

## GROUP 2

### EFFECTIVE MEASURES TO INVESTIGATE THE PROCEEDS OF CORRUPTION CRIMES

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## I. INTRODUCTION

Today in this globalized world, developing countries lose millions of dollars each year through corrupt practices. Most of the time criminals keep moving the proceeds of corruption crime through global financial institutions, changing them to legitimate assets or properties across the globe. The proceeds of corruption crime divert money from services such as healthcare and education, and also weaken public trust and threaten governance.

The United Nations Convention against Corruption (UNCAC) is the only legally binding universal instrument dealing with asset recovery. Chapter V of UNCAC establishes asset recovery as a “fundamental principle” of the Convention and provides the framework to recover the proceeds of corruption crime, requiring Member States to take measures to seize, confiscate, and return the proceeds of such offences. However, the biggest challenge is to turn UNCAC into an effective tool in recovering these proceeds.

The main focus of this paper is to discuss the effective measures to investigate the proceeds of corruption crime. Each member of the group contributed the current challenges they face in identifying, tracing and recovering the proceeds of corruption crimes. The group also discussed the possible measures they can take to resolve the current challenges under different circumstances and what will be the ideal way to identify, trace and recover proceeds of corruption crime that is suitable for each country to make the fight against corruption effective. The following are the main challenges and the solutions discussed among the group.

## II. CHALLENGES IN THE EXISTING LEGAL FRAMEWORKS

### A. Not Being a Member of UNCAC

In the group discussion, the members noticed that some participant’s countries, like Chad, are not members of UNCAC. Also some of the countries which are members of UNCAC have not internalized some of the provisions of UNCAC in their domestic law. It is necessary to affirm that UNCAC is a very important legal tool which sets general provisions so that the State Parties can more effectively fight corruption and recover the proceeds of crimes.

**Solution:** All participants agreed that in order to investigate corruption crimes and also to identify, trace and recover assets it is very important to be party to UNCAC. Because UNCAC provides a framework to recover assets, those countries have a legal basis not only to investigate but to seize, confiscate and recover proceeds of corruption crime and extradite the offenders. Being party to UNCAC also entails a review and implementation mechanism which States Parties shall comply with. That mechanism is a useful tool to show the international community how each country is implementing the Convention’s provisions.

## **B. Lack of Legislation to Criminalize Private Sector Corruption**

Most of the participant's countries have not criminalized private sector corruption. Japan and Zimbabwe, however, have laws that do not specifically mention corruption in the private sector, but those countries' authorities can apply their existing legislation to corruption crimes committed in the private sector.

**Solution:** All participants of the group agreed that it is necessary to encourage the countries that do not have the power to investigate private sector corruption, to amend their existing laws to criminalize it and therefore enable confiscation and recovery of assets as proceeds of corruption crime.

## **C. Lack of Criminalization of Illicit Enrichment**

Members discussed that in order to identify the proceeds of corruption it is necessary to criminalize illicit enrichment. For example, under the constitution of Maldives, the Executive Branch, Members of the Cabinet, Members of the Parliament and Judges are constitutionally obliged to declare assets annually. However, in Maldives illicit enrichment is not an offence under any law. Therefore, the fundamental purpose of asset declaration has been largely left unrealized.

**Solution:** The members of the group agreed that it should be mandatory for all government officials to declare their assets, criminalize illicit enrichment in domestic law and make any property that cannot be explained subject to forfeiture.

## **D. Whistle-Blower and Witness Protection**

Group members discussed and agreed that whistle-blower and witness protection is very important as a tool to identify and trace the proceeds of corruption crime. Lack of these protection measures makes it more difficult to identify and trace the proceeds of corruption.

**Solution:** It was agreed among the participants that enacting and enforcing whistle-blower and witness protection laws will encourage people to come forward to the anti-corruption agencies or investigating authorities and provide information about the proceeds of corruption instead of being reluctant to share the information with the authorities in charge due to being afraid for their careers or even lives or safety.

## **E. Lack of Non-Conviction-Based Confiscation of Assets**

All participants' countries except Zimbabwe have no legislation on non-conviction-based confiscation. Forfeiture actions depend upon the government's ability to demonstrate the relationship between the criminal conduct and the particular property subject to confiscation. Also, as a general rule those actions are limited to property traceable to the criminal offence.

**Solution:** Non-conviction-based forfeiture is civil in nature and the burden of proof is on a balance of probabilities. It does not depend on the conviction of the offender, and it can be resorted to where the offender is acquitted, deceased or is a fugitive.

## **F. Criminal Procedure Allows Multiple Appeals**

Brazilian criminal procedure allows multiple appeals, even within the same court without limitation on the number depending on the case. It takes a long time to finalize corruption cases, even up to more than ten years. The system has been criticized by the courts, prosecutors and civil society. As a result, there is a considerable delay in recovering the proceeds of corruption crimes since a final decision by the judiciary is necessary. In the meantime, there is a possibility of dissipation of certain assets during the appeal period, which results in decreasing the benefit to the government of those assets.

**Solution:** All the members discussed this challenge faced in Brazil and agreed that Brazil and other countries need to amend their laws to limit the number of appeals in corruption cases in order to make the asset recovery process more effective.

## **G. Absence of Specialized Commissions or Agencies to Investigate and Prosecute Corruption Crimes**

In some countries there are no specialized agencies to investigate and prosecute corruption cases. There are also no special departments to deal with asset recovery. All participants agreed that to investigate and prosecute corruption cases there is a need for special expertise.

**Solution:** Even if the country is not a member of UNCAC, it is very important to have a special agency to investigate corruption cases, and it is important to have a special court or judges appointed to deal with those cases.

The members agreed on the need of a special agency to investigate and a special court for corruption trials so that the people involved become specialized in the field of corruption, enabling more effectiveness in the asset recovery process. The members also agreed that specialized judges and prosecutors become quicker at identifying trial issues and more efficient and effective in the decisions taken in that regard. Also, the quality of work will be of a higher level due to the experience gained in dealing with corruption and asset recovery on a regular basis.

### III. CHALLENGES IN INVESTIGATING PROCEEDS OF CORRUPTION CRIME

#### A. Lack of Special Investigation Techniques

Lack of legislation allowing the use of special investigative techniques such as wiretapping, telephone bugging and undercover operations is one of the challenges faced by most of the participants' countries to effectively investigate and trace proceeds of corruption crime.

**Solution:** All participants agreed that there is a need to allow special investigation techniques in corruption cases by amending existing law and by training investigators to deal with those techniques.

#### B. Difficulty in Accessing Bank Records

All participants except Japan agreed that they have difficulty in accessing bank records for domestic investigations or when responding to international cooperation requests. A court warrant is usually needed to obtain the bank information. Apart from the banks' delays in providing information, the documents are usually hard to be read and some banks do not transmit all the necessary documentation which causes severe delay to the investigation. It is also worth mentioning that Suspicious Transaction Reports (STR's) are not admissible as evidence in court, which makes it difficult for the prosecution to prove their case without calling for oral evidence.

**Solution:** Give the investigators and the anti-corruption agencies the authority to obtain bank records without court order. SIMBA, a software programme developed by the Brazilian Federal Prosecution Service, is a useful tool to gather bank statements, since it allows banks to transmit electronically the documents to the agency in charge, and it also controls the deadlines and creates graphics and information about the transactions in an easier way for the investigators and authorities to read. It is also important that STR's and information gathered by Financial Intelligence Units such as the one provided by Egmont Group members are admissible in court as evidence to expedite the proceedings.

#### C. Statute of Limitations

In some jurisdictions the statute of limitations is very short and some investigations need time to be conducted, especially when information from foreign countries is necessary.

**Solution:** Increase the statute of limitations to a longer period, enabling competent authorities to gather evidence in a reasonable time period. For example, in Zimbabwe the statute of limitations is 20 years for all offences except murder, and in Singapore there is no limit<sup>1</sup>.

#### D. Budget Constraints in Tracing, Freezing and Recovering Assets

Lack of budget to investigate the proceeds of corruption crime is one the main challenges faced by most participants' countries. For example, in Indonesia the budget is limited, and they have difficulty in maintenance of the frozen assets, especially abroad.

**Solution:** Agencies should increase budgets to investigate corruption crimes and to recover assets. It also recommended that agencies be permitted to retain a certain percentage of the recovered assets to utilize in

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<sup>1</sup> LIM, Vincent. *Effective measures for tracing proceeds of corruption crimes*. Lecture given for the 20<sup>th</sup> UNAFEI UNCAC Training Programme, 15 November 2017.

the business of the agencies.

### **E. Lack of Plea Bargaining**

Plea bargaining is an agreement between the accused and the prosecutor in a criminal case to arrive at a satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offence or to one or some of the counts of a multi-count indictment in return for a lighter sentence. A majority of participants agreed that plea bargaining is not practiced in their countries.

**Solution:** The advantage of plea bargaining is that the prosecution secures a faster conviction and recovers the proceeds of corrupt practices. Also, UNCAC in Article 37(1) states that each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds<sup>2</sup>. It was agreed among the group to amend the domestic law to allow plea bargaining agreements to facilitate the recovery of proceeds of corruption crime.

### **F. Lack of Access to Most Databases**

In countries like Maldives, Iraq, Japan, Zimbabwe, Nepal, Indonesia and Myanmar, the investigator does not have direct authority to access most of the government databases such as immigration, company registrations and transport registrations without making an official request. Due to the lack of direct access, investigators have to walk in to the relevant institutions with a warrant or request and get the information they need through the requested department staff. However, in Brazil investigators have direct access to a centralized government database, and there is no need of a warrant or request to do so.

**Solution:** All participants agreed that it would be easier to identify and trace proceeds of corruption crimes if investigators had direct access to a centralized government database without a court order or a formal request.

## **IV. POLITICAL CHALLENGES**

### **A. Lack of Political Will**

Lack of political will and government support to pursue asset recovery and deal with corruption issues is one of the main challenges faced by many countries. The participants agreed that even though there are laws, there is reluctance by politicians to enact and enforce the laws. The political will of both the victim country and the countries where the proceeds are located is necessary for asset recovery to materialize.

**Solution:** It was agreed among the group that in order to have political will, there is need to raise public awareness about corruption through education, media, seminars etc. Also, pressure from civil society is necessary for parliament to pass and enforce the necessary laws.

### **B. Political Influence in the Appointment of Anti-Corruption Commission Members**

In order to identify, trace and recover proceeds of corruption crime, it is important that the anti-corruption officials be independent and free from political influence or pressure. In most of the countries there is political influence in appointing anti-corruption commission members. As a result of this, there is the possibility of political influence in investigating cases where politicians are involved.

**Solution:** All participants agreed that those who fight against corruption need to be independent from all political influence. Their appointment could be done by a committee of the parliament instead of the executive branch. Participants also agreed that members of the anti-corruption agency could also be elected by the people.

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<sup>2</sup> United Nations Convention against Corruption, Article 37 (1).

## V. PERSONNEL CHALLENGES

### A. Shortage of Trained Staff

In most of the countries there is a shortage of trained staff such as judges, prosecutors and investigators to deal with corruption cases.

**Solution:** If the authorities dealing with corruption cases are well trained and experienced, the quality of work will be high and the job will be done more effectively. All participants agreed that job training for existing staff is necessary to improve their skills, and it is also important to increase funds for the agencies that deal with corruption, permitting them to hire more staff or to have officers seconded to the anti-corruption agencies.

### B. Low Salaries and Privileges (for Those Who Fight Corruption)

The participants noted that salaries and benefits of anti-corruption officials are usually low in all countries. Investigators and officers are not provided with adequate benefits to carry out their duties.

**Solution:** All participants agreed to improve the salaries and benefits for officials who fight against corruption to encourage them and motivate them. Increased remuneration and benefits could be a preventive measure against their becoming corrupt.

### C. Existence of Corrupt Officers among Those Who Fight Corruption

In some countries it is also perceived that those who fight corruption are also corrupt, which affects the effort to recover proceeds of corruption crime.

**Solution:** It is necessary to have an internal reporting system within the anti-corruption agency to monitor the officials. The participants also agreed to have high standards and requirements for hiring officials and to make sure that those officials should be of high integrity and responsible people in the community. It was also agreed to have a transparent and clear reporting system to communicate if such crimes are committed by anti-corruption officials.

## VI. CHALLENGES IN INSTITUTIONS/AGENCIES

### A. Lack of Cooperation between Organizations (Task Forces and Joint Units)

The participants agreed that lack of cooperation between organizations is a main issue in identifying, tracing and recovering proceeds of corruption crime.

**Solution:** It was agreed that, having joint task forces or liaison officers from anti-corruption agencies in other organizations will help with the lack of cooperation between agencies.

### B. Bureaucracy

In most countries the investigators face challenges to identify and trace proceeds of corruption due to unnecessary and excessive administrative procedures and authorizations.

**Solution:** The participants agreed it is important to remove unnecessary bureaucratic steps to communication channels and to give authorization to administrative personnel to disclose necessary information to anti-corruption agencies instead of meeting with high-ranked officials to get the information needed.

### C. Lack of Equipment (Surveillance Vehicles, Software, Computer Hardware)

In most of countries there is a lack of equipment such as surveillance vehicles, forensic resources, software and modern equipment in the agencies investigating corruption crimes. Due to the complexity of corruption crime, the lack of such equipment affects the effectiveness of investigation of the crime and tracing of proceeds.

**Solution:** All the participants agreed it is important to have adequate equipment and other means for investigation to enhance the recovery of proceeds of crime.

#### **D. Lack of Sufficient Authority (Arrest/Seizure, Prosecution, Requesting Information from Abroad)**

It was noted that in some countries the anti-corruption agency does not have the power to arrest, seize, prosecute or request information from abroad.

**Solutions:** The participants agreed that anti-corruption bodies should have sufficient authority to arrest/seize with or without court orders. For example, in Indonesia the anti-corruption agency can arrest suspects with enough evidence, even without a court order, as corruption crimes are considered as extraordinary offences. Therefore, extraordinary measures are used to deal with corruption cases.

### **VII. INTERNATIONAL COOPERATION**

#### **A. Dual Citizenship**

In some countries, the investigators and prosecutors face challenges to investigate and prosecute offenders that have dual citizenship because they flee to the other country where they are nationals. Some countries refuse to extradite the offender as he/she is the citizen of that country.

**Solution:** The participants agreed that in this case, it is important to use the provisions of UNCAC to extradite or prosecute offenders who commit crimes abroad. As Article 42 and 46 of UNCAC provide that dual criminality should not be an obstacle to rendering assistance to other countries.

#### **B. Different Legal Frameworks**

Some countries face difficulty in international cooperation due to different legal frameworks, such as incompatibility of legal proceedings in the requesting and requested states.

**Solution:** The participants agreed to encourage establishment of MLA agreements to facilitate and to implement some compatibility between legal systems, to recover assets and to gather evidence from abroad. States should be encouraged to enforce non-conviction-based forfeiture orders from foreign jurisdictions.

#### **C. Failure to Acquire Assets from Non-Responsive Jurisdictions**

One of the main challenges to recover the proceeds of corruption crime is that anti-corruption agencies fail to acquire the assets from non-responsive jurisdictions.

**Solution:** International cooperation is very important in addressing corruption crimes because in most cases the assets illegally obtained are transferred to other countries. Therefore, it is crucial to cooperate with foreign requests for evidence and asset recovery even in the absence of Mutual Legal Assistance Treaties, using the principle of reciprocity as a legal basis to execute other countries' requests.

#### **D. Lack of Familiarity with the Process of Mutual Legal Assistance Requests**

It was noted that most of the time the barrier to recovering proceeds of corruption crime is that the anti-corruption agencies are not familiar with MLA requests and other ways to get legal assistance.

**Solution:** Having international cooperation units within the agencies with trained staff in that regard is a key factor for obtaining information from overseas. Also important is using informal contacts between international agencies and INTERPOL to gather intelligence and evidence and to bypass lengthy formal procedures. Networks such as CARIN<sup>3</sup>, RRAG<sup>4</sup>, ARINSA<sup>5</sup> and StAR<sup>6</sup> are useful tools to trace proceeds of corruption crimes.

### **VIII. CONCLUSION**

Corruption is a serious offence and fighting it and recovering assets are difficult tasks faced by the majority of countries in the world. In order to better fulfill their duties, investigators, prosecutors and judges need adequate staff, budget, equipment and training. Corrupt criminals often abuse loopholes in the legal

<sup>3</sup> CARIN–Camden Assets Recovery Inter Agency Network

<sup>4</sup> RRAG–Asset Recovery Network of GAFILAT (Financial Action Task Force of Latin America)

<sup>5</sup> ARINSA–Asset Recovery in South Africa

<sup>6</sup> StAR–Stolen Asset Recovery Initiative

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frameworks. Thus, in order to tackle corruption and recover the proceeds, we need to establish adequate legal frameworks.

But most important is political will to pass laws to enable investigations and fair decisions and the enforcement of those decisions. The role of civil society and the media is crucial to providing pressure on the Parliament and Cabinet members. In the globalized world we are living in, international cooperation between nations is no longer just a formality but a key factor to establishing an adequate response and obtaining reparation for the society that had its money diverted from public use.

To complete the fight against corruption, State Parties to UNCAC and countries that are not signatories need to vigorously pursue the proceeds of corruption crime across borders, ensuring that their countries are not perceived as safe havens for the proceeds of corruption crimes. States should endeavour to the best of their abilities to seize, confiscate and recover proceeds of corruption crimes. The use of non-conviction-based confiscation and forfeiture is the best tool in this regard. States should also assist in enforcing orders from other jurisdictions in order to make asset recovery a success.