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U.S. Tools to Bankrupt Kleptocracy: Anti-Money Laundering and Asset Seizure

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Corruption and money laundering go hand in hand. Money laundering is the effort to legitimize wealth obtained through the commission of a crime, often known as a "predicate offense." Fraud, theft, bribery, and other acts associated with corruption are considered to be predicate offenses in most jurisdictions. A wide range of anti-money laundering provisions have come into force over the past century that can be used to combat corruption. However, numerous loopholes that remain in place allow ill-gotten gains to enter the United States with ease and prevent efforts aimed at tracing and seizing the proceeds of corruption.

Criminal investigations into money laundering

The U.S. government has broad powers to investigate and prosecute individuals who facilitate the movement of corrupt proceeds into the United States (including funds that pass through U.S. banks), as those who knowingly facilitate the movement of the illicit funds into or through the United States are engaging in money laundering.

In order to bring charges for money laundering, prosecutors must establish that a case satisfies the following three criteria:

1. The funds in question derive from a "specified unlawful activity"
2. The individual or institution involved in the laundering scheme understood that the funds derived from some sort of crime
3. There is evidence of a transaction designed to conceal the sources of the proceeds or the parties involved in the transaction

FinCEN's anti-money laundering powers

The Financial Crimes Enforcement Network (FinCEN) is an office of the Department of Treasury. It was founded to combat money laundering and other financial crimes. In 2001, the passage of the Patriot Act significantly expanded FinCEN's power, and the office now has broad

authority to place enhanced due diligence requirements on financial institutions, investigate financial crimes, and even impose sanctions-like prohibitions on entities believed to be involved in money laundering.

Section 311 of the Patriot Act allows FinCEN to declare that a foreign jurisdiction, foreign financial institution, class of transaction, or type of account is a "primary money-laundering concern," meaning that there is a high likelihood the person, entity, or activity is involved in money laundering. Once such a declaration is made, FinCEN has the power to enact one of the following five special measures:

1. Require additional record-keeping and reporting of certain financial transactions
2. Require collection of information about the beneficial owners of accounts
3. Require collection of information pertaining to certain payable-through accounts (accounts maintained by U.S. financial institutions for foreign financial institutions)
4. Require collection of information relating to certain correspondent accounts
5. Prohibit or impose conditions on opening or maintaining correspondent or payable through accounts

Special Measure 5 can effectively block a foreign institution from using the U.S. financial system. It is the most potent tool and the only one that has been used so far—and it has only been used on entire jurisdictions or financial institutions. Moving forward, FinCEN could begin to use this power more creatively and in a more targeted fashion. For example, FinCEN could consider deploying the other special measures (1 through 4) at its disposal on more carefully-specified types of actors and transactions.

FinCEN also has the power to enact Geographic Targeting Orders (GTOs), which are advisories requiring financial institutions to collect additional information on types of accounts, institutions, and transactions in certain geographic areas within the United States for a period of 180 days. While many GTOs issued thus far have been used to collect information about money laundering by drug cartels and other transnational criminal organizations, they can also be used to collect beneficial ownership information about individuals who purchase real estate in the United States, thus making it more difficult for criminals and kleptocrats to park their ill-gotten gains here.

Moving forward, FinCEN should use these powers to identify banks, institutions, and classes of transactions that kleptocrats use to loot and launder state assets. FinCEN should use special measures to prohibit certain transactions where appropriate.

Asset tracing and forfeiture

Laundered money eventually ends up somewhere—and, too often, these funds wind up parked in property in the United States or stashed in U.S. bank accounts. If funds deriving from crime or

corruption pass through the United States, the U.S. government has the power to seize them. The laws and policies empowering the U.S. government to trace and seize the illicit proceeds of corruption have evolved significantly over the last several decades. U.S. civil forfeiture law, which allows the Justice Department to seize the proceeds of criminal conduct (bribes, procurement fraud, theft, embezzlement or misappropriation of state funds, and kickbacks), is increasingly being used to go after the proceeds of grand corruption overseas.

Launched in 2010, the Kleptocracy Asset Recovery Initiative created a dedicated, specialized team to find and recover the assets looted by corrupt foreign officials. The Justice Department, Department of Homeland Security, and the FBI all play a role in this initiative. So far, the Kleptocracy Asset Recovery Initiative has seized more than $1 billion in corrupt proceeds and is currently pursuing cases that could more than double its total.

In order for the U.S. government to pursue the seizure of the proceeds of corruption, two basic criteria must be met:

1. The case must involve "dual criminality" (i.e. the criminal act from which the funds are sourced must be illegal both in the United States and in the jurisdiction in which it was committed.)

2. The case must involve a "U.S. nexus," meaning that the criminal act must have taken place within U.S. territory, the asset must be located in the United States, or the illicit funds must have passed through the U.S. financial system.

The investigative, legal, and administrative processes involved in seizing assets are complex. However, the investigative and legal processes is becoming more streamlined the more it is utilized. Furthermore, the Justice Department has become more experienced in pursuing these cases and has devoted more resources to this effort.

One important question arises when the U.S. government seizes a kleptocrat's assets: what to do with the funds or valuable objects recovered. Ideally, the funds would be repatriated to the country from which they were stolen. However, it makes little sense to do so if a corrupt or abusive government remains in power. Accordingly, several initiatives have been developed in order to ensure that the recovered proceeds of corruption are not simply recaptured by kleptocrats. Importantly, the U.S. government has recently enhanced the resources and staff allocated to kleptocracy cases. As a result, the Kleptocracy Asset Recovery Initiative may become an increasingly potent tool in the fight against international corruption.

For more information, please read Enough's report Bankrupting Kleptocracy: Financial Tools to Counter Atrocities in Africa's Deadliest War Zones.