

# Recovery Initiative

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**Going for Broke: Insolvency tools to Support Cross-Border  
Asset Recovery in Corruption Cases**



# Introduction: UNCAC, Article 53

## Measures for direct recovery of property

### Each State Party shall:

- permit another to initiate civil actions to establish ownership of stolen assets
- permit courts to order compensation or damages for Party harmed by convention offences

- Why civil actions? Limitations of other avenues

- For criminal confiscation, the State must:

- obtain a criminal conviction (beyond reasonable doubt),
- link assets to the crime (except for value confiscation)
- use MLA (for investigations and enforcement of orders)
- Problems in case of death or absence of defendant

- Non Conviction Based Confiscation is not always available.

- Administrative Confiscation may not be recognized in foreign jurisdictions.

- See figure 3-10 of StAR-OECD publication “Few and Far”: in 2010-2012, 19,1 Millions of dollars recovered using criminal confiscation, and 16 Millions using private lawsuits.

# Advantages of insolvency actions

- In grand corruption cases, companies or businesses are often involved by holding assets, and conducting fraudulent transactions
- Having insolvency proceedings commenced against these entities is frequently possible when they are insolvent, or in certain jurisdictions, for “just and equitable grounds”
- In most jurisdictions, insolvency or winding up processes prevent dissipation or transfers of assets, and start with the appointment of an “insolvency representative” who manages the estate and its assets.
- The insolvency representative has access to all relevant documentation, accounting books and records and can audit all financial statements in case of fraudulent activity.
- Investigative measures requested by the insolvency representative can be authorized by courts, help find evidence of corrupt activities, and justify legal claims to recover assets
- Claims can involve “piercing the corporate veil”, liability actions against Directors, Corporate officers, Agents and Third Party facilitators, breach of duty, transactions at undervalue, fraudulent trading.

## New StAR publication :“ Going for broke ”

- Provide guidance to asset recovery practitioners and policy makers on how to use insolvency and private lawsuits to recover stolen assets in the context of UNCAC offences.
- Identify challenges and best practices,
- Step by Step approach
- Case examples show that it is a credible and effective avenue (ex: Maluf case, Tunisia..)

# Steps to contemplate for a Civil Action

- Determine whether a corporate vehicle was used to hold corrupt assets or conduct money laundering of corrupt proceeds
- Decide where to file a case and request the appointment of an insolvency representative
- Study what kind of investigative measures and legal actions are available
- Collect evidence and secure assets
- Use international instruments to enforce investigative measures or freezing
- Estimate amounts to recover
- Enforce and collect judgments in another country

# Steps for insolvency action to recover assets: Examples of Challenges and practices

- Which defendant? the corrupt actor as well as those who assisted in stealing, concealing or laundering the proceeds, and intermediaries and enablers.
- Collecting evidence and freeze assets : pre-trial disclosure, searches, seizure, freezing orders can be used in civil procedures, and sometimes coordinated with prosecutors or LEA.
- Ownership claim: not only on stolen or embezzled assets, but also on bribes paid to an official (Theory of “constructive trust”, See “Attorney General of Hong Kong”).
- Compensation claims and quantification of damages : compensation for damages is not based on specific assets, but often on the amount of damages and the harm caused by of corrupt activities.
- Invalidity of contracts and contractual remedies are sometimes a good alternative: to claiming ownership or damages.

# Thank you

- For further information please consult:  
*[www.worldbank.org/publication/going-for-broke](http://www.worldbank.org/publication/going-for-broke)*
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