CONTRIBUTION TO THE FACTI PANEL – CURRENT SITUATION AND DEADLOCKS

The initiative for Financial Accountability, Transparency and Integrity Panel was announced by the Presidents of ECOSOC & General Assembly during a joint briefing held on 28 January 2020. On that occasion, they announced the establishment of a high-level panel on international financial accountability, transparency and integrity (FACTI), a joint initiative which aims to enhance ongoing efforts to achieve the 2030 Agenda for Sustainable development. This note summarizes Sherpa and Transparency International France's insights on the matter of ***recovery and return of stolen assets****. The objective is to draw conclusions on current deadlocks with respect to asset restitution and to provide in a further note to the Panel recommendations for a responsible asset repatriation process.*

1. A confusion is made between confiscated assets and development grants:

Grand corruption deprives governments of substantial revenues and impedes the development of a transparent public finance system. It undermines people's trust in governmental institutions and financial systems.

Returning stolen assets to their country of origin helps them not only to recover stolen wealth but also to develop and strengthen their institutions and reestablish the trust they need to prevent similar misconduct in the future. In this respect, asset restitution and development assistance share common goals (*e.g.* improving living condition of populations, strengthening the rule of law, etc.).

Because of their illegal origins, confiscated stolen assets and proceeds of crime cannot be assimilated to development assistance funds, though. Returned money is neither a donation nor a loan. For this reason, confiscated assets cannot be returned through classic development assistance channels. On the contrary, returned assets must be tagged as such and clearly distinguished from development grants.

Confusion between returned assets and other funds often results from a lack of transparency and accountability. In the end, it undermines the whole asset recovery process and feeds public distrust toward institutions, as illustrated in the example below.

In 2011, Swiss authorities confiscated USD 48.8 million in assets allegedly stolen from the Kazakh public purse, and announced in December 2012, through a press release, that the assets will be restituted in order to 'benefit the people of Kazakhstan'. The Swiss Agency for Development and Cooperation then transferred returned assets to the World Bank through a grant. After this step, despite the Swiss authorities' public announcement of the return process, both the Government of Kazakhstan and the World Bank have continuously framed the returned assets as a Swiss development grant.

Bibliography:

- "A case of irresponsible asset return – The Swiss-Kazakhstan $48.8 million", Pr K. Lasslett and Thomas Mayne, June 2018

- "World Bank Oversight of Asset Return: Lacking Clear Vision?", Bank Information Center, October 2019

April 2020

2. <u>The blurred outlines of the 'victim of corruption' concept prevent responsible asset restitution</u>:

While it does not provide any definition of these terms, the United Nation Convention Against Corruption ("UNCAC") considers the States Parties as the prior legitimate owners and victims of the crimes[1]. Following this view, UNCAC states that confiscated assets must be returned back to State Parties of their origin (art.57) and that each State Party must allow another State Party to initiate civil action to establish title or ownership of property acquired through the commission of an offence established in accordance with the UNCAC or to be granted compensation for damages caused by such offences (art. 53).

This perspective **excludes from its scope an entire section of potential legitimate victims of corruption** and can lead to nonsensical situations where assets are returned to the corrupt leaders from whom they were confiscated in the first place. Those potential legitimates victims are among others the defrauded population suffering from the under-financing of basic public services such as access to water, health or education

To avoid such situations, the most active countries in the asset recovery area have adopted ten principles at the Global Forum for Asset Recovery ("GFAR") that took place in December 2017. GFAR principle number 9 states that "*all steps should be taken to ensure that the disposition of confiscated proceeds of crime do not benefit persons involved in the commission of the offence(s)*." In accordance with this principle, in situations in which the corrupted officials are still ruling, claims for compensation of damages by States should be made inadmissible to avoid the return of funds to corrupt public agents.

Such situations are far from just being textbook cases. In 2019, French authorities ordered the repatriation of Uzbek assets within the legal framework for compensation, leaving no room for transparency and accountability measures. A French Court convicted three French companies for having laundered proceeds of bribery on behalf of an Uzbek high-level official and confiscated three real estate properties acquired with the corruption money. The Court granted the Republic of Uzbekistan the status of civil party and awarded it over EUR 60 million damages to be drawn from the confiscated real estate assets. Even though there may have been a change of regime in Uzbekistan, several assessments revealed that the new regime appointed to high office individuals directly implicated in illicit activities executed under the former regime[2].

This case not only sheds light on the inadequacy of regular French criminal procedural tools to provide victims compensation in cases of grand corruption but above all its exposes the flaws of the UNCAC perspective and the impact of the absence of the victim of corruption's definition. This case also exposes the **existing incompatibilities between UNCAC provisions and GFAR principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases**.It also reveals how the true victims of corrupt practices, i.e. drefrauded population, are excluded from the return of proceeds of corruption process, underming its legitimacy and efficiency.

[1]In a Resolution 6/2 entitled "Facilitating international cooperation in asset recovery and the return of proceeds of crime", the Conference of the States Parties to the United Nations Convention against Corruption noted that "*a large proportion of the proceeds of corruption, including those emanating from transnational bribery and other offences established under the Convention, are yet to be returned to the requesting States parties, their prior legitimate owners and victims of the crimes*".

[2] Reuters "Uzbek party nominates deputy cabinet head Aripov for PM", 12 December 2016, available at: https://www.reuters.com/article/us-uzbekistan-primeminister/uzbek-party-nominates-deputy-cabinet-head-aripov-for-pm-idUSKBN14111G [accessed 26 March 2020]

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CONTRIBUTION TO THE FACTI PANEL – RECOMMENDATIONS

Summary:

The initiative for Financial Accountability, Transparency and Integrity Panel was announced by the Presidents of ECOSOC & General Assembly during a joint briefing held on 28 January 2020. On that occasion, they announced the establishment of a high-level panel on international financial accountability, transparency and integrity (FACTI), a joint initiative which aims to enhance ongoing efforts to achieve the 2030 Agenda for Sustainable development.

Following a first contribution on Sherpa's insights on the matter of illicit financial flows, Sherpa aims at providing to the Panel some recommendations to tackle this phenomenon

SHERPA is a non-profit organisation based in Paris and created in 2001 in order "*to protect and defend victims of economic crimes*". Our vision is to build a world where law is in service of a more mindful globalization. Being at forefront of the fight against illicit financial flows for twenty years led to significant advances to foster the implementation of the 2003 United Convention against Corruption, notably on ill-gotten gains and the return of proceeds of corruption. Corruption and illicit financial flows in general are indeed an indisputable threat to countries all over the world; it weakens democratic institutions, favours government instability and undermines the legitimate trust between civil society and their leaders.

We welcome with great enthusiasm the launch of the Financial Accountability, Transparency and Integrity Panel. This joint initiative aiming to enhance ongoing efforts to achieve the 2030 Agenda for Sustainable development is a suitable forum to put on the international agenda the fight against illicit financial flows and the urgent need for an efficient return of their proceeds.

We understand from the Terms of Reference that the Panel is expected to review challenges and trends related to illicit financial flows in an interim report to be published in July 2020, and offer new and creative solutions in a final report in January 2021 to make the systems for financial accountability, transparency and integrity more robust, effective and universal.

Based on Sherpa's experience, the objective of this second note is to provide you some recommendations whose purpose is to enhance an improvement of the fight against illicit financial flows. As described below, the matter of illicit financial flows requires a holistic approach that endorses corruption, embezzlement, money laundering and tax and secrecy havens.

1. Corruption and embezzlement

Sherpa has been at the forefront of the global fight against corruption through strategic litigation and advocacy campaigns. In order to overcome several legal deadlocks, the following recommendations can be made.

- **A comprehensive and inclusive implementation review and monitoring of the UNCAC**: The Implementation Review Mechanism of the UNCAC is ensured by a subsidiary body of the Conference of State Parties. The review of State Parties legislation should give up the current chapter-by-chapter analysis and **adopt a cross-cutting perspective** of anti-corruption domestic legal regime. Moreover, **civil society organisations should participate as observers or contributors** in the meetings of UNCAC bodies, which would be more consistent with the

inherent ideals of transparency and multi-stakeholder collaboration of the fight against corruption.

- We recommend the **development and extension of preventive obligations against corruption** imposed to companies under national law. The mechanism is inspired by anti-money laundering legislation (AML). Some leading national law, such as French *loi Sapin II,* makes the establishment of an anticorruption compliance policy compulsory to companies. However, the **under-financing and under-staffing of supervising authorities** impede in-depth analysis on the anticorruption compliance process of companies. Its sanctions must also have a stronger deterrent effect, which they lack until now. **In addition, banks and financial institutions involved in the financing of activities or markets tainted by corruption must be held accountable. Bank money should not be used to finance criminal activities.**
- The **need to reinforce cooperation with AML stakeholders**[1]: AML benefits from strong and committed international stakeholders with leading institutions such as the Financial Action Task Force (FATF). The AML community has developed a wide set of standards and preventive measures and tools to suppress money-laundering such as public ultimate beneficial ownership, self-reporting or permanent review of the business relationships. Anticorruption experts are not always fully aware of them while they are of great help to detect, track, seize and return corruption and its proceeds. By adopting a holistic approach of iillicit financial flows, the AML standards should be transposed to anti-corruption legislation. **We therefore recommend an Addendum to the UNCAC expressly providing for the application of FATF measures as anticorruption tools[2].**
- Corruption is **still hard to evidence**: smoking guns, *i.e.* decisive evidence of corruption agreement, are hard to bring to court since corruption is by nature concealed from public scrutiny. **The extension of the reversal of burden of proof on the origin of proceeds of corruption could facilitate its prosecution.** It would be up to politically exposed persons with important assets to duly justify their origin.
- **The role of financial intermediaries**: so far, the suppression of corruption mainly targets bribers and bribed officials while leaving unpunished the detrimental behaviour of so-called gatekeepers that enable corruption scheme. **The in-betweens shall become accountable** by creating a distinct criminal offence or by a more frequent recourse to complicity (lawyer, accountants, auditors, tax advisors).
- The **lack of independence of prosecuting authorities** may block prosecution of corruption allegations. To overcome it, **civil society organization working on IFF should file complaints with liberal admissibility** conditions for their complaint.
- IFF scandals are revealed by journalists, whistleblowers and HR defenders, sometimes at the expense of their lives even in Europe (ex: Maltese journalist Daphné). **We need an international minimum standard of protection for HR defenders and journalists**.

[1] Financial Action Task Force, Best Practices Paper, The Use of FATF Recommendations to Combat Corruption, Octobre 2013
http://www.fatf-gafi.org/media/fatf/documents/recommendations/BPP-Use-of-FATF-Recs-Corruption.pdf

2 We therefore recommend an Adendum to Article 14.4 to the UNCAC
"In establishing a domestic regulatory and supervisory regime under the
terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to implement into their domestic legislation the relevant initiatives of
regional, interregional and multilateral organizations against money-laundering, first and foremost the Financial Action Task Force recommendations.

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2. The return of proceeds of corruption

The **return of assets** is one of the core principles of the UNCAC pursuant to its Article 51. Yet, the legal regime for restitution is still unclear**. The return of proceeds of corruption is long and faces several obstacles** (diplomatic immunity, identification of the victims of corruption, choice of the institution for proposing projects to the benefit of defrauded population funded with the proceeds of corruption and monitoring). **The issue becomes urgent as national courts start to render their first decisions on conviction and confiscation of ill-gotten gains**. Our recommendations are based on the core principles of efficiency, accountability, transparency and inclusion of civil society. The recommendations below are complemented by a specific document drafted on behalf of Sherpa and Transparency International France.

- **Civil society organisations must be recognized more easily as admissible to file complaint or claim for the return of proceeds of corruption** before civil or criminal courts.
- We call for a conceptual **work on the notions of proceeds of corruption and victims of corruption. The former must consider the full range**, including private illicit profits and companies' monetary and competitive value benefits obtained as a result of bribing public agents while the **latter must receive an international and domestic recognition and definition**. We recommend studying the different facets of the issue of compensation of damages for victims of corruption as well as their identification.
- Immunity of foreign State representative before criminal courts precludes criminal authorities to prosecution. **We recommend measures to exclude the benefit of diplomatic immunity in corruption cases to avoid** the misuse of this instrument of State sovereignty for personal ends.
- A clear legal framework for asset recovery must be established to guarantee the return of proceeds of corruption in **reasonably short timeframes:** strong and practical recommendations must be thinking and created and including the civil society especially from the spoiled countries.
- **Transparency must be key in the return of assets**. Banks must be scrutinized during the receipt and custody of proceeds of corruption by civil society organizations and States
- If the corrupted officials are still ruling, **claim for compensation of damages by States should be inadmissible** to avoid return of funds to corrupted public agents, as exemplified by one of Sherpa's strategic case regarding Uzbekistan.

3. Money laundering

The fight against illicit financial flows shall not be limited to corruption. It also includes money laundering, defined as the illegal process of concealing the origins of money obtained illegally by passing it through a complex sequence of banking transfers or commercial transactions to make it legal. The amount of money laundered globally in one year is 2–5% of global GDP, or $800 billion – $2 trillion in current US dollar – according to the UNODC[3].

- AML benefits from **a strong legal regime** composed of FATF recommendations, EU directives and domestic legislation which **did not impede large money-laundering scandals** within the European Union, yet the most pro-active area on those matters. They **underline the need to ensure a more stringent review** by supervising authorities **of their implementation** by banks and financial actors. Broader investigative powers and adequate financial and human resources to conduct full review must be granted to the monitoring and supervising public authorities.
- Money laundering consists in concealing the origin of illicit funds to turn them legal. Thanks to **complex corporate structures**, the beneficial ownership of shell companies or trusts registered

[3] https://www.unodc.org/unodc/en/money-laundering/globalization.html

in offshore jurisdictions is hidden. **A global beneficial ownership register of companies, trusts and any corporate vehicles should be established** with sanctions on companies that fail to provide adequate information on their ownership.

- The **need to extend the application *ratione personae* of AML obligations to financial intermediaries** (law firms, audit firms, accountants, tax advisors). The recent Luanda Leaks highlighted how leading audit firms helped Isabel dos Santos to launder the proceeds of embezzlement with investments in Europe[4]. It also shed some light upon **how audit firms, known as the Big Four, are largely under-regulated** compared to other financial services providers (banks). The regulation of those financial intermediaries must be strenghtened to reach the level of banks.

4. Tax evasion and tax, banking and corporate havens

Despite the very opaque nature of tax evasion and avoidance, the Tax Justice Network estimated the global loss to governments from profit shifting by multinational companies to $500bn per year in 2017[5]. Those practices are detrimental to the full realisation of human rights as recognised by the UN Economic and Social Committee[6]. They are possible thanks to complicit jurisdictions providing utterly low tax rate and the use of concealment strategies thanks to banking and corporate secrecy. In the frame of the *Plateforme Paradis fiscaux et judiciaires* gathering 19 civil society organisations, 16 proposals were elaborated in 2017.

- The current scarcity of tax information calls for a **public country-by-country reporting of tax contribution by companies** with open access to corporate beneficial ownership registers, their turnorver, profit, number of employees and taxes paid to governments.

- There must be **open access to the public beneficial ownership registers of companies, trusts and any corporate vehicles** for a better tracking of shell companies and other corporate structures registered in offshore jurisdictions. Lack or falsified data transmitted by companies should be punished with public sanctions on on the basis of a name-and-shame perspective.
- The lists of "official" tax havens omit to include some countries and are not efficient at all : we call for a **new methodology for identifying tax havens with common criteria for tax, banking secrecy, corporate and judicial havens**. Coercitive measures against tax havens with taxation of financial flows from and heading to these States.
- Following the example of EU directive 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, a self- reporing obligation of aggressive tax-avoiding mechanism should be established and extended with harsher and more systematic sanctions against intermediaires enabling tax avoidance.
- Finally, we emphasize the need for a more specific definition of tax offences, which recognizes the criminal nature of certain types of behaviour.

[4] https://www.theguardian.com/world/2020/jan/23/pwc-growing-scrutiny-isabel-dos-santos-scandal-luanda-leaks-angola

[5] https://www.taxjustice.net/topics/more/estimates-of-tax-avoidance-and-evasion/

[6] Committee on Economic, Social and Cultural Rights General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, para. 37. http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwlhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y