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Proposals and contributions received from Governments

United States of America: proposed chapter on recovery of assets

V. Recovery of illicitly acquired assets

Preamble

The States Parties to this Convention,

Concerned that the illicit acquisition of personal wealth by senior public officials, their families and their associates can be particularly damaging to democratic institutions, national economies and the rule of law, as well as to international efforts to promote economic development worldwide,

Recognizing that international cooperation is essential to the fight against corruption,

Determined to prevent, deter and detect in a more effective manner international transfers of assets illicitly acquired by, through or on behalf of public officials and to recover such assets on behalf of victims of crime and legitimate owners,

Acknowledging the fundamental principles of due process of law in criminal proceedings and proceedings to adjudicate property rights,

Have agreed as follows:

Article 1
Use of terms

For the purposes of this chapter:

(a) “Assets or property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

(b) “Confiscation”, which includes forfeiture where applicable, shall mean any action under domestic law resulting in the final extinguishing of title to assets of any description related to or proceeding from crime or a sum that amounts to the value of such assets and the vesting of such title in the Government pursuing the action;

(c) “Illicitly acquired assets” shall mean assets or property that are acquired by, through or on behalf of a public official through misappropriation, theft or embezzlement of public funds or the unlawful conversion of State property or through acts of bribery or extortion committed by a public official and shall include other property into which such assets have been transformed or converted;

(d) “Requested State” shall mean a State Party that has been requested to provide assistance in identifying, freezing, seizing or recovering illicitly acquired assets;

(e) “Requesting State” shall mean a State Party that requests assistance of another State Party in identifying, freezing, seizing or recovering illicitly acquired assets;

(f) “Public official” shall mean any official in the legislative, executive, administrative, judicial or military branches of a Government, whether elected or not, any person exercising a public function for a government, including for a public agency or public enterprise, and any official or agent of a public international organization.

Article 2
Prevention

1. Each State Party shall establish, in accordance with its domestic law, appropriate oversight, investigative and prosecutorial institutions with sufficient authority to prevent and appropriately respond to the illicit acquisition of assets through the conduct of senior public officials and shall endeavour to endow such institutions with adequate resources to achieve those objectives.

2. Each State Party shall adopt such measures as may be necessary, in accordance with its domestic law, for financial institutions within its jurisdiction to apply enhanced scrutiny in order to improve the detection of illicitly acquired assets. Such measures shall include:

(a) Issuance of advisories to financial institutions (i) on appropriate measures to identify current and former senior foreign public officials, their immediate family members, close associates and entities formed by or for the benefit of such persons; (ii) on appropriate records to maintain on accounts and transactions involving such persons; and (iii) on types of transactions and accounts to which such institutions should pay particular attention;

(b) Requiring financial institutions to undertake reasonable steps to ascertain the identity of the nominal and beneficial owners of as well as the source of funds deposited into high-value accounts;

(c) Requiring financial institutions to conduct enhanced scrutiny to high-value accounts sought or maintained by or on behalf of current and former senior foreign public officials, their immediate family members, close associates and entities formed by or for the benefit of such persons. Such enhanced scrutiny shall be reasonably designed to detect transactions that may involve illicitly acquired assets and should not be construed to discourage or prohibit financial institutions from doing business with any legitimate customer; and

(d) Requiring financial institutions to report to competent authorities suspicious transactions involving accounts identified in subparagraphs (a), (b) and (c) of this paragraph. Such reporting requirements shall be subject to appropriate safe-harbour provisions to protect individuals and institutions from liability for complying with such reporting requirements and shall prohibit notification or disclosure of the report to legal or natural persons involved in the transaction.

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

4. Each State Party shall adopt such measures as may be necessary, in accordance with its domestic law, to require senior 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.

5. States Parties shall give special consideration to agreeing with other involved States Parties that all or a portion of recovered assets be committed to support initiatives and programmes to prevent corruption.

Article 3 *Recovery mechanisms*

Each State Party shall provide its competent authorities with sufficient authority, in accordance with principles of its domestic law, to provide assistance to other States Parties in the recovery of illicitly acquired assets, and to that end, shall:

Access to courts

(a) Adopt such measures as may be necessary to permit another State Party to initiate legal action in its courts for ownership of illicitly acquired assets that are located in its territory, by presenting either:

- (i) Evidence to establish title to or ownership of the assets; or
- (ii) A final judgement establishing title to or ownership of the assets issued by the competent authorities of another State Party, which order may be given

effect in the territory of the requested State to the extent permitted by the law of that State Party;

Enforcement of foreign confiscation judgements

(b) Adopt such measures as may be necessary to permit its competent authorities to give effect to a final judgement of another State Party ordering the confiscation of illicitly acquired assets or the payment of a sum of money corresponding to such assets;

Confiscation based on a foreign offence

(c) Adopt such measures as may be necessary to enable it to prosecute and punish the laundering of illicitly acquired assets of foreign origin and to confiscate assets pursuant to investigations or proceedings involving illicitly acquired assets of such origin;

Provisional measures

(d) Adopt such measures as may be necessary, in accordance with principles of its domestic law, to enable it, at the request of another State Party, promptly to seize, restrain or otherwise prevent any dealing in or transfer or disposal of property for which there is a reasonable basis to believe that it will be subject to recovery as illicitly acquired assets. In addition to mechanisms to preserve property in anticipation of a domestic confiscation action, such measures shall include authority to restrain assets based upon a foreign arrest or charge related to their illicit acquisition, authority to give effect to a restraining order issued by a court of competent jurisdiction in the requesting State and authority to restrain assets upon a request setting forth a reasonable basis to believe that the property will be named in a confiscation judgement in the requesting State;

Restitution

(e) Consider adopting such measures as may be necessary to provide for restitution of illicitly acquired assets to the requesting State or to other victims of crimes; and

Other measures

(f) Consider adopting such other measures as may be necessary to facilitate the recovery of illicitly acquired assets.

Article 4

Special cooperation provisions

1. In addition to the provisions established in chapter IV [International cooperation], States Parties shall afford one another the widest measure of assistance in the recovery of illicitly acquired assets in accordance with their domestic laws and, as may be appropriate, through the exercise of authority pursuant to this article.

Confiscation and other measures

2. Following a request made pursuant to this chapter, a State Party in which illicitly acquired assets are situated shall:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation consistent with article 3, paragraph 3, of this Convention, and, if such order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting State consistent with article 3, paragraph 2, of this Convention; or

(c) Submit a request for provisional measures to its competent authorities consistent with article 3, paragraph 4, of this Convention; or

(d) Take such other measures as may be permissible under its domestic law to effect the recovery of such assets.

Requests for application of enhanced scrutiny

3. Upon an appropriate request from another State Party, a requested State shall notify financial institutions subject to its jurisdiction of the identity of current and former senior foreign public officials to whose accounts those institutions will be expected to apply enhanced scrutiny as set forth in article 2, paragraph 2, of this Convention, in addition to those officials whom the financial institutions may otherwise identify.

Spontaneous information-sharing

4. Each State Party shall adopt measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on illicitly acquired assets to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that Party under this chapter.

Article 5

Contents of a request

The provisions of chapter IV [International cooperation] of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in chapter IV, requests made pursuant to this article shall contain sufficient evidence and information to support the underlying allegation, including the following:

(a) A complete description of the actions requested and of the assets to be restrained, seized or confiscated, including the location and value of the property;

(b) A statement identifying the legal and natural persons whom the requesting State believes to be victims, whether public or private;

(c) A detailed statement of facts sufficient to enable the requested State to seek appropriate orders under its domestic law, including a full description of the illegal activity and its relationship to the assets to be seized, restrained or confiscated;

(d) In the case of a request pertaining to the enforcement of a foreign judgement or restraining order pursuant to article 3, paragraph 2, of this Convention, a legally admissible copy of an order of the requesting State upon which the request is based, information as to the extent to which execution of the

order is requested, a statement specifying the measures taken to provide adequate notification to third parties and to ensure due process and, if involving an order of confiscation, an attestation by the competent authority of the requesting State that the confiscation order is final, enforceable and not subject to ordinary means of appeal; and

- (e) Such additional information as the requested State may require.

Article 6
Limitations on cooperation

1. The execution of measures pursuant to this chapter shall be in conformity with principles of due process and shall not prejudice the rights of bona fide third parties.

2. The execution of any cooperation measure under this chapter may be refused or provisional measures lifted if:

- (a) The request is not made in conformity with the provisions of this chapter;
- (b) The requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;
- (c) The requested State does not receive sufficient or timely evidence regarding the underlying offences; or
- (d) The illicit acts constitute minor offences or the illicitly acquired assets are of a *de minimis* value.

3. Before lifting any provisional measure taken pursuant to this chapter, the requested State shall, wherever possible, give the requesting State an opportunity to present its reasons in favour of continuing the measure.

Article 7
Disposition of assets

1. Illicitly acquired assets recovered pursuant to this chapter shall be disposed of in accordance with domestic law. When acting on the request of another State Party under this chapter, States Parties shall, to the extent permitted by domestic law:

- (a) Give priority consideration to transferring the recovered assets in such a manner as to compensate the victims of the crime or to return the assets to their legitimate owners;
- (b) Where appropriate, consider requiring that all or a portion of the recovered assets be used to support anti-corruption initiatives and programmes;
- (c) Where appropriate, consider sharing confiscated assets with foreign authorities that assisted in the investigation, prosecution or judicial proceeding leading to the confiscation;
- (d) Where appropriate, the requested State may deduct reasonable expenses incurred in the investigation, prosecution or judicial proceeding leading to the recovery of illicitly acquired assets prior to transferring or sharing such recovered assets pursuant to this chapter.

2. Each State Party shall adopt such measures as may be necessary to establish, consistent with principles of its domestic law:

(a) A mechanism for the consideration of claims by another State Party against illicitly acquired assets involved in a confiscation proceeding; and

(b) Authority to share confiscated assets with foreign authorities in recognition of assistance provided that leads to confiscation.

Article 8
Additional provisions

1. If a State Party elects to make the taking of the measures referred to in this chapter conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

2. States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken and to facilitate the disposition of assets pursuant to this chapter.

3. Each State Party shall furnish copies of its laws and regulations that give effect to this chapter and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

4. States Parties shall promote training and technical assistance among States Parties, international and regional bodies and private institutions with the objective of facilitating international cooperation and the identification and recovery of illicitly acquired assets. Such assistance should also aim to enhance the ability of States Parties to meet the requirements of article 5 of this chapter.
