

Decision-making processes on asset return: The cases of Kazakhstan, (Nigeria), Peru and the Philippines

Draft report

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Executive Summary

This research report analyses decision-making processes on the return of illegally obtained assets in the cases of Kazakhstan, Peru and the Philippines (experiences from Nigeria to be included in second revision). The report is based on semi structured interviews conducted with key decision makers in requesting and requested states involved in said cases (see Annexes I and II for methodology and interview questionnaire).

It particularly focuses on the motivations, considerations and processes that led to the decisions on how and for what purpose to use returned assets. In this context, the report in particular looks at a question often debated in asset recovery circles, namely whether there may be a power imbalance between requesting and requested states in these processes despite the fact that requesting states are legally empowered through the UN Convention against Corruption (UNCAC). Such a power balance has given rise to concern as it is perceived to potentially compromise the fundamental principles of asset return of UNCAC. The report finds that while power imbalances have been observed to various degrees, this has in practice not negatively affected the actual asset return processes in the case studies reviewed. More important seems to be the existence of a shared interest among involved parties for the successful return of the illegally obtained assets back to the requesting states and their meaningful use once returned.

From the perspective of the requesting states, recovering the funds and defining an end use that either redresses the victims, addresses the root causes of the original crime, or contributes in another meaningful way to social and economic development in the country, sends a strong message of commitment to the public good and to the fight against impunity for corruption. From the perspective of the requested states, returning these funds is of utmost importance as harbouring illicit money is a threat to their financial systems, contributes to the wide range of negative impacts of illicit financial flows on the global economy, and undermines global stability and growth. All parties share a common interest in the successful return of stolen assets, but also in avoiding the reoccurrence of instances where ill-gained funds find their way overseas. Thus, while the motivations of the two parties may partially diverge at first sight, they converge in pursuit of a common outcome. The practical experiences analysed in this report suggest that a host of practical considerations that must be addressed in order to obtain a satisfactory outcome of the return and end use of stolen assets are best dealt with in a constructive dialogue that takes into account the perspectives of both requesting and requested states.

While the motivation behind the decision to engage in a dialogue is the first consideration, deserving equal attention are the substantive issues that arise when it comes to defining the precise modality of asset return. Although it may be quite easy to determine the utilisation of returned assets - such as redressing the directly affected victims of the crime - significant challenges arise in the process of identifying and developing the precise modalities that ensure those goals are effectively achieved. The case studies demonstrate that context matters and that a critical element conducive to the success of asset recovery involves carefully considering not only the several possible asset return modalities but also the associated policy and monitoring instruments that need to be put in place to ensure effective implementation. Adequate deliberation about the technical aspects that will govern the transfer and use of recovered funds helps to build trust and enhance cooperation as for example where strong monitoring facilities not only assist in managing the process but simultaneously also act as a risk-mitigating strategy for requesting and requested states alike.

In view of the findings of this report summarised in the above paragraphs, it is suggested that developing guidance for a potential dialogue between requesting and requested states in the context of returning stolen assets may be a key to depoliticise the nature of the engagement, support both parties in the process, manage expectations and facilitate an alignment of the actors involved around a common vision. Such guidance may act as neutral mediation tools in support of building up the cooperation of all stakeholders towards the successful return of assets, providing a framework for dialogue that builds trust without undermining legal rights and obligations of either of the parties and offering actionable insights on the way the process is best managed and implemented.

DRAFT REPORT OPEN FOR COMMENTS

1 Introduction

Decision-making processes for the return of stolen assets engage with one of the more normative dimensions of asset recovery. The United Nations Convention against Corruption (UNCAC) establishes that illegally obtained assets should be returned to its original legitimate owners. Although this is the core principle of the Convention, it provides only general guidance on the return and disposal of assets and sheds only limited light on any particular manner in which asset return and restitution may proceed: In Article 57.5. UNCAC provides that state parties – where appropriate – could consider concluding agreements regarding the final disposal of the assets (UNODC, 2004: 48). While the Convention engages with the legal and technical context of asset recovery and creates an opening for different structures of engagement between state parties, the practice informs that these processes also have clear political dimensions. The political dimensions often revolve around the more normative aspects of sovereignty, underscoring the delicate nature of the dialogues between state parties influencing asset recovery processes and outcomes.

Considering the aforementioned – and inspired by the Addis Ababa Action Agenda, which encourages the development of good practices on asset return – this report seeks to make a contribution to this topic by analysing the decision-making processes on the return of illegally obtained assets in the cases of Kazakhstan, Nigeria (to be included in next draft), Peru and the Philippines. The arguments made in this report are substantiated by research involving interviews with key actors who have had first hand experience in the negotiations of these four asset recovery cases.

In particular, the report aims to further the understanding on the considerations taken into account by requesting and requested states to engage in a dialogue to define the precise terms for the return and end use of illegally obtained assets. Additionally, the report provides information on the outcomes of the different return modalities and end uses adopted in each case. On the basis of that information, the report makes the argument that there is much to be learned from these asset recovery processes, and that these insights can be the basis upon which to consider the potential usefulness of more structured forms of engagement between state parties in the form of guidance as a contribution to the development of good practices on the return of illegally obtained assets.

The main report is organised as follows: chapter two discusses the why, when and how of engaging in a dialogue on asset return. Chapter three considers the critical issue of sovereignty in dialogues between requesting and requested states. Following this, chapter four zooms in on the decision-making processes regarding end-uses of returned assets and chapter five considers the outcomes of these modalities. In light of the aforementioned, chapter six discusses the usefulness and considerations for guidelines and chapter seven concludes.

2 Engaging in a dialogue on asset recovery – why, when and how?

2.1 When and how to initiate a dialogue on asset recovery

The UNCAC establishes that confiscated illegally obtained assets should be returned to its prior legitimate owners. In order to operationalize this principle, the respective state parties involved in the asset recovery processes in the country case studies engaged in a dialogue. These engagements typically commenced at the initial stages of the asset recovery process, i.e. when assets were detected and frozen. The usefulness of engaging in a dialogue at quite an early stage of the asset recovery process have particularly been highlighted in the cases of Peru and the Philippines. In Peru the early engagements between the Swiss and Peruvian authorities, which allowed for the latter to further explain the local case context and express their desire to repatriate the assets in the shortest time possible. In addition, it allowed the parties to engage in a discussion on the identification of the origin of the funds and establish the manner in which these had been transferred from Peru to Switzerland. Having the opportunity to meet in person and by cooperating with the Swiss authorities, the Peruvian officials were able to engage with the formal procedures of the asset recovery process, while at the same time, supporting the case for a final restitution process. Besides this, their early engagements also provided both parties an opportunity to establish a relationship upon which they could build trust and develop an agreement on the end use of assets, which was to be to advance national development objectives and strengthen the fight against corruption. Interviewees confirmed that the trust throughout the process allowed the parties to jointly identify and pursue the most flexible and fast approach to returning the assets to the Peruvian authorities.

As noted above, early engagement between state parties also proved useful in the case of the Philippines. Interviewees noted in this context the absence, initially, of a Mutual Legal Assistance (MLA) Treaty, which made it necessary to break new grounds for the Philippine authority to commence a dialogue with its Swiss counterparts. It was noted that when the Treaty was in place and allowed for the parties to engage in a formal dialogue, the process was expedited. The treaty was particularly instrumental in providing guidance on how collaboration in this process could take shape. However, an early engagement between state parties specifically geared toward discussing the end use of eventually returned assets was also viewed as risky as it was feared the defendants could raise accusations of collusion or of attempting to influence an on-going legal processes. These considerations were also relevant in the case of Kazakhstan.

In terms of the actors involved in these processes and dialogues, in the cases analysed these were predominantly the ministries of justice and foreign affairs as well as the involved prosecuting and judicial authorities and sometimes the requesting countries' legal representatives in the requested states. For instance in the case of Kazakhstan, the Prime Minister's Office, the Ministry of Justice and the Kazakh Ambassador in the USA and lawyers representing the Kazakh Government in USA were important actors in the process. In the case of the Philippines, it was the Office of the Ombudsman and the Departments of Justice and Foreign Affairs that played a leading role. In the case of Peru - due to the very special political situation that existed at the time - the law enforcement agencies played a dominant role, namely, the State Attorney's Office and the Judge presiding over the cases were engaging directly with the Swiss government. The Attorney General Office further supported these institutions and processes.

On the side of the requested states, similar organs were involved in the dialogue. In the case of Switzerland, it was the Federal Department of Foreign Affairs (Public International Law Directorate) and the State Secretariat for Economic Affairs that took a lead role in the processes, while in the United States, the Department of Justice had a lead role, with inputs from the State Department and occasionally other law enforcement agencies and foreign missions. In the case of Kazakhstan, the World Bank was represented in the discussions through the Office of the President and Vice President.

Although it might be easy to imagine the various parties representing the requesting and requested states at different ends of the table, these dialogues were also quite operational and often very collaborative. For instance, in the case of the Philippines, the Swiss government provided support on the drafting of the procedures of the law that detailed the compensation of the victims of human rights abuses under the martial law. In other cases too and despite the asymmetrical nature of the relationship between requesting and requested states, early engagement has also been perceived as conducive to harnessing the expertise available in the requested state in support of the restitution processes to the requesting state. This is particularly helpful when the domestic institutions in the requesting state are limited in their capacity to handle grand corruption cases. This was particularly the case in Peru, where at the time there was very limited infrastructure in place to handle asset recovery processes, i.e. the absence of a financial investigation unit. This resulted, for example, in putting a team from the Federal Bureau of Investigation (FBI) at the disposal of Peruvian authorities and providing a direct point of contact with the US Department of Justice and the focal point in charge of the Peruvian portfolio.

2.2 Rationale for engaging in a dialogue

Beyond the fact that engagement, especially at an early stage, has in the past been perceived as expediting the process, what else would requesting and requested potentially gain from such interactions?

Interviewees stated that by engaging in a dialogue, the parties can establish an initial agreement that guides the ensuing discussions and is instrumental to securing the interests related to the asset recovery process. For instance, in the case of the Philippines, the parties were able to find common ground early on in the idea that the recovered assets should be used to redress victims of human rights abuses under the martial law. Because of this early agreement, assets were returned before the end of the process and placed in an escrow account pending the passing of legislation that determined that the assets would be used to redress victims. This had a significant positive impact in the country, akin to what was stated by an interviewee from Peru as a key impact of asset recovery, namely “(...) a positive moral blow for the country and a very clear message to the corrupt that everything possible will be done to deprive them of those assets which have been obtained illicitly.

Bringing in a third, neutral party into the dialogue may also be a desirable strategy through which the state parties can further increase the effectiveness of the asset recovery process. This was particularly evidenced in the case of Kazakhstan, where the World Bank was requested to facilitate the discussions between the parties involved, namely, Switzerland, USA and Kazakhstan. The World Bank agreed to this role as it provided an opportunity to contribute to anti-corruption activities, which in turn supported its on-going poverty alleviation activities in Kazakhstan. This was later formalised in the decision of the Southern District Court making the involvement of the World Bank legally binding to all state parties.

Thus, both requesting and requested states have clear motivations to engage in a dialogue during the asset recovery process, many of which converge. Not only is this a way to facilitate the process forward, but it also allows the state parties to engage in an early discussion to identify common

interests in the restitution, even when the requesting and requested states may have distinctively different motivations. Whereas restitution sends a strong signal by the requested state that its financial system will not be a conduit for illegal assets, the requesting state sends a similar strong message domestically that corruption will not remain unpunished. The parties can also rally behind a common vision that is articulated through the end use, for example redress for victims (individuals or targeted groups of society) or support to national development which ultimately also highlights the fundamental principle of the UNCAC, emphasising that corruption has a corrosive effect on societies; undermines democracy, the rule of law, violates human rights, distorts markets, erodes quality of life and allows threats to human security to flourish (UNODC, 2004: iii). A neutral party that shares similar objectives can provide further instrumental support to these parties and processes accordingly.

2.3 Key take-aways

- Early engagements between requesting and requested state parties provide an opportunity to facilitate and potentially expedite the asset recovery process and discussions on asset return.
- Requesting states may also use this as an opportunity to harness the expertise residing within the requested states to facilitate the asset recovery processes.
- Early dialogue helps build trust and supports building a common vision of the ultimate objective of asset recovery
- Facilitating an effective asset return process is beneficial to both requesting and requested states.
- Successful asset recovery can send strong symbolic messages in both requesting and requested states

3 Safeguarding sovereignty in the dialogue between requesting and requested state

3.1 Safeguarding the sovereignty of the requesting state

Dialogues between requesting and requested countries on the terms governing the return of illegally obtained assets and their end-use have the potential to be contentious, to a large extent due to the fact that both parties have legitimate interests at stake. A critical aspect that comes up in this debate concerns safeguarding the sovereignty of the requesting country. Although it was clear that the sovereign right to determine the end-use of the returned assets resides with the requesting state, throughout interviewees stated that this issue was more relevant at a political level and less so in the operational context of the various asset recovery dialogues.

For instance, in the case of Kazakhstan, interviewees stated that while the sovereignty of the requesting state was a topic present in the background of the political dialogue between the parties, it was not openly spoken about. The fact that these concerns seemed to be less relevant in practice were attested to the fact that mostly it was a foregone issue since it would not have been possible to engage in a discussion or agree on a modality without the explicit consent of the requesting state. As such, the entering into dialogue as such seemed to cancel out concerns over sovereignty in the eyes of most interviewees. In the case of the Philippines, the absence of an MLA Treaty made the requesting party proactively reached out to the Swiss government for support. The concern was thus more with the absence of a legal framework for collaboration than protecting sovereignty. In the case of Peru, the issue of restitution and destinations was an ever-present topic in bilateral discussions between Peruvian and Swiss and American parties and as such these discussions were not seen under the label of sovereignty but under the label of bilateral (and multilateral) relations.

Particularly interesting in the case of Peru was the inclusion of an element of consultation outside of state actors, further testifying to the acknowledgement that while sovereignty is to be preserved, a dialogue based outcome is likely to be better accepted: Following the recommendation of the US government, the Peruvian government conducted a “notice and comment” system, through which it publicly announced the manner in which the recovered funds would be utilised and requested comments accordingly. The notice and comment system in Peru was particularly helpful in managing societal expectations. By bringing in civil society perspectives and participation in these decision-making processes, it was possible to harness their support and concerns at an early stage. This also served as a strategy to pre-empt possible critiques on the content of the chosen modality during its implementation stage, while the final decision remained in the hands of the government.

Thus, the evidence suggests that while protecting the sovereignty of the requesting state is a critical aspect of asset restitution processes, at the operational level pragmatic considerations have proven to be more relevant to the asset recovery process. Noted in the context of the Kazakhstan restitution by one of the interviewees:

Sovereignty is more discussed in policy meetings, not so much in the discussions on specific cases. Sovereignty is only a theoretical issue. Sovereignty anyway resides in the people not in the government, so how do you get the money back to the people

and make sure people have a role in the use of the money? That is the bottom line. In that sense, it is (...) about ensuring that the actual sovereign – the people – can decide and benefit.

3.2 Balancing the sovereignty of the requesting state with the interests of the requested state

This more pragmatic approach adopted by state parties may be facilitated by the wish to pursue specific goals related to the asset return process. This was particularly relevant in the case of Kazakhstan, where the recovered assets concerned the proceeds of bribery and maintaining the reputation of the government – alongside some pressures from foreign parties – influenced the nature of the dialogue. These dynamics were further impacted by the Southern District Court decision, which placed various conditions on restitution (the funds were not to be returned to the Kazakh government, but to be disbursed by a different entity, with involvement of the World Bank and utilised for social good), which is particular in this case where assets were confiscated in the context of a settlement. As such, at first sight the level of concessions made in this particular case was higher on the side of the Kazakh government, having to consider the conditions placed on the restitution by the US Court, but with clear benefits on the same side too in that the reputational costs could be reduced.

A pragmatic approach to the asset recovery and restitution also influenced the process in the case of the Philippines. Here the interviewee considered that the absence of Mutual Legal Assistance Treaty made the engagement with the Swiss government contingent on the goodwill of the latter government to facilitate these processes more effectively and to return the assets to the Philippines accordingly. Again, by taking on a more pragmatic approach to the asset recovery process, the state parties could find agreement in the need for a swift and successful restitution process, while cognisant of the potential fear that funds could be misused should these be returned without any attention to modalities.

The Swiss government was concerned that the recovered assets would be stolen again or used improperly. I think these were reasonable concerns. They were also concerned about the developmental and social impact that the underlying crime had had on the Philippines, and so was my Government, as levels of corruption in the Philippines were still very high at the time.

Indeed, it was a shared interest of the Philippine and Swiss state parties that the assets should be returned swiftly but with the joint understanding that it would be critical that these funds would not be stolen again and indeed reach the victims of the human rights abuses under the Marcos martial law. By framing the concerns as such, it was possible for both parties to acknowledge (tacitly) the validity of concerns with the integrity of the modality for end-use, while taking away the politically sensitive sting of discussing such issues more openly and as a judgement or reflection on the capabilities of the Philippine government. As such, the primary concern of the Swiss government was that a substantial amount of the recovered funds would be used to compensate the human rights violations victims of the Marcos regime and a result placed two conditions on the return of recovered funds.

The acknowledgement by the Philippine state parties that the concerns of the Swiss government were reasonable and valid also resonated through in the case of Peru. Here the parties were also in agreement over the need for Peru to recover what was lost while considering the need for modalities to protect against future malpractices. In this regard, the explicit political will conveyed by the transitional government and newly elected government were key factors that expedited this agreement. An interviewee in this context said:

It is understandable that states like the USA and Switzerland had their doubts that these funds would be well invested due to the corruption background of Peru. This sort of tension is natural but I would not

This is not to say that agreement was always immediate. The Peruvian and US state parties for example were said to have disagreed on the proposal by the latter to channel a portion of the recovered assets to the fight against drug trafficking. Such politically sensitive issues were however typically overcome by framing them within a pragmatic discourse that led to mutually acceptable modalities of engagement and collaboration. From a comparative perspective, the concessions made by the various state parties seemed to have been more balanced in the cases of the Philippines and Peru. In both cases, the dialogue was said to have been open and collaborative, and interviewees from all concerned parties stated that the joint wish to expedite the restitution resulted in an agreement that was cognisant of the wishes of the requested state while following the interests of the requesting state and local context . An interviewee from Peru summarised this pointedly as follows:

In weak countries with corrupt structures entrenched in the highest echelons of power something that cannot happen is that you make an effort to recover or repatriate all these assets and that they return to corruption schemes. Thus, if the international community - not of course because of a whim or by imposition or other political motivations or otherwise, but based on a healthy concern to see that these funds are well invested in favour of the communities of the requesting states - suggests that dialogue is a good practice for determining asset return and end use, I am totally in favour of being able to create a dialogue to reach reasonable and positive agreements.

3.3 Key take-aways

- The dialogue between parties on the terms governing the return of illegally obtained assets and their end-use is complex as it reflects the power imbalance between requesting and requested states.
- It is in this context that the issue of sovereignty comes up, but this is more relevant when reflecting on engagements between state parties at a political level.
- However at an operational level, pragmatic considerations are much more important to the different state parties.
- These pragmatic considerations reflect the wish to pursue particular interests related to the asset return process.
- These interests are in turn framed within the usefulness of designing adequate modalities to manage the appropriate end-use of recovered assets.
- By framing this interest as such, the state parties avoid more politically charged discussions regarding the appropriateness of the political and administrative framework of the receiving government to adequately manage the recovered assets, which would squarely place the issue of sovereignty back on the table.

4 Decisions on end-use

4.1 Considerations informing the end-use of returned assets

The end-use of returned assets is one of the critical pinnacles of the asset recovery process. As such, the government of the requesting country closes the corruption loop in that it recovers funds that were withdrawn from its national assets. However, recovering the assets is only the first and primarily technical step. To ensure that the asset recovery process comes to a truly successful end, defining the purpose those assets will serve once they have been returned is of huge importance given the pragmatic and symbolic implications that have been discussed in different sections above. The particular end-use for returned assets can be determined based on a variety of possible criteria such as the characteristics of the victims of the crime, the identity of the perpetrator or the specific nature of the crime.

In the case of Kazakhstan, case related considerations were less relevant as the recovered proceeds were the result of alleged bribery and the case had never been judged – assets were returned as a result of a settlement. Consequently, other concerns were given more weight, namely, utilising the funds in a meaningful way to address needs of the Kazak citizens. Indirectly this can be seen as case related, as bribery typically hurts a country's economy and hence development. Also important was to choose a modality that secured sufficient and efficient absorption capacity, while also guaranteeing transparent utilisation of the funds. To this end, a mission of foreign stakeholders to Kazakhstan was conducted to assess such needs and to search for local institutions that could receive and effectively disburse the funds accordingly.

In the case of Peru, the nature of the crime from which the stolen assets originated was the key factor that informed the end-use of the return assets. The decision was quickly made to not dilute the assets in the general budget but rather for them to be used for an “altruistic” purpose, and specifically to address weaknesses in the country's anti-corruption system. These ideas were shared by various international non-governmental organisations that contacted the state parties in Peru.

Similarly in the case of the Philippines, the nature of the underlying crime was the most important consideration informing the decision on the end-use of the assets, though the considerations then geared towards compensating the victims (of human rights abuses under the martial law of former President Marcos) rather than future prevention of similar crimes. Beyond the human rights victims compensation, consideration was also given (in the context of assets stolen by Marcos and recovered in the Philippines) to the peasant farmers who suffered from the land reforms implemented under the martial law and where corruption under Ferdinand Marcos had generated a considerable share of the stolen funds. In sum, the main concern was to ensure that the money went back to those that suffered most under the Marcos regime.

4.2 What modalities for managing and protecting returned assets?

Modalities to manage returned assets can have various designs, and are particularly informed by the objectives of the disbursement and characterised by the extent to which the government of the requesting country is in control of these processes. On the one hand, assets can be returned to the government – via the state coffers – utilising the ordinary public financial management systems to monitor the fund disbursement and by earmarking it potentially for a dedicated purpose. A variant on this concerns the enhanced country systems, which adds on further adjustments to make the fund

management and disbursement more responsive and transparent. On the other hand, arrangements could also be made for the creation of autonomous funds with corresponding public reporting and accountability arrangements, or alternatively, the complete transfer of fund management and disbursement to a non-governmental organisation (World Bank 2009: 11). In some cases not discussed in this report the option of returning the assets through a bilateral development cooperation partner has also been seen.

In the case of Kazakhstan, the state parties together with the World Bank agreed that the recovered assets were to be managed through an autonomous fund called the Bota Kazakh Child and Youth Development Foundation (Fenner Zinkernagel & Attisso, 2014: 340). In view of the fact that no local organisation had been found in Kazakhstan deemed capable enough to absorb the assets meaningfully, the decision was taken to create this new institution. Also, an alternative fund modality for the returned assets was considered less appropriate in this specific case. Following a procurement processes, the International Research and Exchanges Board was selected to build the structure and capacity of the Foundation, which was staffed primarily by local people and overseen by a board of trustees composed of five Kazak citizens and one representative each from Switzerland and the USA.

The recovered assets in the case of the Philippines were returned to the treasury and later on moved to an off budget fund, called the Agrarian Reform Fund (Jimu 2009: 12). This specific modality was chosen to assist in the compensation of human rights victims of the martial law. In order to identify and establish the legitimacy of individual claims an ad hoc specialised body was set up, namely, the Human Rights Victims' Claims Board.

Similarly, in the case of Peru, the recovered assets from Switzerland were channeled through a national fund (FEDADOI¹), but this was administered through the normal budget with a board of representatives determining the allocation of the funds. The board was composed of representatives of five government agencies. The recovered assets from USA were returned to Peru and - based on the bilateral agreement - were to be invested in anti-corruption efforts (Fenner Zinkernagel & Attisso, 2014: 335-336). Indeed, the set-up and implementation of FEDADOI was such to effectively manage the funds and through this structure create projects that would support the rule of law and the fight against corruption. In addition, as these concerned public funds, the funds underwent all the corresponding controls of the ministry of economy. This modality was furthermore chosen as the vibrant civil society present in Peru could provide further monitoring of these projects accordingly.

4.3 Key take-aways

- Recovered assets are often used to redress victims. This objective has great symbolic meaning as it attempts to compensate and make amend for the associated crime.
- Recovered assets are also utilised to support national development or more specific, strengthen the anti-corruption system, so as to prevent the future outflow of illegally obtained assets.
- The objective of the end-use of returned assets also inform the modalities through which these assets would be managed.
- Various designs have in the past been used to manage and protect the returned assets, with varying degree of government influence in the administration of the fund.

¹ Fondo Especial de Administración del Dinero Obtenido Ilícitamente en Perjuicio del Estado (FEDADOI)

5 Outcomes of returning assets

5.1 Returned assets and outcomes for receiving governments and their citizens

The different modalities adopted for the end-use of returned assets in the country case studies were well considerate of the political context of implementation and focused primarily on reparations to victims and preventing or addressing the underlying crimes. Nevertheless, and despite the comprehensive discussions that preceded the various modalities, the implementation has been quite challenging and outcomes limited at times. This section attempts to take stock of these past experiences with a particular focus on some of the weaknesses and failures of the utilised arrangements, not in order to discredit the largely positive outcome but rather to ensure that future end use designs may benefit and become more effective based on this experience.

When considering the case of Kazakhstan, a quite comprehensive autonomous foundation was set-up to disburse the recovered assets. Of all the different modalities that could have been considered, this arrangement had the least amount of government influence. This being said, although on paper the influence of the government was limited, many of the projects would not have been implemented without the assistance and tacit support of the government. This resulted in a positive outcome in that at least one of the project components was later considered for adoption into general government policy, but implementation did suffer occasionally from the limited interaction with and thus support from the Government. Another point to consider was that the Foundation had a fairly comprehensive governance and oversight structure. On the positive side, according to subsequent evaluations of the project this was instrumental in preventing misuse of funds. On the other hand this particular arrangement was quite costly with around 10% of the restitution fund being used for administration, though one could argue though that these expenses were adequate in light of the benefits of having a proper fund management and administrative oversight.

As a take-away from the Kazakhstan experience, we could for example consider that the outcomes, in particular long-term, would possibly be stronger if a local organisation could have been identified with sufficient absorption and implementation capacity to manage the Bota Foundation, and, in the absence of such a capable organisation, to team up an emerging local organisation with an international partner. Moreover, interviewees were of the opinion that although the restitution itself is a powerful symbolism against corruption, it could potentially have had a greater impact to utilise at least some of the recovered assets to strengthen the fight against corruption and money laundering.

The importance of giving due consideration to the modality chosen is also exemplified in the case of the Philippines. Although the recovered assets were returned to the treasury and an escrow account, respectively, no disbursement has yet been made through the Agrarian Reform Fund. The design of the end use was thoughtful and meaningful as it reflected strongly on the causes that have led to the funds being stolen in the first place, but operationalizing the mechanism proved to be complex. In particular there continues to be disagreement in parliament on the manner in which the funds should be disbursed and the manner in which legitimate claims by victims should be identified. The issue with the specific design of this modality is that the scrutiny of the parliament is to be viewed positively as it may allow for adequate monitoring but that on the other hand debate and contest over the manner in which the Fund should be implemented created serious bottlenecks to the effective implementation of the reparation efforts. These issues further contributed to more general concerns for potential political influence and corruption as a result of gaps within the restitution procedures. In addition, there was no consideration made for external monitoring of the assets nor was there a role foreseen for civil society,

despite the fact that civil society in the Philippines is very strong. Hence, although it was clear that the victims should be compensated, there was not enough consideration given prior to making this decision as to how this was going to be implemented in practice. As put forward by one of the interviewees from the Philippines:

Hence, the devil is in the details. In theory, the way the end-use was designed for the returned funds stolen by former President Marcos was meaningful and good, but the practical implementation posed major problems and continues to do so, which may easily result in the purpose being largely defeated.

A different set of challenges arose in Peru where the parameters and management of the fund were well designed and had a clear symbolic significance, conveying a sincere wish of the state to compensate victims, as described as follows by one of the interviewees in Peru:

It was significant in terms of the message and of the destination. It had a positive impact on recipients whom it seems to me were well chosen as priorities by the state.

To this end, an initial list of end use destinations was developed which determined how FEDADOI funds would be used. However, challenges arose when the power struggle over access to these funds erupted. Although the design of the fund should have prevented that the funds would be redirected, a new Minister changed the destination of FEDADOI funds and later, when a new government took affect, further changes were made that attracted criticism from civil society and other stakeholders. The lesson to be learned from this example is that it is important to consider the political context in which modalities are implemented and, more importantly, how a change in this context could influence the end use of the agreed modality. Particularly, the case of Peru shows how everything was proceeding well in the beginning, but then small incremental challenges and changes diluted the initial purpose and meaning of the fund, which ultimately created a situation in which it was possible to use the fund to cover current government expenses rather than for the objectives defined in the restitution discussions.

The cases of Peru and the Philippines showed how a well thought through mechanism for use of the recovered assets can run into difficulties during operationalization. Considering these two challenges, interviewees from both countries considered that an alternative arrangement could have been to manage the recovered assets within an independent fund, to entrust the administration of the fund to a neutral third party or to place stricter requirements on the utilisation of the recovered assets. As an interviewee from the Philippines stated:

Perhaps an independent fund could have prevented some of these problems, but this would have also been an admission on the side of the requesting and requested government that there is a lack of good faith in the administration. It is for this reason that both the requesting and requested states need to be honest about corruption concerns and problems. Otherwise, the returned assets would be lost to corruption again.

This indicates that there is some kind of trade off involved within the manner in which the dialogue between the requesting and requested states ensues and the subsequent operationalization of the modality designed for the end-use of recovered assets. Indeed, the issue of trust and showing good faith in the engagements between the state parties has an important symbolic meaning to support progress in the discussions. However, more critical scrutiny regarding the content of modalities and possible challenges that may arise in their implementation also need to be taken seriously, and should not be sacrificed for the benefit of a swift or over-harmonious dialogue. At the end of the day, detailing

the various safeguards to ensure an effective utilisation of the recovered assets is in the benefit of both the requesting and the requested states. Furthermore, by framing these issues within a context where general guidance to the negotiation of the return of assets are available, state parties would possibly be able to better balance the more delicate relational aspects of the process, while cognisant of the need to establish appropriate modalities to govern the end-use of returned assets.

Although the different modalities for asset return have encountered various challenges, it is clear that none of the associated benefits would have been sustained should the money had gone back directly to the treasury without making provisions for its end-use. Beyond the risk of losing the recovered assets again through corrupt vehicles or alternatively, absorbing the funds within the general budget, the restitution would have also lacked the symbolic impact and political message of recovering illegally obtained assets and for instance compensating victims associated with the crime. This political message associated with the recovery of assets - not only as a goal in its own right, but also as a way to compensate victims - could be considered as important as the value associated with the recovered assets themselves.

5.2 Key take-aways

- The implementation of the different modalities adopted for the end-use of returned assets in the country case studies has had considerable impact in terms of furthering development, preventing corruption or rectifying harm done by preceding corruption, but their implementation has been quite challenging.
- In some instances more consideration should have been given to the feasibility of the end use mechanism, as exemplified by the challenges faced in the Philippines with the human rights compensation scheme.
- A thorough operationalization of the design needs to consider local political context, including how a change in that context could affect the end-use of the agreed modality.
- Monitoring facilities may assist in managing these processes and simultaneously also act as a risk-mitigating strategy for requesting and requested states.
- Dialogues between requesting and requested state parties can provide a framework in support of developing effective and efficient modalities governing the end-use of returned assets; challenges that may occur in this dialogue should not prevent a careful reflection on feasibility and details of end use implementation mechanisms.

6 Usefulness and considerations for guidance on asset return design and dialogue

6.1 Usefulness of guidance

The development of guidance for requesting and requested states alike could be a potential useful tool for having a more structured, technical and less political form of engagement between state parties. This could contribute to the development of good practices on the return of illegally obtained assets and help defining their end-use. It would also support mutual cooperation with the aim of ensuring that recovered assets serve the common good and take into account the sovereign rights of requesting states to determine the end use while also reflecting on the interests of and investments made by requested states in the asset return. While such guidance would not interfere with the legal positions of the state parties, it could provide a framework for engagement at a more operational level. In this regard, it is important for this guidance not to reflect a prescriptive agenda, as there is no best or appropriate design when it comes to the process or outcomes of asset recovery. Cognisant that asset return is not a mere neutral transaction (and to accommodate the political and more sensitive nature of this process), such guidance could provide a framework of support, detailing general considerations that could be taken into account.

Guidance on dialogues for asset return may be particularly instrumental to depoliticise the nature of the engagement and align the actors in the common vision to return the assets to the requesting state. Indeed, while there may be in some cases different types of power imbalances between requesting and requested states, these imbalances which are often carried by both states, in different contexts, is not necessary a negative factor as long as the different parties recognise a set of similar objectives regarding the asset return process. It is a shared interest of the requesting and requested states that the illicit assets be returned to their prior legitimate owner, and that they be put to use to further the public good, for example by redressing the victims of the crime or supporting anti corruption initiatives. By framing the engagements in more neutral mediation tools or considerations, such as a guidance note, parties may address their various interests and concerns in a constructive manner. It would further allow the parties to build trust and have a discussion on compelling and feasible solutions. Parties can then honour neutral tools for discussion versus having a more politically charged engagement. A guidance note may also support the institutionalisation of good practices regarding structured engagements between state parties and reflections regarding feasible and meaningful mechanisms for end use. This could be particularly useful in a situation in which there are conflicting ideas on the best way forward regarding the restitution process.

The bottom line is that these are highly complicated and delicate processes, and the idea is not to disguise these issues merely as technical matters to be solved. Indeed, by relying on an internationally accepted guidance, state parties can pursue their interests by reflecting on previous experiences with asset recovery processes that are systemised in various considerations and parameters.

6.2 Considerations and parameters

A guidance could provide support to state parties by outlining considerations and parameters that may be useful to reflect on in the overall asset return process. In this regard, the guidance could delve on

the following parameters that could be worth pursuing when considering the return of illegally obtained assets and defining their end-use.

- Finding common ground in interests related to the asset return process and using this as the basis of cooperation, thereby, facilitating the return of assets to its prior owners
- Defining the objective for the returned assets:
 - Who defines the objective of the returned assets and is there a role for societal actors to contribute to this?
 - Should the funds be used to redress victims (specific group of all citizens) or deal with the root cause of the crime, by strengthening national development and anti-corruption frameworks, or are there other meaningful ways to use the funds in a way that relates directly or indirectly to the causes that led to the dissipation of the assets in the first place? Or should the assets be used in a way that is completely unrelated to their origin, and if so why?
 - Would involvement of third parties (international organisations, civil society) facilitate the depoliticisation of the dialogue on end use?
 - Is there an issue of feasibility?
- Operationalizing the modality for the return assets:
 - Political context in the requesting state (nature of the political and bureaucratic administration)
 - The role of the executive power (i.e. incumbent or new government and related interests)
 - Presence or absence of strong civil society
 - Absorption power in existing local institutions
 - Role of third parties or autonomous government institutions in the implementation of end use mechanisms?
 - What kind of accountability mechanisms should be considered within the modality?
 - What would a detailed operationalization of this modality look like? (steps of the implementation process)
 - How would the chosen modality be influenced by changes in the political context?
- Monitoring of the modality for the return assets:
 - What existing mechanisms for accountability are available at domestic level in the requesting state?
 - What is the role of international, national and societal monitors (i.e. parliament, civil society, international actors)

7 References

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DRAFT REPORT OPEN FOR COMMENTS

Annex I Methodology

This report is informed by insights gained from semi structured interviews conducted with key officials that were personally involved in the decision-making processes in the cases of Kazakhstan, Nigeria², Peru and the Philippines, both on the sides of the requesting and requested states. The interviews were instrumental in providing further contextual insights and to shed light on factors that influenced how the concerned states interacted and which choices were made in relation to the end-use of returned assets and accountability arrangements.

The statements made by interviewees have purposefully been anonymised in this report in consideration of the delicate processes and outcomes of asset recovery. When the report describes the process or reflections that were made by the concerned parties in this context, this is always based on explicit responses to questions given by the interviewees. The interpretation of these statements as given in this report on the other hand, unless otherwise stated, are those of the authors of this report.

The interviews were conducted by senior staff of the Basel Institute and under the overall strategic leadership of the Director of the International Centre for Asset Recovery.

² The interviews with officials involved in the Nigerian asset recovery process are scheduled to take place between January and March 2017.

Annex II Interview questions

1. Introductory question

- 1.1 What was your position and role in the dialogue leading to the decision making process on asset return and their end-use?

2. Engaging in a dialogue on asset return

- 2.1 At which point of the restitution process did your country consider engaging in a dialogue on asset return?
- 2.2 What were the main motivations to engage in the dialogue?

3. Actors involved in the dialogue on asset return

- 3.1 Who were the key actors and what was their position or role in the dialogue on the side of your country?
- 3.2 Which other actors or partners played an important role in this process?
- 3.3 How did such partners become engaged?

4. Dialogue on end-use of returned assets

- 4.1 Were there are any concerns about safeguarding the sovereignty of the receiving country? If so, how were these taken into account during the dialogue?
 - Was there an open discussion about such concerns?
- 4.2 Which particular concerns were raised by the requested states? How were these taken into account during the dialogue?
- 4.3 What was the primary interest of the requested state in the dialogue in your opinion?
 - Was there an open discussion about these interests?
- 4.4 How did the key considerations in the scope of the dialogue change over time? What were the reasons for this?
 - What were the most important concessions made by each party?
- 4.5 How do you see the balance arising out of the concessions made by the parties?
- 4.6 Which significant exogenous factors influenced the dialogue?
 - Did other bilateral topics influence the dialogue? If so, how?
 - Was reference made (explicitly or implicitly) to another dossier of asset return? If so, could you explain on how this occurred?
- 4.7 What were the most important considerations that ultimately led to the choice of this particular end-use of the returned assets?
 - Identity of the victims resulting from the crime
 - Characteristics of the perpetrator
 - The networks associated with illicitly obtaining public funds were still in power
 - Nature of the crime associated with the recovered funds
 - Amount of money involved
 - National development priorities
 - Concerns about the performance of the public financial management system
- 4.8 Were these discussions held in a private multilateral or bilateral setting or discussed in public settings (such as Parliament).

4.9 How did you manage expectations both internally and externally?

- Were there any arguments appealing not to engage in this particular choice of end-use of the funds?
- Which office or actor did they come from?
- How were these concerns countered or dealt with?

5. End-use of returned assets

5.1 Which different options of end-use were contemplated and what were the decisive criteria for the particular choice made?

5.2 How was the decision made on who would be in charge of implementing the chosen modality of end-use?

6. Implementation of agreed modality for the end-use of returned assets

6.1 Which were the main challenges encountered during the implementation of the modality associated with the end-use of the returned assets?

6.2 Which were the main challenges in the process of monitoring the correct execution of the end-use of the returned assets?

- How and for how long did the monitoring take place?
- Was there a follow-up?

7. Outcomes of the agreed modality for the end-use of returned assets

7.1 In hindsight, do you think that the chosen modality for the end-use of returned assets has been meaningful? If so, could you please give examples of this?

7.2 Alternatively, do you believe there could have been a different and better approach taken? If so, could you please give examples of how an alternative approach would have been more appropriate?

7.3 In your opinion, what would have been the impact should the assets have been returned directly into the treasury?

8. Policy implications

8.1 Do you believe that the development of guiding principles on dialogues for the return and end-use of returned assets would be helpful? (or would have been helpful to you?)

8.2 In your opinion, what would be the key parameters that such guiding principles should take into account?

Annex III Cases overview

Country:	Kazakhstan
Stakeholders:	Stakeholders in agreement. Switzerland - USA -K7/BOTA
Mechanism:	Funds returned through and managed by ad hoc BOTA Foundation. (Autonomous fund)
Monitoring:	BOTA Board of Trustees: 5 Kazakh citizens, 1 US government representative, 1 CH government representative (trilateral monitoring and Supervision: IREX, Save the Children and WB (Advisory)
End-use assets:	Youth development and energy efficiency programmes
Outcome:	Excellent but very expensive monitoring (1/3 of funds) and management of scheme questions of sustainability (Attisso & Zinkernagel, n.d.).
Balance:	Funds did not originate from the receiving country. Common solution sought by US and Switzerland. Funds management independently of receiving state's institution

Country:	Nigeria
Stakeholders:	Stakeholders in agreement, Nigeria – Switzerland – World Bank and Nigerian CSO's
Mechanism:	Funds returned to Nigerian Central Budget, (Enhanced country systems)
Monitoring:	WB review of budgetary process. Monitoring ex post facto for considerable proportion of funds
End-use assets:	Anti-poverty projects, Comprehensive PEMFAR, Quality of impact of the projects dubious
Outcome:	Significant shortcomings associated with weakness of Nigerian Public Financial Management mechanisms. Need to improve monitoring (continuous) and evaluation of funded projects. Funds go through receiving country budget (Attisso & Zinkernagel, n.d.)
Balance:	Decision on terms for restitution of assets made entirely by Switzerland.

Peru:	Peru
Stakeholders:	Peru – Switzerland and US
Mechanism:	National fund (Country systems). FEDADOI. Representatives from Peruvian Anti Corruption. Agencies determined allocation of funds, utilising regular budgetary channels
Monitoring:	Peruvian international control mechanisms
End-use assets:	US restitution: AC Efforts. FEDADOI: Some questionable allocations
Outcome:	Not satisfactory, need for better monitoring of FEDADOI management (Attisso & Zinkernagel, n.d.). Funds go through receiving country budget.
Balance:	Low involvement of requested state on management of funds and monitoring

Peru:	Philippines
Stakeholders:	Philippines – Switzerland
Mechanism:	Funds returned to treasury of newly elected democratic government. (Country systems). Transfer of assets from frozen accounts via escrow account in the Philippines National Bank. Thereafter the funds transferred to an off-budget fund known as the Agrarian Reform Fund'. (Autonomous fund)
Monitoring:	Ex-ante monitoring. Release of frozen assets pending on completion of legal case to determine criminal origin of assets. Funds finally returned after political agreement between The Philippines and Swiss authorities.
End-use assets:	When the funds were in escrow, the Swiss authorities oversaw the choice of investment that could be made from the account. Through the fund, investment was supposed to go to land acquisition and distribution and support services. Also, court decision mandated that 1/3 of the fund should be distributed to the thousands of Pilipino who suffered during the martial law system.
Outcome:	Questionable transactions of the fund. Significant portion of the funds used to finance excessive and unnecessary expenses. Also, general mismanagement and corruption concerns. The victims have not received compensation and there have no action to allocate this (Jimu, 2009). Funds go through receiving country budget
Balance:	Decision on terms for restitution of assets made entirely by Switzerland