enforcement Authorities in the Context of UWOs**

Synergies may be had by contemplating a role for the tax authorities and tax laws in the context of UWO investigations. To tax investigators in many countries, shifting the burden of producing evidence onto the respondents by asking them to explain the discrepancy between “net worth” or expenditures and the income and wealth declared

may be a familiar procedure. Compared to UWO investigations, tax investigations have different triggers (the detection of the discrepancy between declared revenue and wealth accumulated), a different time frame (a specified number of annual tax years), and a different purpose (recovering evaded taxes). By contrast, UWOs are triggered by “reasonable cause” or “reasonable grounds” to suspect that “unexplained wealth” was unlawfully accumulated over a longer period, with UWOs generally resulting in the confiscation of this unexplained wealth under the presumption that it is proceeds of crime. In spite of these differences, both processes can complement each other in effective ways, at the stage of the investigation and at the stage of recovery.

At the stage of the investigation, UWO authorities can coordinate with the tax authorities who generally have certain (and sometimes far-reaching) investigative powers. For example, they can request further information from the taxpayer and third parties and can audit taxpayers, in cases where they suspect income to be underreported. In addition, tax authorities in many countries may have developed information technology and artificial intelligence tools to analyze available government and public data, including on social networks. If the requisite laws are in place to allow for the interagency exchange of information, UWO and tax investigators can compile a more complete picture of the income and wealth of a person. As a result, tax authorities with experience in these methods may be well suited, not only to detect and disclose potential unexplained wealth, but also to assist and train investigators responsible for UWOs on tried-and-tested tactics for gathering information and measuring gaps between known income and other capital.

At the stage of recovery, the UWO confiscation system can reinforce the collection of tax revenues and vice versa. For example, while asset recovery systems with unexplained wealth components do not in every case enable asset recovery agencies to fully recover a property as proceeds of crime, it has often been possible to recover significant amounts in uncollected tax revenues, interest, and sometimes penalties in those same cases. One issue that may arise, however, is that, when multiple agencies have their sights on the same pot of resources, interagency rivalry may result, especially regarding which agency recovers the funds and the way the funds are used. Memorandums of understanding for interagency cooperation or other sharing arrangements may mitigate this concern.

### ***Information sharing with tax agencies***

Laws and regulations can be amended to permit more sharing of information among agencies, including tax agencies. Once discrepancies between assets and revenues are discovered in the context of tax investigations or audits, using them to conduct unexplained wealth cases will often be possible only by overcoming the traditional rules or practices that limit information sharing. Generally, there are limits to what the tax authorities can investigate and disclose (due to confidentiality concerns).

Two potential distinctions can be made in this respect. First, often a division is made between the tax laws in general and tax offenses (for example, criminal matters). As regards tax offenses, in some jurisdictions, tax authorities have the power to investigate suspected tax crimes. In other jurisdictions, tax crimes may require additional specialized tax agencies or require referral to other agencies, such as public prosecutors or the police.<sup>46</sup> Second, while it is less common for tax authorities to have powers to investigate or enforce non-tax-related crimes, enforcement against such infractions may be facilitated by tax authorities, depending on what forms of information sharing and cooperation are possible or mandatory between different agencies of a government. If the tax authorities have suspicions about other (nontax) crimes, usually laws and mechanisms permit referral to another agency or prosecutor. Both legal and practical barriers have to be lifted to make this coordination possible.

The general rule is that tax authorities are obliged to respect the confidentiality of taxpayers’ information provided in their tax returns or in other tax-related disclosures.<sup>47</sup>

According to the OECD, this is a fundamental principle of many tax systems.<sup>48</sup> In fact, for example, in the UK, tax officials could be subject to imprisonment or fines for “wrongful disclosure.”<sup>49</sup> The UK, in codifying the duty of confidentiality in 2005, also enacted exceptions that allow disclosure for purposes such as “preventing or detecting crime.”<sup>50</sup>

A possible solution is to adjust the legislation to permit sharing of information between tax and other authorities under defined circumstances, as some systems have done. For example, in Mauritius, the Income Tax Act 1995, was amended (inserting sec. 4A) to expressly provide for an exception to the obligation of secrecy (under sec. 154) for the duty to report unexplained wealth to IRSA.<sup>51</sup> In Australia, the Australian Federal Police (AFP), in its submission to the 2012 parliamentary inquiry on UWO legislation, explained how crucial taxation information is for their investigations. For this reason, they welcomed amendments in 2010 that facilitated this by, among others, “allow[ing] for the disclosure of taxpayer information to law enforcement agencies and courts for the investigation of unexplained wealth matters” and, in fact, proposed to extend the information sharing even further, by allowing the Australian Taxation Office to share information obtained through telecommunications interceptions in the context of a prescribed task force, crucial among which is the Criminal Assets Confiscation Taskforce.<sup>52</sup>

### ***UWO systems are complemented by tax laws***

Taxation laws can be applied alongside UWO proceedings and proceeds of crime cases. Where actions to confiscate using UWO and proceeds of crime legislation are not successful, tax laws may lead to the recovery of unpaid taxes on income, capital gains, value added tax, and corporation tax. Thus if a UWO investigation is faltering, authorities should pursue the taxation of proceeds of crime. In Australia, one suggestion on how to improve the success of its UWO was “improving information sharing with the Australian Taxation Office.”<sup>53</sup> In the UK, in addition to the tax authorities, the UK’s National Crime Agency is endowed with powers to perform “general Revenue functions.”<sup>54</sup> If the UK’s National Crime Agency has “reasonable grounds to suspect that someone has income or assets obtained as a result of crime,” it will “raise tax assessments and relentlessly pursue that liability together with penalties and interest.”<sup>55</sup>

The total recoveries from tax laws are likely comparable to or may even exceed recoveries from proceeds of crime legislation. This study found that one jurisdiction, Ireland, with a system similar to UWOs, has consistently tracked this data. According to Ireland’s CAB annual reports, from 2015 to 2020, its investigations resulted in sums of more than €10 million under its Proceeds of Crime legislation and more than €13 million in revenue collection.<sup>56</sup>

There is another relationship between UWO investigations and tax enforcement. As discussed in the following, with respect to both mandatory and voluntary income and asset disclosure systems, a person who is the subject of a UWO investigation will likely seek to explain the assets in question by reference to income received over past years. Generally, taxpayers are required to periodically report their income (for example, annually, quarterly) and pay taxes on it, and may even have additional information reporting requirements (for example, to report foreign bank accounts<sup>57</sup>), so one would expect to find a record of it. If not, this means that either the person should have reported the income and paid taxes on it or, if the person did not report it, investigators could question whether it was indeed ever received from legitimate sources.

However, in some countries, there are certain categories of assets that are not taxable and may not fall under any other obligation to be reported to the tax authorities. A claim that one’s wealth originates from these categories holds obvious appeal. If a given type of income or wealth falls outside of the scope of tax laws then the tax authorities have neither the right to tax it, nor (in some cases) the right to request information on it (if the income in question is neither taxable, nor reportable). This has consequences for the interaction between the tax laws and UWO systems.

For example, if winnings from the lottery or gambling activities and inheritances or gifts are not taxable (or reportable), a respondent may try to claim that the property in question is the result of gambling gains in a foreign jurisdiction (perhaps one with which there is no exchange of information or MLA in place).<sup>58</sup> As this income is not taxable in the UWO-jurisdiction, the respondent does not have to report it. If the court accepts this claim as a suitable “explanation” of the person’s wealth, this may reverse the burden back onto the authorities to rely on requesting information from foreign jurisdictions, which could be difficult where well-functioning exchange of information or MLA agreements are not in place. As a result, countries considering UWOs may benefit from reviewing their tax systems and considering three questions: (a) first and foremost, what documentation, if any, can be required if an individual proffers such an explanation, (b) whether it is feasible to adapt tax laws to cover some of the categories of income identified or (c) if the policy reasons as to why certain income (or wealth or transactions) are out of scope of the tax laws outweigh this concern, can such income or wealth be made reportable, at least, if not taxable.

An example of such reporting obligations can be found in Austrian law, where even though inheritance and gifts are not taxable, certain transfers of wealth that exceed a threshold of, for example €50,000, must be reported (so it is not taxable, but it is reportable).<sup>59</sup> In this case, the authorities have the right to request information on income earned from those reportable sources, which can help in ensuring a more complete, traceable picture of an individual’s wealth. To capture more information, the threshold could be lowered (for example, legislators may want it lower than the threshold for property values covered by UWOs, but not so low as to make it difficult to administer for authorities and taxpayers alike). In addition, there should be sanctions for noncompliance and rules to protect against fragmentation and structuring (for example, the risk that taxpayers make smaller gifts over more than one year solely to avoid the reporting obligation).

### **3.2.3 Role of Mandatory Income and Asset Disclosure Systems for Public Officials**

Mandatory income and asset disclosure systems for public officials can reinforce UWO systems. As part of efforts to promote accountability and transparency, many countries have introduced requirements for public officials to disclose their assets and income. These include financial and business interests, such as property, real estate, vehicles, jewelry, and financial investments. An agency, body, or commission receives the declarations and may be charged with verifying its accuracy, making public some of the information, or both. In several works, the StAR Initiative traces the development of such declarations, explaining how and why they have now become a global standard.<sup>60</sup> For example, the African Union Convention on Preventing and Combating Corruption specifies that its parties should “require all or designated public officials to declare their assets at the time of assumption of office, during, and after their term of office in the public service.”<sup>61</sup> In addition, UNCAC specifies that its parties (a) “shall endeavour . . . to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials”<sup>62</sup> and (b) in the provisions on asset recovery, “shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance.”<sup>63</sup>

From these definitions, some design choices include (a) whether to make the declarations public, (b) the timing and frequency of such declarations (ideally at the beginning, during, and after their public service, as the African Union Convention suggests), and (c) appropriate sanctions for non-compliance (as the UNCAC suggests). It is with regard to the third element that a UWO system may be most useful.

Both UWO systems and obligatory asset declarations for public officials mandate information disclosure. Otherwise, they are different tools, both with an important, complementary role to play within the same legal system. By obliging transparency, such declarations aim to deter corruption and conflicts of interest. These disclosure systems concentrate on “public officials,” given that they are entrusted with state resources, responsibilities, and public services, and, therefore, the triggering event is merely the assumption of a public office, irrespective of any suspected unexplained wealth. Those declarations can be a crucial source of information for future UWOs. If a former public official years later, after the term of office, is discovered to have amassed excessive wealth, those previous declarations may be an important starting point for the intelligence-gathering process for a UWO either for what they list or for what they omit.

Moreover, UWO and income and asset declaration systems are mutually reinforcing. If an official who is a respondent in a UWO proceeding provides information as to the sources of certain income—which the official, however, failed to report on his income and asset declaration form—the official may face consequences. For example, in Kenya, if a public official appears to possess unexplained wealth, but, upon request, provides a satisfactory explanation for this discrepancy under the “unexplained assets” procedure of the ACECA, the public official may nevertheless be held accountable for having failed fully to report all wealth in the officer’s “declarations of income, assets and liabilities” to the EACC, as required under the Public Officer Ethics Act.<sup>64</sup> In this way, these two systems can support one another to close a gap, as the example in box 3.5 shows.

### **“Lifestyle” audits of public officials**

Finally, the term “lifestyle audits” has attracted headlines in Africa, although its precise meaning may vary. It has been used in a variety of ways: (a) in some cases, as in South Africa and Zimbabwe, it refers to audits of taxpayers conducted by revenue authorities, similar to the “capital statements” and “net worth” methods in the UK and United States, respectively, that were discussed in section 3.1.1; (b) in others, it refers to audits into the accuracy of public officials’ declarations of wealth or assets, in this case as a tool to strengthen those systems; or (c) it can be an investigative tool, as in the proposed Lifestyle Audit Bill in Kenya (box 3.6), that resembles the UWO systems studied in this report, albeit generally more narrowly targeting domestic public servants to detect misappropriations of public funds.<sup>65</sup>

In Zimbabwe, for several years the revenue authorities (ZIMRA) have been conducting lifestyle audits of some groups of their internal staff. As a result, significant sums were recovered as early as 2018 when more than 30 employees were either suspended or lost their jobs. Those sums have risen each year since: based on ZIMRA’s 2021 report, lifestyle audits, combined with other intelligence, identified over US\$1 million for recovery.<sup>66</sup> As mentioned, these examples of lifestyle audits are generally targeted in scope and function: they may be focused exclusively on public servants and are primarily investigations (as “audits” indicates) aiming to detect misappropriations of public funds or false declarations of assets. They may differ from UWOs if they are designed to cover a class of persons, such as

#### **Box 3.5: Use of Income and Asset Declaration Forms in UWO Proceeding: Kenya: *Ethics and Anti-Corruption Comm’n v. Abachi & Ors* [2021] e.K.L.R. [59], [81], [83] (H.C.K.), Civil Suit No. 15 of 2019 (Kenya)**

**Facts:** The government alleged that the public official respondent had real estate, vehicles, and funds valued at over K Sh 80 million (US\$649,400) during a period when his gross monthly salary as a public official was under Kshs 64,000 (US\$519). As evidence that his legitimate income was very small, the Ethics and Anti-Corruption Commission submitted into evidence the respondent’s Wealth Declaration Forms in compliance with the requirements of the Public Officers Ethics Act for the years 2003 and 2007. He had declared assets in a gross amount of K Sh 1.03 million in 2003 (US\$8,360) and K Sh 1.7 million in 2007 (US\$13,800), making a huge contrast with the results of the investigation.

**Ruling:** Court found the assets constituted unexplained wealth and were subject to forfeiture.

**Note:** UWO = unexplained wealth order.

### Box 3.6. Kenya's Proposed Lifestyle Audit Bill of 2021

Kenya's proposed Lifestyle Audit Bill of 2021, has the following characteristics:

- A "Lifestyle Audit" is defined as "an investigative audit of a person's living standards to ascertain consistency with a person's lawfully obtained and reported income."
- It applies to "public officer[s]."
- A lifestyle audit can be initiated when there are reasons to believe that (a) an official is living beyond his or her lawfully obtained and reported income and (b) is unable to account for the sources of income.
- Under the bill, "unexplained wealth" is a ground for an order compelling information from a public officer: "The Commission may, where there are reasonable grounds to suspect that a public officer's lawfully obtained income would be insufficient to allow the officer to obtain property held by such officer, apply for a search warrant to be issued against an officer—(a) to explain the nature and extent of their interest in a particular property; and (b) the manner in which the property was acquired" (sec. 6).
- The bill also contains an account freezing order in connection with a lifestyle audit and possible forfeiture of accounts.<sup>a</sup>
- The bill lapsed in 2022 when the legislature went out of session but can be reintroduced.

Source: Kenya, The Lifestyle Audit Bill, 2021, accessed March 18, 2022, <http://www.parliament.go.ke/sites/default/files/2021-07/36%20The%20Lifestyle%20Audit%20Bill%2C%202021.pdf>.

a See, for example, The Lifestyle Audit Bill, 2021, sec. 14 and sec. 16; The Lifestyle Audit (No. 2) Bill, 2019, sec. 15 and sec. 17.

a unit of a public agency, rather than being triggered by individualized suspicion, as is the case with UWOs, and if they occur on a regular basis.

### 3.2.4 Role of Voluntary Asset and Income Disclosure Programs

One side effect of UWO systems may be a sudden increase in the number of previously noncompliant taxpayers being brought back into the tax net of a country through voluntary disclosure. The enactment of a UWO system signals to those taxpayers that authorities now have another tool at their disposal for inquiring about their wealth. If assets have not been declared for tax purposes, declarants face a choice. The declarant can come forward under a voluntary disclosure system, if eligible, and thus accept paying taxes with potential interest and penalties. Or the declarant can persist in not declaring and face the increased risk of detection, with potential forfeiture of the asset, as a result of the new UWO.

Voluntary disclosure programs can be defined, generally, as "opportunities offered by tax administrations to allow previously noncompliant taxpayers to correct their tax affairs under specified terms."<sup>67</sup> Following the recent wave of international agreements to exchange information (especially the expansion of the automatic exchange of information),<sup>68</sup> such tools were placed back on the policy radar. The combination of the exchange of information and voluntary disclosure programs was flagged as a unique opportunity to significantly increase compliance by regularizing as many taxpayers as possible and bringing them back into the tax net in a sustained way. The potential benefit of such programs is an opportunity to facilitate compliance in a timely manner, saving costly and contentious audits, litigation, and criminal proceedings.<sup>69</sup> However, there are risks, and delicate calibration is needed.

First, there is a balance to be struck. A voluntary disclosure program should be such that taxpayers who come forward voluntarily pay more than they would have had they been fully compliant from the outset, but face less punitive sanctions than evaders who make no disclosure but are detected by their tax administration.<sup>70</sup> The balance is between granting just enough incentive for taxpayers to participate in the programs while not rewarding or encouraging the previously noncompliant conduct.<sup>71</sup> Second, the program must avoid creating a perception of unfairness to the vast majority of taxpayers who are already compliant.<sup>72</sup> If compliant taxpayers perceive that noncompliant taxpayers eventually obtain favorable treatment, it will fuel resentment.<sup>73</sup>

The introduction of Nigeria's Voluntary Asset and Income Declaration Scheme (VAIDS)<sup>74</sup> provides an interesting illustration of how UWOs can influence the success of such systems. VAIDS was intended to provide a time-limited opportunity for taxpayers to regularize their tax status relating to previous tax periods. Taxpayers were required to fully and honestly declare previously undisclosed assets and income, and in exchange would obtain a waiver of interest and penalty charges, an exemption from facing prosecution for tax offenses, and immunity from any tax audit. Some commentators posited that such a declaration could potentially form a valid defense against a UWO application, the argument being that, if a Nigerian were to be confronted with a UWO action, but having declared under VAIDS, it would be far more difficult for the UK to obtain a seizure order: "For the UK Government to dispute the validity of a VAIDS declaration that Nigeria has accepted and on which taxes have been paid would violate the bilateral tax treaties between the two countries."<sup>75</sup>

It was reported that the potential "stick" of the UWO did, therefore, lead to an increase in opting for the "carrot," under the VAIDS program. Nonetheless, practitioners also rightfully acknowledged the crucial counterargument that, "VAIDS was not designed as an amnesty for looted funds or hot money" and, therefore, in cases where the money or assets represent the proceeds of crime, a declaration and regularization for tax purposes would not change that underlying fact. While Nigeria may already be benefiting from newly collected overdue tax revenue from a wave of VAIDS declarations, Nigeria would still benefit even more from the UK UWO, if it were to uncover that some of the assets declared under VAIDS were acquired as a result of other (nontax) criminal activities, and if the UK were therefore to proceed with recovering those assets and eventually returning them to Nigeria.

Moreover, depending on the form of the voluntary disclosure law, declaring and paying tax on an asset or income stream should not insulate the person from other liabilities, especially if the person lacks evidence of the legitimate origin of the assets. Furthermore, a voluntary tax disclosure program is helpful, but a country should not consider that prong the end of the matter. An important distinction is that UWO systems target the proceeds of crimes in general, not only tax crimes. Thus, voluntary income disclosure statutes should be limited to tax benefits. Countries ought to strive for recovering both evaded taxes and assets that have been illicitly acquired or stolen in other ways. These two tools, if designed properly, can be a powerful combination in that effort.

### 3.3 Cooperation and Coordination Internationally

Countries should be encouraged to cooperate with other countries to maximize the benefits of a UWO system. Regarding exchanges of information and mutual legal assistance, in particular, there is a nuanced relationship with UWOs. On the one hand, UWO systems can help overcome some barriers to information and evidence gathering, precisely because they obtain information and documentation from the respondents who must explain their wealth. Thus, UWOs can be particularly beneficial at the early stage of investigation of proceeds of crime. On the other hand, at later stages, countries

may confront the same challenges as with other asset recovery mechanisms. Often it is still necessary to obtain information from a foreign jurisdiction to test the veracity of or refute evidence adduced by the suspect in relation to whether their income was derived from a lawful source.

Moreover, enforcement of judgments regarding assets located abroad will still require MLA. Though one measure to ease this challenge is to design the UWO system to allow for value-based confiscation or payment orders (in other words, rather than going after the property abroad, to allow that substitute assets or payments of an equivalent amount be considered).<sup>76</sup> This solution would be effective if the respondent has other assets or bank accounts in the enforcing jurisdiction.

Concerning the initial stages, one rationale for UWO systems is that they are overall less dependent on cross-border cooperation at the investigation stage because they rely more on the respondent for the information needed to build the case in favor of recovering the asset. However, before a burden is placed on the respondent, the authorities need some information to be able to detect the unexplained wealth in the first place. For some property within the enforcing jurisdiction, no further information may be needed. For example, a mansion or large yacht of great value is easily observed and may provide a basis to seek a UWO.

However, regarding assets that are situated abroad, challenges may still arise during the initial intelligence-gathering phase if authorities do not have enough information on some assets—for example, if authorities want to confirm certain assets located abroad, such as bank accounts. While exchange of information (including automatic exchange of certain tax and financial information) has improved, more remains to be done, especially for developing countries.<sup>77</sup>

Even for assets located within the enforcing jurisdiction, if a country needs to prove the “link to crime” through reliable evidence of a foreign proceeding, it may struggle for that documentation, though such information may not need to be very detailed, as illustrated by a UK case. In *NCA v. Mrs. A*,<sup>78</sup> the respondent argued that it was wrong for NCA to rely on a corruption conviction against the respondent’s husband in Azerbaijan because the trial proceedings disregarded human rights. The court ruled that, at the stage of the UWO, an investigative proceeding, the court was not required to determine the fairness of a foreign trial, so the court could properly consider his conviction in deciding the income shown was not sufficient to account for the wealth. Moreover, the threshold for excluding reliance on a foreign conviction on human rights grounds is high, requiring a flagrant deprivation of an individual’s rights, such as a conviction based on a confession obtained by torture, and this did not appear to be such a case. On the contrary, certain evidence corroborated the conviction. Thus an advantage of UWOs is that courts are not likely to require elaborate proof as to the strength of the foreign case, whether it resulted in a conviction for certain offenses, or whether all aspects of the proceedings complied with due process, as all that is required is “suspicion,” a weak link to criminal activities.

Nonetheless, UWOs may still depend on the formal (MLA) and informal cooperation agreements and procedures in place with other jurisdictions. This includes laws for the recognition of foreign (non-conviction-based) asset recovery systems (which do not exist in all jurisdictions, so may not be universally recognized) and civil judgments and agreements for exchange of information and MLA. The challenges to obtaining evidence through MLA are reoccurring barriers to asset recovery.<sup>79</sup>

### 3.3.1 Application of Dual Criminality and Specialty Principles

Jurisdictions that have no UWO legislation may question whether the dual criminality principle is respected when they are asked to provide information to support a UWO investigation seeking to verify responses from a respondent claiming that assets were legitimately acquired with resources coming from their territory.

Many UWO laws depend to some extent on the criminal laws, because UWO laws may require, for example, reasonable grounds for suspecting a link to criminal activity in the enforcing jurisdiction or in another one. This has implications for dual criminality in the context of MLA. Not all jurisdictions criminalize, for example, the “corruption of foreign public officials” or “violations of foreign exchange control laws,”<sup>80</sup> and the circumstances under which certain behaviors are criminalized differs. For example, tax evasion alone may not be criminalized in all jurisdictions but instead may become criminal only if accompanied by certain “aggravating circumstances,” such as “when records or evidence are deliberately falsified.”<sup>81</sup>

To the extent the scope of the UWO is linked to certain crimes (for example, as in the UK’s category of UWO respondent for whom there must be “reasonable grounds for suspecting that . . . the respondent is, or has been, involved in serious crime [whether in a part of the United Kingdom or elsewhere]”), the list of offenses criminalized may affect which circumstances fall under the scope of the UWO. Moreover, if the behavior is committed abroad and dual criminality is required for MLA, then discrepancies between what is criminalized in one jurisdiction and not in the other can create limits for the provision of MLA.

In addition, the “rule of specialty,” dictating that information provided through MLA for the stated purpose of the request can only be used in that proceeding may constrain sharing among agencies within a government. If criminal tax investigators receive information for use in the investigation of tax evasion, they may not be able to automatically transfer that information to prosecutors seeking to bring UWO proceedings. Possible solutions include asking the requested state for permission to share its information with the other branches of the requesting state, or having that other branch simply formulate the same request, which in most cases would be granted. Another alternative is to seek the information informally and use it to obtain other information or evidence.

### 3.3.2 International Sharing of Tax Information

As for tax information, exchange of information has historically been enabled by double taxation conventions. Many developing countries, however, have very limited networks of such conventions. One solution is the Multilateral Convention on Mutual Assistance in Tax Matters (MCMATM).<sup>82</sup> It spares countries the more resource- and time-intensive process of having to negotiate multiple bilateral agreements, by granting access to the global system of information exchange, including the possibility to opt—upon mutual agreement between two parties—for the automatic exchange of some categories of information.

Importantly, the MCMATM enables countries to obtain information from key offshore centers with which they are unlikely to want to negotiate a double taxation convention. Using this channel, countries can try to make fuller use of the exchange of information for tax purposes because it may significantly enhance their ability to detect unexplained wealth in the first place. Exchange of information for tax purposes is an important tool for investigators, assuming it is legally and operationally possible to share the information and to coordinate between the tax administration and the other arms of law enforcement.

While the MCMATM could be especially useful for developing countries with limited treaty networks, there are limits on the use of the information. Receiving information for tax purposes can be extremely useful in putting together a more complete picture of a person’s income and wealth (and even more useful if there is successful interagency cooperation, as discussed under the political and institutional considerations). However, availability of the information for use in a UWO proceeding may be constrained by confidentiality restrictions, unless the particular UWO law has overcome this obstacle.

### 3.3.3 Summary

These complex factors of dual criminality and sharing of tax information should be weighed in drafting a UWO system. The dependence on cross-border cooperation varies depending on the circumstances. To the extent the UWO relates to property within the UWO-issuing jurisdiction, the challenges of cross-border cooperation are generally easier to overcome. For example, to date the UK authorities appear to be concentrating their efforts on the property located within their borders (box 3.7).

By contrast, to the extent a UWO relates to property that is not under the control of the jurisdiction in question, cross-border cooperation becomes essential for recovering the asset and at an earlier stage, for a provisional seizure or restraint order.<sup>83</sup> The design of the UWO system can potentially mitigate this challenge if there is value-based confiscation, as in Australia or Mauritius, as it is not necessarily the property itself that needs to be recovered. In this case, the UWO can result in value-based confiscation or an obligatory order to pay an amount equal in value to the recoverable property or to the unexplained wealth, assuming the respondent has monetary assets in the enforcing jurisdiction.

In sum, the dependence on cross-border cooperation varies, hinging on the stage (for example, the investigative stage, the repatriation stage, or the recovery stage), circumstances (for example the location of the property), and the design of the UWO system. If the property is within the enforcing jurisdiction, very little cooperation may be needed, especially at the early UWO stages. At later stages, cooperation is likely to become more important.

#### **Box 3.7. UK: Cases of UWOs with Regard to Property within the Enforcing Jurisdiction**

1. The UK applied for unexplained wealth orders (UWOs) against Mr. Hussain, a property developer, regarding eight properties that were registered as owned by him and six companies that were wholly owned by him. The properties were valued at about £9,970,000 at the time of the application. The UK claimed that Mr. Hussain held the properties because he was the registered owner or a sole shareholder and director of six other corporate registered owners of the properties, having effective control over the properties. Based on the evidence showing that Mr. Hussain's annual declared income was less than £10,000 most of the time, that the six companies didn't have any income, and his suspected links to serious crime, the authorities obtained UWOs to seize over 45 properties in London, Cheshire, and Leeds, four parcels of land, as well as other assets and £583,950 in cash, with a combined value of £9,802,828. *Nat'l Crime Agency v. Hussain & Ors* [2020] EWHC (Admin) 432 (Eng.).
2. Similarly, the UK used UWOs to seize £30 million worth of assets held by Zamira Hajiyeva and her husband, including two pieces of real estate in the UK. One property had been purchased in December 2009 by Vicksburg Global Inc., a company incorporated in the British Virgin Islands, for a price of £11,500,000. *Hajiyeva v. Nat'l Crime Agency* [2020] EWCA (Civ) 108 [3] (Eng.); *Nat'l Crime Agency v. A* [2018] EWHC (Admin) 2534 (Eng.).

## Notes

- 1 See, for example, UK, HM Revenue and Customs's internal guidance, accessed March 8, 2020, <https://www.gov.uk/hmrc-internal-manuals/enquiry-manual/em3581>.
- 2 UK, HM Revenue and Customs, HMRC internal manual, *Enquiry Manual*, "Recalculating Profits: Private Side—Capital Statements: Uses (EM 3581), and "Recalculating Profits: Private Side—Capital Statements: Basis of Computation (EM3583) (published April 12, 2016; updated March 24, 2020), <https://www.gov.uk/hmrc-internal-manuals/enquiry-manual/em3581>.
- 3 See, for example, US, *Internal Revenue Manual*, part 9. Criminal Investigation, chap. 5. "Investigative Process," sec. 9. Methods of Proof, March 19, 2012, [https://www.irs.gov/irm/part9/irm\\_09-005-009](https://www.irs.gov/irm/part9/irm_09-005-009); see also Nelson W. Taylor III, "Taxation—Tax Fraud Cases—Use of Net Worth Method," *North Carolina Law Review* 33, no. 688 (1955), <http://scholarship.law.unc.edu/nclr/vol33/iss4/19>.
- 4 United States v. Schafer, 580 F.2d 774, 775 (5th Cir. 1978).
- 5 SARS (South African Revenue Service), "SARS Search and Seizures Operations Are Strictly Governed" (media release, Pretoria, March 5, 2018), accessed January 31, 2021, <https://www.sars.gov.za/Media/MediaReleases/Pages/5-March-2018-SARS-search-and-seizure-operations-are-strictly-governed.aspx>; "Six SARS Audit Tips for the Captured," Tax Consulting South Africa, <https://www.taxconsulting.co.za/six-sars-audit-tips-for-the-captured/> ("SARS is not allowed to raise a willy-nilly tax assessment, as there must be a valid *prima facie* case of non-compliance.").
- 6 UK, Proceeds of Crime Act 2002, as amended, sec. 362A(7) ("enforcement authority" means—(a) the National Crime Agency, (b) Her Majesty's Revenue and Customs, (c) the Financial Conduct Authority, (d) the Director of the Serious Fraud Office, or (e) the Director of Public Prosecutions).
- 7 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 26 in connection with sec. 55(2).
- 8 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 4(1) (establishing the Integrity Reporting Services Agency) and sec. 7(1) (establishing the Integrity Reporting Board).
- 9 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 5(1)(a), sec. 9(1), and sec. 9(2).
- 10 Australia, Proceeds of Crime Act 2002, as amended, sec. 179B.
- 11 *Id.*
- 12 UK, Proceeds of Crime Act 2002, as amended, sec. 362B.
- 13 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 5(1)(a), sec. 9(1), and sec. 9(2).
- 14 Australia, Proceeds of Crime Act 2002, as amended, sec. 20A.
- 15 Integrity Reporting Board, "First Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board" (Annual Report 2017, submitted January 3, 2018) at 13.
- 16 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 12 and sec. 14(3).
- 17 Integrity Reporting Board, "First Annual Report" at 13 (The Board pointed out an area for improvement: "The inscription lapses after 42 days. This is no doubt designed to encourage expedition on the part of the Agency. Nevertheless, if a reasonable time is to be afforded to owners of property to respond to further enquiries from the Agency, for the Agency to make its own enquiries, for the Board to consider the Agency's report, and for any further action to be taken in the light of the Board's response, more than 42 days are likely to be needed.").
- 18 Mauritius, The Good Governance and Integrity Reporting Act 2015, sec. 14(3), as amended by Act No. 5 of 2020.
- 19 UK, Economic Crime Transparency and Enforcement Act 2022, secs. 49–50, inserting sec. 362DA, sec. 362DB, sec. 396DB, and sec. 396DB, accessed January 4, 2023, <https://www.legislation.gov.uk/ukpga/2022/10/part/2>.
- 20 *Id.*
- 21 *Id.*
- 22 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 5(1).
- 23 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 26.
- 24 Nat'l Crime Agency v. Baker & Ors [2020] EWHC (Admin) 822 [5] (Eng.).
- 25 The COVID-19 was declared a global pandemic in March 2020 and was still ongoing at the time of writing this study. See, for example, World Health Organization, "WHO Director-General's opening remarks at the media briefing on COVID-19," March 11, 2020, accessed January 4, 2023, <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.
- 26 UK, Proceeds of Crime Act 2002, as amended by the Economic Crime Transparency and Enforcement Act 2022, secs. 45 and 46 (Imposition of unexplained wealth orders on officers etc of property holder) (2022), accessed January 4, 2023, <https://www.legislation.gov.uk/ukpga/2022/10/part/2>.

- 27 UK, Proceeds of Crime Act 2002, as amended, sec. 362C.
- 28 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 26(2).
- 29 UK, Proceeds of Crime Act 2002, as amended, sec. 362E(1) and (2).
- 30 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 20(3).
- 31 For example, in the UK, initially the time limit was 60 days in cases where a freezing order was in place; however, it is relevant to note that it starts from “the day of compliance” with the order to provide information. Compliance does not necessarily mean that the information provided under the order constitutes a fully satisfactory explanation. *Nat’l Crime Agency v. Baker & Ors* [2020] EWHC (Admin) 822 [18] (Eng.) (citing “subsection 362D(3)”). Because 60 days was found to be restrictive, it was amended by the Economic Crime Transparency and Enforcement Act 2022 to allow for extensions in certain cases.
- 32 As in the UK, Proceeds of Crime Act 2002, as amended, sec. 362D.
- 33 As in Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 5(2) and sec. 8(1).
- 34 See Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 12. The respondents are not allowed to dispose of their assets that are the subject matter of a statutory request. See sec. 12(1A).
- 35 UK, Economic Crime Transparency and Enforcement Act 2022, secs. 49–50, inserting sec. 362DA and sec. 396DA.
- 36 Jean-Pierre Brun et al., *Asset Recovery Handbook* (Washington, DC: World Bank, 2021) at sec. 7.4.1, 201–3 and footnotes 45–46. Some systems without UWO regimes make use of similar presumptions with regard to increases in the wealth of a PEP and a long-term lack of legitimate sources of income. Switzerland offers an example.
- 37 Some jurisdictions have reserved the application of certain presumptions to serious offenses, including Australia’s Victoria state (in the Confiscation Act 1987) and Australia’s Proceeds of Crime Act 2002. In the United Kingdom, presumptions in value-based confiscation cases are permitted only in “criminal lifestyle” cases: UK Proceeds of Crime Act 2002, sec. 6. In the United States, a presumption is available only in drug cases: 21 U.S.C. § 853(d).
- 38 See, for example, OECD, *Effective Inter-Agency Co-operation in Fighting Tax Crimes and Other Financial Crimes—Third Edition* (Paris: OECD Publishing, 2017), accessed April 17, 2020, <https://www.oecd.org/tax/crime/effective-inter-agency-co-operation-in-fighting-tax-crimes-and-other-financial-crimes.htm>.
- 39 For more on the PULSE database, see, for example, Ireland, An Garda Síochána, Guide to How Crime is Recorded and Counted by An Garda Síochána (August 2020), <https://www.garda.ie/en/about-us/publications/policy-documents/guide-to-how-crime-is-counted-and-recorded.pdf>; Garda Information Services Centre (GISC), available at <https://www.garda.ie/en/about-us/our-departments/garda-information-services-centre-gisc/>.
- 40 Jean-Pierre Brun et al., *Taxing Crime: A Whole-of-Government Approach to Fighting Corruption, Money Laundering, and Tax Crimes* (Washington, DC: World Bank, 2022).
- 41 Jeffrey Owens et al. (eds.), *Inter-agency Cooperation and Good Tax Governance in Africa* (Pretoria, South Africa: Pretoria University Law Press, 2017), accessed April 16, 2020, <http://www.pulp.up.ac.za/component/edocman/inter-agency-cooperation-and-good-tax-governance-in-africa>.
- 42 See, for example, OECD, *Effective Inter-Agency Co-operation in Fighting Tax Crimes and Other Financial Crimes—Third Edition* (Paris: OECD Publishing, 2017), accessed April 17, 2020, <https://www.oecd.org/tax/crime/effective-inter-agency-co-operation-in-fighting-tax-crimes-and-other-financial-crimes.htm>.
- 43 See Australian Federal Police, Criminal Assets Confiscation Taskforce, <https://www.afp.gov.au/what-we-do/crime-types/proceeds-crime/criminal-assets-confiscation-taskforce-cact>.
- 44 See Australia, Unexplained Wealth Legislation Amendment Act 2018, No. 126, 2018, *An Act relating to the national cooperative scheme on unexplained wealth, and for related purposes*, <https://www.legislation.gov.au/Details/C2018A00126>.
- 45 See, for example, Australia, Department of Parliamentary Services, Jonathan Mills and Cat Barker, Bills Digest No. 27, 2018–19, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/bd/bd1819a/19bd027](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1819a/19bd027).
- 46 These different approaches can be seen in, for example, the OECD’s “Tax and Crime” report in which—in addition to offering best practices on “Fighting Tax Crimes: The Ten Global Principles”—it includes a comparative table of the types of investigative roles that tax authorities are granted in different jurisdictions. OECD, *Fighting Tax Crimes: The Ten Global Principles, Second Edition* (Paris: OECD Publishing, 2021), 29–44 (discussing Principles 3 and 4) and 74 (linking to Annex B for the “Country chapters”).
- 47 In the UK, Commissioners for Revenue and Customs Act 2005, sec. 18.
- 48 OECD, *Keeping It Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes* (Paris: Organisation for Economic Co-operation and Development, 2012) at 5 (“Confidentiality of taxpayer information has always been a fundamental cornerstone of tax systems.”).

- 49 UK, Commissioners for Revenue and Customs Act 2005, sec. 19.
- 50 *Id.*, secs. 20–21.
- 51 Mauritius, The Income Tax Act 1995 (Consolidated up to April 25, 2022), <https://www.mra.mu/download/ITAConsolidated.pdf>.
- 52 Australia, Parliamentary Joint Committee on Law Enforcement, Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements (March 2012)—Submission of AFP, paras. 71–73 and Recommendation 7.
- 53 *Id.* at para. 3.54.
- 54 UK, Proceeds of Crime Act 2002 (as amended), part 6, sec. 317.
- 55 UK, National Crime Agency, *Civil Recovery & Tax*, accessed April 19, 2020, <https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/civil-recovery-and-tax>.
- 56 See Ireland, Criminal Assets Bureau (CAB), “Annual Report 2020” (CAB, Dublin, 2021), accessed March 18, 2022, <https://www.cab.ie/wp-content/uploads/2021/09/CAB-Annual-Report-2020-Final.pdf> and the previous years’ CAB Annual Reports, which are also available at the CAB website. For a full tabulation compiled for purposes of this study and all sources, see appendix B, table B.2.
- 57 In the United States, see, for example, 26 U.S. Code § 6038D; 26 CFR § 1.6038D-2; 31 U.S. Code § 5314; 31 CFR § 1010.350.
- 58 See, for example, Natasha Reurts, “Unexplained Wealth Laws: The Overseas Experience,” in White Collar Crime Centre, *Unexplained Wealth Orders: thoughts on scope and effect in the UK*, January 2017, at 18. In Australia, for example, taxes on gifts and inheritances were abolished and winnings from gambling or lotteries are not assessable income. See, for example, Australian Government, Income Tax Assessment Act 1977, Federal Register of Legislation, accessed January 2, 2018, <https://www.legislation.gov.au/Details/C2017C00336>.
- 59 See Gift Registration Act (Schenkungs- und Erbschaftsteuergesetz); Schenkungen—Meldepflicht, accessed April 15, 2020, <https://www.help.gv.at/Portal.Node/hlpd/public/content/79/Seite.794070.html>. For a summary in English, see, for example, EY, *Worldwide Estate and Inheritance Tax Guide 2019* at 13 and following, accessed April 15, 2020, [https://www.ey.com/en\\_gl/tax-guides/worldwide-estate-and-inheritance-tax-guide-2019](https://www.ey.com/en_gl/tax-guides/worldwide-estate-and-inheritance-tax-guide-2019).
- 60 See Ivana Rossi, Laura Pop, and Tammar Berger, *Getting the Full Picture on Public Officials (Stolen Access Recovery [StAR] Initiative*, Washington, DC: World Bank, 2017); Dmytro Kotlyar and Laura Pop, *E-filing Asset Declaration: Benefits and Challenges* (StAR Initiative, Washington, DC, 2017); Francesco Clementucci et al., *Using Asset Disclosure for Identifying Politically Exposed Persons* (Washington, DC: World Bank, 2012).
- 61 African Union Convention on Preventing and Combating Corruption, Article 7, accessed February 18, 2020, <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.
- 62 UNCAC, Article 8, accessed February 18, 2020, <http://www.unodc.org/unodc/en/corruption/uncac.html>.
- 63 UNCAC, Article 52, accessed February 18, 2020, <http://www.unodc.org/unodc/en/corruption/uncac.html>. See also for example OECD, *Asset Declarations for Public Officials: A Tool to Prevent Corruption* (Paris: OECD Publishing, 2011) at 24, <http://dx.doi.org/10.1787/9789264095281-en>. (These are merely an “obligation to consider” such regimes, but states are expected to “make a genuine effort” toward these commitments.)
- 64 Kenya Public Officer Ethics Act, 2003 rev. 2009, part VI; Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, secs. 26 and 55.
- 65 See, for example, United Nations Development Programme in Ukraine, “Lifestyle Monitoring: International Practice Review and Potential for Application in Ukraine” (UNDP in Ukraine, Kyiv, 2016), accessed January 31, 2021, [https://www.ua.undp.org/content/ukraine/en/home/library/democratic\\_governance/monitoring\\_lifestyle.html](https://www.ua.undp.org/content/ukraine/en/home/library/democratic_governance/monitoring_lifestyle.html); UNCAC Coalition, “Kenyan NGOS: Action Needed Against Public Service Corruption,” UNCAC Coalition website, November 17, 2015, <https://uncaccoalition.org/kenyan-ngos-action-needed-against-public-service-corruption/>.
- 66 See, for example, Zimbabwe Revenue Authority (ZIMRA), 2021 Annual Report, at 39 at [www.zimra.co.zw](http://www.zimra.co.zw) (“Revenue identified for recovery from intelligence and risk-driven investigated cases, lifestyle audits, and hotline cases increased by 268 percent from Z\$258,949,331.10 in 2020 to Z\$694,788,754.85 in 2021.”); see also Taurai Mangudhla, “Lifestyle Audit Helps Zimra Recover ZWL\$75m in Ill-Gotten Wealth,” *Business Times*, October 31, 2019, <https://business.times.co.zw/lifestyle-audit-helps-zimra-recover-zwl75m-in-ill-gotten-wealth/>; Farayi Machamire, Lifestyle Audit: Zimra to Recover \$73 Million from Corrupt Staff,” *ZimMornning Post*, October 29, 2019, <https://zimmorningpost.com/lifestyle-audit-zimra-to-recover-73-million-from-corrupt-staff/>.
- 67 OECD, *Update on Voluntary Disclosure Programmes: A Pathway to Tax Compliance* (Paris: OECD Publishing, August 2015).
- 68 An example of such an agreement is the standard on automatic exchange of information, implemented through the Common Reporting Standard (CRS) Multilateral Competent Authority Agreement. This agreement, based on Article 6 of the Convention on Mutual Administrative Assistance

- in Tax Matters, supports the automatic exchange of information on a multilateral basis. Overall, more than 110 countries are signatories to the agreement. For more information, see, for example, OECD, Automatic Exchange Portal, International Framework for the CRS, accessed February 1, 2023, <https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/>.
- 69 OECD, *Update on Voluntary Disclosure Programmes* at 9.
- 70 *Id.* at 7.
- 71 *Id.* at 9.
- 72 OECD, *Update on Voluntary Disclosure Programmes* at 9 (“To succeed, they need to tread a fine line between encouraging noncompliant taxpayers to permanently improve their compliance and retaining the support and compliance of the vast majority of taxpayers who are already compliant.”).
- 73 OECD, *Update on Voluntary Disclosure Programmes* at 10-11.
- 74 Taiwo Oyedele, *Voluntary Assets and Income Declaration Scheme (VAIDS)*, PwC Summary, accessed February 20, 2020, <https://www.pwc.com/ng/en/assets/pdf/voluntary-assets-income-declaration-scheme.pdf>; Republic of Nigeria, The State House, *Abuja Press Release: President Buhari Extends VAIDS Deadline to June 30*, April 11, 2018, <https://statehouse.gov.ng/news/press-release-president-buhari-extends-vaids-deadline-to-june-30/>; Republic of Nigeria, The State House, “Abuja Speech: President Buhari’s 2018 Budget Address,” November 8, 2017, accessed February 20, 2020, <https://statehouse.gov.ng/news/speech-president-buharis-2018-budget-address/>.
- 75 Paul Olanitan, “Unexplained Wealth Orders...Why Nigerians Should Take Careful Note of This New UK Law,” *Prompt News Online*, February 11 2018, <https://promptnewsonline.com/unexplained-wealth-orderswhy-nigerians-take-careful-note-new-uk-law/>.
- 76 See, for example, Mauritius, Good Governance and Integrity Reporting Act 2015, as amended, sec. 16(1) (allowing for confiscation “or an order for the payment of its monetary equivalent”); Australia, Proceeds of Crime Act 2002, as amended, sec. 179E(2) (providing that the “the person is liable to pay to the Commonwealth ... the person’s unexplained wealth amount”).
- 77 See, for example, OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, “The Global Forum’s Plan of Action for Developing Countries Participation in AEOI” (Organisation for Economic Co-operation and Development, Paris, November 2017) at 6 and following, <https://www.oecd.org/tax/transparency/plan-of-action-AEOI-and-developing-countries.pdf> (“Challenges Associated with AEOI Implementation by Developing Countries”); OECD, “Global Forum Secretariat Delivers New Toolkit to Help Countries Become Party to the Convention on Mutual Administrative Assistance in Tax Matters,” July 29, 2020, <https://www.oecd.org/tax/transparency/documents/global-forum-secretariat-delivers-new-toolkit-to-help-countries-become-party-to-the-convention-on-mutual-administrative-assistance-in-tax-matters.htm>.
- 78 Nat’l Crime Agency v. A [2018] EWHC (Admin) 2534 [64], [66], [77], [82]–[83], [88] (Eng.).
- 79 Kevin M. Stephenson et al., *Barriers to Asset Recovery* (Washington, DC: World Bank Group, Stolen Assets Recovery [StAR] Initiative, 2011) [hereinafter *StAR Barriers to Asset Recovery*] at for example 40 and following (barrier 6), 49 and following (barrier 8), 54 and following (barrier 10), 79 and following (barrier 21), 81 and following (barrier 22), 85 and following (barrier 23), and 90 and following (barrier 26).
- 80 *StAR Barriers to Asset Recovery* at 81.
- 81 OECD, *Fighting Tax Crimes: The Ten Global Principles*, 2017, <http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.htm>, at 15, para. 8.
- 82 OECD, Convention on Mutual Administrative Assistance in Tax Matters, accessed May 24, 2020, <https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm> [Consider also challenges under this instrument.].
- 83 See, for example, UK, Proceeds of Crime Act 2002, as amended, sec. 362S (Enforcement abroad: enforcement authority) and sec. 362T (Enforcement abroad: receiver).

# 4 Key Considerations for Designing National UWO Systems

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This study has now reviewed the context of UWO systems among asset recovery tools, the UWO laws of a variety of jurisdictions, and the specific features of those laws. Against this background, it is possible to derive lessons from those UWO systems to inform effective design choices depending on the existing legal infrastructure. Next, it is important to examine the political, legal, and institutional considerations to maximize the effectiveness of a UWO system and analyze what steps a country could undertake to implement such a system in an effective way.

## 4.1 Choices for Elements of Prospective UWO Systems

Chapter 2 demonstrated that UWO systems can be designed in quite diverse ways, as evidenced by systems such as those in the UK and Mauritius, and chapter 3 provided operational context. From comparing the scopes of existing UWO systems and their legal consequences, there emerge some considerations to inform sound policy choices: (a) integrating UWOs into the existing legal infrastructure and (b) evaluating common practices for the scope of UWOs (personal, material, value threshold, temporal, and territorial).

### 4.1.1 Integrating UWOs into Existing Anti-Corruption and Asset Recovery Frameworks

A UWO system must fit within the existing legal infrastructure to form part of a coherent set of asset recovery tools. Before implementing a UWO system, a country should start with a solid legal framework consisting of criminal laws and civil laws, ideally including both conviction-based and non-conviction-based (NCB) forfeiture systems. There should also be rules for provisional seizures or restraint orders<sup>1</sup> and procedures for properly managing any property<sup>2</sup> for the duration of such orders.

UWO systems generally reinforce and supplement existing asset recovery systems, and thus these are the primary set of laws with which they interact, although related laws play important roles. When considering a UWO system, policy makers should consider its interaction with other laws and systems such as the following:

- Laws on conviction-based and non-conviction-based forfeiture systems, including seizure and restraint mechanisms and procedures for property management;
- Laws on relevant predicate criminal offenses;
- Laws on beneficial ownership disclosure and reporting;

- Laws and agreements for the recognition of other states' systems concerning exchange of information, mutual legal assistance, enforcement of judgments, and the return of assets;
- Substantive criminal laws (the link to criminal activity);
- Laws on income and asset disclosure; and
- Tax laws.

If a country wants to implement a UWO system, initially there is an important choice to be made as to whether the UWO system is an investigative tool alone (as in the UK and in Zimbabwe), or whether it will also contain its own recovery mechanism (as in Australia, Kenya, Mauritius, and Trinidad and Tobago). To review, in the investigative-only model, the UWO refers only to an order to oblige the respondent to provide information about how the respondent obtained the property or wealth. Moreover, if the respondent does not comply with the UWO, the authorities usually have a legal presumption in their favor, namely that the property is presumed recoverable for the purposes of subsequent civil recovery proceedings. This model merely plugs into existing asset recovery infrastructure, without substantially modifying it or creating overlaps. By contrast, in the investigate and recover model, the UWO also contains its own recovery mechanism, as in Australia and Mauritius. It becomes a more powerful tool as an independent pillar in the asset recovery infrastructure. Either way, design choices must be made wisely as to the contours of the UWO system.

In general, a strong asset recovery system will provide a solid foundation and justification for the UWO system. If the UWO system follows the pattern adopted in the UK, wherein the UWO is an additional investigative tool, then NCB civil confiscation proceedings are foundational because they serve as the main legal consequence that may follow from a UWO—that is, the UWO is a step before to support the investigation for the civil proceedings.

If the UWO system follows the investigate and recover pattern adopted in Australia or Mauritius with its own standalone recovery mechanism, then previously existing forfeiture systems are less relevant for the UWO system. In any event, UWOs should complement or support those systems where needed, avoid overlap with those systems, and contain their own protections of fundamental rights, as discussed in chapter 5. The next section evaluates common practices in designing a UWO system, as this comparison may assist policy makers in considering which features are most suitable in their own legal context.

### 4.1.2 Evaluating Common Practices for Scope of UWOs

While diverse approaches can work, the following aspects stand out as commonly used, effective practices for the ambit of a UWO system. Most important, though, the main driver should be what the country aims to achieve through its UWO system.

#### ***Personal scope of UWO***

The personal scope of the UWO law should ensure that it can be applied against foreigners holding assets within the enforcing jurisdiction and potentially against a jurisdiction's nationals wherever their assets may be. The purpose of a UWO system calls for a broad personal scope in this respect, as persons with wealth often acquire property outside their home countries.

While in theory UWO systems can be designed to apply to any person, countries may wish to narrow the category based on the precise challenge they need to target, whether that might be foreign PEPs or the top echelon of criminal enterprises or corrupt domestic officials. The family members and close associates of those persons should also be included.

The UK system illustrates how a UWO system can be adapted to the specific needs of a given jurisdiction. It applies to foreign-serving (in non-UK, non-European Economic

Area functions) PEPs, even in the absence of a suspected link to a crime. In this way, the UK places extra scrutiny on foreign PEPs.

Moreover, as UWOs are usually aimed at proceeds of crime, some sort of link between the person and crime may be required, although typically only indirectly or at a lower standard (for example, “reasonable grounds” to believe, rather than “balance of probabilities”) than other proceeds of crime tools.

Including legal persons in the scope of UWO systems, as in the UK, is essential since suspicious property is often held through legal entities and arrangements to obscure the ultimate beneficial owner. The *Amuti*, *Hajiyeva*, *Abachi*, and *Re Application under Section 20A of the Proceeds of Crime Act 2002* cases (all found in appendix A, “Case Studies”) show this.

Beyond merely including legal persons, providing for actions against responsible officers of the entity (directors, partners, trustees, and so forth) even if they don’t hold the property will facilitate seeking UWOs against property held through opaque ownership structures.

Holding legal entities criminally responsible is often difficult, so while it is helpful that authorities using UWOs need only meet a lower standard (for example, reasonable grounds for suspecting a link with crime), even that might not be easy. If the system is designed similarly to the UK’s with regard to non-PEPs, under which authorities may have to provide “reasonable grounds” for suspecting involvement in serious crime and “reasonable grounds” for the “income” requirement (that is, that the legal entity’s income was insufficient to obtain the property), some complexities may arise, compounded when the legal entities are in foreign jurisdictions, as may often be the case (for example, a Panamanian foundation, as in a UK case).<sup>3</sup> For this reason, the UK enacted changes to its UWO system in 2022 (refer to box 2.10).

### **Material scope**

As for the material scope, definitions of property should be broad, and it may be advisable to set a minimum value threshold. Countries should consider (a) the notion of “property” or assets covered, (b) thresholds for the value of the property, (c) the notion of “holding” the property, and (d) where relevant, the scope of the underlying crimes covered.

On “property,” “holding,” and “crimes” covered, it is desirable to have an expansive scope. The UWO should apply to all property of every kind (moveable or immovable, tangible or intangible), including interests in property, wherever located.

One of the inevitable steps in any UWO is to identify the persons holding property. Respondents should be considered to hold the property not only in cases where they directly own the property in their own name, but also where respondents own or control property indirectly via trust arrangements or corporate structures—in essence, in line with the notion of beneficial ownership of the Financial Action Task Force (FATF). Thus, existing registries, such as company registries, land registries, and beneficial ownership registries will further UWO efforts.

Australia even considers property “that the person has disposed of (whether by sale, gift or otherwise) or consumed.”<sup>4</sup> Looking at not only property the person currently holds but also the person’s consumption makes it easier to consider the person’s lifestyle (that is, not only their cars, yachts, and homes, but also their lavish spending on travel, restaurants, and gifts) and use of “proxies” (close persons).

As regards the crimes covered (for example, as in the UK and Zimbabwe, where authorities must provide reasonable grounds for suspecting a link with “serious crime”), property resulting from a wide range of nontrivial crimes should be able to be investigated and potentially recovered, regardless of where the crimes were committed (at home or abroad). If they were committed abroad, all systems consider whether the conduct would be criminalized both at home and abroad (dual criminality). If a jurisdiction seeks

to gather evidence to enable making the link to crime through MLA, dual criminality may be an impediment. As the UWO is most often a civil order, MLA requests may be rejected because many countries assist only in criminal matters. In this context, reference is likely to be made to the underlying criminal offense where dual criminality is required to render assistance.

### **Thresholds**

Another way to target the scope is to consider the appropriate threshold of wealth to which UWOs should apply and whether there should therefore be a minimum threshold. This represents its own form of built-in substantive safeguard against too broad an application of UWOs against those with less means to defend themselves. The UWO is a powerful tool and thus is often well suited for more powerful figures. Setting a threshold can help ensure that investigations are cost-effective, because it can help channel authorities' resources toward cases that pose larger threats and from which greater amounts of proceeds of crime can be recovered. Not all systems set a threshold, however (for example, Kenya).

The key factor in ascertaining whether there should be a threshold and, if so, what the threshold amount should be, is the country-specific rationales put forward for enacting a UWO system—as highlighted under the recommendations for the process (discussed in section 4.2)—namely, what problem is targeted by the UWO legislation. If much of the proceeds of drug crime circulates in small amounts of cash in a given economy, this may indicate a lower threshold for cash in certain cases (as Mauritius has chosen); by comparison, if lawmakers identified grand corruption by oligarchs or foreign officials as one of the key problems that existing laws are struggling to address, then a higher threshold would help focus the UWO tool on this issue. If no threshold is set, authorities could streamline their efforts by setting guidelines for what factors are weighed when deciding whether a given case should be pursued (for example, a cost-benefit assessment considering the costs to the public and the benefits potentially to be recovered, whether the person involved is high-level or senior, and so forth).

As regards the minimum threshold, countries will usually want to set a minimum economic value for what property, or unexplained wealth, the authorities may investigate. The appropriate threshold will differ for each jurisdiction (for example, in the UK, it is £50,000 (US\$60,200); and in Mauritius, MUR 10 million (US\$227,800), generally, or MUR 2.5 million (US\$57,000) for cash seized in criminal investigations) depending on its particular circumstances. Some policy makers may consider the UWO better suited for more powerful counterparties and risks. If so, one approach could be to set a relatively high threshold for the first years of testing out a UWO system, with a clause to revisit the threshold after a given period of time, based on the data gathered from experience. In Mauritius, for example, as the authorities gained experience the threshold for cash was lowered from MUR 10 million to MUR 2.5 million (US\$227,800 to US\$57,000), to make the law more effective against drug dealers. For an at-a-glance comparison of thresholds, see table 2.2.

### **Temporal scope**

As for the temporal scope, a UWO system should apply to all property acquired before or after the enactment of the law. Arguments may arise as to whether this would be inconsistent with existing prohibitions on retroactivity. In most systems, it is unlimited, in that the law applies to property acquired before or after enactment of the UWO law. Setting a time limit as to when the property was acquired may restrict the law in seemingly arbitrary ways, although a good argument can be made that some limit (or other safeguard) is advisable, given the difficulties of defending against assets acquired many years ago, for which records may be scarce. In addition, time limits may depend on the kind of unexplained wealth targeted. It could make sense to have a longer time period with

**Table 4.1. Sampling of Cases: Period of Time over Which Unexplained Wealth Amassed**

Case	Year when UWO issued	Time period over which wealth probably amassed	Approximate length of time period
UK: <i>Hajiyeva v. Nat'l Crime Agency</i> [2020] EWCW (Civ) 108 (Eng.)	2018	Official (respondent's husband) in office 2001–15; some property purchased in 2009.	17 years
UK: <i>Nat'l Crime Agency v. Hussain &amp; Ors</i> [2020] EWHC (Ad-min) 432 (Eng.)	2019	Properties acquired 2005–18; respondent a non-PEP.	14 years
Kenya: <i>Ethics and Anti-Corruption Comm'n v. Abachi &amp; Ors</i> (2021) e.K.L.R. (H.C.K.), Civil Suit No. 15 of 2019	2008	2002–07; Respondent in office 2002–07.	6 years
Kenya: <i>Amuti v. Kenya Anti-Corruption Comm'n</i> (2020) e.K.L.R. (S.C.K.), Peti-tion No. 21 of 2019	2008	Narrowed to 2007–08 (originally listed as 1992–2008); respondent in that post 2007–08 although in government for much longer.	1 to 17 years

Source: World Bank. Note: UWO = unexplained wealth order.

regard to high-ranking officials who amass wealth over decades and a shorter one for lesser non-PEP respondents. A specific time limitation for the officials would be justified by the fact that they are a specific category of persons in charge of public service who, in addition, are well placed to conceal the crimes from which illicit assets are derived. Table 4.1 indicates that unexplained wealth is often amassed over long periods of time.

However, building explicit time limits into the law may be too rigid, as the extent to which a person may be able to explain their assets may depend on the type of asset and its value. Thus, a UWO law could allow for more flexibility and tie the system to when corrupt conduct or time in office occurred. Such safeguards could be left to the facts-and-circumstances assessment of independent courts (for example, provisions in Australia's and Ireland's legislation mention that the court may possess some discretion to refrain from issuing an order where there are risks of injustice).

### **Territorial scope**

As for the territorial scope, a UWO system should be global; that is, in general, it applies to persons and property wherever situated and crimes wherever committed. Given the complex, global nature of many cases, investigators will need flexibility in this respect. In practice, to ensure the proceedings are cost-effective and feasible, authorities will generally have to pursue cases where at least one of those elements (for example, either the person or the property) is situated in the UWO-issuing jurisdiction. This link will also be required for jurisdiction or competence of the court.

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### **Time limits**

On the one hand, a time limit (such as a 60-day limit) is an important safeguard for the protection of property rights when authorities have placed strict constraints to prohibit anyone from in any way dealing with the property under a freezing order. On the other hand, this particular time limit—that is, 60 days—may be too restrictive: for example, when the respondent has provided thousands of pages of complex documentation to the authorities, which they are obliged to review carefully, or when aspects of the explanation given by the respondent require some further follow-up by the authorities, such as to request information from foreign governments to determine what action the authorities deem best to take.

If the authorities need to disprove evidence a person has put forward to justify ownership of assets (for example, asserting that it stems from sources of nontaxable income such as foreign lottery winnings), it could take some time to uncover that information in cases of cross-border investigations. The aim of the UWO law could be undermined if the time limit proves shorter than necessary to conduct a thorough investigation of the information provided by the respondent. Thus, a country could choose to permit applications to a judicial officer for extension of time for exceptional and compelling reasons when authorities can prove that they are diligently working, as the UK has chosen to do.

Moreover, some restraints, which could be considered similar, freeze property for long periods. For example, one can compare interim UWO measures with a provision such as the UK Account Freezing Order, another forfeiture power granted to UK authorities by the Criminal Finances Act 2017, which can last up to two years (sec. 303Z3). These orders are obtained through a police officer applying, generally without notice, to freeze a UK account balance of £1,000 or more, if they have reasonable grounds to suspect that the money is recoverable (that is, obtained through unlawful conduct) or is intended for use in unlawful conduct.

## **4.2 Political and Institutional Considerations to Maximize Effectiveness of a UWO System**

As with other asset recovery tools, the success of a UWO system will be influenced by political will, available resources, and capacity level, especially with regard to the independence of the authorities and the resources allocated. Independent and well-functioning legal and political institutions are the foundation for the proper functioning of any law. With UWOs, independence means that the legal and political institutions (for example, the courts of the judicial branch) are not unduly influenced or compromised in their decision-making process by people and factors extraneous to the law being applied. The degree of judicial independence will factor heavily into the success of a UWO system, as with other asset recovery tools.

Moreover, our study of the experiences in Australia, Mauritius, and the UK revealed four important political and institutional factors in the success (or failure) of the UWO systems: (a) political will, (b) proper resourcing of enforcement agencies, (c) proper organization of and coordination among enforcement agencies, and (d) proper due process safeguards (addressed in chapter 5). All are distinct but interdependent.

### **4.2.1 Political Will**

Political will is widely recognized as essential to anti-corruption and asset recovery systems and will be crucial to the success of a UWO system. A lack of political will is an underlying cause of “general, or institutional, barriers” to asset recovery.<sup>5</sup> The phrase “lack of political will” has been defined as “a lack of a comprehensive, sustained,

and concerted policy or strategy to identify asset recovery as a priority and to ensure alignment of objectives, tools, and resources to this end.”<sup>6</sup>

Moreover, support must be “unequivocally manifested by top political administrators across every branch of government” and “civil society.”<sup>7</sup> The role of civil society and the support of the general public have played demonstrably crucial roles in UWO systems so far. In the UK, the organization Transparency International made active efforts to raise awareness of the issue,<sup>8</sup> which helped generate public support for the measure. It brought the public’s attention to why such a measure was needed and was in everyone’s best interest (for example, pointing out the distortions to the property market made by billions of pounds of suspicious wealth and pointing out the injustice done to the populations from whom those billions are stolen). In Mauritius, the Integrity Reporting Services Agency launched a campaign using radio, newspapers, and billboard displays “to promote awareness of its role in dealing with unexplained wealth.”<sup>9</sup>

Public support can be a fragile thing. Practitioners should be mindful that a single widely publicized case critical of the authorities for an overly harsh application of a UWO system to confiscate a family home could rapidly erode public support for UWOs and sap the energy and resources dedicated to future UWOs, just as in the case of other civil recovery measures. Therefore, it is crucial not only to generate public support, but also to sustain it. UWO systems are more likely to be successful when investigators select those cases for which they have been able to compile the strongest evidence, sometimes even more than what is technically needed by law. For example, although the standard in Australia is the civil “burden of probabilities,” in practice the authorities report that they strive to put forth the most robust cases they can. Another way to sustain public support is through incorporating proper due process safeguards.

#### **4.2.2 Proper Resourcing**

Just like other laws, it is not sufficient to enact a new promising law on UWOs. The country must also be able to enforce it, through allocating the resources needed for investigation and prosecution. One reason that public support is so important is that it helps fuel this factor, namely the proper resourcing of enforcement agencies.

For proper resourcing, agencies require funding, personnel, training, and equipment to carry out their functions, commensurate with the complexity of some of the cases they will confront. As regards the personnel and training, the skills required include the ability to find leads, analyze bank records, trace and secure funds in foreign jurisdictions, draft proper MLA requests, and eventually obtain a final confiscation order.<sup>10</sup>

Moreover, to ensure the funding is adequate and is used as foreseen for the UWO system, annual reports or auditing procedures can be put in place. In Mauritius, for example, the Good Governance and Integrity Reporting Act requires that the UWO-enforcing agency keep accounts of receipts and expenses “which shall, every year, be audited by the Director of Audit” and the “Director shall, at the end of every financial year, cause to be laid on the table of the National Assembly a copy of the audited accounts of the Agency.”<sup>11</sup>

In sum, for the UWO system to be more than promising words on paper, it requires political will, sufficient resources, and efficient organization of law enforcement agencies, supported by independent institutions.

### **4.3 Specific Steps toward a UWO System**

Although the legal systems and international ties of countries will differ, it is incumbent upon policy makers to explore the specific barriers their investigators have confronted when trying to recover the proceeds of corruption and the extent to which such barriers could be overcome with improvements to existing legislation or would require novel

legislation, such as a UWO system. To be able to design a suitable and targeted solution, policy makers should first identify the problem, its extent, and causes. It is also helpful, as just noted, to generate public support, which often translates into more resources allocated to solving the problem. The well-documented experiences of enacting UWO systems in Australia, Mauritius, and the UK indicate a recommendation that the steps include (a) research, (b) proposals, and (c) public consultations. Although these steps may not seem different from the basic action needed for reforming other forms of legislation, it is important to insist on some of them to ensure the credibility and the trust necessary to impose sensitive new constraints and potential liabilities on citizens.

### 4.3.1 Research

The UWO research phase has several aims. The first is to define and measure the problem (for example, estimates of property obtained by unexplained means and of public funds lost to corruption, as compared with the amount recovered by authorities under existing laws) and to publicize these findings. The second aim is to inquire into the country-specific causes of the problem (for example, surveying investigators about the barriers they typically confront). This type of work was undertaken by Transparency International in the UK,<sup>12</sup> but can also be done by the government<sup>13</sup> or by dedicated commissions, such as Australia's Law Reform Commission<sup>14</sup> or the Parliamentary Joint Committee on Law Enforcement.<sup>15</sup> In the UK, common causes were barriers to information and poor results of attempts at international cooperation. Reports revealed that, on the basis of their existing laws, authorities struggled to recover the proceeds of crime to the extent expected and needed to make a dent in corruption and criminal conduct. UWO systems were put forward as a means to reinforce the asset recovery framework.

The third aim is for policy makers to consider possible solutions to the problem, based on existing legal frameworks and other conditions.<sup>16</sup> If policy makers consider UWOs desirable, a fourth aim is to garner lessons from other existing UWO systems, from their design and scope, to see what worked and what did not in other jurisdictions and thus establish best practices. This study seeks to contribute to this fourth aim.

### 4.3.2 Proposals and Public Consultations

Depending on the results of this research process, the lessons learned can be adapted to the particular legal system to draft proposals for legislation, if needed. The government can then publish the proposals for public consultation and engage in activities such as inviting comment. Transparency in the process will not only boost public support, but also improve the draft laws through constructive dialogue. Next, the government could prepare a revised draft on the basis of the public consultation. The UK did this for its UWO, consulting with the devolved administrations, law enforcement agencies, and the regulated sector.<sup>17</sup>

For UWOs, steps along these lines are advisable—as in general for any anti-corruption or anti-crime measure—such as holding comprehensive and inclusive policy debates. This is especially important for measures, such as UWOs, for which debates may arise regarding a trade-off between certain fundamental rights and the objective to fight crime and corruption (explored further in chapter 5).

Regular monitoring and evaluation of UWO systems is desirable. Moreover, one practice from Australia, which could be considered, is to incorporate a clause to mandate a review of the legislation a few years after enactment “to assess the impact of the Act ... and the progress made in achieving its objectives.”<sup>18</sup> This process resulted in various refinements to the act over a period of years. In Mauritius, although not required by the law, the agency and board of their own accord decided that it was a best practice to publish an annual report on the progress in implementing and applying the UWO law.<sup>19</sup>

## Notes

- 1 Regarding these terms, see, for example, Jean-Pierre Brun et al., *Asset Recovery Handbook: A Guide for Practitioners*, 2nd ed. (Washington, DC: World Bank, 2021), <https://star.worldbank.org/resources/asset-recovery-handbook-guide-practitioners-second-edition> [hereinafter ARH2] at 136; Jean-Pierre Brun et al., *Asset Recovery Handbook: A Guide for Practitioners* (Washington, DC: World Bank, 2011) [hereinafter StAR *Asset Recovery Handbook* 2011] at 75–76 (“Seizure involves taking physical possession of the targeted asset.” *Restraint or freeze orders* are “a form of mandatory injunction issued by a judge or a court that restrains any person from dealing with or disposing of the assets named in the order, pending the determination of confiscation proceedings.”).
- 2 Regarding “Managing Assets Subject to Confiscation,” see ARH2 at 161–178.
- 3 On this point, the UK National Crime Agency (NCA) sought a UWO in a complex corporate vehicle case in *Nat'l Crime Agency v. Baker & Ors* [2020] EWHC (Admin) 822 (Eng.). In that case, the NCA did not succeed, and its appeal was refused, owing to insufficient evidence or grounds.
- 4 Australia, *Proceeds of Crime Act* (as amended), secs. 14D, 179G.
- 5 Kevin M. Stephenson et al., *Barriers to Asset Recovery* (Washington, DC: World Bank Group, Stolen Asset Recovery [StAR] Initiative, 2011) at 2 and at 8 (According to one of the recommendations, “Where There is Political Will, There is a Legal Way”).
- 6 *Id.* at 2.
- 7 Anzaniufuno Munyai, *Overcoming the Corruption Conundrum in Africa: A Socio-legal Perspective* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2020), chap. 6 at 130.
- 8 See, for example, Transparency International UK, “Empowering the UK to Recover Corrupt Assets, Unexplained Wealth Orders and Other New Approaches to Illicit Enrichment and Asset Recovery” (London: Transparency International UK, reissued March 2016); Rachel Davies, “Unexplained Wealth Orders: A Brief Guide,” Transparency International UK, May 30, 2017, <https://www.transparency.org.uk/unexplained-wealth-orders-a-brief-guide/>; Transparency International UK, “Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market” (London: Transparency International UK, March 2017).
- 9 Mauritius, Integrity Reporting Board, “Fourth Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board (Annual Report 2020, submitted July 15, 2021) at 7, accessed December 13, 2022, <https://www.irsam.mu/wp-content/uploads/2021/10/IRSA-Annual-Report-2020.pdf>.
- 10 ARH2 at 49; StAR *Asset Recovery Handbook* 2011 at 27.
- 11 Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 19(3) and (4).
- 12 See, for example, Transparency International UK, *Empowering the UK to Recover Corrupt Assets, Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery* (March 2016); Transparency International UK, *Faulty Towers: Understanding the Impact of Overseas Corruption on the London Property Market* (March 2017).
- 13 See, for example, the UK, HM Treasury and Home Office, *National Risk Assessment for Money Laundering and Terrorist Financing (NRA)*, October 2015 and October 2017, accessed April 9, 2020, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468210/UK\\_NRA\\_October\\_2015\\_final\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf) and [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/655198/National\\_risk\\_assessment\\_of\\_money\\_laundering\\_and\\_terrorist\\_financing\\_2017\\_pdf\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655198/National_risk_assessment_of_money_laundering_and_terrorist_financing_2017_pdf_web.pdf), respectively.
- 14 Australia, Australian Law Reform Commission, accessed April 9, 2020, <https://www.alrc.gov.au/>.
- 15 Australia, Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, August 2009.
- 16 See, for example, OECD, *Asset Declarations for Public Officials: A Tool to Prevent Corruption* (Paris: OECD Publishing, 2011) at 12, <http://dx.doi.org/10.1787/9789264095281-en>.
- 17 See, for example, UK, Criminal Finances Bill—Unexplained Wealth Orders, Impact Assessment, 20 June 2017, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621205/Impact\\_Assessment\\_-\\_UWOs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621205/Impact_Assessment_-_UWOs.pdf) (accessed 7 April 2020), at paras. 6–7. UK Home Office, Criminal Finances Bill—Unexplained Wealth Orders, Impact Assessment, June 20, 2017, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621205/Impact\\_Assessment\\_-\\_UWOs.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/621205/Impact_Assessment_-_UWOs.pdf).
- 18 Australia, *Proceeds of Crime Act* 2002, as amended, Sec. 179U (This section provides for parliamentary oversight, by requiring an annual report on the unexplained wealth investigations and proceedings.).
- 19 Integrity Reporting Board, “Second Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board” (Annual Report 2018, submitted March 1, 2019). See also Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 19(4) (regarding a statutory obligation to share the audited accounts with the National Assembly).



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# 5 Due Process and Procedural Safeguards

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An essential consideration for UWO systems is to ensure safeguards for respondents and affected third parties throughout the procedure, as asset recovery mechanisms are successful and sustainable only if they command respect from a human rights standpoint. Because UWOs shift a burden either of production or of proof onto the respondents to provide information as to the lawful origin of their property (and invoke presumptions if that burden is not met), they are a powerful tool. When the eventual legal consequence is deprivation of a person's property, burden shifting provisions, such as those in UWO systems, merit close scrutiny to be sure that they are wielded proportionately and in accordance with due process. Inadequate attention to safeguards could lead to injustice, a lack of public support, and invalidation by the courts of a UWO system.

While there has been and is sure to be more litigation about UWOs, so far in the courts UWO systems have withstood due process attacks. The systems challenged—those in the UK and Kenya<sup>1</sup>—contain copious and careful due process safeguards for respondents and third parties, which are detailed in the next section of this chapter. Such protections are essential not only from a human rights perspective, but also for maintaining public confidence and support for a UWO system. In sum, it is important to incorporate built-in safeguards throughout the procedure, on the legal, institutional, and practical levels.

## 5.1 Considering Legal Challenges to UWO Systems

If a country decides to enact a UWO system, it must ensure that due process and fundamental rights are respected. UNCAC asks its parties to consider “requiring that an offender demonstrate the lawful origin of [the] alleged proceeds of crime” while recognizing the risk that such confiscation systems could cause tensions with certain “fundamental principles” of domestic laws.<sup>2</sup> As with non-conviction-based asset forfeiture laws and any provisions that reverse the burden of proof, some people may perceive UWOs as infringing certain fundamental aspects of the right to a fair trial, in particular the presumption of innocence, the right to silence (or the protection against self-incrimination), and the right to property, as well as retroactivity and privacy.

### 5.1.1 General Due Process Arguments

As for the fair trial and due process concerns, it is argued that the mere existence of unexplained wealth, once established, results too easily in a presumption that the property was derived from illegal activities and, in doing so, reverses the burden of proof onto the respondent to prove their innocence, which is contrary to one of the most fundamental tenets of a fair trial (innocent until proven guilty). Moreover, the argument continues that, depending on what information they must reveal as to how they obtained the property, respondents are forced potentially to incriminate themselves.

To begin with, so far courts have noted that these protections—the presumption of innocence and the privilege against self-incrimination—normally do not apply in civil

proceedings since a person's liberty is not at stake, and thus do not apply to UWOs. For example, in the *Abachi* case (Kenya), the court confirmed that the procedure for recovery of unexplained assets is civil in nature,<sup>3</sup> and that the party seeking to recover unexplained assets wasn't required to prove specific corrupt acts. In addition, UWO laws in Australia and Mauritius unambiguously specify the civil (as opposed to criminal) nature of the proceedings.<sup>4</sup>

More broadly, even criminal proceedings occasionally make exceptions to the presumption of innocence—for example, by placing the burden on the defendant to prove certain defenses (such as “intoxication, extraordinary emergency, compulsion, provocation for an assault or self-defence”) or in cases in which “the matter to be proved by the defendant is peculiarly within the defendant's knowledge.”<sup>5</sup> It may be appropriate for the burden of proof to be placed on a defendant where the facts in relation to the defense might be said to be uniquely within the defendant's knowledge or where proof by the prosecution of a particular matter would be extremely difficult or expensive, whereas it could be readily and cheaply provided by the accused.<sup>6</sup>

In the *Amuti* case (Kenya), the court explained that the “evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it,”<sup>7</sup> and that the “requirement to explain assets is not a requirement for one to explain his innocence,”<sup>8</sup> since “the presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired.”<sup>9</sup>

Courts have also rejected respondents' claims of privilege against self-incrimination and spousal privilege. In *Nat'l Crime Agency v. A* (UK), the court pointed out that the privileges under the Civil Evidence Act 1968 only applied to the “criminal offences under the law of any part of the United Kingdom” and the respondent didn't show “a real and appreciable risk” of prosecution against her and her husband in the UK.<sup>10</sup> In addition, after finding that the power under a UWO to request information and to produce documents “would be rendered very largely nugatory if privilege applied,” the court expressed a view that Parliament in creating the UWO procedure had intended that “the privileges be abrogated.”<sup>11</sup> Thus, well-constructed UWOs have been found consistent with due process.

### 5.1.2 Right to Property Arguments

Similar to the fair trial and due process arguments, the *Amuti* court also addressed the related concerns that the “unexplained assets” law<sup>12</sup> violated the respondent's constitutionally protected right to property. “The right protects the sweat of the brow,” the court responded, “it does not protect property acquired through larceny, money laundering or proceeds of crime or any illegal enterprise.”<sup>13</sup> The *Amuti* court also confirmed that there was no violation of the right to property in requesting an individual to explain the source of his disproportionate assets.<sup>14</sup> It described the theme of the UWO law as “prove it or lose it,” meaning that if a satisfactory explanation of the disproportionate assets wasn't given, such assets should risk categorization as having been unlawfully acquired.<sup>15</sup>

A related concern is how UWO provisions may affect innocent third parties, “such as lenders, co-owners, or family members,” since the forfeiture may be “enforced against whoever holds or owns the affected property, regardless of his or her involvement in, or knowledge of, any crime.”<sup>16</sup> For this reason, safeguards are needed, as discussed in section 5.2.

### 5.1.3 Retrospectivity

In addition, it has been argued that UWO systems infringe on the prohibition of retroactive or retrospective laws,<sup>17</sup> where they apply to property acquired before the UWO law in question came into effect.<sup>18</sup> In Mauritius, the debate on the UWO focused explicitly on the issue of the possible retrospective nature of UWOs. The argument was that the UWO could violate the prohibition on retrospective laws in two respects—namely, that (a) a person cannot be punished for something that was not criminal when they did it, and

(b) a person cannot be punished more severely than they could have been punished at the time of the offense.<sup>19</sup> As the argument goes: because the UWO applies to property acquired from activities carried out before the law went into effect, it is retrospective or *ex post facto*; this is prohibited because the UWO system has a punitive nature, by resulting in deprivation of property, and thus, it amounts to “a quasi criminal offence” merely masquerading as a civil one; and calling it by another name (that is, civil) does not change its true underlying nature (that is, criminal).<sup>20</sup>

There are a number of strong counter arguments. First, as to when the violation occurred, with unexplained wealth it is the possession of the wealth that is being penalized, not the prior acquisition, so it is not *ex post facto* so long as the law was in force when the wealth was possessed. Second, UWOs are civil rather than criminal measures, so protections against punishment for acts not criminalized at the time do not apply. Third, and similarly, it is not a harsher punishment, as it is not a punishment at all but a penalty of a civil nature. Considering that an overarching aim of UWO laws is to reinforce the recovery of the proceeds of crime, it can be argued that it is not punishing a person in a more severe way nor for activity that was not criminal at the time—the predicate or underlying crimes were already criminalized at the time the respondent, or another closely connected person, engaged in those activities to generate the wealth and, presumably, such proceeds were already liable to potential forfeiture as a result; the UWO merely enhances the risk that the proceeds will be uncovered. Fourth, in the analogous context of non-conviction-based forfeiture, a number of court decisions, in both civil and common law jurisdictions, have upheld retrospective application “because forfeiture is not criminal or penal in nature.”<sup>21</sup> Thus, UWOs do not violate prohibitions on retrospective laws.

#### **5.1.4 Privacy and Political Misuse Issues**

In addition, one might argue that the right to privacy is infringed upon, since UWOs require a defendant to divulge information. By compelling the respondents to provide information regarding their income and belongings, respondents are being forced to reveal potentially sensitive, personal financial documents.<sup>22</sup> As regards the concerns over privacy, the cases before the UK High Court illustrate that, while the use of UWOs may indeed call for a balancing act with the right to privacy,<sup>23</sup> finding a “fair balance” can certainly be achieved under UWOs.<sup>24</sup> To this end, one tool used in the UK is a Code of Practice specifying that the use of any tool that could interfere with a human right “must be proportionate.”<sup>25</sup> More concretely, the Code of Practice asks authorities to (a) “fully and clearly justify[y]” the use of a given tool (such as UWOs) and (b) ensure the use is “proportionate,” meaning essentially to consider whether “less intrusive means” could be used to achieve the same goal.<sup>26</sup>

#### **5.1.5 Potential Misuse of UWO Laws**

Finally, some would argue that UWOs could become prone to abuse by authorities to, for example, harass political opponents. This particular concern, however, is not unique to UWO laws, as nearly any legal tool could be misused. Rather than being an argument against UWOs *per se*, this concern reinforces the need to incorporate the safeguards discussed in this chapter. Moreover, UWO laws require some degree of reasonable suspicion, which may justify a burden (just as it does in certain tax inquiries<sup>27</sup>).

## **5.2 Key Legal Safeguards for UWO Systems**

The key ingredients to ensuring that a UWO system guarantees due process and fundamental fairness with respect to the confiscation of assets include the following:

- Review by a judicial officer

- Prohibition on use of statements required in UWO proceedings in criminal proceedings
- Limitation on the use of disclosed information and disclosure to third parties
- Protection of innocent third parties
- Independent oversight of the UWO framework by parliament or another body

In addition, the following features are worth considering:

- Some limit or judicial discretion on how far back the respondent can be compelled to explain the origin of assets
- A minimum threshold for the value of the unexplained assets
- The opportunity for respondents to apply for recoupment of legal fees, under certain circumstances, when UWOs have been denied

The details of each of these safeguards are discussed in the following sections, grouped into legal, institutional, and practical considerations.

## 5.2.1 Legal Safeguards

### *Review by a judicial officer*

The key safeguard is to subject each application for a UWO to an independent, impartial review, normally by a judicial officer. In Mauritius, in addition to a judicial review, an independent agency and board were established for the first two levels of review. Moreover, not only should UWOs require approval from an independent court in order to be issued,<sup>28</sup> but also, after being issued, the respondent should be able to contest or appeal the decision (as has been demonstrated in the UK<sup>29</sup>).

### *Need for specific safeguard against risk of self-incrimination*

While the privilege against self-incrimination does not apply in the UWO proceeding, concerns may arise as to whether the statements made by the respondent could be used against the respondent in other, criminal, proceedings. Thus, regarding the risk of self-incrimination, proponents should ensure that the UWO law contains a specific safeguard to protect against the use of respondents' statements, such as in the UK,<sup>30</sup> to ensure that statements provided under a UWO cannot be used against a respondent in criminal proceedings. See box 5.1.

An important distinction should be made, as was clearly spelled out in the 2020

*Hajiyeva v. Nat'l Crime Agency* decision—namely, between the UWO proceedings and (potential, if any) criminal proceedings. The court held that the privilege against self-incrimination and spousal privilege cannot be invoked in the UWO proceedings themselves.<sup>31</sup> First, such privileges apply only in criminal proceedings, which the UWO proceedings are not. Second, “the power to make such orders ‘would be rendered very largely nugatory if privilege applied,’” and thus the legislators “had necessarily intended that the privileges be abrogated” for the purposes of the information compelled by a UWO system.<sup>32</sup>

Note that this prohibition on use in criminal cases of statements given in UWO proceedings would not necessarily limit using the information in such statements for further civil or administrative proceedings, nor would it preclude a prosecution for a false statement. For

### **Box 5.1. Safeguards against Self-Incrimination in UK Unexplained Wealth Order Law**

“A statement made by a person in response to a requirement imposed by an unexplained wealth order may not be used in evidence against that person in criminal proceedings.” There is a narrow exception when the person knowingly or recklessly makes a false or misleading statement.

Source: UK, Proceeds of Crime Act 2002, as amended, sec. 362F(1). Note: UK = United Kingdom.

example, in the UK, in the *Hussain* case, the authorities made use of the UWO response to identify a larger portfolio of assets than previously known.<sup>33</sup>

### **Possible time limit on period from events in cases of non-PEPs**

Jurisdictions may consider establishing a time limit on how far back a non-PEP respondent can be compelled to explain his or her wealth or, alternatively, granting judicial discretion to consider this if there's a serious risk of injustice. There appear to be quite a few cases of government officials amassing wealth over long periods, so for PEPs a limit is probably not advisable. However, for other persons, it might be, to prevent non-PEP persons from being brought before a court to answer for property or wealth acquired in the distant past. The proper length of any limit is debatable, because some might argue that a limit such as the seven-year limit in Mauritius is too short. There are numerous examples of high-ranking corrupt officials who have been amassing ill-gotten gains for decades, so it is likely that private persons are doing the same (for example, leaders of organized crime). Regarding systems that are "investigative tool only," such as the UK's, there are no express time limits on the UWO proceedings, but one limit stems from the substantive laws governing confiscation orders (in that case, the statute of limitation is 20 years). Thus, countries should also consult those laws in the cases in which they apply.

### **Limitation on use of disclosed information**

The authority or government agency to whom the information is given should also be bound to use it only for the intended statutory purposes and not to share it with third parties where there is any risk of injustice. Again, drawing on the 2020 *Hajiyeva v. Nat'l Crime Agency* decision, the National Crime Agency (NCA), to whom the information is provided in the UK, must use the information only as intended by statute. Moreover, the NCA "as a public body, had a duty to act consistently with the European Convention on Human Rights, and was bound to comply with the Overseas Security and Justice Assistance guidance which included specific processes for deciding whether disclosure to a third party would give rise to an impermissible risk."<sup>34</sup>

### **Minimum value threshold**

As noted in the design section, including a minimum value of the property that is subject to a UWO proceeding will ensure that persons with modest means would be less likely to be targeted by UWOs, thus reinforcing the fairness of the UWO process. The value needs to be determined by the goals and context of the particular country.

### **Protection of innocent third parties**

Given the broad definition of property, UWOs and analogous civil forfeiture laws may apply to property that is held by the respondent jointly with other innocent third parties or is leased to innocent third parties or is used by innocent dependents. Such rights must be protected. To address these risks, Australia's UWO system offers examples of how to allow for modifications to the orders, especially any interim freezing orders or eventual confiscation orders, in cases of hardship and especially in case of effects on innocent third parties or dependents.<sup>35</sup>

## **5.2.2 Institutional Safeguards**

### **Independent oversight of the UWO system**

Parliamentary oversight (or oversight by other independent bodies) may be useful. As mentioned previously, the legal act creating a UWO system can contain an obligation for the relevant enforcement authorities to submit annual reports on the use and outcome of UWOs. After a given period of time, the act itself can be subject to a systematic review

by legislators to consider any needed amendments. For example, Mauritius and the UK have enacted amendments based on practical experience and changing policy priorities.

### ***Review by a judicial officer***

The key safeguard of review by a judicial officer bears repeating in this category as it is the most important safeguard and is linked to the degree of independence of the judiciary.

## **5.2.3 Practical Safeguards**

### ***Possibility of recoupment of legal fees when respondent prevails***

The costs of defending against a UWO may be considerable. It may make sense to allow a successful respondent to apply to the court for reimbursement of fees, at the court's discretion. Such a feature could act as a check on the authorities in deciding whether a situation is appropriate for a UWO. However, a balance must be struck, because this feature can also create disincentives for authorities to act, especially if law enforcement agencies are capacity constrained. The UK had such a system, and it came into play in the case in box 5.2.

Since the time of that case, the UK has amended its legislation to provide that the court cannot award fees unless law enforcement acted unreasonably in pursuing the UWO application or supporting or opposing the making of an order or acted dishonestly or improperly in the course of the proceedings.<sup>36</sup>

### ***Fair process and procedures***

Throughout the UWO procedure, it is important that procedures afford respondents a fair process. Time lines that are too short and unclear requirements as to how the wealth should be explained may violate fundamental fairness or undermine public confidence. The requirements must be clear for respondents as to what information and supporting documentation must be submitted, by when, to where, and how.

One issue of practical relevance is what time lines apply—both to the respondents and to the authorities (for the latter, in particular where property is seized or frozen). Con-

nected to that is the number and types of documents that respondents provide. If respondents inundate authorities with large volumes of often complex documentation (for example foreign legal documents of offshore entities), then shorter time lines (for example 60 days in the UK) may prove insufficient for authorities' ability thoroughly to investigate and corroborate the information provided. This can be exacerbated if the documents are provided in physical paper format, rather than electronically. If respondents need to obtain records from abroad or for further back periods, they may validly require more time.

Policy makers should consider the appropriate length of the time lines and the legal consequences of not adhering to the time lines specified. Other features to debate and consider include (a) specifications for the relevance of documents provided by respondents and (b) the possibility of secure, verifiable ways to submit information electronically, as governments move increasingly toward digital approaches to various procedures, accelerated by the COVID-19 pandemic, and as new technologies continue to improve.

### **Box 5.2. Successful Respondents Recoup Legal Fees: *Nat'l Crime Agency v. Baker & Ors* [2020] EWHC (Admin) 822 (Eng.)**

**Facts:** The UK National Crime Agency (NCA) obtained three unexplained wealth orders (UWOs) against respondent's property. Respondent persuaded the court to set aside the UWOs.<sup>a</sup>

**Result:** The respondent asked the court to exercise its discretion to require the NCA to reimburse respondent for its legal fees. The court granted the request and the NCA was ordered to pay the respondent £1.5 million.<sup>b</sup>

a Nat'l Crime Agency v. Baker & Ors [2020] EWHC (Admin) 822 (Eng.)

b Sean O'Neill, "£1.5 Million Legal Bill Forces Rethink over McMafia Wealth Orders," *The Times*, July 13, 2020.

## Notes

- 1 There is a pending constitutional challenge in Mauritius, lodged in 2018. See Mauritius, Integrity Reporting Board, "Second Annual Report of the Integrity Reporting Services Agency and The Integrity Reporting Board" (Annual Report 2018, submitted March 1, 2019) at p. 7. In Australia, this study found no instances of a court criticizing the federal UWO regime on due process grounds.
- 2 United Nations Convention against Corruption, art. 31(8)–(9), accessed December 23, 2022, <https://www.unodc.org/unodc/en/treaties/CAC/>.
- 3 Ethics and Anti-Corruption Comm'n v. Abachi & Ors (2021) e.K.L.R. [158] (H.C.K.), Civil Suit No. 15 of 2019 (Kenya).
- 4 See, for example, Australia, Proceeds of Crime Act 2002, as amended, sec. 179R(1) and (2) and sec. 315; Mauritius, The Good Governance and Integrity Reporting Act 2015, as amended, sec. 3(5).
- 5 See, for example, Australia, Office of the Queensland Parliamentary Counsel, *Principles of Good Legislation: OQPC Guide to FLPs: Reversal of Onus of Proof*, June 19, 2013, at 6, para. 5 and at 10, para. 22, accessed April 16, 2020, [https://www.legislation.qld.gov.au/file/Leg\\_Info\\_publications\\_FLP\\_Reversal\\_of\\_Onus1.pdf](https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf). See also Australia, Criminal Division, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Attorney-General Department, 2011 edition), 50, <https://www.ag.gov.au/sites/default/files/2020-03/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>.
- 6 See, for example, Australian Government, Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129, December 2015) at paras. 9.36 et seq. (regarding "Justifications for reversing legal burden"); *Amuti v. Kenya Anti-Corruption Comm'n* [2019] e.K.L.R. [78] (C.A.K.), Civil Appeal No. 184 of 2018.
- 7 *Amuti* [2019] e.K.L.R. [78].
- 8 *Id.* [79].
- 9 *Id.* [79].
- 10 *Nat'l Crime Agency v. A* [2018] EWHC (Admin) 2534 [107]–[108] (Eng.).
- 11 *Id.* [110]–[112].
- 12 Kenya, Anti-Corruption and Economic Crimes Act 2003, as amended, sec. 26 and sec. 55.
- 13 *Amuti* [2019] e.K.L.R. [73].
- 14 *Id.* [73].
- 15 *Id.* [79].
- 16 Mat Tromme, "Waging War against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with the Rule of Law," *Duke Journal of Comparative and International Law* 29, no. 2 (Spring 2019) at 187 (discussing such arguments in the broader context of non-conviction-based forfeiture).
- 17 Some treat these two terms as synonymous, whereas others make a distinction. See, for example, *Black's Law Dictionary*, Standard Ninth Edition (The entry for "retroactive" states: "retroactive, *adj.* (17c) (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. Also termed *retrospective*."). By comparison, see, for example, Theodore S. Greenberg et al., *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, DC: World Bank, 2009) [hereinafter *StAR A Good Practices Guide for NCB Asset Forfeiture* 2009] at 44n80 (citing "Supreme Court of Canada in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 adopted the definition of E. A. Driedger, in 'Statutes: Retroactive Retrospective Reflections' (1978), 56 Can. Bar Rev. 264, at pp. 268–69: A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event.").
- 18 See, for example, Ben Clarke, "Confiscation of Unexplained Wealth: Western Australia's Response to Organized Crime Gangs," *South African Journal of Criminal Justice* 15, no. 1 (2002) at 83; Mauritius Labour Party, Position Paper No. 1, November 2015, at 47–50, accessed April 9, 2020, <https://ionnews.mu/wp-content/uploads/2015/11/PTr-Position-Paper-on-GGIR.pdf>.
- 19 Mauritius Labour Party, Position Paper No. 1 at 48, para. 23.
- 20 Mauritius Labour Party, Position Paper No. 1 at 47–50; Anthony Gray, "The Compatibility of Unexplained Wealth Provisions and 'Civil' Forfeiture Regimes with *Kable*," *Queensland University of Technology Law and Justice Journal* 12, no. 2 (2012) at 31–32.
- 21 *StAR A Good Practices Guide for NCB Asset Forfeiture* 2009 at 44–46.
- 22 *Nat'l Crime Agency v. Baker & Ors* [2020] EWHC (Admin) 822 [63]–[65] (Eng.) (discussing the potentially intrusive character of UWOs, owing to compelled disclosure of confidential information, and referring to the "right to respect for private and family life" under Article 8 of the European Convention on Human Rights (ECHR)).
- 23 *Id.* [63]–[65].
- 24 *Nat'l Crime Agency v. A* [2018] EWHC (Admin) 2534 [99] (Eng.) (referring predominantly to Article 1 of the ECHR but also citing Article 8 of the ECHR) and [103] (finding that the use of a UWO struck a "fair balance" in this case).
- 25 *Baker & Ors* [2020] EWHC [64]–[65].

- 26 *Id.* [61], [64]–[65]. See also *Hajiyeva v. Nat'l Crime Agency* [2020] EWCA (Civ) 108 [52] (specifying that the NCA “as a public body, had a duty to act consistently with the European Convention on Human Rights”). More broadly, regarding concerns over the misuse of UWOs and regarding the right to privacy, see also UNCAC, Article 8 on “Codes of conduct for public officials,” and UN, International Code of Conduct for Public Officials, Resolution 51/59, 12 December 1996, accessed December 23, 2022, [https://www.unodc.org/documents/commissions/CCPCJ/Crime\\_Resolutions/1990-1999/1996/General\\_Assembly/A-RES-51-59.pdf](https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1990-1999/1996/General_Assembly/A-RES-51-59.pdf) (advocating against the misuse of power by public officials and advocating for the protection of confidential information).
- 27 See, for example, Australia, Taxation Administration Act 1953 (as amended and in force on September 28, 2022), sec. 8K (“False or misleading statements”) and sec. 8L (“Incorrectly keeping records”), accessed December 23, 2022, <https://www.legislation.gov.au/Details/C2022C00267>; Australian Government, Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129, December 2015) at para. 9.81.
- 28 *Baker & Ors* [2020] EWHC [26].
- 29 See, for example, *Hajiyeva* [2020] EWCA 108; *Nat'l Crime Agency v. A* [2018] EWHC (Admin) 2534. See also *Baker & Ors* [2020] EWHC 822.
- 30 See UK, Proceeds of Crime Act 2002, as amended, sec. 362F(1).
- 31 *Hajiyeva* [2020] EWCA [45]–[56].
- 32 *Id.* [51].
- 33 *Nat'l Crime Agency v. Hussain & Ors* [2020] EWHC (Admin) 432 (Eng.).
- 34 *Hajiyeva* [2020] EWCA [52]; Overseas Security and Justice Assistance (OSJA) Human Right Guidance at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/583304/OSJA\\_Guidance\\_2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583304/OSJA_Guidance_2017.pdf).
- 35 Australia, Proceeds of Crime Act 2002 as amended Section 179(L) (Relieving certain dependents from hardship). Available at (last accessed 1/2/2023) <https://www.legislation.gov.au/Details/C2022C00269>.
- 36 UK, Proceeds of Crime Act 2002, as amended by the Economic Crime Transparency and Enforcement Act 2022, at secs. 52–53, inserting a new sec. 362U and sec. 396V (titled “Unexplained wealth orders: costs of proceedings”), accessed January 4, 2023, <https://www.legislation.gov.uk/ukpga/2022/10/part/2>.

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# 6 Conclusion and Recommendations

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This study shows that UWOs can fill a gap in the asset recovery toolbox. The essence of a UWO is to relieve the authorities of the burden of establishing that assets are linked to specific instances of criminal conduct by requiring the respondent to explain that the source of his or her wealth is of legal origin and to produce evidence to support that conclusion. This can prove particularly useful in cross-border cases of grand corruption or organized crime where authorities might otherwise confront obstacles in obtaining the information or cooperation needed from other jurisdictions via the MLA process or in cases of domestic corruption where it can be notoriously difficult to prove the requisite links with crime under other proceedings yet where there is a clear, inexplicable increase in an official's assets. If legal entities are also targeted, and if certain officers of those entities may also be obliged to comply with information requests, it may help authorities unravel complex offshore legal entity structures seeking to conceal the ultimate beneficial owners, thereby providing information for the next steps of the investigation. As analyzed in previous chapters, UWO systems establish, at the minimum, orders to oblige respondents to provide certain information on the source of their wealth. Alternatively, and more commonly, systems include both the same obligation to provide information and their own recovery mechanism. If the respondent does not comply with the order to provide information or provides insufficiently convincing explanations, this may result in a presumption that the property is illicit and recoverable. The policy choices in designing such systems will be heavily influenced by the existing civil forfeiture infrastructure within a given country.

## 6.1 Key Recommendations for Establishing a UWO System

If a country wishes to explore a UWO system, it should consider the following key recommendations.

### 6.1.1 Preconditions for Establishing a UWO System

- Determine whether a UWO system is needed by conducting policy research to identify existing obstacles and gaps in the jurisdiction's comprehensive anti-corruption and asset recovery framework.
- Consider what exactly the UWO would target, whether politically exposed persons and their relatives, so called oligarchs, organized crime figures, all government officials, or others.
- Assess the existence of a supportive political and institutional environment for the implementation of UWOs, including the degree of independence of the judiciary and the strength of political will.

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- Determine whether UWOs should be recognized alongside of, or as an alternative to, other non-conviction-based remedies and illicit enrichment offenses.

### **6.1.2 Design Considerations for a UWO System**

- Decide based on the specific legal and institutional context which model for a UWO system would be most effective in the jurisdiction, including whether the UWO will be an investigative tool only or both an investigative tool and a mechanism for a confiscation order.
- Relieve the authorities of the burden of establishing that assets are linked to specific instances of criminal conduct by requiring respondents to explain that the source of their wealth is of legal origin and requiring respondents to produce evidence to support that conclusion.
- Establish a presumption that assets are subject to confiscation in cases where the respondent does not provide satisfactory responses showing that they are derived from legitimate sources or does not provide any response at all.
- If the respondent provides false or misleading information, this should constitute an offense, either as part of the UWO system (as in the UK) or by reference to other preexisting laws, such as false statement offenses.
- Ensure that the UWO system covers legal persons, as well as natural persons, and that relevant natural persons are required to respond to UWOs addressed to a legal person.
- Ensure that the UWO system covers all types of assets, wherever located, including tangible assets, intangible assets, interests in property, and even assets gifted or otherwise consumed.
- Consider establishing a minimum value threshold for UWOs based on the context of the jurisdiction to ensure that resources are devoted to cases with substantial monetary or public policy value. Incorporate a means to periodically assess whether this threshold should be revised based on the practical experiences in implementing the law.
- Provide for legal consequences in cases where a respondent in a UWO proceeding lists income and assets not mentioned on his or her official income and asset declaration.
- Allow value-based confiscation in the UWO system, rather than only property-based confiscation, in the event that the original assets are no longer available, and use value-based confiscation if the respondent has other assets in the enforcing jurisdiction.
- Permit UWOs with respect to property and persons outside the enforcing jurisdiction (extraterritorial application).
- Provide for provisional restraints or freezes to accompany UWOs, in appropriate circumstances, to guard against dissipation of the assets where there is a risk that assets could be damaged, moved, or otherwise disposed of.

### **6.1.3 Operational Issues**

- Promote coordination domestically by including mechanisms for sharing information among UWO enforcement agencies and tax agencies, protected with appropriate confidentiality safeguards.
- Consider establishing an asset recovery or UWO-specific multidisciplinary task force.

- Prioritize the use of UWOs for investigating and confiscating assets located in the enforcing jurisdiction when foreign counterparts will likely not be effective in providing evidence of beneficial ownership and illicit origin.

#### **6.1.4 Procedural and Due Process Safeguard Considerations**

Include adequate due process guarantees and judicial review mechanisms in the UWO system, such as the following:

- Require review by a judicial officer before a UWO is issued and the right to appeal against the decision to issue a UWO.
- Consider, in accordance with the jurisdiction's fundamental principles, whether the use of statements from a UWO proceeding should be forbidden in parallel or subsequent criminal proceedings against the respondent (except for false statements and information other than "statements").
- Limit the use of disclosed information and disclosure to third parties.
- Add a limit or other safeguard to assess how far back non-PEP respondents can be compelled to explain the origin of assets if there is a risk of injustice.
- Incorporate a minimum threshold for the value of the unexplained assets calibrated to the specific legal and operational context of the jurisdiction in question.
- Protect innocent third parties.
- Incorporate independent oversight by parliament or another body of the UWO framework.
- Permit potential recoupment of legal fees for respondents when UWOs are denied, possibly limiting this to cases where authorities acted unreasonably or improperly.



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# Appendix A: Case Studies and Related Information

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## A.1 United Kingdom

### A.1.1 *Nat'l Crime Agency v. A*

**Background.** Zamira Hajiyeva is a national of Azerbaijan. Her husband, Jahangir Hajiyev, served as the chairman of the board of the International Bank of Azerbaijan from March 2001 to March 2015. The Ministry of Finance of Azerbaijan was a major shareholder of the bank, with a shareholding between 50.2 percent and 60.6 percent from 2008 until 2013. In December 2015, Mr. Hajiyev was arrested in Azerbaijan and subsequently charged with various offenses—including misappropriation, abuse of office, large-scale fraud, and embezzlement—in connection with the bank. In October 2016, Mr. Hajiyev was convicted and sentenced to 15 years in prison and the payment of US\$39 million to the bank.

In February 2018, on the basis of an application of the National Crime Agency (NCA), a UWO was issued against Mrs. Hajiyeva regarding a property in London. The property was purchased in December 2009 by Vicksburg Global Inc., a company incorporated in the British Virgin Islands, for £11.5 million (US\$13.839 million). Mrs. Hajiyeva had become notorious in the UK for her lavish lifestyle, including spending £16 million (US\$19.254 million) at Harrods between 2006 and 2016.<sup>1</sup>

**Application to discharge the UWO.** The respondent, Mrs. Hajiyeva, didn't dispute the fact that she held the property through Vicksburg Global Inc. However, she asked the High Court to discharge the UWO based on the grounds, inter alia, that (a) neither she nor Mr. Hajiyev was a politically exposed person<sup>2</sup> because the government's shareholding in the International Bank of Azerbaijan was not sufficient to establish that the bank was a "state-owned enterprise" during Mr. Hajiyev's tenure for the purpose of article 3(9)(g) of the Parliament and Council Directive 2015/849/EU (2015 Directive)<sup>3</sup> and Mr. Hajiyev hadn't been entrusted with prominent public functions "by an international organization or by a State" under section 362B(7)(a) of the Proceeds of Crime Act 2002 (PoCA);<sup>4</sup> (b) the NCA was wrong in relying on the conviction against Mr. Hajiyev by the court of Azerbaijan to support the income requirement of the UWO because the trial proceeding was extremely abusive, disregarding any defense rights;<sup>5</sup> and (c) the UWO breached the respondent's privilege against self-incrimination and spousal privilege under section 14 of the Civil Evidence Act 1968, exposing both her and Mr. Hajiyev to the risk of further criminal proceedings and prosecution in the UK and Azerbaijan.<sup>6</sup>

**Ruling.** The judge refused to discharge the UWO, on the grounds that (a) the definitions of "state-owned enterprises" and "politically exposed persons" were so broad that the bank could be seen as a state-owned enterprise based on the government of Azerbaijan's majority shareholding in the bank at all material times, with ultimate control of the bank;<sup>7</sup> and (b) it was not persuasive that, under Azerbaijan law, the bank was not a "state organization," because neither PoCA nor the 2015 Directive require consideration of foreign laws.<sup>8</sup>

The judge further interpreted the phrase “an individual who is, or has been, entrusted with prominent public functions by an international organization or by a State other than the United Kingdom or another EEA State,” defining a politically exposed person under section 362B(7)(a), to exclude such an entrusted individual, not to add an extra condition.<sup>9</sup> Hence, Mr. Hajiyeu, the former board chair of the bank, could be regarded as having been a member of the administrative and/or management body<sup>10</sup> of a state-owned enterprise and thus regarded as having been entrusted with prominent public functions by the state of Azerbaijan. The judge confirmed that both Mr. Hajiyeu and his wife, the respondent, were politically exposed persons.<sup>11</sup>

Regarding the conviction against Mr. Hajiyeu, the judge stated that at this investigative stage the NCA was not obliged to determine issues including the fairness of the trial that might arise at a later stage; thus, it could consider his conviction in deciding the income requirement.<sup>12</sup> He also noted that the conviction was only one of many corroborative pieces of evidence relied upon by the NCA of Mr. Hajiyeu’s alleged misappropriation of bank funds in considering the income requirement.<sup>13</sup>

As for the respondent’s privilege against self-incrimination and spousal privilege, the judge pointed out that the privileges under the Civil Evidence Act 1968 applied only to “the criminal offences under the law of any part of the United Kingdom” and the respondent didn’t show “a real and appreciable risk” of prosecution against her and Mr. Hajiyeu in the UK.<sup>14</sup> In addition, after finding that the power under a UWO to request information and to produce documents “would be rendered very largely nugatory if privilege applied,” the judge expressed a view that Parliament, in creating the UWO procedure, had intended that “the privileges be abrogated.”<sup>15</sup>

Overall, the judge concluded that the position of Mr. Hajiyeu as a state employee from 1993 until 2015 was an improbable source for sufficient income to purchase the property<sup>16</sup> and dismissed the respondent’s challenge since the statutory criteria for issuing a UWO were satisfied.

**After the ruling.** In February 2020, the respondent’s appeal of the ruling was dismissed by the court of appeal.<sup>17</sup> In December 2020, the respondent’s application to appeal to the Supreme Court was dismissed as her challenge raised no arguable point of law.<sup>18</sup>

The NCA has begun a forfeiture proceeding on Mr. Hajiyeu’s seized jewelry, valued at 3.2£ million (US\$3.8 million), which the agency suspects was also bought with her husband’s corrupt money.<sup>19</sup>

### **A.1.2 Nat’l Crime Agency v. Baker & Ors**

**Background.** Rakhat Aliyev was a Kazak national who served in high-level public positions, including as deputy foreign affairs minister. He was convicted in absentia of kidnapping, theft, embezzlement, and other crimes by the Kazak court in 2008 and died behind bars in Austria in February 2015. The NCA obtained three UWOs regarding three properties in London, worth over £80 million (US\$96 million). Each property was initially purchased by a company registered in the British Virgin Islands and subsequently transferred to four of the five respondents: an Anguilla-registered company, two Panama-registered foundations, and a Curaçao-registered foundation. The fifth respondent, Andrew Baker, was president of the Panamanian foundations.

The NCA obtained the UWOs on the basis of the premise that Mr. Aliyev was involved in serious crimes during and after his time in office, he purchased the properties with the proceeds of crime, and his family members were also involved in laundering the proceeds of his crimes in acquiring and handling the properties. The NCA also believed Mr. Aliyev had acquired and managed the properties in a complex and secretive way, using a private offshore arrangement to conceal the unlawful funds used to purchase the properties.

**Reply from the respondents.** The UWOs required the respondents to supply information about the source of the funds used in acquiring and managing the properties and the

ultimate beneficial owners (UBOs) of the properties.<sup>20</sup> The respondents argued that the factual basis of the NCA's application was wrong, as the UBOs were Mr. Aliyev's former wife, Dariga Nazarbayeva (with respect to two of the properties), and their son, Nurali Aliyev (with respect to the third property).<sup>21</sup> The respondents explained that Mr. Aliyev and Ms. Nazarbayeva divorced after years of separation in June 2007, before the purchase of the properties, and that neither the wife nor son had contact with Mr. Aliyev after the divorce. They further claimed that since Mr. Aliyev's assets from his criminal activities had already been confiscated by the government of Kazakhstan, his ex-wife and son didn't receive any illegally acquired assets or funds from him. They also contended that Ms. Nazarbayeva and her son were the rightful owners of the properties because she was a successful businesswoman whose estimated net worth in 2013 was US\$595 million, and that Nurali Aliyev provided a loan of US\$65 million to a company "beneficially owned" by him.<sup>22</sup>

**Ruling on the application to discharge the UWOs.** As the NCA refused to withdraw the application, the respondents applied to the High Court to discharge the UWOs.

Having considered the respondents' evidence, demonstrating how Ms. Nazarbayeva and Nurali Aliyev had come to acquire the properties and how they had held wealth independently of Rakhat Aliyev, the judge rejected the NCA's premise and concluded that Ms. Nazarbayeva and Nurali Aliyev were the source of the funds for purchasing the properties.<sup>23</sup> The judge also pointed out that the NCA failed to consider the relationship between Ms. Nazarbayeva and Mr. Aliyev after their divorce, Nazarbayeva's listing as one of the richest people in Kazakhstan, Nurali Aliyev's economic independence and capacity, and the investigation and confiscation proceedings against Mr. Aliyev in deciding the UBOs or the likelihood of Ms. Nazarbayeva's involvement in laundering the proceeds of her ex-husband's unlawful conduct.<sup>24</sup> The judge further noted the lack of evidence of any financial link between Mr. Aliyev and the properties<sup>25</sup> and that the mere use of complex offshore corporate structures or trusts couldn't be grounds for wrongful purposes without additional evidence.<sup>26</sup>

Furthermore, the judge wasn't satisfied with the NCA's submission that the respondent, Mr. Baker, was the appropriate respondent in this case.<sup>27</sup> Under the Panamanian law and foundation charters, the power to control the foundation and its assets was bestowed upon the founder and the foundation council, not the president.<sup>28</sup> The judge concluded that there wasn't reasonable cause to believe that Mr. Baker "held" the properties of the foundations nor reasonable grounds for suspecting he was or had been involved in serious crimes.<sup>29</sup>

For these reasons, the judge granted the respondents' application to discharge the UWOs. On June 19, 2020, the Court of Appeal dismissed NCA's application to appeal the discharge of UWOs, on the basis that any appeal had "no real prospect of success."<sup>30</sup>

### A.1.3 *Nat'l Crime Agency v. Hussain & Ors*

**Background.** In May 2019, the NCA applied for UWOs against Mansoor Mahmood Hussain, a property developer, regarding eight properties that were registered as owned by him or by six companies wholly owned by him. In July 2019, the NCA also applied for interim freezing orders (IFOs) of the properties. The properties were valued at about £9.970 million (US\$11.998 million) at the time of the application.

**NCA's grounds for application.** The NCA claimed that Mr. Hussain held the properties because he was the registered owner or the sole shareholder and director of six other corporate-registered owners of the properties, thus effectively having control over the properties.<sup>31</sup> Given the evidence that Mr. Hussain's annual declared income was less than £10,000 (US\$12,000) most of the time, that the six companies had no income, and that the market value of the properties was almost £10 million (US\$12 million), the NCA contended it had reasonable suspicions that Mr. Hussain's legitimate income would have

been insufficient to obtain the properties.<sup>32</sup> Per the requirements of the Serious Crime Act, the NCA submitted that it reasonably suspected Mr. Hussain was a “professional enabler” and “serial money launderer” for a number of individuals involved in organized crime gangs in Bradford in Northern England. The NCA contended that he enabled the operation of the criminal gangs by providing money laundering services, facilitating serious crimes or drug crimes, gang violence, armed robbery, and serious fraud.<sup>33</sup> The evidence of Mr. Hussain’s involvement in the organized crime gangs included repeatedly providing funds or a residence to gang members and their families, funding monetary confiscation orders, accompanying gang members to their criminal trials, and listing the properties at issue as gang members’ addresses.<sup>34</sup>

**Ruling and asset recovery.** On January 12, 2020, the judge issued the requested UWOs and IFOs. Mr. Hussain complied with the UWOs by submitting a 76-page witness statement and 127 large files of documentary evidence. This evidence enabled investigators to identify a larger property portfolio than previously known. Pressured by the additional IFOs, Mr. Hussain settled the case on August 24, 2020, giving the NCA 45 properties in London, Cheshire, and Leeds; four parcels of land; £600,000 in cash (US\$722,000); and other assets worth a total of £9.8 million (US\$11.793 million).<sup>35</sup> This case may be the exemplar of what UWOs can achieve, leading to actual asset recovery.

## A.2 Kenya

### A.2.1 *Kenya Anti-Corruption Commission v. Stanley Mombo Amuti*

**Background.** In July 2008, the Kenya Anti-Corruption Commission (KACC) issued a notice under section 26 of the Anti-Corruption and Economic Crimes Act 2003 (ACECA) against Stanley Mombo Amuti. Mr. Amuti had been a civil servant for over 25 years and also had worked as a financial controller in a public institution, the National Water Conservation and Pipeline Corporation (NW&PC), starting in September 2007. The notice required him to provide a written statement explaining the sources of the properties he had acquired between 1992 to 2008, including cash seized from his house and office, checks, bank account balances, and real estates.

The KACC claimed that Mr. Amuti’s various assets were valued at an estimated tens of millions of Kenya shillings (K Sh) and were disproportionate to his salary, which was his only source of income during the period. Among his assets, some were funds linked to the contractors and suppliers of the NW&PC and thus were suspected to be bribes.

In September 2008, dissatisfied with the explanation from Mr. Amuti in his response to the notice, the KACC filed an Originating Summons under section 55 of the ACECA before the High Court 2008. The commission sought to have the properties Mr. Amuti acquired between September 2007 and June 2008 declared “unexplained assets” and forfeited to the government of Kenya. Notably, the time period ultimately targeted, September 2007 to June 2008, was approximately 10 months out of the initial period in the Notice, 1992 to 2008 (a point which Mr. Amuti tried, but failed, to challenge—see Grounds of appeal).

**Progress of the trials.** Initially, the judge found that section 55(5) of the ACECA was inconsistent with the Constitution and dismissed the KACC’s action as null and void.<sup>36</sup> In the appeal against the ruling, the Court of Appeal allowed the appeal and referred the case back to the High Court for trial and determination in October 2015.<sup>37</sup>

**Trial court ruling.** At the trial court, the judge pointed out that a civil recovery proceeding could be decided “on the basis of conduct in relation to property without the identification of any particular unlawful conduct”<sup>38</sup> and that section 55(5) of the ACECA shifted the burden to the respondent if the KACC proved, on the balance of probability, that the respondent had unexplained assets.<sup>39</sup> Having analyzed the submissions and evidence

from both sides, the trial court judge held that Mr. Amuti possessed unexplained assets in the sum of K Sh 41,208,000 (US\$334,500) and ordered him to pay that amount to the government of Kenya.<sup>40</sup>

**Grounds of appeal.** On appeal, Mr. Amuti pointed out that in 2008, a notice under section 26 of the ACECA was issued for his assets acquired over a period of 16 years (from 1992 to 2008); in contrast, the Originating Summons pertained to his assets acquired in the 10-month period from September 2007 to June 2008. He claimed that since the Originating Summons altered the period from 16 years to 10 months, it was null and void.<sup>41</sup> He also claimed that since the assets that were ordered to be forfeited by the trial court were not listed in either the KACC's notice or the Originating Summons, he was denied justice and an opportunity to explain the source of them.<sup>42</sup> Additionally, Mr. Amuti contended that the trial court ruling breached his constitutional right to property as it did not require any proof that his properties had been unlawfully acquired.<sup>43</sup> He claimed that the judge wrongfully required him to prove his innocence even though he was not obligated to satisfy the court that his assets were acquired otherwise than as a result of corrupt conduct.<sup>44</sup>

**Appellate court ruling.** The appellate court stated that because the lesser period of 10 months was within the longer period of 16 years in the original notice, a new notice wasn't necessary.<sup>45</sup> Regarding the assets that were ordered to be forfeited, the appellate court pointed out that it was the appellant, Mr. Amuti, who specified those assets in his response to the KACC's notice and placed them at issue for trial. The appellate court concluded that it had jurisdiction to rule on whether those assets were unexplained assets, which was the issue placed before the trial court. The court also denied Mr. Amuti's assertion that he was not given a fair opportunity to explain the source of the assets.<sup>46</sup>

As for the claim of violation of the right to property, considering the suspicious payment from the contractors and suppliers of the NW&PC and his unsatisfying explanation, the appellate court confirmed that no violation of the right to property was found in requesting an individual to explain the source of assets disproportionate to the individual's legitimate source of income.<sup>47</sup> Moreover, the appellate court regarded the forfeiture proceeding against "unexplained assets" under sections 26 and 55 of ACECA as a "non-conviction based civil forfeiture" proceeding.<sup>48</sup> It stated that the sections required the KACC to prove, on balance of probability, that an individual had assets disproportionate to his or her legitimately known sources of income and that section 55(2) shifted the evidentiary burden to the individual to offer a satisfactory explanation as to the legitimate acquisition of the assets. The court saw the theme of section 55(2) of ACECA as "prove it or lose it," meaning that if a satisfactory explanation of the disproportionate assets wasn't given, such assets should risk categorization as having been unlawfully acquired.<sup>49</sup> The court also stated that the requirement to give an explanation wasn't demanding an individual to explain his innocence, since "the presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired."<sup>50</sup>

Thus, the appellate court dismissed Mr. Amuti's claims and affirmed the trial court's judgment.

### **A.2.2 Ethics and Anti-Corruption Commission v. Patrick Ochieno Abachi et al. (Abachi & Ors)**

**Background.** Patrick Ochieno Abachi was a Chief Accountant in the Ministry of Finance and then in the Ministry of Agriculture between 2002 and 2007, when the so-called Anglo Leasing scandal happened. The scandal involved corruption in the procurement of supplies contracts for installing a nationwide digital, multichannel, security systems telecommunication network for the Kenya Administration Police and the Provincial

Administration. The total cost was €49,650,000 (US\$52,875,000).<sup>51</sup> Eighteen contracts were made between the government of Kenya and fictitious foreign companies, resulting in significant financial loss to the government. The Ethics and Anti-Corruption Commission (EACC) revealed during its investigations that the Ministry of Finance was responsible for making wrongful payments for grossly inflated amounts.<sup>52</sup> As a chief accountant, Mr. Abachi authorized payments related to the Anglo Leasing contracts.<sup>53</sup>

In 2007, based on information that Mr. Abachi had accumulated wealth far beyond his known legitimate sources of income as a result of corrupt conduct related to the Anglo Leasing contracts, the EACC searched his house and traced relevant bank accounts and assets. In 2008, the EACC filed for the forfeiture of his unexplained wealth.

**Arguments from the EACC.** The EACC claimed that between 2002 and 2007, Mr. Abachi had acquired real estate, vehicles, and funds valued at over K Sh 80,840,000 (US\$656,000). Meanwhile, he earned a gross monthly salary of K Sh 53,900 (US\$438) while in the Ministry of Agriculture. The assets were held in his own name and the names of his wife, close relatives, and two limited liability companies in which Mr. Abachi was a major shareholder.

The EACC sought forfeiture of his disproportionate assets as unexplained wealth under ACECA section 55(6). Most of the assets had been acquired during the time he was directly involved in the Anglo Leasing contracts. The EACC asserted that his wealth came from his suspected corrupt conduct related to the scandal; he abused his authority and wrongfully conferred benefits on himself or others.<sup>54</sup>

Moreover, the EACC stated that his wife, relatives, and two other companies held assets in their names in trust for him as a way to hide beneficial ownership. During the search of his house, ownership documents related to the assets in their names were found. The EACC also cited his wife's statement that assets in her name had been solely purchased by Mr. Abachi; a statement from a director of one of the two trustee companies likewise noted that the assets in the company's name were actually owned by Mr. Abachi.<sup>55</sup>

Finally, the EACC submitted into evidence Mr. Abachi's wealth declaration forms, which had been filed in compliance with the requirements of the Public Officers Ethics Act for the years 2003 and 2007. He had declared gross assets of K Sh 1,030,180 in 2003 (US\$8,400) and K Sh 1,719,520 in 2007 (US\$14,000)—a huge contrast with the results of the investigation.<sup>56</sup>

**Opposing arguments from Mr. Abachi.** In response to the EACC's notice under ACECA section 26, requesting an explanation of the sources of the assets in question, Mr. Abachi answered that he had earned considerable income from running a business and engaging in consultancies, without further specification.<sup>57</sup> He also claimed that he had obtained some loans for purchasing assets and held some of the real estate in trust for a US resident.<sup>58</sup> He denied the beneficial ownership of the assets held in the names of his family and companies.

Instead of providing proof of his assertions, he argued that the EACC failed to provide evidence that he received any benefits related to the Anglo Leasing contracts.<sup>59</sup> He contended that he had no obligation to provide documents showing the manner of acquiring his assets and that the fact he didn't produce them could not result in the property being declared an unexplained asset.<sup>60</sup> He further claimed violation of his right to own property under the Constitution of Kenya.<sup>61</sup>

**Ruling.** The court confirmed that the procedure for recovery of unexplained assets is civil in nature<sup>62</sup> and that the party seeking to recover unexplained assets wasn't required to prove specific corrupt acts of the person with unexplained assets. If the EACC shows, on a balance of probabilities, that the defendant has acquired assets that are disproportionate to his known legitimate source of income, then the burden shifts to the defendant to explain the source of the assets at issue.<sup>63</sup>

To analyze whether Mr. Abachi had acquired unexplained assets, the judge pointed out that from initiation of the suit in 2008 until the present in 2020, Mr. Abachi produced no evidence to explain the source and manner of acquiring his assets or the beneficial ownership of the assets held in others' names.<sup>64</sup>

Considering his position and involvement in Anglo Leasing contracts, the sudden increase of wealth (including large deposits in accounts during that time), and the failure to provide an explanation of the source of funds despite of the opportunities given, the judge declared that the assets at issue constituted unexplained assets, and they should be forfeited to the government.<sup>65</sup>

## A.3 Australia

### **A.3.1 *Re Application under Section 20A of the Proceeds of Crime Act; ex parte Commissioner of the Australian Federal Police***

**Background.** In 2017, the commissioner of the Australian Federal Police applied to the Supreme Court in Western Australia for unexplained wealth restraining orders under section 20A and an unexplained wealth order under section 179E of the Proceeds of Crime Act 2002 against anonymized respondents P, a declared drug trafficker, and his de facto wife N. The Australian Federal Police sought to restrain real estate, rental receipts, vehicles, and bank accounts held in the names of P, N, a company DN, and a company DNA.

**Grounds for the application of unexplained wealth restraining orders.** Among the elements for the restraining order to be issued under section 20A were two questions: (a) were there reasonable grounds to suspect that P and N's total wealth exceeded their lawfully acquired wealth, and (b) were there reasonable grounds to suspect that they had committed an offense against the Commonwealth.

The applicant (the federal police) claimed the police had reasonable suspicions that properties held in the names of P, N, Company DN, and Company DNA were all controlled by P and N. These suspicions rested on various interrelationships. For example, N was the sole director of Company DN and a director of Company DNA; N was the sole shareholder of Company DNA; P and N were the only employees of Company DN; N and P were beneficiaries of the DN Family Trust; one of P's bank accounts consumed funds from N's bank account, and so on.<sup>66</sup>

The applicant further claimed there were huge gaps between the value of P and N's assets and their declared income. Whereas the combined value of assets under their effective control during six years amounted to more than \$A 3.5 million (US\$2.365 million) each, P's declared taxable income for the relevant period was \$A 232,173 (US\$157,000), and N's income was \$A 206,000 (US\$139,000).<sup>67</sup>

Regarding P and N's offenses against the Commonwealth, the applicant argued that both intentionally caused a loss to the Commonwealth by failing to disclose their whole income and assets to the government<sup>68</sup> and committed money laundering by betting cash and funds on horse racing, receiving winnings from third parties, and purchasing vehicles and real estate.<sup>69</sup>

**Ruling.** In March 2017, satisfied with the grounds and evidence presented by the applicant, the judge issued restraining orders regarding four properties registered in the name of N or Company DNA, rental receipts, two vehicles in the name of Company DN, and nine bank accounts in the name of P, N, Company DN, or Company DNA.<sup>70</sup>

In deciding there were reasonable grounds to suspect unexplained wealth, the judge stated that "there must be material which is sufficient to induce the state of suspicion in a reasonable person." He also noted that the material for establishing the reasonable grounds for suspicion is not limited to admissible evidence.<sup>71</sup> Further, the judge issued

orders under section 38 for taking custody and control of some of the properties and a preliminary unexplained wealth order under section 179B, requiring the respondents to appear before the court to decide whether or not to make an unexplained wealth order pursuant to section 179E of the 2002 Proceeds of Crimes Act.<sup>72</sup> This case was the first in Western Australia for preliminary unexplained wealth orders and only the second in Australia at the federal level.<sup>73</sup>

On May 15, 2017, the respondents filed an application to revoke the restraining orders and the preliminary unexplained wealth order, which was withdrawn on August 25, 2017.<sup>74</sup> The respondents left Australia since the issuance of the restraining orders, and the trial for the unexplained wealth order is still pending.

### **A.3.2 Operation Enguri**

**Background.** In May 2016, the Criminal Assets Confiscation Taskforce (CACT) of the Australian Federal Police launched “Operation Enguri” against a 39-year-old man who owned two properties, vehicles, and a boat and who had a luxurious lifestyle, spending hundreds of thousands of dollars a year without a legitimate source of wealth. He was suspected of engaging in criminal activities with multiple outlaw motorcycle crime gangs in Perth, Western Australia.

**Progress of the investigation.** During the operation, the police assessed the suspect’s financial activities, as well as those of his relatives and associates. They also searched residences and commercial premises linked to the suspect. In May 2017, the police seized and obtained restraining orders over several items, including three black Harley Davidson motorcycles, a Bayliner Trophy Pro Walkaround fishing boat and trailer, a 2017 white Toyota LandCruiser, a 2015 black Toyota LandCruiser, and nearly \$A 80,000 (US\$54,000) in cash.<sup>75</sup>

In contrast to those assets, valued at millions of dollars, over the six years from 2010 to 2016 the suspect declared just \$A 140,502 (US\$95,000) in total taxable income. The operation also revealed that the suspect had set up a trust structure in a bid to hide his assets and was using family members and other associates to make funds appear legitimate.<sup>76</sup>

**Civil forfeiture under UWO.** After civil court proceedings led by CACT, the suspect agreed to forfeit \$A1 million (US\$676,000) in unexplained wealth assets to the Commonwealth. Court orders were obtained in October 2020. Once his forfeited assets are sold, the sales proceeds are placed in the Commonwealth’s Confiscated Assets Account.<sup>77</sup>

### **A.3.3 New South Wales Crime Commission v. Elskaf**

**Background.** Under section 28A of the Criminal Assets Recovery Act 1990, the New South Wales<sup>78</sup> Crime Commission may apply to the Supreme Court for an unexplained wealth order, requiring a person to pay to the Treasury an amount equivalent to the value of the person’s unexplained wealth. It stipulates that the Supreme Court must issue an unexplained wealth order “if the Court finds that there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order: (a) engaged in a serious crime related activity ... or (b) acquired serious crime derived property from any serious crime related activity of another person,” whether or not the holder of the property knew or suspected that the property was derived from illegal activities. The judge can refuse if an order would be against the public interest.

**Commission’s application for UWO.** The commission applied for an unexplained wealth order against the respondent, Ali Elskaf, based on the suspicion that he had engaged in a serious crime-related activity (namely, fraud by deception) by obtaining a loan from a financial institutional using false information, an offense punishable by up to five years’

imprisonment.<sup>79</sup> It submitted documents and affidavits indicating that the respondent falsified his employment history and overstated his income and the total amount of his assets.

Section 28B(2) of the act defines “unexplained wealth” as “the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied on the balance of probabilities is not or was not illegally acquired property or the proceeds of an illegal activity.” In addition, section 28B(3) declares the burden is on the respondent “to prove that the person’s current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity.” On the basis of a forensic accountant’s calculation, the commission claimed that the respondent’s unexplained wealth as of July 6, 2015, was valued at \$A 4,467,941.90 (US\$3 million), which was the sum of his interest in real property and motor vehicles, funds in bank accounts, and past expenditures including withdrawals or loan drawdowns.<sup>80</sup>

**Court’s ruling.** The Supreme Court of New South Wales found there were reasonable grounds to suspect the respondent had engaged in serious crime-related activity for the purposes of section 28A(4) of the Act.<sup>81</sup> Regarding unexplained wealth, the Supreme Court noted that whether the respondent’s current or previous wealth was unrelated to any actual or suspected serious crime-related activity he engaged in did not matter.<sup>82</sup> The court also stated that the respondent failed to provide any evidence to establish that his current or previous wealth was not illegally acquired property or the proceeds of an illegal activity.<sup>83</sup> Since there was no public-interest reason to refuse the order, the Supreme Court granted the order for forfeiture of more than \$A 4 million (US\$3 million).<sup>84</sup>

### **A.3.4 Director of Public Prosecutions (Northern Territory) v. Paton**

**Background.** Under section 68 of the Criminal Property Forfeiture Act 2002 (Northern Territory), a state law, a person can be regarded as having unexplained wealth if the value of the person’s total wealth is greater than the value of the person’s lawfully acquired wealth. Section 71 of the Act states that the court must declare that “the respondent has unexplained wealth if it is more likely than not that the respondent’s total wealth is greater than his or her lawfully acquired wealth.” It further states that “[a]ny property, service, advantage or benefit that is a constituent of the respondent’s wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.” Thus, the onus is on the respondent to establish on the balance of probabilities that the property, benefits, and advantages asserted to constitute the respondent’s total wealth were lawfully acquired.<sup>85</sup>

**Director of Public Prosecutions’s application for UWO.** In January 2016, the respondent, Mr. Paton, came into possession of 12.7 kilograms of cannabis during a trip from Alice Springs to South Australia. Back in the Northern Territory, he was arrested by police who conducted a search of his vehicle and found the hidden cannabis. In August 2016, the respondent was found guilty of the unlawful possession of a commercial quantity of cannabis and was sentenced to prison for four years and six months. Pursuant to section 67 of the act, the Director of Public Prosecutions (DPP) applied for an unexplained wealth declaration against the respondent. The DPP claimed that various moneys he received between 2010 and 2015 were the proceeds of the sale of cannabis.<sup>86</sup> On the basis of a forensic accountant’s calculation, the DPP asserted that the respondent’s unexplained wealth was \$A 235,264 (US\$159,000), which was the difference between the respondent’s total wealth and known lawful income.<sup>87</sup>

The main issue was whether 49 cash deposits made between 2010 and 2015 into bank accounts held by the respondent were lawfully acquired.<sup>88</sup> The respondent claimed that he engaged in the business of building, sale, and/or purchase of cars and motorcycles and bush work. He asserted that most of the cash deposits were from the trades of those businesses and that some cash transactions were loans he got from his friends

and family to purchase a residential property. He further presented records of vehicle registration or called witnesses to prove the existence of trades or loans.

**Court's ruling.** The Supreme Court of the Northern Territory stated that even though the onus was on the respondent to establish his wealth was lawfully acquired, it didn't require "particularly cogent or strict proof."<sup>89</sup> The Supreme Court assessed that in general, the respondent gave plausible explanations of his cash transactions and that the evidence provided by him did corroborate the explanations.<sup>90</sup> The Supreme Court further pointed out that although the DPP didn't have the burden of proof, it could still provide evidence in support of its assertions and in contradiction of the respondent's case. The DPP didn't submit any evidence indicating that the respondent engaged in drug supply activity even before his conviction nor any evidence those cash deposits were directly related to the proceeds of criminal activities.<sup>91</sup> The court dismissed the DPP's application.

## A.4 Ireland

### A.4.1 *Criminal Assets Bureau v. Abacha*

**Background.** General Sani Abacha was a military officer who took the office of President of Nigeria through a military coup in 1993. He ruled Nigeria until his death in 1998. It is estimated that he laundered more than US\$6.9 billion, stolen from Nigeria's public funds with the help of his family and associates. Since his death, the Nigerian government has been seeking the return of funds that were laundered throughout the world. On the basis of information from the US government, the Criminal Assets Bureau (CAB) tracked down part of the laundered money in Ireland.

**Progress of the investigation.** The CAB found US\$6.5 million worth of investment bonds in an account held in Dublin-based HSBC Life (Europe) Ltd. With Mohammed Sani Abacha, the son of the late general, as the respondent, the CAB applied to the High Court for an interim freezing order under section 2 of the Proceeds of Crime Act 1996. The CAB alleged that the bonds were acquired with money illegally taken out of Nigeria before being laundered to Ireland through institutions in Switzerland, London, and New York. The money used to obtain the bonds was claimed to be procured in two ways before being laundered to Ireland. The first method was to take funds directly from Nigeria's Central Bank by instructing bank officials to release monies in the form of cash or traveler's checks. The second method was to force foreign corporations operating in Nigeria to pay a portion of their contracts' value to "re-validate" the contracts.<sup>92</sup>

**Return of assets.** The High Court concluded that the bonds were funded from the proceeds of crime and were held for the benefit of Mohammed Sani Abacha. After an interim freezing order was granted in October 2014—an interlocutory order, prohibiting the disposal of the asset and diminishment of its value pursuant to section 3 of the Proceeds of Crime Act—was granted in March 2015. At the request of the Nigerian government, the High Court issued an order providing for the return of these assets to Nigeria in 2019. In August 2020, Ireland and the Federal Republic of Nigeria entered into a memorandum of understanding for return of the assets.<sup>93</sup>

### A.4.2 *Criminal Assets Bureau v. John McCormack*

**Background.** The respondent, John McCormack, was said to be a leader in the organized criminal activities of selling and supplying large quantities of controlled drugs, trading stolen goods, and organizing cash in transit robberies since the 1990s. The respondent owned and controlled three properties in Ireland, two located in County

Clare ("Purcell Park" and "Cloontra West") and one in County Limerick ("Claughan Fort"). In 1995, he bought his house, Purcell Park, with a deposit payment of IR£3,791 (US\$5,138<sup>94</sup>) and an endowment loan of IR£25,650 (US\$34,767<sup>95</sup>) that was later converted into a repayment mortgage. In 2005, he bought the estate of Cloontra West for €18,000 (US\$19,000). In 2011, he bought the house, Claughan Fort, for €55,000 (US\$59,000).<sup>96</sup>

**Application for interlocutory orders.** The CAB applied for interlocutory orders pursuant to section 3 of the Proceeds of Crime Act with respect to the three properties, to prohibit the disposal of the assets and diminishment of their value. The CAB claimed that all three properties were acquired with the proceeds of crime or with assets derived from the proceeds of crime that the respondent obtained from his involvement in organized criminal activities. The CAB further claimed that receipts from rental of property and from any of his legitimate business activities were also proceeds of crime because they were derived from businesses and assets which were themselves directly or indirectly the proceeds of crime.<sup>97</sup> They submitted an affidavit of evidence of the belief of two chief bureau officers and corroborative evidence, which included information on the social welfare and tax history of the respondent and his wife and exhibits relating to their bank and credit union accounts.

**High Court's ruling.** First, the High Court was satisfied with respondent's role as a senior figure in serious criminal activities—such as large-scale importation of drugs, plotting cash-in-transit robberies, and handling stolen goods—given his prior conviction records (of handling stolen properties), the recovery of stolen property from and discovery of a substantial quantity of drugs at Cloontra West, and the testimony of a detective.<sup>98</sup> The High Court also took as clear evidence of his criminality that a substantial sum in counterfeit bank notes was found in a vehicle associated with the respondent and his wife.<sup>99</sup>

As for the three properties, the High Court stated that the source of funding for their acquisition and operation and related mortgage payments were not explained. It reasoned that tax and revenue records did not show any convincing sources of legitimate income. Even though it acknowledged that the respondent and his wife were engaged in some businesses, such as dog breeding, spray painting, hairdressing, and renting plants and machinery, it saw no indication of legitimate sources of capital which could have funded the establishment or trading of those businesses. The source of occasional cash deposits to their bank accounts was unknown as well.<sup>100</sup>

The High Court concluded that the CAB established the *prima facie* case and the respondent failed to meet the burden of proving that the properties were not funded out of the proceeds of crime. Interlocutory orders were granted.

#### **A.4.3 Criminal Assets Bureau v. Patrick Farrell & anor.**

**Background.** The respondent, Patrick Farrell, had resided in the United Kingdom for a number of years. Having been sentenced to 30 months in prison for 13 counts of obtaining property by deception in 1996, he escaped from prison and returned to Ireland. He owned his family home in Dublin. It was purchased in 1999 for €131,127.12 (US\$139,645), including a mortgage loan. The mortgage payments of €51,909.72 (US\$55,282) were made for 10 years after the purchase.<sup>101</sup>

**Application for an interlocutory order.** After obtaining an interim freezing order against the property pursuant to section 2 of the Proceeds of Crime Act 1996 in 2012, the CAB applied for an interlocutory order under section 3 of the act. The CAB claimed that the respondent's initial purchase, the mortgage payments, and the large extension made to the house were funded, in whole or in part, by the proceeds of crime.<sup>102</sup> Along with the affidavit of chief bureau officer as evidence of belief, the CAB further adduced corroborative evidence, including the evidence of a financial crime analyst, a revenue bureau officer, and a social welfare officer.<sup>103</sup>

**High Court's ruling.** Analyzing the respondent's financial records, including the bank accounts related to the purchase and extension of the property, the High Court stated that some sources of the monies in the accounts were unknown. For example, the respondent asserted that certain deposits totaling €110,412.27 (US\$117,585) came from repayment of a loan that had been advanced to an Australian national without any supporting documentation in relation to the loan's existence.<sup>104</sup> While the court accepted the respondent's claim that he had engaged in the businesses of carpentry and car sales, it pointed out that the source of finance for his businesses remained unexplained.<sup>105</sup>

The High Court was also satisfied with the CAB's claim of the respondent's involvement in criminal activities and his access to the proceeds of crimes, based on the respondent's 28 recorded convictions in Ireland and 23 recorded convictions in Great Britain, his two arrests for cashing stolen checks after escaping from prison in the UK, and the €630,000 (US\$670,927) worth of cannabis resin found in his van.<sup>106</sup>

Considering his criminal activities and funds from unknown sources lodged to his accounts, the High Court concluded that the initial purchase, subsequent mortgage repayments, and the extension to the house couldn't be explained by his legitimate income and that the property indeed constituted directly or indirectly the proceeds of crime.<sup>107</sup> Accordingly, an interlocutory order was granted.

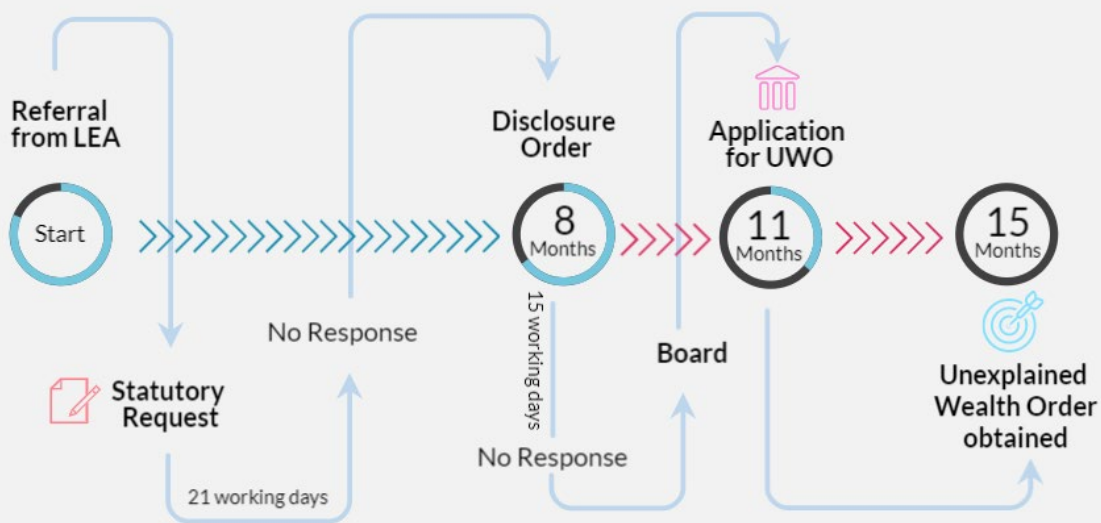
## A.5 Mauritius

### A.5.1 Timelines in UWO Cases in Mauritius

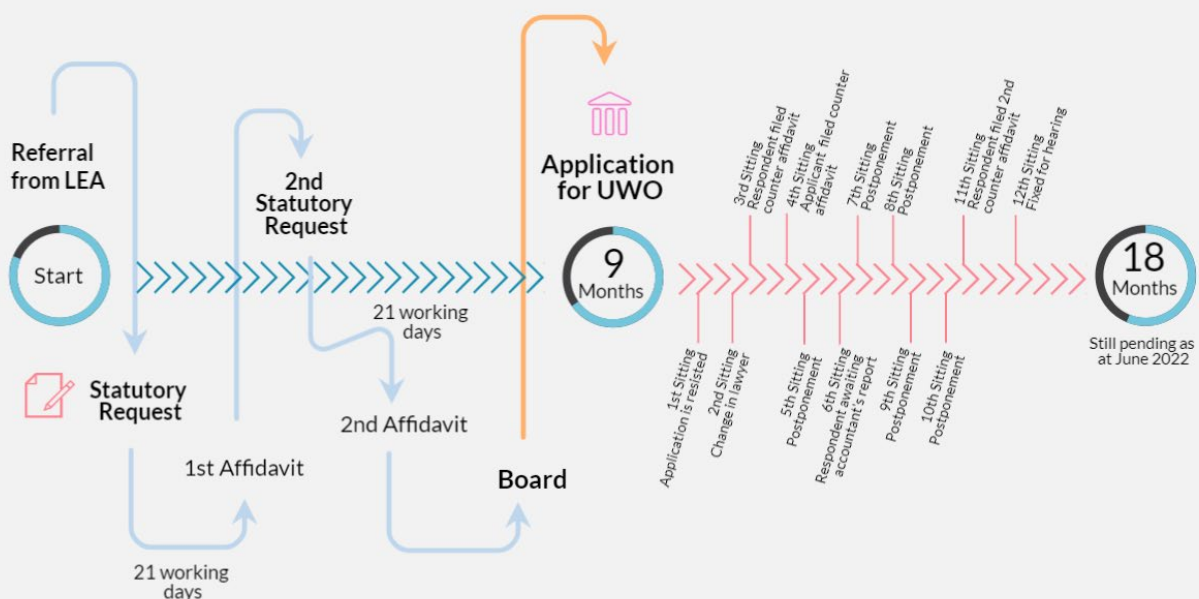
This section describes the timelines of a number of UWO cases in Mauritius, to illustrate typical progress of various types of cases. In one example of an uncomplicated case, the respondent was interdicted at the airport carrying undeclared currency, and much more was later found at his home. He was served with a Statutory Request (the preliminary unexplained wealth inquiry) while in jail on remand for suspected drug trafficking. He was granted extensions to the 21-day time limit to respond to the request so he could access his financial records. He failed to respond by way of affidavit, the only form of response the IRSA can accept, but sent a letter pleading his innocence. Eventually, he was served with a Disclosure Order, to which he also failed to respond. The IRSA analyzed his net worth and the tax authority also indicated the funds seized were disproportionate to his legal emoluments (he had not provided the authority with any meaningful tax returns). The Integrity Reporting Board directed the IRSA to apply for a UWO, and it was granted at the first available hearing. The criminal case is ongoing. (See figure A.1.)

In another drug-related simple case, the IRSA applied for a UWO nine months after receiving the referral. After a further nine months, the court case was still pending (at the time of this study). The respondent submitted two affidavits purporting to explain that his earnings as an artisan, trader, and fruit seller were the source of the funds seized by the police at his premises. However, his alleged earnings had been reported as the same to the last rupee under each category every year for the previous six years, a pattern which appears contrived. The Integrity Reporting Board directed the IRSA to apply for a UWO and the matter is pending. (See figure A.2.)

These data show that in Mauritius the time from a law enforcement referral to obtaining a UWO in simple cases may easily exceed one year. In a more complex case, consisting of comingled legitimate and illegitimate funds and having characteristics of the hawala system, the IRSA took around 16 months to analyze and apply for a UWO (the respondent submitted six affidavits). As of this writing (June 2022), four years have elapsed since the case was referred to the IRSA and the court has yet to give its decision. The IRSA served several statutory requests on respondent and analyzed the affidavit responses in depth. However, given the complexity of the case (which involved a network of cash-only retail shops and multicurrency export sales), the Integrity

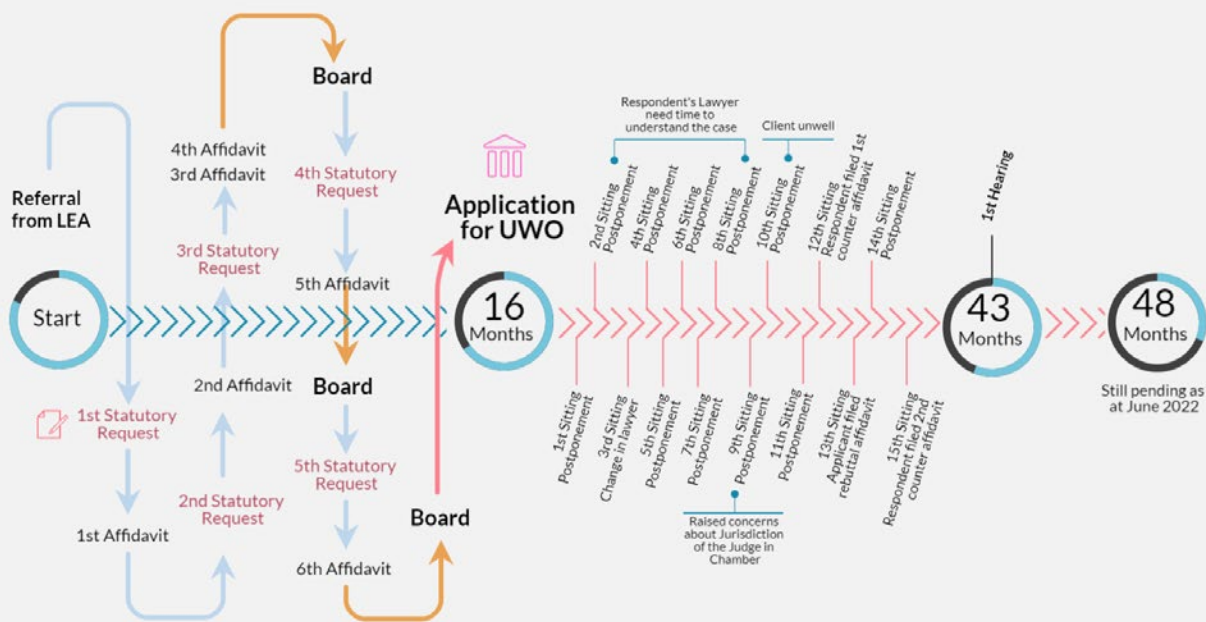
**Figure A.1. Mauritius: Timeline of UWO issuance in simple case one**

Source: Mauritius, Integrity Reporting Services Agency. Note: LEA = law enforcement agency; UWO = unexplained wealth order.

**Figure A.2. Mauritius: Timeline of UWO issuance in simple case two**

Source: Mauritius, Integrity Reporting Services Agency. Note: LEA = law enforcement agency; UWO = unexplained wealth order.

**Figure A.3. Mauritius: Timeline of complex UWO case**



Source: Mauritius, Integrity Reporting Services Agency. Note: LEA = law enforcement agency; UWO = unexplained wealth order.

## Notes

- 1 Rupert Neate. "McMafia' Law: Woman Who Spent £16m at Harrods Is Jailed Banker's Wife," the *Guardian*, October 10, 2018, accessed January 14, 2022, <https://www.theguardian.com/uk-news/2018/oct/10/wife-of-mcmafia-banker-with-16m-harrods-spending-habit-named>; Nat'l Crime Agency v. A [2018] EWHC (Admin) 2534 (Eng.).
- 2 By section 362B(7) of the Proceeds of Crime Act 2002, a politically exposed person was an individual who was, or had been, "entrusted with prominent public functions by an international organization or by a state other than the United Kingdom or another EEA state," or a family member of such a person.
- 3 By article 3(9)(g) of Parliament and Council Directive 2015/849/EU, which applied pursuant to section 362B(8) of PoCA, persons who had been so entrusted with prominent public functions included "members of the administrative, management or supervisory bodies of state-owned enterprises."
- 4 Nat'l Crime Agency v. A [2018] EWHC (Admin) 2534 [26]–[27] (Eng.).
- 5 *Id.* [64]–[66].
- 6 *Id.* [104].
- 7 *Id.* [38].
- 8 *Id.* [39].
- 9 *Id.* [47].
- 10 *Id.* [24].
- 11 *Id.* [54].
- 12 *Id.* [80], [85].
- 13 *Id.* [83], [88].
- 14 *Id.* [107]–[108].
- 15 *Id.* [110], [112].
- 16 *Id.* [58].
- 17 *Hajiyeva v. Nat'l Crime Agency* [2020] EWCA (Civ) 108 (Eng.).
- 18 Dominic Casciani, "Harrods Mega-Spender Loses Supreme Court Challenge," BBC News, December 21, 2021, accessed January 14, 2022, <https://www.bbc.com/news/uk-55389134>.

- 19 Martin Bentham, "'Dirty Money' Court Battle over £3.2m Jewellery," *Evening Standard*, November 8, 2021, accessed January 14, 2022, <https://www.standard.co.uk/news/crime/dirty-money-court-battle-zamira-hajiyeva-jewellery-b964954.html>.
- 20 Nat'l Crime Agency v. Baker & Ors [2020] EWHC (Admin) 822 [5] (Eng.).
- 21 *Id.* [6].
- 22 *Id.* [71], [176].
- 23 *Id.* [100], [167], [197].
- 24 *Id.* [68]–[70], [157], [178].
- 25 *Id.* [81], [162], [191].
- 26 *Id.* [97].
- 27 *Id.* [137], [169].
- 28 *Id.* [110], [169].
- 29 *Id.* [145], [172].
- 30 Nat'l Crime Agency v. Baker & Ors, Court of Appeal (Civil), Carr, J., June 17, 2020.
- 31 Nat'l Crime Agency v. Hussain & Ors [2020] EWHC (Admin) 432 [94] (Eng.).
- 32 *Id.* [97]–[100].
- 33 *Id.* [102]–[103], [105]–[106].
- 34 *Id.* [104].
- 35 Jamie Grierson, "Businessman to Hand Over £10m following 'Unexplained Wealth Order,'" the *Guardian*, October 6, 2020, accessed January 15, 2022, <https://www.theguardian.com/uk-news/2020/oct/07/businessman-to-hand-over-10m-following-unexplained-wealth-order>.
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- 37 Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti-Corruption Commission) v. Amuti [2015] e.K.L.R. (C.A.K.), Civil Appeal No. 213 of 2011.
- 38 Kenya Anti-Corruption Comm'n v. Amuti [2017] e.K.L.R. [92] (H.C.K.), Formerly High Court Civil Suit No. 448 of 2008 (O.S.).
- 39 *Id.* [95].
- 40 *Id.* [96].
- 41 Amuti v. Kenya Anti-Corruption Comm'n [2019] e.K.L.R. [16] (C.A.K.), Civil Appeal No. 184 of 2018.
- 42 *Id.* [17].
- 43 *Id.* [19].
- 44 *Id.* [21]–[22].
- 45 *Id.* [41].
- 46 *Id.* [44]–[51].
- 47 *Id.* [73].
- 48 *Id.* [78].
- 49 *Id.* [79].
- 50 *Id.* [79].
- 51 Ethics and Anti-Corruption Comm'n v. Abachi & Ors [2021] e.K.L.R. [55], [151] (H.C.K.), Civil Suit No. 15 of 2019 (Kenya).
- 52 *Id.* [56].
- 53 *Id.* [17].
- 54 *Id.* [57].
- 55 *Id.* [19].
- 56 *Id.* [80]–[83].
- 57 *Id.* [25].
- 58 *Id.* [69].
- 59 *Id.* [122].
- 60 *Id.* [109].
- 61 *Id.* [105].
- 62 *Id.* [158].
- 63 *Id.* [149].
- 64 *Id.* [160].
- 65 *Id.* [164].
- 66 Re Application under Section 20A of the Proceeds of Crime Act 2002; ex parte Comm'r of Australian Federal Police [2017] WASC 114 [56]–[57].
- 67 *Id.* [62]–[63].
- 68 *Id.* [22], [58].
- 69 *Id.* [23], [59], [60].
- 70 *Id.* [3].
- 71 *Id.* [66].
- 72 *Id.* [71].
- 73 Comm'r of Australian Federal Police v P [No 2] [2018] WASC 2 [2].
- 74 *Id.* [8], [19].

- 75 Australian Federal Police, "WA Man Stripped of Almost \$1 Million in Assets in AFP Unexplained Wealth Case," news release, November 9, 2020, [accessed April 18, 2022, https://www.afp.gov.au/news-media/media-releases/wa-man-stripped-almost-1-million-assets-afp-unexplained-wealth-case](https://www.afp.gov.au/news-media/media-releases/wa-man-stripped-almost-1-million-assets-afp-unexplained-wealth-case).
- 76 *Id.*
- 77 *Id.*
- 78 New South Wales is a state in the federal system of Australia.
- 79 New South Wales Crime Comm'n v Elskaf [2017] NSWSC 681 [5] (Austl.).
- 80 *Id.* [17].
- 81 *Id.* [24].
- 82 *Id.* [20].
- 83 *Id.* [22].
- 84 *Id.* [26].
- 85 Director of Public Prosecutions (NT) v Paton [2021] NTSC 36 [6] (Austl.).
- 86 *Id.* [2]–[3], [7].
- 87 *Id.* [9].
- 88 *Id.* [13].
- 89 *Id.* [64].
- 90 *Id.* [70]–[71].
- 91 *Id.* [68].
- 92 *Irish Times*, "Bonds Held in Frozen Dublin Account Linked to Late Nigerian Dictator's Family, Court Told," March 16, 2015, [accessed April 18, 2022, https://www.irishtimes.com/news/crime-and-law/bonds-held-in-frozen-dublin-account-linked-to-late-nigerian-dictator-s-family-court-told-1.2141932](https://www.irishtimes.com/news/crime-and-law/bonds-held-in-frozen-dublin-account-linked-to-late-nigerian-dictator-s-family-court-told-1.2141932). **Criminal Assets Bureau v. Abacha, H. Ct. Record No. 2014/10/CAB (Ir.).**
- 93 Criminal Assets Bureau, *Annual Report 2020*, submitted May 31, 2021, 31, accessed April 18, 2022, <https://www.cab.ie/wp-content/uploads/2021/09/CAB-Annual-Report-2020-Final.pdf>; Governments of Federal Republic of Nigeria and Ireland, Memorandum of Understanding: "Regarding the Return, Disposition and Management of Certain Forfeited Assets," August 11, 2020, <https://www.anticorruption.ie/wp-content/uploads/2020/09/MOU-NG-and-IE.pdf>.
- 94 This estimate is provided by OANDA Currency Converter using December 31, 2022, accessed February 2, 2023, <https://www.oanda.com/currency-converter/en/?from=IEP&to=USD&amount=3791>. The estimate using December 31, 1995, is approximately US\$6,000, accessed February 2, 2023, <https://www.oanda.com/currency-converter/en/?from=IEP&to=USD&amount=3791>.
- 95 This estimate is provided by OANDA Currency Converter using December 31, 2022, accessed February 2, 2023, <https://www.oanda.com/currency-converter/en/?from=IEP&to=USD&amount=25650>. The estimate using December 31, 1995, is approximately US\$41,000, accessed February 2, 2023, <https://www.oanda.com/currency-converter/en/?from=IEP&to=USD&amount=25650>.
- 96 Criminal Assets Bureau v. McCormack [2020] IEHC 32 [1]–[4] (H. Ct.) (Ir.).
- 97 Criminal Assets Bureau v. McCormack [2020] IEHC 32 [5]–[6].
- 98 *Id.* [13]–[16].
- 99 *Id.* [17].
- 100 *Id.* [121]–[122].
- 101 Criminal Assets Bureau v. Farrell & anor [2013] IEHC 610 [11], [13] (H. Ct.) (Ir.).
- 102 *Id.* [6], [11].
- 103 *Id.* [10].
- 104 *Id.* [16].
- 105 *Id.* [17].
- 106 *Id.* [23]–[24].
- 107 *Id.* [25].

# Appendix B:

## Additional Information

### B.1 Who May Seek a UWO?

Table B.1 reproduces the information in Table 3.1 regarding variations among countries on which agencies may seek a UWO in order to expand upon it below with additional details and resources (see the links to authorizing legislation below).

**Table B.1. Who Investigates and May Seek an Unexplained Wealth Order**

Country	Proceeds of crime authority	In practice	Authorizing legislation
<b>Australia</b>	<ul style="list-style-type: none"><li>• Australian Federal Police (AFP)</li><li>• Director of Public Prosecutions (DPP)</li></ul>	<p>AFP-led Criminal Assets Confiscation Taskforce (CACT):</p> <ul style="list-style-type: none"><li>• Australian Criminal Intelligence Commission</li><li>• Australian Taxation Office</li><li>• Australian Transaction Reports and Analysis Centre</li><li>• Australian Border Force</li></ul>	Proceeds of Crime Act 2002, sec. 179B (preliminary UWO), sec. 179M (UWO), sec. 338.
<b>Kenya</b>	Ethics and Anti-Corruption Commission (EACC)	EACC	ACECA, sec. 55(2).
<b>Mauritius</b>	<p>Newly established specialized agencies → Two-tier investigation/review process:</p> <ul style="list-style-type: none"><li>• (1) Integrity Reporting Services Agency (IRSA)</li><li>• (2) Integrity Reporting Board</li></ul>	IRSA and Integrity Reporting Board	Good Governance and Integrity Reporting Act, sec. 4(1) (establishing the IRSA), sec. 7(1) (establishing the Integrity Reporting Board).

Country	Proceeds of crime authority	In practice	Authorizing legislation
<b>UK</b>	<ul style="list-style-type: none"> <li>National Crime Agency (NCA)</li> <li>Her Majesty's Revenue and Customs</li> <li>Financial Conduct Authority</li> <li>Director of the Serious Fraud Office (SFO)</li> <li>Director of Public Prosecutions (DPP)</li> </ul>	NCA	Proceeds of Crime Act 2002, sec. 362A(7).
<b>Trinidad &amp; Tobago</b>	<ul style="list-style-type: none"> <li>Chairman of Board of Inland Revenue</li> <li>Comptroller of Customs and Excise</li> <li>Commissioner of Police</li> </ul>		The Civil Asset Recovery and Management and Unexplained Wealth Act, Act No. 8 of 2019, sec. 58(1).
<b>Zimbabwe</b>	<ul style="list-style-type: none"> <li>National Prosecuting Authority</li> <li>Zimbabwe Revenue Authority</li> </ul>		Money Laundering and Proceeds of Crime (Amendment) Act 2019, sec. 37A.

## B.2 Links to Authorizing Legislation

**Australia.** The act is available at [http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol\\_act/poca2002160/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/poca2002160/), accessed January 6, 2023. Note the following details:

- CACT information is available at <https://www.afp.gov.au/what-we-do/crime-types/proceeds-crime/criminal-assets-confiscation-taskforce-cact#:~:text=The%20AFP%20led%20CACT%20is,assets%20derived%20from%20criminal%20activity>, accessed January 6, 2023.
- Section 179M: "A []proceeds of crime authority may apply for an []unexplained wealth order."
- Section 338: "Proceeds of crime authority" means the commissioner of the Australian Federal Police or the []DPP.
- Section 69C of the Australian Federal Police Act 1979 provides for the delegation of the functions, powers, and duties of the commissioner of the Australian Federal Police under this act.
- Section 31 of the Director of Public Prosecutions Act 1983 provides for the delegation of the functions of the DPP.
- If an application for a principal order or the order itself has already been made, the proceeds of crime authority responsible for the application or the order is referred to as the "responsible authority" (see the definition in another section).

**Kenya.** The act is available at <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%203%20of%202003>, accessed January 6, 2023.

**Mauritius.** The act is available at <https://www.irsamu.mu/legislation/>, accessed January 6, 2023.

**United Kingdom.** The act is available at <https://www.legislation.gov.uk/ukpga/2002/29/contents>, accessed January 6, 2023.

**Trinidad & Tobago.** The act is available at <https://www.ttparliament.org/publication/the-civil-asset-recovery-and-management-and-unexplained-wealth-act-2019/>, accessed December 14, 2022. Note the following details:

- Section 58(1) states, “Chairman of the Board of Inland Revenue, the Comptroller of Customs and Excise or the Commissioner of Police or such other person delegated by him not below the rank of Assistant Superintendent (hereinafter referred to as ‘the applicant’).”
- Moreover, Part II of the law discusses a specialized agency, namely the “Civil Asset Recovery, Management and Unexplained Wealth Agency.” According to Section 14, this agency is “responsible for the recovery, management and disposal of criminal property, terrorist property or an instrumentality under this Act.” The functions specified under Section 14 appear to revolve more around recovering and managing the property—as the name of the agency implies—rather than the investigation of unexplained wealth and applications for a UWO.
- For one official source confirming UWO activity, see Government of the Republic of Trinidad and Tobago, Anti-Terrorism Unit, available at <https://agla.gov.tt/wp-content/uploads/simple-file-list/ATU/The-Civil-Asset-Recovery-and-Management-and-Unexplained-Wealth-Act-2C-No-8-of-2019/UWO-Matters-3rd-December-2020.pdf>, accessed December 3, 2020. It is also available at <https://agla.gov.tt/anti-terrorism-unit/the-civil-asset-recovery-and-management-and-unexplained-wealth-act/>, accessed January 6, 2023.

**Zimbabwe.** The act and amendment are available from three sources:

- <https://commons.laws.africa/akn/zw/act/2013/4/eng@2020-02-21.pdf>
- <https://zimlil.org/akn/zw/act/2013/4/eng@2020-02-21>
- [https://www.veritaszim.net/sites/veritas\\_d/files/Money%20Laundering%20and%20Proceeds%20of%20Crime%20Amendment%20Act.pdf](https://www.veritaszim.net/sites/veritas_d/files/Money%20Laundering%20and%20Proceeds%20of%20Crime%20Amendment%20Act.pdf)
- Also note the following details:
- According to Section 37B, the “enforcement authority” is empowered to apply to the High Court for a UWO.
- According to Section 37A, the term “enforcement authority” refers to two agencies: “(a) the National Prosecuting Authority; or (b) the Zimbabwe Revenue Authority.”

**Barbados.** The Proceeds and Instrumentalities of Crime Act 2019–17 is available at <https://barbadosfiu.gov.bb/wp-content/uploads/2019/10/Proceeds-Instrumentalities-of-Crime-Act-2019-17.pdf>, accessed December 14, 2022. Note that, per Section 135(1) icw., the authorities that apply for UWOs are referred to as the “Recovery Authority”; more specifically, per Section 2(1), the “‘Recovery Authority’ means the Attorney-General.”

## B.3 Amounts Recovered by Ireland's Criminal Assets Bureau

Table B.2 shows six years of data from Ireland's Criminal Assets Bureau (CAB)

**Table B.2. Amounts Recovered by CAB by Category, Ireland, 2015–20**

Year	Proceeds of Crime Legislation	Revenue Provisions	Social Welfare Provisions
2020 annual report <sup>a</sup>	>€1.8 million	>€2.1 million	€317,000
2019 annual report <sup>b</sup>	> €1.5 million	> €2.0 million	€324,000
2018 annual report <sup>c</sup>	> €2.2 million	> €3.0 million	€323,000
2017 annual report <sup>d</sup>	> €1.6 million	> €2.3 million	€319,000
2016 annual report <sup>e</sup>	> €1.4 million	> €2.0 million	€297,430
2015 annual report <sup>f</sup>	> €1.6 million	> €2.0 million	€185,354
<b>Total</b>	<b>€10.1 million</b>	<b>€13.4 million</b>	<b>€1,765,784</b>

Note: The annual reports for 2010 through 2021 are available at <https://www.cab.ie/annual-reports/>, accessed January 25, 2023.

- a Ireland, Criminal Assets Bureau, *Annual Report 2020*, last accessed 18 March 2022, <https://www.cab.ie/wp-content/uploads/2021/09/CAB-Annual-Report-2020-Final.pdf>. (In addition to the figures cited in the table, totaling €4.2 million, "the Bureau also returned a further €5.494 million to the Nigerian Government following a Memorandum of Understanding signed by the Minister for Justice, Helen McEntee, T.D., and the Federal Republic of Nigeria. The Bureau also returned in excess of €1 million to the Minister for Public Expenditure and Reform (DPER) by utilising, for the first time, legislation under the Criminal Justice Act 1994.").
- b Ireland, Criminal Assets Bureau, *Annual Report 2019*, March 18, 2022, <https://www.cab.ie/wp-content/uploads/2020/07/2019-Annual-Report-English.pdf>.
- c Ireland, Criminal Assets Bureau, *Annual Report 2018* ("The proceeds of crime actions, together with actions under the Revenue and Social Protection provisions, yielded in excess of €5.6 million to the Exchequer in 2018." Of this total: "Using the appropriate Proceeds of Crime legislation, the Criminal Assets Bureau forwarded in excess of €2.2 million to the Exchequer. In addition, in excess of €3 million was forwarded under the Revenue provisions and €323,000 was recovered in respect of overpayments under Social Welfare provisions.").
- d Ireland, Criminal Assets Bureau, *Annual Report 2017*, last accessed July 3, 2020, <https://www.cab.ie/wp-content/uploads/2019/10/CAB-AnnualReport2017.pdf>.
- e Ireland, Criminal Assets Bureau, *Annual Report 2016*, last accessed July 3, 2020, <https://www.cab.ie/wp-content/uploads/2019/10/CABAnnualRep-2016.pdf>.
- f Ireland, Criminal Assets Bureau, *Annual Report 2015*, last accessed July 3, 2020, <https://www.cab.ie/wp-content/uploads/2019/10/CABAnnualRep-2015.pdf>. (The number for the proceeds of crime legislation is an estimation based on the following information in the report: "As a result in the current year, the proceeds of crime actions, together with actions under the Revenue and Social Protection provisions yielding in excess of €3.8 million to the exchequer." "Specifically, the Criminal Assets Bureau, using appropriate Revenue provisions, forwarded in excess of €2 million to the Central Exchequer and also recovered in excess of €185,354 in respect of overpayments under Social Welfare provisions.").

Recovering the proceeds of corruption is a topic of increasing world-wide interest. With international media and global policy forums—like the G-20 and the Financial Action Task Force—paying more attention to kleptocracy and its facilitation by financial institutions and other professional service providers, the discrepancy between amounts stolen and actual recoveries is an issue of mounting concern.

Recovering the proceeds of crime is part of the United Nations (UN) Sustainable Development Goals, but the tools that governments have at their disposal to effect those recoveries are not yielding the desired results. Thus, there is a growing need for exploring new tools.

Several countries have in recent years introduced the unexplained wealth order (UWO) as a tool to improve recoveries of the proceeds of crime—particularly kleptocracy. While it is too early to be able to draw any definite conclusions as to its effectiveness in curbing corruption, the UWO contains novel ideas that are worth examining in more depth. This is what this study intends to do.