Asset Recovery Handbook

A Guide for Practitioners, *Second Edition*

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Asset Recovery Handbook

Stolen Asset Recovery (StAR) Series

StAR—the Stolen Asset Recovery initiative—is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets. StAR also engages with global organizations and policy makers, including at the Conference of the States Parties (COSP) to the United Nations Convention against Corruption (UNCAC), the G-8, the G-20, and the Financial Action Task Force (FATF) to influence and shape the international asset recovery agenda.

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This updated second edition has been prepared by Jean-Pierre Brun (team leader, Financial Market Integrity unit, World Bank) and Anastasia Sotiropoulou (special legal counsel to the governor of Greece's National Transparency Authority and associate faculty lecturer I at Deree College of the American College of Greece).

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Abbreviations

ARIN	asset recovery interagency network
BIC	business identifier code (SWIFT)
CARIN	Camden Asset Recovery Inter-Agency Network
CDD	customer due diligence
CHIPS	Clearing House Interbank Payments System
CTR	currency transaction report
DOJ	Department of Justice (US)
ECHR	European Court of Human Rights
EU	European Union
EWHC (Ch.)	England and Wales High Court (Chancery Division)
FAC	Federal Administrative Court (Switzerland)
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act (US)
Fedwire	Fedwire Funds Service
FinCEN	Financial Crimes Enforcement Network (US)
FIU	financial intelligence unit
GFAR	Global Forum on Asset Recovery
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IFO	interim freezing order
ISP	internet service provider
KYC	know your customer (due diligence)
LLP	limited liability partnership
MOU	memorandum of understanding
MLA	mutual legal assistance
NCB	non-conviction based (confiscation)
NGO	nongovernmental organization
OECD	Organisation for Economic Co-operation and Development
1MDB	1Malaysia Development Berhad (case)
PEP	politically exposed person
PSC	person/people with significant control (UK)
RICO	Racketeer Influenced and Corrupt Organizations Act (US)
SAR	suspicious activity report
SEC	Securities and Exchange Commission (US)
StAR	Stolen Asset Recovery initiative
STR	suspicious transaction report
SWIFT	Society for Worldwide Interbank Financial Telecommunication
UN	United Nations

UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
UWO	unexplained wealth order

Introduction

The theft of public assets from low- and middle-income countries is an immense development problem. The amount of money stolen from these economies and in-transition jurisdictions that is hidden in foreign jurisdictions each year is estimated to be a significant proportion of international financial flows (World Bank and UNODC 2007). The societal costs of corruption far exceed the value of assets stolen by public leaders. Corruption and financial crimes weaken confidence in public institutions, damage the private investment climate, and ruin delivery mechanisms for poverty alleviation programs or public services such as health and education.

The international community has responded to the challenge. A key target of United Nations Sustainable Development Goal 16—Peace, Justice and Strong Institutions—is to "significantly reduce illicit financial and arms flows, *strengthen the recovery and return of stolen assets* and combat all forms of organized crime" (emphasis added).[1] The target recognizes an intrinsic connection between the drain of development resources by illicit financial flows and the need to recover stolen assets for the achievement of sustainable development. In the past decade, asset recovery has thus become a crucial development issue.[2]

International efforts include the United Nations Convention against Corruption (UNCAC), which went into effect in 2005. Chapter V of the convention specifically provides a framework for the return of stolen assets, requiring states parties to take measures to restrain, seize, confiscate, and return the proceeds of corruption. To do so, they may use various mechanisms, such as

- Direct enforcement of freezing or confiscation orders made by the court of another state party;[3]
- Non-conviction based confiscation, particularly in cases of death, flight, absence of the offender, or in other appropriate cases;[4]
- Civil actions initiated by another state party, allowing that party to recover the proceeds as plaintiff;[5]

[1] UN Sustainable Development Goal 16, target 16.4, UN Sustainable Development Knowledge Platform. https://sdgs.un.org/goals/goal16.
[2] World Bank and UNODC (United Nations Office on Drugs and Crime). 2013. "Asset Recovery in the Arab World: The Next Steps." News Release, June 10, 2013. Stolen Asset Recovery (StAR) initiative website. https://star.worldbank.org/news/asset-recovery-arab-world-next-steps.
[3] UNCAC, arts. 54(1)(a) and 54(2)(a).
[4] UNCAC, art. 54(1)(c).
[5] UNCAC, art. 53.

- Confiscation of property of foreign origin by adjudication of money laundering or other offenses;[6] and
- Court orders granting compensation or damages to another state party and recognition by courts of another state party's claim as a legitimate owner of assets acquired through corruption.[7]

In this context, two key tools should be used to conduct asset recovery cases:

- Spontaneous disclosure of information to another state party without prior request[8]
- International cooperation and asset return.[9]

The practice of recovering stolen assets is complex. It involves coordination and collaboration with domestic agencies and ministries in multiple jurisdictions with different legal systems and procedures. It requires special investigative techniques and skills to "follow the money" beyond national borders and the ability to act quickly to avoid any dissipation of assets. To ensure effectiveness, the competent authority must have the capacity to launch and conduct legal proceedings in domestic and foreign courts, to provide the authorities in another jurisdiction with evidence or intelligence for investigations, or both. All legal options—whether criminal confiscation, non-conviction based confiscation, civil actions, or other alternatives—must be considered. This process may be overwhelming for even the most experienced practitioners. It is exceptionally difficult for those working in the context of failed states, widespread corruption, or limited resources.

The complexity of the process highlights the need for a practical tool to help practitioners navigate the process. With this in mind, the Stolen Asset Recovery (StAR) initiative—a joint initiative of the World Bank and the United Nations Office on Drugs and Crime (UNODC) to encourage and facilitate a more systematic and timely return of stolen assets—published in 2011 the first edition of *Asset Recovery Handbook: A Guide for Practitioners* (Brun et al. 2011). Designed as a how-to manual, the *Handbook* guides practitioners as they grapple with the strategic, organizational, investigative, and legal challenges of recovering assets that have been stolen by corrupt actors and hidden abroad. It provides common approaches to recovering stolen assets located in foreign jurisdictions, identifies the challenges that practitioners are likely to encounter, and introduces good practices. By consolidating all information relevant to different stages of the asset recovery process, the *Handbook* will enhance the effectiveness of practitioners working in a team environment.

After 10 years during which the *Handbook* has served as a recognized reference guide for practitioners and trainers, the StAR initiative decided to develop this second edition by incorporating updates based on the experience collected during this decade.

[6] UNCAC, arts. 54(1)(b) and 54(2)(b).
[7] UNCAC, arts. 53(b) and (c).
[8] UNCAC, art. 56.
[9] UNCAC, arts. 55 and 57.

Much has happened in the past 10 years, and this new updated edition includes new case examples, new challenges, innovative legislation adopted by various jurisdictions, examples of international efforts, and good practices highlighted in new publications or found in the conduct of asset recovery work.

Methodology

To develop the first edition of the *Asset Recovery Handbook* as a practical tool to help practitioners navigating the issues, laws, and theory, StAR drew on the practical day-to-day experience of practitioners in one or more of the core areas of asset recovery. Participants included law enforcement, financial investigators, investigating magistrates, prosecutors, lawyers in private practice, and asset managers. They brought experience—from high-income as well as low- to middle-income jurisdictions and from civil and common law systems—in conducting criminal confiscation, non-conviction based confiscation, civil actions, investigations, asset tracing, international cooperation, and asset management. Being familiar with some of the challenges in this regard, they have developed their own methods and ideas for overcoming those challenges.

The overall format of the *Handbook* and key topics for consideration were agreed on by a group of practitioners at a May 2009 workshop in Vienna. The authors developed these topics into a draft version, which they presented and discussed at a second practitioners' workshop held one year later in Marseille, France. The second workshop was followed by additional contributions and consultations, and the final version was agreed to by the expanded group.

For this second edition, StAR aimed to update the different frameworks developed over the past decade in various countries and consider the lessons learned from more recent cases and international developments. The updated chapters were reviewed by a group of academics and practitioners, including law enforcement personnel, financial investigators, investigating magistrates, prosecutors, lawyers in private practice, and asset managers, all of whom provided suggestions based on their experience across different jurisdictions.

How to Use the *Handbook*

The *Asset Recovery Handbook* is designed as a quick-reference, how-to manual for practitioners—law enforcement officials, investigating magistrates, and prosecutors—as well as for asset managers and policy makers in both civil and common law jurisdictions. Given diverse audiences and legal systems, it is important that readers keep in mind that a practice or strategy that has worked in one jurisdiction may not work in another. Likewise, an investigative technique that is permitted in one jurisdiction may not be permitted—or may have different procedural requirements—in another. In addition, jurisdictions may use different terminology to describe the same legal

concept (for example, some using "confiscation" and others using "forfeiture") or procedure ("seizing" assets in some jurisdictions but "restraining," "blocking," "freezing," or "attaching" them in others). Or different jurisdictions may assign different roles and responsibilities to the people involved in asset recovery: for instance, in some jurisdictions, investigations are conducted by an investigating magistrate, and in others, by law enforcement authorities or prosecutors.

The *Handbook* attempts to point out these differences where they exist, and it highlights how different concepts or practices may offer similar solutions to the same challenges. However, it is not designed to be a detailed compendium of law and practices. Practitioners therefore should read the *Handbook* in the context of their specific jurisdictions' legal systems, law enforcement structures, resources, legislation, and procedures—without being restrained by the terminology or the concepts used to illustrate the challenges and tools for successful recovery of assets. They should also consider the context of the legal system, law enforcement structures, resources, legislation, and procedures of the specific jurisdiction where the asset recovery procedures will be sought.

The primary purpose of this *Handbook* is to facilitate asset recovery in the context of grand corruption, particularly as outlined in UNCAC, Chapter V. Nonetheless, asset confiscation and recovery can and should be applied to a wider range of offenses—particularly as in the asset confiscation provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Transnational Organized Crime.

The *Handbook* is organized into 11 chapters, a glossary, and 12 appendixes of additional resources. The chapters are organized as follows:

- *Chapter 1, "Overview of the Asset Recovery Process,"* summarizes the process and legal avenues for asset recovery, along with practical case examples.
- *Chapter 2, "Strategic Considerations in Developing and Managing a Case,"* presents a host of strategic considerations for case development and case management, including gathering initial sources of facts and information, assembling a team, and establishing a relationship with foreign counterparts for international cooperation.
- *Chapter 3, "Securing Evidence and Tracing Assets (1): Investigative Measures,"* introduces the techniques that practitioners may use to trace assets and analyze financial data as well as to secure reliable and admissible evidence for asset confiscation cases.
- *Chapter 4, "Securing Evidence and Tracing Assets (2): Relevant Data and Financial Documents,"* covers the various types of data sources and documents to be gathered during an asset recovery investigation, provides examples of relevant data from commonly sourced documents, and illustrates the importance of organizing and analyzing data.
- *Chapter 5, "Securing the Assets,"* deals with provisional measures (including freezing of assets) that can be taken, often in the early steps of an asset recovery case.
- *Chapter 6, "Managing Assets Subject to Confiscation,"* introduces some of the asset management issues that practitioners must consider before using provisional measures and while planning to secure the assets before confiscation.

- *Chapter 7, "Mechanisms for Confiscation,"* reviews the different confiscation systems, how they operate, and the procedural enhancements that are available in some jurisdictions.
- *Chapter 8, "Key Principles of International Cooperation in Asset Recovery and Informal Channels of Cooperation,"* discusses channels of international cooperation and reviews the various methods available—including "informal" or administrative cooperation and mutual legal assistance requests—and guides practitioners through the entire process.
- *Chapter 9, "Conducting International Cooperation and Mutual Legal Assistance,"* discusses how to apply the key principles for international cooperation. It explains in detail how to effectively combine informal and formal tools for successful international asset recovery while focusing on the formal assistance process.
- *Chapter 10, "Civil Proceedings,"* discusses direct asset recovery through civil proceedings.
- *Chapter 11, "Domestic Confiscation Proceedings Undertaken in Foreign Jurisdictions,"* describes how a requesting jurisdiction can leverage domestic confiscation proceedings undertaken in a foreign country to recover stolen assets.

Practitioners should note that references mentioned in the text are found at the end of each chapter. In addition, the glossary defines many of the specialized terms used within the *Handbook*. Because jurisdictions often use different terminology to describe the same legal concept or procedure, the glossary provides examples of alternative terms that may be used.

The appendixes contain additional reference tools and practical resources to assist practitioners, as follows:

- *Appendix A* provides an outline of offenses to consider in criminal prosecution.
- *Appendix B* presents a detailed list and description of commonly used corporate vehicles and business terms.
- *Appendix C* provides a sample financial intelligence unit report, as used for review of suspicious transactions.
- *Appendix D* offers a checklist of considerations for planning the execution of a search and seizure warrant.
- *Appendixes E and G*, respectively, provide a sample production order for financial institutions and a sample financial profile form.
- *Appendix F* outlines the serial and cover payment methods used by correspondent banks in electronic fund transfers and discusses the cover payment standards that became effective in November 2009.
- *Appendix H* offers discussion points that practitioners may use to begin communications with their foreign counterparts.
- *Appendix I* provides an outline for a letter to request mutual legal assistance, with key drafting and execution tips.
- *Appendix J* provides a broad range of relevant international and regional websites and other online resources.

- *Appendix K* is an overview of the "Guidelines for the Efficient Recovery of Stolen Assets" (from the Lausanne Process, discussed in chapter 2); these guidelines provide a step-by-step approach to the asset recovery process.
- *Appendix L* includes guidance on how to establish and use an electronic case management system developed by the World Bank–UNODC StAR initiative.

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1. Overview of the Asset Recovery Process

1.1 Introductory Remarks

One of the first considerations in an asset recovery case is the development of an effective strategy for recovery of the proceeds and instrumentalities of crime. Practitioners must be aware of the various legal avenues for recovering assets as well as the factors or obstacles to consider in their selection. This chapter introduces the general process for asset recovery and explores the avenues for recovering assets, most of which are addressed in greater detail in the following chapters.

1.2 General Process for Asset Recovery

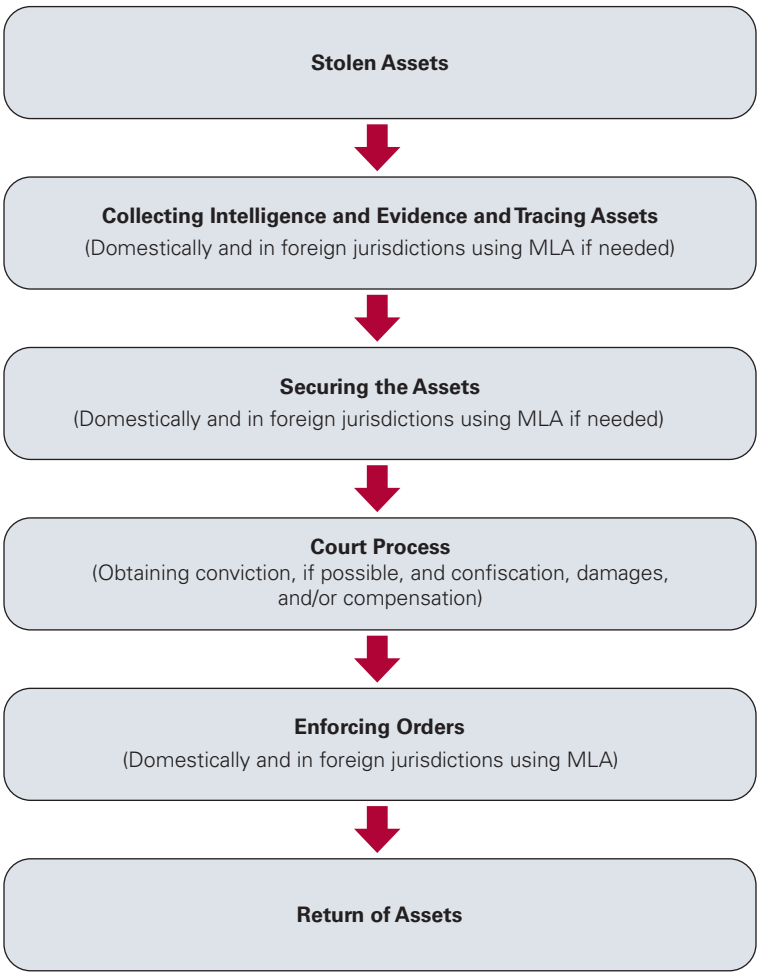
The avenues used for bringing or advancing an asset recovery action may have strategic implications for the case or its outcome, requiring practitioners to develop a working case strategy. Practitioners may seek to recover assets through a criminal, civil, administrative, or non-conviction based (NCB) confiscation; a private civil action; or proceedings in a foreign jurisdiction. In all these cases, the underlying process varies in form while its content remains almost the same. Figure 1.1 illustrates this process, which is analytically explained in subsections 1.2.1 to 1.2.6.

1.2.1 Collecting Intelligence and Evidence and Tracing Assets

During the intelligence gathering and investigative process, intelligence analysts and law enforcement officers collect intelligence, gather evidence, and identify and trace assets. Prosecutors or judges can supervise these efforts. When a case involves civil actions, private investigators or other interested parties may be involved.

In addition to gathering open-source intelligence (OSINT) and intelligence from law enforcement or other government databases—such as databases held by financial intelligence units (FIUs) or anticorruption and asset recovery offices, land registry records, and company registers—law enforcement personnel may employ special investigative techniques. Depending on the level of intrusiveness, some measures may require authorization by a prosecutor or a judge (for example, electronic surveillance, search and seizure orders, production orders, or account monitoring orders). Others may require only the authorization of a senior officer. Still others might not demand prior approval at all (for example, physical surveillance, OSINT, and witness interviews). Although

FIGURE 1.1 Process for Recovering Stolen Assets



Source: World Bank.
Note: MLA = mutual legal assistance.

private investigators do not have the powers granted to law enforcement agents, they may use publicly available sources and apply to courts for specific civil orders (such as production orders, on-site review of records, prefiling testimony, and expert reports).

1.2.2 Securing Assets

During the investigation, assets subject to confiscation will need to be secured through provisional measures to avoid dissipation, movement, or destruction. In some civil law jurisdictions, the power to order provisional seizure or restraint of assets to secure confiscation usually rests with prosecutors, investigating magistrates, or law enforcement agencies. In other civil law jurisdictions, judicial authorization is required to obtain provisional measures. In common law jurisdictions, an order to restrain or seize property generally requires judicial authorization, with some exceptions in seizure cases.

1.2.3 International Cooperation

Because stolen assets are often transferred to or hidden in foreign jurisdictions, international cooperation is fundamental to successful asset recovery. It is required for the gathering of evidence, provisional restraint, and eventual confiscation of the proceeds and instrumentalities of criminal activities as well as for the repatriation of stolen assets to requesting states upon the assets' confiscation or forfeiture. This *Handbook* discusses international cooperation in detail in chapters 8 and 9, where it has been broken down into "informal assistance"[1] and formal mutual legal assistance (MLA), respectively.

Informal assistance includes peer-to-peer or diagonal communications between law enforcement, FIUs, and legal and judicial counterparts as permitted by law and regulation. It is often the primary tool to gather information and intelligence during the first steps of the investigation. Formal mutual legal assistance entails a written request to gather evidence (including evidence obtained through coercive investigative techniques), obtain provisional measures, and seek enforcement of domestic orders in a foreign jurisdiction. MLA was traditionally focused on securing admissible evidence from other jurisdictions for use in domestic trials. Its scope has broadened to securing evidence through coercive means or judicial orders in other jurisdictions for a requesting state's use at the investigatory stage.

Combining informal and formal cooperation as early as possible in the conduct of the case is key to successful asset recovery. "Informal" cooperation is the foundation of almost all successful MLA requests, where formal cooperation is required. Without informal cooperation, not many cases would reach the formal MLA stage, nor would MLA requests be successfully executed in a timely manner (Nainappan 2019). Informal cooperation is also critical in determining whether formal cooperation is required and, if so, how best to undertake it. Hence, successful asset recovery relies entirely on harnessing both informal and formal cooperation. To ensure that the international aspects are considered when necessary, refer to chapters 8 and 9 while reading chapters 2–7, which focus on domestic steps.

1.2.4 Court Proceedings

Court proceedings may involve criminal conviction, NCB confiscation, or private civil actions (each explained below and in subsequent chapters). Confiscation may be property based or value based. Property-based confiscation refers to the confiscation of property found to be the proceeds or instrumentalities of a crime, and it requires a link between the asset and the offense. The latter is difficult to prove when the assets under question have been converted, transferred, or mingled with lawful assets to conceal or disguise their illegal origin.

Value-based confiscation is otherwise referred to as a "benefit" regime, which permits determination of the value of the benefits derived from a crime—and confiscation of an

[1] For the purposes of this *Handbook*, "informal assistance" refers to any assistance that does not require a formal MLA request. This type of informal, practitioner-to-practitioner assistance may be outlined in MLA legislation and may involve authorities, agencies, or administrative bodies. Chapter 8 describes informal assistance and compares it with the MLA request process.

equivalent value, which may be from the offender's "untainted" assets. Some jurisdictions use enhanced confiscation techniques, such as substitute asset provisions or legislative presumptions, to assist in meeting the standard of proof required for such confiscation.

1.2.5 Enforcement of Orders

Once courts have ordered the restraint, seizure, or confiscation of assets, steps must be taken to enforce the order. If the assets are in a foreign jurisdiction, the authorities in that jurisdiction must enforce the decision by recognizing or registering the foreign order for enforcement in a domestic court without readjudicating the merits of the case (direct enforcement). Obtaining a domestic restraint, seizure, or confiscation order (indirect enforcement) may also be an option. However, the United Nations Convention against Corruption (UNCAC) favors direct enforcement by obliging states to establish a mechanism for enforcement of foreign confiscation orders.[2] This process generally involves an MLA request, as described earlier in section 1.2.3 on international cooperation.

1.2.6 Asset Return

The enforcement of a final confiscation order in a foreign jurisdiction should result in the return of assets to the requesting jurisdiction by application of UNCAC articles 54, 55, and 57. If these provisions are not fully applied, however, the assets might end up being transferred to the general treasury or confiscation fund of the requested jurisdiction. Hence, UNCAC requires that a specific mechanism be in place to arrange for the return of the assets.

Under UNCAC article 57, a requested party shall enforce a final foreign confiscation order and return the confiscated property to the requesting jurisdiction without conditions in cases of embezzlement of public funds or laundering of such funds. For other UNCAC offenses, the requested jurisdiction shall enforce the foreign confiscation order and return the assets when the requesting party reasonably establishes prior ownership or when the requested state party recognizes damage to the requesting state party.

In all other cases—including in the absence of a final confiscation order issued by the foreign government—UNCAC obliges the requested party to give "priority consideration" to the repatriation of assets to the requesting jurisdiction, the return of assets to their legitimate owners, or the compensation of victims of corruption. The return of assets may depend in this case on the domestic legislation of the requested party, applicable international conventions, regional agreements, mutual legal assistance treaties (MLATs), or special agreements (such as asset-sharing agreements). Total recovery may be reduced in value to compensate the requested jurisdiction for its expenses in restraining, maintaining, and disposing of the confiscated assets and for investigations,

[2] See UNCAC, arts. 54 and 55; United Nations Convention against Transnational Organized Crime (UNTOC), art. 13; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 5; and International Convention for the Suppression of the Financing of Terrorism, art. 8. For restraint or seizure, see UNCAC, art. 54(2).

prosecutions, or judicial proceedings—as well as, under UNCAC provisions, covering the legal and living expenses of the offender.

Several policy issues are likely to arise during any efforts to recover assets in cases of corruption or embezzlement of public funds. Requested countries may be concerned that the funds will be siphoned off again, because of continued or renewed perception of corruption in the requesting countries, especially if the offender continues to hold office and exerts significant influence. Moreover, the requested jurisdiction may require an agreement on how the requesting country should manage the confiscated assets. In some cases, international organizations such as the World Bank have facilitated the return and monitoring of recovered funds. In chapter 11, box 11.7 discusses how a specially created legal entity in Kazakhstan, the BOTA Foundation, was established to ensure the transparent return to and use by Kazakhstan of assets alleged to be the proceeds of corruption, in order to support vulnerable groups of people in the country.

Assets may also be directly returned to the requesting jurisdictions ("direct recovery") by order of a court of the requested state.[3] A court of the requested state may order compensation or damages directly to the victim jurisdiction in a private civil action. In addition, a court of the requested state may order compensation or restitution directly to the victim jurisdiction in a criminal or NCB asset recovery case. When deciding on confiscation, some courts have the authority to recognize the victim 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 also assist in the recovery process by making available recovery tools designed to address fraudulent activities and transactions. These mechanisms are explained further in chapters 9, 10, and 11.

1.3 Legal Avenues for Achieving Asset Recovery

The legal actions for pursuing asset recovery are diverse. Depending on whether they are only domestic or also international, they may include any of the following mechanisms:

- Domestic criminal prosecution and conviction-based confiscation, followed by an MLA request to enforce orders in foreign jurisdictions
- Non–Conviction based (NCB) confiscation followed by an MLA request to enforce orders in foreign jurisdictions[4]
- Private civil actions, including formal insolvency proceedings
- Administrative confiscation
- Other avenues, such as taxation, fines, and compensation orders in criminal trials.

[3] UNCAC, art. 53, requires that states parties take measures to permit direct recovery of property.
[4] NCB confiscation is not allowed in all jurisdictions.

BOX 1.1 Legal Framework for Asset Recovery

Legislation and Procedures (Domestic or Foreign Jurisdictions)

- Criminal law provisions (offenses such as bribery, embezzlement, money laundering)
- Criminal procedure provisions (for example, investigative powers, search and seizure)
- Provisional measures and confiscation provisions (for example, criminal, non-conviction based [NCB], administrative)
- Mutual legal assistance (MLA) provisions (for example, remedies)
- Civil law provisions (for example, remedies)
- Asset-sharing laws and regulations
- Other relevant laws (including proceeds of crime acts, asset declaration laws, tax laws, and so on)

International Conventions and Treaties[a]

(year instrument adopted / year entered into force)

United Nations

- United Nations Convention against Corruption (2003/2005)
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988/1990)
- United Nations Convention against Transnational Organized Crime (2000/2003) and the Protocols Thereto

Organisation for Economic Co-operation and Development

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997/1999, "the OECD Anti-Bribery Convention")

Organization of American States

- Inter-American Convention against Corruption (1996/1997)
- Inter-American Convention on Mutual Assistance in Criminal Matters (1992/1996)

(continued next page)

BOX 1.1 Legal Framework for Asset Recovery *(Continued)*

Selected Instruments from the European Union and the Council of Europe

- Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968/1973, "the Brussels Convention")
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990/1993) and its update, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism (2005/2008)
- European Convention on Mutual Assistance in Criminal Matters (1959/1962), with two additional protocols (1962)
- Council of the European Union Framework Decision 2003/577/JHA on the Execution in the European Union of Orders Freezing Property or Evidence (2003)
- Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (1997)
- Council of Europe Criminal Law Convention on Corruption (1999/2002)
- Council of Europe Civil Law Convention on Corruption (1999/2003)
- Council of the European Union Framework Decision 2006/783/JHA on the Application of the Principle of Mutual Recognition to Confiscation Orders (2006)
- Regulation (EU) No. 1215/2012 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast Brussels I Regulation) (2012)
- Directive 2014/42/EU of the European Parliament and of the Council on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union (2014)
- Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the Mutual Recognition of Freezing Orders and Confiscation Orders (2018)

African Union

- African Union Convention on Preventing and Combating Corruption and Related Offences (2003/2006)

(continued next page)

BOX 1.1 Legal Framework for Asset Recovery *(Continued)*

Other Regional Treaties

- Association of Southeast Asian Nations Treaty on Mutual Legal Assistance in Criminal Matters (2004)
- Southern African Development Community (SADC) Protocol against Corruption (2001)
- Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters (2002/2007)
- Commonwealth of Independent States (CIS) Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (1993/1994, "Minsk Convention"), amended (1997)

Bilateral Mutual Legal Assistance Treaties

Jurisdictions may have negotiated and signed bilateral treaties among themselves.

a. For available web resources, see appendix J.

The availability of these avenues, either domestically or in a foreign jurisdiction, will depend on the national and foreign laws and regulations as well as on international or bilateral instruments such as conventions and treaties. The legal framework for asset recovery is dispersed across different sources and may not be encompassed in a single asset recovery law, especially in transnational cases. Box 1.1 outlines the various laws and international instruments relevant to practitioners pursuing these avenues. This list is not an exhaustive one, given both the multiplicity of domestic laws and the existence of many treaties not mentioned here.

Apart from the legal framework, the choice of a specific avenue may also depend on various legal, practical, or operational realities. The decisions about venue and type of action ought to be made at the strategic level, having due regard for each type's advantages and disadvantages and any jurisdictional peculiarities that have a bearing on the matter. Some of the strategic considerations, including obstacles and case management issues, are discussed in chapter 2.

1.3.1 Criminal Prosecution and Conviction-Based Confiscation

When authorities seeking to recover stolen assets decide to pursue a criminal case, criminal confiscation is a possible means of redress. Practitioners must gather evidence, trace, and secure the assets; initiate a prosecution action against an individual or a legal entity; and obtain a conviction. After obtaining a conviction, confiscation can be ordered by the court.

In some jurisdictions, the standard of proof for confiscation will be lower than the standard required for obtaining a conviction. In the United Kingdom, for example, proof on a "balance of probabilities" may be needed for confiscation, whereas proof "beyond a reasonable doubt" will be required for the underlying conviction. Other jurisdictions apply the same higher standard of proof ("beyond a reasonable doubt") to both conviction and confiscation. (For an explanation of the standards of proof for both common law and civil law jurisdictions, see chapter 2, section 2.8.5, figure 2.1.) Generally, unless enhanced or extended confiscation provisions apply,[5] relevant legislation may provide for the confiscation of instrumentalities, proceeds, and other benefits that are directly or indirectly traceable to the crime.

International cooperation, including informal cooperation and formal mutual legal assistance, will be required throughout the process to identify, trace, and secure assets in foreign jurisdictions as well as to enforce the final order of confiscation.[6] In most jurisdictions, formal mutual legal assistance is provided only in the context of criminal investigations.

Among the advantages of criminal prosecution and confiscation is the societal recognition of the criminal nature of corruption and the accountability of the perpetrator. Furthermore, penalties such as imprisonment, fines, and confiscation may have a deterrent effect on potential offenders. In addition, criminal investigators generally have the most intrusive means of gathering information and intelligence, including access to data from law enforcement sources and FIUs; use of provisional measures and coercive investigative techniques, such as searches, electronic surveillance, examination of financial records, or access to documents held by third parties; and recourse to grand juries, subpoenas, or other means of compelling appearance, testimony, or evidence.

However, significant barriers may impede criminal conviction and confiscation, such as insufficient evidence, lack of capacity or political will, and time limits (statutes of limitation). In addition, it may be impossible to obtain a conviction in cases of the perpetrator's death, flight, or immunity. Furthermore, the requested jurisdiction might not recognize the alleged crime for which MLA is sought as a criminal offense per se (dual criminality). These and other barriers are discussed in detail in chapter 2.

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[5] The nature and the function of "enhanced confiscation provisions" are discussed in greater detail in chapter 7. Enhancements include (a) "substitute assets provisions," which permit in rem forfeiture of assets not connected with a crime, provided the original proceeds have been lost or dissipated; (b) presumptions about the unlawful use or derivation of assets in certain circumstances; (c) presumptions about the extent of unlawful benefits flowing from certain offenses; and (d) the reversal of the onus and burden of proof in certain circumstances.

[6] UNCAC, art. 54(1)(a); UNTOC, art. 13(1)(a); and United Nations Convention against Narcotic Drugs and Psychotropic Substances, art. 5(4)(a), require that states parties take measures to give effect to foreign orders.

1.3.2 Non-Conviction Based Confiscation

Another type of confiscation gaining traction throughout the world is confiscation without a conviction, referred to as non–conviction based (NCB) confiscation or forfeiture.[7] NCB confiscation shares common objectives with criminal confiscation, namely the recovery and return of the proceeds and instrumentalities of crime. Likewise, NCB confiscation also realizes the goals of deterrence, equity, and restitution.

Nonetheless, criminal conviction–based confiscation and NCB confiscation are substantively different. A criminal conviction–based confiscation requires a conviction, followed by the confiscation proceedings. In contrast, NCB confiscation requires only the confiscation proceedings, not a criminal conviction. In many jurisdictions, NCB confiscation can be established based on a lower standard of proof—such as a "balance of probabilities" or "preponderance of the evidence"—thus helping to ease the evidentiary burden on the authorities. Other jurisdictions, mainly civil law ones, require the same higher standard of proof used for criminal conviction: "intimate conviction of the truth."

NCB confiscation is not available in all jurisdictions. As a result, practitioners may encounter difficulties in obtaining formal mutual legal assistance to carry out investigations and enforcing NCB confiscation orders in jurisdictions that lack legislation on this type of confiscation. Some of these jurisdictions, however, may recognize and enforce foreign NCB confiscation orders, as in the European Union. In addition, requesting jurisdictions may benefit from cooperating with NCB confiscation proceedings conducted in countries where this legislation is frequently applied in money-laundering cases, including the United Kingdom and the United States (see section 1.4 and chapter 11). NCB confiscation is discussed in greater detail in chapter 7.

1.3.3 Private Civil Action

States seeking to recover stolen assets have the option of initiating proceedings in domestic or foreign civil courts to secure and recover the assets and to seek damages based on misappropriation, tort, breach of contract, or illicit enrichment.[8] The courts of the foreign jurisdiction may be competent if (a) the defendant is a person, individual, or legal entity that is a national of or residing or having its seat, respectively, in that country (personal jurisdiction); (b) the assets are within or have transited the

[7] Some of these jurisdictions include Anguilla; Antigua and Barbuda; Australia; certain Canadian provinces (Alberta, British Columbia, Manitoba, Ontario, Quebec, and Saskatchewan); Colombia; Costa Rica; Fiji; Guernsey; Ireland; Isle of Man; Israel; Jersey; Liechtenstein; New Zealand; the Philippines; Slovenia; South Africa; Switzerland; Thailand; the United Kingdom; the United States; and Zambia. International conventions and multilateral agreements have also introduced NCB confiscation: see UNCAC, art. 53(1)(c), and Recommendation 4 (on "confiscation and provisional measures") of the Financial Action Task Force (FATF) Recommendations (FATF 2019).

[8] UNCAC, art. 53(c), calls on states parties to permit another state party to initiate a civil action in domestic courts.

jurisdiction (subject-matter jurisdiction); or (c) an act of corruption or money laundering has been committed within the jurisdiction.[9]

As a private litigant, a state seeking redress can hire lawyers to explore potential claims and remedies (such as ownership of the misappropriated assets, tort, disgorgement of illicit profits, and contractual breach). The initiation of a civil action will be costly and requires collection of evidence to prove the misappropriation of assets or liability on the basis of contract or tort. Evidence gathered in the course of criminal proceedings may, in certain circumstances, also be used in a civil trial. It is also possible to seek evidence with the assistance of a court before an action is filed.

In common law jurisdictions, the plaintiff usually has the option to petition a court to issue a variety of orders, whereas in civil law countries, the options may be more limited.[10] Potential types of orders may include the following:

- Freezing, embargo, sequestration, or restraining orders (potentially with worldwide effect, called "Mareva injunctions" under UK law) to secure assets suspected to be the proceeds of corruption, pending the resolution of a lawsuit, by laying claim to those assets.[11] In some jurisdictions, interim or provisional restraining orders can be issued pending the outcome of a lawsuit or even before the lawsuit has been filed with a court, without notice, and with extraterritorial effect. These orders usually require the posting of a bond, guarantee, or other undertaking by the petitioner.
- Orders that oblige defendants to provide information about the source of their assets and transactions involving them.
- Orders to disclose relevant documents that are useful in obtaining evidence against third parties, such as banks, financial advisers, or solicitors.
- "No-say" (gag) orders that prevent banks and other parties from informing the defendants of a freezing injunction or disclosure order.
- Generic protective or conservative orders that preserve the status quo and prevent deterioration of the assets, legal interests, or both. Such orders usually require a showing of the likelihood of success on the merits and thus pose an imminent risk in delaying a decision.

The principal disadvantages of litigating as a civil party, especially in a foreign jurisdiction, are the costs of tracing the assets and the legal fees required to obtain relevant court orders. However, the litigant has more control over the case when pursuing civil proceedings and going after assets in the hands of third parties and will typically have the advantage of a lower standard of proof than that required in criminal law avenues.

[9] UNCAC, art. 42, sets the requirements for establishing jurisdiction over the offenses established in accordance with the convention.

[10] In civil law countries, the possibilities of seeking the types of orders in all but the first bullet may be limited.

[11] In the United States, the petition for a freezing order needs to clear significant evidentiary or procedural barriers, as further discussed in chapter 5.

It should be noted that arbitration proceedings in the case of international contracts obtained through bribes or illicit advantages awarded to corrupt officials may open promising avenues, including the cancellation of contracts and potential claims for torts or damages. These avenues are discussed analytically in chapter 10.

1.3.4 Administrative Confiscation

Unlike criminal or NCB confiscation, both of which require criminal court action, administrative forfeiture generally involves a noncriminal, sometimes also nonjudicial, mechanism for confiscating assets used or involved in the commission of an offense or infraction falling short of the requirements of a criminal offense. Forfeiture may occur by operation of a statute, or pursuant to specific legislation or regulations, and is typically used to address uncontested confiscation cases or to deal with administrative infractions.

Administrative confiscation is typically carried out by an authorized agency (such as a police unit or a designated law enforcement agency)—often following a process similar to the one traditionally used in customs smuggling cases[12]—or by a court in noncriminal administrative proceedings. The procedure usually requires notice to persons with a legal interest in the assets and publication to the public at large. Otherwise, it may be a full-fledged quasi-criminal court proceeding requiring participation of the state representative and defendant.

Generally, administrative confiscation is restricted to certain types of offenses, low-value assets, or certain classes of assets.[13] However, some jurisdictions have made innovative use of administrative processes in high-value cases. Some jurisdictions have adopted a variation of administrative confiscation called "abandonment," employing similar procedures.

1.3.5 Other Methods

In addition to the above-described avenues, certain alternative methods apply in some jurisdictions and to specific situations. Although they do not display a general or universal pattern, they still have peculiar features that distinguish them from avenues described earlier and therefore merit mentioning. They are useful—if not for practical application, as sources of inspiration to seek innovative solutions and methods in asset recovery. Another nonjudicial means to recover assets is through taxation of the illicit profits. Box 1.2 presents a few examples.

[12] In customs smuggling cases, confiscation is generally limited to a few underlying offenses defined by specific regulations.

[13] In customs smuggling or drug cases, the assets could be of high value such as a yacht or a private plane, but at the same time, stocks held in a company to launder proceeds (as in an embezzlement or corruption case) cannot be seized through administrative confiscation by the market regulator.

BOX 1.2 Other Means of Recovering Assets

Taxation of Illicit Profits

A public official or an executive from a state-owned company who receives bribes, misappropriates funds, or steals assets may be liable for income taxes on this income even if authorities do not prove the illicit origin of assets. It is sufficient to prove that the assets represent undisclosed revenue. The authorities simply prove that the taxpayer has made a taxable gain or received taxable income and is liable for the appropriate amount of taxes, including interest and penalties, if the tax is not paid on time. Therefore, the evidentiary burden is less than in a civil recovery case. Given that this approach generally does not involve court proceedings, this mechanism is potentially cheaper and faster than civil recovery or criminal proceedings.

Fines and Compensation Orders in Criminal Trials

In criminal cases, courts may order defendants to pay fines, compensation to victims, or both. Such orders may accompany confiscation orders or may be ordered in lieu of confiscation orders. Fines against individuals or corporations may be based on the value of the advantage gained or intended to be gained. Countries that permit calculation of fines based on the benefits derived from the crime include Australia, Greece, Hungary, and the Republic of Korea (OECD and World Bank 2012):

- *In Australia,* the maximum penalty for a corporation is the greater of $A 11 million or three times the value of any benefit that the corporation directly or indirectly obtained that is reasonably attributable to the conduct constituting the offense (including the conduct of any related corporation). If the court cannot determine the value of that benefit, it may be estimated at 10 percent of the corporation's annual turnover during the 12 months preceding the offense.
- *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 a maximum of three times the financial advantage gained or intended to be gained, and at least Ft 500,000.
- *In Korea,* the maximum fine for a legal person is ₩1 billion, but if the profit exceeds ₩500 million, the legal person can be subject to a fine up to twice the amount of the profit.

1.4 Recovering Stolen Assets in the Context of Legal Actions Initiated by Foreign Jurisdictions

Authorities seeking to recover stolen assets may seek to support a criminal or NCB confiscation proceeding that has been initiated in another jurisdiction against corrupt foreign officials, their associates, or identified assets. At the conclusion of the

proceedings, the state or government may be able to obtain a portion of the recovered assets through orders of the foreign courts, pursuant to national and international legislation or international agreements.[14] This avenue requires that the foreign authority (a) have jurisdiction, (b) have the capacity to prosecute and confiscate, and (c) most important, be willing to share the proceeds.

An action may be initiated in a foreign jurisdiction in one of the following two ways:

- *Authorities in the jurisdiction affected by corruption may request that the foreign authorities open their own case.* This can be accomplished by filing a complaint or even more simply through a spontaneous information exchange,[15] such as by sharing incriminating evidence or the case file with the authorities of the foreign jurisdiction. In such situations, the foreign or international authorities ultimately have the discretion to pursue or ignore the case. If they decide to pursue it, the jurisdiction affected by corruption will still need to cooperate with the foreign and international authorities in the sharing of evidence and information.
- *Foreign or international authorities may open a case independent of a request from the jurisdiction affected by corruption.* Foreign authorities may receive information linking a corrupt public official or corrupt international public official[16] to their jurisdiction—whether through a newspaper article, information from the international public organization, a suspicious transaction report (STR), or a request for informal assistance or formal mutual legal assistance—and decide to investigate money laundering or foreign bribery committed within their national territory.

The participation of the affected jurisdiction (the state or government harmed by corruption) in the proceedings is generally encouraged in most jurisdictions. In some civil law jurisdictions, however, the affected state may also be able to participate in foreign proceedings as a civil party to the proceedings. In both civil and common law jurisdictions, it may be possible to recover assets in these proceedings—through court-ordered compensation, restitution, or damages—as a party affected by a corrupt offense or as the legitimate owner in confiscation proceedings.

This avenue is an interesting option if the jurisdiction seeking redress lacks an adequate legal basis, capacity, or evidence to pursue an international asset recovery action on its own. In particular, such jurisdictions may benefit from the confiscation of stolen assets in countries (including the United Kingdom and the United States) that apply NCB confiscation proceedings in foreign money-laundering cases and that may agree to return all or part of the confiscated assets pursuant to court orders or asset-sharing agreements.[17]

[14] UNCAC, arts. 53(b) and 53(c), require states parties to take measures to permit direct recovery.

[15] Spontaneous exchange of information is "the provision of information to another contracting party that is foreseeably relevant to that other party and that has not been previously requested" (OECD 2006).

[16] The latter applies when an international public official works in an international organization physically located in a foreign jurisdiction.

[17] See chapter 2, box 2.7, on international cooperation in the 1Malaysia Development Berhad (1MDB) investigation in Malaysia and the United States.

Moreover, if the limitation period rules out prosecution on the basis of the initial corruption or misappropriation offense, it may still be possible to investigate crimes such as money laundering or possession of stolen assets in other jurisdictions.

However, in such cases, the jurisdiction affected by corruption does not have any control over the proceedings, and its success depends to a large extent on the foreign authorities' capacity and willingness to advance the case. Furthermore, unless the foreign court orders the return of the assets, the affected jurisdiction will be dependent on asset-sharing agreements or the foreign government's ability to return the assets on a discretionary basis. For more information on this avenue, see chapter 11.

1.5 Use of Asset Recovery Avenues in Practice: Three Case Examples

Boxes 1.3, 1.4, and 1.5 present three case examples that demonstrate how the various avenues discussed throughout this chapter have been used to recover assets in practice. Each case involved several jurisdictions and incorporated various strategic approaches and considerations depending on the circumstances of the case, the avenues available in the domestic and foreign jurisdictions, and various repatriation arrangements.

BOX 1.3 Peru: Vladimiro Montesinos and His Associates

Background: Vladimiro Montesinos, personal adviser of Peru's President Alberto Fujimori (1990–2000) and the de facto head of Peru's intelligence service, was caught in September 2000 in a corruption scandal that involved the bribery of an elected opposition congressman. In fact, a Peruvian television station broadcast a leaked video (one of the so-called Vladi-videos) showing Montesinos paying the congressman US$15,000 and asking him to leave his party and join Fujimori's coalition.[a] A few months later, in November 2000, President Fujimori resigned, and in June 2001 Montesinos was arrested in Venezuela after eight months on the run.[b] Subsequent investigations revealed that Montesinos was involved in numerous illegal activities including bribery, embezzlement of public funds, arms and drug trafficking, and human rights violations.[c] Montesinos was charged, tried, and convicted on multiple charges.

Illegal assets: Since 1990, Montesinos had received, among other things, kickbacks related to arms trafficking in at least 32 transactions (each worth 18 percent of the purchase price) as well as commissions on the purchase of three planes for the Peruvian air force (Levi, Dakolias, and Greenberg 2007). Montesinos had deposited his illegal assets in several jurisdictions, including Switzerland, the Cayman Islands, Luxembourg, Peru, and the United States.

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BOX 1.3 Peru: Vladimiro Montesinos and His Associates ***(Continued)***

Illegal assets in Switzerland and strategic considerations: Regarding the US$49.5 million frozen in Switzerland (see chapter 5, box 5.8, on the prompt freezing of Montesinos's assets),[d] two options were discussed with the Swiss investigating magistrate: (a) to prosecute the offenders in Peru for corruption and then use formal mutual legal assistance (MLA) channels to repatriate the assets, or (b) to have Switzerland initiate proceedings for drug trafficking and related money-laundering offenses that were also part of the case. However, under the latter option, Peru would have to share with Switzerland a percentage of the recovered assets.

Peru selected the first option and strategically introduced legislation permitting guilty pleas (plea bargaining), as further discussed in chapter 2, section 2.3.[e] In return for a reduced criminal sentence or dismissal of the proceedings, defendants would provide useful information regarding known or unidentified crimes, unknown evidence, access to the proceeds of crime, or testimony against key figures. In addition, defendants would sign waivers authorizing foreign banks that held their assets to transfer them to Peruvian government accounts. Several million dollars were recovered using these waivers. As a result of the efficient cooperation between the Swiss and Peruvian authorities, US$77 million was ultimately transferred to Peru.[f]

Illegal assets in the Cayman Islands: For the assets allegedly deposited in the Cayman Islands, Peru hired local lawyers to assist with the pursuit of US$33 million transferred through a Peruvian bank. Peruvian authorities also met with the financial intelligence unit (FIU) in the Cayman Islands to seek assistance. After several months of financial analysis, Peru discovered that the assets had never been sent to the Cayman Islands but instead had remained in a Peruvian bank. A back-to-back loan scheme had been used to simulate the "transfer" to a Cayman Islands bank and the "return" to a Peruvian bank. Once discovered, the funds in the Peruvian bank were seized and confiscated.

Illegal assets in the United States: Following an FBI investigation (in collaboration with Peruvian authorities) into fraud, corruption, and money laundering involving Montesinos and his associate Victor Venero Garrido, US$20.2 million was frozen while Garrido was arrested and his apartment seized (INL 2005). Another US$30 million of Montesinos's funds held in the name of a front man were also frozen. Non-conviction based (NCB) confiscation proceedings in Florida and California were used to recover the funds, and the entire amount was repatriated to Peru. The repatriation agreement between the United States and Peru provided for transparency as well as for the compensation of victims and the support of anticorruption efforts (INL 2005).

Illegal assets in Peru: In Peru, more than US$60 million was recovered by Peruvian authorities through the seizure and confiscation of properties, vehicles, boats, and other assets in approximately 180 criminal proceedings involving over 1,200 defendants.

(continued next page)

BOX 1.3 Peru: Vladimiro Montesinos and His Associates *(Continued)*

Overall asset recovery outcome: Ultimately, over US$250 million has been recovered from Switzerland, the United States, and local banks in Peru.

a. "Montesinos Timeline," BBC News Online, June 25, 2001, http://news.bbc.co.uk/2/hi/americas/1406486.stm.
b. "Montesinos Timeline," June 25, 2001.
c. Collyns, Dan. 2016. "Former Peru Spy Chief Given Another Jail Sentence for 1993 Forced Disappearances." *The Guardian*, September 28, 2016. https://www.theguardian.com/world/2016/sep/28/peru-spy-vladimiro-montesinos-sentenced-forced-disappearances.
d. Swiss Federal Council. 2002. "Montesinos Case: Switzerland Transfers 77 Million US Dollars to Peru." Press Release, August 20, 2002. https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-23237.html.
e. Referred to as the "Efficient Collaboration Act" (Law 27.378).
f. Swiss Federal Council, "Montesinos Case," August 20, 2002.

BOX 1.4 Zambia: Civil Actions in Tort against Frederick Chiluba and His Associates

Background: Frederick Chiluba was the president of Zambia from 1991 to 2002. In 2002, a task force was established in Zambia to investigate alleged corruption by the former president and his associates from 1991 to 2001, to assess whether criminal proceedings could be brought, and to determine the best options for recovering assets.

In February 2003, stripped of his immunity from prosecution, Chiluba was charged before a Zambian court—along with his former intelligence chief, Xavier Chungu, and several former ministers and senior officials—with 168 counts of theft.[a] The allegations involved assets that were diverted from the Ministry of Finance to an account held at the London branch of the Zambia National Commercial Bank (Zanaco). The Zambian government claimed that the account was used to meet Chiluba's and Chungu's personal expenses, while the latter argued that the account was used by Zambia's intelligence services to fund operations abroad (Ryder 2011, 1).

There were several delays in the legal process: a co-defendant fled the country, two out of three trials collapsed, and political interference was also an issue in the proceedings. Zambia's new president, Levy Mwanawasa, even considered offering Chiluba a pardon if he returned 75 percent of the laundered money. Authorities therefore decided to also bring a civil action in the United Kingdom in the hope of recovering some of the laundered money. Hence, in 2004, the attorney general of Zambia, for and on behalf of the Republic of Zambia, initiated a civil suit in the United Kingdom against Chiluba and 19 of his associates (see also chapter 2, box 2.12, on the liability of Chiluba's lawyers) to recover funds transferred to London and across Europe between 1995 and 2001 to fund the former president's expensive lifestyle, including a residence valued at over 40 times his annual salary.[b] These proceedings were launched in addition to the ongoing criminal proceedings in Zambia.[c]

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BOX 1.4 Zambia: Civil Actions in Tort against Frederick Chiluba and His Associates ***(Continued)***

Choice of legal avenue: Three factors drove the strategic decision to launch the civil action in London in addition to the criminal proceedings in Zambia:

- Most of the defendants were located in Europe, and especially in London, making domestic criminal prosecution and confiscation impossible in some cases.[d]
- Most of the evidence and assets were located in Europe, which made a European venue a more favorable option. In fact, most of the funds diverted from Zambia had passed through two law firms and bank accounts in the United Kingdom. Hence, the Zambian attorney general was able to establish jurisdiction over defendants through application of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[e]
- Successful mutual legal assistance (MLA) was unlikely, especially regarding the cases where domestic criminal prosecution and confiscation were possible, because Zambia lacked the bilateral or multilateral agreements, procedural safeguards, capacity, and experience necessary to collect evidence and enforce confiscation orders across Europe.

Hence, the choice of forum was made on the basis of the ability to enforce a court order obtained in a European jurisdiction, in a country that is a party to legal instruments (such as the Brussels Convention). By virtue of the legal instruments, such a decision would be recognized and enforced throughout Europe. It was anticipated that out-of-court settlements in the United Kingdom would also be enforceable in Zambia once registered before the UK court.

Civil proceedings before UK courts: The first case arose out of the transfer of about US$52 million from Zambia to a bank account allegedly operated outside ordinary governmental processes, the "Zamtrop account," held at Zanaco's London branch (the "Zamtrop Conspiracy"). Another claim related to payments of about US$20 million made by Zambia pursuant to an alleged arms deal with Bulgaria and paid into accounts in Belgium and Switzerland with funds traced in London (the "BK Conspiracy").[f]

The ruling: The court, after considering all the evidence, found Chiluba and other defendants who helped him divert the funds liable in tort. Particularly, it found that the defendants had conspired to misappropriate US$25,754,316 under the Zamtrop Conspiracy and US$21,200,719 under the BK Conspiracy.[g] The defendants were held liable for the value of misappropriated assets plus damages. The ruling decried the "cynical and unjustified misappropriation of funds for the private purposes of Government officials."[h]

Overall asset recovery outcome: The significance of the London court judgment lies in the fact that it permitted the seizure of assets found in the United

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BOX 1.4 Zambia: Civil Actions in Tort against Frederick Chiluba and His Associates *(Continued)*

Kingdom and also in the enforceability of this judgment in other jurisdictions that recognized and enforced UK court decisions (Ryder 2011, 7). However, obstacles remained to the enforcement of the London judgment in Zambia. Chiluba argued that the Zambian law on the enforcement of foreign judgments had not been fully satisfied. In light of the nonenforcement of the London court decision in Zambia, it has been argued that the lessons derived from this case lie mostly in the legal process chosen to pursue the assets rather than in actual recovery of assets, which clearly failed (Ryder 2011, 8).

a. These counts relate to the original criminal action against Chiluba (Ryder 2011, 9).
b. Attorney General of Zambia v. Meer Care & Desai & Others, [2007] EWHC 952 (Ch.) (United Kingdom).
c. The criminal action that was filed in 2003 in Lusaka resulted in a trial that ended in 2009, acquitting Chiluba. An appeal was immediately filed but was withdrawn a few days later by the director of public prosecutions, who did not approve the filing (Ryder 2011, 6).
d. Zambia did not have non-conviction based (NCB) confiscation legislation at that time; however, it was adopted subsequently.
e. The Brussels Convention provides for the recognition of civil and commercial judgments in the European Union.
f. *Meer Care*, [2007] EWHC 952, at § 2.
g. *Meer Care*, [2007] EWHC 952, at §§ 1120, 1132.
h. *Meer Care*, [2007] EWHC 952, at § 57.

BOX 1.5 Nigeria: Diepreye Alamieyeseigha

Background: In 1999, Diepreye Alamieyeseigha was elected governor of the state of Bayelsa in Nigeria, and he was reelected in 2003. In 2005, he was impeached for corruption. From 1999 to 2005, Alamieyeseigha accumulated foreign properties, bank accounts, investments, and cash exceeding £10 million in value. The foreign assets were held in either his or his wife's name, while some other assets were held by companies and trusts incorporated in The Bahamas, the Seychelles, South Africa, and the British Virgin Islands.

The criminal proceedings in Nigeria and the United Kingdom included criminal restraining orders over assets and formal mutual legal assistance (MLA) requests from Nigeria to the United Kingdom. Criminal confiscation of assets took place in Nigeria based on the findings of guilt by the Nigerian court. Private civil proceedings, launched in the United Kingdom, included a worldwide freezing injunction that was enforced in Cyprus and Denmark. Civil forfeiture proceedings also took place in South Africa and the United States. More specifically, the actions proceeded as follows:

- *Suspicion of money laundering and arrest.* In September 2005, the London Metropolitan Police first arrested Alamieyeseigha at Heathrow Airport on suspicion of money laundering. Investigations had revealed that Alamieyeseigha had hidden US$2.7 million in bank accounts and in his London home, while he also possessed real estate in London worth an estimated US$15 million. Alamieyeseigha was released on bail,

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BOX 1.5 Nigeria: Diepreye Alamieyeseigha ***(Continued)***

subsequently fled the United Kingdom in November 2005, and returned to Nigeria.

- *Charging and freezing of assets in Nigeria.* In Nigeria, Alamieyeseigha initially claimed immunity from prosecution. However, he was subsequently removed from office by Bayelsa State's lawmakers, thereby losing immunity. Nigeria's Economic and Financial Crimes Commission (EFCC) charged him with 40 counts of money laundering and corruption and secured a court order freezing assets held in Nigeria.
- *Confiscation of cash in the United Kingdom.* Regarding assets in the United Kingdom, close cooperation between the EFCC and the London Metropolitan Police's Proceeds of Corruption Unit was pivotal. In fact, US$1.5 million in cash was seized from Alamieyeseigha's London home under the Proceeds of Crime Act 2002 on the basis of a court order finding that the assets represented proceeds of crime. In May 2006, a court ordered the funds to be repatriated to Nigeria, and the transfer was made a few weeks later.
- *Civil proceedings in the United Kingdom and criminal proceedings in Nigeria.* For the proceeds deposited in bank accounts, the process was more challenging because both the assets and the relevant evidence were located across several jurisdictions: The Bahamas, the Seychelles, South Africa, the United Kingdom, and the British Virgin Islands. Nigerian authorities recognized that initiating proceedings with formal MLA in all these jurisdictions could take considerable time, while orders from Nigerian courts would not necessarily be executed. In addition, the pursuit of legal proceedings in each of these jurisdictions was a daunting prospect because the Nigerian authorities had little evidence linking Alamieyeseigha to these assets and the assets to acts of corruption. Therefore, Nigerian authorities decided to bring civil proceedings in the United Kingdom and simultaneously pursue criminal proceedings in Nigeria.[a] Nigeria claimed ownership of the stolen assets and proceeds of the defendant's corrupt activities. To secure evidence, the Nigerian authorities obtained a disclosure order for the evidence compiled by the London Metropolitan Police during its investigation.[b] Nigeria was able to use this evidence—obtained using both *criminal* procedures and Alamieyeseigha's income and asset declaration[c] in its *civil* case—to obtain a worldwide freezing order covering all assets owned directly or indirectly by him and a disclosure order for documents held by banks and his associates.[d]
- *Non-conviction based confiscation proceedings in South Africa.* Parallel to these proceedings, the South African Asset Forfeiture Unit initiated non-conviction based (NCB) confiscation proceedings against Alamieyeseigha's luxury waterfront penthouse in Cape Town. Funds were returned to Nigeria following the sale of the property in January 2007.
- *Guilty pleas.* In July 2007, Alamieyeseigha pleaded guilty before a Nigerian High Court to six charges for making false declarations of assets. He also had

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BOX 1.5 Nigeria: Diepreye Alamieyeseigha ***(Continued)***

his companies plead guilty to 23 charges of money laundering. He was sentenced to two years in prison, and the court ordered the confiscation of assets in Nigeria. Alamieyeseigha's guilty pleas effectively voided his defense in the civil proceedings before the London High Court. In December 2007, the court issued a summary judgment confiscating property and funds deposited in the UK bank account. A subsequent judgment in July 2008 led to the confiscation of the remaining assets in the United Kingdom, Cyprus, and Denmark.

- *Forfeiture orders in the United States.* In June 2012, a US District Court issued a forfeiture order allowing the United States to dispose of US$401,931 in assets traceable to Alamieyeseigha.[e] In addition, a forfeiture order was granted in May 2013 against a private residence Alamieyeseigha had purchased in Rockville, Maryland, worth more than US$700,000.[f]

Overall asset recovery outcome: As a result of the efficient collaboration with the authorities in South Africa, the United Kingdom, and the United States, as well as the choice and combination of various asset recovery mechanisms, Nigeria recovered US$17.7 million through domestic and foreign proceedings.

a. See the discussion on the proprietary claim brought by the Federal Republic of Nigeria in chapter 10, box 10.1.
b. The London Metropolitan Police did not contest the Nigerian application for disclosure. This departed from the usual practice whereby the police do not usually concede to providing evidence gathered through criminal investigations to assist private parties pursuing civil claims.
c. The declaration was filed in 1999, when Alamieyeseigha was first elected state governor, and indicated that he had assets amounting to just over US$0.5 million and an annual income of US$12,000.
d. See the discussion on circumstantial evidence taken into consideration in the case in chapter 10, box 10.12.
e. This was the first forfeiture judgment obtained under the Justice Department's Kleptocracy Asset Recovery Initiative (US Department of Justice. 2012. "Department of Justice Forfeits More than US$400,000 in Corruption Proceeds Linked to Former Nigerian Governor." Press Release, June 28, 2012. https://www.justice.gov/opa/pr/department-justice-forfeits-more-400000-corruption-proceeds-linked-former-nigerian-governor).
f. US Immigration and Customs Enforcement. 2013. "Maryland Property Purchased with Nigerian Corruption Proceeds Forfeited through HSI Investigation, DOJ Kleptocracy Initiative." Press Release, May 31, 2013. https://www.ice.gov/news/releases/maryland-property-purchased-nigerian-corruption-proceeds-forfeited-through-hsi.

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2. Strategic Considerations in Developing and Managing a Case

2.1 Introductory Remarks

Successful asset recovery requires a comprehensive action plan that incorporates numerous important steps and considerations.

Practitioners will need to gather and assess the facts to understand the case; identify required resources (staff, information technology [IT], and experts); engage and communicate with their foreign counterparts to open up informal and formal channels of cooperation with affected jurisdictions as soon as possible;[1] grapple with the legal, practical, and operational challenges to international asset recovery;[2] and ensure effective case management.

Each facet will help practitioners select the most appropriate legal avenue to pursue to recover assets. This chapter reviews some of the initial actions as well as some of the issues that practitioners will have to consider in selecting an avenue for asset recovery.

2.2 Gathering the Facts: Initial Sources of Information

To launch an asset recovery investigation, authorities need to analyze leads from diverse sources of information. They may also undertake some preliminary investigations (as outlined in chapter 3). Potential sources of information may include the categories described below.

Criminal complaints (communications) and proceedings. Reports of fraud, corruption, theft, or other offenses—whether filed by victims (including individuals, companies, and states harmed by corruption) or by government agencies (such as regulatory authorities, anticorruption agencies, customs agencies, tax authorities, and financial intelligence units [FIUs])—are vital sources of information. In addition, investigations into other criminal activities may reveal corrupt activities. For example, a search or communications intercept in a drug case could yield evidence of bribery.

[1] For detailed developments regarding informal and formal international cooperation, see chapters 8 and 9.

[2] For a more detailed description of some of the barriers or obstacles faced, see Stephenson et al. (2011): https://star.worldbank.org/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf. Also see FATF (2012): https://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf.

FIU reports. Money-laundering legislation obliges financial institutions, regulatory authorities, and some nonfinancial businesses and professions (such as lawyers, notaries, accountants, dealers in precious metals and stones, and trust and company service providers) to file suspicious transaction reports (STRs) or suspicious activity reports (SARs) with FIUs and to be particularly vigilant when dealing with politically exposed persons such as senior government officials and their family members and close associates.[3] Some jurisdictions also require the filing of currency transaction reports (CTRs) for certain transactions above a specified amount. In addition, FIUs receive reports from border authorities on the cross-border movements of cash over a specified amount. The information that FIUs receive from reporting entities may lead an FIU to either launch an investigation or transmit the information to local law enforcement officers or prosecutors who may commence an investigation (box 2.1).

The FIU may also transmit the information and any related intelligence to a foreign FIU through the Egmont Secure Web system. The Egmont Group of FIUs is the worldwide organization of FIUs, currently consisting of 165 FIUs. (Chapter 3 further discusses the role of the Egmont Group in the asset recovery process.)

BOX 2.1 Role and Contribution of Financial Intelligence Units in Asset Recovery Cases

Financial intelligence units (FIUs) are governmental agencies responsible for collecting suspicious transaction reports (STRs) that are submitted (also referred to as "intelligence reports") from financial institutions and other reporting entities; conducting analysis; and disseminating the resulting intelligence to local competent authorities (typically, law enforcement agencies and prosecutors as well as foreign FIUs) to combat money laundering and terrorist financing. They may be helpful partners for asset recovery practitioners in initiating and investigating a case in several ways:

- *Proactive sharing of intelligence with law enforcement and prosecutors.* Where an FIU analysis reveals money laundering or other criminal activity, FIUs should proactively provide intelligence reports to local law enforcement or prosecutors. Where appropriate, FIUs also provide intelligence reports to foreign FIUs bilaterally, often through the Egmont Group's Secure Web system. That information is analyzed further and may then be passed to foreign law enforcement and prosecutors in an intelligence format.

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[3] See United Nations Convention against Corruption (UNCAC), art. 52, on Prevention and Detection of Transfers of Proceeds of Crime—particularly paragraphs (1) and (2) about the obligations of financial institutions. Also see Recommendations 12, 20, and 23 of "The FATF (Financial Action Task Force) Recommendations" (FATF 2019): https://www.govinfo.gov/content/pkg/USCODE-2009-title18/html/USCODE-2009-title18.htm.

BOX 2.1 Role and Contribution of Financial Intelligence Units in Asset Recovery Cases *(Continued)*

- *Provision of ancillary intelligence.* Most FIUs maintain a central database of all STRs, currency transaction reports (CTRs), cross-border currency reports, intelligence reports, and any queries from law enforcement agencies or foreign FIUs. FIUs thoroughly analyze the individuals and businesses linked to the STR. The intelligence received and stored may not have been sufficient on its own to warrant a report to law enforcement. However, when analyzed together, it may help law enforcement officials understand the activity of an investigation's targets, identify associates, and link the information with other agencies' investigations.
- *Expertise in financial matters.* Financial intelligence analysts are familiar with financial services and products and with money-laundering typologies. They are experienced in analyzing financial records and financial flows and in conducting a wealth assessment when there are concerns about the legitimacy of the source of the wealth. Such expertise is critical throughout an investigation and prosecution, and FIUs may be a helpful resource in this regard.
- *Personal contacts and networks.* FIUs have contacts in financial institutions, other domestic agencies, and foreign FIUs (through the Egmont Group) that may be helpful resources for practitioners.
- *Ability to institute an administrative freeze.* Some FIUs can restrain funds for a brief period (see chapter 8, section 8.5.4), thereby helping practitioners quickly preserve assets before obtaining a formal court order.
- *A new tool, the Geographic Targeting Order (GTO).* In the United States, the Financial Crimes Enforcement Network (FinCEN)[a] issues GTOs obliging financial institutions or other "gatekeepers" to identify or disclose beneficial ownership or other relevant information related to transactions in targeted geographic areas. For example, US title insurance companies must identify the natural persons behind legal entities used in purchases of residential real estate above a certain threshold and without loan financing, in certain areas.

Practitioners have found FIUs to be most effective as partners. Such a relationship requires a two-way sharing of relevant intelligence between the FIU and the practitioner—both upstream and downstream rather than a one-way flow of intelligence from the FIU to the practitioner. Practitioners have found that such a practice increases the intelligence available to FIUs and ultimately improves the financial analysis that FIUs produce.

a. Financial Crimes Enforcement Network (FinCEN), a bureau of the US Department of the Treasury, collects and analyzes information about financial transactions to safeguard the financial system from illicit use, combat domestic and international money laundering and related crimes such as terrorist financing, and promote national security through the strategic use of financial authorities and financial intelligence ("Mission," FinCEN website: https://www.fincen.gov/).

Civil or administrative proceedings. Civil or administrative proceedings, regulatory sanctions against a financial institution, or sanctions against a company by an international or regional development bank may reveal corrupt activities.[4] Such proceedings or sanctions, although not specifically citing fraud and corruption, often lead to the discovery of misconduct upon investigation and are a useful source of evidence. For example, a complaint about missing or defective materials could indicate that a procurement official accepted defective goods in exchange for bribes. Similarly, complaints filed by contractors alleging unfair treatment in a bidding process also merit attention.

Mutual legal assistance (MLA) requests. MLA requests from foreign jurisdictions (as described in chapters 8 and 9) can include a lot of detailed information on individuals and bank account details that may lead to a domestic case for money laundering.

Information shared by tax authorities. While conducting tax audits, the tax agencies often find unusual transactions leading to suspicions of white-collar crime, including false accounting and fictitious billing. This information may be collected by tax authorities from foreign tax agencies through tax exchange agreements and may thus become accessible where there are criminal investigations or proceedings relating to the same factual matrix.

Auditors. While individuals are audited by tax agencies, companies are commonly subject to annual audits of their financial statements. Governments usually establish auditing or regulatory agencies (for example, the Office of the Inspector General in numerous US federal agencies, courts, inspection agencies and bodies, and specialized accounting offices) to oversee government departments or state-owned companies. These audits frequently uncover discrepancies between movements of funds and actual business transactions, signaling possible corrupt activities. In particular, examination of financial documents relating to revenues or expenses may reveal patterns of fictitious billing, typical of corruption and bribery cases.

Spontaneous disclosures. Foreign competent authorities and FIUs may spontaneously provide information on corrupt activities that may have taken place in another jurisdiction or involve its nationals. Such information may also be provided through formal or informal practitioner networks. See chapter 8 for additional information on the role of informal cooperation in international investigations.

Whistle-blowers. Initial referrals for investigation may come from employees. Whistleblower legislation is key to protect employees from retaliation or lawsuits from the

[4] International development banks or other development agencies have developed internal investigative and administrative sanction and referral mechanisms to address corrupt activities by officials, companies, or individuals benefiting from development funds. When internal investigations uncover corrupt activities, these organizations may refer their findings to national authorities that could have jurisdiction related to the criminal offense. Even when the findings are not referred, national authorities could become aware of them once the sanction is published.

companies or agencies for which they work. It is also key to have systems in place to ensure anonymous disclosures.[5]

Cooperating offenders. Tips may sometimes also come from individuals hoping for lenient treatment for their own crimes, in which case law enforcement agencies should be aware of the need to check thoroughly that disclosures are made in good faith.

Media and civil society reports. Suspicious activity or arrests of foreign officials on corruption charges is often relayed by the news media or through reports of civil society and nongovernmental organizations.[6] Such reports may trigger an investigation directly or may prompt the filing of an STR that eventually leads to an investigation.[7] Box 2.2 provides an overview of the Luca Volontè case, which was exposed following a report by a European think tank.

Declarations of assets by public officials. Many countries oblige public officials to disclose information regarding their assets and income.[8] These declarations may highlight significant increases in assets that are inconsistent with the individual's declared income or even falsification of declared income. Comparing declared assets against those assets used by public officials may point toward illicit enrichment.

Intelligence services. Information may be received from an intelligence agency or through intelligence services in another government agency (for example, law enforcement).[9]

Proactive investigations. Practitioners may also actively seek information from potential sources. They may monitor the activities of sensitive industries or those susceptible to money laundering and corruption, such as natural resource extraction or arms dealing. Practitioners may also seek to acquire information through publicly accessible registries on the ownership and control of companies, enabling them to monitor and follow business deals and transactions. Box 2.3 discusses the United Kingdom's introduction of a publicly accessible register of "people with significant control" over particular types of business entities.

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[5] Many jurisdictions have incorporated whistle-blower protections and procedures into legislation. Haiti, for example, enshrined the concept—referred to as "public outcry"—in its 1987 Constitution. See also UNCAC, art. 33.

[6] See, among other organizations, Global Witness (https://www.globalwitness.org/en/) and Public Eye (https://www.publiceye.ch/en/).

[7] See for example the "*Biens mal acquis*" report published by a French nongovernmental organization (NGO), the Catholic Committee against Hunger and for Development (CCFD 2007), which led to the initiation of criminal proceedings in France. The report revealed information about the assets of 23 dictators and their families in Western countries.

[8] UNCAC, art. 8 (5) and arts. 52 (5) and (6), require countries to consider establishing such systems. World Bank research found that approximately 143 countries have introduced a system of asset and/or interest disclosure for public officials (Rossi, Pop, and Berger 2017).

[9] In the United States, for example, the Federal Bureau of Investigation (FBI) is both an intelligence agency and a law enforcement agency.

BOX 2.2 Allegations of "Caviar Diplomacy" against European Politicians

In 2012, the European Stability Initiative (ESI), a Berlin-based think tank, published a report titled "Caviar Diplomacy" that alleged bribery of European politicians in exchange for political support of Azerbaijan (ESI 2012). In 2016, ESI followed up with a report describing how corruption proceeded among members of the Parliamentary Assembly of the Council of Europe (PACE) (ESI 2016).

In 2017, the Council of Europe (COE) set up an independent external body to investigate allegations of corruption against PACE members or former members (COE 2018). After an investigation lasting more than 10 months, the investigation body, relying strongly on voluntary cooperation from witnesses, established that indeed a group of persons were acting in favor of Azerbaijan and contrary to PACE's ethical standards (COE 2018, x) and that certain members of PACE were strongly suspected of engaging in corrupt activities (COE 2018, xi). The investigation resulted in the expulsion of 14 members from the COE and PACE.[a]

The most prominent case resulting from the discovery of this scheme was the one against Italian politician Luca Volontè. Italian prosecutors alleged that Volontè, a former member of PACE, accepted payments in exchange for muting the European body's criticism of Azerbaijan's human rights record. Volontè was allegedly influential in preventing PACE from endorsing a critical report about political prisoners in Azerbaijan (the Strässer Report) in 2013.[b]

As part of the scheme, Italian prosecutors alleged that Volontè used two corporate vehicles to receive the payments[c] from four limited partnerships registered in the United Kingdom, which in turn received money from an Azerbaijani company.[d] All these corporate vehicles held accounts at an Estonian branch of Danske Bank,[e] which is currently being investigated in Denmark, Estonia, Italy, the United Kingdom, and the United States. Former officials of the Estonian branch of Danske Bank were indicted for their involvement in the operation.[f]

In 2014, Milan prosecutors initiated a criminal investigation into money-laundering and corruption allegations against Volontè following a suspicious transaction alert by an Italian bank. A pretrial investigation judge separated the two charges into two separate sets of proceedings, and Volontè was acquitted of money-laundering charges in February 2018, a decision that the prosecutor has appealed.[g]

a. European Observatory of Crime and Security (EU–OCS). 2018. "Council of Europe Expels 14 Members Accused of Corruption in Azerbaijan Case." EU-OCS Political Watch, July 14, 2018. https://eu-ocs.com/council-of-europe-expels-14-members-accused-of-corruption-in-azerbaijan-case/.
b. Indictment of Luca Volontè, July 21, 2016, Public Prosecutor's Office of Milan. The Organized Crime and Corruption Reporting Project (OCCRP) provided information and documents related to this case. See, for example, Paul Radu, Khadija Ismayilova, and Madina Mammadova. 2017. "Azerbaijani Laundromat: The Influence Machine." OCCRP website, September 4, 2017. https://www.occrp.org/en/azerbaijanilaundromat/the-influence-machine. On the Strässer Report affair, see also COE (2018, xiii).
c. These vehicles were the Novae Terrae Foundation, an Italian foundation that received more than €2 million in several installments; and L.G.V. S.r.l., an Italian limited company owned by Volontè's wife (Indictment of Luca Volontè, July 21, 2016).
d. The four UK partnerships were Hilux Services LLP and Polux Management LLP, both registered in Glasgow, Scotland; Metastar Invest LLP, registered at a service address in Birmingham, UK; and LCM Alliance LLP, Hertfordshire, UK. All four limited liability partnerships (LLPs) were ultimately owned by companies in Belize, the Seychelles, and the British Virgin Islands, which also served as corporate partners. These partnerships in turn received money from Baktelekom MMC, an Azerbaijani company. Italian prosecutors alleged that Volontè also received payments from a company registered in the Marshall Islands, Jetfield Network Ltd., via a corporate account at Baltikums Bank, Latvia.
e. Indictment of Luca Volontè, July 21, 2016.
f. Andre Delicata. 2013. "Italy Joins Countries Investigating Bank in Azerbaijan Corruption Scheme." *The Shift News*, January 3, 2019. https://theshiftnews.com/2019/01/03/investigations-into-danske-bank-scandal-continue-to-widen/.
g. "How Azerbaijan Bribed Ex-Council of Europe Members." *European Interest,* April 24, 2018. https://www.europeaninterest.eu/article/azerbaijan-bribed-ex-council-europe-members/; COE (2018, 66).

BOX 2.3 United Kingdom: Register of "People with Significant Control"

Background: Following the global financial crisis and public anger at the use of opaque corporate structures to avoid tax on a large scale, then prime minister David Cameron launched an initiative within the Group of Eight (G-8) highly industrialized nations in 2013 to ensure transparency of legal entities and committed to the establishment of a public register on beneficial ownership. This led to the 2016 introduction of the publicly accessible Register of People with Significant Control ("PSC register").

Purpose: Individuals and legal entities holding an interest in and exercising significant control over UK companies, societates Europaeae (SEs), limited liability partnerships (LLPs), and eligible Scottish partnerships (ESPs) are declared on the PSC register for their respective entities (BEIS 2017, 1).[a] The purpose of the PSC register is to ensure transparency and improve corporate trust by providing information on the ownership and control of UK companies.

Obligations: Since June 26, 2017, these companies and LLPs have been obliged to enter relevant information on their own PSC register within 14 days of becoming aware that a person meets the PSC requirements and must be registered. All companies and LLPs must then update the central PSC register at Companies House within a further 14 days (BEIS 2017, 5).[b]

Who qualifies as a PSC: A PSC is someone that meets any one or more of the following conditions in relation to a company (BEIS 2017, 8):

- Directly or indirectly holds more than 25 percent of the shares
- Directly or indirectly holds more than 25 percent of the voting rights
- Directly or indirectly holds the right to appoint or remove the majority of the board of directors
- Otherwise has the right to exercise or actually exercises significant influence or control
- Has the right to exercise or actually exercises significant influence or control over the activities of a trust or firm that does not have legal personality but would itself satisfy any of the first four conditions if it were an individual.

Information entered on the PSC register: The PSC register holds information about a PSC, including which of the five qualifying conditions to be a PSC have been met, with quantification of the interest where relevant (BEIS 2017, 17–18). A PSC must volunteer information on the PSC register or respond to notices from the company requesting information; failure to do so is a criminal offense.

(continued next page)

BOX 2.3 United Kingdom: Register of "People with Significant Control" *(Continued)*

Accessibility of information: Companies that are obligated to maintain their own PSC register must make it accessible (BEIS 2017, 19). The Central Public Register at the Companies House will provide access to almost all information except for residential address and date of birth. All information held by the Companies House is available to law enforcement agencies (BEIS 2017, 20).

a. Also see the guidance documents available through "PSC Requirements for Companies and Limited Liability Partnerships" (last updated February 15, 2018), https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships.
b. Companies House—an executive agency sponsored by the UK Department for Business, Energy & Industrial Strategy—incorporates and dissolves limited companies, examines and stores company information, and makes that information available to the public. The data files constituting the PSC register are available through the Companies House website at http://download.companieshouse.gov.uk/en_pscdata.html.

2.3 Assessing Legislation and Considering Legal Reforms

It is important for the authorities to determine whether an adequate and effective legal framework is in place, both domestically and in any relevant foreign jurisdiction.[10] This includes considering whether the right legal avenues are available as well as whether there are provisions on asset management and international cooperation. (For more details, see chapter 6 on asset management and chapter 9 on international cooperation.) For example, confiscation might be permitted either by the general legislation covering the confiscation of instrumentalities and proceeds of crime or by provisions applicable to a specific offense. In both cases, authorities should make sure that confiscation related to the crime under investigation is legally permissible.

When legislation on a particular legal avenue is insufficient, another avenue may need to be considered. Alternatively, some jurisdictions may be able to introduce new procedures applicable to crimes committed before the laws were enacted. For example, authorities may consider introducing plea-bargaining agreements allowing peripheral defendants to plead guilty to a lesser charge[11] or with a recommendation of a sentence

[10] Online desk research and contact with foreign practitioners can be helpful resources for foreign legislation. Some countries often publish laws and guidance on government websites. For such resources, see appendix J. Other resources for legislation include the United Nations Office of Drugs and Crime (UNODC) TRACK platform on tools and resources for anticorruption knowledge (http://www.track.unodc.org/Pages/home.aspx) and the International Money Laundering Information Network (IMOLIN) (accessed August 12, 2018) (https://www.imolin.org/). The Stolen Asset Recovery (StAR) initiative has also collected nearly 30 asset recovery guides containing tools and procedures for asset recovery in their respective countries as well as contact information of specific national agencies: https://star.worldbank.org/ArabForum/asset-recovery-guides.

[11] For example, Argentina introduced in 2016 the Ley del Arrepentido to provide criminal collaborators with incentives (such as reduced sentences) to cooperate with the authorities. The law, however, has been criticized for not granting broad powers to investigators and for providing limited incentives to cooperate. (Benjamin N. Gedan and Christopher Phalen. 2018. "In Argentina, Why is All Quiet on the Odebrecht Front?" *Americas Quarterly*, April 9, 2018. https://www.americasquarterly.org/content/argentina-why-all-quiet-odebrecht-front.)

lighter than the maximum, to encourage cooperation in locating evidence relating to more important suspects, as Peru did in the context of the Montesinos case (as discussed in chapter 1, box 1.3) and as Brazil has done in its Operation Car Wash (*Lava Jato*) investigation (box 2.4). Because ex post facto legislation or procedures will likely face

BOX 2.4 Brazil: The Introduction of "colaboração premiada"

The success of the proceedings in Brazil's *Lava Jato* (Car Wash) case would not have been possible without recent reforms that opened up the possibility of plea bargaining, allowing investigators and prosecutors to leverage reduced sentencing in lieu of disclosure of information pertinent to the investigation. During a wave of anticorruption demonstrations in 2013, President Dilma Rousseff fast-tracked laws to root out systemic fraud.[a]

More specifically, in 2013, Federal Law No. 12,850 on Criminal Organizations allowed Brazilian prosecutors to use a new tool: plea bargaining. Although this instrument was provided for in previous legislation, it was not frequently used by Brazilian prosecutors because it lacked implementing regulations (Ribeiro 2017). The introduction of colaboração premiada[b] in said law resembles the practice of plea bargaining frequently used in the United States, yet differs from it significantly because it cannot be used as the basis for a conviction (Ribeiro 2017, 7; Wilson Center 2017). In addition, it applies only to natural persons and not to legal persons,[c] and it can only be used to obtain evidence, such as for identifying other criminals, revealing the structure of a criminal organization, preventing other crimes by the organization, recovering assets, or locating victims (Ribeiro 2017, 7).

A few months after the law came into force, in March 2014, the Federal Police of Brazil and the Federal Prosecution Service initiated an investigation of what was later revealed to be Brazil's largest corruption scheme, the Lava Jato case. The investigation revealed, among other things, the involvement of a *doleiro* (dollar man)—that is, a black-market money dealer—and a former director of Petrobras, Brazil's state-owned oil company. (See also box 2.13 on the importance of identifying liable parties.)

After both of those individuals were arrested, each agreed to collaborate and provide information to the authorities that led to the signing of hundreds of plea-bargain agreements with parties involved in the scandal (Ribeiro 2017, 9). This tool has been substantially used during the Lava Jato operation, and numerous colaboração premiada agreements were entered into between individuals and Brazilian authorities.[d]

a. Jonathan Watts. 2017. "Operation Car Wash: Is This the Biggest Corruption Scandal in History?" *The Guardian*, June 1, 2017 (accessed January 27, 2019). https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history.
b. Translated as "awarded collaboration"; in Brazil, it is popularly referred to as *delação premiada* (awarded denunciation) (Ribeiro 2017, 7).
c. Brazil does not provide for corporate criminal liability except for environmental crimes. Legal persons may face civil or administrative liability on the basis of the Brazilian Clean Company Act (Federal Law No. 12,846 of 2013).
d. Federal Prosecution Service. "Results," Car Wash Case [in Portuguese] (accessed August 10, 2020). http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.

legal or constitutional scrutiny, it is important that countries consider potential legal challenges to such laws at the outset.[12]

For example, the government of Peru took a strategic step in the early phases of its investigation into then intelligence chief Vladimiro Montesinos: it adopted Law 27.738, which established a plea-bargaining mechanism for investigations into organized crime. It introduced "guilty pleas" and plea agreements that had not existed in Peru and in most civil law jurisdictions as they do in common law jurisdictions. The law allowed members of a criminal organization subject to prosecution (except for leaders and some public officials) to cooperate with prosecutors through guilty-plea agreements, often providing information in exchange for a reduced sentence.

The law secured convictions and avoided years of litigation. Most important, it enabled the Peruvian authorities to quickly obtain information on Montesinos's flow of funds and, through a waiver process, to recover assets in foreign jurisdictions amounting to over US$175 million.

2.4 Developing a Case Strategy

It is important for practitioners to think creatively in developing and implementing a strategy. Innovative ways to resolve an issue—such as establishing a joint task force or a joint investigative team with another jurisdiction—should form part of the deliberations when developing the strategy. In the context of large, complex, or transnational cases, it will be important to decide whether a specialized team, unit, or task force must be assembled and whether joint investigations with foreign authorities should be undertaken.

Depending on the jurisdiction and the circumstances, the case is likely to require investigative[13] and prosecutorial teams and may be expanded into a joint task force of the relevant agencies (including agencies involved in seeking civil remedies) or a joint investigation with another jurisdiction. The practitioners and agencies to include while setting up a specialized unit or joint task force with foreign authorities are described in section 2.6. Effective informal cooperation at this juncture is key.

Practitioners should also ensure there is an ongoing process in place to reassess the strategy as decisions are made and as new information, and opportunities, become available. Pragmatism is essential, meaning that the first choices should be regularly reviewed (domestically and with international counterparts where necessary) to ensure that they are still appropriate in light of case development. For example, an asset recovery action based on one legal avenue can lead to the discovery of facts relevant for starting another

[12] For example, the retroactivity of non-conviction based (NCB) confiscation laws has been raised as a concern in cases in Liechtenstein, Thailand, and the United States (Greenberg et al. 2009, 45–46), http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Stolen_Assest_Recovery.pdf.

[13] Investigative teams usually carry out investigations or intelligence gathering before and after the initiation of charges against the defendant. In some jurisdictions, however, the term "investigation" is used exclusively for investigations that follow the initiation of formal charges.

BOX 2.5 The Lausanne Guidelines

The Lausanne Guidelines for the Efficient Recovery of Stolen Assets emerged in 2014 from the "Lausanne process," which since 2001 has convened a series of international expert seminars with participants from around 30 different jurisdictions and international organizations (the "Lausanne Seminars"). The Lausanne process allows jurisdictions to discuss challenges in asset recovery and how to overcome them, working in close cooperation with the International Centre for Asset Recovery (ICAR) of the Basel Institute on Governance and with the support of the Stolen Asset Recovery (StAR) initiative of the World Bank and United Nations Office on Drugs and Crime (UNODC).[a]

Under a mandate—from the United Nations General Assembly and the Conference of States Parties (COSP) to the UN Convention against Corruption (UNCAC)—to prepare the guidelines, participants of Lausanne VIII in 2014 combined their knowledge in the form of the Guidelines for the Efficient Recovery of Stolen Assets (the "Lausanne Guidelines").

The 10 Lausanne Guidelines provide a step-by-step guide and a key-items checklist for developing and managing an asset recovery case. They focus on establishing and using contacts; developing a communication strategy enabling discussions on the legal requirements, timing, and requirements of mutual legal assistance (MLA) requests; and accordingly formulating a case strategy that factors in restraint of assets, investigations, and initiation of parallel investigations.

a. The Lausanne Guidelines are relevant for a variety of users other than practitioners, including policy makers and legislators. For the complete guidelines, see "Guidelines for the Efficient Recovery of Stolen Assets" on the Basel Institute on Governance's website at https://guidelines.assetrecovery.org/guidelines. In addition, appendix K provides an overview of the Guidelines.

case through another legal avenue. The case strategy should be a working document to be revisited throughout the asset recovery process as new facts come to light or as other parties or jurisdictions become involved. Practitioners can also refer to the Lausanne Guidelines for the Efficient Recovery of Stolen Assets (box 2.5) for planning and developing an asset recovery case strategy as well as case development and management.

2.5 Establishing a Team, Unit, or Task Force, and Conducting Joint Investigations with Foreign Authorities

A multidisciplinary team or unit assembled is likely to comprise a range of individuals, including financial investigators and experts in financial analysis, forensic accountants, law enforcement officials, prosecutors, and asset managers. Experts may be appointed from the private sector or seconded from other agencies such as regulatory authorities, FIUs, tax authorities, auditing agencies, or inspection bodies. Where a decision is made to conduct a joint investigation with another jurisdiction, the team should include members who are completely conversant with their national MLA and international

cooperation frameworks. Where possible, team members should also speak the relevant languages for better interaction with their foreign counterparts.

2.5.1 Investigative and Prosecutorial Teams and Specialized Confiscation Units

In addition, the prosecutors should have financial expertise and experience to effectively present their cases in court. Special prosecutors may be appointed in cases involving high-ranking officials to prevent conflict of interest, guarantee independent investigations, and ensure that the process is credible.

Normally, a high-ranking prosecutor should lead the investigation or follow the investigations being conducted by investigating magistrates or law enforcement because the prosecutor is ultimately responsible for presenting the case in court. The lead prosecutor must ensure that law enforcement agencies collect the necessary evidence to prove the offenses and obtain provisional measures and a confiscation order.[14] In addition, the prosecutor acts as an interface between judges and investigators when law enforcement officers need judicial authorization to use special investigative tools such as wiretapping, searches, arrests, and plea agreements.

Law enforcement or prosecutorial agencies that are primarily responsible for the specific offenses involved in the case often have the capacity to gather and present evidence regarding the offenses for the purpose of confiscation. Where possible, there is also merit in creating specialized confiscation, investigation, and prosecution units to support primary investigation teams. Experience suggests that difficulties can arise when law enforcement officers and prosecutors are responsible for both proving the specific offense and pursuing confiscation. In some jurisdictions, for example, criminal prosecutors might not be assigned until the investigation is largely complete—that is, too late for purposes of asset confiscation. In addition, criminal investigators and prosecutors have large caseloads and tend to give priority to obtaining a criminal conviction and not necessarily to pursuing confiscation. In this context, freezing and seizure of assets in the first steps of the process is of paramount importance.

With the establishment of specialized confiscation units, investigators and prosecutors develop the specialized skills needed to present evidence effectively for enforcing confiscation laws. Asset recovery or confiscation proceedings involve more extensive investigatory work than required to prove criminal offenses, and an independent, objective approach to that issue should be viewed as a best practice. Confiscation investigators, as a result of their skill set, also will go further than criminal investigators in identifying and tracing assets for confiscation, and they are well placed to undertake international inquiries to follow assets that have left the jurisdiction. If such an approach is taken, confiscation practitioners must work closely with their counterparts pursuing the criminal prosecution. Failure to do so can have negative consequences for the criminal case by depriving investigators and prosecutors of financial information or evidence that can be key to proving the case, which in turn is likely to affect confiscation efforts.

[14] In some civil law jurisdictions, investigating magistrates may lead the investigations from the beginning of cases until their final adjudication; however, prosecutors can appeal their decisions.

The team may be based in (a) anticorruption agencies that have the authority to investigate, prosecute, or both; or (b) regular law enforcement and prosecution agencies. Wherever the team is situated, it will be critical that investigators and prosecutors are granted, in law, the authority to investigate and prosecute the offenses as well as to confiscate their proceeds and instrumentalities.[15]

2.5.2 Joint Task Forces

A specialized confiscation team may be expanded into a joint task force consisting of members from various agencies, or authorities may consider forming a joint task force at the very outset, depending on the jurisdictions involved and the complexity and magnitude of the case. A joint task force could comprise representatives of various agencies, law enforcement authorities, and, as permitted by legislation, private sector entities that have an interest in the prosecution or the recovery of assets. Such a task force facilitates the exchange of information and expertise and assists in discussions and reviews of the latest developments in the case.

It is important to clarify the respective roles of the team members and other law enforcement authorities to avoid confusion or rivalries among the agencies. In addition, it is important to ensure that the contributions of all agencies are appropriately recognized. Often this can be facilitated through joint press releases and funding arrangements.

A joint task force may include, in addition to law enforcement agencies and prosecutors, representatives who can contribute from their respective fields from the following departments:[16]

- Taxation
- Customs
- Justice
- Foreign affairs
- Treasury
- Immigration
- FIUs
- Regulatory authorities
- Central authorities[17]
- Asset management authorities.

Box 2.6 provides an example of the establishment of a commission to go after the assets belonging to members of the regime of the former Tunisian president Ben Ali.

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[15] Generally, foreign jurisdictions will refuse to grant MLA for investigations or prosecutions led by nonjudicial agencies or agencies not authorized by law.

[16] For the specific roles of these agencies, refer to chapter 3. Information that can be obtained from the relevant agencies is detailed in chapter 3, section 3.4.2.

[17] The concept of central authorities is described in chapter 8, box 8.4.

BOX 2.6 Tunisia: Establishment of Coordination and Investigative Bodies for the Case against Ben Ali and His Family

Following Tunisian President Ben Ali's fall and flight in 2011, the new authorities determined that he and his associates should be investigated for corruption. The interim government initiated investigations into embezzlement of public funds, money laundering, abuse of power, and bribery.

To facilitate the investigation, domestic exchange of information, and legal action, the government established a national committee to coordinate the conduct of the cases in foreign countries. The committee consisted of officials from the Ministries of Justice, Finance, and Foreign Affairs; the Central Bank of Tunisia; the country's financial intelligence unit (FIU), the Tunisian Financial Analysis Committee; and Customs.[a] In addition, the minister of justice separately established a specific prosecution unit at the Tunisian court specializing in financial crimes.

The national committee played an instrumental role in coordinating various cases related to corrupt assets held by defendants in France, Italy, Lebanon, Spain, and Switzerland. It facilitated the regular exchange of information between the FIU and the prosecutors as well as the involvement of the relevant agencies. The committee also ensured the coordination for criminal investigations and representation of Tunisia as a civil party in criminal proceedings initiated in France and Switzerland.

a. See "Decree-Law No. 2011-15, March 26, 2011, on the creation of a national committee for the recovery of ill-gotten assets existing abroad," https://legislation-securite.tn/fr/node/43750.

Another successful example of a domestic task force set up for a large investigation and asset recovery case touching many jurisdictions is the 1Malaysia Development Berhad (1MDB) case, described in box 2.7.

Finally, the private sector might contribute significantly to cases where difficulties are anticipated in enforcing a confiscation order. The private sector possesses expertise and resources that might introduce efficiency in handling complicated cases (Home Affairs Committee 2016, 19–20). Therefore, the collaboration of public agencies with the private sector, including in the context of proceedings related to civil remedies, could enable a more efficient recovery of criminal assets.[18] The United Kingdom's Home Affairs Select Committee has recommended the creation of a market for private enforcement and collection of unpaid confiscation orders, earning a portion from the recovery.

2.5.3 Joint Investigations with Foreign Authorities

In complex investigations requiring coordinated action with other jurisdictions, a joint investigation or agency task force involving foreign authorities should be considered.[19]

[18] See also chapter 4, section 4.2.5, on the advantages of collaborating with the private sector in the case of virtual currencies.

[19] See UNCAC, art. 49, and the UN Convention against Transnational Organized Crime (UNTOC), art. 19, about the establishment of joint investigative bodies on the basis of bilateral or multilateral agreements, arrangements, or agreements on a case-by-case basis.

BOX 2.7 Malaysia: Domestic and International Coordination in the 1MDB Investigation

Background: The case commonly known as "1MDB" involved an international conspiracy to launder funds misappropriated from 1Malaysia Development Berhad (1MDB), a state investment fund wholly owned by the government of Malaysia that had been created to promote economic development.[a] Instead, 1MDB officials and associates allegedly diverted approximately US$4.5 billion in funds through a series of complex transactions and fraudulent shell companies with bank accounts in Singapore, Switzerland, Luxembourg, and the United States.[b]

Domestic task force: A high-level task force was formed in Malaysia to facilitate domestic interaction and international coordination in the 1MDB case. The task force included the attorney general, the inspector general of the Royal Malaysia Police (RMP), the chief commissioner of the Malaysian Anti-Corruption Commission (MACC), and the governor of Bank Negara Malaysia (Central Bank of Malaysia).

International coordination: Malaysian authorities set up close coordination mechanisms with authorities of Singapore, Switzerland, and the United States as well as other countries that initiated investigations in their own countries (France, Indonesia, and Luxembourg). All these countries cooperated to track, coordinate, and share information to facilitate cross-border identification and repatriation of assets.

The critical elements and benefits of the cooperation mechanisms used in this case included the following:

- *Multilateral coordination mechanisms.* To enable the collection of information and facts, information was exchanged through either mutual legal assistance (MLA) requests or the Egmont Group of financial intelligence units (FIUs).
- *Avoidance of legal impediments.* Effective and timely cooperation helped participating jurisdictions understand the legal requirements of other foreign jurisdictions.
- *Maximum utilization of resources.* Efficient resource management avoided duplication of investigations where countries shared details and objectives of their actions, such as the witnesses and subject matters they were pursuing.

Case outcomes and asset recovery: As a result of the case, the Kuala Lumpur High Court sentenced the former prime minister Najib Razak to 12 years in prison and imposed a fine of approximately US$49.4 million.[c] The conviction and fine were appealed.

Significant immediate and eventual outcomes of the international task force were as follows:

- Singaporean authorities were to immediately repatriate S$15.3 million to Malaysia within one year upon initiation of the investigation.
- The *Equanimity* yacht, which Indonesian authorities seized off the island of Bali, was handed over to the Malaysian authorities. Malaysia then sold the luxury superyacht for US$126 million.[d] A US court also permitted the sale of a private jet grounded in Singapore.[e]

(continued next page)

BOX 2.7 Malaysia: Domestic and International Coordination in the 1MDB Investigation *(Continued)*

- The US government returned US$57.04 million to Malaysia following a settlement reached by the US Department of Justice (DOJ) with Hollywood film production company Red Granite Pictures. Malaysia dropped charges against the cofounder of Red Granite Pictures, producer of the film *The Wolf of Wall Street*, alleging that he had received US$250 million from the 1MDB fund, but the court settlement required him to return assets worth US$107 million.[f]
- In the United States, the DOJ settled one of its civil forfeiture cases to forfeit assets with an estimated worth of US$49 million. These included the proceeds from the sale of high-end real estate in Beverly Hills and a luxury penthouse in New York City, both of which were allegedly acquired with funds traceable to misappropriated 1MDB monies.[g] This forfeiture is in addition to the previous forfeiture of assets worth US$1 billion by the United States.
- By May 2020, the US investigation had led to the return of over US$1 billion to Malaysia.[h]
- In July 2020, Goldman Sachs agreed to a US$3.9 billion settlement with the Malaysian government.[i] In October 2020, Goldman Sachs agreed to pay more than US$2.9 billion as part of a coordinated resolution with criminal and civil authorities in Hong Kong SAR, China; Malaysia; Singapore; the United Kingdom; the United States; and elsewhere, including a criminal guilty plea by its subsidiary in Malaysia.[j]

In its communique, the DOJ "[appreciated] the significant assistance provided by" a range of authorities spread across the world, including, among others; the United Kingdom Financial Conduct Authority, the Attorney General's Chambers of Singapore, the Federal Office of Justice of Switzerland, the judicial investigating authority of the Grand Duchy of Luxembourg, the Attorney General's Chambers of Malaysia, the Royal Malaysian Police, and the Malaysian Anti-Corruption Commission. It also appreciated assistance provided by authorities in France and Guernsey.[k]

a. US Department of Justice (DOJ). 2016. "United States Seeks to Recover More than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund." Press Release, July 20, 2016. https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign; and DOJ. 2017. "U.S. Seeks to Recover Approximately $540 Million Obtained from Corruption Involving Malaysian Sovereign Wealth Fund." Press Release, June 15, 2017. https://www.justice.gov/opa/pr/us-seeks-recover-approximately-540-million-obtained-corruption-involving-malaysian-sovereign.

b. DOJ, "U.S. Seeks to Recover Approximately $540 Million," June 15, 2017.

c. Shivanjali Shukla. 2020. "Former Malaysia PM Sentenced to 12 Years in Prison for 1MDB Scandal." JURIST, July 30, 2020. https://www.jurist.org/news/2020/07/former-malaysia-pm-sentenced-to-12-years-in-prison-for-1mdb-scandal/.

d. Rupert Neate. 2019. "Malaysia Sells Luxury Superyacht Seized in 1MDB Scandal for £95m." *The Guardian*, April 3, 2019 (accessed July 23, 2020). https://www.theguardian.com/world/2019/apr/03/malaysia-sell-luxury-superyacht-seized-in-1mdb-scandal-for-95m.

e. Reuters. 2018. "Malaysian Financier's Private Jet Linked to 1MDB Scandal to Be Sold." Reuters, November 1, 2018 (accessed July 23, 2020). https://www.reuters.com/article/us-malaysia-politics-1mdb-jet/malaysian-financiers-private-jet-linked-to-1mdb-scandal-to-be-sold-idUSKCN1N63LS.

f. Christopher Copper-Ind. 2020. "Malaysia Drops 1MDB Money-Laundering Case and Recovers $107m." *International Investment*, May 15, 2020 (accessed June 25, 2020). https://www.internationalinvestment.net/news/4015242/malaysia-drops-1mdb-money-laundering-case-recovers-usd107m.

g. DOJ. 2020. "United States Reaches Settlement to Recover More than $49 Million Involving Malaysian Sovereign Wealth Fund." Press Release, May 6, 2020 (accessed July 10, 2020). https://www.justice.gov/opa/pr/united-states-reaches-settlement-recover-more-49-million-involving-malaysian-sovereign-wealth#:~:text=The%20Department%20of%20Justice%20has,financial%20institutions%20in%20several%20jurisdictions%2C.

h. DOJ, "United States Reaches Settlement," May 6, 2020.

i. Rozanna Latiff, Joseph Sipalan, and Elizabeth Dilts Marshall. 2020. "Goldman to Pay Malaysia $3.9 Billion over 1MBD Scandal, U.S. Settlement." Reuters, July 24, 2020. https://www.reuters.com/article/us-malaysia-politics-1mdb-goldmansachs/goldman-to-pay-malaysia-3-9-billion-over-1mbd-scandal-u-s-settlement-seen-close-idUSKCN24P14L.

j. DOJ. 2020. "Goldman Sachs Resolves Foreign Bribery Case and Agrees to Pay Over $2.9 Billion." October 22, 2020. https://www.justice.gov/usao-edny/pr/goldman-sachs-resolves-foreign-bribery-case-and-agrees-pay-over-29-billion.

k. DOJ, "Goldman Resolves Bribery Case," October 22, 2020.

Where permitted, a joint investigation avoids duplicative efforts and can facilitate cooperation, the exchange of information, and the development of a common strategy (such as pursuit of a case in one jurisdiction or multiple jurisdictions). It can also avoid some of the pitfalls of making an MLA request (such as alerting the targets of the investigation and losing time with subsequent appeals), because the practitioners are all working toward a common purpose.

Where there are multiple venues with ongoing litigation, a joint investigation (and case conferences) may ensure that the various litigants are informed of what is happening in the other jurisdictions. In jurisdictions with weak capacity and a weak legal framework for provisional measures and confiscation, a joint investigation can facilitate the sharing of expertise among its members or permit the pursuit of the matter in the jurisdiction with a more efficient legal framework. In Europe, Eurojust has established the possibility of organizing joint investigation teams.[20]

Nevertheless, because joint investigations can be difficult to coordinate, practitioners will need to consider whether the conditions for a successful joint investigation are present. In that sense, they should verify the existence of appropriate legal frameworks that enable competent authorities to conduct joint investigations in the absence of an MLA request, the gathering of evidence by foreign practitioners in the host jurisdiction, and the direct sharing of information. Because each participating authority is required to have jurisdiction over an offense, laws that provide for extraterritorial jurisdiction can be helpful.

In addition, informal means of cooperation—such as memorandums of understanding (MOUs) between FIUs and information sharing between FIUs through the Egmont Group's information exchange mechanism—are other avenues to be explored because they can enable the investigation to proceed in a more timely and efficient manner. Practitioners should also confirm that they have sufficient resources at their disposal, proper training adapted to the circumstances of the case if needed, security measures for operational information, and an environment of trust and commitment. Finally, the parties will need to agree on a common purpose, duration, cost sharing, and procedures, as well as on how the information collected will be used. Such agreements may be set out in an MOU.

2.6 Establishing Contact with Foreign Counterparts and Assessing Ability to Obtain International Cooperation

2.6.1 Channels for International Connections and Assistance

Establishing even an informal liaison with foreign investigators, prosecutors, or investigating magistrates early in the case may help practitioners to assess potential

[20] Eurojust is an agency of the European Union (EU) for strengthening coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more EU member states. It is seated in The Hague, Netherlands. For more information on the joint investigation teams (JITs), see the JIT section of the Eurojust website: http://www.eurojust.europa.eu/Practitioners/JITs/Pages/JITs-sitemap.aspx.

difficulties, build a strategy, obtain preliminary information and informal assistance,[21] confirm requirements for MLA, and create goodwill in the international cooperation process. Channels for administrative assistance, such as between FIUs and tax and customs administration authorities, can be explored. Making connections with law enforcement attachés or liaison magistrates posted to embassies is a good way to ensure contact with the authorities in foreign jurisdictions. In larger cases, face-to-face meetings with counterparts have proved essential to successful international cooperation. Direct contact helps demonstrate political will and facilitates discussions of the obstacles, strategies, and needed assistance.

Some authorities have opted to convene a case conference or workshop that involves representatives from each of the foreign authorities having a potential interest in the case. The Global Forum on Asset Recovery (GFAR), hosted in 2017 by the United Kingdom and the United States and organized by the StAR initiative, was also used to provide a forum to discuss cases related to Nigeria, Sri Lanka, Tunisia, and Ukraine. This forum facilitated the work of investigators and prosecutors seeking to identify and trace assets by providing access to financial centers.[22]

This approach is particularly effective in cases that involve several jurisdictions or where resource constraints limit foreign travel. Interpol is a key international organization in this context. Although Interpol mainly facilitates police-to-police interaction, it may also invite prosecutors and investigating judges to participate in case discussions. Chapter 8, section 8.3, describes the process of international cooperation and possible points of contact in greater detail. An example of a coordination mechanism with international counterparts is the one established in the 1MDB case in Malaysia (box 2.7).

2.6.2 Meeting Challenges and Assessing Conditions for Cooperation

Differences in legal traditions (common law versus civil law) and confiscation systems (value-based versus property-based) create challenges and frustrations when cooperating with foreign jurisdictions. Practitioners may encounter differences in terminology, procedures, evidentiary burdens, and time required to obtain assistance. For example, some civil law jurisdictions can freeze assets more easily because prosecutors or investigating magistrates have this power and can take swift action. By contrast, some common law jurisdictions require an application before a court. Value-based confiscation systems usually require evidence that the assets are linked to the person who has been accused or convicted of a crime, whereas property-based

[21] Informal assistance typically consists of any official assistance rendered outside the context of a formal MLA request. Some jurisdictions consider informal assistance to be "formal" because the concept is authorized in MLA legislation and involves formal authorities, agencies, or administrations. See chapter 8 for further details.

[22] For more information, see the Global Forum on Asset Recovery (GFAR) section of the StAR website: https://star.worldbank.org/about-us/global-forum-asset-recovery-gfar.

confiscation systems demand proof of the connection between the assets and the offense.

Use of incorrect terminology or failure to meet the necessary evidentiary requirements can lead to confusion, delays, or even to the refusal of assistance. Although this *Handbook* attempts to highlight some of those differences, personal contact should be used continuously to ensure familiarity with all aspects of other systems, hence ensuring that the proper course of action is being deployed.

Authorities pursuing an international asset recovery effort should verify as soon as possible whether the conditions for obtaining informal assistance (including from FIUs as well as tax and customs counterparts) and formal mutual legal assistance in foreign jurisdictions can be met. They should also verify whether there are legal or practical obstacles in obtaining assistance.

A potential legal obstacle to MLA is meeting dual criminality requirements—namely, that the conduct underlying the request for assistance is criminalized in both the requesting and the requested jurisdictions. Because it is generally accepted that dual criminality should be reviewed on the basis of conduct, not terminology, this requirement may be met by providing facts or evidence that support offenses acceptable to the requested jurisdiction. For example, if the requested jurisdiction does not punish "illicit enrichment" or "unexplained wealth,"[23] practitioners will have to provide facts supporting a crime that *is* an offense in that jurisdiction, including money laundering.

Box 2.8 outlines the types of problems that may be encountered in obtaining international cooperation, and chapters 8 and 9 discuss these issues in greater detail. If it becomes apparent that MLA requests for the enforcement of domestic provisional measures and confiscation orders may not be granted, then alternative avenues need to be considered as early as possible. It may be possible to use non-conviction based (NCB) confiscation or civil law actions (including formal insolvency proceedings) to recover the stolen assets, or to provide case materials to support a prosecution in a foreign jurisdiction.

2.7 Securing Support and Adequate Resources

Political will—the demonstrated and credible intent of political actors, civil servants, and mechanisms of the state to combat corruption and recover assets—is a necessary precondition for asset recovery. Without political will and the support of government leaders, political interference and a lack of resources can become major obstacles in developing a case.[24]

[23] UNCAC, art. 20.

[24] For a discussion of how the lack of political will can impede asset recovery, see Stephenson et al. (2011), https://star.worldbank.org/sites/star/files/Barriers%20to%20Asset%20Recovery.pdf.

BOX 2.8 Obstacles to International Cooperation in Asset Recovery

The following obstacles may compromise efforts toward international cooperation (as further discussed in chapters 8 and 9):

- Legal obstacles
  - Ineffective laws and procedures on international cooperation, enforcement of foreign orders, and return of assets
  - Lack of legal authority to cooperate informally
  - Limited ability to provide assistance before the filing of criminal charges
  - Statutory time limits for investigations and prosecutions in the requesting jurisdiction that do not allow sufficient time for the mutual legal assistance (MLA) process
  - Laws that require disclosure to the asset holder of a foreign jurisdiction's interest
- Need to meet the dual criminality requirement and provide the necessary undertakings (such as reciprocity, limits on the use of information, or payment of costs or damages)
- Refusals on the grounds of essential interests, nature of penalty, ongoing proceedings in the requested jurisdiction, lack of due process in the requesting state, and specific crimes (such as tax evasion)
- Length of process (delays) due to formalities, processing times, and appeals
- Evidentiary requirements that are too difficult to meet (for example, a request considered to be a "fishing expedition" because it is overbroad and lacks sufficient details to identify the bank account concerned)
- Differences in confiscation systems (value-based versus property-based) that may lead to problems that hinder enforcement.

As a result, practitioners will need to identify allies and build support for the case, both at the political level and among various agencies.[25] Strong public support, developed with the help of the media (particularly investigative journalists) and nongovernmental organizations (NGOs), can help generate or maintain high-level political will. Regular progress reports to senior political officials in which needs and resources are discussed

[25] The lack of political will was evident in the corruption and embezzlement case against the former Congolese (later Zairean) president Mobutu Sese Seko. Although Swiss authorities froze US$5.5 million of his assets (only a fraction of an estimated US$4 billion or more in the country), appointed a liaison for the matter, and proposed a lawyer to represent the government of the Democratic Republic of Congo, the latter took little action until the statute of limitations had passed concerning any offenses committed by Mobutu. As a result, the funds were released to his heirs in 2009 (FDFA 2016, 16–17), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf.

may help enhance and maintain commitments. GFAR, as mentioned earlier in this chapter, was a great example of productive interaction between practitioners and support from policy makers. At the same time, it is important for practitioners to avoid any damaging interference, especially if potential defendants are political allies or personal friends of government officials.

In addition to securing political and public support, adequate funding for each stage of the asset recovery process should be ensured, preferably through legislation. Asset recovery investigations may be overwhelming for a low- to middle-income jurisdiction because they require a team of practitioners with the expertise and ability to analyze bank records, trace and secure funds in foreign jurisdictions, draft proper MLA requests, and eventually obtain a final order of confiscation.

If the authorities are seeking to conduct a domestic investigation and prosecution, foreign jurisdictions may be willing to contribute personnel (for example, a mentor), funding, or training to investigators and prosecutors. In civil cases, some jurisdictions have helped to fund private civil actions against corrupt officials who have misappropriated assets from a low-capacity jurisdiction, while private law firms have handled cases on a pro bono or contingency fee basis.

Absent political support or adequate resources for a domestically led investigation and recovery through confiscation or a civil action, authorities can provide the case materials and evidence to foreign authorities (assuming jurisdiction) to assist in foreign proceedings.

Countries may establish mechanisms for allocating resources to law enforcement bodies involved in asset recovery through incentivization models. For example, recovered proceeds of crime may be split between governmental bodies and relevant investigation or prosecution agencies or courts. In the United Kingdom, assets recovered under the Proceeds of Crime Act 2002 (POCA) are distributed to operational law enforcement agencies under the Asset Recovery Incentivization Scheme (ARIS) established in 2006, which splits recovered assets between operational agencies and the Home Office. Law enforcement agencies use the recovered assets to fund future asset recovery efforts.[26] Since fiscal year 2011/12, £307 million of ARIS monies returned to operational agencies have been used to fund asset recovery work—equivalent to 88 percent of reported ARIS spending.[27] However, this practice has received some criticism in terms of "policing for profit," because ARIS also rewards those who have not taken a role in the recovery of assets (Home Affairs Committee 2016, 18).[28]

Alternatively, proceeds of crime may also be used to fund community initiatives, activities, and programs for those affected. An example is the "CashBack for Communities" program in Scotland, which invests money seized from criminals into initiatives for

[26] Home Office, "Asset Recovery Statistical Bulletin, 2011/12–2016/17." Statistical Bulletin 15/17 (September 2017), 9.

[27] Home Office, "Asset Recovery Statistical Bulletin," 3.

[28] This is why the Home Affairs Committee recommended the return or donation of at least 10 percent of the criminal assets to the communities affected (Home Affairs Committee 2016, 18–19).

young people. Since 2008, the program has funded approximately 2 million activities and opportunities for young people and mostly focuses on dealing with inequalities for those who are disadvantaged (Home Affairs Office 2016, 18; Scottish Government 2017).

2.8 Addressing Legal Issues and Obstacles

In the early phases of an asset recovery case, practitioners need to assess potential legal issues and obstacles and consider options for addressing them. These potential constraints include issues with jurisdiction, immunities enjoyed by suspect officials, statutes of limitation, return provisions, and applicable standards of proof.

Practitioners must note that there are legal systems beyond civil law and common law systems—for example, customary law systems, mixed law systems, and religious law systems. Thus, legal frameworks, practices, and institutional mechanisms may vary across countries and must be navigated accordingly. The concepts presented here, with a view to distinguish between common law and civil law countries, offer a simplified presentation of a multitude of concepts for practitioners. In recognizing this, practitioners should always be mindful to engage in informal cooperation with their foreign counterparts to understand these issues and identify whether the issues create any problems that must be addressed or overcome.

2.8.1 Jurisdiction

Jurisdiction is the practical power granted to legal authorities to investigate, prosecute, adjudicate, and enforce legal matters.[29] Before an action is launched, authorities must verify that courts have jurisdiction to hear a case.

In criminal proceedings, a country may claim jurisdiction over offenses committed by domestic or foreign offenders within the national territory (territorial jurisdiction). A country may also claim jurisdiction for crimes committed by its own nationals or incorporated entities in a foreign country (personal jurisdiction). In some countries, the commission of a single element of the crime in the national territory will be sufficient to claim jurisdiction, even if other elements were committed in a foreign jurisdiction—as, for example, in a situation where an act of bribery was committed in a foreign jurisdiction but the money was laundered using domestic banks and intermediaries. Some authorities may also claim jurisdiction even if some peripheral acts related to the offense involve their territory in any manner.

In the absence of both territorial and personal jurisdiction, the offenses can only be prosecuted by foreign authorities.[30] Box 2.9 explains how US authorities obtained

[29] See UNCAC, art. 42; UNTOC, art. 15; and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 5, which oblige states parties to adopt the necessary measures to establish their jurisdiction over the offenses in accordance with the respective convention.

[30] This is true, for example, if a foreign national misappropriates assets from a foreign subsidiary of a state-owned company and the money-laundering activities are conducted in foreign jurisdictions.

BOX 2.9 Uzbekistan: US Jurisdiction over the Gulnara Karimova Corruption Case

Background: Gulnara Karimova, a daughter of the former president of Uzbekistan Islam Karimov, was implicated in several corruption schemes for receiving bribes from publicly traded telecommunications companies in return for her influence over Uzbek authorities, allowing the companies to operate and maintain business in the Uzbekistan market.[a] According to the Organized Crime and Corruption Reporting Project (OCCRP), Karimova received more than US$1 billion worth of bribes and ownership shares from the telecommunications companies. (Regarding the use of shell companies beneficially owned by Karimova, also see chapter 3, box 3.2.)

The United States was able to claim jurisdiction over Karimova, her associates, and the bribe-paying companies because the US financial system was used for many of the illicit transactions.[b] The US authorities entered into several resolutions with the three implicated major international telecommunication providers.

Outcomes of cases against telecom companies: VimpelCom, one of the world's largest telecommunications companies and an issuer of publicly traded securities in the United States, along with its Uzbek subsidiary, Unitel, admitted to having paid more than US$114 million in bribes to Karimova between 2006 to 2012 to enter and continue operating in Uzbekistan.[c] According to the US Department of Justice (DOJ), those payments were laundered through bank accounts and assets around the world, including accounts in New York. In 2016, Unitel pleaded guilty while VimpelCom entered into a deferred prosecution agreement with the DOJ and settled with the US Securities and Exchange Commission (SEC) and the Public Prosecution Service of the Netherlands, agreeing to pay a combined total of approximately US$795 million in US and Dutch criminal and regulatory penalties.[d] (See also chapter 8, box 8.2, on the successful collaboration between prosecutors and regulators from 20 countries in this case.)

Telia Company, an international telecommunications company and former issuer of publicly traded securities in the United States, along with its Uzbek subsidiary, Coscom, admitted to having paid more than US$331 million in bribes to Karimova through accounts in New York.[e] In 2017, Coscom pleaded guilty while Telia entered into a deferred prosecution agreement with the DOJ and a settlement with the SEC, the Public Prosecution Service of the Netherlands, and the Swedish Prosecution Authority, agreeing to pay a combined total of approximately US$965 million in criminal and regulatory penalties.[f]

Mobile Telesystems (MTS), Russia's largest mobile telecommunications company and issuer of publicly traded securities in the United States, along with its Uzbek subsidiary Kolorit Dizayn Ink ("Kolorit"), admitted to paying approximately US$420 million in bribes to Karimova between 2004 and 2012 in return for gaining valuable telecom assets and maintaining business in Uzbekistan.[g] In 2019, Kolorit pleaded guilty while MTS entered into a deferred prosecution agreement with the DOJ and settled with the SEC, agreeing to pay a combined total amount of US$850 million in criminal and regulatory penalties.[h]

(continued next page)

BOX 2.9 Uzbekistan: US Jurisdiction over the Gulnara Karimova Corruption Case *(Continued)*

Criminal prosecution of Karimova: In 2019, Karimova was indicted in the Southern District of New York for conspiracy to commit money laundering. In particular, she was accused of accepting more than US$864 million in bribes from the three publicly traded telecommunications companies and laundering them through the US financial system.[i] Karimova was convicted in 2015 in Uzbekistan for embezzlement and extortion, sentenced to five years on probation, and placed under house arrest.[j] In 2017, she was convicted on corruption charges and sentenced to five years of "limited freedom."[k] In 2019, a court ordered Karimova to return to prison for breaking the rules.

Asset recovery outcomes: Thus far, investigations in the United States have yielded more than US$2.6 billion in global fines and disgorgement.[l] In 2016, the DOJ also filed two civil complaints seeking the forfeiture of a total of US$850 million relating to laundered funds or bribes paid by the abovementioned telecommunications companies to Karimova—monies held in bank accounts in Belgium, Ireland, Luxembourg, and Switzerland.[m] Before being deposited into accounts in these countries, the illicit funds were transmitted through US financial institutions, thus granting jurisdiction to the United States. In September 2020, Switzerland and Uzbekistan signed a framework agreement for the return of assets worth US$131 million (Sw F 119 million) to Uzbekistan. The assets are to be used for the benefit of the people of Uzbekistan.[n]

a. Miranda Patrusic. 2015. "How the President's Daughter Controlled the Telecom Industry." OCCRP, March 22, 2015. https://www.occrp.org/en/corruptistan/uzbekistan/gulnarakarimova/presidents-daughter-controlled-telecom-industry; DOJ. 2019. "Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan." Press Release, March 7, 2019. https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department.
b. DOJ, "Mobile Telesystems Pjsc," March 7, 2019.
c. DOJ. 2016. "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." Press Release, February 18, 2016. https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.
d. The amount includes criminal penalties, disgorgement of profits, and prejudgment interest (DOJ, "VimpelCom Limited and Unitel LLC," February 18, 2016).
e. DOJ. 2017. "Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than $965 Million for Corrupt Payments in Uzbekistan." Press Release, September 21, 2017. https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965.
f. The amount includes criminal penalties, disgorgement of profits, and prejudgment interest (DOJ, "Telia Company AB," September 21, 2017).
g. DOJ, "Mobile Telesystems Pjsc," March 7, 2019.
h. The amount includes criminal and civil penalties. MTS has also agreed to the imposition of an independent compliance monitor (DOJ, "Mobile Telesystems Pjsc," March 7, 2019).
i. DOJ, "Mobile Telesystems Pjsc," March 7, 2019. MTS and Kolorit admitted to paying US$420 million in bribes to Karimova.
j. Lisa Lambert and Chris Sanders. 2019. "U.S. Indicts Gulnara Karimova in Uzbek Corruption Scheme." Reuters, March 7, 2019. https://www.reuters.com/article/us-mob-telesystems-usa/u-s-indicts-gulnara-karimova-in-uzbek-corruption-scheme-idUSKCN1QO2GL.
k. Eurasianet. 2019. "Karimova Back to Prison in Uzbekistan, Indicted in US." Eurasianet.org, March 7, 2019. https://eurasianet.org/karimova-back-to-prison-in-uzbekistan-indicted-in-us.
l. DOJ, "Mobile Telesystems Pjsc," March 7, 2019.
m. DOJ, "VimpelCom Limited and Unitel LLC," February 18, 2016.
n. Federal Department of Foreign Affairs (Switzerland). 2020. "Switzerland and Uzbekistan Sign an Agreement with a View to the Restitution of Confiscated Assets." https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80393.html.

jurisdiction over Gulnara Karimova, her associates, and the bribe-paying companies that wanted to obtain and maintain business in Uzbekistan.

Practitioners should be aware that all transactions worldwide that are conducted in US dollars ultimately clear through the US financial system and may rely on "correspondent" banking. The correspondent or intermediary bank bridges the relationship between a domestic financial institution and a US financial institution by facilitating financial services and cross-border payment services (described further in chapter 4, section 4.2.4, on wire transfers). As a result, the US justice system may have jurisdiction over money laundering for every transaction involving US dollars that is conducted via the correspondent-banking channel.

In multijurisdictional cases, a challenge might be that a foreign country with jurisdiction may decide (or be obligated) to start its own case. And it may do so based on the information provided by the victim state during informal and administrative assistance and the submission of an MLA request. Because this could derail a domestic case by alerting the target or suspending the MLA, it is important for practitioners to be aware of the issue, identify when it is applicable, and take necessary precautions and coordination steps to ensure that both cases eventually proceed without difficulty. Chapter 11 provides a more detailed discussion of jurisdictional issues and proceedings initiated by foreign authorities.

2.8.2 Immunities Enjoyed by Officials

Immunities enjoyed by public officials allow them to avoid prosecution for criminal offenses. In most jurisdictions, immunities incorporated into domestic laws or constitutional provisions are referred to as "national immunities." There are also "international immunities" that apply in all countries under customary international law and international treaties, including functional and personal immunity. "Functional immunity" is granted to foreign officials performing acts of state (for example, heads of state or heads of government, senior cabinet members, ministers of foreign affairs, and ministers of defense). "Personal immunity" shields some foreign officials (in particular, heads of state and diplomatic agents) from arrest and criminal, civil, or administrative proceedings (typically while in office). Personal immunities normally cease after an official leaves office, whereas functional immunities may still apply.

If the asset recovery action concerns a head of state, a member of parliament, a judge, or other high-ranking official, practitioners must consider the immunities enjoyed by these officials.[31] In particular, practitioners should examine (a) the type and extent of immunity (for example, whether it is functional or personal immunity and whether it shields the official from criminal, civil, or administrative liability); (b) whether the immunity can be waived; and (c) if necessary, the opportunity to lodge charges against other individuals implicated in the crimes, including family members, accomplices, and those involved in the laundering of the funds.

[31] UNCAC, art. 30, requires states parties to maintain an appropriate balance between immunities and the possibility of effectively investigating, prosecuting, and adjudicating offenses.

Some jurisdictions have changed immunity laws to allow prosecution of officials but not the application of specific punishments such as incarceration.[32] In some cases, a jurisdiction may not recognize the national immunities of another jurisdiction, and it may proceed with a prosecution for money laundering or foreign bribery. For example, in the UK case against Nigerian official Diepreye Alamieyeseigha (chapter 1, box 1.5), prosecuting corruption charges was not an option because the facts took place in Nigeria, where the defendant enjoyed immunity. However, because the laundering of the proceeds of corruption took place in the United Kingdom, that immunity did not prevail there.[33] Even international immunities have been set aside in cases involving the restraint and seizure of assets held in foreign financial institutions.[34] If the success of criminal proceedings appears to be doubtful but civil liability could be established, avenues including NCB confiscation and civil proceedings should be explored.

Boxes 2.10 and 2.11 explain how immunities enjoyed by public officials were addressed by Equatorial Guinea and Brazil, respectively.

2.8.3 Period of Prescription or Statute of Limitations

In most jurisdictions, it is impossible to initiate criminal or civil proceedings after a certain period has passed since the commission of the offense, known as the "period of prescription" or "statute of limitations." The period varies among jurisdictions and usually depends on the severity of the offense (serious ones generally having lengthier limitation periods).[35]

In general, the limitation period begins with the commission of the offense. However, for continuous crimes, the prescription period is usually calculated from the cessation of the illegal activities. An example of a continuous crime is money laundering, which many jurisdictions consider to be continuing as long as the ill-gotten gains are held under the defendant's control. In addition, jurisdictional variations could range from considering the accrual of interest on an account used for money laundering as representing a crime in continuation, while others may require more active use of the account.[36]

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[32] This is the case in Argentina.

[33] The United Kingdom has prosecuted Nigerian governors for corruption and money laundering offenses in circumstances where national immunities were in force (Chaikin and Sharman 2009).

[34] In a case involving the bribery of Kazakhstani officials by an American businessman, the Swiss Federal Tribunal refused to unfreeze US$84 million held in Swiss bank accounts despite Kazakhstan's claims that the money was protected by the doctrine of sovereign immunity (Chaikin 2010, 2–3). The funds were eventually confiscated by the United States using NCB confiscation. For more details, see the discussion on the BOTA Foundation in chapter 11, box 11.7.

[35] For example, in some jurisdictions, a prosecution for murder may have no limitation period, whereas the prosecution for a theft may be limited to five years after the offense.

[36] Toussie v. United States, 397 U.S. 112, 114, 90 S. Ct. 858, 25 L.Ed.2d 156 (1970). In the United States, under the "continuous offense doctrine," if the offense is continuous, then the practical effect of its ongoing nature is to extend the statute "beyond its stated term." United States v. Jaynes, 75 F.3d 1493, 1505 (10th Cir. 1996). "Conspiracy . . . is the prototypical continuing offense."

BOX 2.10 Equatorial Guinea: Immunities in the Case of Vice President Teodoro Nguema Obiang Mangue

Summary: Teodoro Obiang, vice president of Equatorial Guinea (and son of the country's ruler, Teodoro Obiang Nguema Mbasogo) was convicted in October 2017 by French criminal courts for diverting corruptly acquired funds into investments in France that included, among others, a £110 million mansion in Paris, a set of expensive sports cars, and a 76-meter luxury yacht.[a]

Prosecution: The proceedings against Teodoro Obiang were not brought by French prosecutors but by nongovernmental organizations (NGOs) with an anticorruption mission—Association Sherpa, a French lawyers group, and the French chapter of Transparency International (TI France)—through the filing of a criminal complaint with a civil party petition against the presidents of the Republic of Congo (Denis Sassou Nguesso); Gabon (Omar Bongo Ondimba, who died in 2009); and Equatorial Guinea (Teodoro Obiang), as well as against the members of their families and their close associates. (See also chapter 3, box 3.5, on the support provided by the civil society organizations in the overall investigation.)[b]

Immunity claims: The case had to overcome a number of obstacles:[c] apart from the refusal of the French prosecuting authorities to commence a judicial inquiry, the government of Equatorial Guinea tried to protect Obiang and his assets, nominating him in October 2011 as a delegate to the United Nations Educational, Scientific and Cultural Organization (UNESCO), a position that would confer immunity from criminal prosecution. Ultimately, Obiang did not take up this position but was instead appointed as the country's second vice president. To impede the seizure of high-value objects, the government of Equatorial Guinea also claimed that the premises of Obiang's 101-room mansion on 42 Avenue Foch in Paris were a part of the government's diplomatic mission.[d]

In June 2016, Equatorial Guinea filed a legal action against France at the International Court of Justice (ICJ) for the recognition of Obiang's alleged immunity. The ICJ ruled that it did not have prima facie jurisdiction to hear Equatorial Guinea's request regarding Obiang's immunity.[e] However, it ordered France to take the necessary measures to ensure the inviolability of the premises of the diplomatic mission of Equatorial Guinea at the mansion, pending a final decision.

Convictions and confiscations: In October 2017, the 32nd chamber of the Paris correctional tribunal (criminal court) found Obiang guilty of money laundering, embezzlement, abuse of trust, and corruption, and sentenced him to three years in prison and a fine of €30 million. However, the sentence was suspended for five years provided Obiang is not convicted of a new criminal offense.

TI France was awarded €10,000 in moral damages and €41,081 in material damages. The court also ordered the seizure of €150 million in assets held by Obiang in France. Nevertheless, the court did not order the seizure of the mansion's assets pending the decision of the ICJ.[f] The court rejected all his substantive and procedural defenses, including his claims for prosecutorial immunity, arguing that his nomination as the vice president was made after his indictment by

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BOX 2.10 Equatorial Guinea: Immunities in the Case of Vice President Teodoro Nguema Obiang Mangue *(Continued)*

the French courts. After Obiang appealed the ruling, the appeals court confirmed the conviction and confiscations.

ICJ rulings and pending claims: Equatorial Guinea launched an action before the ICJ, contending that France had breached international immunities. The ICJ concluded that it lacked jurisdiction pursuant to the UN Convention against Transnational Organized Crime (UNTOC, also called the Palermo Convention) to entertain Equatorial Guinea's claim that Obiang enjoyed immunity. The court further concluded that it had jurisdiction (pursuant to the Optional Protocol to the Vienna Convention on Diplomatic Relations) to entertain Equatorial Guinea's submissions regarding the status of the building at 42 Avenue Foch in Paris as diplomatic premises, including claims relating to the seizure of furnishings and other property on the premises. The decision on this last point is still pending.[g]

a. Shirley Pouget. 2017. "Why a Trial in Paris Marks a Milestone for Anti-Corruption Activists." Open Society Foundations website, June 16, 2017 (accessed August 13, 2018). https://www.opensocietyfoundations.org/voices/why-trial-paris-marks-milestone-anticorruption-activists.

b. Pouget, "Trial in Paris," June 16, 2017.

c. Perdriel-Vaissière (2017) provides a complete overview of the facts and obstacles, from the filing of the publication of the CCFD (2007) report until December 2016, and argues that without TI France's petition to join the case as a civil party and the decision to accept it by the Court of Cassation, the case would have been dropped. For a summary of the case in its initial stages, see also TI. (2010). "'Biens Mal Acquis' Case: French Supreme Court Overrules Court of Appeal's Decision." Press Release, November 9, 2010 (accessed August 13, 2018). https://www.transparency.org/news/pressrelease/20101109_biens_mal_acquis_case_french_supreme_court_overrules_court_of_appe.

d. Rick Messick. 2017. "The Obiang Trial: Lessons from a Decade-Long Legal Battle." *GAB | The Global Anti-Corruption Blog*, June 26, 2017 (accessed August 13, 2018). https://globalanticorruptionblog.com/2017/07/26/the-obiang-trial-lessons-from-a-decade-long-legal-battle/.

e. International Court of Justice (ICJ). 2016. "Immunities and Criminal Proceedings (Equatorial Guinea v. France)." Press Release no. 2016/38, December 7, 2016. https://www.icj-cij.org/files/case-related/163/19286.pdf.

f. Shirley Pouget and Ken Hurwitz. 2017. "French Court Convicts Equatorial Guinean Vice President Teodorin Obiang for Laundering Grand Corruption Proceeds." *GAB | The Global Anti-Corruption Blog,* October 30, 2017 (accessed August 13, 2018). https://globalanticorruptionblog.com/2017/10/30/french-court-convicts-equatorial-guinean-vice-president-teodorin-obiang-for-laundering-grand-corruption-proceeds/.

g. ICJ. 2018. "Immunities and Criminal Proceedings (Equatorial Guinea v. France), Summary 2018/3." June 6, 2018. https://www.icj-cij.org/files/case-related/163/163-20180606-SUM-01-00-EN.pdf; ICJ. 2020. "Immunities and Criminal Proceedings (Equatorial Guinea v. France)." Press Release no. 2020/16, February 21, 2020 (accessed August 9, 2020). https://www.icj-cij.org/files/case-related/163/163-20200221-PRE-01-00-EN.pdf.

BOX 2.11 Brazil: *"Foro privilegiado"* and the End of Impunity

Background: In accordance with the Brazilian constitution, certain authorities from all branches (executive, legislative, and judiciary) and all levels (federal, state, and municipal)—including the president, members of Congress, governors, and mayors—long enjoyed a special legal status regarding applicable jurisdiction. Under this status, they can be tried only by higher courts (for example, the Supreme Federal Court) and not by lower courts depending on the respective office and the matter under analysis.

(continued next page)

BOX 2.11 Brazil: *"Foro privilegiado"* and the End of Impunity *(Continued)*

This privileged jurisdiction right, known as ***foro privilegiado*** (privileged forum), was related to the office and not to the natural person who occupies such a position.[a] The main purpose of this prerogative was to protect authorities from politically motivated prosecutions by making sure that their cases will be tried by more-experienced judges.[b] At the same time, however, it may have promoted impunity for the country's most powerful lawmakers, because cases can take many years to be tried by the "slow-moving" Supreme Federal Court.[c]

Ruling against officials' privilege: In May 2018, the Supreme Federal Court decided to restrict the applicability of foro privilegiado to members of Congress exclusively. Hence, sitting congressmen (senators and representatives of the house) will be tried in the Supreme Federal Court only if they allegedly committed crimes related to their office during their current term; otherwise, they will be tried by lower courts.[d] The ruling restricts sitting lawmakers' immunity and opens the way for numerous cases to be handed down to lower courts.[e]

Resulting convictions: Convictions of several politicians involved in the *Lava Jato* (Car Wash) case were made possible after the politicians left office. With the abovementioned restriction on foro privilegiado, law enforcement authorities potentially can investigate the cases of numerous sitting politicians.[f]

Among the convicted Brazilian politicians and government officials are Luiz Ignácio Lula da Silva (former Brazilian president); José Dirceu (former presidential chief of staff); Pedro Correa (former congressman); and Eduardo Cunha (former speaker of the house). (On the importance of identifying liable parties, see box 2.13.)[g]

In particular, the former president Luiz Ignácio Lula da Silva was sentenced by the Superior Court of Justice in April 2019 (after reforming a first sentence of July 2017) to more than 8 years, and by the Federal Regional Court of the 4th Region in November 2019 to more than 17 years and a fine for corruption and money laundering.[h]

a. Legislative Consultancy of the Brazilian Senate, May 5, 2017 (accessed April 3, 2019). https://www12.senado.leg.br/noticias/audios/2017/05/mais-de-54-mil-autoridades-tem-foro-privilegiado-revela-estudo-da-consultoria.

b. Sarah DiLorenzo. 2018. "Senior Politicians in Brazil Could Soon Face Swifter Justice." Associated Press, May 1, 2018 (accessed January 27, 2019). https://www.apnews.com/55ac3382f4f54ac8b9fcad48ad02451e.

c. Joe Leahy. 2018. "Brazilian Politicians Lost Key Legal Protection." *Financial Times*, May 4, 2018.

d. André Richter. 2018. "Brazil's Supreme Court Votes to Restrict Politicians' Near Immunity." *Agência Brasil,* May 3, 2018 (accessed January 27, 2019). http://agenciabrasil.ebc.com.br/en/politica/noticia/2018-05/brazils-supreme-court-votes-restrict-near-immunity.

e. Leahy, "Brazilian Politicians," May 4, 2018. In addition, as quoted in the *New York Times,* Judge Sérgio Moro stated, "As I see it, the case known as Lava Jato [Car Wash] represents the end of impunity as a rule in Brazil for this type of crime" (Ernesto Londoño. 2017. "A Judge's Bid to Clean Up Brazil from the Bench." *New York Times,* August 25, 2017 (accessed January 27, 2019). https://www.nytimes.com/2017/08/25/world/americas/judge-sergio-moro-brazil-anti-corruption.html.)

f. Leahy, "Brazilian Politicians," May 4, 2018. Brazilian news website G1 (https://g1.globo.com/) also reported that more than 500 ongoing criminal cases in the Supreme Court would be transferred to lower courts following the decision.

g. With the exception of the judgment against Paulo Roberto Costa (ex-director of Petrobras), which is final, most of these judgments are subject to appeal.

h. For a relatively updated situation of all procedures relating to former president Lula, see BBC News Brasil. 2019. "Entenda em que pé estão os processos e acusações contra o ex-presidente Lula" [Understand the status of the lawsuits and accusations against former president Lula]. November 27. 2019 (accessed August 10, 2020). https://www.bbc.com/portuguese/brasil-49647499.

Most countries provide for both "absolute" and "relative" statutes of limitation. "Absolute" statutes of limitation provide for the terms of prescription regardless of causes of suspension and interruption; the time limitation period cannot be extended. In contrast, "relative" statutes of limitation prescribe the maximum time limits for initiating proceedings, allowing for periods of suspension and interruption (TI Italia 2016, 14–15).

The prescription period can be suspended (tolled) or even restarted for a number of reasons, such as the commencement of a criminal investigation; the initiation of formal proceedings (such as the beginning of a trial); the complexity of the case; an MLA request; immunity; or if the defendant is a fugitive or has evaded justice (TI Italia 2016, 16). Moreover, in some jurisdictions, the start of the limitation period can be delayed until the offense is discovered or until after the public official leaves office.[37] For example, if fictitious invoices and false accounting conceal bribes that are paid to an intermediary, the statute would not start to run until after the discovery of the fraud. The concept of "discovery" will be mandated under statute or by courts, whereas determining the date on which the fraud was discovered is frequently adjudicated before the court.

The expiration of the limitation period presents a challenge for practitioners that is even more acute in cases of corruption because evidence of a corrupt deal or misappropriation of assets is usually discovered long after the corrupt official has left office. Short limitation periods and lack of discovery provisions may hinder investigation, prosecution, and adjudication. In fact, some jurisdictions might require the predicate offense to be within the limitation period even in the case of continuous offenses. Thus, even if the critical element of the money-laundering offense (for example, holding assets derived from a crime) is continuing, the fact that the predicate offense could not be prosecuted because of the application of time limitation statutes prevents authorities from prosecuting for money laundering.

Practitioners seeking to recover stolen assets need to be aware of the applicable limitation periods in the jurisdiction concerned[38] and should

- Identify offenses with a more favorable limitation period (for example, embezzlement, money laundering, and possession of stolen assets);

[37] Under the Argentina Criminal Code, art. 67, for example, the prescription period starts for all defendants after the public official has left office. In NCB confiscation cases, France, the United Kingdom, and the United States apply the principle of discovery (see, for example, U.S.C. § 1621).

[38] Supreme Civil and Criminal Court of Greece, Decision 1/2011. Several statutes of limitations issues arise from the case of Akis Tsohatzopoulos, cofounder of the Greek socialist party and former minister in Greek socialist governments for over 30 years (particularly as minister of defense). Tsohatzopoulos was charged with passive bribery with aggravating circumstances (profit against state property), the punishability of which had already extinguished because of a special deadline under the Greek constitution regarding the initiation of criminal prosecution against a current or former member of the government. Hence, the prosecution for passive bribery was declared inadmissible. Nevertheless, he was charged and convicted of money laundering, an offense that was not subject to the constitutional limitation. The prescription of the predicate offense of passive bribery was considered irrelevant for the prosecution of money laundering.

- Research laws or court decisions delaying the commencement of the limitation period until discovery of the crime or suspending the limitation period when the assets are located outside the jurisdiction;
- Verify whether specific actions by prosecutors or law enforcement agencies have suspended or restarted the prescription period;
- Beware of special categories of people who receive preferential treatment due to their positions, such as heads of state or ministers (TI Italia 2016, 21), because such treatment might include immunities or special constitutional, administrative, or judicial proceedings that must take place to prosecute them, resulting in significant delays—also being aware, however, that immunities valid in one jurisdiction may not be applicable in another;
- Explore all legal avenues—including criminal and NCB confiscation, civil actions, and requesting the initiation of proceedings by a foreign authority—to determine the most favorable statute of limitations;[39] and
- Consider using evidence from a criminal investigation of an offense that has become statute-barred because it may often lead to the discovery of another offense that has not.

2.8.4 Legislative Provisions, Court Orders, and Agreements on Asset Return

In choosing between initiating foreign or domestic criminal proceedings or proceedings through other legal avenues, practitioners need to consider several parameters that relate to the return of assets and the amount to be recovered. When it comes to embezzled or laundered public funds recovered pursuant to the enforcement of a confiscation order by a requesting jurisdiction under UNCAC, these assets must be returned by the requested jurisdiction.[40] On the other hand, this obligation only applies to other UNCAC offenses if the requesting jurisdiction shows that it is the legitimate owner of the assets or when the requested state party recognizes damage to the requesting state party.[41]

However, if the assets were confiscated outside these parameters—including through a domestic money-laundering case conducted by foreign authorities—the return will depend upon the legislation in the confiscating jurisdiction, other applicable treaties, or ad hoc agreements in place.[42] Asset return agreements are sometimes necessary to

[39] Under 19 U.S.C. § 1621, the US statute of limitations for NCB confiscation (unlike the statute of limitations for criminal prosecutions) begins to run from the discovery of the offense giving rise to the confiscation action and can be suspended if the property is located beyond US borders.

[40] UNCAC, art. 57(3), provides that, in the case of embezzlement or laundering of funds as defined under the convention, assets shall be returned to the requesting state party.

[41] In all other cases, the requested party has the obligation to give "priority consideration" to the repatriation of assets to the requesting jurisdiction, the return of assets to their legitimate owners, or compensation to the victims of corruption.

[42] Such circumstances influenced Peru's decision in pursuing a domestic case against Vladimiro Montesinos's assets in Switzerland. Although it was possible to have Switzerland prosecute parts of the case under its drug legislation, asset-sharing laws at that time would have allowed the return to Peru of a portion of the funds. Following strategy discussions with Switzerland, Peru decided to conduct domestic cases and to use MLA and legislative waivers to recover a larger portion of the funds. For additional details, see the discussion of the case in chapter 1, box 1.3.

ensure this effective return of assets (as further discussed in chapters 9 and 11). Furthermore, foreign proceedings may be limited to money-laundering offenses, and that may be a barrier to confiscating the proceeds from predicate or related offenses, particularly in jurisdictions that only confiscate assets linked to the offenses that form the basis of the confiscation (see chapter 7, section 7.3.2, on value-based confiscation).

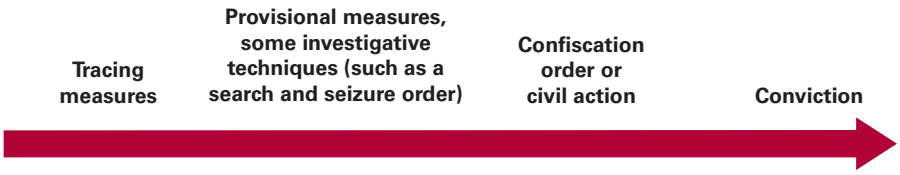
2.8.5 Standards of Proof

Practitioners must also consider whether the evidence is sufficient to meet the standards of proof required for tracing, provisional measures, confiscation, civil actions, or conviction—both domestically and, where applicable, in foreign jurisdictions. Although the applicable standard will vary among jurisdictions, it is generally true that the more intrusive the investigative technique or measure, the higher the evidentiary standard of proof (figure 2.1).

For practitioners involved in cases requiring international cooperation, it is important to understand that legal systems (common and civil law, mixed systems, or other systems) often differ in the terminology used and the way the standard of proof is understood. In most common law jurisdictions, for example, a *conviction* requires proof "beyond a reasonable doubt," while *confiscation* (whether NCB or criminal) requires the lower "balance of probabilities" or "preponderance of the evidence" standard that is normally applied in civil (private law) proceedings. In most civil law jurisdictions, the standard of proof is the same for a conviction, a criminal or NCB confiscation, or a finding for the plaintiff in a civil proceeding—namely, an "intimate conviction" of the truth.

Common law jurisdictions apply a probabilistic approach to assessing the evidence—that is, the quantifiable likelihood of the event's occurrence, expressed as odds or a

FIGURE 2.1 Standards of Proof in Asset Recovery Actions



Common law	Reasonable grounds to suspect	Reasonable grounds to believe or probable cause	Balance of probabilities or preponderance of the evidence	Proof beyond a reasonable doubt
Civil law	Evidence needed to establish the truth	Evidence needed to establish the truth	Intimate conviction of the truth	Intimate conviction of the truth

Source: World Bank.

percentage. Civil law jurisdictions focus more on the judge's subjective impression. In addition, mixed or other systems may have specific requirements.

Practitioners should be aware of these distinctions to ensure that they provide evidence sufficient to meet the applicable standard. Where evidence is insufficient to meet the standard of proof required under one approach, practitioners may have the option to consider another avenue. For example, the inability to establish a criminal conviction "beyond a reasonable doubt" will prevent criminal confiscation. Nevertheless, it may be possible to recover the proceeds and instrumentalities of corruption through a private civil action or through NCB confiscation proceedings (domestically or in a foreign jurisdiction) if the relevant lower standard of proof is met.

2.9 Identifying All Liable Parties

In most jurisdictions, parties that knowingly facilitated the transfer of proceeds of crime or received illicit assets may be held liable under various civil or criminal statutes, including complicity, conspiracy, willful blindness, negligence, fraudulent abstention, or fraudulent omission. This is particularly the case for legal entities and their directors as well as bankers, financial managers, real estate agents, notaries, or lawyers who deliberately fail to make reasonable inquiries.[43] In some jurisdictions, courts may not accept claims of lack of knowledge when consultancy fees are not proportionate to services rendered or paid to agents with no relevant technical expertise. Other jurisdictions may hold the parent company liable for the acts committed by its subsidiary, provided there is a direct involvement by the parent company's employees and officers (OECD 2016).

Targeting the receiving or facilitating parties may have two major advantages: First, it may increase chances to claim restitution or compensation from entities or individuals other than the corrupt official, because the facilitators may have deep pockets. Second, it is sometimes possible to obtain information and cooperation from third parties or co-conspirators that may support the case against the corrupt official. At the same time, practitioners need to consider potential disadvantages such as complicating the management of the case and diverting or diluting resources in too many directions. The cases described in boxes 2.12 and 2.13 illustrate the importance of identifying and categorizing all liable parties (as also discussed in chapter 10).

2.10 Specific Considerations in Criminal Cases

Outlined in section 2.10.1 are several additional considerations for practitioners in pursuing criminal cases for asset recovery.

[43] Recommendation 22 of "The FATF Recommendations" provides for customer due diligence and record-keeping requirements carried out by Designated Non-Financial Businesses and Professions (DNFBPs), covering casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, accountants, and trusts and company service providers (FATF 2019).

BOX 2.12 Zambia: Liability of Lawyers in the Case of Former President Frederick Chiluba

Background: In 2004, the attorney general of Zambia brought a civil action for and on behalf of the Republic of Zambia against former president Frederick Chiluba and other defendants, seeking to recover sums that had been transferred by the Ministry of Finance between 1995 and 2001 (as further discussed in chapter 1, box 1.4). Among the defendants were solicitor Iqbad Meer and his law firm Meer Care & Desai as well as solicitors Bimal Thaker, Bhupendra Bhailal Thaker, and their law firm Cave Malik & Co. See also chapter 10, box 10.3 regarding the basis for civil proceedings instituted in this case.

Targeting Iqbad Meer (and his law firm, Meer Care & Desai): The UK High Court of Justice characterized Meer's behavior as "classic blind eye dishonesty."[a] In other words, Meer followed the instructions he received without questioning the transactions he was involved in on behalf of his clients, because he either (a) knew precisely what was going on and that there was a conspiracy to defraud, in which he participated willingly; or (b) did not want to know the answer. The court found Meer liable for conspiracy, providing dishonest assistance, stealing the monies that were routed through his client account, and facilitating the theft instead of refusing to act.[b]

However, the appellate court found that the High Court had erred in finding Meer liable for dishonest assistance and conspiracy because it had not considered the possibility that Meer was honest but not sufficiently competent, knowledgeable, or experienced with the type of the transaction to understand that he was involved in money laundering.[c] In fact, the court characterized his conduct as "honest, albeit foolish."[d] The court concluded that the solicitor should have acted more cautiously but argued in favor of honesty. Nonetheless, Meer was suspended from practicing law for three years for failure to comply with the relevant professional standards (UNODC 2015, 21).

Case of Bimal Thaker and Bhupendra Bhailal Thaker (and their law firm, Cave Malik & Co.): According to the High Court, Bimal Thaker's conduct was also dishonest because he knew that government monies were being used to acquire property illegally by hiding their original source and misleading the banks.[e] Hence, the court concluded that he was liable for dishonest assistance and conspiracy to steal monies by routing them through his client account.[f]

a. High Court of Justice, Chancery Division [2007] EWHC 952 (Ch.) 04.05.2007, § 587.
b. High Court of Justice [2007], § 589.
c. Court of Appeal, Civil Division [2008] EWCA Civ 1007 31.07.2008, § 267.
d. Court of Appeal [2008], § 294.
e. High Court of Justice [2007], § 851.
f. High Court of Justice [2007], § 875.

BOX 2.13 Brazil: Identifying Liable Parties in the *Lava Jato* Case

In March 2014, the Federal Police of Brazil initiated an investigation against Brazil's state-owned oil company Petróleo Brasileiro ("Petrobras") and a few of Brazil's largest construction companies, including the conglomerate Odebrecht, regarding a global-scale bribery scheme. The investigation, Operation Lava Jato—named after a car wash service station used for money laundering—demonstrates the significance of identifying and categorizing potential liable actors when investigating a complex bribery scheme involving many parties.

In particular, Brazil's Federal Prosecution Service divided the various actors involved in the bribery scheme into four different groups:[a]

- *The "business group"* comprised employees and agents of various Brazilian construction companies who were involved in the bribery scheme and were responsible for paying bribes and kickbacks to Petrobras's senior executives and politicians.
- *The "administrative group"* comprised Petrobras's senior executives.
- *The "political group"* comprised politicians such as current or former members of the National Congress of Brazil and representatives of political parties, which, along with the administrative group, made sure that the interests of construction companies were served.
- *The "financial group"* comprised the so-called *doleiros*, referring to black-market money dealers responsible for money laundering and delivering payoffs.

a. The Federal Prosecution Service described the four groups on the *"Entenda o Caso"* (Understand the Case) page [in Portuguese] for Caso Lava Jato, Federal Police of Brazil website: http://www.mpf.mp.br/grandes-casos/lava-jato/entenda-o-caso. It also applied those descriptions in its complaint against Adir Assad, Agenor Medeiros, and others, dated August 9, 2016.

2.10.1 Identifying Applicable Criminal Offenses

Bribery is not the only possible charge to consider in plotting a strategy for stolen-asset recovery proceedings. Table 2.1 outlines some of the charges that practitioners should consider lodging. (For a description of the terms, see appendix A.)

Corruption will frequently involve the commission of several criminal offenses. In selecting the offenses to pursue, practitioners must consider the following factors: (a) the facts of the case, (b) the availability of evidence and whether either direct or circumstantial evidence fulfills the elements of the offenses, (c) procedural aids such as rebuttable presumptions,[44] (d) the likelihood of a conviction, (e) potential sanctions,

[44] Numerous jurisdictions employ "rebuttable presumptions," which effectively assist the prosecution or plaintiff in meeting the burden of proof. For example, if the prosecution establishes involvement in organized crime, the defendant's assets are presumed to be the proceeds of criminal activity (unless the defendant can overcome the presumption). For more examples, see chapter 7, section 7.4.1.

Table 2.1 Criminal Charges to Consider for Asset Recovery, by Category

Category	Potential charges
Misappropriation or diversion of funds and property	• Theft or larceny • Embezzlement • Misappropriation • Fraud, false pretenses, misrepresentation
Bribery, abuse of position, and related offenses	• Bribery (national and foreign public officials) • Bribery in the private sector • Breach of duty • Trading in influence • Abuse of functions • Conflict of interest • Illegal financing of political parties or campaigns • Extortion • Antitrust or competition law-related offenses
Laundering, concealment, acquisition, possession, or use of proceeds of crime	• Conversion or transfer of property • Concealment and disguise • Acquisition, possession, or use of proceeds of crime • Illicit enrichment
Facilitating and other relevant offenses	• Nondeclaration or false declaration of assets • Regulatory offenses • Breach of public procurement regulations • Forgery or falsification of documents • Accounting crimes • Tax violations • Customs fraud or smuggling • Mail and wire fraud • Conspiracy and participation in criminal organizations • Assistance by aiding or abetting • Obstruction of justice

(f) the public interest, and (g) the ability to obtain foreign assistance and enforcement, where applicable.

In addition to the more obvious corruption offenses, prosecutors should also consider other offenses that could increase the probability of securing a conviction. These include conspiracy, aiding and abetting, receipt or possession of proceeds of crime, or money laundering.[45] Money laundering may often be the most effective avenue to pursue,

[45] In France, tax or false accounting offenses, embezzlement, or breach of trust—offenses frequently associated with corrupt activities—may be easier to prove than bribery.

BOX 2.14 Prosecution of Accounting, Records, and Internal Control Provisions in the United Kingdom and United States

United States v. Siemens:[a] Authorities discovered that bribes were made to public officials to secure government contracts. Bribes were accounted for as payments to consultants who subsequently channeled them to public officials. Siemens and its subsidiaries in Argentina, Bangladesh, and República Bolivariana de Venezuela pleaded guilty to charges of conspiracy and violations of books and records and internal controls provisions of the US Foreign Corrupt Practices Act[b] in a plea agreement that resulted in a US$450 million fine.

United States v. BAE Systems:[c] The company bribed several public officials to secure arms sales deals in different countries and eventually reached a global settlement with the United States and the United Kingdom. In the United States, the company pleaded guilty to charges of conspiring to make false statements in connection with regulatory filings and undertakings and agreed to pay a US$400 million fine and make additional commitments concerning ongoing compliance. In the United Kingdom, the company pleaded guilty to one charge of breach of duty to keep accounting records and agreed to pay a £30 million fine.

a. US District Court for the District of Columbia, United States of America v. Siemens Aktiengesellshaft, Siemens S.A. (Argentina), Siemens Bangladesh Ltd., and Siemens S.A. (Venezuela), Sentencing Memorandum, December 12, 2008 (accessed August 12, 2018), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/05/02/12-12-08siemensvenez-sent.pdf. See also 18 U.S.C. § 371; 15 U.S.C. §§. 78(b)(2)(B), 78m(b)(5), and 78ff(a).

b. In the United States, the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) share responsibility for enforcing the Foreign Corrupt Practices Act. The DOJ has enforcement authority over criminal cases against public companies and criminal and civil enforcement authority over domestic concerns. The SEC is responsible for civil enforcement actions against public companies (DOJ and SEC 2012).

c. US District Court for the District of Columbia, United States of America v. BAE Systems PLC, No. 1:10-cr-035(JDB), Sentencing Memorandum, February 22, 2010 (accessed August 12, 2018), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-22-10baesystems-memo.pdf.

particularly in jurisdictions that allow prosecution for self-laundering (possessing, transferring, or hiding proceeds from a crime) and do not require proof of all elements of the predicate offense to obtain a conviction.[46] Practitioners should be aware that such prosecutorial decisions may affect proceedings in foreign jurisdictions and should try to coordinate with foreign counterparts. Box 2.14 presents examples of prosecution for offenses such as violation of books and records and falsification of regulatory filings in the context of bribery.

The offense of illicit enrichment is considered a particularly useful tool for prosecuting corrupt officials in certain jurisdictions such as in Argentina, Brazil, and Colombia.[47]

[46] In Belgium, defendants involved in financial transactions may be convicted of money laundering if there is sufficient evidence that they knew that the assets were of illicit origin. Prosecutors do not have to establish the elements of the predicate offense.

[47] See UNCAC, art. 20, and the Inter-American Convention against Corruption (IACAC), art. IX. Both conventions require states parties to consider adopting relevant provisions. For a more detailed discussion on how the criminalization of illicit enrichment can contribute to the asset recovery process, see Muzila et al. (2012), https://star.worldbank.org/sites/star/files/on_the_take-_criminalizing_illicit_enrichment_to_fight_corruption.pdf.

It punishes public officials for any significant increase in their declared assets that are not reasonably corroborated by their lawful income. Effectively, it eases the burden on the prosecution, which otherwise would be required to establish the various elements of a corruption offense (such as corrupt act, benefit, and quid pro quo). Some jurisdictions that do not criminalize this type of conduct have incorporated it into their civil or administrative legislation.[48]

Legislation on unexplained wealth orders in the United Kingdom may have similar effects because such orders allow prosecuting authorities to freeze and ultimately confiscate the assets of defendants who cannot prove the assets were purchased using legitimate resources (for an analysis of this practice, see chapter 3, section 3.4.10). Practitioners must be aware that charging with the offense of illicit enrichment may impede international cooperation in jurisdictions that do not provide for this offense in their domestic legislation (see chapter 9, box 9.2).

2.10.2 Anticipating Evidentiary Challenges

Practitioners need to consider the challenges in establishing the specific elements of an offense beyond a reasonable doubt (table 2.2). In some jurisdictions, there may be rebuttable presumptions that will assist prosecutors in establishing these elements. (For a discussion on presumptions, see chapter 7, section 7.4.1).

A review of the challenges relating to different offenses should be conducted on a case-by-case basis. For example, illicit enrichment may be easier to prove than bribery in the absence of written documentation of bribes and a quid pro quo during a preliminary investigation.[49] Nonetheless, if investigators uncover such evidence, bribery will become the easier offense to prove, because illicit enrichment requires the prosecution to gather information on the defendant's assets and lifestyle.

2.10.3 Inability to Obtain a Conviction

In most jurisdictions, it is impossible to adjudicate a criminal case in the absence of the defendant, such as in cases of flight or death. In a few civil law jurisdictions, it may be possible to proceed with a criminal trial in absentia if the person is a fugitive. However, convictions in these cases may not be final, because court decisions are subject to appeal by the fugitive if apprehended. In addition, some confiscation laws contain absconding provisions that permit the law to continue to operate, even in the event of flight or death of the defendant.

If the defendant is a fugitive, authorities should consider obtaining extradition of the fugitive in the context of multilateral and bilateral conventions, the legislation of the

[48] Even some jurisdictions that do have illicit enrichment as a criminal offense will use civil avenues to pursue the recovery of stolen assets.

[49] Note that prosecution for illicit enrichment may cause difficulties in meeting the dual criminality requirement for MLA in some jurisdictions. For more information, see chapter 9, section 9.2.2.

Table 2.2 Key Evidentiary Challenges in Establishing the Elements of Selected Criminal Offenses Pertaining to Asset Recovery

Offense	Challenges
Bribery	The establishment of the offense may require proof that the bribe was offered, promised, or paid as part of a "corruption pact"; it may also require proof of a prior agreement on the terms of the bribe and a showing of a quid pro quo between the briber and the public official or private sector employee. It will be difficult to find evidence of the corrupt deal, which is often agreed to in secrecy, especially if the investigation is conducted well after the fact. When bribes are paid overseas by subsidiaries or intermediaries, prosecutors may need to prove that managers or directors at headquarters knew or intended that the subsidiary or the intermediary would commit this crime. Defendants may claim that employees who paid bribes to foreign public officials acted in their personal capacity, flouting corporate guidelines.
Illicit enrichment	Proving illicit enrichment may necessitate an assessment of the concealed property or income of an individual.
Theft or embezzlement	The offense may not apply to real property, provision of services, or intangible assets.
Money laundering	This usually requires proof of the commission of a predicate offense as well as of transactions or schemes organized to conceal or disguise the illegal origin, ownership, or control of assets.
Forgery or falsification	This may require evidence that the falsified documents have legal significance or consequences. Other types of documents are usually not considered to be subject to forgery. In certain jurisdictions, accounting offenses only apply to published accounting statements.
Criminal liability of legal entities	Criminal liability of legal persons may not exist in all jurisdictions or may not apply to all types of offenses. When charges are brought against legal persons, such as large multinational companies, it might be difficult to identify one individual decision maker within a management chain.
Fraud	When committed over a long period, fraud may involve hundreds or even thousands of individual offenses, for which prosecution can be cumbersome or difficult. Use of sample or representative charges can have adverse consequences upon related confiscation proceedings.

state to which the fugitive has fled, or both. This can be a long and frustrating process, especially when the extradition process in the foreign jurisdiction includes court proceedings and possible appeals to higher courts.

In addition, if some of the criminal offenses that are the basis of the request are denied by the extraditing country, the specialty principle (also known as the limited use

principle)[50] could compel the requesting country to cease the investigation or prosecution of these offenses. Practitioners may seek alternative options such as filing a complaint with the foreign authorities (leading to criminal or NCB confiscation in the foreign jurisdiction) or initiating domestic NCB confiscation proceedings. If the defendant is deceased, authorities may consider a private civil action against the estate inherited by the descendant (in domestic or foreign courts) or domestic or foreign NCB confiscation.

If the authorities may lack sufficient evidence to meet the standard of proof to establish a conviction, practitioners should explore whether there is sufficient evidence to proceed through a private civil action or NCB confiscation proceeding (see section 2.8.5 concerning standards of proof).

2.11 Case Management

To increase efficiency, accountability, and transparency, it will be important that proper policies and procedures are in place to ensure that offenders are appropriately charged, that evidence is properly gathered and passed from law enforcement to prosecutors to courts, and that the due process rights of the offender are respected. Noncompliance with confidentiality or due process requirements may lead to the nullification of the domestic case, loss of credibility, and failure to obtain international cooperation from foreign jurisdictions. In large, complex investigations, it is often advisable to assign specific practitioner(s) to be in charge of evidence collection, collation, and secure management. Some examples of important policies and procedures are discussed below.

2.11.1 Strategic Planning and Leadership

Although strategies must be set at the beginning of the case, authorities should ensure that decision making is an ongoing and fluid process. Unanticipated difficulties or challenges may arise at any moment of the asset recovery process and may call for new investigative methods or the exploration of alternative avenues.

To ensure maximum flexibility, frequent reviews of the case should bring together policy makers, prosecutors, and eventually investigating judges and other participating agencies. These meetings should be based on precise, updated, and accurate reports or records detailing recent decisions and their rationale, and time should be devoted to anticipating potential challenges or opportunities. Many jurisdictions have found it useful to appoint one case manager responsible for coordinating meetings, making final decisions, ensuring resources, and so forth.

2.11.2 Timing and Coordination

The case should be planned to ensure that investigative measures and MLA requests are coordinated with provisional measures and arrests to prevent the dissipation or

[50] For more on the specialty principle, see chapter 9, section 9.2.2, on MLA requirements.

movement of assets or the flight of the target. This is why informal cooperation (as highlighted in chapter 8) is always key to successful international investigations.

Where assets must be seized, asset management issues must be assessed as part of the planning process. Mechanisms should also be in place to ensure the safety of key witnesses, law enforcement officials, attorneys, or judges dealing with high-profile cases. This coordination is particularly important in the initial phases of the investigation because numerous efforts—such as gathering basic information, requesting documents, interviewing witnesses, and submitting MLA requests—could alert potential targets and give them a chance to destroy or conceal documentary evidence, influence key witnesses, move or hide assets, gain political support, or flee to foreign jurisdictions.

That risk should be assessed constantly and minimized by careful choices of covert investigative techniques in the early phases of the investigation—for example, while conducting physical and electronic surveillance, monitoring electronic communication and social networks, examining mail and trash, or using informants. When more overt techniques are needed (such as searches of houses or businesses, orders for seizure or production of documents, or interviews of targets and witnesses), it will be important to consider coordinating those activities with the timing of arrests or of restraint or seizure of assets. (For additional information on these issues, see, among others, chapter 3, section 3.2, "Developing an Investigative Plan"; chapter 5, sections 5.4.2 on "Asset Management Considerations" and 5.5 on "Timing of Provisional Measures"; and chapter 6, "Managing Assets Subject to Confiscation.")

In addition, having experienced investigators conduct interviews can be advantageous to a complex financial investigation.

2.11.3 Implementation of a Case Management System

Electronic databases holding information about asset recovery cases may prove quite helpful. For example, the UK Joint Asset Recovery Database (JARD) is an operational database managed by the National Crime Agency that holds information about asset recovery cases dealt with by the criminal justice system. JARD entries are provided by law enforcement agencies including the police, the Crown Prosecution Service, the Serious Fraud Office, and local authorities. The data are subject to constant change as cases proceed; some new cases are added while others are resolved.[51]

Files should be organized to ensure that deadlines relevant to the case are met—for example, that charges are filed within the prescription period and that extensions of provisional measures, preventive detention of suspects, or other temporary remedies are in place. The case file should also include assets targeted for recovery, graphics illustrating the flow of financial transactions, explanations for calculations of criminal proceeds (made in accordance with domestic legislation), and summaries of testimonial and documentary evidence.

[51] Home Office, "Asset Recovery Statistical Bulletin, 2011/12–2016/17." Statistical Bulletin 15/17 (September 2017), 3.

Evidence should be numbered, logged, and stored in a secured location along with records of the chain of custody between seizure and storage. Although these preparations are time consuming and may appear to impede the development of the case, they are necessary to ensure the integrity of the evidence or chain of custody. Appendix L contains the StAR initiative's guidelines on organizing case files to maximize efficiency.

Report writing is an important aspect of a criminal investigation that is often ignored or given lower priority. In asset recovery investigations, however, it takes on even greater importance because the investigations can be lengthy, complex, and multijurisdictional. Accurate, timely, and concise report writing will assist, for example, in drafting the necessary background information to meet evidentiary requirements in MLA requests for evidence. It is imperative that practitioners document their findings periodically throughout the entire investigation as well as after significant events. Reports should be written clearly and concisely (preferably on the same day as the event being described) and should include all relevant information and events. They should be reviewed and approved by a supervisor as soon as possible.

2.11.4 Addressing Media Inquiries

Corruption cases, particularly those involving high-profile officials, are likely to attract substantial media attention. Practitioners must be prepared to deal with these inquiries, or else the inadvertent release of confidential information is likely to have disastrous consequences for a case.

In most jurisdictions, the responsibility for dealing with the media will lie with the attorney general or the director of a relevant government agency (for example, public affairs, personnel, or the department of justice). Typically, a senior official in the local office or, in large cases, a senior team member is designated as the media contact point. These individuals should be properly trained and familiar with applicable guidance and procedures (if available), such as ways of addressing the media through press releases or conferences, the types of information that may be disclosed in an ongoing investigation, and coordination with national counterparts on issues of national or regional importance. In some cases, practitioners have found it helpful to designate a contact point for procedural (not substantive) information—an individual who can explain how the justice system operates.

Ultimately, care must be taken to avoid any statements that would prejudice legal measures against the target. In some cases, practitioners may also consider the use of media as a means of gaining public support, but they should ensure that this type of communication is allowed by and conducted in the context of relevant legislation or regulation.[52]

[52] For example, practitioners in Brazil's Lava Jato (Car Wash) case used the press to gain popular support. Although the practice of leaking information to the press can raise some serious concerns, "The constant flow of revelations keeps the public interested and party leaders on the defensive" (Gilbert 1995, 134–35).

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3. Securing Evidence and Tracing Assets (1): Investigative Measures

3.1 Introductory Remarks

One of the biggest challenges in an asset recovery case is producing the evidence that links the assets to criminal activities (property-based confiscation) or establishes the amount of the benefit derived from an offense (value-based confiscation).[1] To establish this link (also referred to as the "nexus" or "paper trail"), practitioners must identify and trace assets or "follow the money" until the link with the offense or the location of the assets can be determined.

Quite commonly, however, the assets have been moved around the world using schemes that involve offshore centers, corporate vehicles, nominees, intermediaries, "straw men," and a variety of financial transactions to launder the funds and obfuscate this link. Thus, asset recovery cases are often document-intensive and, as a result, time consuming, complicated, and demanding of diverse technical skills. Practitioners need to be able to

- Obtain relevant information through traditional investigative techniques;
- Fully use information available through domestic and foreign open sources;
- Obtain corroborative evidence through interviews of witnesses or targets;
- Collect contextual or circumstantial evidence;
- Understand what information can be obtained from financial institutions;
- Analyze bank statements, business records, financial documents, and contracts;
- Determine the ultimate beneficial owners;
- Coordinate with authorities in foreign jurisdictions; and
- Organize the information in a timely, comprehensive, and coherent manner.

In addition, practitioners need to understand at the outset what legal tools are available in their toolkit to gain further evidence or resolve a case, such as plea bargaining and identifying a wide set of parties to pursue (including by prosecuting willful blindness).[2]

[1] For a discussion of property-based and value-based confiscation systems, see chapter 7, section 7.3.

[2] Some jurisdictions have created specialized units of investigators who trace assets while other investigators focus on gathering evidence related to the criminal offenses or unlawful conduct. There should be close cooperation between these groups of investigators to avoid compromising either the criminal investigation or the asset-tracing investigation.

Chapters 3 and 4 introduce some of the techniques that practitioners can use to trace assets and analyze financial data as well as to secure reliable and admissible evidence for asset recovery cases. The techniques discussed may also be helpful in gathering evidence to prove the elements of the offenses that are under investigation.

Various investigative techniques followed around the world, as described below, assist practitioners in these efforts.[3] However, jurisdictions may limit the use of some of these techniques or might not even allow some of them. In addition, jurisdictions will differ as to which techniques require prior judicial authorization or the application of a special procedure. Typically, in the case of coercive measures (such as search warrants, access to bank account information, and electronic surveillance), some sort of prior authorization might be required, whereas this may not be necessary in the case of noncoercive measures such as obtaining publicly available information and intelligence from other government agencies.

It is imperative that practitioners determine which techniques are authorized by law and ensure that all legal requirements, policies, and procedures are followed. In furtherance of an investigation, the practitioner should adopt appropriate protocols to preserve the chain of custody of the source evidence on which the case will rely. In this way, it can be demonstrated to the competent authorities that such evidence has been obtained legally and is therefore admissible in any contemplated legal proceedings.

Respect for the rule of law and the due process rights of the accused will also be essential, particularly if international assistance is being sought. Deviating from legal requirements, policies, and procedures or violating the rights of the accused can be catastrophic to a case because it may lead to the invalidation and inadmissibility of evidence discovered through the use of that technique—and possibly of the entire investigation. Hence, practitioners must ensure that the following rights of the accused guaranteed by international instruments are protected: the right to access to courts, the right to a fair trial, the presumption of innocence, the right to privacy, and the protection of ownership (Attisso 2010, 11). In cases requiring international cooperation, many jurisdictions will refuse to provide informal cooperation or mutual legal assistance (MLA) if they perceive that the rights of the accused have not been respected.[4] (See also chapter 9, section 9.2.5, on grounds for refusal, with a focus on due process.)

[3] These chapters are not meant to provide an exhaustive how-to manual for each technique. More detailed how-to guides may be available online and through public sources such as libraries and bookstores. In addition, many agencies, both domestic and foreign, have customized guides that they are willing to share.

[4] For more information on these basic rights, see the United Nations International Covenant on Civil and Political Rights (1966, effective 1976) and the Universal Declaration of Human Rights (1948) as well as regional multilateral agreements such as the Convention for the Protection of Human Rights (1950, effective 1953).

3.2 Developing an Investigative Plan

Fundamentally, all investigations—including complex stolen-asset recovery cases—seek to establish the truth and answer five traditional questions (figure 3.1): who, what, where, when, and how? An investigative plan sets forth the framework to answer these questions and collect information and evidence in an efficient and comprehensive manner.

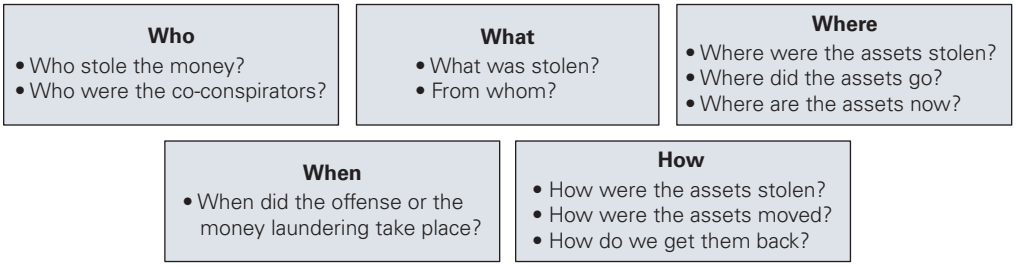
To prevent the dissipation of assets, it is critical to trace assets early in an investigation, simultaneously with the investigation of the criminal offenses of corruption, money laundering, and so forth. Developing an investigative plan is an essential first step and often requires a decision on whether to develop an approach focused on investigating the corrupt activities, the related money laundering, or both. In the first case, law enforcement officials investigate the corrupt activities and then follow the money trail to identify and recover the proceeds and instrumentalities of crime. In the second case, investigators begin by analyzing financial transactions to link them to corruption or other offenses.

Because the underlying facts are rarely static, an investigative plan will constantly evolve throughout the investigation. Selecting the applicable approach may depend upon the jurisdictions involved; the expected legal avenues to be pursued; and the resources, time frame, and preliminary case information available to the investigators. Early contacts through informal channels with foreign counterparts will also be helpful in this context.

In a complex case, an investigative plan will generally set forth the investigative and legal strategy for each stage of the investigation and any legal proceeding, including the following:

- The sequencing and timing of important milestones (for example, requests for provisional orders, exercise of coercive powers, interviews of key associates or targets, MLA requests, or initiation of legal proceedings)
- The sequencing of specific actions to complete such milestones

FIGURE 3.1 Five Important Questions to Ask in an Asset Recovery Investigation



Source: World Bank.

- The timing of actions
- The responsibilities among agencies and specific investigators
- The involved jurisdictions, with a plan for informal and formal cooperation
- The budget and resourcing for the investigation
- An assessment of what can be obtained, at what cost, and in how much time.

Specific steps are likely to include the identification of persons, companies, and assets involved in the case and the connections between them, followed by an analysis of the assets and financial flows. (See, for example, the discussion of the Brazilian *Lava Jato* case in box 3.1, which illustrates the importance of understanding the financial flows in a corrupt scheme, especially where numerous shell companies are used.) It is useful to prepare profiles of subjects, key associates, corporations (for example, ownership history, transfers of interest, and primary activities); assets (for example, ownership and transfers of interests); and updates of these profiles as the case evolves.

In complex cases involving serious criminal activities and volumes of documentation, practitioners will find it helpful to set priorities and focus on specific types of documents, accounts, or a time frame depending on the nature of the case. For example, securing, obtaining, and analyzing bank account documentation that can be interpreted and mapped out easily is most useful in money-laundering cases where investigators need to show links between individuals and companies and reveal the money flow. However, in the case of an individual living off cash bribes, the most important evidence may be witness statements (as from business associates, employees, and neighbors) or open-source information (such as property title information, court records, tax records, and social media).

Practitioners may also consider that a paper file creates challenges for case management and does not suit the needs of multiple investigators working on one case, perhaps at different periods in the investigation cycle. An electronic case management system (CMS) can solve this problem. Such systems can be expanded to not only track and record investigative steps and core data but also to increase e-filing of documents, streamline the briefing process, and ease the discovery or disclosure processes. The CMS could also include the ability to create hyperlinked e-documents from a shared drive—ensuring that the entire investigative record is largely in one safe place. The Stolen Asset Recovery (StAR) initiative of the World Bank and the United Nations Office on Drugs and Crime (UNODC) has developed guidance on how to establish and use case management systems (see appendix L).

The following subsections explain other important considerations to keep in mind throughout an asset recovery investigation.

BOX 3.1 Understanding Connections and Financial Flows: The Use of Shell Companies in the Brazilian *Lava Jato* (Car Wash) Case

Background: The *Lava Jato* (Car Wash) case—a major corruption scandal in Brazil—demonstrates the importance of taking the necessary steps to identify the parties, the companies, and the assets involved in a case to understand their connections and analyze the financial flows. This case involves a grand corruption scheme that used a complex network of shell companies not only in Brazil but also in tax haven jurisdictions to launder the proceeds of corruption taking place in Brazil or to transfer the money to individuals and companies abroad. (For additional discussion of the case, see chapter 2, boxes 2.4 and 2.11; chapter 4, box 4.2; chapter 5, box 5.5; and chapter 8, box 8.1.)

Use of Brazilian shell companies: Brazilian shell companies had a dual role: to launder the proceeds of corruption inside Brazil and to transfer money to individuals and companies abroad. This was made possible with the use of fake contracts between the shell companies and the Brazilian construction companies and was supported by fictitious invoices. Laundered proceeds were delivered in cash to intended beneficiaries by *doleiros*—black-market money dealers usually responsible for money laundering.[a] The latter also used Brazilian shell companies to circumvent Brazil's foreign exchange controls by creating fake import contracts with offshore companies that were also incorporated by doleiros.[b]

Use of offshore shell companies: The corruption scheme became increasingly sophisticated as transactions were channeled through multiple layers of offshore companies and bank accounts. Those layers usually included a first offshore layer whose beneficiaries were the Brazilian construction companies; a second offshore layer controlled by doleiros; and a third offshore layer whose beneficiaries were public officials and politicians.

The operation of offshores is illustrated through the case of Odebrecht, a global construction company based in Brazil that was involved in the scandal. The latter had incorporated several offshore companies, such as Smith & Nash Engineering (incorporated in the British Virgin Islands);[c] Arcadex (Belize); Golac Projects and Construction (British Virgin Islands); and Havinsur (Uruguay)—all with bank accounts at PKB Privatbank in Switzerland.

Using the Swiss accounts belonging to these offshores, Odebrecht then transferred money to bank accounts belonging to the second layer of offshores, incorporated by doleiros, such as Constructora Internacional del Sur (Panama); Sagar Holding (Panama); Innovation Research Engineering and Development (Antigua and Barbuda); and Klienfeld Services (Antigua and Barbuda). In turn, the doleiros used this second layer of offshores to transfer money to the third layer of offshore companies—for example, Quinus Services, Milzart Overseas Holdings, and Pexo (all incorporated in Panama), which had Petrobras employees as the final beneficiaries.[d]

(continued next page)

BOX 3.1 Understanding Connections and Financial Flows: The Use of Shell Companies in the Brazilian *Lava Jato* (Car Wash) Case *(Continued)*

Odebrecht replicated Lava Jato's corruption modus operandi in its business activities around the world. To secure improper advantages, Odebrecht paid foreign public officials using the same scheme of multiple layers of offshore entities and bank accounts. According to the US Department of Justice, Odebrecht paid bribes in 11 countries, including Angola, Argentina, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and República Bolivariana de Venezuela. In Panama alone, Odebrecht was accused of paying more than US$59 million in bribes to government officials and intermediaries working on their behalf.[e]

Prosecutions and seizures: As part of an investigation by Panamanian prosecutors into the Lava Jato bribery scheme, Ricardo Alberto Martinelli and Luis Enrique Martinelli (the two sons of Panama's former president Ricardo Martinelli Berrocal) were charged by the public prosecutor in Panama for accepting bribes of US$22 million from Odebrecht. Swiss authorities are also investigating the Martinelli sons and have seized US$22 million belonging to them in Swiss banks.

Odebrecht allegedly used the same network of offshore shell companies and bank accounts to make payments to offshore companies beneficially owned by the two Martinelli brothers, such as Kadair Investments (incorporated in the British Virgin Islands). Kadair Investments received four separate bank transfers from Odebrecht to its account held at Banque Pictet in Switzerland—of US$1.8 million, US$2.26 million, US$3.2 million, and US$1.5 million. These payments were channeled through four offshore companies, respectively: Trident Inter Trading, Innovation Research Engineering and Development, Constructora Internacional del Sur, and Klienfeld Services, incorporated in Panama and/or Antigua and Barbuda.[f]

a. For instance, according to the Brazilian Federal Prosecution Service, this occurred in the construction of a building in Cenpes (the Américo Miguez de Mello Research and Development Center of Petrobras). The Novo Cenpes Consortium responsible for executing the works (comprising five construction companies—OAS, Carioca Engenharia, Construbase Engenharia, Construcap CCPS Engenharia, and Schahi Engenharia) signed an agreement with MRT Gestão Empresarial, which, despite not having executed any services, resulted in the payment of four invoices in the amounts of R$492,533.88 each (see complaint against Adir Assad, Agenor Medeiros et al., August 9, 2016, http://www.mpf.mp.br/pr/sala-de-imprensa/docs/denunciaabismo.pdf). Afterward, such amounts were used to pay Petrobras employees Renato Duque, Pedro Barusco, and Paulo Adalberto Albes Ferreira in cash.
b. According to the Brazilian Federal Prosecution Service, Alberto Youssef, together with Leonardo Meirelles, Pedro Argese, Esdra de Arantes, Raphael Flores, and Carlos Alberto transferred abroad the amount of US$444,659,188.75 through currency exchange deals, using the following Brazilian shell companies (ME denoting "microenterprise" and EPP, "small business entity"): Bosred Serviços de Informática - ME; Hmar Consultoria em Informática - ME; Labogem S/A Química Fina e Biotecnologia; Indústria e Comércio de Medicamentos Labogem; Piroquímica Comercial - EPP; RMV & CVV Consultoria em Informática - ME; and the offshore shell companies DGX Imp. and Exp. and RFY Imp. Exp. (Fausto Macedo. 2014. "Justiça abre ação contra doleiro da lava jato" [Justice Opens Lawsuit against Lava Jato Doleiro]. *exame.com*, April 23, 2014. https://exame.com/brasil/justica-abre-acao-contra-doleiro-da-lava-jato/).
c. The jurisdiction of incorporation of corporate vehicle is mentioned in parentheses after the corporate vehicle's name.
d. Complaint against Cesar Rocha, Marcelo Odebrecht et al., October 16, 2015.
e. United States of America against Odebrecht S.A., Plea Agreement, Cr. No. 16-643 (RJD) (F.#2016R00709), December 12, 2016, https://www.justice.gov/opa/press-release/file/919916/download.
f. Rolando B. Rodríguez. 2017. "Ricardo y Luis Enrique Martinelli Linares Recibieron Millones de Odebrecht" [Ricardo and Luis Enrique Martinelli Linares Received Millions from Odebrecht]. *La Prensa*, January 23, 2017. http://impresa.prensa.com/panorama/Ricardo-Enrique-Martinelli-Linares-Odebrecht_0_4672782785.html.

3.2.1 Beneficial Ownership Considerations

Frequently, and especially in cases of grand corruption, corrupt officials do not hold assets or bank accounts in their own names. Instead, assets are held by other individuals or companies to disguise the official's role as the beneficial owner—the "natural person" who ultimately owns or controls the assets or the bank accounts (box 3.2). For this reason, it is useful to develop subject profiles and network analysis of their associates and of suspicious commercial operations (unusual investments, loans, consulting agreements, or success fees). It is important for practitioners to look into the assets and bank accounts of those potentially involved, including

- Relatives, spouses, and romantic partners; business associates; friends and other close associates; or even household employees;
- Nominees, intermediaries, or straw men—individuals who are either duped into or willingly participate in shielding the corrupt official by holding an asset or opening and managing an account, often for a small fee; and
- Corporate vehicles, including corporations, trusts, limited liability partnerships, and foundations. For a list and description of some corporate vehicles, see appendix B.[5]

In the case of assets held by financial institutions, some may provide the name of the "natural person" who beneficially owns the account.[6] However, not all banks can obtain this information, especially when a chain of legal persons is used to disguise the ultimate beneficial owner. Although records may identify shareholders or other parties involved, the ultimate beneficial owner is not always disclosed. Even when a beneficial owner is identified by the person opening the account, the latter might provide a false statement to conceal the identity of the corrupt official.

Given these limitations and the fact that many other assets do not list beneficial ownership information, practitioners need to ensure that the investigation takes steps to determine and corroborate the actual individuals who, and the companies that, are the beneficial owners of the assets. Accordingly, an investigator may need to use traditional investigative techniques or develop open-source information to complement the review of the documentary information provided by financial institutions.

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[5] The misuse of corporate vehicles in grand corruption cases (both in the case of corruption and the laundering of the proceeds) is discussed in van der Does de Willebois et al. (2011) at https://star.worldbank.org/sites/star/files/puppetmastersv1.pdf.

[6] The international community has adopted standards requiring financial institutions to conduct customer due diligence to identify their customer and the customer's beneficial owner, obtain information on the nature of the business relationship, and use enhanced due diligence measures in relationships with politically exposed persons (PEPs)—senior public officials, their families, and close associates. See the United Nations Convention against Corruption (UNCAC), art. 52, and the FATF Recommendations 10 and 12 on "Customer due diligence" and "Politically exposed persons," respectively (FATF 2019). Unfortunately, these standards are not always in place (Greenberg et al. 2010, 7, 13).

BOX 3.2 Uzbekistan: Beneficial Ownership of Shell Companies in the Gulnara Karimova Case

According to the US civil forfeiture complaint, former Uzbek official (and daughter of Uzbekistan's former president) Gulnara Karimova used shell companies beneficially owned by her to obtain equity interests in certain telecom companies' Uzbek subsidiaries and later sold these interests back to the telecom companies for an excessive profit.[a]

In addition, a shell company beneficially owned by Karimova entered into a series of contracts with the telecom companies or their subsidiaries to enable her to receive millions of dollars in corrupt payments. In exchange for these payments, her shell company arranged to have its subsidiary waive rights to use certain valuable assets, agreeing that the shell company would not receive full payment from the telecom companies until these assets were assigned to their Uzbek subsidiaries by an Uzbek government agency using a nontransparent and noncompetitive process.

Furthermore, a shell company entered into multimillion-dollar consulting contracts with two of the telecom companies (VimpelCom and TeliaSonera) to structure large, corrupt payments to Karimova to induce her to use her influence with the government and assist their operations in Uzbekistan (a part of the case further discussed in chapter 2, box 2.9).

a. Complaint, United States v. All Funds Held in Account Number Ch1408760000050335300 (S.D.N.Y. 2016), https://www.justice.gov/opa/file/826636/download.

3.2.2 Considerations on Commingled Assets

When tracing assets through the financial sector, it is important to remember that proceeds of corruption are fungible: the proceeds may be commingled with other assets that are not linked to the offense, may change form, and may change flow through various channels. Even if such proceeds change form (for example, US$1 million is deposited into one account, and portions are subsequently wired to different bank accounts or used to purchase property), the ultimate form of the proceeds or their equivalent value may be confiscated.[7]

3.2.3 Adoption of Provisional Measures

Finally, practitioners should continually assess whether it is possible and practical to adopt provisional measures to seize or restrain assets discovered during their tracing efforts. In some cases, they may decide to keep the account open and monitor the

[7] In this regard, it is important that jurisdictions broadly define "assets" or "property" and "proceeds of crime" in their legislation. See UNCAC, art. 2(d). Also see chapter 7, section 7.3.1 ("Property-Based Confiscation"), for a discussion of commingled proceeds.

activity to discover new leads. However, where there is a risk that the target will be tipped off and subsequently dissipate or move the assets, the implementation of provisional measures should be considered, knowing that such measures could often alert the target of the investigation. For a discussion of provisional measures, see chapter 5.

3.3 Creating a Subject Profile

In all investigations, an essential first step is the creation of a subject profile. Practitioners collect and record all basic information related to the target, such as information that fully identifies the target and that shows any aliases used by the target. All these data should be maintained in an orderly fashion within the case folder. In multijurisdictional cases, subject profile information is expected to be shared with foreign counterpart agencies. Box 3.3 provides a checklist of pertinent information that practitioners should try to gather in the early stages of an investigation.

BOX 3.3 Checklist of Basic Information for a Subject Profile

Practitioners should collect and maintain the following information during the early stages of an asset recovery investigation:

- Name (including aliases), date, and place of birth of target; copies of birth certificates; and passports and national identity cards
- Names (including aliases) and dates and places of birth of spouses, children, parents, new partners (if divorced or separated), siblings, spouses of siblings, immediate relatives (uncles, aunts, cousins, grandparents, grandchildren), and spouses' relatives
- Relevant telephone numbers (business, home, mobile), email addresses, and any other contact details—which, in some jurisdictions, may be obtained from subscriber information provided to an internet service provider (ISP)
- Recent photographs of all targets and associates (including government-issued identification)
- A fingerprint card
- Results of a criminal record search
- Academic records, employment history, and association memberships
- Results of public-source searches on targets, associates, and affiliated companies, using internet search engines, social media sites, local and international media reports, and libraries
- Information from government agencies (as further discussed in section 3.4.2)

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BOX 3.3 Checklist of Basic Information for a Subject Profile *(Continued)*

- Salary statements of the subject from a relevant government employer, if applicable
- Real estate records including purchase agreements, mortgages, loan applications, and appraisals
- Information identifying banks or bank accounts and other entities that may hold business records. Practitioners may also consider retention orders (as discussed in box 3.10).

3.4 Obtaining Information, Financial Data, and Other Evidence

As targets are identified, practitioners will need to obtain information and financial data on those targets and to ensure that reliable, admissible evidence is secured for trial. Depending on the investigation plan, the financial data may include all assets and liabilities, income, and expenses of the targets and their businesses. Documents and other leads need to be gathered from a range of sources, including the internet and other publicly available sources; government agencies; financial institutions, including e-banking facilities; money service providers; law and accounting firms; trust and company service providers; real estate agents; art dealers; insurance companies; business competitors; travel and other reward programs; businesses, relatives, employees, and associates of the targets; and the targets themselves (as discussed, for example, in box 3.11 on unexplained wealth orders).

The selection of a particular investigative technique should be assessed as part of the overall investigative plan or framework (see section 3.2) and coordinated among different domestic and foreign investigative units, as applicable.

Typically, the practitioner should begin with the use of the most basic investigative and nonintrusive techniques (such as collection of basic information, including internet and media searches, to prepare the subject profile) before implementing more-complex ones (such as wiretapping). In addition, practitioners may consider using covert techniques (such as physical surveillance, public information, open-source social media searches, information from other government agencies, and trash runs) before moving to overt techniques such as searches—after obtaining a search warrant—in areas where a person has a reasonable expectation of privacy. Where possible, consider using anonymization software to protect the practitioner's identity when performing online and social media searches. At all times, the practitioner should exercise caution and discretion in the investigative approach to avoid tipping off the targets.

Practitioners must also keep in mind that the use of one technique can provide leads or information that will become grounds to take additional measures. A search of a business or residence may reveal evidence that links the target to a bank account—evidence

that can support a subsequent order to obtain bank account information, having demonstrated the nexus with the target. Physical surveillance may reveal a potential gatekeeper or professional intermediary to be investigated. And documents obtained through a production order on a bank may reveal the names of bank officials or individuals involved in a transaction who may be able to provide additional leads if interviewed. For an example of how investigative techniques can be used in practice, see box 3.4, which presents the investigative techniques used by the United Kingdom in the case of a Nigerian state governor, Joshua Dariye.

BOX 3.4 United Kingdom: Investigative Techniques Applied against Joshua Dariye

Law enforcement officers in the United Kingdom became aware of allegations of corruption and misappropriation of assets by Joshua Dariye, the former governor of Nigeria's Plateau State, and suspected that assets could be located in the United Kingdom. Through the following investigative techniques, they eventually traced the assets and linked them to the offenses.

1. ***Technique:*** Investigators searched public records for information on Dariye in the United Kingdom (through property, vehicle, and corporate registries). They also sought intelligence from other governmental agencies, including the UK financial intelligence unit (FIU). For more information on FIUs, see section 3.4.2.
   Result: No link to Dariye was found.
2. ***Technique:*** Investigators identified Dariye's family and associates and checked for a nexus to the United Kingdom.
   Result: Investigators discovered that Dariye's children were attending private school in the United Kingdom.
3. ***Technique:*** Investigators conducted inquiries to the bank from which the school fees were paid. (Such power is permissible to financial investigators.)
   Result: Investigators discovered that Dariye operated a Barclays credit card account and that the balance was paid off each month by transfer from the bank account of Joyce Oyebanjo.[a]
4. ***Technique:*** Investigators obtained a production order to obtain access to Dariye's children's school files.
   Result: Investigators confirmed that the school fees were paid by Joyce Oyebanjo.
5. ***Technique:*** Investigators searched for publicly available information on Oyebanjo as well as for information available with other governmental agencies. They also obtained a production order for Oyebanjo's bank accounts.
   Result: Oyebanjo, employed as a housing officer in the United Kingdom, was found to have 15 bank accounts with funds totaling roughly £1.5 million

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BOX 3.4 United Kingdom: Investigative Techniques Applied against Joshua Dariye *(Continued)*

(approximately US$2.3 million) as well as £2 million (approximately US$3.1 million) worth of real estate. Furthermore, Oyebanjo was managing one of Dariye's properties in Regents Park Plaza, a property purchased in the name of "Joseph Dagwan" and paid for by the Nigerian Plateau State Ecological Fund through various companies.

6. ***Technique:*** Investigators conducted credit reference checks that revealed bank accounts operated by the targets. Assets were then traced from these bank accounts to other bank accounts, property, and vehicles. Production and search orders were used to obtain additional information and trace the assets.
   Result: It was discovered that Dariye had one bank account registered to a particular address in London. Examination of Dariye's and Oyebanjo's bank accounts revealed large electronic credits from various banks in Nigeria.

7. ***Technique:*** Investigators used a production order to obtain the conveyancing solicitor's file for the London address.
   Result: The file revealed that the property had been purchased using a false name and was paid for through a Nigerian company's London-based bank account.

8. ***Technique:*** A mutual legal assistance (MLA) request was sent to Nigeria to determine the origins of the funds received. Note that the formal MLA in this case was used at the latest stage and that informal cooperation was key in the previous steps (see chapters 8 and 9 on international cooperation).
   Result: It was established that an ecological grant obtained by Dariye had been diverted and concealed into his own company bank account, with the assistance of the bank staff. The funds were diverted to a company, and the associated bank account was set up by Dariye in Nigeria and subsequently transferred to London for his use. The Nigerian company that purchased the London property was also linked to the ecological grant theft, because it received £100 million (approximately US$157 million) of the stolen funds. The company had paid £400,000 (approximately US$626,800) for the London property after Dariye had authorized a Plateau State government contract for the installation of £37 million (approximately US$58 million) worth of television equipment in Plateau State.

This case illustrates that it is imperative for practitioners to "know their subjects" and to identify all close relatives, business associates, and other persons who could assist a target in stealing funds and moving them into foreign jurisdictions. Practitioners must use all techniques available (for example, other government agencies, public sources, and coercive measures) because they never know how the next lead may originate.

a. Oyebanjo, Dariye's banker in the United Kingdom, paid off fees and utilities on behalf of Dariye, including fees paid to the private school for his two children.

3.4.1 Open-Source Information

Open-source information is generally defined as publicly available information that can be gathered by any legal means, including information available through social media or the internet for free, for a fee, or by subscription. Information from open sources and other government agencies can reveal assets held by targets, their families and associates, and associated businesses.

Open-source information is used throughout the investigation—from helping to assess the credibility of allegations to submitting admissible evidence at trial. In the preliminary stages, open-source information may be used to develop the investigative plan, including assessing the difficulty of making a successful case and developing the subject profile. It can help in developing leads or identifying domestic or foreign assets held by targets, their families and associates, and associated businesses. It can also assist in identifying associates and potential witnesses and in compiling the subject profile (section 3.3) and financial profile (chapter 4, section 4.3) as well as laying the foundation for search and seizure warrants (section 3.4.8).

Open-source information includes information publicly available through the internet and social networking (including archived information). Actions that are useful to the entire asset-tracing phase include identifying and retrieving information from digital media; examining online information regarding emails; and examining activity on social media (such as Facebook and Instagram) and professional network accounts (such as LinkedIn). For example, posts on social media have helped to identify assets that were otherwise held by proxies but that the targets kept featuring in their own posts. Practitioners should consider scoping the digital footprint of their targets early in the process and engaging with internet service providers (ISPs) and social media companies to trace assets using geolocation and other Internet Protocol (IP) address information.

However, information found in social media and on the internet is not always accurate and is not in itself sufficient proof of important facts. Additional corroboration through traditional investigative techniques may be necessary.

Categories of open-source information include the following:

- Official public records (domestic and foreign)
  - Records of incorporation or birth, death, marriage, real property
- Private, commercial, or law enforcement databases
  - Property and credit reports
  - Due diligence or know your customer (KYC) databases
- Civil litigation, divorce, and probate proceedings (if available)
- Corporate registrations and corporate filings (including financial statements)
- Patent and trademark applications
- Nonprofit organization registrations
- Tax filings or retirement plan information (if available)

- Moveable-asset tracking sites, regarding movement of aircraft,[8] marine vessels, and motor vehicles
- Social media postings
- News media (including newspapers, trade journals, society or gossip tabloids, or websites)
- Educational records, publications of alumni organizations
- Information describing the confiscation legal authorities and relevant information from other countries
  - Financial Action Task Force (FATF) reports: https://www.fatf-gafi.org/
  - Informational country reports: for example, reports available on the US Department of Justice website, www.state.gov
  - Asset Recovery and Beneficial Ownership Guides: for example, guides available at https://star.worldbank.org/ArabForum/asset-recovery-guides and https://star.worldbank.org/content/beneficial-ownership-guides
- Investigative reporting and nongovernmental organization (NGO) reports: for example, reports issued by the International Consortium of Investigative Journalists (ICIJ), Global Witness, Global Financial Integrity, and Public Eye.[9]

Practitioners may also consider subscribing to commercial database providers that hold relevant information. For a list of some helpful open-source websites, see appendix J.

In addition, information can be acquired from civil society organizations that collect evidence, which can be then forwarded to judicial authorities responsible for an investigation. These organizations may become actively involved in an investigation depending on the legal framework. For instance, in jurisdictions where the legal framework allows civil society organizations that specialize in corruption and anticorruption matters to initiate proceedings, the organizations' contribution to the progress of the case may be quite positive. Box 3.5 discusses how such organizations and groups supported the judicial investigation against Teodorin Obiang of Equatorial Guinea. In addition, journalists can play a crucial role in uncovering details of a corrupt scheme by collecting evidence and turning it over to the authorities.[10]

[8] For example, the luxury private jet associated with the Nigeria OPL 245 oil block case (discussed in chapter 5, box 5.4) was tracked using the FlightAware website (https://uk.flightaware.com). See Lionel Faull and Margot Gibbs. 2020. "Nigeria Seizes Luxury Private Jet Linked to OPL245 Money Laundering in Montreal." *Finance Uncovered*, June 6, 2020. https://www.financeuncovered.org/investigations/nigeria-seizes-luxury-private-jet-linked-to-opl245-money-laundering-in-montreal/.

[9] For reports from these NGOs, see the websites of ICIJ (https://www.icij.org/); Global Witness (https://www.globalwitness.org/); Global Financial Integrity (https://gfintegrity.org/); and Public Eye (https://www.publiceye.ch/en/).

[10] Daniel Politi. 2018. "Bags of Cash in Argentina: Driver's Notes Propel Corruption Inquiry." *New York Times*, August 3, 2018. https://www.nytimes.com/2018/08/03/world/americas/argentina-corruption-investigation.html. In a case that has been publicized but not yet settled, a journalist for the Argentinian newspaper *La Nación* received in 2018 a box filled with spiral notebooks from an official driver of a senior Ministry of Federal Planning official, detailing the delivery of over US$50 million in cash bribes between 2005 and 2015. The evidence was turned over to the authorities. According to the investigators, the bribes totaled close to US$160 million. Argentinian prosecutors describe former presidents Néstor Kirchner and Christina Fernández de Kirchner as the leaders of this corruption scheme.

BOX 3.5 Equatorial Guinea: Civil Society Support in the Teodorin Obiang Investigation

A key issue in this case was whether Transparency International France (TI France) had legal standing to join in a criminal proceeding as an "injured civil party."

Association Sherpa, a French lawyer's group, instituted criminal proceedings for corruption in the *Biens mal acquis* case (described in chapter 2, note 8). Despite a police investigation that revealed numerous assets, the public prosecutor dropped charges against the former vice president of Equatorial Guinea, Teodoro Nguema Obiang (commonly called Teodorin). For a discussion of the case against Teodorin Obiang in relation to immunity issues, see chapter 2, box 2.10.

TI France decided to join the criminal case filed by Sherpa as an "injured civil party,"[a] hoping to obtain a judicial investigation in the matter (Perdriel-Vaissière 2017). Before ruling on the investigation, the court had to first determine whether TI France had sufficient legal interest to have standing, and it found for TI France. The judgment on the question of standing was appealed and litigated up to the supreme court of France in criminal matters (the Court of Cassation), which, in a then-historic decision, upheld the decision of the lower court.

TI France and Sherpa also actively supported the investigation (Perdriel-Vaissière 2017) by

- Collecting information and evidence from various sources;
- Forwarding collected material to the magistrates responsible for the investigation;
- Conducting research on points of law that could impede a successful outcome;
- Discovering assets (including the property at 42 Avenue Foch in Paris) whose beneficial owner was Teodorin Obiang.

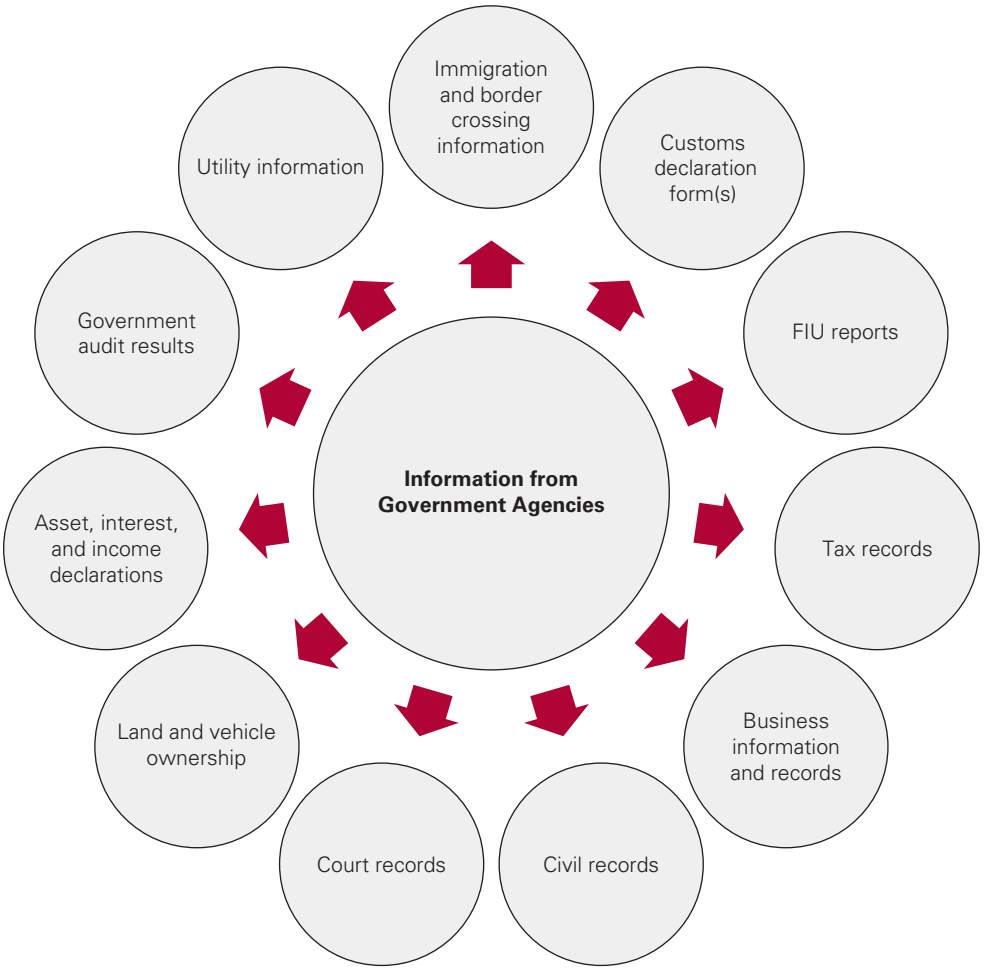
a. Under a new article of the French Code of Criminal Procedure (art. 85), an injured civil party could join the case by filing a petition claiming harm suffered from a felony or misdemeanor.

3.4.2 Information from Other Government Agencies

Data from other government agencies should also be explored, including the types of agencies described below (figure 3.2).

Financial intelligence units (FIUs): The FATF is an intergovernmental body that sets global standards to combat money laundering, financing of terrorism, and financing of proliferation of weapons of mass destruction. According to FATF Recommendation 29, countries should establish an FIU that serves as the national center for the receipt and analysis (operational and strategic) of suspicious transaction reports (STRs) and other

FIGURE 3.2 Sources of Preliminary Information from Government Agencies



Source: World Bank.
Note: FIU = financial intelligence unit.

information relevant to money laundering, predicate offenses, and terrorism financing, and for the dissemination of relevant information spontaneously and upon request.[11]

FIUs may have investigative powers and may be established within the judicial branch, support the efforts of law enforcement agencies, or operate as independent administrative authorities.[12] As an important source of financial intelligence, they can help to

[11] See FATF Recommendation 29, "Financial intelligence units" (FATF 2019, 22) and the Interpretive Note to Recommendation 29 (97–99).

[12] "Financial Intelligence Units (FIUs)" in "About Egmont," Egmont Group website (accessed November 13, 2019), https://egmontgroup.org/en/content/financial-intelligence-units-fius. There are also hybrid models that serve as intermediaries between law enforcement and judicial authorities. For more information on FIUs, see IMF and World Bank (2004).

reconstruct the money trail. For a further description of the functions and contributions of an FIU, see chapter 2, box 2.1.

Countries must ensure that their FIU applies for membership in the worldwide Egmont Group. Box 3.6 explains the Egmont Group's role based on its Statement of Purpose and "Principles for Information Exchange between Financial Intelligence Units" for money laundering and financing of terrorism cases (Egmont Group 2013).

Where permitted,[13] practitioners from law enforcement agencies submitting a request to an FIU should include the following:

- Any suspicious transaction report (STR), suspicious activity report (SAR), or currency transaction report (CTR) filed related to target(s) of the investigation
- Any STR, SAR, or CTR filed related to businesses linked to the target(s)

BOX 3.6 The Role of the Egmont Group in Asset Recovery Cases

The Egmont Group is a united body of 165 financial intelligence units (FIUs) worldwide. It provides a platform for the secure exchange of expertise and financial intelligence to combat money laundering and terrorism financing.[a] The Egmont Group operates as an international financial intelligence forum that facilitates the sharing of financial intelligence among its member FIUs and helps them "to overcome the obstacles preventing cross-border information sharing" (Egmont Group 2013, para. 2).[b]

Membership in the Egmont Group affirms accession to the standards set out in the FATF (Financial Action Task Force) Recommendations 29 and 40 (Egmont Group 2013, para. 3). International cooperation between FIUs is "based upon a foundation of mutual trust" (Egmont Group 2013, para. 7); information may be exchanged "freely, spontaneously, and upon request, on the basis of reciprocity" (Egmont Group 2013, para. 11). Bilateral or multilateral agreements or arrangements may also support cooperation (Egmont Group 2013, para. 15).

In addition, "information received, processed, held, or disseminated by requesting FIUs must be securely protected" and confidential and "should be used only for the purpose for which the information was sought or provided" (Egmont Group 2013, paras. 28–29, 32). To this end, "FIUs should use the Egmont Secure Web or other recognized networks" that ensure security and reliability (Egmont Group 2013, para. 35).

a. "About Egmont," Egmont Group website (accessed May 11, 2020), https://egmontgroup.org/en/content/about.
b. See also "About Egmont," Egmont Group website.

[13] In some jurisdictions, the FIU is not permitted to provide a copy of the STR or CTR to law enforcement. In these circumstances, the intelligence report (if drafted) is usually available to be requested and contains much of the same information.

- Any STR, SAR, or CTR filed related to associates or relatives of the target(s)
- Any related intelligence reports of possible criminal conduct (because some FIUs are not permitted to provide information in the absence of an STR).

Immigration and border crossing authorities. Practitioners may consider it useful to obtain copies of forms or any other relevant documentation that indicate a target's border crossings and immigration history.

Customs. Customs declarations forms may indicate the cross-border movement of the target. In cases where there is a cash declaration requirement, practitioners may also check whether the targets have declared currency.

Tax authorities. The collection of all tax records related to the target of the investigation is considered necessary; such records may include personal income tax, property tax, and corporate tax filings, declarations, and materials related to tax disputes. The tax assessors' office or cadastral office can often provide information on the ownership and purchase history of the property, legal status of the property, and assessment of its value.

Ethics or integrity office. The office that is responsible for promoting and supporting a strong ethical culture inside a public agency or private sector entity might inform practitioners of corruption-related complaints and accountability concerns that have been recorded. Such offices may also hold asset or financial disclosure filings by public officials that may be available to investigators (Rossi, Pop, and Berger 2017).

Auditing agencies (Office of the Inspector General). State or government auditing agencies (referred to in some jurisdictions as the Office of the Inspector General) are typically mandated with providing an independent and objective review of the operations of government departments to which they are assigned. They conduct investigations, audits, and special projects to detect fraud and misconduct and to promote integrity, efficiency, and effectiveness in the department's operations. If a government department is involved in corruption, these agencies may provide information or resources to assist the investigation. For example, auditing agencies may have forensic accountants who may be seconded to an investigation for a specified period.

Land registries. Depending on the jurisdiction, the city, county, or provincial records office might be able to provide deeds of property (buyer and seller), any liens on the property, mortgages, property tax, property tax assessments, sale and purchase registration information, and building permits.

Vehicle, marine vessel, or aircraft registries. Vehicle records offices may provide title information and summary data on the vehicle at transfer or sale dates. Private aircraft and marine boat or vessel registrations can be available in their respective registries. Flight plans and travel manifests can be sought where applicable.

Corporate or business registries and licensing boards. Business registries and regulatory boards can provide information that can help identify the assets of targets and their associates. Records may also lead to the discovery of possible co-conspirators. Some registries will provide practitioners with ownership information, names of agents of record (typically a lawyer or accountant), shareholders, boards of directors, beneficial owners, and company financial statements and other business records. This search should be conducted for all types of businesses, whether sole proprietorships, partnerships, limited liability partnerships, or public or private companies. Licensing boards may have information on professional licenses for lawyers, accountants, notaries, medical professionals, and so on.

Civil records. Civil registries can provide information about inheritances and family status, including current and previous spouses (marriage and divorce records), children, siblings, parents, grandparents, and other relatives.

Court record repositories. Practitioners may search court records to determine whether any of the targets have been involved in prior court matters or civil litigation. If so, practitioners may review plea agreements and transcripts of any testimony, decisions, or sentencing hearings for information on assets or other relevant facts. Because some courts may not be linked to law enforcement databases, practitioners may need to search bankruptcy, civil, or family court records to obtain relevant information.

Utilities. Practitioners may examine the utility bills of all identified residences and businesses (including electric, water, telephone, cable or satellite, sewage, and garbage bills) to determine the recipient of the utility bill, method of payment, the person who executes the payments, and subscriber information. They may also request a general search of the targets and their associates to determine links to other addresses.

Asset, interest, and income declarations. Information about the subject's income and assets, sources of income and gifts, changes in wealth, positions held outside of office, board memberships, ownership of shares, other financial interests, and so on can be available in the income and asset disclosure system or with the relevant government agency (Rossi, Pop, and Berger 2017; World Bank 2012).

3.4.3 Physical Surveillance

Physical surveillance is the covert observation of the targets under investigation to gather information about them. More specifically, physical surveillance may help practitioners identify possible witnesses or co-conspirators; real property or other assets; lawyers, bankers, or accountants possibly involved in facilitating the laundering of corrupt proceeds; and businesses, patterns of conduct, and other forms of intelligence that could be vital to the investigation.

Covert investigations generally require significant advance planning and typically cannot remain covert for an extended period. Physical surveillance also entails certain risks: the target might detect the surveillance regardless of the quality and expertise of the surveillance team. The lead investigator, in consultation with the team, must determine whether the rewards outweigh such risks.

A successful surveillance operation requires adequate resources, including experienced personnel and equipment. For example, radios or mobile phones are important for notifying other team members of the target's location and actions, while recording devices can record events or keep notes of movements or other individuals contacted. In addition, an experienced lead investigator should be assigned to assemble, coordinate, and supervise the surveillance.

Team leaders will determine the size of the team and the format and locations of the surveillance. They will have to prepare pre-surveillance briefings to explain the assignment to the team members, provide continuity at shift changes, and advise of any personal security issues. They will be responsible for making strategic decisions, such as choosing the type of surveillance (for example, stationary, mobile vehicle, or on foot); deciding whether to follow other targets encountered during the surveillance; and drafting a report of the significant events during the surveillance. Although surveillance is a useful technique, cost considerations may favor an intermittent approach because the cost of 24-7 surveillance is usually prohibitive.

3.4.4 Trash Runs

Trash runs involve looking through a target's garbage for relevant information such as discarded bank statements, names of business associates, correspondence, bills, travel receipts, and so forth. In turn, this evidence can support applications for search warrants by showing a nexus between a target and other individuals or assets.

As with other investigative techniques, investigators first need to determine whether this is permissible by law and identify any limitations, because jurisdictions have different "right to privacy" standards regarding trash.[14] Where permitted, the trash run should be conducted at all of the targets' residences and businesses. Practitioners may focus on banking information, bills, or documents related to financial assets and businesses; documents that name other persons, companies, lawyers, or accountants; credit card statements; or travel records (for example, boarding passes or travel loyalty program statements). The evidence collected needs to be recorded (for example, date, time, officers involved, and document number). Trash runs may also be extended to all other family members or associates such as spouses, former spouses, associates, lawyers, accountants, and other business people linked to the targets.

[14] For example, in the United States, there is no expectation of privacy over trash that has been set on the curb outside a house for pickup by sanitation engineers; therefore, investigators can collect and inspect it without a search warrant (California v. Greenwood, 486 U.S. 35 [1988]). However, there is an expectation of privacy if the trash is in the bin *adjacent* to the house, in which case law enforcement officers must obtain a search warrant. In contrast, in some jurisdictions (Ukraine, for example), trash runs are not permitted.

3.4.5 Mail Cover and Visitor or Building Access Logs

Mail cover is the process of making a record, for a specified period, of any data appearing on the outside cover of sealed or unsealed mail (for example, the return address or a postage stamp's cancellation date and country of origin) or of the contents of any unsealed mail. Mail covers can provide excellent leads to the location of assets. Mail received from a bank, law firm, company, or accounting firm, for example, alerts investigators to potential sources of information on the assets owned by the target.

Where permitted, jurisdictions often allow mail covers without a warrant because the recipient of the letter has little to no reasonable expectation of privacy to the content on the outside of the letter or parcel. Most jurisdictions require a search warrant or some other form of legal authority to open and read sealed letters and parcels. Operationally, it is important for investigators to consider the nexus between the target and sender of each letter, record accurately all data found on the outside of an envelope or package, log the date and time when the mail cover was conducted, and maintain a copy of the record in the case file.

In addition, many government agencies and private companies maintain physical visitor logs at either the building or office level. Such logs can establish times and dates of meetings among persons of interest or otherwise establish a record of contacts. Such records are often available without a warrant.

Increasingly, some agencies have established electronic access to premises through card reader systems. Electronic logs of employee access to premises may also be available to investigators.

3.4.6 Interviews

Interviews, an essential element of any investigation, are tremendously important in an asset recovery case.[15] Statements can corroborate or clarify information derived from documentary evidence, reveal new leads, or identify new financial documents. Important sources may include any complainants, business associates, relatives, neighbors, employees, or other associates of the targets; business competitors; financial institution employees and other sources that have been in contact with the targets; and the targets themselves. It is also essential to identify and interview any straw men involved in a case. These individuals have taken substantial risk, with little reward, and might rather inform the authorities about the people on whose behalf they are acting than be implicated in a scheme.

[15] Some jurisdictions make distinctions between interviews and interrogations, defining "interviews" as the questioning of nontargets of the investigation and "interrogations" as the questioning of targets. In this section, the term "interview" refers to both forms of questioning. Practitioners must ensure that proper protections are afforded to witnesses, experts, victims, whistle-blowers, and cooperating targets. See, for example, UNCAC arts. 32, 33, and 37.

Practitioners need to be familiar with the laws concerning interviews with targets and nontargets, especially when working with authorities in foreign jurisdictions.[16] Some jurisdictions, for example, require that all statements be taken through a formal hearing. Other jurisdictions permit a range of interview options, such as routine questioning of witnesses by law enforcement officers (no formal or verbatim record), written statements, video- or audio-recorded statements with warning to the interviewee, or recorded statements under oath.

Thorough preparation is essential in conducting a successful interview—as well as a complete understanding of all the evidence, the targets, associates, timeline of events, and information already gathered in the investigation. Preparation should also include the identification of possible defenses and the planning of interview questions accordingly—for example, to clearly anticipate alibis through witness interviews or to determine the viability of defenses such as lack of intent or advice of counsel. A practitioner may prepare questions to cover the information desired but, during the interview, must also be flexible and focus on the responses of the targets, not on the planned questions.[17]

Because targets may attempt to communicate with one another to agree on a common version of events or influence a witness's testimony, practitioners may take (or request from competent judicial authorities) appropriate measures to ensure that the targets are prohibited or prevented from communicating with one another or with witnesses before the interviews. In addition, the interview location should be one that offers the fewest distractions, provides discretion, and is most likely to solicit open responses (for example, at a residence, police station, or place of business). The number of interviewers present at the interview should be limited to two, if possible.

3.4.7 Account Monitoring Orders

An account monitoring order is an ex parte order by the court (or the investigative magistrate in some jurisdictions) specifying that a particular financial institution must provide account information covering a specified period for the account identified in the order. The information must be given to an appropriate officer in the manner and at or by specified times stated in the order.[18] The order allows for real-time financial surveillance of the ongoing transactions in an account, enabling practitioners to establish typologies of activity and identify new accounts. It can also be a means to gather sufficient grounds to request an order to disclose, freeze, search, or seize assets.[19] In cases of

[16] Practitioners must ensure that interview requirements (for example, a required warning to the interviewee) are conveyed to foreign counterparts, and they should ask whether they can participate in those interviews. For a discussion of cooperation with foreign practitioners or participating in the execution of a request, see chapter 9, section 9.2.6.

[17] In this regard, practitioners may find it more helpful to prepare themes rather than specific questions to guide the interview.

[18] In the United Kingdom, the order can be in place for up to 90 days at a time.

[19] Typically, the standard of proof or other requirements for account monitoring orders are less stringent than for disclosure, freezing, or seizure orders.

large cash withdrawals, it may also present opportunities for cash seizure because the withdrawal locations will be revealed.

3.4.8 Search and Seizure Warrants

The execution of a search warrant on a residence or business premises is a tremendous opportunity to gather evidence of criminal activity, discover information about assets, identify co-conspirators, and develop other leads that support the investigation.[20] In some cases or jurisdictions, this will also be the primary technique used to obtain bank documents (see also section 3.4.9, "Orders for Disclosure or Production of Documents"). In the context of international cooperation, if investigators anticipate the need for such measures in a foreign jurisdiction, early contacts and informal exchanges with relevant counterparts are key to effectiveness because of the need for focused and coordinated action.

Given the coercive nature of a search in an area where a person has a reasonable expectation of privacy, jurisdictions typically require that searches be requested by an authorized individual (often a law enforcement officer or prosecutor) and judicially authorized by a judge or investigating magistrate except under exigent circumstances involving cases posing an immediate emergency. However, practitioners must be aware that civil and common law jurisdictions differ in the requirements for authorizing a search warrant. More specifically, the standard of proof required to obtain a valid search or seizure warrant, the specificity required for the evidence to be seized, and the need to identify the location of the evidence (a particularity requirement) may differ among various jurisdictions. In general, greater specificity is required in common law jurisdictions.

Preparing and Obtaining the Search Warrant

Common law jurisdictions require a written application (except in exigent circumstances, where it can be made orally or by telephone). The request is presented in the form of an affidavit stating the facts that identify the suspicious activities. (For more information on affidavits, see chapter 5, section 5.3.2.)

The latter must articulate the reasonable grounds to believe, or probable cause, that (a) a crime has been committed, (b) the items sought are on the premises to be searched, and (c) the items sought are connected to the crime with a reasonable degree of certainty. (See box 3.7 for sources of information to show reasonable grounds or probable cause to obtain a warrant.) The magistrate, if convinced, will issue the warrant. The warrant itself sets out the details of the search, including who is authorized to conduct the search; location; the hours or days when the search can be carried out (for example, day or night); its duration; what is to be searched; the inventory of items taken; and the requirement for a subsequent report to the court.

[20] In addition to houses and businesses, items to be searched may include banks, people, cars, planes, ships, computers, packages or boxes, and other electronic media (such as compact discs and encryption keys).

BOX 3.7 Considerations Regarding Information Sources to Show Reasonable Grounds or Probable Cause to Obtain a Warrant

Sufficient grounds to obtain a search warrant are likely to be established from a variety of sources, and it is important for practitioners to elaborate this clearly, especially when applying for the issuance of a warrant. Sources of information usually include the following:

- Direct observations (firsthand knowledge)
- Physical or electronic surveillance
- Publicly available information
- Historical case information
- Cooperating witnesses
- Informants
- Anonymous tips.

Important points to consider are the following:

- Witnesses and informants may be acting out of self-interest.
- Anonymous tips and hearsay evidence may be unreliable.
- There may be reason to believe that the target may destroy the evidence.
- There may be objective evidence of the target's attempts to obstruct the investigation.
- Facts may establish that other means to obtain the evidence are unavailable; were unsuccessful; or may compromise the investigation, divulge an informant, jeopardize an undercover officer, and so on. In these cases, practitioners must address such issues operationally.

In some situations described above, evidence will need to be corroborated.

Civil law jurisdictions will require similar information, albeit without the formality and with a standard of proof that differs from "probable cause for" or "reason to believe." An affidavit is generally not required, and law enforcement officers in some jurisdictions may be authorized in advance by a prosecutor or an investigative magistrate to conduct "all necessary searches to establish the truth."[21]

[21] In France and other civil law countries, this authorization is often an order from the judge called "commission rogatoire." In Switzerland, a search, called a "perquisition," can be carried out on a simple written order signed by a prosecutor (Criminal Procedure Code, art. 241ff.).

The applicant will also need to specify the items to be sought and locations to be searched. In civil law jurisdictions, it may be possible to simply refer to "all articles that may have a connection to the crime committed." In common law jurisdictions, the applicant must be more specific because of the particularity requirement for the issuance of a valid warrant. The investigator must be able to articulate why an article should be seized and also be sufficiently descriptive to ensure that important articles are covered. Box 3.8 lists the types of items that may be seized.

Planning and Executing the Search and Seizure

Except under exigent circumstances, practitioners will have the opportunity to plan the execution of the search warrant. They should consider the possibility of searching several businesses or houses at the same time, even in different countries, to avoid the destruction or disappearance of evidence. Although the degree of planning and coordination is demanding, the results can be impressive.

Practitioners must also consider the type of expertise required for the search. For example, a search may need a computer forensic specialist who can gather electronic devices and data in a manner that avoids their loss, destruction, or damage and preserves a chain of custody; can present them in a manageable form; and can ensure that the necessary chain of custody steps are taken to preserve their admissibility at trial (for example, by taking a "forensic image" of the data and recording the procedural steps taken as well as the specialist's name to avoid claims of post-search manipulation).[22] Similarly, if the target is believed to hold virtual currencies, advice should be obtained on possible storage devices or password information.

Because a search will likely tip off the target, practitioners must take necessary measures to secure assets that may not be at the search locations (such as bank accounts), whether in advance or simultaneously with the search. (See also chapter 5, section 5.3, on requirements for obtaining provisional orders.) Appendix D provides a checklist of some additional considerations for planning the execution of the search and seizure warrant.

Preserving the Evidence and Adhering to Postexecution Requirements

Once the warrant has been executed and the evidence seized, the evidence should be taken to a secure location to be properly logged and examined, and the entire procedure needs to be documented in the case file.[23] If an interview of the target or any associates occurred during the execution of the warrant, a report of the interview should be

[22] Note that computer users can implement various mechanisms to protect or hide data or render the system inaccessible when an unauthorized user tries to access it. Computer forensic specialists will have tools for preserving systems, recovering deleted or lost information, monitoring cloud computing use, and so forth. Proper gathering of information will also ensure that information is managed.

[23] Some jurisdictions always require details on the location of each item in order to fulfill the chain of custody requirements.

BOX 3.8 Important Items to Seize in an Investigation

The list below highlights some of the main items that practitioners will want to seize to assist with the investigation. Because common law jurisdictions require greater specificity in the request and issuance of warrants, examples of various forms of these items are also described.

Financial documentation. This category includes books, records, receipts, notes, and ledgers; other documents relating to assets, business interests, business transactions, real estate, letters of credit, money orders, checks, traveler's checks, bank drafts, banking correspondence, cashier's checks, wire transfers, bank checks, mortgage information, credit and charge card information, and safe deposit box information and keys; and other related items supporting the existence, concealment, or transfer of assets or the expenditure of funds. (For documentation to be requested from financial institutions, see box 3.9 concerning orders for disclosure or production of documents.)

Computers, computer storage devices, and electronic devices. This category comprises computers, tablets, electronic equipment, mobile phones (including smartphones), answering machines, personal organizers, CD-ROMs, flash drives, universal serial bus (USB) storage devices, fax machines, and printers. Seizure of computers or electronic devices should include the actual hardware, not simply a mirror or copy of the hard drive's contents, along with all backup drives.

It is often recommended to avoid turning on a device that is off, and symmetrically, to avoid turning off a functioning device, because both actions may trigger change and risk losing data. As a good practice, a computer forensic expert can be part of the team to securely seize these items. When possible, data stored on external "clouds" should be downloaded immediately from the premises searched.

Items to identify associates or other leads. Such items include photographs, videos, social media connections, address books, business cards, calendars, and trash.

Proceeds or instrumentalities of crime. Such items include currency, precious metals, jewelry, financial instruments such as stocks and bonds, and other valuable items like artwork and other collectibles. When possible, cryptocurrencies should be downloaded onto a secured "wallet" controlled by the investigators.[a]

Shredded paper. Shredded materials must be reconstructed, if possible.

a. Nyman Gibson Miralis (NGM). "Seizing a Suspect's Bitcoin: A Step-by-Step Guide." NGM website (accessed May 11, 2020). https://ngm.com.au/seizing-bitcoin-guide/.

prepared as soon as possible and incorporated into the case file. The lead investigator will be responsible for preserving the chain of custody and the integrity of the evidence throughout the review period, making sure that all evidence is detailed in the inventory. The lead investigator may also be responsible for reporting the results to a judge or prosecutor.

Practitioners should also review all the documentary evidence seized; identify possible leads for tracing assets or possible co-conspirators; and, where necessary, take immediate action to restrain assets to avoid their dissipation or movement. If practitioners have engaged the assistance of foreign authorities during the investigation, it is often beneficial to apprise these authorities of the search results in a timely manner so that they might respond favorably.

3.4.9 Orders for Disclosure or Production of Documents

Obtaining business documents is essential to an asset recovery case. Documents that are likely to require judicial authorization include those held by banks, accounting and law firms, insurance companies, express courier or mail delivery services, web-based email services, social media platforms, online retailers, ISPs, and sometimes utility companies. The process for obtaining a disclosure or production order is similar to obtaining a search warrant. (See section 3.4.8 for additional information on search and seizure warrants.)

As with search warrants, jurisdictions vary in the specificity they require for disclosure orders. Common law jurisdictions will require a more specific list, whereas civil law jurisdictions may be satisfied with a general phrase such as "all documents that may have a connection to the crime committed." In practice, many practitioners find it most helpful to combine these two approaches—providing a precise list of documents requested and concluding the list with the general phrase because many disclosing entities will want to limit the documents they offer for disclosure. If practitioners submit a request that is too narrow in scope, they risk being denied the relevant documentation. Box 3.9 lists items to be included in requests to financial institutions.

Although the disclosure request should be broad enough to ensure that relevant documentation is captured, it is important for practitioners to avoid being inundated by boxes of irrelevant information, particularly if the tracing or investigative team lacks the capacity to review vast amounts of financial information in a timely manner. Requesting an excessive amount of documentation may also delay its delivery because it may take some time for the disclosing entity to produce it. Furthermore, the disclosing entity may even challenge the order on the grounds that the information sought is not relevant or will cause an undue burden.[24]

[24] Another common ground for challenge by the disclosing entity is privilege (such as the privilege between a solicitor and a client). Regarding an in-house counsel, there are jurisdictional differences as to whether legal professional privilege applies and to what extent. For example, in the United States, the deposition of an in-house counsel can be sought in certain circumstances. See Kevin C. Baltz. 2018. "United States: Chapter Eleven: Depositions of In-House Counsel—Maintaining and Protecting Evidentiary Privileges." Mondaq.com, September 18, 2018 (accessed May 11, 2020). https://www.mondaq.com/unitedstates/Litigation-Mediation-Arbitration/66334/Chapter-Eleven-Depositions-Of-In-House-Counsel9472Maintaining-And-Protecting-Evidentiary-Privileges. However, under European Union (EU) rules, documents prepared by in-house lawyers are not privileged. See American Bar Association (ABA). 2010. "Keeping Current: EU Court Limits the Scope of Legal Professional Privilege." *Business Law Today*, September 20, 2010. https://www.americanbar.org/groups/business_law/publications/blt/2010/09/keeping_current_balfour/.

BOX 3.9 Documentation to Request from Financial Institutions

Practitioners often need or opt to provide a specific list of items requested from financial institutions for accounts or targets, related persons, close associates, or related companies. In such cases, officials from financial intelligence units (FIUs) or the central bank may help determine the types of documents that might be relevant. Examples of specific records to request include, but are not limited to, the following:

- All account-opening documentation, including forms that identify the beneficial owner (for example, Switzerland's "Form A"), power of attorney documents, signature cards, articles of incorporation or partnership agreements, and copies of identification documents provided when an account is opened—including not only accounts under the target's name but also those accounts that list the target as having a power of attorney, signatory, or other pertinent relationship
- Client profiles; know your customer (KYC) notes; account manager notes; teller or banker journals; cashier check logs; records of any due diligence conducted by the financial institution; and any other data probing the client's economic background, commercial activities, and transactions on the account (for example, copies of contracts, bills, letters of credit, and lists of partners and affiliated companies)
- Loan documentation, mortgage information, copies of loan applications, lists and descriptions of any collateral (including liens against deposits), income, assets, and personal and business references
- Securities and brokerage accounts and transactions
- Documentation or information on wealth management activities or advice given by the bank
- All bank account statements for the period under investigation
- Any reports of suspicious activity submitted by an employee of the financial institution, including those that might not have been forwarded to the FIU
- Documents related to account transactions, including client orders, deposit and withdrawal slips, credit and debit memos, and checks (front and back)
- Wire transfer documentation, including the request form, advice statement, confirmation, and other relevant documents (see chapter 4, box 4.1, on forms and documents related to the wire transfer process)
- Correspondence files maintained by the financial institution, possibly including internal bank memos; records of client visits; phone order notes; emails; faxes; notes authored by account managers; and records or notes related to instructions, transactions, or both
- Credit and charge card information including applications, statements, payment history, transaction logs covering any interaction with credit or charge

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BOX 3.9 Documentation to Request from Financial Institutions *(Continued)*

card staff, and other cards under the umbrella of the target's account but in another person's name

- Safe deposit box information, including contracts, visiting records, and video surveillance of relevant areas (usually excluding box-content viewing areas)
- All documents that may have a connection to the crime committed.

For an example of a draft production order to a financial institution, also see appendix E.

Where data retention laws, retention orders, or "do not destroy" orders are in place—such that the disclosing entity will maintain records that might be relevant later in the investigation (see box 3.10 on retention orders)—practitioners should develop their cases (particularly complex ones) in stages, using the documentary evidence as building blocks. Hence, they should first request what is considered imperative and then submit subsequent requests to follow relevant leads or when capacity is increased. As a precaution against routine or inadvertent destruction, it is a good idea to request that the financial institution preserve other relevant records. When possible, documents must be sorted on-site, which will make it much easier to identify the relevant ones among those seized. Adopting this incremental approach enables practitioners to focus their efforts on smaller amounts of information and then follow the relevant leads, thus saving time in reviewing boxes of documents and large electronic data sets that may not be relevant.

Where permitted by law, the requesting authority should consider asking that the disclosure application be heard ex parte (without notice) to avoid tipping off the target. Even when an ex parte order is made, certain provisions may also prohibit those served with the production order from disclosing the request to the targets. Overall, practitioners must assess the risk that the targets will be informed and take necessary action to restrain or seize the assets.[25]

3.4.10 Unexplained Wealth Orders

In some jurisdictions, the targets themselves might be obliged to explain their assets if such assets appear disproportionate to their income. In those cases, they will have to provide a statement of their interest in the property and how it was obtained, and they may also be required to produce relevant documentation. These unexplained wealth

[25] In cases requiring MLA, practitioners should be aware of potential disclosure obligations of the requested jurisdiction. In such cases, they should address this issue before sending the request. For additional information, see chapter 8, section 8.3.4.

BOX 3.10 Retention Orders

Most jurisdictions have laws that require businesses (such as banks, accountants, lawyers, internet service providers (ISPs), and telephone companies) to retain customer data and records for a prescribed period. This period will vary depending on the type of business—from as short as a few months (telephone companies and ISPs) to as long as several years (banks, lawyers, and accountants). On the investigation side, practitioners are unlikely to have sufficient evidence for a disclosure or production order at the outset—an issue that becomes particularly problematic the shorter the retention period.

Fortunately, many jurisdictions address this issue by permitting retention orders or "do not destroy" orders. Such orders require that the document holder retain documents related to the targets past the period prescribed by statute, thus avoiding the loss of potentially relevant data or evidence. The requirements for obtaining such an order are typically less onerous than for a production or disclosure order and therefore should be considered in the early stages of an investigation. Practitioners should assess where documents may be held; determine the corresponding periods of retention; and, where permitted and necessary, obtain retention orders. Such actions will help preserve potentially relevant data for a future disclosure or production order.

orders (UWOs) may help practitioners obtain important information on the origins of assets where there are sufficient grounds to suspect that an asset was acquired with proceeds of corruption.[26]

UWOs and relevant legislation shift the burden of proof regarding the legitimacy of the assets from the investigating authorities to the asset owner. If the owner fails to account for the legitimate origin of the asset, the property is presumed recoverable with no requirement to prove that the owner has committed any predicate offense. Box 3.11 describes the recent introduction of UWOs in the United Kingdom.

3.4.11 Electronic Surveillance

The secret interception of any wire, oral, telephone, computer, or other electronic communication used by the targets—referred to in this *Handbook* as "electronic surveillance"—can be useful to law enforcement officers in providing investigatory leads similar or complementary to those discussed under physical surveillance (section 3.4.3). At the same time, electronic surveillance is labor-intensive, can be cost-prohibitive, and is an intrusive technique. Therefore, many jurisdictions require judicial oversight and perhaps special authorization to ensure the protection of privacy and due process rights of the accused. Some jurisdictions permit consensual monitoring of

[26] Rachel Davies Teka. 2017. "Unexplained Wealth Orders: A Brief Guide." Transparency International UK, May 30, 2017. https://www.transparency.org.uk/unexplained-wealth-orders-brief-guide.

BOX 3.11 United Kingdom: Requirements for Issuance and Execution of Unexplained Wealth Orders

The Criminal Finances Act: As part of its April 2016 Action Plan to counter money laundering and terrorist financing risks, the United Kingdom's Criminal Finances Act received royal assent on April 27, 2017. Under part 1, chapter 1, the Act introduces the unexplained wealth order (UWO) as a civil power and an investigation tool issued by the High Court. Upon satisfaction of certain criteria, the burden of proof is reversed and shifts to the holder of the assets, who must demonstrate that the source of the assets is legitimate.[a] A UWO is not a power to recover assets but an additional tool to investigate and recover the proceeds of crime.

High Court powers: Upon an application made by an enforcement authority[b]—such as the National Crime Agency, Her Majesty's Revenue and Customs, the Financial Conduct Authority, the Director of Serious Fraud Office, or the Director of Public Prosecutions—the High Court may issue a UWO regarding any property if the court is satisfied that the requirements for making the order are fulfilled.

UWO requirements: To issue a UWO, the High Court must be satisfied that there is reasonable cause to believe that the respondent holds the property, that the value of the property is greater than £50,000, and that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the respondent to obtain the property.[c] In addition, the High Court must be satisfied that the respondent is a politically exposed person (PEP); or that there are reasonable grounds for suspecting that the respondent is or has been involved in a serious crime; or that a person connected with the respondent is or has been so involved.[d]

Politically exposed persons (PEPs): The Act defines a PEP as an individual who is or has been entrusted with prominent public functions by an international organization or by a state other than the United Kingdom; is an official from outside the European Economic Area (EEA); or is a family member of a PEP, a close associate, or is otherwise connected with such a person.[e] A UWO made in relation to a non-EEA PEP would not require suspicion of serious criminality.[f]

Respondents' obligations: The UWO requires respondents to explain their lawful ownership of the property and the means by which it was obtained. In particular, respondents must provide a statement as to the nature and extent of their interest in the property, explain how they obtained the property, set out the details of the settlement if the property is held by trustees, and provide any information or documents regarding the property.[g] They may also be required to produce relevant documentation.[h]

Presumption: If the respondent fails to comply with the requirements of a UWO without any reasonable excuse before the end of the response period, the property is presumed to be recoverable under any subsequent civil recovery action.[i]

Criminal consequences: A respondent commits an offense when the statement that is provided is materially false or misleading and is liable to conviction on

(continued next page)

BOX 3.11 United Kingdom: Requirements for Issuance and Execution of Unexplained Wealth Orders *(Continued)*

indictment to imprisonment not exceeding 2 years, or a fine, or both; or on summary conviction, to imprisonment not exceeding 12 months, or a fine, or both.[j]

Interim freezing orders (IFOs): An enforcement authority may also seek an IFO upon application to the High Court if there is a risk that any recovery order that might subsequently be obtained might be frustrated.[k] This order prohibits the respondent to the UWO, as well as any other person with an interest in the property, from dealing in any way with the property.[l] The UWO and the IFO may be combined in one document.[m]

a. Criminal Finances Act 2017, Chapter 22, Part 1: Proceeds of Crime, Chapter 1: Investigations (2017). https://www.legislation.gov.uk/ukpga/2017/22/contents/enacted; Home Office (UK). 2018. "Circular 003/2018: Unexplained Wealth Orders," February 1, 2018 (accessed August 16, 2018). https://www.gov.uk/government/publications/circular-0032018-criminal-finances-act-unexplained-wealth-orders/circular-0032018-unexplained-wealth-orders.
b. Criminal Finances Act, sec. 362A, para. 7.
c. Criminal Finances Act, sec. 362B, paras. 2(a), 2(b), 3.
d. Criminal Finances Act, sec. 362B, para. 4.
e. Criminal Finances Act, sec. 362B, para. 7.
f. "Circular 003/2018," sec. 2.
g. Criminal Finances Act, sec. 362A, para. 3.
h. Criminal Finances Act, sec. 362A, para. 5.
i. Criminal Finances Act, sec. 362C, paras. 1, 2.
j. Criminal Finances Act, sec. 362E, paras. 1, 2.
k. The first UWOs were secured by the United Kingdom's National Crime Agency in February 2018, regarding two properties totaling £22 million and believed to be owned by a PEP. In addition to the two UWOs, Interim Freezing Orders (IFOs) were also granted to prevent the sale, transfer, or dissipation of assets. See KYC360. 2018. "UK Secures First Unexplained Wealth Orders: Property 'Owned by PEP.'" KYC360 News, February 28, 2018 (accessed May 17, 2020). https://www.riskscreen.com/kyc360/news/uk-secures-first-unexplained-wealth-orders-property-owned-pep/. In the case of Zamira Hajiyeva, a challenge to the order was dismissed by the High Court, and a subsequent appeal was also dismissed by the Court of Appeal. See National Crime Agency (NCA). 2020. "Court Dismisses UWO Appeal by Zamira Hajiyeva." NCA News, February 5, 2020 (accessed May 17, 2020). https://www.nationalcrimeagency.gov.uk/news/court-dismisses-uwo-appeal-by-zamira-hajiyeva. In the case of a Leeds businessman, Mr. Mansoor Hussain, the UWO was the first one obtained solely on an individual's alleged involvement in serious organized crime and also the first recovery in a UWO case– representing a £10 million settlement. https://www.nationalcrimeagency.gov.uk/news/businessman-with-links-to-serious-criminals-loses-property-empire-after-settling-10m-unexplained-wealth-order-case.
l. Criminal Finances Act, sec. 362J, para. 3.
m. Criminal Finances Act, sec. 362J, para. 4(c).

communications with prior consent of one of the parties (for example, a cooperating witness, informant, or undercover agent), where no warrant is needed.[27] In all cases, electronic surveillance must be done in a manner that adheres to domestic laws and internal policies and procedures.

Practitioners involved in electronic surveillance should consider that the persons involved in criminal activities are ready to use the most advanced techniques to secure their communications, including networks providing their customers with special

[27] Consensual monitoring is permitted in the United States. For more information, see the *Justice Manual* of the US Department of Justice, chapter 9, sec. 7.301, https://www.justice.gov/jm/jm-9-7000-electronic-surveillance#9-7.301. The federal electronic surveillance statutes (commonly referred to collectively as "Title III") are codified at 18 U.S.C. § 2510, *et seq.* Where consensual monitoring is not permitted, a court order would be required (for example, in Ukraine).

devices and encrypted exchange of data. In some circumstances, law enforcement agencies may be able to use specific software to intercept the data from these communications before encryption.[28] They should also be diligent in recording the subjects, time, date, length of conversation, and other pertinent information for every intercepted communication.

In addition, they should ensure that original recordings are secured as evidence—properly sealed and maintained in a secure and safe environment—and that copies are also available. Translation services may be necessary for conversations in foreign languages. Intercepts should be monitored 24 hours a day, 7 days a week, to ensure that time-sensitive information is quickly addressed and follow-up actions are properly coordinated. Practitioners should also consider introducing a physical surveillance team that will closely coordinate with the electronic surveillance team, because this will generate both visual and voice evidence.

3.4.12 Undercover Operations

Undercover operations are another investigative technique to infiltrate targets and uncover evidence and information about assets. In asset recovery cases, they might include the controlled delivery of funds through an undercover agent. However, such operations are legally and procedurally complicated, risky, and resource-intensive. As with other techniques, legal requirements and procedures must be strictly followed to ensure admissibility of the evidence. Officers must be skilled, trained, and suited to the investigation. Proper equipment to record and monitor meetings between undercover officers or informants and the targets or associates of targets must be secured and will need to be constantly monitored to protect the safety of those involved.[29]

Use of informants may raise reliability issues; hence undercover officers are usually preferred. When the use of informants is the only option, it is advisable to register them officially in confidential law enforcement databases, provide clear and concise written instructions, and have them sign a written acknowledgment that instructions are understood. In addition, informants' vehicles and other relevant belongings may need to be searched for contraband immediately before the undercover meeting to avoid accusations of evidence planting. Finally, because officers and informants' safety is a priority, it is important to control where the meeting occurs and choose environments that are most conducive to the success and safety of the operation.

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[28] Martin Untersinger and Jacques Follorou. 2020. "EncroChat, cette mystérieuse société technologique prisée par le crime organisé" [EncroChat, this mysterious technological company prized by organized crime]. *Le Monde*, July 3, 2020 (accessed July 9, 2020). https://www.lemonde.fr/pixels/article/2020/07/03/encrochat-une-societe-technologique-mysterieuse-prisee-par-le-crime-organise_6045126_4408996.html.

[29] For example, informants, officers, or consenting parties should wear a body wire or other concealed transmitting device (perhaps a device concealed in a pen, mobile phone, cigarette package, briefcase, or laptop computer) as well as a separate recording device to ensure a clear recording (because transmitter signals can be disrupted, and voice quality may often be poor). In practice, it is helpful to record a preamble to the tape recording, stating the practitioner's name, date and time, and a brief description of events.

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4. Securing Evidence and Tracing Assets (2): Relevant Data and Financial Documents

4.1 Introductory Remarks

Both hard-copy and electronic documents will be gathered during the investigation. These include bank account opening records and diary notes; know your customer (KYC) and due diligence documents; bank and financial statements; and company records including contracts, agreements, and articles of incorporation along with invoices, receipts, and emails. The gathered documents should also include all correspondence to ensure that the investigators obtain all mailed statements and letters covering all languages.

An analysis of these documents will reveal information on assets, the movements of funds, links between individuals and companies, and further investigative leads. To assist practitioners, this chapter provides some examples of relevant data from commonly sourced documents and demonstrates the importance of organizing and analyzing data.

4.2 Identifying Relevant Data: Examples from Commonly Sourced Documents

4.2.1 Suspicious Transaction Reports

Suspicious transaction reports (STRs)[1] and related documents are excellent sources of information for law enforcement practitioners because they typically include transaction data, a description of the reasons for suspicion, and an analysis by financial analysts.[2] The amount of information provided and the quality of descriptions may vary, depending on the requirements of the jurisdiction or the person filing the STR. In general, however, the STR contains several important points of information:

- Source and destination of funds
- The bank's narrative explanation of the nature of its suspicions, possible documents underlying the suspicions, and KYC information

[1] STRs are also known as suspicious activity reports (SARs) in some jurisdictions.

[2] In some jurisdictions, the financial intelligence unit (FIU) is not permitted to provide a copy of the STR or currency transaction report (CTR) to law enforcement officers. In these circumstances, the intelligence report (if drafted) is usually available upon request and contains much of the same information.

- Data on the frequency of use of cash, wire transfers, checks, and e-payments
- Information on other assets or products held by the target at the bank.

In some jurisdictions (including the United States), investigators have access without subpoena to all documents used by the financial intelligence unit (FIU) to write the STR.

From all this information, practitioners can reconstruct the financial flows to trace the money trail—either backward to confirm its (illegal) source or forward to identify where it has gone. The information will also provide additional leads such as bank accounts to subpoena, individuals to interview, companies to examine, or police records of the suspect. When seeking to clarify information in an STR, it may be helpful to speak directly with the bank compliance officer, who may have additional information on the target. For an example of the information that can be drawn from an FIU report, see appendix C.

4.2.2 Account Opening Documents and KYC or Customer Due Diligence Records

Practitioners should carefully review all account opening information and any KYC or customer due diligence (CDD) efforts conducted by the financial institution.[3] In the case of politically exposed persons (PEPs), financial institutions should conduct and document additional due diligence on their financial background and transactions. This documentation may provide useful information and potential leads. For example, practitioners need to

- Examine the notes retained by the bank on the information given by their client, including powers of attorney and signatories on the bank account;
- Review documents provided by the bank account holder to justify the source of funds—for example, documents such as contracts, letters, and real estate sales that may
    - Help identify the beneficial owner (practitioners should particularly check for addresses, companies, and individuals involved);
    - Provide a better understanding of the alleged economic source of the funds;
    - Reveal contradictions with the figures or with other evidence already gathered;
    - Identify potential witnesses and further investigative leads; and
    - Help prepare for interviews with targets.

[3] According to Financial Action Task Force (FATF) Recommendation 10 (on "Customer Due Diligence [CDD]"), "financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names" (FATF 2019, 12–13). They are "required to undertake specific CDD measures when (i) establishing business relations; (ii) carrying out occasional transactions above the applicable designated threshold (USD/EUR 15,000) or that are wire transfers; . . . (iii) there is a suspicion of money laundering or terrorist financing; or (iv) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data." CDD measures include "identifying the customer and verifying that customer's identity"; "identifying the beneficial owner and taking reasonable measures to verify the identity of the beneficial owner"; "understanding . . . the purpose and intended nature of the business relationship"; and "conducting ongoing due diligence."

- Interview the account manager and the persons appointed as power of attorney; and
- Review bank accounts in the name of a corporate vehicle because the company incorporation documents, the names of the board members, and the names of the persons entitled to conduct business on behalf of the company may reveal persons worth interviewing.[4]

4.2.3 Bank Account Statements

As a first step, practitioners should determine the origin of the funds credited to the account and the destination of any transferred funds. This includes debit and credit flows in the accounts through cash withdrawals and deposits, wire transfers, bonds, checks, loans, and so forth. In reviewing these flows, different techniques need to be used for assessing the origin and destination of the funds in various forms, as suggested below.

Cash. Cash movements can be difficult to trace because of the lack of origin or destination information. Practitioners should obtain the cash withdrawals or deposit receipts from the bank, which should indicate the identity of the person initiating the transactions. Locations of automated teller machines (ATMs) used for cash withdrawals and deposits should also be identified. In addition, practitioners need to use traditional investigative techniques to follow the link to cash deposits through texts, emails, letters, and wire transfers (as discussed in section 4.2.4). They may also monitor activity in other accounts and review the visiting records for safe deposit boxes.

Bonds. Bond deposits can be arranged from bank to bank, so practitioners need to ask the banks for all information regarding the bonds and how they were deposited in the account.

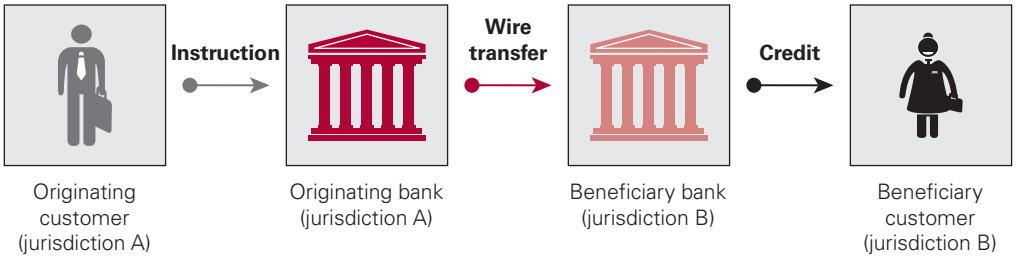
Checks. In the case of a deposit by check, practitioners may have to go to the bank that holds the account from which the check was drawn to identify the drawer, unless electronic records can be requested. Cases where the check is endorsed (that is, signed on the back to cash, deposit, or sign it over to someone else) should be treated similarly to cash deposits. Therefore, practitioners will have to identify the person who endorsed the check. Practitioners should also review the "memo" line of the check because this may indicate suspicious activities. For example, checks to related companies (such as subsidiaries) for "management," "consulting," or other services may indicate that the company is laundering criminal proceeds through a series of companies that it owns.

4.2.4 Wire Transfers

Previous corruption cases have shown that a large amount of criminal proceeds are placed in financial institutions and then moved around the world through wire transfers (also referred to as "electronic funds transfers") in an effort to break the audit trail and place funds in bank secrecy havens. A wire transfer is initiated with a request by a customer (financial institution, legal entity, or individual) to direct funds elsewhere,

[4] In some cases, board members and employees of a professional intermediary or service provider responsible for creating shell companies may have some information to assist the investigation.

FIGURE 4.1 Basic Cross-Border Wire Transfer Process



Source: World Bank

either domestically or internationally.[5] The request provides instructions through a system of messages by telephone, email, fax, or mobile-phone application. (Figure 4.1 depicts a basic cross-border wire transfer process.)[6]

Before the proceeds reach their final destination, wire transfers may be used to layer the funds through several financial institutions and transit jurisdictions using correspondent bank accounts, serial wires, cover payments, shell companies, and offshore jurisdictions. Some financial institutions, attorneys, or accountants have been complicit in helping corrupt politicians, their relatives, and close associates launder funds through complex transactions using corporate vehicles and establishing special private wealth account privileges.[7]

A wire transfer has two components: (a) the instruction, which includes information on both the originator and the beneficiary institutions; and (b) the actual movement or funds transfer. Financial institutions can send instructions in several ways, including electronic networks available through various interbank payment systems, email, fax, telephone, and telex. By far the most common way for banks to communicate transfer instructions to each other is by accessing a special financial telecommunications system known as the Society for Worldwide Interbank Financial Telecommunication (SWIFT). As for the actual movement of money, two major wholesale interbank payment systems are available: the Clearing House Interbank Payments System (CHIPS) and the Fedwire Funds Service (Fedwire). In addition, banks frequently use direct bank-to-bank and other intermediary payment systems to move customer funds between institutions.

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[5] This can include a chain of wire transfers that has at least one cross-border element (for example, a correspondent bank in another country). See also FATF Recommendation 16 (on "Wire Transfers") and the related Interpretive Note (FATF 2019, 15–16, 72–73).

[6] FATF Recommendation 16 applies to cross-border wire transfers and domestic wire transfers, including serial payments and cover payments. See "Scope" of Recommendation 16 (FATF 2019, 72).

[7] See US Senate (2004), https://www.hsdl.org/?abstract&did=451010. Further, a large international bank had a training manual for its employees so they would know how to "strip" (remove) information from wire transfers to hide the fact that the transfers were for, or on behalf of, a sanctioned jurisdiction. See US Department of Justice (DOJ). 2009. "Credit Suisse Agrees to Forfeit $536 Million in Connection with Violations of the International Emergency Economic Powers Act and New York State Law." Press Release no. 09-1358, December 16, 2009 (accessed August 16, 2018). http://www.justice.gov/opa/pr/2009/December/09-ag-1358.html.

CHIPS and Fedwire may be used for US dollar transfers or as part of a US dollar component of an international transaction. However, CHIPS has been used primarily to facilitate dollar-denominated international transfers. Unlike these payment systems, SWIFT is a messaging system only; it does not hold or transfer funds or manage accounts on behalf of its members. Practitioners should be aware that transactions clearing through US banks, CHIPS, or Fedwire provide jurisdiction for US authorities in a forfeiture case.

An actual funds transfer takes place through a "book transfer" and may involve a correspondent bank. A book transfer is essentially an accounting process that moves funds from one account to another. If both the originating customer and the beneficiary customer have an account at the same financial institution, then an internal book transfer can take place between the two customer accounts. When funds are transferred between two unrelated financial institutions, a book transfer occurs through a correspondent or intermediary bank employed to bridge the relationship.[8]

Many banks maintain correspondent accounts primarily for the purpose of processing and clearing wire transfer transactions with institutions that are members of and have access to CHIPS or Fedwire; doing so enables them to carry out wire transfers on behalf of their customers even though they are not member institutions. Correspondent banking relationships are also common between domestic and foreign banks because they can facilitate business and provide services to clients in foreign jurisdictions without the expense and burden of establishing a foreign presence.[9]

Gathering Relevant Documents and Information for Analyzing Wire Transfers

Practitioners should request wire transfer documentation from financial institutions to support asset-tracing efforts. Such documentation should include a copy of the wire transfer message as well as other documents that financial institutions generate in the process of originating or receiving the transfer of funds. Box 4.1 lists some of the forms and documents that may be produced in connection with a wire transfer. A review of these documents and forms will reveal key information, such as the originator and beneficiary financial institutions, customer parties, amounts, dates, and customer-to-customer or financial institution-to-institution information.

Practitioners seeking information should request wire transfer information in both spreadsheet format and advice statement form, if available. Because banks may use formats that are not standardized, a spreadsheet may contain information that makes it

[8] In this case, if the originating bank maintains a correspondent account with a beneficiary bank, it may instruct the beneficiary bank to transfer funds out of the originating bank's correspondent account to the account of the beneficiary customer (FinCEN 1992).

[9] For additional information on correspondent banking communications and the use of serial and cover payment methods, including cover payment practices developed by SWIFT, see appendix F.

BOX 4.1 Forms and Documents Related to the Wire Transfer Process

Originating Institution

- Funds transfer request form
- Wire transfer copy
- Advice statement or confirmation of wire transfer
- Debit memo to originating customer
- Customer monthly account statement
- Internal log of outgoing wires (correspondent bank logs, payment and processing logs)
- Journal entry.

Beneficiary (or Correspondent) Institution

- Funds transfer request form
- Wire transfer copy
- Credit memo to beneficiary customer (if deposited)
- Customer monthly account statement
- Journal entry
- Cashier's check
- Interbank book transfer information that banks keep for purposes of clearing transactions.

easier to understand the transaction, while the advice statement format could contain more comprehensive data.

Depending on the circumstances of the investigation, it will be important to obtain additional documents or apply scrutiny in different areas, such as the following:

- *Underlying payment documents.* These include invoices, shipping documents, receipts, consultant contracts, and other documents associated with a transfer that may reveal key information about the funds in question.
- *KYC information and compliance notes.* At the transaction level, the bank may not have identified the ultimate beneficiary when funds exited the account. KYC information may be helpful in this regard.

- *PEP customers.* In cases involving PEPs, wire transfers may be found in the private banking business operations of a financial institution. PEP-related inquiries should also include a review of all accounts that have a power of attorney attached to them and of any accounts maintained by law firms, often used by PEPs to move money.
- *Book transfers between personal and corporate accounts.* Such transfers may be useful in detecting a layering scheme.
- *SWIFT private gateways and name variants used by the financial institution.* A review of the separate SWIFT gateways used only for private banking clients within the bank and its various branches may uncover a separate and potentially special-permission transaction originating through them. SWIFT name variants used by the financial institution may reveal transfers through different avenues. A bank may have different wire transfer departments, addresses, or internal ways of identifying itself.[10] To ensure that the order to produce bank records includes lists of the gateways and name variants, practitioners should consider gathering this information through interviews with bank officials (for example, compliance officials).
- *Suspicious transaction reports.* Where available, STRs or intelligence reports may reveal valuable wire transfer information and originator details.
- *Federal Reserve Bank inquiries.* For wire transfers submitted through Fedwire, the pertinent district bank of the US Federal Reserve System may be a useful source because it retains wire transfer records for 180 days. When requesting information, it is important to be very specific about the transaction by referencing as many details as possible (for example, date, transaction amount, originating party, beneficiary customer, receiving institution, account numbers, purpose of the transaction if known, and so forth).
- *Transaction patterns at specific institutions.* When reviewing information obtained from smaller banks, practitioners may look for patterns of very large transfers relative to the bank's size (for example, a book transfer that amounts to a significant percentage of the total money transferred for a particular bank over the course of a month).
- *Repaired, returned, and re-sent wires.* Monitoring systems will create a "repair item" for messages containing errors (such as incomplete originator information). Those messages are then set aside and alerted for manual review. Such documents will often be maintained by the originating and beneficiary banks and may reveal patterns of activity by the target or bank.[11]
- *Loan documentation.* Defendants frequently provide misleading information on loan records in order to qualify, which may be a criminal offense per se in some jurisdictions.

[10] One bank was found to have 43 separate identifiers based on variations of its name and address.

[11] These records may also be helpful when looking for a pattern of behavior by a financial institution that may demonstrate it has knowingly laundered the proceeds of crime. In addition, practitioners should ask for all rejected wires from a bank in question within, for example, the last 30 days; they should be particularly alert to information that was supplemented or changed when the wire was re-sent.

Interpreting Wire Transfer Documentation

In most cases, advice statements confirming a wire transfer as well as the debit and credit memos sent by banks to their originating or beneficiary customers will be easy-to-read documents. These documents contain information needed to trace the movements of funds, including account numbers as well as the identities of the originating and beneficiary customers. Where such documents are unavailable, the process of identifying and tracing funds will necessitate an understanding of how to read and interpret the various messaging systems used to effectuate wire transfers.[12]

Payment systems such as CHIPS and Fedwire use separate messaging formats for wire transfer communication between member institutions; however, SWIFT offers a standardized messaging platform for the largest number of financial institutions globally. Regarding SWIFT messages, there are industry-wide protocols for messaging formats and special codes for differentiating between information and direction as well as encryption to prevent security breaches during data transmission.

To identify the different types of SWIFT messages, numbers are assigned to each of them. As an example, for a message identified as "MT 103," the "MT" prefix stands for "message type," while the three-digit number that follows represents a specific SWIFT message type (in this case, "103" denotes a single customer or credit transfer). Within a message type, specific field codes demarcate important information. For example, field 50 (ordering customer) is a key field to focus on for tracing laundered funds because it may include more than just the customer name and address.[13] Figure 4.2 provides a sample of some of the relevant SWIFT messaging fields that investigators will want to review.

SWIFT business identifier codes (BICs) provide the name of the financial institution, country, location and/or branch. BICs are generally eight characters in length: a four-character bank code (unique to the financial institution), a two-character country code (identifying the country where the financial institution is located), and a two-character location code (providing a geographical distinction within a jurisdiction). Sometimes three additional characters are used for a branch code (to identify the physical branch of a financial institution).[14]

4.2.5 Virtual Currencies

Virtual currencies are defined as "a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency, and does not possess a legal status of currency or money, but is

[12] For instance, in the Moldovan Bank Fraud scandal (box 4.5), the Banking Supervision Department of the National Bank of Moldova hired Kroll, a private investigative agency, to support the investigation (Kroll 2015). SWIFT data were used to recover destroyed documents.

[13] Three options for displaying information in field 50 (ordering customer) may be useful to a practitioner: (a) account plus identifier, (b) identifier plus name and address, and (c) account plus name and address.

[14] For more information on BICs, see https://www.swift.com/. The website allows searches by institution name or by BIC, while search parameters may be narrowed by country, city, or both.

FIGURE 4.2 Sample SWIFT Message Format and Code Interpretation

:20: PAYREF-XT78305
:32A: 091010EUR#1010000#
:50: [CUSTOMER NAME AND ADDRESS]
:59: [BENEFICIARY NAME AND ADDRESS]

Code Interpretation

20	Transaction reference number (coded number assigned by the originating institution to identify the transaction)
32A	Value date, currency code, and amount of the transaction
50	Ordering customer (party ordering the SWIFT transaction)
59	Beneficiary (party designated as the ultimate recipient of the funds)

In addition to the above codes, other codes may include:

52D	Ordering bank (financial institution initiating the SWIFT)
53D	Sender's correspondent bank
54D	Receiver's correspondent bank
57D	The financial institution at which the ordering customer requests the beneficiary be paid
70	Details of payment
71A	Details of charges for the transaction
72	Instructions from the sending bank to the receiving bank

Source: World Bank.
Note: SWIFT = Society for Worldwide Interbank Financial Telecommunication.

accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically."[15]

The anonymity of virtual currencies creates potential for misuse for illicit purposes.[16] In fact, there is increasing evidence that organized criminal groups use them for money laundering (Keatinge, Carlisle, and Keen 2018, 17). Tracing the illicit activities involving virtual currencies requires that practitioners acquire forensic tools, technical skills, and resources and that they stay informed on the relevant developments in the field with advanced training (Keatinge, Carlisle, and Keen 2018, 57). Cooperation with experts or private firms that specialize in de-anonymizing transactions and analyzing activities for signs of suspicion can prove helpful (Keatinge, Carlisle, and

[15] Definition of "virtual currencies" from "Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU." See art. 1, which amends art. 3(d) to add element (18), defining "virtual currencies." https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843.

[16] Since June 2019, the FATF's Interpretative Note to Recommendation 15 (on "New Technologies") requires that virtual asset service providers (VASPs) "be licensed and registered"; "obtain and hold required and accurate originator information and required beneficiary information on virtual asset transfers"; and "make it available on request to appropriate authorities" (FATF 2019, 70 [para. 3], 71 [para. 7(b)]).

Keen 2018, 31). Sharing information and good practices among agencies and counterparts is also crucial.[17]

4.2.6 Accounting Records

In business accounting, financial transactions are supported by documentation and are recorded through journal entries that identify account names and amounts. These are summarized in the business's financial statements, which include income statements and balance sheets.[18]

Corrupt officials and those involved in fraudulent schemes will often manipulate these records to conceal their illegal activities. (Box 4.2 describes Odebrecht S.A.'s secret financial structure to facilitate bribe payments.) Practitioners may find illicit transactions by analyzing and comparing accounting entries, actual payments, and the documents used to justify them.

In cases of bribery or when other inappropriate payments to third parties are suspected, the bribe recipient (agent, intermediary, or third party) commonly submits fictitious invoices to the paying parties (usually the company seeking to win a contract). One reason for using fictitious invoices is to provide a false "audit trail" in the records of the bribe-paying company, thereby concealing the true purpose of the underlying payment. It is quite difficult to identify the fake invoices because they appear to be plausible, legitimate documents.

If the use of fictitious invoices is suspected, practitioners should focus primarily on identifying discrepancies between invoiced amounts and the actual value (or the nonexistence) of purchased goods or services. They should also check whether the invoices are issued by fake companies. The various documents recording the transaction—contracts; the documentation to the paying agent (for example, invoices or emails); payment records; bills of lading; and the process for the payment itself—may reveal red-flag indicators. (Box 4.3 discusses red flags in contracts and other records, and box 4.4 specifically addresses red flags in the contract award related to Nigeria's OPL 245 oil block.) When such discrepancies are found, it will be possible to filter the population of suspicious transactions and focus the investigation on the issuer of the fictitious invoice (the suspected bribe recipient).

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[17] For example, Danish police developed software for tracing bitcoin transactions that has allowed them to mount successful drug convictions (Garrett Keirns. 2017. "Danish Police Claim Breakthrough in Bitcoin Tracking." CoinDesk.com, February 22, 2017. https://www.coindesk.com/danish-police-claim-breakthrough-bitcoin-tracking).

[18] A journal is a record that keeps accounting transactions in chronological order. Most commonly used are cash receipts, disbursements, sales, purchases, and general journals. A *ledger* records transactions by type of account. An *income statement* lists revenue and expenses. A *balance sheet* lists assets and liabilities.

BOX 4.2 Brazil: Odebrecht's "Department of Bribery"

Companies involved in Brazil's long-running *Lava Jato* (Car Wash) corruption case included Odebrecht S.A., a Brazil-based global construction conglomerate, and Braskem, a Brazilian petrochemical company controlled by Odebrecht with Petrobras (Brazil's state-owned oil company) as a minority shareholder. To resolve charges with the Brazilian, Swiss, and US authorities, the companies pleaded guilty to pay a combined total penalty of at least US$3.5 billion.[a]

According to the US Department of Justice (DOJ), as early as 2001, Odebrecht and Braskem used a complex and secret financial structure that allowed them to systematically pay bribes to corrupt government officials in Brazil and other countries. This structure evolved into what was later established as the "Division of Structured Operations"—a bribery department within Odebrecht and its related entities, whose head received authorization for the bribes requested by Odebrecht's senior officials.

For this purpose, Odebrecht's bribery department used an off-book communications system that allowed its members to communicate with one another and their co-conspirators via secure emails and messages about the bribe payments. It also managed the company's "shadow" budget, which funded the bribes through a separate computer system that requested and processed the bribes. In addition, this department was responsible for directing the bribes from the offshore companies to the bribe recipients through wire transfers as well as cash payments inside and outside Brazil.

Braskem also used the Odebrecht system to authorize the payment of bribes to Brazilian politicians as well as to a Petrobras official in exchange for preferential treatment (including in procurement proceedings) as well as legislation favorable to the company.

a. For more about the Lava Jato case, see chapter 2 (boxes 2.4 and 2.11) on changes in Brazilian law that advanced the investigation, and chapter 3 (box 3.1) on Odebrecht's and other parties' use of shell companies to launder the proceeds of corruption.

Source: DOJ. 2016. "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History." Press Release no. 16-1515, December 21, 2016. https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

BOX 4.3 Red Flags in Contracts, Payment Documentation, Payment Records, and Payment Mechanisms

Contracts

- Lack of a formal contract to support invoices for significant payments to third parties
- Lack of specificity in the contract or agreement on the services to be performed

(continued next page)

BOX 4.3 Red Flags in Contracts, Payment Documentation, Payment Records, and Payment Mechanisms *(Continued)*

- Absence of written evidence confirming that due diligence was performed to confirm the identity and legitimacy of the contracting party
- Payments to shell companies in tax havens or uncooperative jurisdictions
- Backdated contracts or contracts in which services have been supplied and billed before the date the contract came into existence
- Multiple contracts with different parties for performance of the same services in the same location (that is, contracts paying multiple contractors for the same service)
- Existence of annexes or side agreements (including oral agreements) that unreasonably expand or alter the scope of the original contract
- Success-fee commissions to be paid to the "agent" if the paying party wins a key contract, particularly where the activities of the agent are not specified
- A commission rate that exceeds the expected market rate for the jurisdiction.

Payment Documentation and Proof of Service

- Failure to provide supporting information to confirm that services were provided
- Deliverables or reports provided by third parties that are the same as or similar to others, or that are not commensurate with the commission payable (for example, when an internet search of a report's sections may reveal that the report has been copied or plagiarized)
- Invoices that contain generic add-on fees or surcharges
- Invoices that are missing expected information (such as tax identification or corporate registration numbers)
- Sequential invoice numbering that may indicate that the issuer has no other customers
- Value of services rendered that is not commensurate with the amount paid
- Recipient bank details that differ from the jurisdiction or location where services were performed
- A third-party name that appears to be a shell company or to be managed by shell companies
- A recipient name that differs from the name of the contractual third party
- Multiple third parties who share the same business address
- Multiple consultants who have the same generic invoice format or addresses.

(continued next page)

BOX 4.3 Red Flags in Contracts, Payment Documentation, Payment Records, and Payment Mechanisms *(Continued)*

Payment Records and Entries in Accounting Records

- Significant invoices or invoice amounts that are recorded in generic general ledger accounts, such as "miscellaneous expenses" or "consulting"
- Use of suspense or transitory accounts that are eventually reversed or written off as bad debts
- Payments processed outside of the normal accounts payable process (for example, one-off manual payments or cash payments)
- Failure to follow payment procedures (for example, obtaining one signature when two are required)
- Reluctance of company personnel to approve invoices for payment through normal channels (such as online or directly on the invoice)
- Pressure from third parties or company personnel to process payment urgently
- Unusual interest by company personnel in the processing of payments to specific third parties
- Unusual responses or hostility from company personnel or third parties in response to requests for additional supporting documentation
- Payments to third parties for whom risk management processes were not followed.

Payment Mechanisms Used to Process Fees

- Requests that payments be remitted through tax haven jurisdictions
- Requests by employees to hand deliver payment
- Requests to split payment across multiple company bank accounts or country offices
- Requests by employees that payments be made in cash or cash equivalents
- Requests by employees for purchase of high-value "gifts" (such as watches or jewelry).

In the absence of more-specific leads, attention should be paid to large, unusual, or one-off items recorded under expenditure accounts (for example, consultancy, commissions, entertainment, travel, and miscellaneous expenses). In addition, practitioners should consider assets such as accounts receivables and personal loans that are not repaid and are written off as bad debts.

BOX 4.4 Nigeria: Red Flags and Controversies in Awarding the OPL 245 Oil Block

Background: This ongoing case illustrates how red flags led to investigations of alleged bribery schemes over one of Africa's largest oil fields, which holds an estimated 9 billion barrels of crude oil.[a] If confirmed, Oil Prospecting License (OPL) 245's oil reserves would be equivalent to nearly one quarter of Nigeria's total proven oil reserves (Global Witness 2015, 5). Because of its significance, OPL 245 has been the subject of controversial sales deals that involved, among others, two of the world's largest oil and gas giants: Royal Dutch Shell ("Shell") and Italy's Agip-Eni ("Eni"). Below are five red flags that should alert authorities to further scrutinize such deals to prevent and detect corruption.[b]

Red Flag 1: The government awards a lucrative contract to a seemingly unqualified company. In 1998, Malabu Oil and Gas ("Malabu")—a company that had only been in existence for five days and had no prior experience, assets, or personnel—was awarded 100 percent control of the OPL 245 oil block by Dan Etete, Nigeria's minister of petroleum during the 1993–98 military dictatorship of Sani Abacha (Global Witness 2018, 5; Sayne, Gillies, and Watkins 2017, 12).

Red Flag 2: A politically exposed person (PEP) is the beneficial owner of the company. It was later found that Malabu was secretly owned by Etete, who had actually granted the oil concession to himself for a "signature bonus" of US$20 million, of which only US$2 million was paid to the Nigerian government.[c] In 2001, Shell agreed to buy a 40 percent stake in the awarded license from Malabu.[d]

Red Flag 3: The authorities have a history of controversial decisions. In 2002, the new Nigerian government revoked Malabu's license on the grounds that Etete and Abacha had abused their power to award themselves the oil block at a very low price (Global Witness 2015, 5) and put the block up for a competitive bid. Shell won the bid, and in 2003 it entered into a production-sharing contract with Nigeria's national petroleum company for a signature bonus of US$210 million. Following a court action launched by Malabu, in 2006 the Nigerian government reinstated Malabu as the owner of the oil block. Shell took the matter to arbitration before the World Bank Group's International Centre for the Settlement of Investment Disputes (ICSID).[e]

Red Flag 4: A payment by the winning company was allegedly diverted from a government account. In 2011, Shell and Eni entered into an agreement with Malabu to pay US$1.3 billion for the complete control of OPL 245. The amount was paid into an escrow account at JPMorgan Chase & Co. in London that was set up by the Nigerian government. Investigations into OPL 245 demonstrated that Nigeria only received the signature bonus of US$210 million,[f] while the remaining US$1.1 billion went toward "political contributions" to Dan Etete and President Goodluck Jonathan, among others,[g] as well as to five or more Nigerian companies—believed to be shell companies—linked to Abubaker Aliyu.[h] A December 2018 court ruling in Milan found that the two oil companies, Shell and Eni, knew that a large percentage of the US$1.1 billion would go into "private pockets" (Global Witness 2018, 7).

(continued next page)

BOX 4.4 Nigeria: Red Flags and Controversies in Awarding the OPL 245 Oil Block *(Continued)*

Red Flag 5: The terms of the award deviated significantly from industry or market norms. Shell and Eni were granted not only the license to drill into OPL 245 but also very favorable terms under a production-sharing agreement to which the Nigerian government was not a party.[i] The latter was also deprived of the allocation of a proportion of the oil produced.[j] It has been estimated that the 2011 agreement deprived the Nigerian people out of nearly US$6 billion—enough to fund Nigeria's combined health and education budgets for more than two years (Global Witness 2018, 21).

a. Nigerian House of Representatives. 2013. "Report by the Ad-Hoc Committee on the Transaction Involving the Federal Government and Shell/AGIP Companies and Malabu Oil and Gas Limited in respect of the Sale of Oil Bloc OPL 245," at 64 (July 9, 2013), cited in Global Witness (2015, 5 [n. 17]).
b. By examining more than 100 cases on the award of contracts in the oil, gas, and mining sector, Sayne, Gillies, and Watkins (2017, 2–3) developed a list of 12 red flags that may tip off authorities and oversight bodies that more scrutiny is required.
c. Although Malabu's share register had been altered in subsequent years, in 2013 it was confirmed that Dan Etete has been "the principal beneficial owner of Malabu" since the exclusion of Sani Abacha's son from the share register (Energy Venture Partners Ltd. v. Malabu Oil and Gas Ltd. Queens Bench Division [Comm.] before Lady Justice Gloster, [2013] EWHC 2118 [Comm.], 07.17.2013).
d. Shell executives knew that Etete owned Malabu (Global Witness 2015, 6).
e. See Shell Nigeria Ultra Deep Ltd. v. Fed. Rep. of Nigeria (ICSID Case No. ARB/07/18), https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/18. The case was discontinued in 2011.
f. In a March 2012 N.Y. Sup. Ct. ruling, J. Bernard J. Fried described the Nigerian government's role in the deal as that of "the proverbial 'straw man' holding $1.1 billion for ultimate payment to Malabu." See Int'l Legal Consulting Ltd. v. Malabu Oil & Gas Ltd., No. 83 (N.Y. Sup. Ct. March 22, 2012), https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=llMhqMX_PLUS_/fJrxxubSXRkww==&system=prod.
g. At least US$520 million was converted into cash to pay Nigerian public officials (Global Witness 2018, 3, 15).
h. Aliyu was believed to have close ties with the convicted former governor of Bayelsa State, Diepreye Alamieyeseiga; Aliyu's companies were allegedly fronts for President Goodluck Jonathan of Nigeria. See Malabu Oil & Gas Ltd. v. Director of Public Prosecutions, Case No. 74/14, Southwark Crown Court, London, Judgment by Justice Edis (December 15, 2015), https://shellandenitrial.org/wp-content/uploads/2018/07/JUDGMENT-MALABU-final.pdf.
i. This differs from the standard procedure of production-sharing contracts where there is an agreement between the contractor and the state (Global Witness 2018, 2, 3).
j. The International Monetary Fund recommends that mature oil-producing countries receive 65–85 percent of oil revenues. The current OPL 245 deal is projected to give Nigeria a historically poor share of just 41 percent (Global Witness 2018, 2, 3).

4.2.7 Insurance Policies

Some life insurance policies may be of great value and may be purchased with a single down payment, making them attractive to would-be money launderers, notably so-called "insurance wrappers."[19] Practitioners should determine whether the targets have cash-value insurance policies, especially those with accelerated death benefits, early payout, or other termination conditions. In addition, insurance policies may reveal assets owned by the targets (such as jewelry, cars, art, and the like).

The policies can also help identify other professional intermediaries such as a broker or attorney who assisted in setting up the policies, as well as other family members or

19 Regarding life insurance policies with separate accounts or securities accounts, see the "Swiss Banks' Code of Conduct," art. 42 (SBA 2018), https://www.swissbanking.org/library/richtlinien/vereinbarung-ueber-die-standesregeln-zur-sorgfaltspflicht-der-banken-vsb-20/vsb_2020_einzelseiten_print_en.pdf/.

proxies of the target who could be listed as beneficiaries. Typically, such information can be gathered through various investigative techniques.

4.2.8 Purchase and Sale Documents

Documents related to the purchase and sale of assets—whether real estate, shares of stock, vehicles, jewelry, or artwork—include land registry documents, purchase and sale agreements, loans, mortgages,[20] receipts issued by vendors, financial statements, tax returns, and credit card statements. Practitioners should focus on documenting the dates of purchase and sale; the names of the buyer and the seller; the method of payment (cash, check, currency); and the sources of funds. Where assets were purchased with cash, it may be difficult to trace the purchase date or the value, particularly when there are numerous potential sellers or dealers (as is true for artwork, jewelry, or vehicles). Travel data (gathered from border crossing information, credit card information, or travel reward programs); insurance policies; jewelry repair bills; vehicle identification numbers; vehicle dealer stickers or decals; and art dealers may assist in determining the seller of these items and dates of purchase.

Practitioners also need to consider assets ostensibly owned by family members or close associates but effectively controlled, held, or gifted by a target. (See chapter 5, section 5.3, for a discussion of this issue in the context of provisional measures.)

4.3 Organizing Data: Creating a Financial Profile

It is important to organize the information gathered into an account profile for each bank account. This information, in turn, may be combined with other financial data collected (such as other asset holdings, corporate interests, liabilities, income, and expenses) to build a target's financial profile. A standard computer spreadsheet program could be used for this purpose (see a sample financial profile form in appendix G). Using searchable legal support software is also beneficial.

As an example, the account profile should include the following information:

- Name of the bank and branch location
- Bank account number and type
- Names of the bank account holder, the beneficial owner, and those granted powers of attorney
- Dates of account opening and, if applicable, closing
- Currency

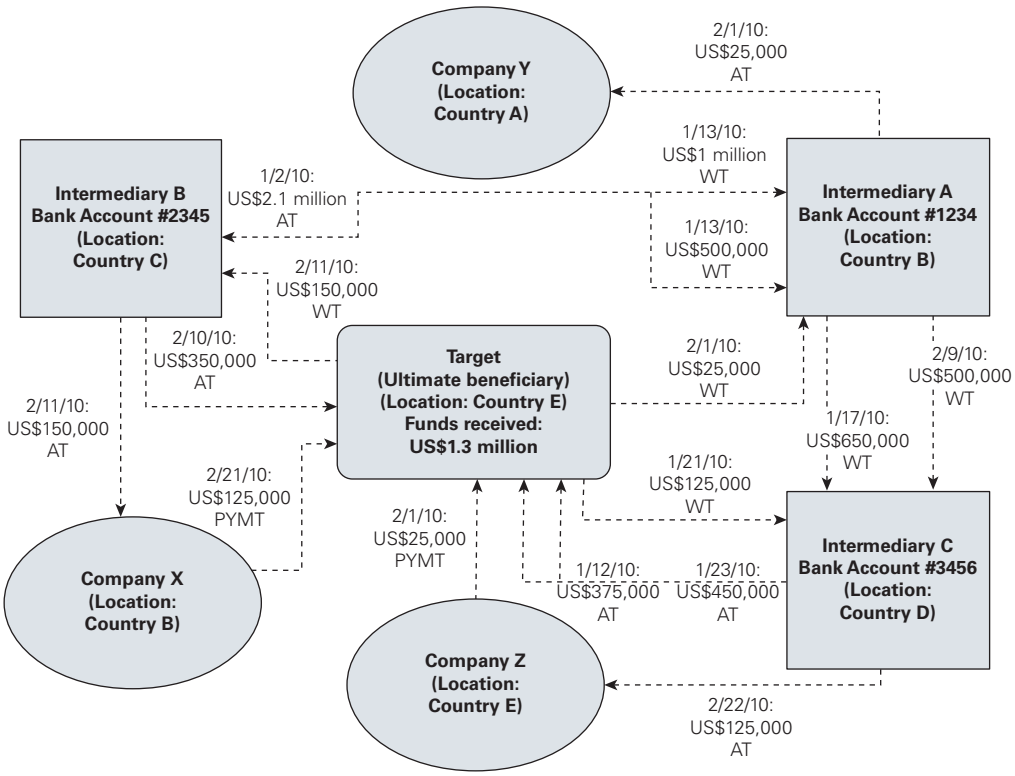
[20] Documents related to a mortgage approval may provide information about other assets that may have been given as collateral for the mortgage. This could include information about real estate, savings and securities bank accounts, art pieces, precious metals and jewelry, and so on.

- Account balance at the time of the disclosure
- Annual credit turnover
- Annual debit turnover
- Whether the assets have been restrained.

Practitioners may then consider entering into the spreadsheet additional relevant data, such as the credit and debit activity that occurs within the bank account during the relevant period under investigation, with the date, amount, and (when available) the source of funds or where the funds were sent (bank and bank account holder's name).

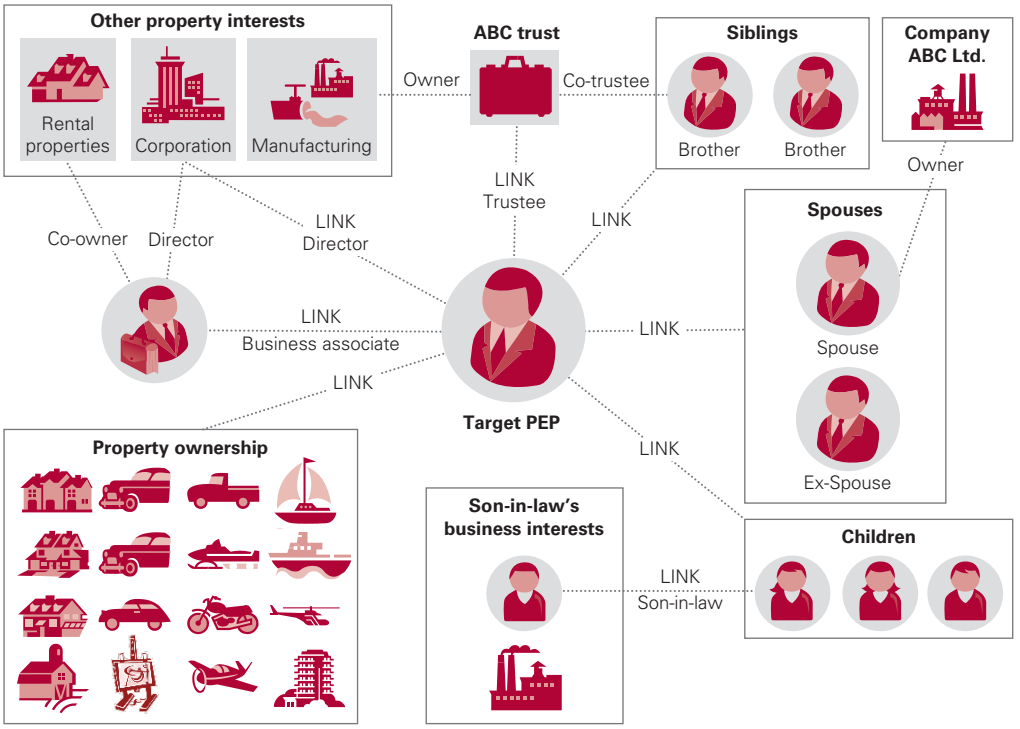
To assist with organizing and eventually presenting and explaining the data, practitioners should map out the flow of funds in a flowchart (figure 4.3) and visualize any relevant relationships (figure 4.4). These flowcharts provide a visual snapshot of the targets, associates, gatekeepers, assets, bank accounts, and corporate vehicles involved.

FIGURE 4.3 Sample Flowchart of Investigated Networks and Flow of Funds



Source: World Bank.
Note: AT = account transfer; PYMT = payment; WT = wire transfer.

FIGURE 4.4 Sample Chart of Relationships and Assets Linked to an Investigation Target



Source: World Bank.
Note: PEP = politically exposed person.

This snapshot or "big picture" view will help practitioners as they attempt to understand and interpret the flows.

In addition, such visualizations are useful for explaining to a prosecutor or judge the flow and associations developed during the investigation. Commercial software (such as IBM i2 Analyst's Notebook) or free open-source network plug-ins to spreadsheet programs (for example, NodeXL) may be useful for such visualizations.

Finally, practitioners should consider using a document management system, particularly in complicated cases and where there are large amounts of data to manage and analyze. Box 4.5 provides an example of a complex case with a series of transactions.

BOX 4.5 The Moldovan Bank Fraud Scandal

Background: In 2014, a series of largely fraudulent loans cost three major Moldovan banks losses totaling more than US$1 billion, ultimately leading to their collapse.[a] The National Bank of Moldova (BNM), the country's central bank, had to compensate the remaining depositors at a cost equal to 12 percent of Moldova's gross domestic product (GDP).

Investigation and findings: According to the investigation ordered by the BNM and carried out by Kroll (a global provider of risk solutions), the loans were transferred to a group of companies registered in various jurisdictions (Kroll 2017, 55). The fraudulent and corrupt scheme involved, among other things, the following (Kroll 2015):

- A series of suspicious transactions with "no sound economic rationale"
- A "carousel" borrowing scheme, with loans at one bank being paid with loans from another, which ultimately emptied the banks (figure B4.5.1)
- A coordinated effort to maximize available liquidity and facilitate "a massive increase in lending to Moldovan entities"
- The splitting and layering of the funds through accounts together with the frequent and arbitrary switching of currencies between linked accounts
- The disguising of the related-party relationship between the loan-receiving companies
- The use of UK limited partnerships with Latvian bank accounts to conceal the true purpose of transactions and their true beneficiaries and to pay down existing loan exposure at the banks
- The use of a common group of newly incorporated Moldovan entities as customers that undertook significant borrowing activity.

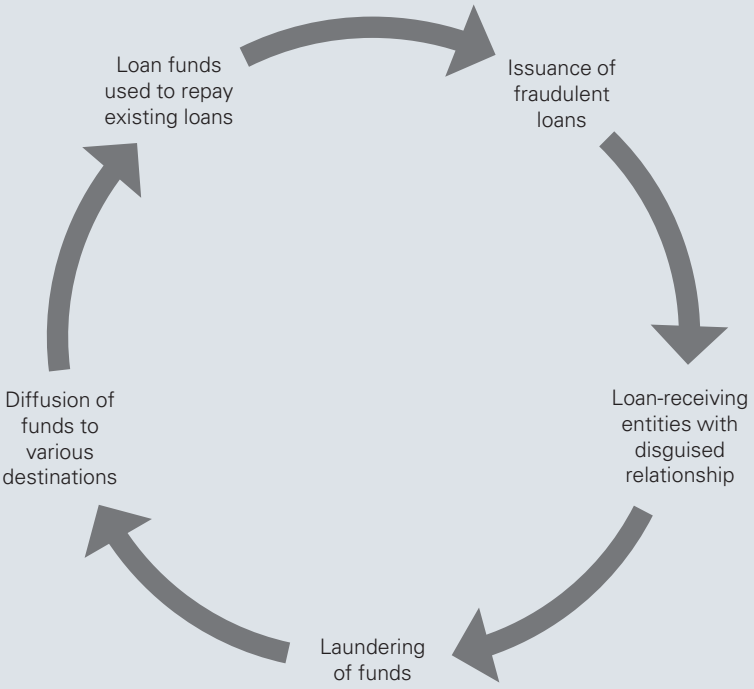
Convictions and asset recovery: The Kroll (2015) investigation alleges that businessman Ilan Shor was the prime coordinator and beneficiary of the complex series of transactions. Shor was convicted in 2017 by a Moldovan Court to seven and a half years in prison, a sentence that he appealed.[b] The scandal also implicated prominent politicians, including former prime minister Vlad Filat, who was convicted in 2016 of abuse of office and corruption for taking bribes in relation to the scandal and was sentenced to nine years in prison.[c]

In a 2017 memorandum of understanding with the European Union, Moldova and the BNM committed to the recovery of the assets and to the establishment of a new Criminal Assets Recovery Agency (EC 2017). As of this writing, however, the asset recovery process does not appear to be finalized.

(continued next page)

BOX 4.5 The Moldovan Bank Fraud Scandal *(Continued)*

FIGURE B4.5.1 Carousel Borrowing Scheme in a Fraud Scandal



Source: World Bank.

a. Andrew Wrobel. 2019. "Restoring Trust in Moldova's Banking Sector" (interview with Sergiu Cioclea, head of the National Bank of Moldova). *Emerging Europe*, February 14, 2019. https://emerging-europe.com/interviews/restoring-trust-in-moldovas-banking-sector/.
b. Matei Rosca and Silvia Sciorilli Borrelli. 2019. "MEPs Help Campaign of Moldovan Convicted in $1B Fraud." *Politico*, February 22, 2019. https://www.politico.eu/article/ilan-shor-fulvio-martusciello-barbara-kappel-richard-milsom-meps-help-campaign-of-moldovan-convicted-in-1-billion-fraud/.
c. Alexander Tanas. 2016. "Moldovan Court Jails Ex-PM for Nine Years for Abuse of Power." Reuters, June 27, 2016. https://www.reuters.com/article/us-moldova-filat-court/moldovan-court-jails-ex-pm-for-nine-years-for-abuse-of-power-idUSKCN0ZD1XM.

4.4 Analyzing Data: Comparing the Flows with the Financial Profile

In this critical phase, analysts will compare and contrast dates, origins, destinations, bank account holders, banks, and sources of information to group and reconcile transactions and identify gaps in data. For example, one account may show the withdrawal of a large sum of cash, leaving the analyst without destination information; another may show a subsequent deposit. Or perhaps physical surveillance records reveal that the target traveled to a foreign jurisdiction in the days following the withdrawal. Payments to contractors may be linked to subsequent deposits. In one case, several

deposits by a corrupt official were found to be the same percentage of the payments to the contractor. Such analysis will help to better understand the asset flow and develop new leads.

Another technique used by practitioners is a net worth analysis. This process is used to compare the value of the assets held by targets with their reported or known incomes. Any unreported income is likely to have illicit origins, and practitioners will subsequently need to direct efforts toward showing a link between the asset and the offense. In jurisdictions where illicit enrichment is criminalized, the net worth analysis is a necessary step in the investigation process.

To assist in identifying corruption and money-laundering schemes, it can be helpful to review information or research on the various typologies and red flags for identifying criminal activity. Many agencies and international organizations publish such reports, also available online, such as the following:

- The Financial Action Task Force (FATF) has published various typology reports on money laundering and terrorist financing (APG 2012; FATF 2006, 2008a, 2008b).
- FIUs as well as the Egmont Group publish annual reports where data on STRs are presented and analyzed.[21]
- Financial sector institutions or banking associations publish reports on typologies and red flags for identifying criminal activity and money laundering (HKAB 2016, 18).

4.5 Garnering International Cooperation

Asset recovery in corruption cases frequently crosses borders and may involve multiple jurisdictions. Therefore, information on assets and bank accounts located abroad must be requested. Some information, such as land, vehicle, and corporate information and financial intelligence, may be obtained through open-source searches and informal channels rather than through a mutual legal assistance (MLA) request. Consider, for example, counterpart practitioners in asset recovery offices; liaison magistrates; regional attachés; practitioner networks such as the Egmont Group; interagency asset recovery networks such as the Camden Asset Recovery Inter-agency Network (CARIN); or the World Customs Organization.

Obtaining information and intelligence at the early stage of an investigation is useful because it enables the investigation to progress. However, if a requesting jurisdiction needs documentation that can be used as evidence in domestic court proceedings, certified copies or originals will be required, which may necessitate an MLA request. In all cases, practitioners may be able to participate in the activities in the foreign jurisdiction. In this context, practitioners should be fully aware of the need to combine

[21] See, for example, the Egmont Group's annual reports (https://egmontgroup.org/en/document-library/10) and the Italian FIU's annual report (UIF 2016).

informal and formal international cooperation—as highlighted in chapters 8 and 9, which provide further guidance on the informal and formal processes and address how to overcome some of the challenges encountered in asset tracing.

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5. Securing the Assets

5.1 Introductory Remarks

Efforts toward asset confiscation are of little value if, at the end of the day, no asset is available for confiscation. Stolen assets may be hidden or moved out of reach in a short period, while investigation and confiscation proceedings may take years, often giving the target ample time to move or dissipate assets. Therefore, it is critical that measures be taken to secure the assets that may become subject to a confiscation judgment. These measures, referred to as "provisional measures," include the seizure and restraint of assets and should be taken as close to the beginning of the case as possible to secure the assets, where feasible, and until the conclusion of the confiscation proceedings.[1]

Under the United Nations Convention against Corruption (UNCAC), article 54 (2), states parties are required to take the necessary measures to permit the freezing or seizing of assets based upon either a court's (or other competent authority's) order or a request "that provides a reasonable basis for the requested state party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation." States are also required to consider measures to preserve property for confiscation based on a lower threshold, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

In most jurisdictions, the laws governing provisional measures involve the balancing of two opposing principles: On one hand, the public interest requires that suspected proceeds and instrumentalities of crime be preserved and maintained until the end of the confiscation case (as discussed in box 5.3, on Switzerland's constitutional power to freeze assets to protect its national interests).[2] On the other hand, individuals' right to enjoy the ownership and use of their property must be protected from any arbitrary deprivation.

[1] Although some jurisdictions limit the duration of the provisional orders, generally the limitations may be extended. In Liechtenstein, for example, the court must limit the duration for which the order is issued, but the deadline may be extended upon an application (Code of Criminal Procedure, sec. 97a[4], https://www.legislationline.org/download/id/8270/file/Liechtenstein_Criminal_Procedure_Code_1987_am2017_en.pdf). No time limit applies in Switzerland, but courts consider the principle of proportionality, meaning they tend to be more restrictive as time passes if the investigations do not tend to confirm the original charges.

[2] The protection of national security interests has been used to justify the freezing of foreign assets in the United States through the issuance of presidential executive orders and, in Switzerland, through the issuance of Federal Council ordinances and rulings (UNODC 2015, 40 [para. 101]).

5.2 Terminology: Seizure and Restraint

In both common and civil law jurisdictions, two distinct mechanisms have been developed to control and preserve assets that may be subject to confiscation: seizure and restraint.

Seizure means taking physical possession of the targeted asset. Although a prior court order or authorization from prosecutors or investigative judges might generally be required, some jurisdictions grant law enforcement officers the right to seize assets. For example, bulk cash or other assets "reasonably suspected or believed" to be the proceeds or instrumentalities of a crime may be seized, in exigent circumstances, without a prior court order. Such powers are particularly useful for seizing suspicious cash that is transported across international boundaries in contravention of cash import or export reporting laws.

A *restraint order* is a form of mandatory injunction issued by a judge or a court that restrains any person from dealing with or disposing of the assets mentioned in the order, pending the determination of confiscation proceedings.[3] Unlike seizure orders, restraint orders do not result in the physical possession of the asset. Judicial authorization is usually required, although some jurisdictions permit restraint to be ordered by prosecutors or other authorities.[4]

The terminology for seizure and restraint of assets may vary among jurisdictions. For example, one jurisdiction may "seize" bank accounts, whereas another may "restrain" them. Other jurisdictions have introduced other terms, such as "freezing" or "blocking."[5] Practitioners should be aware of the distinction between the terms when sending or receiving an order involving another jurisdiction and should ensure that requests use terminology that can be understood. Hence, it may be a good idea to describe the purpose of the order instead of simply using the name of the order to be requested, because the terminology may confuse the recipient authorities. (For additional information on drafting requests for mutual legal assistance [MLA], see chapter 9, section 9.2.)

5.3 Provisional Order Requirements

In most jurisdictions, provisional measures typically require a judicial authorization by a judge or investigating magistrate. Many jurisdictions also allow for emergency or short-term provisional measures to be implemented administratively, through either

[3] Restraint orders are similar (not identical) to the common law "Mareva injunctions" (as further discussed in chapter 10, section 10.3.2, note 45).

[4] A prosecutor has the authority to restrain assets in Colombia and Mexico (see, for example, Law 793.02 Colombia). Similarly, in Switzerland, restraints ordered by prosecutors are subject to court review on appeal (Criminal Code 311.0, art. 71, para. 3; Criminal Code 312.0, art. 263 [Switz.]).

[5] Some confiscation laws contain both restraint and freezing orders. Restraint orders (by a judge) are high-level orders that can restrain any type of property, whereas freezing orders (made administratively by law enforcement officers or public servants) are lower-level orders that can restrain limited classes of lesser-value property.

the financial intelligence unit (FIU), law enforcement agency, or other authority under law. (For a discussion of emergency provisional measures, see chapter 8, section 8.5.4 and chapter 9, section 9.2.6.) Jurisdictions may also have varying evidentiary and procedural requirements for obtaining provisional orders.

5.3.1 Evidentiary Requirements

The requirements for obtaining a seizure or restraint order usually involve the following (for seizure orders, see also chapter 3, section 3.4.8):

- Either (a) a target is suspected of having committed an offense from which a benefit has been derived (value-based confiscation), or (b) the assets being sought are linked to criminal activities (property-based confiscation). (See chapter 7 for a discussion of property-based and value-based confiscation.)
- Proceedings have been instituted or are about to be instituted.[6] In some jurisdictions, criminal proceedings will allow the seizure of substitute assets that can be seized or frozen if the proceeds of the crime were previously spent. In non-conviction based (NCB) confiscation proceedings, however, there is often a requirement that the assets be directly traced back to the crime.

In common law jurisdictions, these requirements are generally established on a "reasonable grounds to believe" or "probable cause" standard of proof.[7] Similarly, in civil law jurisdictions, the decision will rest with the prosecutor's or judge's belief in that the freezing order is necessary to avoid diversion or loss of assets during the investigation. Additional requirements may include grounds to believe that there is a risk of dissipation or that the assets are subject to confiscation and an undertaking as to damages.[8] In the United Kingdom, an interim freezing order (IFO) may be made if the court has issued an unexplained wealth order (UWO) regarding the property in question (as further discussed in chapter 3, box 3.11). The freezing of the property identified in a UWO prevents the property from being dissipated while it is subject to the order (Home Office 2017, 16). Box 5.1 describes the efforts to freeze assets belonging to a former Nigerian minister, Diezani Alison-Madueke.

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[6] Some restraining order provisions permit applications at any time as long as an investigation (criminal or NCB) is underway. This gives much more flexibility to apply for restraining orders at the earliest possible time and is a development that should be encouraged.

[7] The exact formulation of the test will vary by jurisdiction. For example, the High Court of Australia has defined "reasonable belief" as "an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture." George v. Rockett (1990) 170 CLR 104, High Court of Australia.

[8] In those jurisdictions where undertakings must be given, there is a limited scope of circumstances under which the prosecution is required to pay damages, particularly to criminal defendants. The ultimate discharge of the order does not result in the automatic imposition of a damages order unless it can be shown that the prosecutor either acted in bad faith or was negligent in the discharge of his or her duties.

BOX 5.1 Nigeria: Asset Freezing and Civil Forfeiture in the Case of a Former Oil Minister

Background: Nigeria's former minister of petroleum resources Diezani Alison-Madueke allegedly used her influence to steer lucrative oil contracts to her associates Kolawole Akanni Aluko and Olajide Omokore.[a] During her tenure, Alison-Madueke oversaw the country's state-owned Nigerian National Petroleum Corp. (NNPC).

Investigation and civil complaint: Alison-Madueke allegedly steered contracts to two Nigerian shell companies, Atlantic Energy Drilling Concepts Nigeria and Atlantic Energy Brass Development, that were owned by holding companies in the British Virgin Islands and whose beneficiaries were Aluko and Omokore. The companies were required to finance the exploration and production of eight onshore oil gas blocks, yet they failed to meet their contractual obligations because they lacked both the capital and the technical expertise to do so.[b] Nevertheless, the companies were allegedly permitted to lift and sell more than US$1.5 billion worth of Nigerian crude oil.

Aluko and Omokore allegedly funded a lavish lifestyle for the minister and her family, using laundered proceeds and companies incorporated in the Seychelles and in the United States to purchase real estate and other assets in the United Kingdom and the United States, including a US$50 million condominium in one of Manhattan's most expensive buildings and the Galactica Star, a US$82 million yacht.[c]

Asset freezing and forfeitures: The case was investigated in Nigeria, Switzerland, the United Kingdom, and the United States. In September 2016, the UK National Crime Agency (NCA) froze three properties worth £10 million that Omokore and Aluko allegedly purchased for the minister's benefit.[d] However, the NCA could not manage to prevent the sale of two further properties in London worth £8 million.

In August 2017, a Federal High Court in Lagos, Nigeria, ordered the final forfeiture of a property on Banana Island—an artificial island off the shore of Lagos's affluent Ikoyi neighborhood—that was worth N11.75 billion (US$37.5 million).[e] In the course of the investigation, the Economic and Financial Crimes Commission discovered additional properties linked to the former minister while it ordered the forfeiture of billions of assets linked to her.[f]

In July 2017, the US Department of Justice (DOJ) issued a civil complaint seeking the recovery of US$144 million in assets connected to Alison-Madueke, Aluko, and Omokore. The assets subject to forfeiture include the US$50 million condominium and US$82 million yacht.[g]

Current status: In 2018, the United States seized the vessel, which the DOJ says Aluko bought for US$82 million in 2013, and auctioned it for US$37 million in 2019 to avoid monthly maintenance costs of US$170,000 that were eroding

(continued next page)

BOX 5.1 Nigeria: Asset Freezing and Civil Forfeiture in the Case of a Former Oil Minister *(Continued)*

the sum that stood to be recovered from the vessel, according to court filings.[h] The overarching forfeiture claim against US$144 million of assets the DOJ says were acquired by Aluko is currently on hold pending the resolution of a criminal investigation into the related allegations, the filings show.

a. US Department of Justice (DOJ). 2017. "Department of Justice Seeks to Recover over $100 Million Obtained from Corruption in the Nigerian Oil Industry." Press Release no. 77-777, July 14, 2017. https://www.justice.gov/opa/pr/department-justice-seeks-recover-over-100-million-obtained-corruption-nigerian-oil-industry.
b. DOJ, "Seeks to Recover over $100 Million," July 14, 2017.
c. DOJ, "Seeks to Recover over $100 Million," July 14, 2017.
d. Margot Gibbs. 2017. "Exclusive: Noose Tightens around Alison-Madueke in UK, £18 Million Property Uncovered." *Premium Times,* August 28, 2017. https://www.premiumtimesng.com/news/headlines/241676-exclusive-noose-tightens-around-alison-madueke-uk-18-million-property-uncovered.html.
e. Economic and Financial Crimes Commission. 2017. "Court Orders Final Forfeiture of Diezani's $37.5m Banana Island Property." Press Release, August 7, 2017. https://efccnigeria.org/efcc/news/2703-court-orders-final-forfeiture-of-diezani-s-37-5m-banana-island-property.
f. Tony Orilade and Aishah Gambari, "Diezani Alison-Madueke: What an Appetite!" Economic and Financial Crimes Commission. https://efccnigeria.org/efcc/news/2706-diezani-alison-madueke-what-an-appetite.
g. DOJ, "Seeks to Recover over $100 Million," July 14, 2017.
h. Williams Clowes. 2020. "Former Enron Unit Battling U.S. and Nigerian Governments over $80-Million Yacht." Bloomberg, July 3, 2020. https://www.latimes.com/business/story/2020-07-03/enron-legacy-returns-in-battle-over-80-million-yacht.

For a freezing order to be enforceable against the assets belonging to politically exposed persons (PEPs) in foreign countries, legislation in Switzerland (box 5.3) and Canada requires the fulfillment of a number of conditions, including the following:

- Loss of power by the foreign government
- Notoriously high corruption levels in the country
- Assets likely to have been acquired by corruption, criminal mismanagement, or other felonies
- Collapse of the judicial system
- Country's inability to satisfy MLA requirements
- Safeguarding of national interests (in the case of Switzerland)[9]
- Internal turmoil and uncertain political situation in the foreign state, as well as international relations interests (in the case of Canada).[10]

5.3.2 Procedural Requirements

Applicable rules of procedure for a seizure or restraint order may be outlined in confiscation laws or may incorporate criminal or civil procedural laws by reference. Common law jurisdictions, for example, require the application to be in writing, while the

[9] Federal Act on the Freezing and the Restitution of Illicit Assets Held by Foreign Politically Exposed Persons ("Foreign Illicit Assets Act" [FIAA] Dec. 18, 2015, CC 196.1, art. 3, para. 2; art. 4, paras. 2–3 [Switz.]), https://www.admin.ch/opc/en/classified-compilation/20131214/index.html.

[10] Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10 (Can.), Orders & Regulations 4(2) (accessed August 18, 2018), http://laws.justice.gc.ca/eng/acts/F-31.6/page-1.html#h-4.

application or motion usually consists of two documents: (a) the seizure warrant or restraint order, and (b) the supporting affidavit. Box 5.2 describes affidavits and the important evidence to include.

In contrast, civil law jurisdictions may simply require a recitation of the facts demonstrated by relevant documents or evidence contained in the case file before the judicial authority. In certain civil law jurisdictions, however, prosecutors or investigative judges may seize or restrain assets based only on a demonstrated need to preserve evidence or avoid dissipation of assets subject to confiscation.

BOX 5.2 Drafting Affidavits

An affidavit is a sworn statement of facts based on the affiant's personal knowledge or belief. Used mainly in common law jurisdictions, it is an important procedural aid that permits the admission of evidence through a written statement that is not subject to cross-examination. Without an affidavit, the applicant or prosecutor must call witnesses (viva voce evidence) who will then be subject to cross-examination; evidence cannot simply be recited or submitted by the prosecutor, as some civil law jurisdictions permit.

In the United States, affidavits are not required when a complaint is filed in a nonconviction based (NCB) confiscation case. A short recitation of the facts giving rise to the need for confiscation in the complaint is sufficient. Affidavits are useful in asset recovery cases for all applications to the court, including search and seizure warrants, restraint orders, and disclosure or production orders, and they may also be permitted for certain types of evidence at trial.

In applications for seizure, restraint, or other investigative techniques, an affidavit is typically sworn to by law enforcement officers who can introduce all relevant material, including hearsay evidence, derived from numerous sources. Practitioners will need to ensure that affidavits are drafted in a manner prescribed by the rules of the court. Many jurisdictions have forms available to guide practitioners. In addition, they should note the following:

- An affidavit, which provides the evidence for the application, must outline how the case meets the evidentiary requirements for granting a restraining order.
- Hearsay evidence is permitted in affidavits and applications for court orders. Where the deponent relies upon information obtained from another person, the affidavit should state the source of the information and why the deponent believes it to be true.
- Any supporting documents relied upon should be annexed to the affidavit.
- Care should be taken to ensure that the facts in the affidavit are correct.
- If the requesting jurisdiction invokes a confidentiality provision in the mutual legal assistance (MLA) request, the requested jurisdiction must gain consent before any information may be submitted to a court in the form of an affidavit.

Provisional measures can be contested or appealed by targets and their families or associates,[11] particularly when substantial property interests are subject to restraint or seizure. The result is that the application process for provisional measures may be converted into a mini trial in which allegations supporting the application are challenged.

In some countries that are often key to asset recovery procedures, given the size of their financial systems (including the United States), practitioners must keep in mind that the process can hit procedural obstacles. Mindful that provisional measures simply require a reasonable belief of certain facts, prosecutors should urge the court to avoid deliberating upon the ultimate merits of the case, which will be determined at trial. This determination is most appropriately left to the court dealing with the related prosecution and confiscation.

Many jurisdictions permit the prosecutor to make applications for provisional measures ex parte, or without notice to the asset holders, on the notion that notice would tip them off and create an opportunity to move or hide assets. In some jurisdictions, prosecutors or investigative magistrates have an absolute right to proceed ex parte if they choose; others may permit such applications only if certain conditions are satisfied, such as showing a risk of dissipation.

If there is any risk that notice of an application for a restraint order will result in the dissipation of the assets or if the assets subject to the restraint are inherently moveable (such as funds in a bank account, jewelry, cash, or vehicles), good practice dictates that the application proceed on an ex parte basis.

An ex parte order may be effective for a limited time, during which the applicant must either (a) provide notice to the asset holder and an opportunity for a hearing, or (b) apply to the court for an extension of time in which to do so. Some jurisdictions require that the asset holder be provided with details of the proceedings, such as a transcript.

5.3.3 Provisional Restraint or Seizure of Assets in Foreign Jurisdictions

There are various avenues to achieve seizure or restraint of assets located in foreign jurisdictions.[12] On receipt of a jurisdiction's request, the authorities in the foreign jurisdiction may enforce the restraint or seizure order that is in place in the requesting jurisdiction.[13] Alternatively, the authorities in the requested jurisdiction may apply for a domestic restraint or seizure order based upon the facts provided by the

[11] In Switzerland, only the formal holder of a bank account (such as the director of a shell company or the trustee of a trust), not the beneficial owner of the assets, can oppose its freezing.

[12] See UNCAC, arts. 54(2)(a) and 54(2)(b), for a list of these mechanisms.

[13] This avenue requires that the requesting jurisdiction have extraterritorial jurisdiction over the assets located in the foreign jurisdiction, which must be listed in the restraint order. Laws permitting direct enforcement in the requested jurisdiction often have provisions that prohibit the requested jurisdiction's courts from considering issues and challenges that are available to the target and his or her family or associates in the pending confiscation proceeding in the requesting jurisdiction. Such provisions prevent the adjudication of similar challenges in two different jurisdictions.

requesting jurisdiction. There may also be informal or administrative avenues to achieve seizure or restraint of assets, as detailed in chapter 8. Boxes 5.3, 5.4, 5.5, and 5.6 provide examples of provisional restraint measures.

BOX 5.3 Swiss Federal Council's Emergency Powers to Freeze Assets Related to the Arab Spring's Fallen Regimes

The Swiss Federal Council, acting in accordance with its constitutional powers, was able to swiftly freeze the assets associated with Hosni Mubarak (the Arab Republic of Egypt) and Zine el Abidine Ben Ali (Tunisia), among others (Cissé et al. 2013). The Federal Constitution of the Swiss Federation empowers the Federal Council to issue ordinances and rulings to safeguard the interests of the country, although the ordinances can be for a limited duration only.[a]

Assets Held in Switzerland by Former Egyptian President Hosni Mubarak

Freezing order: Following Mubarak's resignation in 2011, and after weeks of mass protests, the Federal Council ordered the freezing of any assets in Switzerland belonging to Egypt's former president and parties close to him. The freezing ordinance had an immediate effect and covered the sale or disposal of any assets, including real estate.[b] The ordinance was initially valid for three years and was extended until 2017.

Current status: Initially the amount of frozen assets totaled approximately US$700 million. However, following a number of reconciliation agreements, acquittals, and decisions by the Egyptian authorities to stop criminal proceedings in notorious cases, the amount was eventually reduced to Sw F 430 million. In December 2017, almost seven years after the initial ordinance, the Federal Council lifted the freeze, realizing that the cooperation with the Egyptian authorities did not result in the expected outcome.[c] Nonetheless, this decision did not result in the release of the assets, and they remain sequestered in Switzerland for the purpose of ongoing criminal proceedings in which the Swiss authorities will have to determine whether their origin is illicit.

Assets Held in Switzerland by Former Tunisian President Ben Ali

Freezing order: Following Ben Ali's flight from Tunisia, the Federal Council decided in January 2011 to take necessary measures to avoid the risk of embezzlement of state assets and their transfer abroad. It issued a three-year freezing ordinance with an immediate effect on any assets that might have been held in Switzerland by Ben Ali and his associates. The Council also banned the sale and disposal of real estate owned by these individuals.[d]

(continued next page)

BOX 5.3 Swiss Federal Council's Emergency Powers to Freeze Assets Related to the Arab Spring's Fallen Regimes *(Continued)*

Current status: In total, Sw F 60 million of assets remain frozen pursuant to the ordinance and its subsequent extensions until 2021.[e] According to the Federal Council, since 2011, the Tunisian authorities have expressed their willingness to cooperate, although neither confiscations nor settlements have taken place. The Federal Council has extended the freeze to assist Tunisia in its efforts for the return of assets.

Enactment of the Federal Act on the Freezing and Restitution of Foreign Illicit Assets

Switzerland responded to the challenges associated with the Arab Spring and relevant asset recovery issues by adopting the Federal Act on the Freezing and Restitution of Illicit Assets (the "Foreign Illicit Assets Act," or FIAA), which came into force on July 1, 2016.[f] The FIAA governs the freezing, confiscation, and restitution of assets of politically exposed persons (PEPs) or their close associates in cases where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement, or other felonies.[g]

The Federal Council may order the freezing of assets of PEPs in Switzerland for the purposes of mutual legal assistance (MLA) (FIAA, art. 3) or for confiscation if MLA proceedings fail (FIAA, art. 4), provided that the conditions specifically mentioned in the law are met. (See chapter 5, section 5.3.1, on evidentiary requirements.)

The FIAA (art. 6) also governs the duration of freezes and extensions to them. It is possible to extend a freeze by one year if the state of origin has expressed its willingness to cooperate within the MLA framework. A freeze can be extended on this basis through annual renewals for a maximum of 10 years. For example, the recent extension in the Ben Ali case was granted on the basis of this provision.[h]

a. Federal Constitution of the Swiss Federation of April 18, 1999, SR 101, art. 184 (on "Foreign Relations"), para. 3 (accessed June 18, 2020), https://www.admin.ch/opc/en/classified-compilation/19995395/index.html.
b. Swiss Federal Council. 2011. "Federal Council Orders Freezing of Any Assets of Egypt's Former President Hosni Mubarak in Switzerland." February 11, 2011 (accessed April 18, 2020). https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-37632.html.
c. Swiss Federal Council. 2017. "Federal Council Extends the Freeze on Tunisian and Ukrainian Assets and Abrogates the Freeze on Egyptian Assets." December 20, 2017 (accessed April 18, 2020). https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-69322.html.
d. Swiss Federal Council. 2011. "Federal Council Orders Freeze of Any Assets Held by Former Tunisian President Ben Ali in Switzerland." January 19, 2011 (accessed April 18, 2020). https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-37285.html.
e. Swiss Federal Council. 2019. "Federal Council Extends Freeze on Assets Relating to Tunisia and Ukraine." December 13, 2019 (accessed June 18, 2020). https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-77509.html.
f. See the Foreign Illicit Assets Act (FIAA) Dec. 18, 2015, CC 196.1, art. 3, para. 2; art. 4, paras. 2–3 (Switz.), https://www.admin.ch/opc/en/classified-compilation/20131214/index.html. Pursuant to similar legislation adopted by Canada—the Freezing Assets of Corrupt Foreign Officials Act , S.C. 2011, c. 10 (Can.), Orders & Regulations 4(2), http://laws.justice.gc.ca/eng/acts/F-31.6/page-1.html#h-4)—the Canadian government issued regulations regarding the freezing of assets in Tunisia and Ukraine.
g. FIAA (Switz.), art. 1, "Purpose."
h. Swiss Federal Council, "Freeze of Any Assets Held by Former Tunisian President," January 19, 2011.

BOX 5.4 Nigeria: Freezing of Assets in the OPL 245 Case

Background: Royal Dutch Shell and Eni S.p.A. were suspected to have been involved in a bribery scheme to acquire Nigeria's Oil Prospecting License (OPL) 245 oil block. Approximately US$1.1 billion was allegedly paid by the oil companies to Malabu Oil and Gas, a company beneficially owned by Dan Etete, Nigeria's former minister of petroleum. (For a discussion of the red flags in this case, see chapter 4, box 4.4.)

Freezing orders: As part of their investigation into Rome-based Eni, Italian prosecutors in May 2014 asked the United Kingdom's Crown Prosecution Service to freeze US$85 million in assets belonging to Malabu Oil and Gas. In response, London's Southwark Crown Court granted an order to freeze these assets. In December 2015, Justice Edis of Southwark Crown Court turned down Malabu's application to discharge the freezing order.[a]

Also at the request of Italian prosecutors, US$110.5 million that had been paid to middleman Emeka Obi was frozen in a 2013 UK Commercial Court case.[b] A significant part of this sum was in Switzerland and believed to be kickbacks to Eni executives following the Malabu deal.

Outcomes and current status: In September 2018, a Milanese court, in a fast-track trial, sentenced Emeka Obi and an Italian middleman to four years in jail and seized more than US$120 million from them.[c] The main trial against Eni and Shell is still under way in Milan.

In January 2017, Justice John Tsoho of the Nigerian Federal High Court in Abuja gave an order ceding control of the oil block to the federal government of Nigeria, pending investigation and prosecution of suspects.[d] This interim forfeiture was lifted in March 2017 by a Nigerian court, returning ownership of the oil block to Shell's and Eni's Nigerian subsidiaries.

a. Global Witness. 2015. "Court Refuses to Unfreeze Funds from 'Smash and Grab' Raid on Nigerian Oil Block." Press Release, December 15, 2015. https://www.globalwitness.org/en/press-releases/court-refuses-unfreeze-funds-smash-and-grab-raid-nigerian-oil-block/.
b. Energy Venture Partners Ltd. v. Malabu Oil & Gas Ltd., Queens Bench Division before Lady Justice Gloster (July 17, 2013) EWHC 2118 (Comm).
c. Ben Chapman. 2018. "Two Middlemen Convicted of Corruption over Shell and Eni Nigerian Oil Field Deal." *Independent,* September 21, 2018 (accessed May 7, 2020). https://www.independent.co.uk/news/business/news/shell-eni-corruption-trial-two-men-convicted-emeka-obi-di-nardo-a8551436.html.
d. Economic and Financial Crimes Commission, "Court Orders Forfeiture of Malabu Oil Block." https://efccnigeria.org/efcc/news/2287-court-orders-forfeiture-of-malabu-oil-block.

BOX 5.5 Brazil: Freezing of *Lava Jato* Assets in Switzerland

In Brazil's *Lava Jato* (Car Wash) case, a major corruption scandal, Brazilian authorities cooperated internationally with several countries to recover assets.[a] Among them, Switzerland returned US$120 million to Brazil in March 2015. The following March, Swiss authorities announced plans to release another US$70 million. In all, US$800 million connected to the case has been frozen in Switzerland.[b]

The beneficial owners of the Swiss accounts (for the most part held by domiciliary companies)[c] were senior executives of Petróleo Brasileiro (Petrobras)—a mixed capital company under control of the Federal Government of Brazil—and their associates, including financial intermediaries and Brazilian politicians.[d]

a. See further discussions of the case in chapter 2, boxes 2.4 and 2.11; chapter 3, box 3.1; and chapter 4, box 4.2.
b. Brazilian Federal Prosecution Service, "A Lava Jato em números no Paraná" [Car Wash, by the Numbers, in Paraná State], last updated March 19, 2020, http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.
c. A domiciliary company is a corporation, trust, or foundation that does not conduct any commercial or manufacturing business in the country where its registered office is located.
d. Swiss Federal Council. 2016. "Petrobras Affair: Further USD 70 million of Frozen Assets to be Unblocked and Returned to Brazil." March 17, 2016. https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-61034.html.

BOX 5.6 Ukraine: Freezing Orders Imposed on Viktor Yanukovych's Assets

Background: In January 2019, former Ukrainian president Viktor Yanukovych was found guilty of treason and was sentenced in absentia to 13 years' imprisonment.[a] Yanukovych and his associates are also under investigation in Ukraine and Switzerland for corruption, abuse of office, and money laundering.[b] According to Ukraine's chief prosecutor, Yanukovych had stolen up to US$100 billion of public funds.[c] Documents discovered after his fall[d] suggest that he and his associates used a complex corporate ownership network of shell companies, trusts, and foundations to thoroughly obscure the beneficial ownership of assets and entities.

In response to the Ukrainian crisis, a few countries imposed freezing orders on Yanukovych's and his associates' assets, including Canada, the European Union, Switzerland, and the United States, among others. However, the amounts of assets frozen were not made public in all cases.

Freezing orders by the European Union: On March 5, 2014, the European Union froze the funds and economic resources belonging to Yanukovych for one year, on the grounds that he was a person subject to pretrial investigations in Ukraine in connection with the embezzlement of state funds and their illegal transfer outside Ukraine.[e] The freezing order also extended to 17 of his closest allies, including his two sons. On April 14, 2014, the initial freezing order was extended to a total of 22 officials.[f] On March 5, 2015, the freezing order was extended by one year, listing Yanukovych and his associates on the grounds that

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they remained subject to criminal proceedings by the Ukrainian authorities regarding the misappropriation of public funds or assets.[g]

Yanukovych and his son Oleksandr challenged the freezing orders before the European General Court, which confirmed the freezing of the funds from March 2015 to March 2016—a judgment later confirmed by the Court of Justice of the European Union (CJEU).[h] Other individuals listed in the orders have also challenged the freezing orders before the CJEU, and as a result, the sanctions against some of them have been lifted.[i] Among the main reasons for the lifting of the sanctions has been the lack of effective investigations in Ukraine and challenges encountered in the context of the cooperation of Ukrainian investigators with foreign counterparts.

Ever since, the freezing of Yanukovych's and his associates' assets has been repeatedly imposed, and the criteria for their inclusion in the list have been amended. In 2019, the freezing was extended until March 6, 2020, to only 12 persons including Yanukovych.[j] In March 2020, the order was extended for one more year and is now applicable to a further reduced list of 10 persons only.[k]

Freezing orders in Switzerland: In the context of the Ukrainian asset recovery case, the Swiss Federal Council, complying with a mutual legal assistance (MLA) request from Ukraine's Office of the Prosecutor General, announced in February 2014 the freezing of Yanukovych's assets up to the amount of Sw F 70 million. The freezing order was extended three times, with the last extension being granted in December 2019 for an additional year.[l] The Prosecutor General's Office also mandated in 2014 that the Basel Institute on Governance's International Centre for Asset Recovery (ICAR) assist with tracing and recovering assets stolen by Yanukovych and his associates.[m]

Blocking order in the United States: On March 6, 2014, US President Barack Obama signed Executive Order 13660, for blocking property within the United States of persons in Ukraine who, among other actions, engaged in misappropriation of Ukrainian state assets.[n]

Freezing regulations in Canada: At Ukraine's request, Canada also adopted regulations, on the basis of the Freezing Assets of Corrupt Foreign Officials Act (2011), to freeze the property of persons who have misappropriated state funds or obtained property inappropriately as the result of their office or their family, business, or personal connections.[o]

a. Andrew Roth. 2019. "Ukraine's Ex-President Viktor Yanukovych Found Guilty of Treason." *Guardian,* January 25, 2019. https://www.theguardian.com/world/2019/jan/25/ukraine-ex-president-viktor-yanukovych-found-guilty-of-treason.
b. Andrew E. Kramer. 2019. "Ukraine's Ex-President Is Convicted of Treason," *New York Times,* January 24, 2019. https://www.nytimes.com/2019/01/24/world/europe/viktor-yanukovych-russia-ukraine-treason.html.
c. Guy Faulconbridge, Anna Dabrowska, and Stephen Grey. 2014. "Toppled 'Mafia' President Cost Ukraine up to $100 Billion, Prosecutor Says." Reuters, April 30, 2014. https://www.reuters.com/article/us-ukraine-crisis-yanukovich/toppled-mafia-president-cost-ukraine-up-to-100-billion-prosecutor-says-idUSBREA3T0K820140430.
d. The recovered documents are posted on the YanukovychLeaks National Project website at https://yanukovychleaks.org/en/.
e. Council Regulation (EU) No. 208/2014 of 5 March 2014 Concerning Restrictive Measures Directed Against Certain Persons, Entities and Bodies in View of the Situation in Ukraine (OJ L 66, 06.03.2014), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014R0208.

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BOX 5.6 Ukraine: Freezing Orders Imposed on Viktor Yanukovych's Assets *(Continued)*

f. Council Implementing Regulation (EU) No. 381/2014 of 14 April 2014 Implementing Regulation (EU) No. 208/2014 Concerning Restrictive Measures Directed Against Certain Persons, Entities and Bodies in View of the Situation in Ukraine (OJ L 111, 15.04.2014), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0381.
g. Council Implementing Regulation (EU) 2015/357 of 5 March 2015 Implementing Regulation (EU) No. 208/2014 Concerning Restrictive Measures Directed Against Certain Persons, Entities and Bodies in View of the Situation in Ukraine (OJ L 62, 06.03.2015), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015R0357.
h. Court of Justice of the European Union. 2017. "The Court of Justice Confirms the Freezing of Funds of Mr Viktor Yanukovych, Former President of Ukraine, and His Son Oleksandr for the Period from 6 March 2015 until 6 March 2016." Press Release no. 108/17, October 19, 2017. https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-10/cp170108en.pdf.
i. AntAC (Anti-Corruption Action Centre). 2019. "Five Years of EU Sanctions against Ukrainian Kleptocrats: Tango that Needs Two." April 3, 2019. https://antac.org.ua/en/publications/five-years-of-eu-sanctions-against-ukrainian-kleptocrats-tango-that-needs-two/.
j. Council of the European Union. 2019. "Misappropriation of Ukrainian State Funds: Council Prolongs EU Sanctions for One Year." Press Release, March 4, 2019. https://www.consilium.europa.eu/en/press/press-releases/2019/03/04/misappropriation-of-ukrainian-state-funds-council-prolongs-eu-sanctions-for-one-year/.
k. Council of the European Union. 2020. "Misappropriation of Ukrainian State Funds: Council Extends Asset Freezes." Press Release, March 5, 2020. https://www.consilium.europa.eu/en/press/press-releases/2020/03/05/misappropriation-of-ukrainian-state-funds-council-extends-asset-freezes/.
l. Federal Council of Switzerland. 2019. "Federal Council Extends Freeze on Assets Relating to Tunisia and Ukraine." Press Release, December 13, 2019. https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-77509.html.
m. Basel Institute on Governance. 2014. "ICAR Mandated to Assist Ukraine in Recovering Yanukovych Assets." News, August 12, 2014. https://www.baselgovernance.org/news/icar-mandated-assist-ukraine-recovering-yanukovych-assets.
n. Exec. Order No. 13660, 79 Fed. Reg. 13491 (March 6, 2014), sec. 1(i)(C). https://www.federalregister.gov/documents/2014/03/10/2014-05323/blocking-property-of-certain-persons-contributing-to-the-situation-in-ukraine.
o. Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44 (March 26, 2014), http://canadagazette.gc.ca/rp-pr/p2/2014/2014-03-26/html/sor-dors44-eng.html.

5.4 Pre-Restraint or Pre-Seizure Planning

Proper planning is essential for effective restraint or seizure. Outlined below are a number of important considerations for practitioners.

5.4.1 Identification of Assets Subject to Provisional Measures

The assets subject to provisional measures are those that can or are likely to satisfy the eventual confiscation order. Applications for provisional measures should be carefully crafted to correspond to the confiscation sanction or sanctions (as more than one can be pursued) that might operate against restrained or seized assets.

Ensuring that the appropriate assets are subject to provisional measures will depend upon the confiscation system in place (that is, whether the system is property based or value based). For example, in jurisdictions where a property-based confiscation order is the only available sanction against a target, no purpose would be served in seizing a house that cannot be characterized as the proceeds or instrumentalities of corruption. In contrast, in jurisdictions where value-based confiscation orders or substitute asset provisions are available, there may be good reason to seize such an asset if there is some evidence that the target has derived a benefit from the alleged offense.

In cases where rebuttable presumptions or reverse onus provisions apply, the scope of the order can be expanded to include the assets that would be confiscated by operation of the presumption. For example, if the offense invokes a presumption that some or all

assets are proceeds of crime, these assets can be subject to provisional measures. (For a discussion on rebuttable presumptions, see chapter 7, section 7.4.1.)

Assets Controlled, Held, or Gifted by a Target

Although some jurisdictions permit the seizure of assets without consideration of the owner's or holder's identity, other jurisdictions—particularly value-based systems—limit confiscation to assets "owned" by the target. A strict interpretation of ownership can be problematic, especially given that corrupt officials are likely to hold assets in ways that disguise ownership. For example, assets might be

- Owned by a family member or associate of the target and held by them for the benefit of the target;
- Owned by a corporate entity or trust that is owned or indirectly controlled by the target; or
- Gifted by the target to a family member, associate, or company.

The capacity to reach corporate assets controlled by the target—and to include, among the seizable assets, those in the hands of third parties—is particularly important for a provisional measures order to be effective. Fortunately, most jurisdictions broadly define the term "ownership" to include assets that are effectively controlled, held, or gifted by the target. Such laws go beyond what the person might own and include assets held by a trust, corporation, or individual that is controlled by the target.

Some jurisdictions use other procedural aids, such as presumptions, that effectively shift the burden of proving the ownership to a third party.[14] These provisions assist with the restraint or seizure of assets that a target has sold to a third party for less than market value or under simulated legal transactions (for example, payment of professional fees or debts that do not exist). Other jurisdictions permit only the restraint of assets that are held by the target, defining "held" broadly to include ownership and assets owned by others in which the target holds a beneficial interest.

As for assets that are gifted, some jurisdictions permit the restraint or seizure of assets that have been gifted within a reasonable time, such as five or six years.[15] These provisions are similar to the "clawback" provisions used to recover assets disposed of by a person or entity in the period leading up to their bankruptcy.

In linking a target to an asset or account held in the name of an associate, close relative, or company, it is helpful to look into the transactional activity of the account and consider a number of factors, including the following:

[14] In Colombia, if assets have been transferred or sold to a third party, they can be restrained; the third party then has the burden of proving that it is not involved with the criminal enterprise.

[15] Colombia permits the confiscation of gifted items at any time (Law 793.02). In the United Kingdom, legislation permits going beyond the six-year period if the sset can be linked to the offense.

- Amount paid for the asset (market value), including whether, for example, the mortgage responsibility was transferred with the title
- Source of funds used to purchase the asset
- Beneficiaries of expenses and outgoings associated with the asset
- Capacity or resources of the owner of the asset to purchase or maintain the asset
- The person occupying, possessing, or controlling the asset.

These questions can lead to the accumulation of evidence, circumstantial or otherwise, that will permit a court to infer that assets, although nominally owned by a third party, are actually beneficially owned or controlled by the target and therefore (if the law permits) subject to restraint or seizure and eventual confiscation.

Partial Interests in Assets

A target often holds a partial interest or share of an asset, business entity, or investment. Unless it is alleged that the remaining interests are beneficially owned or controlled by the target, it is important to ensure that restraint is limited to the target's interest in the asset (as further discussed in chapter 5, section 5.8, on third-party interests).

5.4.2 Asset Management Considerations

In addition to determining which assets are subject to provisional measures, it is essential to consider any asset management requirements that may be generated by the proposed restraint or seizure (as discussed in chapter 6 on asset management). These requirements will involve the *investigation team* (including any investigators specifically responsible for tracing the assets) and the *prosecution team* (including the prosecutor responsible for obtaining the order).

When it is determined that a restraint or seizure will take place, the team should consider involving the agency responsible for asset management (if one exists). The manager can provide valuable advice on whether assets should be restrained or seized and the particular powers and conditions that the order should include to facilitate the management of the asset. The asset recovery office also can provide invaluable insight. The early involvement of the manager will enable consideration of any logistical arrangements needed to achieve the physical control of the assets.

A seizure or restraint order may include bank accounts, share certificates, cash, and other intangible assets that hold value. It is thus necessary to undertake some form of cost-benefit analysis for assets that will require management. Asset management is an expensive activity that could cost more than the value of the assets being managed. In other words, just because assets *can* be restrained or seized does not necessarily mean that they *should* be.

As a general rule, assets should not be seized or restrained if the likely costs of maintaining, storing, or managing them will exceed, or substantially diminish, the return on confiscation. Some jurisdictions have set thresholds to avoid the restraint or seizure of low-value assets; they may even refuse to restrain or seize certain types of assets (such as livestock).

Others may appoint a depository holder, escrow agent, or custodian for assets that are too risky or expensive to administer, or they may permit the seizure and sale of certain items.

This general rule should not be applied inflexibly. There may be reasons in a particular case where seizure or restraint may be in the public interest, such as in the case of an abandoned house used for illegal activities. Likewise, even if the asset has value, there may be reasons for restraining but permitting the continued use of it—for example, if it is the family home and its contents or a car.[16] Clear policies regarding these matters should be developed and communicated to practitioners and asset managers.[17]

Another consideration in the planning stage is whether the asset can be preserved *without* requiring management services, such as by registering a lien on the real property in the public records. Box 5.7 shows how planning can result in small changes to a proposed order that eliminate the need to appoint an asset manager, with consequent savings of expenditure, complexity, and administrative work—and without much loss in the value of the asset.

BOX 5.7 A Hypothetical Example of Pre-Restraint Planning Decisions

During an investigation into the corrupt activities of a government official, it was determined that asset confiscation proceedings would be brought against the official at, or shortly before, his arrest. The following is a list of the official's assets, accompanied by the considerations and decisions regarding restraint and management.

Large residence occupied by the official and his family. The property was included in the restraint order. The existence of the order was noted on the title to warn prospective purchasers or secured lenders. An asset manager was not appointed. The official and his family were permitted to stay in the home on the condition (as noted in the order) that the official maintained the property and paid applicable charges, taxes, and mortgage payments.

Seaside investment house (rented out by agent). Although the house was initially thought to be an asset that would need to be managed, the investigation discovered that a property agent was managing the property and the profits

[16] See, for example, chapter 5, section 5.6, on exceptions to restraint orders for payment of expenses; and chapter 6, section 6.5.3, on motor vehicles, boats, and airplanes that may pose significant management challenges.

[17] In the United States, the government is prohibited from seizing real property during the course of confiscation proceedings unless the government demonstrates that the property is abandoned or is deteriorating in value. However, prosecutors will place a lis pendens (lien) on the public land records to give notice of the pending proceeding. The lien prevents any future purchaser from obtaining bona fide purchase for value status. In Switzerland, property subject to rapid depreciation or requiring expensive maintenance, as well as securities or other assets with a stock exchange or market price, may be sold immediately in accordance with SR 281.1 Federal Act on Debt Enforcement and Bankruptcy (DEBA) (Apr. 11, 1889 [Switz.]). The proceeds shall be seized (Criminal Code 312.0, Oct. 5, 2007, art. 266, para. 5 [Switz.]).

BOX 5.7 A Hypothetical Example of Pre-Restraint Planning Decisions *(Continued)*

generated from it. It was decided that the asset could be adequately restrained without an asset manager by means of an appropriately drafted order requiring the property agent to pay accumulated rent into a restrained bank account. The order authorized the property agent to pay property outgoings and fees from rental receipts. The existence of the order was noted on the title.

Small plastic fabrication factory (in an industrial unit owned by the official) operated by a company owned by the official. The factory was determined to be of little value: the account balance was low, and the investigators suspected that it was simply used as a vehicle to launder the proceeds of corruption. As a result, restraint was not sought, and the business was left in the official's hands. Within six months of the arrest, the plastic factory business folded.

Industrial unit. The only "tenant" of the unit was discovered to be the factory, which had not been paying rent to the official. This property was included in the restraint order, which was noted on the title. It was determined that the factory could continue to occupy the unit without paying rent, provided that it continue to maintain the buildings and pay applicable charges and taxes. After the plastics factory business folded, the restraint order was updated by providing for the appointment of an asset manager to manage this property. The latter arranged to lease the property, paid the outgoings on the land and buildings from the rent, and invested the profits.

Personal bank accounts and share portfolio. These were all restrained, with the exception of one low-value account into which the official's salary was paid (used by the official to pay living expenses for himself and his family). Because the share portfolio was not large and was held in "blue chip" companies with a stable value, an asset manager was not appointed at the outset. After the asset manager was appointed to control the industrial unit, the share portfolio was also placed under his control.

Three high-value cars. The cars were restrained and placed in the custody of law enforcement authorities (in accordance with the legislation) whose vehicle management procedures and facilities enabled them to look after high-value cars properly.

5.4.3 Partial Control or Limited Restraint

Because some assets may be controlled at different levels, advance consideration needs to be given to the degree of control required to preserve the assets for confiscation. For example, if a target owns a business operated on land also owned by the target, it may be possible to restrain both the land and business premises or the business itself. Such a decision will involve certain considerations. Although the land can be restrained without appointing an asset manager, maintaining buildings and a business is more likely to be costly and will require management.

Businesses, in particular, may require specialized management skills involving marketing and sales, customer service, logistics and supply, asset management, and human resource management; failure in any of these areas can quickly turn a profitable business into an unprofitable one. Nonetheless, the profits generated from the buildings or business may not be subject to confiscation unless they are included in the restraint order. Table 5.1 illustrates some of the advantages and disadvantages of the different options.

5.4.4 Preparation for Taking Physical Possession

Often, the only practical way to preserve assets is to take physical possession of them. Before an asset manager can take physical possession, arrangements must be put in place to ensure the safe seizure of the asset, safe storage facilities, and safe transfer to the

Table 5.1 Considerations in Partial Control or Limited Restraint of an Asset—For Example, a Hotel

Option	Advantages	Disadvantages
1. *Restrain the land only* (leave management of hotel business and buildings to the target, who will pay related fees)	• This option might not require the appointment of an asset manager because the target will be responsible for outgoings and taxes. • If the confiscation is unsuccessful, the risk is low that the authorities will be liable for post-restraint losses of the business.	• The profits from the land and business will not be subject to confiscation. • If the business is being used to launder money, this option allows such activities to continue. In this case, it is advisable to consider Option 3.
2. *Restrain the land and buildings only* (lease or rent land to hotel business)	• Profits from the land in the form of rent will be subject to confiscation. This means lower outgoings. • Management tasks are limited to the land and buildings and may thus not be particularly difficult or onerous.	• An asset manager may still need to be appointed. • Profits from the business will not be subject to confiscation.
3. *Restrain everything* (including land, buildings, and hotel business)	• The full value of the asset, including the hotel business, will be restrained and subject to confiscation.	• This major intervention requires the placement of expert managers to oversee the operation of the business and to ensure that the profits of the business are properly restrained. • If confiscation is unsuccessful, the authority may be liable for postrestraint losses of the business.

Note: "Assets" refers to the hotel business of the target, operated on land also owned by the target.

storage facilities. In some cases, storage can be accomplished relatively easily; for example, jewelry or bullion can be stored safely in a bank's safe deposit box. Other types of property such as valuable artwork, motor vehicles, or yachts require specialized storage facilities that may take time and substantial cost to arrange for. In some jurisdictions, including Belgium, virtual currencies that are seized but pending a decision to sell are stored using an external private company.

Regarding *how* an asset may be seized, the asset manager (or asset management authorities) should coordinate with the practitioners investigating the criminal case. If search warrants are to be executed on the premises where assets will be seized, the best time to take possession will be during the execution of the warrants. When the officers have secured the premises and completed their preliminary search for evidence, the asset manager can easily check the premises for the presence of assets that have been authorized for seizure.[18] The applicant for the seizure order must ensure that the asset manager has the necessary authority to enter the premises because he or she may not be covered under the authorities granted to law enforcement.

When the assets must be seized independently of a criminal investigation (for example, to enforce a seizure order in an NCB confiscation proceeding), it may be necessary to obtain orders authorizing the asset manager to enter the premises to take possession of certain assets. Asset managers should liaise with law enforcement on security issues, and law enforcement officials should be prepared to provide agents for this purpose.

5.5 Timing of Provisional Measures

Proper timing of provisional measures is one of the most challenging parts of asset confiscation work.[19] If the measures are imposed too early, the target may be tipped off and cease activities (making it difficult to gather evidence and identify other accounts, targets, or the typologies used). However, if the measures are imposed after the target is aware of the investigation, the assets will most likely be dissipated or hidden. (Box 5.8 provides an example of a prompt freezing of assets.) When the provisional measures involve a foreign jurisdiction, interaction through informal as well as formal cooperation becomes critical.

As a result, practitioners investigating offenses must coordinate with practitioners seeking recovery of the assets. They must be attentive to the risk of the target's becoming aware of the investigation, and they should remain sufficiently agile to

[18] Sometimes practitioners are empowered by confiscation legislation to seize assets that are covered in the restraining order or that they believe are the proceeds or instrumentalities of crime. This may remove the need for the asset manager to be present during the search; however, procedures for dealing with the assets should be worked out in advance between the asset manager and the practitioners.

[19] Swiss bank accounts owned by former Tunisian president Zine el Abidine Ben Ali were frozen only five days after his fall, while the accounts of former Egyptian president Hosni Mubarak were frozen only half an hour after his overthrow (FDFA 2016, 22), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf.

BOX 5.8 Peru: Proactive Freezing of Vladimiro Montesinos's Assets in Switzerland

The return of the assets held in Swiss accounts by former Peruvian presidential adviser and head of intelligence Vladimiro Montesinos (further discussed in chapter 1, box 1.3) was made possible by the Swiss legal framework on money laundering. Complying with their obligation under the Swiss Money Laundering Act to inform the Money Laundering Reporting Office, banks forwarded information about funds belonging to Montesinos and former Peruvian general Nicolás de Bari Hermoza Ríos.[a] The funds were blocked, and a criminal investigation was initiated. The Peruvian judicial authorities were subsequently informed and submitted a request for legal assistance to Switzerland.

Thanks to the proactive response of the Swiss authorities, the illegal assets deposited in Montesinos's and Hermoza's Swiss accounts were frozen without any delay.

a. Swiss Federal Council. 2002. "Montesinos Case: Switzerland Transfers 77 million US Dollars to Peru." Press Release, August 20, 2002. https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-23237.html.

obtain provisional measures when needed. A target may be tipped off at any of the following stages:

- When certain investigative techniques are used during an investigation, such as searches of residences or businesses, witness interviews, production orders, or the issuance of an MLA request—making it important to ensure that assets are secured before (or simultaneously with) the use of these techniques
- At the time the target is charged with a criminal offense
- At the time an application for confiscation is made.

Bad timing can result in the loss of assets and additional evidence. Practitioners should begin consultations early in an investigation and before taking any overt action against a target. They should develop a strategy that will permit criminal investigation objectives to be achieved together with the restraint or seizure of the target's assets at the optimal time.

Provisional measures are less effective in jurisdictions that permit the implementation of measures only after the target has been charged. Most investigations and tracing efforts can take months, if not years, thereby increasing the opportunity for the target to hide or dissipate assets or to flee the jurisdiction. It is remarkable that some jurisdictions have addressed this issue by permitting provisional measures at any time during an investigation into an offense. The existence of NCB confiscation laws can also

provide an opportunity to restrain or seize property much earlier because the power to do so is not dependent on criminal charges.

In short, the mechanism chosen by practitioners will often depend on an informed view of the remedies available in the jurisdiction holding the assets. In turn, this informed view is often the result of using relevant informal channels to exchange information on the legal frameworks of the requested and requesting jurisdiction.

5.6 Exceptions to Restraint Orders for Payment of Expenses

Some jurisdictions permit exceptions to be made to a restraint order to pay for certain categories of expenses, including the living expenses of the target and his or her dependents, legal expenses arising from the confiscation proceedings and any related criminal prosecution, and the target's bona fide debts and business expenses.

Such exceptions are a controversial topic (Greenberg et al. 2009, 74). Applications for exceptions to the restraint order have the potential to entirely strip the order of its value. On one hand, individuals with assets under restraint orders have an obvious incentive to try to use restrained assets under threat of confiscation rather than unrestrained assets—the existence of which may not be known. On the other hand, due process issues and rights such as the right to counsel must be considered.[20]

In jurisdictions that permit the drawing down of restrained assets, practitioners should ensure that there are no other unrestrained assets with which to pay the expenses.[21] Using investigative techniques (such as production or disclosure orders), practitioners may be able to locate evidence of unrestrained property in or outside the jurisdiction and then subsequently use this information to argue before the court that the exception should not be made because other assets are available. In this regard, statements made in disclosure or examinations under oath that reveal lies or contradictions are useful to prosecutors because they damage the applicant's credibility. (See section 5.7 on these ancillary orders.)

Once it is established that no unrestrained assets are available, the applicant likely must submit a bill of costs for consideration by the court. Some jurisdictions place a statutory cap on the fee that lawyers may charge, often an amount comparable with legal aid rates.[22]

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[20] Jurisdictions that do not allow such exceptions typically rely on the legal aid system or appoint a *curator ad litem*.

[21] In some jurisdictions, it will be the responsibility of the applicant (target) of the restraint order to demonstrate to the court through sworn testimony that he or she has no untainted assets with which to pay expenses.

[22] In Ontario, Canada, legislation permits the claimant to apply to the court for the release of reasonable legal expenses in NCB confiscation cases. The payments are subject to limits in the Civil Remedies Act (S.O. 2001, c. 28 [Can.]). The maximum amount of funds available for legal expenses is calculated as a percentage of the total funds, and there are limits on the legal rates.

5.7 Ancillary Orders

Ancillary orders are subsidiary orders to restraint or seizure orders. They increase the effectiveness of such orders by, for example,

- Requiring a target or persons associated with a target to disclose details of the nature and location of the target's property;
- Placing restrained or seized property under the control of an asset manager (see chapter 6);
- Requiring a target to be examined under oath before an official of a court or other appropriate authority regarding his or her assets; or
- Requiring third parties to produce documents relating to a target's assets.

Disclosure and examination powers can be useful ways to probe complex asset holdings and obtain evidence useful in defending against applications to fund expenses from restrained funds. Prosecutors should not conduct examinations unless they are familiar with all available information on the assets and are in a position to test and challenge evidence given by the examinee. Information from a financial institution, for example, may show that the target is failing to disclose assets and could lead to charges for contempt, failure to comply, or misrepresentation.

To protect the target's privilege or right against self-incrimination, evidence obtained in the context of procedures related to ancillary orders may be used in related criminal proceedings.[23] The examiner should identify potential targets of criminal proceedings and be aware of the ramifications of eliciting incriminating evidence. Close consultation with the criminal prosecutors is necessary.

5.8 Third-Party Interests

Third-party claims will inevitably arise in cases of asset restraint or seizure. Targets will often have complicated holdings that involve third parties with legitimate interests, such as business partners and investors. A third party may have an interest in, or own, an instrumentality that was used in the commission of an offense without being aware of its illegal use. In some cases, the legitimacy of the third party's interest may be at issue. For example, the third party may, on paper, own an asset that the target allegedly controls, or the third-party owner may not be a bona fide purchaser.

Where a third party holds an interest or share in a business or investment venture with the target, practitioners want to ensure that the interest is held bona fide and that it is not beneficially owned or controlled by the target. If there are no such concerns, it is

[23] These protections are usually set out in legislation or enshrined as constitutional rights. Some jurisdictions also require an undertaking by the prosecution that the evidence obtained will not be used in a related criminal proceeding.

important to draft the order in such a way that the third-party interests are not restrained or seized. In such cases, a restraining order can require that the business continue under normal processes but with strict reporting requirements to the court and oversight by the property manager, allowing uninvolved participants to participate in and benefit from the business. Any benefits due to the target will be escrowed while the target is prevented from participating in the running of the business.

In cases where assets are jointly owned by a target and an innocent third-party investor who has used legitimate funds to invest in the property without being complicit in any way with the illegal activity, it may not be appropriate to obtain a restraint order over the whole property. Instead, it may be sufficient to restrain the target's interest in a specific asset. In practice, such an order will block dealings with the whole property because it will be difficult for the third party to deal independently for his or her interest. However, constructing the order in this way will make it clear to the third party that it is not intended to confiscate his or her interest, thus avoiding unnecessary disputes with the third party.

The asset subject to confiscation is often encumbered by a lien or other security held by a person or entity that had no involvement in or knowledge of the illegal use of the asset (for example, a bank that has issued a loan). Where satisfied that a creditor was not complicit in the illegal activity, some jurisdictions have streamlined the process for recognizing such creditors as innocent owners. Some jurisdictions require that a lienholder, like any other party in interest, file a timely claim in the confiscation proceeding; if such a claim is not filed, the lien will be extinguished in the confiscation proceeding. When the confiscation proceedings are complete and the asset is confiscated and sold, the bona fide creditor is paid from the proceeds.

In all cases, practitioners should be open to submissions from third parties and, where permitted, should consent to vary the restraint order or to release assets or instrumentalities held legitimately.[24] However, where no satisfactory or verifiable explanations can be given, or if there is a compelling public interest to seize the property (for example, a house where drug trafficking activities have taken place), third-party claims should be left to the court to determine in accordance with the criteria set out in the legislation for the protection or exclusion of third-party interests from restraint and confiscation. (See chapter 7, section 7.5, for a discussion of third-party interests in the confiscation phase.)[25]

When assets are held by a corporation undergoing insolvency proceedings, practitioners need to be aware of potential third-party claims and should consider the legal steps

[24] When making such releases of property, practitioners should ensure that the third parties execute release documents, holding harmless and waiving any future claims against any governmental officials and their contractors who were involved in the seizure or restraint.

[25] Depending on the laws of the jurisdiction and the circumstances of the case, there may be a risk that the government may have to pay damages if the confiscation order is unsuccessful and if it is determined that a loss was incurred (in the property value or income) and that the property manager should have released the assets to the third party.

required to notify third parties that assets are targeted in an asset recovery investigation. (See also chapter 10, section 10.5, pertaining to insolvency proceedings and creditor's rights.)

5.9 Alternatives to Provisional Measures

Although provisional measures are the preferred mechanism for securing assets, there may be insufficient evidence in some cases to obtain the relevant order. In such cases, practitioners should consider alternative means of achieving the same result.

In many jurisdictions, anti-money laundering legislation—in particular, requirements to report suspicious activities or transactions—can provide these alternative tools to secure assets. FIUs may have administrative authority to restrain funds or refuse their release upon receipt of a suspicious transaction report (STR) or suspicious activity report (SAR) from a financial institution. In general, this power of FIUs is limited in time and should be used to verify the seriousness of the money-laundering suspicion.

Financial institutions may also decide independently to restrain accounts to avoid being implicated in a money-laundering scheme. As a result, if a practitioner advises a financial institution that a corrupt official has been indicted or that suspicious activity has taken place, this may raise sufficient suspicion for the bank to issue an STR or SAR and prompt the FIU or bank to implement one of these alternative means to secure the funds. Practitioners should ensure that this method does not violate legal procedures.

Other possibilities include the production by authorities of a "Mareva by Letter" (further explained in chapter 10, section 10.3.2), which is simply a written warning to a bank that the origin of funds in an account is linked to criminal activity, which may trigger the bank's due diligence and reporting obligations as well as corresponding liability if these funds are transferred. Finally, practitioners may sometimes consider the possibility of proceeding to ancillary sales of assets authorized by courts.

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6. Managing Assets Subject to Confiscation

6.1 Introductory Remarks

Once assets have been secured through provisional measures, authorities must ensure their safety and maintain their value until the assets are eventually confiscated (or released)—a process that often may take years. In some cases, seizure or restraint can proceed without any need for ongoing supervision and management. For example, once an order to restrain or freeze a bank account has been served on the bank, the bank can be relied on to ensure that the account is blocked effectively, because it can be sued for damages or sanctioned by supervisors if funds are transferred from the account—although, in some jurisdictions, practitioners may consider it safer to transfer funds to a state account.

Other types of assets, however, such as sophisticated investment vehicles; exotic or valuable livestock; or luxury real estate, cars, boats, and high-priced wines may require more-targeted approaches to ongoing maintenance, control, and management. It is thus essential for any asset confiscation system to have the flexibility to control and manage such assets *pending* confiscation as well as the ability to realize them and pay the proceeds to the state, the government, or other authorized recipient *after* confiscation.[1]

The starting point for establishing a functional asset management system is an appropriate legislative framework with accompanying regulations that enable asset maintenance and the preservation of the assets' economic value in an efficient, transparent, and flexible manner. The establishment of this system will require, among other things, the allocation of sufficient and appropriate resources. Often this will mean setting up a centralized competent authority to manage and control the assets as well as the appointment of senior personnel with the management and administrative skills to oversee the program, because the existing law enforcement agencies may not be structured to possess the necessary skills and resources.

[1] The importance of managing seized assets has been recognized by the international community; see United Nations Convention against Corruption (UNCAC), art. 31(3). Guidance also has been issued on the topic in G8 Lyon/Roma Group (2005), https://docplayer.net/16960901-G8-best-practices-for-the-administration-of-seized-assets.html; and in the Organization of American States (OAS) "Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses," art. 7, March 13, 1992, General Secretariat, OAS, Washington, DC.

Although some states may have some basic capacity in this area—for example, a law enforcement agency assigned to seize and store property that is evidence of criminal offenses—there are usually some limitations when dealing with the seizure, restraint, and confiscation of a wide range of assets. Without carefully drafted legislation, regulations, and funding for asset management, even the most successful confiscation system may be rendered ineffective by the inability to manage the assets seized. In 2017, the United Nations Office on Drugs and Crime (UNODC) published a report with useful guidance on developing legal and policy frameworks and experiences on the day-to-day management of seized and confiscated assets (UNODC 2017).

Finally, resources are required for all phases of asset confiscation, including tracing, restraining, managing, and liquidating. Asset management can be expensive. It requires mechanisms that ensure predictable, continued, and adequate financing. In some cases, management may be financed from the general budget; in other cases, through a confiscation fund. The issue has been addressed in other publications in the World Bank's Stolen Asset Recovery (StAR) series (Greenberg et al. 2009, 90; World Bank 2009). The international community, through various international and regional organizations, has also supported initiatives to provide technical assistance and funding in the asset recovery process.[2]

6.2 Key Players in Asset Management

As noted, asset confiscation requires the coordinated efforts of individuals and agencies with different skill sets working together, including law enforcement officers, prosecutors, investigating magistrates, financial analysts, and the asset manager or asset management agency. Although one group might have more involvement than another at any given time, it is important that all the groups be aware of what is happening in the case, from beginning to end.

Asset managers must have the skills, resources, and legal authority to

- Offer advice, before seizure, regarding whether seizure and confiscation make economic sense considering the storage and maintenance costs, the equity in the property, and the potential liability for loss or damage
- Preserve the security and value of assets pending confiscation (including the sale of rapidly depreciating assets)
- Where necessary, hire contractors with specialized skills to accomplish management tasks
- Determine whether to hold or liquidate assets whose value may fluctuate

[2] For example, as a result of a European Union (EU)-supported initiative, with the United Nations Interregional Crime and Justice Research Institute (UNICRI) as the implementing organization, Libya has established an asset recovery and management office, taking into consideration the best practices established by several EU countries. Through the same initiative, UNICRI assisted countries in tracing and recovering stolen assets (EC 2018, 8).

- Liquidate assets after confiscation for a fair price
- Distribute the proceeds in accordance with the applicable legislation following payment of all necessary expenses.

Law enforcement officers, prosecutors, or courts may lack these skills, resources, or legal powers. Hence, authorities should seek to obtain or create the needed expertise through one of the following options:

- *Establishing a separate, specialized asset management agency or office.* This specialized agency should be responsible for managing seized or restrained assets, hiring qualified asset managers, conducting pre-restraint planning and analysis, and coordinating postconfiscation realization or liquidation (as in the case, for example, of the French Agency for the Management and Recovery of Seized and Confiscated Assets [AGRASC], discussed in box 6.1).[3]
- *Creating an asset management unit within an existing agency.* A unit of a specific governmental agency may be exclusively assigned to manage assets subject to confiscation.[4] An agency with existing expertise in asset management might consider forming such a unit.[5]

[3] The Financial Action Task Force (FATF) has recommended the establishment of asset management offices (FATF 2012, 9–10 [paras. 26–27]). The Camden Asset Recovery Inter-Agency Network (CARIN), based in The Hague, also recommended at its 2008 Annual General Meeting the creation of such offices. Examples of specialized asset management offices include, among others, (a) the Canadian Seized Property Management Directorate; (b) the Romanian National Agency for the Management of Seized Assets (*Agenția Națională de Administrare a Bunurilor Indisponibilizate*, ANABI), https://anabi.just.ro/en/The+mission+and+the+tasks+of+the+Agency; (c) the Ukrainian Asset Recovery and Management Agency (ARMA), https://arma.gov.ua/en/; (d) the Belgian Central Office for Seizure and Confiscation (COSC), https://ec.europa.eu/avservices/photo/photoByReportage.cfm?sitelang=en&ref=020472; (e) the Asset Management Office of the Dutch Criminal Assets Deprivation Bureau (*Bureau Ontnemingswetgeving Openbaar Ministerie*, BOOM), https://www.prosecutionservice.nl/; (f) the Italian National Agency for Seized and Confiscated Assets (*Agenzia Nazionale per l'Amministrazione e la Destinazione del Beni Sequestrati e Confiscati alla Criminalità Organizzata*, ANSBC), https://www.benisequestraticonfiscati.it/; (g) the Spanish Asset Recovery and Management Office (*Oficina de Recuperacion y Gestión de Activos,* ORGA), https://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/oficina-recuperacion-gestion; (h) the Portuguese Asset Management Office (*Gabinete de Administração de Bens,* GAB), https://igfej.justica.gov.pt/Gabinete-de-Administracao-Bens; (i) the French Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC) (as discussed in box 6.1); (j) the US Marshals Service, which manages various types of assets, https://www.usmarshals.gov/; (k) the Thai Anti-Money Laundering Office (AMLO), http://www.amlo.go.th/index.php/en/about-amlo/vision-and-mission; (l) the Peruvian National Seized Property Commission (*Comisión Nacional de Bienes Incautados*, CONABI), http://www.pcm.gob.pe/etiqueta/comision-nacional-de-bienes-incautados-conabi/; and (m) the Honduran Office for the Administration of Seized Property (*Oficina Administradora de Bienes Incautados,* OABI), https://oabi.gob.hn/.

[4] In Colombia, the National Narcotics Office (DNE) has a specialized asset management unit responsible for managing seized or restrained assets pursuant to Colombia's anti-drug trafficking laws. In the United States, the US Marshal's Service, a generalist law enforcement agency, has been performing asset management functions in the US Asset Forfeiture Program since 1984, https://www.usmarshals.gov/assets/ (accessed September 1, 2018).

[5] An example is the Insolvency and Trustee Service Australia (ITSA), the government office responsible for administering bankruptcy and insolvency laws. In addition to performing its primary roles in administering bankrupt estates and managing the assets of bankrupt individuals or insolvent companies, the office also provides specialized asset management services in support of Australian federal confiscation.

BOX 6.1 France: Agency for the Management and Recovery of Seized and Confiscated Assets

Overview: France's creation of the Agency for the Management and Recovery of Seized and Confiscated Assets (AGRASC) represents an asset recovery effort that can be considered by other countries.[a] AGRASC is an administrative agency under the dual supervision of the Ministries of Justice and Budget, the creation of which was provided for by Law 768/2010 of July 9, 2010, on facilitating the seizure and confiscation in criminal matters. This law has widened the scope of property that may be subject to seizure and confiscation and has introduced special criminal seizure proceedings for the purpose of confiscation.

The agency is led by a magistrate, and its board of directors (also chaired by a magistrate) comprises officials from relevant ministries, including the Ministries of Justice, Interior Affairs, and Budget. France has designated the agency as an office for the recovery of assets pursuant to European Union (EU) Council Decision 2007/845/JHA of December 6, 2007.[b]

Mission: AGRASC's main mission is to assist and guide judges regarding seizures and confiscations. More specifically, the agency is responsible for

- Ensuring the centralized management of seized assets (pending a final judgment) in an account that it has opened at the *Caisse des Dépôts et Consignations* (Deposits and Consignments Fund), a public banking institution
- Carrying out all pretrial sales of seized moveable property when it is has been decided that a property is no longer necessary for proving the truth and is likely to depreciate—in this case, adding the amount resulting from such a sale to the Caisse des Dépôts et Consignations account
- Returning the amount deposited in the Caisse des Dépôts et Consignations account (pursuant to a pretrial sale) to the owner of the property if the latter is acquitted or if the property is not confiscated
- Publicizing confiscations of real estate property
- Managing all assets that require administration as well as disposal or destruction of such assets, once confiscated
- Managing seized assets, including selling and distributing their products to execute an international assistance request or in cooperation with foreign judicial authorities
- Ensuring that creditors or victims are notified before executing any judgment for restitution to and compensation of civil parties from the confiscated property.

(continued next page)

BOX 6.1 France: Agency for the Management and Recovery of Seized and Confiscated Assets *(Continued)*

Funding: AGRASC is mainly financed by the interest on the sums seized and by the proceeds of confiscations ordered by the courts.[c] The agency has managed to be self-financing since 2012, particularly from the interest on the investment in the Caisse des Dépôts et Consignations of sums seized.

a. See the AGRASC website at http://www.justice.gouv.fr/justice-penale-11330/agrasc-12207/.
b. See "Council Decision 2007/845/JHA of 6 December 2007 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" (OJ L 332, 18.12.2007), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007D0845.
c. French Senate. 2017. "Pour que le 'Crime ne Paie Pas': Consolider L'Action de l'AGRASC (Agence de Gestion et de Recouvrement des Avoirs Saisis et Confisqués)" [So that "Crime Does Not Pay": Consolidate the Action of AGRASC (Agency for the Management and Recovery of Seized and Confiscated Assets)]. Information Report No. 421, February 15, 2017 (accessed September 1, 2018). https://www.senat.fr/rap/r16-421/r16-4210.html.

- *Outsourcing asset management.* In jurisdictions where the establishment of an asset management office or the formation of a unit within an existing agency is not an option, the engagement of private, locally available property trustees may be appropriate.[6]

6.3 Powers of the Asset Manager

Asset managers derive their authority from existing laws, rules of court, or judicial rulings, which often include important information-gathering powers to assist them in exercising their duties.

6.3.1 Legal Powers

When a court places an asset management office in control of assets pursuant to a restraint or seizure order, the office (or manager) must be given legal powers to carry

[6] South Africa is an example of a jurisdiction that uses private trustees, or *curators bonis*, to provide asset management services in support of enforcing the Prevention of Organised Crime Act of 1998. This legislation permits the court appointment of people to manage assets seized or restrained under the Act and to dispose of property in satisfaction of confiscation orders. The Asset Forfeiture Unit of the South African National Prosecuting Authority created a manual to guide persons appointed as *curators bonis* under the Act. In Belgium and France, the management of complex assets may be assigned to court-appointed asset managers. Similarly, in Italy, court-appointed asset managers are assigned to manage assets that will be reused for social purposes under the country's anti-mafia legislation. Private sector entities are also used to provide sale, transfer, and value assessment services, among others (Working Group on Asset Recovery 2017, 57–59, https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2017-August-24-25/V1705952e.pdf). The remuneration and expenses of these specialized practitioners is often an issue that needs to be addressed in advance, as further discussed in section 6.9.

out the requisite functions. Typically, these powers will be granted through confiscation laws,[7] asset management laws, anti-money laundering laws, and rules of the court. These powers should include the following:

- Authority to transfer or assign the management of assets to a competent individual or entity
- Authority to make daily decisions to manage the assets and pay all necessary costs, expenses, and disbursements connected with the restraint or seizure and the management of the assets
- Authority to sell seized or restrained assets that are in the form of shares, securities, or other investments
- Authority to insure the assets under control
- In the case of a business, authority to operate the business, including to employ (or terminate the employment of) people in the business, hire a business manager if required, and make decisions necessary to manage the business prudently
- In the case of assets consisting of shares in a company, authority to exercise voting and other rights linked to those shares as if the asset manager were their registered holder
- Authority to compensate the asset manager and persons involved in asset management, in accordance with either a defined scale or regulation or a court order that is subject to full disclosure and mandatory audit (as also discussed in section 6.9 regarding fees payable to asset managers).[8]

Asset managers are sometimes given powers to deal with depreciating or perishable assets—specifically, the power to conduct an interlocutory sale before the entry into force of a final confiscation order (as discussed further in section 6.5.7 on perishable and depreciating assets). If asset managers are not given authority to deal with perishable assets, or if they are confronted by any other management issue for which no specific guidance or powers are provided in the legislation, they may have to apply to the court that issued the restraint order to seek guidance and authority. However, this process can be time consuming and costly.

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[7] For instance, in the aftermath of the Tunisian revolution, the new government ordained the confiscation of deposed president Zine el Abidine Ben Ali's assets pursuant to a decree (Decree Law No. 2011-13). The decree involved 114 individuals including Ben Ali and his relatives. The seized assets included properties, boats, yachts, stock portfolios, bank accounts, and at least 662 enterprises, totaling approximately US$13 billion in value (Rijkers, Freund, and Nucifora 2014). (For more about the case against Ben Ali and his family, see chapter 2, box 2.6, and chapter 5, box 5.3.) However, the 2011 decree was annulled in 2015, following an appeal from the Ben Ali family. See Tarek Amara. 2015. "Tunisian Court Annuls Confiscation of Ousted President's Assets." Reuters, June 10, 2015. https://www.reuters.com/article/us-tunisia-corruption/tunisian-court-annuls-confiscation-of-ousted-presidents-assets-idUSKBN0OQ19A20150610.

[8] In some jurisdictions, salaries of asset managers are paid from confiscated assets. It is not recommended that the salaries of practitioners responsible for the investigatory or litigation decisions leading to confiscation be paid directly from such funds, because doing so creates the appearance that assets are being seized for monetary reward. (See also chapter 2, section 2.7, on securing support and adequate resources as well as the criticism regarding the United Kingdom's Asset Recovery Incentivization Scheme [ARIS]).

6.3.2 Information-Gathering Powers

Asset confiscation laws often contain information-gathering powers. In many cases, these powers may only be used by law enforcement officers, prosecutors, or investigating magistrates. However, such powers may sometimes be available to asset managers who have been directed to take control of assets of which the exact nature and location are unknown or to enforce value-based money judgments or benefits orders. Information-gathering powers may include production orders, search warrants for documents relevant to tracing assets, obtaining compulsory statements from targets for disclosing assets, and conducting examinations.

Exercising the power to order a target to disclose to the asset manager, in a sworn statement, the nature and location of the assets is a useful tactic that can be employed in both civil and common law jurisdictions[9] within the limits of self-incrimination protection provisions. Even if a target does not disclose the existence or location of a previously unknown asset, the making of such a statement, or even the refusal to make a statement, can be helpful in defending against a target's subsequent applications to have access to restrained assets to pay for legal fees or living expenses.[10] In addition, false declarations or refusals to make any disclosures may often be prosecuted as contempt or failure to comply with the disclosure order. Furthermore, the power to examine under oath a target, people associated with the target, or a target's professional advisers (such as accountants, agents, or property lawyers) can be useful in tracing assets.

6.4 Recording Inventory and Reporting

When an asset manager takes control of restrained assets, it is essential to maintain detailed records of the assets and any transactions involving them. The manager makes a detailed inventory and description of the assets and their condition and provides subsequent updates.[11] These records should be supplemented with photographs or video records that show the condition of the asset upon seizure or restraint. Appraisals should be obtained and included in the records. These records can protect the asset manager and the applicant for the restraint order from subsequent claims that assets were damaged by staff or agents of the asset manager.

Managers should also be careful to record any management issues or defects identified at the time of seizure or restraint (for example, a leaky roof in a warehouse containing goods). Managers should give this information to the court, the prosecutor, or both in order to take the necessary measures and avoid responsibility for preexisting conditions.

[9] Authorities in Brazil and the United Kingdom are able to request such disclosure orders.

[10] These examination powers sometimes infringe the target's right or privilege against self-incrimination. Where this happens, authorities are usually prevented from using any evidence derived from the examination in related criminal proceedings.

[11] Technological support can be essential to maintaining an updated inventory list. Some jurisdictions have introduced computerized tracking systems specifically designed for these purposes.

A reporting component is also important to an effective asset management system. It increases the transparency of asset management activities and may raise awareness among the public about the purpose and achievements of the office. Reports on specific cases should be delivered to the applicant for the restraining order and, if mandated by the legislation, to the court. The inventory and valuation should be annexed to this report. In addition, annual reports on the general activities of the unit and overall statistics may be required.

6.5 Common Types of Assets and Associated Problems

Assets subject to confiscation may include seized cash, bank accounts, and financial instruments; real property; vehicles, boats, and airplanes; businesses; livestock and farms; precious metals, jewelry, and artwork; as well as perishable and depreciating assets. A wide-ranging variety of such assets may be confiscated even in a single case (as illustrated in box 6.2, regarding the confiscation of assets belonging to retired Chinese official Zhou Yongkang). The confiscation of these types of assets may face a number of challenges, discussed in the subsections below.

BOX 6.2 China: Confiscation of US$14.5 Billion in Assets from Zhou Yongkang and Associates

Background: As part of an anticorruption campaign, Chinese authorities alleged that China's retired minister of domestic security Zhou Yongkang was involved in one of the country's biggest corruption scandals. The former minister was charged with abuse of power, bribery, and revealing state secrets, and he was convicted in June 2015 to life imprisonment.[a]

Assets confiscated: By March 2014, Chinese authorities had seized assets worth at least ¥ 90 billion (US$14.5 billion) from his family members and close associates. In particular, bank accounts with deposits totaling ¥ 37 billion were frozen, and domestic and overseas bonds with a combined value of ¥ 51 billion were also seized.[b]

In addition, Chinese authorities confiscated approximately 300 real estate properties, including villas and apartments worth around ¥ 1.7 billion, antiques and paintings worth ¥ 1 billion, and more than 60 vehicles. Seizure also extended to expensive liquor, gold, silver, and cash in local and foreign currencies. Allegedly, most of the seized assets were not in Zhou Yongkang's name and belonged to his relatives, political allies, and staff.[c]

a. Michael Forsythe. 2015. "Zhou Yongkang, Ex-Security Chief in China, Gets Life Sentence for Graft." *New York Times*, June 11, 2015. https://www.nytimes.com/2015/06/12/world/asia/zhou-yongkang-former-security-chief-in-china-gets-life-sentence-for-corruption.html.
b. Benjamin Kang Lim and Ben Blanchard. 2014. "China Seizes $14.5 Billion Assets from Family, Associates of Ex-Security Chief: Sources." Reuters, March 30, 2014. https://www.reuters.com/article/us-china-corruption-zhou/exclusive-china-seizes-14-5-billion-assets-from-family-associates-of-ex-security-chief-sources-idUSBREA2T02S20140330. It is unclear what share of the total was made up of criminal proceeds.
c. Lim and Blanchard, "China Seizes $14.5 Billion," March 30, 2014.

6.5.1 Seized Cash, Bank Accounts, and Financial Instruments

Money is often difficult to trace, but it is usually easier to manage. Seized cash, except cash to be used as evidence, is most often preserved in an interest-bearing account.[12] Similar policies may be in place in jurisdictions that restrain or seize bank accounts.[13]

Financial instruments (such as cashier's checks, money orders, certificates of deposit, stocks, bonds, and brokerage accounts) will also need to be seized, using procedures that preserve or redeem their value. (As for confiscation issues specific to virtual assets, see box 6.3.)

With stocks, bonds, and brokerage accounts, a professional (such as a stockbroker) must be appointed for a valuation of the assets and a determination of how best to preserve their value. In some cases, the professional may require the authority to (a) exercise judgment regarding the decision to hold or liquidate an asset whose value may fluctuate because of market conditions, and (b) have immunity from liability if the decision results in a financial loss.

6.5.2 Real Property (Land)

As an initial matter, courts and law enforcement authorities will want to determine whether (a) it is necessary to seize real property (that is, take it into government possession); (b) to leave it in the custody of its owner, subject to a judicial restraining order with a notice on the land records; or (c) both. In some jurisdictions, the authority seizing an asset can decide whether it should be kept and managed by the owner or by a third party. As a general rule, unless there is ongoing criminal activity, physical seizure of the property is not required.

In jurisdictions with an efficient land ownership system that records ownership and encumbrance details at a central land registry or land titles office,[14] recording a lien or other notice of encumbrance in the public land records is quite simple and will give notice that the land is subject to confiscation proceedings to any potential arm's-length purchaser to whom a target may try to sell the land. In most cases, this lien or notice will be sufficient to prevent the target from transferring the property for value to a purchaser, who may subsequently claim bona fide ownership. If it is considered necessary, the target may be subjected to judicial sanctions for attempting to sell, encumber, or otherwise degrade the value of the property pending confiscation; however, it may be necessary for a court to enter a judicial restraining order.

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[12] The evidentiary value of the seized cash must be considered before any decision is made to deposit the money into a bank. Such actions, without prior notice to interested parties, may lead to claims regarding the intentional spoliation of evidence. For a discussion of US Department of Justice policy requiring the deposit of seized cash, see *United States v. $209,815 in U.S. Currency,* 2015 WL 5970186, *7–8 N.D. Cal. (2015).

[13] In Switzerland, the Swiss Bankers Association and law enforcement agencies have worked together on a system for managing bank accounts subject to confiscation.

[14] Older systems are generally indexed in books accessible to the public, while newer systems may be found electronically indexed and often available through online databases.

BOX 6.3 Some Confiscation Issues Related to Virtual Assets

According to FATF (Financial Action Task Force) Recommendation 15 ("New Technologies"), countries should consider virtual assets as "property," "proceeds," "funds," "funds or other assets," or other "corresponding value" (FATF 2019, 70 [para. 1]). The confiscation of virtual assets can prove technically challenging, requiring law enforcement agencies to use resources and legal instruments that were designed without having these assets in mind (Keatinge, Carlisle, and Keen 2018, 57).

To secure the confiscation of cryptocurrencies such as Bitcoin, law enforcement agencies should consider having cryptocurrency wallets readily available to which they can transfer seized virtual assets during an investigation while they consider whether to put in place insurance coverage policies in the event of loss of seized virtual assets (Keatinge, Carlisle, and Keen 2018, 60).[a] Practitioners should be aware that the volatility of cryptocurrencies' value makes it difficult to conduct interlocutory sales.

Where the virtual asset exchange operates outside the jurisdiction, it may ignore requests to block the funds or to transfer them to the wallet, and law enforcement agencies may need to establish relations with countries to effectuate such requests.[b] Where the assets remain in the original wallet of the criminal, the risk of their transfer remains because the criminal may still have access to the seed phrase or password.[c]

a. See also the discussion of virtual currencies in chapter, 4, section 4.2.5.
b. RBC (RosBiznesConsulting). 2019. "The Ministry of Internal Affairs Will Develop a Mechanism for the Arrest and Confiscation of Cryptocurrencies." Finance News, November 7, 2019 (accessed May 20, 2020). https://www.rbc.ru/finances/07/11/2019/5dc160019a7947c61a5119a3.
c. Lubomir Tassev. 2020. "Tax Agents 'Confiscate' Bitcoin from Criminal but Keep the Coins in His Wallet." Bitcoin.com, *News*, February 7, 2020 (accessed May 20, 2020). https://news.bitcoin.com/tax-agents-confiscate-bitcoin/.

In the absence of complications, land can often be restrained effectively without appointing an asset manager. However, there are several problems, as categorized below.

Charges, taxes, and secured loans. Land is usually the subject of government charges and taxes, and it may be encumbered to banks as security for mortgages or loans. Before any restraining order is entered, the property manager should ascertain whether the equity in the property, after taking all existing encumbrances into account, is sufficient to justify the restraint and eventual confiscation.

Where land is restrained, the order should require the target or other occupant of the land to ensure the current payment of taxes and other debts that have the potential to encumber the land with a lien. If the owner stops paying charges, taxes, and loan

payments, the court should be alerted, and the government may want to ask the court to order an interlocutory sale.[15]

Alternatively, the manager may reach an agreement with the target or other occupant that allows continued occupancy, conditional on the payment of these expenses, and granting the manager the immediate right to take possession and evict the occupants if the conditions are not met. If it is necessary to evict the occupants, the asset manager may seek to lease the asset at a rate that is sufficient to meet expenses or to sell the property and use the proceeds to pay outstanding debts. Ultimately, taxes and liens will usually take priority over any confiscation order.

Finally, to avoid unnecessary litigation with bona fide lienholders, the property manager may want to enter into a prejudgment settlement agreement whereby the lienholder is promised that the lien will be paid from the eventual liquidation of the property and thus should forbear commencing any litigation, such as a foreclosure proceeding, while the matter is pending in the courts.

Expenses, outgoings, and capital improvements. The restraint of land may be complicated by heavy property-related expenses and utility bills, some of which may be urgent. Some types of land require significant and expensive maintenance to retain their value (for example, a golf course or a farm).

The overall value may be maintained by using funds from the target's assets, a designated confiscation fund, or some other contingency fund. If funds are not available or the value cannot be maintained, leasing or selling the land (where permitted, with or without the owner's consent) may be a better option.

6.5.3 Motor Vehicles, Boats, and Airplanes

Vehicles indisputably pose significant management challenges. They are difficult and costly to store and maintain in the period between seizure and confiscation, which may take years. The market value of seized vehicles may be debatable, and their value typically depreciates rapidly.

Frequently, vehicles seized by practitioners are simply left outside in a yard (photo 6.1). This is not an appropriate asset management strategy because it exposes the seizing agency to claims for compensation and substantially reduces the recovery of any sales proceeds if the vehicles are eventually confiscated.

[15] See Supplemental Rule G(6), Federal Rules of Civil Procedure (authorizing federal courts in the United States to order the interlocutory sale of property if, inter alia, the owner has stopped paying taxes or making mortgage payments).

PHOTO 6.1 High-Value Vehicles, Rapidly Depreciating in a Police Yard

Source: © Clive Scott / World Bank.

Proper maintenance of motor vehicles, boats, and airplanes requires a secure, appropriate storage facility and personnel with expertise in maintaining and meeting any regulatory requirements for the type of vehicle seized. Storage and expertise can be expensive, while financing may also need to be provided by the agency responsible for the seizure—for example, a law enforcement agency or asset manager (if pursuant to seizure order) or other source (such as the target or a confiscation fund).

Given these expenses and the depreciating nature of vehicles, it may not be worth seizing vehicles that are old or in poor condition because their realizable value may not cover the cost of maintenance. Where authorized by law, consideration should be given to selling such vehicles while they are relatively new and in good condition (with or without the owner's consent). Because it is often in the interest of all parties to convert a depreciating vehicle into an asset that holds its value or appreciates, it may be possible to make such an agreement by consent of all parties—including the target. In some jurisdictions, the defendant can only refuse the sale under specific circumstances.

One final option would be to permit a target to retain use of the vehicle or other conveyance during the confiscation proceeding and to post a bond guaranteeing the payment of an amount equivalent to its value at the time the case was initiated.

6.5.4 Businesses

Generally, it is not possible to restrain or seize a business effectively without placing it under the control of an asset manager, while the risks and expenses of this course of action may be considerable. Given that a business may hold little value (for example, if it does not own its inventory or the premises on which it operates), an equity valuation of the business should be undertaken before any restraint or seizure is requested to accurately determine its debt load and equity. If such a valuation cannot be made before requesting a restraint or seizure order, it should be done shortly after the provisional action.

For a business with little value or that is pursuing illegitimate purposes, it may be best to include it for confiscation without undertaking the financial risks associated with its continued operation. Instead, closing operations or selling the business seems more appropriate. There is also the possibility that identifying the business as a target for confiscation will damage its goodwill value. One possible way to prevent this is to permit the current manager to continue its operation but under the control of a business manager contracted by the asset manager or appointed by the court.

Pre-restraint planning will be critical to any restraint or seizure of a business. Restraint orders should be made ex parte to avoid the removal of business assets and cash. Individuals with the necessary skills to manage the business should be appointed and available to assume control immediately at the time of restraint.

The asset manager or appointed manager or contractor should take immediate control of bank accounts, accounting systems and records, important business data (such as customer records), valuable stock, and valuable plants and equipment. If the business will continue its operations, all books and accounting records must be made available and should be assessed by the manager. In addition, managers will need to engage with staff and key personnel to prepare themselves for eventual decisions about the reliability of these employees. Removal of staff may prove costly and can result in loss of corporate knowledge, customer dissatisfaction, claims for unfair dismissal, and loss of business; however, retaining staff whose loyalty lies with a target may also be hazardous to the business. Regular reports on the performance of the business should be sent to the prosecution agency responsible for the restraint order. Any problems with the business should be raised immediately.

Finally, the property manager must be alert to issues that arise when the revenue stream for a business involves both licit and illicit conduct and when it is apparent that, without the illicit component, the business would not be viable. In such cases, the property manager may seek judicial authority to close the business.

6.5.5 Livestock and Farms

This category of assets is often a subset of a business: cattle, sheep, or game animals are usually part of an agricultural business, while horses are used for breeding or

racing purposes. The businesses may also be hobby farms. Whatever the form of the business, managing animals can be quite problematic for asset managers.

When these assets are of very high value to certain markets (for example, racehorses can be worth hundreds of thousands or even millions of dollars), practitioners are more inclined to include them in restraint orders. However, maintaining animals can also be very expensive, involving costs for stock feed, veterinary expenses, yard and pasture maintenance, and caretaking staff. Given these expenses and the fact that sufficient revenue streams to fund them are unlikely, some jurisdictions refuse to seize livestock and farms. Others may be authorized to restrain the farm, then seize and sell the livestock (with or without the owner's consent). Again, a bond could be posted if a target or the target's associates wish to continue their business operations during confiscation proceedings.

6.5.6 Precious Metal, Jewels, and Artwork

In addition to ensuring compliance with procedures and safeguards for the inventory of such items, asset managers will need to retain expertise for inspection, verification, and valuation or have such items tested at recognized centers. A secure and appropriate storage facility will need to be arranged or set out in legislation or regulations.[16]

6.5.7 Perishable and Depreciating Assets

This category of assets generally includes

- *Highly perishable assets,* such as a boatload of fresh fish or a consignment of cut flowers that will lose all value if not sold within a few days;
- *Moderately perishable assets,* such as farm animals or a field crop that will lose value if not harvested at an appropriate time, possibly within weeks or months; and
- *Depreciating assets,* such as cars, boats, and electronic equipment that lose 15–30 percent of their value each year.

Confiscation laws may entail provisions that empower an asset manager to sell perishable or rapidly depreciating assets and place the proceeds in an interest-bearing account supervised by either the asset manager or the court. Where such powers are not available or do not apply, it may be possible to request that a court exercise general discretionary powers to make appropriate orders relating to restrained assets. Consent of all parties is preferable, but the court should have authority to enter such orders even if contested.

6.5.8 Assets Located in Foreign Jurisdictions

Assets may be restrained and seized by foreign jurisdictions through informal assistance (for example, through administrative avenues) or pursuant to a mutual

[16] In Azerbaijan, for example, seized diamonds must be secured at a financial institution.

legal assistance (MLA) request (as also discussed in chapter 5, section 5.3.3, and in chapter 8).[17] When a restraint order is registered, its enforcement will be the responsibility of the authorities in the foreign jurisdiction. An asset manager may be appointed by a court in the foreign jurisdiction to achieve this.

Generally, asset managers in both jurisdictions will work together to maintain the assets. At the same time, it is wise to ensure that the asset manager in the requesting jurisdiction has additional powers to help ensure the enforcement of the foreign restraint order and management of the assets. Such powers would not grant the asset manager physical control over the assets in the requested jurisdiction; however, they could permit the asset manager to hire contractors, lawyers, and other agents in the requested jurisdiction to obtain orders from the courts of the requested jurisdiction.

Additional problems may occur when dealing with foreign jurisdictions. The requested jurisdiction may not have the domestic authority or the operational ability to restrain or seize certain types of assets. For example, some jurisdictions refuse to seize live animals. In addition, the requested jurisdiction may not have an asset manager or funds dedicated to asset management. These issues can be resolved through discussions with the requested jurisdiction, although ultimately the requesting jurisdiction may have to provide funds to hire an asset manager in the requested jurisdiction.

6.6 Ongoing Management Issues

6.6.1 Expenses

In optimal circumstances, an asset manager will control a reasonable mix of assets (income-generating, cash, capital, and depreciating assets) so that expenses can be paid from income, thereby maintaining the portfolio's overall value and preserving it pending the outcome of confiscation proceedings. Sometimes, however, no cash or income will be available to fund the preservation or maintenance of assets. In these cases, the asset manager will either need to sell the assets or generate sufficient funds to pay for maintenance—perhaps from the target or from a confiscation or confiscation fund. Finally, public asset-management offices should not be asked to ensure profitability but to maintain the value of seized assets.

[17] It is worth mentioning here that, in 2016, the Swiss authorities seized 25 luxury vehicles in Geneva as part of the investigation into Teodorin Obiang (former vice president of Equatorial Guinea), prompted by a request from the French authorities (a case also discussed in chapter 2, box 2.10, and in chapter 3, box 3.5). According to the Swiss prosecutor's office, all seized cars were sold and the proceeds given to a social program in Obiang's home country. See Laurent Gillieron. 2019. "Geneva Prosecutor Closes Obiang Case, Sells Off 25 Luxury Cars." *Swiss Info* (swissinfo.ch), February 2, 2019. https://www.swissinfo.ch/eng/equatorial-guinea_geneva-prosecutor-closes-obiang-case--sells-off-luxury-cars-/44740962. Such arrangements may be complex and controversial, as noted by Richard Etienne. 2020. "Teodorin Obiang retrouve un de ses bolides confisqués à Genève, Economie" [Teodorin Obiang Finds One of His Cars Confiscated in Geneva]. *Le Temps*, February 25, 2020. https://www.letemps.ch/economie/teodorin-obiang-retrouve-un-bolides-confisques-geneve.

6.6.2 Heavy Debts

In some cases, an asset manager is placed in control of the assets of a target who also has substantial debts. The asset manager may apply to the court for the release or sale of other restrained assets to pay those debts. Creditors often compete with the confiscating authority's case by attempting to collect judgment liens or by initiating bankruptcy proceedings.

In these circumstances, the asset manager should have a good understanding of how the provisions of the confiscation legislation relate to bankruptcy or company liquidation legislation. In some jurisdictions, the bankruptcy or liquidation legislation may take priority when the individual or company is declared bankrupt; the confiscation authority simply joins the queue with other unsecured creditors. In other jurisdictions, confiscation laws are immune from the operation of bankruptcy and company liquidation law—effectively giving the confiscating authority and its decisions priority over the claims of all other creditors.

6.6.3 Living, Legal, and Business Expenses

A court will often give an asset manager responsibility for disbursing funds from restrained assets for the living, legal, and business expenses of a target and his or her dependents (an issue also mentioned in chapter 7, section 7.5 on "Third-Party Interests"). In most cases, the expenses will be determined by law or fixed by the court, although the asset manager may occasionally be involved in determining what is "reasonable" for certain purposes—an assessment that the target can dispute by making an application to the court.

Because the payment of these expenses is frequently disputed before courts, it is important for asset managers to make decisions carefully and to record and document these decisions and any transactions connected with them.

6.6.4 Use of Assets Subject to Confiscation

The use of assets that have been seized but not yet confiscated presents major ethical and economic issues. The primary ethical issue is an obvious conflict of interest. For example, where prosecutors, magistrates, law enforcement officials, or military personnel are permitted to immediately use any vehicle or conveyance seized in the preliminary stages of a case, they may have little incentive to pursue the confiscation proceeding to its conclusion, thus effectively and perpetually depriving the owner of his or her property without a court judgment. In addition, such provisional-use practices create an unwanted incentive for law enforcement to seize assets without necessarily developing the requisite evidentiary showing.

Financially, there are also cost issues, particularly if a court order requires the return of the asset. Because the use of the asset diminishes its value, restitution from the general treasury funds of the jurisdiction will be necessary.

6.7 Consultations

As discussed earlier, asset managers must consult with other practitioners regarding proposed restraint and asset management decisions. Consultation can also be beneficial when a management proposal or decision may affect the value of the restrained assets. Such consultations may provide protection against claims for losses resulting from mismanagement, particularly if these consultations include the target, the practitioner who obtained the restraint order, and any third party with an interest. Advice by all parties consulted should be recorded in writing and considered seriously. Ultimately, however, asset managers have the final decision, subject to the direction of courts.

6.8 Liquidation (Sale) of Assets

When an asset manager is appointed to take control of assets pursuant to a restraint order, that role is usually expressed in terms of preservation, maintenance, and management. In most cases, sale of restrained assets is contemplated only in relation to perishable and depreciating assets or after a confiscation order has been made. In addition, the authority to sell assets varies. In some jurisdictions, asset managers are given the authority under statute, while in others, courts must issue orders conferring realization powers upon those asset managers.

When selling assets pursuant to realization powers, an asset manager will usually have considerable discretion to decide on the process. The most transparent procedures should be used because they will prevent or minimize allegations of mismanagement. For this reason, it is generally best to arrange to sell assets at well-advertised, professionally run public auctions. Occasionally, specialized or exotic types of assets will be restrained. They can be sold using methods such as sales to specialized markets to attract the maximum price. Decisions to sell assets in this way should be the subject of expert advice and well documented. Many jurisdictions accomplish these objectives with online auctions or other website listings of assets for sale with preset minimum bids.

6.9 Fees Payable to Asset Managers

In some jurisdictions, fee structures for the payment to asset managers are clearly defined in the confiscation laws or by reference to some other laws (for example, property trustee or company liquidation laws). Sometimes these fees are deferred to the discretion of courts and are subject to full disclosure and mandatory audit.

Asset confiscation legislation usually envisages that asset managers' fees are deducted from the proceeds of confiscation, either as a fixed percentage or on a fee-for-service basis, perhaps calculated as an hourly rate or in accordance with a fee scale. Because asset managers may be required to manage assets over a lengthy period, it is good practice for managers to prepare regular updates of fees incurred under their appointments

and to provide them to the relevant prosecutors. The accumulation of fees may alert the prosecutors if an order is becoming uneconomical and suggest that other asset management methods, including direct management by government authorities, should be considered.

Under circumstances where an asset manager performs extensive work but fees cannot be deducted (for example, if confiscation proceedings are discontinued or unsuccessful), the confiscating authority must pay the manager's fees. A confiscation fund can be a useful tool to pay for asset management costs. Good practice suggests that these issues be considered and agreed upon in writing by prosecutors, asset managers, and courts at the earliest possible time to avoid misunderstandings and potentially costly disputes at a later stage.

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7. Mechanisms for Confiscation

7.1 Introductory Remarks

An asset confiscation regime is a prerequisite for any jurisdiction that wishes to provide the full panoply of methods for recovering the proceeds of corruption and money laundering. Confiscation involves the permanent deprivation of assets by order of a court or other competent authority.[1] Legal title is acquired by the state or government without compensation to the asset holder.

International instruments and standards emphasize the importance of confiscation systems by requiring, at a minimum, that parties have criminal confiscation systems in place to combat and deter corruption, money laundering, and other serious offenses.[2] Non-conviction based (NCB) confiscation is encouraged in the United Nations Convention against Corruption (UNCAC) and the FATF (Financial Action Task Force) Recommendations (FATF 2019), and it is being adopted more widely as jurisdictions continue to expand their confiscation regimes.[3] (See also box 7.1 on Directive 2014/42/EU, which aims to expand the confiscation regime in European Union [EU] member states.)

The rationale for confiscation is clear: First, corruption and other offenses generating illegal income harm either a state, a government, or private persons who should be compensated. Second, because gaining illegal income is a primary motive behind these crimes, confiscation provides deterrence by removing the possibility of enjoying the spoils. In other words, confiscation sends a message that "crime does not pay."[4] (See also box 7.2 on the historical development of confiscation.)

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[1] United Nations Convention against Corruption (UNCAC), art. 2; United Nations Convention against Transnational Organized Crime (UNTOC), art. 2; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 1.

[2] UNCAC, arts. 2, 31, 54, 55; UNTOC, arts. 2, 6, 12, 13; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, arts. 1, 5; and FATF (2019) Recommendations 4 and 38 on "Confiscation and Provisional Measures" and "Mutual Legal Assistance: Freezing and Confiscation," respectively.

[3] UNCAC, art. 54(1)(c); FATF (2019) Recommendation 4 on "Confiscation and Provisional Measures."

[4] In *Kaley v. United States*, 571 U.S. 320, 323 (2014), the US Supreme Court noted that confiscation serves to punish the wrongdoer, deter future illegality, lessen the economic power of criminal enterprises, compensate victims, improve conditions in crime-damaged communities, and support law enforcement activities such as police training.

BOX 7.1 The EU's 2014 Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime

Directive 2014/42/EU "on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union" aims to amend and expand the existing confiscation regime by providing for ordinary and value-based confiscation for a number of offenses, such as corruption and organized crime.[a] Some aspects of the Directive worth discussing are the following:

- *Broad definition of proceeds of crime.* The Directive adopts a broad definition of proceeds of crime that includes not only the direct proceeds from criminal activities but also all indirect benefits, thus covering any subsequent reinvestment or transformation of direct proceeds. Under the Directive, proceeds may include property that has been transformed or converted into other property or has been intermingled with legitimate assets.[b]
- *Extended confiscation.* The Directive provides for extended confiscation in cases where the property is disproportionate to the lawful income of the convicted person and the court is satisfied that the property in question is derived from criminal conduct.[c]
- *Cases where conviction is not possible.* The Directive has introduced a "limited form of non-conviction-based confiscation" (Fazekas and Nanopoulos 2016) when confiscation is not possible because of the illness or flight of the suspected or accused person. In such cases, member states must take the necessary measures to enable the confiscation of instrumentalities and proceeds where criminal proceedings have been initiated and could have led to a conviction had the person been able to stand trial.[d]
- *Confiscation of assets in possession of third parties.* The Directive provides for the confiscation of property transferred to or acquired by third parties, directly or indirectly through intermediaries that might have committed the offense on their behalf and for their benefit.[e] Under the Directive, confiscation should be possible in cases where third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation.[f] Rights of bona fide third parties should not be prejudiced.[g]
- *Urgent action.* According to article 7, authorities of member states must take the necessary measures, including "urgent action" to preserve property with a view to possible subsequent confiscation.[h] The freezing order shall remain in force only as long as it is necessary to preserve the property.[i]
- *Procedural safeguards.* Member states must take the necessary measures to ensure that the freezing order is communicated to the affected persons[j] and ensure that such persons have the right to an effective remedy.[k]
- *Statistics.* Data sources are scarce on the freezing and confiscation of the proceeds of crime. It is necessary to collect statistical data at a central level on freezing and confiscation of property, asset tracing, and judicial and

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BOX 7.1 The EU's 2014 Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime *(Continued)*

asset-disposal activities.[l] Under article 11, member states shall regularly collect and maintain comprehensive statistics from the relevant authorities, including data on the following:

- The number of freezing orders executed
- The number of confiscation orders executed
- The estimated value of property frozen
- The estimated value of property recovered at the time of confiscation
- The number of requests for freezing orders to be executed in another member state
- The number of requests for confiscation orders to be executed in another member state
- The value or estimated value of the property recovered following execution in another member state.

a. Directive of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union (OJ L 127, 29.04.2014), art. 3. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN.
b. Directive 2014/42/EU, preamble, para. 11; and definition of "proceeds" in art. 1, para. 1.
c. Directive 2014/42/EU, art. 5, para. 1.
d. Directive 2014/42/EU, art. 4, para. 2.
e. Directive 2014/42/EU, preamble, para. 24.
f. Directive 2014/42/EU, art. 6, para. 1.
g. Directive 2014/42/EU, art. 6, para. 2.
h. Directive 2014/42/EU, art. 7, para. 1.
i. Directive 2014/42/EU, art. 8, para. 3.
j. Directive 2014/42/EU, art. 8, para. 2.
k. Directive 2014/42/EU, art. 8, para. 1.
l. Directive 2014/42/EU, preamble, paras. 36–37.

One of the major and notable developments in confiscation-related legislation and practices (box 7.2) is the increased use of rebuttable presumptions. A presumption is an inference of the truth of a proposition or fact drawn from a defined set of circumstances through a process of probable reasoning in the absence of actual certainty.

Presumptions are enormously helpful in confiscation cases involving corrupt public officials when a link between specific instances of illegal conduct and assets owned or controlled by a defendant is almost impossible to show in cases of state capture. Relieving the prosecution of the burden of establishing the illicit source of unexplained wealth gained by an official during years in office greatly enhances the possibility of obtaining a conviction or confiscation judgment.

Another key tool for practitioners is value-based confiscation, by which courts and authorities calculate the value of the benefits derived from a crime and authorize the confiscation of all the defendant's assets up to that amount.

Prosecutors may have multiple confiscation methods available under their domestic regime, and they should try to keep all options available, particularly in cases where challenges to confiscation are extremely likely to arise and where evolving events may eliminate one method. For example, if a prosecution collapses because of inadmissible evidence or the death of the defendant, the existence of a parallel NCB application preserves the opportunity to confiscate. The availability of multiple options may also enable the authorities to use one method to seize or restrain assets and then switch to another method to confiscate.[5]

This chapter addresses specific steps for obtaining a confiscation order and the procedural aids or enhancements that some countries apply. For information on other aspects of confiscation, see chapters 3–6 and 8–9.

BOX 7.2 Historical Background and Recent Developments in Confiscation Laws

The concept of asset confiscation has been around for a long time. Examples of ancient confiscation laws have been found in texts that are thousands of years old. Descended from these ancient precedents, confiscation laws developed as part of both the English common law and early civil law.[a] Beginning with strengthened efforts in the 1980s to combat drug trafficking and organized crime, some jurisdictions implemented both criminal confiscation procedures and a non-conviction based (NCB) confiscation system.

More recently, jurisdictions have increased their efforts to confiscate illegal profits, often motivated by the relatively low levels of recovery so far when compared with the very high profits the criminal economy is estimated to generate. This reevaluation has led to the following broad trends in confiscation legislation:

- Introduction of NCB confiscation provisions
- Development of value-based confiscation
- Lowering of the standards of proof
- Reversal of the burden of proof in some circumstances (such as lifestyle offenses and unexplained wealth orders, as discussed in chapter 3, box 3.11)[b]

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[5] The United States often "seizes" or "restrains" assets using NCB confiscation legislation before an indictment is obtained but switches to criminal confiscation to confiscate these same assets after a conviction is entered: see *United States v. Candelaria-Silva*, 166 F.3d 19, 43 (1st Cir. 1999). A reason for doing this is that the practitioner will often want to seize or restrain before the evidence will support the obtaining of a formal charge. Generally, however, if a conviction is eventually obtained, it is easier at that point to have the confiscation ordered as part of the sentence in the criminal case. Similarly, under Colombia's *extinción de dominio* (objective confiscation) system, the NCB confiscation proceeding may go forward independently and parallel to the criminal case. But if the defendant is convicted, the *de comiso* (criminal) confiscation is often easier to obtain than is completing the NCB process.

BOX 7.2 Historical Background and Recent Developments in Confiscation Laws *(Continued)*

- Increase in the use of rebuttable presumptions (box 7.7)
- Increase in the use of nonjudicial administrative confiscation authority regarding cash and instrumentalities of crime.

a. Italian criminologist Cesare Beccaria (1738–94) wrote about confiscation in his famous 1764 work, "Dei delitti e delle pene" (On Crimes and Punishments): "The confiscation of effects, added to banishment is a greater punishment than banishment alone; there ought then to be some cases, in which, according to the crime, either the whole fortune should be confiscated, or part only, or none at all" (Panzavolta 2017, 27).
b. Switzerland reversed the burden of proof in the case of former Nigerian dictator Sani Abacha and his family, who were required (and ultimately failed) to prove that the frozen funds had been obtained legally (FDFA 2016, 20), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf.

7.2 Confiscation Regimes

Generally, three types of confiscation are commonly used to recover proceeds and instrumentalities of corruption: criminal confiscation; NCB confiscation; and in some jurisdictions, administrative confiscation. Some countries also have hybrid systems that allow civil law remedies (such as lawsuits and sequestration) within criminal proceedings, effectively resulting in confiscation.

7.2.1 Criminal Confiscation

Criminal conviction–based confiscation requires a criminal conviction by trial or a guilty plea by the defendant. Once a conviction is obtained, the court can make a final confiscation order—often as part of the sentence. In some jurisdictions, confiscation is a mandatory order; in others, courts (or a jury) have discretion.[6] Criminal confiscation may be property based, value based, or both (described further in section 7.3).

In some jurisdictions, different standards of proof may be applied in the two phases of a case (that is, during the adjudication of the conviction and during the confiscation proceedings). During the adjudication of the conviction, the prosecutor's primary burden is to convict the defendant for the offense at the required criminal standard of proof—whether "beyond a reasonable doubt" in a common law jurisdiction or "intimate conviction of the truth" in a civil law jurisdiction. This standard of proof must be met to prove the crime before any confiscation can be ordered.

[6] In Cameroon, for example, confiscation is mandatory in some corruption cases: the Cameroon Criminal Code, sec. 184(4), on misappropriation of public funds, states that confiscation "shall be ordered in every case."

Whereas, different standards of proof may apply to confiscation proceedings, burdens, such as establishing a link between the offense and the asset subject to confiscation, may be imposed during the court's confiscation proceedings. In some jurisdictions, this secondary burden may be established on the lower "balance of probabilities" standard of proof, as is often the case in common law jurisdictions. Other jurisdictions apply the same standard of proof for confiscation as for criminal conviction.[7]

Because of the need for a conviction, a few difficulties may arise in using this procedure to confiscate assets when the offender has died, fled the jurisdiction, or is absent for another reason. Some jurisdictions have incorporated trials in absentia or absconding provisions that declare offenders "convicted" for confiscation purposes once it is established that a target has fled the jurisdiction.[8]

7.2.2 NCB Confiscation

NCB confiscation—sometimes referred to as "civil forfeiture"—authorizes the confiscation of assets without the requirement of a conviction.[9] Because it is often a property-based action against the asset itself, not against the person with possession or ownership, NCB confiscation generally simply requires proof that the asset at issue is the proceeds or an instrumentality of crime;[10] it is not linked to the obtaining of a conviction against an individual.[11]

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[7] Most often, this standard is the "intimate conviction of the truth" in civil law jurisdictions.

[8] For example, the UK Proceeds of Crime Act 2002, sec. 28 ("Defendant Neither Convicted Nor Acquitted"), deals with defendants who have absconded before conviction. A confiscation order may be issued against them if two years have elapsed since they absconded (Proceeds of Crime Act 2002, Explanatory Notes [accessed September 22, 2018], http://www.legislation.gov.uk/ukpga/2002/29/notes/division/5/2/4?view=plain).

[9] For examples of jurisdictions that have NCB confiscation, see chapter 1, note 7. Among them, Ireland provides for NCB confiscation in its Proceeds of Crime Act, 1996, and Slovenia in its Confiscation of Assets of Illicit Origin Act (enacted in 2011, in force May 2012). Forms of civil NCB confiscation have also been introduced in Bulgaria (Law on Forfeiture in Favour of the State of Illegally Acquired Property, 2012) as well as in the Slovak Republic. Greece, Latvia, Lithuania, the Netherlands, Romania, and Spain have introduced NCB confiscation in the form of "unexplained wealth" in some limited cases (EC 2016, 13–14).

[10] In Brazil and the Philippines, however, the confiscation system is not purely property-based because the authorities may obtain a personal judgment against an individual, not against the asset. Also, Antigua and Barbuda and Australia apply value-based NCB confiscation provisions in addition to property-based NCB confiscation.

[11] For example, in Germany, the Criminal Code (sec. 76a, "Independent Orders") provides that if a person may not be prosecuted or convicted for reasons of fact for the offense, confiscation may be ordered independently. This provision, among others, applies to various organized crime and terrorist financing offenses. It was introduced following the adoption of the new Act to Reform Criminal Law on Proceeds of Crime, which transposed the EU Directive 2014/42/EU into the German legal system and became effective in July 2017. To impose confiscation, a court does not require evidence of an individually committed criminal offense; instead, if a court is convinced that the source of the specific assets was a criminal offense, confiscation may be ordered (CMS Law-Now. 2017. "Germany: New Law Makes Confiscating Proceeds of Crimes Easier." eAlert, July 11, 2017 [accessed August 5, 2018]. https://www.cms-lawnow.com/ealerts/2017/07/germany-new-law-makes-confiscating-proceeds-of-crimes-easier). The provision was applied for the first time in July 2018, allowing German authorities to confiscate around 77 properties in the German capital that were associated with organized crime, worth a total of US$10.8 million (Ben Knight. 2018. "Berlin Prosecutors Confiscate Lebanese Mafia's Properties." DW.com, July 19, 2018 [accessed September 13, 2018]. https://www.dw.com/en/berlin-prosecutors-confiscate-lebanese-mafias-properties/a-44742961).

This type of confiscation usually occurs in one of two ways. The first is confiscation within the context of criminal proceedings but without the need for a final conviction or finding of guilt.[12] In such situations, NCB confiscation laws are incorporated into existing criminal codes, anti-money laundering laws, or other criminal legislation and are regarded as "criminal" proceedings to which the criminal procedural laws apply. The second is confiscation through an independent statute that introduces a separate proceeding that can occur independently of, or parallel to, related criminal proceedings and is often governed by the rules of civil or administrative procedure (rather than criminal procedure).[13]

In jurisdictions applying civil procedure, a lower "balance of probabilities" or "preponderance of the evidence" standard of proof is required for confiscation—thus easing the prosecution's burden of proving that the property is derived from a crime. So there is still a requirement to prove that a crime occurred and that the property was derived from or used to commit the crime. The state may obtain a forfeiture judgment even when there is insufficient evidence to support a criminal conviction (Brun et al. 2015, xi). This type of confiscation is not available in all jurisdictions. When it exists, the state in its sovereign capacity initiates a court action in accordance with civil procedures (Brun et al. 2015, 4; Cassella 2015). Box 7.3 discusses the filing of civil forfeiture actions brought by the United States in relation to funds misappropriated from 1Malaysia Development Berhad (1MDB).

BOX 7.3 Malaysia: Civil Forfeiture in the Case of 1Malaysia Development Berhad

Background: With the filing of a series of civil forfeiture complaints in 2016 and 2017, the United States sought to recover more than US$1 billion in assets associated with an international conspiracy to launder funds misappropriated from 1Malaysia Development Berhad (1MDB), a state investment fund wholly owned by the government of Malaysia (as also discussed in chapter 2, box 2.7).[a] The fund was created by the government of Malaysia to promote economic development through the establishment of global partnerships and foreign direct investment and to improve the well-being of the Malaysian people. Instead, officials and associates of 1MDB as well as their relatives allegedly diverted approximately US$4.5 billion in funds belonging to 1MDB through a series of complex transactions and fraudulent shell companies with bank accounts in Singapore, Switzerland, Luxembourg, and the United States.[b]

Forfeiture actions: The funds were allegedly laundered through the United States and traced to the conspiracy. The US Department of Justice (DOJ) called this forfeiture action "the largest single action ever brought under the [DOJ] Kleptocracy

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[12] Examples of these jurisdictions include Liechtenstein, Slovenia, Switzerland, and Thailand.

[13] Examples of these jurisdictions include Colombia, South Africa, the United Kingdom, and the United States. "Civil confiscation" or "civil forfeiture" systems would fit into this category.

BOX 7.3 Malaysia: Civil Forfeiture in the Case of 1Malaysia Development Berhad *(Continued)*

Asset Recovery Initiative."[c] In August 2017, the DOJ asked for a stay of the civil forfeiture cases pending the resolution of a related federal criminal investigation.[d]

US assets that were allegedly purchased with diverted 1MDB funds and subject to forfeiture actions included high-end real estate and hotel properties in New York, Los Angeles, and London; a US$35 million jet airplane; a 300-foot luxury yacht; works of art by Vincent Van Gogh, Pablo Picasso, and Claude Monet; a substantial interest in the music publishing rights of EMI Music; the rights in the production of the 2013 film *The Wolf of Wall Street*; shares in tech company Palantir and fitness company Flywheel; gambling expenses at Las Vegas casinos; and over US$27.3 million worth of diamond jewelry.[e]

Forfeiture settlements: In 2019, the DOJ reached a settlement on assets acquired by one of the key accused persons, Low Taek Jho (and his family), estimated to be worth more than US$700 million.[f]

In 2020, the DOJ settled its civil forfeiture case against another defendant, Khadem al-Qubaisi. Under the settlement terms, the Atlantic Property Trust, which oversees the assets at issue, agreed to forfeit assets worth an estimated US$49 million, subject to pending forfeiture claims. Those assets included proceeds from the sale of high-end real estate in Beverly Hills and a luxury penthouse in New York City that were allegedly acquired with funds traceable to misappropriated 1MDB monies.[g]

Added to the previous forfeiture, the 1MDB forfeitures—a recovery totaling more than US$1 billion in assets related to this case—represent one of the largest recoveries under the DOJ's Kleptocracy Asset Recovery Initiative and also the largest civil forfeiture concluded by the DOJ.[h] In October 2020, Goldman Sachs (GS) entered into a deferred prosecution agreement with the US DOJ, requiring GS to pay more than US$2.9 billion as part of a coordinated resolution with criminal and civil authorities in the United States and elsewhere.[i]

a. See DOJ. 2016. "United States Seeks to Recover More than $1 Billion Obtained from Corruption Involving Malaysian Sovereign Wealth Fund." Press Release no. 16-839, July 20, 2016. https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign. However, a confidential report by the Malaysian auditor-general, which was leaked to the *Wall Street Journal* and Sarawak Report (a London-based investigative news site that played a key role in covering this case), estimated that the money unaccounted for from 1MDB could be as much as US$7 billion (SarawakReport. 2016. "1MDB Auditor General's Report." SarawakReport.org, July 14, 2016. http://www.sarawakreport.org/1mdb-report-summary-eng/.) Also see DOJ. 2017. "U.S. Seeks to Recover Approximately $540 Million Obtained from Corruption Involving Malaysian Sovereign Wealth Fund." Press Release no. 17-655, June 15, 2017. https://www.justice.gov/opa/pr/us-seeks-recover-approximately-540-million-obtained-corruption-involving-malaysian-sovereign.
b. DOJ, "U.S. Seeks to Recover Approximately $540 Million," June 15, 2017.
c. DOJ, "United States Seeks to Recover More than $1 Billion," July 20, 2016.
d. Edvard Pettersson. 2017. "Stolen 1MDB Funds Are Focus of U.S. Criminal Investigation." *Bloomberg,* August 10, 2017. https://www.bloomberg.com/news/articles/2017-08-10/stolen-imdb-funds-are-focus-of-u-s-criminal-investigation.
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h. DOJ, "United States Reaches Settlement," May 6, 2020.
i. https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion.

Some jurisdictions pursue NCB confiscation only after criminal proceedings have been exhausted or unsuccessful. In other jurisdictions, a stay of the NCB confiscation proceedings is ordered until the criminal investigation is completed.[14]

NCB confiscation is useful in a variety of contexts, particularly when criminal confiscation is impossible or unavailable, such as when (a) the offender has died, has fled the jurisdiction, or is immune from prosecution;[15] (b) an asset is found and the owner is unknown; or (c) there is either insufficient evidence to seek a criminal conviction or criminal proceedings have resulted in an acquittal.

This type of confiscation may also be useful when the property belongs to a third party or in large and complex cases where a criminal investigation is in progress and there is a need to freeze and confiscate the assets before a formal criminal charge is brought. Many civil law jurisdictions permit a restraint order in such instances, but many common law jurisdictions either do not permit a restraint order or do require that a formal charge be brought within a specified time frame after the restraint order.[16]

NCB confiscation systems are not intended to replace criminal conviction–based confiscation.[17] In cases where it is possible to prosecute and obtain a conviction, the conviction should be obtained, and powerful and relatively economical criminal confiscation should be available to prosecutors. But as a complement to criminal confiscation, jurisdictions should be encouraged to enact NCB confiscation legislation as one of the legal tools that can be key to successful asset recovery—provided it is in accordance with the principles of their legal system. Box 7.4 discusses a few situations where NCB asset recovery is preferable.

7.2.3 Administrative Confiscation

Administrative nonjudicial confiscation can occur without a judicial determination, but depending on the jurisdiction, a court process may be required. It is often used to

[14] Civil rules permitting pretrial discovery (such as depositions of witnesses, interrogatories, and document production or disclosure orders) may interfere with an ongoing criminal investigation.

[15] See, for example, *United States v. $506,069.09 Seized from First Merit Bank*, 664 F. App'x 422 (6th Cir. 2016), in which the government filed a civil forfeiture action against a doctor (Syed Jawed Akhtar-Zaidi), his wife, and an Ohio pain management clinic. The doctor had allegedly prescribed controlled substances outside the scope of his professional practice and without a legitimate purpose. He laundered the tainted proceeds of his drug trafficking activities by commingling them in various accounts in his own name and those of his wife and clinic, then funneling them into various investment and retirement accounts. The government filed an in rem forfeiture action against 13 accounts in his name and also in his wife's and clinic's names at a total value of approximately US$4.8 million in addition to 139 pieces of jewelry valued at more than US$90,000. Upon learning about the investigation, the Zaidis left the United States. The Court of Appeals upheld the District Court's forfeiture judgment.

[16] For a comprehensive list of the situations in which NCB confiscation is considered necessary in the United States, see Rui and Seiber (2015).

[17] Tunisia has finalized a law for nonpenal confiscation of assets. The law is expected to accelerate the government's efforts to seize and recover assets linked to corruption and other forms of serious crime (EC 2018, 8).

BOX 7.4 United Kingdom: Guidance on Asset Recovery Powers for Prosecutors

The UK Attorney General Office, according to its guidance publication, "Asset Recovery Powers for Prosecutors," considers criminal proceedings and investigations to be the most effective way to reduce crime.[a] However, non-conviction based (NCB) asset recovery powers available under the UK Proceeds of Crime Act (2002) may also contribute to fighting crime when

- It is not feasible to secure a conviction;
- A conviction is obtained but a confiscation order has not been made; or
- A relevant authority believes that the public interest will be better served by using those powers rather than by seeking a criminal disposal.

Cases where NCB asset recovery is preferable: The guidance provides a nonexhaustive list of cases in which a conviction cannot be obtained and NCB confiscation legislation might be appropriate:[b]

- The criminal conduct took place abroad, and there are no grounds for extraterritorial jurisdiction.
- There is no identifiable living suspect within the jurisdiction.
- The proceeds of crime, although identifiable, cannot be linked to any suspect of the offense.
- An investigation cannot provide any evidence.
- The evidence is not capable of securing a conviction.
- The prosecution did not result in a conviction.

Cases where NCB asset recovery better serves the overall public interest: The guidance also provides a nonexhaustive list of circumstances in which a conviction is feasible but the use of the NCB confiscation powers might better serve the public interest:[c]

- There is an urgent need to take action to prevent or stop criminal conduct.
- It is not practicable to investigate all those with a peripheral involvement in the offense.
- Civil recovery is more effective in targeting someone with significant property.
- The offender is prosecuted in another jurisdiction and is expected to receive a sentence that reflects the totality of the criminality.

a. Attorney General's Office, "Asset Recovery Powers for Prosecutors: Guidance and Background 2009" (guidance for prosecutors and investigators on their asset recovery powers under Section 2A of the Proceeds of Crime Act 2002) (Introduction, para. 1), November 29, 2012 (accessed September 22, 2018), https://www.gov.uk/guidance/asset-recovery-powers-for-prosecutors-guidance-and-background-note-2009.
b. Attorney General's Office, "Asset Recovery Powers" (Introduction, para. 5).
c. Attorney General's Office, "Asset Recovery Powers" (Introduction, para. 6).

confiscate assets when a seizure is not contested and certain requirements are met (for example, there is notice to parties, publication, or where no objection is filed). In addition, laws may limit administrative confiscation to assets up to a maximum value or to certain types of assets.[18] Laws establishing administrative confiscation often require that decisions be subject to subsequent court approvals.

Administrative nonjudicial confiscation is commonly associated with—and often results from—the enforcement of customs laws, laws combating drug trafficking, and laws requiring the reporting of cross-border transportation of currency. For example, it may be employed to confiscate cash found in a courier's hands or a vehicle used to transport prohibited goods. In such cases, the statutory authority is typically granted to police and customs officers. This process can result in a speedy and economical confiscation of such assets.

7.3 How Confiscation Works

A confiscation can be either (a) property based (naming a specific asset); or (b) value based (naming an amount of money owed by a specific person). Some jurisdictions employ both systems, permitting confiscation of identified assets and a judgment that can be satisfied from a person's legitimate assets.

There is a large overlap between the operational reach of the laws. However, they differ in the procedures used and the evidentiary requirements for obtaining these proceeds. This section highlights some of these differences.

7.3.1 Property-Based Confiscation

The property-based system (also referred to as "in rem" confiscation or a "tainted property" system) is aimed at assets connected to the proceeds or instrumentalities of crime. This requires that a link be established between the identified assets and an offense.

Property-based confiscation is most useful when identified assets can be linked with evidence of an offense—for example, money seized from a person who has taken a bribe (the proceeds of a crime) or the vehicle used to transport a substantial cash bribe to the recipient of the bribe (an instrumentality of the crime).

However, when assets cannot be linked to an offense because the target has not directly participated in criminal activities or the benefits are distanced from the crime through money laundering, this type of confiscation becomes more difficult. When a corrupt regime managed to stay in power and remained unaccountable for years or decades, showing a link between specific assets owned by its members and crimes

[18] In the United States, currency of any amount and personal property valued at less than US$500,000 may be forfeited administratively, but real estate, regardless of value, must always be confiscated judicially. In Hungary, any property obtained through unlawful conduct could be confiscated in tax proceedings (EC 2016, 14).

committed in the context of "state capture" is extremely complex, as illustrated by the asset recovery efforts launched in the Arab Republic of Egypt and Tunisia in 2011. Some jurisdictions have adopted legal enhancements to overcome these barriers, such as value-based confiscation, substitute asset provisions, and extended confiscation (see section 7.4 on "Confiscation Enhancements"). In other jurisdictions, assets held by members of a criminal organization are presumed to be linked to this organization unless proven otherwise. This type of legislation may also help in the recovery of stolen assets.

The legislative definitions of proceeds and instrumentalities subject to confiscation—and their interpretation by courts—is an important consideration for practitioners in determining which assets to include in the confiscation request. The discussion below addresses some issues that have been raised, along with examples of how definitions have been interpreted to capture (or not capture) proceeds or instrumentalities.[19]

Proceeds Obtained Directly or Indirectly

Generally, "proceeds" are defined as anything of value obtained directly or indirectly as the result of the offense.[20] Often this is expressed in terms of a "but for" test: the proceeds of an offense comprise any property that the defendant would not have obtained or retained *but for* the offense.

"Direct proceeds" would include funds paid for a bribe or amounts stolen by an official from a national treasury or governmental program. "Indirect proceeds," which do not accrue directly from the commission of the offense, would include appreciation in the value of the bribe payments, interest accrued on embezzled funds in a bank account, or a stock portfolio purchased with stolen treasury funds. Indirect proceeds also include ancillary benefits that would not have accrued but for the commission of an offense.

Commingled Proceeds

As proceeds are laundered, they may be mixed with other assets that may not be proceeds of crime, and they may be converted into other forms of assets (box 7.5). As a result, these assets are technically not the direct proceeds of crime but rather assets

[19] In Switzerland, such legislation was useful to finalize the recovery of assets stolen during the 1993–98 Sani Abacha regime in Nigeria (further discussed in chapter 4 [box 4.4] and chapter 5 [box 5.4]).

[20] Many jurisdictions have adopted the "proceeds of crime" definition used in United Nations Conventions, including UNCAC, art. 2; UNTOC, art. 2; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 1. These conventions define "proceeds of crime" as "any property derived from or obtained, directly or indirectly, through the commission of an offense."

intermingled with proceeds of crime.[21] Statutory wording may define what can be confiscated in commingled situations, as in the following examples:

- "*Any asset or part of an asset" or "any asset or its part that illegal proceedings were transformed into*"[22] allow the court to separate out the relevant proceeds that have been mingled with non-proceeds.
- *Assets "derived, obtained, or realized from an offense" or assets "substantially derived or realized from an offense"* can ensure that proceeds of crime mingled with non-proceeds will not lose their status as proceeds. "Substantially derived" may limit recovery to a portion of the proceeds derived from the offense. For example, the court may not be prepared to find that an asset such as a real estate property or a piece of art was "substantially derived" from the corruption offense if only 10 percent of its purchase price was covered by illicit proceeds.
- *"Any asset with which proceeds have been mingled,"* the most far-reaching approach, subjects all commingled assets to confiscation.[23] Under such language,

BOX 7.5 Issues in Confiscating the Commingled Proceeds of Crime: A Case Example

Mr. X is a corrupt official who accepted a cash bribe of US$100,000 to manipulate the process of awarding a government contract. A series of transactions subsequently took place to move and launder the funds:

- Mr. X deposited the bribe into a bank account in his wife's name.
- Mr. X caused his wife to transfer the money into the trust account of a lawyer in another jurisdiction. This lawyer was already holding US$900,000 (the origins of which are unknown) on behalf of Mr. X.
- Mr. X instructed his lawyer to use all of Mr. X's funds to purchase a property worth US$1 million in the name of an investment company controlled by Mr. X.
- Three years later, Mr. X sold that purchased property for US$2 million and had the proceeds returned to an account he controlled in his home jurisdiction.

(continued next page)

[21] International agreements oblige states parties to allow for confiscation of transformed and intermingled assets. See UNCAC, art. 31(4)–(5); UNTOC, art. 12(3)–(4); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 5(6) (a)–(b).

[22] See, for example, the Criminal Procedure Code of the Republic of Azerbaijan, sec. 99-1.1.3, introduced by the Criminal Law (Amendment) Act 2017.

[23] An example of this type of provision is the definition of "proceeds of unlawful activities" in South Africa's Prevention of Organized Crime Act 1998, which includes property "that is mingled with property that is proceeds of unlawful activity."

BOX 7.5 Issues in Confiscating the Commingled Proceeds of Crime: A Case Example *(Continued)*

When these corrupt activities came to light, prosecutors applied for a property-based confiscation order of US$200,000 from the bank account containing the US$2 million, on the basis that it constituted the proceeds of crime. This amount was calculated through the following analysis:

$100,000	Amount *directly derived* from the bribe. That the property was converted to a different form of property and commingled with other assets did not affect its character as direct proceeds of the offense.
+ $100,000	Capital gain on the bribe resulting from the sale of the house (doubled in value)—an *indirect benefit* of the corruption offense
= $ 200,000	*Total proceeds of crime*

Had the law included "any property that is mingled with property that is proceeds of crime," it would have permitted an application for confiscation of the entire amount in the bank account (US$2 million). Another method could have been to confiscate the entire bank account as the "instrumentality" of money laundering.

theoretically, one dollar in proceeds deposited into an account with a balance of US$999 will taint the whole account and result in its confiscation.

- *"Any instrumentality with which proceeds have been mingled."* Some jurisdictions permit the confiscation of the entire bank account that was used to launder funds as an instrumentality of an offense.
- *Property "involved in" a money-laundering offense* can be confiscated if, for example, a defendant laundered criminal proceeds by commingling them with other funds, because the commingled funds may be said to be "involved in" the money-laundering offense.[24]

Proceeds Derived from Foreign Offenses

Corruption or other offenses often generate illegal income in one jurisdiction that is invested in another one. Most confiscation laws provide that jurisdictions may permit

[24] See *United States v. Bikundi*, 926 F.3d 761 (D.C. Cir. 2019), holding that untainted funds in a bank account are forfeitable as property involved in a money-laundering offense if, through commingling or shuffling tainted and untainted funds, the defendant conceals the source of criminal proceeds. Also, India's Prevention of Money Laundering Act 2002, sec. 23, states, "where money laundering involves two or more interconnected transactions, and one or more such transactions is or are proved to be involved in money laundering," it is "presumed that the remaining transactions form part of such interconnected transactions" unless otherwise proven (https://enforcementdirectorate.gov.in/PreventionOfMoneyLaunderingAct2002.pdf?p1=1208271601217172513).

recovery of assets that have been obtained through offenses committed abroad, including offenses involving public corruption or the theft of state-owned funds.

In some jurisdictions, it is sufficient to show that the foreign crime involved conduct that is unlawful in both jurisdictions.[25] Others list specific serious crimes, such as foreign corruption, drug trafficking, and crimes of violence as providing a basis for confiscation.[26]

Instrumentalities of an Offense

"Instrumentalities" are generally assets used or intended for use in any manner or part to commit or facilitate the commission of an offense—for example, a vehicle used to transport a substantial cash bribe to the recipient of the bribe. Assets may become instrumentalities even if they have been acquired legitimately with lawfully obtained funds. It is the illegal use to which the object has been put that makes it an instrumentality.

An issue that practitioners need to consider is the definition of "use"—whether defined by statute or in case law. For example, if a corrupt official uses a telephone in a house to accept a bribe and arrange for delivery of funds, it may be debatable whether the house was sufficiently or substantially "used" to commit the offense. Another example could be a yacht on which a corrupt official has been lavishly entertained.

Courts in some jurisdictions require that there be more than an accidental or incidental connection between the asset and the offense: the offense must be related to, dependent on, could not have been committed without, or have resulted directly from the use of the asset.[27] Courts in other jurisdictions have found that any use of an asset, no matter how peripheral, is a "use" for the purposes of confiscation. In such cases—where legislation provides that "use" means "in connection with" an offense—an asset that has been indirectly used as an instrumentality of an offense is subject to confiscation.

In most jurisdictions, the confiscation of instrumentalities is limited by constitutional or statutory requirements that the confiscation not be grossly disproportional to the gravity of the criminal offense.[28]

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[25] See, for example, the UK Proceeds of Crime Act 2002, sec. 241; and the Liechtenstein Criminal Code, sec. 20b(2).

[26] US law lists only six categories of crimes as the basis for a confiscation order involving the proceeds of a foreign crime. See 18 U.S.C. § 1956(c)(7)(B).

[27] Re an Application Pursuant to Drugs Misuse Act 1986, [1988] 2 Qd. R. 506 (Australia).

[28] In the United States, the government must show both that the instrumentality was "substantially connected" to the criminal offense and that its forfeiture would not be grossly disproportional to the gravity of the offense. See 18 U.S.C. §§ 983(c)(3) and (g).

7.3.2 Value-Based Confiscation

Unlike property-based confiscation orders that are directed at specific assets, value-based confiscation is focused on the value of benefits derived from a criminal offense and often imposes a monetary penalty equal to that value. In this system, there is a quantification of benefits that flowed to the defendant from the offense (direct benefits) and usually any increase in value resulting from the appreciation of the assets (indirect benefits). At sentencing, the court will impose a liability equal to that benefit on the defendant. This judgment may be enforceable as a collection of debt or fine against any asset of the defendant, whether or not it has any link to the offense. Practitioners may consider how to enforce the judgment when assets are owned by an insolvent entity or individual (as discussed in chapter 10, section 10.5, on insolvency proceedings).

The absence of a requirement to link the specific assets to an offense often facilitates the practitioner's ability to obtain a confiscation judgment. However, the benefits must be linked to the offenses that form the basis of the defendant's conviction. In addition, the assets are limited to those owned by the defendant, although this issue is often resolved through presumptions and broad definitions of "ownership" to include assets that are held, controlled, or gifted by the defendant (see chapter 5, section 5.4.1, on identifying assets subject to provisional measures).

Similar to property-based confiscation, the legislative definition and interpretation of key terms is important. Some of the issues raised in litigation are set out below.

Assessing Benefits

The term "benefits" is usually defined broadly to include the full value of cash or noncash benefits received directly or indirectly by a defendant (or a third party, at the defendant's direction) as a result of the offense (see section 7.3.1 for a description of direct and indirect proceeds). Benefits usually cover more than the financial rewards,[29] including the following:

- The amount of money and the value of assets (including "illegal" assets) actually received as the result of committing an offense[30]
- 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 offense
- 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

[29] Some jurisdictions provide guidance in legislation. See, for example, Australia's Proceeds of Crime Act 2002, sec. 122.

[30] Benefits can include legitimate assets as well as assets that are illegitimate or illegal—for example, proceeds generated from criminal enterprises. The value of illegitimate benefits is difficult to assess and must be estimated based upon the evidence available. Most helpful to practitioners are value-based confiscation systems that have flexible benefit assessment procedures, such as those that permit the assessment based on the black-market value and inferences over the period of the crime based on receipts from a finite period.

the offense (for example, the value of the lavish entertainment in a bribery case[31] or of forced manual, household, or other labor in a human trafficking or smuggling case)
- The value of benefits derived directly or indirectly from related or prior criminal activity.

In some jurisdictions, the existence of benefits may be inferred from increases in the value of assets held by a person before and after the commission of an offense.[32]

Benefits are linked to the offenses that form the basis of a defendant's conviction. When prosecutors proceed on a selection of charges that are representative of the defendant's overall criminality and that achieve an appropriate range of sentencing options,[33] several methods have evolved to address potential issues linked to assessing the value of illicit gains:

- *Representative charges that capture a continuing course of criminal conduct over a period of time.* Where permitted, charges for a corruption offense committed between two determined dates will permit an order of confiscation of all the benefits derived from this "course of conduct" over the entire period.
- *Rebuttable presumptions and extended confiscation.* A rebuttable presumption raised on conviction for a single offense could allow the inference that benefits derived over a specific extended period are benefits of that offense. Such a presumption would permit the confiscation of assets that may have been derived from other offenses for which the offender was not charged or convicted. Similarly, provisions that allow the court to confiscate assets for "related criminal activities" will permit the court to include any related or similar criminal activities in calculating benefits. (For more information, see sections 7.4.1 and 7.4.3 below.) Box 7.6 discusses how "related activities" can be used to capture the full benefit.
- *Charging the defendant with an overarching conspiracy*. In jurisdictions that do not have extended confiscation provisions and that limit the confiscation order to property involved in the offense(s) of conviction, the prosecutor may seek recovery of all of the proceeds gained and instrumentalities involved in the context of the conspiracy.

If the relevant legal system permits a value-based confiscation order only for the conduct for which the defendant is convicted, a practitioner must take care in choosing the charges for which to prosecute the defendant (that is, choose the offense according to desired confiscation). In addition, any decision to drop or amend charges must be considered carefully because such decisions can have drastic effects upon the calculation of benefits.

[31] Recent cases have revealed bribes in the form of high-priced entertainment—for example, a US$90,000 dinner for six people, travel expenses, trips to theme parks, and use of assets.

[32] This inference of benefits takes place in jurisdictions whose laws include offenses for illicit enrichment or unjust resources, such as Argentina and Colombia. It is worth mentioning here that France has introduced a new crime for "possession of unjustified assets" (in case of evident links with organized crime activities) that does not exist in other EU member states (EC 2016).

[33] This would not be an issue if proceeding on the offense of illicit enrichment or unjust resources, because all benefits would be linked to the one offense.

BOX 7.6 Using "Related Activities" to Capture the Full Benefit of Crime: A Case Example

Over a two-month period, customs official Ms. X accepted three bribes from undercover agents. The bribes totaled US$20,000. Evidence showed that she was planning further dealings that would have generated additional bribes and that her wealth increased by US$500,000 in excess of what she could have been expected to save from her government salary during the previous two years. Investigators also uncovered several suspicious transaction reports (STRs) concerning Ms. X's unexplained transactions involving large amounts of cash.

Ms. X was convicted on three counts of corruption, based on the bribes from the undercover agents. The prosecutor applied for a confiscation order based on the benefits derived from the commission of the three offenses and any "criminal activities related to the offense"—an option available under the jurisdiction's confiscation law. The prosecutor submitted evidence that Ms. X was engaged in the business of extracting bribes from importers and that the US$500,000 unexplained increase in her wealth was derived from her corrupt business practice for which she was convicted. The court ordered a judgment for US$520,000—the amount of the three bribes plus the value of the wealth derived from the related offenses.

Had the "related activities" clause not been included in the legislation, the prosecution would have been able to seek an order for US$20,000 only (the amount of the three bribes).

Gross or Net Benefits

In most jurisdictions,[34] the term "benefits" is specifically defined as "gross benefits" and not "net benefits" or "profit." A calculation based on "net benefits" would enable the corrupt official to deduct legal, banking, transportation, and other fees paid in the process of laundering funds and would enable him or her to retain parts of the proceeds. Moreover, there is no reason based on public policy why a person who receives a benefit from the state by bribing a public official should be able to deduct the cost of paying the bribe.

In all events, the computation of gross benefits should not be mitigated by any loss in value or dissipation of an asset, because the value of the criminal benefit is "crystallized" at the moment the benefit is generated.

Joint and Several Liability

In some jurisdictions, defendants can be held jointly and severally liable for value-based confiscation orders. The result is that the full value of the benefit is recoverable from

[34] The Netherlands is an exception, where the calculation is based on net profits.

each of the convicted defendants. For example, in the case of a crime committed by five people that generated a total benefit of US$500,000, the entire amount is recoverable from each individual, rather than US$100,000 from each of the five offenders. This is useful if, for instance, four of the defendants are found to be impecunious but the fifth has assets of US$1 million.

Jurisdictions that authorize joint and several liability, however, may limit the imposition of such a confiscation order to the leaders of the criminal enterprise who controlled how the proceeds of its criminal conduct would be distributed or to persons who acted in concert (such as family members who jointly acquired criminal proceeds) but prohibit holding low-level participants liable for proceeds that they did not personally obtain.

7.3.3 Discretion to Confiscate

In some jurisdictions, the entry of a confiscation order is mandatory following a conviction for a criminal offense. In others, a court's authority to make a confiscation order is discretionary.[35] Some confiscation laws provide specific factors that a court must consider in exercising its discretion to grant or refuse confiscation. These factors include

- The *hardship* that a person will endure as a result of the entering of the order;
- The *ordinary use* to which the asset subject to confiscation is put; and
- The *proportionality* between the offense and the amount to be confiscated.[36]

7.3.4 Challenges in Valuing the Proceeds

The task of valuing the proceeds (or, in the case of value-based confiscation, valuing the "benefits") derived from an offense can be difficult. For example, if a corporation pays a bribe to ensure that its bid for a military contract is accepted, there are several options for quantifying the proceeds or benefits. Practitioners may have to consider (possibly with the assistance of accountants or financial experts) the financial consequences of the contract for the company. The payments received in the context of the contract will generate turnover (the gross value of the contract) and expenses (the cost incurred to perform the tasks). The simple elimination of competition can also have more long-term consequences by ensuring that the firm will have a competitive advantage for other contracts. As a result, options for estimating the benefit include the following:[37]

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[35] Such legislation would state that the court "may" order confiscation when requirements are met.

[36] Hardship, ordinary use, and proportionality most often apply to cases involving instrumentalities, such as a lawfully acquired family residence that is also used as a base for illegal activity (both lawful and unlawful purposes). See, for example, *Prophet v. National Director of Public Prosecutions*, (CCT56/05) [2006] ZACC 17, in which the Constitutional Court of South Africa set forth the factors to consider in upholding the forfeiture of a residence as an "instrumentality" of a drug operation.

[37] For further analysis, see OECD and World Bank (2012).

- *Gross value of the contract.* If the contract was for the supply of two patrol boats at US$50 million each, the value of the benefit would be US$100 million. This method assumes that the offender would not have received the contract *but for* the payment of the bribe—an assumption that may or may not be correct.
- *Net profits derived from the contract.* In the example above, if the company incurred US$60 million in expenses (purchase of goods and services, salaries, and so on) in supplying the boats, the net profits would be US$40 million. In most jurisdictions, the amount of the bribe is not deductible.
- *Value of increased profits derived by eliminating competition from the contract.* This may be difficult to measure and necessitate complex economic calculations. However, it is possible to use the value of contracts obtained after the first corrupt transaction for assessing these increased profits.

7.3.5 Use of Expert and Summary Testimony to Present Confiscation Evidence in Court

Evidence establishing the link between the asset and the offense or the value of benefits derived can be complex and difficult for the judge (or jury) to follow. Such evidence is often best presented using flowcharts and spreadsheets that present the financial material in a more easily comprehensible manner (as the sample flowcharts illustrate in chapter 4, figures 4.3 and 4.4).

A forensic accountant or financial investigator with training and experience in presenting evidence can be helpful in this regard. If permitted, the witness could introduce summary evidence in the form of spreadsheets or charts that, when prepared properly, can clearly show how benefits were derived and how complex schemes were operated. Care must be taken to ensure that presentation aids accurately and precisely reflect the evidence in source documents: a factual or methodological error may impeach the credibility of the evidence, leaving a big hole in the prosecution's case.

7.3.6 Disposal of Confiscated Assets

Finally, confiscation laws frequently require that confiscated assets be liquidated and the proceeds paid into a consolidated government account or general treasury. Numerous jurisdictions have established asset confiscation funds into which realized assets must be paid.[38] These funds are used for designated law enforcement and confiscation program purposes, including the purchase of equipment, training, investigative expenses, prosecutorial asset management, and liquidation costs (Greenberg et al. 2009, 90–94; World Bank 2009). For a discussion of issues related to the management of assets subject to confiscation, see chapter 6.

[38] These jurisdictions include Australia, Canada, Italy, Luxembourg, Namibia, Spain, South Africa, and the United States. For a list of jurisdictions with confiscation funds, see Greenberg et al. (2009, 91).

7.4 Confiscation Enhancements

Most jurisdictions provide for procedural aids or enhancements designed to improve the effectiveness of the confiscation law or to capture an extended range of assets.[39] For example, as discussed in section 7.4.2, legislation may provide for the confiscation of a "substitute asset" when the property derived from or used to commit a crime is unavailable.

7.4.1 Rebuttable Presumptions

As described in the introduction, a presumption is an inference of the truth of a proposition or fact drawn from a defined set of circumstances through a process of probable reasoning in the absence of actual certainty. Thus, if a practitioner establishes the defined set of circumstances sufficiently to raise a presumption, the party against whom the presumption exists has the burden of overcoming the presumption by presenting proof to rebut the presumption. If the party fails, the prima facie presumption is converted into an incontrovertible fact.

In criminal law, primacy is given to the presumption of innocence—the legal or constitutional right of the accused to be considered innocent until proven guilty. The burden of proof lies with the prosecution to establish guilt to the required standard, and failure to do so results in an acquittal. Rebuttable presumptions are used infrequently in criminal cases because they effectively reverse this burden.[40] However, they are more common in confiscation and civil proceedings or other proceedings in which the presumption of innocence does not apply because neither criminal liability nor individual liberties are deemed to be at stake.[41]

Presumptions are enormously helpful in confiscation cases involving corrupt public officials because these officials—particularly those who have a long tenure in public service—have had extensive opportunity to embezzle and conceal funds and are often able to influence witnesses and thwart investigations into their assets. Relieving the prosecution of the burden to establish that unexplained wealth is linked to specific instances of illegal conduct greatly enhances the possibility of obtaining a conviction or confiscation judgment. In the context of efforts to recover stolen assets after the fall of a corrupt regime, legislation providing for presumptions that assets held by members of a criminal organization are linked to the corrupt activities can be helpful.[42]

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[39] Enhancements are encouraged in international conventions and agreements (see UNCAC, arts. 48, 59; and Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, art. 5 [OJ L 127, 29.04.2014], https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=EN).

[40] For example, a person in possession of more than a prescribed amount of a drug may, in the absence of evidence to the contrary, be presumed to be a drug trafficker.

[41] Note that criminal confiscation is adjudicated after the conviction has been obtained. Tax and customs legislation also apply such presumptions in their proceedings.

[42] For example, Swiss Criminal Code (CC 311.0), art. 72: https://www.admin.ch/opc/en/classified-compilation/19370083/index.html.

Presumptions are powerful tools, and practitioners must ensure they are used appropriately. Any chronic abuse of the tools available in a confiscation system can bring the entire system into disrepute.[43] For example, using presumptions to confiscate all the assets of a person who has committed a relatively minor crime could raise questions about the integrity of the confiscation system. Common bases for presumptions include the following:

- *Possession.* Under this presumption, assets found in the possession of a person at the time of the offense, or shortly before or after the commission of the offense, are considered to be either the proceeds or an instrumentality of the offense.
- *Associations.* This presumption has been applied in organized crime cases in which assets belonging to a person who has participated in or supported a criminal organization are presumed to be at the disposal of the organization and can be confiscated.[44] The inclusion of this enhancement helps to attack the economic base of entrenched criminal groups.
- *Lifestyle.*[45] This presumption may be raised when the prosecutor can show that the offender does not have sufficient legitimate sources of income to justify the value of assets accumulated over a period of time.[46] Items that the offender can show were acquired lawfully may be excluded from the confiscation order. This presumption requires the defendant to justify more assets than those related to the specific offense.
- *Transfers of assets.* The law can impose a presumption under which transfers to family and close associates or any transfers below market value are not legitimate.[47] The titleholder would have to prove that the asset was the subject of an

[43] Some jurisdictions have reserved the application of certain presumptions to serious offenses, including Australia's Victoria state (in the Confiscation Act 1987) and Australia's Proceeds of Crime Act 2002. In the United Kingdom, presumptions in value-based confiscation cases are permitted only in "criminal lifestyle" cases: UK Proceeds of Crime Act 2002, sec. 6. In the United States, a presumption is available only in drug cases: 21 U.S.C. § 853(d).

[44] In 2005, Switzerland's Federal Supreme Court ruled that former Nigerian dictator Sani Abacha, his family, and associates constituted a criminal organization and ordered the confiscation and return of US$458 million of Abacha-related assets using these provisions (FDFA 2016, 18–20; also discussed in chapter 4, box 4.4). See also the Swiss Criminal Code (CC 311.0), art. 72: "The court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal organization. In the case of the assets of a person who participates in or supports a criminal organization (art. 260ter), it is presumed that the assets are subject to the power of disposal of the organization until the contrary is proven" (Sept. 21, 1937 [status as of Sept. 1, 2017], https://www.admin.ch/opc/en/classified-compilation/19370083/201709010000/311.0.pdf).

[45] A presumption based on lifestyle is separate and distinct from the offense of illicit enrichment or unjust resources. The definition is often the same, but the procedures applied are different.

[46] In South Africa, the presumption extends for seven years before the initiation of proceedings (Prevention of Organised Crime Second Amendment Act, no. 38 of 1999, sec. 22). In the United Kingdom, the presumption period is six years for defendants who have been determined to have a criminal lifestyle (UK Proceeds of Crime Act, sec. 10[8]). See also the French Criminal Code, art. 131-21.

[47] In Thailand, transfers of property to family members are presumed to be dishonest (Anti-Money Laundering Act, B.E. 2542 [1999], secs. 51–52).

arm's-length transaction that involved payment of fair market value.[48] If not rebutted, the transfer will be invalidated.

- *Nature of the offense.* This presumption is usually linked to conviction for a class of particularly serious offenses, such as trafficking in substantial quantities of drugs, major forms of corruption or fraud, racketeering, or organized crime. When the person is convicted of such an offense, a rebuttable presumption is raised, and the assets accumulated during a certain period before and after the commission of the crime are presumed to be the proceeds of crime and subject to confiscation.[49]
- *Illicit origin and unexplained wealth.* This presumption may apply in cases where the wealth of a politically exposed person (PEP) has significantly increased and there are reasons to think that this increase is the result of corruption, particularly if the person's country of origin has high levels of corruption (see box 7.7 on relevant Swiss legislation and the Duvalier assets). In the United Kingdom, if a respondent fails to comply with the requirements of an unexplained wealth order (UWO) made by a court before the end of the response period, the property is presumed to be recoverable under any subsequent civil recovery action (as described in chapter 3, section 3.4.10 and box 3.11).

Although the burden lies with the defendant to rebut the presumption, the prosecutor will normally present information to counter any rebuttal evidence an offender may produce and to help the court infer that the asset was acquired with illicit proceeds or was an instrumentality of crime. The presence of such material will make it much more difficult for an offender to rebut the presumption with a simple assertion as to the lawful source and use of the asset.

7.4.2 Substitute Asset Provisions

Substitute asset provisions help overcome obstacles often faced in property-based confiscation regimes—such as tracing or linking the assets to the offense—by permitting the confiscation of assets not connected to the offense. Such provisions may require proof that (a) the original assets were derived as a benefit from an offense, or a particular asset was used as an instrumentality of the offense; and (b) the asset cannot be located or is otherwise unavailable.

When it is established that the offender has dissipated the direct illicit proceeds, the prosecutor may apply for confiscation of an equivalent value of the offender's untainted assets.

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[48] In Colombia, the party attempting to rebut the presumption must also prove that the transaction actually occurred (that is, the party had sufficient income to purchase, and the selling party received the funds).

[49] See, for example, 21 U.S.C. § 853(d), which provides that property acquired during the course of a drug offense is presumed to be drug proceeds.

BOX 7.7 Haiti: Presumption of Illicit Origin under the Swiss Restitution of Illicit Assets Act in the Case of Jean-Claude "Baby Doc" Duvalier

Swiss law and the presumption of illicit origin: To enhance its legal arsenal in asset recovery, Switzerland in 2011 adopted the Federal Act on the Restitution of Assets Illicitly Obtained by Politically Exposed Persons (the "Restitution of Illicit Assets Act," or RIAA). The Act contains provisions that may apply to countries of origin with weak state structures. Of particular importance is the introduction (in RIAA, art. 6) of a presumption of illicit origin of assets.

More specifically, assets will be presumed to be of illicit origin where (a) "the wealth of the person who holds powers of disposal over the assets has been subject to an extraordinary increase that is connected with the exercise of a public office by the politically exposed person" (PEP); and (b) "the level of corruption in the country of origin . . . was acknowledged as high."[a] An "extraordinary increase" applies to cases where there is a significant difference between the income of a public office holder and the assets concerned that may not be explained (Adam 2013, 253, 259). Corruption levels in a country may be determined as "high" on the basis of research published by acknowledged institutions and organizations such as the World Bank and Transparency International (Adam 2013, 260).

The presumption as applied to the Duvalier assets: After the death of his father, François "Papa Doc" Duvalier, Jean-Claude "Baby Doc" Duvalier succeeded him as the president of Haiti from 1971 to 1986, when he was forced to flee the country. During his presidency, Baby Doc and his entourage embezzled assets worth millions of dollars that were hidden in, among other countries, Switzerland. By the end of 2010, the total amount of assets exceeded Sw F 5 million.[b]

Haitian authorities submitted their first request for international judicial assistance to Switzerland in 1986, seeking to freeze the Duvalier assets. The Swiss Federal Council ordered the assets frozen in 2002, a decision upheld and confirmed by the Federal Administrative Court (FAC) in 2013.[c] Since then, the assets have remained frozen in Switzerland, either within the framework of international assistance in criminal matters or on the basis of the Swiss Federal Constitution.[d] Until 2009, negotiations with Haiti for a settlement and mutual legal assistance (MLA) proceedings were not successful (Adam 2013, 258; Ivory 2014, 43).

In February 2009, the Swiss Federal Office of Justice (FOJ) decided that assets should be returned to Haiti for use in humanitarian purposes, and a subsequent appeal was dismissed. However, in a further appeal by the Duvalier clan to the Federal Supreme Court, the court overruled the FOJ's decision primarily on the grounds of the statute of limitations (Ivory 2014, 44).[e] Even so, the Federal Council decided to keep the Duvalier assets frozen on the basis of the Federal Constitution while the Swiss Parliament considered the new federal law on the restitution of the illicit wealth of PEPs. The Restitution of Illicit Assets Act (RIAA) entered into force in February 2011, providing a presumption of illicit origin.[f]

Pursuant to the RIAA, in February 2011, the Federal Council ordered an administrative freeze of the Duvalier assets, and the Federal Department of Finance

(continued next page)

BOX 7.7 Haiti: Presumption of Illicit Origin under the Swiss Restitution of Illicit Assets Act in the Case of Jean-Claude "Baby Doc" Duvalier *(Continued)*

started the restitution process by initiating asset forfeiture proceedings in April 2011 (Ivory 2014, 45). Duvalier and his fellow complainants subsequently challenged the Federal Council's decision before the FAC.[g]

In September 2013, the FAC upheld the Federal Council's 2002 freezing order as well as the asset forfeiture proceedings launched by the Federal Department of Finance in 2011, ruling against the complainants on the grounds that the Federal Council's decision was necessary to preserve Switzerland's interests.[h] In particular, the FAC held that the assets in question had been obtained illicitly and that Duvalier and his entourage had failed to demonstrate that the increase in their assets resulted from activities unrelated to their roles as public officials. The FAC also added that the level of corruption in Haiti was notoriously high while the Duvaliers were in office and concluded that "the conditions determining the illicit origin of the assets in question were met."[i]

In the end, the return of funds could not be finalized. Criminal proceedings in Haiti were voided in 2014 because the time limitation period expired, and Duvalier died in October 2014.

a. Restitution of Illicit Assets Act (RIAA), art. 6, para. 1. https://www.admin.ch/opc/en/classified-compilation/20100418/201102010000/196.1.pdf.
b. Federal Administrative Court (FAC). 2013. "FAC Confirms Freezing and Forfeiture of Duvalier Assets." Press Release (decisions C-1371/2010 and C-2528/2011), September 25, 2013. https://www.bvger.ch/dam/bvger/de/dokumente/juricom/pressemitteilungen/c-1371_2010_c-25282011facconfirmsfreezingandforfeitureofduvalier.pdf.download.pdf/c-1371_2010_c-25282011facconfirmsfreezingandforfeitureofduvalier.pdf.
c. FAC, "FAC Confirms Freezing," September 25, 2013.
d. Swiss Federal Council. 2010. "The Duvalier Accounts Remain Blocked While a Draft Law Will Be Reviewed that Could Permit Illicit Assets to Be Confiscated." Press Release, February 3, 2010 (accessed September 20, 2018). https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-31463.html.
e. Also see Swiss Federal Council, "The Duvalier Accounts," February 3, 2010.
f. RIAA, art. 6, para. 1.
g. FAC, "FAC Confirms Freezing," September 25, 2013.
h. FAC, "FAC Confirms Freezing," September 25, 2013; Stolen Asset Recovery (StAR) Initiative. 2017. "Jean Claude "Baby Doc" Duvalier (Switzerland)." Asset Recovery Watch, July 20, 2017. https://star.worldbank.org/corruption-cases/node/18515.
i. FAC, "FAC Confirms Freezing," September 25, 2013.

Although substitute assets provisions may be unnecessary in jurisdictions with value-based confiscation laws—because they impose a monetary liability upon the person deriving the benefit that can be enforced against any of that person's assets—some jurisdictions that have such laws nevertheless authorize the confiscation of substitute assets as a means of satisfying a property-based judgment.[50]

[50] In the United States, substitute assets may be confiscated in all criminal confiscation cases but not through NCB confiscation.

7.4.3 Extended Confiscation

Extended criminal confiscation is a type of conviction-based confiscation used in cases where the causal link between the assets and the offense is weak or not clearly established, yet the assets are assumed to be illicit (Boucht 2017, 117, 119). Some jurisdictions permit courts to confiscate (or to include in the benefit assessment) assets derived from similar or related criminal activities.[51] The offender does not need to be charged with an offense for these other related activities; however, the court must find that the "related activities" are sufficiently connected to the offense (as discussed, for example, in box 7.6).

In other jurisdictions, courts may be allowed to confiscate all or part of the assets of an involved or convicted person, without consideration of whether they were purchased before or after the commission of an offense.[52] Such provisions will often be limited to serious crimes (such as terrorism, organized crime, money laundering, corruption, or drug trafficking) and will apply only to assets belonging to or controlled by the offender. Box 7.8 discusses preventive confiscation in Italy.

7.4.4 Mechanisms to Void Transfers of Assets

In addition to the use of presumptions to void certain transfers of assets (see section 7.4.1), some jurisdictions have enacted statutory provisions under which title to the confiscated assets vests in the state or government at the time the unlawful act giving rise to the confiscation took place.[53] If the asset is subsequently transferred, it remains subject to confiscation—with the exception of transfers to bona fide purchasers without knowledge that the asset was subject to confiscation.

7.4.5 Automatic Confiscation on Conviction

This type of provision does not result in the operation of a rebuttable presumption but in the actual confiscation by automatic operation of the statute. Such a provision eliminates the need for any judicial determination once certain conditions are satisfied.[54] The person claiming an interest in an asset subject to automatic confiscation—either a defendant, innocent owner, or third party—may apply to exclude the asset from the operation of the law by proving the lawful derivation and use of the asset. The claimant bears the burden of proof.

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[51] Such extended powers of confiscation are required in EU jurisdictions, pursuant to Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union (OJ L 127 29.04.2014), art. 5.

[52] French Criminal Code, art. 131-21.

[53] 53. This concept is used in the United States, referred to as the "relation-back doctrine"; see 21 U.S.C. §§ 853(c), 881(h).

[54] Automatic confiscation is applied in Australia.

BOX 7.8 Preventive Confiscation in Italy

The fight against organized crime in Italy led to the introduction of preventive confiscation provisions in the anti-mafia legislation as early as 1982, with various amendments ever since (Mazzacuva 2017, 117, 119). This type of confiscation does not require a criminal conviction.[a] The main requirement is reasonable suspicion that an individual belongs to a criminal organization.[b] In addition, the law requires an assessment of an individual's "social dangerousness" (referring to the individual's likelihood of committing additional crimes) and a showing that the assets in question are disproportionate to an individual's income (Mazzacuva 2017).

Since 2008, preventive confiscation has extended beyond mafia-related offenses and applies to several types of crimes. In cases where the authorities cannot trace illegal assets, the confiscation of assets of equivalent value is also possible (Mazzacuva 2017, 104). Confiscation proceedings may also be continued if the subject dies (TI Italia 2013, 11).

Under the Italian legal system, criminal and preventive confiscation share a few similarities: both focus on the disproportion between the income of the target and the assets in question and on the inability to explain the origin of the assets (TI Italia 2013, 12). However, in the case of criminal confiscation, a conviction is necessary, whereas in the case of the preventive confiscation, the "social dangerousness" of the target must be demonstrated. In addition, criminal confiscation may only apply to assets that relate to the crime, while preventive confiscation may extend to assets unrelated to the crime.

a. The European Court of Human Rights (ECHR) has never found this type of confiscation to be criminal in nature and to attract the protections of criminal proceedings. See Simonato (2017, 365, 373) and *M. v. Italy* (no. 12386/86, Commission Decision of April 15, 1991), which held that such confiscation measures seek to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established.
b. Since 2008, it is required that the individual has committed certain offenses that are not necessarily connected with organized crime (Mazzacuva 2017, 103).

7.5 Third-Party Interests

Third parties with a potential legal interest in assets subject to confiscation are entitled to notice of the proceedings and the opportunity to be heard. [55] Typically, appropriate notice is sent to those individuals whom the authorities believe may have a legally recognized interest. This test should be applied liberally. In addition, if a party indicates he or she has an interest, formal notice should be given to that party. Because confiscation extinguishes all rights in the asset, some additional form of notice is generally given to the population at large through newspapers, legal gazettes, or the internet. The restraint

[55] UNCAC, arts. 31(9), 35, 55(3)(c), 57; UNTOC, arts. 12(8), 13(8); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 5(8).

order should also specify procedures for recognizing legitimate interests of third parties. (See chapter 5, section 5.6, for a discussion of this issue.)

Some jurisdictions permit prejudgment appearances by third parties who can assert limited defenses—for example, that the provisional restraint is causing severe hardship or that the asset is from a legitimate source and is needed for living expenses.

Procedural steps for the assertion of third-party interests may vary, depending on whether the confiscation is criminal or NCB. Generally, for criminal confiscation, the criminal proceedings dealing with the underlying offense must be concluded and the defendant's assets are ordered confiscated before third-party interests are heard by the court in a postconviction ancillary proceeding. In such a proceeding, the third party will prevail if it is able to show that the property belonged to that party at the time of the offense, and not to the defendant, or that the third party later acquired it as a bona fide purchaser for value.[56]

Note that the third party in such a case may prevail even if complicit in the offense. If the third party was precluded from participating in the criminal trial, it may be considered a violation of due process to confiscate that party's property without providing the opportunity to contest the basis for the confiscation. NCB confiscation systems afford the government a means of recovering the property of such complicit third parties because they require the government to establish that the crime occurred and—in a separate proceeding involving the third party—that the property was used to commit the crime.

Typically, in NCB confiscation systems, the party must prove (a) a legally cognizable interest in the assets; *and* either (b) that the interest was acquired before the commission of any criminal offense and without any reason for the party to believe the assets were involved in the underlying crime; or (c) that the interest in the assets arose after the criminal activity was committed and the party was a bona fide purchaser for value of the assets. This is sometimes referred to as the "innocent owner" defense.[57]

7.6 Legal Challenges to Consider When Enacting Confiscation Legislation

Like all legislation, confiscation laws have not been without legal challenge before both national and international courts. Such challenges have included debates over property rights and, in the case of NCB confiscation, whether the targets of confiscation are afforded the statutory procedural safeguards offered to those involved in criminal

[56] In the United States, this procedure is prescribed by statute: 21 U.S.C. § 853(n).

[57] In the United States, 18 U.S.C. § 983(d) sets forth the innocent owner defense in civil forfeiture cases.

matters, including the presumption of innocence, the right to be heard before a criminal court, the right against self-incrimination, and protections against double jeopardy and retrospective punishment.

Many of these debates have centered on the issue of whether confiscation should be considered a punishment or a remedial measure. If confiscation is considered a punishment, for instance, then confiscation proceedings must provide the safeguards of the criminal process.

In contrast, if confiscation is considered a remedial measure, then the scope of application will have to expand. It may include hearings before administrative agencies or civil courts and use a different standard of proof, rebuttable presumptions (permitted by many jurisdictions for certain criminal offenses), and retrospective application. Ultimately, many courts have adopted an approach that permits this broader scope of application.[58]

In some jurisdictions, debates on the nature of confiscation were reflected in a different way: For jurisdictions considering confiscation a punishment, its application remained limited to only those instances in which it was specifically provided for in law. For jurisdictions that consider it a remedy, confiscation has a wider application and applies universally to all crimes in cases generating illegal profit unless specifically excluded.[59]

A confiscation regime must provide for the identification, tracing, seizure or restraint, management, confiscation, liquidation, and sharing or return of the proceeds and instrumentalities. Authorities also may consider enhancing the legal framework for confiscation by defining rebuttable presumptions. Further, because most large-scale, profit-generating crime (including corruption and money-laundering cases) tends to transcend international borders, the confiscation regime must provide for ways of enforcing national confiscation orders abroad.

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[58] The European Court of Human Rights (ECHR) has held that, where the amount is limited to the benefit obtained and could not be substituted by imprisonment but rather by other measures of economic value, confiscation of the proceeds of crime will have a remedial character: see *Welch v. United Kingdom* (no. 17440/90, February 9, 1995); *Philips v. United Kingdom* (no. 41087/98, July 5, 2001); and *Butler v. United Kingdom* (no. 41661/98, June 27, 2002). More recently, in *Gogitidze v. Georgia* (no. 36862/05, May 12, 2015), the ECHR held (para. 126) that the forfeiture of property ordered as a result of civil proceedings in rem without a determination of a criminal charge is not of a punitive but of a preventive and/or compensatory nature. For examples from specific jurisdictions, see Greenberg et al. (2009, 19–21). The United States has one of the most developed asset confiscation regimes. For both the historical development and the current status of the statutory and decisional body of law, see Cassella (2013).

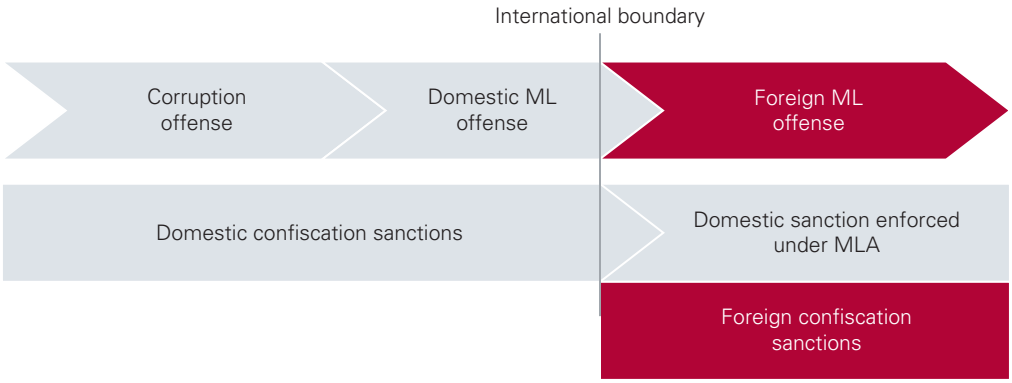
[59] In 2012, Azerbaijan overhauled its confiscation system by transforming confiscation from a kind of main or additional punishment, mandated for a narrow circle of offenses, to a universally available remedy in criminal proceedings regarding all crimes where illegal profit originated.

7.7 Confiscation of Assets Located in Foreign Jurisdictions

It is quite common for corruption and money-laundering investigations to move beyond domestic borders, thus requiring cooperation with foreign jurisdictions.[60] The involvement of a foreign jurisdiction both complicates a case and opens up a whole new range of possibilities. For example, if a case involves domestic offenses for corruption and money laundering as well as foreign offenses for money laundering, several possibilities may arise (figure 7.1), including the following:

- Domestic confiscation proceedings that result in the entry of a confiscation order against property located in a foreign jurisdiction may be enforced in the foreign jurisdiction through a mutual legal assistance (MLA) request and the assets returned to the requesting jurisdiction pursuant to international agreements, treaties, or other agreements.[61] (See chapters 1 and 9 for a description of MLA proceedings and discussion of methods to enforce foreign confiscation orders.)
- Law enforcement authorities in the jurisdiction where the property is located may obtain an NCB confiscation order based on proof of the foreign corruption offense and the connection between that offense and the property.

Figure 7.1 Confiscation of an Asset in a Foreign Jurisdiction



Source: World Bank.
Note: ML = money-laundering; MLA = mutual legal assistance.

[60] See, for example, the case of Crisafulli, in which French authorities executed an Italian NCB confiscation order ("preventive confiscation") although French law did not provide for NCB confiscation. Crisafulli had been convicted by Italian courts for criminal association with drug trafficking. He owned a villa in France that was shown to have been bought from the proceeds of drug trafficking. Following the Italian authorities' request to execute the confiscation—on the basis of the Council of Europe's Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (adopted 1990, entered into force 1993)—the French Supreme Court executed the Italian confiscation order, although under French national law, confiscation could only occur after a criminal verdict (Court of Cassation, no. 03-80371, November 13, 2003).

[61] For example, see the return provisions outlined in UNCAC, arts. 54, 55, 57. In the United States, 28 U.S.C. § 2467 sets forth the procedure for enforcing a foreign confiscation order.

- The foreign jurisdiction may open a money-laundering case and confiscate assets based on this procedure. (See chapter 11 and section 7.8 below on options for the requesting jurisdiction, including joining the case as "civil party" in some jurisdictions.)
- Both domestic and foreign confiscation proceedings may be pursued in tandem. Practitioners should consider at the outset whether the jurisdiction where assets are located has a mechanism for directly enforcing foreign confiscation orders, as required by UNCAC (arts. 54–55), without reconsidering the merits of the case. (See chapters 1 and 9 on international cooperation for enforcement of confiscation orders and asset return.)

7.8 Recovery through Confiscation for the Victims of Crime

It is increasingly common for jurisdictions to use confiscation mechanisms to provide restitution to the victims of crime.[62] Legislation and regulations have been designed to give priority to victims over the general treasury or the confiscation fund of the state or government. If sufficient assets exist to satisfy a confiscation judgment and restitution order, the confiscated assets could be deposited for the benefit of the state or government after the victims receive restitution.

Such mechanisms ensure that confiscation orders are not enforced at the expense of victims who are owed restitution as a result of the underlying criminal conduct. Another advantage lies in the general restraint provisions for confiscation, which permit a more aggressive provisional restraint, once formal charges are filed, than is often available in a civil litigation action to obtain restitution or secure compensation. Finally, using confiscation to obtain restitution for victims will often save them the significant fees or expenses (representing a percentage of the assets that could be recovered) that are usually required for recovery through a private law (civil) case.

This practice is supported in international conventions—specifically UNCAC, art. 53(c), which obliges a state party to "take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another state party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with the Convention." In addition, article 57(3)(c) stipulates that the requested jurisdiction shall "give priority consideration to returning confiscated property to the requesting state party, returning such property to its prior legitimate owners or compensating the victims of the crime."

In many civil law jurisdictions, states and other relevant governments can claim their rights before confiscation as a civil party in criminal proceedings. Even if they lack the status of a civil party, they can request the prosecutors, the investigative judges, or the

[62] The practice of freezing and confiscating property on behalf of the victim currently takes place at least in Finland and France (EC 2016, 23).

court for restitution of their property. Similarly, in common law jurisdictions, statutes and legislation often allow victims to ask for restitution of stolen or embezzled property in which they had previous title or ownership when the court adjudicates the confiscation.

Legal systems should also provide for the right of potential claimants to be informed of proceedings when recoverable assets are identified or seized (UNCAC, art. 56). If this obligation is not fulfilled, prosecutors or relevant authorities may often conduct cases without considering the interests of the foreign government harmed by the corruption offense, depriving the foreign government of an opportunity to claim its rights.

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8. Key Principles of International Cooperation in Asset Recovery and Informal Channels of Cooperation

8.1 Introductory Remarks

Corruption cases and most complex money-laundering cases generally require asset recovery efforts beyond domestic borders. Some offenses or parts of an offense may be committed in another jurisdiction: a company paying bribes for a contract may be headquartered or incorporated in a jurisdiction outside the jurisdiction where the bribes are paid, and the officials receiving the bribes may launder their ill-gotten gains in still another jurisdiction. In addition, the international financial sector is a particularly attractive setting for those seeking to launder funds and impede asset-tracing efforts. Intermediaries such as accountants, lawyers, or trust and company service providers offer access to the financial sector and serve to disguise a corrupt official's involvement in a transaction or ownership of assets. These "gatekeepers" may offer yet another point of attack to go after the funds and thus potentially expand the number of jurisdictions involved.

Corrupt officials use complicated financial schemes to launder the proceeds of corruption, often involving offshore and onshore financial centers, shell companies, and corporate vehicles, all of which are easy and quick to set up. In addition, money can be moved quickly—often instantly, with the click of a keyboard key or a mobile-phone button—with the help of such tools as wire transfers, letters of credit, credit and debit cards, automated teller machines, cryptocurrencies, and mobile devices.

In contrast to the short time it takes to move money and establish opaque structures, asset tracing and recovery by law enforcement officials and prosecutors may take months or years because the principle of sovereignty restricts authorities' ability to take investigative, legal, and enforcement actions in foreign jurisdictions. Successful tracing and recovery efforts often depend on assistance from foreign jurisdictions, a process that may be slowed and complicated by differences in legal traditions, laws and procedures, languages, time zones, and capacities.

In this context, international cooperation, in its widest sense, is essential for the successful recovery of assets that have been stashed or hidden abroad.[1] The international community has recognized this (see specifically the United Nations Convention against

[1] The freezing of former Ukrainian president Viktor Yanukovich's assets (chapter 5, box 5.6) is an example of a coordinated effort ordered at the international level from the beginning.

FIGURE 8.1 Integration of Asset Recovery Phases through International Cooperation

Source: World Bank.

Corruption [UNCAC], arts. 46 and 51) and has concluded a number of multilateral treaties or instruments requiring states parties to cooperate with one another on investigations, production of evidence, provisional measures and confiscation, and asset return. (Chapter 1, box 1.1, outlines the international legal framework for asset recovery.) In particular, UNCAC, art. 51, explicitly recognizes that states parties "shall afford one another the widest measure of cooperation and assistance" in returning assets. Figure 8.1 illustrates the integration of international cooperation through multiple phases of asset recovery.

Practitioners should take into account that international cooperation is "mutual": the jurisdiction that has been plundered of its assets will not only be requesting assistance from the foreign jurisdiction(s) where the assets are hidden but also may need to provide information or evidence to these jurisdictions to obtain the most effective recovery. In addition, practitioners must be proactive in seeking international cooperation as well as alerting their counterparts in foreign jurisdictions to potential corruption offenses.

The decision on the forms of cooperation and process will vary from case to case, and they should at all stages be discussed by the jurisdictions involved. This chapter highlights the strategic considerations, challenges, and characteristics of the various options that practitioners will encounter in international cooperation.

8.2 Comparative Overview of Informal Assistance and Mutual Legal Assistance Requests

This *Handbook* distinguishes between assistance that requires a mutual legal assistance (MLA) request (a formal request from one country to another) and assistance that can be provided more informally.

More specifically, an MLA request is typically submitted in writing and must adhere to specified procedures, protocols, and conditions set out in multilateral or bilateral agreements or domestic legislation. At the investigation stage, these requests generally ask for evidence, provisional measures, or the use of certain investigative techniques (such as compelling the production of bank account documents, obtaining search and seizure orders, taking formal witness statements, and serving documents). An MLA request also is generally required for the enforcement of confiscation orders.

Informal assistance typically consists of any official assistance rendered outside the context of a formal MLA request. Some jurisdictions consider informal assistance to be "formal" because the concept is authorized in MLA legislation and involves formal authorities, agencies, or administrations. The importance of such cooperation has been emphasized in international agreements and standards.[2]

In contrast to an MLA request, the information gathered through informal assistance might not be admissible in court; rather, it is more akin to intelligence or background information that can be used to develop the investigation and may lead to an MLA request.[3] This "informal" process may occur over the telephone between counterparts (that is, between law enforcement agencies, investigating magistrates, or prosecutors); through administrative cooperation; or through face-to-face meetings between counterparts.[4] Usually, police-to-police exchange of information does not require formal MLA.

Informal assistance also includes administrative cooperation through international memorandums of understanding (MOUs) between counterpart agencies in different countries (such as between tax authorities, customs, and financial intelligence units). Such MOUs

[2] UNCAC, arts. 48 and 50; United Nations Convention against Transnational Organized Crime (UNTOC), arts. 26 and 27; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 9; Financial Action Task Force (FATF) Recommendation 40 ("Other Forms of International Cooperation") (FATF 2019).

[3] In general, common law jurisdictions will not permit the results of informal assistance to be used as evidence in court. Civil law jurisdictions, on the other hand, may permit the judge to consider information gathered through informal assistance. Chile and Switzerland, for example, permit the admission of such evidence.

[4] UNCAC, art. 46(9), requires a state party to render noncoercive assistance without requiring dual criminality (further discussed in chapter 9, section 9.2.2), where consistent with the basic concepts of its legal system. FATF Recommendation 37 ("Mutual Legal Assistance") also requires that, to the extent possible, countries should render MLA notwithstanding the absence of dual criminality—particularly for less intrusive and noncoercive measures (FATF 2019).

may allow the information to then be shared with the police and judicial authorities and can be useful for obtaining information on bank accounts, international wire transfers, and cross-border currency transfers. Some customs and tax administration agencies also have criminal investigative powers. The information exchanged under these mechanisms is usually restricted to the agencies authorized to receive the information.

Subject to the applicable legal frameworks, informal assistance may incorporate noncoercive investigative measures—such as gathering publicly available information, conducting visual surveillance, and obtaining information from financial intelligence units (FIUs)—and may extend to spontaneous disclosures of information, conducting a joint investigation, or asking the authorities in another jurisdiction to open a case. In some jurisdictions, emergency provisional measures (for example, to block a pending wire transfer) can be requested through informal channels, although it must be followed up with an MLA request.

On the other hand, formal assistance includes such things as an agreement to transfer proceedings to another jurisdiction; implementation of domestic laws that permit direct recovery; enforcement or registration of a provisional restraint or confiscation order from another jurisdiction; and extradition.[5] Table 8.1 elaborates on the differences between informal assistance and an MLA request.

Table 8.1 Differences between Informal Assistance and MLA Requests

Factor	Informal assistance	MLA requests
Purpose	• Obtain *intelligence* and *information* to assist investigation[a] • Emergency provisional measures in some jurisdictions	• Obtain *evidence* for use in criminal trial and confiscation (in some cases, NCB confiscation) • Enforcement of restraint order or confiscation judgment
Type of assistance	• Access to open information • Noncoercive investigative measures • Proactive disclosure of closed information according to legal frameworks • Joint investigation • Opening of foreign case	• Coercive investigative measures (such as search orders) • Other forms of judicial assistance (such as enforcement of provisional measures or confiscation judgment)
Contact process	*Direct:* • Law enforcement, prosecutor, or investigating magistrate directly to counterpart • Between counterpart FIUs, banking and securities regulators, or tax and customs administrations[b]	*Generally, not direct:* • Often through central authorities in each jurisdiction[c] • Letters rogatory through the ministry of foreign affairs

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[5] Extradition is the process through which a jurisdiction surrenders a suspected or convicted criminal. Whereas parts of the extradition process and requirements are similar to MLA, there are a number of additional issues—such as the extradition of nationals, specialty, and the doctrine of non-inquiry. An extensive review of these issues is beyond the scope of this *Handbook*.

Table 8.1 Differences between Informal Assistance and MLA Requests *(Continued)*

Factor	Informal assistance	MLA requests
Requirements	• Usually just agency-to-agency contact, sometimes a memorandum of understanding • Must be lawfully gathered in both jurisdictions	• Must include dual criminality, and often includes reciprocity, specialty, ongoing criminal investigation, or link between assets and offense
Advantages	• Information obtained quickly; formality of an MLA request not required (for example, dual criminality) • Useful for verifying facts or obtaining background information to improve an MLA request	• Evidence admissible in court • Enables enforcement of orders
Limitations	• Information cannot always be disclosed without restrictions and/or used as evidence • Difficult to determine contacts • Few resources allocated to networking • Potential leaks	• Time-consuming • Resource-intensive • Requirements often difficult to meet • Potential leaks

Source: World Bank.
Note: FIU = financial intelligence unit; MLA = mutual legal assistance; NCB = non-conviction based.
a. At times, informal assistance can also produce evidence that can be used in a criminal trial without the need for an MLA request—for example, evidence obtained by foreign law enforcement doing a drive-by of a location and taking photos; provision of publicly accessible records; or provision of internal law enforcement records that can be certified.
b. To enhance tax cooperation in the context of tax evasion and tax avoidance, many states parties have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Article 6 thereof requires their competent authorities to agree on the scope of the automatic exchange of information (AEOI). See OECD (Organisation for Economic Co-operation and Development), "Convention on Mutual Administrative Assistance in Tax Matters" (last updated September 2020). https://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm. The work of the OECD and the Global Forum on Transparency and Exchange of Information for Tax Purposes includes a common reporting standard and an online portal, the Automatic Exchange Portal, at https://www.oecd.org/tax/automatic-exchange/.
c. There may be bilateral or multilateral agreements that permit direct contact among practitioners.

8.3 Key Considerations for International Cooperation

The strategy of an asset recovery case must involve considerations of international cooperation from the outset.[6] To that end, practitioners should keep in mind the four key principles described below.

8.3.1 Incorporate International Cooperation into Each Phase of the Case

When a case involves more than one jurisdiction, it is important that practitioners immediately focus on international cooperation efforts to be maintained for the duration of the case. Some authorities wait until a domestic conviction and a confiscation

[6] To better understand certain jurisdiction-specific aspects, practitioners can refer to the Asset Recovery Guides (https://star.worldbank.org/ArabForum/asset-recovery-guides) and Beneficial Ownership Guides (https://star.worldbank.org/content/beneficial-ownership-guides) compiled by the World Bank's Stolen Asset Recovery (StAR) initiative. Also see the Lausanne Guidelines for the Efficient Recovery of Stolen Assets (described in chapter 2, box 2.5 of this *Handbook*) on the planning and management of an international asset recovery case at https://guidelines.assetrecovery.org/guidelines.

order are secured before beginning the process of tracing and securing the assets abroad—often with frustrating and adverse results, such as when the delay gives the corrupt official ample opportunity to transfer funds to uncooperative jurisdictions. Therefore, it is imperative to involve authorities from other jurisdictions at the outset, at least through informal means.

Establishing proactive contact early can assist practitioners in understanding the foreign legal system and potential challenges, obtaining additional leads, and developing a strategy. It also gives the foreign jurisdiction an opportunity to prepare for its role in providing cooperation. Boxes 8.1 and 8.2 present two cases where practitioners from various countries collaborated in asset recovery efforts.

BOX 8.1 *Operação Lava Jato* (Operation Car Wash): Collaboration between US, Brazilian, and Swiss Authorities

Although Operation Car Wash began as an isolated investigation of money laundering,[a] it soon expanded into an immense anticorruption operation involving the Brazilian semipublic (majority state-owned) company Petróleo Brasileiro (Petrobras), one of the world's largest oil and gas companies (Moro 2018, 157–58). The investigation was launched in March 2014 by the Brazilian Federal Police and a designated task force of the Brazilian Federal Prosecution Service after discovering unusual financial transactions between Petrobras and its suppliers, including construction giant Odebrecht. It was later found that these transactions were bribes that were used for the criminal enrichment of Petrobras executives and for the financing of politicians' election campaigns (Moro 2018, 158).

The case has been described as groundbreaking and the most comprehensive corruption investigation in the history of Brazil.[b] As of 2018, more than 80 criminal cases have been brought against at least 340 defendants in Brazilian courts. More than half of those cases have already been judged, and some of them led to more than 200 convictions of about 140 defendants for bribery and money laundering, among other crimes.[c]

Early on, the scandal took on an international dimension as numerous countries and companies were shown to be involved. For this reason, Brazil had to work closely with these countries to expose an intricate web of corruption. Between 2014 and 2018, Brazilian authorities submitted 269 mutual legal assistance (MLA) requests to 45 countries and received 248 MLA requests from 36 foreign authorities.[d] As of this writing, they have already signed information-sharing agreements with Argentina, Switzerland, Norway, and the Netherlands, among others.[e]

In particular, the cooperation with the United States[f] set an example for countries looking to address their own political corruption.[g] Brazilian and US authorities cooperated on multiple aspects of the scandal, including the investigation against

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BOX 8.1 *Operação Lava Jato* (Operation Car Wash): Collaboration between US, Brazilian, and Swiss Authorities *(Continued)*

construction company Odebrecht and its petrochemical unit Braskem, which is controlled by Odebrecht and has Petrobras as a minority shareholder.[h] Odebrecht and Braskem were found to have systematically paid large bribes to senior officials in countries around the world to secure various projects.[i]

Brazilian and US prosecutors worked closely to gather evidence and build the case. As a result, Odebrecht and Braskem pleaded guilty and agreed to pay a combined penalty of at least US$3.5 billion to resolve charges brought by Brazilian, US, and Swiss authorities. Each company, however, entered into separate plea agreements with the law enforcement authorities.[j] Under the plea agreements, Brazil will receive 80 percent of the total criminal fine, while Switzerland and the United States will each receive 10 percent. These global settlements make sure that duplicative fines and penalties are avoided, while they ensure fairness in punishment and encourage companies to cooperate with law enforcement authorities.[k] According to the US Department of Justice (DOJ), these agreements are the result of an extraordinary multinational effort to investigate and prosecute a highly complex case, and they constitute one of the largest-ever foreign bribery resolutions.[l]

a. The operation took its name from gas stations and car washes that were used to launder criminal proceeds. Jonathan Watts. 2017. "Operation Car Wash: Is This the Biggest Corruption Scandal in History?" *Guardian*, June 1, 2017 (accessed October 11, 2018). https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history.
b. This *Handbook* also discusses the Lava Jato case in chapter 2, boxes 2.4 and 2.11; chapter 3, box 3.1; chapter 4, box 4.2; and chapter 5, box 5.5.
c. Brazilian Federal Prosecution Service, "A Lava Jato em números no Paraná" [Car Wash, by the Numbers, in Paraná State], last updated March 19, 2020, http://www.mpf.mp.br/grandes-casos/lava-jato/resultados.
d. Brazilian Federal Prosecution Service, "A Lava Jato em números no Paraná."
e. Nathan Davis. 2018. "Argentina, Brazil to Share Some Information Related to Operation Car Wash." *El Hemisferio*, July 20, 2018 (accessed October 11, 2018). https://elhem.co/2018/07/20/argentina-brazil-to-share-some-information-related-to-operation-car-wash/.
f. US Department of Justice (DOJ). 2016. "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History." Press Release no. 16-1515, December 21, 2016 (accessed October 11, 2018). https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.
g. Kees Thompson. 2018. "Brazil: A Model for International Cooperation in Foreign Bribery Prosecutions." *GAB | Global Anti-Corruption Blog*, June 21, 2018 (accessed October 11, 2018). https://globalanticorruptionblog.com/2018/06/21/brazil-a-model-for-international-cooperation-in-foreign-bribery-prosecutions/.
h. DOJ, "Odebrecht and Braskem Plead Guilty," December 21, 2016; United States v. Braskem, Cr. No. 16-644 RJD (E.D.N.Y.), https://www.justice.gov/opa/press-release/file/919901/download.
i. DOJ, "Acting Assistant Attorney General Kenneth A. Blanco Speaks at the Atlantic Council Inter-American Dialogue Event on Lessons from Brazil: Crisis, Corruption and Global Cooperation," speech transcript, released July 19, 2017 (accessed October 11, 2018), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-speaks-atlantic-council-inter-american-1. See also DOJ, "Odebrecht and Braskem Plead Guilty," December 21, 2016.
j. The fine imposed against Odebrecht will be at least US$2.6 billion and up to US$4.5 billion, subject to the company's ability to pay the total amount of penalties imposed. The fine imposed against Braskem will be approximately US$957 million (DOJ, "Odebrecht and Braskem Plead Guilty," December 21, 2016).
k. DOJ, "Odebrecht and Braskem Plead Guilty," December 21, 2016.
l. DOJ, "Odebrecht and Braskem Plead Guilty," December 21, 2016. The February 2020 Airbus settlement involving France, the United Kingdom, and the United States is another example of a foreign bribery resolution. See DOJ. 2020. "Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case." Press Release no. 20-114, January 31, 2020 (accessed May 15, 2020). https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case.

BOX 8.2 The VimpelCom Case: Collaboration among Prosecutors and Regulators from 20 Countries

The VimpelCom case is another example of how prosecutors and regulators from 20 countries collaborated in investigating a cross-border matter to reach one of the largest global foreign bribery resolutions ever.[a] (See also chapter 2, box 2.9, on the deferred prosecution agreement and settlement.)

The case involved VimpelCom (the world's sixth-largest telecommunication company) and its wholly owned Uzbek subsidiary, Unitel, among other companies, regarding a conspiracy to pay bribes to an Uzbekistan government official between 2006 and 2012 (in order to obtain telecom licenses, frequencies, channels, and other benefits) in addition to money-laundering offenses.[b]

VimpelCom agreed to pay nearly US$800 million to US and Dutch authorities to settle criminal and regulatory penalties.[c] This settlement resulted from a coordinated effort between the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC), the Public Prosecution Service in the Netherlands, and law enforcement authorities from numerous countries, including Belgium, France, Latvia, Luxembourg, Sweden, Switzerland, and the United Kingdom.[d]

DOJ has also sought to recover US$850 million in forfeiture. For this reason, it has filed two civil complaints: One seeks US$550 million in proceeds of illegal bribes, or property involved in laundering these proceeds, located in Swiss bank accounts. The other seeks US$300 million involving assets restrained in Belgium, Ireland, and Luxembourg.[e] The investigation has led to US$1.3 billion in criminal penalties paid to the United States and more than US$2.6 billion in global fines and disgorgement.[f]

a. US Department of Justice (DOJ). 2016. "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." Press Release no. 16-194, February 18, 2016 (accessed October 10, 2018). https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.
b. DOJ, "VimpelCom Limited and Unitel," February 18, 2016; US Securities and Exchange Commission (SEC). 2016. "VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations." Press Release no. 2016-34, February 18, 2016 (accessed October 10, 2018). https://www.sec.gov/news/pressrelease/2016-34.html.
c. DOJ, "VimpelCom Limited and Unitel," February 18, 2016.
d. DOJ, "VimpelCom Limited and Unitel," February 18, 2016. See also Ryan Rohlfsen and Joshua Asher. 2016. "VimpelCom Ltd. Agrees to Pay $795M and Accept a Three-Year Corporate Monitor to Resolve Massive Bribery Scheme in Uzbekistan." Lexology, February 19, 2016. https://www.lexology.com/library/detail.aspx?g=6d9fae12-f209-47a0-9be4-e6134e386698.
e. DOJ, "VimpelCom Limited and Unitel," February 18, 2016.
f. DOJ. 2019. "Former Uzbek Government Official and Uzbek Telecommunications Executive Charged in Bribery and Money Laundering Scheme Involving the Payment of Nearly $1 Billion in Bribes." Press Release no. 19-067, March 7, 2019. https://www.justice.gov/usao-sdny/pr/former-uzbek-government-official-and-uzbek-telecommunications-executive-charged-bribery.

8.3.2 Develop and Maintain Personal Connections

Forming personal connections with foreign counterparts is the hallmark of successful asset recovery cases. A telephone call, an email, a videoconference, or a face-to-face meeting with foreign counterparts will go a long way toward moving the case to completion. Communication is important in all phases: obtaining information and intelligence, making strategic decisions, understanding the foreign jurisdiction's requirements

for assistance, drafting MLA requests, or following up on requests for assistance. It helps reduce delays, particularly where differences in terminology and legal traditions lead to misunderstandings. In addition, it can demonstrate that an administration is serious and committed to the case, thereby building trust among the parties and fostering increased attention and commitment to the case.

In larger cases, an early face-to-face meeting of practitioners from the various jurisdictions involved in the investigation may facilitate the exchange of information. It also helps counterparts build trust, assess strategies, and learn about requirements for submitting MLA requests. (Box 8.3 presents a case that illustrates the importance of using and maintaining professional connections.)

In some cases, particularly when faced with resource constraints or in cases that involve several jurisdictions, practitioners have invited representatives of the foreign jurisdictions to attend a case conference held domestically (as has occurred in Brazil). In other cases, practitioners have opted to visit the foreign jurisdictions involved in the case.

BOX 8.3 Connecting with People: A Case Example from Peru

In September 2000, televised videos showed Vladimiro Montesinos, chief of Peru's intelligence service under then-president Alberto Fujimori, bribing an elected congressman.[a] Switzerland subsequently used a spontaneous disclosure to alert Peru to the presence of frozen funds in Switzerland and invited Peru to file an MLA request.

The Peruvian prosecutor personally contacted the Swiss investigating magistrate conducting the case—both by phone and eventually in person in Zurich. Making a personal connection resulted in the following important outcomes:

- *Enabled key strategic decisions.* Through discussions on the options for asset recovery, Peru ultimately decided to pursue the case domestically and to use mutual legal assistance (MLA) and legislative waivers to recover the frozen funds in Switzerland.
- *Clarified requirements for MLA requests.* The personal conversation gave the Peruvian authorities a better understanding of the Swiss system and an idea of what they needed to prove and provide to be successful in their request to Switzerland.
- *Developed trust.* Personal contacts demonstrated the political will and commitment of both parties, and they helped promote trust between the parties.

These outcomes, enabled by personal connections, were central in the repatriation of US$77 million resulting from the Swiss-Peruvian cooperation.[b]

a. For more discussion of this case, see chapter 1, box 1.3; and chapter 5, box 5.8.
b. Swiss Federal Council. 2002. "Montesinos Case: Switzerland Transfers 77 Million US Dollars to Peru." Press Release, August 20, 2002. https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-23237.html.

Establishing personal connections can be difficult. Many practitioners do not have easy access to the internet to determine whom to contact, are not authorized to make long-distance phone calls, and lack the resources to attend the international or regional meetings that help them develop personal networks. Even where a contact's name and telephone number are obtained, language differences may be an additional barrier.

Personal connections are so integral to successful asset recovery, however, that authorities should make every attempt to ensure they happen. The time and effort spent making connections will be worth the results—whether the practitioner is seeking guidance on how best to proceed, gathering leads for the case, or seeking drafting assistance with an MLA request. Box 8.4 provides a list of avenues for pursuing personal connections.

BOX 8.4 Channels for International Cooperation

Professional contacts: Connections developed through previous cases, meetings, conferences, and so forth.

Referrals: Counterparts, personal contacts, networks, and international organizations (for example, the World Bank or the United Nations Office on Drugs and Crime) may have referrals based on their personal networks.

Counterparts in foreign jurisdictions:

- Law enforcement agencies (such as police and those involved in anticorruption, customs, drug law enforcement, and tax efforts)
- Financial intelligence units (FIUs), whose roles and contributions are discussed in chapter 2, box 2.1
- Regulatory authorities (banking, securities)
- Prosecutors
- Investigative magistrates
- Foreign counsels (some jurisdictions may retain counsel who are more familiar with the procedures and requirements of the foreign jurisdiction).

Liaison magistrates and regional law enforcement attachés: Many jurisdictions have resource persons based in their embassies or consulates abroad to facilitate international cooperation with foreign jurisdictions. They include the diplomatic agents in embassies, as well as legal, police, customs, or

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BOX 8.4 Channels for International Cooperation *(Continued)*

judicial attachés seconded for diplomatic representation. These individuals have knowledge of the laws and procedures of both their own jurisdictions and host jurisdiction, and that knowledge can help practitioners avoid the pitfalls of working with different legal systems. Their roles vary, but generally they will facilitate contact with counterparts, provide informal assistance, help with mutual legal assistance (MLA) request preparations (reviewing drafts), and help in following up with an MLA request. Practitioners may wish to contact the foreign jurisdiction's local embassy, consulate, or ministry of foreign affairs to see if such a resource person exists.

Examples of jurisdictions with resource persons attached to their embassies in certain jurisdictions include Argentina, Chile, Colombia, France, the United Kingdom, and the United States (in particular, the Federal Bureau of Investigation and US Immigration and Customs Enforcement). Some jurisdictions have developed the role of their diplomatic representation in corruption cases. Belgium, for example, has set up a mechanism obliging Belgian embassies to inform the liaison magistrate at the Ministry of Foreign Affairs of suspicions about bribes paid by Belgian businesses to foreign officials.

Central authorities: The United Nations Convention against Corruption (UNCAC), art. 46 (13), requires states parties to "designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance (MLA) and either to execute them or to transmit them to the competent authorities for execution." Central authorities often are Ministries of Foreign Affairs or Justice, offices of attorneys general, or in certain cases, anti-corruption agencies. The designation of a central authority in both the requested and the requesting jurisdictions is crucial for international cooperation because both can provide designated channels for communication, as follows:[a]

- *Domestic:* The domestic central authority may be able to refer practitioners to contacts abroad and provide information on jurisdictions with which there are multilateral or bilateral agreements.
- *In the requested jurisdiction:* The office of the central authority in the requested jurisdiction should be able to provide guidance on how best to proceed in light of the needs of the requesting jurisdiction and laws of the requested jurisdiction. Many offices will also assist with drafting requests.

(continued next page)

BOX 8.4 Channels for International Cooperation *(Continued)*

Practitioner networks: Numerous asset recovery interagency networks (ARINs) have been established around the world to facilitate the entire asset recovery process.

Among them, the Camden Asset Recovery Inter-Agency Network (CARIN) is an informal network of practitioners, established in 2004, to support their members' efforts "in depriving criminals of their illicit profits" (CARIN 2012, 5). CARIN focuses on tackling the proceeds of crime and aims to establish a network of contact points. It operates as a center of expertise in the field of asset recovery, promotes the exchange of information and good practice, offers advice to authorities, and supports cooperation among jurisdictions.

Currently, CARIN has 54 registered member jurisdictions, including 28 European Union (EU) member states and nine international organizations. Observer and associate status are also available (CARIN 2012, 6). Members and observers should inform the network about their national contact points and their legislative and procedural frameworks relevant to asset recovery. Members and observers must facilitate the exchange of information and MLA with other CARIN contacts and raise awareness with those authorities assigned to recover assets (CARIN 2012, 7). To facilitate cooperation and ensure security, Europol's Financial Crime Information Centre (FCIC), a closed user group website for investigators and judicial authorities, offers CARIN members and observers access to an open CARIN area as well as a closed folder (called the CARIN Membership Area) that displays information on legislation or case studies relevant to criminal asset recovery (CARIN 2012, 11–12).

Other established ARINs cover many jurisdictions. Like CARIN, their key objectives include operating as centers of excellence and expertise regarding asset recovery, exchanging information and best practices, facilitating training, offering advice to authorities, and supporting cooperation with authorities and the private sector.[b]

- *Regional professional ARINs:*
  - ARIN-SA (since 2009) has members from Eastern and Southern African countries
  - West Africa: ARIN-WA (since 2014)
  - East Africa: ARIN-EA (since 2013)
  - Asia Pacific: ARIN-AP (since 2013)
  - Caribbean: ARIN-CARIB (since 2016)
  - West and Central Asia: ARIN-WCA (since 2018)

(continued next page)

BOX 8.4 Channels for International Cooperation *(Continued)*

  - South America: RRAG (GAFILAT Asset Recovery Network), a virtual platform for exchange of information between contact points for South American countries ("GAFILAT" being the Financial Action Task Force of Latin America).

- *Other practitioner networks:*
  - Egmont Group: an international network of financial intelligence units (see also chapter 2, box 2.1; and chapter 3, box 3.6)
  - Interpol, Europol, Aseanpol, Ameripol: international (and regional) police organizations that facilitate cross-border police cooperation
  - World Customs Organization (WCO) and its regional intelligence liaison offices
  - Arab Anti-Corruption and Integrity Network (ACINET)
  - Iberoamerican Association of Public Ministers (AIAMP)
  - European Judicial Network: representatives of national judicial and prosecution authorities designated as contact points for MLA
  - Eurojust: judges and prosecutors from EU member states who assist national authorities in investigating and prosecuting serious cross-border criminal cases
  - International Association of Prosecutors (IAP)
  - Practitioner networks for regulatory agencies[c] include bank, securities, and company regulators such as the Bank for International Settlements (BIS), International Organization of Securities Commissions (IOSCO), and International Association of Insurance Supervisors (IAIS).

a. Increasingly, MLA treaties and multilateral conventions require that jurisdictions designate a central authority to whom MLA requests can be sent. Some jurisdictions may have two central authorities and numerous contact points for requesting assistance (Stephenson et al. 2011).
b. For example, see the objectives of ARIN-AP at http://www.arin-ap.org/main.do and ARIN-SA https://new.arinsa.org/.
c. This cooperation is more limited because it usually requires a memorandum of understanding (MOU) and may have restrictions on sharing for law enforcement purposes.

An overview and a global directory of asset recovery networks, along with information about their structure and operations, is available on the website of the Stolen Asset Recovery (StAR) initiative (World Bank and UNODC 2019).[7]

[7] For the online version of the StAR publication "International Partnerships on Asset Recovery: Overview and Global Directory of Networks," see https://star.worldbank.org/publication/international-partnerships-asset-recovery.

8.3.3 Engage in Informal Assistance Channels Before, During, and After Transmitting an MLA Request

Many practitioners immediately resort to drafting an MLA request when they determine that international cooperation is required. However, some important information can be obtained more quickly and with fewer formalities through direct contact with counterpart law enforcement agencies and FIUs or from liaison magistrates or law enforcement attachés posted locally or regionally.

Such assistance may lead to a more rapid identification of assets; confirm the assistance needed; and, even more important, provide the proper foundation for a formal MLA request. These contacts can also advise on what information is easily accessible in the jurisdiction because it is in the public domain and searchable. They also offer an opportunity to learn about the procedures and systems of the foreign jurisdiction and to assess strategic options.

These informal contacts often must be cleared through the practitioner's domestic central authority to ensure that protocol with the other country is not violated and that laws and regulations regarding foreign assistance are observed. (Acting without proper clearance could irreparably compromise the foreign aspect of the case.) It is also a good practice, when possible, to discuss these informal contacts with the diplomatic mission of the requesting state in the requested country.

8.3.4 Be Aware of Potential Barriers

Practitioners may encounter many barriers in trying to obtain international cooperation, so it is important that they recognize possible obstacles and take the necessary measures to overcome them (Stephenson et al. 2011). Differences in legal traditions and confiscation systems, jurisdictional issues, procedural variations, legal obstacles, and delays are among the barriers that practitioners need to consider and take steps to overcome. (See chapter 2, section 2.8, for a discussion of some of these obstacles.)

Practitioners should be mindful that information provided to a foreign jurisdiction—whether informally or through a formal MLA request—may cause the foreign jurisdiction to initiate its own domestic investigation and subsequently refuse to provide assistance while there are local "ongoing proceedings." In addition, disclosure obligations may delay the assistance process significantly (box 8.5). Furthermore, despite confidentiality obligations under an MLA treaty, leaks of information are a frequent occurrence.

To gauge and navigate these risks, practitioners should use their personal contacts, Camden Asset Recovery Inter-Agency Network (CARIN), or regional asset recovery interagency networks (ARINs) to learn about the other systems, confirm strategy, and discuss the implications of providing information prior to discussions of substance. To facilitate moving forward without breaching confidentiality or secrecy laws, practitioners will often speak in hypothetical terms during the early phases of the case and planning strategy. For example, "Person *x* did action *y*. How would I achieve the desired

BOX 8.5 Disclosure Obligations: A Barrier to Mutual Legal Assistance?

A few countries—Liechtenstein, Luxembourg, and Switzerland—have disclosure obligations that require authorities to provide notice to the targets of a mutual legal assistance (MLA) request and that grant targets the right to appeal a decision to provide assistance. This is particularly problematic with requests for bank account information or provisional measures. These obligations not only risk dissipation of funds following notice but can also lead to lengthy delays. A target will use all available avenues to block the assistance and will exhaust all appeals—a process that can take months or years.

Here are some ideas for avoiding this barrier:

- Discuss issues and strategy in advance with foreign counterparts and ask them to avoid untimely action that would trigger early disclosure of investigative steps.
- Discuss the possibility of serving a gag order on banks or financial intermediaries from which information is sought to block disclosure of the exchange of information.
- Consider conducting a joint investigation or providing information to the foreign authorities so that they can conduct their own investigation and take provisional measures. Either option may remove this potential avenue for delay because disclosure to a target can be postponed for domestic investigations and provisional measures.
- Ensure that a request is not overly broad to prevent potential arguments that the request breaches privacy.
- Ensure that the facts and reasons for the request are outlined clearly to address potential arguments that the dual criminality test is not met—that is, a target may argue that the request is a tax investigation colored as a corruption investigation to circumvent the dual criminality principle (discussed further in chapter 9, section 9.2.2).

outcome in the foreign jurisdiction?" Box 8.5 describes some ideas for overcoming the barrier of disclosure obligations.

8.4 Overall Process for Informal and Formal International Cooperation

As described earlier, the asset recovery process will use a combination of both informal requests for assistance and formal MLA requests to obtain information, intelligence, evidence, provisional measures, confiscation, and eventual return of the assets. The MLA process can be simple if used correctly between cooperative jurisdictions and cooperative individuals where there has been effective prior informal cooperation, because this will help identify what can be achieved and within what time frames.

Where a request might be extensive, serious consideration and discussion should take place to ensure that the evidence can be secured in a way that enables an investigation or prosecution to proceed in a timely manner.

Although it may seem easier to include everything being sought in one request, an overly broad request may lack the evidentiary basis required to provide all the desired information or take the desired measures—particularly for the latter phases of obtaining provisional measures and confiscation. Moreover, a request containing everything at once may become too complex to be processed in the requested jurisdiction, requiring the mobilization of multiple agencies and ultimately a lengthy delay in response.

In complex cases, the most efficient method is usually a step-by-step process in which information or evidence obtained pursuant to one request is used to support the next (follow-up) request. For example, at the outset of the case, it may be possible through informal assistance to obtain bank account details (through FIU-to-FIU channels) that will provide the necessary foundation and background information for an MLA request to seize bank documents. The activity revealed in these documents will help investigators to start scoping the international issues by tracing the assets and identifying additional accounts to restrain or seize. This information can then be used to gather the evidence required for provisional measures, whether emergency provisional measures (through informal assistance where available) or restraint or seizure though an MLA request. Eventually the accumulated information and evidence secured by MLA will provide the basis for domestic confiscation and enforcement.

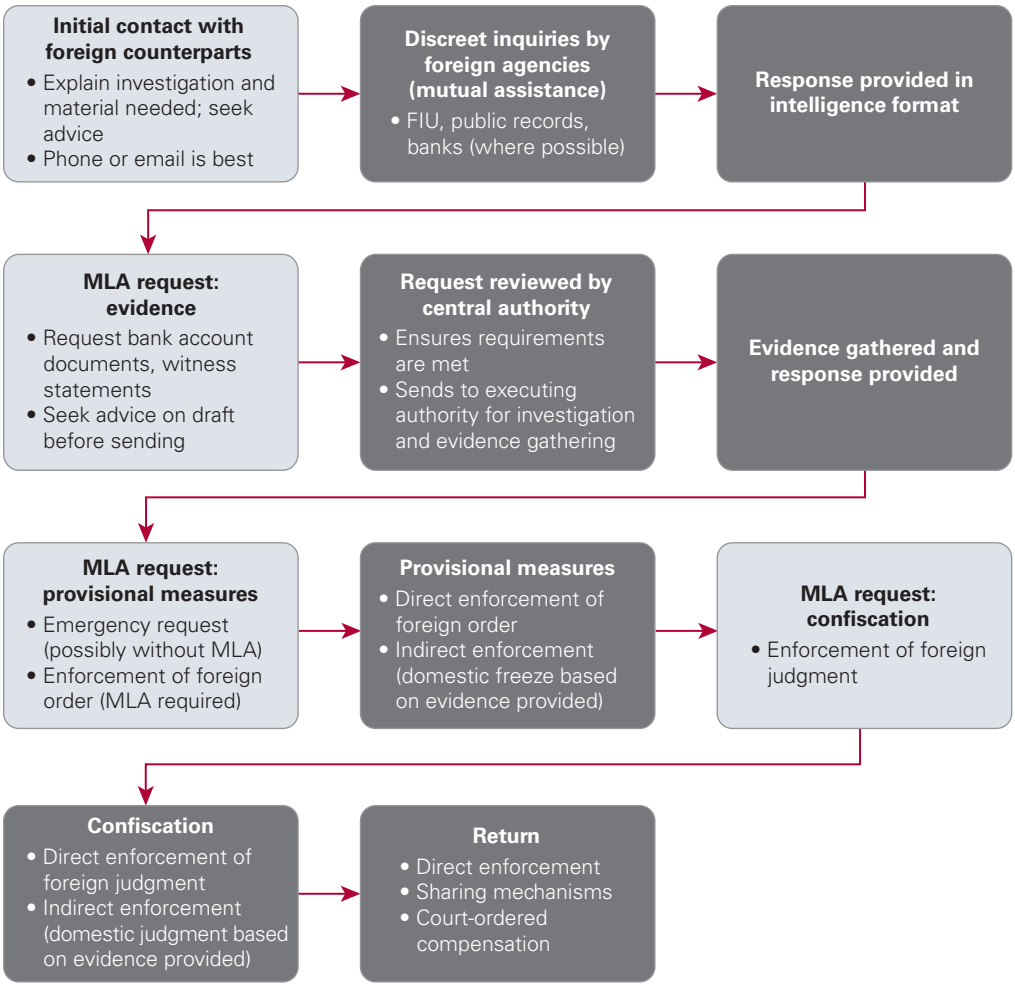
Following a step-by-step process enables practitioners to make important strategic decisions at each stage (figure 8.2). In addition, it leads to greater communication between counterparts, thereby building or fostering a relationship of trust between jurisdictions as material is being shared in both open and closed formats.

At the same time, discussion can be undertaken and an agreement can be reached on what might be requested and the process through which it is best achieved. Figure 8.3 describes information that can usually be requested through informal and formal channels of communication, respectively.

8.5 Channels for Informal Assistance

This section discusses and lists examples of the channels and contact points for informal assistance in requested countries that may be helpful in asset recovery cases, specifically regarding asset tracing, emergency provisional measures, spontaneous disclosures, and asking another jurisdiction to open a case. A joint investigation—one form of cooperation that may be initiated through informal assistance or an MLA request—is further discussed in chapter 2 (section 2.5.3, "Joint Investigations with Foreign Authorities"). Other channels are initiated and led by civil society organizations. A checklist in appendix H lists some of the discussion points and issues that practitioners can use to begin discussions with their counterparts.

FIGURE 8.2 Flowchart of International Cooperation in Asset Recovery Cases

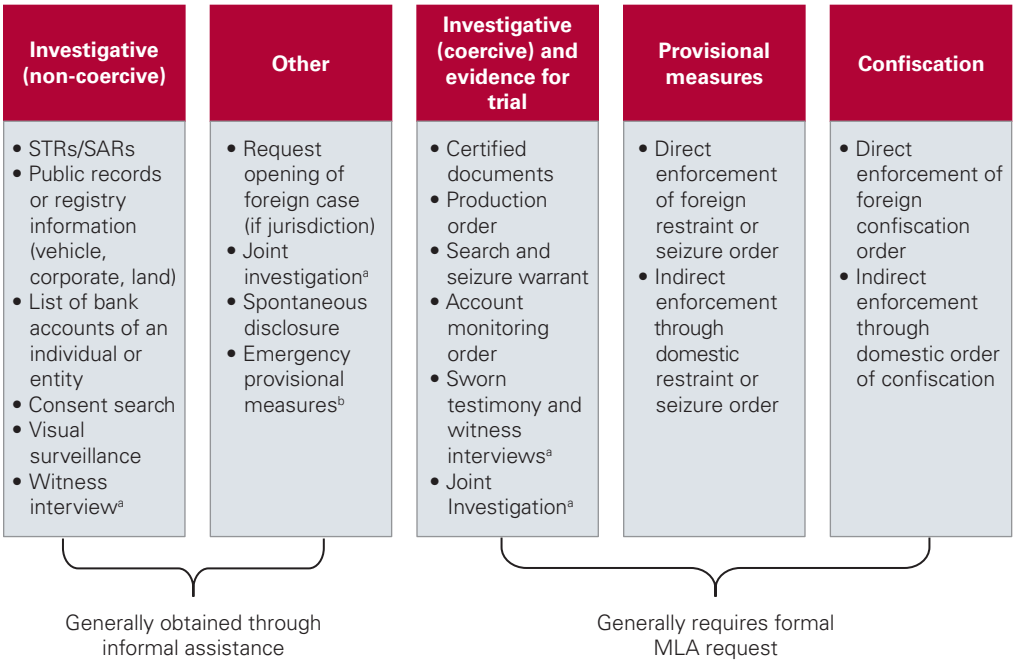


Source: World Bank.
Note: Light gray boxes designate requesting jurisdictions; dark gray boxes designate requested jurisdictions. In some jurisdictions, evidence and provisional measures can be requested at the same time. FIU = financial intelligence unit; MLA = mutual legal assistance.

8.5.1 General Considerations

Although there are fewer restrictions to informal assistance than to formal MLA requests, there are certain restrictions that practitioners need to consider. Information requested or shared must be gathered and communicated lawfully in both the requested and requesting jurisdictions, and communications among counterparts must be authorized. And because cooperation is usually counterpart-to-counterpart, the appropriate practitioners need to go through the relevant domestic agency for their foreign counterparts. (See box 8.6 for an example of how some jurisdictions are moving to eliminate this requirement.)

FIGURE 8.3 Informal Assistance and Formal Mutual Legal Assistance Requests: What Can Be Requested?



Source: World Bank.
Note: MLA = mutual legal assistance; SAR = suspicious activity report; STR = suspicious transaction report.
a. Requiring either informal assistance or formal MLA request (or both), depending on the jurisdiction.
b. May not require formal MLA for initial order but will require one to retain the order.

BOX 8.6 Facilitating Informal Assistance

Informal assistance is generally conducted on a counterpart-to-counterpart basis, a process that introduces a middleman in some exchanges because law enforcement must go through its domestic financial intelligence unit (FIU) to obtain information from an FIU in a foreign jurisdiction.

Some jurisdictions have moved to facilitate informal exchanges by permitting direct cooperation, regardless of whether the foreign agency is a counterpart. For example, the US Financial Crimes Enforcement Network (FinCEN) cooperates directly with foreign law enforcement agencies from the European Union in certain circumstances, and similar cooperation is reciprocal.

Finally, asset recovery offices or agencies, depending on their specific roles in their jurisdictions, may be useful channels for exchange of information about the process and relevant authorities to contact.

For example, instead of a law enforcement agency contacting a foreign FIU, the domestic FIU may use the Egmont Group channels to obtain information from the foreign FIU and then give that information to law enforcement officials. In some cases, in addition to Egmont membership, counterpart agencies must sign an MOU or confidentiality undertakings.

The Interpretive Note to Financial Action Task Force (FATF) Recommendation 40 ("Other Forms of International Cooperation") stipulates requirements for the exchange of information between FIUs, financial supervisors, and law enforcement authorities. It further states that, subject to certain conditions, countries should permit their competent authorities to exchange information indirectly with non-counterparts—that is, enabling the information to pass from the requested authority through one or more domestic or foreign authorities.[8]

Practitioners must always weigh the risks and benefits of proceeding with informal assistance. For example, interviews of voluntary witnesses or even breaches of confidentiality by the foreign counterparts may alert targets to the investigation and give them a chance to destroy evidence, move assets, or flee the jurisdiction.

8.5.2 Counterparts for Informal Assistance in Foreign Jurisdictions and Nongovernmental Organization Channels

Counterpart practitioners for informal assistance in foreign jurisdictions include law enforcement officials, prosecutors, or investigating magistrates. Law enforcement attachés and liaison magistrates are also particularly relevant. Based in embassies or consulates abroad, these individuals facilitate contact with counterparts to provide informal assistance, help with MLA request preparations, and assist in following up MLA requests. One problem for practitioners seeking to contact their counterparts is that many jurisdictions have multiple law enforcement agencies, and it may be difficult to determine which one(s) to contact. (See box 8.7 on law enforcement agencies from four countries.) These agencies could include federal, state or provincial, and municipal police; anticorruption agencies; customs; drug control offices; or tax agencies. This means that practitioners may need to contact multiple agencies, should ask their counterparts whether other agencies might be relevant, or consult central authorities.

In addition, practitioners should consider that informal cross-border cooperation is triggered more and more by channels initiated and led by civil society organizations, as in the Panama Papers investigation (box 8.8).

8.5.3 Asset Tracing and Other Investigations

Asset tracing is often impeded because there is insufficient information to narrow the search to a particular bank, branch, or location. Such information is generally required in jurisdictions with large numbers of financial institutions and branches (none of

[8] See FATF Recommendation 40, "Other Forms of International Cooperation" (FATF 2019, 27) and the Interpretive Note to Recommendation 40 (FATF 2019, 110).

BOX 8.7 Law Enforcement Agencies with Investigative Mandates in France, Switzerland, the United Kingdom, and the United States

Many jurisdictions have multiple law enforcement agencies with authority to investigate and prosecute corruption and money laundering, as listed for a few countries below.

France

- Customs
- *Gendarmerie Nationale* (a branch of the national police force)
- Interregional specialized courts for organized and financial crime
- Investigating judges
- Judicial police, specifically *l'Office Central de Répression de la Grand Délinquance Financière*
- Prosecution offices
- *Agence Française Anticorruption* (AFA), the French Anticorruption Agency
- Tracfin, France's financial intelligence unit (FIU).

Switzerland

- Federal Office of Justice (mutual legal assistance [MLA] central office)
- Federal and cantonal police offices
- Federal public ministry
- Cantonal public ministries (notably in Zurich, Geneva, and Ticino)
- Money Laundering Reporting Office (MROS), Switzerland's FIU.

Note that each of the cantons (states) has its own prosecutors and law enforcement agencies.

United Kingdom (England and Wales)

- Crown Prosecution Service (CPS) and Revenue and Customs Prosecution Office
- Her Majesty's Revenue & Customs
- National Crime Agency
- Serious Fraud Office.

In addition, there are 43 regional police forces in England and Wales—some of which have units dedicated to fighting corruption and money laundering. They include the Metropolitan Police and the City of London Police.

United States

- Customs and Border Protection
- Department of Homeland Security

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BOX 8.7 Law Enforcement Agencies with Investigative Mandates in France, Switzerland, the United Kingdom, and the United States *(Continued)*

- Department of Justice (the United States' central authority)
- Kleptocracy Asset Recovery Initiative (of the Department of Justice)
- Department of the Treasury
- Drug Enforcement Administration
- Federal Bureau of Investigation
- Immigration and Customs Enforcement
- Internal Revenue Service (IRS) Criminal Investigation (CI)
- US Postal Service
- FinCEN (the United States' FIU).

In addition, there are state and local police forces.

BOX 8.8 International Cooperation for Exposing Corruption Scandals: The Panama Papers

Law enforcement authorities are not the only ones that collaborate in cross-border corruption cases. Civil society organizations and media have also raised the need for international cooperation in uncovering corruption scandals. The "Panama Papers" leak exposed information on thousands of offshore entities potentially used for illegal purposes, ranging from tax evasion to corruption. In late 2014, an anonymous source contacted a Bavarian newspaper, *Süddeutsche Zeitung* (SZ), through encrypted channels and started submitting internal documents from Mossack Fonseca, a Panamanian law firm that provided services for establishing offshore companies around the world.[a]

It is not publicly known how such large-volume data sets were transferred, but it is speculated that the data were shipped via encrypted hard drives.[b] The leak is the largest to date, with 2.6 terabytes of data spanning from the 1970s to 2016. SZ decided to analyze data in cooperation with the International Consortium of Investigative Journalists (ICIJ), a nonprofit network that worked together with more than 100 media organizations and 370 journalists in more than 80 countries and shared sources, transcripts, and videos of interviews.[c]

The organizations realized early on that the impact of combined resources would be a force unleashed compared with doing a great job alone.[d] The journalists worked together in password-secure, encrypted collaborative forums, including a real-time chat system to discuss translation issues. The data (such as scanned images) were uploaded on high-performance computers and converted to machine-readable data using optical character recognition (OCR) technology,

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BOX 8.8 International Cooperation for Exposing Corruption Scandals: The Panama Papers *(Continued)*

resulting in searchable text from which a list of famous and prominent names was compiled using search algorithms.[e]

The ICIJ built a search engine for the documents, protected by two-factor authentication, and shared the URL via encrypted email with news outlets such as the BBC, the *Guardian*, Fusion, and dozens of foreign-language media outlets. With more than a 100 news organizations publishing at the same time, the leaks created a firestorm of international attention.[f] The entire data set has not been made public to protect the privacy of innocent private parties. The leaks resulted in many formal requests and spontaneous reports from one country to another.[g] Other than the numerous individual cases pursued globally, it is estimated that 16 countries or international bodies introduced substantive reforms related to the Panama Papers (Graves and Shabbir 2019).

a. Frederik Obermaier, Bastian Obermayer, Vanessa Wormer, and Wolfgang Jaschensky. "About the Panama Papers." *Süddeutsche Zeitung* (accessed June 23, 2020). https://panamapapers.sueddeutsche.de/articles/56febff0a1bb8d3c3495adf4/.
b. Andy Greenberg. 2016. "How Reporters Pulled Off the Panama Papers, the Biggest Leak in Whistleblower History." *WIRED*, April 4, 2016. https://www.wired.com/2016/04/reporters-pulled-off-panama-papers-biggest-leak-whistleblower-history/.
c. Kristen Hare. 2016. "How ICIJ Got Hundreds of Journalists to Collaborate on the Panama Papers." Poynter, April 4, 2016 (accessed October 10, 2018). https://www.poynter.org/news/how-icij-got-hundreds-journalists-collaborate-panama-papers.
d. Hare, "How ICIJ Got Hundreds of Journalists," April 4, 2016.
e. Greenberg, "How Reporters Pulled Off the Panama Papers," April 4, 2016.
f. Greenberg, "How Reporters Pulled Off the Panama Papers," April 4, 2016.
g. European Parliament. 2017. *The Impact of Schemes Revealed by the Panama Papers on the Economy and Finances of a Sample of Member States*. https://www.europarl.europa.eu/RegData/etudes/STUD/2017/572717/IPOL_STU(2017)572717_EN.pdf.

which share information); otherwise the request is too onerous in its breadth. Some jurisdictions have specific tools that may help in addressing this challenge.

A tool that has helped overcome this barrier is a central registry of bank accounts.[9] Operated, for instance, in Brazil, Chile, France (box 8.9), Italy, and Germany,[10] these registries hold limited information (for example, account number, name, and branch location) and have safeguards to ensure that privacy is protected and access is limited to specific agencies and circumstances.

In many jurisdictions, the FIU may search these databases only when there is a reasonable suspicion of money laundering or terrorist financing. Foreign practitioners would have to provide sufficient information to meet requirements for obtaining information, and an MLA request may be necessary.

[9] The FATF has recognized the establishment of central registries as a best practice (FATF 2012), http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf.

[10] For updated information, see also Meinzer (2012) at https://www.taxjustice.net/cms/upload/pdf/BAR2012-TJN-Report.pdf.

BOX 8.9 France's Central Registry of Bank Accounts: FICOBA

The French tax administration, the General Directorate of Public Finances (DGFiP), is responsible for managing the French bank account registry, *Fichier national des comptes bancaires et assimilés* (FICOBA).[a] FICOBA has its legal basis in the general tax code of France and has been in operation since 1992.

FICOBA can be used to identify a variety of accounts such as bank, postal, savings, and so on. It provides authorized persons with information on accounts held by a person or a company in France, including nonresidents. The declarations for opening, closing, or modifying accounts include the following information:

- Name and address of the institution that manages the account
- Account number, nature, type, and characteristic
- Date and nature of the declared transaction (opening, closing, modification)
- Surname, first name, date and place of birth, address of the account holder, plus the SIRET number[b] of individual entrepreneurs.

For legal persons, the following are recorded: name, legal form, SIRET number, and address. Declarations for opening, modifying, and closing accounts are to be made within one month thereof.[c]

Only persons authorized by law can access the registry, including the following:[d]

- Financial administration agents (tax administration, customs, and the like)
- Agents of the *Autorité des marchés financiers* (Financial Markets Authority)
- Social security organizations
- Judges and judicial police officers
- Magistrates of the Court of Auditors and the regional chambers of accounts
- Bailiff
- Notaries in charge of an estate.

The database is fed with information sent by account-managing institutions such as banking and financial establishments, post office check centers, brokerage firms, and so on.[e] FICOBA data can also be accessed pursuant to a court decision expressly permitting such access.

In addition, the General Tax Code of France, art. 1649A, states that natural persons, associations, and companies not having commercial form that are

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BOX 8.9 France's Central Registry of Bank Accounts: FICOBA *(Continued)*

domiciled or established in France are required to declare, at the same time as their declaration of income or results, the references of accounts opened, held, used, or closed abroad. Further, the Code states that amounts, securities, or securities transferred abroad or coming from abroad through accounts not declared under certain conditions constitute, unless proven otherwise, taxable income.

a. CNIL (National Commission for Computing and Liberties). 2018. "FICOBA: Fichier national des comptes bancaires et assimilés, Les grands fichiers en fiches" [FICOBA: National File of Bank and Similar Accounts]. CNIL.fr, March 8, 2018 (accessed June 23, 2020). https://www.cnil.fr/fr/ficoba-fichier-national-des-comptes-bancaires-et-assimiles.
b. A SIRET (*Système d'identification du répertoire des établissements*) number is a unique business registration or business identification number in France.
c. Amended decree of June 14, 1982, "relating to the extension of an automated system for managing the bank account file," governing FICOBA (last modified by the decree of October 13, 2010), art. 1 (accessed June 23, 2020), https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=E3E54137E9BC710C7E977B6FFD4AF7A0.tpdjo09v_3?cidTexte=JORFTEXT000000864438&dateTexte=20131119.
d. CNIL, "FICOBA," March 8, 2018.
e. CNIL, "FICOBA," March 8, 2018.

8.5.4 Emergency Provisional Measures

Several jurisdictions have measures that enable a swift seizure or restraint of funds in emergency situations to prevent transfer and dissipation before formal orders can be secured.[11] This rapid action often takes the form of a temporary measure executed on the expectation that an MLA request will follow within a specified period (although a time extension may be granted on application in some jurisdictions). If the request is not provided on time, the money may be released.

Administrative orders typically constitute a part of informal assistance. Examples of emergency provisional measures that require formal assistance are described in chapter 9, section 9.2.6. An administrative official—typically associated with the FIU (as discussed in chapter 2, box 2.1, "Role and Contribution of Financial Intelligence Units in Asset Recovery Cases")—may issue a preservation order instructing a financial

[11] For example, in the case of former Tunisian president Zine el Abidine Ben Ali's assets, the EU adopted anticipatory freezing measures without a detailed showing that the assets existed in member states. See "Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia" (OJ L 28, 2.2.2011), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:028:0062:0064:EN:PDF, as amended by "Council Decision (CFSP) 2018/141 of 29 January 2018 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia" (OJ L 25, 30.1.2018), which extended the restrictive measures until January 31, 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D0141&from=EN. A further extension is in effect until January 31, 2021, per "Council Decision (CFSP) 2020/117 of 27 January 2020 amending Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia" (OJ L 22, 28.1.2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020D0117.

institution to restrain funds for a brief period. These administrative orders are sometimes limited to cases involving specified underlying offenses.[12]

Some jurisdictions require the financial institution, upon the filing of a suspicious transaction report (STR), to hold the funds until the FIU consents to release them or to hold them for a specified period (thereby allowing the FIU or law enforcement to implement provisional measures). Other jurisdictions may oblige financial institutions to seek consent from the authorities before conducting transactions. If the consent is not granted, the financial institution will refuse to transfer funds (for fear of committing an offense and being found accountable for the funds as a constructive trustee).

8.5.5 Spontaneous Disclosures

Another form of informal assistance that has assisted in recovering the proceeds of corruption is the spontaneous disclosure.[13] UNCAC specifically envisaged the use of this type of disclosure. In some jurisdictions, the power to make such a disclosure may be formally set out in domestic legislation (for instance, to address banking secrecy issues in Switzerland). However, these disseminations are, in substance, a unilateral proactive form of information transmission that can be used to facilitate an investigation and the drafting of a formal MLA request by a foreign jurisdiction. Spontaneous disclosures are specifically useful to alert a foreign jurisdiction to the existence of evidence (such as the bank account of a corrupt politically exposed person), an ongoing investigation of money laundering in the disclosing jurisdiction, or both.

Box 8.10 describes the information that may be transmitted (formally under Swiss Law) by the Swiss authorities in the form of a spontaneous disclosure and specifically refers to lifting banking secrecy if the information might enable a foreign jurisdiction to present a formal MLA request.[14] European Union (EU) legislation also provides for the spontaneous exchange of information between EU Asset Recovery Offices (AROs) or other authorities that are charged with facilitating the tracing and identification of proceeds of crime.[15] This cooperation shall not be prevented by the status of the ARO under the national legal

[12] Thailand's Anti-Money Laundering Act, B.E. 2542 (1999), sec. 48, empowers the Transaction Committee to restrain or seize assets for a period not exceeding 90 days "if there is a probable cause to believe that there may be a transfer, distribution, placement, layering or concealment of any asset related to a predicate offense." In case of emergency, the Secretary-General of the Anti-Money Laundering Board (http://thailaws.com/law/t_laws/tlaw0019_2.pdf) may issue the order. Relevant regulations relating to the procedure for taking into custody, preservation, maintenance, or auction, and so forth may apply.

[13] UNCAC, arts. 46(4) and 56, require that states parties try to provide such disclosures of information.

[14] The enabling legislation for spontaneous disclosures in Switzerland is the Federal Act on International Mutual Assistance in Criminal Matters ("Mutual Assistance Act," Swiss Criminal Code [CC 351.1, art. 67a]). The transmission will not affect the domestic criminal proceedings in Switzerland.

[15] "Council Decision 2007/845/JHA of 6 December 2007 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" (OJ L 332, 18.12.2007); see art. 4 (para. 1) and art. 2 (para. 2) thereof, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007D0845&from=EN.

BOX 8.10 Spontaneous Disclosures from Switzerland

International Mutual Assistance in Criminal Matters (IMAC), art. 67a:

An authority prosecuting offences may, without being requested to do so, transmit to a foreign authority prosecuting offences, information or evidence that it has gathered in the course of its own investigation, when it determines that this transmission may:

a. permit the opening of criminal proceedings; or

b. facilitate an ongoing criminal investigation.

Information that is subject to the rules on secrecy may be transmitted if it could enable the foreign State to present a request for mutual assistance.

Information 'subject to the rules on secrecy' encompasses the name of a bank holding possibly relevant assets, the identity of the account holder and beneficial owner, the account number, the amount of funds frozen, and relevant transactions.

The receiving country is invited to present a mutual legal assistance (MLA) request in case of interest to obtain information regarding the formal elements of proof.

Source: International Mutual Assistance in Criminal Matters ("Mutual Assistance Act," Swiss Criminal Code [CC 351.1]) of March 20, 1981 (status as of March 1, 2019): https://www.admin.ch/opc/en/classified-compilation/19810037/index.html.

framework (administrative, law enforcement, or judicial authority).[16] In 2019, over 7,659 information exchanges were carried out between AROs in the Secure Information Exchange Network Application (SIENA),[17] with a substantial increase since 2012.[18]

Moreover, the international media coverage these corruption cases attract can also prompt a bank to file an STR with its domestic authorities, which can then be spontaneously disclosed (through Egmont or as permitted by their law) to the jurisdiction investigating corruption. That jurisdiction, in turn, can thus advance its investigation and proceed to a formal MLA request. Of equal importance is internal dissemination within the jurisdiction, which can also lead to a domestic investigation into money laundering.[19]

[16] For more information on the launch of EU Asset Recovery Offices, see the "Tracing and Identifying Criminal Assets" section of the European Commission's "Confiscation & Asset Recovery" web page at https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery_en.

[17] SIENA is a platform for exchanging crime-related information between law enforcement in the EU (and its cooperating partners and third parties with whom the EU has agreements): https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena.

[18] European Commission, "Confiscation & Asset Recovery," in What We Do, Migration and Home Affairs, https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/confiscation-and-asset-recovery_en.

[19] A spontaneous disclosure was the catalyst for international cooperation between Peru and Switzerland in the Vladimiro Montesinos case (as discussed earlier in box 8.3 as well as in chapter 1 [box 1.3] and chapter 5 [box 5.8]).

As a good practice, recipients of spontaneous disclosures should contact the sender to clarify the disclosure, find out about the foreign case, ensure that the assets will be or will remain frozen, and discuss the next steps to be taken.

8.5.6 Requesting the Opening of a Foreign Case

In some circumstances, the authorities may not have the ability to pursue a domestic case for either criminal or non-conviction based (NCB) confiscation or civil proceedings. Perhaps this is because of a lack of capacity and political will, or because of an ineffective legislative framework. In these circumstances, a jurisdiction may provide the case materials to their foreign counterparts and request that those authorities initiate domestic proceedings. Ultimately, the foreign authorities will determine whether to proceed and how the proceedings are to be conducted (see chapter 11 for details on this option).

In some cases, this request will necessitate a formal communication. In others, the case material will be transmitted through more-administrative channels, including in the context of FIU-to-FIU or tax agency-to-tax agency exchange of information.

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9. Conducting International Cooperation and Mutual Legal Assistance

9.1 Introductory Remarks

Applying the key principles for international cooperation highlighted in chapter 8 should provide practitioners with a good basis for the effective conduct of international cooperation. Successful international asset recovery generally requires combining both informal assistance and more-formal mutual legal assistance (MLA) processes. This chapter aims to explain how these tools can be used and effectively combined, focusing on the formal assistance process.

9.2 Mutual Legal Assistance Requests

As discussed in chapter 8, practitioners generally should *not* begin their international cooperation efforts with the submission of an MLA request. If available, informal assistance channels should be explored first so that practitioners connect with their counterparts to discuss what will be needed to execute the request and to address potential barriers. Once a practitioner determines that an MLA request is required for certain needed action—such as for seeking production of financial records, obtaining compulsory testimony or a search and seizure, or enforcing a provisional restraint order—numerous requirements and procedures must be adhered to, some of which are described below.

Requirements vary from jurisdiction to jurisdiction, so practitioners should confirm their applicability beforehand with the foreign central authority. Consulting with foreign counterparts or other contacts can be helpful in this regard, although many jurisdictions will require the practitioner to proceed formally through their own central authority when a formal request is being prepared or has been sent.

In addition, many jurisdictions publish information on their central authority's website that may state the MLA requirements, and some even provide sample forms for preparing an acceptable MLA request.[1] (See appendix J for a list of helpful websites in selected jurisdictions and appendix I for a sample MLA request.) The United Nations Office on Drugs and Crime (UNODC) operates a directory of central authorities and has

[1] For example, the United Kingdom and Hong Kong SAR, China, have booklets that are available to assist practitioners.

developed an MLA request writer tool[2] to assist practitioners.[3] Finally, publications by nongovernmental or multilateral organizations may also provide assistance.[4]

9.2.1 Legal Basis for International Cooperation

To proceed with an MLA request, the request must specify a legal basis for cooperation, as provided in

- Multilateral conventions, treaties, or agreements containing provisions on MLA in criminal matters;
- Bilateral MLA treaties and agreements;
- Domestic legislation allowing for international cooperation in criminal cases; or
- A promise of reciprocity through diplomatic channels (referred to as "letters rogatory" or "comity" in some jurisdictions).

These legal avenues are not mutually exclusive, and an MLA request may use one or more of them, depending on the subject matter of the case and the expected outcomes (box 9.1). Each avenue is discussed below. The absence of an MLA treaty or relevant law may significantly complicate proceedings and impede the successful outcome of a case.[5]

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[2] The United Nations Office on Drugs and Crimes (UNODC) offers a Mutual Legal Assistance Request Writer Tool (downloadable from https://www.unodc.org/mla.)—a software program that generates an MLA draft after prompting the user for information. The request must be tailored for each jurisdiction, but the tool will assist with the organization of the request. In its revised and expanded version, the tool is an HTML-based application that can run on all devices. It guides practitioners through the MLA request drafting process and can be linked to the UNODC's Online Directories of Competent National Authorities (https://www.unodc.org/unodc/en/legal-tools/directories-of-competent-national-authorities.html), allowing for the retrieval of contact information.

[3] Other multilateral organizations provide lists of central authorities, including the Organisation for Economic Co-operation and Development (OECD), the Organization of American States (OAS), and the Ibero-American Association of Public Ministries (AIAMP).

[4] See also Stephenson et al. (2011, 114–79), which provides MLA-related information (MLA legal framework and preconditions to cooperation, MLA general procedures, specific asset recovery information, and types of informal assistance) for Canada; Cayman Islands; France; Germany; Guernsey (Crown dependency); Hong Kong SAR, China; Japan; Jersey (Crown dependency); Liechtenstein; Singapore; Spain; Switzerland; the United Kingdom; and the United States. Also see the ADB and OECD (2017) report "Mutual Legal Assistance in Asia and the Pacific: Experiences in 31 Jurisdictions" at https://www.oecd.org/corruption/ADB-OECD-Mutual-Legal-Assistance-Corruption-2017.pdf.

[5] The Ferdinand and Imelda Marcos case was the first time Switzerland had to freeze the assets of a former head of state even before such a request was made by the government (in this case, the Philippines). However, at the time (in 1986), the Philippines had no MLA agreement with Switzerland, thus placing an extra burden on proceedings. In addition, the relevant legislation had only recently come into force, without any precedents. Although the government had requested assistance from Switzerland in releasing bank documents and returning assets, the Marcos family was able to contest the entire proceedings. The Swiss Federal Supreme Court handed down 60 decisions affirming the permissibility of legal assistance and eventually allowed the return of the frozen funds, subject to the initiation of criminal proceedings against Imelda Marcos and upon the promise that the funds would be used to compensate the victims of the regime (FDFA 2016, 12), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf.

BOX 9.1 Selecting a Legal Basis to Include in the Formal Mutual Legal Assistance Request

In selecting the legal basis to include in a mutual legal assistance (MLA) request, many practitioners have found it most helpful to list all relevant treaties, agreements, or legislation that apply, in order of preference.[a] This practice increases the opportunity for applicability: because the types of assistance and potential reasons for refusal vary from treaty to treaty, the request may be acceptable under one legal basis and not under another.

A bilateral treaty is generally a good option if the treaty properly implements the main principles of important multilateral treaties such as the United Nations Convention against Corruption (UNCAC). Bilateral treaties are tailored to the legal traditions and options of the two contracting jurisdictions, in contrast to the "one size fits all" approach of the multilateral treaties. Inclusion of the relevant treaties, followed by any domestic legislation, usually allows for faster cooperation than does a promise of reciprocity such as through letters rogatory.

a. For an extensive (though not exhaustive) list, see chapter 1, box 1.1, "Legal Framework for Asset Recovery," and related web resources in appendix J.

Multilateral Conventions, Treaties, or Agreements

Multilateral conventions, treaties, or agreements contain binding provisions that oblige signatories to provide MLA under international law. The provisions define areas of cooperation and contain governing procedures, thereby bringing clarity and predictability to the process. These agreements often permit more extensive forms of cooperation than the traditional promise of reciprocity or letters rogatory, such as communication between central authorities (rather than through formal diplomatic channels).[6]

The United Nations Convention against Corruption (UNCAC), with 187 states parties,[7] is the most widely applicable multilateral treaty for the recovery of proceeds of corruption, and MLA is required for successfully using this instrument in international asset recovery. UNCAC obliges states parties to afford one another the widest measure of assistance in investigations, prosecutions, and judicial proceedings concerning corruption matters. In addition to UNCAC and other United Nations treaties, a legal basis can be provided through certain regional MLA treaties or agreements, such as the Treaty on Mutual Legal Assistance in Criminal Matters (signed by Association of Southeast Asian

[6] In the Moldovan bank fraud case (discussed in chapter 4, box 4.5), the National Bank of Moldova signed MLA treaties with Cyprus, Estonia, Latvia, and the Russian Federation to obtain critical data relating to the case, including account information, know your customer (KYC) data, and on-site inspection reports.

[7] UNODC, "Signature and Ratification Status" (as of February 6, 2020), https://www.unodc.org/unodc/en/corruption/ratification-status.html.

Nations [ASEAN] member states)[8] and the Inter-American Convention against Corruption of the Organization of American States (OAS).

One issue that practitioners must consider with international conventions, treaties, and agreements is how, if at all, their relevant obligations have been incorporated into domestic legislation in the other jurisdiction—a process referred to as "domestication." In theory, MLA requests submitted under a multilateral treaty (such as UNCAC) can be applied directly as long as both countries have ratified the treaty.[9] However, the mandatory provisions of these treaties are typically formulated in a general manner, leaving room for interpretation and uncertainty. For example, the treaty may not specify the channels for communication, the particular types of evidence or procedures requiring judicial authorization, or the procedures and documents for enforcement of confiscation requests.

Some jurisdictions enact detailed domestic legislation to provide the specifics; others have limited or no legislation domesticating the treaty and rely on direct application through existing criminal laws and procedures, with modifications based on the treaty. Because authorities in some requested jurisdictions may prefer that the treaty is domesticated within their jurisdiction, it is important for practitioners to consider this issue and review the domestic law for details regarding implementation of the multilateral treaty.

In addition, there may be voluntary arrangements with other jurisdictions or regional groups, such as the Commonwealth Secretariat's Scheme on Mutual Legal Assistance in Criminal Matters (the Harare Scheme), which is a commitment of the Commonwealth Law Ministers. Although it is not a binding legal instrument or treaty, parties are expected to implement the provisions in domestic legislation, and assistance is rendered through these provisions.[10]

Bilateral MLA Treaties and Agreements

Similar to the multilateral treaties, bilateral MLA treaties and agreements contain binding provisions that oblige the signatories to provide assistance and define the

[8] The Treaty on Mutual Legal Assistance in Criminal Matters, although signed by ASEAN member states and its ratification status reflected in the ASEAN Secretariat's legal instruments, is not officially designated as an ASEAN instrument. In *ASEAN 2025: Forging Ahead Together*, Measure B3.1.i of the "ASEAN Political-Security Community Blueprint 2025" is to "work towards elevating the MLAT 2004 to an ASEAN treaty" (ASEAN 2015, 33). At their 2019 meeting in Yogyakarta, Indonesia, the ASEAN Attorneys-General/Ministers of Justice also "endorsed the elevation of the MLAT into an ASEAN Treaty" (ASEAN. 2019. "ASEAN Attorneys-General/Ministers Pledged for Stronger Cooperation in Mutual Legal Assistance in Criminal Matters." ASEAN Secretariat News, April 25, 2019. https://asean.org/asean-attorneys-generalministers-pledged-stronger-cooperation-mutual-legal-assistance-criminal-matters.

[9] UNCAC, arts. 46 and 55; United Nations Convention against Transnational Organized Crime (UNTOC), art. 18; and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7.

[10] See Commonwealth Secretariat (2017), "Model Legislation on Mutual Legal Assistance in Criminal Matters," https://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_14_ROL_Model_Leg_Mutual_Legal_Asstnce.pdf.

procedures for practitioners to follow.[11] In addition, they may provide forms of cooperation that are not available under other arrangements, such as direct contact between the practitioners, competent authorities, and members of the judiciary (with limited central authority involvement).

Domestic Legislation

Some jurisdictions have passed legislation that provides an MLA process for jurisdictions without a bilateral treaty,[12] often on the condition of reciprocity (that is, the requesting jurisdiction provides an undertaking that it will provide MLA in similar situations). Unlike treaty arrangements, such legislation does not create an international obligation to provide requested assistance; hence, such flexibility raises the uncertainty of whether the request will be acceptable.[13]

Promise of Reciprocity through Diplomatic Channels (Letters Rogatory)

This traditional form of assistance may be useful if there is neither a treaty between the jurisdictions nor domestic legislation in the requested jurisdiction (although some jurisdictions require an undertaking for reciprocity, even when using a multilateral or bilateral treaty as a basis for the request).

The use of letters rogatory permits formal communication between the judiciary, a prosecutor, or law enforcement official of one jurisdiction and that individual's counterpart in another jurisdiction. This process requires the inclusion of the ministry of foreign affairs and diplomatic formalities.

9.2.2 General Requirements

Each jurisdiction has legal requirements that requesting jurisdictions must meet when submitting an MLA request. Below are some of those requirements as well as considerations for practitioners in meeting them.

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[11] For example, Switzerland and Angola concluded two bilateral agreements in 2005 and 2012 governing the return and use of funds (US$21 million) that were frozen in Swiss bank accounts belonging to Angolan officials and involving the embezzlement of public funds related to the US$43 million sale of Angolan oil (FDFA 2016, 12), https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf, page 26.

[12] For example, the Federal Act on International Mutual Assistance in Criminal Matters ("Mutual Assistance Act," Swiss Criminal Code [CC 351.1]) has enabled Switzerland since 1981 to provide legal assistance to countries with which it has no bilateral agreement.

[13] Some examples of jurisdictions and their legislation include Singapore's Mutual Assistance in Criminal Matters Act, https://sso.agc.gov.sg/Act/MACMA2000; Liechtenstein's Law on International Mutual Legal Assistance in Criminal Matters ("Mutual Legal Assistance Act"), https://www.regierung.li/international-mutual-legal-assistance-in-criminal-matters; Hong Kong SAR, China's Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), https://www.elegislation.gov.hk/hk/cap525; and Switzerland's Federal Act on International Mutual Assistance in Criminal Matters ("Mutual Assistance Act," CC 351.1), https://www.admin.ch/opc/en/classified-compilation/19810037/20190301 0000/351.1.pdf.

Nature of the Matter

Generally, the request must be related to a criminal matter, although some jurisdictions will assist with non-conviction based (NCB) confiscation requests (because they generally arise in connection with a criminal investigation) as well as in civil and administrative confiscation cases.[14] The possibility of obtaining the type of desired assistance should normally be explored early in the process.

Jurisdictions differ as to what type of assistance can be provided and at which point in the criminal investigations or proceedings. Although most jurisdictions will permit requests during the investigation stages, others have more onerous requirements for the provisional seizure or restraint of assets (such as requiring the instigation of charges or a final order of confiscation). Many jurisdictions will not provide assistance if the criminal proceedings have concluded. For these more stringent requirements, practitioners need to consider timing and coordinate the request for provisional measures and arrest to avoid the dissipation of funds.

Dual Criminality

Many jurisdictions will require some showing of dual criminality (if confiscation assistance is sought), meaning that the conduct underlying the request for assistance is criminalized in both jurisdictions. Some jurisdictions waive the requirement in certain circumstances.[15] Other jurisdictions may apply the requirement more restrictively (that is, requiring a match in the names[16] or essential elements of the offense). However, jurisdictions more frequently apply a conduct-based approach (that is, looking at the underlying conduct behind the terminology and requiring that the conduct be a criminal offense under the laws of both jurisdictions).[17] In any event, during the use of informal assistance, it is paramount to discuss, identify, and overcome (if possible) any potential barriers that the dual criminality requirement may pose.

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[14] See chapter 7, sections 7.2 and 7.4, for a discussion of international cooperation in NCB confiscation and civil cases. In addition, UNCAC, arts. 43(1) and 54(1)(c), require states parties to consider assisting each other in civil and administrative matters and to permit NCB confiscation.

[15] Jersey (a Crown dependency) is a jurisdiction that does not require dual criminality.

[16] Some countries used to adopt a list-based approach, whereby the crime was recognized as an offense only if it was listed or described in the same way in the applicable treaty, as opposed to an approach allowing an interpretation of the underlying conduct (Williams 1991, 600), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1454&context=scholarly_works. "For instance, the treaty between Albania and the United States, signed in 1933, includes an inventory of more than two dozen crimes, including murder, rape, arson, and burglary" (Jonathan Masters, "What Is Extradition?" Backgrounder [last updated January 8, 2020], Council on Foreign Relations, https://www.cfr.org/backgrounder/what-extradition). Also see the Treaty of Extradition between the United States of America and the Kingdom of Albania, signed March 1, 1993, 49 Stat. 3313, (accessed June 24, 2020), https://www.loc.gov/law/help/us-treaties/bevans/b-al-ust000005-0022.pdf.

[17] International conventions and agreements require that countries apply this conduct-based approach. See UNCAC, art. 43(2), and Financial Action Task Force (FATF) Recommendation 37 ("Mutual Legal Assistance") (FATF [2019]).

The conduct-based approach can be helpful in corruption cases because some of the more specific offenses involved are not criminalized in all jurisdictions—for example, illicit enrichment, bribery of foreign public officials, tax avoidance, or extended confiscation. It is important to describe rather than merely list the offenses, because the requested jurisdiction may not have the relevant expertise to understand the legal system of the requesting country and may have to assess whether the conduct is punishable under a different name under its domestic laws. (Box 9.2 discusses how to overcome dual criminality requirements in the case of illicit enrichment and corruption of foreign public officials.)

It is also important to put the offense into context, demonstrating its connection to criminal conduct in explaining the request's subject matter. In addition, practitioners should avoid the use of certain words and phrases that may prompt confusion in terminology. For example, "illicit flows" can be problematic in some jurisdictions because the phrase often refers to tax evasion and capital flight. It would be better to use "criminal flows."

International conventions and standards may also require that assistance for noncoercive measures be provided in the absence of dual criminality.[18]

Assurances and Undertakings: Reciprocity, Confidentiality, Limits on Use (Specialty), and Commitment to Pay Costs or Damages

Many jurisdictions require a reciprocity assurance: a written statement that the requesting jurisdiction will provide the requested jurisdiction with the same type of cooperation in a similar case in the future. And many jurisdictions require the requesting jurisdiction to specify whether it wishes the request to be treated as confidential. In addition, jurisdictions may require an assurance that the requesting jurisdiction will limit the use of the supplied information only to the case described in the request for assistance—and not as evidence in another case or in a disclosure to a third party.[19] Finally, some jurisdictions may require a commitment to pay any costs and damages incurred by the requested party while executing the request.[20]

These assurances may be waived on a case-by-case basis, but waivers must be discussed with the other jurisdiction. Some practitioners hesitate or refuse to provide these assurances because they are not used in their own jurisdiction (many civil law jurisdictions do not use them) and the practitioner is unsure about having the authority to provide them. However, these assurances are often not optional, and assistance may be refused if they are not provided or addressed before the request is submitted.

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[18] See UNCAC, art. 46(9), and FATF (2019) Recommendation 37 ("Mutual Legal Assistance"). UNCAC, art. 46(9)(a), also require states parties to consider the purposes of the convention when applying dual criminality.

[19] This is often called the specialty or limited use principle (UNODC 2012), https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

[20] One of the reasons for requiring such a commitment is that the requested jurisdiction may act and expose itself to liability, and the requesting state could fail to follow through in providing promised proof. Through no fault of its own, the requested state could then face an award of costs against it.

BOX 9.2 Overcoming Dual Criminality: Illicit Enrichment and Corruption of Foreign Public Officials

The offenses of illicit enrichment (a significant increase in the assets of a public official that the official cannot reasonably explain as being derived from lawful earnings) and bribery of foreign public officials have not been criminalized in a number of jurisdictions. If strictly interpreted on the basis of terminology, there would be no dual criminality—and thus no assistance available—from such jurisdictions.

This barrier may be overcome when dual criminality is assessed on the basis of conduct because the facts under investigation in the requesting jurisdiction may constitute a different offense in the requested jurisdiction. For example, the conduct that constitutes illicit enrichment may be categorized as another offense (such as accepting a bribe) under the law of the requested jurisdiction. As for bribery of foreign public officials, the requested jurisdiction may consider the offense to be bribery of a national official, not a foreign official.

Once the parallel offenses—based on the same *conduct*—are determined, the dual criminality requirement is met. This approach was confirmed in a 2003 ruling of the Swiss Federal Supreme Court (ATF 129 II 462), which held that dual criminality was met on corruption charges even though bribery of foreign public officials was not a named offense in Swiss law. In reaching this verdict, the court looked at the facts and the conduct, holding that the requesting jurisdiction was able to fulfill the requirement on the basis of another offense: passive corruption of national public officials, an offense under the Swiss system.

Practitioners using this approach must take care when stating the facts and offenses in their mutual legal assistance (MLA) requests. For example, it may not be sufficient to submit a request as follows:

> *Mr. X is a public official who earns US$3,000.00 per month at the Ministry of Transportation. When he began his position five years ago, he had no savings; now he has US$5 million. He was unable to explain this increase and is found guilty.*

Instead, it is important to include additional facts that may support an offense in the foreign jurisdiction:

> *Mr. X is responsible for procurement of construction contracts, and in the past three years he has awarded three major contracts to new companies. His bank account statement shows he received two deposits of US$400,000.00 just prior to the awards. Recently US$1 million was wired to Mr. X's bank account in your jurisdiction Y.*

Asking counterparts in the requested jurisdiction to review a draft of the MLA request before submission may facilitate this procedure. The counterpart may be able to offer drafting suggestions that make the request more easily enforceable.

9.2.3 Evidentiary Requirements

Practitioners usually have to provide sufficient admissible evidence to enable officials to meet the evidentiary threshold mandated by their courts in executing a request. This can be challenging because admissibility requirements vary among jurisdictions. Requested jurisdictions may require standards for some measures that are more demanding than those in the requesting jurisdiction. What may be an appropriate request in one jurisdiction may be considered overly broad—a "fishing expedition"—in another.

This difficulty is augmented when the exchange is between civil and common law jurisdictions or between different confiscation systems (value-based versus property-based, or criminal confiscation versus NCB confiscation) because standards of proof, evidentiary tests, and requirements for admissibility may differ widely. For example, if facts about the case are to be admissible as evidence, common law jurisdictions generally require statements in affidavit or certificate format, but civil law jurisdictions generally will not impose that requirement. (For information on drafting affidavits, see chapter 5, box 5.2.)

Failure to include sufficient admissible evidence to meet the applicable threshold or to use the least intrusive means as a first step in gathering evidence may result in the request being returned or refused. Thus, practitioners should discuss evidentiary requirements, standards, and examples of admissible evidence with their foreign counterparts before sending an MLA request. Once it is determined that a formal MLA request is required, the following three-step process should be considered before submission of the request:

- *Step 1:* Determine what is needed (for example, production or seizure of financial or business records, search of a location, seizure or restraint of assets, or confiscation). It is often best to adopt a step-by-step approach for requesting MLA rather than to request everything at once.
- *Step 2:* Determine the least intrusive means for obtaining the needed information, as well as the standard of proof and evidence required by the requested jurisdiction (for example, specific facts, location of the assets, link between asset and offense, and final court order).
- *Step 3:* Determine the format for admissible evidence in the requested jurisdiction and any other documents required. (See section 9.2.4 below for additional details on form and content.)

Generally speaking, the more intrusive the measure, the higher the evidentiary standard of proof required to demonstrate, among other things, (a) that an offense has been committed; (b) that the assets sought are linked to the offense or offender or are otherwise subject to confiscation in the requested jurisdiction; and (c) the specific location of the assets that are sought to be restrained or recovered.

Common law jurisdictions typically permit investigative and provisional measures on a "reasonable grounds to believe" or "probable cause" standard. For confiscation, a higher standard is required: the "balance of probabilities" or "preponderance of evidence" standard. With some exceptions, most civil law jurisdictions provide investigative and provisional measures if these measures are needed to establish the truth, but they require a higher level of proof ("intimate conviction" of the truth) for confiscation.

In chapter 2, figure 2.1 illustrates the different standards of proof that may be required. Section 9.2.6 below describes more specifically the evidentiary requirements for asset tracing, provisional measures, and confiscation; the standards of proof that must be met; and other relevant information.

9.2.4 Form and Content Requirements of MLA Requests

MLA requests must be in writing and must meet the language, content, and format requirements of the requested jurisdiction, applicable treaty, or practitioner's domestic central authority. As noted previously, practitioners should determine these requirements and obtain sample requests before writing and sending the request. Where permitted and available, practitioners should maximize opportunities to send drafts of the MLA request to the requested jurisdiction's central authority or the relevant authority that will be implementing the request. This drafting process and the resulting assistance help to ensure that requirements are met, the facts of the case are clear, and the terminology is correct. It also helps the requesting practitioner to avoid unnecessary delays or refusals of assistance and gives the requested jurisdiction the opportunity to prepare its responsive actions.

Requests should be provided in a language that is acceptable to the requested jurisdiction. Responsibility for arranging translation lies with the requesting state, although some jurisdictions provide translation services if the requesting jurisdiction agrees to pay the fees. In certain cases, some jurisdictions have agreed to cover these costs for the requesting jurisdictions.

If translation services are used, it is important to use professional services that are familiar with legal terminology because mistakes in translation may result in ambiguities that need clarification by the requesting state and may further delay the process. This is sometimes the most significant obstacle in the process. Also, the authority responsible for drafting the request in the original language should bear in mind that translation will be necessary and hence should write concisely, objectively, and in simple language to facilitate the translators' work and avoid misinterpretation problems. Short, declarative sentences set out in chronological order translate well. Contact information for the lead investigator or prosecutor should also be included in the request.

Practitioners should also determine any preferences for the format of the request and any additional documentation that is required. Some jurisdictions provide template headings to assist in this process. (See appendix I for a sample MLA request.) It may be necessary to include additional documents such as affidavits and either certified copies or originals of court orders for seeking production or seizure of documents, provisional measures, or confiscation. These documents may need to be certified by a court or signed by the author, witness, and taker of oaths.[21]

Finally, if there are any legal requirements from the requesting jurisdiction to the requested jurisdiction in carrying out the request (for example, a specific warning to an interviewee), these must be specified in the request. Practitioners should also specify whether the circumstances require greater urgency and provide details on when and

[21] An affidavit requires a sworn statement of the author, witnessed by a taker of oaths such as a notary public or a commissioner of oaths. Certification can be provided by a judge, magistrate, or officer of the court.

why the information is needed (for example, upcoming trial dates). They should also provide contact details.

9.2.5 Reasons for Refusal

In addition to the general and evidentiary requirements, most MLA arrangements will allow the requested jurisdiction the discretion to refuse assistance in certain circumstances, on a case-by-case basis.[22] Some treaties (including the United Nations conventions) elaborate prohibited grounds for refusal, such as the involvement of fiscal offenses or bank secrecy (box. 9.3).

BOX 9.3 Bank Secrecy and Fiscal Offenses: Prohibited Grounds for Refusing Mutual Legal Assistance Requests

Bank secrecy and fiscal offenses are generally prohibited by the United Nations conventions as reasons for refusing to provide assistance. Where applicable, practitioners should refer to the treaty provisions specified below.

Fiscal Offenses

Mutual legal assistance (MLA) refusals solely on the ground that the offense involves fiscal matters are prohibited by the United Nations Convention against Corruption (UNCAC), art. 46(22); the United Nations Convention against Transnational Organized Crime (UNTOC), art. 18(22); and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 3(10).

Bank Secrecy

MLA refusals on the ground of bank secrecy are expressly prohibited by the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"), art. 9(3); UNCAC, art. 46(8); and UNTOC, art. 18(8).

UNCAC, art. 31(7), and UNTOC, art. 12(6), require states parties to empower courts or other competent authorities to order seizure of bank, financial, or commercial records in domestic cases and in international cooperation.

UNCAC, art. 40, requires states parties to ensure there are appropriate mechanisms to overcome obstacles that arise from bank secrecy in domestic criminal investigations. Although this provision applies to domestic investigations, it still demonstrates efforts toward reducing bank secrecy and would help in cases where the requested jurisdiction is asked or opts to pursue a domestic case for money laundering on the basis of the foreign predicate offense.

[22] For example, UNCAC permits refusals if (a) the request involves matters of a de minimis nature or there are other ways to obtain assistance; (b) the request does not conform to the procedural or substantive requirements (for example, dual criminality); (c) the execution of the request would prejudice the sovereignty, security, public order, or other essential interests of the requested state; or (d) the action requested is prohibited under domestic law. See UNCAC, arts. 46(9)(b) and 46(21), as well as art. 46(23), which require states parties to provide reasons for any refusal to provide MLA.

Practitioners should address these potential obstacles proactively and before the request is sent (if possible) because it becomes much more difficult to overcome a refusal after it has been issued. Consulting with foreign counterparts will be important in this regard. Elaborated below are some reasons for refusals that jurisdictions may use and some suggestions for addressing them.

Essential interests. Assistance may be denied if execution of the request would prejudice the "essential interests" of the requested jurisdiction. Essential interests are not specifically defined in any convention but may include sovereignty, public order, security, and excessive burden on resources. Unfortunately, a broad interpretation of "essential interests" can impair international cooperation. For example, a requested jurisdiction could refuse to cooperate in a bribery case if the cooperation would result in disclosure of information about natural resources.

Assets of de minimis value. As indicated earlier, the process for gaining international cooperation is lengthy and resource-intensive for both the requested and requesting jurisdictions, and a requested jurisdiction may have monetary thresholds or other criteria that must be met (such as the seriousness of the offense).[23] Practitioners should prioritize and filter MLA requests where the assets are of de minimis value or where there is no reasonable prospect of conviction. The value considered to be de minimis will vary among jurisdictions, and most jurisdictions will consider requests that are below this threshold if there is a strong public interest in responding, such as a request involving corruption of a senior political figure.

Double jeopardy and ongoing proceedings or investigations in the requested jurisdiction. Where the target has already been convicted of or has been acquitted for the same crime, or if there are ongoing proceedings or investigations regarding the same conduct in the requested jurisdiction, the requested jurisdiction may refuse to provide assistance. This is particularly problematic in MLA requests because the request itself may provide the requested jurisdiction with sufficient information to open a domestic case and issue the following response: "Thank you for your request. We cannot provide assistance because we have started an investigation based on the information you provided." It is important to assess this issue before sending the request (for example, through the use of personal contacts or networks) and to determine how this will affect the case strategy.

Nature and severity of the penalty. Some jurisdictions will refuse to cooperate if the offense carries a punishment that is deemed too severe, such as the death penalty. As for asset confiscation more specifically, the nature of the penalty may impair cooperation when the same penalty (for example, extended confiscation) does not exist in the

[23] Refusals on such a basis are permitted under UNCAC, arts. 46(9)(b) and 55(7). In addition to the reasons for refusal outlined in art. 46, UNCAC arts. 55(7) and 55(8) provide that cooperation may be refused or provisional measures lifted if sufficient and timely evidence is not received or if the property is of a de minimis value.

requested jurisdiction. This issue may be resolved with an assurance or undertaking that a specific penalty will not be imposed or carried out.

Immunities. Jurisdictions generally refuse to provide assistance if the target has immunity from prosecution. This may be resolved through a waiver of immunity by the requesting state. For example, in the Ferdinand Marcos case, the subsequent government of the Philippines provided a broad waiver of immunity to enable action by one of the foreign jurisdictions involved.[24] For more information, see the discussion of immunities in chapter 2, section 2.8.2.

Lack of due process. Practitioners often must make a showing to the requested jurisdiction that an offender's due process rights will be protected. In requests for provisional measures and confiscation, due process must also be afforded to any third parties with an interest in the assets. Due process generally includes a fair hearing; sufficient time to prepare a case; third-party protections; protection of the right against self-incrimination; and nondiscrimination on the basis of race, nationality, gender, or religion.[25]

It is important for practitioners to note that the due process issue, like other reasons for refusal, must be looked at on a case-by-case basis—not as an analysis of an entire legal system. As a result, it is important that the request provide sufficient detail about the domestic proceedings, the rights afforded to the parties (for example, notice and the opportunity to be heard), and any procedural decisions made. Additional reasons for refusal will apply in cases of extradition.[26]

9.2.6 Specific Considerations: Tracing, Provisional Measures, and Confiscation

Investigations and Asset Tracing

As outlined in chapters 3 and 4, there are numerous investigative tools for tracing assets and obtaining information and evidence relevant to the investigation. Many of these tools will require an MLA request, including (a) *production or seizure orders* to compel financial institutions to produce or surrender relevant documents; (b) *account monitoring orders* to compel a financial institution to provide account activity and transactions data over a period of time; (c) *search and seizure warrants* for physical evidence and

[24] A diplomatic note provided by the government of the Philippines (August 9, 1988) stated, "Taking note of the agreement on procedures for mutual legal assistance entered into between the Government of the United States and the Government of the Philippines, and other efforts of the parties to cooperate with respect to the investigation being conducted in the Southern District of New York, the Government of the Philippines hereby waives any residual sovereign, head of state, or diplomatic immunity that former Philippine President Ferdinand Marcos and his wife Imelda Marcos may enjoy under international and U.S. law." See *In re Doe*, 860 F.2d 40, 43 (2d Cir. 1988).

[25] See, for example, the United Nations International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

[26] Extradition may be refused if the offense was committed (even partly) in the requested jurisdiction or if the offense is of a political nature. In this regard, it is important to note that UNCAC, art. 44(4), states that offenses under the convention are not considered to be political offenses.

documents held by private parties or businesses; and (d) *interviews* with witnesses. Examples of conditions commonly necessary to give effect to such requests include the following:

- General requirements for MLA requests are met and there are no grounds for refusal.
- There are reasonable grounds to suspect (or believe) that the requested information is relevant to the investigation and that it can be found in the bank account or place to be searched.
- As much information as possible is provided on the location of the assets to be monitored, bank account records to be produced, and time periods for which information is sought, in order to avoid being accused of making an overly broad request (see box 9.4 for tips on avoiding such refusals).

In some civil law jurisdictions, certain orders can be executed by a prosecutor or investigating magistrate; in common law jurisdictions, these orders are usually issued by a court. Which authority issues the orders may have implications for the form and requirements of the request as well as the length of time it takes to process the request. (For example, requests that require court authorization also require greater formality and more time.)

In larger or particularly complicated cases involving a vast amount of financial and bank documentation, practitioners should consider participating in the execution of the request. Where permitted, participation by the investigating practitioners from the requesting country—in executing search and seizure orders, seizing and sorting documents, and questioning witnesses and experts in the requested country—may

BOX 9.4 Avoiding Rejections of Overbroad Mutual Legal Assistance Requests

One of the common reasons cited for the refusal of a mutual legal assistance (MLA) request or a request for additional information is that the request is a "fishing expedition"—an overly broad request that goes beyond the scope of the offense being investigated. Several types of issues could arise, but certain avoidance techniques and good practices can reduce the risk of refusal.

Overly Broad Requests

For instance, the following request could uncover accounts that are outside the investigation and therefore would be overly broad: "*Mr. X is suspected of corruption. Please provide a list of all accounts he has in your jurisdiction and restrain them immediately.*"

(continued next page)

BOX 9.4 Avoiding Rejections of Overbroad Mutual Legal Assistance Requests *(Continued)*

More importantly, in jurisdictions with thousands of financial institutions and tens of thousands of intermediaries, gathering this information would be too onerous a task. Even in jurisdictions with only a few large financial institutions, each with hundreds of branches, the request would be too burdensome because banks do not hold information in a central database.

Imprecise or Vague Requests

To avoid a refusal or delay on grounds of a fishing expedition, the request must be as precise as possible in its description of the assets and their location(s). It often requires an established link between those assets and the offense being investigated unless the request concerns a value-based judgment.

The request should include the bank or financial intermediary where assets may be located and the names of possible proxies (spouses, children, shell companies, trusts, close associates, lawyers, and so forth). It may be difficult to assemble this information, but it is essential to the request.

Suggestions for Preventing MLA Rejection

Several suggestions can help in gathering enough information to make specific MLA requests.

- Use the domestic investigation and informal assistance channels—including an Egmont Group request through your domestic financial intelligence unit (FIU), as discussed in chapter 3, section 3.4.2—to find out as much information as possible. Such channels are also thoroughly addressed in chapter 8.
- When the bank account number or branch location cannot be obtained, look to other information that could help the requested jurisdiction identify the location of the accounts—for example, the bank's phone or fax number, an account manager's name or business card, travel destinations, hotel bills, credit reports, credit card records, copies of checks or bank transfer information, and the like.
- Even if only a minimum amount of evidence is provided, a few jurisdictions may be able to help—namely, the smaller jurisdictions or those with national registries of bank accounts (for example, Brazil, Chile, France, Germany, Italy, and Spain). Certain conditions, such as a link between the assets and the offense, must still be established in these jurisdictions as they are in others. (See chapter 8, section 8.5.3, for more about central registries.)

greatly facilitate the execution of a request.[27] The requesting jurisdiction is more familiar with the case and the requirements regarding admissibility of evidence, so it is in a better position to identify relevant documents and ensure that procedural safeguards are followed (for example, reading a warning to a witness). Direct participation also avoids the need for follow-up requests because relevant leads can be followed.

Participants can include the judge in charge of the investigation, representatives of the authority conducting the proceedings (public ministry or state prosecutor); law enforcement officers (including analysts and technicians); any accused persons and their lawyer(s); and civil parties and their lawyers. Certain safeguards are in place to ensure the MLA process is respected: although foreign practitioners may be able to view the documents, copies of the documents will not be sent until the MLA request is received and approved. An undertaking is often required to ensure that information will not be used before the official MLA response is received.

Also, in large cases, practitioners should consider narrowing the scope of their request. Many corruption investigations span years—possibly decades—and involve multiple accounts, account holders, products, companies, and corporate vehicles. If a requesting jurisdiction were to request bank and other documents for the duration of this period, it could take months or years to assemble all the information. And when the information is received, practitioners will have to sift through boxes and boxes of documents, many of which will be irrelevant. Therefore, it is important to prioritize requests and avoid framing requests so broadly that vast amounts of documentation will be required (for example, 10 years of account materials on multiple individuals and companies). It would be more appropriate first to request only bank statements and significant transactions, and then to request additional documents based on a review of the first batch of materials.

This narrowing of scope not only makes it possible to process the request more quickly but also avoids unnecessary requests and effort expended on irrelevant documents. In jurisdictions that require disclosure of the request to the asset holder, a focused request makes it more difficult for the asset holder to contest on the grounds that the request is overly broad.

For guidance in seeking relevant documents that may be requested to assist with asset tracing, see chapter 4, section 4.2.

[27] This is permitted in Switzerland, the United Kingdom, and other jurisdictions. In Switzerland, foreign investigators are forbidden access to "information within the scope of secrecy" (Federal Act on International Mutual Assistance in Criminal Matters ["Mutual Assistance Act," CC 351.1], sec. 65[3]). "Secrecy" refers to information protected by law, notably bank information and commercial secrets. "Access" refers to handing out copies of documents, taking written notes, taping audiences, or gathering any similar material element of proof to be used in court. Therefore, to safeguard these limits, the foreign authority can participate on the condition that it will not use information before closure of the regular MLA procedure.

Provisional Measures

Once the assets are identified, authorities need to take steps to seize or restrain the assets to prevent dissipation before the eventual confiscation. Practitioners should consider options for administrative or emergency provisional measures by the foreign authorities (through the FIU, law enforcement officials, or other authority under that jurisdiction's domestic law), if such measures are available, before submitting an MLA request (an approach described in chapter 8, section 8.5.4, as a part of informal assistance).[28] Ultimately, an MLA request for the provisional measures (seizure or restraint) must be submitted to retain the measures. The following provisional measures typically require an MLA request:

- *Provisional orders by investigating magistrates.* In civil law jurisdictions, investigating magistrates carrying out pretrial investigations may be able to issue formal orders authorizing provisional measures if there is reason to believe that a confiscation order might ultimately be issued, that assets are likely to be dissipated, or both.[29]
- *Provisional measures on instigation of charges or arrest.* Some jurisdictions permit a temporary restraint or seizure of assets subject to confiscation following an arrest in another jurisdiction.[30] The requesting jurisdiction must provide evidence of the arrest and a summary of the facts of the case. The funds will be restrained while further evidence is awaited, and this period of restraint can be extended by making an application. Generally, no treaty arrangement is necessary, and the proceeding is conducted without notice to the asset holder (ex parte).
- *Direct referral to prosecutors.* In some jurisdictions, incoming requests for restraint and confiscation are referred to prosecutors to provide the same level of international cooperation in obtaining provisional measures and confiscating proceeds of crime as is available in domestic cases.[31] Evidence of crime and benefit derived or evidence that assets are proceeds or an instrumentality of crime may be required.

Some jurisdictions will require an MLA request to obtain any provisional measure, but in case of emergency, a hearing can be obtained on short notice and ex parte.[32]

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[28] UNCAC, art. 54(2), outlines provisional measures for freezing or seizure on the basis of a foreign order or request or where necessary to preserve property on the basis of a foreign arrest or criminal charge related to the assets.

[29] This was once the case in Switzerland. However, since 2011, the dual functions of investigating magistrates and prosecutors have been merged into one, and prosecutors are now themselves in charge of pretrial investigations and are entitled to issue provisional freezing orders (as mentioned in the bullet point "Direct referral to prosecutors"). The MLA central authority in Switzerland—the Federal Office of Justice—seldom (if ever) carries out MLA requests; it hands out such requests to cantonal or federal public ministries and does not act on a simple fax.

[30] The United States has a temporary restraint order (30 days) that can be issued upon notice of charges being laid or upon arrest under 18 U.S.C. 984(b)(4).

[31] See, for example, the United Kingdom's Proceeds of Crime Act 2002 (External Requests and Orders), Order 2005, sec. 6, https://www.legislation.gov.uk/uksi/2005/3181/contents/made.

[32] Hong Kong SAR, China will provide for a hearing on short notice.

Other jurisdictions may have stricter conditions, such as the requirement of an arrest or formal charges in the requesting jurisdiction. If that is the case, the practitioner may have to consider other options—perhaps initiating a joint investigation or supplying the foreign jurisdiction with sufficient information through informal assistance channels to enable provisional measures under domestic law. These options are possible only if the foreign authority has jurisdiction over some element of the underlying crime such as money laundering.

The extent of the different approaches adopted by jurisdictions serves to reinforce why close informal cooperation with counterparts should be undertaken at the earliest opportunity. Depending on the jurisdiction, fulfilling an MLA request for provisional measures typically involves either the requested jurisdiction's "direct" enforcement of the requesting jurisdiction's order or "indirect" enforcement, whereby the evidence submitted by the requesting jurisdiction is used to support an application for a domestic order to restrain or seize assets.[33]

Indirect enforcement of the order (that is, when the requested jurisdiction "domesticates" the confiscation by filing its own case in domestic courts) generally implies that the requesting jurisdiction will provide the evidence necessary for practitioners in the requested jurisdiction to prove their case. The burden of proof and type of evidence required will be as per the requested jurisdiction's laws, even if a confiscation order was obtained separately in the requesting jurisdiction. If the requested jurisdiction has a lower burden of proof for NCB confiscation, this process may be useful.

Direct enforcement of foreign seizure or restraint orders allows the requested jurisdiction to recognize or register the foreign order and subsequently enforce the order in the same way as a domestic order. The requesting state will need to provide the restraint or seizure order as well as information on the proceedings and the grounds to believe that a confiscation order may be issued (in affidavit or certificate format in common law jurisdictions). Some jurisdictions will permit the registration of a faxed copy of the order; however, an official copy of the order must be filed to retain the restraint or seizure. The requesting jurisdiction can then register the foreign order in its courts.

The direct enforcement process is simpler and quicker than indirect enforcement because it avoids duplicating efforts and relitigating the order. However, it is not possible in every case. There may not be a legal basis for direct enforcement in a treaty or legislation, or the requested jurisdiction may have concerns about the process through which the orders were obtained.[34]

[33] See UNCAC, arts. 54(2)(a) and (b) and 55(2). See also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 5; UNTOC, art. 13; and the International Convention for the Suppression of Financing of Terrorism ("Terrorist Financing Convention"), art. 8.

[34] An important advantage of UNCAC is that it requires states parties to consider this convention as the necessary and sufficient treaty basis if they make the enforcement of foreign confiscation, freezing, or seizing orders conditional on the existence of a treaty. See UNCAC, art. 55(6).

Examples of conditions commonly necessary to give effect to such requests are as follows:

- General requirements for MLA requests are met, and there are no grounds for refusal.
- There are reasonable grounds to believe that the assets being sought are linked to the criminal activities or that the target has committed an offense from which a benefit has been derived.
- There are reasonable grounds to believe the assets will be confiscated.
- The location of the assets to be restrained is provided.
- The relief sought could also be obtained if proceedings had been brought in the requested country (or the assets subject to confiscation are also subject to confiscation in the requested jurisdiction).[35]
- Copies (certified if necessary) of relevant court orders are included and are enforceable in the requested jurisdiction.

Similar to investigative orders, provisional measures can be taken by a prosecutor or investigating magistrate in civil law jurisdictions; common law jurisdictions generally require authorization by a court. As stated above, this jurisdictional variation may affect the form and requirements for the request as well as the time it takes to process the request. Practitioners also need to consider the additional points described below.

Notice to the asset holder. Most jurisdictions will issue provisional orders ex parte, but laws typically require that notice be given to the asset holder and others with a legal interest in the asset. Notices in foreign jurisdictions must be translated (if necessary) and published—another cost consideration for practitioners. Some jurisdictions permit use of the internet to publish notices, a process that is more cost-effective. Some jurisdictions do not permit foreign authorities to publish or serve legal notices (even by mail or shipper) within their borders, and an MLA request to serve notice must be made through the central authority. Some jurisdictions also require that the MLA request, application, and order be disclosed to the asset holder. (See chapter 8, box 8.5, on disclosure obligations as a barrier to MLA requests.)

Additional dissipation risks. Some jurisdictions allow for legal fees and living expenses (such as schooling, leases, or mortgages) to be paid out of seized or restrained assets—which, over time, can significantly reduce the assets available for confiscation.

[35] This condition can be difficult to fulfill, especially because jurisdictions differ in the types of relief that are permitted. Relief generally includes restraint, seizure, or confiscation of anything of value obtained directly or indirectly from an offense and instrumentalities used in connection with an offense. However, relief can extend to incorporate fines, substitute assets, extended confiscation, and assets intended for use in an offense.

BOX 9.5 Worldwide Provisional Orders in the United Kingdom

In cases involving assets held in the United Kingdom by politically exposed persons (PEPs) in non-European Union (EU) countries, consider requesting a worldwide freezing or disclosure order (see chapter 10, section 10.3.2).[a] Such an order requires that the target repatriate funds or disclose documents (such as bank statements) held in foreign jurisdictions so that they form a single group of assets in one jurisdiction.

Sometimes a receiver is appointed to pursue the repatriation of assets during the provisional restraint or seizure phase through the use of a power of attorney.

The effect of these orders may be limited because they rely on the compliance of the target and others who are named in the order. At the same time, the prospect of additional charges for contempt or failure to comply have proved to be sufficient to gain compliance in some cases.

a. In the case of an application for a freezing order in India, the London High Court explained the factors that may be relevant in determining a risk of dissipation of assets. These factors include the nature of the assets to be frozen; the nature and standing of the defendant's business; how long the defendant has been in business; the defendant's domicile or residence; the machinery for enforcement in the country of the defendant's business; the defendant's credit record; any intention expressed by the defendant about future dealings with his assets; connections between a defendant and other companies that have defaulted on arbitration awards or judgments; and the defendant's behavior in respect of the claims. See *State Bank of India & Ors v. Mallya & Ors,* [2018] EWHC (Comm) 1084 at para. 105.

Courts in the requested jurisdiction may order these fees to be paid, even if such payment is not permitted under the law of the requesting jurisdiction.[36]

Different features of confiscation models. Where the cooperating jurisdictions have different models for asset confiscation, practitioners must be aware of the differences in evidentiary requirements and standards of proof. For example, one jurisdiction may apply value-based confiscation, which requires evidence that the defendant financially benefited from the crime and owns the assets; another jurisdiction may use property-based confiscation, which requires evidence of a link between the asset and the offense. In addition, some jurisdictions permit provisional measures that apply more broadly (box 9.5).

Confiscation

Ultimately, practitioners must submit an MLA request for confiscation of the assets. Practitioners must examine the legal options available in the jurisdiction where assets are located to verify whether a confiscation order may be enforced directly or enforced indirectly through an application for a domestic order in the requested country.

Under UNCAC, art. 55(1)(b), a requested party "shall, to the greatest extent possible within its domestic legal system . . . submit to its competent authorities, *with a view to giving effect to it* [emphasis added] to the extent requested, an order of confiscation

[36] In some jurisdictions, an argument can be made that if the requested jurisdiction is "enforcing" the requesting state's order, it should follow the procedural and substantive law provisions of the requesting state.

issued by a court in the territory of the requesting State Party . . . insofar as it relates to proceeds of crime, property, equipment or other instrumentalities . . . situated in the territory of the requested State Party."

Such a requirement reflects what is commonly understood as "direct enforcement" of foreign confiscation orders. UNCAC, art. 54(1)(a), specifically requires that state parties "take such measures as may be necessary to permit [their] competent authorities to give effect to an order of confiscation issued by a court of another state party," hence enabling the implementation of art. 55(1)(b) in practice. Box 9.6 discusses what is

BOX 9.6 Requirements for Direct Enforcement of Mutual Legal Assistance Requests for Confiscation in the United States and the United Kingdom

Requests to the United States

Mutual legal assistance (MLA) requests for the enforcement of a foreign order in the United States require a treaty agreement and must include a case summary, a description of the legal proceedings that resulted in the confiscation order, a certified copy of the confiscation order, and an affidavit that notice was provided and that the decision rendered is in force and not subject to appeal.

The US authorities will file an application to enforce the order as if it had been rendered by a court in the United States. A US District Court will order the enforcement of the judgment on behalf of the foreign jurisdiction unless it finds that (a) the judgment was rendered under a system incompatible with the requirements of the due process of law; (b) it was obtained by fraud; or (c) the foreign court lacked subject matter or personal jurisdiction.

Requests to the United Kingdom

In the United Kingdom, for property in England and Wales, an MLA request should be sent to the UK Central Authority, which refers the confiscation orders arising from a foreign jurisdiction to the relevant authority (the Serious Fraud Office, the Director of Public Prosecution, or the Director of Revenue and Customs Prosecutions). The Crown Court decides whether to register the external order, thus giving it effect. It will register only an order made as a consequence of the final conviction of the person named in it, not subject to appeal, and compatible with the Human Rights Act of 1998. Appeals to the Court of Appeal and the House of Lords are possible.

Different authorities and rules are relevant for properties in Scotland, Northern Ireland, and Crown dependencies (Guernsey, Jersey, and the Isle of Man). In addition, until the United Kingdom exits the EU, specific rules apply to orders made by EU member states.

Practitioners may refer to the UK Home Office's detailed online Guidance on Mutual Legal Assistance, March 26, 2013 (last updated June 17, 2020), at https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests.

required to obtain direct enforcement of confiscation in the United Kingdom and the United States.

In another legal approach, based on UNCAC, arts. 54(1)(b) and 55(1)(a)—often referred to as "indirect enforcement"—the requested jurisdiction may need to obtain a domestic confiscation order in order to execute the foreign request. In practice, evidence submitted by the requesting jurisdiction is often used to support an application for a domestic confiscation order. The requesting jurisdiction is thus expected to provide evidence satisfying the standards for confiscation in force in the requested jurisdiction.

Examples of conditions typically necessary to obtain a confiscation judgment[37] include

- The conditions as outlined above for provisional measures applications;
- A provisional restraint during the litigation to ensure assets are not moved or dissipated;
- A final order or judgment for confiscation not subject to any possible appeal; and
- Proof that notice was provided to all potential claimants and that they were given an opportunity to present any challenges recognized by law.

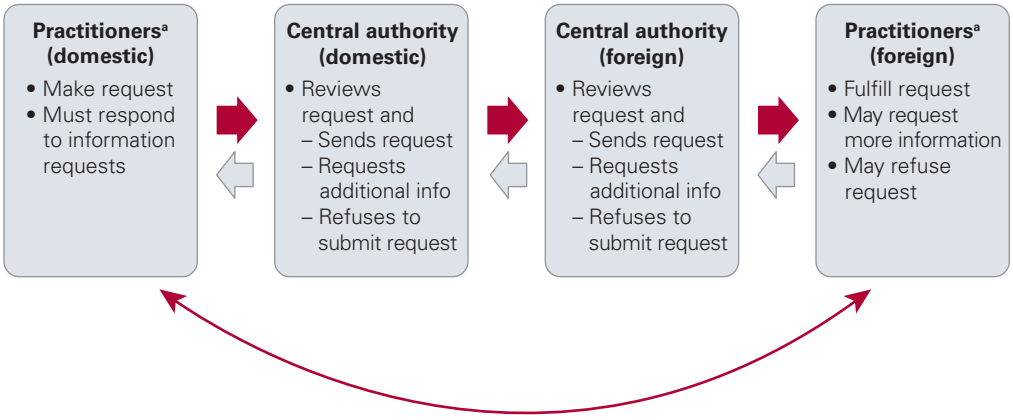
Some jurisdictions require additional information, such as information on the amount that remains unpaid from the requesting jurisdiction's confiscation order or confirmation that the person has been convicted of an offense. The latter requirement can be a barrier if a conviction is not possible because the accused has died, fled the jurisdiction, or is immune from prosecution. Many jurisdictions cannot convict in absentia or through absconding provisions, but they can issue a final order of confiscation using criminal law provisions or NCB confiscation.

9.2.7 Submission of an MLA Request, Follow-Up, and Addressing Refusals

When finalized, an MLA request must be signed by appropriate authorities in the requesting jurisdiction and then transmitted through the authorities listed in the applicable treaty, legislation, or agreement—often the central authorities, although some bilateral and multilateral treaties (such as the Council of Europe conventions) allow the request to be sent directly to law enforcement practitioners with a copy to the central authority. Other jurisdictions may require more-traditional processing through diplomatic channels (that is, the ministry of foreign affairs). Figure 9.1 illustrates the flow of a request.

[37] Laws that permit recognition and/or registration and enforcement of the foreign confiscation judgment usually prohibit the courts in the requested jurisdiction from entertaining challenges to the confiscation that may be raised in the requested jurisdiction's courts. Even if the law does not explicitly provide for such a prohibition, practitioners should argue that courts in the requested jurisdiction should not hear the same type of challenge that has been raised or could be raised in the requesting jurisdiction's courts as long as all potential claimants have been sufficiently notified of the proceeding and been given the opportunity to raise a challenge.

FIGURE 9.1 Flow of an MLA Request in the Presence of a Treaty or Domestic Legislation



Source: World Bank.
Note: If letters rogatory are required, the domestic and foreign ministries of foreign affairs must be added to the process. MLA = mutual legal assistance.
a. Practitioners could include prosecutors, investigating magistrates, or law enforcement officials.

Following submission of the MLA request, practitioners will have to follow up on the progress of the request. If possible, they should speak directly with the person assigned to execute the request because this opens the opportunity to clarify any terminology or translation issues, check whether requirements are met, and offer additional information. The requesting jurisdiction may be asked for more information to support the request. Such a request is not a refusal, nor should it be perceived as one: the number of requirements and opportunities for misunderstanding mean that requests often need more information, even among jurisdictions with a lot of experience in transmitting requests. Clarify the information needed with personal contacts and provide the information as soon as possible to avoid further delay.

If there is still no response or if there is a refusal to address possible errors in the reasons for refusal, look for other avenues. Applying third-party pressure through other jurisdictions or international organizations has sometimes been helpful, particularly in multijurisdictional cases. The Stolen Asset Recovery (StAR) initiative, for example—a joint initiative of the World Bank and the UNODC—has a track record in facilitating the cooperation of different jurisdictions involved in asset recovery and in providing a platform for dialogue and collaboration on specific cases.[38]

One requested jurisdiction may have greater success than the requesting jurisdiction in reaching out to another requested jurisdiction that is refusing to help, especially if there

[38] For more information, see Stolen Asset Recovery (StAR) initiative, "About Us: Our Work," https://star.worldbank.org/about-us/our-work.

is an existing relationship between the two requested jurisdictions. In one example, jurisdiction *x* applied to two major financial centers for assistance: jurisdiction *y* and jurisdiction *z* (all UNCAC signatories). Jurisdiction *y* responded with an offer to help, and jurisdiction *z* refused. Jurisdiction *y*, which had worked with jurisdiction *z* on other cases, wrote to jurisdiction *z* to indicate that it was assisting jurisdiction *x* and urged officials to reconsider assistance because the reasons for refusal were not authorized under UNCAC. That led jurisdiction *z* to reconsider the situation.

Another option for assistance with drafting, submission, and follow-up of MLA requests is to hire an attorney from the requested jurisdiction. The benefit of such an arrangement is that this person is on the ground, has contacts, and knows the language. The disadvantage is the cost.

9.3 Cooperation in Cases of Confiscation without a Conviction

Although an increasing number of jurisdictions are adopting legislation that permits confiscation without a conviction, which is encouraged in multilateral treaties and by international standard setters,[39] international cooperation in NCB confiscation cases remains quite challenging for a number of reasons.

First, although NCB confiscation is a growing area of law, it is not yet universal; therefore, not all jurisdictions have adopted legislation permitting NCB confiscation, enforcement of foreign NCB confiscation orders, or both.

Second, even where NCB confiscation exists, the systems vary significantly. Some jurisdictions conduct NCB confiscation as a separate proceeding in civil courts (known as "civil confiscation"), requiring a lower standard of proof than in criminal cases (specifically, a "balance of probabilities" or "preponderance of the evidence"). Others use NCB confiscation in criminal courts and require the higher criminal standard of proof. Some jurisdictions will pursue NCB confiscation after criminal proceedings have been abandoned or unsuccessful, whereas others pursue NCB confiscation in a proceeding parallel to the related criminal proceeding.[40]

There have been some successes in overcoming these barriers. Some jurisdictions have been able to incorporate cooperation on NCB confiscation into bilateral treaties or agreements. Other jurisdictions have provided the case information to the foreign jurisdiction, and the foreign jurisdiction has been able to pursue the case under

[39] UNCAC, art. 54(1)(c), requires that countries consider such cooperation in cases of death, flight, or absence, or in other appropriate cases. FATF Recommendation 4 ("Confiscation and Provisional Measures") requires that countries consider allowing confiscation without a conviction (FATF 2019). The FATF has also introduced best practices on NCB confiscation, including recognition of foreign NCB confiscation orders, which the FATF plenary adopted in October 2012 (FATF 2012).

[40] The United Kingdom generally pursues NCB confiscation only after criminal proceedings are abandoned or unsuccessful. The United States often pursues NCB confiscation parallel to the related criminal proceeding.

domestic legislation. Finally, some jurisdictions have been able to enforce foreign NCB confiscation orders despite differences in pertinent systems[41] or even in the absence of a domestic NCB confiscation system.[42]

At a regional level, the EU regulations stipulate timelines for recognition and execution of freezing and confiscation orders issued by another EU country,[43] specifying a deadline of 45 days for a decision upon the recognition of a confiscation order. In urgent cases, a deadline of 48 hours is provided for a decision on the recognition of freezing orders and 48 hours for the execution thereof. In addition, European countries are obliged to consider NCB confiscation orders from other EU members as a legal basis for confiscation even if they do not themselves have NCB confiscation in their domestic laws.

Even if the requesting jurisdiction does not have a system for NCB confiscation, it may be possible to use NCB confiscation in a requested jurisdiction that does have it. The requesting jurisdiction will need to ask the requested jurisdiction to open a case. This may be the only way to recover assets in some cases, particularly if the offender has died, fled the jurisdiction, or is immune from prosecution (see chapter 11 for information on this option).[44]

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[41] In an NCB confiscation case involving a request by the United States to Switzerland (in which criminal proceeds were restrained in a criminal court), the Supreme Court of Switzerland held that there can be circumstances in which confiscation can be likened to a case of "criminal character"—even in the absence of a criminal proceeding in the foreign state. See *A____ Company v. Federal Office of Justice* (1A.32612005, ATF 132 II 178). The country must have jurisdiction to punish, even if the authorities do not intend to exercise it. Although this requirement can be met in the United States (a jurisdiction that usually conducts NCB confiscation parallel with or prior to the conclusion of criminal proceedings), it would not be met in jurisdictions that pursue NCB confiscation only after a criminal case has been dropped or unsuccessful.

[42] Hong Kong SAR, China and Jersey (a Crown dependency) had legislation permitting enforcement of foreign NCB confiscation orders, even though laws permitting NCB confiscation domestically were passed only later. Recent legislation in Jersey (Forfeiture of Assets [Civil Proceedings] Law 2018); Hong Kong SAR, China (Mutual Legal Assistance in Criminal Matters Ordinance ["MLA Ordinance"], Chapter 525 of the Laws of Hong Kong); and China (Criminal Procedure Law of the People's Republic of China, art. 128) allow NCB confiscation, although in very limited circumstances in the case of China. Some Latin American countries accept an NCB confiscation order and file it in a civil court for enforcement. In France, courts recognized and executed a foreign NCB confiscation order from Italy pursuant to the Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, despite France's lack of a system for NCB confiscation (see the case of *Crisafulli* [Court of Cassation, no. 03-80371, November 13, 2003]). The court recognized the decision owing to two factors. First, the evidence establishing that the property was the product of a criminal offense was sufficiently similar to that required for a criminal decision, thus likened to a criminal case. Second, the consequences on the property of the person were similar to a criminal penalty. (See also, in this *Handbook*, a reference to the Crisafulli case in chapter 7, note 60.)

[43] See Council Regulation (EU) 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (OJ L 303, 28.11.2018), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1805.

[44] This method has been used in a number of cases: US$20 million was returned to Peru from the United States in the case of Victor Venero Garrido, an associate of Vladimiro Montesinos, adviser to former Peruvian president Alberto Fujimori and de facto head of intelligence in Peru (chapter 1, box 1.3). US$2.7 million was returned to Nicaragua from the United States in the case of Byron Jerez, former Nicaraguan director of taxation. And funds were returned to Ukraine from the United States and Antigua and Barbuda in the case against Pavlo Lazarenko, former prime minister of Ukraine.

9.4 Cooperation in Civil Recovery (Private Law) Cases

International cooperation in civil recovery (private law) cases can be difficult, even when the jurisdiction is a litigant in a private case.[45] Although information gathered through informal assistance channels could help in developing the investigation, many MLA agreements limit the use of information and do not permit its use in actions by private litigators to obtain civil judgments. Civil judgments can be enforced between jurisdictions through processes such as "reciprocal enforcement of judgments" and related laws.

At the same time, the international community has recognized that civil recovery is often the only recourse in cases of corruption and has recommended cooperation in civil and administrative matters.[46] As a result, it has become increasingly common for jurisdictions to consent to such use, either generally in a treaty or on a case-by-case basis. Cooperation in civil cases can also be based on specific international instruments, including the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention") of March 18, 1970.[47]

9.5 Cooperation in Asset Return

Once a jurisdiction enforces a foreign confiscation order following an MLA request, the assets can be returned to the requesting jurisdiction (box 9.7). By virtue of UNCAC, art. 57, a requested party must return the funds confiscated by way of a final confiscation order issued by another party in the case of embezzlement of public funds or the laundering of embezzled funds. For other UNCAC offenses, the requested party is obliged to return the assets if it recognizes damage to the requesting jurisdiction or when the requesting jurisdiction reasonably establishes prior ownership of the confiscated assets. In all other cases under UNCAC, the requested jurisdiction should give priority consideration to the return of assets.

Statutory authority, multilateral and bilateral treaties, and asset-sharing or ad hoc agreements (either on a case-by-case basis or by permanent agreement) may also be used to share or return the confiscated assets.

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[45] For example, in September 2001, the Nigerian government submitted an ex parte application to the Chancery Division of the High Court in London requesting the disclosure by banks of accounts held by the family members, associates, and corporate vehicles of former military dictator Sani Abacha. The court issued a so-called Bankers Trust order (in accordance with *Bankers Trust v. Shapira* [1980] 1 WLR 1274) for the disclosure of copies of bank statements and other information held by them, including account opening forms, know your customer (KYC) forms, payment instructions, and relevant banking information, without the account holders' knowledge (ADB, OECD, and Basel Institute on Governance 2007, 183–84), https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Abacha_Daniel_Case_Study_ADB_2007.pdf.

[46] See UNCAC, art. 43, as well as Recommendation 37 of the "Report of the Commonwealth Working Group on Asset Repatriation" (Commonwealth Secretariat 2006, 350), which states, "The mutual legal assistance regimes in Commonwealth countries should permit evidence gathered for a criminal proceeding to be subsequently used in civil proceedings and requests for such use should be granted in corruption cases."

[47] The process and the instruments for international assistance in civil matters are described in more detail in Brun et al. (2015), https://star.worldbank.org/sites/star/files/9781464803703_0.pdf.

BOX 9.7 Asset Recovery Pursuant to a Mutual Legal Assistance Request in France

In France, a mutual legal assistance request based on a foreign court decision is sent by the Ministry of Justice to the competent prosecutor's office, which will request the court to confiscate the assets. If the court does so, the confiscated assets become the property of the French government. The competent officials (in particular, those within the Treasury Department) will determine whether France is obliged to return the assets under an international agreement. Even if there is no such obligation, the assets may be returned at the discretion of the government or under an ad hoc agreement with the requesting state.

Chapter 11 provides additional information on these avenues in cases where the requested jurisdiction conducts confiscation proceedings related to assets located in its territory while the requesting jurisdiction claims that it was harmed by the corruption and money-laundering offenses. Chapter 11 also includes an example of an asset return agreement between the United States, Nigeria, and Jersey (a Crown dependency) to repatriate assets stolen by former Nigerian dictator General Sani Abacha (box 11.8).

Practitioners should be aware that such agreements are often facilitated when they include mechanisms ensuring transparent and effective management of the returned assets by the requesting jurisdictions. This can be achieved by involving specific auditing or monitoring mechanisms, informing civil society organizations, and planning to use the returned assets for specific development projects. The Global Forum on Asset Recovery (GFAR)—held in 2017 at the World Bank and hosted by the United Kingdom and the United States—concluded with a declaration of principles (box 9.8) to promote the return of stolen assets (GFAR 2017).

BOX 9.8 Global Forum on Asset Recovery's Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases

"Principle 1: Partnership

It is recognised that successful return of stolen assets is fundamentally based on there being a strong partnership between transferring and receiving countries. Such partnership promotes trust and confidence.

Principle 2: Mutual Interests

It is recognised that both transferring and receiving countries have shared interests in a successful outcome. Hence, countries should work together to establish arrangements for transfer that are mutually agreed.

Principle 3: Early Dialogue

It is strongly desirable to commence dialogue between transferring and receiving countries at the earliest opportunity in the process, and for there to be continuing dialogue throughout the process.

(continued next page)

BOX 9.8 Global Forum on Asset Recovery's Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases *(Continued)*

Principle 4: Transparency and Accountability

Transferring and receiving countries will guarantee transparency and accountability in the return and disposition of recovered assets. Information on the transfer and administration of returned assets should be made public and be available to the people in both the transferring and receiving country. The use of unspecified or contingent fee arrangements should be discouraged.

Principle 5: Beneficiaries

Where possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct.

Principle 6: Strengthening Anti-Corruption and Development

Where possible, in the end use of confiscated proceeds, consideration should also be given to encouraging actions which fulfill UNCAC [United Nations Convention against Corruption] principles of combating corruption, repairing the damage done by corruption, and achieving development goals.

Principle 7: Case-Specific Treatment

Disposition of confiscated proceeds of crime should be considered in a case-specific manner.

Principle 8: Consider Using an Agreement under UNCAC Article 57(5)

Case-specific agreements or arrangements should, where agreed by both the transferring and receiving state, be concluded to help ensure the transparent and effective use, administration, and monitoring of returned proceeds. The transferring mechanism(s) should, where possible, use existing political and institutional frameworks and be in line with the country development strategy in order to ensure coherence, avoid duplication, and optimize efficiency.

Principle 9: Preclusion of Benefit to Offenders

All steps should be taken to ensure that the disposition of confiscated proceeds of crime do not benefit persons involved in the commission of the offence(s).

Principle 10: Inclusion of Non-Government Stakeholders

To the extent appropriate and permitted by law, individuals and groups outside the public sector, such as civil society, non-governmental organizations, and community-based organizations, should be encouraged to participate in the asset return process, including by helping to identify how harm can be remedied, contributing to decisions on return and disposition, and fostering transparency and accountability in the transfer, disposition, and administration of recovered assets."

Source: GFAR (2017), https://star.worldbank.org/sites/star/files/the-gfar-principles.pdf.

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10. Civil Proceedings

10.1 Introductory Remarks

The United Nations Convention against Corruption (UNCAC), art. 53 (on "direct recovery of property"), requires that states parties take measures to permit another state party to claim ownership of assets or compensation for damages in its domestic courts. In most jurisdictions, authorities seeking to recover the proceeds of corruption have the option to initiate civil proceedings in domestic or foreign civil courts in the same way as a private citizen.[1] In some cases, the authorities may also decide to pursue a criminal conviction and use civil proceedings to recover the proceeds of corruption.[2]

Civil proceedings may be considered for various reasons, including the inability to obtain (a) criminal confiscation, (b) non-conviction based (NCB) confiscation, or (c) mutual legal assistance (MLA) for the enforcement of confiscation orders. (See chapter 1 regarding these and other obstacles that may lead to the selection of one confiscation approach over another.)

In addition, there are procedural advantages. Civil proceedings may take place in the absence of defendants who have been properly notified; and, at least in common law jurisdictions, the case will be adjudicated on a lower standard of proof (usually the "balance of probabilities"). In some jurisdictions, civil actions can be launched more easily than criminal proceedings against third parties, intermediaries, and professionals who facilitated, participated in, or assisted in the reception, transfer, or management of suspicious assets.[3]

And in cases that transcend borders, a civil action affords a jurisdiction seeking to recover assets greater control of the process relative to criminal proceedings in foreign jurisdictions. It may also offer a more expedient route than waiting for enforcement

[1] "Civil proceedings" are separate and distinct from "civil confiscation," "civil forfeiture," or other forms of non-conviction based (NCB) confiscation.

[2] In some jurisdictions, the proceedings will go forward in parallel. In others, the civil proceedings will be stayed until the conclusion of the criminal matter. In some other jurisdictions, the award of civil damages may affect a confiscation order. Moreover, in some jurisdictions, confiscation is discretionary rather than mandatory when civil damages are ordered.

[3] In this situation, although it may be difficult to prove criminal intent to participate in a conspiracy, it could be easier to establish civil liability.

action by the foreign jurisdiction.[4] To collect evidence in a foreign country, jurisdictions that conduct a civil action can benefit from international cooperation treaties relevant in civil matters, including the Hague conventions.[5]

The drawbacks to civil proceedings include the cost of tracing assets and the legal fees entailed in obtaining relevant court orders. In addition, civil cases may extend over many years like criminal cases, and private investigators do not typically have the range of investigative tools or access to intelligence that are available to law enforcement.

When the decision is made to bring a civil lawsuit in a domestic or foreign court, practitioners must explore the potential claims and remedies (including ownership of misappropriated assets, disgorgement of illicit profits, compensation for damages, and invalidity of contracts) or other options (such as insolvency proceedings). Practitioners will then have to determine how they will initiate the lawsuit, collect evidence, secure assets, and enforce foreign judgments. This chapter discusses various options and techniques used in civil actions.[6]

10.2 Potential Claims and Remedies

Various types of claims and remedies exist in civil litigation, including proprietary claims for assets and personal claims. A *proprietary claim* is generally understood as a direct claim to a particular piece of property or asset by its true owner, whereas a *personal claim* is filed against a person and can be satisfied out of various assets. Personal claims typically include actions based in tort or actions based on invalidity or breach of contract or on illicit or unjust enrichment.

10.2.1 Proprietary (Ownership) Claims and Remedies

Causes of Action

In many jurisdictions, misappropriated assets and bribes paid to government officials may be claimed by the jurisdiction seeking redress as the legitimate and true owner. Box 10.1 presents four examples of civil actions to claim ownership of assets in transnational corruption cases.

[4] The factors considered before proceeding with the civil legal avenue in the cases of Frederick Chiluba of Zambia and Diepreye Alamieyeseigha of Nigeria are discussed in chapter 1, boxes 1.4 and 1.5, respectively.

[5] The process and the instruments for international assistance in civil matters are described in more detail in the Stolen Asset Recovery (StAR) initiative publication *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (Brun et al. 2015), https://star.worldbank.org/sites/star/files/9781464803703_0.pdf.

[6] For a detailed study of these options and techniques, see Brun et al. (2015) as well as another StAR publication, *Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery in Corruption Cases* (Brun and Silver 2019), https://star.worldbank.org/sites/star/files/going-for-broke.pdf.

BOX 10.1 Case Examples of Actions to Claim Ownership of Assets

Case 1: Kartika Ratna Thahir v. Pertamina (1992–94)

The facts: Pertamina, an Indonesian state-owned enterprise whose principal business was the exploration, processing, and marketing of oil and natural gas, sought to recover bribes paid to Pertamina executive Haji Achmad Thahir by contractors hoping for better contractual terms and preferential treatment.[a] The executive deposited the bribes into a Singapore bank. Pertamina learned about the Singapore bank accounts (owned jointly by Thahir and his wife, Kartika Ratna Thahir) after the executive's death and brought an action in Singapore claiming to be entitled to the funds.[b]

The ruling: The court of first instance ruled that the bribes and all earned interest were held by the executive as a constructive trustee. The court of appeal upheld the ruling and confirmed the existence of a fiduciary relationship between Thahir and Pertamina and emphasized that a fiduciary who accepted a bribe in breach of his or her duty held that bribe "in trust for the person to whom the duty was owed."[c] As a result, Pertamina was entitled to recover the money laundered in Singapore as its legitimate owner.

The outcome: The assets in question were returned to the state-owned company, Pertamina (Brun et al. 2015, 18 [box 1.5]).

Case 2: Attorney General for Hong Kong v. Reid (1994)

The facts: In this case, the Independent Commission against Corruption (ICAC) of Hong Kong SAR, China, sought to recover properties purchased in New Zealand by a former prosecutor, Charles Warwick Reid.[d] The purchases were made with bribes received in exchange for not prosecuting certain offenders. The total amount of bribes thought to have been received by Reid exceeded $NZ 2.5 million. Two properties had been assigned to Reid and his wife, and one had been assigned to his solicitor.

The ruling: The Judicial Committee of the Privy Council decided that these properties, as far as they represented bribes accepted by Reid, were held in trust for the Crown. As the court explained it, when a bribe is accepted by a fiduciary in breach of his or her duty, that fiduciary holds the 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 or she 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 that individual is not allowed by any means to profit from a breach of duty.[e] This case is still considered one of the leading common law authorities on the use of constructive trusts to recover bribery proceeds from an unfaithful fiduciary.

(continued next page)

BOX 10.1 Case Examples of Actions to Claim Ownership of Assets *(Continued)*

The outcome: The three properties that were found to be held in trust for the Crown were in New Zealand and had been purchased for approximately $NZ 500,000. The government of Hong Kong SAR, China, recovered these properties as their legitimate owner.

Case 3: State of Libya v. Capitana Seas Ltd. (2012, 2015)

The facts: After Muammar el-Qaddafi was deposed during Libya's civil war, the state of Libya brought a civil action in the London High Court in 2011 to obtain the ownership of a luxurious £10 million real estate property with eight bedrooms, an indoor swimming pool, and a private cinema in the prestigious Hampstead Gardens Suburb in London.[f] The claim was brought against Capitana Seas, a company registered in the British Virgin Islands, because the company was allegedly used by Muammar's son, Saadi Qaddafi, to purchase the property in 2009.

The State of Libya claimed that Saadi Quaddafi could not have bought the real estate property with his official military salary and that it was wrongfully and unlawfully purchased with funds belonging to Libya. Although Libyan investigators reportedly said they were unable to establish Saadi as the owner of the Hampstead mansion because of the British Virgin Islands' lack of beneficial ownership transparency, the UK Treasury intervened and directly contacted the British Virgin Island authorities.

The ruling: Saadi Quaddafi was found to be the sole ultimate beneficial owner of Capitana Seas Limited, which was used to purchase the property.[g] According to the court, the property was held by Capitana Seas for the State of Libya as constructive trustee.[h] The State of Libya was granted a default judgment because neither Capitana Seas Limited nor Saadi Quaddafi appeared in court.[i] The justice thus awarded the property to Libya.

Following the court's order, the UK Treasury consented to the action, permitting transfer of the property to Libya. The court order was upheld in 2015, as Capitana Seas' claim to set aside the 2012 judgment was rejected for lack of evidence.[j]

The outcome: The ownership of the real estate property was awarded to the State of Libya, marking the first successful asset recovery case brought by an Arab Spring country.

Case 4: Federal Republic of Nigeria v. Santolina Investment Corp., Solomon & Peters, and Diepreye Alamieyeseigha (2007)

The claim: The Federal Republic of Nigeria applied before a London Court for a summary judgment claiming that Diepreye Alamieyeseigha, who was the governor of Bayelsa State in Nigeria from May 1999 until his impeachment and dismissal in December 2005, had engaged in corrupt conduct.[k] In particular, the Nigerian government claimed that companies controlled by Alamieyeseigha—namely Santolina

(continued next page)

BOX 10.1 Case Examples of Actions to Claim Ownership of Assets *(Continued)*

Investment Corp. and Solomon & Peters Ltd. (S&P), which were Alamieyeseigha's codefendants in the civil action—were holding properties and bank accounts in London.[l] The Nigerian government claimed ownership of those assets because they constituted bribes and secret commissions obtained by Alamieyeseigha as the result of his abuse of power as a public officer. (For more details on this case, see box 10.12 as well as chapter 1, box 1.5.)

The ruling: In December 2007, the London High Court of Justice held that Nigeria was the true owner of the residential properties in London and the credit balances of certain bank accounts.[m] The properties and funds were officially held by the two companies—namely Santolina and S&P, which were incorporated in the Seychelles and the British Virgin Islands, respectively, and were controlled by Alamieyeseigha.[n] In separate proceedings in Nigeria, the two companies, represented by Alamieyeseigha, pleaded guilty to money-laundering charges related to bribes obtained for the awarding of government contracts.

Based on this Nigerian proceeding and other circumstantial evidence, the London High Court inferred that the bank balances and real estate investments held by the two companies controlled by Alamieyeseigha were bribes and secret profits to be returned to the government of Nigeria as the legitimate owner of those assets. That the defendant's legitimate resources were not enough to explain this wealth was, as often is in similar cases, a key element underlying the reasoning.

The outcome: The court concluded that Nigeria was the legitimate owner of US$2.7 million held in bank accounts (of which £1.8 million was held by a Santolina Investment Corp. account) and of the London real estate worth US$15 million (with four properties registered under S&P as the sole proprietor).[o]

a. Kartika Ratna Thahir v. PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina) [1994] 3 SLR 257; [1994] SGCA 105 (Singapore).

b. *Kartika Ratna Thahir v. Pertamina*, paras. 2–3.

c. *Kartika Ratna Thahir v. Pertamina*, paras. 53, 57. In the case of *State of Libya v. Capitana Seas Ltd.* (2012) EWHC 602 (Comm), the London High Court found that the property in question was wrongfully and unlawfully purchased by Saadi Quaddafi with funds belonging to the State of Libya and was held by him as a constructive trust (para. 3). More recently, in *FHR European Ventures LLP & Ors v. Cedar Capital Partners LLC* [2014] UKSC 45, the UK Supreme Court held that bribes and secret commissions are held in trust by an agent for his or her principal.

d. Att'y Gen. for Hong Kong v. Reid [1994] 1 AC 324 PC (UK).

e. Att'y Gen. for Hong Kong v. Reid [1993] UKPC 2 (November 1, 1993).

f. State of Libya v. Capitana Seas Ltd. [2012] EWHC 602 (Comm).

g. High Court of Justice, Commercial Court [2012] EWHC 602 (Comm), para. 5.

h. *High Court of Justice* at para. 3.

i. *High Court of Justice* at para. 4.

j. *Libya v. Capitana Seas Ltd.*, QBD (Comm) (Knowles J) 05/08/2015.

k. Fed. Republic of Nigeria v. Santolina Inv. Corp., Solomon & Peters, and Diepreye Alamieyeseigha [2007] EWHC 437 (Ch) (UK). Interestingly, the petition for summary judgment was the Federal Republic of Nigeria's second such attempt in the case. The first one had been dismissed because of disputed allegations of corruption that ought to go to trial. However, since the dismissal of the first application, the circumstances changed because Alamieyeseigha had pleaded guilty to money-laundering offenses within Nigerian criminal proceedings. See Fed. Republic of Nigeria and (1) Santolina Inv. Corp., (2) Solomon & Peters Ltd., (3) Diepreye Alamieyeseigha [2007] EWHC 3053 (QB), para. 2.

l. *Nigeria v. Santolina*, para. 1.

m. *Nigeria v. Santolina*, para. 54.

n. *Nigeria v. Santolina*, paras. 4–5.

o. Stolen Asset Recovery (StAR) initiative case study, "Diepreye Alamieyeseigha," https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Alamieyeseigha_StAR_Case_Study_2.pdf.

Remedies

A court could consider the return or restitution of assets to their legitimate owners through a variety of available remedies.[7] Proprietary remedies have significant advantages over personal claims for compensation or contractual remedies in that the claimant's rights are not in competition with other creditors, and civil procedures frequently allow courts to issue seizure and restraint orders even if the claimant does not demonstrate a risk of dissipation. If the proceeds of corruption were invested, the claimant may also be entitled to recover interest or profits earned by the defendant, as demonstrated by the *Kartika Ratna Thahir v. Pertamina* and *Attorney General for Hong Kong v. Reid* cases discussed in box 10.1.

However, proprietary claims and remedies may not be available if the proceeds cannot be traced to the corruption offense because they have been laundered around the world.[8] For bribes received by government officials or profits derived from fraudulent contracts, some jurisdictions in common law countries apply the principle of constructive trust. In other words, a government official who illegally receives funds in breach of one's duties is holding them "in trust" for the benefit of the government, their ultimate beneficial owner. In other (mainly civil law) jurisdictions, these assets will not be recognized as property of the state or government.

10.2.2 Actions in Tort

Causes of Action

Pursuant to UNCAC, states parties should allow requesting jurisdictions to claim compensation for damages caused by a corrupt act.[9] Tort damages are paid to compensate a

[7] In *Sinclair Investments (UK) Ltd. v. Versailles Trade Finance Ltd.* (2011), the Court of Appeal stated that the beneficiary of a fiduciary duty could not claim a proprietary interest and was entitled only to an "equitable account" unless the assets were beneficially owned by it or derived from an opportunity or right of the beneficiary. However, in *FHR European Ventures LLP v. Mankarious* (2013), the Court of Appeal granted the proprietary remedy based on the rule that the profit derived from corruption was held by the fiduciary in trust for the principal (Shantanu Majumdar. 2013. "Agents, Bribes and Remedies: Where Are We Now?" Radcliffe Chambers article for Lexology, December 3, 2013. https://www.lexology.com/library/detail.aspx?g=18d25953-827a-4971-8a70-9e370f0f433b.).

[8] However, in the Paulo Maluf case described below, the UK Privy Council confirmed the legality of "backwards tracing" as a method of recovering illegal payments after the money has been paid into a bank account, even if that money is spent elsewhere ([2015] UKPC 35, Privy Council Appeal No. 0069 of 2013, https://www.jcpc.uk/cases/docs/jcpc-2013-0069-judgment.pdf). The case involved a civil action brought in 2005 by the Federal Republic of Brazil and the municipality of São Paolo against two companies, Durant and Kildare (registered in the British Virgin Islands under the control of Paolo Maluf, senior mayor of the municipality, and his son Flavio) regarding bribes paid in connection with a public works contract. In 2012, the Royal Court of Jersey found the defendants liable to the municipality as constructive trustees of approximately US$10 million representing bribes connected with the contract. The companies challenged the decision before the Jersey Court of Appeal, claiming that the total amount that could be properly traced to them from the bribes was limited to US$7 million. The Court of Appeal upheld the Royal Court's ruling in 2013. Finally, the companies appealed to the Privy Council, the court of last resort for British dependencies and other Commonwealth countries. Its ruling "reject[ed] the argument that there can never be backward tracing, or that the court can never trace the value of an asset whose proceeds are paid into an overdrawn account" ([2015] UKPC 35, Privy Council Appeal No. 0069 of 2013, para. 40).

[9] See UNCAC, art. 53, and the Council of Europe's Civil Law Convention on Corruption, art. 5.

plaintiff for loss, injury, or harm directly caused by a breach of duty, including criminal wrongdoing, illegal conduct, and precontractual fault. Where a corrupt act has occurred, a plaintiff generally has to prove that the plaintiff suffered compensable damage, that the defendant breached a duty, and that there is a causal link between corruption and the damage.

Legal persons and individuals who directly and knowingly participate in the corrupt act are primarily liable for the damage. In addition, courts may hold liable those who facilitated the corrupt act or failed to take appropriate steps to prevent corruption. This may be the case for lawyers or intermediaries who assisted in corrupt acts or for parent companies and employers that failed to exert appropriate control over their subsidiaries or employees.

In some civil law countries, any person who suffers direct harm caused by an offense can claim damages for tort in civil or criminal court once a defendant has been convicted.[10] To recover damages from the defendant, general liability statutes simply require that the plaintiff show that an act or omission by the defendant caused the plaintiff's damages.

In bribery cases, courts in some jurisdictions may consider that a bribe payer and the person receiving the bribe have committed a joint tort for which the victim is entitled to recover the entire loss from either party.[11] Once it is established that a bribe was given, there is an irrefutable presumption that it was given with an intention to induce the agent to act favorably to the payer and thereafter unfavorably to the principal. This presumption is sufficient to prove that the act was affected and influenced by the payment.[12] In other jurisdictions, a principal or employer also has a claim against an employee who takes a bribe on the basis of loyalty owed in application of an employment contract. In practice, however, it may be difficult to prove that an act of bribery is the direct cause of a material loss.[13] Box 10.2 describes examples of and grounds for a tort action in the United States.

Remedies

In most jurisdictions, the basic rule for determining damages is that the victim must be placed as closely as possible in the same position in which the victim would have been

[10] In Panama, for example, the commission of a crime or any unlawful act gives rise to a claim for damages that can be sought through proceedings in criminal courts or by filing a civil claim for damages in a civil court. France permits plaintiffs to claim damages in criminal courts; see Criminal Code of Procedure (France), art. 2. Switzerland also allows victims of a criminal offense to seek compensation in the context of the criminal procedure.

[11] In the United Kingdom, the defendant may then seek contribution from the joint tortfeasor under the Civil Liability (Contributions) Act of 1978.

[12] Industries & General Mortgage Co. Ltd. v. Lewis [1949] 2 All ER 573 (UK).

[13] For example, in the case where the city of Cannes (France) sued the mayor after he had been convicted for corruption, courts held that damages were the result of a ministerial decision to revoke and refuse a license (not an act of bribery). Damages awarded for the town's loss of reputation were quantified at €100,000 (approximately US$128,300).

if the corrupt act that caused the damage had not taken place. Courts may be authorized to award compensation for loss of profits reasonably expected but not gained as a result of corruption as well as nonpecuniary damages that cannot be immediately calculated.[14] The plaintiff's right to compensation may be reduced or even disallowed in

BOX 10.2 The US Racketeer Influenced and Corrupt Organizations (RICO) Statute

In the United States, foreign governments or foreign nationals acting as civil plaintiffs may seek compensation for harm resulting from tortuous corrupt practices. The Alien Tort Claims Act (adopted in 1789) can be used to bring a tort claim based on violations of the law of nations or a treaty of the United States and could therefore be used for corrupt or fraudulent activity falling within this ambit.[a] Courts have held that there is no private right of action under the Foreign Corrupt Practices Act (FCPA),[b] which prohibits the payment of bribes to foreign officials and is enforced by criminal or civil actions by government agencies. However, plaintiffs could receive civil compensation under the Racketeer Influenced and Corrupt Organizations (RICO) Act for damages caused by corruption.[c]

The RICO statute makes it unlawful to participate, directly or indirectly, in an enterprise through a pattern of racketeering activity or collection of unlawful debt. Racketeering activities that could be considered "predicate acts" of RICO violations include bribery, theft, embezzlement, extortion under the color of official rights, fraud, obstruction to justice, and money laundering. Predicate acts form a pattern if they "have the same or similar purposes, results, participants, victims, or methods of commission." The statute is applicable to defendants who committed two predicate acts within a 10-year period. In practice, courts have ruled that FCPA violations can serve as predicate acts for civil liability in RICO actions. Treble damages are available, although some foreign jurisdictions view these as punitive and will not enforce them.

A successful case of using an FCPA violation as a predicate act for a civil RICO action was *Dooley v. United Technologies Corp.,*[d] which involved a bribery scheme between representatives of the Saudi Arabian government and Dooley's employer, defendant Sikorsky, along with Sikorsky's parent corporation, United Technologies Corp., and various co-conspirators including the two British defendants and the three Saudi Arabian defendants. The court found that "Dooley

(continued next page)

[14] For example, in the French city of Cannes, the mayor who accepted a bribe and the bribe payers were ordered to pay €100,000 for the town's loss of reputation caused by the corruption scandal (Brun et al. 2015, 92 [box 7.2]).

BOX 10.2 The US Racketeer Influenced and Corrupt Organizations (RICO) Statute *(Continued)*

may assert his RICO claim … based on the alleged violation of the FCPA and Travel Acts" and that "allegations against the Saudi defendants that they committed … Travel Act/FCPA violations … are sufficient to establish the plaintiffs' RICO claims as to the Saudi defendants." Thus, the use of the FCPA as a predicate offense for civil RICO actions could address the lack of a direct right of private action under the FCPA and entitle the plaintiff to treble damages.[e]

However, most recently, the US Supreme Court, in *RJR Nabisco, Inc. v. European Community* (579 U.S. [2016]), settled some issues regarding the extraterritorial scope of the RICO Act. It found that RICO can apply to foreign racketeering activity "based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial," but it also concluded that RICO's private right of action "does not overcome the presumption against extraterritoriality" because "nothing … provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States."[f]

a. Under the Alien Tort Claims Act (ATCA), also known as the Alien Tort Statute (ATS), the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. The Act has been used by foreign nations seeking redress in US courts in cases of human rights offenses and acts of terrorism (CRS 2018). However, the scope of the Act has been limited by the US Supreme Court to apply only to a narrow set of international law violations (Sosa v. Alvarez-Machain, 542 U.S. 692, 725 [2004]), yet not to matters outside the US territorial jurisdiction (Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 120 [2013]). Most recently, the Act was found inapplicable to claims against foreign corporations (Jesner v. Arab Bank PLC, 584 U.S. _ [2018]). In *RSM Production Corp. v. Fridman*, the US District Court (S.D.N.Y.) held that the plaintiff, arguing a violation of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, could not show that the defendant had violated the "law of nations" because the defendant was the bribe *taker* and not the bribe *giver*. The OECD Anti-Bribery Convention in fact deals with active corruption (the offense committed by the person who promises or gives the bribe) and not passive corruption (the offense committed by the official who receives the bribe) (RSM Production Corp. v. Fridman, 643 F. Supp 2d 382 [S.D.N.Y 2009]). According to Matt A. Vega, "In doing so, the court left open the possibility that private individuals and corporate defendants who make questionable payment to [foreign] officials may be in violation of the law of nations" (Vega 2010, 433). Such decisions, he writes, "[suggest] that federal courts are primed to conclude foreign bribery is actionable under the ATS in the near future, a development as yet unaddressed in the legal literature" (389). The FCPA, in contrast, provides for extraterritorial application and can be used as the basis for criminal actions against multinational corporations (Spalding 2014). However, then US Secretary of State Condoleezza Rice's letter of transmittal to the US Senate regarding the United Nations Convention against Corruption (UNCAC) states the following (Deming 2010, 346 [note 60]): "Nothing in this right [art. 35 UNCAC] should be interpreted as requiring the United States to create a private right of action under the FCPA or as expanding the scope of the Alien Tort Statute to permit foreigners to litigate corruption claims in U.S. courts." Also the United States' ratification of UNCAC was subject to a declaration that "none of the provisions of the Convention creates a private right of action."

b. In *Lamb v. Philip Morris, Inc.*, 915 F. 2d 1024 (6th Cir. 1990), the US Court of Appeals, Sixth Circuit, found that no private action is available under the FCPA.

c. See, for example, *State of Indiana & the City of East Chicago v. Robert A. Pastrick*, No. 3:04-CV-506, Mar. 11, 2010, regarding a voting scandal that included, among other allegations, a "sidewalks-for-votes" scheme that cost the city approximately US$24 million. The court found that the defendants had (a) violated RICO by engaging in repeated and continuous instances of the transfer or transmittal in interstate commerce of money known to have been stolen, converted, or taken by fraud and conspiracy to do the same; (b) violated Indiana's "little RICO" statute; and (c) committed theft and were civilly liable under the Crime Victims Act. US District Judge James Moody awarded damages of US$108,007,584.33, an amount that included treble damages for RICO violations and prejudgment interest for state law claims.

d. 803 F. Supp. 428, 440 and 441 (1992).

e. Douglas R. Young, "The Foreign Corrupt Practices Act as a Factor in Private Civil Litigation," a 2002 article formerly on the Farella Braun + Martel website that has since been removed.

f. The Court specifically mentioned that allowing recovery for foreign injuries in a civil RICO action creates potential for international friction.

cases where the plaintiff was negligent or obtained some benefit.[15] In corruption cases (as illustrated in box 10.3), some common law jurisdictions have ordered compensation of an equivalent sum of monetary damages.

Specific difficulties in calculating damages may arise in bribery cases. In some jurisdictions, the loss sustained is equivalent to the value of the bribes. However, that amount may not be sufficient if a government decision or contract conferred undue advantages. The bribe may have resulted in a price for goods and services that is above market value or may have permitted the use or the sale of government resources at less than market value. In addition, social or environmental damage may have been incurred as a result of the contract award.

To be fully compensated in these situations, government entities may have to establish the difference between the benefits they would have received if bribery had not taken place and those received after entering into the fraudulent contract (Davis 2009). It may not be sufficient to show that prices for goods and services were set above market rates. Courts may require a more precise measure of rates that a hypothetical prudent negotiator would have accepted given the market for goods and services of the same quality. Determining this measure will be particularly challenging in specific circumstances and in the absence of clear market references (particularly

BOX 10.3 Compensation for Damages Where Assets Are Misappropriated

In *Attorney General of Zambia v. Meer Care & Desai & Others* (2007)[a]—a case further described in chapter 1 (box 1.4) and chapter 2 (box 2.12)—the London High Court found sufficient evidence that US$25 million had been misappropriated or misused and that there was no legitimate basis for Zambia's payments of approximately US$21 million pursuant to an alleged arms deal with Bulgaria.

The defendants were held liable in tort for these actions. They were also found to have breached the fiduciary duties they owed to the Republic of Zambia or to have dishonestly assisted in such breaches. As a result, they were held liable for compensation of damages resulting from the misappropriation of assets. The High Court also held liable the lawyers who were involved in the transactions, but the claims against them were dismissed on appeal.

a. Att'y Gen. of Zambia v. Meer Care & Desai, [2007] EWHC 952 (Ch) (UK).

[15] In *Cameroon Airlines v. Transnet Ltd.*, an arbitral tribunal held that Cameroon Airlines could void contracts obtained by bribery and was entitled to restitution, but the restitution would not include the "fair value" of the services provided (Brun et al. 2015, 93 [box 7.4]).

for specific constructions or equipment or for "intellectual" services including consulting services).

In these situations, establishing financial damage will frequently require (a) evidence of a secret agreement between the briber and the corrupt agent, (b) technical or accounting assistance, or (c) both.[16] Chapter 7, section 7.3, presents the various methods for calculating damages, and section 7.3.4 thereof addresses challenges in valuing the proceeds.

In some jurisdictions, when the corrupt act is uncovered years after it has taken place, courts may presume that the bribe was incorporated into the contractual prices. Other losses must be proved and quantified by the plaintiff (Meyer 2009).

In other jurisdictions, the briber may be held liable for the loss sustained by the victim in entering a contract with unfavorable terms.[17] Some courts have assumed that the true price of any goods bought by the principal pursuant to a fraudulent contract was increased by at least the amount of the bribe,[18] and any loss beyond this amount must be proved.[19]

In the context of employee-employer relations, other jurisdictions have found that both the employee who received the bribe and the briber are liable to the employer for at least the amount of the bribe,[20] and companies in turn may be liable for tortious acts committed by their employees or representatives.[21] In the absence of a more precise yardstick, a reasonable measure of damages may be the bribe itself,[22] an accounting of profits,[23] or the harm caused by predicate acts constituting an illegal pattern.[24] The case *Fyffes Group Ltd. v. Templeman and Others* highlights how courts may identify and quantify such damages (box 10.4).

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[16] For example, such evidence could be documents showing (a) that the briber and the corrupt agent secretly agreed to increase usual rates by a specific amount or percentage, (b) comparisons with bids from competitors in the same bidding process, or (c) transcripts of conversations or reports on meetings where the corrupt agreement was discussed.

[17] Salford Corporation v. Lever (No. 2) (1891) 1 QB 168 (UK).

[18] *Salford Corp. v. Lever (1891)*.

[19] Solland Int'l Ltd. v. Daraydan Holdings Ltd. [2002] EWHC 220 (TCC) (UK).

[20] Williams Electronic Games, Inc. v. Garrity, 479 F.3d 904 (7th Cir. 2007) (US Court of Appeals).

[21] For example, in Germany, companies can have administrative liability for acts committed by their representatives (Act on Regulatory Offences, sec. 30).

[22] Continental Management, Inc. v. U.S., 527 F.2d 613, 620, 208 Ct. Cl. 501 (1975) (US Court of Claims).

[23] US courts have concluded that an accounting of profits may be a reasonable measure of damages because it ensures compensation to the plaintiff, prevents unjust enrichment by a defendant, and deters willful violations of law.

[24] In *County of Oakland v. Vista Disposal, Inc.,* 900 F. Supp. 879 (E.D. Mich. 1995), the US District Court held that the measure of civil damage in RICO cases is the harm caused by predicate acts constituting an illegal pattern. In the case of a contract to treat a county's waste, the damage was the difference between the price charged and the price that would have been charged in the absence of corruption.

BOX 10.4 *Fyffes Group Ltd. v. Templeman and Others* (2000)

Fyffes, a Dublin-based company involved in the banana trade, claimed that an employee who negotiated a service agreement with a shipping contractor took bribes amounting to over US$1.4 million between 1992 and 1996.[a] The bribes were revealed when the US Internal Revenue Service was tipped about undeclared payments that the employee received in the United States from a company incorporated in Cyprus.

Fyffes sought to recover damages from the employee, the shipping company, and its agents. All defendants were found jointly liable for the total value of the bribes. The court ruled that "there can be no dispute that [the bribes] were taken into account by the contractor in agreeing to the amount of the freight for each year, which would have been correspondingly less for Fyffes if they had only had to pay the net sum which the contractor was prepared to accept."

The shipping company and its agents were liable to pay additional compensation for the loss that Fyffes suffered from entering into the contract on unfavorable terms. For each year, the court determined what Fyffes would have normally agreed to pay if it had been represented by a prudent and honest negotiator. There was no evidence that actual payments would have been different in 1992, 1994, and 1995. But the court ruled that they were inflated by US$830,022 in 1993 and by US$1.1 million in 1996.

An account of all profits made by the contractor was rejected because it was "highly probable that Fyffes would have entered into a service agreement with the contractor if the employee had not been dishonest." As a result, "ordinary" profit from the contract was not caused by bribery but by "the provision of services for which there would have been a contract in any event."

a. Fyffes Group Ltd. v. Templeman [2000] 2 Lloyd's Rep 643 (UK).

10.2.3 Actions Based on Invalidity, Unenforceability, or Breach of Contract

Causes of Action

Courts or arbitration tribunals may hold that contracts awarded as a result of bribes to government officials are illegal, and thus invalid or unenforceable.[25] Invalidity may be based on the fact that the contract was extorted by fraud and that consent was vitiated by corruption (box 10.5).

Breach of contract is another possible cause of action in some jurisdictions, particularly if a contract included clauses wherein the contractor promised not to provide any inducements to public officials in connection with the award or performance of the contract. Violation of this particular prohibition in the United Kingdom entitles the government to terminate the contract, avoid its own obligations, and claim damages.

[25] UNCAC, art. 34, permits such actions by states parties. See also *Att'y Gen. of Turks and Caicos Islands v. Star Platinum Island Ltd.* (Brun et al. 2015, 58 [box 4.8]).

BOX 10.5 *National Iranian Oil Company v. Crescent Petroleum Company International Ltd. & Gas Corporation Ltd.* (2016)

National Iranian Oil Co. (NIOC) and Crescent Petroleum Co. had entered into a long-term contract for the purchase and supply of gas that was governed by Iranian law. In 2009, Crescent Petroleum and its subsidiary, Crescent Gas Corp., commenced arbitration, claiming that NIOC had failed to deliver any gas.[a] The arbitrators rejected NIOC's argument that the contract was not enforceable because it was procured by a bribe and found that NIOC had breached the agreement by failing to deliver gas.

NIOC brought an appeal before the High Court of Justice to set aside the award under the English Arbitration Act (1996), secs. 67 (challenging substantive jurisdiction) and 68 (serious irregularity).[b] NIOC claimed that the award was not valid because it was the result of a contract procured by Crescent's corruption and that its enforcement should be denied on public policy grounds.[c]

The court did not accept the challenge to the tribunal's findings on the corruption aspect, which had concluded that "there had been discussions about a corrupt payment but that it was never put into effect."[d] The High Court noted that there was no "fresh evidence" that the contract was procured by bribery and that "there is no English public policy requiring a court to refuse to enforce a contract procured by bribery" or a contract that is "unaffected by a failed attempt to bribe, on the basis that such a contract, or one or more of the parties to it, have allegedly been tainted by the precedent conduct."[e]

However, the judge also concluded that "there may be many contracts which have been preceded by undesirable conduct on one side or other or both—lies, fraud, threats and worse—but the Court would not interfere with a contract entered into by such parties, even if one or more of those parties had committed criminal acts for which they could be prosecuted, unless the contract itself was illegal and unenforceable, or one or more of the acts of such parties induced the contract, in which case it might be voidable at the instance of an innocent party so induced."[f]

a. National Iranian Oil Co. v. Crescent Petroleum Co. Int'l Ltd. & Gas Corp. Ltd. (2016) EWHC 510 (Comm), para. 3, https://www.uncitral.org/docs/clout/GBR/GBR_040316_FT.pdf#.
b. *National Iranian Oil v. Crescent*, para. 4.
c. *National Iranian Oil v. Crescent*, para. 39.
d. *National Iranian Oil v. Crescent*, para. 37.
e. *National Iranian Oil v. Crescent*, paras. 48, 49(2), 49(3).
f. *National Iranian Oil v. Crescent*, para. 49(3).

Remedies for Invalidity or Breach of Contract

Remedies for invalidity or breach of contract will include rescission of the contract and monetary damages, such as compensatory damages, incidental damages, and other (for example, liquidated or punitive) damages. In some cases, courts have limited damages to contractual fees already paid, and they have excluded unpaid fees.[26]

[26] In *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938 (US), the court ruled that a contractor who paid a bribe to obtain a contract to clean the New York City reservoir could not recover unpaid fees, but the city could recover all of the fees it had already paid to the vendor. Other courts have ruled that a municipality was only entitled to compensation for the harm caused by an illegally awarded contract.

Rescission of contract is possible in some jurisdictions, particularly in cases of bribery and collusion in bidding (box 10.6).[27] A claim for rescission requires proof that the government entity would have refused the contract in the absence of any fraudulent acts. If rescission is not the desired remedy, the government entity would only be entitled to damages for entering into the contract under less favorable terms than what would have been agreed to in the absence of the act causing the breach.

In disputes arising from international investment contracts, the principle of "state responsibility"—obliging governments to assume full responsibility for the actions of their agents—may be taken into account (Raeschke-Kessler and Gottwald 2008). The results are that contracts could remain valid in spite of the illegality or defect of consent caused by corruption and that remedies should be limited to damages, adaptation of the contract, and reduction in prices (Davis 2009). On the other hand, "international public policy" (also referred to as *ordre public international*) has been used to support the avoidance of contracts—as, for example, in a Kenyan case before the International Centre for Settlement of Investment Disputes (ICSID) arbitration panel (box 10.7).[28]

BOX 10.6 Guinea: Rescission of Contracts for Mining Rights in Simandou Iron Mine

In 2008, the Guinean government awarded the control of two blocks of the Simandou iron ore mine, one of the world's largest iron ore deposits, to BSG Resources (BSGR), a company controlled by Israeli tycoon Beny Steinmetz.[a] To secure the rights over Simandou, BSGR made a number of corrupt payments to Mamadié Touré, one of the four wives of then Guinean president Lansana Conté. In a signed declaration published by the government of Guinea, Touré admitted the receipt of at least US$5.3 million in bribes that were given with the aim of influencing President Conté to assist the company in obtaining iron ore mining rights in Guinea.[b]

Under President Alpha Condé, elected in 2010, Guinea launched a review of mining contracts signed before 2011 to increase transparency in the mining sector.[c] The task was assigned to a special committee (*Comité Technique de Revue des Titres et Conventions Miniers* [CTRTCM]), which investigated the bribery allegations.[d] In April 2014, the committee concluded that there was corruption connected to the issuance of licenses over Simandou obtained by VBG, a BSGR-Vale joint venture, and recommended the rescission of contracts.[e] Following the committee's recommendations, the Guinean government rescinded the mining rights over Simandou.[f]

(continued next page)

[27] See *Ross River Ltd. v. Cambridge City Football Club Ltd.* [2007] EWHC 2115 (Ch) (UK). In addition, French courts have ruled that government entities that entered a contract after bidders colluded to suppress competition in the bidding process are entitled to rescission of contracts or damages.

[28] It is not clear whether international commercial arbitration would uphold this result in the absence of an applicable national law containing the voidability rule.

BOX 10.6 Guinea: Rescission of Contracts for Mining Rights in Simandou Iron Mine *(Continued)*

In response, BSGR denied wrongdoing and initiated arbitration proceedings against the Republic of Guinea at the International Centre for Settlement of Investment Disputes (ICSID).[g] In February 2019, the government of Guinea and Beny Steinmetz settled their legal dispute over Simandou, with BSGR relinquishing its claims on the two blocks and both parties waiving all outstanding procedures.[h]

a. Global Witness. 2014. "Guinea's 'Deal of the Century.'" Report, May 13, 2014. https://www.globalwitness.org/en-gb/reports/guineas-deal-century/. In 2010, BSGR sold 51 percent of its stake in the Simandou mine to Brazilian mining company Vale for US$2.5 million.
b. In 2014, the United States initiated forfeiture proceedings against three properties in Jacksonville, Florida, and against restaurant equipment. See *U.S. v. 4866 Yacht Basin Drive* (Case No. 3:14-cv-1428-TJC-PDB), Amended Verified Complaint for Forfeiture in Rem (US District Court, Middle District of Florida, Jacksonville Division). In February 2016, Touré entered into a settlement agreement with US authorities, acknowledging that the properties were proceeds of criminal conduct, namely bribery. Two of the properties along with the restaurant equipment were forfeited, while the United States dismissed its claim against the third property. See *U.S. v. 4866 Yacht Basin Drive* (Case No. 3:14-cv-01428) (M.D. Fla), Settlement Agreement (February 1, 2016), and Consent Order for Judgment of Forfeiture (April 4, 2016).
c. Barbara Lewis. 2019. "Steinmetz's BSGR Settles Guinea Row, Looks to Zogota Iron Ore." Reuters, February 25, 2019. https://www.reuters.com/article/guinea-bsgr/update-3-steinmetzs-bsgr-settles-guinea-row-looks-to-zogota-iron-ore-idUSL5N20K1QG.
d. Guinée Diversité, "Le Comité de Revue Recommande la Retrait de la Convention de BSGR pour 'Corruption'" [The Review Committee Recommends the Withdrawal of the BSGR Convention for "Corruption"], Declaration of the Technical Committee for the Review of Mining Titles and Conventions, April 4, 2014, https://guineediversite.com/index.php/2014/04/09/090414le-comite-de-revue-recommande-la-retrait-de-la-convention-de-bsgr-pour-corruption-declaration-2/.
e. Guinée Diversité, "Le Comité de Revue," April 4, 2014. See also *Jeune Afrique*, "La Guinée Retire Les Permis de BSGR" [Guinea Withdraws BSGR Permits], April 21, 2014, https://www.jeuneafrique.com/164220/economie/la-guin-e-retire-les-permis-de-bsgr/.
f. Barbara Lewis, "Steinmetz's BSGR Settles," February 25, 2019.
g. BSG Resources Ltd. (in administration), BSG Resources (Guinea) Ltd., and BSG Resources (Guinea) SÀRL v. Republic of Guinea (ICSID Case No. ARB/14/22), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3765/DS11530_En.pdf.
h. Simon Goodley. 2019. "Beny Steinmetz Settles Dispute with Guinea over Iron Ore Project." *Guardian*, February 25, 2019. https://www.theguardian.com/business/2019/feb/25/beny-steinmetz-settles-dispute-guinea-iron-ore-simandou.

BOX 10.7 *World Duty Free Company Limited v. Republic of Kenya* (2006)

In 1989, Kenya initially entered into an agreement with World Duty Free Company Ltd. (WDF) for the construction, maintenance, and operation by WDF of duty-free complexes at the Nairobi and Mombasa international airports. In obtaining the contract, WDF paid bribes to Daniel arap Moi, the then president of Kenya. Subsequently, in 1998, WDF was placed under receivership by the High Court in Kenya; a formal judgment and decree was made in 2001, transferring beneficial ownership to the receiver.

In disputing the order before the International Centre for Settlement of Investment Disputes (ICSID), WDF claimed that Kenya had unlawfully destroyed its contractual rights through the receivership order. The government of Kenya argued that the agreement with WDF was obtained through bribes, thus breaching English and Kenyan laws applicable to the contract as well as international public policy, and that the government was lawfully entitled to avoid contract obligations.

The ICSID tribunal ruled that Kenya was legally entitled to avoid, and did legally avoid, its obligations.[a]

a. World Duty Free Co. Ltd. v. Republic of Kenya (ICSID Case No. ARB/00/7, Award of October 4, 2006).

Nongovernmental organizations (NGOs) such as Transparency International have encouraged the use of so-called integrity pacts by which government entities and bidders to public tenders agree on preannounced sanctions for violations of commitments not to bribe public officials.[29] Depending on the agreement, sanctions applied by courts or arbitration tribunals may include denial or loss of the contract, liability for damages to the principal and the competing bidders, and debarment of the violator for an appropriate period. To avoid overly complicated arguments about the level of damages, contracts may include clauses to predetermine the value of "liquidated damages," which could be based on a percentage of the contract revenues or profits (or a multiplication of the bribe, such as 200 percent or 300 percent of the bribe).

Although recent case law is limited, integrity pacts have been used in Argentina, China, Colombia, Ecuador, Germany, India, Mexico, Pakistan, and other countries. When applicable, they may help governments recover undue payments or advantages awarded pursuant to corrupt payments to public officials. In addition, practitioners may consider the inclusion in contracts of anticorruption clauses, which can provide efficient avenues for pursuing remedies against corruption, including nullification of the contract or contractual damages.

Consequences of Nullity of Contracts for Public-Private Partnerships

The legal concepts related to annulment of contracts tainted by bribes may vary from one jurisdiction to another. Notwithstanding, most laws set forth conditions for the validity of contracts. Noncompliance with these conditions may render them null and void. In the case of corruption, the contract can generally be voided retroactively or from the date of the declaration of nullity.[30]

However, nullification of contracts as the main or only legal tool may result in challenging economic consequences for public-private partnership (PPP) contracts. Specifically, nullity may invalidate not only the main contract between the state and the contractor but also all the contractual relations associated with it (De Michele, Prats, and Revol 2018). In some countries, the annulment of awarded contracts has paralyzed a significant number of infrastructure works, interrupted the respective payment chains, forced certain suppliers into bankruptcy, and caused the dismissal of thousands of workers.[31]

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[29] Transparency International, "Integrity Pacts," https://www.transparency.org/en/tool-integrity-pacts.

[30] UNCAC, art. 34, establishes that "States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument." Similarly, the Council of Europe (COE) Civil Law Convention on Corruption, art. 8, sets forth that "Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void."

[31] See Christiane Lucchesi, Felipe Marques, and Aline Oyamada. 2018. "Odebrecht to Miss Debt Payment as Loan Deal Proves Elusive." Bloomberg, April 24, 2018. https://www.bloomberg.com/news/articles/2018-04-23/odebrecht-is-said-likely-to-miss-payment-on-debt-due-this-week; and Mac Margolis. 2018. "Latin America's Fight Against Corruption Isn't Free." Bloomberg, March 26, 2018. https://www.bloomberg.com/opinion/articles/2018-03-26/latin-america-s-anti-corruption-fight-can-hurt-economic-growth.

BOX 10.8 Examples of Legislative and Administrative Measures Providing Alternative Remedies to Contract Nullification

Colombia: Law No. 1882 of January 15, 2018, art. 20, provides that, in the case of administrative or judicial annulment,

- The contractor must be compensated for the updated value of the costs, investments, and expenses incurred, including interest;[a] and
- The concessionaire responsible for the illegal conduct has to pay the amount specified in the agreed penalty clause, or, should the amount not have been mutually agreed, 5 percent of the value of the contract.

Panama: After the Odebrecht corruption scandal,[b] the Panamanian government initiated a process that included a series of measures:

- Adopting the necessary actions to prohibit Odebrecht from being awarded or endorsing contracts arising from future public bidding processes of the state
- Canceling the association contract between the state and Odebrecht for a hydroelectric power plant, awarded for about US$1 billion, on which significant material steps for its initiation had not yet been made[c]
- Ensuring compliance with ongoing works in an attempt to preserve their value, maintain the jobs created by them, and guarantee the economic and social development that depends on the completion of the works
- Signing a plea bargain agreement with Odebrecht, by virtue of which the construction company would be fined US$22 million.[d]

Peru: Law No. 30737 "ensures the immediate payment of civil damages in favor of the Peruvian State in cases of corruption and related crimes" and establishes a mechanism that regulates the transfer of projects under the control of companies that have been condemned or are under investigation for acts of corruption. Moreover, it stipulates four specific measures:

- The suspension of transfers abroad of capital obtained from the investments in the country, or the profits and dividends derived from the investments
- The creation of a procedure for requiring prior authorization to dispose of the company's assets, rights, shares, or other securities representing rights, as well as requiring the purchaser to deposit 50 percent of the sale price of such a company's assets until the total amount of civil reparations and potential tax liabilities is covered[e] (as well as creation of a procedure for a preventive entry in public registries related to such assets)

(continued next page)

BOX 10.8 Examples of Legislative and Administrative Measures Providing Alternative Remedies to Contract Nullification *(Continued)*

- A provision that a net profit margin be withheld up to 10 percent of the payments to be made by the Peruvian state in favor of the affected subjects and the companies or consortia in which they participate[f]
- Plea bargaining agreements that can waive, suspend, or minimize the legal consequences of the crime or reduce the amount awarded for civil damages.

Furthermore, the law creates the role of process overseer with the authority to access the necessary documentation. Finally, the law establishes that the legal persons covered by its provisions that fail to comply with the obligations assumed shall be barred from entering into contracts with the Peruvian state.

a. The value does not include, however, the remuneration and the payments received by the contractor for its performance under the contract, or penalties imposed on the contractor by third parties by virtue of the early termination of the contract.
b. Odebrecht admitted to US authorities that the firm had paid bribes to secure the award of contracts (US Department of Justice. 2016. "Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History." Press Release no. 16-1515, December 21, 2016. https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.
c. Reuters. 2016. "Panama to Cancel Odebrecht Contract amid Corruption Scandal." *Reuters World News*, December 27, 2016. https://www.reuters.com/article/us-panama-corruption-idUSKBN14H072.
d. As per the Public Prosecutor's Office, pursuant to the Plea Bargain Agreement and in relation to the issuance of a technical report by the Comptroller General of the Republic of Panama, the company undertook to make the referred payment, to provide all information related to Panama of which any of its employees, officers, or outsourced third parties may have knowledge, as well as any facts relating to the jurisdiction that may have already been reported to the US Department of Justice and to the Public Prosecutor's Office of Brazil.
e. The law establishes certain exceptions—for instance, transfers of funds made before the emergency decree No. 003 of 2017 entered into effect, except when there is evidence of bad-faith intent. See Mena and Bravo (2019), https://thelawreviews.co.uk/edition/the-anti-bribery-and-anti-corruption-review-edition-8/1210835/peru.
f. Law No. 30737, art. 6, https://busquedas.elperuano.pe/normaslegales/ley-que-asegura-el-pago-inmediato-de-la-reparacion-civil-a-f-ley-n-30737-1624757-1/.

In the Brazilian *Lava Jato* (Car Wash) case, for example, nullification of PPP contracts has reportedly led to a stoppage of public works amounting to R$90 billion, equivalent to almost US$27 billion.[32] Similarly, in Peru, 562 suppliers were affected by the Odebrecht scandal, 175 of which filed for bankruptcy in 2017 and lost their machinery, buildings, and vehicles, while the rest found themselves in a similar situation in the first quarter of 2018. Furthermore, as of February 2017, some 60,000 workers had been dismissed as a result of the US$260 million owed by construction conglomerate Odebrecht to various suppliers.[33] These consequences may discourage investment and can lead to the paralysis of the sector.

[32] Renée Pereira. 2017. "Operação Lava Jato deixa mais de R$ 90 bi em paradas" [Operation Lava Jato Leaves More than R$90 Billion in Stopped Works]. *Estadão*, June 18, 2017. https://economia.estadao.com.br/noticias/geral,operacao-lava-jato-deixa-mais-de-r-90-bi-em-obras-paradas,70001846435.

[33] *La República*. 2018. "Hay 60 mil trabajadores despedidos por causa Odebrecht" [There Are 60 Thousand Workers Fired Because of Odebrecht]. March 3, 2018. https://larepublica.pe/politica/1206155-hay-60-mil-trabajadores-despedidos-por-causa-odebrecht/.

10.2.4 Actions Based on Illicit or Unjust Enrichment

Claims for disgorgement or restitution of profits obtained by illegal or unethical acts are based on the legal and moral principle that no one should benefit from wrongdoing or from illicit or unjust enrichment (box 10.9). Courts may order defendants to pay back illegal profits, even if the victim did not suffer loss or any other disadvantage.[34]

In certain jurisdictions, courts have ruled that the receipt of bribes gives rise to liability based on dishonesty or claims for restitution of profits, independent of any harm.[35] As a result, a bribe payer is liable to account for the amount of the bribe. Any loss in excess of the bribe must be recovered as damages.

Illicit profits earned by a contractor after bribing an official in one jurisdiction may be subject to confiscation or "disgorgement" by application of a court order or a settlement made in another jurisdiction where the contractor is registered or incorporated (OECD and World Bank 2012). In this case, the question of the recovery by or the return of the "disgorged" profit to the jurisdiction affected by the corrupt contract is potentially controversial (Oduor et al. 2014). Establishing prior ownership or title to the contractual

BOX 10.9 Disgorgement of Profits: Practice in the United States

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 Foreign Corrupt Practices Act (FCPA).[a] 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, 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 taxes are generally not considered deductible expenses.

In other civil actions brought by parties as private plaintiffs, US 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.[b]

a. Although the Victims and Witness Protection Act (1982), the Mandatory Victims Restitution Act (1996), and the Crime Victims' Rights Act (2004) do not cover FCPA violations, they do include the offense of conspiracy to violate the FCPA, which almost always is a charge brought in FCPA prosecutions, thus providing a basis for restitution. US courts have recognized the standing of foreign countries to seek restitution in FCPA actions (Messick 2016). See, for example, the FCPA enforcement action against the French telecommunications equipment company Alcatel-Lucent SA (Alcatel), during which the state-owned Costa Rican Electricity Institute (ICE) petitioned the US District Court for the Southern District of Florida to recognize ICE as a "crime victim" because of Alcatel's conspiracy to bribe ICE officials. Although the courts found that ICE was not a victim but a co-conspirator in the case, they did not deny the right of foreign countries to seek restitution (Asner and Thompson 2013).
b. Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334, 339 (E.D.Wis.1956) (US).

[34] In principle, German civil law upholds the view that an agent or wrongdoer must not be allowed to retain the proceeds from a bribe.
[35] Dubai Aluminum Company Ltd. v. Salaam [2002] All ER (D) 60 (Dec) (UK).

profits may be challenging in many jurisdictions, and disgorgement proceedings are not based on damages.

As a result, it is key that the country of incorporation informs the jurisdiction harmed by the corrupt contract that disgorgement proceedings have been initiated. UNCAC, art. 51, establishes asset recovery as "a fundamental principle of this Convention," and art. 56 stipulates that states parties should take measures to permit their relevant authorities, without prior request, to inform another state party when it might assist in conducting proceedings to recover proceeds of corruption. Both articles provide a solid legal basis for such proactive communication and for enabling the affected jurisdiction to consider its options for claiming compensation or ownership of assets before the end of the proceedings. See also chapter 11, section 11.1, for other avenues to pursue in disgorgement cases.

10.3 Bringing a Civil Action to Recover Assets

10.3.1 Initiating a Civil Action

A civil action to recover assets may be brought in courts or through arbitration proceedings. Courts of a foreign country may be competent if

- A defendant has his or her residence or domicile (individual) or is incorporated or does business in the country;
- The assets are within or have transited the jurisdiction; or
- An act of corruption or money laundering was committed within the jurisdiction (for example, a civil action before English courts described in box 10.10).

It is generally possible to use evidence gathered in the course of criminal proceedings in a civil trial.

In civil recovery proceedings, an enforcement authority may pursue a civil recovery order on the grounds that the property in question was unlawfully obtained. In the United Kingdom, the Criminal Finances Act (2017) has introduced new asset recovery and investigation powers in the Proceeds of Crime Act 2002 (POCA) and has made amendments to existing powers. The powers under POCA to recover assets include, among others, a civil recovery order—that is, an order made in civil proceedings by the High Court against property that can be shown to be the proceeds of crime[36] (as illustrated in box 10.11).

Arbitration may be used when an international contract includes an arbitration clause. Alternatively, a bilateral investment treaty may be the basis for investment arbitration. Most bilateral investment treaties provide for mandatory dispute resolution mechanisms or permit recourse to international arbitration under the auspices of ICSID. The Centre's

[36] "The Proceeds of Crime Act 2002 (POCA): Guidance under Section 2A, January 2018," https://www.gov.uk/government/publications/the-proceeds-of-crime-act-section-2a.

BOX 10.10 *The Libyan Investment Authority v. Société Générale SA and Others* (2016)

In 2014, the Libyan Investment Authority (LIA), Libya's sovereign wealth fund, sued Société Générale SA (SocGen) in London's High Court to recoup US$1.5 billion in losses. LIA alleged that SocGen had made bribe payments of US$58.5 million to LIA officials in return for entering into five trades of over US$2.1 billion between 2007 and 2009, before Muammar el-Qaddafi was overthrown.[a] The claim was also brought against Leinada Inc., a Panamanian company through which the payments were executed, and against Walid Al-Giahmi, a Libyan businessman who controlled the company.

In total, over 50 Libyan individuals received part of those payments, yet their identities were not disclosed in order to protect them and their families from violent acts of retribution in Libya.[b] In 2017, LIA and SocGen reached a settlement in which the latter agreed to pay US$963 million. The terms of the settlement remain confidential.[c]

This was LIA's second claim against a Western bank, the first being against Goldman Sachs.[d] The latter case was dismissed in the High Court of London in 2016.

a. The Libyan Investment Authority v. Société Générale SA [2016] EWHC 375 (Comm) at para. 1.
b. A confidentiality club was found necessary to protect the persons who were reported to have received bribes because Libya was characterized as "a dangerous place." LIA had applied to set this arrangement aside, however, claiming that it interfered with its ability to prepare its case (*LIA v. SocGen* [2016] at paras. 4 and 67).
c. SocGen expressed its regret about "the lack of caution of its employees" and apologized to LIA (Société Générale. 2017. "Société Générale SA and the Libyan Investment Authority (LIA)." Press Release, May 4, 2017. See also Michael Stothard and Jane Croft. 2007. "SocGen Agrees €963m Settlement with Libyan Investment Authority." *Financial Times*, May 4, 2007. https://www.ft.com/content/7dc88450-3094-11e7-9555-23ef563ecf9a.
d. LIA had filed a US$1.2 billion claim against Goldman Sachs, alleging that the investment bank had exerted undue influence to make LIA enter into a number of derivatives transactions. See Libya Investment Authority v. Goldman Sachs Int'l [2016] EWHC 2530 (Ch).

BOX 10.11 United Kingdom: The Oxford Publishing Ltd. Case

Background: The case involved illegal payments made between 2007 and 2010, directly or through agents, by Oxford University Press East Africa (OUPEA) and Oxford University Press Tanzania (OUPT)—wholly owned subsidiaries of Oxford Publishing Limited (OPL) and part of the International Division of Oxford University Press (OUP)—with the intent to be awarded competitive tenders or publishing contracts for textbooks.

In 2011, OUP became aware of the illegal practices and immediately ordered an investigation into the matter while it reported a potential breach of the World Bank's Procurement Guidelines because two of the tenders were funded by the World Bank.[a]

Rationale for the civil recovery order: The Serious Fraud Office considered the following reasons for pursuing a civil recovery order instead of commencing criminal proceedings:[b]

(continued next page)

BOX 10.11 United Kingdom: The Oxford Publishing Ltd. Case *(Continued)*

- The evidence obtained would not be sufficient to support a criminal prosecution.
- Securing evidence involved a number of difficulties (for example, witnesses were domiciled overseas).
- OUP self-reported the matter and cooperated with the Serious Fraud Office.
- There was no evidence of board-level knowledge or approval of illegal practices.
- The products supplied were of good standard and not the result of overpaying or of being unsuitable or not required.
- OUPEA and OUPT were subject to parallel proceedings by the World Bank (debarment).

Recovery judgment against OPL: Under the civil recovery order, OPL was ordered to pay £1,895,435 as sums deriving from unlawful conduct, as well £12,500 for the cost of pursuing the order. In addition, OUP was required to contribute £2 million to not-for-profit organizations for educational purposes in Sub-Saharan Africa.

a. Serious Fraud Office. 2012. "Oxford Publishing Ltd to Pay Almost £1.9 Million as Settlement after Admitting Unlawful Conduct in Its East African Operations." News release, July 3, 2012. https://www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations/.
b. Serious Fraud Office, "Oxford Publishing Ltd to Pay," July 3, 2012.

jurisdiction extends to any legal dispute arising directly out of an investment between a contracting state (or any constituent subdivision or agency of a contracting state designated to ICSID by that state) and a national of another contracting state, which the parties to the dispute consent in writing to submit to ICSID.

10.3.2 Collecting Evidence and Securing Assets

As with criminal proceedings, the plaintiff in a civil court will have to provide direct or circumstantial evidence to establish the cause of action. Box 10.12 describes the use of circumstantial evidence in private civil proceedings.

Using Evidence Gathered in Criminal Proceedings

Although it is possible to use evidence gathered in the course of a criminal proceeding in a civil action, it may not be permitted in some jurisdictions because of the secrecy and confidentiality provisions of investigation laws.[37] Similarly, evidence initially

[37] In France, for example, it is a crime to disclose elements of ongoing criminal proceedings to third parties. However, when criminal proceedings are completed, civil parties to the criminal procedure are allowed to use and disclose related documents in a civil proceeding.

BOX 10.12 Circumstantial Evidence Considered in *Federal Republic of Nigeria v. Santolina Investment Corp., Solomon & Peters, and Diepreye Alamieyeseigha* (2007)

The case was adjudicated in the absence of the defendants, who were notified of the proceedings.[a] (See also discussion of the case in box 10.1 as well as in chapter 1, box 1.5). The court relied on inferences to find that funds deposited in London bank accounts and properties held by the two companies controlled by Alamieyeseigha were bribes and secret profits that should be returned to the Nigerian government. To reach this conclusion, the court mentioned several elements that served as circumstantial evidence:

- There was a huge discrepancy between assets and income officially declared by Alamieyeseigha and the funds deposited in foreign bank accounts.
- The defendant held these foreign bank accounts in breach of a constitutional prohibition.
- The defendant could not give any plausible and legitimate explanation of his ability to acquire such an amount of assets outside Nigeria.
- Funds were transferred by state contractors in separate transactions and held by offshore corporate vehicles.
- Residential properties were purchased with transfers or loans from those corporate vehicles.

a. Fed. Republic of Nigeria v. Santolina Inv. Corp., Solomon & Peters, and Diepreye Alamieyeseigha [2007] EWHC 437 (Ch) (UK).

gathered to support foreign criminal investigations and prosecutions may be used in civil proceedings initiated in some common law jurisdictions.[38] In some other jurisdictions, the position is more nuanced.[39]

[38] In *Federal Republic of Nigeria v. Santolina Investment Corp., Solomon & Peters, and Diepreye Alamieyeseigha*, the Proceeds of Corruption Unit of the Metropolitan Police gathered information about the corrupt assets and activities of Alamieyeseigha in support of its own criminal investigations and pursuant to requests for MLA from the federal government of Nigeria. Alamieyeseigha fled the United Kingdom before prosecution could be initiated and enjoyed immunity from prosecution in Nigeria while in office. Nigeria brought civil proceedings in England to recover its assets. The High Court of England ordered the Metropolitan Police to disclose the information gathered during the criminal investigations to Nigeria upon confirmation by the police that disclosure would not prejudice its investigations.

[39] Some jurisdictions place restrictions on the (civil) use of evidence secured from abroad for use in a criminal trial. In a UK case, the Court of Appeal concluded that the fact that material obtained under The Crime (International Co-operation) Act 2003 had been adduced in open court in a criminal trial did not render it admissible in proceedings not identified in the (MLA) requests (Family Law Week, "Crown Prosecution Service & Anor v Gohil [2012] EWCA Civ 1550," Judgments, 2012 Archives, https://www.familylawweek.co.uk/site.aspx?i=ed105368).

As a result, starting an asset recovery effort by opening a criminal case may not permit authorities to use the evidence collected by investigators to launch parallel civil proceedings. In some jurisdictions, the criminal case will legally have priority over the civil action, which will be suspended until the end of the former, at least if both actions are based on the same facts. Authorities may consider carefully how they delimit the criminal action to allow civil actions to continue in parallel on the basis of facts that are not part of the criminal case.

Disclosure and No-Say (or "Gag") Orders

Depending on the applicable civil procedure, documents held by the parties and third parties are subject to disclosure. In asset recovery cases, it is particularly useful to request disclosure of documents held by third parties—banking and financial documents, including account opening forms; the identity of beneficial owners of accounts or of companies and trusts; bank statements; and know your customer (KYC) information. A third party could also be ordered to disclose a wrongdoer's identity.[40]

In some civil law jurisdictions, disclosure is ordered by a judge, and the application can be made without any formality.[41] In other civil law jurisdictions, any interested party may make an ex parte request in a civil court to issue orders for the taking of evidence before filing a civil action. In common law jurisdictions, the parties must usually provide their opponents with all relevant documents under their control, and applications can be made to the court for disclosure of third-party documents.

In some jurisdictions, courts are permitted to order worldwide disclosure of assets (as discussed in chapter 9, box 9.5). To be truly effective in the foreign jurisdiction, such worldwide orders must also be enforced by foreign courts. Such orders are typically made ex parte.

To prevent third parties, including banks, from informing a defendant of the existence of a disclosure order, the court can impose a no-say (or "gag") order.[42] Any breach of confidentiality may be considered contempt of court. Courts may also order disclosure and restraint of bank accounts before service of the proceedings on the defendants.[43]

Restraint Orders

Interim injunctions or restraint orders are frequently used to freeze assets suspected of being the proceeds of crime.[44] A restraint order may also be obtained during the

[40] Norwich Pharmacal Co. v. Customs & Excise Commissioners [1974] AC 133 (UK).
[41] Code of Civil Procedure (France), art. 139.
[42] This mechanism is usually available in common law systems.
[43] These orders are referred to as "Bankers Trust" orders in some jurisdictions (after *Bankers Trust v. Shapira* [1980] 1 WLR 1274).
[44] These are often referred to as "Mareva Injunctions" after *Mareva Compania Naviera SA v. Int'l Bulk Carriers SA* [1980] 1 All ER 213, [1975] 2 Lloyd's Rep. 509 (CA) (UK).

proceedings (to ensure that a defendant has sufficient assets to satisfy a judgment) or after judgment (to enforce the court's decision).

The applicant must meet certain requirements to obtain the order, and these requirements will vary among jurisdictions. Generally, the applicant must establish that there is justification for the order (an arguable case) and a risk of dissipation of the assets. The applicant may also be required to give an undertaking or post a bond that the defendant will be compensated for losses suffered if the court finds that it should not have granted the order. (See box 10.13 for examples of such requirements.)

Ex parte applications may be permitted in both civil and common law jurisdictions to avoid tipping off the asset holder and risking the dissipation of assets. In some jurisdictions, this requires the applicant to provide full and frank disclosure of all factual elements and evidence in his or her possession.[45] Others require evidence of the risk of dissipation in the event of notice.

Some jurisdictions permit courts to issue worldwide restraint orders to cover assets in both the jurisdiction in question and foreign jurisdictions and may reach defendants

BOX 10.13 Requirements for Restraint Orders in France, Panama, and the United Kingdom

In France, courts (referred to as *juges de l'execution*) may order the restraint of assets (movable or immovable, tangible or intangible) pending the outcome of a trial when the applicant shows that there is a risk of dissipation. For funds in bank accounts, the applicant must demonstrate that the order would be "justified in principle" and that there is "peril with respect to the recovery of the funds."

In Panama, the plaintiff must meet the basic pleading requirements and post an adequate bond to be set by the court. Furthermore, the plaintiff must ensure that the freezing order is followed by an action at law against the defendant. The restraint order remains in place unless these requirements are not met. When a favorable judgment is obtained, the prevailing plaintiff is entitled to recover from the frozen assets if the defendant does not pay the judgment. If, however, the ruling favors the defendant, on a showing of bad faith, the party whose assets were frozen may recover from the bond posted by the plaintiff.

In the United Kingdom, the applicant must show a good, arguable case; sufficient evidence identifying and locating the assets; and the existence of a real risk of asset dissipation. The applicant must give an undertaking that the defendant will be compensated for losses suffered if the court finds that it should not have granted the restraint order.

[45] These requirements apply in the United Kingdom (UK Ministry of Justice, Civil Procedure Rules, Practice Direction, Freezing Injunctions, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a).

who are not resident within the jurisdiction (as discussed, regarding the United Kingdom, in chapter 9, box 9.5).[46] Similar to the worldwide disclosure orders outlined above, worldwide restraint orders must be enforced by foreign courts to be truly effective in the foreign jurisdiction. Defendants or third parties (including banks or lawyers) who are notified may be held in contempt of court for failing to comply with such orders; and possible sanctions including imprisonment, fines, or seizure of assets may apply.

A victim of corruption may also employ a "Mareva by Letter" technique, which puts a third-party guardian or holder of assets on notice that he or she holds potentially corrupt proceeds.[47] Such notice effectively constitutes an immediate and de facto restraint of assets and avoids the costly and lengthy process of applying to a court to restrain assets. It operates by triggering the due diligence and reporting requirements that financial institutions and some nonfinancial businesses have in place for detecting and preventing the laundering of crime proceeds. Receipt of notice that an account holder or beneficial owner (who is neither the current guardian nor the holder of the assets) holds the proceeds of crime is typically sufficient for the financial institution or business to report the suspicious activity and freeze the funds; otherwise, it is opening itself to potential liability as an accessory to the crime.

A Mareva by Letter can be effected by sending a letter to the current guardian or asset holder, notifying him or her that the true or beneficial owner holds the proceeds of crime and providing an advisory warning that he or she may be a potential accessory to civil or criminal liability (or both) if the assets are disposed of or transferred. The letter should be accompanied by adequate proof of the true or beneficial owner's link to the criminal activity to give the third-party holder sufficient justification for the restraint.

In some cases, the plaintiff may benefit from the restraint of assets on the basis of criminal law provisions (box 10.14).

Search and Seizure Orders

Civil proceedings may permit a plaintiff's lawyer to enter premises to preserve evidence that might be destroyed (also referred to, in common law jurisdictions, as an "Anton Piller Order"). Although some civil law jurisdictions may use similar legal concepts under different names and rules, common law jurisdictions benefit from more extensive legal tools in this context.

In some jurisdictions, courts may grant such orders if there is strong prima facie evidence that incriminating documents are in the defendant's possession and there is a real possibility that such material will be destroyed. In addition, some court may issue such

[46] In *Mareva Compania Naviera SA v. Int'l Bulk Carriers SA*, 1 All ER at 213 and 2 Lloyd's Rep. at 509, the court covered assets in both England and foreign jurisdictions.

[47] See also Martin S. Kenney. 2006. "'Mareva by Letter'—Preserving Assets Extra-Judicially—Destroying a Bank's Defense of Good Faith by Exposing It to Actual Knowledge of a Fraud." Martindale Legal Library, November 27, 2006. http://www.martindale.com/international-law/article_Martin-Kenney-Co._258798.htm.

BOX 10.14 Macao SAR, China: The Ao Man Long Case

In 2008, Ao Man Long, former minister of transport and public works in Macao SAR, China, was convicted of corruption offenses involving about HK$800 million (approximately US$103 million). He was sentenced in Macao SAR, China, to 27 years' imprisonment, and a confiscation order of approximately HK$250 million (roughly US$32 million) was entered.

A significant amount of his bribery proceeds had been deposited into accounts in Hong Kong SAR, China. There was no mutual legal assistance (MLA) agreement between the jurisdictions, but authorities in Macao SAR, China, used informal channels (the Independent Commission against Corruption in Hong Kong SAR, China) to restrain the proceeds and obtain search warrants.

Because MLA channels were unavailable to recover the proceeds, Macao SAR, China, subsequently launched a civil suit in Hong Kong SAR, China, for more than HK$230 million (approximately US$30 million). The original restraint order, obtained pursuant to antibribery legislation in Hong Kong SAR, China, remained in place even though a criminal prosecution was not launched in that jurisdiction.

Source: Young 2009.

orders if the defendant's activities must cause serious potential or actual harm to the plaintiff's interest.[48]

10.4 Final Dispositions

In many cases, the disputing parties will choose to settle the matter before or after the court proceedings have begun. Both sides typically have a strong incentive to settle to avoid the costs (such as fees for lawyers and expert witnesses), time, and stress associated with a trial as well as to maintain some control over the final amount to be paid. Authorities should verify that settlements do not include a waiver of future claims related to assets that were not fully disclosed at the time of the agreement.

Alternatively, the parties will need to await the judgment of the court. This may occur at the end of trial proceedings. Summary judgments may be sought when the jurisdiction seeking redress shows strong evidence and where the defendants do not present a reasonable defense. Similarly, judgments by default may be obtained when defendants

[48] Applications for search orders (as well as freezing injunctions) submitted to competent judges must be supported by affidavit evidence. Urgent applications can be made without notice and even before a claim form has been issued. Where it is not possible to arrange a hearing, applications may also be made by telephone or by fax sent to a duty judge. See UK Ministry of Justice, Civil Procedure Rules, Freezing and Search Orders and Practice Direction 25A (Supplements), para 4.5. For additional details, see "Practice Direction 25A – Interim Injunctions" (accessed December 2018), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part25/pd_part25a.

BOX 10.15 Enforcement of Judgments When the Defendant Is Absent from the Proceeding

In *Attorney General of Zambia v. Meer Care & Desai & Others* (2007),[a] a civil action was brought in the United Kingdom against the former president of Zambia Frederick Chiluba and his associates in the United Kingdom. (See box 10.3 as well as chapter 1, box 1.4, for additional details on this case.) Because the terms of bail required the defendants to remain in Zambia, the court made special arrangements to address the situation. These arrangements included a special examiner sitting in Zambia to hear evidence and, for proceedings in London, setting up a live video link between London and Zambia and recording daily transcripts.

The London High Court held in favor of Zambia's attorney general, who then registered the judgment in the Lusaka High Court in Zambia. The former president applied to set aside the judgment on the basis that he was not able to participate in the hearings in London and was not afforded the opportunity to be heard by the National Assembly of Zambia (which had stripped him of his immunity against criminal prosecution in Zambia). In 2010, Zambia's Supreme Court rejected his application on the basis that sufficient actions had been taken.

a. Att'y Gen. of Zambia v. Meer Care & Desai & Others, [2007] EWHC 952 (Ch) (UK).

do not comply with court orders asking for detailed explanations on facts and documents. Both summary and default judgments allow courts to shorten the process and grant decisions without a full trial.

In civil actions, the absence of the defendants is much less likely to be a barrier to adjudicating a case than it would be in a criminal action. However, it may complicate enforcement in foreign jurisdictions (box 10.15).

10.5 Formal Insolvency Processes

Insolvency processes are class remedies. Therefore, they will not provide recovery for one creditor (or victim) alone. However, the fact that formal insolvency regimes provide powerful tools for investigation, preservation, and recovery of assets often outweighs the class nature of these processes (Brun and Silver 2019).

The process typically follows a standard pattern, although it may vary by jurisdiction. When insolvency is declared by a judge, an insolvency representative is appointed to take control of the debtor and the debtor's assets. In instances of corruption, the debtor is the corrupt official or perpetrator or the corporate vehicle used to enable the corrupt activity (a shell company, for example). Under many formal insolvency processes, there is an automatic moratorium on dissipation of assets when an insolvency representative

has been appointed. As a result, if a perpetrator has assets within the jurisdiction in which the bankruptcy has been declared, insolvency regimes will prevent any further dissipation. Asset recovery practitioners may take the legal steps required in their jurisdiction to claim assets as legitimate owners and to avoid their liquidation to the benefit of other creditors.

The effect of the moratorium on an international level is often complex, but the existence of international regimes such as the Council of the European Union's regulation on insolvency proceedings[49] and the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (UNCITRAL 2014) often enable this stay on proceedings with extraterritorial effect. Practitioners should also read this section keeping in mind chapter 5, section 5.8, on "Third-Party Interests" in the case of provisional measures.

Once insolvency is declared, the insolvency representative can gain access to the debtor's bank accounts, legal files, and accountancy records. This enables the representative to identify where stolen funds are located, exercise appropriate legal claims, and liquidate assets as the representative sees fit to return money to the estate from which it was stolen. The insolvency officeholder's asset recovery efforts will likely need to be coordinated with those of the criminal prosecutors.

Investigatory powers frequently include the ability to cross-examine the bankrupt party and the directors of the insolvent entity as well as any person with information related to the person or entity (including accountants and lawyers). Such powers are wide-ranging and can often be enforced by court orders. Many of them are also backed by the ability to arrest and imprison a recalcitrant debtor. In addition, investigatory powers usually involve the ability to compel the production of books and records, including those from lawyers and banks. Any legal privilege of the bankrupt person or insolvent entity is typically overridden, denying a perpetrator of crime the ability to hide behind his legal advisers.

Generally, the definition of property owned by a bankrupt person or insolvent entity is interpreted broadly to include not only tangible property but also intangible property as well as any assets that are the traceable products of such property. Insolvency officeholders[50] as well as creditors or business partners, too, may have specific claims to recover assets—some of which are unavailable to any other party. Examples of such claims may include claims for preferences, transactions that were undervalued, and wrongful and fraudulent trading. For example, a debtor may have paid some creditors knowing that insolvency was imminent, thus giving them preference, or conducted transactions at an undervalued price to ensure benefits to some of his business

[49] Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings (for proceedings opened before June 26, 2017); and European Parliament and Council Regulation (EU) No 2015/848 of 20 May 2015 on Insolvency Proceedings.

[50] Such claims could be brought by trustees, administrators, liquidators, insolvency representatives, or similar functionaries who make many insolvency systems work in insolvency cases.

partners to the detriment of other creditors. Remedies for such claims often include the ability to undo transactions, reverse transfers of property to third parties, and void security rights.

In 2015, insolvency proceedings were successfully used to pursue assets stolen in an official corruption scheme in Brazil. The former mayor of São Paulo was convicted of defrauding taxpayers after authorities found that he had siphoned off approximately 20 percent of the funds intended for the construction of a highway around the city. Much of the cash had been laundered through unlicensed money brokers, deposited into bank accounts in several US states, and transferred into the control of two private companies incorporated in the British Virgin Islands (BVI). After uncovering the scheme, the governments of Brazil and São Paulo successfully sued the two companies. They then applied for creditors' rights in a BVI court so that insolvency representatives would be appointed. The BVI court agreed and appointed insolvency representatives to take control of the companies. They immediately gained access to records and witnesses, enabling them to piece together the remaining assets from what had been stolen, to be restituted to the taxpayers in Brazil.

In the Banco Santos insolvency case in Brazil, an important precedent was set by applying the Brazilian law to conflicts between creditors' rights and the state's interest in confiscation. In some cases, there is a conflict between the interests of (a) the victims of criminal offenses committed in the context of the management of the bankrupt entity, and (b) the creditors of this entity. Under Brazilian law, the proceeds or assets must first benefit the victims, and creditors are only satisfied with the remaining assets. The criminal court and the bankruptcy court concluded and executed an agreement on how to coordinate both courts' actions to ensure first the reimbursement of the victims of the criminal offenses.

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11. Domestic Confiscation Proceedings Undertaken in Foreign Jurisdictions

11.1 Introductory Remarks

Under certain circumstances, it might not be possible for practitioners to obtain a domestic criminal or non-conviction based (NCB) confiscation order or foreign enforcement pursuant to a mutual legal assistance (MLA) request and civil proceedings. There may be issues in the legal framework; legal obstacles (such as immunities, statutes of limitation, or refusal to extradite); or a lack of resources or political will.[1] (See chapter 2, section 2.8, for a description of these obstacles.)

In such cases—and where offenses involve other jurisdictions (such as with bribery or the laundering of the proceeds of corruption)—practitioners may decide to support a foreign authority's efforts to pursue the assets through either criminal charges, NCB confiscation, or civil proceedings against those individuals or assets over which they have jurisdiction. Alternatively, a foreign authority may decide independently to initiate criminal or NCB confiscation or civil proceedings.

In particular, confiscation or "disgorgement" of profits derived from corruptly awarded government contracts is often pursued by the jurisdiction where the beneficiary corporation is registered or incorporated or has its main business operations rather than by the jurisdiction that awarded the contract. In this context, the requesting jurisdiction (that is, the jurisdiction awarding the contract) may encounter enormous challenges in establishing that it has prior title or ownership rights to these profits because the profits never became government property. In this case, the government seeking redress may consider claiming compensation or restitution by joining proceedings opened in the prosecuting jurisdiction.[2]

When a foreign jurisdiction brings confiscation or civil proceedings against a target or assets located in its territory, the authority in the jurisdiction where the corruption offenses were committed effectively "loses control" over the case unless its state intervenes as a civil party or private claimant (as also discussed in boxes 11.4 and 11.5). Because the case is a domestic proceeding of the foreign jurisdiction, the jurisdiction harmed by corruption has no authority to choose the direction of the proceedings or to

[1] For instance, in the case of Equatorial Guinea's vice president, Teodoro Obiang (see chapter 2, box 2.10), Equatorial Guinea brought a case against France before the International Court of Justice for violation of Obiang's conferred diplomatic immunity.

[2] Of course, the requesting jurisdiction may also choose in this case to pursue its own confiscation or disgorgement proceedings and send MLA requests to enforce its judicial orders.

decide how the case is conducted. It has limited standing (if any) and may have fewer options for the recovery of assets. As a result, practitioners often choose this method only after they have considered or attempted all other mechanisms, including domestic criminal or NCB confiscation (and enforcement pursuant to an MLA request) or civil proceedings.

Proactively selecting this approach will depend on various factors that should be verified at the outset (see chapter 2 on forming a strategy) through informal and formal cooperation mechanisms. The factors to be addressed include

- The foreign jurisdiction's capacity and willingness to undertake investigation and confiscation proceedings;
- The commitment by the jurisdiction harmed by corruption offenses to provide requested MLA in the foreign proceedings; and
- An agreement on the return of assets.

11.2 Jurisdiction

The foreign authority must have jurisdiction to investigate and prosecute the offense. International treaties require or encourage states parties to adopt measures that establish broad jurisdiction over corruption offenses.[3] States parties to the United Nations Convention Against Corruption (UNCAC), for example, must have jurisdiction over corruption offenses committed within their territory, by or against one of their nationals, or by or against a stateless person who has habitual residence in their territories.[4] In cases where the "extradite or prosecute" principle is applied (described in box 11.4), jurisdiction is established by virtue of the delegation of legal proceedings.

In cases that do not involve nationals and where only some of the elements of a criminal offense are committed in or to the detriment of a foreign jurisdiction, establishing jurisdiction may still be possible (see also chapter 2, box 2.10). Some authorities will claim jurisdiction even if only peripheral acts related to an offense have "touched" their territories. (Box 11.1 discusses innovative ways of establishing jurisdiction.)

[3] UNCAC, art. 42; United Nations Convention against Transnational Organized Crime (UNTOC), art. 15; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4. See also the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Anti-Bribery Convention"), art. 4; and Recommendation 3 ("Money Laundering Offence") of the Financial Action Task Force (FATF) Recommendations (FATF 2019).

[4] UNCAC, art. 42. Offenses under UNCAC include bribery of national and foreign public officials (arts. 15–16); the embezzlement, misappropriation, or other diversion of property by a public official (art. 17); and the knowing acquisition, possession, or use of the proceeds of crime and money laundering (art. 23). Possible offenses that UNCAC encourages states parties to legislate include influence peddling, abuse of functions, illicit enrichment, and private sector bribery or embezzlement.

BOX 11.1 Establishing Jurisdiction Where Limited Acts Have Occurred in the Territory

Establishing jurisdiction may appear to be difficult in cases that do not involve nationals and where only some of the elements of an offense are committed in or against a particular jurisdiction. However, many countries have found innovative ways to accomplish this. Here are some factors they have considered:

- *Financial transactions in the territory.* The US Supreme Court has upheld convictions of defendants who used interstate wires to execute a scheme to defraud a foreign government of tax revenue.[a]
- *Origin of activities.* In Brazil, a telephone call, fax, or email emanating from Brazil would be sufficient to establish jurisdiction over an act of foreign bribery.
- *Links to other crimes committed in the territory.* In France, jurisdiction can be established over crimes committed in a foreign jurisdiction if those crimes can be linked to crimes committed in France.[b]
- *Money-laundering offenses.* Countries may establish jurisdiction over money-laundering offenses if assets or surrogates suspected to be of criminal origin are located in their jurisdiction (box 11.3).
- *Transfers of national currency (even if outside the territory).* In 2009, the US Department of Justice (DOJ) filed a confiscation action against bribery proceeds paid (in Singapore, with US currency) by a foreign company to the son of the former prime minister of Bangladesh.[c] The DOJ successfully argued that the transfer of US currency between financial institutions outside the United States necessarily transited through US correspondent banks. Another basis for jurisdiction was that the foreign company making the bribe was registered on the New York Stock Exchange and subject to US laws and regulations.
- *Offenses against national interests.* Foreign nationals are criminally liable for offenses committed outside Ukraine if they commit grave offenses against rights and freedoms of Ukrainian nationals or against the interests of Ukraine.

a. Pasquantino v. United States, 544 U.S. 349 (2005). Also, the US Department of Justice asserted jurisdiction over Bridgestone, a company based in Japan, for violations under the Foreign Corrupt Practices Act (FCPA), as well as the Sherman Act, on the basis of emails sent between Japan and the United States regarding a bribery scheme. See *United States v. Bridgestone Corp.,* No. 11-651, Information (S.D. Tex. 2011), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/10/18/09-15-11bridgestone-information.pdf.
b. Court of Cassation, April 23, 1981.
c. 18 U.S.C. § 981(a)(1)(C): any property, real or personal, which constitutes or derives from proceeds traceable to a violation […].

Most laws extend jurisdiction beyond nationals to include companies incorporated (or simply active) in the jurisdiction for acts of bribery committed in another jurisdiction. Box 11.2 presents grounds for such jurisdiction in the United Kingdom and the United States.[5]

Box 11.3 provides examples of how jurisdiction is established for prosecuting money-laundering offenses in several countries.

BOX 11.2 Establishing Jurisdiction over Nationals in the United Kingdom and the United States

United Kingdom

In the United Kingdom, the Bribery Act 2010 imposes criminal penalties on organizations or companies whose employees, subsidiaries, agents, or consultants pay bribes in the context of the organization's business activities anywhere in the world. A foreign bank operating a small branch in London will be criminally liable if an employee, agent, or subsidiary pays a bribe in any country, even if the bribe is not approved by or paid through the branch in the United Kingdom. The mere existence of the branch office will give jurisdiction to UK prosecutors and courts. Section 7 of the Act provides for failure of commercial organizations to prevent bribery: the offense is committed by a "relevant commercial organization" if a person associated with it bribes another person intending to obtain or retain business, or an advantage in the conduct of business, for the organization.

The Serious Fraud Office charged and convicted Sweett Group for an offense under the Bribery Act, sec. 7. The company was found liable because its subsidiary in Cyprus (Cyril Sweett International) had made corrupt payments to a non-UK national (Khaled Al Badie, vice chairman of the board and chairman of the Real Estate and Investment Committee of Al Ain Ahlia Insurance) to secure a building contract for a hotel in Dubai.[a]

United States

In the United States, the Foreign Corrupt Practices Act (FCPA) establishes jurisdiction in three situations:

- In cases regarding issuers, any officer, director, employee, or agent or any stockholder thereof acting on behalf [revised based on 78dd-1, Section 30A of the Securities & Exchange Act of 1934] of a corporation that issues securities registered in the United States
- In cases of domestic concerns, any legal person established under US law or headquartered in the United States, and any US citizen, for acts related to a corrupt payment, even where those acts took place outside the United States

(continued next page)

[5] Of the 38 OECD parties, 37 have jurisdiction over nationals and companies.

BOX 11.2 Establishing Jurisdiction over Nationals in the United Kingdom and the United States *(Continued)*

- Regarding territorial jurisdiction, foreign nationals or companies that act in furtherance of a corrupt payment while in the territory of the United States.

In an FCPA action against Alcatel-Lucent, the Paris-based telecommunications company and three of its subsidiaries agreed to pay more than US$137 million to settle charges brought by the US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ).[b] According to the SEC complaint, Alcatel made bribe payments directly or indirectly to foreign government officials to obtain contracts in Costa Rica; Honduras; Malaysia; and Taiwan, China; using mail and other means and instrumentalities of US interstate commerce and making illegal payments through US banks.[c]

Foreign officials who receive corrupt payments are exempt from prosecution under the FCPA. They can, however, be prosecuted for money laundering in relation to the payment if the United States otherwise has jurisdiction over the money-laundering offense.

In addition, a foreign official receiving a corrupt payment may be prosecuted under the Travel Act of 1961 (18 U.S.C. § 1952) or for wire or mail fraud (18 U.S.C. §§ 1341, 1343) and related statutes, even where they cannot be prosecuted under the FCPA.

Legislation may also use broadly defined money-laundering offenses to establish jurisdiction—such as legislation that permits money-laundering predicates to have been committed in another jurisdiction as mandated by Financial Action Task Force (FATF) standards. (Box 11.3 presents grounds for such jurisdiction in five countries.) In some jurisdictions, authorities will prosecute ancillary offenses committed domestically that are intended to prepare or promote acts of corruption committed in another jurisdiction (for example, conspiracy, receipt of criminally derived assets, and complicity).[d] Finally, some jurisdictions permit NCB confiscation proceedings against correspondent accounts of foreign banks holding illicit proceeds in a customer account abroad.[e]

a. See Serious Fraud Office. 2016. "Sweett Group PLC Sentenced and Ordered to Pay £2.25 Million after Bribery Act Conviction." News release, February 19, 2016. https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/; and Serious Fraud Office, "Sweett Group," Case Information (last modified May 12, 2016), https://www.sfo.gov.uk/cases/sweett-group/.
b. US Securities and Exchange Commission. 2010. "SEC Charges Alcatel-Lucent with FCPA Violations." Press Release, December 27, 2010. https://www.sec.gov/news/press/2010/2010-258.htm.
c. See *Sec. & Exch. Comm'n v. Alcatel-Lucent, SA*, No. 10-cv-24620 (S.D. Florida 2010), Complaint (para. 64), https://www.sec.gov/litigation/complaints/2010/comp21795.pdf.
d. For example, French authorities may bring charges against a foreigner for participating in a conspiracy intended to prepare a money-laundering operation in France, even if the individual did not commit the actual criminal act in France (Court of Cassation, February 20, 1990).
e. Under 18 U.S.C. § 981(k), US courts have jurisdiction to order the confiscation of an amount of funds located in a foreign bank's US correspondent account that is equivalent to the amount of illicit proceeds deposited by a customer to the foreign bank. The provision is generally used only if the foreign jurisdiction is unable or unwilling to provide mutual legal assistance (MLA) to restrain and confiscate those assets.

BOX 11.3 Jurisdiction to Prosecute Money-Laundering Offenses in Brazil, France, Switzerland, the United Kingdom, and the United States

Brazil

In Brazil, the federal bill no. 9.613 of March 3, 1998, was modified by the federal bill no. 12.683 of 2012, which adopted a broad concept of money laundering by suppressing the list of predicate offenses. This legislative change provides Brazil jurisdiction with a larger scope to assist foreign victims.

France

French courts have convicted defendants accused of receiving the proceeds of crimes committed overseas when circumstantial evidence proved that they knew or should have known that the asset was of illegal origin.[a] The French Criminal Code, art. 321-1, criminalizes *"recel"*—that is, the receiving, retaining, concealing, or transferring of ill-gotten items or acting as an intermediary therein, knowing that the items were obtained by a felony or misdemeanor.

Similarly, France criminalizes the laundering of proceeds of predicate offenses committed abroad. For example, French courts convicted a former Nigerian minister who used bribes collected in Nigeria to purchase residences in France. All elements of the bribery offense were committed in Nigeria, but French courts exercised jurisdiction over the money-laundering activities.[b]

Switzerland

Switzerland, using circumstantial evidence and often plea bargains, also prosecutes account holders, beneficial owners, and non–bona fide intermediaries who control bank accounts where suspected proceeds or instrumentalities of crime are lodged. The corresponding assets are often confiscated through nonconviction based (NCB) proceedings.

United Kingdom

UK authorities may prosecute the concealment, disguise, conversion, or transfer of criminal assets derived from crimes committed abroad if the predicate offense also constitutes an offense under UK law.[c] Prosecutors can rely on circumstantial evidence to prove that the asset is generally derived from "criminal conduct"; they are not required to show that the asset was acquired by means of a specific criminal act.[d]

United States

In the United States, money-laundering predicates include bribery of foreign officials, embezzlement of public funds, fraud by or against a foreign bank, and any crime for which the United States will be obliged to extradite under an international treaty.[e] NCB confiscation actions may be used to confiscate the proceeds of those same foreign criminal offenses, as well as assets involved in money-laundering transactions. In such cases, the United States

(continued next page)

BOX 11.3 Jurisdiction to Prosecute Money-Laundering Offenses in Brazil, France, Switzerland, the United Kingdom, and the United States *(Continued)*

can seek confiscation of corruption proceeds held inside and proceeds of crime outside the United States if the underlying offense occurred in the United States.

In the prosecution of former Ukraine prime minister Pavlo Lazarenko for money laundering, prosecutors established jurisdiction by demonstrating that funds received through banks in San Francisco were the proceeds of acts of extortion and bribery committed in Ukraine.[f]

a. See the "Angolagate" case (Tribunal of Paris, 11th Chamber, 3d section, October 29, 2009), in which a number of suspects and former officials were prosecuted in France for arms trafficking, bribery, and money laundering although some of the predicate offenses were committed in Angola.
b. Paris Court of Appeals, Criminal Chamber, Section A, March 8, 2009 (France), https://shellandenitrial.org/wp-content/uploads/2018/07/France-Court-Doc-2-ETETE-translation-20091215093409518-ETETE-Appeal_English.pdf.
c. Proceeds of Crime Act 2002 (UK), secs. 327 and 340 (2).
d. Crown Prosecution Service, Proceeds of Crime Act 2002, Money Laundering Offences (UK), https://www.legislation.gov.uk/ukpga/2002/29/part/7.
e. 18 U.S.C. §§ 1956(c)(7)(B), 981.
f. United States v. Pavel Ivanovich Lazarenko, 564 F.3d 1026 (9th Cir. 2009).

11.3 Procedure for Beginning an Action

It is important for practitioners to recognize that domestic criminal confiscation proceedings in foreign jurisdictions are not solely dependent on a request from the jurisdiction where the corruption offense was committed. The foreign authorities may initiate a case independently based on information obtained through various avenues. (Box 11.4 presents several of these sources of information.) The foreign authorities ultimately decide whether to pursue the case and how it is to be conducted.

11.4 Role of the Jurisdiction Harmed by Corruption Offenses in Foreign Investigations and Prosecution

Once a foreign investigation is initiated, practitioners in that jurisdiction will need to gather evidence in the jurisdiction harmed by corruption to prove corruption or the predicate crimes of money-laundering offenses. In some jurisdictions, such as Belgium, the autonomy of the money-laundering offense may allow prosecution, even in the absence of proof of the predicate offense, if a transaction was conducted under circumstances that clearly show the defendant could not ignore that the transaction involved ill-gotten gains.

BOX 11.4 Examples of Information Sources for Confiscation Proceedings Initiated by a Foreign Jurisdiction

1. A jurisdiction harmed by corruption offenses files a complaint or shares evidence and case files with authorities in a foreign jurisdiction.

This source is most often used when the jurisdiction harmed by corruption offenses is seeking to have the case proceed in a foreign jurisdiction. In civil law jurisdictions, those jurisdictions seeking the return of corruptly acquired assets may also be permitted to initiate (as a civil party) criminal investigations or proceedings concerning those assets, such as investigations into or proceedings against the laundering of those assets.

2. A mutual legal assistance request is submitted by a jurisdiction harmed by corruption offenses.

A mutual legal assistance (MLA) request typically contains detailed information on targets, alleged offenses, and money flows. This information may lead a requested jurisdiction to initiate its own investigation into money laundering, foreign bribery, or other offenses that may have occurred within its national territory or involving its nationals. This is done almost systematically in Switzerland and relatively frequently in other jurisdictions.

In Switzerland, authorities are generally permitted to conduct broader and more in-depth investigations than under the MLA request, including examination of bank accounts not mentioned in the request. In most cases, two different proceedings will be conducted in the foreign jurisdiction: the first to respond to the MLA request and the second to pursue the domestic money-laundering charges.

3. News or media reports cover corruption or money-laundering cases.

Corruption cases—particularly those involving politically exposed persons—typically attract substantial media coverage. That coverage may reveal links to foreign jurisdictions, and those links may be picked up by foreign practitioners who decide to initiate a case or by bank compliance officers who file a suspicious transaction report (STR) that ultimately leads to an investigation.

In the recent years, the research of journalist "consortiums"[a] and media leaks have launched various cases, including the Panama Papers (chapter 8, box 8.8), the Luanda Leaks, the Paradise Papers, and the Russian Laundromat.

4. Financial institutions file STRs.

When financial institutions suspect that activities or transactions are involved in money laundering or terrorist financing, they must report their suspicions to financial intelligence units (FIUs) by filing STRs. The FIUs are required to analyze the STRs and disseminate reports to law enforcement or, through the Egmont Group, to other FIUs. Law enforcement agencies may subsequently open an investigation based on information provided by the FIU.

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BOX 11.4 Examples of Information Sources for Confiscation Proceedings Initiated by a Foreign Jurisdiction *(Continued)*

5. The "extradite or prosecute" principle is applied.

Jurisdictions that refuse to grant extradition of nationals under the United Nations Convention against Corruption (UNCAC), art. 44(11), are obliged to submit the case to their domestic authorities for prosecution if requested to do so by the requesting jurisdiction.[b]

In France, offenses carrying a penalty of at least five years in prison will be prosecuted domestically whenever an extradition is refused on the grounds of due process or if the penalty is not compatible with French public order (Criminal Code [France], art. 113-8-1).

6. Parties decide upon a transfer of proceedings.

Pursuant to UNCAC, art. 47, states parties shall consider transferring cases for prosecution of an offense established in accordance with the convention where such a transfer is in the interests of the proper administration of justice. When several jurisdictions are involved, this serves to concentrate the prosecution of such cases.

a. Prominent journalistic organizations in this regard include the International Consortium of Investigative Journalists (ICIJ), https://www.icij.org/; and the Organized Crime and Corruption Reporting Project (OCCRP), https://www.occrp.org/.
b. See also United Nations Convention against Transnational Organized Crime (UNTOC), art. 16[12], and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art 6[9]2.

Even if the jurisdiction harmed by corruption offenses has provided the case file at the outset, the foreign jurisdiction likely needs additional information and legal assistance (including witness statements, financial records, and banking or corporate documents). This information may be sought through informal assistance or an MLA request. However, once the information is requested, it is imperative that a response be transmitted. Without continued attention to the case and responses to foreign requests, success in the foreign case will be limited or impossible. (Box 11.5 discusses the importance of such cooperation in a Haitian case.) In any event, it is key to create a communication channel allowing for exchange of information.

In most civil law countries, a foreign jurisdiction that has been harmed by corruption offenses can participate as a complainant or victim (referred to in some jurisdictions as "the plaintiff") to some extent in the investigation, trial, and sentencing or confiscation proceedings. Complainants and victims may attend trial proceedings and consult with practitioners on the progress of the investigation and prosecution. Many jurisdictions encourage practitioners to involve victims in all phases—particularly in the sentencing or confiscation proceedings to facilitate direct recovery from the court. Victims may be consulted on orders to be requested from the court or may be given the opportunity to testify. However, decisions on how to proceed, the people to interview, the records to obtain, and the compensation or damages to be requested of the court ultimately lie with the practitioners.

BOX 11.5 Haiti: Important Role of the Jurisdiction Harmed by Corruption

Background: From May 2001 to April 2003, Robert Antoine—former director of international affairs for Haiti's state-owned national telecommunications company, Telecommunications D'Haiti (Haiti Teleco)—accepted bribes from three US telecommunications companies and laundered the bribes through intermediaries.

Cooperation between Haiti and the United States: Haiti could not proceed against Antoine or any of the intermediaries involved because it lacked sufficient legal provisions, including the necessary anticorruption offense legislation and investigative tools required to establish an offense. Haitian authorities reviewed the case with US authorities and ultimately decided that the best course of action would be to support a case initiated by the United States.

The United States initiated a case against Antoine for a conspiracy to commit money laundering in connection with the foreign bribery scheme and also cases against the briber and the intermediaries for conspiring to commit Foreign Corrupt Practices Act (FCPA) violations and money laundering. Haitian authorities collaborated by actively seeking and providing all evidence and expertise required by the US prosecutors. Assistance was required from and provided by a range of authorities, including the Haitian financial intelligence unit (FIU), national police, and the Ministry of Justice and Public Security. Without that specific collaboration, it would have been impossible to proceed in the United States.

Conviction, sentencing, and confiscation: Antoine pleaded guilty to the offenses and in June 2010 was initially sentenced to 48 months in prison. His sentence was later reduced to 18 months owing to "substantial assistance to law enforcement." He was ordered to pay $1,852,209 in restitution, and an additional amount exceeding US$1.5 million was confiscated.[a]

a. US Department of Justice. 2010. "Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme." News release no. 10-639, June 2, 2010. https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-prison-his-role-money-laundering-conspiracy; United States v. Robert Antoine (S.D. Fla. 2010), Amended Judgment in a Criminal Case.

In civil law jurisdictions or mixed systems, victims (including a state or government) may initiate criminal investigations or proceedings in the foreign jurisdiction as a civil party. Civil parties may be permitted to submit evidence or claims to the prosecutor or investigating magistrate, participate in interviews of witnesses and targets, and have access to the case file. The prosecutor or investigating magistrate ultimately determines whether the case has sufficient evidence to proceed to trial. If a trial proceeds, civil parties may apply to the court for a judgment awarding damages in the same manner that they would before a civil court (as further discussed in chapter 10). The action for damages proceeds along with the criminal case, on the same basis and evidence.

Some jurisdictions will allow complainants and civil parties to have access to case information, including a copy of the case file. For example, if a prosecutor or investigating

magistrate is appointed, a copy of the case file will be provided, on request, to attorneys representing victims who have joined the action as civil parties.[6]

11.5 Ensuring Recovery of Assets from the Foreign Jurisdiction

In some jurisdictions, the courts or other competent authorities will order restitution of seized or restrained assets as part of the criminal proceeding. Some of this restitution can be made before the confiscation is final if assets are returned pending the resolution of the case when the ownership is not really discussed, or as instrumentalities or proceeds of crime or as evidence.[7] In addition, UNCAC, art. 53, obliges states parties to allow other states parties to claim compensation, damages, or legitimate ownership before confiscation in the prosecuting jurisdiction.

Assets not returned through such an order are likely to become the property of the foreign jurisdiction. As a result, the jurisdiction seeking to recover assets should consider, at the outset, whether recovery or sharing of these confiscated proceeds will be possible. Depending on the jurisdiction and the procedures followed, recovery may be available through international conventions, MLA treaties, asset-sharing agreements, or legislation. Even if a foreign jurisdiction independently initiates a case, the jurisdiction harmed by corruption offenses may be able to obtain restitution of the assets.

11.5.1 Claiming Ownership of Stolen Assets during Criminal Investigations

In some jurisdictions, claiming ownership of stolen assets is possible at an early stage of an investigation.[8] When assets are found and the offender remains unknown, the prosecutor or investigating magistrate will attempt to establish or determine whether the assets are the proceeds or an instrumentality of the alleged offense. If a connection is established, restitution of the restrained assets may be ordered. These orders can be appealed.

11.5.2 Direct Recovery of Assets through Foreign Courts

Many courts will order direct recovery to a foreign jurisdiction that can demonstrate its status as a victim of a tort or a legitimate owner of the asset. Under UNCAC, art. 53, a state party shall (a) permit its courts adjudicating confiscation proceedings to order compensation or damages to the jurisdiction harmed by corruption offenses, or (b) allow its courts or competent authorities to recognize the jurisdiction's claim as a legitimate owner of an asset in confiscation proceedings. In practice, this is often included in international agreements between jurisdictions.

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[6] For example, see Code of Criminal Procedure (France), art. 114, R.155, R.165.

[7] Tunisia received such assets, including a plane seized in Switzerland and owned by a company previously controlled by the defendants that was placed under receivership. Similarly, Italy and Spain returned two yachts before the end of their own investigations, and France sent back a plane that was seized in Paris.

[8] France and Switzerland permit this procedure.

Direct recovery is often facilitated through the participation of the jurisdiction harmed by corruption offenses, whether as plaintiff in a civil action, as a complainant or victim (plaintiff) in criminal proceedings, or as a civil party to a criminal action. In jurisdictions that allow the injured party to join a criminal case as a civil party, the jurisdiction harmed by corruption has the opportunity to apply to the court for damages or compensation. Otherwise, the jurisdiction harmed will need to discuss potential compensation or damages with the prosecutor in the foreign jurisdiction, who can then apply to the court for the order. Box 11.6 offers examples of direct recovery in practice.

The treatment of a claim for damages in the event of acquittal varies among jurisdictions. In some jurisdictions, the claim cannot be considered, and the injured party must file a civil action for damages. In others, the court may reach a decision on damages despite the acquittal if the facts are sufficiently established.

11.5.3 Return of Assets Pursuant to Treaties, Agreements, Memorandums of Understanding, or Statutory Authorities

Several international conventions introduce obligations on the return of assets.[9] To enforce these international conventions—or when international conventions do not apply—multilateral and bilateral treaties (such as MLA treaties), agreements, memorandums of understanding (MOUs), and statutory authorities are often used to allow for the return of assets.

If no obligation to return confiscated assets is in place, multilateral and bilateral asset-sharing agreements or MOUs between jurisdictions may set out specific procedures for these mechanisms.[10] Such agreements may be negotiated on a case-by-case basis, or more expediently, through an ongoing asset-sharing agreement designed to cover all sharing cases that arise.[11]

Some jurisdictions prefer to negotiate a sharing arrangement either before providing the requested restraint or following the restraint but before the entry of a final order of confiscation. The Global Forum on Asset Recovery (GFAR) in 2017 issued 10 principles under which sharing agreements should be pursued (GFAR 2017). These principles are further elaborated in chapter 9, box 9.8.

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[9] UNCAC, art. 57; UNTOC, art. 14; and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 5. Note that the UNCAC provisions set forth mandatory requirements on the return of assets, as opposed to the discretionary requirements outlined in UNTOC and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

[10] Agreements for disposal of confiscated property are also within the ambit of international conventions: UNCAC, art. 57; UNTOC, art. 14; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 5.

[11] In the United States, a formal asset-sharing agreement is not confirmed until the conclusion of the case, and it is based on the amount of cooperation provided by each jurisdiction: 50–80 percent of confiscated assets if the foreign jurisdiction provided "essential" assistance, 40–50 percent in the case of "major" assistance, and up to 40 percent if the foreign jurisdiction provided "facilitating" assistance.

BOX 11.6 Direct Recovery in Practice

Civil Party to Criminal Proceedings

In France, the Code of Criminal Procedure, art. 2, provides that a victim may obtain civil compensation from a criminal court if the plaintiff can prove personal and direct damage resulting from the corrupt act. In a corruption case involving the former mayor of Cannes, the city of Cannes (which joined as a civil party to the criminal action) was able to obtain from the court an order for damages but was not granted material compensation. The damages were awarded on the basis of the loss of reputation; however, the compensation order was refused on the basis that the damage suffered was the consequence of a ministerial decision to revoke and refuse a license, not a consequence of corruption.

Compensation Pursuant to a Criminal Plea Agreement

In the United Kingdom, a bridge-building company, Mabey & Johnson, pleaded guilty to conspiracy relating to the payment of bribes to public officials in Ghana and Jamaica and to "making funds available" in connection with illegal kickbacks to the Saddam Hussein regime in Iraq through contracts awarded under the United Nations Oil-for-Food Program. The company admitted that, but for the bribe, the contract would have been for less money and that the Iraqi people lost out on funds diverted to pay the kickbacks.[a]

The settlement included £4.6 million (approximately US$7.2 million) in criminal penalties and an additional £2 million (approximately US$3.1 million) in reparations and costs to be paid to the governments of Ghana, Iraq, and Jamaica. Regarding the Iraq case, confiscation was awarded for the value of the contract—€4.22 million plus interest (approximately US$5.41 million)—and compensation of £618,484 (approximately US$969,100) was awarded to the Iraqi people (Development Fund for Iraq).

Restitution or Compensation through a Civil Action

In a case involving funds and real estate in London held in the name of a corrupt Nigerian official (a former Plateau State governor, Joshua Dariye), investigations conducted by the Metropolitan London Police resulted in the criminal conviction of a property manager for money laundering. Following this conviction, a civil action brought in the London High Court resulted in the recovery of stolen assets to the benefit of Nigeria. (For more details about the Dariye case, see chapter 3, box 3.4.)

a. Rob Evans and David Leigh. 2009. "Mabey and Johnson Admits Bribing Officials Abroad to Secure Contracts." *Guardian,* July 10, 2009. https://www.theguardian.com/business/2009/jul/10/mabey-johnson-guilty-plea-compensation.

The chapter concludes with discussions of successful examples of options for returning assets—such as through an MOU that established the BOTA Foundation (box 11.7), an ad hoc agreement with the requesting jurisdiction in the Sani Abacha case (box 11.8), and an MOU in the Abacha case for a separate set of funds repatriated from a different requested jurisdiction (box 11.9).

BOX 11.7 Kazakhstan: A Memorandum of Understanding as the Legal Basis for Establishing the BOTA Foundation

Background: In 1999, Swiss magistrates ordered the freezing of US$84 million held in a Swiss bank account, of which the government of Kazakhstan claimed to be the sole beneficiary. In 2003, following a criminal investigation by the US Department of Justice, prosecutors charged US citizens with wire fraud, money laundering, and violations of the Foreign Corrupt Practices Act (FCPA) for having bribed Kazakhstani officials in exchange for obtaining prospecting rights for oil in Kazakhstan.

Memorandum of understanding on return of assets: Negotiations began as early as 1999 between the United States and Switzerland regarding the freezing and the subsequent disposition of amounts in the Swiss bank account. The World Bank joined the discussions in 2005 as an intermediary and technical adviser. In 2007, the three governments—Kazakhstan, Switzerland, and the United States—finally reached an agreement and signed a memorandum of understanding (MOU) laying out the terms and conditions for transferring the funds from Switzerland to the BOTA Foundation (Bornstein 2016, 2). The United States initiated a civil action in US District Court of the Southern District of New York seeking the forfeiture of the funds to the United States. The release of the funds was agreed to be contingent upon the establishment and implementation of three programs (specified below) within the overall "BOTA Program." The MOU, as amended and re-signed by the governments in April 2008, called for BOTA to be a local Kazakhstani organization with local founders and a board of Kazakhstani nationals (Bornstein 2016, 14).

The foundation and its mission: The "BOTA Program" provided for the establishment and administration of projects for the benefit of the poor children of Kazakhstan. It was agreed that it would be implemented through a nonprofit, nongovernmental foundation—the BOTA Foundation—established under the laws of Kazakhstan and supervised by the World Bank, which would receive and disburse the funds (Bornstein 2016).

The governments of Kazakhstan, Switzerland, and the United States as well as five Kazakhstanis founded the BOTA Foundation in 2008, with the mission to return more than US$115 million in disputed assets associated with corruption (IREX and Save the Children 2015, 4). The assets were used to improve the lives of poor citizens of Kazakhstan and especially to support the poor children, youth, and their families through investment in their health, education, and social welfare using conditional cash transfers, scholarships, and grants.[a] The BOTA Foundation had three program departments: a Conditional Cash Transfer Program, a Social Service Program, and a Tuition Assistance Program.

Oversight: The World Bank contracted an international nongovernmental organization (International Research & Exchanges Board [IREX]) to oversee the foundation's operations, offer administrative support, and ensure that the foundation's goals were met (IREX and Save the Children 2015, 7, 9). In addition, the local financial management officer of the World Bank periodically checked the foundation's accounting records.

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BOX 11.7 Kazakhstan: A Memorandum of Understanding as the Legal Basis for Establishing the BOTA Foundation *(Continued)*

The legacy: From 2009, when the foundation started its operations, until the end of its operation in December 2014, the foundation managed to improve the health and poverty status of more than 208,000 children and youth (IREX and Save the Children, 49). The foundation has left a significant legacy as a model for asset recovery and management of assets cases worldwide, demonstrating how assets recovered from corruption can be used to improve the living conditions of thousands of people. Apart from the positive impact it had on the lives of its programs' recipients, the foundation hired and trained more than 100 local staff who are currently sharing their experience in various international agencies (IREX and Save the Children 2015, 50). The successful repatriation of more than US$115 million through the BOTA Foundation also demonstrated that responsible repatriation via civil society is possible and that it can have a role to play in every step of the asset recovery process (IREX and Save the Children 2015, 51).

a. BOTA Foundation. 2015. "BOTA Foundation Completed Its Mission." BOTA Foundation Announcements, January 27, 2015 (accessed July 31, 2020). https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Kazakh_Oil_BOTA%20Fdn_End_Announcement_Dec_2014.pdf.

BOX 11.8 Nigeria: An Asset-Return Agreement between the United States, Nigeria, and Jersey to Repatriate Assets Stolen by Former Nigerian Dictator General Sani Abacha

Background: General Sani Abacha (president of Nigeria from 1993 to 1998) and his co-conspirators embezzled, misappropriated, and extorted billions of dollars from the government of Nigeria and others, then laundered their criminal proceeds through US financial institutions (a case also discussed in chapter 4, box 4.4).

In 2014, as the result of a civil forfeiture complaint filed by the US Department of Justice (DOJ), the US District Court for the District of Columbia entered a forfeiture judgment for approximately US$500 million located in accounts around the world involving the proceeds of Abacha's corruption.

The trilateral agreement: Jersey, a Crown dependency, enforced the US judgment against over US$308 million located in its jurisdiction. On February 3, 2020, the DOJ executed a trilateral agreement with Nigeria and Jersey to repatriate these funds to Nigeria.

Under the trilateral agreement, the United States and Jersey agreed to transfer 100 percent of the net forfeited assets to Nigeria to finance the construction of three critical infrastructure projects in Nigeria: the Second Niger Bridge, the Lagos-Ibadan Expressway, and the Abuja-Kano Road—investments that will benefit the citizens of each of these important regions in Nigeria.

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BOX 11.8 Nigeria: An Asset-Return Agreement between the United States, Nigeria, and Jersey to Repatriate Assets Stolen by Former Nigerian Dictator General Sani Abacha *(Continued)*

The agreement includes key measures to ensure transparency and accountability, including administration of the funds and projects by the Nigeria Sovereign Investment Authority, financial review by an independent auditor, and monitoring by an independent civil society organization with expertise in engineering and other areas.

The agreement reflects the principles for ensuring transparency and accountability adopted at the December 2016 Global Forum on Asset Recovery (GFAR) in Washington, DC, which the United States and the United Kingdom hosted with support from the Stolen Asset Recovery (StAR) initiative of the World Bank and United Nations Office on Drugs and Crime (GFAR 2017).

BOX 11.9 Asset-Return Options in Switzerland: Use of a Memorandum of Understanding in the Abacha Case

Background: Assets in Switzerland are returned to their legitimate owner if the judge is "intimately convinced" that the assets are linked to the crime and that ownership is clearly established. If ownership is uncertain or cannot be determined (as with funds transferred, withdrawn, or mingled with other amounts of money), the judge will order confiscation of proceeds of crime or assets, and the confiscated assets will become the property of the government of Switzerland. The jurisdiction seeking recovery of stolen assets may be able to negotiate with Swiss political authorities to obtain the return of confiscated assets on the basis of specific agreements or discretionary decisions. Alternatively, the criminal court may order the equivalent of contractual or tort damages to the jurisdiction seeking redress.

In the Abacha case, Nigeria recorded a successful asset recovery of US$752 million from Switzerland in 2005 and 2006.[a] In 2017, the Swiss authorities also returned approximately US$300 million of the Abacha loot to Nigeria. With respect to these funds, in 2017, in the context of the December 2016 Global Forum on Asset Recovery (GFAR), Nigeria, Switzerland, and the World Bank signed a memorandum of understanding (MOU) pertaining to approximately US$300 million of funds to be returned to Nigeria by Switzerland. Under the MOU, the World Bank is monitoring the disbursement of the funds, which are being used for a direct cash transfer program under the National Social Safety Net Project (NSSNP).[b]

National Social Safety Net Project (NSSNP): The project is implementing a targeted cash transfer that finances safety net transfers to targeted poor and vulnerable households.[c] As of May 2019, the funds had reached 300,000 targeted poor households, with US$37 million of stolen funds already disbursed and a further US$50 million in stolen assets requested for disbursement.[d]

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BOX 11.9 Asset-Return Options in Switzerland: Use of a Memorandum of Understanding in the Abacha Case *(Continued)*

Oversight: Nigerian civil society organizations played a prominent role in the negotiations leading up to the MOU and in the monitoring of the disbursed funds. The Africa Network for Environment and Economic Justice (ANEEJ), with financial support from the UK's Department for International Development (DFID), monitored the disbursement and end use of returned assets.[e] Under the first round of monitoring, 500 monitors were sent to the field by a group of 35 civil society partner organizations to verify the reported data, survey beneficiaries, and witness cash disbursements firsthand. Spot checks confirmed the enrollment of participants in all 11 states and that over 90 percent of monitored beneficiaries reported having received at least the base transfer of N5,000 per household per month (around US$16).

The framework of this MOU is in accordance with GFAR Principles 4 and 10, which call, respectively, for transparency and accountability in the return and disposition of recovered assets and for the inclusion of civil society, nongovernmental, and community-based organizations in the asset-return process (GFAR 2017).

Legacy: The project has established the very foundation of a national safety net system at the national and state levels in Nigeria to deliver targeted support to poor households.[f] The larger project includes development of the building blocks of a structural national safety net system and financing of investments, including the creation of a robust targeting mechanism and a national registry of poor and vulnerable households.

a https://star.worldbank.org/content/gfar-principles-action-mantra-projects-monitoring-disbursement-abacha-ii-funds-nigeria.
b. World Bank and UNODC (United Nations Office on Drugs and Crime). "GFAR Principles in Action: the MANTRA Project's Monitoring of the Disbursement of Abacha II funds in Nigeria." The StAR Quarterly, October 2019 (accessed April 13, 2020). https://star.worldbank.org/content/gfar-principles-action-mantra-projects-monitoring-disbursement-abacha-ii-funds-nigeria.
c. World Bank. 2016. "World Bank Commits Half a Billion Dollars to Provide Social Assistance to Nigeria's Poorest." Press Release, June 7, 2016. https://www.worldbank.org/en/news/press-release/2016/06/07/world-bank-commits-half-a-billion-dollars-to-provide-social-assistance-to-nigerias-poorest.
d. World Bank and UNODC, "GFAR Principles in Action," October 2019.
e. World Bank and UNODC, "GFAR Principles in Action," October 2019.
f. World Bank, "Abstract," National Social Safety Nets Project (accessed July 11, 2020), https://projects.worldbank.org/en/projects-operations/project-detail/P151488?lang=enP151488.

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OECD (Organisation for Economic Co-operation and Development) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) (adopted 1997; entered into force 1999), OECD, Paris. http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

UNCAC (United Nations Convention against Corruption, UN General Assembly Resolution 58/4 (October 31, 2003), United Nations Office on Drugs and Crime (UNODC), Vienna. https://undocs.org/en/A/RES/58/4.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (December 20, 1988), United Nations, Vienna. https://www.unodc.org/pdf/convention_1988_en.pdf.

UNTOC (United Nations Convention against Transnational Organized Crime, UN General Assembly Resolution 55/25 (November 15, 2000), United Nations Office on Drugs and Crime (UNODC), Vienna. https://undocs.org/en/A/RES/55/25.

Glossary

Administrative confiscation. A nonjudicial measure for confiscating proceeds of crime or assets used or involved in the commission of an offense.

Assets. Assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.[1] The term is used interchangeably with **property.**

Bona fide purchaser. See **innocent owner.**

Coercive investigation techniques. Coercive investigative techniques generally include measures that law enforcement authorities can take without the consent of a defendant or a concerned third party by virtue of statutory, judicial, or other authorization. This is often the case for more intrusive techniques such as searches, electronic surveillance, examination of financial records, or seeking a production order or access to documents held by third parties. A mutual legal assistance (MLA) request is typically required to obtain evidence through such techniques.

Civil action. See **private law action.**

Claimant. The party asserting an interest in the asset or a dispute. This may include a third party, innocent owner, defendant, target, or offender.

Commingled assets. Proceeds or instrumentalities of an offense that have been mixed with other assets that may not be proceeds of crime.[2]

Confiscation. The permanent deprivation of assets by order of a court or other competent authority.[3] The term is used interchangeably with **forfeiture.** The persons or entities that hold an interest in the specified funds or other assets at the time of the confiscation lose all rights, in principle, to the confiscated funds or other assets (FATF 2019).

[1] United Nations Convention against Corruption (UNCAC), art. 2(e).
[2] See chapter 7, section 7.3.1, for a discussion of commingled assets.
[3] UNCAC, art. 2(g). See also FATF (2010).

Conviction-based confiscation. Describes all forms of confiscation that require the defendant to be convicted of an offense before confiscation proceedings can be initiated and confiscation can take place.

Criminal confiscation. See **conviction-based confiscation.**

Defendant. Any party who is required to answer the complaint of a plaintiff in a civil lawsuit before a court, or any party who has been formally charged or accused of violating a criminal statute.

Ex parte proceedings. Legal proceedings brought by one person in the absence of, and without representation or notification of, other parties.

Financial intelligence unit (FIU). "A central, national agency responsible for receiving, (and as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime and potential financing of terrorism, or (ii) required by national legislation or regulation, in order to combat money laundering and terrorism financing."[4]

Forfeiture. See **confiscation.**

Freezing. See **provisional measures.** See also chapter 5.

Gatekeeper. A professional who can facilitate the commission of money-laundering transactions. This category generally includes accountants, lawyers, financial consultants, financial services providers, or other professionals holding accounts at a financial institution and acting on behalf of their clients, either knowingly or unwittingly, to move or conceal the proceeds of illegal activity. Criminals may seek to use gatekeepers to access the financial system while remaining anonymous themselves (FATF 2001, 2007). Gatekeepers are often called "facilitators."

Hearsay. An out-of-court statement that is offered in court as evidence to prove the truth of the matter asserted. Whereas civil law jurisdictions do not usually exclude hearsay from proceedings, hearsay is inadmissible in common law (with certain exceptions). If hearsay is admitted, the court must also consider the appropriate weight to give the evidence.

Informal assistance. Any international cooperation assistance that is provided without the need for a formal mutual legal assistance (MLA) request. There may be legislation that permits this type of practitioner-to-practitioner assistance, including MLA legislation.

[4] Definition adopted at the plenary meeting of the Egmont Group, Rome, November 1996; as amended at the Egmont plenary meeting, Guernsey, June 2004.

Innocent owner. A third party with an interest in an asset subject to confiscation who did not know of the conduct giving rise to confiscation and is a good faith purchaser for value. The term is used interchangeably with **bona fide purchaser**.

In personam. Latin for "directed toward a particular person." In the context of confiscation or a lawsuit, it is a legal action against a specific person.

In rem. Latin for "against a thing." In the context of confiscation, it is a legal action against a specific thing or asset. See **property-based confiscation**.

Instrument or instrumentality. An asset used to facilitate crime, such as a car or boat used to transport narcotics or cash.

Know your customer (KYC). The due diligence and bank regulation that financial institutions and other regulated entities must perform to identify their clients and ascertain relevant information pertinent to doing financial business with them.

Letters rogatory. A formal request from a court to a foreign court for some type of judicial assistance. It permits formal communication between the judiciary, a prosecutor, or law enforcement official of one jurisdiction, and his or her counterpart in another jurisdiction. A particular form of **mutual legal assistance**.

Mutual legal assistance (MLA). The process by which jurisdictions seek and provide assistance in gathering information, intelligence, and evidence for investigations (through formal channels); in implementing provisional measures; and in enforcing foreign orders and judgments. This *Handbook* distinguishes between assistance that can be provided informally (see **informal assistance**) and formally (see **mutual legal assistance request**). See chapters 8 and 9.

Mutual legal assistance request. An MLA request is typically a request in writing that must adhere to specified procedures, protocols, and conditions set out in multilateral or bilateral agreements or domestic legislation. These requests are generally used to gather evidence (including through coercive investigative techniques), obtain provisional measures, and seek enforcement of domestic orders in a foreign jurisdiction.

Non-conviction based confiscation (NCB confiscation). Confiscation for which a criminal conviction is not required (FATF 2010).

Open-source intelligence (OSINT). Open-source intelligence is generally defined as information that is publicly available that can be gathered by any legal means, including information available through social media or the internet for free, for a fee, or by subscription.

Politically exposed persons (PEPs). "Individuals who are, or have been, entrusted with prominent public functions, their family members, and close associates" (Greenberg et al. 2010).

Practitioner. Refers to law enforcement investigators, investigating magistrates, private lawyers, forensic accountants, financial analysts, and prosecutors. One or all of these roles may be involved in a component of the investigation, depending on the laws of the jurisdiction.

Private law action. A lawsuit or action that is noncriminal in nature where the party initiates the action as a private party. Typical examples of such actions are those initiated for a tort or breach of contract. See also chapter 10.

Proceeds of crime. Any asset derived from or obtained, directly or indirectly, through the commission of an offense.[5] In most jurisdictions, **commingled assets** are included.

Property. See **assets.**

Property-based confiscation. A confiscation action that targets a specific thing or asset found to be the proceeds or instrumentalities of crime. Also known as ***in rem*** confiscation or a "tainted property" system.

Provisional measures. Temporary prohibitions on the transfer, conversion, disposition, or movement of assets or temporary assumption of custody or control of assets on the basis of an order issued by a court or other competent authority.[6] The term is used interchangeably with **freezing, restraint, seizure,** attachment, and blocking.

Requested jurisdiction. A jurisdiction that is asked to provide assistance to another jurisdiction for the purpose of returning assets or assisting a foreign investigation or prosecution or enforcing a judgment.

Requesting jurisdiction. A jurisdiction that asks for the assistance of another jurisdiction for the purpose of a domestic investigation or prosecution or enforcing a judgment or seeking the return of assets.

Restraint. See **provisional measures.** See also chapter 5.

Seizure. See **provisional measures.** See also chapter 5.

Seller for value. A bona fide seller of an asset for value who did not know or did not have reasonable cause to believe that the property was subject to forfeiture or represents proceeds or instrumentality of a crime.

Special investigative techniques. Special investigative tools are specifically used to investigate the most serious crimes, such as participating in or leading a criminal organization, trafficking, racketeering, corruption, and money laundering. Examples of special investigative techniques represent a higher degree of intrusiveness and include wiretapping, electronic surveillance, undercover investigations, searches, arrests, and

[5] UNCAC, art. 2(e).
[6] Adapted from UNCAC, art. 2(f). See chapter 5, section 5.3, for a discussion on provisional measures.

plea bargaining. These techniques usually require judicial authorization, and an MLA request is typically required for gathering evidence through such techniques in foreign countries.

Substitute assets. Assets that cannot be linked to an offense giving rise to confiscation but that may be confiscated in substitution for such assets if the assets that are directly subject to confiscation cannot be located or are otherwise unavailable.

Suspicious activity report (SAR). See **suspicious transaction report.**

Suspicious transaction report (STR). A report filed by a financial institution about a suspicious or potentially suspicious transaction or activity. The report is filed with the jurisdiction's financial intelligence unit (FIU). The term is used interchangeably with **suspicious activity report (SAR).**

State capture. A type of systemic political corruption in which private actors and public officials significantly influence governmental decision-making processes to their own advantage and render accountability mechanisms ineffectual.

Tainted property. See **property-based confiscation.**

Target or **targets.** The suspect or suspects of an investigation.

Value-based confiscation. A confiscation action to recover the value of benefits that have been derived from criminal conduct or to recover the equivalent value of a monetary penalty.

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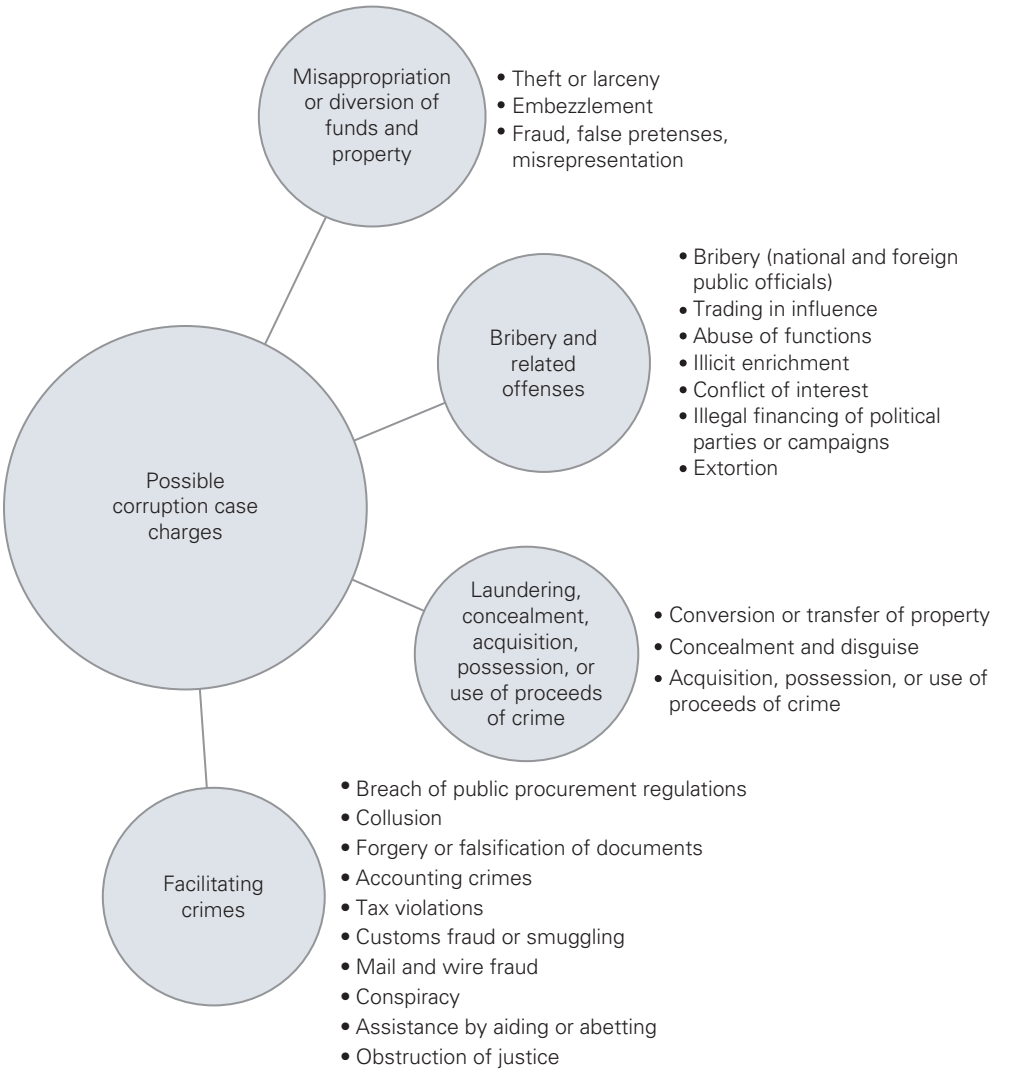
Appendix A. Offenses to Consider in Criminal Prosecution

Practitioners can consider charging the subject from a variety of criminal offenses, listed and categorized in figure A.1.

FIGURE A.1 Criminal Charges to Consider for Asset Recovery



Source: World Bank.

Misappropriation or Diversion of Funds and Property

The category of "misappropriation or diversion of funds and property"[1] comprises the offenses described below.

Theft or larceny. These crimes are generally defined as the unlawful appropriation of personal and tangible assets with the intention of depriving the legitimate owner of this property. In this case, assets are simply taken without the consent of the legitimate owner (or, in some jurisdictions, with consent obtained by fraud). Unauthorized harvesting in protected areas or public forests, or looting cash, checks, and other financial instruments from a central bank are well-known examples of theft committed by public officials. In many jurisdictions, real property, services, or intangible assets are not included in the definition of larceny.

Embezzlement. This offense is generally defined as the fraudulent transfer of property by an individual or legal entity in lawful possession of assets belonging to another individual or legal entity, for his or her own benefit. This criminal offense applies to public officials or executives who misappropriate, divert, or misuse funds or property that they are supposed to manage for a government entity (central, local, or city government; government agency; or state-owned company). It involves violation of the terms of a trust agreement authorizing the offender to hold the assets and manage them in the interest of the legitimate owner. In several jurisdictions, embezzlement does not apply to the misappropriation of real estate or services.

Examples of embezzlement include hiring and paying employees who do not perform their duties (no-show jobs), purchasing goods or services at above-market rates (overbilling), and paying fees for nonexistent goods or services that do not correspond to a real counterpart (fictitious billing).

Fraud, false pretenses, and misrepresentation. These offenses are generally defined as (a) the acquisition of a title or the possession of property belonging to another person by intentional deception, or (b) false statements of past or existing facts. In some jurisdictions, the applicable offense may be considered to be larceny or theft by trick if only possession of property is obtained. In other jurisdictions, the crime will extend to obtaining possession of the property even in the absence of title.

Although the definition of this offense is always based on intentional deception, the specific legal definition of deceptive actions may vary. Here is a typical example: a public official instructs subordinates to pay money or grant loans to fictitious companies that have no real business activity and are managed by straw men or the official's relatives.

[1] Embezzlement, misappropriation, or other diversion of property by a public official is defined in the United Nations Convention against Corruption (UNCAC), art. 17.

Bribery and Related Offenses

The category of "bribery, trading in influence, abuse of functions, and related offenses" comprises the offenses described below.

Bribery of national public officials (UNCAC, art. 15) consists of, when committed intentionally,

- "The promise, offering, or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"; or
- "The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."

Bribery of foreign public officials and officials of public international organizations (UNCAC, art. 16) consists of, when committed intentionally,

- "The promise, offering, or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business"; or
- "The solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."

Trading in influence (UNCAC, art. 18) consists of, when committed intentionally,

- "The promise, offering, or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person"; or
- "The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage."

Abuse of functions (UNCAC, art. 19) consists of "the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity."

Illicit enrichment (UNCAC, art. 20) is generally defined as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income." Authorities prosecuting illicit enrichment are not required to demonstrate the illegal origin of property to obtain convictions or confiscation orders. It will be sufficient to show that the legitimate income of a public official cannot explain an increase in assets or expenditures. The public official must then explain how the property in question accrued from legal sources. (See box A.1 for an example from France.)

Conflict of interest. In some jurisdictions, it is a crime for public officials to take or accept any direct or indirect interest in any grant, contract, or decision subject to the official's opinion, supervision, control, or administration. In many jurisdictions, it is a crime for public servants whose duties include supervising private activities or companies to take a financial interest in those activities or companies. The typical example of conflict of interest is a public official's awarding of a government contract to a company in which the official has direct or indirect ownership or control.

Illegal financing of political parties or campaigns. Covered by statutes proscribing the illicit financing of political activities and those relating to corruption, these schemes typically involve contractors who inflate the price of government contracts. From the

BOX A.1 Illicit Enrichment Provisions in France

In France, two provisions of the Criminal Code are relevant in the context of illicit enrichment.

Conviction Proceedings

Article 321-6 provides that a person can be convicted because of his or her "inability to justify an income corresponding to [one's] lifestyle or the origin of a property, while maintaining regular relationships with one or more persons involved in felonies or misdemeanors punishable by at least five years' imprisonment and from which they drew a direct or indirect benefit, or who are the victims of these offences." This offense is punishable by three to seven years' imprisonment and allows the confiscation of the convicted person's entire assets.

Confiscation Proceedings

Article 131-21 provides that confiscation may be carried out on all the defendant's properties unless the defendant can show those properties are of legitimate origin. The offense must be punishable by at least five years' imprisonment and must have resulted in a direct or indirect profit.

proceeds of overbilling, these contractors relay funds to "taxi" firms (so called because they receive the equivalent of illicit payments) that submit forged invoices. In return, these taxi firms finance political activities. These schemes also fall under racketeering or extortion statutes when it is clear that reluctant contractors will lose government business if they refuse to participate in these schemes.

Extortion. In some jurisdictions, this crime is defined as the collection of unlawful fees by a public official in an official capacity by means of oral or written threats, fear, coercion, and intimidation.

Laundering, Concealment, Acquisition, Possession, or Use of the Proceeds of Crime

These offenses are defined in UNCAC, arts. 23 and 24, as the

- "Conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or [for] helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action";
- "Concealment or disguise of the true nature, source, location, disposition, movement, or ownership of or rights with respect to property, knowing that such property is the proceeds of crime";
- "Acquisition, possession, or use of property, knowing, at the time of receipt, that such property is the proceeds of crime";
- "Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating, and counselling the commission of any of the offences established in accordance with this article"; and
- "Concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with [the] Convention."

Money-laundering offenses are usually applicable to all financial or nonfinancial institutions, businesses, individuals, and intermediaries who knowingly engage in transactions intended to disguise the illicit source of the property. Money-laundering charges should be considered in plotting an asset recovery strategy, because corrupt officials need to invest or to spend illegally derived property in financial centers.

In many corruption cases, money-laundering schemes facilitate the commission of the corruption offense. In particular, a company may pay fictitious invoices, with the funds going to offshore accounts held by contractors or consultants. Those intermediaries then use the funds to bribe corrupt public officials on behalf of the company. In most legal jurisdictions, the organization of such slush funds falls under money-laundering statutes.

Facilitating Crimes

"Facilitating crimes" include a diverse range of offenses described below.

Breach of public procurement regulations. When public officials fail to comply with procurement regulations, they frequently intend to grant an undue advantage to certain government contractors. For example, a public official in charge of procurement operations may provide a bidder with sensitive information, including government cost estimates, to ensure that this potential contractor will enjoy a significant advantage. Similarly, large procurement contracts may be artificially divided into smaller "slices" to avoid a competitive bidding process that would be mandatory given the total cost of the project. Or, during the execution of a contract, administrative officers may agree to pay for goods that are not delivered, for services that are not rendered, or for a quantity or quality of goods that does not correspond to the provisions of the contract.

Government contracts awarded or executed at significantly inflated costs illicitly benefit the contractor. In return, kickbacks or other advantages received from this contractor may reward the public official.

Collusion. This offense criminalizes (usually secretive) agreements that occur between two or more persons to deceive, mislead, or defraud others of their legal rights; to obtain an objective forbidden by law; or to gain an unfair advantage. In particular, secret agreements among firms or between a firm and a public official to limit or organize competition or set prices in public procurement are frequently encountered in corruption cases. A public official who drafts work statements or terms of reference for a competitive bidding process based on information provided by a potential bidder commits collusion.

Forgery or falsification of documents. This offense involves forging or altering the substance, the date, or the signatures of parties or witnesses in any private or public documents having the effect of an obligation, discharge, or disposition.

Accounting crimes. A common tool to organize or facilitate corruption or misappropriation of funds, accounting crimes include falsifying accounts, books, records, or financial statements. In particular, companies will issue or record fictitious or false invoices to justify and conceal improper payments to intermediaries, to manage slush funds, and to pay bribes.

A common scheme consists of private firms paying false invoices submitted by intermediaries posing as consultants who use the funds to bribe officials. In this case, the accounts of both the company and the "consultant" will record fictitious transactions.

Tax violations. Schemes involving the misrepresentation of transactions in the accounts or the financial records of a company will result in the overestimation or underestimation of assets, revenues, or expenses, hence illegally modifying taxable

revenues or deductible expenses. This is typically the case for fictitious or falsified invoices that increase purchase accounts, hence reducing the taxable profit of an entity.

Customs fraud or smuggling. Corruption, misappropriation of assets, and money laundering frequently involve illegal transportation of money or the transfer of goods out of or into the victim country. Customs fraud may also involve the duty-free import of goods that will supposedly transit the country but are actually sold illegally within the country.

Mail and wire fraud. Some jurisdictions criminalize mail and wire fraud. For example, in the United States it is a crime to devise a scheme to defraud or to obtain money or property by means of false or fraudulent pretenses and to use the mail or telecommunications infrastructure (telephone, facsimile transmissions, and email) to execute the plan. This criminal offense is also applicable to public officials who obtain money in ways that may not be commonly defined as illicit.

Conspiracy. This offense involves agreements between two or more persons to break the law at some time in the future. Actions agreed to in conspiracy often include fraud, corruption, misappropriation of property, and money laundering. In some jurisdictions, conspiracy charges can be lodged only if malefactors commit at least one overt act in furtherance of the conspiracy agreement.

Assistance by aiding or abetting. An accomplice takes no part in a criminal offense but participates by assisting the principal offender. Subject to prosecution for the same crime, the accomplice faces the same criminal penalties.

Obstruction of justice (UNCAC, art. 25) consists of

- "The use of physical force, threats, or intimidation or the promise, offering, or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offenses established in accordance with this Convention"; and
- "The use of physical force, threats, or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offenses established in accordance with this Convention."

In some countries or systems, obstruction of justice also includes the concealment of evidence material to the investigation or proceedings.

Appendix B. Explanation of Selected Corporate Vehicles and Business Terms

"Corporate vehicle" is a broad concept that refers to all forms of legal entities and legal arrangements through which a wide variety of commercial activities are conducted and assets are held. Below are definitions, descriptions, and examples of a range of such vehicles and related business terms.

Agency: Under an agency relationship, the principal (normally, the client) engages an agent to perform duties by agreement. Examples of a principal-agent relationship are client and attorney, client and accountant, or employer and employee. An agent may create a corporate vehicle or open a bank account or perform management services on behalf of the principal but may not do so in the agent's own name. Unlike a trust, there is no conveyance of title to the account where the assets are held or to the property when the agency relationship is established; legal title to the property remains with the principal.

Association: This is a membership-based organization whose members (legal or natural persons) or their elected representatives constitute the highest governing body of the organization. An association may be formed to serve the public benefit or the mutual interest of members. Whether an association is a legal entity often depends on registration. Registered associations may enjoy the same benefits as other legal entities.

Bearer share: This negotiable instrument accords ownership of a corporation to the person who possesses the bearer share certificate. The person who has physical possession of the bearer share certificate is deemed to be the lawful shareholder of the corporation that issues such bearer share and is entitled to all of the rights of a shareholder. Many jurisdictions have introduced safeguards—for example, by requiring immobilization or dematerialization—to ensure that these instruments are not abused. Immobilization requires that bearer shares be held with a regulated financial institution or professional intermediary. Bearer shares are dematerialized when the shares are required to be converted into registered shares or share warrants. In addition, countries may require bearer shareholders to report their identities to the company and the company to record such identities when the bearer shareholders want to vote the shares, collect dividends, or hold a certain level of controlling interest.

Beneficial owner: A beneficial owner is the natural person who ultimately owns or controls the corporate vehicle or benefits from its assets, the person on whose behalf a transaction is being conducted, or both. The term also encompasses those persons who

exercise ultimate effective control over a legal person or arrangement. Such ownership or control could be held or exercised directly or indirectly.

Chain of corporate vehicles: This term generally refers to groups of two or more corporate vehicles connected through legal ownership, interest, or control.

Control: The term means the direct or indirect possession of the power to direct or cause the direction of the management and policies of a corporate vehicle, or the ability to exercise significant influence thereon.

Corporate director: This is a corporate entity, not a natural person, that serves as and performs the duties of a director for another corporate entity.

Corporation: Corporations maintain a legal personality separate from their shareholders, the owners. Control of a corporation is ordinarily vested in the board of directors, and shareholders have limited power to manage the corporation directly. Powers granted to shareholders usually include the right to elect directors, to participate and vote in general shareholders' meetings, and to approve extraordinary transactions that effectively result in the sale of the company. A corporation typically enjoys unlimited duration. In most cases, the shareholders of a corporation are granted limited liability protection, which means that their liability to the company and the company's creditors is limited to their investment. Many offshore jurisdictions offer registration for foreign or offshore companies and international business corporations or exempt companies. Foreign or offshore companies are companies incorporated in a different jurisdiction but registered to do business in the host jurisdiction. International business corporations or exempt companies are companies incorporated in the host jurisdiction but not permitted to do local business. These latter firms generally receive an exemption from local taxes.

Designated nonfinancial businesses and professions: This term encompasses casinos (including internet-based casinos), real estate agents, dealers in precious metals, dealers in precious stones, lawyers, notaries, other independent legal professionals and accountants, and trust and company service providers.

Enforcer: For the purposes of a trust or a foundation, an enforcer is the person who holds the rights to enforce the trust and to apply to the courts for the same, if necessary. For charitable trusts, the enforcer is usually the senior law officer of the jurisdiction—the attorney general or some equivalent authority. But for noncharitable purpose trusts, a separate person is appointed who is responsible for ensuring that the trust's purpose is fulfilled, who has the authority to bring a court action for such purposes, and who can be held accountable in court for failure to carry out his or her duties.[1]

[1] Marks Paneth. 2017. "Use a Noncharitable Purpose Trust to Achieve a Variety of Goals." Marks Paneth website (blog) August 3, 2017. https://www.markspaneth.com/blog/2017/use-a-noncharitable-purpose-trust-to-achieve-a-variety-of-goals.

Foreign or offshore company: These companies are incorporated in a different jurisdiction but registered to do business in the host jurisdiction.

Foundation: A foundation is a legal entity that consists of a property that has been transferred into it to serve a particular purpose and has no owners or shareholders. Foundations are ordinarily managed by a board of directors according to the terms of a foundation document or constitution. Some jurisdictions restrict foundations to public purposes (public foundations); other jurisdictions allow foundations to be established to fulfill private purposes (private foundations). Common law jurisdictions generally permit the formation of companies limited by guarantee (essentially equivalent to a civil law foundation) but regulated by company law. Some of these jurisdictions also permit companies to be limited by guarantee and have shares (hybrid companies). A hybrid functions as a foundation but issues shares like a company.

International business corporation (IBC): This vehicle, sometimes called an exempt company, is the primary corporate form employed by nonresidents in offshore financial centers. An IBC has the features of a corporation but is not permitted to conduct business within the incorporating jurisdiction and is generally exempt from local income taxes. In most jurisdictions, an IBC is not permitted to engage in banking, insurance, and other financial services.

Legal arrangement: A legal arrangement refers to express trusts or other similar arrangements such as *fiducie, treuhand,* and *fideicomiso*.

Legal owner: The legal owner of a corporate vehicle is defined as the natural person, legal entity, or combination of both recognized by law as the owner of the corporate vehicle.

Legal person: The term refers to bodies corporate, foundations, Anstalts, partnerships, associations, or any similar bodies that may establish a permanent customer relationship with a financial institution or otherwise own property.

Letter of wishes: This letter, which often accompanies discretionary trusts, sets out the settlor's wishes regarding how the settlor desires the trustee to carry out trustee duties, from whom the trustee should accept instructions, and who the beneficiaries should be (who may include the settlor himself or herself). Although a letter of wishes is not legally binding on trustees, the trustee usually follows the wishes expressed there.

Limited liability company (LLC): This is a business entity that provides limited liability to its owners (known as members). Unlike a corporation that has a legal personality separate from its owners, an LLC is deemed to be a flow-through vehicle for tax purposes. Therefore, it permits profits and losses to be allocated to, and taxed at, the member level. An LLC may be managed either by members themselves or by one or more separate managers engaged by the LLC under the terms contained within its articles of organization.

Nominee director: This person appears as the registered director in a company on behalf of another person (normally undisclosed) who is called the beneficial owner. In some nominee director arrangements, a confidential legal document (such as a mandate agreement, a nominee services agreement, or something similar) is issued by the nominee and held by the beneficial owner. When the nominee director is a corporate entity, the nominee is referred to as a corporate director. Certain jurisdictions do not recognize nominee directors. Consequently, a person who accepts a directorship is subject to all of the requirements and obligations of a director (including fiduciary obligations), notwithstanding that the person is acting as a nominee. In certain jurisdictions, nominee directors cannot be indemnified by the beneficial owner.

Nominee shareholder: This is a legal or natural person who appears as the registered shareholder in a company but who holds the shares on behalf of another person (normally undisclosed) who is called the beneficial owner. Sometimes, in a nominee shareholder arrangement, a confidential legal document (such as a declaration of trust, a deed of transfer, a nominee services agreement, or something similar) is issued by the nominee and held by the beneficial owner. With respect to publicly traded shares, nominees who, for example, are registering shares in the names of stockbrokers are commonly and legitimately used to facilitate the clearance and settlement of trades.

Partnership: A partnership is an association of two or more individuals or entities formed to carry out business activity. In contrast to corporations, traditional partnerships are entities in which at least one partner (in the case of limited partnerships) or all partners (in the case of general partnerships) have unlimited liability for the obligations of the partnership. In a limited partnership, the limited partners enjoy limited liability, provided that they do not participate actively in management decisions or bind the partnership. In recent years, certain jurisdictions have introduced limited liability partnerships (LLPs) whereby all partners, regardless of the extent of their involvement in the management of the partnership, have limited liability. For tax purposes, partnerships are deemed to be flow-through vehicles that permit profits and losses to be allocated to and taxed at the partner level.

Power of attorney: A power of attorney or letter of attorney in common law systems, or a mandate in civil law systems, is an authorization to act on someone else's behalf in a legal or business matter. The person authorizing the other to act is the principal, grantor, or donor of the power. The one authorized to act is the agent, the attorney-in-fact, or (in many common law jurisdictions) simply the attorney.

Private trust company (PTC): This vehicle is a corporation formed for the express and sole purpose of acting as the trustee of a specific trust or a group of trusts, where each trust beneficiary is a connected person in relation to the settlor of the trust, and each settlor of such a trust is a connected person in relation to any other settlor of any other trust to which that corporation provides trust business services. "Connected person" includes all relationships established by blood, marriage, and adoption. PTCs must neither solicit trust business from nor provide trust business services to the public.

Normally, a PTC will be managed by its board of directors, comprising a combination of family members or representatives and professionals who are experienced in trust law and administration.

Protector: The protector of a company, trust, or foundation is the person who is given supervisory power over the company, trust, or foundation. The supervisory power granted to the protector is determined by the incorporator, settlor, or founder. Although the protector is not a trustee, director, or foundation council, that individual does have the right to full information—including the right to attend organizational meetings. The protector may also have veto powers in certain key areas (such as fees, the timing and recipients of distributions, and the appointment of beneficiaries) and may have the power to hire and fire trustees and directors.

Purpose trust: In this trust, the trust fund is held by the trustees to meet prescribed purposes rather than for the benefit of the beneficiaries. Purpose trusts may be charitable or noncharitable, depending on the jurisdiction. Asset protection trusts are a type of purpose trust.

Shelf company: This term is generally used to describe an arrangement where a company is incorporated (with a standard memorandum or articles of association and with inactive shareholders, directors, and secretary) and left dormant to later be sold. When the shelf company is sold, the inactive shareholders transfer their shares to the purchaser, and the directors and secretary submit their resignations. On transfer, the purchaser also receives the company's credit and tax history.

Shell company: This company has no independent operations, significant assets, ongoing business activities, or employees. Shell companies are not illegal and may have legitimate business purposes.

Trust: This vehicle provides for the separation of legal ownership from beneficial ownership. It is an arrangement whereby property (including real, tangible, and intangible) is managed by one person for the benefit of others. A trust is created by one or more settlors who entrust property to the trustee or trustees. The trustees hold legal title to the trust property but are obliged to hold the property for the benefit of the beneficiaries (usually specified by the settlors, who hold what is termed equitable title). The trustees owe a fiduciary duty to the beneficiaries, who are the beneficial owners of the trust property. The trust is not, of itself, an entity having legal personality. Any transactions undertaken by the trust are undertaken in the names of the trustees. Although the trustees are the legal owners, the trust property constitutes a separate fund that does not form part of the trustees' personal estate. Thus, neither the personal assets nor the personal liabilities of the trustees attach to the trust, and the trust assets are accordingly insulated from any personal creditors of the trustees.

Trust and company service provider: The term refers to any person or business providing any of the following services to third parties: acting as a formation agent of legal

persons or legal arrangements; acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons; providing a registered office, a business address or office, a correspondence address, or an administrative address for a company, partnership, or any other legal person or arrangement; acting as (or arranging for another person to act as) a trustee of an express trust; or acting as (or arranging for another person to act as) a nominee shareholder for another person.

Appendix C. Sample Financial Intelligence Unit Report

Financial Intelligence Unit

To : Chief of Police, Prosecutor's Office, or Other Competent Authority

From : Director, Financial Intelligence Unit

Date : March 1, 2020

Subject : **John Smith Charity Fund**

Strictly Confidential

This document is confidential and is to be considered as law enforcement–sensitive financial information. The data contained in this document are to be used only for intelligence purposes; are not to be disseminated or disclosed, in whole or in part, to any person, agency, or organization; and may not be used in any judicial or administrative proceeding, without the prior written consent of the financial intelligence unit (FIU).

This case was initiated by the FIU after the FIU received a suspicious transaction report (STR) indicating there are irregularities in an account related to the **John Smith Charity Fund**. The irregularities indicate that the **John Smith Charity Fund** could be involved in possible money-laundering violations or in violation of other provisions of the Money Laundering Act.

On January 25, 2020, the FIU received an STR concerning suspicious transactions of the **John Smith Charity Fund**. The FIU discovered that account number **17026557** was involved in roughly **48** suspicious transactions of **$9,000.00** each. This account number belongs to a nongovernmental organization (NGO) named the **John Smith Charity Fund**. This NGO was registered with number **5110282** as the **John Smith Charity Fund** on March 23, 2017, under Regulation 1985, section 18 on the Registration and Operation of NGOs. Registration certificate carries serial number **99951**. Contact address of this NGO is **100 Palm Street, Smithville, Smith Islands,** mobile number **255-401-050**, fax number **251-401-202**. General activity of this NGO as stipulated within the registration documents is "Developing of donations from Smith Island

citizens, and from institutions and nongovernment organizations and charity organizations, organizing of concerts, theatre plays, and sports matches." There are three founders of this NGO:

1. **Robert FRANK,** D.O.B. May 1, 1980, in Jonesville, Smith Islands; **ID 1000718145**; address 195 Palm Street, Smithville; mobile 255-505-233; current minister of sports and gaming; member of Alliance for the Smith Islands (ASI) political party; first cousin of the current prime minister, Thomas MARK.
2. **Betty FRANK**, D.O.B. May 17, 1985, in Jonesville, Smith Islands; **ID 1009875847**; address 195 Palm Street, Smithville; mobile 255-211-440; email betty.frank@gmail.com; spouse of Robert FRANK.
3. **Anthony SMITH,** D.O.B. June 14, 1975, in Marksville, Smith Islands; **ID 1000719109;** address 8097 Yankee Way, Marksville; mobile 255-540-050; email tony.smith@gmail.com; person authorized to open and operate the **John Smith Charity Fund** bank accounts in Peoples Bank, Mountain Bank, and River Bank; businessman, co-owner of Smithville Brewery; second cousin of Robert FRANK; current adviser to Prime Minister MARK; and treasurer of ASI political party.

Account 17026557 opened in Peoples Bank. Peoples Bank holds the abovementioned account, no. **17026557**. Between March 31, 2018, and January 3, 2019, it recorded a total cash flow of $733,987.52. **Anthony SMITH** signed the deposit orders for the suspicious deposits described above. On at least three occasions, **SMITH** went to Peoples Bank with several hundred thousand dollars in new $100 notes in stacks of 100 notes each. He told bank officials that the money represented donations to the **John Smith Charity Fund** from several people, and that he was there to deposit the money into the fund account. On each occasion, he proceeded to complete several deposit orders, mostly in the sum of $9,000 (although a few were for lesser sums), signing each deposit order with his own name. At present, no information is available regarding the actual source of the currency deposited.

Between August 2018 and October 2018, a total amount of $492,000 was deposited in this account. Most of this money was 48 deposits of $9,000. Money was deposited as follows:

There were roughly 59 transactions in the **fund account.** Most of the roughly **48 cash deposits** were for $9,000 and were deposited by one individual. The NGO **John Smith Charity Fund** opened accounts in all banks that operate in the Smith Islands. **Anthony SMITH** is an authorized person on all of the accounts. Since **January 1, 2018,** the total turnover in these accounts is roughly $1,766,039.47.

Date	Number of deposits	Value/deposit ($)
08/19/2018	5	9,000
09/05/2018	20	9,000
09/05/2018	1	10,000
09/05/2018	3	5,000
09/06/2018	20	9,000
09/06/2018	7	5,000
09/20/2018	2	9,000
10/03/2018	1	9,000

Appendix D. Planning the Execution of a Search and Seizure Warrant

- Identify assets in bank accounts and take steps to secure them, either in advance of the search or simultaneously (for example, through freezing orders).
- Identify the type of location to be searched (for example, residence or business).
- Determine the probability that civilians or nontargets will be present, and plan accordingly. Avoid peak business times, if possible.
- Consider closing the business during execution of the warrant, if appropriate.
- Determine the number of officers required to conduct a safe and thorough search.
- Take necessary precautions to maintain operational integrity. Don't let the target(s) get word of an impending search.
- Execute the warrant in accordance with the authorization—that is, during normal business hours.
- If permitted by law and if beneficial to the investigation, consider executing the search warrant after normal business hours.
- Determine whether the location is outfitted with an alarm system or has armed security personnel, cameras, canine patrol, and the like. Plan the operation accordingly.
- Provide a comprehensive briefing to all officers involved in the execution of the warrant.
- Include in the briefing any relevant intelligence about the target(s) and location(s) to be searched.
- Provide maps, schematic drawings, or other pertinent information about the residence(s) or business(es), if available.
- Assign a role to each officer involved in the warrant execution. Assignments should be made by the lead investigator. Some of these roles include the following:
    - *An entry team* enters first and secures the premises so that other officers can conduct a safe and thorough search. This team should disconnect telephone lines when it enters the premises.
    - *A perimeter team* may be useful when conducting a search in a hostile environment. These officers provide security in the area and allow the search team to conduct a safe and thorough search.
    - *Search officers* work in teams of two, if possible, to help avoid or refute any accusations of evidence planting. The lead investigator may identify specific places to be searched by each team.
    - *A videographer or photographer* records the execution of the warrant and documents where evidence is discovered. Where it is appropriate, remember

to demonstrate scale when taking photos: place a ruler or other object that indicates size alongside object(s) being photographed.

- *An evidence custodian* receives and records all evidence discovered and seized by search officers, thus maintaining a chain-of-custody record.
- *An interview team,* including the lead investigator, should be identified during the planning stage. If target(s) are present and agree to be interviewed, questioning should occur in an area that is conducive to interviews and does not impede the ongoing search.
- *A computer forensic specialist* may be helpful in gathering and securing evidence. Electronic and computer data must be gathered in a manner that avoids its loss, destruction, or damage and that avoids potential claims by the suspect that the data were subsequently manipulated by law enforcement officials (for example, by preparing a mirror copy of the data). If there are no trained computer forensic experts within the investigator's unit or other related units, the investigator should consider securing such services from the private sector or requesting assistance from other jurisdictions that have this capacity.

Appendix E. Sample Document Production Order for Financial Institutions

Document Production Order to BANK *ABC* to Be Served on an Authorized Official of BANK *ABC*

Re: Investigation of

- Account number 12345678 at BANK *ABC* in the name of John Doe
- *XYZ* Company incorporated in Delaware, United States; with a registered agent in Douglas, Isle of Man; and an office in London, England
- Unknown beneficial owners of accounts or funds related to the persons and entities above.

The Order to Produce Documents

In accordance with *[applicable law]*, the authorized representative of BANK *ABC* is commanded to produce the documents identified below to the public prosecutor's office *[judge, investigating magistrate, or other appropriate authority]* by *[date]*. An intentional failure to comply with this document production order is a criminal offense punishable by fine, imprisonment, or both.

[Where authorized by law] BANK *ABC* is ordered not to disclose to anyone outside of BANK *ABC* the fact of this production order, the identity of the subjects of the production order, or the documents ordered produced. Nor is it to disclose what is produced to the public prosecutor's office *[judge, investigating magistrate, or other appropriate authority]* until further order.

This order shall cover the time period from *[date]* to *[date]* or beginning the date this order is received by BANK *ABC*.

The order shall cover all documents related to the individuals, legal entities, and beneficial owners listed above, either individually or in combination with any other individual or legal entity; and documents for accounts for which these individuals are/were trustees, have/had signature authority, power of attorney, or the authority to transact business. This includes but is not limited to the following:

Account Opening, Client Identification, and Instructions

1. Account opening documents for any service or line of business provided by BANK *ABC*, including but not limited to any subsidiary and correspondent

institution; and, if applicable, closing documents for all accounts related to the individuals and legal entities listed above. For *XYZ* Company, the documents should include articles of incorporation, corporate resolutions and minutes, partnership agreements, powers of attorney, and signature cards (front and back) related to any person or beneficial owner referenced above.

2. Bank statements, periodic statements, and transcripts of accounts for any person or beneficial owner referenced above.
3. The identity of the beneficial owner of any account related to any person referenced above and the documents in which this information appears. This is to include but is not limited to all supporting documentation submitted by the contracting party or beneficial owner or prepared by any financial institution, employee, or third party on behalf of the contracting party or the beneficial owner.
4. Information obtained by BANK *ABC* relating to the identification and verification of any person or beneficial owner referenced above.
5. National identity numbers, tax numbers, customer identification numbers, date and place of birth, and any reference number or method (other than the account number) used by BANK *ABC* to identify any person or beneficial owner referenced above.
6. For any person referenced above, any safe deposit box contract, identity of all persons with access to the box, documents showing dates when the safe deposit box was accessed, and any video or other electronic medium showing the authorized person(s) who visited the safe deposit box area.
7. Client instructions regarding when and how account statements are to be delivered and client instructions regarding mail, electronic, or voice contact by BANK *ABC*.
8. The identity of any BANK *ABC* employee who has or had any responsibility for dealing with or handling the accounts of any person or beneficial owner referenced above.
9. All records of charges for local and long-distance telephone calls, including telephone bills, and all records of charges for other communication services, telexes, courier, and mail services incurred by or on behalf of any person or beneficial owner referenced above. In each case where there has been contact, the bank official who had the contact is to be identified, and any notes, documents, and information given or received during the contact or the sending or receiving of packages, letters, faxes, and emails are to be produced.

Due Diligence Documentation

10. The "know your customer" due diligence documents prepared by BANK *ABC* on any person or beneficial owner referenced above.
11. Where a person related to a transaction, account, wire transfer, Society for Worldwide Interbank Financial Telecommunication (SWIFT) message, or other action identified by this order has been identified by BANK *ABC* as a beneficial owner or a politically exposed person (PEP) (as defined in BANK *ABC*'s policies and procedures), provide

a. All due diligence and enhanced due diligence files created;
b. Documents identifying the rules and alerts placed in BANK *ABC*'s processing and compliance systems to identify and segregate transactions related to the clients, accounts, identified PEPs, other public officials, those who have recently left public office, and beneficial owners; and the documents related to any transactions or question that triggered an alert; and
c. The identity of any BANK *ABC* employee handling the due diligence files and the alert systems related to this order.

Incoming and Outgoing Wire Transfers and Related Documents

12. Documents related to incoming and outgoing, domestic, or cross-border funds transfers (for example, by Fedwire, CHIPS, or CHAPS) for or on behalf of any person or beneficial owner referenced above, including but not limited to wire transfer request forms, advice statements, confirmation statements, debit memos, journal entries, or internal logs.
13. Documents related to SWIFT messages originating, terminating, or passing through BANK *ABC* and any related intermediary or correspondent institution, for or on behalf of any person or beneficial owner referenced above, including but not limited to
    a. SWIFT messages, including but not limited to SWIFT message type (MT) 100, MT 103, MT 202, MT 202 COV, MT 199, and MT 299 messages and any other SWIFT message (including those related to securities and trade transactions);
    b. Fax, mail, email, or telephone instructions; wire transfer request forms; advice statements; confirmation statements; debit memos; journal entries; or internal logs; and
    c. Any "repair items" or rejected funds transfers or SWIFT messages; and any documents related to the repair and retransmission of the funds transfer or SWIFT message related to the persons, legal entities, and beneficial owners referenced above.
14. SWIFT business identifier codes (BICs) for BANK *ABC*, including its business lines (for example, private banking), subsidiaries, and branches for which the codes differ from the main BIC code.
15. All names by which BANK *ABC* and its subsidiaries are identified.

Account Transactions

16. Documents related to funds that went into or out of any BANK *ABC* account related to any person or beneficial owner referenced above, including client orders, deposit slips, deposit items (front and back), withdrawal slips and canceled checks (front and back), debit and credit memos, book transfers, and interbank transfer slips related to any person or beneficial owner referenced above.
17. Documents sent to or received from any intermediary or correspondent financial institution related to any person or beneficial owner referenced above.

Other Transactions

18. Copies of certificates of deposit, including interest payments, redemption records, and disposition of the proceeds regarding any person or beneficial owner referenced above.
19. Records of purchase or sale of bearer bonds or other securities and investment products by any person or beneficial owner referenced above.
20. Documents for purchase of manager's checks, cashier's checks, and bank money orders, together with the checks that were purchased by or on behalf of any person or beneficial owner referenced above.

BANK *ABC* Submissions to Financial Intelligence Units (Where Authorized)

21. Currency transaction reports relating in any manner to the persons or beneficial owners referenced above.
22. Currency and monetary instruments reports relating in any manner to the persons or beneficial owners referenced above.
23. Suspicious activity or transaction reports filed, relating in any manner to the persons or beneficial owners referenced above.

Include all additional documents that may have connection to the offense committed.

Definitions and Instructions

A. The terms "BANK *ABC*" and "*XYZ* Company" shall mean the business entity to which this order pertains. It shall include all of the entity's affiliates, joint ventures, subsidiaries, subdivisions, and successors in interest; and all of its present and former directors, officers, partners, employees, agents, and other persons purporting to act on behalf of any of the foregoing.
B. The term "document(s)" means all written or printed matter of any kind, formal or informal, including the originals and all nonidentical copies thereof (whether different from the original by reason of any notation made on such copies or otherwise) in the possession, custody, or control of the Company, wherever located, including, without limitation, papers; correspondence; memoranda; notes; diaries; statistical materials; letters; telegrams; minutes; contracts; reports; studies; checks; statements; receipts; returns; summaries; pamphlets; books; interoffice and intraoffice communications; offers; notations of any sort of conversations, telephone calls, meetings, or other communications; bulletins; credit matter; computer printouts; hard discs; flash drives; removable hard drives; floppy discs; mainframe and personal computer databases; teletypes; telex materials; invoices; worksheets; and all drafts, alterations, modifications, changes, and amendments of any nature or kind to the foregoing. Also included are all graphic and aural records or representations of any kind, including

videotapes, sound recordings, and motion pictures; and any electronic, mechanical, or electrical recordings, including without limitation tapes, cassettes, discs, recordings, and films.

C. The term "document(s)" also means any container, file folder, or other enclosure bearing any marking or identification in which other "documents" are kept, but it does not include file cabinets. In all cases where any original or nonidentical copy of any original is not in the possession, custody, or control of the legal entity to which this production order is directed, the term "document(s)" shall include any copy of the original and any nonidentical copy thereof.
D. The word "and" should be interpreted as including "or" and vice versa.
E. The term "person" shall mean any natural person, legal entity, proprietorship, corporation, partnership, joint venture, unincorporated association, and governmental agency; or any subdivision, affiliate, officer, director, employee, agent, or other representative thereof.
F. The term "beneficial owner" includes the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf the transaction is being conducted. It also incorporates those persons who exercise ultimate effective control of a legal person or arrangement, as well as relevant third parties.
G. The term "identity" shall mean the full name, including middle name; date of birth; place of birth; national identity or passport number; all positions held during employment; dates of service; responsibilities and duties in each position; termination date, if any; and the reasons for such termination.
H. "Public official" shall mean (1) any person holding a legislative, executive, administrative, or judicial office, whether appointed or elected, whether permanent or temporary, and whether paid or unpaid, irrespective of that person's seniority; and (2) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service.
I. The terms "wire transfer" and "funds transfer" refer to any transaction carried out on behalf of a person through a financial institution by electronic means, with a view to making an amount of money available to a beneficiary person at another financial institution. The originator and the beneficiary may be the same person.
J. "Cross-border transfer" means any wire transfer for which the originator and beneficiary institutions are located in different countries. The term also refers to any chain of wire transfers that involves at least one cross-border element.
K. The "originator" is the account holder; where there is no account, the originator is the person who places the order with the financial institution.
L. "SWIFT" refers to the Society for Worldwide Interbank Financial Telecommunication.
M. "CHIPS" refers to the Clearing House Interbank Payments System.
N. "Fedwire" refers to Fedwire Funds Service, the electronic funds transfer system owned and operated by the US Federal Reserve System.
O. "CHAPS" refers to the Clearing House Automated Payments System, which offers same-day sterling and euro fund transfers.

Claim of Privilege

If any document is withheld by BANK *ABC* under claim of privilege, including attorney-client privilege, BANK *ABC* shall furnish a schedule setting forth the date; the name and title of the author, addressee, and recipient; and the subject matter of each such document, the nature of the privilege claimed, the basis on which it is claimed, and the paragraph of this order to which each such document is responsive.

Identifying Documents

To facilitate the handling of documents submitted pursuant to this order, to preserve their identity, and to ensure their accurate and expeditious return, it is requested that each document be marked with an identifying number and that the documents be numbered consecutively. Only the first page of multipage, bound documents should be numbered, and the total number of pages in a document should be noted. Documents should also remain within the file folders in which they were located at the time this order was served. Such file folders should also be numbered as if they were another document. Within each file folder, documents should remain in the same order they were at the time this order was served. Multipage documents should remain intact.

Document Production

The person appearing before the court or prosecutor in response to this order must be a person who is fully knowledgeable concerning BANK *ABC*'s search for the documents responsive to this order, as well as one who can authenticate the documents as business records. Should the same person not be competent to perform both requirements, BANK *ABC* should designate such additional persons as may be necessary to appear on the same time and date.

Documents that exist in an electronic format should be produced electronically along with a paper copy certified by the BANK *ABC* custodian of records to be a true and accurate copy of the electronic original. All electronic documents should be produced in a form that is reasonably usable and searchable without the use of any specialized software.

Originals Required

This order requires the production of the originals of all documents ordered herein, except as particularly noted above. Submission of photocopies in lieu of originals is not in compliance with this order.

Appendix F. Serial and Cover Payment Methods in Electronic Funds Transfers

Payment Processing Methods

Society for Worldwide Interbank Financial Telecommunication (SWIFT) messaging is an integral part of correspondent banking communication between financial institutions that do not have a direct account relationship with each other. SWIFT has developed fixed messaging formats for the two payment processing methods used between such institutions: the serial (or sequential) method and the cover method.

Serial or sequential payment method. With the serial payment method, a transfer is sent from the originating customer's financial institution through any correspondent banks and then on to the beneficiary customer's financial institution (figure F.1). The steps around this process are sequential in that clearing and settlement occur directly and at each point. Accordingly, relevant payment and customer information can be preserved along the way.

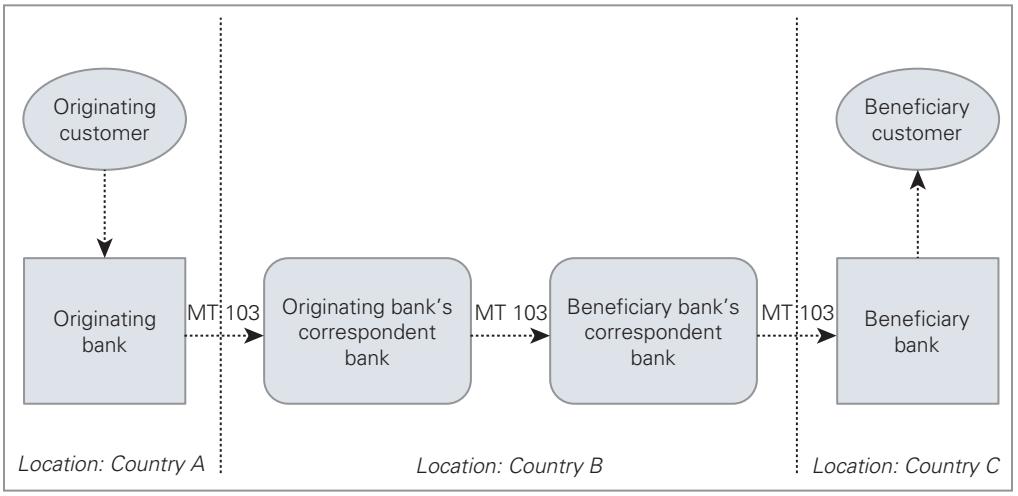
The applicable SWIFT messaging format used for such a transfer is the message type (MT) 103—a direct payment order to a beneficiary bank that contains both originator and beneficiary information. MT 103s are the most heavily used message format on the SWIFT network, accounting for 15 percent of total SWIFT messaging volume.

Cover payment method. The cover payment method also uses correspondent banks to intermediate transfers from one unrelated bank to another. However, as figure F.1 shows, the lack of a direct banking relationship requires correspondent accounts between banks to facilitate settlement. In this case, the originating bank may directly instruct the beneficiary bank to make payment to the customer and to advise that the transfer of funds to "cover" the payment obligation has been arranged through a separate interbank relationship. Settlement of the funds may then take place through another correspondent if no relationship exists between the originating bank's correspondent bank and that of the beneficiary institution. In this way, the beneficiary customer can typically have his or her account credited by his or her own bank before interbank settlement is completed, especially where an established commercial relationship exists. Cover payments are also frequently used to help reduce overall transaction costs and the time taken for clearing commercial transactions by clearing banks.

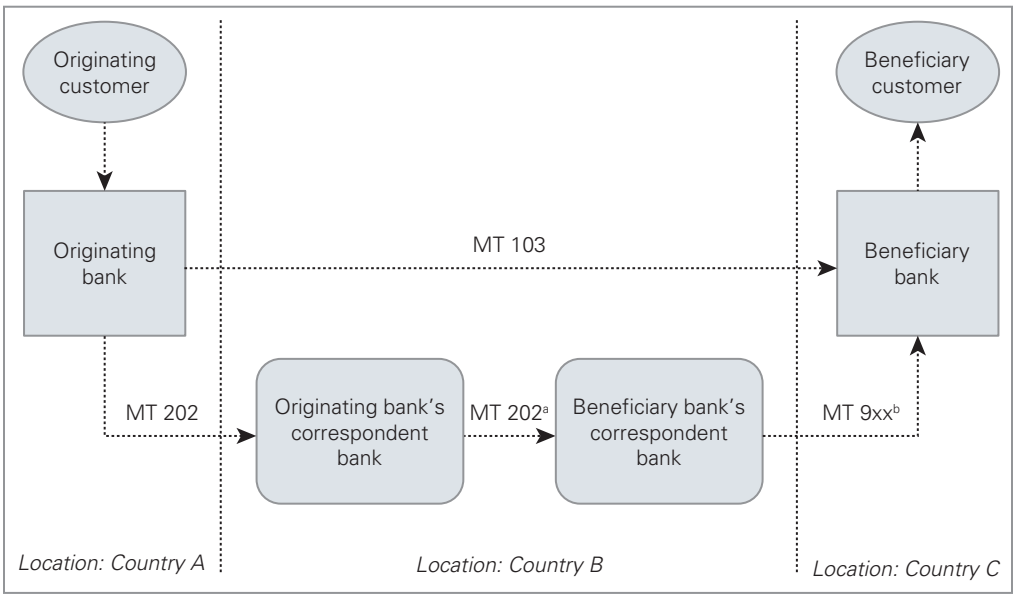
In the context of SWIFT messaging, the bank-to-bank order to a correspondent bank to cover the originating bank's obligation to pay the ultimate beneficiary bank is effected through the use of an MT 202. These messages are used primarily for cover payments

FIGURE F.1 SWIFT Serial/Sequential and Cover Payment Processing Methods

a. Serial/sequential payment chain



b. Cover payment chain



Source: Adapted from Basel Committee on Banking Supervision, *Due Diligence and Transparency Regarding Cover Payment Messages Related to Cross-Border Wire Transfers,* May 2009, p. 3.
Note: a. Alternatively, this could be a local clearing system.
b. Category 9 message types pertain to Cash Management and Customer Status, with the type designation MT 9xx.
MT = message type; SWIFT = Society for Worldwide Interbank Financial Telecommunication.

and settlements between financial institutions (for example, foreign exchange trades, payment of interest, and so forth). It is important to note that a correspondent bank that receives an MT 202 cover payment instruction does not receive an MT 103, which means that this bank is unable to monitor or filter payment details contained in an MT

103 or to determine the purpose of the transfer (that is, cover payment or interbank settlement). For this reason, it is important that an investigator obtain all incoming and outgoing MT 103s related to a cover payment.

New Cover Payment Standards (MT 202 COV)

Recommendation 16 of the Financial Action Task Force (FATF) requires that financial institutions include the originator and beneficiary information on wire transfers and related messages and that such information remain with the wire transfer or related message throughout the payment chain. The Interpretive Note to Recommendation 16 further clarifies that the scope of the recommendation includes cross-border wire transfers, domestic wire transfers—including serial payments and cover payments (with a few exceptions)—and that the originator and beneficiary information should be made available to ordering, intermediary, and beneficiary financial institutions.[1] Box F.1 briefly describes the Basel Committee on Banking Supervision's response to wire transfers that raise transparency concerns and the possible implications for money laundering and terrorist financing activities.

BOX F.1 Responses to Wire Transfers That Hide Originating Customer Information

To hide originator information, wire transfers may contain incomplete information, meaningless keystrokes, or false client names (for example, "Mickey Mouse").

According to the Basel Committee on Banking Supervision, "Where fields are manifestly meaningless or incomplete, responses could include, for example, (i) contacting the originator's bank or precedent cover intermediary bank in order to clarify or complete the information received in the required fields; (ii) considering (in the case of repeated incidents involving the same correspondent or in the case where a correspondent declines to provide additional information) whether or not the relationship with the correspondent or the precedent cover intermediary bank should be restricted or terminated; banks should report such situations to their supervisor; and/or (iii) filing a report of suspicious activity with the local authorities, when the situation satisfies the local definition of reporting requirements."[a]

These actions create internal bank records that will help the investigator trace and expose laundered funds.

a. Basel Committee on Banking Supervision, *Due Diligence and Transparency Regarding Cover Payment Messages Related to Cross-Border Wire Transfers,* May 2009, para. 30.

[1] See FATF Recommendation 16 ("Wire Transfers") and the Interpretive Note to Recommendation 16 in FATF, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation," updated October 2020, pp. 17–18, 78–83, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.

BOX F.2 Monitoring Records from Financial Institutions

Generally, financial institutions use different types of monitoring where wire transfers are concerned:

- *Sanction screening.* Conducted automatically and in real time, the system will read the originator, beneficiary, and payment information and will check for any name that matches United Nations or other sanctions lists. If there is a match, the message will be segregated for review, and payment is either released for processing or the financial intelligence unit or other appropriate officials are notified. This entire process creates electronic and paper records that the investigator should subpoena from a bank and review.
- *Back-end monitoring.* Performed after transmission, back-end monitoring uses a risk-based approach to look for patterns of activity that appear unusual or potentially suspicious. This process will also generate records that the investigator should subpoena from a bank and review.
- *Monitoring of wire transfers.* Financial Action Task Force (FATF) Recommendation 16 stipulates that financial institutions monitor wire transfers to *detect* those lacking originator and beneficiary information and that the institutions take appropriate measures.[a] The Interpretive Note to Recommendation 16 further elaborates these requirements—for example, by requiring that this information and/or the unique transaction reference number be included with the transfer.[b] Where there is a suspicion of money laundering or terrorist financing, financial institutions should verify the customer's information. An ordering financial institution should not execute a noncompliant wire transfer and should maintain related records for five years. An intermediary financial institution should have risk-based policies and procedures to determine when to execute, reject, or suspend noncompliant wire transfers and take the appropriate follow-up action.

a. FATF Recommendation 16, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation," updated October 2020, https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf.
b. FATF, Interpretive Note to Recommendation 16, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation," pp. 17–18, 78–83.

As the leader in global interbank telecommunications, and to standardize international cover payment messaging practices in cross-border wire transfers, SWIFT developed new standards for all cover payments, effective November 2009. The new MT 202 COV messaging format, which is simply a variant of the MT 202, aims to provide greater transparency by making all payment information that is available to the originating institution also available to other institutions in the payment process.

The MT 202 COV, which must now be used for all cover payments, replicates certain information fields from the MT 103 (namely, the originator and beneficiary information fields). The MT 202 may still be used for interbank settlement payments but

not for cover payments. The creation of this new standard now requires financial institutions, and specifically correspondent banks, to apply risk-based monitoring practices to customer and payment information to which they were not previously privy.

Although the MT 202 COV mandates the inclusion of all customer and financial institution identifying information, it is important to note that SWIFT does not play a role in validating or policing the standard. This responsibility lies with member institutions themselves. The SWIFT system will reject a transfer where the originator and beneficiary fields are blank; however, it cannot determine whether information entered in those fields contains false or incomplete data. Box F.2 describes two ways that financial institutions attempt to monitor wire transfer information.

Appendix G. Sample Financial Profile Form

Financial Profile

Surname	Unique reference no. (URN)
First name	
Alias	Date of Birth
Address	

Commercial

Criminal Case Officer _____

Financial Investigator _____

Criminal Case Solicitor _____

Tel _____ Fax _____

Criminal Case Counsel _____

Tel _____ Fax _____

Financial Solicitor _____

Tel _____ Fax _____

Financial Counsel _____

Tel _____ Fax _____

Forensic Accountant _____

Tel _____ Fax _____

Drugs

Team/Branch _____

Tel _____

Team/Branch _____

Tel _____

Financial Profile – Index & Check Sheet

Part 1: Personal Financial Profile

ASSETS	Cash/valuables seized	
	Bank accounts	
	Other bank/building society accounts	
	National savings	
	Premium bonds	
	Shares	
	Unit trusts	
	Life insurance policies/endowments	
	Motor vehicles	
	Boats/Motor Vehicles/Airplanes, etc.	
	Other	
	Value of gifts to third parties	
LIABILITIES	Credit cards	
	Store cards	
	Credit agreements	
	Maintenance/CSA payment	
	Court judgments/fines/previous forfeiture orders	
	Other liabilities/debts	
	Overdraft current	
	Personal solvency	
DECLARED INCOME	Employment	
	Previous employment	
	Income tax details	
	Other sources of income	
PROPERTY	Property details	
	Occupiers	
	Rented property	
	Owned property	
	Value	
	Mortgage	
	Other property charges	
	Ground rent (leasehold)	
	Third-party interest	
	House contents	

UTILITIES (property liabilities)	Community charge	
	Water charges	
	Electricity	
	Gas	
	Telephone	
	Mobile telephone	
	Internet/cable	
	Property and renter's insurance	

Part 2: Business Financial Profile

BUSINESS ASSETS	Bank accounts	
	Motor vehicles	
	Plant/machinery, etc.	
	Office/trade fixtures and fittings	
	Other valuable property	
	Stock in trade	
	Work in progress	
	Fully secured debtors	
	Partly secured debtors	
	Other (intellectual property rights, etc.)	
BUSINESS LIABILITIES	Employees	
	Fully secured creditors	
	Partly secured creditors	
	Credit cards	
	Debit cards	
	Credit agreements	
	Direct debit/standing orders	
	Court judgments	
	Winding-up order/voluntary liquidation	
	Other contractual liabilities	
	Corporation tax/income tax	
	Value added tax	

BUSINESS INTEREST	Preliminary assessment	
	Trading partnership/company	
	Company directors/partners	
	Company's documentation	
	Interest in business	
	Realizable property held by business	
BUSINESS PREMISES	Assets	
	Other occupiers	
	Liabilities	
	Mortgage (business)	
	Other charges on property	
	Regular charges/business expenses	
	Water charges (business)	
	Electricity (business)	
	Gas (business)	
	Telephone (business)	
	Premises insurance (business)	
	Contents insurance (business)	
	Company insurance claims	

Part 1: Detailed Personal Financial Profile of _____

DECLARED INCOME

Employment

	Current Employment	Previous Employment
Name of employer or self-employed:		
Occupation:		
Net income:		
Weekly/monthly or annually:		
Commencement date:		
Leaving date:		
Notes:		

Income Tax Details

Period covered:	
Tax reference number:	
Tax paid:	
Tax office:	
Notes:	

Other Sources of Income

Source of income:	
Notes:	

PROPERTY

Property Details

	Current Property	Previous Address
Full address and postal code:		
Date of purchase:		
Purchase price:		
Current value:		
Date last value:		
Valuer's name and address:		
Name in which property held:		
Mortgage/charges:		
Land registry office copy, attached (Y/N), and date:		
Notes:		

Mortgage

Name of mortgagee:	
Address of mortgagee:	
Account name(s):	
Account number:	
Amount borrowed:	
Date commenced:	
Balance of account:	
Payment per week/month:	

Method of payment:	
Arrears:	
Notes:	

Other Charges on Property

Charge holder:	
Address:	
Amount of charge:	
Date of charge:	
Reason for charge:	
Notes:	

Ground Rent (leasehold property)

Name of landlord:	
Address of landlord:	
Payable per month/year:	
When due:	
Method of payment:	
Notes:	

Third-Party Interest in Property

Status:	
Name:	
Amount:	
Contribution mortgage:	
Contribution expenses:	
Notes:	

House Contents (significant value only: antiques, paintings, jewelry, etc.; and videos/photos)

Description	Value

Notes:	

UTILITIES (Property Liabilities)

Community Charge

	Community charge	Water charges	Electricity	Gas
Authority paid:				
Payable annually:				
When and how paid:				
Current arrears:				
Notes:				

Telephone

	Telephone	Mobile telephone
Telephone number:		
Authority paid:		
Payable annually:		
When and how paid:		
Current arrears:		
Itemized billing attached (Y/N):		
Notes:		

Property Insurance

Insurance company:	
Amount insured:	
Risks covered:	
Amount paid per week/year:	
When paid:	
How paid:	
Any special risks:	
Notes:	

ASSETS

Cash/Valuables Seized by Police/Customs

Amount/value:	
Where deposited:	
Date of deposit:	
Deposit reference:	
From where seized:	
Restrained (Y/N):	
Notes:	

Bank/Building Society Accounts

Bank name:	
Bank address:	
Sort code:	
Account number:	
Type of account:	
Full name of account holder:	
Current balance:	
Annual credit turnover:	
Annual debit turnover:	
Notes:	

National Savings

Certificate numbers:	
Value:	
Where held:	
Amount held and dates of acquisition:	
Notes:	

Premium Bonds

Certificate numbers:	
Value:	
Where held:	

Amount held and dates of acquisition:	
Notes:	

Shares

	Quoted Shares	Nonquoted Shares
Name of company:		
Amount of holding:		
Location of certificates:		
Value of holding:		
Share transfer office:		
Notes:		

Unit Trusts

Description of trusts:		
Number of units held:		
Value:		
Name and address of holder:		
Notes:		

Life Policies/Endowments

Insurance company:	
Branch address:	
Policy details:	
Surrender value:	
Beneficiary:	
Premium amount per week/month/year:	
How and when paid:	
Mortgage linked (Y/N):	
Notes:	

Motor Vehicles, Boats, Airplanes, etc.

	Motor vehicles	Boats, airplanes, etc.
Make and model:		
Location:		

Registration mark (if applicable):		
Dealer's details (motor vehicles):		
Purchase price:		
Current value:		
(Registered) keeper:		
Hire purchase (Y/N):		
Name of company:		
Address of company:		
Date of agreement:		
Balance of agreement:		
Notes:		

Other Personal Property

Description	Holder	Location	Purchase price	Value
Notes:				

Gifts to Third Parties

Description	Holder	Location	Purchase price	Value

LIABILITIES

Credit Cards

Name of card:	
Amount owed or credit:	
Average payments:	
Name of holder:	
Notes:	

Store Cards

Name of card:	
Amount owed or credit:	
Average payments:	
Name of holder:	
Notes:	

Credit Agreements

Name of company:	
Branch:	
Purpose of loan:	
Amount borrowed:	
Amount owed:	
Monthly payments:	
Arrears:	
Notes:	

Maintenance Payment

Court/office:	
Date of order:	
Beneficiary:	
Amount of payment:	
When payable:	
Method of payment:	
Notes:	

Court Judgments/Fines/Previous Forfeiture Orders

Court:	
Date of order:	
Beneficiary:	
Amount of payment:	
When payable:	
Method of payment:	
Notes:	

Other Liabilities/Debts

Creditor:	
Creditor address:	
Amount of debt/liability:	
Particulars of debt:	
Notes:	

Actual Overdrafts

Bank:	
Address and telephone no.:	
Sort code/Account no.:	
Amount:	
Notes:	

Personal Solvency

Bankruptcy order (Y/N):	
Date of order:	
Trustee/official receiver:	
Address:	
Contact and telephone no.:	
Notes:	

Part 2: Business Financial Profile of _____

BUSINESS INTEREST

Preliminary Assessment

Sole trader and business premises are realizable property (Y/N):	
Substantial interest in partnership/limited company where the interest is held in realizable property (Y/N):	
Partnership/company holds realizable property (Y/N):	
Notes:	

Trading Partnership/Company

Name:	
Date commenced:	
Company registration no. (if applicable):	
VAT registration no.:	
Trading address:	
Registered address:	
Notes:	

Company Directors/Partners

Name:	
Address:	
Position:	
Notes:	

Company's Documentation

Company details (Y/N):		Dated:	
Financial accounts (Y/N):		Dated:	
Annual returns:		Dated:	
Notes:			

Subject's Interest in Business

Details	Value
Notes:	

Realizable Property Held by Business

Details	Value
Notes:	

BUSINESS PREMISES

Assets

Trading name:	
Business address:	
Freehold/leasehold/rented (if rented, see below):	
Registered land (Y/N):	
Title number:	
Purchase price:	
Date of purchase:	
Amount outstanding:	
Current arrears:	
Current value:	
Date last valued:	
Name of valuer:	
Address of valuer:	
Notes:	

Other Occupiers

Part of premises sublet (Y/N):	
Details of area 1 sublet:	
Name of lessee:	
Address of lessee:	
Amount paid:	
To whom paid:	
Details of area 2 sublet:	
Name of lessee:	
Address of lessee:	
Amount paid:	
To whom paid:	
Details of any third-party interest:	
Notes:	

Rented Premises

Landlord's name:	
Landlord's address:	
Rent payment per week/month:	
How paid/by whom:	
Notes:	

Mortgage

Name of mortgagee:	
Address of mortgagee:	
Account number:	
Account name(s):	
Amount of loan:	
Payment week/month:	
How paid/by whom:	
Notes:	

Other Charges on Property

Name of charge holder:	
Address of charge holder:	
Amount of charge:	
Date of registration:	
Notes:	

Business Expenses

	Ongoing expenses/ business charges	Water	Electricity	Gas	Telephone
Authority paid:					
Amount per week/ month:					
Method of payment:					
Current arrears:					
Notes:					

Business Insurance

	Premises	Contents
Name of insurer:		
Address of insurer:		
Amount insured:		
Risks covered:		

Payment per week/month:		
How/by whom paid:		
Notes:		

Company Insurance Claims

Insurance company:	
Date claimed:	
Claim type:	
Amount claimed:	
Amount paid:	
When paid:	
How paid:	
Copy of claim attached (Y/N):	
Notes:	

BUSINESS ASSETS

Business Bank Accounts

Name of bank:	
Branch address:	
Sort code:	
Account number:	
Account name(s):	
Current balance:	
Date of balance:	
Credit turnover:	
Debit turnover:	
Account signatories:	
Name:	
Notes:	

Motor Vehicles, Plant/Machinery, etc.

	Motor vehicles	Plant/machinery, etc.
Make and model:		
Registration mark if applicable:		

Dealer's details (motor vehicles):		
Purchase price:		
Current value:		
(Registered) keeper:		
Hire purchase (Y/N):		
Name of company:		
Address of company:		
Date of agreement:		
Balance of agreement:		
Notes:		

Office/Trade Fixtures and Fittings

Make and model:	
Serial number:	
Purchase price:	
Current value:	
Lease purchase (Y/N):	
Name of lease company:	
Address of company:	
Date of agreement:	
Notes:	

Other Valuable Property

Details:	
Registration details if applicable:	
Purchase price:	
Current value:	
Keeper/location:	
Hire/lease purchase (Y/N):	
Name of company:	
Address of company:	

Date of agreement:	
Balance of agreement:	
Notes:	

Stock in Trade

Details	Value	Date of value
Notes:		

Work in Progress

Details	Value	Date of value
Notes:		

Fully Secured Debtors (Business)

Name	Address	Amount	Security
Notes:			

Partly Secured Debtors (Business)

Name	Address	Amount	Security
Notes:			

BUSINESS LIABILITIES

Employees

Full time:	
Part time:	
Outstanding wages:	
Notes:	

Fully Secured Creditors

Name	Address	Amount	Security
Notes:			

Partly Secured Creditors

Name	Address	Amount	Security
Notes:			

Credit Cards, Debit Cards

	Credit Cards	Debit Cards
Name of card:		
Amount owed or credit:		
Average payments:		
Name of holder:		
Notes:		

Credit Agreements (Business)

Name of company:	
Branch:	
Purpose of loan:	
Amount borrowed:	
Amount owed:	
Monthly payments:	
Arrears:	
Notes:	

Direct Debit/Standing Orders

Bank name:	
Branch details:	
Account number:	
Account name(s):	
Amount per week/month:	
When due:	
Payable to:	
Notes:	

Court Judgments

Court:	
Date of order:	
Amount of order:	
Method of payment:	
Notes:	

Winding-Up Order/Voluntary Liquidation

Winding up (Y/N):	
Liquidation (Y/N):	
Date of order:	
Resolution:	
Notes:	

Other Contractual Liabilities

Details	Amount	When payable
Notes:		

Corporation Tax/Income Tax

Tax inspector name:	
Tax inspector address:	
District:	
Reference number:	
Amount due:	
Notes:	

Value Added Tax (VAT)

VAT office:	
Address:	
VAT registration no.:	
Amount due:	
Prosecutions pending (Y/N):	
Notes:	

Articles on Premises Controlled by Subject but Not Belonging to Subject (such as goods on hire, on loan, for repair, or otherwise claimed by some other person). (Supporting evidence of claim should be sought.)

Article	Value	Third-party interest
Notes:		

Source: Adapted from Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, and Larissa Gray, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, DC: World Bank, 2009), 213.

Appendix H. Possible Discussion Points with Contacts—Informal Assistance Stage

Discussion Points

- Verify the information you have obtained.
- Obtain information and intelligence for asset tracing and investigation, including financial intelligence through financial intelligence units.
- Obtain background information to support mutual legal assistance (MLA) requests to trace and seize or restrain assets (for example, names, dates of birth, and addresses of witnesses; bank account locations; bank account numbers; and links between the assets and the offense or offender).
- Confirm any requirements or procedures for obtaining noncoercive measures, including requirements for providing notice to asset holder or target.
- Learn of any options for an emergency provisional measure (non-MLA) to avoid the risk of dissipation. If there are such options, what are the procedures and requirements?
- Define additional needs: urgency, confidentiality, procedures that must be followed.
- Review case strategy, including potential barriers to international cooperation, the best venue(s) for prosecution, and the possibility of conducting a joint investigation or using case conferences.
- Where there are multiple investigative agencies, identify relevant agencies that could provide assistance.
- Review resource issues.
- Get guidance on next steps, including MLA requirements, processes, and contacts.

Issues to Keep in Mind (and Clarify with Counterpart before Discussing Substance)

- A memorandum of understanding may be required to share information in some jurisdictions.
- Differences in legal traditions and confiscation systems may result in differences in what can be provided, what is required, and the process.
- Information you provide may be used by a foreign jurisdiction to open its own case.
- Information you request must be gathered lawfully in both the requested and the requesting jurisdictions.
- For a large case, consider a joint investigation and face-to-face meeting with counterparts.

Appendix I. Mutual Legal Assistance Template and Drafting Tips

Described below is a mutual legal assistance (MLA), along with MLA drafting and execution tips in box I.1.

Letter of Request

TO: [*Name and address of central authority in requested jurisdiction*]

FROM: [*Name and address of judge, prosecutor, central authority, or other competent authority under domestic law in requesting jurisdiction*]

[*I/we*] make this request pursuant to [*insert relevant domestic legislation authorizing request*]. [*I/we*] have the honor to request your assistance in relation to a criminal [*investigation or prosecution*] being conducted by [*name of agency*].

- *Include names and contact information of investigators and prosecutors leading the proceedings.*

Legal Basis

This request is made pursuant to *[cite legal basis (such as domestic or multilateral treaty)]*.

Nature of the Criminal Matter

This request relates to *[prosecution against or ongoing investigation involving, or restraint of assets suspected to be the proceeds of crime and subject to confiscation proceedings against]* the following individuals: *[list targets]*

- *Specify the assets to be restrained. Most often, it is best to list these assets in an appendix and reference that appendix here.*
- *List target(s), with as much information as possible—passport number, date and place of birth, nationality, address, employer.*

BOX I.1 Mutual Legal Assistance (MLA) Drafting and Execution Tips

- Contact your counterpart (including through a face-to-face meeting, if possible) to
  - Confirm general and evidentiary requirements;
  - Discuss how evidentiary and procedural thresholds might be met, and obtain examples of the types of evidence required;
  - Confirm the format for evidence (for example, affidavit, signed statement, certified court documents);
  - Discuss undertakings or assurances that may be required;
  - Discuss needs of urgency, confidentiality, or procedure;
  - Seek drafting assistance and templates;
  - Determine whether it is possible to participate in the execution of the request;
  - Assess potential barriers in fulfilling the request, such as disclosure obligations, and raise potential resource issues.
- Ensure that general and evidentiary requirements are met.
- Exclude requests when property is of a de minimis value.
- Provide a clear and concise description of the facts and the state of proceedings in the requesting jurisdiction.
- If translation is required, use professional services.
- If tracing or freezing, include as much information as possible about the location of the assets and the link between the assets and the offense or offender.
- Do not ask for everything (trace, freeze, and confiscate) in one request. Start early and proceed step by step.
- Allow sufficient time for the request to be processed and action to be taken.
- Ensure that your domestic investigations and proceedings continue, because a final order of confiscation will be required before funds can be returned. Also ensure that due process (including notice to parties and opportunity to appear) requirements are met.

Assistance is sought in relation to the following offenses: *[list offenses with maximum penalty]*

- *For wording of offenses, it is best to use the language used in the charge or proposed charge, with reference to the applicable statutory authority. Include extracts of relevant domestic law in an appendix and reference that appendix here.*

Purpose of the Request

In relation to this matter, the following is requested: *[state briefly the assistance required]*

- *Remember that mutual legal assistance (MLA) is a step-by-step process. Avoid asking for everything (documents, restraint, confiscation) in one request.*

Statement of Facts

[Describe here the relevant facts of the case clearly and concisely.]

- *There must be sufficient facts for the foreign authority to assess whether MLA requirements have been met (for example, dual criminality) and whether to grant the request. This necessitates a fact-gathering investigation in the requesting jurisdiction.*
- *Include an explanation of the link between the assets and the offense(s) or target(s).*
- *If requesting the use of coercive measures (for example, a search warrant or production order), include sufficient facts to show that the requirements in the requested jurisdiction have been met. (For examples of requirements, see chapter 4.)*
- *Include in an appendix any documents that may assist in executing the request, and reference that appendix here. Include, for example, certified court orders, affidavits, or a certificate supporting the application.*

Assistance Requested

[State the assistance requested.] We request that any mandatory court order or other order necessary to enable the provision of this assistance be sought.

- *The description of assistance should focus on what you are seeking—not the name of the measure for obtaining it—because the measures used will vary among jurisdictions. For example, one jurisdiction will use a search and seizure order to obtain bank records, and another will use production orders.*
- *Provide sufficient justification for the request, particularly with coercive measures.*
- *Provide details of any procedures that must be followed in gathering evidence to ensure admissibility. Include oaths or warnings that are required or the format of the evidence—for example, witness statements must be taped; documents must be certified.*
- *For tracing efforts, provide as much information as possible on the location of the assets. Greater specificity will be required in requests for restraint and confiscation—name of account holder, account number, branch, amount to be restrained, location of property, and so forth.*
- *For restraint requests, it may be necessary to explain the risk of dissipation, confirm that a conviction will likely result in the assets' being restrained (as listed in an appendix), provide relevant statutory authority showing that the requesting country has extraterritorial jurisdiction over the assets, and explain any other restraint proceedings that have taken place.*
- *For interviews, consider including an appendix with a proposed line of questioning.*
- *To leave open the scope for additional information, an additional statement can be added (although it is not sufficient on its own). For example,* "It is also requested that such other inquiries be made and evidence gathered as appears to be necessary to further this investigation."

Confidentiality

- *If confidentiality is required, provide a statement requesting it and the reasons it is important.*

Period of Execution

- *Provide details on when the information is needed. Include court dates, if applicable. Preserve "urgent" requests for cases of actual urgency.*

Assurances or Undertakings

Reciprocity: The government of *[name of requesting jurisdiction]* undertakes that it will comply with a future request by the government of *[name of requested jurisdiction]* for similar assistance, by providing assistance having a comparable effect with respect to an equivalent offense to that requested from the government of *[name of requested jurisdiction]* in this case.

Limits on Use: *[It may be necessary to promise that information will be used only in the investigation specified.*[1] *Some jurisdictions will not require this assurance, and it may be possible to state explicitly that information can be used for other purposes.*[2]*]*

Prior Contact or Use of Other Channels

There has been previous contact between *[name of relevant agency or authority in requesting jurisdiction]* and *[name of relevant agency or authority in requested jurisdiction]*.

---

[1] An assurance regarding use of evidence may be stated as follows: "The government of *[name of requesting jurisdiction]* undertakes that all information, documentation, or other evidence obtained pursuant to this request will be used only for the purposes of the request in connection with the offenses described above. It should not be used for any other purpose, except with prior consultation with and the consent of the appropriate authorities of *[name of requested jurisdiction]*."

[2] The United Kingdom requires that a formal request be made to use evidence for a purpose different than that stated in the original MLA request, with additional information along with the new request. See "Collateral Use: Requests Made to the UK" (pp. 6–7) in Home Office, "Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom, 2015," https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415038/MLA_Guidelines_2015.pdf.

Contact Information

The *[judge, prosecutor, or central authority officer]* who is in charge of this matter is *[name of officer],* and *[he/she]* can be contacted at *[street address, telephone number, e-mail address]*.

The case officer in *[name of the enforcement agency or prosecutorial authority]* who has knowledge of this matter is *[name of officer]*, and *[he/she]* can be contacted at *[street address, telephone number, e-mail address]*.

Appendix J. Web Resources

Stolen Asset Recovery (StAR) Initiative

- StAR website: https://star.worldbank.org/
- StAR, Asset Recovery Guides (country-wise): https://star.worldbank.org/ArabForum/asset-recovery-guides
- StAR, Beneficial Ownership Guides (country-wise): https://star.worldbank.org/content/beneficial-ownership-guides
- StAR publications: https://star.worldbank.org/?q=publications&keys=&sort_by=field_date_value&sort_order=DESC&items_per_page=20
- StAR Asset Recovery Watch Database: https://star.worldbank.org/corruption-cases/?db=All

World Bank Group

- World Bank: https://www.worldbank.org/
- Financial Integrity Unit: https://www.worldbank.org/en/topic/financialmarketintegrity

United Nations

- United Nations: https://www.un.org/en/
- United Nations Office on Drugs and Crime (UNODC): https://www.unodc.org/
- United Nations Mutual Legal Assistance (MLA) Request Writer Tool (for criminal justice system practitioners only): https://www.unodc.org/mla/
- UNODC TRACK platform (Tools and Resources for Anti-Corruption Knowledge): https://www.unodc.org/unodc/en/corruption/track.html
- UNODC Documents, Publications, and Tools: https://www.unodc.org/unodc/en/corruption/publications.html
- UNODC International Money Laundering Information Network (IMOLIN): https://www.imolin.org/
- UNODC SHERLOC (Sharing Electronic Resources and Laws on Crime): https://sherloc.unodc.org/cld/v3/sherloc/

The resources listed in this appendix are illustrative and are not exhaustive.

Financial Action Task Force (FATF) on Money Laundering

- FATF: http://www.fatf-gafi.org
- FATF 40 Recommendations: https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html

Basel Institute on Governance

- Home page: https://www.baselgovernance.org/

International Conventions, Treaties, and Agreements

(year instrument adopted / year entered into force)

International Instruments

- United Nations Convention against Corruption (UNCAC): https://www.unodc.org/unodc/en/treaties/CAC/
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988: http://www.unodc.org/unodc/en/treaties/illicit-trafficking.html
- United Nations Convention against Transnational Organized Crime (UNTOC) https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html
- Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention): http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf
- Multilateral Convention on Mutual Administrative Assistance in Tax Matters, OECD and Council of Europe: https://www.oecd.org/tax/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters-9789264115606-en.htm
- Inter-American Convention against Corruption, Organization of American States (OAS): http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp
- Inter-American Convention on Mutual Assistance in Criminal Matters, OAS: https://www.oas.org/juridico/english/treaties/a-55.html

Regional Instruments

- Commonwealth of Independent States (CIS) Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention, 1993/1994): http://www.cisarbitration.com/2017/02/03/minsk-convention-on-legal-assistance-and-legal-relations-in-civil-family-and-criminal-matters/

- African Union Convention on Preventing and Combating Corruption (2003/2006): https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf
- Southern African Development Community (SADC) Protocol against Corruption (2001/2003): https://www.sadc.int/documents-publications/show/
- SADC Protocol on Mutual Legal Assistance in Criminal Matters (2002/2007): https://www.sadc.int/documents-publications/show/807
- Treaty on Mutual Legal Assistance in Criminal Matters (2004, Association of Southeast Asian Nations [ASEAN] Legal Instruments): https://asean.org/storage/2020/02/20160901074559.pdf; http://agreement.asean.org/home/index/2.html

European Union (EU) and Council of Europe (COE) Conventions

- Council of Europe Treaty Office: https://www.coe.int/en/web/conventions/
- COE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), revised as the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005): https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/198
- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, 1950/1953): https://www.echr.coe.int/pages/home.aspx?p=basictexts
- Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Convention of Lugano, 2007): https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29
- 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention, 1968/1973): https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:41968A0927(01)
- European Convention on Mutual Assistance in Criminal Matters (1959/1962): https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/030; with two additional protocols:
  - *1978/1982*: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/099
  - *2001/2004*: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/182
- Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (1997): https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41997A0625%2801%29
- COE Criminal Law Convention on Corruption (1999/2002): https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173#:~:text=The%20Criminal%20Law%20Convention%20on,the%20prosecution%20of%20corruption%20offences
- COE Civil Law Convention on Corruption (1999/2003): https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174

EU and COE Regulations, Directives, and Decisions

- EU legal documents: https://eur-lex.europa.eu/homepage.html
- Council of the European Union Framework Decision 2003/577/JHA on the Execution in the European Union of Orders Freezing Property or Evidence: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=24; and Corrigendum to Council Framework Decision 2003/577/JHA: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003F0577; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003F0577R%2801%29
- Council of the European Union Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32005F0212
- Council of the European Union Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX%3A32006F0783
- Council Decision 2007/845/JHA of 6 December 2007 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007D0845
- Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001R0044
- Council Regulation (EC) No. 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1206
- Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast Brussels I Regulation): https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012R1215
- Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042
- Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the Mutual Recognition of Freezing Orders and Confiscation Orders: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1805

G-8 Best Practice Principles

- G-8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets: https://www.justice.gov/sites/default/files/ag/legacy/2004/06/03/G8_Best_Practices_on_Tracing.pdf
- G-8 Best Practices for the Administration of Seized Assets: https://docplayer.net/16960901-G8-best-practices-for-the-administration-of-seized-assets.htm

EU, Council of the European Union, and COE Websites

Main sites

- Official website of the European Union: http://europa.eu/index_en.htm and European Council/Council of the European Union: https://www.consilium.europa.eu/
- Mutual Legal Assistance (COE): https://www.coe.int/en/web/transnational-criminal-justice-pcoc/mutual-legal-assistance

Civil and commercial matters

- European Justice, European Judicial Network in civil and commercial matters: https://e-justice.europa.eu/content_european_judicial_network_in_civil_and_commercial_matters-21-en.do
- European Commission, Civil Justice: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice_en
- European Justice, European Judicial Atlas in civil matters (practical information on judicial cooperation in civil matters): https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do
- European Justice, Taking Evidence, national information and online forms concerning Regulation No. 1206/2001: https://e-justice.europa.eu/content_taking_evidence-374-en.do

Criminal matters

- European Justice, European Judicial Network in criminal matters: https://e-justice.europa.eu/content_ejn_in_criminal_matters-22-en.do
- EUR-Lex, Glossary of Summaries of EU Legislation on Police and Judicial Cooperation in Criminal Matters: https://eur-lex.europa.eu/summary/glossary/police_judicial_cooperation.html
- European Parliament, Judicial Cooperation in Criminal Matters: https://www.europarl.europa.eu/factsheets/en/sheet/155/judicial-cooperation-in-criminal-matters
- EUR-Lex, Summaries of EU Legislation on Judicial Cooperation in Criminal Matters: https://eur-lex.europa.eu/summary/chapter/2303.html
- EUR-Lex, Green Paper on Obtaining Evidence in Criminal Matters From One Member State to Another and Securing Its Admissibility, November 2009: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0624

Open-Source Intelligence (OSINT) Asset-Tracing Resources

Free Sites (general information, public records, business records, asset tracing, banking records)

- Open Corporates: https://opencorporates.com/ (company registries and company records)
- Open Ownership: https://www.openownership.org/ (beneficial ownership information)
- Opentender: https://opentender.eu/start (procurement data in the EU)
- EveryPolitician: https://everypolitician.org/ (politically exposed person [PEP] data)
- TinEye: https://tineye.com/ (reverse image search)
- FlightAware: https://flightaware.com/ (flight tracker)
- Internet Archive: http://www.archive.org/web/web.php
- SearchSystems.net: http://www.searchsystems.net ("invisible web" search of public records and company records—worldwide)
- Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system: http://www.sec.gov/edgar.shtml (US company records)
- ZoomInfo: http://www.zoominfo.com (people and company finder)
- White Pages: https://people.yellowpages.com/whitepages/ (people finder)
- World Legal Information Institute (WorldLII): http://www.worldlii.org (legislation and court decisions)
- Companies House: http://www.companieshouse.gov.uk (UK company records, insolvency records, persons of significant control)
- Node XL, Social Media Research Foundation: https://www.smrfoundation.org/nodexl/ (social network and media analysis tool)
- SAM.gov, US General Services Administration: https://sam.gov/SAM/pages/public/searchRecords/search.jsf (search engine for records on entities doing business with the US government)
- Court Lookup, Public Access to Court Electronic Records (PACER) (free information on US court websites): https://pacer.uscourts.gov/file-case/court-cmecf-lookup

Subscription Sites

- Dun & Bradstreet: https://www.dnb.com/
- Arachnys: https://www.arachnys.com/
- Refinitiv: https://www.refinitiv.com/en
- TRACE International: https://www.traceinternational.org/
- LexisNexis: http://www.lexisnexis.com (public records, court decisions, media reports, business records, people searches, and so on)
- CompanyDocuments: http://www.companydocuments.com (business records—worldwide)
- CorporateInformation: http://www.corporateinformation.com (company records)

- FCPA Tracker: https://fcpatracker.com/ (public disclosures by companies and agencies related to Foreign Corrupt Practices Act [FCPA] investigations)
- Clear (Thompson Reuters): http://www.clear.thomsonreuters.com (public records, company records—worldwide)
- FreeERISA: http://www.freeerisa.com (US employee benefits data)
- Echosec: https://www.echosec.net/features (social media monitoring)
- IBM Security i2 Analyst's Notebook: https://www.ibm.com/products/analysts-notebook (tools for analyzing and uncovering connections and patterns in data)

Media, Civil Society, and Private Sector Resources

- Transparency International: https://www.transparency.org/en/
- Global Witness: https://www.globalwitness.org/en/
- Global Financial Integrity (GFI): https://gfintegrity.org/
- Global Integrity: https://www.globalintegrity.org/
- Public Eye: https://www.publiceye.ch/en/
- International Consortium of Investigative Journalists (ICIJ): https://www.icij.org/
- Organized Crime and Corruption Reporting Project (OCCRP): https://www.occrp.org/en
- Tax Justice Network (TJN): https://www.taxjustice.net/
- Partnering Against Corruption Initiative (PACI) of the World Economic Forum: https://www.weforum.org/communities/partnering-against-corruption-initiative

Specialized Asset Management Offices in Selected Countries

- *Belgium:* Belgian Central Office for Seizure and Confiscation (COSC), https://ec.europa.eu/avservices/photo/photoByReportage.cfm?sitelang=en&ref=020472
- *Canada:* Canadian Seized Property Management Directorate, https://www.btb.termiumplus.gc.ca/tpv2alpha/alpha-eng.html?lang=eng&i=&index=alt&srchtxt=SEIZED%20PROPERTY%20MANAGEMENT%20DIRECTORATE
- *France:* Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC), http://www.justice.gouv.fr/justice-penale-11330/agrasc-12207/
- *Honduras:* Office for the Administration of Seized Property (OABI), https://oabi.gob.hn/
- *Italy:* National Agency for Seized and Confiscated Assets (ANSBC): https://www.benisequestraticonfiscati.it/
- *Netherlands:* Asset Management Office of the Dutch Criminal Assets Deprivation Bureau (BOOM), https://www.prosecutionservice.nl/
- *Peru:* National Seized Property Commission (CONABI), http://www.pcm.gob.pe/etiqueta/comision-nacional-de-bienes-incautados-conabi/

- *Portugal:* Asset Management Office (GAB), https://igfej.justica.gov.pt/Gabinete-de-Administracao-Bens
- *Romania:* National Agency for the Management of Seized Assets (ANABI), https://anabi.just.ro/en/The+mission+and+the+tasks+of+the+Agency
- *Spain:* Asset Recovery and Management Office (ORGA), https://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/oficina-recuperacion-gestion
- *Thailand:* Anti-Money Laundering Office (AMLO), http://www.amlo.go.th/index.php/en/about-amlo/vision-and-mission
- *Ukraine:* National Agency for Finding, Tracing, and Managing Assets Derived from Corruption and Other Assets, https://arma.gov.ua/en/
- *United States:* US Marshals Service, https://www.usmarshals.gov/

Practitioner Networks and Resources

- StAR, *International Partnerships on Asset Recovery: Overview and Global Directory of Networks*: https://star.worldbank.org/sites/star/files/networks-16-reduced-maps.pdf
- Camden Asset Recovery Inter-Agency Network (CARIN): https://www.carin.network/
- ARIN-SA (Asset Recovery Inter-Agency Network Eastern and Southern Africa): https://new.arinsa.org/
- ARIN-EA (East Africa): https://eaaaca.com/about-arinea
- ARIN-AP (Asia Pacific): http://www.arin-ap.org/main.do
- ARIN-CARIB (Caribbean): https://arin-carib.org/
- ARIN-WCA (West and Central Asia): http://www.arin-wca.org/home
- RRAG (in South America, the GAFILAT Asset Recovery Network, "GAFILAT" being the Financial Action Task Force of Latin America): https://www.gafilat.org/index.php/es/espanol/18-inicio/gafilat/49-red-de-recuperacion-de-activos-del-gafilat-rrag
- Egmont Group: https://egmontgroup.org/en
- Interpol: https://www.interpol.int/en
- Interpol, Anti-Corruption and Asset Recovery: https://www.interpol.int/en/Crimes/Corruption/Asset-recovery
- Europol: https://www.europol.europa.eu/
- Secure Information Exchange Network Application (SIENA): https://www.europol.europa.eu/activities-services/services-support/information-exchange/secure-information-exchange-network-application-siena
- Aseanapol: http://www.aseanapol.org/
- Ameripol: http://www.ameripol.org/
- OECD Automatic Exchange Portal (for cooperation on tax matters): https://www.oecd.org/tax/automatic-exchange/
- World Customs Organization (WCO): http://www.wcoomd.org/

- Arab Anti-Corruption and Integrity Network (ACINET): http://www.arabacinet.org/index.php/en/home
- Iberoamerican Association of Public Ministers (AIAMP): http://www.aiamp.info/
- European Judicial Network (EJN): https://www.ejn-crimjust.europa.eu/ejn/ejn_home/EN
- Eurojust: http://www.eurojust.europa.eu/pages/home.aspx
- International Association of Prosecutors: https://www.iap-association.org/
- Bank for International Settlements (BIS): https://www.bis.org/
- International Organization of Securities Commissions (IOSCO): https://www.iosco.org/
- International Association of Insurance Supervisors (IAIS): https://www.iaisweb.org/home

Country-Specific International Cooperation Resources

Australia

- Information on mutual assistance, alternatives to mutual legal assistance, and contact details of central authority: https://www.ag.gov.au/international-relations/international-crime-cooperation-arrangements/mutual-assistance
- International relations, including information on serving legal documents, enforcement of foreign judgments, and bilateral treaties: https://www.ag.gov.au/international-relations
- Department of Foreign Affairs and Trade: https://www.dfat.gov.au/
- Australian Federal Police: https://www.afp.gov.au/
- Attorney-General's Department: https://www.ag.gov.au/
- Australian Transaction Reports and Analysis Centre (AUSTRAC) (financial intelligence unit): https://www.austrac.gov.au/
- Commonwealth Director of Public Prosecutions: http://www.cdpp.gov.au/

Brazil

- Ministry of Justice and Public Security: https://www.gov.br/mj/pt-br
- Ministry of Justice and Public Security, International Legal Cooperation: https://www.justica.gov.br/sua-protecao/cooperacao-internacional
- Ministry of Foreign Relations: http://www.itamaraty.gov.br/
- Financial Activities Control Council (COAF) (financial intelligence unit): http://www.coaf.fazenda.gov.br/
- Legislation Portal: http://www4.planalto.gov.br/legislacao/

France

- Ministry of Foreign Affairs: https://www.diplomatie.gouv.fr/en/
- Ministry of Justice: http://www.justice.gouv.fr/

- Tracfin (financial intelligence unit): https://www.economie.gouv.fr/tracfin
- National Police: https://www.police-nationale.interieur.gouv.fr/Accueil
- FICOBA (repository of bank accounts): https://www.service-public.fr/particuliers/vosdroits/F2233
- Légifrance (official publication of legislation, regulations, and legal information): https://www.legifrance.gouv.fr/
- Agence Française Anticorruption (AFA): https://www.agence-francaise-anticorruption.gouv.fr/fr

Germany

- Federal Foreign Office: https://www.auswaertiges-amt.de/en
- Federal Ministry of Justice and Consumer Protection: https://www.bmjv.de/DE/Startseite/Startseite_node.html
- Federal Ministry of Justice and Consumer Protection (International Cooperation): https://www.bmjv.de/DE/Themen/IntZusammenarbeit/IntZusammenarbeit_node.html
- Federal Ministry of Justice and Consumer Protection (Europe and International Cooperation): https://www.bmjv.de/DE/Themen/EuropaUndInternationaleZusammenarbeit/EuropaUndInternationaleZusammenarbeit_node.html
- Financial Intelligence Unit: https://www.zoll.de/DE/FIU/fiu_node.html
- Federal Criminal Police (BKA): https://www.bka.de/DE/UnsereAufgaben/Aufgabenbereiche/aufgabenbereiche_node.html
- German legal provisions: http://www.gesetze-im-internet.de/
- National Procedures for Mutual Legal Assistance: https://rm.coe.int/16806b6348

Hong Kong SAR, China

- Department of Justice: https://www.doj.gov.hk/eng/index.html
- List of Mutual Legal Assistance Agreements (Legislative References): https://www.doj.gov.hk/eng/laws/table3ti.html
- Ministry of Foreign Affairs (Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region): http://www.fmcoprc.gov.hk/eng/
- Independent Commission Against Corruption: https://www.icac.org.hk/
- Joint Financial Intelligence Unit: https://www.jfiu.gov.hk/en/

India

- MLA information, Ministry of External Affairs: https://mea.gov.in/mutual-legal-assistance-in-criminal-matters.htm and https://www.mea.gov.in/emtsp.htm
- Indian Central Bureau of Investigation (investigation assistance, letters rogatory, MLA treaties): http://www.cbi.gov.in/interpol/interpol.php
- Ministry of Law and Justice: https://lawmin.gov.in/

- Directorate of Enforcement: https://enforcementdirectorate.gov.in
- Financial Intelligence Unit: https://dor.gov.in/preventionofmoneylaundering/financial-intelligence-unit-india-fiu-ind
- Ministry of Home Affairs (central authority): https://www.mha.gov.in/
- Ministry of Home Affairs, Internal Security-II Division (also issues policy guidelines on mutual legal assistance): https://www.mha.gov.in/division_of_mha/internal-security-ii-division

Luxembourg

- European Judicial Network (EJN) in Civil and Criminal Matters (information on civil processes, taking of evidence and mode of proof, and service of documents): https://e-justice.europa.eu/content_taking_of_evidence-76-lu-en.do?member=1
- Ministry of Foreign Affairs: https://maee.gouvernement.lu
- Ministry of Justice: https://mj.gouvernement.lu/
- Luxembourg–Financial Intelligence Unit (FIU-LUX): https://justice.public.lu/fr/organisation-justice/crf.html

Mexico

- Ministry of Foreign Affairs: https://www.gob.mx/sre
- Deputy Attorney General's and Prosecutor's Offices (request and receive MLA requests on criminal matters): https://www.gob.mx/fgr/acciones-y-programas/subprocuradurias-de-la-fgr
- Financial Intelligence Unit: https://www.uif.gob.mx/

Singapore

- Attorney-General's Chambers (central authority, receives MLA requests): https://www.agc.gov.sg/
- Ministry of Foreign Affairs: https://www.mfa.gov.sg/
- Suspicious Transaction Reporting Office (STRO) (financial intelligence unit): https://www.police.gov.sg/Advisories/Crime/Commercial-Crimes/Suspicious-Transaction-Reporting-Office

South Africa

- National Prosecuting Authority (for informal requests): https://www.npa.gov.za/
- Department of International Relations and Cooperation: http://www.dirco.gov.za/
- Department of Justice and Constitutional Development (central authority for formal MLA requests): https://www.justice.gov.za/
- Department of Justice and Constitutional Development (International Legal Obligations, including service of process and treaties): https://www.justice.gov.za/ilr/about.html

- Financial Intelligence Centre (financial intelligence unit): https://www.fic.gov.za/Pages/Home.aspx
- Public Service Commission (anticorruption authority): http://www.psc.gov.za/

Spain

- European Judicial Network (EJN) in Civil and Commercial Matters: https://e-justice.europa.eu/content_about_the_network-431-es-es.do?member=1
- Ministry of Foreign Affairs and Cooperation: http://www.exteriores.gob.es/Portal/en/Paginas/inicio.aspx
- Ministry of Justice: https://www.mjusticia.gob.es/cs/Satellite/Portal/en/ministerio
- Ministry of Justice (International Affairs): https://www.mjusticia.gob.es/cs/Satellite/Portal/en/area-internacional
- Financial intelligence unit: https://www.sepblac.es/en/

Switzerland

- Federal Office of Justice, International Legal Assistance (criminal, civil, administrative, legal aid): https://www.rhf.admin.ch/rhf/de/home.html
- Federal Office of Justice: https://www.bj.admin.ch/bj/en/home.html
- Database of Swiss Localities and Courts: https://www.elorge.admin.ch/elorge/
- Federal Department of Foreign Affairs (FDFA): https://www.eda.admin.ch/eda/en/home.html
- Office of the Attorney General of Switzerland (OAG): https://www.bundesanwaltschaft.ch/mpc/de/home.html
- Federal Office of Police (police cooperation): https://www.fedpol.admin.ch/fedpol/en/home.html
- Money Laundering Reporting Office (MROS) (financial intelligence unit): https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei.html

United Arab Emirates (UAE)

- Ministry of Justice: https://www.moj.gov.ae/
- Office of Public Prosecution: https://www.pp.gov.ae
- Central Bank of the UAE, Anti-Money Laundering and Suspicious Case Unit (AMLSCU) (financial intelligence unit): See https://www.centralbank.ae/ar and https://egmontgroup.org/en/content/united-arab-emirates-anti-money-laundering-and-suspicious-cases-unit

United Kingdom

- The UK Central Authority (UKCA), Home Office: https://www.gov.uk/government/organisations/home-office
- Guidance on Mutual Legal Assistance, Home Office: https://www.gov.uk/guidance/mutual-legal-assistance-mla-requests

- Crown Prosecution Service (represents requesting state in court proceedings): https://www.cps.gov.uk/about-cps and https://www.cps.gov.uk/legal-guidance/international-enquiries
- Serious Fraud Office (represents requesting state in court proceedings): https://www.sfo.gov.uk/
- National Crime Agency (NCA) (for investigation cases, asset tracing): https://www.nationalcrimeagency.gov.uk/
- UK Financial Intelligence Unit (within the NCA): https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/intelligence-enhancing-the-picture-of-serious-organised-crime-affecting-the-uk

United States

- Department of Justice, Money Laundering and Asset Recovery Section (MLARS): https://www.justice.gov/criminal-mlars
- Office of International Affairs, Department of Justice (central authority): https://www.justice.gov/criminal-oia
- Department of State: https://www.state.gov/
- Department of State, Office of Anti-Crime Programs (INL/C): https://2009-2017.state.gov/j/inl/c/index.htm
- Financial Crimes Enforcement Network (FinCEN) (financial intelligence unit): http://www.fincen.gov/
- Federal Bureau of Investigation (FBI), specialized agency: https://www.fbi.gov/; https://www.fbi.gov/about/leadership-and-structure/international-operations; and https://www.fbi.gov/investigate/public-corruption
- Department of Homeland Security (DHS), Homeland Security Investigations (HSI), specialized agency: https://www.dhs.gov/

Appendix K. Overview of Lausanne Guidelines

Guideline 1: Preliminary Review

Prior to a criminal investigation, involved jurisdictions should undertake a sufficient preliminary review of any indications and allegations, using all available sources, including financial and law enforcement intelligence and open source, and where appropriate share financial information with concerned financial intelligence units (FIUs), with a view to support subsequent criminal investigations.

Guideline 2: Restraining Assets

Involved jurisdictions should promptly consider various options for preventing the untimely dissipation of assets, such as government freezes or delaying transactions for predetermined periods.

Guideline 3: Investigation

Involved jurisdictions should develop a comprehensive investigative and legal strategy for the case in consultation with all concerned public institutions.

The strategy should designate a domestic lead authority, outline responsibilities, and consider all legal avenues (including administrative, civil, and criminal). Sequencing of the lines of inquiry should be agreed, including the initiation of an investigation, exchange of information, and submission of requests for mutual legal assistance (MLA). The strategy should be regularly reviewed throughout the asset recovery process.

Guideline 4: Timing

Consider—and discuss with the jurisdiction to be requested—the timing of various types of requests for MLA.

For further details and the complete Lausanne Guidelines, see the Guidelines for Efficient Recovery of Stolen Assets website (accessed June 4, 2020) at https://guidelines.assetrecovery.org/guidelines/guideline-1-preliminary-review.

Guideline 5: Legal Requirements

Requesting and requested jurisdictions need to understand the legal requirements of one another, as these will become relevant for both domestic proceedings and international cooperation.

Guideline 6: Contacts

Requesting and requested jurisdictions should establish and use direct contacts between practitioners.

Requesting and requested authorities should consider seeking assistance from international experts.

They should use all available channels for information sharing, such as international and regional networks.

Guideline 7: Communication

Requesting jurisdictions should promptly discuss relevant elements of the investigative and legal strategy as well as a case outline and subject profile with all involved jurisdictions, where appropriate.

Involved jurisdictions should designate a focal point of contact and inform all concerned parties.

Guideline 8: Parallel Investigation

Requested jurisdictions should consider initiating a parallel investigation into the assets and the facts surrounding these, in order to establish any wrongdoing in their jurisdiction.

Requesting and requested jurisdictions should fully support one another's proceedings by furnishing additional information spontaneously whenever possible and promptly processing valid requests for MLA.

Requesting and requested jurisdictions should assess their potential right of participating in legal proceedings underway in one another's jurisdiction.

Requesting and requested jurisdictions should determine whether to maintain parallel investigations and consider initiating joint investigations.

Guideline 9: Draft Request for MLA

Share draft requests for MLA between the requesting and requested jurisdictions to confirm all requirements are met.

Requesting and requested jurisdictions should ensure follow-up to support the prompt execution of requests for MLA and periodic consultation on progress in domestic processes.

Guideline 10: Execution of Request for MLA

The requested authority promptly proceeds to the execution of the request.

When considering concluding domestic proceedings that may affect related proceedings in another jurisdiction, including settlements, engage in consultation, where appropriate, to minimize obstacles to foreign proceedings or international cooperation.

Appendix L. Utilizing an Electronic Case Management System to Improve Management of Complex Investigations

Overview

This guidance is prepared not for the operational units that are well resourced and have underlying information technology (IT) infrastructure in place but rather for the many investigative units that operate where resources are scarce.

The country engagements of the Stolen Asset Recovery (StAR) initiative have seen a number of countries placing greater emphasis on the financial investigation associated with the underlying corruption, fraud, or other serious offenses. These countries are all seeking to enhance the capacity of practitioners—investigators, prosecutors, and judges—to investigate, present, and adjudicate on these crimes and to effectively trace, freeze, and recover the assets derived from criminal offenses. Alongside this capacity building, there is the need to ensure that robust policies and systems are in place to maintain the integrity of investigations, hence enabling senior managers to provide greater oversight and input into the investigations.

Given the complexity of these cases and the need for senior management to have greater visibility and involvement in determining case strategies, there is a requirement to change the way in which a case is managed. What often becomes starkly obvious, once these complex cases progress, is that the paper file creates challenges to case management and does not serve the needs of multiple investigators working on one case, perhaps at different periods in the investigation cycle. A solution to this problem is to introduce an electronic case management system (CMS).

Whether the electronic CMS should apply to all cases under investigation is a decision for management. As the investigative unit's competencies grow, the system can be expanded so that it not only tracks and records investigative steps and core data but also leads to greater e-filing of documents, thus streamlining the briefing process and easing the discovery or disclosure processes. It would not be too difficult to hyperlink e-documents from a shared drive into the CMS—ensuring that the entire investigation is largely in one safe place.

Challenges in Complex Cases

Often not fully appreciated, at the time these complex investigations are identified and commence, is the time it will take to complete the investigation, file the case in court, and reach a final adjudication. Add to this the challenges that arise once the agencies seek to recover the stolen assets, and many years can pass. Often, the investigators involved when the case started may move on, and someone else will inherit responsibility for the file. Understanding what steps have taken place; why certain decisions were made; what evidence was gathered; what evidence was not available; and why and how the data were analyzed (and by whom) can be a challenge if the information is recoded in multiple diaries, stored in different folders—or worse—misfiled.

An investigation will also need to draw on a wide range of skills, often from multiple agencies. Ensuring that all involved in the investigation can contribute to the strategy is important; no single person has all the answers. This multidisciplinary approach needs to be managed, which can be aided by the following:

- A central reporting system
- Coordination of the investigation's activities (assigning responsibility for particular tasks to the appropriate shareholder)
- The ability to review and ensure that tasks have been completed or, if there are delays, determine when their result can be expected
- The ability to gather the volume of documents (hard and soft copies) needed during the investigation and to ensure that effective chain-of-custody processes are maintained.

Alongside these management steps, any strategic decisions that must be made that affect the timing of investigative steps—when to execute search warrants; the timing of witness interviews; whether the legal professional is a witness or suspect; and when to move from informal to formal mutual legal assistance (MLA)—need to be understood and appropriately factored in or budgeted for.

All too often, cases start and incur many delays. The single most significant error and cause of delays in an investigation is reaching for MLA too early. Drafting MLA requests, supplementary requests, or informal requests consumes time—and the requests are rewritten each time, relying on the knowledge of a single person who has sole visibility of the file. If the request for MLA is not accepted, it may take many months to understand why—if an answer is provided at all. Again, the case is vulnerable if knowledge of why that MLA was requested sits with one person with sole visibility of the file.

Although these challenges will continue to exist, greater file organization will mitigate duplication and lead to a greater understanding of the investigative steps taken and the progression of the file.

The move to an electronic system does require both a process and a mindset change in the way that information is recorded for each case. By starting with a basic Excel-based system, the learning curve is reduced for those with limited exposure to and use of IT systems. For the many new graduates moving into this field of work, the Excel system also provides enough scope to use the analytical tools built into the program as they analyze data (bank statements or accounts) as well as produce charts and graphs, which simplify the presentation of large volumes of evidence before the court.

An electronic system is also likely to require a number of policy and operational decisions and directives to ensure effective implementation.

Advantages of an Electronic Case Management System (CMS)

The structure can be adapted to reflect the existing paper-based system that may be in use, but having the staff transition to an electronic system provides advantages to both the investigative staff and management:

- Standardized core processes across all investigations
- Increased accountability and visibility
- Ability to remotely monitor and provide input into a case
- Ability to scale up resources based on investigative needs
- Enhanced reporting through ease of extracting key evidence into requests and reports
- Improved systems for disclosure of information
- Central repository of intelligence data.

Although a CMS can be either a customized system or an off-the-shelf package, a customized system is likely to require significant investment in the underlying IT infrastructure, which may not always be practicable.

In transitioning, it is important that the system be user-friendly. A more complex CMS can be introduced at a later stage (as resources permit), but it is important that the transition take place, and a useful starting point may be from an agreed-upon date for adoption of the CMS for all new investigations. Retrospectively placing past investigations into an electronic CMS will require careful planning and consideration, especially if the old paper files already contain a significant amount of information. Once implemented operationally, staff and management will also better understand the benefits and limitations of such a system and be better informed on what their requirements are when seeking to move to a customized CMS.

Consider the ability to migrate the data from the initial system into a more enhanced system as resources and infrastructure permit.

Case management also needs to consider broader file and document management and core investigative products that can be similarly reproduced within the case file.

Implementing a CMS

Often the organization's IT infrastructure may be limited. Staff may need to share computers and occasionally may be using their own laptops at work. The organization may not have a reliable network system, and the IT security protocols may be outdated. All of these limitations pose challenges to maintaining the confidentiality of the investigation.

Local solutions will need to be found for each individual organization. However, it remains important that the CMS be implemented in a manner that ensures that a

backup of the system exists and that access to the system is controlled. Additionally, there must be some process to audit who accessed the system and what changes or additions were made. Some governments and international organizations use either Google Workspace or Microsoft Office 365 for Business (and Microsoft Teams) because these collections of cloud computing, productivity, and collaboration tools tend to meet most elementary security requirements. Both allow the creation of shared documents that can have restricted access and allow for a simple CMS to be put in place. This will require internal discussions and the involvement of the IT specialists supporting the institution.

Part of the solution may rest in creating a case folder in an external cloud storage system. Access to these systems often attribute different levels of access, from owner of the folder (full access) to controlling access to the case files. Even when the underlying IT infrastructure is insufficiently developed (that is, not an internal network system), it is imperative that access to the system be controlled by management and there be a robust data backup system. Where possible, it may be preferred to have a system supported by a nonexternal cloud storage system.

Core Components of a CMS

This section provides details of the core elements of any investigative organization's CMS. These can be adapted to suit specific processes or use existing forms familiar to the users who will adopt the system. It is important to reiterate that what is being set out is not a tool to streamline or automate business processes but rather a centralized system for recording case-specific information.

It should be noted that, where possible, separate information should be placed in different fields because this will improve the sorting and filtering of data. This may require that additional lines be inserted into the table structure that follows.

Case Tabs

Although tabs can be added to the example shown (figure L.1), consideration should be given to ensuring that there is effective control over who has rights to edit this database. Effective information management dictates that the rationality of separate work streams is as important as proper access.

In many instances, it may be appropriate that detailed financial analysis be undertaken in separate files created for that purpose. Although standard account analysis of transactions such as debits and credits for a bank account can easily be recorded on an Excel spreadsheet, this will be explained further in the "Financial Profile" section. The data being recorded under these tabs provides information on the case's progress. This information will assist in the preparation of other reports or requests and provide management with sufficient information to make informed decisions.

Front Sheet

The "Front sheet" tab is the file cover sheet containing basic case-file staffing information and key dates (figure L.2). Good practice is to use a unique number for each case, ending with the date the case commenced.

Investigation Log

A good way to view this tab is as the investigator's notebook or even diary. Start with a case summary of the allegations; possible offenses under investigation (remember that what you start investigating and what you eventually charge and/or indict may be different offenses, because you have yet to complete a full investigation); and the facts you are currently in possession of and can prove. For your case summary, it is good practice to think about the following:

- What potential offenses are under investigation?
- When broken down, which elements of each offense do I need to prove?
- What evidence do I currently have available? What facts can I prove now?
- What evidence and facts do I need to obtain and how?

The initial investigative steps or strategy are followed by a detailed log recording all actions taken on this case. If listing actions, treat it like a to-do list. It is important for investigators and managers alike to understand the nature of the work outstanding.

An accurate, succinct, and up-to-date overview of the allegations is important. If completed properly, the case summary can be utilized across a number of tasks within

FIGURE L.1 Core Tabs for Investigative Case Files in Excel

Source: StAR.
Note: COI = company of interest; POI = person of interest.

FIGURE L.2 Sample Front Sheet for a Case File

Case number:
Team/Investigating unit:
Date case opened:
Date case to court:
Date case closed:

Source: StAR.

the investigation and ultimately reduce the time spent repeatedly setting out the overarching facts of the case. Often, investigators will need to provide a short introduction to the investigation—for example, when applying for a search warrant or making an informal or formal request for assistance—before setting out specific evidence to support the application. The case summary provides an opportunity to ensure that the overview is accurate, reflects the current position of the investigation, can easily be utilized as an introduction, and when necessary, can be copied and pasted into other documents, reducing time.

The possible offenses under investigation are further expanded upon under the "Evidence matrix" tab (further described below), providing the investigator with an opportunity to build on the evidence for those allegations. Initial investigative steps are the initial actions that will be taken to secure evidence, identify leads, and interview possible witnesses.

Following the case summary, the log will then record the investigative steps identified and action taken. It can be written in the style of a diary or written commentary to reflect the rationale for what action has, or has not, been taken. By adopting this approach, you can provide the most accurate record of what the investigator's or investigators' thought processes were at any given time in the investigation. Adopting the diary or written commentary approach makes it easier to supervise the case, understand what obstacles may be present, and explain why the investigator has adopted a specific course of action. This may be particularly important during protracted investigations and when the investigator has to hand over the file to a colleague. Understanding *what* action was taken (possibly a year ago) and *why* it was taken may prove critical to the outcome of the investigation and is a useful reference point should the case go to trial.

In the sample shown (table L.1), the dates and times should be recorded in column A and who initiated this action in column C. Column D allows for a link or cross-reference to any document generated from that investigative step. For example, if the action was to secure bank statements, the document reference from the exhibit register (described

Table L.1 Sample Investigation Log

Date & time	Record of investigation	Entry author	Document number
	Overview of allegations:		
	Possible offenses under investigation:		
	Initial investigative steps:		
	Log of activities:		

Source: StAR.

later in this appendix) would be entered. If the action was to interview a person, a reference to the statement would be entered.

Dependent on the laws of the jurisdiction where you are working, the investigation log may be subject to discovery or disclosure. It is therefore of paramount importance that this be considered throughout the investigation. Some sensitive police or investigative tactics are afforded special legal protection in court, often to ensure that operational tactics are not exposed and lose their value.

If you are using sensitive tactics, you may wish to adopt a parallel record of investigation in a separate Excel CMS solely for sensitive operational matters. An example might be the use of intercept, covert video or audio recordings, or even a whistle-blower. By recording your log of activities in a separate location—password protected and only accessible by those authorized to see it—you significantly reduce the risk that sensitive information is inadvertently disclosed to parties unauthorized to see it.

Subject Profile

A key product in any investigation is a "subject profile" for each subject of the investigation. This set of data is necessary to establish the links between the subject; his or her associates, family, and criminal associates (some of whom may be professional enablers); and the subject's lifestyle—links that will help tie the subject to the assets and illicit money. See it as the foundation of your financial investigation.

We know criminals will do their utmost to hide assets and prevent the investigator from tying the proceeds of their crimes to them. After all, if the investigator can associate the criminal proceeds with the criminal, it immediately strengthens the investigation. The subject profile is a living document, by which we mean it should never be complete, because new information on the subject(s) of the investigation will come to light throughout the case.

The smallest piece of information in the subject profile may provide the links necessary to demonstrate the footprint or trail to a particular jurisdiction where the proceeds of crime are hidden—all of which are necessary when seeking MLA and pursuing investigative leads. These leads will generate further lines of inquiry, providing more data for the subject profile and maintaining that "living document" status. For example, if you identify that your subject is in a rental property, inquiries may establish the source of the rental payments—and identify previously unknown bank accounts associated with your subject. If a person has purchased a property, inquiries may establish the legal agent whom the subject uses.

The Excel structure allows for new subjects to be entered in each column: B, C, D, and so on. Column A sets out the standard information that should be assembled for each subject, and as appropriate, additional rows can be added if within the country there are other data sources used in forming the profile.

Where there are multiple entries, each entry should be placed on a separate line and, where possible, a standard format adopted (table L.2). The rationale for a standard format is that the investigator will become familiar with the baseline of information required when commencing an investigation. This, in turn, may generate standardized checks: Does the subject have a criminal record, and what are the crimes? Does the subject have any bank accounts held in your country? There are other standardized questions to be answered: Who is the next of kin (NOK)? Spouse or partner? Siblings? It is important that separate lines be used for each question, although it is acknowledged that addresses and other questions are likely to have multiple entries. The list of questions is not exhaustive and can be adapted to meet whatever information may be available to an investigator in any given country.

Although much of the subject profile content is self-explanatory, several points are worth noting.

Table L.2 Sample Standard Format for a Subject Profile

Profile data	Subject 1
Family name (Surname)	
First (given) name	
Middle name	
Nickname/aliases	
Subject's DOB	
NOK/partner/spouse	
Children	
Born (location)	
Passport no.	
Expiration date of passport	
Alternative ID (driver's license, etc.)	
Other nationalities	
Known addresses (current and previous)	
Employment address (not companies owned) and nature of employment	
Occupation or official position	
Parents	
Parents' address	
Parents' DOBs	
Countries frequented/foreign travel	

Source: StAR.
Note: NOK = next of kin.

Nicknames and aliases. This part of the profile should also include any known alternative spellings of the name. This is particularly important where there has been transliteration of a name, because it is not uncommon to find multiple spellings of a person's name when it has been recorded by different bodies. For example, Hailee, Haleigh, Haley, Haylee, Hayleigh, Hayley, and Haylie are variations of the same name that may appear across utility providers or between identity documents. It is also common for criminals to deliberately misspell their names across legal and other official documents as a way of disassociating themselves from the official record. It also helps investigators to know all the variations in the way a name is spelled because it allows them the greatest chance of finding critical information when searching across databases or asking others, especially foreign jurisdictions, to search across their databases. An "alternate spelling finder" (such as https://datayze.com/alternate-spelling-finder) will give you an idea of the number of variations for a given English word that could exist, based on possible character substitutions.

It is also worth remembering that if you can copy a subject's passport picture (or national ID) into the subject profile, it may become useful in subsequent requests. Often this may be the only picture you have of the subject.

Open-source intelligence (OSINT). OSINT is an invaluable source of information—and should be extensively used to identify information about your subject (table L.3). Today, much information on companies and properties can be accessed online, along with social media accounts linked to individuals.

Table L.3 Sample Subject Profile Data from Social Media and Other OSINT Sources

Profile data	Subject 1
Email	
Telephone	
Twitter	
LinkedIn	
Facebook	
Other social media	
Attorneys/agents	
Companies owned or shares held (incl. percentage held): registration name, operating name	
Associates	
Transportation or known vehicles (incl. ID numbers)	
Hobbies/interests	

Source: StAR.
Note: OSINT = open-source intelligence.

Subjects' email addresses and telephone numbers are unique identifiers and are often more useful than their names when conducting open-source inquiries.

The information from social media websites can provide useful information about a person's associates, where they may have traveled, and links to possible assets. When identifying information on nongovernment websites, it is important to take screen shots of the data because these links often can be quickly removed.

Information on the subject's assets. The "Financial profile" tab provides more scope for analysis on a person's assets, liabilities, income, and expenditures—all useful in determining a change in net worth. However, as the profile is being established, it is useful to also record initial information on assets linked to the subject under the "Subject profile" tab (table L.4).

Financial Profile

The challenge with any financial investigation is distinguishing legitimate from illicit income—sometimes referred to as criminal proceeds or the proceeds of crime. Creating a financial profile allows the investigator to profile all the subject's finances and ultimately help determine whether the subject's net worth (the total value of income and assets) exceeds what can be legitimately explained through any lawful income. In turn, that helps infer before the court which assets and income identified in the course of your investigation may be the proceeds of crime.

The financial profile is to establish whether the subjects' assets—less their liabilities (net worth) and personal expenditures—can be explained when examined against their reported income during the period covered by the investigation. If the net worth and personal expenditure exceed the reported income and cannot be accounted for by previous savings, the inference starts to be drawn that the subject has benefited from the proceeds of crime. The exercise of analyzing income, expenditure, and assets may also help illustrate sudden and dramatic changes in unexplained income and the

Table L.4 Initial Financial Data to Include in Subject Profile

Profile data	Subject 1
Known assets (1)	
Known assets (2)	
Known assets (3)	
Known assets (4)	
Known assets (5)	
Known assets (6)	
Associates	
Transportation or known vehicles (incl. ID numbers)	
Known debts (Experian - if legally entitled to search)	

Source: StAR.

subject's change in lifestyle, again helping to prove the subject has benefited from the proceeds of crime.

When looking to determine a person's change in net worth, a definite opening net worth at a date needs to be established; this may be the start of a month (for example, 01/2017). Similarly a date must be identified for calculating the closing net worth (for example, 01/2020). Sometimes the only official record you can obtain from which to draw a baseline of the subject's income is a tax record—being an official record that would prove difficult to dispute in court. Of equal use are bank account records, which again can show income and expenditures, although you may not uncover the subject's bank accounts at the outset. Much like the subject profile, the financial profile should be treated as a living document.

If you can, when recording property or assets, it will prove helpful for subsequent analysis to place the transactions in order (by transaction date and time). For a physical asset, that may be the date when the title of a property was exchanged to the subject, or when a physical asset (such as a car, boat, or jewelry) was purchased.

Because the financial profile looks to record all the known assets and liabilities for each of the subjects, it will likely be necessary to duplicate this tab for each subject. Depending on the volume of assets identified for a subject, you may also want to create a separate tab for the opening net worth and closing net worth calculation.

The current structure places all real property (houses, boats, cars, jewelry, art, bullion, and so on) in one section (table L.5, panel a). Liquid assets—cash and investments such as bank accounts (savings or checking), shares, bonds, redeemable life insurance policies, and securities (stocks, bonds, or exchange-traded funds [ETFs])—are in another section (table L.5, panel b). Assets should always be valued at cost, not at fair market value, because it helps the investigator understand the total benefit from the proceeds of crime.

When recording the assets, additional information is recorded: bank account details, addresses of properties, and the like. This information will be of use when compiling requests and when bringing the investigation file together. Where there are multiple assets, the particulars of each asset or liability are recorded in columns B, C, D, and so on for the opening and closing years.

Based on these data, total assets can then be calculated for each year, along with the change in net worth between Year *X* and Year *Y* (table L.6).

Table L.5 Sample Standard Format for a Financial Profile

a. Real property							
		Year *X*	Year *X*	Year *X*	Year *Y*	Year *Y*	Year *Y*
Property	Type (house/boat/car)						
	Address						
	Date of purchase						
	Purchase price						
	Current value						
	Date of last value						
	Valuer's name/address						
	Name in which property held						
	Mortgage/charges						
	Land registry documents (Y/N)						
	Subtotal	0	0	0	0	0	0
b. Liquid assets							
		Year *X*	Year *X*	Year *X*	Year *Y*	Year *Y*	Year *Y*
Assets	Type (deposit/shares/ bonds)						
	Bank						
	Bank address						
	Sort code						
	Account number						
	Type of account						
	Full name of account holder						
	Current balance						
	Annual credit turnover						
	Annual debit turnover						
	Notes						
	Subtotal	0	0	0	0	0	0

Source: StAR.

Table L.6 Sample Format for Calculating Value of Assets in Subject's Financial Profile

Asset type	Year *X*	Year *Y*
Bank accounts		
Other banks		
Shares		
Bonds/investments		
Boats/vehicles		
Real estate		
Jewelry/art		
Cash on hand		
Total assets		

Source: StAR.

Table L.7 records all the liabilities for the relevant dates. As appropriate, additional lines should be added if further liabilities are identified (for example, student loans).

Throughout the period the subject receives income, it must all be recorded. The total income over the period (Year *Y* – Year *X*) must also be recorded. Additionally, all income from known sources should be recorded and totaled in the appropriate table. The suggested structure (table L.8) provides a guide; however, it is important that the total calculation consider whether the funds are received on a yearly, monthly, or weekly basis.

During this period, additional expenses could also have been paid. These range from living expenses such as food and utilities to interest payments that are servicing debts (table L.9).

Based on the entries and subtotals, the change in net worth of a subject can be calculated (table L.10). By subtracting known income and adding expenditures, it is possible to identify income from unknown sources. This unknown income will then require further investigation.

When calculating the net worth and unexplained expenditure, the time period to be analyzed will be determined based on the underlying investigation, the facts of the case, and the information available. When looking at income and expenditures, if estimates are needed, it is suggested you place a comment in the Excel cell because at a future date you may be able to establish the exact figure and change the estimate to reflect the actual cost. There must be a basis for the estimate, and it is safer to overestimate.

Table L.7 Sample Format for Liability Calculation in Subject's Financial Profile

Liability type	Year *X*	Year *Y*
Real estate mortgage		
Vehicle loans		
Credit card debt		
Other consumer loans		
Money owed to others		
Unpaid taxes		
Other liabilities		
Total assets		

Source: StAR.

Table L.8 Sample Income Data in Financial Profile

Income data	Year *X*		Through to Year *Y*			
Employer or self-employed						
Occupation						
Net income						
Weekly/monthly/annually						
Commencement date						
Leaving date						
Notes						
Total income						

Source: StAR.

Table L.9 Sample Expenditure Data in Financial Profile

Expense type	Year *X*		Through to Year *Y*			
Employer or self-employed						
Utilities						
Mortgage interest payments						
Insurance						
Food						
Clothing						
Entertainment						
Total income						

Source: StAR.

Table L.10 Sample Format for Calculating Change in a Subject's Net Worth

Net worth and unexplained income data	
Total property year *Y*	
Less: Liabilities year *Y*	
Less: Total property year *X*	
Plus: Liabilities year *X*	
Increase in net worth	
Plus: Total expenses	
Less: Total income	
Expenditures from unknown sources	

Source: StAR.

The "expenditures from unknown sources" should require explanation. These expenditures may also lead to direct evidence of the crimes you are investigating. If a fraud has taken place and you can trace the financial transactions directly to the subject's bank account, you not only have evidence of illegitimate income but also can directly connect the beneficiary of the proceeds of crime to the predicate (principal) offense. The same may apply to a simple bribe payment.

This stage of the investigation should look to address common defenses raised, effectively disproving the defense should it be untrue. Such defenses include

- *Hoarding:* a claim by the subject that he or she had large amounts of cash at the starting period and that all the subject may have fallen afoul of is not having declared the cash to the tax authorities;
- *Gifts or loans:* a claim by the subject that he or she received gifts or private loans during the period; and
- *Failure to declare by error:* a claim by the subject, again, of failure to declare to tax authorities the income from funds held in certain accounts or nonmainstream financial institutions, all of which were not factored into the analysis.

Evidence Matrix

The evidence matrix is a key investigative work product that ensures that the investigation remains focused and that the investigative steps being undertaken are directed at gathering evidence relevant to the alleged crime(s).

In the initial stages, the evidence matrix looks to identify evidence the investigator has obtained and how it aligns with the elements of a criminal offense. With complex financial cases, especially where crimes have been committed in foreign jurisdictions, the investigator should expect gaps to exist in the case because the evidence-gathering exercise is not complete. The evidence matrix exercise helps identify those gaps and focus the subsequent work to be undertaken. At this stage, for complex cases, it also is

a way of recording who is assigned to undertake the investigation or part of the investigation, and it provides a place to record when each investigative step has been completed.

As the case develops, the same matrix is then used to summarize the evidence relevant to each element being proved and to provide a cross-reference to the exhibits supporting or providing that evidence.

Additionally, this matrix is a useful tool to brief newly assigned investigators as well as management on the progress of the investigation, identify where gaps in the evidence gathered may exist, and facilitate strategic decisions on the viability of continuing an investigation.

When seeking to obtain evidence from overseas, one of the principal challenges can be proving the elements of an alleged crime to a required standard not only in the country investigating the crime but also in the country receiving the request for MLA. The evidence matrix provides a structure to the request, ensuring the evidence is structured and logically and clearly identified, which is particularly useful when seeking to satisfy dual criminality requirements of the MLA request. The dual criminality requirement exists to satisfy the receiving jurisdiction that the conduct, as set out in the application, is a crime in its jurisdiction. It is unlikely that the receiving jurisdiction will have a crime described in the same way as the sending jurisdiction, but the facts as set out must constitute an offense in both jurisdictions.

For each alleged criminal offense being investigated, an evidence matrix should be prepared. It is accepted that, particularly regarding financial crime, the alleged criminal offense may eventually transpire to be something different from that charged and/or indicted to court. Therefore, during the investigation, the evidence matrix may need to be amended to meet the new elements of the crime that are likely to be subject to charge. A common example may be when "illicit enrichment" is the criminal offense initially under investigation but the investigation finds that "money laundering" is a more suitable crime for the charge or indictment. It would then be appropriate to adjust the elements of the crime.

Initially, the evidence matrix should set out in a short paragraph the allegation being investigated (table L.11). Although this may be drawn from the summary in the investigation plan (within the "Investigation log" tab), the summary must be specific to this offense—for example, as follows: "*Between* [dates], *Mr. X received payments from Company Y, in return for ensuring the company was awarded the contract for the construction of the bypass road. At this time, Mr. X was head of the evaluation committee for contracts issued by the Road Ministry under which this contract was awarded. The payments were made to an offshore account in the name of one of his children.*"

The matrix should then set out the offense—a short description, such as *bribery or bribery by a public official*—followed by the the relevant Section and Act (law) it contravenes, along with the penalty for such a contravention.

Table L.11 Sample Preliminary Evidence Matrix

A	Allegation				
	Offense:				
	Section:				
	Elements	Avenues of inquiry	Task	Who	When
1					
2					
3					
4					
5					
6					

Source: StAR.

This information would need to be included in an MLA request. This process, as stated, provides a useful reference point to ensure the offense can be charged. Because financial investigations can take months, if not years, if the law may have changed with amendments to the criminal act, this can also be catered for and adopted into the matrix.

The elements that make up the offense should then be set out in each row. The investigator must understand the law and be in a position to answer immediately or during the investigation the following questions for the criminal offense or offenses being investigated, using one row for stating each element of the crime (for instance, in this example, for *bribery by a public official*):

1. "An Official": What is the definition of "an official" in the law being applied?
2. "Corruptly accepts or obtains": What is the definition and legal interpretation of "corruptly," "accepts," and "obtains"?
3. "Any bribe for himself or any other person": What is the definition of a "bribe" and "any other person"?
4. "In respect of any act done or omitted": What is the definition of "any act done" or "omitted"?
5. "In his or her official capacity": What is the definition of "official" and "capacity"?

Alongside each of these elements, the investigator should set out the inquiries that will be initiated to obtain the evidence proving the respective element (and answering the question of law); identify who has undertaken the inquiry; and enter the date

assigned, relevant exhibits, and notes. For example, the entries for Element 1 above might be as follows:

- *Element:* Official
- *Avenue of inquiry:* Government gazette showing appointment as official
- *Task:* Obtain certified copy of gazette
- *Who and when:* (name of investigator assigned to) (date assigned)

As the inquiries are completed and the evidence gathered, the matrix can be extended with further entries of evidence for each element of the offense (table L.12), as follows:

- *Under the Evidence column:* a description of the evidence obtained. Where the evidence is to be given by a witness, it can be useful to extract the specific statements from their statement or affidavit along with any key documentary evidence to which the witness may refer. Where the evidence is a document, the Evidence column should explain the key elements of the document.
- *Under the Exhibit reference (Exhibit register) column:* an exhibit reference, which should be cross-referenced to the Exhibits tab.
- *Under the Notes column:* Anything that may be relevant to the piece of evidence. For example, for a document, you may want to reference who will need to produce the exhibit.

The objective of fully completing the evidence matrix is to provide a succinct summary of the key evidence that will be produced in support of a charge and subsequent prosecution case and to ensure that gaps in the case are identified as early as possible and addressed.

Table L.12 Sample Extension of Evidence Matrix, Listing Key Evidence by Element

A		Key evidence relevant to each element		
	Offense:			
	Section:			
	Elements	Evidence	Exhibit reference	Notes
1				
2				
3				
4				
5				
6				

Source: StAR.

Exhibit Register

Internally, a number of processes will be in place to record and manage exhibits. Although it is important to avoid duplicating processes, maintaining a register of the exhibits relevant to the case file within this electronic file provides a method to easily update and track exhibits. This system also enables the exhibits to be readily cross-referenced across the other tabs in this system, and if electronic filing is taking place, to create hyperlinks to the documents.

This register also provides a good way to identify and compile the evidence to be put forth to any witnesses and suspects, and when preparing any court file, to assemble the exhibit list and prepare the list of exhibits for discovery.

The current columns in the "Exhibits" tab can easily be added to and include data that would assist further analysis and sorting (table L.13). For example, "date of document," "to/from," and "amount" are all fields that could be added when completing the exhibit register.

Timeline of Key Events

A key investigative output produced during an investigation is a timeline (table L.14). As the investigation develops and additional evidence is gathered, understanding and remembering how events are linked becomes important. The timeline is also a useful method to identify gaps in the investigation, recall key events, and prepare for interviews of subjects and witnesses.

Table L.13 Sample Standard Format of Exhibit Register

Exhibit no.	Description of exhibits	Location recovered	Inquiries	Date/time exhibit taken & by whom

Source: StAR.

Table L.14 Sample Event Timeline Format

Date	Time	Event	Source

Source: StAR.

The timeline provides an opportunity to link a sequence of events established during the investigation to help explain the full picture of what has occurred. In especially difficult or complex cases, the sequence of events may extend over years, not months or days. Each event will have a source, be it a local news report or the concerns raised about financial transactions by a staff member in an audit department. New rows will almost certainly need to be inserted to ensure that all key events are chronologically recorded in the timeline.

Key events may also include significant transactions, although it is not recommended to use the timeline to chronologically record *all* transactions, especially in a complex financial investigation where account analysis is better employed.

Lists of Persons of Interest and Companies of Interest

As the subject profile is developed and the investigation progresses, a number of names and companies will be identified through the searches made and within the documents held. In many instances, these people may be identified early on as potential witnesses. Often, such as in the case of agents and companies, the roles they played may not become apparent until further evidence is gathered. On occasion, the person of interest (POI) or company of interest (COI) may not reappear until evidence is gathered several months or years later.

Implementing a COI and POI list at the commencement of the investigation ensures that there is a record of each natural or legal person identified, and an appropriate entry in the notes (or "additional information") section will link back to the data source (table L.15).

On the finalization of the case, consideration should be given to utilizing the POI and COI list within any intelligence database.

Case Closure Check Sheet

When a case file is finalized, standard practice is to complete a case closing sheet, recording when certain actions were completed. The form of the check sheet can replicate the existing form used by the agency.

Increasingly, under international standards to which countries are signatories—such as the Financial Action Task Force (FATF) 40 Recommendations and 11 Immediate Outcomes—countries are being assessed on the effectiveness of their systems to combat money laundering and recover stolen assets. In updating the case closing sheet, a number of new metrics should be gathered and consideration given to preparing a case study or typology report if there are lessons that can be extracted and shared.

Table L.16 shows additional checks that should be incorporated into the file closing process.

Table L.15 Sample Format of Persons and Companies of Interest Lists

a. Persons of interest (POIs)						
Date	Family name (Surname)	Other names	Address	DOB	Phone contact nos.	Additional information

b. Companies of interest (COIs)							
Date	Company name	Company number	Address	Directors	Shareholders	Agent	Additional information (linked companies)

Source: StAR.

Table L.16 Sample Items to Include in a Case Closure Check Sheet

Item	Description
Dated to court	Core data that will enable the case to be located in the judicial system.
Trial number	
Appeal date	
Appeal resolution date	
Outcome of case	Convicted/dismissed, etc.
Suspect name	A list of all persons convicted under this case, along with information on the crime charged, provision of the act, and penalty imposed. A separate entry should be made for all persons.
Offense	
Penalty	
MLA requests issued/ jurisdictions	This information will support the assessment of how well the country engages in international cooperation.
Confiscation orders issued	Details of the orders issued by the court.
Assets confiscated/value	Details of what was confiscated under the order.
Sectors used to facilitate crime/ money laundering	Where the offense charged includes money laundering, details of how the money was laundered. For example, how did the money enter the financial system? What assets were purchased?
Source of initial intelligence	This is to identify whether the information that started the investigation resulted from intelligence developed from domestic agencies (such as an FIU), from information received from an overseas agency, or from other sources such as the public or a whistle-blower.

Source: StAR.
Note: FIU = financial intelligence unit; MLA = mutual legal assistance.

The World Bank has developed a comprehensive Money Laundering Case Collection Tool as either an Excel-based or a JavaScript and HTML solution. Both versions provide flexibility for additional customization and configuration. There is no cost associated with obtaining these tools, which provide for the collection of more granular information at all stages of the investigative process. For more information, see the Financial Integrity Unit's brochure about the tool at http://pubdocs.worldbank.org/en/422681580318460585/POC-Update-04.pdf.

Lookup

A "Lookup" tab (which could be added to the tabs shown in figure L.1) is a central register of useful links and resources that can be accessed by the investigative teams (table L.17). This would include source-data websites, including government websites and agencies that should be contacted to see whether they hold any information relevant to the case.

By having a central repository of this information, investigators working on specific components have a checklist of contacts for inquiries that should be considered. Depending on how this tab is utilized, additional columns can be added to show when and who may have made contact or initiated inquiries—to avoid duplication of efforts. Ensuring that this tab is properly managed, so that defunct links and contacts are updated, will ensure maximum efficacy for what can become a useful cache of information.

The information in this register can also be carried through to new investigation files.

Charts

While not a separate tab, the financial flow and association charts created within Excel are useful products that can be added to the CMS. By using either text boxes or text boxes within different shapes, the usual practice of representing individuals, companies, and associations or links can be represented visually with ease.

This is particularly useful when more advanced analytical tools like i2 are not available.[1] Because financial investigations can cover complex financial flows, it may be easier to break down the financial flows to cover a specific period, a transaction, a company and immediate links, or a suspect.

Filing of Documents

Large case files will result in significant amounts of information being obtained from electronic files—ranging from soft copies of bank statements obtained from financial

[1] The IBM i2 Analyst's Notebook can be used to analyze and uncover connections and patterns in data. For information, see the product website at https://www.ibm.com/products/analysts-notebook.

Table L.17 Information for Inclusion in "Lookup" Tab

Phones	Internet	Flagging	Financial	Other checks
Account information	Email account information	Information check	Customs check	Births, deaths, and marriages
Billing request	IP address check	Flagging form	Inland revenue	Local tax check
Special services	Other	Alert check	FIU check	Company register
NMPR		Interpol	Utilities check	Equifax
Other			Production order	Experian
			Moneyweb search	Immigration
			Experian	Information check
			Equifax	Inland revenue
			Land registry	Land registry
			Other	Open source
				Passport check
				Alert check
				Utilities check
				Voter register
				Other

Source: StAR.
Note: FIU = financial intelligence unit; IP = internet protocol; NMPR = National Mobile Property Register.

institutions to emails and documents seized from laptops. In addition, electronic copies of documents may be created, and documents will be produced during the investigation process.

In creating the electronic CMS system, the broader structure of how all the electronic files will be filed in the system needs to be considered. A structure resembling the former paper-based system may be appropriate during the transition to the electronic CMS process. Within the case folder, the structure will likely have a number of subfolders, possibly as follows:

- Case folder *(file number)*
  - CMS *(location of case management Excel folder)*
  - Admin *(internally generated documents)*
    - Directives *(direction issued or received on the file)*
    - Applications *(soft copies of search warrant, MLA, and financial intelligence unit [FIU] requests)*
  - Exhibits *(soft copies of all exhibits)*
    - Subfolders based on source of documents and suspects
  - Work products
    - Subfolders for each product, such as bank analysis and charts.

Resources

StAR has developed a training program to introduce participants to the case management system. The two-course program, adapted to specific country legislation and practices, includes the following:

1. An introduction, through practical exercises, to the core principles of conducting a financial investigation, utilizing domestic resources, and engaging in international cooperation. This course also provides useful links to a number of open-source resources that can be utilized to support the preparation of the subject and financial profiles and to expedite the obtaining of evidence relating to companies and properties in offshore jurisdictions.
2. Application of the learning from the initial course to a case simulation exercise, utilizing the case management system. This simulation requires participants to analyze financial information, trace assets, draft requests, and prepare the core work products for the investigation, culminating in the preparation of the financial evidence file and presentation of the case.

The program is more effective when run with participants from all investigative and prosecutorial agencies within the country. This multidisciplinary team approach encourages domestic cooperation and a broad understanding of how each agency can contribute to ensuring that an effective investigation is conducted. Each program includes a series of quizzes that tests the participants' knowledge and learning throughout the course.

In addition to this program, StAR runs a number of other programs to support a country's asset recovery efforts and has produced a series of resources for practitioners, including the following publications:

- *Asset Recovery Handbook: A Guide for Practitioners*
- *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*
- *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets*. Civil lawsuits are often overlooked as a way to recover stolen assets. This StAR report shows how they can effectively complement the more commonly used criminal approaches.
- *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do about It*
- *Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery in Corruption Cases*. A step-by-step guide for asset recovery practitioners on the use of insolvency proceedings in recovering corruption proceeds.

All publications can be downloaded from the StAR website at https://star.worldbank.org.

ECO-AUDIT

Environmental Benefits Statement

The World Bank Group is committed to reducing its environmental footprint. In support of this commitment, we leverage electronic publishing options and print-on-demand technology, which is located in regional hubs worldwide. Together, these initiatives enable print runs to be lowered and shipping distances decreased, resulting in reduced paper consumption, chemical use, greenhouse gas emissions, and waste.

We follow the recommended standards for paper use set by the Green Press Initiative. The majority of our books are printed on Forest Stewardship Council (FSC)–certified paper, with nearly all containing 50–100 percent recycled content. The recycled fiber in our book paper is either unbleached or bleached using totally chlorine-free (TCF), processed chlorine–free (PCF), or enhanced elemental chlorine–free (EECF) processes.

More information about the Bank's environmental philosophy can be found at http://www.worldbank.org/corporateresponsibility.

Developing countries lose billions each year through bribery, misappropriation of funds, and other corrupt practices. Much of the proceeds of this corruption find "safe haven" in the world's financial centers. These criminal flows are a drain on social services and economic development programs, contributing to the impoverishment of the world's poorest countries. Many developing countries have already sought to recover stolen assets. A number of successful high-profile cases with creative international cooperation has demonstrated that asset recovery *is* possible. However, it is highly complex, involving coordination and collaboration with domestic agencies and ministries in multiple jurisdictions, as well as the capacity to trace and secure assets and pursue various legal options—whether criminal confiscation, non-conviction based confiscation, civil actions, or other alternatives.

This process can be overwhelming for even the most experienced practitioners. It is exceptionally difficult for those working in the context of failed states, widespread corruption, or limited resources. With this in mind, the Stolen Asset Recovery (StAR) Initiative has developed and updated this *Asset Recovery Handbook: A Guide for Practitioners* to assist those grappling with the strategic, organizational, investigative, and legal challenges of recovering stolen assets. A practitioner-led project, the *Handbook* provides common approaches to recovering stolen assets located in foreign jurisdictions, identifies the challenges that practitioners are likely to encounter, and introduces good practices. It includes examples of tools that can be used by practitioners, such as sample intelligence reports, applications for court orders, and mutual legal assistance requests.

StAR—the Stolen Asset Recovery Initiative—is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.

StAR Stolen Asset Recovery Initiative
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