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The role of private actors in asset recovery

The growing use of private litigation funding

Among the many barriers to asset recovery, the lack of funding is a prominent challenge. Destination countries, on the one hand, are often criticised for not allocating sufficient resources to prevent corrupt actors from hiding and laundering stolen assets and the proceeds of corruption in their territories. Origin countries seeking to recover assets located abroad, on the other hand, often lack funding to support complex and intricate international legal assistance proceedings.

More and more countries are attempting to recover illegally obtained assets through private proceedings based on civil lawsuits, which can be faster and more efficient than the criminal avenue based on international cooperation, and yet are considerably more expensive.

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Query

Recent years have seen increasing involvement of private actors in asset recovery cases, notably to bear the litigation costs of such processes. What is the impact of this growing engagement by private sector players?

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MAIN POINTS

- Origin countries increasingly use private lawsuits based on civil proceedings to recover assets.
- Providing many valuable advantages, the civil route nonetheless comes with high litigation costs.
- The involvement of private actors who bear the litigation costs of asset recovery cases appears to be one option to address this funding issue.
- Private litigation funding in asset recovery remains scarcely regulated, which gives rise to risks of conflict of interest and opacity.
- Alongside a growing role for traditional models of private litigation funding, more novel practices, such as the sale of claims by origin countries to groups of investors, also appear to be on the rise, which brings additional risks and challenges to the integrity of the process and may, ultimately, undermine the whole asset recovery process and reinforce public distrust in measures to counter corruption.

1. Background: private litigation funding and asset recovery

a. State and non-state actors in asset recovery

Asset recovery encompasses the process to confiscate illegally obtained assets as well as their restitution to the country from which they were stolen.

Illegally obtained assets often do not remain in the jurisdiction in which they were stolen. Corrupt actors rather tend to place them abroad, whether in economic and financial centres such as Western capitals that provide a safe and reliable economic environment for their assets, or in tax and judicial heavens that provide them the needed opacity to

hide their identity and the illicit origin of their assets.

The traditional asset recovery model mainly focuses on public actors: on the one hand, the origin country, in whose territory bribes were taken or where public funds have been embezzled, and on the other hand the destination country, in whose territory the illegally obtained funds have been laundered.

New practices involving private actors have, however, begun to emerge that depart from this established pattern (Burger and Holland 2006).

Private actors as claimants in asset recovery cases

Private actors increasingly tend to join corruption proceedings as claimants. Article 35 of the United Nations Convention against Corruption (UNCAC) provides that any "entities or persons" suffering damages from corrupt acts should have the right to seek compensation. Under this article, both public and private actors may seek to obtain compensation for any harm they have incurred as a result of corruption through participation in asset recovery cases.

Private actors may come from the business or civil society sectors. While business actors are extensively active in foreign bribery cases,[1] private actors who file asset recovery cases as claimants mostly come from the civil society sector. In France, anti-corruption NGOs filed complaints of money laundering against Teodoro Nguema Obiang, the vice-president of Equatorial Guinea. As a result, a French criminal court convicted Teodoro Nguema Obiang for money laundering and ordered the confiscation of his assets.[2] Other similar examples of civil society organisations filing claims targeting illegally obtained assets have also been observed in Spain and Tunisia (ICAR 2020).

Private actors as defendants in asset recovery cases

For years, private actors who helped corrupt officials to hide and launder their illegally obtained assets abroad have remained relatively undisturbed by law enforcement authorities seeking to recover ill-gotten assets. This tendency is now changing. Law enforcement authorities increasingly target private actors such as banks, real estate agents, lawyers, and notaries, and seize profits gained from having advised or enabled money laundering.

The prosecution of facilitators and enablers is now central in countries' asset recovery strategies, as shown by the United States' new strategy on countering corruption that increases its focus on facilitators (The White House 2021). Things are also evolving on the judicial front. French criminal judges, for instance, have already started to prosecute French banks, lawyers, and notaries for the role they have played in the laundering schemes of public funds embezzled by foreign officials.[3]

Collaboration between public actors and private actors in asset recovery

Initiatives promoting collaboration between public and private actors in asset recovery have also flourished. Experts and practitioners underline the

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[1] Class actions initiated by shareholders in response to corporate misconduct are becoming more common in the US and Canada. See Gan Integrity. 2019. The Rise of Shareholder Class Actions in Response to Corporate Misconduct

[2] French law recognises anti-corruption NGOs' legal standing in corruption cases. Anti-corruption NGOs may launch anti-corruption proceedings, including asset recovery through money laundering proceedings, and obtain compensation for the reparation of their redress. See M. Perdriel-Vaissière. 2017. France's Biens Mal Acquis Affair: Lessons from a Decade of Legal Struggle

[3] Mediapart. 2021. "Biens mal acquis" du clan Bongo: la BNP mise en examen pour blanchiment

benefits of such partnerships especially in information sharing and awareness raising.

Public-private partnerships can consist of coalitions offering informal forums for discussions such as the Global Coalition to Fight Financial Crime, created in 2018, that gathers actors as diverse as EUROPOL, INTERPOL, the European Association on Corporate Treasurers, and the Basel Institute on Governance.

For instance, the 11th Lausanne Seminar, an initiative of the Swiss Federal Department of Foreign Affairs, jointly organised by the Basel Institute's International Centre for Asset Recovery (ICAR) and the Stolen Asset Recovery (StAR) Initiative, brought, in September 2021, 150 experts from the public and private sectors to explore how public-private collaboration can increase asset recovery efficiency. The Organisation for Economic Co-operation and Development (OECD), in its revised recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, has also recommended collective multistakeholder action to address corruption.

In addition to joining asset recovery processes as claimants or defendants and partnering with public actors, private actors may also provide valuable expertise and resources to countries by funding their litigation costs. This option has a special resonance for countries that have not opted to engage in asset recovery in the past because of the high cost of this process.

b. Civil action as a tool for asset recovery

Experts identify four main avenues through which countries may recover stolen assets and proceeds of corruption located abroad: criminal prosecution and confiscation, non-conviction-based confiscation, administrative confiscation, and private lawsuits based on civil remedies (Brun et al. 2015).

Administrative confiscation and non-conviction-based confiscation, when they are allowed under domestic legislations, are actions brought by States in their sovereign capacity in their own jurisdictions (Brun et al. 2015). Civil actions, however, provide the opportunity for States to initiate litigation in foreign jurisdictions. For reasons of simplicity and brevity, this paper focuses on the comparison between the criminal avenue and the civil one.

Asset recovery through the criminal route

The criminal route goes hand in hand with international cooperation and mutual legal assistance (MLA). Under article 55 of the UNCAC, following a request made by the origin country, the destination country shall take measures to identify, trace and freeze or seize proceeds of crime, for the purpose of eventual confiscation to be ordered or requested by the origin country.

The origin country seeking to recover its stolen assets hidden abroad via the criminal route must proceed through different stages:

(1) the origin country must first domestically initiate investigations and prosecutions against the predicate offenders. During the investigation and prosecution stage, the origin country may issue a freezing or a seizing request to destination countries to secure a temporary prohibition of disposition and transfer of assets and prevent them from being moved abroad, e.g. in tax and judicial heavens.

(2) the origin country's criminal courts must order a criminal conviction, that is, a

permanent deprivation of property, following a conviction or a guilty plea.

(3) the origin country must notify this confiscation order or issue a confiscation request to the destination country to obtain the restitution of its assets located abroad.

Acting as a powerful deterrent to future criminal behaviours, the criminal route is traditionally the first one that comes to mind when it comes to recovering misappropriated assets or proceeds of corruption. Criminal sanctions, either monetary fines or jail sentences, are also often perceived as a powerful symbol of justice. In addition, the criminal avenue offers prosecutors a wide range of coercive procedural measures to conduct their investigations such as search and arrest warrants and freezing orders (Brun et al. 2015).

Many obstacles, however, delay or even hinder international asset recovery through the criminal avenue (Stephenson et al. 2011). Because the prosecutor must prove that the defendant is guilty of a criminal offence, conviction and confiscation sentences require evidence beyond a reasonable doubt (Brun et al. 2015). The death, immunity or fugitive status of the defendant may also prevent a criminal prosecution and investigation (Greenberg et al. 2009).

On top of that, countries that seek to recover assets located abroad through a criminal route must deal with international cooperation hurdles. MLA requests may be inconsistent or deficient because of the requesting country's lack of resources and capacities, leading the requested country to reject the request or lift asset freezing measures in the absence of a legal basis. Requested countries' overly formal requirements for MLA requests may also hinder international cooperation in asset recovery cases (Fenner and Roth 2012).

In other words, when the asset recovery process goes beyond domestic borders, choosing the criminal avenue can result in the origin country "losing control" over the case and relying on foreign law enforcement authorities (Jorge 2017).

Recognising these hurdles, experts, practitioners, and international organisations, such as the Stolen Asset Recovery (StAR) Initiative, have begun to promote alternative routes to complement criminal proceedings, such as the civil route (Brun et al. 2015).

Asset recovery through the civil route

Simultaneously or instead of the criminal avenue, origin countries have the option to file private lawsuits based on civil proceedings in all foreign countries where illegally obtained assets have been identified or are suspected.

Rather than launching a unique centralised criminal proceeding against the predicate offenders and waiting for destination countries to answer MLA requests, the civil avenue allows the origin country to "deploy a coordinated strategy issuing claims in the different jurisdictions where the assets or evidence are located" (Jorge 2017).

This option, also known as direct recovery, is covered by article 53 of the UNCAC, which allows a country to participate as a private litigant in the courts of another country to recover corruption proceeds as a plaintiff in its own action, as a claimant in a forfeiture proceeding or as a victim for the purposes of court ordered restitution (Greenberg et al. 2009).

Portrayed as a "more expedient route than waiting for enforcement action by the foreign jurisdiction" (Jorge 2017), direct recovery can offer considerable benefits. Notably in June 2021, State parties to the UNCAC committed to increasing the use of direct

recovery in the political declaration adopted during the special session of the United Nation General Assembly against Corruption (UNGASS).

Advantages of asset recovery through the civil route

Civil proceedings are known to require a lower standard of proof than criminal proceedings. This is especially true for common law countries. Civil and common law standards of proof in criminal cases are relatively similar, with common law countries requiring a standard beyond a reasonable doubt and civil law countries requiring an *intime conviction*, that is, an intimate, deep-seated conviction from the judge. In civil cases, however, civil law standards of proof diverge from common law ones. While civil law countries maintain high standards of proof in civil cases, common law countries only require civil claims to be proved by a preponderance of the evidence (Clermont and Sherwin 2002).

Compared to the international cooperation route, another advantage of direct recovery is that civil claims can be filed by origin countries in destination countries independently of any criminal conviction made in their domestic jurisdiction. Securing a criminal conviction or issuing a confiscation order is, indeed, not a precondition for the origin country to file a private lawsuit based on civil proceedings in a foreign jurisdiction. Origin countries may, for instance, choose to file a civil lawsuit in foreign jurisdictions where a criminal proceeding is already pending or alternatively rely on a prior criminal conviction in a foreign jurisdiction to establish civil liability (Brun et al. 2015).

The advantages of civil recovery vary depending on where the illegally obtained assets are located. Common law countries generally offer a greater range of civil options for asset recovery than civil law countries.

Asset recovery through the civil route in common law jurisdictions

Common law jurisdictions offer a variety of mechanisms to secure and recover assets through the civil avenue. When illicit assets are placed in common law jurisdictions, origin countries may, for instance, seek damages based on torts, breach of contract or illicit enrichment. They may also petition the civil courts to issue a wide range of orders to secure the allegedly ill-gotten assets (freezing, embargo, sequestration or restraining orders), as well as to oblige the defendants to disclose information regarding the origin or their assets, etc. (Brun et al. 2015).

Nigeria's successful recovery of more than $US17 million through successful civil lawsuits filed in the United Kingdom

In the early 2000s, Nigeria prosecuted a former state governor and charged him with counts of money laundering and corruption. After the defendant pleaded guilty, Nigeria chose to recover his ill-gotten assets dispersed around the globe through civil proceedings rather than through MLA. Nigeria filed a civil lawsuit in the UK.

In 2007, a UK court allowed this civil suit and held that Nigeria was the true owner of several real estate properties and credit balances of several bank accounts.*

Nigeria ultimately recovered a total of about US$17.7 million.

* See Nigeria v. Santolina Investment Corp. and Ors. 2007. EWHC 3053 (Q.B.) (UK High Court decision in Nigeria v. Santolina Investment Corp. and Ors. 3 December 2007 Case No: HC05 CO3602).

Asset recovery through the civil route in civil law jurisdictions

Civil law countries offer a narrower range of available tools under civil action. The main reason is that in many civil law countries, asset confiscation is only possible through the criminal route. In these countries, confiscation is a criminal sentence that may only be pronounced following a criminal conviction.

Origin countries that seek to recover assets located in civil law jurisdictions may, however, do it without going through the intricate and lengthy international cooperation route.

Destination countries often have jurisdiction to launch criminal proceedings, such as those related to money laundering offences, over stolen assets laundered in their territories. Origin countries may initiate or join such criminal proceedings by requesting a civil party status.

The civil party is a hybrid status straddling civil and criminal proceedings. Requesting a civil party status necessarily takes place in the context of criminal proceedings.

As they join the proceedings as a plaintiff, civil parties may access the case file, submit evidence to the prosecutor as well as participate in interviews of witnesses and defendants. Such procedural rights are an undeniable advantage for origin countries seeking to recover stolen assets hidden abroad (Brun et al. 2021). Being granted civil party status is also a predicate condition for a victim seeking compensation. In other words, to be awarded damages, a victim – an individual, a private company or foreign country – has to be granted civil party status by the criminal court.

An origin country seeking to obtain civil party status must demonstrate that it personally suffered loss or damage resulting directly from the offence.

If the case succeeds and leads to the confiscation of assets, the compensation and damages adjudicated within the criminal proceedings in the destination country will then be withdrawn from the confiscated assets (Brun et al. 2015).

The use of the civil party status allows the origin country to initiate or join criminal proceedings in civil law jurisdictions without having to request MLA or go through international cooperation channels. For this reason, this avenue remains a valuable option for origin countries as it gives them more control over the criminal proceedings than via the international cooperation avenue.

Uzbekistan's successful (but controversial) recovery of EUR60 million through joining criminal proceedings in France as a civil party

In 2019, the government of Uzbekistan became a civil party to ongoing money laundering proceedings initiated by French authorities in 2013 over the acquisition of three real estate properties located in France by the daughter of former Uzbekistan leader, Islam Karimov, who had died in 2016. The case concluded with a guilty plea and the confiscation of the properties.

The Republic of Uzbekistan was compensated by up to €60 million, corresponding to the amount of the three properties confiscated by French authorities. In June 2020, the government of Uzbekistan announced in a press release the return of the first tranche of US$10 million corresponding to the sale of one of the three French properties.*

Several non-governmental organisations and Uzbek activists have denounced the opacity of this restitution process as non-compliant with the principles for disposition and transfer of confiscated assets in corruption cases adopted in

2017 at the Global Forum on Asset Recovery (GFAR) (Messick 2020a).

* Ministry of Justice of the Republic of Uzbekistan. 2020. "The Ministry of Justice announced the return of the exported assets of Gulnara Karimova in the amount of $ 1.3 billion".

While providing many advantages for origin countries seeking to recover stolen assets located abroad, the civil route also comes with significantly higher costs.

c. Financial challenges in asset recovery processes

Among the many barriers to asset recovery, insufficient resources and a lack of funding feature prominently. Because of the complexity of money laundering schemes and the flaws and loopholes with international cooperation in the area of asset recovery, efforts to recover stolen assets often fail to yield results. Coupled with these reasons, the scarce resources dedicated to asset recovery explain why only a tiny fraction of stolen assets and proceeds of corruption are annually recovered and returned (Stephenson et al. 2011).

To address the lack of funding typically available to origin countries to pay the legal costs of recovery cases, destination countries have decided, in certain cases, to cover the costs that would otherwise have been borne by the origin countries. Switzerland has, for instance, appointed and funded lawyers to help origin countries, including Haiti, Mali, and the Democratic Republic of Congo, to draft legal assistance requests and participate in international cooperation processes (Swiss Federal Department of Foreign Affairs 2018).

Ample financial resources are central to the success of the civil avenue because it entails considerable expenditure to hire legal counsel and private attorneys in all the countries that are believed to host the illegally obtained assets.

While in criminal cases the victim has less control over the proceedings, the costs of investigation and freezing suspect assets are carried out by law enforcement authorities. However, in civil cases, the victim has much more control over the case but has to bear cost of tracing and freezing the assets without the benefit of criminal investigative tools.

This is especially true in common law countries where initiating a civil action is costly as it requires the collection of evidence – via private investigators, asset tracing companies and specialised law firms, for instance – to prove the misappropriation of assets or liability on the basis of contract or tort law (Brun et al. 2021). In civil law countries with a hybrid system of civil parties allowing private litigants to join criminal proceedings as plaintiffs, the investigative costs continue to be borne by law enforcement authorities. However, the victim with civil party status has to be legally represented by local lawyers in the destination countries. This entails higher direct costs than the international cooperation entirely conducted by the origin countries' public officials.

Direct recovery strategies are therefore considered to be "undoubtedly more expensive than MLA-based strategies" (Jorge 2017). The StAR Initiative even states that the high cost of tracing assets and litigation are the main challenge to direct recovery strategies (Brun et al. 2015).

In this context, the engagement of private actors who could cover the litigation costs of asset recovery is becoming increasingly of interest to potential claimants.

2. Private litigation funding: a promising solution for asset recovery?

a. Overview of private litigation funding

Private litigation funding, or third-party litigation funding (TPLF), consists of a third party providing a claimant or a defendant with the financial resources to finance all or part of the litigation process. The private funder does not only support by covering the lawyers' fees but may also cover associated litigation costs such as experts' fees, investigative and procedural costs, and so on.

One of the main advantages of private litigation funding is that it facilitates access to justice for parties. Litigation funding is, indeed, often presented as a "win-win" solution for the claimant as it provides resources on a non-recourse basis. In general terms, if the case is lost and there is no recovery made from the dispute, the client has no obligation to pay the funder its advanced capital or to reimburse its investment.

If the case is won, the litigation funder is reimbursed and remunerated from the recovered damages or confiscated assets. The client generally pays a contingency fee out of the damages or withdraws a portion of the recovered assets.

Common arrangements for private litigation funding

The calculation of the funder's payment is generally based on a percentage of the amount recovered or a multiple of the capital provided (Saulnier et al. 2021). In most agreements, a typical contingency fee ranges between 20% and 50% of the recovered damages, with a threshold of 3 to 4 times the capital advanced by the funder (Steinitz 2011). Most private litigation funding agreements provide a "waterfall" provision whereby the funder's remuneration and reimbursement must be the first to be paid on the recovered damages or assets (Saulnier et al. 2021).

Third-party litigation funding, as its name indicates, brings an external party into the litigation process. Under the traditional private litigation funding agreements, the case party contracts the funder directly. Informal agreements between the funder and the attorney have sometimes been observed (Steinitz 2011).

Private litigation funding may take different forms from single-case financing (where the private funder provides capital to support a single case) to portfolio financing (where the private funder supports multiple cases from a law firm or a company). With the portfolio financing, the funder provides capital to the law firm or the company at scheduled intervals. For the entity that is funding litigation, portfolio financing offers the benefit of diversifying the funder's investment and spreading the risks across different cases (Saulnier et al. 2021).

Private litigation funding: a historical perspective

Litigants' use of third parties to fund all or part of a lawsuit is a long-established practice which has taken many forms over the years (Bedi and Marra 2021). Attorneys offering to defend a party in a case on a contingent fee basis or through litigation insurances that cover the costs of the insured party's litigation under certain conditions may, for instance, be considered as a form of private litigation funding (Sebok 2015).

For centuries until the middle of the 20th century, common law prohibited third-party litigation funding under the doctrines of "maintenance" and "champerty", which prohibit officious intermediaries who do not have bona fide interest in the case from financing the litigation of others (Steinitz 2011). Such a prohibition reflected "the general anxiety over the commercialisation of litigation in premodern and modern societies" (Sebok 2015).

Starting in the second half of the 20th century, and in response to a changing view of public policy, most countries have progressively authorised litigation funding. Private litigation funding now represents a lucrative market in most common law countries such as Australia, Canada, the United States, and the United Kingdom. While still less developed in most European Union countries (with the exceptions of Germany and the Netherlands), private litigation funding is also expected to play a growing role in the provision of litigation services there (Saulnier et al. 2021).

Authors tend to distinguish "first-wave litigation funding", mostly used by individual plaintiffs in personal injury cases, from "second-wave litigation funding", used by corporate litigants and individual plaintiffs in non-personal injury cases (Steinitz 2011). Litigation funding is notably used in the fields of class action lawsuits and international arbitration, especially investor-state dispute settlements (Guven et al. 2021).

Regulation of private litigation funding practices

Litigation funding remains scarcely regulated. In the European Union, third-party litigation funding is still generally prohibited in Ireland;[4] Germany prohibits the use of litigation funding in actions for confiscation of profits;[5] a 2017 Slovenian legislation on collective redress[6] allows litigation funding as long as it complies with European Commission's recommendations on common principles for injunctive and compensatory collective redress.[7] The remaining EU Member States have not provided any legal framework for litigation funding, which led the European Commission to state that "general lack of rules means that unregulated and uncontrolled third-party financing can proliferate without legal constraints" (European Commission 2018).

Private litigation funding's lack of regulation brings significant risks that may ultimately undermine the whole judicial architecture.

Usually, private litigation funders perform due diligence prior to the investment and select only suitable cases with good chances of success. However, the development of new practices, such as the portfolio financing, has resulted in a rise of frivolous, excessive, and opportunistic claims. By bringing a large number of litigation cases, such claims ultimately disturb the effective functioning of the judicial system (Saulnier et al. 2021).

Conflicts of interest are also likely to occur between the funder and the client regarding the managing of

[4] In Ireland, private litigation funding is prohibited by the Supreme Court of Ireland in Persona Digital Telephony Ltd v Minister for Public Enterprise, Ireland. 2017]. IESC 27 at 54 (iv). The court considered that third-party litigation funding (TPLF) amounted to maintenance and champerty and is as such prohibited by law.

[5] The German Federal Court of Justice (Bundesgerichtshof – BGH, Urteil des I. Zivilsenats vom 13.9.2018 - I ZR 26/17) held that TPLF in actions for confiscation of profits pursuant to Section 10 of the German Act Against Unfair Competition (UWG) is inadmissible.

[6] Slovenian Collective Action Act (CAA) passed in 2017 - Zakon o kolektivnih tožbah (ZKolT).

[7] European Commission recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the member states concerning violations of rights granted under Union law (2013/396/EU)

the case and the choice of the procedural strategy. Such conflicts of interest may arise at the stage of a settlement negotiation when the proposed compensation could satisfy the third-party funder but be considered insufficient by the client. The latter might then wish to continue the procedure while the third-party financier would be in favour of settling.

Conflicts of interest may also arise between the client and his lawyer, who sometimes acts as a broker between his client and the funder. Lawyers can also be placed in a difficult situation when they are contractually and ethically obliged to their clients, but their fees are paid by third-party funders (Saulnier et al. 2021). Private litigation funding raises the question of who controls the legal strategy. There are lively debates regarding whether private litigation finance undermines the principle of party control, interferes with the lawyer-client relationship, and even impedes legal counsel's professional independence (see Sebok 2015).

A World Bank study suggests that this issue of fundamental conflicts of interest between funder and client over the direction of a case could be especially fraught in the area of asset recovery. Brun et al. (2015: 37-38) have observed that

> *"this type of legal financing may involve risks […] the funder could withdraw its financial assistance if the case is not progressing in the manner it would like […] governments should be aware of the extent to which the litigation fund, not the government, may direct the course of certain aspects of the litigation and the asset recovery scheme."*

b. Potential use in asset recovery

The civil route has proven to be a promising yet costly route for origin countries, and more generally for victims, seeking to recover illegally obtained assets located abroad.

At first glance, the use of private funds to finance the cost of asset recovery in foreign jurisdictions in exchange, in the case of success, for a portion of the recovered assets appears to be a neat solution to overcome the high cost of asset recovery. Private litigation funding could, in theory, secure the recovery of stolen assets and proceeds of corruption which otherwise would never have been claimed.

Indeed, advocates of private litigation funding present it as the perfect solution for origin countries that cannot afford litigation costs (Shaulko 2020) and present remarkable, although difficult to corroborate, figures. According to Katherine Mulhern, the chief executive officer of a private litigation fund specialised in sovereign asset recovery, "any country that tries to recover assets themselves gets a 5 to 10% success rate. When you get litigation funding involved that success rate goes to about 90%" (Mulhern quoted from RUSI 2021).

The use of private litigation funding in asset recovery being relatively new, the accuracy of such claims remains difficult to assess. Indeed, as the Executive Director of the Ukrainian Anti-Corruption Action Center puts it, "ill-considered asset recovery initiatives that promise fabulously easy results can ultimately hurt and deprive us of the chance to reclaim assets that are currently under investigation by law enforcement" (Kaleniuk 2020).

It is, therefore, instructive to look at other litigation fields, such as international arbitration or ISDS, and draw lessons from those experiences with private litigation funding.

The example of Investor-State Dispute Settlement (ISDS)

Unlike other forms of litigation, international asset recovery has the characteristic of involving a State actor: the origin country. For this reason, looking at ISDS, a dynamic market for private litigation funding, is particularly enlightening. Like international asset recovery, international arbitration also involves at least one sovereign State party. Some of the issues and challenges of private litigation funding in international arbitration may, thus, provide useful lessons about the use of private litigation funding in international asset recovery.

International arbitration is a highly specialised type of litigation largely monopolised by a small number of Western lawyers and private institutions. States may not have the financial resources or capacity to pursue such litigation and often turn to private litigation funders and high-priced Western law firms. Arbitration is such a small world that private funders and lawyers are often connected by informal, yet intricate, ties. To develop or protect what some authors call a "funder-attorney relationship", a funder may choose to propose a specific lawyer to his client with no or few considerations for the case specificities or the client's interests (Steinitz 2011). This context creates significant inequalities in the bargaining power. It also entails a high risk of conflicts of interest and ultimately affects the whole case management.

In recent years, frivolous claims by investors have multiplied in ISDS field. Such claims, even if unsuccessful, ultimately weigh heavily on States' budgets that must bear the cost of defending their actions in lengthy and costly litigations. Because of this, calls for regulation have been growing, with some countries, such as Argentina, Nigeria, and Vietnam, demanding an outright prohibition of private litigation funding for ISDS, and other countries, such as the United Kingdom, calling for greater transparency of litigation funding (Guven et al. 2021).

Following a public consultation conducted in 2021, the United Nations Commission on International Trade Law (UNCITRAL) began working on a series of draft regulatory provisions. All options remain open, and the choice of a regulation model or a prohibition model is still a matter of discussion (UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) - Draft provisions on third-party funding, 2021).

Countries in favour of the regulation model propose various options, such as restricting private litigation funding (UNCITRAL draft provision 5 on third party funding 2020). Aiming to address concerns about frivolous claims, this model would prohibit for-profit investors from financing arbitrations but would allow other forms of third-party litigation funding (TPLF), such as contingency fees based on legal services effectively performed. Another proposed option is the "sustainable development model" whereby third-party funding is permitted if the claimant can demonstrate that its investment is in compliance with sustainable development requirements that remain as yet undefined (UNCITRAL draft provision 6 on third party funding 2020).

Like international arbitration, asset recovery touches upon sensitive and political matters of the public interest. A matter of justice and a powerful symbol that crime does not pay, asset recovery processes may be unsuitable for third-party litigation funders driven by private – and often for-profit – interests, not least that these operate in a

space that is as yet largely unregulated (see Kaleniuk 2020).

The impact and implication of private litigation funding in asset recovery

The involvement of private actors in asset recovery is not new. In destination countries, civil society organisations, with the help of pro-bono lawyers and, sometimes, private donors, have been able to trigger asset recovery processes by submitting money laundering complaints. Two notable examples of this include the '*Biens Mal Acquis*' cases in France and the criminal complaint, or '*querella*', filed against the Obiang family by the *Asociación pro Derechos Humanos de España* (APDHE) in Spain (Open Society Justice Initiative 2021).

Origin countries have also been using, for several decades now, law firms to manage all or part of their asset recovery procedures. Between 2000 and 2015, to recover the billions of dollars stolen and hidden in Swiss bank accounts by General Abacha, then Head of State, Nigeria hired a Geneva lawyer whose fees amounted to USD 24 million, roughly 4% of the USD 600 million recovered in total (Le Temps 2015). In 2021, the Tunisian government entrusted an international business law firm - for an unspecified fee - with the worldwide coordination of the procedures to recover Ben Ali's assets (Africa Intelligence 2021).

In addition to the use of private law firms by countries seeking support to recover illegally obtained assets, conversations with practitioners in the field indicate that there is a growing tendency among some origin countries to resort to third-party litigation funding in asset recovery. As yet, little information about such activity is available in the public domain, which speaks to the general opacity about the funding structures of asset recovery processes.

Nonetheless, anecdotal evidence, such as the emergence of newly established private litigation funders dedicating all or part of their practice to sovereign asset recovery suggests that the use of private litigation funding is being actively promoted to states and is a likely growth area (see Mulhern 2021).

Crucially, asset recovery is not immune from the type of abuses of private litigation funding that have emerged in the international arbitration field.

While concrete examples in the public domain remain elusive, certain asset recovery practitioners have reported the emergence of frivolous claims, or strike suits, creating an increasing volume of litigation, excessive costs, and a potential waste of time for destination and origin countries alike (RUSI 2021).

Private litigation funding generally comes hand in hand with confidentiality requirements, and most funding arrangements provide a non-disclosure agreement. Such a lack of transparency may negatively affect the whole process of asset recovery, including asset restitution. The investors behind private litigation funds typically have no legal obligation to disclose their identity. In some cases, the structure of the funding arrangement is deliberately opaque, with funding companies located in offshore tax havens.

Recently, Nigeria's choice of mandating a relatively unknown Lagos-based law firm, Johnson & Johnson, and a US-based private investment management firm, Drumcliffe Partner, to recover over USD 5.5 billion looted from the country via "one of the most corrupt oil deals in corporate history" has been sharply criticised by observers (Messick 2020b).

An investigation into the Nigerian government's asset recovery programme conducted by a Nigerian newspaper and a London-based team of investigative journalists revealed "details of vital decisions that have taken place behind closed doors," shedding light on the lack of a tender process in the selection of the law firm by the Nigerian government (Finance Uncovered 2020).

Some have argued that such opacity could allow kleptocrats and the corrupt to invest in private litigation funds with the sole aim of taking control of potential claims, targeting their assets (see Kaleniuk 2020).The risk of instrumentalisation of asset recovery cases through litigation funding gave rise to heated debates in Ukraine when, in 2020, a reform that would allow third-party litigation funders to invest in civil cross-border recovery actions was proposed in parliament.

Advocates of this reform pointed to the possibility for Ukrainian law enforcement agencies to hire the best foreign lawyers to prosecute cases in foreign jurisdictions hosting illegally obtained assets of Ukrainian origin (Shaulko 2020). However, as the draft law did not specify any selection criteria for private litigation funds nor any transparency guarantee regarding the identity of private litigation funding companies' investors, some raised the risk of manipulation of private litigation funds by oligarchs "to influence cases against them" (Kaleniuk 2020). In their view, hidden behind private litigation funding companies, oligarchs could easily take control and sabotage a litigation process targeting their assets through obstruction, delay, or misdirection.

Despite these risks of irregularities, there appear to be few initiatives to regulate the use of private litigation funding in asset recovery processes.

c. New trends and practices of private ligation funding in asset recovery

Self-regulation initiatives

Faced with this lack of regulation, some private funders have developed alternative models of private sector involvement in asset recovery cases.

One notable approach is that, instead of seeking to maximise investors' profits by taking a high percentage of any eventual restitution, some litigation funders have started to target impact investors who are guided by certain environmental, social and governance concerns. Calling themselves litigation funders "with a difference", they claim that under their model, the vast majority of recovered assets (anywhere from 75% to 90%) goes back to the origin countries (Mulhern quoted from RUSI 2021). Advocates of responsible private litigation funding in asset recovery also present their work as being aligned with the national priorities of origin countries and compliant with the asset restitution principles of transparency and accountability (Mulhern 2021).

The inclusion of such voluntary principles in private litigation funding in the asset recovery area is a welcome initiative. However, scarce data and a lack of transparency make it difficult to assess the reality and effectiveness of these so-called responsible litigation funders' commitments.

Emergence of novel practices

At the other end of the spectrum, some private actors may exploit the general lack of regulation to propose even more radical practices such as claim purchasing.

Claim purchasing, or sale of claim, refers to "a contractual model according to which a claim is

purchased outright and pursued by the purchaser in return for a price” (Saulnier et al. 2021).

Financially strapped countries that cannot afford to wait for asset recovery proceedings to come to an end may be willing to cede their litigation rights to private actors for a fee.

With claim purchasing, however, risks of opacity, conflicts of interest and inequality in bargaining power arise in a much more profound way than with private litigation funding. Asset recovery is an intricate and lengthy process where the amount of potential assets prone to be recovered is rarely knowable at the outset of the proceedings. In this context, determining the claim's price is complex and sensitive. Far from just being a technical calculation issue, the sale of claims could lead poorly advised countries to sell off their legal action and lose a considerable amount of money.

Countries who sign over huge claims for relatively little money up front could ultimately deprive their citizens of vast sums of public resources that are rightfully theirs.

Claim purchases also raise the question of the overall objective of asset recovery. More than an option to fill the origin country's public treasury, asset recovery is also and foremost a matter of justice and a symbol that crime does not pay. In this regard, a country’s decision to bargain away their sovereign right to recover illegally obtained assets may undermine the whole asset recovery process and damage the public’s trust in measures to counter corruption.

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