RECOVERING SOVEREIGN WEALTH AND ASSETS FROM KLEPTOCRATS

Introduction

Governments worldwide are provisioning billions of dollars to support their shrinking economies and crumbling healthcare sector in the face of the pandemic. Whilst the states are assuming unprecedented levels of responsibility, whether the system provides for adequate checks to ensure that state funds are properly utilised and are not seen as an opportunity for kleptocrats to further enrich themselves is yet to be seen.

Most countries have laws that prohibit bribery, money laundering and embezzlement of state funds. It is not the deficient legislative intent but the ineffective financial disclosure regime of states that allows corrupt public officials to amass wealth and then to launder state funds out of the country. The fact that the corrupt public officials enjoy unwritten exemption from consequences and are well-positioned to control the administration further blunt the blade of justice. The web of issues, particularly related to linking inconspicuous transactions to state officials siphoning state funds, and seeking evidence from the state or state agency where the kleptocrat exercised control for years, add to the challenges. Significant efforts are required not only to seize assets from corrupt public officials who stole their nation's wealth but also to ensure that the loot is repatriated back without enriching the looters.

A Bespoke Approach

In a world where the kleptocrats are globally connected, tracing and recovering assets from such organised corrupt officials require a bespoke strategy addressing challenges which are the distinct from those posed by traditional asset recovery cases. This may also include the effective use of political and public relations campaigns in addition to the judicial tools available. The response of the victim state to an act of corruption of a political elite, and the organised transnational movement of proceeds of crime are not always easy to activate or coordinate.

At the outset, it is critical to establish a mission control - the jurisdiction that is best placed to act as the nucleus of the campaign which usually spans across multiple jurisdictions and involves various assets types. The aim is to strategically drive multiple aspects of the campaign and seize assets, simultaneously or in quick succession. It is important to bear in mind that recovery of stolen assets, and not merely their seizure, is the end goal.

Unique Challenges

The formidable challenges encountered in locating and recovering stolen assets from kleptocrats stem from both the international and political dimension of such cases. The immunity that protects heads of states and other high ranking state officials from civil and criminal actions is one of the first hurdle in the process. There are many examples where corrupt state leaders misused this protection from criminal

sanctions to loot national coffers. Another, and linked issue being the failure of the victim state to initiate domestic proceedings, or, having initiated them, to conclude them. The emasculated judicial system of these states falls short from sanctioning public officials for siphoning state funds. There are many examples where the appointments of Judges, Attorneys-General and prosecutors are driven by the political elites implicated in corruption. The kleptocrats have deep pockets, funded with stolen state wealth, and are able to deploy vast amount of resources to resist any recovery and enforcement action.

Legal Tools

Like most corrupt, kleptocrats too have a circle of people who have benefitted from illicit wealth or assisted with its generation and concealment. While the kleptocrat knows he or she is the likely target of any investigation and therefore takes measures to hide assets, their inner circle comprising family, friends and members from the administration may not always have the same level of diligence, leaving open a window of opportunity. Disclosure orders or discovery acts as important investigative tool when battling state officials deploying the shield of immunity. These offences are not victimless. There is a human cost to them. The citizens of the state, who are the ultimate victims, often only become aware of the corrupt acts long after the acts have been committed and the proceeds have moved across many borders. It is still commonplace for investigative commissions of inquiry to report their findings in secret, and for the reports to be kept away from the public. Disclosure orders by courts in leading jurisdictions help not only uncover covert transactions but equally important, open avenues for public scrutiny.

From experience, there are times where discussions revolving around the scope of discovery or disclosure itself dissuade the kleptocrat from contesting an action and opt for settlement.

In 2018, on the back of extraordinary allegations of mysterious wealth of the world's corrupt kleptocrats finding its way into the country, the UK's Criminal Finances Act 2017 added a new investigative tool, the Unexplained Wealth Order (*UWO*), into the civil recovery regime. UWOs shift the burden of proof to the asset's owner, empowering the UK enforcement agencies to ascertain if large purchases made by alleged high-risk individuals are in fact the fruits of ill-gotten gains.

Another legal instrument codified in Switzerland's Foreign Illicit Assets Act also shifts the burden of proof onto foreign officials to prove funds in Swiss accounts were legally obtained. The legislation allows Swiss law enforcement to presume assets were obtained illicitly. This can be done with the help of information that the foreign official is from a country where corruption was "notoriously high" during the official's time in office. Such a reversal of burden of proof, in effect, require the (corrupt) foreign official to establish how they were able to earn the amounts in question and in the specified period of time. Any failure on their part to satisfy this burden of proof results in legal proceeding.

Strategic Intelligence on Assets

Information about assets and connections is crucial to the development of a successful recovery strategy. Although the primary goal of an asset tracing exercise is to identify assets that can be seized, in case of kleptocrats it is critical to identify assets which if frozen paralyze operations, cause embarrassment, disrupt cash-flows, and attract unwanted scrutiny from the media and international regulators. In other words, freezing assets translates to pressure. Flagship assets, , which may not have a high monetary value but carry a reputational value for the corrupt elite, presents one such an opportunity. When an asset of this kind is at stake, even a temporary seizure or credible threat of enforcement can drive an otherwise incalcitrant kleptocrat to the settlement table.

Conclusion

Government officials in corrupt jurisdictions continue to loot state coffers to enrich their personal wealth. The global growth of kleptocracy and tax evasion, often with links to human rights abuse, demand action from the legislature and executive alike.

However, even as things stand, strategies can be crafted, assets traced, and tools deployed to forfeit proceeds of foreign officials' corrupt acts and repatriate the assets back to the state for the benefit the people harmed by these acts of corruption and the abuse of office.

There are a significant number of factors to take into account when assessing what asset recovery solutions are likely to lead to the largest and most efficient recovery of state assets within a reasonable timeframe. Although various effective tools are available, to ensure successful recovery of embezzled state assets, experience and expertise in overall management of a holistic strategy comprising judicial tools and non-judicial strategies to create pressure, remains the key.

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