

Mutual Legal Assistance: (a) Between Business Regulatory Agencies, (b) Protection of the Cultural Heritage

Paper by The Hon Dr E N Tjiriange, Minister of Justice of the republic of Namibia

(A) Between Business Regulatory Agencies

It is quite important for the Commonwealth countries business regulatory agencies to develop inter-agency agreements on regulatory instruments. Such agreements should be backed by legislative provisions with powers of compulsion which must be exercised in the fulfilment of requests in appropriate cases. Of course, the extent and limitation of powers of compulsion should be well-defined and should take cognizance of the requested country's laws. The inter-agency agreements should allow an exchange of information on transnational criminalities and malpractices, cooperation at investigation, apprehension and prosecution of such transnational business criminalities and malpractices.

The opinion has been expressed in certain quarters "that recourse to a formalised Commonwealth Scheme, such as that relating to mutual assistance in criminal matters, would be of limited value." This should not be the case if the scheme of mutual assistance was backed or underwritten by necessary changes in domestic legislation of Commonwealth member states. I regard this approach to be the best for achieving a minimum level of harmonisation in order to secure an enhanced and effective cooperation.

Whether formal or informal, a Commonwealth inter-agency agreement is necessary for mutual assistance in transnational business offences. Practically, a wide variety of issues should be considered and addressed by parties to such an understanding or arrangement, for example:

(a) Enactment of legislation with "compulsory evidence gathering powers" so that requesting authority/agency may be able to obtain critical information at the investigative stage of the matter.

The following points should be considered in this regard:

- (i) extent of the powers to be exercised;
- (ii) appropriate decision-making process to be adopted;
- (iii) criteria to be applied for decision-making;
- (iv) types of conditions which may be imposed on the use of the information provided;

- (v) appropriate civil liberties and similar safeguards to be included;
- (vi) goals of flexibility, efficiency and effectiveness; and
- (vii) a scheme of cooperation should take cognizance of various options, comparable and compatible with existing legislative and administrative arrangements elsewhere.

(b) The necessary changes in domestic laws and practices so as to permit transnational cooperation in the public information and, subject to appropriate conditions and safeguards, non-public information held by regulatory authorities.

Subject to the resolution of the issues that I have raised, an inter-agency Commonwealth agreement, formal or informal, would be acceptable as a countermeasure to growing transnational criminalities and other malpractices in business transactions. This type of mutual assistance will create inter-dependence and confidence among Commonwealth regulatory agencies leading to mutual understanding, competence and improvements.

(B) Protection of the Cultural Heritage

I am pleased to say that Namibia has no difficulty in accepting the Scheme for the protection of cultural heritage within the Commonwealth, and, where possible and practicable, to obtain the return of items of material cultural heritage.

As was noted by the Working Group, one good thing about the Scheme is that it is not an international treaty; it is merely a flexible framework for municipal legislation which would offer an efficacious approach to international cooperation in the protection of the illicit export of items of material cultural heritage. Thus Commonwealth countries would be in a position to adopt the Scheme to suit their peculiar constitutional and other legal circumstances and legislative requirements and yet be in a position to cooperate with other member States of the Commonwealth in such an important area.

It is interesting to note that the Scheme would greatly assist Namibia because the Ministry of Education and Culture and the National Monuments Council are in the process of drafting a Bill for the protection of Na-

mibia's material cultural heritage. Presently no such legislation exists in Namibia - a very undesirable situation.

It is our view that the definition of "unlawful export" in section 2(d) of the draft Scheme is too restrictive and seeks to legitimise other equally unlawful "export" of very important artifacts and other material items of cultural heritage from certain Commonwealth countries during the colonial era. It is an open secret that such many cultural and historical items were removed from many colonised countries by colonial Administrations and colonial Administrators and taken to the mother country and elsewhere in the Commonwealth. Such items should be covered by the Scheme so long as they are in State-owned or State-controlled museums, Universities and such institutions of the country of location.

We wish to propose also that paragraph 3 of clause 9 of the draft Scheme should be further strengthened in such a way that purchasers of items of material cultural her-

itage exporting countries would no longer be presumed to be bona fide purchasers for value. They would bear the onus of proving that they took special diligence, considering the rarity, aesthetic qualities and value of the item, to ensure that the object was not stolen. In other words, because of the ever rising tide of theft of items of material cultural heritage, buyers should be put on their strict enquiry and be expected to take greater care than buyers of other items normally would.

Namibia again supports the proposal by the Working Group that a database of such items should be maintained by the Commonwealth Secretariat with inputs from Commonwealth Governments and circulated to Governments. But the database should not only contain information regarding private collectors and dealers of items of cultural heritage but also State institutions which may be holding such items.