UNCAC Conference Edition

Stolen Asset Recovery

TOWARDS A GLOBAL ARCHITECTURE FOR ASSET RECOVERY

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EXECUTIVE SUMMARY

1. The international community is well placed to make significant progress in asset recovery. There is broad awareness and acceptance of the role of asset recovery in the fight against corruption. National authorities have made some progress in developing the institutional and legal structures foreseen under the Convention. The international community has put in place institutions such as the World Bank and UNODC Stolen Asset Recovery Initiative and INTERPOL's Anti-Corruption Office to support national authorities' asset recovery and anti-corruption programs. Recent commitments by the international community, such as the Leaders' Statement at the September 2009 G20 Summit, signal continued high level support. They have also encouraged international anti-corruption and anti-money laundering bodies to collaborate more effectively in addressing the risks posed by the laundering of the proceeds of corruption.

2. The challenge going forward is to accelerate the pace of implementation and to translate goodwill into results: to put to use the institutional and legal framework established under UNCAC by bringing asset recovery cases to court, pursuing and achieving successful judgments, and demonstrating the positive development impacts of asset return on governance and citizens' quality of life. Success stories will help motivate the key actors and sustain high level support (see Recommendation 1).

3. The purpose of this policy note is to explore how the international community and national authorities can meet this challenge. This is a collective international responsibility: asset recovery by its very nature requires the cooperation and collaboration of multiple jurisdictions. But it is also a national responsibility: national authorities will have put UNCAC's asset recovery provisions to use by initiating and pursuing asset recovery cases if the international system is to deliver results.

4. Building on previous international agreements, UNCAC provides a robust international framework for asset recovery. Continued efforts are needed to extend the coverage of the convention and promote convergence between countries.

5. An effective **review process** for international asset recovery would serve three purposes. First, it would help assess progress in establishing the legal and institutional capacity for asset recovery at both the national and international level, thereby signaling particular issues that require further attention. Second, it would provide data on the level of asset recovery activity, allowing the international community to determine whether progress is being made at an operational level, in terms of increasing numbers of asset recovery cases and successful returns. Third, it would generate feedback from case law and operational experience and use this information to inform the design of international standards. These functions do not necessarily have to be embodied in a single review mechanism. Indeed, while some elements of these functions may be adopted by UNCAC CoSP, others may be managed through the review mechanisms established to support other international and regional agreements (Recommendation 2).

6. UNCAC lays out a comprehensive framework of legal instruments to support international asset recovery. Traditional approaches to corruption have focused on the crime, the criminal and the conviction. This note advocates a shift to an integrated law enforcement

approach to corruption, whereby the pursuit of the proceeds of corruption is an integral part of each and every corruption case. The development of an adequate legal framework is critical since jurisdictions will not be able pursue asset recovery cases if they have not criminalized corruption offenses or lack forfeiture procedures. At a minimum, countries should be able to undertake criminal forfeiture. Countries are also encouraged to put in place non-conviction based forfeiture and arrangements for civil asset recovery proceedings.

7. The results of the UNCAC self assessment checklist indicate that many countries recognize that have yet to fully implement UNCAC's asset recovery provisions. These countries consider **legislative development** as a priority. National authorities will have to take the lead in the design the appropriate legal framework to meet their needs. Technical assistance can facilitate this process by providing advice and information on good practice drawn from international experience (Recommendation 3).

8. An effective asset recovery process requires leadership, collaboration across multiple agencies and clear lines of accountability for results. This can prove difficult where public agencies operate in institutional silos, with distinct priorities and formal communication requirements. Countries have solved these challenges by establishing **multi-agency teams**, either on a case-by-case basis or as permanent structures dedicated to asset recovery activities (Recommendation 4).

9. The success of the asset recovery process is determined by the quality of the supporting evidence, so the identification and investigation of corruption cases are critical steps in the asset recovery process. However, they are also the weakest links. Interpol's Anti-Corruption Office is well placed to provide **operational support** in these areas. The office will establish a global information exchange portal, UMBRA, to facilitate information exchange and analysis on corruption cases at global level, helping to generate leads and support investigations. Interpol's Incident Response Teams (Corruption) will assist in the operational aspects of gathering evidence, financial analysis and asset tracing, whilst also providing broad strategic advice. The teams will work under the direction of the national authorities and will comprise IACO staff and specialists on assignment from national law enforcement agencies. This note encourages national authorities to support these initiatives (Recommendation 5).

10. Financial centers should take the initiative in detecting and pursuing the proceeds of corruption in their jurisdiction. This requires a more **proactive approach to the proceeds of corruption** and significant commitment on the part of the financial center. Law enforcement needs to identify areas of risk, pursue leads on specific cases, follow-up in tracing assets and collecting evidence to support prosecution or asset forfeiture in the home jurisdiction or through the courts in the financial center. Again, there is likely to be little progress unless there are clear lines of accountability. The note encourages financial centers to nominate specialists or put together teams with specific responsibility for pursuing proceeds of corruption cases (Recommendation 6).

11. The Leaders' Statement at the September 2009 Pittsburgh summit called on "the FATF to help detect and deter the **proceeds of corruption** by prioritizing work to strengthen standards on customer due diligence, beneficial ownership and transparency." FATF has taken up this challenge. This note highlights a number of measures that would help integrate the anti-corruption and anti-money laundering agendas more effectively and thereby facilitate asset recovery.

12. The AML/CFT assessment methodology can be strengthened by requiring assessors to review risks related to the laundering of domestic and foreign proceeds of corruption. This would focus attention on possible sources of corruption – such as the pillaging of natural resources, embezzlement, and the abuse of public procurement or state owned enterprises – and the mechanisms used to launder the proceeds. Similarly, in financial centers, assessors would be asked to assess the risks that the center is a destination for the proceeds of corruption and, if so, the features that make the jurisdiction attractive for these illicit purposes. These risk assessments would help national authorities identify possible preventive measures.

13. FATF recommendations related to the definition of the designated predicate offenses for money laundering, the treatment of politically exposed persons as high risk customers requiring enhanced due diligence, and the identification of beneficial ownership all merit particular attention. The definition of designated offenses and politically exposed persons can both be strengthened by incorporating elements from UNCAC. FATF mutual evaluations indicate poor compliance against the recommendation dealing with politically exposed persons. A recent StAR policy note on politically exposed persons has made practical recommendations aimed at strengthening implementation. A FATF interpretative note would further clarify implementation issues and ensure more consistent treatment across jurisdictions. Similarly, attention needs to focus on the implementation of FATF recommendations regarding beneficial ownership. FATF can support this process by providing guidance clarifying outstanding technical issues (Recommendation 7).

14. **Inter-agency coordination** on anti-money laundering and anti-corruption issues would enhance national authorities' ability to detect and investigate corruption-related money laundering. There is little evidence that this coordination is taking place. These coordination issues will have to be addressed if progress is to be made in tackling the proceeds of corruption. This note encourages national authorities to include both the financial intelligence unit and the anti-corruption body in the multi-agency task teams working on proceeds of corruption cases as appropriate. It also proposes that national authorities develop policies targeting the risks related to the laundering of domestic and foreign proceeds of corruption, since this would provide a framework around which agencies can define common priorities and assign roles. UNCAC and FATF can promote this coordination by issuing guidance for national authorities to incorporate anti-corruption bodies in their anti-money laundering structures where appropriate (Recommendation 8).

15. UNCAC Art. 46(1) calls on States Parties "to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention". The convention promotes and facilitates **international cooperation** by strengthening key elements of the existing international arrangements. There should be strong incentives for countries to collaborate, since all countries are both requesting and requested parties. Nonetheless, implementation is lagging and there remains room for improvement in the provision of mutual legal assistance to support asset recovery.

16. At a policy level, the goal is to gradually reduce the scope for discretion and focus attention on technical considerations when responding mutual legal assistance. At an operational level, performance of the mutual legal assistance regime can be strengthened by improving the signaling of gateways and addressing management and capacity constraints. There is also potential for expanding the use of systems established for other purposes, such as the Interpol I-24/7 system, and for making greater use informal cooperation, particularly in the preparatory

stages of investigations. International bodies can promote more effective cooperation by developing international standards, guidance and tools supporting streamlined procedures for mutual legal assistance. They can also encourage more extensive use of alternative, informal channels and support the development of informal networks linking practitioners at a regional and international level (Recommendation 9).

17. Taking a broader perspective, the note briefly reviews third party approaches to asset recovery and their implications for the asset recovery regime. These include: transnational criminal approaches, human rights approaches and third party civil litigation. Developments in this area are unlikely to be driven through a negotiated process in the framework of international agreement. Instead, alternative avenues will be opened through the decisions of national authorities, judiciaries and activist litigants. Cases following human rights approaches are currently before national and regional courts.

18. The note concludes with a brief discussion of the role of development assistance and civil society in supporting the goal of more effective, timely asset recovery. The note encourages development agencies to play an active role at home, advocating for improvements in their domestic asset recovery regime and measures to prevent the jurisdiction becoming a destination for the proceeds of corruption. Development agencies can similarly encourage national authorities to exert peer pressure in international bodies to demand the highest standards of other jurisdictions. National law enforcement and specialist international agencies are best placed to assist developing countries' asset recovery programs. Development financing for these activities will help deliver results in the short term. At the same time, it is important to maintain a long-term, institutional development perspective and integrate the key elements of the anti-money laundering, anti-corruption and law enforcement agendas.

19. Civil society will play an important role in promoting demand, not just for asset recovery but also for institutional reforms in financial centers that will hinder access for corrupt officials and the proceeds of corruption. Civil society is encouraged to take an active role in monitoring the progress made by financial centers and as advocates for reform. Similarly, civil society can play an active role in promoting demand for asset recovery in the developing countries, though it is important to moderate expectations as regards to the timing and scale of possible returns. Strengthening demand is critical to the success of asset recovery agenda since the system can only function when there are cases to pursue.

20. The joint UNODC and World Bank Stolen Asset Recovery Initiative supports this agenda across a broad front. StAR's work program includes the development of policy analysis and guidance, knowledge products for practitioners, and support to national authorities in launching and implementing their asset recovery programs. The challenge is to translate these activities into results on the ground, in terms of successful asset recovery cases and asset returns. Here the commitment of national authorities in both developing countries and financial centers are critical to success. In this context, the present policy note should be read as a call to action. Conditions are now set for a significant progress in tackling the proceeds of corruption and recovering stolen assets. What is now needed is the will to make it happen.

RECOMMENDATIONS

1. **COMMUNICATING SUCCESS**. National authorities are encouraged to document and disseminate successful experience in asset recovery, demonstrating not only the financial benefits but also impacts in terms of improvements in the quality of life and governance. Success stories should be used to promote awareness of and support for asset recovery activities at the national and international levels.

2. **REVIEWING PROGRESS AND GATHERING FEEDBACK.** International bodies can promote the development of the global asset recovery regime by putting in place mechanisms that will: a) generate information on the legislative and institutional framework at the national level, identify and resolve implementation constraints; b) monitor and report the level of asset recovery activity at a global level: and c) identify, document and analyze asset recovery cases, so as to generate an evidence base for policy analysis, identify trends and emerging risks in international corruption and allow practitioners to learn from international experience.

3. **DEVELOPMENT OF THE LEGAL FRAMEWORK FOR ASSET RECOVERY**. National authorities are encouraged to put in place legislation that provides for the widest possible range of legal tools to facilitate the recovery of the proceeds of corruption. Particular attention should be given to: a) the criminalization of corruption offenses as identified by UNCAC; b) mechanisms for criminal forfeiture, non-conviction based forfeiture and civil proceedings. The international community can promote and facilitate this process by convening expert groups to advise on any difficulties that may emerge and enabling the exchange of experience between practitioners, policy makers and legislators.

4. **ASSET RECOVERY TEAMS**. National authorities are encouraged to put in place multi-agency asset recovery teams, following the institutional structure most appropriate to their needs, with clear accountability for results. The international community can promote and enable development of the institutional framework to support asset recovery by facilitating the international exchange of experience between such teams.

5. **OPERATIONAL SUPPORT.** National authorities are encouraged to support Interpol's efforts to provide operational support to anti-corruption activities, notably: a) the UMBRA initiative, a global anti-corruption information exchange mechanism that will gather and undertake analysis of information on international corruption and asset recovery; and b) Incident Response Teams (Corruption), that will provide practical technical assistance to national authorities on the operational aspects of corruption and asset recovery investigations. Where national authorities cannot provide operational technical assistance through a multilateral mechanism they are encouraged to do so on a bilateral basis.

6. **PROACTIVE ENGAGEMENT IN FINANCIAL CENTERS.** Financial centers should take the initiative in recovering the proceeds of corruption in their jurisdictions. To this end, they are encouraged to a) put in place teams or assign specialists to work on proceeds of corruption specifically, following the institutional structure most appropriate to their needs, but ensuring clear accountability for results; and b) proactively pursue cases related to foreign corruption, including the bribery of foreign officials, and facilitate the recovery and return of the proceeds of corruption. The international community can promote greater proactivity by monitoring progress and facilitating the exchange of

experience national authorities.

7. **TACKLING THE PROCEEDS OF CORRUPTION.** FATF can address the laundering of the proceeds of corruption more effectively by: a) strengthening the risk and structural elements of the AML/CFT assessment methodology, particularly the risks related to the laundering of domestic and foreign proceeds of corruption; b) incorporating those elements of UNCAC provisions that will strengthen the FATF standards as regards designated corruption predicate offenses and the treatment of politically exposed persons; c) issuing an interpretative note to clarify implementation issues on politically exposed persons; and d) adopting technical solutions that would foster compliance with recommendations on beneficial ownership.

8. **COORDINATION AROUND PROCEEDS OF CORRUPTION.** National authorities can strengthen coordination between anti-money laundering and anti-corruption efforts by: a) integrating key anti-corruption bodies and financial intelligence units into multi-agency teams working on specific asset recovery cases; b) developing policy guidance, based on an assessments of the risks posed by the laundering of the domestic and foreign sources of the proceeds of corruption; and c) integrating anti-money laundering and anti-corruption efforts within their development assistance programs. UNCAC and FATF can support this integration by issuing appropriate guidance or typology.

9. **COOPERATION ON ASSET RECOVERY.** National authorities are encouraged to facilitate and expedite the exchange of information and mutual legal assistance regime in support asset recovery. International bodies can support these efforts by: a) developing international standards, guidance and tools supporting streamlined procedures for implementation at the national level; b) promoting and signposting appropriate gateways for formal cooperation, including access to procedural information through appropriate web portals; and c) developing guidance on the use of alternative, informal channels and supporting the development of informal networks linking practitioners at a regional and international level. Given that the mutual legal assistance regime supports a number of treaties and conventions, a joint working group under the United Nations would be well placed to take stock and propose follow-up action on appropriate standards, guidance and tools.

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ABBREVIATIONS

AC	Anti-Corruption
AFU	Asset Forfeiture Unit
AML/CFT	Anti-Money Laundering/Combating the Financing of Terrorism
APEC	Asia-Pacific Economic Cooperation
APG	Asia/Pacific Group on Money-Laundering
AR	Asset Recovery
ARINSA	Asset Recovery Inter-Agency Network for Southern Africa
ATS	Alien Tort Statute USA
CARIN	Camden Asset Recovery Inter-Agency Network
CiCIG	Comision Internacional Contra Impunidad en Guatemala
CNCP	Commonwealth Network of Contact Persons
CoE	Council of Europe
CoSP	Conference of State Parties
CPS	Crown Prosecution Service, United Kingdom
DFID	Department for International Development United Kingdom
DRCI	Department of Asset Recovery and International Cooperation Brazil
EJN	European Judicial Network
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corruption Practices Act USA
FIU	Financial Intelligence Unit
G20	Group of Twenty (19 Countries plus the European Union)
GRECO	Group of States against Corruption
IACO	Interpol Anti-Corruption Office
IAACA	International Association of Anti-Corruption Agencies
IberRed	Ibero-American Judicial Cooperation Network
ICAR	International Centre for Asset Recovery, Basel Institute of Governance
ICSL	International Court Sierra Leone
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
KACC	Kenya Anti-Corruption Commission
MLA	Mutual Legal Assistance
MPS	Metropolitan Police Service, United Kingdom
NCB	Non-Conviction Based (Forfeiture)
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
PEP	Politically Exposed Person
POCU	Proceeds of Corruption Unit, Metropolitan Police, London
SADC	Southern African Development Community
SCCU	Specialized Commercial Crime Unit -South Africa
SOCA	Serious Organized Crime Agency. United Kingdom
StAR	Stolen Asset Recovery Initiative
SAR	Suspicious Activity Report

TI	Transparency International
UMBRA	INTERPOL Tactical and Strategic Anti-Corruption knowledge database
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention on Transnational Organized Crime

A. INTRODUCTION

1. This policy note will be presented as a consultative draft at the United Nations Convention against Corruption Third Conference of States Parties to be held in Doha, Qatar, from November 9 to 13, 2009. The timing of the conference is opportune for the asset recovery agenda. There is a ground swell of good will and support for asset recovery, as reflected in a series of high level political commitments, most recently in the Leaders' Statement at the September 2009 Pittsburgh Summit of the G20. As the fourth anniversary of UNCAC's coming into force approaches, there is much broader awareness and acceptance of the role of asset recovery in the fight against corruption. Furthermore, national authorities have made some progress in developing the institutional and legal structures needed to support the implementation of the asset recovery provisions of the convention. The challenge going forward is to accelerate the pace of implementation and to translate goodwill into results: putting the institutional and legal framework established under UNCAC to use by bringing asset recovery cases to court, pursuing and achieving successful judgments, and demonstrating the positive development impacts of the asset recovery process.

2. The purpose of this policy note is to explore how the international community and national authorities can meet this challenge. This is a collective international responsibility: asset recovery by its very nature requires the cooperation and collaboration of multiple national authorities. It is also a national responsibility: national authorities can put the system to use by launching and pursuing new asset recovery cases. Without a stream of asset recovery cases, the structures that have been put in place to support the asset recovery process will wither.

3. To this end, the note reviews the status of asset recovery at a global level and lays out an agenda for action. The goal of the agenda is straightforward: to accelerate the pace of asset return by increasing the number of asset recovery cases and facilitating their timely and successful resolution. The key instruments needed to achieve this goal are foreseen under UNCAC. The agenda focuses on implementation.

4. The note is structured around the pillars of the global architecture that support the asset recovery process: the institutions, rules and relationships. Section B identifies the incentives that drive the asset recovery process at a global, national and institutional level and their implications for the way that success is measured. Section C outlines the framework of international agreements and the nature of the review mechanism needed to support the asset recovery provisions of the convention. Section D identifies the key elements of the legal framework for asset recovery, arguing for the integration of asset recovery into the law enforcement approach to corruption and advocating for continued efforts to put in place the legal instruments foreseen under UNCAC. Section E addresses the operational challenges of asset recovery, stressing the need for investments in the identification and investigation of asset recovery cases and a more proactive approach to the proceeds of corruption on the part of victim states and financial centers. Section F explores how to more effectively integrate the anti-corruption, anti-money laundering and asset recovery agendas, recognizing that there is a window of opportunity to influence the design of international anti-money laundering standards. Section G reviews the mechanisms in place to facilitate international cooperation, noting that national authorities can both facilitate and support more timely and effective formal cooperation and the scope and role of informal channels. Section H takes note of legal developments outside the framework of UNCAC that may impact the asset recovery agenda. Finally, Section I concludes with a brief

discussion of the implications of the emerging asset recovery agenda for development institutions and the role of civil society.

5. The note provides some analytical background to support policy recommendations and to draw a picture of the asset recovery agenda as a whole. Each section maps the key national and international institutions engaged in asset recovery, their role within the overall system and the mechanisms that support each stage of the asset recovery process. The analysis identifies the strengths and weaknesses of the existing institutional arrangements, assessing the extent to which mandates, incentives and capabilities are aligned with the goal of effective, timely asset recovery and the effectiveness of functions critical to achieving this goal. Finally, the note makes a few high level recommendations as to how national authorities and international organizations can collaborate to strengthen the overall global system and further harmonize their support of developing countries' efforts to recover stolen assets.

6. The note is intended for policy makers rather than practitioners. In targeting its recommendations, the document recognizes that asset recovery lies at the intersection of broader policy agendas focusing on law enforcement, anti-money laundering, anti-corruption and the governance aspects of development. Policy makers include senior officials and technical staff of government agencies and international organizations working in all of these fields. This audience already has some familiarity with asset recovery issues, though often from only one institutional or professional perspective. Consequently, it has been necessary to include more back ground information on each of the issues addressed than would probably be desirable if the note were directed at one particular group. Using this material, the note seeks to bring together the various strands of the policy agenda, demonstrating how they can contribute to the goal of effective, timely asset recovery.

7. The analysis has drawn on the experience of international and national institutions involved in asset recovery process, gathered through interviews and the consultation of public and internal documents. It has been informed by a review of the growing academic and professional literature on the subject. Several attempts were made to generate a quantitative analysis of various dimensions of the asset recovery process at a global level but to no avail as the limited quantitative data available is not structured in such a way as to support analysis.

8. A process of consultation with a core group of practitioners and policy makers has helped guide the preparation of the note. The group has included prosecutors, investigators, policy makers and representatives of civil society with broad experience of asset recovery from a wide range of legal traditions. The note has also benefited from consultations with stakeholders, principally practitioners, in the context of international events in Southern Africa and Latin America. The consultative process has helped identify the key challenges facing the asset recovery agenda from the perspective of developing countries and financial centers. Consultations have also helped define and validate the policy recommendations. The Conference of States Parties provides an opportunity for a final round of consultation, with a broader range of stakeholders, through a side event and discussions in the plenary. The note will be finalized taking into account the results of this consultation and published after the Conference.

B. FROM GOOD WILL TO RESULTS

9. Recent commitments from the international community signal continued high level support for the asset recovery agenda. There is a window of opportunity to make significant progress. This section discusses the incentives that drive the asset recovery agenda, arguing that these incentives impact differently on requesting and requested countries. Requesting states have financial, law enforcement and governance incentives for asset recovery. For requested states, on the other hand, the benefits of asset recovery may not be immediately apparent. Consequently, law enforcement and financial sector oversight bodies may accord asset recovery a lower priority than issues that impact directly on domestic constituencies unless there is high level political commitment in support of asset recovery. This commitment can only be sustained if there is convincing evidence that asset recovery has development impacts.

An International Commitment

10. The launch and ultimate success of a few prominent international asset recovery cases - Fernando Marcos (1986-2005 and ongoing), Sani Abacha (1999-2005 and ongoing) and Vladimir Montesinos (2000-2002 and ongoing) – played a significant role in raising awareness, demonstrating the feasibility of the asset recovery process and mobilizing international support. The delays, costs and frustrations endured by developing countries in undertaking these cases – notwithstanding the collaboration of some financial centers – helped focus the attention of leaders in the developing world on the need for an appropriate international framework to facilitate asset recovery. President Olusegun Obasanjo voiced these concerns in his address to the UN General Assembly in September 1999, calling for the creation of an international convention for the repatriation of Africa's illegally appropriated wealth.

11. Over this same period, the international community came to recognize the international dimensions of corruption, the inadequacy of controls to detect and deter these illicit flows and the associated risks that financial centers could serve as safe havens for the stolen assets of corrupt leaders. These concerns facilitated the negotiation of international agreements establishing common international framework and standard for anti-corruption activities. Building on the Inter-American Convention against Corruption (1996) and the OECD

BOX 1: DEFINING TERMS

Proceeds of Corruption refers to any property derived directly or indirectly from commission of acts of corruption. Corruption encompasses the offenses identified under UNCAC in the public (Art 15 to 20) and private (Art. 21 and 22) sector, namely: bribery of public officials; bribery of foreign public officials; embezzlement, misappropriation or other diversion of property by a public official; trading in influence; abuse of functions; illicit enrichment; bribery in the private sector; and embezzlement of property in the private sector.

Stolen Assets refers to the proceeds of corruption by high level officials, including heads of state. Typically stolen assets are the product of systematic corruption over an extended period, often associated with state capture and looting by kleptocractic regimes. Stolen assets are the product of any and all of the offenses indentified under UNCAC.

Asset Recovery is the process used to recover for the state, the victims of corruption or duly designated third parties property acquired through the commission of any and all of the offences established under UNCAC.

BOX 2: INTERNATIONAL SUPPORT FOR ASSET RECOVERY

"Donors will take steps … to track, freeze, and recover illegally acquired assets." Accra Agenda for Action, September 2008.

"Additional measures should be implemented to prevent the transfer abroad of stolen assets and to assist in their recovery and return … we note the efforts of … the Stolen Asset Recovery Initiative and other relevant initiatives". Conference on Financing for Development, Doha, December 2008.

"We reiterate our support for the World Bank – UN Stolen Assets Recovery Initiative (StAR) to champion the recovery of assets stolen from developing countries. The systematic enforcement of FATF standards with respect to the identification of beneficial ownership and the enhanced monitoring of Politically Exposed Persons would have a significant deterrence effect on corruption and make it easier to detect and deter the flow of proceeds of corruption. We also ask the World Bank to review and develop mechanisms for strengthening global cooperation." G20 Working Group Report, Reinforcing International Co-operation and Promoting Integrity in Financial Markets, London, April 2009.

"*As we increase the flow of capital to developing countries, we also need to prevent its illicit outflow. We will work with the World Bank's Stolen Assets Recovery (StAR) program to secure the return of stolen assets to developing countries, and support other efforts to stem illicit outflows. We ask the FATF to help detect and deter the proceeds of corruption by prioritizing work to strengthen standards on customer due diligence, beneficial ownership and transparency. … We call for the adoption and enforcement of laws against transnational bribery, such as the OECD Anti-Bribery Convention, and the ratification by the G-20 of the UN Convention against Corruption (UNCAC) and the adoption during the third Conference of the Parties in Doha of an effective, transparent, and inclusive mechanism for the review of its implementation*." Leaders' Statement, The Pittsburgh Summit, September 24-25, 2009

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the United Nations Convention against Corruption (UNCAC, 2003) was the first international treaty to address asset recovery as a fundamental principle.

12. UNCAC provides a robust and comprehensive international framework for asset recovery. The rapid pace of ratification and recent statements by the international community suggests continued commitment to implementation and the underlying principles (see Box 2). This presents a unique opportunity to make progress on the asset recovery agenda. The challenge going forward is to translate continued goodwill into action, increasing the number of asset recovery cases and accelerating the pace at which these cases are translated into asset returns. The baseline is set low. International recoveries to date, calculated by StAR on the basis of the major reported judgments, amount to a mere $4.9 billion over a fifteen year period. This is only a fraction of the amount lost to developing countries through corruption, conservatively estimated in the range of $20 to $40 billion a year.

13. Progress will require concerted action by the international community and national authorities in financial centers and developing countries. In order for key actors to support the policy and operational initiatives needed to bring about progress, institutional incentives will need to be aligned with the goal of more effective, timely asset recovery.

Incentives Driving the Asset Recovery Agenda

14. Three incentives drive the asset recovery agenda: a resource mobilization incentive; a law enforcement incentive; and moral and reputational considerations, which encompass both the belief that it is wrong for corrupt officials to benefit from stolen loot and the concern that the reputations of those who fail to act will be tarnished. Similar incentives drive public policy on the proceeds of crime. There are important parallels between these agendas, not least because efforts to tackle the proceeds of corruption use the institutional and legal framework established for broader law enforcement purposes.

15. These incentives operate at both the international level, helping to form the consensus needed for global collective action, and the national level, mobilizing support for concerted action across the public sector. They influence both policy and operational decisions regarding the appropriate level of resources – financial, political and reputational – to allocate to asset recovery.

16. Box 3 illustrates how these incentives impact key actors: the heavier the shading the greater the incentive. Key actors include the law enforcement agencies responsible for the asset recovery process and respond to domestic constituencies; ministries of foreign and affairs and development agencies who deal with international interests; and ministries of finance responsible for resource mobilization and banking supervisors responsible for protecting the probity and interests of the financial sector. It further distinguishes how these incentives impact differently on institutions in the requesting country, which seeks cooperation in the return of assets, and the requested country, where the assets are held and which must assist the requested country. In principle, all countries are both requesting and requested countries. In practice, when it comes to asset recovery, developing countries are often requesting countries and financial centers are often requested countries.

17. Resource mobilization has figured prominently in arguments in support of asset recovery.

BOX 3: INCENTIVES DRIVING THE ASSET RECOVERY AGENDA

	Requesting State			Requested State		
	Law Enforcement Agencies	**Foreign Affairs**	**Finance & Banking Supervisors**	**Law Enforcement Agencies**	**Foreign Affairs & Development**	**Finance & Banking Supervisors**
Resource Mobilization Incentive	Possible additional resources	Possible additional resources	Additional resources	Costs: possibly unfunded mandate	Resources for development partners	Resources for development partners
Law Enforcement Incentive	Crime & corruption control	Cooperation on law enforcement issues	Reinforce control environment	Limited domestic law enforcement risk	Support for development agenda	Money laundering risk
Reputational Incentive	Internal credibility & legitimacy	External credibility & reputation	Internal & external credibility & reputation	Reciprocity in mutual legal assistance	External credibility & reputation	Financial sector interest & reputation

The vast amounts of stolen from developing countries are in stark contrast to the scarcity of resources available for development purposes and the development potential of stolen resources in terms of public services. The communiqué from the December 2008 Financing for Development Conference and the Leaders' Statement at the September 2009 Pittsburgh summit clearly place asset recovery in this context, as a tool for mobilizing resources for development, alongside preventive measures to curtail the outflow of stolen assets.

18. While there is considerable potential for resource mobilization, it is important to manage expectations. The experience of the proceeds of crime agenda is salutary in this regard. Expectations for the resource mobilization potential of proceeds of crime were generally out of line with actual performance when these instruments were first introduced. Resource mobilization performance picked up over time as institutions and tools were put in place and practitioners gained experience but nonetheless rarely met initial expectations. The proceeds of corruption agenda faces a similar challenge, especially because a few spectacularly large, high profile cases have set expectation at a point that may prove difficult to meet.

19. Financial incentives drive support in requesting countries, which stand to benefit from the return of the proceeds of corruption. But the financial incentive is less important for requested states, notwithstanding the interest of development agencies and foreign ministries in facilitating asset recovery for requesting countries. The treatment of the proceeds of corruption contrasts with treatment of proceeds of crime: the United Nations Convention on Transnational Organized Crime (UNTOC) creates a financial incentive for requested states by allowing the requested and requesting states to share in the proceeds of crime. UNCAC expects countries to collaborate without the inducement of a financial incentive.

20. From a law enforcement perspective, the recovery of the proceeds of corruption attacks the motivation of those involved in corruption and the means of financing corrupt activities: taking their money, it has been argued, "hits them where it hurts". For requesting states, there is a strong law enforcement incentive since the recovery of the proceeds of corruption offers an opportunity to attack the structures put in place to support corrupt activities. The arrest of gatekeepers, business associates and relatives that launder the proceeds of corruption and the freezing of assets disrupts the flow of funds, deters potential collaborators and undermines the patronage structures that sustain corrupt officials' political support. A combination of asset recovery and criminal prosecution can also have a deterrence effect. Hardened criminals assert that they would go to jail to protect the proceeds of their crimes, while evidence from plea bargaining suggests that white collar criminals pay heavily to avoid spending time in jail.

21. In contrast, law enforcement agencies in the requested state may find it difficult to justify using scarce resources to address foreign corruption cases when these activities present no immediate law enforcement threat. Asset recovery cases are complex, expensive to investigate and likely to drain resources with no guarantee of a successful outcome. Law enforcement agencies will respond to requests for assistance from foreign jurisdictions, in part because there is an expectation of reciprocity, but even so, the pursuit of foreign crimes will have to compete with demands from local constituencies for scarce law enforcement resources.

22. UNCAC represents an international commitment that corrupt officials should not enjoy the benefits of their stolen loot and that all countries share responsibility for tracking down the proceeds of corrupt activities. For requesting states, the pursuit and prosecution of corrupt public servants and the recovery of the proceeds of corruption serves a broader purpose in strengthening

the credibility in state institutions and ultimately the legitimacy of the state itself. High level corruption cases can demonstrate the authorities' willingness to put an end to impunity by showing that even the most prominent public servants will be held to account. Where the authorities are unable to pursue prosecutions – because the corrupt public servant has died, has fled beyond the reach of the law or the state cannot meet the standard of evidence needed to prosecute – the seizure and eventual recovery of assets can demonstrate that the authorities are still willing to take legal action. Asset recovery cases can mobilize support and help overcome the political challenges faced when tackling corruption (see Box 4).

23. For requested states, the reputational considerations will tend to center on the perceptions of the probity of their financial services sector and implications for economic and business development. Reputation and credibility are critical for businesses in the financial sector. The discovery and prosecution of morally reprehensible and criminal activities, such as knowingly laundering of the proceeds of corruption and actively pursuing such business, can have devastating consequences for the financial institutions involved. Wider, national interests may also be affected, leading national authorities to intervene. Such interventions have proved critical

BOX 4: POLITICAL WILL AND ASSET RECOVERY

The pursuit of high-level corruption is usually a political decision. Even where those prosecuting corruption cases are institutionally independent of the political leadership, that independence is often conditional on the political leadership's continued support. Political support will be needed to mobilize resources and secure the collaboration of other agencies. This is equally true of both requested and requesting states in the context of asset recovery.

In the requesting state, the authorities have to determine which cases to pursue taking into account the prospects for success and likely costs and benefits. Senior public servants that are accused of corruption may have constituencies that cry foul and accuse the authorities of acting for political motives. They may seek to manipulate public opinion through the media, through counter accusations, impugning the credibility of investigators, prosecutors and their supporters. They may threaten, bribe and blackmail politicians, law enforcement officials and members of the judiciary into dropping investigations or overturning judgments. Faced with these threats, the authorities may simply decide that the political costs of pursuing a case are unacceptable, abandoning investigations and efforts to collaborate with other jurisdictions. Occasionally they may turn on those responsible for pursuing corruption, removing them from office. Recent resignations of the heads of anti-corruption agencies in several countries, north and south, have highlighted these risks.

Requested states face similar challenges. Recent evaluations of progress against the OECD bribery convention suggest that some countries still have to summon the political will to tackle foreign corruption and protect investigators and prosecutors from undue political influence. The authorities may be concerned that accusation are politically motivated, the process followed by the requesting state does not adequately protect human rights, or about the consequences for bilateral relationships if the accused or their supporters return to office. National security or national interest may be invoked, sometimes in an effort to protect domestic constituencies and commercial interests. Foreign and domestic corruption may be interrelated through mechanisms such as political campaign financing, raising concerns that support for asset recovery actions against foreign officials may have political consequences at home.

The pursuit of corruption requires political and personal courage. Progress in asset recovery requires both requested and requesting states to rise up this challenge.

to the successful conclusion of some of the most prominent asset recovery cases.

Measuring and Communicating Success

24. The incentive structure surrounding asset recovery has profound implications for the way that success is measured and the asset recovery agenda is perceived. In order to make progress, the incentive structure has to be realigned so that the key actors in financial centers see the proceeds of corruption and asset recovery agenda as a priority. This will require high level political commitment, in the form of a clear mandate for law enforcement agencies to tackle the proceeds of corruption and backed by adequate resources for agencies to fulfill this mandate. In order to sustain this high level commitment, the international community will have to provide convincing evidence that asset recovery delivers development impacts.

25. Success will, inevitably, be measured in terms of the amount of money returned and the amount of returns in relation to estimates of the amount stolen. However, this simple metric can be misleading, particularly in the early years when institutions and capacity are being put in place and cases have yet to reach judgment. Moreover, this single indicator fails to capture the law enforcement and governance dimensions of the asset recovery agenda.

26. Given the daunting challenges posed by corruption cases, national authorities should consider the launch of a corruption investigation, the issuing and successful response to a request for mutual legal assistance, or the freezing of assets all represent victories as indicators of success. Such recognition would help maintain momentum in what can be a long process with no guarantee of a return. Consequently, reporting systems will need to capture the steps in the asset recovery process as well as the final results.

27. Although statistics can play a part (see Box 6 on page 10) narratives demonstrating that the funds returned are used transparently and effectively, bringing identifiable improvements in public services, and which show that progress in asset recovery cases has helped restore confidence in the rule of law and an end to impunity are likely to be more powerful.

RECOMMENDATION 1: COMMUNICATING SUCCESS

National authorities are encouraged to document and disseminate successful experience in asset recovery, demonstrating not only the financial benefits but also impacts in terms of improvements in the quality of life and governance. Success stories should be used to promote awareness of and support for asset recovery activities at the national and international levels.

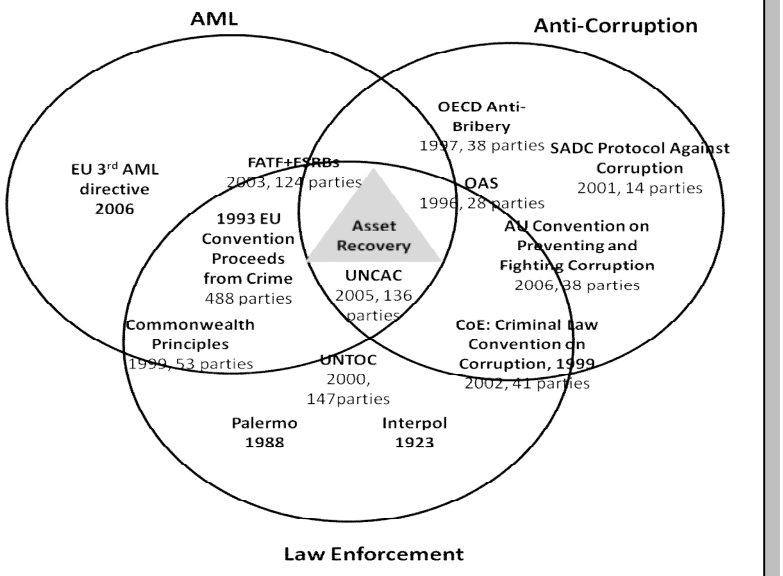
C. THE INTERNATIONAL FRAMEWORK

28. Asset recovery constitutes a fundamental principle of the United Nations Convention against Corruption (UNCAC). Building on previous international agreements, UNCAC provides a robust framework for international asset recovery. Continued efforts are needed to extend the coverage of the convention and promote convergence between countries. The section provides an overview of the mechanisms that have been developed to review implementation of the international agreements. The section argues that development of the international framework would benefit from review processes that: generate information on the legislative and institutional framework at the national level, identify and resolve implementation constraints; monitor the level of asset recovery activity; and identify, document and discuss the policy implications of asset recovery cases.

Supporting the Convention

29. Over the last twenty years, the international community has gradually put in place a framework of international agreements and standards dealing with anti-corruption, law enforcement and anti-money laundering issues. Asset recovery lies at the intersection of these three agendas (see Box 5). Many of these international instruments have included specific asset recovery provisions, notably so the recommendations of the Financial Action Task Force and United Nations Convention against Transnational Organized Crime, both of which include extensive treatment of mechanisms to facilitate the detection and recovery of the proceeds of crime .

BOX 5: INTERSECTING AGENDAS



30. UNCAC builds and expands on the existing instruments as the first global anti-corruption treaty with a particular focus on the international dimensions of corruption: as the preamble argues, "corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential". In order to tackle the international dimensions of corruption, UNCAC provides a framework for international cooperation in law enforcement, asset recovery, technical assistance and information exchange.

31. Chapter V recognizes the return of the proceeds of corruption as a fundamental principle of the Convention. The Chapter lays out the key instruments to support the process of asset

recovery, in both civil and criminal law, through the tracing, freezing, forfeiting and returning funds obtained through corrupt activities. These instruments include several important innovations.

32. Article 54(c) complements the arrangements for criminal forfeiture, first recognized internationally in the 1988 Palermo Convention, by asking States Parties to consider putting in place instruments for non-conviction based forfeiture (see page 17). Article 56 introduces the concept of spontaneous sharing of information, encouraging States Parties to advise each other of information that could lead to investigations, judicial proceedings or requests for assistance to recover the proceeds of corruption. Article 57 codifies international practice in requiring States Parties to return the confiscated proceeds of embezzlement and the laundering of embezzled assets to their rightful owner, with the deduction of reasonable expenses. In the case of all other offenses, the convention requires that assets be returned if the requesting state establishes prior ownership or if the requested state recognizes damage to the requesting state.

33. UNCAC guides the design of the international asset recovery regime. However, the international framework can only be implemented and put to work through the action of national authorities. In this context, the coverage and convergence of national systems are critical in determining the effectiveness of the whole.

34. In terms of coverage, UNCAC has made rapid progress. There are now 141 parties to the Convention. That said there are still notable gaps. Four of the G20 members are still not parties to the convention: Germany, India, Japan and Saudi Arabia. A number of international financial centers are also not yet parties (see Annex B). Further progress towards global coverage is essential to close the doors to potential safe havens for the proceeds of corruption.

35. Convergence requires progress in the implementation of the convention, both in terms of the mandatory provisions and the provisions that have been left to the discretion of States parties. But convergence also requires progress in implementing the spirit of the convention, notably as regards the exhortation in Article 55 that States Parties should "afford one another the widest measure of cooperation and assistance" in the recovery of the proceeds of corruption. There are several areas that present significant challenges in this respect. Flexibility will be needed to assist countries find appropriate solutions at a national and international level (see Section G).

Reviewing Progress on Asset Recovery and Feedback from Practice

36. UNCAC's review mechanism is currently under discussion and will constitute the key agenda item at the third Conference of State Parties in Doha, Qatar in November 2009. Some initial steps have been taken: States Parties agreed to complete self-assessment checklists at during the first CoSP held in December 2006. To date 87 self assessment checklists have been completed (of which 83 States Parties). The checklist covered fifteen articles of the convention, including articles from Chapter V on asset recovery. UNODC has developed software to facilitate the task of completing and compiling a comprehensive checklist, covering the whole convention. This software will be distributed shortly. The final form of the UNCAC review mechanism has yet to be determined. However, there is broad commitment to the principles that the mechanism should be effective, transparent, and inclusive.

37. The UNCAC mechanism will complement a number of other review mechanisms established to support international agreements related anti-corruption and anti-money laundering activities. Box 6 summarizes key characteristics of the review mechanisms adopted to

BOX 6: CHARACTERISTICS OF REVIEW MECHANISMS FOR INTERNATIONAL AGREEMENTS

	FATF and FSRBs	OECD Convention	GRECO	OAS Convention
COUNTRY REVIEW MECHANISMS				
Country input	Questionnaire	Questionnaire	Questionnaire	Questionnaire
Peer and expert review teams	Yes, experts from institutions and IFIs	Yes	Yes, drawn from expert panels	Yes, expert plenary
Onsite visits	Yes	Yes	Yes	No
Civil society inputs	Yes during on site visits	Yes during on site visits	Upon invitation	Civil Society questionnaire
Secretariat	Yes	Yes	Yes	Yes
Plenary discussion of reports	Yes & adopted by plenary	Yes & adopted by plenary	Yes	Yes
Follow up on recommendations	Yes	Yes	Yes	Yes
Report published	Reports mostly authorized	Yes	Yes, if authorized	Yes, both country & civil society reports
THEMATIC AND OPERATIONAL REVIEWS				
Typologies, modalities of crime	Yes, wide range of typologies reports	Yes, typologies exercises	No	No
Case coordination & problem solving	No	Tour de table, prosecutors meetings	No	No

support four of these international instruments: the Financial Action Task Force; the OECD Convention; Council of Europe's Group of States against Corruption (GRECO); and the Organization of American States (OAS) Inter-American Convention against Corruption. These instruments have all been launched at regional level or, in the case of FATF and the OECD Convention, by countries that share similar policy perspectives. However, the FATF review mechanism has grown into a truly global process, now encompassing 124 countries, through the collaboration with regional initiatives with similar goals. Furthermore, the FATF recommendations are closely aligned with the asset recovery agenda and include most of the key elements of the international framework for asset recovery.

38. The four review mechanisms share common features. Data provided by national authorities in response to a questionnaire is complemented by peer and expert reviews. The reviews draw on international experience to identify areas where national systems could be further strengthened. The reviews are conducted in country thereby allowing teams to consult with practitioners and other stakeholders as appropriate. A secretariat is able to provide technical support to the review mechanism and helps ensure consistency in approach. The reports are subject to a plenary review, allowing countries to learn and comment on the national systems in the context of broader international experience. And lastly, the review mechanisms are forward

looking, providing recommendations and opportunities for follow-up to discuss progress in implementing the recommendations.

39. An effective review process for international asset recovery would serve three purposes: firstly, to provide information on the status of the legal and institutional capacity for asset recovery; second, to provide data on the level of asset recovery activity; and thirdly, to generate feedback from country experience and specific cases so as to inform policy and legislative development. These functions would not necessarily have to be embodied in a single review process. Indeed, the nature of the international agreements, each with a different group of institutional and regional stakeholders and each with a specific area of focus, makes it more likely that system will continue to be served by a variety of review processes. While there is a strong rationale for harmonizing the information requirements where possible, the content, scope and nature of each mechanism will ultimately be determined by the governing body for each international agreement.

40. Information on the status of States Parties' legal and institutional framework provides a basis for assessing the level of convergence towards the UNCAC and other relevant standards. This serves as a guide to the overall capability of the asset recovery system. Such information is best gathered at the country level. However, the effectiveness of national regimes cannot be assessed by looking at national regimes in isolation, as the capability of the national regime to cooperate effectively with other jurisdictions has to be taken into account. This international dimension is similarly important when considering solutions to the constraints identified through the review process. In some cases these can best be addressed through measures at the national level; in others, solutions may require collective action at the international level.

41. Data on the level of asset recovery activity is needed to assess trends and the overall performance of the asset recovery system. How much asset recovery activity is there? Is

BOX 7: MEASURING PROGRESS AND CONSOLIDATING CASE LAW

There is an urgent need for a systematic data collection process on asset recovery that establishes a baseline and monitor performance going forward. Two processes are underway which start to address this need, each taking a slightly different approach.

StAR is collaborating with OECD DAC and partner countries to establish a reporting system for the purposes of gathering information of progress in fulfilling the commitment in the September 2008 Accra Agenda for Action that "*Donors will … take steps to track, freeze and recover illegally acquired assets"*. A questionnaire has been tested by five countries and will be circulated to begin the collection of basic quantitative information for 2009, covering the number of on-going asset recovery cases related to corruption, the number of cases that are resolved and the amount of money frozen, forfeited and returned. The intention is to develop the nucleus of a more permanent statistical reporting mechanism that can be used to track progress in the international asset recovery agenda.

Following up on the recommendations at the May 2009 meeting of the Open-ended Inter-governmental Working Group on Asset Recovery to the Conference of States Parties, UNODC requested that States parties provide information on asset recovery cases that originated in or involved their jurisdictions. The information is to be consolidated in the UNCAC Legal Library, so as to constitute a record of case law to support legal analysis. As of mid-October, 26 countries had replied.

performance improving in terms of the number and timeliness of cases? Is the amount recovered increasing? In the absence of systematic reporting of successful asset recovery cases, let alone on-going activity, it is not possible to answer these basic questions authoritatively. Box 7 describes two initiatives aimed at gathering this basic data.

42. Lastly, there is a need for gathering feedback from practitioners, drawing on case law and operational experience and using this information to share best practices and inform the design of international standards. Case analysis would deepen practitioners' understanding of corrupt activities, the problems encountered in pursuing corruption cases and how these may be resolved through developments in the international asset recovery regime. FATF and OECD undertake "typologies" exercises, which provide an opportunity for panels of national authorities and experts to analyze specific cases, identify the mechanisms used by criminals and assess risks. The "typologies" serve as a bridge between the practitioners in law enforcement and policy makers, generating recommendations on operational practice and periodic revisions of the standards. A similar thematic review exercise focused on asset recovery would allow practitioners to draw out lessons for a broader range of prevention, investigation, legal and international cooperation issues.

43. The OECD process carries the review step process one step further, by creating a forum for national authorities to discuss the operational issues around specific cases through the *tour de table* review at least four times a year and meetings between prosecutors. This information exchange and problem solving forum would be extremely attractive model for other regional fora to support asset recovery. The challenge will be to establish a mechanism by which national authorities' are comfortable with sharing information.

RECOMMENDATION 2: REVIEWING PROGRESS AND GATHERING FEEDBACK

International bodies can promote the development of the global asset recovery regime by putting in place mechanisms that will: a) generate information on the legislative and institutional framework at the national level, identify and resolve implementation constraints; b) monitor and report the level of asset recovery activity at a global level: and c) identify, document and analyze asset recovery cases, so as to generate an evidence base for policy analysis, identify trends and emerging risks in international corruption and allow practitioners to learn from international experience

D. THE LEGAL FRAMEWORK

44. UNCAC lays out a comprehensive framework of legal instruments to support international asset recovery. This section briefly reviews the strengths and weaknesses of each of these instruments, distinguishing: criminal forfeiture; private party to criminal procedure; non-conviction based forfeiture; and civil forfeiture. It goes on to argue that traditional approaches to law enforcement have focused on the crime, the criminal and the conviction, thus relegating asset recovery to a secondary and minor role. The section advocates an integrated law enforcement approach, whereby the pursuit of the proceeds of corruption is an integral part of each and every corruption case so that national authorities are able to draw, as appropriate, on the widest possible range of legal instruments. Development of an adequate legal framework is critical: jurisdictions will not be able pursue asset recovery cases if they have not criminalized corruption offenses or lack forfeiture procedures. At the very least, countries should be able to undertake criminal forfeiture. Ideally, they should also be able to use non-conviction based and civil procedures. The results of the UNCAC self assessment checklist indicate that many countries recognize that they have yet to fully implement UNCAC's asset recovery provisions and that they regard legislative development as a priority. Technical assistance can play a facilitating role in the process by which national authorities design the appropriate legal framework to meet their specific needs.

The Asset Recovery Process

45. The asset recovery process consists of four steps: identification; investigation, tracing and freezing; confiscation or forfeiture; and return. Identification of the underlying criminal activity or the suspected proceeds of corruption triggers an investigation. The investigation gathers evidence of the corrupt activity and simultaneously traces the location of the proceeds of corruption. Timely freezing of the assets as they are discovered is essential to prevent the dispersion and loss of the assets. In order to recover the assets a definitive court judgment has to be secured through proceedings in criminal or civil (private) law. Assets are returned through a court order assigning ownership to or between the state or states, victims and, in some cases, third parties.

46. Within this broad outline, there is considerable variation in the asset recovery process between jurisdictions. This section focuses on the legal procedures for asset recovery. The options available and choices taken with regard to the legal procedure play an important part in determining the process followed from the moment the initial lead is identified through to its end. Consequently, when reviewing the asset recovery process it is helpful to start in the middle.

47. Box 8 provides an overview of the principal asset recovery procedures available to national authorities in common law and civil law jurisdictions. The advantages and disadvantages each of procedure are briefly reviewed in the following sections. The purpose is to highlight the need for countries to adopt variety of approaches and develop an integrated approach to corruption which encompasses both the pursuit of successful convictions and the recovery of the proceeds of corruption.

Criminal Forfeiture

48. Criminal forfeiture takes place as part of sentencing following conviction at trial. Charges must be brought against a person or persons. As such, it cannot be used where the

BOX 8: ASSET RECOVERY PROCEDURES

Characteristics	Criminal Forfeiture	Non-Conviction Based Forfeiture	Civil Proceedings	Civil Party to Criminal Procedure
International agreement	UNCAC31,54,55 UNCAC15-17 Shall 18-22 Consider	UNCAC 54 (1)(c) Consider	UNCAC 53 Shall	UNCAC 53, 35 Shall
Nature of forfeiture action	Action against a person	Action against a thing	Action against a person	Action against a person
Other legal recourse	Criminal conviction and sentence	None	Recovery of damages	Criminal conviction and sentence
Criminal proceeding	Required	Desirable, not required	Not required	Required
Criminal conviction	Required	Not required	Not required	Not always required
Forfeiture takes place	As part of the judgment	On judgment	On settlement or judgment	Following judgment
Standard of proof	"beyond reasonable doubt", "intimate conviction"	"balance of probabilities", "intimate conviction"	"balance of probabilities", "intimate conviction"	"intimate conviction"
Nature of action against property	Forfeit defendant's interest in property	Forfeit the thing itself, subject rights of innocent owners	Assert plaintiff's claim on property	Restitution of damages
Proceedings undertaken by	Public Prosecutors	Public Prosecutors	Plaintiff though Private Counsel	Private Counsel, alongside prosecutor
International legal cooperation	State-to -State through MLA	State-to-State through MLA	Enforcement of foreign court orders	State-to -State through MLA

This summary is intended as a broad outline of the alternative legal procedures used for asset recovery. The summary is not definitive, other procedures may be applied and the procedures themselves may have different characteristics in different jurisdictions.

accused have died, have absconded or cannot be prosecuted for reasons of immunity. Furthermore, criminal forfeiture can only take place when there is a conviction for the underlying offense, where the state has proven guilt "beyond a reasonable doubt" or upon being "intimately convinced".

49. Cases are usually brought before the courts by public prosecutors in the country where the crime took place. Courts can issue temporary freezing orders, usually on the same standard of proof required for arrest warrants. In some countries temporary freezing orders can be issued by law enforcement, in a few countries by the FIU, whilst the authorities request court orders.

50. Countries that have ratified UNCAC are required to criminalize the bribery of national and foreign public officials (Art. 15 and 16), the embezzlement, misappropriation or other diversion of property by a public official (Art. 17) and the laundering of the proceeds of crime (Art. 23). However, criminalization of corrupt activities provided for under Art. 18 to 22 of the convention – trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, and embezzlement of property in the private sector – is left to the discretion of the States Parties. Consequently, the nature of the charges that can be brought will vary between

jurisdictions and some countries may have difficulty responding to requests for cooperation where they do not recognize the underlying criminal offense (see Box 9).

51. UNCAC defines the property covered by forfeiture in broad terms (Art. 31) to include the proceeds and instrumentalities of crime, and the income derived from the proceeds of corruption. Depending on the jurisdiction, the definition of property may be object-based, requiring the prosecution to prove that the assets are the product or instruments of the corrupt activity. Alternatively, they may be value based, in which case it may not be necessary to prove a direct link to the crime. The broader concept of the "profits" of corruption, particularly corrupt acts that are not necessarily directly linked to a financial transaction, such as trading in influence, is poorly developed in most jurisdictions.

Private Party to Criminal Procedure

52. Most civil law jurisdictions provide for private persons to become parties to a criminal procedure in order to seek damages. The purpose is to facilitate redress for the victims of criminal offenses and to expedite the award of damages. This procedure can be used by foreign states as the party injured by acts of corruption.

53. Investigations can be launched by the prosecutor or investigating magistrate on receipt of

BOX 9: ILLICIT ENRICHMENT AND ORGANIZED CRIME

UNCAC Art. 21 encourages states parties to put in place measures that would criminalize illicit enrichment, defined 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". Criminalization of illicit enrichment is a requirement under the Inter-American Convention against Corruption and many countries have enacted supporting legislation. Prosecutors are generally required to determine the public official's legitimate sources of wealth, the property under the public official's control and the relationship between the two. The prosecutor is not required to demonstrate the illegal origin of the property. Rather, the illegal origin is taken on the basis of a *prima facie* standard, which — unless rebutted — would be taken as proof. The public official's defense lies in explaining the accumulation of property from legal sources.

A similar approach is followed in the United Nations Convention against Transnational Organized Crime Art. 12(7), which asks states parties to consider "requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to forfeiture". This has been applied in the asset recovery context. The Swiss Criminal Code, for instance, provides for the confiscation of all property over which a criminal organization has power of disposal and further states that any property belonging to a person associated with a criminal organization is "presumed to be at the disposal of the organization until the contrary is proved". Prosecutors have to prove the links between the defendant and the criminal organization, but not the link between the crime and the property. In 2005, Switzerland's Federal Supreme Court ruled that the Abacha, his family and associates constituted a criminal organization and ordered the confiscation and return of $458 million of Abacha-related assets using these provisions.

The illicit enrichment and criminal organization approaches can be powerful tools for pursuing corruption. They enable investigators to focus on the standard of living and property of the public official which may be the most obvious manifestation of the underlying corrupt activity. However, these approaches are not applicable in many common law countries and these countries may refuse to enforce judgments on dual criminality grounds.

a request for mutual legal assistance from the foreign state. As a party to the investigation, the foreign state will have the same rights as the defendant, namely access documents on the court file, participation in the examination of witnesses, and the rights to make submissions to the investigating magistrate. This is a significant advantage over a civil procedure, where the plaintiff has to generate supporting evidence for the case.

54. The prosecutor determines if the case has sufficient evidence to go trial based on the pre-trial hearings. The injured party applies to the court that will hear the criminal trial for a judgment awarding damages in the same manner that they would before a civil court. The action for damages is accessory to the criminal proceedings and will proceed on the same basis and evidence. The court usually has the prerogative to transfer the claim for damages to a civil court.

55. Treatment of the claim for damages on acquittal varies between jurisdictions. In some cases, the claim cannot be considered and the injured party must file before a civil court. In others, if the facts are sufficiently established, the court may reach a decision on damages despite acquittal.

Non-Conviction Based Forfeiture

56. Non-Conviction Based Forfeiture (NCB), also referred to as "civil forfeiture" or "*in rem* forfeiture" in some jurisdictions, is a legal proceeding against the asset itself and not against a person. NCB is not a substitute for criminal proceedings, which should proceed in parallel where possible. However, the NCB procedure does not require a conviction for the underlying criminal offence in order to proceed or reach a judgment. Instead, the NCB procedure requires demonstration that property is tainted, either as an instrument of a criminal activity or being the proceeds of a crime. Since the action is against the property and not against a defendant, the owner of the property is a third-party who has the right to defend their interest in the property.

57. Cases are usually brought to court in the jurisdiction where the crime took place. In common law jurisdictions, the underlying criminal conduct generally has to be proved to the balance of probabilities standard of proof. This eases the evidentiary burden on the state, allowing NCB procedures to be used where there is insufficient evidence to secure a conviction. This reduced burden of proof has been applied in some civil law jurisdictions, but many jurisdictions the standard of "intimate conviction" is required for both criminal and civil proceedings. The assets are defined in the same terms as they would be in a criminal case.

58. UNCAC Art. 54 (1)(c) encourages States Parties to give consideration to measures that would allow confiscation of the proceeds of corruption without a conviction. However, while coverage is increasing, many countries have yet to put in place NCB forfeiture procedures and mutual legal assistance with these jurisdictions in relation to NCB procedures has sometimes proved difficult. Even where states have similar procedures in place they may require that criminal proceedings against the person accused of the underlying crime be underway before they will provide assistance (see Section G).

Civil Proceedings

59. UNCAC Art 53 requires that States Parties put in place measures to allow other states to take civil action in their courts in order to establish ownership of property acquired through an offence under the convention and to seek damages from those that have committed the offenses. Under civil proceedings, the state, represented by counsel, brings a private action to recover property in exactly the same way as would a private citizen.

60. Civil proceedings do not require a criminal conviction or even the initiation of criminal proceedings. Consequently, civil proceedings are particularly attractive where a criminal conviction of corruption is difficult or impossible to obtain. In common law countries, the civil burden of proof requires the plaintiff to demonstrate “clear and convincing”/”balance of probabilities" rather than proof "beyond a reasonable doubt". In many civil law countries, the standard of “intimate conviction” is applied. In most jurisdictions, proceedings can take place without the defendant: all that is required is that the defendant is informed that the proceedings will take place.

61. Courts in foreign jurisdictions are competent to hear civil proceedings if a defendant is living in the country, if the assets are within or have transited the jurisdiction, or if an act of corruption or money laundering was committed within the jurisdiction. Courts have generally interpreted their jurisdiction on civil proceedings liberally, allowing cases to be brought where conditions are favorable in expectation that the judgment can be enforced in other jurisdictions. The range of the property that can be recovered is broader than under criminal law since the plaintiff may apply for damages as well as the recovery of property.

62. UNCAC makes no provision for mutual legal assistance between states on civil matters and it has not been the practice for states to share evidence collected by law enforcement with parties in civil cases. Courts may issue orders for disclosure and freezing assets. However, the burden of proof for preventive measures falls on the plaintiff and may be set at a higher standard than required of law enforcement. In principle, court orders should have worldwide effect, but in practice would have to be enforced through the local courts at the plaintiff’s expense.

63. Lastly, the plaintiff has to bear the upfront costs associated with civil action. In some cases these costs have been a substantial part of the recovery. Where the defendant is authorized to draw on frozen assets to cover reasonable legal fees, the defendant and his counsel will have every incentive to use delaying tactics to draw out proceedings as long as possible. The parties may negotiate a settlement, possibly allowing the defendant to retain part of the proceeds of corruption, to avoid protracted proceedings. Retention of counsel on a contingency basis, so that no upfront costs are incurred, may help mitigate difficulties encountered in financing litigation in some jurisdictions. In many jurisdictions the losing pays the costs or the court can require the losing party to do so, significantly increasing risks for the plaintiff.

Towards an Integrated Law Enforcement Approach to Corruption

64. Traditional approaches to law enforcement focused on the crime, the criminal and the conviction. Little attention, if any, was given to the proceeds of crime and its recovery which was generally seen as a complicated, difficult and ancillary activity. Efforts to trace the criminal’s property often started towards the closing stages of the investigation and sometimes only after conviction. As a result, proceeds of crime that could have been recovered through prompt action were lost to criminals.

65. Over the past decade, the law enforcement in many OECD countries has gradually mainstreamed the proceeds of crime approach, so that all relevant criminal investigations include a financial investigation and all relevant criminal indictments include forfeiture. Law enforcement approaches to corruption have followed a similar trajectory, with the focus initially on convictions and only recently shifting to the proceeds of corruption. In many countries, this change in approach is still at a very early stage, with law enforcement and the judiciary still

focused on convictions, sometimes reluctant and often ill-equipped to tackle the financial aspects of corruption cases.

66. A more integrated, strategic approach to corruption cases significantly increases the prospects of both successful convictions and successful recoveries. This requires law enforcement agencies to review all the options for developing a case at the earliest stages of the investigation. Decisions need to be taken about the line of investigation and asset tracing, about investigating links to other offenses such as tax evasion, which civil or criminal procedures to pursue, the options and prospects for cooperation from foreign jurisdictions.

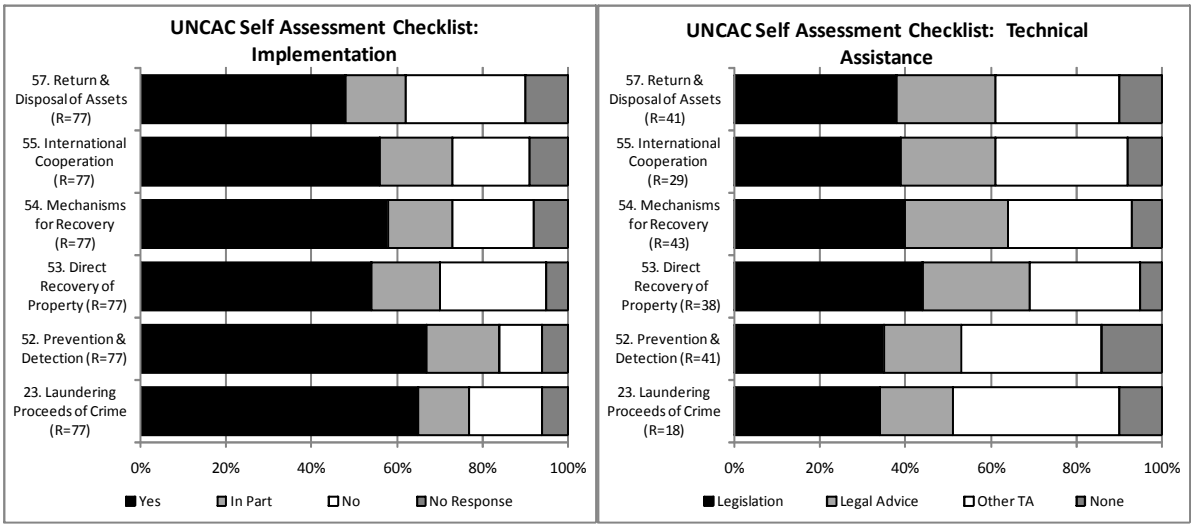
67. Where civil proceedings are followed, law enforcement's involvement can significantly

BOX 10: SELF ASSESSMENT IMPLEMENTATION STATUS AND ASSISTANCE NEEDS

Between November 2007 and September 2009, 77 countries from all regions completed the UNCAC self assessment checklist. The checklist requested States parties' assessment of progress in implementing selected articles within the Convention, including articles 52, 53, 54, 55 and 57 on asset recovery and Article 23 criminalizing money laundering. In addition, the checklist asked those countries that responded that they had not implemented the article or had only implemented the article in part, what assistance they might require.

States parties' responses are summarized in the figures below. The number of countries reporting partial or non-compliance and indicating the need for technical assistance (R) varied from 43 to 18. Responses have been grouped into three categories: assistance with legislation (model legislation or drafting), legal advice, and other technical assistance (on site visits, development of an action plan for implementation or other assistance). Respondents could identify more than one form of assistance. The data present the percentage of countries requesting each form of assistance.

Around half of respondents reported that the provisions in the articles had been implemented. Implementation of those articles related to money laundering (Art 23) and prevention and detection (Art 52) was reported as being most advanced. Respondents that had not completed implementation identified support for legislative development and related legal advice as the priority. A review of the responses suggests many of the requests for other technical assistance are linked to the legislative agenda. In contrast, responses linked to the money laundering and prevention articles included a slightly larger proportion of respondents interested in assistance on more operational issues.



increase the chances of success and help keep costs down. For law enforcement, collaboration with litigators representing foreign states in civil asset recovery cases helps support public policy objectives in tackling corruption. Where law enforcement is prepared to provide such assistance, legal procedure has not stood in their way.

Supporting Legislative Development

68. The process of legal convergence under UNCAC supports the shift towards a more integrated law enforcement approach to corruption. States Parties are encouraged to develop the most comprehensive package of legal instruments to tackle corruption as possible. At the very least, countries should have criminalized the mandatory corruption offenses under UNCAC and have procedures for criminal forfeiture. Ideally, prosecutors should have at their disposal the full range of criminal offenses and forfeiture tools.

69. Responses to the UNCAC Self-Assessment Checklist indicate that many countries have yet to fully implement the legal framework needed to support asset recovery and that those countries that have yet to do so recognize that this is a priority (see Box 10). In this context, technical assistance can play a useful role in supporting legislative development by helping countries' identify areas where their domestic legal framework could be strengthened, by providing comparative legal analysis and legal advice on the design of the legal framework, and by facilitating dialogue between key stakeholders.

70. Unfortunately there are no short cuts, no "models" that can be transposed from one legal system to another. Comparative legal analysis can help identify the some of the key issues to consider when designing legal instruments, but such analysis has to take into account the institutional and policy context in which the instruments are applied. StAR's "*Good Practices Guide to Non-Conviction Based Asset Forfeiture*" provides an example of this analytical approach. At a country level, the engagement of a broad range of stakeholders, including practitioners, law enforcement and representatives of the branches of government – executive, judicial and legislative – is generally the most effective means of diagnosing the shortcomings of the existing legal framework, identifying possible solutions and designing new legal instruments. Technical assistance can facilitate this process by providing information and analysis, but the appropriate design of the legal framework can only be determined by the national authorities.

RECOMMENDATION 3: DEVELOPMENT OF THE LEGAL FRAMEWORK FOR ASSET RECOVERY

National authorities are encouraged to put in place legislation that provides for the widest possible range of legal tools to facilitate the recovery of the proceeds of corruption. Particular attention should be given to: a) the criminalization of corruption offenses as identified by UNCAC; b) mechanisms for criminal forfeiture, non-conviction based forfeiture and civil proceedings. The international community can promote and facilitate this process by convening expert groups to advise on any difficulties that may emerge and enabling the exchange of experience between practitioners, policy makers and legislators.

E. THE ASSET RECOVERY PROCESS

71. An effective asset recovery process requires close coordination and collaboration across multiple agencies. This section illustrates how countries have solved these challenges by establishing multi-agency teams, either on a case-by-case basis or as permanent structures dedicated to asset recovery activities. The section goes on to identify the challenges faced in managing each stage of the asset recovery process and suggest how the international community can support national authorities' efforts most effectively. The identification of actionable leads and subsequent investigation are critical steps in the process: in the end, success of the asset recovery process is determined by the quality of the supporting evidence. They are also the weakest links. The section argues for the development of an analytical capacity to help identify corruption cases and callable technical assistance that can assist asset recovery teams in their analytical work. Financial centers can further assist developing countries by adopting a more proactive approach in tackling the proceeds of corruption. The section concludes with a brief review of the challenges faced in building technical capacity over the longer term and the opportunities offered by partnerships with successful asset recovery programs.

Building Effective Teams

72. Box 11 illustrates the engagement of key institutions in the asset recovery process. The key relationships are between those responsible for investigating the corrupt activity and generating evidence; those responsible for tracing the proceeds of corruption; and those responsible for the legal aspects of the asset recovery process, such as securing freezing orders, the confiscation and forfeiture of the assets.

73. There are many variations in the way that these functions can be distributed between agencies. In some countries, investigations are undertaken by police, while the prosecutors are responsible for the legal aspects of criminal cases, usually through an economic crime or anti-corruption unit which has experience in dealing with complex cases. In others, the role of the prosecutors or investigating judge may be significantly broader, including direct responsibility for investigations and strategic direction of cases. Where cases are pursued through civil proceedings, the solicitor general or *Procurador*, may take the lead on these issues, generally in coordination with private counsel.

74. FIUs, audit authorities, anti-corruption agencies and tax authorities may be involved in case identification and may provide some support to the early stages of investigations. FIUs, for instance, may also be involved in asset tracing. However, these institutions will tend to have a lesser role as the case develops, since they will lack the legal tools to support investigation unless they have been constituted with a law enforcement role.

75. Close and early collaboration between those responsible for the investigation and the legal aspects of the case is particularly important. Early engagement with prosecutors can help identify the strengths and weaknesses of evidence, identify promising leads that may support additional charges, identify lines of defense and the evidence needed to rebut them and ensure that evidence is properly managed. In order to facilitate this coordination, prosecutors are usually designated by law as the head of the investigation or granted authority to supervise investigators. Where the investigative authority is independent, investigators and prosecutors will consult at critical points in the investigations, particularly as regards the use of special –

BOX 11: INSTITUTIONAL ENGAGEMENT IN INTERNATIONAL ASSET RECOVERY CASES

	Identification	Investigation	Tracing / Freezing	Confiscation / Forfeiture	Return
Financial Intelligence Units	Suspicious Activity Reports	Where mandated to investigate	In some jurisdictions		
Anti-Corruption Agency	Whistleblowers, IAD and other	Where mandated to investigate			
Audit Authority	Through audits, whistleblowers	Where mandated to investigate			
Tax Authority	Through tax audits	Where linked to tax offenses			
Police / Investigators	Intelligence & investigations	Criminal & financial	Tracing & FIU cooperation		
Prosecutors / Attorney General	Intelligence & external sources	Criminal & NCB forfeiture	Criminal & NCB forfeiture	Criminal & NCB forfeiture	
Solicitor General / *Procurador*		Civil forfeiture	Civil forfeiture	Civil Forfeiture	Criminal, NCB & Civil Forfeiture
UNCAC Central Authority		Criminal, NCB & some civil	Criminal, NCB & some civil	Criminal, NCB & some civil	Criminal, NCB & some civil
Ministry of Finance					Manage return

Institutional arrangements vary greatly between jurisdictions. In some jurisdictions, the Financial Intelligence Unit, Anti-Corruption Agency and, in rare cases, the audit and tax authorities may have law enforcement functions in specific areas. This will lead these institutions to have a more active role in investigations and the prosecution of cases.

undercover, electronic surveillance, controlled-delivery activities – or coercive methods for the collection of evidence.

76. The challenge is to bring the agencies more directly involved in the identification, investigation and prosecution of asset recovery cases together in an operational context. This entails establishing clear priorities across institutional borders, accessing adequate financial investigation and tracing skills, assigning responsibilities between agencies and facilitating information sharing in a secure environment. Solutions have been found in setting up multi-agency teams to deal with asset recovery cases. The extent to which states institutionalize these coordination arrangements is likely to depend of the level of asset recovery activity and the extent to which communication and information exchange between public agencies requires prior authorization.

77. Where there is a political commitment to strengthen the proceeds of crime approach to law enforcement and there are large numbers of potential asset recovery cases, national authorities have established specialized asset recovery or asset forfeiture units. These units may be based in law enforcement or the prosecution service, often with staff on secondment from other agencies such as tax and customs. These permanent, multi-agency structures coordinate national and international cases throughout the asset recovery process (see Box 12).

BOX 12: CONTRASTING INSTITUTIONAL ARRANGEMENTS FOR ASSET RECOVERY

Asset Recovery Offices	Special Investigative Teams
The European Union has required member states to establish specialist Asset Recovery Offices (AROs) in order to facilitate cooperation in the recovery of the proceeds of crime. Member states are encouraged to staff AROs with multidisciplinary teams, including experts from law enforcement, prosecution and tax authorities. AROs should have the means to access the relevant data bases, registries and financial information so that they can identify and trace assets, together with coercive powers to access information and provisionally freeze assets, pending a court order. Progress in implementing the Council Decision varies. In some cases, United Kingdom for instance, the AROs function has been assigned to an existing structure within the Serious Organized Crime Agency. In others, the AROs have only recently been established and are not yet fully resourced. Nonetheless, member states are making progress and there is a commitment to review the status of the initiative at the end of 2010.	Uruguay has made adjustments in its legal and institutional framework in recent years in order to order to strengthen its response to money laundering threats. For the majority of cases handled since 2006, judges have ordered the creation of special investigative units. These have comprised members of Uruguay's Police Asset Analysis Unit, the Financial Information and Analysis Unit (UIAF), the Judiciary's Technical Forensic Unit, the tax authorities, the National Anti-Money Laundering Secretariat, and on occasion also Customs, the National Registries Directorate, and the National Information and Intelligence Secretariat. The teams have proved an effective way of coordinating across institutions and focusing attention on results. In 2009, in cooperation with the Brazilian and Greek authorities, Uruguay successfully seized assets with a value of $17 million in relation to two corruption cases.

78. Permanent coordination structures may not be needed where there are few ongoing asset recovery cases. Instead, solutions may lie in *ad hoc* teams established to deal with a specific case or group of cases. The composition of these teams will depend on the institutional arrangements in country and the nature of the cases to be addressed. In order to function effectively, the roles and responsibilities, internal and external reporting structures, information exchange procedures and resourcing of the teams will generally need to be spelled out in a memorandum of understanding. In some countries, such arrangements may need to be formalized by a decree or executive order. Formal establishment of the team may also serve a purpose in signaling the authorities' commitment to pursue the recovery of the proceeds of corruption.

79. Well defined asset recovery goals are critical to ensure that the team focuses on the proceeds of corruption rather than simply pursuing the criminal investigation. Similarly, teams will need a broad mandate to pursue various recovery procedures. Decisions will generally need to be taken as to which foreign jurisdictions to prioritize in tracing assets and whether to use criminal, NCB or civil forfeiture procedures or a combination of approaches. This can be challenging for teams with a background in national procedure, since they may lack familiarity with international practice, experience in collaborating with foreign jurisdictions and the language and technical skills to manage this process.

80. Asset recovery teams can serve as a focus and entry point for technical assistance. This allows technical assistance to be effectively targeted, supporting the operational aspects of on-going cases rather than providing generic advice to officials that are only marginally involved in asset recovery activities. Technical assistance can also facilitate collaboration with financial centers and complement – or substitute for – the use of private counsel to coordinate the management of complex, international asset recovery cases involving multiple jurisdictions. The team structure provides a framework for a wide range of technical inputs, covering the investigation, tracing and the legal aspects of the case.

RECOMMENDATION 4: ASSET RECOVERY TEAMS

National authorities are encouraged to put in place multi-agency asset recovery teams, following the institutional structure most appropriate to their needs, with clear accountability for results. The international community can promote and enable development of the institutional framework to support asset recovery by facilitating the international exchange of experience between such teams.

Generating Actionable Leads

81. Most of the prominent asset recovery cases have come about following the collapse of a kleptocratic regime, where the incoming administration has pursued the proceeds of corruption held by the former leader, their family and associates. In such circumstances, the corrupt activity is common knowledge and cases have moved directly into investigation and tracing. Often, special prosecutors or tribunals are set up in response to the high profile, highly politicized nature of the crimes and the sheer scale of the investigative and legal work, involving multiple jurisdictions and criminal measures against a wide network of conspirators.

82. For the more routine asset recovery work, however, the challenge is to identify leads that can provide sufficient information to warrant further investigation. Box 10 identifies some of the administrative channels through which cases are identified. These include: on-going investigations into criminal activity; internal and external audits of government agencies; suspicious activity reports filed by financial service providers; denunciations by whistleblowers; discrepancies arising from reviews of income and asset declarations; and investigations into customs and tax violations. Alongside these internal, administrative channels, civil society and media reporting has often proved an effective means of bringing leads to the attention of the authorities and exerting pressure for prompt, effective follow-up.

83. Leads can also be generated in financial centers. Where suspicious activity reports are filed by financial service providers regarding transactions originating or involving individuals from a foreign jurisdiction, there are well established mechanisms for communicating this information to the appropriate foreign FIU (see Section F). Information may also be generated by many of the administrative channels identified above, or through civil society and media reporting of the activities of corrupt officials. In this context, national authorities are increasingly communicating such information through official channels, just as foreseen under UNCAC 56 which encourages spontaneous information sharing between States Parties in support of asset recovery.

BOX 13: INTERPOL AND ANTI-CORRUPTION

INTERPOL is mandated to facilitate cross-border police co-operation. It works through the National Central Bureaus, staffed by law enforcement officials, in each of its 188 member countries. INTERPOL has four core functions:

- **Secure global police communications**, through a global communications system known as I-24/7 which enables police in all of its member countries to request, submit and access information instantly in a secure environment. I-24/7 system also enables member countries to access each others' national criminal databases where access has been authorized.
- **Operational data services,** through databases with information on known criminals and criminal activity. INTERPOL also disseminates crime-related data through its system of international notices, including the Red Notice, an international request for the provisional arrest of an individual.
- **Operational police support,** including technical assistance and a command and co-ordination center to assist members faced with a crisis situation, co-ordinate the exchange of information and assume a crisis-management role during serious incidents.
- **Police training and development,** through focused police training initiatives for national police forces, on-demand advice, guidance and support in building capacity to address transnational crime.

Corruption is one of INTERPOL's six priority areas. The INTERPOL Anti-Corruption Office is developing products to support international anti-corruption investigations within the framework of INTERPOL's core functions. Initiatives approved at the October 2009 INTERPOL General Assembly include:

- A dedicated anti-corruption portal UMBRA within the I-24/7 framework, in order to facilitate the exchange of information on corruption-related crimes, criminals and asset recovery. The information exchange system will build on the StAR- Asset Recovery Focal Point Database. The database allows the international law enforcement to co-ordinate in an emergency at an operational level, such as when law enforcement agencies suspect that a corrupt official has transferred funds to a particular jurisdiction, and where the failure to act immediately may lead them to lose the trail.
- Analytical capacity to support national authorities' investigations and develop more strategic information on global corruption. Initial analysis will focus on the 278 valid Red Notice for corruption related crimes. These represent about one and a half percent of the total universe of Red Notices.
- Corruption Response Teams, building on experience with Incident Response Teams, which field law enforcement officers to assist national authorities deal with emergencies and high profile cases. The teams will draw on IACO staff and specialists on assignment from national law enforcement agencies.

84. The quality of information generated from leads varies considerably. Where faced with limited investigative and prosecution resources, national authorities generally have to make hard choices regarding which potential lines of enquiry to pursue. Cost-benefit outcomes, the likelihood of a conviction or successful recovery, and reputational considerations all weigh heavily in these deliberations. In the end a large proportion of the potential leads are dropped,

usually because there is insufficient information to mount a successful investigation or because the costs – financial, manpower and political – may outweigh the expected benefits.

85. In contrast to this reactive approach, where law enforcement responds to the information presented at any one point in time, many law enforcement agencies are developing analytical capacity which uses information to identify patterns and consolidate information in support of potential investigations. This intelligence-led approach can be applied to international asset recovery. The consolidation of information across a range of jurisdictions can help generate information to support national authorities' investigations in a particular case, by generating evidence and leads for tracing assets. This information may also reveal associations with gatekeepers and facilitators, opening them to investigation in their home jurisdiction and potentially disrupting wider networks of corrupt activity. At a more strategic level, this analytical function can identify the structures supporting international corruption, the channels used to transfer funds and the high risk jurisdictions where the proceeds of corruption are sheltered, information that can be used to develop preventive measures.

86. Interpol is in the process of establishing a global information exchange platform for anti-corruption activities and supporting analytical function (see Box 13). The analytical function has considerable potential in terms of consolidating information on corruption cases, the involvement of gatekeepers and related criminal activity across jurisdictions. Development of this capacity will require support from national authorities, in terms of core financing, the secondment of skilled analysts and a commitment to information exchange. The UMBRA initiative represents a significant opportunity to build the first ever global approach to tackling the global criminal network supporting corruption and merits broad international support.

87. Alongside measures to strengthen capacity for analysis and exchange of information, further efforts are needed to engage the private sector in the identification of corruption cases. Recent typologies work by the OECD identifies internal control structures within corporations, whistleblowers and whistleblower protection, external auditors and information gathered about competitors as important sources of information for law enforcement. Professional associations, notably those for legal and financial professions provide a venue of awareness raising, helping inform professionals about possible risks, their responsibilities and reporting mechanisms. National authorities can encourage the private sector to take a more proactive role by establishing and signaling secure reporting channels. OECD has highlighted to the role of officials working with national corporations operating abroad in detecting and reporting suspected acts of foreign bribery provided they are allowed, protected and encouraged to do so. Lastly, an effective sanctions regime, where cases of corruption, such as the bribery of foreign public officials, are prosecuted and subject to heavy penalties, can provide a strong incentive for corporations to be vigilant and report suspicious activities of their staff and competitors.

Supporting Investigations and Legal Assistance

88. The transformation of leads into corruption and asset recovery cases that can be successfully pursued in court requires the collection of evidence. This is a significant challenge. Corruption and international laundering of the proceeds of corruption are complex crimes, requiring analysis of vast amounts of financial and technical documentation, tracing flows of funds through transactions that are designed to obscure the trail and the use of corporate vehicles established for the sole purpose of hiding the beneficial owners. Asset recovery requires skilled

analysts, with access to analytical tools, data and communications systems and resources to carry enquiries overseas as needed.

89. A recent Eurojust assessment of the asset recovery regime in the European Union highlighted the shortage of skilled financial investigators as one of the principal constraints. These constraints can be particularly acute in developing countries. Police forces are generally geared to maintaining public order rather than the investigation of financial crimes. Financial analysts may be in short supply and higher private sector pay may make it difficult to attract skilled analysts to the public sector.

90. Consequently, many developing countries are ill placed to undertake corruption investigations and even more constrained when it comes to pursuing asset recovery. These constraints can be addressed over the longer term, but in the meantime there is a pressing need for operational assistance from appropriately skilled and resourced practitioners. If progress is to be made in asset recovery, the financial centers will have to provide technical capacity to support investigations. They can do this at two levels: firstly, by providing technical assistance in the developing country either through bilateral or multilateral channels; and secondly, as discussed in the following section, by taking the lead on investigations related to foreign corruption cases within their jurisdiction.

91. There are already many technical assistance programs supporting capacity building initiatives on money laundering, financial analysis, the investigation and prosecution of financial crimes. These programs tend to focus on training and skills transfer. Few programs provide assistance at the operational level, advising on the specific cases. For most development partners assistance of this nature raises legitimate concerns regarding liability, reputational risks and perceived interference with internal affairs. While practitioners tend to push the envelope, informally seeking and providing advice on specific operational matters, there is a need for a more structured approach to such assistance.

92. Interpol offers a framework for operational technical assistance. IACO has proposed the concept of Incident Response Teams (Corruption) which will draw on IACO staff and specialists on assignment from national law enforcement agencies. Working under the overall direction of the national authorities, the teams would be able to assist in the operational aspects of gathering evidence, financial analysis and asset tracing, whilst also providing broad strategic advice, thereby addressing the most pressing operational needs of their counterparts.

93. Where investigations, prosecutions and judicial proceedings are underway in more than one jurisdiction, UNCAC Art. 49 encourages cooperation through joint investigations. Joint investigations provide for a much closer working relationship between law enforcement agencies in pursuing a specific case than simply advisory assistance. A framework agreement, either a treaty or a memorandum of understanding is usually required to establish the rules of engagement for these joint investigations teams. Experience is gradually growing in this area and there is clearly potential for the approach to be applied in complex international corruption cases at some point in the future.

94. Focusing on the investigation and the coordination of prosecutions represents a departure from current practice in external support to asset recovery, which has mostly financed private counsel to pursue civil proceedings in foreign jurisdictions. External financing has facilitated timely access to legal counsel and enabled cases that might otherwise have been abandoned to proceed. However, financing litigation can present challenges for both parties (see Box 14).

BOX 14: FINANCING LEGAL REPRESENTATION

The Swiss authorities first financed legal counsel to represent the interests of the Malian state in the Mousa Traore recovery case in 1991 through to the successful conclusion of the case in 1997[1]. The Swiss have followed the same approach in assisting Haiti with the Duvalier case. In Zambia, after President Frederick Chiluba stepped down in 2002, a number of donors contributed funding for the Zambian Task Force Against Corruption's civil action against the former president filed in London.

Where external partners finance legal counsel, care has to be taken not to interfere in the privileged relationship between attorney and client. Consideration needs to be given to how to manage fiduciary issues, such as the contracting process and ensuring value for money as the case proceeds. Litigation risks will need to be properly assessed and assigned, since an adverse judgment in civil litigation may entail the apportionment of costs. Lastly, national authorities will need to coordinate effectively to avoid conflicting judgments, so that a successful action in the financial center is not voided by actions or decisions in the country of origin.

Several proposals have been presented for funding mechanisms that would substitute for the present *ad hoc* bilateral arrangements. A Trust Fund to finance access to legal and technical expertise was proposed for the consideration of the 2006 UNCAC Conference of States parties but was not adopted. Recently, a civil society organization has proposed a private fund with similar objectives, financed from initial contributions and cost recovery from successful asset recovery cases. The proposal suggests that its private sector, results-oriented approach is likely to generate additional demand from developing countries.

95. More fundamentally, while initiatives that expand the range of options to pursue asset recovery cases are to be encouraged, it is important for the national authorities to view the full range of options available. This will include the pursuit of criminal and NCB forfeiture as well as civil litigation. Technical assistance can support this broader analysis, identifying the alternative procedures available in the relevant jurisdictions, and assisting the national authorities in making informed decisions about the direction of their asset recovery strategy. Technical assistance on legal issues is most helpful to those directly involved in managing the cases. Where the authorities have established a multi-agency team, this would be the natural entry point for legal advisors.

RECOMMENDATION 5: OPERATIONAL SUPPORT

National authorities are encouraged to support Interpol's efforts to provide operational support to anti-corruption activities, notably: a) the UMBRA initiative, a global anti-corruption information exchange mechanism that will gather and undertake analysis of information on international corruption and asset recovery; and b) Incident Response Teams (Corruption), that will provide practical technical assistance to national authorities on the operational aspects of corruption and asset recovery investigations. Where national authorities cannot provide operational technical assistance through a multilateral mechanism they are encouraged to do so on a bilateral basis.

Proactive Engagement by Financial Centers

96. UNCAC encourages national authorities to adopt a proactive approach to asset recovery in support of other States Parties by putting in place mechanisms that would allow them to adjudicate a criminal confiscation within their jurisdiction, through money laundering charges or other procedures (Art. 54(1)(b)). This proactive approach requires a significant commitment to tackling proceeds of corruption, not only in terms of putting in place legal procedures tackle foreign corruption, but also through the commitment of investigative and prosecution capacity and the will to use domestic resources to pursue foreign corruption.

97. One entry point is through the prosecution of active bribery under domestic legislation implementing the OECD Anti-Bribery Convention and UNCAC (see Box 15). There is significant potential for developing countries to recover the proceeds of corruption through these instruments, though the practice to date has been for the prosecuting jurisdiction to retain the proceeds of foreign bribery cases. The grounds for repatriation of part of the proceeds, corresponding to damages, as provided for under UNCAC Art. 57 (3)(b) and (c), may be stronger where there is active collaboration between jurisdictions in the prosecution of the bribery case and where the jurisdiction initiates parallel proceedings against the officials involved. However, there may be practical difficulties that prevent jurisdictions from collaborating in this way. This is an issue which merits further analysis both in the context of UNCAC and the on-going OECD Convention.

BOX 15: PROACTIVE PURSUIT OF BRIBERY CASES

The OECD Anti Bribery Convention has been in force for over ten years. The first few years of implementation saw little action in terms of investigations and prosecutions. Recently performance has improved, with a more proactive approach on the part of law enforcement authorities in a number of countries. Law enforcement authorities have relied on the broad jurisdiction required under the OECD Convention, covering acts by their corporations and individuals regardless of the place where the bribery offence occurred, to investigate and prosecute individuals and companies involved in bribe payments to foreign public officials in international business transactions.

Over 140 natural and legal persons have been sanctioned, and approximately 250 investigations into acts covered by the OECD Anti Bribery Convention are ongoing. In some countries, prosecutors have sought punitive damages and required offenders to disgorge profits. This has resulted in several huge settlements, notably so in the USA following their Foreign Corrupt Practices Act. Siemens has received highest financial sanctions so far, with a total of EUR 1.24bn (in the USA, Germany and Italy), to which other sanctions could be added in the future from other jurisdictions. These judgments have, in turn, led to a shift in attitudes in the business community, with significant interest in measures to strengthen compliance and reduce business risk.

The challenge going forward is to intensify these efforts and expand the number of countries proactively pursuing bribery cases. A 2009 review of progress by Transparency International argued that more can be done. According to TI's assessment, just four countries – the United States, Switzerland, Norway and Germany – are actively enforcing the OECD convention. An additional eleven countries are considered as showing moderate enforcement, which means having one major case and several investigations underway. The remaining 21 of the 36 countries reviewed are considered as undertaking little or no enforcement.

BOX 16: DEDICATED PROCEEDS OF CORRUPTION UNIT

In the United Kingdom, law enforcement agencies struggled to prioritize proceeds of corruption work: it was resource intensive, required specialist skills and the development of international relationships that were not directly related to law enforcement's domestic policy priorities. In 2006, the UK Department for International Development (DfID) stepped in with financing for a dedicated Proceeds of Corruption Unit (POCU) in the Metropolitan Police Service. POCU employs nine specialist investigators, six of whom were funded with support from DfID. The unit has been actively involved in investigations in close collaboration with Nigeria, Malawi and Zambia, providing evidence for prosecutions overseas, pursuing prosecutions through the UK courts and supporting the freezing and confiscation of assets. As of July 2009, the POCU, working with the Serious Organized Crimes Agency and the Crown Prosecution Service, has contributed to the recovery and return of £20.7 million and the freezing of a further £131 million of corruptly acquired assets.

98. National authorities may also have grounds for acting unilaterally to freeze the proceeds for a much broader range of corruption offenses, beyond bribery, by using money laundering – as foreseen explicitly in UNCAC – and anti-criminal organization statutes. These offenses establish jurisdiction, even if the predicate offense occurs overseas. Switzerland has used the criminal code provisions which require the prosecutor to demonstrate the individual's links to the criminal organization rather than the criminal origin of the funds. This approach has been used successfully in freezing and confiscation of Abacha-related assets (see Box 9 on page 8). Again collaboration from the victim state will still be needed to demonstrate their interest in recovering their property.

99. The proactive approach requires a significant commitment on the part of the financial center. Law enforcement will have to identify areas of risk, pursue leads on specific cases, follow-up in tracing assets and collecting evidence to support prosecution or asset forfeiture in the home jurisdiction or through the courts in the financial center. This goes far beyond the assistance envisaged in formal and informal mechanisms of cooperation geared to information exchange (see Section G). Where a team is charged with this responsibility, the proceeds of corruption are likely to receive greater attention than would be the case where there is no clear accountability for this work. It is also then possible to encourage proactivity by identifying specific results and setting targets.

100. Mobilizing this kind of assistance has to overcome the resource constraints and

RECOMMENDATION 6: PROACTIVE ENGAGEMENT IN FINANCIAL CENTERS

Financial centers should take the initiative in recovering the proceeds of corruption in their jurisdictions. To this end, they are encouraged to a) put in place teams or assign specialists to work on proceeds of corruption specifically, following the institutional structure most appropriate to their needs, but ensuring clear accountability for results; and b) proactively pursue cases related to foreign corruption, including the bribery of foreign officials, and facilitate the recovery and return of the proceeds of corruption. The international community can promote greater proactivity by monitoring progress and facilitating the exchange of experience national authorities.

disincentives for law enforcement agencies in the financial center, which are unlikely to see foreign corruption as a law enforcement priority. Financing these law enforcement activities from the financial center's development budget is one solution (see Box 16).

Building Institutional Capacity

101. An effective asset recovery strategy has to look beyond the short-term objective of assisting countries deliver successful asset recovery cases to contributing to the development of sustainable, institutional capacity. The development of an effective legal framework which, encompasses the key instruments available to support asset recovery is an important part of this institutional development approach (see paras 68). The need for technical assistance and operational support has already been highlighted. Training complements these efforts.

102. The training needs in support of asset recovery are multifaceted. Lawmakers and policy makers need to understand the options available to them in order to tailor legislation and policy for asset recovery to their own political and institutional context. Law enforcement will often require advanced training on financial crime, investigation and asset tracing techniques if they are to investigate corruption cases that have an asset recovery aspect. They may also require knowledge about how to develop and preserve the chain of evidence in complex financial cases. Both prosecutors and judges require training on the analysis of evidence in complex financial crimes.

103. A number of organizations have provided both in-country and regional training. These include training programs delivered by national law enforcement agencies, professional associations, accounting and audit firms, financial service providers, and universities as well as multilateral institutions such as the World Bank and UNODC. StAR has worked closely with the International Centre for Asset Recovery, a non-governmental organization which has developed specific training materials focused on the transfer of practical skills to support various elements of the asset recovery process. This experience has demonstrates that hands on, practical training using case studies and structured exercises can be a particularly effective way of transferring skills. However, such training comes at a price owing to the need for customization content to countries' specific capacity building needs.

104. Alongside the short-term training programs currently on offer, institutions will need to

BOX 17: PARTNERSHIPS IN CAPACITY BUILDING

South Africa established a specialized Asset Forfeiture Unit (AFU) in May 1999. In that year, the unit comprised three staff. By 31 March 2009 the unit had grown to 117 employees and in had obtained 275 restraint orders, completed 277 forfeiture cases and recovered in R330 million (approximately US $ 40 million) in the previous year. The AFU has an 86.5 percent success rate on cases taken to court. In order to support this expansion, the South African AFU has put in place an internal training unit and has developed guides, manuals and training materials to support staff development. The AFU has an interest in using this capacity to support the growing number of cases involving neighboring countries where South Africa is both a requested and requesting party. In 2008, South Africa provided on-the-job training staff from a neighboring country on secondment. In 2009, the AFU (with StAR sponsorship) opened its national training days for prosecutors and financial investigators to representatives from three neighboring countries. The AFU has expressed interest in further developing these partnerships.

develop the capacity to transfer skills on a sustainable basis to accommodate the gradual rotation of staff and to familiarize a wide range of actors with the key principles of asset recovery. Training of trainers within the law enforcement and the judiciary can be an efficient way of building capacity on specific issues, such as to support changes in legislation or in basic skills. Over the longer term, training will need to be institutionalized. First, through the development of training content and the incorporation of training for practitioners in law enforcement agencies' training programs. Second, by reaching out to professional training institutions for lawyers and law enforcement to ensure that they incorporate asset recovery approaches appropriately in the basic curriculum. This awareness raising approach is particularly important to promoting the cultural shift behind the proceeds of corruption agenda, encouraging practitioners to see asset recovery as an effective law enforcement tool alongside the more traditional approach focused on securing convictions.

105. In countries that have a small asset recovery program or are still at the early stages of setting one up, there may be a strong case for partnering with other countries to support on-going capacity building activities. Box 17 highlights the experience of a country with an active asset recovery program that has provided capacity building support to partner countries. Initiatives along these lines could provide an effective mechanism for channeling assistance for capacity building and skills transfer.

106. The more general point is that many developing countries would benefit from a more coherent, better coordinated and country-led process of institutional capacity building to support asset recovery. National authorities may be faced with multiple offers of assistance, offering a variety training opportunities dealing with specific elements of the asset recovery process, some targeted at particular agencies others on particular themes, some delivered abroad others delivered in-country, some as standalone events others as part of an institutional development project. Selecting the appropriate program and coordinating these efforts is a challenge. Development of a coherent training strategy, focused on institutional capacity building to sustain training activities and taking a long-term view of staff development and skills transfer would provide a framework for more effective donor coordination in this area. At the same time, donor coordination in-country would greatly facilitate the work of national authorities.

F. TACKLING THE PROCEEDS OF CORRUPTION

107. The Leaders' Statement at the September 2009 Pittsburgh summit called on "the FATF to help detect and deter the proceeds of corruption by prioritizing work to strengthen standards on customer due diligence, beneficial ownership and transparency." FATF responded at its October 2009 plenary by establishing a working group to follow-up on measures to strengthen the linkages between international anti-corruption and anti-money laundering efforts. This offers a window of opportunity to influence the design of anti-money laundering standards and the basis for assessment of national anti-money laundering control systems. Over the next year, FATF will finalize the standards and methodology to be used in the next, fourth round of mutual evaluations to be launched in 2011. This section addresses some of the measures that would be helpful to see addressed, first in terms of the treatment and focus on corruption within the methodology and secondly in terms of the treatment of key standards. The focus is on deterrence, using anti-money laundering controls to exclude the proceeds of corruption from the financial system. The section concludes with an assessment of the challenges at a more operational level, in the linkages between anti-money laundering system and anti-corruption efforts in the detection and pursuit of the proceeds of corruption.

Addressing Money-Laundering as an Instrument of Corruption

108. The FATF 40 + 9 recommendations and methodology recognize the close linkages between money laundering and corruption. The methodology asks assessors to consider corruption as part of a broader review of the structural elements that impact on the effectiveness of the anti-money laundering regime. This includes the quality of governance and transparency, the effectiveness of the judiciary and the observance of professional and ethical standards within law enforcement, the judiciary and among professions such as accountants, auditors and lawyers. In this context, the methodology specifically requires an assessment of "appropriate measures to prevent and combat corruption, including, where information is available, laws and other relevant measures, the jurisdiction's participation in regional or international anti-corruption initiatives (such as the United Nations Convention against Corruption) and *the impact of these measures on the jurisdiction's AML/CFT implementation*" (emphasis added).

109. Risk assessments could be strengthened by requiring a more systematic review of the money laundering risks related to both domestic and foreign sources of the proceeds of corruption. It would be helpful for assessors to identify domestic corruption risks, such as the pillaging of natural resources through illegal logging and mining, embezzlement and misappropriation of public funds, and the abuse of public procurement or state owned enterprises. Assessors should also consider the mechanisms used to launder and remit the proceeds of this corruption, including the possibility that official channels may be misused to transmit funds. With regard to the risks posed by foreign sources of the proceeds of corruption, it would be helpful to assess not only the risks but also those features that might make the jurisdiction attractive as a safe haven for the proceeds of corruption. Such assessments would provide a basis for the financial institutions, supervisors and FIUs to make more informed decisions when identifying suspicious activity.

110. Most reports provide an assessment of the risks of domestic corruption in public institutions in general and the anti-money laundering regime in particular. The reports focus on

the risks to the proper functioning of banking supervision, the FIU, law enforcement and the judiciary. Addressing these issues is complex, because of the sensitivity of corruption and the difficulty in making informed judgments regarding the level and likely impact on corruption. As such, the reports tend to resort to perception-based and composite indicators of corruption, such as those generated by the World Bank Institute, as a guide in their risk assessments.

111. These institutional assessments could be strengthened by drawing more systematically on country reviews undertaken in support of international anti-corruption conventions. Analysis of corruption risks will inevitably expand the range of institutions that are drawn into the anti-money laundering regime to include agencies with oversight over public resources and a mandate to address corruption risks such as the audit authority and specialist anti-corruption agencies. Institutions that comprise the anti-money laundering regime would also benefit from some of the methodological work undertaken to support governance assessments in other public institutions, notably the work in developing actionable indicators. This would entail a longer-term engagement bringing together the anti-corruption and anti-money laundering agendas at the country level.

112. As the FATF explores how to deepen its engagement on anti-corruption issues, it will be critical to avoid undermining the effectiveness of the mutual evaluation process through the dilution of mandate and focus. Clearly, the treatment of corruption issues will have to vary between jurisdictions, taking into account institutional risks and the risks as a source and destination of the proceeds of corruption.

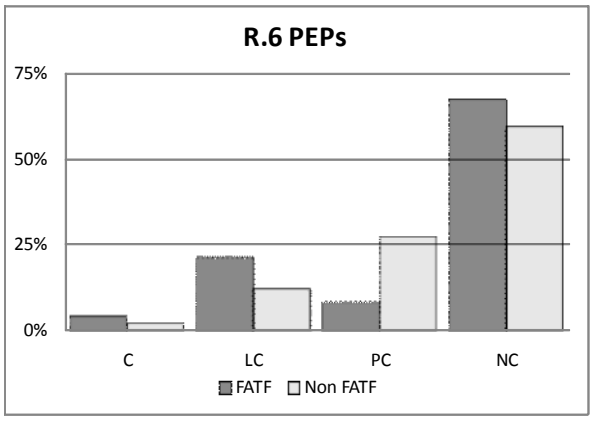
Strengthening Standards and Implementation

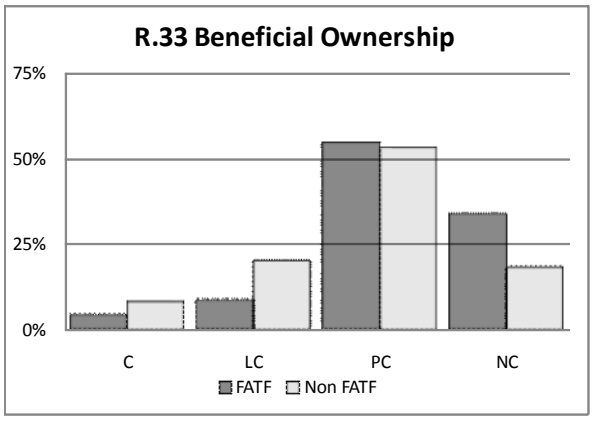
113. The FATF recommendations and methodology underwent a comprehensive revision in 2003 in a process that ran parallel to but ended slightly before UNCAC was finalized. Further alignment would facilitate the implementation and improve the effectiveness of both instruments. FATF recommendations that are particularly relevant to the detection and deterrence of the proceeds of corruption, notably recommendations related to politically exposed persons and beneficial ownership also merit more detailed analysis with a view to strengthening implementation.

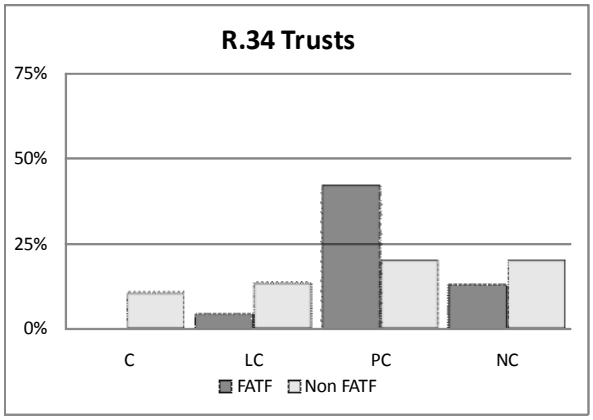
114. The FATF standard requires countries to criminalize money laundering on the basis of the 1988 Vienna (narcotic drugs) and 2000 Palermo (UNTOC) conventions, including corruption and bribery as one of twenty designated categories of offenses. The range of offenses actually covered within this category could be interpreted very differently between jurisdictions. Adoption of corruption offenses identified in UNCAC Chapter III as the offenses to be criminalized as predicate offenses for money laundering purposes would add clarity to the FATF standard.

115. Box 18 presents the results of assessments of compliance with FATF recommendations 6, 33 and 34 based on mutual evaluations undertaken from 2003 to 2009. The data distinguishes FATF members, comprising “strategically important” jurisdictions that have met performance benchmarks set against the FATF standards, and non-FATF members, comprising a diverse group of mainly middle and lower income countries. While some of the mutual evaluations are several years old and compliance may have improved over the intervening period, the data still provides a revealing “snap-shot” of a moving picture.

BOX 18: FATF ASSESSMENTS OF PEPS, BENEFICIAL OWNERSHIP AND TRUSTS







C=compliant. LC=largely compliant. PC=Partially compliant. NC=Non-compliant.

Data represents assessments undertaken in period June 2003 to October 2009, including 24 assessments of FATF members and 100 assessments of non-members. Data for R.34 excludes 42 percent of FATF members and 37 percent of non-members whose legal systems do not recognize trusts or related corporate instruments.

116. FATF Recommendation 6, which introduces the concept of politically exposed persons (PEPs), specifically addresses corruption-related risks. The data presented in Box 18 indicates that there is a serious implementation challenge (see Box 18). Just 4 percent of FATF members and 2 percent of non-members are assessed as compliant; fully 67 percent of members and 59 percent of non-members are assessed as non-compliant.

117. A recently published StAR Policy Note on PEPs suggests a number of factors behind these low ratings. A review of 59 mutual evaluation reports concluded that 43 percent of jurisdictions did not have enforceable legislation, regulations or guidance on PEPs. Lack of regulation is compounded by lack of consistency between the UNCAC and FATF standards. Furthermore, poor performance against the PEPs standard is generally associated with poor performance in implementing the standard laying out customer-due diligence requirements, suggesting a more general failure in anti-money laundering controls.

118. The StAR Policy Note goes on to propose practical solutions: standardizing the definition of PEPs to include prominent domestic and foreign public figures and removing time limits to PEPs status; the use of official income and asset declarations as one source of information to support the verification of sources of wealth; and a requirement for customers to provide a signed declaration regarding beneficial ownership of accounts. FATF could provide further guidance in an interpretative note clarifying issues that are either pending, or addressed in diverse ways: what is the minimum definition of close associates, what is meant by enhanced due diligence, what are the expectations in establishing the source of wealth?

119. A review of international corruption cases demonstrates that corporate vehicles are frequently used to disguise the beneficial ownership of property and thereby hide the proceeds of corruption and hinder the work of investigators. Furthermore, interviews with practitioners suggest that corrupt officials are ever more sophisticated in their use of these instruments. FATF recommendations 33 and 34 seek to address these risks by requiring timely access to beneficial ownership information for competent authorities and the communication this information to competent authorities at home and abroad. FATF recommendation 33 asks countries to ensure that their commercial, corporate and other laws provide adequate transparency concerning the beneficial ownership and control of legal persons. FATF recommendation 34 makes the same requirement specifically in the context of trusts and similar legal entities, such as foundations.

120. FATF does not mandate how countries should ensure transparency. However, drawing on mechanisms highlighted by the OECD, FATF suggests that countries may find it beneficial to use a combination of measures to facilitate access to this information including: up to date central registries of ownership and control information for all companies and other legal persons; requirements for company service providers to obtain, verify and retain records of the beneficial ownership and control of legal persons; and empowering law enforcement, regulatory, supervisory, or other competent authorities in a jurisdiction to obtain or have access to the information.

121. Implementation of recommendations 33 and 34 is a prerequisite to effective deterrence and detection of the proceeds of corruption, indeed the proceeds of crime more generally and effective tax administration (see Box 19). Nonetheless, Box 18 demonstrates that performance against both recommendations is poor in most jurisdictions: 87 percent of FATF-members and 71 percent of non-members are either partially compliant or non-compliant with FATF 33. Not one FATF member is considered as meeting the standard with regard to recommendation 34.

122. FATF is undertaking technical work aimed at strengthening implementation of the recommendations related to transparency in beneficial ownership. StAR is conducting an in-depth review of cases where corporate vehicles have been used to hide the proceeds of corruption, in part to inform these discussions, but also to demonstrate to practitioners how investigators and prosecutors have been able to find ways around some of these obstacles.

BOX 19: ASSET RECOVERY AND THE TAX AGENDA

The asset recovery and tax agendas share a common interest in improving transparency and facilitating international cooperation. Legal structures established for legitimate purposes can be abused for criminal purposes where there is insufficient transparency and inadequate supervision. On this matter, the tax and proceeds of corruption agendas are aligned. Where the proceeds of corruption and tax agendas diverge is in the mechanisms used to overcome lack of transparency. For tax purposes, solutions have been found in the expanded use of tax information exchange agreements. These provide tax authorities with access to a wide range of beneficial ownership information for tax purposes only. The OECD model tax information exchange agreement specifically excludes information sharing for other law enforcement or regulatory purposes. In contrast, asset recovery requires a broad range of competent authorities to have access to and exchange information including financial supervisors, financial intelligence units, law enforcement and the judiciary. Consequently, improvements in transparency will have brought about through distinct policy measures involving a different group of institutions.

However, the current low level of compliance suggests that progress will require high level political intervention to overcome corporate and national interests. Progress is most likely to be made where stakeholders at the national and international level are able to raise awareness of the costs and negative impacts of lack of transparency in beneficial ownership.

RECOMMENDATION 7: TACKLING THE PROCEEDS OF CORRUPTION

FATF can address the laundering of the proceeds of corruption more effectively by: a) strengthening the risk and structural elements of the AML/CFT assessment methodology, particularly the risks related to the laundering of domestic and foreign proceeds of corruption; b) incorporating those elements of UNCAC provisions that will strengthen the FATF standards as regards designated corruption predicate offenses and the treatment of politically exposed persons; c) issuing an interpretative note to clarify implementation issues on politically exposed persons; and d) adopting technical solutions that would foster compliance with recommendations on beneficial ownership.

Strengthening Coordination on Anti-Corruption Issues

123. Financial intermediaries, including banks, other financial service providers and gatekeepers – including lawyers, notaries, company formation and real estate agents – are the first line of defense against money laundering. Intermediaries are required to monitor the transactions and behavior of their clients and prospective clients with due diligence and report suspicious activities to the FIU.

124. FIUs centralize and analyze information regarding suspected money laundering activity. Their broader responsibilities vary between jurisdictions. Administrative FIUs are independent bodies which receive, process and then transmit information to the judicial or law enforcement authorities for investigation. FIUs established within law enforcement agencies will have a proactive role in and may even lead the money laundering investigations. FIUs within the judicial branch, may have authority to order coercive and preventative measures in support investigations. In 2007, when Egmont had 101 members, there were 66 administrative FIUs, 29 law enforcement FIUs and 6 hybrids.

125. Suspicious activity reports (SARs) constitute an important source of leads identifying potential corruption and asset recovery cases. Most countries have reported a steady increase in both the quantity and quality of the STRs as financial intermediates gain experience and confidence. However, there is very little official data available on the proportion SARs where the suspicion relates to corruption. The Swiss mutual evaluation report suggests that about seven percent of SARs are corruption related, though about forty percent are unclassified. This seems to be a somewhat higher proportion than seen in other jurisdictions; the Isle of Man, for instance, reports that between one and a half to two percent of SARs were related to PEPs or suspected corruption in the period 2004-08, while Singapore reports that just over one percent of SARs referred for further investigation were corruption-related. Interviews with FIUs in major financial centers tend to confirm that the proportion of PEPs and corruption-related SARs is generally around one percent, though the FIUs are quick to point out that this probably underestimates the amount of corruption-related money laundering. Suspected corrupt activity may not be reported: for example, the financial intermediary refuses a customer but does not file a SAR. Alternatively, the corrupt activity is reported for unrelated reasons: the proceeds of

BOX 20: EGMONT GROUP AND INFORMATION EXCHANGE

The Egmont Group is a network of 116 Financial Intelligence Units established to improve cooperation in the fight against money laundering and financing of terrorism and promote programs in this field at the national level. The Egmont Group manages a secure information network which allows members to exchange information freely that would facilitate analysis or investigation of financial transactions. This information originates from suspicious activity reports or other disclosures from the financial sector, as well as government administrative data and public record information. Members have agreed that information exchanged between FIUs may be used only for the specific purpose for which the information was sought or provided. Rarely is information used as evidence and then only where authorized by the requested FIU. Nonetheless, the Egmont network serves as an important support to international asset recovery both in terms of detecting illicit flows, identifying possible leads, and facilitating tracing and the collection of evidence to support asset recovery cases.

corruption may be indistinguishable from the proceeds of other crimes and are often reported to the FIU because of the suspicious nature of the transaction rather than concerns regarding the origin of the funds.

126. Coordination with the institutions that are engaged in corruption on a regular basis, such as the audit authority and anti-corruption agencies, could be expected to improve understanding of risks and help identify red flags. This would enhance the FIUs ability to detect corruption-related money laundering. Greater awareness of money laundering aspects of corruption would assist the audit authority and anti-corruption agencies engage with the FIU at an early stage in the investigation to assist in tracing.

127. There is little evidence that this coordination is taking place. A study by ESMAALG (the East and Southern Africa FATF-style regional body) of twelve member countries concludes "in most member countries, corruption and money laundering are investigated by agencies that are separate, distinct and have little interaction. This results in a regrettable dissipation of resources and unhealthy competition". Upcoming research by the World Bank of an additional thirteen countries in several regions comes to similar conclusions. There is little understanding of how money laundering and anti-corruption regimes interact and little incentive for countries to these relationships.

128. Clearly, if progress is to be made in tackling the proceeds of corruption these coordination issues will have to be addressed. This can be done at various levels.

129. FATF standards can provide guidance through the clarifications in the methodology encouraging members' to expand the competent authorities for the domestic and foreign information exchange to include audit authorities and anti-corruption agencies as appropriate. The UNCAC Conference of States Parties can offer similar guidance.

130. National authorities can facilitate coordination by integrating these institutions in teams supporting asset recovery. The composition of these teams will vary depending on the institutional configuration at the country level. It will be important for these teams to take account of the risks posed by both domestic and foreign sources of the proceeds of corruption. In countries where the principal risk arises from foreign sources, it may be appropriate to include institutions with international experience and the ability to reach out to foreign jurisdictions in

these teams, such as ministries of foreign affairs and development agencies. This may help overcome reluctance on part of law enforcement to engage on foreign corruption and asset recovery cases.

131. National authorities can provide policy guidance to the key agencies; identifying the risks posed by the laundering of the proceeds of corruption, the source and destination of these funds; laying out the policy priorities in tackling the proceeds of corruption and the role of the various agencies involved in the process. Development of policy guidance will provide an opportunity to clarify how coordination arrangements will work and define shared priorities.

132. Lastly, development partners can assist developing countries by clarifying the linkages between anti-corruption and anti-money laundering agendas within their own institutions. While external assistance on these issues is provided through parallel tracks, possibly with little information flowing between teams working on these issues, the national institutions may be encouraged to see anti-corruption and anti-money laundering as competing agendas. A more coherent approach on the part of external partners would facilitate national authorities' coordination efforts.

RECOMMENDATION 8: COORDINATION AROUND PROCEEDS OF CORRUPTION

National authorities are encouraged to facilitate and expedite the exchange of information and mutual legal assistance regime in support asset recovery. International bodies can support these efforts by: a) developing international standards, guidance and tools supporting streamlined procedures for implementation at the national level; b) promoting and signposting appropriate gateways for formal cooperation, including access to procedural information through appropriate web portals; and c) developing guidance on the use of alternative, informal channels and supporting the development of informal networks linking practitioners at a regional and international level. Given that the mutual legal assistance regime supports a number of treaties and conventions, a joint working group under the United Nations would be well placed to take stock and propose follow-up action on appropriate standards, guidance and tools.

G. FORMAL AND INFORMAL COOPERATION

133. UNCAC Art. 46(1) calls on States Parties "to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention". The convention promotes and facilitates this cooperation by strengthening key elements of the existing international arrangements. Furthermore, there should be strong incentives for countries to collaborate, since all countries are both requesting and requested parties. However, implementation is lagging and there remains room for improvement in the provision of mutual legal assistance to support of asset recovery. At a policy level, the goal is to gradually reduce the scope for discretion and focus attention on technical considerations when responding mutual legal assistance. In the meantime, performance of the mutual legal assistance regime can be strengthened by improving the signaling of gateways and addressing management and capacity constraints. There is also potential for expanding the use of systems established for other purposes, such as the Interpol I-24/7 system, and for making greater use informal cooperation, particularly in the preparatory stages of investigations. Investments in informal networks of practitioners can promote and facilitate this informal cooperation.

Performance of the Mutual Legal Assistance Regime

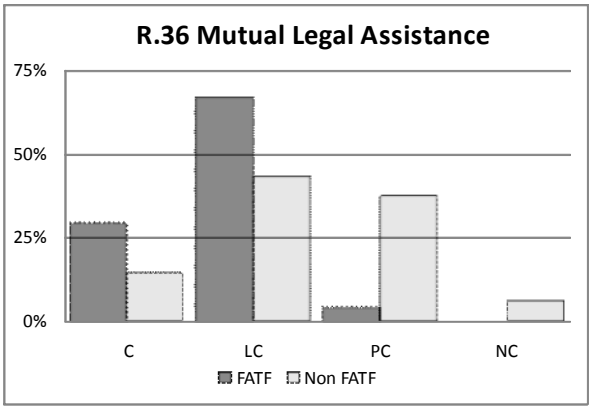
134. Financial Action Task Force (FATF) recommendations address key features of the mutual assistance regime and are closely aligned with the requirements under UNCAC. Mutual evaluation reports provide a means of assessing the level of compliance with the FATF recommendations. Box 21 presents the results of assessments for the recommendations dealing with mutual legal assistance issues for FATF members and non-FATF members.

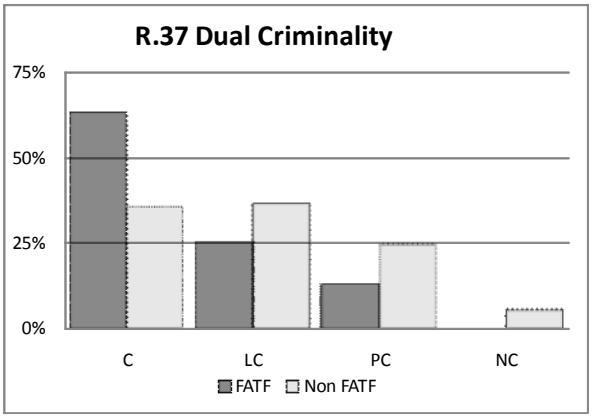
135. FATF recommendation 36 addresses the legal basis and effectiveness arrangements for providing mutual legal assistance. The criteria for assessment are broad, encompassing the nature of assistance provided, the provision of assistance free from unduly restrictive conditions and the existence of clear and efficient procedures for attending to requests. Both the FATF recommendation and UNCAC require that assistance should not be denied on grounds of bank secrecy (Art 46 (8)) or because the request deals with fiscal matters (Art 46 (22)). Assessments indicate that compliance is far from comprehensive – just 29 percent of FATF members and 11 percent of non-members are compliant – and reveal significantly stronger compliance among FATF members than non-members.

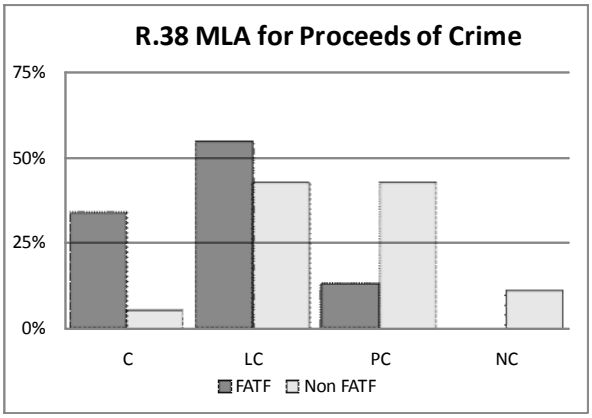
136. FATF recommendation 37 and provisions under UNCAC seek to restrict the scope for States Parties to deny assistance on grounds of dual criminality to requests for assistance in executing coercive actions (UNCAC Art 46(9)(b)). That recommendation and UNCAC (Art 43 (2)) also ask States Parties to adopt a conduct-based test to establish whether dual criminality is satisfied. This requires requesting states to demonstrate that the underlying acts would be a criminal offense in both countries rather than exactly matching the offenses across legal regimes. Again, FATF assessments suggest that compliance with the dual criminality standard is incomplete, with the performance of FATF members significantly stronger than non-members.

137. FATF recommendation 38 seeks an effective regime for mutual legal assistance in the identification, freezing, seizure and confiscation of the proceeds of crime, including mechanism to recognize and enforce foreign confiscation orders. UNCAC has similar requirements for

BOX 21: FATF ASSESSMENTS OF THE MUTUAL LEGAL ASSISTANCE REGIME







C=compliant. LC=largely compliant. PC=Partially compliant. NC=Non-compliant.

Data represents assessments undertaken in period 2003-09, including 24 assessments of FATF members and 100 assessments of non-members.

criminal forfeiture (Art. 54 (1)(a)). Again, compliance with recommendation 38 is far from complete – just 33 percent of FATF and 5 percent of non-members – with significantly lower ratings for non-members. This is, in large part, owing to the poor coverage of mechanisms enforcing foreign confiscation orders. A recent survey of the Asia and Pacific region, for instance, revealed that less than half of the jurisdictions had put in place mechanisms that would allow them to recognize a foreign confiscation order.

138. Furthermore, both the FATF recommendations and UNCAC are somewhat ambivalent in their treatment of non-conviction based forfeiture. FATF addresses this instrument as an additional criterion for recommendation 3, which lays out the legal framework for confiscation, and makes no specific mention in the recommendations on cooperation. Similarly, UNCAC Art 54(1)(c)) leaves cooperation with regard to non-conviction based forfeiture to the consideration of States Parties. FATF assessments suggest that many jurisdictions do not recognize requests assistance related to NCB and civil forfeiture. Recent assessments by the European Commission have also highlighted the lack of cooperation in executing NCB and civil forfeiture judgments within the European Union, signaling this as one of most serious impediments to effective cooperation on asset recovery.

Strengthening the Mutual Legal Assistance Regime

139. Most of the legal and procedural constraints to effective mutual legal assistance can be addressed by national authorities directly. Countries have discretion as to whether to restrict mutual legal assistance by requiring dual criminality, speciality (the information may only be used for the purpose, and specific

charges, listed in the request), proportionality (the response should only include the information needed for the purposes of the request) and reciprocity (the requesting state must confirm that they would provide information in the same circumstances) in order to provide mutual legal assistance.

140. The Harare Scheme, which provides a framework for mutual legal assistance between members of the Commonwealth, makes a presumption of cooperation, with the authorities declining on grounds of dual criminality only where there are very particular concerns regarding the nature of charges and procedures. The UN Informal Expert Working Group on mutual legal assistance advocated a similar approach with regard to limitations on the use of information, with a presumption that there would be no restrictions on use – beyond the requirement for confidentiality – unless otherwise requested by the authorities. The interests of effective cooperation are best served by a gradual move in this direction, towards a presumption of assistance and the denial or restriction of cooperation only in extraordinary circumstances.

141. International agreements provide a framework for addressing these issues at a multi-lateral level. The on-going review of the FATF recommendations and methodology provides the opportunity to strengthen international standards. In this context, FATF could strengthen current arrangements by explicitly requiring members to cooperate in the exchange of information and enforcement of orders related to non-conviction based and civil forfeiture under recommendation 38, thereby addressing one of the principal constraints on cooperation on asset recovery. At the same time, the United Nations can play a useful role in facilitating the dissemination of good practices.

142. FATF assessments suggest that management and capacity issues are at least as important in determining the effectiveness of the mutual legal assistance regime as the legal and procedural arrangements. Solutions lie in the hands of national authorities, in terms of putting in place well signaled gateways to channel assistance, laying out clear, streamlined procedures and ensuring that the central authority has the capacity to cope with demand.

143. The UN Expert Group Working Group on Mutual Legal Assistance underlined the importance of having effective central authority, covering the various treaty commitments, the purpose being to facilitate coordination within and between countries through a clearly marked gateway. While this structure was built into UNCAC, only 55 of the 140 States Parties have notified the United Nations regarding their designated central authorities as of September 30, 2009. While most countries the authorities are the same for both UNCAC and UNTOC, this is not always the case. Several countries have identified more than one central authority and there are also parallel structures, notably the use of Interpol National Central Bureau as the emergency point of contact. Clearly, there is a need to complete the structure, putting in place central authorities where these do not yet exist, and give more attention to signposting if the gateway function is to work as intended.

144. Well-documented, streamlined domestic procedures greatly facilitate the preparation and processing of MLA requests. National legislation which details the nature of assistance available, outlines the procedures and institutional responsibilities for rendering assistance, limits the grounds for denying assistance and the scope for appeal can provide an effective framework. Where countries have yet to enact legislation, or legislation is out of date, the development of a regulatory framework provides an opportunity to bring the mutual legal assistance regime in line with international good practice. Where possible such procedural

BOX 22: HOW MUCH MUTUAL LEGAL ASSISTANCE?

Unfortunately the lack of comprehensive and standardized data on mutual legal assistance makes it impossible to draw firm conclusions regarding composition and trends. That said, FATF mutual evaluations do provide some insight into key characteristics of the mutual legal assistance regime.

The data for incoming mutual legal assistance requests from the 2007 United Kingdom FATF mutual evaluation report presented below, indicate that: around half of the mutual legal assistance requests dealt with non-coercive matters; a fraction of one percent dealt with asset restraint; around one percent was primarily concerned with money laundering and around two percent had a money laundering component. The low proportion of MLA requests related to money laundering in noteworthy given London's status a financial center but may reflect registration of requests under the predicate offense.

	2002	2003	2004	2005	2006
Asset Restraint	6	5	11	5	7
Coercive Evidence	87	58	45	65	54
Non-Coercive	1,428	1,283	1,561	1,803	2,187
Service of Process	1,588	1,512	1,300	1,504	1,073
Total	**3,109**	**2,858**	**2,917**	**3,377**	**3,321**

Most jurisdictions that reported total MLA data indicated that MLA activity was significantly lower than the UK's. Canada, for instance, received an average of 350 requests a year over the same period. In these countries, the proportion of money laundering-related requests was between three and ten percent of the total. Reports that identified corruption-related MLA include Singapore, at 3.5 percent of incoming MLA requests in the period 2004-07, Jersey 9 percent of incoming requests 2003-08, and Switzerland, at 2.8 percent of total MLA activity in the period 2002-04.

information should be posted on the institution's website for ease of access. UNODC is currently revising its MLA-writer tool. This tool will help central authorities access information on procedures, systematize the presentation of MLA requests and track the MLA process.

145. Lastly, practitioners have repeatedly stressed the need for central authorities to be adequately resourced with the requisite legal skills, experience, and - ideally - language skills. Unfortunately, many of the central authorities face capacity limitations, particularly in developing countries where financial and human resource constraints are often acute. Capacity limitations have been identified as an important factor in poor response times in both requesting and requested countries, poor quality requests which fail to provide the necessary substantiating information or evidence and inefficient back-and-forth communications. That said, it is important to bear in mind that capacity requirements will vary greatly between jurisdictions reflecting the overall level of cooperation and the nature of the issues addressed (see Box 22).

146. Long-term solutions clearly lie in raising awareness of the critical role of the international cooperation function and of the importance of investing in staff. In the short-term, some regional organizations have invested in training and seminar opportunities that help bring practitioners together. Countries have also found the secondment of practitioners from corresponding jurisdictions to be particularly helpful in building relationships and explaining procedures. Practitioners stress that MLA works best where the corresponding parties already have some familiarity with the jurisdiction, whether that be through working on previous requests or

contacts through training or other international events. Where central authorities have invested time in building these relationships, mutual coaching by the requesting and requested authorities ultimately pays off in a more effective and efficient process.

Alternative Mechanisms, Informal Cooperation and Networks

147. Alongside the arrangements for cooperation through mutual legal assistance, there are formal structures for information exchange within networks of institutions established for specific functions and governed by international protocols and agreements. The two key networks for the purposes of asset recovery are the Interpol's network of National Central Bureaus and their supporting secure communication system (see Box 13 on page 25) and the Egmont Group of FIUs (see Box 20 on page 38). Both of these mechanisms provide alternative channels for communication, particularly during early stages of investigation. The information gathered through these channels can be used, subject to the constraints imposed, to support the preparation of requests for mutual legal assistance requests when evidence, coercive or preventative measures are required.

148. There is a broad consensus among practitioners that proactive use of informal channels and alternative mechanisms for cooperation can complement and often substitute for formal MLA procedures, particularly during the early stages of investigations. Many of the requests for assistance on routine, non-coercive measures could be dealt with through informal channels, such as gathering information from public records, contacting potential witnesses to determine availability and taking voluntary statements. Mutual legal assistance would then be used primarily for measures that would require the direct participation of law enforcement authorities during the investigation (such as the interviewing of involuntary witnesses, interviewing suspects under caution, obtaining bank and financial information, search and seizure requests), preventive and ultimately coercive measures. As long as care is taken to gather information lawfully, with due regard to future use as evidence, and the authorities in both jurisdictions are informed, informal cooperation along these lines can greatly follow-up though formal channels by ensuring that requests are well documented.

149. Contextual considerations, such as the status of diplomatic relations between countries, the perceived risk that information will be abused owing to corruption or to serve political agendas, are important in determining the potential for informal cooperation. But so too are

BOX 23: INFORMAL ASSET RECOVERY NETWORKS

The Camden Asset Recovery Inter-Agency Network (CARIN) was launched in 2004 as an informal network of practitioners and experts with the intention of improving mutual knowledge, information exchange and proactive cooperation on the recovery of the proceeds of crime at an international level. CARIN has a permanent secretariat is based in Europol headquarters. Membership largely comprises European Union countries, mostly represented by their Asset Recovery Offices, and a few other financial centers some with observer status and international organizations. Besides networking through its annual plenary meeting, members are encouraged to collaborate in informal information exchange and facilitate mutual legal assistance. CARIN has proved extremely successful in facilitating cooperation between member countries. Building on this success, a similar network (ARINSA) was launched, with assistance from UNODC and UK DfID, in Southern Africa in mid 2009. CARIN has expressed interest in collaborating with the ARINSA network on operational and capacity building activities and is exploring similar networking opportunities in other regions.

personal contacts. The effectiveness of informal – and to a lesser extent formal – cooperation largely depends on trust which, in turn, develops through familiarity, working relationships and mutual respect for the informal rules of cooperation, such as confidentiality and reciprocity. Practitioner networks provide a framework for developing these informal cooperation arrangements. Box 23 highlights an informal practitioner network specifically established to support asset recovery. Training activities provide another avenue for networking. The International Center for Asset Recovery, for instance, has launched a virtual network for the 600 or more participants in training programs from thirty countries, to facilitate informal contacts to solve technical and operational issues.

150. Experience suggests that investments in networks bring ample returns in terms of more effective cooperation and, ultimately, easier more effective asset recovery. National authorities are best placed to determine the regional and international networks that most effectively meet their needs. The international community can play a useful role in supporting these initiatives and facilitating connections between networks. There are many other networks that share an interest in asset recovery, usually as part of broader law enforcement, anti-corruption or anti-money laundering agenda. Continued engagement with these networks is particularly useful in raising awareness and disseminating information on asset recovery at an international level.

RECOMMENDATION 9: COOPERATION ON ASSET RECOVERY

National authorities are encouraged to facilitate and expedite the exchange of information and mutual legal assistance regime in support asset recovery, by: a) developing international standards, guidance and tools supporting streamlined procedures for implementation at the national level; b) promoting and signposting appropriate gateways for formal cooperation, including access to procedural information through appropriate web portals; and c) developing guidance on the use of alternative, informal channels and supporting the development of informal networks linking practitioners at a regional and international level. Given that the mutual legal assistance regime supports a number of treaties and conventions, a joint working group under the United Nations would be well placed to take stock and propose follow-up action on appropriate standards, guidance and tools.

H. ALTERNATIVE APPROACHES

151. UNCAC provides a framework for states to collaborate in the asset recovery process. There are circumstances, however, where jurisdictions that have been the victim of corruption are unable or unwilling to pursue the recovery the proceeds of corruption. Private actors are currently exploring mechanisms by which they may intervene and take action to freeze and possibly seize stolen assets. Developments in this area are unlikely to be driven through a negotiated process in the framework of international agreement. Instead, alternative avenues will be opened through the decisions of national authorities, judiciaries and activist litigants. This section outlines developments in three areas – transnational criminal approaches, human rights approaches and third party civil litigation – and explores the implications of these developments for the asset recovery regime.

Transnational Criminal Approaches

152. The International Criminal Court, established in 2002, exercises jurisdiction over "the most serious crimes of concern to the international community as a whole", comprising genocide, crimes against humanity, war crimes and aggression, where the national authorities are unwilling or unable to pursue the perpetrators of these crimes. The *ad hoc* special tribunals established by UN Security Council Resolutions to address crimes arising in conflicts in the Former Yugoslavia (ICTY established 1993), Rwanda (ICTR established 1996) and Sierra Leone (ICSL established 2002) are similarly constituted to address crimes of violence arising out of armed conflict. The jurisdiction of these courts is purposefully limited to offenses related to conflict and attacks on civilian populations, without reference to the economic dimension of these crimes.

153. Nevertheless, the International Criminal Court and the special tribunals can play role within overall international architecture for asset recovery since they do have the power to order

BOX 24: DEALING WITH CORRUPT REGIMES

Asset recovery is predicated on the active cooperation of states in the prevention and combating of corruption. Such cooperation will not be forthcoming where corrupt regimes are actively involved in plundering national assets. In these circumstances the overriding obligation to respect sovereignty leaves little scope for States parties to intervene.

National authorities are reluctant to intercept the proceeds of corruption when they are channeled between official accounts following duly authorized procedures. Officials enjoy immunity from prosecution while in office, a principle upheld by the International Court of Justice, preventing national authorities from initiating criminal proceedings. Furthermore, UNCAC 40(2) allows states considerable discretion in determining the appropriate officials that may benefit from these immunities.

International practice has been to extend immunities under criminal law to property held in the name of the official, but not to recognize those immunities where property is held in the name of corporate instruments or associates. The extent to which these immunities apply under civil (private) litigation is less clear cut, with some commentators arguing that officials cannot enjoy immunity from civil litigation for activities that they undertake in a private capacity in pursuit of private economic interests. Human rights approaches may lead to litigation that will test the extent of these immunities.

BOX 25: INDEPENDENT INVESTIGATORS

CICIG (*Comisión Internacional Contra La Impunidad en Guatemala*) began its operations in January 2008 under an agreement signed by the UN and the Guatemalan authorities, with a mandate to assist the Guatemalan authorities identify, tackle and dismantle organizations that have facilitated and shielded criminal activity. Within this broad framework, CICIG is empowered to investigate high level corruption cases. CICIG's primary role is to support the efforts of the Attorney General, working with the Public Prosecutors Office in criminal prosecutions. However, CICIG may also participate as complimentary prosecutor (*querellante adhesivo*) in the prosecutorial process. This allows CICIG to promote criminal proceedings by filing criminal petitions with the relevant national agencies. CICIG is staffed by international law enforcement professionals, most of whom are seconded from their national authorities. The team includes four financial investigators, with experience in tracking illicit financial activity, the preparation and prosecution of financial crimes and corruption cases and undertaking international legal cooperation. CICG recently requested the recruitment of additional financial investigators.

the tracing, freezing and forfeiture of assets as a penalty linked directly or indirectly to a crime within their jurisdiction, and all member states must comply. Where the defendants can be captured, tried and convicted, the court can distribute forfeited funds and fines to victims through a trust fund or, alternatively, order defendants to pay reparations directly to victims. Precisely how the distribution between national authorities and victims would be managed remains to be seen. ICTY and ICSL have on-going investigations aimed at tracing the proceeds of crime and corruption transferred abroad. Investigations have led to the freezing of some assets but have yet to recover funds. The use of judgments by international criminal courts to support subsequent civil suits before domestic courts may constitute the most promising avenue for recovery initiated by the victim state and third parties.

154. The International Commission against Impunity (CICIG) in Guatemala represents a variation on this approach (See Box 25). CICIG has been established at the request of the Guatemalan authorities and will work through national structures and courts. However, CICIG is an international body and retains relative autonomy in investigating and prosecuting cases. Furthermore, while corruption is not the focus of CICIG's work, CICIG is empowered to investigate corruption as an instrumentality of organized crime and human rights violations. CICIG has been financed by the international community and may serve as a model for future engagement where national authorities seek assistance in dealing with governance failures.

Human Rights Approaches

155. The human rights approach seeks to prevent, deter and sanction corruption by using the mechanisms put in place through national and international law to hold states and individuals accountable for human rights violations. While there is extensive experience public interest and private litigation to enforce human rights and to seek compensation for the damages only recently have attempts been made to extend this practice to the issue of corruption.

156. The challenge at a conceptual level is to establish the causal link between corruption and the violation of human rights obligations under domestic and international law. A recent publication by the International Council on Human Rights Policy and Transparency International outlines a systematic approach and suggest lines of argument that would support the causal links between corruption and a range of human rights violations. However, the evidentiary

BOX 26: TESTING THE HUMAN RIGHTS APPROACH

The Spanish human rights organization *Asociación pro Derechos Humanos de España* (APDHE), in collaboration with the Open Society Justice Initiative and EG Justice, filed a complaint with the African Commission on Human Rights and Peoples' Rights in 2008 alleging spoliation and corruption by the Government of Equatorial Guinea, violating the right under the Art 21 of the Charter which provides that "*All peoples may, for their own ends freely dispose of their natural wealth and resources … based on the principle of mutual benefit and international law. In no case may a people be deprived of its means of subsistence*". The complaint argues that there is no realistic prospect of obtaining redress through the authorities in Equatorial Guinea and thereby seeks jurisdiction through the Commission. The Commission is currently reviewing the admissibility of the complaint, which has been contested on grounds that the organization submitting the complaint is not of African origin.

In a parallel process, APDHE has used provisions under Spanish law allowing petitioners lodge an *acción popular* with an investigative judge who determines whether the complaint merits investigation, authorizes the investigation and then rules whether the complaint should proceed to trial. APDHE's complaint accuses the President of Equatorial Guinea and his family of laundering the proceeds of corruption in Spain, thereby establishing the jurisdiction of the Spanish courts. The complaint has been referred to the state prosecutor who determined that there was a case to answer and in early 2009 the case was sent to the pre-trial investigative court.

requirements that would be required to establish these casual links have yet to be tested in court. There are two principal channels by which plaintiffs may seek judgment, both of which are currently being tested by civil society organizations (see Box 26).

157. One approach is through the domestic courts in country where the human rights violation has taken place. The victims of human rights abuses may also seek redress through supra-national, regional human rights courts - the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights – where the national authorities have been shown to be unresponsive to complaints or by appealing the judgment of a national court. Regional courts can issue judgments enforceable against states and individuals, and are empowered to distribute reparations among victims and mandate arrangements in compliance with these judgments.

158. Plaintiffs may also seek recourse where courts claim universal jurisdiction: the authority to prosecute crimes that were committed beyond their borders, regardless of any relation between the perpetrator, the victim or the crime with the jurisdiction that will issue judgment. In the United States, the Alien Tort Statute has been used extensively to seek judgments against foreign states and companies for crimes that have taken place abroad and awarded substantial damages in some cases. The US Supreme Court has upheld judgments arguing that ATS provides for universal jurisdiction on crimes against humanity and human rights offenses. In Europe, the Council of the European Union on Justice and Home Affairs has agreed that countries should actively pursue crimes against humanity and gross human rights violations, establishing mechanisms for cooperation on these matters in 2002. There has been a steady increase in the number of cases prosecuted under national legislation that provides for universal jurisdiction, with successful prosecutions Spain, France, Belgium, the United Kingdom and the Netherlands

since 2003. The admissibility of test cases applying these procedures to corruption by high level officials is currently under judicial review in France and Spain.

159. At this stage it is unclear whether the human rights approach to corruption will prove successful or which judicial authorities will accept jurisdiction. Much will depend on the decisions of judicial authorities in test cases, both through courts of the first instance and on appeal. This has raised concerns that issues which have significant impact on matters of foreign policy and national economic interests may be determined through judiciary rather than the executive. Some countries have already amended procedures so that complaints of private parties are channeled through the public prosecutor, who will determine whether or not to proceed, with the possibility of intervention by the executive, preventing direct recourse to the judiciary. It has been argued that the establishment of the International Criminal Court renders the assertion of universal jurisdiction by national authorities superfluous and there are on-going debates regarding legislative intervention to curtail the scope of universal jurisdiction.

Private Rights of Action in Civil Law

160. UNCAC Art 35 requires States Parties to provide mechanisms that would allow natural and legal persons to undertake private rights of action to seek compensation for damages as a result of acts of corruption. This concept is more fully developed under the Council of Europe's Civil Law Convention on Corruption, which entered into force in 2003. The Civil Law Convention outlines the mechanisms by which natural and legal persons who have suffered damage through corruption can defend their rights and interests, including the possibility of receiving damages. 39 of the 46 member states of the Council of Europe's Group of States against Corruption (GRECO) have signed – though notable financial centers are among those that have not – and 33 countries have ratified the convention.

161. The Civil Law Convention defines corruption narrowly in terms of bribery or means of securing undue influence, thereby excluding many of the corrupt acts covered under UNCAC. Otherwise the Convention provides a broad framework. The Convention considers damages to include material damage, loss of profit and non-pecuniary loss such as reputational damage. Those who directly participate in the corrupt act are held liable, but so too are those that have facilitated the act of corruption through omission. While the complainant is required to demonstrate the causal connection between the act of corruption and the damages, the Convention does not exclude claims for compensation from persons that were not the victim. Furthermore, the convention includes the right to seek damages against public officials, requiring states to establish "appropriate procedures" to pursue such cases.

162. While the Civil Law Convention is, potentially, a powerful tool, a recent review of selected GRECO member states concluded that few of them had made progress in implementation: civil law tools were generally poorly developed and rarely used. Only the United States of America, United Kingdom and Germany are cited as having used civil litigation in corruption cases[i]. Furthermore, the scope of application is very narrow, with many potential cases settled through arbitration and few reaching the courts. Companies have not sought to use private action to seek redress against competitors. Third parties have yet to use private rights of action to pursue direct and indirect damages arising from corruption cases. And finally, states have yet to use civil action as means of recovering the damages caused by procurement and concessions that have been tainted and costs inflated, by bribery and other corrupt practices. In most jurisdictions, private rights of action in civil law offer potential but are not yet a reality.

I. CONCLUDING REMARKS

163. Readers familiar with the history of the asset recovery agenda over the last five to six years may have had a sense of *déjà vu* reading the report, particularly recommendations related to the setting up of teams to work on proceeds of corruption issues in financial centers. Similar recommendations emerged from the G8 Sea Island Summit in June 2004, about six months after UNCAC opened for signature (see Box 27). There has been some, rather uneven progress in establishing institutional capability to deal with asset recovery but this capability has not always been put to use. Commentators have argued that this is partly a reflection of limited demand. So what has changed in five years? What would make the prospects brighter today than five years ago? Two developments offer particular promise.

164. First, there has been an important shift of perspective in the major economies. The Sea Island summit sought to raise awareness on the asset recovery agenda and sought to mobilize national institutions to support these initiatives. Recent G20 statements have extended the agenda by recognizing that asset recovery has to be paired with measures to tackle illicit outflows. Asset recovery is now seen a part of a broader issue of international corruption across a broad front using a range of tools, including both UNCAC and the FATF process.

165. Second, there are more actors involved in the asset recovery agenda, with a much more focused approach. Developing countries now have a variety of windows where they can seek assistance. These include multilateral institutions such as the World Bank and UNODC's Stolen Asset Recovery Initiative and the Interpol Anti-Corruption Office. They also include non-governmental initiatives, such as the International Center for Asset Recovery. These institutions offer a range of assistance to support national asset recovery programs so that countries have the

BOX 27: REVISITING THE SEA ISLAND COMMITMENTS

G8 Justice and Home Affairs Ministerial Declaration

G8 Accelerated Response Teams. G8 countries today commit to utilize and deploy joint teams of forfeiture-related mutual legal assistance experts, in appropriate large-scale corruption cases, at the request of victim states whose assets have been secreted abroad. Teams from countries that volunteer to participate would work with concerned authorities in the victim state on the form and substance of their legal assistance requests – and, where appropriate, assist in underlying investigations such as on developing leads for records and assets located abroad – in order to facilitate quicker action on requests. Practitioners from relevant public authorities would be assembled on a case specific basis and could also include non-G8 country experts, as appropriate.

G8 Asset Recovery Case Coordination. At the request of a state that is a victim of large-scale corruption, G8 countries would also consider establishing case-specific coordination task forces, including volunteer G8 and non-G8 countries as appropriate, to work through responses to mutual legal assistance and forfeiture requests.

G8 Asset Recovery Workshops. As appropriate, the G8 will be prepared to convene regional workshops to exchange information and best practices with potential victim states on international financial investigation techniques and on mutual legal assistance procedures to recover and, as appropriate, return assets to victims. Such efforts would be undertaken in coordination with existing regional and international organizations, and specialized agencies such as the UNODC.

support they need to pursue asset recovery cases.

166. Looking forward, two actors that are not part of the asset recovery mainstream can play an important role in supporting this agenda in both financial centers and developing countries: international development agencies and civil society. Possible roles for these actors are touched on briefly below. The section concludes with a brief discussion of the implications of the policy considerations laid out in this note for the joint UNODC and World Bank Stolen Recovery Initiative.

Implications for Development Assistance

167. While the development assistance community has made bold commitments, notably in the Accra Agenda for Action, in terms of recovering the proceeds of corruption, there remains some uncertainty as to how this can best be achieved. In part this is because the asset recovery agenda pushes at the margins of the traditional mandate and scope of development assistance. Clearly, the role that development agencies can play will depend on the institutional context, mandate and their role in formulating broader government policy. Development agencies carry more weight in some jurisdictions than others. Four salient policy issues are addressed here.

168. First, start at home. Asset recovery targets the proceeds of corruption that find safe haven in financial centers. Before turning to the needs of the developing world it would be helpful if development agencies could determine whether their own country is a destination of the proceeds of corruption, whether money laundering controls are sufficiently robust and whether the mechanisms for asset recovery meet the highest standards foreseen under UNCAC. Measures taken strengthen the domestic asset recovery regime may often be the most effective way to help developing countries recover the proceeds of corruption: tightening up on domestic arrangements will also have a deterrence effect.

169. Second, exert pressure on peers. The higher overall standard of anti-money laundering controls and asset recovery arrangements the more difficult it will be for corrupt officials to hide the proceeds of corruption. There are numerous opportunities for financial centers to review the performance of their peers and hold them to account. It would be helpful if development agencies and their counterparts in other government agencies used these opportunities to demand the highest standards. Not only does this help developing countries it also helps "level the playing field" between financial centers.

170. Third, go to the experts. Asset recovery entails investigative and legal work that most development agencies are ill equipped to advise on or supervise. In addition, dealing with litigation and the prosecutions of corrupt officials raises concerns about involvement in the internal affairs of partner countries and liability issues that make it difficult to provide assistance in specific cases, the very area where developing countries need help. The law enforcement and prosecution services in financial centers are the best placed to advise and assist their counterparts in developing countries. Institutions such as INTERPOL can play a similar role at a multi-lateral level, both in terms of providing technical assistance and providing a global service, such as UMBRA the corruption information exchange and analysis platform. Development assistance can play a facilitating role in this operational work by financing these promising initiatives.

171. Fourth, take the long view and see whole picture. There is unlikely to be a sudden burst in asset recovery activity and returns. Progress will take place over the long-term as institutional capacity is built up, legal and investigative tools are put in place and agencies built and expand

on successful cases. The proceeds of crime agenda followed this trajectory and, notwithstanding a handful of high profile cases early on, this looks to be the profile for the proceeds of corruption. Development agencies are well placed to support this kind of institutional development assistance through policy, legal advice, knowledge generation and capacity building. They have proved less effective in seeing the whole picture, largely because there is often a division between anti-corruption and anti-money laundering in development agencies just as there is a division in countries that they are trying to assist. Similarly, development agencies have tended to focus on prevention, paying little attention to effective law enforcement. These bridges will have to be crossed if development assistance is to be effective in supporting the asset recovery agenda.

Dealing with the Demand Side

172. This policy note has dealt almost exclusively with the supply side of asset recovery: putting in place systems and capabilities that will enable developing countries to pursue asset recovery cases and strengthening controls against the proceeds of corruption in financial centers. However, without the demand for asset recovery, without a steady stream of new asset recovery cases, the structures that have been put in place to support the asset recovery process will not develop. Similarly, little progress is likely to be made in addressing proceeds of corruption risks without demand for change in the financial centers. Civil society plays a role in promoting demand in both contexts.

173. Civil society organizations have helped in bring to light, document and promote investigations into corruption cases, sometimes at great personal risk of legal or physical reprisals. Civil society organizations have helped defend investigators and prosecutors from interference by powerful interests that may want to curtail investigations or dismantle their institutions. They have also served as a bridge, working with civil society organizations in financial centers to promote more active collaboration in investigations and asset recovery cases. Finally, civil society organizations have helped in monitoring the return of assets to ensure that these resources are used effectively. All of these roles help promote the authorities' active engagement on asset recovery cases.

174. Awareness raising and sharing of information about asset recovery can help develop capacity to engage on these activities across a wider range of countries and actors. However, it is important to maintain a sense of proportion. A focus on the resource mobilization potential of asset recovery may raise unrealistic expectations regarding the amount and timing of returns. This would be counterproductive. Instead, asset recovery has to be seen as part of a broader effort to improve governance, strengthen the rule of law and clamp down on corruption.

175. Civil society organizations have adopted two contrasting approaches the proceeds of corruption and asset recovery agendas in financial centers: one that entails close collaboration with the authorities in the design of technical measures to address a policy challenge, the other as advocates for a change in policy.

176. The collaborative approach is illustrated by the recent the Transparency International UK report "*Combating Money Laundering and Recovering Looted Gains: Raising the UK's Game"*. Financed by DfID and prepared in collaboration with the authorities, the report focuses on the domestic agenda and the specific measures that can be undertaken by the authorities to strengthen defenses against the proceeds of corruption. This approach serves several purposes. It increases awareness around the proceeds of corruption risks. It focuses attention on actionable

recommendations and can serve as the basis for monitoring progress and on-going dialogue with the administration. As a local civil society organization, TI UK is well placed to promote the reform agenda by engaging with key stakeholders in civil society and the media, as well as the executive and the legislature. For all of the above reasons, it would be highly desirable to see similar civil society engagement in other financial centers. The counterpart to civil society engagement, of course, is the willingness of national authorities to collaborate in – and possibly finance – the diagnostic process, the identification and follow-up on key recommendations.

177. The advocacy approach seeks to generate a sense of public outrage that will compel national politicians to address proceeds of corruption risks at home and through their representation in international bodies. The Global Witness report "*Undue Diligence: How banks do business with corrupt regimes*" and on-going advocacy campaign provides an excellent example. The report is a call to action on a set of high level recommendations aimed at an international audience. Particular attention is given to FATF as an international standard setting body, though the report also presents specific recommendations for national authorities, regulators, banking supervisors and commercial banks. The report and follow-up campaign seek to make the key issues accessible and relevant to a wider audience.

178. Effective advocacy campaigns will strengthen the asset recovery agenda. This underlines the importance of communications, raising awareness about the risks and costs of international corruption, the successes in asset recovery and the benefits in terms of development impacts. Communicating success helps focus on results and mobilize continued support for asset recovery agenda. In this context, this note's first recommendation is worth repeating.

RECOMMENDATION 1: COMMUNICATING SUCCESS

National authorities are encouraged to document and disseminate successful experience in asset recovery, demonstrating not only the financial benefits but also impacts in terms of improvements in the quality of life and governance. Success stories should be used to promote awareness of and support for asset recovery activities at the national and international levels.

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