U4 ANTI-CORRUPTION RESOURCE CENTRE

U4 Practitioner Experience Note 2020:6

Twenty years with anti-corruption. Part 6

The end game: asset recovery and return – an unfinished agenda

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Keywords
development cooperation - illicit financial flows - asset recovery

Publication type
U4 Practitioner Experience Note

The tracing, confiscation, and return of stolen funds is the final part of the anti-corruption journey. Successful recoveries and returns are crucial if 'returner' and 'receiver' countries are to be convinced that this complex process is worth the effort. Despite few successes to date, there are reasons to be optimistic.

Main points

- Asset return remains unfinished business. The global rules of the game have still to be settled. The world is still feeling its way.
- 'Politics' has distracted the early years of international debate. While developing countries (the 'victims' of stolen assets) want funds to be returned unconditionally, developed countries (donors) want to ensure returned funds won't be re-corrupted.
- On the positive side, the dialogue now shows more of a consensus than it did in those early days. On the negative side, there have still been far too few successful recoveries and returns. These remain extraordinarily complex and time consuming, even with parties sharing the best resolve.
- The challenges for donors wanting to help are similar to the challenges they face supporting action against money laundering and illicit flows, as highlighted in Note 5. These include time, multi-agency complexity, and uncertainty of outcome.
- Yet we are in a much better place today than when we started, not least because of increasing experience and experimentation, and the increased expectations among civil society and citizens that returned assets should be transparently used to support development.

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Phil Mason OBE was senior anti-corruption adviser in DFID from 2000 until March 2019. He formally retired from the UK public service after 35 years, 31 of which were with ODA/DFID. He continues in the anti-corruption field in an independent capacity.

ABOUT THE SERIES
Experiences, lessons, and advice for future anti-corruption champions

In this series, Phil Mason covers the origins of anti-corruption in DFID as an illustrative example of how development agencies came to encounter the issue in the late 1990s. He lays out how he and DFID saw the development implications of corruption, how the world was so ill-equipped to deal with it, and how the global response has developed to what it is today.

Mason explores the origins of DFID's involvement in some of the 'niche' areas that often stump development practitioners as they lie outside their usual comfort zones of development assistance: money laundering, financial intelligence, law enforcement, mutual legal assistance, illicit financial flows, and asset recovery and return. He summarises lessons learned over the past two decades, highlights some of the innovations that have proved especially valuable, and point up some of the challenges that remain for his successors.

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My preceding notes have laid out the start of the anti-corruption journey: the significance of corruption as a factor holding back development, the emerging international architecture that has grown up in the past two decades to combat it, and, coming increasingly to the fore, the importance of being able to tackle cross-border flows of finance that has been acquired corruptly.

Here we get to the end game: the tracing, freezing, confiscation, and return of those funds to where they were stolen from in the first place. Compared to other parts of the anti-corruption agenda, this remains in its early stages of evolution. The existing tools at the disposal of those seeking to recover stolen assets remain ill-suited and, in some respects, obstacles.[1] The rules for actual return have yet to find a global consensus.

This note brings out some key aspects of the challenge.

Return – the final frontier

We shall focus here mainly on the final stage of *return*, as this contains the largest range of still-evolving issues that practitioners should be aware of. We touched on most of the asset *recovery* elements in Note 5, when we surveyed the anti-money laundering and IFFs agenda. The background papers referenced there address the key issues relating to efforts to investigate and pursue stolen funds (the asset recovery process). The Department for International Development's (DFID) experience in helping asset recovery in the UK, enabled by aid funding, was examined in Note 2.

Here, therefore, I focus on what happens once assets have been recovered. I explore the historical development of the agenda and how it came to the fore in negotiations for the UN Convention against Corruption (UNCAC). Understanding the politically charged origins of asset return is vital to grasping the policy issues that practitioners need to be aware of, and grapple with, today.

We then survey the progress that has been made in practice – it is not all bad news – and conclude with some lessons learned and pointers to the future.

The ultimate success of asset recovery hinges on the last step – a safe return

> *"Asset return must be about closing a scandal, not starting another one."*

1. Traditional methods of law enforcement cooperation and judicial process (such as the cumbersome requirements of mutual legal assistance and the traditional criminal tests of proving specific crimes attached to specific hauls of money) have proved onerous hurdles in corruption cases. These are covered well in *Barriers to Asset Recovery*,produced by the World Bank/UNODC Stolen Asset Recovery Initiative (StAR). There is need for new methods that are more suited to the criminality being tackled. We shall cover the state of play on these in Note 9 on the developing legal landscape.

Asset return must be about closing a scandal, not starting another one. Getting this last part right is *the* absolute prerequisite. An unsuccessful return exercise, where recovered funds simply get re-corrupted, would represent a crushing defeat. This would bring into question the whole point of recovering and returning assets. Returning countries expend great effort and resources going after stolen assets arriving in their jurisdictions. Failures of this kind would likely kill off all enthusiasm, if the ultimate result is merely to lose the funds a second time to a fresh perpetrator.

Most corruption-related returns are likely to involve sending funds back to governments that have (at least some) question marks hovering over them. Even after 'regime change,' things often turn out to be not too different. Hence the problem of how to safeguard returned funds has become the central issue to solve. In order to do this, a delicate diplomatic ballet has to be danced. The reasons for this will become apparent once we delve into the history of how the principle of return came about.

In the beginning … the principle of return – a milestone agreement

Efforts to reach international agreement on arrangements to govern the return of stolen assets were some of the most contentious of the UNCAC negotiations in 2001–03. While there was universal agreement to the principle that funds should be returned – itself a major advance over prevailing practice – a common approach to *how* it should be done proved highly contentious.

It needs to be remembered that, prior to UNCAC, there was not even an agreed international presumption that recovered funds *would* be returned. The only model that countries had at that time was the practice of asset-sharing agreements reached for the disposal of the proceeds of drugs-related recoveries. These generally worked on the basis of dividing the proceeds, usually 50/50, between the authorities of the country that undertook the seizure and the country of origin of the drugs (which usually had contributed to the success of operation – eg US/Colombia; US/UK). The approach was seen to be justified, since any funds recovered did not constitute stolen funds and there was rarely an identifiable victim to whom funds should be paid.

In the absence of such sharing agreements, the prevailing practice was for the recovering state simply to keep everything. In the UK, the proceeds were passed to the Treasury for absorption into the public purse (although an element was often recycled to fund national programmes to counter drugs misuse).

It was immediately clear that such arrangements could not apply to handling the different case of stolen public assets, where a 'victim' was clearly identifiable (ie, the country of the corrupt perpetrator). UNCAC set the new standard by declaring, at the beginning of the Asset Recovery chapter, that asset return was '*a fundamental principle*' of the Convention, and that parties should afford one another '*the widest measure of cooperation and assistance in this regard*' (Article 51). Other than allowing for the deduction of expenses incurred in the recovery (which includes costs of investigations, prosecutions, and judicial proceedings (Article 57(4)), the international expectation now is that all funds recovered will be returned.

The method of return – origins of the UNCAC settlement

Exactly *how* funds should be returned generated huge disagreement and remains an issue of some delicacy. During the negotiations, two camps emerged, with strongly differing emphases on the principles that should guide the return process:

The developing country view

Developing countries – usually the 'victim' in a stolen assets case – started from the premise that the return of stolen funds must be strictly unconditional. There should be no attempt, by the returner or any other party, to seek to require that the returned funds be used for specified purposes, or for the return to be governed by any specific processes. In their ideal world, the funds should simply be returned to the general government account. The logic behind this position was that it was 'their money.' Developing countries also regarded it as insulting that the country that had been complicit in the original theft (by hosting the funds in its system), might seek a role in determining their future use.

The developed country view

In contrast, developed countries – usually donors – were extremely anxious about unconditional return. In their view, with the funds having already been stolen once, it was right to look for safeguards to be in place to ensure that returned funds were not simply corruptly recycled out of the country once more. This concern was particularly acute when the country seeking return exhibited high corruption risks, even if there had been a change of personnel at the top. Since any funds stolen from developing countries

were most likely to have been intended for development purposes, developed countries started from the premise that returned funds should be demonstrably put to productive purposes when returned. Moreover, this was consistent with the overall statement of purpose in UNCAC's Preamble. This reflected the consensus view that corruption harmed development and that UNCAC's purpose was to repair the damage that corruption did.

These two contrasting views could not be reconciled in UNCAC. The compromise achieved in Article 57(5) is to recognise that agreements on the use of returned funds *may* be made between relevant parties:

Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements on a case-by-case basis, for the final disposal of confiscated property.[2]

The UK argued strongly in the negotiations that the global credibility of the asset return process rested on being able to demonstrate that recovery of stolen funds was contributing to better conditions in the victim country. Among the donor countries, the working interpretation of Article 57(5) was that returning countries would in every instance seek to persuade a returnee that both parties had a mutual interest to reach an agreement on a modality of return that could provide confidence that the funds had been used for productive purposes. Such public confidence matters in both the returning state (whose law enforcement has laboured to achieve the recovery) and the receiving state (whose citizens want reassurances too that the monies will now be used for public benefit).

Hence the diplomatic ballet

> *"It would likely take one example of funds being re-corrupted for most returning states to question whether asset recovery was worth doing."*

Since in strict legal terms, UNCAC does not *require* any agreement on disposal at all,[3] it is entirely within the legal rights of a receiving state to eschew reaching any agreement

2. 'Property' is defined in the Convention as meaning 'assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing the title to or interest in such assets.'

3. Article 57(5)'s encouragement to give 'special consideration' uses a strength of language that only appears once elsewhere in the Convention. It is the strongest sentiment short of making the provision a

with the returning state. However, as outlined earlier, it would likely take one example of funds being re-corrupted for most returning states to question whether asset recovery was worth doing.

Thus, despite there being no legal obligation to have such an arrangement (and no legal basis for a returning state to insist there should be one), there is an overwhelming argument in favour. Consequently, it is for returning states to try to persuade and cajole receiving states to see the virtue of having an agreement on 'end use'. That argument will have to be based not on any legal right of a returning state to have one, but on political pragmatism. A successful example of asset return is the very best argument to be had for doing more cases in the future. By contrast, a failure that sees the funds re-corrupted is the strongest way of bringing about a halt to asset recovery efforts, possibly for good.

Showing the way

As part of this diplomatic armoury, there is therefore considerable value in documenting cases of asset return. Each to date has tended to use a different approach, and each has thrown up lessons and issues for reflection. Understanding the practical issues involved will help shape new approaches that can reduce risks of re-corruption.

We will focus for the rest of this note on these insights. Space does not permit us to go into more detail on the conceptual issues surrounding the asset recovery phase. There are good places to go to for more information.[4]

A good summary of four early examples, produced by the International Centre for Asset Recovery (ICAR), shows that planning the return process is infinitely better than the 'lottery cheque' approach where funds simply disappear into the receiving country's finance ministry. It also demonstrates that careful thought is needed on each return modality, as none has been entirely problem free.

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mandatory requirement. UNCAC was clearly signalling an expectation that agreeing arrangements would be good for all.

4. A huge repository of expert guidance is available from the Stolen Asset Recovery Initiative (StAR), which DFID was instrumental in helping to launch in 2007 by providing one of the two secondees who began the journey. StAR led the way in the early years, capturing and documenting the conceptual essentials of asset recovery (and later, return) in a series of seminal manuals which are all available online. StAR also offers a hugely valuable database of corruption cases that consolidates open-sourced information about current and past judicial cases involving the recovery of stolen assets.

Four early examples

Swiss return of US$505m Abacha money to Nigeria (2005–06)

An agreement was reached to commit to pro-poor projects. Funds were overseen by the World Bank as part of public financial reform programme. A non-governmental organisation (NGO) was contracted to do field survey of sample of projects.

Problems
Some projects attributed to returned funds were already completed before funds arrived, so funds were effectively diverted to other uses; funds were used to pay off different arrears; poor quality of some projects; some projects were later abandoned.

Message
It is essential to be prepared for close accounting (although the scale of this return was likely to have been a management problem in itself).

Swiss, Cayman, US return of US$185m Montesinos money to Peru (2001–04)

The Peru government created a special fund, run by a five-person board drawn from government ministries. Guidelines and rules were developed on eligibility of projects/expenditure. There was no other external oversight.

Problem
Money ended up mainly supplementing budgets of public institutions that had a member on the board.

Message
Be aware of the political economy of the disbursement mechanism. Inject an independent element into decision-making.

Swiss return of US$624m Marcos money to Philippines (2004)

Funds were paid to an escrow account in Philippines National Bank. A Swiss (Zurich cantonal attorney) national oversaw the choice of investments that could be made from the account. Later, funds were transferred to a special fund for agrarian reform, audited by Philippines Commission of Audit.

Problem
Numerous allegations of mismanagement of fund.

Message
Independent audit is often a further necessary safeguard.

Swiss/US return of US$84m to Kazakhstan (2009)

A trilateral agreement established an independent not-for-profit foundation (BOTA) to manage funds. This was led by a seven-person board (five Kazakh, one Swiss, one US national). The aim was to ensure dispersal was not interfered with by the Kazakhstan government. The focus of projects was on child development, social safety net welfare schemes, and education scholarships.

Problem
BOTA established itself as a highly successful organisation delivering never-before provided services. When the pool of returned funds was exhausted, no follow-on was feasible as the Kazakhstan government had effectively boycotted BOTA. Services stopped.

Message
Creating bespoke structures to handle returned funds may set up continuity problems once the returned funds have been disbursed.

These early pointers illustrated some important lessons that are still being considered today. Other examples have followed, such as DFID's assistance to manage the payment by BAE Systems of a £29.5m ex-gratia payment to Tanzania in connection with the 2010 settlement of a bribery episode; DFID's collaboration with Kenya in 2017 over the proceeds of a bribery case prosecuted in the UK, through the purchase of ambulances

for local health districts; and DFID's assistance in programming recovered funds back to Chad after a successful confiscation by the UK Serious Fraud Office in 2018.

Each new case generates fresh learning and lessons. ICAR has been central to leading the global dialogue on using these insights to try to evolve an agreed set of rules for asset return.

The Global Forum on Asset Recovery principles – a potential consensus?

As a result of its initiatives, which have convened policymakers from all sides of the debate, a synthesis of principles for sound asset return has emerged. These draw on the lessons that have been learned on critical aspects, like the importance of ensuring a partnership approach from start to finish; mechanisms that can reduce the risks of re-corruption; and the methods than can give reassurance to the returning state, as well as citizens of the receiving one, about where the returned funds have gone.

These principles received their first public airing at the inaugural Global Forum on Asset Recovery (GFAR) in December 2017. The Annex to the Communique sets out 10 principles which offer a road map for successful asset return that respects the sovereignty of receiving states ('no conditionality' on how to use returned funds), while providing the transparency and accountability to be expected for exercises of this public prominence.

Why we are in a better place now than before

The GFAR principles represent the closest the world has come so far to setting some basic rules of the game for asset return. The next few years will be pivotal as to whether they become enshrined as the accepted way of doing business or whether old, previously ingrained, positions revive and we revert to proposals to send funds into national treasuries without a clear demonstration on what happens to them. The latter would re-create all the risks for that specific recovery itself, but also reduce any future appetite by returners to go after other stolen proceeds.

I am optimistic. It is worth dwelling on how far we have come since the original negotiation phase of UNCAC. The passage of time has, in fact, helped. The uncertainties of what were then very new issues in 2002 and 2003, have come sharper

into focus on the back of actual experience. Because asset recovery and return *has been going on*. The tone of the conversation has shifted in recent years, for two reasons:

There is increasing experience

Over the past 15 years, we have seen actual cases happen and get solved with monies returned. There has been a variety of practical solutions adopted and tested. There is now an emerging body of evidence and practical experience to draw on. We are not shaping the future by hypothesis, as we were back then; we have the opportunity to shape it by the experience many practitioners have given us.

High civil society and citizen expectations

> *"More than ever, there are high expectations from … civil society and citizens."*

Secondly, more than ever, there are high expectations from those keeping a watch on us – civil society and citizens, on both sides of the equation – in returning countries and receiving countries. Citizens in returning countries do not expect funds that were painfully recovered after lengthy legal proceedings to be quickly re-corrupted upon their return; likewise, citizens in receiving countries, who have borne the consequences once of the loss of the money, are rightly concerned to ensure that this time they do reap the benefits of the return.

And this link has now been recognised globally through the Addis Ababa Financing for Development Action Agenda and the Sustainable Development Goals (SDGs), among others: that the return of corrupt assets represents a development dividend that cannot be refused.

Each case matters

So for now the world is at a crossroads on asset return. We do not know whether the GFAR Principles will become the norm. While we are still at this formative stage, practitioners should bear in mind that the methods adopted for each and every return have the potential to reinforce the shaping of a global standard of practice.

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