

Editorial

Every year, developing countries lose between USD 40 to 60 billion due to corrupt acts such as bribery, misappropriation of funds or other abuse of functions by political elite and civil officers. Hence, the recovery and return of these stolen assets is increasingly being discussed among the negotiators of the Financing for Development process as a substantial source of additional resources for funding the Sustainable Development Goals.

Switzerland has made asset recovery a key priority since the Marcos case in 1986. Its proactive policy has made it an international leader in this domain. The Swiss strategy is to prevent corruption in developing countries, to ensure that assets of criminal origin are not deposited in our finance centers, and to detect and return stolen assets to their countries of origin.

Over the last 25 years, Switzerland has returned around USD 1.8 billion. These funds have been used to improve the living conditions of the poorest in the country of origin and to strengthen the rule of law in order to avoid impunity. In the preparatory process of the forthcoming third international conference on Financing for Development in Addis Ababa, Switzerland advocates for a strengthened implementation and enforcement of the UN Convention against Corruption, the promotion and acceleration of international initiatives that support concerned countries in recovering stolen assets and the promotion of standards of good practices for stolen asset return.

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Devastating impact

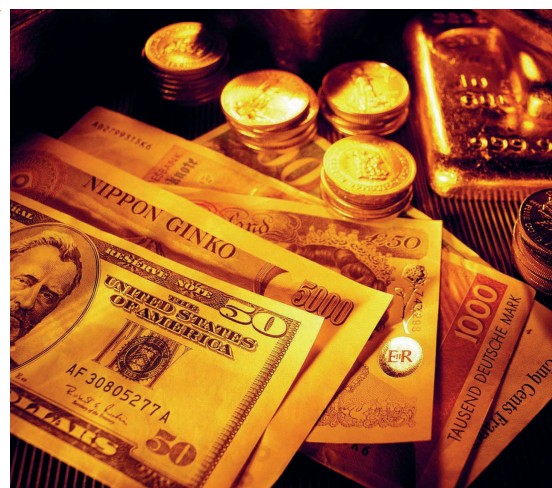
The long hunt for dirty money

ANALYSIS Each year, tens of billions of Swiss francs leak out of developing countries unlawfully. Identification and seizure of such funds requires intense international cooperation.

In March 2014, the Brazilian police launched a huge anti-corruption operation under the code name “Lava Jato” (car wash). It brought to light a formidable web of dubious, if not criminal, activities which, according to the investigators, had been going on for fifteen years or more. Corruption, misappropriation of public funds, party slush funds, systematic overcharging for public works, money laundering... the whole, or almost the whole panoply of methods of embezzling public assets was being deployed at the highest level. The Petrobras oil company (which gave its name to the affair), the country’s four largest construction businesses, members of the political and financial elites were all busted. And as in any good financial thriller, the money had been deposited in Swiss banks (the banks in fact froze these funds, and Switzerland has just returned USD 120 million to Brazil, while USD 280 million are still frozen). The investigation continues.

Increasing illicit financial flows

This scandal is taking place in an emerging country, rated by the World Bank as an upper middle income economy. In poorer countries, the misappropriation of public assets has an even more serious impact on the population as a whole. A recent report commissioned by the African Union and the UN Economic Commission for Africa estimates that USD 50 billion are spirited out of Africa alone each year. But though Africa accounts for only 7.7% of illicit financial flows from developing countries, the impact on its economy



Illicit enrichment is one of the most tangible signs of corruption. Photo: All rights reserved

is the most severe. The loss of earnings in fact represents 5.7% of its gross domestic product (GDP). The American NGO Global Financial Integrity (GFI) provides these figures in a study covering the decade 2002-2011. “We estimate that illicit financial outflows from the developing world totalled a staggering USD 946.7 billion in 2011,” note the authors of this document.

Moreover, these outflows are increasing. GFI estimates that globally they grew by 10% per annum in real terms over the decade 2002-2011. “This gives further evidence to the notion that illicit financial flows are the most devastating economic issue impacting the global South.” In 2012 (the most recent year for which figures are available), they amounted to USD 991 billion, more than public aid and foreign investment combined.

There is no “official” definition of illicit financial flows. According to the OECD, it is a matter of “methods, practices and crimes aiming to transfer financial capital out of a

country in contravention of national or international laws.” In most cases, the money transferred has been acquired legally and is abstracted by tax evasion, manipulation of the costs of transfer and invoicing, etc. Various forms of illegal trafficking are another source of illicit financial flows, fuelling money laundering and potentially funding terrorism.

Illicit enrichment, a crime

Another approach, adopted by Switzerland as part of its strategy on “freezing, confiscating and returning” assets, is to keep tabs on politically exposed persons (PEPs) (see article p. 4) Any suspect banking transaction can thus be traced.

According to the World Bank and the United Nations, the proceeds of corruption in developing and transitional countries amount to between 40 and 60 billion dollars per annum. The only tangible trace of these corrupt practices are in many cases the exchanges of currency, while their most visible manifestation is unjust enrichment. This is why the UN Convention against Corruption (UNCAC), in common with the Inter-American and African Conventions against Corruption, has made unjust enrichment a crime. Prosecution depends on establishing a significant increase in the assets of a PEP “which he or she cannot reasonably explain on the basis of his or her legal income”, according to the UNCAC.

Freezing and confiscation of assets

At the Forums on Aid Effectiveness held in Accra in 2008 and Busan in 2011 under the aegis of the OECD, the participating countries undertook to strengthen their measures against corruption and money laundering, and to develop an institutional framework for confiscating and returning funds they had seized. According to the report “Few and Far, The Hard Facts on Stolen Asset Recovery” jointly produced by the StAR initiative (World Bank and UN) and the OECD to monitor the implementation of these commitments, assets seized between 2010 and 2012 totalled USD 1.398 billion. The bad news is that this amount is nowhere near the sums estimated for illicit financial flows, because “there is a big gap between international commitments and practice at



For several years, the United Nations has been debating the links between illicit financial flows and development funding. This was the topic of this debate in New York in 2003.

Photo UN/Eskinder Debebe

individual country level”. But there are two pieces of good news: seizures of assets are increasing as compared with earlier years, and progress is being made in the return of assets from OECD countries to developing countries. The previous report showed that returns were being made principally to other OECD countries. Another positive point is that an increasing number of jurisdictions (including Switzerland) have launched investigations on their own initiative, without being prompted by a complaint from the injured party. Where the confiscation of assets is concerned, administrative procedures have been used more frequently than criminal proceedings, and with greater success. The “Arab Spring” had a considerable effect on this result, as during the period 2010 to 2012 almost 40% of the assets seized on the basis of an administrative ruling originated from Egypt and Tunisia.

But it is not yet time to proclaim victory. Of the 34 OECD countries, 14 failed to reply to the StAR-OECD survey. With the remainder, the progress noted was minimal. The document stresses the importance of gathering and publishing statistics of seizures of assets and the nature of the assets concerned. Such statistics help to identify which actions are effective and to guide national decision-making.

International cooperation

The methods used for identifying illicit financial flows, combating corruption and initiating legal

proceedings are complex and require resources which developing countries often lack. In some cases, their institutions are just not up to the job. Such methods demand close international cooperation. With this in mind, the Arab Forum on Asset Recovery (AFAR) was established at the time of the Arab Spring (2012) as a platform bringing together the G7, the Deauville Partnership (a multilateral initiative to strengthen governance in transitional countries), a number of Arab states and several financial institutions and led to the rapid freezing of the assets of the Tunisian and Egyptian leaders who had been overthrown. The third meeting of this forum was held in Switzerland in November 2014.

Adopting a similar model, an Ukraine Forum on Asset Recovery was set up on 28 April 2014 by the United States and the United Kingdom, following a request for judicial cooperation from the new government. The aim of the Forum is to identify assets stolen by the Yanukovich regime, in particular through complex operations involving dummy companies. The operation is taking place under an agreement signed by the International Centre for Asset Recovery, ICAR, a specialised unit of the Basel Institute on Governance funded by Great Britain, Liechtenstein and Switzerland.

Switzerland, for its part, had already frozen the assets and economic resources of the president and 19 PEPs on 26 February, four days only after Yanukovich was deposed.

Illicit financial flows and development

In a document published at the end of 2014 by a joint high level panel, the African Union and the UN Economic Commission for Africa expressed the view that the loss of earnings due to illicit financial flows was making it even more difficult for African countries to achieve the Millennium Development Goals by the end of 2015. It recommended that these countries urgently pass clear legislation on taxation, transfer costs and other invoicing manipulations, and set up an institutional framework capable of applying such legislation. In the chapter on combating corruption, the panel stressed the importance of ensuring public access to information on budgets, introducing monitoring of PEPs and giving civil society and the media scope for expression.

The issue of illicit financial flows should be one of the strategic priorities of donor agencies, according to the OECD and StAR. Moreover, reports the U4 Anti-Corruption Resource Centre online platform, funded by a group of European countries (including Switzerland) and Australia, multilateral agencies have a unique role to play in this area “as bridges between aid beneficiaries and donor countries”. They are well placed to support international standards and training, encourage donors to act consistently, help build political will and provide assistance during the repatriation of funds. ■■



Dominic Grieve, Queen's Counsel, United Kingdom. Ukraine Forum on Asset Recovery, 30 April 2014. Photo: Foreign and Commonwealth Office

Illicit assets for the cause of development

Render unto Caesar...

REVIEW Illicit assets that have been confiscated must be returned to their country of origin and used for development purposes. More easily said than done, but examples of successful operations lay a foundation for good practice.

On 24 September 2014, a high-level meeting was held on the fringe of the UN General Assembly in New York. The participants were representatives of the OECD, the United Nations, the World Bank, the United States Agency for International Development (USAID), and the governments of Mexico, Australia and Nigeria. The subject of the meeting: “Curbing Illicit Financial Flows for Domestic Resource Mobilization and Sustainable Development in the Post-2015 Era”.

Despite the convoluted title, the result was an “extraordinary conversation” (albeit totally ignored by the media), according to a member of the NGO Global Financial Integrity who was taking part. This meeting was evidence of the now well-established link between the phenomenal sums involved in illicit financial flows and the funding of development.

Returning confiscated assets

The same consideration applies to the other end of the chain, when assets are confiscated. Not only must these assets be returned to their country of origin, as stipulated in the UN Convention against Corruption (UNCAC), but they must also be used for the purposes of development and compensation. In addition, restitution serves the cause of justice, helps combat corruption and makes for social cohesion.

However, the convention does not give precise instructions on how to proceed, while the sums of money involved are in some cases considerable. The first difficulty

lies in assessing them. The “gap” between the sums announced as having been misappropriated by a potentate and the amounts actually returned at the end of the process may be very large, and incomprehensible to a layman. In fact, it may not be possible to locate all the misappropriated assets, and those that are frozen may not necessarily be confiscated, much less returned. A proportion of them may turn out to be legitimately owned. The process itself may take years, depending on the complexity of the illicit dealings.

No ready-made solution

There is (as yet) no international consensus on the best way of returning illicit assets, but one thing is certain: there is no single solution. “The return of stolen assets is the culmination of the recovery process”, notes the Stolen Asset Recovery Initiative (StAR) platform set up by the World Bank and the UN Office for Drugs and Crime. One of their brochures explores the delicate issue of returning assets. It notes that “Planning for the return of stolen assets raises a series of policy questions that the authorities recovering stolen assets will need to consider carefully”. While emphasising that these assets are the property of those who have been robbed, StAR points out that “Countries that have embraced a policy of openness and transparency in the design of arrangements for the management of returned assets have benefited from this approach”.

There are good reasons for this barely disguised appeal for close cooperation. Repatriation of assets may well be a delicate business, especially when the government of a country that has suffered loss may itself be the perpetrator of acts of embezzlement, or is ill-equipped to prevent them. Countries which return funds want to be sure that the funds will not be misused.

The OECD and StAR point out that between 2006 and June 2012 only three countries returned illicit assets: the United States, Great Britain and Switzerland. Switzerland has long been in the eye of the storm because of its attractiveness as a financial centre and its banking secrecy. Nowadays, the mechanisms it has adopted to repatriate assets and ensure they are put to good use are followed with interest. For example, its call for assistance to the World Bank as a third-party institution in the case of embezzlement by the Abacha family in Nigeria; the establishment of autonomous funds to handle the assets of the Fujimori in Peru or the Marcos family in the Philippines; and, more recently, the setup of an ad hoc foundation in Kazakhstan, known as BOTA.

Good practices

The BOTA Foundation has relied on the cooperation of three governments (the United States, Switzerland and Kazakhstan), the World Bank and two other organisations: Save the Children and the American International Center for Asset Recovery (IREX). Between 2009 and 2014, the foundation handled the repatriation of USD 116 million. This amount consisted of bribes paid by an American investor to Kazakh



The restitution of assets has allowed the funding of social programmes in Kazakhstan.

Photo IREX

officials and deposited in Swiss banks, reports the Centre ICAR in a document citing a number of cases in which assets have been returned. As a result of BOTA, social and health services have been developed, particularly for children and disadvantaged young people. The operational side was entrusted to IREX. The foundation eventually managed to double the number of beneficiaries estimated to be involved at the half-way point in 2011. According to an external evaluation, its programmes have been carried out “with a high degree of effectiveness”. They have benefited the population as a whole, various categories of direct victims (children, regions), or different public sectors (education, health).

“BOTA is a good example of how assets can be returned in a challenging context”, says Salomé Steib, head of the corruption and asset returns section at the Swiss Cooperation and Development SDC, who has taken a keen interest in the operation. “The process was sensitive and fairly expensive, but the results have been excellent. Over five years, the foundation has improved the lives of 208,000 Kazakhs and strengthened local capacities and expertise”. Taken together with earlier experiments, this operation contributes to establish a set of good practices. According to Salomé Steib, it is important that there be agreement among the parties, to avoid misunderstandings. External expertise is also desirable, for example from the World Bank. The model adopted must have a good chance of success, i.e. it must be straightforward, and must be supervised so as to ensure accountability and transparency. It will need to be staged over a period of between five and eight years, depending on the amounts of money involved. A shorter period is unrealistic, while over a longer time span the results will not be sufficiently tangible for the beneficiaries. |||

Switzerland’s strategy

In 1986, for the first time, Switzerland froze the assets of a fallen dictator, Philippine President Ferdinand Marcos, who had been forced into exile. Ever since, as affairs relating to foreign leaders guilty of sheltering their ill-gotten gains in Swiss banks have come and gone, our country has developed a system of measures for combating such abuse and has recently published a “Strategy on freezing, confiscating and returning potentate funds”. The strategy is part of the policy of strengthening the rule of law and combating impunity expressed by the Federal Council.

In the context of this strategy, made public in 2014, the term “potentate funds” refers to the property that politically exposed persons (PEPs) and their entourage “have unlawfully appropriated by acts of corruption and similar criminal offences”.

Since the Marcos affair, Switzerland took action on two fronts: prevention (in countries where it is active, in accordance with international legislation) and combating crime (preventive freezing of assets, judicial cooperation, return of assets). Things are more complex in practice than they appear on paper, as the strategy warns. Assets are sometimes dispersed among several jurisdictions, the link between these assets and acts committed abroad is not always clear, or the state of origin may lack the know-how, the political will or the ability to guarantee respect for human rights.

Taking these challenges into account, the first objective of the strategy is “to return assets as quickly as possible, while respecting the principles of the rule of law”. This involves internal cooperation within Switzerland (between different

authorities); changes, if necessary, to the legislative framework; technical assistance to the countries of origin, etc. Second objective: to achieve conditions of fair competition, which requires cooperation between different financial centres, so as to facilitate the freezing of suspect assets without weakening Switzerland as a financial centre. Third objective: to establish “transparent, rigorously defined procedures for the return of assets” (see article p. 3). And finally, “clear and active communication regarding Swiss policy”. The message is threefold: to make clear that Switzerland does not want assets “deriving from corruption and other crimes in its financial system”; to establish “realistic expectations” as to the duration of procedures and the amounts concerned; and finally to draw international attention to the search for solutions for the return of assets, and so avoid situations in which the problematic assets themselves becoming the main focus of attention. |||

“Our job is to oil the wheels”

INTERVIEW For the past four years, Jean Pesme has been coordinator of the StAR (Stolen Assets Recovery) initiative. This partnership between the World Bank and the UN Office on Drugs and Crime supports international efforts to eliminate safe havens for the proceeds of corruption. An engineer by training, Frenchman Jean Pesme previously worked for the OECD’s Anti-Corruption Group. He stresses the positive influence that more dynamic countries, including Switzerland, can exert in the confiscation and return of illicit assets.

Flows of illicit money are increasing, as are seizures and returns of assets. Is this an endless race?

The figures need to be taken with a pinch of salt: these estimates are open to question. At StAR, we focus only on funds connected with corruption. It is not our job to intervene in other areas, such as tax evasion or the proceeds of crime. According to the data we have, between 40 and 60 billion dollars are lost to developing countries each year because of corruption. And that is a conservative estimate. Meanwhile, according to our information, returns of assets have amounted to around five billion dollars in the last 15 years.

In recent times, there has been an increase in asset freezes and confiscations. Our most recent analysis of the official figures for OECD countries [autumn 2014] shows a slight improvement. Most of these measures have been taken by just three countries: the United States, the United Kingdom and Switzerland. But there is still a great deal of work to be done. The main thing is that this should have a motivating effect on other financial centres.

How can you convince other countries to act?

First by providing information. We must establish concrete facts, analyse them and draw the right conclusions. We address our appeals to international organisations and major political audiences, such as the G20 and the G7. And we try to secure public,



“Switzerland showed real political will.” Jean Pesme, StAR coordinator. Photo StAR

measurable commitments from financial centres. We also work through civil society and organisations set up to fight corruption, such as Transparency International, and through the media. The aim is to exert and maintain pressure on national governments and ensure they stick to their commitments.

But the bulk of our work, some 60%, consists in helping practitioners and politicians to draw up effective strategies to recover assets, develop reliable case studies and confiscate or recover funds. But we have to avoid acting in their stead. Our role is to remain neutral, explain the issues and possibilities to both sides, encourage the parties to speak to one another, and ensure compliance with procedure. We try to ensure that applications are as complete as possible, that dossiers are flawless before they are sent off.

In how many countries are you active at present?

In about 20 countries, to different degrees, depending on current circumstances. In Libya at the present time, progress is very slow indeed. By contrast, we are very active in Sri Lanka and Ukraine. It is long-term work. We would like to speed up our procedures: they should no longer drag on for 15 or 20 years, but neither can they be completed in six months.

What are your most useful tools?

There are several: applications for confiscation, reversing the burden of proof and civil suits. The aim of the latter is to secure recognition of a right of ownership. Reversing the burden of proof (i.e. making the indicted party prove he/she is in the right) and civil suits have been used more frequently in the last five years and have proved more effective than we expected. But probably a mix of methods is needed, and a strategic approach to each case, adopting the most effective tools depending on the information and evidence available to us.

How are you recognised, and perceived, when you intervene in this way?

Technically, we are recognised, I hope. People listen to us and we are increasingly invited to become involved. Our job is really to oil the wheels. I believe we create a climate of confidence and impartiality. Moreover, we are backed by two major international organisations, and this lends us credibility and legitimacy.

And what obstacles do you face?

First of all, technical difficulties: it is a complicated matter to trace funds and show that an asset is in fact the fruit of corruption. Secondly, international cooperation in legal matters is very complex and demanding, particularly when it comes to gaining a technical understanding of different legal systems. And there is of course the question of political will, which is difficult to measure. We assess it on a case-by-case basis.

Switzerland is often accused of being a safe haven for illicit assets. But it is also one of the countries that have returned the most.

So does it get a good or bad mark?

A bit of both. Where the freezing and confiscation of assets is concerned, and their return, Switzerland has shown real political will, great readiness to get involved and plenty of initiative. Switzerland has shown leadership and a true spirit of innovation (the Duvalier Law, for example). But there is the danger of a discrepancy between these remarkable efforts, on the one hand, and prevention and detection, on the other. It is important to ensure that the right hand knows what the left hand is doing! It is necessary to strengthen the means of prevention so as to create a more coherent and effective system. ■



Anti-corruption campaign in Namibia. Photo Worldbank/Philip Schuler

International cooperation

Combating corruption

COMMITMENT Donors are increasingly concerned about the embezzlement of the public assets of developing countries and money laundering.

Corruption exists in all corners of the world. Although it accounts for only a small part of all illicit financial flows, it is extremely corrosive for development and the democratic process generally. It misappropriates public assets, weakens development efforts, undermines the rule of law and distorts the market rules. And, like all illicit financial flows, it has a disproportionate impact on the poorest in society. This no doubt explains the speed with which the UN Convention

against Corruption (UNCAC) was drawn up (between 2000 and 2003) and has so far been ratified by 170 countries, although the subject was taboo for many years within the UN institution.

Corruption may take various forms and mainly targets public assets, but it also extends to the private sector and to international organisations. Its manifestations are bribes, influence peddling, abuses of power and other ways of embezzling public funds. The UNCAC lists a wide range of legal instruments which signatory states are invited to implement in order to combat corruption and its related evils,

unjust enrichment and money laundering. But it makes no provisions for imposing sanctions. Where those offering inducements are concerned, the OECD has established legal standards criminalizing the bribing of foreign officials in international transactions.

Money laundering is also a potential source of funding for terrorism. To counter this, another intergovernmental organisation was set up in 1989: The Financial Action Task Force (FATF). Its purpose is “to set standards and promote effective implementation of legal, regulatory and operational measures” in this field. Its recommendations have become a point of reference for 188 jurisdictions around the world: 34 member states, two regional organisations (the European Commission and the Gulf Cooperation Council), eight associated organisations and a long list of observers. Unlike the UNCAC, it does make provision for sanctions.

In recent years, “donor agencies have become increasingly involved in tackling illicit financial flows,” notes the OECD. They have “supported civil society organisations and researchers working on this agenda”, as well as “countries’ efforts to build capacity in fighting tax evasion, money laundering and corruption”.

In Switzerland, the State Secretariat for Economic Affairs (SECO) is contributing, for example, to an IMF initiative to combat money laundering and the funding of terrorism. The aim is to offer technical assistance to countries seeking help in this area. The main aim of the initiative is to strengthen the integrity of countries’ financial sectors and their financial stability both nationally and internationally. In phase I, there were 59 requests from 33 different countries. Phase II began in 2014. The Swiss Agency for Cooperation and Development (SDC), for its part, supports Transparency International, which has a hundred or so branches around the world. Transparency International is known mainly for its annual ranking of perceived corruption around the world, but it also carries out research and runs anti-corruption programmes in cooperation with governments, the private sector and civil society. ■

IMPRINT



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