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Accelerated International Momentum to Return Stolen Assets

United Nations Office on Drugs and Crime (UNODC)
UNODC World Bank Stolen Asset Recovery Initiative (StAR)

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Accelerated International Momentum to Return Stolen Assets
United Nations Office on Drugs and Crime (UNODC)/ UNODC World Bank Stolen Asset
Recovery Initiative (StAR)

Commitment: *We reaffirm the importance of freedom, human rights and national sovereignty, good governance, the rule of law, peace and security, combating corruption at all levels and in all its forms and effective, accountable and inclusive democratic institutions at the subnational, national and international levels as central to enabling the effective, efficient and transparent mobilization and use of resources. (para. 5, AAAA) We will redouble efforts to substantially reduce illicit financial flows by 2030, with a view to eventually eliminating them, including by combating tax evasion and corruption through strengthened national regulation and increased international cooperation. (para. 23, AAAA) We urge all countries that have not yet done so to ratify and accede to the **United Nations Convention against Corruption**, and encourage parties to review its implementation. **We commit to making the Convention an effective instrument to deter, detect, prevent and counter corruption and bribery, prosecute those involved in corrupt activities and recover and return stolen assets to their country of origin. We encourage the international community to develop good practices on asset return. We support the Stolen Asset Recovery Initiative of the United Nations and the World Bank and other international initiatives that support the recovery of stolen assets.** We further urge that regional conventions against corruption be updated and ratified. **We will strive to eliminate safe havens that create incentives for transfer abroad of stolen assets and illicit financial flows.** We will work to strengthen regulatory frameworks at all levels to further increase transparency and accountability of financial institutions and the corporate sector, as well as public administrations. We will strengthen international cooperation and national institutions to combat money-laundering and financing of terrorism. (para. 25, AAAA)*

Commitment: *Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development. The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. (para. 35, Agenda 2030)*

Monitoring implementation: Sustainable Development Goals: 16.4 *By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime; 16.5* *Substantially reduce corruption and bribery in all their forms; 16.6* *Develop effective, accountable and transparent institutions at all levels; 17.1* *Strengthen domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection*

1. Introduction

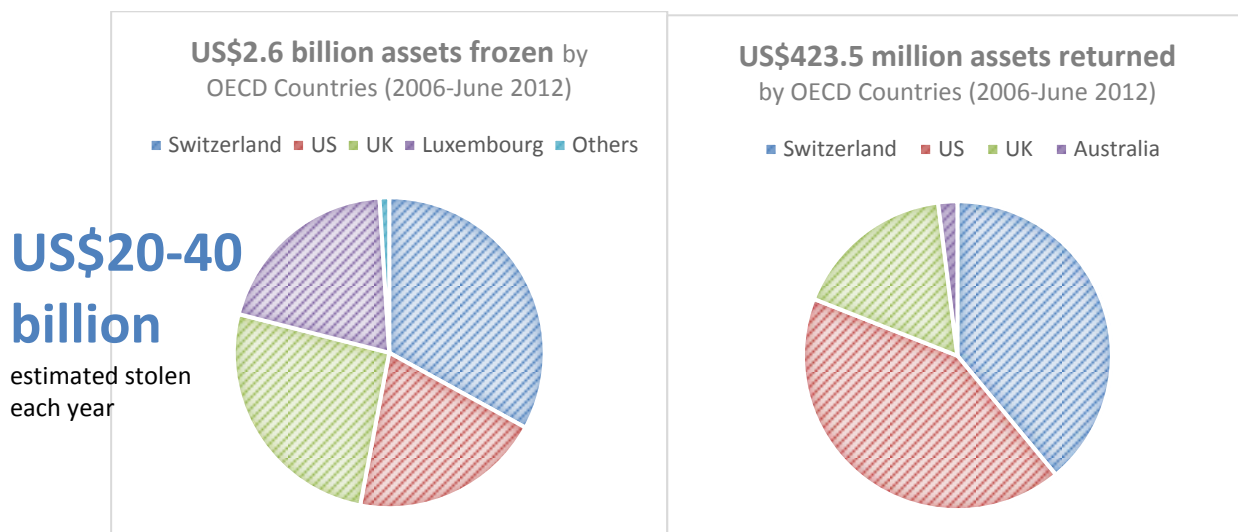
“In the first place, the return of the proceeds of corrupt activities can have an important development impact when returns are used for development purposes: Recent examples have resulted in improvements in the health and education sectors and in the reintegration of displaced persons. Asset recovery also helps to deter corruption by showing that corrupt officials will be deprived of their illicit gains. Finally, additional benefits accrue in terms of improved international cooperation and enhanced capacity of law enforcement and financial management officials.”¹

The concern over the steady increase in funds of illicit origin flowing out of developing countries, and the impact of that on corruption, the rule of law, the ability to manage economic policy, create equitable growth and raise domestic resources to enable governments to deliver vital basic services in health, security and education has prompted Member States to accelerate action on asset recovery in a wide variety of multilateral fora.

The UN Convention against Corruption (UNCAC), adopted in 2003, created a binding legal framework for prevention and suppression of corruption and international cooperation in this area. The Convention which has 178 States parties dedicated a separate chapter to the recovery and return of assets, constituting the proceeds of corruption, as a “fundamental principle” of the Convention. In fact, the political momentum for Member States to implement effective asset recovery for sustainable development has never been higher. This has been reflected in the framework documents which list the commitments of the Sustainable Development Agenda, as well as in recent resolutions of the Conference of the States Parties to UNCAC and in international fora including meetings of the G20 (where effective asset recovery has become a priority issue) and at the UK Anti-Corruption Summit, where practical, forward looking commitments to use asset recovery as a powerful tool to combat corruption were made.²

¹ Stolen Asset Recovery Initiative of the World Bank and UNODC and the OECD, *Few and Far: The Hard Facts on Stolen Asset Recovery*, 2014.

² See StAR, “G20 Anti-Corruption Working Group,” at <http://star.worldbank.org/star/about-us/g20-anti-corruption-working-group>; and “Anti-corruption Summit, London 2016 – Communiqué” at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf



2. Stocktaking

While there has been progress in recovery of proceeds of corruption in recent years, only a small share of what is estimated to have been diverted through a variety of corruption offences is recovered and returned.

A 2014 UNODC/World Bank Stolen Asset Recovery Initiative (StAR) and the OECD report *Few and Far: The Hard Facts on Stolen Asset Recovery*³ estimates that US\$20-40 billion is stolen each year. However, between 2006 to June 2012 only US\$2.625 billion of stolen assets were frozen and only US\$423 million of stolen assets were returned by OECD countries. At the same time, freezing and return of assets during 2010 to 2012 period increased considerably in comparison to the previous 4 years. According to StAR and OECD “[u]ltimately, a huge gap remains between the results achieved and the billions of dollars that are estimated stolen from developing countries. Only US\$147.2 million was returned by OECD members between 2010 and June 2012, and US\$276.3 million between 2006 and 2009, a fraction of the US\$20 – 40 billion estimated to have been stolen each year.”⁴

According to the same study “[t]he legal avenues and powers used most successfully to freeze and return assets were not the ‘traditional’ ones. Administrative actions were introduced to freeze assets rapidly, and more jurisdictions proactively initiated their own investigations, rather than waiting for a request from the jurisdiction of the corrupt official. Non-conviction based confiscation, court-ordered reparations and restitution, and settlement agreements were used to return more assets than was criminal confiscation—commonly thought to be the main legal avenue for asset recovery.”

In another study, StAR, building on the experience of asset recovery practitioners identified 29 different barriers to asset recovery grouped under general barriers and institutional issues, legal

³ StAR and the OECD, *Few and Far: The Hard Facts on Stolen Asset Recovery*, 2014 (Hereinafter: *Few and Far*).

⁴ In 2011 StAR estimated that only \$5 billion in stolen assets had been repatriated over the previous 15 years. P. 1.

barriers and requirements that delay assistance, and operational barriers and communication issues.⁵

The general, or institutional, barriers “include issues related to the overall context in which asset recovery takes place. ‘Lack of political will’-- a lack of a comprehensive, sustained, and concerted policy or strategy to identify asset recovery as a priority and to ensure alignment of objectives, tools, and resources to this end--was cited as a key impediment to the recovery of the proceeds of corruption. The general barriers also include lack of trust and the lack of adherence to and enforcement of anti-money laundering (AML) measures as a means to prevent and detect the proceeds of corruption in the first place” (*Barriers*, p. 2). Quick trigger on formal MLA requests, failure to engage in pre-MLA or informal cooperation, including police to police or FIU to FIU cooperation and lack of domestic coordination are other general barriers.

Most of the legal barriers identified by StAR are “onerous requirements to the provision of mutual legal assistance (MLA); excessive banking secrecy; lack of non-conviction based asset confiscation procedures; and overly burdensome procedural and evidentiary laws, including the need to disclose information to asset holders during investigations.” (*Barriers*, p. 3)

Even with a sound legal framework, asset recovery “is stymied by operational barriers—impediments involving processes and communication between parties. Communication issues dominate: difficulties in identifying focal points to make MLA requests, challenges in maintaining contacts and coordinating asset recovery actions, delays in processing and responding to MLA requests, and deficiencies in the drafting of the requests all impede the provision of assistance. Other important operational barriers include difficulties in identifying owners of bank accounts because of the lack of a national bank registry as well as the use of corporate structure geared towards hiding the true beneficial owner of assets. Establishing a national bank registry of account holder information is a powerful tool to facilitate the tracing of assets and to accelerate and assist international cooperation. Setting up credible and effective asset management measures, aimed at preventing the depletion of restrained or seized assets, are strong incentives to improved asset recovery.” (*Barriers*, p. 2)

StAR has already established databases on asset recovery-related cases and information and built analytical capacity in measuring progress in this area. However, as highlighted StAR and OECD study data on asset recovery cases continues to be scarce and it would be important to extend this work beyond OECD countries in order to allow for a truly global measurement of SDG 16.4.

3. Selected policy options and considerations

According to StAR, “[t]he cornerstone of any country’s successful and lasting policy and practice on the recovery of stolen assets is the adoption of a clear, comprehensive, sustained, and concerted policy and strategy. Beyond publicly showing commitment by policy makers, such a strategy is necessary to define goals and targets, to identify all available tools (laws and

⁵ StAR, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, 2011 (Hereinafter: *Barriers*).

regulations as well as processes), to mobilize the needed expertise and resources, and to make stakeholders accountable. Such a strategy should build on a proactive, responsive, spontaneous, and transparent policy and practice toward asset recovery [...as well as] on more forceful implementation of anti-money laundering measures, many of which are not properly observed or enforced.” Furthermore, financial institutions and their supervisors need to be more diligent and proactive when dealing with politically exposed persons (PEPs) (*Barriers*, p. 2).

In order to effectively address legal barriers to asset recovery countries need to “adopt a more flexible and proactive approach to dual criminality (criminalization of the offense in both jurisdictions) and reciprocity; to protect the integrity of investigations by not informing the asset holder in cases where investigative and asset preservation measures are involved, provided that sufficient protections of due process rights are present; to take steps to limit the grounds for MLA refusal, including by extending statutes of limitations; and to stop automatic denial of MLA for reasons of economic interest. In addition, [the] report strongly recommends a systematic lifting of bank secrecy in international cases involving all UNCAC and UNTOC offenses. Finally, legislation allowing non-conviction based confiscation should be adopted and implemented.” (*Barriers*, p. 3). Furthermore, UNCAC and UNTOC can be used as a direct basis for requesting and granting mutual legal assistance for offences covered in those conventions by their States parties.

To foster trust and communication among practitioners, and bolster their expertise, StAR study recommends “significant efforts to train investigators, investigative magistrates, prosecutors, and judges on the international standards, on the various tools available for asset recovery, and on the experience to be gained from actual cases.” (*Barriers*, p. 3)

Two resolutions of the last Conference of the States Parties to UNCAC were adopted to facilitate international cooperation in asset recovery and the return of proceeds of crime and in fostering effective asset recovery. Resolutions 6/2 and 6/3 (CAC/COSP/2015/10) as well as Resolution 5/3 (CAC/COSP/2013/9) contain comprehensive list of policy level options, recommendations and considerations to improve the effectiveness of asset recovery efforts. These are reflections of the current international momentum and echo several recommendations of StAR study on *Barriers* and the StAR and OECD *Few and Far*, including:

- **Show commitment:** “Demonstrate strong commitment to ensuring the return and disposal of [stolen] assets” (Res. 6/2, para. 1, Res. 6/3. Para. 2);
- **Make plans:** Adopt and implement comprehensive strategic plans targeting stolen asset recovery and provide sufficient resources and training.
- **Provide practitioners the framework and the tools:** Ensure that “adequate legal and institutional frameworks [are] in place to prosecute corruption, to detect the illegal acquisition and transfer of assets derived from corruption, to request and provide international legal cooperation, including mutual legal assistance, to ensure that there are suitable mechanisms in place - conviction-based and, where appropriate, non-conviction-based - to recover through confiscation the identified proceeds of corruption, to enforce foreign conviction-based and non-conviction-based orders in accordance with the requirements of the Convention and to ensure that such frameworks are enforced” (Res. 6/3, para. 8). Such frameworks can also provide for value-based confiscation, and may

reduce the evidentiary requirements for linking the assets to individual crimes either by allowing the proof of such a link on a balance of probability or by shifting the burden of proof under certain conditions to the owner of the asset. Also effectively apply existing anti-money laundering measures (make better use of existing tools).

- **Freeze, before assets disperse:** “[E]nsure that procedures for international cooperation allow for the seizure and/or freezing of assets for a time period sufficient to preserve those assets in full, pending confiscation proceedings in another State” (Res. 6/3, para. 15 and Res. 6/2, para. 2).
- **Build trusting relationships:** Adopt policies and operational procedures to cultivate mutual trust and improve communication.
- **Provide effective mutual legal assistance:** Provide a sound legal basis for a wide range of types of mutual legal assistance and “give particular and timely consideration to the execution of requests for mutual legal assistance in asset recovery” (Res. 6/2) (where there is political will, there is a legal way).
- **Engage in collaboration and coordination:** “Establish or strengthen domestic mechanisms for intragovernmental coordination and intergovernmental cooperation and to ensure appropriate levels of information-sharing and coordination between competent authorities that have a role in efforts to prevent and prosecute corruption and in asset recovery, including, but not limited to, regulatory authorities, investigative authorities, financial intelligence units and prosecutorial authorities”(Res. 6/3, para. 9); “consider, where appropriate [...] establishing joint investigation teams” (Res. 5/3, para. 10); and encourage, pursue, and maintain all methods of informal assistance before initiation of a formal MLA request, including police to police and FIU to FIU cooperation, “including through participation in international law enforcement networks”(Res. 6/3, paras. 1 & 13).
- **Promote transparency:** Establish “effective financial disclosure systems for appropriate public officials” and “[i]mplement the necessary measures to enable [governments] to obtain and share reliable information on beneficial ownership of companies, legal structures or other complex legal mechanisms, including trusts and holdings, misused to commit or conceal crimes of corruption or to hide and transfer proceeds, thus facilitating the investigation process and execution of requests” (Res. 6/3, paras. 10 & 11).
- **Lend a helping hand:** “[D]esignate providers of technical assistance and officials or governmental institutions, as appropriate, as technical experts in international cooperation and asset recovery, to assist their counterparts in effectively meeting requirements for mutual legal assistance without undue delay” (Res. 6/3, para. 14).
- **Be proactive, not reactive:** “[T]ake a proactive approach to international cooperation in asset recovery [...], including initiating requests for assistance, making spontaneous disclosures of information on proceeds of offences to other States parties” (Res. 5/3, para. 8) and “proactively share information [on settlements]” (Res. 6/2, para. 10);
- **Collect data:** “Collect and make public data on the volume of assets seized, confiscated and returned or disposed of” (Res. 6/3, para. 7).

Asset Recovery Working Group of the Conference of the States Parties to UNCAC and other relevant international fora on asset recovery can be further engaged in follow up to the relevant commitments. The joint UNODC/World Bank StAR Initiative has been working since 2008 with Member States and other partners to address several of the recommendations listed above.