



## Recovering the Proceeds of Corruption: How States Can Recover Stolen Assets

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*Cooley discusses the legal options open to states seeking to locate, freeze and recover the proceeds of corruption laundered to foreign states, and considers their advantages and disadvantages.*

Corruption cases are typically international and multi-jurisdictional. Bribes for the award of public contracts or stolen public funds may be paid into foreign accounts or used to acquire foreign properties or other assets; the proceeds of corruption may be laundered through a number of countries, usually involving both major financial centres and offshore jurisdictions.

The available recovery mechanisms are criminal or civil; or, in the case of civil forfeiture by law enforcement agencies in the absence of criminal conviction, a hybrid of the two. These mechanisms are all identified by the United Nations Convention Against Corruption (UNCAC) as viable routes to recover the proceeds of corruption.

However, the choice of mechanism sometimes polarises opinion. These practitioners will usually point to individual examples that support their viewpoint.

In our experience, the "correct mechanism" for an individual case will depend on its particular facts and include analysis of the potential value and speed of recoveries. There are some circumstances in which the criminal route is the most likely to achieve meaningful recoveries in a sensible time-frame, and others where the civil route is more likely to do so. In some cases either the criminal or civil mechanism is unavailable, so the choice is between a particular route and no recovery at all.

An effective asset recovery strategy is likely to make use of a combination of criminal and civil mechanisms. At the outset, states often carefully consider the circumstances before selecting the right route for a particular case. There will always be difficult cases where reasonable people can quite properly disagree, often on incomplete information, on

the most effective recovery route. But there are also plenty of cases where the correct route is reasonably obvious on open-minded analysis.

### Options for Recovering the Corruption Proceeds

A victim state has the following broad options when seeking to identify, freeze and recover corruptly acquired assets that have been laundered to foreign countries:

- Mutual legal assistance to obtain evidence for domestic criminal investigations or prosecutions;
- Mutual legal assistance seeking enforcement abroad of domestic confiscation orders obtained after criminal conviction, for example for the value of the benefit obtained by a defendant from corrupt conduct;
- Mutual legal assistance seeking enforcement of domestic forfeiture orders against the proceeds of corrupt activities held abroad;
- Criminal or forfeiture proceedings brought by a foreign law enforcement agency to recover assets in its own country deriving from corrupt activities elsewhere, followed by the repatriation of those assets;
- Domestic or foreign private civil proceedings brought by the victim state against former or current public officials, or against associates or financial institutions that have assisted public officials to obtain and launder the proceeds of corruption, or against bribing companies.

### Mutual legal assistance in criminal proceedings

Mutual legal assistance is a process by which countries co-operate over the investigation, prosecution and enforcement of criminal offences where evidence or the proceeds of crime are available in two or more states. It

offers various benefits in a programme to recover corrupt assets.

- Evidence that is only available abroad can be obtained to assist a domestic investigation or prosecution, or to trace assets;
- A joint investigation team may be established, offering closer co-operation with foreign authorities in the investigation and prosecution of the corrupt conduct, and the recovery of assets;
- Foreign states can be asked to freeze assets believed to represent the proceeds of corruption prior to, or during, criminal investigations. Mutual legal assistance can therefore be an effective and cheap method of securing assets at an early stage, pending later attempts to recover those assets;
- It is typically the mechanism through which domestic confiscation or forfeiture orders are enforced in a foreign country;
- Evidence gathered through mutual legal assistance can sometimes be used in civil claims. This typically requires the permission of the foreign state providing it. Some states are unable legally to consent to the use in civil proceedings of evidence obtained through mutual legal assistance. Countries that can consent vary in their willingness to grant permission, and defendants will usually challenge a positive decision.

More information about the process is contained in our briefing "Mutual Legal Assistance in Corruption Cases".

### Enforcing domestic confiscation or civil forfeiture orders abroad

Most jurisdictions have legislation permitting assets derived from criminal conduct, or untainted assets to the value of the benefit obtained from criminal conduct, to be confiscated following criminal conviction.

Many jurisdictions have also given their law enforcement agencies, in the absence of criminal conviction, power to bring civil forfeiture proceedings to recover the proceeds of crime (including corruptly acquired assets).

Some countries deploy a non-conviction based forfeiture mechanism only where criminal proceedings cannot take place, for example, because of the death or serious illness of the accused, or where the accused is a fugitive. Others permit its use whenever it is considered to be a more effective mechanism than criminal proceedings to recover

corrupt assets. Usually, forfeiture mechanisms have a lower burden of proof than criminal proceedings, with the case being proved on, for example, the "balance of probabilities" test typically used in private civil proceedings.

UNCAC requires signatories to enforce foreign confiscation orders consequent on criminal conviction, and permits signatories to allow enforcement of forfeiture orders.

Most jurisdictions require specified criteria to be fulfilled before enforcement of an overseas confiscation order. For example, criteria in the UK for enforcement of foreign criminal confiscation orders include:

- Order must specify the assets against which enforcement is sought (although the asset can be traced if converted: for example, enforcement is available against the proceeds of sale of a property named in the confiscation order);
- Order must be based on a finding that the assets were obtained as a result of or in connection with criminal conduct (being conduct which would be an offence if committed in the United Kingdom);
- Order and the underlying conviction from which it derives must be in force and not subject to any appeal;
- Order must be compatible with the European Convention on Human Rights, which can provide scope for defendants to cause delay pending determination of false claims that they were not given a fair trial.

### Foreign criminal or civil forfeiture proceedings

Foreign authorities may be willing to bring criminal proceedings against offenders within their jurisdiction. Potential defendants may include corrupt public officials that have transferred funds or acquired assets within the jurisdiction, advisers and banks that have helped to launder the proceeds of corruption, or contractors and suppliers that have paid bribes to win contracts.

Most foreign states can, following conviction, confiscate assets obtained through corruption or sometimes, where those assets have been hidden or spent, other assets to the value of the benefits obtained from the corrupt activity. Civil forfeiture powers may also be available to recover the proceeds of corruption in the absence of a conviction. In either case, recoveries can usually be repatriated to the

victim state, or the defendants can be ordered to pay compensation.

As part of criminal or civil recovery proceedings, foreign authorities may also be able to freeze corruptly acquired assets within their jurisdiction, sometimes at an early stage of an investigation.

In some countries (for example Switzerland and other civil law systems) the foreign state seeking to recover assets can become a party to the criminal proceedings. On conviction an application can be made for damages or the recovery of corruptly acquired assets. Where available this is a powerful procedure: the foreign state usually has access to all of the evidence that has been gathered by the Court, is present when the Court questions suspects and witnesses, will be able to ask its own questions, and can itself apply for the recovery of the proceeds of corruption.

Some Governments are willing to enter into bilateral asset sharing agreements with foreign countries. The terms are individually negotiated, but typically provide that assets misappropriated from one state party and recovered by the agencies of another are shared in an agreed proportion.

### Civil proceedings

Private civil proceedings are a separate recovery mechanism. They are not dependent on Government to Government co-operation. A state engages lawyers to bring a claim in the civil courts of a foreign jurisdiction, just as a wronged private company or citizen would do.

One important distinction between most criminal and civil mechanisms is their differing burdens of proof: "beyond reasonable doubt" or similar language is used in criminal systems while a lower test such as "on the balance of probabilities" is applicable in civil cases. There is a huge difference between these tests, which can be significant where information and evidence about a corruption scheme is incomplete.

The nature and formulation of available civil claims will vary across jurisdictions. Many jurisdictions permit a state, in civil proceedings, to recover bribes and stolen assets, or their value, as well as damages for losses caused by corrupt activities. Some legal systems permit a victim state to recover the profits that public officials, and others, have obtained from corrupt activities or even from successfully investing the proceeds of corruption.

Potential defendants to civil claims include corrupt public officials and the companies or other legal entities they use

to receive, hold, launder and conceal the proceeds of corruption; associates of public officials that have participated in corruption or assisted with the laundering of funds; and banks, solicitors, financial advisers and other professionals that have assisted public officials or other defendants with corrupt activities or have knowingly laundered the proceeds of that corruption. Civil proceedings therefore can sometimes offer a wider range of targets than criminal alternatives.

Civil proceedings typically offer a range of weapons to assist in tracing, freezing and recovering the proceeds of corruption. These include *mareva* or freezing injunctions to preserve assets pending the outcome of the case, and orders requiring defendants or third parties to provide information and documents to assist the tracing, freezing and recovery of the proceeds of corruption. In corruption cases, these may initially be obtained without warning to the defendants.

### Factors to weigh when considering criminal and civil asset recovery mechanisms

A successful asset recovery strategy involving cases against a range of defendants and assets is likely to make use of a variety of mechanisms. The prospects for making successful recoveries are enhanced by early evaluation of the most appropriate mechanism for a particular case, and review of the decision if circumstances change. Co-ordination and co-operation between criminal and civil teams, if and to the extent legally permissible, can be a vital factor in ensuring overall success.

Deciding which recovery mechanism to deploy in a particular case requires a victim state, at the outset, to consider and weigh answers to all or some of the following questions, or versions of them.

#### **Is the imperative to prosecute a particular offender, or to recover his corruptly acquired assets?**

Ideally, of course, offenders will be prosecuted, and corruptly acquired assets confiscated following conviction. Where prosecution is both desirable and available in a sensible time-frame, asset recovery may have to await the conclusion of the criminal process, although assets should typically be secured at an early stage through criminal restraining orders.

However, prosecution of other offenders may not be possible or desirable for a number of reasons, including

death, flight, immunities or political influence or interference. In addition, particularly where resources are scarce, a decision may be made that minor participants in corruption should not be prosecuted but their corruptly acquired assets should be recovered. In all of these circumstances, the choice of asset recovery mechanism will be between civil forfeiture and private civil proceedings.

### **What asset recovery mechanisms are legally and practically available?**

There is no point investing time in a mechanism which cannot lead to success, or in obtaining a judgment that does not meet the criteria of a relevant foreign state for enforcement.

At the outset of a case it is necessary to assess what asset recovery mechanisms are legally and practically available to actually recover assets.

It is also necessary to consider the impact of immunities and statutes of limitation, if applicable. Their presence may mean one mechanism is more attractive than another.

As noted above, UNCAC envisages, as one asset recovery mechanism, that victim states can obtain confiscation or forfeiture orders in their own countries, which are then enforced in foreign countries where assets are located. Too often, it is simply assumed that this means a domestic order will be enforced in foreign countries, without an understanding of the criteria for doing so and the circumstances in which this will not be possible or can be disputed by defendants.

Enforcement is intended to be a streamlined procedure, with limited grounds for challenging enforcement. To date, however, the enforcement abroad of domestic judgments has been a rare mechanism in corruption cases for a variety of reasons. Domestic confiscation or forfeiture orders may not be obtainable due to the ability of the defendant to influence his domestic courts, or where the defendant absconds, or where criminal proceedings (including appeals) take many years, not least because defence teams engineer endless adjournments and appeals.

Further, assets may be held in the names of foreign companies and trusts. These may not be susceptible to domestic confiscation or forfeiture proceedings, or to judgments or orders made against their owners or beneficiaries personally. Foreign jurisdictions may not allow enforcement of confiscation orders against trusts and

companies that did not themselves participate in the proceedings.

Finally, defendants may challenge enforcement, alleging for example that judgments against them are politically motivated or obtained without due process, meaning delay as the issues are litigated for a second time.

Where available, civil proceedings in the courts of the country where assets are located may be a necessary or more efficient recovery solution where it is difficult to obtain, or enforce abroad, domestic confiscation or forfeiture orders. This is particularly so where the foreign state cannot or will not bring its own criminal or civil forfeiture proceedings to recover assets.

Where contemplated, advice will be required at an early state as to whether civil proceedings are available, and whether the foreign court has jurisdiction to determine a claim to the relevant assets. Courts will invariably have jurisdiction to deal with disputes over assets in their own country, even where the corrupt activities giving rise to the assets have occurred elsewhere.

### **Is further evidence necessary to win or bolster a case, and how can it most effectively and expeditiously be obtained?**

In international cases, the most effective method of obtaining evidence of corrupt activities and linking those activities to particular assets is usually mutual legal assistance in support of a criminal investigation or prosecution, provided that timely and meaningful assistance can be obtained. This is because law enforcement agencies usually have a range of powers to require the disclosure of evidence and information, particularly from third parties such as banks. That information and evidence can often be obtained before proceedings are brought, often without the knowledge of the alleged wrongdoers. Criminal mechanisms are also less likely to be constrained by banking secrecy laws, which can apply in the civil context.

If a victim state does not already have sufficient evidence to bring or win a case, criminal mechanisms may be the only way to obtain it. The position will be more complex where there is already sufficient evidence to bring a civil claim, recognising the lower burden of proof discussed below, but there is more evidence to obtain that could bolster a case or lead to further claims.

On the other hand, mutual legal assistance has, for a variety of reasons, proved in some cases to be a slow and ineffective process.

Civil proceedings do offer various mechanisms to obtain evidence, including disclosure from third parties, although generally they are more cumbersome than their criminal equivalents and usually require that proceedings have commenced or are imminent.

However, particularly in common law jurisdictions, defendants to private civil proceedings are required, or can be required, to disclose relevant documents and information, which is not always the case in the criminal process. A failure to disclose documents can lead to adverse inferences against the defendants that documents have been withheld as they would demonstrate corrupt activities, or even judgments in default of compliance with Court orders.

### **What is the most effective method of freezing assets?**

Where available, mutual legal assistance is often the most effective method of securing assets. Foreign authorities often have an easier test to satisfy when freezing assets: they do not have to demonstrate a claim to the asset, merely that an investigation has commenced and there is evidence that the assets represent the proceeds of crime (e.g. sometimes nothing more than a reasonable suspicion, although a reasonable belief is required in other countries, like the UK). However, they do bear the cost of freezing assets.

Sometimes, however, foreign authorities are unable or unwilling to freeze assets at an early stage through criminal mutual legal assistance mechanisms, or cannot do so sufficiently quickly.

Civil proceedings in most states, but not all, allow a state to freeze or attach assets in circumstances where defendants may conceal them to avoid later enforcement. Where available, states seeking to freeze assets in civil proceedings often face more onerous obligations, including a duty to disclose all relevant known information to the Court, whether helpful or unhelpful, and the need to provide an undertaking to meet a defendant's losses and costs if the injunction is later discharged. In addition, the state will be expected expeditiously to issue and progress its claim at the point that the injunction is obtained.

There is no invariable rule as to whether civil or criminal mechanisms should be deployed to secure assets. The relative ease and speed of obtaining civil and criminal freezing orders will vary between jurisdictions, and on the circumstances of the particular case.

### **What is the most effective method of recovering the assets?**

Determining which mechanism is more likely to recover assets quickly and cheaply itself involves a number of questions, including: How much is recoverable under each mechanism? How long will the process take, including appeals? Is the standard of proof relevant? Are claims available against third parties? Are waivers, amnesties, settlements and plea-bargains available and desirable?

As a general rule, assets are often more likely to be recovered quickly when proceedings to recover them, whether criminal or civil, are taken in the jurisdiction where they are located. This is because the alternative is to take proceedings in another jurisdiction, and then to have separate enforcement proceedings in the state where the assets are located. This creates a risk that the issues are effectively litigated twice over, causing substantial delay. Exceptions to this general rule include enforcement between countries that through treaty or other agreement have ensured mutual and efficient enforcement of judgments. A notable example is the enforcement arrangements between the states of the European Union. Another is the arrangements between some Commonwealth states.

### **How much is recoverable?**

When deciding which mechanism to deploy, consideration needs to be given as to which mechanism is likely to lead to the recovery of the most money or valuable assets. That will sometimes be criminal mechanisms and sometimes civil, depending on the circumstances of a case.

Civil proceedings for corruption often offer a range of different legal theories as to how claims can be formulated. These theories may lead to claims for different amounts. Further, civil judgments for damages can usually be enforced against any assets belonging to the defendants, including assets which derive from legitimate business activities or whose source is unknown.

Criminal or non-conviction based forfeiture mechanisms are sometimes limited to assets which can be specifically demonstrated to have been obtained through corruption.



The relevant laws of other states either contain rebuttable presumptions, where a defendant is shown to be corrupt, that his assets derive from corruption, or permit enforcement of judgments or orders against untainted assets.

### **How much time are proceedings likely to take, including appeals?**

The length of time it takes to conclude criminal and civil cases varies significantly from jurisdiction to jurisdiction, depending for example on the resources given to the Courts, the number of cases assigned to Courts, and the efficiency of the legal process. Timetables can be heavily influenced by the willingness of Courts to grant adjournments and permit procedural battles, and whether it is open to defendants to appeal any decision, procedural or substantive, to higher courts.

### **Is the standard of proof relevant?**

The quality of the existing evidence, and of the evidence that can reasonably be obtained, may be an important consideration in some cases. Criminal charges must typically be proved beyond reasonable doubt, or to a similar standard. Civil proceedings and civil forfeiture claims must be proved on the balance of probabilities, which is usually a significantly easier task. There are often cases where the strength of evidence is insufficient to have a high, or even reasonable, level of confidence of conviction, but where there can be confidence that the civil burden of proof will be met.

The relative difference in the civil and criminal tests may be important where there are gaps in the evidence, and inference of corruption may play an important role. The difference in the standards of proof may be of lesser or no importance where the evidence of corruption is overwhelming.

The standard of proof will also be relevant in jurisdictions that will make criminal confiscation and civil forfeiture orders only on proof of a link between the assets that are claimed and a specific offence.

### **Are claims available against third parties?**

There are sometimes barriers to, or reluctance about, prosecuting those that have assisted the principal wrongdoers to obtain and launder corruptly acquired assets, perhaps because of resource or evidential concerns. Civil claims may be available to a state against

those third parties for damages for their participation in corruption, or the return of assets they hold for the principal wrong-doers.

### **Are waivers, amnesties, settlements and plea-bargains available and desirable?**

The availability of ways to settle a case may be a relevant consideration. Settling corruption cases is often, quite understandably, a controversial topic. After all, settlements may lead to a corrupt official avoiding conviction or prison, or returning only some of his corruptly acquired assets.

However, settlements are often an important part of any asset recovery programme. Fighting corruption cases, whether through criminal or civil routes or both, can be time-consuming and expensive. Settlements achieve the pragmatic outcomes of avoiding prolonged and expensive litigation, ensuring the return of funds to the public purse, and helping to fund further cases. The attractiveness of any deal will depend on the terms of offer.

Settlements may be of particular interest in relation to those that have assisted the principal wrong-doers. They may be used, for example, to encourage junior civil servants, bank officials, and company employees to provide valuable evidence and information to assist with prosecutions and civil proceedings against the principal wrongdoers.

### **What is the cost, or range of possible costs, of action to recover assets, and how will this be funded?**

It is imperative to ensure that costs of a particular mechanism are reasonable and proportionate to the amount in dispute.

Generally, criminal mechanisms are cheaper for the victim state, although this is not always so. Enforcement of domestic confiscation orders is usually carried out by the foreign state in which the assets are located, and at its cost, although expenses may be deducted from recoveries or assets may be shared in accordance with bilateral arrangements.

Funding lawyers to bring civil claims can be expensive, particularly when claims need to be advanced or assets secured in several jurisdictions. Costs are sometimes difficult to predict as much depends on the manner in which claims are defended by the defendant. However, it is not uncommon for a successful claimant to recover a large proportion of its costs in common law jurisdictions.

In some jurisdictions a Government's lawyers may be retained on contingency arrangements, meaning they will be paid only following success and from recovered funds. In addition, where funding is legally available, commercial investors may fund cases in return for a share of the recoveries.

Under either approach, a state would not have to fund its legal team unless and until recoveries have been made. The cash-flow benefit is obvious. However, states need to ensure success fees are appropriate and reasonable, and need carefully to weigh whether contingency or funding arrangements really do offer "value-for-money": the amount paid on success may well be greater than costs paid under the traditional model of paying the lawyers for the amount of work undertaken at agreed hourly rates.

However, one objective of a successful asset recovery programme should be to ensure that funding is a short-term difficulty, with the programme moving into profit as early as reasonably possible. This will allow the virtuous cycle of recoveries being used in part to fund future action. Grants or loans may sometimes be available to fund cases.

## Conclusion

As this note demonstrates, there are a significant number of factors to take into account and weigh when assessing what asset recovery mechanisms are likely to lead to the largest and most efficient recovery of corrupt assets. The decision will rest on the particular circumstances of each case, and victim states should be alert to changing circumstances during the course of a case.

Careful consideration of the options at the outset of each case and during its progress, and an open mind as to the available mechanisms, will give a state the best opportunity to make meaningful recoveries in an appropriate time-frame.

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