

# **Illicit Enrichment and Alternatives: Criminalization, Asset Declarations and Non- Conviction Based Forfeiture**

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Tunis, Tunisia  
July 2015**

# Understanding the UNCAC

## Mandatory and Other Criminal Offences

### 5 Mandatory Offences

**Bribery of National Public Officials (Art.15)**

**Active Bribery of Foreign Public Officials (Art.16)**

**Embezzlement, Misappropriation and Other Diversion  
of Property (Art.17)**

**Money Laundering (Art.23)**

**Obstruction of Justice (Art.25)**

### 6 Other Criminal Offences

**Passive Bribery of Foreign Public Official (Art.16)**

**Trading in Influence (Art.18)**

**Abuse of Function (Art.19)**

**Illicit Enrichment (Art.20)**

**Bribery in Public Sector (Art.21)**

**Embezzlement in Public Sector (Art.22)**

# Article 20. Illicit Enrichment

- **Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed *intentionally*, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.**

# ILLICIT ENRICHMENT: MYTH AND REALITY

- Looks straightforward, but
  - What protections are in place?
  - Abuse politically?
  - Seeking return of funds in other jurisdictions will be limited
- Alternatives
  - Asset Declaration certifications
  - Non-conviction based forfeiture (civil)

# Other Important Innovations in Criminalization

- Article 32: Protection of Witnesses, Experts & Victims
  - **Witness protection programs**
  - Using communications systems to conceal identity
  - Creating evidentiary rules that provide safety
- Article 36: Specialized authorities for criminal enforcement
  - Parallel to Article 6: Preventive anti-corruption bodies
- Article 40: **Limits on bank secrecy**

# Asset Recovery: What is the likelihood of success?

- Optimism generated by Nigeria, Peru or Philippines
- Reality:
  - **Stolen money can be gone** – The Queen Mary
  - Protected in “**Money Laundering States**” -
    - Bahamas, Dubai, Singapore
  - Years (and cost) of **litigation** - Marcos
  - **Politics of Returning the Money** – Congo
  - **Non-monetary recovery**: of cows and cars (Brazil and Brunei)
  - **Vulture Funds** - Uganda
  - **Money is stolen again**

# Illicit Enrichment Prevention

- Too much attention is paid on recovery rather than prevention: **How do you stop it moving forward?**
- **Article 51:**
  - require financial institutions within its jurisdiction to verify the identity of customers [who have] high-value accounts and to conduct enhanced scrutiny of accounts for individuals who **are, or have been, entrusted with prominent public functions and their family members and close associates.** (due diligence) – report these to FIU
  - effective **financial disclosure systems** for appropriate public officials providing for appropriate sanctions for non-compliance.
  - require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship.

# Asset Declarations: A tool to Address Illicit Enrichment

Objectives of an IAD System:  
preventing and detecting Illicit Enrichment (IE) & Conflicts of Interest (COI)

## Illicit Enrichment

IE systems capture information about assets to monitor changes in wealth

IAD serves to flag unusual behavior and assist in the **prevention, investigation & prosecution** of underlying **corrupt acts**

## Conflicts of Interest

COI systems work with officials to identify situations that present a risk of actual or perceived conflict of interest

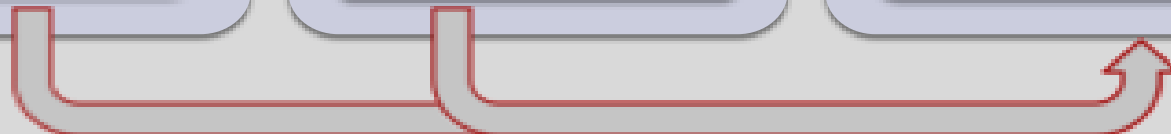
COI systems capture information about sources of income, membership of boards, ownership of shares etc

IAD serves to assist the filer in preventing potential COI.

## Dual Objective

Most systems combine elements of both COI and IE

Particular care must be taken not to compromise the advisory role of a COI system when implementing dual objective systems





# Non-Conviction Based Forfeiture

## Criminal forfeiture forfeiture

Against the person:  
*(in rem)*:

*part of the criminal  
process*

Charge against a person

Imposed as part of sentence  
*in criminal proceedings*

**Action**

**When**

## Non-conviction based

*Against the thing*

*judicial action filed by a  
government*

against the thing.

*Filed before, during  
or after criminal case  
conviction, or even if there  
is no criminal  
charge against a person*

# Non-conviction based forfeiture - 2

Criminal conviction required. Must	<b>Proving</b>	Criminal conviction not
Must establish criminal activity conduct on a	<b>unlawful</b>	establish the unlawful
“beyond a reasonable doubt” standard of	<b>conduct</b>	“balance of probabilities”
or “intimate conviction.” proof		(standard may vary).
Forfeit defendant’s interest in subject to the property claims	<b>Forfeiture</b>	Forfeit the thing itself, to innocent owners
Varies (criminal or civil)	<b>Jurisdiction</b>	Varies (criminal or civil law)

# Other Important Innovations in Criminalization

- Article 26: Liability of Legal Persons
- Article 30: Prosecution, Adjudication and Sanctions
  - **Balance between immunities and adjudication**
    - Immunity is not impunity
  - **Removal or suspension from office pending trial**
  - Disqualification for holding public office
  - Disqualification for positions in state companies
- Article 31: **Freezing, Seizing and Confiscation**
  - Converted proceeds of crime, e.g. buildings or property
  - Income: **“fruit of the poison tree”**

- **There is no calamity greater than lavish desires.**
- **There is no greater guilt than discontentment.**
- **And there is no greater disaster than greed.**

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Lao-tzu