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Panel on Giving Voice to Victims in Settlements and Asset Repatriation

Asset recovery as redress for the victims of corruption in closed societies

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1. Since corruption is a criminal offence, by definition there must be both perpetrators and victims, at least in cases known to me.
2. Who are the victims? The answer to this question differs on a case by case basis. The victim (or victims) might be a specific individual, group or entity. But at least in some cases, especially in the most corrupt regimes, the population as a whole is the victim - especially its poorest and most vulnerable members. This is because corruption diverts resources from the public finances that would otherwise fund programs of public interest.
3. A typical case that raises the question of who should benefit from asset recovery:
 - Foreign Investor A wants to acquire licenses allowing it to enter and operate in the lucrative domestic market of Country B.
 - Normally, according to domestic law, these licenses are issued by a state regulator. According to international standards, such an allocation of licenses should be issued through an open and transparent tendering process.
 - However, being aware of the political culture of omnipresent corruption in Country B, Investor A seeks a deal behind closed doors. It pays a bribe, say \$100 million, to the fixer of this deal. Of course, the investor, expecting to earn its money back, will try to pass on the costs to the consumers.
 - In a corruption-free country, this \$100 million would contribute to the state budget and, therefore, to various public services.
 - Who is the victim in this situation? There might be more than one category of victims. For example, it could be the paying customers who did not receive adequate and affordable services due to unfair competition.
 - Furthermore, the population as a whole is also a victim, since it did not receive public services worth \$100 million.
 - After a while, the corruption scheme is revealed and the assets are seized in a Western country where they are being held in a bank. Criminal or civil proceedings follow, which aim at forcing the confiscation of these assets.
 - The government of Country B files a claim, demanding that the assets be repatriated back to the country and placed under the government's control.

- But who should receive these assets totaling \$100 million?
 - Herein lies the question, can the government as a claimant be considered an innocent party, if it has turned a blind eye on the crime, to say the least?
 - If this country is a closed society, then returning the assets to its government may only perpetuate a vicious circle of grand corruption endemic to this state. Ultimately, this would be against the spirit and goals of Convention against Corruption.
4. But what do we mean by closed societies? We can define them through their opposite, open societies. Open is such society where human rights are respected, where there is commitment to rule of law, and where the government is democratically elected. Closed states are the extreme case of unfree societies, where the UN-enshrined civil and political rights, as well as social-economic rights are not observed. In such states there is a lack of institutional constraints on corrupt practices, such as division of powers; strong and independent judiciary; freedom of press and speech.
 5. One should be careful when deciding whether to return assets obtained through corruption directly to the governments of such states affected by an organized corruption system.
 6. The same, to some extent, could be applied to those states that don't demonstrate sufficient political will to establish the rule of law. The ill-gotten assets should be, instead, used for redress to the victims of corruption. That should become an axiom of international law and practice.
 7. The question is whether the UN Convention provides for such an outcome. The term "victim" is used in the convention mainly in the context of protecting victims as witnesses. Only in Article 57 (3) (c) it says that the proceeds of offence can be used for "compensating the victims of crime".
 8. In other sections, Convention gives priority to state parties in countries where the offence had taken place. Article 53 designates only state parties as the legitimate owner of property acquired through the commission of an offence. According to Article 57 (3) (a) and (b), it is a state party that is going to get back property confiscated in another state.
 9. This priority of state parties as a prime beneficiary of asset recovery, as it is stipulated in the UN Convention, is not surprising, as respect for the principle of sovereignty is clearly indicated in its Article 4.
 10. The question then is how to mitigate this apparent contradiction between the principles of state sovereignty and victims of corruption in respect to closed states?
 11. A compromise between these two principles is possible, and I see it in making sure the claim of the state party for assets is consistent with the fulfillment of its obligations under UNCAC. The convention requires state parties to take measures preventing and tackling corruption and creating respective institutional environment (see Chapter II.

Preventive measures; Chapter III. Criminalization and law enforcement). But what if the state fails to deliver on these commitments?

12. UNCAC already sets some stipulations that might restrict states' claims for assets, but these stipulations are limited to determining the prime ownership of the confiscated property (Article 57 (3) (b)). This should be expanded to determining whether the state party has taken anti-corruption measures suggested by UNCAC in Chapters II and III.
13. Under such conditionality, the repatriation of assets to closed states is possible, provided the assets are returned through transparent and accountable mechanisms. These mechanisms should guarantee that the assets reach the victims of corruption and compensate for the damage the victims suffered because of the offence in question.
14. The Bota fund represents such a lucky compromise between two principles, state sovereignty and representation of victims of corruption. Its value is also in the fact that the three-partite agreement, under which it was created, stipulated also a five-year program of technical assistance run by the World Bank to help Kazakhstan establish greater transparency of its public finances and oil revenues.
15. In each case such a mechanism of asset recovery can be different and tailored to the political context and conditions of the specific country. However, the model of this transaction should be derivative to the main principle: the assets must be used as redress for the victims of corruption.
16. Who can guarantee that the victims are compensated for the damage they suffered due to grand corruption? First of all, the states holding the assets and deciding how to dispose them.
17. What these states should do?
 - First of all, act responsibly, in accordance with the word and the spirit of UNCAC, that is, make sure that the assets are not used for perpetuating the vicious circle of corruption and are not stolen again.
 - Since UNCAC doesn't provide clear guidance on how to repatriate the assets, the countries holding them should act, first of all, in interests of the victims of corruption.
 - Finally, from the very moment of freezing the suspected corrupt proceeds and then filing forfeiture cases, these states should consult with civil society, to make sure the interests of the victims of corruption are well represented, or at least expressed. These might be human rights and anti-corruption organizations having a long record of acting on behalf of the victims of state abuses.