

INTERNATIONAL CO-OPERATION IN THE RECOVERY OF CRIMINAL ASSETS

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I. INTRODUCTION

On 25 July of this year, U.S. Attorney General Eric Holder, in remarks to the African Union in Kampala, Uganda, announced a new Department of Justice initiative “to combat and prevent the costs and consequences of public corruption.” In so doing, he noted the World Bank’s estimate that out of a world economy of 30 trillion dollars per year, at least one trillion dollars is spent on bribes. The project, known as the Kleptocracy Asset Recovery Initiative, will dedicate a team of prosecutors to combat “large-scale foreign official corruption and recovering public funds for their intended – and proper – use: for the people of our nations.” Attorney General Holder promised that the U.S. will continue to work with all governments to strengthen the judicial sectors throughout the global community in order to help stem the scourge of grand corruption. President Obama approved the Kleptocracy Initiative as part of a “new standard of transparency” highlighted by the recent enactment of financial reform legislation in the U.S.

Recognizing that this conference is dedicated to general issues of asset recovery, with an emphasis on corruption and organized crime, this paper will explore tools which investigators and prosecutors currently have available to seek assistance from other countries in criminal matters. It will also address more specific issues involved in tracing, identifying, restraining, and eventually confiscating the proceeds and instrumentalities of transnational crime and corruption.

II. OVERVIEW OF GLOBAL TOOLS FOR MUTUAL LEGAL CO-OPERATION

A. Formal and Informal Mechanisms for Assistance

Historically, governments have relied primarily on formal requests from other governments for legal assistance in criminal matters. For the most part, governments must seek such assistance through one of four possible modes: (1) an international convention or agreement providing for mutual legal assistance (“MLA”); (2) a bilateral mutual legal assistance treaty (“MLAT”); (3) domestic legislation permitting international co-operation; or (4) a promise of reciprocity through diplomatic channels (often called a “letter rogatory”).

A letter rogatory was the traditional means for obtaining such assistance, and consists of a formal request from a court in one country to a court in another country, generally for evidence or service of process. These requests are transmitted through diplomatic channels of each country in order to be received by the foreign court, and a certificate of service or evidence must be returned in the same manner, creating a slow process for obtaining assistance.¹ Countries using letters rogatory to obtain evidence in criminal investigations, for example the identification of assets, may use the same vehicle for requesting restraint of those assets. However, use of a bilateral or multilateral agreement will generally result in a more expeditious process because such requests are generally handled directly between the central authorities of each country.

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¹ Several Conventions signed in the Hague have supplanted the need for letters rogatory, but only in civil and commercial matters: the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“Hague Service Convention”) signed on 15 November 1965; and (2) the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Evidence Convention”) signed on 18 March 1970. Neither Convention permits assistance in criminal matters, however.

1. Bilateral Mutual Legal Assistance Treaties (MLATs)

The most common formal procedure used by the United States to request or provide legal assistance in criminal matters is through a formal bilateral MLAT. An MLAT is a formal agreement, generally negotiated and approved by the ministries of justice and foreign ministries of both countries, which provides for the gathering of information in connection with the enforcement of the criminal laws of both countries. The United States currently has bilateral mutual legal assistance treaties with over 70 other countries and one with the European Union. Most of these MLAT agreements have provisions governing mutual legal assistance in confiscation or forfeiture matters as included in the enforcement of criminal laws. These provisions obligate parties to provide to each other formal assistance in the nature of restraint of property which is subject to confiscation, and to assist in the eventual confiscation of the property. Generally, an MLAT agreement will require a form of dual criminality, sometimes called dual forfeitability, for assistance to be available – in other words, that the conduct underlying the confiscation in Country A also subject the property located in Country B to forfeiture had the conduct occurred in Country B.² MLAT's are often used to obtain financial records and to obtain search and seizure warrants or orders in a foreign country.

2. United Nations Conventions and Other Multilateral Treaties

For foreign partners with whom we do not have an MLAT, the U.S. will use the appropriate United Nations Convention, or, if preferred by the other country, a multilateral treaty such as the Inter-American Convention on Mutual Assistance in Criminal Matters, which has been in effect since 1992. Depending upon the relationship and the willingness of the other country, these Conventions may provide results as satisfactory as an MLAT.³

3. Informal Channels of Assistance

Often, near the beginning of an investigation, coercive powers are not yet needed, and some form of "informal assistance" may suffice to provide information helpful to the investigation. This term is generally used for assistance through channels outside of the formal MLA channels, often through direct communications between counterparts such as financial intelligence units ("FIU's"), police, prosecutors or investigating magistrates sharing intelligence or data which is legally available to that agency through domestic databases.

The Camden Assets Recovery Inter-Agency Network ("CARIN") is one such example of "an informal network of contacts and a co-operative group in all aspects of tackling the proceeds of crime." See http://www.europol.europa.eu/publications/Camden_Assets_Recovery_Inter-Agency_Network/CARIN_Europol.pdf. CARIN's membership consists of law enforcement and judicial authorities from the European Union and invited jurisdictions, and observer status is granted to several others. This organization began in October 2002 with a conference of the Criminal Assets Bureau of Ireland and Europol held at the Camden Court Hotel in Dublin, Ireland. CARIN has become an effective law enforcement tool used among member countries for the expedient sharing of information and use of multiple tools available for each jurisdiction to trace, freeze or seize, and confiscate the assets of international criminal organizations.

Such informal assistance can be exceedingly helpful to the process of asset recovery, particularly in the initial identification of other names used by the criminal targets, associates, and properties in the names of these individuals. Less formal contacts can often be the starting point for later formal requests. Informal assistance creates a dialogue which can produce invaluable information, but formal MLA will likely be needed to obtain documents and witness statement to be used in court as evidence. Following the informal assistance, if permitted, a draft of the formal MLA request can be sent to the other country to insure that the prerequisites are met. This practice can hopefully avoid time-consuming delays resulting from rejections of the request for failure to comply with treaty requirements.

² Such a provision often eliminates the ability to provide formal legal assistance in criminal tax matters because many countries, including the United States, do not provide for forfeiture or confiscation for tax crimes.

³ For example, because of the absence of a bilateral MLAT with Colombia and the Dominican Republic, the U.S. routinely uses the Vienna and Palermo Conventions, with excellent results.

B. Egmont Group of Financial Intelligence Units

What is now known globally as the Egmont Group began in 1995, at a meeting of heads of FIUs at the Egmont Arenberg Palace in Brussels.⁴ The Group now includes 121 member countries, and meets on a regular basis throughout the world to improve methods of international co-operation, especially in the area of information exchange through its Egmont Secure Web (“ESW”), which only member FIUs are permitted to access. The assistance which member FIUs can render to each other through Egmont varies, and is dependent upon domestic law. The primary function of many FIUs is the collection and storage in a database of all suspicious activity reports (“SARs”)⁵ generated by entities within country which are required to file them; others actually perform analysis of the SARs and prepare reports; and, still other FIUs have their own investigators and prosecutors. Generally, an Egmont member receiving a request for information from another member will share, often under the terms of a Memorandum of Understanding (“MOU”) which provides for confidentiality and assurances of reciprocity, whatever information that the requesting FIU would be permitted to share.

The United States’ FIU, known as FinCEN (the Financial Crimes Enforcement Network) is celebrating its 20th year in operation. FinCen has an International Programs Division dedicated to strengthening support among its international partners. This Division receives, processes, and responds to requests from foreign FIUs and acts as a conduit for requests from U.S. law enforcement to foreign FIUs. Historically, FinCEN has been legally empowered to respond to foreign requests by providing only the information contained in its domestic database – i.e., SARs, Currency and Monetary Instrument Reports, Currency Transaction Reports and other documents required by the United States Bank Secrecy Act (“BSA”).

Just this year, in response to our obligations under the US/EU MLAT, FinCEN amended its regulations to permit foreign law enforcement to request, through U.S. law enforcement attachés, account information from U.S. banks in certain defined cases. Initially, this power was granted to FinCEN under Section 314(a) of the USA PATRIOT Act of 2001. Currently, U.S. investigators may submit a Section 314(a) request in connection with an investigation of terrorism or significant money laundering, and FinCEN will contact the more than 25,000 U.S. financial institutions to identify accounts and transactions of the suspected targets. Every two weeks, FinCEN sends the 314(a) requests via a secure Internet website. The institutions must query their records for data matches during the preceding 12 months and transactions during the preceding six months, and have two weeks to respond if a match is identified. FinCEN bundles the responses and sends them to the requesting agency. As noted, FinCEN is rolling out this ability on a global level, region by region. By running this scan of U.S. financial institutions for a foreign law enforcement agency, FinCEN will be able to provide even more helpful information to foreign investigations than it does at the present.

C. United Nations Conventions

1. General Principles

Since its establishment in 1945, the United Nations has provided a global venue for its Member States to convene and address matters of critical importance to the world’s humanitarian and economic conditions. With 192 current Member States, the UN has generated many multilateral treaties and protocols (agreements ancillary to treaties) which address issues from nuclear destruction to drug trafficking, money laundering, terrorist financing, and corruption.

Depending on constitutional requirements, countries generally have one of two options for implementing their obligations once they have signed and ratified a multilateral agreement such as a UN treaty.⁶ Some countries must transpose the treaty provisions into domestic law before the treaty has legal force in that country. For others, the mere act of ratification makes the treaty provisions self-executing. In these latter jurisdictions, assistance may be granted directly based on the convention provisions.

⁴ An FIU, for Egmont purposes, is a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to 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 counter money laundering and terrorism financing. <http://www.egmontgroup.org/about>

⁵ For purposes of this paper, the term “SAR” will be used to cover all categories of suspicious financial transaction reporting.

⁶ Hans Kelsen, *Principles of International Law* (New Jersey: the Lawbook Exchange, 2003), p. 195 (f).

2. Vienna Convention (1988)

The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“Vienna Convention”) was adopted in 1988, and provides the basis for mutual assistance in drug trafficking cases. The Convention has been ratified by at least 175 countries, and most countries which provide mutual legal assistance have little difficulty providing assistance in drug cases. Article 5 of the Vienna Convention requires each State Party to enact domestic confiscation and freezing provisions for proceeds, instrumentalities and intended instrumentalities of drug offences, and to provide international assistance in these areas. The same article requires that financial records pertaining to such offenses be available to domestic and foreign investigators despite bank secrecy provisions.

Finally, Article 5(a) provides that “proceeds or property confiscated by a Party . . . shall be disposed of by that Party according to its domestic law and administrative procedures,” and Article 5(b)(ii) encourages the sharing of such confiscated assets with other Parties “on a regular or case-by-case basis” in accordance with domestic law or any applicable bilateral or multilateral agreements. Thus, although the Vienna Convention requires the provision of legal assistance such as evidence to other countries, and requires each State Party to provide for the confiscation of drug-related assets, it does not require that those assets be shared with other countries.⁷

3. UN Convention against Transnational Organized Crime (1999)

The UN Convention against Transnational Organized Crime (“UNTOC”) was signed in Palermo, Italy, in December 2000, and provides for a global response to combat serious international criminal activity, such as the trafficking in persons, arms and ammunition, and money laundering. This Convention, which has been ratified by at least 147 countries, also obligates States Parties to adopt domestic regimes to confiscate the proceeds, instrumentalities, and intended instrumentalities of offences covered by the Convention. These offences include certain specified crimes such as an organized criminal group, money laundering, corruption, obstruction of justice, and “serious crimes” which are transnational and punishable by imprisonment of over four years. The Convention also requires States Parties to criminalize the laundering of the proceeds of certain listed predicate crimes.

Article 13 of UNTOC governs the obligations of States Parties to each other in confiscation matters. It requires that the requested country “take measures to identify, trace and freeze or seize proceeds of crime” as well as instrumentalities “for the purpose of eventual confiscation to be ordered either by the requesting State Party or . . . by the requested State Party.” Such procedures must not prejudice the rights of “bona fide third parties.” Like the Vienna Convention, Article 14 provides that confiscated assets be disposed of under domestic law, but that “if so requested” a State Party should “give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.” Sharing is encouraged, as well as contributions to intergovernmental bodies specializing in the fight against organized crime. Thus, under UNTOC, use of confiscated assets as restitution to victims of crime is a priority.

4. UN Convention against Corruption (2005)

The UN Convention against Corruption (“UNCAC”), signed in Merida, Mexico, in December 2003, provides an entirely different, and mandatory, scheme for the recovery and return of corruption proceeds. In further discussing the G8 and global initiative against grand corruption, this paper will cover these provisions in greater detail in a subsequent section. The UNCAC took effect in 2005, and has been ratified by over 137 States Parties.

⁷ Like the Vienna Convention, Article 8 of the UN Convention for the Suppression of Financing of International Terrorism (“Terrorist Financing Convention”), signed in 1999 and ratified by 167 States Parties, requires each State Party to enact provisions for the identification, detection, freezing or seizure, and forfeiture of “any funds used or allocated for the purpose of committing” any of the offenses covered by the Convention. Sharing of forfeited proceeds is again recommended, but not mandated.

III. INTERNATIONAL CO-OPERATION LAWS IN THE U.S.

A. Assistance Available Under U.S. Law for the United States to Assist Foreign Countries to Restrain and Forfeit Property Located in the United States

Like most countries, the United States may respond to an MLA request to provide confiscation assistance by either filing its own domestic forfeiture action or by enforcing orders undertaken by the requesting country. The domestic action could be either a civil *in rem* forfeiture action, or a criminal forfeiture. Generally, the U.S. case would be a civil forfeiture, particularly if the criminal case is being prosecuted in the foreign country or not being prosecuted at all.

The United States' Central Authority for receiving MLA requests is the Department of Justice, Criminal Division, Office of International Affairs ("OIA"). OIA will receive the MLA request, and submit it for execution by one or more of the 93 United States Attorney's Offices ("USAOs") or another section of the Criminal Division. If the request is for records or other evidence, it will normally go to a USAO to obtain a Commissioner's Subpoena from a U.S. district court, which will be served on the party from whom the information is sought. If the request is to freeze assets, it will normally go to the Asset Forfeiture Money Laundering Section ("AFMLS") of the Criminal Division. AFMLS has the lead responsibility for obtaining restraints, seizures, or confiscations at a foreign government's request.

Until a recent adverse decision in the Court of Appeals for the District of Columbia, the Department of Justice believed it had authority under a provision of 28 U.S.C. § 2467 enacted as part of the USA PATRIOT Act of 2001, to provisionally restrain assets at the request of our treaty partners, either based upon an affidavit by a law enforcement officer or based upon the enforcement a restraining order issued by a foreign court. 28 U.S.C. § 2467(d)(3). The foreign order had to be certified by the U.S. Attorney General, and the conduct underlying the foreign violation had to constitute an offence for which forfeiture would be permitted under U.S. law.

However, on July 16, 2010, the appellate court in the District of Columbia in the case of *In Re: Any and All Funds or Other Assets in Brown Brothers Harriman & Co. Account # 8870792, et al.*, -- F.3d --, 2010 WL 2794281 (D.C. Cir. July 16, 2010), No. 09-5065 ("*Dantas* case"), held that, because of problems with certain aspects of the statutory language, the provision allowing restraining orders applies only *after* a foreign judgment of forfeiture was entered.

This ruling has affected ten restraint cases currently filed in the District of Columbia, involving nearly \$500 million. The United States will have to either request a domestic forfeiture restraint based on the filing of an entirely separate U.S. forfeiture action or release the funds. In many of the cases, the U.S. statute of limitations has run, and therefore filing a domestic case is not possible. In others, because a criminal act did not occur in the United States, we have no venue to file a U.S. case. Under 18 U.S.C. § 981(b)(4), if there has been a foreign arrest for certain "foreign predicate offenses" under U.S. law, we can request a 30-day freeze on assets to give us time to obtain from the foreign government the evidence necessary to file a domestic case, and that period may be extended as necessary. The "foreign predicate offenses" include: arson, fraud by or against a foreign bank, public corruption, arms smuggling, trafficking in persons, narcotics, and weapons (including nuclear, biological) plus crimes under 18 U.S.C. § 1956(c)(7)(B) (which include drug trafficking, murder, arson, extortion, explosives, public corruption, fraud by or against a foreign bank, munitions smuggling, human trafficking, child sexual exploitation, child trafficking, and any offence for which extradition is required by multilateral agreement).

The potential pitfalls with filing a domestic forfeiture action to obtain a freeze or restraint based upon a foreign request are legion. The case would generally be a duplicated trial of the confiscation trial which is ongoing in the foreign country. Sufficient evidence would have to be produced in English from the foreign country for the U.S. court. Under U.S. law, a civil forfeiture case (which these would normally be) generally requires tracing of the direct criminal proceeds to the property to be forfeited; the U.S. could not restrain based upon "value-based" foreign forfeiture systems, although it can enforce final judgments entered in such systems. The expenditures and unreliability of foreign witness travel could result in a dismissal of the U.S. case, in which case the U.S. government would be liable to pay attorney's fees to the claimant.

The *Dantas* court opinion does not affect the United States' ability to register and enforce a final

forfeiture or confiscation judgment entered in a foreign country which has an agreement for forfeiture assistance with the U.S. However, the practical effect of the ruling is that there will seldom be such assets remaining for execution of a final judgment unless the U.S. has filed its own forfeiture action and obtained restraint.⁸

B. United States' Laws Governing U.S. Efforts to Confiscate and Recover Foreign Assets

United States prosecutors have authority to file either domestic civil or criminal forfeiture actions against property abroad. Under 28 U.S.C. § 1355(b), a civil forfeiture action may be filed against any foreign property which is subject to civil forfeiture under U.S. law. Case law has established that, in order to provide the U.S. district court with jurisdiction, the U.S. government must be able to demonstrate that the foreign government will cooperate in recognizing the forfeiture or in allowing the asset to be transferred to the United States.

Under 21 U.S.C. § 853(l) and 18 U.S.C. § 982(b)(1), a U.S. district court can enter any criminal forfeiture order "without regard to the location of any property" which may be subject to forfeiture. Also, in a criminal forfeiture proceeding, a U.S. court may order a defendant, under 21 U.S.C. § 853(e)(4) to repatriate any foreign assets to the United States. Such repatriation should occur only if permitted by the foreign government and if not in violation of any restraining order which the foreign government has enforced on behalf of the U.S.

Further, if a criminal defendant agrees to plead guilty pursuant to an agreement, the agreement will contain a provision by which the defendant agrees to repatriate the foreign-based property back to the U.S. for forfeiture. The plea agreement may also contain a provision by which the defendant agrees to the appointment of a representative in the foreign country to assist in the confiscation and liquidation of the property. Also, the United States will often add to an Extradition Treaty request a request that any valuable property which is found on or near the defendant when he or she is arrested be returned to the United States with the person.

IV. INTERNATIONAL ASSET SHARING

A. FATF Recommendation 38 and UN Model Sharing Agreement⁹

Recommendation 38 of the Financial Action Task Force ("FATF") 40 Recommendations covers international co-operation: "There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value. There should also be arrangements for coordinating seizure and confiscation proceedings, which may include the sharing of confiscated assets."

This Recommendation basically restates most of the UNTOC requirements, mandating the provision of legal assistance in the identification, freezing, seizing, and confiscation of the proceeds, instrumentalities and intended instrumentalities of money laundering and predicate offences, and encouraging sharing.¹⁰ It also imposes an obligation to identify, restrain, and confiscate "property of corresponding value." Unfortunately, in the U.S., without our amended Section 2467(d)(3), we are unable to restrain assets of corresponding value, which poses an extra burden on our "value-based forfeiture system" partners to trace the proceeds and instrumentalities of crime to identified U.S.-based assets. The UN Office on Drugs and Crime ("UNODC") developed a model sharing agreement which was endorsed by the UN General Assembly in

⁸ The Department of Justice is seeking to obtain an amendment to Section 2467(d)(3) which would address the language problem relied on by the *Dantas* court. It is unknown whether, or when, such an amendment will be enacted by the U.S. Congress.

⁹ The 40 Recommendations of the FATF provide a set of counter-measures against money laundering covering the criminal justice system, law enforcement, the financial system, and international co-operation. They are recognized, endorsed, or adopted by many international bodies, and set out principles for action, while allowing countries flexibility in implementing those principles. Though not a binding international convention, those countries who have joined the FATF or any regional styled FATF body have made a political commitment to combat money laundering by implementing the 40 Recommendations. <http://www.fatf-gafi.org>

¹⁰ Thus, Country A could conceivably freeze and forfeit property at the request of Country B, but keep the proceeds from the sale of the property for its own treasury. This has happened to the United States in several cases.

December 2005. Some of the suggested language in this model agreement has been adopted by the U.S. in its most recent bilateral sharing agreements with other countries.

B. U.S. Statutory Conditions for Sharing

Authority for the United States to share civilly or criminally forfeited assets with other jurisdictions is found at 18 U.S.C. § 981(i).¹¹ Three conditions must be met in order for sharing to occur: (1) the amount and conditions of sharing must be authorized by the Attorney General or Secretary of the Treasury with concurrence of the Secretary of State; (2) there must be a treaty or an agreement (either case-specific or long term) between the U.S. and the foreign jurisdiction which authorizes the sharing; and (3) if applicable, the foreign jurisdiction must be certified by the Secretary of State as having met certain criteria permitting foreign assistance. Since 1989, well over \$250 million has been shared with over 40 jurisdictions from assets forfeited to the Department of Justice Assets Forfeiture Fund. The jurisdiction requesting sharing must have facilitated the initial forfeiture by rendering some form of assistance. DOJ and Treasury have the same internal guidelines for how the percentage of sharing is determined.¹²

The United States does not generally share where there are identified innocent owners or victims of the crimes underlying the forfeiture. Instead, we will endeavour to return the forfeited assets to innocent owners and victims either through our remission process or by taking advantage of a similar process in a foreign country.

V. GLOBAL IMPERATIVE FOR RECOVERY OF CORRUPTION PROCEEDS: INTERNATIONAL “KLEPTOCRACY” INITIATIVE

A. International Agreements to Combat Corruption, the G8 Initiative, and StAR

The term “kleptocracy” is derived from the Greek “kleptes” and “kratos”, meaning rule by thieves. Thus, it is applied to a government which uses corruption to extend the personal wealth and power of the government officials and the ruling class. As noted by Attorney General Holder in Uganda, corruption accounts for at least \$1 trillion, or over 3% of the world’s Gross Domestic Product (“GDP”), each year. This number is even higher for members of the African Union, where up to 25% of the GDP is estimated to be lost to corruption.¹³ A number of multilateral agreements have been enacted over the years to enable jurisdictions to assist each other in fighting and recovering the proceeds of corruption, such as the Inter-American Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials (both signed in 1997), the European Union Convention on the Fight Against Corruption of 1995, and the African Union Convention on Preventing and Combating Corruption of 2004. Despite these agreements, the obstacles to investigating and prosecuting kleptocracy cases have persisted.

In May 2004, in conjunction with the anticipated effective date of UNCAC, the G8 issued a Justice and Home Affairs Ministerial Declaration calling on all governments to prioritize the recovery of corruption assets for victim states. As part of an effort to combat corruption, or at least to deprive the kleptocrat and his family of the enjoyment of the stolen assets, the G8 committed to developing joint teams of forfeiture-related MLA experts to send to victim states, co-ordination task forces to work with victim states on MLA requests, and workshops to exchange information and best practices. The projects and publications of the World Bank StAR initiative are designed to help accomplish these stated goals.

¹¹ Duplicate provisions are found at 21 U.S.C. § 881(e)(1)(E) (for criminal and drug forfeitures) and 31 U.S.C. § 9703(h) (for Department of Treasury forfeitures).

¹² For “essential assistance,” 50% or more of the amount forfeited can be shared. For “major assistance” between 40 and 50% can be shared and for “facilitating assistance,” the amount would be up to 40%. Essential assistance can involve a country’s waiving its own forfeiture action, repatriating the assets without needing a signed letter from the defendant, providing virtually all of the evidence for forfeiture, or defending litigation in that country connected with the forfeiture. Major assistance may consist of enforcing a U.S. forfeiture order in order, freezing assets at the request of the U.S., repatriating assets with an extradited defendant, or expending substantial law enforcement resources to obtain the forfeiture. Facilitating assistance may involve the provision of bank or financial records, giving of intelligence information, providing service of process for witnesses or facilitating witness interviews.

¹³ “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan”, UNODC/World Bank Group, published June 2007, at p. 9.

B. Implementation of UNCAC

UNCAC's mandatory asset recovery provisions entered into force in December 2005 as the first legally binding global anti-corruption agreement. UNCAC makes it clear that Asset Recovery is a major mission of the agreement – all of Chapter V is dedicated to this “fundamental principle of” the Convention, for which States Parties must “afford one another the widest measure of cooperation and assistance” (UNCAC, Art. 51).

Articles 14, 23 and 31 provide requirements for the domestic regimes of States Parties to detect identify, freeze, seize and confiscate the proceeds, commingled proceeds, instrumentalities, and intended instrumentalities of corruption. Article 53 mandates provisions for the direct recovery of corruption assets, including laws permitting private civil causes of action to recover damages owed to victim states and the recognition of a victim state's claim as a legitimate owner of stolen assets. Article 54 requires States Parties to give effect to any confiscation order for corruption proceeds issued by another State Party, and to “consider taking such measures as may be necessary to allow confiscation [. . .] without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.” Although stopping short of requiring non-conviction based forfeiture, UNCAC recognizes that in cases of corruption, the criminal kleptocrat may not always be available for criminal prosecution. States Parties must be able to freeze or seize corruption assets based upon an order issued by another State Party *and* upon an MLA request which 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”. Similar assistance must be given to a final order of confiscation under Article 55. Article 55 ¶ 7 provides that co-operation may be refused if necessary, sufficient and timely evidence is not received, or if the property is of minimal value. Finally, Article 57 mandates a return of confiscated embezzled or laundered public property to the requesting State Party. UNCAC also requires that financial institutions of the States Parties strengthen their ability to detect and freeze corruption-related assets. Most of these mandates require methods to determine the true beneficial ownership of accounts being used to conceal corruption proceeds.

C. Case Studies: Abacha and Fujimori/Montesinos

Two pre-UNCAC cases of grand corruption resulted in significant recoveries of assets for two victim states – Nigeria and Peru. Both cases provide examples of successful collaboration between financial sector jurisdictions and the states which were victimized by their kleptocrat leaders which led to the recovery and return of hundreds of millions of dollars of stolen assets.

1. General Sani Abacha (Nigeria)

General Abacha governed Nigeria from 1993 to 1998, dying in June 1998 of an ostensible heart attack. He is reported to have looted from \$3 billion to \$5 billion from the Nigerian national treasury during his five years in office. Subsequent to Abacha's death, Nigerian investigators determined that he had obtained property through outright theft from the Nigerian treasury through the central bank, inflation of the value of public contracts, extortion of bribes from contractors, and fraudulent transactions. The funds were laundered through “a complex web of banks and front companies in several countries, but principally Nigeria, the UK, Switzerland, Luxembourg, Liechtenstein, Jersey, and the Bahamas.”¹⁴

In excess of \$800 million was recovered in Nigeria from Abacha's family and associates. Abacha's successor, President Olusegun Obasanjo, hired a Swiss legal firm to help trace and recover funds held abroad. Nigeria sent an MLA request to Switzerland, which then immobilized over \$500 million in Swiss bank accounts. After several years, Switzerland was able to waive the usual requirement of a final confiscation order from the foreign jurisdiction, as Nigeria was simply not able to produce one under its legal regime at the time. The Abacha family delayed Nigeria's recovery for over five years with various motions and appeals. However, finally the World Bank was selected as a monitor for the recovered assets, and in late 2005 and early 2006, \$505 million was repatriated. An additional \$106 million was repatriated from Jersey. The World Bank monitored Nigeria's use of the funds, insuring that they were used for the welfare of the public in areas such as rural infrastructure, health and education.

¹⁴ “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan”, UNODC/World Bank Group, published June 2007), at p. 18.

2. President Alberto Fujimori and Intelligence Police Chief Vladimiro Montesinos (Peru)

During his ten years as president of Peru, Alberto Fujimori and his intelligence police chief, Vladimiro Montesinos, methodically bribed judges, politicians, and the media. However, on September 14, 2000, Fujimori lost control of the media when a television station broadcast a video showing Montesinos giving a Peruvian Congressman a \$15,000 bribe. Investigations followed, leading to Fujimori's resignation, flight to Japan, and his later 2007 arrest in Chile and extradition to Peru. Fujimori was convicted in Peru on charges of human rights violations, embezzlement, and bribery, and he is serving a combined term of 25 years imprisonment.

Montesinos had known connections to Colombian drug traffickers, and was involved with arms trafficking for the benefit of the Colombian terrorist group, the FARC. In 2001, he was arrested in Venezuela, and extradited to Peru, where he was convicted on charges of embezzlement and official corruption, receiving a combined sentence of 20 years' imprisonment. The first repatriation of Montesinos' corruption proceeds came *sui generis* from Switzerland in 2002 in the amount of \$77.5 million, based upon clear and convincing evidence that the funds represented bribes paid on Russian arms deals. Also, the Swiss made spontaneous disclosures to Peru of other suspicious transactions, invited the Peruvian government to submit an MLA request to freeze additional funds, and later repatriated over \$50 million in additional funds.

In the United States, suspicious transaction reports filed with FinCEN indicated additional funds at the Miami branch of the Pacific Industrial Bank. Approximately \$20 million connected with Montesinos' associate, Venero Garrido, were frozen in Florida and California in two civil forfeiture actions. Venero was arrested in Miami and extradited to Peru, and Peruvian authorities were able to document the funds frozen in the U.S. as bribes received by Venero from fraudulent schemes connected with the Peruvian Military Pension Fund. These funds were forfeited in the U.S. and returned to the government of Peru. Additional funds of \$33 million appeared to be held at the Pacific Industrial Bank in Cayman Islands; however, the Caymans provided sufficient documentation and co-operation for Peruvian authorities to eventually determine that although the tangled web of financial transactions made it seem that the funds had been transferred there, they were physically still located in a Peruvian bank.¹⁵ Thus, within a five year period, as a result of commendable co-operation by several countries, Peru recovered over \$180 million in corruption proceeds.¹⁶

VI. CONCLUSION

Despite the major gains achieved in recent years in the global recovery of criminally-derived assets, much remains to be done. Jurisdictions must conform their domestic legislation to their international treaty obligations. Through institutions such as the UNODC, the StAR Initiative, and the Basel Institute on Governance, efforts are being made to provide training and other resources to nations with developing AML and anti-corruption regimes.

Recovery of corruption proceeds is fraught with barriers not necessarily present in other types of criminal cases. Differences in legal systems and the resources needed for endless court challenges by the kleptocrat's family and associates increase the difficulty. However, armed with ever evolving legal and technological tools, investigators, prosecutors, and judges will hopefully be increasingly more effective in combating international organized crime and political corruption. At a minimum, if at least some of that 3.5% of the world's GDP can be redirected to the vast needs of world's poor and underfed, then our efforts will not have been in vain.

¹⁵ "Peruvian Efforts to Recover Proceeds from Montesinos' criminal network of corruption," Guillermo Jorge, (September 2007), ¶¶ 14, 26, 50-76 <http://www.baselgovernance.org>.

¹⁶ "Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan", UNODC/World Bank Group, published June 2007), at p. 20, 25 (also noting that the repatriated funds were deposited to a special fund called FEDADOI, which was established to ensure the transparent use of the recovered assets; however, the resources ended up supplementing the budgets of institutions with members on the FEDADOI board).