

Integrity & Anti-Corruption in the G20: the Post-2014 Agenda
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**CREATING HAVENS FOR THE ANTI-CORRUPT: TAX TRANSPARENCY AND
FINANCIAL INTEGRITY**

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I. INTRODUCTION

Wildlife trafficking has increasingly become a lucrative business for transnational organized crime groups and gains. The level of poaching of elephants and rhinos has proliferated to such an extent that some of the species in several national parks and countries are in danger of extinction. An important solution is the use of money laundering and asset recovery to cross-border aspects of international wildlife trafficking. A particularly successful mechanism in the United States has been the use of a statute that enables courts to order defendants, after they are found guilty, to pay their fines to the Multinational Species Conservation Fund, which supports international efforts to protect critically endangered species around the world.

As some developed countries earn record fines and monetary penalties against multinational corporations which are found guilty of transnational bribery, the international (and especially the development community) are challenged to find mechanisms to provide capacity and motivation to developing countries, where most transnational bribes occur. The first part of this paper looks at ways to improve mechanisms whereby developing countries can share in the enormous fines and penalties paid, gain early access to the evidence, so that they may consider bringing prosecutions, and participate in restitution efforts.

The second section discusses some problems in foreign bribery settlements, whereby huge fines and monetary penalties are levied and only 3% of the penalties are shared with the source country of the bribe, which tend to be developing countries. In addition, the source countries receive very little information about the crimes and hence have difficulties holding the persons in their countries who participated in the transnational bribe accountable.

The third section discusses the laws of transparency and whistleblowing, particularly using asset disclosure information to identify Politically Exposed Persons and laws to facilitate and encourage whistleblowers.

The fourth section discusses the interplay between automatic exchange of information, particularly the Foreign Account Tax Compliance Act (FATCA), and economic sanctions, in the context of the U.S. suspension of negotiations of a FATCA intergovernmental agreement (IGA) as a result of the Russian sanctions.

For each of these issues the paper suggests remedies.

II. USING ANTI-MONEY LAUNDERING PROSECUTIONS AND ASSET RECOVERY AGAINST WILDLIFE TRAFFICKING

Effectively combatting wildlife crime, especially trafficking in ivory and rhino horns, requires the use of international money laundering laws to prosecute the perpetrators, including the intermediaries, and seize, forfeit, and share with the source countries the instrumentalities

and proceeds of the crime. The reasons that money laundering prosecution and asset recovery must be used are to deprive the perpetrators of the instrumentalities and proceeds to continue to perpetrate the criminal activities and to have a means by which to channel some of the ill-gotten gains to the source developing countries. Without receiving some of the assets recovered, the developing countries that are the source of the wildlife will not have the means or the motivation to effectively conduct the prevention and/or prosecution activities. Already, a limitation in sharing is that the international community has decided that so valuable are the ivory and rhino horns that they should be confiscated and destroyed. Hence, in many cases, courts and prosecutors are limited in terms of finding money, assets, and other objects that can be shared with the victim countries.

A. Multilateral Mechanisms

International conventions provide the mechanisms for sharing proceeds. Article 14 of the Palermo Convention on Transnational Organized Crime has an article with respect to the sharing of assets recovered in a transnational organized crime case. It states as follows:

Article 14. Disposal of confiscated proceeds of crime or property

1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.
2. When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.
3. When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:
 - (a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2(c), of this Convention and to intergovernmental bodies specializing in the fight against organized crime;
 - (b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

Interested persons (i.e. countries) should consider making arrangements between the sources and consuming countries of ivory trafficking, whereby the consuming countries agree to return proceeds either directly to the source countries and/or to a regional mechanism on wildlife trafficking that can be used by regional enforcement groups, such as Eastern Africa Police Chiefs Cooperation Organization (EAPCCO). Many countries that are the source of wildlife crime are members of the Palermo Convention. As of May 16, 2014, the Convention has 147 Parties: 179.¹

The United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC), contain detailed provisions to support international cooperation in criminal matters, such as extradition and mutual legal assistance, and provide for specific and innovative forms of cooperation that can be applied in the field of wildlife and forest crime. Examples include joint investigations and cooperation for the use of special investigative techniques, such as controlled delivery, electronic and other forms of surveillance, and undercover operations. These Conventions further require States parties to adopt appropriate measures aimed at promoting law enforcement cooperation.

In April 2011, the CITES Secretariat, Interpol, UNODC, the World Bank, and the WCO formed the International Consortium on Combating Wildlife Crime (ICCWC). International ICCWC is the collaborative effort by five inter-governmental organizations working to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks that, on a daily basis, act in defense of natural resources.²

ICCWC has the mission of developing a regime whereby perpetrators of serious wildlife crimes will face a formidable and coordinated response, rather than the present situation where the risk of detection and punishment is all too low. In this context, ICCWC will mainly work for, and with, the wildlife law enforcement community, since it is frontline officers who eventually bring criminals engaged in wildlife crime to justice. ICCWC seeks to support development of law enforcement that builds on socially and environmentally sustainable natural resource policies, taking into consideration the need to provide livelihood support to poor and marginalized rural communities.

In the mid- to longer-term, ICCWC seeks to develop programs to enhance awareness of wildlife crime; provide institutional analysis and support; build capacity of national institutions, sub-regional, and regional enforcement organizations, taking into consideration the whole range of investigative and prosecutorial techniques; foster coordinated enforcement actions; support analytic reviews, especially through its Wildlife and Forest Crime Analytic Toolkit; mainstream

¹ For the status of ratifications and signatories, *see* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en

² For additional discussion of the ICCWC's activities, *see* <http://www.cites.org/eng/prog/iccwc.php>.

wildlife crime across relevant national agencies; promote natural resource management and development; understand and address drivers of wildlife crime; and address the drivers of wildlife crime to reduce demand.

The consortium has developed the Wildlife and Forest Crime Analytic Toolkit, built on the technical expertise of all ICCWC partners, as well as through extensive consultations with experts from across the globe from a variety of related fields. The toolkit is designed to serve as an initial entry point for national governments, international actors, practitioners, and scholars to better understand the complexity of the wildlife and forest crime and serve as a framework around which a prevention and response strategy can be developed.

The tool kit consists of five parts: legislation relevant to wildlife and forest offenses and other illicit activities; law enforcement measures pertaining to wildlife and forest offenses; prosecutorial and judicial capacities to respond to wildlife and forest crime; factors that drive wildlife and forest offenses, and the effectiveness of preventive interventions, and the availability, collection, and examination of data and other information relevant to wildlife and forest crime.

B. Bilateral Mechanisms: The United States Government as an Example

One way to participate in asset recovery is through bilateral arrangements or mechanisms. An example of the bilateral mechanisms is the policy and practice of the U.S. government. The U.S. government encourages international asset sharing and recognizes all foreign assistance that facilitates U.S. forfeitures so far as consistent with U.S. law. Federal statutes, namely 18 U.S.C. § 981(i), 21 U.S.C. § 882(e)(1)(E), and 31 U.S.C. § 9703(h)(2), govern international sharing in the U.S. International sharing by the U.S. is often guided by standing international sharing agreements or the subject of a future case-specific forfeiture sharing arrangement which the U.S. Department of Asset Forfeiture and Money Laundering Section (AFMLS) negotiates and the Department of State approves.³

Standing international sharing agreements or the subject of a future case-specific forfeiture sharing arrangement negotiated by AFMLS and approved by the Department of State often guide international sharing by the U.S. The decision to share assets forfeited to the U.S. with a foreign government is a completely discretionary function of the Attorney General or the Secretary of the Treasury. It requires the concurrence of the Secretary of State, and, in certain circumstances, it is a decision that can be disapproved by Congress.⁴

³ U.S. Department of Justice, Asset Forfeiture Policy Manual at 139 (2012) www.usdoj.gov/com/foia/docs/policy07.pdf.

⁴ *Id.*

Foreign governments do not need to follow a specific process to request sharing of assets with the U.S. They can do so pursuant to a treaty, a sharing agreement, or even via other diplomatic or law enforcement channels. Prosecutors and law enforcement agencies should make spontaneous sharing recommendations whenever they receive foreign assistance that facilitated the forfeiture of an asset in a U.S. case, especially when that asset is located in the U.S. When the U.S. forfeits assets in a judicial forfeiture case with the help of a foreign state and the seizing agency is a Department of Justice component or participant in the Department of Justice forfeiture fund, the federal prosecutor assigned to the case is responsible for sending a formal sharing recommendation to AFMLS.⁵

In an administrative forfeiture matter, the seizing agency is responsible for the recommendations. In cases that implicate the Treasury forfeiture fund, the seizing agency, e.g., Internal Revenue Service, U.S. Secret Service, or Immigration and Customs Enforcement is responsible to send a sharing recommendation to Treasury Executive Office of Asset Forfeiture (TEOAF). The seizing agency should consult the prosecutor on the case first. For Department of Justice forfeiture fund international sharing recommendations, AFMLS International Programs Unit (IPU) prepares the sharing recommendations for approval for the Deputy Attorney General. For Treasury forfeiture fund international sharing recommendations, the director of TEOAF approves the sharing recommendations. AFMLS and TEOAF must obtain State Department and each other's concurrence for each proposed transfer to a foreign government after it is approved by their respective designees.⁶

The interagency process can be lengthy. To avoid delays, the agency or prosecutor should make the international sharing recommendation as soon as is practicable, or immediately after the final order forfeiting the foreign assets is obtained. As soon as possible, the seizing agency should note in any electronic asset tracking system, such as the Calibrated Asset Trafficking System (CATS) or TALONS, that a particular asset might be, is, or will be subject to an international sharing request or recommendation – and definitely before that asset has been liquidated.

DOJ policy advises prosecutors and federal law enforcement agencies to be mindful that domestic sharing will occur only after completion of the international sharing process, and will be taken from the federal share, which is the amount of money that the U.S. has available at that time.

With increasing frequency, countries are enacting laws to allow them to share domestically forfeited assets with other countries. Hence, if the U.S. prosecutors or investigators assisted in foreign cases that resulted in a foreign forfeiture, they are encouraged to contact an

⁵ *Id.*

⁶ *Id.*

AFMLAS IPU attorney to see whether it would be fruitful to submit a sharing request to that country.⁷

Pursuant to the provisions of U.S. law, including 18 U.S.C. §981(I), 21 U.S.C. § 881(e)(1)(E), and 31 U.S.C. §9703(h)(2), the Departments of Justice, State, and Treasury have proactively sought to encourage foreign governments to cooperate in joint investigations of narcotics and money laundering as well as other crimes, offering the possibility of sharing in forfeited assets. A parallel goal has been to encourage the spending of these assets to improve narcotics-related law enforcement. The long-term goal of the U.S. government is to encourage governments to improve asset forfeiture laws and procedures so they will be able to conduct investigations and prosecutions of narcotics trafficking and money laundering, which include asset forfeiture. The U.S. and its partners in the G-8 are pursuing a program to strengthen asset forfeiture and sharing regimes. Canada, Cayman Islands, Hong Kong, Jersey, Liechtenstein, Switzerland, and the United Kingdom have shared forfeited assets with the U.S.⁸

Under 9-118.000 of the U.S. Attorney's Manual, the United States Attorney General may transfer any forfeited personal property or the proceeds from the sale of any forfeited personal or real property, as authorized by statute, to a foreign country which participated directly or indirectly in any acts which led to the seizure or forfeiture of the property, if such transfer: (1) has been agreed to by the Secretary of State; (2) is authorized in an international agreement between the United States and the foreign country; and (3) is made to a country which, where applicable, has been certified under § 481(h) of the Foreign Assistance Act of 1961.

Requests by a foreign agency must be in the form prescribed by the Director, Executive Office for Asset Forfeiture.⁹

Governments wanting to participate in asset recoveries on wildlife trafficking should join multilateral agreements that provide for sharing and consider concluding additional agreements with the main consuming countries of ivory trafficking. Such countries include the Peoples' Republic of China, the Philippines, Thailand, Taiwan, and the U.S. Whenever possible, they should also consider negotiating mutual legal assistance in criminal matter agreements.

The U.S. and other governments that share assets in wildlife trafficking may want to encourage other consuming countries to participate in pilot projects to be proactive in seizing and

⁷ *Id.* at 170.

⁸ U.S. Department of State, II INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, MONEY LAUNDERING AND FINANCIAL CRIMES 30 (March 2006).

⁹ In an effort to help foreign governments and others understand international cooperation on U.S. asset recovery, the U.S. government has authored a publication, *U.S. Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation* (<http://www.state.gov/documents/organization/190690.pdf>).

sharing proceeds with the source countries. They may want to do so in CITES, Interpol, the UNODC, the G8, and the G20 fora.

1. Seizure and Forfeiture of Wildlife Trafficking

The U.S. Department of Justice has brought actions for non-conviction based forfeiture. In one case, it successfully forfeited a Mongolian dinosaur skeleton and returned it to Mongolia.¹⁰

Another case involved an *in rem* action for civil forfeiture against the ivory tusk of an African elephant. The owner killed the elephant during a sport hunt under a license from Zimbabwe Parks and Wildlife Management Authority. The owner obtained permits from Zimbabwe to export the tusk to the U.S. However, U.S. customs concluded that the tusk did not qualify as a sport-hunted trophy and could not be lawfully imported into the U.S. The U.S. government won the case on summary judgment because the defendant imported the tusk into the U.S. in violation of the Endangered Species Act and the African Elephant Conservation Act. The owner imported the tusk into the U.S. without a permit for the export or the import of a species listed on Appendix 1 of CITES, and hence the tusk was found subject to forfeiture.¹¹

To successfully prosecute civil and criminal forfeiture cases often requires evidence from the source country that the importer acted in violation of the source country's laws. Hence, the foreign government can help by sending to the U.S. evidence of their law and declarations of government and/or law enforcement officials with respect to such laws, regulations, and enforcement policies, as well as any information to support the prosecution of the case involved.

When the U.S. DOJ successfully prosecutes a criminal case, it seeks restitution, e.g., pursuant to 18 U.S.C. §§ 3663, 3663A as well as 3563(b)(2) and 3583(d). Sometimes restitution is satisfied by the proceeds seized during the investigation. Restitution may be paid into the Multinational Species Conservation Fund.¹²

2. Multinational Species Conservation Fund

The Multinational Species Conservation Funds (MSCF) save some of the world's fastest disappearing and most treasured animals in their habitats. In particular, the African elephant Conservation Act (ACEA) (16 U.S.C. §§ 4201-4203, 4211-4214, 4221-4246 and 1538) is used to fund expenses to carry out the AECA.

¹⁰ *United States v. One Tyrannosaurus Bataar Skeleton*, 2012 U.S. ist. LEXIS 165153 (S.D.N.Y. Nov. 14, 2012).

¹¹ *United States v. One Etched Ivory Tusk of African Elephant (Loxodonta Africana)*, 871 F. Supp. 2d 128 (E.D.N.Y. 2012).

¹² *See, e.g., U.S. v. Vinh Chuong Kha*, U.S. Dist. Ct., C.D. Ca., CR No. 12-202(A) – CAS, Motion for Entry of Consent Restitution Order; Memorandum of Points and Authorities.

The funds from the MSCF provide direct support in the form of technical and cost-sharing grant assistance to a range of countries for on-the-ground protection and conservation of African elephants and other endangered species.

A range of activities funded through this program are designed to promote collaboration with key range country decision-makers, furthering the development of sound policy, international cooperation, and goodwill toward the U.S. among citizens of developing countries. The funds strengthen law enforcement activities, build support for conservation among people living in the vicinity of the species' habitats, and provide vital infrastructure and field equipment needed to conserve habitats. The program strengthens local capacity by providing essential training and collaborative efforts. Without this financial assistance, it is likely that degradation of species and their habitats will continue, which may ultimately result in extinction.

The MSCF, which are implemented through International Conservation's Wildlife without Borders Species Program, provide technical assistance and grant funding to range countries through broad-based partnerships with national governments, local communities, non-government organizations, and other private entities for on-the-ground conservation projects. Funding is target to the highest-priority projects impacting the greatest number of species and support is provided for a range of activities including anti-poaching, conservation education, research, monitoring, habitat restoration, community outreach, law enforcement, training, and capacity building.

In many cases, the U.S. Fish and Wildlife Service is the sole or leading funder of projects that affect the survival of these endangered wildlife populations. The MSCF are an important mechanism to garner trust and respect for the U.S. internationally, and have engaged nearly 600 domestic and foreign partners working in over 54 countries. From 2007 to 2011, the MSCF provided \$56 million in grant funding for on-the-ground conservation, leveraging nearly \$87 million in additional matching funds.

In 2011, funds for African elephants improved protection of elephants and key habitats in and in and around the Udzungwa Mountains of southern Tanzania by identifying and monitoring corridors between protected areas used by elephants and initiating programs to protect connectivity and dispersal areas for these increasingly isolated elephant populations. Another project conducted aerial surveillance of Gabon's national parks to detect and respond to signs of poaching targeting forest elephants to prevent future and illegal inclusions, and conducted systematic surveys of the savannah and swamp areas of Batecke, Lope, Loango, and Wonga Woungueparks.

C. Asset Sharing

Both bilaterally and multilaterally, perhaps the most important short-term initiative that can help strengthen both the political will to prosecute elephant poaching and ivory trafficking in the source countries, and simultaneously give resources to execute the enforcement strategy, is for governments from consuming countries to share assets. This can be done both bilaterally, as discussed in ‘bilateral mechanisms’ under practices of the U.S. government.

FATF best practices call for assets to be returned to victims or prior legitimate owners of assets forfeited. FATF best practices also call for assets to be returned in accordance with the provisions of UNCAC and UNTOC.

Informal international cooperation through the Interpol NCB should be highlighted. Already, Interpol ‘s Wildlife Crime Working Group and Interpol’s Project Wisdom have made significant commitments to helping coordinate effective international cooperation to combat wildlife trafficking and especially elephant poaching and ivory trafficking.

Pilot projects and political commitments by the consuming countries to participate in asset sharing, especially within international organizations and informal groups, such as the G8 and G20, are important potential steps to develop momentum for asset sharing.

D. Potential Additional Mechanisms

One mechanism that could be useful is the establishment of a mechanism to investigate and prosecute wildlife trafficking. It would be staffed by law enforcement officials in general, park rangers and environmental officials, and financial officials who are responsible for anti-money laundering. It could be called African Center for Investigation and Prosecution of Environmental Crimes (ACIPEC). If useful, it could be staffed by some external professionals (e.g., professionals experienced in money laundering prosecutions and asset recovery). They could be seconded to a participating country to help with the investigation and prosecution of a specific case. The participants in ACIPEC could meet periodically and have telephone and/or video conferences to share law enforcement issues and practical approaches to resolving problems. In other words, the participants would informally share ideas and know-how with respect to responding to wildlife trafficking and other environmental problems.

ACIPEC could be modeled on the Joint International Tax Shelter Information Center (JITSIC). The aims of JITSIC are to supplement the ongoing work of tax administrations in: curbing abusive tax avoidance transactions, arrangements, and schemes (also referred to as abusive tax schemes) as well as enhancing activities against cross-border transactions involving tax compliance risk.

Periodically, the parties will agree on focus areas for JITSIC, based on potential compliance risks. The initial focus areas are: tax administration issues arising from the global economic environment and financial crisis, use of off-shore arrangements to avoid tax, arrangements used by high wealth/income taxpayers to minimize their tax liabilities, and tax administration approaches and activities to improve transfer pricing compliance.¹³

1. Clinton Global Initiative

On September 26, 2013, the Wildlife Conservation Society (WCS) announced the Partnership to Save Africa's Elephants, a campaign to strengthen and support the Clinton Global Initiative (CGI) commitment made by Hillary Clinton, Clinton Foundation Vice Chair Chelsea Clinton, representatives from African and Asian countries, and a powerful list of several conservative NGOs to save Africa's elephants and respond to the crisis facing Africa's elephants.¹⁴

The CGI initiative will be part of an \$80 million, three-year program directed at ending ivory trafficking, including new park guards at major elephant ranges and sniffer-dog teams at global transit points.

The new program will enable an expanded law enforcement presence at 50 major elephant sites that together harbor 285,000 elephants, or roughly two-thirds of the African population. It also will include the hiring of an additional 3,100 park guards, adding sniffer-dog teams at 10 key international transit points and strengthened intelligence networks.¹⁵

"96 Elephants" (www.96elephants.org) is named for the number of elephants currently gunned down each day by poachers. The WCS campaign focuses on: securing effective U.S. moratorium laws, strengthening elephant protection with additional funding, and educating the public about the connection between ivory consumption and the elephant poaching crisis.

The campaign calls for the Obama Administration to start a moratorium on domestic ivory sales and request other countries to do the same. The U.S. is the second largest importer of ivory. Much of the trade is legal under a confusing set of U.S. regulations that perpetuate black market sales of illegal ivory. For instance, it is legal to sell some types of ivory depending on its age and origin. The laws are confusing and complicated and easy to manipulate. The legal trade provides a front for laundering in ivory from the illegal trade.¹⁶

¹³For background and terms of reference for the JITSIC, see <http://www.irs.gov/pub/irs-utl/jitsictermsoref.pdf>.

¹⁴ Wildlife Conservation Society, *WCS Supports Clinton Global Initiative with "96 Elephants" Campaign*, Sept. 26, 2013.

¹⁵ Philip Rucker, *Clinton pushes program to protect wild elephants*, WASH. POST, Sept. 27, 2013, at A20, col. 5.

¹⁶ *Id.*

The 96 Elephants campaign will strengthen elephant protection in the wild by increasing support for park guards, intelligence networks, and government operations in the last great protected areas for elephants throughout the Congo Basin and East Africa. WCS recently started elephant protection programs in four new target sites: Ivindo National Park in Gabon; Okapi Faunal Reserve in the Democratic Republic of Congo; Ruaha and Katavi National Parks in Tanzania; and Niassa National Reserve in Mozambique. In these four sites alone, 44,000 elephants are at immediate risk.¹⁷

The 96 Elephants campaign will fund high-tech tools in the field ranging from drones and sophisticated remote cameras that track poachers in real-time to specially trained sniffer dogs to find smuggled ivory in ports and trading hubs.

The 96 Elephants campaign will engage the public through a series of actions, including online petitions and letter writing campaigns strengthened through social media to support a U.S. moratorium, increase funding, and spread the word about demand and consumption of ivory. WCS will educate public audiences about the link between the purchase of ivory products and the elephant poaching crisis, and support global moratoria and other policies that protect elephants.¹⁸

Another partnering organization is the International Fund for Animal Welfare (IFAW) which has more than 10 years' experience working with INTERPOL, a trusted partner since the start of its wildlife crime program to stop wildlife trafficking.¹⁹

As part of the program ten countries, including China, Japan, Vietnam, and other Asian countries that are among the largest consumer markets for ivory, committed to helping reduce the demand among their citizens for the product, including through public education campaigns.²⁰

The campaign illustrates the further development of an environmental enforcement network and subregime, whereby governments, international organizations, such as Interpol, and non-governmental organizations, such as WCS and IFAW, cooperate to use heightened enforcement and education to reduce elephant poaching and ivory trafficking and increase prosecutions of persons that are poaching and trafficking ivory.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Azzedine Downes, *Committing to the Clinton Global Initiative, a milestone Partnership to Save Elephants*, International Fund for Animal Welfare, Sept. 26, 2013.

²⁰ Rucker, *supra*.

III. FOREIGN BRIBERY SETTLEMENTS

Throughout the world the major way to enforce foreign bribery laws is through settlements. For instance, a recent study, *LEFT OUT OF THE BARGAIN* reviews 395 settlement cases that occurred between 1999 and mid-2012. The cases resulted in a total of \$6.9 billion in monetary sanctions. Approximately \$6 billion of this amount came from monetary sanctions imposed by a country different from the one that employed the bribed or alleged bribed officials. Most of the monetary sanctions were imposed by the countries where the corrupt companies (and related individual defendants) are headquartered or otherwise operate. Of the approximately \$6 billion imposed, only about \$197 million, or 3.3 percent, has been returned or ordered returned to the countries whose officials were bribed or alleged bribed.²¹

The report concludes that significant monetary sanctions have been imposed with almost none of the respective assets being returned to the countries whose officials have allegedly been bribed. The overwhelming majority of the jurisdictions harmed by foreign bribery are in the developing world and the vast majority of the settlements involve state-owned enterprises and public procurement contracts, including projects that range from tens to hundreds of millions of dollars in infrastructure and natural resources sectors.²²

Developing countries whose officials were allegedly bribed should increase their own efforts to initiate and maintain effective investigations and prosecutions against the providers and recipients of transnational bribes. Such increased effort to investigate and prosecute would significantly boost their prospects of recovering assets and strengthen deterrence against active and passive corruption. The international community may want to monitor and report on the efforts by countries to investigate and prosecute bribes that occur within.

Many countries enter into settlements to resolve foreign bribery charges. The cases include criminal, civil, and administrative enforcement actions. The levels of transparency and judicial review vary significantly among the different jurisdictions and, depending on the form of settlement, within a given jurisdiction. The trend toward the use of settlements to resolve foreign bribery and related cases is likely to continue.

A problem is that outside of the home countries of the bribe payers (where many of the cases are settled), those countries whose officials were bribed or allegedly bribed have had difficulties bringing prosecutions against either the public officials in question or the foreign bribe payers. In the vast majority of such cases, these countries have not participated in the settlements concluded in the jurisdictions pursuing the bribe payers, nor have they found any other way of obtaining accountability.

²¹ *LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY* (Jacinta Anyango Oduor et al, ed.) 2 (2014).

²² *Id.*

As a result, interested stakeholders, especially the International Corruption Hunters Alliance (ICHA) and policy makers in countries where officials were allegedly bribed have complained that settlements might impede their own criminal/enforcement investigations and affect the liability of multinational companies in third countries. They have raised questions about whether settlements may impede evidence gathering and other forms of international cooperation in criminal matters. Several developing governments and civil society organizations²³ have raised questions and/or criticized the fact that the fines, confiscations, and other sums paid in the context of settlements are not shared with the countries whose officials were allegedly bribed. From their standpoint, these countries have also suffered significant damage as a result of the acts of foreign bribery.²⁴

At a meeting of ICHA at the World Bank in 2010, the ICHA issued a report, observing that many countries have used settlements to concluded transnational corruption cases. In some cases, the settlement has included fines and reparations that must be paid to the authorities of victim countries. However, the sharing of fines and restitution of losses to the victim country through settlements is the exception rather than the rule. In contrast, UNCAC encourages countries to seek restitution for losses (Art. 35), proactively share information (Art. 56), and repatriate proceeds of corruption offenses (Art. 57).²⁵

The meeting and report underscored many potential constraints: (1) victim countries may not know that investigations or legal proceedings are taking place and whether they have the ability to participate; (2) prosecutors tend to focus the information required for the prosecution and may not always consider the rights of victims; (3) most jurisdictions have limited experience with or understanding of the procedures and techniques required to quantify the proceeds of bribery, and experience and understanding vary among jurisdictions, which may partly explain the apparent lack of interest of many victim countries in participating in settlements; and (4) limited understanding exists of how settlements are reached and implemented, especially with respect to the basis for settlement, possible confidentiality and immunities, and their implications for authorities pursuing prosecutions and restitution proceedings in their own jurisdictions.²⁶

A. Transparency of Information

Transparency of information in foreign bribery settlements is important to understand the impact of foreign bribery laws on developing countries, particularly if information from a foreign

²³ Established in August 2006, the UNCA Coalition (<http://www.uncaccoalition.org/>) is a global network of over 350 civil society organizations in more than 100 countries committed to promoting the ratification, implementation, and monitoring of UNCAC. It mobilizes civil society action for UNCAC at international, regional, and national levels.

²⁴ *Id.* at 8-9.

²⁵ ICHA, A Time for Action, 201 ICHA meeting report (Washington, D.C.: World Bank 2010), 16, http://siteresources.worldbank.org/INTDOII/Resources/ICHA_Meeting_Report.pdf.

²⁶ *Id.*

bribery law investigation can be used to start an investigation on the same case in a developing country, targeting the public official who received the bribe, the foreign company that paid it, and intermediaries. The case of settlements is particularly relevant.

Article 56 of UNCAC underscores the importance of transparency of information. It encourages States Parties to transmit any information about known or suspected proceeds of corruption to another State Party without prior request when the requesting State believes that the disclosure of such information might help the receiving party in starting or conducting investigations, prosecutions, or judicial proceedings, or when such information might trigger a request for international cooperation.

Article 37, paragraph 2 of UNCAC states that each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offense established in accordance with the convention.

While trials are usually public, settlements and other related procedures have varying degrees of publicity. For settlements, factors influencing the degree of transparency include whether the hearing is public; whether victims and other affected parties are informed that the settlement is occurring and are made aware of its outcome; whether any relevant documents are made public, especially ones that may be admissible in evidence; and at what stage of the process. In practice, different jurisdictions have very different levels of transparency when it comes to settlements.²⁷

Undoubtedly, more transparency in foreign bribery settlements across developed countries is strongly needed, as it would, among other things, facilitate an investigation in developing countries.²⁸ Research suggests that when the level of transparency is low, and countries make little information on settlements automatically and voluntarily available, mutual legal assistance could fill the gap and ensure that relevant information is shared between jurisdictions.

Clearly the extent and timing of transparency will impact the ability of developing countries to be able to investigate and prosecute alleged wrongdoing as well as consider other accountability mechanisms. The extent and timing of transparency will also affect the potential of civil society to take action.

²⁷ LEFT OF THE BARGAIN, *supra*, at 41.

²⁸ The possibility of using the information from settlements to launch investigations in other countries is obviously not the only reason why transparency is needed. Other reasons include holding prosecutors and judges accountable, avoiding excessive concentrations of power, reducing the perception that companies may be simply buying their way out of sanctions, and providing precedents for future cases to defense counsels.

B. Enforcement Cooperation

1. Informal Assistance

Informal assistance is very important for asset recovery and investigating and prosecuting foreign bribery cases. The most common channels for information assistance include counterpart practitioners, Financial Intelligence Units (FIUs), and regulatory authorities.

Counterpart practitioners include law enforcement officials, prosecutors, or investigating magistrates. Many countries have law enforcement attachés and liaison magistrates in embassies or consulates abroad. The attachés and liaison magistrates facilitate contact with counterparts to render information assistance, help with MLA requests, and help in follow up MLA requests.

FIUs sometimes can facilitate assistance, especially if FIUs have networked with one another through the Egmont Group now headquartered in Toronto.

Regulatory authorities, such as bank, securities, anti-trust, customs, and company regulators may also be a source of information cooperation, even though these authorities have only Memoranda of Understanding (MOU) providing for limited assistance and restrictions in sharing for law enforcement purposes.

In some cases international organizations, such as the European Union, the Council of Europe, the Organization of American States, Interpol, and the World Customs Organizations, provide a mechanism for law enforcement and/or regulatory agents to informally discuss cases.²⁹

Normally, informal assistance is conducted on a counterpart-to-counterpart basis, a process that introduces a middleman in some exchanges because law enforcement must utilize its domestic financial intelligence unit (FIU) in a foreign jurisdiction. Some jurisdictions have moved to facilitate informal exchanges by allowing direct cooperation, regardless of whether the foreign agency is a counterpart. For instance, the U.S. Financial Crimes Enforcement Network cooperates directly with foreign law enforcement agencies from the European Union in certain circumstances, and similar cooperation is reciprocated.³⁰

While fewer restrictions exist to informal assistance than to mutual legal assistance (MLA) requests, practitioners must consider some restrictions. Information requested or shared must be gathered lawfully in both the requested and requesting jurisdictions, and communications among counterparts must be authorized.³¹

²⁹ Jean-Pierre Brun et al, ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS 132 (2011).

³⁰ *Id.* at 134.

³¹ *Id.*

2. Evidence Sharing

As foreign bribery cases are, by definition, multijurisdictional, MLA is essential to ensure that investigators from different jurisdictions can access the necessary information to investigate and prosecute a foreign bribery case. MLA is particularly relevant to developing countries, as these often lack investigatory capacity and could greatly benefit from the result of investigations conducted in other countries.

The overwhelming majority of settlements involve only one jurisdiction. The reason there are not more multijurisdictional settlement is that concluding a foreign bribery case can be time consuming. The average length of a case from the start of the investigation to conclusion probably surpasses three years. A possible reason for the low number of multijurisdictional cases is the practical and operational challenges encountered by jurisdictions when seeking assistance from other countries, either one that has concluded a settlement or a third country following a settlement elsewhere. Obtaining data on this question is challenging, partly because most requests for international cooperation and MLAT occur in the context of criminal investigations and hence, are highly confidential.

The main international legal framework for MLA in foreign bribery cases is provided by the UNCAC and the OECD foreign bribery convention. The OECD convention (article 9) requires parties to provide “prompt and effective legal assistance” to other parties in foreign bribery investigations. The UNCAC requires states parties to “afford one another the widest measure of MLA in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention” (art. 46). Article 48 encourages parties to cooperate with one another in a variety of ways to combat corruption, while Article 49 encourages parties to conclude bi- or multi-lateral agreements for joint investigations.

Within the framework of the OECD convention, MLA is a critical mechanism without which governments may not be able to successfully prosecute foreign bribery cases. The convention’s Working Group however, has recognized since 2005 the difficulty for government parties (that is mostly developed countries governments) in obtaining MLA from non-parties (that is, often developing countries) ‘regarding the bribery of foreign public officials that takes place in those countries’. In response to this problem, the OECD recently published a study on ‘Mutual Legal Assistance in Foreign Bribery Cases’ (OECD, 2012). The report argues, among other things, that “[countries] in the developing world may struggle with a lack of capacity to respond effectively to MLA requests, where, for instance, they may lack the technical expertise, the institutional framework, or the human and financial resources to effectively respond to requests for assistance.” While this comment concerns MLA requests filed by developed countries with developing countries, developing countries have similar issues when they are the requesting states.

The case of Pavlo Lazarenko exemplifies the use of mutual assistance in prosecuting foreign bribery cases and in international asset recovery cases. U.S. prosecutors combined information assistance, including visits to Ukraine and mutual assistance requests to Ukraine and obtained significant assistance in their successful prosecution of Lazarenko, the former Prime Minister of the Ukraine, for crimes connected to foreign bribery. Thereafter, in the asset forfeiture case in the U.S. District Court in Washington, D.C., which the U.S. and other governments are on opposing sides, the U.S. has tried to block other governments and parties to the litigation from learning the results of mutual assistance made and even from seeing the actual mutual assistance requests.³² The U.S. government is trying to block private litigants, including foreign governments and an NGO representing Ukraine from learning the results of the mutual assistance requests because recent U.S. MLATs have the following provisions:

This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private party to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

Precedent exists under the Swiss treaty for the U.S. courts to order the U.S. government to make a request under the MLAT on behalf of a defendant. In that case, Switzerland did not object to the request. However, the U.S.-Swiss MLAT did not specifically prohibit use by defendants.

Another example of the use of the MLAT was to unfreeze and release the funds of General Noriega in Austria in order to pay his defense counsel so that he would have effective assistance of counsel.

The U.S. position is at odds with the majority of international practice. For instance, the UN Model Treaty on Mutual Assistance in Criminal Matters, G.A. Res. 45/177, 4.5. GAOR Supp. No. 49A, U.N. Doc. A/45/49 (Dec. 14, 1990) does not contain such provisions. Similarly the European Union Convention on Mutual Service in Criminal Matters (see <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:42000A0712%2801%29:en:html>), adopted in May 2000 to support and improve the mechanisms established in the 1959 Council of Europe Mutual Legal Assistance Treaty and its 1978 and 2001 Protocols (see <http://conventions.coe.int>) do not contain such provisions. However, Art. 2 of the Inter-American Convention on Mutual Assistance in Criminal Matters, May 23, 1992, O.A.S.T.S. No. 75, available at <http://www.oas.org/juridico/english/treaties/a55.html>, does contain the provisions that the MLAT “applies solely to the provision of mutual assistance among states parties. Its

³² *U.S. v. All Assets Held at Bank Julius Baer & Company, Ltd.*, U.S. District Court for D.C., C.A. No. 0409798 PLF/DAR, Memorandum Order and Opinion (Sept. 20, 2011); *Judge Orders DOJ to Provide Details in Asset Forfeiture Case*, BLOG OF LEGAL TIMES, Sept. 21, 2011.

provisions shall not create any right on the part of any private person to obtain or exclude any evidence or to impede execution of any request for assistance.”

Several bar groups have opposed these provisions on the grounds that they tilt the balance of mechanisms too much in the favor of law enforcement and render the process unfair. Prosecutors have responded that defendants and private parties are able to use other procedures to obtain assistance (i.e., letters rogatory). However, the inadequacy, untimeliness, and other weaknesses of these procedures are the very reasons that law enforcement agencies conclude MLATs. Undoubtedly, these provisions will be challenged constitutionally and under international human rights treaties as being unfair, depriving defendants of equal protection under the law, deprivation of effective assistance of counsel, and so forth.

The impact of settlements on MLA in foreign bribery cases seem to be mostly negative. For instance, countries that are in the process of settling a foreign bribery case may be reluctant to share information with any other jurisdiction, including the one where the bribe was paid (typically a developing country) for fear that this may somehow jeopardize the negotiation. The concern is that sharing the information prior to the settlement may give the defendant more information. In addition, sharing the information may trigger an investigation and prosecution within the source country. The target may raise double jeopardy arguments or contend that the settlement should take into account the collateral consequences, thereby reducing monetary penalties.

Another concern is related to the quality of information: settled cases are often based on the result of an internal investigation conducted by the company being prosecuted; these investigations differ significantly from those conducted to prosecute cases that go to court, in which investigators are likely to use the full arsenal of weapons at their disposal to uncover the facts. Therefore, information shared with other countries in settled cases may be incomplete and of lower quality.³³ In addition, in foreign bribery cases that are litigated in court, prosecutors are likely to file MLA requests with the country where the bribe was paid. As a result of MLA requests together with informal assistance, the source country becomes immediately aware of the details of the ongoing investigation. On the contrary, in settled cases, the developing country where the bribe occurred may not be aware that a settlement negotiation took place until the settlement is publicly announced. The information released at settlement is comparatively brief and of a much lower quality than the evidence a prosecutor must introduce at trial, which must be admissible evidence.

A review of the 395 foreign bribery settlements shows that settlements do not affect the duty or readiness of the countries in which the settlement occurs to respond to formal MLA requests. Hence, settlements normally will not impede formal MLA requests. However, in

³³ LEFT OUT OF THE BARGAIN, *supra*, at 52-53.

practice the number of investigations conducted in developing countries following MLA requests in foreign bribery cases is very limited.³⁴ It appears that, while settlements may not be an obstacle to MLA, legal, institutional, and operational obstacles to cooperation may exist. Such obstacles include the lack of resources, delays in responding to MLAs, the risk of “tipping off the target”, the tendency to provide incomplete or insufficient responses, and the need to meet the dual criminality requirement.³⁵

3. Joint Investigations

One of the best ways to empower developing countries where transnational bribes occur to successfully investigate, freeze, seize, and confiscate illegal instrumentalities and proceeds is through joint investigations. In this regard, Article 49 of UNCAC provides as follows:

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

An example of the efforts by the UK and U.S. governments to develop a joint investigation on an ad hoc basis was the convening of the Ukraine Forum on Asset Recovery (UFAR) in London on April 29-30, 2014. On April 29, 2014, at the start of the Ukraine Forum on Asset Recovery (UFAR) in London, both United States Attorney General Eric Holder and the Rt. Hon. Theresa May, MP, who hosted the meeting, pledged to continue the commitment of a financial SWAT squad to help the Ukraine government trace and recover stolen assets. The UK and U.S. jointly organized the UFAR to help efforts by the Ukraine government to recover stolen assets.

The goals of the UFAR were to: reaffirm the political commitment of the international community in tracing and recovering stolen assets; facilitate international cooperation for the early tracing of such assets; enable sharing of best practices, lessons learned, and available tools; address ways of tracing assets hidden behind complex corporate structures; facilitate networking and trust-building among practitioners across jurisdictions; and identify specific capacity building needs for Ukraine.

³⁴ LEFT OUT OF THE BARGAIN, *supra* at 64.

³⁵ OECD, TYPOLOGY ON MUTUAL LEGAL ASSISTANCE IN FOREIGN BRIBERY CASES (Dec. 2012) <http://www.oecd.org/daf/anti-bribery/TypologyMLA2012.pdf>

In his remarks, Holder explained that within days of the fall of President Yanukovich's regime, the U.S. Department of Justice sent a response team to Kiev to assess the needs of Ukraine's investigation into stolen assets belong to its people; to provide assistance with document review and preservation; and to help initiate and coordinate any and all efforts required by further investigations.

Holder explained that the U.S. has also deployed significant resources from the Asset Forfeiture and Money Laundering Section; from its Office of Overseas Prosecutorial Development, Assistance, and Training; from the Federal Bureau of Investigation; and from the U.S. Treasury Department's Financial Crimes Enforcement Network – or FinCEN – to help collect information, analyze data, and look into potential leads.

The prior week, Vice President Biden announced that the U.S. would be committing an additional \$1 million in technical assistance to aid the Ukrainian investigation for equipment and other developing needs. The funds will place a Justice Department attorney in Kiev to work exclusively with Ukraine and its partners on asset recovery and mutual assistance issues.

Holder announced the creation of a dedicated kleptocracy squad within the FBI to partner with the DOJ Asset Forfeiture and Money Laundering Section to proactively investigate and prosecute corruption cases not only in Ukraine, but around the world. The financial SWAT squad of about a dozen personnel will consist of case agents and forensic analysts who are capable of unraveling the intricate money laundering transactions commonly employed by kleptocrats. Deputy marshals from the U.S. Marshals Service and analysts from FinCEN will support their work.

In her remarks, the Rt. Hon. Theresa May, M.P. and the Home Secretary, said the UK has played a leading role in promoting the EU sanctions regime to freeze the assets of Ukrainians suspected of misappropriating state funds, allowing for proper investigations and judicial processes to occur. She said in October 2013, the UK took two steps to transform its response to serious and organized crime. First, it started a new National Crime Agency (NCA) which has stronger powers and a clear remit to lead and coordinate the fight against serious and organized crime, including corruption. The NCA has coordinated the UK law enforcement response to the events in Ukraine, bringing together partners to provide support to the Ukrainian authorities, investigate cases, and build the intelligence picture. Learning from its experiences on asset recovery during the Arab Spring, officers from the NCA and the Metropolitan Police, accompanied by Crown Prosecution Service prosecutors, went to Ukraine to offer support soon after the fall of Yanukovich's regime.

Secondly, with the start of the NCA, the UK published a Serious and Organized Crime Strategy, which includes measures to crack down on persons who facilitate serious and organized criminals in using, hiding, and moving the proceeds of crime. May said she intends to introduce legislative measures on asset seizure as soon as Parliamentary time in the UK permits.

May thanked the World Bank and UN Office on Drugs and Crime's Stolen Asset Recovery Initiative for their crucial support in organizing the Forum.

Meanwhile, on April 28, 2014, David Green QC, the Director of the UK Serious Fraud Office announced it had opened a criminal investigation into possible money laundering arising from suspicions of corruption in Ukraine. The SFO has obtained a restraint order freezing approximately \$23 million of assets in the UK in connection with this case. The \$23 million of assets has been placed under restraint using the Proceeds of Crime Act.

Green exercises powers under the superintendence of the Attorney General. These powers are derived from the Criminal Justice Act 1987. The strict liability rule in the Contempt of Court Act 1981 applies.

Attending the forum was Ukraine's acting Prosecutor General Oleh Makhnitskyi. The UK government said that, under the current circumstances, it would not have been appropriate to invite Russia to the forum. However, a UK government spokesman said in a statement that "Russia is a signatory of the United Nations Convention against Corruption and therefore has responsibilities to prevent the proceeds of overseas corruption finding safe haven in its territory. We would of course expect Russia to respect its international obligations in this regard with respect to the former Ukrainian regime."

Notwithstanding the efforts of the UFAR to strengthen the ability of the Ukrainian government to track stolen assets, events on the ground in Ukraine undermined such efforts. On May 1, 2014, pro-Russian separatists stormed the state prosecutor's office and grabbed everything from legal files to hard drives. The violence appeared partly to prevent any investigation into the sources of deposed former president Viktor Yanukovich's wealth. The Donetsk region of eastern Ukraine was the heartland of Yanukovich's support.

4. *Restitution*

Another important factor to understand the impact of foreign bribery laws is that of restitution, particularly whether developing countries should be granted a portion of the funds recovered by developed countries when enforcing foreign bribery legislation.

Restitution is closely connected to compensation, disgorgement, and tort/contract remedies. The premise of restitution is that a person who has suffered loss as a result of a wrong committed against him or her must be restored as closely as possible to the circumstance in which he or she existed before the damage occurred. Restitution can be either civil or criminal. In some jurisdictions, as part of a criminal conviction, the court has the authority to order the guilty party to pay restitution to the victim in an amount of the costs incurred by the victim as a result of the guilty party's actions.³⁶ For instance, if a corrupt official steals government property

³⁶ LEFT OUT OF THE BARGAIN, *supra* at 68.

and sells it, the court may order the defendant to pay back the value of the stolen property, to restore the victim to the financial position it was in before the crime. Statutes normally define the authority. On the civil side, restitution is closely tied to, and sometimes indistinguishable from, compensation.

Sometimes restitution may be agreed as part of the plea agreement and subsequently approved by the court. In addition, to receive restitution, the victim must be included in or addressed by a plea agreement or other settlement agreement and/or must meet requirements such as direct harm and damages. If a victim has not been identified during the process, there may be little restitution to victims of corruption. Restitution has been rarely used in foreign bribery settlements.

An example of restitution is in the Haiti Teleco case in which a U.S. court ordered an individual defendant to pay restitution of \$73,824 to Haiti.³⁷

Restitution to developing countries is important for various reasons. First, it provides a public statement that corruption is not a victimless crime and that corrupt public officials can be prevented from acting with impunity. It deprives them of the instrumentalities and the proceeds of their crimes. The amounts paid in restitution in foreign bribery cases can represent additional resources to be reinvested in anticorruption activities. Asserting restitution claims in foreign bribery cases prosecuted in developed countries can be an opportunity for developing countries to increase their capacity to investigate and prosecute such cases domestically, as well as to gain access to information on cases.

However, obtaining restitution in connection with settlements or prosecutions conducted in other countries can be a disincentive to start a case domestically, thereby preventing the public officials involved from being prosecuted. Finally, one needs to consider the long-standing argument against restitution paid to developing countries in which public officials were bribed. These countries were complicit and not victims in the crime, and any funds returned may just end up being lost to corruption again. Mechanisms exist to ensure that any funds returned will not be subject to corruption and even will be used for development purposes (e.g., helping the impoverished), as discussed below.

The UNCAC clearly establishes the principle of the recovery and return of assets to prior legitimate owners and those harmed in chapter 5, particularly article 57, which encourages States Parties to repatriate the proceeds of corruption offenses. Article 53(c),³⁸ further states that Parties should allow their courts and other competent authorities to recognize another State Party's claim of ownership or damages when deciding on a confiscation or other monetary sanction.

³⁷ *Id.*, at 143.

³⁸ Article 53(c) states that States Parties "shall...take such measures as may be necessary to permit its courts or competent authorities...to recognize another State Party's claims as a legitimate owner of property acquired through the commission of an offense established in accordance with this Convention."

The provisions cover relating to a settlement since most monetary sanctions are ordered in the context of settlements.

In practice, the review of foreign bribery settlements conducted by StAR finds cases of assets returned to other countries in the form of reparations, restitution, and voluntary payments. Funds have not been returned directly to countries, but rather channeled through “special funds administered by government or nongovernmental organizations for the benefit of the people of the affected countries,” a strategy perhaps aimed at offsetting concerns that repatriated funds may end up back into the pockets of corrupt public officials or politicians.

The international legal framework against corruption adopts an optional approach to determining the use of returned funds. States can conclude mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.³⁹ An example is that the U.S., Kazakhstan, and Switzerland agreed with World Bank support to transfer approximately \$84 million of funds recovered in a complex corruption case between Kazakhstan, U.S., and European oil companies to Kazakhstan on the condition that they were used exclusively for development projects involving impoverished children.⁴⁰ Such arrangements have been made on several occasions, for instance, when the U.S. returned the assets stolen from Peru by Montesinos and when Switzerland returned to Nigeria the assets embezzled by Abacha.⁴¹

However, a StAR study also finds that, in practice, restitution only takes place in a minority of cases. In a review of 395 settled cases, the StAR report finds that a total of about \$6.9 billion have been imposed in monetary sanctions. Only about \$197 million, or 3.3 percent of this amount, had been ordered returned to the countries whose officials were bribed.

The reasons for such a low percentage of funds ordered returned seem to suggest that per se the fact that a case is being settled rather than litigated in court does not represent an impediment to restitution. Instead, the problem appears to be a blend of legal and bureaucratic obstacles, reluctance to return funds to developing countries due to corruption concerns, the perception (or in some cases the evidence) that governments may have endorsed corrupt payments, and the lack of initiative on behalf of developing countries in claiming victim status. These obstacles are likely to surface regardless of whether a case is litigated or settled.

³⁹ UNCAC, Art. 57(5).

⁴⁰ Julio Bacio Terracino, THE INTERNATIONAL LEGAL FRAMEWORK AGAINST CORRUPTION: STATES' OBLIGATIONS TO PREVENT AND REPRESS CORRUPTION 290 (2012), citing World Bank Press Release *Frozen Funds to Help Kazakh Youth under New International Agreement*, No.2007/360/ECA; The World Bank Europe and Central Asia Region. News Release No: 2008/07/KZ.

⁴¹ Terracino, *id.* See also Pietro Veglio and Peter Siegenthaler, *Monitoring the Restitution of Looted State Assets: The Role of Multilateral Development Banks (MDBs)*, IN RECOVERING STOLEN ASSETS (Mark Pieth, ed.) 315-329; Stolen Asset Recovery (StAR), Initiative, STOLEN ASSET RECOVERY: MANAGEMENT OF RETURNED ASSETS: POLICY CONSIDERATIONS (2009).

Anecdotal evidence and research done in the area of asset recovery⁴² suggest that the failure to repatriate the proceeds of foreign bribery to developing countries may erode support for institutions in general and for the fight against corruption. It also prevents governments from recovering funds that can be used in a number of activities, including anti-corruption ones. Finally, it erodes the deterrent effect of foreign and domestic bribery policies. Further ramifications at a domestic and international level may include reducing the tax base, increasing inequality, harming competition, and destabilizing free trade⁴³. Preliminary findings point to the fact that restitution to developing countries in foreign bribery cases would be desirable and should be done more frequently.

C. Technical Assistance

Article 60 of UNCAC requires States Parties to “initiate, develop or improve specific training programs for its personnel responsible for preventing and combating corruption.” Ten different areas are mentioned, including preventing and combating the transfer of proceeds of bribery offense, detecting and freezing the transfer of bribery offenses, surveillance and movement of proceeds of bribery offenses, and facilitating the return of proceeds of bribery offenses.

The trial in Zambia against former President Chiluba is an example of the importance of international cooperation and technical assistance in law enforcement. Experienced U.S. prosecutors provided technical advice and financial support to the Zambian Task Force prosecuting Chiluba, assisting the inexperienced and under-resourced Zambian authorities.⁴⁴

States Parties must consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply UNCAC through technical assistance programs and projects.

IV. LAWS OF TRANSPARENCY AND WHISTLEBLOWING

A. Using Asset Disclosure Information to Identify PEPs

1. World Bank Proposal to Use Asset Disclosures to Identify PEPs

A recent report issued by the World Bank suggested supplementing FATF Recommendations related to Politically Exposed Persons (“PEPs”) with asset disclosure

⁴² StAR, *Barriers to asset recovery*, 2011.

⁴³ *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, UN Office on Drugs and Crime, 229 (2006).

⁴⁴ For additional background on the trial and the role of international technical assistance, see Paul Lewis, *Shifting Legitimacy: The Trials of Frederick Chiluba*, in *PROSECUTING HEADS OF STATE* (Ellen L. Lutz and Caitlin Reiger, eds.) 130-150 (Cambridge: Cambridge Univ. Press, 2009).

requirements imposed on public officials in order to reinforce efforts to combat corruption.⁴⁵ The Financial Action Task Force (“FATF”) is an inter-governmental policy-making body charged with developing and promoting national and international means of combatting money laundering and terrorist financing. Through its Forty Recommendations, FATF provides the basic framework for anti-money laundering efforts that is intended to be universally applied. Among these recommendations is the requirement that financial institutions undertake reasonable customer due diligence measures when providing financial services.⁴⁶ Increased due diligence measures are required when the financial institution’s customer is deemed to be a Politically Exposed Person (“PEP”).⁴⁷

The World Bank report explores these two traditionally independent regimes—the detection and monitoring of PEPs and the use of asset disclosure requirements for public officials—and argues that their integration would better enable the enforcement of their respective goals, namely anti-money laundering and anti-corruption. Requiring adequate asset disclosure for certain individuals can assist public and private entities alike in implementing PEP regimes to monitor transactions with these individuals.

To promote this integration, the World Bank report provides a series of recommendations. There should be a minimum level of disclosure by public officials required to file asset disclosures that include at least the position held by each official as well as basic identifying information such as date of birth, national identification number, and information on family members. Furthermore, countries should designate an institution tasked with the responsibility of compiling, maintaining, and updating the list of people required to file and sharing this list with relevant stakeholders. This list, and the information generated by the mandated disclosures, should also be made accessible to the relevant government agencies and financial institutions charged with combatting both money laundering and corruption. In particular, the report suggests making this information available in a user-friendly format online to ensure ease of access.

Effective channels must be developed to facilitate cooperation between domestic agencies and their foreign counterparts. This cross-border cooperation poses the biggest challenge to the effective implementation and integration of asset disclosure and PEP regimes, and the report argues for a gradual approach starting with strengthened bilateral ties with repeat counterparties and evolving to regional, then international, networks of formal exchange.

This report observes that in all cases, stakeholders must recognize that the list of those required to file asset disclosures in a particular jurisdiction is not necessarily the same as a list of

⁴⁵ Ivana Rossi, et al., *Using Asset Disclosure for Identifying Politically Exposed Persons*, World Bank Report (Feb. 7, 2012) available at http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Using_AD_for_PEP_identification.pdf.

⁴⁶ FATF Recommendation 10, FORTY RECOMMENDATIONS.

⁴⁷ FATF Recommendation 12, FORTY RECOMMENDATIONS.

PEPs for the same jurisdiction as asset disclosure requirements may fall short of or extend beyond the definition of PEPs. Despite the complementary measures that may need to be taken to round out either regime, their integration still provides a more efficient means of combatting both money laundering and corruption around the world.

B. Laws to Facilitate and Encourage Whistleblowers

1. Laws of Individual Countries

The laws of individual countries with respect to whistleblowing are in transition.

In the United States, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “D-F Act”)⁴⁸ provides new financial incentives and protections for whistleblowers who report violations of securities laws to the U.S. Securities and Exchange Commission (“SEC”). The D-F Act also protects from retaliation for whistleblowing employees of public company subsidiaries and affiliates. The protection potentially includes employees of foreign subsidiaries and affiliates.

The D-F Act authorizes a monetary award to one or more whistleblowers who voluntarily give original information leading to the successful enforcement of a judicial or administrative action brought by the SEC or certain regulatory and enforcement authorities that result in monetary sanctions of more than \$1 million. This award may be between ten and thirty percent of amounts recovered in excess of \$1 million, a significant incentive to persons who voluntarily provide “qualified original information.”

The SEC final rules clarify anti-retaliation protection. A whistleblower who informs the Commission about wrongdoing cannot suffer employment retaliation if the whistleblower possesses a reasonable belief that the information s/he is providing relates to a possible securities law violation that has occurred, is ongoing, or is about to occur. In addition, the rules make it unlawful for anyone to interfere with a whistleblower’s efforts to communicate with the Commission, including threatening to enforce a confidentiality agreement.

Under the D-F Act the SEC has established an Office of the Whistleblower which works with whistleblowers, handles their tips and complaints, and assists the Commission determine the awards for each whistleblower. During 2013, the Office paid whistleblowers a total of over \$14 million in recognition of their contributions to the success of enforcement actions pursuant to which ongoing frauds were stopped in their tracks.

Because of the whistleblower provisions in Dodd-Frank, employees anywhere in the world who spot foreign bribery can protest or reveal to the SEC the alleged violations without being subject to retaliation by the company and they can obtain substantial rewards from the

⁴⁸ Pub.L. 111–203, H.R. 4173.

SEC. These provisions have the potential to enhance transparency and reduce the incidence of foreign bribes both because workers now have incentives to report violations and bribe payers have a bigger risk of being caught. .

Notwithstanding the whistleblowing provisions of the Dodd-Frank Act, controversy has arisen with respect to whistleblowers of so-called national security information. One case concerned leaks by Bradley Manning that Wikileaks published. Mr. Manning was eventually prosecuted and convicted. The head of Wikileaks has been in the Ecuadorean Embassy in London. Although he is fighting surrender under the European Arrest Warrant to Sweden, he fears that Sweden will extradite him to the U.S. for publishing national security information, including the leaks from Manning.

A more recent controversy concerns Edward Snowden. Last year Mr. Snowden leaked to the media information about allegedly improper and at times unconstitutional surveillance activities by the National Security Administration. Subsequently, he went from Hawaii to Hong Kong and then to Russia. Due to pressure by the U.S. government, Snowden was prevented from leaving the Moscow airport and eventually received temporary asylum in Russia.

In support of his whistleblowing activities and status, Snowden claims he raised concerns about the illegal surveillance activities with colleagues and supervisors for more than six months, including in the NSA's Technology Directorate and two in the NSA Threat Operations Center's regional base in Hawaii.⁴⁹ In March 2014, in testimony presented to the European Parliament Snowden claims he reported the problematic programs to more than 10 distinct officials, none of whom took any action. He stated that "(a)s an employee of a private company rather than a direct employee of the U.S. government, I was not protected by U.S. whistleblower laws."⁵⁰

Some countries, such as Switzerland, have laws that make it a crime to whistle blow to foreign governments. For instance, Article 6 of the Swiss Federal Act on Data Protection precludes the transfer of personal data abroad if the personal privacy of the persons affected could be seriously endangered and especially in cases where there is a failure to provide protection equivalent to that provided under Swiss law. A person wanting to transmit data abroad must notify the Federal Data Protection Commissioner. Article 34 of the same law makes wilful violations of the law a criminal violation punishable by a term of detention or a fine.

Article 47 of the Swiss Federal Act on Banks and Savings banks of November 8, 1934 also requires the employees, representatives, liquidators and external audits of a bank and the members of the Swiss Financial market Supervisory Authority (FINMA) to treat as confidential

⁴⁹ Ellen Nakashima and Barton Gellman, *U.S., Snowden duel over e-mails*, WASH. POST, May 30, 2014, at A2, col. 1.

⁵⁰ David E. Sanger, *N.S.A. Releases Email That It Says Undercuts Snowden's Whistle-Blower Claim*, N.Y. TIMES, May 20, 2014, at a8, col. 1. For additional background on Snowden and his decision to become a whistleblower, see Michael Gurnow, *THE EDWARD SNOWDEN AFFAIR: EXPOSING THE POLITICS AND MEDIA BEHIND THE NSA SCANDAL*, especially 25-73 (2014); Luke Harding, *THE SNOWDEN FILES* (2014).

what they learn about bank customers in the course of their professional activity. Failure to respect this confidentiality carries criminal penalties.

The Swiss have started prosecutions of violators of these laws when they have transmitted bank information to foreign governments. In July 2013, Pierre Condamin-Gerbier, a former employee of Reyl & Cie, was arrested on his return to Switzerland from France, for violating these laws.⁵¹ The Swiss have brought criminal charges against Hervé Falciani, a former HSBC computer engineer. In May 2013, a Spanish court rejected Switzerland's request to extradite him.⁵²

The Swiss prosecuted Rudolf Elmer, a former banker with Julius Baer, who worked for the bank for almost two decades until he was dismissed in 2002. In 2008, he was a whistleblower when he gave confidential documents to WikiLeaks concerning the activities of Julius Baer in the Cayman Islands and its role in alleged tax evasion. In January 2011, Elmer was convicted in Switzerland of breaching security laws and other offenses.

As a result of the divergence of laws and practices on whistleblowing, there remain many obstacles to transparency and not even havens for the anti-corrupt.

2. *International Conventions and/or International Organizations*

a. **United Nations**

Whistleblower protection has become recognized as part of international law in recent decades. The United Nations adopted the Convention Against Corruption in 2003 in an effort to prevent corruption and strengthening international law enforcement. Signed by 140 nations and ultimately ratified by 137 of them, including the United States, this convention endorses protections for whistleblowers. Under Article 33, the signatories agree that each State “shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”⁵³

⁵¹ *Swiss bank CEO investigated in tax case told to stay in France*, REUTERS, Dec. 6, 2013; Giles Broom, *Swiss Bank Reyl Contests Charges Over Cahuzac Tax Affair*, BLOOMBERG NEWS, Oct. 30, 2013.

⁵² Ilan Briat, *Spain Refuses to Extradite Ex-HSBC Employee*, WALL ST. J., May 8, 2013; Manuel Altozano Madrid, *Hervé Falciani: “United States advised me: Go to Spain, your life is in danger (Hervé Falciani: “Estados Unidos me avisó; Ve a España, tu vida corre peligro”)*, EL PAÍS, April 21, 2013.

⁵³ United Nations Convention Against Corruption, art. 33, available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

b. Council of Europe

The Council of Europe adopted the Civil Law Convention on Corruption in 1999. This convention, which entered into force in 2003, and has been ratified by 34 member states of the Council, explicitly requires for the incorporation of whistleblower protection in the domestic laws of its signatories.⁵⁴ Article 9 states that each State “shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.”⁵⁵

The Council recently revisited whistleblower protections in July of 2013 with a motion for a recommendation to amend the European Convention of Human Rights. This recommendation, which has not yet been discussed in the Parliamentary Assembly of the Council and commits only those who have signed it, was made in the wake of the Bradley Manning prosecution. In it, the Assembly “opposes the prosecution of Bradley Manning in the U.S.A. for the legitimate disclosures of illegitimate secrets as the helicopter attack in Iraq” and states that “such prosecution should be made impossible in Member States of the Council of Europe.”⁵⁶

c. Organization of American States

In 1996, the Organization of American States adopted the Inter-American Convention Against Corruption (IACAC). This convention, which came into force in 1997, was the first international convention to address the question of corruption. According to Article II, the purposes of the convention are to “promote and strengthen the development by each of the State Parties of the mechanisms needed to prevent, detect, and eradicate corruption” and to “promote, facilitate, and regulation cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish, and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.”⁵⁷ In furtherance of this goal, Article III calls for the adoption by each member state of “[s]ystems for protecting public servants and private citizens who, in good faith, report acts of corruption,

⁵⁴ Council of Europe, Treaty Office, *available at* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=&DF=&CL=ENG>.

⁵⁵ Council of Europe, Civil Law Convention on Corruption, art. 9, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>.

⁵⁶ Council of Europe, *Additional protocol to the European Convention on Human Rights on the protection of whistle-blowers who disclose governmental action violating international law and fundamental rights*, Motion for a Recommendation, Doc. 13278 (July 5, 2013), *available at* <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20031&lang=en>.

⁵⁷ Organization of American States [OAS], Inter-American Convention Against Corruption, art. II, *available at* <http://www.oas.org/juridico/english/treaties/b-58.html>.

including protection of their identities, in accordance with their Constitutions and the basic principles of their domestic legal regimes.”⁵⁸

On September 14, 2011, the OAS announced the preparation of draft model laws in several fundamental areas envisaged by the IACAC. One of these model laws was intended to facilitate and encourage the reporting of acts of corruption and to protect whistleblowers and witnesses of corruption. This draft model law reflected the ongoing trend for national governments to enact laws facilitating whistleblowing.⁵⁹ On March 21, 2013, representatives from the 31 States that make up the OAS Anti-Corruption Mechanism approved of the new model law, which provides a set of recommended provisions to be incorporated into domestic legal regimes to protect both public officials and private citizens who report acts of corruption.⁶⁰

d. African Union

In an effort to combat rampant political corruption and its negative effects on “the political, economic, social and cultural stability of the African States and...the economic and social development of the African peoples,” the African Union adopted the Convention on Preventing and Combatting Corruption in Maputo in 2003. Ratified by 35 African States as of 2014, this convention makes whistleblowing provisions a key mechanism in this effort to counter both public and private corruption. Article 5(5) calls on signatories to adopt “legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities.”⁶¹ The convention also urges States to “ensure that citizens report instances of corruption without fear of consequent reprisals.”⁶²

To help in enforcing these goals, the convention provides for an Advisory Board on Corruption as a follow-up mechanism within the African Union. This Board is tasked with research and the collection of data on corruption, advising African governments in their anti-corruption efforts, and reporting regularly to the Executive Council on the progress of the Member States’ implementation of the convention.⁶³

⁵⁸ *Id.*, art. III.

⁵⁹ Bruce Zagaris, *OAS Prepares Model Anticorruption Laws on Declaration of Assets by Public Officials and Encouraging Reporting Corruption and Protecting Whistleblowers*, 27 INT’L ENFORCEMENT L. REPORTER 979 (NOV. 2011).

⁶⁰ OAS. (2013). OAS Anti-Corruption Mechanism Approves Model Law to Protect Whistleblowers of Corruption [Press release]. Retrieved from http://www.oas.org/juridico/newsletter/nl_en_125.htm.

⁶¹ African Union, Convention on Preventing and Combatting Corruption, art. 5(5) *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>.

⁶² *Id.*, art. 5(6).

⁶³ Transparency International report on the African Union Convention on Preventing and Combatting Corruption, *available at* http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/au_convention.

e. Asian Development Bank/OECD

Asian States have also sought to curb corruption and counter its widespread negative effects. Under the joint leadership of the Asian Development Bank (ADB) and the Organization for Economic Co-operation and Development (OECD), governments in the region launched the Anti-Corruption Initiative for Asia and the Pacific in 1999. The Initiative provides a regional forum for supporting domestic and multilateral anti-corruption measures.⁶⁴

In 2001, the Initiative released the Anti-Corruption Action Plan for Asia and the Pacific. The Action Plan cites as one of its “Pillars” the support of active public involvement in its anti-corruption efforts and specifically mandates the “[p]rotection of whistleblowers.”⁶⁵ Since then, as can be seen above, international standards in anti-corruption have advanced dramatically. In 2010, the Initiative set out its long-term strategy and made the implementation of the U.N. Convention Against Corruption a top priority.⁶⁶

The Initiative has assessed and enforced the implementation of its “strategic principles” in the 31 Member States through regular meetings of its Steering Group, where delegates discuss their countries’ efforts and share experiences.⁶⁷

V. THE INTERPLAY BETWEEN TAX ENFORCEMENT AND ECONOMIC SANCTIONS

A. Automatic Exchange of Information and FATCA

The Foreign Account Tax Compliance Act (FATCA) is found in Sections 1471-2474 of the Internal Revenue Code of 1986, enacted into law by Section 501(a) of the Hiring Incentives to Restore Employments (HIRE) Act 2010. When it was introduced, the law was projected to raise revenue during a ten year period in the amount of \$8.714 billion.⁶⁸ FATCA is designed as an interim measure to force foreign financial institutions to disclose private financial information to the IRS unilaterally.

Compliance with FATCA by foreign financial institutions will provide to the IRS a significant amount of information and searchable data on all U.S. taxpayers that have a financial account reported under FATCA.

⁶⁴ ADB/OECD Anti-Corruption Initiative Information Sheet [ADB/OECD Information Sheet], *available at* http://www.oecd.org/site/adboecdanti-corruptioninitiative/InformationADB_OECDInitiative_April2014.pdf.

⁶⁵ ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, Anti-Corruption Action Plan for Asia and the Pacific, Pillar 3, *available at* <http://www.oecd.org/site/adboecdanti-corruptioninitiative/meetingsandconferences/35021642.pdf>.

⁶⁶ ADB/OECD Information Sheet.

⁶⁷ *Id.*

⁶⁸ HIRE Act, 156 Cong. Rec. § 1745 (daily ed. Mar. 18, 2010) (Statement of Sen. Levin).

B. The Importance of the Role of OECD, G20, and G7

International organizations and intergovernmental bodies have played and continue to play an important role in automatic exchange of information.

An important milestone for automatic exchange of information was the G20 London summit of April 2009.⁶⁹ The G20 London summit, which followed the international economic crisis closely, started with a series of statements, and also concrete actions, toward initiating automatic exchange of information as the new international standard.

On October 29, 2011, the OECD issued the report “The Era of Bank Secrecy Is Over”.⁷⁰ It encouraged all the countries to transition towards a multilateral exchange of information based on a network of bilateral treaties and to improve the effectiveness of the automatic exchange of information. Almost one week later during the Cannes G20 summit, all the G20 countries agreed to sign the Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters (CMAATM). The latter has provisions for automatic exchange of information.⁷¹

On June 2012, the OECD issued a report, “Automatic Exchange of Information. What It Is, How It Works, Benefits, What Remains to Be Done.”⁷² The G20 leaders endorsed the initiative and encouraged all the States to increase the trend.⁷³

During the Finance Ministers and Central Banks Governors meetings of November 2012 and February 2013, the members stated their support of automatic exchange of information and asked the OECD to analyze the safeguards, mechanisms, and milestones required to increase its use and efficient implementation in a multilateral context.⁷⁴

During the G20 Finance Ministers and Central Banks Governors meeting of April 2013 the automatic exchange of information was hailed as the forthcoming international standard. The Global Forum was appointed as the responsible body for monitoring the compliance with the new standard.

After the meeting, the OECD issued the report “A Step Change in Transparency.” It set forth four concrete steps required to develop a global, secure, and cost effective model of

⁶⁹ London G20 Summit, Leader’s statement, April 2, 2009, *see* http://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf.

⁷⁰ OECD, *The Era of Bank Secrecy Is Over*, October 26, 2011. *See* <http://www.oecd.org/tax/exchange-of-tax-information/48966146.pdf>.

⁷¹ *Id.*

⁷² OECD, *Automatic Exchange of Tax Information. What It Is, How It Works, Benefits, What Remains to Be Done*, June 2012. *See* http://www.oecd.org/ctp/exchangeof-tax-information/AEOI_FINAL_with%cover_EEB.pdf.

⁷³ G20 Leaders Declaration, Los Cabos, México, June 18-19, 2012. *See* http://g20mexico.org/images/stories/temp/G20_Leaders_Declaration_2-12.pdf.

⁷⁴ Communiqué of Meeting of G20 Finance Ministers and Central Bank Governors, Moscow, February 16, 2013, paragraph 20. *See* <http://www.g20.utoronto.ca/2013/2013-0216-finance.html>.

automatic exchange of information: enact broad framework legislation; select a legal basis for the exchange of information; adapt the scope of the reporting and due diligence requirements and coordinate guidance to ensure consistency and reduce cost; and develop common or compatible IT standards.⁷⁵

On June 2013, the G20 Finance Ministers and Central Banks Governors stated that the automatic exchange of information would be the new standard and set forth some measures and deadlines to implement such new standard in 2014 and 2015. They asked the OECD to prepare a progress report by its next meeting, including a timeline for completing this work in 2014. They called on all jurisdictions to commit to implement the standard. It asked the World Bank Group and others to help developing countries identify their need for technical assistance and capacity building.

At the G8 meeting on June 18, 2013, the G8 leaders committed to establishing the automatic exchange of information between tax authorities as the new global standard, and pledged to work with the OECD to develop rapidly a multilateral model.⁷⁶

At the G20 summit of September 2013, the automatic exchange of information was ratified as the new standard and established concrete deadlines to carry out its implement. It called for the new standard to be presented in February 2014, the modalities of exchange to be defined in mid-2014, and implemented before the end of 2015. It called for a Model Competent Authority Agreement to be presented at the G20 Finance Ministers and Central Banks Governors' meeting in February 2014. It cited as the next challenge regarding automatic exchange of information having all jurisdictions commit to this standard and put it into practice.⁷⁷

C. The Issuance of the Common Reporting Standard

On February 13, 2014, the Organization for Economic Cooperation and Development (OECD) unveiled the first half of its model framework for automatic exchange of tax information, which the U.S. and other major countries have awaited as a major weapon to fight offshore tax evasion.⁷⁸

⁷⁵ OECD, *A Step Change in Transparency. Delivering a standardized secure and cost effective model of bilateral automatic exchange for the multilateral context.* OECD Report for the G8 Summit, June 2013. See http://www.Oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf.

⁷⁶ G8 Lough Erne Communiqué, June 18, 2013. See http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/201771/Lough_Erne_2013_G8_Leaders_Communique.pdf.

⁷⁷ Saint Petersburg G20 Leaders' Declaration, September 6, 2013, <http://wn.g20russia.ru/load/782795034>. See also OECD Secretary General Report to the G20 Leaders. See <http://www.oecd.org/ctp/SG-report-G20-Leaders-StPetersburg.pdf>; Tax annex to the Saint Petersburg G20 Leaders' Declaration, September 5, 2013. See <http://en.g20russia.ru/load/782804366>.

⁷⁸ For the text see <http://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Common-Reporting-Standard.pdf>. For background see OECD, *OECD delivers new single global*

The Common Reporting Standard (CRS) was developed by the OECD together with G-20 countries. It calls on jurisdictions to obtain information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions that need to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.

The OECD will formally present the standard for the endorsement of G-20 finance ministers during a February 22-23 meeting in Sydney, Australia. The G-20 invited the OECD to develop a global standard on automatic exchange of information in 2013 and remains the driving force behind the move toward greater tax transparency worldwide.⁷⁹ The G20 leaders endorsed the initiative and encouraged all countries to adopt this increasing trend.⁸⁰

The CRS emulates the U.S. Foreign Account Tax Compliance Act (FATCA) Intergovernmental Agreements (IGAs). The new standard draws extensively on previous OECD work on the automatic exchange of information. It incorporates progress made in this area within the European Union and ongoing efforts to reinforce global anti-money laundering standards have played in the G-20 move towards automatic exchange of information in a multilateral context.⁸¹

On February 26, 2012, the G20 Finance Ministers requested an update of the measures to improve the exchange of information, including the automatic exchange of information.⁸²

The CRS consists of two components: a) the CRS, which sets the reporting and due diligence rules and b) the Model Competent Authority Agreement (CAA), which has the detailed rules on the exchange of information. To prevent circumventing the CRS, it is designed with a broad scope across three dimensions:

(1) the financial information to be reported with respect to reportable accounts includes all types of investment income, including interest; dividends; income from certain insurance contracts; and other similar types of income, but also account balances and sales proceeds from financial assets.

standard on automatic exchange of information, Feb. 13, 2014 <http://www.oecd.org/tax/exchange-of-tax-information/oecd-delivers-new-single-global-standard-on-automatic-exchange-of-information.htm>.

⁷⁹ OECD, OECD delivers new single global standard on automatic exchange of information, *supra*.

⁸⁰ G20 Leaders Declaration. Los Cabos, México, June 18-19, 2012. *See* http://g20mexico.org/images/stories/temp/G20_Leaders_Declaration_2012.pdf.

⁸¹ *Id.*

⁸² Meeting of Finance Ministers and Central Bank Governors, Mexico City, Communiqué, February 26, 2012. *See* <http://www.g20.utoronto.ca/2012/2012-120226-finance-en.html>.

(2) The financial institutions that must report under the CRS do not only include banks and custodians, but also other financial institutions, such as brokers, certain collective investment vehicles, and certain insurance companies.

(3) Reportable accounts include accounts held by individuals and entities (which includes trusts and foundations). The standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities.

The Model CAA links the CRS and the legal basis for the exchange, such as the Convention or a bilateral tax treaty, permitting the financial account information to be exchanged. The Model CAA has seven sections. Section 1 contains definitions. Section 2 provides for the type of information to be exchanged (e.g., reportable accounts). Section 3 provides for time and manner of exchange of information. Section 4 provides for collaboration on compliance and enforcement while Section 5 sets forth confidentiality and data safeguards. Section 6 provides for consultations and amendments. Section 7 contains the term of the agreement. Similar to Annex I of the FATCA IGA, the CRS has an annex, describing the due diligence procedures that must be followed by financial institutions to identify reportable accounts.

The goals of the CRS are to provide one standard that jurisdictions wanting to engage in automatic exchange can use in order to avoid a proliferation of different standards which would increase costs for both governments and financial institutions.

The CRS still does not yet have: (1) a detailed commentary to help ensure the consistent application of the standard or (2) information and guidance on the necessary technical solutions, including compatible transmission systems and a standard format for reporting and exchange. Work on these more technical modalities is ongoing. The commentary and technical solutions should be completed by mid-2014.

An important future aspect is that the G-20 Finance Ministers and Central Bank Governors not only have endorsed the OECD proposals for a global model of automatic exchange in the multilateral context, but have also asked the Global Forum to establish a mechanism to monitor and review the implementation of the new global standard on AEI. As a result, the stage is set for potential countermeasures if countries do not meet the new global standard.⁸³

Prior to an agreement to exchange information automatically with another jurisdiction, the receiving jurisdiction must have the legal framework and administrative capacity and processes in place to ensure the confidentiality of the information received and that such information is used only for the purposes specified in the instrument. The OECD released a

⁸³ OECD, CRS for Automatic Exchange of Financial Account Information, *supra*. Part I (Introduction and Overview), paragr. 6 (p.6).

Guide on Confidentiality, “Keeping it Safe,”⁸⁴ which has best practices related to confidentiality and gives practical guidance on how to ensure an adequate level of protection.⁸⁵

Section IX of the CRS describes the rules and administrative procedures an implementing jurisdiction is expected to have in place to ensure effective implementation of, and compliance with, the CRS. Such a jurisdiction must have (1) rules to prevent any Financial Institutions, persons, or intermediaries from adopting practices intended to circumvent the reporting and due diligence procedures; (2) rules requiring Reporting Financial institutions to keep records of the steps undertaken and any evidence relied upon for the performance of the above procedures and adequate measures to obtain those records; (3) administrative procedures to verify Reporting Financial Institutions’ compliance with the reporting and due diligence procedures and administrative procedures to follow up with a Reporting Financial Institution when undocumented accounts are reported; (4) administrative procedures to ensure that the entities and accounts defined in domestic law as Non-Reporting Financial Institutions and Excluded Accounts continue to have a low risk of being used to evade tax; and (5) effective enforcement provisions to address non-compliance.⁸⁶

Analysis

While it is early for a full assessment, especially without either a detailed commentary or information and guidance on the necessary technical solutions, the Swiss Bankers Association has already criticized the CRS for the lack of a level playing field between the U.S. and other countries. In particular, the Model CAA requires financial institutions, when reporting client information, to “look through shell companies, trusts or similar arrangements” to report on the individuals that ultimately control these entities, typically those based in foreign jurisdictions. This is intended to limit the opportunities for taxpayers to circumvent reporting by using interposed legal entities or arrangements.

However, institutions in the U.S., it appears, are to be exempt from this requirement, under the following provision in the OECD protocol (Part I, section i, point 8, page 7): “It is compatible and consistent with the CRS for the U.S. to not require the look-through treatment for investment entities in non-participating jurisdictions.” The SBA observes that these provisions can be “misused as a loophole for clients of US banks ... who will continue to be able to hide behind certain offshore vehicles”. The justification given in the OECD paper for the special U.S. treatment apparently relates to the fact that the U.S. government has already negotiated its own automatic exchange agreements under FATCA.⁸⁷

⁸⁴ <http://www.oecd.org/ctp/exchange-of-tax-information/keepingitsafe.htm>.

⁸⁵ OECD, CRS for Automatic Exchange of Financial Account Information, *supra*. Part I (Introduction and Overview), paragr. 6 (p. 8).

⁸⁶ *Id.*, Sec. IX (p. 42).

⁸⁷ For more information *see* Swiss banks welcome global tax standard, http://www.swissinfo.ch/eng/business/Swiss_banks_welcome_global_tax_standard.html?cid=37954956.

According to the SBA, it is also “becoming apparent that the U.S. will not be prepared to offer full reciprocity.” Though the U.S. Treasury Department has concluded several FATCA agreements offering reciprocal information exchange, they are being challenged in the U.S. courts and in Congress. In this regard, in Article 6(1) of the FATCA Model 1 IGA, the U.S. acknowledges that it needs to adopt equivalent reciprocal level of exchange of information. It pledges to do that by adopting regulations or enacting legislation. Given the opposition of the Republican Party and representatives in Congress from both parties in key states, such as Texas and Florida, U.S. reciprocity may not be quick or certain.

The Tax Justice Network (TJN) has criticized the OECD Common Reporting Standard for the following reasons: the OECD plan is likely to result in developing countries being excluded because they are expected to provide “reciprocal” information exchange, even though most all active tax havens are in rich countries, and many developing countries would need to sacrifice scarce resources to set up the arrangements to collect the information to be exchanged.

The OECD standard, while technically useful, contains loopholes that can easily be, and must be, closed. Freeports, safety deposit boxes, and other kinds of storage mechanism are excluded. There are no sanctions for recalcitrant jurisdictions. The latter criticism ignores the work of the Global Forum (GF) to assess compliance and the practice of OECD and other countries to impose countermeasures on countries that do not meet international standards as assessed by the GF.

Another TJN criticism is that the Common Reporting Standard will only require a single settlor to be named, rather than all settlors. The Tax Justice Network says that for both trusts and foundations the rules should require the reporting of all participants in the trust and/or foundation.⁸⁸

Despite the criticisms, the issuance of the CRS and Model CAA, along with the endorsement by the OECD; the G-20; the EU; and a number of other countries, has enormous practical and political importance in terms of signaling support by key international organizations and countries to automatic exchange of information. In fact, it catapults automatic exchange of information into being imminently a basic international standard. The issuance of the CRS illustrates how quickly the OECD and the EU, in conjunction with informal groups such as the G-20 and G-8, are changing international law through enforceable soft law standards.

D. The U.S. Decision to Suspend FATCA IGA Negotiations with Russia

As a result of the Russian annexation of Crimea, the U.S. Department of the Treasury has ceased negotiating a Foreign Account Tax Compliance Act (FATCA) Intergovernmental

⁸⁸ For more information see Tax Justice Network, *New OECD report on automatic information exchange: will developing countries be left out?*, Press Release, Feb. 13, 2014, reprinted in *Tax Justice Network Criticizes Aspects of OECD Automatic Information Exchange Report*, 2014 WORLDWIDE TAX DAILY 31-19, Feb 14, 2014.

Agreement (IGA) with Russia, leaving the Russian Finance Ministry scrambling to find other ways to allow local banks to comply with FATCA before it takes effect on July 1.⁸⁹

On April 29, 2014, Senators Carl Levin, D-Mich. and John McCain, R-Ariz., urged the Obama administration to continue to refrain from further negotiations with Russia on compliance with the Foreign Account Tax Compliance Act (FATCA) until Russia ceases its aggressive and destabilizing actions toward Ukraine.⁹⁰

Levin is chairman of the Senate Armed Services Committee and of the Permanent Subcommittee on Investigations, which has extensively explored the use of offshore banks in avoiding U.S. tax compliance. McCain is a ranking member of the Permanent Subcommittee on Investigations and a member of the Armed Services and Foreign Relations committees.

1. Russian FATCA Implementation Initiatives

The media reports that the Russian Finance Ministry's proposed legislation would not authorize Russian banks the right to impose the 30 percent tax on cash transfers. It would allow them to exchange information about their U.S. account holders not only to the IRS, but to other companies with the authority to withhold taxes.⁹¹

The Russian Finance Ministry's amended proposal also allows banks to refuse recalcitrant clients (e.g., those who do not provide the information required to transfer funds to foreign tax authorities or who do not authorize the banks to withhold foreign taxes).

The Russian proposed legislation also provides reciprocity. Foreign banks with majority ownership in Russian banks must share information with Russian authorities about their Russian taxpayers if more than \$10,000 has passed through the client's account during the financial year.⁹²

On April 23, 2014, amended legislation sent to the Russian Parliament would permit not only banks, but financial institutions, including brokers; depositories; insurers; investment funds; and pension funds to obtain and exchange information with the IRS, and refuse to service recalcitrant clients.⁹³

The deadline for foreign financial institutions to register in order to be on the initial IRS list and obtain a Global Intermediary Identification Number (GIIN) by July 1, 2014 is May 5,

⁸⁹ Peter Hobson, *Finance Ministry Wants Foreign Banks to Help Russia Comply With FATCA*, MOSCOW TIMES, April 18 2014.

⁹⁰ *Levin, McCain call for U.S. to refrain from FATCA negotiations with Russia*, Press Release, April 29, 2014 <http://www.levin.senate.gov/newsroom/press/release/levin-mccain-call-for-us-to-refrain-from-fatca-negotiations-with-russia> (also contains the letter to Treasury Secretary Lew).

⁹¹ Hobson, *supra*.

⁹² *Id.*

⁹³ Peter Hobson, *Russia Races to Dodge Sanctions by adapting Law to FATCA*, MOSCOW TIMES, April 24, 2014.

2014. U.S. and other financial institutions worldwide will be able to access the initial list, which the IRS will update monthly. Foreign financial institutions not on the list may experience delays in receiving payments.

2. U.S. Senators Urge Treasury Not to Resume FATCA IGA Negotiations

The letter sent by Senators Levin and McCain explains that the Treasury should not negotiate with the Russians to help them avoid FATCA's sanctions at a time when Russian forces are threatening and continuing to destabilize Ukraine. The letter explains that declining to negotiate a FATCA IGA would impose financial pressure upon Russia and help reinforce diplomatic efforts to avoid military action. According to the letter, if the Treasury does choose to negotiate, it should at least ensure that negotiations do not benefit those Russian financial institutions that have Russian government funds, or have Russian government officials on their boards or in their leadership, or otherwise help support disruptive activities in the Crimea or Ukraine.⁹⁴

3. Analysis

While certain parts of the executive and legislative branches may want to impose pressure on Russian financial institutions, the withholding tax in FATCA was only meant for one purpose: to motivate foreign financial institutions to comply with FATCA. The decision to negotiate FATCA IGAs was in response to the difficulties of foreign governments complying with FATCA's requirements to obtain and transfer to the IRS bank account information protected by financial privacy and often constitutional laws. FATCA did not contemplate interaction with economic sanctions. In fact, the legislative history of FATCA only views withholding as a last resort and was meant to provide incentives for foreign financial institutions and governments to comply with FATCA.

The effort to use FATCA as a sanctions mechanism can potentially distort its purpose to give incentives to comply with FATCA. Already, controversial and enormously complex and burdensome in terms of compliance, the use of FATCA as a sanctions weapon is a paradigm shift.

The best argument whereby the U.S. Treasury can stop negotiating a FATCA IGA would be lack of confidence with the Russian exchange of information system. Indeed, the enactment by the U.S. Congress of the Magnitsky legislation was in response to allegations of Russian abuse of tax charges to detain, arrest, and convict Magnitsky and others of tax violations.

William F. Browder, the co-founder of the company Hermitage, helped to expose the alleged misuse of tax charges against the Hermitage in order to confiscate his shares in

⁹⁴Letter from Sens. Levin and McCain to Secretary Lew, April 29, 2014.

Hermitage after he become critical of Russian corporate governance laws. Over the years of its operation, Hermitage had occasionally furnished to the press information related to corporate and governmental misconduct and corruption within state-owned Russian enterprises.⁹⁵

On December 14, 2012, the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (H.R. 6156), was signed into law by President Obama.⁹⁶ On July 11, 2013, a court in Moscow found Magnitsky guilty of tax evasion in a posthumous trial. The court also found Magnitsky's onetime client, the U.S.-born British investor William Browder, guilty of evading some \$17 million in taxes.⁹⁷ Notwithstanding the apparent problems with the integrity of the Russian tax enforcement system, the U.S. Treasury has not yet mentioned this problem and indeed had been negotiating the FATCA IGA until the Crimea issue arose.

It will be important to see the response from G-20, the European Union, and the G-7. On February 13, 2014, the OECD issued a Common Reporting Standard to globalize automatic exchange of information. The G20 has pledged to engage in automatic exchange of information by the end of 2015. Since automatic exchange of information is costly and bureaucratic for all countries, the imposition of another obstacle (e.g., refusing to conclude IGAs) may be a dangerous step.

International tax enforcement is interacting with economic sanctions and illustrates the interplay between international law, policy, and diplomacy.

VI. SUMMARY AND CONCLUSION: PROPOSALS FOR REVISIONS TO NATIONAL LAWS

A. Wildlife Trafficking and Crimes

The challenges for the source countries, the consumer countries, and the international community are substantial if they are going to succeed in stopping the slaughter of elephants. Clearly money laundering prosecutions and international asset recovery, especially if the money is directed to park rangers, will provide more incentives for the source countries to protect elephants and take enforcement action against the persons involved in elephant poaching and ivory trafficking.

⁹⁵ Clifford J. Levy, *An Investment Gets Trapped in Kremlin's Vise*, NEW YORK TIMES, July 24, 2008.

⁹⁶ Text and legislative history at: www.govtrack.us/congress/bills/112/hr6156/text. For background on the law see Konstantinos D. Magliveras, *The Magnitsky Rule of Law Accountability Act: An Extraterritorial Instrument with a Good Cause?*, 29 INT'L ENFORCEMENT L. REP. 68 (Mar. 2013).

⁹⁷ Associated Press, *Dead Russian Lawyer Magnitsky Found Guilty*, July 11, 2013.

Much more education is required in the source countries to sensitize the general public about the link between ecotourism, which is increasingly an important economic sector, and preserving their elephant population as well as the rest of their ecosystems.

Some pilot projects by national governments, international organizations, such as Interpol, UNODC, and African regional organizations, in combination with environmental NGOs, may serve to develop examples of means to prevent and prosecute elephant poaching and ivory trafficking.

B. Foreign Bribery Settlements and Sharing Assets Recovered

Governments, international organizations, and informal groups need to act to facilitate greater sharing of assets recovered in foreign bribery settlements.

As required by UNCAC, governments should transmit any information about known or suspected proceeds of corruption to another State Party without prior request when the requesting State believes that the disclosure of such information might help the receiving party in starting or conducting investigations, prosecutions, or judicial proceedings or when such information might trigger a request for international cooperation.

Informal assistance should be undertaken whenever possible, at the earliest possible time, to facilitate the source country's ability to engage in asset recovery and investigating and prosecuting foreign bribery cases.

Governments should consider undertaking joint investigations on a case-by-case basis and concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies.

Governments should try to include restitution as part of the plea agreement. In addition, prosecutions should try to include the victim in a plea agreement or other settlement agreement and/or must meet requirements such as direct harm and damages.

Foreign bribery laws and international standards should encourage the use of an optional approach to determining the use of returned funds. In this regard, governments can conclude mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

UNCAC States Parties must consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply UNCAC through technical assistance programs and projects.

C. Transparency and Whistleblowing

To foster transparency in order to identify PEPS, there should be a minimum level of disclosure by public officials required to file asset disclosures that include at least the position held by each official as well as basic identifying information such as date of birth, national identification number, and information on family members. In addition, countries should designate an institution tasked with the responsibility of compiling, maintaining, and updating the list of people required to file and sharing this list with relevant stakeholders. This list, and the information generated by the mandated disclosures, should also be made accessible to the relevant government agencies and financial institutions charged with combatting both money laundering and corruption. This information should be available in a user-friendly format online to ensure ease of access.

Given the importance of whistleblowing in order to prevent and combat corruption and the number of international conventions with provisions on whistleblowing, the G20 may want champion whistleblowing provisions in order to ensure that they are more effective.

D. The Interplay between AEI and Economic Sanctions

Given the lack of experience with new forms of automatic exchange of information (AEI), including FATCA, the controversial nature of AEI, its complexity, cost, and administrative requirements, the best way to gain support and momentum is to not clutter it with other non-tax regulatory or enforcement initiatives, such as economic sanctions. To maintain its integrity, it is useful to ensure that the participants are able to safeguard confidentiality of tax information and whose record ensures that tax enforcement is not abused and used for political purposes.