REPORTS OF THE COURSE

GROUP 1

CRIMINALIZATION, ISSUES IN THE INVESTIGATION AND PROSECUTION OF CORRUPTION, HANDLING OF ASSETS, MUTUAL LEGAL ASSISTANCE AND EXTRADITION

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I. INTRODUCTION

Group 1 started its discussion on 5 November 2007. The group elected, by consensus, Mr. Sharada Bhakta Ranjit (Nepal) as its chairperson, Mr. Shigeru Nomura (Japan) as its co-chairperson, Ms. Santanee Ditsayabut (Thailand) as its rapporteur, and Mr. Dejan Milenković (Serbia) as its co-rapporteur. The group was assigned to discuss the following topics:

1. Criminalization, focusing on the discrepancies in the respective countries' legislation with regard to the UNCAC requirements;
2. Investigation and prosecution:
   - 2.1 Collecting information of corruption;
   - 2.2 Witness protection;
   - 2.3 Legal obstacles to effective investigation;
3. Freezing, seizure, confiscation and recovery of assets:
   - 3.1 Identifying and tracing proceeds of corruption;
   - 3.2 Freezing, seizure and confiscation of proceeds of corruption;
   - 3.3 International co-operation in locating the proceeds of corruption;
4. Mutual legal assistance;
5. Extradition.

The outcome of the group discussion, by topic, was as follows.

II. CRIMINALIZATION, FOCUSING ON THE DISCREPANCIES IN THE RESPECTIVE COUNTRIES' LEGISLATION VIS-À-VIS UNCAC REQUIREMENTS

The group agreed to discuss the domestic law of each country in compliance with the mandatory requirement of criminalization under UNCAC.

All countries have the offence of bribery of national public officials under UNCAC Article 15. However, the definition of "public official" is varied. In some countries, such as Thailand and Nepal, the definition of public official under their penal law is narrower than provided in Article 2 of the UNCAC. It is noted that the definition of public official in Burundi, Japan, Serbia and Malawi covers all requirements under the UNCAC. In Timor-Leste, a public official is called a "public agency or entity" which includes non-government agencies that provide a public service.

With regard to the offence of active bribery of foreign public officials in UNCAC Article 16, almost all countries except Nepal and Thailand criminalize such acts either under the penal law or other specific laws,

such as the Anti-Corruption Law in Burundi and Malawi, and under the Unfair Competition Prevention Law in Japan. Thailand has interpreted the term "public official" to cover only Thai public officials. Therefore, at present, it cannot punish the act of giving a bribe to a foreign public official.

The offences of embezzlement, misappropriation and other diversion of property are criminalized in all countries by various means.

Most countries have an anti-money laundering law. However, it is noted that not all offences provided in the UNCAC are predicated offences under such laws. It is worth noting further that even though some countries do not have a money laundering law, such as Nepal and Timor-Leste, a particular act of money laundering is penalized under their penal law.

The group concluded that the offence of obstruction of justice is penalized in all countries, but with different approaches. In the case of giving a bribe to a witness (Article 25(a) of the UNCAC) the law in some countries, such as Japan and Thailand, still has a gap. Some countries would have this offence in the Penal Code. It should be noted that under the Corrupt Practice Act of Malawi, once the act is committed, there will be two offences; the obstruction of justice offence can be treated under the Corruption Practice Act and the Penal Code as well. This act is penalized in Serbia under the Penal Code and the Law on Public Order.

III. INVESTIGATION AND PROSECUTION

A. Collecting Information of Corruption

After extensive discussion, participants agreed that in each country there are various methods of collecting information on the corruption issue. Most countries collect information through the reports of citizens, or related agencies; rumours; NGOs; media, internet, etc.

However, some participants highlighted the problem of encouraging the public to report corruption and give information to relevant governmental agencies. Japanese participants pointed out that there is a whistleblower protection law in Japan, which was recently enacted to protect persons who report illegal acts, including corruption cases. If there is an unfavourable treatment resulting from the reporting or if there is any damage to the reporter, it can be compensated. The whistleblower protection law protects employees who report corruption in their company.

After discussion, a Japanese participant explained the methods of the tax investigation agency. He said that without any warrant, investigators can visit a bank for investigation and access account information and transactions as well as customer information on opening a new account and the signatures and handwriting of the customer. The investigator may also open desk drawers and take any evidence. If there is a suspicion that there are other tax evaders in the same institution, they can investigate further. In Japan, banks co-operate voluntarily. If a Bank does not co-operate, an investigator will have to obtain a court order to access such information.

This information initiated discussion on the issue of bank secrecy. It was pointed that in almost every respective country police or other governmental agencies need court orders or a warrant to search or seize bank records and other information.

The group had the benefit of the presence of Ms. Catherine Volz, a visiting expert from UNODC. She made two points on bank secrecy. Firstly, usually the obligation to maintain secrecy is between the bank and the customer, and the law establishes bank secrecy. Also, bank clerks have a duty not to tell the customer that the police are looking for information on a bank account.

B. Witness Protection

The group also welcomed the presence of Mr. Tony Kwok Man-wai, a visiting expert from Hong Kong, to give his view as well as his experience regarding the special unit on witness protection in Hong Kong.

Besides Serbia and Thailand, the other represented countries have no specific law to protect witnesses, although general police protection or protection measures during trial may be provided. It is noted that confidentiality is provided in the Anti-corruption Law of Burundi as well as the Ombudsman Law of Timor-

Leste. Furthermore, the Burundi law only mentions the protection of witness by stating that the authority who receives information from the witness needs to protect the witness. However, there are no specific measures provided by law on how to protect the witness.

The Witness Protection Act, 2003 of Thailand provides a comprehensive regime on witness protection and can be highly regarded by other countries considering the issue. The measures under this law include providing safe accommodation for the witness, relocation, giving allowances and compensation, changing identity, etc. Those measures are extended to people who have close relationships with the witness such as his or her parents, spouse or children. The Office of Witness Protection was established in the Ministry of Justice to take care of this matter. However, the effectiveness of enforcing this law is to be considered.

The Serbian participant presented an effective enforcement regime on witness protection in his country. In Serbia, there is a special law to protect an associate in criminal proceedings, meaning not only witnesses but victims, suspects, expert witnesses, accused, witnesses' associates, convicts, and closely related persons such as friends. A special unit to implement the said law was established under the Internal Affairs Ministry. It is a legal obligation and government duty to protect witnesses regardless of the desire of individual witnesses. To implement this law, the group recognized that it requires a large budget. However, the group agreed that such budget is worth spending to curb corruption where its consequences are more expensive. Besides, an effective witness protection law can encourage members of organized crime groups to report the crime and co-operate with the law enforcement authorities.

C. Legal Obstacles to Effective Investigation

The issue of legal obstacles to effective investigation produced extensive and lively discussion among the participants. During the discussion participants agreed that immunity is one legal obstacle to effective investigation and that every country has immunity for some social circles.

However, this issue has resulted in different types of implementation and various practices in each country. For example, in Nepal a special commission under a special law can investigate and prosecute anybody, including high-ranking officers, except when the House of Representative is in session. If the House of Representatives is in session the investigation and prosecution authorities need permission from the speaker of the house.

On the other hand, in some countries, persons under immunity cannot be arrested and prosecuted without permission of parliament. However, practice showed that there is no problem with getting the permission for arrest or prosecution like in Serbia and Japan. In some countries it is difficult to obtain permission for investigation.

In Burundi, after getting permission, high-ranking officers have the privilege to be tried in the Supreme Court.

As an additional topic, participants agreed that even where no specific immunity is given by law, there are practical problems with the investigation and prosecution of high-ranking officials.

It was pointed by some participants that as a solution, the immunity law should be abolished because of its frequent misuse by high-ranking officials. Also, raising public awareness, education, the involvement of NGOs and generating political will are very important issues in defeating this obstacle.

IV. FREEZING, SEIZURE, CONFISCATION AND RECOVERY OF ASSETS

During discussion on this topic, Ms. Volz gave guidance on the meaning of freezing, seizure, confiscation and recovery of assets according to the UNCAC's requirements.

A. Identifying and Tracing Proceeds of Corruption

It is mentioned that in some countries, banks are required to report all suspicious transactions to the relevant authority which is a very helpful technique because authorities can then analyse the movement of the fund and who was involved in the transactions. Moreover, in some countries, an order to freeze a bank account can be obtained immediately after the authority receives such information from a financial institution.

Most countries have an asset declaration system. However, the difficulties often occur where people conceal money in the name of their spouse, relatives, or extra-marital partner. Criminals further conduct other business to launder money. The group exchanged knowledge of some particular types of business that are frequently used to launder money, such as through Chinese restaurants in Europe or casinos in Nepal. The group noted that identifying and tracing the proceeds of crime becomes very difficult and requires much more sophistication due to the advanced technology at the disposal of criminals.

B. Freezing, Seizure and Confiscation of Proceeds of Corruption

The group discussed the difference between criminal forfeiture and civil forfeiture as well as the positive and negative aspects of both systems. For example, a conviction is needed to confiscate the property of the convicted person. Therefore, if the defendant dies, there will be no further action on his or her property. While the standard of proof in civil forfeiture is lowered to preponderance of evidence, it is arguable whether or not this violates human rights. Many countries have both systems.

In all countries, freezing and seizure are always used to preserve property during investigation. Most countries need to a obtain court order in conducting the freezing and seizure. The group noted that in case of tax evasion in Japan, the frozen or seized property can be used to pay the amount of evaded tax.

The group also discussed the issue of maintenance of the seized properties in which some type of property is difficult to preserve. In such cases, we would sell the property and reserve the proceeds of the sale instead.

There are also problems in the process. For example, in Serbia, under court orders, police can search and seize some assets but if the police do not submit a report and the assets to a prosecutor within 90 days, that asset should be returned to the owner. Sometimes, the 90 day period is not long enough to complete the process of international co-operation between Interpol and the domestic authority.

C. International Co-operation in Locating the Proceeds of Corruption

The group recognized that international co-operation in some areas, such as exchanging information, identifying the proceeds of crime, etc., can be obtained through the diplomatic channel. The need for a decent legislative regime is necessary to effectively co-operate with other countries to trace and retrieve the proceeds of crime. Moreover, international instruments, either multilateral or bilateral, can be a basis for efficient co-operation in this matter.

Some countries can provide assistance only if a treaty exists between the requesting country and the requested country while other countries, such as Japan, Thailand and Serbia, can provide co-operation on the basis of reciprocity where there is no treaty. However, not in conformity with UNCAC requirements, once Thailand confiscates any property per request from other country, the confiscated property would be vested in the Kingdom of Thailand according the provision in the Mutual Legal Assistance in Criminal Matters Act.

International co-operation can be provided by Serbia under bilateral treaties and the Criminal Procedure Code of Serbia which devotes one chapter to international co-operation and allows for recovery of assets to the requesting State. Therefore, the group noted that there would be no need to have special law if the present legislation already established a proper legal basis for international co-operation.

V. MUTUAL LEGAL ASSISTANCE

The group recognized that most countries, if they can, give assistance to other countries even where there is no treaty. In such cases assistance is provided on a reciprocal basis. However, where a treaty exists between the requesting country and the requested country, we have to firstly look at the treaty's requirements. Then, if the assistance requested is not covered by the treaty, domestic law regarding mutual legal assistance or international co-operation will be applied. The term 'treaty' includes international conventions, and regional as well as bilateral treaties.

Further, the group discussed the type of assistance which can be provided according to Article 46 paragraph 3 of the UNCAC. It should be noted that in most countries, Interpol plays a very significant role in international co-operation regarding criminal matters, especially by providing member countries with

necessary information through the Interpol channel in each country. However, from the discussion, in some countries, the Interpol channel can be employed only in the investigation stage. The evidence obtained through Interpol is not admissible or it will be objected to by the defendant in the court trial. In such circumstances, the formal process of mutual legal assistance would be necessary.

Almost all kinds of assistance stated in Article 46 paragraph 3 of UNCAC can be provided by all countries either by treaty, diplomatic negotiation or national law. Nevertheless, the group recognized that in some countries assistance that would involve the private sector or another person's property, such as requesting information on bank records or asking to seize property, might be difficult or impossible to provide.

The group then touched upon the problem of mutual legal assistance. The practical problems were presented as follows:

1. Language difficulty. In some countries, the request for mutual legal assistance has to be translated to the requested state's language, as well as English. Therefore, there is a need to hire outside translators which is very expensive. Furthermore, the requesting officer cannot check the quality of the translation.
2. Delay. A request for mutual legal assistance is a formal matter. Therefore, it takes time for the document to go through each step. The poor communication between the Central Authority and Competent Authority can cause delays in the process as well.
3. Limited resources. If the requested state requires extensive time, it may also cause delay as the requested country may have not enough human resources to complete the assistance. Normally the cost of delivering assistance would be borne by the requested country; in case of a large amount of expenses, the requested country might seek consultation with the requesting country.
4. Different domestic regimes. Basic requirements for mutual legal assistance can be expected in every country. In detail, the national law of each country may require specific forms of evidence to be admissible in court. It is difficult to know in advance the requirement in the requested country regarding mutual legal assistance requests.

VI. EXTRADITION

The group recognized the UNCAC's requirement to make corruption offences under UNCAC, as discussed earlier, extraditable offences.

In some countries, such as Burundi, Malawi and Timor-Leste, extradition would be solely based on a treaty while some countries, such as Japan and Thailand, can provide extradition on the basis of reciprocity as well.

Countries which are already a party to the UNCAC, such as Burundi, fully comply with the 'extradite or prosecute' principle. Burundi cannot extradite its own nationals. Therefore, in such cases, instead of extradition, the fugitive would be prosecuted in Burundi. For Japan and Thailand, it is possible to extradite their own nationals, but only to countries with which they have existing treaties.

The group took note of all common requirements for extradition. It is well observed that the double criminality principle is a standard rule for extradition in all countries. Extradition cannot be provided in cases of political and military offences.

The group further discussed other factors that would bar extradition. It is found that in Thailand the Penal Code imposes the death penalty in serious corruption offences. Even though so far the death penalty has never been imposed in corruption cases, Thailand would encounter obstacles if it requested extradition from a country where the death penalty no longer exists.

It was mentioned that if a country still does not criminalize any mandatory offence under UNCAC, that country would not be able to provide extradition for such offences because of the double criminality principle noted earlier.

VII. RECOMMENDATIONS

In conclusion, all participants agreed with the following suggestions:

1. Encourage all countries which have not yet ratified the UNCAC to do so and to fully implement it as soon as possible;

2. All countries should formalize their domestic laws to accommodate the mandatory requirements of the UNCAC, especially in the area of criminalization, international co-operation and asset recovery;

3. National legislation should be enacted to ensure the protection of witnesses and whistleblowers in corruption cases;

4. There is a need to regulate in law the right of the citizenry to access information of public importance held by public authority bodies, with the purpose of the fulfillment and protection of the public interest and to attain a free democratic order and an open society;

5. Countries should seek co-operation from various channels such as Interpol, Europol, or any other inter-organization network to acquire useful information in order to prepare a formal mutual legal assistance request;

6. Countries should encourage the use of UNODC toolkits presented by UNODC visiting experts in preparing requests to other countries for Mutual Legal Assistance;

7. Through a public education programme, raise awareness of the corruption problem in all societies and call for concert action from the public;

8. Improve investigation techniques by using advanced equipment to detect corruption as well as training law enforcement officers on best practices in investigating this specific crime. An asset declaration system for high-ranking officials and 'lifestyle checking' should be emphasized;

9. Make it easier for the public to report corruption, by providing contact with the relevant authorities via email, telephone, and anonymous reporting, etc;

10. Strengthen international co-operation by utilizing existing informal networks among law enforcement agencies in different countries to benefit the formal process of mutual legal assistance and extradition as much as possible;

11. Where necessary, legislation and procedures providing for excessive immunity of high-ranking officials in corruption cases should be amended. To achieve such a purpose, national authorities must engage civil society to take action in supporting the amendment;

12. Countries should engage in capacity building for law enforcement officers on how to effectively protect witnesses as well as provide programmes to educate witnesses on how to protect themselves;

13. The above recommendations depend on sufficient allocation of resources from the government to combat corruption;

14. The above recommendations further depend on strong political will and the promotion of good governance.