

CHAPTER 5

ASSET RECOVERY AND MUTUAL LEGAL ASSISTANCE

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1. INTRODUCTION

The World Bank estimates that US\$20 billion to 40 billion is stolen every year through high-level corruption from developing countries and hidden overseas, and that these stolen assets are equivalent to 20-40% of official development assistance.¹ The Stolen Asset Recovery Initiative (StAR) estimates that only 5 billion was recovered in the past 15 years (between 0.8% and 1.6% of stolen assets).² StAR estimates that \$1 trillion to \$1.6 trillion in global proceeds from criminal activities, corruption and tax evasion crosses borders every year.³

Asset recovery in corruption cases includes the uncovering of corruption and the tracing, freezing, confiscating and returning of funds obtained through corrupt activities. It is particularly vital for developing countries that see their national wealth corruptly exported. There are several barriers to asset recovery. Once stolen assets are transferred abroad, recovery is extremely difficult. In developing countries, this difficulty results from limited legal, investigative and judicial capacity, as well as inadequate resources. Further, the lack of resources affects the ability of a state to make requests to countries holding the stolen assets. The problem is exacerbated in developed countries where assets are hidden or where necessary laws may be lacking to respond to requests for legal assistance.⁴ Moreover, the lack of non-conviction based asset forfeiture laws in some countries makes it difficult when the officials engaged in stealing assets have died, fled or have immunity. The United Nations and other relevant organizations attach a high priority to the problem of cross-border

¹ World Bank & United Nations Office on Drugs and Crime, "Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan" (World Bank, 2007) at 9, online: <http://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>.

² World Bank & United Nations Office on Drugs and Crime, "Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action" (World Bank, 2011) at 1.

³ *Ibid.*

⁴ *Ibid.*

transfers of illicitly obtained funds and the return of such funds. Confiscating assets is an important tool in the fight against corruption. It serves as both a sanction for improper, dishonest, and corrupt behaviours and a deterrent as the incentive to commit corruption is removed. Further, it incapacitates the offenders by depriving them of their assets and instruments of misconduct. It also repairs the damage done to victim populations when financial resources are confiscated from the offenders and ideally are directed toward economic development and growth in that country. Finally, asset recovery promotes accountability and positively affects the rule of law. The asset recovery process involves four steps: (1) identification; (2) investigation, tracing, freezing and seizing; (3) confiscation or forfeiture; and (4) return of the stolen assets to the owner.

This chapter discusses the international and domestic obligations to facilitate the recovery of stolen assets through UNCAC, OECD and other multilateral agreements. It then discusses StAR and the role of FIUs in facilitating recovery of stolen and corrupt assets before moving on to the various legal approaches to the freezing, confiscation and ultimate return of assets obtained by corruption.

2. ASSET RECOVERY CONCEPTS AND TOOLS

The following sections summarize the asset recovery process, identify the important agencies involved and describe the legal tools used for asset recovery. An important resource for these sections, and the chapter as a whole, is the 2011 StAR/World Bank publication *Asset Recovery Handbook: A Guide for Practitioners*.⁵ This guide provides a detailed description of the entire asset recovery process. However, it is worth noting at this stage, as discussed in Section 5.2, that some commentators are not enamoured with the policies and practices of the World Bank and StAR.

2.1 Asset Recovery Steps

2.1.1 The General Process for Asset Recovery

The following excerpt is from the *Asset Recovery Handbook: A Guide for Practitioners* (2011):⁶

⁵ Jean-Pierre Brun et al, “Asset Recovery Handbook: A Guide for Practitioners” (StAR/World Bank, 2011), online: <https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf>.

⁶ *Ibid.* at 5–8.

BEGINNING OF EXCERPT

1.1.1 Collection of Intelligence and Evidence and Tracing Assets

Evidence is gathered and assets are traced by law enforcement officers under the supervision of or in close cooperation with prosecutors or investigating magistrates, or by private investigators or other interested parties in private civil actions. In addition to gathering publicly available information and intelligence from law enforcement or other government agency databases, law enforcement can employ special investigative techniques. Some techniques may require authorization by a prosecutor or judge (for example, electronic surveillance, search and seizure orders, production orders, or account monitoring orders), but others may not (for example, physical surveillance, information from public sources, and witness interviews). Private investigators do not have the powers granted to law enforcement; however; they will be able to use publicly available sources and apply to the court for some civil orders (such as production orders, on-site review of records, prefilings testimony, or expert reports).

...

1.1.2 Securing the Assets

During the investigation process, proceeds and instrumentalities subject to confiscation must be secured to avoid dissipation, movement, or destruction. In certain civil law jurisdictions, the power to order the restraint or seizure of assets subject to confiscation may be granted to prosecutors, investigating magistrates, or law enforcement agencies. In other civil law jurisdictions, judicial authorization is required. In common law jurisdictions, an order to restrain or seize assets generally requires judicial authorization, with some exceptions in seizure cases.... Systems to manage assets will also need to be in place....

1.1.3 International Cooperation

International cooperation is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. It will be required for the gathering of evidence, the implementation of provisional measures, and the eventual confiscation of the proceeds and instrumentalities of corruption. And when the assets are confiscated, cooperation is critical for their return. International cooperation includes "informal assistance," mutual legal assistance (MLA) requests, and extradition.⁷ Informal assistance is often used among counterpart agencies to gather information and intelligence to assist in the investigation and to align strategies and forthcoming procedures for recovery of assets. An MLA request is normally a written request used to gather evidence (involving coercive measures that include investigative techniques), obtain provisional measures, and seek enforcement of

domestic orders in a foreign jurisdiction.

...

1.1.4 Court Proceedings

Court proceedings may involve criminal or NCB [non-conviction based] confiscation or private civil actions (each described below and in subsequent chapters); and will achieve the recovery of assets through orders of confiscation, compensation, damages, or fines. Confiscation may be property based or value based. Property-based systems (also referred to as “tainted property” systems) allow the confiscation of assets found to be the proceeds or instrumentalities of crime—requiring a link between the asset and the offense (a requirement that is frequently difficult to prove when assets have been laundered, converted, or transferred to conceal or disguise their illegal origin). Value-based systems (also referred to as “benefit” systems) allow the determination of the value of the benefits derived from crime and the confiscation of an equivalent value of assets that may be untainted. Some jurisdictions use enhanced confiscation techniques, such as substitute asset provisions or legislative presumptions to assist in meeting the standard of proof.

...

1.1.5 Enforcement of Orders

When a court has ordered the restraint, seizure, or confiscation of assets, steps must be taken to enforce the order. If assets are located in a foreign jurisdiction, an MLA request must be submitted. The order may then be enforced by authorities in the foreign jurisdiction through either (1) directly registering and enforcing the order of the requesting jurisdiction in a domestic court (direct enforcement) or (2) obtaining a domestic order based on the facts (or order) provided by the requesting jurisdiction (indirect enforcement).⁸ This will be accomplished through the mutual legal assistance process... Similarly, private civil judgments for damages or compensation will need

⁷ [13] For the purposes of this handbook, “informal assistance” is used to include any type of assistance that does not require a *formal* MLA request. Legislation permitting this informal, practitioner-to-practitioner assistance may be outlined in MLA legislation and may involve “formal” authorities, agencies, or administrations. For a description of this type of assistance and comparison with the MLA request process, see section 7.2 of chapter 7.

⁸ [14] See United Nations Convention against Corruption (UNCAC), art. 54 and 55; United Nations Convention against Transnational Organized Crime (UNTOC), art. 13; United Nations Convention against Narcotic Drugs and Psychotropic Substances, art. 5; and the Terrorist Financing Convention, art. 8. For restraint or seizure, see UNCAC, art. 54(2).

to be enforced using the same procedures as for other civil judgments.

1.1.6 Asset Return

The enforcement of the confiscation order in the requested jurisdiction often results in the confiscated assets being transferred to the general treasury or confiscation fund of the requested jurisdiction (not directly returned to the requesting jurisdiction).⁹ As a result, another mechanism will be needed to arrange for the return of the assets. If UNCAC is applicable, the requested party will be obliged under article 57 to return the confiscated assets to the requesting party in cases of embezzlement of public funds or laundering of such funds, or when the requesting party reasonably establishes prior ownership. If UNCAC is not applicable, the return or sharing of confiscated assets will depend on domestic legislation, other international conventions, MLA treaties, or special agreements (for example, asset sharing agreements). In all cases, total recovery may be reduced to compensate the requested jurisdiction for its expenses in restraining, maintaining, and disposing of the confiscated assets and the legal and living expenses of the claimant. Assets may also be returned directly to victims, including a foreign jurisdiction, through the order of a court (referred to as “direct recovery”).¹⁰ A court may order compensation or damages directly to a foreign jurisdiction in a private civil action. A court may also order compensation or restitution directly to a foreign jurisdiction in a criminal or NCB case. Finally, when deciding on confiscation, some courts have the authority to recognize a foreign jurisdiction’s claim as the legitimate owner of the assets.

If the perpetrator of the criminal action is bankrupt (or companies used by the perpetrator are insolvent), formal insolvency procedures may assist in the recovery process.

...

A number of policy issues are likely to arise during any efforts to recover assets in corruption cases. Requested jurisdictions may be concerned that the funds will be siphoned off again through continued or renewed corruption in the requesting jurisdictions, especially if the corrupt official is still in power or holds significant influence. Moreover, requesting jurisdictions may object to a requested country’s attempts to impose conditions and other views on how the confiscated assets should be used. In some cases, international organizations such as the World Bank and civil society organizations have been used to facilitate the return and monitoring of recovered funds.¹¹

END OF EXCERPT

Judges in the United States and the United Kingdom have, in a number of cases, made orders directing corrupt public officials and money launderers, as well as corporations and their agents involved in bribery of public officials to pay compensation or damages to a State that has been harmed by corruption offences.¹² For instance, when the British construction and engineering firm Mabey & Johnson disclosed to the UK Serious Fraud Office that it had paid bribes in several jurisdictions, it was ordered to make reparations of about £658,000 to Ghana, £618,000 to Iraq and £139,000 to Jamaica.¹³ In the United States, Robert Antoine, director of operations for Haiti's State-owned telecommunications entity, and executives of the telecommunications companies, who bribed him were jointly ordered to pay \$2.2 million in restitution to the government of Haiti. Similarly, the United States court ordered the three co-defendants of Steve Ferguson, head of the National Gas Company of Trinidad and Tobago, to make restitution to the government of Trinidad and Tobago in the amounts of \$4 million, \$2 million and \$100,000 respectively.¹⁴

Further Reading

For more on the use of anti-money laundering framework in asset tracing, see Hounta & Lehmann, "Using the Anti-Money Laundering Framework in Asset Tracing" in *Tracing Illegal Assets: A Practitioner's Guide* (Basel Institute on Governance, International Centre for Asset Recovery, 2015) at 69-91, online:

<https://forum.assetrecovery.org/sites/collective.localhost/files/publications/tracing_illegal_assets_manuscript_final_online.pdf>.

⁹ [15] Stolen Asset Recovery (StAR) Initiative Secretariat, "Management of Confiscated Assets" (StAR, 2009), <http://www.worldbank.org/star>.

¹⁰ [16] UNCAC, art. 53 requires that states parties take measures to permit direct recovery of property.

¹¹ [17] In 2007, the U.S. Department of Justice filed a civil confiscation action against a U.S. citizen indicted in 2003 for allegedly paying bribes to Kazakh officials for oil and gas deals. The action was for approximately \$84 million in proceeds. The American citizen agreed to transfer those proceeds to a World Bank trust fund for use on projects in Kazakhstan. See "U.S. Attorney for S.D.N.Y. Government Files Civil Forfeiture Action Against \$84 Million Allegedly Traceable to Illegal Payments and Agrees to Conditional Release of Funds to Foundation to Benefit Poor Children in Kazakhstan," news release no. 07-108, May 30, 2007; World Bank, "Kazakhstan BOTA Foundation Established," news release no. 2008/07/KZ, June 4, 2008, http://siteresources.worldbank.org/INTKAZAKHSTAN/News_and_Events/21790077/Bota_Establishment_June08_eng.pdf.

¹² United Nations Office on Drugs and Crime, "Digest of Asset Recovery Cases" [UN Digest (2015)] (United Nations, 2015), at 63-66, online:

<https://www.unodc.org/documents/corruption/Publications/2015/15-05350_Ebook.pdf>.

¹³ *Ibid* at 63.

¹⁴ *Ibid* at 64.

2.1.2 Management of Seized Assets

Below is an excerpt from International Centre for Asset Recovery/Basel Institute on Governance publication entitled *Development Assistance, Asset Recovery and Money Laundering: Making the Connection* (2011):¹⁵

BEGINNING OF EXCERPT

Asset Recovery, Management of Seized Assets and the Monitoring the Use of Returned Assets

Two additional elements should be considered in the asset recovery process: the management of assets that have been seized and that are pending confiscation, and the monitoring of assets that are repatriated by the recipient country to the victim country.¹⁶

Both national and international authorities often overlook the management of seized assets that are pending a confiscation order. Some of the problems include the cost of maintenance of the property – whether the taxes that are due during the seizure or the cost of up-keeping it in storage – while the seizure is pending a confiscation order, and the depreciation that the asset may have during its storage. To overcome such a situation, it is useful to analyse how some jurisdictions deal with the challenges, varying from the anticipated sale of the seized assets, such as in the United States and several Eastern European countries, or the promise from the person that committed the corrupt or other criminal act before a court that he/she will not sell the asset and will maintain it in good condition, such as in the United Kingdom.

¹⁵ International Centre for Asset Recovery, “Development Assistance, Asset Recovery and Money Laundering: Making the Connection” (Basel Institute on Governance, International Centre for Asset Recovery, 2011) at 18, online: <https://www.baselgovernance.org/sites/collective.localhost/files/publications/dfid_brochure_final_version_for_print.pdf>.

¹⁶ [7] For more on the management and use of recovered assets, see [Ignasio] Jimu. Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan. (2009), available at [updated link: https://www.baselgovernance.org/sites/collective.localhost/files/publications/biog_working_paper_06.pdf].

Whatever the option chosen, if at all since many countries do not yet have regulations in place to adequately address the management of seized assets, countries must bear in mind the fact that the anticipated sale of assets must be properly introduced into a legal system, so as to avoid any conflicts with the right to property of persons who may have a legitimate claim to the assets. Furthermore, an adequate database of seized assets must be put in place so as to ensure transparency and security in the management of such assets.

On the other hand, the monitoring of returned assets is a much debated topic in the asset recovery field. Some countries returning assets have in the past requested or conditioned the return of proceeds of corruption and other criminal acts to spending on specific projects or areas mutually determined by both countries. The argument used by returning countries is that this is an attempt to avoid the returned assets being recycled out of the country again through further corruption or other criminal acts. Many victim countries, in turn, argue that such imposition and conditioning of the returned assets is a violation of their sovereign right to decide how to spend or invest returned money.

The monitoring of returned assets must be mutually decided upon both the recipient and victim countries in a case-by-case scenario, ensuring transparency and dialogue in the process. In past cases, there have been examples countries using independent third parties, such as civil-society organisations from both countries to monitor the process.¹⁷

END OF EXCERPT

In regard to the somewhat controversial issue of monitoring returned assets, Article 57(5) of UNCAC stipulates that state parties may “give special consideration to concluding agreements or mutually acceptable arrangements on a case-by-case basis, for the final disposal of confiscated property.” This vague provision attempts to ensure that return of property to fragile, corrupt recipient states can have anti-corruption safeguards attached to the agreement to return. Aside from objections relating to the erosion of the recipient’s

¹⁷ For example, in Kazakhstan, criminal proceedings in Switzerland led to the restitution of assets derived from bribery. In a relatively successful monitoring arrangement, a non-profit, independent foundation was set up in Kazakhstan to monitor the use of returned assets. The foundation is supervised by IREX Washington and Save the Children: Greta Fenner Zinkernagel & Kodjo Attisso, “Past Experience with Agreements for the Disposal of Confiscated Assets” in Greta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publishers, 2013) 340.

sovereignty, monitoring may pose its own challenges, such as expense and technical difficulties.¹⁸

The BOTA Foundation in Kazakhstan provides an example of a successful agreement to facilitate the return of assets. In 2007, the US DOJ brought a civil forfeiture action against \$84 million held in a Swiss bank account—the money was tied to unlawful bribery transactions between oil and gas companies and Kazakh officials. In 2007, a memorandum of understanding between the governments of Kazakhstan, the US and Switzerland created the BOTA Foundation (BOTA) to ensure funds were used to benefit disadvantaged citizens in Kazakhstan. The MOU stipulated that the Foundation be independent from the Kazakh government, its officials and their associates. The Foundation was also monitored by the US and Switzerland and supervised by the World Bank. In order to continue receiving BOTA’s funds, Kazakhstan had to participate in a program to improve budget accountability and increase transparency of oil and gas revenues. According to Aaron Bornstein, the executive director of BOTA until it closed in 2014, the foundation used the \$115 million from the bank account and interest to help 200,000 poor children, youth and their families.¹⁹ The Foundation disbursed \$80 million directly to families and also funded various programs, including a tuition assistance program. As a result of BOTA’s success, discussions are currently underway to set up a similar arrangement in the Ukraine. However, recovering the proceeds of corruption is often impossible. Civil society organizations and transparency advocates argue that money from *FCPA* settlements should also be used to compensate victims, just as settlements in environmental cases often go towards affected communities.²⁰ StAR echoes this argument, encouraging countries to consider legislation allowing third parties to be included in settlement agreements for foreign bribery cases.²¹

2.2 International Asset Recovery Agencies

The World Bank in partnership with UNODC launched the Stolen Asset Recovery Initiative (StAR) in 2007 for the international support of asset recovery. The StAR Initiative was designed to do the following:

- (1) urge countries to ratify UNCAC and apply the framework,
- (2) lower the barriers to asset recovery,
- (3) build technical capacity to facilitate asset recovery,

¹⁸ *Ibid* at 329.

¹⁹ Aaron Bornstein, “The BOTA Foundation Explained (Part Nine): How Effective was BOTA?”, *The FCPA Blog* (22 April 2015), online: <<http://www.fcpablog.com/blog/2015/4/22/the-bota-foundation-explained-part-nine-how-effective-was-bo.html>>.

²⁰ Andy Spalding, “The BOTA Foundation explained (Part Twelve): Future BOTAs and the FCPA”, *The FCPA Blog* (29 April 2015), online: <<http://www.fcpablog.com/blog/2015/4/29/the-bota-foundation-explained-part-twelve-conclusion-future.html>>.

²¹ Larissa Gray et al, *Few and Far: The Hard Facts on Stolen Asset Recovery* (World Bank and OECD, 2014) at 45, online: <<https://openknowledge.worldbank.org/handle/10986/20002>>.

- (4) help to deter such flows and eliminate safe havens for corruption,
- (5) generate and disseminate knowledge on asset recovery,
- (6) advocate for implementation of measures that reduce barriers to asset recovery,
- (7) support national efforts to build institutional capacity for asset recovery, and
- (8) monitor recovered funds if requested.

Each country maintains its own asset recovery system. In 2010, the UK created the National Crime Agency to fight serious and organized crime. Within this agency, the Economic Crime Command deals with economic crime and the Organized Crime Command deals with serious and organized crime. The Asset and Forfeiture and Money Laundering Section of the Department of Justice is the US government body dealing with asset forfeiture and anti-money laundering enforcement efforts.²² An international unit assists prosecutors in the restraint and forfeiture of assets located abroad and assists foreign governments seeking restraint and forfeiture of assets held in the United States. The Kleptocracy Team investigates and litigates to recover proceeds of foreign official corruption. The US manages the Consolidated Assets Tracking System—a database for managing the approximately \$2 billion in assets seized.

Many jurisdictions, such as Canada, Australia, Italy, the US, and South Africa, maintain asset forfeiture funds to ensure adequate funding for asset recovery. Confiscation laws may require confiscated assets be liquidated and the proceeds paid into these accounts. Canada identifies its fund as the Seized Property Proceeds Account, South Africa has the Criminal Assets Recovery Account,²³ while the US has the Assets Forfeiture Fund.²⁴

2.3 State-Level Financial Intelligence Units (FIUs)

Financial Intelligence Units (FIUs) are responsible for collecting suspicious transaction reports from financial and some non-financial organizations in order to combat money laundering. An FIU is defined as a central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating disclosures of financial information involving the proceeds of crime to the authorities as required by national legislation or regulation. FIUs may conduct investigations based on the reports received and disseminate results to local law enforcement.

FIUs are essential in the fight to prevent or reduce the laundering of proceeds of corruption and other crimes. Anti-money laundering legislation requires many financial and non-financial organizations to file activity or suspicious transaction reports, known as STRs, with FIUs. Some FIUs also collect currency transaction reports (CTRs). Organizations include

²² Online: <<http://www.justice.gov/criminal/afmls/>>.

²³ Online: <<http://www.justice.gov.za/reportfiles/other/cara-anr-2010-11.pdf>>.

²⁴ Online: <<http://www.justice.gov/criminal/afmls/>>.

financial institutions, regulatory authorities and professions such as lawyers, accountants and trust company providers. The local FIU may also give information to the Egmont Group, the informal association of FIUS, which can then pass information to foreign FIUs.²⁵

The US FIU is known as the Financial Crimes Enforcement Network (FinCEN), while the UK simply called it UKFIU. Canada created the Financial Transactions and Reports Analysis Centre (FINTRAC) in 2000. FINTRAC joined the Egmont Group in 2002. UNCAC does not require an FIU be established, but Article 58 states that parties shall cooperate to prevent the transfer of the proceeds of Convention offences and to promote recovery of such proceeds. To that end, Article 58 requires state parties to consider establishing an FIU.

Below is an excerpt from a 2010 StAR report entitled *Towards a Global Architecture for Asset Recovery*:

BEGINNING OF EXCERPT

123. Financial intermediaries, including banks, other financial service providers and gatekeepers – including lawyers, notaries, company formation and real estate agents – are the first line of defense against money laundering. Intermediaries are required to monitor the transactions and behavior of their clients and prospective clients with due diligence and report suspicious activities to the FIU.

124. FIUs centralize and analyze information regarding suspected money laundering activity. Their broader responsibilities vary between jurisdictions. Administrative FIUs are independent bodies which receive, process and then transmit information to the judicial or law enforcement authorities for investigation. FIUs established within

²⁵ The following description is taken from “Towards a Global Architecture for Asset Recovery” (StAR/World Bank/UNODC, 2010) at 38, online: <https://star.worldbank.org/star/publication/towards-global-architecture-asset-recovery>. “The Egmont Group is a network of 116 Financial Intelligence Units established to improve cooperation in the fight against money laundering and financing of terrorism and promote programs in this field at the national level. The Egmont Group manages a secure information network, which allows members to exchange information freely that would facilitate analysis or investigation of financial transactions. This information originates from suspicious activity reports or other disclosures from the financial sector, as well as government administrative data and public record information. Members agreed that information exchanged between FIUs be used only for the specific purpose for which the information was sought or provided. Rarely is information used as evidence and then only where authorized by the requested FIU. Nonetheless, the Egmont network serves as an important support to international asset recovery both in terms of detecting illicit flows, identifying possible leads, and facilitating tracing and the collection of evidence to support asset recovery cases.”

law enforcement agencies will have a proactive role in and may even lead the money laundering investigations. FIUs within the judicial branch, may have authority to order coercive and preventative measures in support investigations. In 2007, when Egmont had 101 members, there were 66 administrative FIUs, 29 law enforcement FIUs and 6 hybrids.

125. Suspicious activity reports (SARs) constitute an important source of leads identifying potential corruption and asset recovery cases. Most countries have reported a steady increase in both the quantity and quality of the STRs as financial intermediaries gain experience and confidence. However, there is very little official data available on the proportion SARs where the suspicion relates to corruption. The Swiss mutual evaluation report suggests that about seven percent of SARs are corruption related, though about forty percent are unclassified. This seems to be a somewhat higher proportion than seen in other jurisdictions; the Isle of Man, for instance, reports that between one and a half to two percent of SARs were related to PEPs or suspected corruption in the period 2004-08, while Singapore reports that just over one percent of SARs referred for further investigation were corruption-related. Interviews with FIUs in major financial centers tend to confirm that the proportion of PEPs and corruption-related SARs is generally around one percent, though the FIUs are quick to point out that this probably underestimates the amount of corruption-related money laundering. Suspected corrupt activity may not be reported: for example, the financial intermediary refuses a customer but does not file a SAR. Alternatively, the corrupt activity is reported for unrelated reasons: the proceeds of corruption may be indistinguishable from the proceeds of other crimes and are often reported to the FIU because of the suspicious nature of the transaction rather than concerns regarding the origin of the funds.

126. Coordination with the institutions that are engaged in corruption on a regular basis, such as the audit authority and anti-corruption agencies, could be expected to improve understanding of risks and help identify red flags. This would enhance the FIUs ability to detect corruption related money laundering. Greater awareness of money laundering aspects of corruption would assist the audit authority and anti-corruption agencies engage with the FIU at an early stage in the investigation to assist in tracing.

127. There is little evidence that this coordination is taking place. A study by ESMAALG (the East and Southern Africa FATF-style regional body) of twelve member countries concludes “in most member countries, corruption and money laundering are investigated by agencies that are separate, distinct and have little interaction. This results in a regrettable dissipation of resources and unhealthy competition”. Upcoming research by the World Bank of an additional thirteen countries in several regions comes to similar conclusions. There is little understanding

of how money laundering and anti-corruption regimes interact and little incentive for countries to these relationships.

128. Clearly, if progress is to be made in tackling the proceeds of corruption these coordination issues will have to be addressed. This can be done at various levels.²⁶

END OF EXCERPT

The following is an excerpt from a 2009 publication by the Basel Institute on Governance entitled *Tracing Stolen Assets: A Practitioner's Handbook*:²⁷

BEGINNING OF EXCERPT

Probably the most interesting tool for an investigator in tracing assets, especially assets stashed away in financial centres, is the requirement obliging financial institutions and DNFBPs [designated non-financial businesses and professions] to report suspicious transactions to the national FIU. In most financial centres, financial institutions and DNFBPs have to file a suspicious activity report (SAR) if the assets the suspect entrusted to them originate from a predicate offence.²⁸ Corruption offences are mandatory predicate offences to money laundering. What does that mean for a Police Officer, Magistrate or Prosecutor investigating corruption, who believes that the suspect has stashed away the proceeds of the corruptive act in a particular financial centre? Most often, the investigator will not know which financial institution is involved. In Switzerland alone, there are 400 banks and nearly 10,000 non-banking financial institutions. A request for information from the Swiss MLA authorities without being able to name the financial institution involved would be considered as a 'fishing expedition', and returned to the sender.

How can we overcome this obstacle? Once again, the AML [anti-money laundering] framework may prove to be of assistance: A bank is likely to file a SAR in respect of a client if the information reaches the bank that the bank's client is under investigation for a predicate offence to money laundering. Once the SAR is with the FIU in the

²⁶ *Ibid* at 37–38.

²⁷ International Centre for Asset Recovery, "Tracing Stolen Assets: A Practitioner's Handbook" [Tracing Stolen Assets (2009)] (Basel Institute on Governance, International Centre for Asset Recovery, 2009) at 65–66, online: <<https://www.baselgovernance.org/publications/421>>.

²⁸ [6] E.g., Art. 9 Swiss AML Law, Art. 17 Liechtenstein Due Diligence Law.

financial centre concerned, this FIU can share information with its counterpart FIU in the country where the predicate offence took place. Under certain conditions, this information can be made available to the investigator in the country where the predicate offence occurred (normally as intelligence only, not as evidence). This allows the investigator in question to locate the stolen assets and submit a tailor-made MLA request to his or her counterpart in the financial centre and avoid the problematic ‘fishing expedition’.

However, to prompt an SAR, the financial institution in the financial centre must learn about the predicate offence in the country of origin of the crime in some way. In corruption cases, the country of origin is very often a developing or transition country with limited law enforcement capacities. Financial institutions will not regularly access news from developing or transition countries. Only a few major banks’ compliance officers would systematically read newspapers and screen them for potential allegations against clients. So, the information on an ongoing investigation must somehow be spread and reach the financial institutions in financial centres. There are various mechanisms for ensuring this information can be spread, either by using existing contacts in the financial centre – networking is of crucial importance for successful asset tracing – or the international media in cases of high profile investigations. Or else specialists can be found in financial centres that target major financial institutions, and provided with case related information that is not confidential but sufficient for the financial institution to consider filing an SAR.

END OF EXCERPT

Further Reading

For a discussion of the potential of FIUs and their ideal use in asset recovery, see Thelesklaf & Salihodzic, “The Role of Financial Intelligence Units in Fighting Corruption and Asset Recovery” in Zinkernagel, Monteith & Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publishers, 2013).

2.4 Types of Tools for Asset Recovery

The following sections briefly describe the statutory and private law remedies that can be used for asset recovery, as well as the ways in which they interact and their limitations.

2.4.1 Criminal Forfeiture

Confiscation (or forfeiture) is a means of redress for authorities seeking to recover stolen assets. Confiscation is an order by which a person is permanently deprived of assets without compensation. As a result, title is acquired by the state. The rationale for confiscating proceeds of corruption is both to compensate victims and to provide deterrence by removing the enjoyment of the illegal gains. Criminal confiscation takes place after a criminal conviction has been made (at trial or by a guilty plea). The forfeiture order follows as part of the sentencing process. Guilt must be proven at trial “beyond a reasonable doubt” in common law regimes, or the judge must be “intimately convinced” in civil law regimes. Once a conviction is obtained, the court can order confiscation. In most jurisdictions, the standard of proof for establishing that certain assets are derived from criminal activities is lowered to a “balance of probabilities.”

2.4.2 Civil (Non-Criminal Based) Forfeiture

Another form of forfeiture is non-conviction based (NCB) forfeiture. Criminal forfeiture and NCB forfeiture share the same objective, but their procedures are different. Criminal confiscation can only occur after a criminal conviction. NCB forfeiture, on the other hand, can operate separately from the criminal justice system or alongside it, and it allows for the restraint, seizure and forfeiture of stolen assets without a finding of guilt in the criminal context. NCB forfeiture only requires a finding that the property is tainted, either as the proceeds of a crime or as an instrument of criminal activity.

NCB forfeiture is an action against the asset itself (e.g., money, property, etc.), not the person. After an NCB forfeiture order, the defendant forfeits the thing itself subject to any innocent owners. There are generally three ways NCB forfeiture is available. First, it can form part of criminal proceedings without requiring a final conviction or finding of guilt. In this regard, NCB confiscation tools are incorporated into criminal legislation. The second method is through a separate proceeding normally governed by the rules of civil procedure and can occur independently or parallel to criminal proceedings. The final method is administrative confiscation, which can occur in some jurisdictions and does not require a judicial determination.

An acquittal from criminal charges does not bar NCB forfeiture proceedings.²⁹ Article 54 of UNCAC requires all State Parties to consider forfeiting the proceeds of crime without a conviction. It also obliges State Parties to enable domestic authorities to recognize and act on an order of confiscation issued by a court of another State Party. This is broadly worded and could include NCB forfeiture orders. Further, it obliges State Parties to permit competent authorities to order the confiscation of property of foreign origin acquired through Convention offences. Again, this is broadly worded and could include NCB forfeiture

²⁹ See, for example *Director of the Assets Recovery Agency v T and Others*, [2004] EWHC 3340 (UK); *National Director of Public Prosecutions v Prophet*, [2006] ZACC 17; *United States v One Assortment of 89 Firearms*, 465 US 354 (1984); *Proceeds of Crime Act 2002* (Cth), s 51 (Australia).

orders. However, many jurisdictions have yet to put in place procedures allowing NCB forfeiture.

NCB forfeiture is particularly important for asset recovery in circumstances when there is a lack of evidence to support a criminal conviction (beyond a reasonable doubt). For example, when the offender is dead (bringing to an end criminal proceedings), has fled the jurisdiction, is immune from prosecution, is unknown, or the property is held by a third party who is aware (or wilfully blind) that the property is tainted. For these reasons, the Stolen Asset Recovery (StAR) Initiative views NCB forfeiture as a “critical tool for recovering the proceeds and instrumentalities of corruption.”

Confiscation can be either property-based or value-based. In a property-based order, assets linked to illicit activities are specifically targeted for confiscation. In a value-based order, a monetary amount is calculated based on the value of the benefit, advantages, and profits a person gained from illicit activities.

Criminal proceedings and NCB forfeiture operate together to achieve the best results. Both procedures can occur without violating double jeopardy because NCB forfeiture is not considered a punishment or a criminal proceeding.³⁰ In both methods, it must be established that the targeted assets derived directly or indirectly from the commission of the crime. Tracing assets can be extremely difficult as they can quickly change form, location and ownership, and complicated legal vehicles are used to hide assets abroad. Fortunately, “know-your-customer” policies and procedures imposed by international treaties can assist in the asset tracing process. Further, FIUs can also provide helpful information in an asset tracing investigation.

For both criminal and NCB forfeiture, confiscated proceeds go to the prosecuting state treasury, unless compensation for victims is ordered as well.³¹

For non-conviction based forfeiture statutes in Canada, see provincial statutes such as the *Civil Forfeiture Act*, SBC 2005, c 29 and *Remedies for Organized Crime and Other Unlawful Activities Act*, 2001, SO 2001, c 28.

2.4.3 Administrative Freezing and Confiscation Measures

Administrative orders to freeze or confiscate assets are issued by a government rather than the judiciary and can bypass mutual legal assistance requests from foreign countries in cases of urgency. For example, after the Arab Spring, administrative measures were implemented to facilitate the rapid freezing of assets of corrupt former leaders in the Arab world. Canada,

³⁰ See, for example, *United States v Ursery*, 518 US 267 (1996); *The Scottish Ministers v Doig*, [2006] CSOH 176 (Scotland); *Walsh v Director of the Assets Recovery Agency*, [2005] NICA 6 (Northern Ireland CA); and *Ontario v Chatterjee*, 2009 SCC 19.

³¹ Jacinta Anyango Oduor et al, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (StAR/World Bank/UNODC, 2014) at 141.

the US, Switzerland and the EU introduced legislation allowing their governments to order financial institutions to freeze assets without a judicial order or mutual legal assistance request from the corrupt officials' countries.³²

2.4.4 Fines that Correspond to the Value of the Benefit

Fines can also be imposed on individuals or corporations that are equal to or greater than the value of benefits derived from the inappropriate conduct. The judgment may be enforceable as a fine or a debt. Derived benefits include all assets and profits that can be reasonably linked to the offences forming the offender's criminal conviction. This is also referred to as "value-based confiscation," as the person is ordered to pay an amount of money equivalent to or greater than his/her criminal benefit. Fines are generally paid into the treasury of the prosecuting jurisdiction.³³

The OECD/World Bank publication entitled, *Identification and Quantification of the Proceeds of Bribery* gives examples of how various countries use fines and value-based forfeiture orders to remove any "criminal benefits".³⁴

BEGINNING OF EXCERPT

The term "benefits" is usually broadly defined to include the full value of cash or non-cash benefits received by a defendant (or a third party, at the defendant's direction) directly or indirectly as a result of the offence. Benefits will usually cover more than the rewards of a financial nature. Some examples include:

- the value of money or assets actually received as the result of committing an offence (for example, the revenues from an initial contract obtained by bribery);
- the value of assets derived or realized (by either the defendant or a third party at the direction of the defendant) directly or indirectly from the offence (for example, supplemental work obtained in the context of that same contract); and

³² Gray et al (2014) at 41. See also UN Digest (2015) at 26-27, 40, 49-52. In respect to Canada, see Sections 4.3(1) and (2) of this Chapter.

³³ *Ibid* at 143.

³⁴ OECD/The World Bank, *Identification and Quantification of the Proceeds of Bribery: Revised edition*, (OECD Publishing, 2012) [Identification & Quantification (2012)] at 19-20, online: <<http://dx.doi.org/10.1787/9789264174801-en>>.

- the value of benefits, services or advantages accrued (to the defendant or a third party at the direction of the defendant) directly or indirectly as a result of the offense (for example, the possibility to obtain future contracts based on the experience gained through that initial contract obtained through bribery).

...

Examples of fines calculated from benefits include Australia, Greece, Hungary and Korea. For instance, in Australia, the maximum penalty for a corporation will be the greater of AUD 11 million or three times the value of any benefit that the corporation has directly or indirectly obtained that is reasonably attributable to the conduct constituting the offence (including the conduct of any related corporation). If the court cannot determine the value of that benefit, it may be estimated at 10% of the annual turnover of the corporation during the 12 months preceding the offence. In Greece, the corporate liability legislation imposes an administrative fine of up to three times the value of the “benefit” against legal persons who are responsible for foreign bribery. In Hungary, fines for legal persons can be of a maximum of three times the financial advantage gained or intended to be gained, and at least HUF 500 000. In Korea, the maximum fine for a legal person is KRW 1 billion, but if the profit obtained through the offence exceeds a total of KRW 500 million, the legal person shall be subject to a fine up to twice the amount of the profit. [footnotes omitted]

END OF EXCERPT

2.4.5 Civil Actions and Remedies

2.4.5.1 Introduction

Civil remedies provide another tool in recovering the proceeds of corruption and can complement criminal proceedings. Civil actions are not limited to asset recovery purposes, but also achieve anti-corruption goals more generally by sanctioning wrongdoing and allowing injured parties to bring suits. All civil actions related to corruption will be discussed in this section, including those not specifically related to asset recovery.

Article 35 of UNCAC creates an international obligation to provide private actors with the right to initiate civil proceedings:

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

However, Article 35 does not provide special standing or a special right of action for private litigants and is subject to sovereignty and domestic law. As pointed out by Makinwa in *Private Remedies for Corruption*, this means that private rights of action “exist only to the extent provided under domestic laws and processes.”³⁵ Makinwa also points out that Article 35 applies only where a causal link exists between the claimant and the wrongdoing.³⁶ As a result, Article 35 on its own “gives a very limited right of redress to only a very particular group of people.”³⁷

A foreign court is competent to hear a civil suit if the defendant lives in or is incorporated in the court’s jurisdiction, if assets are located in or have passed through the jurisdiction, or if an act of corruption or money laundering was committed in the jurisdiction.³⁸ In some countries, civil and criminal proceedings can be run simultaneously. In *Attorney General of Zambia v Meer, Care & Desai and Others* (2007) (“*Attorney General of Zambia*”),³⁹ the court found that civil proceedings can run parallel to criminal proceedings, subject to the civil proceedings and evidence being “ring fenced” to prevent self-incrimination in the criminal trial.⁴⁰

State parties, local public entities like municipalities and state-owned companies can initiate civil proceedings in foreign or domestic courts in the same manner as private citizens, although legal standing may be denied if the public entity has no direct and personal interest in the case.⁴¹ Article 43 of UNCAC requires all State Parties *consider* assisting each other in investigations and proceedings in civil and administrative matters relating to corruption. Article 53 requires each State Party take necessary measures to:

- (i) ensure that other States may make civil claims in its courts to establish ownership of property acquired through a Convention offence;
- (ii) ensure that courts have the power to order the payment of damages to another State Party; and
- (iii) ensure that courts considering criminal confiscation also take into consideration the civil claims of other countries.

Domestic statutes, such as the US *Racketeering Influenced and Corrupt Organizations Act (RICO)*, sometimes recognize the right of foreign states to sue. Another option for victims of

³⁵ Abiola O Makinwa, *Private Remedies for Corruption* (The Hague: Eleven International, 2013) at 377.

³⁶ *Ibid* at 428.

³⁷ *Ibid* at 428.

³⁸ Jean-Pierre Brun et al, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (World Bank, 2015) at 4.

³⁹ *Attorney General of Zambia v Meer, Care & Desai and Others* [2007] EWHC 952 (Ch) (UK).

⁴⁰ John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Edward Elgar, 2014) at 326.

⁴¹ Brun et al (2015) at 14.

corruption is to bring an action domestically and seek to enforce the judgment in the foreign jurisdiction in which assets are located.⁴²

In general, to be enforceable in Canada, a judgment “must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce.”⁴³ The defences to enforcement of a foreign judgment include fraud, public policy and lack of natural justice.⁴⁴ Overall, Canadian courts have adopted a “generous and liberal” approach to the enforcement of foreign judgments, but the recent case against Chevron demonstrates that enforcement of foreign judgments in complex disputes may involve years of litigation in multiple jurisdictions.⁴⁵

An Example of a Complex Enforcement of a Foreign Judgment Case

In the Chevron case, in 2011, after a seven-year-long trial process, a provincial court in Ecuador issued a judgment ordering California-based oil company Chevron to pay \$8.6 billion in environmental damages and \$8.6 billion in punitive damages to the plaintiffs representing around 30,000 Ecuadorian indigenous villagers. In November 2013, Ecuador’s Court of Cassation reduced the total amount to \$9.5 billion. In May 2012, the plaintiffs sought recognition and enforcement of the Ecuadorian judgment against Chevron and its Canadian subsidiary in the Ontario Superior Court of Justice. The dispute ultimately reached the Supreme Court of Canada, which held that the only prerequisite to recognize and enforce a foreign judgment is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction (the defendant’s presence in the jurisdiction or consent to submit to the court’s jurisdiction) were satisfied.⁴⁶ There is no need to prove that a “real and substantial connection” exists between the enforcing forum and the judgment debtor or the dispute, or that the foreign debtor has assets in the enforcing forum.⁴⁷ However, the fact that a court in Canada has jurisdiction in an enforcement proceeding does not mean that the judgment will be enforced because the debtor may still raise any of the available defences (i.e. fraud, denial of natural justice or public policy).⁴⁸ Here Chevron instituted legal proceedings in the United States alleging that the plaintiffs’ American lawyer Steven Donziger and his team corrupted the Ecuadorian proceedings by offering a bribe of \$500,000 to the trial judge and “ghost-writing” the judgment. In 2011, Judge Kaplan of the US District

⁴² *Ibid* at 14.

⁴³ *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52 at para 31, [2006] 2 SCR 612.

⁴⁴ *Beals v Saldanha*, 2003 SCC 72 at paras 39-77, [2003] 3 SCR 416. See also *British Columbia Court Order Enforcement Act*, RSBC 1996, c 78, s 29(6); *Ontario Reciprocal Enforcement of Judgments Act*, RSO 1990, c R5, s 3; *Civil Code of Québec*, CQLR, c CCQ-1991, s 3155.

⁴⁵ *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 27, [2015] 3 SCR 69.

⁴⁶ *Ibid*.

⁴⁷ *Ibid* at para 3.

⁴⁸ *Ibid* at paras 34, 77.

Court for the Southern District of New York granted Chevron a global anti-enforcement injunction with respect to the Ecuadorian judgment.⁴⁹ In 2014, Judge Kaplan held that the Ecuadorian judgment had been procured by fraud.⁵⁰ In Canada, the case is currently back before the Ontario Superior Court of Justice where Chevron argues that the Ecuadorian judgment was fraudulently obtained and may not be enforced against Chevron's Canadian subsidiary.⁵¹

Civil actions in corruption cases may benefit private interests or public interests. In this respect, Makinwa divides claims for damage into two categories. The first involves claims for damage to private interests. Claimants in this category are direct parties to a corruption-tainted transaction, such as shareholders or losing competitors in a bidding process. States or public entities can be included in this category if they are party to a tainted contract. Remedies for damaged private interests are found in tort law, principles of fiduciary duty, or securities and antitrust litigation. The second category of claims is for damage to public interests. Claimants in this category are indirect victims of corruption, or states and civil society groups claiming on behalf of indirect victims. Because obtaining legal standing and establishing a cause of action is challenging for indirect victims, they "do not have as clear a path to redress as compared with the methods available to direct victims such as principals, shareholders and third parties affected by noncompetitive behavior."⁵² Makinwa, however, lists some strategies used in past cases involving damage to the public interest:

[Examples include] a state government using private law processes to protect the *interest of the state and people*; a state company seeking redress for international corrupt activity affecting its officials; and a succeeding government using the processes of private law to seek remedies for corrupt actions. Other examples show attempts by NGOs and private citizens to seek redress on behalf of the general citizenry for damage caused by a corrupt activity.⁵³

Recovery in civil proceedings can take the form of compensation for damages, return of property acquired through corruption to the legitimate owner, or restitution of the rewards

⁴⁹ *Chevron Corp v Donziger*, 768 F Supp (2d) 581 (SDNY 2011). The United States Court of Appeals for the Second Circuit overturned the injunction in 2012: see *Chevron Corp v Naranjo*, 667 F (3d) 232 (2d Cir 2012).

⁵⁰ *Chevron Corp v Donziger*, 974 F Supp (2d) 362 (SDNY 2014), affirmed, 833 F (3d) 74 (2d Cir 2016).

⁵¹ Drew Hasselback, "Chevron's US\$9.5 Billion Ecuador Case Returns to an Ontario Court", *Financial Times* (12 September 2016), online: <<http://business.financialpost.com/news/chevrons-9-5-billion-ecuador-case-returns-to-an-ontario-court>>; Colin Perkel, "Ecuadoreans Face off against Chevron in an Ontario Court" *The Globe and Mail* (15 September 2016), online: <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ecuadoreans-face-off-against-chevron-in-an-ontario-court/article31913977/>>.

⁵² Makinwa (2013) at 432.

⁵³ *Ibid* at 407.

of unjust enrichment. As mentioned above, civil remedies in corruption cases do not always further the goals of asset recovery and instead might be related to sanctioning wrongdoing and compensating individuals for harm arising from corrupt conduct. The following sections will explore various claims and remedies related to anti-corruption and asset recovery goals.

2.4.5.2 Personal Claims and Remedies

Victims of corruption can bring claims against other persons to seek redress for damage caused by corruption. For example, a victim might bring an action in tort for monetary damages to compensate for economic losses caused by corruption. Possible plaintiffs include governments that pay excessive amounts for goods or services due to bribes paid to their officials or harmed individuals like consumers and unsuccessful bidders.

a) Actions for compensation for damages in tort

In tort-based actions, the plaintiff is compensated for losses caused by a defendant's breach of duty. In the case of bribery, the giver and the receiver of the bribe will likely be joint tortfeasors, since both act wrongfully towards the plaintiff.⁵⁴ Causes of action useful to asset recovery and corruption include civil fraud, tortious interference, conspiracy and misfeasance in public office.⁵⁵ Tort claims are sometimes hindered by the need to establish intent on the part of the defendant and causation between the corrupt act and the loss.

Tortious interference is relevant when the private interests of parties to a transaction are damaged, such as when bribery taints a bidding process. The interfering conduct must be unlawful, like bribery, in order to provide a foundation for the tort. In *Korea Supply Co (KSC) v Lockheed Martin Corp* (2003),⁵⁶ KSC succeeded in recovering damages based on the tort of interference with prospective economic advantage. KSC stood to gain a hefty commission if it secured a contract for another company. The defendant, another bidder, bribed a public official and was awarded the contract instead.

The tort of misfeasance in public office holds potential to assist in asset recovery, as demonstrated by the successful claim for compensation in *Marin and Coye v Attorney General of Belize* (2011).⁵⁷ The state was allowed to bring an action for misfeasance against its own officials, who sold state land to a company beneficially owned by themselves.⁵⁸ However,

⁵⁴ Emile van der Does de Willebois & Jean-Pierre Brun, "Using Civil Remedies in Corruption and Asset Recovery Cases" (2013) 45:3 Case W Res J Intl L 615 at 637–639.

⁵⁵ *Ibid.*

⁵⁶ *Korea Supply Co v Lockheed Martin Corporation*, 63 P (3d) 937, 941 (Cal 2003).

⁵⁷ *Marin and Coye v Attorney General of Belize*, [2011] CCJ 9 (AJ).

⁵⁸ Hatchard (2014) at 96.

Makinwa warns that claims of misfeasance in public office are often unfeasible due to the requirement of establishing intent to cause loss.⁵⁹

In *Attorney General of Zambia*, the Attorney General of Zambia sought the recovery of millions of dollars based on the tort of conspiracy. The money was siphoned from state coffers by ex-president Frederick Chiluba and his cronies under the pretext of payments for bogus security projects. The court found that Chiluba and other officials committed the tort of conspiracy to misappropriate funds and breached their fiduciary duties. They were liable for the value of the misappropriated assets.

Recent developments surrounding the case against SNC-Lavalin Group Inc. provide another example of a civil action for damages in the context of corruption. SNC-Lavalin was charged with corruption and fraud in relation to alleged bribery in Libya and is now suing two former executives for financial losses and reputational damage. SNC-Lavalin claims it was unaware that one of the executives was the beneficial owner of a shell consultancy company, which the executives used as a pretext for siphoning funds.⁶⁰

b) Actions for contractual invalidity, contractual damages and contractual restitution

Makinwa outlines two different contracts involved in cases of bribery: the primary contract, which consists of offer and acceptance of the bribe, and the secondary contract, which comes into being because of the bribe.⁶¹ The author notes that international consensus exists as to the unenforceability of the primary contract, since it evidences criminally prohibited

⁵⁹ Makinwa (2013) at 243.

⁶⁰ Nicholas van Praet, "SNC-Lavalin Sues Former Executives over Alleged Bribery and Embezzlement", *The Globe and Mail* (April 9, 2015), online at: <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/snc-lavalin-sues-former-executives-over-alleged-bribery-embezzlement/article23870439/>. In his statement of defence, SNC's former executive vice-president of construction Riadh Ben Aissa alleged that specific SNC executives organized and approved purchases of a number of lavish gifts for Saadi Gadhafi, including a \$38 million yacht. He further claimed that "most of SNC's senior executives knew that the so-called agency contracts were in reality bribes paid to Libyan foreign officials in exchange for the award of the sole-source contract" (see John Nicol & Dave Seglins, "SNC-Lavalin Replaces CEO amid More Allegations", *CBC News* (14 September 2015), online: <http://www.cbc.ca/news/business/snc-lavalin-card-bruce-1.3226097> >). Also, in December 2014, SNC-Lavalin recovered \$13 million from Ben Aissa's frozen assets in Switzerland after Ben Aissa was found guilty for bribery in Swiss proceedings. The recovered money was part of the \$47 million surrendered by Aissa and was awarded to SNC-Lavalin on the basis that the company was an "injured party." Recovery by corporate "victims" in bribery cases is very rare and has only occurred in two cases. See Richard L Cassin, "'Victim' SNC-Lavalin Collects \$13 Million in Recovered Funds", *The FCPA Blog* (15 December 2014), online: <http://www.fcpablog.com/blog/2014/12/15/victim-snc-lavalin-collects-13-million-in-recovered-funds.html>.

⁶¹ Makinwa (2013) at 471.

behaviour. Therefore, a court will not interfere with disputes over the primary contract, but rather will leave the parties as is.

The secondary contract will generally be void or, particularly in common law jurisdictions, voidable at the instance of the betrayed principal. This unenforceability is based on public policy. If the secondary contract is invalidated, a court might order restitution of money paid by the victim under the contract. Restitution might include all sums paid by the victim or, in other cases, the expenses incurred by the defendant under the contract might be subtracted from the victim's recovery. If the contract is voidable and the betrayed principal wishes to rescind the contract and escape their obligations, the principal might need to show that they would have refused the contract in the absence of wrongdoing.

If the principal decides not to rescind, the court may award compensation for damages resulting from entering a contract with unfavourable terms. For example, if a government buys goods from a company that has bribed a public official, a court might find that the true price of the goods has been inflated by the amount of the bribe. This allows the government to recover the amount of the bribe as well as any other losses it can show.⁶²

Damages are also available for breach of contract. Breaches might include defective or shoddy performance, or breach of a term in the contract stipulating that the defendant would not induce public officials.⁶³ A betrayed principal might also seek damages from a corrupt agent for breach of the duty of good faith and loyalty in employment or agency contracts.

Usually damages are calculated by determining the plaintiff's loss. However, in some jurisdictions, the defendant in a suit for contractual breach might be obliged to disgorge the profits of corruption instead of, or even in addition to, compensating the plaintiff for losses. The rationale behind this alternative measure of damages is that bribery is not only a breach of contract, but also a wrongful act.⁶⁴

c) Unjust enrichment and disgorgement of profits

Unjust enrichment is available as a non-tortious, non-contractual cause of action. An action for unjust enrichment generally requires that one party acquire and retain a benefit at the expense of another. However, in the context of agents, such as public officials, who retain secret profits through corruption, retention of the benefit need not be at the principal's expense. The principal is not obliged to establish loss in order to seek restitution of secret profits because harm is considered to flow from the breach of fiduciary duty alone.⁶⁵

Disgorgement of profits is an equitable remedy in common law systems based on notions of unjust enrichment. In the enforcement of the US *FCPA*, the Securities Exchange Commission

⁶² Brun et al (2011) at 164-165.

⁶³ *Ibid* at 165.

⁶⁴ van der Does de Willebois & Brun, (2013) at 634.

⁶⁵ *Ibid* at 637.

(SEC) considers disgorgement to be an essential element of any SEC settlement for bribery offenses. Foreign companies that trade on the US Stock Exchanges (currently about 1600 multi-national companies) are subject to SEC penalties and disgorgement actions.⁶⁶

In the StAR/World Bank report entitled *Asset Recovery Handbook: A Guide for Practitioners* (2011), the authors state:

In the United States, disgorgement of profits is frequently sought by the Securities and Exchange Commission and the Department of Justice in civil or criminal actions to enforce the FCPA. Settlements often include recovery of the benefits of wrongful acts or illicit enrichment. In cases where a government contract was awarded as a result of bribery, the illicit enrichment is normally calculated by deducting direct and legitimate expenses linked to the contract from the gross revenue. The amount of the bribe and the taxes are generally not considered deductible expenses. In other civil actions brought by parties as private plaintiffs, U.S. courts have ruled that an employer or buyer is entitled to recover the amount of the bribe received by an employee even if the goods or services were exactly what the employer was seeking and even if the price was reasonable (*Sears, Roebuck & Co. v. American Plumbing & Supply Co.*, 19 F.R.D. 334, 339 (E.D.Wis., 1956) (U.S.)).⁶⁷

2.4.5.3 Proprietary Claims and Remedies

Proprietary claims are for specific assets, as opposed to personal claims against another party for damages. In a property-based action, the state or another party claims to be the rightful owner of assets, or the state claims on behalf of the rightful owners that assets have been taken by theft, fraud, embezzlement or other wrongdoing. For example, in *Federal Republic of Nigeria v Santolina Investment Corp* (2007), the London High Court of Justice found Nigeria to be the true owner of several bank accounts and properties in London, which were the proceeds of bribery accepted by a corrupt Nigerian official.⁶⁸ Over \$17.7 million were recovered and repatriated.

Article 53 of UNCAC requires States to permit the initiation of civil actions by other State Parties to establish ownership of property acquired through corruption and to recognize another state's claim as the true owner. Unlike personal claims in tort and contract, a successful claimant in a property-based action will have priority over the defendant's other creditors.⁶⁹

⁶⁶ Robert W Tarun, *The Foreign Corrupt Practices Act Handbook* (American Bar Association, 2012) at 20.

⁶⁷ Brun et al (2011) at 168.

⁶⁸ *Federal Republic of Nigeria v Santolina Investment Corp, Solomon & Peters and Diepreye Alamiyeseigha*, [2007] EWHC 437 (Ch) (UK).

⁶⁹ van der Does de Willebois & Brun (2013) at 620.

In common law jurisdictions, claimants can use constructive trusts to recover beneficial ownership of assets acquired through breach of trust or fiduciary duty. When public funds or property are embezzled or misappropriated, the State will be the beneficial owner of the stolen property, any profits derived from it, or any property into which the stolen property is converted. The State's beneficial ownership will stick to the asset as it goes through successive transactions, unless there is a bona fide purchaser for value without notice of the breach of trust. For example, Saadi Qadafi used funds belonging to the State of Libya to purchase a \$10 million house in London. Ownership of the house was easily traceable to Qadafi, since it was owned by a shell company of which he was the beneficial owner. The court found that Qadafi held beneficial ownership of the house in constructive trust for Libya, allowing the transfer of the house to the State of Libya.⁷⁰

The same logic of constructive trust has been extended to situations where a State or other principal claims a proprietary interest in a bribe accepted by an agent. A successful proprietary claim allows the principal to recover the bribe and any increases in its value. *Kartika Ratna Thahir v Pertamina* (1994) provides an example of the use of constructive trust to return a bribe to the bribe-taker's principal.⁷¹ Pertamina, a state-owned oil and gas company, discovered that one of its executives had accepted bribes from contractors seeking preferential treatment. The court held that the executive breached his fiduciary duty by accepting the bribe, and therefore the bribe was held in trust for Pertamina.

As the Privy Council of the UK House of Lords stated in an earlier case:

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.⁷²

Currently the law is unclear as to whether principals can still claim a proprietary interest in bribes accepted by their agents. One line of authority supports the idea that all traceable proceeds of a fiduciary's corruption belong to the victim in equity. However, according to *Sinclair Investments (UK) v Versailles Trade Finance Ltd* (2011),⁷³ claimants can only acquire a proprietary interest in a fiduciary's wrongfully acquired property if the property belongs or belonged to the claimant or if the fiduciary took advantage of a right belonging to the

⁷⁰ Brun et al (2015) at 49–52.

⁷¹ *Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)*, [1994] 3 SGCA 105 (Singapore).

⁷² *The Attorney General for Hong Kong v (1) Charles Warwick Reid and Judith Margaret Reid and (2) Marc Molloy*, [1993] UKPC 2, [1994] 1 All ER 1.

⁷³ *Sinclair Investments (UK) v Versailles Trade Finance Ltd*, [2011] EWCA Civ 347.

claimant.⁷⁴ This suggests that betrayed principals cannot claim a proprietary interest in a bribe.⁷⁵

2.4.5.4 Other Civil Claims, Remedies and Tools

a) Actions based on FCPA violations

FCPA violations can provide the basis for civil actions under other statutes including securities laws, antitrust laws, or the *Racketeering Influenced and Corrupt Organizations Act (RICO)*.⁷⁶ For instance, if a violation adversely affects competition between companies, a civil action can be brought under state or federal antitrust laws.⁷⁷ Shareholders can also bring claims based on FCPA violations in order to obtain compensation for damages. For example, shareholders might bring a class action for damage caused by false and misleading information about a company's bribery activities that led to a fall in share prices.⁷⁸ For example, Avon Products Inc. (Avon) was sued by a group of shareholders in a derivative class action lawsuit alleging securities fraud. Avon conceded the fact that it had bribed Chinese government officials to boost sales revenues. In December 2014, Avon paid \$135 million in fines for SEC and FCPA offenses as part of a DPA, which included the appointing of an independent monitor for 18 months to review Avon's FCPA compliance program. In August 2015, Avon settled the shareholder class action with a \$62 million settlement.⁷⁹ Similar securities class actions against Petrobras⁸⁰ and Wal-Mart⁸¹ were certified in 2016.

⁷⁴ van der Does de Willebois & Brun, (2013) at 621-625.

⁷⁵ Brun et al (2015) at 52.

⁷⁶ Padideh Ala'i, "Civil Consequences of Corruption in International Commercial Contracts" (2014) 62 Am J Comp L 185 at 208-211.

⁷⁷ *Ibid* at 66.

⁷⁸ Makinwa (2013) at 390.

⁷⁹ The securities fraud lawsuit was brought on behalf of Avon's shareholders from 2006 to 2011 and led by two German investment funds. The plaintiffs alleged that the cosmetics company developed a corporate culture that was hostile to effective oversight and concealed the company's dependence on corrupt activities to boost sales in China. See Jonathan Stempel, "Avon Seeks Approval in U.S. of \$62 Mln Accord over China Bribery", *Reuters* (18 August 2015), online: <<http://www.reuters.com/article/avon-corruption-settlement-idUSL1N10T14B20150818>>.

⁸⁰ In February 2016, the US District Judge Jed Rakoff in the Southern District of New York certified a class action brought against the Brazilian oil company Petrobras. The plaintiffs, who held Petrobras securities from 2010 to 2015, sought to recover their losses following a bribery and political kickbacks scandal involving dozens of public officials in Brazil. The scandal has contributed to a drop in Petrobras' market value to below \$20 billion from almost \$300 billion less than eight years ago. See Jonathan Stempel & Nate Raymond, "Brazil's Petrobras Must Face U.S. Group Lawsuits over Corruption: Judge", *Reuters* (2 February 2016), online: <<http://www.reuters.com/article/us-brazil-petrobras-lawsuit-idUSKCN0VB20Q>>.

⁸¹ In September 2016, the US District Judge Susan Hickey in Fayetteville, Arkansas certified a class action led by a Michigan retirement fund. The investors alleged that Wal-Mart concealed a corruption scheme in Mexico, where millions of dollars were paid in bribes to speed building permits and gain other benefits. See Anne D'Innocenzio, "Wal-Mart to Face Class-Action Over Alleged Bribery in Mexico", *CTV News* (22 September 2016), online: <<http://www.ctvnews.ca/business/wal-mart-to-face-class-action-over-alleged-bribery-in-mexico-1.3083753>>.

Corporations may face foreign corrupt practices-related class actions in Canada as well. For example, SNC-Lavalin is currently defending securities class proceedings in Ontario and Quebec based on material misrepresentations in its disclosure of internal investigations of bribery in Bangladesh and elsewhere.⁸²

b) Social damages

The concept of social damage is an emerging tool in obtaining compensation for damages to the public interest. Costa Rican law, for example, allows the Attorney General to bring a civil action for compensation when conduct causes damage to society. Costa Rica successfully used this tool to obtain compensation in a 2010 settlement after corruption was uncovered in a bidding process for telephone service providers in Costa Rica. As explained by Makinwa, “[t]he action filed by the government of Costa Rica under the Criminal Procedural Rules in Costa Rica, to seek pecuniary compensation for damage suffered by the collective interests of the state and peoples of Costa Rica, illustrates a resort to private law notions of compensation for damage suffered as a result of corrupt activity.”⁸³

c) Insolvency proceedings

Brun et al. point out that insolvency and receivership proceedings provide another tool in tracing and recovering assets. They summarize the advantages and disadvantages of using insolvency proceedings in asset recovery:

Insolvency or receivership may present opportunities because the receiver (or other insolvency office holder) enjoys increased powers over assets. In such proceedings, the state claimant may be able to recover property simply by showing that it owns it. It is also easier to reclaim assets that have been transferred away, for example, by fraud. The insolvency office holder has the power to access information and demand testimony and has proved powerful and pivotal in large asset recovery cases. Within an insolvency proceeding, an insolvency office holder can compel the testimony of witnesses, including the directors or managers who may have been culpable in hiding assets. Refusal to cooperate can lead to imprisonment, which may motivate testimony that helps the office holder to locate and subsequently recover substantial assets.

⁸² “Judge Certifies \$1 billion Class Action Lawsuit against SNC-Lavalin”, *CBC News* (20 September 2012), *CBC News*, online: <<http://www.cbc.ca/news/canada/montreal/judge-certifies-1-billion-class-action-lawsuit-against-snc-lavalin-1.1169847>>. See also SNC-Lavalin, *Annual Information Form (Year Ended December 31, 2015)* at 22-23, online: <<http://www.snclavalin.com/en/investors/financial-information/annual-reports/2015>>.

⁸³ Makinwa (2013) at 408.

Formal insolvency processes are complex to implement internationally. Generally, in pursuing assets across borders, a plaintiff or creditor will need to pursue the assets under the insolvency laws of that country. Moreover, insolvency judgements are not easily recognized in foreign courts, unless certain regulations, conventions, or model laws apply. Therefore, the insolvency laws of the country where the assets are located will influence the effectiveness of approaching asset recovery through insolvency [footnotes omitted].⁸⁴

d) *Partie civile*

Victims of corruption can participate in criminal proceedings for corruption-related offences as a *partie civile* in civil law jurisdictions. The victim must establish that they suffered direct and personal harm as a result of the criminal offence. This allows claims for damages to be assessed within a criminal trial and awarded if there is a conviction. For example, in 2007, Nigeria was awarded €150,000 for non-pecuniary damages after a French court convicted a former Nigerian energy minister for money laundering. Disadvantages of the *partie civile* approach include the victim state's lack of control over criminal proceedings and the fact that prosecutors may engage in plea bargaining without consideration of the *partie civile*.⁸⁵

2.4.6 Limitations and Advantages of Criminal and Civil Proceedings

Both criminal and civil proceedings have their advantages and limitations. Civil actions are limited in terms of access to information and investigative powers. Criminal proceedings provide investigators with privileged access to information at the national and international level and allow them to overcome bank secrecy and obtain freezing orders more easily. Further, the assistance and cooperation between states provided by mutual legal assistance (MLA) in criminal proceedings is not mandatory in civil cases (see UNCAC Article 43). For example, in *Attorney General of Zambia*, the Zambian government was obliged to hire a private firm specializing in the tracing of assets due to the absence of MLA in civil actions.⁸⁶

Benefits of civil litigation, aside from the lower burden of proof, include the possibility of action against third parties like facilitators (parties who knowingly facilitated the transfer of proceeds or received illicit assets). For example, a whole range of defendants were included in *Attorney General of Zambia*, including lawyers and other third parties.⁸⁷ However, plaintiffs might be required to establish dishonesty on the part of third parties, since incompetence is not always sufficient to ground liability.

Another advantage of civil actions is the possibility of the inclusion of moral and punitive damages in compensation. Further, plaintiffs can choose the jurisdiction in which recovery

⁸⁴ Brun et al (2015) at 113.

⁸⁵ Brun et al (2015) at 68–69.

⁸⁶ Hatchard (2014) at 327.

⁸⁷ *Ibid* at 326.

is pursued. Civil remedies also provide a foreign state with greater control over the proceedings, whereas the harmed jurisdiction has no control over criminal proceedings in another jurisdiction. Prosecution must follow pre-set jurisdictional conditions. Civil recovery, on the other hand, can be pursued almost anywhere and in several jurisdictions at once.

As pointed out by Makinwa, civil actions can be pursued independently of the state, which is an advantage when states are unwilling to pursue criminal proceedings. Makinwa also points out that private suits deter corrupt transactions through the introduction of “an element of uncertainty in terms of the number, duration and costs (both financial and reputational) of potential private suits that may be filed by a variety of claimants. The criminal process is much more predictable as fines and punishment are pre-determined and can be more easily factored into the decision whether or not to give a bribe.”⁸⁸

Further Reading

For a detailed discussion of civil actions and remedies available in asset recovery proceedings in both common law and civil law jurisdictions, see van der Does de Willebois & Brun, “Using Civil Remedies in Corruption and Asset Recovery Cases” (2012) 45:3 Case W Res J Intl L 615.

For a recent guide to navigating civil actions in asset recovery, see the following StAR publication: Brun et al., *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (The World Bank, 2015), online: <https://star.worldbank.org/star/publication/public-wrongs-private-actions>.

2.4.7 Interaction between Remedies

The following is an excerpt from OECD/The World Bank report entitled *Identification and Quantification of the Proceeds of Bribery*:⁸⁹

BEGINNING OF EXCERPT

1. Interaction between confiscation, disgorgement, and fines

Disgorgement and confiscation serve similar purposes, as noted above. Both seek to remove ill-gotten gains. However, disgorgement and confiscation can be computed

⁸⁸ Makinwa (2013) at 365.

⁸⁹ Identification & Quantification (2012) at 22-25.

based on different factors depending on the specific facts and circumstances of the bribery scheme and the relevant jurisdiction. Thus, it is possible to have both disgorgement and confiscation used in the same case. In the United States, disgorgement and restitution are quite similar and are unlikely to be used simultaneously. In the United States, if the SEC has already sought civil disgorgement of profits, generally the DOJ would exercise its discretion not to seek the same funds as a criminal restitution or forfeiture order. Unlike confiscation and disgorgement, the purpose of fines is to punish the offender, and not to remove the benefits of crime per se. In the U.S., the authorities frequently seek a criminal fine and/or a civil penalty in addition to disgorgement and forfeiture. In the United Kingdom, case law makes clear that a fine is to serve as a deterrent and that “offending itself must be severely punished quite irrespective of whether it has produced a benefit.” If a defendant is in a position to pay both a fine and have the benefits confiscated, both may be ordered. In other cases, if the defendant does not have sufficient resources to pay both, confiscation will take primacy over a fine.

...

2. Interaction between confiscation and compensation for damages

Compensation is based on the existence of damages suffered by the victim and may be awarded even in cases where bribery did not generate any profit or benefit for the briber. However, bribes are generally intended to, and often do, ensure that the briber makes a profit. In certain instances, the profit may be greater than the damage suffered by the victim. There are various remedies that can be sought in this instance – the government enforcing anti-bribery laws can seek confiscation and the victim of the bribery can seek compensation for damages.

...

3. Interaction between confiscation and contractual restitutions

In some jurisdictions government agencies have the authority to declare void or invalidate contracts awarded by or through bribed officials. In such instances, the government harmed by the bribery may seek recovery of all the amounts expended and the property transferred under the terms of the tainted contracts. In this situation, contractual restitutions could be as high as the proceeds of crime confiscated by the government enforcing the antibribery laws.

...

4. Interaction between remedies applied in foreign or multiple jurisdictions

Courts may take into account confiscation decisions or settlements with the same effect in foreign jurisdictions to avoid unfair duplication. ...

Similarly, in the resolution of the Johnson & Johnson (J&J)/DePuy case, the United States and the United Kingdom simultaneously resolved investigations into some of the same misconduct. In the U.S., J&J's criminal fine was reduced by 25%, in part in light of anticipated fines in the U.K. and Greece, noting in the deferred prosecution agreement, "J&J and the Department agree that this fine is appropriate given [...] penalties related to the same conduct in the United Kingdom and Greece [...]" J&J was also required to disgorge profits from the conduct in a settlement with the SEC. DePuy settled the U.K. charges by agreeing to financial penalties under a civil recovery order. In reaching the settlement, the U.K. Serious Fraud Office also took the multijurisdictional nature of the settlement into account, stating that it had "taken particular note of the fact of disgorgement and recovery in more than one jurisdiction for the same underlying unlawful conduct. [...] The Serious Fraud Office has considered the matter from a global perspective. It has worked to achieve a sanction in this jurisdiction which will form part of a global settlement that removes all of the traceable unlawful property and at the same time imposes a penalty."

END OF EXCERPT

3. INTERNATIONAL CONVENTION OBLIGATIONS

3.1 UNCAC

International cooperation is extremely important for successful foreign recovery of corrupt assets. Most corruption cases require asset recovery efforts beyond domestic borders. For instance, the assets may be held in one jurisdiction and then laundered to another jurisdiction, with the offence committed in a third jurisdiction and the company responsible for paying bribes headquartered in a fourth jurisdiction. Further, money can be moved very quickly through computers, mobile devices and wire transfers.

As corrupt activities often involve several borders, international cooperation is emphasised in UNCAC. Chapter V of UNCAC provides a framework to facilitate the recovery of stolen assets. The first provision of Chapter V, Article 51, declares that asset recovery is a "fundamental principle" of the Convention:

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.

Article 51 makes cooperation and assistance mandatory. Procedures and conditions for asset recovery in Chapter V include facilitating civil and administrative actions (Article 53), recognizing and taking action on the basis of foreign confiscation orders (Articles 54 and 55), returning property to requesting States in cases of embezzled public funds or other corruption offences, and returning property to its legitimate owners (Article 57). UNCAC provides a direct method of recovery in requiring State Parties to permit civil suits by other state parties in their courts and requires that State Parties recognize the judgments of other state party courts.

Article 52 calls for “know your customer” policies in financial institutions. It requires each State Party to take measures requiring financial institutions to verify the identity of customers and beneficial owners of funds and conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are or have been entrusted with prominent public functions, along with their family members and close associates. This applies to public officials not just of the government of the jurisdiction where the surveillance takes place but other countries. State Parties must require their financial institutions to report suspicious transactions, issue advisories and maintain adequate records. State Parties must also prevent the establishment of banks known as “shell banks,” which have no physical presence and are not affiliated with a regulated financial group.

Article 53 requires each State Party to have a legal regime allowing another State Party to initiate civil litigation for asset recovery in its jurisdiction or to intervene or appear in proceedings to enforce their claim for compensation. State Parties are required to take measures to (i) permit another State Party to initiate a civil action in its courts to establish title to or ownership of property acquired through the commission of a Convention offence, (ii) permit its courts to order those who have committed offences to pay compensation or damages to another State Party that has been harmed, and (iii) allow its courts or authorities to recognize another State Party’s claims as legitimate owner of property acquired through the commission of an offence.

UNCAC sets forth procedures for international cooperation in confiscation matters in Articles 54 and 55. These Articles create a basic regime for domestic freezing, seizure and confiscation. Article 54 provides that each State Party must take measures to:

- (i) permit its authorities to give effect to an order of confiscation issued by a court of another State Party;
- (ii) order confiscation by adjudication of an offence (must also *consider* allowing confiscation of property without a criminal conviction when the offence cannot be prosecuted by reason of death or flight);
- (iii) permit its authorities to freeze or seize property upon an order issued by an authority of a requesting State Party concerning property eventually subject to confiscation; and

- (iv) permit its authorities to freeze or seize property upon request when there are sufficient grounds for taking such actions regarding property eventually subject to confiscation.

Article 55 implements mutual legal assistance between each State Party by providing a mechanism for responding to orders and requests from State Parties. It requires each state party to:

- (i) submit the request for confiscation over corruption offences to its authorities;
- (ii) submit the order of confiscation issued by a court of the requesting state party; and
- (iii) take measures to identify, trace and freeze or seize proceeds of crime, property, etc., for confiscation by the requesting State or by themselves.

Article 55 also sets out the requirements for making a request for assistance. When a State Party receives a request for confiscation of proceeds of crime, the State Party must submit the request to its authorities for the purpose of obtaining an order of confiscation and shall take measures to identify, trace and freeze or seize the property. The request must include:

- (i) a description of the property to be confiscated including the location if possible and the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law; and
- (ii) if the request is based on a confiscation order, the requesting party must include a copy of the order, statement of facts and information, statement specifying the measures taken by the requesting party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final.

The assistance sought by the requesting State Party may be refused if the requested State Party does not receive sufficient and timely evidence or if the property is of *de minimis* value.

The United Nations Convention against Transnational Organized Crime (UNTOC) also imposes international obligations on the signatories. Article 13(1) requires a State to act in response to requests for confiscation from other States to the “greatest extent possible within its domestic legal system.” Note that the obligations under this convention apply only if the criminal act is carried out by an organized criminal group within the definition under Article 2(1). Article 14(2) requires the return of assets in order to “give compensation to the victims of crime or return such proceeds of crime to their legitimate owners.”

Daniel and Maton point out that UNCAC's asset recovery provisions are based on the assumption that victim states will attempt to recover assets.⁹⁰ Daniel and Maton see this as a fundamental flaw. Fear, lack of political will, breakdown of political systems, or the corruption of current leaders in victim countries can easily frustrate UNCAC's asset recovery goals by preventing requests from victim countries. For example, after the death of Zaire's kleptocratic president, Mobutu Sese Seko, the Swiss authorities froze Mobutu's Swiss bank accounts. However, Zaire, by now the Democratic Republic of Congo, failed to request repatriation of the stolen funds, which allowed the money to be recovered by Mobutu's family. Similarly, Haiti failed to claim funds from a member of Haiti's kleptocratic Duvalier family during litigation in Switzerland. However, the day after a Swiss court ruled that the money would be remitted to "Baby Doc" Duvalier, Haiti experienced its 2010 earthquake. The Swiss government prevented the return of the money to Duvalier by passing a law that allows Switzerland to freeze assets if the rule of law has broken down in a victim country, incapacitating the victim state's ability to make requests (known as the "Duvalier law"). Because of UNCAC's reliance on action by victim states, Switzerland was obliged to pass a new domestic law to circumvent the retention of stolen funds by the Duvalier family.⁹¹

Further Reading

For an analysis of obstacles surrounding UNCAC's asset recovery provisions, as well as the potential of the provisions if used well, see Vlassis, Gottwald & Ji Won Park, "Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery" in Zinkernagel, Monteith & Pereira, eds, *Emerging Trends in Asset Recovery* (Peter Lang AG, International Academic Publisher, 2013) 161–172.

3.2 OECD Anti-Bribery Convention

Parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions are required to provide mutual legal assistance to other jurisdictions investigating offences involving the bribery of public officials. Article 3 states that each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable. Proceeds are defined as the "profits or other

⁹⁰ Tim Daniel & James Maton, "Is the UNCAC an Effective Deterrent to Grand Corruption?" in Jeremy Horder & Peter Alldridge, eds, *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press, 2013) at 293.

⁹¹ *Ibid* at 316–22.

benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.”

The implementation of the OECD Anti-Bribery Convention is monitored by the OECD Working Group on Bribery, composed of members of all State Parties. The Working Group compiled recommendations for State Parties published in the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*. Recommendation XIII asks State Parties to consult and co-operate with authorities in other countries in investigations and other legal proceedings concerning specific cases of bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials.⁹²

3.3 Other Instruments

There are several other conventions and agencies that place asset recovery obligations on convention signatories and agency members. For example:

1. The Arab Forum on Asset Recovery (AFAR), established in 2012, is an initiative supporting asset recovery efforts of Arab countries. It brings together the G8, the Deauville Partnership and Arab countries for the return of stolen assets. The Deauville Partnership was launched in 2011 by the G8 in Deauville, France to support transition efforts of Arab countries. In May 2012, the G8 adopted an “Action Plan on Asset Recovery” as part of the Deauville Partnership. The partnership countries purport to commit to “a comprehensive list of actions aimed to promote cooperation, capacity building efforts and technical assistance in support of the efforts of Arab countries in transition in recovering assets diverted by past regimes”: <<http://star.worldbank.org/star/ArabForum/About>>. At the Arab Forum on Asset Recovery in 2013, the United States announced that it would appoint two Department of Justice attorneys to specialize in the recovery of illicitly acquired assets in the Arab region.
2. The Busan Partnership for Effective Development Cooperation, created in 2011 under the auspices of the OECD, committed signatories to strengthening processes for the tracing, freezing and recovery of illegal assets.
3. The Financial Action Task Force is a policy-making body established to “set standards and pro-mote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system”:

⁹² OECD Working Group, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, (2009), online: <<https://www.oecd.org/daf/anti-bribery/44176910.pdf>>.

- <http://www.fatf-gafi.org/about/>. The FATF develops recommendations and monitors the progress of its 36 members.
4. The Council of European Union Decision 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 (2007) requires member states set up a National Asset Recovery Office and cooperate with the recovery offices of member states: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery/index_en.htm.
 5. The Council of the European Union Framework Decision on the Recognition and execution of Confiscation Orders (2006) purports to enable judicial decisions of European Union countries to be recognized and executed within deadlines: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006F0783&from=EN>.
 6. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism (2005) requires parties to enable themselves to freeze, seize and confiscate proceeds of crime: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198>.
 7. The Council of the European Union Framework Decision on the Execution in the European Union of Orders Freezing Property or Evidence (2003) purports to establish rules under which a Member State is to recognize and execute in its territory a freezing order issued by another Member State in the framework of criminal proceedings: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003F0577>.
 8. The Council of Europe Criminal Convention (1999) provides some support mechanisms for tracing, seizing and freezing assets: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>.
 9. The Council of Europe Civil Convention (1999) allows the payment of damages for bribery and similar offences recovered against anyone who has committed or authorized an act of corruption or failed to take reasonable steps to prevent such an act: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174>.
 10. The European Convention on Mutual Assistance in Criminal Matters (1959) contains a framework for mutual legal assistance in European Union countries: <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>.
 11. Commonwealth states have signed the Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters (2002). These two multilateral conventions regulate criminal prosecution, extradition and mutual legal assistance: <http://cis-legislation.com/document.fwx?rgn=26119>.

12. The Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty signed in 2004 is “aimed at improving the effectiveness of the law enforcement authorities of the Parties to the MLA Treaty in the prevention, investigation and prosecution of offences through cooperation and mutual legal assistance in criminal matters.” This treaty is a multilateral instrument and provides for many forms of mutual legal assistance: <<http://www.asean.org/storage/images/archive/17363.pdf>>
13. The African Union Convention on Preventing and Combating Corruption and Related Offences (2003) contains measures for mutual legal assistance and recovery of assets: <http://www.eods.eu/library/AU_Convention_on_Combating_Corruption_2003_EN.pdf>.
14. The Southern African Development Community Protocol Against Corruption (2001) requires State Parties to seize, confiscate, provide mutual legal assistance and judicial cooperation: <<http://www.sadc.int/documents-publications/show/>>.

4. STATE-LEVEL ASSET RECOVERY REGIMES

4.1 US

The following excerpt from a 2011 StAR/World Bank publication, entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, starts with a summary of mutual legal assistance provisions in the US, since MLA is usually essential to the pursuit of asset recovery in large-scale corruption cases.⁹³

BEGINNING OF EXCERPT

United States

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The United States provides assistance directly based on bilateral and multilateral treaties, letters of request, and letters rogatory. The types of assistance available are very broad but, with regard to asset recovery, depend on the provisions of the applicable treaty or convention to a specific case.

⁹³ Kevin M Stephenson et al, “Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action” (StAR/World Bank, 2011) at 175–179, online: <<http://documents.worldbank.org/curated/en/2011/01/14571139/barriers-asset-recovery-analysis-key-barriers-recommendations-action>>.

- The United States has entered into bilateral MLA treaties with more than 70 jurisdictions, namely: Anguilla; Antigua and Barbuda; Argentina; Aruba; Australia; Austria; the Bahamas; Barbados; Belgium; Belize; Brazil; British Virgin Islands; Bulgaria; Canada; Cayman Islands; China; Colombia, Cyprus; Czech Republic; Denmark; Dominica; Arab Republic of Egypt; Estonia; Finland; France; Germany; Greece; Grenada; Guadeloupe; Hong Kong SAR, China; Hungary; India; Ireland; Israel; Italy; Jamaica; Japan; Republic of Korea; Latvia; Liechtenstein; Lithuania; Luxembourg; Malaysia; Malta; Martinique; Montserrat; Mexico; Morocco; Netherlands; Netherlands Antilles; Nigeria; Panama; the Philippines; Poland; Romania; Russian Federation; Singapore; Slovak Republic; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Slovenia; South Africa; Spain; Sweden; Switzerland; Thailand; Trinidad and Tobago; Turkey; Turks and Caicos Islands; Ukraine; United Kingdom; Uruguay; and República de Bolivariana Venezuela. An agreement was also entered into on June 25, 2003, between the United States and the European Union concerning mutual legal assistance that, among other things, provides a mechanism for more quickly exchanging information regarding bank accounts held by suspects in criminal investigations.
- The United States has ratified the Merida Convention and may therefore grant MLA directly based on the provisions of the convention. The United States has also ratified the Inter-American Convention on Mutual Legal Assistance of the Organization of American States; the Vienna, Palermo, and the Financing of Terrorism conventions; the Inter-American Convention against Terrorism; the Inter-American Convention on Letters Rogatory and the Additional Protocol to the Convention; the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and the Inter-American Convention against Corruption.
- The United States responds to requests in the form of letters of requests and letters rogatory, as well as to MLA requests, pursuant to US Code Title 28 Section 1782 and US Code Title 18 Section 3512 even in the absence of a treaty relationship. The United States is able to provide broad assistance in response to requests from foreign authorities.

A.2. Legal Preconditions for the Provision of MLA

- Most bilateral MLA treaties do not generally require dual criminality. Some but not all of them require dual criminality with respect to coercive measures. When dual criminality is required, technical differences between the categorization of the crime in the United States and requesting state do not affect the provision of the requested assistance because the qualification of the offense is irrelevant, as long as the underlying acts are punishable in both states.

- Many forms of assistance based on letters of request or letters rogatory, including the issuance of compulsory measures, do not require dual criminality.

A.3. Grounds for Refusal of MLA

- Grounds for refusals are set out in the applicable bilateral and multilateral agreements, such as Article 7 of the Vienna Convention, Article 18 of the Palermo Convention, and Article 46 of the Merida Convention.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- The Office of International Affairs of the Department of Justice (OIA) is the U.S. central authority for all requests for MLA and coordinates all international evidence gathering.
- OIA has attorneys and support staff with responsibilities and expertise in various parts of the world and in different substantive areas. The OIA executes MLA requests through competent law enforcement authorities, such as the United States Attorney's Offices, ICE (Immigration and Customs Enforcement), USSS (United States Secret Service), FBI (Federal Bureau of Investigation), the USMS (United States Marshall's Service), Interpol, and others. Requests for freezing, seizing, or confiscation of assets are executed in close cooperation with the Department of Justice's Asset Forfeiture Money Laundering Section.

B.2. Language Requirements

- English is the preferred language for requests. Requesting jurisdictions could incur translation costs if the request is submitted in any other language.

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Most bilateral treaties allow for the provision of MLA during the investigative stage. Equally, OIA may apply to the courts for a production order or a search, freezing, or seizing warrant once an investigation has commenced in the requesting country, depending on the provisions of the MLA treaty or convention at issue.

Tracing

C.2. Available Tracing Mechanisms

- The types of measures available with respect to MLA requests by a specific country and with respect to a specific offense depend on the provisions of the applicable multilateral and bilateral treaties. In general, bilateral treaties allow for a substantial range of measures, including taking the testimony or statements of persons; providing documents, records, and other items; locating or identifying persons or items; serving documents; transferring persons in custody for testimony or other purposes; executing searches and seizures; assisting in proceedings related to immobilization and forfeiture of assets and restitution; collection of fines; and any other form of assistance not prohibited by the laws of the requested state.
- For requests based on letters of request or letters rogatory, OIA, based on US Code Title 18 Section 3512 or Title 28 Section 1782, may request the district court to order any person to give a testimony or statement or to produce a document or other thing for use in proceedings in a foreign tribunal, including in the course of criminal investigations conducted before the filing of formal accusations. Furthermore, OIA may apply to a federal judge for issuance of search warrants and other compulsory measures.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Information covered by financial secrecy may be provided, if necessary by a court order.
- Information subject to professional legal privilege is protected from disclosure.

Provisional Measures (Freezing, Seizing, and Restraint Orders)

C.4. Direct Enforcement of Foreign Freezing and Seizing Orders

- For requests based on a treaty or agreement that provides for assistance in forfeiture (for example, the Merida Convention), US Code Title 28 Section 2467 allows for the registration and subsequent direct enforcement of foreign restraining orders to preserve property that is or may become subject to forfeiture or confiscation. Recent case law has called into question the viability of this option in the prejudgment context, and the Department of Justice is considering the need for a statutory amendment to clarify the congressional intent to enforce foreign prejudgment restraining orders.
- Requests for enforcement of foreign orders have to be submitted, along with a certified copy of the foreign order, to the U.S. attorney general, who will make a final decision on whether to grant the request.

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** US Code Title 28 Section 2467
- **Procedure:** OIA, often in conjunction with the Asset Forfeiture and Money Laundering Section, may apply to the courts for issuance of a restraining order on behalf of the requesting country.
- **Evidentiary requirements:** The United States may initiate domestic seizing proceedings if the requesting country can establish through written affidavit that an investigation or proceeding is under way and that there are reasonable grounds to believe that the property to be restrained will be confiscated at the conclusion of such proceedings. The request has to be made pursuant to a treaty or agreement that provides for mutual assistance in forfeiture, and the foreign offenses that give rise to confiscation also have to give rise to confiscation under U.S. federal law.
- **Time limit:** None, if a permanent restraining order was issued in foreign state. If the requesting country has arrested or charged somebody, property that might become subject to confiscation may be restrained for 30 days even without the requirement to establish probable cause, but upon the expectation the United States will file its own *in rem* confiscation action against the proceeds or instrumentalities of foreign crime based upon probable cause evidence that will be provided by the requesting state at a later date. This 30-day order can be extended for cause shown, for example, a delay in gathering or translating the foreign evidence.

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** US Code Title 28 Section 2467.
- **Procedure:** Requests for enforcement of foreign orders, including a copy of the foreign order, have to be submitted to the U.S. attorney general, who will in turn make a final decision on whether the request should be granted. If the request is granted, the attorney general may apply to the district court for enforcement.
- **Evidentiary requirements:** The requested state must provide a certified copy of the judgment and submit an affidavit or sworn statement by a person familiar with the underlying confiscation proceedings setting forth a summary of the facts of the case and a description of the proceedings that resulted in the confiscation judgment, as well as showing that the jurisdiction in question, in accordance with the principles of due process, provided notice to all persons with an interest in the property in sufficient time to enable such persons to

defend against the confiscation and that the judgment rendered is in force and is not subject to appeal.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- The United States can seek the registration and enforcement of a foreign forfeiture judgment whether it is for specific property or an order to pay a sum of money, whether conviction based or non-conviction based.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- Both domestic and foreign confiscation orders may be executed toward legitimate assets of equivalent value to proceeds or instrumentalities of crime.

D. Types of Informal Assistance

- Assistance may be provided by the Financial Crimes Enforcement Network (Fin-CEN) (<http://www.fincen.gov/>), as well as U.S. regulatory, supervisory, and law enforcement authorities. However, all requests have to be channeled through Fin-CEN, which serves as the primary portal through which information may be shared.
- The United States does maintain and use law enforcement attaché offices in foreign jurisdictions primarily by the FBI, ICE, and DEA. The FBI has over 75 offices serving 200 countries. For details, visit <http://www.fbi.gov/contact/legat/legat.htm>. ICE has offices serving over 40 countries: Argentina; Austria; Brazil; Canada; Caribbean; China; Colombia; Denmark; Dominican Republic; Ecuador; Arab Republic of Egypt; El Salvador; France; Germany; Greece; Guatemala; Honduras; Hong Kong SAR, China; India; Italy; Jamaica; Japan; Jordan; Republic of Korea; Mexico; Morocco; Netherlands; Pakistan; Panama; the Philippines; Russian Federation; Saudi Arabia; Singapore; South Africa; Spain; Switzerland; Thailand; United Arab Emirates, United Kingdom; República Bolivariana de Venezuela; and Vietnam. For details, see <http://www.ice.gov/international-affairs/>.⁹⁴

END OF EXCERPT

⁹⁴ [98] Practitioners should contact the nearest United States embassy to determine the appropriate attaché office.

The following excerpt is from a 2011 paper by Weld entitled “Forfeiture Laws and Procedures in the United States of America”:⁹⁵

BEGINNING OF EXCERPT

III. Overview of Current U.S. Forfeiture Processes

A. Preference for Administrative Forfeiture

Each year, the majority, generally over 60 percent, of federal forfeitures in the U.S. are obtained through administrative forfeiture. The reason is that most seizures are not contested. This may seem strange at first, but when one considers that most of the property seized for forfeiture in the U.S. constitutes large bundles of cash, it is readily apparent why many seizures are not challenged, particularly if the person from whom the cash was seized is not arrested or later indicted. No one really wants to come forward to swear that he or she has an interest in such large amounts of generally quite unexplained U.S. currency.

Administrative forfeiture is not used for real property or businesses. Since 1990, the Customs laws (19 U.S.C. § 1607, et seq.) have permitted administrative forfeiture of currency and monetary instruments⁹⁶ without limit, and of other personal property up to a value of \$500,000.

An administrative forfeiture usually begins when a federal law enforcement agency seizes an asset identified during the course of a criminal investigation.⁹⁷ The investigation may be a purely federal one, or may be a task force which also involves state and/or local law enforcement agencies. The asset seizure must be based upon “probable cause” to believe that the property is subject to forfeiture. Once the asset is seized, attorneys for the seizing agency are required by CAFRA [Civil Asset Forfeiture Reform Act of 2000] to send notice to any persons whom the government has reason

⁹⁵ Jean B Weld, “Forfeiture Laws and Procedures in the United States of America” in UNAFEI Resource Materials Series No. 83 (UNAFEI, 2011) at 20–26, online: http://www.unafei.or.jp/english/pdf/RS_No83/No83_06VE_Weld1.pdf.

⁹⁶ [3] Monetary instruments include such items as bank checks, traveller’s checks, money orders, and bearer paper, but not bank or other financial accounts.

⁹⁷ [4] In the U.S., as in most countries, each agency is responsible for the enforcement of a different category of criminal laws: for example, the Drug Enforcement Administration (“DEA”) investigates drug crimes; the Federal Bureau of Investigation (“FBI”) investigates most white collar crime and terrorism; and the Immigration and Customs Enforcement (“ICE”) and Customs and Border Patrol (“CBP”) of the Department of Homeland Security investigate smuggling violations, intellectual property violations, human trafficking, passport fraud, drug violations at the border and bulk cash smuggling. Note that not all federal law enforcement agencies have administrative forfeiture authority.

to believe may have an interest in the property. Such notice must be sent within 60 days of the seizure if a federal agent seized the property. An administrative forfeiture can also be based upon an “adoptive seizure,” where a state or local officer has seized the property under the authority of state or local law, but then transfers it to federal custody for forfeiture. In that case, the federal adopting agency has 90 days after the seizure within which to send notice. Notice is usually sent by Certified Mail or Federal Express, so that the agency has proof of delivery. The agency must also publish its intent to forfeit for three successive weeks in a newspaper of general circulation in the area where the property was seized, or via a government internet publication website. A person receiving notice has 30 days within which to file a sworn claim with the seizing agency, asking for one of two types of relief: (1) the opportunity to challenge the forfeiture in court; or (2) remission or mitigation from the forfeiture. In the second option, the property owner is basically acknowledging the forfeiture, but claiming some mitigating circumstance. If a timely claim is filed under the first option, the seizing agency refers the matter to the appropriate U.S. Attorney’s Office to file a judicial forfeiture action in the case. If no one files a claim after the deadlines provided in the notice and publication expire, the property is summarily forfeited to the United States. Remission or mitigation may be provided if certain guidelines are met.

B. Civil (Non-Conviction Based) Judicial Forfeiture in the U.S.

In the United States, non-conviction based (“NCB”) forfeiture is known as “civil forfeiture.” This judicial process may be brought at any time prior to or after criminal charges are filed, or even if criminal charges are never filed. It is an action filed in court against a property, not against a person.⁹⁸ Once the U.S. Attorney’s Office receives a referral from a seizing agency of a seized asset case, that office has 90 days to either file a civil judicial case or include the seized asset in a criminal indictment and name it for criminal forfeiture. 18 U.S.C. § 983(a)(3)(A). If a civil case is not filed within those 90 days, the CAFRA “death penalty” will prevent the United States from ever filing a civil forfeiture case. 18 U.S.C. § 983(a)(3)(B). If the asset is included in an indictment and the defendant is later acquitted or has a conviction reversed on appeal, the property cannot be forfeited. For this reason, many U.S. prosecutors choose to file a timely civil forfeiture action and include the property for criminal forfeiture in an indictment. The law also allows the prosecutor or the claimant to obtain a “stay” of the civil forfeiture case while a criminal investigation is pending. Thus, if the defendant is convicted of an offence which will give rise to

⁹⁸ [5] This is why civil forfeiture actions in the U.S. have names like *United States v. One Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (because civil forfeiture is an in rem proceeding, the property subject to forfeiture is the defendant); *United States v. All Funds in Account Nos. 747.034/278*, 295 F.3d 23 (D.C. Cir. 2002) (civil forfeiture actions are brought against property, not people).

the forfeiture, the forfeiture may be obtained more easily in the criminal case, although it will not be final until all appeals are exhausted.

Because civil forfeiture does not depend upon a conviction, it may be filed at any time. Often the case will be filed under seal before criminal charges are brought, providing for Warrants of Arrest in Rem to be issued for the assets which may be served by the law enforcement officers at any time. These warrants are similar to seizure warrants, and are issued by the presiding judge in the civil forfeiture case. Rule G(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims (“Rule G(8)”) prescribes the procedures which must be followed in a civil forfeiture action, which include: (1) notice to all potential claimants, even if notice was already provided in an administrative process; and (2) full publication notice by either newspaper or internet. Claimants have 30 days from when they are notified to submit a sworn claim indicating the basis for asserting an interest in the property (even if a claim was already submitted in an administrative case), and must, within 20 days after a Claim is filed, file an Answer with the court directly responding to the allegations in the prosecutor’s judicial complaint. If those deadlines are not met, the prosecutor can seek a “default” judgment of forfeiture, which will generally be granted, particularly if the claimant is represented by counsel who blew the deadlines!

If a timely claim is filed, the case will follow the Federal Rules of Civil Procedure in U.S. District Court. Civil discovery in the nature of interrogatories and depositions may take place. Prior to discovery, either side may file for a judgment on the pleadings. Following discovery, either side may file for summary judgment on legal issues supported by uncontested facts. If the case survives this “motions practice,” either side may request a trial by civil jury of nine persons, of whom a majority must agree on a verdict of forfeiture in order for the property to be civilly forfeited to the United States. The government has to prove by a “preponderance of the evidence” that the property is linked to the underlying crime as alleged.⁹⁹ In the United States, civil forfeiture is not available for any type of “value-based” forfeiture judgment, money judgment, or property which is equivalent to the criminally-derived or involved property. Such forfeitures require that the defendant be bound by in personam jurisdiction. Because the jurisdiction in civil forfeiture is in rem, U.S. law requires a “nexus” to the crime – either as proceeds or instrumentality, or – in the case of money laundering – an “involvement in” the crime in some manner.

A Claimant in a civil forfeiture case may take one or both of two approaches to defending a forfeiture: (1) he or she may challenge the government’s ability to sustain its burden to prove the property has a “nexus” to the crime; and/or (2) he or she may

⁹⁹ [6] The “preponderance of the evidence” standard is also known in the United States as “more likely than not” and abroad is frequently referred to as a “balancing of the probabilities.”

assert an “innocent owner” status which would deny forfeiture even if the government proves forfeitability. If the Claimant asserts “innocent owner” status, he or she has the burden to prove that defence by a “preponderance of the evidence”. A civil forfeiture judgment may be appealed from the U.S. District Court to the U.S. Court of Appeals of that federal circuit. The appeal is first heard by a three judge panel; and, the losing party may seek rehearing by the panel or by the entire en banc panel of the circuit’s appellate judges. If the case involves a novel issue or one which has created a conflict between any of the eleven federal circuits, then certiorari may be granted by the U.S. Supreme Court.

C. Ease of Criminal Judicial Forfeiture in the U.S.

As previously noted and as in most countries providing for criminal forfeiture, criminal forfeiture in the United States is dependent upon a conviction of a defendant for a crime which provides a basis for the forfeiture. For example, if a defendant is charged with securities fraud and income tax evasion, and is convicted of the tax evasion charges, but not the fraud offences, there can be no forfeiture because U.S. law does not provide for forfeiture based upon tax evasion. Over the years, United States criminal forfeiture laws have gradually expanded, and in 2000, CAFRA added 28 U.S.C. § 2461(c) which provides that if any law provides for civil forfeiture, then the prosecutor may also include a criminal forfeiture for the property in a criminal indictment. Now prosecutors often seek parallel civil and criminal proceedings against the same property.

Criminal forfeiture is in personam, against the defendant. One drawback to this type of forfeiture under U.S. law is that only property in which the defendant has a true interest may be forfeited criminally. Property which is held by “nominees” or straw owners on behalf of the defendant may be forfeited criminally, but the government must prove that the defendant is the true owner. Any property which is truly owned by other parties who are not convicted as part of the criminal case, such as a spouse or other family member or business partners, may not be forfeited criminally. Such property may be forfeited only in an in rem civil action.

The greatest advantage which criminal forfeiture holds for prosecutors in the U.S. is that it affords the possibility of a money judgment for the amount of the proceeds of the crime, and property involved in the crime. If that property – for example, the direct proceeds obtained by a fraudulent scheme or the mansion which was used to store narcotics – is no longer owned by or in the possession of the defendant, the government can get a judgment against the defendant for an amount equivalent to the value of that property. Rule 32.2 of the Federal Rules of Criminal Procedure permits the government to seek forfeiture of “substitute assets” belonging to the defendant. The procedure for obtaining criminal forfeiture is a bifurcated process. First, the defendant must be found guilty by proof “beyond a reasonable doubt” by either a

judge (if the defendant elects) or by a unanimous twelve person jury. Or the defendant may decide to plead guilty to the charged crimes. Following the entry of a guilty verdict or plea which will support forfeiture, the judge or jury will consider whether the government has shown the required “nexus” between the property named for forfeiture and the crime of conviction. If forfeiture is ordered, a Preliminary Order of Forfeiture is entered against the defendant, which becomes final at sentencing. This order may be appealed, along with the defendant’s convictions. Appeal is taken to the court of appeals for the relevant circuit, and beyond that to the U.S. Supreme Court if the issues are sufficiently important.

The Preliminary Order of Forfeiture must be served on anyone whom the prosecutor has reason to believe may have an interest in the property, and must be published unless it is a money judgment alone. Any interests asserted by third parties are heard in a separate part of the criminal case called an “ancillary proceeding,” which is held after a guilty verdict or plea against the defendant. To the extent that any third party proves by a preponderance of the evidence that he or she has an interest in the forfeited property which is superior to the defendant’s, the court must carve out that interest from the final order of forfeiture.

D. Strategy of Using Criminal vs. Civil Forfeiture Processes

1. Pros and Cons of Civil Forfeiture

(i) Pro: Lower standard of proof of the crime and no need for conviction.

The entire case in a civil forfeiture proceeding need be proven only by a “preponderance of the evidence” to a majority of a jury of nine. Thus, if there are proof problems which may make it difficult to prove the criminal conduct beyond a reasonable doubt to a unanimous jury of twelve, a civil proceeding may be the best venue for the forfeiture. If there are other impediments to obtaining a criminal conviction, such as the absence, death or incapacity of the defendant, a civil forfeiture proceeding will permit the forfeiture of the criminally linked property. This mechanism is exceedingly important in seizures of property, such as currency, where often the prosecutor cannot prove the exact crime which may have generated the unusual amount of cash, but has some evidence of criminal activity – such as a canine alert or ion scan¹⁰⁰ positive hit for the presence of narcotic solvent or drugs on the

¹⁰⁰ [7] An ion scan is a portable, state-of-the-art mass spectrometry device which ionizes chemical compounds, generating charged molecules whose mass-to-charge ratios can be measured. Ion scans are used to detect the presence of explosives, drugs and drug residue in parts per billion. Scans can detect the particulate residue of over twelve types of narcotic drugs. In addition to scanning currency for seizure, ion scans are used to inspect cargo containers and luggage, to identify hidden compartments, and for passenger security at many airports.

money, and perhaps previous criminal activity by the property owner which may explain the cash. Because of the lower burden of proof, forfeiture may be available in these cases. Also, if a criminal conviction is reversed on appeal, a civil forfeiture proceeding (which may have been stayed during the course of the criminal case) may rescue the forfeiture.

(ii) Pro: Property belonging to non-defendant parties may be forfeited

In a civil case, the prosecutor does not have to prove that the property owner committed or participated in the commission of the underlying criminal activity. As long as there is proof that the property is sufficiently linked to a crime, and the owner cannot satisfy the test for “innocent owner” by a preponderance of the evidence, the property may be forfeited.

The “innocent owner” definition in the U.S. code depends upon when the owner acquired an interest in the property. For persons having an interest in the property at the time the crime was committed, the claimant must show that he or she did not know of the criminal conduct or upon learning of it “did all that reasonably could be expected under the circumstances to terminate such use of the property.”¹⁰¹ For property which is acquired after the crime occurred (for example, proceeds of the crime), he or she must prove by a preponderance that he or she : (1) was a bona fide purchaser for value; and (2) did not know or was reasonably without cause to believe that the property was subject to forfeiture. 18 U.S.C. § 983(d)(A). A hardship provision is included which guarantees that third parties will retain a minimum shelter needed for survival as long as the property was not criminal proceeds. Only a bona fide purchaser for value without notice or knowledge can defeat a civil forfeiture of criminal proceeds.

(iii) Cons: Deadlines, duplicated resources, and liability for attorney’s fees

The CAFRA “death penalty” mentioned earlier means that if any of the filing deadlines are missed for a seizing agency giving notice, and the prosecutor filing an action, a civil forfeiture action is forever barred. Criminal forfeitures are not subject to any deadlines. If a stay is not granted on the civil case, the discovery and motions practice can create not only extra work for the prosecutor’s office, but also potentially interfere with the criminal prosecution which is proceeding along a different time frame, under different rules of court procedure. Finally, as noted before, if a claimant

¹⁰¹ [8] 18 U.S.C. § 983(d)(2)(B) provides that such action may include giving notice to the police, or doing all that was possible to prohibit the criminal from using the premises.

succeeds at having property released in a civil judicial proceeding, the government may have to pay the claimant's reasonable attorney's fee.

2. Pros and Cons of Criminal Forfeiture

(i) Pro: Forfeiture is addressed as part of the same proceeding as the criminal offence

Successfully obtaining forfeiture of all of the property sought for forfeiture in the criminal case saves an enormous amount of prosecutorial and judicial resources. Quite often, the court in the civil case will grant a "stay" while the criminal case proceeds. If the defendant reaches a point in the criminal prosecution of entering into an agreement to plead guilty to any of the criminal charges, the prosecutor will obtain – as part of that agreement – an agreement which addresses all of the assets sought for forfeiture. If a plea agreement is not reached and the case proceeds to trial, a criminal forfeiture judgment (including a money judgment) may be obtained based upon the same evidence as produced in the criminal case. Thus, there is no need for extra witnesses, or another court proceeding or another trial in order to obtain the forfeiture. In drug cases, 21 U.S.C. § 853(d) provides a presumption that any unexplained wealth accumulated during the course of a drug crime (which can include a multiple-year conspiracy), combined with a lack of legitimate income may be considered forfeitable drug proceeds.

(ii) Pro: A money judgment forfeiture is available and no attorney fees

Most significantly, if the property generated from the crime or used to commit the crime is no longer available for forfeiture, the prosecutor may request that the judge or jury enter a money judgment which may be collected against the untainted assets belonging to the defendant.

This money judgment is available for collection for years after the criminal case concludes. Finally, if criminal forfeiture is not successful – either because the defendant is acquitted or because a third party succeeds in obtaining release of the property – the government is not liable for anyone's attorney's fees.

(iii) Con: Only the defendant's property may be forfeited

Because of this limitation, any legally recognized superior interest by a third party – even if that person knew of the criminal nature of the property – must be forfeited in a parallel civil forfeiture case, or it cannot be forfeited. Thus, often both proceedings are required in order to obtain the maximum forfeiture potential under U.S. law.

IV. PROPERTY SUBJECT TO FORFEITURE UNDER U.S. LAW

A. Proceeds Forfeitures

Although the U.S. forfeiture system provides robust measures which may be used to deprive criminals of their ill-gotten gains, and U.S. prosecutors aggressively use this system to its best advantage, the truth is that it is overly complicated even for American prosecutors and judges. Most countries have enacted generic asset forfeiture laws, such as the Proceeds of Crime Acts (“POCAs”) found in many Commonwealth countries and threshold crimes forfeiture systems enacted in many civil law countries. In the United States, property which can be forfeited either civilly or criminally varies greatly from one offense to another. For some crimes, only the proceeds can be forfeited; for others, only instrumentalities and for others, property “involved in” the offense. There are still many felony crimes for which forfeiture is not provided. Yet, all property owned by individuals or organizations involved in any crime related to terrorism may be forfeited. 18 U.S.C. § 981(a)(1)(G). The Department of Justice has attempted several times to obtain passage of an all crimes approach with the introduction of Proceeds of Crime Act legislation. However, the bill has generally been dead-on-arrival in Congress because there is no apparent urgent need to obtain such a complete overhaul and because of general political ambivalence toward forfeiture. So, we work with our hodgepodge of statutes the best we can.

The closest to an “all crimes” approach to forfeiture of proceeds in the United States is 18 U.S.C. § 981(a)(1)(C) which authorizes the forfeiture of the proceeds of over 200 state and federal offences. Most of these are subject to forfeiture because they are “specified unlawful activities” (“SUAs”) within the definition of 18 U.S.C. § 1956(c)(7). All of the UN Convention required crimes are included, such as terrorist financing, money laundering, arms smuggling, drug crimes, most varieties of fraud (except tax fraud), corruption, human trafficking, smuggling, counterfeiting, securities violations, violent crimes, and environmental crimes. Others are linked through cross-referencing the RICO law (18 U.S.C. § 1961) to state crimes such as gambling, arson, kidnapping, murder, obscenity and nearly all types of theft. U.S. courts have regarded “proceeds” as including any property, real or personal, tangible or intangible, which would not have been obtained “but for” the commission of the crime. The civil forfeiture law defines “proceeds” in several ways: (1) in cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly, as the result of the commission of the offence giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offence; (2) in cases involving lawful goods or lawful services that are sold or provided in an illegal manner, “proceeds” includes the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services; and (3) in cases involving bank or other financial fraud, “proceeds”

for forfeiture purposes excludes any amount of fraudulent obligation which was repaid.

Under U.S. law, “proceeds” will also include any increase in value which has occurred to property generated from criminal activity. For example, if a house bought with drug proceeds increases in value 100 percent in ten years, the entire house is subject to forfeiture. “Proceeds” may also include the value of services and benefits received from criminal activity, such as human trafficking or forced labour, even if the defendant does not actually receive payment for those services. “Proceeds” forfeitures are strong medicine; however, they do require that the police and prosecutors trace the property obtained from the criminal activity, and in today’s era of transnational criminal activity, that endeavour can be difficult, if not impossible, in many cases.

B. Facilitating Property Forfeitures

“Facilitating property” is considered to be any property which makes the criminal activity more likely to occur. This term is the United States’ version of an “instrumentalities” of crime confiscation. Criminal and civil forfeiture of facilitating property has long been permitted in drug cases. Most of the forfeitures permitted under the more generic criminal forfeiture law, 18 U.S.C. § 982, and civil forfeiture law, 18 U.S.C. § 981, apply only to criminal proceeds. Immigration, telemarketing, identity theft, child pornography and alien smuggling are exceptions.

CAFRA added the requirement that in “facilitating property forfeitures”, the prosecutor must prove, by a preponderance of the evidence, that the property had a “substantial connection” to the underlying offence. This test has been held to prohibit forfeiture of an entire residence based upon one telephone call from the property, or a vehicle which is used to transport someone to a meeting to discuss the crime. Such uses would be considered “incidental” and not “substantially connected” to the criminal activity.

C. Property “Involved In” Money Laundering

U.S. forfeiture law allows the criminal or civil forfeiture of any property which is “involved in” a money laundering offence. 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1). This concept reaches further than “facilitating” or instrumentality property primarily because it allows the prosecutor to forfeit also untainted property which has been commingled with the criminally-related property. For example, if someone uses criminal proceeds to purchase real property in the name of a nominee family member, but half of the purchase price is paid for with legitimate funds, the entire property becomes subject to forfeiture. If tainted funds are used to purchase a business by one partner, but another partner uses untainted funds, the entire business becomes subject to forfeiture if the business partner cannot establish that he was a bona fide purchaser

for value. The money laundering forfeiture provision is a popular one among U.S. prosecutors.

The primary limitation to its use is the assertion of the 8th Amendment defence of “excessive fines and penalties.” The 8th Amendment to the U.S. Constitution prohibits the government from imposing an excessive fine or penalty. In *Austin v. United States*, 509 U.S. 602, 622 (1993), the Supreme Court applied the 8th Amendment to civil forfeiture cases, determining that such forfeitures must be limited to property which is, in some way, “proportional” to the underlying crime committed. Such a measure is often difficult. Many courts have applied the test of comparing the value of the property sought to be forfeited to the maximum fine which Congress authorized for the underlying crime; however, this has not been adopted as a conclusive measure, and courts generally look to the entire circumstances of a case to determine what is grossly disproportional to the crime, and what is not, for forfeiture purposes.

V. PROVISIONAL RESTRAINT OF PROPERTY UNDER U.S. LAW

Prosecutors in the U.S. must generally determine whether they will seek to seize or restrain assets prior to the initiation of either a criminal or civil forfeiture proceeding. A seizure always precedes an administrative forfeiture proceeding. The law recognizes the obvious principle that if property can effectively be restrained during the pendency of a forfeiture case, restraint is generally preferable to an actual seizure, which often requires significant expenditure of maintenance and storage fees.

A. Restraining Orders

U.S. laws provide a three-stage procedure for obtaining restraining orders against assets sought for either civil or criminal forfeiture. Prior to the initiation of criminal charges, a temporary restraining order (“TRO”) may be obtained for 14 days upon an ex parte application and without prior notice to anyone with an interest in the property. The prosecutor must establish in the application that there is probable cause to believe that the property is subject to forfeiture and that providing notice would jeopardize the availability of the property. The 14 day period may be extended upon good cause shown, permitting serial TRO’s until law enforcement agents have completed their “take down” of a criminal operation. Prior to the expiration of the initial TRO, the prosecutor must serve the order upon any potential parties in interest.

After affected parties have received notice and been given an opportunity to request a hearing, the prosecutor must demonstrate that: (1) there is a substantial probability that the U.S. will prevail on forfeiture and that failure to enter the order could result in the property’s becoming unavailable; and (2) the need to preserve the property outweighs hardship to the affected parties. The court may then grant a 90-day restraining order, which can be extended upon good cause.

Once a criminal indictment or a civil forfeiture complaint is filed, the prosecutor may obtain a permanent pre-trial restraining order. The reason for this provision is that in either case, an independent entity has found probable cause to believe that the property will be forfeited, thus satisfying possible judicial concerns about violations of the U.S. Constitution's 4th Amendment protections against unreasonable searches and seizures. In a civil forfeiture, the judge makes that determination based on the civil complaint; in a criminal forfeiture, the grand jury makes the determination based upon allegations in the indictment. Except for a request to pay attorney's fees (which is not permitted in the U.S. from tainted property), no one is entitled to a hearing on a restraining order issued after an indictment or civil forfeiture complaint has been filed.

B. Seizure Warrants

Civil and criminal seizure warrants are both available, with slightly different standards. A civil seizure warrant may be issued by the court upon probable cause to believe the property is subject to forfeiture (18 U.S.C. § 981(b)), which is usually accomplished by an affidavit sworn to by a law enforcement officer. This seizure warrant is used for most administrative seizures.

A criminal seizure warrant requires not only a showing of probable cause for forfeiture, but also that a restraining order is insufficient to maintain the property (or its value) for forfeiture. This provision confirms that restraint during the course of a forfeiture proceeding is preferable; but if the government learns that property is being transferred, damaged, or destroyed, a criminal seizure warrant would be available.

C. Management of Restrained or Seized Assets

Though somewhat beyond the scope of this paper, issues of asset management should be considered when deciding whether and when to restrain or seize property subject to forfeiture. For example, most vehicles and other modes of transportation, such as boats, motorcycles, and recreational vehicles, are generally seized because of the depreciation in their value through continued use. Prior to seizure, a computation should be undertaken as to whether the overall costs of seizing, storing and maintaining the asset will be less than the anticipated sales price.

Real property and businesses present special challenges. A net equity computation of real property is essential, taking into account any liens or mortgages upon the property. As for business forfeitures, the U.S. Marshal's Service has a team of professionals who advise prosecutors on whether – and how best to – seek forfeiture of a business. U.S. law prohibits the seizure of real property before a final forfeiture judgment unless the prosecutor shows the attempted sale, destruction or unlawful use of the property; however, the filing of a *lis pendens* in the public land records office is

permitted, as is a restraining order setting forth certain conditions for continued occupancy of the property by its owners. Likewise, restraining orders are most useful in connection with preserving the value of most businesses until a final judgment is entered. If seizure is required, a business manager or receiver can be appointed by the court.

Most financial accounts should generally be simply restrained pending the outcome of the proceeding. Some investment accounts may need to be liquidated or converted with court approval to maintain their value.

D. Provisional Restraint of Assets Overseas

U.S. courts have extraterritorial jurisdiction over assets which are named in either a civil forfeiture action or a criminal indictment. The court may order a criminal defendant to “repatriate” any property named for criminal forfeiture. 18 U.S.C. §853(e)(4). Penalties for a failure to comply with a repatriation order can include a finding of contempt and/or a sentencing enhancement to the defendant for obstruction of justice. Civil forfeiture provisions do not have a repatriation option, but the court can take “any action to seize, secure ...” the availability of property subject to civil forfeiture, which would include ordering any claimants to the case to take action with respect to foreign assets.¹⁰²

END OF EXCERPT

The 2016 FATF Mutual Evaluation Report assessing anti-money laundering and combating the financing of terrorism (AML/CFT) in the US regime notes that the federal authorities aggressively pursue high-value confiscation in large and complex cases and in respect of assets located both domestically and abroad.¹⁰³ The law enforcement agencies at the federal level give high priority to both criminal and civil forfeiture and seek orders forfeiting property of equivalent value as a policy objective.¹⁰⁴ In 2014, the federal authorities recovered over \$4.4 billion.¹⁰⁵ Although there is not much information available at state and local levels, it appears that civil forfeiture is actively pursued by some states.¹⁰⁶

¹⁰²[9] One caveat our prosecutors must keep in mind is that if they have made an MLAT request to a foreign country asking the government to restrain assets, that restraint must be lifted before a repatriation order can be complied with.

¹⁰³ Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States*, Fourth Round Mutual Evaluation Report (FATF, 2016) at 4, 50, online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>>.

¹⁰⁴ *Ibid* at 75.

¹⁰⁵ *Ibid* at 50.

¹⁰⁶ *Ibid* at 4.

In the US, domestic asset repatriation and restitution are managed at the federal level by the Department of Justice Asset Forfeiture Funds (DOJ-AFF) and the Treasury Forfeiture Fund (TFF). In the 2014 fiscal year, the combined value of assets in the DOJ-AFF and the TFF was about \$4.6 billion,¹⁰⁷ and between fiscal years 2010 and 2015, \$2.9 billion in forfeited assets was distributed to victims from the DOJ-AFF.¹⁰⁸ During the 2014 fiscal year, the TFF paid \$93.3 million in restitution to victims and shared \$68.5 million with other authorities and \$921,000 with foreign countries.¹⁰⁹ Asset recovery is facilitated by specialized units within the Department of Justice, such as the Asset Forfeiture and Money Laundering Section (AFMLS), the Kleptocracy Asset Recovery Initiative, and the Organized Crime Drug Enforcement Task Force (OCDETF) Proactive Asset Targeting Team (PATT).¹¹⁰

Table 5.1 Total Net Deposits to the Two Federal Forfeiture Funds, FY2012-2014 (in USD)

	FY2012	FY2013	FY2014
DOJ-AFF	9 536 078 674	2 037 205 905	4 416 227 025
TFF	173 255 617	1 052 796 355	204 500 384
Total	9 709 334 291	3 090 002 260	4 620 727 409

Source: Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures – United States*, Fourth Round Mutual Evaluation Report (FATF, 2016) at 79, [Mutual Evaluation Report (2016)] online:

<<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>>.

¹⁰⁷ *Ibid* at 79.

¹⁰⁸ *Ibid* at 80-81.

¹⁰⁹ *Ibid* at 81.

¹¹⁰ *Ibid* at 77.

Table 5.2 DOJ-AFF- Distributions and Deposits (in USD)

Fiscal Year	Forfeiture Victim Compensation	Equitable Sharing Cash/Proceeds Distribution Amount to State and Law Enforcement	Assets Forfeiture Fund Deposits
2007	306 088 353	416 255 221	1 583 388 625
2008	451 672 140	440 432 098	1 327 604 903
2009	143 712 258	394 218 350	1 404 822 898
2010	298 622 572	389 842 469	1 600 370 705
2011	322 080 158	439 368 553	1 684 810 126
2012	1 496 270 214	446 368 553	4 221 909 505
2013	193 807 168	657 220 346	2 084 563 742
2014	294 600 487	425 261 026	4 473 669 260
Total	3 506 853 487	3 609 261 435	18 381 139 764

Source: Mutual Evaluation Report (2016) at 81.

The gaps in the US asset recovery legal framework include the fact that not all predicate offenses include the power to forfeit instrumentalities, as well as the lack of general power to obtain an order to seize or freeze property of corresponding/equivalent value which may become subject to a value-based forfeiture order.¹¹¹ The Report recommends ensuring that all predicate offenses include the power to forfeit instrumentalities; the law enforcement authorities are able to seize and freeze pre-conviction, non-tainted assets that are likely to be required to satisfy a value-based forfeiture order in criminal proceedings; and the anti-money-laundering proceeds recovery activities and statistics at the state level are more widely available.¹¹²

The case of Teodoro Obiang, Second Vice President of Equatorial Guinea, provides an example of successful asset recovery by the US Department of Justice. Civil forfeiture actions against various assets in the US were settled in October 2014. Under the settlement, Obiang was required to forfeit a house in California, Michael Jackson memorabilia and a Ferrari, collectively worth over \$30 million. The case was brought under the Kleptocracy Asset Recovery Initiative, which was launched by the DOJ in 2010 and established a dedicated team of prosecutors, investigators and financial analysts for investigation and prosecution in asset recovery cases. In accordance with the Initiative’s goals, the recovered funds were to be used for the benefit of the citizens of Equatorial Guinea. \$20 million was set aside for a private charitable organization in Equatorial Guinea, while \$10 million was to be forfeited to

¹¹¹ *Ibid* at 50, 78.

¹¹² *Ibid* at 51, 78.

the US and used for the benefit of the people of Equatorial Guinea to the extent permitted by law.¹¹³

4.2 UK

In their book *Corruption and Misuse of Public Office*, Nicholls et al. summarize the various options for restraining and recovering the proceeds of crime in the UK in both the criminal and civil realms. The following is a summary based on their book.¹¹⁴

Criminal confiscation and restraint orders are used to assist asset recovery in criminal proceedings. The Crown Court exercises confiscation powers under *POCA 2003*. Confiscation in the UK is value-based, meaning a defendant must pay a sum equal to the value of the benefits accrued through criminal conduct. The prosecution might also request a compensation order for victims, since otherwise confiscated assets are forfeited to the Crown. The court may also decline to make a confiscation order if the victim intends to pursue proceedings against the defendant.

In confiscation proceedings, the court will consider whether the defendant has a criminal lifestyle, which reverses the burden of proof, requiring the defendant show that assets were acquired legitimately. A defendant will have a criminal lifestyle if they are convicted of offences in Schedule 3 of *POCA* (money laundering offences are included, but bribery offences are not), have committed an offence over a period of at least six months and benefitted from it, or have been convicted of a combination of offences that comprise a “course of criminal activity.” If the defendant does not have a criminal lifestyle, the court will consider whether he or she benefited from particular criminal conduct when determining the recoverable amount.

Restraint orders are a key pre-confiscation tool that prevent dissipation of assets during criminal proceedings. Any property in which the defendant has a legal or beneficial interest, including jointly held property, will be targeted, as will tainted gifts to third parties. Reasonable living expenses are allowed for the defendant. Restraint orders may be accompanied by disclosure orders and repatriation orders, which may require, for example, repatriation of money in offshore accounts.

POCA also provides for non-conviction based forfeiture. The applicant must prove on a balance of probabilities that the assets were obtained through unlawful conduct, including conduct occurring abroad, and that the property is in fact held by the defendant. However,

¹¹³ Department of Justice, 14-1114, Press Release, “Second Vice President of Equatorial Guinea Agrees to Relinquish More Than \$30 Million of Assets Purchased with Corruption Proceeds” (10 October 2014), online: <<http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased>>.

¹¹⁴ Nicholls et al, *Corruption and Misuse of Public Office*, 2nd ed (Oxford University Press, 2011) at 244–266.

NCB forfeiture, unlike confiscation, does not have a mechanism for compensation orders for victims. However, a victim can claim a legitimate interest in recovered property, as claimed by Nigerian government in order to recover one million pounds in the *Alamieseigha* case in 2007.

In private actions, claimants have a variety of options to assist in the tracing and preservation of assets during proceedings. The most important is the freezing injunction, discussed in more detail below. Claimants can also apply for search and seizure orders, which will be carried out by the claimant's counsel and an independent solicitor, as well as bankers' books orders, which allow the claimant's legal team to inspect bank records without notice to the defendant. Finally, claimants in private actions can also seek injunctions to preserve assets and evidence.

The following excerpt from the 2011 StAR/World Bank publication entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* describes the use of restraint and recovery mechanisms when foreign jurisdictions are involved, with a focus on MLA procedures.¹¹⁵

BEGINNING OF EXCERPT

United Kingdom

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The *Crime (International Co-operation) Act* (CICA) [updated link: <http://www.legislation.gov.uk/ukpga/2003/32/contents>] allows for the provision of mutual legal assistance to any country.
- The *Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005* (POC) [updated link: <http://www.legislation.gov.uk/uksi/2008/302/contents/made>] allows for the issuance of restraint warrants and the confiscation of assets upon request or based on an order issued by a foreign country in both conviction based and non-conviction based proceedings.

¹¹⁵ Stephenson et al (2011) at 170–174, online:

<<http://documents.worldbank.org/curated/en/2011/01/14571139/barriers-asset-recovery-analysis-key-barriers-recommendations-action>>.

- The *Criminal Justice (International Cooperation) Act 1990 (Enforcement of Overseas Forfeitures) Order (CRIJICA)* [updated link: <http://www.legislation.gov.uk/ukpga/1990/5/contents>] regulates the restraining and forfeiture of the instrumentalities of crime upon request or based on an order issued by a foreign country.
- The United Kingdom has entered into 32 bilateral MLA agreements with Antigua and Barbuda; Argentina; Australia; Bahamas; Bahrain; Barbados; Bolivia; Canada; Chile; Colombia; Ecuador; Grenada; Guyana; Hong Kong SAR, China; India, Ireland; Italy; Malaysia; Mexico; Netherlands; Nigeria; Panama; Paraguay; Romania; Saudi Arabia; Spain; Sweden; Thailand, Trinidad and Tobago; Ukraine; United States; and Uruguay.
- The United Kingdom is a party to the following multilateral agreements, which include provisions on mutual legal assistance: the Merida, Vienna, and Palermo conventions; the European Convention on Mutual Legal Assistance in Criminal Matters and Additional Protocol; the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and Protocol to the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union; and the Harare Scheme. However, the United Kingdom may provide MLA directly based only on domestic law and not on international treaties.

A.2. Legal Preconditions for the Provision of MLA

- Reciprocity is generally not required for the provision of MLA.
- Dual criminality is not required for most measures under the CICA. However, requests for search and seizure for evidentiary reasons as well as restraint and confiscation of assets are subject to dual criminality; that is, they cannot be executed unless the underlying criminal conduct would be an offense under U.K. law.

A.3. Grounds for Refusal of MLA

- Requests involving double jeopardy will not be executed.
- Requests relating to offenses punishable with the death penalty or relating to trivial offense may be refused.
- Requests that affect the U.K. national security or other U.K. essential interests may be declined.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- For assistance in England, Wales, and Northern Ireland, the U.K. Home Office, Judicial Cooperation Unit, is the central authority to receive all requests for MLA.
- For assistance in Scotland, the Crown Office, International Cooperation Unit, is the central authority to receive MLA requests.
- The central authorities ensure that requests meet the form requirements and the requirements under U.K. law and subsequently disseminate requests to the relevant domestic authorities for implementation.

B.2. Language Requirements

- Requests must be made in writing in English or be submitted with an English translation. If no translation is provided, the central authorities will ask for one, and the request will remain unexecuted until the translation is received.

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Measures pursuant to CICA Sections 13–15 as well as account and customer information orders may be issued as soon as an investigation for an offense has been initiated in the requesting country.
- In Scotland, search and seizing warrants may be issued as soon as there are reasonable grounds to suspect that an offense under the law of the requesting country has been committed.
- Search and seizing orders in England, Wales, and Northern Ireland (CICA Section 17) may be taken only if criminal proceedings have been instituted or an arrest been made in the requesting country.

Tracing

C.2. Available Tracing Mechanisms

- Obtaining of Evidence (CICA Sections 13–15): Evidence gathering orders may be issued if a request is made in connection with criminal proceedings or a criminal investigation in the requesting state. In England, Wales, and Northern Ireland, suspects cannot be compelled to attend court or be coerced to provide evidence under oath for the purposes of MLA. In Scotland, both suspects and witnesses

can be compelled to attend the court, but suspects cannot be compelled to provide evidence.

- CICA Section 17: Search and seizing warrants for England, Wales, and Northern Ireland may be issued if criminal proceedings have been instituted or an arrest has been made in the requesting country; if the conduct in question would constitute an arrestable offense had it been committed in the United Kingdom; and if there are reasonable grounds to suspect that evidence is in the United Kingdom relating to the offense. In Scotland, such warrants may be issued if there are reasonable grounds to suspect that an offense under the law of the requesting country has been committed and if the offense would be punishable with imprisonment under Scottish law had the conduct occurred domestically. Warrants may not be issued with respect to items or documents subject to professional legal privilege.
- Customer Information Orders (CICA Sections 32 and 37): Orders may be issued requiring a financial institution to provide any customer information it has relating to the person specified in the order if the specified person is subject to an investigation in the requesting country, if the investigation concerns serious criminal conduct, if the conduct meets dual criminality, and if the order is sought for the purposes of the investigation. A customer information order has effect regardless of any restrictions on the disclosure of information that would otherwise apply.
- Account Monitoring Orders (CICA Sections 35 and 40): Orders may be issued requiring a financial institution specified in the application to provide account information of the description specified in the order and at the time and in the manner specified if there is a criminal investigation in the requesting country and if the order is sought for the purposes of the investigation. It is an offense under U.K. law to tip off customers that an account monitoring order has been received by a financial institution. The monitoring period may not exceed 90 days.
- Interception of Telecommunication: This measure is available only to parties of the EU Convention on Mutual Legal Assistance in Criminal Matters.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Customer or account information orders pursuant to CICA Sections 32, 37, 35, and 40 have effect regardless of any restrictions on the disclosure of information that would otherwise apply. Therefore, they may also be used to obtain information covered by banking secrecy.
- Information covered by legal privilege is protected and may not be subject to search and seizing warrants.

Provisional Measures (Freezing, Seizing, and Restraint Orders)

C.4. Direct Enforcement of Foreign Freezing and Seizing Orders

- **Legal basis:** Foreign freezing orders are executed through CICA Sections 17 and 18.
- **Procedure:** Direct application of foreign freezing orders through a decision by the territorial authority for the part of the United Kingdom in which the evidence to which the order relates is situated. Only orders relating to criminal proceedings or investigations for an offense listed in the CICA may be directly applicable. The court may decide not to give effect to a foreign freezing order that would be incompatible with the rights under the Human Rights Act 1998 or if the person whose conduct is in question, if he was charged under the law of the requesting state or the United Kingdom, would be entitled to be discharged based on a previous acquittal or conviction.

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** POC Articles 8, 58, and 95.
- **Procedure:** Countries may apply for issuance of a restraint order by the Crown Court.
- **Evidentiary requirements:** An order may be issued if a criminal investigation has been started in the requesting country or proceedings for an offense have been initiated and not concluded in the requesting country and if there is reasonable cause to believe that the alleged offender named in the request has benefited from his criminal conduct. The POC provides for the seizing order to extend to any “realizable property,” which is defined to include any free property held by the defendant or by the recipient of a tainted gift.
- **Time limit:** A restraint order remains in force until it is discharged by a further order of the court on the application of either the U.K. authorities or any person affected by the order. The court must discharge the order if at the conclusion of the foreign proceedings no external confiscation order is made or if the external order is not registered for enforcement within a reasonable time.

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** POC Articles 21, 68, and 107.
- **Procedure:** Foreign conviction-based confiscation orders may be registered and subsequently directly enforced in the United Kingdom if the Crown Court is satisfied that the conditions of the POC are met.

- **Evidentiary requirements:** A foreign confiscation order may be executed if it was made based on a conviction, if it is in force and final, if giving effect to the order will not violate any rights of the Human Rights Act of 1998, and if the property specified in the order is not subject to a charge under U.K. law.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- POC Articles 143 ff. allow for the registration and implementation of (civil) forfeiture orders. Article 147 permits an application for a property freezing order to preserve property so that it is available to satisfy an external order enforced in the United Kingdom by means of civil recovery.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- Criminal confiscation in the United Kingdom is value-based, that is, the defendant's proceeds of crime are calculated as a value and the defendant is then ordered to pay that amount. There-fore, equivalent-value confiscation is possible.

D. Types of Informal Assistance

- Informal assistance may be provided by the police; the Serious Organized Crime Agency (FIU) (<http://www.soca.gov.uk/>), and the Financial Services Authority (<http://www.fsa.gov.uk/>).
- The United Kingdom has attaché offices in France, Italy, Pakistan, Spain, and the United States.¹¹⁶

END OF EXCERPT

¹¹⁶ [97] Practitioners should inquire with the nearest British High Commission to determine the nearest attaché.

The following is an excerpt from a 2009 publication by the Basel Institute on Governance entitled *Tracing Stolen Assets: A Practitioner's Handbook*:¹¹⁷

BEGINNING OF EXCERPT

II. FREEZING ORDERS

1. Background

The order takes its name from *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509. The Civil Procedure Rules now refer to it as a freezing injunction (CPR 25.1(1)(f)). It developed as a form of recourse against foreign-based defendants with assets within the UK and consequently the early authorities assumed that the injunction was not available against English-based defendants. In the same vein an early judicial guideline for the grant of the order required claimants to establish a risk of the removal of assets from the jurisdiction.

Section 37(3) of the Supreme Court Act 1981 now provides that the injunction may be granted to prevent defendants from removing from the jurisdiction 'or otherwise dealing with' the assets. Section 37 forms the basis of the jurisdiction for granting freezing injunctions 'in all cases in which it appears to the court to be just and convenient to do so'. The Court of Appeal held in *Babanaft International Co. S.A. v Bassatne* [1990] Ch. 13 that the wording of subsection 3 did not restrict the scope, geographical or otherwise, of s.37(1). The Civil Procedure Rules currently provide that the injunction may be granted in relation to assets 'whether located within the jurisdiction or not' (CPR 25.1(1)(f)).

2. Purpose and effect

A freezing order prohibits D from unjustifiably dissipating his assets within the jurisdiction so that there are insufficient or no assets left to satisfy a judgment against him. To preserve assets pending enforcement, a freezing order can also be obtained post-judgment. If D has insufficient assets within the jurisdiction to meet the quantum of C's claim, the court can grant a worldwide freezing order.

¹¹⁷ International Centre for Asset Recovery (2009) at 90–99, online: <<https://www.baselgovernance.org/publications/421>>.

3. Penal notice

Freezing orders, as well as search orders, are endorsed with a Penal Notice, which warns that disobedience of it may be regarded as contempt of court the penalty for which may be imprisonment, a fine or seizure of assets. Contempt may extend to any third parties who are notified of the order and do anything which helps or permits a breach its terms. However, since the English court has no jurisdiction over third parties located abroad, the worldwide order has to be recognised, registered or enforced by the relevant foreign courts to be effective. This process is often described as 'domesticating' the English order.

The orders usually freeze assets up to a financial limit, calculated according the value of C's claim with likely legal costs and interest taken in to account. D can deal with any '*surplus*' assets that exceed the limit of the order as he sees fit. In addition payment of a sum equal to the value of the limit into court or providing security in that sum can discharge the freezing order.

A freezing order bites on the individual not his assets (*in personam*) and as such it does not grant any proprietary rights over the assets of D. It therefore does not confer on C any advantage in the event of D's insolvency. However, the position is different where proprietary rights are claimed over frozen assets (see Proprietary Injunctions below). A freezing order is an interim measure and therefore the standard form of order permits D to draw on frozen assets to pay a '*reasonable sum*' for legal expenses and to pay a pre-set sum (fixed by the court) to meet ordinary living expenses. C is given a measure of control over any increases in expenses in order to prevent D from depleting his assets improperly. For example any increase in expenses has to be agreed with C, or in the absence of agreement, approved by the court.

4. Asset disclosure

The standard freezing order requires D to give details of the value, location and details of assets within the jurisdiction or elsewhere, for a worldwide freezing order. This enables C to identify the whereabouts of the assets and notify third parties of the freezing order. D may refuse to provide some or all of this information if in providing it, he is likely to incriminate himself. The assertion of self incrimination privilege has been much curtailed in the United Kingdom (UK) by the Fraud Act 2006 – and in practical terms by the fact that reliance on the privilege is generally regarded as in effect an admission of liability. Forcing the fraudster defendant into an assertion of self incrimination privilege can be the first stage in victory for the claimant victim. Where there are concerns about the completeness of D's disclosure on affidavit, C can apply to have D cross examined in relation to those assets. In addition, the court can

grant orders requiring third parties (e.g., banks) to assist in identifying and locating assets and other relevant information.

5. Application and requirements

The application to the court for a freezing order, as well as a search order, is almost invariably made *without notice* to D (*ex parte*). The first time that D learns about the order should be when he is personally served with it (see below for more detail about Service). This is done so as not to 'tip off' D and T about C's intention to commence proceedings or to take any legal steps to secure assets and/or evidence. The court may decide not to grant a freezing order if D has had notice of C's intentions because '*the court is unlikely to make orders which are futile*' (*Oaktree Financial Services v Higham* [2004] EWHC 2098 Ch [10]).

6. Grounds

In order to obtain a freezing order, C needs to show:

- A good arguable case; and
- A real risk of unjustifiable dissipation of assets; and
- That the order is just and convenient in all the circumstances

The court will not automatically conclude that because D is alleged to be dishonest he cannot be trusted not to dissipate his assets. Careful consideration should therefore be given in the evidence to the profile and background of D.

7. Cross-undertaking in damages

The court will require C to give a 'cross-undertaking in damages' which is a promise to comply with any order that it may make if it decides that the freezing order caused loss to D and that D should be compensated for that loss. This may include provision of security to fortify the cross-undertaking in damages.

8. Full and frank disclosure

On a *without notice* application the court is being asked to grant a hugely intrusive order against D who has not had a chance to be heard. Therefore C and his lawyers must give full and fair disclosure of all the material facts, including what D is likely to argue in his defence, or against C, or any facts likely to be relied upon. If there has not been full and frank disclosure, there is a real risk that the court will set aside the order.

9. Service

Personal service is usually a precondition to committal for contempt of court for a breach of an order endorsed with a penal notice. However, the court does have an inherent discretion to vary the requirements for personal service (RSC Order 45.7(7)).

Where relevant and possible, service should be effected simultaneously on D and the third party asset holders.

III. PROPRIETARY INJUNCTIONS

If C contends that D is holding C's property (which can include cash) or the traceable proceeds of his property (the '*proprietary assets*') then the court can grant a proprietary freezing injunction. Its terms are typically more draconian than a standard (non-proprietary) freezing order and can restrain any dealings with the proprietary assets so that D cannot use them to pay for living or legal expenses. When applying for a proprietary injunction, C needs to show a good arguable case and that it is just and convenient that the order be granted. He does not need to establish a risk of dissipation, because the nature of C's claim is that D is holding his assets or the proceeds of those assets. As a result the proprietary injunction does give C priority over D's creditors on the asset pool.

IV. ANCILLARY ORDERS

The English courts have developed a number of orders to assist victims of fraud and corruption in their fight against those who attempt to delay and obfuscate. These include specific disclosure orders, which require disclosure of particular documents to help identify the nature and location of assets or passport orders requiring delivery up of all travel documents and prohibiting D from leaving the jurisdiction. A fraudster¹¹⁸ suddenly deprived of the means of travel internationally is inevitably shocked by the severity of the civil court's powers and it immediately impacts particularly if he is an overseas national who cannot return home or leave the UK during the currency of the asset disclosure process. Third party disclosure (*Norwich Pharmacal*) orders require third parties who are mixed up in the wrongdoing (whether innocently or not) to disclose information that will assist in the identification of wrongdoers, allow assets to be traced and to establish the validity of proprietary claims against third parties or tracing assets into the hands of third parties. Banks

¹¹⁸ [1] In this context a fraudster denotes a person who may have committed criminal offences but who, for the purposes of this chapter, is the subject of the full panoply of civil measures that are available in the UK and also possibly in other jurisdictions.

through which stolen funds are believed to have passed are an obvious target for such orders.

In addition, third party freezing orders can be obtained against third parties but only where there is good reason for believing that assets ostensibly held by third parties are in reality D's assets. This is known as the *Chabra* jurisdiction. These orders are particularly useful where D has structured his affairs through sham trusts or other opaque vehicles so as to give the impression that he has no interest in the assets in question.

A critical weapon for the claimants is to be found in section 25 of the Civil Jurisdiction and Judgments Act 1982. Section 25 allows an English court to grant interim relief in aid of proceedings elsewhere. These are commonly invoked where assets are located in England, but D is located outside the jurisdiction, in the place where the substantive proceedings are being conducted. It is not necessary for foreign proceedings to have been commenced as long as they will be commenced. One can obtain relief in England – subject to demonstrating a sufficient geographical nexus – which cannot be obtained in the location of the substantive action.

...

3. General

As technology advances daily, the English Courts have shown themselves, time and again, to be adept and creative in assisting the victim claimant to recover the proceeds of fraud and corruption. The last years have seen an explosion of applications made under Section 25 Civil Jurisdiction and Judgment Acts (see section IV, last paragraph) – this enables the Courts on application without notice by the victim to utilise the panoply of weaponry available to the Court to assist a foreigner with jurisdiction in its pursuit of the fraudster or corrupt official. The dictator, the businessman, the expolitician or the 419 crook against whom proceedings have been started or are about to be started in a host domestic state – wherever in the world that may be – can find themselves the subject of International Freezing and Tracing Order relief where proceedings are commenced in England on the basis that there is sufficient nexus with England and Wales to justify it. The nexus can be in terms of the location of property, perhaps a small shareholding in an operating company in which the defendant has a claimed beneficial interest, even if owned offshore but beneficially by him, or by the simple expedient of him being present in England and Wales at a particular time so that service upon him, *in personam*, can be effected.

The Section 25 jurisdiction is far reaching and often causes amazement to those unaware of its implications – witness for example a defendant with no apparent connection with England who is served with a freezing order requiring the worldwide

disclosure of his assets issued by an English Court in ancillary support of proceedings in an European Union country relating to his alleged breach of duty while the director of an international conglomerate. Failure to make worldwide disclosure of his assets to an English Court, even though the subject matter of the fraud or corruption arose in a different jurisdiction, represents a contempt of Court punishable by imprisonment or segregation of assets. This where the subject matter of the alleged fraud or corruption has nothing whatsoever to do with England. The jurisdiction is secured by the expedience of property or *in personam* jurisdiction.

Technological advance in future years will doubtless enable the Courts to devise orders directed at the recovery of proprietary information held by internet servers providers and mobile phone operators (so that SMS messages can be retrieved aside from e-mail). Aside from the fund flows through the banking systems, developments of this kind enable the claimant lawyer to steal yet another march on the misapplication of laundered funds by the criminal – and this a civil process, though one that co-exists and operates very effectively as we have seen in the Banco Noroeste case with a parallel criminal investigation, prosecution and jail for the wrongdoer.

END OF EXCERPT

In 1980, the *Bankers Trust* case¹¹⁹ introduced a new type of disclosure order which requires a bank to furnish information about assets and transactions normally protected by the bank's duty of confidentiality. In the case involving Nigeria's last military dictator General Sani Abacha, a UK court was requested to issue a Bankers Trust order requiring named banks to disclose copies of bank statements, account opening forms, customer information, debit and credit notes, as well as internal bank memoranda regarding the operation of the accounts.¹²⁰ As a result, disclosure was obtained from about twenty banks on approximately 100 Abacha family members, associates and corporate entities.¹²¹

The following is an excerpt from a 2009 StAR/ World Bank publication entitled *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*:¹²²

¹¹⁹ *Bankers Trust v Shapira*, [1980] 1 WLR 1274 (CA).

¹²⁰ For more details about the so-called "Abacha loot" see Section 6.11 of this Chapter.

¹²¹ UN Digest (2015) at 40-41.

¹²² Theodore S Greenberg et al, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (StAR/World Bank, 2009) at 120, online: <<https://star.worldbank.org/star/publication/good-practice-guide-non-conviction-based-asset-forfeiture>>.

BEGINNING OF EXCERPT

The Assistance of U.K. Law Enforcement

When trying to trace, freeze, and recover the illicit gains of a corrupt official found either to be in or to have been laundered through the United Kingdom, a foreign state may do one of the following:

- Invoke the mechanism of mutual legal assistance, and working with a U.K. law enforcement agency either
 - restrain assets¹²³ (during a criminal investigation) and having obtained a criminal conviction in the foreign state, enforce its own recovery order in England and Wales¹²⁴; or
 - freeze assets and having obtained either an NCB or conviction based asset recovery order in the foreign state, give effect to that order by means of an NCB asset forfeiture order in England and Wales (known in the United Kingdom as civil recovery).¹²⁵
- Invite a U.K. law enforcement agency to adopt the case for investigation with a view to bringing in England and Wales
 - a criminal prosecution in the United Kingdom (if that is feasible) and if a conviction is obtained, seek a criminal confiscation order;
 - cash detention and forfeiture (if applicable); or
 - NCB asset forfeiture proceedings (civil recovery) and seek a civil recovery order.

If a criminal confiscation order is obtained, a compensation order (in favor of a victim) may also be made in the same case. A foreign state may also, therefore, intervene in criminal confiscation proceedings and seek a compensation order. A criminal confiscation order requires the defendant to pay back the value of the benefit from a

¹²³ [212] Requests will go through the United Kingdom Central Authority (with the exception of requests seeking enforcement via the NCB route, which should go through the High Court of England and Wales), which passes it to the appropriate law enforcement agency, such as the Serious Organised Crime Agency (SOCA), the Crown Prosecution Service (CPS), Her Majesty's Revenue and Customs (HMRC), or the Serious Fraud Office (SFO).

¹²⁴ [213] *Proceeds of Crime Act 2002* (United Kingdom) Part 11 and Order in Council 2005/3181 Parts 2, 3, and 4 re cooperation in the recognition and enforcement of foreign, conviction-based asset recovery orders.

¹²⁵ [214] *Proceeds of Crime Act 2002* (United Kingdom) Part 11 and Order in Council 2005/3181, Part 5 re the cooperation in the recognition and enforcement of foreign, NCB asset recovery orders.

given crime (the proceeds).¹²⁶ If there are insufficient funds with which to fulfill both a criminal confiscation order and a compensation order, the court can require a proportion of the realized assets under the criminal forfeiture order to be used to discharge the compensation order.¹²⁷ A detailed consideration of this area is outside the scope of this contribution.

In proceedings for NCB asset forfeiture, the true owner of property is entitled to seek a declaration from the civil court that he has a valid claim to the property (or property which it represents) because it was unlawfully taken from him.¹²⁸

If either a conviction based confiscation or NCB asset forfeiture order is registered and enforced in England, the recovered property (or money equivalent) is not automatically transmitted to the foreign state and the English court has no power with which to remit the property to the foreign jurisdiction. Instead, the proceeds of the recovered property (or money equivalent) are placed in the U.K. Government's Consolidated Fund. Some countries have entered into asset-sharing agreements with the United Kingdom in respect of conviction based confiscation cases. These, however, are not thought to apply to NCB asset forfeiture. The United Kingdom is taking steps to enter into either bilateral treaties or memoranda of understanding with foreign states with regard to NCB asset forfeiture. Asset sharing agreements may also be entered into on a case-by-case basis. With respect to corruption cases, the United Kingdom has ratified UNCAC, and as such is mindful of its obligations under that Convention.

END OF EXCERPT

¹²⁶ [215] *Proceeds of Crime Act 2002* (United Kingdom), Section 6, and *The Financial Challenge to Crime and Terrorism* (London: HM Treasury, 2007), p. 24. In confiscation proceedings it is not necessary to link a particular crime to a particular benefit. The court can, therefore, assume that all of the defendant's properties held over the previous six years are the proceeds of crime. This is known as the option of "general criminal conduct confiscation." Prior to the making of the confiscation order a restraint order may be obtained from the court to prevent the dissipation of assets that may later need to be sold to satisfy the confiscation order.

¹²⁷ [216] *Proceeds of Crime Act 2002* (United Kingdom), Section 13 (5)–(6).

¹²⁸ [217] *Proceeds of Crime Act 2002* (United Kingdom), Section 281.

Further Reading

For more on the UK, see: <<http://star.worldbank.org/star/sites/star/files/UK-Guide-to-Asset-Recovery.pdf>>.

For recent updates on and evaluation of confiscation and civil recovery law in the UK, see Peter Alldridge, “Proceeds of Crime Law since 2003 – Two Key Areas” (2014) *Crim L Rev* 171.

4.3 Canada

The following excerpt from a 2011 StAR/World Bank publication, entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, starts with a summary of mutual legal assistance provisions in Canada, since MLA is usually essential to the pursuit of asset recovery in large-scale corruption cases:¹²⁹

BEGINNING OF EXCERPT

Canada

A. MLA Legal Framework and Preconditions to Cooperation (General)

A.1. Relevant Laws, Treaties, and Conventions Dealing with or Including a Component Relevant for MLA and Asset Recovery

- The *Mutual Legal Assistance in Criminal Matters Act* (MLACMA) [updated link: <http://laws-lois.justice.gc.ca/eng/acts/M-13.6/>] [as amended *Protecting Canadians from Online Crime Act*¹³⁰] allows for the provision of MLA. Canada may not provide MLA directly based on multilateral conventions but only pursuant to the provisions of the MLACMA.
- The *Canada Evidence Act* (EA) [updated link: <http://laws-lois.justice.gc.ca/eng/acts/C-5/>] Section 46 allows for the provision of certain forms of MLA, including certain coercive measures, based on letters rogatory if criminal proceedings are pending abroad.

¹²⁹ Stephenson et al (2011) at 113–116.

¹³⁰ SC 2014, c 31. Section 41 provides that production orders for obtaining bank information, transmission data or tracking data described in the *Code* may be used by Canadian authorities who receive assistance requests from their international partners.

- Canada has entered into bilateral treaties with 33 countries, namely Argentina; Austria; Australia; Bahamas; Belgium; China; Czech Republic; France; Greece; Hong Kong SAR, China; Hungary; India; Israel; Italy; Republic of Korea; Mexico; Netherlands; Norway; Peru; Poland; Romania; Russian Federation; South Africa; Spain; Sweden; Switzerland; Thailand; Trinidad and Tobago; Ukraine; United Kingdom; United States; and Uruguay.
- Canada has ratified the Merida Convention, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters, the Vienna and Palermo Conventions, the Organization of American States Inter-American Convention on Mutual Assistance in Criminal Matters, and the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

A.2. Legal Preconditions for the Provision of MLA

- Dual criminality is generally not required for requests based on bilateral or multilateral treaties. Administrative agreements with non-treaty states may be concluded only for indictable offenses under Canadian law and thus require dual criminality.
- Foreign restraint and seizing orders may be enforced directly in Canada only if they relate to an indictable offense under Canadian law.
- Reciprocity is required and assumed for countries that have signed a relevant treaty, convention, or administrative agreement with Canada. Administrative agreements may be entered into for specific cases and in the absence of an applicable treaty.

A.3. Grounds for Refusal of MLA

Pursuant to MLACMA Section 9.4, the minister of justice must refuse requests if there are:

- Reasonable grounds to believe that the request has been made for the purpose of punishing a person by reason of his or her race, sex, sexual orientation, religion, nationality, ethnic origin, language, color, age, mental or physical disability, or political opinion.
- Enforcement of the order would prejudice an ongoing proceeding or investigation.
- Enforcement of the order would impose an excessive burden on the resources of federal, provincial, or territorial authorities.
- Enforcement of the order might prejudice Canada's security, national interest, or sovereignty.
- Refusal of the request is in the public interest.

Further grounds for refusal may be contained in applicable bilateral, multilateral, or administrative agreements.

B. MLA General Procedures

B.1. Central Authority Competent to Receive, Process, and Implement MLA Requests in Criminal Matters

- The Ministry of Justice is the central authority to receive any requests for MLA.
- In practice, the ministry performs its function as central authority through the International Assistance Group (IAG), which reviews and coordinates the implementation of MLA requests. The IAG may receive requests either through diplomatic channels or directly from the central authority of the requested entity or state.

B.2. Language Requirements

- Requests have to be submitted in English or French.

C. Asset Recovery Specific

C.1. Stage of Proceedings at Which Assistance may be Requested

- Tracing measures under the MLACM are available once a criminal investigation has been initiated in the requesting country.
- The measures under the EA, including direct enforcement of foreign freezing and seizing orders, are available only after formal charges have been brought before a foreign court or tribunal. It is not required that a conviction has been obtained.

Tracing

C.2. Available Tracing Mechanisms

- Under MLACMA Section 11 and 12, search warrants may be issued by a Canadian court if there are reasonable grounds to believe that an offense has been committed under the law of the requesting country, evidence of the commission of the offense or information on the whereabouts of a suspect will be found in the place to be searched, and it would not be appropriate to issue a production order. The person executing the search warrant may seize any thing he believes will afford evidence of, has been obtained by, is intended to be used, or has been used in the commission of an offense.

- Under MLACMA Section 18, a Canadian judge may issue a production order if there are grounds to believe that an offense has been committed under the law of the requesting country, and evidence of the commission of the offense or information on the whereabouts of the suspect will be found in Canada. Items or documents subject to privilege or nondisclosure under Canadian law cannot be compelled. EA Section 46 also allows for the issuance of production orders and for the compelled testimony of witnesses by Canadian courts if criminal charges have been brought in the requesting country.
- Other measures provided for under the MLACMA and the EA include video or audio-link of a witness in Canada to proceedings in a foreign jurisdiction, an order for the lending of exhibits that have been tendered in Canadian court proceedings, an order for the examination of a place or site in Canada, the transfer of a sentenced prisoner to testify or assist in an investigation, and service of documents and account monitoring orders.

C.3. Access to Information Covered by Banking or Professional Secrecy

- Privileged information can be obtained pursuant to an MLAT search warrant if any information over which privilege is claimed is sealed and filed with the court.

Provisional Measures (Freezing, Seizing, and Restraint Orders)

C.4. Direct Enforcement of Foreign Freezing or Seizing Orders

- MLACMA Section 9.3 allows for the direct enforcement of foreign restraint or seizing orders if a person has been charged with an offense in the requesting jurisdiction and if the offense would be an indictable offense in Canada.
- Upon approval by the minister of justice, the attorney general may file the order with the Superior Court of Criminal Jurisdiction of the relevant province. The order is then entered as an order of that court and may be executed in Canada.

C.5. Issuance of Domestic Provisional Measures upon Request by a Foreign Jurisdiction

- **Legal basis:** There are no provisions that permit domestic provisional measures within the Criminal Code to be used by a foreign state.
- **Procedure:**
- **Evidentiary requirements:**
- **Time limit:**

Confiscation

C.6. Enforcement of Foreign Confiscation Orders

- **Legal basis:** MLACMA Section 9.
- **Procedure:** Subject to approval by the minister of justice, MLACMA Section 9 allows for the direct enforcement of foreign confiscation judgments in Canada. Upon approval by the minister, the attorney general may file the judgment with the Superior Court of Criminal Jurisdiction of the relevant province. The order is then entered as the judgment of that court and may be executed in Canada pursuant to domestic law.
- **Evidentiary requirements:** Foreign confiscation judgments may be enforced in Canada if the affected person has been convicted of an offense in the requesting country, if the offense would be an indictable offense under Canadian law, and if the judgment is final. The judgment may extend to any offense-related property or any proceeds of crime.

C.7. Applicability of Non-Conviction Based Asset Forfeiture Orders

- Some but not all provinces in Canada can enforce civil forfeiture orders.

C.8. Confiscation of Legitimate Assets Equivalent in Value to Illicit Proceeds

- A foreign confiscation order may be enforced under MLACMA section 9 (see C.6.).

D. Types of Informal Assistance

- Informal assistance may be provided by the FINTRAC (FIU and FI Supervisor) (<http://www.fintrac.gc.ca/>), the Office of the Superintendent of Financial Institutions (<http://www.infosource.gc.ca/inst/sif/fed04-eng.asp>), provincial securities regulators, and the police.
- MOUs are required only by FINTRAC (both as supervisor and as FIU). All other authorities are empowered to provide decentralized types of assistance also in the absence of MOUs.
- Canada maintains and uses attaché offices.¹³¹

END OF EXCERPT

¹³¹ [92] Practitioners should contact the nearest Canadian embassy to determine the appropriate attaché office.

(1) Freezing Assets of Corrupt Foreign Officials Act**a) Preconditions for a Freezing Order or Regulation**

The *Freezing Assets of Corrupt Foreign Officials Act* (“*FACFOA*”) was introduced in 2011 to respond to the aftermath of the fall of several dictatorships in the Middle East during the Arab Spring. The legislation allows the Minister of Foreign Affairs to quickly freeze the assets of a foreign political figure upon the request of a foreign government. The law requires that a foreign state make a written request to the Government of Canada to freeze the assets of an individual. The foreign state must also assert that the individual “has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship.”¹³² The *Act* defines a “foreign state” as a state other than Canada and includes any government or political subdivision of the foreign state as well as any agency or department of the government or political subdivision.¹³³

Once the foreign state has made a request, the Governor in Council (i.e., the Cabinet) must ensure that three preconditions are fulfilled before making an order or regulation that freezes a person’s assets. First, the Governor in Council must be satisfied that any persons targeted for asset seizure qualify as “politically exposed” foreign persons.¹³⁴ The *Act* defines a “politically exposed foreign person” as a person who holds or who has held one of several enumerated offices in a foreign state. The list includes specific offices such as “head of state” and “military officer with the rank of general or above.” However, the definition also includes a residual clause specifying that the “holder of any prescribed office or position” would also fall under the definition of “politically exposed foreign person.”¹³⁵ This residual clause is important because it allows the Governor in Council to prescribe other government positions as politically exposed foreign persons in regulations under *FACFOA*. This power ensures that it would be possible for *FACFOA* to target corrupt officials who do not hold an enumerated title, such as former Colonel Gaddafi of Libya (although he has never actually been the target of an order or regulation under *FACFOA*).¹³⁶ The definition of “politically exposed foreign person” also includes “any person who, for personal or business reasons, is or was closely associated with such a person [a person holding an enumerated or prescribed office as defined above], including a family member.”¹³⁷ This language further expands the category of person who may be the subject of an order or regulation. Second, before issuing an order or regulation, the Governor in Council must also be satisfied that “there is internal turmoil, or an uncertain political situation, in the foreign state.” Finally, the Governor in

¹³² *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10, s 4(1). See the *Legislative Summary of Bill C-61: The Freezing of Assets of Corrupt Foreign Officials Act*, [Leg Summary Bill 61] online: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c61&Parl=40&Ses=3>.

¹³³ *Ibid* at s 2(1).

¹³⁴ *Ibid* at s 4(2)(a).

¹³⁵ *Ibid* at s 2(1).

¹³⁶ Martin Asser, “The Muammar Gaddafi Story”, *BBC News*, online: <<http://www.bbc.com/news/world-africa-12688033>>.

¹³⁷ *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10, s 2(1).

Council must be satisfied that “the making of the order or regulation is in the interest of international relations.”

Concerns with the preconditions

The major concern is the lack of evidence required for the Governor in Council to make an asset seizure regulation under *FACFOA*. During the review of the proposed legislation by the Standing Committee on Foreign Affairs and International Development, the Hon. Bob Rae noted that a requesting government does not “have to give you any court judgments. They don’t have to give you any evidence with respect to exactly what this [person] has done. They simply have to say, ‘We’re giving you a request’, and in response to that request, you can pass a regulation to seize that person’s property.” He also noted that the additional preconditions were vague in their wording.¹³⁸ These concerns are a large part of why the current five-year review in section 20 of *FACFOA* was added.¹³⁹ Witnesses in the current review have continued to identify the lack of evidence provided by requesting foreign governments as an issue. In particular, Ms. Maya Lester, QC, criticized both the European and Canadian frameworks for accepting the word of post-revolution regimes such as Tunisia or Egypt “without standards that Canada or the United Kingdom certainly would regard as complying with the rule of law.”¹⁴⁰

The current act allows for persons affected by an order or regulation under section 4 to apply for ministerial reconsideration of their status as a “politically exposed person.”¹⁴¹ However, the only way to otherwise contest the substantive or procedural validity of an order or regulation under *FACFOA* is to apply for judicial review under section 18.1 of the *Federal Courts Act*.¹⁴²

b) “Freezing” Regulations under *FACFOA*

To date, there are two regulations created to freeze assets under *FACFOA*. The first regulation, in 2011, targeted foreign officials from Tunisia and Egypt,¹⁴³ and the second, in 2014, targeted foreign officials from Ukraine.¹⁴⁴ The original numbers of persons listed in those regulations was 123 for Tunisia, 148 for Egypt, and 18 for Ukraine. The Tunisia and

¹³⁸ Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (7 March 2007) at 1630-1635.

¹³⁹ Leg Summary Bill 61 at 10. That five-year review began in the Fall of 2016 and is called “Statutory Review of the *Special Economic Measures Act* and the *Freezing Assets of Corrupt Foreign Officials Act* of the House of Commons Standing Committee on Foreign Affairs and International Development.”

¹⁴⁰ Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (2 November 2016) at 1555.

¹⁴¹ *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10, s 13.

¹⁴² Leg Summary Bill 61 at 10.

¹⁴³ *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011-78, online: <<http://canlii.ca/t/52p9g>>.

¹⁴⁴ *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2014-44, online: <<http://canlii.ca/t/527c6>>.

Egypt regulation has been amended several times. The current numbers of listed persons are 8 for Tunisia and 18 for Ukraine.¹⁴⁵ According to media reports, under the Tunisia and Egypt regulation, the government targeted residential property valued at \$2.55 million and bank accounts containing \$122,000.¹⁴⁶ However, it is not clear how much of that money was returned to the people of Tunisia. The *Act* itself does not provide a mechanism for the return of assets. Hugh Adsett from the Department of Foreign Affairs, Trade and Development testified on this point before the Standing Committee in the current review, saying, “what happens under the act is that the assets are frozen. If the foreign state wishes to have the return of those assets, they need to take a further step to be able to have the assets returned. That usually will be in the nature of a mutual legal assistance request in order to have assets returned.”¹⁴⁷

c) Duties to Disclose and Offences for Non-Disclosures

Section 8 of *FACFOA* imposes a duty on banks and other enumerated or prescribed entities to determine, on an ongoing basis, whether they are in possession or control of property that they have reason to believe belongs to a politically exposed foreign person who is the subject of an order or regulation under section 4. Section 9 of *FACFOA* imposes an obligation on any Canadian or person in Canada to report any property that they know to be in their possession, or knowledge of a property transaction, that is the subject of an order or regulation under section 4.

Section 10 of *FACFOA* creates hybrid offences for willfully contravening orders made under section 4 or the duties imposed by sections 8 and 9. In both cases, the maximum penalties are five years in prison for an indictable offence, or, for a summary conviction, a fine of \$25,000 and a maximum of one year in prison.

d) Economic and Logistical Costs

Witnesses before the Standing Committee in the current five-year review expressed several concerns about the economic and logistical burdens individuals and entities face under *FACFOA*. Dr. Charron, Director of the Centre for Security Intelligence and Defence Studies at Carleton University, pointed out that the complexity of Canada’s multiple legislation governing sanctions means that Canadian companies and banks have to spend a large amount of money to ensure compliance.¹⁴⁸ She notes that *FACFOA* applies to property within

¹⁴⁵ Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (17 October 2016) at 1605.

¹⁴⁶ Jim Bronskill, “Canada Froze Billions in Assets to Support Arab Spring: RCMP”, *The Globe and Mail* (15 July 2012), online: <<http://www.theglobeandmail.com/news/national/canada-froze-billions-in-assets-to-support-arab-spring-rcmp/article4417551/>>.

¹⁴⁷ Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (17 October 2016) at 1555.

¹⁴⁸ Proceedings of House of Commons Standing Committee on Foreign Affairs and International Development (19 October 2016) at 1540.

Canada and as such could impose a particularly onerous burden on companies or banks involved in domestic real estate transactions.¹⁴⁹ However, it is not clear how onerous the burden on companies of tracking asset transactions of a relatively small group of individuals really is or whether the money banks and companies have to spend on compliance goes beyond the simple cost of doing business in a heavily-regulated industry.

Government institutions currently provide informational support to institutions affected by *FACFOA*. While the Office of the Superintendent of Financial Institutions does not have a legislated role under *FACFOA*, they provide notice and some guidance to federally regulated financial institutions about duties and expectations under incoming regulations under *FACFOA*. For example, they provided a notice when the Ukraine regulations were released under the Act.¹⁵⁰

(2) *Special Economic Measures Act*

The *Special Economic Measures Act (SEMA)* allows the Governor in Council to make orders or regulations taking economic measures against a foreign state. The Governor in Council can do this in order to implement a call for sanctions from an association of states of which Canada is a member or “where the Governor in Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.” The Governor in Council can also order the freezing or seizure of property belonging to the foreign state, to individuals in that foreign state, or to nationals of that foreign state not normally residing in Canada.¹⁵¹ Whereas the function of *FACFOA* is to aid foreign governments in freezing assets held by members of corrupt former regimes, *SEMA* allows Canada to act on its own to further the effectiveness of multilateral sanctions.

(3) *Sergei Magnitsky Law*

Sergei Magnitsky was a well-respected tax lawyer in Russia. Bill Browder, founder and CEO of Hermitage Capital Management LTD (the largest foreign investment fund in Russia at the time) was Magnitsky’s client. In response to the fraudulent taking of some of Browder’s assets, Magnitsky investigated and discovered a \$230 million tax fraud by senior Russian officials. Once the incident became public, Magnitsky, Browder and others, were investigated by Russian officials on suspicion of tax fraud. Browder and the others fled Russia before they could be arrested. But Magnitsky refused to leave Russia because he knew he had done nothing wrong, and because he wanted to have the senior Russian officials actually involved in the theft and tax fraud brought to justice. He was arrested in October 2008 and grossly tortured and maltreated until his death in prison on November 16, 2009. Why? Because he refused to recant his allegations of official corruption and falsely confess to tax evasion himself. As Browder has stated, “Sergei Magnitsky was killed for his ideals.

¹⁴⁹ *Ibid* at 1615.

¹⁵⁰ See <<http://www.osfi-bsif.gc.ca/Eng/fi-if/amlc-clrpc/snc/facfo-bbde/Pages/2014-03-05-RAFACFOUR.aspx>>.

¹⁵¹ Leg Summary Bill 61 at 6.

He was killed because he believed in law. He was killed because he loved his people, and because he loved Russia.”¹⁵²

Since Sergei’s death, Browder has devoted his life to getting justice for Sergei. One of those manifestations of justice has been the enactment in the US of the *Sergei Magnitsky Rule of Law Accountability Act of 2012*, which after a long and suspenseful political ride became law in December 2012.¹⁵³ The law authorizes the President to impose visa bans and freeze and seize the assets of Russians responsible for gross violations of human rights and significant acts of corruption. In 2016, the Act was expanded to include all foreign officials – Russian or otherwise.¹⁵⁴

In October 2017, Canada followed suit by enacting the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*.¹⁵⁵ The Act authorizes visa bans and freezing and seizing of assets of foreign officials from any country who are responsible for gross human rights violations and significant corruption. In early November 2017, Canada issued its first round of sanctions listing 52 human rights violators in Russia, Venezuela, and south Sudan.

(4) Criminal Forfeiture of Proceeds of Crime

Canada's *Criminal Code* also deals with the proceeds of crime:

- Section 462.32 provides search and seizure powers of the proceeds of crime;
- Section 462.33 provides for restraint and freezing of the proceeds of crime; and
- Section 462.37 provides for the forfeiture of proceeds of crime.

When the property is forfeited under section 462.37, it is forfeited to the government that prosecuted the offender unless a third party has a valid and lawful interest in the property. In that case, the property would be returned to that person under section 462.41. This third party could include a requesting state in the case of corruption of foreign public funds. Section 462.37(2.1) can be used to issue forfeiture orders for property located outside Canada, but the order can only be enforced through a request to the foreign state’s government.

Where the offender is convicted of an offence and has subsequently died, or been at large for more than six months, offence-related property can also be forfeited to the government of Canada under section 490. This property is available for return through the sharing with another State under section 11 of the *Seized Property Management Act*, provided there is a

¹⁵² Bill Browder, *Red Notice: A True Story of High Finance, Murder and One Man’s Fight for Justice* (Simon & Schuster, 2015) at 278. Browder gives a lively, detailed account of his experiences in Russia, of Magnitsky’s arrest, detention, torture, and death, and the subsequent events leading to the enactment of the Magnitsky Act in the US.

¹⁵³ Public Law 112-208, 112th Congress, 126 Stat. 1496, Dec. 14, 2012.

¹⁵⁴ *Global Magnitsky Human Rights Accountability Act*, Subtitle F, Public Law 114-328, 2nd Session, 114th Congress.

¹⁵⁵ Stats. Can. 2017, c.21.

reciprocal bilateral agreement.¹⁵⁶ For a detailed practical summary of Canada's proceeds of crime forfeiture laws, see Justice Selwyn Romilly, "Proceeds of Crime: The Basics of Part XII-2 of the Criminal Code" in *Anti-Money Laundering Conference Materials* (CLE BC, 27 May 2011) at Part 4, 1-49.

(5) *Effectiveness and Challenges*

The 2016 FATF Mutual Evaluation Report assessing the Canadian anti-money laundering and combating the financing of terrorism (AML/CFT) regime notes that asset recovery is generally low, although some provinces, such as Quebec, seem to be more effective in recovering assets linked to crime.¹⁵⁷ Canada has made some progress since its last evaluation in terms of asset recovery, but the fact that assets of equivalent value cannot be recovered hampers the recovery of proceeds of crime, and confiscation results do not adequately reflect Canada's main money laundering risks.¹⁵⁸ The Report recommends an increase in timeliness of access by competent authorities to accurate and up-to-date beneficial ownership information; use financial intelligence to a greater extent to investigate money laundering and trace assets; ensure that asset recovery is pursued as a policy objective throughout the territory of Canada; and make a greater use of the available tools to seize and restraint proceeds of crime other than drug-related assets and cash, especially proceeds of corruption, including foreign corruption and other major asset generating crimes.¹⁵⁹

Transparency International released a report in 2014 outlining the difficulties in recovering assets following the Arab Spring, including problems repatriating assets after they were frozen under schemes such as *FACFOA* in Canada. Problems include premature *Mutual Legal Assistance Act* requests, lack of evidence-gathering capacity in requesting countries, and insufficient use of informal channels in requesting assistance.¹⁶⁰

The 2014 StAR report *Few and Far: The Hard Facts on Stolen Asset Recovery* indicates that between the years 2006 and 2012 Canada only froze assets totaling \$2.6 million and that no assets were thus far reported as returned (most likely owing to the long lag time between freezing and repatriating assets).¹⁶¹ StAR released another report in the same year entitled *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, which discusses the implications of cases being settled rather than proceeding to trial and

¹⁵⁶ *Seized Property Management Act*, SC 1993, c 37.

¹⁵⁷ Financial Action Task Force, (2016) at 3, 6, 36, online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>>.

¹⁵⁸ *Ibid* at 36.

¹⁵⁹ *Ibid* at 9, 36-37.

¹⁶⁰ Máira Martini, "Lessons Learnt from Recovering Assets in Egypt, Libya, and Tunisia"

(Transparency International, 2014), online:

<http://www.transparency.org/files/content/corruptionqas/Lessons_Learnt_in_recovering_assets_from_Egypt_Libya_and_Tunisia_2014.pdf>.

¹⁶¹ Gray et al (2014).

whether the settlement money is returned to those harmed by the corrupt practices.¹⁶² It includes an analysis of Canada's practices in settling bribery cases.

Public Safety Canada released a report in 2013 examining the use of civil forfeiture regimes internationally. The report includes an examination of whether Canada might be able to implement a law allowing for civil forfeiture pursuant to unexplained wealth orders (used in Australia), which reverse the burden of proof and force the respondent to justify the lawful origin of their property.¹⁶³

China Pressures Canada to Facilitate Extradition of Corrupt Officials and Return of Stolen Assets

It appears that Canada is one of the key destinations for fugitive Chinese corruption suspects. Of the top-100 most wanted Chinese nationals for economic crimes, Chinese authorities believe that 26 may be in Canada. From 2009 to 2015, Canada sent back home some 1,400 Chinese people but most of them for immigration law violations.¹⁶⁴ In 1994, Canada and China concluded a treaty on mutual legal assistance in criminal matters.¹⁶⁵ The scope of mutual legal assistance pursuant to this treaty includes measures related to the proceeds of crime and the restoration of property to victims.¹⁶⁶ In particular, a State party may, upon request, ascertain whether any proceeds of a crime committed in the other State party are located within its jurisdiction and shall notify the other Party of the results of its inquiries.¹⁶⁷ Where the suspected proceeds of crime are found, the requested State party shall take measures to freeze, seize and confiscate such proceeds.¹⁶⁸ To the extent permitted by its law, the requested State party may transfer to the requesting State party such proceeds of crime, but the transfer shall not infringe upon the rights of a third party to such proceeds.¹⁶⁹

¹⁶² Oduor et al (2014).

¹⁶³ Elaine Koren, "Civil Forfeiture Regimes in Canada and Internationally" (Public Safety Canada, 2013) online: <<https://www.publicsafety.gc.ca/lbrr/archives/cn63313146-eng.pdf>>.

¹⁶⁴ Nathan Vanderklippe, "China Pressuring Canada to Ease Return of Corruption Suspects", *The Globe and Mail* (6 June 2016), online: <<http://www.theglobeandmail.com/news/world/china-pressuring-canada-to-ease-return-of-corruption-suspects/article30283903/>>; Nathan Vanderklippe, "China's Fox Hunt in Canada Strains Trust that an Extradition Treaty is Possible", *The Globe and Mail* (23 September 2016), online: <<http://www.theglobeandmail.com/news/world/chinas-fox-hunt-in-canada-strains-trust-that-an-extradition-treaty-is-possible/article32042306/>>.

¹⁶⁵ *Treaty Between Canada and the People's Republic of China on Mutual Legal Assistance in Criminal Matters*, 29 July 1994, CTS 1995 No 29, online: <<http://www.treaty-accord.gc.ca/text-texte.aspx?id=101640>>.

¹⁶⁶ *Ibid*, art 2(i).

¹⁶⁷ *Ibid*, art 17(1).

¹⁶⁸ *Ibid*, art 17(2).

¹⁶⁹ *Ibid*, art 17(3).

Furthermore, the State parties shall assist each other, to the extent permitted by their respective laws, in proceedings related to restitution to the victims of crime.¹⁷⁰

There is, however, no extradition treaty in force between Canada and China. The 2016 FATF Mutual Evaluation Report cites this as an indication of Canada's particular vulnerability to laundering the proceeds of crime by Chinese officials, notably through the real estate sector in Vancouver, and the Chinese government has already listed Canada as a country that it wishes to target for recovering the proceeds of Chinese corruption.¹⁷¹

At present, the Chinese government seems to rely on its secret agents to find fugitive suspects abroad and pressure them to return home. In particular, Operation Fox Hunt, commenced by China in 2014, resulted in the repatriation of some 700 suspected economic fugitives globally, and Operation Skynet saw the return of another 857 persons in 2015.¹⁷² Meanwhile, China seeks to conclude extradition treaties with Western democracies, including Canada. On September 12, 2016, the inaugural meeting of the Canada-China High-Level National Security and Rule of Law Dialogue was held in Beijing. The parties determined that the short-term objectives for the bilateral cooperation shall include, among others, starting discussions on an Extradition Treaty and a Transfer of Offenders Treaty, as well as finalizing negotiations of a one-year memorandum of understanding on the Pilot Project between the Canada Border Services Agency and the Bureau of Exit and Entry Administration where Chinese experts will be invited to assist in the verification of the identity of inadmissible persons from mainland China in order to facilitate their return from Canada.¹⁷³

Some commentators, however, oppose the contemplated extradition treaty citing human rights concerns and the possibility that repatriated suspects may be subject to

¹⁷⁰ *Ibid*, art 17(5).

¹⁷¹ Financial Action Task Force, (2016) at 16, online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>>.

¹⁷² Affan Chowdhry, "China's Corruption Crackdown Ruffles International Feathers", *The Globe and Mail* (20 September 2016), online: <<http://www.theglobeandmail.com/news/world/chinas-corruption-crackdown-ruffles-international-feathers/article31979594/>>.

¹⁷³ Prime Minister of Canada, "1st Canada-China High-Level National Security and Rule of Law Dialogue – Joint Communiqué" (13 September 2016), online: <<http://pm.gc.ca/eng/news/2016/09/13/1st-canada-china-high-level-national-security-and-rule-law-dialogue>>.

torture or death penalty upon their return to China.¹⁷⁴ Others point out that Canada already has extradition treaties with the United States, Japan, Zimbabwe, Singapore and the Maldives, all of which have capital punishment, and that a treaty with China would send a clear signal that Canada is not a safe haven for money launderers.¹⁷⁵ In any event, in October 2016, Canadian ambassador to China Guy Saint-Jacques explained that so far Canada and China have agreed only to “discussions” on an extradition treaty, a step removed from negotiations, and “it could be years” before formal negotiations of the treaty text begin.¹⁷⁶

China was more successful in pressuring Canada to cooperate in the recovery of stolen assets. During the official visit of the Chinese Premier Li Keqiang to Canada from September 21 to September 24, 2016, the parties signed the Agreement on Sharing and Return of Forfeited Assets as well as the Memorandum of Understanding on Cooperation in Combating Crime between the RCMP and the Ministry of Public Security of China.¹⁷⁷ The deal on return of stolen assets is the first agreement of this kind China has signed with another country. It provides that forfeited assets are to be returned to their legitimate owners or, if the origin of such funds cannot be identified, both countries will share the assets in proportion to each country’s contribution to the investigation.¹⁷⁸

¹⁷⁴ “China Wants an Extradition Treaty. Ottawa Should Say No”, Editorial, *The Globe and Mail* (20 September 2016), online: <<http://www.theglobeandmail.com/opinion/editorials/china-wants-an-extradition-treaty-ottawa-should-say-no/article31975466/>>; Michael Byers, “Extradition Treaty with China Would Be an Affront to Human Rights”, *The Globe and Mail* (20 September 2016), online: <<http://www.theglobeandmail.com/opinion/extradition-treaty-with-china-would-be-an-affront-to-human-rights/article31968585/>>.

¹⁷⁵ Christine Duhaime, “An Extradition Treaty with China Sends a Message about Corruption”, *The Globe and Mail* (26 September 2016), online: <<http://www.theglobeandmail.com/report-on-business/rob-commentary/an-extradition-treaty-with-china-sends-a-message-about-corruption/article32043651/>>.

¹⁷⁶ Nathan Vanderklippe, “Extradition Talks with China Could Take Years, Canadian Diplomat Says”, *The Globe and Mail* (6 October 2016), online: <<http://www.theglobeandmail.com/news/world/extradition-talks-with-china-could-take-years-canadian-diplomat-says/article32270628/>>.

¹⁷⁷ Prime Minister of Canada, “Joint Statement Between Canada and the People’s Republic of China” (23 September 2016), online: <<http://pm.gc.ca/eng/news/2016/09/23/joint-statement-between-canada-and-peoples-republic-china>>.

¹⁷⁸ Zhuang Pinghui, “China and Canada Seal Deal on Return of Assets Stolen by Fugitive Corruption Suspects”, *South China Morning Post* (23 September 2016), online: <<http://www.scmp.com/news/china/policies-politics/article/2021977/china-canada-sign-treaty-return-assets-stolen-fraud>>.

Further Reading

For more on Canada, see <<http://star.worldbank.org/star/sites/star/files/Canada's-Asset-Recovery-Tools-A-Practical-Guide.pdf>>.

4.4 A Typical Example of the Asset Recovery Process

Below is an excerpt from a 2009 publication by the Basel Institute on Governance entitled, *Tracing Stolen Assets: A Practitioner's Handbook*:¹⁷⁹

BEGINNING OF EXCERPT

1. Suspicious Transaction Report

The government of country A has just received an official letter from the Swiss government advising that one of their banks has received suspicious electronic funds transfers in excess of USD 8 million to an account held by the son of country A's Deputy Minister of Internal Development. The account was opened 14 months ago. Under the Swiss bank's money laundering controls with regard to Politically Exposed Persons (PEP), the transaction had been flagged as suspicious and a temporary freeze put on the funds. The letter stated that no additional information concerning this account can be disclosed at this time. However, upon receipt of an official mutual legal assistance (MLA) request, the account details may be provided following disclosure proceedings. The letter indicated that the request should include the nature of any criminal investigation being conducted in country A, the potential criminal violations, a summary of the investigative efforts and all additional MLA requirements. There have been rumours for many years that the Deputy Minister lives beyond his means but no investigation has ever been undertaken.

2. Investigation planning and strategy

Is the information from the Swiss government important? What should be done first? Can a MLA request immediately be filed with the Swiss government to seize the bank account? Should the Deputy Minister be placed under investigation? These are all questions that need to be answered very quickly. The facts of each case will vary, and the investigative decisions and actions will depend on the individual circumstances.

¹⁷⁹ International Centre for Asset Recovery (2009) at 51–59, online: <<https://www.baselgovernance.org/publications/421>>.

The legal system, criminal procedures code and investigative practices for each country will, to some degree, dictate the process to follow. However, to the extent possible, the decisions, based on the facts stated above, should be made quickly and coordinated through a multi-agency approach.

The first question that some may ask is 'Can we seize the money and have it returned to our country?' This would be a mistake to attempt to seize the money at this stage. One has no information that the money was illegally obtained. If a request is sent to the Swiss government to seize the funds, it would most likely be rejected because there has been no investigation and, in fact, there are not even any allegations – only rumours – that the Deputy Minister is living beyond his means. This request would only result in the loss of valuable time.

The letter from the Swiss government indicated that a temporary freeze had been placed on the account. The first step would be to immediately contact the sender of the letter and ask some questions to clarify a few issues. What are the issues and who should make the call? The most important issue is how long will the temporary freeze be held on the account. The second key question would be: Has the Swiss government opened an official money laundering investigation? Once one knows how long the funds will remain frozen and whether extensions are possible, then one can more accurately plan one's investigative steps and strategy. Knowing if the Swiss government has opened an official investigation will immediately tell the investigator if he or she has a partner in this potential investigation. This will lead to a more efficient sharing of information and evidence in the months to come.

Who should make this initial call? The answer will depend on who received the letter – the central authority for MLA, the Ministry of Justice, the Foreign Affairs Office or some other agency. The executive structure of the government will certainly dictate the answer to this question. The important point is that a decision should be made to determine the appropriate person very quickly. Time is of the essence. These funds may only be frozen for five days or possibly for 90 days but the investigator needs this information so a call must be made. In this instance, one would place the phone call and speak with the prosecutor of the Confederation or of a Canton (a Swiss administrative subdivision of the country) who sent the letter. The investigator is informed that the freeze is for 60 days; eight days have already passed; the freeze can be extended for another 60 days if additional evidence is provided through proper legal channels. The investigator also learns that the prosecutor has opened an official money laundering investigation. The prosecutor advises the investigator that he cannot provide any additional details of the account until he receives an official MLA request which contains information to the effect that country A has taken investigative steps. He further states that the request must contain new information or evidence

that has been gathered in country A. Simply returning the same information that he has provided in his letter in the first instance will not suffice.

3. Pre-investigative steps

A preliminary investigation should now be initiated by the lead agency – possibly the anti-corruption unit or some other appropriate agency depending on the structure of the government. This lead agency should quickly gather all available information during this pre-investigative stage. This will generally include information that can be obtained without making overt investigative inquiries that would alert the public. All national law enforcement and commercial databases would be checked; inquiries would be made to other government and investigative agencies; the financial intelligence unit would be queried for suspicious transactions; and limited surveillance may be conducted to determine additional property that the Deputy Minister may own. The results of these pre-investigative inquiries disclosed the following:

- The Deputy Minister’s government income is approximately USD 120,000 per year.
- His required wealth disclosure statement indicates that he maintains a domestic bank account in the capital city of your country.
- His wife is unemployed and drives a Mercedes valued at USD 80,000.
- He resides in a house that was purchased two years ago for USD 850,000 that currently has a mortgage of USD 300,000.
- He has two sons who both attend universities in the United Kingdom (UK).
- His office has awarded 23 sole source contracts in the last three years for infrastructure development projects totally in excess of USD 195 million.

Based on these facts, the Director of the lead agency initiates a full investigation.

(1) Communication with foreign counterparts

The pre-investigation stage took 40 days to complete. Now that a full investigation has been authorised, what steps should be immediately taken? What is the status of the frozen funds in Switzerland? In 12 days’ time, the freeze will be lifted and the funds can be moved around the world in a matter of minutes through electronic funds transfers. The preparation of a formal MLA request, processing it through the central authority, transmitting it to the central authority of Switzerland and having it forwarded to the prosecutor will take at least one month. What options does the investigator have to prevent the freeze from being lifted and the funds disappearing? The answer is simple. It is again based on communication and developing a relationship with your foreign counterparts. The prosecutor in Switzerland had

previously advised that the freeze could be extended for an additional 60 days, based on new evidence. A telephone call should be placed to the prosecutor, asking him for advice on the best way forward. The investigator then learns that the prosecutor will accept a letter stating that an investigation is underway in country A, additional information has been obtained on the Deputy Minister and that the investigator is in the process of filing a formal MLA request. He advises that once this letter is received, he can extend the freeze on the account. He also states that the freeze can be continued as more evidence is developed. This letter must now be prepared and immediately sent to the Swiss prosecutor to protect the assets from being moved.

(2) Compilation of MLA request

At the same time, a formal MLA request must be prepared and submitted to the Swiss government. What format should be used for this request? How should it be transmitted? What actions should be requested?

Format of request

The answer to the first question is relatively easy. There are 192 member countries of the United Nations and a few other countries with limited international recognition. So how would one know what MLA format each country needs? Again, communication is the key to fast and efficient international cooperation. Prior to drafting the MLA request, place a call to the central authority of the requested country and ask for their MLA template, explain the request, seek advice and finally inquire if an advance email copy of the MLA request can be sent to them for their review. Most jurisdictions will be pleased to assist an investigator with the formatting, substantive requirements and general guidance. Without taking this very simple step, one risks losing months of valuable time if one's MLA request is rejected and returned for corrections.

Transmittal of request

The second question, namely, how should it be transmitted, is critical. The courts in many jurisdictions will not allow evidence obtained from a foreign country to be admitted unless it is obtained through the proper channels. Each country should have a central authority. This is the designated government body that is authorised to send and receive MLA requests. For example, the United Nations Convention against Corruption (UNCAC) (Article 46 paragraph 13) requires that 'Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution.'

The Article continues to explain that 'The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each

State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties.'

Nature of requested actions

The third question, namely, what actions should be requested, is also of great importance. The investigator knows that there is a bank account in Switzerland that is held in the name of the son; there are incoming electronic funds transfers into the account in excess of USD eight million; the Deputy Minister has two sons, both of whom are students; and the account is currently frozen. One may want to confiscate the funds in the account and have them immediately repatriated to your country but it is probably premature to request these actions. There are two main activities that one should request. Firstly, based on the limited evidence that has been gathered through one's pre-investigation, one would like to have the freeze order extended on the account while the full-scale investigation progresses. Secondly, the records of the bank account should be requested for a specific period of time – in this case, from the opening of the account 14 months ago to the present. What records should be requested? This is a critical question. One's request should be very specific and also provide for follow-up inquires if appropriate. When requesting the specific documentation, the investigator may want to consider using language such as 'including but not limited to'. This gives the receiver of the request a definite list of required documents but allows them to provide additional related documents of which you may not have been aware. In this case, one will want to request items such as the following:

- The account opening documentation (know your customer information) and any due diligence that may have been conducted as a result of the PEP rules that are in place
- Information from the bank explaining why the transactions were considered to be suspicious
- All bank account periodic statements
- The details of all items credited to the account. This would include the specifics of all electronic funds transfers, showing the original bank and account name and number. Knowing the specific source of each deposit is extremely critical
- The details of all debit items. Again, this would include the ultimate beneficiary of any electronic funds transfers
- All correspondence files. This is often where the best evidence is obtained, particularly if an account manager is assigned to the client. Small notes or formal documentation that may have been placed in the file by the account

manager could disclose personal relationships, the purpose of transactions or false statements concerning the person's background or business. These false statements can later be used as evidence to prove the concealed purpose of the account activities

- **Loan Files.** This may be the source of numerous additional leads. If the person obtained a loan from the bank, there will probably be a loan application that lists the source of income, assets, personal references and other loans
- **Credit card statements, application and payment history.** This information often needs to be requested specifically. The bank may not routinely provide credit card information when bank records are requested. The payment history on credit cards may be of particular interest. Payments on the account may originate from cash, another account or a seemingly unrelated company

The MLA request should also ask that any leads to other accounts, persons or entities within the country's jurisdiction be followed. Communication is again the key to this type of extended request. Discussions with the central authority or prosecutor prior to filing the MLA request will provide the investigator with information relating to how far he or she can expand the request. It will also strengthen one's relationship with the authorities in the foreign jurisdiction, and provide the basis for future collaboration on additional investigative action. For example, the bank information may lead to large payments being made to a person in the same country. If the MLA request covered the possibility of following leads, then an interview may be conducted with the recipient of the funds, and one could be closely involved either through the submission of a detailed list of questions or even participation in the interview if so invited by the requested country.

Regarding the requested bank records, in most cases, the investigator will not know the volume of records contained in the account until the bank researches its files. It is usually advisable to request all possible records that may be pertinent to the case but to control the delivery of these records to the investigator as he or she assesses their relevance. For example, if the account turns out to be in respect of an active business, it may contain hundreds or thousands of records for each month, many of which may not be of interest to your investigation. If possible, start by asking the bank to provide one with only the bank statements and significant transactions such as the large electronic transfers. The bank will still be under *subpoena* or a compulsion order to supply all records but they will only be asked to research the records as one determines the need. This will allow the investigator to quickly study the summary records (bank statements) and make an investigative decision on what records he or she would like to review next. If one asks to receive all records at once, one may wait

months for the bank to gather these records and then find out that one is in possession of thousands of documents, many of which have little value.

(3) Prioritisation of leads

With the guidance of the central authority in Switzerland, the investigator has now prepared and filed a complete and accurate MLA request. What is the next investigative step that should be taken? There are a number of leads that can be followed, based on the information that was discovered during the pre-investigation stage. It would be advisable to prioritise this information and select which leads may result in the development of the most significant evidence in a timely manner.

Personal residence

How shall the investigator now proceed? The personal residence is a very interesting situation because it was purchased just two years ago for USD 850,000 and the current loan balance is only USD 300,000. Therefore, USD 550,000 has been paid toward the purchase price of the house, either through large payments in the past two years or as a very large initial payment at the time of purchase. The detailed financial information relating to the purchase may be fairly easy to obtain because the house was purchased through a licensed Notary Public and the loan (mortgage) was obtained at a major bank. This bank may maintain detailed records of the transaction since they financed a significant amount and should have conducted due diligence which may have included the source of the initial payment. The Notary Public may also have records of the complete transaction. In some countries, it is customary to use 'title companies' or 'closing agents' that act as an escrow agent or middleman to facilitate the purchase of the property between the buyer and seller. These entities also maintain complete records of all money flows between the buyers, sellers, taxing authorities and financial institutions. The seller of the property should also be interviewed to obtain the complete details of the transaction, including the method of payment for the house.

Cash flow analysis

The Deputy Minister maintains a bank account at a domestic financial institution. The records of this account should be requested very early in the investigation because it may require a significant amount of time for the bank to research the records. The same type of records should be requested for this account as was indicated for the Swiss account above. If the government salary of the Deputy Minister has been deposited into this domestic account, it will be important to perform a complete analysis to establish how his legitimate salary has been spent. A cash flow analysis relating to any cash withdrawals or deposits should also be prepared. Once these financial flows have been analysed, it will create a complete picture of the distribution of his legal funds and show how much cash was available for purchases. This may be

very significant if expenditures are later identified from unknown or illegal funds. Large cash payments or purchases from unknown sources may be an important piece of evidence at trial.

Corruption cases are often difficult to prove through direct evidence because the perpetrators are skilled and devious schemers who may utilise the services of lawyers and accountants to disguise the trail of the funds. Painting the complete financial picture of the corrupt official and isolating his legal income to more clearly identify expenditures from unknown sources can be important facts when presented at trial. This type of circumstantial evidence will, of course, have to be combined with other evidence – pieces of the puzzle – to demonstrate that the money flows from unknown sources came from illegal or corrupt activities. The Organisation for Economic Cooperation and Development (OECD) has stated

‘Proving the requisite intention is not always an easy task since direct evidence (e.g., a confession) is often unavailable. Indeed, bribery and trading in influence offences can be difficult to detect and prove due to their covert nature, and because both parties to the transaction do not want the offence exposed. Therefore, the offender’s mental state may have to be inferred from objective factual circumstances.’

University education

Preliminary information in the case relating to the Deputy Minister indicated that he has two sons attending universities in the UK. Further inquiries disclose that the oldest son attends the London School of Economics (LSE) and the younger son is a student at Oxford University. Is there further information that the investigator would want to pursue regarding the education of these boys? What investigative action would be most efficient and beneficial? There is a very good chance that the Deputy Minister is not able to afford the tuition, living expenses and travel relating to his sons’ education. The boys may be receiving scholarships and attending the universities at no cost. There is only one way to determine the true facts. The universities must be contacted, the expenditures documented and the source of payments identified.

What is the best way to pursue this investigative inquiry at the universities? An MLA request can certainly be prepared and submitted to the central authority in the UK. This process should again begin with communication by way of a telephone call to an appropriate official in the UK. The same steps as described above with the Swiss MLA request should be followed. A telephone call to the central authority asking advice on the best way forward should be the first step. However, in this situation the investigator may want to explore other options during his or her call. It may be possible that the police, the money laundering section or the asset forfeiture unit have the ability to request the desired information from the universities on an informal

basis. If they do not have this ability, one has wasted approximately two minutes asking the question. But, if the answer is that they do have this ability, then one may possibly have saved four months of valuable investigative time.

How could the investigator have saved this amount of time? Let's explore two different possibilities. In the first scenario, the police obtain the information informally from the university as a result of their many years of working together. The payment records indicate that the tuition was paid directly from the Deputy Minister's domestic bank account in your country. This will save one the time and effort of filing an MLA request with the UK because one has already traced the payments to the domestic account to which one has access. In the second scenario, the payment information obtained informally indicates that the tuition was paid by a subsidiary company of a corporation that was awarded a USD 35 million contract through the Deputy Minister's office. The subsidiary company is located in a third jurisdiction. How has the investigator saved a significant amount of time? One can now file an MLA request with the UK to obtain this evidence through a formal process to assure its admissibility as evidence at trial. Simultaneously, an MLA request can be submitted to the third jurisdiction where the subsidiary company is located. Instead of waiting possibly four months for the return of the MLA request to the UK, one immediately has the information which leads one to the third jurisdiction. We will return to this scenario later to determine what evidence should be requested.

Vehicle ownership

Another major lead that one has from the pre-investigation activities is the ownership of an USD 80,000 Mercedes by the wife. The fact that the Deputy Minister's wife owns an expensive automobile is an indication that he may be living above his means. However, the more important question is how the USD 80,000 was paid. This will involve first tracing the ownership of the car to determine the prior owner. In this case, one determines that the vehicle was purchased from the local Mercedes dealership. The records of this transaction indicate that the Deputy Minister was the purchaser and the date of the purchase. Is this enough information? The answer is no. The most important piece of evidence is to establish the source of the payment. If the payment were made by bank cheque, the dealership may have a copy of the cheque. However, if the files do not contain a copy, it may be necessary to obtain this information from the dealership's bank where the cheque was deposited. If the payment was made by cash, this is an interesting piece of evidence since one's cash analysis of his bank account established that he did not have available cash in the amount of USD 80,000 from his legitimate sources of income.

Award of sole source contracts

The pre-investigation also disclosed that the Deputy Minister's office has awarded 23 sole source contracts in the last three years for infrastructure development projects, totalling in excess of USD 195 million. The government procurement rules for country A require competitive bids on all contracts over USD 100,000 unless certain conditions are met that are provided in the exception rules which are very strict. Each of the 23 sole source contracts will need to be analysed to determine how they qualified for the exception, who approved the contracts, how other potential bidders were disqualified and the personal involvement of the Deputy Minister in each situation. This will often require employing the services of someone who is an expert in government contracting procedures to assist in the analysis of these files. If managers below the Deputy Minister's level approved the contracts, it may be necessary to analyse their promotion history and perform a brief review of their assets. For example, if the person approving the contracts received three promotions by the Deputy Minister in the past two years, this could be an indication that he owes favours to the Deputy Minister. This situation would require further investigation. In another instance, it may be discovered that the approving official has acquired assets that are beyond the scope of his legal income. It may be fruitful to trace the purchases of these assets to determine the source of the payments. Possibly the Deputy Minister is providing funding for the subordinates' asset acquisitions. All possibilities must be considered to determine the reason for the sole source contract awards.

IV. Results of the investigative inquiries

The Deputy Minister's personal residence was purchased just two years ago, and he has over USD 500,000 in equity. How did this occur? The investigation has disclosed that the Deputy Minister made an initial down payment in the amount of USD 540,000 on the house. This payment was received from a lending institution in the United States (US). Did the Deputy Minister really obtain a loan from a US company? What collateral did he give for such a large loan? Further investigation through the MLA process reveals that the loan was actually guaranteed by a company that received a large contract through the office of the Deputy Minister. This company, which is located in country A, has also been making each of the monthly loan payments. What questions should be asked when the representative of this company is required to submit to an interview? One area of great importance is to determine how the company recorded these payments to the loan company in the US in its internal records. There are very few legitimate reasons why a company that was awarded a large contract through the Deputy Minister's office is making payments on a loan for the benefit of the Deputy Minister. These payments certainly have the appearance of a potential bribe. There is a high probability that the company records will disclose a false accounting entry such as listing the payments as a 'bonus' or 'research cost' or

'consultant fees'. Further investigation of the company records and related interviews should prove the true nature of these 'bribe' payments.

Information from the universities in the UK also yielded interesting information. The police in London were able to obtain informal intelligence that the tuition payments were made by a subsidiary company of a corporation that was awarded a USD 35 million contract through the Deputy Minister Deputy Minister's office. This company is located in a separate jurisdiction that will require a formal MLA request to compel testimony from the company officials and to obtain copies of their accounting records. Prior to submitting this MLA request, a preliminary call should be placed to the officials in this country to establish the communication links. It would also be advisable to ask if law enforcement officials from country A could participate in the interview with the company officials. The investigator will have the most information about the details of his or her case and is best prepared to ask follow up questions and to pursue leads developed through the answers provided. The investigator's presence at the interview in this foreign jurisdiction will, of course, only be possible through invitation by that country.

The Mercedes was purchased for USD 80,000 and the payment came from a loan company in Guernsey. Subsequent investigative efforts through MLA requests revealed that the loan company was merely a shell entity with a bank account. Deposits to this account came from another corporation that was awarded a contract by the Deputy Minister's office.

V. Conclusions

The investigation is certainly not complete at this point. There are many additional inquiries that need to be made. All payments from companies to the benefit of the Deputy Minister must be pursued. Company officials will be interviewed, accounting records analysed and all banking transactions completely traced. This will most likely identify additional assets acquired by the Deputy Minister, many of which will be in nominee names or hidden in corporate structures. Following the money will lead the investigator to these.

The investigation also disclosed that personal expenses for university costs were paid by similar companies. Taking further investigative steps following the money trail will yield additional evidence of apparent bribe payments. These money trails will not always lead directly from the private sector bribe giver to corrupt government officials. Sometimes, the payments will be clouded by numerous shell companies, trusts and nominees. However, the concept of following the money will usually lead to the beneficial owner of the assets and the maze of companies, trusts and nominee owners can be pierced through the complete financial investigative process. Hidden assets will generally not be identified through commercial database searches and open

source information. The information that the corrupt official wants to hide will often be concealed through complex financial structures established by skilled lawyers and accountants. In most cases, the financial investigation will be the best method of identifying the proceeds of corruption and making the connection to the corrupt activity.

END OF EXCERPT

5. EFFECTIVENESS OF ASSET RECOVERY REGIMES

5.1 Overview of Existing Data

The following is an excerpt from a 2014 OECD publication entitled *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*:¹⁸⁰

BEGINNING OF EXCERPT

5.1 ASSET RECOVERY EFFORTS BY OECD MEMBER COUNTRIES: TAKING STOCK

In preparing for the Fourth High-Level Forum on Aid Effectiveness in Busan, Korea (December 2011), the OECD and the Stolen Asset Recovery (StAR) initiative surveyed OECD countries to take stock of their commitments on asset recovery. The survey measured the amount of funds frozen and repatriated to any foreign jurisdiction between 2006 and 2009. It found that during this time, only four countries (Australia, Switzerland, the United Kingdom and the United States) had returned stolen assets, totalling USD 276 million, to a foreign jurisdiction. These countries, plus France and Luxemburg, had also frozen a total of USD 1.225 billion at the time of the survey.

In 2012, the OECD and StAR launched a second survey measuring assets frozen and returned between 2010 and June 2012. In this time period, a total of approximately USD 1.4 billion of corruption-related assets had been frozen. In terms of returned assets, a total of USD 147 million were returned to a foreign jurisdiction in the 2010-June 2012 period. This is a slight decrease from the USD 276 million recorded from the last survey round.

¹⁸⁰ Kjetil Hansen et al, *Illicit Financial Flows from Developing Countries: Measuring OECD Responses* (OECD, 2014) at 88–90, online: <http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf>.

[Table 5.3 OECD Countries that Have Frozen or Recovered Stolen Assets]

COUNTRY	2006-2009		2010-June 2012	
	Assets frozen (USD million)	Assets returned (USD million)	Assets frozen (USD million)	Assets returned (USD million)
Switzerland	67	146	786	20
UK	230	2	451	67
US	412	120	112	60
Canada	0	0	3	0
Luxembourg	508	0	27	0
Australia	7	8	0	0
France	1	0	0	0
Portugal	0	0	18	0
Netherlands	0	0	1	0
Belgium	0	0	0.3	0
TOTAL	1.225 billion	276 million	1.398 billion	147 million

[Note. This table has been constructed by us from Figures 5.1 and 5.2 of the report]

Also, during 2010-June 2012, the majority of returned assets and 86% of total assets frozen went to non-OECD countries while in the 2006-09 period asset recovery mainly benefited OECD countries.

Freezing stolen assets

Figure 5.1 [see table above] shows the volume of frozen assets during the two survey periods for OECD countries. During the latter period (2010-June 2012), Switzerland accounted for the largest volume of frozen assets (56%), followed by the United Kingdom (32%) and the United States (8%). These countries all have large financial centres and have made asset recovery a political priority. Belgium, Canada, Luxembourg, the Netherlands and Portugal had also frozen some assets during this period. Many OECD countries have not frozen any corruption-related assets to date. While this may be due to legal and policy obstacles, it may also be that few illicit assets had been placed in these countries to start with.

Recovered stolen assets

Figure 5.2 [see table above] examines the USD 147 million in stolen assets that were returned to a foreign jurisdiction between 2010 and June 2012, and the USD 276 million returned between 2006 and 2009. From 2006 to 2009, four OECD member countries reported the return of corruption-related assets. More than half, 53%, was returned by Switzerland, and another large share, 44%, by the United States, while Australia (with 3%) and the United Kingdom (with 1%) accounted for much smaller returned amounts. Only three OECD countries had returned corruption-related assets

between 2010-June 2012: the United Kingdom (45% of total assets returned) followed by the United States (41%) and Switzerland (14%).

5.2 ASSET RECOVERY IN THE CONTEXT OF THE ARAB SPRING

The Arab Spring has helped focus attention on international asset recovery. As long-standing governments began to tumble in Tunisia, Egypt and Libya in early 2011, banks and governments the world over started freezing billions of dollars held by these countries' previous leaders and their associates. For example, a mere hour after Egypt's ex-president Hosni Mubarak stepped down in February 2011, the Swiss government ordered its banks to freeze his assets held in Switzerland on suspicion that they were the proceeds of corruption. Other OECD member countries followed suit. The European Union ordered an EU-wide freeze of assets linked to Tunisia's ex-president Zine El Abidine Ben Ali in January 2011, and of assets linked to ex-President Hosni Mubarak in March the same year. Despite the heightened attention to asset recovery following the Arab Spring, relatively few assets have to date been returned to the affected countries, and the process of recovering the stolen assets is proving to be both long and cumbersome (Cadigan and Prieston, 2011). The main obstacle to returning stolen assets to these countries is being able to provide solid enough proof that the assets were gained through corruption.

As a response to these challenges, several OECD member countries have aided the process of bringing forth asset recovery cases and delivering such proof. Switzerland has sent judicial experts to both Egypt and Tunisia; US investigators and prosecutors have visited Egypt, Libya and Tunisia to work directly with their requesting country officials; and Canada has provided assistance on asset recovery to Tunisian officials.

In addition, some governments have taken steps to strengthen domestic inter-agency co-operation. For example, in 2012 the United Kingdom launched a cross-government task force on asset recovery to Arab Spring countries. To date, the multi-agency task force has visited Cairo to forge links with their counterparts in the Egyptian authorities, and has posted a Crown Prosecution Service prosecutor and a Metropolitan Police Financial Investigator to Egypt. In the near future, the United Kingdom will post a regional asset recovery adviser to the region to assist the authorities in Egypt, Libya and Tunisia (United Kingdom Parliament, 2012). In November 2012, the European Union announced that its member countries had amended legislation to facilitate the return of the frozen assets formerly belonging to former presidents Mubarak and Ben Ali and their associates to Egypt and Tunisia respectively. The new legislative framework authorises EU member countries to release the frozen assets on the basis of judicial decisions recognized in EU member countries. It also facilitates the exchange of information between EU Member States

and the relevant Egyptian and Tunisian authorities to assist in the recovery of assets to these countries (European Commission, 2012).

END OF EXCERPT

Further Reading

For a discussion of asset recovery in the context of the Arab spring, see Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (International Academic Publishers, 2013) 3.

5.2 Continuing Challenges to Effective Asset Recovery

After analyzing the data from 2006 to 2012 on asset recovery cases in OECD member countries, the StAR report *Few and Far: The Hard Facts on Stolen Asset Recovery* concludes that “a huge gap remains between the results achieved and the billions of dollars that are estimated stolen from developing countries.”¹⁸¹ The report also criticizes OECD members for the “disconnect between high-level international commitments and practice at the country level” due to lack of interest and prioritization.¹⁸² According to the report, inadequate progress has been made.

In the conclusion to their book, Zinkernagel, Monteith and Pereira offer a mixed, but optimistic, assessment of the progress made to date in asset recovery. They note that:

[T]he efforts to prosecute international corruption and money laundering cases and to successfully recover stolen assets have made considerable progress over the last five years. However, not all challenges have been overcome and, apart from a handful of cases, little money has effectively been recovered, especially in international cases. This has led to frustrations among citizens at large, as in the Egypt-Mubarak cases, as well as among concerned authorities in requesting and requested states.

On the other hand, we have seen a clear increase in action: cases under investigation with assets at stake have increased exponentially. Ten years ago, there were fewer than 60 foreign bribery offenses under investigation, with the vast majority of them conducted by the US (which, in these cases alone, recovered over USD 5 billion of assets and disgorged profits). Today there are over 500 ongoing investigations being conducted by over 50

¹⁸¹ Gray et al (2014) at 2.

¹⁸² *Ibid.*

different countries. By way of example, since 2008 the Serious Fraud Office of the UK has recovered nearly USD 150 million of assets, with the UK as a whole freezing over USD 150 million in 2011-2012. Germany too has recovered millions and other countries, like South Korea and Hungary, are quickly scaling up their investigations in spite of all the difficulties they encounter.¹⁸³

Other commentators are more critical! For example, Sarlo states:¹⁸⁴

In the context of anti-corruption, the role of the World Bank in StAR, an asset-recovery program, is a continuation of its role as a lender – advice-driven and inefficacious. “[A]sset recovery is *undertaken by states* using legal procedures, which means that StAR does not investigate cases, prosecute cases or request mutual legal assistance.” StAR is oxymoronic because it results in the World Bank instructing corrupt governments about how to recoup stolen loans, even though the governments themselves are probably complicit in the speculation [theft] of the loans. The situation is like advising the fox that was in the henhouse about how later to return the eggs. Even when a government is not involved in the theft of a loan and has legitimate interest in its return, prospects for asset recovery are dim because the process is a slog, laden with formidable obstacles – twenty-nine to be exact, by the World Bank's count.¹⁸⁵ “[Asset recovery] requires hacking through thickets of international law. It cuts across criminal, civil and administrative justice. It relies on cooperation between countries (and between agencies within countries) that are often unable or unwilling to share information.”¹⁸⁶

Although, for instance, countries had frozen the funds that former Philippine president Ferdinand Marcos had stolen from the Philippines in 1986, various legal complexities prevented them from returning the money to the Philippine government until 2002. And today a dozen countries are still hunting all over – in the United States, Antigua, and Europe – for the \$200 million that Pavlo Lazarenko, the former prime minister of Ukraine, embezzled from his country in the 1990s. With these impediments to asset recovery, the slogan for StAR should be “[e]asy to steal, easier to keep.” Although asset recovery may become less arduous in the future, countries could have to depend on StAR – with all its legal expenses, political red tape,

¹⁸³ Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, “Conclusion” in Zinkernagel, Monteith & Pereira, eds (2013) 347 at 347–348.

¹⁸⁴ Paul Sarlo, “The Global Financial Crisis and the Transnational Anti-Corruption Regime: A Call for Regulation of the World Bank’s Lending Practices” (2014) 45 *Geo J Intl L* 1293.

¹⁸⁵ [103] “Recovering Stolen Assets: Making a Hash of Finding the Cash,” *The Economist* (May 11, 2013) at 63.

¹⁸⁶ [104] *Ibid.*

and general complications – much less if the World Bank were to perform due diligence before making loans. [some footnotes omitted]

Two main challenges identified in the earlier chapters of *Emerging Trends in Asset Recovery* deal with the complications inherent in transnational legal cooperation and the difficulties in determining the beneficial ownership of corporations and trusts. Each of these challenges is briefly discussed below.

5.2.1 Transnational Communication and Cooperation

Transnational criminal law is a complex area. Successfully prosecuting corruption offences, including money laundering and recovering assets held in other jurisdictions, requires efficient communication and close cooperation between all states involved. However, in a chapter entitled “Proactive cooperation within the mutual legal assistance procedure,” Wyss argues that in practice mutual legal assistance frequently falls short of this standard. Instead, in many cases “a strange desire to preserve a country’s own domestic legal system coupled with a passive attitude at the beginning of MLA challenges disregard the keyword ‘assistance’ in mutual legal assistance procedures.”¹⁸⁷ Wyss explains that:

The traditional perception of the roles of the requesting and requested States often results in a passive attitude on the part of the requested State. Some requested States do not even answer requests that seem at first glance to have little chance of being accepted. In cases in which responses are provided to the requesting State, sometimes after a long period of time, the response usually includes a long enumeration of the missing elements in the request. Such attitudes and delays on the part of judicial authorities is in sharp contrast to the speed with which business transactions can be carried out by criminals. In a number of countries complicated channels of transmission for MLA requests are still in place. Consequently, not only is time lost before the request can reach the hands of the competent magistrates but sometimes the whole case-file is lost.

Other requested countries’ practice is to send a standard model of a ‘perfect’ MLA request to the requesting magistrate who finds it difficult to understand the model, because it is written from the sole viewpoint of the requested State and generally does not take into account the legal differences of the requesting countries. Requesting States are bombarded with manuals, guidebooks and links to Internet pages none of which bring any further concrete assistance. From experience, these usually well-intended tools can sometimes lead instead to a great deal of confusion

¹⁸⁷ Rudolf Wyss, “Proactive Cooperation within the Mutual Legal Assistance Procedure” in Zinkernagel, Monteith & Pereira, eds (2013) 105 at 107.

amongst the investigating authorities or can even discourage them from taking further steps or actions.¹⁸⁸

Strengthening both official and informal channels of communication between states is necessary if the MLA process is to function as intended.

The settlements in the VimpelCom corruption scandal offer an example of successful international cooperation in a foreign bribery case. On February 18, 2016, Amsterdam-based VimpelCom Limited, an issuer of publicly traded securities in the United States, and its wholly owned Uzbek subsidiary Unitel LLC, admitted to a conspiracy to pay more than \$114 million in bribes to a government official in Uzbekistan to enable them to operate in the Uzbek telecommunications market.¹⁸⁹ Pursuant to its agreement with the US Department of Justice, VimpelCom agreed to pay a criminal penalty of more than \$230 million to the US, including \$40 million in forfeiture. On the same day, the Department of Justice filed a civil complaint seeking forfeiture of more than \$550 million held in Swiss bank accounts, which constitute bribes made to the Uzbek official or funds involved in the laundering of those payments. This action follows an earlier civil complaint filed by the Department of Justice on June 29, 2015, which sought forfeiture of more than \$300 million in bank and investment accounts held in Belgium, Luxembourg, and Ireland. In that case the US District Court for the Southern District of New York entered a partial default judgment (on January 11, 2016) against all potential claimants, other than the Republic of Uzbekistan. In its verified claim filed on January 26, 2016, Uzbekistan indicated that on July 20, 2015 the Tashkent Regional Criminal Court issued a final criminal judgment confirming the rightful ownership of the assets in question by Uzbekistan.¹⁹⁰ In its press release on the resolution of the criminal case, the US Department of Justice acknowledged that law enforcement professionals from the Public Prosecution Service of the Netherlands, the Swedish Prosecution Authority, the Office of the Attorney General in Switzerland and the Corruption Prevention and Combating Bureau in Latvia provided significant cooperation and assistance in this matter, while law enforcement colleagues in Belgium, France, Ireland, Luxembourg, and the United Kingdom provided valuable assistance. The case is also an example of extensive domestic cooperation between law enforcement agencies in the United States, including not only the Department of Justice and the Securities and Exchange Commission, but also Immigration and Customs Enforcement's Homeland Security Investigations and the Internal Revenue Service Criminal Investigation Division.

¹⁸⁸ *Ibid* at 106–107.

¹⁸⁹ United States Department of Justice, “VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than \$795 Million; United States Seeks \$850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme” (18 February 2016), online: <<https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>>.

¹⁹⁰ “Settlements and Other Alternative Mechanisms in Transnational Bribery Cases and their Implications for the Recovery and Return of Stolen Assets”, Conference of the States Parties to the UNCAC, CAC/COSP/WG.2/2016/2 (18 July 2016) at para 36, online: <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604599e.pdf>>.

5.2.2 The Need for Mandatory Public Disclosure of Beneficial Ownership

In addition to the difficulties raised by mutual legal assistance, the international financial system creates its own challenges. Corrupt officials, criminals and those they employ have created many ingenious ways to disguise the beneficial ownership of illicit funds using trusts, shell companies and other vehicles. As pointed out by Sharman, shell companies in most countries can be set up easily and inexpensively online, without any connection required between the beneficial owner's location and the jurisdiction of incorporation.¹⁹¹ This allows true owners of proceeds of crime to frustrate investigations by ensuring the corporate service provider, beneficial owner and jurisdiction of incorporation are each in separate jurisdictions. Out of date company registries, particularly in developing countries, add further difficulty to tracing the beneficial owner.¹⁹² While significant gains have been made in financial regulation, driven in part by the Financial Action Task Force, this greater regulation has sparked new innovations by criminals. As Schulz explains:

For decades, banks and financial institutions have identified beneficial owners as part of their AML [anti-money-laundering] program. Therefore, those years of experience should make it easy to identify beneficial owners. The challenges, however, have not much changed over the years. If anything, it may be even harder today to identify beneficial ownerships than it was in the past. People who have something to hide, like money launderers, corrupt politicians, rogue employees and fraudsters, seek to channel illegitimate funds through the system. At the same time as banks and financial institutions have increased their efforts to make it harder to abuse the system, criminals are getting smarter at exploiting the system.¹⁹³

Schulz recommends an improved system for identifying politically exposed persons (PEPs) as well as regulations requiring company registers to maintain a record of beneficial ownership.¹⁹⁴ Sharman recommends the establishment of "a new global standard mandating that all registries contain the identity of all beneficial owners and that this information be publicly accessible to all."¹⁹⁵ The Global Organization of Parliamentarians Against Corruption (GOPAC) also advocates for further transparency through the identification of

¹⁹¹ Jason Sharman, "Shell Companies and Asset Recovery: Piercing the Corporate Veil" in Zinkernagel, Monteith & Pereira, eds (2013) 67.

¹⁹² *Ibid* at 68–69.

¹⁹³ Markus E Schulz, "Beneficial Ownership: The Private Sector Perspective" in Zinkernagel, Monteith & Pereira, eds (2013) 75 at 75.

¹⁹⁴ *Ibid* at 80–81.

¹⁹⁵ Sharman (2013) 67 at 70.

beneficial owners. GOPAC recommends requirements for financial institutions to demand a declaration of beneficial ownership and impose strict “know your customer” measures.¹⁹⁶

A significant development in the global movement towards mandatory disclosure of beneficial ownership was implemented through the Extractive Industries Transparency Initiative (EITI). EITI is briefly discussed in Chapter 8, Section 8.2.1. In December 2015, the EITI Board decided that disclosure of the beneficial ownership of companies involved in the extractive industries must be mandatory.¹⁹⁷ The EITI Standard was reissued in February 2016 and now requires disclosure of beneficial ownership. The second requirement of the EITI Standard sets out the timeline and requirements for how the beneficial ownership disclosure will be gradually implemented beginning in 2017.¹⁹⁸

Global concern about the use of shell corporations, trusts, nominee directors, and shareholders to hide beneficial ownership of criminal proceeds has reached a new level of concern. For asset recovery and anti-money laundering regimes to be effective, authorities must be able to identify the natural persons who actually own and benefit from a given corporation’s bank account, real property, or other assets. In 2013, the G8 set forward a commitment for transparency of company ownership, and in 2014 the G20 adopted 10 high-level principles on beneficial ownership transparency.¹⁹⁹ Transparency International in a recent evaluation has shown, on the other hand, that most G20 countries have been in no rush to implement the 10 Beneficial Ownership Principles.²⁰⁰ The TI Report entitled “Just for Show?” evaluates the extent to which each G20 country’s legal framework for beneficial ownership transparency conforms to the G20’s 10 Beneficial Ownership Transparency Principles. The results are presented in Table 5.4.

Table 5.4 Transparency of Beneficial Ownership

Ranking	Number	Country
Very Strong Framework	1	UK
Strong Framework	3	Argentina, France & Italy
Average Framework	9	Germany, India, Indonesia, Japan, Mexico, Russia, Saudi Arabia, S. Africa & Turkey
Weak Framework	6	Australia, Brazil, Canada, China, S. Korea & US
Very Weak Framework	0	

¹⁹⁶ “Transparency Through Beneficial Ownership Declarations” (September 2013) GOPAC Position Paper, Vol 1, Issue 1, online:

<http://gopacnetwork.org/Docs/PositionPapers/PP_GTFAML_EN_WEB.pdf>.

¹⁹⁷ Kjerstin Andreasen and Victor Ponsford, eds, *2016 Progress Report: From Reports to Results* (EITI, 2016) at 5, online: <<https://eiti.org/sites/default/files/documents/progressreport.pdf>>.

¹⁹⁸ Dyveke Rogan, ed, *The EITI Standard 2016* (EITI International Secretariat, 2016) at 17-21, online: <https://eiti.org/sites/default/files/documents/english-eiti-standard_0.pdf>.

¹⁹⁹ See *G20 High-Level Principles on Beneficial Ownership Transparency*, online: <http://star.worldbank.org/star/sites/star/files/g20_high-level_principles_beneficial_ownership_transparency.pdf>.

²⁰⁰ “Just for Show? Reviewing G20 Promises on Beneficial Ownership” (TI, November 2015), online: <http://www.transparency.org/whatwedo/publication/just_for_show_g20_promises>.

As the above table shows, UK has a very strong framework, and Canada and USA have a weak framework.

Further Reading

For more on the use of corporate vehicles to hide stolen assets, see Phyllis Atkinson, "The Use of Corporate Vehicles to Conceal Illegal Assets" in *Tracing Illegal Assets – A Practitioner’s Guide* (Basel Institute on Governance, International Centre for Asset Recovery, 2015) at 95-111.

For a detailed guide to finding the beneficial owner, including recommendations, see: Emile van der Does de Willebois et al., *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (The World Bank, 2011).

5.2.2.1 UK

In 2015, the UK government enacted Part 7 of the *Small Business, Enterprise & Employment Act 2015 (SBEE)*,²⁰¹ which amended the *Companies Act 2006*²⁰² "to require companies to keep a register of people who have significant control over the company (PSCs)."²⁰³ The *SBEE* inserted Part 21A of the *Companies Act 2006*, which identifies which companies are required to maintain a register. The only companies exempted from the register are "DTR5 issuers" and companies exempted by regulation. These exempt companies are companies which "are bound by disclosure and transparency rules (in the UK or elsewhere) broadly similar to the ones applying to DTR5 issuers."²⁰⁴ DTR5 issuers are "principally companies whose shares are traded on the Main Market of the London Stock Exchange and AIM."²⁰⁵ Thus, UK companies that are not subject to transparency and disclosure rules will now be subject to the mandatory public disclosure of persons with significant control over the company. *The Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016 (UK)*²⁰⁶ also require some Limited Liability Partnerships to keep a registry of persons with significant control. Persons with significant control, which include, amongst other things, persons with 25% or more of the shares in a company, are fully defined in the *Companies Act 2006* Schedule 1A:²⁰⁷

²⁰¹ *Small Business, Enterprise and Employment Act 2015* (UK), c 26, part 7.

²⁰² *Companies Act 2006* (UK), c 46.

²⁰³ *Small Business, Enterprise and Employment Act 2015* (UK), c 26, part 7, s 81.

²⁰⁴ *Companies Act 2006* (UK), c 46, part 21A.

²⁰⁵ "Companies Act 2006: New Rules on People with Significant Control" (Dentons, 2016), online: <<http://www.dentons.com/en/insights/newsletters/2016/january/26/uk-corporate-briefing/uk-corporate-briefing-winter-2016/companies-act-2006-new-rules-on-people-with-significant-control>>.

²⁰⁶ 2016 No 340, Schedule 1.

²⁰⁷ *Companies Act 2006* (UK), c 46, Schedule 1A.

Introduction

This Part of this Schedule specifies the conditions at least one of which must be met by an individual (“X”) in relation to a company (“company Y”) in order for the individual to be a person with “significant control” over the company.

Ownership of shares

The first condition is that X holds, directly or indirectly, more than 25% of the shares in company Y.

Ownership of voting rights

The second condition is that X holds, directly or indirectly, more than 25% of the voting rights in company Y.

Ownership of right to appoint or remove directors

The third condition is that X holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of company Y.

Significant influence or control

The fourth condition is that X has the right to exercise, or actually exercises, significant influence or control over company Y.

Trusts, partnerships etc

The fifth condition is that—

- (a) the trustees of a trust or the members of a firm that, under the law by which it is governed, is not a legal person meet any of the other specified conditions (in their capacity as such) in relation to company Y, or would do so if they were individuals, and
- (b) X has the right to exercise, or actually exercises, significant influence or control over the activities of that trust or firm.

The beneficial ownership registry also applies to “Politically Exposed Persons” who hold a share of 5% or more of a company.

Under the new rules instituted under the *SBEE*, companies are required to keep a registry of people with significant control beginning April 6, 2016. They are also required to declare that information in their registry to Companies House with their annual statement beginning June 30, 2016. Thus, Companies House should have a complete register of PSCs by June 29, 2017.²⁰⁸ The Companies House registry will be available to law enforcement officials

²⁰⁸ UK, House of Commons Library, “Shining a Light on Beneficial Ownership: What’s Happening in the UK and

investigating money laundering or engaged in criminal asset recovery. Failure to keep a registry of persons with significant control or to file an annual report with Companies House are subject to penalties of fines, imprisonment, and freezing of assets or interests.

5.2.2.2 US

The lack of beneficial ownership laws is one of the most significant loopholes in the anti-money laundering and counter terrorism financing laws in the US. The Department of Treasury recently introduced the Customer Due Diligence Final Rule to close this gap. The Final Rule became effective July 11, 2016, and institutions must comply by May 11, 2018.

As the Department of Treasury states:

The CDD Final Rule adds a new requirement that financial institutions – including banks, brokers or dealers in securities, mutual funds, futures commission merchants, and introducing brokers in commodities – collect and verify the personal information of the real people (also known as beneficial owners) who own, control, and profit from companies when those companies open accounts. The Final Rule also amends existing Bank Secrecy Act (BSA) regulations to clarify and strengthen obligations of these entities.²⁰⁹

There are three core requirements introduced by the rule:

- (1) identifying and verifying the identity of the beneficial owners of companies opening accounts;
- (2) understanding the nature and purpose of customer relationships to develop customer risk profiles; and
- (3) conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.²¹⁰

Under the Final Rule, beneficial owners can stem from two prongs. The “ownership prong” includes every individual who directly or indirectly owns 25 percent or more of a company. Under the “control prong,” a beneficial owner is a single individual with significant

Elsewhere?” (Briefing Paper No 07616) by Gabrielle Garton Grimwood (London: House of Commons Library, 2016) at 4, online: <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7616>>.

²⁰⁹ United States, Department of Treasury, “Treasury Announces Key Regulations and Legislation to Counter Money Laundering and Corruption, Combat Tax Evasion” (5 May 2016), online: <<https://www.treasury.gov/press-center/press-releases/Pages/jl0451.aspx>>.

²¹⁰ *Ibid.*

responsibility to control, manage or direct the legal entity.²¹¹ Each company will therefore have between one and five beneficial owners.

The Final Rule does not apply retroactively, meaning it only applies to accounts opened on or after May 11, 2018.²¹²

5.2.2.3 Canada

Canada currently lags behind in adopting beneficial ownership laws. As Transparency International Canada (TI Canada) notes, “[i]n Canada, more rigorous identity checks are done for individuals getting library cards than for setting up companies.”²¹³ TIC rates Canada’s compliance with the G20 principle as being weak or very weak in 7 of 10 principles, as shown below:

Table 5.5 Canada’s Ranking on G20 Beneficial Ownership Principles

G20 Principles	Ranking
1. Definition of beneficial owner	Weak
2. Risk assessment relating to legal entities and arrangements	Strong
3. Beneficial ownership information of legal entities	Very Weak
4. Access to beneficial ownership information of legal entities	Very Weak
5. Beneficial ownership information of trusts	Average
6. Access to beneficial ownership information of trusts	Weak
7. Roles and responsibilities of financial institutions and businesses professions	Very Weak
8. Domestic and international cooperation	Weak
9. Beneficial ownership information and tax evasion	Average
10. Bearer shares and nominees	Very Weak

Source: Transparency International Canada, *No Reason to Hide - Unmasking the Anonymous Owners of Canadian Companies and Trusts* (2016) at 12 online: <<http://www.transparencycanada.ca/wp-content/uploads/2017/05/TIC-BeneficialOwnershipReport-Interactive.pdf>>.

²¹¹ Convington & Burling LPP, “FinCEN Releases Final Rule on Beneficial Ownership and Risk-Based Customer Due Diligence” (10 May 2016), online: <https://www.cov.com/-/media/files/corporate/publications/2016/05/fincen_releases_final_rule_on_beneficial_ownership_and_risk_based_customer_due_diligence.pdf>.

²¹² Jacqueline M Allen, Elizabeth A Khalil & Jesse Tyner Moore, “FinCEN Releases Long-Awaited Beneficial Ownership Final Rule”, *Consumer Financial Services Law Blog* (16 May 2016), online: <http://www.cfs-lawblog.com/fincen-releases-long-awaited-beneficial-ownership-final-rule_051616>.

²¹³ Transparency International Canada, *No Reason to Hide: Unmasking the Anonymous Owners of Canadian Companies and Trusts* (TI Canada, 2016) at 6, online: <<http://www.transparencycanada.ca/wp-content/uploads/2016/08/TIC-BeneficialOwnershipReport-Interactive.pdf>>.

As TI Canada reports, “[a] recent study found that of 60 countries around the world – including known tax havens and secrecy jurisdictions—only in Kenya and a select few US states is it easier to set up an untraceable company than it is in Canada.”²¹⁴ Further, TI Canada notes “[a]s a testament to the secrecy afforded in Canada, the law firm at the centre of the Panama Papers leak, Mossack Fonseca, marketed Canada to its clients as an attractive place to set up anonymous companies.”²¹⁵ Canada currently has approximately 3.4 million business corporations²¹⁶ and is estimated to have millions of trusts.²¹⁷ Trusts are treated as private contracts and can be guarded by attorney-client privilege, trusts provide even a greater degree of anonymity to beneficial owners than corporations.²¹⁸ This level of secrecy is a huge hindrance to law enforcement efforts. In 2011, the RCMP noted a suspect can only be identified in 18% of money laundering cases.²¹⁹

Nominees are individuals or entities appointed to act on behalf of a beneficial owner; they add another layer of secrecy to companies.²²⁰ Nominee owners are a common means of money laundering and hiding crime proceeds through real estate. TI Canada notes that a study in 2004 found that “of 149 proceeds of crime cases successfully pursued by the RCMP ... nominee owners were used in over 60 percent of real estate purchases made with laundered funds.”²²¹ TI Canada notes that of the 42 high-end properties sold in Vancouver in the previous 5 years, 26% were bought by students or homemakers with no visible known income or wealth.²²²

A beneficial ownership regime is crucial for Canada to have an effective, proactive regime to combat corruption, money laundering, as well as offences such as drug trafficking and fraud, and to assist in the recovery of proceeds of corruption and other crimes. TI Canada and FATF have both noted various ways in which the Canadian laws currently fail in this regard. Canada’s Report includes a number of recommendations to bolster Canada’s beneficial ownership framework. The key recommendation made by TI Canada is that:

The Government of Canada should work with the provinces to establish a central registry of all companies and trusts in Canada, and their beneficial owners. The registry should be available to the public in an open data format.

²¹⁴ *Ibid* at 15, citing Sharman et al, “Global Shell Games: Testing Money Launderers’ and Terrorist Financiers’ Access to Shell Companies” (2013).

²¹⁵ *Ibid* at 15.

²¹⁶ *Ibid* at 17. As there is no central registry for corporations in Canada, TIC contacted each provincial and territorial registry, noting the basic data was not readily available to registry employees in most parts of Canada.

²¹⁷ *Ibid* at 18.

²¹⁸ *Ibid* at 18.

²¹⁹ *Ibid* at 24, citing Julian Sher, “Money Laundering Going Largely Unpunished in Canada”, *The Globe and Mail* (27 June 2011).

²²⁰ *Ibid* at 19.

²²¹ *Ibid* at 27.

²²² *Ibid* at 31.

Corporate directors and trustees should be responsible for submitting beneficial ownership information and keeping it accurate and up to date.²²³

Other recommendations made include the following:

- Nominees should be required to disclose that they are acting on another's behalf, and the beneficial owners they represent should be identified.
- Corporate registries should be given adequate resources and a mandate to independently verify the information filed by legal entities, including the identities of directors and shareholders.
- Beneficial ownership information should be included on property title documents, and no property deal should be allowed to proceed without that disclosure.
- The Government of Canada should make it mandatory for all reporting sectors – including real estate professionals – to identify beneficial ownership before conducting transactions.
- All government authorities in Canada should require beneficial ownership disclosure as a prerequisite for companies seeking to bid on public contracts.²²⁴

In an earlier report, TI Canada noted another problem Canada may face in requiring mandatory disclosure of beneficial ownership.²²⁵ TI Canada noted that in *Reference re Securities Act*,²²⁶ the Supreme Court of Canada found that a national securities commission would be unconstitutional. As a result, TI Canada voiced concerns regarding Canada's ability to reach a national consensus or impose a national requirement on beneficial ownership transparency requirements.

In December 2017, the Canadian arm of Publish What You Pay (PWYP) published Mora Johnson's detailed study entitled *Secret Entities: A Legal Analysis of the Transparency of Beneficial Ownership in Canada*.²²⁷ Johnson states in her introduction:

Financial institutions and other designated non-financial businesses and professions (DNFBPs) such as accountants, casinos, real estate agents, and

²²³ *Ibid* at 37.

²²⁴ *Ibid* at 7. For a full list of recommendations, see *ibid* at 38-39.

²²⁵ Transparency International Canada [TI Canada], *Review of Canada's Implementation of UNCAC* (October 2013) at 14. For a very short summary of the report, see Sabrina Bandali, "Transparency International Canada Inc, - UNCAC Implementation Review – Civil Society Organization Report" (October 2013), online:

<https://www.bennettjones.com/Publications/Articles/Transparency_International_Canada_Inc_-_UNCAC_Implementation_Review_-_Civil_Society_Organization_Report>.

²²⁶ *Reference re Securities Act*, 2011 SCC 66.

²²⁷ Online: <<http://www.pwyp.ca/images/documents/BOT%20Report.pdf>>.

dealers in precious gems and stones have anti-money-laundering and terrorism financing obligations because they may handle large cash transactions, which are susceptible to misuse. Despite a certain level of implementation of these obligations in Canada, this report will demonstrate that there are numerous ways to legally remain anonymous in business transactions and to hide beneficial ownership information from law enforcement authorities, financial institutions, and DNFBPs. In addition to the FATF obligations, in 2014, the G20 Leaders committed to lead by example and improve the transparency of beneficial ownership in their respective jurisdictions. In striving to meet these commitments, the UK and other European countries have taken clear steps to improve public beneficial ownership information, including establishing public registries of beneficial owners. Public beneficial ownership registries will ensure that civil society organizations, businesses, customers, law enforcement agencies, tax collection authorities, and others are able to discern the true owner or the person who ultimately benefits or controls the entity or property in question. Registries, alongside complementary efforts to require that agents and nominees disclose their status and the identities of those they represent, are critical to creating a transparency beneficial ownership system that can allow law enforcement to fight crime.²²⁸

In her conclusion, Johnson states:

This report identifies several shortcomings relating to the transparency of beneficial ownership information of legal entities, trusts and business arrangements in Canadian law. Implementation of proposed recommendations in this report would enable Canada to possess a more rigorous and effective AML/TF regime, as well as meet our G20 and FATF commitments as they relate to beneficial ownership information. Most importantly, proposed changes would help Canadian law enforcement more effectively and efficiently fight crime in this country.²²⁹

5.2.3 Other Challenges to Effective Asset Recovery

Developing countries face additional challenges due to a lack of resources, expertise, investigative experience, foreign contacts and institutional stability for pursuing complex transnational asset recovery proceedings and MLA requests. The MLA system is particularly impossible for failing states. Section 4 of Canada's *Freezing Assets of Corrupt Foreign Officials Act*, enacted in the wake of the Arab Spring, aims to deal with failed states by allowing the freezing of assets on request from countries experiencing "internal turmoil" or "an uncertain

²²⁸ *Ibid* at 4-5.

²²⁹ *Ibid* at 40.

political situation.”²³⁰ The “Duvalier law” in Switzerland represents another attempt to fill in the gaps of the international asset recovery framework in relation to states where the rule of law has broken down (see Section 3.1 above for more on the “Duvalier law”).²³¹

Political immunity presents another barrier to asset recovery. In some states, immunities have been extended to protect various public officials, who are then able to use immunities to block or delay investigation and prosecution for corruption or money laundering.²³²

Vlasic also pointed out that lack of political will often hinders asset recovery; “often, when states compare the costs of pursuing an asset recovery agenda to uncertain benefits, the risk of stepping outside the status quo is more than they are willing to take on.”²³³ As pointed out by Kingah, requesting countries must hire an “army of attorneys” and expensive firms specializing in asset tracing.²³⁴ To make matters worse, many jurisdictions allow the owner of seized or restrained assets to deplete those assets for their own legal fees, which are often exorbitant.²³⁵ This dissipation of assets can discourage originating countries from pursuing asset recovery proceedings.

Returned assets may be further reduced by asset sharing agreements with the requested country. As Stephenson points out, although Article 57(5) of UNCAC requires states to enable the return of all confiscated property, Article 14(3)(b) of UNTOC allows states to consider negotiating case-by-case asset sharing agreements.²³⁶ Originating countries may lack the resources for these lengthy negotiations and may find themselves in a weak negotiating position since the requested country has custody of the confiscated assets.

The authors of *Barriers to Asset Recovery* also point out that inadequate enforcement of AML measures, particularly regulation of gateways into financial centres, prevents the interception of stolen assets.²³⁷ In the StAR publication *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, the authors outline asset recovery challenges resulting from the increasingly dominant use of settlements, as opposed to full

²³⁰ Robert J Currie & Dr Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed (Irwin Law, 2013) at 367.

²³¹ For further discussion of challenges faced by developing countries, see Jesse Mwangi Wacanga, “Hurdles in Asset Recovery and Fighting Corruption in Developing Countries: The Kenya Experience” in Gretta Fenner Zinkernagel, Charles Monteith & Pedro Gomes Pereira, eds, *Emerging Trends in Asset Recovery* (International Academic Publishers, 2013) 147.

²³² Silvio Antonio Marques, “Political Immunities: Obstacles in the Fight against Corruption” in Zinkernagel, Monteith & Pereira, eds (2013) 93.

²³³ Mark V Vlasic, “Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems” (2010) 5:2 Yale J Intl Affairs 106 at 112.

²³⁴ Stephen Kingah, “Effectiveness of International and Regional Measures in Recovering Assets Stolen from Poor Countries” (2011) 13 U Botswana LJ 3.

²³⁵ Stephenson et al (2011) at 94–95.

²³⁶ *Ibid* at 77–78.

²³⁷ *Ibid* at 33–34.

trials, in foreign bribery cases.²³⁸ In 365 settlements between 1999 and mid-2012, sanctions amounting to \$6 billion were imposed by countries other than the corrupt official's country. Of that \$6 billion, only \$197 million (3.3%) was returned to the corrupt official's country. Between mid-2012 and the end of April 2016, monetary sanctions totalling \$4 billion were imposed, but only \$7 million (0.18%) was returned to the corrupt official's country.²³⁹ That pitiful figure arose from just one case in which a settlement (a deferred prosecution agreement) was entered into by the Serious Fraud Office of the UK and Standard Bank in November 2015 and required the latter to pay \$6 million in compensation and \$1 million in interest to Tanzania.²⁴⁰ Also, between 1999 and mid-2012, roughly \$556 million was returned or ordered returned in cases where the jurisdiction of enforcement and the jurisdiction of the corrupt foreign officials were the same, whereas between mid-2012 and the end of April 2016 this sum amounted to just \$137,325.²⁴¹ It is worth mentioning that since April 2014 the Office of the Attorney General of Switzerland (OAG) has opened some 60 investigations in relation to the Petrobras corruption scandal, resulting in \$800 million in assets being frozen, and in March 2016 the OAG announced that \$70 million of frozen assets were to be unblocked and returned to Brazil.²⁴²

According to the authors of *Left out of the Bargain*, settlements are often lacking in transparency with negotiations taking place behind closed doors. Further, affected countries are often unaware of ongoing cases in other countries until they are over. Even when affected countries have the opportunity to participate in negotiations elsewhere, for example as a *partie civile*, they often lack the resources and knowledge of other legal systems to follow through. The authors suggest that countries pursuing settlements inform affected countries of the facts of the case and legal avenues to asset recovery, such as seeking a restitution

²³⁸ Settlements include "any procedure short of a full trial," such as plea agreements, deferred prosecution agreements and non-prosecution agreements: Oduor et al, (2014) at 1.

²³⁹ "Settlements and Other Alternative Mechanisms in Transnational Bribery Cases and their Implications for the Recovery and Return of Stolen Assets", Conference of the States Parties to the UNCAC, CAC/COSP/WG.2/2016/2 (18 July 2016) at paras 21, 33, online: <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604599e.pdf>>.

²⁴⁰ Serious Fraud Office, "SFO Agrees First UK DPA with Standard Bank" (30 November 2015), online: <<https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>>.

²⁴¹ "Settlements and Other Alternative Mechanisms in Transnational Bribery Cases and their Implications for the Recovery and Return of Stolen Assets", Conference of the States Parties to the UNCAC, CAC/COSP/WG.2/2016/2 (18 July 2016) at para 34, online: <<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604599e.pdf>>.

²⁴² Office of the Attorney General of Switzerland, "Petrobras Affair: Further USD 70 Million of Frozen Assets to be Unblocked and Returned to Brazil" (17 March 2016), online: <<https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-61034.html>>.

order.²⁴³ As mentioned above in Section 2.1.2, in relation to the BOTA Foundation, StAR also recommends that States permit third parties to be included in settlement agreements in foreign bribery cases.

Finally, the desire to respect civil liberties presents another obstacle to crafting effective asset recovery regimes. As explained by Bacio-Terracino, asset recovery initiatives have the potential to infringe property rights and the presumption of innocence, as well as rights to privacy and a fair trial during investigation and other rights in relation to the offence of illicit enrichment (see below).²⁴⁴

Further Reading

For a discussion of potential issues regarding the right to a fair trial in transnational asset recovery proceedings, see Radha Dawn Ivory, “The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases” (2013) 9:4 Utrecht L Rev 147.

For more on forfeiture and the presumption of innocence, see Johan Boucht, “Civil Asset Forfeiture and the Presumption of Innocence under Article 6(2) of ECHR” (2014) 5:2 New J European Crim L 221.

5.3 Emerging Tools in Asset Recovery

StAR found that OECD members are increasingly turning to less traditional avenues of asset recovery. Instead of waiting for slow mutual legal assistance requests from corrupt officials’ jurisdictions, some jurisdictions have initiated their own investigations.²⁴⁵ Although criminal confiscation is generally considered the most obvious tool in asset return, many cases analyzed by StAR used administrative actions for freezing assets, NCB confiscation, reparation payments, and settlement agreements to facilitate the return of assets.²⁴⁶

Some other new techniques for pursuing asset recovery have emerged in recent years and are discussed below.

²⁴³ If a third party can show direct and proximate damage resulting from a crime, prosecutors in common law countries will act on their behalf. For example, in the Oil-for-Food bribery scandal in Iraq, the company Vitol SA was ordered to pay \$13 million to the Iraqi people after pleading guilty (*ibid* at 93).

²⁴⁴ Julio Bacio-Terracino, “Lurking Corruption and Human Rights” (2010) 104 American Society of Intl Law Proceedings 245.

²⁴⁵ Gray et al (2014) at 2.

²⁴⁶ *Ibid*.

(1) Illicit Enrichment Offences

The offence of illicit enrichment assists in asset recovery by relaxing proof burdens. Prosecutors only need to prove that a defendant cannot justify their illicit funds through legitimate income sources. Article 20 of UNCAC requests States to consider establishing a criminal offence of illicit enrichment. Because the offence has the potential to deteriorate the presumption of innocence and the privilege against self-incrimination, critics discourage creation of the offence in states with a weak rule of law and weak governance. Canada has stated it will not implement an illicit enrichment offence because such an offence would violate the presumption of innocence in its Constitution.²⁴⁷ Prosecutorial discretion also makes the offence vulnerable to abuse.²⁴⁸ For a detailed analysis of illicit enrichment, see the following StAR publication: Lindy Muzila et al., *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (The World Bank, December 2012).

(2) Unexplained Wealth Orders

The UK government recommended the creation of a system of unexplained wealth orders in the *Criminal Finances Bill* introduced in the UK House of Commons on October 13, 2016.²⁴⁹ Australia already has a system for making unexplained wealth orders in five of its six states and all of its territories.²⁵⁰ The UK Bill was enacted as the *Criminal Finances Act 2017*, and the unexplained wealth order provisions came into force on January 31, 2018.²⁵¹ The UK *Criminal Finances Act 2017* is aimed at targeting the revenue generated by organized crime, with a particular focus on money laundering and terrorist finance.²⁵² Perhaps the most novel and potentially controversial power introduced by the Act is the introduction of unexplained wealth orders, which place a burden on individuals whose assets are disproportionate to their income to explain the origin of their wealth.²⁵³ The Act amends the *Proceeds of Crime Act 2002* (POCA) to allow a court to make an UWO.²⁵⁴ An enforcement authority such as the Crown Prosecution Service or the Serious Fraud Office can make an application to the High Court for an UWO. The Court must be satisfied that the respondent has property valued over £100,000. The Court must also be satisfied that “there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property.” Finally,

²⁴⁷ Currie & Rikhof, (2013) at 367.

²⁴⁸ L Muzila et al, “Illicit Enrichment: An Emerging Tool in the Asset Recovery Process” in Zinkernagel, Monteith & Pereira, eds (2013) 245.

²⁴⁹ Bill 75, *Criminal Finances Bill*, 2016-2017 sess, 2016.

²⁵⁰ Koren (2013).

²⁵¹ *Criminal Finances Act 2017* (UK), c 22, online: <<https://services.parliament.uk/bills/2016-17/criminalfinances.html>>.

²⁵² UK, House of Commons Library, “Criminal Finances Bill” (Briefing Paper No 07739) by Joanna Dawson et al

(London: House of Commons Library, 2016) at 4, online: <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>>.

²⁵³ *Ibid.*

²⁵⁴ *Proceeds of Crime Act 2002* (UK), c 29.

the Court must be satisfied either that there are reasonable grounds to suspect that the respondent, or a person connected with the respondent, are involved in serious criminal activity, or that the respondent is a “Politically Exposed Person” (PEP). A PEP is defined as a person who has been “entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State,” or a family member or close associate of such a person.²⁵⁵

If granted, an UWO places a requirement on the respondent to explain the source of their assets within a specified period of time.²⁵⁶ If the respondent fails to respond in the specified period, the assets will then be considered “recoverable property” and subject to civil forfeiture under Part 5 of the *POCA*. If a respondent purports to comply with the UWO, the enforcement agency may undertake further enforcement or investigatory proceedings. The Act also makes it an offence to knowingly or recklessly make “a statement that is false or misleading in a material particular” when purporting to comply with a UWO. Statements made when attempting to comply with an UWO would not be admissible as evidence against a respondent in criminal proceedings.²⁵⁷ Section 2 of the Act amends the *POCA* to provide for freezing of assets identified in an UWO, while Section 3 amends *POCA* to allow for enforcement of UWOs overseas.²⁵⁸

Transparency International assessed the Act while it was at the Bill stage for its possible human rights impact and came to the conclusion that there are sufficient safeguards included in the legislation to prevent UWOs from being abused. The factors that weighed in favour of TI’s assessment are as follows:

- The UWO is a civil – not criminal – measure and is laid against the asset, not the individual. Civil actions against property are an altogether different proposition to deprivation of liberty and actions taken against individuals.
- The measure has a specific remit and its use is limited to illicit assets owned by foreign government officials or those who have links to serious crime.
- A reasonable level of evidence is required before applying to the High Court for a UWO, and the approval of a High Court Judge is required before a UWO can be served. This element of the process provides an opportunity to rebut the measure if there are concerns.

²⁵⁵ *Criminal Finances Act 2017* (UK), c 22, s 1.

²⁵⁶ UK, House of Commons Library, “Criminal Finances Bill” (Briefing Paper No 07739) by Joanna Dawson et al

(London: House of Commons Library, 2016) at 4, online:

<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>>.

²⁵⁷ *Criminal Finances Act 2017* (UK), c 22, s 1.

²⁵⁸ *Ibid*, ss 2-3.

- TI has been reassured by... legal advice that use of UWOs is compatible with the UK's international obligations on safeguarding human rights.²⁵⁹

(3) Other Measures

The *Criminal Finances Bill* also introduced five other measures aimed at criminal proceeds in addition to the UWO regime:

(a) Disclosure Orders

Sections 7 and 8 of the Act grant law enforcement the power to require "anyone that they think has relevant information to an investigation, to answer questions, provide information or to produce documents. They are used to gather the information required for a successful criminal investigation, although the compelled evidence may not be used in criminal proceedings against the person who gave the information." This power has not previously been available when investigating money laundering.²⁶⁰

(b) Changes to Strengthen the Suspicious Activity Report Regime

The Act allows for an extension of moratorium periods on suspicious transactions beyond the 31 days previously allowed, giving agencies more time to investigate.²⁶¹ The Act also allows investigative agencies to follow up on suspicious activity reports where further information is needed. Finally, the Act permits firms in the regulated sector to share information amongst themselves to create better protections against being used by money launderers.²⁶²

(c) Proceeds of Crime Recovery

The Act creates new civil powers that allow law enforcement agencies to seize proceeds of crime that are stored in bank accounts or in non-cash valuables such as jewels or precious metals.²⁶³

²⁵⁹ Rachel Davies Teka, "Unexplained Wealth Orders" (Transparency International, 2016), online: <<http://www.transparency.org.uk/publications/uwo-criminal-finances-bill-2016/>>.

²⁶⁰ UK, House of Commons Library, "Criminal Finances Bill" (Briefing Paper No 07739) by Joanna Dawson et al (London: House of Commons Library, 2016) at 49, online: <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>>.

²⁶¹ *Ibid.*

²⁶² *Criminal Finances Act 2017* (UK), c 22, s 11, online: <<https://services.parliament.uk/bills/2016-17/criminalfinances.html>>.

²⁶³ *Ibid.*, ss 14-16.

(d) Terrorist Financing Powers

The Act extends powers of disclosure and civil recovery to law enforcement in the investigation of terrorist property or financing.²⁶⁴

(e) Corporate Offences of Failure

The Act creates the new offence of corporate failure to prevent facilitation of tax evasion.²⁶⁵ This new offence allows for the prosecution of employers if they fail to prevent individual employees from facilitating tax evasion.²⁶⁶

(4) New Forms of Civil Damages

New measures of damages provide another useful tool in asset recovery. As pointed out by van der Does de Willebois in his article “Using civil remedies in corruption and asset recovery cases,” those who pay bribes are rarely caught, which could encourage the perception that compensation orders are merely a cost of doing business.²⁶⁷ Punitive damages would increase deterrence and encourage plaintiffs to bring actions. The emerging concept of social damages provides another recourse for victims of corruption and is already employed in Costa Rica. The concept is explained by van der Does de Willebois:

To ensure full compensation and deterrence when punitive damages are not applicable, other jurisdictions have tried to use the concept of social damages. In some jurisdictions, a social damage may be defined as the loss that is not incurred by specific groups or individuals but by the community as a whole. This could include damages to the environment, to the credibility of the institutions, or to collective rights including health, security, peace, education, good governance, and good public financial management. It is different from damages to collective rights, which belong to a restricted and identifiable group of individuals or legal entities. Social damage can be pecuniary and nonpecuniary.

(5) Financial Disclosure for Public Employees

Messick points out that financial disclosure requirements for public employees are also useful in asset recovery. Disclosure can provide evidence of a predicate offence if discrepancies exist between an official’s disclosed finances and other records. Messick

²⁶⁴ UK, House of Commons Library, “Criminal Finances Bill” (Briefing Paper No 07739) by Joanna Dawson et al (London: House of Commons Library, 2016) at 55-56, online: <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7739>>.

²⁶⁵ *Ibid* at 56-57.

²⁶⁶ *Criminal Finances Act 2017* (UK), c 22, ss 44-46, online: <<https://services.parliament.uk/bills/2016-17/criminalfinances.html>>.

²⁶⁷ van der Does de Willebois & Brun (2013) at 648.

recommends that States create a criminal offence around non-reporting to support asset recovery actions. He also recommends following Trinidad’s example in making forfeiture of an asset automatic when an official knowingly omits the asset from disclosure statements.²⁶⁸

(6) Donor Assistance to Assist Poor Countries in Pursuing Asset Recovery

Finally, Mason recommends that aid agencies contribute resources to asset recovery proceedings in donor countries as a means to assisting development in donee countries, since donees often lack the resources to carry out MLA requests and transnational proceedings.²⁶⁹ StAR echoes this recommendation, advising development agencies to allocate assistance funds to domestic law enforcement efforts that could lead to return of assets to developing countries.²⁷⁰

6. INTERNATIONAL MUTUAL LEGAL ASSISTANCE AGREEMENTS

6.1 Introduction to Mutual Legal Assistance Agreements

Mutual legal assistance is a process by which jurisdictions seek and provide assistance to other jurisdictions in the gathering of evidence, investigation and prosecution of criminal cases, and in tracing, freezing, seizing and confiscating proceeds of crime. It facilitates cooperation in dealing with transnational and multinational cases of corruption. Agreements oblige requested States to cooperate with requests. There are two types of mutual legal assistance agreements – bilateral (between two states) and multilateral (between more than two states). UNCAC, UNTOC, the OECD Convention and the Southeast Asian Mutual Legal Assistance in Criminal Matters are examples of multilateral conventions that provide mutual legal assistance in corruption cases.

Mutual legal assistance may be requested for a broad range of anti-corruption activities: see Article 46(3) of UNCAC, set out below. In most instances, a jurisdiction requests the assistance of another jurisdiction through a formal written request, although mutual legal assistance can and is sometimes provided without a formal request: UNCAC, Article 46(4).

The United Nations Office on Drugs and Crime states the importance of mutual legal assistance in the *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*:

The importance of effective mutual (legal) assistance as a tool to combat transnational crime cannot be overstated. Whatever the applicable legal

²⁶⁸ Richard E Messick, “How Financial Disclosure Laws Help in the Recovery of Stolen Assets” in Zinkernagel, Monteith & Pereira, eds (2013) 235.

²⁶⁹ Phil Mason, “Being Janus: A Donor Agency’s Approach to Asset Recovery” in Zinkernagel, Monteith & Pereira, eds (2013) 197.

²⁷⁰ Gray et al (2014) at 56.

system or tradition, criminal investigations and proceedings are based on evidence and increasingly that evidence in the criminal context is located outside of national borders. As a result, there is now an increased emphasis on a global level on the need to develop effective instruments that will allow for seeking and rendering assistance with cross border evidence gathering. While law enforcement co-operation by way of informal agreement and otherwise remains an important component of international cooperation, there are inherent limits to it in that it will not generally extend to the use of compulsory measures. Similarly, court to court requests, particularly as between states of different legal traditions may be of limited application and can prove slow and time consuming. For this reason, many states are striving to adopt instruments and measures to allow for the rendering of formal mutual (legal) assistance in a direct and effective manner.²⁷¹

In general, MLA is a three-step process that involves (1) preparing for MLA, (2) drafting and (3) submitting a request for MLA.²⁷² Prior to drafting a request for MLA, the requesting authority decides whether to use the MLA channels or another intelligence or informal method of cooperation and determines the timing for submitting the request for MLA, the status of the authority requesting MLA, the type of assistance sought, and the legal basis for the request, as well as what criminal offence(s) are being investigated.²⁷³ The request for MLA must contain basic identification information, and the narrative section sets out the facts of the case, description of the assistance sought, objectives of the request, any procedures to be observed, and transcription of the criminal offences.²⁷⁴ Once prepared, the request may be transmitted via diplomatic channels (as the general rule), via central authorities or directly to the executing authority (if the applicable treaty or international agreement authorizes direct transmission).²⁷⁵

6.2 Legal Basis for MLA

The legal basis for mutual legal assistance can arise out of (1) a convention, (2) a unilateral treaty (one country to another) or a bilateral treaty (between multiple countries), (3) unilateral and bilateral agreements, and (4) domestic legislation. Executing a large number of unilateral or bilateral treaties or agreements can be expensive and time consuming, especially where there are no other treaty arrangements with a country. As an alternative,

²⁷¹ *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* (UNDOC), online:

<http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf>.

²⁷² Pedro Gomes Pereira, "Mutual legal assistance" in *Tracing Illegal Assets – A Practitioner's Guide* (Basel Institute on Governance, International Centre for Asset Recovery, 2015) at 53-65, online:

<https://forum.assetrecovery.org/sites/collective.localhost/files/publications/tracing_illegal_assets_manuscript_final_online.pdf>.

²⁷³ *Ibid* at 54.

²⁷⁴ *Ibid* at 58-59.

²⁷⁵ *Ibid* at 59-60.

some countries, like Australia, Thailand and Japan, have enacted domestic legislation authorizing mutual legal assistance to countries where there is no treaty.²⁷⁶ The assistance is usually premised on promises of reciprocity. Reciprocity is a promise between States that the requesting State will provide the requested State with the same assistance in the future. The terms and procedures for such assistance are similar to that found in treaties. However, only treaties can bind States under international law, and therefore legislation does not oblige the requested jurisdiction to assist the foreign requesting States.

6.3 Mutual Legal Assistance under UNCAC

Article 46 of UNCAC states:

1. State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.
3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
 - a) Taking evidence or statements from persons;
 - b) Effecting service of judicial documents;
 - c) Executing searches and seizures, and freezing;
 - d) Examining objects and sites;
 - e) Providing information, evidentiary items and expert evaluations;
 - f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
 - g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

²⁷⁶ "Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific" (ADB/OECD, 2007) at 32, online: <<http://www.oecd.org/site/adboecdanti-corruptioninitiative/mutuallegalassistanceextraditionandrecoveryofproceedsofcorruptioninasiaandthepacific.htm>>.

- h) Facilitating the voluntary appearance of persons in the requesting State Party;
 - i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
 - j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
 - k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.
4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.
- ...
27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.
- ...
29. The requested State Party:
- a) shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
 - b) may, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its

possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

6.4 Mutual Legal Assistance under OECD Anti-Bribery Convention

Article 9 states:

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

6.5 Request Processes and Procedures

Requesting assistance varies depending on the jurisdictions and the treaties, agreements or legislation in place. The request must be tailored to the requirements of the requested jurisdictions. The request must specify a legal basis for cooperation (i.e., through conventions, treaties, bilateral agreements, domestic legislation allowing international cooperation or promises of reciprocity). The request must also be related to a criminal matter, although assistance with non-conviction based confiscation may be possible. Some jurisdictions require charges to be filed or a final confiscation order before providing assistance with seizure or restraint of assets. UNODC developed a Mutual Legal Assistance Request Writer Tool to assist in the process.²⁷⁷

UNCAC Article 46 states the following with respect to the request process under the Convention:

Article 46 – Mutual legal assistance

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a

²⁷⁷ Online: <<http://www.unodc.org/mla/index.html>>.

treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

...

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.
14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.
15. A request for mutual legal assistance shall contain:
 - a) The identity of the authority making the request;
 - b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

- c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
 - d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
 - e) Where possible, the identity, location and nationality of any person concerned; and
 - f) The purpose for which the evidence, information or action is sought.
16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.
17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.
18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.
19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.
20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

...

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

...

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Similar mutual legal assistance provisions can be found in Article 18 of UNTOC.

6.6 Request Process in the United States

The details of the US MLA process are summarized at Section 5.4.1. The following is an excerpt from a 2011 document produced by the UNODC's Commission on Crime Prevention and Criminal Justice, *Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide*:

BEGINNING OF EXCERPT

I. INTRODUCTION

The Central or Competent Authority of a foreign country may request assistance from the United States in the gathering of evidence for criminal investigations, prosecutions and proceedings related to criminal matters. All requests, whether they are (1) bilateral treaty or multilateral convention requests, (2) letters rogatory (court issued non-treaty requests) or (3) non-treaty letters of request are presented to the Office of International Affairs of the Criminal Division of the Department of Justice (OIA), the designated U.S. Central Authority. As further explained below, all three of these types of requests are generally handled and processed in a similar manner by OIA.

(a) Requests Made Under a Treaty/Convention

Requests made under a Mutual Legal Assistance Treaty (MLAT) are executed pursuant to the terms of the treaty and United States domestic law, specifically Title 28 United States Code Section 1782 and Title 18 United States Code Section 3512.

After an MLAT request has been reviewed by OIA, it is generally sent to one of the 94 federal U.S. Attorney's Offices for execution. The request is sent to the U.S. Attorney's Office where the evidence or witness is located. The usual practice is for the Assistant U.S. Attorney in that district to apply to the U.S. district court for an order appointing him or her as a commissioner to execute the foreign request. Among the powers that are granted the commissioner under U.S. law (Title 28 United States Code Section 1782) is the authority to issue subpoenas to compel the appearance of a witness to provide testimony or produce documents. Once the requested evidence is obtained by the commissioner, it is transmitted to OIA and then on to the foreign authorities, in accordance with the terms of the treaty.

Generally, the procedures used in providing assistance under multilateral conventions are very similar to the procedures described above and are further dictated by the terms of the underlying agreements.

(b) Letters Rogatory Requests (Court-Issued Non-Treaty Requests)

Absent an MLAT or other applicable treaty, letters rogatory from a foreign court should be forwarded to OIA for execution. Pursuant to Title 28 United States Code Section 1782, requests may be executed on a discretionary basis, even if there is no treaty or multilateral agreement with the requesting country. For the most part, the United States will provide cooperation. Assistance can be provided at the investigative stage of the proceedings. Section 1782 is broad in scope and can be used to obtain assistance such as: (1) production of government or corporate records; (2) witness interviews; and (3) handwriting exemplars. Generally, almost all evidence requiring the use of compulsory process (subpoena or judicial order) may be sought in accordance with U.S. law.

(c) Non-Treaty Letters of Request

Just as with a letter rogatory, absent an MLAT or other applicable multilateral convention, a letter of request from a foreign authority should be forwarded to OIA for execution. Pursuant to Title 28 United States Code Section 1782, these requests may be executed on a discretionary basis. Generally, the United States makes its best efforts to provide cooperation.

(d) Dual Criminality is Generally Not Required

As a general rule, dual criminality is not required when seeking legal assistance from the United States. However, when seeking a search warrant or other intrusive measure in the United States as part of an MLAT request, pursuant to Title 18 United States Code Section 3512, dual criminality is required. There may also be some instances in which an MLAT request seeks the restraint and forfeiture of assets where dual forfeitability is required. Also, some requests may relate to conduct that is protected under U.S. laws regarding free speech and may be denied on that basis.²⁷⁸

END OF EXCERPT

The 2016 FATF Mutual Evaluation Report concluded that the United States provides constructive and timely mutual legal assistance across the range of international cooperation requests, including in relation to money laundering and asset forfeiture.²⁷⁹ However, there may be barriers to obtaining beneficial ownership information in a timely way, and tax information is not generally available to foreign law enforcement authorities for use in non-tax criminal investigations.²⁸⁰ The Report recommends, in particular, allocating more resources to process the large number of MLA and extradition requests, as well as taking urgent steps to ensure that adequate, accurate and current information about beneficial owners of legal entities is available in a timely manner.²⁸¹

As of July 2015, the US was actively seeking MLA in 1,542 criminal matters related to money laundering, terrorist financing and asset forfeiture.²⁸² Also, between 2009 and 2014, the US received 1,541 MLA requests in matters involving money laundering, terrorist financing and asset forfeiture.²⁸³ In money laundering and asset forfeiture matters, from 2009 to 2014, the most MLA requests were received from Switzerland, Mexico, the United Kingdom and the Netherlands, while the US sought MLA primarily from Switzerland, the United Kingdom, the Netherlands and Canada.²⁸⁴

²⁷⁸ Commission on Crime Prevention and Criminal Justice, “Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide” (United Nations Office on Drugs and Crime, 2011) at 56–57, online: <http://www.coe.int/T/dghl/standardsetting/pc-oc/PCOC_documents/8_MLA_step-by-step_CN152011_CRP.6_eV1182196.pdf>. Reprinted with the permission of the United Nations.

²⁷⁹ Financial Action Task Force, (2016), at 163-164, online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>>. For more details on mutual legal assistance in the context of anti-money laundering, see Section 6.3.1 of Chapter 4.

²⁸⁰ *Ibid* at 163.

²⁸¹ *Ibid*.

²⁸² *Ibid* at 168.

²⁸³ *Ibid* at 165.

²⁸⁴ *Ibid* at 165, 168.

International asset sharing is encouraged by US authorities and is available even when a country makes no direct request for a share of forfeited proceeds of crime.²⁸⁵ Since 1989, more than \$257 million in forfeited assets has been transferred to 47 countries from the Department of Justice Asset Forfeiture Funds (DOJ-AFF), and, since 1994, the Treasury Forfeiture Fund (TFF) has transferred more than \$37 million to 29 countries.²⁸⁶

Overall, the Report concluded that the United States is “largely compliant” with the FATF Recommendations 37 (“Mutual legal assistance”) and 38 (“Mutual legal assistance: freezing and confiscation”). The following is an excerpt from the report assessing the US anti-money laundering and combating the financing of terrorism (AML/CFT) regime:²⁸⁷

BEGINNING OF EXCERPT

Recommendation 37 – Mutual legal assistance

In its 3rd MER [Mutual Evaluation Report], the U.S. was rated largely compliant with these requirements. The technical deficiency related to potential barriers to granting MLA request linked to the laundering of proceeds that are derived from a designated predicate offense that is not covered.

Criterion 37.1 – The U.S. has a legal basis that would permit for the rapid provision of a wide range of MLA in relation to the investigation, prosecution and related proceedings for ML [money laundering], TF [terrorism finance] and associated predicate offenses. A statutory legal framework applies to all MLA requests regardless of whether they are based on a letter rogatory, or letter of request: 18 USC §3512. MLA treaties (MLATs) themselves are also a legal framework under which MLA requests may be executed. Where a bilateral treaty is not in place, the basis for cooperation may often be found in multilateral or regional conventions,²⁸⁸ and agreements.²⁸⁹ Additionally, U.S. courts are authorized to provide direct MLA to international tribunals: 28 USC §1782.

²⁸⁵ *Ibid* at 167.

²⁸⁶ *Ibid*.

²⁸⁷ Financial Action Task Force, (2016) at 245-249, online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-United-States-2016.pdf>>.

²⁸⁸ [128] Including, but not exclusively: the Inter-American Convention on Mutual Assistance in Criminal Matters (“The OAS MLAT”), the Vienna Convention [arts 7-8], the Convention Combating Bribery of Foreign Public Officials in International Business Transactions (OECD) [arts. 9, 11]; the International Convention for the Suppression of the Financing of Terrorism [arts. 12-16]; the Palermo Convention [arts. 18, 21]; Convention Against Corruption (Merida) [arts. 46-49]; Council of Europe Convention on Cybercrime [arts. 25-35].

²⁸⁹ [129] As of May 2015, the U.S. had 70 such accords in place with 85 territories.

Criterion 37.2 – The U.S. has a central authority for transmitting and executing MLA requests – DOJ-OIA [DOJ Office of International Affairs] through which must be channeled all requests in criminal matters for legal assistance requiring compulsory measures. DOJ-OIA has a prioritisation system in place for incoming and outgoing requests by which Treaty requests are prioritized above non-treaty requests. Crimes of violence, including terrorism cases, are given a high priority. High priority cases are dealt with by order of arrival or urgency (e.g. trial deadline). There is flexibility to deviate from these prioritizations in exceptional circumstances. However, due to their current IT system, the U.S. is only able to monitor progress and time taken to handle a request.

Criterion 37.3 – MLA is not prohibited or made to be subject to unduly restrictive conditions. MLA may be provided to foreign investigative authorities in criminal matters, including before a charge is laid and does not specify dual criminality as a condition: 18 USC §3512. Some restrictions may be provided for in treaties and conventions. Where dual criminality applies, this is mainly restricted to requests for assistance requiring the application of compulsory or coercive measures.

Criterion 37.4 – The U.S. does not refuse requests for MLA on the sole ground that the offense is also considered to involve fiscal matters, even where the applicable MLATs exclude fiscal matters from the scope of assistance²⁹⁰. Separate Tax Treaties or Conventions on Tax Information Exchanges also provide additional information exchange mechanisms, including on tax offenses. Likewise, MLA requests are not refused on the sole grounds of secrecy or confidentiality requirements on FIs [financial institutions] or DNFBP [designated non-financial businesses and professions], except where information is protected by the attorney-client privilege. Attorney-client privilege may be overcome if it can be shown that the attorney was actively participating in the criminal activities of his/her client.

Criterion 37.5 – The U.S. maintains the confidentiality of MLA requests received, subject to fundamental principles of domestic law, in order to protect the integrity of the investigation or inquiry. Most MLATs signed by the U.S. contain confidentiality provisions that can be invoked by the requested State. Additionally, subpoenas for documents or testimony, restraining orders, and other compulsory measures may be issued or undertaken with a court order sealing the matter from public disclosure for a certain period of time. Where legal process is required, sealing orders are routinely

²⁹⁰ [130] For instance the MLATs between the U.S. and Switzerland, the Bahamas and the Cayman Islands exclude fiscal matters, including offences involving taxes, customs duties, governmental monopoly charges and/or exchange control regulations, from the scope of available assistance. Assistance is however generally available for criminal tax matters relating to the proceeds from criminal offences.

issued on the basis of the country's invocation of a treaty's confidentiality provision and factual circumstances that counsel confidentiality.

Criterion 37.6 – Where MLA requests do not involve coercive actions, the U.S. does not make dual criminality a condition for rendering assistance. Most of the bilateral MLATs do not require dual criminality as a condition for granting assistance. Where dual criminality is a condition, this is usually restricted to requests for compulsory or coercive measures. In such instances, gaps in the ML offenses can adversely impact MLA particularly when the foreign request is based on ML activity derived from a predicate offense that does not fall within the definition of SUA [specified unlawful activity] or the foreign request does not identify the underlying predicate offense (see R.3 [*Money laundering offense*] and R.36 [*International instruments*]). Conduct-based dual criminality applies when issuing search warrants necessary to execute a foreign request: 18 USC 3512(e). There is no dual criminality requirement for most court orders issued pursuant to 18 USC §3512 in aid of requests for assistance from foreign authorities.

Criterion 37.7 – Where dual criminality applies, technical differences between the offense's categorization in the requesting State do not prevent the U.S. from providing the requested assistance. It is enough to determine that the underlying acts are criminalized in both States. The U.S. has not denied any MLA requests on the basis of dual criminality (ML, TF and asset forfeiture).

Criterion 37.8 – The powers and investigative techniques required under R.31 and which are otherwise available to domestic competent authorities are also available for use in response to MLA requests. When a compulsory process is necessary, an OIA [Office of Intelligence and Analysis] attorney or a Federal prosecutor is routinely appointed as a commissioner to seek any order necessary to execute the request: 18 USC §3512. Where LEAs have entered into case specific MOUs with other countries for ML and TF investigative assistance, additional investigative tools and powers may be used. However, the interception of communications can only be undertaken as a part of a U.S. investigation.

Weighting and Conclusion:

The minor shortcomings identified in R.3 [*Money laundering offense*] could limit assistance when dual criminality applies. The interception of communications can only be undertaken as part of a U.S. investigation. The OIA case management system is being improved to facilitate the electronic monitoring of the processing of outgoing and incoming requests process and the monitoring of the time taken to handle these.

Recommendation 37 is rated largely compliant

Recommendation 38 – Mutual legal assistance: Freezing and Confiscation

In its 3rd MER, the U.S. was rated largely compliant with these requirements. The technical deficiency related to potential barriers to granting MLA request linked to the laundering of proceeds that are derived from a designated predicate offense which is not covered.

Criterion 38.1 – The U.S. has a range of authorities to take action in response to requests by foreign countries to identify, freeze, seize or confiscate laundered property, proceeds, and instrumentalities used or intended for use in ML, TF or associated predicate offenses, or property of corresponding value including:

- (a) Providing assistance in identifying and tracing assets mainly via informal police-to-police communication and information sharing networks. Additionally, the U.S. may obtain evidence for court proceedings on behalf of a foreign request including testimony, documents, or tangible items: 18 USC 3512 (see R.37).
- (b) Restraining or seizing assets located in the U.S. upon the request of a foreign country for preservation purposes: 28 USC 2467(d)(3) A(i).
- (c) Enforcing foreign confiscation orders. The U.S. may also restrain untainted property as long as these are subject to forfeiture and provided all other requirements are met: 28 USC 2467.
- (d) Enforcing a foreign confiscation judgment on the condition that the requesting country is party to the Vienna Convention, a MLAT or other international agreement with the U.S. that provides for confiscation assistance. The offense must: i) be an offense for which forfeiture would be available under U.S. Federal law if the criminal conduct occurred in the U.S.; or ii) is a foreign offense that is a predicate for a U.S. ML offense: 28 USC 2467 (a)(2) & 18 USC 1956(c)(7)(B).
- (e) Initiating its own civil forfeiture proceedings against any property, proceeds and instrumentalities: 18 USC 981(b)(4). In such cases, the U.S. can proceed if it can state sufficiently detailed facts to support a reasonable belief that the property would be subject to forfeiture under U.S. Federal law, based on its own evidence and evidence from the requesting State, of a predicate offense for confiscation under U.S. law which would make that the property subject to confiscation.

Gaps in the ML offenses and the requirement for dual criminality are potentially an issue when the predicate offense is not one covered in the U.S. However, no MLA request has been denied on the basis of dual criminality (ML, TF and asset forfeiture).

Criterion 38.2 – The U.S. has authority to provide assistance to requests for cooperation made on the basis of non-conviction-based (NCBF) proceedings and related provisional measures 18 USC 981(b)(4)(A)-(B). Provisional measures may also be carried out under the enforcement of a foreign judgment any time, before or after, the initiation of enforcement proceedings by a foreign nation, including NCBF proceedings: 28 USC 2467(d)(3)(A)(1).

Criterion 38.3 – The U.S. has arrangements for coordinating seizure and confiscation actions with other countries; and for managing and disposing of property frozen, seized, or confiscated whether by on its own behalf or on behalf of a foreign government.

Criterion 38.4 - The U.S shares the proceeds of successful forfeiture actions with countries that made possible, or substantially facilitated, the forfeiture of assets under U.S. law as set out in free-standing international asset sharing agreements or asset sharing provisions within mutual legal assistance agreements and multilateral treaties by 18 USC §981(i), 21 USC §881(e)(1)(E), and 31 USC §9703(h)(2). AFMLS may negotiate case specific, bilateral asset sharing arrangements even in the absence of specific agreement/treaty.

Weighting and Conclusion:

In the context of dual criminality requirements, the gaps identified under R.3 [*Money laundering offense*] may be a barrier to providing freezing and confiscation assistance, particularly when the predicate offense is not covered in the U.S.

Recommendation 38 is rated largely compliant.

END OF EXCERPT

6.7 Request Process in the United Kingdom

The details of the UK MLA process are summarized at Section 4.2. The following is an excerpt from a 2011 document produced by the Council of Europe Commission on Crime Prevention and Criminal Justice, *Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide*:

BEGINNING OF EXCERPT

I. INTRODUCTION

The following gives a brief overview of the way in which Mutual Legal Assistance (MLA) can be requested from the UK. For further guidance please visit:

<http://police.homeoffice.gov.uk/operational-policing/mutual-legal-assistance/>.

A foreign state may request MLA from the UK via a letter of request to one of the central authorities in the UK. Requests are not required by the UK to come via diplomatic channels.

a) Countries the UK can assist

The UK can assist any country or territory in the world, whether or not that country is able to assist the UK. The UK can provide most forms of legal assistance without bilateral or international agreements. Where a treaty or Convention imposes specific conditions or procedures on the provision or requesting of MLA the UK expects such conditions or procedures to be adhered to.

b) Dual Criminality is Generally Not Required

As a general rule, dual criminality is not required when seeking MLA from the UK except for certain types of assistance. Requests which the UK require dual criminality for are:

- (a) search and seizure
- (b) restraint and confiscation of assets²⁹¹

END OF EXCERPT

²⁹¹ *Ibid* at 50. © 2011 United Nations. Reprinted with the permission of the United Nations.

6.8 Request Process in Canada

The details of Canada's MLA process are summarized at Section 5.4.3. The following is an excerpt from a 2011 document produced by the Council of Europe Commission on Crime Prevention and Criminal Justice, *Requesting Mutual Legal Assistance in Criminal Matters from G8 Countries: A Step-by-Step Guide*:

BEGINNING OF EXCERPT

A foreign state may request assistance from Canada in the gathering of evidence or the enforcement of some criminal orders (seizure orders, confiscation orders, fines) through three separate routes: (i) treaty and convention requests, (ii) letters rogatory (court issued non-treaty letter of request) and (iii) non-treaty requests. In rare circumstances, Canada may enter into an administrative arrangement with a non-treaty country to give effect to an individual request for assistance, for a time-limited period. The widest assistance can be provided for treaty or convention requests. More limited assistance is available for letters rogatory and non-treaty requests.

(i) Requests Made Under a Treaty/Convention

Requests made under a treaty or convention, and which seek court-ordered assistance, are executed under Canada's *Mutual Legal Assistance in Criminal Matters Act*. The Act gives Canadian courts the power to issue orders to gather evidence for a requesting State, including by search warrant; to locate a person who is suspected of having committed an offence in the requesting State; and to enforce orders of seizure and confiscation. The Act permits assistance to be rendered at any stage of a criminal matter, from investigation to appeal.

In most cases, before issuing a court order to give effect to a request for assistance, the Canadian court must be satisfied, on reasonable grounds, that an offence has been committed and that the evidence sought from Canada will be found in Canada. Therefore, when seeking assistance that requires the issuance of compulsory measures (e.g. production orders, search warrants, orders compelling statements/testimony), a requesting country must provide Canada with sufficient and clear information to establish a connection between the foreign investigation/prosecution and the evidence or assistance requested.

(ii) Letters Rogatory Requests (Court-Issued Non-Treaty Requests)

Where there is no treaty/convention in place between Canada and the requesting State, it is still possible for the requesting State to seek some court-ordered assistance from Canada. Under the *Canada Evidence Act*, orders compelling witnesses to give evidence (including by video-link) and to produce records can be issued at the request of a foreign state. However, this mechanism requires that two essential conditions be met: (1) that there be a criminal matter pending before the foreign judge, court or tribunal; and (2) that the foreign judicial body wishes to obtain the evidence sought (i.e. the request must be made by the foreign judge, court or tribunal). It is important that this be clearly stated in the letters rogatory request. In addition, the request should include information that indicates how the evidence sought is relevant to the foreign proceedings.

(iii) Non-Treaty Letters of Request

To the extent possible, Canada will also execute non-treaty requests for assistance, as well as those that do not satisfy the requirements of the *Canada Evidence Act* (i.e. letters rogatory requests). However, the assistance that is generally available in response to a non-treaty letter of request is voluntary in nature (e.g. taking voluntary statements from persons; obtaining publicly available documents; or serving documents).

(iv) Dual Criminality is Generally Not Required

As a general rule, dual criminality is not required when seeking mutual assistance from Canada, unless the treaty with the requesting State requires it. Note, however, that with respect to requests to enforce seizure and forfeiture orders, dual criminality is always required under Canadian law.²⁹²

END OF EXCERPT

The 2016 FATF Mutual Evaluation Report concluded that Canada is “largely compliant” with FATF Recommendations 37 (“Mutual legal assistance”) and 38 (“Mutual legal assistance: freezing and con-fiscation”). The following is an excerpt from the report assessing the Canadian anti-money laundering and combating the financing of terrorism (AML/CFT) regime:

²⁹² *Ibid* at 3-4. © 2011 United Nations. Reprinted with the permission of the United Nations.

BEGINNING OF EXCERPT

Recommendation 37 – Mutual legal assistance

In its third MER [Mutual Evaluation Report], Canada was rated LC [Largely Compliant] with former R.36 and SR. V due to concerns about Canada's ability to handle MLA requests in a timely and effective manner and about the lack of adequate data that would establish effective implementation. Canada's legal framework for MLA was supplemented by Canada's new Protecting Canadians from Online Crime Act (PCOCA, in force 9 March 2015). The requirements of the (new) R.37 are more detailed.

Criterion 37.1 – Canada has a sound legal framework for international cooperation. The main instruments used are the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA); the relevant international conventions, the Extradition Act; 57 bilateral treaties on MLA in criminal matters, extradition and asset sharing; and MOUs for the other forms of assistance to exchange financial intelligence, supervisory, law enforcement or other information with counterparts. These instruments allow the country to provide rapid and wide MLA. In the absence of a treaty, Canada is able to assist in simpler measures (interviewing witnesses or providing publicly available documents), or, based in the MLACMA, to enter in specific administrative arrangements, that would provide the framework for the assistance.

Criterion 37.2 – Canada uses a central authority (the Minister of Justice, assisted by the International Assistance Group – IAG) for the transmission and execution of requests. There are clear processes for the prioritization and execution of mutual legal assistance requests, and a system called “iCase” is used to manage the cases and monitor progress on requests.

Criterion 37.3 – MLA is not prohibited or made subject to unduly restrictive conditions. Canada provides MLA with or without a treaty, although MLA without a treaty is less comprehensive. Requests must meet generally the “reasonable grounds to believe standard, in relation for example to MLACMA ss 12 (search warrant) and 18 (production orders). However, certain warrants (financial information, CC, s.487.018, tracing communications, and new s.487.015) may be obtained on the lower standard of “reasonable ground to suspect.”

Criterion 37.4 – Canada does not impose a restriction on MLA on the grounds that the offense is also considered to involve fiscal matters, nor on the grounds of secrecy or confidentiality requirements on FIs or DNFBPs [Designated Non-Financial Businesses and Professions].

Criterion 37.5 – MLACMA, s.22.02 (2) states that the competent authority must apply *ex parte* for a production order that was requested in behalf of a state of entity. In

addition to that, the international Conventions signed, ratified and implemented by Canada include specific clauses requiring the confidentiality of MLA requests be maintained.

Criterion 37.6 – Canada does not require dual criminality to execute MLA requests for non-coercive actions.

Criterion 37.7 – Dual criminality is required for the enforcement of foreign orders for restraint, seizure and forfeiture of property situated in Canada. MLACMA, ss.9.3 (3) (a) and (b) and 9.4 (1) (3) (5) (a) (b) and (c) allow the Attorney General of Canada to file the order so that it can be entered as a judgment that can be executed anywhere in Canada if the person has been charged with an offense within the jurisdiction of the requesting state, and the offense would be an indictable offense if it were committed in Canada. This applies regardless of the denomination and the category of offenses used.

Criterion 37.8 – Most, but not all of the powers and investigative techniques that are at the Canadian LEAs' [law enforcement agencies'] disposal are made available for use in response to requests for MLA. The relevant powers listed in core issue 37.1 are available to foreign authorities via an MLA request, including the compulsory taking of a witness statement (according to MLACMA, s.18). Search warrants are not possible to obtain via letters rogatory. However, the Minister may approve a request of a state or entity to have a search or a seizure, or to use any device of investigative technique (MLACMA, s.11). The competent authority who is provided with the documents of information shall apply *ex parte* for the warrant to a judge of the province in which the competent authority believes evidence may be found. Regarding the investigative techniques under core issue 37.2, undercover operations and controlled delivery are possible through direct assistance between LEAs from the foreign country and Canada. Production orders to trace specified communication, transmission data, tracking data and financial data are possible by approval of the Minister in response to a foreign request. The authorities will not grant interception of communications (either telephone, emails or messaging) solely on the basis of a foreign request (this special investigative technique is not provided for in the MLACMA and will not be provided for in bilateral agreements. According to MLACMA, s.8.1, requests made under an agreement may only relate to the measures provided for in the bilateral agreement). The only possibility to intercept communications is within a Canadian investigation in the case of organized crime, or a terrorism offense, which would require that the criminal conduct occurred, at least in part, in Canadian territory (including a conspiracy to commit an offense abroad). Foreign orders for restraint, seizure and confiscation can be directly enforced by the Attorney General before a superior court, as if it were a Canadian judicial order.

Weighting and Conclusion

The range of investigative measures available is insufficient.

Canada is largely compliant with R.37.***Recommendation 38 – Mutual legal assistance: freezing and confiscation***

Canada was rated LC with R.38 in the 2008 MER due to the limited evidence of effective confiscation assistance, the rare occurrence of sharing of assets and the fact that Canada executed requests to enforce corresponding value judgments as fines. The framework remains the same.

Criterion 38.1 – Canada has the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize or confiscate laundered property and proceeds from crime (MLACMA, ss.9.3, 9.4 and CC, ss.462.32, 462.33), and instrumentalities used in or intended for use in ML [money laundering], predicate offenses or TF [terrorist financing]. There is, however, no legal basis for the confiscation of property of corresponding value. As was the case during its previous assessment, Canada still treats value-based forfeiture judgement as fines, which has limitations and cannot be executed against the property. If the fine is not paid, it can be converted into a prison sentence. Regarding the identification of financial assets new CC, s.487.018 allows the production of financial registration data in response to requests from foreign states.

Criterion 38.2 – In Canada, MLA is based on the federal power in relation to criminal law. Therefore, the enforcement of some foreign non-conviction based confiscation orders is not possible under the MLACMA because they were not issued by a “court of criminal jurisdiction.” However, in cases where the accused has died or absconded before the end of the foreign criminal proceedings, the MLACMA applies because the matter would still be criminal in nature. Due to Canada’s constitutional division of powers, the Government of Canada cannot respond to a request for civil forfeiture as such requests fall within the jurisdiction of Canada’s provinces. However, most of the Canadian provinces have already adopted legislation on a civil confiscation regime. Even if Canada is not able to provide assistance to requests for cooperation based on NCB proceedings, non-conviction based confiscation is possible under Canadian law. Should a foreign state seek to recover assets from Canada through NCB asset forfeiture, it must hire private counsel to act on its behalf in the province where the property or asset is located.

Criterion 38.3 – a) No particular legal basis is required in Canada for the coordination of seizure and confiscation actions. It is a matter primarily for national and foreign

police authorities at the stage of seizure. Thus, via direct police-to-police contact, arrangements are made in relation to any relevant case.

b) The Seized Property Management Act sets out the mechanisms for the management and, when necessary, the disposition of property restrained, seized and forfeited. The Minister of Public Works and Government Services is responsible for the custody and management of all property seized at the federal level. The Minister may make an interlocutory sale of the property that is perishable or rapidly depreciating, or destroy property that has little or no value. Property seized in the provincial level is managed by the provincial prosecution services.

Criterion 38.4 – Canada shares confiscated property on a mutual agreement basis, under the Seized Property Management Act, s.11. Canada has 19 bilateral treaties regarding the sharing and transfer of forfeited or confiscated assets and equivalent funds.

Weighting and Conclusion

The seizure and confiscation regime has a deficiency, which is the impossibility of confiscation of equivalent value.

Canada is largely compliant with R.38.²⁹³

END OF EXCERPT

Further Reading

For more on the law of MLA in Canada, see Robert J Currie and Dr Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed (Irwin Law, 2013).

6.9 Request Process for Asia-Pacific Countries

Many Asia and Pacific countries experience significant challenges in making MLA requests to other countries and responding to MLA requests that they receive from other countries. In 1999, some jurisdictions in the Asia-Pacific region began cooperating with each other through the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. As of 2017, there are now 31 members of the initiative who act in regional cooperation. In 2005, the Initiative

²⁹³ Financial Action Task Force, (2016), at 196-198, online: <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>>.

identified ineffective MLA systems as a serious obstacle to fighting corruption. In 2007, the ADB and OECD published a detailed Report on the problems and suggestions for improvement. That Report has now been followed up by a 2017 ADB/OECD report entitled “Mutual Legal Assistance in Asia and the Pacific: Experiences in 31 Jurisdictions.”²⁹⁴ This Report focuses on common challenges, best practices, and practical tools. Annex B of the Report also provides statistical data from each country on MLA requests made, received, and rendered.

Further Reading

For a detailed account of mutual legal assistance requests in Asia-Pacific countries, see “Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific” (Asian Development Bank/OECD Anti-Corruption Initiative for Asia and the Pacific, 2007) at 61–72, online:

<<http://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf>>.

For more on the request process in Hong Kong, see Wayne Patrick Walsh, “Processing Requests for International Recovery of Ill-Gotten Assets in Hong Kong, China” UNAFEI Resource Materials Series No 83 (UNAFEI, 2011), online:

<<http://www.unafei.or.jp/english/pages/RMS/No83.htm>>.

6.10 Grounds for Refusal of Mutual Legal Assistance Request under UNCAC and OECD Anti-Bribery Convention

There are several grounds upon which a jurisdiction can refuse a request for mutual legal assistance. The specific grounds for refusal of a request for mutual legal assistance in the US, UK and Canada are summarized in Sections 5.4.1, 5.4.2 and 5.4.3.

1. Dual Criminality. A request may be refused where the requested jurisdiction does not criminalize the conduct that the requesting jurisdiction is investigating or prosecuting. For instance, the offences of illicit enrichment and bribery in the public sector have not been criminalized in all jurisdictions. The problem may be resolved by employing a conduct-based approach. This approach involves re-examining the criminal conduct in order to fit the conduct into the criminal law framework of the requested jurisdiction. Some countries, for example Canada, do not require dual criminality for most requests based on treaties.

²⁹⁴ Online: <<https://www.oecd.org/corruption/ADB-OECD-Mutual-Legal-Assistance-Corruption-2017.pdf>>.

(a) UNCAC Article 46(9) states the following with respect to the dual criminality requirement:

- 9.(a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;
- (b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;
- (c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(b) OECD Anti-Bribery Convention in article 9 states:

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

2. Essential Interests. Refusal may occur where the execution of the request could prejudice the “essential interests” of the requested jurisdiction. These interests could include sovereignty, security, burden on public resources and public order. Bilateral treaties may specify the essential interests that allow parties to deny mutual legal assistance. UNCAC also allows denial on grounds of essential interests. Article 46(21)(b) states the following:

21. Mutual legal assistance may be refused:

- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests.

The meaning of the terms “essential interests” or “public interests” is not precise, which affects the effectiveness of international cooperation treaties. Article 5 of the OECD Convention recognizes that the investigation and prosecution of corruption cases can be impacted by “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

3. Assets of *de minimis* value. Because mutual legal assistance is resource intensive, jurisdictions can refuse to assist where the assets involved are *de minimis*. UNCAC Article 55(7) states:

Article 55 – International cooperation for purposes of confiscation

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.

4. Lack of information. Requests must provide sufficient evidence and information to enable the requested jurisdiction's authorities to meet their own evidentiary thresholds in their domestic courts (see Art. 46(21)(a)).

5. Lack of due process in requesting jurisdiction. UNCAC Article 46(21)(d) states:

21. Mutual legal assistance may be refused:

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

6. Double jeopardy and ongoing proceedings or investigations in the requested jurisdiction or severe penalty deemed to be too harsh. A requested State may deny assistance if the accused person has been acquitted or punished for the conduct underlying the request for assistance. They may also deny assistance if there are ongoing proceedings or investigations in the requested State concerning the same crime for which the requesting State seeks assistance.

7. Immunity. Some public officials are provided with immunity, but immunity can be waived or subsequently repealed. For instance, in the Ferdinand Marcos case, the successive Philippines government enabled action to be taken against him by providing a waiver of immunity.

8. Bank Secrecy is not a ground for refusing mutual legal assistance. UNCAC Articles 46(8), (22) and 40 state the following:

Article 46 – Mutual legal assistance

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.
22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

Article 40 – Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

OECD Anti-Bribery Convention states in article 9(3):

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

9. Reasons must be provided for refusing mutual legal assistance.

UNCAC Article 46(23) states:

23. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may also be postponed.

UNCAC Article 46(25) and (26) states:

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

11. Power to Override by Bilateral Agreement. Paragraphs 9 to 29 of UNCAC Article 46 can be overridden by a bilateral agreement. Paragraph 7 of Article 46 provides that those sections only apply “to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.”

6.11 Barriers to MLA

As discussed at Section 5.2.3, MLA procedures are challenging for developing nations and nearly impossible for failing states due to the complexity and variety of formatting requirements. The MLA process is time-consuming and often hindered by the difficulty of tracing the location and ownership of assets. Egypt has expressed frustration with the MLA

system since the uprising against Hosni Mubarak, complaining of both the lack of response by some requested countries and the barriers to MLA put up by others.²⁹⁵

When central authorities for MLA are themselves corrupt, their potential to wreak havoc in MLA procedures is boundless. An example is provided by the case of James Ibori, a former governor of Delta State in Nigeria who allegedly stole somewhere between US\$300 million and US\$3.4 billion while in public office. Investigations into Ibori by British law enforcement began in 2005. Assistance was provided by Nigeria's Economic and Financial Crimes Commission (EFCC) during the early stages of the investigation. In Nigeria, the Attorney General is the central authority for MLA purposes, and part way through the investigations, Michael Aondoakaa was appointed as the new Attorney General. Aondoakaa actively worked against investigation and prosecution of Ibori, among others, and, in his capacity as central authority, demanded that any evidence provided to the UK by the EFCC be returned. Although Aondoakaa was dismissed in 2010, he provides an example of the potential problems involved in entrusting MLA responsibilities to central authorities in corrupt states.²⁹⁶

The Abacha Loot

Barriers exist even in relatively successful cases of asset recovery. The Abacha case in Nigeria provides an example of a fairly successful asset recovery effort, although many hurdles were encountered along the way. General Sani Abacha was Nigeria's last military dictator and allegedly pilfered between \$3 billion and \$5 billion from the country. Nigeria began its efforts to recover the "Abacha loot" in 1999 when it requested Switzerland to assist in freezing Abacha's accounts.

Daniel and Maton describe the successes and challenges encountered in the Abacha saga.²⁹⁷ At the time Daniel and Maton wrote their article in 2013, about \$2.3 billion had been recovered by Nigeria, and other funds have been recovered since then. For example, after sixteen years, Swiss proceedings relating to the Abacha loot were concluded in March 2015 with a decision to return €360 million to Nigeria.

According to Daniel and Maton, Nigeria's ability to maintain political will from 1999 to the present has contributed greatly to successes in the asset recovery process. Nigeria also set up a Special Investigative Panel that uncovered valuable information to assist in MLA requests. In Switzerland, Nigeria was able to take part in proceedings through the *partie civile* procedure. This allowed Nigeria to persuade the court that the Abacha family was a criminal organization, thereby shifting the burden of proof to the Abachas to show their funds were legitimate. Since the Abachas were unable to do so, Nigeria recovered \$0.5 billion. Nigeria promised to devote the money to projects for the benefit of the Nigerian people and the

²⁹⁵ Daniel & Maton (2013) at 310.

²⁹⁶ *Ibid* at 307. See also UN Digest (2015) at 11, 70.

²⁹⁷ *Ibid* at 299–303.

World Bank was appointed as trustee to ensure the funds were used properly. These proceedings lasted six years in total.

Along with these relative successes, Daniel and Maton describe the many challenges encountered during the asset recovery process. Responses to MLA requests were often unhelpful. For example, the UK took four years to provide the information requested by Nigeria. During this time, the Abacha family brought two applications for judicial review in the UK, slowing the process. The Abachas also mounted many challenges to MLA requests in other jurisdictions, maintaining apparently endless funding for such legal battles. The process of asset recovery was also hindered by Nigerian court judgments that were likely the product of bribes. For example, a Nigerian court complicated the MLA process in the UK by declaring MLA requests unconstitutional. Liechtenstein's Chief Examining Magistrate was also ordered by a court to refrain from interviewing Abacha's eldest son on the basis that such an interview would be against the rule of law and infringe sovereignty. In June 2014, however, Liechtenstein succeeded in returning \$227 million of the Abacha loot to Nigeria. In order to obtain this recovery and end legal challenges against the Liechtenstein proceedings by the Abacha family, Nigeria agreed to drop charges against Abacha's eldest son.

Further Reading

For an in-depth discussion of barriers to MLA and asset recovery and recommendations for success, see Stephenson et al., (2011), online:

[https://star.worldbank.org/star/sites/star/files/Barriers to Asset Recovery.pdf](https://star.worldbank.org/star/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf).