

GROUP 2

CONFISCATION OF ILLEGAL BENEFITS AND ASSET RECOVERY

<i>Chairperson</i>	Mr. Dharam Chand Jain	(India)
<i>Co-Chairpersons</i>	Mr. Younsi Nouredine	(Algeria)
	Ms. Anna Mphetle	(Botswana)
<i>Rapporteur</i>	Mr. Antonio Mendoza, Jr.	(Philippines)
<i>Co-Rapporteurs</i>	Mr. Muhammad Tareen	(Pakistan)
	Mr. Hiroshi Fukushima	(Japan)
<i>Member</i>	Ms. Satsuki Miyaji	(Japan)
<i>Advisers</i>	Prof. Kayo Ishihara	(UNAFEI)
	Prof. Ryuji Tatsuya	(UNAFEI)

I. INTRODUCTION

Group 2 began its discussions on 28 January 2008. The Group unanimously elected Mr. Jain as its Chairperson, Mr. Younsi and Ms. Mphetle as its Co-Chairpersons, Mr. Mendoza as its Rapporteur and Mr. Tareen and Mr. Fukushima as its Co-Rapporteurs. The subject of the group workshop was “Confiscation of Illegal Benefits of Corruption and Asset Recovery”. The group agreed to proceed with the discussion with the following agenda: 1) Identifying and tracing crime proceeds (e.g. access to bank, government, financial, business and corporate records, co-operation with the FIU); 2) Seizure, freezing and confiscation; 3) International co-operation in identifying, tracing, seizing, freezing and confiscating the proceeds of corruption; and 4) Asset recovery.

II. SUMMARY OF THE DISCUSSIONS

The Chairperson opened the discussion and noted that confiscation of the proceeds of crime and recovery of assets are key elements in effectively fighting corruption. He stated that the crime of corruption results in double loss as the offender causes loss to the public treasury and then a great amount of resources are spent on investigation.

A. Identifying and Tracing Crime Proceeds

The group agreed that proceeds of corruption usually end up as deposits in domestic or foreign banks or are concealed by acquiring other properties. Thus, a majority of the participants agreed that investigation agencies need to have access to the bank accounts and bank records of suspects as well as government, business and corporate records. It was noted that in the Philippines, due to bank secrecy laws, law enforcement agencies must obtain a court order prior to accessing any bank account or bank records. Similarly, income tax returns can only be accessed if there is tax fraud filed against the taxpayer. This is a serious bottleneck in the investigation of corruption cases. Against this backdrop, it was noted by the group that bank accounts, tax returns and lists of assets are useful in proving corruption cases, thus it would be beneficial if investigators are facilitated by law to acquire such information. In this regard, the group underscored the need for adequate measures for evidence gathering in corruption cases. It was further noted that investigators must foster credibility in order to achieve full co-operation from bank agents.

It was the general consensus that besides bank accounts, investigators should also request other records pertaining to bank loans and mortgaged properties of the suspect in order to trace crime proceeds. The group further agreed that investigating agencies must get some help from experts who have the special skills to decipher complex financial transactions. The group acknowledged that law enforcement agencies must maintain close contact with the financial intelligence units (FIU) in order to acquire reports of suspicious financial transactions.

It emerged during discussion that in Algeria the law empowers designated non-governmental organizations to identify and trace crime proceeds and to pass on the information to the law enforcement agencies for further action. Uncommon to most other countries, this idea could be an effective mechanism for identifying and tracing crime proceeds and may be considered by other countries. The discussion further revealed that in

Pakistan there is a central database, based upon the National Identification Card of its citizens, which stores information on citizens, including assets, and which is a vital source of data used by the National Accountability Bureau during investigation of corruption cases. Mr. Tareen stated that in Pakistan the law provides for plea bargaining and this might be an instrument for the identification of ill gotten assets.

The discussion also highlighted the importance of whistle blowers in identifying and tracing crime proceeds. Moreover, the group agreed that legal protection must be provided to whistle blowers.

B. Seizure, Freezing and Confiscation

The group discussed to what extent a warrant is required in search and seizure of assets and identified approaches amongst the participating countries. The group agreed that effectiveness of search and seizure should be ensured with due consideration for human rights protection. It was highlighted that in Japan both search and seizure require separate warrants from a court. Items not listed on the warrant require the issue of a separate warrant, which, in practice, can usually be obtained in the course of the search. Ms. Mphetlhe said that in Botswana there is also a restriction on the execution of search of women, wherein only female officers can carry out the search, but there is insufficient number of such officers in rural areas.

Mr. Younsi pointed out that sometimes the judiciary face difficulties in deciding whether to grant the search, seizure or freezing order when applications are not made for criminal justice purposes but with hidden political considerations.

It was noted that in Botswana, once a restraining order has been granted, the prosecution is required to register the case before the court within seven days. This creates a challenge because corruption cases are complicated and the time allowed is too short. Some investigators also lack the necessary skills to meet the above requirement.

Further, Mr. Jain and Mr. Mendoza highlighted the challenges of properties which are proceeds of crime but not registered in the name of the suspect(s). Mr. Jain said that investigators must then be able to search various premises where crime proceeds could be traced and identified.

Mr. Mendoza enquired whether the judicial authorities could confiscate some other personal properties if the corruption proceeds have already been disposed of by the convict. Ms. Mphetlhe stated that properties which do not pertain to the crime cannot be confiscated, hence there will only be imprisonment. In cases wherein there is evidence to prove that the crime proceeds are no longer in the hands of the offender, in Japan, the court can confiscate money of an equivalent amount from his/her assets. Mr. Jain said that in the case of illicit enrichment, properties can be confiscated which are found to be disproportionate to the known sources of income and in other cases the court can order recovery of the proceeds of crime by imposing an adequate fine.

The group acknowledged the difficulties in proving the link between the crime and the property beyond reasonable doubt and agreed that civil forfeiture of such properties or other civil proceedings may also be considered in addition to launching of criminal proceedings as provided by the laws of certain countries.

C. International Co-operation in Identifying, Tracing, Seizing, Freezing and Confiscating Proceeds of Corruption

The group agreed that the UNCAC provides an effective mechanism for international co-operation in identifying, tracing, seizing, freezing and confiscating proceeds of corruption, hence the member countries should be encouraged to ratify the UNCAC. Such convention will facilitate harmonization of criminal legislation of all the States Parties. However, the group believed that bilateral treaties still hold a special place and countries should maximize the mutual legal assistance treaties as they create a direct obligation on the consenting states. Treaties should provide for repatriation of the proceeds of crime to the requesting state and the requested state may also get some share in proportion to the amount spent by it on the recovery of proceeds. Mr. Younsi said that sometimes international co-operation is difficult to obtain because of differences in the criminal justice systems of countries and issues such as sovereignty and political policies. He stated that disputes of international co-operation may be settled through an independent international body or court.

Ms. Miyaji pointed out that there is a need to simplify procedures in the formal route, such as Mutual Legal Assistance (MLA), by allowing a direct channel between central authorities as much as possible to expedite the process. The group agreed that in MLA proceedings, it is important that a requesting state may be allowed to send investigator(s) or prosecutor(s) to the requested state so as to facilitate and assist in the execution of the request in a way tailored to their needs.

Moreover, the group acknowledged that informal contacts, including but not limited to Interpol, law enforcement co-operation and FIU-FIU information exchange, provide faster and easier channels for international co-operation. These contacts are useful to decide whether or not, and to what extent, to go with the formal route.

The group also acknowledged the difficulties and challenges in seeking international co-operation through MLA because of the provision of dual criminality. There are certain actions, such as illicit enrichment of corrupt individuals, which are still not crimes as per the laws of certain countries. Recognizing further that illicit enrichment is related to crimes such as bribery, embezzlement, tax evasion, etc., the group agreed that concerned countries may ground their request for international co-operation based on the common crimes stated above. Similarly, confiscation of assets through civil forfeiture or civil proceedings may also be difficult in the context of international co-operation because laws of certain countries may not have such provisions.

D. Asset Recovery

The group acknowledged the difficulties and impediments to asset recovery, especially those assets which are located in other countries. These include the absence of an appropriate legal framework, a lack of technical know-how and expertise, insufficient financial resources, etc. The group noted with concern the disparity in the systems of different countries relating to evidential requirements: this poses a further challenge in obtaining international co-operation.

The group therefore felt that countries should put in place legal frameworks which would enhance international co-operation pertaining to asset recovery. The group further gave import to maximizing mutual legal assistance. This could be supplemented by informal contacts (Interpol, FIU-FIU information exchange, etc.). In this way countries may be able to implement the spirit of the provisions of the UNCAC relating to asset recovery.

III. CONCLUSIONS AND RECOMMENDATIONS

Based upon the foregone discussions and deliberations, the group arrived at the following conclusions and recommendations:

1. Laws of some countries do not facilitate the law enforcement agencies in collection of adequate evidence in identifying and tracing crime proceeds. The group has therefore underlined the need to have adequate legal and practical measures for evidence gathering in corruption cases;
2. Investigators need to foster credibility in order to achieve the full co-operation of banks and other agencies during investigations;
3. Wherever required, the help of experts possessing special skills to decipher complex financial transactions should be employed in identifying and tracing crime proceeds;
4. Countries may consider empowering designated non-governmental organizations (NGOs), as in Algeria, to help and assist their law enforcement agencies for the above purpose;
5. Whistleblowers play a crucial role in exposing corruption and tracing crime proceeds; therefore they need to be provided adequate legal protection;
6. Countries need to have effective legal measures for search, seizure, freezing and confiscation keeping in view the human rights of citizens;
7. Investigators should be facilitated to acquire specialized skills through continuous training in the collection of evidence linking the proceeds of corruption to the crime;
8. Wherein it is not feasible to confiscate illegal properties, countries may consider having legal

provisions to confiscate money of an equivalent amount from other assets of the convict. Countries may also consider launching civil forfeiture/civil proceedings in addition to criminal proceedings;

9. Countries should be encouraged to ratify and implement the UNCAC because it provides an effective mechanism for international co-operation in identifying, tracing, seizing, freezing, and confiscating the proceeds of corruption;
10. Countries should make an effort to maximize mutual legal assistance (MLA) in order to enhance bilateral international co-operation;
11. MLATs and laws shall have provisions regarding repatriation of proceeds of crime to the requesting state, and the requested state may also deduct expenses incurred by it on recovery;
12. The procedure provided for bilateral co-operation in MLATs needs to be simplified so as to allow a direct channel of communication between central authorities of the two countries;
13. The group also underscored the importance of informal contacts between law enforcement agencies for obtaining the desired international co-operation. In order to facilitate effective provision of assistance, countries may be allowed to send a team of investigators/prosecutors; and
14. Absence of appropriate legal framework, disparity of systems of different countries, lack of technical know-how and expertise, insufficient financial resources, etc. have been underlined as some of the impediments to obtaining international co-operation for asset recovery. Countries need to have proper legal frameworks in place to enhance international co-operation. This could be followed by maximizing mutual legal assistance supplemented by informal contacts and providing technical and financial assistance as envisaged in the UNCAC for effective asset recovery.