

GROUP 2

INTERNATIONAL COOPERATION FOR THE PURPOSE OF CONFISCATING ILLICIT PROFITS AND RECOVERING DAMAGES

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I. INTRODUCTION

The world has become a global village, and there is an increase of cases in which the economic activities of society have become international. As a result, the property acquired through corruption crime is concealed in foreign countries. In investigating corruption offences, international cooperation including Mutual Legal Assistance (MLA) is increasingly important to trace, freeze and forfeit proceeds of corruption crimes.

II. INTERNATIONAL CONVENTIONS

The group noted that all participating countries are State parties and members of the United Nations Convention against Corruption (UNCAC) and other international conventions.

III. IDENTIFYING AND TRACING FINANCIAL FLOWS

All participating countries have legislation on identifying and tracing financial flows in their domestic legislation, which empowers them to search, trace assets and money trails.

Good Practice: All participants agreed that it is good practice to liaise with other jurisdictions to obtain information through informal contacts and affiliate groups. The participants also noted the need to create bilateral and multi-lateral agreements or Memorandums of Understanding (MOU) among member countries to enhance the provision of information and requests.

Challenges: The following issues were identified as challenges: lack of political will, impunity, lack of prosecution powers in certain countries, lack of trust between agencies in the multi-agency approach, constitutional capacity, determining the location of the funds in the requested state, illegal ways of transferring money to foreign countries such as *hawala* and *undial*, and Financial Intelligence Units (FIU) in many countries cannot share information without the existence of MOUs with the requesting countries.

Recommendations: The participants' countries should create a strong network and share information informally to enhance and expedite formal procedures in cases which require international cooperation, efforts should be made by the different jurisdictions to enlighten the judiciary on the importance of MLA and international cooperation in corruption cases, to establish MLA Units within anti-corruption agencies to enhance their knowledge and capacity on the procedures of MLA, make use of informal regional organizations like the Stolen Assets Recovery Group (StAR) and Asset Recovery Inter-Agency Network

Southern Africa (ARINSA), create Joint Investigation Teams (JIT), cooperate with FIUs, and encourage FIUs in different jurisdictions to establish MOUs.

IV. FREEZING, SEIZING AND CONFISCATION OF THE PROCEEDS OF CORRUPTION

Good Practice: Kenya successfully managed to obtain a freezing order in a case involving a public official who was charged with abuse of office and unexplained wealth. The court ruled that this official had unexplained wealth, and the official was ordered to pay Kenyan Shillings 75 million, an equivalent of US \$ 750 000.¹

Formal and/or informal communication and exchange of operative information — Japan's Cooperation with South Korea; Ukraine's cooperation with Switzerland, Latvia and Austria; Zimbabwe's cooperation with South Africa and Botswana, Malaysia's cooperation with Hong Kong, Brunei, Indonesia, Thailand, the United States, Switzerland and Singapore; Kenya's cooperation with Japan; Kazakhstan's cooperation with Ukraine, Sri Lanka's cooperation with its neighbouring countries; Malawi's MOU with Japan.

Ukraine had success in an international case between Germany, the United States and Latvia, where requests for freezing orders were facilitated using information from informal contacts which was eventually used as the basis for due court process.

Challenges: The Group noted that there are many challenges associated with freezing orders, confiscation and forfeiture orders. There are different legal frameworks for freezing, seizing and confiscation of proceeds of crime from country to country, so we are faced with the conflict of jurisdictions and the absence of legislation on criminalization of illicit enrichment in some jurisdictions. Confiscation orders can be granted by the courts, but assistance and cooperation may be difficult to obtain from the other jurisdictions. Strict legislation on bank information and bank secrecy. The issue of off-shore zones is a challenge when seeking to implement freezing or confiscation orders, especially if there are no treaties or bi-lateral agreements. Lack of political will, political interference, impunity, lack of trust among investigative agencies when using a multi-agency approach, delays or no responses from requested states due to the diplomatic bureaucracy stipulated by the law, lack of prosecuting powers for some anti-corruption agencies (Kenya & Zimbabwe), the issue of non-conviction-based confiscation, admissibility of evidence in foreign court proceedings, translation of MLA documents when countries have different official languages. Determining the location of the funds in other jurisdictions, the need to establish a link between misappropriated and requested funds, non-disclosure of suspect funds detected by the requested State, sluggish asset disclosure proceedings and spelling variations of the names of indicted persons whose assets are to be frozen².

Recommendations: Create a strong network between participating countries such as a creation of focal points in their respective countries for providing consultancy on domestic legislation of the requested country. Engage representatives from offshore jurisdictions to participate in training or conferences and seminars on MLA and international cooperation. To strengthen inter-agency cooperation. The Anti-Corruption agencies to lobby for enactment of laws to empower them. Some of the participants encouraged countries to criminalize illicit enrichment.

V. ASSET RECOVERY

Challenges: Countries' reluctance to cooperate in asset recovery because of the prejudice to their economies. The absence of a common framework of procedures regarding asset recovery among member States of UNCAC to ensure successful forfeiture of the proceeds of corruption offences regardless of where these proceeds are deposited or transferred. Differences in the legal systems of countries, the absence of non-conviction-based forfeiture/confiscation in some jurisdictions.

Recommendations: Focal points for UNCAC. Creation of alumni UNAFEI network. State parties to

¹ Article by Phillip Muyanga, Daily Nation of 2017 September 21st.

² Note Verbal, dated 7 October 2011, from the Permanent Mission of Egypt to the United Nations (Vienna) addressed to the United Nations Office on Drugs and Crime, Corruption and Economics Crime Branch CAC/Cosp/2011/13.

attend Working Group Meetings and the continuous review cycles of UNCAC. Some of the participants encouraged the adoption of non-conviction-based confiscation.

VI. CONCLUSION

Corruption offences and the laundering of criminal proceeds is a global concern so at the international level there should be a sincere and extensive intention to cooperate in the field of freezing, seizure and asset recovery. The need for international cooperation should be emphasized to enable countries to confiscate illicit proceeds of corruption crimes.