Accountability Asset Recovery: A Leadership and Sustainability Initiative

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Since Rio, also known as the United Nations Conference on Environment and Development [UNCED] held in Rio de Janeiro in June 1992 and informally referred to as "The Earth Summit," a practical way forward has eluded leadership specifically in regard to an accountability process. High instructions have been evaded and postponed by actors on the international economic front not due to the lack of vision, clarity, or agency infrastructure, but due to a missing link in the chain at follow-through. Dialogue-based public diplomacy competence is the key to collaboration with summit leadership when instigating geo-political macro-economic initiatives correspondent to the practice of public private partnership within the vast confines of a participatory democracy. Research can find positioned in the media, via internet and electronic sources, signals, visuals, and language cues by leaders which can be utilized as building blocks in conjunction with summit level leadership directives toward public participation, by citizens. Thus this missing link is the focus of an initiative created by this writer; the topic of this research.

Keywords: asset recovery, grand corruption, institutional change, public private partnership, rule of law, sustainable development goals

INTRODUCTION

In "*Transnational Corporations, Corporate Responsibility and the Law: Analysis of an Evolving Interaction*," Dr. Kernaghan Webb of the Ted Rodgers School of Management at Ryerson University in Ontario, Canada, reached the tentative conclusion that significant and focused attention to the Corporate Responsibility−Law dynamic is critical to the ongoing durability of firms in the 21st century.

The White Paper entitled *Toward a Global Pact for the Environment* released in September 2017 by Le Club des juristes confirms that the idea of a global environmental pact—the issue driving the momentum of Corporate Responsibility—endorsed by the international community of jurists is not new. We witness this fact, indeed, with the adoption of the Sustainable Development Goals [SDGs] in September 2015 followed by the adoption of the Paris Agreement in December 2015. Laurent Fabius, President of the Constitutional Council of the French Republic, President of the Group of Experts of the Pact [GEP], Former President of the COP21, insists correctly that the time is now to "take a decisive step' toward adopting the Global Pact, "which would unite the guiding principles of environmental action into a single text with legal force."

The UNCAC Coalition, a global network of over 350 civil society organizations [CSOs] in over one hundred different countries provides a reminder that the United Nations Convention against Corruption's framework is so comprehensive that it is relevant to all areas of the SDGs inclusive of the effects of corruption on the environment. The UNCAC Coalition in particular advocates for the importance of joint

action, citing that for the works to be effective, efforts are demanded from the whole of civilization: governments, civil society, the private sector, and members of the general public itself. The UNCAC Coalition even goes as far as to express concern that the UNCAC may not achieve its promise.

Damage to the planet and to humanity has reached a critical tipping point; the Global Pact for the Environment intends to make an institutional change in the form of a third generation of fundamental Rights; the Rights associated with the protection of the environment. As more than 50 years have passed since the adoption of the other institutional changes in 1966 by the United Nations; the first one relating to Civil and Political Rights and the other to Economic, Social, and Cultural Rights.

Debates and discussions surrounding these promises always include the pragmatism of the costs involved and the practicalities of financing them. The Accountability Asset Recovery: A Leadership and Sustainability Initiative also intends to make an institutional change; indeed, one that allows a mindful, reasoning awareness of the gap in the capacity of institutions and consequences posed by this gap that heretofore has frustrated the promises framed within the international Conventions—an institutional change that is, indeed, motivated by its economic value. Based on many decades of intensive work that has resulted in currently available international and domestic law, legal instruments and guiding principles of what constitutes responsible behavior by corporations, states, and individuals such institutional change is, indeed, proper.

This author has a history in contacting summit-level leadership and creating solutions to seemingly intractable problems. One such initiative, The Dangers of Dementia and Global Leadership, became the G8 Dementia Summit that convened for the first time on December 11, 2013 in London, England, United Kingdom.

The background to the interest in creating this particular initiative and in pursuing the requisite research is the SK Foods LP Scott Salyer debacle in the United States Federal Eastern District of California (USA v. Salyer, 2010). Dubbed by the US Federal Bureau of Investigation (FBI) "Operation Rotten Tomato," it had more to do with the Hollywood movie critic website *Rotten Tomatoes* than it did with tomatoes that were alleged to be moldy. The labyrinthine case is one of the most complex and complicated business, accounting, finance, strategy, political, media, diplomacy, policing, and legal machinations in the world. Work on this case spans four continents in three languages; sadly, a genius agriculture business expert was violently attacked in a king toppling scam (The Economist, 2003) (Supporters of Scott Salyer, 2012) (LA Times, 2008, 2009, 2010, 2011, 2012, 2013) (New York Times, 2010). The scam was a sophisticated theft facilitated by gaming the system by certain elites, a closely knit group of oligarchs, literally comprising a small number of intertwined families as described by US President Barack Obama during his final State of the Union Address in 2016. In essence, the opportunity was presented to confront high-level corruption involving senior government figures, both elected and appointed, their cronies, and the bankers, lawyers (including lobbyists and other's within civil society), and other agents who enable it.

Analyzed through the economic lens, this case represents just one example of a system, a hierarchical parallel, designed for the purposes of pillage through the instrumentalization of international Conventions utilizing the corporation as the vehicle to do so. The motivation in following through, therefore, is that the opportunity at hand became evident as their perturbation of the system in the courts created a convenient statute for other, certainly more appropriate confiscations. Functions, as a foundation to the second pillar of the Hypothesis: Existing Legislation and [Legal Statute] also can streamline Accountability Asset Recovery into a function of the Executive Branch. The opportunity to intercept a precedent while it was in the process of being set as legal statute and case law, and then shepherd that precedent to be set responsibly and within the intended context of its underlying Legislation, which in this case are the United Nations Office of Drugs and Crime UNODC Model Legislation on Money Laundering and Financing of Terrorism UNODC 2003, UNODC 2005, UNODC 2009 and the United Nations Convention Against Corruption UNCAC 2003 in cross-border and international cooperation.

It can be said that such a unique and certainly somewhat catastrophic debacle, a perfect storm of sorts, piqued curiosity from the economic standpoint and became a Calling that today is Accountability Asset Recovery: A Leadership and Sustainability Initiative.

Ultimately, the very topic of partnerships and the consequences such partnerships (Murphy, 1997) have had on activity since *Rio* galvanized the draft initiative into a highly supported framework. The quality of the research and published material available is world-class and prepared to couple with the well-travelled road of Public Private Partnership (Yescombe, 2011). Public Private Partnerships are defined as "the arrangement in which the private sector supplies infrastructure, assets, and services traditionally provided by Governments" (Heming, 2006, p. 1). Thus, the leadership and sustainability accountability initiative (Accountability Asset Recovery), which is a financial technical service, could be a viable Public Private Partnership concept and lead the way to relevant institutional change.

Former US Attorney General Eric Holder discussed the opportunity as outlined in his Remarks on October 28, 2013 at the Arab Forum on Asset Recovery in Marrakech (OAG, 2013). Clearly evidenced is how Public Private Partnerships facilitate the effective bringing together of relevant stakeholders. The topic is economically and financially valuable and potentially one that has been alluded to in End Times-type language in a more confused and mystical manner, yet, not unexpected. Since *Rio,* substantial opportunity to participate in sustainable development change has been on offer globally. Failure to have done so to such a degree has been by choice. There is nothing that can permit these games to continue in this way as permissive political will has expired.

In relation to follow-through, a vital aptitude this writer brings to this project, is a Postgraduate Diploma in Contemporary Diplomacy (framing and structure) undertaken as part of field investigations for this research. The United Nations system within the context of bilateral, multilateral, public and economic diplomacy is the domain of contemporary diplomacy and the avenue to go about addressing principal – agent policy failure and initiating solutions to address institution limitation within the rule of law. By engaging in analysis of the related international Conventions and subsequent adopted Draft Declarations, it became possible to identify each individual decision and step being orchestrated by the various players.

One such example excerpted from pages seven and eight of the United Nations Office of Drugs and Crime (UNODC) UNODC Model Legislation on Money Laundering, Proceeds of Crime And Terrorist Financing Bill 2003 ["Act"] number four letter a [4.(a)], "Meaning of Conviction in relation to a serious offence. For the purpose of this Act, a person shall be taken to be convicted of a serious offence if: the person is convicted, whether summarily or on indictment of the offence." Interestingly, what this means is that an accusation or allegation is sufficient for transgressing the inalienable Right to fair trial enshrined in most Constitutions and the Geneva Convention. Indeed, this Act not only takes place in direct contravention of the rule of law, it could under certain circumstances permit a bank to attempt at the instrumentalization of the Act as its own personal international Convention.

Words, symbols, images, sounds, colors, and tones are adapted in Diplomacy in order to convey specific meaning; thus, when the concept denoted by the two words *serious offence* entered this writer's sphere of influence, the signal registered and the source of that direction was fairly simple to locate at page seven, number three [3.] of the Act, "Meaning of charge in relation to a serious offence. Any reference in this Act to a person being charged or about to be charged with a serious offence is a reference to a procedure." Thus, a Federal judge trying out this unprecedented and rather novel notion for the first time in his court room would be cause for concern and an immediate revisit of the ideas published in the *Stanford Law Review* in 2013 during the time they were originally introduced to the law students preparing to enter their profession as jurists, such as *An Introduction to Law and Economics* by A. Mitchell Polinsky (1983).

The debates between factions over which text actually makes it into the international legal instruments are not entirely civilized. These debates include machinations by the anarchist capitalist school of economists'. Though due to issues involving information asymmetry and moral hazard each factions' participation must become exposed. Stanford Law and Economics professor, A. Mitchell Polinsky, who along with George Priest and Steven Shavell founded the American Law and Economics Association in 1991, authored several relevant works on corruption, fines, imprisonment, and capturing of wealth in order to facilitate the application of microeconomics theory "to the analysis of laws, to the explanation of the effects of laws, to assess which legal rules are economically efficient and assist in

predicting which legal rules will be promulgated" (Friedman, 1987, p. 144). In addition to this approach and by coincidence, the key players represent themselves politically as Libertarian and of the Austrian School of Economics, home to anarchist capitalism; the legal strategy was found to be underpinned by an idea also from Stanford University found in the *Law Review*: "in a series of articles published in the 1980s that culminated in a highly influential book, Frank Easterbrook and Daniel Fischel extended the Jensen and Meckling framework to develop what they called a positive and normative theory of corporate law. Before long, this work and other legal scholarship grounded in economic theory began to influence the courts and the SEC" (Klausner, 2013, p. 1327). There is no reference; however, it has since become couched under growth strategies and results in systemic loss (Maturana, 2008).

Further field investigation became available as the research progressed. The American Bankruptcy Institute (ABI), a global organization, created a membership placement as an Emerging Leader and three days training in their 2016 Winter Leadership Conference, which exposed further systemic mechanisms that are available, helping prove the idea is feasible and reasonable. A powerful Lobby in and of itself, and what many consider to be a functional arm of banks and their interests, ABI members feature on the Working Groups who drafted the Treaty and international Convention texts at the UNODC and UNCITRAL, and the founding of organizations such as Fraud Net and the Financial Intelligence Unit [FIU].

The National Association of Federal Equity Receivers [NAFER] created a new category, the International Associate Member to provide key information at trainings and networking consultations with members of Government and quasi-Governmental Agencies in Miami during October 2017. After having attended, there is no doubt that the precedent setting was being shepherded into the purview of insolvency practice, the domain of workout, bankruptcy, and turnaround, and as the domain of action underpinned by the previous Law and Economics scholarly efforts, something that should never have been attempted.

The procedure signaled by the use of *serious offence* refers to number forty five [45.(i)] of the Act, Lifting of the Corporate Veil, "In assessing the value of benefits derived by a person from the commission of a serious offence, [the court], may treat as property of the person and property that, in the opinion of [the court], is subject to the effective control of the person, whether or not he or she has (a) any legal or equitable interest in the property; or (b) any right, power or privilege in connection with the property."

An idea that could appear to engage in extraordinary overreach, by piercing the corporate veil breaching Corporate Entity and Trust Entity status alike through substantive consolidation, in deeming that everything is nothing more than the alter ego of the person, became accepted and acted upon within the courts. "The view of the corporation that emerged over this period through the work of Jensen and Meckling, Winter, Easterbrook, and Fischel, and others was a contractarian one. The corporation was viewed as a 'nexus of contracts' among 'constituents.'" (Klausner, 2013, p. 1327).

The purpose of this tightening of the vice—essentially throwing out the concept of corporate law and moving toward the personalization of all entity activity—could be the anthropomorphizing of the corporation itself. Today, it has become common place among the Law and Economics community to refer to the corporation as a person (Winkler, 2013).

The main research aim was to investigate the viability of an accountability initiative, Accountability Asset Recovery: the process whereby specific assets that qualify are recovered from wherever they have been accumulated into the respective Public Treasury as an operational mechanism and process, and adapt it to partner with existing agencies as an entrepreneurial endeavor, a system, and the creation of a new sector for knowledge workers.

One objective is to ascertain how the Accountability Asset Recovery process can build a bridge between the ministry level and the International Monetary Fund (IMF) functions.

The study sets out to answer the question: How can Public Private Partnership facilitate accountability driven asset recovery? It also tests the Hypothesis: Existing Legislation and Legal Statute can streamline Accountability Asset Recovery into a function of the Executive Branch, also referred to as Head of State, Office of the President, High Instructions and Summit Level of leadership.

Without citing the official texts, suffice to say that the purpose served by the instrumentalization of *serious offence* is for the purpose of obtaining court orders to restrain assets and funds, to freeze, seize, and move toward confiscation without becoming encumbered by due process. Unless there is a mass return to the rule of law—in which case it would then become possible to obtain a restraining order, freeze the assets and funds, and even seize them from the charged person without making the petition to confiscate until after due process has been satisfied—a course of action that does not transgress inalienable Rights and is the basis for this writer's precedent setting argument and is evidence based in order to arrest the abusive thwarting of due process through the substitution of the Right to a fair trial with the Plea Bargain by aggressive and questionably motivated prosecutors.

With the lack of accountability, "prosecutors have become the law," according to *Federal Crimes and the Destruction of Law: Prosecutor's abuse of the RICO and fraud statutes increasingly is threatening the nation's economy* by Associate Professor of economics in the College of Business (William A. Anderson, published by Frostburg State University in *Regulation*, winter 2009–2010 issue). Verily, ensuring the charges are indeed evidence-based and not just an unsubstantiated accusation or allegation underpinned by nothing but false testimony and a state-sanctioned fake news campaign, this case administration procedure can be properly mechanized and institutionalized to create a new sector for the knowledge worker.

The Accountability Asset Recovery: A Leadership and Sustainability Initiative has been applied to extricate international Conventions from the shepherding through the courts by players in the financial services sector. What has been an unobservable externality is now fully exposed as the administrative gap at the institution level. A successful sustainable development agenda requires partnerships between organizations, governments, the private sector and civil society. United Nations Sustainable Development Goal number 17 codifies the importance of these partnerships and recognizes that revitalization of the partnerships is a critical ingredient. Sustainable Development Goal number 16 acknowledges deficiencies at the level of institutions. Decision makers must fathom how certain institutions are simply not present. The initiative is thus oriented for the development and performance of the technical expert competency already presumed of the appointed Receiver, yet abstracted from the terms of the UNODC International Convention; the mandating authority of the Receivers' post appointment activity. Organizational structure at the level of the institutions in this context simply does not exist. As such the signatories are in non-compliance while the initiative intends to bring them into compliance with their multilateral commitments under the rule of law, end pillaging of assets and funds and deliver on Sustainable Development Goals (UNGA, 2015).

This is the first step in creating a world where the promises of the United Nations Convention Against Corruption and the United Nations Office of Drugs and Crime Draft Doha Declaration, "on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges, promote the rule of law at national and international levels with public participation" (UNODC, 2015, p. .3), become promises that can be kept.

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