

Returning Stolen Assets - Learning from past practice: Selected case studies

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1 Introduction

Before the adoption of UNCAC, there was no policy or international legal framework guiding the disposal and monitoring of repatriated assets.¹ As a result, there were no globally accepted rules to follow when repatriating confiscated assets to requesting countries. Even after the adoption of UNCAC, global practice regarding the disposal of repatriated assets remains unclear. Indeed Article 57 (5) of UNCAC does not provide clear guidance in relation to the final disposal of confiscated assets.

The selected case studies explore the proactive and innovative practice of Switzerland in the past decade in recovering, repatriating and monitoring stolen assets. These four cases, which are different from various aspects, in particular the types of the mechanism of monitoring, are insightful and yield some important lessons. The lessons drawn in the respective cases highlight the successes achieved as well as some challenges encountered. The Swiss experience has influenced reflection on existing policies and legislation regarding the disposal and monitoring of repatriated assets, including in the context of the introduction by the Federal Council of the Restitution of Illicit Assets Act (RIAA 2011) and, in May 2013, the opening of a consultation procedure on the draft of a new federal act on the freezing and restitution of potentates' assets.²

This selection of case studies has been drafted as background document to the 2-day workshop on Returning Stolen Assets, organised by the Basel Institute on Governance's International Centre for Asset Recovery (ICAR) in collaboration with the Directorate for Public International Law of the Swiss Federal Department of Foreign Affairs (FDFA/DPIL) in October 2013 in Küsnacht/Zürich, Switzerland.

2 Peru: National monitoring

2.1 Overview of the case

The restitution to Peru concerned assets frozen in Switzerland and in the US misappropriated by the former head of Peruvian secret service and presidential advisor, Vladimiro Montesinos Torres,³ and related people.

In Switzerland, a total of USD 113 million was frozen on two different grounds: part based on the Swiss domestic money laundering prosecution and another part upon the Peruvian authorities' mutual legal assistance request. The restitution by Switzerland to Peru was based primarily on a ruling from the Public Prosecutor's Office of the Canton of Zurich in money laundering proceedings against Vladimiro Montesinos. In 2002, the Public Prosecutor's Office ordered the restitution to Peru of around USD 77.5 million.⁴ With the consent of the persons concerned, a further tranche was returned the same year. In addition, in October 2006 Switzerland returned to Peru a further USD 11.5 million that originated from accounts held by one of Montesinos' associates.⁵

In the US, USD 20 million was frozen and ultimately repatriated to Peru in 2004.⁶

1 Cf. Planning for the return of stolen assets to Nigeria, UK policy outline, HMG Asset Return Working Group, December 2011.

2 Federal Department of Foreign Affairs, 22.05.2013. Available at www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=48933.

3 Vladimiro Lenin Montesinos Torres was the right hand man of President Alberto Fujimori of Peru, whose presidency lasted from 28 July 1990 to 17 November 2000. Montesinos was officially head of Peru's secret service (Servicio de Inteligencia Nacional SIN) and de facto presidential advisor and national security advisor.

4 In total, Peru has recovered around US 185 million. In addition to the assets returned by Switzerland, USD 33 million from Cayman Islands in 2001, USD 20 million from the United States in 2004 and the balances from other jurisdictions were returned.

5 Available at www.bj.admin.ch/content/bj/en/home/dokumentation/medieninformationen/2002/2002-08-20.html.

6 Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, p. 20; Cf. also: Acuerdo Entre el Gobierno de la Republica del Peru y El Gobierno de Los Estados Unidos de America Sobre Transferencia de Activos Decomisados, 21 January 2004.

2.2 *The disposal of the assets*

In 2001, Peru established a special national fund for the administration of forfeited corruption proceeds (FEDADOI)⁷ with a view to ensuring the appropriate and transparent management of the proceeds of corruption recovered by the country. While money from the fund went through normal budgetary channels, not Congress but the FEDADOI board, composed of representatives from five government agencies involved in fighting corruption, determined the allocation of these funds.⁸

This mechanism was used to return the Montesinos' assets from Switzerland to Peru. As such, this restitution did not give rise to an agreement whereby the returning State was involved in the determination or monitoring of the final use of the assets.⁹ Instead, a national mechanism was used. Nonetheless, the two concerned States agreed on the use of this mechanism prior to the assets being returned.

In the case of the restitution of the Montesinos assets that were confiscated in the US, an agreement between the US and Peru preceded the return, whereby it was determined that Peru would invest the returned assets in anti-corruption efforts.¹⁰

2.3 *Lessons learned*

The establishment of a national mechanism for monitoring the return of stolen assets is generally considered a good practice in line with the principles of ownership and alignment of the Paris Declaration and the Accra Agenda.

Unfortunately, some questionable spending allocations of the funds repatriated to Peru were found.¹¹ According to reports, it seems items of expenditure were not clearly set out in advance and the funds were used to supplement the annual fiscal budget of agencies that had a member on the FEDADOI board. Other monies were used to finance leisure activities for the police.¹²

Consequently, the arrangement with Peru does not seem to have yielded only satisfactory results. Perhaps, better transparency and oversight of the allocation of assets could have been achieved with a different, possibly multi-stakeholder composition of the FEDADOI board, hence creating more checks and balances.

3 Nigeria: External ex-post monitoring

3.1 *Overview of the case*

In total, approximately USD 1.2 billion of 'Abacha assets'¹³ have been repatriated to the Federal Republic of Nigeria from a number of jurisdictions, including Belgium, Jersey, Luxembourg, Switzerland and the UK.

In Switzerland, the Swiss Federal Supreme Court on 7 February 2005 decided to return USD 700 million that had previously been frozen in Switzerland in the context of MLA, domestic criminal proceedings

7 Fondo Special de Administracion del Dinero Obtenido Illicitamente en perjuicio del Estado (FEDADOI): Decreto de Urgencia No 122-2001 (27 October 2001).

8 Cf. Ignacio Jimu, *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan*.

9 Cf. P. Veglio and P. Siegenthaler, *Monitoring the restitution of looted state assets: the role of Multilateral Development Banks*, in *Recovering Stolen Assets* Mark Pieth (ed.), pp. 324-325.

10 *Acuerdo Entre el Gobierno de la Republica del Peru y El Gobierno de Los Estados Unidos de America Sobre Transferencia de Activos Decomisados*, 21 January 2004.

11 Cf. the factsheet on 'Asset Recovery – a Breakthrough by the UN Convention against Corruption (UNCAC)' published by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, Division State and Democracy in June 2007. Available at: www.giz.de/Themen/en/dokumente/en-gtz-asset-recovery-case-of-montesions-2007.pdf.

12 *Ibid.*

13 General Sani Abacha was the military dictator of Nigeria from 17 November 1993 to 8 June 1998. Nigeria had long been plagued by corruption, but under his rule these practices became blatant and omnipresent. Funds were removed in cash from the central bank, sometimes by truckload, and taken out of the country by members of the Abacha family and their associates. Moreover, inflated public contracts were systematically rewarded to the members of this group. It was only after the end of the dictatorship that the full extent of the practice and the modus operandi were revealed to the general public.

for money laundering and criminal organisation. Out of these USD 700 million, USD 500 million were returned as a result of judicial rulings in Switzerland; USD 200 million were returned based on the consent of the 'owners' of those assets.¹⁴ The court determined that the majority of the Abacha assets frozen in Switzerland were of evident criminal origin (money laundering, fraud and taking part in a criminal organisation).¹⁵ The decision allowed the funds to be handed back to Nigeria successively even though the latter had not issued any forfeiture order. The Swiss Federal Council subsequently determined detailed terms under which the assets were to be restituted.

3.2 *The disposal of the assets*

The USD 700 million were restituted into the Nigerian central budget, based on an agreement on restitution modalities signed in 2005 by Switzerland, Nigeria and the World Bank. Under this agreement, the World Bank was mandated to review the Nigerian budgetary process. Nigeria agreed to use the repatriated funds for specific projects designed to alleviate poverty and to undertake a comprehensive Public Expenditure Management and Financial Accountability Review (PEMFAR). Following pressure from both Swiss and Nigerian civil society organisations (CSOs), efforts were made to ensure civil society participation in this endeavour.¹⁶

3.3 *Lessons learned*

The direct return of assets into a country's central budget is the preferred modality from the viewpoint of a number of requesting countries as voiced in different international forums. However, and depending on the quality and capacity of the concerned country's administration, it also offers very limited assurance that the returned assets are used according to good practice in public financial management. Indeed in development cooperation, direct budget support is only provided under certain very strict criteria.

The agreement between Nigeria, Switzerland and the World Bank, and in particular the provisions on the review of the Nigerian budgetary process and the PEMFAR, sought to deal with some of these challenges. Regardless, a number of problems arose during the monitoring of the returned assets. Notably, while the Abacha assets were repatriated to the Nigerian treasury in 2005 and 2006, spending of these funds had already begun as part of the 2004 budget. There were also cases in which spending was allocated to projects that had been completed prior to 2004. Consequently, the monitoring and other control mechanisms were implemented largely *ex post facto*.

The findings of the World Bank review were also mixed. They showed that implementation for all projects had commenced and that most had been completed. However, the quality and impact of projects varied greatly across sectors and significant weaknesses in budget accounting and reporting were identified.

The difficulties experienced show that appropriate budget coding for tracking the use of resources is crucial to demonstrate the developmental impact of asset recovery and to make sure that a maximal part of the population profits from the restitution.¹⁷ They further show that *ex post facto* monitoring mechanisms are of limited use and that systems should be set-up to enable a continuous monitoring, which also encompasses the stage during which a country may decide on the allocation of funds, the allocation of contracts related to the expenditure of funds, etc.

14 Cf. Swiss Federal Council Dispatch 28 April 2010 concerning *Restitution_Illicit_Assets_Act*, pp. 39-40. Available at: www.eda.admin.ch/etc/medialib/downloads/edazen/topics/finec/intcr.Par.0018.File.tmp/Message%20LRAl%20in%20English.pdf.

15 Federal Office of Justice, Press Release, 16 February 2005. Available at: www.ejpd.admin.ch/ejpd/en/home/dokumentation/mi/2005/ref_2005-02-16.html. See the Swiss Federal Supreme Court judgment ATF 131 II 169, 7 February 2005, published leading cases.

16 See *supra* notes 25 and 26.

17 *Ibid.*

4 Kazakhstan: Trilateral monitoring

4.1 Overview of the case

The restitution of Kazakh assets took place within the context of a criminal investigation initiated by the Geneva judicial authorities on suspicions of money laundering. These measures were related to a request for assistance from the US in the context of a bribery investigation. In fact, US authorities suspected that funds paid by US citizens into certain Swiss bank accounts were bribes paid by American oil companies to Kazakh officials in exchange for obtaining operating or prospecting rights for oil in Kazakhstan.¹⁸ In 2011, the proceedings led to the confiscation in Switzerland of USD 48 million;¹⁹ these funds had been frozen in accounts in Geneva in the framework of international mutual assistance proceedings involving the US (approx. USD 84 million), as well as proceedings in Geneva (approx. USD 60 million).²⁰

Unlike, for example, in the Abacha case, in this case the confiscated assets do not constitute funds that were stolen from Kazakhstan. Instead they originated as bribes paid by a US investor to Kazakh officials. Because the ownership of the assets is more complex, it has consequences on the modalities for the restitution of the funds.

4.2 The agreement on the disposal of the assets

Given that the confiscated assets related to legal proceedings in Switzerland and in the US, the two countries sought to find a common solution for their repatriation. Discussions between Switzerland, the US and Kazakhstan started in 2003 and aimed to identify a restitution mechanism that would guarantee that the returned assets would be used appropriately.²¹

In 2007, Switzerland, the US, Kazakhstan and the World Bank signed agreements regarding the restitution of USD 84 million of funds through the 'BOTA Kazakh Child and Youth Development Foundation' (BOTA) for projects that benefit the Kazakh population, notably in the domains of youth development and energy efficiency.²² BOTA's board of trustees is composed of five local Kazakh citizens and one representative each from the governments of the US and Switzerland; its duty is to monitor the expenditure of the money. The foundation is administered by an international NGO set-up by the concerned parties, which operates independently of the Kazakh authorities. The frozen assets are to be transferred in tranches to this foundation and deployed by it under the supervision of a consortium of two internationally recognised institutions (IREX Washington and Save the Children) and with the advice of the World Bank.

4.3 Lessons learned

The restitution of the Kazakh assets is an example of trilateral monitoring involving requested countries and the requesting country (though the monitoring does not involve the government in the case of Kazakhstan, as the Kazakh representatives on the BOTA board must be independent) and an uninvolved third party, the World Bank. Apart from this tripartite arrangement, the most striking difference of this arrangement to others is that the agreements explicitly prescribe that BOTA has to remain independent from the Kazakh government. BOTA further cannot fund any activity of this government, its ministries or national public institutions.

18 Available at: <http://www.star.worldbank.org/corruption-cases/node/18528>.

19 Swiss Federal Department of Foreign Affairs. Available at: <http://www.news.admin.ch/message/index.html?lang=en&msgid=47337>.

20 See supra note 32.

21 Swiss Federal Department of Foreign Affairs. Available at: <http://www.admin.ch/aktuell/00089/index.html?lang=en&msgid=47337>.

22 These are the Conditional Cash Transfer (CCT) program that provides regular cash transfers to poor households, the Tuition Assistance Program (TAP) that disburses grants for higher education and the Social Services Program (SSP) that offers funds to local NGOs to support vulnerable groups.

As compared to other examples, the BOTA monitoring model addresses concerns regarding timeliness (ex ante rather than ex post) and independence of the oversight. The high quality of the oversight provided by the World Bank has been recognised by all parties involved in the Kazakh restitution. The qualitative evaluation of the BOTA programme conducted over the last two years by Oxford Policy Management (OPM) at the request of the concerned parties also confirmed that the implementation of the program across all activities was highly effective for the beneficiaries.²³

On the other hand, it was found that the administrative costs of the arrangement are extremely high and may end up amounting to one third of the total funds returned to Kazakhstan. This is mainly because entirely new programs and organisations had to be set-up due to the prohibition to fund any (pre-existing) activities of the Kazakh government. During the first two years, up to seven foreign specialists managed the most important aspects of the implementation of the BOTA program. However, since then, the administrative costs have been substantially reduced by the progressive replacement of all foreign specialists by Kazakh managers.

Secondly, while the assets seem to have been spent on highly valuable projects, the question of the sustainability of their impact remains open. Once all assets of the BOTA Foundation have been spent – a little over half the funds remain – no mechanism exists to maintain the foundation’s operations. Discussions are on going between parties on the future financial sustainability of BOTA. Of course, this project is still on going and only the final evaluation of the restitution effort will allow for definite conclusions.

5 Angola: Monitoring by a bilateral development agency

5.1 Overview of the case

The repatriation of assets to Angola by Switzerland relates to two separate cases. In the first case, Switzerland confiscated assets as part of a domestic criminal investigation in Geneva in April 2002, which related to the diversion of Angolan oil revenues supposedly destined to repay the country’s debt with Russia. While proceedings were suspended in 2004 after the investigation found no irregularities, a total of USD 21 million held in accounts in the names of four high-ranking Angolan public officials remained frozen as the concerned individuals had not disputed that the money actually belonged to the Angolan State.²⁴

In the second case, the backdrop to the restitution were the judicial proceedings conducted by judicial authorities in Geneva regarding alleged money laundering, which at the end of 2008 led to the confiscation of USD 43 million to be restituted to Angola.²⁵

5.2 The agreement on the disposal of the assets

In the first case, the Swiss and Angolan authorities in 2005 signed an agreement determining that the assets were to be used for social and humanitarian purposes and that the Swiss Agency for Development Cooperation (SDC) should administer the fund and provide support to the programme. The assets were to be held in an account with the Swiss National Bank, on which Angola was named as the beneficial owner but only SDC was authorised to initiate the withdrawal of funds.

The funds were used to finance two projects in the area of mine clearance and agricultural development. Interestingly, at the request of the Angolan government the funds dedicated to the mine clearance component were used to finance an existing contract for the removal of mines between the country and the Swiss company RUAG.

23 See Evaluation of the BOTA Foundation’s programmes, Kazakhstan, Summary notes 1, 2, 3, Oxford Policy Management, February 2013.

24 Cf. Swiss Federal Council Dispatch 28 April 2010 concerning *Restitution_Illicit_Assets_Act*, pp. 39-40.

25 Cf. Press Release of Federal Department of Foreign Affairs, 17.12.2013. Available at: <http://www.news.admin.ch/message/index.html?lang=en&msg-id=47233>.

As for the second restitution case, in 2012 Switzerland and Angola signed another agreement over the repatriation of about USD 43 million. According to information released, the funds will again be administered by SDC as per the earlier arrangement, and they will benefit similar purposes.

5.3 *Lessons learned*

The arrangements between Switzerland and Angola represent particularly close involvement of the requesting country in the restitution and the disposal of confiscated assets. When the two concerned countries have an on going relationship in development cooperation, this can be a useful and sustainable arrangement. It is important, as was the case with the Angola restitution, that when assets are channelled back to requesting countries through aid programmes the principles of the Paris Declaration and the Accra Agenda for Action are respected. Notably ownership, alignment and mutual accountability are important principles in this context.

Some Swiss NGOs criticised the use of part of the confiscated assets for a contract with the Swiss company RUAG, as it was perceived as not transparent and reminiscent of the old tied aid principles. Given that this arrangement was chosen at the request of the Angolan government, however, it would seem an adequate choice. This case illustrates some of the risks associated with channelling funds back through bilateral aid programmes, as the requested State may be exposed to potential criticism.

6 Conclusion

The case studies highlight that the choice of mechanism of restitution varies from case to case, depending on a range of factors. These include, notably, the *nature of the crime from which the assets have derived* (bribery in the case of Kazakhstan, or corruption or misuse of function in the case of Nigeria, or – a situation not described in this paper – proceedings deriving from a settlement with a corporation in a foreign bribery case²⁶), the *origin of the confiscation order* (legal proceedings in the requesting or in the requested State) and the *capacity of the requesting State* to ensure a transparent and purposeful disposal of assets. The Swiss experience also demonstrates that an amicable solution normally can be found, which usually produces the best results.

In analysing these cases and discussing with involved practitioners, three key topics have clearly emerged as being at the forefront of all concerned parties' interests, namely transparency, end use and the role of stakeholders. The October 2013 workshop organised by ICAR and FDFA/DPIL will serve to analyse these three topics in more depth, using the case studies presented in this paper and the experience from other cases, involving yet additional jurisdictions, with a view to hopefully inspire policy dialogue and the emergence of a global consensus on legislation and practice in relation to the return of assets. Arriving at a global consensus on these practices is essential if we are, hopefully, going to see the practice of recovering and then returning stolen assets become increasingly frequent over the coming years.

26 As for example in R v. BAE Systems PLC (Case No. S2010565, Southwark Crown Court, United Kingdom): In an MOU signed by the UK Serious Fraud Office (SFO), the Government of Tanzania, BAE Systems and the UK Department for International Development (DFID), BAE Systems agreed to pay GBP 29.5 million plus accrued interest for educational projects in Tanzania. The payment follows the settlement between BAE Systems and the SFO pursuant to a guilty plea by BAE Systems for one count of breaching its duty to keep accounting records contrary to section 221 of the Companies Act 1985 (UK).