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Digest of Asset Recovery Cases

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DIGEST OF ASSET RECOVERY CASES



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INTRODUCTION

1. This Digest of Asset Recovery Cases provides an analytical study requested by the Open-Ended Intergovernmental Working Group on Asset Recovery¹ of the Conference of the States Parties to the United Nations Convention against Corruption. In the context of the Convention, asset recovery means the identification, freeze, seizure and confiscation of illegally derived assets and, where authorized by law, the return of confiscated property to the prior legitimate owner of a confiscated asset or to those victimized by corruption, which in some instances might be a State party. The Digest intends to supplement the various valuable resources available through the United Nations Office on Drugs and Crime (UNODC) Tools and Resources for Anti-Corruption Knowledge (TRACK).² It provides factual examples of how the mechanisms for asset recovery and international cooperation have been applied and how well they have functioned in actual situations over past decades.³

Methodology

2. The Digest draws on desk research of the case descriptions and other information provided by Member States. Other sources are the publications of the UNODC/World Bank Stolen Asset Recovery (StAR) Initiative, cases in the StAR Initiative's Stolen Asset Recovery Watch Database and Corruption Cases Search Center,⁴ the collection of cases of Asset Recovery and Mutual Legal Assistance in Asia and the Pacific published as part of the Asian Development Bank/Organization for Cooperation and Development (ADB/OECD) Anti-Corruption Initiative for Asia and the Pacific,⁵ the Basel Institute of Governance Asset Recovery Knowledge Centre's collection of cases and other information,⁶ and other sources, such as public records, official government press announcements, legislative reports and judicial decisions which the Secretariat has found through open source research. Moreover, with a view to validating and further complementing the information collected during the desk research, UNODC organized an Expert Group Meeting on 2 and 3 April 2012. The Digest was then widely disseminated at the fifth session of the Conference of the States Parties to the United Nations Convention against Corruption, held from 25 to 29 November 2013 in Panama. Inputs, comments and proposals for amendments received thereafter were given thorough consideration in the drafting of the final version of the Digest.

¹Article 63 of the United Nations Convention against Corruption states that the Conference of the States Parties may establish any appropriate mechanism or body to assist in the effective implementation of the Convention. Pursuant to that authority, the Conference established the Open-ended Intergovernmental Working Group on Asset Recovery by its resolution 1/4 and extended the Group's mandate in resolutions 2/3 and 3/3. By resolution 4/4, the Conference decided that the Working Group should continue its work to advise and assist the Conference in implementing its mandate on the return of the proceeds of corruption. See paragraph 48 of the Group's report for the interest and support for this study.

²Available from www.track.unodc.org.

³It must be noted that the majority of cases referred to in this Digest were initiated prior to the adoption of the Convention or before the ratification of the Convention by relevant States parties.

⁴All StAR databases are available from <http://star.worldbank.org/corruption-cases/?db=All>.

⁵Available from <http://www.oecd.org/site/adboecdanti-corruptioninitiative/41246239.pdf>.

⁶Available from <http://www.baselgovernance.org>.

Overview of this Digest

3. The Digest organizes the cases into thematic sections that follow the structure of the United Nations Convention against Corruption (hereinafter “the Convention”). Each section concludes with a summary for policymakers and practitioners drawn from the cases examined.

4. Due to the constantly expanding universe of asset recovery cases and practical limitations, not all significant cases can be discussed. Recently publicized allegations of international transfers of corruptly obtained assets, even though they involve extensive amounts, may not be explored at length if official or otherwise reliable sources are lacking. Completed and ongoing cases are discussed to the extent that reliable and publicly accessible sources exist for the information provided. Where possible, legal references are provided so that the publication can also serve law schools and law students as an introduction to the technical complexities of the asset recovery process.

5. Starting with “Noteworthy cases of corruption”, chapter I provides case examples of corruption. The cases demonstrate the scope and gravity of the economic, social, and political harm done by corruption and the possibilities for substantial recoveries of corruption proceeds.

6. The Digest then follows the structure of the Convention to touch on the different aspects of asset recovery. The discussion presents the ways in which Convention provisions can be used in asset recovery cases. Particular challenges to successful asset recovery are identified, and suggestions made for overcoming those challenges. The Digest focuses on identifying and categorizing the individual components in a case whose presence or absence enabled, facilitated, obstructed or otherwise influenced cases of potential asset recovery.

7. Chapter II contains case examples which illustrate how traditional money-laundering techniques of placement, layering and integration are used to disguise the criminal nature and origin of funds derived from corrupt acts. The cases follow the structure of the provisions of the Convention which prescribe measures that would prevent, deter and repress these concealment practices. References are also made to relevant provisions of the Convention, including its chapter II (Preventive measures), chapter III (Criminalization and law enforcement) and chapter IV (International cooperation). Those provisions provide a framework for States parties to prevent corruption and related criminal offences in the first instance rather than reactively attempting to recover the proceeds of criminal conduct that have flowed through a country’s financial systems or stolen assets that have been diverted to a foreign country.

8. Chapter III, on the initiation of asset recovery cases, uses case examples to illustrate some of the circumstances or steps that lead to the detection of criminal proceeds derived from specific offences established in the Convention. A number of Convention articles contain provisions that are designed to enhance opportunities for detecting proceeds derived from corruption and initiating recovery of such ill-gotten gains.

9. Chapter IV, on identifying, freezing or seizing and tracing the proceeds of crime, deals with the steps taken in foreign jurisdictions to locate and to immobilize improperly obtained assets. The provisions of articles 53, 54 and 55 of chapter V of the Convention are of particular relevance to the processes discussed in this chapter.

10. Chapter V, on the tools and mechanisms for recovery and confiscation of stolen assets, is also closely related to chapter V of the Convention. Cases examined in chapter V identify the legal mechanisms that have been used to accomplish confiscation and other means of recovering illicit assets under the Convention.

11. Chapter VI, on the return and disposal of assets, deals with cases involving the process of securing the return of assets to legitimate owners or those harmed by the corrupt conduct. Article 51 emphasizes that:

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States parties shall afford one another the widest measure of cooperation and assistance in this regard.⁷

12. Article 57 of the Convention is devoted to the return of confiscated assets. This article is particularly significant because its paragraphs 3 (a) and (b) establish the principle of mandatory return of confiscated assets in specified circumstances.⁸ These obligations appear in a United Nations instrument of global acceptance.⁹ As is demonstrated by numerous examples in the Digest, return of confiscated assets to legitimate owners or those harmed by the corrupt conduct is increasingly recognized as an ideal solution, even when not required by the terms of paragraphs 3 (a) or (b) of article 57.

13. Chapter VII draws together conclusions derived from the sources reviewed and analysed in the Digest and makes proposals on how the practical implementation of the Convention can be further improved with a view to achieving better asset recovery outcomes.

14. A Glossary of terms is provided at the end of the Digest.

⁷The phrase “fundamental principle” (article 51) was deemed in negotiations of the Convention to have no legally binding effect on the remaining provisions of the chapter on asset recovery. See *Travaux Préparatoires: United Nations Convention against Corruption*, available from https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf.

⁸Mandatory return is applicable to proceeds of embezzlement or embezzled assets that have been laundered and should be based on a confiscation order. It should also be noted that there are exceptions to obligations of return referenced in article 46 of the Convention wherein countries may deny a mutual legal assistance request under specified circumstances.

⁹One hundred and seventy-six States parties as of July 2015.

I. NOTEWORTHY CASES OF CORRUPTION

A. Typologies of offences established in the Convention

15. The sums diverted from national treasuries through embezzlement, misappropriation or other diversion of property by a public official, bribery and other forms of abuse of official positions are so immense that they are difficult to imagine. The amount lost to developing countries through grand corruption has been estimated at 20 to 40 billion United States dollars yearly.¹⁰ At the same time, the StAR Initiative estimates that no more than US\$ 5 billion in stolen assets have been repatriated in the 15 years prior to 2011.¹¹ The total value of assets returned by 30 OECD member countries in the period 2006-2009 was only US\$ 277 million and the total value of assets frozen only US\$ 1.225 billion.¹² A more recent study conducted by OECD and the StAR initiative found that while there had been an increase in assets frozen between 2010 and 2012 (US\$ 1.398 billion), only US\$ 147.2 million were returned during the same time period.¹³ No one knows how much corrupt proceeds are transferred out of the countries from which they are stolen. Nonetheless, these numbers show the magnitude of the loss to economies and demonstrate the need to recover far more of the proceeds of corruption, which obviously have been many times higher than the funds recovered. Asset recovery faces many challenges in practice, including legal, operational and institutional challenges, which will be seen in the cases described in this Digest. There may be demanding requirements to the provision of mutual legal assistance, excessive banking secrecy and limitations in legal mechanisms, such as non-conviction based asset confiscation procedures or burdensome procedural and evidentiary laws. There may also be immunity laws in place that prevent prosecution and mutual legal assistance, or a lack of effective coordination or even political will to prosecute corruption offences and recover assets.¹⁴

16. This chapter examines examples of the corruption offences established in articles 15 to 25 of the Convention and article 26, on liability of legal persons. The cases analysed in this chapter aim to provide insights into some of the typologies of corruption offences and the sectors that are vulnerable to corrupt influences. Furthermore, the cases offer an illustration of the applicability of the offences that are captured by the Convention. The Convention contains three types of obligations for States to implement. The first are mandatory obligations, phrased as: each State party “shall adopt such legislation and other measures as may be necessary”. The second are non-mandatory obligations, or obligations to “consider”, phrased as: each State party “shall consider adopting such legislation and

¹⁰UNODC and World Bank, *Stolen Asset Recovery Initiative: Challenges, Opportunities, and Action Plan*, (Washington, D.C.: World Bank, 2007), p. 9. A billion (sometimes “milliard” in British usage) here represents one thousand million. Throughout the Digest, monetary amounts are stated in United States dollars to be consistent with the StAR Asset Recovery Watch database, unless otherwise indicated.

¹¹Stolen Asset Recovery Initiative: “Barriers to Asset Recovery: an Analysis of the Key Barriers and Recommendations for Action”, 2011, p.1.

¹²Stolen Asset Recovery Initiative and OECD, “Tracking Anti-Corruption and Asset Recovery Commitments”, 2011, p. 23, available from <http://www.oecd.org/dac/governance-development/49263968.pdf>.

¹³OECD/StAR Initiative: “Far and Few”, 2014, p.19

¹⁴For a comprehensive analysis of challenges to asset recovery and recommendations to overcome them, see Stolen Asset Recovery Initiative: “Barriers to Asset Recovery: an Analysis of the Key Barriers and Recommendations for Action”, 2011.

other measures as may be necessary”. The third are measures to consider, phrased as: each State party “may consider adopting such legislation and other measures as may be necessary”.

B. Bribery of national and foreign public officials and of officials of public international organizations

17. Articles 15 and 16 establish as offences the bribery of national public officials, and of foreign public officials, and officials of public international organizations. The following cases are examples of such offences.

18. In 2000, executives of entities related to Alcatel, a French electronics company, made payments to Costa Rican officials to secure contracts worth more than US\$ 300 million in order to provide cellular telephone service.¹⁵ After payment of US\$ 18 million in fees to consultants that were used primarily for bribes, the contracts yielded US\$ 23.5 million in profits. Payments were made through intermediaries to directors and officials of the responsible government entity, Instituto Costarricense de Electricidad (ICE), and to President Miguel Rodríguez Echeverría. Consultant contracts were created for fictitious services and payments were channelled through bank accounts in Switzerland, the Netherlands and the Bahamas. Confidential information providing undue advantages was supplied to Alcatel representatives by corrupt officials and the company received undue preference in procurement decisions. In 2011, the former president was convicted in Costa Rica of receiving over US\$ 800,000 in cash, checks and certificates of deposit, and a share of an investment in a real estate transaction.¹⁶ Alcatel-Lucent, the successor entity to Alcatel-CIT, entered into an agreement with the Attorney General of Costa Rica to settle claims for social damage to Costa Rican society by payment of approximately US\$ 10 million. The agreement was judicially approved and payments were made.

19. Vladimiro Montesinos served as de facto head of the National Intelligence Service and an advisor to Peru’s President Fujimori between 1990 and 2000. After a scandal involving payment to legislators by Montesinos, Fujimori resigned and Montesinos was criminally prosecuted on numerous corruption charges. According to a press release by the Federal Office of Justice of Switzerland dated 20 August 2002, US\$ 77.5 million in accounts controlled by Montesinos and his associates were returned from Switzerland to Peru after a court order by a Swiss magistrate in June 2002; a smaller portion was voluntarily signed over by an associate.¹⁷ Forty-nine and a half million United States dollars had been frozen in Switzerland and the investigation by an examining magistrate revealed that Montesinos had received “commissions” on arms deliveries to Peru. Then, he had this bribe money paid to his bank accounts in Luxembourg, the United States and Switzerland. Montesinos received bribes for at least 32 transactions for 18 per cent of the purchase price. He also collected US\$ 10.9 million in commissions on the purchase of three MIG29 airplanes bought from the State-owned Russian arms maker. In return, he

¹⁵http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Acusacion_Rodriguez.pdf.

¹⁶Acusacion formal en la Causa 04-06835-647-PE contra Miguel Angel Rodriguez y Otros en el Segundo Circuito Judicial de San Jose, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Acusacion_Rodriguez.pdf.

¹⁷Montesinos case: Switzerland transfers 77 million US dollars to Peru”, press release of the Swiss Federal Office of Justice, 20 August 2002, available from <http://star.worldbank.org/corruption-cases/node/18595>, also from www.bj.admin.ch/bj/en/home/documentation/medieninfomationen/2002/2002-08-20.

See also http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Montesinos_Jorge_Case_Study_ADB_2007.pdf, p. 204.

used his position to ensure that certain arms dealers received preferential treatment. On the basis of these facts and prior judicial decisions such as the Marcos case, the magistrate issued a decision on 12 June 2002 to transfer the Montesinos assets to Peru. The decision was not appealed. The balance of the US\$ 77.5 million total represented US\$ 7 million from an arms dealer who received commissions and agreed to their return to Peru and from General de Bari Hermoza Ríos, who agreed to the return of US\$ 21 million. Over US\$ 20 million in confiscated assets¹⁸ controlled by Montesinos associates were transferred from the United States to Peru.¹⁹ The United States transferred assets in recognition of the assistance of Peru's law enforcement authorities. This led to successful United States confiscation action and pointed to the impact official corruption can have on State institutions and affected citizens. The United States transfer to Peru was accomplished by mutual agreement with particular attention given to the interests of the receiving State and the responsibility for transparency in the treatment of recovered assets.

20. Article 16 also establishes the offence of bribery of "an official of a public international organization". That term is defined in Convention article 2 as "an international civil servant or any person who is authorized by such an organization to act on its behalf". This article would apply to United Nations officials such as Sanjaya Bahel²⁰ and Alexander Yakovlev.²¹ Sanjaya Bahel was the former Chief of the Commodity Procurement Section of the United Nations Procurement Division. As a result of a United States conviction, he was ordered to pay over US\$ 900,000 in restitution to the United Nations.²² Yakovlev was the unit chief of the United Nations Oil for Food Programme for Iraq. He pleaded guilty to United States charges of defrauding the United Nations and conspiracy to commit money-laundering and agreed to forfeit over US\$ 900,000 in accounts held in Liechtenstein.

C. Embezzlement, misappropriation and other diversion of property

21. Article 17 requires the criminalization of embezzlement, misappropriation or other diversion of property by a public official. These categories cover a variety of means of unlawfully converting national assets as shown in below cases.

22. Raúl Salinas was an advisor to his brother Carlos Salinas, President of Mexico from 1988 to 1994. He was investigated for a number of offences in Mexico. While he was in judicial process, his wife appeared at a Swiss bank and attempted to transfer funds from there. That attempt resulted in her arrest and the freezing of US\$ 110 million. Investigations on the origin and transmittal of the funds by Switzerland and Mexico ultimately resulted in the recovery of US\$ 74 million by Mexico including accrued interest as part of a settlement between the government of Mexico and Salinas. A Swiss court found that

¹⁸The returned assets were confiscated. See the 2004 agreement by the United States and Peru; the transfer or return was done via International Sharing. Available from <http://2001-2009.state.gov/r/pa/prs/ps/2004/28114.htm>

¹⁹Response of Republic of Peru to a request of the UNODC secretariat for information on asset recovery. "The Peruvian efforts to recover proceeds from Montesinos' criminal network of corruption", Guillermo Jorge, Executive Director, Program on Corruption and Governance, Universidad de San Andres, Argentina, Case Study for Regional Seminar for Asia Pacific, Asian Development Bank/Basel Institute on Governance/UNODC, Bali 2007, available from <http://www.udesa.edu.ar/files/uahumanidades/libros/2008jorge.pdf>.

²⁰See details in chapter V.

²¹Ibid.

²²*United States v. Nishan Kohli*, Stipulated Order, United States District Court Southern District of New York, August 2008, para. 6, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kohli_SDNY_Stipulation_Order_Restitution_Aug_8_2008.pdf.

this amount represents US\$ 66 million in proceeds of unlawful appropriation of public funds. Salinas diverted these to bank accounts in Mexico and transferred them to Switzerland, together with other funds of criminal origin.²³

23. General Marco Antonio Rodríguez Huerta was an associate of Vladimiro Montesinos and a member of the board of the Peruvian Military and Police Pension Fund. By abuse of his position, General Rodríguez Huerta diverted funds from the pension fund into fraudulent real estate investments and private accounts, using banks in the United States to hide illicit proceeds from the Government of Peru. For these crimes and other illegal activities, Rodríguez Huerta was sentenced to 15 years in prison in Peru in 2002. A request from Peru resulted in tracing funds to an account in BNP Paribas in Miami. Seven hundred and fifty thousand United States dollars were confiscated and transferred to Peru.²⁴ Rodríguez Huerta, other generals acting as fund directors, and an engineer also received prison sentences in Peru ranging from 3 to 5 years. Furthermore, they were ordered to repay the US\$ 2,270,400 that were diverted by fraudulently overpriced purchases of buildings and real estate.²⁵

24. Former Philippine President Ferdinand Marcos held office from 1965 to 1986. Proceeds of corrupt activities by Marcos and his associates were estimated at US\$ 5 to 10 billion.²⁶ Six typologies of corruption were considered the principal sources of these funds: takeover of large private enterprises, creation of State-owned monopolies in vital sectors of the economy, awarding government loans to private individuals acting as fronts for Marcos or his cronies, direct raiding of the public treasury and government financial institutions, kickbacks and commissions from firms working in the Philippines, and skimming off foreign aid and other forms of international assistance. Proceeds of corruption were laundered through the use of shell corporations. These invested the funds by depositing them in various domestic and offshore banks under pseudonyms, or in accounts denominated by numbers or code names, or in real estate in the United States. After years of recovery efforts, US\$ 684 million from Switzerland, and approximately US\$ 50 million from the United States were returned to the Government of the Philippines.²⁷ Moreover, US\$ 7.5 million were returned to human rights victims from Marcos assets and another US\$ 2.5 million paid for legal fees and expenses in connection with the victims' private civil litigation.²⁸

25. Joshua Dariye was Governor of Plateau State, Nigeria, from 1999 to 2007 and subsequently became a Federal Senator. In 2004, London's Metropolitan Police seized over 100,000 pounds sterling in cash from Dariye and a money-laundering prosecution was

²³Salinas assets handed over to Mexico – Federal Examining Magistrate concludes 12-year proceedings, Press Release, Swiss Federal Office of Justice, 18 June 2008, accessed from www.bj.admin.ch/bj/en/home/dokumentation/medieninformationen/2008/2008-0-6-18.html.

²⁴Vladimiro Montesinos/Marco Antonio Rodriguez Huerta, StAR Asset Recovery Watch database, available from <http://star.worldbank.org/corruption-cases/node/18597>

²⁵La República de Peru, 6 July 2012, Envían a prisión a ex directivos de la Caja de Pensión Militar Policial, available from <http://www.larepublica.pe/06-07-2012/envian-prision-ex-directivos-de-la-caja-de-pension-militar-policial>; response of the Republic of Peru to a UNODC request for asset recovery information.

²⁶Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan (UNODC/World Bank, Washington, D.C., 2007), *supra note* 10, p.11.

²⁷Response of the Swiss Confederation to the UNODC secretariat's request for asset recovery information. Please also see an extensive discussion on the issue below. Alternative source: <http://rt.com/business/163776-switzerland-freezes-ukraine-assets/>.

²⁸Ferdinand Marcos and Imelda Marcos (United States), StAR Asset Recovery Watch database, available from <http://star.worldbank.org/corruption-cases/node/18499>; World Bank case summary Ferdinand Marcos, available from <http://star.worldbank.org/corruption-cases/node/18501>; "Recovery of the Marcos Assets", Dr. Jaime S. Bautista, Special Counsel, Philippine Commission on Good Government, in *Measures to Freeze, Confiscate and Recover Proceeds of Corruption*, United Nations Asia and Far East Institute/UNODC Third Regional Seminar on Good Governance for Southeast Asian Countries (2009), p. 73, available from http://www.unafei.or.jp/english/pdf/PDF_ThirdGGSeminar/Third_GGSeminar_P72-79.pdf; *Ferdinand E. Marcos (Philippines): A Case Study*, ADB/OECD Anti-Corruption Initiative for Asia and Pacific (2007).

initiated. The defendant fled to Nigeria, where he was protected from prosecution by a constitutional immunity while in office. The State legislature removed him from office by impeachment, but he was reinstated by court decisions. Investigation revealed that within months after being elected, Dariye began transferring State funds into bank accounts in London and Nigeria, which eventually amounted to over US\$ 5 million. Money from a State ecological fund was diverted to purchase a London property in an assumed name. Successful civil suits were brought by the Federal Republic of Nigeria to recover the London property and rental proceeds owned by Dariye and for recovery of nearly 3 million UK pounds in two London banks.²⁹ The funds were returned to Nigeria in 2007.³⁰

26. The Kuwaiti Investment Organization (KIO) was established in Kuwait by Emiri Decree, Law No. 47 of 1982, with responsibility for managing the Government's funds. Sheik Fahad al-Sabah was a member of the Kuwaiti royal family and was chairman of the KIO from July 1984 to 1991, which included the chaotic period after the Iraqi invasion of Kuwait in 1990. He and his associates made questionable investments which ultimately caused a loss of US\$ 5 billion to the KIO, of which at least US\$ 1.2 billion were attributable to fraud, embezzlement, misappropriation or other diversion. Complex investment and financing transactions with little or no economic justification were used to generate liquid funds, which then flowed to accounts under the control of the Sheikh in Switzerland and the Bahamas, as well as to other conspirators. Recovery orders for over US\$ 1 billion were secured against the Sheik and his associates. US\$ 550 million were recovered, and restitution orders were secured against banks and accountants.³¹

D. Trading in influence and abuse of function

27. Articles 18 and 19 define and propose adoption of the offence of trading in influence and abuse of function. Many of the offences engaged in by President Ferdinand Marcos and Sheik Fahad al-Sabah also involved abuse of their official positions and functions in order to manipulate transactions or to extract payments for personal enrichment.

E. Illicit enrichment

28. Article 20 recommends the establishment of an offence of illicit enrichment. It should be considered together with related article 8, paragraph 5 and article 52, paragraph 5 recommending that public officials are required to make declarations regarding their assets, and with article 52, paragraph 6 on reporting foreign financial accounts (please see also chapter II for some examples of different approaches to the criminalization of illicit

²⁹StAR Asset Recovery Watch database on Joshua Chibi Dariye and Joyce Oyebanjo, available from <http://star.worldbank.org/corruption-cases/node/18521>; Financial Action Task Force Report, *Laundering the Proceeds of Corruption*, July 2011; Basel Institute of Governance Asset Recovery Knowledge Centre, *Case Chronology* (to 2007), available from <http://www.assetrecovery.org/kc/node/44186379-8580-11dd-81c3-399112e3d573.4>; "Metropolitan Police to Return 200,000 pounds to Nigeria", available from <http://www.assetrecovery.org/kc/node/6439035f-c836-11dd-b3f1-fd61180437d9.5>.

³⁰See StAR Asset Recovery Watch database on Joshua Chibi Dariye and Joyce Oyebanjo, Id.

³¹Judgement in *Grupo Torras v. Sheikh Fahad Modammed al-Sabah*, 1993 Folio No. 624, In the High Court of Justice, Q.B. Division, 24 June 1999, accessed at StAR Asset Recovery Watch database page on Kuwaiti Investment Organization/Spain, available from <http://star.worldbank.org/corruption-cases/node/18534>; "Stolen Asset Recovery: a Case from Kuwait", Dr. Muhammad A. A. Al Moqatei in *Stolen Asset Recovery – a Good Practices Guide to Non-conviction Based Forfeiture*, World Bank/UNODC (2009), available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/KIO_StAR_Case_Study_NCBF_Guide.pdf

enrichment in different jurisdictions).³² The policy and technical arguments concerning the illicit enrichment offence can be complex as described in a publication by StAR on illicit enrichment. Among the numerous convictions of former Peruvian presidential advisor and de facto security chief Vladimiro Montesinos, there was illicit enrichment on 6 May 2006, for which he was sentenced to 10 years imprisonment.³³ Diepreye Alamiyeseigha, former governor of Nigeria's Bayelsa State, was arrested in the United Kingdom in 2005 on suspicion of money-laundering. He fled to Nigeria while he was released on bail. US\$ 1.5 million in seized cash was then confiscated as money-laundering proceeds and returned to Nigeria. The Federal Republic of Nigeria then initiated a civil proceeding in the United Kingdom to freeze and recover assets controlled by Alamiyeseigha and his entities, Santolina Investment Corporation and Solomon & Peters Ltd. Alamiyeseigha pleaded guilty to filing false asset declarations and a number of his corporate entities pleaded guilty to money laundering in Nigeria in 2007. As a result, summary judgement was granted in the United Kingdom civil proceeding against the corporate defendants and three billion naira (equal to approximately US\$ 20 million), 441,000 United States dollars, 7,000 euros and 2,000 pounds sterling, in addition to ownership of properties worth another three billion naira, were recovered by the Federal Government of Nigeria and transferred to Bayelsa State. A judgement of July 2008 by a United Kingdom court led to the confiscation of additional assets in Cyprus, Denmark and the United Kingdom.³⁴ One of the principal points relied on by counsel for Nigeria was "the scale of the discrepancy between Alamiyeseigha's declared assets and income and his undeclared assets".³⁵ In another similar case, Uruguayan and Brazilian authorities have cooperated in tracking, finding and seizing real estate, private jets and luxury boats owned by Ricardo Raúl Jaime. Jaime, the former Secretary of Transportation in the Federal Planning Ministry of Argentina, was charged with illicit enrichment and unlawful receipt of gifts.

F. Corruption offences in the private sector

29. These are counterpart articles for the private sector to the bribery and embezzlement offences applicable to public officials, foreign public officials and public international organization officials found in articles 15, 16 and 17. Articles 21 and 22 of the Convention are related to private corruption offences and do not use the mandatory language found in the articles related to core public corruption offences. Many countries have such measures or equivalent fraud offences that can be used to punish corrupt dealings between private parties, such as a corporate purchasing official and a supplier who provides a bribe to secure a contract.

30. There is a point of intersection between public and private corruption, which is demonstrated in the case involving payments by Alcatel subsidiaries to win and maintain contracts in Costa Rica. Eighteen million United States dollars in commissions were paid in connection with contracts worth US\$ 300 million. The distributions included US\$ 300,000 paid to a consulting firm and passed on to the Panamanian bank account

³²Detailed information concerning the historical development of the illicit enrichment offence and analytical discussion of its definitions and operational application can be found in the StAR publication on illicit enrichment. StAR Initiative: "On the take – Criminalizing Illicit Enrichment to Fight Corruption", 2012

³³www.allafrica.com, *The Monitor*, 19 February 2012, Uganda: Enact Asset Confiscation Law to Fight Graft, available from <http://www.monitor.co.ug/Magazines/PeoplePower/-/689844/1330166/-/13dummy4z/-/index.html>.

³⁴StAR Asset Recovery Watch case study, "Diepreye Alamiyeseigha", available from <http://star.worldbank.org/corruption-cases/assetrecovery/Diepreye%20Alamiyeseigha>.

³⁵Judgement of 3 December 2007, *Federal Republic of Nigeria and (1) Santolina Investment Corporation, (2) Solomon & Peters Ltd. And (3) Diepreye Alamiyeseigha & Others*, case No. HC05 CO3602, [2007], High Court of Justice, Chancery Division, para. 34(2), accessed at StAR Asset Recovery Watch database page on Diepreye Alamiyeseigha/Cyprus, <http://star.worldbank.org/corruption-cases/node/18490>.

of the Alcatel-CIT Regional Director for Latin America. The President of Alcatel Costa Rica received an even greater share, with US\$ 4.7 million transiting through a consulting firm to him and members of his family. Alcatel insiders, who were responsible for directing the bribery scheme, received 5 of the 18 million United States dollars in commissions. Another case in which private bribery or embezzlement seems to have been involved is the litigation with an employee that led the Mabey and Johnson bridge building firm to report itself to the United Kingdom Serious Fraud Office.³⁶

G. Laundering and concealment of proceeds of crime

31. Laundering of proceeds of crime and concealment of proceeds are covered by articles 23 and 24 of the Convention. An example of this is found in the case of former Nigerian State governor James Ibori, who pleaded guilty in the United Kingdom in 2012 to conspiracy to defraud and money-laundering offences. Three of the charges related to the sale of Delta State's shares in a mobile phone company to a neighbouring State. Ibori and his counterpart in the neighbouring State were both on the company's board. To generate funds from the sale, they used a London solicitor to establish a consultancy called Africa Development Finance. Both the solicitor and the consultancy then charged fees for fictitious services to generate funds for the conspirators. The resulting US\$ 37 million in proceeds were diverted to them. Ibori purchased six houses in London, one for 2.2 million pounds sterling in a cash payment. He also enjoyed a lavish lifestyle, including sending his children to exclusive English schools. The total amount involved in Ibori's guilty plea equalled £50 million as other diversions were involved during his tenure as governor. His wife, sister, a female friend and the London solicitor Bhadresh Gohil were also convicted of money-laundering.³⁷ His property had been frozen under a 2007 United Kingdom court order and United Kingdom authorities are pursuing its confiscation. As mentioned previously, funds seized and confiscated in the United Kingdom from Ibori's fellow ex-governors Joshua Dariye and Diepreye Alamieyeseigha were returned to Nigeria. United Kingdom authorities indicated a similar intent with regard to the value of assets to be confiscated from Ibori. At the time of Ibori's sentencing, the United Kingdom International Development Secretary issued a statement that: "We are committed to rooting out corruption wherever it is undermining development and will help bring perpetrators like Ibori to justice and return stolen funds to help the world's poorest."³⁸

32. Similarly, Joyce Oyebanjo, an associate of former Nigerian Governor Dariye, was convicted in the United Kingdom of assisting Dariye in retaining criminal proceeds. Funds seized from her were confiscated and repatriated to Nigeria along with £1.28 million of stolen assets. These had been returned to Nigeria since 2006 after investigations into the financial dealings of Dariye and the former Governor of Bayelsa State, Diepreye Alamieyeseigha. She served as Dariye's financial conduit, paying his children's school fees

³⁶ *Regina v. Mabey and Johnson Limited*, Prosecution Opening Note, 102147845_2, No.T2009 7513, In the Southwark Crown Court, www.docstoc.com/docs/22494640/CONFIDENTIAL/WITHOUT-PREJUDICE.

³⁷ BBC News Africa, 27 February 2012, "Nigeria ex-Delta State Governor James Ibori guilty plea", available from <http://www.bbc.com/news/world-africa-17181056>; Press release of 28 February 2012, Economic and Financial Crimes Commission, Nigeria, *The Guardian*, 27 February 2012, "James Ibori pleads guilty to fraud and money laundering charges", available from <http://www.theguardian.com/global-development/2012/feb/27/james-ibori-pleads-guilty-fraud>; "V-Mobile \$37 million Shares Fraud – Bhadresh Gohil sentenced to 7 years in prison", *saharareporters.com*, 8 March 2011, available from <http://saharareporters.com/2011/03/08/v-mobile-37million-shares-fraud-bhadresh-gohil-ibori%E2%80%99s-uk-lawyer-sentenced-7-years-prison>. <http://www.dfid.gov.uk/Documents/publications1/press-releases/Success%20in%20fighting%20against%20corruption%20as%20Ibori%20starts%20jail%20term.pdf>.

³⁸ "James Ibori in final fall", 18 April 2012, *Information Nigeria.org*, accessed from <http://www.informationng.com/2012/04/james-ibori-in-final-fall.html>.

and other expenses, and providing him with currency on his visits to the United Kingdom. While employed as a low-level public servant, she maintained 15 bank accounts containing over £1.5 million, was the recorded owner of real estate worth over £2 million, and managed a property held by Dariye under a false name.

33. In connection with corruption during the Abacha regime in Nigeria, an Indian businessman, Raj Bhojwani, sold military vehicles at inflated prices to the Nigerian government. He then transferred a share of the proceeds to bank accounts linked to the Abacha family and deposited his share in the Jersey branch of the Bank of India. He was convicted in Jersey for violating the Penal Code section against concealing or transferring proceeds of criminal conduct and £26.5 million were confiscated. In 2011, over 20 million confiscated pounds sterling were returned to Nigeria.³⁹ Previously, the Bailiwick of Jersey had transferred US\$ 160 million to Nigeria. This was the result of an agreement by Abacha's associate Abubakar Bagudu to release and return the funds to Nigeria and to face criminal charges, after being arrested in the United States based upon an extradition request from Jersey for money laundering. Bagudu was a close associate of General Abacha's oldest son Mohammed and participated in laundering proceeds of embezzlement of funds from the Bank of Nigeria through false security expenditures.⁴⁰

H. Obstruction of justice

34. Obstruction of justice can be committed under article 25 (a) by the use of force, threats or intimidation or the prospect of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to Convention offences. Under article 25 (b), the offence can be committed by the use of force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of a Convention offence. No case of prosecution of such conduct was found in the cases submitted by Member States, in the StAR Stolen Asset Recovery Watch database or in the other anti-corruption databases consulted for the purpose of this study.

I. Liability of legal persons

35. Liability of legal persons must be established under article 26. That liability may be criminal, civil or administrative. In connection with Convention article 20, the prosecution in Nigeria of former Governor Alamieyesiegha described above resulted in his guilty plea to filing false asset declarations as well as guilty pleas to money laundering by seven of his corporations, accompanied by dissolution of the entities and confiscation of their assets. Two of those entities, Santolina Investment and Solomon & Peters Ltd, were also found liable and their assets were frozen in a United Kingdom civil suit for their role in the diversion of approximately US\$ 21.5 million in public assets of Bayelsa State.

³⁹StAR Asset Recovery Watch database, available from <http://star.worldbank.org/corruption-cases/node/18574>; *Jersey Evening Post* 8 September 2011, "Recovered: Nigeria's 20 million pounds", available from <http://jerseyeveningpost.com/news/2011/09/08/recovered-nigerias-20-million/>.

⁴⁰Mark Pieth (editor), Basel Institute on Governance, *Recovering Stolen Assets*, publisher Peter Lang, Bern, pp. 29-45, available from <http://www.edwardswildman.com/files/Publication/033ee01d-1df3-4d1d-b98d-45e96c9ae411/Presentation/PublicationAttachment/5210b6e6-1c42-485f-a5fb-f2305cbfab17/Basel%20Institute%20Recovering%20stolen%20assets%20-%20February%202008.pdf>; Enrico Monfrini, *The Abacha Case* (2008), available from http://www.mcswisslaw.com/pages_e/2008%20Monfrini%20-%20The%20Abacha%20Case.pdf; "General Sani Abacha – A Nation's Thief", ADB/OECD Anti-Corruption Initiative for Asia and Pacific (2007), available from http://www.baselgovernance.org/fileadmin/docs/pdfs/Bali/Timothy_Daniel.pdf.

J. Summary

36. Several of the cases cited in this chapter predate the negotiation and entry into force of the Convention. Nevertheless, they serve to illustrate the potential application of the Convention's provisions and had the Convention been in force at the relevant times, its provisions could have provided the legal authority and mechanisms for facilitating and expediting international inquiries into the offences committed, and the recovery of the proceeds of those offences. The article 16 cases of bribery of foreign officials all involved international financial transactions which could have been investigated using the Convention's international cooperation mechanisms. The cases which describe schemes using national security secrecy as an excuse for unexplained disbursements are clear examples of embezzlement, misappropriation and other diversion of property by a public official, so article 17 would apply. Any of the cases involving passive bribery of a national public official or of a foreign public official as established might, depending on their factual circumstances, also involve trading in influence in violation of article 18, abuse of function in violation of article 19 and result in illicit enrichment in violation of article 20. The act of a corporate official administering a bribery scheme who takes an unauthorized share of the funds could constitute embezzlement of property in the private sector in violation of article 22. If an intermediary pays a corporate executive to be allowed to inflate expenses in order to bribe public officials, a violation of article 21, bribery in the private sector, could make the Convention and its international cooperation mechanisms available. Laundering of proceeds of their crimes by corrupt public officials under article 23 and concealment of property by a person who did not participate in the offence generating the property concealed under article 24 are offences involved in virtually every case studied in this chapter.

II. FORMS AND DEVICES OF CONCEALMENT OF PROCEEDS OF ACTS OF CORRUPTION

37. Once proceeds of corruption have been obtained, offenders go to great lengths to make sure they keep the money. They conceal and transfer proceeds in many ways to lower the risk of detection, often supported by so-called gatekeepers. For this reason, the Convention provides for a diverse range of measures aimed at detecting and preventing the transfer of proceeds of corrupt offences.

A. Significance of preventive measures and financial intelligence units

38. The role of each of the provisions in articles 52 on preventive measures and 58 on financial intelligence units in order to prevent and combat the transfer of crime proceeds is examined in the next subsections.

39. Article 52 of the Convention sets forth a number of measures designed to detect and prevent the flow of criminal proceeds through financial systems. These measures include the following:

- Implementation of customer due diligence requirements for financial institutions to include the verification of customer identity, measures to determine beneficial ownership of assets deposited into high-value accounts, enhanced scrutiny of accounts held or controlled by individuals with prominent public functions and their family members or close associates (otherwise referred to as politically exposed persons, PEPs).
- Issuance of advisories regarding individuals or entities whose accounts should be subjected to enhanced scrutiny and appropriate account-opening, maintenance and record-keeping measures to be taken with such accounts.
- Mechanisms to notify financial institutions of the identity of natural or legal persons that should be subjected to enhanced account scrutiny.
- Measures ensuring that financial institutions maintain adequate records regarding customer identity, beneficial ownership, and accounts maintained by PEPs.
- Measures to prevent the establishment of banks with no physical presence and without any affiliation to a regulated financial group.
- Measures implementing effective financial disclosure systems for appropriate public officials and sanctions for non-compliance.
- Measures requiring appropriate public officials to disclose interest in or other authority over foreign financial accounts.

40. Article 52 of the Convention requires States parties to apply enhanced scrutiny to "... accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates".

Challenges posed by PEPs for asset recovery are highlighted in a dedicated StAR publication, which includes conclusions and recommended actions consistent with the preventive measures provided in article 52.⁴¹ The article lists counter-measures that are especially adapted to combating concealment of bribery and of proceeds of acts of corruption.

41. Recommendation 12 of FATF also calls for financial institutions to take preventive measures with respect to domestic as well as foreign politically exposed persons, who are defined in language similar to that in the Convention's article 52. These provisions have a reinforcing effect on each other, and are necessary elements of an effective anti-money-laundering system that can help stop diversions of public funds like those in the following case examples. One of the counter-measures that has not yet yielded its full potential is the requirement that enhanced scrutiny be applied to accounts sought or maintained by or on behalf of persons entrusted with prominent domestic public functions and their family members and close associates, in addition to foreign public officials. Prior to 2012, the Glossary to the 40 Recommendations of the FATF defined a politically exposed person as a foreign official entrusted with prominent public functions, while the Interpretative Note to former Recommendation 6 encouraged States to extend their increased scrutiny to individuals who held prominent public functions in their own country. With the revision of the FATF Recommendations in February 2012, Recommendation 12 and the Glossary definition of "politically exposed persons" covered both domestic and foreign politically exposed persons.

42. In October 2000, funds in Switzerland were frozen as a result of banks informing the Money Laundering Reporting Office about the assets belonging to Vladimiro Montesinos and General Nicolás Hermoza Ríos.⁴² This event immediately followed the global media's repeated circulation in September of a video showing Montesinos bribing a Peruvian Congressman. Montesinos, however, had previously been a close advisor and political associate of Fujimori and his name would normally have appeared in the database services to which major banks subscribe to identify so-called politically exposed persons, i.e. individuals who are, or have been, entrusted with prominent public functions (article 52.1). Montesinos has had a long history of involvement with the intelligence services and it is not known if Montesinos' accounts may have been opened under a false name, and if so what degree of diligence would have been necessary to raise a suspicion about that identity. However, the situation demonstrates the need for reasonable steps to identify the true identity of account holders, and the possibility that the scrutiny required by article 52.1 might have been exposed the corruption network of Vladimiro Montesinos described in chapter I. Similarly, had the customer due diligence rules⁴³ been in place when the Marcos' were transferring Philippine assets to Switzerland and elsewhere, their banking activity would clearly have been subject to suspicious transaction reporting obligations.

43. In 2001, the United Kingdom Financial Services Authority published a report on money-laundering controls in 23 banks where accounts linked to the Abacha family and close associates were identified. The Managing Director of the Authority indicated that, "The extent of the weaknesses identified is frankly disappointing", noting that the investigation found that 15 of the 23 had significant control weaknesses. However, the report also reflected that a number of the banks had reported suspicions to the National Criminal

⁴¹ StAR Initiative, "Politically Exposed Persons: Preventive Measures for the Banking Sector", 2012, available from https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Politically_Exposed_Persons.pdf.

⁴² *The Peruvian efforts to recover proceeds from Montesinos' criminal network of corruption*, Guillermo Jorge, Executive Director, Program on Corruption and Governance, Universidad de San Andres, Argentina, Case Study for Regional Seminar for Asia Pacific, Asian Development Bank/Basel Institute on Governance/UNODC, Bali 2007, available from <http://www.udesa.edu.ar/files/uahumanidades/libros/2008jorge.pdf>.

⁴³ FATF Recommendations 5 and 6 prescribed due diligence requirements.

Intelligence Service on a timely basis.⁴⁴ While the immense sums deposited by the Abacha family and associates seem suspicious in themselves, the available public sources do not exclude the possibility that their suspicious nature may have been somewhat disguised by use of legal structures, attorneys and other intermediaries. Nevertheless, there also seems to be the possibility that financial institutions were able to identify accounts with the Abachas and their associates as soon as called upon to do so by a Swiss Examining Magistrate, but had not done so before.⁴⁵ The Particulars Claim that led to a finding of liability in the court's opinion in *Federal Republic of Nigeria v. Joshua Chibi Dariye*⁴⁶ describe how Dariye, then Governor of a Nigerian State and clearly within the definition of a person entrusted with prominent public functions under the Convention or politically exposed person under applicable Financial Action Task Force Recommendation, within two years made bank transfers of £213,000 from Nigeria to an account in Barclay's bank, and over a four and a half year period caused the deposit into that account of £489,000 in cash.

44. Similarly, the need for measures to regulate activities of service providers like lawyers and notaries to prevent them from helping conceal corruption proceeds can be seen from different cases. For example, the diversion of funds from the Treasury of Zambia could not have succeeded without the conspiratorial connivance of at least one attorney, Bimal Thaker, and the negligence of another who was found to have acted unprofessionally as a financial nominee for former President Chiluba and other political figures.

45. The active participation of these solicitors and other non-banking professionals underscores the necessity and importance of subparagraph 1 (a) of article 14 of the Convention, as far as it requires States Parties to institute a comprehensive domestic regulatory and supervisory regime for bodies particularly susceptible to money-laundering and demonstrates the relevance of Financial Action Task Force Recommendation 22 (2012). The solicitors, who used their professional reputation and privilege of confidentiality for the diversion of Zambian assets, did many of the activities listed in Recommendation 22. So did solicitor Bhadresh Gohil, who was convicted of organizing the scheme by former Nigerian Delta State governor James Ibori to divert US\$ 37 million in proceeds from sale of a State interest in a mobile phone company. He was convicted with two registered financial service providers, who appear to have supplied services similar to those described in paragraph 22 (e) of the Financial Action Task Force 40 Recommendations.

46. Another example can be found in the Dariye case. It shows how quickly the diversion of public resources could have been halted if the concerned State party had been able to impose effective observance of articles 52.1 and 52.2 on its banks, and if its Financial Intelligence Unit had been able to take effective action. Joshua Dariye was Governor of Plateau State in Nigeria from 1999 to 2006. In 1999, according to the particulars of the claims upon which he was subsequently found liable in a United Kingdom civil action, the Governor opened an account at Allstates Trust Bank in Abuja in the name of Ebenezer Retnan Ventures, signing the application as Ebenezer Retnan. The bank management waived all account opening requirements beyond completion of the application form. It is not evident from the public record whether the bank management knew of the governor's true identity, but since Ebenezer Retnan Ventures was not a registered Nigerian corporation, it seems that little or no customer due diligence was done. Plateau

⁴⁴FSA publishes results of money-laundering investigation, available from www.fsa.gov.uk/Pages/Library/communication/PR/2001/029.shtml.

⁴⁵Response of the Swiss Confederation to the UNODC secretariat's request for asset recovery information.

⁴⁶Particulars of Claim, *Federal Republic of Nigeria v. Dariye and Dariye*, EWHC 0169 (CH), Jan. 25, 2007; Approved Judgement, *Federal Republic of Nigeria v. Dariye and Dariye*, EWHC 708(Ch) Mar. 12, 2007. Accessed from StAR Asset Recovery Watch database on Joshua Dariye/United Kingdom, <http://star.worldbank.org/corruption-cases/node/18619>.

State paid large amounts to this bank account, however, the State's regular financial institution was the Lion Bank. On two occasions, the Central Bank of Nigeria issued checks for ecological and other purposes to Plateau State. Dariye instructed the Lion Bank to debit the State account and to transfer equivalent amounts to Allstates Trust Bank to his Ebenezer Retnan account. The first transfer comprised about £325,000 and the second about £127,000. On a third occasion, he procured a State official to instruct Diamond Bank, Ltd, which also held State funds, to transfer about £1.24 million to the Ebenezer Retnan account. A fourth diversion involved a federal check for £7 million which Dariye instructed to be cleared through Allstates Trust Bank, where Plateau State did not have an account, and to make various disbursements, one being the Ebenezer Retnan account. If a suspicious transaction report on these transfer and disbursements by a person entrusted with prominent domestic functions had been submitted and if it had resulted in an inquiry or freezing action by the Nigerian Financial Intelligence Unit, or the Economic and Financial Crimes Commission, the diversion of funds might have been prevented or interrupted at an early stage.

47. Article 52.3 deals with one of the most difficult questions in asset recovery, which is ascertaining the beneficial owner of accounts and legal structures. An indispensable element of many, in particular large-scale, money-laundering schemes are legal structures used in layering transactions to conceal their beneficial ownership. Some jurisdictions allow corporate formation with legislation that facilitates de facto anonymity of the beneficial ownership, for example the lack of requirements to collect beneficial ownership information. Generalized references to "offshore financial centres" or "fiscal paradises" that are often found in anti-money-laundering and asset recovery literature are under-inclusive and may impede necessary corrective action by confining attention to off-shore jurisdictions. While both article 52.3 of the Convention and FATF Recommendation 5 focus on identification of the beneficial owner, access to beneficial ownership information in appropriate circumstances for asset recovery and other lawful purposes needs to be improved in nearly all jurisdictions. This is an area of opacity in the business and financial world that has successfully resisted change and some new initiative or approach is necessary if more transparency is to be achieved. The Olden Corporation case described below is one of many similar examples of the manipulation of a myriad of corporate structures to shield its beneficial owners from identification and accountability which hinder asset recovery. The abolition of anonymous and fictitious name accounts in accordance with FATF Recommendation 5 has been a step in the right direction. However, concealment of the proceeds of crime can still take place relatively simply if legal structures are allowed to hold accounts whose beneficial ownership is not known and cannot be traced.⁴⁷

48. Article 52.4 concerns the prevention of the establishment of banks without physical presence or affiliation with regulated financial groups, which the FATF refers to as "shell banks" (Recommendation 18). The layer of insulation against detection that is furnished by this type of institution and their resistance to regulation and transparency is now well recognized. Their role in the concealment and movement of assets is not as widely reported as was the case before the adoption of the Convention's article 52 and FATF Recommendation 18.

49. Article 52.5 on effective financial disclosure systems for public officials is functionally linked to article 20 of the Convention on the offence of illicit enrichment and to

⁴⁷The StAR Initiative provides an analysis of this problem in the publication "The Puppet Masters - How the Corrupt use Legal Structures to Hide Stolen Assets and What to Do About It", available from <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>. Inter alia, the publication highlights the need of improved and accessible information at company registers, the collection and access to beneficial ownership information, abolishment of bearer shares and strengthening of investigative capacity.

article 8.5, which encourages disclosure regimes as preventive measures for public officials, where appropriate. A financial disclosure form provides a starting point for an analysis of a person's accumulation of wealth and limits a public official's claim to have legitimate income and assets. If an inference of illicit enrichment can be drawn based on an analysis of the form, a subsequent accumulation of wealth and insufficient lawful sources to explain the increase, asset recovery becomes much easier. The civil action against former Governor Dariye brought by the Federal Republic of Nigeria in the United Kingdom included proof of specific diversions but was strongly corroborated by evidence of huge increases in assets totally inconsistent with lawful sources of income.⁴⁸ Evidence of illicit enrichment could be extremely useful to satisfy Switzerland's mutual assistance requirement to demonstrate the illegal origin of funds. The Swiss Federal Supreme Court opinion allowed the return of funds when their illegal provenance was clear even though they could not be traced to particular offences (in this case, Marcos funds were frozen in Switzerland and the confiscation ruling was issued by the Philippines). Proof of an extraordinary increase in wealth associated with public office and supported by comparison with a financial disclosure form or forms could furnish the evidence of criminal provenance necessary for securing return of the proceeds of corruption. Former Governor Diepreye Alamiyeiseiga's conviction in Nigeria for filing a false financial form is a practical demonstration of the utility of this measure.⁴⁹

50. Related to this issue, article 20 of the Convention requires States parties to consider adoption of an illicit enrichment offence, but establishment of such an offence is not mandatory. Different approaches can and have been used to accommodate human rights concerns and national jurisprudence.⁵⁰ Sierra Leone criminalizes the possession by a present or former public official of unexplained wealth above a living standard commensurate with present or past official emoluments or the control over pecuniary resources disproportionate to those emoluments, unless satisfactorily explained. The law of Guyana states that when public persons or their nominees are found in possession of resources disproportionate to their known sources of income, and they fail to provide satisfactory evidence that the resources were acquired by lawful means, they are punishable. The law of China provides that any State functionaries whose property or expenditure obviously exceed their lawful income, and if the difference is enormous, may be ordered to explain the sources of the property. If they cannot prove that the sources are legitimate, the part that exceeds lawful income shall be regarded as illegal gains subject to recovery, in addition to a term of imprisonment.

51. The financial disclosure system proposed in paragraph 5 of article 52 of the Convention is complementary to the illicit enrichment offence in article 20. If a wealthy businessperson is elected to public office and £2 million are subsequently found in that person's account in a London bank, in the absence of financial disclosure requirements, no inference is possible as to whether the money is previously accumulated wealth or proceeds of corruption. However, if the businessperson had been required to file a financial disclosure form and had listed various real estate properties and £500,000 cash, and then was found to still own those properties a year later but to now have £2 million in cash, an inference of illicit enrichment would be justified, absent an innocent explanation. That

⁴⁸Particulars of Claim, *The Federal Republic of Nigeria v. Joshua Chibi Dariye*, accessed at StAR Asset Recovery Watch database page on Joshua Dariye/Joyce Oyebanjo, available from <http://star.worldbank.org/corruption-cases/node/18521>.

⁴⁹Shortly after the conviction of corruption offences, Mr. Alamiyeiseiga was pardoned by the council of States, a group headed by the President of Nigeria. See "Nigeria pardons Goodluck Jonathan ally, Alamiyeiseiga", <http://www.bbc.com/news/world-africa-21769047> and "Nigeria president pardons ex-governor convicted of graft", <http://www.reuters.com/article/2013/03/13/us-nigeria-pardon-idUSBRE92C0WK20130313>.

⁵⁰The StAR publication on Illicit Enrichment (2012) gives details about provisions on illicit enrichment, as used by China, Guyana and Sierra Leone.

explanation does not have to be the defendant's testimony; rather, it could be a documentary in nature or could be provided by other witnesses, or even could be the prosecution's own evidence.⁵¹

52. Article 52.6 is a variation of the preceding paragraph 5 of article 52, since a comprehensive disclosure of assets would include those held in a foreign country and those held indirectly or as a beneficial owner. However, greater clarity in completion of complex forms is a desirable quality, so a separate question directed to compliance with this measure could be worthwhile.

53. Article 58 of the Convention requires States parties to cooperate for the purpose of combating the transfer of proceeds of Convention offences and to consider the establishment of a financial intelligence unit to be responsible for receiving, analysing and disseminating reports of suspicious financial transactions to the competent authorities. As a practical matter, the advantages of such a unit, particularly the information exchange possibilities among the members of the Egmont Group formed by financial intelligence units for that purpose have contributed to a virtually universal adoption of the concept. While not all countries qualify for the standards of the Egmont Group, nearly all seek to achieve that goal.⁵²

B. Concealment techniques used to hide corruption proceeds

54. The use of the financial system to conceal and move corruption proceeds has been found, among others, in the case of the Riggs Bank and Augusto Pinochet, who was formerly President of Chile and Commander-in-Chief of the Chilean Army from 1973 to 1998. In a staff report of the United States Senate Permanent Subcommittee on Investigations, it was reported that Riggs had repeatedly ignored its anti-money-laundering obligations in dealing with Pinochet family accounts. In 1994, Riggs secured accounts of the Chilean military; in the same year, its executives visited Chile and offered its services to General Pinochet. Thereafter, Riggs served as Pinochet's personal banker, opened multiple accounts for him, some in false or disguised names, and accepted millions in deposits without inquiry as to the source of his wealth. It also conducted transactions through its own administrative accounts to hide his involvement in cash transactions.⁵³ In 1998, a Spanish judge issued a worldwide freeze order against General Pinochet. In violation of that order, Riggs moved US\$ 1.6 million from London to the United States and made it available to Pinochet, thereby obstructing the court order and efforts by victims to be compensated for acts by the Pinochet government. In 2005, a Spanish court issued an order to dismiss with prejudice all criminal and civil claims against Riggs and seven of its former and current directors and officers. The Spanish Court's order was issued in connection with a settlement entered into between Riggs and the private plaintiffs in the Spanish criminal investigation of Pinochet. Under this settlement, Riggs agreed to pay US\$ 8 million and to provide the plaintiffs, consistent with Riggs' legal obligations, with information concerning Pinochet's accounts at Riggs.⁵⁴ The US\$ 8 million payment was

⁵¹This is subject to the provisions of a law like that of China, which expressly allows an official to be ordered to explain the sources of his or her property.

⁵²Further information on the implementation of article 58 can be found in discussion guide and report of the Working Group on Asset Recovery: <http://www.unodc.org/unodc/en/treaties/CAC/working-group2-meeting7.html>

⁵³*Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act – Case Study Involving Riggs Bank*, United States Senate Permanent Subcommittee on Investigations, 2004, p.129.

⁵⁴Riggs Bank SEC filing Form 10-K, 20050329, available from <http://www.sec.gov/Archives/edgar/data/350847/000095013305001344/0000950133-05-001344.txt>.

to be administered by a foundation for the benefit of persons who suffered under the Pinochet regime.⁵⁵ The response of the Republic of Chile to a UNODC secretariat request for information made reference to a recovery from Riggs Bank and to US\$ 3 million recovered from various properties belonging to Pinochet via the mechanism of direct recovery.⁵⁶

55. The role of lawyers as facilitators of the concealment of proceeds of corruption is well illustrated by their prominence in the case brought by the Attorney General of Zambia against former President Chiluba and others, including London solicitors Bimal Thaker, Bhupendra Bhailal Thaker and their firm Cave Malik and Thaker, as well as the solicitor Mohammed Iqbal Meer and his firm Meer, Care and Desai (also referred to in chapter V). The private civil action sought recovery from the Thakers and the Meer, Care and Desai firms for assisting in the diversion of Zambian government funds. The funds were paid to the firms and transferred through numerous corporate vehicles without performing any legal services, resulting in a finding of liability exceeding US\$ 3 million as to Bimal Thaker. The court concluded that Bimal Thaker was liable for conspiracy because he turned a blind eye to obviously suspicious transactions when he had a duty to inquire and must have known that he was facilitating diversion and laundering of government funds. Important factors that led to this conclusion were his lack of normal accounting records and correspondence, the unusual nature of transactions he carried out, and his lack of credibility in denying knowledge of money laundering regulations despite having been exposed to a prior laundering case.⁵⁷ The other firm of solicitors, Meer Care and Desai, was found liable by the trial court for facilitating the diversion of funds of the Zambian government. The judgement, however, was reversed on appeal. The basis of the finding was the appellate panel's conclusion that the responsible solicitor, Mr. Meer, acted foolishly in failing to comply with money laundering warnings and should have gathered information about the purpose of transactions involving millions of United States dollars. While he should have been more suspicious and should have acted with caution with regard to large cash transaction with government officials, the appellate judges declined to conclude from this, contrary to the judge who conducted the trial, that Meer knew or suspected what was going on or that he chose not to ask questions.⁵⁸ Despite the Court of Appeals decision, Mr. Meer was suspended from the practice of law for three years for failure to observe professional standards.⁵⁹

56. In the Kuwaiti Investment Organization case, Spanish attorney Juan José Folchi was found civilly liable for helping divert funds from the Organization's investment vehicle Grupo Torras (GT). In considering his appeal, in its judgement, the United Kingdom Supreme Court of Judicature, Civil Division, commented on the conduct of lawyers involved in facilitating offences such as those established by the Convention:

The assistance that Mr. Folchi gave in all the transactions was crucial and without it they could not have taken place as they did. He was just as much a linchpin in giving dishonest assistance as he would have been if he was a conspirator. It was the obvious duty of an honest lawyer to make more enquiries as to why very large sums of money were being dealt with in highly questionable ways, and to stop the

⁵⁵Albrittons, Riggs to Pay Victims of Pinochet", *Washington Post*, 26 February 2005, accessed at StAR Asset Recovery Watch database page on Agosto Pinochet/Spain, <http://star.worldbank.org/corruption-cases/node/18468>.

⁵⁶Response of Republic of Chile to UNODC Secretariat request for asset recovery information.

⁵⁷StAR Asset Recovery Watch database page on Frederick Jacob Titus Chiluba; *Attorney General of Zambia v. Meer, Care and Desai* [2007] EWHC 952 (Chancery Division), available from <http://star.worldbank.org/corruption-cases/node/18504>.

⁵⁸*Attorney General of Zambia v. Meer, Care and Desai* [2008] EWCA Civ 1007, available from <http://star.worldbank.org/corruption-cases/node/18504>.

⁵⁹Findings and Decision, Solicitors' Disciplinary Tribunal, *In the Matter of Mohamed Iqbal Meer*, 31 January 2011, available from <http://maravi.blogspot.co.at/2011/02/another-uk-lawyer-loses-licence-over.html>.

transactions if he did not receive satisfactory explanations. Mr Folchi repeatedly failed in his duty and in consequence GT suffered losses.⁶⁰

57. As noted when discussing articles 23 and 24 of the Convention, the fraud by which former Nigerian State governor James Ibori diverted proceeds from the sale of a State-owned telecommunications firm also resulted in the conviction of his London solicitor Bhadrash Gohil. It was reported in the press that the judge, who sentenced him to prison terms of 10 years, described him as the architect of the scheme to divert State property by creating unnecessary and fictitious consulting services through a corporate shell. Gohil was responsible for creating fictitious documentation and forging signatures to make the consulting contract appear to be legitimate. Once the proceeds of the sale of State property were deposited in a Nigerian bank, he used two London confederates and a number of shell companies and bank accounts to launder them by such means as a sham loan and sale of the consulting company at a price which grossly undervalued its assets, using the proceeds to buy property in England and to attempt to purchase a Challenger private jet aircraft.⁶¹ The use of these intermediaries and legal structures served the intended goal of concealing Ibori's beneficial ownership of these assets. After his conviction, United States authorities, pursuant to a request under the United Kingdom-United States Mutual Assistance Treaty, secured judicial enforcement of the United Kingdom criminal court order freezing assets controlled by Ibori and Gohil, including a brokerage account in New York.⁶² Not only the lawyer, but also Ibori's wife, sister and a female friend were convicted of money-laundering in the United Kingdom, with the women having served as nominee owners for Ibori.⁶³

58. Banks, lawyers and trust and corporate service providers also make use of shell companies and similar legal structures to create layers of legal ownership and formal control. In the meantime, they ensure that the beneficial ownership of the assets remain with the original owner, whose identity has been hidden behind layers of anonymous structures and obligations of confidentiality.

59. An example of using shell corporations to shelter assets and hide the identities and contribution of a corporate service provider is found in the case *Ukrvaksina*, a Ukrainian State-owned enterprise against Olden Group, LLC, a limited liability corporation in Oregon, United States, and Interfarm, LLC, a Ukrainian company.⁶⁴ An investigative report ordered by the Cabinet of Ministers of the Ukrainian Republic revealed that for years Interfarm had been among the top suppliers of medical products under State procurement contracts. Its dominance in this field and its high prices had long made it a subject of controversy. In 2008 and 2009, Interfarm signed five contracts for the purchase of specified vaccines manufactured by a French pharmaceutical firm. For no apparent business reason, these were not purchased directly by Interfarm but through a United States

⁶⁰Judgement of 2 November 2000 in *Al-Sabah and Folchi v. Grupo Torras*, accessed from www.ucc.ie/law/restitution/archive/englcases/al-sabah.htm.

⁶¹*Wall Street Journal-Europe*, 12 April 2011; Sahara Reporters, New York, 8 March 2011. The references are not clear. Probably referring to: "U.K. and Nigeria Seek Former Politician", *Wall Street Journal-Europe*, 12 April 2011, <http://online.wsj.com/articles/SB10001424052748703841904576256942147696476>; "V-Mobile \$37 Million Shares Fraud-Bhadrash Gohil, Ibori's UK Lawyer Sentenced To 7 Years In Prison", Sahara Reporters, New York, 8 March 2011, available from <http://saharareporters.com/2011/03/08/v-mobile-37million-shares-fraud-bhadrash-gohil-ibori%E2%80%99s-uk-lawyer-sentenced-7-years-prison>

⁶²*Wall Street Journal*, 24 July 2012, "US Restrains \$ 3 Million of Nigerian Ibori's Asset", www.blogs.wsj.com/corruption-currents/2012/07/24/us-restrains-3-million-of-nigerian-iboris-us-assets/.

⁶³BBC News Africa, "Nigeria ex-Delta State governor James Ibori guilty plea", 27 February 2012, available from <http://www.bbc.com/news/world-africa-17181056>.

⁶⁴StAR Asset Recovery Watch database page on Ukrainian Government/*Ukrvaksina v. Olden Group LLC and Interfarm LLC*, available from <http://star.worldbank.org/corruption-cases/node/18588>.

corporation, the Olden Group. Olden's participation allowed the vaccines' purchase prices to be manipulated, thereby enabling Interfarm to inflate its charges and avoid legal limitations on its profit margin. Participation in this manipulation was the basis for a liability finding against Olden. Olden was sued in a private civil action by the Government of Ukraine in Oregon, United States, where it was registered.⁶⁵ It offered no defence and the court rendered a default judgement in 2011 in favour of Ukrvatsina for approximately US\$ 60 million, plus interest.⁶⁶ As suggested by the Olden Corporation's failure to appear in court and defend the civil action, its beneficial owners appear to be relying upon anonymity as means of escaping liability.

C. Summary

60. Articles 52 and 58 of the Convention provide the antidotes that can diminish the success of the concealment mechanisms employed by persons engaged in corrupt offences established in the Convention. Article 52.1 makes the customer due diligence measures and suspicious transaction reporting measures binding international obligations for all the States parties to the Convention, which had been voluntary actions under the Financial Action Task Force 40 Recommendations. Article 52.2 does the same with regard to supervisory and regulatory measures on enhanced scrutiny of persons holding prominent public functions, and extends that scrutiny to domestic officials, whereas the relevant Recommendation of the Financial Action Task Force only applies to foreign officials. Paragraph 3 of article 52 requires record-keeping to permit identification of the account customer, and as far as possible, of the beneficial owner. This is an attempt to overcome the chronic problem of layering by use of nominees, legal structures, attorneys and other nominees to conceal the power of disposal over proceeds of crime. Paragraph 4 of article 52 deals with shell banks, a phenomenon which seems to be one of the few concealment and layering problems of which the impact may be lessening over time with growing recognition of its nature and harmful effects. Paragraph 5 and 6 of article 52 deal with financial disclosure systems and the reporting of foreign accounts, which are related measures. Article 58 endorses the utility of financial intelligence units to receive, analyse and disseminate to competent authorities reports of suspicious transactions.

61. Different concealment mechanisms exist in order to avoid the identification of corruption proceeds. Offenders frequently conceal funds by arranging for their deposit in a favoured foreign country. Nominees are used by bribe recipients to pay debts such as credit card bills and to hold property, including bank account funds which the official can draw upon at will. Some banks facilitate transactions for foreign officials in situations that are highly suspicious by making transactions appear anonymous and knowingly tolerating the use of false names. Some attorneys use their professional skills to structure seemingly legitimate transactions which they know or should clearly recognize as criminal diversions of government funds. Corporate service providers are an indispensable element of many laundering schemes, providing the legal structures used in layering transactions to conceal their beneficial ownership.⁶⁷

⁶⁵Ibid

⁶⁶Ibid.

⁶⁷See also the StAR Initiative publication on good practices for non-conviction based asset forfeiture, which mentions that compensation orders were secured against banks and accountants. *Stolen Asset Recovery- A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, a publication of the StAR Asset Recovery Initiative of the World Bank/UNODC (2009), p.165.

III. INITIATION OF ASSET RECOVERY CASES

A. Overcoming the obstacles remaining after a corrupt regime

62. A State normally cannot hope to recover its stolen assets without an effectively functioning authority with sufficient freedom and powers to undertake tracing and recovery action. Sometimes this condition cannot be achieved until the departure of an official whose administration may have either engaged in or neglected to combat corruption. In the cases of Egypt and Tunisia, attempts are now being made to recover assets possessed by members and associates of the former regimes. Those attempts would not have been possible during the years that Hosni Mubarek and Zine Ben Ali served as Presidents of Egypt and Tunisia, respectively.⁶⁸ The degree of control exercised for decades by the governments of Marcos,⁶⁹ Suharto,⁷⁰ Pinochet⁷¹ and Traore⁷² make it understandable why efforts to recover the proceeds of corruption could only be initiated years after funds had been diverted, when those regimes had been replaced. That delay factor complicates recovery, as is illustrated by the Mobutu disposition discussed in the next paragraph. A contrasting situation was the rule of General Sani Abacha in Nigeria from 1993 to 1998. The relative brevity of his tenure may have contributed to the ability to detect and recover substantial amounts of diverted funds and bribes before memories faded and records were lost or destroyed. Once the conditions exist for investigation of corruption and recovery of stolen assets after a change of regime, prompt action may be necessary to locate and preserve relevant information. Even departing officials of a corrupt government intending to destroy evidence of misconduct may have overlooked items or simply have been unable to locate and destroy everything that may be of investigative utility. The recovery of illegally obtained assets from the Marcos family and associates was greatly facilitated by the seizure of documents from a file safe in the Presidential bedroom within hours of Marcos's departure from the country. The papers identified Swiss bank accounts and other financial transactions, revealing 60 accounts at six Swiss banks in the names of Liechtenstein foundations, other entities and companies, as well as under pseudonyms such as William Saunders and Jane Ryan for Mr. and Mrs. Marcos.⁷³ They also revealed a multi-million dollar brokerage account in the United States.

⁶⁸Mubarek was President of Egypt from 1981 to 2011. Zine Ben Ali was President of Tunisia from 1987 to 2011.

⁶⁹Ferdinand Marcos was President of the Philippines from 1965 to 1986.

⁷⁰President Suharto of Indonesia served in that position from 1967 to 1998.

⁷¹Augusto Pinochet was President of a military government of Chile from 1973 to 1981, then President of the Republic until 1990 and Commander in Chief of the Armed Forces until 1998.

⁷²Moussa Traore came to power by military means and ruled Mali under several titles from 1968 to 1991.

⁷³"Tracking the Proceeds of Organized Crime – the Marcos Case", David Chaikin, Barrister, New South Wales, paper presented at the Transnational Crime Conference convened by the Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service and held in Canberra, 9-10 March 2000, available from http://www.aic.gov.au/media_library/conferences/transnational/chaikin.pdf. Dr. Chaikin was formerly head of the International Criminal Law Enforcement and Security Branch of the Australian Attorney-General's Office; StAR Asset Recovery Watch database page on Ferdinand Marcos and Imelda Marcos/United States, available from <http://star.worldbank.org/corruption-cases/node/18499>. See also Jovito R. Salonga, *Presidential Plunder: The Quest for the Marcos Ill-Gotten Wealth*, Regina Pub (2000).

63. In some situations, an incoming government may find that it lacks the investigative resources to prove the disposition of financial resources from the national Treasury or to pursue the legal remedies necessary to recover those assets. This was the case in the lengthy efforts to return assets placed in Switzerland by Mobutu Sese Seko, President of Zaire, now the Democratic Republic of the Congo, from 1965 to 1997. Despite the fact that the Swiss government paid a lawyer to represent the Democratic Republic of the Congo, Swiss judicial interpretation of the statute of limitations and lack of evidence from the Congolese side ultimately made recovery impossible. According to a Swiss Foreign Ministry press release of 30 September 2009 on Moussa Traore, the Swiss Agency for Development and Cooperation paid for a lawyer to represent Mali in requesting return of diverted funds. That effort proved successful.⁷⁴

64. In other situations, limitations in legislation might hamper asset recovery. The change of the Ben Ali regime in Tunisia has led to legislative innovation. After the change of government in January 2011, a relative of the former President Ben Ali sought asylum in Canada. The new Government of Tunisia requested a freeze of the relative's assets but conceded that it could not yet establish a criminal origin of the funds.⁷⁵ In response, the Government of Canada proposed and its Parliament enacted a Freezing Assets of Corrupt Foreign Officials Act, officially assented to on 23 March 2011, which reads in pertinent part as follows:

Orders and regulations

4. (1) If a foreign State, in writing, asserts to the Government of Canada that a person has misappropriated property of the foreign State or acquired property inappropriately by virtue of their office or a personal or business relationship and asks the Government of Canada to freeze property of the person, the Governor in Council may

(a) make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (3) in relation to the person's property that the Governor in Council considers necessary; and

(b) by order, cause to be seized, frozen or sequestered in the manner set out in the order any of the person's property situated in Canada.

Conditions

(2) the Governor in Council may make the order or regulation only if the Governor in Council is satisfied that

(a) the person is, in relation to the foreign State, a politically exposed foreign person;

(b) there is internal turmoil, or an uncertain political situation, in the foreign State; and

(c) the making of the order or regulation is in the interest of international relations.

⁷⁴See page on Moussa Traore in the StAR Initiative's Stolen Asset Recovery Database, available from <http://star.worldbank.org/corruption-cases/node/18555>.

⁷⁵*The Globe and Mail*, "Attempt to freeze Ben Ali clan's assets hits a wall", 18 February 2011, available from <http://www.theglobeandmail.com/news/politics/attempt-to-freeze-ben-ali-clans-assets-hits-a-wall/article569092/>.

Restricted or prohibited activities

(3) Orders and regulations may be made under paragraph (1)(a) with respect to the restriction or prohibition of any of the following activities, whether carried out in or outside Canada:

(a) the dealing, directly or indirectly, by any person in Canada or Canadian outside Canada in any property, wherever situated, of the politically exposed foreign person;

(b) the entering into or facilitating, directly or indirectly, by any person in Canada or Canadian outside Canada, of any financial transaction related to a dealing referred to in paragraph (a); and

(c) the provision by any person in Canada or Canadian outside Canada of financial services or other related services in respect of property of the politically exposed foreign person.

65. Similarly, prior to the changes in government in North Africa in early 2011, Switzerland had adopted an even more far-reaching reform in October 2010. Its Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons will be described in detail in chapters V and VII. The Act established special freezing, seizing and confiscation provisions for mutual legal assistance and freezing requests when:

The country of origin is unable to satisfy the requirements of mutual legal assistance proceedings owing to the total or substantial collapse, or the unavailability, of its national judicial system (failure of State structures).⁷⁶

66. In addition, the Swiss law introduces a beneficial presumption of illicit origin based upon an extraordinary increase in wealth connected to the exercise of public office and a related reputation for corruption. This presumption should facilitate confiscation in appropriate cases. Once confiscated, whenever appropriate, the illicit assets are to be returned to the country of origin. This provision is subject to some qualifications but it is a step toward implementing the mandatory return obligation of paragraphs 3 (a) and (b) of article 57. The Swiss legislation also creates a mandatory national obligation to return all the presumptively illicit confiscated assets of politically exposed persons. Those assets may come not only from embezzlement and laundering of embezzled property but also from a variety of offences established by the Convention. According to the Swiss legislation, assets must be returned whether or not a final judgement has been entered in the other State, although the concept of a negotiated agreement on the disposal of the assets does not appear wholly consistent with article 57. Nevertheless, examples set forth in the Swiss legislation introducing mandatory return obligations in limited circumstances and a presumption of illicit origin for disproportionate wealth holds promise as a means of facilitating asset recovery and deserves consideration by other State parties.

67. Another mechanism to overcome possible obstacles to asset recovery is the initiation of criminal prosecution and confiscation or non-conviction based confiscation by a foreign jurisdiction. For this avenue, it is necessary that the foreign jurisdiction does have jurisdiction over an offence that was committed abroad and cooperation from the jurisdiction that was harmed by the corruption offences.⁷⁷

⁷⁶Unofficial English translation accessed from the Swiss Confederation website at http://www.admin.ch/ch/e/rs/196_1/a2.html.

⁷⁷See also: StAR, *Asset recovery Handbook. A guide for practitioners*, 2011, http://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf.

68. In some situations a change in government and the proclamation of an anti-corruption agenda by a new administration has not been a guarantee that such an agenda would be implemented, except for symbolic gestures. This is amply demonstrated in the report of a Kenyan legislative committee concerning a situation known as the Anglo-Leasing scandal.⁷⁸ In 2001, international firms were invited to bid on designing and implementing a secure machine-readable new passport/visa system. The process continued through 2002 and three bids ranging from 10 to 12 million United States dollars were received in November 2002. The new presidential administration, which entered into office in January 2003 on a strong anti-corruption platform, disqualified the three bidders. A technical committee then recommended adoption of a slightly expanded concept for the system. Without any public or official announcement of the technical specifications of the expanded concept, but with apparent advanced knowledge of those details, a firm named Anglo-Leasing & Finance Limited submitted a technical proposal to supply and finance the project. The proposal was accepted, apparently without any due diligence inquiries, at a price of 32 million euros. Further inquiries exposed Anglo-Leasing as a phantom that was not registered in the United Kingdom as claimed. As parliamentary, media and public interest grew, a number of similar off-budget leasing contracts were discovered. Two firms, Anglo-Leasing and Infotalent, refunded US\$ 6 million and €6 million respectively received under the contracts.

69. A report of a Committee of the National Assembly made the following findings after extensive hearings:

The Committee heard evidence and noted that the Anglo Leasing & Finance Limited is part of an organized, systematic and fraudulent scheme designed to fleece the government through the so-called special purpose finance vehicles for purported security contracts. The salient features of these contracts are as follows:

All contracts are supply and finance contracts, in which the contractor is purportedly financed by external credit through what is called lease finance. In reality, it is the government that unwittingly paid upfront for these projects. Evidence received indicates that most of the lease finance companies used in these contracts are considered to be possibly non-existent. Security was used as an excuse to procure these contracts using single sourcing, even where the projects merely involved the postal services and meteorological department. The effect of using non-competitive process is over-pricing of the contracts. It is possible that a few individuals use different companies as fronts to perpetrate these possible frauds, with the support of government officials. Further investigations are likely to reveal that these companies could possibly share directors, shareholders or owners/agents.⁷⁹

B. Domestic anti-corruption efforts

70. A factor contributing to increased recovery of proceeds of offences established in accordance with the Convention is the increased enforcement attention devoted to these issues, both by agencies with general jurisdiction and by specialized units. Criminal justice enforcement units with specialized anti-corruption mandates are increasing in number and

⁷⁸Kenya National Assembly, Ninth Parliament fifth session, 2006, Public Accounts Committee, *Report on Special Audit on Procurement of Passport Issuing Equipment by the Department of Immigration, Office of the Vice-President and Ministry of Home Affairs*.

⁷⁹See page on Daniel Arap Moi, Mwai Kibaki, Anglo-Leasing Scandal in the StAR Initiative's Stolen Asset Recovery Database, available from <http://star.worldbank.org/corruption-cases/node/18608>

effectiveness. One example is the success of the Hong Kong Independent Commission Against Corruption in reducing corruption since its founding in 1974 has inspired the creation of similar entities in other countries, with broad powers of prevention, education and enforcement, and in some cases, also of prosecution. The Commission is a multi-disciplinary institution with educational, preventive audit and investigative functions.

71. The Presidential Commission on Good Government Philippines was created in 1986; one of its specific tasks being the recovery of illegally obtained assets from the Marcos family and their associates. More than 25 years after its creation, the Commission continues to make recoveries, despite numerous obstacles, including unfavourable court rulings, competing claims to assets and restructuring under different political administrations.⁸⁰

72. Ananias Tumukunde, advisor to the President of Uganda, pleaded guilty in the United Kingdom and agreed to the restitution of nearly US\$ 100,000 received in unlawful payments for a security contract for the Commonwealth Heads of Government meeting in Kampala in 2007. The case was based on information that received attention by the Overseas Anti-Corruption Unit of the police in the City of London police, a specialized unit operating in the centre of the United Kingdom financial services industry and funded by the Department for International Development. The Unit's website expressly acknowledges the spirit of the Convention in informing the Bribery Act 2010, with its emphasis on foreign bribery. The Department for International Development also funds the Metropolitan Police Service's Proceeds of Corruption Unit. The United Kingdom also has an Anti-Corruption Domain within its Serious Fraud Office as well as a Proceeds of Crime Unit within its Crown Prosecution Service.

73. When the transitional government came into power in Nigeria in 1998, it created a Special Investigation Panel 45 days after the death of General Abacha to investigate corruption during the prior regime. That panel secured evidence which resulted in recoveries in a number of jurisdictions despite efforts by a subsequent government to withdraw evidence already provided to foreign counterparts. In 2002, the Economic and Financial Crime Commission was created by legislation in Nigeria. It not only serves as the Financial Intelligence Unit (FIU) in Nigeria, but also has investigative and prosecutorial powers over a broad range of corruption and other economic offences. It has become a member of the Egmont Group, enabling it to exchange sensitive information with other FIUs, and has cooperated with other countries in recoveries in the cases of Nigerian State Governors Dariye and Alamiyesiegha, which were described in chapter II.⁸¹

74. In 2003, the Anti-Corruption and Economic Crimes Act came into force in Kenya and established the Kenya Anti-Corruption Commission. Over US\$ 13 million were voluntarily repatriated from Switzerland after the issuance of a Special Audit Report by the Controller and Auditor-General, without MLA and confiscation procedures. A request for mutual assistance sought information on accounts paid out to Swiss accounts of a subsidiary of First Mercantile Securities, BVI. First Mercantile opposed the request, but the Kenyan Supreme Court held that the request was properly made by the Anti-Corruption Commission, which has had the power to make such requests independently of the Government.⁸²

⁸⁰Presidential Commission on Good Government, www.pcg.gov.ph.

⁸¹See Economic and Financial Crime Commission, www.efccnigeria.org.

⁸²Judgement in *Kenya Anti-Corruption Commission v. First Mercantile Securities Corporation*, Court of Appeals at Nairobi, 16 July 2010, http://kenyalaw.org/Downloads_FreeCases/76031.pdf.

75. In El Salvador, the Court of Accounts (Corte de Cuentas) conducted audits of public officials and employees with a view to preventing and administratively sanctioning acts of corruption. Carlos Perla, ex-president of the Salvadoran Water Authority, was found to have misappropriated US\$ 31 million during his tenure. Perla was prosecuted criminally and sentenced to 10 years imprisonment and Panama was requested to freeze and return assets worth over US\$ 2 million.⁸³ In November 2008, Panama created a Tribunal de Cuentas with competence for offences against public assets by government functionaries.⁸⁴

76. Similarly, in Pakistan, the creation of the National Accountability Bureau and the receipt of assistance from foreign expert organizations led to the revival of previous investigative efforts. Consequently, over US\$ 6 million were recovered through voluntary repatriation from the former Chief of Naval Staff of Pakistan, Mansur ul-Haq.⁸⁵

77. Switzerland-based businessman Bruce Rappaport held diplomatic positions under the administration of the Bird family, which led the Government of Antigua and Barbuda from 1981 to 2004. He negotiated a debt repayment agreement during that period for construction of a desalination and power plant. Amortization of the debt required monthly payments of US\$ 200,000 for 25 years, but Rappaport arranged payments of US\$ 400,000 monthly for allegedly advancing the funds and directed the excess to a company he controlled. After a change of Government, a new Attorney General terminated the arrangement and secured a US\$ 12 million repayment from Rappaport through a settlement in a private civil action proceeding filed in Florida, United States, by the Government of Antigua and Barbuda, which can be classified as direct recovery.

78. After the Fujimori administration, Peru adopted a number of measures to deal with the consequences of corruption and to pursue the proceeds of the numerous corruption offences committed by Vladimiro Montesinos and his associates. One measure was the creation of an ad hoc prosecution office staffed with attorneys hired from a respected law firm. At the same time, a specialized anti-corruption team of prosecutors, financial consultants and police technical experts was established by a newly appointed Attorney General. To deal with these newly generated cases, six anti-corruption trial courts and a Special Criminal Court of Appeal were established. Moreover, Peru benefitted from new legislation that gave Montesinos' associates incentives to cooperate in the form of reduced sentences and even immunity from prosecution. Under the new system, prosecutors could negotiate terms with a defendant. The granting of the benefit is conditioned upon the positive result of the defendant's collaboration. The judge examines whether the collaborator entered into the agreement voluntarily with knowledge of the consequences. The judge does not adjudicate the usefulness of the collaboration and cannot change its terms. If the agreement involves immunity, the judge grants immediate freedom and cancels the criminal record. If the agreement contemplates a reduced sentence, the judge declares the sanction corresponding to the terms of the agreement. This motivated a number of them to provide information about accounts in other countries and about the offences generating the proceeds, thus permitting both their identification and tracing.

79. The legal authority for an anti-corruption agency to act should be clearly established by law or constitutional provision, as it may come under attack from several directions.

⁸³StAR Asset Recovery Watch database page on Carlos Perla, available from <http://star.worldbank.org/corruption-cases/node/18475>; lusalvador.com, "FGR busca recuperar dinero de Carlos Pena", 4 November 2010.

⁸⁴Response of the Republic of Panama to a UNODC secretariat request for asset forfeiture information.

⁸⁵StAR Asset Recovery Watch database page on Mansur ul-Haq, case study, available from http://www.nab.gov.pk/Downloads/Case_studies/mansoorulhaq.pdf.

The First Mercantile Securities Corporation of the BVI was beneficiary of one of the 18 security-related financing contracts collectively referred to as the Anglo-Leasing scandal in Kenya, described above. When the Anti-Corruption Commission of Kenya requested assistance with respect to accounts in Switzerland, First Mercantile sued to challenge the Commission's authority to do so. A stay was issued, but ultimately the Kenyan Supreme Court upheld the Commission's independent authority to make such a request based on the Commission's legislative charter. In upholding the legitimacy of the Commission's mutual assistance request, the Court of Appeals rejected the arguments that the request was an improper attempt to interfere with civil litigation being brought in Geneva and that it unlawfully requested investigation that the Commission could not itself perform. The Court did not reach a decision on the merits as to one argument advanced by the Commission. The Commission lawyers argued that since Kenya had become a State party to the Convention against Corruption, it was bound by customary international law and the law of treaties to apply the Convention's principles even though it might not yet have adopted implementing legislation. The Court of Appeals of Kenya stated that, "We have already held that the Appellant was entitled to issue the LMA (letter for Mutual Assistance) under section 12 (3) of its creating statute and we see no reason to go into the question of principles of international law."⁸⁶

80. Some countries also have established specialized asset recovery units. In some cases, these are located in their police agencies, as is the case for Canada's Royal Canadian Mounted Police. The Commercial Affairs Department of Singapore has a broad mandate to deal with economic crime and has a special Proceeds of Crime Unit for asset recovery. The Economic Crime Authority of Sweden has a similar Proceeds of Crime Unit. The United States, through its Kleptocracy Asset Recovery Initiative—consisting of a team of dedicated prosecutors, investigators and financial analysts within its Asset Forfeiture and Money Laundering Section, has primary responsibility for investigating and prosecuting asset recovery cases involving high-level corruption.⁸⁷ After a commissioner appointed by the Government of the United Kingdom found substantial indications of corruption in the Turks and Caicos Islands, a British Overseas Territory, a Special Investigation and Prosecution Team led by a former prosecutor of the United Kingdom Serious Fraud Office initiated a number of prosecutions and secured a global freeze of assets of the former Premier, Michael Misick. At the same time, a United Kingdom Civil Recovery Team secured several substantial judgements, including one for over US\$ 19 million against foreign land developers for corruption in tax payments.⁸⁸

81. The Kuwaiti Investment Organization⁸⁹ was established as a unified national team pursuing an integrated strategy combining prosecution, private civil action and non-conviction based confiscation as essential to successful asset recovery. Certain agreed decisions were adopted within the Government, including forming a national team with the necessary capabilities, gaining the necessary political will and national support, assuring that all pressures and interference in the recovery process would be resisted, and admitting recovery would be a costly and time consuming process and coming up with a strategy to deal with the public embarrassment resulting from the investigation and litigation. Once formed, the National Team established its Task Priorities, described as follows:

⁸⁶ Kenya Anti-Corruption Commission, *Appellant v. First Mercantile Securities Corporation*, Respondent, Court of Appeal of Kenya, Civil Appeal 194 of 2008, Judgement of the Court, 16 July 2010, accessed from Daniel Arap Moi/Anglo-Leasing Case/Switzerland: http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Moi_AngloLeasing_First_Mercantile_Appeal_Ct_2010.pdf.

⁸⁷ Attorney General Holder at the African Union Summit, Kampala, Uganda, remarks, 25 July 2010, accessed from www.justice.gov/ag/speeches/2010/ag-speech-100725.html.

⁸⁸ Stolen Asset Recovery Watch database, page on Michael Misick: Quarterly Review and Annual Review from the Governor, Turks and Caicos, September 2010, http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Misick_Governor_Wetherell_4th_Quarterly_Statement_Sep_9_2010.pdf.

⁸⁹ StAR Asset Recovery: *A Good Practices Guide for Non-Conviction Based Asset Forfeiture 2009*, available from http://www.coe.int/t/dghl/monitoring/moneyval/web_ressources/IBRDWB_Guidassetrecovery.pdf.

- Set up a structural vision for running the case worldwide and for managing international law firms and accountancy firms engaged in the case.
- Develop and implement the following steps in the legal process:
 - Initiate offensive actions, rather than being in defensive positions. This required limiting any defensive action to pressing situations.
 - Determine the nature of legal actions to be launched in dealing with embezzlement or conspiracy and recovery actions, including criminal, civil, interlocutory and settlements.
 - Identify the jurisdictions for legal actions.
 - Distribute and allocate legal team tasks and responsibilities.
 - Define the role of legal firms in handling the cases and initiating litigation.
 - Acquire technical assistance (financial and legal) as deemed required. Determine key legal issues to be addressed or faced, including:
 - Waiver of State immunity,
 - Statutes of limitations,
 - Choosing defendants,
 - Building witness lists, particularly among potential defendants, and
 - Dealing with discovery threats, including political pressures and public embarrassment that might result from the disclosure of sensitive documents.
- Collaborate in judicial processes (technical legal assistance).⁹⁰

82. The Kuwaiti model was devised to deal with an external diversion of funds from the country's sovereign wealth fund. Internal diversions will require a greater emphasis on a domestic investigative and asset recovery plan, which would dictate a different composition for any expert advisory team. Indeed, it might be that two separate or overlapping sets of technical experts may be required, one to advise on gathering the available domestic evidence and a second team to advise on international evidence collection and recovery efforts.

83. For some countries, financial assistance may be required, which necessitates a willing donor. The counsel in the Lesotho Highlands Water Project prosecution, mentioned in detail below, described Lesotho's disappointment in regard to funding:

As to actual financial assistance, we make mention of a meeting held in Pretoria at the commencement of these prosecutions in November 1999. This meeting was called by the World Bank in order to discuss the pending prosecutions in Lesotho and ways in which Lesotho could be assisted by the international community. It was attended by representatives from South Africa, Britain, the European Union, the European Investment Bank, individual banks in Europe, as well as others. Various promises of assistance were made by those attending. The official minutes of the meeting also record such promises, such as the representative of the EU undertaking to "contribute to the cost of the process" and the British High Commissioner in Lesotho saying that "DFID could possibly offer direct assistance, even though a part of the EU". The World Bank representative that chaired this meeting, assured the

⁹⁰Star Initiative publication entitled *A Good Practice Guide for Non-Conviction Based Asset Forfeiture, 2009*, p. 164, available from http://www.coe.int/t/dghl/monitoring/moneyval/web_ressources/IBRDWB_Guidassetrecovery.pdf.

Attorney-General of Lesotho in the context of assistance that “the World Bank has deep pockets”. Unfortunately none of this help has been forthcoming.⁹¹

84. Domestic efforts to uncover past and ongoing official corruption and to trace its proceeds can be enhanced by adoption of the measures provided in Convention article 9 on public procurement and management of public finance and article 10 on public reporting. Article 14 on measures to prevent money-laundering can be particularly useful to permit identification of beneficial owners of accounts and entities and suspicious cross-border money transfers. Article 52 of the Convention repeats these requirements in the specific context of asset recovery. Its specific provisions are discussed in chapter II, on forms and devices of concealment of proceeds of acts of corruption. Article 52.4 warns of the direct or indirect dealings with or the existence in a State party of banks with no physical presence and that are not affiliated with a regulated financial group. Article 52.5 suggests consideration of “effective financial disclosure systems” for public officials. Article 8.5 provides more detail on the types of information that might be required in such reports. The use of the word “effective” serves to emphasize the reality that a person willing to risk criminal sanctions for the offence of receiving bribes or diverting public funds will be willing to risk additional sanctions for a false financial statement. Consequently, adoption of a financial disclosure system should be accompanied by the allocation of sufficient budgetary resources, and the assignment of enforcement responsibilities, so that filing a false disclosure statement constitutes a significant additional risk factor for a corrupt public official. The requirement for disclosure of a financial account in a foreign country in article 52.6 is useful, even though it does not address ownership or control of other forms of assets in a foreign country and may be difficult to enforce without foreign sources of information. However, like violation of an asset disclosure regime under article 52.4, violation of a foreign account disclosure requirement under article 52.6 provides means of imposing criminal or administrative sanctions when undisclosed assets or a foreign bank account is found, without having to prove the source or the corrupt nature of the assets which are not disclosed or were used to open the unreported foreign account.⁹²

C. The role of the *partie civile*⁹³ in asset recovery cases

85. Article 13 of the Convention requires States to promote the active participation of individuals and groups, such as civil society and non-governmental organizations, in the fight against corruption. Equally, they can play an important role in asset recovery. Article 35 of the Convention calls for States to take measures to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. Civil law countries such as France, Spain and Switzerland have mechanisms that non-governmental organizations are using to encourage the identification, freezing and tracing of assets suspected of being stolen. Criminal code provisions in those and other civil law countries also allow parties injured by an offence to petition for the opening of a criminal inquiry and for the recovery of the proceeds of the offence. In common law countries, States parties bringing a civil action and criminal action can secure *ex parte*

⁹¹“Case study: the Lesotho bribery prosecutions”, paper presented by L. L. Thetsane and G. H Penzhorn SC, Conference on the Protection and Optimization of Public Funds, Rabat, Morocco, 14 to 16 May 2007, para. 21, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Lesotho_Highlands_EU_Anti_Fraud_Case_Study_Thetsane_Penzhorn_May_2007.pdf.

⁹²The StAR Initiative publication, *Public Office, Private Interests*, dedicated to analysis of income and asset disclosure systems for public officials is useful reading for anyone charged with responsibility for devising or enforcing such a system and which will be supplemented with a companion volume of case studies.

⁹³*Partie civile* is French for “civil party”.

orders to compel a third party to disclose information leading to the identification of assets as well as their owner. It appears from the opinion in the United Kingdom civil suit in the Kuwaiti Investment Organization case that valuable evidence contributing to asset recovery effort by Grupo Torras against its executives and others for diversion of its assets was secured in this manner.

Sheikh Fahad's objections (since ceasing to be legally represented) to the use in evidence of documents provided by Judge Tappolet is without merit. The documents were properly obtained by the plaintiffs as *partie civile* in respect of Swiss criminal proceedings and immediately they were so obtained were provided to other parties in the present actions.⁹⁴

86. On 10 May 2012, a Swiss court recognized Egypt as a *partie civile* in a criminal investigation of possible organized criminal activity by members and associates of the Mubarek family with respect to 410 million Swiss francs deposited in that country.⁹⁵

87. In November 2010, petitions claiming that France was in possession of proceeds of crime by politically exposed persons resulted in a decision by the Court of Cassation of France that enabled non-governmental organizations (NGOs), including Transparency International France (an affiliate of Transparency International) and SHERPA to participate as *parties civiles* in an inquiry conducted by an examining magistrate. The suit in France involved three heads of State and their families, who had allegedly spent large sums in acquiring luxury assets, including multiple properties and automobiles. Now-deceased President Omar Bongo of Gabon was the subject of a complaint in France by NGOs alleging that he and his relatives, including his son—who has succeeded to the presidency, used unlawful proceeds to acquire 39 real estate properties, primarily in Paris and on the Riviera. In addition, there are seventy identified bank accounts, eleven of which are registered under the name of Omar Bongo, and a fleet of nine automobiles with a value of 1.5 million Euros. In a private civil action brought by non-governmental organizations in France, President Sassou Nguesso of the Republic of Congo (Brazzaville) and his relatives were alleged to be in unlawful possession of extensive assets, including 24 real estate properties, 112 bank accounts and a fleet of luxury automobiles.⁹⁶ President Teodoro Obiang of Equatorial Guinea and his son were also alleged in the private party criminal complaint to be in possession of unlawful proceeds, resulting in the February 2012 seizure of 12 luxury vehicles as possible proceeds of crime in France. Moreover, a Spanish NGO filed a criminal complaint against Obiang family members in Spain, resulting in a criminal proceeding that has been under way since 2009. A previous request in Spain by an NGO to join a criminal investigation of former President Pinochet of Chile had led to an agreement under which Riggs Bank officials were ordered to compensate the civil parties in the proceedings. In order to secure release from charges of improper transfer of Pinochet assets, Riggs and its owners agreed to pay a total of US\$ 9 million, consisting of approximately US\$ 1 million for lawyers' fees and expenses and US\$ 8 million to the Salvador Allende Foundation in Chile to compensate victims of human rights abuses.

⁹⁴Judgement in Grupo Torras S.A, High Court of Justice, Queens Bench Division, 1993 Folio No. 5, decided 24 June 1999, under (10.8), available from [http://www.trusts.it/admincp/UploadedPDF/201109011311030.jEng%20Grupo%20Torras%20%5B1999%5D%20EWHC%20300%20\(Comm.pdf](http://www.trusts.it/admincp/UploadedPDF/201109011311030.jEng%20Grupo%20Torras%20%5B1999%5D%20EWHC%20300%20(Comm.pdf).

⁹⁵*Egypt Independent*, 12 May 2012, www.egyptindependent.com/news/swiss-federal-court-allows-egypt-sue-mubarek%E2%80%99s-money.

⁹⁶Denis Sassou Nguesso case, StAR Database, <http://star.worldbank.org/corruption-cases/node/18489>.

D. The role of the media

88. On occasion, the exposure of a questionable arrangement can itself motivate the return of those proceeds. The influence of the media is reflected in the Anglo-Leasing scandal in Kenya, described above. The former Permanent Secretary for Governance and Ethics and chief presidential anti-corruption advisor testified that the Anglo-Leasing transaction was the subject of press headlines in June 2000. At the same time, a Swiss bank refunded payments of nearly US\$ 5 million to the Kenyan Central Bank on behalf of Anglo-Leasing in connection with a forensic laboratory contract and nearly €1 million on a passport system contract, followed by another firm refunding over €5 million on a security contract. The desire to avoid further inquiries suggests that minimizing publicity may have been a factor motivating the refund payments. However, the Anglo-Leasing case also demonstrates that the possibility of media attention is not enough to deter corruption when the financial rewards are great and the governmental deterrents are lacking. The case known as the Goldenberg Affair has been a continuing financial and judicial scandal since the 1990s in Kenya. It involved losses of as much as US\$ 600 million through export rebates and abuses of government programmes and prosecutions related to it were proceeding very slowly and intermittently through the judicial system at the very time the Anglo-Leasing contracts were executed.⁹⁷

89. Another example of media exposure is found in the trial court's opinion in *Attorney General of Zambia v. Meer, Care and Desai*. The judge describes how the media contributed to exposure of corruption in the administration of President Chiluba. While the President was still in office in 2001, a prominent political figure made accusations of corruption against him in the media. The accuser, several journalists and a former Minister of Finance were prosecuted for criminal libel, but the suit was dismissed in 2002. The dismissal in 2002 occurred after Chiluba had left office and a press exposure had detailed factual information about Zamtropol payments.⁹⁸

E. Efforts to combat money-laundering

90. The cases examined for this Digest reflect an encouraging development, which is the initiation of foreign inquiries based upon suspicious financial activity and the disproportionate wealth of politically exposed persons. Article 52 of the Convention and FATF Recommendation 12 have succeeded in focusing on the duties of financial institutions with respect to politically exposed persons.

91. Numerous cases of asset recovery can be traced to observance of these measures. A Guernsey branch of a Swiss bank notified the authority charged with combating money-laundering that it was being requested to release funds held by a corporate vehicle associated with Tommy Suharto, son of the former Indonesian President. The Guernsey authority did not consent to the transfer. The rights of the parties are currently being litigated (described in more detail in chapter IV, on identifying, freezing or seizing and

⁹⁷Report on the Judicial Commission of Inquiry into the Goldenberg Affair, Republic of Kenya, October 2005, accessed at Basel Institute of Governance Asset Recovery Knowledge Centre, page on Kenyan commission of Inquiry: Report on Goldenberg Affair, www.assetrecovery.org, <http://www.assetrecovery.org/kc/node/c800a8aa-dc00-11dd-8d28-f13739c882dc.3>.

⁹⁸[2007] EWHC 952 (Ch): *The Plundering of Zambian Resources*, Jan Kees van Donghe, African Affairs, 2008.

tracing of assets).⁹⁹ Former Kenya Power and Lighting executive Samuel Gichuru and Parliamentary Finance Committee Chair and one-time Energy Minister Chris Okemo have been charged with money-laundering and fraud in Jersey after identification of suspicious activity. The responsible police authority in Jersey declined to give consent to a transfer of funds and the financial institution refused to make any payments from the funds. Meanwhile, the United Kingdom has charged Gichuru and Okemo and requested their extradition from Kenya.¹⁰⁰ Nigeria State Governors Dariye and Alamieyeseigha were subjects of inquiry by United Kingdom authorities resulting in significant asset seizures. As described in chapter I, civil actions in the United Kingdom resulted in recovery of investments and funds from both former governors, and cash seized from both Dariye and Alamieyeseigha were repatriated after United Kingdom non-conviction based confiscations. Both had been arrested in the United Kingdom based upon money-laundering investigations and fled to Nigeria while on bail. Further, *in rem* proceedings in the United States resulted in the confiscation of Alamieyeseigha's corruption proceeds.

92. The recovery of assets from Víctor Alberto Venero Garrido, a Montesinos associate and money launderer, resulted from the identification of suspicious activity by a financial institution. Over US\$ 20 million were confiscated and transferred from the United States to Peru based upon a United States statutory procedure permitting the Attorney General to transfer funds in recognition of another State's law enforcement contribution to the underlying investigation and proceedings.

93. Pursuant to paragraph 1 of article 52 of the Convention, States parties shall take measures to require financial institutions to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high value accounts and to conduct enhanced scrutiny of accounts maintained by or on behalf of individuals who have been entrusted with prominent public functions or their family members or close associates.

94. Now that compliance with the precautions to combat money-laundering of articles 14 and 52 is made mandatory by the Convention, concealment of significant sums by politically exposed persons should become more difficult.¹⁰¹ Article 14.2 of the Convention also suggests the consideration of measures to detect and monitor cross-border movements of cash. The sons of Philippine Armed Forces Controller Carlos F. Garcia were arrested for attempting to smuggle undeclared currency into the United States and US\$ 100,000 they were carrying into the United States were confiscated. An investigation in the Philippines resulted in the prosecution of Carlos Garcia in that jurisdiction on plunder and perjury charges. A plea bargain forfeiting assets worth US\$ 3 million to the Philippine Government was negotiated but delayed by other legal proceedings against Garcia,

⁹⁹StAR Asset Recovery Watch database page on Tommy Suharto, also known as Hutomo Mandala Putra; Guernsey Law Reports 2009-10 GLR 1, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Tommy_Suharto_Guernsey_Garnet_Investments_2009-10_GLR_1.pdf. *Garnet Investments Limited v. BNP Paribas (Suisse) SA and Government of Republic of Indonesia*, 9 January 2009.

¹⁰⁰StAR Asset Recovery Watch database page on Samuel Gichuru, available from <http://star.worldbank.org/corruption-cases/node/18426> Judgment of the Royal Court, Bailiwick of Jersey in *Gichuru v. Walbrook*, 25 April 2008, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Gichuru_Jersey_Royal_Court_Walbrook_2008_JRC_068.pdf.

¹⁰¹United States General Accounting Office Report GSA-OSI 99-1, *Private Banking – Raúl Salinas, Citibank, and Alleged Money Laundering*, October 1998, available from <http://www.gao.gov/archive/1999/os99001.pdf>.

accompanied by Philippine Congressional opposition to the disposition.¹⁰² Some months after issuance of the Senate report criticizing the proposed plea bargain, the Philippine anti-corruption court, the Sandiganbayan, issued a resolution reviewing its terms. The resolution reviewed the terms of the agreement and approved the plea bargain as fully executed.¹⁰³ A reference in the resolution also indicated that United States authorities had agreed to confiscate a New York condominium and two bank accounts (all of which had been restrained and which the Garcia family had agreed to forfeit), and to transfer the proceeds to the Philippines pursuant to a bilateral mutual assistance treaty.¹⁰⁴

95. Measures to combat money-laundering are particularly effective in asset recovery when they are combined with the implementation of article 56 on special cooperation in chapter V, on asset recovery. Accordingly, the last reference in article 56 to a spontaneous disclosure that might lead to a request “under this chapter of the Convention” specifically contemplates that asset recovery will likely result from such cooperation in the jurisdiction to which the information is disclosed. An example of such special cooperation in the form of a spontaneous disclosure that contributed to recovery of assets is described in a release of the Federal Office of Justice of the Swiss Federation dated 20 August 2002. The release announces the transfer of a credit of US\$ 77.5 million to the Banco de la Nación del Perú. The funds represent blocked assets of the former Peruvian security service official and presidential advisor Vladimiro Montesinos and former Peruvian general Nicolás de Bari Hermoza Ríos. In October 2000, Swiss banks informed the Federal Office for Police Matters pursuant to their obligations under the Money Laundering Act of the Montesinos and Hermoza accounts. The Police Money Laundering Reporting Office forwarded the information to the Examining Magistrate’s Office, which blocked the funds and initiated a criminal investigation. Results of that investigation were provided by the Federal Office for Justice to the Peruvian judicial authorities, who in turn conducted inquiries and submitted a corresponding request for legal assistance to Switzerland, leading to return of the funds. Panama banks also reported Montesinos-related accounts to Panama authorities, which informed Peru. The funds had largely been transferred out of Panama, but the reports permitted their tracing to other jurisdictions.¹⁰⁵

F. Summary

96. The practical problems of reconstructing the forms of diversion and other illegal activities that occur or have occurred within a corrupt government can be immense, and the investigation of a criminal offence that may have taken place wholly outside the

¹⁰²StAR Asset Recovery Watch database page on Carlos F. Garcia, available from <http://star.worldbank.org/corruption-cases/node/18472>; Manila Mail article, “Garcia jailed while plunder case is reviewed”, 12c October 2011, available from <http://www.manilamaildc.net/garcia-jailed-while-plunder-case-is-reviewed.html>; 2011 Philippine Senate Committee on Accountability of Public Officials and Investigations Report on Proposed resolution 337 (not able to find the document with the exact name, but probably the following source: <http://www.ellentordesillas.com/wp-content/uploads/2011/03/BLUE-RIBBONCOMMITTEE-REPORT-Garcia-plea-bargain.pdf>). Decision of Sandiganbayan, Second division, 9 May 2011, available from http://sb.judiciary.gov.ph/RESOLUTIONS/2011/E_Crim_28107%20&%20SB-09-CRM-0194_Garcia,%20et,%20al_05_09_2011.pdf.

¹⁰³Resolution of Sandiganbayan, Second Division, *People of the Philippines v. Carlos Flores Garcia and others*, Criminal Cases Nos. 28107 and SB-09-CRM-0194, promulgated 9 May 2011, available from http://sb.judiciary.gov.ph/RESOLUTIONS/2011/E_Crim_28107%20&%20SB-09-CRM-0194_Garcia,%20et,%20al_05_09_2011.pdf.

¹⁰⁴See also United States Department of Justice letter to United States District Judge Jesse Furman, filed on 3 May 2012 in *United States v. All Rights, Title and Interest in Real Property and Appurtenance Located at Trump Park Avenue Condominium, Unit 6A (502 Park Avenue, New York, New York)*, 04 Civ. 8919 (JMF). Forfeiture case vs. Timothy Mark Garcia in New York re-opened, 8 April 2009, <http://www.gmanetwork.com/news/story/156165/pinoyabroad/forfeiture-case-vs-timothy-mark-garcia-in-new-york-re-opened>.

¹⁰⁵Press release of the Swiss Confederation, Federal Office of Justice, “Montesinos case: Switzerland transfers 77 million dollars to Peru”, 20 August 2002, available from http://www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2002/ref_2002-08-20.html.

territorial jurisdiction can be even more difficult. Lack of records, lack of live or cooperative witnesses, deliberate falsification of records and forgeries are all routine obstacles to overcome. To compensate for the difficulties facing countries seeking to recover assets where the legal order has essentially collapsed, two countries (Canada and Switzerland) have adopted laws, notwithstanding their limited scope, introducing concepts worthy of consideration by other countries. These new laws ease the initial difficulty of freezing the assets of politically exposed persons (see also chapter IV). The Swiss Federal Law on the Restitution of Illicit Assets of Politically Exposed Persons and the Law Freezing Assets of Corrupt Foreign Officials Act of Canada are encouraging signs of increased sensitivity to the problems of regime changes. Both contain procedures enabling targeted freezing measures based upon a lower than normal level of specificity in evidentiary requirements in view of emergency situations in States facing difficult conditions. Allowing non-governmental organizations to request the initiation of a criminal investigation as *partie civile* is an option being pursued with some degree of success in civil law countries. In common law countries State parties bringing a civil action and criminal action can secure *ex parte* orders to compel a third party to disclose information leading to the identification of assets as well as their owner. On occasion, asset recovery efforts have been enhanced through media, either by bringing to light large scandals, using investigative journalism to trace assets across jurisdictions, or by putting pressure on governments to pursue asset recovery cases with greater resolve. Moreover, specialized and independent anti-corruption bodies can play a decisive role in pursuing asset recovery from high ranking public officials and members of the government. It was also observed that money-laundering measures, as well as timely sharing of information between concerned jurisdictions, could be very effective in contributing to asset recovery.

IV. INTERNATIONAL COOPERATION IN IDENTIFYING, FREEZING OR SEIZING AND TRACING PROCEEDS OF CRIME

97. This section will address the mechanisms and processes required for identifying, tracing and freezing or seizing the proceeds of offences established by the Convention.

98. Article 46.3 (*j*) of the Convention states that mutual legal assistance may be requested for the purpose of identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V, which relates to asset recovery. Article 55 in chapter V is entitled “International cooperation for purposes of confiscation”. Article 55.2 requires that following a request by another State party having jurisdiction over an offence established by the Convention, the requested State shall “take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31.1, of this Convention for the purpose of eventual confiscation”. Article 54.2 of the Convention regulates the measures States parties must put in place or should consider with a view to enabling them to effectively respond to requests for mutual legal assistance for the purpose of seizing and freezing assets that allegedly constitute the proceeds of corruption. Article 54.2 (*a*) requires measures to permit freezing or seizing based on an order of a competent authority in the requesting State. Article 54.2 (*b*) requires measures to permit freezing or seizing upon a request providing sufficient grounds for action and for a belief that the property will be subject to a confiscation order in the requesting State. Article 54.2 (*c*) requires that States consider measures to preserve property based on a lower threshold, such as an arrest.

A. Identification of the proceeds of crime

99. The identification of criminally derived assets is frequently complicated by the common use of trusts, legal structures and nominees (see chapter II, Forms and devices of concealment of proceeds of acts of corruption). Different measures have been taken to overcome such complications.

100. Issuing a broad disclosure and freezing order has been allowed in certain cases, which can help identify any assets that may be hidden in a jurisdiction. An example of this can be found in the Abacha case. After a criminal complaint had been made in Switzerland by a lawyer representing the Federal Republic of Nigeria, the examining magistrate issued a disclosure and freezing order to all 385 banks registered in Switzerland at the time, but that was a unique situation. The Abacha regime had been notorious for its corruption. Foundational work by a Special Investigation Panel in Nigeria resulted in criminal charges and recovery of several hundred million United States dollars in Nigeria under the Forfeiture of Assets, Etc. Decree No. 53 of 26 May 1999. Abacha assets had already been located in a number of Swiss banks and suspicious transaction reports were being received from others revealing the use of false identities to open accounts. The number of persons allegedly involved in the Abacha criminal organization and disclosures

in a civil suit in the United Kingdom gave reason to issue an unusually broad order to all the Swiss banks.¹⁰⁶ Absent that combination of circumstances a request to identify and freeze or seize assets is unlikely to succeed without an identification of the financial institution believed to hold the account or some information or indicia narrowing the universe of banks that might be involved, such as the city visited by the suspected account holder or an association with a person known to have connections with certain banks. In the Abacha proceedings, the information sought by Nigeria in an MLA request could be provided only after years of delay caused by legal objections raised by the Abachas. That was long after Nigeria, as a civil party in the criminal proceedings under the Swiss civil law procedure, had gained access to the information discovered in the criminal investigation.

101. Another measure that has been taken with a view to identifying assets is the use of domestic laws and regulations that permit the issuance of executive orders that allow, inter alia, the freezing of foreign assets to protect national security interest or in an international economic emergency. For example, the United States Government has, through Presidential Executive Order among other things, the authority to identify and block assets and/or transactions involving particular individuals, entities, or jurisdictions (“designated persons”) that pose an unusual and extraordinary threat to the national security, foreign policy, or economy of the United States. Similarly, Switzerland was able to issue a freezing ordinance based on constitutional power to safeguard national interests with respect to the Marcos assets. The Swiss authorities issued ordinances under that power to freeze assets associated with the regimes of Hosni Mubarek of Egypt, Zine Ben Ali of Tunisia, Laurent Gbagbo of Côte d’Ivoire, Mobutu Sese Seko of the former Zaire, now the Democratic Republic of the Congo, and Jean-Claude Duvalier of Haiti. After former President Ben Ali left Tunisia, also Austria,¹⁰⁷ Qatar¹⁰⁸ and the United Arab Emirates¹⁰⁹ announced freezes of his assets. Many of those actions, even if taken after the effective date of the Convention, would not be within the mandatory provisions of the Convention without a request for assistance. They might arguably be considered steps in accordance with article 54.2 (c) because they preserve property for confiscation and are intended to enable the freezing country to provide mutual assistance upon receipt of a future request from another State party.

B. Tracing the proceeds of crime

102. In common law jurisdictions, civil procedures allow for applications to be made for remedies that have facilitated asset recovery, such as Norwich Pharmacal orders, Anton Piller orders, Mareva injunctions and Bankers Trust orders. The precedents of such asset recovery remedies were developed in civil actions that are now commonly used in the recovery of proceeds of corruption offences. As the number of asset recovery cases increases, courts and other authorities are becoming increasingly adaptive in permitting procedures necessary to facilitate identification, freezing and tracing of unlawful proceeds. Historically the development of these measures can be traced to the decision establishing

¹⁰⁶Response of the Swiss Confederation to a UNODC secretariat request for asset recovery information.

¹⁰⁷www.news24.com/Africa/News/Austria-freezes--Ben-Ali-Assets-20110130, “Austria freezes Ben Ali assets”, 29 January 2011.

¹⁰⁸“Qatar freezes assets of ousted Tunisian president Zine al-Abidine Ben Ali”, 31 May 2011, available from <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/tunisia/8549098/Qatar-freezes-assets-of-ousted-Tunisian-president-Zine-al-Abidine-Ben-Ali.html>.

¹⁰⁹“UAE Central Bank orders freeze of Ben Ali assets”, 8 June 2011, available from <http://www.alarabiya.net/articles/2011/06/08/152462.html>

the order in the Norwich Pharmacal case that originated in the United Kingdom.¹¹⁰ A pharmaceutical firm noticed that its patent rights were being infringed by imported products. It sought information from Her Majesty's Customs and Excise Commissioners about the infringers. The request was administratively denied but granted upon application to the court. The grounds for the judicial decision were that clear damage was resulting from wrongful conduct and that the responsible party could not be identified and sued without the requested information. This decision established the circumstances in which a proceeding could be brought to compel a third party to provide information about a cause of action. The case is significant as it establishes case authority for disclosure orders, as a useful tool for civil actions.¹¹¹ Shortly thereafter, the case establishing the precedent for a Mareva injunction was decided.¹¹² This was an appellate decision continuing an injunction for the freezing of assets in a bank account to protect a creditor when the owner of the account was otherwise unable to pay its debt. There was also a serious risk that the funds would be moved out of the jurisdiction. This case was followed by a decision finding it appropriate in circumstances where there was very strong evidence of wrongdoing and imminent harm to issue an injunction permitting a private inspection of the defendant's premises and the removal of documents relating to the wrongdoing. Such injunctions do not authorize the use of force but rely upon the threat of contempt sanctions for unjustified non-compliance. This type of injunction is known as an Anton Piller order after an appellate decision endorsing the procedure.¹¹³ In 1980, a final important innovation was introduced by the so-called Bankers Trust order.¹¹⁴ In the case where the precedent for the Bankers Trust was established, the power of the court to impose an obligation of temporary non-disclosure on a third party required to provide information about assets and transactions was recognized. The Bankers Trust *ex parte* procedure can assist both in the identification and tracing process by determining where deposits are located or transactions may have taken place while protecting the possibility of an effective freezing because of its temporary non-disclosure feature. It can be a form of independent action preparatory to a recovery suit. These various types of orders have now been incorporated into the civil procedure rules of many jurisdictions. Several types of relief, such as disclosure and restraint may be combined in one order, and the former case names are sometimes used to describe a particular type of relief in an order.

103. A case study prepared by a partner in the firm of solicitors hired by Nigeria to recover assets of the Abachas and associates was published in connection with the Asian Development Bank/Organisation for Economic Co-operation and Development Anti-Corruption Initiative for Asia and the Pacific.¹¹⁵ This study describes how a United Kingdom court was requested to issue a Bankers Trust order based upon an *ex parte* application. The order required named banks to disclose copies of bank statements, and other information, including account opening forms, customer information, debit and credit notes, internal bank memoranda regarding the operation of the accounts and their source of funds and payment instructions. Disclosure was obtained from about 20 banks on approximately 100 Abacha family members, associates and corporate vehicles.

¹¹⁰*Norwich Pharmacal and others v. Customs and Excise Commissioners*, AC 133 (1974), <http://www.bailii.org/uk/cases/UKHL/1973/6.html>.

¹¹¹Please see p. 150f, StAR report on non-conviction based asset forfeiture, <http://star.worldbank.org/star/publication/good-practice-guide-non-conviction-based-asset-forfeiture>

¹¹²The term is derived from an order issued in 1975 by a United Kingdom court in the case of *Mareva Compania Naviera SA v International Bulkcarriers SA*, 2 Lloyd's Rep 509 [1975].

¹¹³*Anton Piller KG v. Manufacturing Processes Limited and others* [1975 A-1692]

¹¹⁴The procedure was used in a United Kingdom case entitled *Bankers Trust v. Shapira*, [1980] 1 WLR 1274 CA.

¹¹⁵Making international anti-corruption standards operational: Asset Recovery and mutual legal assistance, Regional Seminar for Asia-Pacific, 5-7 September 2007, Bali, Indonesia background paper, "General Sani Abacha A Nation's Thief", www.baselgovernance.org/fileadmin/docs/pdfs/.../Timothy_Daniel

104. Cases exemplifying how identification orders and restraint orders work together include the Duvalier and Alamieyeseigha cases which could be regarded as the first stage leading to the eventual confiscation proceedings. In 1986, President Jean Claude Duvalier and members of his family left Haiti and took up residence in France. In the same year, the Republic of Haiti sued the Duvaliers in France, alleging embezzlements exceeding US\$ 120 million. In 1988, Haiti initiated *ex parte* proceedings in the United Kingdom. The court there granted orders to be served outside the United Kingdom on the defendants, restraining them from moving assets.¹¹⁶ It also granted an order against a firm of English solicitors to identify bank accounts to which funds belonging to the defendants had been transferred. Evidence had been secured in Jersey that the firm represented Duvalier and had purchased Canadian bonds in Toronto valuing 40 million Canadian dollars for a client account. Eventual disclosures revealed 17 Duvalier accounts at 11 banks in seven countries, eleven of which were under the names of solicitors in the firm. An important aspect of the order against the solicitors was that it required them not only to disclose information known to them as to the nature, location and value of the defendants' assets, but also not to advise the defendants of the court's orders. The utility of this provision was explained in the appellate court judgement¹¹⁷ permitting the issuance of follow-up orders to other parties identified in the disclosures by the English solicitors, based on the precedent in *Bankers Trust v. Shapira* case.¹¹⁸ Former Nigerian Governor Alamieyeseigha's case was described in chapter I as an example of an illicit enrichment offence established in article 20 of the Convention. According to the *Asset Recovery Handbook – A Guide for Practitioners*, in a civil suit against him, Nigeria was first able to obtain a disclosure order for evidence secured by the London police, which was granted without police opposition. Based on that information and its comparison with Alamieyeseigha's asset disclosure form filed as a State Governor, a worldwide restraint order covering all assets beneficially owned by Alamieyeseigha and a further disclosure order for information held by banks and the Governor's associates was granted. Nigeria ultimately prevailed in its lawsuit and secured title to properties in Cyprus, Denmark and the United Kingdom.¹¹⁹ Nigeria's civil action commenced with an application for a court order requiring disclosure of the London police evidence. The information allowed Nigeria to develop its case and to apply for its own injunction to freeze assets, which was granted to apply everywhere except in Nigeria. A disclosure order was also issued by the United Kingdom court requiring banks and Alamieyeseigha's London financial advisor to disclose financial information.¹²⁰

C. Freezing or seizing the proceeds of crime

Article 54, paragraphs 2 (a) to 2 (c)

105. Article 54.2 (a) and article 54.2 (b) specify the measures that a State party must have available when presented with a request for freezing from another State party.

¹¹⁶*Republic of Haiti and other v. Duvalier and others*, Court of Appeal, 1 Queens Bench 202 (1990), accessed at StAR Asset Recovery Watch database page on Jean Claude "Baby Doc" Duvalier/United Kingdom, available from <http://star.worldbank.org/corruption-cases/node/18516>. See also the 2008 article entitled "Disarming litigation terrorists" at <http://www.newlawjournal.co.uk/nlj/content/disarming-litigation-terrorists>.

¹¹⁷*Ibid.*

¹¹⁸*Ibid.*

¹¹⁹Case 1.3.3 Diepreye Alamieyeseigha, *Asset Recovery Handbook—A Guide for Practitioners*, p.18, StAR Stolen Asset Recovery Initiative, The World Bank/UNODC (2011), <http://star.worldbank.org/star/sites/star/files/Asset%20Recovery%20Handbook.pdf>.

¹²⁰"The Kleptocrat's Portfolio Decisions", in *Draining Development?: Controlling Flows of Illicit funds from Developing Countries*, p. 432, Peter Reuter, ed.; the World Bank, 2012, <https://openknowledge.worldbank.org/bitstream/handle/10986/2242/668150PUB0EPI0067848B09780821388693.pdf?sequence=1>.

Article 54.2 (a) provides that in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55, the State party shall:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State party that provides a reasonable basis for the requested State party to believe that there are sufficient reasonable grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article. [Note: Paragraph 1 (a) refers to giving effect to an order of confiscation issued by a court of another State party.]

106. Freezing or seizing property pursuant to the particular type of requests contemplated by paragraph 2 (a) of article 54 are not common actions. This scarcity is understandable in that it is difficult for a State in which officials have been bribed or in which public property has been diverted to freeze the property before that property is located and shown to be the probable proceeds of an offence established by the Convention. However, examples of the application of this provision exist. For instance, the United States has the capacity to enforce foreign confiscation judgements and requests for restraint. It has done so on numerous occasions. The Digest includes one case where a seizure order secured in the requesting State permitted authorities in the requested State to freeze property upon the de facto basis of the foreign seizure order. That result was accomplished even though the requested State could have insisted upon a more formal procedure before freezing the accounts.

107. The following description of those events was provided by the Chief Justice of the Cayman Islands, who was also its mutual legal assistance authority.

The Montesinos-Torres matter, mentioned earlier, was yet another example of the importance of a legal system which is flexible and amenable to inventive ways of recovering the proceeds of crime.

Effective results were achieved because of the willingness on the part of the Cayman authorities, to take recourse to restrain the money itself in rem out of concern that the local laws were also being violated, instead of awaiting a judgment *in personam* which may never have been forthcoming because of the fugitive status of the perpetrator and which would have to be also enforced to recover the proceeds which would have no doubt taken flight without the restraint.

Thus, what began simply as a letter of request to “lift the bank, financial and stock market secrecy procedures, as well as to execute a preventive attachment in the form of a restraining order” on all and any bank accounts held in Grand Cayman in the name of Vladimiro Montesinos-Torres or in the name of several other related parties; ended in the repatriation of some 44 million dollars to Peru, without a trial between the parties having to take place.

This happened because in urgent response to the Judicial Request from Peru, a restraint order was obtained from the Cayman Court, freezing the bank accounts which could be identified. This afforded the Peruvian Government the time it needed to prepare and present its case for the ultimate declaration of its ownership over those accounts as containing the proceeds of the crime.

Montesinos-Torres, a member of the Directorate of the Peruvian National Intelligence Service (SIN) was alleged to have carried out acts “contrary to his functional duties in exchange for high economic benefits”. He was a fugitive at the time of the request, thereby rendering to be unlikely, the prospect of a conviction and a civil trial to

recover the proceeds, based on his proven guilt. However, because the accounts had been frozen and would likely have remained so indefinitely while he was at large, others, including his wife, whose names were linked to the accounts; agreed to the repatriation of the funds to Peru.

In effect, what the Peruvian Government sought and obtained, was an order enforcing the Preventive Seizure Warrant which had been issued by the Peruvian Court in the same matter.”¹²¹

108. A more common situation is requesting for mutual assistance using the procedure found in paragraph 2 (b) of article 54, which requires a State party to:

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State party to believe there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; (implementing a foreign order of confiscation).

109. Examples of freezing in this kind of situation include an account in the Mercator Corporation case frozen by Switzerland in response to a request by the United States. As reflected in a verified Complaint for Forfeiture filed in a United States court,¹²² the Mercator Corporation acted as an agent for United States oil companies operating in Kazakhstan. In order to secure contracts, Mercator bribed high-level government officials, transferring funds to a number of accounts in Switzerland. For years, monies were paid on an account controlled by a high-ranking official and designated as the “Orel” account. In 1999, the principal of Mercator and the Kazakh officials learned that the Swiss authorities were conducting an inquiry into the accounts containing the bribes. The contents of the Orel account were thereafter transferred on an account at a different Swiss bank. This account was designated under the name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan in an apparent effort to convey an appearance of legitimacy. The Kazakh government official, who was the beneficial owner of the Orel account, occupied a sufficiently high-level position in the Kazakh government that he retained the effective power of disposal over the account. The principal of Mercator was charged in the United States with various offences and the United States Government made a mutual assistance request (a restraint order for purposes of eventual confiscation) to Switzerland, which froze the account controlled by the senior Kazakh official.¹²³ As a consequence, Switzerland forfeited an account nominally belonging to the Treasury of the Ministry of Finance of the Republic of Kazakhstan but which contained assets subject to the power of disposal by a high official of the Kazakh Government.

¹²¹International Co-Operation against Money Laundering and Assistance in the forfeiture of the proceeds of Corruption, Forfeiting the Proceeds of Corruption, A Seminar on Asset Forfeiture and Money Laundering for Member States of the Organization of American States, May 2-5, 2006, Miami, Florida, United States, p.12, http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Montesinos_Cayman_Islands_Chief_Justice_Speech_May_2006.PDF.

¹²²Verified Complaint, *United States of America v. Approximately \$84 million*, No. 07-CV-3559, filed 3 May 2007, United States District Court for the Southern District of New York, [http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_\\$84m_Verified_Complaint_May_3_2007.pdf](http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_$84m_Verified_Complaint_May_3_2007.pdf).

¹²³Amended Memorandum of Understanding Among the Governments the United States of America, the Swiss Confederation and the Republic of Kazakhstan, accessed at the StAR Asset Recovery Watch database page on Kazakhstan Oil Mining/James Giffen/Mercator Corporation Case Switzerland, available from <http://star.worldbank.org/corruption-cases/node/18528>; response of the Swiss Confederation to a UNODC request for asset recovery information.

110. Article 54.2 (c) places a duty upon States parties to:

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

111. The Marcos case is a historical example which took place before negotiation of the Convention against Corruption. Nevertheless, it illustrates the trigger which could lead authorities to preserve property for confiscation even without receiving a mutual assistance request. In the chaotic period following the departure of Ferdinand Marcos from Manila in 1986, a Filipino banker secured powers of attorney from former President Marcos and Mrs. Marcos after they had left Manila and relocated to Hawaii. He personally presented these to Credit Suisse in Zurich with a request that the money and assets of Liechtenstein foundations controlled by the Marcos family be transferred to his bank in Vienna, Austria. He was told to return the following day. That same day the bank informed Swiss authorities. Later that evening, the Swiss Federal Council imposed an emergency freeze prohibiting all Swiss banks from transferring funds in any account identifiable with the Marcos family. The legal basis for the action was the foreign affairs power granted to the Federal Council, the executive branch of the Swiss government under the Swiss Constitution.¹²⁴ The pertinent article at the time was article 102, which under the 1999 Constitution has become article 184, the pertinent paragraph of which now reads:

(3) Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.¹²⁵

112. In the Duvalier case, a Swiss court ordered release of funds which had been frozen from 1986 to 2010, because of the Swiss constitutional provisions requiring that a freeze has to be of limited duration, the lack of a criminal prosecution related to funds belonging to the Duvalier family and the passage of a statutory time limit. A national ordinance was employed in 2010 to extend the freeze until the Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons was adopted in October 2010.¹²⁶ The Swiss Federal Council has adopted ordinances blocking the assets of persons associated with the former regimes of Côte d'Ivoire, Egypt, Libya and Tunisia.¹²⁷ In some cases, the freeze may have preceded a mutual assistance request and in others the requesting country may have been unable to provide information and evidence of the specificity that would normally be required for the granting of a freezing order.

113. In the Mobutu situation, Switzerland responded to a 1997 legal assistance request from the Democratic Republic of the Congo (DRC) by partially freezing Mobutu assets. The request did not supply sufficient evidence to support a complete freeze, so the Government adopted an ordinance to freeze the remaining assets of Mobutu and his family. Despite repeated communications between 1997 and 2003, the DRC failed to clarify or supplement its request for assistance. In 2003, the Swiss Government froze the funds for three more years based on the aforementioned constitutional provision allowing it to act to protect the national interest. In December 2006, the ordinance was extended for two

¹²⁴"James Ibori in final fall", 18 April 2012, Information Nigeria.org, accessed from <http://www.informationng.com/2012/04/james-ibori-in-final-fall.html>.

¹²⁵Unofficial translation provided at the Swiss Confederation website, <http://www.admin.ch/ch/e/rs/101/a184.html>.

¹²⁶StAR Asset Recovery Watch database page on Jean Claude "Baby Doc" Duvalier/Switzerland and sources there cited, available from <http://star.worldbank.org/corruption-cases/node/18515>.

¹²⁷The Libya freeze ordinance based upon article 102 of the Constitution was soon replaced by one based on a legislative act implementing United Nations sanctions, the Federal Act of 22 March 2002 on Implementation of International Sanctions (the Embargo Act).

years. In 2007, the President of the Swiss Federation visited the DRC and other personal contacts were made seeking to achieve action by the DRC. In 2008, the Federal Department of Foreign Affairs offered technical support to recommence the criminal legal assistance proceedings from 1997. The DRC responded that it instead preferred to negotiate with the Mobutu heirs. The Minister of Foreign Affairs of Switzerland then offered to pay for a Swiss lawyer to seek a judicial freezing order. On acceptance of this offer the Government used its constitutional power to extend the freeze until early 2009. After the lawyer paid for by the Government of Switzerland filed a criminal complaint, the constitutional stay was extended to allow the Attorney General of Switzerland to consider its validity, which was found lacking because the statutory time for action had passed. The DRC instructed its Swiss counsel not to avail himself of the available means of challenging the decision, thus ending the litigation. A private citizen's complaint was rejected by the Federal Criminal Court as he was not a victim of any crime and after 12 years the funds were released to the Mobutu heirs. The Ambassador of Switzerland to the Democratic Republic of the Congo released the above chronology in Kinshasa on 21 July 2009, expressing regret for the negative conclusion to the matter and noting Switzerland's offer to the Congolese Ministry of Justice to support programmes for training prosecutors and fighting corruption.¹²⁸

114. Vladimiro Montesinos' name and corrupt reputation became globally known after a video was broadcast showing him bribing a Peruvian Congressman. As a result, a suspicious transaction report was filed by a Swiss bank and a magistrate issued a freezing order in connection with the opening of a money-laundering proceeding. Switzerland then spontaneously communicated to Peru requesting an investigation of the origin of the funds and inviting a request for mutual assistance. This is the special cooperation procedure encouraged in article 56 of the Convention. Each State party is to endeavour to forward information on proceeds of offences without request when that information might assist a receiving State party in initiating or carrying out investigations or proceedings or might lead to a request for recovery of assets.¹²⁹

115. Some jurisdictions allow a custodian whose banking records are sought by governmental authorities for the purpose of responding to a request for mutual assistance to notify the interested parties of a mutual assistance request. Those interested parties are then given an opportunity to be informed of and to appeal both domestic execution of the request and transmission of the results to the requesting State.¹³⁰ Since this notice to interested parties may take place before an interim freeze has been ordered by the authority from which assistance is requested, the danger exists that the assets in question will be transferred while the assistance request is being litigated. Consequently, prudence dictates that before seeking foreign assistance that might alert the beneficial owners of crime proceeds, substantial domestic work should be done to establish the underlying criminal activity, as well as some basis to suggest that illegally obtained assets are located in the requested country. This work would also include pursuing all available avenues of informal international cooperation prior to submitting the mutual legal assistance request. Ideally that information would be used to support the initial request not only for identifying assets but also for a freezing or seizure order of any accounts found.

¹²⁸"The Mobutu Assets in Switzerland", Statement of the Swiss Ambassador to the Democratic Republic of the Congo, Kinshasa, 21 July 2009, accompanied by *Chronology of the Mobutu Assets Frozen in Switzerland*, Federal Department of Foreign Affairs of the Swiss Confederation, available from http://www.eda.admin.ch/etc/medialib/downloads/edactr/cod.Par.0024.File.tmp/CHRONOLOGY_OF_THE_MOBUTU_ASSETS_FROZEN_IN_SWITZERLAND.pdf.

¹²⁹See chapter I.

¹³⁰Article 80n, Right to inform, Federal International Mutual Assistance Act of Switzerland, 1981 as amended, unofficial translation, <http://www.admin.ch/ch/e/rs/3/351.1.en.pdf>.

116. A person under investigation for offences established in accordance with the Convention against whom a restraining order is issued may feel there is little to lose in terms of exposure to sanctions and much to gain financially by ignoring a Mareva injunction order described above, if he or she is outside the geographic jurisdiction of the issuing court. Former Nigerian Governor Alamieyeseigha had violated his bond restrictions and fled to Nigeria when a Mareva restraining order was secured against him in the litigation described in chapter I, in effect duplicating a previous restraining order issued in the criminal proceedings. Considering that he had been willing to violate his bond provisions and risk incarceration if he ever returned to the United Kingdom, it seems unlikely that Alamieyeseigha would voluntarily obey the Mareva injunction. However, such an injunction may still have a collateral effect. A bank or other institution conducting transactions which may involve the United Kingdom or use of United Kingdom financial facilities must weigh the possibility of being found to have assisted in a breach of the order, as well as the risk of a claim by a government to be the rightful owner of restrained assets. An informal extension of the Mareva injunction procedure is the use of a so-called Mareva-by-letter procedure. Once a judicial order is issued to the defendants, banks and other financial institutions are put on notice by private correspondence from counsel representing the plaintiff that the funds are claimed as property stolen from or rightfully belonging to a State or other victim. The bank is thus on notice of another claim to the funds and of their asserted illegal origin. It may thus find itself in a vulnerable situation if it has not observed all of the appropriate know-your-customer and other precautions to combat money-laundering applicable to that client.

117. When a bank is put on notice by a country or private victim that funds are the proceeds of crime,¹³¹ the bank must report those funds to satisfy its administrative responsibilities to combat money-laundering and to reduce the risk of administrative and criminal sanctions. The bank also has to consider whether the lawful owner of funds may ultimately secure a judgement that the bank is liable to pay the amount which it had on deposit to the lawful owner of the assets. If it has already released or transferred those funds, it may thus have to pay them out twice. To avoid that prospect, a financial institution may delay, seek official guidance and relief, and ultimately rely upon a judicial determination to resolve to whom the funds should be paid. So, a Mareva-by-letter procedure can be seen as a threat in one sense but also a beneficial warning which may assist asset recovery efforts by States. This is illustrated the Codelco matter. Codelco was a Chilean State-owned copper mining, refining and selling company, which traded in futures. The head of its futures trading department was discovered to have received millions of United States dollars from metal brokerage firms. The Chief Justice of the Cayman Islands described how an early warning to the Cayman bank putting it on notice that its accounts contained proceeds of the trader's corrupt acts caused the bank voluntarily to freeze the accounts. In responding as it did, the bank's primary early concern was to avoid its own civil liability as a constructive trustee. The bank action allowed the Chilean Government time to obtain discovery orders against the bank for disclosure of information about the accounts and ultimately to freeze the accounts and recover the proceeds via direct recovery in the Cayman Islands following criminal prosecution in Chile.¹³²

118. Another case considered whether a refusal by a financial intelligence unit to consent to a release of funds constituted a freezing action. A provision of the Guernsey Proceeds of Crime Act requires the jurisdiction's financial intelligence unit to consent to a transfer reported as suspicious. Hutomo Mandara Putra, also known as Tommy Suharto, was a

¹³¹This can occur in multiple ways, one being the Mareva-by-letter technique used in civil asset recovery litigation and described above.

¹³²*Stolen Asset Recovery: A Good Practice Guide for Non-Conviction Based Asset Forfeiture*, p. 150, <http://star.worldbank.org/star/sites/star/files/Non%20Conviction%20Based%20Asset%20Forfeiture.pdf>.

son of the late President of Indonesia. In 1994, at a time when he was in his twenties, he purchased a majority interest in Lamborghini, the Italian luxury automobile manufacturer. In view of legal limitations on his father's earning capacity, there was no substantial possibility of legitimate family wealth sufficient to provide the funds for that purpose. President Suharto resigned in 1998 and in the same year his son sold the Lamborghini shares and deposited the proceeds in a new account in Guernsey, in the name of Garnet Investment Limited. In 2002, Hutomo was sentenced to 15 years jail for paying two hitmen to kill Syafiuddin Kartasasmita, a Supreme Court judge who had convicted him of graft. In the same year, Garnet Investment directed the Guernsey bank to transfer €36.5 million from the accounts. The bank refused and notified the Guernsey Financial Intelligence Unit, which declined to consent to the release of the funds. In 2006, Garnet commenced a suit against the bank for failure to pay over the funds. The Government of Indonesia sought to join that litigation and secured a civil freezing order in 2007. That order was lifted after two years by the Court of Appeal. During the freeze, Garnet gave new payment instructions to the bank, which again informed the Financial Intelligence Service (FIS) and was refused consent to make the transfer.

119. Garnet sought judicial review of the FIS refusal, claiming that the unit's refusal of consent constituted an arbitrary and unreasonable official freezing action. Garnet prevailed in the court of first instance, but the Court of Appeal reversed that decision. On the merits, it found that the Proceeds of Crime Act of Guernsey placed a heavy burden on bankers to avoid involvement in money-laundering, and that burden was necessary to protect the island's financial services economy in view of its limited enforcement capabilities. At the same time, the legislative purpose of the FIS power to consent was not to confer an informal freezing power by the ability to withhold consent, but rather to allow consent when it is in the legitimate interests of law enforcement to do so. If there is legitimate suspicion that funds may be the proceeds of crime, the FIS should not be compelled to consent to a potentially criminal transaction. The court stated that:

In our judgement, it is not the FIS that is denying Garnet access to its property and preventing judicial oversight, it is the impact of the width of the criminal law and its chilling effect upon the person holding the fund, namely BNP.

Furthermore for the reasons we set out below the refusal of consent does not preclude judicial oversight by the courts. The legality of any refusal to transfer funds may be challenged by a private law claim brought against the person holding the funds before the Courts of the Bailiwick.¹³³

120. This opinion succeeded in preserving the prerogative of the Guernsey financial intelligence unit and leaves Mr. Suharto with a potential remedy, as the Court went on to point out that the bank will have to prove that the funds are the proceeds of crime by a preponderance of evidence to prevail at trial. Furthermore, should it prevail, the bank would only be entitled to remain as custodian until some further resolution.

Measures to permit freezing in special circumstances

121. Switzerland and Canada adopted legislation in special circumstances that prevent a requesting country from meeting the normal requirements for mutual legal assistance.

¹³³Judgement, Court of Appeal of the Island of Guernsey, *Chief Officer, Customs and Excise v. Garnet Investments Limited*, 1 August 2011; accessed from http://www.opp.vic.gov.au/getattachment/e45cf8e8-a020-48dc-9e6b-f86b8e478672/chief_officer_customs_v_garnet_investments_ltd_app.aspx.

122. In 2010, Switzerland adopted the Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons, (see chapter III, Initiation of asset recovery cases). The Swiss law applies to situations involving politically exposed persons in certain defined circumstances:

Art. 1. This Act governs the freezing, forfeiture and restitution of assets of politically exposed persons or their close associates in cases where a request for mutual legal assistance in criminal matters cannot produce an outcome owing to the failure of State structures in the requesting State in which the politically exposed person exercises or exercised office (the country of origin).

Art 2. Requirements

The Federal Council may order the freezing of assets in Switzerland with a view to the instigation of forfeiture proceedings under this Act, provided the following conditions are fulfilled:

- a. The assets have been secured provisionally in the context of a process of mutual legal assistance in criminal matters instigated at the request of the country of origin.
- b. Powers of disposal over the assets rest with:
 1. Individuals who exercise or have exercised a high public office abroad (politically exposed persons). This category includes specifically heads of State or government, high-ranking politicians, high-ranking members of the administration judiciary, armed forces or national political parties, and senior executives of state-owned corporations of national importance, or
 2. Natural or legal persons who are closely associated with politically exposed persons for family, personal or business reasons (close associates).
- c. The country of origin is unable to satisfy the requirements of mutual legal assistance proceedings owing to the total or substantial collapse, or the unavailability, of its national judicial system (failure of State structures).
- d. The safeguarding of Swiss interests demands that the assets be frozen.¹³⁴

123. Canada adopted similar legislation with the Freezing Assets of Corrupt Foreign Officials Act of March 23, 2011. After the fall of Tunisia's Ben Ali regime, a number of his relatives and associates were believed to have substantial assets in Canada. Tunisian authorities asked for these assets to be frozen, but could not yet establish a criminal origin of the funds. The adoption of the law widened the scope of the Canadian freezing authority beyond situations that threaten international peace and security as declared by the United Nations Security Council, as well as established the procedures and requirements for each person's assets in such cases (see chapter III on the initiation of asset recovery cases). It allows freezing of assets based on the assertion of a foreign State that the politically exposed foreign person has misappropriated State property or inappropriately acquired property, and there is internal turmoil or an uncertain political situation in the foreign State, and the making of the order or regulation is in the interest of international relations. The Canadian law involves communicating to financial institutions and other regulated entities the designation, as well as penal and administrative sanctions for anyone contravening an order or regulation under the act. Moreover, section 8 of the law

¹³⁴Unofficial English translation provided by the Swiss Confederation, available from http://www.admin.ch/ch/e/rs/196_1/index.html#id-1.

establishes a “duty to determine” for an extensive list of designated financial entities and requires that:

Each of the following entities must determine on a continuing basis whether it is in possession or control of property that they have reason to believe is the property of a politically exposed foreign person who is the subject of an order or regulations (...).

Targeted sanctions freezing the assets of designated persons and entities are familiar mechanisms in other areas, such as counter-terrorism, and are applied by this law to foreign politically exposed persons. The Canadian statute defines “politically exposed foreign person” more detailed than Article 52.1 of the Convention. Its interpretative section defines a “politically exposed foreign person” as:

“a person who holds or has held one of the following offices or positions in or on behalf of a foreign State and includes any person who, for personal or business reasons, is or was closely associated with such a person, including a family member:

- (a) head of State or head of government;
- (b) member of the executive council of government or member of a legislature;
- (c) deputy minister or equivalent rank;
- (d) ambassador or attaché or counsellor of an ambassador;
- (e) military officer with a rank of general or above;
- (f) president of a state-owned company or a state-owned bank;
- (g) head of a government agency;
- (h) judge;
- (i) leader or president of a political party represented in a legislature; or
- (j) holder of any prescribed office or position(“prescribed” means prescribed by regulation).

124. Pursuant to this legislative authority, the Government of Canada issued the Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations (SOR 2011-78). The regulations recited that Tunisia and Egypt had asserted that named persons have misappropriated property of Tunisia or of Egypt, as the case may be, or have acquired property inappropriately by virtue of their office or a personal or business relationship and had asked the Government of Canada to freeze the property of those persons. The regulation went on to state that the Governor General in Council was satisfied that each person is a politically exposed foreign person, that there is internal turmoil or an uncertain political situation in Tunisia and Egypt and that the making of the annexed Regulations is in the interest of international relations. Accordingly, an asset freeze was imposed prohibiting a person in Canada from dealing with and engaging in any transaction related to or providing any financial or related service to property of the designated persons. The accompanying schedules listed 123 persons for Tunisia and 145 for Egypt. The Freezing Assets of Corrupt Foreign Officials Act, 2011, provided penalties of up to five years imprisonment and a US\$ 25,000 maximum fine for an offence under the Act or for a contravention of the regulations.

125. The Swiss and Canadian solutions to the mutual assistance difficulties that face countries suffering from internal challenges were applicable to all countries meeting the special conditions specified in the respective laws.

126. Similar solutions can also be found at a regional level. Reacting to regime changes in Northern Africa, the Council of the European Union adopted a number of decisions and regulations. The European Union took action to target at Ben Ali and Mubarek assets. That action consisted of anticipatory freezing measures without a detailed showing of the presence of assets in each country required to observe freezing measures. On 14 January 2011, President Zine Ben Ali left Tunisia for Saudi Arabia. On 31 January 2011, the Council of the European Union “[...] decided to adopt restrictive measures against persons responsible for misappropriation of Tunisian State funds and who are thus depriving the Tunisian people of the benefits of the sustainable development of their economy and society and undermining the development of democracy in the country”. The decision went on to order the freezing of all funds and economic resources of former President Ben Ali and his wife, the grounds being stated as:

Person subject to judicial investigation by the Tunisian authorities in respect of the misappropriation of property real and movable, the opening of bank accounts and the holding of assets in several countries as part of money-laundering operations.¹³⁵

127. On 4 February 2011, Council Decision 2011/79/CSFP implemented Decision 2011/72/CFSP by substituting a new annex listing 48 Tunisian citizens as subject of a freeze order on the same ground originally stated with respect to former president Ben Ali. The media reported that the action was taken at the request of the transitional government in Tunisia.¹³⁶ On 2 March 2011, a statement was issued by the acceding country Croatia, the candidate countries Montenegro, the former Yugoslav Republic of Macedonia, the countries of the Stabilisation and Association Process and potential candidates Albania, Bosnia and Herzegovina, Serbia and the EFTA countries Liechtenstein and Norway, members of the European Economic Area, as well as the Republic of Moldova to align themselves with this Decision and announce that they will ensure that their national policies conform to this decision. Former president Ben Ali’s departure was followed soon after by a change of government in Egypt, with long-time President Hosni Mubarek resigning from office on 12 February 2011.¹³⁷ On 13 April 2011, the former president and two sons were detained on allegations¹³⁸ of corruption. On 21 March, the Council of the European Union adopted Decision 2011/172/CFSP freezing the assets of Mubarek and 18 family members and associates. The reason for freezing the assets of all the named persons, reflecting the growing international recognition of and reliance upon the United Nations Convention against Corruption, was stated as:

Person subject to judicial proceedings by the Egyptian authorities in respect of the misappropriation of State Funds on the basis of the United Nations Convention against corruption.

128. The restrictive measures under that decision were extended to March 2013 by Council Decision 2012/159/CFSP of 19 March 2012. On 17 April 2012, a statement was issued by the acceding country Croatia, the candidate countries Iceland, Montenegro, the former Yugoslav Republic of Macedonia and Serbia, the Country of the Stabilisation and Association Process and potential candidate Albania, and the EFTA countries Liechtenstein and Norway, members of the European Economic Area, as well as the Republic of

¹³⁵Council of the European Union Decision 2011/72/CFSP of 31 January 2011, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2013.032.01.0020.01.ENG.

¹³⁶BBC News Europe, “EU freezes assets of Tunisia’s ousted President Ben Ali”, 31 January 2011, available from <http://www.bbc.com/news/world-europe-12327180>.

¹³⁷BBC News Middle East, “President Hosni Mubarek resigns as leader”, 12 February 2011, available from <http://www.bbc.com/news/world-middle-east-12433045>.

¹³⁸BBC News Africa, “Press welcomes Mubarek arrest”, 14 April 2011, <http://www.bbc.co.uk/news/world-africa-13080470>.

Moldova and Georgia to align themselves with this Decision and announce that they will ensure that their national policies conform to this decision.¹³⁹ A Cairo court decision in June 2012 acquitting Mubarek family members of corruption charges was based on the expiration of the criminal statute of limitation rather than a factual finding on the merits of the allegations.¹⁴⁰ From the perspective of a technical legal analysis, whether or not that decision is upheld on appeal, would not necessarily dictate any modification of the European Union decision. Egypt filed a lawsuit against the United Kingdom Treasury in March 2012 to secure the release of information on frozen funds. An official of the Ministry of Justice accused the United Kingdom Treasury of violating the United Nations Convention against Corruption and the European Union freezing regulation, which a Treasury spokesperson denied.¹⁴¹ Egypt also presented a paper at the fourth session of the Conference of the States parties to the United Nations Convention against Corruption, listing difficulties it had encountered with regard to its request for identification, freezing and seizure of funds of persons indicted in Egypt for corruption offences. Among the difficulties listed in the Egyptian paper were determining the location of funds in the requested State, the need to establish a link between misappropriated funds and the funds requested to be identified, non-disclosure of suspect funds detected by the requested State without additional information, investigation of money-laundering crimes without notice to Egyptian judicial authorities, sluggish asset disclosure proceedings as well as the need to deal with different jurisdictions within States and the need to deal with them on a case-by-case basis. The Egyptian paper identified the investigation of money-laundering crimes without notice to Egyptian authorities as the major impediment facing its authorities and asserted that this practice violated article 46.26 of the Convention, which requires consultation before refusing a request or postponing its execution.¹⁴²

129. Freezing implicates the rights of both the beneficial owner and the custodian of property. Consequently, a requested State party is likely to require particularized justification for freezing (see article 54.2 (a) and (b) of the Convention). A freezing request, or the order from a court or competent authority upon which it is based, under those paragraphs must provide “a reasonable basis” for the requested party to believe there are sufficient grounds for freezing and ultimate confiscation in the requesting State. That “reasonable basis” generally requires persuasive evidence that an offence established in the Convention has occurred and that its proceeds are found in the requested State. Chapter II of this Digest, on forms and devices of concealment of proceeds of corruption, describes in detail the many forms of corrupt arrangements, the techniques used to conceal them and the resulting proceeds. Successful implementation of the freezing and seizure provisions of chapter V of the Convention, on asset recovery, requires that sufficient evidence be assembled to overcome those efforts at concealment.

130. In the absence of facilitating laws like the Swiss Federal Restitution of Assets illicitly obtained by Politically Exposed Persons Act and the Freezing Assets of Corrupt Foreign Officials Act of Canada, a non-specific request asking for assistance in identifying and freezing assets of a particular person without evidence that the assets to be frozen are the proceeds of an identified offence is unlikely to be productive.

¹³⁹“Declaration by the High Representative for the European Union”, Press release No. 157 in the *Official Journal of the European Union*, No. L 80, page 18; 17 April 2012, available from http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/129562.pdf.

¹⁴⁰“Political Clashes and Vow of Appeal in Verdict on Mubarak and Aides”, New York Times World on-line, 3 June 2012, available from http://www.nytimes.com/2012/06/04/world/middleeast/political-clashes-and-vow-of-appeal-in-mubarak-verdict.html?pagewanted=all&_r=0.

¹⁴¹“Egypt sues UK over frozen assets”, BBC News United Kingdom, available from www.bbc.co.uk/news/uk-17717988.

¹⁴²United Nations document CAC/COSP/2011/13, 12 October 2011, available from <http://www.unodc.org/documents/treaties/UNCAC/COSP/session4/V1186327e.pdf>.

D. The role of regional and international practitioners' networks

131. There are also cooperation networks which do concentrate specifically upon facilitating the recovery of assets as envisioned by article 57 of the Convention both with respect to their identification and tracing. On 6 December 2007, the European Council adopted a decision, No. 2007/845/JHA, mandating that all member States have an Asset Recovery Office to facilitate international cooperation. According to the decision, each European Union member State shall have at least one and may have two Asset Recovery Offices designated as points of contact authorized to exchange information for the tracing and identification of proceeds of crime and other crime related property which may be subject of a freezing, seizure or confiscation order made by a competent judicial authority in the course of criminal, or as far as possible under the national law of the member State, civil proceedings. The procedures and the form to be used for cooperation are established either by the decision itself or by a prior Framework Decision, No. 2006/960/JHA.

132. A 2011 follow-up report by the European Commission on implementation of the 2007 Decision indicated that 21 member States had reported their designation of Asset Recovery Offices and that seven States had designated two Asset Recovery Offices as points of contact. Most of the points of contact were established within law enforcement services, with the others divided between judicial and multidisciplinary structures. Cooperation was generally evaluated as successful, even considering the strict limits imposed by what was referred to as the Swedish Initiative embodied in Framework Decision 2006/960/JHA. Those limits require the provision of a form providing extensive details about the investigative justification for the request and its degree of urgency. The reply must also follow an established format and has to be furnished within eight hours in response to an urgent request, within one week to a non-urgent request for information held in a database and within two weeks for all other requests. A common complaint was that Asset Recovery Offices are understaffed, with only 6 of 28 having 10 or more staff members. All have access to company registers but centralized land registers do not exist in all member States and only one has access to a national register of bank accounts, which exist in only five countries. Access to financial records was considered to be the most important challenge faced by the reporting offices. The second most relevant concern was a secure communication system. An experiment was consequently undertaken to test the use of Europol's Secure Information Exchange Network Application, a secure communications system between Europol, member States and third parties with whom Europol has a cooperation agreement.¹⁴³

133. Paragraph 5 of the preamble to the 2007 European Council Decision states that:

The Camden Assets Recovery Inter-Agency Network (CARIN) established at The Hague on 22-23 September 2004 by Austria, Belgium, Germany, Ireland, Netherlands and the United Kingdom already constitutes a network of practitioners and experts with the intention of enhancing mutual knowledge on methods and techniques in the area of cross-border identification, freezing, seizure and confiscation of the proceeds from, and other property related to, crime. This Decision should complete the CARIN by providing a legal basis for the exchange of information between Asset Recovery Offices of all the Member States.

¹⁴³ Report from the Commission to the European Parliament concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, Brussels, 4 December 2011, available from http://ec.europa.eu/dgs/home-affairs/news/intro/docs/1_en_act_part1_v8.pdf.

134. CARIN is an informal network supported by a permanent secretariat supplied by Europol and serves as a means to exchange information on the best approaches to trace and recover proceeds of all crimes, including corruption. Its members and observers as of 2011 were 49 geographically widespread countries and nine global and regional organizations.¹⁴⁴

135. A similar network exists for Southern Africa. It is called the Asset Recovery Inter-Agency Network of Southern Africa (ARINSA) and is composed of Botswana, Mauritius, Namibia, South Africa, United Republic of Tanzania, Zambia and Zimbabwe. The Secretariat is housed in the Asset Recovery Office for South Africa. A Spanish speaking network, the Red de Recuperacion de Activos de Gafisud (RRAG), includes representatives from 12 countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, Paraguay, Peru and Uruguay. Its Secretariat is located at the Gafisud headquarters in Argentina. Networks such as CARIN, ARINSA and the RRAG coexist with a number of other cooperation networks.¹⁴⁵ Similar practitioners' networks are Global Focal Point Network on Asset Recovery facilitated by StAR and Interpol, the Egmont Group of Financial Intelligence Units, the European Judicial Network, the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States, Ibero-American Legal Assistance Network (IberRed), the Judicial Regional Platforms of Sahel and Indian Ocean Commission Countries, the Commonwealth Network of Contact Persons, in addition to cooperation mechanisms with broader mandates, such as Interpol and the Financial Action Task Force.

E. The role of private legal counsel and other asset recovery service providers

136. The cases surveyed in chapter II of the present Digest, Forms and devices of concealment of proceeds of acts of corruption, demonstrate that the identification, freezing or seizing and tracing of corruption proceeds are likely to involve the complexities of international banking and finance, of legal structures that serve to obscure beneficial ownership, and of mutual legal assistance and civil litigation procedures. Only a relatively small number of government officials, particularly in smaller or developing economies, can be expected to have a working familiarity with those subjects. For this reason, governments have sought assistance from experts of helpful governments and from private investigative, auditing and legal service providers to find funds hidden abroad and to build an evidentiary basis for their recovery. According to the National Accountability Bureau of Pakistan, the recovery of millions of United States dollars in unjust enrichment from former chief of Naval Staff Mansoor ul-Haq was achieved "in collaboration with legal assistance from foreign expert organizations which led to a major breakthrough towards collection of concrete evidence and discovery of his illegal foreign assets".¹⁴⁶ The foreign

¹⁴⁴Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, *Gibraltar*, Greece, *Guernsey*, Hungary, Iceland, Ireland, *Isle of Man*, Israel, Italy, *Jersey*, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, United Kingdom, United States of America and Turkey, plus Europol, Egmont Group, Eurojust, International Criminal Court, International Monetary Fund, Interpol, OLAF, United Nations Office on Drugs and Crime and the World Bank, source presentation of Europol representative Burkhard Muehl at the Fifth intersessional meeting of the Open-ended Intergovernmental Working Group on Asset Recovery (Vienna, 25-26 August 2011).

¹⁴⁵"Toward an effective asset recovery regime: networks", United Nations document CAC/COSP/WG.2/2011/3, available from <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2011-August-25-26/V1183994e.pdf>.

¹⁴⁶*Case study on Mansoor ul-Haq*, accessed at StAR Asset Recovery Watch database page on Mansoor ul Haq, available from http://www.nab.gov.pk/Downloads/Case_studies/mansoorulhaq.pdf.

expert organizations in the Pakistan case are not specified. Depending on the circumstances, foreign law enforcement or intelligence agencies, financial intelligence units, regulatory agencies with power over securities markets, private investigative services, forensic accountants or law firms may be able to help locate assets and provide evidentiary support in establishing the criminal origin of such assets.

137. The High Court of Lesotho found Masupha Ephraim Sole, chief executive of the Lesotho Highlands Development Agency, guilty of accepting bribes from various multinational companies. In an earlier dispute involving Mr. Sole, the Government hired a globally recognized accounting firm, whose audit discovered that Mr. Sole had Swiss bank accounts into which the project contractors and consultants had placed large sums of money. Four multinational companies were convicted or pleaded guilty in the case, allowing Lesotho recoveries in the form of fines. In the course of the trial, the prosecution relied on the testimony of an expert from a forensic service unit of another global auditing firm to analyse Sole's accounts and trace by whom, to whom and when payments had been made. The testimony was not considered as opinion evidence by the court, but as a substantive summary interpreting complex documentary evidence and making its contents intelligible.¹⁴⁷

138. In 2009, the Attorney General of Antigua and Barbuda announced recovery of US\$ 12 million from Bruce Rappaport in connection with inflated costs paid to Rappaport for the financing of infrastructure projects. Rappaport was a close associate of the leading political family of the country and had been appointed as an ambassador to negotiate refinancing arrangements for various infrastructure projects. The 25-year arrangement which was approved by the then government required monthly payments of US\$ 403,334. Less than US\$ 200,000 of this sum went to reduce the debt. US\$ 133,836 was his monthly fee for settling another infrastructure debt, US\$ 56,000 his monthly costs and US\$ 13,000 his monthly "success fee". A Canadian forensic auditor hired by the Attorney General in a new administration succeeded in tracing government payments through Rappaport's accounts to government and elected officials and to a political party. The press release announcing that the basis for the direct recovery of the US\$ 12 million was the investigation by the forensic auditor. In his press release, the Attorney General made reference to the same auditor having led an investigation in Trinidad and Tobago. The results of that inquiry were described as the recovery of US\$ 7 million in illegal payments to public officials and the arrests and prosecutions of persons involved in an airport construction bid-manipulation and bribery case.¹⁴⁸

139. The Government of Nigeria hired a private Swiss attorney to pursue unlawful proceeds in the possession of the Abacha family and associates. The attorney was involved in extensive litigation over a period of years. The efforts and approaches of the lawyer can be found in the publication *Recovering Stolen Assets* and provide a detailed description of how US\$ 2 billion were frozen in 10 jurisdictions, of which US\$ 1.2 billion had already

¹⁴⁷ *United Nations Handbook on Practical Measures for Prosecutors and Investigators*, United Nations Office on Drugs and Crime, Vienna, September, 2004, available from <http://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

¹⁴⁸ StAR Asset Recovery Watch database page on Bruce Rappaport, available from <http://star.worldbank.org/corruption-cases/node/18471>; "Government of Antigua Barbuda Recoups US \$12 million dollars in case against former government officials and others", Press Release by Attorney General of Antigua and Barbuda of 10 July 2009 (the article is no longer available from the official website); "Government files Suit against Former Prime Minister Bird and eight defendants to account for millions", Government of Antigua and Barbuda, Press Statement of the Attorney General, 1 March 2006, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Rappaport_Antigua_AttyGen_Statement_March_1_202006.pdf.

been recovered by Nigeria at the time of the publication in 2008.¹⁴⁹ Private counsel representing Nigeria were also successful in securing recoveries in multiple civil suits against former Nigerian State Governors Alamiyiesiegha and Dariye in the United Kingdom.

F. Summary

140. The direct implementation of foreign freezing orders is rare since in most of the cases requesting States parties were not able to obtain such orders within their own jurisdictions. Actions to preserve property based upon measures to combat money-laundering are also quite frequent. To alleviate the burden of identification of assets, a number of States and the European Union have adopted recent legislation which under specified circumstances permits freezing the assets of persons who exercised prominent public functions in named countries, or countries meeting certain criteria of instability justifying relaxed standards. This legislation is intended to facilitate freezing of those assets derived from corrupt practices. Such laws, however, require domestic parties to perform the task of identifying those assets for freezing. In a country emerging from a corrupt regime, new laws and procedures can be effective in motivating witnesses and offenders to come forward with information that permits identification of the location of stolen assets and tracing to specific offences by their beneficial owner.

141. Tracing of financial flows and identification of beneficial owners has improved with the creation and training of specialized units dedicated to recovery of the proceeds of foreign corruption offences. Multiple networks of contact points exist for different international organizations and for different geographic areas. Communication is greatly facilitated by these structures, but understaffing is a problem as is access to financial data. Private experts and attorneys have also contributed substantially to governmental recovery efforts

142. Freezing efforts always must contend with the danger that the assets will disappear while the evidence necessary to secure a freezing order is being sought. When sufficient evidence is gathered to secure a freezing order, it may be desirable to put the relevant financial institutions on notice. They will risk their own civil and criminal liability if they allow the assets to escape, knowing of an order directed to the beneficial or nominal owner. As a result, they may take independent action to protect their interests.

¹⁴⁹Mark Pieth (editor), Basel Institute on Governance, *Recovering Stolen Assets*, publisher Peter Lang, Bern, pp. 29-45, available from <http://www.edwardswildman.com/files/Publication/033ee01d-1df3-4d1d-b98d-45e96c9ae411/Presentation/PublicationAttachment/5210b6e6-1c42-485f-a5fb-f2305cbfab17/Basel%20Institute%20Recovering%20stolen%20assets%20-%20February%202008.pdf>; Enrico Monfrini, *The Abacha Case* (2008), available from http://www.mcswisslaw.com/pages_e/2008%20Monfrini%20-%20The%20Abacha%20Case.pdf.

V. TOOLS AND MECHANISMS FOR RECOVERY AND CONFISCATION OF STOLEN ASSETS

143. Once stolen assets have been detected and, whenever possible, frozen or seized through the procedures and mechanisms described in chapters III and IV of this Digest, means must be found to recover those assets from their illegal possessors. Recovery can be direct or through international cooperation.

144. Article 53, on measures for direct recovery of property, is one of the key provisions of the Convention. It deals with the domestic legal infrastructure that States parties are required to have in place in order to fulfil their Convention obligations with respect to measures for direct recovery (article 53) by another State party asserting its rights as the legal personality lawfully entitled to property or to compensation or damages. Article 53 remedies facilitate recovery, through measures such as civil suits, judicial orders providing for compensation or damages to another State party; restitution awards in connection with criminal sentencing and recognition of a State party's claim as a legitimate owner of property acquired through the commission of an offence in a confiscation proceeding.

145. Article 54.2 of the Convention deals with mutual legal assistance requests for freezing, seizing or preserving property for confiscation in different circumstances. Cases involving those types of requests were already discussed in chapter IV. Article 54.1, which is covered in the present chapter, addresses three situations all beginning with a mutual legal assistance request for confiscation.

A. Direct recovery by a civil action

146. Article 53 (*a*) provides that States parties shall take measures to permit another State party to “initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention.” Since proceeds of crime are defined in article 2 (*e*) of the Convention as “any property derived from or obtained, directly or indirectly, through the commission of an offence” it seems appropriate for the purpose of this Digest to include in this discussion civil actions which result in judgements for money damages, even though some or all of the direct proceeds of an embezzlement or bribe may no longer be directly traceable to a specific account or purchase.

147. The case of former Zambian President Chiluba is an example of embezzlement, misappropriation and other diversion of property by a public official under article 17 of the Convention. In 2003, a prosecution against former President Chiluba was initiated in Zambia for embezzlement, but he was eventually acquitted in 2009. During the intervening years, the civil action was brought to the United Kingdom by the government of Zambia. Chiluba, his intelligence chief Xavier Chungu, and their associates were found liable for having diverted public funds, conspired and breached their fiduciary duties, with

Chiluba personally liable for approximately US\$ 46 million and others for like amounts. One of the law firms involved was found liable for US\$ 11 million but that award was reversed on appeal. Another lawyer and his partnership were found liable for approximately US\$ 3 million in damages. As described by the Court of Appeals,

The case was a remarkable example of effective proactive case management. The judge was imaginative and determined in seeking to ensure that the case brought to trial with minimal delay, while ensuring fair treatment of all parties.¹⁵⁰

Two of the Zambian defendants who had been found liable, one for US\$ 26 million and the other for US\$ 9 million, sought relief from the European Court of Human Rights, alleging that the United Kingdom violated the European Convention on Human Rights by its conduct of the trial in London. That claim was rejected and the trial proceedings were found not to have violated any right of the defendants guaranteed by the European Convention on Human Rights.¹⁵¹

148. The above would appear to be a description of a successful outcome of the type of procedure required to be available under article 53 (a) of the Convention. Even though a domestic prosecution of Chiluba for embezzlement of US\$ 500,000 did not succeed, the United Kingdom civil action allowed Zambia to establish its right as a judgement creditor to recover US\$ 46 million from its former President. An extremely complex proceeding involving 20 defendants and a plaintiff's case of 47 witnesses, plus testimony by some defendants, heard in two countries with a video link at all times, was tried within 30 months of its initiation, the appeal by one law firm was concluded the following year, and review by the European Court of Human Rights completed by the fourth year from initiation of the suit. Recoveries exceeding US\$ 50 million were ordered against three prominent Zambians and lesser amounts against other defendants.

149. The trial court decision in *Attorney General of Zambia v. Meer, Care & Desai*, involving solicitors and professionals who facilitated diversion of funds, contains some very practical lessons that should inform direct recovery efforts by means of the civil action provided in article 53 (a).¹⁵² The decision in that case has particular relevance in cases in which large, ostensibly respectable partnerships of solicitors or other professionals may have facilitated diversions of public funds. If the actions of the facilitating partner were within the scope of the partnership agreement all partners may share liability for any award of damages attributable to the firm's contribution to the diversion. Even if the proceeds of the unlawful diversion which have been frozen during the litigation prove insufficient to satisfy any resulting judgement, the individual assets of firm partners, and the insurance protection purchased by that firm, may in appropriate circumstances be available to satisfy an award of damages. This reality dictates that in preparing a civil action, the actions of professionals who facilitated the diversion and subsequent placement, layering and integration of the criminal proceeds be carefully scrutinized for possible liability.

¹⁵⁰[2008] EWCA Civ 1007, Case Nos.: 2007/1146, 1708, 1709, 1751, 1752, Court of Appeal (Civil Division), 31 July 2008, para. 19, accessed at StAR Asset Recovery Watch database page on Frederick Jacob Titus Chiluba, available from <http://star.worldbank.org/corruption-cases/node/18504>.

¹⁵¹Decision on application Nos. 29647/08 and 33269/2008, *Faustin M. Kabwe and Aaron Chungu against the United Kingdom*, 2 February 2010, accessed at StAR Asset Recovery Watch database page on Frederick Jacob Titus Chiluba, available from <http://star.worldbank.org/corruption-cases/node/18504>.

¹⁵²*Attorney General of Zambia v. Meer Care & Desai & Ors*, [2007] EWHC 952 (Ch), especially see paras. 711-712, available from <http://www.bailii.org/ew/cases/EWHC/Ch/2007/952.html>.

150. It appears, however, that recovery efforts in Zambia encountered difficulties. The United Kingdom trial court judgement was dated 4 May 2007.¹⁵³ An order for registration on behalf of Zambia as a judgement creditor against the Zambian defendants was entered in a Lusaka court on 7 July 2007, but the issuing judge died soon thereafter. The successor judge apparently considered submissions of the parties and on 15 August 2010 ruled that the order for recovery could not be registered.¹⁵⁴ His decision was that in the absence of an order by the President extending the application of the Foreign Judgments (Reciprocal Enforcement) Act to the United Kingdom, a United Kingdom judgement could be enforced only by a common law action in Zambia, not by registration of the judgement. The judge further ruled that the attempted registration did not qualify as a common law action founded on the judgement. Frederick Chiluba died in June 2011.

151. Another case is the lawsuit of the Ukrainian government agency against an American firm previously described in chapter II. A Ukrainian State entity secured a US\$ 60 million default judgement against vaccine supplier Olden Group in a United States court in Oregon. Olden was found to have colluded with a Ukrainian sales firm, Interfarm, to overstate vaccine prices on false customs declarations in order to defraud the State purchasing entity. The defendant failed to make an appearance or answer the complaint so a default judgement was entered. Finding and securing title to assets to satisfy the judgement is likely to be a more difficult task than securing the judgement, as reflected in the report of the investigative firms hired by the Ministry of Finance of the Ukrainian Government to examine this and other purchasing contracts.¹⁵⁵ Even though bank accounts associated with the transactions have been identified there is no assurance that assets sufficient to satisfy the judgement can be located or recovered. The practical consequence of the lack of transparency in business formation practices and regulation by the concerned jurisdictions renders the beneficial owners of Olden Group LLC not only unknown but also virtually untraceable, and may make attempts to collect a US\$ 60 million judgement futile.

152. A more successful outcome can be found in the Kuwaiti Investment Organization (KIO) case. A bankruptcy judgement of over US\$ 1 billion resulted in partial recovery totalling approximately US\$ 550 million, plus compensation orders against banks and accounting firms.¹⁵⁶ Contributing to the recovery total were collections accomplished by cooperative action among Caribbean countries. As described by the Chief Justice and Mutual Assistance Authority of the Cayman Islands:

... The Kuwaiti Investment Authority (“the K.I.A.”) in its worldwide quest to recover a judgment worth US\$ 800 million from its former director. The director, a Sheik, a member of the Royal Family, had been put in charge of the K.I.A. established circa 1990, with the mission of diversifying Kuwaiti investments under the looming threat of Iraqi invasion at the time. In gross breach of his duty of faith to his country and people, the Sheik set about, with the assistance of others, to defraud the K.I.A.

¹⁵³ [2007] EWHC 952 (Ch), Case No. HC04C03129, In the High Court of Justice, Chancery Division, Judgement in *Attorney General of Zambia v. Meer, Care & Desai*, 4 May 2007. 05/2007, available from http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2007/952_2.html&query=HC04C03129&method=boolean.

¹⁵⁴ In the Matter of: The Foreign Judgments (Reciprocal Enforcement) Act, Cap. 76 of the Laws of Zambia, High Court of Zambia, 2007/HP/FJ/004.

¹⁵⁵ *Report of Investigative Findings*, October 14, 2010 by Trout, Cacheris PLLC, Akin, Gump, Strauss, Hower & Feld, LLP, and Kroll Inc, accessed from StAR Asset Recovery Watch database page on Ukrainian Government/ Ukrvaksina v. Olden Group, LLC and Interfarm LLC, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Ukraine_Min_Finance_Investigation_Report_Oct_14_2010.pdf.

¹⁵⁶ *Stolen Asset Recovery – A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, Stolen Asset Recovery Initiative (StAR), World Bank/UNODC (2009), available from http://www.coe.int/t/dghl/monitoring/moneyval/web_ressources/IBRDWB_Guidassetrecovery.pdf.

Some of the hundreds of millions defrauded made its way into trusts in the Channel Islands, the Bahamas, and the Cayman Islands and into properties in England. Early restraint orders were obtained freezing the trust assets in Cayman. Orders were also made requiring early disclosure of information about them.

Eventually the K.I.A. succeeded in its main action brought in England (the K.I.A. was based in London and the fraud primarily committed there). The judgment was obtained in the amount of US\$ 800 million and the K.I.A. sought its enforcement. It elected to seek early recourse in the Bahamas where the Sheik is domiciled and there obtained an order of the Bahamian Court adjudging him to be a bankrupt on the basis that the judgment liability of US\$ 800 million exceeded his known assets.

The K.I.A. next sought and obtained orders from the Grand Court of the Cayman Islands in recognition and enforcement of the Bahamian bankruptcy judgment. Trusts which had been maintained by him in the Cayman Islands were made to surrender their assets—more than US\$ 30 million—in partial satisfaction of the English judgment.¹⁵⁷

153. Two cases that have been mentioned in other sections of this Digest involve former Governors of Nigerian States, Joshua Dariye and Diepreye Alamiyeseigha. Both were successfully sued by the Federal Republic of Nigeria in the United Kingdom. Then, Governor Dariye of Plateau State was arrested for money-laundering in London in September 2004. After release on bail he fled to Nigeria where he enjoyed constitutional immunity while in office. Nigeria employed a London firm of solicitors to secure a worldwide Mareva injunction¹⁵⁸ against his known assets outside of Nigeria and to file actions to recover assets of which Dariye was the beneficial owner. Those included a property at Regents Plaza, London and bank accounts at National Westminster and Barclay's Banks. On 24 May 2007, a United Kingdom court ordered transfer of the title interest in the real property to Nigeria. On 7 June 2007, the bank funds that were subject to the order were ordered to be paid to Nigeria.¹⁵⁹ Dariye created controversy in Nigeria by claiming that various British and Nigerian authorities and the London solicitors were cheating the residents of his State by withholding funds taken from him in the United Kingdom proceedings initiated by the government of Nigeria. According to a Case Chronology on Dariye,¹⁶⁰ the controversy was complicated by lack of conclusive signed contracts for the solicitors' services and a claim on their part for a fee reported in Kenyan news sources as 900,000 pounds sterling. As late as July 2011, Nigerian news sources reported on-going litigation and claims over recovered proceeds between Plateau State and the Federal Attorney General and the fee paid or deducted from the recovery by the London law firm.¹⁶¹ It has to be noted that in case there are mechanisms for cooperation and recovery through the mutual legal assistance between governments, they can be less costly than direct recovery via civil litigation, due to the additional legal fees associated.

154. The Alamiyeseigha civil action produced recoveries for Nigeria with less apparent controversy. Perhaps because unlike Dariye, Alamiyeseigha was impeached soon after his

¹⁵⁷International Co-operation against Money Laundering and Assistance in the forfeiture of the proceeds of Corruption, Forfeiting the Proceeds of Corruption, A Seminar on Asset Forfeiture and Money Laundering for Member States of the Organization of American States, May 2-5, 2006, Miami, Florida, United States, p.10, http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Montesinos_Cayman_Islands_Chief_Justice_Speech_May_2006.PDF.

¹⁵⁸An interim order to restrain assets pending the outcome of litigation. Its origin, effect and conditions are explained in the *Asset Recovery Handbook, A Guide for Practitioners*, a World Bank/UNODC publication under the Stolen Asset Recovery Initiative, 2011, pp. 169-173.

¹⁵⁹*International Thief*, A Report by Global Witness, Section 3 Joshua Dariye (2010), available from https://www.globalwitness.org/sites/default/files/pdfs/international_thief_thief_final.pdf.

¹⁶⁰Basel Institute of Governance Asset Recovery Knowledge Centre, Case Chronology (to 2007), available from <http://www.assetrecovery.org/kc/node/44186379-8580-11dd-81c3-399112e3d573.4>.

¹⁶¹"Dariye Loot: Plateau Demands 1.17 million pounds from AGF", available from <http://www.assetrecovery.org/kc/node/f7e56d95-f6be-11dd-aec1-9dfae7b42ba1.7>.

arrest and successfully prosecuted and convicted by Nigerian authorities.¹⁶² A principal feature of that litigation was the use of circumstantial evidence to prove the unlawful source of funds. The July 2008 judgement by a United Kingdom court against Alamiyeseigha and the companies holding his assets led to the confiscation of assets in Cyprus, Denmark and the United Kingdom. The evidence presented to persuade the United Kingdom that the assets were proceeds of crime from bribery or secret profits included the violation of a prohibition against a State governor maintaining a foreign bank account; the scale of the discrepancy between his declared assets and income and his accumulated assets; the use of “offshore companies”, Cyprus bank accounts and Bahamian trusts; the fact that government contractors were the sources of the funds for the purchase of London properties; the pattern of deposits in the bank accounts without corresponding expenditures that would have been characteristic of a legitimate business; possession of the millions of pounds sterling in cash found by the police without any legitimate explanation; and the absence of any plausible, legitimate means to acquire assets outside Nigeria on such a scale had he been properly discharging his obligation not to hold any other office or paid employment while serving as a State Governor.¹⁶³ Summary judgement in the London proceedings and recoveries in other jurisdictions were made possible after the Governor’s guilty plea in Nigeria to making false financial declarations and his companies’ guilty pleas to money-laundering offences. Alamiyeseigha’s conviction in Nigeria resulted in a domestic order for confiscation of 1 billion naira (approximately US\$ 6 million) and recoveries totalled nearly US\$ 18 million in London, Cyprus and Denmark based upon the United Kingdom non-conviction based confiscation. The United States has also recovered illicitly derived assets originating from Alamiyeseigha’s corrupt activities.

155. In another case the Republic of Nigeria was initially a defendant, together with Abacha family members and associates, in a London civil action over the purchase of the Ajaokuta steel plant debt instruments. The government hired private counsel, counter-sued and recovered 330 million deutsche mark. Participation by Nigeria as a civil party in a Swiss criminal proceeding against the Abacha criminal organization for offences involving fraud, breach of trust, money-laundering and other offences resulted in the return of US\$ 80 million.¹⁶⁴

156. Similarly, a civil action in Canada against the estate of former Trinidad and Tobago official John O’Halloran by Trinidad and Tobago and several national companies resulted in a judgement for 7.65 million Canadian dollars.¹⁶⁵

157. One means of recovering assets is the declaration of a constructive trust in property that can be traced to an embezzlement or breach of trust. In the Codelco matter (see chapter IV), the plaintiff was a Chilean State-owned copper mining, refining and selling company, which traded in futures. The head of its futures trading department was investigated for improper trading activities. During the investigation, it was discovered that he had received very large sums of money as bribes to influence trading which he had carried contrary to Codelco’s interest and involving employees of two of the world’s largest metals brokerage firms. He had accepted bribes of several million United States dollars for having had Codelco enter into metals futures contracts which were very favourable to the

¹⁶²See case study 3 in StAR Initiative’s “The Puppet Masters”, pp. 179-183, <http://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf>; and a case study on the StAR Asset Recovery website deal with the civil litigation to recover assets from Governor Alamiyeseigha of Bayelsa State.

¹⁶³*Federal Republic of Nigeria v. Samolina Investment Corporation and others*, Court of Appeal, 2007 EWHC 3053 (QB), decided 3 December 2007, para. 34, available from <http://star.worldbank.org/corruption-cases/node/18493>.

¹⁶⁴Response of the Swiss Confederation to a UNODC secretariat request for asset recovery information.

¹⁶⁵StAR Asset Recovery Watch database page on John O’Halloran/Canada, available from <http://star.worldbank.org/corruption-cases/node/18517>.

co-conspirators but highly unfavourable to Codelco. He was prosecuted in Chile and was convicted of fraud. He was then imprisoned and ordered to pay damages to Codelco. Codelco brought proceedings in a number of jurisdictions including the Cayman Islands, to recover the US\$ 180 million damages. The theory of the recovery in the Cayman Islands by the Republic of Chile was explained by the Chief Justice of the Cayman Island as follows:

In the Cayman proceedings, it sought and succeeded in obtaining a declaration that moneys frozen in bank accounts within the Cayman Islands (as the result of the proceedings described earlier) and which were connected to D, were actually held by D on trust for it. Under Cayman law, D could not be permitted to profit from his wrongdoing, by receiving bribes or other unlawful payments. In Equity, D had not only immediately become a debtor to Codelco (his employer to whom he owed a fiduciary duty) for the sums received, but also a constructive trustee of the unlawful payments or any property acquired with them. D was therefore liable to account to Codelco for all sums received.¹⁶⁶

158. An important legal precedent supporting the freezing of disputed assets prior to a final civil determination on the “constructive trust” theory is the case of Charles Warwick Reid, which was relied on in the judicial opinion in the Codelco judgement.¹⁶⁷ Reid was a New Zealand national who served as Deputy Crown Prosecutor in Hong Kong and head of the Commercial Crime Unit. He was convicted of bribery and ordered to pay a substantial fine. In the absence of a mutual legal assistance treaty with New Zealand, Hong Kong authorities registered legal notices in New Zealand to freeze the title to real estate purchased by Reid, while a civil suit was being pursued to establish that the properties were purchased with bribery proceeds. Reid secured a ruling from the New Zealand Court of Appeals stating that Reid was free to sell or otherwise dispose of the property until a judgement was rendered against him in domestic courts encumbering the title to the properties. The ruling was suspended during an appeal to the Privy Council of the United Kingdom House of Lords, which then acted as the ultimate interpreter of law in the case. The Privy Council Judicial Commission held that having proved an arguable case in which the properties were purchased with the proceeds of bribery, Hong Kong was entitled to treat Reid as though he was holding the property in trust for Hong Kong until a final determination was made. The judgement of the Privy Council provides a comprehensive explanation of the reasoning supporting the “constructive trust” theory of recovery and its consequences. Therefore, it is particularly significant for the primarily common law countries of the Commonwealth of Nations.¹⁶⁸ As the Privy Council of the United Kingdom House of Lords elaborated,

When a bribe is accepted by a fiduciary in breach of his duty then he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not

¹⁶⁶Cayman Islands Government, Enforcement of Judgments in Practice, pp.1-2, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/CODELCO_Cayman_Islands_Enforcement_Judgments.pdf.

¹⁶⁷Deutsch Sudamerikanische Bank 1996 CILR judgement accessed from StAR Asset Recovery Watch database page on Codelco/Juan Pablo Davila/Cayman Islands, p. 5, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/CODELCO_Cayman_Islands_Deutsch_Sudamerikanische_Bank_1996_CILR_1.pdf.

¹⁶⁸Privy Council Appeal No. 44 of 1992, *The Attorney General for Hong Kong Appellant v. (1) Charles Warwick Reid and Judith Margaret Reid and (2) Marc Molloy Respondents*, from the court of Appeal of New Zealand [1993] UKPC 2, accessed at www.bailii.org/uk/cases/UKPC/1993/2.html.

entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.¹⁶⁹

B. Direct recovery by an order for compensation or damages

159. Article 53 (b) requires States parties to take measures “to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State party that has been harmed by such offences.” Judges in a number of cases in the United Kingdom and in the United States have entered orders of the type envisioned by Convention article 53 (b) against corporations and their agents responsible for bribing national officials, against the officials themselves and against money launderers of the proceeds of Convention offences.

160. At least three cases of orders to make reparation or restitution payments can be found in United Kingdom cases. Steel and bridge construction firm Mabey and Johnson disclosed to the United Kingdom Serious Fraud Office that it had paid bribes in several countries. In addition to criminal sentences of executives and fines and costs of investigation, the firm was ordered to make reparations of approximately £658,000 to Ghana, £618,000 to Iraq and £139,000 to Jamaica, together with confiscation of £1.1 million.¹⁷⁰

161. Ananias Tumukunde, Science and Technology Advisor to the President of Uganda, pleaded guilty in the United Kingdom to laundering proceeds of a corrupt arrangement with a provider of security services and equipment. For a contract worth £210,000, Tumukunde and a military associate received £83,000 through accounts in London. In connection with his guilty plea, £35,000 (or 117 million Ugandan shillings) were returned to Uganda by the United Kingdom.¹⁷¹

162. Joyce Oyebanjo was convicted in London of laundering the proceeds from Governor Joshua Dariye’s unlawful diversions of resources from Nigeria’s Plateau State. As a result of her conviction for money-laundering, she was ordered to return approximately £200,000 of unlawful proceeds from Dariye’s crimes under her control to Nigeria. The funds had to be returned within one year in order to avoid an additional 30 months of imprisonment in default after service of an initial three-year period.¹⁷² At the time of sentencing United Kingdom officials expressly stated that the funds recovered were to be repatriated in compliance with their obligations under the Convention.

163. Another example is an award of US\$ 70 million that was made to Nigeria as a victim of the fraud and other criminal activities of the Abacha organization concerning the Central Bank of Nigeria in a Swiss prosecution of Mohammed Abacha and Abubakar Bagudu.¹⁷³

¹⁶⁹Ibid.

¹⁷⁰25 September 2009, “Mabey and Johnson Ltd Sentencing”, Serious Fraud Office media release, accessed from the StAR Asset Recovery Watch database page on Mabey and Johnson/Jamaica, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Mabey_Johnson_UK_SFO_Press_Release_Sentencing_Sep_25_2009.pdf.

¹⁷¹*New Vision*, Ugandan daily journal, 27 August 2008, “Britain returns bribe paid to Ugandan officials”, available from www.newvision.co.ug/D/8/12/663826.

¹⁷²Basel Institute of Governance Asset Recovery Knowledge Centre page on Joyce Oyebanjo reporting an 11 June 2007 article from the African Echo on Oyebanjo’s sentencing of 4 April 2007 entitled “Metropolitan Police to Return 200,000 pounds to Nigeria”, available from <http://www.assetrecovery.org/kc/node/6439035f-c836-11dd-b3f1-fd61180437d9.0;jsessionid=641EAAABE8C5D718FDC6CAE4C20D58EC>.

¹⁷³Response of the Swiss Confederation to a UNODC secretariat request for asset recovery information.

164. United States examples of restitution orders include those relating to Robert Antoine and executives of the telecommunications service providers who bribed him. They were jointly ordered to pay US\$ 2.2 million in restitution to the Government of Haiti for overcharges resulting from bribery of Antoine, director of operations for Haiti's State-owned telecommunications entity, to influence contract and operational relations. United States authorities credited Haitian authorities with actively supporting the investigation and prosecution.¹⁷⁴

165. Juan Diaz, an intermediary in the same scheme, was ordered to pay restitution of approximately US\$ 74,000¹⁷⁵ in a case involving bribery and other offences related to construction of an airport in Trinidad and Tobago.

166. Three co-defendants of fugitive Steve Ferguson, former head of the National Gas Company of Trinidad and Tobago, were ordered by a United States court to make restitution to the government of Trinidad and Tobago in the amount of four million, two million and 100,000 United States dollars respectively. The court records reflect active participation by government counsel in pursuing restitution. Extradition of the Trinidad and Tobago defendants was denied by a High Court judge in that country in November 2011. A local prosecution was initiated in 2002 but had lapsed and officials indicated that it was uncertain whether it would be revived. The refusal of extradition was not appealed.¹⁷⁶

167. David Chalmers and his Bayoil companies pleaded guilty to wire fraud in the United States in a kick-back scheme related to the United Nations Oil-for-Food Programme in Iraq, Chalmers and the companies were ordered to pay restitution of US\$ 9 million to the Development Fund of Iraq for the benefit of the Iraqi people.¹⁷⁷

168. Chapter I provided an example of article 16 on Bribery of an official of a public international organization involving Sanjaya Bahel, the former Chief of the Commodity Procurement Section of the United Nations Procurement Division. As a result of a United States fraud and bribery conviction, he was ordered to pay US\$ 900,000 restitution to the United Nations. An instructive aspect of his case was that it led to an appellate decision considering whether a dishonest civil servant owed restitution to the United Nations of some or all of his salary payments received from that organization. The trial court ordered confiscation of approximately US\$ 100,000 and a three-bedroom apartment in the Dag Hammarskjold Tower a few blocks from United Nations Headquarters in New York. These were directly traceable proceeds of bribery. In addition, Bahel was ordered to pay nearly US\$ 1 million restitution. The United States Mandatory Victims Restitution

¹⁷⁴*Asset Recovery Handbook-A Guide for Practitioners*, a StAR Asset Recovery initiative publication, World Bank/UNODC, 2011, p. 183, Box 9.5, available from http://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf; amended judgement *U.S. v. Carlos Rodriguez and others*, No. 1-09-21010, United States District Court, Southern District of Florida, 3 November 2011, http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Haiti_Teleco_Rodriguez_Amended_Judgment_Nov_3_2011.pdf.

¹⁷⁵United States Department of Justice press release, "Florida Businessman sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme", 30 July 2010, available from <http://www.justice.gov/opa/pr/florida-businessman-sentenced-57-months-prison-role-foreign-bribery-scheme>.

¹⁷⁶StAR Asset Recovery Watch database page on Steve Ferguson/Piarco airport case/United States, available from <http://star.worldbank.org/corruption-cases/node/18581>; "AG won't Appeal Ish", Steve Case, Trinidad and Tobago News Blog, 20 December 2011, accessed at www.trinidadandtobagonews.com/blog?p=5974; "Major Hurdles in pursuing Ish, Steve Case", Trinidad and Tobago News Blog, 24 December 2011, accessed from <http://www.newsday.co.tt/news/0,152697.html>; also see http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Ferguson_Trinidad_High_Court_Extradition_Denied_Trinidad_Express_Nov_7_2011.pdf

¹⁷⁷Restitution Order of 18 March 2008, *United States v. David B. Chalmers Jr., Bayoil (USA) Inc., and Bayoil Supply and Trading, Limited*, No. S5-05-Cr-59, Southern District of New York, accessed at StAR Asset Recovery Database page on David Chalmers, Bayoil (United States) Inc., and Bayoil Supply and Trading, Limited (United Nations Oil for Food), available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Bayoil_Chalmers_SDNY_Order_Restitution_Development_Fund_Iraq_Mar_25_2008.pdf.

Act¹⁷⁸ requires a convicted defendant to reimburse a victim for other “necessary” expense incurred during the participation in the investigation or prosecution of the offence or attendance at proceedings.¹⁷⁹ The Court ordered restitution to the United Nations in the amount of US\$ 846,000 for legal fees and US\$ 86,000 in salary paid to him for the period of time he was under suspension. Bahel’s argument that fees for independent lawyers were unnecessary because the United Nations has in-house counsel was quickly rejected by the appellate court. His objection to the salary award received more attention by the Court because it raised a policy question as to how the loss of due honest services from an employee should be valued in terms of restitution or reparations. The Court reasoned that the money paid to Bahel as salary during the years he was being bribed was property which the United Nations lost in whole or in part due to his actions against its interests in favor of the persons who paid him bribes. Arguably, he may have provided services of some value to the organization but there is no easy method of calculating it. He was suspended due to his criminal conduct and, obviously, he did not deliver any performance during this suspension. Consequently, the trial court’s order requiring restitution for the salary paid during that period of suspension was the minimum indisputable salary restitution that might have been ordered.¹⁸⁰

169. The measures that a State party is required by article 53 (b) to take to enable its courts to order the payment of compensation or damages to another State party may operate differently in common law legal systems than in those legal systems which follow the civil law tradition.

170. In criminal proceedings in common law countries the legal authority to award restitution to an injured party is often conferred by legislation. In the common law system, the State harmed by the offences may seek reparation as a victim and may seek to encourage prosecution by diplomatic representation or informal contacts, but normally the prosecuting authority is the only entity exercising a formal role in the investigative or prosecutorial process.

171. However, a number of civil law systems may allow the victims of crime to take part in the criminal procedure as *partie civile*¹⁸¹ for the type of offences established by the Convention. The cases surveyed in this Digest include the cases from Switzerland, France and Spain which allowed the intervention of the civil parties to initiate and actively participate in the criminal process (see chapter III).

172. Examples can be found in the cases initiated by the filing of criminal complaints by non-governmental organizations accompanied by requests to join in the prosecution as *partie civile* against the Bongo, Nguesso and Obiang families. These resulted in freezing and seizure action under the authority of French magistrates, although no confiscations have yet resulted. In connection with recovery of Abacha assets, a Swiss lawyer representing Nigeria succeeded in having the Federal Republic of Nigeria be declared as a *partie civile* in a criminal proceeding for Swiss Penal Code offences against named family members and associates of deceased Nigerian ruler Sani Abacha. The offences included breach of trust, fraud, money-laundering, extortion and participation in a criminal organization.

¹⁷⁸ 18 USC §3663 A(b)(f).

¹⁷⁹ 18 USC § 3663(b)(4).

¹⁸⁰ *United States v. Bahel*, No. 08-3327-cr, 2nd Circuit Court of Appeal (2011), available from <http://caselaw.findlaw.com/us-2nd-circuit/1583659.html>.

¹⁸¹ See also StAR, “Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery”, 2014, p. 86: “In several civil law jurisdictions, those who suffered damages as a result of the bribery have the opportunity to join the proceedings as a *partie civile*, either at the investigative stage or once the matter has gone to trial. While common law jurisdictions do not provide for this option, they do allow affected entities or persons to apply to the court for a restitution order. These two avenues merit consideration in an overall asset recovery strategy”, Available at <http://star.worldbank.org/star/sites/star/files/9781464800863.pdf>.

Through participation in the criminal process, Nigeria gained access to Swiss evidentiary materials earlier than would have been possible through the mutual assistance process, which the interested parties can delay by objections and appeals. As a result, Nigeria was able to request a disclosure and freezing order which the examining magistrate issued to all 385 registered Swiss banks. In subsequent proceedings, the burden of demonstrating the legal origin of funds held by members of the organization was reversed and placed upon members of the Abacha organization once the evidence demonstrated that they belonged to a criminal organization, pursuant to article 72 of the Swiss Criminal Code, discussed below. The disparity between the amounts from lawful sources and the amounts deposited was great. Moreover, the claimants failed to make any effort to factually demonstrate a lawful origin, resulting in a finding that the funds were of illicit origin and should be confiscated. This result demonstrates the utility of the evidentiary mechanism proposed in article 31.8 of the Convention, which provides that:

States parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principle of their domestic law and with the nature of judicial and other proceedings.

C. Recognizing other States parties' claims as legitimate owner

173. Article 53 (c) requires that a State party contemplating confiscation to enable its appropriate authorities to recognize the claim of another State party to be a legitimate owner of property acquired through the commission of a Convention offence.

174. Virtually, all modern confiscation statutes have language referring to the protection of the rights of third parties, which in some cases might include recognition of a State party as the legitimate owner of property acquired through the commission of a Convention offence. However, this type of claims was not observed in the cases examined for this Digest. A contributing factor may be that States parties prefer to seek restitution through diplomatic and other formal or informal government-to-government channels rather than seek representation by counsel and appear as a private party publicly in the courts of another country.

175. A number of United Kingdom cases reflect return of cash and other confiscated proceeds to other States, such as Nigeria, after confiscation by the United Kingdom under its Proceeds of Crime Act. Representative cases include the Dariye, Alamiyeseigha and Oyebanjo cases, a pattern which is apparently also being followed in the Ibori case.

176. A United States case also reflects reliance upon post-confiscation release of funds under the remission procedure, rather than by intervention of the State party as a private claimant in the confiscation proceeding before a court. In the United States, once assets have been judicially forfeited, the authority to distribute them to owners, lienholders and victims solely rests with the Attorney General.¹⁸² The determination of whether a victim is entitled to remission is governed by regulation. The breadth of options available for transfer of forfeited property to victims depends on the statute under which the property is forfeited. Peru received US\$ 750,000 described in the Rodríguez Huerta case (see

¹⁸²See 28 C.F.R. Part 9.

chapter I), which is an example of the proceeds resulting from an embezzlement offence established by article 17 of the Convention. In August 2004, the Government of Peru had requested assistance in identifying former General Rodríguez Huerta's assets in the United States. Agents in Miami initiated an investigation of Rodríguez Huerta, a Montesinos associate who was a trustee of a government pension fund. In December 2004, the United States Government filed a civil complaint and seized three bank accounts which were subsequently confiscated. Peru submitted a petition to the United States to remit the confiscated funds. In 2009, US\$ 750,000 were returned to the Peruvian government and the Peruvian military and police pension fund, the victims of the fraud, based on a decision by the United States Department of Justice.¹⁸³ In sentencing Rodríguez Huerta and other trustees a Peruvian court ordered them to repay the US\$ 2,270,400 that were diverted by overpriced purchases of buildings and real estate.¹⁸⁴ Over US\$ 20 million confiscated from Montesinos' money-launderer Alfredo Venero Garrido were transferred to Peru through an international "sharing" procedure.¹⁸⁵

177. It can also be noted that in other instances the United States has confiscated and returned more than US\$ 1.45 billion of corruption proceeds to foreign jurisdictions. Such proceeds connected to the criminal conduct of former Peruvian intelligence chief Vladimiro Montesinos and his associates were confiscated by the United States and over US\$ 117 million was repatriated to Italy. Similarly, more than US\$ 2.7 million connected to the criminal conduct of Nicaraguan Tax and Customs Minister Byron Jerez was confiscated by the United States and returned to Nicaragua.¹⁸⁶

D. Recovery by execution of a foreign confiscation order

178. The legal systems of some States require that provision of mutual legal assistance involving coercive measures like confiscation can be provided only pursuant to a treaty relationship with procedural formalities. The enforcement of foreign restraining and/or confiscation orders is now becoming more common and expeditious.

179. Alexander Yakovlev's case (see chapter I) is an example of bribery in an international organization under article 16 of the Convention. He was a procurement officer of the United Nations who received bribes through a shell company and had transfer accounts in Antigua and Switzerland. The funds were transferred to destination accounts in Liechtenstein. Yakovlev was convicted of fraud and money-laundering charges, and a United States judge ordered confiscation of US\$ 900,000 which were held in two accounts in Liechtenstein: one in Yakovlev's true name and another in the name of a legal structure of which Yakovlev was the beneficial owner. The order of confiscation was filed on 22 December 2010 in New York and a satisfaction of judgement was signed by the United States judge and filed on 10 February 2011. This demonstrated that Liechtenstein received a foreign order of confiscation, satisfied itself of its appropriateness, issued its own order

¹⁸³"United States Transfers More Than \$750,000 in Forfeited Funds to Government of Peru", United States Department of Justice news release, 2 September 2009, accessed at StAR Asset Recovery Watch database page on Victor Alberto Venero Garrido, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Montesinos_Huerta_US_DOJ_Press_Release_Sep_2_2009.pdf.

¹⁸⁴*La República de Perú*, 6 July 2012, "Envían a prisión a ex directivos de la Caja de Pensión Militar Policial", available from <http://www.larepublica.pe/06-07-2012/envian-prision-ex-directivos-de-la-caja-de-pension-militar-policial>; response of Peru to UNODC Secretariat request for asset recovery information.

¹⁸⁵Resource Materials Series 65, *Repatriation Obligations Under the United Nations Convention against Corruption*, Linda M. Samuel, p. 62, accessed at StAR Asset Recovery Watch database page on Vladimiro Montesinos/Marco Antonio Rodríguez Huerta, available from http://www.unafei.or.jp/english/pdf/PDF_rms/no65/RESOURCE-DivisionNo06.pdf.

¹⁸⁶<http://www.state.gov/documents/organization/190690.pdf>

of confiscation and transmitted the proceeds so that their receipt could be reported to the court and the case closed within a 45-day period.¹⁸⁷

180. The Interpretative Note to paragraph 54.1(a)¹⁸⁸ states that:

The reference to an order of confiscation in paragraph 1 (a) of this Article may be interpreted broadly, as including monetary confiscation judgements, but should not be read as requiring enforcement of an order issued by a court that does not have criminal jurisdiction.

181. The possibility of enforcing a monetary confiscation judgement against a person's property for a fixed amount, as opposed to a confiscation order, varies widely by jurisdiction and requires full knowledge of the law in both the requesting and requested State and the facts of the particular case.

182. Several key concepts on this issue are laid out in the StAR's publication *Stolen Asset Recovery—A Good Practices Guide for Non-Conviction Based Asset Forfeiture*.¹⁸⁹ In the same publication, an experienced Swiss magistrate concludes that executing a money value judgement on substitute assets would not be an easy process under Swiss procedure.

When the criminal proceeds subject to forfeiture have been disposed of, the judge can order an equivalent compensatory payment called a "money value judgment". The Federal Supreme Court has held that it is not possible to return assets to a foreign jurisdiction based on a money value judgment because there is no nexus between the crime and the assets. In addition, returning assets that have not been linked to an offence would allow the foreign jurisdiction to circumvent the usual procedure for enforcement of domestic compensatory claims issued under Article 71 para. 3 Criminal Code of Switzerland. This requires enforcement of the judgment in accordance with the Swiss Federal Act on Debt collection and Bankruptcy and, if necessary, validation through a civil action in accordance with the Law on Civil Procedure, as for any other private creditor.

To enforce a money value judgment, the requesting jurisdiction should ask for an exequatur procedure based on IMAC Article 94 (International Mutual Assistance in Criminal Matters). The procedure is complex and does not appear to have been used. Nonetheless, if such a procedure was conducted and if the foreign money value judgment was exequatored, the requesting State could then follow the usual procedure for enforcement of a judgment [...].¹⁹⁰

183. It appears that it would be easier to secure a confiscation order for a money value judgement or for a substitute asset confiscation order in a common law jurisdiction, where they seem to be used more frequently, than it would be to enforce such an order in a civil law jurisdiction like Switzerland. At a minimum, a State hoping to collect on such a confiscation order in a civil law jurisdiction should be prepared to enforce it as a judgement debt as an ordinary creditor in a civil action.

¹⁸⁷<http://star.worldbank.org/corruption-cases/node/18454>

¹⁸⁸In the *Travaux Préparatoires* of the Negotiations for the Elaboration of the United Nations Convention against Corruption, p. 472, footnote 4, available from https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf.

¹⁸⁹StAR Initiative, *Stolen Asset Recovery – A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, 2009, Key concept 6 and 34, http://star.worldbank.org/star/sites/star/files/Non_Conviction_Based_Asset_Forfeiture.pdf.

¹⁹⁰StAR, *Ibid.*, p. 114.

184. Bilateral agreements may help to overcome the difficulties of collecting money value judgements. The Mutual Assistance Treaty between China and Australia (see chapter VI), defines proceeds of crime as including:

[...] any property suspected or found by a court to be property derived or realized, directly or indirectly, from the commission of an offence or which represents the value of property and other benefits derived from the commission of an offence.

185. The summary judgement order in the United Kingdom against former governor Alamieyeseigha points to another challenge of international enforcement of confiscation orders. Despite the criminal confiscation of the same property that was the subject of the civil action in the United Kingdom, counsel for Nigeria argued that it was still necessary to have a judgement against those assets. After hearing his explanation the court stated:

I am sufficiently satisfied that the making of the confiscation orders in the Nigerian court does not make it unnecessary for the claimant to continue with this application before me.¹⁹¹

186. Similarly, as mentioned above in the reference to the Chiluba case, even in a highly developed commercial law system like the United Kingdom, a confiscation order may prove difficult to collect; attention therefore should be paid to additional steps that must occur in the requested State to entirely domesticate the foreign confiscation order.

E. Recovery by confiscation for money-laundering or other domestic offences

187. Article 54.1 (b) requires States parties to:

Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law.

188. A purchase of military vehicles during the Abacha regime in Nigeria resulted in the conviction of Raj Bhojwani in the Bailiwick of Jersey. Most of the US\$ 40 million illegal proceeds from the sale were confiscated.¹⁹² This was accomplished despite efforts by a Nigerian court and Attorney General into persuading Jersey prosecution and judicial authorities that evidence gathered by Nigeria's Special Investigation Panel, including an interview of Bhojwani, and a promise by a former Attorney General to permit the use of the evidence collected, should not be used in the prosecution and the proceeds should be returned to Nigeria. The Jersey Attorney General refused the Nigerian ruling and request and his position was upheld by the Jersey courts. Despite these events, the official website of the Bailiwick of Jersey posted a statement on 7 June 2011 reporting the final confiscation from Bhojwani. It stated that:

¹⁹¹The United Kingdom High Court of Justice in the case of *Nigerian Federal Republic vs. Santolina Investment Corporation, Solomon & Peters LTD and Depreye Alamieyeseigha and others*, 3 December 2007

¹⁹²Court of Appeals, Royal Court of Jersey in the case of *Bhojwani v. Attorney General*, Judgement upholding conviction and sentence, 10 February 2011, para. 255, available from https://www.jerseylaw.je/Judgments/UnreportedJudgments/Documents/Display.aspx?url=2011/11-02-10_Bhojwani-v-_AG_JCA_034.htm&JudgementNo=%5B2011%5DJCA034.

It is now anticipated that discussions will take place with the government of Nigeria regarding the return of some of the confiscated funds which are held in Jersey. Approximately 170 million dollars connected with the Abacha investigations have already been returned by Jersey to the Nigerian authorities as part of previous asset sharing agreements.

On 11 September 2011, the Nigerian journal *Punch* quoted presidential spokesperson Dr. Reuben Abati as confirming that 22.5 million pounds sterling had been returned to a special account in Nigeria.¹⁹³

189. In another Abacha case, a Swiss investigating magistrate found Abba Abacha (son of the late Nigerian President) guilty of membership in a criminal organization and sentenced him to a suspended prison term and ordered confiscation of US\$ 350 million frozen in Luxembourg and the Bahamas. The jurisdictional nexus or basis was that acts of the organization had taken place in Switzerland or their result had occurred there, and accordingly all members of the organization could be adjudicated in the courts of that country.¹⁹⁴

190. James Ibori's case is an example of a money-laundering offence established by the Convention. James Ibori was a former Governor of Delta State in Nigeria. He was extradited from Dubai to the United Kingdom and prosecuted there for fraud and money-laundering charges. During the prosecution, controversy arose between the Serious Fraud Office and the Nigerian Attorney General concerning the Attorney General's refusal to respond to a request for mutual assistance, because it was not personally signed by the Home Secretary of the United Kingdom. On 27 February 2012, Ibori pleaded guilty to the money-laundering charges in the United Kingdom. In April 2012, he was sentenced to 13 years of imprisonment. According to media reports on the court hearing to set the date of the confiscation hearing, the assets involved include: a house in Hampstead, North London worth £2.2 million, a property in Shaftesbury, Dorset, for £311,000, a mansion in Sandton near Johannesburg, South Africa, worth £3.2 million, a fleet of armoured Range Rovers valued at £600,000, a Bentley that cost £120,000 and a Mercedes Maybach purchased for €407,000 that was shipped directly to his mansion in South Africa.¹⁹⁵

191. In May 2012, pursuant to a Mutual Assistance request from the United Kingdom, United States authorities obtained judicial enforcement of the United Kingdom criminal court restraining order against all of Ibori's assets, which had been found to include a residence purchased for US\$ 1.8 million in Houston, Texas, United States.¹⁹⁶

192. The effectiveness of any confiscation procedure depends to a great extent on the evidentiary mechanisms with which it is implemented. There are certain examples of such mechanisms that provide avenues for the significant facilitation of the recovery of property through international cooperation including confiscation. Swiss law contains several very helpful mechanisms in this regard. The Swiss Penal Code now provides that a judge must order the confiscation of any securities over which a criminal organization has power of disposal, and any person who has been involved in or aided or abetted a criminal

¹⁹³“FG recovers N5.6bn Abacha loot”, Sunday, 11 September 2011, available from Odili.net/news/source/2011/sep/11/838.html.

¹⁹⁴See *The Abacha Case* by Enrico Manfrini, the Swiss counsel for Nigeria in the Abacha matter, published in *Recovering Stolen Assets*, Mark Peith, editor, Peter Lang, Bern, 2008 and articles of the Swiss Penal Code there cited. Please see <http://www.peterlang.com/index.cfm?event=cmp.ccc.seitenstruktur.detailseiten&seitentyp=produkt&pk=13968>)

¹⁹⁵BBC News Africa, 17 April 2012, “Former Nigeria governor James Ibori jailed for 13 years”, available from www.bbc.co.uk/news/world-africa-17739388.

¹⁹⁶*Wall Street Journal*, 24 July 2012, “US Restrains \$ 3 Million of Nigerian Ibori's Asset”, available from <http://blogs.wsj.com/corruption-currents/2012/07/24/us-restrains-3-million-of-nigerian-iboris-us-assets/>.

organization shall be presumed to be subject to the power of disposal of the organization until proved otherwise. The relevant provision of the Swiss Penal Code is article 72 on the forfeiture of assets of a criminal organization reads:

The court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal organisation. In the case of the assets of a person who participates in or supports a criminal organisation (art. 260 *ter*), it is presumed that the assets are subject to the power of disposal of the organisation until the contrary is proven.

193. The Swiss Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons introduced another presumption that could be extremely useful in the limited category of cases to which it applies, i.e. politically exposed persons from countries unable to satisfy mutual assistance requirements because of failure of State structures. The presumption introduced in the 2010 law is found in article 6 on the presumption of illicit origin.

1. The presumption that assets are of illicit origin applies where:
 - a. the wealth of the person who holds the powers of disposal over the assets has been subject to an extraordinary increase that is connected with the exercise of a public office by the politically exposed person; and
 - b. the level of corruption in the country of origin or surrounding the politically exposed person in question during his or her term of office was acknowledged as high.
2. The presumption ceases to apply if it can be demonstrated that in all probability the assets were acquired by lawful means.

194. Since a money-laundering conviction is possible in many legal systems without proof of the particular offence giving rise to the proceeds, this kind of presumption could be of particular evidentiary benefit in money-laundering prosecutions.

F. Recovery by non-conviction based confiscation

195. Article 54.1 (c) requires States parties to consider taking measures that allow confiscation without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases. In 2009, 18 jurisdictions had non-conviction based asset confiscation laws,¹⁹⁷ however, more countries have been adopting such regimes in their domestic legal systems in recent years.

196. Case examples of non-conviction based cash confiscation can be found in the cases of Nigerian Governors Dariye of Plateau State and Alamiyeseigha of Bayelsa State. The cases were separately initiated by arrests on suspicion of money-laundering by United Kingdom Police. After posting bail for their future appearance, both of the governors fled from the jurisdiction, returning to Nigeria where each enjoyed official immunity from prosecution while in office. In both cases the cash was confiscated by United Kingdom authorities. The United Kingdom's proceeds of crime/money-laundering laws permit summary proceedings by a lower court magistrate for the confiscation of cash and other

¹⁹⁷StAR, *Stolen Asset Recovery—A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, 2009, p. 22, box 6

negotiable instruments readily convertible to cash, who may also order return of the property to the victim. In the Dariye situation, the confiscation recovery was US\$ 250,000 and Nigeria again secured recovery as a victim of unlawful diversion.¹⁹⁸ In the Alamiyeseigha case, US\$ 1.5 million were seized from his London residence in September 2005 and in May 2006. After the judicial order of confiscation was entered, the funds were returned in July 2006 at the request of Nigeria as a victim of diversion of government resources.¹⁹⁹ These proceedings were independent of the civil suits brought by Nigeria against Dariye and Alamiyeseigha. In addition, Alamiyeseigha's real estate property in South Africa was confiscated in a civil confiscation proceeding and the proceeds returned to Nigeria in 2007.²⁰⁰ Alamiyeseigha's property has also been confiscated in the United States.

197. Criminal prosecution of Ferdinand and Imelda Marcos for money-laundering was attempted in the United States without success. The former president was determined to be medically unfit for trial and his wife had been acquitted in the United States. Those results did not prevent the non-conviction based confiscation of approximately US\$ 50 million of their assets.²⁰¹ No determination on the merits was ever reached with respect to former President Marcos so there could be no conflict with a civil finding that assets were subject to confiscation. With regard to Mrs. Marcos, her acquittal in the criminal case was not legally inconsistent with a civil confiscation order because an acquittal in a common law legal system demonstrates that there is insufficient evidence to prove the defendant's commission of an offence beyond a reasonable doubt. Non-conviction based confiscation of assets requires, among other things, proof by a preponderance of the evidence that the assets subject to confiscation are the proceeds of a criminal offence. That is a lesser standard of proof which could be established without being in conflict with the jury's finding that the criminal case evidence did not prove her guilt beyond a reasonable doubt.

198. An example of non-conviction based confiscation involved the proceeds of judicial bribery by two Italian nationals, Pierfrancesco Munari and Angelo Rovelli. A mutual legal assistance request from Italy resulted in the tracing of the funds and non-conviction confiscation in the United States of US\$ 122 million in four investment and bank accounts. The funds were subsequently transferred to Italy for the benefit of the victims based upon their petitions for remission.²⁰²

G. Other mechanisms for asset recovery

199. There are mechanisms in Switzerland for recovery by the return of funds when evidence of criminal provenance is clear. A procedure that may not fit comfortably within

¹⁹⁸BBC News Front Page, "UK targets Nigeria's stolen loot", 27 September 2007, available from <http://news.bbc.co.uk/2/hi/africa/7015765.stm>.

¹⁹⁹London Police return Alamiyeseigha's 1 million pound loot", allAfrica.com, *Daily Champion*, Nigeria, 6 July 1996, www.allafrica.co/stories/200607070098.html

²⁰⁰Response of South Africa to a UNODC secretariat request for asset recovery information; Diepreye Alamiyeseigha, case study by Edwards Angell Palmer and Dodge, "Recovering stolen assets: a case study", IBA Conference Paris, 24-25 April 2008, para. 23, available from <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=2735cc8b-e7ca-11dd-859a-ab8cb1c9747f>.

²⁰¹StAR Asset Recovery Watch database page on Ferdinand Marcos and Imelda Marcos/United States, available from <http://star.worldbank.org/corruption-cases/node/18499>;

"Recovery of the Marcos Assets", Dr. Jaime S. Bautista, Special Counsel, Philippine Commission on Good Government, in *Measures to Freeze, Confiscate and Recover Proceeds of Corruption*, United Nations Asia and Far East Institute/UNODC Third Regional Seminar on Good Governance for Southeast Asian Countries (2009), available from http://www.unafei.or.jp/english/pdf/PDF_ThirdGGSeminar/Third_GGSeminar_P72-79.pdf;

Ferdinand E. Marcos (Philippines): A Case Study, ADB/OECD Anti-Corruption Initiative for Asia and Pacific (2007); Reply of the Swiss Confederation to a UNODC secretariat request for asset recovery information.

²⁰²StAR Asset Recovery Watch database page on Munari and Rovelli/United States, available from <http://star.worldbank.org/corruption-cases/node/18556>.

any of the categories of direct recovery or confiscation of proceeds enumerated in the Convention is the procedure decided on by the Swiss Federal Court to grant restitution under mutual assistance requests to return the Marcos funds to the Republic of the Philippines,²⁰³ to return the Abacha funds to the Federal Republic of Nigeria²⁰⁴ and to return the Montesinos and de Bari Hermoza Ríos funds to Peru.²⁰⁵ The Swiss court decision in the Marcos case resulted in an anticipatory return of US\$ 684 million to escrow accounts in a Philippine bank.²⁰⁶ The basis for this significant decision clearly stated the relevant policy considerations and enunciated the criteria for deciding the important question of when to return assets pursuant to a mutual legal assistance request. Since the Philippines and Switzerland did not have a bilateral mutual legal assistance treaty, the Swiss domestic law on mutual assistance was applied.²⁰⁷ In interpreting the application of its International Mutual Assistance in Criminal Matters Act the Federal Court stated that:

[...] It is contrary to the interests of Switzerland, if this country turns into a haven for capital flight or criminal monies [...] It is the primary duty of the legislator, the banks and the banking organisations to ensure that the heads of dictatorial regimes cannot—as happened in the present case—deposit millions of obviously criminally acquired monies on Swiss bank accounts. If such monies are nevertheless discovered in Switzerland and their restitution requested by the aggrieved foreign State, the mutual assistance administrations and the courts are required to make a decision. According to Article 1a IMAC, the application of the law must take into consideration the public order or other vital interests of Switzerland [...]

Today's state of knowledge does not allow serious doubts about the illegal provenance of the seized monies. The incompleteness of the records makes it impossible to attribute the individual assets to specific offences, and it is possible therefore that also legal assets of the Marcos families were deposited with the foundations. However, such legal sums could, as established correctly by the claimant only to be minor sums compared to the total amount of the assets seized. With respect to the overwhelming majority of the assets seized the facts are sufficiently clear to allow the assumption of an illegal provenance. Under these circumstances an anticipatory restitution of the assets is possible in principle if there are sufficient guarantees that the decision regarding seizure or restitution, respectively, will be rendered in proceedings according to law and order. The decision whether to seize or retribute the monies seized must be taken in the Philippines where the offences were committed.²⁰⁸

²⁰³Unofficial translation, Decision of the Swiss Federal Court of 10 December 1997, *Federal Office for Police Affairs v. Agumina Corporation*, No.123II 595, accessed at Basel Institute of Governance Asset Recovery Knowledge Centre, Judgement of the Swiss Federal Supreme Court in the case of Ferdinand Marcos, available from <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=3be163cf-a345-11dc-bf1b-335d0754ba85>.

²⁰⁴Decision of the Federal Court in *Mohammed Abacha and others v. Federal Office of Justice*, 7 February 2005, No. 1A.215/2004, <https://icc-ccs.org/component/flexicontent/118-leading-cases/697-abacha-case>; <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht-leitentscheide1954-direct.htm>

²⁰⁵See Response of Republic of Peru to a UNODC secretariat request for information on asset recovery. "The Peruvian efforts to recover proceeds from Montesinos's criminal network of corruption", Guillermo Jorge, Executive Director, Program on Corruption and Governance, Universidad de San Andres, Argentina, Case Study for Regional Seminar for Asia Pacific, Asian Development Bank/Basel Institute on Governance/UNODC, Bali 2007, available from <http://www.udesa.edu.ar/files/uahumanidades/libros/2008jorge.pdf>

²⁰⁶Response of Confederation of Switzerland to a secretariat request for asset recovery information.

²⁰⁷That law is referred to differently by its acronym in English, IMAC for International Mutual Assistance in Criminal Matters and as the EIMP, its acronym in French, *Loi fédérale sur l'Entraide Internationale en Matière Pénale*.

²⁰⁸See "Tracking the Proceeds of Organized Crime—the Marcos Case", David Chaikin, Barrister, New South Wales, Australia, paper presented at the Transnational Crime Conference convened by the Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service and held in Canberra, 9-10 March 2000, available from http://www.aic.gov.au/media_library/conferences/transnational/chaikin.pdf.

200. Final recovery of those funds by the Philippine Treasury did not take place until January 2004, after a final judgement on ownership of the assets was issued by the Philippine Supreme Court in July 2003.²⁰⁹ The reference by the Federal Court that “the decision regarding seizure or restitution, respectively, will be rendered in proceedings according to law and order”, clearly refers to the future final determination by the Philippine judicial system that was one of the conditions for anticipatory return of the funds to the Philippines. By definition under article 2 of the Convention, confiscation is “the permanent deprivation of property”. Since the Swiss action in response to a mutual assistance request was clearly an interim action, leaving a final determination to another court on another day, it cannot be considered a confiscation. Neither is it a form of direct recovery, since it is based on a mutual assistance request. The closest Convention provision is paragraph (c) of article 53, involving recognition of a legitimate owner’s claim in a confiscation proceeding. However, execution of a mutual assistance request is not a confiscation proceeding under Swiss law and the decision in the landmark Marcos case did not decide ultimate ownership but left that determination to a Philippine court. Consequently, return under a mutual assistance request must be regarded as *sui generis*, a unique action that goes beyond the measures and mechanisms established by the Convention in a positive way.

201. The positive contribution to international cooperation of the Swiss Federal Court’s decision in the Marcos Estate case was carried forward and expanded by that court’s decision in the mutual assistance litigation by *Mohammed Abacha v. the Federal Office of Justice*. In that case, the court noted that the Swiss Penal Code had been amended by the addition of Criminal Code article 72 and that a judge must now order the confiscation of any securities over which a criminal organization has power of disposal. Moreover, assets belonging to any person who has been involved in or aided or abetted a criminal organization shall be presumed to be subject to the power of disposal of the organization until proved otherwise. After an analysis of the legislative history the Federal Court concluded that the presumption applied not only to confiscation under the criminal law but also to return of property pursuant to a mutual legal assistance request:

With regard to the criminal organization, confiscation extends to all the assets in its possession. This is explained by the fact that if the assets in question are held by a criminal organization, it is entirely probable that they are derived from an equally criminal activity. (authorities omitted). The Federal Council has justified the adoption of a specific rule in that respect inter alia by the need to facilitate mutual assistance and the execution of foreign confiscation orders relating to property and assets transferred to Switzerland by criminal organizations. ... Thereafter, funds held by a criminal organization are presumed to be of criminal origin unless the holders prove the contrary. Unless they have reversed the presumption in Art. 59 (of illegal provenance) delivery must be ordered in accordance with Art. 74 a (3) EIMP, without any further examination of the provenance of the funds reclaimed. The structure set up by Sani Abacha and his accomplices constitute a criminal organization as defined by Art. 59 ch.3 CP, since its object was to embezzle funds from the Central Bank of Nigeria for private purposes.²¹⁰

202. The facts leading up to the return to Peru of US\$ 77.5 million from the accounts of Vladimiro Montesinos and two associates at the order of a Swiss magistrate are discussed in Section I. Like the Marcos and Abacha cases, the Swiss decision in the

²⁰⁹ *Republic v. Sandiganbayan*, No. 152154, decided 15 July 2003, Supreme Court of the Philippine Republic, available from <http://sc.judiciary.gov.ph/jurisprudence/2003/jul2003/152154.htm>.

²¹⁰ ATF 1A.215/2004 of 7 February 2005, para. 9.1, at BGE 131 II 169 S. 184, French version available from <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht-leitentscheide1954-direct.htm>.

Montesinos case involved a determination to return property in the mutual assistance context without a declaration of confiscation. While the use of mutual assistance for discovery of assets can be delayed by resistance from the document and asset custodian and from the beneficial owner, if a requesting State can assemble persuasive proof of a criminal organization, the Mohammed Abacha and Montesinos cases suggest that return of assets can occur.

203. More recently, the 2010 Swiss Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons contains two provisions that can facilitate future confiscation proceedings in Switzerland in the special circumstances covered by that act. Those provisions are its article 5, section 3, which states as follows on forfeiture:

1. The Federal Council may instruct the Federal Department of Finance (FDF) to take legal action before the Federal Administrative Court to enable frozen assets to be forfeited.
2. The Federal administrative court shall decide on the forfeiture of assets
 - a. in respect of which the power of disposal is held by a politically exposed person or his or her close associates;
 - b. which have been obtained by illicit means; and
 - c. which have been frozen by the Federal Council pursuant to this Act.

Article 6 (see above) facilitates the recognition of the nature of frozen assets as the proceeds of crime by providing a presumption of illicit origin.²¹¹

204. Similar to the Swiss IMAC, the European Union Convention on Mutual Assistance in Criminal Matters contains a provision permitting return of property pursuant to a mutual assistance request without an order of confiscation in either the requesting or requested State. Article 8.1 on restitution reads:

At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place Articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.

205. Article 8 seems to dispense with formalities and to allow discretionary return of criminal proceeds to a requesting State and then to the lawful owner. The appearance of an informal process is deceptive however, because any action by a member of the European Union involving property rights is subject to the entire *acquis communautaire*, in this case the accumulated body of human rights and right to property law and procedural guarantees under the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights and of the European Court of Justice. Accordingly, national procedures to return property under this Mutual Assistance Convention provision will have to implement European Community concepts of notice, opportunity to defend and similar due process guarantees.

²¹¹Restitution of Illicit Assets Act (RIAA) of the Swiss Federation, unofficial translation, available from http://www.admin.ch/ch/e/rs/196_1/index.html#id-3.

H. International cooperation procedures for purposes of confiscation

206. Article 55 prescribes the procedures to be followed for preparation and receipt of a mutual legal assistance request for confiscation or for identification, tracing, freezing or seizing for the purpose of confiscation from another State party. These procedures are standard for the form and content of mutual legal assistance requests and for their execution. The only matter particularly oriented toward confiscation can be found in article 55, paragraph 7, providing that cooperation may be refused if the property is of *de minimis* value. The mechanisms to be implemented by the procedures in article 55 are discussed in chapters IV through VI of the present Digest.

207. In this context, the Swiss Federal Supreme Court also issued a helpful ruling in the Montesinos Case on the degree of evidentiary specificity necessary to go forward with the mutual assistance request for the recovery and return of stolen assets. The court decided that Swiss authorities could properly provide assistance based on a description by Peruvian authorities of the facts under investigation. The request was found to be sufficient in describing the investigation into illegal commissions obtained by public servants in purchasing defence equipment from the Russian Federation. It gives sufficient grounds for Swiss authorities to evaluate the request as conforming to treaty provisions.²¹²

I. Summary

208. Among measures for direct recovery of property, the initiation of civil actions in the courts envisioned in article 53 (a) has been a prominent and effective mechanism, although the only recovery was sometimes a money judgement or eventually even an unsatisfied money judgement. An aspect of these cases is that a strong legal system and respect for the rule of law are, together with economic and political stability, among the factors that traditionally attract foreign investment. A strong, objective legal system can thus have dual effects. It may help attract the placement and investment of the proceeds of corruption offences because of the protections it affords, and at the same time give other countries a forum in which it is possible for them to recover those proceeds, even if their own domestic efforts have been less successful. While significant recoveries of the proceeds of Convention offences have been achieved through civil actions, the cases have also involved significant costs, controversies and disappointments. Expert legal representation in international litigation is costly. A fee dispute can raise doubts, particularly among the public, about the integrity and value of recovery litigation. A lengthy and expensive lawsuit may result in a judgement for damages that may never be collected unless assets have been restrained in the jurisdiction of litigation or are otherwise available. In some cases, the recovery by a civil action might also diminish the benefits of international cooperation, such as access to law enforcement information and investigative capacity of counterpart State parties, seizing abilities, and asset management options pending the litigation.

209. The orders envisioned in article 53 (b) are another valuable measure for recovery of property. They require States parties to permit courts in their jurisdiction to order

²¹²"The Peruvian efforts to Recover Proceeds from Montesinos's Criminal Network of Corruption", Guillermo Jorge, Executive Director, Program on Corruption and Governance, Universidad de San Andres, Argentina, Case Study for Regional Seminar for Asia Pacific, Asian Development Bank/Basel Institute on Governance/ UNODC, Bali 2007, pp.116-117, available from <http://www.udesa.edu.ar/files/uahumanidades/libros/2008jorge.pdf>.

persons who have committed offences established by the Convention to pay compensation and damages to a State party harmed by the offence. Sentencing provisions that require satisfaction of a restitution order seem to be appropriate when the funds for restitution are demonstrably available. Use of a criminal organization theory and a resulting presumption that funds of any member are available for criminal use is another very practical mechanism which can enhance prospects for recovery.

210. Another channel is the measures required by article 53 (*c*) to recognize a State party's claim as legitimate owner of the proceeds of Convention offences. This requirement is often satisfied by third party protections in confiscation statutes, although they do not seem to be widely used.

211. Article 54.1 (*a*) is intended to ensure the recognition of final confiscation orders as a form of mutual legal assistance. The exequatur process can be complicated in some jurisdictions and as a result requests to enforce confiscation orders from countries that suffered losses through Convention offences are not common.

212. Examples illustrating confiscation of property of foreign origin by adjudication for money-laundering or for other offences under measures described in article 54.1 (*b*) are instead frequent and can be found in multiple jurisdictions where assets have been placed.

213. Finally article 54.1 (*c*) requires measures to permit non-conviction based confiscation, and examples of this procedure can also be found in multiple jurisdictions where assets have been detected and confiscated.

214. In addition to measures listed in the Convention, jurisdictions like Switzerland have adopted measures that facilitate recovery of assets in cases related to politically exposed persons where there is clear evidence of criminal provenance of those assets.

VI. RETURN AND DISPOSAL OF ASSETS

A. Progression from discretionary sharing to mandatory return

215. The principal Conventions that contain asset confiscation provisions are the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 2002 United Nations Convention against Transnational Organized Crime and the 2005 United Nations Convention against Corruption. The references in those instruments reflect a significant change in international focus. Asset confiscation in the 1970s and 1980s was focused on depriving narcotics traffickers of their criminal proceeds, protecting legitimate economies from infiltration and competitive pressures from illicit capital flows and reducing the financial incentive for their activity. These concerns are expressed in the preamble to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

Aware that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels, Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing.

216. As a consequence of this focus on confiscation as a means of depriving offenders of their ill-gotten gains, article 5 of the 1988 Vienna Convention merely adopted the long-standing customary approach that asset sharing was purely a matter of discretion for the confiscating State. Article 5, paragraph 5 of the 1988 Convention provided that:

(a) Proceeds or property confiscated by a party pursuant to paragraph 1 or paragraph 4 of this Article shall be disposed of by that party according to its domestic law and administrative procedures.

(b) When acting on the request of another party in accordance with this Article, a party may give special consideration to concluding agreements on:

(i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;

(ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

217. The 1988 Convention focused exclusively on drug matters. Its money-laundering offence only applied to the proceeds of drug trafficking. Article 5, paragraph 1, limited confiscation to proceeds of drug and drug money-laundering offences. Its provisions

related to return and disposal of assets were designed to secure funding for international drug control efforts and for “sharing” with other parties. In the practical context of the 1980s, this kind of sharing typically meant an allocation made by a confiscating State to other State parties that had contributed to investigative, prosecutorial or confiscation efforts.

218. The efforts to combat money-laundering of the Financial Action Task Force, founded in 1989, succeeded in broadening the global focus on money-laundering from drug offences to the laundering of proceeds from all serious offences. When the United Nations Convention against Transnational Organized Crime was adopted in 2002, criminalization of the laundering of the proceeds of crime was defined in its article 6 as applicable to all of the predicate offences established by the Convention. This included non-drug related crimes punishable by deprivation of liberty for four or more years and committed by an organized criminal group. Active and passive bribery were specifically required to be criminalized by article 8 of that Convention. Confiscation and seizure provisions under article 12 applied to all Convention offences and article 13 required international cooperation for the purpose of confiscation. Article 14 of the Transnational Organized Crime Convention, entitled “Disposal of confiscated proceeds of crime or property”, made a tentative advance with respect to return of assets. Paragraphs 3 (a) and (b) of article 14 repeated the provisions quoted above from article 5.5 of the 1988 Vienna Convention concerning contributing or sharing confiscated property. In addition, paragraph 2 of article 14 of the Transnational Organized Crime Convention introduced a greater emphasis on repatriating confiscated property to its lawful owner or to compensate a victim: “When acting on the request made by another State party in accordance with article 13 of this Convention, States parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds or property to the requesting State party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.”

219. Although the decision to return was still discretionary and within the parameters of the domestic law of the confiscating State, the United Nations Convention against Transnational Organized Crime signalled a broadening of focus from an exclusive emphasis on denying criminals the fruits of their wrongdoing to giving “priority consideration to returning the confiscated proceeds of crime or property to the requesting State party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners”.²¹³ The language in article 14 does not explicitly address situations in which the requesting State party is itself the victim of the offence or the legitimate owner of the confiscated crime proceeds. Article 8 of the Transnational Organized Crime Convention, however, had required the criminalization of active and passive bribery and encouraged criminalization of other forms of corruption. As a result, situations in which the State party would be a victim or legitimate owner of confiscated assets are clearly within the scope of article 14 of that Convention. The Transnational Organized Crime Convention thus began the transition from a perspective under which asset recovery was regarded primarily as recovery from the criminal to a new paradigm of restorative justice, in which asset recovery involves recovering assets through both direct recovery measures and confiscation and returning them to the victims and prior legitimate owners.

220. With its focus on corruption offences in which individual States parties are often the victims, the United Nation Convention against Corruption refocused the recovery emphasis, broadening its perspective from the process of depriving wrongdoers of illegally

²¹³Article 14.2, United Nations Convention Against Transnational Organized Crime.

derived assets to a more comprehensive process of confiscation of corruption proceeds and returning and disposing of such assets in the manner contemplated by article 57. The innovation of converting return of assets from a discretionary choice to a mandatory convention obligation, in certain circumstances, was accomplished by the introduction of paragraphs 3 (a) and (b) of article 57, which require mandatory return under certain circumstances. Paragraph 57.3 (a) and (b) require that, where there has been a final order obtained by the requesting State party, confiscated property has to be returned to a requesting State party where:

57.3 (a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in Articles 17 and 23 of this Convention, when confiscation was executed in accordance with Article 55 and on the basis of a final judgment in the requesting State party, a requirement that can be waived by the requested State party, return the confiscated property to the requesting State party;

57.3 (b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with Article 55 of this Convention and on the basis of a final judgment in the requesting State party, a requirement that can be waived by the requested State party, return the confiscated property to the requesting State party, when the requesting State party reasonably establishes its prior ownership of such confiscated property to the requested State party or when the requested State party recognizes damage to the requesting State party as a basis for returning the confiscated property; [...]

221. Article 57.2 lays the necessary foundation for the implementation of these two duties by requiring that a State party takes the necessary legislative and other measures to enable it to return confiscated property in response to the appropriate request of another State party.

222. However, article 46 of the Convention has to be recalled, wherein requested States parties to the Convention may deny a mutual legal assistance request based on the following circumstances:

46.21 (a) If the request is not made in conformity with the provisions of this Article;

46.21 (b) If the requested State party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

46.21 (c) If the authorities of the requested State party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

46.21 (d) If it would be contrary to the legal system of the requested State party relating to mutual legal assistance for the request to be granted.

223. Article 57.3 (a) applies to two categories of offences, embezzlement of public funds as referred to in article 17 of the Convention and money-laundering of embezzled public funds as referred to in article 23. Whether or not jurisdiction is exercised on the basis of territory, nationality or protection of national interests, offences of embezzling public funds would most frequently be prosecuted in the courts of the State whose funds have been diverted. Conversely, while convictions for money-laundering could occur in the State whose public funds are embezzled, most of those examined for this Digest took place in jurisdictions outside of where the embezzlement originally occurred. In reviewing the cases

examined for the Digest, the scarcity of requests for international cooperation based on confiscation orders from the State whose resources were diverted or that suffered harm is notable. One prominent example of domestic confiscation was the case of former State Governor Diepreye Alamieyeseigha,²¹⁴ who was convicted in Nigeria of money-laundering offences, as well as a false asset declaration.²¹⁵ His companies were convicted of money-laundering and their assets were criminally confiscated. His cash assets were subject to non-conviction based United Kingdom confiscation and a civil freezing order was issued for the same company assets in the United Kingdom litigation. In addition, as the company assets became the subject of a civil judgement, it is assumed that through one method or another Alamieyeseigha's company assets eventually were returned to Nigeria. Besides this one occasion, the cases examined revealed no requests from harmed States seeking return of funds based upon confiscation orders issued by their courts (article 55, paragraph 1 (b)).²¹⁶ By default, the most broadly applicable provision is article 57.3 (c), which provides that, "in all other cases, give priority consideration to returning confiscated property to the requesting State party, returning such property to its prior legitimate owners or compensating the victims of the crime".

224. Examples of confiscating States making discretionary returns of assets as envisioned by the omnibus discretionary return paragraph of article 57.3 (c) are numerous. Switzerland returned funds to Nigeria from the Abacha criminal confiscations even before the Convention and its article 57.3 became effective.²¹⁷ Confiscated cash was returned by the United Kingdom in the Dariye and Alamieyeseigha cases,²¹⁸ and from Jersey in the Raj Bhojwani criminal confiscation.²¹⁹ The defendant in the Joyce Oyebanjo matter was made subject to a United Kingdom criminal confiscation order for £200,000²²⁰ and more proceeds are likely to be confiscated and returned when former State governor James Ibori is sentenced in that jurisdiction. An additional example is the transfer of United States confiscated funds to Peru in the Venero Garrido and General Rodríguez Huerta cases.²²¹

Bribery and embezzlement in the private sector

225. Paragraph 3 (c) of article 57 may be also applicable to recovery of the proceeds of private sector bribery and embezzlement. However, the reported cases in anti-corruption literature dealing with recovery of the proceeds of bribery or embezzlement in the private sector are few, relative to those involving public officials. Numerous cases from multiple jurisdictions, some identified by name and some anonymous, are analysed in a revised

²¹⁴As noted above, Mr. Alamieyeseigha was pardoned by the council of States, a group headed by the President of Nigeria after the conviction of corruption offences. See "Nigeria pardons Goodluck Jonathan ally, Alamieyeseigha", available from <http://www.bbc.com/news/world-africa-21769047> and Nigeria president pardons ex-governor convicted of graft, 13 Mar 2013, available from <http://www.reuters.com/article/2013/03/13/us-nigeria-pardon-idUSBRE92C0WK20130313>.

²¹⁵See *Federal Republic of Nigeria v. D.S.P Alamieyeseigha & Ors*, Federal High Court in Lagos, Nigeria, available from <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=f5e10cbf-ca94-11dd-b3f1-fd61180437d9>.

²¹⁶Enforcement of confiscation orders from the United States in the Yakovlev and Mercator Corporation cases was described in paragraphs 176-177 and 233-236, but those were not confiscation orders secured by the State party whose assets were stolen or which suffered harm.

²¹⁷*United States v. Nishan Kohli*, Stipulated Order, United States District Court Southern District of New York, August 2008, available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kohli_SDNY_Stipulation_Order_Restitution_Aug_8_2008.pdf.

²¹⁸See paragraph 28.

²¹⁹See paragraph 33.

²²⁰See *United Kingdom, Self-Assessment for the United Nations Convention against Corruption—Chapters III and IV*, accessed at the StAR Asset Recovery database page on Anianas Tumukunde, available from <http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/UK-self-assess-un-convention-Jul-2011.pdf>.

²²¹See paragraph 165.

version of a publication entitled *Identification and Quantification of the Proceeds of Bribery* issued in February 2012 by the OECD and StAR, with an effort to quantify the proceeds of active bribery, the benefits achieved by bribe payers. Of the 20 cases reviewed,²²² only one involved private sector bribery. This almost certainly does not reflect the comparative degrees of honesty in the private and public sectors, but may rather relate to a scarcity of published cases and other sources on corruption in the private sector. The discussions in chapter II, chapter V as well as in the present chapter could in large part be applicable to proceeds of private sector bribery and embezzlement offences. One difference would be that specialized anti-corruption agencies would probably play a lesser role with regard to asset recovery in private sector cases, since their mandate may either be legally limited to public sector corruption or they may place less emphasis on private sector corruption. Another difference is that mutual legal assistance between governments would not normally be available to a private victim, who would have to rely on *lettres rogatoires*, injunctions and other mechanisms traditionally available to private litigants. Treaties providing mutual legal assistance in criminal matters are reciprocal agreements designed to serve the criminal justice interests of the participating sovereigns, not of individual litigants who do not have international personalities and cannot offer the same degree of institutional reciprocity. The recovery mechanisms discussed in this section for the most part would not be applicable except insofar as a government may legitimately seek to use inter-governmental cooperation mechanisms on behalf of a victim or damaged party.

226. Article 57 and article 55 provide for the channels to return confiscated assets. In addition, recoveries accomplished through non-confiscation measures, some of which are not explicitly covered by the Convention, are of practical importance. The most exemplary instances of non-confiscation measures resulting in the return of proceeds of corruption offences are the US\$ 684 million returned to the Philippines by Switzerland in the Marcos case,²²³ the funds returned by Switzerland to Nigeria in the Abacha related recoveries that were not based upon criminal convictions and confiscations, the US\$ 93 million to Peru in Montesinos-related matters,²²⁴ and the US\$ 74 million to Mexico in the Salinas case.²²⁵ As explained in Section V, these Swiss recoveries were not accomplished by way of confiscation, either as defined under Swiss law or by the United Nations Convention against Corruption. They were responses to mutual assistance requests and were anticipatory transfers of funds authorized under explicit provisions of Swiss legislation and judicial opinions. The Swiss procedures are *sui generis*, and as such unique means for returning assets. Those procedures resemble the recognition of a legitimate owner under article 53 (c) but differ in some important technical respects and so must be regarded as being outside the Convention's structural division of measures between direct recovery and confiscation in response to a mutual assistance request.

227. Within the Convention structure it is also important to recognize that the recoveries accomplished by confiscations under article 54 may be rivalled in frequency and volume by the recoveries accomplished through direct recovery measures established in article 53 of the Convention. Those direct recoveries were previously examined in chapter V. Significant recoveries have been accomplished using these direct recovery mechanisms. Civil actions conforming to paragraph (a) of article 53, including participation as a civil party in a criminal proceeding, were successfully used by Nigeria in the Abacha, Alamieyeseigha

²²²OECD and StAR, "Identification and Quantification of the Proceeds of Bribery", 2012, Part III, available from <http://www.oecd.org/daf/anti-bribery/50057547.pdf>.

²²³Response of the Republic of Switzerland to a secretariat request for asset recovery information.

²²⁴"Montesinos case: Switzerland transfers 77 million US dollars to Peru", Swiss Federal Office of Justice Press Release of 20 August 2002, accessed at StAR Asset Recovery Watch database page on Vladimiro Montesinos/Switzerland.

²²⁵"Swiss assets handed over to Mexico, Federal Magistrate concludes 12-year proceedings", Press Release, Federal Office of Justice, 16 June 2008, accessed at StAR Asset Recovery Watch database page on Raúl Salinas.

and Dariye cases, and by the Kuwaiti Investment Organization in the Grupo Torras case. A recent StAR publication on the use of civil remedies in asset recovery examines these types of approaches in greater detail.²²⁶

228. A number of cases were found wherein a court by imposing a criminal sanction has ordered an offender to pay compensation or damages to another State that has been harmed by Convention offences. The most notable example is the BAE System case, where a United Kingdom court ordered 29.5 million pounds sterling to be paid to the United Republic of Tanzania in damages as result of a bribery scheme that substantially inflated the cost of a radar contract with that country.²²⁷ The method of direct recovery provided by paragraph (c) of article 53 is available through victim protection laws but is not much used, perhaps for reasons related to the concept of sovereignty or for practical reasons related to the availability of non-judicial intergovernmental measures.

B. Provisions at the bilateral and regional levels

229. Older agreements on mutual legal assistance tended to emphasize the possibility of asset sharing by discretion or agreement. The emphasis on that aspect of international cooperation is consistent with the fact that from the 1970s until the negotiation of United Nations Convention against Corruption, international law and custom presumed that assets belonged to the confiscating sovereign and their return or sharing was a matter of graciousness. Even in modern treaties that include a duty to recognize the right to recovery of stolen State assets, the emphasis upon the older asset sharing procedure is still evident. For example, the mutual assistance treaty negotiated in 2009 between the Philippines and the United Kingdom seems designed to expressly implement the obligations of both countries as States parties to the United Nations Convention against Corruption Convention and its article 57.3.

Article 17. Restraint, Forfeiture and Confiscation of Property

1. The Contracting States shall assist each other in proceedings involving the identification, tracing, restraint, seizure and confiscation of the proceeds and instrumentalities of crime in accordance with the domestic law of the Requested State.
2. In addition to the provisions contained in Article 4 (Form, Language and Content of Requests) of this Treaty, a request for assistance in restraint or confiscation proceedings shall also include:
 - (a) details of the property in relation to which co-operation is sought;
 - (b) the location of the property and its connection with the subjects of the request;
 - (c) the connection, if any, between the property and the offences;
 - (d) details of any third party interests in the property; and
 - (e) a certified true copy of the restraint or confiscation order made by the court and statement of the grounds on the basis of which the order was made, if they are not indicated in the order itself.

²²⁶StAR Initiative: "Public Wrongs, Private Actions", 2014

²²⁷Serious Fraud Office Press Release, "BAE fined in Tanzania Defence Contract Case", available from http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/BAE_Tanzania_SFO_PR_DEC_21_2010.pdf.

Article 18. Return of Assets

1. Where an offence has been committed and a conviction has been obtained in the Requesting State, the assets which have been seized by the Requested State may be returned to the Requesting State for the purpose of confiscation, in accordance with the domestic law of the Requested State.
2. The rights claimed by bona fide third parties over these assets shall be respected.

Article 19. Return of Embezzled Public Funds

When the Requested State seizes or confiscates assets that constitute public funds, whether or not these have been laundered, and which have been embezzled from the Requesting State, the Requested State shall return the seized or confiscated assets, less any costs of realisation, to the Requesting State.²²⁸

230. The treaty provides for the protection of third parties in paragraph 2 of its article 18, stating that the rights claimed by bona fide third parties over “these assets” shall be respected. The placement of this protection within article 18 leaves room for the argument that it does not apply to the return of embezzled public funds, which are covered in a separate article. However, that approach seems unnecessarily categorical. The constructive trust theory discussed at length in chapter V suggests that in many legal systems it is difficult even for bona fide unsecured creditors to acquire a claim to the embezzled property superior to that of the government from which it was embezzled through a breach of trust. As to secured creditors, and in fact in all creditors’ rights situations, the domestic law in each country is likely to be well developed and must be carefully analysed to know who constitutes a bona fide third party.

231. Another modern mutual assistance treaty reconciling the confiscation and recovery approaches of systems with two different legal traditions is the 2006 Treaty in force between the People’s Republic of China and the Commonwealth of Australia on Mutual Legal Assistance in Criminal Matters. It does not specifically address embezzled public funds or their return, but its general provisions seem to be designed to implement a number of provisions of the Convention against Corruption without complex formalities while explicitly respecting the rights of third parties:

Article 19. Instruments and proceeds of crime

1. The Requested party shall, upon request, make inquiries as to whether any instruments or proceeds of a crime, including any bank accounts, are located within its jurisdiction and shall notify the Requesting party of the results of its inquiries. In making the request, the Requesting party shall notify the Requested party of the reasons for its belief that such instruments or proceeds may be located in the Requested Party’s jurisdiction.
2. Where any instruments or proceeds of crime are found, or believed to be located in the jurisdiction of the Requested Party, the Requested party shall, at the request of the Requesting Party, take such measures as are permitted by its laws to prevent

²²⁸Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, London, 18 September 2009, entered into force on 1 June 2012, available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236030/8398.pdf.

any dealing in, transfer or disposal of those instruments or proceeds of crime including, but not limited to, giving effect to a court order of the Requesting Party.

3. At the request of the Requesting Party, the Requested party may, to the extent permitted by its laws and under the terms and conditions agreed to by the Parties, transfer all or part of the instruments or proceeds of crime, or the proceeds from the sale of such assets to the Requesting Party.

4. In applying this Article, the legitimate rights and interests of the Requested party and bona fide third parties shall be respected under the laws of the Requested Party.

5. In this Treaty “instruments of crime” means any property used in or intended to be used in, or in connection with, the commission of an offence.

6. In this Treaty “proceeds of crime” means any property suspected or found by a court to be property derived or realized, directly or indirectly, from the commission of an offence or which represents the value of property and other benefits derived from the commission of an offence.²²⁹

232. The European Union also included a provision on return of assets in its Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000) in its article 8, on restitution:

At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place Articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.²³⁰

C. Potential areas of controversy in the return and disposal of assets

233. The rights of bona fide third parties in the requested State would certainly be a consideration in connection with the return of alleged proceeds of offences established by the Convention. When the possibility of assets of the Zine Ben Ali family being located and confiscated in Canada materialized, some of the earliest media accounts involved speculation about unpaid debts. At least as reported in some media articles, the son-in-law of Ben Ali owned a 2.5 million Canadian dollar mansion in Montreal but fled to Qatar and allegedly owed taxes on the house and other debts in Canada.²³¹ Article 57. 3 (a) of the Convention would leave no discretion as to the return of any embezzled public funds or laundered proceeds of such embezzlement unless Tunisia were to waive some portion of the recovery to which it would be entitled by the Convention.

234. One potentially contentious area of return of assets involves the question of expenses of the confiscating State party. Article 57.4 anticipates the issues and establishes that:

²²⁹People’s Republic of China and the Commonwealth of Australia on Mutual Legal Assistance in Criminal Matters, available from <http://www.comlaw.gov.au/Details/F2007L00302>.

²³⁰Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF>.

²³¹“Ottawa eyes former Tunisian ruler’s family assets”, CBC News, 26 January 2012, accessed from www.cbc.ca/news/canada/montreal/story/2012/01/26/tunisian-ben-ali-assets.html; Ottawa expedites special law to freeze foreign assets, The Globe and Mail Ottawa and Toronto, accessed from www.theglobeandmail.com/news/politics/Ottawa-expedites-special-law-to-freeze-foreign-assets.

Where appropriate, unless States parties decide otherwise, the requested State party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this Article.

235. The requesting and the requested State party could have diverging views on what are reasonable expenses. The divergence could be emphasized in those situations in which the requesting State is a developing economy, left in dire condition by the diversion of national assets and accustomed to very low costs for public services, while the requested confiscating State is a wealthy economy which is accustomed to comparatively more generous compensation and therefore higher costs for public services. Fortunately, based on review of the cases examined for this Digest, there seems to have been relatively little public acrimony over costs, although such frictions certainly have existed in other cases.

236. Some conflicting claims have arisen in cases involving attempted direct recovery as described in article 53. Article 53 (a) requires that a State party enable another party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with the Convention. An early example of this was the Marcos case. After the downfall of the Marcos regime, criminal proceedings, non-conviction based confiscation proceedings and civil suits were filed in a number of United States courts. The criminal prosecutions were unsuccessful, while the non-conviction based confiscation proceedings and related negotiated settlements resulted in some recoveries, estimated by the Philippine Ombudsman to be worth less than US\$ 50 million.²³² The Government of the Philippines was also pursuing mutual legal assistance remedies with Swiss authorities which eventually resulted in the anticipatory return to an escrow account of US\$ 684 million. Meanwhile, the victims of human rights abuses were pursuing claims in United States courts against the Marcos estate. In a complicated series of proceedings and appeals, the human rights plaintiffs succeeded in securing a US\$ 2 billion award, which was tentatively settled by agreement with the Marcos estate for US\$ 150 million to be taken from the Swiss bank funds. The Philippine Sandiganbayan, a specialized anti-corruption court, rejected this agreement because Philippine law dictated that the Marcos recoveries go to land reform, and the legal fees in the settlement amounted to over US\$ 41 million, more than one quarter of the award, plus expenses.²³³ The lawyers for the human rights plaintiffs attempted to block any movement of the Swiss funds, including any action by the Philippine government, an effort rejected by a United States appellate court with respect to the Government of the Philippines. The Swiss bank custodians of the funds found themselves at risk of having to pay out twice to satisfy orders of their own court and the United States court. The Swiss Federal Court ruled that the Swiss banks would be protected from that possibility. An American financial institution and a Singapore bank sought a declaration from the United States court as to their rights and the Philippine government sought a determination that the rights to the funds should be determined within its judicial system. The United States Supreme Court eventually resolved the claims from the United States court in favour of the Philippines' right to resolve the issues in its courts. The human rights plaintiffs continued to pursue other remedies on 26 June 2012. On that date, the New York State Court of Appeals, the state's highest court, ruled that the judgement in favour of the human rights plaintiffs was only applicable against the Marcos estate. Those assets were

²³² *Ferdinand E. Marcos (Philippines): A Case Study*, Asian Development Bank/Organization for Economic Cooperation and Development Anti-Corruption Initiative for Asia and the Pacific, p.164, available from <http://www.oecd.org/site/adboecdanti-corruptioninitiative/41246239.pdf>.

²³³ "Recovery of the Marcos Assets", Dr. Jaime S. Bautista, Special Counsel, Philippine Commission on Good Government, in *Measures to Freeze, Confiscate and Recover Proceeds of Corruption*, United Nations Asia and Far East Institute/UNODC Third Regional Seminar on Good Governance for Southeast Asian Countries (2009), p. 74, available from http://www.unafei.or.jp/english/pdf/PDF_ThirdGGSeminar/Third_GGSeminar_P72-79.pdf

been determined by the Philippine Supreme Court to belong to the people of the Philippines, which had also suffered under the Marcos regime, and the New York court was unwilling to intercede in a matter within Philippine sovereignty.²³⁴

237. The history of the Marcos estate proceedings demonstrates that when the sums of money involved are great enough, litigation can be expected over every conceivable issue. The financial incentive to recover stolen assets can also motivate officials and private parties to engage in high-risk activities which can be counter-productive and even threaten international relations. After the downfall of the Marcos regime in 1986, a banker who had contacts both in the new Government and with the Marcos family secured power of attorney from Ferdinand Marcos. Under a tentative agreement with the Presidential Commission on Good Government, the banker De Guzman, would have received a commission of 20 per cent of the US\$ 213 million on deposit in the concerned bank. De Guzman presented the power of attorney to the bank in Zurich and requested Credit Suisse to transfer the funds to his bank in Austria. Credit Suisse instructed De Guzman to return the next day and immediately notified Swiss authorities. The Swiss Federal Council adopted an emergency ordinance imposing a freeze on the funds under its constitutional power to protect Swiss national interests. Thereafter, further negotiations continued with De Guzman and eventually the Solicitor General of the Philippines filed a request with the Swiss Federal Office of Police to transfer the US\$ 213 million to a Philippine Government account in De Guzman's bank. The Swiss authorities unfroze the funds and ordered Credit Suisse to make the requested transfer. At the last moment, however, the Philippine Presidential Commission on Good Government became concerned about the safety of placing funds in De Guzman's bank and its lawyers requested the Swiss Federal Office of Police to order the funds to be transferred to a Philippine government account in Credit Suisse. Credit Suisse contacted the Marcos family concerning this instruction and Ferdinand Marcos revoked the power of attorney previously given to De Guzman. In reaction, the Swiss authorities refroze the funds until the ultimate anticipatory restitution to the Philippines years later. The events resulted in hearings by the Philippine House of Representatives as to whether the Presidential Commission action resulted in a failure to recover US\$ 213 million or whether it prevented those funds from being lost or stolen.

238. An even higher risk activity undertaken in connection with the Marcos case was the employment by the Presidential Commission of an Australian national, Reiner Jacobi. A detailed description of Jacobi's activities which resulted in his being charged by Swiss authorities with economic espionage and prohibited actions on behalf of a foreign government in Switzerland is found in the paper by Dr David Chaikin, who represented Jacobi.²³⁵ According to this article, these events led to the temporary suspension of mutual assistance from the Zurich prosecutor to the Philippine Presidential Commission on Good Government in its efforts to recover Marcos assets.

239. The existence of a federal system in Nigeria and lack of public clarity over fee arrangements contributed to a long-lasting controversy over the proceeds recovered from former Nigerian State Governor Joshua Dariye in the United Kingdom and a dispute over

²³⁴*Osugama F. Swezey, Appellant v. Merrill Lynch, Fenner & Smith, Incorporated*, Respondent, Philippine National Bank, et al, Intervenors-Respondents, No 88, New York court of appeals, 26 June 2012, p. 9, available from <http://blog.internationalpractice.org/wp-content/uploads/2012/07/Swezey-v-Merrill.pdf>. See also *Ferdinando Marcos, Jr. v. Republic of the Philippines*, G.R. No 189434 and *Imelda Romualdez-Marcos*, No. 189505 in the Supreme Court of the Republic of the Philippines, decided 25 April 2012, available from <http://sc.judiciary.gov.ph/jurisprudence/2012/april2012/189434.htm>. Response of the Republic of Philippines to a UNODC secretariat request for asset recovery information.

²³⁵*Tracking the Proceeds of Organised Crime—the Marcos Case*, David Chaikin, Canberra, 9-10 March 2000, pp. 5, 9-12, available from http://www.aic.gov.au/media_library/conferences/transnational/chaikin.pdf.

the right to recover funds between Plateau State and the Federal Republic. After having been arrested for money-laundering in London, Joshua Dariye returned to Nigeria where he enjoyed immunity as a State governor. After his immunity as governor ended, he has been indicted for 14 counts of money-laundering in Nigeria—the trial remains ongoing. Cash confiscation from him prior to his flight from the United Kingdom and from his associate Joyce Oyebanjo resulted in the return of £130,000 to the Federal Republic of Nigeria in September 2007. Other funds were recovered as a result of the civil action by the Federal Republic of Nigeria. Dariye complained to the President of the Republic that Nigerians were being cheated, partly due to excessive legal fees. According to the case chronology, assembled by the Basel Institute of Governance on Dariye,²³⁶ the situation was complicated by the lack of a conclusive contract stipulating the terms for payments of the requested legal fees, alleged by Nigerian media to be £900,000. On 17 November 2007, a Nigerian media outlet reported that an additional check for £300,000 had been delivered to the Federal Ministry of Justice by the British solicitors. The law firm announced that it had submitted a bill for £647,000 and that additional payments would be made when the bill was settled.²³⁷ The Basel Institute of Governance database also contains a report entitled “Dariye loot: Plateau demands 1.17 million pounds from AGF”. The report describes a letter of 19 January 2009 addressed to the Attorney General and Minister of Justice of the Federal Republic requesting payment of over £1.17 million. It also describes a Nigerian news source claiming that £1.3 million had been recovered by the law firm representing Nigeria but less than £1 million had been sent to the Ministry of Justice and only £416,000 forwarded to Plateau State, with some of the withheld funds being used to pay legal fees.²³⁸ These controversies ensured that continuing Nigerian media and public attention would be devoted to the disputed recovery and disposal of the recovered proceeds. There would have been no way and no reason to avoid public examination of these issues. However, the long running controversy probably succeeded in confusing public opinion concerning the value of litigation which, considered together with Dariye’s funds recovered from Joyce Oyebanjo, resulted in recoveries in excess of £1 million.

240. The Federal Republic of Nigeria did not seem to contest the legitimacy of Plateau State’s claim to be the legitimate owner or at least the proper ultimate recipient of the funds repatriated from the civil recoveries and confiscations in the United Kingdom, although it may have reserved some of the funds to ensure payment of expenses. In any event, Plateau State did not seek to assert its own claims in the London proceeding, which is understandable both for legal reasons and for the fact that Dariye was the State governor during at least part of the recovery proceedings.

241. In a United States prosecution of Alcatel-Lucent for securities and foreign bribery offences, the Costa Rican state telecommunications entity, as opposed to the sovereign Government of the Republic, sought to be considered eligible for pecuniary and moral damages. The Instituto Costarricense de Electricidad (ICE) asked the sentencing court to treat it as a victim entitled to restitution, which the court declined because of ICE’s role in the corruption and the difficulty of determining its damages, which were also being sought by the Instituto in a court in Costa Rica. When its request was refused, the ICE asked the United States Court of Appeals for the Miami area to order the sentencing court to treat it as a victim eligible for restitution. Another United States appellate court

²³⁶Basel Institute of Governance Asset Recovery Knowledge Centre, Case Chronology (to 2007), available from <http://www.assetrecovery.org/kc/node/e82843b7-b4c6-11dd-a1f9-7986f5e51dc8.1>.

²³⁷“Britain Returns Additional Dariye Loot”, accessed at <http://allafrica.com/stories/200711170010.html>, 17 November 2007.

²³⁸Basel Institute on Governance Asset Recovery Knowledge Centre, “Dariye Loot: Plateau demands 1.17 m from AGF”, *Punch* newspaper, 7 February 2009, available from <http://www.assetrecovery.org/kc/node/f7e56d95-f6be-11dd-aec1-9dfae7b42ba1.2>.

had previously dealt with a similar issue involving Pavel Lazarenko, a former Prime Minister of Ukraine. An associate of Lazarenko named Kiritchenko had initially been an extortion victim of Lazarenko in the Ukraine, but eventually became his business partner in corrupt transactions and money-laundering. When he came under investigation in his new home in the United States, he became a government witness against Lazarenko and later sought victim restitution for the amount originally extorted from him. The United States Court of Appeals in San Francisco rejected Kiritchenko's claim, stating:

We agree with the Second Circuit that, as a general rule, an order of restitution to a co-conspirator is a 'fundamental' error that 'adversely reflect(s) on the public reputation of the judicial proceedings'.

* * *

We hold that, as a general rule, a participant in a crime cannot recover restitution. The circumstances here do not constitute exceptional circumstances warranting departure from that general rule.²³⁹

242. When asked by the ICE to order the sentencing court to consider it a victim for the purposes of restitution, the Court of Appeal overseeing the court in Miami applied the rule of the Lazarenko case. It found no error in the sentencing court's finding that the Instituto actually functioned as a co-conspirator. The principals of ICE, who were its Board of Directors and management, were described in the appellate opinion as engaged in pervasive, constant and consistent illegal conduct. That conduct was spelled out in detail in the government's opposition to the ICE request for victim status. The evidence in the case established that in the Alcatel transaction alone nearly half of the directors accepted bribes. ICE's upper management was thoroughly complicit in the bribery scheme and a previous audit report from 2003 indicated serious deficiencies in internal controls. Evidence showed that bribes were being paid by companies other than Alcatel doing business with ICE for telecommunications business. A witness could testify that the corruption had gone on for years, possibly decades. Bribery affected personnel administration. On 26 October 2010, London insurance broker Julian Messent was sentenced to imprisonment for 21 months and ordered to pay £100,000 compensation to the Republic of Costa Rica within a matter of weeks or serve an additional 12 months imprisonment. His offence was making or authorizing corrupt payments of almost US\$ 2 million to officials of the State insurance company, Instituto Nacional de Seguros and of the ICE.²⁴⁰ The organization had become a vehicle for the solicitation and receipt of bribes, and one of its corrupt directors described the bestowal of gifts or rewards as part of its culture.²⁴¹

243. Instances of an absence of prosecution and investigation of corruption offences, or a lack of success in prosecution and asset recovery efforts in States asserting that their resources were diverted or their officials bribed can contribute to an impression expressed by the courts of Guernsey, which were called upon to hear an attempted direct recovery effort involving assets of the Suharto family of Indonesia. The Guernsey courts expressed an observation that could impact adversely on the receptivity of other courts to claims

²³⁹*United States v. Pavel Lazarenko*, 634 F. 3rd 1247, 1252 (9th Cir. 2010).

²⁴⁰"Insurance Broker Jailed for Bribing Costa Rican Officials", 26 October 2010, available from <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/insurance-broker-jailed-for-bribing-costa-rican-officials.aspx>.

²⁴¹*In re Instituto Costarricense de Electricidad*, Nos. 11-12707-G and 11-120708-G, 11th Circuit Court of Appeals, filed 17 June 2011, available from http://jenner.com/system/assets/assets/953/original/In_re_Instituto.pdf#1317065417. Government's Response to ICE's Petition for Victim Status and Restitution, *United States Alcatel Lucent, France SA and United States v. Alcatel Lucent*, United States District Court for the Southern District of Florida, Nos. 10-CR-20906 and 10-CR-20907, filed 24 May 2011, p. 11, available from <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-et-al/2011-05-23-Gov-Response-re-Victim.pdf>.

for return of disputed assets. In the case of *Garnet Investments Limited v. BNP Paribas (Suisse) SA*, the Guernsey Court of Appeal was faced with a claim by the Government of Indonesia for a continued freeze on assets controlled by a son of former President Suharto, Hutamo Putra, also known as Tommy Suharto. The Court's decision lifted the freezing order previously granted to Indonesia because of insufficient efforts by the Government of Indonesia to pursue civil claims against Mr. Putra in Indonesia despite an earlier extension of the freeze. The author of the Court's opinion stated:

My conclusion is that the Government's proceedings against Mr. Putra have been largely, if not wholly, inspired by the Guernsey Court's invitation in September 2006 to state whether or not the Government wished to assert any claim (sic) the monies in the Accounts.

★ ★ ★

[...] It is hard to understand why the only active steps taken by the Government to assert what they claim to be their rights, are directed at a small jurisdiction where they have fortuitously been asked to consider making a claim to a sum that is relatively (and I stress relatively) small compared to the vast wealth the alleged wrongdoers are said to have amassed.

I can only conclude that there is much the government has been unwilling to tell both us and the Royal Court about the difficulties in bringing proceedings in Indonesia against the Suharto family, and that the truth may well be different from the picture that Mr. Sabda (an Indonesian official who furnished affidavits about the difficulty of investigating fraud and corruption) has painted. I cannot and will not speculate about where that truth may lie, but it seems at least possible that there is limited political will to take steps in Indonesia in relation to the alleged corruption and that the substantive claims may be more difficult to conclude favourably for the Government than is presently being admitted.

This possibility is given some foundation by what happened before Lieutenant Bailiff Carey, when Advocate Strappini was acting for the Government on the original application for the injunction on 22nd 2007. Paragraph 58 of the Lieutenant Bailiff's 23rd May 2007 judgment described how Mr. Strappini had made the revealing comment that "the problem facing the Government was that the Suharto family by virtue of the fact that they had a lot of money still in their possession, had great influence in Indonesia".

244. Whether justified by the record in the case above or not, the scepticism expressed in the Guernsey opinion is a significant warning signal. If the authorities of requested States question the diligence of a requesting State in seeking domestic recovery of the proceeds of corruption from powerful persons, that scepticism may affect their exercise of discretion in attempting to recover corruption proceeds. Such scepticism may particularly affect decisions on whether or not to waive insistence upon a final judgement under paragraphs 3 (a) and (b) of article 57 before returning disputed assets. It could even affect the initial or continued freezing of accounts upon a request under paragraph 2 (b) of article 54. However, the lesson that should be drawn from the observations of the Guernsey court is not that the wealth and influence of an authoritarian regime in power for decades may continue to condition the conduct of public affairs for some time after a regime change. Rather the conclusion should be drawn is that the international community and requested States may need to go beyond the strict legal requirements of the Convention to help and encourage a State party to overcome those lingering effects.

D. Agreements on return and disposal of assets

245. Article 57.5 of the Convention provides that “States parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property”. Bilateral agreements for the disposal of confiscated assets have been concluded between States parties in different instances.

246. For example, subsequent to an agreement with Switzerland and the United States, Peru set up its Fondo Especial de Administración de los Dineros Obtenido Ilícitamente (Fedadoi) with a governing board composed of representatives of Peruvian government agencies involved in the fight against corruption to control expenditure of the funds received from Switzerland and the United States.²⁴² An agreement was also reached between Kazakhstan, Switzerland and the United States in the Mercator case, where an artfully and carefully expressed compromise agreement was achieved in the spirit of article 57.5 of the Convention. As reflected in a verified complaint for confiscation filed in a United States court, officials of the Government of Kazakhstan were the beneficial owners of accounts into which bribes on behalf of United States oil companies were paid over a period of years. When one of those accounts came under suspicion, US\$ 84 million were transferred into an account in the name of a Kazakh government agency. The verified complaint does not specify who the authorized signatories were on that account but the officials involved were of sufficient governmental stature that the previous beneficial owner would have been in a position to continue to exercise control and power of disposal over the account. In those circumstances, both the State party seeking confiscation and the State party which had frozen the funds might be understandably reluctant to see the funds returned to the official or associates of the official who had originally received the payments being confiscated. In this situation, either the confiscating or freezing State might simply wish to preserve the status quo, to confiscate the funds for its own national Treasury in preference to returning them to the State party that formally is the injured State party, or to expend them at its own discretion for what it thinks could be projects benefitting the population of the other State party.

247. The solution agreed to in the Mercator situation channelled the confiscated funds through a foundation for specified purposes. The Memorandum of Understanding among the Governments of Kazakhstan, Switzerland and the United States filed in the United States court to dispose of the Complaint for Forfeiture was non-accusatory and simply recited in pertinent part that:

WHEREAS, in and before July 1999, approximately \$84 million was held on deposit in the account of Orel Capital Ltd. ("Orel") at Credit Agricole Indosuez ("CAI") in Geneva, Switzerland. Orel was a British Virgin Islands corporation beneficially owned by a Liechtenstein foundation, the sole beneficiaries of which were individuals;

WHEREAS, on or about July 29, 1999, the contents of the Orel account were transferred to an account held in the name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan at Pictet & Cie, Geneva, Switzerland;

WHEREAS, on or about August 16, 1999, the \$84 million transferred from the Orel account to the Pictet account was frozen by order of a Swiss examining magistrate;

* * *

WHEREAS, the Government of the Republic of Kazakhstan claims that it is the sole beneficiary of the Funds and that the Funds are its property;

²⁴²See chapter I.

WHEREAS, the Government of the United States asserts that if it were to forfeit the Funds, in keeping with its practice of using forfeited funds, where practicable and not inconsistent with law, to restore forfeited property to victims of the underlying criminal violation or to protect the rights of innocent persons in the interest of justice, it would endeavour to have the Funds used for the benefit of the people of Kazakhstan;

WHEREAS, the Government of the Republic of Kazakhstan asserts that if it were to obtain release of the Funds, it would endeavour to utilize the Funds for the benefit of the people of Kazakhstan;

WHEREAS, the International Bank of Reconstruction and Development (the “World Bank”), at the request of the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan, has agreed to provide technical assistance and supervision for the administration of the Funds for the benefit of the Kazakh people;

WHEREAS, in furtherance of the relationship between the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan, the parties have agreed that the Funds shall be used to benefit the most needy citizens of Kazakhstan, as set forth herein;

NOW, THEREFORE, the parties hereto agree as follows:

1. Summary of Memorandum of Understanding

This Memorandum of Understanding (MOU), as amended and restated, sets forth the terms and conditions by and under which the parties will consent to release of the Funds.²⁴³

248. The Memorandum then set an agreement to establish the BOTA Foundation independent of the Government of Kazakhstan, its officials, and their personal or business associates. The Foundation is to conduct the BOTA Program to benefit poor children, social organizations and education purposes in Kazakhstan, subject to monitoring by the Governments of the United States of America and the Swiss Confederation. The administration, management, and expenditures of the BOTA Foundation are to be conducted by a reputable international non-governmental organization serving as the BOTA Programme Manager, supervised and monitored by the World Bank.²⁴⁴ Governance issues were to be addressed by a World Bank supported Public Finance Management Review over a period of five years. They also were to be addressed by Extractive Industries Transparency Initiative, through which the Government, with the support of the World Bank, prepared and implemented a comprehensive strategy and action plan to increase transparency over payments and revenues of the extractive industries operating in Kazakhstan. The audit reports contained within the annual reports of the Foundation revealed that an independent, monitored programme consumed a large percentage of available resources.²⁴⁵ For 2011, grants for the various programmes were US\$ 9 million out of total net expenditures of nearly US\$ 16 million. Treating not just grants but all expenses allocated to programme activities as delivery of services to the intended recipients, the expenses

²⁴³Memorandum of Understanding among the Governments of the United States of America, the Swiss Confederation and the Republic of Kazakhstan, pp. 1-2, available from <http://www.state.gov/documents/organization/108887.pdf>.

²⁴⁴The ten-page Amended Service Agreement among the International Bank for Reconstruction and Development, the executing agency, and the Governments of Kazakhstan, Switzerland and the United States is publicly available from <http://www.docstoc.com/docs/2931704/AMENDED-SERVICE-AGREEMENT-FOR-THE-BOTA-FOUNDATION-among-the-International>

²⁴⁵BOTA Foundation, Independent Auditor’s Report and Special Purpose Financial Statements for the Year Ended 31 December 2013, available from <http://www.bota.kz/uploads/538478d53d7ca.pdf>, BOTA Foundation website, Information resources, Independent Auditor’s reports.

accounted for US\$ 13 million. The remaining US\$ 3 million went primarily to an United States non-governmental organization, as a management fee, and an evaluation contract.

249. Independent, monitored programmes are one method of returning funds by agreement. In other situations, agreements have been reached for the return of funds to the national Treasury without monitoring or with monitoring of government expenditures, but not independent administration of the funds. A publication by the StAR Initiative on the Management of Returned Assets provides an analytical framework for policymakers addressing the key management issues they will face when stolen assets have successfully be returned.²⁴⁶ A paper published in 2009 by the Basel Institute on Governance's International Centre for Asset Recovery examined four experiences in asset recovery of Nigeria, Peru, the Philippines and Kazakhstan.²⁴⁷ The document suggests that unmonitored programmes have their own set of problems and expenses. For example, in the case of Nigeria, the paper indicates that after long negotiations Nigeria and Switzerland agreed in 2004 that US\$ 50.5 million to be returned would go into pro-poor projects under World Bank supervision divided between power, public works, health, education and water resources. Switzerland made a grant to help finance an accountability review. The World Bank secured a Nigerian civil society organization to conduct a field monitoring survey. A 2006 World Bank report described how those funds had been utilized for development purposes.²⁴⁸

250. The above mentioned publication of the StAR Initiative raises a series of policy questions that the authorities recovering stolen assets will need to consider carefully, e.g. how to use the funds most effectively to support the country's development goals, how to keep the public informed about the decisions taken, and how to reassure citizens that the returned assets will be used for development and poverty reduction purposes. Returned assets will generally be channelled through the public financial management systems, particularly so where these systems are robust and enjoy the public's confidence. However, national authorities may decide that alternative arrangements are to be preferred because they provide for greater visibility, offer additional safeguards and controls, or address other policy considerations. The decision regarding the appropriate arrangements rests with the receiving country's national authorities. The StAR Initiative identifies three alternative arrangements:

(a) "Enhanced" country systems that are arrangements which build on the existing country system with adjustments to improve control systems. For example, enhanced procurement, reporting and auditing arrangements may be added to the existing country system;

(b) Autonomous funds established by public entities through legislation with discrete governance and management arrangements, which ensure clear lines of accountability for the delivery of specific outputs or services; and

(c) Grants are being awarded to CSOs where they can offer benefits that could not be realized through public structures, such as the ability to mobilize grass-roots participation, reach out to marginalized groups, and use innovative, community-based service delivery models.

²⁴⁶StAR Initiative: "Management of Returned Assets-Policy Considerations", 2009.

²⁴⁷Basel Institute on Governance, "Managing Proceeds of Asset Recovery: the Case of Nigeria, Peru, the Philippines and Kazakhstan", 2009, available from https://www.baselgovernance.org/sites/collective.localhost/files/publications/biog_working_paper_06.pdf.

²⁴⁸World Bank, "Utilization of Repatriated Abacha Loot", 2006, available from http://siteresources.worldbank.org/INTNIGERIA/Resources/Abacha_Funds_Monitoring_1221.pdf.

251. Considerations that are likely to influence national authorities' decision regarding the appropriate choice of management arrangements include the strengths and weaknesses of the financial management system, the amount and timing of asset returns, and the overall governance context. Arrangements that enhance access to information and offer opportunities for engagement in decision making are generally welcome, particularly where there are high-profile returns. The case for investing in strengthened management arrangements is much stronger where there are substantial returns.

252. Moreover, highlighting areas of risk for the management of returned assets, the Basel Institute of Governance publication suggested the presence of certain basic elements in managing repatriated assets based on the work of the World Bank:

- Public recording of receipt of the asset (amount, value, date of receipt and date of availability for use) and safeguarding of those assets once received
- Public declaration of intended use of the asset (specific uses, amounts, time period of availability, entity responsible for executing the activity and expending the asset and accountable for results) through the budget process
- Public or official reporting of actual expenditures (amount, object of expenditure and date) and results achieved
- Timely auditing of financial statements and results to verify the accuracy of reporting, to identify weaknesses, and to assure that appropriate processes were followed (procurement, hiring, accounting, etc.)
- Official response to material weaknesses identified in audit findings, specifying the corrective action to be taken and actually taken

E. Summary

253. Focusing global attention on recovery of stolen assets has been an evolutionary process. Confiscation measures initially aimed at depriving drug traffickers of the economic motivation for their criminal activities evolved over a number of decades and a number of United Nations Conventions into the specific remedies and obligations presented in the United Nations Convention against Corruption. Mandatory return of the confiscated proceeds of embezzled public funds and of the laundering of embezzled public funds, as well as of confiscated property, subject to a final order, as to which a requesting State can reasonably establish prior ownership or when the requested State party recognizes damage to the requesting State party as a basis for return, is provided in the Convention. Bilateral agreements can assist in facilitating the implementation of these provisions of the Convention and can appropriately set forth any procedures for asset return.

254. Areas of controversy with regard to the return and disposal of proceeds can include the fees charged by the requested State, the claims of units of government from which the funds may be diverted, and concern over whether the beneficial owners of confiscated funds may still be in a position to receive the benefit of those funds once they are returned or transferred to a requesting State.

VII. CONCLUSIONS

255. While several of the cases examined in chapter I, on noteworthy cases of corruption, predate the entry into force of the Convention, they serve to illustrate how offences have been investigated and prosecuted. Moreover, the chapter demonstrates the advantages States with adequate criminal legislation have had to deal with these cases domestically as well as to use the Convention as a basis to cooperate internationally in the investigation and prosecution of such offences as well as in the recovery of the respective proceeds. States are therefore encouraged to fully implement chapter III of the Convention as relates to criminal offences and liability of legal persons. States may also consider practicing flexibility in the adoption of the dual criminality requirement and providing mutual legal assistance for all Convention offences, including non-mandatory offences when they have opted to not criminalize them.

256. Chapter II of this Digest, on forms and devices used to conceal corruption schemes, demonstrates that the methods used to disguise bribery and other forms of corruption, as well as the transfer of the proceeds of crime are well known and documented. Enhanced suspicious transaction reporting and due diligence standards applied to both domestic and foreign politically exposed persons in line with the requirements of the Convention have helped to prevent the diversions of public funds committed by public officials as well as to detect the laundering of the proceeds of corruption. Moreover, the cases illustrate that measures aimed to ensure the identification of beneficial owners of legal entities and legal arrangements are crucial in preventing the laundering of the proceeds of corruption. The cases examined further demonstrate how asset disclosure regimes as well as disclosure requirements for foreign accounts held by public officials can provide a means of imposing criminal or administrative sanctions without having to prove the source or the corrupt nature of the undisclosed assets or the source of funds in the unreported foreign account. Accordingly, States are encouraged to fully implement these measures and update their legislation and regulatory frameworks to cover the variety of service providers who are typically involved in assisting corrupt individuals. Furthermore, States should establish effective and well-resourced financial intelligence units and encourage close and direct cooperation of such units with their counterparts in other jurisdictions.

257. With regard to the initiation of cases, examined in chapter III, States may be faced with various practical issues. Specialized anti-corruption and/or asset recovery bodies and units can play a decisive role in pursuing asset recovery, including from offences committed by high ranking public officials and members of the government. Measures which have proven effective are the establishment of open channels of communications, including for the purpose of spontaneous disclosures, using FIU to FIU, police to police as well as prosecutors to prosecutors contacts in particular when multiple jurisdictions are involved. The initiation of proceedings, investigations and prosecutions in foreign jurisdictions, including through non-conviction based confiscation should also be encouraged in order to overcome challenges in the requesting State with regard to the effective investigation and prosecution of the alleged offences. Another effective avenue consists in providing other actors, such as civil society, with the capability to initiate action, e.g. as *partie civile* or in the form of *ex-parte* litigation. Initial indications triggering asset recovery efforts have at times been enabled through the media, either by using investigative journalism to trace

assets across jurisdictions, or by putting pressure on States to pursue asset recovery. Moreover, cases analysed showed that countries emerging from major regime changes followed by large scale asset recovery efforts require an enhanced level of support, if they are to be successful in their endeavours to trace, freeze and seize and eventually recover the often vast amounts of stolen assets. Two jurisdictions have adopted specific laws to assist other States where the legal order has essentially collapsed in the recovery of assets, by allowing the freezing the assets of politically exposed persons from such States based on less demanding evidentiary requirements. Other States are encouraged to adopt similar approaches taking into account the exceptional nature of such situations.

258. The cases in chapter IV, on international cooperation for identifying, tracing, freezing and seizing assets, illustrate how States have implemented measures to facilitate international cooperation. Legislation and measures that enable States to respond quickly to requests for assistance, initially without imposing overly burdensome evidentiary requirements have proven key in many successful asset recovery cases. The setting up or strengthening of specialized units or inter-agency task teams enabled States in several cases to be successful in the identification and tracing of assets. Moreover, dedicated global and regional networks of asset practitioners help to facilitate exchange of information and foster closer coordination and cooperation in the identification and tracing of assets. States should further consider how identification and restraint orders work together in order to avoid potential loss of assets, and when sufficient evidence is gathered, to alert the relevant financial institutions to prevent the dissipation of assets.

259. In terms of tools and mechanisms for confiscation and recovery, as examined in chapter V, direct recovery through the initiation of private civil action has been used effectively in a number of cases. At the same time, little use has been made of the procedures outlined in articles 54.1 (a) and 55.1 (a) of the Convention providing for the possibility of one State party, upon request, to directly enforce the confiscation order issued by the courts of another State party. Multiple factors may explain the relative scarcity of confiscation orders in States where resources were diverted or an official was bribed. Lack of investigative capabilities and of financial resources may be a serious handicap as well as the absence of non-conviction based forfeiture powers. In order to alleviate these shortcomings, States are encouraged to introduce non-conviction based forfeiture regimes, take measures to allow their courts to recognize and enforce foreign confiscation orders and to coordinate actions among the jurisdictions involved as early as possible with a view to identifying the most opportune legal avenues to obtain and give effect to confiscation orders.

260. In chapter VI, dealing with the return and disposal of assets, it emerges that, while the return of assets under the Convention is mandatory, there are a number of issues that have hampered States in their efforts, including weak domestic public financial management systems as well as multiple competing claims for the assets. States are, therefore, encouraged to put effective measures into place for the transparent and accountable management and disposal of returned assets and, where appropriate, to consider entering into agreements on the return and disposal of assets.

GLOSSARY

The terms defined below include those necessary to understand the text of this Digest and those used in laws and judicial decisions quoted in this Digest. Reference in the Glossary to the “Convention” means the United Nations Convention against Corruption.

Active bribery

The acts of promising, offering or giving to a public official, directly or indirectly, an undue advantage for the official himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties. This definition applies to bribery of national public officials in the offence established in article 15 (a) of the Convention, of foreign public officials and officials of public international organizations in article 16 (a), and in article 21 (a) to persons who direct or work, in any capacity, for a private sector entity in order that he or she, in breach of his or her duties, acts or refrains from acting.

Asset recovery

The meaning of this term has evolved over time. Before negotiation of the United Nations Convention against Corruption it was often understood to describe the process of depriving criminals of the economic benefit of their crimes without any particular emphasis on recovery by affected states of the proceeds of corruption. Since adoption of the Convention, asset recovery has been understood to be all of the processes provided in the United Nations Convention against Corruption aimed at facilitating the detection, identification, tracing, freezing, seizure and confiscation, as well as the return and disposal of assets derived from corruption offences.

Asset sharing

Many bilateral treaties and agreements provide for States to share recovered assets, for example on the basis of the contribution by another in the investigation or prosecution. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (paragraph 5 (ii)) and the United Nations Convention against Transnational Organized Crime (article 14.3 (a)) provide for this. Treaties or agreements can be made for a regular or case-by-case basis sharing the proceeds of crime or property, or funds derived from the sale of such proceeds.

Beneficial owner

The natural person who ultimately owns or controls the corporate vehicle or benefits from its assets, the person on whose behalf a transaction is being conducted, or both. Beneficial owners also include those persons who exercise ultimate effective control over a legal person or arrangement.

Compensation

Payment designed to balance harm in whole or in part and similar in meaning to damages. Article 53 (b) of the Convention requires States parties to permit their courts to order those who commit offences established in accordance with the Convention to pay compensation or damages to another State party that has been harmed by such an offence.

Confiscation

Confiscation is defined in article 2 (g) of the Convention as follows:

“Confiscation, which includes forfeiture where applicable, shall mean the permanent Deprivation of property by order of a court or other competent authority.”

In the legislation and judicial opinions of the United Kingdom and other common law countries, and in unofficial translations furnished by the Swiss Confederation the word “forfeiture” is used with essentially the same meaning as confiscation under the Convention.

Constructive trust

A constructive trust is an equitable remedy resembling a trust (implied trust) imposed by a court to benefit a party that has been wrongfully deprived of its rights due to either a person obtaining or holding legal right to property which they should not possess due to unjust enrichment or interference.

Corporate vehicle

A broad concept that refers to all forms of legal entities and legal arrangements through which a wide variety of commercial activities are conducted and assets are held (for example, corporations, trusts, partnerships, foundations and others).

Criminal confiscation

An order of confiscation imposed in a criminal proceeding as a result of the conviction.

Damages

See the Glossary definition of “compensation”.

Disposal of assets

This term is used in the title to article 57, Return and disposal of assets, and in paragraph 1 of that article, which states that property confiscated by a State party pursuant to article 31 or article 55 of the Convention “shall be disposed of” according to paragraph 3 of article 57. In context, the term includes decisions as to whether confiscated assets are deposited to a national treasury of the confiscating state, returned to another State party, or returned to a prior legitimate owner or used to compensate victims of the crime.

Exequatur

Exequatur, is a concept specific to the private international law and refers to the decision by a court authorizing the enforcement in that country of a judgement, arbitral award, authentic instruments or court settlement given abroad.

Ex gratia payment

A payment made without admitting civil liability.

Financial disclosure systems

Paragraph 5 of article 52 requires that consideration be given to establishing such systems. By reference to paragraph 5 of article 8 the content of such a system would appear to “declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions of as public officials”. In the context of chapter V of the Convention, the reference to financial disclosure systems would emphasize reporting mechanisms that would reveal an illicit accumulation of assets, such as a requirement to declare a foreign bank account referred to in paragraph 6 of article 52.

Forfeiture

See the Glossary definition of “confiscation”.

Freezing or seizure

Article 2 (*f*) of the Convention states that freezing or seizure shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

Identification

The process of identifying criminally derived proceeds and the jurisdiction where assets have been placed or are held as well as identifying the beneficial owners of those assets.

Illicit origin or illegal provenance

These terms are used in the Swiss Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons law and in the Swiss Federal Court opinion returning assets in the Marcos case to refer to assets that have been shown to result from criminal acts in violation of national law. In those contexts they are not necessarily limited to the proceeds of offences established in accordance with the Convention.

In personam

In the context of forfeiture or a lawsuit, it is a legal action against a specific person.

In rem

In the context of forfeiture, it is a legal action against a specific thing or property.

Integration of assets

This term refers to the last of the three phases frequently used to describe the money-laundering process, which are placement, layering and integration. Integration refers to the third phase in which illegal proceeds have been initially placed in the financial system, their illegal origin disguised by layering techniques, and the disguised proceeds funds integrated into legitimate appearing assets available for investment, saving or expenditure at the direction of the beneficial owner.

Kickback

The return of a portion of a payment, accomplished directly or indirectly, typically done to influence the action of a person involved with the payment decision, for example a public official or a private sector purchasing agent awarding a contract and secretly receiving a payment as a reward for making or influencing the contract decision. The term “back-hander” is also used.

Layering techniques

This term refers to the second of the three phases frequently used to describe the money-laundering process, which are placement, layering and integration. Layering refers to the use of nominees and legal structures, such as attorneys and shell companies, to construct layers of formal ownership and control with the goal of making the identity of the beneficial owner of property difficult or impossible to determine.

Location of property

“Location” is used in paragraph 3 (a) of article 55 to indicate the physical site of the property to be confiscated. The process of determining where stolen assets have been transferred and then immobilizing them for the purpose of eventual confiscation is referred to in paragraph 3 (j) of article 46, Mutual legal assistance as “Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this convention.” Paragraph 2 of article 55, International cooperation for purposes of confiscation, refers to “measures to identify, trace and freeze or seize proceeds of crime”.

Multinational or multinational corporation

As used in this Digest, the term refers to complex business organizations that conduct substantial operations in more than one country and not simply at a local level across a single border.

Non-conviction based confiscation

Asset forfeiture in the absence of the conviction of a wrongdoer. As used in paragraph 1 (c) of article 54 of the convention, a measure which a State party shall consider allowing in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases. This type of confiscation requires proof that the subject assets are derived from a criminal offence and applies a lesser standard of evidence than would be required to convict a defendant in a criminal case.

Partie civile

Partie civile is French for “civil party”. As a legal concept it exists in several civil law jurisdictions and allows those who suffered damages as a result of a crime have the opportunity to join the criminal proceedings as a *partie civile*, either at the investigative stage or once the matter has gone to trial. While common law jurisdictions do not provide for this option, they do allow affected entities or persons to apply to the court for a restitution order.

Passive bribery

The acts of solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties. This

definition applies to bribery of national public officials in the offence established in article 15 (a) of the Convention, of foreign public officials and officials of public international organizations in article 16 (a), and in article 21 (a) to persons who direct or work, in any capacity, for a private sector entity in order that he or she, in breach of his or her duties, act or refrain from acting

Person entrusted with prominent public functions

This phrase is intended to be self-explanatory when used in paragraph 1 of article 52 to describe the category of public officials whose financial institution accounts, together with those family members and close associate, should be subjected to enhanced scrutiny. The term is equivalent to “politically exposed person” used in the Financial Action Task Force Regulation 6, the Swiss Act for the Restitution of Assets Illicitly Obtained By Politically Exposed Persons and the Freezing Assets of Corrupt Foreign Officials Act of Canada, except that paragraph 1 of article 52 is not limited to foreign officials.

Placement of assets

This term refers to the first of the three phases frequently used to describe the money-laundering process, which are placement, layering and integration. Placement refers to the initial introduction of assets into the financial system, often into a bank account in which such a deposit would not arouse suspicion, such as a business with large cash deposits an account protected by confidentiality, such as a lawyer’s client account.

Politically exposed person

See Glossary definition of “Person entrusted with prominent public functions”.

Power of disposal

Effective control by a natural person over the transfer and use of assets, even though legal structures and formal documentation may show a different owner. The phrase is found in Swiss court opinions to describe the essence of beneficial ownership.

Proceeds of crime

As provided in article 2 (e) of the Convention, “proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence.

Property

As provided in article 2 (d) of the Convention, “property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documentation or instruments evidencing title to or interest in such assets.

Recovery

See Glossary definition of “asset recovery”.

Remission

A term used in some national laws to describe a process by the government may mitigate the effect of forfeiture in favour of an innocent third party. This process may result in

the return of property to a prior legitimate owner or lienholder, or to a victim of the crime underlying the forfeiture if certain eligibility criteria are met. Remission is to be distinguished from the payment of compensation or damage (e.g. restitution) under paragraph (b) of article 53, which is ordered by a court. Remission is often the prerogative of the executive branch of government and does not take place during a confiscation proceeding, but after confiscation has been ordered and executed.

Repatriation

This term is not used in the Convention. It is used in this Digest in a general sense as a synonym for return of assets to refer to transferring property to the country from which they it has been stolen or which is otherwise entitled to them, such as the proceeds of a bribe paid to a national public official.

Requested State

The State party receiving a request for mutual assistance for one of the measures permitted under article 54, Mechanisms for recovery of property through international cooperation in confiscation, or article 55, International cooperation for purposes of confiscation.

Requesting State

The State party making a request for mutual assistance for one of the measures permitted under article 54, Mechanisms for recovery of property through international cooperation in confiscation, or article 55, International cooperation for purposes of confiscation.

Restitution

The term “restitution” in the Swiss Federal Act on the Restitution of Assets Illicitly Obtained by Politically Exposed Persons has the same meaning as the term return of assets under article 57 of the Convention. Restitution is often used in other legislation and judicial opinions to express the same meaning as the payment of compensation or damages under article 53 (b) of the Convention.

Return of assets

Article 57 refers to return and disposal of assets. Return refers both to the physical transfer of property, when applicable, and the transfer of title or ownership by the confiscating State party to the requesting State party or to legitimate owners of the property

Shelf corporation

See Glossary definition of “Trust and company service providers”.

Shell bank

Paragraph 4 of article 52, on Prevention and detection of transfers of proceeds of crime, addresses what are commonly called “shell banks”. It requires States parties to “... implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group”.

Shell company

A shell company is a legal structure often utilized in the layering phase of money-laundering to conceal beneficial ownership and create obstacles to the tracing of funds by creation of companies that can, in substance, be owned anonymously and have no physical presence, but may be the owners of record of assets.

Substitute assets

When confiscation of specific assets belonging to a defendant is ordered but those assets no longer exist, in some legal systems, a court, may order satisfaction of the value of the confiscation order to be collected from other assets of the defendant.

Summary judgement

A court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. The movant will contend that all necessary factual issues are settled, and therefore need not be tried. The motion is supported by declarations under oath, excerpts from depositions which are under oath, admissions of fact, and other discovery, as well as a legal argument (points and authorities), that argue that there are no triable issues of fact and that the settled facts require a summary judgement for the moving party as a matter of law.

Tracing of assets

See Glossary definition of “Identification”. As stated there, the Convention is not consistent in the sequence in which it uses the terms identification, freezing or seizure and tracing, except that it always places identification before tracing. It is therefore assumed that the initial investigation necessary to identify the jurisdiction where assets have been placed or are held is encompassed within the definition of identification. Tracing generally is the investigative procedure of establishing the nexus between identified criminal proceeds and the offence from which they were derived. Asset identification, identification of the legal owner and/or beneficiary, and the link or nexus between the assets and associated criminal activity is contemplated by asset tracing.

Trust and company service providers

Trust and company service providers are businesses that create and provide administrative services for corporate vehicles. Those services will typically include establishing the company and registering the corporate name, paying the necessary fees, handling annual renewal procedures, providing mail forwarding, opening a bank account, providing nominee directors necessary for the incorporation process, and serving as a registered agent. Often trust and company service providers will have an inventory of previously established corporate vehicles available for immediate use, called shelf corporations. They are sometimes called incorporation agents or corporate service providers.

Value-based confiscation

A confiscation order expressed in a fixed currency amount against which the defendant's realizable assets are used to satisfy.



UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, PO Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, www.unodc.org