

BACKGROUND BRIEFING

Repatriating Stolen Assets: Potential Funding for Sustainable Development

This background briefing was prepared for “We Want Our Money Back,” a civil society side-event at the 3rd International Conference on Financing for Development, Addis Ababa, on July 15, 2015. It was prepared by the Open Society Justice Initiative with input from the participants in the event: African Network for Environment and Economic Justice (ANEEJ), Nigeria; Anticorruption Action Centre (AntAC), Ukraine; Integrity, Nigeria; International Research & Exchanges Board (IREX), USA/Kazakhstan; Association Sherpa, France.



I. INTRODUCTION

An estimated \$20-40 billion are stolen from public treasuries each year in developing countries. Of this, an estimated \$5 billion have been recovered and returned over the past 15 years.¹ This low recovery rate affirms the difficulties in tracing, freezing, and seizing assets. When substantial stolen funds have been successfully traced, frozen, and seized, it has generally been in response to abrupt political turning points. Within hours of Hosni Mubarak's overthrow in 2011, ill-gotten assets of his family and cronies stashed in Swiss bank accounts had been frozen, while regime changes in Tunisia and Libya led to efforts to freeze the assets of former leaders.² Similarly, the 2014 fall of former Ukrainian president Viktor Yanukovich ignited probes into his corrupt dealings and assets hidden abroad.

Because the origin and nature of assets are often very difficult to prove, especially when assets are hidden in complicated shell company schemes and opaque lines of beneficial ownership, judicial due process is critical to confirm that the assets were indeed corruptly acquired. Importantly, actually securing control over assets that are frozen in foreign jurisdictions requires significant political will, across a range of stakeholders, in and outside of government offices.

Public assets belong to the people of the country from which the assets have been removed. Such monies do not constitute foreign aid, wherein a donor may have some legitimate discretion as to the terms; and yet a state that seizes assets retains, at least for a period, possession, legal rights and responsibilities as to their disposition. The government representing the people from whom the assets were taken must play an important role as administrator of public assets, which includes a duty to administer the assets for the public good.

Particularly where trust between the government and the public has been broken – through previous theft or mismanagement of public assets, or in times of unelected or unfairly elected leadership or perceived unfairness in assumption of power – questions arise as to how a government can legitimately represent the population whose assets they hold in trust. These questions serve as opportunities to force each stakeholder – the involved governments, the people with rightful claim to the assets, civil society (in both the country where assets originate and where assets are seized) – to reflect firstly, on how it came to be that the assets were misappropriated, and secondly, how these circumstances affect the process by which assets are returned.

II. STATE-TO-STATE TRANSACTIONS

Nigeria: Return of Abacha Assets

Between 2004 and 2006, Switzerland seized \$505.5 million from former president Sani Abacha and repatriated the money to the Nigerian government. Agreement between the Swiss and Nigerian governments and the World Bank indicated the money would be spent on Millennium Development Goal (MDG) projects related to health, education,

¹ Kevin Stephenson, and others, *Barriers to Asset Tracing*, (Washington, DC: The World Bank, 2011), 11. http://www.worldbank.org/finance/star_site/publications/bar_consolidated.pdf.

² Cynthia O'Murchu, "Asset Tracing: Follow the Money," *Financial Times*, August 13, 2014. <http://www.ft.com/cms/s/0/3a6cf942-222e-11e4-ad60-00144feabdco.html#axzz3eflx7QqE>.

water, electricity, and roads.³ However, transparency in the use of the funds was not built into the repatriation process⁴, which meant that obstacles in accounting for the uses of the funds arose. The World Bank and Nigerian NGOs sought to monitor the use of the funds once they had been returned,⁵ but because the funds were returned to the general budget and therefore co-mingled with other government resources, and because the monitoring took place after the funds were reportedly spent, the monitoring groups found it very difficult to determine how the funds were actually used. The monitors depended on government-provided information to track the expenditure of funds and found that while some public fund projects were fully executed, misuse of public funds and at least one alleged case of corruption occurred in connection with the returned Abacha assets.⁶

Angola: Return of Criminal, Money Laundering Proceeds

In two distinct proceedings, a total of \$64 million--a 2005-2006 return of \$43 million and a 2012-2013 return of \$21 million--was restituted from accounts in Switzerland and returned to Angola on condition that the money would be held in a Swiss bank account (with Angola as the beneficiary), and that the funds would be used on development projects.⁷ Both returns established that the Swiss Agency for Development Cooperation would administer the funds.⁸ Angolan civil society criticized the lack of consultation and transparency of the process, which resulted in an arrangement that resembled traditional aid conditionality.⁹ For example, some of the funds never entered the Angolan economy, going instead toward payment of an existing contract with Swiss company RUAG. The performance of the agreement was criticized for failing to meet the agreed humanitarian requirements.¹⁰ These assets could arguably have provided more benefit to the Swiss economy than to the intended beneficiaries, reflecting how closed processes around the disposition of public assets can lead to outcomes that do not adequately address the

³ Soji Apampa and others (on behalf of Integrity), *Utilization of the Repatriated Abacha Loot, Results of the Field Monitoring Exercise, Report Prepared by the World Bank with Cooperation from the Federal Ministry of Finance* (Abuja: 2006), 4, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/04/10/00001823_20070410131028/Rendered/PDF/393900v10UNIoAnMonitoring01PUBLIC1.pdf.

⁴ "...[T]hese resources were treated as part of general budget resources and not distinguished in any way from other budget spending. Increased allocations to various spending agencies were therefore not clearly labeled in the budget as coming from the repatriated 'Abacha loot'. Indeed, it was only after spending had begun that the FGN and Swiss officials agreed on funds monitoring and tracking. In many instances, government field officials and similarly project beneficiaries were unaware of the source of the funds. This approach meant that use of these resources could not be rigorously/clearly tracked. Since then, the [Nigerian] Government has put in place a mechanism, including appropriate budget coding for tracking the use of resources released by the recent debt deal with the Paris Club, through the creation of a Virtual Poverty Fund. This will make it easier for Nigerians to see how debt relief gains are being used," *Ibid.*, 6.

⁵ *Ibid.*

⁶ David Ugolor, Apollos Nwafor, and John H. Nardine, *Shadow Report on the PEMFAR Monitoring Exercise*, (Benin City: Nigerian Network on Stolen Assets, 2006), 10, https://www.ladb.ch/fileadmin/files/documents/Potentatengelder/Nigerian_Network_on_Stolen_Assets_Shadow_report_on_the_Pemfar_Monitoring_Exercise.pdf

⁷ Stolen Asset Recovery Initiative Database, "Angolagate," *citing* Swiss Agency for Development and Cooperation, "Switzerland and Angola sign agreement on the return of Angolan funds currently blocked in Switzerland to benefit humanitarian projects," November 1, 2005, http://www.deza.admin.ch/en/Home/News/Close_up?itemID=21008, <http://star.worldbank.org/corruption-cases/node/18461>.

⁸ Gretta Fenner Zinkernagel and Kodjo Attisso, *Returning Stolen Assets - Learning from past practice: selected case studies*, (Basel: International Center for Asset Recovery, 2013), 6-7, http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Angolagate_Swiss_ICAR_Case_Study_2013.pdf.

⁹ *Ibid.* See also, Aktionfinanzplatz, Bern Declaration and Global Witness, "Angola/Switzerland: Millions in Angolan Public Funds Still Frozen in Swiss Banks," September 24, 2007, https://www.globalwitness.org/documents/14188/microsoft_word_millions_in_angolan_public_funds_still_frozen_in_swiss_banks2409071.pdf.

¹⁰ Berne Declaration, "Time for joined-up justice on oil related corruption cases involving Angola," October 23, 2008, https://www.bernedecorruption.ch/media/press-release/time_for_joined_up_justice_on_oil_related_corruption_cases_involving_angola/.

needs of the people to whom the assets belong. No public accounting was ever made of the ultimate disposition of either tranche of funds.

III. MOVING TOWARDS COLLECTIVE ACTION

The BOTA Foundation in Kazakhstan, a non-profit, non-governmental organization aimed at improving child and youth welfare, was established following a 2006 trilateral agreement between the governments of the Republic of Kazakhstan, the Swiss Confederation and the United States of America¹¹ to repatriate \$84 million in assets uncovered under a US Foreign Corrupt Practices Act investigation involving alleged unlawful payments on behalf of US oil companies in Kazakhstan.¹²

The Foundation came together through the cooperation of the American, Swiss, and Kazakh governments to ensure that all parties had a say: that the funds be applied in a transparent and accountable manner, directed and informed by Kazakh citizens, and in a manner that directly benefited Kazakhstan's most vulnerable populations.¹³

The Memorandum of Understanding stipulated that the BOTA Foundation would be supervised by the World Bank and that the US and Switzerland would each have a seat on BOTA's seven-member board. The BOTA Foundation was launched and operated by the US-based non-governmental organizations International Research & Exchanges Board (IREX), a group with decades of experience working in education and grants, and Save the Children, acknowledged for their deep understanding and experience with child welfare issues.¹⁴ Both organizations were chosen following an open call for bids by the board of trustees of the Foundation and the World Bank.¹⁵ The BOTA Foundation applied \$116 million (the original \$84 million plus interest and additional mobilized funding from individuals, corporations and government sources)¹⁶ to improve the health, education, and social welfare of children and youth in the poorest regions of Kazakhstan via conditional cash transfers and tuition assistance as well as grants to increase the capacity of the social-service sector. Kazakh citizens participated in the program design and delivery, with more than 100 local staff hired and trained across all three programs.¹⁷

¹¹ Memorandum of Understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan, December 1, 2006, <http://www.state.gov/documents/organization/108887.pdf>.

¹² Alima Bissenova, "Swiss to Hand Over \$84 Million in Blocked Assets to Kazakhstan," *Central Asia Caucasus Institute Analyst*, May 4, 2007, <http://old.cacianalyst.org/?q=node/4620>.

¹³ International Research and Exchanges Board, "BOTA Foundation: Innovative Asset Return," IREX website, <https://www.irex.org/projects/bota-foundation>.

¹⁴ Aaron Bornstein, "The BOTA Foundation explained (Part Seven): BOTA's Conditional Cash Transfer Program," *The FCPA Blog*, April 20, 2015, <http://fcpcbog.squarespace.com/blog/2015/4/20/the-bota-foundation-explained-part-seven-botas-conditional-c.html>.

¹⁵ Colby Pacheco and Swathi Balasubramanian, *Achieving Development Impact with an Inclusive Asset-Return Model, The Case of the BOTA Foundation in Kazakhstan*, (Washington: IREX, 2015), 9, <https://www.irex.org/sites/default/files/BOTA%20Case%20Study.pdf>.

¹⁶ Ignacio Malizani Jimu, "Asset recovery and the civil society in perspective: Nigeria, Peru, the Philippines and Kazakhstan cases considered," *Emerging Trends in Asset Recovery*, (Bern: Peter Lang AG, 2013), 324-328.

¹⁷ Colby Pacheco and Swathi Balasubramanian, *Achieving Development Impact with an Inclusive Asset-Return Model, The Case of the BOTA Foundation in Kazakhstan*, 14.

IV. CURRENT OPPORTUNITIES TO LEARN FROM PAST EXPERIENCE AND DEVELOP BETTER SOLUTIONS

In October 2014, the US Department of Justice settled its civil asset forfeiture cases against assets claimed by Teodoro Nguema Obiang Mangue, the son of the President of the Republic of Equatorial Guinea.¹⁸ Under the terms of the settlement, Nguema Obiang is to liquidate the US assets, valued at around \$36 million, and of the proceeds, \$20 million is to be given to a charitable organization and used for the benefit of the people of Equatorial Guinea and another \$10.3 million, while forfeited to the United States, will also be used for the benefit of the people of Equatorial Guinea. The settlement stipulated that the US and Equatorial Guinea would jointly select a charity to receive the funds.¹⁹ A coalition of Equatorial Guinean NGOs has advocated for international cooperation and civil society involvement and oversight as prerequisites to ensure the transparent, efficient return of assets to benefit the victims of political corruption.

In France, cases from multiple jurisdictions in which high-level officials allegedly have misappropriated public funds are ongoing. These cases were initiated either by (i) French civil society organizations (regarding assets stolen from the Republic of Congo, Gabon, the Republic of Equatorial Guinea and Syria), (ii) countries of asset origins through mutual legal assistance requests (by Egypt and Tunisia) or (iii) a criminal complaint in French courts (by the Central African Republic) and asset freezing/seizing countries (such as Switzerland, re properties claimed by Gulnara Karimova, daughter of the Uzbek president). Although proceedings are still ongoing, the manner in which assets should be repatriated is a consistent question, especially when assets frozen or seized may be returned to governments controlled by those who embezzled the funds, or their close family or associates.

Ukrainian NGO Anticorruption Action Centre (AntAC) petitioned the United States Justice Department on behalf of Ukrainian civil society to dedicate the nearly \$3 million in forfeited and seized assets allegedly laundered by former Ukrainian Prime Minister Pavlo Lazarenko, to creating an anticorruption training facility within the Kyiv Mohyla Academy in Ukraine. Under the proposal, remitted funds would be used to develop the program, hire instructors, provide scholarships to students, and support anticorruption initiatives within the country, in coordination with a forthcoming National Anti-Corruption Bureau. The proposal is supported by an interagency working group on asset recovery set up by the current president of Ukraine, Petro Poroshenko, as well as Transparency International Ukraine, the Kyiv Mohyla Foundation, and the European Research Centre for Anti-Corruption and State-Building (ERCAS). Efforts are underway to have a much larger sum of Lazaenko money – some \$200 million, as to which proceedings are in final stages – repatriated and administered by a private foundation to support public works projects in Ukraine, including the funding of a Children’s Hospital.

¹⁸ United States Department of Justice, “Second Vice President of Equatorial Guinea Agrees to Relinquish More Than \$30 Million of Assets Purchased with Corruption Proceeds,” October 10, 2014, <http://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased>.

¹⁹ *United States v. One Michael Jackson Signed Thriller Jacket and other Michael Jackson Memorabilia, etc*, CV 13-9169-GW-SS Stipulation and Settlement Agreement, (2014). http://www.justice.gov/sites/default/files/press-releases/attachments/2014/10/10/obiang_settlement_agreement.pdf.

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