INTRODUCTORY REMARKS

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I. INTRODUCTION

It is my pleasure to be given this opportunity to address a group of distinguished criminal justice and law enforcement specialists attending the Third Regional Seminar on Good Governance for Southeast Asian Countries. We have decided to organize this Seminar on the subject of "Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering."

As a mental warm-up to the seminar, I will first explain the reason why we chose this particular topic, and then shall proceed with a general over view of the major issues relevant to the topic.

II. WHY ASSET RECOVERY?

Why Asset Recovery?

Because it is important and, at the same time, an extremely complicated area of law, with which the law enforcement authorities have yet to familiarize themselves.

The need to fight corruption is undebatable and it has been voiced over and over in every conceivable forum, domestic and international. "Corruption poses serious governance challenges and threats to the stability and security of societies, undermines institutions and values of democracy, and jeopardizes sustainable development and economic prosperity." Corruption also constitutes a major obstacle in the international fight against transnational organized crime and terrorism.

Consequently, once a corruption scheme is uncovered, public officials involved should be promptly removed and appropriate criminal sanctions need to be imposed. While these are no easy tasks, and if successful, are worthy of highest commendation, they should not be the end of the matter. Corruption often involves cross-border flow of assets illicitly acquired by kleptocrats over a period of years. They will keep their ill-gotten gains unless efforts are made to recover the funds, and the international community simply cannot blink at such injustice.

Seen from the victim country's perspective, such transfers are outright usurpation of monies rightfully belonging to its people; looting of monies that could have been spent for useful governmental purposes, such as basic health or education programmes, poverty reduction, environmental protection, and institution-building for the country's overall integrity. The precise scope of the problem and the amount of assets stolen worldwide are not readily quantifiable. Several estimates have been furnished by international organizations such as UNODC or the World Bank, and they place the amount in the order of billions and trillions of dollars every year. Suffice it to say that the drain of national wealth and collateral damages in terms of foregone growth is staggering.

The problem of stolen assets should be a matter of concern for the countries into which the assets are transported as well. Such assets are often hidden in the financial centres of developed countries, and in today's world, where abuses of the global financial system – particularly money-laundering – are considered serious criminal conduct, such countries need to be prepared to provide appropriate and timely responses if they wish to continue to be seen as responsible and reputable financial centres. Developed countries, in their capacity as donors of development assistance and foreign aid, also have legitimate interests in seeing that the funds provided are spent in accordance with sound development policies, and for the national good

of the recipient country.

In short, preventing the theft of public assets by corrupt officials, and taking effective remedial measures once it has been uncovered, are pressing objectives of global concern. This notion is clearly codified in Article 51 of the United Nations Convention against Corruption which reads "The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard."

There are several notable success stories in which millions of dollars were recovered by victim countries. Nigeria recovered more than $500 million, Peru nearly $185 million, and the Philippines $624 million. It should be noted, however, that these occurred following a regime change, and it took a prolonged period before the money was actually transferred back to their respective national treasuries. In the case of Nigeria, more than seven years after the death of General Sani Abacha, in the case of Peru, three years after the political bribery scandal broke and President Fujimori fled the country, and in the case of the Philippines, eighteen years have passed since the "People Power Revolution," which put an end to Marcos's regime. Heartening though these cases were, we know that successful repatriation of stolen assets is still rare.

Retracing the myriad steps of asset transfers is a time-consuming enterprise, and it is not realistic to take such actions in every single case of corruption. Naturally, they will have to be limited to where the amount of money involved is substantial or the nature of the underlying corruption is egregious. On the other hand, however, there is no reason why it should be limited to cases of grand corruption in which hundreds of millions of dollars were stolen by national leaders. There is a need to systemize and streamline the process so that cross-border asset-recovery actions are undertaken in a broader array of cases and on a more regular basis.

This is a huge challenge for the countries victimized by corruption as well as the countries that are recipients of stolen assets. Specific issues and difficulties involved will be described in the following section. Before proceeding, however, let me point out that the initial obstacle to overcome is the lack of experience and expertise on the part of criminal justice and law enforcement practitioners. This is no secret or mystery given that it is relatively recently that asset recovery has become a focus of international debate and an urgent topic in the criminal justice field.

By now, I hope you understand why we chose "Measures to Freeze, Confiscate and Recover Proceeds of Corruption, including Prevention of Money-Laundering" as our main theme. This seminar is intended to serve as an opportunity for learning, experience sharing, and network-building on the subject of asset recovery.

III. ISSUES AND DIFFICULTIES

A. Prevention, Detection, Identification and Tracing

Prevention of crime has always been important, and this is especially true of corruption offences. Unlike murders or other crimes of violence, corruption leaves no readily visible traces that alert authorities to its occurrence, and after-the-fact prosecution and recovery of stolen assets are usually very laborious, time-consuming and costly.

Codes of conduct and financial disclosure requirements for public officials, know-your -customer due diligence and record-keeping requirements for financial institutions, and the suspicious transaction reporting systems are major examples of commonly employed measures to prevent, deter, and detect corruption and money-laundering resulting from corruption. Every jurisdiction is expected to have their laws and regulations in compliance with 40+9 FATF recommendations and requirements of UNCAC, and

whether and how that is achieved are matters of interest.

Furthermore, the measures I have just described presuppose the establishment of anti-corruption bodies and financial intelligence units. These bodies should not only be established, but adequately empowered, staffed and financed so that they will be able to execute their expected responsibilities.

At this point, in connection with identification and tracing of stolen assets, let me stress that jurisdictions are expected to ensure that bank secrecy and fiscal secrecy do not stand in the way of international mutual legal assistance of corruption offences. We need to bear in mind that proceeds of crime are geographically mobile, and they will quickly move to jurisdictions where compliance is ineffective, enforcement is limited, and transparency is below international standards.

B. Freezing

As I have already mentioned, asset recovery is an arduous and time-consuming process, and as such it necessitates a procedure by which authorities can immobilize targeted assets before they disappear. Article 31, paragraph 2 of UNCAC thus mandates States Parties to take necessary measures to freeze or seize relevant assets for the purpose of eventual confiscation, and Article 54 paragraph 2 requires States Parties to make available parallel measures for mutual legal assistance purposes.

In this regard, a proper balance between the rapidity and effectiveness of freezing/seizure mechanisms and the adequacy of procedural safeguards given to legitimate property interests must be incorporated into the legal framework. One country tries to achieve this by requiring financial institutions that have filed suspicious transactions reports to automatically freeze relevant assets for several days, during which the authorities will have time to consider the course of actions to be taken. There also may be instances in which it is undesirable to notify the account holder of the freezing or seizure. This situation likewise requires a careful balancing between the law enforcement needs and the protection of property rights.

C. Confiscation

Procedural requirements in the judicial phase of the asset–recovery process most frequently mentioned as obstacles to the implementation of foreign confiscation orders are proof of unlawful origin of the alleged proceeds of corruption and specification of the assets to be confiscated. An obvious solution to these problems is to mitigate or shift the burden of proof regarding the source of criminal assets.

Another major topic in this area concerns "non-conviction-based confiscation." Article 54 paragraph 1 (c) of UNCAC obliges States Parties to consider, in accordance with their domestic law, taking measures as may be necessary to allow confiscation without a criminal conviction, when the offender cannot be prosecuted. For such purposes, several countries allow forfeiture actions to be brought against the asset itself (*In Rem forfeiture*), which has an obvious advantage when the offender has died or fled its jurisdiction. The applicability of civil standards of burden of proof is also cited in its support.

The pros and cons of these solutions, however, as well as their compatibility with existing procedures and traditional principles, such as presumption of innocence, may be still open to debate. Many would like to know the experiences of and lessons learned in jurisdictions that already have these measures in place.

D. Repatriation

Repatriation, the final step in the international asset recovery process, can also raise quite complicated issues such as disposal of the confiscated property – whether and to what extent victim countries can claim ownership – and the treatment of costs incurred by the requested state in order to achieve its confiscation. In this regard, Article 57 of UNCAC generally prefers the repatriation of confiscated proceeds to the victim country and sets rules for disposal according to the type of underlying corruption offences. At the same time, it allows requested states to deduct reasonable costs from the proceeds or other assets before they are returned. Additionally, requested states may wish to impose conditions on how and when the assets will be used. Information on arrangements made in practice in connection with these matters would be very

helpful.

E. General Impediments

I have so far described some of the issues and difficulties that are encountered in the process of international asset recovery. However, the single most pervasive impediment may be the differences and variations in substantive laws and criminal procedures among the states and jurisdictions, which is exactly what the kleptocrats and money-launderers try to exploit. Dialogue, sharing of information, creating relationships and networks, and developing cumulative knowledge and experiences should be the key to overcoming this longstanding issue in international co-operation and mutual legal assistance.

IV. CONCLUSION

Confiscation of criminal proceeds and repatriation of stolen assets restores justice and repair damages done to the victim country. They are also powerful deterrents that hit the kleptocrats where it hurts them most. The current state of affairs, however, leaves much to be desired in terms of their real-life application. To give sharper teeth to these important legal tools, a better understanding and expertise-building are much called for. I hope this seminar will contribute to your understanding of the subject and, in the long run, help translate the text of the UNCAC into effective action.