



The role of donors in the recovery of stolen assets

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Abbreviations

AFAR	Arab Forum on Asset Recovery
AML	Anti-money laundering
CARIN	Camden Assets Recovery Interagency Network
CoSP	Conference of State Parties to UNCAC
CSO	Civil society organisation
Danida	Danish International Development Agency
DfID	UK Department for International Development
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
GIZ	German Federal Enterprise for International Cooperation (<i>Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH</i>), successor to GTZ
GTZ	German Organisation for Technical Cooperation, predecessor to GIZ
HLF	High Level Forum on Aid Effectiveness
ICAR	Basel Institute on Governance's International Centre for Asset Recovery
ICIJ	International Consortium of Investigative Journalists
MLA	Mutual legal assistance
OECD	Organisation for Economic Co-operation and Development
OECD DAC	OECD Development Assistance Committee
OWG	Open Working Group of the General Assembly on Sustainable Development Goals
PEP	Politically exposed person
StAR Initiative	Stolen Asset Recovery Initiative
TI	Transparency International
UFAR	Ukrainian Forum on Asset Recovery
UNCAC	United Nations Convention against Corruption
UNDP	United National Development Programme
UNODC	United Nations Office on Drugs and Crime

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Abstract

Financial crimes such as corruption, fraud, and embezzlement generate significant profits, often at the expense of the public budget. These proceeds of crime are usually hidden outside of the country where the crime was originally committed, and laundered through complex financial and commercial transactions, often spanning across numerous jurisdictions. Asset recovery – the process of identifying, restraining, seizing, and repatriating these assets to the countries from whence they were originally stolen – is one of the greatest challenges for the global anti-corruption movement. Asset recovery is also an essential development challenge, as it usually involves repatriating funds back to a developing country where they were stolen, and where they could be used to support development projects. As a bridge between aid recipient and donor countries, donor agencies are uniquely positioned to support asset recovery initiatives. Interesting examples are emerging of how donors can support asset recovery by: (i) supporting international standards and initiatives; (ii) providing technical assistance and capacity building (most often through third parties); (iii) encouraging policy coherence at home; (iv) helping build political will; and (v) providing assistance during the asset repatriation phase.

1 Introduction

Financial crimes such as corruption, fraud, and embezzlement generate significant profits, often at the expense of the public budget. These proceeds of crime are usually hidden outside of the country where the crime was originally committed and laundered through a range of financial and commercial transactions, often spanning across numerous jurisdictions before being reintroduced into the legal financial system.

Identifying, restraining, seizing, and repatriating these assets to the countries from whence they were originally stolen is one of the greatest challenges for the global anti-corruption movement. Asset recovery – as this process is usually called – is also an essential development challenge as it usually involves repatriating funds from an international financial centre to a developing country where they were stolen.

The developmental impact of asset recovery cases cannot be overstated. First, large-scale corruption and embezzlement cases subtract public funds that should be used for development objectives in countries where public budgets are already stretched and resources are often scarce. Incidentally, these are the same countries to which donor agencies provide hundreds of millions of dollars in budget support. Using returned “stolen assets” for developmental purposes can make a significant contribution to remedying previous losses to the public budget. Second, repatriating these assets is the most effective way to counter the perception, widespread in many developing countries, that corruption is hardly ever punished and that corrupt politicians and other public officials get to enjoy the proceeds of their crimes. This perception erodes trust in institutions and may further fuel criminal behaviour in other contexts. On the contrary, asset recovery results in criminals being deprived of the profits of their crimes, which is a powerful deterrent against future criminal activities.

As a bridge between aid recipient and donor countries, donor agencies are uniquely positioned to support asset recovery initiatives when assets are stolen from aid-recipient countries and placed in international financial centres. While the involvement of donor agencies in asset recovery is relatively recent, and few donors have supported initiatives in this area, some important examples of how donor agencies can successfully support asset recovery have nevertheless emerged. This paper provides an overview of five ways in which donors have supported and can continue to support asset recovery: (i) supporting international standards and initiatives; (ii) providing technical assistance and capacity building (most often through third parties); (iii) encouraging policy coherence at home; (iv) helping build political will; and (v) providing assistance during the asset repatriation phase. Overall, the paper suggests that a greater involvement of donor agencies in this area is desirable, since donor agencies can help fill significant gaps in the asset recovery process, can help build trust between institutions in different countries, and are strategically positioned to help determine the end use of and, if needed, to help manage returned funds.

2 An overview of the asset recovery process Assumptions

2.1 What is meant by “asset recovery”?

Financial crimes such as corruption and fraud generate enormous unlawful profits. These criminal activities often prove so lucrative that the threat of a jail term is not sufficient to deter perpetrators. To build a more powerful deterrent effect, investigators and prosecutors also need to go after the profits generated by such criminal activities, with the objective of returning the recovered assets to the legitimate owner (often a country’s treasury) and thus making the criminal activity itself less lucrative and attractive. This process has come to be known as “asset recovery.”

The ultimate goal of asset recovery is to deprive criminals of their illegally acquired assets and return these assets to their country of origin. As noted by a recent study on asset recovery and development assistance (OECD DAC and StAR 2011, 13), asset recovery represents a significant improvement compared to the traditional focus of law enforcement, which was limited to obtaining a conviction and prison penalty. This has often occurred because prosecuting a perpetrator for the underlying criminal offence (such as corruption) is often easier for law enforcement, prosecutors, and courts than following the money that has been laundered; it is also in line with law enforcement’s approach to other, non-financial crimes.

2.2 Linking money laundering to asset recovery

Both money laundering and asset recovery are related to the concept of “proceeds of crime” (Gray et al. 2014, 9). Asset recovery is the effort by law enforcement and prosecutors to (i) identify and trace the proceeds of crime; (ii) restrain them to avoid their dissipation; (iii) link them to a criminal activity and its perpetrators; (iv) confiscate them from the perpetrators; and (v), where applicable, return them to their rightful owners (ibid., 15). Asset recovery is a complex process. It requires knowledge and expertise in several different areas (e.g., finance and accounting), as well as the intense use of resources. To successfully pursue an asset recovery case, investigators and prosecutors must possess significant technical capacity (ICAR 2011) and involved jurisdictions must have in place (i) adequate legal and procedural frameworks; (ii) an institutional understanding of the asset recovery process; and (iii) appropriate knowledge, resources, and capacity.

The term “money laundering” refers to the criminal activity that individuals (or companies), following the commission of a “predicate” offence, carry out in order to hide the true origin, nature, and ownership of their unlawful gains and avoid having the proceeds of their crimes confiscated. A perpetrator of a crime thus commits two offences: the offence that generated the unlawful profits (e.g., the corruption, fraud, or embezzlement that is known as the predicate offence) and the offence of money laundering, whereby the perpetrator attempts to mask the illicit origin of the assets to give them a veil of lawfulness.¹

Criminals respond to law enforcement’s attempts to recover the proceeds of crime by making it harder to identify and trace them. Money laundering often takes place across numerous jurisdictions. Routing the proceeds of crime through different countries, and using intricate corporate, legal, and financial structures, makes the tracing of stolen assets more complicated and cumbersome and reduces the chances of confiscation.

The exact amount of illicit assets laundered globally is not known; figures in this area are famously difficult to extrapolate, and estimates pose multiple methodological issues that make their reliability

limited. Estimates should therefore be taken cautiously and only be used to assess the scale of the problem. The UNODC (2014) estimates that two to five percent of the global GDP is laundered annually. Global Financial Integrity estimates that the illicit financial flows from developing countries in 2011 stood shy of US\$ 947 billion, a figure much greater than the US\$ 134.8 billion that donors disbursed in official development assistance in 2013, according to the OECD (2014). More reliable figures, albeit from a limited sample of countries, come from a recent StAR Initiative study, which collected data from OECD countries on stolen asset recovery cases involving proceeds from foreign jurisdictions (Gray et al. 2014). Twenty out of 34 OECD countries responded to the survey and reported approximately US\$ 2,623 million frozen and approximately US\$ 424 million returned between 2006 and June 2012. The amounts returned, albeit still a fraction of assets reportedly stolen each year, are clearly quite significant and could have an important developmental impact if returned to the countries of origin.

Corruption offences belong to the category of serious crimes that are considered predicate offences for money laundering, according to international standards. Understanding how money is laundered thus plays a key role in recovering stolen assets, since criminals typically use money laundering techniques to disguise the illegal origin of their assets and to disassociate themselves (to the extent possible) from their assets, while retaining ultimate ownership (often referred to as “beneficial ownership”). Law enforcement agencies that want to pursue asset recovery cases must have an extensive capacity to investigate international money laundering schemes.

Beyond that, asset recovery requires communication, coordination, and cooperation by numerous stakeholders at different levels and often across several jurisdictions. It furthermore requires a high level of trust between the institutions involved, both within and across jurisdictions. Because of these and other factors, asset recovery cases can be very time consuming. In fact, the fastest international recovery of stolen assets on record is considered to be the recovery of Abacha funds from Switzerland, which took approximately five years. Other known cases have taken up to 20 years (or more) from the beginning of the investigation to the return of the stolen assets. By way of example, the return of Ferdinand Marcos’ assets from Switzerland to the Philippines took more than 28 years and was completed only in 2014.

3 The role of donors in asset recovery

Although asset recovery has been of interest to the international community since the 1980s (including in areas not directly related to corruption, such as the return of stolen cultural property), it has not traditionally been incorporated into development assistance programmes (OECD DAC and StAR 2011, 23). Following the 2000 Millennium Development Goals (MDGs), however, asset recovery has gradually become part of the international aid agenda. A growing consensus has emerged from literature and practice that illicit financial flows and money laundering have a deleterious effect on development.

Furthermore, implications of financial crimes themselves provide compelling arguments for the involvement of donors in asset recovery. Most stolen assets cases stem from embezzlement investigations involving public officials from developing countries who have stolen public funds and hidden them abroad. In other words, the illicit movement of assets subtracts resources that might otherwise be destined to funding health, education, agriculture, and other development programmes. Furthermore, some of these illicit funds come from the budgets of aid recipient countries to which donor agencies provide significant amounts of funding, often in the form of budget support. From a public view standpoint, it could appear that donor funds are making their way into the pockets of dishonest public officials. Finally, the possibility of hiding abroad the proceeds of corruption or embezzlement is one of the greatest motivations behind financial crime. In developing countries, the idea that corrupt public officials get to enjoy the proceeds of their crimes abroad can fuel a sense of impunity among those officials and ultimately erode public trust in institutions and the overall rule of law. This runs directly contrary to key objectives of many development assistance programmes. In sum, stolen assets undermine development in significant ways, and returning stolen assets can help counter the negative developmental effects of large-scale corruption, fraud, and embezzlement cases.

The sections below present suggestions regarding the role donors can play in the asset recovery process, based largely on existing practices. First, as discussed below in section 3.1, donors play a key role in establishing and implementing international standards for asset recovery, such as those set forth in international development goals or in international agreements such as the UNCAC. These standards can help facilitate other international initiatives on asset recovery, which are essential in building momentum in support of asset recovery efforts. Second, because asset recovery is an extremely complex process that requires specialised skills often missing in developing countries, section 3.2 focuses on the types of technical assistance that donor agencies have provided and can provide to support developing countries as they investigate cases and attempt to repatriate stolen assets. Section 3.3 focuses on the role donor agencies can play in at home. Often donor countries are home to the international financial centres where stolen assets are hidden and laundered. Donor agencies can help sensitize other institutions in their home countries on the negative developmental effects of money laundering, thus helping ensure greater consistency between their government's development policies and its general stance on and regulation in the area of anti-money laundering. Section 3.4 examines how donors can help build political will, which can be a significant obstacle to the recovery of stolen assets. Finally, section 3.5 looks more specifically at the different steps in the delicate asset repatriation phase and what donors can do to help ensure that returned funds are used transparently and for their intended purposes.

3.1 Supporting international asset recovery standards and initiatives

3.1.1 Advocating asset recovery to further development goals

The MDGs laid the groundwork for asset recovery becoming part of the international aid agenda by changing the paradigm for donor-driven technical assistance (see UN 2000). While they do not directly mention the asset recovery process, they do refer to processes closely intertwined with asset recovery, such as global efforts to improve good governance (ibid., para. 13). In 2002, the Monterrey Consensus followed this paradigm shift, establishing that good governance is essential to sustainable development and that combating corruption is a priority (UN 2002; see also UN 2000, para. 13). The Monterrey Consensus also triggered discussions on mechanisms for a more effective recovery of stolen assets and on strengthening cooperation in combating money laundering. Both the Millennium Declaration and the Monterrey Consensus affirmed some of the underlying principles of the asset recovery process, particularly the principle of restitution of illicitly acquired funds.

BOX 1. ASSET RECOVERY AND HIGH LEVEL FORUMS ON AID EFFECTIVENESS (HLFS)

The HLFs have occurred every three years since 2005 and have served as milestones in the incorporation of asset recovery into development assistance programmes. Anti-corruption, anti-money laundering, and asset recovery have been discussed in all HLFs since 2005. The *Paris Declaration on Aid Effectiveness*, which was produced as part of the second HLF, affirmed the commitment of the donor community to address the challenges of corruption and lack of transparency, both of which erode public support and prevent donors from using partner country systems (2005, para. 4). The *Accra Agenda for Action* (2008), in turn, established that transparency and mutual accountability are essential elements for development results and the effective and efficient use of development financing requires both donors and partner countries to fight corruption. As part of the *Accra Agenda* (i) aid recipients agreed to address corruption by “improving systems of investigation, legal redress, accountability, and transparency in the use of public funds” and (ii) donors agreed to address corruption by taking “steps in their own countries to combat corruption by individuals or corporations and to track, freeze, and recover illegally acquired assets” (ibid., para. 24). After the 2011 HLF in Busan, the HLF was replaced by The Global Partnership for Effective Development Cooperation, a more inclusive and diverse alliance of stakeholders that also endorses asset recovery as an essential component of the aid effectiveness agenda.

Significantly, the post-2015 Sustainable Development Goals address asset recovery under Goal 16: “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels” (OWG 2014). Specifically, target 16.4 under that goal focuses on the need to “significantly reduce illicit financial and arms flows, strengthen recovery and return of stolen assets and combat all forms of organised crime” by 2030 (ibid.). Inclusion of this issue in the post-2015 MDG indicates that asset recovery is likely to remain an important component of the international development discourse over the coming years.

In addition, international agreements have contributed to the development of international standards related to asset recovery. For example, the UNCAC, approved in 2003, was the first binding instrument that acknowledged asset recovery as a global challenge. It has provided additional momentum to allow donors to incorporate asset recovery as part of their anti-corruption agenda, particularly in light of commitments made by state parties, including donor countries.

BOX 2. INTERNATIONAL ASSET RECOVERY STANDARDS: THE UNCAC

Chapter V directly addresses asset recovery, but chapters IV (on international cooperation) and VI (on technical assistance and information exchange) also deal with the issue. In particular, chapter IV lays a foundation for international cooperation in the area of asset recovery by setting standards for activities such as mutual legal assistance (MLA) (see UNCAC article 46). For example, it provides that a country may ask so that a “requested country”¹ (i) to collect and provide evidence to substantiate an investigation or prosecution (such as executing a search or seizure); (ii) to identify, trace, or freeze the proceeds of crime; or (iii) to engage in certain criminal proceedings (such as service of process on a defendant).

Chapter V builds upon these MLA standards in the area of recovery of stolen assets. Article 55, for instance, sets forth two possible ways that a donor country and an aid recipient country can cooperate when stolen assets from the aid recipient are in the donor country. First, the requested country (the donor country) could initiate its own criminal proceedings for money laundering or a related criminal offence. Second, the requested country could enforce a final court order from the requesting country to confiscate the assets.

It should be noted, however, that conducting financial investigations with a view to seizing and repatriating assets outside the jurisdiction conducting the investigation is both complex and time consuming. For this reason, UNCAC article 60 foresees that state parties will initiate, develop, or improve training programmes destined to prevent and combat the underlying corruption. Many donor agencies actively support the training of investigation and prosecutorial authorities both at home and abroad – as well as their own staff – to help them understand and respond to the complexities and challenges of financial investigations.

3.1.2 Facilitating global asset recovery dialogue

Because asset recovery cases are complex and involve multiple jurisdictions, they require excellent communication and coordination among involved jurisdictions, as well as mutual responsibility, reciprocal trust, and the definition of clear expectations on expected outcomes of the asset recovery process.

Asset recovery practitioners have been aware of these challenges for a long time. The willingness to overcome them has led to discussions among stakeholders, and, over the last 25 years, to the negotiation and introduction of several international (and regional) standards in the area of asset recovery and AML. These efforts, aimed at creating a common understanding and a level playing field in the fight against corruption, culminated in the UNCAC.

One of the main results of these efforts has been an increased push within the international community to streamline the asset recovery process and to launch initiatives aimed at effective coordination and communication among different legal systems and traditions. Examples of these initiatives include (i) the AFAR and UFAR processes (see box below) and (ii) practitioner networks, such as the Egmont Group,

the StAR/Interpol Global Focal Point Initiative, and the Camden Assets Recovery Interagency Network (CARIN) and its regional peers. Many of these initiatives already benefit and others would benefit from donor support in the form of contributions to the policy dialogue or through financial support for implementation.

Despite these efforts, though, significant challenges remain, particularly the diverging interpretations of these international standards and the divide between requesting and requested countries that emerged during the negotiations of UNCAC on certain topics, such as the modalities for returning stolen assets.

Donor agencies already play a role in international initiatives such as those listed above, and they are in a unique position to support emerging initiatives as well. In particular, they can help countries overcome divergent views and interpretations of international policies on asset recovery. While donor agencies are often based in requested countries, they are also well aware of the needs of requesting countries. Thus, they can play a mediating role in international forums. In particular, they may understand the needs of requesting countries better than the law-enforcement agencies that are generally tasked with processing MLA requests from developing countries and handling the other logistical aspects of asset recovery.

BOX 3. INTERNATIONAL FORA FOR DIALOGUE: THE ARAB FORUM ON ASSET RECOVERY (AFAR) AND THE UKRAINIAN FORUM ON ASSET RECOVERY (UFAR)

The events that took place in Egypt, Tunisia, and Libya in 2011 (collectively referred to as the “Arab Spring”) as well as those in Ukraine in 2013 to 2014 resulted in the deposition of a number of government leaders and have triggered several high-profile asset recovery cases. These cases are particularly challenging given their high political profile. They highlight the daily challenges faced by those working on asset recovery cases.

With a view to bringing together the Arab countries in transition, G8 countries and other financial centres, the G8 established the AFAR in 2012. Its objective is to enable dialogue and raise awareness of effective measures for asset recovery. It provides a forum for regional training and discussion of best practices on cases and identifies country-specific capacity building needs. The forum, operating under Chatham House rules, has enabled intelligence and law enforcement officials, prosecutors, diplomats, and other government officials from all the involved countries to discuss the challenges faced in asset recovery and options in overcoming them.

In 2014, through a British and American initiative, a similar forum (UFAR) was established for Ukraine. The early involvement of all interested jurisdictions has allowed the UK and US to quickly meet the technical assistance needs of the Ukraine in the Yanukovich asset recovery case.

In both instances, understanding the sensitivities surrounding a specific case and the legal boundaries of each of the involved countries has been essential to achieving effective cooperation between jurisdictions. These forums have enabled the countries whose financial institutions held assets belonging to these former government leaders to learn from past cases, understand present limitations in asset recovery, and take a more proactive approach to restraining unlawful assets prior to opening formal investigations (in both requesting and requested countries).

3.1.3 Supporting the development of global knowledge on asset recovery

Although knowledge on asset recovery has rapidly increased since the adoption of UNCAC, and despite the enhanced global political will to recover stolen assets, the numerous technical challenges described in previous sections show that many legal and practical issues remain unsolved. Countries have to continuously review their domestic laws and policies in order to reduce any hurdles and create an enabling environment for the recovery of stolen assets. Ideally such developments are supported by a body of knowledge that has been built based on the input from practitioners and policy makers from around the world.

The Stolen Asset Recovery (StAR) Initiative, a joint project by the World Bank and UNODC, has taken the lead in creating valuable resources on asset recovery, which have in turn led to a gradual increase in the harmonisation of practices. The availability of these resources and the combined efforts put into their development by experts from requesting and requested countries alike have also generated new policy initiatives that delve deeper into selected topics. Donor agencies actively support some of these initiatives (e.g., the processes initiated by UNODC and ICAR on the return of stolen assets and the Swiss government's Lausanne Process).

BOX 4. SHARING PRACTICAL EXPERIENCE: THE LAUSANNE PROCESS

Since 2001, the Lausanne Process has brought together experts from requesting and requested jurisdictions and international organisations to share and discuss practical experience in asset recovery. In these annual meetings, held in Lausanne, Switzerland, officials and experts from different financial centres discuss issues related to the return of assets illicitly obtained by corrupt officials. The Lausanne Process has gained wide recognition as a platform for expert-level discussions about asset recovery. It also highlights the importance of direct contacts between practitioners in asset recovery cases as well as the relevance of establishing trusting personal relationships. The participants generally agree that strong partnerships and active cooperation between requesting and requested states are prerequisites for successful asset recovery.

By 2008, the Lausanne Process had begun to focus on concrete examples of successful and unsuccessful asset recovery. Representatives involved in specific cases highlighted the obstacles they had encountered. The discussion of specific proceedings from the opposing perspectives of requesting and requested states has deepened understanding of existing barriers, a topic that was specifically addressed in the 2010 meeting.

Meetings in 2012 and 2013 were specifically dedicated to the asset recovery efforts in the aftermath of the Arab Spring, including practical barriers to these efforts. Following these meetings, the 2014 session of the Lausanne Process launched an initiative, endorsed by the Conference of State Parties (CoSP) to UNCAC in November 2013, to develop practical guidelines for efficient asset recovery. These guidelines are currently being discussed in a range of relevant international forums, with a view to presenting them for consideration to the 2015 CoSP.

3.2 Providing technical assistance and capacity building

The first and perhaps most important aspect of technical assistance in the area of asset recovery is that donor agencies often do not have the expertise to provide technical assistance themselves. This is true also

for other areas of anti-corruption work, but more so for asset recovery, which, as noted, is particularly complex and delicate. To meet this challenge, donor agencies have often relied on their countries' national law enforcement agencies and other national and international organisations capable of providing specialised knowledge and expertise on asset recovery.

The main objectives of development cooperation in the asset recovery area have been (i) developing the capacity of aid-recipient countries to investigate, prosecute, and adjudicate asset recovery cases and (ii) establishing mechanisms to coordinate different legal systems. The search for solutions has thus far focused on criminal sanctions and repression more than prevention (Husmann and Penailillo 2007). More specifically, technical assistance in the asset recovery area has focused on four main streams, which are further described in the following sections.

3.2.1 Gap analyses: Building an adequate legal and institutional framework

The first stream of technical assistance seeks to provide support to develop an effective legal and institutional framework for asset recovery in aid recipient countries. One of the main approaches to do so is through gap analyses, also known as self-assessments, which donor agencies can fund. Such analyses can identify constraints and weaknesses in the asset recovery process and its subcomponents (e.g., prevention of corruption or money laundering and enforcement of laws) in a specific country.

A gap analysis is a comparative analysis of the legal system and institutional setup of a country vis-à-vis international standards on asset recovery and related aspects, such as the country's compliance with the UNCAC and the Financial Action Task Force Recommendations (FATF 2012). These international standards are used as benchmarks to assess the strength of the country's legal and institutional setup for asset recovery. The UNDP has produced a comprehensive guide on how to conduct gap analyses (Richter and Fenner 2011).² This guide presents a basic methodology that can be tailored to the legal and institutional context of each country (ibid., 9).

At the strategic and policy levels, gap analyses strengthen the mutual and shared responsibility between donors and aid-recipient countries, strengthening the commitments set out in the *Paris Declaration* (2005) and the *Accra Agenda for Action* (2008). As gap analyses are nationally driven processes, they should ideally involve all concerned government agencies as well as non-state actors such as business and NGOs. In practice, however, this has often been a government-led process, with varying degrees of participation of other actors. At the operational level, gap analyses encourage inter-institutional dialogue and cooperation and provide information that can inform the development of national asset recovery strategies. They also allow for the identification of bottlenecks in the asset recovery process and entry points to improve the effectiveness of the overall system. Furthermore, these gap analyses can provide input into other assessments and review mechanisms related to asset recovery, anti-money laundering, and anti-corruption systems, such as those provided under the UNCAC and FATF frameworks.

Finally, donor agencies can rely on these gap analyses to develop country strategies and action plans and to assess the technical assistance needs of their partner countries. As such, gap analyses can be a starting point for the provision of further technical assistance to aid-recipient countries.

BOX 5. GAP ANALYSES AND SELF-ASSESSMENT CHECKLISTS IN BANGLADESH AND KENYA

GIZ and its predecessor GTZ¹ have assisted partner countries in assessing their anti-corruption, anti-money laundering and asset recovery systems through gap analyses since 2006. For example, the government of Bangladesh – through funding from GTZ – launched an Inter-Ministerial Committee in April 2007 to conduct the Bangladesh Compliance and Gap Analysis. The study was conducted by the Bangladeshi Ministry of Law, Justice and Parliamentary Affairs and had the technical support and expert advice from the Basel Institute on Governance, the Institute of Governance Studies of BRAC University, UNODC, and UNDP. The study was carried out between October and January 2008, when it was presented to the Inter-Ministerial Committee (Government of Bangladesh 2008, 14).

In April 2007, the government of Kenya also conducted a UNCAC gap analysis and implementation plan – again with funding and technical assistance from GTZ as well as support and expert advice from the Basel Institute (Republic of Kenya 2009). The Kenya gap analysis was part of GTZ's broader anticorruption programme in the country. Since 2007, GTZ and its successor GIZ have continued to support anti-corruption institutions in Kenya (e.g. the Ethics and Anti-Corruption Commission, the Director of Public Prosecutions, and the courts in general) through targeted reform and practical capacity building assistance as well as support for improving coordination between the various actors involved. According to the GIZ, as a result of this and other programmes, the number of corruption cases investigated and pursued criminally in Kenya has risen from an annual average of 61 in 2009 to over double that number (236) in 2012.

In 2010, UNDP, with the technical support from GTZ, IGS, and the Basel Institute on Governance, drafted a methodology for the UNCAC self-assessment process. This and similar methodologies for conducting gap analysis have been used extensively by states to prepare for their self-assessment and peer review under UNCAC.

3.2.2 Technical assistance: Strengthening procedures and standards in investigation, prosecution, and adjudication

As mentioned previously, asset recovery is a complex, resource intensive process. To successfully pursue an asset recovery case, law enforcement officials, prosecutors, and courts need to understand the complexities in investigating, prosecuting, and adjudicating complex financial and transnational crimes. They need multi-disciplinary teams capable of gathering and processing large amounts of financial data, conducting forensic investigations, and communicating with foreign jurisdictions for the purposes of gathering evidence and restraining assets.

Capacity building in these areas is essential to ensure that (i) law enforcement officials and prosecutors understand and correctly apply the available tools and (ii) partner countries see the added value of conducting their asset recovery investigations and prosecutions through a multi-disciplinary approach. Law enforcement officials, prosecutors, and courts also need to understand how their legal systems interact with foreign ones through mutual legal assistance. These skill sets are usually not readily available, often because investigators and prosecutors are used to focusing on predicate offences and may have limited experience pursuing money laundering cases.

Technical assistance – for example, capacity building and training – can help stakeholders understand the connections between money laundering and other serious financial crimes (such as corruption) and how these fit into the asset recovery process.

BOX 6. FINANCIAL INVESTIGATION AND ASSET RECOVERY TRAINING IN THE KYRGYZ REPUBLIC

Between 2009 and 2010, as part of an IMF-funded 18-month technical assistance programme focusing on enhancing the anti-money laundering / counter terrorism financing (AML/CTF) capacities and skills of the Financial Intelligence Service (FIS) of the Kyrgyz Republic, the national bank, and the state securities market regulator, the Basel Institute on Governance provided a tailor-made practical training programme on asset recovery to the Kyrgyz FIS. During this programme, participants investigated a complex simulated case involving corruption and money laundering, which allowed them to move from the basics of money laundering and corruption to an advanced level. Another key component of the programme was a set of questions on how to obtain evidence from foreign jurisdictions through the use of MLA.

The impact of training is usually hard to measure (beyond comparing pre- and post-training test results and gathering general feedback), but this particular training yielded quite tangible results. Shortly after it, the Kyrgyz Republic initiated a number of new investigations into international corruption and money laundering schemes and, in connection with these investigations, issued a number of MLA requests to foreign jurisdictions. A review of the quality of the investigations and MLA requests showed that the training lessons were correctly applied and essential for the pursuit of these cases and MLA requests, as confirmed through feedback received from participants.

3.2.3 Asset recovery mapping: Testing the mechanics of the asset recovery process and its subcomponents

The third stream of technical assistance focuses on providing countries with support to test the effectiveness and efficiency of their asset recovery processes and mechanisms. Unlike a gap analysis, which is mostly a legal assessment and often covers areas of a country's integrity system outside of just asset recovery, this is a more practical and operational analysis focusing solely on the actual functioning of the asset recovery process.

This is done by mapping and testing, through an analysis of how cases are handled and processed, the institutions and regulations that are part of the asset recovery process. The findings of this process are then benchmarked against a theoretical model, based on good international practice and standards, in order to (i) identify gaps and weaknesses of the operational aspects of the asset recovery process and (ii) propose reforms to the process. This step is followed by on-site interviews to validate the findings, to engage with key stakeholders and to test the feasibility of the suggested reforms within the political, institutional and structural context of the partner country. At the end of this process, a report is drafted containing the findings, conclusions, and recommendations.

BOX 7. ASSET RECOVERY MAPPING IN MOZAMBIQUE AND SOUTH AFRICA

In 2012, DfID and Danida funded a project in Mozambique that aimed to (i) analyse the institutional capacity and (ii) identify technical assistance needs in relation to implementing an asset recovery support package that the government had partially approved. The Basel Institute on Governance executed the project, which involved conducting an on-site mission to understand the intra- and inter-institutional interactions of the relevant Mozambican institutions responsible for combating money laundering and corruption through the asset recovery process. The resulting report also contained a detailed logframe for donors to consider as part of their short-, medium-, and long-term strategies to support Mozambique's anti-corruption and asset recovery efforts (Gomes Pereira and Cruz 2012).

Similarly, and with the technical and financial support of GIZ, the Basel Institute on Governance conducted an analytical study of the anti-corruption system in South Africa. This project arose after a 2011 constitutional court decision determined a need for an independent anti-corruption body with structural and operational autonomy in the country (Gomes Pereira et al. 2012, 24–25). The Institute's report presented a variety of country examples and case studies. Furthermore, the analytical report mapped the South African anti-corruption system and the elements that enable coordination and cooperation between the relevant stakeholders. It also identified the system's strengths and weaknesses and provided a set of recommendations to close existing gaps and allow for the establishment of an independent anti-corruption body with structural and operational autonomy (ibid.).

3.2.4 Casework assistance: Building local capacity

The fourth stream of technical assistance focuses on providing investigators and prosecutors with on-the-job capacity building. All of the technical assistance modalities described above are best understood when put in practice. Donor agencies can assist aid recipient countries in at least two different ways.

First, donor countries can embed their own law enforcement and prosecution staff in the partner country. By doing so, practitioners with experience in the donor country can assist their counterparts in understanding – through the investigation of real cases – how to deal with the complexity of asset recovery cases.

Donor countries can also provide funding for neutral third parties to provide support in investigating asset recovery cases. Experts with specific knowledge of the asset recovery process can be called in to assist in building the necessary national and international strategies for the collection of evidence, investigation, mutual legal assistance, and prosecution in asset recovery cases.

The main benefit of this approach is that it provides assistance for specific cases in the short term, while also helping build the skills of local staff over the long term (provided that local prosecutors and investigators cooperate closely with external experts). By working on real cases in which a positive outcome is expected, foreign experts may also help local staff better understand national and international investigative and prosecutorial strategies in the area of asset recovery. Scarcity of human resources is often a problem in developing countries, and may result in serious delays and deficiencies, particularly

when an asset recovery case emerges that needs immediate attention. Casework assistance has shown to be an effective mechanism to transfer knowledge between donor and partner countries, while also providing a short-term remedy to gaps in skills of local staff.

BOX 8. CASEWORK ASSISTANCE: ICAR AND THE STAR INITIATIVE

Donor agencies have been funding the Basel Institute on Governance's International Centre for Asset Recovery (ICAR) and the World Bank / UNODC Stolen Asset Recovery (StAR) Initiative to assist countries around the world with strategic advice for international corruption and money laundering cases, with a view to facilitating the recovery and return of stolen assets.

With this funding, ICAR has been able to assist a number of jurisdictions, most recently Ukraine, with case management, devising investigation and prosecution strategies, drafting MLA requests to foreign jurisdictions, and facilitating other forms of formal and informal cooperation with requested states. The StAR Initiative provides similar assistance, with a particular focus on coordinating international responses to complex asset recovery cases.

The experience of these organisations suggests that case assistance and guidance can assist partner countries, particularly (i) after a regime change (when institutions are going through major transition); (ii) when the case load is overwhelming; or (iii) when a country has had limited past experience in handling international cases that may, for example, require MLA.

3.3 Encouraging coherent attitudes towards asset recovery at home

3.3.1 Mutual responsibility

As noted above, under a typical scenario, assets stolen from a developing country are deposited and laundered in an international financial centre in a donor country. Thus, the donor country has jurisdiction over the money laundering offence, while the aid recipient country has jurisdiction over both money laundering and the predicate offence. Both countries must rely on MLA to exchange information and investigate the case. Both must do their part if they want a success prosecution.

This creates some challenges for donor agencies that want to support the work of developing countries in the asset recovery area. Under a traditional development aid approach, donor countries provide technical assistance in certain areas through their aid agencies and this has limited or no repercussions on the donor country's domestic policies and activities. When it comes to illicit financial flows and asset recovery, however, a donor country's domestic policies can undermine the efforts of that country's donor agency if domestic and aid policy are not consistent. For instance, if a donor country fails to respond to MLA requests from a developing country or does not apply domestic policies aimed at curbing money laundering, this may completely undermine efforts to build that developing country's capacity to investigate and prosecute asset recovery cases.

The implication for donor agencies and countries is that they have an important role to play domestically if they want to push forward the international asset recovery agenda. For donor agencies in particular, this means they also must interact with other domestic institutions to raise awareness on the importance of these issues and on the impact that money laundering in general has on developing countries. This may be

a difficult task, as few examples exist of donor agencies cooperating with other domestic institutions in this area (see Fontana 2011, for an often cited example). The next sections provide some suggestions on the role that donor agencies can play domestically in the area of asset recovery.

3.3.2 Facilitating mutual legal assistance

Due to the complexity of asset recovery cases, which are often multi-jurisdictional, a key challenge for investigators relates to obtaining information and evidence; this applies both in the requesting country and in the requested country. In one possible scenario, an aid recipient country (the requesting country) may be conducting an investigation into the predicate offence and will require assistance in tracing the flow of money through foreign jurisdictions in order to identify the assets and link them to the predicate offence. The donor country (the requested country) will at the same time be investigating the money laundering offence and will need evidence about the predicate offence that occurred in the requesting country to substantiate that offence. International cooperation in legal matters is therefore a core element of international asset recovery cases. To exchange information one or both jurisdictions may have to file an MLA request, which may in itself be a challenging technical task.

Added to the technical challenge is the legal conservatism of many requested countries in relation to providing MLA. Requested countries may demand that requesting countries comply with special conditions or meet certain requirements of their legal systems before they can obtain any information. Because of the complexity of some of these requirements, it is often essential that requested states assist their counterparts in this process. However, the current practice in most requested countries is often one of negativity and criticism rather than support (Hussmann and Penailillo 2007, 4).

This is an area where donor agencies can play an active role by seeking dialogue with their own countries' central authorities in charge of MLA in order to sensitise them on the importance and developmental impact of MLA requests and to offer assistance, if possible, in facilitating communication with requesting states. These types of activities can complement technical capacity activities and other assistance provided or funded by donors and aimed at improving the quality of MLA requests presented from requesting countries to ensure they meet all the procedural requirements of the requested country.

3.3.3 Making international asset recovery a domestic priority

Asset recovery cases are resource intensive. They require not only financial resources, but also specialised staff and knowledge on the subject matter. These specialised resources are normally in short supply in both requesting and requested states (Fenner Zinkernagel, Monteith, and Gomes Pereira 2013, 192).

Where resources are limited, prioritisation is necessary. Normally, law enforcement and prosecution will focus on the cases with biggest national impact and the highest rate of success. International asset recovery cases that aim at returning assets to a partner country are not a national priority in many countries – aside from notable exceptions such as Switzerland and the UK. In addition, even if they are explicitly considered to have a significant national impact, the sheer complexity of asset recovery cases puts limitations on likely success rates. As a result, they may not be assigned a high priority vis-à-vis domestic cases.³ Finally, from a donor country's perspective, asset recovery cases may not be considered a priority when the amounts involved are considered too small in the donor country or when there is not a trusting relationship between the concerned countries.

In these circumstances, donor agencies could consider funding or providing other forms of support to domestic law enforcement agencies to ensure that money laundering and asset recovery cases involving

foreign jurisdictions, and particularly developing countries, are adequately prioritized. The box below describes an oft-cited example of this approach.

BOX 9. STRENGTHENING DOMESTIC LAW ENFORCEMENT IN REQUESTED COUNTRIES: DFID'S EXPERIENCE

DfID realised that focusing its anti-corruption programmes solely on the partner country missed a crucial point in the dynamics of modern cross-border financial crime, particularly money laundering and asset recovery (Fenner Zinkernagel, Monteith, and Gomes Pereira 2013, 191). Upon consultations with UK law enforcement agencies, DfID concluded that cases emerging from its partner countries were not receiving sufficient attention and were not prioritised due to other competing demands on already stretched resources (ibid., 192).

DfID decided that additional resources were essential to ensure that international asset recovery cases received adequate investigative attention and that priority was also given to cases that had significant repercussions for developing countries (ibid., 194). DfID focused particularly on cases of public funds stolen by public officials in developing countries, who then used the City of London financial centre to launder the proceeds of their crimes. DFID also recognized that UK law enforcement agencies already had staff with expertise to conduct complex asset recovery investigations (Fontana 2011, 3).

As a result of these policy considerations, since 2006, DfID has been funding specialised units of the UK law enforcement system to support investigations and prosecutions emanating from crimes committed in developing countries that are predicate offences to money laundering occurring in the UK. These units are dedicated to tracing, restraining, and returning assets illicitly acquired from developing countries (Fenner Zinkernagel, Monteith, and Gomes Pereira 2013, 195).

This initiative cost GBP 5 million in the 2006–2013 period, but has resulted in a return of over GBP 100 million in restrained assets, which are confiscated and returned to the countries of origin (ibid., 197). These activities resulted in money laundering convictions in the UK of James Ibori (a former Nigerian governor) and several of his associates (ibid.).

3.4 Strengthening political will to recover stolen assets

As Lack of political will is an often-cited obstacle to asset recovery. “Political will” is itself very hard to objectively define, given the multiple facts and situations to which the term has been applied. Under a typical “lack of political will” scenario, a given country may refuse to investigate a certain corruption-related offence because it implicates high political figures. In some instances the political will factor may be trickier to isolate. For example, a country may refuse to admit certain evidence from a foreign jurisdiction in a court case, claiming different evidentiary standards, and it may be hard for external observers to determine whether this is warranted or is just a cover to avoid prosecuting a political figure or launching an international asset recovery case (see box below).

BOX 10. A POSSIBLE LACK OF POLITICAL WILL: THE LATIN NODE CASE

In 2009, US-based Latin Node pleaded guilty to violations of the US Foreign Corrupt Practices Act (FCPA) in connection with bribes paid to obtain telecommunication contracts in Honduras and Yemen. The company agreed to a US\$ 2 million settlement of the proceedings. Four former company executives also pleaded guilty and were sentenced to terms of imprisonment (De Simone and Zagaris 2014, 37).

Following the US prosecution of Latin Node, both the Honduran and Yemeni governments launched their own investigations of the case. A key defendant in the Honduran case was Marcelo Chimirri, the former managing director of Hondutel, the state-owned company found to be on the receiving end of the bribe. The Honduran Supreme Court acquitted Chimirri in 2013. The court refused to admit as evidence documents sent by the US State Department and related to the US bribery investigation, including a bank check that provided evidence of Chimirri's involvement. The court's refusal was based on technical grounds: the evidence failed to meet Honduran "requirements for international assistance" in legal matters. Following the acquittal, some commentators asserted that Chimirri's family relations with Manuel Zelaya (Honduras's former president) was the key factor leading to his acquittal, demonstrating a potential lack of political will to prosecute him (ibid.).

Lack of political will is especially challenging to overcome in contexts where law enforcement agencies or the judiciary are not fully independent, or where public officials involved in asset recovery cases may have the power to influence the development and outcome of investigations and court cases (De Simone and Zagaris 2014). As noted further below in section 3.5, these concerns arise particularly in cases where continuing ties exist between the current government and officials involved in the asset recovery case.⁴

The question of what donor agencies can do to create political will to investigate and prosecute asset recovery cases is a delicate one. In some countries, donor agencies have spoken out against corruption and in favour of the prosecution of corruption cases, including by threatening the withdrawal of aid. This approach has proven scarcely effective, however (de Vibe et al. 2013). In principle, some forms of donor support discussed in the previous sections, particularly providing technical assistance and MLA, can indirectly help build political will: if a country is provided with all the tools, resources and information needed to pursue an asset recovery case, it may be difficult for the government or judiciary to decline to act. In some cases, however, this may not be sufficient.

One activity that has proven effective in building political will is creating public awareness campaigns and encouraging civil society organisations (CSOs), the general public, and the media to put pressure on governments. This may create additional incentives for law enforcement agencies to pursue certain corruption and money laundering cases, even if public officials are involved. This is an area where donor agencies have traditionally played and can continue playing a role.

BOX 11. DEVELOPING POLITICAL WILL THROUGH MEDIA EFFORTS: THE INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS

A number of private donors (such as the Open Society Foundations and the Ford Foundation) support the International Consortium of Investigative Journalists (ICIJ), a network of investigative journalists that operates out of a US office but focuses on building initiatives that involve journalists from all over the world, especially from developing countries.

Since 2011, the ICIJ has been running Offshore Leaks, a programme aimed at unveiling the true beneficial owners of hundreds of shell companies created in tax havens around the world. The project started after the ICIJ gained access to a database of over 2.5 million records of companies, trusts, and funds incorporated in the British Virgin Islands, Cayman Islands, Cook islands, and Singapore, all jurisdictions frequently recognized as tax havens. These types of corporate structures are commonly used to disguise the true identities of their owners, in order to hide the proceeds of financial crimes such as corruption, embezzlement, and tax evasion.

Since 2013, the ICIJ has worked with hundreds of investigative journalists on all continents to analyse these records in order to unveil how hundreds of corrupt public officials, politicians, criminals, and tax evaders have used tax havens and shell companies to hide the proceeds of their illegal activities abroad.

Initiatives such as the ICIJ can help build public awareness and political will to prosecute large cross-border corruption and asset recovery cases. All Offshore Leaks articles are published on the ICIJ website, which also contains a detailed list of all the actions triggered by ICIJ articles, including investigations and regulatory changes in countries ranging from India to the Philippines and from Canada to South Korea.

3.5 Assisting in the return of stolen assets

3.5.1 Background

There is universal agreement today on the principle that stolen funds found in a foreign jurisdiction should be returned to the country of origin, that is, the country from which they were stolen. For example, UNCAC requires confiscated assets to be returned to their prior legitimate owner(s). In the case of corruption and misappropriation of state funds this legitimate owner would be the state from which the assets were misappropriated – after taking into account the rights of bona fide third parties and possibly the deduction of expenses incurred by foreign jurisdictions in investigating the case (UN 2003, art. 57(1), (2), and (4)). This approach departs from earlier international treaties and practice in relation to other underlying offences such as drug trafficking, under which the confiscating state (that is, the state in which the assets have temporarily been placed) has ownership of the proceeds (UN 2006, 233). The UNCAC also foresees that, where appropriate, countries involved may conclude agreements on a case-by-case basis for the final disposal of confiscated property (UN 2003, art. 57(4)).

The manner in which assets are repatriated and used once legal proceedings have been successfully completed and concerned assets have been confiscated was one of most contentious issues during UNCAC negotiations. Consequently, beyond the provisions above, no clearer or more detailed instructions for the disposal of returned assets exist in this or any other international treaty.

Numerous challenges exist when it comes to the repatriation of assets. These include, among others, (i) the potentially limited capacity for transparent and effective management of returned funds in some recipient

countries; (ii) the concern that in some cases there may be a close relationship between those who have stolen the assets and those in power; and (iii) the expectations of civil society in requesting and requested jurisdictions regarding the end use of confiscated assets.

3.5.2 Returning stolen assets: Why?

Before proposing constructive ways forward in this debate, in particular relating to the role that donors may play, it is worth recalling that all concerned parties have a strong interest in stolen assets being returned, and for good reasons:

- First, it is widely recognised that the recovery of stolen assets could provide essential resources for financing of public services and investments in essential infrastructure in the countries where the funds were stolen. This is relevant in any country, but it is particularly vital in developing countries, which are most often the victims of large-scale corruption and suffer the most from these practices. Consequently, asset recovery has an important developmental purpose.
- Relatedly, for donor countries it is frustrating to disburse development aid to countries whose budget is regularly plundered by individuals who then place the assets they have stolen in donor countries' financial centres. This is a fundamental contradiction that can undermine the very purpose of development aid.
- The recovery of stolen assets is an important deterrent to corruption as it fundamentally undermines the key incentive for corruption – personal enrichment.
- The continuous presence of illegal assets in financial institutions is increasingly seen as undermining the reputation of the concerned financial centres, thus reducing their attractiveness for legitimate assets that continue to make up for the majority of financial assets globally.

3.5.3 Past experience and the role of donors

Past cases of donor involvement in managing returned assets, as few as there are, provide some useful guidance for informing and possibly harmonising practice. This being said, no two experiences of returning stolen assets are alike; thus, thus it is a matter of identifying general principles and decision-making guidelines rather than defining a unified one-size-fits-all practice. Consequently, there is no one predefined role for donors in the return of stolen assets; several options have been tested during and have emerged from the experience with past cases.

These past cases vary significantly because of a number of factors:

- (i) the unique characteristic of each asset recovery case and the underlying offence (and, consequently the nature of any final court order or settlement agreement);
- (ii) the characteristics of involved jurisdictions, notably in relation to the quality of their governance and financial management capacity, the independence of key institutions, and their development priorities;
- (iii) the amounts involved; and
- (iv) the expectations of other concerned parties in requesting and requested states (including the public).

This translates into a variety of models regarding the role and involvement of requesting and requested states and possible third parties, including donors, in the chosen arrangement, regarding the purpose for which the returned funds are employed, and regarding the method chosen to secure transparency and accountability in the end use of the returned funds. These three topics – role of stakeholders, end use definition, and transparency and accountability – are indeed also the three main topics identified in policy debates about the management of returned funds.

3.5.4 Donors' role in deciding the end use of returned funds

In a few cases, donor agencies have played decisive roles in determining the modalities for returning stolen assets. This is an emerging and encouraging trend in asset recovery that may add value to the process in some circumstances, such as where there is a low level of trust between jurisdictions.

Typically, the ministries of justice and/or foreign affairs in the requested and requesting countries are primarily involved in discussions regarding the destination and end use of returned funds. However, donor agencies can play a facilitating (and possibly even leading) role to ensure adequate policy coherence between the asset repatriation effort and the development policy and priorities of both the requesting and requested states. Donor agencies often have a local presence in requesting (developing) countries and are well acquainted with the long-term development priorities and needs of those countries. They are therefore important interlocutors for requesting states and other agencies from their own jurisdictions in identifying suitable end use programmes that satisfy the expectations of all concerned parties. The involvement of donor agencies in this identification process directly strengthens the developmental impact of asset recovery.

BOX 12. REPATRIATION OF ASSETS IN TANZANIA

One example where a donor agency played such a role was in the return of assets from the UK to Tanzania following a settlement between British Aerospace (BAE) and the UK Serious Fraud Office in connection with an investigation of foreign bribery in Tanzania, which concluded in 2012. DfID helped facilitate an agreement between BAE and the Ministry of Education of Tanzania, under which the ex gratia payment that BAE agreed to pay to the Tanzanian government would be used to meet education budget expenses in Tanzania. BAE and the Tanzanian government also agreed to a reporting framework that would allow the Tanzanian government to demonstrate that the repatriated funds were used for their intended purposes.

3.5.5 Donors' role in implementing programmes funded with returned assets

Development partners, including bilateral aid agencies and international organisations, can also contribute to the actual management of returned assets, that is, the implementation of programmes financed by returned assets, to varying degrees and in various roles. This was the case in both Angola and Kazakhstan, as describe in the box below.

BOX 13. GUIDING THE RETURN OF ASSETS TO ANGOLA AND KAZAKHSTAN

In relation to the return of assets from Switzerland to Angola in late 2008, national Angolan development priorities (de-mining and development of the agriculture sector) were used to guide the utilisation of returned assets. The local office of the Swiss Agency for Development and Cooperation implemented the subsequently designed programmes. A similar arrangement is envisaged for a second return to Angola from Switzerland, which was concluded in 2012. In a slightly different setting, in connection with the return from Switzerland and the United States to Kazakhstan of assets resulting from a settlement in a bribery case, the funds were channelled through the independent BOTA Foundation. The case is described in more detail below. Development actors played a key role in this asset return. Notably two international development NGOs, IREX and Save the Children, and the World Bank were involved in managing and supervising the use of the returned assets. Assets were used for programmes to support energy efficiency and the development of youth organisations in disadvantaged communities.

In both cases, public records offer few insights regarding why it was decided that a donor agency would manage the returned assets. However, similarities between the cases suggest some possible lessons to be learned. Both cases were resolved through settlement rather than through final court decision. This may hint at difficulties encountered by the judicial authorities of the requested states to obtain meaningful cooperation from the countries of origin of the funds, which in turn may suggest that there was limited political appetite in the countries of origin to repatriate the stolen assets. Also, both were foreign bribery cases rather than cases involving politically exposed persons (PEPs); that is, they were not cases where a PEP misappropriated funds but cases in which a public official accepted bribes in return for offering lucrative contracts to foreign companies. Unlike PEP cases (for example, cases in Egypt and Tunisia related to the Arab Spring, where the regimes led by corrupt leaders were overthrown), foreign bribery cases may involve public officials who are still in power or close to power. This may explain the previously mentioned lack of proactive efforts to repatriate the stolen assets by the country of origin. On the other hand this closeness of the perpetrators of the underlying crime to the ruling governments and the related concerns for the integrity of the returned funds may explain why the returned assets were managed through a donor agency rather than through a government-managed programme.

When choosing to designate a bilateral or international donor agency for the management of returned funds, care must be taken to avoid the perception that previously budgeted donor programmes are being replaced by the use of returned assets. Instead, as with any model chosen for the management of returned funds, the programme should be seen to add value in addition to normal state expenditures and donor funded programmes.

3.5.6 Donors' role in monitoring of the management of returned assets

Monitoring the end use of returned assets is tremendously important because of the enhanced public interest in these assets and the extremely negative impact that a potential misappropriation of these returned assets may have on public opinion. Depending on the capacity of the requesting state to appropriately manage its public funds, additional monitoring activities may be needed to ensure the appropriate use of returned assets.

The return of the stolen assets to the state budget is seen by many as a good practice, but only so when the country's public financial management capacity is sufficiently solid. The role of donors in such programmes is mostly indirect and can possibly be compared to the influence donors can have on the way funds are spent when they provide budget support. In other words, the role of donors will be focused primarily on supporting overall governance reforms, with a particular focus on strengthening public financial management and the quality of budgeting processes. This model is typically used when requesting states have highly developed governance structures and a solid public financial management track record. Donor agencies in their own domestic context could advocate for the use of criteria similar to those applied for deciding over budget support when determining whether stolen assets should be returned to state budget.

In addition, donors should advocate for the earmarking of returned assets when these are returned to state budget, with a view to ensuring the visibility of programmes funded with returned assets – an expectation of the public interest in asset recovery – and avoiding the perception that returned assets may be used to fund programmes that were previously budgeted for under regular state budget (a criticism that was voiced in relation to the return of assets from Switzerland to Nigeria). Finally, the role of donors could be expanded to supporting capacity building among dedicated CSOs, including through social accountability mechanisms, to play a strong oversight role and monitor state expenditure from an independent source.

Another option is for assets to be channelled through a dedicated fund run by government authorities. In the Montesinos case, for example, stolen assets returned to Peru were managed by FEDADOI, a special national fund for the administration of forfeited corruption proceeds.⁵ In cases such as this, the monitoring of the use of returned assets is easier because the financial management structure of these funds is separate from the regular state budget. In these circumstances, a possible donor role is strengthening the capacity of concerned state agencies in adequately managing the expenditures funded with the returned assets, as well as supporting CSOs that can provide external monitoring.

BOX 14. MONITORING BY AN INDEPENDENT FOUNDATION: REPATRIATION THROUGH THE BOTA KAZAKH CHILD AND YOUTH DEVELOPMENT FOUNDATION

The above mentioned return of assets from the US and Switzerland to Kazakhstan in a foreign bribery case that was settled in 2007 provides an interesting model for a possible monitoring arrangement. Due to the nature of the relationship of the Kazakh government to the defendants in the bribery case, the management of the returned assets by Kazakh government agencies was not considered appropriate. Instead, an independent foundation – the BOTA Kazakh Child and Youth Development Foundation (BOTA) – was created to steer the end use of funds and ensure an enhanced level of monitoring, thus strengthening transparency and accountability in an environment that was generally considered as complex.

BOTA's board of trustees is composed of five Kazakh citizens (not associated with the Kazakh government) and one representative each from the governments of the US and Switzerland. The foundation operates independently of the Kazakh authorities, with the funds deployed in tranches under the supervision of a consortium of two internationally recognised independent specialist organisations (IREX Washington and Save the Children) and with the advice of the World Bank. It is widely recognised that this enhanced monitoring system has served extremely well to ensure transparent and accountable expenditure of the returned assets, which is one of the main reasons why the BOTA model is widely recognised as a good practice example, especially in fragile states. It is particularly interesting in this case that in addition to an international donor (the World Bank), a private aid agency (IREX) played a key role in the monitoring of the management of the returned funds.

4 Conclusions

As the previous sections have highlighted, the role of donors in asset recovery is relatively recent, and is currently evolving and consolidating. This paper has argued that a greater role for donors in this area is desirable: (i) asset recovery is undoubtedly a development problem; (ii) as a bridge between requesting and requested countries, donor agencies are uniquely positioned to help address it; and (iii) donor agencies can fill a significant gap and prove essential in addressing some of the challenges related to recovering and repatriating stolen assets. The developmental impact of asset recovery cannot be overstated, and the failure to address its challenges represents a failure for the entire international community. Below are some final reflections and considerations on the way forward, based on the comprehensive framework for addressing asset recovery challenges presented in the paper.

Donors' support in providing technical assistance is necessary, since capacity in developing countries to handle complex international cases is often limited. As noted in part 3.2, one of the main obstacles to a greater role of donors in providing technical assistance is the lack of specialized in-house technical expertise, as well as a lack of political will in the requesting state. As in other areas of development assistance, the former has been resolved by donor agencies by relying on external, specialized institutions for the provision of technical assistance, a strategy that has proven successful so far, and that should be continued.

At the same time the number of countries that has been covered by technical assistance programmes, particularly gaps analyses and case assistance, should be expanded. Practitioners note that donor agency country offices are often somewhat reluctant to engage in the anti-corruption initiatives tied to the recovery of stolen assets. The activities of donors in support of the recovery of stolen assets are usually primarily led by headquarter agencies. More awareness raising among country offices would greatly assist in promoting the topic at the country level and thus expand the provision of relevant technical assistance in a growing number of partner countries.

As discussed in section 3.3, financial centres located in donor countries are often the main destinations for assets stolen in developing countries, and ultimately the location where such funds are hidden and laundered. This poses some challenges for donor agencies. It is clearly not sufficient to approach asset recovery as a traditional development problem, whereby developing countries are simply provided with technical assistance and funding by donors. Donor countries also need to ensure "policy coherence," that is, ensure that their domestic policies and regulations – as well as the way in which they are implemented – are consistent with the country's development aid policy and with the overall objective of asset recovery. For donor agencies, this may mean exploring new ways to provide development assistance, including working more closely on AML with other domestic agencies in their home countries in order to sensitize other agencies on the importance of asset recovery, ensure adequate prioritisation of asset recovery cases, and help overcome practical obstacles (e.g., MLA). The practice still shows few instances in which this has happened; the further adoption and gradual consolidation and development of this approach by donor agencies would greatly benefit the overall cause of asset recovery.

In the same vein, because donor agencies play a unique role in facilitating dialogue between requesting and requested states, their understanding and view of the challenges to both sides should more frequently find its way into international policy debate about asset recovery. This is achievable through more active donor engagement in relevant international policy forums and the creation and dissemination of knowledge in the area of asset recovery across different stakeholder groups.

Asset recovery also raises other intriguing challenges related to the relationship between donors and aid recipients. As noted in section 3.5, one common concern when repatriating recovered assets is related to the possibility that these may be misappropriated again, which can be an obstacle to repatriation, particularly in cases where the perpetrator of the crime has not been prosecuted or the government has not changed. From a donor country perspective, it may be hard to justify the significant effort and investment that goes into repatriating stolen funds if the risk of misappropriation remains high. At the same time, this risk may sometimes be overstated, perhaps because of a lack of will to repatriate or a negative attitude toward the requesting country. This problem relates to a central development debate regarding the use of aid recipients' public financial management and administrative systems, and ultimately to the key issue of building trust between donors and aid recipient countries.

While there are no simple solutions, donors are uniquely positioned to address these challenges and doing so can help build mutual trust. Because each case and country is different, donors should continue to pursue creative approaches to asset repatriation. Past experience shows that donor involvement is beneficial and should continue to be pursued, particularly where it can contribute to public confidence, for example, where a country's public financial management system has significant weaknesses or the corrupt individual has a close relationship with the government. Finally, in cases where building such trust is difficult, donors may help by provide support and oversight during the repatriation phase.

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¹ Importantly, however, that this is not always the case. Some jurisdictions do not criminalize “self-laundering,” that is, cases in which the defendant who laundered the funds also committed the predicate offence.

² The publication focuses on anti-corruption processes under the guise of the UNCAC. However, the methodology is also applicable to the asset recovery process, given that chapters III to V of the UNCAC delineate the international requirements for the asset recovery process.

³ Even when asset recovery is prioritized, investigations and prosecutions may stagnate for other reasons, such as a lack of political will because the investigation involves politically exposed persons.

⁴ This is a different scenario than that which occurred in the Arab Spring, where asset recovery cases resulted from changes in country leadership.

⁵ This fund was set up by presidential decree (Toledo 2001).

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Financial crimes such as corruption, fraud, and embezzlement generate significant profits, often at the expense of the public budget. These proceeds of crime are usually hidden outside of the country where the crime was originally committed, and laundered through complex financial and commercial transactions, often spanning across numerous jurisdictions. Asset recovery – the process of identifying, restraining, seizing, and repatriating these assets to the countries from whence they were originally stolen – is one of the greatest challenges for the global anti-corruption movement. Asset recovery is also an essential development challenge, as it usually involves repatriating funds back to a developing country where they were stolen, and where they could be used to support development projects. As a bridge between aid recipient and donor countries, donor agencies are uniquely positioned to support asset recovery initiatives. Interesting examples are emerging of how donors can support asset recovery by: (i) supporting international standards and initiatives; (ii) providing technical assistance and capacity building (most often through third parties); (iii) encouraging policy coherence at home; (iv) helping build political will; and (v) providing assistance during the asset repatriation phase.