

Proposals for FACTI Panel Recommendations – November 2020 updated

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We commend the excellent FACTI Panel interim report and recommend it to anyone interested in issues relating to financing for development. The real challenge now is to find the solutions that are technically feasible and politically viable, as is the intention of the FACTI Panel. And since the aim is to secure financing for the 2030 Agenda for Sustainable Development, we are looking for game-changing actions to take from 2021 onwards, that will have impact in the following eight years. But we at Transparency International also urge the Panel to include in their final report recommendations not only for the short- and medium-term, but also more visionary proposals that may take longer than eight years to achieve but would help secure sustainable development beyond 2030.

This paper focuses on the corruption-related challenges identified by the FACTI Panel interim report. Like the Panel, we have been looking for solutions. And while the focus in this paper is on the anti-corruption slice of the Panel's work, there are areas where anti-corruption issues overlap with the tax justice issues being considered by the Panel, as well as other areas, such as tackling organized crime.

The World Bank has a rough estimate that developing countries lose 20 to 40 billion dollars annually to bribery, embezzlement and other corrupt practices. But this amount does not account for the damage caused by corruption to societies, communities and individuals, which makes the harm and the financial loss from corruption a multiple, perhaps 100 times more. We are talking about substantial amounts that could be made available for financing for development. As the FACTI Panel interim report notes, citing an OECD report, a US\$1 million bribe can easily create US\$100 million worth of damage.¹

Our proposals in this paper focus on issues related to cross-border enforcement and cooperation against corruption, an area where improvements could make a difference to financing for achieving the 2030 Agenda.

Most of the ideas mentioned here are long-standing proposals that Transparency International has made over a period of years. The proposals are grouped in this paper into five categories: 1) tackling secrecy; 2) improving asset recovery; 3) addressing grand corruption; 4) enhancing enforcement monitoring; and 5) ensuring follow-up.² There is a wide range of options to explore that could help address enforcement and asset recovery gaps.

Tackling secrecy

¹ FACTI Panel interim report page 55 (September 2020) citing OECD (2014) Illicit Financial Flows from Developing Countries: Measuring OECD Responses, https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf.

² Our proposals on the first two subject areas are contained in our input to the FACTI Panel: https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/5ef2878c33bf5417b3e94200_INPUT%20OF%20TRANSPARENCY%20INTERNATIONAL.pdf and in our submission to the UNGASS against Corruption on Proposals on the international legal framework and infrastructure to address grand corruption impunity: <https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TransparencyInternational.pdf>

While international frameworks provide for multiple measures to tackle illicit financial flows, secrecy remains a problem area that should be tackled as a matter of high priority. The FACTI Panel interim report recognises secrecy as a common denominator in illicit financial flows observing that “Perpetrators of financial crimes and abuses rely most commonly on secrecy” and that cross-border access to beneficial ownership information is too difficult.³

We propose a common agenda for illicit financial flows focusing on the secrecy problem, in order to bring together the dispersed frameworks, institutions and policy areas with agreements on concrete measures. One of the most important secrecy problems concerns the beneficial ownership of legal structures like companies and trusts.

As part of the common agenda we are proposing, all countries should introduce central public registers of companies’ beneficial owners.⁴ This reform is long overdue and while there has been some progress, including a Financial Action Task Force (FATF) policy working group looking into the matter, it is too slow. FACTI Panel recommendations could help move the international community forward in the direction of stronger measures. The central public registers needed should be adequately resourced and have robust verification and sanctions mechanisms to address vulnerabilities identified in the FACTI Panel interim report.⁵

The need for such registers is widely understood. A Transparency International petition calling for universal central public registers was announced on 9 December 2020 and as of the end of January 2021, there were over 700 signatories from 120 countries, both organisations and individuals, from all sectors.⁶ A UN meeting of 140 experts from 50 countries in June 2019 also recommended central, public registers of beneficial ownership of legal entities.⁷

We also propose creation of a global asset register, starting with Politically Exposed Persons. This would be a global database of real and financial assets, including real estate, valuable goods and crypto assets and would provide information about the real owners. If well-designed and maintained, such a register would assist in the fight against corruption and illicit financial flows of all kinds, by making it more difficult for criminal actors to hide assets, expediting detection of unexplained wealth and enabling investigation of instruments and proceeds of illicit activities. A proposal along these lines was identified as an innovative idea in the annex to the “UN common position to address global corruption” submitted to UN General Assembly Special Session (UNGASS) against Corruption 2021; it also mentioned an international registry of asset declarations.⁸

Improving asset recovery

³ FACTI Panel interim report, page 58

⁴ <https://www.transparency.org/en/blog/illicit-financial-flows-facti-panel-path-forward-will-governments-act>

⁵ FACTI Panel interim report pages 62 - 63

⁶ <https://www.transparency.org/en/ungass-2021-commit-to-transparency-in-company-ownership-for-the-common-good>

⁷ https://www.unodc.org/documents/corruption/meetings/OsloEGM2019/Oslo_Outcome_Statement_on_Corruption_involving_Vast_Quantities_of_Assets_-_FINAL_VERSION.pdf

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https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/UN_Common_Position_to_Address_Global_Corruption_Towards_UNGASS2021.pdf

Action is also needed in response to the challenges in the area of international asset recovery identified by the FACTI Panel interim report. The amounts in question are not only embezzled funds, but also illicit gains and harm associated with foreign bribery, often very large amounts of money.

The challenges include insufficient use of proactive freezing and non-conviction-based confiscation. Another challenge is lack of proactive information sharing and a poor record of return of confiscated illicit proceeds by states where assets are held, resulting from lack of trust on the part of requested countries, including in foreign bribery cases.

In Transparency International's submission to the FACTI Panel, we proposed a multilateral agreement on asset recovery that would bundle together areas where new rules are needed, as part of a major international initiative for the return of proceeds of corruption.⁹ The aim would be to overcome specific challenges, including problems of trust.

Such an agreement should address problems with domestic legal frameworks and capacity in both requesting and requested states. It should include guidelines on victims' compensation, on handling grand corruption cases and on transparency and accountability at all stages of the asset recovery process, as well as on the role of civil society in asset recovery processes. It could also establish new or enhanced international structures to provide support, coordination, oversight and/or mediation in asset recovery processes.

Negotiating such an agreement could help focus minds and move the discussion beyond the regular disagreements at sessions of the UNCAC Conference of States Parties. It would set deadlines, put the spotlight on key problem areas and help efforts to overcome trust issues on the side of requested countries.

Addressing grand corruption

A third area where action would release resources for the Sustainable Development Goals would be through addressing grand corruption - meaning high-level, large-scale corruption. The FACTI Panel report recognizes that "many former kleptocrats manage to escape justice and enjoy their wealth with almost total impunity".

The international anti-corruption framework developed in the last twenty-five years does not provide a sufficient basis for ensuring accountability for the perpetrators of grand corruption schemes, including in the private sector. Often those perpetrators can interfere with and disable national justice systems, making justice officials unwilling or unable to pursue grand corruption cases. Often national justice systems are inadequately resourced or trained and incapable of handling grand corruption cases, especially where cross-border aspects make international

⁹ https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/5ef2878c33bf5417b3e94200_INPUT%20OF%20TRANSPARENCY%20INTERNATIONAL.pdf See also, https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TI_UNCAC_Coalition_Proposal_for_Asset_Recovery_Agreement.12.6.2020.pdf

investigations and enforcement complex and expensive. Decisive action is needed on this front to strengthen international and national frameworks.

We propose initiation of inter-governmental discussions to develop a definition of grand corruption and review possible new and stronger national measures to counter impunity, such as rules on extensive extraterritorial jurisdiction, lifting of immunities, unlimited statutes of limitation, standing for non-state actors in criminal and civil cases, higher sanctions and so on. Preventive measures could also be considered, such as those identified in the Oslo Statement on Corruption Involving Vast Quantities of Assets.¹⁰ The aim would be an international agreement on grand corruption, possibly an optional protocol to the UNCAC.

There should also be in-depth study of options for new regional and international structures to improve cross-border enforcement as proposed in Transparency International's submission on grand corruption to the UNGASS against Corruption 2021.¹¹ Another approach would be a mechanism for states and non-state actors to raise serious concerns about weak enforcement against international corruption.

Enhancing enforcement monitoring

A further area where there are challenges is in enforcement monitoring. The FACTI Panel interim report identifies a number of deficiencies in the UNCAC review mechanism including lack of inclusion, lack of transparency, lack of impartiality (due to lack of discussion in a peer review body) and lack of a formal follow-up process to country reviews and recommendations.¹² A further issue is the exclusion of civil society observers from subsidiary bodies of the UNCAC Conference of States Parties.

These are limitations that undermine the credibility of the UNCAC review process and reduce the attention paid to UNCAC and its review mechanism by civil society activists, the private sector, the media and academics, with a resulting loss of momentum and impact. These issues should be addressed, which will require overcoming longstanding opposition by a number of countries that do not favour having a strong UNCAC review mechanism.

The FACTI Panel interim report also identified lack of comprehensiveness as a problem with regard to the UNCAC review mechanism, commenting that “the peer review process would reveal impunity where it exists, yet the panel finds that this has not been realized effectively in the review process.”¹³

One approach to the weakness in enforcement monitoring identified by the FACTI Panel would be a major coordinated initiative on enforcement monitoring across existing monitoring bodies or outside those bodies, to produce periodic multi-country reports on country enforcement performance, using statistics, court decisions and other enforcement-related information.

¹⁰https://www.unodc.org/documents/corruption/meetings/OsloEGM2019/Oslo_Outcome_Statement_on_Corruption_involving_Vast_Quantities_of_Assets_-_FINAL_VERSION.pdf

¹¹ Proposals on the international legal framework and infrastructure to address grand corruption impunity <https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TransparencyInternational.pdf>

¹² FACTI Panel Interim Report, page 62 - 63

¹³ FACTI Panel Interim Report, page 62

Weaknesses in country performance should generate technical assistance and other support. More emphasis on actual practice would contribute to a better understanding of country-level strengths and weaknesses.

It would also be useful to create a public database of cross-border corruption enforcement statistics, court decisions and other publicly available information on cases. The Stolen Asset Recovery Initiative database on asset recovery cases has shown that this is feasible. It has also collected and compiled comprehensive data on asset recovery using a very detailed questionnaire.

Ensuring follow-up

Follow-up to the FACTI Panel report is crucial. We recommend that the UN General Assembly mandate a task force or working group to look deeper into the solutions that proposed by the Panel, as well as other proposals from the anti-corruption community to the UNGASS against Corruption. That body should include civil society members and take a period of one or two years to review proposals and come up with draft standards, agreements and detailed recommendations.