

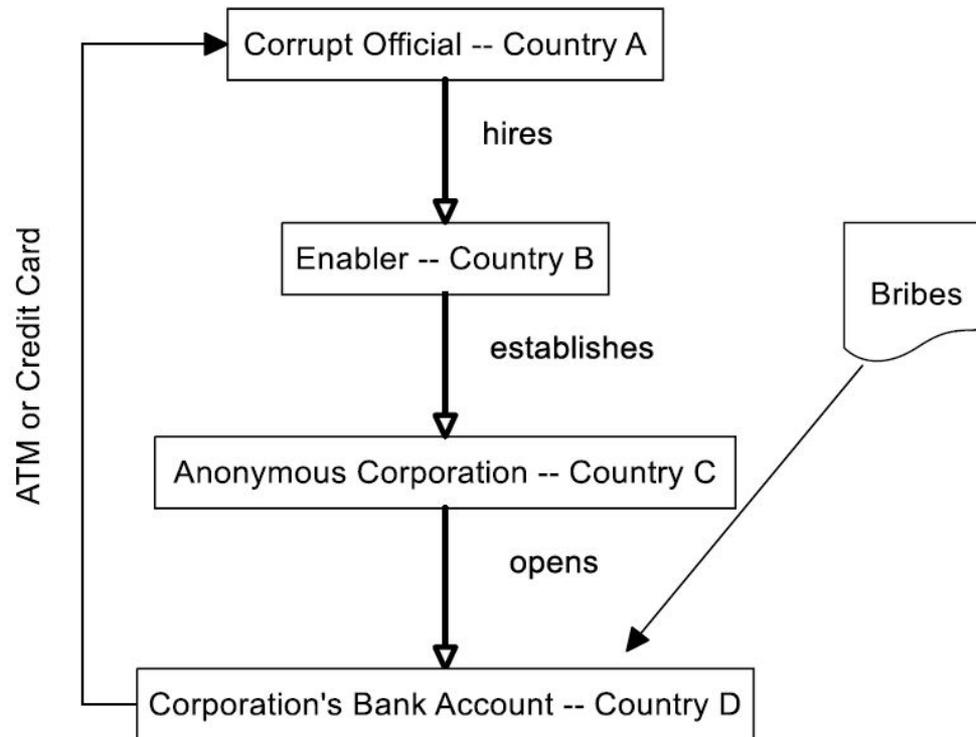


International Cooperation For Taxing HNIs: Freezing and Confiscating Assets

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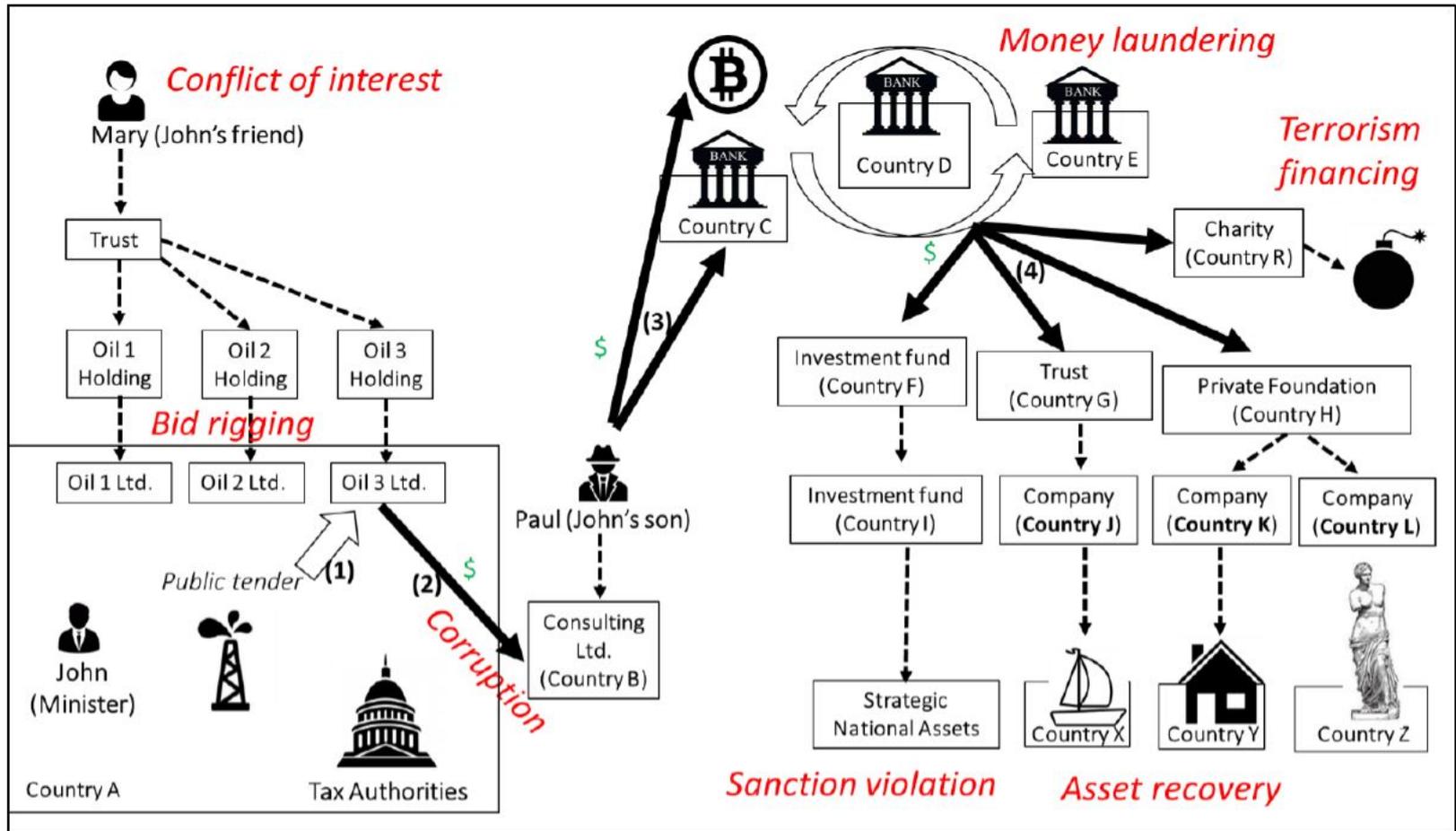
Sample Process For Hiding Assets Overseas

Figure 1. Use of Anonymous Corporation to Hide Asset Ownership



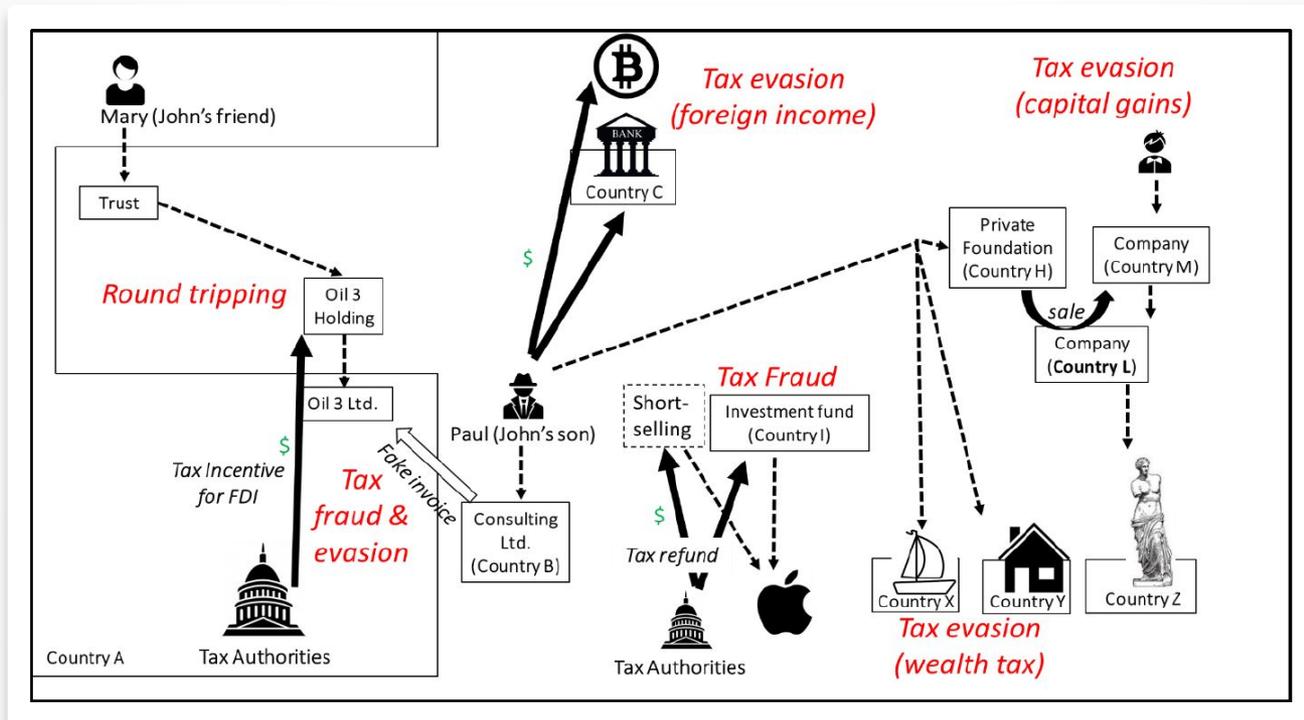
- Source: Kanji and Messick(2020)

Sample Process for Hiding Assets Overseas



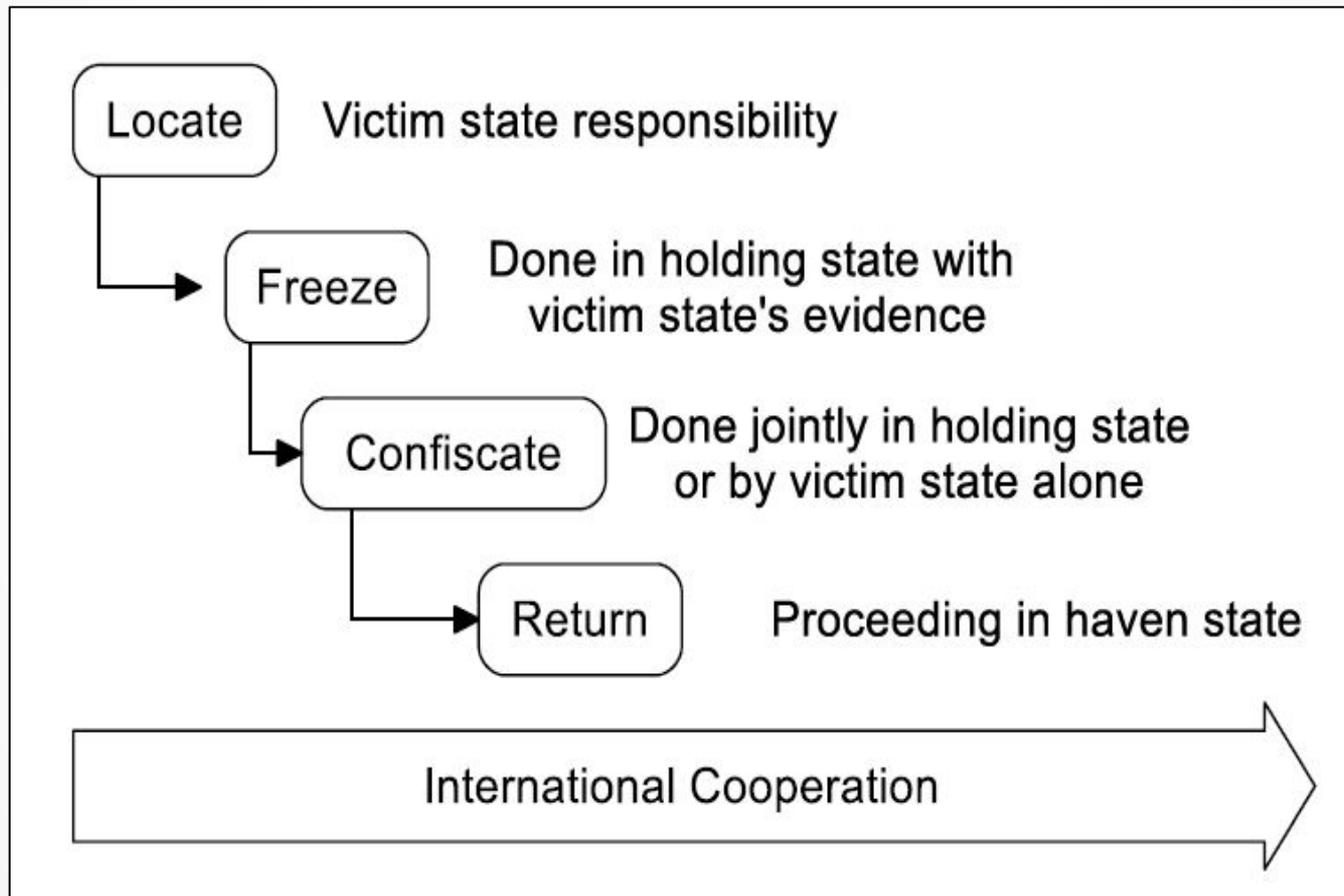
- Source: Andres Knobel (2020)

Sample Process for Hiding Assets Overseas



Source: Andres Knobel (2020)

Asset Freezing and Recovery



- Source: Kanji and Messick(2020)

What Assets Can be Frozen and Recovered?

Proceeds relating to Offences under:

UN Convention Against Corruption

UN Convention Against Transnational Organized Crime

UN Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances

International Convention For The Suppression Of The Financing Of Terrorism

What Assets Can be Frozen and Recovered?

- UN Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances
- Article 3: Drug production, financing, money laundering of the proceeds

Asset Freezing and Recovery

Returned to	Returned by	Amount (millions USD)	Date				
Angola	Switzerland	24.0	2005	Malaysia	United States	300.0	2020
Angola	Switzerland	43.0	2012	Malaysia	United States	49.0	2020
Brazil	Switzerland	365.0	2015- '19	Nigeria	Jersey, United States	308.0	2020
Equatorial Guinea	United States*	20.0	2014	Nigeria	Liechtenstein	233.8	2013-2014
Kazakhstan	Switzerland, United States	115.0	2007	Nigeria	Switzerland	700.0	2005
Kazakhstan	Switzerland	48.8	2012	Nigeria	Switzerland	321.0	2017
Kyrgyz Republic	United States	4.5	2019	Nigeria	United Kingdom	17.7	2006 - '10
Libya	United Kingdom	12.5	2012	Pakistan	United Kingdom	248.0	2019
Malaysia	United States	196.0	2019	Taiwan	Switzerland	20.5	2010
Libya	The Netherlands	143.5		Tunisia	Switzerland	3.9	2017
Macao SAR	Hong Kong SAR	56.0	2009	Uzbekistan	France	10.0	2020
Macau	United Kingdom	44.0	2015	Zambia	United Kingdom	46.0	2007
Malaysia	United States	196.0	2019				
Malaysia	United States	300.0	2020			\$3.5 billion	

- Source: Kanji and Messick(2020)

Questions for consideration

- Which of these offences are recognized in the domestic laws of your countries?
- Are there any which are not yet recognized?
- What have been the challenges in doing so?

What Assets Can be Frozen and Recovered?

- Definitions of “freezing, “seizure” and “confiscation”
- Article 2(f) & (g) of UNCAC

What to do once Assets have been located

Variety of international tools available:

Article 8 -
International
Convention For
The Suppression
Of The Financing
Of Terrorism, 1999

Articles 53, 54, 55
- UN Convention
Against
Corruption, 2005

Article 5 - UN
Convention
Against Illicit
Traffic In Narcotic
Drugs And
Psychotropic
Substances, 1988

Articles 13, 14 -
UN Convention
Against
Transnational
Organized Crime,
2003

Recommendations
4 and 38 – FATF

What to do once Assets have been located

Procedure under UNCAC

Initiate civil action in your court to establish title to or ownership of property acquired through the commission of an offence.

Request the holding state to:

Give effect to an order of confiscation issued by your court if available;

If unavailable, give effect to a freezing or seizure order *providing reasons that the property would eventually be subject to an order of confiscation;*

If no orders are available, then a request for identifying, tracing, freezing or confiscation with the accompanying reasons that the property would eventually be subject to an order of confiscation.

What the request should contain

The request is technically one of Mutual Legal Assistance (MLA) and is hence governed by the relevant Article of the particular Convention (46 for UNCAC, 18 for UNTOC, 7 for Vienna Convention, 37 and 38 of FATF Recommendations)



Details mentioned in Art. 46 (15) of UNCAC along with



Details in Art. 55 (3) –

- Where the request is to the holding state to issue a confiscation order, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

What the request should contain

- Details in Art. 55 (3) –
 - Where the request is to the holding state to give effect to a confiscation order issued by your court, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;
 - Where the request is to the holding state to identify, trace and freeze or seize the assets a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

MLA Guidelines for Foreign Authorities

- Many developed countries have uploaded MLA guidelines which can be referred to before making the request
- US:
 - https://star.worldbank.org/sites/star/files/booklet_-_english_final_edited.pdf
- UK:
 - <https://www.gov.uk/government/publications/mla-guidelines-for-foreign-authorities-2012>
- G20 Countries:
 - https://www.bmjv.de/SharedDocs/Downloads/EN/G20/Requesting%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters%20from%20G20%20Countries%20-%20A%20step-by-step%20guide.pdf?__blob=publicationFile&v=1
- Countries from East Asia and the Pacific:
 - https://www.unodc.org/documents/southeastasiaandpacific/2013/07/mla/Guide_To_Mutual_Legal_Assistance.pdf

Importance of Confiscation Order

- Art. 57(3) provides for mandatory return of assets when:
 - a final order confiscating the assets has been issued in the requesting State's courts;
 - that order has been accorded legal effect by the holding State's courts; and
 - the requesting State's claim to the assets is clear.
- Hence, efforts should be taken to obtain **a final order of confiscation in the requesting state** to increase chances of freezing, confiscating and recovering the stolen assets.
- A requested State may waive the requirement that a final judgment of confiscation has been issued in the requesting State.

Questions

- Have you ever been involved in preparing requests for identifying, tracing, freezing or confiscating assets?
- What were the lessons learned / key takeaways from the experience?

Non Conviction Based (NCB) Freezing Orders and Confiscation Judgements

Allows for the accused's assets to be confiscated even without conviction, in cases where s/he has died, cannot be found or the statute of limitation has expired.

Growing trend - 14/20 countries assessed by UNODC in 2019 had NCB legislation.

Recommended as a good practice esp as UNCAC calls on State Parties to provide each other the "widest measure of assistance" in the return of stolen assets.

Can be implemented in both common and civil law jurisdictions.

Non Conviction Based (NCB) Freezing Orders and Confiscation Judgements

NCB confiscation laws can be incorporated into existing criminal codes, as well as anti-money-laundering acts or drug laws, and regarded as “criminal” proceedings to which the criminal procedural laws apply.

This would increase the chance of confiscation in the holding country.

Different country approaches are laid out in UNODC Note CAC/COSP/WG.2/2019/CRP.1 (paras 27-48)

Courts in France, Switzerland and UK have broadly and favorably interpreted requests looking at substance rather than form.

Additional Aspects of UNCAC

Decisions by the holding state to be in conformity with its domestic laws and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

UNCAC can act as a treaty basis for freezing and confiscation.

Holding state can stop cooperation if it does not receive sufficient and timely evidence or the property is of a *de minimis* value.

Draft Non-Binding Guidelines for managing frozen, seized and confiscated assets can be referred to in CAC/COSP/WG.2/2019/3.

Policy Recommendations

- Make all enablers subject to the anti-money laundering laws
 - Implementation of FATF Recommendations 22 (Enhanced Due Diligence) and 23 (Suspicious Transactions Reports)
- Ensure illicit enrichment statutes cover all corruptly acquired assets
 - Article 20s and 54 of UNCAC

Thank You!

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