Introduction

1. Asset recovery represents an entirely new field of international law and international cooperation. The recovery of diverted assets is highly complex and cumbersome, and success stories are scarce. Indeed, attempts to trace and repatriate illegally exported wealth in such cases are commonly frustrated and may sometimes lead to friction between the States or governments involved.

2. Chapter V of the United Nations Convention Against Corruption (UNCAC) seeks to remedy these difficulties by providing for the necessary legal framework to enable countries to effectively prevent the transfer of proceeds of corruption and to detect, trace, freeze, forfeit, and return funds obtained through corrupt activities across jurisdictions. More specifically, the Chapter sets forth procedures and conditions for asset recovery, including the facilitation of civil and administrative actions, recognition of and action based on foreign confiscation orders, return of property to requesting States in cases of embezzled public funds or other damaging corruption offences, return of property to legitimate owners and compensation of victims. Most importantly, Art. 51 declares the return of assets as a ‘fundamental principle’ of the United Nations Convention Against Corruption.

3. Measures relevant to the prevention of the laundering of the proceeds of corruption and their transfer abroad, as well as the tracing, seizing and confiscation of such proceeds are, however, not only contained in Chapter V of the Convention. Other relevant provision deal with:
   - Measures to prevent and criminalize the laundering of the proceeds of corruption, Art. 14, 23 and 24;
   - Measures to allow for the effective freezing, seizure and confiscation of the proceeds of corruption domestically, Art. 31;
   - Measures allowing the victims of corruption to claim damages suffered as a result of corruption and to obtain compensation, Art. 35;
   - Procedures related to the request and provision of mutual legal assistance and law enforcement cooperation, Art. 46 and 48.

Prevention of Money Laundering and the Detection of Transfers of Proceeds of Crime

4. Two Articles of the Convention, Art. 14 and 52, frame the provisions aimed at the prevention of the laundering of the proceeds of corruption and their transfer abroad. Art. 14 establishes the basic operational principles and the legal and administrative framework for a preventive anti-money laundering system. It obliges
States Parties to introduce an effective regulatory and supervisory regime for banks and non-banks financial institutions; and to ensure that relevant authorities have the ability to cooperate and exchange information at the national and international levels.

5. Moreover, according to Art. 14, States Parties shall consider adopting measures to detect and monitor cross-border cash transfers; as well as require their financial institutions to ensure that electronic transfers and related messages do contain meaningful information on the originator, and to apply enhanced scrutiny to those transfers that do not contain such information.

7. Art. 52 builds and expands on the basic provision contained in Art. 14, in particular in the areas of customer identification, the issuing of advisories and notification to financial institutions concerning matters of due diligence, record-keeping obligations, the prevention of the establishment of and business relations with shell banks, as well as the implementation of an effective system for the disclosure of assets and foreign accounts held by appropriate public officials.

8. In particular, Art. 52 obliges States Parties to enhance the ‘know-your-customer’ requirements for financial institutions. Among others, States Parties shall ensure that financial institutions within their jurisdiction verify the identity of customers, and take steps to determine the identity of beneficial owners of funds deposited into high valued accounts. Financial institutions also need to scrutinize accounts held by or on behalf of individuals entrusted with prominent public functions, their family members and close associates; and where appropriate report any arising suspicion to the competent authorities. States Parties shall also issue advisories to their financial institutions regarding the types of persons, accounts and transactions which require enhanced scrutiny, and ensure that records are kept, over an appropriate period of time.

9. The Convention also seeks to prevent the establishment of shell banks, and to discourage regular financial institutions engaging in business relations with such banks or establishing relations with foreign financial institutions that permit their accounts to be used by ‘shell banks’. Shell banks are defined by the Convention as banks that have no physical presence in the jurisdiction in which they operate and that are not affiliated with a regulated financial group.

10. As mentioned above, Art. 52 also requires States Parties to consider establishing financial disclosure systems for ‘appropriate public officials’ and to adopt ‘appropriate sanctions for non-compliance’. This provision needs to be read in conjunction with related provision concerning the obligation of States Parties to establish systems for the disclosure of assets and the prevention of conflicts of interest (Art. 7 and 8).

**Direct Recovery**

11. Asset recovery under criminal proceedings have often foundered because of legal obstacles, particularly with regard to impossibilities of conviction, a failure to reach standard or criminal proof and the death or flight of defendants. In addition to the more traditional proceedings relating to the recovery of assets through international cooperation in criminal matters, Art. 53 of the Convention provides for
several provisions facilitating the recovery of assets through civil action. In particular, it recognizes States Parties and third parties as potential victims of corruption and establishes their consequent rights to recover property that has been exported through civil action. It also permits civil action in the case of death or absence of alleged offenders, and allows for the establishing of liability on the basis of civil standards without the requirement of a criminal conviction of the person possessing or owning the assets. Finally, it permits the pursuit of assets in cases of acquittal on criminal charges where sufficient evidence meeting civil standards shows that assets were illegally obtained.2

12. Moreover, Art. 53 obliges States Parties to allow their courts ordering the corruption offenders to pay compensation or damages to another State Party that has been harmed by such offences (This provision does not specifically identify if the procedures in this instance to be followed are of a civil or criminal nature). Thus, this innovative provision departs from the traditional understanding that proceeds of crime should be recovered only through criminal confiscation.3

13. Finally, Art. 53 requires States Parties to ensure that their respective legal framework permits its courts or competent authorities, when having to decide on confiscation, to recognize another parties’ claim of ownership, as well as damages and compensation. This allows for States or other third parties claiming ownership and other rights in a confiscation procedure, being it civil or criminal.

**International Co-operation in Confiscation – Measures at the Domestic Level**

14. Different legal systems have diverse legal approaches. Matters such as jurisdiction, evidentiary requirements, the relationship between criminal prosecution and recovery proceedings, and whether civil proceedings could be used have traditionally proven to be insurmountable obstacles. Countries seeking the return of assets often face severe challenges in requested countries because of the high evidentiary and complex procedural standards.

15. Art. 54 appreciates the challenges that States have faced in international confiscation cases and reflects a growing trend towards a crime control policy which attempts to deprive offenders of the fruits of their crimes across national borders. Art. 54 thus breaks new ground by encouraging the use of creative measures to overcome some of these obstacles.4

16. Art. 54 addresses this problem by imposing minimum requirements on countries in terms of the legal mechanisms their domestic legal system should provide for to act upon a request for the tracing, seizing, freezing and subsequent confiscation of the proceeds of corruption.5 In doing so, Art. 54 provides for the mechanism that

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3 Art. 35 are relevant within the context this context, as it requires States Parties to ensure that entities or individuals who have suffered damages as a result of corruption have the right to initiate legal proceedings to obtain damages or compensation from those responsible.
5 This article goes further than the United Nations Transnational Organized Crime Convention insofar as it offers detailed guidance on how freezing or seizure should be sought and obtained for the purposes of confiscation.
are necessary so that the options offered in Art. 55 to a requesting State Party can be exercised effectively. In essence, Art. 54 enables the implementation of Art. 55.6

17. Art. 54 obliges States Parties to enable their authorities to recognize and give effect to a confiscation order issued by another States Party’s courts. States Parties are further obliged to enable domestic authorities to order the confiscation of property of foreign origin either on the basis of a money-laundering or related offence over which they have jurisdiction, or through any other procedure established by domestic law.

18. Moreover, States Parties are requested to consider allowing for the confiscation of property, acquired through or involved in the commission of an offence established in accordance with the Convention, 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.

19. The article also requires States Parties to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party 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. At the same time, States Parties should allow its competent authorities to freeze or seize property (directly) upon 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 a confiscation order.

20. Art. 54 also introduces for the first time in a international treaty the concept of preservation of confiscated property, by requiring States Parties to consider taking additional preliminary measures to preserve property for its later confiscation, for example allowing for the freezing or seizure of property based on a foreign arrest or criminal charge related to the concerned property. Art. 54 is complemented by Art. 31, which requires States Parties to the greatest extent possible under their domestic system to establishment of a comprehensive legal framework for the domestic freezing, seizure and confiscation of proceeds and instrumentalities of corruption.

**International Co-operation for the Purpose of Confiscation**

21. Art. 55 requires States Parties to establish a regime and procedures for the receipt, processing, recognition and enforcement of a request received by another State Party for the purpose of confiscation. In particular, the article foresees that States Parties submit the request to their competent authorities with a view to obtaining a freezing, seizure or confiscation order, or to give direct effect to such an order.

22. The article further clarifies that the general provisions on mutual legal assistance contained in Art. 46, apply also to international cooperation for the purpose of confiscation.7 In addition, Art. 55 details the specific content and minimum

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7 Art. 46 builds on existing bilateral and multilateral treaties. In this regard Art. 46 calls on States Parties to ‘afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention’. 

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requirements of requests for international cooperation for the purpose of obtaining provisional order for the freezing and seizure of property, as well as for the purpose of confiscation.8

22. Art. 55 also clarifies that its provisions apply to all proceeds of crime, property, equipment or other instrumentalities referred to in Art. 31 and which is situated in the territory of the requested State.

23. Finally, Art. 55 establishes the conditions and procedures under which a cooperation may be refused or a provisional measure may be lifted. This may be the case if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis or insignificant value.

**Return and Disposal of Assets**

24. The Convention, in Art. 57, also establishes the mandatory requirements and general rules upon which States Parties shall base their procedures for the return and disposal of the confiscated assets, once the proceeds of corruption have been traced, frozen and confiscated. Art. 57 establishes the principle that the proceeds of corruption and related practices which have been confiscated by a State Party shall be

Significantly Art. 46 is applicable to international cooperation with regard to ‘identifying, freezing and tracing proceeds of crime in accordance with the provisions of Chapter V of this Convention’ (Art. 46, Para 3(j)) and ‘the recovery of assets, in accordance with the provisions of Chapter V of this Convention’ (Art. 46, Para 3(k)). These provisions have particular resonance to Art. 31, 54 and 55.

As outlined within the context of Art. 54, the Convention recognizes the diversity of legal systems. In this regard Art. 46 allows States Parties the right to refuse to provide mutual legal assistance under certain conditions. However assistance cannot be refused on the grounds of bank secrecy (also Art. 31) or for offences considered to involve fiscal matters.

This article not only complements the provisions of the United Nations Transnational Organized Crime Convention but significantly expands upon it, specifically in two instances. ‘Firstly, mutual legal assistance now extends to the recovery of assets, a fundamental principle of the Convention against Corruption (see Art. 1 and 51). Secondly, in the absence of dual criminality, States Parties are required to render assistance through non-coercive measures, provided this is consistent with their legal system and the offence is not of a trivial nature. States Parties are encouraged to extend as wide a scope of assistance as possible in the pursuit of the main goals of the Convention, even in the absence of dual criminality (Art. 46, Para 9, and Art. 1)’.7

In addition Art. 46 requires that States requesting cooperation must include in their request a copy of the order of confiscation, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final.

8 Depending on the kind of assistance sought, such requests should include a description of the concerned property, its location, and value, as well as the facts which are required under the domestic law of the requested State Party to issue the requested order. In case of the direct enforcement of a foreign confiscation order the request should include a legally admissible copy of the respective order as well as a statement specifying the measures taken by the requesting country to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final. Moreover, if a provisional measures is requested, the request must include a statement of facts relied upon by the requesting State Party and a description of the specific action requested, and, where available a legally admissible copy of the provisional order on which the request is based.
returned to the prior legitimate owner. In doing so, the provision departs significantly from other conventions in particular the United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotrope Substances and the United Nations Transnational Organized Crime Convention.

25. More specifically, Art. 57 outlines the main principles governing the return and disposal of the proceeds of corruption confiscated under Art. 46 and 55 of the Convention. Difficulties surrounding the degree of ownership on confiscated property traditionally prevented the timely return of confiscated assets. This paragraph rejects the concept where it was left to the discretion of States to consider the return of confiscated assets.

26. Art. 57 recognizes that the claims of requesting States Parties are stronger in some cases than in others. Where property has been obtained through embezzlement, the property must be returned. Where property is obtained through other forms of corruption covered by the Convention, the property must be returned subject to proof of ownership or the recognition of damages. In all other cases, the requested State Party still shall give priority consideration to the return of confiscated property to the requesting State, or the prior legitimate owners, or to use such property for the compensation of victims.

27. Furthermore, Art. 57 determines that the requested State Party should consider to waive the requirement for a final judgment in cases where a final judgment cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

28. Finally in view of the possibly very costly measures taken by a requested State Party in order to trace, freeze, seize and confiscate the proceeds of corruption, Art. 57 allows the requested State Party to deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property. At the same time, the provision emphasizes that the obligation to return assets minus reasonable expenses is separate and distinct from any voluntary arrangement, for the final disposal of confiscated property.

**Other Provisions**

29. Other provisions contained in Chapter V on asset recovery urge States Parties to take a proactive approach to international cooperation, including in cases where no request for cooperation has been received. As such States Parties are encouraged to forward any information on (suspected) proceeds of corruption to another State Party without prior request, when it believes that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings, or such information might trigger a request for international cooperation. This provision, which is contained in Art. 56 of the Convention underlines the proactive spirit of Chapter V and challenges traditionally hostile approaches by States Parties to cooperate in the recovery of illicitly obtained assets.
30. Art. 58 must also be read with a view to the proactive spirit of Chapter V. This provision establishes a mandatory requirement with respect to cooperation between States Parties in dealing with proceeds of corruption and the laundering of such proceeds. In this context, Art. 58 also encourages States Parties to consider establishing a financial intelligence unit to be responsible for receiving, analyzing and disseminating to the competent authorities reports of suspicious financial transactions’.

31. Finally, Art. 59 urges States Parties to consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to the chapter on asset recovery.

**Conclusion**

32. In conclusion, Chapter V establishes a highly innovative and comprehensive framework for the prevention, detection, tracing, seizure, freezing and confiscation, as well as the return and disposal of the proceeds of corruption. As such the chapter provides for a potentially effective deterrent, as it removes possible incentive structures for corruption. It also establishes effective preventive measures against the concealment of assets, and the development of complex trans-national crime networks. Finally, it demonstrates potentially immediate justice through the restitution of stolen assets.