

© 2011 Basel Institute on Governance, International Centre for Asset Recovery

Steinenring 60, 4051 Basel, Switzerland

Phone +41 61 205 55 11, Fax +41 61 205 55 19

www.baselgovernance.org, info@baselgovernance.org

Cover design by Peter Huppertz, Basel Institute on Governance.

All rights reserved.

All parts of this publication are protected by copyright. Copying and/or transmitting portions or all of this work without permission may be a violation of applicable law. The Basel Institute on Governance encourages dissemination of its work and will normally grant permission readily. For permission to photocopy or reprint any part of this work or any other queries on rights and licences, including subsidiary rights, please contact info@baselgovernance.org.

Asset recovery: a remedy against the destructive forces of corruption

*'Capacity is Development.'*¹

Corruption is one of the endemic evils in today's world. The phenomenon has negative impacts on world poverty, democratic governance, progress and development. According to the World Bank, USD 20 to 40 billion is lost annually by developing nations because of corruption.² With the adoption of the United Nations Convention Against Corruption (UNCAC), the international community aims at setting up a comprehensive global framework to contain and ultimately lower significantly the levels of corruption worldwide. Chapter IV of the UNCAC focuses on asset recovery and provides tools for effectively fighting corruption.

Asset recovery is the process whereby the proceeds of corruption are traced, frozen, confiscated and repatriated in favour of countries that become victims to corruption. Asset recovery is an effective countermeasure to corruption because it signals to corrupt leaders that corruption no longer pays. However, many developing countries still lack the skills to collect evidence, prepare indictments, adjudicate cases and obtain convictions.³

This publication will demonstrate what asset recovery means, and, most importantly, how capacity building is needed to fight corruption in today's world. Successful asset recovery can function as a powerful tool to repair the damage caused by corruption. Skilled hands can effectively use asset recovery to help bring justice to those who have suffered from the diverse consequences of corruption.



- 1 Kanni Wignaraja, Director, Capacity Development Group, Bureau of Development Policy, UNDP, speech from Investing in Capacities for National Development, ESCAP-UNDP-SNV, April 2009, Regional Commission Session.
- 2 World Bank and United Nations Office on Drugs and Crime, Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, p. 9 available at <http://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>.
- 3 Anne Lugon-Moulin in *Recovering Stolen Assets*, edited by M Pieth, Bern 2008.



What is asset recovery?

Asset recovery is a complex and multi-faceted process which involves several steps that require high levels of technical knowledge and capacity. The actual repatriation of assets stands at the very end of a series of actions.

Corruption has no direct victim who could report the crime to law enforcement. Hence, a corruption case often starts indirectly, with a suspicion based on a newspaper article, a person blowing the whistle, intelligence gathering, a Suspicious Transaction Report (STR) from a financial institution or other potential lead that causes law enforcement authorities to suspect that illicitly acquired monies might have been obtained and concealed. Consequently, an investigation is often instituted to gather evidence to substantiate the criminal violation that generated the illegal proceeds. This investigative phase will also include the identification and tracing of assets that are directly connected to the underlying crime. In some countries, provisional freezing of assets can take place at this stage to prevent their movement or disappearance. Contemporaneous to securing evidence of the criminal violation and possibly freezing accounts, the criminal origin of the assets has to be proved. A conviction is dependent upon a thorough investigation and asset tracing. If successful, the authorities in the requested countries will have such assets frozen or seized and ultimately confiscated. Once a court has passed judgment, the assets can thereafter be forfeited.⁴

The last step in the process is the repatriation of those assets to the requesting country and their rightful owners, which should be followed by the monitoring of their further disposal.

The graphic provides a brief sketch of the asset recovery process and illustrates the complexity of asset recovery. It becomes clear that this process requires both domestic inter-agency cooperation and international co-ordination. It depends upon sound evidence, specific investigative techniques and legal knowledge. Critical to success is the need for efficient strategies for tracing the stolen assets and the capacity to act quickly to avoid their dissipation.

⁴ Non-conviction based forfeiture (NCB) in which no criminal conviction to forfeit the assets is necessary is an alternative in some countries.

Challenges ... and solutions

In recent years, it has been possible, in some instances, to recover assets. In the case of Ferdinand Marcos of the Philippines, USD 684 million was returned by Switzerland in 2003 after ongoing legal proceedings which lasted for 17 years. In the case of Sani Abacha, former Nigerian Dictator, USD 700 million was returned by Switzerland after six years of court proceedings. Despite a few cases providing a ray of hope, corruption remains a challenge for both developed and developing countries. It continues to be difficult to prevent assets from being stolen and stashed away, or to trace, investigate, seize and eventually repatriate them. It is, however, possible to identify and isolate those challenges. An overarching observation that applies to all the challenges in asset recovery is the fact that capacities, especially in developing countries, remain low. Those capacities must first be developed for asset recovery cases to progress successfully.

In the Mobutu case, the lack of political will in the Democratic Republic of Congo (DRC) proved to be a major obstacle. This lack of political will is often a result of the fact that those who diverted the assets are still in power, and will therefore oppose the idea of the assets being found and returned (Case Story 1).

Another recurring obstacle to asset recovery is a weak domestic legal framework that does not conform to internationally benchmarked standards for asset recovery (Case Story 2).

Case Story 1

Lack of Political Will

Former Zairian dictator Mobutu Sese Seko Kuku Ngbendu wa za Banga accumulated an estimated USD five billion during his reign. A large proportion of those assets were deposited into Swiss bank accounts. Switzerland attempted to return the assets to the DRC for 12 years. However, in the end, the statute of limitations ran out and, in 2009, the Federal Criminal Court of Switzerland ruled against pursuing a complaint with regard to these assets. The freezing of Mr. Mobutu's assets was lifted, and the assets had to be released to the Mobutu family.

The challenge

Asset recovery can only be successful if there is sufficient political will to act, and the countries involved are willing to cooperate and follow the required legal procedures and provide the requisite materials.

Possible solutions

Awareness raising and education about the pitfalls of corruption in countries where political will is lacking/ Targeted and specialised trainings for law enforcement/ Support countries to ratify and implement UNCAC/ Organisation of experts meetings

Weak domestic legal framework

The Investigation Section of the Liberian Anti-Corruption Commission (LACC) is staffed with highly dedicated and competent investigators. However, they are operating with their hands effectively tied behind their backs because the Liberian Anti Corruption Act does not allow the LACC to investigate any offences that occurred prior to the promulgation of the act in 2008 – even if the offense (bribery, corruption, etc) existed prior to it. Additionally, the act does not give the LACC the power to compel the production of bank records, commercial documents, or the testimony of witnesses. This failure in the law makes it virtually impossible to conduct any complex corruption investigation – effectively giving sophisticated corrupt officials immunity from prosecution. By international standards, the Liberian money laundering statute is one of the most ineffective in the world. It is not apparent from a casual reading of the statute but a closer analysis reveals that there are only six permissible predicate offences – rape, treason, murder, terrorism, hijacking and armed robbery. Few of these offences actually generate funds that can be laundered and there are no corruption related violations included as predicate offences.

The challenge

The asset forfeiture laws of a country serve as the basis for asset recovery. With a domestic legal framework that effectively lacks “teeth” and does not enable investigators, prosecutors and judges to act, asset recovery is made difficult, if not impossible.

Possible solutions

Legislative procedural advice/ Case consultancy

Lack of capacity and domestic resources

In the case of ex-dictator Jean-Claude Duvalier from Haiti, Switzerland froze about CHF six million. After more than 20 years of efforts to return the money to Haiti, the Swiss Federal Court finally ruled in January 2010 that the money could not be returned to Haiti because of the lack of criminal proceedings against Mr. Duvalier in Haiti and the statute of limitations, which had run out. This put an end to the mutual legal assistance (MLA) between the two countries. Despite the court ruling and to avoid a return of those assets to the Duvalier family, the assets remain frozen based firstly on the Swiss Constitution and later on article 14 of the new Swiss Act on the Restitution of Illicit Assets (RIAA) which entered into force on 1 February 2011. At the beginning of 2011, the Federal Council requested the Federal Department of Finance to initiate proceedings for the forfeiture of the funds based on the aforementioned new law which allows for the return of stolen funds to states whose political structures are dysfunctional.

The challenge

If capacity to investigate and trace assets is low, a MLA request will often not satisfy the requirements of the legal system in the country in which the assets are located, and ultimately will fail.

Possible solutions

Targeted and tailor-made asset recovery trainings/ Specialised trainings in MLA/ Legal and case consultancy/ Distribution of expert literature and handbooks

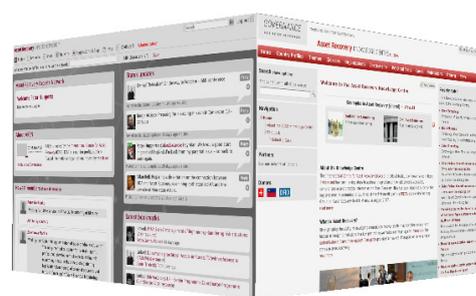
In addition to domestic legal frameworks that often do not provide a proper basis for the successful recovery of assets, law enforcement in many instances lacks the necessary investigative experience and techniques. Experience and practical knowledge, however, are essential to successfully drive an asset recovery case forward (Case Story 3).

Problems also lie in the area of deficient or inadequate national and international networks and channels of communication and cooperation, both on a formal and informal level (Case Story 4).

Often, we observe a general lack of awareness that asset recovery is an interlinked process requiring the cooperation and joint efforts of national as well as international institutions. The situation is further exacerbated by differences in domestic legal systems, especially in relation to procedural rules. A country may face the situation where, in accordance with its legal system, it has a valid case whereas another country applies different standards and conditions (Case Story 5).

Last but not least, financial centres, where hidden assets often end up, sometimes do not provide the most favourable conditions for recovering assets. One such challenge to overcome in this regard relates to banking secrecy provisions which can make it impossible for investigators to receive the information needed to be able to convert suspicions into intelligence, and ultimately into evidence that is admissible in court.

To successfully meet these challenges, various solutions are available: The lack of political will can be countered by aware-



Case Story 4

Problems of internal cooperation and lack of clear structures of communication

On mission in Armenia, experts of the International Centre for Asset Recovery learned that there were six to seven different agencies involved in the process of the investigation of corruption. A co-ordinated or a joint task team approach, however, was lacking or seldom practiced.

The challenge

Without clear structures of communication, anti-corruption and asset recovery efforts risk being inefficient, duplicated or even doomed to fail because relevant information is not shared and efforts remain splintered.

Possible solutions

Assistance in the creation of inter-agency asset recovery working groups, round tables and task forces/ Assistance in the creation of national strategies for combating corruption/ Promotion of informal networks like the Asset Recovery Experts Network (AREN, <http://aren.assetrecovery.org>).

Differences in legal systems

In the case of the Abacha monies deposited in Switzerland, an experienced Swiss law firm was hired by the Nigerian government and paid for by the Swiss government to act as a mediator between the two countries' authorities in the asset recovery process. Being familiar with Swiss law, the responsible lawyer successfully assisted the Nigerians in formulating a MLA request.

The challenge

National legal provisions (i.e. evidentiary threshold) might differ widely: Legal standards and processes in a common law country, Nigeria, may be significantly different from those in a civil law country, Switzerland. Sometimes those differences are hard to overcome without the assistance of experts who come from the country in which the assets are located.

Possible solutions

Legal assistance and advice/ Encouragement in the creation and use of informal networks like AREN/ Provision of free online resources like the Asset Recovery Knowledge Centre (<http://www.assetrecovery.org>).

ness raising activities, targeted and specialised trainings for law enforcements agencies, as well as support to countries, especially civil society organisations (CSOs), in pushing for UNCAC ratification.

Legislative procedural advice and gap analysis can help overcome the challenges of weak domestic legal frameworks, making them compatible with international standards. The lack of experience in asset recovery investigations can be met with targeted and tailor-made trainings in financial investigations and MLA that aim at establishing the exact skills necessary to recover assets successfully. Such trainings must be country-specific and aim to include the group of people who will later deal with the investigations and tracing of assets. On a more theoretical level, the initialisation of expert literature and handbooks like the StAR Initiative's *Asset Recovery Handbook*⁵, or the *Tracing Stolen Assets Practitioner's Guide*⁶ by the Basel Institute on Governance can assist in filling such gaps in capacity.

Addressing the lack of national and international communication and networks, the aforementioned trainings can also provide a valuable opportunity to facilitate inter-agency exchange. Networking platforms like AREN may further help to foster informal contacts and communication, both of which are essential for victorious asset recovery.

Differences in legal systems can be addressed with enhanced

5 http://www1.worldbank.org/finance/star_site/documents/arhandbook/ar_handbook_final.pdf

6 http://www.baselgovernance.org/fileadmin/docs/publications/books/asset-tracing_web-version.pdf

international cooperation. Learning from each other and assisting one another in complying with different legal requirements will ultimately benefit both sides.

The challenge of lifting strict banking secrecy provisions normally requires legislative changes. However, a combination of CSO pressure on governments and legal and case consultancy assistance will aid in changing the provisions relating to access to bank accounts.

The key issue in overcoming the challenges to asset recovery is capacity building. It is crucial for requesting countries to be skilled at managing and developing the process of asset recovery. Complete understanding of all phases of this process and the related technical details is critical to the successful return of assets. Capacity building can provide the tools and strategies necessary to increase the amount to be repatriated and to reduce the annual loss of income to countries through corruption.

The future?

Asset Recovery possesses great potential as an effective tool for addressing the damages of corruption, and also for fighting corruption as such.

To recover assets successfully, capacities in a variety of areas are crucial. Supporting developing, least developed and transition countries in building those capacities is one of the major tasks of international and other organisations working in the anti-corruption field. Players like the UNODC/World Bank StAR Initiative that are active in the arena of anti-corruption and strengthening capacities in developing countries to recover assets have already taken important steps in that process. Indispensable are initiatives like those of the Wolfsberg Group, an association of banks that developed rules aimed at supporting anti-corruption and anti-money laundering efforts for the private banking sector. Also, the Egmont Group, an association of Financial Intelligence Units (FIUs), established an informal network aimed at the expansion and the systematisation of international cooperation in the reciprocal exchange of information. CSOs like Transparency International or SHERPA play a crucial role in promoting non-governmental concerns.

The importance of ensuring that a level of justice is brought to those betrayed by the corrupt acts of their political leaders must not be ignored. Asset recovery presents itself as a powerful weapon in this regard, and it is of importance to strengthen the ability of those who will need to use it as a tool.



The Basel Institute on Governance/ International Centre for Asset Recovery

The Basel Institute on Governance is an independent think tank that specialises in the areas of good governance at the public and corporate level and in anti-corruption and anti-money laundering. Founded in 2003, the Institute has gained a reputation for its expertise in capacity building, research and policy advice. Its members consist of experienced practitioners, experts and academics.

The International Centre for Asset Recovery (ICAR) was founded in 2006 as a part of the Institute. The ICAR assists countries in building sustainable capacities to support the asset recovery and AML processes. This specialised Centre carries out its mandate through different activities, all of them aiming at long-term, sustainable and tangible results. A key activity of the ICAR is the development and delivery of tailor-made, country-specific trainings in financial investigations, asset tracing/ recovery and MLA. Trainings have been carried out in over 20 countries worldwide. The ICAR also offers legal and case consultancy services in the area of asset tracing, recovery and repatriation. Legal experts of the Centre with long-standing experience in litigation and prosecution are ready to assist law enforcement and anti-corruption agencies in managing specific asset recovery cases.

ICAR publications analyse both theoretical issues in the specific area of asset recovery and provide direction for practical applications. Information Technology (IT) tools and services are designed to accommodate the specific needs of the respective anti-corruption agencies and institutions that may be involved in asset recovery processes. They include knowledge products as well as intelligence tools and management systems.

The difference between the ICAR and other institutions working in the broad area of governance and anti-corruption is its tailor-made, country-specific and highly targeted capacity building programs, its combination of training and practical case consulting and the integration of practice-oriented work with policy development and research.



Dear Daniel, I have been telling everybody in the region that the Basel Institute on Governance is a resource pool; so those who want to drink from it are most welcome to do so [...] Just keep up your good work

Hermann Kessy, FIU Tanzania

I have participated in many trainings, which, of course, were very useful for my job and performance, this [ICAR] training methodology was extremely important for me as I was required to actually investigate the case, collect evidence, seize criminals' property and charge them.

Mr. Koba Gogiberidze from The Ministry of Environmental Protection and Natural Resources of Georgia, Head of Investigation Department who participated in an ICAR Training in January 2011.

I note with tremendous appreciation the role you played as an international consultant/expert in this project [Kenya Gap Analysis]. Your advise and comments on policy and technical issues of the UNCAC and especially in regard to Chapter IV (International Cooperation), Chapter V (Asset Recovery) and Chapter VI (Technical Assistance) ensured that our technical team was availed the best exposure to an understanding of international best practices and case studies.

Prof. Plo Lumumba, Director/ Chief Executive of the Kenya Anti-Corruption Commission who had worked with the Head of Legal and Case Consultancy for the UNCAC Gap Analysis.

The Knowledge Centre has been very useful for my ongoing research related to my LL.M. You can easily find decisions from the Swiss Supreme Court on the main asset recovery cases, as well as their respective chronology. My sincere thanks to the organizers of the Knowledge Centre!

Rochelle Ribeiro, LL.M candidate , 28 April 2011

From the views expressed to me by delegates from the developing countries it would appear that they found the Conference very helpful. If this means that the Conference met our prime objective in starting a process of providing help to developing countries in obtaining information on financial crime and assisting them in the recovery of the proceeds of such crime, this owed much to the quality of the presentations. We are therefore very appreciative of important contribution you made to the Conference. Thank you again for giving your time to help us take a first step down a road at the end of which hopefully there will be much benefit for all concerned and in particular for the developing countries.

Colin Powell, Adviser- International Affairs, Chief Minister's Department, States of Jersey

Basel Institute on Governance
Steinenring 60
4051 Basel, Switzerland

Phone +41 (0)61 205 55 11

Fax +41 (0)61 205 55 19

Email info@baselgovernance.org

Web www.baselgovernance.org | www.assetrecovery.org