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United Nations Convention against Corruption**

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**Articles of the United Nations Convention against
Corruption on asset recovery: analysis of reported
compliance and policy recommendations**

The Secretariat wishes to bring to the attention of the Conference of the States Parties the aforementioned report, produced by the Stolen Asset Recovery (StAR) Initiative. This report is transmitted as received.

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**Articles of the United Nations Convention against
Corruption on Asset Recovery: Analysis of
Reported Compliance and Policy
Recommendations**

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I. Introduction

A. Background and Disclaimer

At its first session, held in Amman in December 2006, the Conference of the States parties (hereinafter, CoSP or the Conference) to the United Nations Convention against Corruption (hereinafter, UNCAC or the Convention) decided¹ that a self-assessment checklist shall be used as a tool to facilitate the provision of information on implementation of the Convention. At the same session, the Conference requested the United Nations Office on Drugs and Crime (hereinafter, UNODC) to finalize the self-assessment checklist and begin the process of information-gathering, urging States parties, and inviting signatories, to complete and return the checklist to UNODC. In response to this mandate, the Office launched the information-gathering tool on 15 June 2007. Data presented in this report, including the statistical analysis and policy recommendations, are solely based on States parties' own evaluations of progress made toward implementing the asset recovery articles of the UNCAC that were selected for review herein. Country-provided information has not been subjected to an independent verification process by the UNODC, the StAR Initiative or a third party. The StAR Initiative, therefore, does not endorse the accuracy of the self-assessments and so qualifies the analysis and recommendations in this report insofar as they are derived from the self-assessments. Against this background, it is worthwhile sharing the impressions of the experts involved in reviewing the self-assessments and authoring this report.

Many of the States parties provided extensive supporting documentation as part of their submissions, which enabled the reviewers to find internal consistency in the various statements and representations made in the self-assessments. In other cases the documentation was not fully responsive to the UNCAC provisions under consideration, leading the reviewers to question the submitting State parties' interpretations of the requirements. In yet other cases, explanation was scant or not given. Despite these qualifications on the uneven and unverified nature of information analyzed, the self-assessments provide valuable insight into the successes, challenges, and needs of the various States parties and regions.

B. About this Document

1. This report contains an analysis of States parties' efforts to implement articles of UNCAC pertinent to asset recovery. Information analyzed in this report was submitted by reporting States parties to UNODC through the UNCAC self-assessment checklist (SAC).

2. Articles 23, 52, 53, 54, 55 and 57 were selected² (selected articles) because of their importance and immediate relevance to asset recovery. Information

¹ Resolution 1/2. Conference of the States parties to the United Nations Convention against Corruption. First Session, Amman, 10 December – 14 December 2006.

² These articles were included in the Self-assessment Checklist according to guidance received from States Parties during consultations in the development of the tool.
<http://www.unodc.org/documents/treaties/UNCAC/COSP/session2/V0788913e.pdf>

on country and regional compliance with the selected articles was extracted from the 78 self-assessment reports³ submitted at the time of writing the present report.

3. This report examines reported compliance with all twenty-eight provisions of the selected articles. Analysis of reported compliance is presented in accordance with the composition of the regional groups of Member States of the United Nations.

4. The analysis, recommendations, charts, tables, graphics and statistics in this report are based on the self-assessment reports submitted by States parties. No verification or validation of the submitted data was undertaken prior to the analysis.

5. Regional Compliance Tables of self-assessment data for the selected articles are included in Appendix B.

C. Methodology and the way forward

The analysis consists of three activities. First, reported legislative and institutional implementation efforts and gaps are analyzed at the article and provision level by country and region. Second, regional recommendations are developed based on trends, patterns and observations drawn from the self-assessment reports and regional research. Third, recommendations are developed for bridging gaps and for adopting effective asset recovery mechanisms, using good practices and examples of successful legislative frameworks and institutional capacity building. The following steps were taken to implement the methodology:

1. Analyze the self-assessment reports and supporting documentation for compliance, good practices and technical assistance needs.
2. Compile information on compliance with the selected articles from the self-assessment reports and identify variables for coding.
3. Identify trends and patterns in compliance by region
4. Assemble States parties' profiles and regional data.
5. Develop policy recommendations based on analysis of self-assessment reports and supporting documentation using current research and expertise on good practices and effective approaches to implementing the selected articles

It is worth mentioning that at its second session, held in Nusa Dua, Indonesia, in 2008, the Conference of the States parties to the Convention welcomed⁴ the development of the aforementioned self-assessment checklist and its effective use to compile initial information on the implementation of several articles of the Convention – including those analyzed in the present report. At the same session, the Conference requested UNODC to explore the option of modifying the self-assessment checklist in order to create a comprehensive information-gathering tool

³ These articles were included in the SAC according to guidance received from States Parties during consultations in the preparation of the SAC during the 2nd Conferences of the States Parties held in Bali 2008. <http://www.unodc.org/documents/treaties/UNCAC/COSP/session2/V0788913e.pdf>

⁴ Resolution 2/1. Conference of the States Parties to the United Nations Convention against Corruption. Second Session, Nusa Dua, Indonesia, 28 January 2008 – 1 February 2008.

that might serve as a useful starting point for collecting implementation information in any future reviews. The comprehensive tool will be presented to the Conference of the States Parties at its third session, to be held in Doha in November 2009. Following its endorsement by the Conference, the tool will be utilized to collect more in-depth and accurate information on States' implementation efforts. While it is undisputed that self-assessments are important building blocks for any analytical and diagnostic work at the country level, the mechanism to review the implementation of the Convention, expected to be adopted at the upcoming session of the Conference, will provide additional means to verify and validate the accuracy of country-provided information. The upcoming information-gathering tool, and its use in the context of the mechanism to review the implementation of the Convention,⁵ will generate new data warranting more comprehensive and in-depth analysis.

D. Structure

The structure of the report in Section II consists of the graphical analysis and visualization for the five regions, a narrative analysis illustrating reported compliance as well as technical assistance needs. The policy recommendations in Section III are organized by region for the five States party groupings. Appendix A consists of generic policy recommendations by subject areas covering the selected articles and comparison tables of reported compliance by groupings.

Legend for all graphical analysis: 1) Green bars indicate percentage of countries with Reported Full Compliance 2) Yellow or Amber bars indicate percentage of countries with Reported Partial Compliance or by selecting the answer "Yes in Part"; and 3) Red bars indicate countries with Reported Non-Compliance or with an answer "No".

Table 1

UNCAC articles governing asset recovery included in analysis

<u>Article</u>	<u>Description</u>	<u>Paragraphs</u>
23	Laundering of proceeds of crime	1(a), 1(b), 2(a)(b)(c)(e), 2(d)
52	Prevention and detection of proceeds of crime	1, 2(a), 2(b), 3, 4, 5, 6
53	Measures for direct recovery of property	(a), (b),(c)
54	Mechanisms for recovery of property through international cooperation in confiscation	1(a), 1(b), 1(c), 2(a), 2(b), 2(c)
55	International cooperation for purposes of confiscation	1,2,3
57	Return and Disposal of Assets	1,2,3,4,5

⁵ CAC/COSP/2009/3. Draft terms of reference of the mechanism for the review of implementation of the United Nations Convention against Corruption: rolling text. Working paper prepared by the Secretariat. <http://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V0986376e.pdf>

E. Groupings of States Parties

The countries included in each group submitting self-assessment reports and responding to at least some of the relevant questions of the self-assessment checklist are listed below:

Group of African States: Algeria, Angola, Burkina Faso, Egypt, Kenya, Mauritania, Mauritius, Namibia, Nigeria, Rwanda, Sierra Leone, Tunisia, Uganda, United Republic of Tanzania.

Asian Group: Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, China (including Hong Kong Special Administrative Region), Fiji, Indonesia, Jordan, Kyrgyzstan, Mongolia, Pakistan, Philippines, Republic of Korea, Tajikistan, Yemen.

Group of Eastern European States: Armenia, Azerbaijan, Bulgaria, Croatia, Czech Republic, Hungary, Latvia, Lithuania, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, the former Yugoslav Republic of Macedonia.

Group of Latin American and Caribbean States : Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Uruguay.

Western European and Other States: Australia, Austria, Canada, Finland, France, Germany, Greece, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America.

II. Analysis of Implementation of Selected Articles

This section analyzes, by region, reported compliance with articles and provisions of the United Nations Convention against Corruption relevant to asset recovery.

A. Analysis of Article 23 Implementation

Article 23, which criminalizes the laundering of the proceeds of corruption, is a critical component of the international anti-corruption legal framework and for recovering stolen assets. This article underscores the importance of criminalizing the various manifestations of money laundering such as the conversion, transfer, and concealment of property derived from criminal activity and makes it mandatory to include a wide range of predicate offences committed both in the jurisdiction of the State party and in foreign territories. Through this article, both corruption offender and individuals who launder the proceeds will be held accountable for their actions.

1. Article 23 Paragraph 1: Criminalization of Conversion, Concealment and Acquisition of Proceeds of Crime

Paragraph 1 contains several mandatory provisions that are important to asset recovery. Paragraph 1(a) requires States parties to criminalize *“the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or helping any*

person who is involved to evade the legal consequences of her or her actions.” Conversely, paragraph 1(b) requires States to criminalize the “*acquisition, possession of use of property, knowing at the time of receipt that such property is the proceeds of crime*” in addition to “*participation, association, or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling*” money laundering. In sum, domestic legislation that complies with the provisions of paragraph 1 should criminalize all forms of the money laundering process.

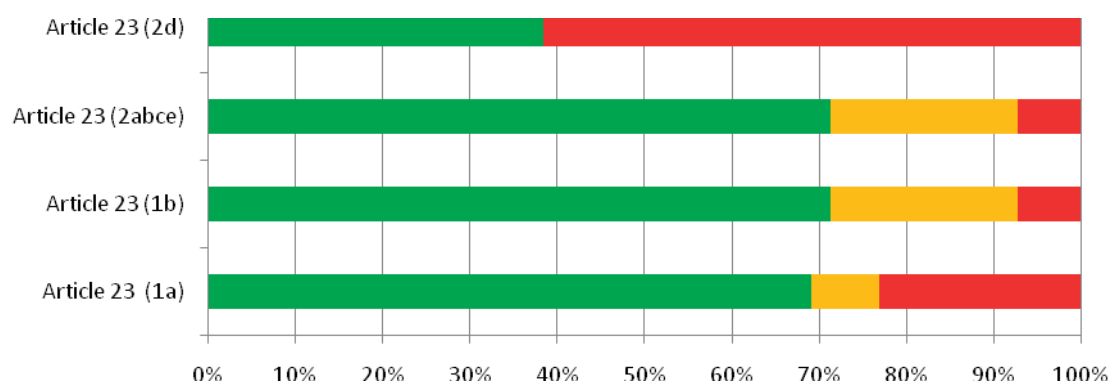
2. Article 23 Paragraphs 2(a)(b)(c)(e): Predicate Offences to Money Laundering and Dual Criminality

There are a variety of provisions contained in paragraph 2 that cover important topics ranging from requiring that offences criminalized in accordance with the Convention be recognized as predicated offences to money laundering, as well as enshrining the necessity of dual criminality. Specifically, paragraph 2(b) requires that States “*include as predicate offences at a minimum a comprehensive range of criminal offences established in this Convention*” and that predicate offences “*include offences committed both within and outside the jurisdiction of each State party.*” However, offences will only be considered predicate offences to money laundering when dual criminality exists.

Note: The majority of States in the every regional group reported *full compliance with the requirements of article 23*, except for paragraph 2(d). However, the apparent non-compliance with paragraph 2(d) is a red herring in that this provision simply requires States to furnish copies of laws that give effect to article 23 to the Secretary-General of the United Nations.

Figure 1

Group of African States Compliance Graph for Article 23



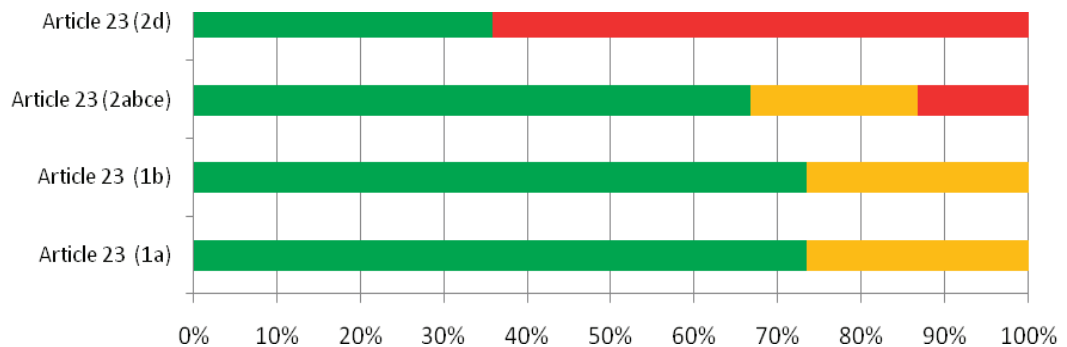
Group of African States – Article 23 paragraph 1(a):	69% - reported full compliance
Group of African States – Article 23 paragraph 1(b):	71% - reported full compliance
Group of African States – Article 23 paragraph 2(abce):	71% - reported full compliance
Group of African States – Article 23 paragraph 2(d):	38% - reported full compliance

70% of reporting African States indicated full compliance with the substantive requirements of article 23. The most important provision, paragraph 1(a), which

requires criminalization of money laundering, showed a reported partial compliance rate of 23% and a reported non-compliance rate of 8%.

Figure 2

Group of Asian States Compliance Graph for Article 23



Group of Asian and Pacific States – Article 23 paragraph 1(a): 73% - reported full compliance
 Group of Asian and Pacific States – Article 23 paragraph 1(b): 73% - reported full compliance
 Group of Asian and Pacific States – Article 23 paragraph 2(abce): 67% - reported full compliance
 Group of Asian and Pacific States – Article 23 paragraph 2(d): 36% - reported full compliance

Among the few countries reporting partial or non-compliance with the substantive provisions of article 23, one State party nevertheless seemed to be compliant with paragraphs 1(a) and (b), but had not identified predicate offences to money laundering.

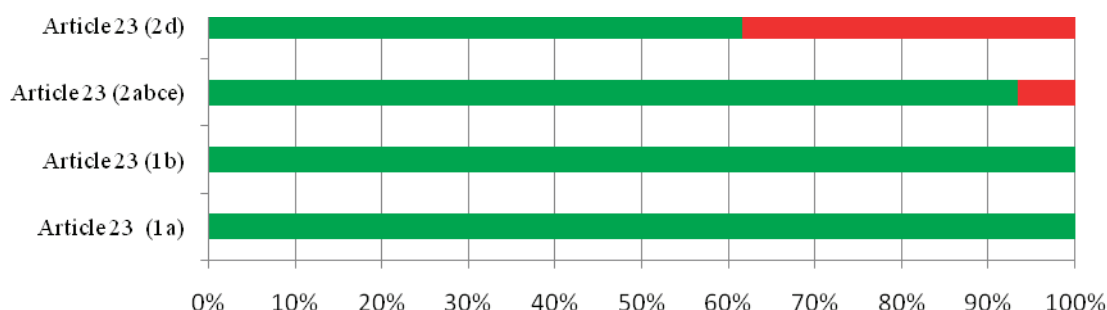
It may be that this country's statutory definition of money laundering was broad enough to cover all criminal proceeds, although it did request technical assistance to include predicate offences. Another State party's legislation, as described in its self-assessment report, criminalized money laundering and included a wide range of predicate offences, despite reporting only partial compliance. Mongolia reported successful implementation by a broad inclusion of predicate offences to money laundering as follows:

“For the purpose of implementing or applying paragraph 1 of this article, all criminal offences indicated in this Convention have been generally included as predicate offences in Article 268 of the Criminal Code of Mongolia; The Parliament passed the Law on Combating Money Laundering and Terrorism Financing in July 2006 in order to regulate relations concerning prevention and combating money laundering and terrorism financing. Under 3.1.1 of this law, “money laundering” is defined as conversion of assets, though known as illicitly gained, for the purpose of concealing their origin and legalizing the right to possess, use and administer them. In 3.1.4 of the same law, “illegally gained assets” means assets gained otherwise than provided in Article 166 of the Criminal Code, i.e. through commitment of a rather severe, severe or extremely severe crime. Article 166 of the Criminal Code is on tax evasion. In most countries' legislation against money laundering, assets gained by committing tax evasion are not comprised under the definition of illegally

gained assets. This experience has been taken by our lawmakers and used in our legislation.”

Figure 3

Group of Eastern European States Compliance Graph for Article 23



Group of Eastern European States – Article 23 paragraph 1(a): 100% - reported full compliance
 Group of Eastern European States – Article 23 paragraph 1(b): 100% - reported full compliance
 Group of Eastern European States – Article 23 paragraph 2(abce): 94% - reported full compliance
 Group of Eastern European States – Article 23 paragraph 2(d): 65% - reported full compliance

Reporting States parties from the Eastern European Group indicated a nearly perfect level of compliance with article 23. All of them indicated full compliance with two out of three substantive provisions governing the criminalization of money laundering. 94% of such States reported full compliance with the provisions of paragraph 2(a) (b) (c) (e). While robust sets of laws criminalize money laundering, including laundering the proceeds of crimes that take place outside a State’s jurisdiction, enforcement remains a key component to create effective anti-money laundering (AML) regime. With the expansion of the Schengen Agreement, Eastern Europe is coming under increasing pressure from criminal groups that seek to launder funds.⁶ Continued expansion of efforts and greater international cooperation is crucial to bridging the implementation gap. Latvia described successful implementation by quoting from its Law on Prevention of the Laundering of the Proceeds from Crime, reporting an increase in the number of money laundering investigations by its State Police, noting that avoiding tax payment, unlicensed business activities and transaction with real estate as well as VAT fraud, fraud and extortion were dominant offenses prosecuted. Latvia also reported difficulties in investigating the unlawful use of offshore companies in the United States of America, the United Kingdom of Great Britain and Northern Ireland and Malta.

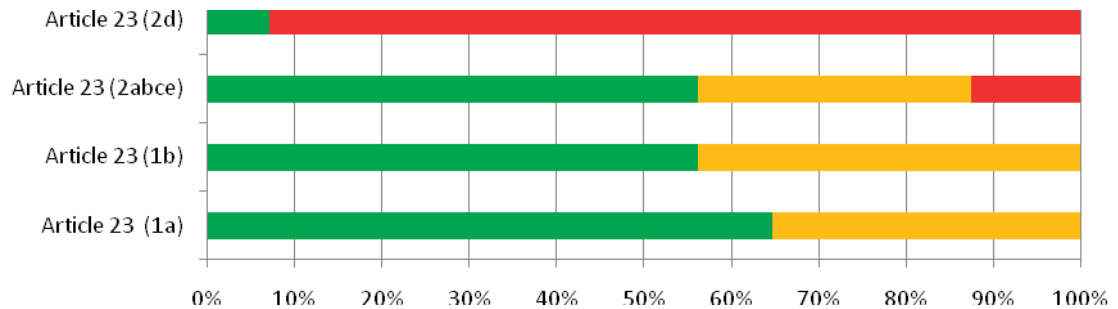
Several countries in the Eastern European group reported successful implementation to establish predicate offences to money laundering including Bulgaria,⁷

⁶ European Organised Crime Threat Assessment (OCTA) 2008 available at <http://www.europol.europa.eu/index.asp?page=publications>

⁷ Self Assessment Report - Bulgaria (p.19) The Bulgarian legislation does not limit the range of the predicate offences regarding the commission of money laundering. In other words all-crimes approach is applied. According to Article 253 paragraph 7 of the Penal Code, the anti-money laundering provisions are applicable also where the predicate offence falls outside the criminal

Czech Republic and Hungary, by reporting the adoption of an “all-crimes” approach. This is a recommended good practice, later advocated in this report’s appendix under generic recommendations. Only one country in the Eastern European group has reported non-compliance with paragraph 2 (a) (b) (c) (e) of article 23, and has expressed interest in receiving technical assistance to increase its capacity.

Figure 4
Group of Latin American and Caribbean States Compliance Graph for Article 23



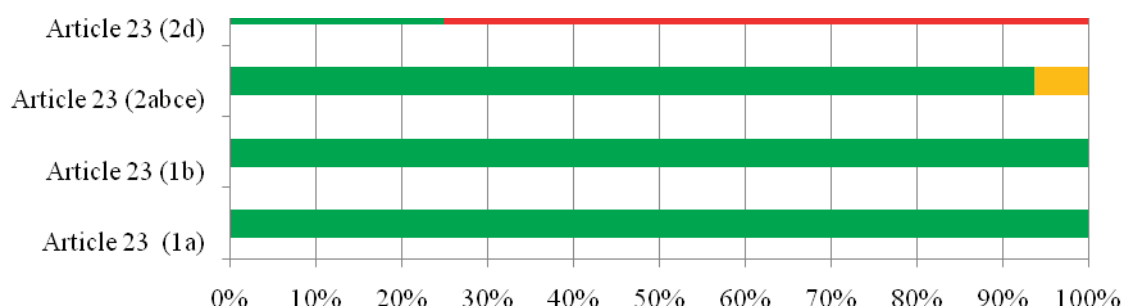
Group of Latin American and Caribbean States – Article 23 paragraph 1(a): 65% - reported full compliance
 Group of Latin American and Caribbean States – Article 23 paragraph 1(b): 56% - reported full compliance
 Group of Latin American and Caribbean States – Article 23 paragraph 2(abce): 56% - reported full compliance
 Group of Latin American and Caribbean States – Article 23, paragraph 2(d): 7% - reported full compliance

A significant number of reporting States parties in the Latin American and Caribbean Group reported partial compliance with the requirements of article 23. Considering the importance of article 23 to enhancing effective anti-money laundering, this constitutes a gap that should be addressed within the group.

However, one States party that reported partial compliance may in fact be fully compliant based on the plain language of its money laundering act, which sanctions “any person who acquires, uses, holds, keeps, receives, conceals or maintains under his control money, property, securities or profits whose illicit source he knows or may assume, in order to prevent the identification of the source, confiscation or seizure...”

jurisdiction of the Republic of Bulgaria.

Figure 5
Group of Western European and Other States Compliance Graph for Article 23



Group of Western European and Other States – Article 23 paragraph 1(a): 100% - reported full compliance
 Group of Western European and Other States – Article 23 paragraph 1(b): 100% - reported full compliance
 Group of Western European and Other States – Article 23 paragraph 2(abce): 94% - reported full compliance
 Group of Western European and Other States – Article 23 paragraph 2(d): 25% - reported full compliance

Reporting State parties from the Western European and Others Group indicated near perfect compliance with the provisions of article 23. All of them reported full compliance with paragraphs 1a and 1b of article 23, which requires states to make money laundering a criminal offence. States took several approaches to establishing predicate offences for money laundering, as required by article 23 paragraph 2. Some countries used a “list-based” approach, designating by name specified unlawful activities. The United States of America’s list of predicate offences can be found in the United States Code section 1956 (c) (7). Alternatively, under an “all-crimes” approach, the proceeds of any crime can form the basis of a money laundering charge. The Netherlands reported successful implementation by citing its criminal code, article 420, which includes all crimes, including fiscal crime, generally having a potential jail term of at least six months as predicate offences to money laundering. Countries can use either approach to satisfy the requirements of paragraph 2, although this report recommends an “all-crimes” approach to limit issues relating to dual criminality. The one country that reported partial compliance with paragraph 2 (a) (b) (c) (e), stated that it required minor amendments to its criminal code and that a draft law to enact such amendments was under consideration in its legislative body.

B. Analysis of Article 52 Implementation

Article 52 governs the prevention and detection of transfers of proceeds of crime. It requires States to establish regulations for financial institutions including “know your customer” (KYC) requirements, identify the beneficial owners on high-value accounts as well as apply enhanced scrutiny to “politically exposed persons” (PEPs). Article 52 restricts the use of legitimate financial systems to conceal and obfuscate the trail of stolen assets.

1. Article 52 Paragraph 1: Verify Identity of Beneficial Owners

Paragraph 1 requires States to take three actions: verify customer identification, determine identity of beneficial owners of high-value accounts, and require financial institutions to apply enhanced scrutiny to PEPs.

2. Article 52 Paragraph 2(a): Issuance of advisories to financial institutions

Paragraph 2(a) requires States to issue advisories to financial institutions within their jurisdictions identifying the types of natural and legal persons to whom enhanced scrutiny and record keeping standards apply.

3. Article 52 Paragraph 2(b): Identification of Politically Exposed Persons

Paragraph 2(b) encourages each States party to “*notify financial institutions within its own jurisdictions of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny.*” Article 52 paragraph 2(b) of the Convention provides for enhanced legal scrutiny for PEPs, referred to as individuals “*entrusted with prominent public function*” together with their family members and close associates.

4. Article 52 Paragraph 3: Maintenance of Records

Paragraph 3 requires States to “*ensure that (domestic) financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions.*”

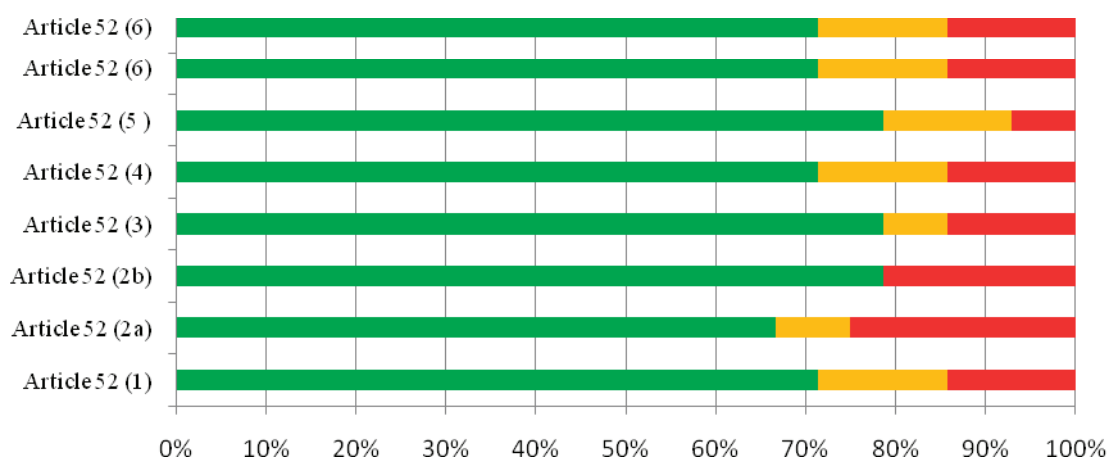
5. Article 52 Paragraph 4: Preventing Establishment of Shell Banks

Two provisions comprise paragraph 4: the first provision requires States to “*prevent... the establishment of banks that have no physical presence and that are not affiliated with a registered financial group.*” The second provision requires States to consider restricting (domestic) financial institutions from entering into “a correspondent banking relationship” with shell banks or financial institutions known to have correspondent banking relationships with shell banks.

6. Article 52 Paragraphs 5 and 6: Establishing Effective Financial Disclosure Systems

The disclosure of public officials’ wealth is a powerful tool for investigators and prosecutors to generate intelligence on corruption-related offences and when prosecuting the offence of illicit enrichment. Paragraph 5 requires States parties to consider “*establishing... effective financial disclosure systems for appropriate public officials and ...provide appropriate sanctions for non-compliance.*” Paragraph 6 also prescribes that States must consider requiring public officials “*having an interest in or signature or other authority over a financial account in a foreign country... report that relationship to appropriate authorities.*” Notably, both provisions complements article 8 paragraph 5 which requests that States endeavour to “*require public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public state officials*”

Figure 6
Group of African States Compliance Graph for Article 52



Group of African States – Article 52 paragraph 1: 71% - reported full compliance
 Group of African States – Article 52 paragraph 2(b): 79% - reported full compliance
 Group of African States – Article 52 paragraph 3: 79% - reported full compliance
 Group of African States – Article 52 paragraph 4: 71% - reported full compliance
 Group of African States – Article 52 paragraph 5: 79% - reported full compliance
 Group of African States – Article 52 paragraph 6: 71% - reported full compliance

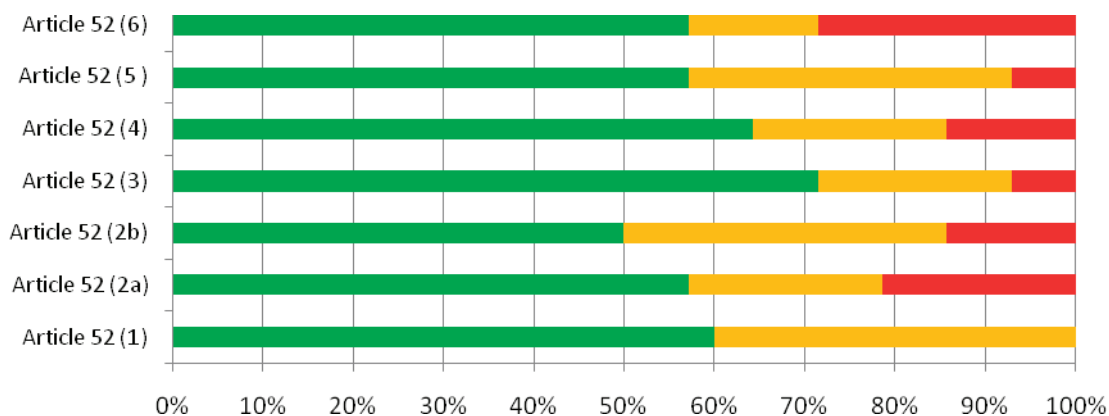
Reporting States parties from the African Group indicated, on average, moderate to high compliance with measures to prevent and detect the transfers of proceeds of crime. Of the fourteen reporting States, all but three reported very high levels of compliance. The one country that reported non-compliance with every provision of the article said that technical assistance was necessary for implementation. Another country that reported partial or non-compliance with the provisions of the article, stated that it was in the process of reforming its banking and financial disclosure laws and that an anti-money laundering bill designed to achieve full conformity with the Convention was under consideration. The country further reported that since 2003 its public officials have been required by law to file asset and income declarations bi-annually. However, these legislative measures were reportedly confronted with implementation and enforcement challenges. The third low compliance State party did report that its 2008 Anti-Corruption Act required the declaration of assets and foreign accounts by public officials. While it requested several types of technical assistance, the country gave little explanation for its lack of implementation of the measures prescribed by article 52 in relation to financial institutions.

Nigeria described its successful implementation of article 52 as follows:

“A robust identification/verification regime has been put in place. This has led to the abolition of confidentiality of information in all financial transactions, thereby making access to transactions by PEPs easy. Banks have acquired anti-money laundering mechanisms to detect suspicious transactions. As part of the economic reform of the Government, the Central Bank of Nigeria restructured

the financial sector in 2005 with the consolidation of the banking sector by reducing it from 89 to 25 banks. Most of the 25 banks were inspected for anti-money laundering purposes in 2006 and sanctions were imposed on institutions that failed to comply with their obligations in this area. The most frequent infractions include: failure to conduct proper KYC assessments, non-reporting and lack of training programmes.”

Figure 7
Group of Asian States Compliance Graph for Article 52



Group of Asian States – Article 52 paragraph 1:	60% - reported full compliance
Group of Asian States – Article 52 paragraph 2(a):	57% - reported full compliance
Group of Asian States – Article 52 paragraph 2(b):	50% - reported full compliance
Group of Asian States – Article 52 paragraph 3:	71% - reported full compliance
Group of Asian States – Article 52 paragraph 4:	64% - reported full compliance
Group of Asian States – Article 52 paragraph 5:	57% - reported full compliance
Group of Asian States – Article 52 paragraph 6:	57% - reported full compliance

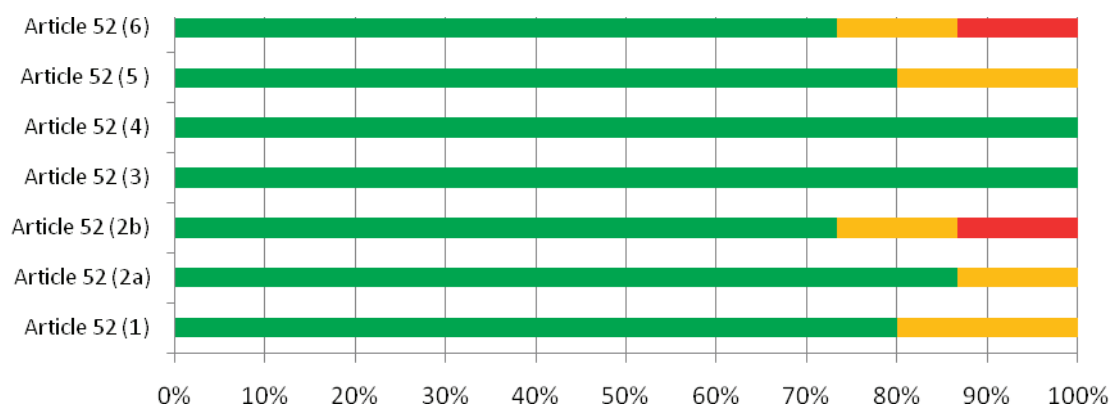
Reporting States parties from the Asian Group indicated moderate compliance with measures to prevent and detect the transfers of proceeds of crime.

Three countries reported the lowest rate of compliance in the region, while another did not report on its efforts to implement article 52 of the Convention. One large State in the group reported that it did not require its public officials to report assets or foreign accounts and requested technical assistance in the form of model legislation. One State reported full compliance with paragraph 2(a), citing “Instructions by the Central Bank on money-laundering and financing of terrorism, which include a comprehensive system for client identification and auditing accounts of judicial and natural persons. They also include rules on due care to be observed by banks in dealings with persons at risk by virtue of the nature of their work.” This country, however, reported non-compliance with paragraph 2(b) and requested technical assistance in the form of legal advice. Among reported successes, Indonesia stated that as of May 2006 the government and its financial intelligence unit (FIU) had responded to more than 100 inquiries of cooperation involving financial intelligence with other countries such as the United States of America, Australia, China, the Philippines and Switzerland. Hong Kong’s self-

assessment report described in detail some of the exemplary measures it had taken to comply with the letter and intent of article 52. Other countries may find Hong Kong's approaches to these issues useful for their own domestic purposes.

Figure 8

Group of Eastern European States Compliance Graph for Article 52



Group of Eastern European States – Article 52 paragraph 1:	80% - reported full compliance
Group of Eastern European States – Article 52 paragraph 2(a):	87% - reported full compliance
Group of Eastern European States – Article 52 paragraph 2(b):	73% - reported full compliance
Group of Eastern European States – Article 52 paragraph 3:	100% - reported full compliance
Group of Eastern European States – Article 52 paragraph 4:	100% - reported full compliance
Group of Eastern European States – Article 52 paragraph 5:	80% - reported full compliance
Group of Eastern European States – Article 52 paragraph 6:	73% - reported full compliance

Reporting States parties from the Eastern European Group indicated a high degree of compliance with the article 52, which regulates the prevention and detection of the transfers of proceeds of crime.

By way of an example of successful implementation, Azerbaijan referred to the recent adoption of rigorous domestic legislation consistent with many of the requirements of article 52, including restricting the creation of anonymous accounts, verify customer identity, and define beneficial owner of accounts. Reportedly, the National Bank of Azerbaijan also distributed advisories to domestic financial institutions on how to identify suspicious transactions. Additionally, Azerbaijan required that customers be categorized into one of three predetermined risk categories in order to apply proper scrutiny using the baselines set forth by the Financial Action Task Force (FATF) and the Basel Committee.

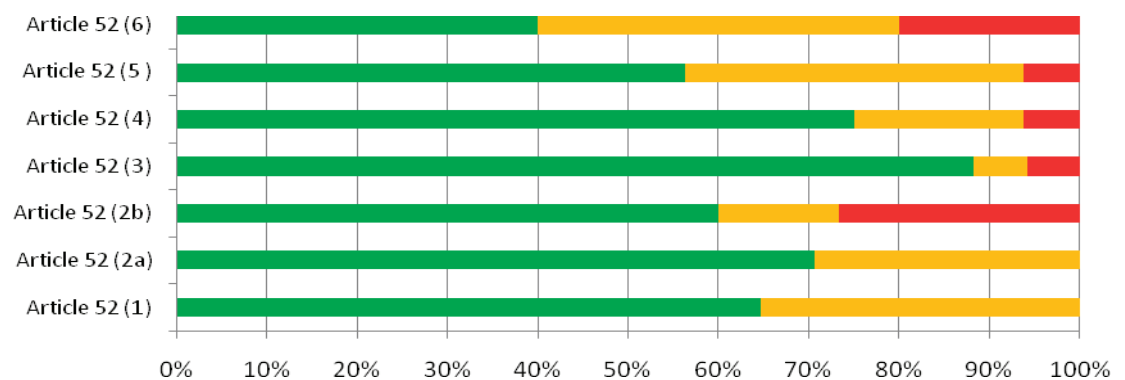
Although full compliance with paragraph 2 of article 52 was largely reported in the region, information provided through the self-assessment reports appeared to be inconclusive as to what advisories financial institutions received regarding the types of natural or legal persons to whom enhanced scrutiny had to be applied. Moreover, it was difficult to determine specific measures adopted to notify financial institutions of the identity of PEPs for the purpose of applying enhanced scrutiny to

their accounts. When substantiating their reported compliance with the requirements of the Convention, some countries mentioned that their financial institutions had been informed of criminal and terrorist advisory notices generated by the United Nations and the United States of America. A comprehensive identification of PEPs and dissemination of such information to financial institutions should be undertaken by each State party. Typical regulations consistent with paragraph 3 of article 52, providing for the maintenance of adequate records of transactions involving PEPs, were reported by several States, indicating that such documents were held for **at least five years** after an account had been closed. One country reported that legal documents relating to a financial operations or transactions were to be kept for **at least ten years** from the date of execution.

Several of the approximately 80% of State parties that indicated full compliance with paragraph 6 of article 52, described strong financial disclosure systems. Reporting an example, Bulgaria's *Law for Publicity of the Property of Persons Occupying High State Positions* provided for a considerable list of public officials required to declare property, income and expenses to the National Audit Office.

Figure 9

Group of Latin American and Caribbean States Compliance Graph for Article 52

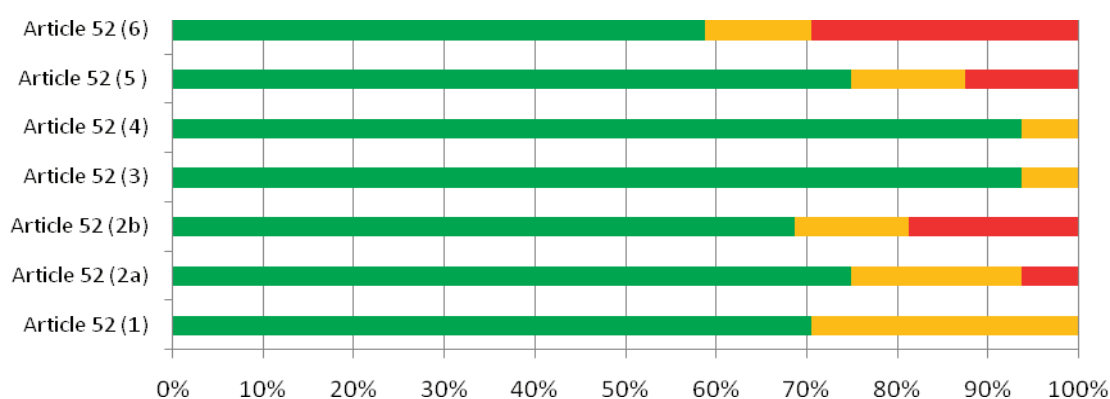


Group of Latin American and Caribbean States – Article 52 paragraph 1:	65% - reported full compliance
Group of Latin American and Caribbean States – Article 52 paragraph 2(a):	71% - reported full compliance
Group of Latin American and Caribbean States – Article 52 paragraph 2(b):	60% - reported full compliance
Group of Latin American and Caribbean States – Article 52 paragraph 3:	88% - reported full compliance
Group of Latin American and Caribbean States – Article 52 paragraph 4:	75% - reported full compliance
Group of Latin American and Caribbean States – Article 52 paragraph 5:	56% - reported full compliance
Group of Latin American and Caribbean States – Article 52 paragraph 6:	40% - reported full compliance

The analysis of information provided by States parties from the Group of Latin American and Caribbean States revealed two recurrent gaps in compliance with article 52. Such gaps related to the establishment of financial disclosure systems for public officials as prescribed by paragraph 5, and the request for public officials to report offshore financial accounts and holdings as prescribed by paragraph 6. Both provisions are essential for investigators to prove the offence of illicit enrichment and investigate other allegations of corruption. While reporting partial compliance

with the majority of the provisions of article 52, one of the largest countries in the group provided a comprehensive account of the many measures introduced and executed in the area of financial oversight and accountability governed by the article under review. For example, the self-assessment report detailed an extensive set of standards to trigger financial institutions' enhanced scrutiny of persons and transactions. In order to achieve full compliance, its self-assessment report stated that "After a three-year experience, the cooperation between the Financial Information Unit and the Central Bank may be described as successful, but some issues still need to be tackled: (a) cooperation agreements between the Unit and the other oversight bodies; and (b) an implementation plan for these sectors". Reportedly, this country required a wide range of public officials to report their foreign accounts. However, such officials were not expected to report accounts nominally sought or maintained by others. To overcome its partial compliance with the article under review, it required technical assistance, specifically to improve procedures and amend legislation.

Figure 10
Group of Western European and Other States Compliance Graph for Article 52



Group of Western European and Other States – Article 52 paragraph 1:	81% - reported full compliance
Group of Western European and Other States – Article 52 paragraph 2(a):	88% - reported full compliance
Group of Western European and Other States – Article 52 paragraph 2(b):	75% - reported full compliance
Group of Western European and Other States – Article 52 paragraph 3:	100% - reported full compliance
Group of Western European and Other States – Article 52 paragraph 4:	94% - reported full compliance
Group of Western European and Other States – Article 52 paragraph 5:	93% - reported full compliance
Group of Western European and Other States – Article 52 paragraph 6:	80% - reported full compliance

High levels of compliance with the provisions of article 52 on preventing and detecting the transfer of the proceeds of crime were indicated by almost all reporting States parties from the Western European and Others Group.

Full compliance with paragraphs 1 and 3 on verification of identity, beneficial ownership and identification of PEPs was reported at 81% of reporting States parties. One country, reporting partial compliance with this article, indicated that its Money Laundering Act was being amended in order to require financial institutions to determine beneficial ownership, thereby bringing its legal system in full

compliance with article 52 of UNCAC. Notably, 25% of Western European and Other States reported non-compliance with paragraph 2(b), which requires that domestic financial institutions be notified of the names of PEPs. Australia however reported an example of a good practice in this field. It indicated that the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Department of Foreign Affairs and Trade had circulated to financial institutions lists of PEPs and other designated persons requiring enhanced scrutiny. Finland provided an example indicating that it was standard practice for its FIU to notify financial institutions of the need for enhanced scrutiny in specific cases.

Over 90% of reporting States parties indicated full compliance with some provisions of article 52, such as requiring financial institutions to maintain adequate records or prevent the establishment of shell banks. The one State party that reported partial compliance with paragraph 4 of article 52 preventing the establishment of banks with no physical presence indicated that new regulations on prohibiting financial institutions to maintain correspondent banking relationships with “shell banks” were being adopted.

C. Analysis of Article 53 Implementation

The three mandatory provisions of article 53, which requires States to allow for direct recovery of property, provide an increasingly important alternative to the normally lengthy procedures for mutual legal assistance and confiscation. Recent successes as reported by the United Kingdom of Great Britain and Northern Ireland, where civil actions can recover stolen assets, have reinforced the importance of implementing the mandatory provisions of article 53 so that direct recovery becomes a viable legal strategy for all States parties.⁸ Under this article, States parties are required to take all measures necessary to allow foreign State parties to initiate civil action in order to establish title to or ownership of proceeds of corruption or to receive compensation.

1. Article 53 Paragraph (a): Allow a Foreign State Party to Initiate Civil Action

Paragraph (a) requires States to permit other States “*to initiate civil action in (their) courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention.*”

2. Article 53 Paragraph (b): Allow Courts to Pay Compensation to a foreign State Party

Paragraph (b) requires States to take all measures necessary “*to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with the Convention.*”

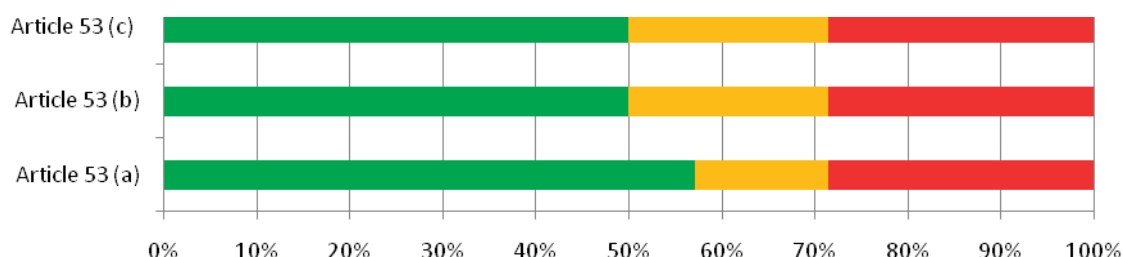
⁸ Stolen Asset Recovery Guide to Non-Conviction Based Forfeiture (p. 119-142)

3. Article 53 Paragraph (c): Recognize a State Party's claim to legitimate ownership of proceeds of crime

Paragraph (c) requires States to “recognize another State party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.”

Figure 11

Group of African States Compliance Graph for Article 53



Group of African States – Article 53 paragraph (a): 57% - reported full compliance

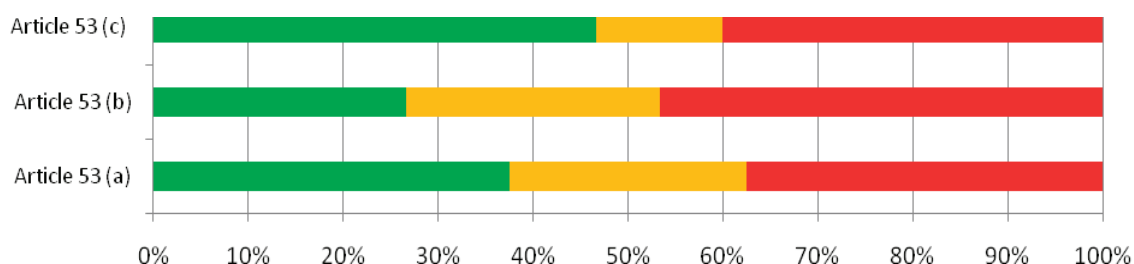
Group of African States – Article 53 paragraph (b): 50% - reported full compliance

Group of African States – Article 53 paragraph (c): 50% - reported full compliance

Nearly 50% percent of reporting States parties from the African Group indicated partial or no compliance with article 53, which provides for State parties to pursue direct recovery of property in the courts of another State party. Recognizing the mandatory nature of article 53, this constitutes a significant gap in compliance. Six countries reported full compliance with all provisions of this article. One reported non-compliance with paragraph (a), but full compliance with paragraphs (b) and (c), citing as examples the recovery and return of proceeds of crime to victims in another State, and “Proceeds of corruption recovered from Politically Exposed Persons after conviction were given to the rightful owners (states).” Another country, in contrast, reported non-compliance with article 53 and requested several forms of technical assistance.

Figure 12

Group of Asian States Compliance Graph for Article 53



Group of Asian States – Article 53 paragraph (a): 38% - reported full compliance

Group of Asian States – Article 53 paragraph (b): 27% - reported full compliance

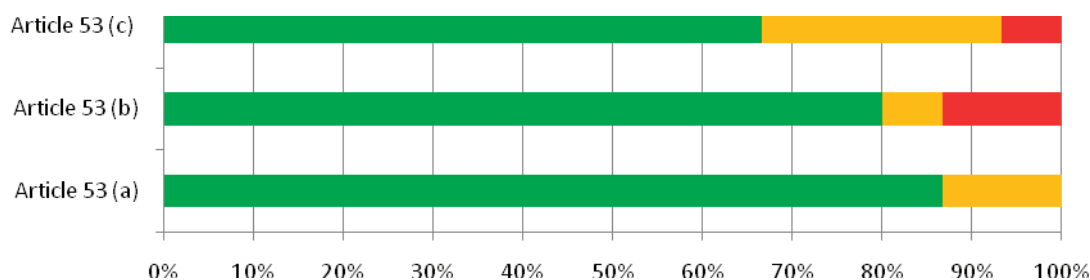
Group of Asian States – Article 53 paragraph (c): 47% - reported full compliance

The majority of reporting States parties from the Asian Group indicated partial or no compliance with the provisions of article 53. This amounts to a substantial gap and makes pursuing direct recovery of property as an alternative to the return of proceeds of corruption following confiscation a difficult proposition in the Asian Group. It has been observed, however, that this gap may be less acute than reported. Many States parties have legal systems that allow for any persons, legal or natural, to initiate civil action. In some cases, States parties reporting non-compliance seem to have legislation that sufficiently allows any individual or legal entity to initiate civil action.

Five countries in the group reported non-compliance with the three subparagraphs of the article under review and requested technical assistance in one or more forms. Another country reported partial compliance, stating that bilateral arrangements would strengthen cooperation with other states. A different respondent, citing a reference in its law to “suits” by foreign states, reported partial compliance with paragraph (a) and non-compliance with the rest of this article.

Figure 13

Group of Eastern European States Compliance Graph for Article 53



Group of Eastern European States – Article 53 paragraph (a):	88% - reported full compliance
Group of Eastern European States – Article 53 paragraph (b):	81% - reported full compliance
Group of Eastern European States – Article 53 paragraph (c):	69% - reported full compliance

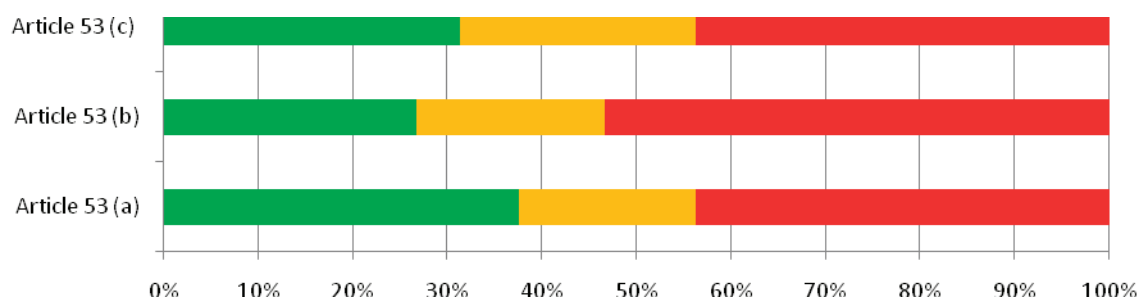
Reporting States parties from the Eastern European Group indicated a high degree of compliance with the three paragraphs of article 53 providing for the direct recovery of property. However, over 30% of such State parties were still not fully compliant with all three provisions. 88% of reporting Eastern European States parties indicated full compliance with paragraph (a), which permits foreign States parties to initiate civil action in the courts of other States parties. Reported compliance was manifested in several forms, either by lack of legislation forbidding civil action by a foreign State or by quoting specific legislation designed to enable foreign States parties to exercise such action. Interesting legal situations were noted by several States. One country for instance, reported partial compliance owing to the fact that its Criminal Code does not forbid other States from initiating a criminal action in a domestic court with a view to presenting claims. Reportedly, however, this jurisdiction’s code of civil procedure did not provide for the right of other States to initiate a civil recovery action.

In contrast, Lithuania reported an example of success stating that under its Code of Criminal Procedure, when responding to a request for legal assistance, its

prosecutors or pre-trial investigating officer “must take all possible measures to secure a civil action case” for a foreign State party to effect quick recovery. Specifically, prosecutors were reported to be under “an obligation to bring civil action in cases where any criminal offence has caused damages to the State or a person who, because of important reasons, is incapable of protecting his/her lawful interests in a court of law.”

Figure 14

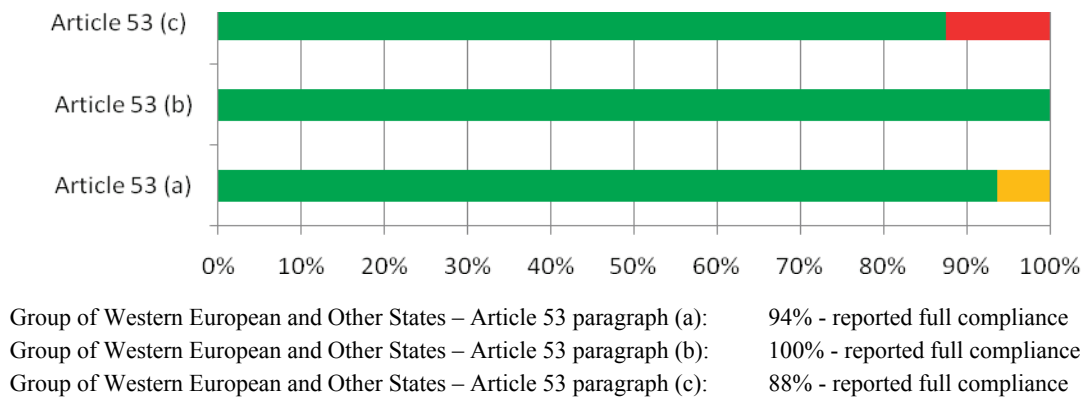
Group of Latin American and Caribbean States Compliance Graph for Article 53



Group of Latin American and Caribbean States – Article 53 paragraph (a): 38% - reported full compliance
 Group of Latin American and Caribbean States – Article 53 paragraph (b): 27% - reported full compliance
 Group of Latin American and Caribbean States – Article 53 paragraph (c): 31% - reported full compliance

According to self-assessment reports, a significant gap exists in the Group of Latin American and Caribbean States owing to the fact that foreign States were not able to recover assets through civil processes. As many State within the region are based on civil law systems, reportedly, civil actions has to be attached to a criminal procedure. However, some countries reported the development of innovative non-conviction based forfeiture scenarios as an alternative. Brazil reported to be partially compliant with paragraph (c). It pointed out that the Brazilian Criminal Code provided for compensation for damage caused by the crime to individuals or bona-fide third parties. Brazil’s response implied that a State could qualify as a bona-fide third party and recover the proceeds of corruption. Only two countries in the group reported full compliance with article 53.

Figure 15
Group of Western European and Other States Compliance Graph for Article 53



Reporting States parties within the Group of Western European and Others revealed high levels of compliance with the provisions of article 53, which provides for direct recovery of the proceeds of corruption. Many States parties reported full compliance with all three provisions of the article under review. Some noted that according to their civil procedure codes, any person (legal or natural) may file lawsuits, and that foreign States are considered legal persons. Remarkably, 100% of States parties reported full compliance with paragraph (b), which provides for the empowerment of domestic courts to order compensation or damages to other States parties harmed by an offence of corruption.

Notably, the provision with the lowest level of compliance was paragraph (c), which mandates recognition of a foreign State party as a prior legitimate owner when domestic courts have to decide on confiscation of property acquired through the commission of an offence of corruption. Two countries reported non-compliance with this requirement, while indicating compliance with paragraph (b).

D. Analysis of Article 54 Implementation

Article 54 requires States to take such measures as may be necessary to provide mutual legal assistance pursuant to article 55 with respect to property sought in connection with an offence covered by the Convention. Submitting and responding to mutual legal assistance requires harmonization of laws and procedures on both ends, making compliance with article 54 critical to facilitating asset recovery.

1. Article 54, Paragraphs 1(a) and 1(b): Orders of Confiscation

Paragraph 1 pertains to effecting confiscation to recover the proceeds of crime. Specifically, paragraph 1(a) requires States parties to empower their competent authorities to give effect to an order of confiscation issued by a foreign State party. Paragraph 1(b) requires States parties to empower their courts to order confiscation of property by adjudication of money laundering or other offences or by other procedures under their domestic law.

2. Article 54 Paragraph 1(c): Confiscation without a criminal conviction of property acquired through corruption (Non Conviction Based Forfeiture)

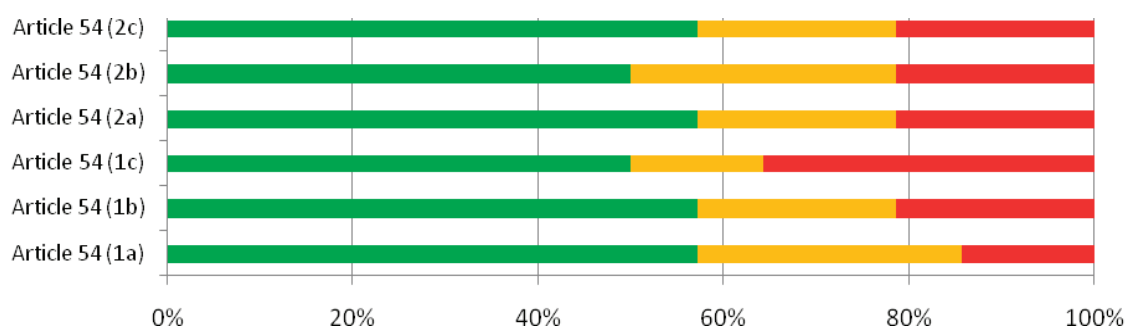
Paragraph 1(c) requires States to consider measures that will allow “*confiscation of property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight, or absence or in other appropriate cases.*”

3. Article 54 Paragraph 2: Freezing or Seizure Orders

Paragraph 2 requires States to empower their competent authorities to freeze or seize property for future confiscation when acting upon a foreign seizure order or upon a request that provides a reasonable basis that the property would eventually be subject to a seizure order, or in anticipation of a seizure request being forthcoming such as on the basis of a foreign arrest or criminal charge pertaining to such property. Paragraph 2(a) covers the enforcement of freezing or seizure orders issued by a court or competent authority of a requesting State party that provides a reasonable basis for the requested action, while paragraph 2(b) requires the same deference to a request that provides a reasonable basis. Interestingly, paragraph 2(b) does not explicitly state that the request may only originate from a State party, although that is the implication from the cross-reference to article 55 paragraph 2. Paragraph 2(c) requires States to consider taking additional measures to preserve property for future confiscation, such as on the basis of a foreign arrest or criminal charge relating to the acquisition of such property.

Figure 16

Group of African States Compliance Graph for Article 54



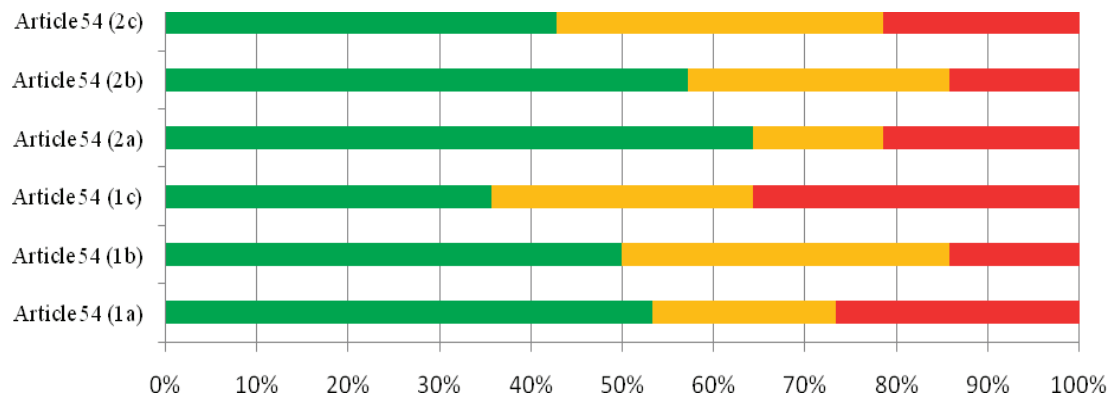
Group of African States – Article 54 paragraph 1(a):	57% - reported full compliance
Group of African States – Article 54 paragraph 1(b):	57% - reported full compliance
Group of African States – Article 54 paragraph 1(c):	50% - reported full compliance
Group of African States – Article 54 paragraph 2(a):	57% - reported full compliance
Group of African States – Article 54 paragraph 2(b):	50% - reported full compliance
Group of African States – Article 54 paragraph 2(c):	57% - reported full compliance

Reporting States parties from the African Group indicated an average compliance rate with article 54 ranging from 50% to 70%, thus evidencing a significant gap.

Six countries in the group reported full compliance with the article under review. Another, reporting full compliance with all the provisions of the article except for

paragraph 1(c), requested technical assistance to bridge this implementation gap. One State cited several laws enacted between 2002 and 2007 governing money laundering, the recovery of proceeds of corruption and the facilitation of mutual legal assistance. It reported partial compliance with paragraphs 1(a) and 2(b) and full compliance with the rest of article 54, adding that it was in the process of establishing necessary organizational capacity. This country also indicated that it had received some technical assistance from the United States Agency for International Development (USAID) and requested that addition support be provided. Other countries in the region report partial or no compliance with the article under review, typically requesting several forms of technical assistance. One respondent elaborated on its partial compliance with paragraph 1(a), stating that “Foreign Confiscation orders cannot be enforced directly as they must comply with the procedure” in its anti-corruption law, which provides for the anti-corruption commission to apply ex-parte to the high court “for an order prohibiting the transfer or disposal of or dealing with property or evidence that the property was acquired as a result of corruption”.

Figure 17

Group of Asian States Compliance Graph for Article 54

Group of Asian States – Article 54 paragraph 1(a): 53% - reported full compliance

Group of Asian States – Article 54 paragraph 1(b): 50% - reported full compliance

Group of Asian States – Article 54 paragraph 1(c): 35% - reported full compliance

Group of Asian States – Article 54 paragraph 2(a): 64% - reported full compliance

Group of Asian States – Article 54 paragraph 2(b): 57% - reported full compliance

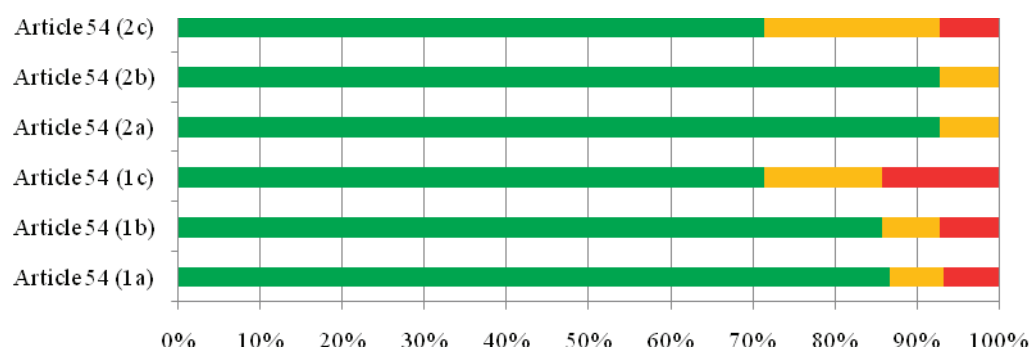
Group of Asian States – Article 54 paragraph 2(c): 43% - reported full compliance

Reporting States parties from the Asian Group indicated an average full compliance with the article under review ranging from 35% to 64%. Reportedly, the most pronounced compliance gaps related to paragraphs 1(c) and 2(c), which require States parties to consider taking measures to facilitate non-conviction based confiscation. These responses demonstrate a substantial compliance gap.

The Philippines reported full compliance with article 54, except for paragraph 2 (c), in relation to which technical assistance was requested. As for paragraph 2(a), the Philippines reported that “Rule 10 of the Implementing Rules of the Anti-Money

Laundering Law allows the freezing of accounts or property upon finding of existence of probable cause that the money is probably the proceeds of a covered unlawful activity.” This is a reported example of a simple, straightforward standard for an interim freeze order, which is likely to be permissible in every legal system and can serve as a model for countries seeking to come into compliance with this article. One country reported full compliance with this article, except for paragraph 1(c) on non-conviction based confiscation, and requested technical assistance to better implement the Convention. It added that its laws did not distinguish between property of domestic and foreign origin for purposes of confiscation. One country reported non-compliance with the entire article under review, while two others indicated they were largely lacking in compliance. One of these acknowledged the need to develop a legislative framework that would enable mechanisms for freezing and seizure of property upon request by another State party and requests legal advice to that end. Another country reporting full compliance with all provisions of article 54 except for paragraph 1 (c), stated that its laws empowered “authorities on request from a foreign authority to take appropriate measures to prevent alienation or destruction of property so that the same is preserved until final disposal of the case. It can take the form of an ad-interim measure if so requested.”

Figure 18

Group of Eastern European States Compliance Graph for Article 54

Group of Eastern European States – Article 54 paragraph 1(a): 87% - reported full compliance
 Group of Eastern European States – Article 54 paragraph 1(b): 86% - reported full compliance
 Group of Eastern European States – Article 54 paragraph 1(c): 71% - reported full compliance
 Group of Eastern European States – Article 54 paragraph 2(a): 93% - reported full compliance
 Group of Eastern European States – Article 54 paragraph 2(b): 93% - reported full compliance
 Group of Eastern European States – Article 54 paragraph 2(c): 71% - reported full compliance

Reportedly, except for paragraphs 1(c) and 2(c), levels of full compliance with article 54 were high in the Group of Eastern European States. Serbia, reporting full compliance with the provision of this article providing for non-conviction based forfeiture, specified that:

“During the drafting of the Law on confiscation of property gained from criminal offences, Serbian authorities considered the possibility provided for under this article. The new draft provides the confiscation from the accused or

intestate acquired prior to instituting proceedings for criminal offence that is manifestly disproportionate to his/her lawful income. Intestate denotes a person against whom, due to procedural impediments, criminal proceedings are not instituted or are set aside, whilst in criminal procedure it is determined that he/she possesses assets deriving from criminal offence.”

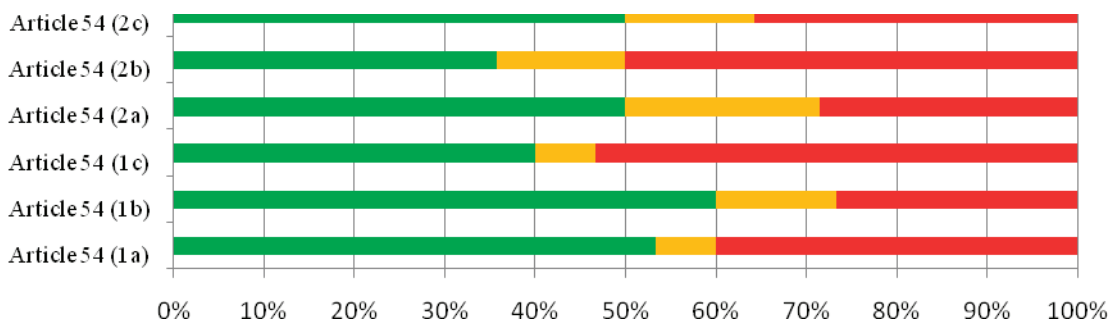
With respect to paragraph 2(c), Serbia reported the establishment of a Directorate for Management of Seized Assets with broad responsibilities.

To comply with article 54 paragraph 1(a), Latvia reported successful implementation and cited Section 785 of the Latvian Criminal Procedure Law on Determination of a Confiscation of Property to be Executed in Latvia. Reportedly, even in situations where Latvian law did not provide for confiscation (i.e. a penalty/fine) a foreign confiscation order could still be honored.⁹

Several interesting examples of non-conviction based forfeiture can be found among State parties in the group. Elaborating on its efforts to comply with paragraph 2(b) of article 54, Lithuania reported that its prosecutors could enact pre-trial freezing order when initiating a civil case restricting property rights of specified property until the matter was resolved. Moreover, Section 627 of Latvia’s decision to initiate proceedings regarding criminally acquired property allowed for pre-trial criminal proceedings to solve financial matters in a timely manner in the economy of proceedings to separate a criminal matter regarding criminally acquired property if: 1) the totality of evidence provided a basis for determining that property is criminally obtained, and 2) regular court proceedings were not possible in timely manner.

Figure 19

Group of Latin American and Caribbean States Compliance Graph for Article 54



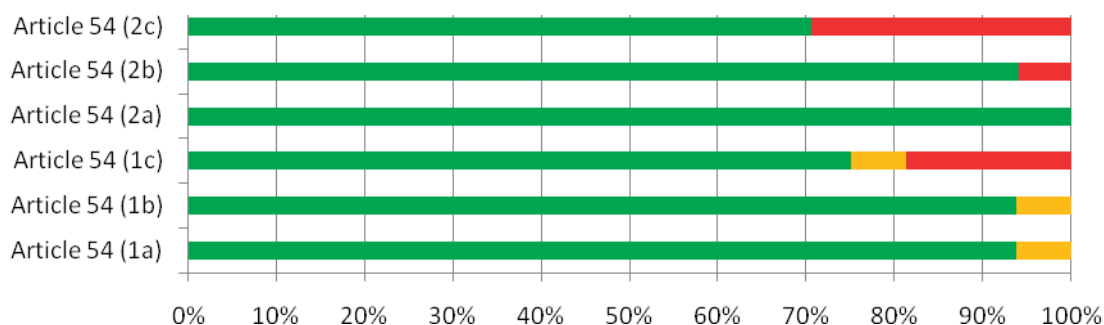
Group of Latin American and Caribbean States – Article 54 paragraph 1a: 53% - reported full compliance

⁹ Section 785 of the Criminal Procedure Law on Determination of a Confiscation of Property to be Executed in Latvia. If a judgment of a foreign state provides for the confiscation of property, but the Criminal Law of Latvia does not provide for the confiscation of property as a basic penalty or additional penalty, confiscation shall be applied only in the amount, determined in the judgment of the foreign state, that the asset to be confiscated is a tool of the committing of the offence or has been obtained by criminal means.

Group of Latin American and Caribbean States – Article 54 paragraph 1b:	56% - reported full compliance
Group of Latin American and Caribbean States – Article 54 paragraph 1c:	37% - reported full compliance
Group of Latin American and Caribbean States – Article 54 paragraph 2a:	46% - reported full compliance
Group of Latin American and Caribbean States – Article 54 paragraph 2b:	40% - reported full compliance
Group of Latin American and Caribbean States – Article 54 paragraph 2c:	47% - reported full compliance

Reported compliance among the group is low and represents a substantial gap. Only four of 16 countries in the group reported full compliance with all provisions of the article. Another State reported full compliance with all provisions, except paragraphs 2(b) and (c), with which partial compliance was reported. To substantiate its reported compliance, this country referred to the law regulating confiscation, freezing and seizure, but did not explain under what circumstances these remedies were available. It also qualified its responses with the statement, “Although the content of the Convention is covered by its national law, [it] requires international technical assistance in this field, in particular a possible visit by an anti-corruption expert to design a plan for implementation of this paragraph.”

Figure 20

Group of Western European and States Compliance Graph for Article 54

Group of Western European and Other States – Article 54 paragraph 1(a):	94% - reported full compliance
Group of Western European and Other States – Article 54 paragraph 1(b):	94% - reported full compliance
Group of Western European and Other States – Article 54 paragraph 1(c):	75% - reported full compliance
Group of Western European and Other States – Article 54 paragraph 2(a):	100% - reported full compliance
Group of Western European and Other States – Article 54 paragraph 2(b):	94% - reported full compliance
Group of Western European and Other States – Article 54 paragraph 2(c):	71% - reported full compliance

States parties within the Group of Western European and Others reported nearly 100% full compliance with paragraphs 1(a) and (b) of article 54. Only one country reported partial compliance. There are significantly lower levels of full compliance with paragraphs 1(c) and 2(c), which were reported to be 75% and 71%, respectively.

An example of good practice as reported from States within this group implementing non-conviction based forfeiture is Title 18 of United States Code Section 981, which empowers authorities to confiscate the proceeds of a wide variety of offences through *in rem* civil forfeiture. Some States parties find creative legal methods to repatriate funds. While the Netherlands explained that its legal

system allowed actions only against the person, Article 13c of the Netherlands’ Enforcement of Criminal Judgements (Transfer) Act provided for a procedure to transfer property seized “pursuant to the Act for the purpose of countries that do have an *in rem* procedure.”

E. Analysis of Article 55 Implementation

As the corollary to article 54, providing for the improvement of States parties’ capacity to render mutual legal assistance, article 55 lays out the expectations and requirements for requested States parties, and also the procedures that States parties are to follow when requesting international cooperation for purposes of confiscation.

1. Article 55 Paragraph 1: Giving Effect to Requests and Orders for Confiscation

Paragraph 1 contains two provisions requiring States parties that receive a valid request or court order from another State for confiscation of property to have their competent authorities take the steps needed to effectuate the confiscation.

2. Article 55 Paragraph 2: Measures to Identify, Freeze, or Seize the Proceeds of Crime

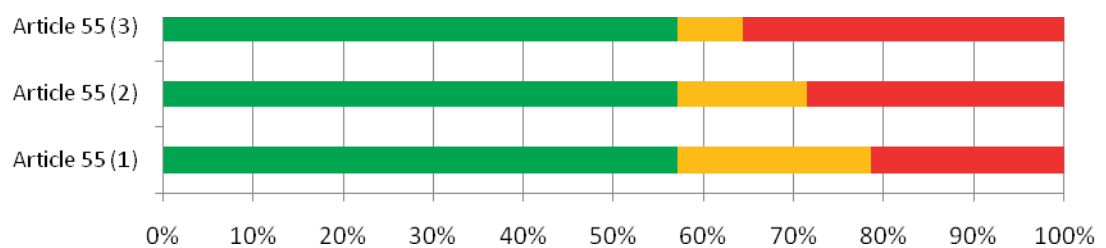
Paragraph 2 requires requested States parties to “take measures to identify, trace and freeze or seize proceeds of crime, property, equipment, or other instrumentalities referred to in article 31 Paragraph 1, of this Convention for purposes of eventual confiscation.”

3. Article 55 paragraph 3: Requirements for Submitting a Request for Legal Assistance

Paragraph 3 sets forth drafting requirements for a mutual legal assistance. The three subparagraphs detail the information to be provided when requesting assistance (description of property, location, estimated value, statement of the facts, etc).

Figure 21

Group of African States Compliance Graph for Article 55



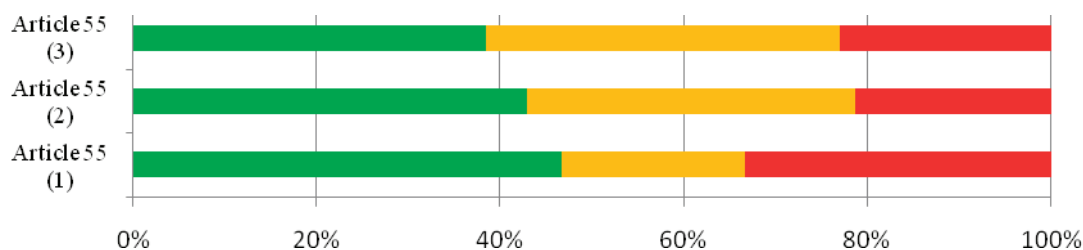
Group of African States – Article 55 paragraph 1: 57% - reported full compliance
 Group of African States – Article 55 paragraph 2: 57% - reported full compliance
 Group of African States – Article 55 paragraph 3: 57% - reported full compliance

The 14 reporting States parties within the African Group are evenly divided between fully compliant and largely non-compliant. The countries in the latter category

provided little explanation for their lack of implementation, although technical assistance was widely sought.

Figure 22

Group of Asian States Compliance Graph for Article 55

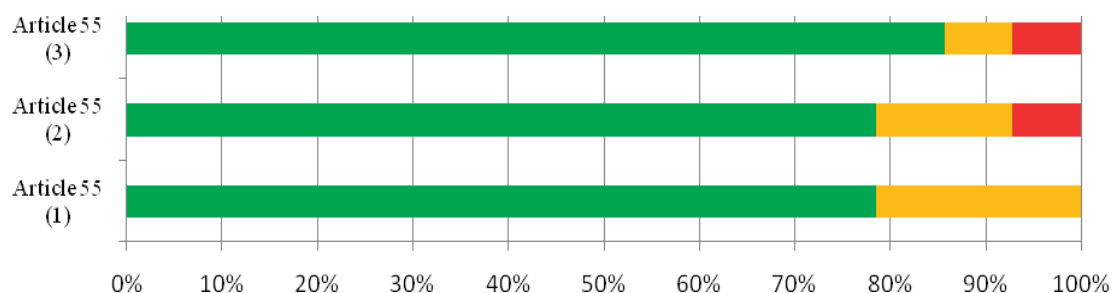


Group of Asian States – Article 55 paragraph 1: 47% - reported full compliance
 Group of Asian States – Article 55 paragraph 2: 43% - reported full compliance
 Group of Asian States – Article 55 paragraph 3: 38% - reported full compliance

Reported compliance with article 55 was low in the Asian Group. Fewer than half of the 15 countries in the group reported full compliance with the three paragraphs. One of the compliant countries acknowledged its need for adequate infrastructure: “Law enforcement agencies ... receive and process requests in such respects in such matters. However, a well defined framework for the identification and tracing of assets of foreign origin being successfully followed in other contracting states will be considered for adaptation in our domestic laws.” A respondent elaborated on its partial compliance with article 55 by referring to laws and court decisions that legitimize the confiscation of property. In order to become fully compliant, this country requested assistance in developing a model procedural law on confiscation and administering confiscated property. Several countries did not comment on their reported non-compliance.

Figure 23

Group of Eastern European States Compliance Graph for Article 55



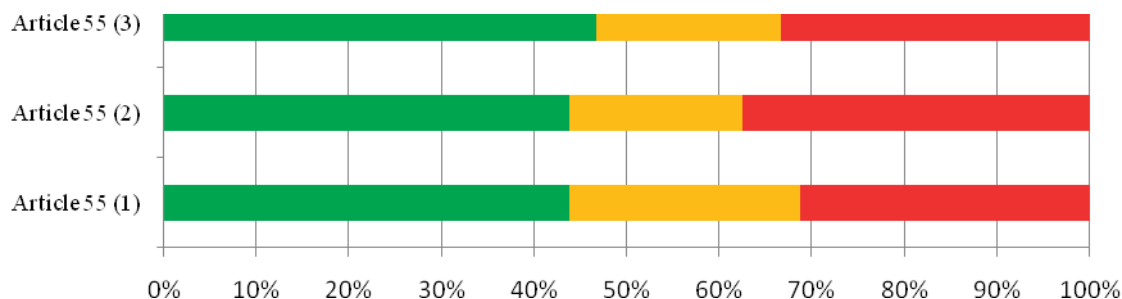
Group of Eastern European States – Article 55 paragraph 1: 79% - reported full compliance
 Group of Eastern European States – Article 55 paragraph 2: 79% - reported full compliance
 Group of Eastern European States – Article 55 paragraph 3: 86% - reported full compliance

Many States parties in the Eastern European Group reported high levels of compliance with the requirements of article 55, providing for the facilitation of international cooperation for purposes of confiscation. 79% of the reporting States in the group indicated full compliance with both paragraphs 1 and 2 on the administration and execution of incoming requests for mutual legal assistance. Several States reported partial compliance with these provisions and only a few reported non-compliance. Typically, States parties in the group reported that their laws required a domestic court to approve a request for execution of a conviction or confiscation order of a foreign court.

Paragraph 3 of article 55 specifies the kinds of information to be included in a request for mutual legal assistance. Full compliance with this provision was reported to be 86% of the respondents in the group. One country reported partial compliance and requested model legislation in order to achieve full compliance with all three provisions. Another reported non compliance with paragraphs 2 and 3, thereby indicating limited ability to cooperate in asset recovery investigations. However, it reported that changes and addenda to its criminal code were underway, as well as the promulgation of a new "Law on management of confiscated property, property benefit and subtraction of objects in criminal and misdemeanour procedure." Notably, enacting new legislation is not always necessary to comply with the standards set forth by paragraph 3 of article 55. One respondent, pragmatically, reported that it let the requirements set out in international agreements inform the formulation of requests for mutual legal assistance.

Figure 24

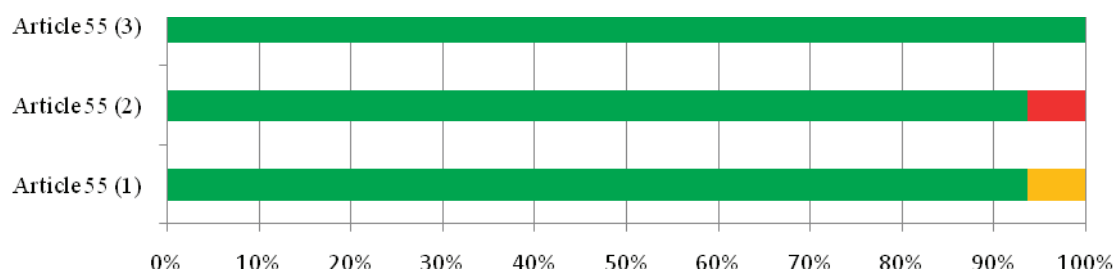
Group of Latin American and Caribbean States Compliance Graph for Article 55



Group of Latin American and Caribbean States – Article 55 paragraph 1:	44% - reported full compliance
Group of Latin American and Caribbean States – Article 55 paragraph 2:	44% - reported full compliance
Group of Latin American and Caribbean States – Article 55 paragraph 3:	47% - reported full compliance

In the Group of Latin American and Caribbean States, almost half reported full compliance with all three paragraphs of article 55. Non-compliance with the article under review was reported by five States; four reported partial compliance.

Figure 25
Group of Western European and Other States Compliance Graph for Article 55



Group of Western European and Other States – Article 55 paragraph 1:	94% - reported full compliance
Group of Western European and Other States – Article 55 paragraph 2:	94% - reported full compliance
Group of Western European and Other States – Article 55 paragraph 3:	100% - reported full compliance

Nearly all reporting States parties within the Western European and Others Group reported full compliance with article 55. One country reported non-compliance with paragraph 2, yet did not elaborate.

F. Analysis of Article 57 Implementation

Article 57 places certain obligations on States parties for the return of confiscated proceeds of corruption.

1. Article 57 Paragraph 1 and 2: Disposal of Assets

Paragraph 1 requires States parties that have confiscated property in response to a request, to return such property to its prior legitimate owners in accordance with paragraph 3, which specifies how to handle recoveries based on differing legal grounds. Paragraph 1 also requires States parties to bring their domestic laws regarding disposal of confiscated assets in conformity with the Convention. Paragraph 2 requires States parties to empower their competent authorities to legally return confiscated assets to a foreign party while taking into consideration the rights of bona fide third parties.

2. Article 57 Paragraph 3: Legal Conditions Where Repatriation Should Occur

Paragraph 3(a) requires requested States parties to return confiscated assets in the case of the embezzlement or laundering of embezzled public funds. Paragraph 3(b) sets forth the circumstances under which a requested State Party must return confiscated proceeds of any other offence covered by the Convention. Paragraph 3(c) requires States parties, in all other cases, to give priority consideration to returning confiscated property to the requesting State party or its prior legitimate owners, or compensating the victims of the crime.

3. Article 57 paragraph 4: Deduction of Reasonable Expenses

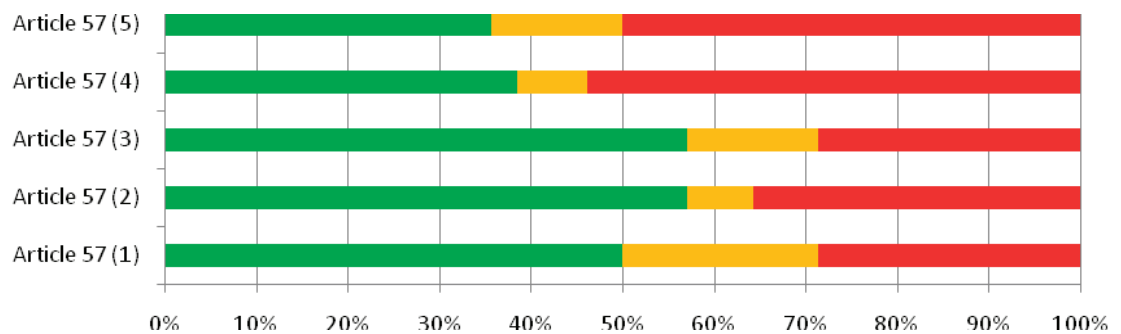
Paragraph 4 provides for States parties to deduct “reasonable expenses” from confiscated properties in order to offset costs.

4. Article 57 paragraph 5: Concluding Agreements for final disposal

Paragraph 5 encourages States parties to give special consideration to concluding agreements on a case-by-case basis for final disposal of assets.

Figure 26

Group of African States Compliance Graph for Article 57



Group of African States – Article 57 paragraph 1: 50% - reported full compliance

Group of African States – Article 57 paragraph 2: 57% - reported full compliance

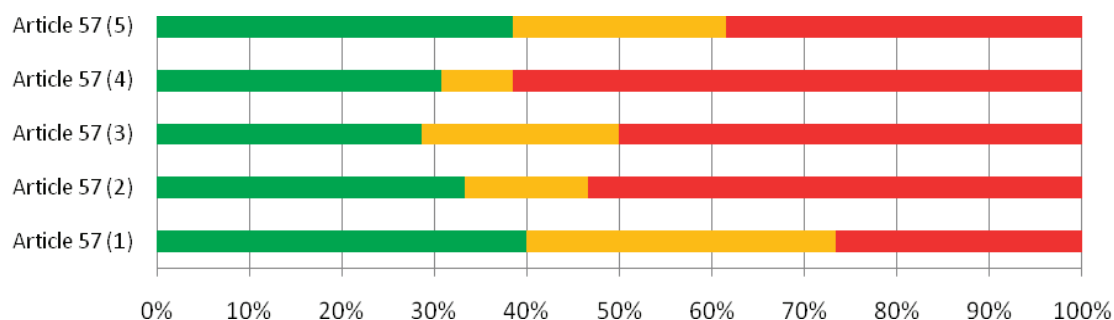
Group of African States – Article 57 paragraph 3: 57% - reported full compliance

Group of African States – Article 57 paragraph 4: 38% - reported full compliance

Group of African States – Article 57 paragraph 5: 36% - reported full compliance

Of the fourteen reporting African States parties, five indicated full compliance with all paragraphs of article 57. Two reported full compliance except for paragraphs 4 and 5. This may be due to the fact that neither State had a case in which they withheld expenses or negotiated special arrangements for the return of confiscated property. Almost all of the remaining responses from this group indicated non-compliance, rather than partial compliance. These countries did not provide significant explanatory material or plans of action to implement the provisions of article 57.

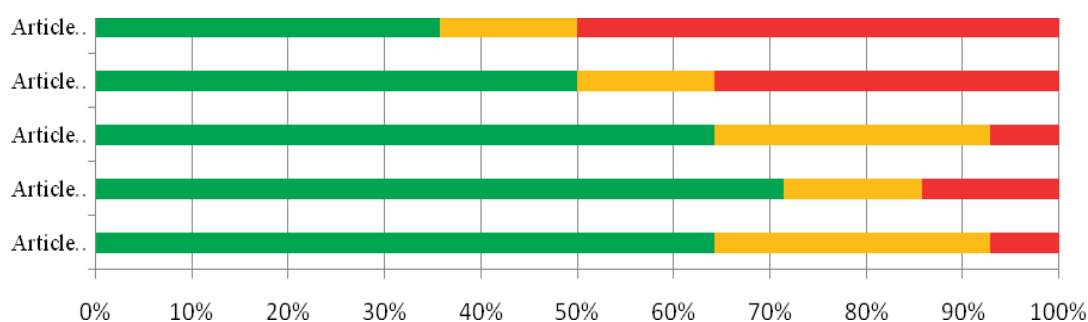
Figure 27
Group of Asian States Compliance Graph for Article 57



Group of Asian States – Article 57 paragraph 1:	40% - reported full compliance
Group of Asian States – Article 57 paragraph 2:	33% - reported full compliance
Group of Asian States – Article 57 paragraph 3:	29% - reported full compliance
Group of Asian States – Article 57 paragraph 4:	31% - reported full compliance
Group of Asian States – Article 57 paragraph 5:	38% - reported full compliance

One country, which indicated high levels of compliance with other articles of the Convention governing asset recovery, reported non-compliance with all five paragraphs of article 57 and requested assistance in legislative drafting. Another State reported uncharacteristically low levels of compliance with several paragraphs of article 57 and requested technical assistance in the forms of legislative drafting, legal advice and on-site expertise. The frequent requests for technical assistance suggest that some States are confronted with particular difficulties when endeavouring to meet the requirements of Article 57.

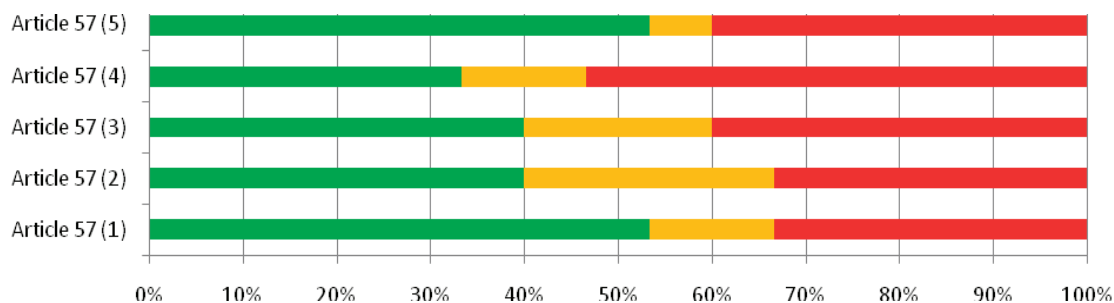
Figure 28
Group of Eastern European States Compliance Graph for Article 57



Group of Eastern European States – Article 57 paragraph 1:	64% - reported full compliance
Group of Eastern European States – Article 57 paragraph 2:	71% - reported full compliance
Group of Eastern European States – Article 57 paragraph 3:	64% - reported full compliance
Group of Eastern European States – Article 57 paragraph 4:	50% - reported full compliance
Group of Eastern European States – Article 57 paragraph 5:	35% - reported full compliance

The majority of reporting States parties within the Eastern European Group indicated to be fully compliant with article 57. In order to return confiscated property under paragraph 1, the Czech Republic referred to the forfeiture of property to itself, followed by the return to the prior legitimate owner under Section 80 et sequentes of the Criminal Procedure Code (no. 141/1961 Coll.). The Czech Republic added that ownership disputes were resolved by civil proceedings.

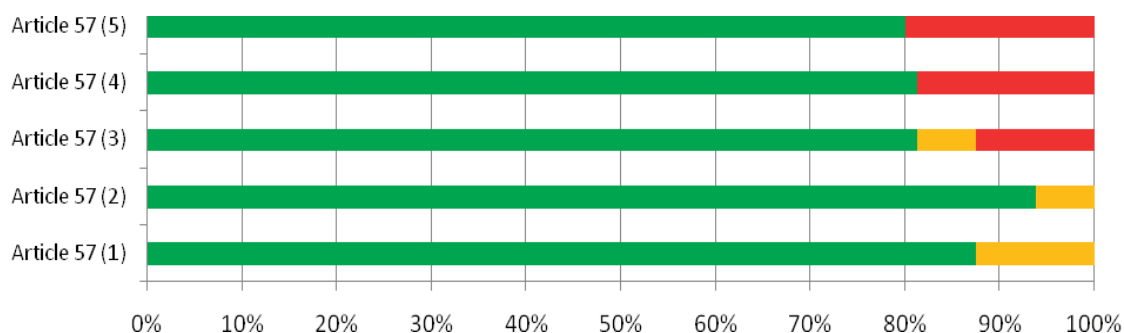
Figure 29
Group of Latin American and Caribbean States Compliance Graph for Article 57



Group of Latin American and Caribbean States – Article 57, paragraph 1: 53% - reported full compliance
 Group of Latin American and Caribbean States – Article 57 paragraph 2: 40% - reported full compliance
 Group of Latin American and Caribbean States – Article 57 paragraph 3: 40% - reported full compliance
 Group of Latin American and Caribbean States – Article 57 paragraph 4: 33% - reported full compliance
 Group of Latin American and Caribbean States – Article 57 paragraph 5: 53% - reported full compliance

Within the region, the key paragraphs 2 and 3 of article 57 received only 40% full compliance and average non-compliance of 33.3% and 40% respectively. Six countries reported full compliance with paragraphs 2 and 3. Five States reported non-compliance with paragraph 2 and six with paragraph 3.

Figure 30
Group of Western European and Other States Compliance Graph for Article 57



Group of Western European and Other States – Article 57 paragraph 1: 88% - reported full compliance
 Group of Western European and Other States – Article 57 paragraph 2: 94% - reported full compliance

Group of Western European and Other States – Article 57 paragraph 3:	81% - reported full compliance
Group of Western European and Other States – Article 57 paragraph 4:	81% - reported full compliance
Group of Western European and Other States – Article 57 paragraph 5:	80% - reported full compliance

Almost all States parties in the group reported full compliance with article 57. Only a few countries reported significant non-compliance. Good practices were reported by the United Kingdom of Great Britain and Northern Ireland, which used administrative forfeiture to return to Nigeria assets embezzled by politically exposed persons.

Some States parties acknowledged their adherence to the European Union Framework Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders.

III. Regional Recommendations

This section identifies reported implementation gaps within the five regional groups, provides a set of recommendations and, where available, good practices within the region. Some States parties provided examples of successful implementation of the provisions under review, as requested by the self-assessment checklist. The present report reproduces such examples with attributions to reporting States, following a practice adopted by the Secretariat in the formulation of official documentation of the Conference of the States parties. A number of such practices are discussed herein as practical guidance for achieving compliance with particular provisions of selected articles. In a few cases, the recommendations reference sources other than the self-assessment reports to illustrate good practices or case studies. It bears repeating that the material submitted by States parties in their self-assessment reports, including examples of good practice, has not been independently verified. This paper is not to be read as an endorsement of the accuracy of these reports. The review and analysis of reported compliance with these asset recovery articles leads to the conclusion that some States parties applied different evaluation criteria, interpretations of provisions, and compliance standards in scoring their implementation of the articles. The regional averages are nevertheless useful for identifying trends and patterns, as well as for addressing compliance gaps. The self-assessment reports, moreover, may guide decisions to conduct more in-depth research and analysis of specific country situations. These recommendations complement the more general ones contained in Appendix A.

A. Group of African States

Many States parties from the African Group consistently reported full compliance with the asset recovery articles. Several countries, however, reported very low compliance levels.

1. Criminalization of Money Laundering

Criminalizing money laundering is a key component in the fight against corruption, particularly as misappropriated funds are often laundered by States parties in this region in developed financial centres. Nigeria documented its progress in this area

by referencing the Money Laundering Prohibition Act (2004) (2) and Economic and Financial Crimes Commission Act (2004) (3). Reportedly, these laws take an “all crimes” approach, making any criminal activity that is punishable by a minimum threshold of incarceration or pecuniary fine a predicate offense to money laundering. Embezzlement, bribery, looting of public funds, tax evasion, and a long list of other serious crimes are thus treated as predicate offences to money laundering. Other States in the region can adopt a similar model to comply with the requirements of article 23 of the Convention.

2. Know Your Customer Policies, Customer Identification, and Financial Institutions

60% of States parties from the African Group were reportedly fully compliant with article 52 paragraph 2(a) and had issued advisories regarding PEPs and high-risk customers to domestic financial institutions. Only 22% were fully compliant with article 52 paragraph 2(b) and had identified the particular natural or legal persons to whom enhanced scrutiny should be applied. In order to ensure that corrupt officials are unable to channel misappropriated funds from the region into major financial centres, States parties in the region need to clearly identify high-risk customers or PEPs and communicate this information to both domestic and international financial institutions, insisting upon enhanced scrutiny of those customers’ accounts.

It has been observed throughout the region that the economies of many States parties’ are primarily cash based, and that financial institutions often lack the capacity and resources necessary to perform due diligence of their customers. When cash is predominantly used in transactions, the main problem that compliance professionals are confronted with is the lack of an audit trail, which makes it very hard to know where that money has come from. Under such conditions, strict KYC regulations become of paramount importance.

3. Non-Conviction Based Forfeiture and Other Facilitating Measures

Half of the States parties in the African Group reported that they had adopted non-conviction based forfeiture mechanisms. More than a third reported that they had not taken the measures specified in article 54 1(c), which obligates countries to consider allowing the confiscation of proceeds of crime when criminal conviction may be difficult to obtain. Half of reporting States parties in the group indicated compliance with article 53 paragraph (a), permitting other States parties to initiate civil action against stolen assets or property.

Non-conviction based forfeiture can be highly successful in recovering stolen assets, as illustrated by a documented example taken from a source other than the self-assessment reports. When recovering more than GBP 1 million from the former Nigerian governor, Diepreye Alamiyeseigha, the South African government used non-conviction based forfeiture under the provisions of the South African Prevention of Organized Crime Act.¹⁰

South Africa’s Proceeds of Crime Act, 1996, generally requires a conviction as a prerequisite to confiscation, yet it empowers its courts to make forfeitures where the

¹⁰ James Maton and Tim Daniel, “Recovering the proceeds of corruption by public officials: a case-study,” *ERA-Forum* 10, no. 3 (October 1, 2009): 453-465.

defendant absconds before conviction and there are grounds to believe that confiscation would be an outcome of the proceedings. The law also gives South African courts reasonably broad authority to restrain and seize property that may be confiscated by order against a criminal defendant. Additionally, South Africa's Special Investigating Units and Special Tribunals Act, 1996 established a specialized body for pursuing asset recovery in corruption cases through civil action. Finally, South Africa's International Cooperation in Criminal Matters Act, 1996, permits other States parties to initiate civil actions in South African courts, without the strict requirement of dual criminality.

4. Lack of Capacity for Executing MLA

Eight of fourteen States parties reported full compliance with the all three provisions of article 55, International Cooperation for Purposes of Confiscation. Three countries reported non-compliance with all provisions of the article and three reported at least some partial compliance. It has been observed across the region that institutional capacity is a key obstacle to successful submission and execution of requests for MLA. Magistrates, prosecutors, and investigators lack the resources and knowledge necessary to properly submit MLA requests to other States parties or to execute requests when received. Language barriers, complex internal bureaucratic procedures, and lack of communication along informal channels between requesting and requested States impede progress.

Training and relationship building, particularly with officials from major financial centres to whom requests are submitted, can help to overcome some of these obstacles. For example, the United Kingdom of Great Britain and Northern Ireland reportedly afford a full range of legal assistance to judicial and prosecuting authorities in other States for the purpose of criminal investigations and proceedings and does not require reciprocity. Unlike many other States, it can offer this assistance in the absence of a bilateral or multilateral treaty.

In cases where dual criminality is an issue, informal or administrative assistance may still be available to a requesting State. Such channels can also produce admissible evidence for prosecutors. There are many training resources and materials readily available to States parties within the region to build capacity for international cooperation and mutual legal assistance. The UNODC/World Bank's Stolen Asset Recovery (StAR) initiative, the International Centre for Asset Recovery in Switzerland and other international organizations provide capacity-building training to bridge the knowledge and procedural gaps in this area.

B. Group of Asian States

Full compliance by the reporting States parties from the Asian Group was highest in relation to articles 23 and 52. Reportedly, full compliance averaged below 50% in relation to articles 53, 54, 55, and 57. Full compliance with article 53 averaged 37% for the group, while non-compliance averaged 42%. Full compliance with article 57 averaged 34%, while non-compliance averaged 46%.

1. Issue advisories to financial institutions of the types of persons and of particular persons that warrant enhanced scrutiny

Within the Asian Group, just over half of the reporting States parties indicated that they had taken measures to notify financial institutions of the types of natural or legal persons and the identities of particular persons whose accounts warranted enhanced scrutiny. The remaining 21% that reported partial adoption of these measures, and 35% that responded that no such measures had been adopted would benefit from information and experience sharing with their regional counterparts.

Bangladesh, documenting its actions to implement these provisions, reported that it required its banks and financial institutions to create their own guidelines identifying high-risk customer types. Factors to be taken into account include customer background, country of origin, public or high profile position and the nature of the business.

Reportedly, the Monetary Authority of the Hong Kong Special Administrative Region complied with the requirements of paragraph 53 (b) by periodically issuing circular notices to financial institutions within its jurisdiction notifying them of persons or entities suspected to be involved with money laundering or terrorist activities.

2. Asset Declaration Forms

57% of reporting States parties within the Asian Group region had imposed requirements on public officials to declare assets and interests in foreign accounts.

The Convention requires States parties only to consider taking these measures. Although not mandatory, these reporting requirements force officials either to expose questionable wealth, or to conceal the proceeds of corruption and risk prosecution for false statements in the filing. An example drawn from outside the self-assessment reports illustrates the point. In Macau Special Administrative Region, the former Secretary of Transportation, Ao Man Long was convicted of bribery, money laundering and failure to disclose assets. Investigators for the Macau Commission against Corruption (MCAC) were aided by Ao's failure to file any of his amassed wealth on asset declaration forms, leading to a criminal conviction in 2008 and the recovery of USD 85 million.¹¹ It is therefore recommended that States parties establish criminal sanctions for falsification of asset and account declaration forms, as well as sanctions such as removal from office for failure to file required forms.

3. Allow States Parties to Initiate Civil Action

A considerable implementation gap was reported by States parties in the Asian Group in relation to article 53, which empowers States parties to initiate civil action and to claim either legitimate ownership or compensation for damages by offences covered by the Convention.

Just 38% of reporting States parties in the region indicated that they were in full compliance with subparagraph (a), allowing foreign States parties to file civil

¹¹ Case Study: Ao Man Long. *Asset Recovery Knowledge Centre*, available at <http://www.assetrecovery.org/kc/node/3eff4944-0d61-11de-a72f-27bb2e50913c.4>

actions in their courts, while 38% were non-compliant. 47% of reporting States parties did not make provision in their legal systems for compensation or damages to be awarded to foreign States parties harmed by offences covered by the Convention.

A variety of legal impediments must be overcome to achieve compliance in the different jurisdictions. For example, the laws of one country in the group preclude liability against legally-created persons for corruption. A legal framework that exempts corporations and other entities created by law from accountability for corrupt acts severely limits the recourse available to countries seeking to recover their stolen assets.

4. Disconnects in international cooperation

One of the larger implementation gaps indicated by reporting States parties in the Asian Group was the difficulty of obtaining mutual legal assistance and overcoming other normative obstacles to recovery without a formal treaty in place. A common obstacle to international cooperation, which the Convention seeks to remedy, is the inadequacy of both the domestic legal system and the organizational framework to implement legislation once it is enacted.

Hong Kong SAR reportedly created a model central authority to manage a large number of cases involving requests for mutual legal assistance. The Mutual Legal Assistance Unit in Hong Kong's Department of Justice manages the entire process of cooperation in criminal matters, assisting foreign authorities in drafting MLA requests, overseeing communication between local and foreign officials, and receiving and processing foreign court orders and other MLA requests.¹²

C. Group of Eastern European States

The reporting States parties from the Eastern European Group indicated very high levels of compliance with many of the asset recovery articles under review. Several gaps have been identified, however, which States need to address.

1. Enable Courts to Recognize State Party as Prior Legitimate Owner

Reportedly, States parties from the Eastern European Group have taken considerable measures to implement their treaty obligations emanating from article 53 (Measures for Direct Recovery of Property). While full compliance was 80% or higher in relation to provisions (a) and (b), four States reported partial compliance with article 53 (c), and one was non-compliant. Article 53(c) is an important provision for asset recovery, providing for the recognition of a requesting State party's legitimate claim to ownership of confiscated assets.

Romania cited Article 19(4) of its Criminal Procedure Code as the legal instrument that permits Romanian officials to recognize other States parties as "legitimate owner[s] of property acquired through the commission of an offense" if those States parties are subject to a binding international agreement to which Romania is a

¹² "Organization Chart of International Law Division" Department of Justice, Hong Kong Special Administrative Region <<http://www.doj.gov.hk/eng/about/ild.htm>> Accessed 20 August 2009

signatory. This specific recognition of other States parties as the legitimate owners of property acquired through criminal offences established by the Convention provides a powerful tool for a successful asset recovery regime.

2. International Cooperation in Confiscation

In general, compliance with article 54 by reporting States parties from the Eastern European Group was high, averaging about 90% for most provisions. Reportedly, 70% of respondents have taken measures in accordance with article 54 paragraphs 1(c) and 2(c), which require countries to consider permitting non-conviction based forfeitures and giving its authorities broader powers to preserve property for confiscation. A non-conviction based forfeiture scheme is important because a criminal conviction sometimes cannot be gotten for a variety of reasons, including flight from the jurisdiction, incapacity and death. The Czech Republic referenced its Criminal Code (no. 140/1961), section 73 (1), which reportedly allows Czech courts to issue confiscation orders against the property acquired by means of a criminal act, independent of a criminal conviction in the matter. Reportedly, Czech authorities have wide discretion to confiscate the illicitly acquired property of perpetrators who “cannot be prosecuted or sentenced,” or “if the property belongs to an offender whom the court has discharged.” This reported legal framework permits the Czech authorities to confiscate the proceeds of crimes, independent of a criminal conviction against the perpetrator.

Taking additional measures in accordance with article 54 paragraph 2(c) to ensure that the proceeds of a crime are preserved for confiscation during criminal proceedings is a crucial element in the asset recovery process. The Group of Eastern European States clearly recognized this, with 71% reporting full compliance. Three reporting States parties in the region were partially compliant and one had not adopted any additional measures.

The former Yugoslav Republic of Macedonia’s Law on Criminal Procedure, Article 219, as reported, is a good example of a country taking affirmative steps to enable freezing and seizure of the proceeds of a crime for future proceedings. According to the self-assessment report of the former Yugoslav Republic of Macedonia, its officials are able to secure/confiscate property acquired in connection with a *suspected* criminal act temporarily at the request of another State party for use in anticipated criminal proceedings. As long as the properties were acquired through an act that is a crime under domestic law, even if it occurred outside the jurisdiction of the Macedonian legal system, the property may be “temporarily secured and disposed of” according to the needs of the criminal proceedings.

It is recommended that States parties in the region implement similar legislation to ensure that their domestic authorities have the ability to freeze suspected criminal proceeds for use in future criminal proceedings in a foreign court *without* a formal foreign court order requesting freezing, seizure and/or confiscation.

3. Return and Disposal of Assets

Despite high rates of compliance with many of the previous articles, the Group of Eastern European States reported lower levels of compliance with article 57 (Return and Disposal of Assets). While considerable efforts to implement these provisions

were reported, in many cases partial compliance rates are relatively high, denoting that significant work is necessary to reach full compliance.

Article 57 (1) regulates the return of assets seized in criminal or civil proceedings to the “prior legitimate owners” of the assets or properties. Reportedly, many States parties in the Eastern European Group lacked the necessary legislative framework to return confiscated assets to their prior owners. Only 64% of States parties in the region reported full compliance, leaving 35% in partial or non-compliance.

Latvia reported full compliance with the requirements of article 57, pointing to its Criminal Procedure Law, section 357(1), which provides that the prior “lawful possessor” of the properties may have the confiscated assets returned, presuming that they are no longer necessary for the completion of criminal proceedings. This is a key component of asset recovery, recognizing the legitimate rights of previous *legal* owners of the confiscated property.

4. Return of Property Confiscated through a Request of Mutual Legal Assistance

Article 57 paragraph 3 ensures that property confiscated following a request for legal assistance is returned to the requesting State. Three of fourteen reporting States parties in the Eastern European Group were partially compliant with the provision, while one country was non-compliant. Many States parties in partial or non-compliance reported lacking sufficient domestic legislation to implement the provision.

Romania indicated in its self-assessment report that its Law 302 (2004), Article 21 was an example of successful implementation. This legislation permitted Romanian authorities to return assets confiscated at the behest of another State party to the requesting State, even if an outstanding extradition request is denied. As long as the assets were acquired through a criminal act under Romanian law, they were subject to confiscation and return to the requesting State party.

Lithuania also reported compliance, stating that property seized on the grounds of a foreign State party’s request is “stored and kept in accordance with the procedure set out in Articles 91, 92, 93 and 94 of CCP of RL. Paragraph 3 of Art. 94 of CCP of RL provides for the possibility to transfer confiscated property to a foreign authority upon its request.”

It is recommended that States parties in the region implement similar provisions subject to limitations within their domestic setup, to permit their competent authorities to return assets confiscated in response to a MLA request by another State. This provision is a critical element in ensuring an effective and comprehensive asset recovery regime based on mutual legal assistance.

5. Deduction of Expenses and Agreements on the Final Disposal of Confiscated Property

Asset recovery proceedings are often long and expensive, taxing the financial capacity of many States parties. Only 50% of reporting States parties in the region indicated that they permit their authorities to deduct reasonable expenses for asset recovery proceedings from confiscated assets. More than a third of reporting States parties in the region had made no provision for deduction of expenses at all. Additionally, only 36% of reporting States parties in the region permitted their

competent authorities to come to special agreements in specific cases for disposal of confiscated assets. Article 57 paragraphs 4 and 5, respectively, ensure that States parties may tap into confiscated assets to offset the costs of asset recovery proceedings and enter into agreements for the final disposal of confiscated assets. Five countries reported non-compliance with paragraph 4 and seven with paragraph 7. These parties reported limited interest in legal technical assistance. One of these States stated as the reason for its response was that comprehensive legislation on confiscation was pending. Bulgaria reported full compliance with article 57, stating that its Penal Code, article 477, specifically empowered its competent authorities to deduct “reasonable expenses for the execution of a MLA request or the sharing of proceeds based on reciprocity.” Additionally, the law reportedly permitted Bulgaria to enter into special relationships with countries that were not party to international agreements, such as UNCAC, to regulate disposal of confiscated assets.

It may not be necessary for a State party to enact legislation in order for it to be able to deduct reasonable expenses or negotiate agreements for the return of confiscated assets. These actions may already be allowed and require only a procedural framework for the responsible agencies. Where new legislation truly is needed, Bulgaria’s approach seems to be an effective, straightforward way of enabling authorities to take these actions.

D. Group of Latin American and Caribbean States

The reporting States parties in the Latin American and Caribbean Group were on average only about 50% fully compliant with the asset recovery provisions analyzed in this report. The subset of countries reporting the lowest compliance in the group did so particularly in relation to articles 53, 54, 55 and 57.

1. Criminalization of Money Laundering

While very few Latin American and Caribbean States parties reported non-compliance with the substantive provisions of article 23, a significant number of States parties in the region remained only partially compliant. Considering the importance of article 23 to enhancing effective anti-money laundering, this constitutes a gap that must be addressed within the region.

However, in at least one case, what was reported as partial compliance seemed more likely to be full compliance. In fact, although Peru indicated partial compliance with article 23, paragraph 1(b), it nevertheless reported that its Money Laundering Act (No. 27765) sanctions “*any person who acquires, uses, holds, keeps, receives, conceals or maintains under his control money, property, securities or profits whose illicit source he knows or may assume, in order to prevent the identification of the source, confiscation or seizure.*”¹³ The coverage of this legislation appears to be broad enough to meet the requirements of article 23 paragraph 1(b).

¹³ Translation of Article 2 of Peru’s Money Laundering Act (No. 27765) based on translation of Peru’s UNCAC Self Assessment Report, *United Nations Office on Drugs and Crime 2007*.

2. Financial Disclosure Systems

Analysis of information provided by reporting States parties in the Group of Latin American and Caribbean States showed two gaps in compliance related to article 52, concerning establishment of public official financial disclosure systems (paragraph 5) and also requiring reporting of public officials' offshore financial accounts and holdings (paragraph 6). Both of these articles are vital for investigators to identify proceeds of corruption and to demonstrate illicit enrichment. It is recommended that the State parties require public officials to disclose their assets and any foreign banking accounts at least annually, and impose penalties for noncompliance or false declaration. In this context, Brazil reported that its "Legislation on Individual Income Tax: Decree n. 3.000, of March 26, 1999," "requires that *"all persons, including public officials, shall inform in their annual income tax return the number of accounts held overseas as well as their respective balances."*

3. Direct Recovery and Non-Conviction Based Forfeiture

Most States parties in the region reported partial compliance or non-compliance with the provisions of article 53, except for paragraph (c), which provides for the obligation to consider the adoption of measures allowing non-conviction based confiscation. Reportedly, a significant gap existed in the ability of foreign States parties to recover assets through the civil process. This may be due to the civil law basis of the legal systems in many of these countries in which actions to recover the proceeds of corruption must be attached to a criminal proceeding.

Non-conviction based forfeiture traditionally is not found within the predominant civil law systems of the group, although there are examples of good practice. Only 38% of reporting States parties in the region indicated full compliance with article 54 paragraph 1(c), while 56% were non-compliant.

Like most civil law systems in the region, Costa Rica reportedly has civil proceedings attached to criminal ones. The judges presiding over the criminal hearings often preside over the civil pretences, making the civil proceeding *"an accessory to the criminal proceeding."*¹⁴ Asset forfeiture can only be exercised *"within the frame of a criminal procedure,"* and *"reparation is achieved through civil action, carried out within the criminal process."*¹⁵

Colombia and Costa Rica's criminal codes, which are based on civil law, allow for awarding compensation from the proceeds of crime and instrumentalities through a civil action attached to a criminal process. This action, which is also known as an Accion Civil Resarcitoria, requires that a Judicial Magistrate investigates and makes a determination that a crime has been committed. Once determined, a separate civil process takes place for third

¹⁴ "Costa Rica Country Profile – Asset Recovery Mechanisms" *Asset Recovery Knowledge Centre*, International Centre for Asset Recovery <http://www.assetrecovery.org/kc/node/5bfb89d6-abd4-11dc-ad0c-e9a31c7f1d1a.15>

¹⁵ "Colombia Country Profile – Asset Recovery Mechanisms" *Asset Recovery Knowledge Centre*, International Centre for Asset Recovery <http://www.assetrecovery.org/kc/node/eccbfad7-1b4f-11dd-95ef-c3cba758e5a8.25>

parties to claim damages and seek reparations. Alternate mechanisms include private complaints (Querrella).¹⁶

Brazil, on the other hand, reported the creation of a hybrid process in which civil forfeiture proceedings were subsumed by and dependent upon a criminal conviction. Assets could be confiscated following the criminal conviction and repatriated to damaged parties. Brazilian law, however, also permitted forfeiture proceedings to take place in civil court, irrespective of a criminal conviction. Reportedly, with “sufficient evidence,” the proceeds of crime could be confiscated, even if it remained difficult to secure a conviction against the criminal because he or she was “unknown or exempt from prosecution”. If criminal proceedings were initiated, though, the presiding judge in civil court might suspend the civil action until the outcome was realized.

However, non-conviction based forfeiture seems to be taking root as several countries in the group, including Colombia and Mexico, reported the adoption of confiscation mechanisms known as *ley de extinción de dominio* confiscation proceedings. Both Mexico and Colombia have introduced non-conviction based forfeiture into their legal systems in response to drug trafficking crimes, which present unique difficulties in conducting *in personam* cases or even identifying the beneficial owner of criminal proceeds. In a *ley de extinción de dominio* action, an individual’s right to property involved in crime is “extinct” based on a preponderance of evidence standard.¹⁷ Ecuador has also expressed interest in adopting *ley de extinción de dominio* in its own legal system.¹⁸

Reportedly, civil legislation of the United States of America permits authorities to freeze, seize, or confiscate the assets of criminal actions without a conviction for the underlying offense.¹⁹ At the beginning of the decade, US banks reportedly discovered significant deposits associated with Montesinos figurehead Venero Garrido. While Peruvian officials were unable to prosecute Garrido for the crimes of corruption that produced the illicit assets, the US Department of Justice was able to secure a confiscation order against the assets because of their obvious criminal origin. The assets were later repatriated to a Peruvian fund dedicated to anti-corruption efforts.²⁰

Considering the wide variety of statutes within State parties’ legal systems, there is no single method to implement article 54 paragraph 1(c). Countries in the group can look at similar legal systems, such as Colombia’s Act 793 of 2002 establishing *ley de extinción de dominio*.²¹ Brazil’s Code of Civil Procedure and article 2 of its Money Laundering Law may also be instructive.

¹⁶ John Toth “Asset Recovery through Multijurisdictional Litigation” Patton Boggs LLP.

¹⁷ Perla Cristal Gomez, Asset Seizure Law in Nuevo Leon *Vivir Mexico* 22 June 2009 available at <http://vivirmexico.com/2009/06/ley-de-extincion-de-dominio-en-nuevo-leon>

¹⁸ Legislative leader presented Extinction Ecuador Domain Law, *Periodico26.com* 19 February 2009 available at http://www.periodico26.com/noticias_mundo/febrero2009/ecuador130209.html

¹⁹ “Recovery of Corruption-related Assets” U4 Helpdesk. U4 Anti-corruption Resource Centre <<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=4>>. Accessed 20 August 2009

²⁰ Jorge, Guillermo. “The Peruvian Efforts to Recover Proceeds from Montesinos’ Criminal Network of Corruption” *Making International Anti-Corruption Standards Operational: Asset Recovery and Mutual Legal Assistance*. Regional Seminar for Asia-Pacific, Bali, Indonesia: 5-7 September 2007.

²¹ Legal Information Institute, Cornell University

As reported, the Central Bank in Uruguay can request the freezing and seizure of assets, credits, rights and actions that belong to those private companies included in law 15.322, as well as those which belong to natural or legal persons that participated in any manner in wilful actions that contributed directly or indirectly to breach the law. The judge will issue the freezing or seizing orders without further considerations. Article 62 establishes that in order to guarantee the confiscation or forfeiture of the assets, proceeds or instrumentalities of money laundering or any of the offences of the expanded scope, judges may order the preventive freezing, seizing of assets or whichever measure might be needed to preserve the availability of the assets. In the event of a conviction the assets are subject to confiscation. Furthermore, article 159 of the Criminal Procedures Code (law 15.032 of 7th July 1980), empowers the judge to establish any preventive measures over the defendant that he may deem necessary to protect the rights of the State or the victims. Forfeiture was defined in law 14.294 as the definite suppression of the rights of ownership over an asset or instrument. Bona fide third parties are protected. Article 34 of law 17.060 contains principles and procedures for the processing of requests, similar to those contemplated in law 17.016. However, cooperation is granted without considerations of dual criminality, as opposed to law 17.016.

Reportedly, Brazil could in fact provide Mutual Legal Assistance within the context of a treaty or on the basis of reciprocity. Brazil could also provide assistance pursuant to requests for direct assistance, whereby the Brazilian authorities presented foreign requests directly to Brazilian judges for information requiring judicial authorization, such as the production of records and lifting of bank secrecy. The court would review the merits of the requests and authorize the lifting of secrecy if it concluded that the request was in accordance with Brazilian law. Apparently, between 1999 and 2003 Brazil received 40 MLA requests and 741 letters rogatory.

4. Network information technology

Electronic communication has advanced significantly in recent years and domestic legal systems are keeping pace. In the past, it took several years for the central authority of a prominent Latin American State to accept mutual legal assistance requests in electronic formats (fax, e-mail) rather than traditional diplomatic pouches and letters rogatory. This was based on the misconception that electronic formats would not have been accepted by the courts. Concerns about security have been addressed with the development of secure electronic file-sharing systems, including the Organization for American States Secure Electronic Communication System (**GROOVE**) network and the Commonwealth Network of Contact Persons²².

<http://www.law.cornell.edu/background/forfeiture/>

²² “Conclusions and Recommendations” from the Workshop for Caribbean Countries on Countering Terrorist Financing” St. John’s, October 13-17, 2008 Report available at <http://www.cicte.oas.org/Rev/EN/Events/.../Antigua%20OCT%2013-17.pdf>

5. Disposal of Confiscated Assets

Managing frozen assets pending confiscation was reported to be a challenge within the region. Often assets that were originally the proceeds of corruption are transformed from money into less liquid assets, such as cars, property, businesses or even boats. These assets, unlike funds stored in a financial institution, require costly maintenance and supervision while being frozen and are at risk of being devalued at the end of court proceedings. Liquidation of these assets generally takes place through a competitive auction system designed to maximize the amount of funds gained. However, in most countries in the group, the liquidation must wait until a final judgment has been achieved. As a result, authorities sometimes struggle to keep pace of the additional workload. In the United States of America for example, many federal law enforcement agencies that participate in asset forfeiture programs have been able to consolidate their efforts using the Consolidated Asset Tracking Services (CATS), an asset forfeiture database that tracks information and support operations business functions, including seizure, custody, notification, forfeiture, claims, petitions, equitable sharing, official use and disposal.²³ When liquidation becomes possible, the United States Marshall's Service, which is the primary agency administrating the CATS system, utilizes successful procedures employed by the private sector and often subcontracts liquidation to qualified vendors who minimize the amount of time and maximize the net return to the government.²⁴ Pre-seizure planning has also become more and more critical for proper forfeiture planning, as seizing certain maintenance-intensive assets can be extremely cost-ineffective.

E. Group of Western European and Other States

Overall, the reported compliance with the article of the Convention governing asset recovery is higher in the Western Europeans and Others Group than in other regions. While implementation gaps were limited in the region, gaps were reported in relation to the implementation of article 52, which provides for the verification of customer identity and risk assessment methods, and article 54, which provides for the preservation of assets without a court order.

1. Verification of Customer Identity Standards

Reporting States parties indicated large compliance with provisions designed to ensure that financial institutions verify the identity of customers and the beneficial owners of funds as well as apply enhanced scrutiny to high value accounts or those held by politically exposed persons. Moreover, inasmuch as many of these countries are major international banking centres, high compliance is necessary to ensure successful anti-money laundering and asset recovery efforts across the globe. Approximately 30% of the group was only partially compliant. As shown in the analysis, average compliance with article 52 paragraphs 1, 2(b), and 6 is below 85%, signalling an area for emphasis.

²³ "Consolidated Asset Tracking System" Website of the United States Department of Justice, Checked on August 24, 2009, available at <http://www.usdoj.gov/jmd/foia/jmdcats.htm>

²⁴ "Asset Forfeiture Program" Website of the United States Marshals Service Checked on August 24, 2009, available at <http://www.usmarshals.gov/assets/assets.html>

Canada, providing examples of implementation of article 52, referred to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (2006) (hereafter, PCMLTFA), which regulates the methods that financial intermediaries, from banking institutions to real estate brokers, must take to verify the identity of customers or the beneficial owners of funds, securities or other properties. Canada further reported that its financial intelligence unit, the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), provided extensive information and resources to concerned industries and individuals regarding customer identity verification, due diligence and enhanced monitoring of high-value and high-risk accounts. In addition to the establishment of an online resource for the specific steps that financial intermediaries must take to identify customers, FINTRAC was reported to regularly perform risk assessments throughout the financial sector (using open-source information, reporting volumes, volunteered information, proprietary databases, outreach activities and assurance reviews) to identify and regulate high risk transactions and customers.

To better comply with the requirements of article 52, a legislative foundation, while critical for success, is insufficient. Regulators must create easily accessible resources that facilitate financial intermediaries' efforts to properly perform due diligence and to report suspicious or high risk transactions and customers to the appropriate authorities.

It is recommended that other countries in the group take such measures to create a robust regulatory and institutional framework for verifying customer identity and applying enhanced scrutiny to high-risk accounts and/or transactions.

2. Enhanced Scrutiny of Politically Exposed Persons

It is recommended that States parties in the region take additional measures to ensure higher compliance with articles 52 paragraphs 2(a) and (b), mandating PEP advisories to domestic and foreign financial institutions. Full adoption of such measures was reported by 75% and 69%, of reporting States parties in the region respectively.

As an example of good practice, Canada referred to a website with a comprehensive list of the types of customers and types of accounts to which domestic financial institutions are expected to apply enhanced scrutiny. Additionally, FINTRAC provided specific requirements regarding the type and quality of records to be kept regarding such accounts and when and how to file appropriate suspicious transaction reports for such accounts and customers. Australia reported that the Australian Transaction Reports and Analysis Centre (AUSTRAC) actively identified domestic PEPs and disseminated this information to financial institutions. The AUSTRAC model may be a good practice for other countries in this Group and beyond.

3. Disclosure of the Foreign Assets/Accounts of Public Officials

Only 75% and 59% of reporting States parties in the Group indicated full compliance with article 52 paragraphs 5 and 6, respectively, which require disclosure of assets and foreign accounts by public officials. 13% and 29%, respectively, were non-compliant.

The United States of America reported a robust set of laws and regulations regarding the disclosure of assets by senior government officials. According to Title 5, US Code Appendix, sections 101-111, over 20,000 senior government officials are required to file exhaustive financial disclosure forms, which are publicly accessible. The reports require officials to declare all income-earning properties and assets held by the official or designated members of the official's family that earn greater than a specified minimum threshold per annum. These financial disclosures do not discriminate between assets held in the US and those held outside US borders, requiring officials to report all specified assets and properties, foreign and domestic.

A non-partisan, non-profit research group, the Center for Responsive Politics, uses these disclosure forms to communicate the assets and financial connections of US politicians in a widely used, searchable online database. The Center compiles data from the financial disclosure forms of prominent politicians in order to increase transparency regarding campaign finance.²⁵ Similar measures and tools should be adopted by States parties to include all senior government officials in order to increase the probability that suspicious properties, assets or income streams are identified and investigated. Full and transparent disclosure mechanisms will help ensure that high-risk PEPs are subject to enhanced financial scrutiny, creating significant obstacles to public corruption.

4. Mechanisms for International Cooperation for Freezing and Confiscation of Stolen Assets

Many reporting States parties indicated difficulties in recovering the proceeds of corruption when such proceeds were deposited in the banking and financial centres of some States of the Western European and Other Group. The challenges in receiving international cooperation and assistance are felt by countries that have the greatest need for assistance and are often plagued by lack of capacity, technical know-how, understanding of the requested State's legal and procedural systems, language barriers and other cultural differences. To improve international cooperation and overcome these barriers, States parties in the group can take a number of steps:

1. As reported by several States parties from the region such as the United Kingdom of Great Britain and Northern Ireland, Switzerland and the United States of America, States parties in the Group under consideration should endeavour to provide legal assistance to judicial and prosecuting authorities to the fullest extent possible without insisting on reciprocity, thus lowering the burdens of dual criminality and expanding the mechanisms to enforce a foreign order to freeze or seize suspected proceeds of corruption.

2. Make international cooperation in criminal matters, and the provision of mutual legal assistance in particular, a priority to actively assist asset tracing investigations.

²⁵ Williams Aled "International Experience of Asset Declarations" *U4 Helpdesk* Anti-corruption Resource Centre. <<http://www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query114.pdf>>. Accessed 8 October 2009

3. Several jurisdictions in this region, such as Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America, have successfully used their domestic anti-money laundering laws and financial regulatory bodies to pro-actively assist other States parties in triggering asset tracing investigations, many of which led to successful recovery of stolen assets either through civil or criminal proceedings in recent years. For example, a suspicious activity report filed in Switzerland led to the unravelling of the Montesinos' asset recovery case.

4. Actively participate in and enhance informal cooperation networks and channels between States parties to broaden the level of assistance rendered to requesting States parties. A number of networks of focal points have been developed to assist States parties to build capacity and disseminate and exchange information.

5. Publish MLA requirements and procedures, highlighting any special evidentiary requirements under domestic law.

5. Preservation of Assets without a Foreign Court Order

Less than 71% of reporting States parties in the Group had fully complied with article 54 paragraph 2(c), which provides for States parties to consider additional measures to preserve property for confiscation. The ability of a State party to restrain assets based on reasonable grounds before it receives a formal court order from a requesting State party is necessary to ensure that the assets are returned.

Norwegian law, reportedly empowers the country's judicial authorities to freeze, seize, or confiscate assets or properties acquired through a criminal act that may have taken place in a foreign State (Extradition Act, no. 39, sect 24), upon an MLA request, rather than a foreign court order. Additionally, section 192 of Norway's Criminal Procedure Act permits Norwegian authorities to apply coercive measures to properties *suspected* of being connected to a criminal act, for which a criminal charge may be pending. This legislative combination effectively allows Norway to respond to MLA requests from other States parties to preserve properties or assets acquired through a criminal act without the issuance of a foreign court order.

Appendix A

Generic Policy Recommendations

The generic recommendations provided in this Appendix include approaches and actions intended to improve the effectiveness of asset recovery mechanisms. It should be stated at the outset that the practices advocated here are not the result of the analysis of national self-assessment reports. Rather, they are a compilation of recommendations mainly extracted from publications of UNODC, the World Bank (e.g. UNCAC Technical and Legislative Guides, A Good Practices Guide for non-conviction based Asset Recovery) and other reputable (and quoted) sources. The recommendations contained in this Appendix address the following topics:

1. Anti-Money Laundering
2. Verification of Identity and Regulation of Financial Institutions
3. Civil Asset Recovery
4. International Cooperation in Confiscation of Assets
5. Mutual Legal Assistance (MLA)
6. Streamlining Processes and Procedures

A. Anti-Money Laundering (article 23)

1. Threshold Approach to Predicate Offences

It is recommended that States parties implement legislation that provides the widest range of predicate offenses for money laundering. Rather than creating a list of offenses, States parties should adopt a “threshold” or “all crimes” model, whereby any criminal offense of a sufficiently serious nature becomes a predicate offense to money laundering. Establishing a threshold model for defining predicate offenses guarantees that the transfer, conversion, use, acquisition, or receipt of the proceeds of any major criminal act may lead to anti-money laundering proceedings.²⁶

There are two primary models for establishing what constitutes a predicate offense. States parties may, as in the United States of America, create a large list of the specific crimes that are predicate offenses to money laundering. The United States of America has criminalized money laundering in the Money Laundering Control Act of 1986 (MCLA), codified principally at 18 U.S.C 1956-57. This Act creates potential liability for any person who conducts a monetary transaction or certain other activity knowing or with reason to know that the funds involved were derived from unlawful activity. Section 1956 covers the knowing and international transportation or transfer of monies derived from ‘specified unlawful activities’. This approach, however, may fail to encapsulate all the crimes that may lead to money laundering. Therefore, States parties should adopt a legislative framework that captures the widest array of predicate offenses. By doing so, any criminal offense that would result in a minimum sentence of prison time or severe enough

²⁶ Jae-myong Koh, *Suppressing terrorist financing and money laundering* (Springer, 2006)

fine would constitute a predicate offense.²⁷ As evidenced in the United Kingdom of Great Britain and Northern Ireland, this model guarantees that all major criminal acts are predicate offenses for money laundering, providing legal authorities with the most flexibility in prosecuting money laundering offenses.

2. Money Laundering Proceedings without Conviction of Predicate Offense

It is recommended that States parties implement domestic legislation to allow prosecution of money laundering without a criminal conviction for the underlying predicate offense. Money laundering is a crime prosecutable by itself, independent of conviction in the underlying predicate offense. Indeed, strong circumstantial evidence based on facts that laundered assets are the direct result of a criminal offense should be sufficient for initiating money laundering proceedings.²⁸ Domestic legal frameworks should not require criminal convictions of the predicate offense in order to prosecute money laundering cases, providing enhanced capabilities to legal authorities seeking to initiate money laundering proceedings in cases in which a prior conviction of a predicate offense is difficult or impossible to attain.²⁹

The UK's Proceeds of Crime Act 2002 provides legal authorities with such abilities. "Stand alone" money laundering investigations do not need to wait for a criminal conviction for the predicate offense (e.g. bribery of a foreign public official). Rather, the prosecution must only submit sufficient circumstantial evidence that indicates the laundered assets were the result of a criminal act in order to proceed in prosecuting a money laundering case.³⁰ The existence or suspicion of corruption, defined by Articles 15-22, and in conjunction with Article 28 will allow States parties to pursue anti-money laundering investigations independent of the outcome of other criminal investigations.

3. Strengthening the Use of Circumstantial Evidence to Link Proceeds of Crime to Predicate Offense

It is recommended that States parties take appropriate measures to allow the use of circumstantial evidence when linking the proceeds of crime to a predicate offense.

4. Enhanced Inter-Agency Cooperation in Money Laundering Proceedings

It is recommended that States parties implementing sound anti-money laundering (AML) frameworks also to promote inter-agency cooperation between their financial institutions, regulatory bodies and specialized AML units. There is a danger that money laundering investigations can occur in a vacuum, independent of the prosecution of the predicate offense. The financial investigation that would

²⁷ "Recommendation 1" *The 40 Recommendations* Financial Action Task Force on Money Laundering <http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html#r1>. Accessed 20 August 2009

²⁸ "Proving that Proceeds are the Benefit from Criminal Conduct in Money Laundering" *Money Laundering Offences – Part 7 Proceeds of Crime Act 2002*. Crown Prosecution Service. <http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_money_laundering/#Proving_that_pro_perty>. Accessed 19 August 2008

²⁹ Pieth Mark "Common Standards to Prevent and Control the Laundering of Corruption Proceeds." United Nations Global Programme against Corruption Expert Meeting 13-14 April 2000

³⁰ See, "Proving that Proceeds are the Benefit from Criminal Conduct in Money Laundering."

identify and prosecute a money laundering offense can be stifled by a lack of coordination and a lack of capacity within and among States parties' investigative and prosecutorial bodies.

In these situations, criminal investigators and prosecutors may be unaware of the circumstances of money laundering offenses stemming from predicate offenses. In other cases, a specialized financial investigatory unit may be in charge of the investigation, but have limited contact with the authorities prosecuting the predicate offense or lack the authority to prosecute money laundering offenses autonomously, independent of a criminal conviction for the predicate offense. In these situations, money laundering cases falter as prosecutors fail to secure a conviction for the underlying offense or ignore a money laundering investigation in favour of pursuing conviction on the predicate offense. Prosecutorial and investigative authorities must be given the proper authorization and capabilities to investigate the predicate offense in conjunction with the offense of money laundering in order to successfully identify, trace, freeze, seize and confiscate the proceeds of criminal acts.

The US Customs Service established the Money Laundering Coordination Center (MLCC) in 1999 in order to enhance cooperation amongst agencies prosecuting drug-trafficking and money laundering crimes. The MLCC serves to integrate money laundering investigations with investigations regarding the underlying predicate offences that facilitate money laundering through inter-agency information and capabilities sharing network. The efforts of the MLCC have allowed prosecutors to investigate and convict a number of criminals involved in drug trafficking and money laundering by coordinating investigations with units uniquely suited for both financial and traditional criminal investigations.³¹

5. Clear Definitions of Money Laundering in Domestic Statutes

It is recommended that States parties adopt the specific definitions of money laundering offenses provided by article 23 of UNCAC and integrate them into domestic legislation. Definitions of money laundering are diverse, simplistic and in many cases, obstructively narrow. The liberalization of financial flows and the emergence of new financial technologies and instruments, moreover, have made many generic definitions of money laundering obsolete. Ultimately, money laundering is always whatever State defines it to be in their domestic legislation. Efforts to curb transnational money laundering often rely on the nature of domestic legislation. Article 23 of UNCAC seeks to overcome these hurdles by clearly identifying offences that constitute money laundering through an agreed upon multilateral mechanism.

³¹ "The Colombian Black Market Peso Exchange" Embassy of the United States, Bogota, Colombia <http://bogota.usembassy.gov/topics_of_interest/money_laundering/toiml210699.html> Accessed 19 August 2008

B. Verification of Customer Identity and Regulation of Financial Institutions (article 52)

1. Verification of Customer Identity Standards

States parties must fulfil their obligations under the Convention to require financial institutions within their jurisdiction to identify customers and take reasonable steps to determine the beneficial owners and signatories of bank accounts and financial interests.

The prevention of money laundering critically depends on the diligence of reporting institutions in knowing their customers, especially politically exposed persons.³² Article 52 paragraph 1 purports to prevent the use of fake documentation in the establishment of a client relationship with financial institutions by requiring financial institutions to not only ‘identify’ their clients but also ‘verify’ the identity provided.³³ While cognizant that the implementation of some procedures may take time, UNCAC clearly requires that “all the necessary documents and verifications...be completed before allowing transactions above a reasonable level, or forbidding significant transactions, or transfers to and from foreign jurisdictions.”³⁴

Essential components of comprehensive Know Your Customer (KYC) programs include a solid customer acceptance policy, customer identification procedures, monitoring of transactions and risk management.³⁵ Banks must develop and abide by explicit criteria to verify the identity of any customer or beneficiaries by requiring documentation of identity, the nature of the business activity, and location of client in order to prevent the opening of anonymous accounts. For example, Brazil instituted Law N. 9,613/98 requiring “financial institutions... to identify their customers and maintain records of financial transactions as well as notify the Financial Intelligence Unit of suspicious or atypical transactions.”³⁶

³² Transparency International UK “Combating Money Laundering and Recovering Looted Gains” Transparency International UK: London, 2009 Available online: www.transparencycy.org.uk

³³ United Nations Office on Drugs and Crime, *Technical Guide to the United Nations Convention against Corruption*. United Nations: New York, 2009. 194

³⁴ Ibid.

³⁵ Reserve Bank of India, “Know Your Customer (KYC) Guidelines – Anti-Money Laundering Standards” DBOD.NO.AML.BC.58/14.01.001/2004-05 RBI-2004-05/284 November 2004. Accessible Online: <http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=2039&Mode=0>.

³⁶ Text taken from Article 52 of Brazil’s Self Assessment Report, *United Nations Office on Drugs and Crime* (2007)

Figure 31
Customer Identification Procedure: Features to be verified and documents that may be obtained from customers³⁷

Features	Documents
Accounts of individuals	(i) Passport (ii) PAN card (iii) Voter's Identity Card (iv) Driving license
Legal name and any other names used	(v) Identity card (subject to the bank's satisfaction) (vi) Letter from a recognized public authority or public servant verifying the identity and residence of the customer to the satisfaction of bank
<ul style="list-style-type: none"> Correct permanent address 	(i) Telephone bill (ii) Bank account statement (iii) Letter from any recognized public authority (iv) Electricity bill (v) Ration card (vi) Letter from employer (subject to satisfaction of the bank) (any one document which provides customer information to the satisfaction of the bank will suffice)
Accounts of companies	(i) Certificate of incorporation and Memorandum & Articles of Association (ii) Resolution of the Board of Directors to open an account and identification of those who have authority to operate the account (iii) Power of Attorney granted to its managers, officers or employees to transact business on its behalf (iv) Copy of PAN allotment letter (v) Copy of the telephone bill
<ul style="list-style-type: none"> Name of the company Principal place of business Mailing address of the company Telephone/Fax Number 	
Partnership firms	(i) Registration certificate, if registered (ii) Partnership deed (iii) Power of Attorney granted to a partner or an employee of the firm to transact business on its behalf (iv) Any officially valid document identifying the partners and the persons holding the Power of Attorney and their addresses (v) Telephone bill in the name of firm/partners
<ul style="list-style-type: none"> Legal name Address Names of all partners and their addresses Telephone numbers of the firm and partners 	
Accounts of trusts & foundations	(i) Certificate of registration, if registered (ii) Power of Attorney granted to transact business on its behalf (iii) Any officially valid document to identify the trustees, settlers, beneficiaries and those holding Power of Attorney, founders/managers/ directors and their addresses (iv) Resolution of the managing body of the foundation/association (v) Telephone bill
<ul style="list-style-type: none"> Names of trustees, settlers, beneficiaries and signatories Names and addresses of the founder, the managers/directors and the beneficiaries Telephone/fax numbers 	

³⁷ Reserve Bank of India "Know Your Customer (KYC) Guidelines – Anti-Money Laundering Standards." DBOD.NO.AML.BC.58/14.01.001/2004-05. RBI-2004-05/284 November 2004, Annex II. Accessible Online: <http://www.rbi.org.in/scripts/NotificationUser.aspx?Id=2039&Mode=0#A2>

2. Identification of Beneficial Owners of High-Value Accounts

It is recommended that States parties take steps to determine the identity of beneficial owners of high-value accounts.

A beneficial owner refers to any person with direct or indirect interest in or control over assets or transactions, regardless of whether this person serves as the official account holder.³⁸ Article 52 paragraph 1 requires that State parties ensure financial institutions take reasonable steps to verify the identification of beneficial owners of high-value accounts in order to prevent the use of third persons holding the proceeds of crime on behalf of corrupt individuals.³⁹ Global Witness, a non-governmental organization studying illicit financial flows, suggests that each country publish an online registry of the beneficial ownership of all companies and trusts to assist banks in avoiding corrupt funds.⁴⁰ Financial operators are urged to not enter into business relations when companies' schemes designed to guarantee anonymity make such disclosure impossible.⁴¹

3. Enhanced Scrutiny of Politically Exposed Persons (PEPs)

It is recommended that States parties require their financial institutions to conduct enhanced scrutiny of accounts held by PEPs and set up a system of suspicious transaction reports for the benefit of relevant competent authorities.

The precise definition of PEPs remains highly debated within international spheres. This ambiguity has obvious negative implications for targeting individuals to whose accounts financial institutions will be expected to apply enhanced scrutiny. The Financial Action Task Force (FATF) defines PEPs as "individuals who are or have been entrusted with prominent public functions in 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, or important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves⁴²." States should conform their legal definitions of PEPs to such standards and consider expanding such definitions to domestic prominent officials. Notably, this definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

To comply with article 52 paragraph 2(b), domestic regulators are required to notify financial institutions within their jurisdiction of PEPs. State parties should also generate types of roles and government positions occupied by PEPs to be communicated to other State parties in order to help them identify and apply enhanced scrutiny to PEPs' accounts abroad. Mexico serves as one example of a

³⁸ United Nations Office on Drugs and Crime (UNODC) *Technical Guide to the United Nations Convention against Corruption*. United Nations: New York, 2009. 69

³⁹ Ibid, 194.

⁴⁰ Global Witness, *Undue Diligence: How banks do business with corrupt regimes*. Global Witness, March 2009, 6

⁴¹ United Nations Office on Drugs and Crime *The Global Programme Against Corruption: UN Anti-Corruption Toolkit*, 3rd edition Vienna, September 2004, 441

⁴² Financial Action Task Force on Money Laundering. *The Forty Recommendations*. FATF, France June 2003 <http://www.u4.no/pdf/?file=/document/literature/fatf-2003-money-laundering-forty-recommendations.pdf>

country whose regulators go as far as to explicitly name specific governmental departments and public offices – including the titles of the respective officeholders – in their PEP definition and regulatory compliance requirements⁴³. World-Check, a commercial database of heightened risk individuals, also recommends that institutions conduct regular PEP screening of the entire customer database in the event that one of the institution’s existing customers is elected, thus becoming a PEP⁴⁴.

Additionally, PEP databases are the most useful when State parties are actively engaging and identifying PEPs. Commercial organizations such as Dow Jones Watch list and World-Check, which aggregate information from watch lists across the world, rely in part on information provided by States and international organizations. Therefore, helping financial institutions scrutinize PEP accounts requires active participation in identification from States parties.

4. Maintain Financial Records

Article 52 paragraph 3 instructs State parties to implement measures ensuring that their financial institutions maintain adequate records over an “appropriate period of time.”⁴⁵

FATF Recommendation 10 suggest that financial institutions “Maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved if any) so as to provide, if necessary, evidence for prosecution of criminal activity.”⁴⁶

While article 52 paragraph 3 does not explicitly mention how long the records should be maintained, several sources note that countries should take into consideration the extensive time period over which cases occur. Additionally, the Wolfsberg Group has developed a series of AML recommendations for member banks, covering both the need for a system of ongoing monitoring to track accounts with increased activity, potentially unusual or suspicious activities, or known PEPs.⁴⁷

5. Prevent the Establishment of Shell Banks

Article 52 paragraph 4 is designed to prevent the use of “shell banks,” defined as banks that have “no physical presence (i.e. meaningful mind and management) in the country where they are incorporated and licensed and are not affiliated to any financial services group that is subject to effective consolidated supervision.”⁴⁸

⁴³ World-Check “*Politically Exposed Person*”: *Refining the PEP Definition*, Edition II. Global Objectives Limited, 2008, 6

⁴⁴ Ibid.

⁴⁵ Article 52 paragraph 3 *United Nations Convention against Corruption*. United Nations Office on Drugs and Crime, Vienna, Austria (2004)

⁴⁶ FATF Recommendations 10

⁴⁷ Wolfsberg 2002b, The Wolfsberg Anti-Money Laundering Principles for Correspondent Banking (21 October 2002). Section 5. Accessible online: <http://www.wolfsberg-principles.com/privat-banking.html>

⁴⁸ Basel Committee on Banking Supervision *Shell Banks and Booking Offices*, Bank for

Shell banks are frequently used to channel proceeds of crime, particularly because the lack of a physical presence makes them difficult to track. The FATF 40 Recommendations also urge countries to discourage the establishment or continued operation of shell banks. For example, Colombia's Decreto 663 de 1993 - Estatuto Orgánico del Sistema Financiero - sets down requirements for the establishment of a financial institution or corporation including frequent inspections by la Superintendencia Financiera de Colombia.

While not mandatory under the Convention, State parties are encouraged to take all appropriate measures to restrict their domestic financial institutions from entering into or continuing correspondent banking relationships with shell banks or financial institutions that permit their use.⁴⁹

6. Public Officials Asset Disclosure Forms

It is recommended that States parties establish voluntary disclosure forms for all senior public officials, politically prominent individuals and their close associates as prescribed by article 8 paragraph 5 and article 52 paragraphs 5 and 6 of the UN Convention against Corruption. It is worth recalling that article 8 paragraphs 5 calls for the disclosure not only of wealth, but also of activities, employments, investments, substantial gifts or benefits from which a conflict of interest may result with respect to the performance of a public function.

Article 52 paragraphs 5 and 6 reflect the growing use of disclosure forms (both voluntary and mandatory) as tools for asset recovery practitioners to initiate recoveries. When public officials declare their assets, asset recovery practitioners are able to better establish reasonable suspicions that the assets are the proceeds of crime. Failure to disclose all assets should be sanctioned with fines and possible dismissal from service. Disclosure forms can act as supporting evidence in cases where investigators need a reasonable basis for the suspicion of criminal conduct. Recoveries by the Nigerian Economic and Financial Crimes Commission (EFCC) in the United Kingdom of Great Britain and Northern Ireland against Nigerian Delta State Governor Dieprieve Alamiyeseigha were initiated through the use of public disclosure forms to demonstrate reasonable suspicion.⁵⁰

C. Asset Recovery through the Civil Process (articles 53)

A. Enable foreign States Parties to Initiate Civil Action

It is recommended that States parties review their domestic legislation to ensure that there are no restrictive criteria or other legal roadblocks preventing a foreign State

International Settlements 2003

⁴⁹ Financial Action Task Force on Money Laundering *The Forty Recommendations* FATF; France: June 2003, 18. <http://www.u4.no/pdf/?file=/document/literature/fatf-2003-money-laundering-forty-recommendations.pdf>

⁵⁰ Edmond Angell Palmer and Dodge UK LLP "Recovering Stolen Assets: A Case Study" presented at IBA Conference, Paris 24-25 April 2008 (p.4) available at <http://www.assetrecovery.org/kc/node/f7bcef36-e7c9-11dd-859a-ab8cb1c9747f.27>

party from initiating civil proceedings as a plaintiff to establish ownership of property.⁵¹

Civil action has become a successful alternative legal strategy in recovering the proceeds of corruption. Important cases, in the United Kingdom of Great Britain and Northern Ireland against corrupt officials including former Zambian President Frederick Chiluba and Nigerian Plateau State Governor Joshua Chibi Dariye as well as worldwide recoveries by the Kuwaiti Investment Organization (KIO), have demonstrated that civil processes can be an effective tool in recovering the proceeds of corruption.⁵²

From 1989-1992, the London-based Kuwaiti Investment Office (KIO) lost US \$1.2 billion as the result of conspiracy of top management officials. A team of lawyers representing the Kuwaiti government used a combination of non-conviction based forfeiture (NCBF) and civil litigation against both persons and banking institutions connected to KIO to recovery US \$548 million. Although civil litigation was acknowledged to be expensive, it was credited as the best strategy to retain control of the investigation and prioritize the recovery of assets.⁵³

In certain conditions, civil processes are the only route available to recover the proceeds of crime. When a corrupt official has died, fled the jurisdiction, or is immune from prosecution, civil litigation can provide several benefits. These include not requiring the presence of the defendant to effect judgment, less resource intensive evidence gathering procedures, increased flexibility to employ third parties as consultants, use of “balance of probabilities” instead of “beyond a reasonable doubt” burden of proof, and availability of summary judgments and injunctions.

However, use of civil action raises several practical concerns in civil law jurisdictions as civil action aimed at confiscation is traditionally a common law procedure and hence the provisions of article 53 are more difficult to implement in civil law countries. However several civil law jurisdictions have alternative and sometimes creative ways of obtaining direct recovery of property without the criminal conviction of the plaintiff. Additionally, State parties attempting to directly recover assets must consider what legal standing they would possess when initiating litigation in another State party’s courts. Some State parties’ domestic legislation provides foreign State parties with legal standing as a “special category” of plaintiff and grants them a higher original jurisdiction. At times, this can present a problem as pressing a civil claim in a higher court rather than a court of first instance may curtail a defendant’s procedural rights and can add to significant delay through a lengthy appeal process.

⁵¹ UNCAC Legislative Guide (p.259)

⁵² Mohammed A. A. Al Moqatei *Stolen Asset Recovery: A Case from Kuwait* in Theodore S. Greenberg, Linda M. Samuel, and Wingate Grant, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, Pap/Cdr. (World Bank Publications, 2009)

⁵³ “Recovery of Corruption-related Offenses” *U4 Helpdesk*. U4 Anti-corruption Resource Centre <<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=4>>. Accessed 20 August 2009

B. Enable Courts to Recognize State Party as Prior Legitimate Owner

It is recommended that States parties enable their domestic courts to recognize a foreign State party as the legitimate owner of a property acquired through the commission of an offence covered by the Convention.

Article 53 paragraph (c) requires that courts be legally empowered to recognize foreign State party's claims as a legitimate third party owner of property that has been confiscated following the commission of an offense of corruption. However, States parties should ensure that foreign States parties have *expansive* legal standing to pursue litigation necessary for confiscation. If legal standing in States parties' courts is restricted to cases involving a close causal connection or requiring evidence of damage, restrictive access to civil courts may allow for only recoveries of assets that were the proceeds of embezzlement (a direct connection) and exclude the proceeds of bribery (an indirect connection).⁵⁴ Finally, in States parties' domestic courts that are less familiar with using civil litigation, special procedures may need to be outlined in order to protect the rights of the State party as plaintiff as well as the rights of the defendants.

For example, in 2005, the London Metropolitan Police did not object to Nigeria claiming GBP 9.5 million in cash that was being laundered by Nigerian Delta State Governor Alamiyeseigha.⁵⁵ Although the confiscated assets were in violation of United Kingdom money laundering laws, the London Metropolitan Police exercised full cooperation and after receiving an appropriate court order, disclosed information that assisted in a recovery through a civil action.

Notably, civil actions are *in personam* and remain distinct from *in rem* forfeiture or other types of "Non-Conviction Based Forfeiture" (NCBF), which is still connected to the criminal process.^{56, 57} For more explanation on Non-Conviction Based Forfeiture, please see the Stolen Asset Recovery Initiative's *Stolen Assets: A Good Practitioners Guide* (2009).

C. Enable Courts to Order Compensation to a State Party

It is recommended that States parties undertake measures to enable their domestic courts to order individuals within their jurisdictions to pay compensation or damages to a foreign State party that has been harmed by the commission of offences of corruption established in accordance with the Convention.

Article 53 paragraph (b) requires that State parties' domestic courts be capable of awarding compensation or damages to another State party for offences covered by the Convention. Without the ability to enforce an order or judgment for compensation or damages in favour of a foreign State party, private civil litigation yields little benefit to States parties. Offences that could be subsumed under this

⁵⁴ "Practical Challenges and solutions" in II.1 Ensuring Legal Standing in Technical Guide to the United Nations Convention against Corruption (2009) Produced by United Nations Office on Drugs and Crime and United Nations Interregional Crime and Research Institute (p.203)

⁵⁵ Edwards Angell Palmer & Dodge *Recovering stolen assets: a case study* IBA Conference, Paris 24-25 April 2008

⁵⁶ Stolen Asset Recovery Initiative's *Non-Conviction Based Asset Forfeiture Guide* (p.117) available at <http://www.worldbank.org/star>

⁵⁷ Legislative guide for the implementation of the United Nations Convention against Corruption—Chapter V Asset Recovery (p.244)

provision include offenses where funds were not directly siphoned off from the foreign State party, but caused a harm that requires compensation. Such offences include bribery, trading in influence and abuse of function, concealment, illicit enrichment or money laundering.

While property over which a requesting State party claims prior legitimate ownership is likely to be uncontested by the requested State party, it is more difficult to demonstrate a direct link between harms caused by bribery related offences and the asset being recovered. Therefore, State parties' domestic courts need to be capable of recognizing non-material harms caused by offences covered by the Convention and determining compensation/damages on separate legal grounds to enable recovery.

D. Non-Conviction Based Forfeiture (article 54 paragraph 1(c))

It is recommended that States parties implement appropriate legislative frameworks to permit their competent authorities to freeze, seize, or confiscate the proceeds of criminal offenses as established in accordance with UNCAC, *without* requiring a criminal conviction.

In many cases, States parties find it impossible to prosecute criminals responsible for corruption due to death, flight, or political or legal immunity from prosecution.⁵⁸ Article 54 paragraph 1(c) calls upon States parties to permit their competent authorities to issue confiscation orders on the proceeds of a crime even in cases where conviction of the offense is impossible to secure. This form of non-conviction based forfeiture empowers the legal authorities of States parties to confiscate the proceeds of crime in cases where prosecution is impossible given "death, flight, or absence or...other appropriate cases," such as political immunity.

Civil actions can be highly successful in recovering stolen assets. In 2005 and 2007, Nigeria successfully brought civil action suits against more than US \$6m of assets stolen by Joshua Dariye and hidden in the United Kingdom of Great Britain and Northern Ireland. Despite this success, though, Nigeria's domestic legislation still does not permit civil action to be brought against assets in Nigerian courts.⁵⁹ The recent publication *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture*, by Theodore S. Greenberg, Linda M. Samuel, and Wingate Grant, World Bank Publications (2009), can be a valuable resource for countries seeking to implement civil recovery (See <http://www.worldbank.org/star>).

E. International Cooperation for the Confiscation of the Proceeds of Crime (articles 45 and 55)

1. Direct Execution of Foreign Orders and Requests

It is recommended that States parties implement a domestic legislative framework that permits their competent authorities to directly execute freezing, seizure or

⁵⁸ "Recovery of Proceeds of Corruption in Criminal Proceedings" *Mutual Legal Assistance, Extradition, and Recovery of Proceeds of Corruption in Asia and the Pacific* ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (2006): 85

⁵⁹ "Joshua Chibi Dariye" *Asset Recovery Knowledge Centre*. International Centre for Asset Recovery <<http://www.assetrecovery.org/kc/node/44186379-8580-11dd-81c3-399112e3d573.47>>. Accessed 9 October 2009

confiscation orders or requests issued by a foreign court. Direct execution substantially reduces the time, financial and judicial resources needed to institute a second round of adjudication to secure a domestic order.⁶⁰

Article 54 paragraphs 1(a) and 2(a) require that States parties take necessary measures for their competent authorities to “give effect to an order of confiscation issued by a court of another State party,” and to “freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State party that provides a reasonable basis...” for the local authorities to issue a freezing order.^{61, 62}

States parties have two mechanisms they can use to implement this provision: 1) permit their competent authorities to register and execute foreign orders and requests directly; or 2) permit their competent authorities to submit a foreign order or request to the appropriate domestic court in order to enforce confiscation.⁶³

2. Designating a Central Authority for Mutual Legal Assistance

It is recommended that States parties designate a single central authority for providing assistance with the submission of foreign orders and incoming requests to domestic courts. A central authority should have the autonomy and resources necessary to register and execute foreign confiscation orders, submit foreign requests to the appropriate domestic courts, and to assist other States parties in drafting and submitting requests. Additionally, the central authority should provide potential requesting States parties with a comprehensive list of standards and requirements that foreign orders and requests must include for enforcement.

3. Capacity to Freeze Assets upon Order from a Foreign Court

It is recommended that States parties implement domestic legislation necessary to permit their competent authorities to execute freezing, seizure, or confiscation orders and requests from foreign courts *and* other competent authorities.

During criminal investigations, it is often imperative that authorities prevent identified stolen assets from being transferred to another jurisdiction, hampering prosecution, and recovery efforts. Articles 54 paragraphs 2(a) and 2(b) arm the competent authorities of a State party to issue interim or provisional freezing and seizure orders at the request of a foreign State party in anticipation of a criminal conviction or final forfeiture judgment by the foreign courts

Additionally, States parties should publish guidelines and procedures on appropriate websites that explain the contents and other requirements of pre-judgment orders and requests for freezing and seizure of assets.

⁶⁰ “Recovery of Proceeds of Corruption in Criminal Proceedings” *Mutual Legal Assistance, Extradition, and Recovery of Proceeds of Corruption in Asia and the Pacific* ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (2006): 83

⁶¹ Article 54 1(a) *United Nations Convention against Corruption*, United Nations Office on Drugs and Crime Vienna, Austria: 2004

⁶² Article 54 2(a) *United Nations Convention against Corruption*, United Nations Office on Drugs and Crime Vienna, Austria: 2004

⁶³ “Mechanisms for Recovery and International Cooperation” *Legislative Guide for the Implementation of the United Nations Convention against Corruption* United Nations Office on Drugs and Crime Vienna, Austria (2006): 251-252.

In 1999, the Swiss authorities issued a provisional freezing order against assets looted by former Nigerian ruler Sani Abacha at the request of Nigerian officials investigating the Abacha's corrupt practices. While the Swiss authorities initially required a final forfeiture judgment by a Nigerian court, lawyers for Nigeria successfully argued that the connection between the assets and Abacha's criminal actions were undeniable, justifying the original confiscation orders.⁶⁴

4. Preservation of Assets for Confiscation without a Foreign Court Order

It is recommended that States parties empower their competent authorities to issue domestic orders for freezing and seizing assets without a formal request from a foreign court or competent authority on the basis of criminal charges, arrest warrants, or other measures indicating serious suspicion of corruption-related offenses. States parties that empower their competent authorities to issue freezing and seizure orders pre-emptively can prevent the transfer of identified stolen assets beyond the reach of law enforcement.

Article 54 paragraph 2(c) encourages States parties to provide broad discretion to "*preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge....*" Article 54 paragraph 2(c) enhances 2(a) and 2(b) by permitting States parties' competent authorities to *anticipate* and pre-empt a foreign order or request for freezing and seizure during the early stages of a foreign criminal investigation.⁶⁵

Swiss authorities exercised such discretion in October 2000, when they froze assets associated with former Peruvian intelligence director Vladimiro Montesinos. A Zurich district attorney, after receiving reports of suspicious account activity and learning of Montesinos' flight to Panama (and subsequent charges of bribery and human rights violations) ordered the accounts frozen. She then notified Peruvian officials of the stolen assets, preventing Montesinos from accessing and transferring the assets beyond the reach of investigators.⁶⁶

5. Better International Outreach and Communications

It is recommended that States parties endeavour to find better methods of communication in a spirit of pragmatism and openness in order to communicate each other's capabilities and find innovative ways to create avenues for cooperation.

⁶⁴ "Challenges and Opportunities: Findings from Case Studies." *Stolen Asset Recovery Initiative: Challenges, Opportunities, and Action Plan* International Bank for Reconstruction and Development Washington, DC (2007): 19

⁶⁵ "Provisional Measures for the Eventual Confiscation of Assets" *Technical Guide to the United Nations Convention against Corruption* United Nations Office on Drugs and Crime Vienna, Austria (2006): 208

⁶⁶ Efforts to Recover Assets Looted by Vladimiro Montesinos of Peru" *Asset Recovery Knowledge Center* International Centre for Asset Recovery
<<http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=1aafec73-a345-11dc-bf1b-335d0754ba85>>. Accessed 20 August 2009

6. Enhancing International Cooperation through Informal Networks

It is recommended that States parties provide domestic legal authorities with the training and resources necessary to foster international working relationships with legal authorities across the globe, particularly in major financial and international banking centres and in States parties most vulnerable to corruption.

A State party's willingness to execute a foreign freezing, seizure, or confiscation request or order is often based on the State party's own domestic laws *and* the "nature of its relationship with the requesting state."⁶⁷ Legal authorities processing or implementing a foreign request or order often make the difference between a successful execution of a MLA or other request for cooperation and a failure.

In 2007, two Dutch professors studied five Western European states' international confiscation efforts. One of their key findings was that "successful cooperation in executing a mutual assistance request – in all stages of the confiscation procedure, but particularly in the seizure and execution stages – is linked to personal contacts. The building of personal relationships, preferably through meetings, was a success factor in all countries studied. In contrast, the lack of a personal network, or the lack of incentives to build or maintain a personal network, hinders the practice and constitutes a bottleneck in international cooperation in confiscation matters."⁶⁸

Legal authorities in requesting States will benefit greatly by establishing relationships with their foreign counterparts to request information on the measures necessary to properly draft an MLA request and seek advice on the legal and procedural requirements of the requested State.

F. Mutual Legal Assistance

Mutual Legal Assistance (MLA) in criminal matters can be defined as a process by which the requested State party executes within its jurisdiction and territories, an official act to gather evidence on a specific criminal case that is under investigation or is being prosecuted in the requesting State party. In the context of financial investigations for the purposes of freezing and seizing assets, MLA can cover an ever-expanding range of acts including bank account inquiries, searches of private and business premises and leading up to confiscation of assets, transfer of evidence that will aid the requested State party's proceedings and extradite offenders. It is important to note that MLA is a formal process requiring careful drafting of the request that meets the often stringent requirements of the requested party. The submission of evidence and supporting documentation with the MLA request is critical. A significantly wide range of assistance is handled through more informal police-to-police contacts for situations in which coercive measures are not required. Article 55 of the UNCAC comes into play when States parties have empowered their legal systems to take the actions necessary for the recovery of stolen assets.

⁶⁷ "Building Working Relationships in Mutual Legal Assistance and Informal Assistance" *Combating Money Laundering and Recovering Looted Gains: Raising the UK's Game*, Transparency International London, UK (2009): 43.

⁶⁸ Matthias Borgers and Johannes Moor, "Targeting the Proceeds of Crime: Bottlenecks in International Cooperation" *European Journal of Crime, Criminal Law and Criminal Justice* (2007) 1-22.

Article 55 requires States parties to carry out valid requests for evidence collection and the freezing, seizing and confiscation of the proceeds of crime.

A key issue in developing the international cooperation requirements is the scope or range of offences to which they would apply. Between State parties there are a number of significant issues concerning the presence of uniform and reciprocal legislation and offences, resulting in a more flexible and accommodating approach. Dual criminality requirements have been narrowed as much as possible within the fundamental legal requirements of those States which cannot criminalize some of the offences established by UNCAC. On the other hand, offenders may be extradited without dual criminality where this is permitted by the law of the requested State party and, although mutual legal assistance may be refused in the absence of dual criminality, this may only be accepted if the assistance requested involves some form of coercive action, such as arrest, search or seizure.

Thus States parties are encouraged to allow a wider scope of assistance without dual criminality where possible with an understanding that should be applicable to all forms of cooperation: where dual-criminality is required, it must be based on the fact that the relevant States parties have criminalized the conduct underlying an offence, and not whether the exact elements of the offence coincide.

G. Streamlining Processes and Procedures

Dealing with high case-loads and foreign states' unique requirements means that States parties have a lot of work cut out for them. Process Management, which is *"the planning and administering the activities necessary to achieve a high level of performance in a process and identifying opportunities for improving quality, operational performance and ultimately customer satisfaction. It involves design, control and improvement of key business processes"*⁶⁹. It is recommended that State central authorities regard foreign States parties as their customers and afford them a high level of service. In this respect, the following is recommended:

1. Develop and publish standards and guidelines for processing orders and requests from States parties and for submitting States parties' own orders and requests to other jurisdictions.
2. It would be helpful for competent authorities to have process charts detailing the necessary steps and prescribed timeframes for processing.
3. Ensure that competent authorities have adequate resources for timely and accurate processing of orders and requests taking into account anticipated increases in international requests. For example, if a country sees a tenfold increase in requests for international cooperation without allocating additional staffing and funds, this will invariably result a considerable backlog and confusion.
4. Each State party designates points of contact to provide information and guidance to other States parties. E.g. StAR Focal Points.⁷⁰

⁶⁹ Definition of Process Management Available at <http://www.stile.coventry.ac.uk/cbs/staff/beeceh/BOTM/Glossary.htm>

⁷⁰ "Interpol Website "Launch of the Stolen Asset Recovery (StAR) Database" available at <http://www.interpol.int/Public/corruptionStar/default.asp>.

5. Establish information technology infrastructure to facilitate effective handling of requests, data security and case-management.
6. Include training programs to build competency and knowledge management to develop good implementing practices. Technical assistance channels can be utilized to actively build capacity and obtain international knowledge and exposure.
7. Improve inter-agency coordination through memorandums of understanding and other agreements and resolve any jurisdictional issues.
8. Not all gaps in compliance with the Convention are the result of legislative issues or institutional capacity. Several States parties have sufficient internal legislation and capable institutions to combat predicate offences and cooperate internationally, but there is a strong need to think “outside the box” and find creative ways to tackle a foreign State party’s domestic legal system and the myriad ways of offering each other assistance and meeting common objectives to recover stolen proceeds.

Appendix B

Regional Comparison Tables for each article as reported by States parties in their self-assessment reports

Article 23, paragraph 1(a)

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	69%	8%	23%
Asian Group	73%	27%	0%
Eastern European Group	100%	0%	0%
Group of Latin American and the Caribbean	65%	35%	0%
Group of Western European and Others	100%	0%	0%

Article 23, paragraph 1(b)

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	71%	21%	7%
Asian Group	73%	27%	0%
Eastern European Group	100%	0%	0%
Group of Latin American and the Caribbean	56%	44%	0%
Group of Western European and Others	100%	0%	0%

Article 23, paragraph 2 (a) (b) (c) (e)

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	71%	21%	7%
Asian Group	67%	20%	13%
Eastern European Group	93%	7%	0%
Group of Latin American and the Caribbean	56%	31%	13%
Group of Western European and Others	94%	6%	0%

Article 52 paragraph 1 Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	72%	14%	14%
Asian Group	60%	40%	0%
Eastern European Group	81%	19%	0%
Group of Latin American and the Caribbean	65%	35%	0%
Group of Western European and Others	71%	29%	0%

Article 52 paragraph 2A Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	72%	14%	14%
Asian Group	57%	21%	21%
Eastern European Group	87%	13%	0%
Group of Latin American and the Caribbean	71%	29%	0%
Western European and Others Group	75%	19%	6%

Article 52 paragraph 2B Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	79%	0%	21%
Asian Group	50%	36%	14%
Eastern European Group	73%	13%	13%
Group of Latin American and the Caribbean	60%	13%	27%
Western European and Others Group	69%	13%	27%

Article 52 paragraph 3: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	79%	7%	0%
Asian Group	71%	21%	7%
Eastern European Group	100%	0%	0%
Group of Latin American and the Caribbean	88%	6%	6%
Western European and Other Group	94%	6%	0%

Article 52 paragraph 4: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	71%	14%	7%
Asian Group	64%	21%	14%
Eastern European Group	100%	0%	0%
Group of Latin American and the Caribbean	75%	19%	6%
Western European and Others Group	94%	6%	0%

Article 52 paragraph 5: Regional Compliance Table

Region	Fully	Partially	Non-
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	Compliant	Compliant	Compliant
African Group	79%	14%	7%
Asian Group	57%	35%	7%
Eastern European Group	80%	20%	0%
Group of Latin American and the Caribbean	56%	38%	6%
Western European and Others Group	75%	12.5%	12.5%

Article 52 paragraph 6: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	72%	14%	14%
Asian Group	57%	14%	29%
Eastern European Group	73%	13%	13%
Group of Latin American and the Caribbean	40%	40%	20%
Western European and Others Group	59%	12%	29%

Article 53 paragraph 1: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	14%	29%
Asian Group	38%	25%	38%
Eastern European Group	88%	12%	0%
Group of Latin American and the Caribbean	38%	19%	44%
Western European and Others Group	94%	6%	0%

Article 53 paragraph 2: Regional Compliance Table

Region	Fully	Partially	Non-
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	Compliant	Compliant	Compliant
African Group	50%	21%	29%
Asian Group	27%	27%	47%
Eastern European Group	81%	6%	13%
Group of Latin American and the Caribbean	27%	20%	53%
Western European and Others Group	100%	0%	0%

Article 53 paragraph 3: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	50%	21%	29%
Asian Group	47%	13%	40%
Eastern European Group	69%	19%	13%
Group of Latin American and the Caribbean	31%	25%	44%
Western European and Others Group	88%	0%	13%

Article 54 paragraph 1A: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	29%	14%
Asian Group	53%	20%	27%
Eastern European Group	86%	7%	7%
Group of Latin American and the Caribbean	50%	13%	37%
Western European and Others Group	94%	6%	0%

Article 54 paragraph 1B: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	21%	21%
Asian Group	50%	36%	14%
Eastern European Group	85%	7%	7%
Group of Latin American and the Caribbean	56%	13%	31%
Western European and Others Group	94%	6%	0%

Article 54 paragraph 1C: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	50%	14%	36%
Asian Group	43%	29%	29%
Eastern European Group	64%	21%	14%
Group of Latin American and the Caribbean	38%	6%	56%
Western European and Others Group	75%	6%	19%

Article 54 paragraph 2A: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	21%	21%
Asian Group	64%	14%	21%
Eastern European Group	93%	7%	0%
Group of Latin American and	64%	14%	21%

the Caribbean			
Western European and Others Group	100%	0%	0%

Article 54 paragraph 2B: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	50%	29%	21%
Asian Group	57%	29%	14%
Eastern European Group	93%	7%	0%
Group of Latin American and the Caribbean	40%	13%	47%
Western European and Others Group	94%	0%	6%

Article 54 paragraph 2C: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	21%	21%
Asian Group	43%	36%	21%
Eastern European Group	71%	21%	7%
Group of Latin American and the Caribbean	47%	13%	40%
Western European and Others Group	71%	0%	29%

Article 55 paragraph 1: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
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African Group	57%	21%	21%
Asian Group	47%	27%	27%
Eastern European Group	79%	21%	0%
Group of Latin American and the Caribbean	44%	25%	31%
Western European and Others Group	94%	6%	0%

Article 55 paragraph 2: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	14%	29%
Asian Group	43%	36%	21%
Eastern European Group	79%	14%	7%
Group of Latin American and the Caribbean	44%	19%	37%
Western European and Others Group	94%	0%	6%

Article 55 paragraph 3: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	7%	36%
Asian Group	43%	36%	21%
Eastern European Group	86%	7%	7%
Group of Latin American and the Caribbean	47%	20%	33%
Western European and Others Group	100%	0%	0%

Article 57 paragraph 1: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	50%	21%	29%
Asian Group	40%	33%	27%
Eastern European Group	64%	29%	7%
Group of Latin American and the Caribbean	53%	13%	33%
Western European and Others Group	88%	12%	0%

Article 57 paragraph 2: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	7%	36%
Asian Group	33%	13%	53%
Eastern European Group	71%	14%	14%
Group of Latin American and the Caribbean	40%	27%	33%
Western European and Others Group	94%	6%	0%

Article 57 paragraph 3: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	57%	14%	29%
Asian Group	29%	21%	50%
Eastern European Group	64%	29%	7%
Group of Latin American and the Caribbean	29%	21%	50%

Western European and Others Group	81%	6%	13%
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Article 57 paragraph 4: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	38%	8%	54%
Asian Group	31%	8%	62%
Eastern European Group	57%	7%	36%
Group of Latin American and the Caribbean	33%	13%	53%
Western European and Others Group	81%	0%	19%

Article 57 paragraph 5: Regional Compliance Table

Region	Fully Compliant	Partially Compliant	Non-Compliant
African Group	36%	14%	50%
Asian Group	38%	15%	46%
Eastern European Group	43%	14%	43%
Group of Latin American and the Caribbean	53%	7%	40%
Western Europe and Others Group	80%	0%	20%