Towards the end of last year the OECD published a report on measuring OECD country responses to illicit financial flows from developing countries ("the Report"). The Report makes a number of practical and sensible recommendations for combating money laundering, tax evasion and international bribery. This Blog piece, however, focuses on a separate chapter in the Report which considers improving asset recovery and repatriation of the proceeds of corruption stolen from developing countries.

Introduction

Chapter 5 of the Report considers the freezing, recovering and repatriating of "stolen assets". It might have been helpful, although perhaps overly complicated, for the Report to have provided a definition of the term "stolen assets" because it can encompass a number of categories in the corruption context including: bribes, the fruits of "legalised corruption" eg from rigged public procurement contracts or the privatisation of state assets in favour of associated persons or entities, as well as the classic kleptocrat's looting of state coffers. Different typologies of 'stolen assets' may well require different solutions and alternatives to the generic approach to asset recovery which we describe later in this Blog as the 'MLA approach'.

The Report concludes that progress to date on recovering stolen assets and returning them to developing countries has been "modest". Even that assessment is somewhat optimistic. The Report refers to figures produced by the OECD and the World Bank's STAR initiative which revealed that between 2010 to 2012 approximately US$1.4bn of corruption-related assets had been frozen with a total of US$147bn returned to a foreign jurisdiction in the same period. Between 2006 to 2009 US$276bn was returned to the country of origin (where the corruption occurred) by only four countries – Switzerland, Australia, the UK and Australia – with US$1.22bn frozen by these countries plus France and Luxembourg. But those recoveries are paltry compared to the estimated levels of annual illicit flows which according to the Report includes US$20 to US$40bn in bribes paid each year in the developing world (the annual global estimate is an astounding US$1 trillion) and on top of those figures one needs to include moneys that have been directly stolen from the State, as well as indirectly which would include the profits from corrupt deals. The Report is certainly correct in one respect namely that there needs to be better collation of statistics and measures on corrupt flows and actual recoveries so that progress on asset recovery can be evaluated and necessary improvements made to the international legal and policy framework.

OECD recommendations

The Report makes a number of recommendations to OECD countries to improve asset recovery which are summarised below:

- Install and enforce an effective legal framework including non-conversion based asset forfeiture legislation, allowing for compensation in cases involving asset recovery and enabling quicker freeze of corrupt assets
- Establish adequately resourced and trained specialist units which investigate stolen assets and prosecute offenders
- Implement comprehensive, strategic policies and best practices for rapid tracing, freezing and repatriating stolen assets
- Enhance information sharing on asset recovery cases
- Provide technical assistance, capacity-building support and case assistance to other countries

The Report also called on OECD countries to encourage so-called developing countries to introduce and implement the following ideals:

- Request and engage in mutual legal assistance
- Demonstrate commitment to combating corruption and bringing the guilty to justice
- Examine the best options for managing returned funds
- Discuss with developed countries proper cost-sharing arrangements for asset recovery cases

Comment

The Report contextualises asset recovery through the prism of the Arab Spring. Whilst some of the alleged corrupt assets of the former Tunisia, Egyptian and Libyan regime members have been frozen – there are very few instances of repatriation to date. It has become increasingly apparent that the traditional approach of a domestic conviction followed by confiscation which is then enforced against assets abroad through mutual legal assistance has proved to be extremely problematic. The UK eventually launched its own domestic money laundering investigations concerning alleged Egyptian stolen assets, perhaps in recognition of the difficulties and obstacles involved in criminal prosecutions of corruption in Egypt especially against former Mubarak regime members.

In an ideal world, the bilateral or multilateral cooperative approach to recover corrupt assets which ultimately relies on successful domestic criminal prosecutions would be the preferable route ("the MLA approach"). The OECD recommendations focus on achieving this noble goal; but is it quixotic? Realistically, can we expect post-revolutionary states, which will face further years of political instability, to locate and process evidence that link assets to corruption and successfully bring very complicated criminal prosecutions that meet the criminal standard, and do so within a reasonable time-frame? The Report acknowledges that the MLA approach is far from straightforward. It offers alternatives including a discreet reference to the possibility that the origin country might, as an alternative, considering initiating private civil actions in foreign courts (where the corrupt assets are located). Such proceedings operate on the lower standard of proof ie on the balance of probabilities. This is a potentially sensible alternative to the traditional MLA approach. There are, however, barriers to such an approach that also need to be addressed:

- the victim State might need the assistance of foreign law enforcement with its powerful compulsory powers to gather evidence abroad if viable civil proceedings are to be brought. Generally, foreign law enforcement’s hands are tied and they cannot assist with the collation and provision of evidence for private civil proceedings.
- private civil proceedings are costly. The victim State may be unwilling or unable to fund private lawyers to bring civil proceedings.

The Report does go as far as to admit that in some cases the MLA approach is simply not practicable. For example, the MLA approach is unlikely to be viable to freeze and recover the proceeds of present and ongoing corruption when a corrupt regime is still in power or wields influence. In that environment, it is unlikely that the 'victim' country will instigate the necessary criminal procedures. In these circumstances, the OECD's recommendations are unlikely to be particularly effective. But is it right that OECD countries that may host corrupt assets do nothing as a consequence?
Bearing in mind some of the difficulties with asset recovery, it would be helpful for the OECD to consider and recommend alternative, perhaps more drastic and even controversial, solutions to the traditional MLA approach. The OECD might consider the following.

- To encourage a policy-change that OECD countries that have been siphoned away from developing countries should instigate standalone domestic proceedings using either the criminal or using non-conviction based asset forfeiture route. There are of course practical difficulties with such an approach not least the political and diplomatic consequences — but there are strong arguments that OECD countries in allowing their shores to be used to launder illicit monies are destabilising and undermining the very fabric of their society and the rule of law. This is a discussion for another time. But if this route is to be pursued more aggressively in the future, there does need to be an open debate as to whether the costs of any such initiative by foreign law enforcement can be compensated through the recoveries, or even some recoveries retained until positive anti-corruption measures are implemented in the victim country or there is a regime change.

- To urge OECD countries to be bolder in introducing more effective asset recovery laws that allow easier and quicker (and longer) freezing of assets suspected to be the proceeds of corruption, and that shift the burden of proof if there are reasonable grounds to suspect that the wealth of politically exposed persons and their close associates exceeds what could have lawfully been acquired (analogous to unexplained wealth laws) - a 'corrupt enrichment law'.

- To require OECD countries to introduce a comprehensive and uniform and properly monitored system of interest and asset declarations (and encourage non-OECD countries to do the same) which may assist with both criminal prosecutions (especially any new corrupt enrichment offence) and private civil actions. Independent anti-corruption agencies or equivalents should be entitled to monitor and query IADs.

- To encourage OECD countries to educate developing countries about the availability of private civil proceedings, and/or the ability to trigger criminal investigations in host countries such as in France (a notable example being the SHERPA/TTI-France investigation against President Obiang of Equitorial Guinea's son), OECD countries should also consider introducing laws that allow greater sharing of evidence obtained for the purpose of criminal investigations to be used by the victim state for private civil proceedings (both domestic and abroad) or even private criminal prosecutions (if available) if certain criteria are met. Greater consideration needs to be given as to how private actions can be funded including say through use of a designated global fund.

- To encourage OECD countries to inform developing (and indeed other) countries as to whether they are able to obtain compensation as a result of criminal proceedings against companies for bribery of foreign public officials. And to formally notify victim countries that they are able to bring private proceedings for compensation against companies which have been convicted of or have settled foreign bribery allegations.

- To recommend that OECD (and encourage non-OECD countries) to consider introducing laws that enable and recognise that civil society can bring private civil proceedings to recover corrupt assets located both at home and abroad where the State is unwilling or unable to do so – drawing from laws such as the US False Claims Act.

- To encourage OECD and non-OECD countries to embrace NGOs within the asset recovery process to expose corruption and help gather evidence for use in prosecutions or private civil proceedings.

- To encourage OECD countries to consider the issue of how to tackle ‘legalised corruption’. Information needs to be provided to countries as to how to unwind corrupt transactions and recover any profits gained by those players complicit in the wrongdoing – through criminal or civil means.

- To recommend that OECD countries and non-OECD countries remove state immunity in relation to corruption and limitation periods should not apply with respect to both criminal and civil proceedings for such offences.

Conclusion

When the MLA approach is viable it can be effective. In a perfect world it would be the correct mechanism for all asset recovery actions. But on many occasions and for a variety of factors it may not be a viable route — either there is no political will in the origin country or politically-related criminal prosecutions there are notoriously difficult or interminably slow, evidence has been destroyed, assets dissipated, possible defendants are located abroad, there is a lack of capacity within law enforcement - the list can go on.

The OECD overview and recommendations ostensibly appear wedded to the traditional MLA approach, perhaps necessarily so. But it is at present failing to deliver meaningful amounts of recoveries when compared to the suspected volume of illicit flows. The pernicious effect of corruption (and fraud) is, however, provoking some radical change. For example, the EU Parliament recently blessed a new requirement within its proposed Fourth Money Laundering Directive that Member States publish a public register of corporate beneficial ownership. A few years ago the idea of a public register would have been too controversial. Therefore, more radical approaches to asset recovery should not be dismissed as fantastical. Indeed, the Global Organization of Parliamentarians Against Corruption has called for grand corruption to be declared as a crime of international law which can be prosecuted anywhere. Bold ideas such as those proposed by GPPAC reflect the growing appreciation that new ways to prosecute corruption and recover the corrupt assets need to be considered. Depending on the facts of each case better routes might be more viable such as criminal and non-conviction based asset forfeiture proceedings in the host countries, and private civil actions where the assets are located.

[1] Please see Daniel Kaufmann and Pedro C. Vicente 2005 Paper entitled 'Legal Corruption'