Supporting Legislation and Action on Recovery of Stolen Assets and Money Laundering

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DAC DEVELOPMENT PARTNERSHIP FORUM
IMPROVING DONOR EFFECTIVENESS IN COMBATING CORRUPTION

Organised jointly by
OECD DEVELOPMENT ASSISTANCE COMMITTEE
AND TRANSPARENCY INTERNATIONAL
9-10 DECEMBER 2004

This paper was prepared for the DAC Development Partnership Forum: Improving Donor Effectiveness in Combating Corruption organised jointly by OECD Development Assistance Committee and Transparency International, 9-10 December 2004. It represents the views of the author and not those of the OECD DAC or Transparency International.

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Commonwealth Heads of Government, at their Summit in Abjua, Nigeria in December 2003 stated the following in the Aso Rock Declaration:

> "We recognize that corruption erodes economic development and corporate governance. We welcome the successful conclusion of the United Nations Convention against Corruption and urge the early signature, ratification and Implementation of the Convention by member states. We pledge maximum cooperation and assistance amongst our governments to recover the assets of illicit origin and repatriate them to their countries of origin. This will make more resources available for development purposes. To this end, we request the Secretary General to establish a Commonwealth Working Group to help advance effective action in this area."

With the foregoing mandate, this Working Group on Asset Repatriation has met twice in an anticipated schedule of four meetings, at Marlborough House London. The majority of the conclusions of the Group, where any have been reached, remain provisional at this stage, but we have focused on a number of topics, which I would wish to touch on briefly, as follows:

- The critical importance of having in place a comprehensive asset forfeiture regime in all states, including where possible, the implementation of a non conviction based (civil) forfeiture process, both for the enforcement of asset forfeiture following upon domestic cases of corruption and other criminal offences but also to provide a basis for assisting in asset repatriation following upon international requests in instances where criminally derived assets may be located in another jurisdiction from where they were plundered. In addition to the presence of comprehensive laws, we have also recognized that those laws would be useless without the presence of trained investigators, prosecutors, judges and administrators familiar with the laws in question and committed to their implementation.

- The ongoing difficulties of the use of mutual legal assistance processes in criminal matters. Even within the Commonwealth, where there is in existence a non treaty scheme for mutual legal assistance in criminal matters, a number of Commonwealth countries have still not implemented domestic legislation to give effect to the so called "Harare Scheme" and as a result require bilateral treaties for mutual legal assistance (MLATS). In our contemporary global financial environment, where money is moved not in lock boxes but in cyberspace and therefore can end up anywhere in the world, the dangers of any number of our small, and even large states, requiring mutual legal assistance from a country with which they do not have a bilateral agreement is not a hypothetical but very real problem. Further even where there exists such an agreement, our discussions have already highlighted other practical difficulties with the MLAT process, including:

- Unfamiliarity with the domestic requirements of requested states,
- Long delays in processing requests,
- Differences, from jurisdiction to jurisdiction, with approaches to the direct or indirect enforcement of foreign restraint orders, pending the completion of criminal prosecutions in the requesting state,
- The need to provide third party rights protection.

- The actual mechanisms for repatriation have also come under scrutiny, recognizing the need to implement the United Nations Convention against Corruption and in particular the obligations imposed by article 57 in the case of embezzlement (and subsequent laundering) of public funds, for the return of those funds. The requirement by a number of countries, for the existence of an asset sharing agreement, whether in the form of a treaty or a memorandum of understanding may well be in conflict with this obligation and would require those countries revisiting those requirements. We have also considered whether the principles contained in article 57 should not also be extended to other corruption related cases.

- The Working Group has also looked at prevention issues and has provisionally recommended that member states of the Commonwealth should have regard to the extensive provisions in the Prevention chapter of the Corruption Convention and make best efforts to reflect those measures in domestic law, including:
  - Establishing a broad range of criminal offences in corruption cases,
  - The use of declaration requirements with meaningful and adequate systems for verification of those declarations including access to tax information and adequate penalties for breaches of the declaration requirements, and
  - The creation of the offence of unjust enrichment, where constitutionally permissible under domestic law.

- Some of the chief challenges to successful asset recovery and repatriation has to do with the constitutional and other legal restraints in the country the actual victim of the loss of state assets through corruption and other related criminal activity. Some of these restraints have been identified and include:
  - Excessive immunity of politicians and other civil servants from prosecution for the commission of criminal offences, including corruption related offences; in many instances this immunity extends not only to non-liability, in the case of serving members of the legislature, for actions or pronouncements in their capacity as members of the legislature, but extends to inviolability, or complete freedom from arrest, for any offence, and
  - Excessive cabinet secrecy, which prevents the evidence of corruption related activities from being revealed.