GROUP 2

EFFECTIVE MEASURES TO PREVENT, DETECT AND PUNISH MONEY LAUNDERING

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I. INTRODUCTION

On September 7 2010, Group 2 started its discussion, and elected, by consensus, Mr. Konno as its chairperson, Mr. Aldana Ramírez as its co-chairperson, Mr. Cazetta as its rapporteur and Mr. Motomura as its co-rapporteur.

The Group mission is to discuss effective measures to prevent, detect and punish money laundering and, to do that, it agreed to conduct its discussion in accordance with the following agenda: 1) the basic legal framework to address money laundering; 2) advanced legal frameworks and practices to prevent and detect money laundering; 3) investigation and punishment of money laundering; and 4) promotion of international co-operation.

II. SUMMARY OF THE DISCUSSIONS

A. Basic Legal Framework to address Money Laundering

1. Criminalization of Money Laundering

Considering the differences in the legislation of the participants' countries, the group agreed that there is a need to use FATF Recommendation 1 as a minimum goal to criminalize money laundering on the basis of the United Nations Convention Against Illicit Trafficking in Narcotic Drugs (the Vienna Convention) and the UN Convention on Transnational Organized Crimes (the Palermo Convention), observing at least 20 categories of predicate offences: participation in an organized criminal group and racketeering; terrorism, including terrorist financing; trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder; grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; extortion; forgery; piracy; and insider trading and market manipulation.

Furthermore, all participants agreed that tax evasion[1] must be considered a predicate offence as part of

[1] There have been debates on whether tax evasion should be included in the list of predicate offences to money laundering, considering that tax evasion involves money that came from legitimate businesses or income. This issue was in fact mentioned in the lecture of Mr. Daniel Thelesklaf of the Basel Institute on Governance. Nevertheless, there is no question that tax evasion is a crime which deprives the government of much-needed revenue. Thus, whenever tax evasion is committed, the money that is due to the government is unlawfully withheld by the tax offender. In effect, the money withheld becomes "illicit money." And when that "illicit money" is transacted, or converted to make it appear as having originated from legitimate

the efforts to enhance the fight against money laundering.

2. Keeping Bank Records for a Substantial Period of Time

The group considered that to effectively implement an anti-money laundering regime, it is essential for the reporting entities to have a system of record-keeping which applies for a substantial period of time - at least five years.

3. Establishing and Empowering FIUs

All participants agreed that FIUs should enhance the quality of their analysis in order to provide material and intelligent "leads" to detect possible money laundering.

The FIUs of Japan and Hong Kong are set up under their respective police agencies, so those FIUs can easily make use of police records, such as crime records, to analyse suspicious transaction reports (STRs). But, Japan's FIU is facing the problem of lack of access to information that other authorities possess.

On the other hand, Brazil's and Mexico's FIUs, which are under their respective Ministries of Finance, and Sri Lanka's FIU, which under its central bank, can also get information from police records, so it does not matter under which authority an FIU stands as long as it can gain access to necessary information.

The Philippines' FIU is an independent government agency which has the authority to conduct investigation (including bank inquiries) relative to money laundering offences, initiate criminal complaints for money laundering, institute action to freeze properties, and institute civil forfeiture proceedings against properties or assets that are related to unlawful activities and money laundering offences.

All participants agreed that FIUs should have power to access a wide variety of information in order to enhance the quality of analysis.

Brazil's and Mexico's FIUs can obtain a wide variety of information, such as tax records, assets declarations of public officials, etc. and analyse STRs with aggressive use of information technology.

With regard to the above-mentioned discussion, it is reported that the Philippines' and Sri Lanka's FIUs can obtain additional information as part of their investigative powers. Then we discussed whether FIUs should have investigative powers, but we eventually found out that producing new authority often leads to conflict with existing law enforcement agencies (LEAs), so we agreed that it is more important to establish a co-operative relationship between FIUs and LEAs, such as setting up a task force, than to provide FIUs with new investigative powers.

The group agreed that there is a need to strengthen the capabilities of FIUs and to empower them by providing adequate human resources and efficient organizational structure, and more importantly, FIUs should be spared from inappropriate interference, such as political interference.

4. Establishing a Suspicious Transaction Reporting System and Securing Compliance with it

All participants confirmed that their countries have STR systems, and breach of obligation to file STRs can lead to administrative or criminal sanctions in every country.

All participants agreed on the importance of promoting awareness of reporting entities and building good relationships between FIUs and reporting entities so as to enable/encourage them to have better understanding of STRs.

All participants confirmed that Designated Non-Financial Businesses and Professions (DNFBPs) have rarely produced STRs in their respective countries and agreed that it is necessary to consider enacting laws that would require them to comply with the filing of STRs.

5. Utilizing Information Gathered and Analysed by FIUs

All participants were aware of the importance of STR analysis for the purpose of more effectively fighting Money Laundering and Terrorism Financing. Unfortunately, as observed by most of the participants, STRs

sources, an offence of money laundering is committed. Thus, the group agreed that tax evasion should be included in the list of predicate offences.

are not fully utilized by LEAs. Probably, it is due to insufficient analysis of STRs, lack of understanding on the part of the LEAs as to the proper use of information obtained from STRs, or lack of proper co-ordination between FIUs and LEAs. We also noticed that there are several issues surrounding analysis of STRs, namely, lack of human resources, difficulty in allowing analysts to gain experience due to personnel rotation cycles, limited access to information possessed by other authorities, and lack of feedback from investigative authorities.

After confirming the current situation and issues that each country's FIU is facing, and discussing possible countermeasures, we agreed that it is desirable for FIUs to consider the following points:

- To assemble staff with a variety of backgrounds, such as financial experts, LEA officials, lawyers, and computer experts;
- To have their own permanent staff (not be assigned staff on a rotation basis);
- To provide their staff with adequate training so that they can have the latest information on ML modus operandi;
- To provide reporting entities with necessary information as well;
- To develop IT systems, such as utilizing newer software to deal with vast quantities of information and ensure the security of such systems;
- To improve the quality of STRs disseminated to LEAs to facilitate utilization of such information. On the other hand, LEAs should also be trained in the proper use of STR information and how to maximize its use.

B. Advanced Legal Frameworks and Practices to Prevent and Detect Money Laundering

1. Extension of the STR System to Designated Non-Financial Businesses and Professions

Relative to FATF Recommendation 16, some participants reported that the legal profession is not subject to an STR reporting obligation (in Japan, Brazil and Philippines). The Philippines' FIU is proposing an amendment to the the AM Law, which would require non-financial institutions to report STRs, but lawyers raised concerns because of the privileged nature of lawyer-client communication. Indonesia faces the same problem. One of the participants proposed that lawyers, for example, must pay a large amount of money to retain their license to practice. Others, however, raised the concern that such a measure might limit the freedom of the person to choose their occupation.

No one disagreed about the importance of adopting an STR reporting system that includes non-financial institutions and the legal profession, even though it must include some kind of protection of lawyers' privileged communication with their clients.

2. Increasing the Capacities of FIUs and Financial/Non-Financial Institutions to Detect Money Laundering, including Development of Typologies

Recognizing the importance of the STR/CTR reporting system in the investigation of money laundering, the group concluded that it is vital to maintain open and constant communication between the FIU and the financial/non-financial institutions, adopting, for instance, the practices of most countries, where FIUs regularly meet and confer with the financial/non-financial institutions and discuss matters relating to STRs.

3. Conducting Enhanced Scrutiny of Accounts of "Politically Exposed Persons"

The group considered that there is a higher possibility that Politically Exposed Persons[2] (PEPs) can gain illicit profits through unlawful means, such as bribes.

In accordance with FATF Recommendations 6 and 12, countries are required to take appropriate measures to ensure that financial and designated non-financial institutions apply enhanced due diligence with respect to PEPs, such as verifying the identity of the customer and beneficial owner before or during the course of establishing the business relationship, obtaining senior management approval for establishing business relationships with PEPs, and so on. However, we found that some countries do not have legislative,

[2] According to the glossary of FATF Recommendation 40, "Politically Exposed Persons" (PEPs) are defined as individuals who are or have been entrusted with prominent public functions in a foreign country, for example, heads of state or government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, or important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves.

regulatory or other enforceable requirements in respect of PEPs.

Considering the importance of preventing money laundering related to corruption, all participants agree that every country should implement the requirements with regard to the PEPs so that there should be no loophole for dirty money gained through corruption. And we also agreed that the requirements of FATF Recommendations 6 and 12 should be extended to PEPs who exercise prominent public functions domestically.

And there still remains the complex question of defining who should be regarded as a PEP. For instance, as mentioned by Visiting Expert Mr. Daniel Thelesklaf, it is difficult to decide how long a person will be considered a PEP after retirement. Thus, the participants consider it important to have a more specific international standard for the definition of PEPs.

4. Asset Disclosure Requirement for Certain Public Officials

We noticed that Mexico, the Philippines and Brazil have asset disclosure systems for certain public officials.

All agreed that money laundering and corruption have a close relationship and, at least, that investigative authorities should have easy access to information thereof in order to easily detect the proceeds of crime.

5. Co-operation and Information-sharing among Relevant Authorities

Some participants explained that co-operation among relevant authorities has not been so effective due to a lack of information-sharing mechanisms and a lack of initiative on the part of relevant government agencies to regularly meet and confer with each other. So in order to observe FATF Recommendation 31, all participants agreed that it is necessary to establish continuous and comprehensive mechanisms to implement co-operation and information-sharing among relevant authorities. Some good practices shared by the Philippines and Brazil are outlined below.

(i) Philippines

The National Law Enforcement Coordinating Committee (NALECC), whose membership includes all relevant government agencies, serves as the forum for co-ordination of all official activities of such relevant government agencies in law enforcement. The Committee holds meetings every three months during which all concerns/issues affecting domestic co-operation are tackled and resolved.

(ii) Brazil

The National Strategy Against Corruption and Money Laundering (ENCCLA), which is co-ordinated by the Ministry of Justice, is the primary policy-co-ordination mechanism in Brazil with respect to money laundering, terrorism financing (ML/TF) and corruption. The Integrated Management Cabinet for Prevention and Combat against Corruption and Money Laundering (GGI-LD), composed of 60 agencies, meets once a year to identify ML/TF activities and review the effectiveness of the national system in order to determine the main objectives for ENCCLA for the following year. The document that results from this meeting establishes joint actions for GGI-LD members. ENCCLA is in charge of delivering this national policy and also seeks to enhance the co-ordination of relevant government institutions and the private sector. The full ENCCLA meets once per year, and a core group of ENCCLA's members meet every three months.

6. Measures to Prevent and Detect Cash Smuggling, including Border Control

All countries have adopted some kind of cash smuggling detection system (border form or customs declaration), that enables monitoring of cash transportation. It is not clear, however, if all countries provide this information to FIUs and the group determined that it is necessary to implement measures to share information between different countries' authorities, so that they can check if the same information was provided in the country of origin and the country of destination.

C. Investigation and Punishment of Money Laundering

1. Effective and Proactive Enforcement of Anti-Money Laundering Legislation

The group agreed that it is quite important to monitor financial/non-financial institutions, especially banks, so that they submit STRs appropriately, and that they should be punished when they do not comply properly.

Some FIUs, like Japan's and Brazil's, have no power to order reporting entities to rectify any omission, but FIUs give relevant competent institutions notice that reporting entities do not comply with the requirements.

2. Special Investigative Techniques, including Controlled Delivery, Communications Interceptions and Undercover/Sting Operations

Even though they function under different requirements and conditions, the group found that each country has special investigative techniques, such as communications interceptions and controlled delivery, etc. In some countries they are frequently used to combat money laundering and predicate offences. But, because of their complexity, investigators need constant training in such special investigative techniques.

All participants agreed that an IT system is also critical to allow investigators to make use of the information collected through these special investigative techniques. For example, Mexico and Brazil are equipped with information systems which integrate, visualize and analyse various information sources such as bank accounts, tax records, phone records, etc.

Participants were also aware of technology-related issues which investigators may face due to the increasing use of electronic devices. For example, in Brazil, there was a case in which the investigative authority seized a database but was unable to crack a code. So Brazil has proposed a law to allow investigative authorities to order companies to give information about how to crack a code.

3. Capacity Building of Investigators in Financial Investigation

FIUs and LEAs should improve their investigators' capacities in order to fight effectively against complex money laundering offences and predicate offences.

So, the group agreed that it is very important for FIUs/LEAs to develop their human resources by constantly providing relevant training.

D. Promotion of International Co-operation

1. International Exchange of Information among Relevant Agencies, including FIUs

The group discussed the importance of promoting international co-operation among FIUs and other relevant law enforcement authorities. Indeed, international co-operation has been consistently encouraged under the Vienna Convention and the Palermo Convention. All of the represented countries except Japan have ratified the Palermo Convention. International co-operation is also urged under the FATF 40 Recommendations, particularly Recommendations 35-40.

The group recognizes that money laundering is a global problem; it is an offence that knows no border. In some cases, no single country can successfully detect, investigate and prosecute money laundering without the assistance of other jurisdictions.

With the exception of Guyana, the FIUs of the participating countries are members of the Egmont Group. The sharing of information through the Egmont Secure Web has been very helpful; many cases have been investigated and prosecuted after receiving information from the counterpart FIUs, either on a voluntary basis or upon request.

Participants from Japan and Indonesia explained that their FIUs can share information only if there is a Memorandum of Understanding (MOU); others said that an MOU is not necessary to share information with a requesting FIU as long as the requesting FIU is a member of the Egmont Group.

The participants also agreed that the same kind of information sharing among the other relevant LEAs had been very helpful and fruitful. Also, information sharing through international organizations, such as INTERPOL and IberRED,[3] has been very useful.

2. Mutual Legal Assistance and Extradition in Cases of Money Laundering

It is natural that there are some formal channels of seeking and obtaining mutual assistance from foreign states, i.e. through MLATs, bilateral treaties and regional treaties. But sometimes, these formal channels involve difficulties, such as taking longer periods of time to obtain assistance or to comply with legal

[3] IberRED means *Rede Ibero-Americana de Cooperação Judicial* (Ibero-American Network of Judicial Cooperation), an international organization for Spanish and Portuguese speaking countries.

requirements from a requested country due to differences in the legal system. Thus, the group agreed that informal channels, such as FIU-to-FIU and LEA-to-LEA information sharing, are more expeditious; it is encouraged that such kind of co-operation be promoted and maintained among us all, to communicate more effectively, in tandem with the formal channels.

3. Joint Investigation with other Countries or Agencies

The group also recognized the need for joint investigation (among different jurisdictions) since investigators cannot conduct investigations outside of their national territory. Hence, as presented by Visiting Expert Ms. Jean Weld, joint investigation, such as Operation Mantis,[4] is very helpful.

4. Obtaining Technical Assistance provided by International Organizations

Finally, the group also recognized the importance of receiving technical assistance from international organizations such as the International Centre on Asset Recovery (ICAR),[5] especially in the areas of training and continuing education relative to investigation of money laundering, as part of the wider capacity building of the investigators.

III. CONCLUSION

In conclusion, the group reached a consensus that, indeed, money laundering is a global problem that needs a global solution. While international standards to combat money laundering have been set by relevant international bodies, it is the observance thereof and compliance therewith by all jurisdictions that determine real success in this fight. Legal frameworks and regulatory measures should be in place.

And while different jurisdictions adopt different systems that prove applicable to their peculiar circumstances, what matters most is their ability to extend co-operation and willingness to provide assistance to other jurisdictions in the investigation of money laundering and its predicate offences. Surely, if all jurisdictions act as one in the fight against money laundering, this crime will find no place to flourish in this world.

[4] *Operation Mantis* is a multi-lateral initiative, conducted by the Roma Lyon Group in 2009, focusing on addressing bulk cash smuggling, as mentioned in Ms. Weld's report.

[5] The International Centre for Asset Recovery is a institution supported by core funding from the Swiss Agency for Development Cooperation (SDC), the UK Department for International Development (DFID) and the Principality of Liechtenstein, as well as by project-specific funding from partners such as UNODC and the World Bank (through their Stolen Asset Recovery Initiative, StAR) and the Council of Europe, that continued to develop and deliver a high number of asset recovery capacity building programmes. ICAR is one branch of The Basel Institute on Governance (BIoG).