Module 5

Asset Recovery Process and Avenues for Recovering Assets
(adopted from the Handbook for Practitioners on Asset Recovery under StAR Initiative)
Overview

Module 5 looks at how to improve understanding of the requirements and strategies of successful asset recovery. It has as its premise the notion that ultimately the goal of fighting financial crime is to take the profit out of the crime. There is no better way of doing this than to freeze, seize and confiscate the proceeds of any crime including corruption. The module provides case examples of asset recovery and the management of seized and forfeited assets. Moreover, as noted in modules 1 through 3, there is usually an international dimension to most corruption cases. Consequently, module 5 also addresses the matter of international cooperation in asset recovery. Thus, there is a reinforcement of what has been already discussed in modules 1 and 3.

This module is derived from chapter 1 of the Handbook for Practitioners on Asset Recovery published by the Financial Market Integrity unit under the auspices of the Stolen Asset Recovery Initiative. And while module 5 does cover a lot of ground with respect to the subject matter of asset recovery and international cooperation, practitioners are encouraged to refer to the handbook. The handbook addresses this subject matter in a comprehensive manner.

At the end of the study of this module, practitioners are expected to:

- Identify the process for going after assets that are proceeds of financial crime;
- Know the different forms of confiscating proceeds of financial crime;
- Understand that confiscation provides some deterrent by removing the possibility of enjoying the illegal gains; and
- Understand and know that the process for asset recovery will use a combination of both informal assistance and formal mutual legal assistance.
An Overview of the Asset Recovery Process and Avenues for Recovering Assets

One of the first considerations in an asset recovery case will be the development of an effective strategy for both obtaining a criminal conviction (if possible) and recovering the proceeds and instrumentalities of crime. Practitioners must be aware of the various legal avenues available for recovering assets, as well as some of the factors or obstacles that may lead to the selection of one avenue over another. This module introduces the general process for asset recovery and the various avenues for recovering assets.

General Process for Asset Recovery

Whether pursuing assets through criminal or non-conviction based (NCB) confiscation proceedings in a foreign jurisdiction or a private civil action, the objectives and fundamental process for recovery of assets is generally the same. Figure 1 below outlines this process.

**Figure 1: Process for Asset Recovery**

- **Stolen Assets**
- **Collecting Intelligence, Evidence and Tracing Assets**
  - (domestically and in foreign jurisdictions using MLA)
- **Securing the Assets**
  - (domestically and in foreign jurisdictions using MLA)
- **Court Process**
  - (to obtain conviction (if possible), confiscation, damages and/or compensation)
- **Enforcing Orders**
  - (domestically and in foreign jurisdictions using MLA)
- **Return of Assets**

**Collecting Intelligence and Evidence and Tracing Assets:** Evidence is gathered and assets are traced by law enforcement officers under the supervision of prosecutors or judges, or by private investigators or other interested parties in private civil actions. See module 4 for more details.

**Securing the Assets:** During the investigation process, proceeds and instrumentalities subject to confiscation will need to be secured to avoid dissipation, movement, or destruction. In certain civil law jurisdictions, the power to order the seizure or restraint of assets subject to confiscation is usually granted to prosecutors, investigating magistrates or law enforcement agencies. In other
civil law jurisdictions, judicial authorization is required. In common law jurisdictions, an order to restrain or seize property generally requires judicial authorization, with some exceptions in seizure cases.

**Mutual Legal Assistance:** International cooperation is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. It will be required for the gathering of evidence, the provisional restraint, and the eventual confiscation of the proceeds and instrumentalities of corruption. And once the assets are confiscated, cooperation is critical for the repatriation of the stolen assets to the victim state. International cooperation includes “informal assistance,”¹ formal mutual legal assistance and extradition.

**Court Proceedings:** Court proceedings may involve criminal, NCB or administrative forfeiture, or private civil actions (each described further in this module).

**Enforcement of Orders:** Once courts have ordered the restraint, seizure or confiscation of assets, steps must be taken to enforce the order.

**Asset Return:** The enforcement of the confiscation order in the foreign jurisdiction often results in the assets being confiscated to the foreign authorities or treasury (not directly returned to the requesting jurisdiction). As a result, another mechanism will be needed to arrange for the return of the assets. If the United Nations Convention against Corruption (UNCAC) is applicable, the requested party will be obliged under Article 57 to return the confiscated property to the requesting party in cases of embezzlement of public funds or laundering of such funds, or when the requesting party reasonably establishes prior ownership.

Assets can also be directly returned to victims, including the requesting or victim jurisdiction, through the order of a court (referred to as “direct recovery”).² A court may order compensation or damages directly to the victim jurisdiction in a private civil action. A court may also order compensation or restitution directly to the victim jurisdiction in a criminal or NCB case. Finally, some courts, when deciding on confiscation, have the authority to recognize the victim jurisdiction’s claim as the legitimate owner of the property.

**Legal Avenues for Achieving Asset Recovery**

Asset confiscation is a pre-requisite for any jurisdiction that wishes to have in place all methods for recovering the proceeds of corruption and money laundering. Confiscation involves the permanent deprivation of assets by order of a court or other competent authority. Title is acquired by the State without compensation to the asset holder. Emphasizing the importance of a

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¹ Informal assistance is used in this handbook to mean any activity or assistance that is provided without the need for a written MLA request. There may be legislation that permits this type of practitioner-to-practitioner assistance, including MLA legislation.

² UNCAC, Article 53 requires that States Parties take measures to permit direct recovery of property.
confiscation system, international instruments and standards, such as UNTOC, UNCAC and the FATF 40+9 Recommendations, require that, at a minimum, parties have criminal confiscation systems in place as a means to combat and deter corruption, money laundering, and other serious offenses.3 Non-conviction based (NCB) confiscation is encouraged in UNCAC and the FATF 40+9 Recommendations, and is being more widely adopted as countries continue to expand their confiscation programs.4

The rationale for confiscation is clear: First, in crimes involving corruption and other financial predatory crime, there are victims (either governmental or private) who should be compensated with any recoverable funds. Second, because greed is a primary motivator behind corruption and financial crime, confiscation provides some deterrent by removing the possibility of enjoying the illegal gains and sends a message that “crime does not pay.”

Prosecutors may have a number of confiscation methods available under their domestic regime and should try to keep all options available, particularly in cases where challenges to the confiscation are extremely likely and evolving events may eliminate one method. There are generally two types of confiscation used to recover the proceeds and instrumentalities of crime: criminal and NCB confiscation. In addition, some jurisdictions employ a concept referred to as administrative or summary confiscation.

**Criminal Confiscation**

Criminal confiscation requires a criminal conviction by trial establishing guilt “beyond a reasonable doubt” or sufficient to “intimately convince” the judge, or following a guilty plea by the defendant. Once a conviction is obtained, a final order of confiscation can be ordered by the court, often as part of the sentence. In some jurisdictions, confiscation is a mandatory order; in others the court (or jury) has discretion in imposing an order of confiscation.5 In some jurisdictions, the standard of proof for confiscation will be the lower “balance of probabilities” standard of proof; other jurisdictions require the higher “beyond a reasonable doubt” or “intimate conviction” standard.

Because of the need for a conviction, there can be difficulty in confiscating assets using this procedure when the target has died, fled the jurisdiction, or is a fugitive. Some countries have incorporated absconding provisions which declare that the target is “convicted” for confiscation purposes once it is established that the target has fled the jurisdiction.

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3 UNCAC, Articles 2, 31, 54, 55; UNTOC Articles 2, 6, 12, 13; Vienna Articles 1, 5; FATF 40+9 Recommendations 3 and 38.
4 UNCAC, Article 54(1)(c), FATF 40+9 Recommendation 3.
5 For example, in Cameroon, confiscation is mandatory in some corruption cases: Criminal Code on Misappropriation of Public Funds (Cameroon), Section 184(4) states that confiscation “shall be ordered in every case.”
NCB Confiscation

NCB confiscation, sometimes referred to as “in rem confiscation”, “objective confiscation” or “extinction de dominio”, authorizes the confiscation of assets without the requirement of a conviction. As it is typically a property-based action against the asset itself, not against the person with possession or ownership, NCB confiscation generally requires proof that the asset is the proceeds or instrumentalities of crime. In addition, a conviction is not required.

NCB confiscation most often takes place in one of two ways. The first is confiscation within the context of criminal proceedings but without the need for a final conviction or finding of guilt. In these situations, NCB confiscation laws are incorporated into existing criminal codes, anti-money laundering acts or other criminal legislation, and are regarded as “criminal” proceedings to which the criminal procedural laws apply. The second is confiscation through an independent statute which introduces a separate proceeding that can occur independently of, or in parallel to, related criminal proceedings, and is often governed by the rules of civil procedure (rather than criminal procedure laws). In jurisdictions applying civil procedure, a lower “balance of probabilities” or “preponderance of the evidence” is often the standard of proof required for confiscation.

Some jurisdictions pursue NCB confiscation only after criminal proceedings have been exhausted or unsuccessful. In other jurisdictions, a “stay” of the NCB confiscation proceedings until the criminal investigation is completed.

NCB confiscation is useful in a variety of contexts, particularly when criminal confiscation is impossible or unavailable, such as when: (1) the offender has died, fled the jurisdiction or is immune from prosecution; (2) an asset is found and the owner is unknown; (3) there is insufficient evidence to seek a criminal conviction or criminal proceedings have resulted in an acquittal (applies in jurisdictions which apply a lower standard of proof). NCB confiscation may also be useful in large and complex cases where a criminal investigation is in progress and there is a need to freeze and confiscate the assets before a formal criminal charge is brought.

NCB confiscation systems are not intended to replace criminal confiscation. In cases where it is possible to prosecute and obtain a conviction, the conviction should be obtained and powerful and relatively economical criminal confiscation should be available to prosecutors.

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6 Examples of jurisdictions include Switzerland, Liechtenstein, Slovenia, and Thailand.
7 Examples of jurisdictions include Colombia, South Africa, the United States, and the United Kingdom. “Civil confiscation” or “civil forfeiture” systems would fit into this category.
8 Civil rules permitting pre-trial discovery, such as depositions of witnesses, interrogatories, and document production or disclosure orders, may adversely impact an ongoing criminal investigation.
9 Many civil law jurisdictions permit a freeze in such instances; but many common law jurisdictions do not, or require that a formal charge be brought within a specified time frame after the freezing order.
Private Civil Action

States seeking to recover stolen assets have the option of initiating proceedings in foreign civil courts to secure and recover the assets, or to seek damages based on torts, breach of contract, or unjust enrichment. The courts of the foreign country may be competent if a defendant is a person (individual or business entity) living or incorporated in the country (personal jurisdiction), if the assets are within or have transited the jurisdiction (subject matter jurisdiction), or if an act of corruption or money laundering was committed within the jurisdiction. As a private litigant, the state seeking redress can hire lawyers to explore the potential claims and remedies (ownership of misappropriated assets, tort, disgorgement of illicit profits, contractual breaches).

Actions Initiated by Foreign Jurisdictions

A competent authority seeking to recover stolen assets may seek to support a criminal or NCB confiscation proceeding which has been initiated in another country against the corrupt official, associates, or identified assets. At the conclusion of the proceedings, the country may be able to obtain a portion of the recovered assets through orders of the foreign courts or pursuant to legislation or agreements. This will require that the foreign authority has jurisdiction, the capacity to prosecute and confiscate and, most importantly, be willing to share the proceeds. The initiation of an action by a foreign authority may take place in one of two ways: Victim jurisdiction asks the foreign authorities to open their own case or foreign authorities open case independent of request from victim jurisdiction.

Administrative confiscation

Unlike criminal or NCB confiscation which requires court action, administrative confiscation generally involves a non-judicial mechanism for confiscating assets used or involved in the commission of the offense. It may occur by operation of statute, pursuant to procedures set out in regulations, and is typically used to address uncontested confiscation cases. The procedures usually require notice to persons with a legal interest in the asset and by publication to the public-at-large. Administrative confiscation is typically performed by an authorized agency, such as a police unit or a designated law enforcement agency and will often follow a process similar to that traditionally used in customs smuggling cases. Generally administrative confiscation is restricted to low-value assets or certain classes of assets (for example, any amount of cash can be seized, but not real property). Another variation on this type of confiscation is called “abandonment” by some jurisdictions, which will employ a similar procedure.

10 UNCAC Article 53(c) calls on States Parties to permit civil actions by foreign states.
11 UNCAC, Articles 53 (b) and (c) requires States Parties to take measures to permit direct recovery.
Another non-judicial means to recover assets is through taxation of the illicit profits (see box below).

<table>
<thead>
<tr>
<th>Another Means for Recovering Assets -- Taxation of Illicit Profits</th>
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<tbody>
<tr>
<td>A public official or an executive from a state-owned company who receives bribes, misappropriated funds or stolen assets may be liable for income taxes on this illicit income. In this case, authorities do not have to prove the illicit origin of assets. It is sufficient to prove that they represent undisclosed revenues. The authorities simply prove that the taxpayer has made a taxable gain or received taxable income and that he is liable for the appropriate amount of taxes, including interest and penalties if the tax was not paid on time. The evidentiary burden is therefore less than in a civil recovery case. Given the fact that this approach generally does not involve court proceedings, this mechanism is potentially cheaper and speedier than civil recovery or criminal proceedings.</td>
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**Preventing dissipation of assets**

Asset confiscation is of little value if, at the end of the day, no asset is available for confiscation. Given that assets can be hidden or moved out of reach in a short period of time, as well as the fact that an investigation and confiscation can take years (giving the target ample time to move or dissipate assets), it is critical that measures be taken to secure the assets that may become subject to a confiscation judgment. These measures are referred to as provisional measures and include the seizure and restraint of assets. These measures should be taken as close to the beginning of the case as possible and should secure the assets, if possible, until the conclusion of the confiscation proceedings.12

In both common and civil law jurisdictions, two distinct mechanisms have been developed to control and preserve assets which may be subject to confiscation: seizure and restraint. Seizure involves taking physical possession of the targeted asset. Although generally court orders are required, some jurisdictions grant law enforcement the right to seize assets: for example, bulk cash or other property “reasonably suspected or believed” to be the proceeds or an instrumentality of crime may be seized in exigent circumstances. Such powers, often emanating from customs laws, are particularly useful for seizing suspicious cash that is transported across international boundaries in contravention of cash import or export reporting laws.

Restraint orders (also referred to as restraining orders or freezing orders)13 are a form of mandatory injunction issued by a judge or a court that restrains any person from dealing with or disposing of the assets named in the order pending the determination of confiscation proceedings.14 Unlike seizure orders, restraint orders do not result in the physical possession of the asset. Judicial authorization is usually required; however some jurisdictions permit restraint

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12 Some jurisdictions limit the duration of the provisional orders, but generally the limitations may be extended: In Liechtenstein, for example, the court must limit the duration for which the order is issued, but the deadline may be extended upon application (Code of Criminal Procedure, Section 97a(4)).
13 Some confiscation laws contain both restraint and freezing orders, the former being high level orders made by a judge that can restrain any type of property, the latter being lower level orders made administratively by police officers or public servants that can restrain limited classes of property of lesser value.
14 Restraint orders are similar (not identical) to the common law Mareva Injunctions.
to be ordered by prosecutors or other authorities. At the same time, not all jurisdictions use the same terminology for seizure and restraint of assets. For example, one jurisdiction will “seize” bank accounts, whereas another will “restrain” them. Other jurisdictions have introduced other terms, such as “freezing” or “blocking.”

The Management of Assets Subject to Confiscation

Once assets have been secured through provisional measures, authorities will need to ensure the safety and value of the assets up until the assets are eventually confiscated (or released)—a period of time that can often take years. Sometimes these control mechanisms are capable of working effectively over assets without any need for ongoing supervision and management (e.g., once an order to freeze a bank account has been served on the bank, the bank can usually be relied upon to ensure that the account is effectively blocked). Other assets may require more targeted approaches to ongoing maintenance, control and management, such as unique investment vehicles, exotic or valuable livestock, or luxury real estate. It is essential for any asset confiscation system to have the flexibility to control and manage such assets pending confiscation, and the ability to realize them and pay the proceeds to government or other authorized recipients after confiscation.16

The starting point for the establishment of a functional asset management system is appropriate legislation and accompanying regulations that enable the preservation of the economic value of assets in an efficient, transparent and flexible manner. Sufficient and appropriate resources will need to be allocated, including the identification of a centralized competent authority to manage and control the assets and the appointment of senior personnel with management and administrative skills to oversee the program. It cannot be assumed that existing law enforcement structures already have the skills and resources that are required to manage assets: While there may be some, basic capacity in this area—for example police seize and store property that is evidence of criminal offenses—the systems are insufficient to deal with the seizure or restraint and confiscation of a wide range of assets. Without carefully drafted legislation, regulations and funding for asset management, even the most successful confiscation system can be rendered ineffective by the inability to manage the assets seized.

Asset managers must have the skills, resources and legal authority to (1) preserve the security and value of assets pending confiscation (this will include the sale of rapidly depreciating assets); (2) if necessary, hire contractors with specialized skills to accomplish management task; (3) liquidate assets after confiscation for a fair price; and (4) following payment of all necessary expenses, distribute the proceeds in accordance with the applicable legislation. Such skills are

15 A prosecutor has the authority to restrain assets in Mexico and Colombia (see, for example, Law 793.02 (Colombia)).
16 The importance of the management of seized assets has been recognized international community: see Article 31(3) UNCAC. Guidance has also been issued: See “G8 Best Practices for the Administration of Seized Assets” (April 27, 2005) and the Organization of American States Model Regulations, Article 7.
unlikely to be found among investigators, prosecutors, or the courts; instead, authorities should seek to fill the needed expertise in other ways, which may include:

- **Creation of a Separate Specialized Asset Management Office (AMO):** One option is the creation of a separate, specialized agency with the responsibility to manage seized or restrained assets, hire qualified asset managers, conduct pre-restraint planning and analysis, and coordinate post-confiscation realization or liquidation.\(^{17}\)

- **Creation of an Asset Management Unit within an Existing Agency:** In some cases, a new unit dedicated solely to the duties of managing assets subject to confiscation is established within another existing governmental agency.\(^{18}\) In some cases, this may be an agency with existing expertise in asset management.\(^{19}\)

- **Outsourcing Asset Management:** In those jurisdictions where the establishment of an AMO or the co-opting of an existing agency is not an option, the remaining option is to engage private, locally available property trustees.\(^{20}\)

**How Confiscation Works**

A confiscation judgment can be either: (1) property-based (naming a specific asset); or (2) value-based (naming an amount of money owed by a specific person). Criminal confiscation can be either type, but NCB confiscation is almost exclusively a property-based system.\(^{21}\) Some jurisdictions will employ both systems, permitting confiscation of identified assets and a judgment which can be satisfied from the legitimate assets of a person. In these situations, a property-based system may be the first choice, but a value-based confiscation would be available when the proceeds have been dissipated or hidden.

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\(^{17}\) Examples of specialized asset management offices include the Canadian Seized Property Management Directorate and the Haitian Bureau d'Administration du Fond Special de lutte contre la drogue (BAFOS). The Financial Action Task Force (FATF) has recommended asset management offices in “Best Practices Paper on Confiscation (R.3 and 38),” adopted by the plenary in February 2010. The Camden Asset Recovery Inter-Agency Network (CARIN) also recommended the creation of Asset Management Offices (AMO) at its 2008 Annual General Meeting.

\(^{18}\) In Colombia, the Anti-Narcotics Agency (DNE) has a specialized asset management unit which is responsible for the management of seized or restrained assets pursuant to Colombia’s anti-drug trafficking laws. In the United States, the US Marshal’s Service, a generalist law enforcement agency, has been performing asset management functions in the US Asset Forfeiture Program since 1984.

\(^{19}\) An example is the Insolvency Trustee Service Australia, the government office responsible for administering bankruptcy and insolvency laws. In addition to performing its primary role as the administrator of the estates of bankrupts and managing the assets of bankrupt individuals or insolvent companies, ITSA also provides specialized asset management services in support of Australian federal confiscation laws.

\(^{20}\) South Africa is an example of a jurisdiction that makes use of private trustees, or *curators bonis* to provide asset management services in support of the enforcement of the Prevention of Organised Crime Act 1998. This legislation permits the appointment of persons by a court to manage assets seized or restrained under the Act and to realize property in satisfaction of confiscation and forfeiture orders. The Asset Forfeiture Unit of the South African National Prosecution Authority has created a manual to guide persons appointed as *curator bonis* under the Act.

\(^{21}\) In the Philippines, the system is not purely property-based because the government can obtain a personal judgment against an individual, not against the asset, although the purpose and impact is to target the asset.
Both approaches target proceeds of crime and there is a large overlap between the operational reach of the laws. However, they differ in the procedures used and evidentiary requirements for obtaining these proceeds. This section attempts to highlight some of these differences.

Property-Based Confiscation

The property-based system is aimed at assets (also referred to as “in rem”) that are connected to, or found to be, the proceeds or instrumentalities of crime. This requires that a link be established between the identified assets and an offense.

Property-based confiscation is most useful when identified assets can be linked with evidence to an offense, for example, money seized from a person that has taken a bribe (proceeds) or a yacht upon which a corrupt official has been lavishly entertained (instrumentality). However, when assets cannot be linked to an offense because the target has not directly participated in criminal activity or the benefits are distanced from the crime through money laundering, this type of confiscation becomes more difficult. Some jurisdictions have adopted legal enhancements to overcome these barriers, such as substitute asset provisions and extended confiscation.

Proceeds of Crime: Obtained Directly or Indirectly

Proceeds are generally defined as anything of value obtained directly or indirectly as the result of the offense.22 “Direct proceeds” would include funds paid for by a bribe or amounts stolen by an official from a national treasury or governmental program. “Indirect proceeds” would include the appreciation in the value of the bribery payments or a stock portfolio purchased with the stolen treasury fund. Indirect proceeds do not accrue directly from the commission of an offense, but are ancillary benefits that would not have accrued were it not for the commission of an offense.

A case example of issues encountered in determining the proceeds of crime.

Mr. X is a corrupt official who accepted a cash bribe of USD $100,000 to manipulate the process in awarding a government contract. A series of transactions subsequently took place to move and launder the funds:

- Mr. X deposited the bribe into a bank account in his wife’s name.
- Mr. X caused his wife to transfer the money into the trust account of a lawyer in London, UK. This lawyer was already holding USD $900,000 on behalf of Mr. X (the origins of which are unknown).
- The lawyer is instructed to use all the monies he holds to purchase a property worth USD $1 million in the name of an investment company controlled by Mr X. Three years later, Mr X sells the property for USD $2 million and has the proceeds returned to an account controlled by him in his home country.

Once these corrupt activities come to light, prosecutors applied for a property-based confiscation order of USD $200,000 from the bank account containing the USD $2 million on the basis that it constituted

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22 Many jurisdictions have adopted the “proceeds of crime” definition used in UN Conventions, including UNCAC, Article 2, UNTOC, Article 2, and Vienna, Article 1. These Conventions define “proceeds of crime” to mean “any property derived from or obtained, directly or indirectly, through the commission of an offense.”
the proceeds of crime. This amount was calculated through the following analysis:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>$100,000</td>
<td>The amount directly derived from the bribe. The fact that the property was converted to a different form of property and co-mingled with other assets did not impact its character as direct proceeds of the offense.</td>
</tr>
<tr>
<td>+ $100,000</td>
<td>The capital gain on the sale of the house (doubled in value) amounted to an indirect benefit of the corruption offense.</td>
</tr>
<tr>
<td><strong>$200,000</strong></td>
<td>Total proceeds of crime</td>
</tr>
</tbody>
</table>

**Value-Based Confiscation**

Unlike property-based forfeiture orders which are directed at specific assets, value-based confiscation, is focused on the value of benefits derived from criminal conduct and often imposes a monetary penalty equal to an equivalent value. In this system, there is an assessment of the amount of benefits which flowed from the offense to the offender, including increases in value due to appreciation of the assets. The court will impose a liability equal to that benefit on the defendant at sentencing. This judgment may be enforceable as a judgment debt or fine against any asset of the defendant, whether or not it has any link to the offense.

The absence of a requirement to link the proceeds to an offense often facilitates the practitioner’s ability to obtain a confiscation judgment. On the other hand, the benefits must be linked to the offenses that form the basis of the defendant’s conviction which can be problematic in cases where the prosecutor only proceeds or succeeds on some of the offenses (see explanation below). In addition, the assets are limited to those owned by the defendant, although this issue is often resolved through presumptions and broad definitions of “ownership” to include assets that are held, controlled or gifted by the defendant. Similar to property-based confiscation, the legislative definition and interpretation of key terms will be important. Some of the issues raised in litigation are set out below to assist practitioners.

**Assessing the benefits of crime – Using “related activities” to capture the full benefit.**

Over a two month period, a customs official, Ms. X, accepted three bribes from undercover agents totaling $20,000. Evidence obtained also showed that she was planning further dealings which would generate additional bribes and that her wealth increased by $500,000 in excess of what she could have been expected to have saved from her government salary during the previous two years. There was also several STR of Mrs. X conducting unexplained transactions involving large amounts of cash.

Ms. X was convicted on three counts of corruption based upon the bribes from the undercover agents. The prosecutor applied for a confiscation order based on the benefits derived from the commission of the three offenses and any “criminal activities related to the offense,” an option available under the jurisdiction’s confiscation law. The prosecutor submitted evidence that Ms. X was engaged in a business of extracting bribes from importers and that the $500,000 unexplained increase in her wealth was derived from her corrupt business practice which was “related to” the offenses for which she was convicted. The court ordered a judgment for $520,000 – the amount of the three bribes and the value of the wealth derived from the related offenses.\(^{23}\)

\(^{23}\) Had the “related activities” clause had not been included in the legislation, the prosecution would only have been able to seek an order for $20,000 (the amount of the three bribes).
Standards of Proof

In a criminal confiscation case, the primary burden that must be discharged by the prosecution is the requirement to convict at the criminal standard of “beyond a reasonable doubt” or “intimate conviction.” This standard of proof must be met to prove the crime before confiscation can be ordered. Subsequent or secondary burdens may be imposed during the court’s consideration of confiscation. In some jurisdictions, this secondary burden may be established on the lower “balance of probabilities” standard of proof; other jurisdictions require the higher “beyond a reasonable doubt” or “intimate conviction” standard.

NCB confiscation is not linked to the obtaining of a conviction. The prosecution must establish that the offense giving rise to confiscation has been committed or make a showing of “illicit enrichment” justifying a confiscation judgment. This is often on the balance of probabilities standard, although jurisdictions with NCB provisions in their criminal legislation may require the higher “intimate conviction” or “beyond a reasonable doubt” standard.

It is important to note that the standards of proof required for restraint and investigative techniques will be lower, whether criminal or NCB confiscation.

An Illustration of Standards of Proof

<table>
<thead>
<tr>
<th>Tracing measures</th>
<th>Freezing order Search &amp; seizure order</th>
<th>Confiscation order</th>
<th>Conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reasonable Grounds to Suspect or Evidence is necessary to establish the truth</td>
<td>Probable Cause or Reasonable Grounds to Believe</td>
<td>Balance of Probabilities or Preponderance of the Evidence</td>
<td>Beyond a Reasonable Doubt or Intimate conviction (intimately convinced)</td>
</tr>
</tbody>
</table>

Use of Expert and Summary Testimony to Present Confiscation Evidence in Court

Evidence establishing the link between the asset and the offense or the value of benefits can be complex and difficult for the judge (or jury) to follow. Such evidence is often best presented using flow charts and spreadsheets which present the financial material in a way that may be more easily comprehended (see Module 4 for sample flow charts). A forensic accountant or financial investigator with training and experience in the presentation of evidence can be helpful
in this regard, and it may be helpful for the witness to present a summary chart showing the steps to the total benefits or money judgment calculation.

Confiscation Enhancements

Most jurisdictions provide for procedural aids or enhancements designed to improve the effectiveness of the confiscation law or to capture an extended range of assets.24 One of these aids are rebuttable presumptions. Presumptions are enormously helpful in corruption cases, in particular, because corrupt public officials—particularly those who have a long tenure in public service—have had extensive opportunity to embezzle and conceal funds and often are able to influence witnesses and thwart investigations into their assets. Relieving the prosecution of the burden to establish that the defendant’s unexplained wealth is linked to specific instances of illegal conduct or a benefit from crime greatly enhances the possibility of obtaining a conviction or confiscation judgment (or both).

One example is presumption based on possession. Under this presumption, assets found in the possession of a person at the time of, or shortly before or after an offense has been committed, are considered to be either the proceeds or an instrumentality of the offense. Another example is presumption based on lifestyle.25 This presumption can be raised when the prosecutor can show that the defendant does not have sufficient legitimate sources of income to justify the value of assets accumulated over a period of time.26 Items that the defendant can show were lawfully acquired may be excluded from the confiscation order. This presumption requires the defendant to justify more assets than those related to the specific offense.

Confiscation of Assets Located in Foreign Jurisdictions

It is quite common for corruption and money laundering investigations to move beyond domestic borders, thus requiring cooperation with foreign jurisdictions. The involvement of a foreign jurisdiction both complicates a case and opens up a whole new range of possibilities. For example, if a case involves domestic offenses for corruption and money laundering and foreign offenses for money laundering, several possibilities may arise, including:

- Domestic confiscation proceedings triggered by the domestic corruption and money laundering offenses, to be enforced in the foreign jurisdiction through MLA and returned to the victim jurisdiction pursuant to international agreements, treaties, or

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25 A presumption based on lifestyle is separate and distinct from the offense of illicit enrichment or unjust resources. The definition is often the same, however the procedures applied are different.

26 In South Africa, the presumption extends for a period of seven years prior to the initiation of proceedings: Prevention of Organised Crime Act Second Amendment 1999, Section 22. In the United Kingdom, the period is six years for defendants determined to have a criminal lifestyle: Proceeds of Crime Act (United Kingdom), Section 10(8). See also Criminal Code (France), Article 131-21.
other agreements

- Foreign confiscation proceedings triggered by the foreign money laundering or bribery offense with the proceeds of the confiscation returned to the victim jurisdiction by means of a sharing agreement; and
- Both domestic and foreign confiscation proceedings may be pursued in tandem.

**International Cooperation in Asset Recovery**
Corruption cases and most complex money laundering cases will generally require asset recovery efforts beyond domestic borders. Some or parts of an offense may be committed in another jurisdiction: a company paying bribes for a contract may be from a jurisdiction outside the jurisdiction in which the bribes are paid, and the officials receiving the bribes may launder their ill-gotten gains in another jurisdiction. In addition, the international financial sector is a particularly attractive setting for those seeking to launder funds and impede asset tracing efforts. Intermediaries or “gatekeepers”, such as accountants, lawyers, or trust and company service providers, provide access to the financial sector and also serve to disguise a corrupt official’s involvement in a transaction or ownership of assets. They employ complicated financial schemes, often involving offshore centers, shell companies, and corporate vehicles to launder the proceeds of corruption. In addition, money can be moved quickly, often at the click of a keyboard or cell phone button, with the help of multiple tools, such as wire transfers, letters of credit, credit and debit cards, automated teller machines, and mobile devices.

In contrast, tracing and recovery of the assets by police and prosecutors may require months, if not years, because the principle of sovereignty restricts a jurisdiction’s ability to take investigative, legal and enforcement action in foreign jurisdictions. Successful tracing and recovery efforts will often depend upon assistance from foreign jurisdictions, a process which can be slowed and complicated by differences in legal traditions, laws and procedures, as well as varying languages, time zones, and capacities.

In this context, international cooperation is essential for the successful recovery of assets that have been stashed abroad. The international community has recognized this and has concluded a number of multilateral treaties or instruments requiring States Parties to cooperate with one another on investigations, production of evidence, provisional measures and confiscation, and return to the victim state or to other victims. The figure below demonstrates how international cooperation is integral to each phase of asset recovery.

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27 For example, see the return provisions outlined in UNCAC, Article 57.
It is important to keep in mind that international cooperation begins immediately and is an ongoing process that must be incorporated into each phase of the case. Once the case reaches beyond domestic borders, it is important that practitioners focus on international cooperation efforts immediately and ensure they are maintained for the duration of the case. Some jurisdictions have waited until a domestic conviction and confiscation order was achieved before beginning the process of tracing and securing the assets abroad—with frustrating and adverse results: the delay gave the corrupt official ample opportunity to transfer funds to bank secrecy or uncooperative jurisdictions. Therefore it will be imperative to involve other jurisdictions at the outset, at a minimum through informal means. Establishing proactive contact early can aid practitioners in understanding the foreign legal system and potential challenges, in obtaining additional leads, and in forming a strategy. It also gives a “heads-up” to the other jurisdiction, giving them time to prepare for their role in providing cooperation.

Forming personal connections with foreign counterparts is the hallmark of successful asset recovery cases. A telephone call, an e-mail, a videoconference or—particularly in larger cases—a face-to-face meeting with foreign counterparts will go a long way to moving the case along. It is important in all phases, whether obtaining information and intelligence, making strategic decisions, understanding the foreign jurisdiction and requirements for assistance, drafting formal mutual legal assistance (MLA) requests, or following-up requests for assistance. It helps to reduce delays, particularly where differences in terminology and legal traditions lead to misunderstandings.

Practitioners should generally not begin their international cooperation efforts with the submission of a formal MLA request. Many practitioners will immediately resort to a formal MLA request once they determine that international cooperation is required. However, some important information can be obtained more quickly and with fewer formalities through direct contact with counterpart law enforcement agencies and financial intelligence units, or from
liaison magistrates or law enforcement attachés posted locally or regionally. Such assistance may lead to a more rapid identification of assets, confirm the MLA needed, and even more importantly, provide the proper foundation for a formal MLA request. It is also an opportunity to learn about the procedures and system of the foreign jurisdiction and assess strategic options.

**Legal Assistance**

MLA is a process by which states seek and provide assistance in gathering information, intelligence, and evidence for investigations, in implementing provisional measures, and in enforcing foreign orders and judgments. Under the umbrella of MLA, we will distinguish between assistance that can be provided informally (“informal assistance”) and formally (“formal MLA”). Formal MLA is a request in writing that must adhere to specified procedures, protocols and conditions set out in multilateral or bilateral agreements or domestic legislation. In the investigation stages, these requests generally ask for evidence, provisional measures, or for the use of certain investigative techniques, such as the power to compel production of bank account documents, search and seizure orders, take formal witness statements, and serve documents. Formal MLA request will generally be required for the enforcement of confiscation orders.

In contrast to a formal MLA, the information gathered through informal assistance may not be admissible in court, but is more in the nature of intelligence or background information that can be used to develop the investigation and may lead to a formal MLA request.28

<table>
<thead>
<tr>
<th>Differences Between Informal and Formal Mutual Legal Assistance</th>
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<tbody>
<tr>
<td><strong>Informal assistance</strong></td>
</tr>
<tr>
<td>Obtain intelligence and information to assist investigation.</td>
</tr>
<tr>
<td>Emergency provisional measures (restraint or seizure) under</td>
</tr>
<tr>
<td>foreign law or police powers</td>
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<tr>
<td>Non-coercive investigative measures; proactive disclosures of</td>
</tr>
<tr>
<td>information; joint investigation; opening of foreign case.</td>
</tr>
<tr>
<td>Direct: Investigator or prosecutor directly to counterpart,</td>
</tr>
<tr>
<td>among Financial Intelligence Units, between banking &amp;</td>
</tr>
<tr>
<td>securities regulators.</td>
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<tr>
<td>service to foreign country.</td>
</tr>
<tr>
<td>Usually just agency-agency contact.  Sometimes an MOU.</td>
</tr>
<tr>
<td>Must be lawfully gathered in both jurisdictions.</td>
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<td></td>
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</table>

28 In general, common law jurisdictions will not permit the results of informal assistance to be used as evidence in court. Civil law jurisdictions, on the other hand, may permit the judge to consider information gathered through informal assistance. Chile and Switzerland, for example, will permit the admission of such evidence.

29 There may be bilateral or multilateral agreements which permit direct contact among practitioners.
Information is obtained quickly; formal requirements of MLA not required (e.g., dual criminality). Also useful for verifying facts, obtaining background information to improve MLA request.

| Advantages | Evidence is admissible in court; enables enforcement of orders. |

Information cannot always be used as evidence. Difficult to determine contacts and few resources allocated to networking.

| Limitations | Time-consuming; resource intensive; many requirements that are often difficult to meet; problem with leaks. |

The Process for International Cooperation

As described above, the process for asset recovery will use a combination of both informal assistance and formal MLA to obtain information, intelligence, evidence, provisional measures, confiscation, and eventual return of the assets. Unfortunately it is not a simple process in which one can simply request everything all at once by submitting a written MLA request for information on bank accounts held, copies of any bank documents, as well as the restraint or seizure and confiscation of any funds that are found to be linked to the suspect or convicted criminal. While it may seem easier to have everything in one request, such a request often lacks the evidential basis required. Instead, it is a step-by-step process in which information or evidence obtained pursuant to one request is used to support the next (follow-up) request. For example, it may be possible to obtain bank account details through informal assistance, which will help to provide the necessary foundation and background information for a formal MLA request to seize bank documents. The activity revealed in these documents will help investigators trace the assets, determine additional accounts to restrain or seize, and assist with the evidence required for provisional measures, whether emergency provisional measures (through informal assistance where available) or an MLA request. Eventually the accumulated information and evidence will provide the basis for domestic confiscation and enforcement. Figure 3 provides a simple flow chart to illustrate this step-by-step process.
Figure 3: Flow Chart of Informal assistance and MLA Process

Channels for informal Cooperation

The most common channels for informal assistance include:

- **Financial intelligence units (FIUs).** The amount and type of assistance they provide will vary, depending on the style of the FIU (administrative or law enforcement), but they will generally be able to share financial intelligence with other FIUs; some FIUs have authority to freeze funds or operate in a consent regime.

- **Law enforcement practitioners (e.g., investigative agencies, prosecutors, investigating magistrates).** Also helpful in this regard are law enforcement attachés and liaison magistrates. Based in embassies or consulates abroad, these individuals facilitate contact with counterparts to provide informal assistance, assist with MLA request preparations, and help following-up MLA requests.

- **Regulatory authorities, such as bank, securities, and company regulators.** This cooperation is more limited as it usually requires an MOU and may have restrictions in sharing for law enforcement purposes.

How does one initiate cooperation with foreign agencies? Often this is accomplished through personal contacts from previous cases, directly, or through networks to which the agencies are members, for example Interpol and the World Customs Organization (WCO) for law enforcement.
enforcement, the Egmont Group for FIUs, and CARIN or the OAS network for prosecutors and investigating magistrates.

Legal Basis for International Cooperation

In order to proceed with a formal MLA request, there must be a legal basis for cooperation and this must be specified in the formal MLA request (see box xx for including the legal basis in formal MLA). This may come through (1) multilateral conventions, treaties or agreements containing provisions on MLA in criminal matters; (2) bilateral mutual legal assistance treaties and agreements; (3) domestic legislation allowing for international cooperation in criminal cases; or (4) a promise of reciprocity through diplomatic channels (referred to as “letters rogatory” in some jurisdictions). Each of these avenues is outlined below.

Selecting a legal basis to include in the formal MLA request

In selecting the legal basis to include in the formal MLA request, many practitioners have found it most helpful to list all relevant treaties, agreements or legislation that apply, in order of preference. This practice increases the opportunity for applicability: since the types of assistance and potential reasons for refusal vary from treaty to treaty, the request may be acceptable under one legal basis and not under another. The list should be in order of preference and a bilateral treaty is generally the best option, followed by a multilateral treaty (both jurisdictions must be states parties) as it fits better the legal traditions and options of the two contracting jurisdictions, as opposed to a “one size fits all” approach of the multilateral treaties. The relevant treaties would then be followed by any domestic legislation (if available) and the promise of reciprocity.

Multilateral Conventions, Treaties or Agreements: Multilateral conventions, treaties or agreements contain binding provisions that oblige signatories to provide MLA under international law. The provisions define areas of cooperation and contain governing procedures, thereby bringing clarity and predictability to the process. These agreements will often permit more extensive forms of cooperation than the traditional promise of reciprocity or letters rogatory, such as communication between central authorities (rather than through formal diplomatic channels).

UNCAC is the most applicable multilateral treaty for recovery of the proceeds of corruption and the mutual legal assistance required for success. It has been ratified by over 140 jurisdictions and obliges States Parties to afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings concerning corruption matters.

Bilateral mutual legal assistance treaties (MLATs) and agreements: Similar to the multilateral treaties, bilateral MLATs contain binding provisions that oblige the signatories to provide MLA and define the procedures for practitioners to follow. In addition, they may provide forms of cooperation that are not available under other arrangements such as direct
contact between the practitioners, competent authorities, and members of the judiciary (with limited central authority involvement).

**Domestic legislation:** A number of jurisdictions have passed legislation which provides an MLA process for jurisdictions without a bilateral treaty, often on the condition of reciprocity (undertaking of the requesting jurisdiction provide MLA in similar situations. Unlike with a treaty arrangement, there is no international obligation to provide requested assistance; such flexibility raises the uncertainty of whether the request will be acceptable.

**Promise of Reciprocity through Diplomatic Channels (Letters Rogatory):** This traditional form of assistance may be useful if there is neither an existing treaty between the jurisdictions nor domestic legislation in the requested jurisdiction. It permits formal communication between the judiciary, a prosecutor or police of one jurisdiction and their counterpart in another jurisdiction. It is a longer process because it requires the inclusion of an additional party in the process, the Ministry of Foreign Affairs, and diplomatic formalities.

<table>
<thead>
<tr>
<th>Legal Framework for Asset Recovery</th>
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<tbody>
<tr>
<td><strong>Legislation &amp; Procedures (Domestic and Foreign Jurisdictions)</strong></td>
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<tr>
<td>- Confiscation provisions (criminal, non-conviction based, administrative)</td>
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<tr>
<td>- Mutual legal assistance</td>
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<tr>
<td>- Criminal law provisions and procedures (corruption, money laundering)</td>
</tr>
<tr>
<td>- Private law provisions; codes of procedure</td>
</tr>
<tr>
<td>- Asset sharing laws</td>
</tr>
<tr>
<td><strong>International Conventions &amp; Treaties</strong></td>
</tr>
<tr>
<td>- United Nations Convention against Corruption</td>
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<tr>
<td>- United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances</td>
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<tr>
<td>- United Nations Convention against Transnational Organized Crime</td>
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<tr>
<td>- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions</td>
</tr>
<tr>
<td>- Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty</td>
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<tr>
<td>- Inter-American Convention against Corruption</td>
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<tr>
<td>- Council of the European Union Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence</td>
</tr>
<tr>
<td>- Council of the European Union Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders</td>
</tr>
<tr>
<td>- Southern African Development Community (SADC) Protocol against Corruption 2001</td>
</tr>
<tr>
<td>- Commonwealth of Independent States Conventions on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters</td>
</tr>
<tr>
<td>- Bilateral mutual legal assistance treaties</td>
</tr>
</tbody>
</table>

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30 Some examples include the Informal assistance in Criminal Matters Act (Singapore), Law on International Mutual Legal Assistance in Criminal Matters (Liechtenstein), Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 (Hong Kong, China), Federal Act on International Informal assistance in Criminal Matters (Switzerland).
Summary and Review of Module 5

In this module an introduction was made to the general process for asset recovery and the various avenues for recovering assets. It was observed that one of the first considerations in an asset recovery case will be the development of an effective strategy for both obtaining a criminal conviction (if possible) and recovering the proceeds and instrumentalities of crime. It was suggested that practitioners need to be aware of the various legal avenues available for recovering assets, as well as some of the factors or obstacles that may lead to the selection of one avenue over another.

It was then observed that asset confiscation is a pre-requisite for any jurisdiction that wishes to have in place all methods for recovering the proceeds of corruption and money laundering. Moreover, the rationale for confiscation was articulated as requiring that victims of corruption or money laundering (either governmental or private) should be compensated with any recoverable funds. Further, it was argued that because greed is a primary motivator behind corruption and financial crime, confiscation provides some deterrent by removing the possibility of enjoying the illegal gains and sends a message that “crime does not pay.”

Then the module went on to indicate that once assets have been secured through provisional measures, authorities will need to ensure the safety and value of the assets up until the assets are eventually confiscated (or released)—a period of time that can often take years.

Finally, a brief overview of the international cooperation dimension for asset recovery was described. It was indicated that international cooperation for the purpose of recovery assets will generally involve a combination of both informal assistance and formal MLA to obtain information, intelligence, evidence, provisional measures, confiscation, and eventual return of the assets.