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Consideration of the draft United Nations Convention against Corruption, with particular emphasis on articles 2 (remaining definitions), 3, 4, 20, 30, 32-39 and 40-85

Global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption**

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I. Introduction

1. In its resolution 55/61 of 4 December 2000, the General Assembly recognized that an effective international legal instrument against corruption was desirable; decided to begin the development of such an instrument; and requested the Secretary-General to convene an intergovernmental open-ended expert group to examine and prepare draft terms of reference for the negotiation of the future legal instrument against corruption.
2. In its resolution 55/188 of 20 December 2000, on preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin, the General Assembly invited the intergovernmental open-ended expert group to examine the question of illegally transferred funds and the repatriation of such funds.
3. In its resolution 56/260 of 31 January 2002, the General Assembly requested the Ad Hoc Committee for the Negotiation of a Convention against Corruption, in developing the draft convention, to adopt a comprehensive and multidisciplinary approach and to consider a series of indicative elements, among which were preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds.
4. On the recommendation of the Commission on Crime Prevention and Criminal Justice, the Economic and Social Council adopted resolution 2001/13 of 24 July 2001 on strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning such funds, in which the Council requested the Secretary-General to prepare for the Ad Hoc Committee a global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption, and its impact on economic, social and political progress, in particular in developing countries, and to include in his study innovative ideas regarding appropriate ways and means of enabling the States concerned to obtain access to information on the whereabouts of funds belonging to them and to recover such funds.
5. On 21 June 2002, during the second session of the Ad Hoc Committee, a one-day technical workshop on asset recovery was held with a view to providing interested participants with technical information and specialized knowledge on the complex issues involved in the question of asset recovery. The workshop was structured along major thematic areas, corresponding to the phases of a hypothetical case study: (a) transfer abroad of funds or assets of illicit origin, efforts to identify the location of such funds or assets and confiscation; (b) return of funds or assets of illicit origin; and (c) prevention of the transfer of funds or assets of illicit origin. The preparation of the global study on the transfer of funds of illicit origin has also benefited from the presentations of experts as well as from the outcomes of the discussion during the workshop.
6. The present study is submitted to the Ad Hoc Committee in accordance with Economic and Social Council resolution 2001/13. It should be noted that the Secretary-General has submitted reports on the subject to the General Assembly at both its fifty-sixth and fifty-seventh sessions,¹ in accordance with General Assembly resolutions 55/188 and 56/186 of 21 December 2001.²

II. Overview of the issue and its impact

7. It is widely recognized that corruption is a threat to the stability of societies, the establishment and maintenance of the rule of law and economic and political progress. Any meaningful solution to the problem must account for the recovery of the assets derived from corruption. The recovery and return of those ill-gotten gains can make a significant difference to countries recovering from corruption and sends the important message that the international community will not tolerate such unlawful conduct.

8. In cases of large-scale corruption the amounts of state resources illicitly converted to private ownership and exported to international banking centres and financial havens can be staggering.³ According to the Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth:⁴

“An estimated US\$ 20-40 billion has over the decades been illegally and corruptly appropriated from some of the world's poorest countries, most of them in Africa, by politicians, soldiers, businesspersons and other leaders, and kept abroad in the form of cash, stocks and bonds, real estate and other assets.”

9. Although the full extent of the transfers of illicit funds or assets is impossible to measure with precision, there can be very little doubt that corruption and the laundering of proceeds derived from corruption have a cancerous effect on economies and politics around the globe. The International Monetary Fund (IMF) has estimated that the total amount of money laundered on an annual basis is equivalent to three to five per cent of the world's gross domestic product (GDP), an amount of between \$600 billion and \$1.8 trillion. It would be safe to assume that a significant portion of that activity involves funds derived from corruption.

10. The exporting of funds derived from corruption has a number of severe consequences for the country of origin. It undermines foreign aid, drains currency reserves, reduces the tax base, harms competition, undermines free trade and increases poverty levels. Corruption and laundering can therefore operate in tandem to limit every advance (social, economic or political) of countries, especially developing countries and countries with economies in transition. The harm caused to countries is tremendous in both absolute and relative terms. For instance, it has been reported that the former President of Zaire, Mobutu Sese Seko, looted the treasury of some \$5 billion—an amount equal to the country's external debt at the time.⁵ As indicated in the framework of the workshop on asset recovery, held in Vienna on 21 June 2002, during the second session of the Ad Hoc Committee, around \$227 million, transferred abroad from Peru under the Government of Alberto Fujimori, had been frozen in five foreign countries and \$68 million had been recovered.⁶ The major sources of the illicit funds were various forms of illegal commissions and the direct and illicit diversion of state funds.⁷

11. The impact of the transfer of funds of illicit origin on social and economic progress can be evaluated in relation to the developmental factors for two States with recent, high-profile corruption cases, Nigeria and Mexico.⁸ During the debate of the Second Committee of the General Assembly, at its fifty-seventh session, the representative of Nigeria affirmed that corrupt practices and the transfer of illicit funds had contributed considerably to capital flight and that Africa ranked highest in

that connection, with an estimated \$400 billion or more in funds having been looted and stashed away in foreign countries. Of that, an estimated \$100 billion or more was from Nigeria. He also stressed that, by the account of the Government of Nigeria, the nation's total external indebtedness stood at \$28 billion, approximately 28 per cent of total funds siphoned out of the country⁹. The late Nigerian dictator Sani Abacha and members of his inner circle looted and exported an estimated \$2.2 billion (some estimates are even higher). Such diversion is particularly troubling in view of World Bank estimates that the entire GDP for the country is approximately \$41.1 billion and that more than two thirds (70 per cent) of the estimated population of 123.9 million people live on less than \$1 a day.¹⁰

12. In Mexico, it is estimated that the brother of former President Carlos Salinas amassed a fortune of \$120 million as a result of corruption, an amount that, according to World Bank estimates, would pay for annual health care at current per capita levels for more than 594,000 Mexican citizens.¹¹

III. Obstacles to recovery and return

A. Laundering activities

13. Corrupt officials do not always disguise their transfers of illegally acquired wealth through laundering activity. In some remarkable examples of corruption, little if any effort was made to hide the systematic embezzlement. For instance, when Jean-Claude Duvalier fled Haiti, investigators had little trouble locating incriminating paperwork that showed that the former "President for Life" had embezzled more than \$120 million.¹² More recently, vans owned by Nigeria's Central Bank were reported to have delivered cash directly from the bank to the homes of General Abacha and his associates.¹³ In those cases, the greatest difficulty in tracing the assets can be the sheer number of transactions and the enormous amount of paperwork.

14. However, the tracing of illicit wealth is even more difficult when the transfers are cloaked by money-laundering. As a general matter, the money-laundering process is most susceptible to detection during the so-called "placement" stage, when the assets are being physically deposited into a financial institution, because the wealth is still close to the original criminal activity. For that reason, transparency is necessary for the international financial and banking markets to prevent money-launderers from placing profits gained from corruption into financial institutions. The principle of "sunlight" works particularly well because money-laundering is an inherently hidden activity. Simply put, the more banks and other financial institutions report suspicious transactions, the more information authorities receive about possible laundering operations.

15. Banks and other financial institutions can assist anti-laundering efforts by the adoption and application of information-sharing measures generally known as "know-your-customer" policies. Those principles are intended to overcome the historical weakness of those institutions in distinguishing clean money from money with illicit origins and "blowing the whistle" on clients who are laundering funds. Contrary to traditional bank secrecy laws and culture, "know-your-customer"

principles require that financial institutions perform due diligence in obtaining and maintaining certain account information.¹⁴

16. “Know-your-customer” principles are intended to ensure that adequate policies, practices and procedures prevent a financial institution from being used, intentionally or unintentionally, to further laundering activities. Pursuant to those programmes, institutions should take active steps to establish the identity of their customers and monitor account activity. The institutions are required to file “suspicious activity reports” when unusual activity is detected.¹⁵ Properly implemented, “know-your-customer” rules can facilitate transparency and prevent the placement of illicit funds in a number of ways. In the first place, the simple act of reporting may deter criminals, including corrupt political officials, who intend to use the financial institution as an instrument for their laundering activity. Then, if those customers nonetheless still seek to establish a relationship with a financial institution, the application of “know-your-customer” principles can reveal the true illicit nature of the customer’s business. Furthermore, the information provided from a customer pursuant to “know-your-customer” guidelines allows a financial institution to detect when certain transactions are inconsistent with the customer’s normal business transactions.

17. Despite their successes, “know-your-customer” guidelines have not met with universal acclaim. Some contend that the guidelines, which have tended to become more specific over the years, may hinder the fight against money-laundering because imposition of the guidelines on less developed financial systems is not feasible or equitable.¹⁶ Further, institutional compliance can be inconsistent and even non-existent. The investigation into the Abacha affair, for instance, revealed that several foreign banks had failed to exercise appropriate oversight on Abacha’s accounts and even, in some cases, had sent agents to Nigeria to help carry suitcases full of cash out of the country.¹⁷

18. Nonetheless, in the wake of the 11 September attacks, the trend continues towards higher standards of transparency as a number of countries continue to tighten loopholes in their financial systems. A variety of other efforts to promote financial transparency have recognized the role of banks and other financial institutions as prime machinery for money-laundering. In 2001, IMF and the World Bank divided the international efforts to counter money-laundering into three categories: (a) efforts concerned primarily with financial/supervisory matters (e.g. those of IMF, the World Bank and the Basle Committee on Banking Supervision); (b) efforts concerned with both financial/supervisory and legal/criminal enforcement matters (e.g. United Nations activities); and (c) efforts concerned primarily with legal/criminal enforcement matters (e.g. activities of the Egmont Group of Financial Intelligence Units and the International Criminal Police Organization (Interpol)).¹⁸

19. Generally speaking, the recent international efforts towards increased transparency include both improved coordination among existing institutions and the creation of new institutions and instruments. Many institutions have made considerable advances against money-laundering. The increasing international efforts have resulted in the negotiation of international conventions addressing both the issues of corruption and money-laundering, such as in the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25 annex I), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime¹⁹ and the Criminal Law Convention on

Corruption of the Council of Europe,²⁰ the Inter-American Convention against Corruption of the Organization of American States (see E/1996/99) and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Cooperation and Development.^{21, 22}

B. Opaque financial systems

20. Both practical and legal obstacles, including the absence of a comprehensive international instrument relating to corruption and money-laundering, impede the international efforts to create transparency. One basic hindrance is that the rapid movement of funds complicates efforts to recover and return money because the electronic transfers, in particular via the Internet, lend anonymity to the transactions and can be extremely difficult to trace.²³

21. A second practical problem is the continued lack of transparency in many of the world's financial systems.²⁴ For example, one conduit for laundered funds continues to be the correspondent accounts that certain financial institutions provide to foreign banks. Correspondent banking involves one bank providing services to another bank to move funds, exchange currency and carry out other transactions. Those accounts can provide the owners and clients of a poorly regulated, and even corrupt, bank with the ability to move money freely around the world. Trusts are also increasingly being recognized as a gap in transparency that enables complex laundering schemes. The anonymity provided by such instruments, in particular blind trusts and asset protection trusts, allows corrupt officials freedom to avoid seizure orders. Likewise, offshore accounts and personal investment companies provide havens and opportunities for any laundering activity, including the laundering of funds derived from corruption. A January 2000 report by the University of Trento for the European Commission, entitled "Protecting the EU financial system from the exploitation of financial centres and off-shore facilities by organised crime", shows that corporate law is also an important aspect of systemic transparency that has been largely overlooked. International attention should be given to the problem of obtaining documents from corporations in other countries and the use of those entities to facilitate laundering by shielding the identity and ownership of funds.

22. A further example of opaque obstacles is presented by private banking operations. "Private banking" describes the preferential services provided by some financial institutions to individuals of high net worth and is of particular relevance to the laundering of the proceeds of corruption. Private banking provides vulnerabilities to laundering activity that can be exploited by corrupt politically exposed persons who, according to the Basle Committee on Banking Supervision, are individuals who are or have been entrusted with prominent public functions, including heads of State or of Government, senior government, judicial or military officials, senior executives of publicly owned corporations and important political party officials.²⁵ The private banker may fail to apply thorough due diligence to such accounts because a corrupt official is a valuable client and the bank is assisting him or her in investing the deposited funds. In addition, the use of an intermediary in such a situation can enable the official to open and then operate the account virtually anonymously.²⁶

C. Complications in recovery actions

23. International investigations to recover funds derived from corruption require authorities to institute legal proceedings to win legal title to assets located after what can be complex and lengthy investigations. Those recovery actions can take many forms, including: (a) criminal proceedings in the State of origin (the “requesting State”) with enforcement of the sentence in the State where the funds are located (the “requested State”); (b) civil proceedings in the requesting State followed by international enforcement of the judgement; (c) criminal or civil proceedings initiated by the requested State leading to forfeiture of the property either to the requesting State directly or to the requested State (which may then share the assets); (d) civil proceedings initiated by the requesting State in the courts of the requested State; or (e) some combination of the above. As discussed below, there are numerous difficulties and complications inherent in such recovery actions.

1. Lack of uniformity of laws

24. A fundamental complication facing recovery actions is the diversity of legal systems. Governments and financial institutions from different legal systems can have difficulties bridging differences in concepts and procedures. The resulting legal problems in recovery actions vary, depending upon the jurisdiction (common law/civil law) and the recovery approach (civil/criminal).

25. Most differences in procedural law are not irreconcilable because all modern legal systems essentially adhere to the principle of fairness. However, the harmonization of specific legal procedures has been impeded by a lack of international attention to such matters as claim formulation and the decision-making process.

26. With regard to substantive law, standards vary on what official misconduct is designated as a crime. That variation hinders international cooperation in recovery cases because the alleged predicate activity may not violate the laws of the requested State.

27. To date, most international legal instruments have focused on the concept of bribery because virtually every State prohibits the bribing of its public officials by either nationals or foreigners. Bribery is therefore the core act of corruption prohibited by the international community generally and by States parties specifically in accords such as the Inter-American Convention against Corruption, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Criminal Law Convention on Corruption and the United Nations Convention against Transnational Organized Crime (see para. 19).

28. Scholars have observed that, while an admirable first step, the understanding of corruption as synonymous with bribery has inherent limitations. The limited reach of proscriptions against bribery can be particularly evident in cases where the officials become enriched from illicit payments, such as skimming and kickbacks, that are as harmful to the public good as bribery, but do not fit within the definition of passive or active bribery. The emerging international approach to corruption should consider when prohibitions are appropriate against those other activities. That consideration would need to take into account constraints that may be imposed

by due process and other fundamental requirements and safeguards that can be found in most national constitutions.

2. Due process and evidentiary roadblocks

29. Another legal obstacle to recovery actions may be the inability to satisfy a jurisdiction's due process requirements necessary to initiate the type of intrusive investigation generally needed to untangle sophisticated financial schemes. Significant discrepancies exist among legal systems relating to the substantive and procedural safeguards in place to ensure fundamental principles of civil liberty. A practical complication of such variation is that even though evidence was obtained in a lawful manner in one State, the search and seizure may be against the law in another.

30. The complications arising from varying legal standards can be seen in the testimony of such key witnesses as bank officers and investigators. Those individuals have traditionally had to undertake expensive and time-consuming (as well as dangerous) travel from jurisdiction to jurisdiction to testify about recovered funds. Such travel has also raised legal issues relating to perjury and the granting of immunity from prosecution for related or unrelated offences in each jurisdiction where the witness testifies. Modern communication developments, such as enhanced videoconference capacity, may ease that burden, but legal issues remain as States have varying standards for granting immunity to witnesses compelled to testify.

31. An additional evidentiary concern is the basic inability of some requesting States to satisfy the due process requirements of requested States. The infrastructure of those States can be limited, leading to little or no record-keeping or accounting records. In the aftermath of large-scale corruption, the central tension in recovery actions is the length of time needed to restore the rule of law and the State's need for speedy action against former high-level officials and their assets. Often, when a State initiates efforts to recover assets illicitly exported by former leaders, reform has begun but is far from completed. The transitional nature of the requesting State's judicial system can result in requests for assistance that fail to satisfy such threshold requirements for mutual legal assistance as evidence establishing that an offence has been committed and that the assets are the proceeds of that crime. The promotion of evidentiary standards might allow for a more even application of such threshold matters.

32. Unfortunately, even in cases of blatant corruption, a criminal prosecution may not always be possible. The official's death (as in the case of General Abacha in Nigeria) may prevent prosecution. The official may remain in control of governmental power long after the case has come to light. And even if the official has left the Government, he may retain sufficient local power to obstruct a domestic criminal proceeding. In other more extreme cases, the suspect officials may enjoy immunity from criminal prosecution or there may not be any "criminal" conduct to investigate because the acts did not violate any laws of the State at the time. Even if the State subsequently enacts laws forbidding the challenged conduct, the defendant may argue that the reformed criminal code creates *ex post facto* crimes that should not be recognized by States for purposes of mutual legal assistance.²⁷

3. Civil versus criminal forfeiture

33. A third common legal complication to recovery actions arises because the tracing and freezing of illicitly transferred assets straddle the boundary between civil and criminal proceedings. Each type of proceeding is distinct and may not be available in every State under the same circumstances.²⁸

34. As a general rule, criminal proceedings allow for more effective remedies. At the same time, however, the penal nature of the remedy also means that a high burden of proof and relatively stringent procedural safeguards must be satisfied before the remedies will be applied. By contrast, because imprisonment is not at issue, civil proceedings generally offer lower burdens of proof and fewer procedural safeguards. For that reason, however, civil forfeiture, which is a common tool for asset forfeiture in some States, is not recognized by many national legal systems.

35. These conflicting views on the propriety of civil forfeiture pose one of the central difficulties to international cooperation. Requests by States have been denied by other countries that allow only criminal forfeiture. In addition, the initial use of such civil proceedings may complicate or interfere with later (or simultaneous) criminal proceedings.

36. The issue of which type of seizure to use and which individuals and/or institutions to target can raise serious tactical and ethical questions. In selecting defendants, tactical considerations require investigators to evaluate which potential defendants are most vulnerable, based on their own criminal involvement and the legal system of their country of residence. In other words, the most culpable defendant may not be the best target for a successful recovery action.²⁹

4. Lack of international cooperation

37. A fourth difficulty often inherent in recovery actions relates to the need to assemble lawyers and investigators from various jurisdictions and to coordinate their efforts to unravel what can be complicated financial transactions. That coordinated work must be done as quickly as possible because time is not on the side of investigators.

38. A common stumbling block to those efforts is the general lack of international instruments on recognition and enforcement of foreign judgements. Relatively few agreements or arrangements exist on the topic. In the absence of a relevant treaty, enforcement of a foreign judgement depends on domestic law and international comity.

39. In addition, the international agreements that do exist allow countries not to recognize judgements in certain situations. For instance, the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of the European Union³⁰ lists five grounds upon which a foreign judgement shall not be recognized: (a) if recognition would be contrary to public policy in the recognizing State; (b) if a default judgement was entered without sufficient notice; (c) if the judgement is irreconcilable with a judgement between the parties in the recognizing State; (d) if the judgement went beyond the civil dispute to required determination of a matter of status arising out of a matrimonial relationship, wills or succession; or (e) if the judgement is irreconcilable with an earlier judgement from a non-contracting State that is entitled to *res judicata*.³¹

40. Given those circumstances, certain enforcement issues will remain contentious with regard to judgements recovering the proceeds of corruption. In cases of default judgements issued against former leaders in exile, important jurisdictional questions may exist. For instance, the English Court of Appeal of the United Kingdom of Great Britain and Northern Ireland has held that a foreign judgement will not be enforced if it has been obtained by fraud even when the alleged fraud has been investigated by the originating court.³² However, in other countries, including the United States of America, if the originating court has considered and determined the question of fraud, the facts bearing on that issue may not be subject to re-examination when enforcement of the foreign judgement is sought.³³

5. Lack of technical expertise and resources

41. Finally, recovery actions are often hampered by a lack of resources and a lack of technical expertise. Ironically, and tragically, the financial burdens imposed on an impoverished country by large-scale investigations may be too great because the country has become so impoverished by the very offenders whose assets are now being traced. Further, investigators may lack the necessary training in the fields of finance and law to build a corruption case in addition to tracing the stolen assets.

42. At the same time, however, officials in a requested country may feel disadvantaged by having to conduct the bulk of the proceedings with what they perceive as little support from the requesting country and may resent the fact that their own actions may be fruitless if the requesting country is unable or unwilling to pursue an action in its own courts. Further, those officials in a requested country may also lack the resources and expertise to pursue a recovery action without assistance from the requesting country. Equitable sharing of the labour required in recovery actions appears a key factor for success.

D. Complications in the return of funds or assets

43. The tracing and seizure of assets represent only part of the investigation in international cases. The jurisdiction holding the recovered assets must then determine when and to whom the recovered assets will be returned. Experience has taught that the return of those funds can be a difficult and complex process.

1. Concerns about the motivation behind recovery efforts

44. In addition, efforts to obtain return of recovered illicit funds or assets may be frustrated or delayed by concerns about the motives of the officials or investigators acting on behalf of the requesting State. In some cases, those concerns may arise from claims or suspicions that recovery efforts might be politically motivated, in view of existing rules in many countries preventing the provision of cooperation for alleged crimes of a political or military nature. In other cases, the officials of the State in which assets or funds are recovered may harbour doubts about whether the requesting State is free from corruption and may entertain fears about the fate of the returned funds or assets. Obvious sensitivity may result in those concerns being left unspoken. However, their existence is likely to hamper or prevent return of illicit funds or assets.

2. Competing claims and multiple jurisdictions

45. The ultimate disposition of successfully recovered assets may be complicated by competing claims from States other than the State requesting mutual assistance. Those claims can arise from a number of sources, including, in cases of embezzled international aid, the State from which the funds originated. Consideration of the issue of the return of illegally transferred funds would be incomplete without fully exploring and analysing the eventuality and impact of this question.

3. Identification of beneficial owners

46. In many cases existing rules foresee the distribution of proceeds from successful recovery actions according to the domestic law of the requested State. Similar to the diversity in procedural law discussed above, different countries have different mechanisms for handling seized funds. For instance, investors and creditors seeking compensation for their losses may institute private lawsuits while the new Government may wish to recover the funds to support various public works.

IV. Concluding remarks and possible future action

47. The preceding sections of the present study have addressed some of the principal obstacles standing in the way of both the recovery of funds or assets of illicit origin and their subsequent return. Building on that discussion, there are several possibilities for consideration as to how to remove those impediments and, at the same time, take the necessary action to prevent the transfer of illicit funds in the first place.

A. Recovering funds or assets

1. Legal measures

(a) *Expansion of predicate offences to include foreign corruption*

48. Measures that enable the confiscation of the proceeds of corruption in national legislation appear key. Those measures would become considerably more effective if they were combined with an expansion of anti-money-laundering provisions to include foreign corruption as a predicate offence. In the same vein, the concept of corruption in domestic legislation would need to be adjusted in a way that would capture the concept of grand corruption so as to prevent corrupt leaders from shaping domestic law to shield their regimes from future legal action.

(b) *Provision of access to courts in requested States*

49. A means of facilitating international cooperation would be a provision that would allow the initiation by the requesting State of legal actions in the courts of the requested State relating to the proceeds of corruption that are located in its territory. That access could be provided when the requesting party can either establish an ownership interest in the assets or upon the presentation of a final, valid judgement. At the same time, however, it is important that requesting States make every effort to provide support and obtain sufficient evidence regarding the underlying offences.

(c) *Pre-trial seizure or restraining orders or other action to prevent the dissipation or disappearance of assets*

50. To provide for the type of expeditious legal action often necessary to seize funds in the modern global economy, it would appear necessary to have measures that would enable authorities, at the request of another State, to prevent any transfer of those assets for which there is a reasonable basis to believe that they will be subject to recovery as the proceeds of corruption. Such legal mechanisms should also allow for the restraining of assets based on a foreign order or the issuance of an appropriate restraining order by a court in the requesting State. At the same time, however, those mechanisms should ensure that the foreign action has a legitimate basis and impose reasonable deadlines on the requesting State to submit evidence supporting the seizure.

(d) *Enforcement of foreign judgements*

51. The enforcement of foreign judgements is often a key factor in the successful recovery of funds derived from corruption. Domestic legal measures would be necessary to permit courts to enforce a valid final judgement from a foreign jurisdiction ordering the confiscation of the proceeds of corruption. Those measures would need to be in line with principles of domestic law regarding public policy or principles of due process.

2. Organizational arrangements

(a) *Establishment of a technical assistance clearing house at the United Nations*

52. With the appropriate support from Member States, the United Nations could assume an enhanced role by providing a technical assistance clearing house to assist multinational recovery actions that target the proceeds of corruption. The creation of such a clearing house would be a positive step towards ensuring the flow of necessary information and mutual understanding of requirements in both requesting and requested States.

(b) *Designation of governmental bodies to handle requests for assistance*

53. The effectiveness of mutual assistance would be greatly enhanced by the availability of updated and easily accessible information on individuals or governmental bodies to be approached with requests for assistance. The responsible agency officials could be identified in online directories freely available to all countries. That step would clear up some of the confusion generated, in particular when officials from a requesting State are seeking recovery of assets in cases of grand corruption.

(c) *Spontaneous disclosure of information on assets of illicit origin*

54. The spontaneous sharing of information between States is an important component of the international cooperation necessary to recover and return funds derived from corruption. Therefore international cooperation would be significantly strengthened by measures that allow the forwarding of information on funds of illicit origin to another State without prior request, and without endangering ongoing investigations in the State offering the information, when the disclosure would assist the other State in a recovery action.

3. Methods for recovery

(a) Contingency fee arrangements

55. The expanded use of civil proceedings as a supplement to, or replacement of, criminal actions, when appropriate, could be considered as a vehicle for recovery. As discussed during the technical workshop on asset recovery (see para. 5), civil proceedings instituted by the Philippines and the Russian Federation have allowed those countries to recover nearly \$1 billion and \$180 million, respectively. More recently, Nigeria has recovered over \$1 billion in Abacha funds (to date) in large part because of a civil lawsuit filed in the United Kingdom. One problem with civil litigation, however, is that attorneys must be retained and suitable counsel can be expensive. In some jurisdictions, law firms and investigators may be willing and able to work on the recovery of laundered funds on the basis of fees that are contingent upon the ultimate recovery of wealth. In those jurisdictions, fees are paid in amounts proportional to the total value of assets recovered. However, contingency fees are prohibited in some jurisdictions and they are not available if the jurisdiction does not provide for the civil recovery of laundered assets.

(b) *Qui tam* actions

56. Another method of limiting the drain on public resources, unless the Government elects to join the action, would be making greater use of information leading to the return of assets of illicit origin or an expansion of *qui tam* actions. In some countries, for example, private plaintiffs can keep up to 30 per cent of the recovery.³⁴ The possibility of expanded *qui tam* actions might be considered because of their potential benefits, including application of lower civil evidentiary standards. However, as with contingency fees, some States do not recognize *qui tam* enforcement.

(c) Loans

57. Loans could be another potential funding source for pursuing appropriate proceedings. Interested States can be approached about providing support for the State seeking recovery of assets as a form of foreign aid. Similarly, international financial institutions, such as IMF and the World Bank, may be approached for advance loans that would be repaid from recovered amounts. Those financial institutions may also be willing to include that funding as part of larger economic aid packages because the recoveries would improve the economic prospects of the requesting State. Private corporations, foundations or non-governmental organizations interested in international aid might be other possible sources for loans.

(d) Reimbursement

58. As noted, the costs imposed by vigorous prosecution of recovery actions in the courts of a requested State can impose significant financial burdens on both the requested and requesting States. Consideration might be given to having some or all of those costs borne by those financial institutions which have blatantly failed to exercise appropriate levels of due diligence and thereby created the financial climate that resulted in the exportation of the illicit funds. Such reimbursement would require States' appropriate legislation to define the level of care to be

exercised by financial institutions and the extent of liability for failure to exercise sufficient diligence.

B. Returning funds or assets

1. Possibility of appointing an independent custodian to resolve claims

59. To help resolve competing claims for recovered assets, consideration could be given to the establishment of asset forfeiture funds to hold and disburse such assets. Such a mechanism would allow for an informed and impartial individual or tribunal to sort through the often conflicting claims made against the recovered assets. This mechanism is suggested by the civil procedural device known as interpleader, which is provided for in some jurisdictions to resolve conflicting claims to money or property.³⁵ An interpleader action allows the individual or entity in possession of an asset or fund of money to join two or more claimants asserting mutually exclusive claims, thereby allowing the court to resolve the claims in a single proceeding.

2. Earmarking certain assets for development

60. In order to ensure the appropriate use of recovered funds, consideration could be given to servicing national debt. In addition, in order to limit the vulnerability of those funds as well as other state assets, a portion of the recovered assets or a small portion of development aid packages could be earmarked to empower local monitoring efforts to stem corruption and the diversion of aid. Those funds could be used to build or expand financial intelligence systems and to train officers to investigate money-laundering.³⁶

3. Establishing priorities for the allocation of recovered assets or funds

61. Competing claims for the recovered assets inherently raise important questions of priorities. It would be important to establish clear and consistent rules for the priorities that would be applied to the allocation of recovered funds or assets. In establishing such rules, consideration would need to be given to compensation to victims of crime, to support for anti-corruption programmes as well as to the need to meet expenses that may have been incurred by the State in which the funds or assets were located.

4. Asset-sharing

62. Successful international recovery actions in criminal cases involve arrangements for sharing recovered proceeds with States that made possible or substantially facilitated the forfeiture. As at July 2000, for example, the United States had transferred approximately \$169 million to almost 30 States in recognition of their assistance on forfeiture actions.³⁷ Asset-sharing offers a financial incentive for States to work together towards successful recovery regardless of where the assets are located or which jurisdiction will ultimately enforce the forfeiture order. As a general guideline, the shared funds reflect the proportional contribution of the State relative to the assistance provided by other law enforcement participants. However, in cases clearly involving public funds, that is, funds taken directly from the treasury of the requesting State, consideration could be given to rules or arrangements that would allow for a departure from more traditional asset-sharing

and would foresee the possibility of maximizing recovery. Such maximization of recovery would be consistent with the proposed convention's goal of ameliorating the harmful social and economic effects of corruption.

C. Preventing the transfer of funds or assets of illicit origin

63. As noted above, the difficulties and complexities inherent in combating the transfer of illicit funds arising from acts of corruption cannot be underestimated. The recovery and return of diverted funds is similarly complex and cumbersome, with efforts to trace and return the wealth frequently frustrated by a combination of legal and practical factors. For those reasons, it is important that all States take steps to prevent the transfer of illicit funds or assets derived from corruption.

1. Establishment of financial intelligence units and increased voluntary information-sharing

64. Financial intelligence units are created by national Governments to receive and review international suspicious activity reports, analyse financial information, disseminate information to domestic law enforcement agencies and exchange information. As recently as the mid-1990s, there were less than a handful of financial intelligence units in the world. As at June 2002, 69 countries had financial intelligence units.³⁸ Operating as the informal Egmont Group, financial intelligence units have helped foster the exchange of information and improved the expertise of anti-corruption organizations around the world. The importance of that cooperation is evidenced in a 2001 compilation by the Egmont Group of 100 sanitized money-laundering cases.³⁹

2. The United Nations as a repository for information on due diligence and on suspicious transaction reporting

65. The International Money-Laundering Information Network (IMoLIN) database, created by the Global Programme against Money-Laundering of the Office on Drugs and Crime of the Secretariat, provides the basis for the construction of a secure web site by which Member States can share information on due diligence and suspicious transaction reporting. The United Nations system could also take other measures to train and assist officials from Member States. Over the longer term, the United Nations should consider taking advantage of its global nature to analyse past recovery operations. To date, those operations against corrupt officials have been conducted in a largely uncoordinated manner and the valuable knowledge acquired from them has been limited to the States actually involved in the investigations. The United Nations is in a position to extract information about those cases to create a general body of knowledge available to all interested States.

3. Development of early warning

66. The need to pay special attention to all complex, unusually large transactions and all unusual patterns of transactions with no apparent economic or visible lawful purpose is widely recognized and has been demonstrated by cases of large-scale corruption. Given the millions and even billions of dollars that can be involved, it is clear that financial institutions and law enforcement agencies must be alert to any

abnormal circumstances that indicate the existence of related criminal activities. Such “red flags” can be detected pursuant to the due diligence (“know-your-customer”) programmes adopted by many countries and described above. If a financial institution, based on such monitoring of banking activity, suspects that funds stem from laundering, it should immediately report its concerns to legal authorities who should then act promptly upon that information and share it with their appropriate foreign counterparts. In particular, heightened scrutiny should be applied to transactions involving political officials and States with a high risk for corruption.⁴⁰

4. Implementation of comprehensive due diligence programmes

67. “Know-your-customer” programmes and the other forms of due diligence performed by financial institutions described above are not always applied with appropriate enthusiasm. To take one example, in the wake of the investigation into the Abacha affair, the Swiss Federal Banking Commission investigated 19 Swiss banks for their dealings with the former Nigerian leader and his colleagues and published a report that cleared 13 banks but named 6 as not respecting due diligence obligations.⁴¹ States should actively enforce due diligence requirements. Competent authorities should be designated to supervise banks and other financial institutions to ensure the effective implementation of all requirements. The due diligence programmes should have at least three dimensions: (a) the application of enhanced diligence (as already described) to unusual financial transactions; (b) the creation and retention of client identification files and records on unusual transactions; and (c) the obligation to report suspicious transactions to competent authorities.

5. Other preventive measures, including capacity-building for specialization of prosecutors and judges

68. As noted, the lack of resources and technical expertise in requesting States is often extreme and remains a serious hindrance to both preventing illicit transfers and recovering any assets that are illegally exported. South Africa presents an example of the importance of funding and staffing teams of prosecutors and judges. The country created a special commission to investigate corruption and special tribunals to adjudicate civil matters arising from those investigations.⁴² Similarly, requested States should address the needs for capacity-building to enable those countries to participate actively in the expanding international action against the transfer of funds of illicit origin. In addition to the important research and clearing house functions that it could perform, consideration should be given to the key leadership role that the United Nations can play in capacity-building efforts.

Notes

¹ A/56/403 and Add.1 and A/57/158 and Add.1-2, which include a summary of the wide range of measures and initiatives undertaken by Member States as well as by relevant entities of the United Nations system and other intergovernmental organizations to combat and prevent the scourge of corruption and the transfer of funds of illicit origin, as well as recommendations to address those problems.

- ² Reference should also be made to the fact that, at the end of November 2002, the Second Committee of the General Assembly, at its fifty-seventh session, approved a draft resolution on preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin (A/C.2/57/L.46).
- ³ See generally Ibrahim F. I. Shihata, "Corruption: a general review with an emphasis on the role of the World Bank", *Dickinson Journal of International Law*, vol. 15, 1997, pp. 451-458.
- ⁴ The Nyanga Declaration was signed on 4 March 2001 by representatives of Transparency International in Botswana, Cameroon, Ethiopia, Ghana, Kenya, Malawi, Nigeria, South Africa, Uganda, Zambia and Zimbabwe (for the full text, see www.transparency.org).
- ⁵ See Andrea D. Bontrager, "From corruption to cooperation: globalization brings a multilateral agreement against foreign bribery", *Indiana Journal of Global Legal Studies*, vol. 7, 2000, p. 655.
- ⁶ Presentation by José Carlos Ugaz.
- ⁷ During the workshop it was recalled (see note 6) that types of corruption committed by the Government of Alberto Fujimori included receipt of illicit funds, the bribery of officials, kickbacks, commissions and other contract-related abuses, inappropriate appointment of judges, inappropriate use of and procurement by the military, drug-trafficking, the persecution of political opponents and the diversion of State funds to political campaigns. In Peru, around 1,400 individuals are currently under investigation and 120 people are in custody.
- ⁸ The role of one large private bank in these two cases is described in the United States Senate Permanent Subcommittee on Investigations Minority Staff Report on Private Banking and Money Laundering, published at the end of 1999. See "Minority staff report for Permanent Subcommittee on Investigations Hearing on Private Banking and Money Laundering: a case study of opportunities and vulnerabilities", 106th Congress, 9 November 1999 (see www.senate.gov/~gov_affairs/110999_report.htm). The Abacha affair, which has yet to be fully resolved, is perhaps the most thoroughly documented example of the interrelationship between corruption and money-laundering.
- ⁹ The summary of the statement of the representative of Nigeria is contained in the United Nations Press Release of 14 October 2002 (GA/EF/3002), p. 8.
- ¹⁰ See World Bank, *World Development Indicators 2001*, pp. 45 and 65.
- ¹¹ *Ibid.*, p. 99.
- ¹² See Peter Slevin, "Duvaliers didn't swindle subtly", *Miami Herald*, 8 February 1987).
- ¹³ See Tom Masland, "'A case of direct stealing': Nigeria's VP on recovering the nation's looted treasure", *Newsweek International*, 13 March 2000.
- ¹⁴ For an overview discussion of the role of "know-your-customer" programmes, see, for example, Paulina L. Jerez, "Proposed Brazilian money-laundering legislation: analysis and recommendations", *American University Journal of International Law and Policy*, vol. 12, 1997, p. 329.
- ¹⁵ The Global Anti-Money-Laundering Guidelines for Private Banking, better known as the Wolfsberg Principles, agreed to by Transparency International and 11 large international banks in October 2000, include "know-your-customer" procedures to identify early signs of money-laundering with heightened scrutiny for accounts with funds from countries with a high risk for corruption and individuals with positions of public trust.
- ¹⁶ See Daniel Mulligan, "Know your customer regulations and the international banking system: towards a general self-regulatory regime", *Fordham International Law Journal*, vol. 22, 1999, p. 2324.
- ¹⁷ See "The lost billions: the inside story of the hunt—from Lagos to New York to Geneva—for an African dictator's stolen loot", *Newsweek International*, 13 March 2002.

- ¹⁸ See IMF/World Bank, “Enhancing contributions to combating money laundering: policy paper” (26 April 2001).
- ¹⁹ United Nations, *Treaty Series*, vol. 1862, No. 31704.
- ²⁰ Council of Europe, *European Treaty Series*, No. 173.
- ²¹ See *Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18).
- ²² In addition, the 1991 European Union Directive against money-laundering (Council Directive 91/308/EEC) was amended in late 2001 to expand the definition for money-laundering beyond drug offences (to include “corruption” and other “serious crimes”) and to expand the application of “know-your-customer” principles to accountants, real estate agents, lawyers and other “gatekeepers”.
- ²³ For an overview of the increasingly sophisticated methods of launderers, see Patrick Moulette, “Money laundering: staying ahead of the latest trends, *OECD Observer*, April 2000. A lengthy discussion of money-laundering tactics and efforts against laundering can be found in a report by the United States Department of State, *International Narcotics Control Strategy Report* (1 March 2001).
- ²⁴ The aspects of the financial system that present special vulnerabilities to money-laundering—including correspondent banking, trusts and gatekeepers—are explored in detail by the Financial Action Task Force on Money Laundering in its annual reports.
- ²⁵ Basle Committee on Banking Supervision, “Customer due diligence for banks” (October 2001), p. 10.
- ²⁶ A recent report of the Financial Action Task Force on Money Laundering notes that there are two schools of thought on applying due diligence principles to politically exposed persons. If the principles are properly and broadly applied, the politically exposed persons’ accounts should be monitored as part of the general “know-your-customer” procedures. Yet it is also recognized that accounts of politically exposed persons are of a different category in their potential for abuse of public funds and therefore should be the subject of enhanced due diligence. The report states that it must be determined whether politically exposed persons will be explicitly mentioned in the revised Forty Recommendations on Money Laundering. See Financial Action Task Force on Money Laundering, “Review of the FATF Forty Recommendations: consultation paper (30 May 2002), pp. 12-13 (available at www1.oecd.org/fatf/pdf/Review40_en.pdf).
- ²⁷ For discussion of why high-level official corruption should be considered a violation of the law of States, see Ndiva Kofele-Kale, “Patrimonicide: the international economic crime of indigenous spoliation”, *Vanderbilt Journal of Transnational Law*, vol. 28, 1995, p. 48.
- ²⁸ For a review of these various characteristics of forfeiture actions, see, for example, Otto G. Obermaier and Robert G. Morvillo, *White Collar Crime: Business and Regulatory Offenses* (New York, Law Journal Press, 1990).
- ²⁹ The selection of a target can be further complicated by basic questions regarding venue and jurisdiction, as reflected in a sanitized case study presented by an official in the United States Department of Justice. See Lester M. Joseph, “Money laundering enforcement: following the money”, *Economic Perspectives*, May 2001, p. 14.
- ³⁰ *Official Journal of the European Community*, No. C 189, 28 July 1990.
- ³¹ See article 27 of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention). Council regulation No. 44/2001 for the European Community likewise provides for non-recognition of judgements on public policy and lack of proper notice grounds.

- ³² See *Jet Holdings v. Patel*, *Washington Law Review*, vol. 59, No. 3 (1983), p. 295. For a discussion of this ruling and other enforcement considerations, see the Committee on Foreign and Comparative Law, Association of the Bar of the City of New York, “Survey on foreign recognition of U.S. money judgments”, 31 July 2001.
- ³³ See Ronald A. Brand, “Enforcement of foreign money-judgments in the United States: in search of uniformity and international acceptance”, *Notre Dame Law Review*, vol. 67, 1991, pp. 253 and 274-275.
- ³⁴ The term “*qui tam*” is an abbreviation of the phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*”, which means, “who sues on behalf of the King as well as for himself”.
- ³⁵ See for example, *Bandes v. Harlow & Jones, Inc.*, 826 F. Supp. 700 (S.D.N.Y. 1993) (interpleader action in the United States involving competing claims to a fund corresponding to shares of stock in a Nicaraguan company that had been illegally confiscated).
- ³⁶ This type of earmarking was proposed by the Minister of Justice of Nigeria, Bola Ige, shortly before his assassination in December 2001. Mr. Ige estimated that earmarking 1 per cent of a project’s cost towards preventing diversion could bring a return of 1,000 per cent in some countries. See Bola Ige, “Abacha and the bankers: cracking the conspiracy”, *Forum on Crime and Society* (United Nations publication, vol. 2, No. 1 (2002), p. 111.
- ³⁷ See Joseph, *op. cit.*, p. 14.
- ³⁸ The countries and territories with financial intelligence units are Andorra, Aruba, Australia, Austria, the Bahamas, Barbados, Belgium, Bermuda, Bolivia, Brazil, the British Virgin Islands, Bulgaria, Canada, the Cayman Islands, Chile, Colombia, Costa Rica, Croatia, Cyprus, the Czech Republic, Denmark, the Dominican Republic, El Salvador, Estonia, Finland, France, Greece, Guernsey, Hong Kong (Special Administrative Region of China), Hungary, Iceland, Ireland, the Isle of Man, Israel, Italy, Japan, Jersey, Latvia, Liechtenstein, Lithuania, Luxembourg, the Marshall Islands, Mexico, Monaco, the Netherlands, the Netherlands Antilles, New Zealand, Norway, Panama, Paraguay, Poland, Portugal, Republic of Korea, Romania, the Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan Province of China, Thailand, Turkey, United Arab Emirates, the United Kingdom, the United States, Vanuatu and Venezuela.
- ³⁹ See “financial intelligence units in action” at www.ncis.co.uk/fiu.asp
- ⁴⁰ For instance, in January 2001, the United States Treasury Department issued its *Guidance on Enhanced Scrutiny for Transactions that May Involve the Proceeds of Foreign Official Corruption*. The *Guidance* calls for financial institutions to apply enhanced scrutiny to transactions and accounting openings of a “senior foreign political figure”, any member of a senior foreign political figure’s “immediate family” and any “close associate” of such a political figure.
- ⁴¹ It should be noted that the report found that the failure of the six banks was not sufficient to warrant prosecution. Additional information about the investigation is available from the web site for the Swiss Federal Banking Commission (www.ebk.admin.ch).
- ⁴² This measure and other reform efforts were described in 2001 by the Public Protector of South Africa, Selby Baqwa, in his article “Anti-corruption efforts in South Africa”, *Journal of Public Inquiry*, vol. 21, Fall/Winter 2001, p. 21.