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**Human Rights Council
Advisory Committee
Eighteenth session**20 – 24 February 2017
Item 3 (a) (vi) of the provisional agenda **Requests addressed to the Advisory Committee stemming from Human Rights resolutions:
Negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights**

 Draft progress report on the research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights

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 I. Mandate and background

1. In Human Rights Council resolution 31/22, the Human Rights Council requested the Advisory Committee to conduct a comprehensive research-based study on the impact of the flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights, with a special emphasis on the right to development.

2. Among its other goals, the study was commissioned with a view to compiling relevant best practices and main challenges, and to make recommendations on tackling those challenges based on the best practices in question. The Advisory Committee was asked to present a progress report to the Human Rights Council at its thirty-sixth session for its consideration. The Advisory Committee was further requested to seek, if necessary, further views and the input of Member States, relevant international and regional organizations, the United Nations High Commissioner for Human Rights and relevant special procedures, as well as national human rights institutions and non-governmental organizations, in order to finalize the above-mentioned study. The Advisory Committee was also asked to take into account the final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (A/HRC/31/61). At its 17th session, the Advisory Committee established a drafting group composed of Mr. Mario Luis Coriolano, Mr. Mikhail Lebedev, Mr. ObioraChinedu Okafor (Co-Rapporteur), Mr. Ahmer Bilal Soofi (Chairperson) and Mr. Jean Ziegler (Co-Rapporteur).

3. This report additionally draws on earlier UN-sponsored studies including:

4. The ‘Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky’ (A/HRC/31/61) [hereafter referred to as the “Final study”]

5. ‘Illicit financial flows, human rights and the post-2015 development agenda – Interim study by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky’ (A/HRC/ 28/60) [hereafter referred to as the “Interim study”]

Schubert, Esther, ‘Illicit financial flows, tax and human rights’ Background paper, October 2015[[3]](#footnote-4).

6. ‘The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights – Interim report by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina’ (A/HRC/22/42)

 II. Introduction and definitions

 A. Definitions

7. The expression ‘illicit financial flows’ (IFFs) is a term that has no single, universally accepted definition. The United Nations (UN) has, thus far, not expressly defined the term.

8. According to Global Financial Integrity (GFI), a research and advocacy organisation working to curb such flows, IFFs refer to the “*illegal* movements of money or capital from one country to another. … [T]his movement [is classified] as an illicit flow when the funds are illegally earned, transferred, and/or utilized[[4]](#footnote-5) [emphasis added].”

9. While useful as a starting point, this definition has been criticized by other institutions and actors working in the area. The primary deficiency in the GFI definition is the conflation of ‘illicit’ with ‘illegal’ in the discussion about the source and origins of these funds. As the Tax Justice Network points out, defined thus, the term excludes “many important phenomena such as abusive activities that may not necessarily involve lawbreaking[[5]](#footnote-6).” These abusive practices include forms of tax avoidance and transfer mispricing.

10. Similar objections have been raised by others. In a 2013 report, the International Monetary Fund (IMF) also pointed out that “[i]n contrast to illicit financial flows instigated by political elites, the form of capital flight brought on by multinational corporations that *manipulate prices and take advantage of loopholes in tax codes* has received less attention. However, the latter may have far-reaching consequences for developing countries—especially the resource-rich ones whose wealth is concentrated in one sector [emphasis added][[6]](#footnote-7).”

11. In 2013, the Organisation for Economic Cooperation and Development (OECD) and the Group of Twenty advanced and emerging economies (G20) also placed tax avoidance and profit shifting in general at the top of their agenda. In July 2013, the group adopted the Base Erosion and Profit Shifting package to rein in tax avoidance by multinational corporations at the expense of “domestic companies and individual tax payers”[[7]](#footnote-8). While the term ‘illicit’ was not specifically used, the group repeatedly adverted to the “exploitation” of “tax loopholes” by multinationals that ran counter to “fairness” principles.

12. Accordingly, in two subsequent reports on illicit financial flows issued in 2014, the OECD attempted a fuller definition than the GFI one. The first report recognised that the current literature on IFFs defined the term by focusing on “methods, practices and crimes aiming to transfer financial capital out of a country in contravention of national or international laws” such as money laundering, bribery and tax evasion by international companies and trade mispricing. Criticising this approach, the OECD proposed an analysis of the source and origin of such flows as well as their intended use: “[s]uch flows … may have arisen from illegal or corrupt practices such as smuggling, fraud or counterfeiting; or the source of funds may be legal, but their transfer may be illegal, such as in the case of tax evasion by individuals and companies. … They may be intended for other illegal activities, such as terrorist financing or bribery, or for legal consumption of goods. In practice, illicit financial flows range from something as simple as a private individual transfer of funds into private accounts abroad without having paid taxes, to highly complex schemes involving criminal networks that set up multi-layered, multi-jurisdictional structures to hide ownership[[8]](#footnote-9).” The second report distinguished between tax evasion and tax avoidance by dilating on what was meant by illicit funds from legitimate activities[[9]](#footnote-10).The OECD also pointed to the fact that contemporary scholarship has focused almost exclusively on “outflows of corrupt profits, particularly those of kleptocrats” while much less was known about the tax evasion outflows, which the OECD deemed “perhaps the most ubiquitous of the sources of illicit financial flows[[10]](#footnote-11).”

13. The OECD definition of IFFs seems to have had widespread resonance. The United Nations Conference on Trade and Development (UNCTAD) has adopted a broader definition of IFFs that include activities “contravening the law or its spirit[[11]](#footnote-12)”. The United Nations Economic Commission for Africa, meanwhile, has included the origins of such flows in its own definition: “These funds typically originate from three sources: commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials[[12]](#footnote-13).”

14. Based on the foregoing, any useful definition of IFFs would necessitate a broader, two-tiered interpretation of the word ‘illicit’. In the first, ‘illicit’ would refer to funds which are illegally earned, transferred or utilized and include all unrecorded private financial outflows that drive the accumulation of foreign assets by residents in breach of relevant national or international legal frameworks. More specifically: funds relating to the proceeds of crime – for example, funds acquired through corruption; criminal activities; abuse of power including theft of state assets/ funds; market abuse; tax abuse and regulatory abuse.

15. In its second sense, ‘illicit’ would refer to funds from legitimate economic activity that become illicit due to the subsequent contravention or circumvention of laws in how those funds are handled or dealt with (A/HRC/22/42, para. 5). This includes all arrangements designed to circumvent the law or its spirit such as tax evasion, forms of tax avoidance, and forms of tax optimization schemes; as well as profit shifting by multinational corporations; trade misinvoicing and transfer mispricing. This definition is consistent with the definitions canvassed above, as well as the one employed in the Final Study.

16. Finally, and perhaps more importantly, this definition with its inclusion of tax avoidance is in consonance with current politico-economic exigencies. Two recent ‘political’ events seem to indicate the increasing centrality of tax avoidance to a working definition of IFFs. The first is the political fallout from the Panama Papers; and the second is the creation of the Platform for Collaboration on Tax, a joint initiative of the IMF, OECD, UN and the World Bank. Thus, tax avoidance has clearly evolved into a significant political issue distinct of its twin (i.e. tax evasion) and any attempt to sidestep it in a study like this is untenable. This is particularly true as the majority of all illicit financial flows are related to cross-border tax transactions (Final Study; para 5), while corruption-based outflows are a very small fraction of the total (Interim Study; para 14).

17. Also, such reasoning seems to be acquiring momentum within academic circles. For example, in a 2016 edited volume titled “Global Tax Fairness”, the editors define illicit financial flows almost exclusively in terms of tax avoidance[[13]](#footnote-14).

18. The expression ‘countries of origin’ is has hitherto been generally understood to refer to developing countries. This is because the flow of illicit funds primarily proceeds from developing countries to developed countries. However, the revelations of the Panama Papers indicate that developed countries can also be countries of origin and segregation along the developed/developing axis is thus inaccurate. As such, the expression is used in the more encompassing way in this report.

19. However, the main beneficiaries of illicit financial flows are understood to be the developed countries[[14]](#footnote-15); secrecy jurisdictions; financial service providers and the economic sectors into which laundered funds are reinvested, including the vendors of luxury estates and producers of luxury goods (Interim study; para 13).

20. The expressions ‘asset recovery’ or ‘repatriation’ refer to the process by which the proceeds of corruption are recovered from a given country and returned to a foreign jurisdiction. Asset recovery includes the tracing of illicit assets, and the securing, freezing and returning of these to another country through a variety of legal avenues, including criminal confiscation and restitution, non-conviction-based confiscation, civil actions or actions involving the use of mutual legal assistance (Interim Study; para 7).

21. The key actors involved in illicit financial flows are private actors (individuals, including government officials and politicians); domestic businesses; transnational corporations and accounting, legal and tax advisers); public officeholders (elected and employed); and criminal groups (Interim Study, para 6).

 B. Estimates

22. Relying on trade data and balance of payments leakages for their December 2015 report, the research and advocacy non-profit, Global Financial Integrity, estimates that in 2013, $1.1 trillion left developing countries in illicit financial outflows. This highly conservative estimate does not pick up movements of bulk cash, the mispricing of services or many types of money laundering[[15]](#footnote-16). UNCTAD, meanwhile, endorses the French NGO CCFD-Terre Solidaire’s estimate of €800 billion worth of IFFs per annum[[16]](#footnote-17). Significantly, in its analysis of the three broad motivations driving IFFs – crime, corruption and tax abuse – UNCTAD argues that “only about a third of total IFFs represent criminal money, linked primarily to drugs, racketeering and terrorism. … [M]oney from corruption is estimated to amount to just 3 per cent. The third component, which accounts for the remaining two thirds of the total, refers to cross-border tax-related transactions, about half of which consists of transfer pricing through corporations[[17]](#footnote-18).” Comparatively, GFI estimates that trade misinvoicing accounts for 83.4 percent of measurable IFFs on average[[18]](#footnote-19). The United Nations Economic Commission for Africa, on the other hand, estimates that the continent has lost more than $1 trillion in IFFs in the last 50 years and continues to haemorrhage over $50 billion per annum. The figure is understood to be a conservative estimate due to, first, the lack of accurate data for all African countries and second, the fact that some forms of IFFs – such as the proceeds of bribery and drugs/firearms and human trafficking – cannot be reliably assessed[[19]](#footnote-20).

 III. The phenomenon of illicit financial flows

23. Although there are no conclusive data due to disparities in the measuring method, numbers suggests the magnitude and the impact of IFFs’ phenomena - in both economic and democratic terms- for developing and transitional countries[[20]](#footnote-21). From 20 to 40 billion USD is annually stolen from developing countries by means of corruption-related activities according the World Bank[[21]](#footnote-22). That means that the level of IFFs from Africa exceeds the official development assistance to the continent, which stood at 46.1 billion USD in 2012[[22]](#footnote-23). In other words, African countries are losing the 25 percent of the GDP per year[[23]](#footnote-24).

24. The linkage between IFFs and great corruption has been notably developed over the past years. Several studies have underlined how IFFs basically divert resources intended for development, thereby, undermining State’s efforts to provide basic services and, ultimately, its ability to comply with human rights obligations[[24]](#footnote-25). The transfer of assets of illicit origin to foreign jurisdictions commonly requires the complicity of high level officials (popularly called “*kleptocrats*”) and corrupt practices that may progressively erode trust in democratic institutions and the rule of law[[25]](#footnote-26).

25. As it has been observed, when corruption is prevalent, those in public positions fail to take decisions with the interest of society in mind, damaging as consequence the legitimacy of a democratic regime in the eyes of the public, and leading to a loss of public support for the democratic institutions[[26]](#footnote-27). Furthermore, according the World Bank “IFFs together with the underlying activities distort economic and political competition, subvert government institutions, generate conflicts and violence, and undermine the integrity of legal and financial systems”[[27]](#footnote-28).

26. Potentate funds are commonly sent out of the country and hidden in banks located in the financial centres of developed countries. Complex and opaque money laundering schemes serve to “hiding or obscuring the source, ownership, control, and movement”of the criminal proceeds[[28]](#footnote-29). The whole system is perversely supported and preserved by those who benefit from corruption and presupposes the creation of “a powerful constituency that discourages the identification or monitoring of PEPs [politically exposed persons] accounts and may attempt to discredit or silence anticorruption organizations and leaders”[[29]](#footnote-30).

27. The question of looted developing countries is longstanding but no doubt that the cases which followed the Arab Spring set a milestone for stolen “asset recovery” or “repatriation” processes. It made clear that a strong political will and intense and sustainable coordination and cooperation between States are needed from the very outset to avoid the dissipation or transfer of the stolen assets[[30]](#footnote-31). The strong call to ensure that such assets do not find safe haven triggered the adoption by States of innovative measures, prompting also a shift of paradigm on asset recovery procedures[[31]](#footnote-32).

28. The Arab Spring was not only instrumental in raising public awareness regarding the problem and the significant challenge that IFFs pose to development and development assistance’s efforts[[32]](#footnote-33). More importantly, it has demonstrated once more that important financial centres continue to play a major role in assisting corrupt leaders to invest their gains[[33]](#footnote-34). In fact, the negative costs and consequences of being safe havens for such illegal assets are becoming evident for developed States, which have progressively started to see a growing interest in protecting the reputation and credibility of their financial centres[[34]](#footnote-35).

29. Against this background, the return of misappropriated assets remains a highly political priority “due to its symbolism of justice and accountability being restored in the spirit of democracy and rule of law”[[35]](#footnote-36). Resources are urgently needed for the reconstruction and rehabilitation of societies under new governments, and the capacity of international community in helping these States to re-establishing national wealth is thus at stake[[36]](#footnote-37). As the High Level Panel of IFFs of the Economic Commission for Africa has recently underlined, success in addressing IFFs is ultimately a political issue that requires a global consensus[[37]](#footnote-38).

 IV. Overview of international initiatives on illicit funds

30 Tackling the adverse impact of IFFs and effective asset recovery has become an urgent area of focus for international community. Over the past years, it has emerged a growing consensus on the need to undertake concrete actions in a more coordinated and effective manner. The UN General Assembly and the Human Rights Council have regularly followed the question, and a number of initiatives have been taken in the framework of the UN Convention against Corruption (UNCAC). Reducing IFFs and strengthening the recovery and return of stolen assets is also one of the specific targets of the 2030 Sustainable Development Goals (SDGs).

31. In November 2016, the General Assembly expressly acknowledged that asset recovery and return “plays an important role in the promotion and protection of all human rights and in the process of creating an environment conducive to their full enjoyment and realization” (A/C.3/71/L.11/Rev.1). It further expressed its concern “about the negative impact of widespread corruption on the enjoyment of human rights”, and urged Member States to work on the identification and tracking of IFFs linked to corruption, the freezing or seizing of assets derived from corruption and the return of such assets.

32. In March 2016, the Human Rights Council, underscored that “the repatriation of funds of illicit origin would provide States that are undergoing a democratization process with a further opportunity to improve the realization of economic, social and cultural rights and to fulfil their obligation to meet the legitimate aspirations of their peoples”. At the same time, it called upon “all States requesting the repatriation of funds of illicit origin to uphold their commitment to make the fight against corruption a priority at all levels and to curb the illicit transfer of funds” (A/HRC/31/22).

33. According the resolution, there is an “urgent need to repatriate illicit funds to the countries of origin without conditionalities, taking into account due process, to strive to eliminate safe havens that create incentives for transfer abroad of stolen assets and illicit financial flows, and to strengthen regulatory frameworks at all levels”. States Parties to the UNCAC are invited to consider “ways of adopting a human rights-based approach in the implementation of the Convention, including when dealing with the repatriation of funds of illicit origin”.

34. Chapter V of the UNCAC provides for the general framework to facilitate the recovery of stolen assets making cooperation and assistance mandatory[[38]](#footnote-39). The return of illicit assets to the countries of origin constitutes one of the fundamental principles of the Convention, which also emphasizes the importance of returning confiscated property to its prior legitimate owners or of compensating the victims[[39]](#footnote-40). Being the repatriation of assets peremptory, cases of non-return only are justified in exceptional circumstances[[40]](#footnote-41). States may, however, conclude agreements or “mutually acceptable arrangements” on a case-by-case basis for the final disposal of the assets[[41]](#footnote-42).

35. An increasing consensus on the principles that govern the repatriation of illicitly acquired assets has progressively emerged on this basis. However, it is commonly felt that the UNCAC needs a more vigorous implementation. Measures under the auspices of the UN to overcome impediments to the return of stolen assets have also been demanded (A/HRC/28/60). In fact, the absence of a proper monitory mechanism has led to the development of a number of initiatives to assist States in the implementation of its obligations under the convention[[42]](#footnote-43).

36. Notably, the Stolen Assets Recovery Initiative (StAR), a joint venture of UNODC and the World Bank, works with developing countries and financial centres to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets [[43]](#footnote-44). At the Regional level, the Arab Forum on Asset Recovery (AFAR) was set in 2012 under the auspices of the G8 to support the tracing and recovery of assets stolen by members of the former regimes in the MENA[[44]](#footnote-45). The High Level Panel of Illicit Financial Flows of the Economic Commission for Africa also provides a forum for discussion and to design strategies for action[[45]](#footnote-46).

37. The adoption of the “Draft Guidelines for the Efficient Recovery of Stolen Assets”, in 2014, led to the so-called Lausanne process, another forum where experts meet once per year to dialogue and exchange their expertise and experiences on the recovery of stolen assets. The Swiss initiative aims at facilitating efficient international cooperation between authorities in the handling of restitution requests[[46]](#footnote-47).

38. Finally, a remarkable milestone was set by the inclusion of target 16.4 of the Sustainable Development Goals which is specifically directed at significantly reducing IFFs and at strengthening the recovery and return of stolen assets by 2030 (A/69/L.85)[[47]](#footnote-48). Previously, at the 2015 International Conference on Financing for Development, States committed themselves to “redouble efforts to substantially reduce illicit financial flows by 2030”, and agreed to “strive to eliminate safe havens that create incentives for transfer abroad of stolen assets and illicit financial flows (A/CONF.227/L.1).

 V. Best practices in the return of illicit funds

39. A number of global best practices in the return of illicit funds can be discerned from the available evidence:

40. i. Greater scrutiny of Politically Exposed Persons: The term “Politically Exposed Persons” (PEPs) was devised by the Financial Action Task Force (FATF) in 2003 to refer to individuals (or their family or close associates) who were or had been entrusted with a prominent public function[[48]](#footnote-49). FATF contended that such persons should undergo additional scrutiny since they were capable of abusing their position and influence to launder money or commit related predicate offences, including corruption and bribery, as well as conduct activity related to terrorist financing. The February 2012 revision to the FATF rules expanded the definition of PEPs to include domestic PEPs in addition to those in foreign jurisdictions[[49]](#footnote-50). More significantly, the definition was extended to cover PEPs in international organisations[[50]](#footnote-51). Financial institutions and other professionals (e.g. brokers, jewelers etc) were charged with conducting this scrutiny[[51]](#footnote-52).

41. ii. Reversal of the Burden of Proof: The reversal of the burden of proof – i.e. the new requirement under money laundering and anti-corruption laws that an individual possessed of excessive wealth demonstrate that such wealth has a legitimate origin – has had some success in impeding IFFs. Further success may be achieved if destination countries accept foreign confiscation orders and provide legal and technical assistance to foreign jurisdictions[[52]](#footnote-53). Such assistance not be restricted to only criminal cases but ought also apply to civil and administrative matters regarding corruption. To qualify for such assistance, the foreign jurisdictions should be willing to assume a corresponding burden of proof (or mutual burden of proof) i.e. prove that the transfer of funds violated domestic civil or administrative laws. Further, such assistance should also include exchange of information and coordination of administrative and other measures to ensure early detection of potential criminal and civil wrongdoing. This would be in consonance with Article 43 and 48(1)(f) of the UN Convention against Corruption[[53]](#footnote-54).

42. However, critical to the success of such efforts are adequately resourced and trained specialist units capable of handling complex multijurisdictional investigations and prosecuting offenders across jurisdictions. These investigators must necessarily have knowledge of the differences in the legal systems between the two countries and be familiar with Mutual Legal Assistance processes of the other state. Such teams should also be able to share information on asset recovery cases among jurisdictions and institutions[[54]](#footnote-55).

43. iii. Pro-repatriation laws in destination countries: Haitian president Jean-Claude Duvalier was believed to have amassed over $300 million by skimming government contracts. This money was deposited in Swiss bank accounts. When Duvalier was deposed by popular revolt in 1986, Haiti asked Swiss authorities to freeze $5m but couldn’t secure its return since it failed to mount a legal case. Duvalier would have won the money back by default in 2002 when the statute of limitations kicked in had Switzerland not invoked constitutional powers which allow it to freeze assets in order to safeguard national interests. A 2011 Swiss law which reverses the burden of proof and a court decision have paved the way for the return of the money to the country of origin.

44. The Swiss law is a reflection of the changed political environment around the world as well as the global crackdown on money laundering, which have forced even jurisdictions like Switzerland to try and clean up their image as money laundering havens. Not only have the Swiss relaxed the standard of proof they require, the enhanced scrutiny of PEPs under global anti-money laundering regulation has helped further. The 2015 Swiss law that allows for the repatriation of funds held in Switzerland by foreign dictators can thus be seen as part of a broader chronological shift against IFFs[[55]](#footnote-56).

45. However, several provisions of the said law are open to entirely subjective interpretation that may be construed in derogation to the rights and interests of the countries of origin[[56]](#footnote-57). Equally problematic are Article 15 of the Swiss law, which sets out criteria for “the presumption that the funds are of illicit origin”[[57]](#footnote-58) and Article 17, which prescribe conditions for repatriation of funds[[58]](#footnote-59). Accordingly, such pro-repatriation laws merit the introduction of appropriate and objectively determined safeguards that will protect the interests and rights of the countries of origin.

46. iv. Adequate training and funding of law enforcement officers: The forensic audit skills required to trace monies held by multiple shell companies and parked in Special Purpose Vehicles across multiple jurisdictions are not easily available, particularly in developing countries. While some developed countries are trying to build domestic capacity, effective asset recovery requires sufficient investment, both financially and in staff: training for law enforcement officers, dedicated staff with sufficient expertise and funding to carry out investigations.[[59]](#footnote-60)

47. v. Greater transparency and exchange of information: To combat IFFs, law enforcement authorities must be able to access and exchange relevant information about activities, assets or incomes of individuals, companies and legal entities and arrangements in foreign jurisdictions.

48. In the specific area of anti-money laundering and counter-terrorism financing efforts, the Egmont Group comprising 152 Financial Intelligence Units is an example of a global platform whereby expertise and financial intelligence is shared with a view to combating both crimes[[60]](#footnote-61).

49. vi. Robust, issue-specific and cross-jurisdictional institutional and professional networks: Restricting the ambit of their anti-IFFs operations to specific issues allows such networks to focus on the details, leverage their specializations, learn from each other’s successes and failures and reduces the potential for politically-motivated conflict in large groups.

50. One such example is found in Russia, where the General Procuratura located in the Federal Prosecutor’s office promotes practicable international cooperation through formal and informal patterns of interaction between various national contact centres. This cooperation extends to the identification, arrest, confiscation and restitution of assets accumulated as result of corruption.

51. Another example is the network for greater transparency in the area of tax. The Global Forum for Transparency and Exchange of Information for Tax Purposes (Forum) has been working in this area since 2000[[61]](#footnote-62). The Forum’s focus on tax issues obviously excludes crime and corruption (as the two other sources of IFFs) from its remit. However, the exclusion seems tacit recognition of the fact that the three sources require different redressal strategies. By focusing on its core expertise, the Forum has been able to develop innovative, tax-specific precision tools such as the Automatic Exchange of Information Portal (AEOI) rather than relying on a carpetbag of less efficient, mixed-purpose tools (for example, enhanced reporting requirements for tax consultants, which would arguably net criminal syndicates as well as corrupt bureaucrats). Also, the focus on a specialised, ‘technical’ subject such as tax usually reduces the potential for partisan politics and infighting among the member jurisdictions.

52. Further, the Forum is also a good example of how robust institutional and professional engagement can redress the specific problem of jurisdiction in the context of preventing IFFs. At present, the Forum comprises 137 jurisdictions, which include all G20 countries, the EU, OECD member countries, off-shore financial centres and many developing countries[[62]](#footnote-63). Some 15 organisations such as the IMF, World Bank and UN are signed up as ‘observers’ while another 90 jurisdictions are also committed to implementing the AEOI. The Forum website features elaborate explanations of the benefits of joining[[63]](#footnote-64), thereby creating the impression of voluntariness. However, the extensive membership/ observer list, the mainstreaming of the transparency standards through “peer reviews” and ‘naming-and-shaming’ compliance methodology suggest the Forum’s success as a cross-jurisdictional pressure group.

53. vii. Harmonisation of global tax strategies: Base erosion and profit shifting (BEPS) refers to aggressive tax avoidance strategies practiced by multinational corporations (MNCs). By exploiting gaps and mismatches in tax rules, these MNCs artificially shift profits to no- or low-tax jurisdictions, thereby eroding the tax base of the host country[[64]](#footnote-65). Often these host countries are poor South countries. The harmonisation of tax strategies across the globe would eliminate the incentive for MNCs to shift profits from one jurisdiction to the next. For, if all jurisdictions offered the same or similar tax rates, there would be no incentive to move revenues around as a tax evasion/avoidance strategy. Similarly, if all national tax administrations worked together to ensure effective compliance – i.e. taxpayers pay the correct amount to the right jurisdiction – the opportunities for MNCs to engage in BEPS (and to thus author IFFs) would be severely diminished.

54. A few steps in this direction are already underway. In November 2015, the G20 Leaders called for an Inclusive Framework for Base Erosion Profit Shifting implementation. Featuring a mix of government tax officials from G20, OECD, and developing countries, the framework is to be observed by the IMF, UN and WB. A key function of the group is to translate the complexity of BEPS outcomes (in relation, for instance, to transfer pricing) into user friendly guidance for low capacity countries. These countries often lack both the ability to develop such guidelines themselves and/or to strictly monitor and enforce the same. Another key function of the BEPS group is to address international tax issues not included in the BEPS project (such as indirect transfers of assets), especially those of interest to developing countries[[65]](#footnote-66).

55. The efficacy of the BEPS framework further enhanced by a series of converging initiatives and actions, including the recent decision to enhance the resources of the UN Committee of Experts in order to strengthen its effectiveness. Other developments include a new joint IMF/World Bank initiative on strengthening tax systems in developing countries and fostering inclusive policy discussions, a partnership between the OECD and UNDP on Tax Inspectors Without Borders plus the Addis Ababa Tax Initiative designed to dramatically increase donor support for building tax capacity in poorer countries[[66]](#footnote-67).

56. viii. Promotion of global anti-corruption and tax reform initiatives through greater civil society participation: The UN Convention against Corruption (UNCAC) adopted in 2004 is a high-profile example of the mobilisation of states as well as civil society, NGOs and grass roots communities to a common end: the combating of corruption. Significantly, while the UNCAC holds states primarily responsible for rooting out corruption and effective international cooperation, it also places similar responsibility on individual and groups comprising civil society to provide the support states require to achieve such ends[[67]](#footnote-68).

57. The Independent Commission for the Reform of International Corporate Taxation is a Friedrich-Ebert Stiftung-supported organisation set up in 2015 by a coalition of civil society and labor organizations. These include Action Aid, Alliance-Sud, CCFD-Terre Solidaire, Christian Aid, the Council for Global Unions, the Global Alliance for Tax Justice, Oxfam, Public Services International, Tax Justice Network and the World Council of Churches.

58. The ICRICT comprises a group of leaders from around the world (including Joseph Stiglitz) “who believe that, at this moment in history, there is both an urgent need and an unprecedented opportunity to bring about significant reform of the international corporate taxation system. The Commission aims to promote the reform debate through a wider and more inclusive discussion of international tax rules than is possible through any other existing forum; to consider reforms from a perspective of global public interest rather than national advantage; and to seek fair, effective and sustainable tax solutions for development[[68]](#footnote-69).”

 VI. National legislation and practice on the return of assets of illicit origin

59. Over the past years, some countries have taken further steps to prevent the flow of illicit assets into their financial sectors, and to identify, freeze and return to the country of origin assets of criminal origin[[69]](#footnote-70). High level corruption (i.e. PEPs and their associates) have been particularly targeted by domestic policies and measures. At the regional level, other common policies and actions have been undertaken in the framework of the EU[[70]](#footnote-71), the OECD[[71]](#footnote-72) and the Council of Europe[[72]](#footnote-73).

60. But despite progresses international efforts have demonstrated to be insufficient. According to data, between 2010 and June 2012, only 8 of 34 OECD countries reported asset recovery efforts, including cross-border asset tracking, freezing or asset return efforts[[73]](#footnote-74). Out of these, only 4 (i.e. Australia, Switzerland, United Kingdom and the United States) managed to return stolen assets to countries of origin after completing national procedures between 2006 and June 2012. Two countries (Switzerland and the US) account for about 40 per cent of all asset returns to foreign jurisdictions[[74]](#footnote-75).

 i) National legislation: Switzerland

61. Being probably one of the financial places that have attracted huger amounts of “dirty money” from all over the world, Switzerland constitutes one of the most prominent and illustrative examples on state practice and legislative measures[[75]](#footnote-76). Aware of the negative impact this situation produce on its reputation and integrity on international markets, the country has progressively developed a comprehensive legal framework encompassing preventive and repressive measures as well as technical cooperation aspects[[76]](#footnote-77).

62. With some 2 billion USD, Switzerland has effectively returned to countries of origin nearly half of all recovered assets worldwide[[77]](#footnote-78). Such positive results cannot hide that hundreds of millions of suspicious assets from Egypt, Tunisia, Syria, Libya, Ukraine, Haiti and Nigeria are still frozen in Swiss banks’ accounts[[78]](#footnote-79).

63. In 2011, the *Federal Restitution of Illicit Assets of Politically Exposed Persons Obtained by Unlawful Means Law* was passed[[79]](#footnote-80). Drawing on lessons learned from previous high-profile cases, the law regulated the freezing, forfeiture, and restitution of the assets of PEPs and their close associates. It particularly addresses requests cases for mutual assistance in criminal matters that are unsuccessful due to the failure of the state structures (notably the judicial system) in the country of origin. Under such circumstances, assets suspected of being illicit can be frozen and returned to the country of origin following an administrative procedure.

64. Some prominent features are introduced: a) the PEP does not need to be convicted in the jurisdiction of origin; b) the presumption of the illicit nature of assets when the enrichment of the PEP is clearly exorbitant and the degree of corruption of the state or the person in question is notoriously great.

65. In 2015, a new *Act on the Restitution of Illicit Assets* was passed to expedite the mutual legal assistance process[[80]](#footnote-81). Building on the previous regulation, the law enables the Federal Council to order the freeze of assets provided that certain circumstances are met[[81]](#footnote-82). Nonetheless, assets will only be frozen if there is a likelihood of a request for legal assistance on the part of the country concerned[[82]](#footnote-83).

66. The process is notably ameliorated by: a) extending the possibility of administrative confiscation; b) including provisions on targeted measures; c) enabling the government to support a requesting country in its efforts to obtain the restitution of assets of criminal origin transferred abroad; d) enabling to provide legal support or send experts to assist the recovery of the illicitly acquired assets in the States of origin. Prior to ordering an asset freeze the Federal Council shall inquire into the position of Switzerland’s main partner countries, and of international organizations in order to coordinate the timing and substance of the measures ordered[[83]](#footnote-84).

67. As general principle, the restitution of assets must either improve the living conditions of the population or reinforce the rule of law in the country of origin[[84]](#footnote-85). Despite the inclusion of these objectives through domestic legislation may favour a human rights perspective, it can also lead to controversies with the countries of origin[[85]](#footnote-86). In fact, the implementation of this legislation in practice raises a dilemma: how can a country take all reasonable care to prevent assets from novel disappearance without being at the same time held accountable for conditioning the return of assets in violation of the principles of sovereignty and non-intervention?[[86]](#footnote-87)

 ii) Return and non-return of illicit funds: case studies

68. Although the number of asset returned is increasing on the whole, there is still a great disproportion between the assets frozen and those effectively returned to the country of origin[[87]](#footnote-88). A recent study found that between 2010 and 2012 out of the 1.398 billion USD frozen only USD 147.2 million was returned[[88]](#footnote-89).

69. Asset recovery faces a number of legal, operational and institutional challenges[[89]](#footnote-90). There may be demanding requirements to the provision of mutual legal assistance, excessive banking secrecy and limitations in legal mechanisms, such as non-conviction based asset confiscation procedures or burdensome procedural and evidentiary laws[[90]](#footnote-91). Experience also shows that immunity laws in place may prevent prosecution and mutual legal assistance. Lack of effective coordination or even political will to prosecute corruption offences and recover assets constitute another common barrier to the success of recovery procedures[[91]](#footnote-92).

70. After the 2011 uprisings in the Arab world the restitution of illicitly acquired assets become a more salient global issue. Suspicions that very senior government officials (in most cases Head of State) were abusing their public offices to defraud the country substantial amounts of public money inflamed massive protests[[92]](#footnote-93). Subsequent evidence confirmed that those assets were hidden in international financial centres, often by using family members or other close associates as cover, and that they had remained concealed and undetected in foreign banks for years.

71. The cases of Tunisia and Egypt illustrate that effective assets repatriation can very often only be achieved after the departure of those whose administration may have either engaged in or neglected to combat corruption[[93]](#footnote-94). In the cases of Libya and Yemen, political instability has triggered the intervention of the Security Council under Chapter VII. Such examples show that, as a matter of practice, stolen assets cannot be recovered without an effectively functioning authority with sufficient capacity to undertake the tracing and recovery action.

 Tunisia

72. It is estimated that USD 38.9 billion were lost over the period of 1960-2010 in Tunisia. These IFFs outflows represent a significant loss to the country’s economy[[94]](#footnote-95). Global Financial Integrity estimates that illicit financial outflows from Tunisia reached nearly USD 2 billion in 2013, translating to USD 181 per capita[[95]](#footnote-96). The looting of public funds by part of the former ruling dictator represents a new dramatic example of abuse of power, impunity and institutionalized corruption. At least it served to awaken international community which eventually was able to make a common front to quickly freeze the assets[[96]](#footnote-97).

73. Ben Ali’s family and friends diverted public funds and lands for their benefit instrumentalizing state institutions such as public banks, the judiciary, and the police to benefit and to punish those who resisted their business initiatives[[97]](#footnote-98). A study published by the World Bank concluded that the former dictator manipulated the law to serve its own interests- and those of its entourage- to the point that he controlled more than 21% of the profits generated by Tunisia’s private sector at the end of 2010[[98]](#footnote-99).

74. The Government has set up a National Committee to Investigate Corruption and Wrongdoings, and a legal office to pursue corrupt officials, with a view to freezing the impugned assets abroad, but tangible results are still not very successful[[99]](#footnote-100). Reportedly in 2013 USD 28.8 million of looted assets were recovered, after Lebanese authorities took decisive action in freezing the account of Ben Ali’s wife[[100]](#footnote-101). As of today approximately 61 million USD remains frozen in Switzerland alone[[101]](#footnote-102). Assets have been returned but allegedly failures in judicial cooperation continue to block and slow down the final repatriation of the assets looted during the regime of Ben Ali[[102]](#footnote-103). Criminal investigations into the origins of the funds on measures against certain persons from Tunisia have been extended by an order until 2017[[103]](#footnote-104).

 Egypt

75. Around a billion USD in frozen assets in several countries around the world are suspected to be the proceeds of corruption belonging to the former President Mubarak and its entourage. 750 USD million are frozen in Switzerland[[104]](#footnote-105) and some other 85 million pounds in the UK, in addition to undeclared amounts in Spain, Cyprus, Hong Kong, Canada and France[[105]](#footnote-106). NGOs denounce that much of the assets recovered so far went back to the same government authorities of which the money was first embezzled subjecting it to similar risk of being lost[[106]](#footnote-107). However, an adequate political will may open the room to invert this trend through corrective measures.

 Libya

76. Resolutions 1970 (2011) and 1973 (2011) imposed an asset freeze against Gaddafi and his family members, as well as funds, financial assets, and economic resources owned or controlled by Libyan authorities, such as the Central Bank of Libya, the Libyan Investment Authority and the Libyan National Oil Corporation. After that, Switzerland, the UK, the US and the European Union also ordered the freezing of assets held by several individuals and entities connected to Gaddafi. The country, however, has not developed a clear strategy for investigating and tracing assets of the regime of Gaddafi despite different committees have been appointed to that end[[107]](#footnote-108).

 Yemen

77. Yemen has, however, made lesser progress in its attempts to recover funds illicitly removed from its jurisdiction. This is due in great part to its own political instability[[108]](#footnote-109). In 2014, the Yemeni Government’s planned to introduce an Asset Recovery Law but this regulation was never enacted. As a result, the Security Council acting under Chapter VII imposed a travel ban and asset freeze on individuals or entities designated by the 2140 Committee for engaging in or providing support for acts that threaten the peace, security or stability of Yemen, including human rights violations[[109]](#footnote-110).

78. A Panel of Experts has identified a financial network established by the former President, Ali Abdullah Saleh, and his family, comprising business operations, companies and individuals in countries in North America, Europe, South Asia, the Caribbean and the Middle East[[110]](#footnote-111). Reportedly, accounts that belong to three main companies have been frozen as consequence of the targeted sanctions imposed by the UN[[111]](#footnote-112). There are however, also evidences showing movements to circumvent the UN sanctions, and that Saleh’s companies are being used to move and conceal funds[[112]](#footnote-113).

 VII. Negative impact on the enjoyment of human rights

79. In general terms, human rights obligations apply to both countries of origin and recipient countries of IFFs. As it has been pointed out, “being a component of any anti-corruption strategy, the asset-recovery process should be understood in light of the human rights framework, as part of the several efforts that States must make in order to comply with their human rights obligations” (A/HRC/19/42, para. 23)

80. Countries of origin must seek repatriation as a part of their duty to ensure the application of the maximum available resources to the full realization of economic, social and cultural rights. Countries of destination, by their side, have the duty to assist and facilitate repatriation as part of their obligation of international cooperation and assistance (A/HRC/19/42, para. 25). In addition, States parties to the relevant treaties, particularly the ICAC, must account for not having repatriated illicit assets effectively within a reasonable period of time[[113]](#footnote-114).

81. Such a process not only requires that countries of origin make every effort to achieve the recovery and repatriation of proceeds of corruption for implementation of their international human rights obligations, it also to countries of destination understand repatriation not as a discretionary measure but also as a duty derived from the obligations of international cooperation and assistance (A/HRC/19/42, para. 26). In this context not only political will but also the idea of “shared responsibility” comes to the fore.

 i) Impact on the State’s capacity to fulfil human rights obligations

82. Indeed, the corrupt management of public resources is one of the main root causes of IFFs which may have both a direct and an indirect impact on (long-term) economic growth in the country of origin[[114]](#footnote-115). As a consequence, the State’s obligation to take steps to the maximum of its available resources, with a view of achieving progressively the full realization of economic, social and cultural rights is jeopardized. The prevalence of corruption compromises the State’s ability to deliver an array of services, including health, educational and welfare services, which are essential for the realisation of economic, social and cultural rights.

83. Violations due to corruption-related diversion of funds are particularly evident when States cannot fulfil their minimum core obligations regarding each right (A/CHR/19/42, par. 22). The consequences are borne largely by the weakest members of society. In many countries, corruption is among the most important obstacles to development; leading to lower growth rates and lower investments in social programs which serve the poor.

84. The impact of the non-repatriation of funds of illicit origin in developing countries is evident since it may hinder progress in policies aimed at fostering the enjoyment of human rights, by reducing programs aimed at ameliorating the socio-economic conditions of the most deprived and therefore reducing the resources available for all sectors in development (A/HRC/28/73). Conversely, a successful procedure of asset repatriation may remedy the State’s corruption-related failure to complying with human rights obligations (A/CHR/19/42, par. 23).

 ii) Impact on the right to development

85. The mobilization and effective use of public resources remains critical for developing countries and therefore the returned of looted assets remains a high priority and target under the 2030 SDGs[[115]](#footnote-116). IFFs largely affect developing countries and undermine the realization of the right to development and, according the World Bank, “are a symptom of the problems that institutionalize inequality and constraint prosperity”[[116]](#footnote-117).

86. Tolerated large-scale corruption not only has devastating consequences for a country’s society and economy, and for investment. As it has been observed, “dictators who enrich themselves not only steal money from their countries, they also, and above all, rob their people of development prospects[[117]](#footnote-118).

87. From this perspective tax evasion, tax avoidance and IFFs have become a major obstacle to sustainable development as they deprive them of the revenue much needed “to fulfil human rights treaty obligations, alleviate poverty, improve the administration of justice, ensure that remedies are available to victims of human rights violations, build infrastructures, create jobs and provide social security, quality health services and free education” (A/71/286, para. 72)[[118]](#footnote-119).

88. It is largely acknowledged in this context that “the ability to raise revenue domestically is not only a function of domestic policies and institutions but is also strongly affected by international tax norms, the policy environment, and the prevalence of international tax avoidance and evasion”[[119]](#footnote-120).

 iii) Impact on the rule of law of the countries of origin

89. Structures that facilitate tax evasion, corruption and other crimes undermine trust in democratic institutions and in governmental policies, exacerbate inequalities and contribute to erode the rule of law[[120]](#footnote-121). Ultimately, they threaten the very foundations of democracy and call the legitimacy of public administration into question

90. As the Independent Expert has stated IFFs “undermine efforts to build up effective institutions to uphold civil and political rights and the rule of law in the countries of origin” (A/HRC/28/60). Moreover, the existence of illicit unregulated money may contribute to the spread of other criminal activities, particularly weapons, smuggling, terrorism and the infiltration of criminal interest in the public sector.

91. The permanence of tax havens stimulates corruption and contributes to decrease the chances of detection and therefore increases the likely returns[[121]](#footnote-122). According the World Bank, IFFs “reduce resources, but they are also symptomatic of other issues that constrain poverty reduction and shared prosperity, such as vested interests and weak transparency and accountability”[[122]](#footnote-123).

92. The prevalence of corruption creates discrimination in the access to public services in favour of those able to influence the authorities to act in favour of their personal interest. Such practices especially undermine the access of the most disadvantaged groups not only to public goods but also to justice[[123]](#footnote-124).The weakening of accountability and of the structures that are responsible for protecting human rights, leads ultimately to a culture of impunity.

 VIII. Main challenges inhibiting the return of illicit funds

93. As was noted earlier, the return of illicit funds expatriated mostly from developing countries has too often met with difficulty and ineffectiveness. The main challenges that inhibit the return of these funds are as follows:

94. i. Benefits of IFFs to Local Property Markets: Illicit funds are now key to shoring up real estate markets in many places, including London (UK), New York (US) and Vancouver (Canada). This trend has manifested itself in irrational market dynamics in property prices but also, more importantly, in ambitious development projects, both commercial and residential. Since these construction projects involve several score ancillary industries[[124]](#footnote-125) as well as multiple service industries (financial services, real estate brokerage firms etc), they provide a fillip to the economy in the destination jurisdictions. In the last five years, this trend – financed largely by money of foreign origin – has helped the UK market recover from the effects of the 2007 recession. Repatriation could cause the speculative bubbles in these economies to burst triggering and propagating steep economic downturns. The impact would not just be limited to construction- and property finance-related industries but also manifest itself in decreased spending power available to most consumers in economies of these destination countries.

95. ii. Benefits of IFFs to Local Financial Markets: Foreign funds, including IFFS,have also been key to shoring up all-too-many credit-driven, developed, economies due to the latters’ lack of domestic savings that would finance their economic growth. This is evident, for example, from the $1.3 trillion debt Canada owes and its 64.8 per cent net tax-to-GDP ratio,[[125]](#footnote-126) or the $1.4 trillion the US owes China[[126]](#footnote-127)within its pool of public debt worth $19.4 trillion, or the investment portfolios of the various Sovereign Wealth Funds. The appetite for the influx of foreign equity is also reflected in investor category immigration rules prevalent in countries such as Canada, UK and Australia. Thus, the hasty withdrawal of any funds (licit or illicit) due to the need to repatriate them to their countries of origin would severely affect the economies of many of the developed countries.

96. iii. Benefits of IFFs to Local Professional Service Providers: Many jurisdictions have specialized in the provision of financial and legal services to those who are involved in the generation and facilitation of IFFs: e.g. tax evaders/ avoiders/ corrupt politicians/ other criminals in jurisdictions such as Panama, Liechtenstein and some of the Crown Dependencies and Overseas Territories of the United Kingdom such as the Cayman Islands, Jersey, and Bermuda[[127]](#footnote-128). However, this list of IFFs-friendly countries/jurisdictions includes the Switzerland, Hong Kong and Singapore, as well as USA states such as Delaware, Nevada and Wyoming[[128]](#footnote-129). The Tax Justice Network’s 2015 financial secrecy index, for example, ranked the USA above the Cayman Islands, Barbados and Panama in terms of how protected the identities of its financial clients were[[129]](#footnote-130).Thus, the hasty repatriation of the illicit funds which are ‘banked’ in these jurisdictions would threaten the stability and prosperity of the economies of these jurisdictions.

97. iv. Difficulty of establishing a nexus between IFFs and crime and/or civil wrongdoing: In the case of illicit flows resulting from criminal conduct, establishing a clear link between the crime committed in the country of origin and the proceeds of crime in the destination jurisdiction is inordinately difficult[[130]](#footnote-131). This difficulty is compounded by the fact that the link – the proof – needs to be incontrovertible if repatriation is to be ordered.

98. For example, in 1994, when Benazir Bhutto was the Pakistani premier and her husband Asif Zardari was her investment minister, Swiss companies SGS and Cotecna were awarded the contract to inspect Pakistan cargo. The subsequent Nawaz Sharif government accused the duo of having taken kickbacks on the contract and funneling proceeds through offshore companies into Swiss accounts. In 1997, Swiss judicial authorities accepted Pakistan’s claim to the monies, froze the assets worth $60 million and started investigating the charges. But the enquiry had not been concluded even as at 2007 when Bhutto negotiated a deal with then president Pervez Musharraf to withdraw Islamabad’s request to the Swiss authorities for judicial assistance and relinquish all claims to the assets. Switzerland promptly closed the case file and unfroze the disputed assets.

99. Where the IFFs stem from activities which qualify as civil wrongdoings, repatriation is all the more difficult since there is no clearly established international convention for doing so. As noted in Section V, while instruments such as the UNCAC urge states to “consider” cooperating in such cases too, this provision remains of an advisory – and thus limited – utility.

100. v. Difficulty of establishing beneficial ownership and/or piercing the corporate veil: Whether IFFs stem from crime, corruption or tax abuse, many – if not most – transactions are conducted behind several corporate veils and routed through multiple jurisdictions to extinguish traces of ownership[[131]](#footnote-132). In many cases, criminals or Politically Exposed Persons use intermediaries (family members, friends and/ or professional intermediaries such as bankers and lawyers) to form legal persons[[132]](#footnote-133). As such, it is too often very hard to conclusively identify the beneficial owner of a company. This issue is compounded by the fact that many designated non-financial businesses and professions[[133]](#footnote-134) (DNFBPs) can also be used to launder funds. However, the issue is not a priority for many of the relevant jurisdictions: according to the OECD, 44 percent of OECD countries do not comply with regulations demanding that governments regulate and monitor DNFBPs while 27 out of 34 OECD countries store or require insufficient beneficial ownership information for legal persons[[134]](#footnote-135).

 IX. The importance of international cooperation in the return of funds of illicit origin

101. IFFs carry catastrophic economic and human rights consequences that cannot be redressed without concerted international cooperation. For example, the African Commission on Human and Peoples’ Rights notes that both MNCs and individuals from Africa drain billions of US dollars every year from the continent[[135]](#footnote-136). Unless all countries commit to significantly more coordinated global action to address loopholes, weak laws, and monitoring across jurisdictions, many such countries will continue being heavily drained of their revenue potential.

102. The return of IFFs derived from criminal activity and/or corruption depends in part on the forensic audit skills and strong state prosecution that some countries of origin, particularly developing countries, lack. This need is exacerbated where criminal syndicates and politicians control or have significant influence over the legal and state authorities in these source countries. Repatriation is also exceedingly difficult where the underlying wrongful act is civil in nature (rather than criminal).

103. Further, in many cases where IFFs are routed via multiple jurisdictions to their eventual destination, repatriation requires engagement with multiple legal regimes. Thus, without greater international cooperation, it will be even more difficult for many countries of origin to trace IFF flows and meet the standards of proof required to effect repatriation. Further, the criminal networks and politicians who control state and legal authorities in some of these countries will continue to facilitate IFFs unless destination countries do much more to stem IFF inflows into their countries.

104. In their ostensible competition for foreign investment, speculative financial flows and/or individual wealth, poor countries are increasingly pitted against each other in needless “tax wars” that do little more than eventually shrink almost all of their tax bases, distort markets and lead to a regulatory race to the bottom[[136]](#footnote-137). Greater international cooperation can allow poor countries to resist the temptation to institute such ‘beggar-thy-neighbour’ policies and maintain a common minimum standard to protect all of their respective markets and tax bases.

105. The fundamental imbalance of wealth and power between a poor host country and an MNC often leads to tax treaties that favour MNCs[[137]](#footnote-138). In their bid to win the investment/jobs/technology that MNCs often promise, such countries too often implement tax policies that are more harmful than helpful to their economies. The IMF, for example, recognizes that “the network of bilateral double taxation treaties based on the OECD model significantly constrain the source country’s rights[[138]](#footnote-139)”. Adherence to a minimum common taxation standard that safeguards the interests of almost all poor host countries will constrain the ability of MNCs to wring more concessions from particular host countries.

106. In order to prevent IFFs, all stakeholders need to be equally committed to both South-South and North-South cooperation. The necessity for North-South cooperation stems from the fact that the final destinations of almost all IFFs are, almost without exception, either rich Western countries or their satellites[[139]](#footnote-140). This point is picked up by the Independent Expert in Para 9 of his Final Study, when he notes that “… many of the world’s most important secrecy jurisdictions are developed countries, which have historically been overlooked in their role in facilitating tax evasion” and IFFs. Further, a 2014 OECD report noted: “… without action, OECD countries are at risk of becoming safe havens for illicit assets from developing countries[[140]](#footnote-141).” This is corroborated by academic research. Unless secrecy jurisdictions and destination countries commit to doing all that they can to end such IFFs, attempts to check IFFs will fail.

107. South-South cooperation is also critical as it will, first, arrest regional beggar-thy-neighbour taxation policies and anti-corruption policies by enhancing cooperation, presenting a common front, and reducing harmful competition. Second, this kind of cooperation could conceivably lead to the formation of regional economic blocs focused on this issue that would tend to strengthen the negotiating positions of these poorer countries vis-à-vis the relevant MNCs and their countries of origin[[141]](#footnote-142). This will address the fundamental imbalance of wealth and power between these actors.

 X. Conclusion and recommendations

108. IFFs hinder State capacity to finance social and economic development, jeopardizes the State’s capacity to fulfil human rights and negatively impact on the enjoyment of all human rights, including through the implementation of the GSDs. Strengthening a human rights perspective in the process of asset recovery may contribute to ensure to improve the socio-economic conditions of the affected populations, as well as to the consolidation of the rule of law in transitional countries. Considering policy implications relating the use of returned illicit funds may be necessary to reinforce this view (A/HRC/22/42, par. 51).

109. It is generally admitted that the use of the returned assets is a sovereign decision of the country that recovers its stolen property and that the conditional repatriation of illicit assets interferes with the internal affairs of the country and the principle of ownership of the looted assets. Countries of origin may consequently object to attempts to impose conditions and other views on how the confiscated assets should be used[[142]](#footnote-143). No doubt that they must have discretion in the decision on how to invest the returned assets in any public purpose of its own election, the question is: should that discretion be unlimited?[[143]](#footnote-144)

110. In fact, it is an open question whether it may be desirable that the state of origin provide guarantees on the good use of the funds and its monitoring as to ensure that the recovered assets are not lost again in the same corruption channels[[144]](#footnote-145). Decisions on the use must be informed by a human rights based approach, which implies that the country of origin should provide “assurances” that measures are taken to avoid any further misuse of the assets[[145]](#footnote-146). With no guarantee that the proceeds of corruption would be used to benefit the victims, they may lose its potential impact and multiplier effect. Such a view is consisting with human rights commitments undertaken by States also under the UNCAC[[146]](#footnote-147).

111. Of note is that increasingly, state practice tends to make the return dependent to certain guarantees in certain particular cases[[147]](#footnote-148). Civil society has also consistently claimed a more human-rights oriented approach, aimed at putting the needs of the looted population at the centre of the debate[[148]](#footnote-149). Human rights monitoring bodies have also emphasized this approach. It seems thus that the mainstreaming idea that underlies this practice is that countries of origin should not be made accountable for the use of looted assets before countries of destination but rather before their own people.

112. In order to operationalizing a compromise solution between involved States the establishment of an international mechanism under the auspices of the UN would be advisable (be that mixed commissions or an intergovernmental committee or committee of experts). The setting up of an international body on asset recovery built on the experience of previous initiatives would definitely bolster mutual trust and cooperation, facilitating prompt and efficient arrangements particularly in cases where mutual legal assistance is not possible.

113. In this way, the current multifaceted efforts made by States and international organizations would be more easily oriented and unified. Resources could also be more effectively channelled to the achievement of effective and human rights oriented solutions, which are those tend to have a tangible impact in the daily lives of the real holder of the sovereignty, the people. Informed and agreed solutions would have more chances of benefiting the population in development terms by improving their social and economic situation.

114. Finally, the setting of a neutral and independent international mechanism supporting the affected States would contribute to overpass existing obstacles to the timely return of the assets as well as to avoid controversies about resorting to “conditionalities” or other possible requirements as an excuse to interfere in the internal affairs of the developing country by developed countries. Likewise, the distorted use of recovered assets by decisions on the allocation or the management open corrupt practices by the governing authorities could be more easily avoided.

115. Further elements for reflection on the viability of this proposal are provided by the following recommendations on strengthening a human rights perspective in asset recovery processes.

 i) Prevention and detection of assets

116. It is a good practice to establish a duty of enhanced diligence applicable to banks and other financial entities in relation to politically exposed persons[[149]](#footnote-150). In Switzerland, for example, persons or institutions who hold or manage in Switzerland assets of persons affected by an asset freeze must immediately report these assets to the Money Laundering Reporting Office Switzerland (MROS)[[150]](#footnote-151). The Canadian law, includes a list of entities that have “a duty to determine” on a continuing basis whether it is in possession or control of property that they have reason to believe is the property of a politically exposed foreign person who is the subject of an order or regulation made under the law[[151]](#footnote-152).

117. Participation and the involvement of civil society are key actions aimed at tracking and detecting cases[[152]](#footnote-153). Protection of whistle-blowers in those countries of destiny of the assets, particularly to employees working in the private sector which are those who have access to up-to-date information remains a key aspect at this stage (A/71/286, para. 77)[[153]](#footnote-154).

 ii) Freezing of assets

118. Particularly in situations of political instability, the freezing of assets as a precautionary measure to prevent their withdrawn by PEEs must be seen as a good practice. In certain jurisdictions this is made through administrative procedures establishing the precautionary freeze of the assets to provide legal clarification of the origin of potentially illicit assets even before criminal proceedings have been initiated. The reversal of the burden of proof is a key element in this context.

119. Framework and norms aimed at regulating the handling of frozen assets by financial entities and banks should be enacted to ensure that such entities identify and refuse to accept IFFs not only on the basis of self-regulations. In this connection, the proposal of setting up an institutional escrow system based on regional development banks should be valued as a plausible solution. Frozen assets could be placed in escrow accounts in regional development banks “rather than allowing banks that are culpable in accepting such deposits to continue to benefit from them”[[154]](#footnote-155).

 iii) Return and allocation of assets

120. Despite the funds must be returned to the State of origin and this must be given ample margin of appreciation regarding the destiny of the funds, there is a tendency to interpret that recipient State’s sovereignty and autonomy in the allocation decision is not unlimited. Emerging practice[[155]](#footnote-156) and a human rights approach seems to require that the State of origin should ensure that: a) the returned funds will be kept outside of the corrupt cycle[[156]](#footnote-157); b) the funds will be used in the benefit of the affected population and/or the victims of corruption and human rights violations[[157]](#footnote-158).

121. A human rights-based approach requires that repatriated funds be appropriately used in the creation of conditions for complying with human rights obligations and for avoiding new corruption-based diversions. For the OHCHR, “repatriated funds of illicit origin should be allocated to the realization of economic, social and cultural rights in compliance with the maximum-available resources principle, through decision-making processes and implementation procedures that incorporate the principles of transparency, participation and accountability” (A/HRC/19/42, para. 63)[[158]](#footnote-159). Decisions over resources allocation must be made publicly and openly, and taking into account human rights indicators to identify the priority areas for budget allocation (A/HRC/19/42, para. 30)

122. Practice provides other examples showing that the allocation decision-making process has been informed by this approach[[159]](#footnote-160). Examples include the financing for anti-corruption and law enforcement activities; social development activities such as education and health; specific programs tied to specific policy outcomes or goals such as those included in the poverty reduction strategies tied to the Millennium Development Goals; and specific beneficiaries or groups of persons, such as those that have been the victim of corruption or human rights abuses[[160]](#footnote-161).

123. Different solutions have been suggested to prevent that the returned assets from being stolen a second time and to ensure that they are used for the benefit of citizens. The establishment of a central fund to manage and dispose of assets which can be used for the benefit of the country has proved to be a good solution that may also enable a proper monitoring[[161]](#footnote-162).

 iv) Managing and monitoring mechanisms

124. The prudent use and efficient administration of the repatriated illicit funds must be governed by the principles of transparency, participation and accountability (A/HRC/28/60, para. 43) Establishing the procedures and determining the authorities that will be accountable for guaranteeing that the allocation decisions will be strictly followed remain a key aspect of the whole process.

125. Well-designed tracking arrangements should tend to facilitate oversight and foresee external review as well as the disclosure of the results of the monitoring (A/HRC/19/42, para. 31). The active participation of third parties, such as international organizations and/or civil society organizations in the process should also be actively promoted[[162]](#footnote-163).

126. Different forms and degrees of control and supervision of the use of the returned funds in the recipient country may be introduced. Oversight mechanisms may also vary. The funds may be channelled through structures that are independent of governments, such as trust funds, foundations or dedicated public accounts (or escrow accounts). At the other side of the spectrum, monitoring may simply consist in the review of the management of the budget in cases where returned funds flow into the general government budget[[163]](#footnote-164).

127. Transparency in budget spending is fundamental. Experience shows that when the recovered assets have been transferred to an off-budget fund are problematic, giving rise to a number of questionable transactions (A/HRC/19/42, para. 33).

128. Participation must also be favoured by promoting the direct involvement of NGOs in the management, implementation and monitoring of the arrangements and projects[[164]](#footnote-165). Where monitoring mechanisms have not being set-up recovered assets have end up financing activities that did not benefit nor promote the socio-economic development of the affected communities.

1. Sections (Jean Ziegler): III (The phenomenon of illicit financial flows), IV (Overview of international initiatives on illicit funds), VI (National legislation and practices on the return of assets of illicit origin), VII (Negative impact on the enjoyment of human rights) and X (Conclusions and recommendations). [↑](#footnote-ref-2)
2. Sections (Obiora Okafor): I (Mandate and background), II (Introduction and definitions), V (Best practices in the return of illicit funds, VIII (Main challenges inhibiting the return of illicit funds), and IX (The importance of international cooperation in the return of funds of illicit origin). The assistance of Ms. Sanaa Ahmed, PhD Candidate at the Osgoode Hall Law School, in the preparation of this report is gratefully acknowledged. [↑](#footnote-ref-3)
3. Available at [http://www.ohchr.org/Documents/Issues/IEDebt/IllicitFinancialFlowsConsultation/BackgroundPaperFinal.pdf](https://www.ohchr.org/Documents/Issues/IEDebt/IllicitFinancialFlowsConsultation/BackgroundPaperFinal.pdf); accessed August 2, 2016 [↑](#footnote-ref-4)
4. http://www.gfintegrity.org/issue/illicit-financial-flows/ [↑](#footnote-ref-5)
5. http://www.taxjustice.net/topics/inequality-democracy/capital-flight-illicit-flows/ [↑](#footnote-ref-6)
6. Arezki, Rabah, Rota-Graziosi , Gregoire&Senbet, Lemma (2013) “Capital Flight Risk” in *Finance & Development*, Vol. 50, No. 3[.](file:///C%3A/Users/ookafor/AppData/Local/Microsoft/Windows/Temporary%20Internet%20Files/Content.IE5/LL5NZDRN/) Available at http://www.imf.org/external/pubs/ft/fandd/2013/09/arezki.htm [↑](#footnote-ref-7)
7. <https://www.oecd.org/tax/beps/beps-about.htm>&<https://www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm> [↑](#footnote-ref-8)
8. OECD (2014), Illicit Financial Flows from Developing Countries: Measuring OECD Responses, OECD Publishing, p 20-21, <http://dx.doi.org/10.1787/9789264203501-en>, pp 20-21 [↑](#footnote-ref-9)
9. OECD (2014), Better Policies for Development 2014: Policy Coherence and Illicit Financial Flows,

 OECD Publishing, p 22. doi: http://dx.doi.org/10.1787/9789264210325-en [↑](#footnote-ref-10)
10. OECD (2014), Illicit Financial Flows from Developing Countries: Measuring OECD Responses, OECD Publishing, p 20-21, http://dx.doi.org/10.1787/9789264203501-en [↑](#footnote-ref-11)
11. UNCTAD (2014) Trade and Development Report, 2014. Available at <http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf> p 173 [↑](#footnote-ref-12)
12. UNECA (2016) Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa; available at [http://www.uneca.org/sites/default/files/PublicationFiles/iff\_main\_report\_26feb\_en.pdf p 9](http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf%20p%209). The UNECA was mandated to establish the High Level Panel on Illicit Financial Flows from Africa by the 4th Joint African Union Commission/United Nations Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development held in 2011. The chairperson of the panel was former South African president Thabo Mbeki. [↑](#footnote-ref-13)
13. Pogge, Thomas and Mehta, Krishen (2016) “Introduction” in Pogge, T & Mehta, K (eds) *Global Tax Fairness*, OUP, Oxford, p 3 [↑](#footnote-ref-14)
14. OECD (2014), Illicit Financial Flows from Developing Countries: Measuring OECD Responses, OECD Publishing, http://dx.doi.org/10.1787/9789264203501-en [↑](#footnote-ref-15)
15. http://www.gfintegrity.org/issue/illicit-financial-flows/; accessed August 2, 2016.In its December 2015 report *Illicit Financial Flows from Developing Countries*: *2004* – *2013*, GFI estimated that developing and emerging countries lost $7.8 trillion during the period under study. IFFs grew at an average rate of 6.5 percent per annum during this period and topped $1 trillion in the year 2011. The authors of the report justify the selection of the 2004-2013 period for analysis by pointing to the fact that this is the most recent 10-year period for which data are available (p vii; 5). Available at <http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf>. [↑](#footnote-ref-16)
16. UNCTAD (2014) “Urgent global action needed to tackle tax avoidance”, available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=838&Sitemap\_x0020\_Taxonomy=CSO [↑](#footnote-ref-17)
17. UNCTAD (2014) Trade and Development Report, 2014; available at <http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf>, p 173 [↑](#footnote-ref-18)
18. GFI (2015) *Illicit Financial Flows from Developing Countries*: *2004* – *2013* p 1; available at <http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf> [↑](#footnote-ref-19)
19. UNECA (2016) Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa; available at [http://www.uneca.org/sites/default/files/PublicationFiles/iff\_main\_report\_26feb\_en.pdf p 15](http://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf%20p%2015). [↑](#footnote-ref-20)
20. However, these estimates may well be short of reality as they exclude such other forms of illicit financial flows as proceeds from smuggling and mispricing of services. [↑](#footnote-ref-21)
21. *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*, 2007, p. 9. According the UN Economic Commission for Africa, the continent continues to lose over 50 USD billion per annum. UNECA, *Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa,* 2016, p. 15; available at http://www.uneca.org/sites/default/files/PublicationFiles/iff\_main\_report\_26feb\_en.pdf. [↑](#footnote-ref-22)
22. http://www.uneca.org/stories/high-level-panel-illicit-financial-flows-meets-lusaka [↑](#footnote-ref-23)
23. Current evidence shows that between 1970 and 2008 African countries lost over USD 854 billion due to illicit financial flows. This is an increasing trend, since the yearly average of about USD 22 billion of illicit financial flows in 2008 has being increased to USD 50 billion between 2000 and 2008.  [↑](#footnote-ref-24)
24. To date, five studies have particularly looked into the issue. See: A/HRC/19/42, A/HRC/22/42, A/HRC/25/52 and A/HRC/28/60 and A/HRC/31/61. [↑](#footnote-ref-25)
25. According to Anne Peters corruption constitutes “the negation of the idea of human rights” and, therefore, the “antithesis of the rule of law”. See: *Corruption and Human Rights*, Basel Institute of Governance, 2015, p. 9. [↑](#footnote-ref-26)
26. Universal Rights Group, *Corruption and human Rights, Concept Note*, April 2016. Available at: <http://www.universal-rights.org/wp-content/uploads/2016/04/Concept-paper-corruption-and-human-rights.pdf>. [↑](#footnote-ref-27)
27. The 2011 *World Development Report* concludes that corruption, the laundering of the proceeds of crime and tax evasion are global threats that “fuel grievances and violence, and undermine the effectiveness of national institutions and social norms, ultimately compromising economic growth”. See also: *The World Bank Group’s Response to Illicit Financial Flows: A Stocktaking*, March 2016, p. 3. [↑](#footnote-ref-28)
28. Money laundering process usually involves three stages: 1) placement: the process of separating the illicit funds from their illegal source and placing them into one or more financial institutions, domestically or internationally; 2) Layering: the process of separating criminal proceeds from their source by using layers of financial transactions designed to hide the audit trail and provide anonymity, and 3) Integration schemes place the laundered proceeds back into the legitimate economy in such a way that they appear to be normal business funds. *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*, 2007, p. 13. [↑](#footnote-ref-29)
29. Ibid. p. 17. Disparities in the definition of politically exposed persons in domestic law constitute a common excuse to justify lack of an effective action by States, regulatory authorities, and banks. [↑](#footnote-ref-30)
30. The EU adopted EU Council Decision 2011/ 72/CFSP (January 31 2011) and EU Council Decision 2011/172/CFSP (March 21, 2011), directing member States to freeze the assets of persons responsible for misappropriation of Arab Republic of Egypt and Tunisian state funds and directing member States on conditions for release. [↑](#footnote-ref-31)
31. ‘Asset recovery’ or ‘repatriation’ refers to the process by which the proceeds of corruption are recovered from a given country and returned to a foreign jurisdiction. It includes the tracing of illicit assets, and the securing, freezing and returning of these to another country through a variety of legal avenues, including criminal confiscation and restitution, non-conviction-based confiscation, civil actions or actions involving the use of mutual legal assistance; A/HRC/22/42, para 7. [↑](#footnote-ref-32)
32. *The World Bank Group’s Response to Illicit Financial Flows: A Stocktaking*, March 2016, p. 3. [↑](#footnote-ref-33)
33. D. Richter, P. Uhrmeister, “Returning ‘Politically Exposed Persons’ Illicit Assets from Switzerland-International Law in the Force Field of Complexity and Conditionality, *GYIL*, 56, 2013, p. 461. [↑](#footnote-ref-34)
34. <https://www.eda.admin.ch/eda/en/home/foreign-policy/financial-centre-economy/illicit-assets-pep.html>; FDFA, *No Dirty Money. The Swiss Experience in Returning Illicit Assets*, 2016, p. 5. [↑](#footnote-ref-35)
35. Commission Implementing Decision of 29.7.2014 on the Preparatory Action for Supporting Arab Spring countries to implement asset recovery to be financed from the general budget of the European Union, C(2014) 5206 final, p. 2. [↑](#footnote-ref-36)
36. P. Veglio and P. Siegenthaler, “Monitoring the restitution of looted state assets”, in M. Pieth (ed) *Recovering Stolen Assets*, p. 315. While IFFs are a global problem, their impact on the African continent is monumental. The main beneficiaries of IFFs are understood to be the developed countries secrecy jurisdictions; OECD (2014), *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*, OECD Publishing, http://dx.doi.org/10.1787/9789264203501-en. [↑](#footnote-ref-37)
37. *Illicit Financial Flow. Report of the High Level Panel on Illicit Financial Flows from Africa*, 2015, p. 65. [↑](#footnote-ref-38)
38. See articles 51-59. The UNCAC was the first international treaty to directly address the issue of the return of stolen assets. As of today 180 States parties have ratified or acceded to the convention. [↑](#footnote-ref-39)
39. See in particular Articles 51 and 57 (3) and V.16-04993 3CAC/COSP/WG.2/2016/CRP.1. [↑](#footnote-ref-40)
40. Mutual legal assistance may be refused if the execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests. See article 46. 21 (b) [↑](#footnote-ref-41)
41. See Article 57(5) UNCAC. [↑](#footnote-ref-42)
42. It criticised that the numerous existing initiatives produces “an ever-increasing number of recommendations that will create anything but consistent standards”. D. Richter, P. Uhrmeister, *op.cit.,* p. 462. [↑](#footnote-ref-43)
43. http://star.worldbank.org/star/ [↑](#footnote-ref-44)
44. This initiative seeks to enable dialogue and raise awareness of effective measures for asset recovery. It provides a forum for regional training and discussion of best practices and identifies country-specific capacity building needs. <http://star.worldbank.org/star/ArabForum/About>; [↑](#footnote-ref-45)
45. The establishment of the Panel was mandated in 2011 by the 4th Joint African Union Commission/United Nations Economic Commission for Africa (AUC/ECA) Conference of African Ministers of Finance, Planning and Economic Development; http://www.uneca.org/iff [↑](#footnote-ref-46)
46. Launched in 2001 by the Swiss Federal Department of Foreign Affairs (FDFA) the Lausanne Seminars are organised in close collaboration with the International Centre for Asset Recovery (ICAR) of the Basel Institute on Governance and with the support of the Stolen Asset Recovery Initiative (StAR) of the World Bank and the UNODC; https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-60738.html [↑](#footnote-ref-47)
47. See SDG target 16.4 of the outcome document of the 2015 Sustainable Development Summit “Transforming our world: the 2030 Agenda for Sustainable Development” [↑](#footnote-ref-48)
48. Available at [www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF Recommendations 2003.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf); p 14. Article 52 of the UN Convention against Corruption (2004) echoes this definition but in far less detail. Available at <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>; p42 [↑](#footnote-ref-49)
49. Foreign PEPs are defined as individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Domestic PEPs are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. FATF (2013) *Politically Exposed Persons* (*Recommendations 12 and 22*), p 4-5; available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> [↑](#footnote-ref-50)
50. International organisation PEPs are persons who are or have been entrusted with a prominent function by an international organisation, refers to members of senior management or individuals who have been entrusted with equivalent functions, *i.e.* directors, deputy directors and members of the board or equivalent functions.While even the 2003 version of FATF’s 40 recommendations advised caution on dealings with PEPs, the focus was on foreign PEPs. FATF (2013) *Politically Exposed Persons* (*Recommendations 12 and 22*), p 3; available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> [↑](#footnote-ref-51)
51. FATF (2013) “FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22)”. Available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf> p5 [↑](#footnote-ref-52)
52. Illicit Financial Flows from Developing Countries: Measuring OECD responses, p 16 [↑](#footnote-ref-53)
53. Said article urges states to consider helping each other out in investigations and proceedings on civil and administrative matters regarding corruption. Available at <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>, p 30, p40 [↑](#footnote-ref-54)
54. Illicit Financial Flows from Developing Countries: Measuring OECD responses, p 16 [↑](#footnote-ref-55)
55. The first beneficiary of the December 2015 law was Nigeria, which stands to receive $321 million of the Abacha monies. <http://www.reuters.com/article/us-swiss-assets-idUSKCN0YG29Z> and <http://www.dailynigerianews.com/2016/07/29/nigeria-switzerland-sign-mou-on-repatriation-of-321m-abacha-loot/>, accessed Aug 2, 2016. [↑](#footnote-ref-56)
56. The section regarding conditions where an asset freeze is to be deemed admissible read as follows: “[where] the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable; [] the level of corruption in the country of origin is notoriously high; [] it appears likely that the assets were acquired through acts of corruption or misappropriation or other crimes; [] the safeguarding of Switzerland's interests requires the freezing of the assets.” Available at <https://www.newsd.admin.ch/newsd/message/attachments/44109.pdf>; p 2 [↑](#footnote-ref-57)
57. The presumption will follow if “the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person; [and] the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office.” Available at <https://www.newsd.admin.ch/newsd/message/attachments/44109.pdf>; p 7 [↑](#footnote-ref-58)
58. ”The restitution of assets is made in pursuit of the following objectives: [] to improve the living conditions of the inhabitants of the country of origin, or [] to strengthen the rule of law in the country of origin and thus to contribute to the fight against impunity.” [↑](#footnote-ref-59)
59. OECD Better Policies for Development 2014, Policy coherence and illicit financial flows [↑](#footnote-ref-60)
60. <https://www.egmontgroup.org/en/content/about> [↑](#footnote-ref-61)
61. The Forum was born of the OECD’s need to address the risks to tax compliance in non-cooperative jurisdictions. In 2009, concerned by the impact of the 2007 financial crisis, the G20 leaders committed to strengthening transparency standards for tax purposes, thereby declaring the end of the era of bank secrecy. Member jurisdictions are expected to obtain information from their financial institutions and exchange this with other jurisdictions on an annual basis. The work is carried out by both OECD and non-OECD economies. The transparency standards are mainstreamed via the “peer review” of all 137 member jurisdictions and the primary method of compliance and/ or enforcement appears to be naming-and-shaming. <https://www.oecd.org/tax/transparency/abouttheglobalforum.htm>; G20 Communique “Leaders’ statement: the Pittsburg Summit” *Financial Times* (September 25, 2009); available at <https://www.ft.com/content/5378959c-aa1d-11de-a3ce-00144feabdc0> [↑](#footnote-ref-62)
62. http://www.oecd.org/tax/transparency/about-the-global-forum/members/#d.en.351555 [↑](#footnote-ref-63)
63. These include: first, participation in a forum attended by all financial centres, which considerably enhances developing countries' ability to negotiate information exchange agreements. Second, the Global Forum claims its peer review process helps members improve their legal frameworks. Third, the forum provides help in improving the legal framework for transparency and exchange of information. Fourth, by monitoring and reviewing the implementation of the new global standard on AEOI, the Global Forum helps its members to recover tax revenue lost to non-compliant taxpayers, and further strengthen international efforts to increase transparency, cooperation, and accountability among financial institutions and tax administrations. Additionally, AEOI will generate secondary benefits by increasing voluntary disclosures of concealed assets and by encouraging taxpayers to report all relevant information. Fifth, membership of the forum is used to signal reliability as business destination. Finally, all members have an equal voice in the decision making process of the Global Forum as all decisions are taken by consensus. <https://www.oecd.org/tax/transparency/abouttheglobalforum.htm> [↑](#footnote-ref-64)
64. http://www.oecd.org/ctp/beps/. [↑](#footnote-ref-65)
65. <https://www.oecd.org/tax/concept-note-platform-for-collaboration-on-tax.pdf>, p 4 [↑](#footnote-ref-66)
66. <https://www.oecd.org/tax/concept-note-platform-for-collaboration-on-tax.pdf>, p 3 [↑](#footnote-ref-67)
67. <https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>; p 6 [↑](#footnote-ref-68)
68. http://www.icrict.org/about-us/ [↑](#footnote-ref-69)
69. A number of countries and jurisdictions have made asset recovery guides available, containing tools and procedures on asset recovery measures applicable within the respective countries. http://star.worldbank.org/star/ArabForum/asset-recovery-guides [↑](#footnote-ref-70)
70. EU Member States have set up National Asset Recovery Offices (AROs). In 2012, the Commission proposed new legislation to make it easier for EU Member States to confiscate assets derived from serious and organised crime and protect our economies. See: Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the EU, Brussels, 12.3.2012, COM(2012) 85 final [↑](#footnote-ref-71)
71. https://www.oecd.org/site/adboecdanti-corruptioninitiative/ [↑](#footnote-ref-72)
72. http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/default\_en.asp [↑](#footnote-ref-73)
73. Belgium, Canada, Luxembourg, the Netherlands, Portugal, Switzerland, the United Kingdom of Great Britain and Nothern Ireland and the United States of America. France and Australia reported asset freezes during the period 2006-2009. L. Grey and others, *Few and Far: The Hard Facts on Stolen Asset Recovery*, World Bank, 2014, p. 18. [↑](#footnote-ref-74)
74. Ibid. p. 20. [↑](#footnote-ref-75)
75. See: FDFA, *No Dirty Money. The Swiss Experience in Returning Illicit Assets*, 2016, p. 24. The cornerstones of Swiss policy on dealing with potentate funds are contained in the strategy adopted in 2014; *Stratégie de la Suisse concenant le blocage, la confiscation et la restitution des avoirs de potentats*; [↑](#footnote-ref-76)
76. See: ‘Switzerland is not a safe haven for stolen funds’, http://www.telegraph.co.uk/news/worldnews/europe/switzerland/8383275/Switzerland-is-not-a-safe-haven-for-stolen-funds.html [↑](#footnote-ref-77)
77. https://www.eda.admin.ch/eda/en/home/aussenpolitik/finanzplatz-wirtschaft/unrechtmaessig-erworbene-vermoegenswerte-pep.html [↑](#footnote-ref-78)
78. Egypt (USD 570 million ascribed to former president Hosni Mubarak and his entourage); Tunisia (CHF 60 million linked to former president al-Abidine Ben Ali); Syria (CHF 120 million connected to Bashar Al-Assad) and with Syrian companies (EU sanctions); Libya (CHF 90 million from the entourage of Muammar a Gaddafi (UN sanctions), Ukraine (USD 70 million following the removal of the former Ukrainian President from office); Haiti (6.3 million USD) and Nigeria II (321 million USD) See: FDFA, Making Sure Crime Doesn’t Pay: Repatriating the Proceeds of Crimes. Freezing orders may last a maximum of four years, and are renewable annually, for a maximum of ten years. An asset freeze may also be admissible following receipt of a request for mutual legal assistance when cooperation with the country of origin proves to be impossible because there are reasons to believe that proceedings in the country of origin do not satisfy the essential principles of procedure and where the safeguarding of Switzerland’s interests so requires (art. 4.3). [↑](#footnote-ref-79)
79. 1 October 2010. Available at: https://www.admin.ch/opc/en/classified-compilation/20100418/201102010000/196.1.pdf [↑](#footnote-ref-80)
80. Foreign Illicit Assets Act (FIAA) of 18 December 2015. The act came into force on 1 July 2016. Available at: CAC/COSP/WG.2/2016/CRP.2. [↑](#footnote-ref-81)
81. The following: a) the assets have been made subject to a provisional seizure order within the framework of international legal assistance proceedings in criminal matters instigated at the request of the country of origin; b) the country of origin is unable to satisfy the requirements of mutual legal assistance owing to the total of substantial collapse, or the impairment, of its judicial system (failure of state structures); c) the safeguarding of Switzerland’s interests requires the freezing of the assets [↑](#footnote-ref-82)
82. This is obviously a limitation since it is very unlikely to happen while a potentate is still in power. [↑](#footnote-ref-83)
83. Article 3 of 2015 Act. [↑](#footnote-ref-84)
84. Article 17 of 2015 Act . [↑](#footnote-ref-85)
85. In the absence of an agreement, the return is made via international institutions under the supervision of the FDFA. See Article 18 of 2015 Act. [↑](#footnote-ref-86)
86. The country of origin is left with no other choice than either to accept any suggestion of the Swiss authorities or to reach an agreement to determine the modalities of the restitution. D. Richter, P. Uhrmeister, *op.cit.,* p. 489-490. [↑](#footnote-ref-87)
87. According to the UNODC, out of the 20 to 40 billion USD yearly lost by developing countries through corruption, no more than 5 billion was repatriated to them in the 15 years prior to 2011. The total volume of assets returned between 2006 and June 2012 was 423.5 USD million, which is significantly less than the 2-623 billion in assets that were reported frozen. UNODC, *Digest of Asset Recovery Cases*, 2015, para. 15. Ibid. pp. 18-21. See also A/CHR/28/60 par. 16. [↑](#footnote-ref-88)
88. OECD/StAR Initiative: “Far and Few”, 2014, p.19. [↑](#footnote-ref-89)
89. FDFA, *No Dirty Money. The Swiss Experience in Returning Illicit Assets*, 2016, p. 5. [↑](#footnote-ref-90)
90. StAR, Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action, 2011. [↑](#footnote-ref-91)
91. See: Stolen Asset Recovery Initiative: “Barriers to Asset Recovery: an Analysis of the Key Barriers and Recommendations for Action”, 2011. [↑](#footnote-ref-92)
92. It is reported that around 165 billion USD were stolen in Egypt, Libya, Tunisia and Yemen. See: Transparency International, *Lost billions: recovering public money in Egypt, Libya, Tunisia and Yemen*, 2014. [↑](#footnote-ref-93)
93. UNODC, *Digest of Asset Recovery Cases*, 2015, para. 62. [↑](#footnote-ref-94)
94. Global Financial Integrity, Illicit Financial Flows, Corruption, and Sustainable Economic Development in Tunisia, 2016,http://www.gfintegrity.org/illicit-financial-flows-corruption-sustainable-economic-development-tunisia/ [↑](#footnote-ref-95)
95. http://www.gfintegrity.org/issues/data-by-country/ [↑](#footnote-ref-96)
96. Following the 2011 revolution in Tunisia, many States and the EU froze assets of Ben Ali regime and some members of his family/regime. [↑](#footnote-ref-97)
97. <http://www.cnicmtunisie.tn/index.php?option=com_k2&view=itemlist&task=category&id=2:rapport>; [↑](#footnote-ref-98)
98. B. Rijkers, C.Freund, A. Nucifora, *All in the Family. State Capture in Tunisia*. World Bank, Policy Research Paper, 2014. [↑](#footnote-ref-99)
99. Instance Nationale de Lutte contre la corruption; http://www.anticor.tn/acteurs/instance-nationale-de-lutte-contre-la-corruption/ [↑](#footnote-ref-100)
100. StAR, Tunisia’s cash-back, April 2013; available at: https://star.worldbank.org/star/news/tunisia%E2%80%99s-cash-back; The involvement the UNODC Special Regional Advocate for Anti-Corruption in the MENA Region, Ali bin Fetais al-Marri, was instrumental in this return; <https://www.unodc.org/unodc/en/press/releases/2014/October/attorney-general-of-qatar-reappointed-as-unodc-advocate-for-anti-corruption-in-mena-region.html>. [↑](#footnote-ref-101)
101. In 2015 Switzerland announce that it will return some 250.000 USD to Tunisia. http://www.africanews.com/2016/06/01/switzerland-to-return-over-250000-of-ben-ali-s-money-to-tunisia/ [↑](#footnote-ref-102)
102. Tunisia still waiting to get Ben Ali clan funds back from Switzerland;

 http://www.swissinfo.ch/eng/blocked-money\_tunisia-still-waiting-to-get-ben-ali-clan-funds-back-from-switzerland/42587966 [↑](#footnote-ref-103)
103. https://www.eda.admin.ch/eda/en/home/foreign-policy/financial-centre-economy/illicit-assets-pep/freeze-assets.html [↑](#footnote-ref-104)
104. <http://www.swissinfo.ch/eng/arab-spring_-remarkable-progress--made-returning-stolen-assets/41092730>, As consequence of the regime change the Egyptian dossier was blocked in Switzerland. http://www.swissinfo.ch/eng/arab-spring\_-remarkable-progress--made-returning-stolen-assets/41092730. [↑](#footnote-ref-105)
105. Egyptian Initiative for Personal Rights, *How to Best Utilize our Stolen Assets?* September 2014, p. 19. [↑](#footnote-ref-106)
106. Ibid. [↑](#footnote-ref-107)
107. See: *Asset recovery in Egypt, Libya, Tunisia and Yemen*, p. 12. [↑](#footnote-ref-108)
108. The National Body for Recovering Stolen Assets (AWAM) was established as an outcome of the Arab Spring; see: https://www.alaraby.co.uk/english/features/2015/1/28/the-battle-to-recover-yemens-lost-billions [↑](#footnote-ref-109)
109. Resolution 2140 (2014), para. 4. [↑](#footnote-ref-110)
110. The Committee is supported by the Panel of Experts established pursuant to resolution 2140 (2014). It was initially comprised of four experts and was expanded to five experts by resolution 2216 (2015). The Panel of Experts is home-based. Its current mandate extends through 27 March 2017. [↑](#footnote-ref-111)
111. S/1016/73, par. 97. [↑](#footnote-ref-112)
112. Reportedly some of these funds are being used to buy weapons and arm the opposed armed groups. [↑](#footnote-ref-113)
113. D. Richter, P. Uhrmeister, *op.cit.,* p.499. [↑](#footnote-ref-114)
114. The range of impact will depend on the particular national development situation. High Level Conference on Illicit Financial Flows: Inter-Agency Cooperation and Good Tax Governance in Africa, Pretoria, 14-15 July 2016, p. 2. [↑](#footnote-ref-115)
115. In connection to the SDG’s and the need to track progress in implementation and its contribution to sustainable development there is a need of operationalize the targets with specific indicators that will allow to measure efforts to curb IFFs, corruption as well as progress in asset recovery. Human rights indicators should also be considered as to ensure that they are fully integrated into national and international efforts (A/HRC/28/60, par. 74). [↑](#footnote-ref-116)
116. *The World Bank Group’s Response to Illicit Financial Flows: A Stocktaking*, March 2016, p. 3. [↑](#footnote-ref-117)
117. FDFA, *No Dirty Money. The Swiss Experience in Returning Illicit Assets*, 2016, p. 6. [↑](#footnote-ref-118)
118. UN, *World Economic Situation and Prospects*, 2016, p. 9. [↑](#footnote-ref-119)
119. Ibid., p. 103. [↑](#footnote-ref-120)
120. When large-scale tax evasion is allowed to occur with impunity, the rule of law is undermined, leading also to low tax moral and more widespread non-compliance, as well as reduced confidence in government more generally. [↑](#footnote-ref-121)
121. T.S. Greenberg and others Politically Exposed Persons: Preventive Measures for the Banking Sector, StAR, 2010; A/HRC/28/60, par. 32. [↑](#footnote-ref-122)
122. http://www.worldbank.org/en/topic/financialmarketintegrity/brief/illicit-financial-flows-iffs [↑](#footnote-ref-123)
123. Universal Rights Group, *Corruption and human Rights, Concept Note*, April 2016. Available at: <http://www.universal-rights.org/wp-content/uploads/2016/04/Concept-paper-corruption-and-human-rights.pdf>. [↑](#footnote-ref-124)
124. Traditionally, some 52 industries (including cement, hardware, finishingsetc) were said to be associated with construction. With multiple new sustainability-driven projects and products, it is hard to put a precise number on the amount of industries. [↑](#footnote-ref-125)
125. Csanady, Ashley “Government debt in Canada set to top $1.3 trillion in 2016: Fraser Institute”, National Post, Jan 5, 2016, available at <http://news.nationalpost.com/news/canada/canadian-politics/government-debt-in-canada-set-to-top-1-3-trillion-in-2016-fraser-institute> [↑](#footnote-ref-126)
126. http://www.forbes.com/sites/mikepatton/2014/10/28/who-owns-the-most-u-s-debt/#20e0d1141907 [↑](#footnote-ref-127)
127. Shaxson, Nicholas & Christensen, John “Tax Competitiveness—a Dangerous Obsession” in Pogge, Thomas & Mehta, Krishen (eds) *Global Tax Fairness*, OUP, Oxford, 2016) [↑](#footnote-ref-128)
128. Kasperkevic, Jana “Forget Panama: it's easier to hide your money in the US than almost anywhere”, The Guardian, April 6, 2016. Available at <https://www.theguardian.com/us-news/2016/apr/06/panama-papers-us-tax-havens-delaware> [↑](#footnote-ref-129)
129. http://www.financialsecrecyindex.com/introduction/fsi-2015-results [↑](#footnote-ref-130)
130. O’ Murchu, Cynthia “Follow the money”, Financial Times, (London, England) August 14, 2014 [↑](#footnote-ref-131)
131. Halter, Emily Marie; Harrison, Robert Mansour; Park, Ji Won; Sharman, Jason Campbell; Van Der Does De Willebois, Emile J. M. (2011) *The puppet masters*: *how the corrupt use legal structures to hide stolen assets and what to do about it*, Stolen Asset Recovery (StAR) initiative, Washington, DC: World Bank. Available at <http://documents.worldbank.org/curated/en/784961468152973030/The-puppet-masters-how-the-corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it>; OECD Better Policies for Development 2014 *Policy coherence and illicit financial flows*; available at <http://www.oecd.org/pcd/Better-Policies-for-Development-2014.pdf>, p 27. [↑](#footnote-ref-132)
132. FATF (2014) *Transparency and Beneficial Ownership*; available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>, p 6 [↑](#footnote-ref-133)
133. These include lawyers; jewelers; real estate brokers etc. [↑](#footnote-ref-134)
134. OECD Better Policies for Development 2014Policy coherence and illicit financial flows p 27 [↑](#footnote-ref-135)
135. *The African Commission on Human and Peoples’ Rights, meeting at its 53rd Ordinary Session held from 9 to 23 April 2013 in Banjul, The Gambia;236 Resolution on Illicit Capital Flight from Africa; available at* [*http://www.achpr.org/sessions/53rd/resolutions/236/*](http://www.achpr.org/sessions/53rd/resolutions/236/) [↑](#footnote-ref-136)
136. Shaxson, Nicholas &Christensen, John “Tax Competitiveness—a Dangerous Obsession” in Pogge, Thomas & Mehta, Krishen (eds) *Global Tax Fairness*, OUP, Oxford, 2016 [↑](#footnote-ref-137)
137. Mehta, Krishen “Ten Ways Developing Countries Can Take Control of their Own Tax Destinies” in Pogge, Thomas Mehta, &Krishen (eds) *Global Tax Fairness*, OUP, Oxford, 2016, p 340 [↑](#footnote-ref-138)
138. IMF (2014) IMF Policy Paper, “Spillovers in International Corporate Taxation”, p 13. Available at <http://www.imf.org/external/np/pp/eng/2014/050914.pdf> [↑](#footnote-ref-139)
139. OECD reports on IFFs; J. Henry, (2016) “How to respond to the Panama Papers”, Foreign Affairs; available at <https://www.foreignaffairs.com/articles/panama/2016-04-12/taxing-tax-havens>; Shaxson, Nicholas &Christensen, John “Tax Competitiveness—a Dangerous Obsession” in Pogge, Thomas & Mehta, Krishen (eds) Global Tax Fairness, OUP, Oxford, 2016). [↑](#footnote-ref-140)
140. <https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf> p 3; accessed August 2, 2016 [↑](#footnote-ref-141)
141. Mehta, Krishen “Ten Ways Developing Countries Can Take Control of their Own Tax Destinies” in Pogge, Thomas Mehta, &Krishen (eds) Global Tax Fairness, OUP, Oxford, 2016, p 353 [↑](#footnote-ref-142)
142. See: A/HRC/22/42, par. 51; Asset recovery handbook, StAr p. 8; N. Ribadu, “Challenges and Opportunities of Asset Recovery in a Developing Economy”, in Asset Recovery and Mutual Legal Assistance in Asia and Pacific, ADB/OECD, 2008, p. 133. [↑](#footnote-ref-143)
143. At the same time it must be acknowledge that, as a matter of fact, the country of destiny may have a concern and a say on the final use. [↑](#footnote-ref-144)
144. As observed, the risks are high if the government is corrupt or is weak in its fight against corruption, which puts the returned money at risk of being wasted and lost again in the same corruption channels without victims of corruption benefiting from it. Egyptian Initiative for Personal Rights, *How to Best Utilize our Stolen Assets?* September 2014, p. 6. In practice, arrangements have been reached easily when countries have embraced a policy of openness and transparency in the design of the management of the return assets. StAR Initiative, *Stolen Asset Recovery- Management of returned assets: Policy Considerations*, 2009, p. xi. [↑](#footnote-ref-145)
145. To be in conformity with international law, such guarantees should strictly stick to the purpose of avoiding new losses. D. Richter, P. Uhrmeister, *op.cit.,* p. 495. [↑](#footnote-ref-146)
146. In the Preamble it is stated that corruption poses serious problems and threats to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law. See also Art. 35 UNCAC “Compensation for Damage”, and K. Attisso, “The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake”, Basel Institute of Governance, Working Paper Series, n. 8, p. 10. [↑](#footnote-ref-147)
147. Countries of destination may be concerned that the funds will be siphoned off again through continued or renewed corruption in the requesting jurisdictions, especially if the corrupt official is still in power or holds significant influence. Asset recovery handbook, StAr p. 8 [↑](#footnote-ref-148)
148. Egyptian Initiative for Personal Rights, *How to Best Utilize our Stolen Assets?* September 2014, p. 6. [↑](#footnote-ref-149)
149. See: FATF, Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for ongoing work on asset recovery, 2012, at 6 (e); and HRC Resolution 17/4 endorsing the "Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework" [↑](#footnote-ref-150)
150. Other persons or institutions who have knowledge by virtue of the functions they perform, must also report the assets. The MROS receives and analyses suspicious activity reports in connection with money laundering, terrorist financing, money of criminal origin or criminal organisations. Where necessary, it forwards them to the law enforcement agencies for follow-up action. The MROS may request information and documents from any person or institution that may hold or manage assets covered by the Act. Such information is transmitted to the FDFA and the Federal Office of Justice, which may provide the country of origin with assistance in its efforts to obtain restitution of the frozen assets. https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei.html [↑](#footnote-ref-151)
151. Freezing Assets of Corrupt Foreign Officials Act (S.C. 2011, c. 10); available at: http://laws-lois.justice.gc.ca/eng/acts/F-31.6/ In accordance with Article 8 b) This includes the following ones: authorized foreign banks, cooperative credit societies, savings and credit unions and *caisses populaires*; foreign companies in respect of their insurance business in Canada; companies, provincial companies and societies; fraternal benefit societies in respect of their insurance activities and insurance companies and other entities engaged in the business of insuring risks; companies including trust companies; loan companies, and entities that engage in any activity described in paragraph 5(h) of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act if the activity involves the opening of an account for a client; entities authorized under provincial legislation to engage in the business of dealing in securities or to provide portfolio management or investment counselling services; and other entities of a prescribed class of entities. [↑](#footnote-ref-152)
152. Relevant examples of local NGOs that have developed an expertise in this area are: the Association Tunisienne pour la Transparence Financière (ATTF); the Yemeni National Authority for Recovering Stolen Assets (AWAM); the Egyptian Initiative for Personal Rights (EIPR); Global Witness; and the Open Society Justice Initiative Sherp. [↑](#footnote-ref-153)
153. See also: OECD, « Whistle blower protection: encouraging reporting », July 2012, p. 3. [↑](#footnote-ref-154)
154. Report of the High Level Panel on Illicit Financial Flows from Africa, 2016, p. 70. [↑](#footnote-ref-155)
155. Some States have included in their legislation requirements aimed at ensuring the proper use of the funds See i.e. Article18 of the Swiss Act on the Restitution of Illicit Assets. [↑](#footnote-ref-156)
156. According some authors, it is a well-established practice that States prefer to return dictators’ assets to developing countries only on certain conditions in order to avert the risk of novel diversion by a corrupt successor regime. D. Richter, P. Uhrmeister, op.cit., p. 468. [↑](#footnote-ref-157)
157. P. Veglio and P. Siegenthaler, op.cit., p. 325. [↑](#footnote-ref-158)
158. In the same vein, the FATF considers that “as a matter of best practice, countries should endeavour to use confiscated property transparently to fund projects that further the public good”. See: Interpretative Note to Recommendation 38. FATF, Best Practices on confiscation (Recommendations 4 and 38) and a framework for ongoing work on asset recovery, October 2012, p. 7. [↑](#footnote-ref-159)
159. Swiss practice illustrates some more concrete cases. In Philippines, for example (Marcos funds) assets returned were set aside to finance agricultural reform for the most deprived, and to set up compensation measures to benefit the victims of human rights violations under dictatorship. In Nigeria (Albacha funds), the assets were earmarked for programs to combat poverty, create employment, promote health and education, agriculture, build roads, and in general terms, improving the living conditions of the people. In Kazakhstan a project to educate unprivileged children were planned and in Angola, the funds were allocated to a project intended to help the most vulnerable members of society, with priority given to reconstruction, construction of medical infrastructure and equipment, basic professional training and the promotion of local capacities, particularly the reintegration into society of displaced population. [↑](#footnote-ref-160)
160. StAR, Stolen Assets Recovery: Management of Returned Assets: Policy Considerations, 2009, p. 4. [↑](#footnote-ref-161)
161. G8 Asset Recovery Action Plan, May 2012; available at: <https://www.state.gov/j/inl/rls/190483.htm>. The FATF recommends countries to consider establishing an asset forfeiture fund into which all or a portion of confiscated property will be deposited for law enforcement, health, education, or other appropriate purposes. <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf>. In Peru, for example, the government in 2001 set up a special fund to allow the appropriate and transparent management of the process of corruption recovered. The funds were deposited in a different account and kept separate from other government revenue. Once the board of the fund agreed to appropriate funds to a particular program or agency, these appropriations were included in the budget law as earmarked funds. *Stolen Asset Recovery: Management of Returned Assets: Policy Considerations*, pp. 33-34. [↑](#footnote-ref-162)
162. In some cases, international organizations such as the World Bank and civil society organizations have been used to facilitate the return and monitoring of recovered funds. [↑](#footnote-ref-163)
163. P. Veglio and P. Siegenthaler, op.cit., p. 319. [↑](#footnote-ref-164)
164. Maintaining the good quality of the work financed or completed with the repatriated funds may however be challenging in certain cases. In Nigeria for example, lack of good faith and corruption reportedly prevented the Abacha returned funds from being translated into infrastructure development benefiting communities. I. Jimu, “Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan”, Basel Institute of Governance, Working Paper Series, n.6, 2009, p. 9. [↑](#footnote-ref-165)