

GROUP 3

DOMESTIC AND INTERNATIONAL COOPERATION APPROACHES FOR INVESTIGATION OF PROCEEDS OF CORRUPTION CRIMES

Rapporteur: Ms. Caroline Nyaga (Kenya)
Co-Rapporteurs: Mr. Kazuo Akagi (Japan)
Mr. Asrori Iftikhor Qurbon (Tajikistan)
Mr. Desmond Mwayawa (Papua New Guinea)

Chairperson	Mr. Abdelazim Mohammed Elzaki	(Sudan)
Co-Chairperson	Mr. Tandin Penjor	(Bhutan)
Members	Mr. Mohamed Abdelhamid Elhamady	(Egypt)
	Mr. Sovann Srin	(Cambodia)
	Mr. Mohammad Ibrahim	(Bangladesh)
Advisers	Prof. Ayuko Watanabe	(UNAFEI)
	Prof. Nozomu Hirano	(UNAFEI)

I. INTRODUCTION

Following a series of lectures, Individual Presentations and study trips focused on the theme of “Effective measures to investigate the proceeds of corruption crimes”, the participants were asked to retreat into groups so as to exchange experiences, share best practices, identify challenges and consider practical recommendations that would help them resolve the identified issues. Group 3 decided on the topic of “*Domestic and International Cooperation Approaches for Investigation of Proceeds of Corruption Crimes*”.

There is need for domestic and international cooperation due to the complexities of corruption crimes, challenges of capacity constraints of individual agencies and emerging transnational trends that result in suspects transferring assets across borders. At the domestic level authorities charged with prosecuting and investigating corruption crimes cooperate in conducting joint inquiries and sharing information.

Internationally, states cooperate with one another through:

- a. Establishing channels of communication between authorities, agencies and services to secure and facilitate rapid exchange of information;
- b. Conducting inquiries with respect to identification, whereabouts and activities of suspects and movement of property and proceeds of crime;
- c. Providing, where appropriate, necessary items or quantities of substances for analytical or investigative purposes, among others.

This cooperation will assist states in sharing information on a real-time basis and will enhance the tracing, freezing, confiscation and recovery of proceeds of corruption crimes.

It was agreed that the deliberations would take the following outline:

1. Introduction
2. Information and detection of corruption
 - a. Whistle-blowers
 - b. Financial intelligence units
 - c. Other agencies

3. Investigation
 - a. Special investigative techniques
 - b. Tracing, freezing and confiscation
4. International cooperation
 - a. Bilateral and multilateral agreements
 - b. Joint investigations
5. Challenges
6. Recommendations

II. INFORMATION AND DETECTION OF CORRUPTION

Corruption is mostly a “silent” crime with no crime scene and no clear evidence. The perpetrators act in private, hence the importance of whistle-blowers, FIUs and other agencies in the detection and reporting of corruption cannot be understated. This leads to efficient recovery of proceeds of corruption crimes.

A. Whistle-Blower Protection

A whistle-blower is a person who exposes any kind of information or activity that is deemed illegal within an organization or public office, in this instance, corruption. Therefore, to enhance reporting, a whistle-blower must be protected from any harm or victimization that may befall him as a result of exposing corruption, such as dismissal from work, harassment, death or harm to his life or family. Members reported that most agencies had put mechanisms in place to enable corruption reporting, including websites, phone calls, anonymous reporting or emails. All reports whether anonymous or not have to be verified.

Most countries have specific whistle-blower protection laws while others have provisions in various laws for the same purpose. It was noteworthy though, that for some, whistle-blowers are protected but must appear as witnesses in court. On the other hand, in Bhutan, whistle-blowers’ identities are withheld, and their names are not disclosed to any other person or brought to court. If it is extremely necessary for them to appear, they are put in separate rooms and they testify on different days from the rest of the witnesses. Other forms of protection offered to whistle-blowers include protection from victimization at their work places and dismissal.

B. Financial Intelligence Units

All countries in this group have Financial Intelligence Units (FIU) established in accordance with UNCAC due to the rising cases of money laundering activities by corrupt individuals who either stash money in foreign countries or have secret accounts used to conceal proceeds of crime. Some FIUs are independent while others operate under the police service or the national or central bank.

The main responsibility of the FIUs include: to receive, process, analyse and disseminate information relating to suspicious transaction reports (STRs), and to provide such information to enforcement agencies. Also, FIUs transmit the same information simultaneously to foreign FIUs they collaborate with. The FIUs also work in collaboration with investigation authorities. For some states, however, any information must be relayed through the ministry in charge of foreign affairs. In Bangladesh, Tajikistan, Bhutan, Papua New Guinea, Sudan, Egypt, Cambodia, Japan and Kenya, the FIU may enter into Memoranda of Understanding with other foreign FIUs for purposes of easier collaboration and also to direct banks to freeze accounts until the STRs are investigated.

C. Other Agencies

Other agencies identified as sources of information include banks and other financial institutions, tax agencies, customs, securities exchange, audits, and the media. The group was informed that the banking institutions cooperated with enforcement agencies and most of them report any suspicious transactions, and some have power to freeze accounts for a period of time until investigations are completed. In some countries, the banks are required to report to the Central Bank regularly, which flags any suspicious transactions.

In Bangladesh, the banks are required to report to the Central Bank at the end of each day, and it flags

any suspicious transactions and freezes the account for an initial 30 days (maximum of 6 months).

Asset declaration was also a tool used to detect corruption and trace proceeds of crime. In most states, certain or all public officers are required to submit wealth declaration forms, whether digitally or manually, on a regular basis; annually or biannually. Various agencies are charged with the responsibility of safeguarding records of the declarations. Officers who fail to declare are punished administratively.

In Egypt, appointed and elected officials, including large contractors or suppliers to any public agency, are required to declare and justify their assets to the Illicit Enrichment Organization administratively. Failure to do so will result in prosecution for the crime of illicit enrichment. In Japan, only politicians are required to declare their assets and liabilities.

III. INVESTIGATION

Using the information received from the sources outlined above, the prosecutors, police or investigators in the anti-corruption agencies, as the case may be, employ various techniques to trace, freeze, seize and confiscate proceeds of crime that may be concealed either domestically or in foreign jurisdictions.

The members shared the practices from their countries on how investigations are conducted. As per UNCAC, special investigative techniques were identified. These methods allow investigators to gather further information useful to freeze, seize and confiscate proceeds of corruption crimes. Papua New Guinea does not recognize or use special investigative techniques. For Cambodia, there has to be a clear hint of corruption in order for such techniques to be used. As per UNCAC, these special investigative techniques include:

- a) Controlled delivery—In most countries, controlled delivery is allowed. However, these techniques require supporting evidence and are not given much weight to guarantee convictions; therefore, controlled delivery is not very effective.
- b) Electronic or other forms of surveillance—This is an effective method of investigation. In some jurisdictions, a court order has to be obtained as it borders on infringement of privacy, which is a constitutional guarantee. In Sudan, only the Special Court can issue the warrant allowing the use of these techniques. In Egypt and Tajikistan, wiretapping is only allowed after obtaining a court order/warrant. In Bhutan, the Chairman of the Anti-Corruption Commission has the power to issue a warrant for wiretapping and has to inform the Court within 24 hours of the same. Japan does not allow use of wiretapping for corruption crimes.
- c) Undercover operations—All countries, except Japan, use this special technique. However, it is a requirement that undercover operations must be carried out within the ambit of the law.

➤ **Freezing, seizure and confiscation of proceeds of corruption crime**

Freezing is an effective method in the process of recovery of proceeds of corruption crimes. In some countries, court orders are required while in others, orders from the heads of the anti-corruption agencies, prosecution agencies, police commissioners and registrar of titles suffice. It was noted that most confiscations were conviction based and only non-conviction based where a person fled the country or was deceased. The issue of liquidation of depreciating assets or those that were perishable so as to maintain value also posed a challenge to some states due to lack of cooperation by the suspect. All states have legislation on anti-money laundering that stipulates the procedure to be followed in the process of recovering proceeds of crime. Moreover, some countries have special agencies whose function is to recover assets. In Kenya for instance, there is a Multi-Agency Team that is composed of various investigative and enforcement agencies that work simultaneously in these cases through real-time sharing of information. This has enhanced the conviction rates and asset recovery, as all necessary information and evidence is shared and simultaneous actions are taken by the various agencies to enable cases to be water tight.

IV. INTERNATIONAL COOPERATION

In the course of investigations, it may be found out that the suspect has assets concealed in foreign

jurisdictions. Therefore, there may be need for mutual legal assistance and joint investigative techniques to be employed. Moreover, states reported that most of them are members of organizations that enable them to collaborate, including: Interpol, the Egmont Group, the East Africa Police Chiefs Organization, among others. States reported that most of them offer MLA on the basis of reciprocity and dual criminality. Others have concluded bilateral and multilateral agreements that enable them to seek assistance as well as conduct joint investigation teams with their counterparts.

The Central Authorities for purposes of MLA were shared including the Office of the Attorney General, the Prosecutor General and the Ministry of Foreign/International Affairs (through diplomatic channels), the Ministry of Justice and the Ministry of Interior in all countries. In Cambodia, the Anti-Corruption Unit (ACU) cooperates with its foreign counterparts based on its membership in the South East Asian Parties Against Corruption (SEA-PAC) and through MoUs. In practice, if MLA is required, the anti-corruption agency of a foreign state can directly send a request to the ACU. Upon receiving the request, the ACU will undertake measures on a case-by-case basis.

V. CHALLENGES

A. Difficulties in Gathering Information from the Public

UNCAC obligations on whistle-blower protection guarantee that people with information can come forward with information for which the full protection of the law is guaranteed to such persons afterward. Without the existence of such protection, persons with information fear that their personal, economic and job security will be at risk when information is given to authorities. Inadequate laws and mechanisms of whistle-blower protection posed a challenge for some countries because whistle-blowers are afraid to report to authorities. Public awareness on whistle-blower protection is important because lack of cooperation by whistle-blowers with the authorities was also identified as a challenge.

B. Balancing between the Right to Privacy and Investigation of Proceeds of Corruption Crimes

Discussions among group members also point to the fact that access to information may infringe the right to privacy in some countries. UNCAC obligates member states to put in place legislative measures to ensure bank-client privileges relating to privacy are overridden when information on bank accounts is requested by authorities. In some countries banks may willingly provide a client's banking information. In some countries, a court warrant has to be obtained for banks to provide such information as well as wiretapping into private communications. As courts are independent, applications to obtain banking information and private communications may not be provided in instances where the case is not properly argued with all relevant background information being presented. Such instances hamper the likelihood of success in any investigation for a successful conviction. Although the importance of such measures is noted in gathering information against a suspect, the discussions pointed to the fact that some countries view this as infringing privacy rights.

C. Special Investigative Techniques

It was noted that not all countries implement controlled delivery, undercover operations and surveillance provisions under UNCAC. This is largely due to lack of technological requirements, capacity requirements or a legal basis to authorize such measures. In PNG, all of these measures are not utilized because of privacy issues and the lack of a legal basis. Appropriate training and technological resources would follow suit in the event that laws are amended to provide a legal basis.

D. Lengthy Court Processes

In some jurisdictions, court processes hamper obtaining important warrants to complete investigations. An application may be made *ex parte* or *inter parte* in some jurisdictions. The decision made is subject to a number of instances for appeal and may take some time before the final result is known. In countries where there are no special corruption courts, this may take longer. In freezing assets, where it is not possible to administratively freeze a bank account, the funds may be transferred before the warrant to freeze is obtained and any appeal is decided on.

E. Lengthy MLA Processes

Although UNCAC obligates member states to offer assistance in a timely manner, practically such assistance may take years, or a request may not even be responded to at all. As the laws relating to

production of evidence in a requesting State may differ drastically to those of the requested State, the time taken to obtain court warrants may be an issue. In some instances, conflicting laws in gathering evidence may result in MLA requests being refused.

In some countries, the primary administrative process of putting together an MLA request from the police or anti-corruption agency for the MLA authority is an issue. Because of the non-uniformity of MLA authorities among countries, the administrative approvals required and the channels such approvals have to go through before the actual request is sent may deter investigators. This may be the same for the requested country. It is hoped that countries will reduce bureaucratic procedures to ensure that MLA requests remain a productive tool in international cooperation.

F. Immunities

In some countries, high-ranking officials are provided immunity from investigations or being charged for an offence. In such instances, vital information required for an investigation may not be obtained. Where the office holder has immunity, it is not possible to charge that person for a corruption crime. Hence, the assets which he illegally holds may not be recovered until such time as the person leaves office and loses the immunity. Other countries hold the view that no one is above the law. Hence, no immunity is provided to any office holder. Associated issues with immunities therefore require political support to change laws. However, that may not be possible in most instances where lawmakers are vested with immunity.

G. Conflict of Laws

As mentioned earlier, UNCAC requires cooperation amongst its member States. However, in MLA and extradition requests, dual criminality requirements and conflicting laws for obtaining evidence may result in refusal of requests for assistance. The UN recognizes this as a problem which still requires more discussions among Member States before a resolution on a way forward is passed. The timeframe for this still remains indefinite.

H. Lack of Capacity

It is noted that it is vital that officers in anti-corruption agencies and FIU's are well trained to ensure effective results in the fight against corruption. In-house training, on-the-job training and international training courses are required to achieve this. Hence, there should be adequate funding put in place for training and appropriate administrative support to ensure training remains an integral component in the fight against corruption. Attending UNCAC training is seen as an important capacity-building tool. Officers who attend such international training must therefore take it upon themselves to train fellow colleagues in their home states.

I. Lack of Centralized Databases

It was noted that Brazil has a centralized database from which anti-corruption investigators easily search assets in the form of bank accounts, real property, movable property etc. In almost all other countries, this tool does not exist. Hence, investigators are required to conduct searches at the relevant land registry to obtain information about real property or at vehicle and vessel registries to obtain information on vehicles and vessels. Banking information may also require a court warrant. It was agreed that putting in place such a database requires Government support and may take time, if it can be done at all. However, it remains a vital tool for efficient and timely investigation where a country chooses to create such a database.

J. Lack of Stringent Punishment

It was agreed that punishment for corruption differs from country to country depending on the laws of each country. However, to ensure the fight against corruption, appropriate sentencing laws must be formulated to ensure deterrence. In countries where sentences are weak, corruption is not deterred. It is also noted that in some countries plea bargaining agreements or leniency programmes exist as a trade-off between a lighter sentence or immunity and the suspect providing information or transferring assets back to the State. Hence, there are advantages and disadvantages of plea bargain agreements or leniency programmes. These mainly exist to ensure assets are recovered as imprisoning the offender does not solve the issue of asset recovery where the asset cannot be located.

K. Restricted Media

Though media is an important source of information for reporting corruption crime, it may be restricted.

In Sudan, the media is restricted from reporting or publishing certain corruption cases, such as when a high-ranking officer is involved.

VI. CONCLUSION AND RECOMMENDATIONS

Corruption crimes are complex in nature and carried out in secret, sometimes across borders. The use of modern technology has made transferring proceeds of corruption crimes even easier both domestically and internationally. Cooperation assists in detecting and recovering of corruption proceeds that have been transferred or hidden. Therefore, it is important for agencies fighting corruption to cooperate both domestically and internationally. Given the foregoing, the members proposed the following recommendations:

- i. There is need for joint trainings for capacity-building for judicial officers, investigators and prosecutors on modern trends in corruption. More international training programmes should be offered with financial support from the UN or donor agencies to countries in need;
- ii. Governments should enhance public awareness efforts to educate the public to detect and report corruption crimes;
- iii. More effort should be placed on discussions at the UN level to ensure harmonized laws in Member States to reduce instances of conflicts of laws. This includes laws relating to criminalization and evidence;
- iv. The media is given freedom to report without influence from the government. The media must also be aware of international conventions and treaties to which its host county is a party; and
- v. Governments should establish a central database for law enforcement agencies to gather vital information.