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DIGEST OF ASSET RECOVERY CASES

Draft

Summary

The document is submitted with a view to soliciting comments to be taken into account when finalizing the draft digest of asset recovery cases.

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DIGEST OF ASSET RECOVERY CASES

(DRAFT)*

**Member States are kindly requested to provide their comments (if any) on the given Draft to the Secretariat no later than 31.01.2014.*

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INTRODUCTION

1. Article 63 of the United Nations Convention against Corruption provides 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. The Working Group held its fifth meeting in Vienna on 25 and 26 August 2011. In its conclusion and recommendations the Working Group highlighted the importance of learning from past experience and requested the Secretariat "to continue its work on collecting and systematizing information on asset recovery cases, as well as preparing an analytical study of such cases, building on the relevant experience of the Secretariat". Paragraph 32 of the Group's report indicated that speakers at the meeting had expressed great interest in and support for the study and had noted that it should include data "on both successful and unsuccessful attempts to recover the proceeds of corruption, as well as information on problems faced and lessons learned in the implementation of asset recovery and mutual legal assistance frameworks, particularly chapter V of the Convention against Corruption". This Digest of Asset Recovery Cases provides the analytical study requested by the Working Group, drawing on the case descriptions and other information provided by Member States to the Secretariat. The Digest also draws on publications of the StAR Stolen Asset Recovery Initiative, and on cases found in the StAR Initiative's Stolen Asset Recovery Watch database of active and completed international asset recovery cases maintained as part of the StAR initiative¹; 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 Pacific²; the Basel Institute of Governance Asset Recovery Knowledge Centre collection of cases and other information;³ such as public records, official government press announcements, legislative reports and judicial decisions which the Secretariat has found through open sources research.

2. The Digest is intended to supplement the many valuable resources available through the United Nations Office on Drugs and Crime's (UNODC) Tools and Resources for Anti-Corruption Knowledge (TRACK)⁴ by providing 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 a period of decades and around the world. The work is not merely descriptive. Each section concludes with a Summary for policymakers and practitioners drawn from the cases examined. Observations and Recommendations for consideration by the Conference of the States Parties are found in Section VII. When feasible, legal references are provided so that the publication can also serve law schools and students of the law as an introduction to the technical complexities of the asset recovery process. Due to the constantly expanding universe of asset recovery cases and to practical limitations, not all significant cases can be discussed. Recently publicized allegations of international transfers of corruptly obtained assets, even though involving extensive assets, may not be explored at length if official or otherwise reliable sources are lacking.

3. The Digest organizes the cases to be examined in thematic sections, with appropriate subsections. These sections are arranged in a sequence approximately paralleling the progression from corrupt activity to

¹ <http://assetrecoverywatch.worldbank.org>

² <http://www.oecd.org/site/adboecdanti-corruptioninitiative/41246239.pdf>

³ <http://assetrecovery.org/kc>

⁴ Available at www.track.unodc.org

identification of criminal proceeds or stolen assets, freezing or seizure of the same, confiscation and return. Both completed and ongoing cases are discussed to the extent that reliable and publicly accessible sources exist for the information provided. Section I, Noteworthy Cases of Corruption, is self-explanatory. This Section provides case examples in order to demonstrate the scope and gravity of the economic, social and political harm done by corruption and the possibilities for substantial recoveries of corruption proceeds.

4. Beginning with Section II, each section of the Digest identifies the articles of the United Nations Convention against Corruption relevant to the aspect of asset recovery being discussed. 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. Cases are not categorized as successful or unsuccessful. The methodology of the Digest is instead designed to identify and categorize the individual components in a case whose presence or absence enabled, facilitated, obstructed or otherwise influenced cases of potential asset recovery. Section 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, embezzlement and other diversions of public funds. These stratagems are contrasted with the provisions of the Convention which prescribe structures and measures that would prevent, deter and repress these concealment practices. The Digest will discuss asset recovery principles set forth in Chapter V of the Convention and mechanisms for international cooperation for those purposes. Reference will also be made to relevant provisions of Convention Chapter II, Preventive Measures, and Chapter III, Criminalization and Law Enforcement. Those provisions provide a framework for a State to proactively prevent corruption and related criminal offenses 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.

5. Section III, Initiation of Asset Recovery Cases, uses case examples to illustrate some of the circumstances or steps that lead to the identification of criminal proceeds derived from specific offenses set established in the Convention. A number of Convention articles contain provisions that are designed to enhance opportunities for identifying proceeds derived from corruption and initiating the recovery of such ill-gotten gains. Section IV is entitled Identifying, Freezing or Seizing and Tracing the Proceeds of Crime. Its contents deal 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 particularly applicable to the processes discussed in Section IV of the Digest. The same is true concerning their applicability to Section V of the Digest, Tools and Mechanisms for Recovery and Confiscation of Stolen Assets. Cases examined in Section V identify the legal mechanisms that have been used to accomplish confiscation and other means of recovering illicit assets under the Convention. How those cases relate to the articles of Chapter V of the Convention will be analyzed in depth.

6. Section VI of the Digest, Return and Disposal of Assets, deals with cases involving what is often a difficult process of securing the return of assets to legitimate owners or those harmed by the corrupt conduct from a country where those assets have been frozen, seized and confiscated. Chapter V of the United Nations Convention against Corruption contains Articles 51 through 59. Article 51 stresses 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."*⁵

Article 57 of the Convention is devoted to the return of confiscated assets. This article is particularly significant because its paragraphs 3 (a) and 3 (b) establish the principle of mandatory return of confiscated assets in

⁵ The phrase "fundamental principle" (Article 51) was deemed in negotiations of UNCAC to have no legally binding effect on the remaining provisions of the chapter on asset recovery. *See Travaux Préparatoires: United Nations Convention against Corruption.*

specified circumstances.⁶ These obligations appear in a United Nations instrument of global acceptance.⁷ As a consequence they can thereby serve to reverse the prior international presumption and practice that regarded the return or sharing of assets with the country harmed as a matter of grace on the part of a confiscating state. 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 coming to be recognized as a new norm, and as an ideal even when not required by the terms of paragraphs 3 (a) or (b) of Article 57. Section VII, Observations and Recommendations, draws together conclusions and proposals derived from the sources reviewed in the Digest and from analysis of how application of the Convention provisions and overall anti-corruption efforts might be improved. Suggestions are offered for consideration by the Conference of the States Parties on desirable practices identified through analysis of the cases presented in the Digest. A Glossary is provided as a final Section VIII.

7. An introductory explanation of the scope of the Digest and of possible confusion concerning the term “asset recovery” is necessary. As is explained in Section VI, Return and Disposal of Assets, the term was originally popularized in the money laundering field before the return of confiscated assets to the people harmed by corruption, which in some cases may be a state, became an issue of global priority. As a consequence, many sources and authorities use “asset recovery” in a generic sense to focus on “recovering” the proceeds of crime from the wrongdoer or possessor. That is not the meaning of asset recovery in the United Nations Convention against Corruption whose concept of asset recovery takes into account the identification, freeze, seizure, and confiscation of illegally derived assets and the return of confiscated property, where authorized by law, to the prior legitimate owner of a confiscated asset or to those victimized by corruption, which in some instances might be a State Party.

SECTION I NOTEWORTHY CASES OF CORRUPTION

A. Typologies of offences established in the Convention

8. The sums diverted from national treasuries through embezzlement, misappropriation or other diversion of property by a public official, when considered together with the proceeds of bribery and other forms of abuse of official positions established as offences in the United Nations Convention against Corruption, are so immense that they are difficult for the ordinary citizen to imagine. The amount lost to developing countries through corruption has been estimated at 20 to 40 billion US dollars yearly,⁸ while the StAR initiative of UNODC and the World Bank estimates that no more than 5 billion dollars in stolen assets have been repatriated in the 15 years prior to 2011⁹. That estimated figure would average approximately 333 million dollars yearly, a minuscule percentage of the estimated annual loss through corruption. No one knows the percentage of corrupt proceeds transferred out of the countries from which they are stolen. Those amounts suggest the magnitude of the loss to economies and the need to recover far more of the proceeds of corruption, which almost certainly have been many times greater than the funds recovered. The cases analyzed yield valuable lessons about the typologies of

⁶ Mandatory return is applicable to proceeds of embezzlement or embezzled assets that have been laundered and should be based on a confiscation order. It also has to 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.

⁷ 168 States Parties as of October 2013.

⁸ UNODC and World Bank, Stolen Asset Recovery Initiative: Challenges, Opportunities, and Action Plan, (Washington, D.C.: World Bank, 2007), p. 10. A billion (sometimes milliard in British usage) here represents one thousand million. Throughout the Digest monetary amounts are stated in U.S. dollars to be consistent with the StAR Asset Recovery Watch database, unless otherwise indicated.

⁹ Barriers to Asset Recovery, Stolen Asset Recovery Initiative, Executive Summary, the World Bank/UNODC, 2011.

corruption offences and the sectors most vulnerable to corrupt influences. In this Section representative examples of the substantive offences established in Articles 15 through 25 of the Convention will be examined.

B. Articles 15 and 16 of the Convention

9. These articles establish as offences the bribery of national public officials and of foreign public officials and officials of public international organizations. The bribe paying entities are characteristically large multinational commercial enterprises, many of whose names among the most recognizable industrial and commercial global entities. The following examples are grouped by region.

Central and South Latin America

10. In the year 2000 executives of entities related to **Alcatel**, a French electronics company, made payments to Costa Rican officials to secure contracts worth more than 300 million dollars to provide cellular telephone service.¹⁰ After payment of 18 million dollars in fees to consultants that were used primarily for bribes, the contracts yielded 23.5 million dollars 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. The former President was convicted in 2011 in Costa Rica of receiving over 800,000 dollars in cash, checks and certificates of deposit and a share of an investment in a real estate transaction.¹¹ Alcatel-Lucent, the successor entity to Alcatel-CIT, entered into an agreement with the Costa Rican Attorney General to settle claims for social damage to Costa Rican society by payment of approximately 10 million dollars. The agreement was judicially approved and payment made.

11. **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, 77.5 million dollars in accounts controlled by Montesinos and his associates were returned from Switzerland to Peru after a finding by a Swiss magistrate in June 2002.¹² 49.5 million dollars had been frozen in Switzerland and the investigation by an Examining Magistrate revealed that Montesinos had received "commissions" on arms deliveries to Peru and 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% of the purchase price. He also collected 10.9 million dollars in commissions on the purchase of three MIG 29 airplanes bought from the state-owned Russian arms maker. In return, he 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 77.5 million dollars total represented 7 million from an arms dealer who received commissions and agreed to their return to Peru, and

¹⁰ U.S. Department of Justice news release, 27 December 2010, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$ 92 Million to Resolve Foreign Corrupt Practices Act Investigation.

¹¹ [Acusacion formal en la Causa 04-06835-647-PE contra Miguel Angel Rodriguez y Otros en el Segundo Circuito Judicial de San Jose](#), accessed at [Star Asset Recovery Watch database page on Alcatel- Lucent/Instituto Costriccense de Electricidad \(ICE\)/ Costa Rica Settlement Case](#)

¹² Montesinos case: Switzerland transfers 77 million US dollars to Peru, press release Swiss Federal Office of Justice, 20 August 2002, accessed at [StAR Asset Recovery Watch database page on Vladimiro Montesinos/Switzerland](#), also at www.bj.admin.ch/bj/en/home/documentation/medieninfomationen/2002/2002-08-20.

General de Bari Hermoza Rios, who agreed to the return of 21 million dollars. Over 20 million dollars in assets¹³ controlled by Montesinos associates were transferred from the United States to Peru.¹⁴

North America

12. 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 like **Sanjaya Bahel**¹⁵ and **Alexander Yakovlev**¹⁶. Sanjaya Bahel was the former Chief of the Commodity Procurement Section of the U.N. Procurement Division. As a result of a U.S. conviction he was ordered to pay 900,000 dollars in forfeiture to the United Nations. Yakovlev was the unit chief of the U.N. Oil for Food Programme for Iraq. He pleaded guilty to U.S. charges of defrauding the United Nations and conspiracy to commit money laundering and agreed to forfeit 900,000 dollars in accounts in Liechtenstein.

C. Article 17 of the Convention

13. This article 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.

Central and South America.

14. Raul 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 under judicial process his wife appeared at a Swiss bank and attempted to move funds on deposit there. That attempt resulted in her arrest and freezing of 110 million dollars. Investigation into the origin and transmittal of the funds by Switzerland and Mexico ultimately resulted in recovery of 74 million dollars by Mexico including accrued interest. A Swiss court found that amount to represent 66 million dollars in proceeds of unlawful appropriation of public funds diverted by Salinas to bank accounts in Mexico and transferred by him to Switzerland, together with other funds of criminal origin.¹⁷

15. General Marco Antonio **Rodriguez 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 Rodriguez 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 Peruvian government. For these crimes and other illegal activities, Rodriguez Huerta was sentenced to 15 years in prison in Peru in 2002. A Peruvian request resulted in tracing funds to an account in BNP Paribas in Miami. 750,000 dollars were confiscated and transferred to Peru.¹⁸

¹³ The returns assets were confiscated please see the 2004 agreement by the US and Peru – the transfer or return was done via the DOJ Equitable Sharing program. <http://2001-2009.state.gov/r/pa/prs/ps/2004/28114.htm>

¹⁴ Response of Republic of Peru to 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.

¹⁵ See details in paragraph 133.

¹⁶ See details in paragraph 139.

¹⁷ Salinas assets handed over to Mexico – Federal Examining Magistrate concludes 12-year proceedings, Press Release, Swiss Federal Office of Justice, 18 June 2008, accessed at www.bj.admin.ch/bj/en/home/dokumentation/medieninformationen/2008/2008-0-6-18.html

¹⁸ The Peruvian Efforts to Recover Proceeds from Montesinos’ Criminal Network of Corruption, Guillermo, Asian Development Bank/Organization for Economic Cooperation and Development Anti-Corruption Initiative for Asia and the Pacific (2007).

Rodriguez Huerta, other generals who were fund directors, and an engineer also received prisons terms in Peru ranging from 3 to 5 years and were ordered to repay the 2,270.400 dollars that were diverted by fraudulently overpriced purchases of buildings and real estate.¹⁹

Asia

16. Former Philippine President **Ferdinand Marcos** held office from 1965 to 1986. According to the World Bank case summary on Marcos and a UNODC/World Bank publication²⁰, proceeds of corrupt activities by Marcos and his associates were estimated at 5 to \$10 billion dollars. 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, which invested the funds by depositing the funds 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, 684 million dollars were returned from Switzerland to the Philippine government.²¹ Approximately 50 million dollars were returned to the Philippine government from the United States, plus 7.5 million dollars returned to human rights victims from Marcos assets and another 2.5 million dollars paid for legal fees and expenses in connection with the victims' private civil litigation.²²

Africa

17. **Joshua Dariye** was Governor of Plateau State, Nigeria from 1999 through 2007 and subsequently became a Federal Senator. In 2004 London's Metropolitan Police seized over 100,000 pounds in cash from Dariye and a money laundering prosecution was initiated. The defendant fled to Nigeria and was protected from prosecution there 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 totalled over 5 million dollars. 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 a London property and rental proceeds owned by Dariye and for recovery of nearly 3 million pounds in two London banks.²³ The cash seized from Dariye was returned to Nigeria in 2007.²⁴

¹⁹ LaRepublica de Peru, 6 July 2012, **Envían a prisión a ex directivos de la Caja de Pensión Militar Policial; response of Republic of Peru to UNODC request for asset recovery information.**

²⁰ Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan (UNODC/World Bank, Washington, DC, 2007).

²¹ Response of the Swiss Confederation to UNODC Secretariat request for asset recovery information. Please also see an extensive discussion on the issue below.

²² StAR Asset Recovery Watch database; World Bank case summary Ferdinand Marcos; 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, UN Asia and Far East Institute/ UNODC Third Regional Seminar on Good Governance for Southeast Asian Countries (2009); Ferdinand E. Marcos (Philippines): A Case Study, ADB/OECD Anti-Corruption Initiative for Asia and Pacific (2007); Reply of the Swiss Confederation to UNODC Secretariat request for asset recovery information.

²³ StAR Asset Recovery Watch database on Joshua Chibi Dariye and Joyce Oyebanjo; Financial Action Task Force Report, Laundering the Proceeds of Corruption, July 2011; Basel Institute of Governance Asset Recovery Knowledge Centre, Case Chronology (to 2007) and page on Joyce

Middle East

18. The **Kuwaiti Investment Organization (KIO)** was established in Kuwait by Emiri Decree, Law No. 47 of 1982, with responsibility for managing funds of the Government of Kuwait. **Sheik Fahad al-Sabah** was a member of the Kuwaiti royal family and was chairman of the KIO from July 1984 through 1991, which included the chaotic period after the Iraqi invasion of Kuwait in 1990. He and his associates made questionable investments which ultimately caused as much as 5 billion dollars in losses to the KIO, of which at least 1.2 billion dollars 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 and to other conspirators. Recovery orders for over one billion dollars were secured against the Sheik and his associates. 550 million dollars were recovered, and restitution orders were secured against banks and accountants.²⁵

D. Articles 18 and 19 of the Convention

19. These two articles 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. That type of conduct is established as an offence under Article 19. The offence of trading in influence under Article 18 reaches situations wherein an undue advantage is promised, offered, given to or solicited or accepted in order that a person abuse a real or supposed influence to influence public action to confer an undue benefit. This is an innovative offence that is also found in the Council of Europe Criminal Law Convention on Corruption adopted in 1999. The offence differs from traditional bribery in that illegal payment or intended payment need not be to a public official. The payment may be made or intended to be made to an influence trader for his or her supposed influence for the purpose of obtaining from an administration or public authority of a State Party an undue advantage. In this way it differs from Articles 15 and 16 of the United Nations Convention against Corruption in which the payment must be to a public official who acts or refrains from acting. From a practical perspective the trading in influence offence can resolve a difficult investigative and prosecutorial dilemma. A colleague, relative, political ally or mere acquaintance of a public official may claim to be able to influence that official to act or refrain from acting in exchange for a bribe. Without an evidentiary contact by a cooperating witness with that official to confirm the arrangement or independent evidence, such as surreptitiously intercepted conversations between the influence trader and an official who actually is corrupt, it may be impossible to prove whether an influence trader is perpetrating a fraud or truly has and is exercising corrupt influence. The trader in influence may simply be exaggerating an innocent acquaintance or relationship in order to fraudulently secure a payment that allegedly will be shared with the public official but in truth will be retained by the trader in influence. Such fraudulent representations seem to be common because they involve relatively little risk. The trader in influence can falsely claim credit for a favourable decision and simply return some or all of the payment in case of an unfavourable decision. The source of the payment cannot complain to the authorities without admitting to an act of intended bribery, so that person has no remedy other than violence even if none of the bribe payment is refunded. Widespread adoption of this new offence would be a useful deterrent to conduct that sometimes involves actual corruption, but always breeds cynicism and public distrust in government.

Oyebango 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.

²⁴ UK targets Nigeria's stolen loot, BBC News Africa, 27 September 2007, accessed at <http://news.bbc.co.uk/2/hi/africa/701765.stm>.

²⁵Judgment 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; Stolen Asset Recovery: a Case from Kuwaiti, Dr. Muhammad A.A. Al Moqatei in Stolen Asset Recovery – a Good Practices Guide to Non-conviction Based Forfeiture, World Bank/UNODC (2009).

E. Article 20 of the Convention

20. This article recommends establishment of an offence of Illicit enrichment and should be considered together with related paragraph 5 of Article 8 and paragraph 5 of Article 52 recommending that public officials be required to make declarations regarding their assets, and with paragraph 6 of Article 52 on reporting foreign financial accounts. Among the numerous convictions of former Peruvian presidential advisor and de facto security chief **Vladimiro Montesinos** was that of illegal enrichment on 6 May 2006, for which he was sentenced to 10 years imprisonment.²⁶ **Diepreye Alamiyeseigha**, former governor of Nigeria's Bayelsa State was arrested in the U.K. in 2005 on suspicion of money laundering. He fled to Nigeria while on bail and 1.5 million dollars 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 judgment was granted in the U.K. civil proceeding against the corporate defendants and three billion naira (equal to approximately 20 million dollars.), 441,000 dollars, 7000 Euros and 2000 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. According to a case study by the Stolen Asset Recovery (StAR) Initiative, a July 2008 judgment by a United Kingdom court led to the confiscation of additional assets in the United Kingdom, Cyprus and Denmark.²⁷ In granting summary judgment against Alamiyeseigha's companies, when a previous motion for that relief had been denied, the court cited changes in circumstances. Chief among those changes were the companies' guilty pleas in Nigeria. One of the principal points relied upon by counsel for Nigeria was "the scale of the discrepancy between Alamiyeseigha's declared assets and income and his undeclared assets".²⁸ The policy and technical arguments concerning the illegal enrichment defence can be complex, resulting in the current situation described at page 9 of the StAR Illicit Enrichment publication, wherein such offences can be found in most regions of the world, with the exceptions of North American and most of Western Europe. 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 Raul Jaime. Jaime was formerly Secretary of Transportation in the Federal Planning Ministry of Argentina and has been charged with illicit enrichment and unlawful receipt of gifts. Additional 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 Illicit Enrichment.

F. Article 21 and 22 of the Convention

21. 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 applicable to private corruption offences do not use the mandatory language found in the articles applicable to core public corruption offences, which is that each State Party "**shall adopt** such legislation and other measures as may be necessary" to criminalize bribery of public officials and embezzlement or other diversion of property by a public official. Instead, Articles 21 and 22, like Articles 18

²⁶ www.allafrica.com, The Monitor, 19 February 2012, *Uganda: Enact Asset Confiscation Law to Fight Graft*.

²⁷ StAR Asset Recovery Watch case study, [Diepreye Alamiyeseigha](#).

²⁸ Judgment 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, accessed at StAR Asset Recovery Watch database page on [Diepreye Alamiyeseigha/Cyprus](#).

(Trading in influence), Article 19 (Abuse of function), Article 20 (Illicit enrichment) and Article 24 (Concealment), require that each State Party “**shall consider adopting** such legislation and other measures as may be necessary” to criminalize the particular offence. 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. Moreover, legislation such as the U.K. Bribery Act 2010 applies to international bribery to influence private business or employment, as well as in connection with a public function. Jurisdiction is based upon commission of an act within U.K. territory or upon the actor having a “close connection” with the United Kingdom, such as being a national, a permanent resident or being incorporated under U.K. law or a Scottish partnership.

22. 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. 18 million dollars in commissions were paid in connection with contracts worth 300 million dollars. The distributions included 300,000 dollars paid to a consulting firm and passed on to the Panamanian bank account of the Alcatel-CIT Regional Director for Latin America. The President of Alcatel Costa Rica received an even greater share, with 4.7 million dollars transiting through a consulting firm to him and members of his family. In total 5 million dollars of the 18 million dollars in commissions were received by Alcatel insiders responsible for directing the bribery scheme. In such situations it is not surprising that an executive engaged in criminal risk taking would ensure that he or she be compensated for that risk and for achieving corrupt relationships which benefit the company. Due to the covert nature of the relationships and resulting payments made by consultants, internal auditing processes, even if they were allowed to operate independently by higher level corporate management, might not reliably identify such payments. Moreover, the executive is in possession of damaging information so the company has a disincentive to report his or her embezzlement to criminal authorities for fear that the bribery scheme would be exposed. Consequently, there is little restraint preventing high level executives from sharing, either with or without institutional approval, in the flow of funds diverted for bribery. To the extent that top leadership of the commercial organization paying the bribes has not authorized its executives to share in the monies paid to consultants, the diversion of those funds by the executives could involve a violation of Article 22, Embezzlement of property in the private sector. If an executive who is diverting funds pays other corporate employees to buy their complicity and silence, those acts could involve a violations of Article 21(a) and (b) Bribery in the private sector, both on the part of the active giver and the passive receiver. Intermediaries negotiating and delivering bribes must also be compensated and some may increase that compensation by overstating the payments and expenses necessary to influence public officials. They also may pay the corporate official responsible for overseeing their activities to allow them to inflate their compensation. The first situation could involve a violation of Article 22, Embezzlement of property in the private sector. The second situation could involve an offence under Article 21, Bribery in the private sector. Another case in which private bribery or embezzlement appears to have been involved is the litigation with an employee that led the **Mabey and Johnson** bridge building firm to report itself to the U.K. Serious Fraud Office.²⁹

G. Articles 23 and 24 of the Convention

23. Laundering of proceeds of crime and concealment of proceeds are covered by these two articles. Former Nigerian state governor **James Ibori** 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 share in a mobile phone company to a neighbouring state. Ibori and his counterpart in the neighbouring state were both on the company’s corporate 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 37 million dollars in proceeds were diverted to the conspirators.

²⁹ [Regina v. Mabey and Johnson Limited](http://www.docstoc.com/docs/22494640/CONFIDENTIAL/WITHOUT-PREJUDICE), Prosecution Opening Note, 102147845_2, No. T2009 7513, In the Southwark Crown Court, www.docstoc.com/docs/22494640/CONFIDENTIAL/WITHOUT-PREJUDICE.

Ibori purchased six houses in London, one for 2.2 million pounds in a cash payment, and enjoyed a lavish lifestyle, including education of his children in exclusive English schools. The total amount involved in Ibori's guilty plea equalled 50 million pounds as other diversions were involved during his tenure as governor. His wife, sister, a female friend and the London solicitor were also convicted of money-laundering.³⁰ His property had been frozen under a U.K. 2007 court order and U.K. authorities are pursuing confiscation of a house in Hampstead, North London worth 2.2 million pounds; a property in Shaftesbury, Dorset, worth 311,000 pounds; a 3.2 million pound mansion in Sandton, near Johannesburg, South Africa; a fleet of armoured Range Rovers valued at 600,000 pounds; a Bentley worth 120,000 pounds and a Mercedes Maybach purchased for 407,000 Euros that was shipped direct to his mansion in South Africa. As mentioned previously, funds seized in the United Kingdom from Ibori's fellow ex-governors Joshua Dariye and Diepreye Alamieyeseigha and confiscated there were returned to Nigeria. U.K. 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 U.K. 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".³¹

24. Joyce Oyebanjo, an associate of former Nigerian Governor **Dariye** was convicted in the U.K. of assisting Dariye to retain criminal proceeds. 1.28 million pounds seized from her were repatriated. She served as Dariye's financial conduit, paying his children's school fees and other expenses and providing him with currency on his visits to the U.K. While employed as a low level public servant, she maintained 15 bank accounts containing over 1.5 million pounds, was the record owner of real estate worth over 2 million pounds, and managed a property held by Dariye in a false name.³²

25. 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 pounds were confiscated. In 2011 over 20 million pounds were returned to Nigeria.³³ Previously the Bailiwick of Jersey had transferred 160 million dollars to Nigeria as a result of an agreement by **Abacha** associate **Abubakar Bagudu** to release the funds and return to Nigeria 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.³⁴

³⁰ BBC News Africa, 27 February 2012, [Nigeria ex-Delta state Governor James Ibori guilty plea](#); 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](#), guardian.co.uk; [V-Mobile \\$37 million Shares Fraud – Bhadrash Gohil sentenced to 7 years in prison](#), saharareporters.com, 8 March 2011. <http://www.dfid.gov.uk/Documents/publications1/press-releases/Success%20in%20fighting%20against%20corruption%20as%20Ibori%20starts%20jail%20term.pdf> ;

³¹ [James Ibori in final fall](#), 18 April 2012 , Information Nigeria.org, accessed at www.informationnigeria.org/2912/04/james-ibori-in-final-fall.html.

³² See paragraph 17.

³³ StAR Asset Recovery Watch database; Jersey Evening Post 8 September 2011; [Recovered: Nigeria's 20 million pounds](#).

³⁴ [General Sani Abacha – A Nation's Thief](#), ADB/OECD Anti-Corruption Initiative for Asia and Pacific (2007).

H. Article 25 of the Convention

26. Obstruction of justice, the offence in this article, expresses a very specific definition of obstruction. Obstruction can be committed under paragraph 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 paragraph 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.

I. Article 26 of the Convention

27. Liability of legal persons must be established under this article. That liability may be criminal, civil or administrative. The prosecution in Nigeria of former Governor **Alamiyesiegha** described above in connection with Convention Article 20 resulted in his personal 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 frozen in a U.K. civil suit for their role in the diversion of approximately 21.5 million dollars in public assets of Bayelsa State.

J. Summary

28. Many of the historical cases cited in this Section predate the negotiation and entry into force of the Convention. Nevertheless, they serve to illustrate the potential application of the Convention's provisions and the reasons why the Convention was negotiated and has been so rapidly adopted by 167 States Parties. 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 as established by Article 15 (b) or of a foreign public official as established by Article 16 (b) might, depending on its 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. A corporate official administering a bribery scheme who takes an unauthorized share of the funds could constitute a violation of Article 22, Embezzlement of property in the private sector. If an intermediary pays a corporate executive to be allowed to inflate expenses necessary 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 Section. Article 25, Obstruction of justice, would probably have been applicable to cases involving attempts to interfere with inquiries by anti-corruption officials. Because no force, threats or offer of undue advantage was involved it would not have been applicable in cases involving banks which were less than wholly candid and cooperative in official inquiries, a frequent situation which is addressed in Section VII of the digest, Observations and Recommendations.

SECTION II FORMS AND DEVICES OF CONCEALMENT OF PROCEEDS OF ACTS OF CORRUPTION**A. Significance of Convention Article 52 on preventive measures and Article 58 on financial intelligence units**

29. 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 Politically Exposed Person (PEPs) and their family members or close associates
- 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 record 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.

Article 58 of the United Nations Convention against Corruption 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 to the competent authorities reports of suspicious financial transactions. The role of each of the provisions in Articles 52 and 58 are examined in the following subsections.

30. Article 52.1

Paragraph 1: Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction 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 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. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

Convention paragraph 52.1 contains a number of highly important control mechanisms commonly known as customer due diligence, including the importance of identifying a true personal identity for the individual who is the beneficial owner of an account and identifying and applying increased scrutiny to persons who are entrusted with prominent public functions and their family and close associates. Paragraph 52.1 also requires reasonable efforts to detect suspicious transactions by these persons for the purpose of reporting them to competent authorities.

31. Article 52.2

In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

(a) Issue advisories regarding the type of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

The task of issuing advisories under paragraph 52.2 (a) is for the purpose of more accurate and comprehensive identification of suspicious transactions, which are often reported to a specialized financial intelligence unit. However, in several systems the responsibility for prudential and operational supervision of banks is the responsibility of the Central Bank or other regulatory authority, which may be assigned the task of issuing non-case specific advisories. Coordination with a financial intelligence unit, if a separate one exists, would obviously be desirable. Normally, a financial intelligence unit would be responsible for particular notifications under paragraph 52.2 because it would be the communicating unit within the Egmont network of financial intelligence units.

32 The Convention's scope of enhanced scrutiny applies 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.”

The Interpretative Note to Article 52 found in the *Travaux Préparatoires* to the Negotiations for the Elaboration of the United Nations Convention against Corruption makes it clear that, unlike former Recommendation 6 of the Financial Action Task Force, this provision is not limited to individuals who perform public functions in a foreign country. The Note to Article 52 states that:

“... States parties may guide financial institutions on appropriate procedures to apply and whether relevant risks require application and implementation of these provisions to accounts of a particular value or more, to its own citizens as well as citizens of other States and to officials with a particular function or seniority.”

33. When the Financial Action Task Force's 40 Recommendations were re-issued in February 2012, revised Recommendation 12 called 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 Convention Article 52. If States Parties were to fulfil their obligations under paragraph 52.2 to instruct their financial institutions to apply enhanced scrutiny to domestic persons entrusted with prominent public functions, and if other necessary elements of an anti-money laundering system were implemented and effective, some of the most obvious diversions of public funds like those previously described in this Digest could be stopped at their inception. Efforts of the FATF and FATF-style regional bodies to encourage observance of the new recommendations should serve to reinforce the efforts of States Parties to the United Nations Convention against Corruption to prevent future corrupt diversions by enhanced scrutiny of persons entrusted with public functions.

34. 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 **Nicholas Hermoza Rios**.³⁵ As pointed out in the article referenced in footnote 14, this date immediately followed the global media's repeated circulation in September of a video showing Montesinos bribing a Peruvian Congressman. Montesinos,

³⁵ See footnote 14.

however, had been a close advisor and political associate of Fujimori for years previously and his name would normally have appeared in the database services to which major banks subscribe to identify so-called politically exposed persons, a term which corresponds to Article 52.1's "individuals who are, or have been, entrusted with prominent public functions". Montesinos had a long history of involvement with the intelligence services and it is not known if the 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 safeguards required by Article 52.1 might have been exposed the corruption network of Vladimiro Montesinos described in paragraph 11. Had the customer due diligence rules popularized by then-applicable Financial Action Task Force Recommendations 5 and 6 been in place when the Marcoses were transferring Philippine assets to Switzerland and elsewhere their banking activity would clearly have been subject to suspicious transaction reporting.

35. In 2001 the United Kingdom the 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 Intelligence Service on a timely basis.³⁶ 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 previously.³⁷ The Particulars of Claim that led to a finding of liability in the court's opinion in *Federal Republic of Nigeria v. Joshua Chibi Dariye*³⁸ describe how Dariye, then Governor of a Nigerian state and clearly within the definition of a politically exposed person under applicable Financial Action Task Force Recommendation, made bank transfers in two years totalling 213,000 pounds from Nigeria to an account in Barclay's bank and over a four and one half year period caused the deposit into that account of 489,000 pounds in cash.

36. The diversion of funds from Zambia's Treasury could not have succeeded without the conspiratorial connivance of at least one attorney, **Thaker**, and the negligence of another who was found to have acted unprofessionally in his actions as a financial nominee for former **President Chiluba** and other political figures (please see paragraph 48 for more details).

The active participation of these solicitors and other non-banking professionals underscores the necessity and importance of Financial Action Task Force Recommendation 22 (2012):

22. DNFBPs: customer due diligence: The customer due diligence and record-keeping requirements set out in Recommendations 10,11,12,15, and 17, apply to designated non-financial businesses and professions(DNFBPs) in the following situations:

³⁶ www.fsa.gov.uk/Pages/Library/communication/PR/2001/029.shtml.

³⁷ Response of the Swiss Confederation to UNODC Secretariat request for asset recovery information.

³⁸ Particulars of Claim, *Federal Republic of Nigeria v. Dariye and Dariye*, EWHC 0169 (CH), Jan. 25, 2007; Approved Judgment, *Federal Republic of Nigeria v. Dariye and Dariye*, EWHC 708(Ch) Mar. 12, 2007. Accessed at StAR Asset Recovery Watch database on Joshua Dariye/United Kingdom.

(d) Lawyers, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their clients concerning the following activities: (i) buying and selling of real estate; (ii) managing of client money, securities or other assets; (iii) management of bank, savings or securities accounts; (iv) organization of contributions for the creation, operation or management of companies'; (v) creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

37. These solicitors who lent their professional reputation and privilege of confidentiality to the diversion of Zambian assets did many of the activities listed in Recommendation 12, as did solicitor **Bhadresh**, who was convicted of organizing the scheme by former Nigerian Delta state governor James Ibori to divert 37 million dollars in proceeds from sale of a state interest in a mobile phone company was convicted with two registered financial service providers, who appear to have supplied services similar to those described in paragraph 12 (e) of the Financial Action Task Force 40 Recommendations: "(e) Trust and company service providers when they prepare for or carry out transactions for a client concerning the activities listed in the definition in the Glossary."

38. One example is sufficient to show 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 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 U.K. civil action, the Governor opened an account at Allstates Trust Bank in Abuja in the name Ebenezer Retnan Ventures, signing the application as Ebenezer Retnan. Bank management allowed him to waive all account opening requirements beyond completion of the application form. It is not evident from the public record whether bank management knew of the governor's true identity but since Ebenezer Retnan Ventures was not a registered Nigerian corporation it appears little or no customer due diligence was done. The account was used to receive large amounts from Plateau state, where Dariye was Governor. Lion Bank was Plateau state's regular bank. On two occasions the Central Bank of Nigeria issued checks for ecological and other purposes to Plateau state. Dariye instructed Lion Bank to debit the state account and to transfer equivalent amounts to All States Trust Bank to his Ebenezer Retnan account. The first transfer was for about 325,000 pounds and the second for about 127,000 pounds. On a third occasion he procured state official to instruct Diamond Bank, Ltd, which also held state funds, to transfer about 1.24 million pounds to the Ebenezer Retnan account. A fourth diversion involved a Federal check for 7 million pounds which Dariye instructed be cleared through Allstate 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, the Economic or Financial Crimes Commission, the diversion of funds might have been prevented or interrupted at an early stage.

39. The StAR Asset Recovery Initiative has issued a publication³⁹ analyzing the asset recovery problems related to politically exposed persons, using the acronym PEPs, which is the Financial Action Task Force terminology counterpart to the "individuals who are, or have been, entrusted with prominent public functions" language of Convention paragraph 52.1. Its conclusions and recommended action include steps consistent with the preventive measures provided in Convention Article 52.

Principal Recommendation 1 – Apply Enhanced Due Diligence to all PEPs, Foreign and Domestic

Principal Recommendation 2 - Require a Declaration of Beneficial Ownership

Principal Recommendation 3 – Request Asset and Income Disclosure Forms

Principal Recommendation 4 – Periodic Review of PEP customers

Principal Recommendation 5 – Avoid Setting Limits on the Time a PP Remains a PEP

³⁹ Politically Exposed Persons – Preventive Measures for the Banking Sector, World Bank/UNODC (2010).

40. Article 52.3

In the context of paragraph 2 (a) of this article (advisories to financial institutions), each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

This paragraph confronts one of the most difficult questions in asset recovery, which is ascertaining the beneficial owner of accounts and legal structures. The abolition of anonymous and fictitious name accounts in accordance with Financial Action Task Force Recommendation 5 has been a step in the right direction, but concealment of the proceeds of crime is still a simple matter if legal structures are allowed to hold accounts whose beneficial ownership is not known and cannot be traced. The StAR Initiative of the World Bank and UNODC has produced an entire volume of expert analysis of this problem entitled *The Puppet Masters - How the Corrupt use Legal Structures to Hide Stolen Assets and What to Do About It* (2011). That publication identifies five core issues requiring the attention of States:

Issue 1. The information available at company registries should be improved and made more easily accessible.

Issue 2. Steps should be taken to ensure that service providers collect beneficial ownership information and allow access to it.

Issue 3. All beneficial ownership information should be available within the same jurisdiction.

Issue 4. Bearer shares should be abolished.

Issue 5. Investigative capacity should be strengthened.

41. Article 52.4

With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall 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. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

This provision is self-explanatory. The layer of insulation 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 Financial Action Task Force Recommendation 18, which states:

18. Countries should not approve the establishment or accept the continued operation of shell banks. Financial institutions should refuse to enter into, or continue, a correspondent banking relationship with shell banks. Financial institutions should also guard against establishing relations with respondent foreign financial institutions that permit their accounts to be used by shell banks.

The Glossary to the 40 Recommendations defines shell banks in substantially the same terms as used in Article 52.4.

“Shell bank” means a bank incorporated in a jurisdiction in which it has no physical presence and which is unaffiliated with a regulated financial group.

42. Article 52.5

Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when

necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

This Article is functionally linked to Convention Article 20, the offence of illicit enrichment and to paragraph 5 of Article 8 encouraging such disclosure regimes as preventive measures for appropriate public officials. A financial disclosure form provides a starting point for an analysis of a person's accumulation of wealth and limits a public official's claims to have legitimate income and assets. If an inference of illicit enrichment can be drawn based upon 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 included proof of specific diversions but was strongly corroborated by evidence of huge increases in assets totally inconsistent with lawful sources of income.⁴⁰ 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 quoted in paragraph 153 of this Digest 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 extra-ordinary 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 Alamiyeysiga's** conviction in Nigeria for filing a false financial form is a practical demonstration of the utility of this measure.

43. As was noted in paragraph 20, Section I, Convention, Article 20 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. The StAR Initiative of the World Bank and UNODC has produced a publication entitled *Illicit Enrichment (2012)*. At page 13 the formulations used by Sierra Leone, Guyana and the People's Republic of China are presented. Sierra Leone criminalizes the possession by a present or former public official of unexplained wealth accompanied by a standard of living above that which is commensurate with present or past official emoluments or the control over pecuniary resources disproportionate to those emoluments, unless satisfactorily explained. Guyana's law states that a person is punishable who was a person in public life, or a nominee is found in possession of resources disproportionate to the known sources of the first person's income and that person fails to produce satisfactory evidence that the resources were acquired by lawful means. The People's Republic of China's law provides that any State functionary whose property or expenditure obviously exceeds his lawful income, if the difference is enormous, may be ordered to explain the sources of the property. If he cannot prove 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.

44. The financial disclosure system proposed in Convention Article 52, paragraph 5 is complementary to the illicit enrichment offence in Article 20. If a wealthy businessperson is elected to public office and two million pounds are subsequently found in that person's account in a London bank no inference is possible as to whether the money is prior accumulated wealth or proceeds of corruption. If the business person had been required to file a financial disclosure form and had listed various real estate properties and 500,000 pounds cash, and then was found to still own those properties a year later but to now have 2 million pounds in cash, an inference of illicit enrichment would be justified, absent an innocent explanation on behalf of the defence. That explanation need not come from the defendant but could be documentary in nature or could be provided by other witnesses, or even by the prosecution's own evidence.⁴¹ If the defence counsel finds a business interest reflected in the

⁴⁰ Particulars of Claim, [The Federal Republic of Nigeria v. Joshua Chibi Dariye](#), accessed at StAR Asset Recovery Watch database page on Joshua Dariye/Joyce Oyebanjo.

⁴¹ This is subject to the provisions of a law like that of the People's Republic of China, which expressly allows an official to be ordered to explain the sources of his or her property.

government's documentary evidence that is not reflected a year later and therefore could have been sold for cash that fact could provide an innocent explanation without the defendant ever having to testify. Thus, the defendant's right to silence is not threatened except in the very practical sense that, like a Treasury clerk caught trying to leave the Treasury vault with uncirculated currency concealed in her clothing, a defendant risks conviction when the evidence of guilt is strong unless he or she provides some explanation or defence that creates a degree of doubt.

45. Article 52.6

Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance

This is a variation on 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, great clarity in completion of complex forms is a desirable quality, so a separate question directed to compliance with this measure could be worthwhile.

46. Article 58

States Parties shall cooperate with one another for the purpose of presenting and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

This article contains only an obligation to "consider established a financial intelligence unit". 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 and the peer pressure exerted by the mutual evaluation process of the Financial Action Task Force and of the regional FATF-style bodies that exist in every region, have led to 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.

B. Concealment techniques used to hide corruption proceeds

47. Riggs Bank and Augusto Pinochet. Riggs was described in a staff report of the U.S. Senate Permanent Subcommittee on Investigations as having repeatedly ignored its anti-money laundering obligations in dealing with Pinochet family accounts. Riggs secured accounts of the Chilean military in 1994 and its executives visited Chile in 1994 and offered its services to General Pinochet. After 1994 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.⁴² In 1998 a Spanish judge issued a worldwide freeze order against General Pinochet. In violation of that order Riggs moved 1.6 million dollars from London to the United States and subsequently 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 dismissing with

⁴² Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act- Case Study Involving Riggs Bank, U.S. Senate Permanent Subcommittee on Investigations, 2004.

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 8 million dollars and to provide the plaintiffs, consistent with Riggs' legal obligations, information concerning Pinochet's accounts at Riggs⁴³. The 8 million dollar payment was to be administered by a foundation for the benefit of persons who suffered under the Pinochet regime.⁴⁴ The Republic of Chile's response to a UNODC Secretariat request for information made reference to a recovery from Riggs Bank and to 3 million dollars recovered from various properties belonging to Pinochet via the mechanism of direct recovery.⁴⁵

48. 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 of **Meer, Care & Desai** (also referred in paragraphs 121 and 198 below). The suit sought recovery from the Thakers and the Meer, Care and Desai firm for assisting in the diversion of Zambian government funds. The funds were paid to the firms and transferred through numerous corporate vehicles without performance of any legal services, resulting in a finding of liability exceeding 3 million dollars as to Bimal Thaker. The court concluded that Bimal Thaker was liable on a conspiracy theory 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.⁴⁶ The other firm of solicitors, **Meer Care and Desai**, had been found liable by the trial court for facilitating the diversion of funds of the Zambian government but that judgment 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 informed himself about the purpose of transactions involving millions of dollars. While he should have acted with caution and exhibited more suspicion 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 in order to not to learn the truth.⁴⁷ Despite the Court of Appeals decision Mr. Meer was suspended from the practice of law for three years for failure to observe professional standards.⁴⁸

49. In the **Kuwaiti Investment Organization** case, Spanish attorney **Juan Jose Folchi** was found civilly liable for helping divert funds from the Organization's investment vehicle Grupo Torras (GT). In considering his appeal

⁴³ Riggs Bank SEC filing Form 10-K, 20050329.

⁴⁴ Albrittons, Riggs to Pay Victims of Pinochet, Washington Post 26 February 2005, accessed at StAR Asset Recovery Watch database page on Agosto Pinochet/Spain.

⁴⁵ Response of Republic of Chile to UNODC Secretariat request for asset recovery information.

⁴⁶ StAR Asset Recovery Watch database page on, Frederick Jacob Titus Chiluba; Attorney General of Zambia v. Meer, Care and Desai [2007] EWHC 952 (Chancery Division).

⁴⁷ Attorney General of Zambia v. Meer, Care and Desai [2008] EWCA Civ 1007.

⁴⁸ Findings and Decision, Solicitors' Disciplinary Tribunal, In the Matter of Mohamed Iqbal Meer, 31 January 2011.

in its Judgment the U.K. 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 transactions if he did not receive satisfactory explanations. Mr Folchi repeatedly failed in his duty and in consequence GT suffered losses.”⁴⁹

With regard to that same case a summary published in Stolen Asset Recovery- A Good Practices Guide for Non-Conviction Based Asset Forfeiture mentions that compensation orders were secured against banks and accountants.⁵⁰

50. As noted in paragraph 23 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 **Bhadresh Gohil**. The judge who sentenced him to prison terms totalling 10 years was reported in the press to have 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 forged signatures to make the consulting contract appear to have been legitimate. Once the proceeds of the sale of state property were deposited in a Nigerian bank, used two London confederates and a number of shell companies and bank accounts to launder them by means such 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.⁵¹ The use of these intermediaries and legal structures served the intended goal of concealing Ibori’s beneficial ownership of these assets. After his conviction U.S. authorities, pursuant to a request under the U.K.-U.S.A. Mutual Assistance treaty, secured judicial enforcement of the U.K. criminal court order freezing assets controlled by Ibori and Gohil, including a brokerage account in New York.⁵² Not only the lawyer but also Ibori’s wife, sister and a female friend were convicted of money laundering in the U.K., with the women having served as nominee owners for Ibori.⁵³

51. Banks, lawyers and trust and corporate service providers make use of shell companies and similar legal structures to create layers of legal ownership and formal control, while ensuring the beneficial ownership of the assets involved remain with the original owner, whose identity has been hidden behind layers of anonymous structures and obligations of confidentiality. An example of use of shell corporations to shelter assets and hide identities and the contribution of a corporate service provider is found in the litigation entitled Ukrvaktšina, an Ukrainian state owned enterprise v. Olden Group, LLC an Oregon limited liability corporation, and Interfarm,

⁴⁹ Judgment of 2 November 2000 in Al-Sabah and Folchi v. Grupo Torras, accessed at www.ucc.ie/law/restitution/archive/eng/cases/al-sabah.htm.

⁵⁰ Page 165, 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).

⁵¹ Wall Street Journal-Europe, 12 April 2011; SaharaReporters, New York, 8 March 2011.

⁵² 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/.

⁵³ BBC News Africa, Nigeria ex-Delta state governor James Ibori guilty plea, 27 February 2012.

LLC, a Ukrainian company.⁵⁴ An investigative report ordered by the Cabinet of Ministers of the Ukrainian Republic revealed that for years a Ukrainian firm, Interfarm, has been among the top suppliers of medical products under state procurement contracts. Its dominance in this field and its high prices have 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 an American 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 Oregon in the United States because it was registered in that state. It offered no defence and suffered a default judgment in 2011 for approximately 60 million dollars plus interest. As suggested by the Olden Corporation's failure to appear and defend the civil action, its beneficial owners appear to be relying upon anonymity as a means of escaping liability.

C. Summary

52. 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 that had been voluntary actions under the Financial Action Task Force 40 Recommendations into binding international obligations for all the States Parties to the Convention. 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 in 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 the impact of which 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.

53. Different concealment mechanisms exist 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 transactions to appear legitimate that they know or clearly should recognize are 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.

⁵⁴ StAR Asset Recovery Watch database page on [Ukrainian Government/ Ukrvaksina v. Olden Group LLC and Interfarm LLC](#).

SECTION III INITIATION OF ASSET RECOVERY CASES

A. Overcoming the obstacles remaining after a corrupt regime

54. A country cannot normally 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 may not be achieved until the departure of a ruler whose administration may have 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.⁵⁵ The degree of control exercised for decades by the **Marcos**⁵⁶, **Suharto**⁵⁷, **Pinochet**⁵⁸ and **Traore**⁵⁹ governments 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 intent on destroying 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.⁶⁰ They also revealed a multi-million dollar brokerage account in the United States.

⁵⁵ Mubarek was President of Egypt from 1981 to 2011. Zine Ben Ali was President of Tunisia from 1987 to 2011.

⁵⁶ Ferdinand Marcos was President of the Philippine Republic from 1965 to 1986.

⁵⁷ President Suharto of Indonesia served in that position from 1967 to 1998.

⁵⁸ Augusto 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.

⁵⁹ Moussa Traore came to power by military means and ruled Mali under several titles from 1968 to 1991.

⁶⁰ 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. 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. Please also see Jovito R. Salonga, Presidential Plunder: The Quest for the Marcos III-Gotten Wealth.

55. 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. The Swiss government paid the fees of a lawyer to represent the DRC but despite this assistance, 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 cited in the Stolen Asset Recovery database page 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.

56. The change of the **Ben Ali** regime in Tunisia has led to an imaginative legislative innovation. After the change of government in January 2011 a relative of former President Ben Ali sought asylum in Canada. The new Tunisian government asked that the relative's assets be frozen but conceded that it could not yet establish a criminal origin of the funds.⁶¹ In response the Canadian government proposed and 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.

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.

57. 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 Sections V and VII. The Act established special freezing, seizing and confiscation provisions for mutual legal assistance and freezing requests when:

⁶¹ The Globe and Mail, Attempt to freeze Ben Ali clan's assets hits a wall, 18 February 2011.

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).⁶²

58. 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 the situation known as the **Anglo-Leasing** scandal.⁶³ 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 in the 10-12 million dollar ranges were received in November 2002. A new presidential administration entered into office in January 2003 and disqualified the three bidders. A technical committee then recommended adoption of a slightly expanded concept for the system. Without there being any public or official announcement of the technical specifications of the expanded concept, but with apparent advance 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 6 million dollars and 6 million Euros respectively already received under the contracts.

59. 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.⁶⁴

⁶² Unofficial English translation accessed at the Swiss Confederation website.

⁶³ Kenya 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.

⁶⁴ See footnote 63.

B. Domestic anti-corruption efforts

60. Once effectively functioning domestic anti-corruption agencies exist, whether charged with a legislative, audit or law enforcement function, they can do much to uncover corrupt arrangements and initiate steps for the tracing and recovery of unlawful proceeds. Swiss-based businessman **Bruce Rappaport** held diplomatic positions under the administration of a family which led Antigua and Barbuda's government 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 200,000 dollars for 25 years, but Rappaport arranged payments of 400,000 dollars 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 12 million dollar repayment from Rappaport which can be classified as direct recovery.

61. 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 the cases generated by this new emphasis six anti-corruption trial courts and a Special Criminal Court of Appeal were established. Moreover, Peruvian law was changed to permit inducements in the form of immunity or mitigation in punishment to secure the testimony and cooperation of potential witnesses and cooperating defendants. Evidence gathering powers were also expanded.⁶⁵

62. 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. 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 in paragraphs 58 through 59. 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 upon 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 United Nations 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."⁶⁶

63. 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 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

⁶⁵ See footnote 14.

⁶⁶ Kenya Anti-Corruption Commission, Appellant v. First Mercantile Securities Corporation, Respondent, Court of Appeal of Kenya, Civil Appeal 194 of 2008, Judgment of the Court, 16 July 2010, accessed at Daniel Arap Moi/Anglo-Leasing Case/Switzerland.

specific provisions were discussed in paragraphs 30 through 45 in Section II on Forms and devices of concealment of proceeds of acts of corruption. Article 52.4 warns against the direct or indirect dealings with or the existence in a State Party of banks with no physical presence 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 a 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. The World Bank and UNODC’s StAR Initiative has issued a publication, *Public Office, Private Interests*, dedicated to analysis of income and asset disclosure systems for public officials that is essential 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.

C. Role of the Media

64. 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 previously in paragraphs 58 through 59. 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 about that time a Swiss bank refunded payments of nearly 5 million dollars to the Kenyan Central Bank on behalf of Anglo-Leasing in connection with a forensic laboratory contract and nearly one million Euros on a passport system contract, followed by another firm refunding over five million Euros on a security contract. The desire to avoid further inquiries suggests that a desire to diminish 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** had been a continuing financial and judicial scandal since the 1990s in Kenya. It involved losses of as much as 600 million USD 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.⁶⁷

65. 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 news 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 government 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 expose had detailed factual information about Zamtropol payments.⁶⁸

⁶⁷ Report 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

D. Foreign anti-money laundering efforts

66. The cases examined for this Digest reflect an encouraging development, which is the frequent initiation of foreign inquiries based upon suspicious financial activity and the disproportionate wealth of politically exposed person. Article 52 of the Convention, and FATF Recommendation 612 have succeeded in focusing attention on the duties of financial institutions with respect to politically exposed persons. Article 52.1 describes the obligation of a State Party:

“... to require financial institutions within its jurisdiction 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 are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.”

67. Numerous cases of asset recovery can be traced to observance of these measures, reflecting the importance of national policy, educational efforts by international organizations and peer reviews by the Financial Action Task Force and FATF-style regional bodies. A Guernsey branch of a Swiss bank notified the anti-money laundering authority 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, a process described in more detail in paragraph 104 and 105 of Section IV, Identifying, freezing or seizing and tracing of assets.⁶⁹ Former Kenya Power and Lighting executive **Samuel Gichuru** and Parliamentary Finance Committee Chair and one-time Energy Minister Chris Okemo have been charged in Jersey with money laundering and fraud after a financial services firm filed a suspicious transaction report. 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.⁷⁰ Nigeria State governors **Dariye** and **Alamieyeseigha** were subjects of inquiry by U.K. authorities resulting in significant asset seizures. As described in paragraphs 17 and 20 of Section 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 U.K. non-conviction based confiscations. Both had been arrested in the United Kingdom based upon money laundering investigations and fled to Nigeria while on bail.

68. The recovery of assets from **Victor Alberto Venero Garrido**, a Montesinos associate and money launderer, resulted from the filing of a suspicious transaction report by a New York bank. Followed confiscation of funds in the United States over 20 million dollars were transferred to Peru based upon a U.S. statutory procedure permitting the Attorney General to return funds in recognition of another State's contribution to the proceedings.

⁶⁸ [2007] EWHC 952 (Ch): The Plundering of Zambian Resources, Jan Kees van Donghe, African Affairs, 2008.

⁶⁹ StAR Asset Recovery Watch database page on Tommy Suharto, also known as Hutomo Mandala Putra; Guernsey Law Reports 2009-10 GLR 1. Garnet Investments Limited v. BNP Paribas (Suisse) SA and Government of Republic of Indonesia, 9 January 2009.

⁷⁰ StAR Asset Recovery Watch database page on Samuel Gichuru; Judgment of the Royal Court, Bailiwick of Jersey in Gichuru v. Walbrook, 25 April 2008, response of Republic of Kenya to UNODC Secretariat request for asset recovery information.

69. Pursuant to paragraph 1 of Convention Article 52, 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 and are their family members or close associates. In November 1995 the wife of Raul Salinas, brother of former President Carlos Salinas of Mexico, was arrested attempting to withdraw 84 million dollars from accounts her husband had established using a false name and passport. The extent of the bank's knowledge of Salinas' true identity when the account was opened or the circumstances under which he was introduced to the bank were not found in public sources.

70. However, now that compliance with the anti-money laundering precautions of Articles 14 and 52 is made mandatory by the Convention, concealment of significant sums by politically exposed persons should become more difficult.⁷¹ 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 attempting to smuggle undeclared currency into the United States. The 100,000 dollars they were carrying was confiscated by the United States. Inquiries in the Philippines resulted in the prosecution of Carlos Garcia in that jurisdiction on plunder and perjury charges. A plea bargain forfeiting assets worth 3 million dollars to the Philippine government was negotiated but delayed by other legal proceedings against Garcia, accompanied by Congressional opposition to the disposition.⁷² 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.⁷³ A reference in the Resolution also indicated that U.S. 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 share the proceeds with the Philippines pursuant to a bilateral mutual assistance treaty.⁷⁴

71. Foreign anti-money laundering measures are particularly effective in contributing to asset recovery when they are combined with use of Article 56, Special cooperation, of the Convention. That article provides that:

“Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by the State Party under this chapter of the Convention.”

⁷¹ U.S. General Accounting Office Report GSA-OSI 99-1, Private Banking - Raul Salinas, Citibank, and Alleged Money Laundering, October 1998.

⁷² StAR Asset Recovery Watch database page on Carlos F. Garcia; Manila Mail article, Garcia jailed while plunder case is reviewed, 12c October 2011; 2011 Philippine Senate Committee on Accountability of Public Officials and Investigations Report on Proposed resolution 337. Decision of Sandiganbayan, Second division 9 May 2011.

⁷³ Resolution of Sandiganbayan, Second Division, People of the Philippines v. Carlos Flores Garcia and others, Criminal Cases Nos. 281097 and SB-09-CRM-0194, promulgated 9 May 2011; Response of Philippine Republic to UNODC secretariat request for asset recovery information.

⁷⁴ Republic of Philippines response to UNODC Secretariat request for asset forfeiture information. See also U.S./ Department of Justice letter to U.S. District Judge Jesse Furman, filed on 3 May 2012 in U.S 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),

Article 56 occurs in Chapter V, Asset Recovery, of the Convention. 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 in the jurisdiction to which the information is disclosed will likely result from such cooperation. 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 77.5 million dollars to the Banco de la Nacion del Peru. The funds represent blocked assets of the former Peruvian security service official and presidential advisor **Vladimiro Montesinos** and former Peruvian general **Nicholas de Bari Hermoza**. 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 that country’s authorities, who informed Peru. The funds had largely been transferred out of Panama, but the reports permitted their tracing to other jurisdictions.⁷⁵

E. Increased attention to domestic and foreign corruption, including creation of specialized units

72. A factor contributing to increased recovery of the proceeds of offences established in accordance with the United Nations Convention against Corruption is the increased enforcement attention devoted to these issues, both by agencies with general jurisdiction and by specialized units. The Financial Action Task Force has urged the creation of Financial Intelligence Units since its creation in 1989 and that concept must also be considered by States Parties to the Convention under Article 14.1 (b). Criminal justice enforcement units with specialized anti-corruption mandates are increasing in number and effectiveness. Ananias Tumukunde, advisor to the President of Uganda, pleaded guilty in the United Kingdom and agreed to restitution of nearly 100,000 dollars received in unlawful payments for a security contract for the Commonwealth Heads of Government meeting in Kampala in 2007. The case was based upon information that came to the attention of the Overseas Anti-Corruption Unit of the police in the **City of London police**, a specialized unit operating in the centre of the U.K.’s 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.⁷⁶ The Department for International Development also funds the **Metropolitan Police Service’s** Proceeds of Corruption Unit. The U.K. also has an Anti-Corruption Domain within its **Serious Fraud Office** as well as a Proceeds of Crime Unit within its **Crown Prosecution Service**. The success of the **Independent Commission against Corruption** in reducing corruption since its founding in **Hong Kong** 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 multidisciplinary institution with educational, preventive audit and investigative functions. The **Philippine Commission on Good Government** was created in 1986 with one of its specific tasks being the recovery of illegally obtained assets from the Marcos family and associates. Over 25 years after its creation the Commission continues to make recoveries, despite numerous obstacles, including some unfavourable court rulings, competing claims to assets and restructuring under different political administrations.⁷⁷

⁷⁵ Press release Swiss Confederation, Federal Office of Justice, [Montesinos case: Switzerland transfers 77 million dollars to Peru](#), 20 August 2002.

⁷⁷ www.pcg.gov.ph .

73. The transitional government that came into power in Nigeria in 1998 created a Special Investigation Panel 45 days after the death of General Abacha to investigate corruption during the prior regime. That panel secured evidence that 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 Nigeria's Financial Intelligence Unit 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 **Alamieyesiegha**, which were described in Part II.⁷⁸ In 2003, the Anti-Corruption and Economic Crimes Act came into force in Kenya and established the **Kenya Anti-Corruption Commission**. Over 13 million dollars were voluntarily repatriated from Switzerland without MLA and confiscation procedures after issuance of a Special Audit Report by the Controller and Auditor-General. 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 had the power to make such requests independently of the Government.⁷⁹ 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 31 million dollars during his tenure. Perla was prosecuted criminally and sentenced to ten years imprisonment and Panama was requested to freeze and return assets worth over 2 million dollars.⁸⁰ In November 2008, Panama created a Tribunal de Cuentas with competence for offences against public assets by government functionaries.⁸¹ The recovery of over 6 million dollars through voluntary repatriation from Pakistan's former Chief of Naval Staff Mansur ul-Haq resulted from revival of previous investigative efforts after creation of the National Audit Bureau and the receipt of assistance from foreign expert organizations.⁸²

74. Some countries locate their specialized asset recovery units in their police agencies, as does Canada in its **Royal Canadian Mounted Police**. **Singapore's Commercial Affairs Department** has a broad mandate to deal with economic crimes and has a special Proceeds of Crime Unit for asset recovery. **Sweden's Economic Crime Authority** 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.⁸³ A StAR Initiative publication⁸⁴ identified the creation of a unified national team pursuing an integrated strategy combining prosecution, private civil action and non-

⁷⁸ See www.efccnigeria.org.

⁷⁹ Judgment in Kenya Anti-Corruption Commission v. First Mercantile Securities, Court of Appeals at Nairobi, 16 July 2010.

⁸⁰ StAR Asset Recovery Watch database page on Carlos Perla; lsalvador.com, FGR busca recuperar dinero de Carlos Pena, 4 November 2010.

⁸¹ Response of the Republic of Panama to UNODC Secretariat request for asset forfeiture information.

⁸² StAR Asset Recovery Watch database page on Mansur ul- Haq, Case Study.

⁸³ Attorney General Holder at the African Union Summit, Kampala, Uganda remarks, 25 July 2010, accessed at www.justice.gov/ag/speeches/2010/ag-speech-100725.html.

⁸⁴ StAR Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture 2009).

conviction based confiscation as essential to successful asset recovery by the **Kuwaiti Investment Organization**. After a commissioner appointed by the U.K Government found substantial indications of corruption in the Turks and Caicos Islands, a British Overseas Territory, a **Special Investigation and Prosecution Team** headed by a former prosecutor of the U.K. Serious Fraud Office initiated a number of prosecutions and secured a global freeze of the assets of the former Premier, **Michael Misick**. At the same time a **Civil Recovery Team** secured several substantial judgments, including one for over 9 million dollars against foreign land developers for corruption in tax payments.⁸⁵

H. Summary

75. The practical problems of reconstructing the forms of diversion and other illegal activity that occur or have occurred within a corrupt government or element thereof can be immense, and the investigative task of proving a criminal offense that may have taken place wholly outside the 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 be overcome. To compensate for the difficulties facing countries where the legal order has essentially collapsed two countries (Canada and Switzerland) have adopted laws which, notwithstanding their limited scope, introduce concepts worthy of consideration by other countries. These new laws ease the burden for the freezing of assets of politically exposed persons. One of the laws also provides a new evidentiary presumption based upon illicit enrichment and a generally acknowledged atmosphere of corruption. Asset recovery cases can be initiated by multiple sources and the power of the information media should never be underestimated. Official structures and personalities with sufficient independence to overcome political obstacles are essential if a country hopes to recover national assets lost through diversion, bribery and other offences established in accordance with the Convention against Corruption. Several situations suggest those corporate anti-corruption efforts and structures need to be pursued even more vigorously. Domestic integrity programmes in states can help to prevent, identify and on occasion result in interruption and seizure of transfer of the proceeds of Convention offences.

SECTION IV IDENTIFYING, FREEZING OR SEIZING AND TRACING PROCEEDS OF CRIME

A. Identification of the proceeds of crime

76. Article 46.3(j) of the Convention provides 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 of this Convention”. Chapter V is the Convention chapter dealing with Asset Recovery. Article 55 in Chapter V is entitled “International cooperation for purposes of cooperation”. 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, paragraph 1, of this Convention for the purpose of eventual confiscation . . .”. This section will be addressed to the mechanisms and processes required for the tasks of identifying, tracing and freezing or seizing the proceeds of offences established by the Convention. Some but not all of these

⁸⁵ Stolen Asset Recovery Watch database, page on Michael Misick: Quarterly Review and Annual Review from the Governor, Turks and Caicos, September 2010.

mechanisms and processes are mandated by Article 54.2 of the Convention. Article 54.2 contains three paragraphs, which are the provisions of Chapter V establishing the freezing and seizing obligations of the Convention. Article 54.2 (a) requires measures to permit freezing or seizing based on an order of a competent authority in the requesting state. Paragraph 54.2(b) requires measures to permit freezing or seizing upon a request providing sufficient grounds for action and for a belief the property will be subject to a confiscation order in the requesting state. Paragraph 54.2 (c) requires that states consider measures to preserve property based on a lower threshold, such as an arrest. The sequence in which identification, freezing or seizing and tracing should be discussed depends upon the meaning assigned to each term and the facts of a particular case. If tracing were to mean whatever process succeeds in directing investigative efforts towards a possible hiding place for stolen assets then it would be logical to discuss that process first. However, since both Article 46.3 (j) and Article 55.2 place identification first in their description of the mutual assistance process it is assumed that identification includes the preliminary investigative efforts (including tracing or tracking) that are necessary to identify the existence, location, origin, and ownership of criminally derived assets. The subsequent tracing part of the process would therefore require financial investigation that may logically consist in the accumulation of witness testimony, documentary evidence, traditional investigative techniques, and expert analysis to establish the requisite connection between identified assets and an identifiable offence established in accordance with the Convention or, in some cases, to establish their criminal provenance under the illicit enrichment approach suggested in Article 20 of the Convention.

77. The common use of trusts, legal structures and nominees described in Section II, Forms and devices of concealment of proceeds of acts of corruption, of this Digest frequently complicate the identification of criminally derived assets. 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 had resulted in criminal charges and recovery of hundreds of millions of dollars in Nigeria under the Forfeiture of Assets, Etc. Decree No. 53 of 26 May 1999. Abacha assets had been located already 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 alleged to be involved in the Abacha criminal organization and disclosures in a civil suit in the United Kingdom also gave reason to issue an unusually broad order to all the Swiss banks.⁸⁶ 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 responsive to Nigeria's request for mutual legal assistance could be provided only after years of delays 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 described in paragraphs 87 and 135 had gained access to the information discovered in the criminal investigation.

78. Many countries have domestic sanctions laws and regulations that permit an executive decision to issue orders freezing foreign assets to protect national security interest or in an international economic emergency. For example, The United States, through Presidential Executive Order, has 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 U.S. Even with such measures, some measure of cooperation by the country from which the funds and/or criminal conduct originated remains necessary. Switzerland first issued a freezing ordinance based upon a constitutional power to safeguard national interests respect to the Marcos assets. It has subsequently issued ordinances under that power to freeze

⁸⁶ Response of the Swiss Confederation to UNODC Secretariat request for asset recovery information

assets associated with the regimes of Hosni Mubarek of Egypt, Zine Ben Ali of Tunisia, Laurent Gbagbo of Cote 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 at least Austria⁸⁷, Qatar⁸⁸ and the United Arab Emirates⁸⁹ 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 if not taken in response to 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.

79. This desire to lessen the burden on a state in difficulty is evident from the background and structure of Canada's 2011 Freezing Assets of Corrupt Foreign Officials Act. The background of the Canadian law is that after the fall of Tunisia's **Ben Ali** regime a number of his relatives and associates were believed to have substantial assets in Canada. The Freezing Assets of Corrupt Foreign Officials Act was adopted on March 23, 2011 by that country for the stated reason that previous freezing authority was limited to situations declared by the United Nations Security Council to threaten international peace and security or to procedures that would have required an individualized evidentiary showing with respect to each person's assets. The relevant operational part of the 2011 law was set forth in paragraph 56 of Digest Section III on 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 a governmental process to administratively designate an entity, legislative creation of a general duty to disclose assets of designated entity and relevant transaction information, a system for communicating that designation to financial institutions and other regulated entities, and penal and administrative sanctions for anyone within the jurisdiction contravening an order or regulation under the act. Its Section 8 announces a "Duty to Determine" for an extensive list of designated financial entities and requires that:

8. 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 made under section 4:

80. Targeted sanctions freezing the assets of designated persons and entities are familiar mechanisms in some fields, such as counter-terrorism, and are applied by this law to foreign politically exposed persons. The term "politically exposed foreign person" is comparable to that used in Article 52.1 of the Convention to identify the class of persons whose accounts should receive enhanced scrutiny from financial institutions. Article 52.1 speaks of "individuals who are, or have been, entrusted with prominent public functions and their family members and close associates". The Canadian statute is more detailed. 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:

- o (a) head of state or head of government;

⁸⁷ www.news24.com/Africa/News/Austria-freezes--Ben-Ali-Assets-20110130; Austria freezes Ben Ali assets, 29 January 2011.

⁸⁸ www.telegraph.co.uk, Qatar freezes assets of ousted Tunisian president Zine al-Abidene Ben Ali, 31 May 2011.

⁸⁹ www.alarabiya.net/articles/201106/08152462.html, UAE Central Bank orders freeze of Ben Ali assets, 8 June 2011.

- (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.

81. Pursuant to this legislative authority the Canadian government 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, engaging in any transaction or providing any financial or related service related to property of the designated persons. The accompanying schedules listed 123 persons for Tunisia and 145 for Egypt. The 23 March 2011 Act had provided penalties of up to five years imprisonment and a 25,000 dollar maximum fine for an offence under the Act or for a contravention of the Regulations.

82. In 2010 Switzerland adopted the Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons, which was mentioned in paragraph 100 in Section 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.⁹⁰

83. The Canadian and Swiss solutions to the mutual assistance difficulties facing countries suffering from internal challenges were statutes of general application to all countries fitting the special conditions specified in the respective law. At least one regional organization, the European Union, took action on behalf of its Members States that was more specifically targeted 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. Reacting to regime changes in Northern Africa, the Council of the European Union adopted a number of decisions and regulations. 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.⁹¹

On 4 February 2011 Council Decision 2011/79/CFSP 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. News media reported that the action was taken at the request of the transitional government in Tunisia.⁹² On 2 March 2011 a statement was issued by the acceding country Croatia, the candidate countries the former Yugoslav Republic of Macedonia, Montenegro, 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.

84. 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 2011.⁹³ On 13 April 2011 the former president and two sons were detained on allegations⁹⁴ 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.

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 the former Yugoslav Republic of Macedonia, Montenegro, Iceland 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 Moldova, and Georgia to align

⁹⁰ Unofficial English translation provided by the Swiss Confederation.

⁹¹ Council of the European Union Decision 2011/72/CFSP of 31 January 2011.

⁹² BBC News Europe, EU freezes assets of Tunisia’s ousted President Ben Ali, 31 January 2011.

⁹³ BBC News Middle East, President Hosni Mubarek resigns as leader, 12 February 2011.

⁹⁴ BBC News Africa, Press welcomes Mubarek arrest, 14 April 2011.

themselves with this Decision and announce that they will ensure that their national policies conform to this decision.⁹⁵ 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 and not on a factual finding on the merits of the allegations.⁹⁶ From the perspective of a technical legal analysis that decision, whether or not upheld on appeal, would not necessarily dictate any modification of the E.U. Decision even if the acquittal were upheld on appeal. According to a BBC News UK report Egypt filed a lawsuit against the UK Treasury in March 2012 to secure the release of information on frozen funds and an official of the Ministry of Justice accused the U.K. Treasury of violating the United Nations Convention against Corruption and the European Union freezing regulation, which a Treasury spokesperson denied.⁹⁷ It is not known if Article 66 of the United Nations Convention against Corruption was invoked by either State Party. Article 66 is a somewhat standard Settlement of disputes article common to many U.N. instruments. It provides initially that States Parties “shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation”. If the dispute cannot be settled through negotiation within a reasonable time the article then provides for progressive steps of submission to arbitration and ultimately for submission to the International Court of Justice, subject to the acceptance of the Court’s jurisdiction. 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 and 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, paragraph 26 of the Convention, which requires consultation before refusing a request or postponing its execution.⁹⁸

85. Article 13 of the Convention requires States to promote the active participation of non-government organizations in the fight against corruption. Civil law countries like Switzerland, France and Spain 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 recovery of the proceeds of the offence. It appears from the opinion in the U.K. civil suit in the **Kuwaiti Investment Organization** case that valuable evidence contributing to recovery by Grupo Torras against its executives and others for diversion of its assets was secured in this manner.

(10.8) 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.⁹⁹

⁹⁵ 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.

⁹⁶ Political Clashes and Vow of Appeal in Verdict on Mubarak and Aides, New York Times World on-line, 3 June 2012.

⁹⁷ Egypt sues UK over frozen assets, BBC News UK., www.bbc.co.uk/news/uk-17717988.

⁹⁸ United Nations document CAC/COSP/2011/13, 12 October 2011.

⁹⁹ Judgment in Grupo Torras S.A, High Court of Justice, Queens Bench Division, 1993 Folio No. 5, decided 24 June 1999.

On 10 May 2012 a Swiss court recognized Egypt as a civil party in a criminal investigation of possible organized crime activity by members and associates of the Mubarek family with respect to 410 million Swiss francs deposited in that country.¹⁰⁰

86. In France petitions alleging the possession in France of the proceeds of crime by politically exposed persons resulted in a November 2010 decision by the French Court of Cassation that non-governmental organizations, including Transparence France, an affiliate of TI International, were entitled to participate as civil parties in an inquiry to be conducted by an examining magistrate. The French suit involved three heads of state and their families alleged to have expended large sums of money in acquiring luxury assets, including multiple properties and automobiles. Now-deceased **President Omar Bongo** of Gabon was the object 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 thirty-nine real-estate properties, primarily in Paris and on the Riviera. In addition, there are seventy identified bank accounts, eleven of which are registered in name of Omar Bongo, and a fleet of nine automobiles with a value of 1.5 million Euros. **President Sassou Nguesso** of the Republic of Congo (Brazzaville) and relatives were alleged to be in unlawful possession of extensive assets, including 24 real estate properties, one hundred and twelve bank accounts and a fleet of automobiles including at least one vehicle estimated to be worth 172,321 Euros. **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 11 luxury vehicles as possible proceeds of crime. A Spanish non-governmental organization filed a criminal complaint against Obiang family members in that country, resulting in opening of a criminal proceeding that has been underway since 2009. A previous request in Spain by a non-government organization to join a criminal investigation of former President Pinochet of Chile had led to an agreement under which Riggs Bank officials were ordered as 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 9 million dollars, consisting of approximately 1 million USD for lawyers' fees and expenses and 8 million dollars to the Salvador Allende Foundation in Chile to compensate victims of human rights abuses.

87. In common law jurisdictions procedures for asset recovery were developed in civil actions that have now become common in recovery of the 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 the order in the **Norwich Pharmacal** case that originated in the U.K.¹⁰¹ 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 establishing case authority for disclosure orders, as useful tool for civil actions.¹⁰² Shortly thereafter the case

¹⁰⁰ Egypt Independent journal, Saturday, 12 May 2012, www.egyptindependent.com/news/swiss-federal-court-allows-egypt-sue-mubarek%E2%80%99s-money.

¹⁰¹ Norwich Pharmacal and others v. Customs and Excise Commissioners, AC 133 (1974)

¹⁰² Please 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>

establishing the precedent for a **Mareva injunction** was decided.¹⁰³ This was an appellate decision continuing an injunction freezing the assets in a bank account to protect a creditor when the owner of the account was otherwise unable to pay its debt and there was serious risk 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 a defendant's premises and the removal of documents relating to 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.¹⁰⁴ In 1980 a final important innovation was introduced by the so-called **Bankers Trust order**.¹⁰⁵ This case recognized 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. 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.

88. A 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. 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/Organization for Economic Cooperation and Development Anti-Corruption Initiative for Asia and the Pacific.¹⁰⁶ This study describes how a U.K. court was requested to issue this type of 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, know your 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.

89. Cases exemplifying how identification orders and restraint order work together include the **Duvalier** and **Alamiyesigha** 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, where they thereafter resided. In the same year the Republic of Haiti sued the Duvaliers in France, alleging embezzlements exceeding 120 million dollars. 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.¹⁰⁷ It also granted an order to a firm of English solicitors to identify bank accounts to which funds belonging to the defendants were transferred. Evidence had been secured in Jersey that the firm

¹⁰³ The term is derived from an order issued in 1975 by a UK court in the case of Mareva Compania Naviera SA v International Bulkcarriers SA, 2 Lloyd's Rep 509 [1975].

¹⁰⁴ Anton Piller KG v. Manufacturing Processes Limited and others [1975 A-1692]

¹⁰⁵ The procedure was used in a U.K. case entitled Bankers Trust v. Shapira, [1980] 1 WLR 1274 CA

¹⁰⁶ Making 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.p...

¹⁰⁷ 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 Jean Claude "Baby Doc" Duvalier/United Kingdom. See also the 2008 article entitled *Disarming litigation terrorists* at <http://www.newlawjournal.co.uk/nlj/content/disarming-litigation-terrorists>.

represented Duvalier and had purchased Canadian bonds in Toronto of the value of 40 million Canadian dollars for a client account. Eventual disclosures revealed 17 Duvalier accounts at 11 banks in seven countries, 11 of which were in the names of solicitors in the firm. An important aspect of the order to the solicitors 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 judgement¹⁰⁸ as 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.¹⁰⁹ Former Nigerian Governor Alamiyeseigha's case was described in paragraph 20 in Section 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 secure a disclosure order for evidence secured by the London police, which was granted without police opposition. Based upon that information and upon its comparison with Alamiyeseigha's asset disclosure form filed as a state governor, a worldwide restraint order covering all assets beneficially owned by Alamiyeseigha and a further disclosure order for information held by banks and the Governor's associates was granted. As reflected in the Asset Recovery Handbook, Nigeria ultimately prevailed in its lawsuit and secured title to properties in the United Kingdom, Cyprus and Denmark.¹¹⁰ According to a selection by James Maton and Tim Daniel in a World Bank publication, Nigeria's civil action commenced with an application for a court order requiring disclosure of the London police evidence, which the police did not oppose. The information provided 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 U.K. court requiring banks and Alamiyeseigha's London financial advisor to disclose financial information.¹¹¹

B. Freezing or seizing the proceeds of crime

90. 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.¹¹² 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. Ideally that information would be used to support the initial request not only to identify assets in the requested state but also a request for a freezing or seizure order of any accounts found.

¹⁰⁸ See footnote 107.

¹⁰⁹ See footnote 107.

¹¹⁰ Case 1.3.3 Diepreye Alamiyeseigha, Asset Recovery Handbook- A Guide for Practitioners, StAR Stolen Asset Recovery Initiative, The World Bank/UNODC (2011).

¹¹¹ "The Kleptocrat's Portfolio Decisions," from *Draining Development?: Controlling Flows of Illicit funds from Developing Countries*, Peter Reuter, Ed; the World Bank, 2012.

¹¹² Article 80n, Right to inform, Federal International Mutual Assistance Act of Switzerland, 1981 as amended, unofficial translation.

91. The legislative actions by the Council of the European Union, Switzerland and Canada described in Subsection A on the Identification of the proceeds of crime were provided as an example of efforts to permit freezing in special circumstances that prevent a requesting country from meeting the normal requirements for mutual legal assistance. Freezing, however, 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 similar to that in the measures that they are required to establish by Convention paragraphs 54.2 (a) and (b). 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 to be found in the requested state. Section II of the Digest on Forms and devices of concealment of proceeds of acts of corruption described in detail the many forms and devices used by participants in corrupt arrangements to conceal their offences 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.

92. In the absence of facilitating laws like the Swiss Federal Restitution of Assets illicitly obtained by Politically Exposed Persons Act and Canada’s Freezing Assets of Corrupt Foreign Officials Act, 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. In jurisdictions where non-conviction based confiscation is recognized, evidence that the assets to be confiscated on this basis are the proceeds of underlying criminal conduct and information concerning the ownership of such assets, would in most cases still be required. If a jurisdiction does not recognize non-conviction based confiscation, perhaps the most obvious offence that can be established in cases which provides a ground for international cooperation under Chapters IV and V of the United Nations Convention against corruption is the least specific of those established in the United Nations Convention against Corruption, that is the Article 20 offence of illicit enrichment.¹¹³ The compensation of government officials is normally modest enough that any significant accumulation of funds, especially if deposited in a foreign bank account, is inherently suspicious and permits an inference that the funds are the proceeds of a Convention offence. The suspicious nature of such an account can be confirmed if it conflicts with the information stated in a declaration of assets and income, a measure recommended in paragraph 5 of Convention Article 8 on Codes of conduct for public officials and paragraph 5 of Article 52 on Prevention and detection of transfers of proceeds of crime. The utility of such a financial declaration procedure is demonstrated in the case of former Nigerian state governor **Diepreye Alamieyesigha**, discussed in paragraph 20 as an example of an offence of illicit enrichment under Article 20 of the Convention. After Alamieyesigha pleaded guilty to a false asset declaration charge in Nigeria and his corporations pleaded guilty to money laundering in Nigeria, summary judgment was entered against them in the U.K. civil suit and substantial recoveries made; the U.K. authorities dropped the civil action in order to allow asset recovery via civil action to proceed. An additional helpful prohibition was that making it unlawful for a state governor to hold a paying position in addition to the elected office.

93. The steps taken after a Royal Commission identified apparent corruption in the Turks and Caicos Islands were briefly mentioned in paragraph 74 in Section III dealing with Initiation of Asset Recovery Cases. An *ex parte* worldwide restraint order on all assets however held and no matter where located was secured and served on **Michael Misick**, former Prime Minister, and on numerous nominees and associates, including corporations, a Czech bank and a Liechtenstein “anstalt”, a trust-like structure. The order communicated the following notice:

¹¹³ Not all countries have such an offence, which may be an impediment to mutual assistance. In some case it may be possible to allege the more common offence of tax fraud, assuming that offence would be covered by a bilateral mutual assistance arrangement.

PENAL NOTICE: If you, the alleged offender disobey this Order, you may be held in contempt of court and may be imprisoned, fined, or have your assets seized. Any person named above or who knows of this order and does anything which helps or permits the alleged offender to breach the terms of this order may also be held in contempt of court and may be imprisoned, fined, or have their assets seized.

94. 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 the kind of order called a Mareva injunction described in paragraph 87 of this Section if he or she is outside the geographic jurisdiction of the issuing court. Former Nigerian Governor **Alamiyeseigha** had violated his bond restrictions and fled to Nigeria when a Mareva restraining order was secured against him in the litigation described in paragraph 20 in Section 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 risked incarceration if he ever returned to the United Kingdom, it seems unlikely that Alamiyeseigha would voluntarily obey the Mareva injunction issued in his case. 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 U.K. 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 or banks and financial institutions are put on notice by private correspondence from counsel representing the plaintiff that the funds suspected to be on deposit 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 independently concluded the funds appear suspicious or has not observed all of the appropriate know-your-customer and other anti-money laundering precautions applicable to that client.

95. Article 54, paragraphs 2(a) and 2(b) specify the measures that a State Party must have available when presented with a request for freezing from a requesting State party. 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 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).

96. Freezing or seizing property pursuant to the particular type of requests contemplated by paragraph 2 (a) of Article 54 are not common actions because requests supported by freezing or seizing orders involving offences of bribery and embezzlement in the requesting state are not common. That scarcity is understandable in that it is difficult for a state whose official has been bribed or whose public property has been diverted state to order the freezing of property as the proceeds of crime before that property is located and shown to be the probable proceeds of an offence established by the Convention. However, examples of where application of this provision does function appropriately also exist. For instance, the United States has the capacity to enforce foreign confiscation judgments and requests for restraint and has done so on numerous occasions. One situation appears among the cases analyzed for the Digest in which a seizure order had been secured in the requesting state and a cooperative judicial and financial system 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.

97. 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.¹¹⁴

98. A more frequent situation is for a mutual assistance request to be made 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) 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

¹¹⁴ Paper for Seminar on the Recovery of the Proceeds of Corruption, Organization of American States, 2-5 May 2006, Miami, Florida; accessed at StAR Asset Recovery Watch database page Vladimiro Montesinos/Cayman Islands.

in a U.S. court,¹¹⁵ the **Mercator Corporation** acted as an agent for American oil companies operating in Kazakhstan. In order to secure contracts Mercator bribed high government officials, transferring funds into a number of accounts in Switzerland. Monies were paid for years into an account controlled by one high 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 was thereafter transferred into 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 had been the beneficial owner of the Orel account occupied a sufficiently high 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 a mutual assistance request (a restraint order for purposes of eventual confiscation) was made by the U.S. government to Switzerland, which froze the account controlled by the senior Kazakh official.¹¹⁶ 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.

99. 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.

The **Marcos** case is a historical example which took place before negotiation of the United Nations Convention against Corruption. Nevertheless, it illustrates the triggering events which could lead authorities to preserve property for confiscation even without receiving a mutual assistance request. In the confused 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 Marcoses be transferred to his bank in Vienna, Austria. He was told to return the following day. That same day the bank informed Swiss authorities and later that evening the Swiss Federal Council imposed an emergency freeze prohibiting all Swiss banks from transferring funds in any account identifiable with the Marcoses. 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.¹¹⁷ 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.¹¹⁸

100. The Swiss constitutional provisions requiring that a freeze be of limited duration, the lack of a criminal prosecution related to funds belonging to the Duvalier family of Haiti and the passage of a statutory time limit

¹¹⁵ United States of America v. Approximately \$84 million., No. 07-CV-3559, filed 3 May 2007, U.S. District Court for the Southern District of New York.

¹¹⁶ Amended 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; response of Swiss Confederation to UNODC request for asset recovery information.

¹¹⁷ See footnote 37.

¹¹⁸ Unofficial translation provided at the Swiss Confederation website.

caused a Swiss court to order release of funds which had been frozen from 1986 to 2010. 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 2010.¹¹⁹ The Swiss Federal Council has adopted ordinances blocking the assets of persons associated with the former regimes of Libya, Egypt, Tunisia and the Ivory Coast.¹²⁰ 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.

101. 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 freezing the remaining assets of Mobutu and his family on a legal assistance basis. 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 a constitutional provision allowing it to act to protect the national interest. In December 2006 this was extended for two 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 Swiss Minister of Foreign Affairs 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 Swiss government filed a criminal complaint the constitutional stay was extended to allow the Swiss Attorney General 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 Swiss Ambassador 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 .¹²¹

102. **Vladimiro Montesinos'** name and corrupt reputation became globally familiar 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 made a spontaneous communication to Peru requesting an investigation of the origin of the funds and inviting a request for mutual assistance. This is the procedure encouraged in Article 56 of the Convention, entitled Special cooperation. 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.¹²²

¹¹⁹ StAR Asset Recovery Watch database page on Jean Claude "Baby Doc" Duvalier/Switzerland and sources there cited.

¹²⁰ The Libya freeze ordinance based upon Article 102 of the Constitution was soon replaced by one based on a legislative act implementing U.N. sanctions, the Federal Act of 22 March 2002 on Implementation of International Sanctions (the Embargo Act).

¹²¹ 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.

¹²² See paragraph 11.

103. When a bank is put on notice by a country or private victim that funds are the proceeds of crime,¹²³ the bank must report those funds to satisfy its administrative anti-money laundering responsibilities 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 judgment 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 may have to rely upon a judicial determination to resolve to whom the funds should be paid. So, a Mareva-by-letter procedure can be looked upon as a threat in one sense but also a beneficial warning which may assist asset recovery efforts by states. Paragraph 97 in this Section contained a description of events in a Montesinos case from a speech by the Chief Justice and Mutual Assistance Authority of the Cayman Islands. Another case mentioned in those remarks was the **Codelco** matter from Chile. **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 dollars from metals brokerage firms. The Chief Justice 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 get 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.¹²⁴

104. 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 allowed the jurisdiction's financial intelligence unit to consent to a transfer which had been reported as suspicious. Hutomo Mandara Putra, also known as **Tommy Soeharto** or Suharto, was a son of the late President of Indonesia. In 1994, when in his 20s 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 such a purpose. President Soeharto 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 prison for planning to murder a judge in a corruption inquiry and related violations. In the same year Garnet Investment directed the Guernsey bank to transfer 36.5 million Euros from the accounts. The bank refused and notified the Guernsey Financial Intelligence Unit, which declined to consent to 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.

105. 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. The Court of Appeal reversed that decision. On the merits it found that Guernsey's Proceeds of Crime Act 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

¹²³ This can occur in multiple ways, one being the Mareva-by-letter technique used in civil asset recovery litigation and described in paragraph 88.

¹²⁴ See footnote 114.

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 a legitimate suspicion that funds may be the proceeds of crime is not dissipated by events over time, the FIS should not be compelled to consent to a potentially criminal transaction. The court stated that:

41. In our judgment, 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.

42. 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.¹²⁵ This opinion succeeds in preserving the prerogative of the Guernsey financial intelligence unit and leaves **Mr. Suharto** with a potential remedy, as the Court goes 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 a trial. Even should it prevail, the bank would only be entitled to remain as custodian until some further resolution.

C. Tracing the proceeds of crime

106. The effectiveness of anti-corruption investigation and recovery efforts is progressively being enhanced by more experienced and dedicated units. Some of these concentrate on freezing, seizing and confiscation of the proceeds of foreign crime found within their jurisdiction, including the offences established in the Convention. One such example is the creation of the Kleptocracy Unit within the Asset Forfeiture and Money Laundering Section of the United States Department of Justice's Criminal Division. This team, formed in 2010, is comprised of a dedicated group of prosecutors and experienced financial investigators. The team's mission has three main components: 1) identifying proceeds of kleptocracy; 2) freezing, seizing, and forfeiting those assets; and 3) disposing of the forfeited assets for the benefit of the people of the jurisdiction harmed by corruption..

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 countries have an Asset Recovery Office to facilitate international cooperation. According to the decision, each E.U. 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 the 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.

107. 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, which are sometimes liberally interpreted.

¹²⁵ Judgment, Court of Appeal of the Island of Guernsey, Chief Officer, Customs and Excise v. Garnet Investments Limited, 1 August 2011; accessed at www.opp.vic.gov.au/resources/2/7/27/e28e8048ec90208d57ad584c9c7e34chief_officer_customs_v_garnet_investments_ltd_approved_judgment_01_08_11.

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 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 six 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.¹²⁶

108. 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.

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.¹²⁷

109. A similar network exists for Southern Africa, called the Asset Recovery Inter-Agency Network of Southern Africa (ARINSA), composed of Botswana, Mauritius, Namibia, South Africa, 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, Brazil, Chile, Colombia, Costa Rica, Ecuador, Mexico, Panama, 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. This landscape of often overlapping relationships is described in a Background Paper prepared by the UNODC Secretariat for the Open-ended Intergovernmental Working Group on Asset Recovery at its meeting in Vienna, 25-26 August 2011.¹²⁸ Those overlapping relationships include the specific asset recovery

¹²⁶ 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.

¹²⁷ Albania, 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, Macedonia, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, 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).

¹²⁸ Toward an effective asset recovery regime: networks, UN document CAC/COSP/WG.2/2011/3

focal points to be nominated in addition to the Central Authorities designated for formal cooperation by States Parties under Article 46 (13) to the Convention, the StAR—Interpol Focal Point Initiative, 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.

110. The cases surveyed in Section II of the 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 few 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 non-governmental investigative, auditing and legal specialists 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 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.”¹²⁹ The foreign expert organizations in the Pakistan case are not specified. Depending on the circumstances, foreign law enforcement or intelligence agencies, FIUs, regulatory agencies with power over securities markets, private investigative services, forensic accountants or law firms may be able to help locate and freeze assets.

111. 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 upon the testimony of an expert from a forensic service unit of another global auditing firm to analyze 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.¹³⁰

112. As mentioned in paragraph 60, in 2009 the Attorney General of Antigua and Barbuda announced recovery of 12 million dollars 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 he negotiated and which was approved by then government required monthly payments of 403,334 dollars. Of that less than 200,000 dollars went to reduce the debt. 133,836 dollars were his monthly fee for settling another infrastructure debt, 56,000 dollars his monthly costs and 13,000 dollars were 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 12 million dollars was the

¹²⁹ Case study on Mansoor ul-Haq, accessed at StAR Asset Recovery Watch database page on Mansoor ul Haq.

¹³⁰ United Nations Handbook on Practical Measures for Prosecutors and Investigators, UN Office on Drugs and Crime, Vienna, September, 2004

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 7 million dollars in illegal payments to public officials and the arrests and prosecutions of persons involved in an airport construction bid-manipulation and bribery case.¹³¹

113. The Government of Nigeria hired a private Swiss attorney to pursue unlawful proceeds in the possession of the **Abacha** family and associates, who 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 2 billion dollars were frozen in ten jurisdictions, of which 1.2 billion had already been recovered by Nigeria at the time of the publication in 2008¹³². Private counsels representing Nigeria were successful in securing recoveries in multiple cases in the U.K. civil suits against former Nigerian state governors **Alamiyesiegha and Dariye**.

114. In the **Montesinos** investigations 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 but 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 country and about the offences generating the proceeds in those accounts and investments, thus permitting both their identification and tracing. The Swiss Federal Supreme Court also issued a helpful ruling on the degree of evidentiary specificity necessary to go forward with a mutual assistance request. The court decided that Swiss authorities could properly provide assistance based upon 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 involved in purchasing defence equipment from Russia to permit Swiss authorities to evaluate the request as conforming to treaty provisions.¹³³

D. Summary

115. To alleviate the burden of identification of assets, a number of States and the European Union have adopted recent legislation that that under specified circumstances permits freezing of 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.

¹³¹ StAR Asset Recovery Watch database page on Bruce Rappaport; 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; 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.

¹³² Mark Pieth (editor), Basel Institute on Governance, Recovering Stolen Assets, publisher Peter Lang, Bern, article by Enrico Monfrini, The Abacha Case (2008).

¹³³ 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.

Such laws, however, require domestic parties to perform the task of identifying those assets for freezing. Allowing non-governmental organisations to request the initiation of a criminal investigation is an option in some civil law countries under conditions that vary between countries and is being pursued with some degree of success. In common law countries both State Parties bringing a civil action and criminal authorities can secure *ex parte* orders to compel a third party to disclose information leading to the identification of the holder or assets.

116. 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 enable a freezing order to be secured it may be desirable to put the relevant financial institutions on notice. They will have their own concerns about civil and criminal liability if they allow the assets to escape knowing of an order directed to the beneficial or nominal owner and may take independent action to protect their interests. The proceeds of bribery and embezzlement in the private sector can also be recovered using provisions of the Conventions. The provisions for freezing by a requested State pursuant to Article 54.2 (a) are little used because few confiscation orders in requested States are used as the basis for mutual assistance requests, perhaps because of difficulty in securing such orders before tracing has been accomplished. Actions to preserve property even without a formal mutual assistance request are not uncommon based upon anti-money laundering precautions.

117. 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. In a country emerging from a corrupt situation, 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 their tracing to specific offences by their beneficial owner.

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

A. Article 53. Measures for direct recovery of property

118. Once stolen assets¹³⁴ have been detected and, whenever possible, frozen or seized through the procedures and mechanisms described in Sections III and IV of this Digest, means must be found to recover those assets from their illegal possessors. Article 53, Measures for direct recovery of property, is one of the key provisions of the United Nations Convention against Corruption. 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 offense in a confiscation proceeding.

¹³⁴ The term "stolen assets" as used here is not meant in a technical legal sense but rather as a generic reference to any of the financial violations established in the United Nations Convention against Corruption.

B. Recovery under Article 53 (a) by a civil action

119. Article 53 of the Convention is entitled Measures for direct recovery of property. It provides that:

“Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary 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;”

The language of Article 53 speaks of establishing title to or ownership of property acquired through a Convention offence. 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 judgments 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.

120. 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 against Corruption. 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 in 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 46 million dollars and other for like amounts. One of the law firms involved was found liable for 11 million dollars but that award was reversed on appeal. Another lawyer and his partnership were found liable for approximately three million dollars 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”.¹³⁵ Two of the Zambian defendants who had been found liable, one for 26 million dollars and the other for 9 million dollars, sought relief from the European Court of Human Rights, alleging that the U.K. 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.¹³⁶

121. 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 500,000 dollars did not succeed, the U.K. civil action allowed Zambia to establish its right as a judgment creditor to recover 46 million dollars 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 50 million dollars were ordered against 3 prominent Zambians and lesser amounts against other defendants. The appeals of London solicitors Bimal Thaker and his father were described by the Court of Appeal as having been “compromised”, which may suggest a monetary compromise of the approximately three million pounds in damages awarded against them. In addition, the trial court had ordered funds and property returned during the litigation when facts relating to its ownership were

¹³⁵ [2008] EWCA Civ 1007, Case Nos: 2007 / 1146, 1708, 1709, 1751, 1752, **Court** of Appeal (Civil Division), 31 July 2008, accessed at StAR Asset Recovery Watch database page on Frederick Jacob Titus Chiluba.

¹³⁶ Decision 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.

uncontested. The amount of actual recoveries realized by the Zambian government in the United Kingdom and elsewhere is unknown, but was substantial, including unspecified amounts recovered from Belgian defendants.

122. It appears, however, that recovery efforts in Zambia encountered difficulties. The U.K. trial court judgment was dated 5 May 2007¹³⁷. An order for registration in behalf of Zambia as a judgment 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.¹³⁸ 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 U.K. judgment could be enforced only by a common law action in Zambia, not by registration of the judgment. The judge further ruled that the attempted registration did not qualify as a common law action founded on the judgment. Frederick Chiluba died in June 2011.

123. Another case is the lawsuit of the Ukrainian government agency against an American firm previously described in paragraph 51 in Section II. A Ukrainian state entity secured a 60 million dollar default judgment against vaccine supplier **Olden Group** in a U.S. 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 judgment was entered. Finding and securing title to assets to satisfy the judgment is likely to be a more difficult task than securing the judgment, as reflected by the report of the investigative firms hired by the Ministry of Finance of the Ukrainian Government to examine this and other purchasing contracts.¹³⁹ Even though bank accounts associated with the transactions have been identified there is no assurance that assets sufficient to respond to the judgment can be located or recovered. The practical consequence of weaknesses in transparency in business formation practices and regulation by the three concerned jurisdictions renders the beneficial owners of Olden Group LLC not only unknown but also virtually untraceable, and may make attempts to collect a 60 million dollar judgment futile.

124. A more successful outcome can be registered in the **Kuwaiti Investment Organization (KIO)** case. A bankruptcy judgment of over one billion USD of liability resulted in partial recovery totalling approximately 550 million USD, plus compensation orders against banks and accounting firms.¹⁴⁰ 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 USD 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

¹³⁷ [2007] EWHC 952 (Ch), Case No: HC04C03129, In the High Court of Justice, Chancery Division, Judgment in Attorney General of Zambia v. Meer, Care & Desai, 4 May 2007. 05/2007, accessed at StAR Asset Recovery Watch database page on Frederick Jacob Titus Chiluba.

¹³⁸ 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.

¹³⁹ Report of Investigative Findings, October 14, 2010 by Trout, Cacheris PLLC; Akin, Gump, Strauss, Hower & Feld, LLP; Kroll Inc, accessed at StAR Asset Recovery Watch database page on Ukrainian Government/Ukrvaksina v. Olden Group, LLC and Interfarm LLC.

¹⁴⁰ Stolen Asset Recovery- A Good Practices Guide for Non-Conviction Based Asset Forfeiture, Stolen Asset Recovery Initiative (StAR), World Bank/UNODC (2009).

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.

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 USD 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 USD 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 \$30 million – in partial satisfaction of the English judgment.¹⁴¹

125. Two cases that have been mentioned in other sections of this Digest involve former governors of Nigerian states, **Joshua Dariye** and **Diepreye Alamiyeigha**. Both were successfully sued by the Federal Republic of Nigeria in the United Kingdom. Then-**Governor Dariye** of Plateau State was arrested in London in September 2004 for money laundering. 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 injunction¹⁴² 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 U.K. court ordered transfer of the title interest in the real property to Nigeria and on 7 June 2007 the bank funds that were subject to the order were ordered to be paid to Nigeria.¹⁴³ 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 U.K. proceedings initiated by the government of Nigeria. According to a Case Chronology on Dariye¹⁴⁴ 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. 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.¹⁴⁵ 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 more efficient

¹⁴¹ A Paper for Seminar on the Recovery of the Proceeds of Corruption, presented at the Seminar on Asset Forfeiture and Money Laundering for Member States of the Organization of American States, 2-5 May 2006, Miami, Florida; accessed at the StAR Asset Recovery Watch database page on Vladimiro Montesinos/Cayman Islands.

¹⁴² An 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. See paragraph 150.

¹⁴³ International Thief, A Report by Global Witness, Section 3 Joshua Dariye (2010).

¹⁴⁴ Basel Institute on Governance Asset Recovery Knowledge Centre

¹⁴⁵ www.kemisearch.com, Dariye Loot: Plateau Demands 1.17 million pounds from AGF, 10 July 2011.

than direct recovery via civil litigation. The latter option may also involve additional legal fees associated with the relevant proceedings.

126. The **Alamieyeseigha** civil action produced recoveries for Nigeria with less apparent controversy, perhaps because unlike Dariye, he was impeached soon after his arrest and successfully prosecuted and convicted by Nigerian authorities. Case Study 3 in the publication [The Puppet Masters and a case study found on the StAR Asset Recovery website](#) deal with the civil litigation to recover assets from Governor Alamieyeseigha of Bayelsa state. A principal feature of that litigation was the use of circumstantial evidence to prove the unlawful source of funds. According to a case study by the Stolen Asset Recovery (StAR) Initiative, the July 2008 judgment by a United Kingdom court against Alamieyeseigha and the companies holding his assets led to the confiscation of assets in the United Kingdom, Cyprus and Denmark. The evidence presented to persuade the U.K. 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 million pounds in cash found by the police without any legitimate explanation for the need to hold such a sum of cash; and the absence of any plausible, legitimate means to acquire assets outside Nigerian on such a scale while properly discharging his obligation not to hold any other office or paid employment while serving as a State Governor.¹⁴⁶ Summary judgment in the London proceedings and recoveries in other jurisdictions were possible after the Governor’s guilty plea in Nigeria to making false financial declarations and his companies’ guilty pleas to money laundering offences. Alamieyeseigha’s conviction in Nigeria resulted in a domestic order for confiscation of 1 billion naira (approximately 6 million dollars) and recoveries totalled nearly 18 million dollars in London, Cyprus and Denmark based upon the U.K. non-conviction based confiscation. The United States has also recovered illicitly derived assets originating from Alamieyeseigha’s corrupt activities.

127. 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 deutschemarks. 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 480 million dollars.¹⁴⁷ A civil action in Canada against the estate of former Trinidad and Tobago official **John O’Halloran** resulting in a judgment for 7.65 million Canadian dollars.¹⁴⁸

128. 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 mentioned previously in paragraph 103 in Section 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 on contrary to Codelco’s interest and involving employees of two of the world’s largest metals brokerage firms. He had accepted bribes in some

¹⁴⁶ [Federal Republic of Nigeria v. Santolina Investment Corporation and others](#), Court of Appeal, 2007 EWHC 3053 (QB), decided 3 December 2007.

¹⁴⁷ Response of the Swiss Confederation to UNODC Secretariat request for asset recovery information.

¹⁴⁸ StAR Asset Recovery Watch database page on John O’Halloran/Canada.

millions of dollars for having entered Codelco into metals futures contracts which were very favourable to the co-conspirators but highly unfavourable to Codelco. When prosecuted in Chile, he was convicted of fraud, imprisoned and ordered to pay damages to Codelco. Codelco brought proceedings in a number of jurisdictions including the Cayman Islands, to recover the 180 million dollars in damages owed to it.

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.

129. 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 upon in the judicial opinion in the Codelco judgment.¹⁴⁹ 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 that Reid was free to sell or otherwise dispose of the property until a judgment was secured against him in domestic courts encumbering the title to the properties. The effect of that ruling was suspended during an appeal to the Privy Council of the U.K. House of Lords, which then acted as the ultimate interpreter of the law in the case. The Privy Council Judicial Commission held that having proved an arguable case that the properties were purchased with the proceeds of bribery, Hong Kong was entitled to have Reid treated as though he were holding the property in trust for Hong Kong until a final determination of its claim that the properties were purchased with bribe proceeds. The judgment of the Privy Council provides a comprehensive explanation of the reasoning supporting the “constructive trust” theory of recovery and its consequences. It is, therefore, particularly significant for the primarily common law countries of the Commonwealth of Nations.¹⁵⁰

When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. The legal estate in freehold property conveyed to the false fiduciary by way of bribe vests in him. Equity however which acts *in personam* insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. In the present case, as soon as Mr. Reid received a bribe in breach of the duties he owed to the Government of Hong Kong, he became a debtor in equity to the Crown for the amount of that bribe. So

¹⁴⁹ Deutsch Sudamerikanische Bank 1996 CILR judgment accessed at StAR Asset Recovery Watch database page on Codelco/Juan Pablo Davila/Cayman Islands.

¹⁵⁰ Privy 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.

much is admitted. But if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred *instantly* to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured. Two objections have been raised to this analysis. First it is said that if the fiduciary is in equity a debtor to the person injured, he cannot also be a trustee of the bribe. But there is no reason why equity should not provide two remedies, so long as they do not result in double recovery. If the property representing the bribe exceeds the original bribe in value, the fiduciary cannot retain the benefit of the increase in value which he obtained solely as a result of his breach of duty. Secondly, it is said that if the false fiduciary holds property representing the bribe in trust for the person injured, and if the false fiduciary is or becomes insolvent, the unsecured creditors of the false fiduciary will be deprived of their right to share in the proceeds of that property. But the unsecured creditors cannot be in a better position than their debtor. The authorities show that property acquired by a trustee innocently but in breach of trust and the property from time to time representing the same belong in equity to the *cestui que* trust and not to the trustee personally whether he is solvent or insolvent. Property acquired by a trustee as a result of a criminal breach of trust and the property from time to time representing the same must also belong in equity to his *cestui que* trust and not to the trustee whether he is solvent or insolvent.

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 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.

C. Recovery under Article 53 (b) by an order for compensation or damages

130. Article 53 (a) dealt with civil actions for direct recovery of property, although the only recovery was sometimes a money judgment and sometimes only an unsatisfied money judgment. Article 53 (b) requires a State Party to:

(b) Take such measures as may be necessary 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.

131. At least three other cases of orders to make reparation or restitution payments can be found in U.K. cases. Steel and bridge construction firm **Mabey and Johnson** disclosed to the U.K. 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 pounds to Ghana, 618,000 pounds to Iraq and 139,000 pounds to Jamaica, together with confiscation of 1.1 million pounds.¹⁵¹ **Ananias Tumukunde**, Science and Technology Advisor to the President of Uganda, pleaded guilty in the United Kingdom

¹⁵¹ 25 September 2009, [Mabey and Johnson Ltd Sentencing](#), Serious Fraud Office media release, accessed at the StAR Asset Recovery Watch database page on Mabey and Johnson/Jamaica.

to laundering the proceeds of a corrupt arrangement with a provider of security services and equipment. For a contract worth 210,000 pounds, Tumukunde and a military associate received 83,000 pounds through accounts in London. In connection with his guilty plea 35 thousand pounds (or 117 million Ugandan shillings) were subsequently returned to Uganda by the United Kingdom.¹⁵² **Joyce Oyebanjo**, whose case was described in paragraph 24, was convicted in London of laundering the proceeds from Governor **Joshua Dariye's** unlawful diversions of resources from Nigeria's Plateau state. She was ordered to surrender approximately 200,000 pounds of unlawful proceeds from Dariye's crimes under her control, to be returned to Nigeria as a result of her conviction for money laundering. The funds were to be returned within one year in order to avoid an additional 30 months of imprisonment after service of an initial three year period.¹⁵³ At the time of sentencing U.K. officials expressly stated that the funds recovered were to be repatriated in compliance with their obligations under the United Nations Convention against Corruption.

132. An award of 70 million dollars 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**.¹⁵⁴ U.S. 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 2.2 million dollars 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. U.S. authorities credited Haitian authorities with actively supporting the investigation and prosecution.¹⁵⁵ Juan Diaz, an intermediary in the same scheme, was ordered to pay restitution of approximately 74,000¹⁵⁶ in a case involving bribery and other offences related to construction of an airport in Trinidad and Tobago, three co-defendants of fugitive **Steve Ferguson**, former head of Trinidad and Tobago's National Gas Company, were ordered by a U.S. court to make restitution to the government of Trinidad and Tobago in the amount of four million, two million and 100,000 dollars respectively. The court records reflect active participation by counsel on behalf of that government to urge its claim for 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 uncertainty if it would be revived. The refusal of extradition was not appealed.¹⁵⁷ **David Chalmers** and his **Bayoil** companies pleaded guilty to wire fraud in the

¹⁵² www.publications.parliament.cm/pa/co201213/cmselect/cmintdev/130/130we14.html; NewVision, Ugandan daily journal, 27 August 2008, *Britain returns bribe paid to Ugandan officials*, www.newvision.co.ug/D/8/12/663826.

¹⁵³ Basel 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.

¹⁵⁴ Response of the Swiss Confederation to UNODC Secretariat request for asset recovery information,

¹⁵⁵ Box 9.5 in the Asset Recovery Handbook- A Guide for Practitioners, a StAR Asset Recovery initiative publication, World Bank/UNODC, 2011; amended judgment U.S v. Carlos Rodriguez and others, No. 1-09-21010, U.S. District Court, Southern District of Florida, 3 November 2011.

¹⁵⁶ U.S. Department of Justice press release, Florida Businessman sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme, 30 July 2010., www.justice.gov/opa/pr/2010/July/10-cr-883.html.

¹⁵⁷ StAR Asset Recovery Watch database page on Steve Ferguson/Piarco airport case /United States; AG won't Appeal Ish, Steve Case. Trinidad and Tobago News Blog, 20 December 2011, accessed at www.trinidadandtobagonews.com/blog?p=5974 and Major Hurdles in pursuing Ish, Steve Case. Trinidad and Tobago News Blog, 24 December 2011, accessed at www.trinidadandtobagonews.com/blog?tag=steve same site

United States in a kick-back scheme related to the UN Oil-for-Food program in Iraq, Chalmers and the companies were ordered to pay restitution of 9 million dollars to the Development Fund of Iraq for the benefit of the Iraqi people.¹⁵⁸

133. Paragraph 12 in Section I provided an example of an Article 16 bribery of an official of a public international organization involving **Sanjaya Bahel**, the former Chief of the Commodity Procurement Section of the U.N. Procurement Division. As a result of a U.S. fraud and bribery conviction he was ordered to pay 900,000 dollars 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 100,000 dollars and a three bedroom apartment in the Dag Hammerskjold 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 one million dollars restitution. The U.S. Mandatory Victims Restitution Act,¹⁵⁹ requires a convicted defendant to reimburse a victim for “necessary ”other expense incurred during the participation in the investigation or prosecution of the offence or attendance at proceedings.¹⁶⁰ The Court ordered restitution to the United Nations in the amount of 846,000 dollars for legal fees and 86,000 dollars in salary paid to him for a period of time he was under suspension. Bahel’s argument that fees for independent lawyers were unnecessary because the U.N. 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 honest services due from an employee should be valued in ordering 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 Nation lost in whole or in part due to his having worked 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 what that value may have been. There is no question that he was of no value during his period of suspension prior to being separated, and his criminal conduct was the cause of that suspension. Consequently, the trial court’s order requiring restitution for the salary paid during that period of suspension was the indisputable minimum salary restitution that might have been ordered.¹⁶¹

134. The measures that a State Party is required by Article 53(b) to take to permit 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. In criminal proceedings in common law countries the legal authority to award restitution to an injured party, including a State Party to the Convention, 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. A number of civil law systems may provide for the intervention of a legal or natural person that has been harmed by the type of offences established by the United Nations Convention against Corruption in the criminal process. The cases surveyed in this Digest include the cases from Switzerland, France and Spain mentioned in paragraph

¹⁵⁸ Restitution 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 (USA) Inc., and Bayoil Supply and Trading, Limited (UN Oil for Food).

¹⁵⁹ Section 3663 A (b)(f) of Title 18 of the United States Code.

¹⁶⁰ 18 USC Section 3663(b)(4) – Order of Restitution.

¹⁶¹ United States v. Bahel, No. 08-3327-cr, 2nd Circuit Court of Appeal (2011).

which allowed the intervention of so-called civil parties to initiate and actively participate in the criminal process.

135. The cases initiated by the filing of criminal complaints by non-government organizations accompanied by requests to join in the prosecution as civil parties against the **Bongo, Nguesso** and **Obiang** families and mentioned in paragraph 86 have 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 declared a civil party 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. Through participation in the criminal process Nigeria gained earlier access to Swiss evidentiary materials 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 in paragraph 147. The disparity between 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 the funds were of illicit origin and confiscation. 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.”

D. Recovery under Article 53 (c) by a claim as a legitimate owner in a confiscation proceeding

136. Article 53 (c) requires that a State Party contemplating confiscation enable their 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. States Parties to the Convention must:

Take such measures as may be necessary to permits its courts or competent authorities, when having to decide on confiscation, to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with the Convention. This provision is self-explanatory. Virtually all modern confiscation statutes have language referring to 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 claim 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 formal or informal government-to-government channels rather than engage counsel and appear as a private party in public litigation in the courts of another country. A number of U.K. cases reflect return of cash and other confiscated proceeds to other states, such as Nigeria, after confiscation to the United Kingdom under its Proceeds of Crime Act. Representative cases include the Dariye, Alamieyeseigha and Oyebanjo cases¹⁶², a pattern which is apparently also being followed in the Ibori case.¹⁶³ It is not clear from the available records whether Nigeria formally intervened as a third party claimant in any of the

¹⁶² See paragraphs 17, 20 and 24.

¹⁶³ See paragraph 23.

judicial proceedings, but there clearly seem to have been informal law enforcement requests or formal mutual legal assistance requests with respect to these funds asserting Nigeria's claim as a legitimate owner of the proceeds being confiscated. It can also be noted that in other instances the U.S. has confiscated and returned more \$1450 million of corruption proceeds to foreign jurisdictions harmed by such conduct. Significant examples include the confiscation and repatriation of corruption proceeds worth more than USD \$20 million to Peru, such proceeds connected to the criminal conduct of former Peruvian intelligence chief Vladimiro Montesinos and his associates. Over \$117 million USD constituting the proceeds of corruption was confiscated by the U.S. and repatriated to Italy. Similarly, more than USD \$2.7 million connected to the criminal conduct of Nicaraguan Tax and Customs Minister Byron Jerez was confiscated by the U.S. and returned to Nicaragua.

137. A U.S. case also reflects reliance upon post-confiscation release of funds under the inter-governmental procedure referred to as remission, rather than by intervention of the State Party as a private claimant in the confiscation proceeding before a court. Peru received 750,000 dollars described in the **Huerta** case mentioned in paragraph 15 as an example of the proceeds resulting from an embezzlement offence established by Article 17 of the Convention. In August 2004, the Peruvian government had requested assistance in identifying former **General Rodriguez Huerta's** assets in the United States. Agents in Miami initiated an investigation of Huerta, a Montesinos associate who was a trustee of a government pension fund. In December 2004, the U.S. government filed a civil complaint and seized three bank accounts which were subsequently confiscated. Peru submitted a petition for remission of the confiscated funds and in 2009 750,000 dollars were returned to the Peruvian government and the Peruvian military and police pension fund, the victim of the fraud, based upon a decision by the U.S. Department of Justice.¹⁶⁴ In sentencing Huerta and other trustees a Peruvian court ordered them to repay the 2,270,400 dollars that were diverted by overpriced purchases of buildings and real estate.¹⁶⁵ Over 20 million dollars confiscated from Montesinos money launderer **Alfredo Venero Garrido** were transferred to Peru through an international "sharing" procedure.¹⁶⁶

E. Recovery under Article 54.1 (a) by execution of a foreign confiscation order

138. Article 54, paragraph 2 deals with legal assistance requests for freezing, seizing or preserving property for confiscation in different circumstances in three subparagraphs. Cases involving those types of requests were discussed in Section IV of the Digest on Identifying, freezing or seizing and tracing of assets and that discussion need not be repeated in this Section. Article 54, paragraph 1, addresses three situations, all beginning with the making of a mutual assistance request for confiscation, which are dealt with in this subsection.

139. Article 54.1, entitled "Mechanisms for recovery of property through international cooperation in confiscation", provides that:

Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

¹⁶⁴ United States Transfers More Than \$750,000 in Forfeited Funds to Government of Peru, U.S. Department of Justice news release, 2 September 2009, accessed at StAR Asset Recovery Watch database page on Victor Alberto Venero Garrido.

¹⁶⁵ LaRepublica de Peru, 6 July 2012, **Envían a prisión a ex directivos de la Caja de Pensión Militar Policial; resposne of Peru to UNODC Secretariat request for asset recovery information.**

¹⁶⁶ Resource Materials Series 65, Repatriation Obligations Under the United Nations Convention against Corruption, Linda M. Samuel accessed at StAR Asset Recovery Watch database page on Vladimiro Montesinos/Marco Antonio Rodriguez Huerta.

Article 54's paragraph 1 (a) continues:

Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

The legal systems of some states require that provision of mutual assistance involving coercive measures like confiscation can be provided only pursuant to a treaty relationship with procedural formalities. The procedure is now becoming more common and expeditious. **Alexander Yakovlev's** case was cited in paragraph 12 as an example of bribery at 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 U.S. judge ordered confiscation of 900,000 dollars 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 judgment was signed by the U.S. 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 of confiscation and transmitted the proceeds so that their receipt could be reported to the court and the case matter closed within a 45 day period.

140. The Interpretative Note to Paragraph 54.1(a) found in the *Travaux Préparatoires* of the Negotiations for the Elaboration of the United Nations Convention against Corruption states that:

Subparagraph (a)

(a) 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.

The possibility of enforcing a monetary confiscation judgment 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.

141. At least two references in the StAR Initiative publication, Stolen Asset Recovery- A Good Practices Guide for Non-Conviction Based Asset Forfeiture, touch on this issue. Key Concept 34 is stated to be that:

Countries should have the authority to enforce foreign forfeiture orders and should enact legislation that maximizes the enforceability of the judgments in foreign jurisdictions.

The text explaining that concept states:

When drafting a law to permit the enforcement of foreign forfeiture judgments, it is important to allow for the enforcement of foreign money judgments because not all forfeiture judgments are directed against specific property. If criminal assets have been spent or cannot be located, some jurisdictions allow for the entry of judgments against substitute assets or a money judgment (see Key Concept 6).

Key Concept 6 reads in pertinent part as follows:

The broadest category of assets should be subject to forfeiture.

NCB (non-conviction based) forfeiture should be drafted so as to reach all assets of value, including proceeds of crime and property traceable thereto, instrumentalities of crime, fungible property, commingled goods and substitute assets (that is, equivalent goods) . . .

* * *

Substitute Assets

Given that criminal enterprises, especially covert ones, are able to convert specifically forfeitable assets to other assets by the time a forfeiture order is obtained, some jurisdictions have enacted laws providing for the forfeiture of substitute assets. This concept permits a government to forfeit untainted assets of an equivalent value to those assets that cannot be recovered because of some action by the violator.

142. Another reference in that same publication provides another perspective on the utility of what is often called value-based confiscation. An article entitled Good Practices in Non-Conviction Based Forfeiture: A Perspective from Switzerland by an experienced Swiss magistrate concludes that executing a money judgment on substitute assets would not be an easy process under Swiss procedure.

Asset Return Based on a Money Value Judgment

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 exequated, the requesting state could then follow the usual procedure for enforcement of a judgment (outlined above).

It thus seems possible that it would be easier to secure a confiscation order for a money value judgment or for a substitute asset confiscation order in a common law jurisdiction, where they seem to be more 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 should be prepared to collect the judgement as a judgment debt like an ordinary creditor in a civil action.

143. A solution to the difficulties of collecting money value judgements may be facilitated by a bilateral agreement. The Mutual Assistance Treaty between the People’s Republic of China and Australia quoted at paragraph 175 in Section VI, Return and disposal of assets, 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.

The provisions of the law of the Requested State will still apply to transfers to the Requested State, but value-based confiscations enjoy the same legal status under the treaty as any other confiscation.

144. Another indicator of the difficulty of international enforcement of confiscation orders is found in the summary judgment order in the United Kingdom against former governor **Alamiyeseigha**. Despite the criminal confiscation of the same property that was the subject of the civil action in the U.K, counsel for Nigeria argued that it was still necessary to have a judgment against those assets. After hearing his explanation the court stated:

He explained in some detail the procedures which would have to be gone through, some administrative and some judicial, before the orders of the Nigerian court could become effective orders in this jurisdiction in relation to monies and properties here. 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. As was noted in paragraph 120 in the reference to the **Chiluba** case above, 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.

F. Recovery under Art. 54.1 (b) by confiscation for money laundering or other domestic offence

145. 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;

The phrase “adjudication of an offence of money-laundering or such other offence” and the contrast with the following paragraph 54.1(c) applicable to “confiscation of such property without a criminal conviction” confines the scope of paragraph 54.1 (b) confiscations to those involving the criminal conviction of an individual. 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 40 million dollars in illegal proceeds from the sale were confiscated.¹⁶⁷ This was accomplished despite efforts by a Nigerian court and Attorney General to persuade 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 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 and stating that “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 had been returned to a special account in Nigeria.¹⁶⁸ 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 350 million dollars in funds frozen in Luxembourg and the Bahamas. The jurisdictional nexus, or basis, for that prosecution 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.¹⁶⁹

146. **James Ibori**, whose case was mentioned in paragraph 23 as an example of a money laundering offence established by the Convention, 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 money laundering charges in the United Kingdom. In April 2012 he was sentenced to 13 years imprisonment, with confiscation hearings to be held in June 2013. 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 pounds; a property in Shaftesbury, Dorset, for 311,000 pounds; a 3.2 million pound mansion in Sandton, near Johannesburg, South

¹⁶⁷ Court of Appeals, Royal Court of Jersey in the case of Bhojwani v. Attorney General, Judgment upholding conviction and sentence, 10 February 2011.

¹⁶⁸ Odili.net/news/source/2011/sep/11/838.html

¹⁶⁹ See 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.

Africa; a fleet of armoured Range Rovers valued at 600,000 pounds; a Bentley costing 120,000 pounds and a Mercedes Maybach purchased for 407,000 euro that was shipped direct to his mansion in South Africa.¹⁷⁰ In May 2012, pursuant to a Mutual Assistance request from the United Kingdom, United States authorities obtained judicial enforcement of the U.K. criminal court restraining order against all of Ibori's assets, which had been found to include a residence purchased for 1.8 million dollars in Houston, Texas.¹⁷¹

147. The effectiveness of any confiscation procedure depends to a great extent upon the evidentiary mechanisms with which it is implemented. There are certain examples of such mechanism 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 organization shall be presumed to be subject to the power of disposal of the organisation until proved otherwise. The relevant provision of the **Swiss Penal Code** is **Article 72**:

“Forfeiture of assets of a criminal organisation

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.”

148. 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, which is to 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, 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.

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.

G. Recovery under Article 54.1 (c) by non-conviction based confiscation

149. Article 54.1(c) requires States Parties to:

¹⁷⁰ ThisDay Live, Nigerian news website, 10 May 2012, www.thisdaylive.com, BBC News Africa, 17 April 2012, Former Nigeria governor James Ibori jailed for 13 years, www.bbc.co.uk/news/world-africa-17739388.

¹⁷¹ 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/.

Consider taking such measures as may be necessary to allow confiscation of such property 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.

This type of proceeding is described at length in a Stolen Asset Recovery Initiative publication entitled [A Good Practices Guide for Non-Conviction Based Asset Forfeiture \(2009\)](#). Box 6 in that publication lists 18 jurisdictions with non-conviction based asset confiscation laws as of the date of the publication in 2009. The non-conviction based cash confiscation cases of Nigerian Governors **Dariye** of Plateau State and **Alamieyeseigha** of Bayelsa State were introduced in Section I, paragraphs 17 and 20 of this Digest. The cases were separately initiated by arrests on suspicion of money laundering by U. K. Police. After posting bail for their future appearance both of the governors fled the jurisdiction, returning to Nigeria where each enjoyed official immunity from prosecution while in office. In both cases the cash was confiscated by U.K. authorities. That country's proceeds of crime/money laundering laws permit summary proceedings by a lower court magistrate for the confiscation of cash and other 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 250,000 dollars and Nigeria again secured recovery as a victim of unlawful diversion.¹⁷² In the Alamieyeseigha case 1.5 million dollars were seized from his London residence in September 2005 and in May 2006 the judicial order of confiscation was entered, followed by return of the funds in July 2006 at the request of Nigeria as a victim of diversion of government resources.¹⁷³ These proceedings were independent of the civil suits brought by Nigeria against Dariye and Alamieyeseigha. In addition, Alamieyeseigha's real estate property in South Africa was confiscated in a civil confiscation proceeding and the proceeds returned to Nigeria in 2007.¹⁷⁴

150. 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 was acquitted in the United States. Those results did not prevent the non-conviction based confiscation of approximately 50 million dollars of their assets. 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. A complaint for non-conviction confiscation requires proof by a preponderance of the evidence that the assets in question were the proceeds of crime. That is a lesser standard 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.

151. An example of non-conviction based confiscation involved the proceeds of judicial bribery from Italian nationals **Munari and Rovelli**, based upon their laundering of the proceeds of judicial bribery. The bribery of a judge in Italy in a case involving an investment dispute resulted in the Rovelli family laundering millions of dollars in unlawful proceeds with the assistance of financial advisor Munari. A mutual legal assistance request from Italy resulted in tracing the funds and non-conviction confiscation to the United States of 122 million dollars in four investment and bank accounts. The funds were subsequently returned to Italy for the benefit of the victims based upon their petitions for remission.¹⁷⁵

¹⁷² BBC News Front Page, [UK targets Nigeria's stolen loot](#), 27 September 2007.

¹⁷³ [London Police return Alamieyeseigha's 1 million pound loot](#), allAfrica.com, Daily Champion, Nigeria 6 July 2006, www.allafrica.co/stories/200607070098.html.

¹⁷⁴ Response of South Africa to UNODC to Secretariat request for asset recovery information Diepreye Alamieyeseigha, Case study by Edwards Angell Palmer & Dodge, Recovering stolen assets, a case study, IBA Conference Paris, 24-25 April 2008.

¹⁷⁵ StAR Asset Recovery Watch database page on Munari and Rovelli/United States.

152. 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:

Article 5, 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 (as cited in paragraph 148 above) facilitates the recognition of the nature of frozen assets as the proceeds of crime by providing a presumption of illicit origin.¹⁷⁶

H. Swiss mechanisms for recovery by the return of funds when evidence of criminal provenance is clear

153. A procedure that may not fit comfortably within any of the categories of direct recovery or confiscation of proceeds enumerated in the Convention is the procedure decided upon by the Swiss Federal Court to grant restitution under mutual assistance requests to return the **Marcos** funds to the Republic of the Philippines¹⁷⁷, to return the Abacha funds to the Federal Republic of Nigeria¹⁷⁸ and to return the Montesinos and de Bari Hermoza Rios funds to Peru.¹⁷⁹ The Swiss court decision in the Marcos case resulted in an anticipatory return of 684 million dollars to escrow accounts in a Philippine bank.¹⁸⁰ 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.¹⁸¹ 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

¹⁷⁶ Unofficial translation, website of the Swiss Confederation.

¹⁷⁷ Unofficial translation, Decision of the Swiss Federal Court of 10 December 1997, Federal Office for Police Affairs v. Aguamina Corporation, No.123II 595, accessed at Basel Institute of Governance Asset Recovery Knowledge Centre, Judgments of the Swiss Federal Supreme Court in the case of Ferdinand Marcos.

¹⁷⁸ Decision of the Federal Court in Mohammed Sani Abacha and others v. Federal Office of Justice, 7 February 2005, No. 1A.215/2004, accessed at www.icc.ccs.org/home/resourcews/118-leading-cases/697-abacha-case, unofficial translation.

¹⁷⁹ See footnote 14.

¹⁸⁰ Response of Confederation of Switzerland to Secretariat request for asset recovery information.

¹⁸¹ That law is variously referred to by its acronym in English, IMAC for International Mutual Assistance in Criminal Matters and as the EIMP, its acronym in French Loi fédéraleloi federal sur l'Entraide Internationale en Matière PénaleMaterie Penale.

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 restitute the monies seized must be taken in the Philippines where the offences were committed.¹⁸²

154. Final recovery of those funds by the Philippine Treasury did not take place until January 2004 after a final judgment on ownership of the assets was issued by the Philippine Supreme Court in July 2003.¹⁸³ 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 beneficial way.

155. The European Union Convention on Mutual Assistance in Criminal Matters contains a similar 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

Restitution

1. 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.

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

¹⁸² See sources listed in footnote 18 and 37.

¹⁸³ Republic v. Sandiganbayan, No. 152154, decided 15 July 2003, Supreme Court of the Philippine Republic.

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.

156. 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 Sani 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, quoted in paragraph 147, 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 organisation 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.¹⁸⁴

157. The facts leading up to the return to Peru of 77.5 million dollars from the accounts of **Vladimiro Montesinos** and two associates at the order of a Swiss magistrate appear at paragraph 11 in Section I of the Digest. Like the Marcos and Mohammed Sani Abacha cases, the Montesinos decision 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.

I. Article 55 International cooperation procedures for purposes of confiscation

158. This article prescribes the procedures to be followed for preparation and receipt of a 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 assistance requests and for their execution. The only matter particularly oriented toward confiscation can be found in paragraph 55.7, providing that cooperation may be refused if the property is of *de minimis* value.¹⁸⁵ The mechanisms to be implemented by the procedures in Article 55 are discussed at length in Sections IV through VI of the Digest.

¹⁸⁴ ATF 1A.215/2004 of 7 February 2005 (published on <http://www.bger.ch>).

¹⁸⁵ It has also to be noted that paragraph 21 of article 46 of UNCAC contains general grounds under which a request for mutual legal assistance can be refused.

J. Summary

159. 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. An ironic 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 judgment for damages that may never be collected unless assets have been restrained in the jurisdiction of litigation or are otherwise available. No provision of the United Nations Convention against Corruption requires an jurisdiction to maintain effective means for enforcement or collection of a foreign judgment. The Convention assumes a functioning legal infrastructure in its States Parties, but its recovery provisions risk irrelevance if that infrastructure is not present.

160. The orders envisioned in Article 53(b) require States parties to permit courts in their jurisdiction to order persons who have committed offences established by the Convention to pay compensation and damages to a State Party harmed by the offence are another valuable measure for recovery of property. Sentencing provisions that encourage satisfaction of a restitution order, such as a sentence reduction, seem appropriate when the funds for restitution are demonstrably available. Use of a criminal organization theory and a resulting presumption that funds of a member are available for criminal use is another very practical mechanism which can enhance prospects for recovery. The measures required by Article 53(c) to recognize a State Party's claim as legitimate owner of the proceeds of Convention offences are often satisfied by third party protections in confiscation statutes, although they do not seem to be widely used. Return of assets pursuant to a mutual assistance request differs from a proceeding under Article 53 (c) because there is no confiscation proceeding and the ownership of the property must ultimately be decided in the requesting country.

161. Article 54.1(a) is intended to ensure the recognition of confiscation orders as a form of mutual legal assistance. Requests to enforce confiscation orders from countries that suffered losses through Convention offences are not common. A number of possible reasons will be explored in Section VII, Observations and Recommendations. 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. 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. In addition, recent legislation in one influential jurisdiction has adopted a presumption of illicit origin with respect to the wealth of a person who has powers of disposal over assets representing an extraordinary increase connected with the exercise of public office and associated with an environment of corruption.

SECTION VI RETURN AND DISPOSAL OF ASSETS

A. Progression from discretionary sharing to mandatory return

162. The principal universal 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 2004 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, thereby and 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,

163. As a consequence of this focus on confiscation as a means of recovering illicit assets from the offender, Article 5 of the **1988 Convention Against Illicit Traffic** merely adopted the long-standing customary view approach that asset sharing was purely a matter of discretion for the confiscating state. Article 5, paragraph 5 of the 1988 Convention provided that:

5 (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 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.

The 1988 Convention was focused exclusively on drug matters. Its money laundering offence only applied to the proceeds of drug trafficking, and its 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 that sharing typically meant an allocation made by a confiscating state to other State Parties which had contributed to investigative, prosecutorial or confiscation efforts.

164. The anti-money laundering efforts 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, including 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, paragraph 5 of the 1988 Vienna

Drug 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.

2. 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.

165. Although the decision to return was still discretionary 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 restoring the confiscated proceeds of crime to a requesting State Party so that it could give compensation to victims of the crime or return such proceeds to their legitimate owner. Article 14's language 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, so 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 direct recovery measures such as an award of restitution and or award of damages in addition to recovery through confiscation.

166. With its focus on corruption offences in which individual States Parties are the victims, the **United Nation Convention against Corruption** refocused the recovery emphasis, broadening its perspective from the process of depriving wrongdoers of illegally derived assets to a more comprehensive process of confiscation of illegally derived assets and returning 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 in limited circumstances. Paragraph 57.3 (a) and (b) require that, where there has been a final order obtained by the requesting state party, confiscated property 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;

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

167. 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 Convention Article 23. Whether or not jurisdiction is analyzed 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 in the state whose resources were diverted or which suffered harm is notable. One prominent example of domestic confiscation was the case of former state governor **Diepreye Alamieyeseigha**, who was convicted in Nigeria of a false asset declaration. His companies were convicted of money laundering and their assets were criminally confiscated. His cash assets had already been the object of non-conviction based U.K. confiscation and a civil freezing order had already been issued for the same company assets in the U.K. litigation and they became the subject of a civil judgment, so it is assumed that through one method or another Alamieyeseigha's company assets eventually were returned to Nigeria. Other than this one possibility, review of the cases examined revealed no requests from states which had suffered harm seeking return of funds based upon confiscation orders under Convention Article 55, paragraph 1 (b) or Article 57, paragraphs 3 (a) and (b) based on an order of confiscation from their courts.¹⁸⁶ As a practical matter, the mandatory provisions introduced in Article 57 are yet to be implemented on any significant scale. By default, the most broadly applicable provision of Article 57 is paragraph 57.3 (c), which provides that:

(c) 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.

168. Examples of confiscating states making discretionary returns of assets as envisioned by the omnibus discretionary return paragraph of Article 57.3 (c) are fortunately more numerous. Those states are often the states where assets were placed for safe keeping or investment by corrupt public officials. Switzerland returned funds to Nigeria from the Abacha criminal confiscations even before the Convention and its Article 57.3 became effective.¹⁸⁷ Confiscated cash was returned by the United Kingdom in the Dariye and Alamieyeseigha cases,¹⁸⁸ and from Jersey in the Raj Bhojwani criminal confiscation.¹⁸⁹ The defendant in the Joyce Oyebanjo was made subject to a U.K. criminal confiscation order for 200,000 pounds¹⁹⁰ and more proceeds are likely to be confiscated and returned when former state governor James Ibori is sentenced in that jurisdiction. One additional example is the transfer of U.S. confiscated funds to Peru in the Venero Garrido and General Rodriguez Huerta cases.¹⁹¹

169. Paragraph 3(c) of Article 57 may be also applicable to recovery of the proceeds of private bribery and embezzlement. However, the number of 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. In February 2012 the Organization for Cooperation and Economic Development and the Stolen Asset Recovery Initiative of the World Bank and the UNODC issued a revised version of a publication entitled Identification and Quantification of the Proceeds of Bribery. Numerous cases from multiple jurisdictions, some identified by name

¹⁸⁶ Enforcement of confiscation orders from the United States in the **Yakovlev and Mercator** Corporation cases was described in paragraphs 139 and 187-190 but those were not confiscation order secured by the State Party whose assets were stolen or which suffered harm.

¹⁸⁷ See footnote 21.

¹⁸⁸ See paragraph 20.

¹⁸⁹ See paragraph 25.

¹⁹⁰ See paragraph 25 and 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.

¹⁹¹ See paragraph 137.

and some anonymous, are analyzed therein in an effort to quantify the proceeds of active bribery, that is the benefits achieved by bribe payers. Of 20 cases reviewed in Part III of the publication, 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 relate to a scarcity of published cases and other sources on corruption in the private sector. The discussions in Section II of this Digest on Forms and devices of concealment of proceeds of acts of corruption, in this section on Identifying, freezing or seizing and tracing assets; and in Section V on Tools and mechanisms for recovery and confiscation of stolen assets 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 corruption or they may place less emphasis on private 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 of the Digest 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.

170. Article 57, and Article 55 to the extent its mechanisms are incorporated in the operation of Article 57, are the channels for return of confiscated assets. In addition, recoveries accomplished through non-confiscation measures, some of which may be outside the Convention structure are of practical importance. The most obvious and important examples of non-confiscation measures resulting in the return of proceeds of corruption offences are 684 million dollars returned to the Philippines by Switzerland in the Marcos case¹⁹², the funds returned by Switzerland to Nigeria in the Abacha related recoveries that were not based upon criminal convictions and confiscations, 93 million dollars to Peru in Montesinos-related matters,¹⁹³ and 74 million dollars to Mexico in the Salinas case.¹⁹⁴ As explained in paragraphs 153 and 154 in Section V on Tools and mechanisms for recovery and confiscation of stolen assets, 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*, unique means for returning assets. Those procedures resemble 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 into direct recovery and confiscation in response to a mutual assistance request.

171. 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 paragraphs 1119 through 137 of Section V. Significant recoveries have been accomplished using these direct recovery mechanisms. Civil actions conforming to Paragraph (a) of Article 53, including

¹⁹² Response of the Republic of Switzerland to Secretariat request for asset recovery information.

¹⁹³ 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.

¹⁹⁴ 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 Raul Salinas.

participation as a civil party in a criminal proceeding, were successfully used by Nigeria in the Abacha, Alamieyeseigha and Dariye cases, and by the Kuwaiti Investment Organization in the Grupo Torras case.

172. Cases representative of the measures required under paragraph (b) of Convention Article 53 relating to compensation or damages payments are found in Paragraphs 130 through 133 of the Digest. A number of cases were found wherein a court in imposing a criminal sanction has ordered an offender to pay compensation or damages to another State that has been harmed by the commission of Convention offences. The most notable example is the 29.5 million pounds payment BAE Systems was ordered by a U.K. court to make to Tanzania in damages as result of a bribery scheme that substantially inflated the cost of a radar contract to that country.¹⁹⁵ As explained in paragraph 136, the method of direct recovery provided by paragraph (c) of Article 53 is available though victim protection laws but is not much used, perhaps for reasons related to the concept of sovereignty and perhaps for practical reasons relating to the availability of non-judicial inter-governmental measures.

B. Provisions at the bilateral and regional level

173. 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 grace. 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. The mutual assistance treaty negotiated in 2009 between the Republic of the Philippines and the United Kingdom, which has not yet entered into force, 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.

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.

¹⁹⁵ <http://www.judiciary.gov.uk/media/judgments/2010/r-v-bae-systems-plc>.

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.

174. The proposed agreement provides for the protection of third parties by 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 harsh. The constructive trust theory discussed at length in paragraphs 128-129 suggests that in many legal systems it is difficult even for *bona fide* unsecured creditors to acquire a claim to 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 analyzed to know who constitutes a bona fide third party.

175. 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 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 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.

176. 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):

Article 8

Restitution

1. 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.

However, as explained at paragraph 128 in Section V, Tools and mechanism for recovery and confiscation of stolen assets, that language may conceal a great deal more complexity than seem apparent on its surface.

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

177. 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, 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.¹⁹⁶ Article 57, paragraph 3 (a) 3 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 treaty. If Canada had discretion whether or not to waive a final judgment with regard to government property as to which there was no final judgment under paragraph 3 (b) or to returning property to prior legitimate owners or victims, it would be entitled to consider compensating its own nationals in a domestic confiscation proceeding.

178. One potentially contentious area of return of assets involves the question of expenses of the confiscating State Party. Paragraph 57.4 anticipates the issues and establishes that:

4, 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.

As can be imagined, the requesting State Party and the requested State Party could have widely 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 and the requested confiscating state is a wealthy economy where the funds were placed for laundering and 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 in the cases described in the Digest, although such frictions certainly have existed in other cases.

179. Some conflicting claims have arisen in cases involving attempted direct recovery under the type of measures required by Article 53. Article 53 (a) requires that a State Party enable another Party to seek recovery in its courts. 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 U.S. courts. The criminal prosecutions were unsuccessful, while the non-conviction based confiscation proceedings and

¹⁹⁶ [Ottawa eyes former Tunisian ruler's family assets](http://www.cbc.ca/news/canada/montreal/story/2012/01/26/tunisian-ben-ali-assets.html), CBC News 26 January 2012, accessed at 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 at www.theglobeandmail.com/news/politics/Ottawa-expedites-special-law-to-freeze-foreign-assets.

related negotiated settlements resulted in some recoveries, estimated by the Philippine Ombudsman to be worth less than 50 million dollars.¹⁹⁷ The Philippine government was also pursuing mutual legal assistance remedies with Swiss authorities which eventually resulted in the anticipatory return to an escrow account of 684 million dollars. Meanwhile, human rights plaintiffs were pursuing claims in U.S. courts against the Marcos estate. In a complicated series of proceedings and appeals the human rights plaintiffs succeeded in securing a 2 billion dollar award, which was tentatively settled by agreement with the Marcos estate for 150 million dollars 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 more than 41 million dollars, more than one quarter of the award, plus expenses.¹⁹⁸ 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 which was rejected by a U.S. appellate court with respect to the Philippine government. 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 U.S. 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 U.S. 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 American court in favour of the Republic of the Philippines' right to resolve the issues in its courts. The human rights plaintiffs have continued to pursue other remedies as recently as 26 June 2012. On that date the New York State Court of Appeals, that state's highest court, ruled that the judgment in favour of the human rights plaintiffs was only applicable against the Marcos estate. Those assets had been determined by the Philippine Supreme Court to belong to the people of the Philippine Republic, who had also suffered under the Marcos regime, and the New York court was unwilling to intercede in a matter within Philippine sovereignty¹⁹⁹.

180. The history of the **Marcos** estate proceedings demonstrates that when the sums of money involved are large 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 and border on criminality. 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 powers 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% of the 213 million dollars on deposit in the concerned bank. De Guzman presented the powers 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 Philippine Solicitor General filed a request with the Swiss Federal Office of Police to transfer the 213 million dollars 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

¹⁹⁷ Ferdinand E. Marcos (Philippines): A Case Study, Asian Development Bank/Organization for Economic Cooperation and Development Anti-Corruption Initiative for Asia and the Pacific.

¹⁹⁸ See footnote 21.

¹⁹⁹ *Osugama F. Swezey, Appellant v. Merrill Lynch, Fenner & Smith, Incorporated, Respondent, Philippine National Bank, et al, Intervenors-Respondents*, No 88, N.Y. court of appeals, 26 June 2012. 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. Republic of Philippine's response to UNODC Secretariat request for asset recovery information.

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 213 million dollars or whether it prevented those funds from being lost or stolen.²⁰⁰

181. 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 the activities of Jacobi that resulted in his being charged by Swiss authorities with having committed economic espionage and prohibited actions on behalf of a foreign government in Switzerland is found in the paper described in footnote 74, whose author, Dr. David Chaikin has represented Jacobi. These events led to the suspension for some time of mutual assistance from the Zurich prosecutor to the Philippine Presidential Commission on Good Governance in its efforts to recover Marcos assets, according to Dr. Chaikin's article.

182. The existence of a federal system in Nigeria and lack of public clarity over fee arrangements contributed to a long-running controversy over the proceeds recovered from former Nigerian state governor Joshua Dariye in the United Kingdom and a dispute over the right to recover funds between Plateau state and the Federal Republic. After his money laundering arrest in London **Joshua Dariye** returned to Nigeria where he enjoyed immunity as a state governor. After his immunity as governor ended he was prosecuted in Nigeria for 14 counts of money laundering but has not yet come to trial. Cash confiscation from him prior to his flight from the United Kingdom and from his associate Joyce Oyebanjo resulted in return of 130,000 pounds 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, due in part to excessive legal fees. According to the case chronology assembled by the Basel Institute of Governance on Dariye,²⁰¹ the situation was complicated by the lack of a conclusive contract stipulating the terms for payments of the requested legal fees, alleged in Nigerian media to be 900,000 pounds. On 17 November 2007 a Nigerian media outlet reported that an additional check for 300,000 pounds 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 pounds and that additional payments would be made when the bill was settled.²⁰² 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 pounds. It also describes a Nigerian news source relating that 1.3 million pounds had been recovered by the law firm representing Nigeria but less than 1 million pounds had been sent to the Ministry of Justice and only 416,000 pounds forwarded to Plateau state, with some the withheld funds being used to pay legal fees.²⁰³ These controversies ensured that continuing Nigerian media and public attention would be devoted to the disputed recovery and disposition of the recovered proceeds. There obviously would have been no way and no reason to avoid public examination of these issues. However, the long running controversy probably

²⁰⁰ See footnote 22.

²⁰¹ See footnote 23.

²⁰² [Britain Returns Additional Dariye Loot](http://www.Financialnigeria.com/NEWS/news-item-detail-archives.aspx?item=396), accessed at www.Financialnigeria.com/NEWS/news-item-detail-archives.aspx?item=396, source This day journal, 17 November 2007.

²⁰³ Basel Institute on Governance Asset Recovery Knowledge Centre, [Dariye Loot: Plateau demands 1.17 m from AGF](#), source Punch newspaper, 7 February 2009.

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 a million pounds.

183. 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 because Dariye was the state governor during at least part of the recovery proceedings. In a U.S. 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** asked the sentencing court to treat it as a victim entitled to restitution, which the court declined to do 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 U.S. Court of Appeals for the Miami area to order the sentencing court to treat it as a victim eligible for restitution. Another U.S. appellate court had previously dealt with a similar issue involved **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 U.S. 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.²⁰⁴

184. 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 existed that bribes were being paid by other companies besides 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. London insurance broker **Julian Messent** was sentenced on 26 October 2010 to imprisonment for 21 months and ordered to pay 100,000 pounds 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 2 million dollars to officials in the state insurance company, Instituto Nacional de

²⁰⁴ U.S. v. Pavel Lazarenko, 634 F. 3rd 1247 (9th Cir. 2010).

Seguros and in the ICE.²⁰⁵ 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.²⁰⁶

D. Agreements on return and disposal of assets

185. Article 57, paragraph 5 provides that:

Where appropriate, 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. Agreements which might serve as a mutually agreeable model for disposal of confiscated assets were not common among the cases reviewed. Peru set up its Fondo Especial de Administracion de los Dineros Obtenido Ilicitamente (Fedadoi) with a governing board composed of representatives of Peruvian government agencies involved in the fight against corruption to control expenditure of the funds to receive funds from Switzerland and the United States.²⁰⁷

186. In the case involving the Instituto Costarricense de Electricidad described in paragraph 184, the government of Costa Rica did not support the position of ICE, was actively cooperating with the U.S. prosecution, and had convicted its former president and secured its own 10 million dollar civil settlement from Alcatel-Lucent.²⁰⁸ In the Dariye controversy over fees and recoveries described in paragraph 149 it was the Federal Republic of Nigeria and not Plateau state under the governorship of Joshua Dariye that was suing for recovery of criminal proceeds. The ultimate dilemma that can be faced in regard to return and disposal of the proceeds of crime would be a situation similar to the **Mercator** case, described in paragraph 98 in Section IV, Identification, freezing and tracing. As reflected in a verified complaint for confiscation filed in a U.S. court, officials of the government of Kazakhstan were the beneficial owners of accounts into which bribes on behalf of American oil companies were paid over a period of years. When one of those accounts came under suspicion 84 million USD 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 that situation, either the confiscating or freezing state might wish simply 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. In the

²⁰⁵ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/insurance-broker-jailed-for-bribing-costa-rican-officials.aspx> .

²⁰⁶ In re Instituto Costarricense de Electricidad, Nos. 11-12707-G and 11-120708-G, 11th Circuit Court of Appeals, filed 17 June 2011. Government's Response to ICE's Petition for Victim Status and Restitution, U.S. Alcatel Lucent, France SA and U.S. v. Alcatel Lucent, U.S. District Court for the Southern District of Florida, Nos. 10-CR-20906 and 10-CR-20907, filed 24 May 2011, Alcatel-Lucent media release, Controversies, September 2010; Statement of Facts, Plea Agreement, Case No. 10-20906, U.S. District Court, Southern District of Florida, approved 1 June 2011, all accessed at StAR Asset Recovery Watch database page on Alcatel-Lucent, Instituto Costarricense de Electricidad (ICE) (Costa Rica Settlement Case); Statement of Facts, Plea Agreement, Case No. 10-20906, U.S. District Court, Southern District of Florida, approved 1 June 2011.

²⁰⁷ See paragraph 11.

²⁰⁸ See paragraphs 183, 184.

Mercator situation those potentially awkward choices were avoided by an artfully and carefully expressed compromise agreement in the spirit of Article 57.5 of the Convention.

187. The solution agreed to in the **Mercator** situation channelled the confiscated funds through a foundation for specified purposes. The Memorandum of Understanding by the Governments of Kazakhstan, Switzerland and the United States filed in the U.S. 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;

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.

188. The Memorandum then set an agreement to establish a BOTA Foundation independent of the Kazakh government, its officials, and their personal or business associates. The Foundation is to conduct the BOTA Program to benefit poor children, social organisations 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 Program Manager, supervised and monitored by the World Bank. Governance issues were to be addressed by a World Bank supported Public Finance Management Review over a period of five years and an Extractive Industries Transparency Initiative through which the Government, with the support of the World Bank, will prepare and implement a comprehensive

strategy and action plan to increase transparency over payments and revenues of the extractive industries operating in Kazakhstan. For those interested in the detailed language of such a programme agreement, the 10 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 available at www.docstoc.com/docs/2931704/AMENDED-SERVICE-AGREEMENT-FOR-THE-BOTA-FOUNDATION-among-the-International. The audit reports contained within the annual reports of the Foundation reveals that an independent, monitored program consumes a large percentage of available resources.²⁰⁹ For 2011 grants for the various programmes were 9 million dollars out of total net expenditures of nearly 16 million dollars. Treating not just grants but all expenses allocated to programme activities as delivery of services to the intended recipients accounts for 13 million dollars. The remaining 3 million dollars went primarily for a management fee to an American non-government organization and an evaluation contract.

189. 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 paper published in 2009 by the Basel Institute on Governance's International Centre for Asset Recovery examined four experiences in asset recovery. The document is entitled *Managing Proceeds of Asset Recovery: the Case of Nigeria, Peru, the Philippines and Kazakhstan* and suggest that unmonitored programmes have their own set of problems and expenses. In the case of Nigeria, the paper for example indicates that after long negotiations Nigeria and Switzerland agreed in 2004 that 50.5 million dollars 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 World Bank report entitled *Utilization of Repatriated Abacha Loot* released in 2006 described how those funds had been utilized for development purposes.

190. Highlighting areas of risk for the management of returned assets, the Basel Institute of Governance publication suggested certain basic principles for 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

191. 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

²⁰⁹ www.bota.kz/en/uploads/4fb0f5a0e7566pdf, BOTA Foundation website, Information resources, Independent Auditor's reports.

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 the Convention and can appropriately set forth any procedures and conditions for asset return.

192. 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 have been 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 to the state of origin. The Convention provides for agreements on the final disposal of confiscated property, which can be an effective means of avoiding unilateral action.

Section VII OBSERVATIONS AND RECOMMENDATIONS

A. Observations of a technical nature and associated recommendations

193. The cases examined in Section II, Forms and devices used to conceal corruption schemes, demonstrate that the methods used to conceal bribery and transfer the proceeds of crime are well known and documented. The quantum of information about those methods may increase with the adoption of legislation that encourages whistle blowing by increasing the financial rewards for persons revealing corporate corruption. Article 52 of the Convention lists counter-measures that are especially adapted to combating concealment of bribery and of proceeds of acts of corruption.

194. One of those 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 Financial Action Task Force 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 40 Recommendations in February 2012 new Recommendation 12 and the Glossary definition of “politically exposed persons” now cover both domestic and foreign politically exposed persons.

195. As was suggested in paragraph 39 enhanced suspicious transaction reporting standards for domestic politically exposed persons might have helped prevent the diversions of public funds committed by Plateau State Governor Joshua Dariye. One way in which Article 52, paragraph 1 may become operational with respect to enhanced scrutiny for domestic politically exposed persons could be as a consequence of new Recommendation 12 and the revision of the Financial Action Task Force definition of politically exposed persons bringing it in line with the terminology of the Convention.

196. States Parties are required by Convention Article 52, paragraphs 5 and 6, to consider establishment of financial disclosure systems and required reporting of foreign accounts. Violation of an asset disclosure regime under Article 52.5 or of a foreign account disclosure requirement under Article 52.6 provides 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, the Conference of the States Parties may wish to consider directing Secretariat efforts toward popularizing and helping to implement the counter-measures in paragraphs 5 and 6 of Article 52.

197. Corporate service providers are an indispensable element of many laundering schemes, providing the legal structures used in layering transactions to conceal their beneficial ownership. Particular jurisdictions, including several American states, encourage corporate formation with legislation that facilitates *de facto* anonymity of the beneficial ownership. Generalized references to “off-shore 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 (as discussed in the StAR Asset Recovery publication of the World Bank and UNODC, *The Puppet Masters*), 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 is described in paragraph 51 in Section II, Forms and devices of concealment of proceeds of acts of corruption. The fact that a corporation can be registered and exist as a shell, receive and disburse 60 million dollars in government payments, then default in a civil action and shield its beneficial owners from identification makes a mockery of the global asset recovery regime.

198. The trial court decision in **Attorney General v. Meer, Care & Desai** contains some very practical observations that should inform direct recovery efforts by means of the civil action provision of Article 53 (a). The solicitor Bimal Thaker (referred to in the court opinion as BT) took the position that his firm (Cave Malik, referred to in the court opinion as CM) was a partnership with his lawyer father in Zambia, even though that would have the effect of making his father (referred to as BBT in the court opinion) liable for BT’s having aided Zambian President Chiluba’s diversion of official funds. The court analyzed that position and certain inconsistent arguments made by Bimal Thaker’s counsel with the following comments:

“I find it surprising that it was ever considered an appropriate way to act. I have no doubt why it was done and it involves insurance. If there is a sole proprietor an insurer will not pay out if that sole proprietor is found guilty of dishonesty: see the *Constanides* case referred to above. Insurers behind CM therefore had an incentive to a finding that there was no partnership as they would not pay out if CM was the sole business of BT in the event that he was found liable to AGZ in this action.

BT of course will not obtain an indemnity personally if he is liable to AGZ (Attorney General of Zambia) because he would be the conspirator/dishonest assister. However he would be able to save something out of the wreckage because if BBT was a partner CM would be entitled to an indemnity. On that basis for example BBT would have the indemnity benefit in the event that the firm is found liable.”²¹⁰

199. The court’s observation 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 judgment, 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.

²¹⁰ StAR Asset Recovery Watch database pages on Joshua Chibi Dariye and Joyce Oyebanjo; Financial Action Task Force Report, *Laundering the Proceeds of Corruption*, July 2011; Basel Institute of Governance Asset Recovery Knowledge Centre, *Case Chronology* (to 2007); *Combating Money Laundering and Recovering Looted Gains: Raising the U.K.’s Game*, Transparency International United Kingdom, June 2009.

B. Observations on strategic approaches and associated recommendations

200. A review of the cases examined in this Digest and of the multiple other cases surveyed in the literature during the research for this work revealed surprisingly little use of a procedure provided in the Convention in most jurisdictions. That procedure is referenced in Article 54, paragraph 1 (a) and Article 55 1 (a).²¹¹ It consists of a receiving state having mechanisms for, and actually giving effect to, an order of confiscation issued by a court of another State Party.²¹² Multiple factors may explain the relative scarcity of confiscation orders in states where resources were diverted or an official was bribed. Official funds may be found to be missing but records and witnesses may not reveal at what point in the governmental process they went missing, whether they were spent or stolen or simply unaccounted for, or where they went or who is responsible. Lack of investigative capabilities and of financial resources may be a serious handicap. In some cases, no prosecution or non-conviction based confiscation proceeding may have been attempted despite the availability of ample evidence to bring proceedings. Sometimes prosecution has been attempted but does not succeed or is delayed for years. Former **President Chiluba** was acquitted in Zambia despite extensive evidence resulting in his being found civilly liable in the civil proceeding in the United Kingdom.²¹³ **Joshua Dariye** was arrested in London in 2004 but his prosecution in Nigeria has been delayed for years by his immunity as governor and extremely protracted court proceedings.²¹⁴

201. Instances of 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 Soeharto family of Indonesia. The Guernsey courts expressed a perception that could impact adversely on the receptivity of other courts to claims 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 Indonesia's Government for a continued freeze on assets controlled by a son of former President **Soeharto, Hutamo Putra** also known as **Tommy Soeharto**. The Court's decision lifted a freeze order previously granted to Indonesia. When he concluded that insufficient efforts to pursue civil claims against Mr. Putra had taken place in Indonesia despite extension of the freeze, the author of the Court's opinion wrote:

"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.

²¹¹ Nevertheless, there are some notable examples to the contrary. For instance, since 2006, the United States has given effect to orders relating to the confiscation of proceeds of corruption resulting in the return of over \$120 million to other states parties.

²¹² Egypt was reported to have frozen Mubarek family assets in February 2011,²¹² so subsequent mutual assistance requests presumably could have been based on that order. As mentioned previously in footnote 224, confiscation orders were executed in the Mercator and Yakovlev cases but the requesting State Party was not the affected state or international organization that suffered harm.

²¹³ See paragraph 120, 121.

²¹⁴ See paragraph 17.

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 Soeharto 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 Soeharto family by virtue of the fact that they had a lot of money still in their possession, had great influence in Indonesia".

202. Whether justified by the record in the case before it 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 judgment under paragraph 3 (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 power of an authoritarian regime that was in power for decades may continue to condition the conduct of public affairs for some time after a regime change. That seems like a reality that is too obvious to deny. Rather the conclusion that 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. In a particular lawsuit the rule of law and the rights of other parties must always be respected. However, technical assistance efforts and the type of helping hand that was extended by Switzerland when it paid for counsel to assist the Democratic Republic of the Congo and Mali may be needed. The Conference of the States Parties may wish to consider tasking the Secretariat with developing a programme capable of furnishing expert advisory teams staffed by persons with relevant experience to assist a State Party faced with the need to recover the proceeds of Convention offences.

203. The World Bank/UNODC Star Initiative publication entitled [A Good Practice Guide for Non-Conviction Based Asset Forfeiture](#) describes the steps taken to recover assets diverted from the **Kuwaiti Investment Organisation**. Certain agreed decisions were adopted within the government, including formation of a national team with the necessary capabilities, gaining the necessary political will and national support, an assurance that all pressures and interference in the recovery process would be resisted, an admission that recovery would be a costly and time consuming process and 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 in the selection, [Stolen Asset Recovery: A Case from Kuwait](#) at page 164:

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)

204. 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 may 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. For some countries financial assistance may be required, which will require a willing donor. The **Lesotho Highlands Water Project** prosecution was previously mentioned in paragraph 111. Counsel for Lesotho in that case, which involved bribery of the project manager by Canadian firm Acres Limited and other multinationals, 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 Lesotho Attorney-General in the context of assistance that "the World Bank has deep pockets". Unfortunately none of this help has been forthcoming.²¹⁵

Whether or not any of the comments quoted above amounted to binding promises is an open question, but it appears to be undisputed that no funds were forthcoming, so the difficulties in this regard should not be underestimated. However, if the Conference of the States Parties could encourage a programme of expert advisory teams, their participation might facilitate further international awareness of the need for support when the concerned State Party clearly lacks the resources and recoverable assets are within reach.

205. To conclude these Observations and Recommendations on a positive note, the **Swiss Federal Law on the Restitution of Illicit Assets of Politically Exposed Persons** and **Canada's Law Freezing Assets of Corrupt Foreign Officials Act** 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 specific evidence in view of emergency situations in states facing difficult conditions. In addition, the Swiss law

²¹⁵ 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.

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 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 law 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 from a variety of offences established by the Convention. Assets must be returned whether or not a final judgment 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, legislation introducing mandatory return obligations 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.

SECTION VIII GLOSSARY

Terms to be defined include those necessary to understand the text of the Digest and those used in laws and judicial decisions quoted in the Digest, such as the Swiss Federal Law on the Restitution of Assets illicitly obtained by Politically Exposed Persons. 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, 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.

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 is understood as all of the processes provided in the United Nations Convention against Corruption for the transfer of property to the country from which it has been stolen or which is otherwise entitled to it.

Asset sharing

Many bilateral treaties and agreements provide for a confiscating state to share recovered assets on the basis of the contribution another state may have made to an investigation or prosecution. Paragraph 5 (ii) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and paragraph 3 (a) of Article 14 of the United Nations Convention Against Transnational Organized Crime of 2001 provide for a confiscated state to share with other States Parties, on a regular or case-by-case basis the proceeds of crime or property, or funds derived from such proceeds. The United Nations Convention against Corruption does not provide for asset sharing. A fundamental principle of this Convention is stated in Article 51 to be the return of assets. Article 57 requires the mandatory return of assets in some situations and in all other cases requires that priority consideration be given to returning confiscated property to the requesting State Party, returning it to its

prior legitimate owners or compensating the victims of the crime. Article 57 paragraph 5 allows States parties to give special consideration to concluding agreements or mutually acceptable arrangements for the final disposal of confiscated property.

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 the same meaning as confiscation under the Convention.

Convention

Unless otherwise stated to the contrary, the term refers to the United Nations Convention against Corruption.

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.

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 means 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

This is the term used in paragraph 2 of Article 31 on Freezing, seizure and confiscation; paragraph 3 (j) of Article 46 on Mutual legal assistance; and paragraph of 2 of Article 55 on International cooperation for purposes of confiscation as the first phase in the process of recovering assets. Article 31 refers to a sequence of identification, tracing and freezing or seizure, as does Article 55. Article 46 refers to a sequence of identifying, freezing and tracing proceeds of crime in accordance with chapter V, which includes Article 55. Since all three references place identification before tracing and freezing, and one reference places tracing after freezing, it is assumed that whatever initial investigation is necessary to identify criminally derived proceeds and the jurisdiction where assets have been placed or are held.

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 the 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 a crime has been committed but may apply a lesser standard of evidence than would be required to convict a defendant in a criminal case. The StAR Initiative publication by the World Bank/UNODC entitled *Stolen Asset Recovery- A Good Practices Guide to Non-Conviction Based Forfeiture* describes the many nuances related to application of this mechanism.

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 Canada’s Freezing Assets of Corrupt Foreign Officials Act, except that paragraph 1, 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 exercising a prominent public function.

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 definition of "asset recovery".

Remission

A term used in some national laws to describe a process by the government may ameliorate a forfeiture in favor of an innocent third party. This process may result in the return of property to an owner or leinholder, or to a victim of the crime underlying the forfeiture if certain eligibility criteria are met. A foreign State may seek all or part of confiscated property. Depending on national law, remission may be based upon the foreign State's contribution to the investigation or prosecution or because the foreign State is the lawful owner of the property or has been harmed by the offence from which the proceeds result. Remission is to be distinguished from the payment of compensation or damage 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 the 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 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 can be owned anonymously and have no physical presence, but may be the owners of record of assets. The StAR Initiative World Bank/UNODC publication [The Puppet Masters](#) defines a shell bank as a nonoperational company that has no independent operations, significant assets, ongoing business activities or employees.

Substitute assets

When a confiscation order is an *in rem* order but those assets are unavailable a court in some legal systems may order satisfaction of the value of the confiscation order to be collected from other assets of the same person to an equivalent value.

Summary judgement

Decision of the court in the United Kingdom case against former governor Diepreye Alamiyeseigha based upon a procedure under which no evidentiary trial is necessary if the documentary evidence by way of affidavits and other admissible evidence, such as records of the Nigerian court proceeding show there is no need for a trial to resolve any substantial factual question.

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 must logically have some different meaning, the most obvious being the tracing of funds, once identified, as the proceeds of a particular offence or the property of a particular beneficial owner. This may be necessary in some cases before a freezing order can be secured, and in other cases may follow freezing, for example when a presumption of illicit origin has been applied. The possibility of a variable factual sequence could explain why the Convention sometimes places tracing before and sometimes after freezing.

Trust and company service providers

As described in the World Bank/UNODC publication The Puppet Masters, 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 and not limited to identified assets.
