Symposium on IFFs: Illicit Financial Flows & FACTI Recommendations: Reforming International Asset Recovery Mechanism

By:

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Introduction The International Asset Recovery Mechanism as it currently operates is highly unfair and disadvantageous to developing African countries. It is a system frost with power game, colonial vestige, and the undermining of the African sustainable development agenda. Indeed, African countries persistently suffer from the detrimental impact of outward illicit financial flows (IFFs), stemming from complex and multifaceted criminal and commercial activities. Latest IFFs estimates from the United Nations Conference on Trade and Development Organization for Economic Cooperation and Development and African Development Bank (AfDB) reveal an ugly illicit financial flight that continues to deprive the continent of huge domestic resources and economic prosperity.

Since these large-scale financial crimes frequently entail the movement of funds across national boundaries, international collaboration to ensure proactive repatriation is crucial. Unfortunately, developed states are sometimes uncooperative or impose pre-return conditions that demonstrate power imbalance and hegemony. Developed countries are sometimes unjustifiably hesitant to return assets because it benefits them, fail to release the full amount and demand undue fees as dividends for asset management during the pendency of legal proceedings.

In an attempt to address these challenges, the latest recommendations of the UN High-Level Panel on International Financial Accountability Transparency and Integrity (FACTI) proposed among others, the establishment of a multilateral mediation mechanism for disputed asset recovery and the use of escrow accounts for frozen/seized assets. In this short piece, I reflect on these two recommendations, describing the delay challenge that African countries face under the current governance framework, reemphasizing the power asymmetry in recovery processes, and the need for what I describe as an "Africentric" reform in the creation of a new multilateral system and the development of guiding rules and procedures.

The Delay Dividend

The necessity to reshape the current fragmented, politicalized and uncoordinated international asset recovery mechanism has been on for decades. The United Nations Convention Against Corruption is the main international mechanism for asset recovery. Article 51 of the Convention treats asset recovery as a fundamental principle requiring states to provide the "widest nature of cooperation and assistance". However, several reports reveal that returning states do not often provide their relevant authorities with the financial, technical resources and human training to process requests on time in accordance with the UNCAC. Aside from that, delays have been at the heart of recovery and return processes, often caused by the returning state's lack of cooperation, heavy legal evidentiary burden, lack of effective channel of communication and what could otherwise pass as "delay tactics". This concern was expressed in paragraph 7 of the 2020 Decision on the Common African Position on Asset Recovery, in which it "*expresses concern on the present practices by destination countries of keeping identified African assets in foreign*

jurisdictions during the lengthy processes involved in recovery which result in source/such countries losing out on the potential monetization, use and enjoyment of such assets to the detriment of Africa's development".

Current data from the Stolen Asset Recovery Initiative (SAtR) shows that an overwhelming majority of countries waiting to have assets returned from developed countries like the USA, UK and Switzerland are developing countries, many of which struggle to secure their return. Interestingly, the most recent data from SAtR seems to suggest some positive development in repatriation efforts. The database currently flags 566 cases across 141 jurisdictions, with a total of USD 16.5B being the total value of assets frozen/confiscated/returned and USD 10.1B as the value of assets returned internationally.

Nevertheless, the incidence of illicitly transferred assets from corruption related IFFs indicates that current successes, compared to past indices while worthy of celebration do not reflect the whole picture of assets that still reside in offshore accounts/countries. Government officials and corporate entities continue to illegally transfer, and camouflage stolen assets through secret offshore vehicles. While there is no precise corruption related IFFs data for Africa, AfDB suggested in 2015 that Africa loses USD 148 billion to corruption every year, indicating a financial tune that astronomically exceeds current return developments.

Also, the database does not provide a wholesome narrative of IFFs related incidences since it relies mainly on the very narrow definition of corruption under the UNCAC which focuses mainly on corruption from public officials rather than corrupt practices from private companies in the form of tax evasion, bribery, and other dubious corporate activities that often cross legal boundaries.

Returning states benefit immensely from the delayed return of frozen/confiscated proceeds often benefit returning countries. Confiscated assets frequently end up retained by financial institutions in returning states, which persist in unjust profiting of the assets, or by the requesting states that oversee them for extended periods. In fact, the management of these assets, especially financial assets, may continue to be entrusted to a financial institution that facilitated the initial wrongdoing. Often resulting in further legal

and diplomatic tussles, the receiving States frequently lose significant amounts of the proceeds to fees charged by the returning states as administrative fees for asset management.

FACTI Recommendations on Asset Recovery and Return

Given the operational and legal challenges associated with asset repatriation by developing countries, mostly African states, the 2021 Report of the UN High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda recommended among others, two interventions namely; the creation of a voluntary multilateral mediation mechanism to help states fairly resolve difficulties in asset recovery and return and the use of escrow accounts for frozen/seized accounts until their return.

Recommendation 5A provides that the voluntary mediation mechanism should be hosted by a multilateral institution as a neutral third party that will assist concerned states to expeditiously resolve difficulties and disputes that arise during the recovery process. It also envisages the use of "common standards and procedures, building on good practice guidance already developed" that will ensure that repatriation processes are fair, and victims compensated.

FACTI has not provided any Implementation Notes on Recommendation 5A, but the proposal raises a number of important questions. These include questions on which multilateral institution should host the mechanism and what procedures/standards should be used. In the absence of an Implementation Notes, it is not clear who the hosting multilateral institution should be. However, there cannot be any doubt that a fair and equitable host would not be the World Bank or OECD dispute resolution mechanisms whose rules and standards are fundamentally determined by developed countries, especially the USA, which remains the principal haven for illicit assets from Africa.

On the other hand, there is some inclining based on Recommendation 5A that the common rules and procedure could be informed by the ongoing UNODC Working Group on Asset Recovery World Bank and other non-state actors' initiatives. It has been suggested that a more viable option would be to host the mechanism as a subsidiary body of the United Nations Convention Against Corruption, constituted by delegates of the Conference of the States Parties. While these may be the most favourable option for African States, the guiding

rules must be equitable and fair; it must be “Africentric” in the sense that the rules should respond to balancing current power asymmetry in international asset recovery and return processes. Also, there is a need to expand the definitional scope of corruption under the UNCAC to include illicit activities carried out by private actors whose activities constitute the lion's share of transfer funds out of Africa. Past advocacy efforts to ramp up support for the elaboration of the UNCAC to adopt a multidisciplinary approach and cover a wide range of areas including corruption in the private sector should be pursued alongside the mechanism if the initiative would be truly “Africentric”.

Recommendation 5B suggests the use of escrow accounts, managed by multilateral regional development banks, should be used to manage frozen/seized assets until they can be legally returned. This recommendation aligns with the African position as stated in AU Draft CAP on Asset Recovery which proposed that recovery efforts must ensure “...*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 institution*”.

Indeed, this mechanism if effectively operationalized would be immensely advantageous to African States. The proposal if implemented could lower administrative fees paid by receiving countries which often further deplete the face value of the proceeds or asset, aside from inflationary impacts. Also, taking the proceeds away from financial institutions that charge humongous fees for managing the assets despite being complicit in the transfer would disincentivize them since they have no perceived vested interest. FACTI Implementation notes on Recommendation 5B also proposed transferring management of assets to regional development banks like the AfDB, which arguably would be a neutral party. The process could be operationalized using an MOU between relevant states in a way that is mutually beneficial for all parties.

The difficulty with achieving this is the mechanism is conceived as voluntary rather than mandatory. Arguably, the recommendations would suffer from the political will of returning States if they would pursue it at all, or the transfer process may be stymied by unjustifiable terms and conditions that could fundamentally defeat the overall goal of the mechanism. Moreover, making it

voluntary could allow developed countries to cherry-pick which countries to contract with, which could lead to uneven development for specific regions. This is aside from the possibility of weaponizing the system for the diplomatic chip to the detriment of African States. In any case, African states must tread carefully.

Conclusion

The necessity for an effective and proactive asset recovery mechanism is central to Africa's sustainable developmental agenda. The FACTI recommendations discussed above are one of the many ongoing initiatives to combat the challenges with the extant governance framework. They indeed invite critical reflections but also underscore the disparity in the global financial system that undermines Africa's human and economic growth. As was briefly discussed in this short piece, African States disproportionately remain the victim of IFFs in billions of USDs. While it is most desirable for African States to focus on preventative measures that will close the gaps of cross-border illicit flows, effective, Africentric, and mutually respecting international recovery mechanisms must be aimed at to ensure prompt repatriation for leakages.

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