



Ivan Pavletic
International Centre for Asset Recovery

The Political Economy of Asset Recovery Processes

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ANNE LUGON-MOULIN

Preface

Asset recovery is by no means a new topic. Prosecutors and investigators of various jurisdictions around the world have been dealing with this issue every day for several decades. However, the spotlight shed on the matter by the international anti-corruption community, and especially development assistance actors, is a recent phenomenon. It was only after the entry into force of the United Nations Convention against Corruption that international organisations and bilateral donors started to think about their potential role in and usefulness to the lengthy processes of tracing and locating the proceeds of corruption, asking for mutual legal assistance, freezing of assets, and, if everything works out, recovering them.

Today, two separate worlds are dealing with the problem: on one side, investigators, prosecutors and investigative judges, both from requested and requesting countries, are working on these issues daily; on the other side, diplomats, NGOs and the aid community gather together at international conferences and debate the importance of the matter and how detrimental stolen assets are to poverty reduction. These two worlds rarely meet. The latter is trying, with some difficulty, to understand how complex and complicated asset recovery processes are, while the former tends to stick to a legalistic view of the procedures.

This paper intends to add a third dimension to the problem. Putting aside legal hurdles currently hampering smooth collaboration between various jurisdictions on one hand, and poverty reduction and governance worries on the other, it tries to look at the actual feasibility of asset recovery from an economist's point of view. What are the incentives of both requesting and requested states to get involved in an asset recovery process? What are the calculations, in terms of politics, that politicians make before entering into such processes? What kind of collaborative agreements are needed internationally? By looking at these economic factors, which are parts of the 'political economy' discourse, this paper intends to assess the underlying economic rationale which may explain either the existence or the lack of political will to actively engage in asset recovery on both sides of the equation.

One can easily testify that the major successful asset recovery cases, at the time of the writing of this study, are behind us. For almost a decade now, few new cases have been brought to light. How can this be explained? Where are the bottlenecks? This paper argues that mostly, the difficulties do not lie in the legal complexities of the matter, but in the rent-seeking behaviour and calculations of prominent officials. Those critically important points may not be easily addressed in a highly sensitive area, where the prosperity of countries, sovereignty issues and national interests are at stake.

Bearing the conclusions of this paper in mind might be of assistance to both judicial authorities and international development actors in finding common ground and forging new alliances in order to overcome the hidden obstacles to asset recovery.

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1. Introduction

Since the mid-1990s, the fight against corruption has become an integral part of the international development agenda. Along with the growing concern about corruption, the problem of assets stolen by public officials came to the fore of the agenda. This is evidenced by a steady increase in international agreements, such as the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted in 1997, and the United Nations Convention against Corruption (UNCAC) signed in 2003. The UNCAC, in particular, includes specific mechanisms that facilitate repatriation of stolen public assets.

The new focus on assets stolen from developing and transition countries can be explained by the growing concern about the devastating impact of public asset theft on social and economic development. Although precise estimates are difficult to come by, existing studies suggest that corrupt money received by public officials in developing and transition countries amounts to US\$ 20 to 40 billion – or the equivalent of 20 to 40 percent of official development assistance funds – per year, a significant portion of which is believed to be hidden in overseas bank accounts (UNODC and World Bank, 2007, 10f.). The large amounts of money being diverted from the public funds of developing and transition countries have raised the international community's awareness of the necessity to repatriate these assets and prevent future asset looting.

As of September 2009, there are 140 signatories and 139 parties to the UNCAC. Yet, and despite seemingly widespread support, the implementation of UNCAC's provisions on asset recovery remains slow. In order to explain this discrepancy, it has been suggested that governments in developing and transition countries often do not have the human, material and financial resources to effectively carry out asset recovery procedures (UNODC and World Bank, 2007). However, given that the implementation progress is slow in many developed countries as well, capacity problems seem to tell only half the story. Accordingly, recent studies have drawn attention to the lack of 'political will' to set up the legal framework for finding, freezing, forfeiting, and repatriating stolen public assets (Hussman, ed., 2007; Bacarese, 2008, Transparency International, 2008).

Since political will is the concentrated expression of powerful political and economic interests in a country, more attention must be paid to these interests when it comes to asset recovery measures. This is the aim of the present paper. By using the political economy framework, the paper identifies the political and institutional obstacles to effective policy implementation. The focus will be on the factors involved in the process of international recovery of stolen assets, although this process can and should not be analyzed separately from the broader challenge of the fight against corruption. Both these issues are interrelated and can have a significant impact on each other.

The rest of the paper is organized as follows: The next section briefly presents the theoretical political economy framework underpinning the analysis. The third and fourth sections identify the political and institutional factors that affect the asset recovery process (ARP) in requesting and requested states respectively. As a basis for future debate, Section 5 proposes a number of policy recommendations for overcoming the political and institutional obstacles to asset recovery.

2. Political Economy Analysis

2.1. Basic Assumptions

The lack of ‘political will’¹ has been identified as one of the main reasons for the poor asset recovery record so far (for concrete examples see Scher, 2005; Bertossa, 2008; Gutierrez, 2008). But the lack of ‘political will’ reflects deeper underlying issues, such as *collective action* dilemmas, the opportunity of powerful groups to extract economic *rents* as well as the inadequacy of the institutional framework that determines the relationships among individuals in a society.² These issues influence the efficiency, cost, and quality of human relations, and thus the incentive structure of individuals and interest groups alike.

Political economy analysis can improve our understanding of the incentives and constraints that influence individual and collective behavior. The analysis rests on the concept of *homo economicus*. In sum, *homo economicus* attempts to achieve the highest possible payoff given the existing information about opportunities and restrictions on her/his ability to achieve a predetermined goal. Adjustments in human behavior occur as a reaction to shifts in these restrictions. Based on this assumption, political economy analysis can (ideally) predict the likelihood of the occurrence of individual and collective behavior in a setting of changing constraints.

2.2. The Policy-Making Process

Political economy analysis can be applied to the policy-making process in order to examine how policies are formed and implemented. The task is a difficult one, because the reality behind politics is complex. Policy-making cannot simply be considered as a sequence of discrete policy changes consisting of putting government decisions into practice. Rather, policies result from the interactive and dynamic process of decision-making by political actors in response to actual or anticipated demands from individuals and groups in strategic positions. These demand groups generally have conflicting political objectives, with the consequence that technocratic ‘first-best’ policies are prone to sabotage by powerful vested interests devoted to defending the *status quo*. This is particularly true for anti-corruption measures, which tend to have significant impact on the distribution of and access to political and economic power in countries..

Governments, i.e., politicians in power, decide which policies are ‘supplied’ and this is usually done in competition with the promises of politicians who want to gain power. By analyzing how the demand and the supply of policies emerge and how different actors compete and cooperate, political economy analysis can help us to understand how and on what basis political decisions are made, and which policies get finally implemented.

2.3. The Institutional Framework as a Binding Constraint

The choices available to political actors are constrained by the institutional setting in

¹ Political will is understood as a shorthand for interests and incentives of stakeholders.

² Key economic concepts, such as collective action or economic rents, are defined in the glossary at the end of the document.

signaling that its willingness to cooperate will remain unaffected by potential short-term needs.¹

In order for an institution to be effective, the interest groups involved must be confident that an agreement made today will be binding in the future. If one party to the agreement has an interest to break its promise in the future and the other party has no possibility to enforce the agreement, inter-temporal cooperation is unlikely to emerge.

Any enforcement problem potentially limits the possibility of entering cooperative agreements. Enforcement problems occur in the absence of effective monitoring, control and sanctioning provisions. In such cases, parties have few incentives to comply with the agreement. This problem is particularly relevant in situations where interest groups controlling the state would like to enter into a cooperative agreement with other social groups or states. As such agreements are generally enforced by the state, the groups controlling the state cannot commit to not using their power to break their promises. As a result, the allocation of political power creates a *commitment problem* that undermines the possibility to reach a mutually efficient agreement (Acemoglu, 2002).

As Acemoglu (2002, 3f.) notes:

‘the commitment problem (...) is twofold: First, those in power, e.g., the rulers, cannot commit to not using this power – as long as they do not relinquish it – in ways that benefit them in the future. Second, if the rulers relinquish their power, the citizens cannot commit to [compensate] them in the future because the former rulers no longer possess the political power to enforce such promises. This double commitment problem restricts the potential remedies to [political or institutional] inefficiencies.’

To understand this, consider the following example. Citizens in a country may benefit from the initiation of an ARP. However, if domestic public officials incur the cost of this undertaking in terms of reduced power, economic resources, or political discretion, they are unlikely to support the process. On the contrary, they may pretend to commit to put in place the institutional prerequisites for successful asset recovery, but eventually break their promise in order to maintain their hold on political power.

There is no easy way out of this dilemma. In the absence of third-party enforcement agencies, those in power must simultaneously establish constraints *and* send a strong signal to the other parties to the agreement that they are sincere in their commitment to reform. Such a signal can then create sustainable change based on the repeated dealings between contracting parties (Keefer, 2006; Coyne and Boettke, 2009).

3. The Asset Recovery Process in Requesting Countries from a Political Economy Perspective

This section focuses on the incentives of public officials to initiate and sustain an ARP in countries that are victims of theft of public assets. According to the assumption about *homo economicus* as stated above, an individual will attempt to maximize his or her utility under a given set of restrictions. Applied to the asset recovery topic this means that a government will initiate the ARP whenever the present value of discounted future income streams of doing so is higher than under the current *status quo*. In other words, if the perceived overall benefit of initiating an ARP today exceeds

¹ See the glossary for the definition of the present value of future income streams.

the associated costs, the process is likely to get underway.¹

In view of the huge amount of assets stolen by corrupt public officials each year, one would expect that governments in affected countries would be particularly interested in improving international cooperation in the field of asset recovery. However, this is not necessarily the case. When performing their cost-benefit evaluation, government officials do not only focus on the beneficial aspects of recovering a large amount of money. Instead, they assess whether and how positively and negatively the ARP will affect their current and future political power (in terms of political support, reputation, votes, parliamentary seats etc.), as well as their current and future economic power (in terms of material income sources). While the amount of money to be repatriated is important, it is only one among many factors that governments take into account when choosing to engage in the ARP.

Yet in some of those countries that have initiated an ARP in the past, state capacity is rather weak and corruption is often rampant and corrosive. Figure 2 (next page) shows the average value of three governance indicators – government effectiveness, rule of law, and control of corruption – for two groups of countries over the period 2001-2007. The first group includes 20 countries that are either in the process of recovering stolen public assets, or have recently completed the process (AR group). The second group includes all OECD countries and represents the benchmark (OECD group). As it can be easily noticed, the AR group performs significantly worse than the benchmark with respect to all three indicators. The weaknesses in governance are likely to negatively affect the efficiency and effectiveness of the ARP in these countries.

In countries with poor governance, state institutions generally struggle to fulfill the requirements for accountability and control. Economic and political power is usually concentrated in the hands of a few, who occupy commanding positions within the executive branches of the government. In many cases, parliaments are weak and have a limited influence on the policy-making process. The public administration mostly suffers from weak technical, financial and human resources, thereby impeding effective implementation of public policies. The combination of these factors weakens control and oversight mechanisms, and allows corrupt practices to go undetected and unsanctioned.

¹ For a full description and technical discussion of the ARP, see Greenberg et al., 2009 and World Bank, 2009.

ARPs (see, for instance, Scher, 2005; Gutierrez, 2008; Daniel, 2008; Jorge, 2008 for concrete examples). This suggests that the general picture sketched above is somewhat overdrawn. There are several possible explanations why governments initiate an ARP. Firstly, in the face of a credible threat, such as increasing public outrage over the looting of public assets, and/or increasing international pressure, government officials are often forced to express remorse and promise to spare no efforts in clamping down on corruption. This is usually accompanied by the formulation of an extensive anti-corruption strategy and the creation of investigative and oversight agencies to bring wrongdoers to justice and recover the proceeds of their crimes.

Secondly, however, if the threat cannot be sustained, that is, if public and international monitoring, oversight and sanctioning mechanisms remain weak, government officials will either try to conceal their corrupt activities, or they will circumvent the rules they established themselves. One way of doing that is to staff investigative and oversight agencies without qualified and independent personnel. Another is to deny these agencies the necessary political and technical support to effectively perform their task. Alternatively, policymakers may attempt to steer anti-corruption efforts towards areas that are not damaging to them, but to their political opponents. While not resolving the problem of corruption, such window-dressing measures enable domestic policymakers to secure their vital interests.

In line with this scenario, a recently published study on the implementation of UNCAC provisions in a number of signatory states identified a discrepancy between governments' readiness to adopt broad-based anti-corruption programs and their willingness to implement them properly (Hussman, ed., 2007). The authors observed that policy implementation was uncoordinated and generally ineffective. Despite substantial financial and technical donor support, public agencies charged with conducting investigations, prosecutions, and judicial proceedings relevant to asset recovery lacked the authority, political backing or capacity to effectively carry out their duties.

To date, the most successful ARPs have been carried out in countries, where corrupt government officials were discredited, despised, or dead, and replaced by political reform champions committed to eradicate corruption and recover stolen public assets. Previous officeholders became useful targets against which the new political establishment of the country could unite (Scher, 2005). The window of opportunity enabled the new policy champions to consolidate their power base, to put in place a functioning system of checks and balances, and to implement their anti-corruption agenda.

Yet even under such favorable circumstances, asset recovery procedures remain a difficult, risky, and uncertain undertaking. There is no guarantee that political reform champions can sustain expensive asset recovery efforts. The window of opportunity is generally short and can be easily wasted. The entrenched nature of corruption and the fact that many of the most powerful and influential people can also potentially be the most corrupt, significantly increase the cost of the asset recovery measures for all agencies involved.

This stands in stark contrast with the shortage of human, technical, and material capacity in the administrative and criminal justice systems. To enable criminal prosecution, investigative, prosecutorial, and adjudicative authorities have to work closely together in order to trace and identify the proceeds of criminal activities, collect and present evidence, prepare indictments, obtain valid freezing and forfeiture orders, prosecute cases and obtain convictions. Most of these procedures are highly complex, time-consuming, and expensive. Most developing and some transition countries lack the skills and resources to efficiently carry out these procedures – because governments are either unable or unwilling to allocate the necessary funds to

train people and to attract competent staff. Moreover, it is sometimes difficult for poorly paid investigators, prosecutors, and judges to resist the temptation of corruption, especially when huge discrepancies in salaries exist. In many developing countries, newly created and well-funded anti-corruption commissions pay much higher salaries than the traditional justice sector can afford.

Since asset recovery is only one among many pressing issues on the political agenda vying for limited resources, even the most committed political reform champions will have to set priorities. In their decision-making, they will have to take into account that some governments have invested considerable political and financial resources in recovering stolen assets without many rewards. They will probably also be aware of the fact that the lower the capacity of domestic administrative and criminal justice systems, the harder it will be to bring an ARP to a successful end. Corruption offenders, by contrast, will spare no effort to protect their ill-gotten gains. The unattractive combination of high investment costs and uncertain returns might discourage the most honest policymakers from fully engaging in the ARP. On top of that, it might cost them their job in the next election.

Another obstacle is that the ARP might challenge vested interests in the administrative and criminal justice systems. For an ARP to work efficiently, major procedural changes are generally required. Since successful actions by one agency depend on the implementation of complementary actions by other agencies, there is a need for sharing information and resources as well as for more concerted coordination. Agencies which previously operated relatively independently may have to interact with each other. However, since these changes affect entrenched procedures and routines as well as the alliances with existing constituents and interests, they are likely to generate resistance among those administrators who benefit from the status quo. Institutional and policy changes, which are sometimes necessary to initiate an ARP, may be opposed by groups/agencies who risk losing their rents or their power in the process of change. Hence, conflicts of interest arise: ministries, prosecution authorities, investigative police, and the judiciary have their own particular institutional goals and interests. In many cases, they compete for financial resources and space on the government's political agenda. If they do not perceive the benefits of the ARP, they will neither modify their behavior, nor commit to the process. New policy directives may simply be ignored or modified to adapt to systems already in place. Because the turnover of cabinet ministers is relatively high in some developing and transition countries, public officials know that if they stall long enough, the minister and the new policy directive may simply go away (Brinkerhoff and Crosby, 2002).

Since law enforcement authorities are supposed to enjoy significant political autonomy in a rule of law system, this problem is particularly difficult to solve. While autonomy is a necessary bulwark against political pressure or interference, it tends to create a certain degree of political and operational isolation that affects inter-institutional cohesion and cooperation. A serious problem in this connection is the question of who monitors and reports on a comprehensive picture of overall policy. Because monitoring and evaluation reports can be used for reward, punishment and accountability, conflicts of interest can arise when monitoring responsibilities are allocated. Such monitoring mechanisms give those who own them the power to shape the distribution of future economic rents. A failure to address these issues may, in turn, result in a lack of process vision regarding the country's overall strategy in fighting corruption (Brinkerhoff and Crosby, 2002; Hussmann and Penailillo, 2007; for concrete examples, see Scher, 2005, 23; Atmasasmita, 2008, 54).

The high level of uncertainty arising from the lack of capacity and the existence of conflicts of interest within the administrative and criminal justice systems can thus considerably complicate the implementation of asset recovery measures. When

comparing the costs associated with the implementation of such measures to the relatively uncertain benefits, policymakers might well decide to abandon the ambitious project altogether. The fact that asset recovery efforts depend to a large extent on the policy followed by the state in which the assets are located, might even reinforce them in their decision. This issue will be discussed in the next section.

4. The Asset Recovery Process in Requested Countries from a Political Economy Perspective

Financial centers and bank secrecy jurisdictions have been identified as the preferred destination for stolen assets from developing and transition countries. These jurisdictions offer some unique advantages: a qualified workforce, low tax levels, bank client confidentiality, lack of excessive regulation, a high degree of legal certainty and political stability. These features make them very attractive to capital inflows, with the result that the financial sector accounts for a large proportion of the economic activity (Brühlhart, 2008).

Yet by offering high levels of secrecy and anonymity, financial centers also provide the potential cover and protection for money laundering and, therefore, the possibility to conceal stolen public assets. A recent report found that despite numerous laws, treaties, and multilateral agreements leading to the exercise of due diligence by banks and financial service providers, financial centers continue to act as repositories for assets stolen by corrupt public officials (Global Witness, 2009). This nourishes the perception that governments and banks in financial centers are to a large extent responsible for facilitating criminal behavior in developing and transition countries, whether intentionally or unintentionally. As a result, there are calls for more transparency and international legal cooperation through better use of mutual legal assistance (MLA) and multilateral instruments, such as the UNCAC, and for the abolishment of bank secrecy.

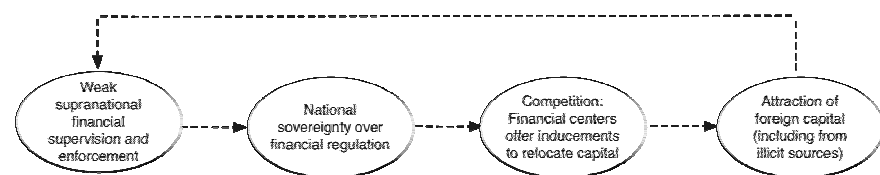
Governments in financial centers have opposed such plans for a long time. There are several reasons for this opposition. First, bank confidentiality and the careful use of information are vital components of a market economy in that they guarantee personal and corporate privacy. Moreover, the right to maintain banking confidentiality is highly valued in liberal democracies, and thus enjoys strong popular support. Efforts to impose new regulatory measures will be resisted vigorously if, directly or indirectly, they frighten away legal activities and affect commercial interests at the level of individual firms, particular economic sectors, or the nation as a whole (UNODC, 1998).

Second, many financial centers and bank secrecy jurisdictions are countries with limited alternative economic resources and potential for industrial development. In such cases, the financial sector provides the majority of the state's fiscal revenues and attracts high-quality manpower. The state, the economy, and a large portion of the workforce are thus dependent on the overall attractiveness of the financial environment. As a result, there is often broad public support for maintaining an attractive institutional framework in order to prevent capital from leaving the country. For '[c]apital is as shy as a bird: only disturb its nest, and it will take wing for another spot, where it can build and multiply in greater security.' (Ward, 1868, 127)

Third, and closely related to the previous point, the increasing competition for financial and human capital is increasingly placing constraints on governments all around the world. The more competitive the financial environment is, the less margin a government has to tighten transparency requirements and strengthen cooperation mechanisms without losing clients to jurisdictions with more flexible regulation. Part

of the reason may be that the capital fleeing the jurisdiction belongs to those who have something to hide. The primary reason, however, is that regulatory measures entail costs for the bank client, thereby weakening the comparative advantage of the financial center. The growing amount of capital that responds decisively to such regulatory initiatives thus forces governments in financial centers to consider the market reaction before introducing new regulations. They will do everything possible to defend their comparative advantage for fear of compromising the competitive position of the economy. Figure 4 illustrates this situation.

Figure 4: Relationship between institutions, power, and resource distribution in the context of international competition for capital



Notes: The weakness of international banking supervision and regulation has allowed some countries to implement ‘capital-friendly’ regulatory standards. This has permitted them to attract capital at the expense of more rigid, expensive, or politically unstable jurisdictions.

However, in the context of growing international concern over money laundering, tax evasion, and corruption, financial centers have come under fire for harboring, among others, public assets stolen from developing and transition countries. Since the 1990s, a number of (international and national) development and regulatory agencies, as well as international non-governmental and civil society organizations (NGOs and CSOs, respectively) have been particularly effective in raising awareness about the role some banks and governments in financial centers have played in facilitating money laundering in developing and transition countries. The efforts of these organizations have also brought the asset recovery agenda to the attention of a much broader audience and strengthened the claims of requesting countries. In parallel to that, OECD member states – anxious to prevent capital and tax revenues to flow out of their jurisdictions – have stepped up pressure on financial centers, requiring them to loosen bank secrecy, implement internationally agreed tax and anti-money laundering standards, and improve administrative information exchange and MLA mechanisms. The resulting negative media coverage, depicting financial centers as safe havens for the proceeds of corrupt public officials, tax dodgers and organized crime, has had negative reputational effects, making it difficult for banks and governments in financial centers to maintain their opposition against legal cooperation in asset recovery matters. The recent international financial crisis has highlighted the need for tightening financial supervision and improving international legal cooperation, thereby putting further pressure on financial centers (UNODC and World Bank, 2008).

Caught between the necessity to compete in the global financial market and the risk of damaging their reputation, governments in financial centers have been confronted with the following dilemma: the more rigorous they are about due diligence and vetting customers, the more likely it is that some customers will take their business to other, less scrupulous, countries. Conversely, if the financial center develops a reputation as a home for dirty money, legitimate capital will move elsewhere, as respectable individuals and companies will try to avoid tarnishing their reputation (UNODC, 1998).

Some state authorities have taken the risk of reputational damage very seriously when it became apparent that the long-term costs for the financial center might by far exceed

the short-term benefits some of the resident banks derive from harboring dirty money. Moreover, it was realized that the negative reputational effects were also likely to affect other economic sectors in the country. Hence, considerable efforts have been made in recent years to strengthen financial regulation and banking supervision, as well as the mechanisms for international legal cooperation in matters of money laundering and asset recovery – sometimes even despite considerable opposition from financial interest groups. This process is illustrated in Figure 5.

Figure 5: Institutional Reform Induced by (Informal) Political Pressure



Notes: International and national development agencies, as well as international NGOs and CSOs have raised awareness about the role banks and governments in financial centers played in money laundering and harboring stolen public assets. The potential reputational costs have induced some financial centers to strengthen their financial regulation and banking supervision.

To avoid what they perceived as a threat of (national and international) over-regulation, twelve leading international financial institutes created the Wolfsberg Group in the late 1990s in order to set and adopt standards and standard-setting procedures with regard to money laundering that had previously been identified and pushed for by the Financial Action Task Force. While one aim of the Wolfsberg Group was to ameliorate the reputation of the financial sector, the main objectives were the prevention of the ‘next regulatory push or at least influencing its direction’ and the establishment of ‘a level playing field amongst key competitors in order to marginalize those who fall below the benchmark’ (Pieth, 2006, 9ff.). These efforts of both state authorities and the financial sector have somewhat improved the chances of developing and transition countries to repatriate stolen assets.

However, efforts in this direction have not been uniform across states and financial institutions, with the result that the international system of financial regulation and banking supervision remains limited, patchy and incoherent. Major institutional gaps and loopholes continue to provide anonymity and secrecy to criminals who want to invest their illicit proceeds. Moreover, similar to the situation in countries requesting asset repatriation, there can be large discrepancies between the regulatory framework and its implementation. For instance, while banks may be willing to comply with the regulations prevailing in their home jurisdiction, their subsidiaries in less regulated environments may feel entitled to circumvent these regulations, giving rise to the problem of double standards. Getting information and seizing assets under these circumstances is difficult, because it again involves two or more sovereign jurisdictions that do not necessarily communicate with each other outside the strict rules of legal assistance (Schmid, 2008). More worrisome, perhaps, is the fact that when confronted with demands for legal assistance, some countries have shown persistent reluctance to provide information for and assistance to requesting authorities performing their investigations, thereby exacerbating the problem of double standards (see, for instance, CCFD, 2007, 85ff.; Bauer, 2008; Goulder, 2009; Transparency International, 2009).

Inconsistencies in the practical application of MLA in corruption cases arise because existing multilateral agreements, such as the UNCAC, lack adequate enforcement mechanisms to ensure that countries comply with their commitments. Although a number of proposals have been discussed to fix this impending problem, none so far

has been adopted – mainly due to lack of political support for such a measure. As a result, non-compliance with the rules and regulations stated in the UNCAC has no legal consequences whatsoever. At best, they are seen as moral obligations.

Cases of non-compliance arise whenever enforcement mechanisms are imperfect, and the expected benefits from non-compliance exceed the expected costs. Given that existing multilateral agreements are toothless and international development agencies, NGOs, or CSOs do not always have the same leverage to exert pressure on governments, the cost of non-compliance can be relatively low. In such cases, ethical responsibility gives way to the harsh realities of political and economic power. This means that government officials will first and foremost respond to individuals and groups in strategic positions to ensure their political survival. Corrupt foreign public officials will be granted immunity against legal proceedings as long as doing so enables the government to secure important business contracts for domestic companies, jobs for the domestic workforce, and therefore votes at home. By initiating legal proceedings against corrupt foreign public officials, governments would not only run the risk of losing the country's economic sphere of influence to countries in which government officials are less concerned about corruption issues, but they also risk being sanctioned by the electorate if they fail to create employment opportunities and increase the standard of living. Hence, in the absence of powerful actors able and willing to enforce international agreements, judicial cooperation in criminal matters involving corrupt public officials is unlikely when strategic national interests are at stake. Moreover, as long as the electorate prefers jobs at home to less corruption abroad, the government faces little reputational costs, and, therefore, no electoral liabilities.

This explains why so many countries continue to roll out the red carpet for state visits of notoriously corrupt public officials. There is a wealth of anecdotic evidence showing that the same authorities that are responsible for ensuring that banks and financial service providers meet their legal obligations, grant corrupt public officials the opportunity to buy luxury estates for themselves and their entourage (see, for instance, CCFD, 2007, 85ff.; Bauer, 2008; Global Witness, 2009; Goulder, 2009; Transparency International, 2009).

Inconsistencies and double standards in the practical application of MLA do not only increase the uncertainty and the transaction costs of investigative, prosecutorial, and adjudicative authorities in requesting countries. They also seriously call into question the commitment of some requested states to fight corruption and strengthen international cooperation in the field of asset recovery.

Administrative and judicial capacity constraints in requested countries can further complicate the ARP. The measures necessary to return assets are complex and involve considerable effort. MLA procedures imply that some of the administration's resources are diverted to the benefit of another country. This in turn means that investigative, prosecutorial, and adjudicative authorities can pay less attention to domestic cases. In view of restricted human, financial and material resources, state authorities may not always be convinced that the effort and the associated expenditure are justified, especially when cooperation is potentially damaging to national interests and/or the overall gains of the effort remain elusive. Indeed, the uncertainty as to whether the repatriated funds will be used properly is also a major disincentive for requested state authorities to engage in the ARP. The political constituency of a requested state often struggles to understand why large sums of money should be returned to governments which show poor governance records and which are likely to misappropriate the funds again. This can slow down investigations, often fatally (Bertossa, 2008; Schmid, 2008; van Thiel, 2008).

To date, the most successful asset recovery operations can be attributed to dedicated

prosecutors and judges in requested states who developed a proactive way of dealing with MLA demands from foreign authorities – in strong contrast to prosecutors and judges who adapt a laissez-faire attitude to the problem or do not show enough imagination and skills to fully make use of the existing legal framework. In successful cases, this involved launching investigations quickly and freezing assets from the outset, no matter the origin or status of the suspect. In some cases, informal channels were used to overcome legal hurdles of international cooperation.

From a political economy point of view, there are several reasons why some individuals are more willing than others to act at the request of a foreign jurisdiction. For example, there may be material motivations (e.g., career-related considerations) as well as ideal motivations (e.g., a strong sense of justice and equity with respect to international legal issues). Some prosecutors may also be aware of the reputational damage that sheltering the proceeds of corruption may cause to a country and its economy in the long run. However, the fact that to date there have been few such cases indicates that the problems related to the difficulties of changing entrenched procedures and routines, as discussed at the end of Section 3, also prevail in requested countries.

Summing up, despite recent efforts to enhance international cooperation in the field of asset recovery, it is not clear whether these efforts can be sustained. This entails that few governments or investigative, prosecutorial, and adjudicative authorities in requesting countries will be disposed to make a massive outlay if the prospects of return are grim. If all that is achieved is that some financial centers and bank secrecy jurisdictions avoid direct deposits from corrupt sources but that the proceeds of crime, whatever their form, are distributed elsewhere, there will be little gain in taking up the ARP.

5. Policy Recommendations

The previous sections have suggested that there is a large gap between the rhetorical commitment of many governments towards international cooperation in asset recovery matters and their actual willingness to make it happen. It has been argued that this discrepancy reflects unfavorable constellations of political and economic interests in both requesting and requested countries.

The focus on commitment problems has revealed a central dilemma that must be overcome if the asset recovery agenda is to ultimately succeed. In the absence of mechanisms that signal sustained credible commitment, international agreements, such as the UNCAC, will not be trusted and therefore remain ineffective. International requests for legal assistance in asset recovery matters will continue to be granted on the basis of existing bilateral agreements. In the absence of bilateral agreements, requests for legal cooperation will mainly depend on the goodwill of the authorities in requested countries, or the ability of governments in requesting countries to come up with mutually beneficial deals. Consequently, the outcome of ARPs become less predictable because they depend on the specific context rather than on internationally agreed legal rules and standards.

The debate in the wake of the international financial crisis has created momentum for the asset recovery agenda in so far as it has raised the awareness about the necessity of tightening financial supervision and improving corporate transparency. However, the focus has almost exclusively been on measures to curtail tax evasion at the benefit of OECD member states, pushing asset recovery issues to the margins of the debate.

Given that the asset recovery agenda sometimes interferes with the political and economic interests of some OECD countries, it is not unlikely that the political commitment leading to the successful implementation of (bilateral) cooperation mechanisms with regard to tax evasion, cannot be sustained when it comes to doing the same with developing countries. In order to prevent the asset recovery agenda from being marginalized, it is imperative to mobilize and sustain political support from individuals and groups in strategic positions in both requesting and requested states. Only if sufficient political pressure is brought to bear on governments, will they be willing to honor international commitments. The goal should be to compel them to simultaneously establish legally binding constraints and send strong signals that they are sincere in their commitment to the asset recovery agenda. Once it becomes clear that governments are serious about enforcing their international obligations, reluctant public officials in the administration and the judiciary, as well as the financial service providers, will find it harder to ignore the new rules of the game.

However, mobilizing support is a challenging task, all the more because pressure must be exerted on both sides. It does not make sense to force governments in requested states to allocate more resources to improve banking supervision, strengthen legal assistance procedures, and investigate corruption cases more effectively if, on the other side of the equation, administrative and judicial authorities in requesting states lack the capacity, the autonomy, and the willingness to initiate and follow up on requests for assistance. The challenge thus lies in identifying strategic individuals and groups in requesting and requested states that would support the asset recovery agenda and press their governments to commit to their international obligations.

As being in most cases the final beneficiaries of asset recovery measures, requesting countries should take the lead in promoting the asset recovery agenda. Although it is often in the public administration and the judiciary that resistance to anti-corruption and asset recovery measures is strongest, experience has repeatedly demonstrated that there are public officials, including ministers, law enforcement officers, administrators, prosecutors and judges who take their duties seriously and are fully committed to bringing the perpetrators of corrupt practices to justice – even at the expense of their own safety (Scher, 2005, 23). The support of such policy champions is essential to promote the asset recovery agenda and overcome resistance from *status quo* forces, because their involvement sends a credible signal of commitment to both domestic and international audiences. Moreover, the congruence between their personal values and public interest is more likely to sustain anti-corruption and asset recovery efforts in the long run.

Another support group is the donor community, including international development and financial institutions as well as bilateral development agencies. These organizations have recently emerged as key advocates of the asset recovery agenda. They have led the fight against corruption for more than two decades by providing technical and financial support for institutional strengthening and capacity development. Those efforts were mainly devoted to awareness raising campaigns and sensitization at all levels of government and society. Recent support has shifted to measures and strategies aimed at criminalizing corruption by strengthening the national justice system, including the investigative police, the prosecution authorities, and the judiciary. They have also made efforts to improve the compatibility of the legal framework that is needed for international cooperation, such as MLA, extradition and asset recovery (Hussman, ed., 2007).

However, experience shows that bi- and multilateral donor organizations generally pursue their own cooperation strategies. These strategies reflect the political and economic interests, visions, and priorities of their home countries or management boards. Notwithstanding all efforts of harmonization, the donor community remains largely fragmented and uncoordinated. It is not unusual that disagreements arise

between the various organizations about the focus, goals, and practical modalities of their cooperation. Consequently, the political leverage of the donor community with respect to the asset recovery agenda is constrained by its ability to overcome its own collective action problems.

Depending on the particular issue at stake, political support may also come from a somewhat unexpected source, namely from executive, administrative and judicial authorities in some financial centers, as well as from the financial service providers themselves. As outlined in Section 4, a number of financial centers and financial service providers have undertaken significant efforts to strengthen their supervision and legal assistance arrangements in cases of overseas corruption. These actors may have a strong interest in providing support, experience, and know-how if the focus of the asset recovery agenda was on leveling the playing field, i.e., reducing the gaps between best practices and actual practices in requested countries. If, by contrast, the agenda were to focus on imposing ever-stricter regulations, support is unlikely to be very strong, because such measures may further reduce their competitive advantage.

Support may also come from organizations with the ability to shape international opinion. These include the growing coalition of international NGOs and CSOs that are active in the field of governance, and the media. These organizations have been very effective in raising the profile of the asset recovery agenda in development policy circles in recent years. They can advocate for institutional reforms, both nationally and internationally, sensitize public opinion, influence and support national authorities, and conduct independent research that helps the process of criminal investigation. The media can be a powerful ally in spreading factual information internationally and arouse the interest of investigators who might orientate their inquiry accordingly. Compliance staff in financial institutes relies more and more on the media for information about their clients, the businesses they are involved in, the sources of their wealth, and their agents. Moreover, the media does succeed, at times, in building up enough pressure to prevent the burying of a sensitive criminal case. According to what has become public through the press, compliance staff in financial institutes might find themselves compelled to report to the authorities, or at least increase the level of due diligence (Schmid, 2008). However, such pressure is to some extent random and cannot be taken for granted. In any case, the greater the international attention, the greater the pressure on governments to live up to their promises. Therefore, support provided to the media by peers or donors for improving their investigation techniques is a key issue.

More detailed studies are required to assess with any confidence the capacities and constraints, the respective incentives, goals and commitments of the aforementioned potential support groups. What can be said with certainty is that the political and economic interests of these groups, their goals and priorities can conflict with each other. Efforts to promote and sustain political support for the asset recovery agenda will therefore need to balance the competing interests and priorities. More scope should also be created for the systematic sharing of experiences and know-how and the creation of synergies among these groups. The sharing of experiences and knowledge is important to help them find a common ground, formulate policies, and engage in collaborative action that will make a positive difference. By pooling their resources, these groups may raise the profile of the asset recovery agenda and create enough pressure to induce reluctant governments to fulfill their international obligations.

An impressive number of initiatives and working groups has been set up in recent years to facilitate the exchange of knowledge and information on good practice in the field of asset recovery (for an overview, see Conference of the States Parties to the UNCAC, 2009). Efforts are also under way to provide preparatory assistance in the recovery of assets, and to help build national capacity for asset recovery. In that regard, the establishment of a funding mechanism to cover the legal fees of requesting

states when pursuing asset recovery cases, has also been discussed. Moreover, it has been suggested to create a network of contact points that could provide opportunities for dialogue among asset recovery practitioners. It is expected that such a network can help open communication channels among requesting and requested states, build trust relationships and encourage the development of mutual understanding, which is a necessary prerequisite for successful cooperation.

While these undertakings are valuable and important, they should not divert the focus from the real problem: the reluctance of some governments in both requesting and requested states to implement the UNCAC framework. It is therefore imperative that the aforementioned advocacy groups continue to exert pressure on governments to set up legally binding targets and timetables for the implementation of the UNCAC framework. Progress towards achieving these targets should be evaluated in a transparent way and on a regular basis, and laggards should be firmly encouraged – if not sanctioned – to step up their efforts. ‘Only through a transparent program of mutual evaluation will countries take such an instrument seriously, and get serious about implementing it.’ (Transparency International, 2008). Moreover, the current international financial crisis has created momentum to improve international coordination and capacity building among institutions charged with asset recovery. The current momentum should therefore be accelerated.

Appendix: Glossary

Collective action: Collective action dilemmas arise when it comes to the provision of public goods. Since public goods are non-excludable and non-rival in consumption, it is rational for individuals to wait until someone else contributes to their production. However, if private benefits do not compensate for the costs, nobody will be willing to contribute to the public good independently and hence no provision will take place. Lobbying for asset recovery is such a public good. Lobbying might not occur, because it is rational for individuals to wait until someone else accepts to bear the cost associated with the effort.

Economic rent: In the political economy literature, the term of economic rent refers to higher than necessary profits. The existence of rents creates opportunities for rent seeking activities. Rent-seeking can be interpreted as activities which seek to create, maintain or change the institutions on which particular rents are based. Some rent-seeking activities, such as lobbying or advertising, are perfectly legal; others, such as bribing or even coercion, are distinctly illegal, and it goes without saying that society would be better off without their corrupting influence. Studies have shown that in the aggregate these rent-seeking activities impose substantial losses on society.

Present value of future income streams: The present value of future income streams is the sum of the present values of each individual income amount received in the future. Each future income amount has to be discounted to account for the cost of holding capital from now until the year the income is received. To use a simple example for illustration, consider an individual who has a choice of either earning \$1 today or \$1.50 tomorrow. If a) the next best alternative investment opportunity does not exceed 50 cents, and b) the uncertainty of receiving \$1.50 tomorrow is low, the individual will prefer to receive \$1.50 tomorrow than a \$1 today. However, if there is only a 50 percent chance of receiving \$1.50 tomorrow, the net present discounted value of tomorrow's payoff is 50 percent x \$1.50 = 75 cents, which is less than \$1. This implies that if the cost of holding capital is high, the individual will tend to prefer the short-term benefit to the higher, but riskier yield in the future.

Transaction costs: Social and, more specifically, political exchanges come at a cost. These so-called 'transaction costs' comprise search and information costs, bargaining and decision costs, policing and enforcement costs. By influencing the transaction costs of doing politics, institutions structure the interactions of political actors.

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