

ASSET RECOVERY

KEY PRINCIPLES / KEY ELEMENTS FOR AN INSTITUTIONAL FRAMEWORK

Introduction

During the Paris meeting of the working group, and building on the concept paper then presented, the World Bank and UNODC – under StAR – were requested to report back to the Working Group on:

- . Key principles for asset recovery (taking into consideration the Swiss proposal).
- . Key elements of an institutional framework through which asset recovery can effectively be channeled and on lessons learned from asset recovery cases.

This paper aims at addressing these two issues, following up on the concept paper and building on a review of asset recovery cases in a StAR database expected to be made public soon. In addition, per the Group's request, a specific horizontal review of asset tracing capabilities by G20 members has been undertaken. More details on these, as well as statistical information on asset recovery, are presented in the attachments to this "chapeau paper."

In addition to their participation in the different mechanisms for peer review on asset recovery related issues, G20 countries can show leadership by developing a policy to tackle the proceeds of corruption, and put in place key legislative and institutional structures that will facilitate the recovery of assets. The characteristics of the necessary policy, legislative and institutional developments are outlined below.

Policy Development

1. **Make asset recovery and return a policy priority; align resources to support policy.** To make progress on domestic commitments and international cooperation, such a policy could help communicate the importance of asset recovery as an integral part of broader anti-corruption efforts, empower authorities leading asset recovery cases, mobilize them with the appropriate resources and expertise to trace, seize, confiscate and return stolen assets, promote the proactive pursuit of cases (rather than waiting for an MLA request), and encourage the widest range of assistance to other countries. It would identify the steps needed to promote, sustain, and strengthen the development of specialized expertise in the appropriate bodies and include a roadmap, appropriate to the country, to adopt legal and/or institutional measures to support effective implementation of the policy. The policy would serve to define goals and targets and to make stakeholders accountable.

Legislative Framework

2. **Strengthen preventive measures against the proceeds of corruption consistent with international standards such as those set forth in the FATF recommendations.** Strengthened preventive mechanisms to protect the financial system against the proceeds of corruption are critical. Measures requiring that financial institutions and designated non financial businesses and professions (DNFBPs) conduct customer due diligence, identify and monitor PEPs, and collect and make available beneficial ownership information are essential in this regard: without obtaining this information, subsequent asset tracing, freezing, confiscation and return efforts are rendered futile. It is also essential that supervisory authorities effectively enforce these

requirements, and make public such enforcement actions, subject to domestic procedures.

3. **Set up tools for rapid locating and freezing of assets.** To facilitate the prompt identification of bank assets that may be proceeds of corruption, establishing tools that would allow competent authorities to obtain information from financial institutions in a timely fashion to determine whether an individual has access to banking facilities in that jurisdiction is critical. Such a search could be initiated upon appropriate domestic or international request. This could be achieved either through a register(s) of bank accounts that can be directly accessed by competent authorities or through a system which allows competent authorities to directly and without delay query banks within a jurisdiction. The system should also enable competent authorities to rapidly freeze assets, whether through a temporary administrative freeze, automatic freeze upon the filing of charges or an arrest, or by order of an investigating magistrate or prosecutor.
4. **Establish a wide range of options for asset recovery.** Experience shows that multiple avenues can be used for asset recovery, including systems that allow for recovery through non-conviction based confiscation or equivalent (at a minimum in cases of death, flight, absence), unexplained wealth orders, and private (civil) law actions. Further, consistent with the UNCAC, it is necessary to have in place the legal and institutional framework to allow for direct recovery and the return of confiscated proceeds of corruption to prior legitimate owners, subject to the rights of bona fide third parties.
5. **Adopt laws that encourage and facilitate international cooperation.** Permitting foreign authorities to obtain all relevant information on the proceeds of corruption in a timely manner and enabling prompt legal action in response to foreign requests are the cornerstone of asset recovery efforts. This should entail:
 - a. Permitting the direct enforcement of foreign orders unless inconsistent with fundamental principles of domestic law. This would include wherever possible non-conviction based confiscation orders, at a minimum in the circumstances foreseen by UNCAC. Such direct enforcement should be permitted even in the absence of a domestic system for non-conviction based confiscation or other equivalent avenue.
 - b. Ensuring that mutual legal assistance can be granted in the absence of a bilateral legal assistance agreement (i.e., an ad hoc basis) when dealing with asset recovery of PEPs. In addition, UNCAC should be recognized as a sufficient legal basis for mutual legal assistance.
 - c. Ensuring that MLA requests for freezing can be permitted on an ex parte basis (i.e., no requirement to give the asset holder the opportunity to contest beforehand the provision of MLA).

Institutional Framework

6. **Create specialized asset recovery teams – a kleptocracy unit.** Success is closely related to the existence of specialized team of investigators and prosecutors that focus on the recovery of assets, including on behalf of countries harmed by grand corruption.¹ Such specialization can be undertaken notwithstanding efforts to more systematically include asset recovery in all efforts against financial crime. Such units should be properly resourced, have proper expertise and training, and have access to relevant databases, registries, and financial information to allow practitioners to iden-

¹ In some jurisdictions, an asset recovery office may fulfill this role.

tify, locate, and freeze assets. They should also have authority to cooperate with foreign authorities with similar mandates (which could include FIUs, law enforcement, and judicial authorities), and to provide upon request technical assistance in “following the money” to third party countries.

7. **Actively participate into international cooperation networks:** National institutional frameworks should be set up to ensure that foreign authorities are able to obtain all relevant information on the proceeds of corruption in a timely manner and to enable prompt legal action in response to foreign requests. Such institutional frameworks include:
 - a. **Encourage upstream contacts with foreign counterparts** particularly before the presentation of mutual legal assistance requests.
 - b. **Establishing focal points of contact** for law enforcement and clear and effective channels for mutual legal assistance requests related to corruption and asset recovery.
 - c. **Working with existing networks (policy or operational)**, such as UNCAC, Interpol/StAR, the International Corruption Hunters Alliance, CARIN, and the meeting of law enforcement authorities at the OECD, amongst others, to identify possible gaps and identify best course of action in multi-countries international investigations and prosecutions.
 - d. **Make information available** on applicable procedures and legal requirements for pre-MLA and MLA international cooperation (including whether UNCAC is a sufficient basis for MLA).
 - e. **Allow spontaneous peer-to-peer outreach by domestic authorities**, a proactive form of assistance which alerts a foreign jurisdiction to an ongoing investigation in the disclosing jurisdiction and indicates that existing evidence could be of interest.
 - f. **Improve capacity to respond to MLA requests in grand corruption cases.** Mutual legal assistance should not be rejected solely on the grounds of non-material technical or formal deficiencies. Such situations should be proactively remedied by increased consultations between the two parties. Allocating increased staff and resources to work with the foreign jurisdiction in the drafting or clarification of requests will help to avoid such deficiencies.
8. **Provide technical assistance to developing countries.** Past cases demonstrate that asset recovery and international cooperation usually require a domestic criminal investigation and proceedings in the jurisdiction harmed by corruption. To build up sufficient expertise in all countries, developed jurisdictions should provide technical assistance on how to investigate, restrain and confiscate the proceeds of corruption to those countries in need of it. Training or mentorship programs that enable the achievement of results in cases over the long-term should be the primary focus in this regard; and assistance should be coordinated among the donors. Other jurisdictions which lack such expertise should undertake to request such assistance from donors and international organizations.
9. **Collect data on cases and share information on impact and results.** To ensure the momentum for action is maintained, it is very important to step up the tracking of measures and operational actions being taken. It is also very important to track actual asset recovery cases, to show that “it works.” Existing forums, such as the UNCAC Asset Recovery Working Group, the OECD anti-bribery working group or CARIN and

similar networks, should be used for discussions of asset recovery cases (even if only sanitized or when completed) and exchanges on lessons learned. Where information on cases is public, countries should ensure that this information is shared more broadly, via channels that minimize duplication of information-gathering exercises (for example the StAR Asset Recovery Database).