Testimony of Jack A. Blum, Esq.
Before
the Committee on Financial Services
Subcommittee on Financial Institutions and Consumer Credit
U.S. House of Representatives
May 9, 2002
Recovering Dictators' Plunder

My Name is Jack Blum. I am a partner in the Washington D.C. law firm of Lobel, Novins and Lamont. For the past year I have served as the chair of a United Nations experts group on asset recovery. I have been working on the issue for the past several years as part of my concern with the global problem of corruption. My statement today is my own and does not represent the views of any organization I have worked with or consulted for.

Every discussion of government corruption begins with a denunciation of corruption and an agreement that it is evil. Of course we agree that corruption is bad, but it is far more than a development issue or a barrier to foreign investment.

Corruption is directly linked to the most important issues on the America's international agenda – peace in the Middle East, terrorism, and the collapse of the Argentine economy. We must address the corruption component of each of these issues if there is to be a solution.

For years Arabs and Israelis alike have known that the government of the Palestinian Authority is riddled with corruption. It's finances are opaque. They not subject to political oversight. The personal finances of Palestinian Authority officials are equally opaque. Millions of dollars of assistance to the Authority from Arab governments have disappeared; neither the donors or the Palestinian people have much to show for their contributions. Continuing violence gives the government a perfect excuse for lack of transparency and accountability. It gives the leadership an excuse to solicit funds which will not be accounted for. War and violence cover corruption. Peace would make it awkward and difficult to hide. The protection of corruption has become a reason for not making peace.

The countries that have been the breeding grounds for terrorism have a common denominator – failed and corrupt governments. These countries do not provide opportunities for young people who are entering the job market. Instead of offering needed services, governments in much of the Islamic world have become a vehicle for the theft of the national wealth. To a greater or lesser degree, these countries lack schools, health care, clean water, job opportunities, a working legal system, and democratic government. The only acceptable form of political protest is anger at America or rage over the Arab/Israeli conflict.

To control terrorism the international community will have to find a way to control corruption. It will have to get political leaders to understand that being head of state means taking responsibility for a country's problems – that it is not just an opportunity to loot a country's treasury. It will have to insure that stolen money cannot find a safe haven in the banking system and the financial markets of the developed world.

As the committee knows, Argentina is a the final stages of economic collapse. Economic gurus from the World Bank and the IMF have offered prescriptions for fixing the Argentine economy which include further austerity, additional restructuring and foreign management of the economy as a condition of further lending. This line of thinking can be summarized as "punish the victims." I believe that no solution will work until the corruption element of the Argentine collapse is addressed. Successive governments have drained the country of its wealth. Payoff money, funds from the manipulation of the value of Argentina's foreign debt, and tax evasion money have all played a role. Money that has been taken should be recovered. But, for an economic fix to work, a repeat performance must be prevented.

In short the corruption issue is priority business for American foreign policy.

The Foreign Corrupt Practices Act and the Anti-Corruption Treaties

The United States was the first country to make it a crime for an American citizen to bribe a foreign official. The original Foreign Corrupt Practices Act grew out of the first Lockheed Aircraft bribery scandal. Congress made it a crime for Americans to bribe foreign officials. I participated in the 1976 U.N. effort to draft an international convention on the corruption issue. The effort foundered on the disagreements among the Cold War adversaries and the regional blocks. It was long referred to as the disaster of 1976.

For a long time, other countries refused to follow the U.S. lead. But, during the 1990's a series of regional treaties – one covering the OAS member states, another covering the OECD countries – on the issue of corruption outlawed the use of bribes to get contracts and to influence government decision making. These treaties, coupled with advances in the bilateral agreements on mutual legal assistance have become the major tools for addressing the problem.

Preparations are now under way for negotiation of a global anti-corruption treaty. The treaty will cover the countries which are not party to the regional agreements and will create global standards on the issue of bribery. Negotiations will open this summer. These negotiations offer an opportunity to remedy existing barriers to recovery and to create of an international mechanism for asset recovery.

Our representatives at these negotiations should go beyond the issues of bribes, payoffs and shakedowns. The should be seeking a way to assure the recovery of stolen money for countries that have been victimized. They should be working to improve the machinery of the international legal system so that civil fraud and corruption cases do not get snared by international

boundaries and the differences in national legal systems.

U.S. government anti-corruption efforts have focused on improving government management systems and raising the awareness of the corruption issue among elements of civil society. While these efforts are commendable, I believe that asset recovery must be included in the program as a priority. Victim countries should have our help as they try to find the money and repatriate it. We should help the victim countries go after the bankers, lawyers, and accountants who participated in laundering the proceeds of corruption.

The most important most important impact of a successful asset recovery program will be deterrence. If countries are successful in getting the money back, government officials in other countries will face the reality that they will not be able to keep what they steal. The day that the first banker or lawyer has to pay significant damages to a country for laundering one of its corrupt official's money will be the last day bankers and lawyers take on corrupt officials as clients. If a successful global asset recovery program is created the message will be that corruption does not pay and that assisting in corruption will carry serious financial risks.

The Problem of Recovery

With rare exception, efforts to recover funds stolen by departing heads of state have been unsuccessful. I know about the about the problems because I was asked to assist in asset recovery in two cases and have talked to people who participated in other efforts. Recovery efforts fail for the following reasons:

- Countries focus on criminal prosecution of outgoing government officials and the use of mutual legal assistance agreements without considering civil legal actions for fraud to recover funds moved outside the country.
- Countries fail to conduct national investigations with an eye to using the fruits of the investigation in foreign courts.
- Countries lack the money to hire lawyers and the expertise to follow the stolen money as it moves into the world's major financial centers.
- Very few lawyers in the developing world have the legal expertise to manage complex international litigation.
- Recovery efforts confront barriers in the international legal system. The problems include the collection of relevant evidence, the compulsion of testimony, and the use of evidence acquired in criminal investigation in civil litigation.
- There are political pressures on the successor regime to protect the powerful circle of people who surrounded, supported, and benefitted from the departing regime's dishonesty.

The Problem With Criminal Prosecution

The first step in going after a departed corrupt official is a criminal investigation. Incoming governments find that a criminal investigation is a political and practical necessity. The criminal investigation allows the victim government to bring mutual legal assistance agreements into play. Through the MLATs the victim government can access foreign evidence at a relatively low cost. The victim government can also request that the proceeds of crime be frozen pending the outcome of the criminal case.

In some cases, the MLAT requests from a victim government have become a significant burden on the Department of Justice. A victim government can use lengthy requests which can take many months to fill as a justification for inaction. On the U.S. side the resources available to meet the demands of MLAT assistance are limited. I have been forced to listen to serious complaints about U.S. MLAT responses in corruption matters from a number of foreign government officials.

The problem with asset seizure under the proceeds of crime agreements is that if the criminal case fails the funds will be released. If the government which has frozen the money has anti-money laundering legislation it can bring its own case, but then the issue will turn on whether a predicate offense has occurred. If there has been no predicate offence, then there has been no laundering.

All legal systems require a high standard of proof for a successful criminal prosecution. In the common law system it is proof beyond a reasonable doubt. In complex fraud cases the high criminal standard is very difficult to meet. Criminal cases against a departed head of state who has taken billions of dollars will be defended by an army of well paid lawyers. They will use the complexity to raise reasonable doubt.

Cases involving corruption are politically charged in all the countries they touch . If major banks or prominent people are involved in the country from which assistance has been requested the issue is especially touchy. On my trips to Mexico, for example, I am frequently asked about Raul Salinas's money. The Mexicans ask why the United States could not make a case against Citibank for laundering Salinas' money if Switzerland and Mexico could prosecute Salinas. No matter how legitimate the answer, there are lingering suspicions that the answer is political influence.

In my view the solution to these sensitive issues is to encourage, indeed facilitate a parallel effort at civil recovery. A civil action brought by the victim government in the country where the funds are located sidesteps all of the tricky issues of sovereignty. It also sidesteps the sensitive politics. . It gets around the problem of high standards of proof raised by criminal prosecution.

If civil recovery is used the cases will be tried in the courts of the United States, the United Kingdom, and continental Europe. The courts that try the cases will not be under the local political pressures and should in a position to resolve the conflict.

The Investigation

When a country has been looted and the government departs in haste or in a cloud of scandal the new government has a host of problems to face. In country after country the cupboard is bare both literally and figuratively. I remember being in Guyana shortly after a change in government during which the departing government took everything including desks, chairs, filing cabinets, light bulbs and toilet paper. In that setting the first priority is getting the government functional. Governments turn to the asset recovery issue after they are up and running. Often they get to the issue too late to be effective.

For the recovery effort to succeed it is essential to gather evidence, collect documents and interview witnesses as quickly as possible. It is also essential to do the investigation so that the evidence which is gathered can be used in court. The evidence must be kept so that a chain of custody can be established. Witness interviews must be documented, and if there is a deposition, the deposition should be recorded and transcribed. Witness interviews should meet the accepted international legal norms regarding the protection of human rights. A developing country which has just gone through a change of government finds all of this very hard to do.

In 1993, a representative of the Philippine Good Government Commission asked me to take on a portion of an asset recovery case against Marcos. Specifically, we discussed going after a portion of the overseas assets. I asked basic questions including what the basis of the government claim was. The answer I got was that the money in Marcos' account was obviously the property of the government because he got it while he was President and because his salary was too small to account for the wealth. The difficulty with that rationale was that at that time the Philippines did not have a law against unjust enrichment.

I asked whether the government had a documentary trail linking the assets to a specific fraud and I was told that it did not. I asked whether the government has obtained a civil judgement against Marcos in its own courts with respect to the assets we were discussing and the answer was no. Needless to say, I declined the representation.

Based on that experience and subsequent discussions with governments in Latin America, Central America, and Africa I have concluded that a government which has been victimized needs immediate expert legal and investigative assistance from the international community. It is only with experienced outside help that a government can gather and protect evidence, build an internationally credible case and establish its right to the funds. It has to do all these things at the same time it is trying to rebuild a wrecked economy and address the overwhelming problems it has inherited.

This need for expertise raises the next serious problem for an incoming government – money. By definition the victimized country is broke. Investigating an international fraud properly is very expensive. The out of pocket costs alone can be staggering. Fraud cases involve thousands of documents. If the fraud crosses international boundaries the documents are almost certainly in a variety of languages and will have to be translated – sometimes into more than one language. If the fraud involves the mis-pricing of commodities, experts are required to determine what the true market value should have been. The documents must be authenticated and translated. They

will have to be loaded into a document management system so that they can be used in a trial. Investigators will have to locate and interview witnesses. There will be dozens of witnesses all over the world. The out of pocket travel costs and the cost of transcribing interviews and depositions are backbreaking.

Confronted with realistic cost estimates, the first reaction of the victimized government is to suggest a contingent fee recovery arrangement with the lawyers and investigators. In many legal systems contingency contracts are not permitted. Even if they are legal, I will flatly assert that contingent fee agreements in these cases are unworkable. The amount of money a law firm would have to advance in a recovery case is so large and the case so difficult that the competent firms will want a very high percentage of the recovery or they will refuse the case. If a law firm takes the case on contingency it will go for the "low hanging fruit." It will recover the money which is easiest to get and ignore the rest.

Even if the firm wins, the percentage of the recovery they demand will become a political problem. To understand this you need look only as far as my home state of Maryland and the problems its contingency fee agreement with its lawyers in the tobacco case created. The taxpayers were properly outraged that the law firm wanted more than $1 billion for its work on the settlement. Imagine a multi-billion dollar recovery for a developing country on a 40% contingency contract. The lawyers would be roundly castigated.

My conclusion is the lawyers and investigators have to be paid in cash as they do the work Unfortunately the experts who do this work are expensive and there is no cheap substitute for their expertise.

The Litigation

As the investigation develops, experts in international litigation should evaluate the evidence and develop a global recovery strategy. The elements of the strategy may include civil suits against a variety of defendants, injunctions and civil freeze orders, criminal complaints in civil law countries. The factors which will have to be considered are jurisdiction, the ability to enforce a country's judgements, the doctrine of *lis pendens,* and the applicable law. The evaluation process should include consultation with litigation experts in each of the relevant countries.

The plaintiffs in civil cases could include the government itself, para-statal companies which were victimized, the central bank, or private entities which were forced into disadvantageous arrangements by a corrupt government.

Once a plan is developed, local counsel should be hired to move forward. Their activity must be monitored and centrally coordinated. If the job is done properly, the pressure should build for an overall resolution.

Civil cases are much easier to settle than criminal cases. A settlement in a criminal is an expected outcome. A settlement in a criminal case if often considered capitulation by the

government.

Some Needed Changes

When the U.N., experts group met, it discussed the most serious obstacles to civil recovery of the fruits of corruption. Members of the group suggested that some of these difficulties could be overcome through international agreement, perhaps through the treaty on corruption now being negotiated.

Some of the issues which were discussed included compelling the testimony of foreign witnesses. As matters now stand there is no way to compel a witness to travel from a foreign country to testify at a civil or criminal trial. If there is an MLAT or if there is comity, the testimony can be obtained through letters rogatory or through a judicial commission. A desirable improvement would be an agreement which would compel testimony on the following assurances:

- Use immunity in the country where the testimony is given.
- Safe passage to and from the country where the testimony is given.
- Assurance that no other legal action could be taken against a witness while in the country where the testimony is given.
- Payment of all expenses and a witness fee.
- The right of the home country of the witness to object on political grounds.

Other ideas which were advanced included:

- International agreement to waive bank secrecy in civil fraud cases, subject to court protective orders and court supervision of the data supplied.
- Legislation in common law countries to make information discovered as part of the criminal investigation available for use in civil litigation.
- International agreement that judgments obtained in grand scale corruption cases be enforceable on a global basis.

Finally there was discussion about providing special jurisdictional legislation to facilitate recovery litigation.

An International Recovery Foundation: One Idea

Given the complex nature of the legal problems and the difficulty of financing recovery litigation, I believe a new institution to manage recovery efforts must be created. It could be public and under the auspices of one of the international organizations or it might be a charitable non-profit under foundation auspices.

There are many possible models for handling recovery efforts, none of which are mutually

exclusive. For example, the victim country might assign the right of recovery to the non-profit in exchange for an agreement on the repatriation of the recovery money less the expenses. This approach would have the advantage of keeping the victim country out of the courts of other countries as a plaintiff. It would also help insulate the recovery effort from local politics. Alternatively, the victim country could retain the organization to handle and manage the case – just as a major corporation retains counsel.

As I see it, the organization would operate as a public interest law firm which would take on the global management of the investigation and the litigation. Its staff would help the victim country assess its case. It would help select the necessary team to handle the investigation and it would hire, supervise and manage the private investigators, forensic accountants, and lawyers who did the detail work.

To fund the operation I envision the creation of a revolving fund with money coming from donor governments, private foundations, corporations and individuals. The fund would be reimbursed from the recovered money. For the project to start up I believe that a fund of $50 million would be appropriate. That amount of money would give the recovery effort credibility and the capacity to take on several recovery efforts simultaneously.

The initial staff should include an executive director with experience in the field and several experienced litigators with a knowledge of the different legal systems and how they interact. These professionals could come from various governments on temporary assignment for a term of years or from the private sector as permanent employees.

I believe that the design of the entity should be flexible and should evolve with experience. In principle it should operate as a small boutique international law firm with a high degree of professionalism and flexibility.

I would want the organization to report regularly to the U.N. and to the OECD countries on the changes it suggests in the international system to prevent corruption and to facilitate the recovery of assets. I would also want to insure that the organization would generate a report on each case it completes to educate the citizen of the victimized country and international community on the facts of the case.

The world should see public justice done publically.

The International Banking Institutions

As this committee knows there has been a considerable problem with fraud and theft from the proceeds of international bank loans. The World Bank has hundreds of auditors looking into allegations of abuse, and although none of its findings have been made public, it is clear that there is a substantial amount of World Bank loan money to be recovered from contractors and dishonest civil servants.

The recovery organization could handle this task for the World Bank and the regional development banks. By moving the effort out of the banks themselves and making recovery a condition of the initial loan, the recovery effort could be depoliticized. No executive director would be forced to vote to investigate the employees of anther sovereign state.

If all the development banks were included in the effort, the result might be the needed level of transparency to improve their accountability.

I urge this Committee to press this asset recovery theme with the administration. I believe, that if the Committee presses forward, the idea will be discussed seriously and that there is a real opportunity to see a recovery entity created within the next two years. Without your support, I believe that the idea will be lost in the swamp of competing priorities.

Specifically you should ask State, Justice, and Treasury to offer their views and ask for their comments on what can and should be added to the new corruption convention to enable civil asset recovery. You should ask for their views on how to create an entity responsible for assisting governments with civil recovery.