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Tracing, freezing, confiscating and repatriating the proceeds of corruption

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Let me just begin by saying how delighted I am in being given the opportunity to speak to such a distinguished audience on what is increasingly a subject of considerable debate. It is also a personal pleasure having been part of the UK's delegation to the OECD's Working Group on Bribery for a number of years now and despite having assisted on some outreach activities, in Russia and South America principally, as I have never had the good fortune to work on the ADB/OECD SE Asian projects. It has been without doubt a huge success and provides a light to so many other regional initiatives.

I have been asked by my friends in the OECD to speak for just 20 minutes on what is probably the most talked about aspect of the international anti-corruption struggle at present – asset recovery.

By way of a brief introduction to the subject it is worth noting that despite the visible efforts of the international community to stem the growth of corruption, consider the many international anti-corruption conventions adopted in recent years such as the Inter-American Convention against Corruption, the OECD Convention against Bribery of Foreign Public Officials, the African Union Convention on Preventing and Combating Corruption, and the Council of Europe Criminal Law Convention on Corruption to name a few, little has been done to address the real problems that countries face in trying to recover what has been plundered from them. And so the problem seems to remain almost unabated. The figures remain depressing.

In 2004 the World Bank announced that in one year alone over \$1 trillion were paid in bribes – this figure, now out of date, does not even include the cost of large scale fraud or embezzlement from public funds.

TI's CPI last year suggested that of the \$4 trillion spent on government procurement annually that approximately \$400 billion will be siphoned off in corruption, classically in the form of bribes. This is monies that are lost to public projects such as roads, schooling and the construction of hospitals. It also often leads to the building of unnecessary infrastructure or infrastructure that is of dangerously poor quality.

And in 2003 the EU's Commission published a paper entitled the EU Africa Dialogue which maybe should have been the start of a new realisation when it estimated that foreign banks hold the proceeds of corrupt practices across Africa equivalent to more than half of the entire continents debt!

Into this rather depressing equation has come the United Nations Convention Against Corruption (UNCAC). Will it simply be added to the shelf with all the other international and regional structures or will it lead to the dawn of a new hope, a realisation that a change is

slowly but inexorably taking place. Can it become the tool by which we start to make a change and by which we start to even make a dent into the figures that are declared annually by the G8, for example, on asset repatriation?

Well UNCAC is certainly the first truly global and legally binding instrument in the fight against corruption coming into force as it did on 14 December 2005. The Convention deals with an impressive range of offences, preventative measures and also builds upon the growing array of provisions designed to strengthen international cooperation in criminal matters. However, where UNCAC differs from many of the other anti-corruption conventions already in existence is the innovative and far-reaching provisions on asset recovery.

It is indeed remarkable that those who negotiated the Convention were ever able to get such consensus out of those deliberations. Some have described the asset recovery part as full of more legal holes than a good Swiss cheese. However, what is truly remarkable is that it exists at all.

Borrowing the words of the UNODC's Executive Director Antonio Maria Costa during the opening session of the first session of the Conference of the States Parties to the UNCAC last year he said: *"the section of the convention that seems to get the most attention is asset recovery -- and for good reason. To make the return of assets a fundamental principle of the convention, and to agree on bold new measures for such return, were major breakthroughs. Implementing these measures is new to all countries, whether developed or not."*

You will have already heard much about the manner in which Chapter V of the Convention begins with the statement that the return of assets is a "fundamental principle" and how the substantive provisions set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned.

But UNCAC goes further in the sense that in terms of the latter it proposes a series of provisions which favour return to the requesting State Party, depending on how closely the assets were linked to it in the first place. Thus, funds embezzled from the State are returned to it, even if subsequently laundered, and proceeds of other offences covered by the Convention are to be returned to the requesting State Party if it establishes ownership or damages recognised by the requested State Party as a basis for return. In other cases assets may be returned to the requesting State Party or a prior legitimate owner, or used in some way for compensating victims.

Chapter V also provides mechanisms for direct recovery in civil or other proceedings and a comprehensive framework for international cooperation which incorporates the more general mutual legal assistance requirements.

So what are the real challenges in breathing real life into these new provisions? How do we for example overcome the common problems that we have seen in the limited cases so far of difficulties in repatriating monies to its true owners, usually developing nations, when all types of legal and administrative obstacles are put in the way? How do we prevent the flood of monies that comes out of those countries so easily? Furthermore, how do we make the developed nations face up to the inevitable fact that they appear almost complicit in harbouring stolen funds?

In my short time available I simply wish to flag up what I believe are just some of the main challenges that face us all in seizing the wonderful opportunity that UNCAC has delivered to us and making asset recovery work.

Lack of an appropriate legal framework

Some of the well documented recent asset recovery efforts have demonstrated that existing legal frameworks can often fail to provide a sufficiently practical basis for the recovery of assets. Multilateral and bilateral MLA treaties for example can often be too limited in scope and are often not applicable other than in the context of the specific cases for which they were originally designed. As a consequence, no standard procedures have been developed. Indeed it is difficult to establish what is often required in terms of legislation to allow agencies to follow the requisite steps in a recovery action.

There needs to be a concerted effort to assist States in implementing UNCAC and in ensuring that its legal framework is capable of ensuring that requests can be made to repatriate stolen assets and indeed that its laws are able to accede to such requests.

Overcoming jurisdictional issues

Where legal systems are incompatible or just plain different for example when cases require cooperation between civil law and common law systems, cooperation has been historically difficult. And when the objective is to trace and freeze assets as a matter of urgency. MLA treaties have often proved to be ineffective. Overcoming jurisdictional problems can slow down investigations, often fatally. By the time investigators get access to documents in one jurisdiction, the assets may have been moved to another.

Changing the mindset of law enforcement

As criminal investigators and prosecutors there has always naturally been an emphasis on convicting perpetrators of corrupt activity and sending them to prison. The question of seizing their assets has often been almost an afterthought. Increasingly if course as crime has become transnational and assets are moved at the press of a button law enforcement agencies the world over have had to rise to a new challenge. They have also realised that sometimes the criminal route is not quick or flexible enough.

For example, in an international criminal recovery strict requirements often have to be met under the national law of a requested State before the collaboration of its authorities can be obtained. Courts in requested States often set preconditions prior to their agreeing to freeze assets or to keep them frozen.

Of course the new dawn requires that investigators and prosecutors should now think in terms of civil recovery. Civil law, allowing for confiscation and recovery based on the balance of probabilities, has a clear advantage, as the evidentiary threshold is not as demanding as it is with criminal actions. This civil standard or burden of proof also means that in civil proceedings, the link between the assets and the criminal acts at their origin need be established only on the grounds of a balance of probabilities.

Civil recovery also opens alternative approaches as far as civil actions against third parties are concerned and for the participation of victims in the action. It also has the advantage of civil recovery in a totally different jurisdiction or even in several jurisdictions at once.

Increase Capacity/Expertise.

The mindset change required in our law enforcement agencies leads naturally to the need for an increase in capacity to undertake the work and in expertise. Almost all countries, whether developed or developing, have deficiencies in capacity and expertise in the areas of MLA and asset recovery cases. This has been exploited by corrupt officials across the world. The solutions are, as usual, political will, training and funding.

The political will is increasing as can be verified by the number of ratifications on the UNCAC. The training is becoming available through initiatives of the UNODC, the Commonwealth Secretariat, ICAR, Interpol and other organizations. However, there is a large demand for a high level of investment to develop case management tools, manuals, an internet knowledge database (complete with asset recovery tools, access to pleadings and court decisions, training materials, scholarly articles and glossaries), comprehensive training and the expertise to provide follow-up mentoring and assistance on individual live cases. The funding to support new training and increased resources devoted to anticorruption and asset recovery has been slow to develop.

What is necessary to increase the flow of funds is a concerted effort to publicize the UNCAC and its importance and demonstrate that individual plans for capacity/expertise building are concrete, well conceived and will truly reduce levels of corruption in developing countries.

Increasing vigilance in Financial Centres

There is understandably a great burden required of financial centres the world over in ensuring that its practices are not adding to the problems of corruption and allowing the corrupt individuals to hide their monies safely. One way in which the centres could help further might be in improving suspicious activities reporting systems. Articles 14 and 52 of the UNCAC address bank requirements for knowing their customers, especially politically exposed persons, and the reporting of suspicious transactions. Participation of the financial centres is critical to detecting money-laundering and improper transactions by corrupt officials. If bank officials are doing this job properly, they generate information relating to criminal matters which can be transmitted to other State Parties under Article 46 (4), and they facilitate compliance with requests from victim countries for financial information about corrupt officials, as well as act as a deterrence to corruption and money-laundering.

In terms of politically exposed persons it is difficult under the best of circumstances for financial institutions to keep up with who is or is not a politically exposed person from another country. This problem could be alleviated if countries would circulate their lists of high officials to the banking authorities of the financial centre countries.

Sharing and facilitating an improved exchange of information between countries

There is a crying need for a systematic sharing of experiences in this field. The sharing of such experiences whether good or bad is likely to be able to assist countries in formulating policies and practices that will make a positive difference. The access to information in this field or some of the related fields such as MLA contacts and FIU contacts is in many cases inadequate or simply not easily accessible. Although Conferences such as this are a wonderful opportunity to discuss such cases and practices what is really required is a firm commitment to create the sort of international database that will allow such information to be

accessed relatively easily by those that need to most. As always such requests come down to political will and also funding.

Of course this list does not represent an exhaustive list of the considerable challenges but provides maybe a starting point on what will be a long road.

Finally it is also worthy of mention that there are a number of both regional and also international initiatives that are leading the way in this challenge.

Key players and institutional initiatives:

- UN Office on Drugs and Crime (UNODC)
- World Bank Stolen Asset Recovery (StAR) Initiative
- Basel Institute on Governance International Centre for Asset Recovery (ICAR)
- Interpol
- OECD Development Assistance Committee (DAC)
- UN Development Programme (UNDP)
- Commonwealth Secretariat
- Bilateral donors

I have not even attempted to detail in addition to multilateral programs and initiatives, and concerted actions of bilateral donors and other actors, the large number of individual efforts being undertaken at country level by development agencies, law enforcement and professional bodies.

Thank you for listening.