

ENGLISH only



Seminar on Identifying, Restraining and Recovering Stolen Assets in the OSCE Region

Background Paper

Vienna, 3-5 September 2012

Corruption, theft of public funds and flow of stolen money both individually and collectively can have devastating impacts on economic, political and social development. Although precise estimates are inherently difficult to produce, the Stolen Asset Recovery (StAR) Initiative of the World Bank and the United Nations Office on Drugs and Crime (UNODC) conservatively estimates that corrupt officials steal USD 20 to 40 billion from developing countries each year – a figure equivalent to 20 to 40 per cent of annual international development assistance.¹

These financial losses, together with corruption and lack of transparency that drive them, waste public resources, destabilize financial systems and hinder foreign investment. When widespread and sustained, these crimes undermine trust in government, and weaken confidence in public institutions, democratic values and the rule of law, with negative implications for stability and security. Moreover, criminals who succeed in holding onto the proceeds of crime are often driven to further crime.

Identifying, confiscating and returning stolen assets, however, when properly executed, have the potential to break that criminal cycle. International awareness of the benefits of asset recovery has increased in recent years. The topic has also been included, in a major breakthrough, as an explicit component and autonomous chapter (chapter V) of the United Nations Convention against Corruption (UNCAC). The StAR Initiative and other support structures have emerged to support States in adopting and implementing the UNCAC provisions on asset recovery.

Working Session I: Successes and challenges in asset recovery

A number of national authorities have taken steps to adopt and implement domestic legislation to facilitate asset recovery efforts. Many countries have developed anti-corruption and asset recovery institutions, and several asset recovery cases have drawn significant media attention. However, asset recovery efforts continue to face challenges in a number of countries and to date, the StAR Asset Recovery Watch database has recorded only 177

¹ http://www1.worldbank.org/finance/star_site/stolen-assets.html

international asset recovery cases.² In addition, the StAR estimates that only \$5 billion in stolen assets has been repatriated over the past 15 years.

Successful asset recovery cases benefit from sound legislation, well-functioning institutions, open channels of communication and trust among asset recovery practitioners in different jurisdictions. Asset recovery efforts are hampered by inadequate legal frameworks, mishandled mutual legal assistance requests, limited investigative and judicial capacity and a lack of political will. Acknowledging these barriers to asset recovery, and studying successful cases as guidance for further action are steps countries can take to streamline their asset recovery efforts.

Successful outcomes in a number of asset recovery cases with creative international co-operation models have demonstrated that asset recovery, while highly complex, is possible. In order to mobilise efforts for more systemic and timely return of stolen assets, there is a need for both preventive and enforcement measures. Likewise, there is a need for an environment in which different public agencies are able to co-operate so that information can be analysed appropriately and acted upon.

The participants may wish to consider the following questions:

- What type of barriers is encountered in asset recovery practice in OSCE participating States?
- What are the priority areas in OSCE participating States for which enhanced efforts are needed and sufficient resources should be provided to deal effectively with asset recovery cases?
- Are there good practices on how to overcome barriers to asset recovery that could be disseminated and shared for the benefit of countries lacking the related capacities?

Working Session II: International and domestic legal instruments and processes available to support asset recovery efforts

Over the past two decades, the international community has developed a framework of international agreements and standards to address issues pertinent to asset recovery that are instrumental in building robust asset recovery regimes. These instruments include, inter alia, the following:

- United Nations Convention against Transnational Organized Crime (UNTOC);
- The revised Financial Action Task Force (FATF) International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation;
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198).

It was the United Nations Convention against Corruption, however, which for the first time regulated in a detailed manner asset recovery issues in a separate chapter. Beginning with stating that the return of assets pursuant to that chapter is a “fundamental principle” and that States parties shall afford one another the widest measure of cooperation and assistance in that regard (art. 51), the Convention includes substantive provisions laying down specific measures and mechanisms for co-operation with a view to facilitating the repatriation of assets derived from offences covered by the UNCAC to their country of origin. One of the basic elements that differentiates the UNCAC from the UNTOC is the regulation of the return and disposal of assets. While the UNTOC foresees the absolute discretion of the confiscating

² <http://star.worldbank.org/corruption-cases/arwcases/>

State party as to the ways of disposal of the confiscated proceeds of crime or property (article 14), the UNCAC imposes the obligation for States parties to adopt such legislative and other measures that will enable their competent authorities, when acting on a request made by another State Party, to return confiscated property to the requesting State Party, depending on how closely the assets are linked to it in the first place (article 57).

At the international level, these instruments and standards provide tools to assist authorities in putting in place an efficient system of mutual legal assistance which is necessary for asset recovery purposes as well. Both the UNTOC and the UNCAC, in particular, are essential to collective action to recover the proceeds of corruption and stolen assets. Ratification and full implementation of these two conventions is a necessary step forward. Almost all OSCE participating States have ratified the UNCAC, with the exception of Andorra, the Czech Republic, Germany, the Holy See and San Marino.

To prevent public officials from stealing assets and to promote transparency in government structures, many countries around the world have recognized the potential risk posed by Politically Exposed Persons (PEPs) and have introduced asset declaration systems. International instruments and standards that address PEPs and asset declaration systems include the UNCAC (Article 52), the FATF Recommendations (Recommendation 12) and the 3rd EU Anti-money laundering Directive (2005/60/EC) (Article 13).

Although international and domestic legal instruments are critical in support of asset recovery, in many countries there is still a need to work on their effective implementation. The implementation can be slowed down due to insufficient political will, ill-equipped institutional frameworks, and lack of resources and manpower. Also, diverse legal systems and varying legal standards can make it difficult to introduce new concepts and procedures into existing legal systems.

A good practice reported in the area of confiscation, and increasing in a number of jurisdictions, is the adoption of legislation permitting confiscation without a conviction. Such practice is encouraged in multilateral treaties and by international standard setters (see, for example, article 54(1)(c) of the UNCAC).

The participants may wish to consider the following questions:

- What measures can be taken in OSCE participating States to accelerate the ratification and/or promotion of the full domestication of multilateral instruments focusing on asset recovery (UNCAC) or supporting recovery efforts?
- What measures and initiatives could be explored to ensure that domestic laws are regularly reviewed as to their adequacy in line with the international standards on – or pertaining to – asset recovery?
- What is the current practice in identifying politically exposed persons (PEPs) and how can such practice be improved?
- How best to facilitate mutual understanding between jurisdictions with different legal traditions, standards and requirements?
- What is the experience emerging from the application of non-conviction-based confiscation measures in certain OSCE jurisdictions? What are the lessons learnt?

Working Session III: Practices and lessons learned in asset recovery for requesting and requested states

Noting the links between efforts to tackle various types of economic crime, states have increasingly devoted attention to fostering co-operation between their national institutions with mandates to prevent and stop corruption, money laundering and the financing of

terrorism. The FATF, for example has produced a report entitled Specific Risk Factors in Laundering the Proceeds of Corruption.³ In some countries, tax authorities are involved in verifying the income and asset declarations of public officials. In addition, financial intelligence units analyse information from banks and other entities which file reports on suspicious transactions.

Even with a sound legal framework, asset recovery is often hampered by operational barriers or impediments which are related to ineffective communication between the co-operating States. Communication problems involve, for example, difficulties in identifying focal points to make Mutual Legal Assistance (MLA) requests, challenges in maintaining contacts and coordinating asset recovery actions, delays in processing and responding to MLA requests as well as the lack of direct contacts among asset recovery practitioners. Among the primary challenges to the recovery of the proceeds of crime is the lack of exchange of information among the affected countries. An effective asset recovery process requires collaboration across multiple stakeholders, such as banks, financial intermediaries, FIUs, law enforcement authorities and others. Such a collaborative approach allows for more strategic intelligence gathering and access to additional asset recovery tools.

The cornerstone of any country's successful and lasting practice on the recovery of stolen assets is the adoption of a clear, comprehensive, sustained and concerted policy and strategy. Part of this strategy should build on more forceful implementation of anti-money laundering measures, many of which are not properly observed or practically applied. Financial institutions and their supervisors need to be more diligent and proactive when dealing with Politically Exposed Persons (PEPs) in the first place. Robust anti-corruption measures, both in the areas of prevention and criminalization and law enforcement, should also be in place as substantial components of a strategy on asset recovery.

The participants may wish to consider the following questions:

- What are the strategic components of an effective asset recovery policy?
- How have OSCE participating States applied the provisions of related international legal instruments on the prevention and detection of the transfer of proceeds of crime, especially by identifying the customers of financial institutions and the real beneficiaries of the funds; and by increased monitoring of suspicious financial flows?
- Which are the obstacles encountered in the field of asset recovery co-operation regarding investigation and prosecution in money-laundering and corruption cases?

Working Session IV: Asset tracing, freezing and seizure

Stolen assets can be moved across the borders in minutes and the proceeds generated by crime are often transferred through various legal entities and countries in an attempt to obscure the criminal origins and beneficial ownership of the funds. Consequently, one of the biggest challenges in an asset confiscation case is producing the evidence that links the assets to the criminal activities. To establish this link (also referred to as the “nexus” or a “paper trail”), practitioners in the asset recovery field need to identify and trace assets or “follow the money” until the link with the offence or location of the assets can be determined.

Particularly in large cases involving significant activity and volumes of documentation, practitioners often find it helpful to set priorities and focus in their investigations on specific types of documents per accounts or on a particular time frame. For example, securing, obtaining and analyzing bank account documentation that can be mapped out is most useful in

³ <http://www.fatf-gafi.org/media/fatf/documents/reports/Specific%20Risk%20Factors%20in%20the%20Laundering%20of%20Proceeds%20of%20Corruption.pdf>

money laundering cases where practitioners need to identify the links between individuals and companies and to understand the money flow.

However, practitioners seeking to recover assets may face difficulties with a requested country due to bank secrecy rules or the prioritization of national casework over international mutual legal assistance (MLA) requests. Legal barriers including a lack of criminal liability for legal persons may also hinder a State's ability to act on an international request for assistance.

A variety of professionals including lawyers, financial advisors, notaries, accountants and others are often used by criminals to piece together complicated transfers of money and other assets in order to hide ownership of ill-gotten gains. Ample experience with money laundering cases demonstrates that "piercing the veil" is a formidable task. This, in turn, requires asset recovery practitioners to gain an understanding of different mechanisms and vehicles that might be exploited to secure proceeds of criminal activity. Technology also has an important role to play in facilitating cooperation, employing systematic and proven techniques during an investigation and constructing the money trail in cases involving stolen assets.

Obviously, once ill-gotten gains have been traced to a specific location, the legal action sets in: restraint or freezing orders are of paramount importance. Many jurisdictions require a full domestic judicial procedure before a freezing order can be enforced. During that time, the stolen funds may have moved out of the court's jurisdiction. Efficient and timely asset recovery therefore requires countries to establish mechanisms for enforcing foreign orders to freeze and seize proceeds of crime or property derived from it for the purpose of eventual confiscation.

The participants may wish to consider the following questions:

- What type of measures need to be in place to allow for the rapid tracing and temporary freezing or seizure of assets before receiving a formal MLA request?
- What is the role of financial intelligence in the investigation and the tracing of stolen assets in complex economic crime and corruption cases?
- How best to use the anti-money laundering framework to trace, freeze and seize assets?

Working Session V: Internal and external co-operation and private civil litigation for the purpose of asset recovery

The primary forms of international co-operation in asset recovery include informal assistance, the conduct of joint investigations, the provision of MLA, transfer of criminal proceedings to another jurisdiction, sending and enforcing foreign freezing and seizing orders and – if the request for assistance is also focused on the arrest of, and judicial action against, the person(s) involved - extradition.

When seeking international co-operation, practitioners should be proactive, focus on strategic considerations and be aware of challenges or difficulties that may arise in the process of asset recovery. Because tracing of assets is highly time sensitive, engaging in informal assistance channels with foreign counterparts can help practitioners to ensure more rapid investigations as well as build trust among the parties. Considerations about legal and evidentiary requirements that requesting jurisdictions must meet in submitting MLA requests should also be taken into account.

Mutual legal assistance (MLA) requests can be a useful tool for securing international co-operation on asset recovery cases, particularly when one State is requesting another to identify, freeze and repatriate assets believed to have been stolen from the country of origin and moved to a country of destination. Often, however, MLA requests are completed in a manner to which the requested State is unable to respond. MLA requests are sometimes sent to a broad range of countries with a demand that any assets related to a particular individual or case be identified. Many countries are unable to respond to such requests because they do not include specific information linking the allegedly stolen assets to individual offences. Due to differences in national law and practice, MLA requests often do not contain the specific language a requested country may require in order to act. There may also be a lack of trust between states hampering the exchange of sensitive information. Informal contact prior to sending a formal MLA request, can assist in preventing and overcoming some of these issues, ultimately speeding up and increasing the chances of success of the asset recovery process. Simplifying and harmonizing legislation and proactively working with foreign counterparts to address these differences are important in establishing effective asset recovery systems.

The lack of co-ordination between relevant players is an impediment in asset recovery. Within the domestic context, the timely response to MLA requests could be hampered by their channelling through numerous government agencies or departments, thus slowing down the process unnecessarily. Many practitioners recommend a “joint task force” approach, whereby joint working arrangements can facilitate national co-ordination and co-operation, as well as avoid duplication of effort and fragmented action.

With a view to overcoming challenges in the effective pursuit and recovery of criminal assets, many countries have also introduced civil confiscation regimes or other forms of non-conviction based forfeiture laws. Seeking mutual legal assistance for the enforcement of such civil or non-conviction based forfeiture orders may be difficult, in particular where the requested country’s legal system does not provide for such legal tools.

As a third avenue, countries may use private civil litigation filing cases in the courts of other jurisdictions for the purpose of recovering the proceeds of corruption, in particular in cases where the state can successfully claim damages or prior ownership of the assets. In such cases, however, the country pursuing the recovery will only in limits be able to rely on the cooperation of the law enforcement authorities of the jurisdiction where the assets are located.

The participants may wish to consider the following questions:

- How can OSCE participating States best achieve efficient and effective co-ordination of domestic authorities when acting as requested or requesting in asset recovery cases?
- In the area of mutual legal assistance, what good practices are there to expedite co-operation and eliminate impediments to the full execution of requests? What are the difficulties encountered when applying the provisions of international legal instruments on international co-operation in criminal matters? Which are the possible solutions for addressing such difficulties?
- Have there been any experiences/practical cases/best practices in OSCE participating States in pursuing international cooperation in the enforcement of non-conviction based seizure and confiscation orders?
- Have there been any experiences in the OSCE region in using private civil litigation in pursuing asset recovery in other jurisdictions?

Working Session VI: Regional co-operation on asset recovery via networks and focal point initiatives

To facilitate more effective cooperation in asset recovery, it is important to involve as many countries as possible in the dialogue and encourage the development of contacts and partnerships between and among different national authorities. One way of doing so is by developing global and regional networks.

These networks provide a platform for dialogue between parties and help to build trust and mutual co-operation in support of tracing, freezing or seizing, and confiscating stolen assets. In addition, asset recovery networks can also act as advisory groups to other appropriate authorities, promote the exchange of information and good practices, and with time can develop into centres of expertise on tackling the challenges of asset recovery.

Examples of such networks are: StAR/Interpol Asset Recovery Focal Point Network, Camden Asset Recovery Inter-Agency Network (CARIN), and the Asset Recovery Experts Network (AREN).

The CARIN is an informal network of contacts, comprised of law enforcement and judicial practitioners. The aim is to increase the effectiveness of its members' efforts to deprive criminals of their illicit profits by advising on MLA requests and developing practical co-operation channels to help each other in asset tracing and confiscation. It consists of 35 members of which 28 are from the OSCE participating States.

Also the StAR/Interpol Asset Recovery Focal Point Network supports investigations through informal assistance for the purpose of recovering proceeds of corruption and financial crime. It has established a secure contacts database of law enforcement officials who are able to respond to emergency requests for assistance to reduce the risk of losing the money trail. The StAR/Interpol Asset Recovery Focal Point Network has 77 member states.

Furthermore, the AREN initiative is an informal online forum for professionals, who are involved in asset recovery, allowing its members to connect, network, communicate and exchange information at all times on issues related to asset recovery.

The participants may wish to consider the following questions:

- What is the experience gained in OSCE participating States from the role and function of focal points, or designated points of contact, whether for formal MLA or other assistance?
- What channels of communication need to be in place to ensure speedy and effective exchange of information and co-ordination?
- What measures need to be taken to strengthen networking for asset recovery purposes in the OSCE region?
- What kind of assistance can international organizations offer to assist countries in the OSCE region in strengthening the networking among asset recovery practitioners?

Session VII: Knowledge materials, self-assessments and gap analysis in preparation for the 2015 UNCAC review of implementation

Asset recovery is a highly complex process requiring practitioners to act with professional expertise, efficiently and timely. To help build up the knowledge and skills in asset recovery a number of resources have been developed over the last few years. The Working Group on Asset Recovery, established under the authority of the Conference of the States Parties to the

UNCAC, accords high priority to the availability, creation and management of cumulative knowledge on asset recovery. The StAR Initiatives has produced several publications addressing knowledge gaps in specific areas of asset recovery such as *Asset Recovery Handbook: A Guide for Practitioners*; *Barriers to Asset Recovery Study*; *Report on Politically Exposed Persons: Preventative Measures for the Banking Sector*; StAR-OECD Publication - *The Identification and Quantification of the Proceeds of Bribery*; and *A Good Practice Guide for Non-conviction-based Asset Forfeiture*, to name only a few, as well as tools for practitioners such as the *Asset Recovery Watch Database*

The UNODC has developed tools such as the *TRACK Portal*, the *UNCAC Legal Library*, and the *Self-Assessment Checklist on the Implementation of the UNCAC*. In addition, the UNODC is currently completing its work to expand the *Mutual Legal Assistance Request Writer Tool* (available online at <http://www.unodc.org/mla>) to include additional features related to asset recovery requests. The existing computer-based tool currently provides support to national practitioners in the preparation and transmission of mutual legal assistance requests and its expansion intends to ensure the prompt communication of asset recovery requests and, thus, the expeditious return of assets through the effective co-operation of the requesting and requested States.

Moreover, the UNODC has been preparing a *Digest of Asset Recovery Cases*, which is intended to provide factual examples of how the mechanisms for asset recovery and international co-operation have been applied and how well they have functioned in actual situations over a period of decades and around the world.

The challenge ahead is to disseminate these knowledge products that have already been generated and facilitate their application in support of asset recovery activities.

Another challenge that needs to be addressed is that of conducting self-assessments to collect feedback on asset recovery priorities and needs. Recognizing that chapter V of the UNCAC would be reviewed during the second cycle of the Implementation Review Mechanism, the Working Group on Asset Recovery stressed the importance of preparing States parties for the review of implementation of that chapter, to commence in 2015. For that purpose, the Working Group recommended that a multi-year work plan be developed to structure its work until 2015, and requested States to submit relevant proposals to the UNODC Secretariat by 1 October 2011. At its fourth session in Marrakech in October 2011 the Conference requested the Working Group to proceed with developing such a work plan. At its sixth meeting, held in Vienna from 30 to 31 August 2012, the Working Group considered and assessed the multi-year work plan prepared by the UNODC Secretariat.

The participants may wish to consider the following questions:

- How can the knowledge materials on asset recovery best be used for training and technical assistance activities in countries within the OSCE region lacking capacity in related issues?
- What options need to be considered to ensure that dedicated resources for asset recovery in countries are in place?
- How can international stakeholders best assist, upon request, OSCE participating States in identifying needs and priorities in the field of asset recovery?