

CSO GFAR report on Sri Lanka

Country: Sri Lanka

Report submitted by: Transparency International Sri Lanka

+94 (0) 114 369781, ed@tisrilanka.org

Main authors: Ms. Sankhitha Gunaratne (sankhitha@tisrilanka.org), Ms. Maheshi Herat (maheshi@tisrilanka.org) and Mr. Asoka Obeyesekere (asoka@tisrilanka.org)

Introduction

At the 2016 UK Anti-Corruption Summit Sri Lanka identified grand corruption and asset recovery as priority areas in the country's anti-corruption work. The Sri Lankan legal framework currently does not adequately address the various facets of asset recovery and knowledge of the system of asset recovery is very limited. The following report reflects this lacuna.

1. Country overview: A short assessment of laws and policies

a. *Legal framework*

While laws are in place for asset freezing, confiscation and recovery, there is no holistic law on asset recovery. Furthermore, legislation does not outline the procedure to be followed in dealing with recovered assets. Additionally, Sri Lanka lacks a non-conviction-based forfeiture mechanism, and the existing laws require the conviction of a person. The civil recovery of proceeds of crime is not provided for.

Different pieces of legislation deal with different aspects of asset recovery, and are only applicable to a very narrow set of offences in the case of each piece of legislation. Furthermore, legislation does not outline the procedure to be followed in dealing with assets, once recovered.

Mutual Legal Assistance agreements between countries currently provide the sole mechanism for recovering assets from foreign jurisdictions.

While there is evidently a need for law enforcement and anti-corruption agencies to cooperate with each other as well as with citizens in the recovery of assets, there exist secrecy provisions that impact on sharing information between anti-corruption agencies, as well as criminalizing the sharing of Declarations of Assets and Liabilities accessed through the Declaration of Assets and Liabilities Law No. 1 of 1975.

The Stolen Assets Recovery Taskforce (START), a presidential task force (details of which are given later on in the report) is currently working to draft a law (Proceeds of Crime Bill) that will govern proceeds of crime. According to START, they will soon be appointing a drafting committee for the purpose.

i. Seizure – Art. 31 UNCAC

Specific laws such as the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (Sec. 6 (1) (d)), the Financial Transactions Reporting Act, No. 6 of 2006 (Sec. 24, 25, 26), laws relating to banking (e.g. sec. 57, 67 of Banking Act No. 30 of 1988), and the Customs Ordinance 1870 (e.g. sec. 125) deal with the seizure of assets. In the case of the offence of money laundering, the Prevention of Money Laundering Act No. 5 of 2006 provides for the freezing of assets (Sec. 6 -12).

ii. Confiscation – Art. 54 UNCAC

Similar to seizure, there is no specific law on confiscation. With regard to the offence of money laundering, the Prevention of Money Laundering Act deals with the forfeiture of assets in relation to which the offence of money laundering has been committed (Sec. 13-16). Apart from the above, domestically the general provisions of the Code of Criminal Procedure Act (No. 15 of 1979) apply to confiscation of the proceeds of crime (e.g. Sec. 29, 426, 431, 433).

iii. Restitution – Art. 57 UNCAC

Restitution in domestic criminal cases are dealt with under the Code of Criminal Procedure, but it does not directly address cross-jurisdictional restitution in the manner identified under the UNCAC.

iv. Mutual Legal Assistance – Art. 46 UNCAC

The Mutual Assistance in Criminal Matters Act No 25 of 2002, deals with the mechanisms through which MLAs can be sought and responded to. Currently, Sri Lanka relies on the provisions of Mutual Legal Assistance treaties in matters of cross-jurisdictional asset recovery. It has treaties in place with the United States, Singapore, Hong Kong, Dubai, India, Pakistan, and Ukraine among others. However, as Sri Lanka does not currently have a comprehensive law relating to asset recovery, there are some challenges in using these agreements. (E.g. Reciprocity)

In the context of money laundering, under the Prevention of Money Laundering Act (Sec. 32) Sri Lanka is under a duty to provide assistance to foreign states in criminal proceedings in corresponding money laundering offences under that state.

Further, since Sri Lanka has not opted out of article 48 (2) of UNCAC, in the absence of a bilateral treaty between countries, the UNCAC may be used as the treaty basis for mutual legal assistance.

v. Direct Measures – Art. 53 UNCAC

There are no measures for the direct recovery of property in Sri Lankan legislation. However Mutual Assistance in Criminal Matters Act (Sec. 19) gives the power to the Central Authority to require the Attorney General to register an order of forfeiture or confiscation from a foreign jurisdiction in a criminal matter in the High Court. Further, the same law allows freezing or seizure of property based on a proceeding or investigation relating to a criminal offence of serious nature of a competent authority of a requesting state, subject to pursuing certain procedural steps (Sec. 15). Both such instances do not cover civil or administrative orders of foreign countries.

vi. Sharing of information

Though there are numerous agencies with the mandate to address corruption within Sri Lanka – e.g. the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) – Section 17 of the CIABOC Act No. 19 of 1994, prevents the primary anti-corruption agency from sharing information with other such agencies, thereby hindering collaborative efforts.

Furthermore, under the Declaration of Assets and Liabilities Law archaic secrecy provisions remain, which curtail the freedom to publicise the contents of such a declaration: in effect negating the utility of the legislation in the efforts towards the recovery of stolen assets.

Whilst Sri Lanka has expressed its commitment informal cooperation and information sharing through its membership to the Egmont Group, we are unaware of instances where such information sharing has taken place.

b. Institutional strengths and weaknesses

Strengths

The Stolen Assets Recovery Taskforce (START), a presidential task force, is a mechanism mandated to:

... conduct necessary intelligence gathering, coordinate with local and foreign intelligence, law enforcement, prosecuting and judicial authorities and investigate and inquire into and thereby identify, trace, seize and transfer or return to Sri Lanka to be confiscated and be vested in the general treasury ... state assets and revenue due to the Government of Sri Lanka. (Cabinet Memorandum, dated 16th March, 2015, No. PS/CP/10/2015)

START comprises representatives from the CIABOC, the Financial Crime Investigation Division (FCID) and the Financial Intelligence Unit at the Central Bank, among others.

Sri Lanka has established law enforcement agencies, some of which have been in existence for decades. In addition to the Sri Lanka Police force there are several institutions mandated to address corruption such as the CIABOC, the FCID and the Criminal Investigation Department (CID). They have different, but sometimes overlapping mandates.

It has also been noted over the years that there has been considerable foreign investment in terms of expertise afforded to Sri Lankan law enforcement agencies. It has been seen that Sri Lanka is receiving assistance from the United Nations Office on Drugs and Crime, the World Bank and the Basel Institute on Governance, in terms of its asset recovery work.

Weaknesses

Although START was established to deal with asset recovery matters (as described above) it was created through a decision of cabinet and is not a statutory body. This raises concerns over its survival beyond the current government's mandate.

Furthermore, although START includes representatives from institutions that are mandated to combat bribery and corruption – for example, the CIABOC and FCID – there is lack of coordination between these agencies due to archaic secrecy provisions in the law. This has a negative effect on the investigations carried out by START.

While START enables the coordination of efforts between various relevant entities, it does not conduct investigations on its own.

The fact that asset recovery remains highly technical, requiring increasing the capacity of domestic expertise, is also an issue that needs to be addressed.

c. Overall assessment of political will

Combating corruption is one of the few areas of the government's current "good governance" mandate (Jan 2015) that has public support.

The political change in early 2015, while significant, marks a reconfiguration of political elites as opposed to a revolution in political will, and so therefore the practice of tackling corruption has not lived up to its election campaign rhetoric. There have been no corruption charges levelled against any members of the current government, many of whom were in the previous government led by former President Mahinda Rajapaksa.

Asset Recovery was often spoken about after the January 2015 presidential election. However, the seeming lack of progress is underpinned by a lack of expertise in the state sector and an unwillingness to professionalise, combined with poor communication to the public on progress that has been made. The opportunity to show results would align well with the current government's attempt to show progress on its good governance mandate.

Despite passing a progressive Right to Information (RTI) Act, the government has not allocated sufficient resources to adequately implement it. Similarly, the government, despite committing to making asset declarations of elected officials public through Open Government Partnership (OGP) commitments, has so far resisted all attempts to release asset declarations through RTI requests, thereby showing a potential lack of bona fide commitment to open government.

Among the members of START there is a will to try and establish a comprehensive legislative framework. According to START they are currently planning the drafting process of a law relating to proceeds of crime. They intend to appoint a drafting committee for this purpose in the coming months. However, plans beyond the legislative framework are unclear, given the deficit in political will.

d. Transparency and involvement of civil society

There has been no CSO engagement on asset recovery. CSOs have in the past engaged in the anti-corruption space through the CIABOC, but these engagements particularly focused on prevention of corruption.

An example of CSO activity in the anti-corruption space, more broadly, is the collaboration of CIABOC and CSOs in the championing of amended asset declaration laws that seek to improve regulation and implementation, in addition to enhancing public disclosure. The complexity of international asset recovery frameworks has also posed a challenge to CSO engagement.

While Sri Lanka has recently enforced the RTI Act, the CIABOC has been slow in its approach to responding to information requests. Similarly, very little information is made public on corruption cases, with no public knowledge even on how corruption cases are classified by nature of the offence. There is no public information on the asset recovery process.

At the Conference of States Parties on the UNCAC held in November 2017, it was announced that Transparency International Sri Lanka and the Sri Lanka Bar Association would each have a place in the drafting committee of the proposed Proceeds of Crime Act.

Furthermore, even though there appears to be a proposal to create a national action plan on bribery, corruption and asset recovery initiated by the Ministry of Justice, and to be spearheaded by CIABOC, there has thus far been no commitment made to meaningful participation of civil society in the exercise.

2. Domestic enforcement of corruption cases

a. Resolved cases (in the past 3-5 years)

According to CIABOC, 87 cases (covering bribery, corruption, non-declaration of assets and liabilities, and unexplained assets) were filed in Magistrates Courts and High Court in 2016 out of which there were 15 convictions. We do not have further details on these cases.

Recently a case regarding the largest ever misappropriation of funds during election time involving the Telecommunications Regulatory Commission (TRC) was concluded (HC 8026/2015). The Attorney General had filed indictments against the former Secretary to the President Lalith Weeratunga and TRC Director General Anusha Palpita in connection with a criminal misappropriation of Rs. 600 million belonging to the TRC during the 2015 presidential election campaign. The charges were filed in the High Court under the Penal Code, following a complaint by a TISL election observer.

They were both sentenced to three years in jail by the Colombo High Court, and ordered to pay Rs. 2 million each as a fine and Rs. 50 million each in compensation to TRC.

Despite having a case pending at the High Court, last year the indicted director general was appointed as an Additional Secretary to the Home Affairs Ministry. It was only after significant CSO advocacy that he was interdicted, as he had a high court case pending, in line with the provisions of the Establishment Code, which explicitly contends that misconduct involving corruption will result in interdiction.

There have been no instances of successful repatriation of frozen assets, and no domestic cases on asset recovery.

b. Other cases

According to the CIABOC's 2015 annual report, they have 10,634 pending complaints to process – with 108 cases filed in court in 2015 – but there is no specific information on the nature of the complaints.¹

According to CIABOC there were 3450 complaints in 2016 from which 2435 were forwarded for investigation (bribery – 465, corruption – 1503 and unexplained assets – 467). We are unaware of the reasons behind dropping certain investigations and pursuing others.

Out of the 87 cases mentioned in 2 (a) above, 19 were acquittals. We are unaware of the reasons for no sanctions, since these cases were in Magistrates Courts and High Courts.

There are several Supreme Court decisions that have shed light on the “Public Trust Doctrine” and have linked certain decisions made at different levels of government as impacting on the right to freedom from corruption in the exercise of legislative, executive and judicial power (e.g. *Sugathapala Mendis and Others v Chandrika Bandaranaike Kumaratunga and others* [2008] 2 SLR 339, *Wasudewa Nanayakkara v N.K.Chocksy, Minister of Finance and others* SCFR 209/2007 decided on 13 October 2009).

Further there are other cases that have interpreted the ‘Rule of Law’ as requiring the observance of minimum standards of openness, fairness, and responsibility in administration (e.g. *Jayawardena v Wijayatilake* [2001] 1 SLR 126, 143).

c. Information: Overall assessment of availability and ease of access to information

TISL attempted to access greater data on corruption statistics through RTI requests, which has thus far yielded limited results. The greatest public information source is the CIABOC annual report, the most recent of which is from 2015. This provides very high-level information, with little data available to better understand the processes, nature and momentum of the complaints and cases handled by the CIABOC.

Nevertheless, CIABOC recently shared with TISL some data on the complaints and cases handled by CIABOC, which lack much detail. This information is not yet available to public.

3. Experience in relation to freezing, seizing and confiscation of assets

a. Overall picture

There is insufficient information on the freezing, seizing and confiscation of assets. There is no information on the:

- Number and nature of on-going procedures: amounts frozen/seized, countries involved, problems encountered etc.
- Number of concluded procedures in the past five years: amounts confiscated/released, countries involved, problems encountered etc.
- Cases where assets were unfrozen and reasons for this

It is therefore impossible to make an assessment of the proactivity and effectiveness of response to information concerning stolen assets (including MLAs, freezing orders, sanctions, information from CSOs,

¹ The report can be viewed here -

<http://www.ciaboc.gov.lk/web/images/pdf/publications/reportonbriberyorcorruption2015english.pdf>

or allegations in media) and where applicable, the effectiveness of the process of creating lists of people for sanctions.

b. Examples of specific proceedings

There is insufficient information on specific proceedings:

- Name and subject matter of proceedings
- Origin of proceedings (e.g. MLA, UN Sanction, domestic investigation, for instance started because of an AML-Report to the national FIU)
- Amount frozen/seized/confiscated for each of these proceedings
- Problems encountered

c. Overall assessment of availability and ease of access to information

Public information on freezing, seizure and confiscation of assets is absent and media coverage is superficial. With regard to civil society participation, there have been no government-civil society consultations. Furthermore, CSOs have not been engaged in asset recovery due to the lack of public information about asset recovery efforts and the failure of civil society to sufficiently connect domestic corruption with the technical aspects of international asset recovery.

4. Experience of repatriation

We are aware of assets being frozen in other jurisdictions, but we have little further information. However, there is yet to be an example of a case of successful asset repatriation. There is not enough information to know whether there are assets that have been confiscated or retained abroad, but have not been repatriated.

5. Current debates

The current debates on asset recovery are notably linked to the previous government. The institution of legal proceedings against people accused of misappropriating/ misusing public funds are widely seen as means of taking political revenge.

There are also concerns that the government is particularly slow in bringing party supporters to justice; there are some that are similarly accused of corruption. Therefore, there is a faded expectation of success in improving the situation in asset recovery.

As a result, while formulating a composite law on asset recovery and developing related procedures would mark significant progress in accountability, there would be challenges in divorcing the debates from party politics at a later stage of implementation.

It must also be noted that the domestic conversation is largely limited to holding corrupt actors accountable, and rarely extends to the need to repatriate stolen assets to the victims of the theft, which is to a large extent the public, as most theft has occurred from the public coffers.

6. CSO recommendations and expectations

a. Key asks

- Adopt comprehensive asset recovery legislation, in line with the UNCAC obligations, including processes for investigation, instituting actions, including non –conviction-based forfeiture and procedures for administering recovered assets.
- Utilise the government's existing OGP National Action Plan commitments on anti-corruption, namely through amendments to restrictive information sharing provisions between anti-corruption agencies and introducing the long delayed amendment bill to the Declaration of Assets and Liabilities Act.
- Expand the mandate of the CIABOC (the primary independent anti-corruption body) to include all matters related to asset recovery.
- Build political support for the new composite asset recovery law and the long-delayed amendment bill to the Declaration of Assets and Liabilities Act.
- Ensure that the bill containing the proposed composite law for asset recovery incorporate the role of CSOs into law (such as providing for civil society to initiate action in Sri Lanka in relation to asset recovery, monitoring asset management). This would build on the cabinet approved OGP National Action Plan (2016), which proposes a multi-stakeholder approach in addressing corruption.
- Ensure that a degree of information relating to asset recovery processes, statistics and cases (the number of cases, case selection criteria, total quantum of assets known to have been stolen and recovered, the names of countries where Sri Lankan assets are held after recovery, etc.) is made available to the public and CSOs, without prejudicing on-going investigations.
- Enhance public accountability through publicly disseminated asset declarations for elected officials.
- Adopt a multi-stakeholder approach in formulation the proposed national action plan of bribery, corruption and asset recovery.

b. Expectations

- The laying down of a timeframe for asset recovery deadlines, including the passage of composite asset recovery legislation.
- Steps taken in ensuring Sri Lanka is able to strengthen bilateral agreements for asset recovery.
- Advice on the best ways to incorporate treaty obligations pertaining to asset recovery into domestic legislation.
- Greater technical expertise for Sri Lankan government and CSOs in tackling asset recovery cases.