

A photograph of a modern architectural staircase. The staircase features glass railings supported by metal brackets and bolts. The steps are made of light-colored concrete or stone. The background shows more of the staircase and some interior lighting. The overall color palette is cool, with blues and greys.

INDIRECT ASSET RETURN THROUGH THIRD-PARTY ENTITIES

CIFAR RESEARCH PAPER

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EXECUTIVE SUMMARY

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Indirect return mechanisms describe the practice of **returning recovered money across borders indirectly via third-party entities that stand between cooperating governments**. These entities might be called in to aid in the negotiations, as well as in the process of the distribution of the returned assets, especially in situations where there are challenging relationships between the negotiating governments and when the receiving countries lack the necessary corruption controls to mitigate the risk of re-looting the assets.

In the past, asset returns have been channeled to the country of origin in this way through projects implemented by multilateral organisations, special mechanisms established for the purpose of the return, or through the involvement of non-governmental organisations. The **BOTA Foundation, Abacha II, US - Equatorial Guinea and Jersey – Kenya returns** are some examples of cases where third parties have been involved in the disposal of funds, and which are analysed in this paper. While not an exhaustive list of cases which involve third-party entities, they offer an indication into some of the economic, social and political challenges, as well as opportunities, that might arise with returns conducted through the use of third parties.

Benefits of this kind of return include, for example, increasing transparency and oversight of the return process by involving a third-party entity independent from the governments involved. This increased transparency and oversight, together with additional safeguarding measures usually championed by third-party entities, such as conflict of interest policies, can then lower the risk of misappropriation of the returned assets. This is especially relevant in countries with a weak rule of law or fragile contexts. Moreover, the third-party

entities involved can provide additional capacity to the process, ranging from their programmatic strengths to oversight and negotiating skills.

However, the involvement of third parties often comes at a cost of higher administrative and financial burdens versus directly returning assets. The amount of these additional costs directly depends on the number of safeguarding measures and layers of oversight that are placed upon the return, which might need to be higher in politically challenging contexts. Another challenge is that these third-party entities are often chosen in closed-door negotiations between governments and not following an open tendering process or CSO perspective, which raises transparency and accountability concerns. Additionally, because projects run by third-party entities usually run only for a limited time and are contingent on the funds from an asset return, questions over the future and sustainability of such programmes, especially without any government involvement, can be raised. Lastly, because the involvement of third-party entities in practice means the imposition of conditionalities on the asset return process, it can be perceived by the receiving government as a threat to its sovereign rights over the assets and in practice lead to protracted negotiations over the return modalities.

In order to weigh in the opportunities and challenges that the indirect return brings, policy makers and civil society members should consider several factors when deciding to advocate for this type of return:

1. An assessment of the rule of law in the receiving country should be made. Indirect return mechanisms are best suited for environments that require additional monitoring safeguards provided by an independent third-party entity or when the relations between cooperating governments are challenging.
2. The type of organisation and expertise that are needed should be guiding principles when deciding which independent organisations will be tasked with receiving the returning funds and distributing them via their programmes. Moreover, third parties should be appointed through a public process, where possible, and the public and civil society should be given information about why particular organisation(s) were chosen and not chosen.
3. Civil society organisations representing local populations and the victims of corruption should be involved in negotiating, monitoring and distributing recovered assets. In countries with weak and repressed civil society, or where expertise is lacking, the involvement of international organisations can fill this gap or to work together with local organisations. However, local organisations should be included as much as possible, even if this means investing into building their capacity to do so over time.
4. Return modalities should adhere to international standards and best practices regarding transparency, accountability and integrity. Of particular importance to indirect returns is publishing monitoring and evaluation information created by third-party entities, as well procurement documents related to the contracting processes and detailed texts and agreements on the modalities of the return.

INTRODUCTION TO THIRD PARTY RETURNS

INTRODUCTION

Assets stolen through criminal activities, such as corruption, that are successfully traced and confiscated by a government in a country of destination can be returned to the country of origin of the illicit funds in a number of different ways. These can take different forms ranging from a direct wire transfer channelled to a centralised budgetary account of a receiving government, a specially designated budget line, or a separate bank account held by the government or a by a third party. Whether the funds are channelled to the country of origin directly or not is often (but not always) mirrored in the way that the return mechanism is conducted - directly between governments or with the involvement of an additional non-state third-party entity.

These indirect return mechanisms are an increasingly used practice of returning recovered money across borders managed by third-party entities. In such cases, a bi- or multi-lateral agreements will be concluded that return stolen assets to an entity outside of the governments involved, often the World Bank or an agency of the United Nations, to distribute the money through on-going or expanded programmes to beneficiaries in the receiving country. This third party or parties can be called on to aid in different stages of the asset recovery process, from helping to navigate different legal environments and making connections across borders (with the involvement of StAR or UNICRI, for example), to aiding in negotiations about the return modalities, the disbursement of funds through programmatic work or to monitoring the disbursement process. The focus of this paper is primarily on the involvement of third parties in the final stage of asset recovery – the disposal of funds.

There are many considerations that both countries of origin and countries of destination need to take into account when deciding on the modalities of asset return. Even after the assets have been successfully confiscated, whether through a settlement arrangement or completed criminal or civil prosecution, the successful and timely disbursement of funds to the victims of corruption and other crimes in the origin country is not guaranteed. Depending on various factors, such as the amount being repatriated, complexity of the case and political circumstances, some cases can take more than a decade to complete. This is not true for all cases, however, and a recent survey of 123 cases self-reported by countries showed that it takes on average 4 years to start of the return process after an asset freezing order was made.¹

The factors that might delay and jeopardise the transfer of confiscated assets are, for example, lengthy negotiations between requesting and requested and countries about the modalities of return, choice of a country programme to disburse funds or lack of oversight measures that risks the re-looting of stolen assets. Therefore, the length of the process does not only depend on the legal and technical complexity of these cross-border cases but is also driven by diverging political priorities and realities of receiving and sending governments.

While sending countries might propose a range of conditions which in their view safeguard the return, these might be seen as unfair, infringing on the right on the assets by the receiving countries.

Channelling recovered funds through the indirect return mechanisms is thus often done with the aim to reduce corruption risk

in countries with poor controls to mitigate the risk of re-looting the assets. Unlike assets that would be returned directly to a state budget, assets managed by a special mechanism are kept separately earmarked for certain projects and therefore may be monitored more easily. In some circumstances, the use of an independent party to channel and deliver funds might be driven by human rights concerns, and in cases of a return to fragile countries or countries where those involved in the original corruption remain in power, they might be the only possible way of a return that avoids repeat corruption and to safely deliver these funds to the corruption victims.

However, many questions still surround the use of indirect return mechanisms. How do these mechanisms fair in comparison to direct returns in terms of economic value or transformative potential? Do they contribute towards building transparent and accountable institutional structures and thus help to prevent corruption from occurring in the future? What are the criteria for choosing one return mechanism or a type of a third party involved over another that would secure the best value for impacted populations? While the transparency and traceability of the management of funds confiscated from abroad in a number of countries of destination is very limited and prompts questions, this paper investigates the stage of the disposal of funds.

Although civil society has been increasingly involved in the global asset recovery discussion and to some extent also setting up and monitoring the terms of these indirect asset returns, an understanding of the inherent benefits and challenges of indirect returns can enable civil society to both advocate for the use of these mechanisms at times it is appropriate and to advocate for particular criteria to be put

in place to ensure that these mechanisms have high standards of accountability and transparency.

This paper therefore seeks to lay out key benefits and challenges of the use of indirect return mechanisms with a specific focus on an assessment against accountability, transparency and participation principles. The first chapter of the paper conceptualizes indirect return mechanisms within the wide range of return modalities. The second chapter looks at the applicability of transparency and accountability standards to third party returns. The third chapter analyses several cases of these types of returns to then summarise the opportunities and challenges in their use in the fourth chapter. It ends with conclusions on the use of these mechanisms, as well as providing recommendations on when their use might be most appropriate.

THE CONCEPT OF INDIRECT RETURN MECHANISMS

THE CONCEPT OF INDIRECT RETURN MECHANISMS

The terms 'indirect return mechanisms' or 'third party returns' are not in general use. However, they are a good approximation of the type of return this paper considers. Rather than a direct return between two or more states, with the confiscated proceeds of corruption returning directly to the bank account of the receiving government or any special account for managing the recovered proceeds of corruption established nationally by the returning government, the situations considered here are those whereby assets are returned to the country of origin indirectly, via a third party.

This means that assets are directed towards the people of the country of origin, but without first going through government accounts and instead going through a third party. This party can be a multilateral organisation, a special mechanism established for the purpose of the return, or a non-governmental organisation/CSO. The receiving and sending governments may also be directly involved in the management of the mechanism, through e.g. being on the board, or may have more arms-length involvement, e.g. through negotiations on the use of the mechanism. Key here though is that this third party acts as a step between the return and the disbursal of funds, between the sending and the receiving government.

Typically, these third agencies will have to disburse funds for specific project or purposes either as part of their mandate in receiving the assets or will be specially set up to fulfil those purposes. Various monitoring and safeguarding mechanisms usually accompany these schemes, aiming to offer independent oversight over the dissemination of returning assets. This is

in contrast to some other disbursement mechanisms, such as when assets are returned directly to the general budget of a receiving government, where they might be harder to monitor.

In this report, we differentiate between two distinct paths that assets can be returned through based on the presence of an independent party - direct and indirect - which are visualized in Table 1 below. In practice, there are a number of different ways for assets and movable property to be channeled from one country to another. Funds can be returned directly via a wire transfer to a centralised budgetary account of a receiving government, a specially designated budget line, or a separate bank account held by the government or a by third party - whether an international or a civil society organisation. Other disbursement mechanisms that can and have been used in the past is the physical transfer of a movable asset (e.g. a yacht); via an escrow account; a trust account; transfer of legal title; and a transfer of shares.²

As there are currently no official statistics which would track how much money is being confiscated and returned each year across countries, there are also no central accounts that would provide insights into the proportions of returns conducted via indirect mechanisms. However, a survey conducted by the Stolen Asset Recovery (StAR) Initiative showed that out of 123 self-reported cases of completed returns worldwide, there were 6 examples of cases where funds were returned to a designated account held by a third party, even though the concrete cases were not named.³ Even though this is a small proportion of the total returns, several of these cases have been

large in size.

Civil society has been increasingly vocal in its calls for transparent negotiations between sending and receiving countries, as well as calling for sufficient safeguards that ensure effective and accountable use of returned funds, which also concerns indirect return mechanisms. Beyond the advisory role that civil society has played in various return cases in helping to decide how recovered money should be spent to best meet the needs of the local population, it has also been effective in monitoring returned assets. National organisations know the needs on the ground and together with international NGOs can identify interventions that will yield the best development impacts, and most importantly, meet international standards for transparency.

Characteristics of an indirect return mechanism

- Returned assets are transferred to the country of origin through a chosen party, without first going through accounts of the receiving government.
- This party acts as a step between the return and the disbursement of funds, between the sending and the receiving government.
- This party can be a multilateral organisation, a special mechanism established for the purpose of the return, or a non-governmental organisation.
- The receiving and sending governments may be involved in the management of the mechanism but they do not influence the disbursement of funds directly.

Table 1: The differences between direct and third party returns

DIRECT RETURNS	THIRD PARTY RETURNS
Money held by sending government	Money held by sending government
Return can be unconditional or with conditions attached	Return is always conditional
Assets are transferred directly to the government / or a part of the government	Assets are transferred to a third party separate from both governments – World Bank to a national or local NGO
Disbursement is part of the general budget / special budget line / for agreed on purposes or project	Disbursement is for specific projects or purposes

**TRANSPARENCY &
ACCOUNTABILITY
STANDARDS
APPLICABLE
TO RETURNING
STOLEN ASSETS
AND FOR THE
USE IN INDIRECT
RETURNS**

TRANSPARENCY & ACCOUNTABILITY STANDARDS APPLICABLE TO RETURNING STOLEN ASSETS AND FOR THE USE IN INDIRECT RETURNS

The importance of promoting transparency and accountability in the management of public finances, as well as the importance of promoting active civil society participation in the fight against corruption have long been enshrined in the United Nations Convention Against Corruption (UNCAC).⁴ While the UNCAC provides a useful starting point for key consideration around asset returns and for the development of national legal frameworks for reparations in the context of damage caused by corruption, it lacks detailed guidance on best practices in many areas.

More recently, the Civil Society Principles for Accountable Asset Return⁵ – developed by civil society as a framework for the accountable and transparent return of public assets stolen through corruption – include some important points to consider in ensuring that returns comply with global standards relating to good governance and human rights. Several of these are also applicable to the use of third agencies in indirect returns to manage and disburse recovered assets.

Principle 1 highlights the importance of the provision of information in returning stolen assets. Particularly important for third agencies involved is that it is important to publicly provide timely and accessible information on: the timeline of planned steps for return; the modalities for asset return and disbursement, the foreseen role of civil society in the return; and the disposition, administration and monitoring

of returned assets. It particularly highlights the importance of: a public and open tendering process for the involvement of third-party stakeholders in the disbursement of funds; due diligence on third-party/intermediary actors involved in the disbursement and monitoring of assets; independently audited reports on the disbursement and management of funds; and reports on the progress of programs.

Principle 2 underscores this in highlighting that the public must be able to trace returned funds at all stages of the process from receipt to disbursement.

Principle 3 highlights the importance of involving and enabling the involvement of independent civil society organisations, including victims' groups/representatives, in the return and has several elements relevant for third agencies. This includes involvement in taking decisions on the disposition of returned assets and in independently monitoring the disbursement process.

Principle 4 calls for the open publication of case-specific agreements which should involve CSO representatives.

Principles 5 and 6 deal with integrity provisions, that third agencies involved in indirect returns should also have in place to ensure that returned assets are not again subject to corruption. Principle 5 includes a requirement that perpetrators of the original corruption should be precluded from benefiting directly or indirectly

from returned funds, a condition which should be strongly included within the arrangement made with the third party. Principle 6 calls for the establishment of independent oversight and complaints mechanisms to ensure that any suspected misuse of recovered funds are detected and addressed. Here too, this Principle calls for any third party involved in indirect return agreement to require the party to cease disbursement and open an investigation where suspicion of irregularities concerning the management of recovered assets arises. This investigation should be independent and involve the authorities of both the sending and receiving states.

Principle 7 considers accountability mechanisms for the prevention of any potential corruption. Relevant for third agencies is that any agreement should ensure that these agencies have transparent and public procurement and tendering processes, clear rules on conflict of interest and the ability for the public to monitor that these processes are in place. In other words, the party should publish procurements, the results of tenders and have publicly available conflict of interest policies.

Principles 8 to 10 argue for the disbursal of returned funds to be used as close as possible to benefit those harmed by the original corruption. In this regard, Principle 8 calls for compensation for victims and victim groups where direct harm resulting from the corruption has occurred. Any third party should therefore include a process for identifying, assessing and compensating victims. Principle 9 suggests that in addition to compensation, the returned funds should be used to benefit the people of the country. This means improving the living standards of populations and/or strengthening the rule of law and prevention of corruption in line with international human rights obligations in the

country or countries where the underlying offences occurred, and thus contributing to the achievement of the Sustainable Development Goals. Third agencies should therefore have as aims disbursal that achieves these aims. Principle 10 highlights the need for the involvement of broad range of stakeholders in decisions about disbursal. Third agencies should therefore have obligations for both a diverse leadership and board in how assets are spent and should have obligations for wide consultation with affected communities.

Key considerations for third agencies involved in indirect return

Transparency requirements

- Timely publication of timeline, modalities and actors involved in the disbursal process
- Publicly available independently audited reports and regular programme reports
- Systems to enable the public to trace assets from receipt to disbursal
- Publicly available case-specific agreements

Integrity mechanisms

- Contractual obligations to exclude and have a process to exclude perpetrators from direct and indirect benefit
- Independent oversight and complaint mechanisms
- Independent investigations involving sending and receiving states and paused disbursements during investigations

Accountability measures

- Open procurement, published results of tenders, publicly available conflict of interest policies

Disbursal

- Process for identifying, assessing and compensating victims
- Social aims directed at improving living standards or preventing corruption
- Broad stakeholder engagement

Similar principles are contained in a series of indicators for measuring the degree of transparency, accountability, and inclusiveness at each stage of an asset restitution process, developed by Transparency International France. While third parties can be involved in every stage of the restitution process, the indicators assessing stages of selecting recipient project entities and monitoring the restitution process are particularly relevant.⁶

EXAMPLES OF THE USE OF THIRD PARTIES IN INDIRECT RETURNS

EXAMPLES OF THE USE OF THIRD PARTIES IN INDIRECT RETURNS

There are different types of mechanisms that can be involved in indirect asset return, standing in the middle between the sending and the receiving government. In the past, asset returns have been channeled to the country of origin for example via projects established by a multilateral organisation, a special mechanism established for the purpose of the return, or a non-governmental organisation. The following chapter provides an overview of several asset recovery cases where these different types of mechanisms have been used.

SPECIAL MECHANISMS

By special mechanisms this paper means temporary institutional arrangements, such as charitable foundations, established for the purpose of disbursement of funds in a particular asset return case. These special mechanisms might be supported by one or more international and multilateral organisations but they stand separate to the established programmes of these organisations in the receiving country and outside of their regular frameworks. Particularly well-known return case using special mechanisms is the BOTA Foundation established in Kazakhstan.

BOTA FOUNDATION

Assets confiscated:	USD 84 million
Assets returned so far:	USD 115 million (84 million + interest)
Years from confiscation to disbursement:	10 (1999 frozen in Switzerland, 2009 - 2014 BOTA operational)
Third-party entities appointed with disbursement of funds:	IREX, Save the Children
Third-party entities appointed with monitoring of disbursement	World Bank in advisory and oversight role, BOTA Board of Trustees

Background

An early example of the use of an indirect asset return via a special mechanism is the return of assets to Kazakhstan via an independent, non-governmental and non-profit foundation BOTA, established solely for this purpose. The return was a result of a rare case of a disbursement of funds from a foreign bribery settlement and it involved three governments, one multilateral organisation and two international civil society organisations.⁷

The BOTA foundation was created to disburse funds that were retrieved by the US Department of Justice in cooperation with the Government of Switzerland. Interestingly, the investigation was initiated by the president at that time, Nursultan Nazerbayev, who wanted to discredit his political opponent but ended up implicating himself in possible money laundering. In

1999, Switzerland froze USD 84 million that had been used by American businessman - James Giffen - convicted of money laundering in the US several years after, to bribe Kazakhstani government officials on behalf of Western oil companies. By 2009, when the frozen funds were made available to fund the BOTA Foundation, the account had grown from USD 84 million to USD 115 million due to interest.⁸

The World Bank entered the discussions over the disbursement of funds to act as an "honest broker" between the governments and "technical advisor" in 2005 and oversaw the creation of the founding legal documentation of the BOTA foundation.⁹ In 2007, The BOTA Foundation was established by a partnership between the World Bank and the governments of Switzerland, the U.S., and Kazakhstan, to repatriate these funds in support of Kazakh youth and their families. The foundation was in operation from 2009 until 2014.

The return agreement and structure

As stated in the Memorandum of Understanding (MoU) which was the basis for the foundation's structure, the continued allocation of funds to the BOTA Foundation were contingent on Kazakhstan's agreement to participate and progress in two other programs to promote public accountability. The required programs were the "Extractive Industries Transparency Initiative (EITI) Program" for the purpose of increasing transparency in its oil and gas industry, and the "Public Finance Management Review (PFMR) Program" to improve the transparency in government budgeting.¹⁰

The foundation was governed by a Board of Trustees (BoT), established by the Foundation's Founding Charter, written by the three government parties and the World Bank. Five of the seven BoT seats were held by members of Kazakhstan's civil society

who were independent of the government and government officials. The last two seats were appointed by the U.S. and Swiss governments.

Daily management of three programmes for returning funds to disadvantaged citizens (Conditional Cash Transfer, Social Service and Tuition Assistance) were run by two international development organisations — IREX and Save the Children — and supervised by the World Bank and the three governments.¹¹ The World Bank contracted IREX, an international non-governmental organisation based in Washington, to build the Foundation, oversee its operations, and provide administrative support for its programmes. IREX also selected the executive directors for each of the main programmatic departments, who at first were nearly all expatriates, but by 2012 half of these roles were filled by Kazakhstan citizens. Save the Children was contracted to provide additional technical assistance to the Foundation's departments.¹²

Transparency, integrity, and accountability considerations

There is a wealth of evidence documenting the restitution of funds via the BOTA Foundation, including a published MoU,¹³ reports documenting the creation and operations of the Foundation,¹⁴ as well as its programmatic evaluations.¹⁵ The information about the World Bank's involvement comes from these analytical reports, even though the Bank was also allowed to publish information about its activities linked to the Foundation.¹⁶ During its operations, BOTA representatives, including the local Board members, held several press conferences to inform about upcoming and past activities of the BOTA programmes.

The BOTA's programmes were reviewed internally on a monthly basis and annually by an external auditor. Even though BOTA's annual audited financial statements which

were previously published on its now inactive website are no longer available, aggregated data on spending and beneficiaries reached are available across the years. Operating costs accounted for about 30% of the total BOTA funds, with 15% going into direct programme costs and 15.6% spent on operations and overhead, including external evaluations.¹⁷

The World Bank was paid an initial fee of USD 500,000 for preparatory services in the first year and then annually a fixed fee of USD 150,000 for their support by the government of Kazakhstan. The total cost of the Bank's services is not known, however, since the latter yearly fee was subject to an annual review and adjustment of unknown magnitude.¹⁸

The creation of BOTA was accompanied by many contractual integrity obligations, such as the establishment of independent financial audits, which if proven unsatisfactory, could halt further disbursement of funds. The agreement also established the independence of BOTA from the Kazakh government and made it clear that the funds should in no way benefit any members of the government, their relatives or business associates.¹⁹

To ensure this in practice, all vendor relationships were scrutinised, and all hired employees and vendors signed forms establishing that there were no conflicts of interest, such as connections to the Kazakh government or family members already working at BOTA.²⁰ While no tender preceded the World Bank's involvement in the return case, IREX and Save the Children were selected after an open tender process organised by the Bank, a requirement imposed by the MoU.

Although the involvement of a number of actors provided for good oversight mechanisms, some of the management structures were regarded as overly

complicated and bureaucratic. This can be illustrated in the need for all important decisions to be initially signed off by the Bank and then approved first by the Board, and subsequently by the three Governments.²¹

Even though Kazakh civil society played an important role in putting pressure on the Nazerbayev regime to negotiate and accept the return via BOTA, the decision to move forward with the Foundation was made by the three governments without the involvement of the members of civil society. The MoU called for BOTA to be a local Kazakh organisation, with predominantly local founders and a board, and some few CSO representatives were also involved in discussions on BOTA's programmes and governance structure. Civil society thus played an important role in implementing and in daily operations, as well as in monitoring and evaluating BOTA's programmes.²²

Outcomes

Overall, the BOTA Foundation has been widely regarded as a success in terms of the number of stakeholders that were reached and positively impacted in Kazakhstan,²³ as well as in terms of a successful, transparent, inclusive and corruption-free disbursement of funds. From the amount of USD 115 million originally available to the Foundation, around USD 80 million was spent directly on the programmes and the rest on operational costs, which can be considered quite high.

As highlighted by Transparency International France, some potential for further improvement lay in enshrining the obligation to publish all relevant information on the recovery process in the MoU as a principle, and to make all monitoring and auditing documents available to the public.²⁴

In order to maximise its impact, especially considering the high initiation costs it was initially envisaged that after BOTA Programmes were due to end, in 2014, the Foundation would continue in some manner. However, even though a sustainability plan was drafted, and approved by the Foundation's Board of Trustees, it did not ultimately materialise. The governments were not in favour of the extension, mainly due to questions related to the different needs of such a foundation, who would control and benefit from money invested on behalf of the foundation, concerns over the high costs of the foundation's administration and oversight, and a lack of political will on the side of the Kazakh government.²⁵ Because BOTA proved to be administratively cumbersome, Switzerland has said to prefer restitution through a World Bank alone in the case of a subsequent return of USD 48 million to Kazakhstan.²⁶

MULTILATERAL ORGANISATIONS

Multilateral organisations which in the past participated on the disbursement of funds from successful asset recovery cases are the United Nations and, even more so, the World Bank. An analysis of returns with the involvement of the World Bank conducted by the Bank Information Centre found that where projects have been successful, they have been monitored by independent civil society, and the recipient governments have committed to support such monitoring.²⁷ At times, the Bank has faced challenges in conducting oversight of the programmes, alerting stakeholders about inconsistencies and providing sufficient information about its activities to the public.

The World Bank has had various roles in a number of asset return cases. In some cases it acted as a monitoring organisation overseeing the return of funds to the country budget (Abacha I), as a party to

the establishment of a special mechanism (BOTA), as a recipient of funds for newly established programmes or as a recipient of funding for its existing programmes. The latter is also the case with regards to part of the Abacha II return from Switzerland from Nigeria described below in more detail.

NIGERIA, ABACHA II

Assets confiscated:	USD 321 million
Assets returned so far:	USD 322.5 million, including interest (pending review)
Years from confiscation to disbursement:	3 (2014 frozen in Switzerland, 2017 MoU)
Third-party entities appointed with disbursement of funds:	World Bank
Third-party entities appointed with monitoring of disbursement	Monitoring of Recovered Assets through Transparency and Accountability (MANTRA) project

Background

It has been estimated that the former head of state of Nigeria, General Sani Abacha, might have embezzled up to USD 5 billion from the country during 1990s, which then ended up in invested in various jurisdictions.²⁸ In the years between 2004 and 2006, Switzerland had frozen and returned nearly USD 700 million,²⁹ a series of returns commonly referred to as "Abacha I". Switzerland further investigated and froze also the assets of Sani Abacha's family, mainly his son Abba Abacha. The process of recovering a further USD 321 million which was initiated in 2016 is commonly referred to as "Abacha II".

Following a 2014 Repatriation Agreement between Nigeria and the Abacha Family, which established that charges against Abba Abacha would be dropped on the condition that assets seized in other countries would be returned to the Nigerian state, the Swiss government confiscated USD 321 million from Luxembourg via international mutual legal assistance. On December 4, 2017, the World Bank and the Swiss and Nigerian governments reached a tripartite agreement for the restitution of the USD 321 million to Nigeria's population.³⁰

The return agreement and structure

The Memorandum of Understanding for the tripartite agreement (MoU) stated that the funds were to be used by the government of Nigeria exclusively for the purpose of financing Targeted Cash Transfers to the poorest families and households.³¹ Cash transfers were conducted by the State Case Transfer Unit to families selected for enrollment by Nigeria's National Cash Transfer Office (NCTO) under the National Social Safety Net Project (NSSP).³² Funds were allocated from the frozen account into an account for use by the NSSP every six months. Each beneficiary was supposed to be paid N5,000 monthly according to the NCTO payment framework.³³ Accounting for interest, there was 322.5 million from the Abacha case to be distributed via the Cash Transfer Program (CTP).

Because of evidence of low project design quality and even of re-looting of funds in the Abacha I return overseen financially by the World Bank, Nigerian civil society opposed the decision of the Swiss court that the World Bank should be involved also in the Abacha II return process. While in the case of Abacha I the World Bank analysed spending after they were repatriated to the Nigerian government, the Abacha II saw the application of the funds to Banks existing cash programme in

Nigeria and thus direct responsibility for the cash flow.³⁴ However, CSOs criticised the lack of information and guidelines about the return details, as well as safeguards to ensure proper disbursement of funds on this occasion.³⁵ Some CSOs called for the creation of an independent trust fund monitored by credible CSOs that would manage the recovered proceeds.³⁶

Transparency, integrity, and accountability considerations

As established by the publicly available MoU, Article 7 on information sharing, the states involved in the Abacha II return have access to all programmatic documents, and all relevant documentation and reports should be published on the Nigerian government's website. The disclosure of materials prepared by the World Bank was subject to the Bank's own policies on access to information.³⁷

The returned funds were transferred from Switzerland to an account held by the Nigerian government, from which instalments were transferred every six months to a specially designated Conditional Cash Transfers project account. This allowed for the separate accounting of the returned funds, as required by the MoU, even though the CCT programme involved funding from other sources as well.

The agreement offers an anti-corruption framework for the projects and asks the parties to provide information about any possible allegations of misuse of funds. In the case that the World Bank, who was asked to monitor the return process, found any financial irregularities, it was the responsibility of the Nigerian government to take measures to investigate them and inform the other parties about the outcomes of the investigations. If cases of fraud or a corruption event occurred, Nigeria committed to reimburse these funds back into the project's account.³⁸

In addition to the World Bank being responsible for monitoring the success of the program, civil society was required to be a part of the monitoring process of the CTP. In fact, the inclusion of civil society in the return process was one of the principles established in the MoU by the three signing parties. In practice, the Africa Network for Environment and Economic Justice (ANEEJ) led a group of Nigerian NGOs in providing civil society oversight of the CTP through the "Monitoring of Recovered Assets through Transparency and Accountability" (MANTRA) project.³⁹ The project, supported by the UK Department for International Development, informed the public about the return, as well as trained and deployed more than 500 citizens to monitor the disbursement of assets across the country.⁴⁰

Outcome

The World Bank's NSSP which ran from 2016 until the end of 2022 has now been concluded.⁴¹ With the returning assets being just one part of its total project costs which amounted in total to USD 1.833 billion, the reporting on the project's final expenditures which should be provided by the Bank as well as the MANTRA project is pending but reports from earlier stages of the project are available.

The MANTRA project has been regarded a success by several NGOs⁴² and can be seen as not only lowering the risk of misappropriation of the returning funds but also in helping to train several hundred citizens to track spending of the project. The citizens can then use these skills to further support the fight against corruption in the country.

The outcomes of the field monitoring conducted by the MANTRA project also point to the disbursement of funds via the Conditional Cash Transfer programme as successful in effectively channelling the funds to people in need and improving

their living conditions. However, MANTRA found quite considerable delay in some payments and as of November 2021, 1,632,206 beneficiaries were on the list to receive payments, with 812,721 paid and 819,485 unpaid – whose credit to receive the payments were still outstanding.⁴³ By November 2021, USD 246,123,150 million of the total 322.5 million had been disbursed.⁴⁴ Newer reports had not been published as of January 2023.

Beyond technical issues with delayed cash transfers,⁴⁵ there have also been issues of intimidation by community leaders to pressure beneficiaries to contribute some of their allowance to others or to the community.⁴⁶ Multiple states have documented cases where deductions have been made to beneficiaries' payments. Further complications have also been due to circumstances of deaths in families, overcrowded management centres, payment points too far away from beneficiaries, shortages of cash, and general insecurity in some locations.⁴⁷

Lastly, in light of the COVID-19 pandemic, the Nigerian government has issued palliatives to the public, which, in some cases, were mixed with the CTP payments. In these cases, beneficiaries were denied the CTP payments when granted COVID-19 relief.

Unlike in the Abacha I case, when the World Bank only analysed spending of funds after they were disbursed, it had a direct oversight of the funds dissemination through its programmes in the Abacha II case. The Bank's oversight was therefore more comprehensive, and after initial concerns over the Bank's involvement in the Abacha II restitution process, local CSOs viewed the cash programme as generally successful.⁴⁸

EQUATORIAL GUINEA

Assets confiscated:	circa. USD 36,65 million
Assets returned so far:	Unclear, USD 26,6 million announced
Years from confiscation to disbursement:	10+ (2014-ongoing)
Third-party entities appointed with disbursement of funds:	United Nations, Medical Care Development International
Third-party entities appointed with monitoring of disbursement	Unknown besides the US government and Theodorin Obiang

Background

In 2014 Teodoro "Teodorin" Nguema Obiang Mangué, the current Vice President of Equatorial Guinea, entered a civil forfeiture settlement agreement with the United States Government in resolution to United States v. One Michael Jackson Signed Thriller Jacket.⁴⁹ The US alleged that Teodorin Obiang leveraged his position in the Equatorial Guinea's government to make millions in bribes and kickbacks, money with which he then allegedly used to fund a "spending spree on assets in the U.S".⁵⁰

Pursuant to the out-of-court settlement, Obiang agreed to give up more than USD 30 million in return for various civil forfeiture proceedings against himself being dropped by the US government. He was required to sell a Malibu home he purchased for USD 30 million, a Ferrari car, and various Michael Jackson memorabilia as well as contribute USD 1 million to offset the value of his other movable property already taken out of the U.S.⁵¹

The US Department of Justice seized assets belonging to Obiang back in 2011 and initially sought the forfeiture of more than USD 70 million in assets. However, Obiang flew several items out of the US, including a jet worth USD 38.5 million.⁵² The sale of his mansion mandated by the settlement agreement was flawed by attempts of undue profit, and therefore, the US judge also ordered the transfer of USD 6.35 million from the settlement proceeds from towards a lawsuit against the real estate agent who sold the property.⁵³

The return agreement and structure

The 2014 settlement was followed by more than six years of unsuccessful negotiations about how the money should be spent to benefit the citizens of Equatorial Guinea. The settlement provided that in case the United States and Obiang failed to agree on a foundation or entity to which the funds in question would be transferred, a three-member panel would be tasked with the decision. The settlement provided that after several years of stalemate in the bilateral negotiations, a panel should be created – with two representatives appointed by each respective government and the third member appointed by the governments jointly or by a court.⁵⁴

Ultimately, the three-member panel was created and considered a number of options for the modalities of the asset recovery process, including a support for UNICEF and the education programmes that Philadelphia's Drexel University has in Equatorial Guinea but none materialised due to perceived obstruction by Equatorial Guinea.⁵⁵ When the panel member selected by Equatorial Guinea revoked his decision from May 2021, which agreed to disburse funds through a COVID-19 Vaccines Global Access (COVAX) programme, the United States filed and subsequently won a law suit to implement the proposed plan.⁵⁶

Finally, in September of 2021, the U.S. Department of Justice announced that USD 26.6 million of the proceeds of Obiang's 2014 settlement would be restituted to Equatorial Guinea to fund vaccines for COVID-19 and to address other medical needs in the country.⁵⁷ In this announcement, the U.S. shared that it has entered into two agreements to distribute the money: USD 19.25 million to be sent to the United Nations to purchase, store, distribute, and administer at least 600,000 vaccinations and USD 6.36 million to Medical Care Development International (MCDI) - a US based charity with a history of administering programmes in Equatorial Guinea - for the purchase and distribution of other medicines throughout the country.⁵⁸

Transparency, integrity, and accountability considerations

The settlement agreement was published on the US Department of Justice website⁵⁹ and calls for the annual publication of financial and narrative reports on the distribution of the assets, but does not mandate that these reports are made available to the public. Until now, there has been little published beyond two press releases announcing this return. No formal contract outlining a course of action between the U.S. government and these partners has been publicised.

Neither the United Nations or the MCDI have published information on the implementation plans or progress of their projects in Equatorial Guinea, nor they have acknowledged the receipt of the funds. According to a local member of civil society, as of Autumn 2022, there were also no signs of a public campaign for vaccines from the US.⁶⁰ It is possible that the institutions are still planning their approach to their projects or they have encountered some hurdles in the process. In other ongoing projects MCDI has partnered with a wide range of

implementation partners, it is likely a similar approach will be used for the purchase and distribution of medicines funded by the USD 6.36 million.⁶¹

While various deadlines have been locked into the settlement agreement and it is expected that the funds shall be spent within five years of their transfer, no complaints or sanctions procedure in case of irregularities in the asset recovery process has been established.

Similarly to the BOTA case, this agreement stipulates that the funds are to be used for the benefit of the local population and never for the benefit of the Equatorial Guinean government, public servants employed by the government, their relatives or any legal persons nor entities affiliated with them. Interestingly, the agreement mentions that the funds can also not be used for the benefit of organisations in opposition to the government of Equatorial Guinea.⁶²

The reasons why the United Nations and Medical Care Development International (MCDI) were chosen to be the recipients of recovered funds are not clear and there was seemingly no open tendering process. Equatorial Guinean civil society was not consulted in the decision and, in fact, criticised it⁶³ on the grounds that the International Monetary Fund had already provided an emergency loan to the amount of tens of millions of US dollars in September 2021 to help the country deal with the consequences of the pandemic.⁶⁴ Therefore, the decision to use the returning assets to fund Covid relief has been seen as somewhat redundant. Even though Equatorial Guinean civil society has come forward with recommendations around the reuse of these assets and has been approached about these ideas by the US government informally, no formal consultation process, nor a future

monitoring role has been assigned to date.⁶⁵

Outcomes

While the efforts of the US government to pursue and return the proceeds of corruption belonging to the citizens of Equatorial Guinea should be applauded, the lack of information surrounding the case makes it hard for the civil society to understand and track the benefits of this return. Particularly, it is unclear why and how recipient entities of the returning funds were selected, and whether and how exactly the return took place.

While in 2014, when the settlement agreement was signed, current asset recovery standards with transparency and accountability at their centre were not so well developed, a glance at BOTA foundation's structure, which was established at an earlier point, indicates that a lack of knowledge of transparency standards cannot be the reason behind the lack of information surrounding this Equatorial Guinea return. Equatorial Guinean civil society has, in light of the ongoing rule of the Obiang family, rather called for returned assets to be used for anti-corruption programming and the building of anti-corruption institutions, as well as building the capacity of local civil society by inviting them to monitor the process.⁶⁶

Further, it is important to note that the U.S. still holds USD 10.3 million from Obiang's 2014 settlement.⁶⁷ Bipartisan letter in January 2022 urged the U.S. government to release its plan to return these funds to Equatorial Guinea but so far there has been no announcement on how this money will be used or returned.⁶⁸ Since the modalities around this return have not been agreed upon, the U.S. government has a great chance to formally involve Equatorial Guinean civil society in the negotiations to accelerate the process and impact of the return.

NON-GOVERNMENTAL ORGANISATIONS

The repatriation of funds can also be done by contracting one or more non-governmental or civil society organisations, either operating internationally or based in the receiving country. A return case combining the use of both types of NGOs is the return from Jersey to Kenya announced last year

Jersey to Kenya return - FRACCK I

Assets confiscated:	GBP 3 million (USD 3.7 million)
Assets returned so far:	In process
Years from confiscation to disbursement:	8+ (2016 – ongoing)
Third-party entities appointed with disbursement of funds:	Crown Agents, Amref Health Africa
Third-party entities appointed with monitoring of disbursement	Project team (representatives of government of Jersey and Kenya, Crown Agents, Amref Health Africa) and the FRACCK Steering Committee

Background

A basis for this return is a corruption case involving Kenya Power and Lighting Company head Samuel Gichuru who is alleged to have hidden kickback money in bank accounts in Jersey. Between 1999 and 2001, Gichuru contracted several engineering and energy companies who in turn made corrupt payments to Windward Trading company, controlled by Gichuru. The Jersey-registered Windward Trading cooperated during the international investigation, involving twelve jurisdictions,

and pled guilty to money laundering. Subsequently, the company was stripped of all its assets, which resulted in the confiscation of around GBP 3.6 million in 2016.⁶⁹

Jersey has been trying to extradite Gichuru, together with the former Kenyan Energy Minister, Chrysanthus Okemo to face money laundering charges of up to 14 years in jail in connection with Windward's activities. The extradition request was first made in 2011 and the court proceedings in Kenya have been ongoing ever since without a final judgment so far.⁷⁰

The return agreement and structure

The return of GBP 3 million of the confiscated amount was announced in March 2022 by the signing of an Asset Recovery Agreement (ARA) between the governments of Jersey and Kenya. The ARA is the first return under the Framework for the Return of Assets from Corruption and Crime in Kenya (FRACCK),⁷¹ a multilateral initiative involving Kenya, the UK, and Switzerland and Jersey, signed by state representatives in August 2018.

Initially, the funds were to be directed to projects within the energy sector but were redirected to health interventions following the onset of COVID 19. Two non-profit organisations were tasked with disbursing the funds, Crown Agents, a non-profit development company, headquartered in London, and Nairobi-based NGO Amref Health Africa.

The vast majority of the funds - 90% - was set to be allocated to the procurement of medical equipment by Crown Agents, and 10% of the funds was earmarked for a project under Amref Health Africa to strengthen healthcare worker capacity and home-based care at the community level.⁷²

Transparency, integrity, and accountability considerations

The ARA includes provision on transparency and information sharing in Article 10.⁷³ It envisages but does not mandate the publication of asset return documentation, including the interim and final reports, as well as the agreement itself. It calls for the signatory parties, and the FRACCK Steering Committee under whose framework the agreement was made, to have access to all project-related documents.

The ARA for the recovery, transfer, repatriation, disposition and management of recovered assets sets out "to ensure the proceeds of crime are returned to Kenya in a manner transparent and beneficial to the people of Kenya," and that they do not benefit people involved in corrupt activities.⁷⁴ The monitoring of the project is entrusted to a project team comprised of representatives of both governments and the implementing partners. The agreement sets out key content requirements of the interim, as well as financial reports, with ultimate oversight lying in the hands of the FRACCK Steering Committee.

The implementing NGOs are prompted to adopt conflict of interest and anti-corruption clauses in their contracts, and the Government of Kenya is required to investigate any allegations of the misuse of funds. However, no provisions in the ARA exist around the procedure or possible penalties in the case of misappropriation of the returning funds. In the event of the use of funds which is out of the scope with the agreement or inability to carry the projects as envisaged, amendments and new terms would need to be negotiated.

Together with the roles of key implementing state authorities, the position of Crown Agents and Amref Health Africa as implementing organisations was established in the ARA. Attached to the ARA

are Service Level agreements which offer detailed implementation and monitoring plans for projects chosen to disburse funds. The selection of implementing projects was chosen by the FRACCK steering committee on the basis of pursuing development objectives and did not follow a tender procedure.

Outcomes

Nearly a year after the signing of ARA, as of February 2023, there has not been any information provided to the public on the start of the implementation of the projects focused on improving the health sector in Kenya. There have also been no signs of a campaign announcing the procurement of healthcare equipment or capacity building at the community-level. According to local public officials, the discussions on how the funds will be used are still ongoing.⁷⁵ Schedule 2 accompanying the ARA should provide details of the disbursement timeline to the implementing organisations but its details were kept confidential and have not yet been provided to the general public.

THE USE OF REGIONAL DEVELOPMENT BANKS

The above-described chosen cases are not an exhaustive representation of types of indirect return mechanism. Besides the supporting role of a multilateral organisation, international or local NGOs, or a foundation specially set up for the purpose of a return, a consideration for a greater role of regional development banks have also been proposed.

The Financial Accountability, Transparency and Integrity (FACTI) panel, recommended in its report focused on Achieving the 2030 Agenda, in recommendation 5A, that multilateral mediation mechanisms should be established to fairly assist countries in resolving difficulties on international asset recovery and return, and

to strengthen compensation. Moreover, in recommendation 5A it further suggests that escrow accounts, managed by regional development banks, should be used to manage frozen/seized assets until they can be legally returned.⁷⁶

Similarly, the Common African Position on Asset Recovery (CAPAR) recommends to its Member States in its point 4.2.2 on Strengthening legal and financial institutions to aid the process of asset recovery that they strive towards: *"Ensuring that source countries benefit from frozen or seized assets pending their recovery and return through the establishment of funds, trusts or dedicated African escrow accounts, to be held by regional financial institutions"*.⁷⁷

Regional development banks may be well placed to hold frozen funds while the terms of asset recovery cases are being negotiated. This can sometimes take several years during which the funds usually appreciate in value and gain interest. Since regional development banks are headquartered and operate in many countries of origin, they might have closer ties with local stakeholders and might be well placed to take on a monitoring role over the disbursed funds as well. The use of the regional development banks could also avoid some of the criticism that the engagement of World Bank in asset recovery cases has faced.

However, the use of the regional banks might not be without its risks. Closer ties to the region might potentially bring conflict of interest in the oversight of the returning funds, especially in situations when ruling government officials implicated in corruption scandals are also part of the regional bank's supervisory structures. Moreover, regional banks themselves, for example the African Development Bank, has witnessed several incidents suggesting governance issues and potential

OPPORTUNITIES AND CHALLENGES IN INVOLVING THIRD-PARTY ENTITIES

As cooperating states try to navigate and balance the political, social and economic realities of asset returns, they might consider the use of an indirect return mechanism with the aid of a chosen party. The examples analysed in the previous chapter show that these returns can offer benefits, for example in the form of an additional oversight body which might be required in challenging environment. However, on the downside, they also require additional resources to be allocated towards administration and monitoring activities, which increases the overheads costs at the expense of programmatic spending. The following section looks at some of the opportunities and challenges inherent in using indirect return mechanisms for the recovery of stolen assets.

OPPORTUNITIES

Increased oversight over and transparency of the returning funds

The decision to channel recovered funds indirectly via third-party entity should make the oversight and monitoring of asset disbursement accessible to all involved state parties equally. This is in contrast to situations of a direct return, when the receiving government has direct control over the funds, as well as how much information it will share with other interested parties. Because the funds in indirect returns are managed by a body independent from the governments, with set guidelines over the distribution and reporting on the returning funds to engaged stakeholders, the oversight of these funds is arguably more stringent and at times more transparent, especially towards the sending state party.

However, the involvement of a third-party does not automatically increase the amount of information available, especially to the public, and the parameters for this need to

be established in advance. When looking at the cases described through the lens of the transparency and accountability standards of returning stolen assets introduced by CSOs,⁷⁹ we receive a mixed picture. While the BOTA and Abacha II returns fulfill many of the criteria proposed as best practice in the transparent involvement of third-party entities, the return to Equatorial Guinea and Kenya so far have left many questions unanswered.

Lower risk of misappropriation of returning assets

Connected to the previous point, the involvement of third-party entities can lower the risk that the returning assets will be re-looted. Such a risk is directly lowered by the increased oversight and transparency criteria usually employed but can also be by the establishment of additional safeguarding measures on the side of third-party entities. These can include terms over conflict of interest policies, complaints mechanisms and also processes for identifying and compensating victims of crime.

Moreover, because the sending government has easier access to information about the project's progress via the third-party entity involved in the disbursement projects, return agreements often envisage the transfer of funds in several instalments. This gives the sending government the opportunity to halt the payments in case any financial discrepancies or programmatic issues arise. For example, funds for the BOTA Foundation's costs and programmes were kept in the frozen account in Switzerland and they were transferred to Kazakhstan on a semi-annual basis. The transfer was contingent on the approval of work programmes and budgetary reports, which were submitted by BOTA staff every six months for a sign off to BOTA's Board of

Trustees, the World Bank and the three governments.⁸⁰

Third-party entities provide additional capacity

The organisations called in to aid in the indirect return process can be involved at many stages of the process, from helping to negotiate the agreement, monitoring the returning funds, or distributing returned funds through their programmes. Therefore, the organisations can add value depending on their skills and experience and depending on the skillset required for the particular return.

Typically, organisations are brought in for their experience with overseeing large cashflows and delivering programmes that benefit vulnerable communities. This has been the case in the Jersey-Kenya return when two organisations were tasked with using recovered assets for the procurement and capacity building in the health sector.

Different expertise was required from the World Bank when it was brought into the discussions between the Swiss, US and Kazakh government to act as an intermediary and a facilitator, which was particularly helpful in a situation where the ownership over the frozen assets were initially disputed by the three involved governments. The World Bank was seen as the “founding force” of the BOTA Foundation and led on the development of the disbursement and monitoring mechanism to repatriate the disputed funds, as well as negotiations between the three governments, and later also with civil society.⁸¹ Such mediation and facilitation can at times speed up the negotiation process.

CHALLENGES

Conditionality as the infringement of national sovereignty

Because the involvement of third-party entities in practice means the imposition of conditionalities on the asset return process, it can be perceived by the receiving government as a threat to its sovereign rights over the assets.

Aside from pure questions of ownership over the returned funds, while third-party entities can contribute towards more transparent and accountable return of funds, the track record is not fully conclusive yet.

Mixed results, together with the consideration of higher operational costs, and loss of control over the assets, can make the use of the third party less favorable in the eyes of receiving countries.

These differing views between the sending and receiving governments over the questions of conditionality in the return of stolen assets and the involvement of third parties can then lead to protracted negotiations and difficulties to find a suitable asset recovery modality.

Costs of monitoring and administration

The involvement of additional independent organisations involve overhead costs that need to be spent on staff, monitoring and auditing activities that are not present in direct returns in the same way. In indirect returns, these costs often need to be covered from the pool of recovered assets, whereas they would likely be covered directly by the receiving governments in the case of a return to its budget or a government run programme.

The amount of these additional costs directly depends on the number of

safeguarding measures and layers of oversight that are placed upon the return, which might need to be higher in politically challenging contexts. BOTA, as the most complex administrative structure, which involved not only two implementing international organisations but also the World Bank to monitor and sign off on some decisions, spent about 30% of its total funding on costs linked to programmes, operations and overheads.⁸² Moreover, additional structural complexity often brings a risk of an increased bureaucratic burdens, the need to extend timelines which in turn pose a further pressure on indirect costs.

Discretionary choice of independent organisations

In some cases, organisations involved in the indirect return are chosen after an open tender, like the contracting of IREX and Save the Children for BOTA. In most of cases, however, the choice is made during closed door discussions between the governments involved in negotiations over the return. The rationale behind these discretionary choices is not always clear and, if the voice of civil society is not heard, the choice risks not only being questioned by the people but also not delivering for the citizens of the country of the origin. Questions like this have been raised in the Equatorial Guinea return analysed in this paper, where the governments agreed after closed door negotiations on the funds being spent on costs related to the COVID-19 pandemic, even though a substantial loan for the same purpose had been promised from another source just a few days prior.

Additionally, while the position of the World Bank as a multilateral organisation is somewhat unique and it has been involved at different stages and different roles in recovery cases, why the World Bank is contracted for particular services and returns is not always clear. On one

hand, the World Bank is often seen by the countries of destination as a reliable partner with transparent and accountable service delivery. On the other hand, because it usually implements its programmes through government agencies, it might not always be possible to ensure complete oversight and that the programmes will benefit the intended communities.⁸³

Sustainability of disbursement projects

Unlike direct returns which arguably boost the budget and the capacity of the receiving government, indirect returns rather build the programmatic capacity of third-party entities by channeling the recovered assets through their programmes and by asking them to monitor them. Multilateral organisations, however, often contract local agencies through which they implement their programmes. Even though the chosen third-party entities usually have a history of implementing projects in the receiving country, because these types of projects usually run only for a limited time and are contingent on the funds from an asset return, questions over the future and sustainability of such programmes, especially without any government involvement, can be raised.

CONSIDERATIONS IN THE USE OF AN INDIRECT RETURN

Indirect asset returns offer various opportunities and challenges and their use in recovery cases should follow a careful assessment of what they might mean for a particular asset return. Below are some further considerations that might guide the choice of government deciding for a return modality, as well as anti-corruption activists choosing a modality to advocate for.

POLITICAL REALITIES IN INVOLVED STATE PARTIES

In order to sign an asset return agreement, both the sending and receiving country need political will to find a compromise and deliver the stolen assets back to the victims of corruption. Evolving realities around geopolitics, economic or other cooperation can have a positive or negative impact on the speed of return negotiations. Return negotiations need to strike a balance between administrative and monitoring costs on the one hand and the need to put in place safeguards against re-looting on the other. Therefore, openly acknowledging potential bottlenecks might help in finding the most appropriate solutions, the type of return and the granularity of common agreements. Where parties foresee difficult negotiations ahead, the establishment of deadlines that move decisions ahead, as in the Equatorial Guinean case, can be useful. However, this comes with the risk that the use of third agencies may also face criticism for increasing conditionalities on the return of funds.

Since indirect return mechanisms are accompanied with more conditionalities on how the returned assets should be spent and more oversight over how the spending is undertaken, they are more appropriate in cases where government cannot guarantee sufficient safeguards for the assets not to be looted again. In cases where some of the officials responsible for the misuse of assets might still be in power, it is particularly

important to channel the assets via third parties and impose strict monitoring requirements even though they come with an additional cost. The imposition of oversight mechanisms in the form of third parties might be the only way to return assets to corruption victims in difficult environments, such as in non-cooperative authoritarian regimes and fragile states.

THE TYPE OF INVOLVEMENT OF THIRD-PARTY ENTITIES

If an indirect return with the involvement of an independent organisation is found to be fit for the purpose of a particular return, considerations should be given with regards to the type of organisations and expertise that are needed. The choice should depend on the needs of the return, as well as the development or capacity building need identified in the receiving country. Organisations can have strengths in specific areas of service delivery, in reaching the most vulnerable population, in navigating risky environments or even in mediating between involved state parties.

Close attention should also be given to the consideration over whose interests are being represented in by the third-party entity. Multinational organisations, such as the World Bank and the United Nations, do not directly report to citizens but are funded and comprised of member governments. Therefore, in cases when multinational organisations are chosen as the main service delivery party, state parties should take extra care to involve civil society in the asset recovery process to provide the communication with corruption victims and local stakeholders. Moreover, the decisions over the involvement of particular third parties should be clarified to the public and follow an open tendering process, where possible. Important here is also a cost/benefit analysis as to why a third party return in the form envisioned is

more beneficial than another kind of return modality, and more beneficial than a direct return.

THE INCLUSION OF CIVIL SOCIETY AND CORRUPTION VICTIMS

Our analysis, as well as research from other organisations, increasingly points to the beneficial role of involving civil society in negotiating, monitoring and distributing recovered assets. In countries with weak or repressed civil society, unable to oversee the disbursement returned funds, or where their particular expertise is required, the involvement of international organisations might be needed. However, the local population should be included as much as possible throughout the whole process.

Whenever possible, including involved civil society should be done from the start of the negotiations, not only once agreement between governments is reached. This can ensure that the funds are used in a way most beneficial to the local population and that CSOs can raise awareness and manage expectations of the public around the return. CSOs are also best placed to represent and amplify the voices of corruption victims in the country of origin and ensure they are adequately compensated.

Advocacy, management and organisational skills, together with an established track record of operating in the local country context are key to successful involvement of CSOs in return cases. In order to be part of the process of disbursement and monitoring of funds, civil society lacking specific technical skills and experience can be offered training programmes and gradually assume more responsibilities. Capacity building can then ensure the takeover of the programmatic operations from international staff to local citizens, as it was the case in Kazakhstan with the BOTA foundation.

TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY STANDARDS

No matter the type of third-party entity or entities involved, the return modalities should adhere to international standards and best practices regarding transparency, accountability and integrity. As described above in the Chapter 2, the Civil Society Principles for Accountable Asset Return provide key pointers for policy makers on these standards.

In order to promote the rule of law and minimize the risk of misappropriation of returning funds, transparent and accountable asset return frameworks are key. The cases analysed throughout Chapter 4 show that while it is now a common practice for governments to share some information about upcoming asset returns, further details about the exact modalities of these returns are needed in order to secure the highest impact.

Specific to indirect returns is the need of the governments to find, procure and agree on one or more organisations, which will be tasked with the distribution of the returning money via its programmes. Here again, governments or entrusted third-party entities should adhere to best practice and make as much information about the choice of these organisations public. Where organisations have been chosen based on an open tender, which is the ideal modality although highly dependent on the circumstances surrounding the return, the procurement documents should also be published to clarify the choice taken.

While all indirect returns analysed in this report published a Memorandum of Understanding and/or an Asset Recovery Agreement providing information about monitoring activities to be undertaken, not all cases include the publication of detailed oversight documentation. Not doing so is a missed opportunity because the ability of

the public and civil society to trace returns from the start until the end can help to raise their budget tracking capacity. It can also increase the oversight over these funds and minimize the re-looting risk.

CONCLUSIONS

CONCLUSIONS

There are many considerations that both countries of origin and countries of destination need to reflect on when deciding on the modalities of asset return. Even after the assets have been successfully confiscated, whether through a settlement arrangement or completed criminal or civil prosecution, the successful and timely disbursement of funds to the victims of corruption and other crimes in the origin country is not guaranteed.

In order to mitigate the risk of re-looting and to highlight the success story of the returning assets, the disbursal of funds is sometimes done indirectly through the involvement of third-party entities. In some circumstances, the use of an independent party to channel and deliver funds might be driven by human rights concerns, and in cases of a return to fragile or hostile countries, they might be the only possible way of a return that safely delivers those funds to the corruption victims.

As there are currently no official statistics which would track how much money is being confiscated and returned each year across countries, there are also no central accounts that would provide insights into the proportions of returns conducted via indirect mechanisms. The four cases analysed here are: BOTA Foundation, Abacha II, US - Equatorial Guinea and the Jersey - Kenya FRACCK return. While not an exhaustive list of cases which involve third-party entities, they offer an indication into some of the economic, social and political challenges and opportunities that might arise in using third parties in asset return. Future research after all of the analysed returns are completed and evaluated might look further into financial considerations of indirect returns and conduct a cost-benefit analysis of involving third-party entities.

Nevertheless, experience from these and similar returns indicates that the inclusion of one or more actors in the return process brings several advantages and increases the chances for the return not only to happen successfully but also to have impact. This is because the assets managed by an independent organisation are kept separately from the state budget of the receiving country, which can enhance oversight over the spending of these funds and creates an opportunity to halt the payments in case any financial discrepancies arise. This is especially relevant in countries with a weak rule of law or fragile contexts and can then lower the risk of misappropriation of the returning assets. The entities called in to aid in the indirect return process can also improve the asset return due to the skills and experience they have, ranging from their help in negotiating the return, to overseeing large cashflows and delivering programmes that benefit vulnerable communities.

However, there are also some challenges that the involvement of independent third-party entities brings to the return process. The involvement of additional parties increases the costs of monitoring and administration and thus decreases the money that will be distributed back to the population. When the programmes are set up specifically for the purpose of one return, they can be seen as not systemic enough and lacking sustainability in their planning. Moreover, the choice of the implementing party is not always clear and made public, which risks alienating the public and local civil society from being engaged in the process. Moreover, the use of a third party might also be seen as adding unnecessary conditionalities to the return process and thus be a source of discontent over the manner of return on the side of the receiving government.

Policy makers and civil society should therefore consider several factors when deciding to advocate for this type of return:

- An **assessment of the rule of law in the receiving country** should be made. Indirect return mechanisms are best suited for environments that require additional monitoring safeguards provided by an independent third-party entity or when the relations between cooperating governments are challenging.
- The **type of organisation and expertise that are needed should be guiding principles** when deciding which independent organisations will be tasked with receiving the returning funds and distributing them via their programmes. Moreover, third parties should be appointed through a public process, where possible, and the public and civil society should be given information about why particular organisation(s) were chosen and not chosen.
- Civil society **organisations representing local populations and the victims of corruption should be involved** in negotiating, monitoring and distributing recovered assets. In countries with weak and repressed civil society, or where expertise is lacking, the involvement of international organisations can fill this gap or to work together with local organisations. However, local organisations should be included as much as possible, even if this means investing into building their capacity to do so over time.
- Return modalities should adhere to **international standards and best practices regarding transparency, accountability and integrity**. Of particular importance to indirect returns is publishing monitoring and evaluation information created by third-party entities, as well procurement documents related to the contracting processes and detailed texts and agreements on the modalities of the return.

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