REPORTS OF THE COURSE

GROUP 1

IDENTIFYING AND PUNISHING CORRUPT OFFENDERS

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I. INTRODUCTION

Group 1 started its discussion on 25 July 2009. The Group elected by consensus Mr. Done as Chairperson, Mr. Miyazaki as Co-chairperson, Ms. Novkovic as Rapporteur and Ms. Siriwardena as Co-rapporteur. The group, which is assigned to discuss "Identifying and punishing corrupt offenders", agreed to conduct its discussion in accordance with the following agenda:

1. Identifying corrupt offenders;
2. Proactive approach to collecting information and/or evidence;
3. Identifying and tracing crime proceeds;
4. Seizure, freezing and confiscation;
5. International co-operation.

II. SUMMARY OF DISCUSSIONS

A. Identifying Corrupt Offenders

The Group chose not to define corruption, rather to focus its discussion on detecting perpetrators of these offences. The first topic on the agenda was the method for identifying corrupt offenders. Following a lengthy debate, the Group concluded that, due to the clandestine nature of offences of corruption, competent authorities need to employ an array of measures so as to collect clues of corruption.

Firstly, the Group discussed the issue of protection of persons who disclose information on criminal offences of corruption to the competent authorities. There was an agreement across the table that it is necessary to encourage persons with knowledge of criminal activity to co-operate with law-enforcement authorities. Therefore, these persons should be awarded suitable protection so as to limit any undue consequences. In most countries, civil servants are protected from undue consequences, e.g. termination of employment. However, the protection should be more substantial and should include protection of identity, confidentiality in processing the report at all stages of the proceedings and, ultimately, protection of physical integrity and/or relocation.

When adopted, these measures need to be communicated to the citizenry in a form of a continuous information campaign, in order to encourage them to co-operate with the competent authorities. However, it was rightly pointed out by the Group that protection of whistleblowers might present substantial challenges in small countries.

Award or other types of incentive for people who have information on corruption offences was ardently

discussed. This approach has both positive and negative consequences and it should be carefully considered. For this reason, the Group could not reach a consensus on this matter.

The Group went on to inspect the issue of granting immunity to corrupt offenders, in order to allow for a successful prosecution in those cases where collection of evidence is significantly difficult or impossible. In some jurisdictions, e.g. Palestine, the prosecution is empowered to do so. However, plea bargaining is not allowed in Japan.

Moreover, the group discussed whether it would be beneficial to consider mitigation of punishment for those offenders who co-operate with the authorities. It was highlighted that such an approach would contribute to more successful prosecutions. However, it was also mentioned that, for judges, the statements of accomplices may lack credibility. In such cases, other independent evidence is necessary to corroborate the constituent elements of the offence.

The issue of the independence of institutions in charge of investigation was addressed as a prior requirement for a successful investigation. The independence of the institutions and their ability to follow up on the reports of the citizens will influence public trust, and could cast away any reluctance of the citizens to co-operate with the investigative authorities.

Summary of recommendations:

1. In countries where needed, existing laws should be amended so as to incorporate measures which guarantee protection to persons who disclose information on criminal offences of corruption to the competent authorities;
2. Protection of witnesses and victims should be implemented, pursuant to the requirements of Article 32 of the UNCAC;
3. The protection which is guaranteed in respect of public sector employees should also be afforded to those employed in the private sector;
4. Granting immunity or mitigating punishment to those offenders whose testimony or co-operation is vital for the prosecution should be considered;
5. Independence of institutions should be secured, so as to enable effective investigations of corruption offences, without any undue influence. These institutions should be given broad access to files, documents, databases, etc.

B. Proactive Approach to Collect Information and/or Evidence

The Group discussed possible ways to initiate an investigation. An avenue of formal complaint by citizens or organizations was mentioned as a typical commencement of the investigation, as well as independent initiation of the proceedings by the national anti-corruption authorities. Secondly, the Group elaborated on the use of information communicated in the media. The Group recollected the experience of Singapore's anti-corruption authority which is empowered to follow up on a media report or other sources where there are allegations of corruption. In countries like Thailand, Yemen, Japan, Samoa and Nepal, the situation is similar to that of Singapore. The institutions can initiate investigations based on suspicions of corruption independently, without a formal complaint. However, in countries like Papua New Guinea and Sri Lanka, this is rather scarce, or there needs to be a formal complaint to start investigations.

Though media reports and other sources of information, e.g. the World Wide Web, can be highly valuable in gathering clues of corruption, it was mentioned that extreme caution is needed when handling these sources. The ownership of the media is one of the elements which need to be taken into account as it is not uncommon for the media to be owned by the political parties and/or interest groups. Therefore, media reports on corruption offences could be misleading or defamatory and require utmost vigilance.

The Group proceeded to discuss the handling of anonymous complaints of corruption. Anonymous reports should not be disregarded though the proper handling of anonymous reports is rather complex and requires a great deal of attention. Prior to the initiation of the investigation of an anonymous report, the background of the accused person should be verified in terms of e.g. previous convictions and/or suspicious behaviour. The information provided in this manner could be well-founded, thus enabling the investigative authority to

uncover offences. However, in treating these types of reports, greater attention should be paid to safeguarding the human rights of all involved.

Investigation of related offences was also singled out as a useful approach in obtaining initial intelligence which can be used as a basis for an investigation into corruption offences. During investigation of other offences corruption might be unveiled. It was agreed that this is a very effective method for finding clues of corruption.

There is now a general understanding that corruption, due to its clandestine nature, cannot be detected using conventional investigative techniques. In some countries, the investigative authorities may use special investigative techniques such as electronic surveillance, simulated active and passive bribery, controlled delivery, undercover operations, etc. However, in some countries there are limitations as to the use of these measures. For example, in Sri Lanka, wire-tapping is not used in investigation of corruption offences as the lack of technical equipment and financial resources presents an obstacle. In Montenegro, these measures may be used for offences of organized crime and offences sanctioned with imprisonment of more than ten years; there are legislative efforts to enable the use of these measures in investigation of corruption. It was recalled by the Group that introduction of these investigative techniques is one of the requirements of the UNCAC.

Summary of recommendations:

1. A proactive approach is recommended. National anti-corruption authorities should be empowered to verify the accuracy of allegations of corruption communicated by the media or other sources, e.g. the Internet. However, following up on a media report requires utmost vigilance.
2. Anonymous complaints of corruption should not be ignored; however, there should be a developed methodology which provides clear guidelines on the course of action as regards anonymous reports.
3. There should be an opportunity for authorities to initiate investigations independently and without a prior formal complaint.
4. Relevant legislation should provide for the use of special investigative means in investigation of corruption cases. Where necessary, training on the use of these sophisticated techniques should be provided to the law enforcement agencies and the prosecution offices. Specific techniques to be considered are:
    (a) Wire tapping and/or electronic surveillance;
    (b) Controlled delivery and/or simulated active/passive bribery;
    (c) Undercover operations.

C. Identifying and Tracing Crime Proceeds

As offences of corruption are predominantly driven by the desire to accumulate wealth illegally, identifying proceeds of crimes becomes a primary issue. Therefore, the Group discussed bank secrecy and its implications for investigation of corruption offences.

It was mentioned that in some countries a search warrant is needed to access bank records and account statements, whereas in Thailand the police are authorized to access bank accounts of suspects without a court order. However, the real issue lies in the fact that the offenders deposit their proceeds in foreign banks. Therefore, there is dire need for international co-operation.

The Group proceeded to discuss access to information which is compiled by various government agencies. It was stated that in all countries public officials are obliged to disclose their income and property on a regular basis. This data should be used to gather clues of corruption, particularly if there are evident discrepancies between the registered income and the person's affluent lifestyle. However, the issue of administrative capacity to verify these declarations was raised. For example, in Sri Lanka there is no designated authority to perform this task. In Japan, it is the executive officers who supervise the declarations of their staff and in case of suspicion, they may refer the case to the internal or external inspection authority.

Apart from the obligation to disclose income and property, it was mentioned that investigative authorities may request information to be provided by a government agency. This is commonly done in Japan, and the

relevant authorities have been co-operative to date.

Ensuring the secrecy of investigation was also singled out as a matter of concern. It was mentioned that gathering evidence of corruption is significantly difficult, and this task is made even more tedious in an event where information leaks, giving the offender enough time to hide or destroy evidence. Therefore, the Group agreed that the secrecy of investigation needs to be safeguarded at all costs. This could be achieved by involving as few investigators as possible, who should be selected from amongst senior staff. It goes without saying that during the course of investigations information should not be disclosed or publicized.

On the issue of information collated by the financial intelligence units (FIUs), it was pointed out that the reports on suspicious transactions may be indispensable in corruption investigations. It was noted that there is a need for strengthened inter-agency co-operation, as well as for a proper analysis of information provided by the FIUs. In Palestine and Japan, information coming from FIUs is regularly checked in order to detect corruption related offences. For example, in Japan the special investigative departments established in Tokyo, Nagoya and Osaka District Public Prosecutors Offices have designated units which analyse the reports provided by the FIUs.

However, attention needs to be paid to the operations of bank staff that are not necessarily mindful of the need to detect suspicious transactions and to identify customers. Therefore, FIUs should play a significant role in the training of bank officers on due diligence. To that end, guidelines on detecting and reporting suspicious transactions should be produced by the FIUs and regularly updated. There needs to be a suitable and swift communication channel between the banks and the FIUs, as well as interaction between the FIUs and investigative authorities. With respect to the information collected by the FIUs, it could be beneficial to apply a risk-based approach in analysing these data. For those entities that choose not to comply with anti-money laundering provisions, administrative and/or monetary sanctions should be imposed.

Summary of recommendations:

1. Bank secrecy must not be used to conceal the identity of customers who are suspected to have committed an offence of corruption;
2. With respect to disclosure of officials' assets and other wealth, it was proposed:
    (a) to empower the institutions tasked with collecting declarations of income and property and to provide adequate human resources and technical capacities;
    (b) to scrutinize these data in cases of suspicions of corruption;
    (c) to conduct random checks of the accuracy of information provided by high ranking officials; and
    (d) to conduct risk-based checks of declarations of income and property;
3. At the early stages of the investigation, the number of officers should be limited and there should be a strict confidentiality policy. Information leaks need to be resolved immediately with appropriate measures;
4. The reports on suspicious transactions provided by the FIUs should be carefully analysed so as to gather clues of corruption and/or collect evidence. It would be beneficial to set up departments or units within investigative authorities which would be tasked with regular checks of the information provided by the FIUs. A risk-based approach is recommended.

D. Seizure, Freezing and Confiscation

Having in mind that corruption offences are inherently profit-driven, there was consensus across the table that it is vital to identify the proceeds of corruption. That is where measures such as seizure, freezing and confiscation come into play. However, it is contested whether investigative authorities and prosecution services pay significant attention to detecting proceeds of crime. It is agreed that financial investigations require advanced skills in, for example, forensic accounting, and that due to electronic money transfers it is painstakingly difficult to follow the money trail.

The Group discussed both the possibility of criminal confiscation as well as the avenue of civil forfeiture. It was concluded that both procedures present different challenges. The traditional rules of evidence imply that, in criminal proceedings, the prosecution bears the onus of proof and the standard is beyond a

reasonable doubt. The rules of evidence vary if the procedure is that of civil forfeiture.

In most countries, confiscation is allowed only following a conviction in a court of law (Sri Lanka, Palestine, Japan and Montenegro). As such, it is considered a part of the sentencing procedure. The onus of proof lies with the prosecution and the standard is beyond a reasonable doubt. In Sri Lanka and Nepal the burden of proof is shifted to the offender, but only with regard to the property suspected to have been acquired illegally.

However, it was indicated that in Thailand and Papua New Guinea civil forfeiture is introduced, and that it is being used to forfeit to the state the property suspected to originate from a criminal offence. In such instances, the standard of proof is on the balance of probabilities which basically means that the state must make it probable that the property comes from an illegal source and it is up to the defendant to rebut these assumptions by means of documentary evidence.

Summary of recommendations:

1. The competent authorities in respective countries should be empowered by law to seize, freeze and confiscate illegal proceeds;
2. Introduction of civil forfeiture should be considered as a way forward for those jurisdictions which still rely on criminal confiscation;
3. Training programmes for investigators and prosecutors should be conducted, so as to promote a wider use of financial investigations and change their mindsets, generally inclined to conducting traditional investigations;
4. Forensic accounting needs to be utilized as a method of following the money trail;
5. It is worth considering shifting the burden of proof from the prosecution to the offender, in respect of the property which is suspected to originate from illegal sources;
6. Finally, inter-agency co-operation should be strengthened.

E. International Co-operation

Bearing in mind the transnational nature of corruption, all members of the Group agreed that international co-operation is of paramount importance. In most countries, the types of assistance provided under Article 46 of the UNCAC are already in place. Direct communication among law-enforcement agencies and INTERPOL in exchanging information and requesting assistance is often utilized. However, it was pointed out by several participants that, in order to secure admissible evidence, authorities need to rely on formal avenues of providing assistance through mutual legal assistance. It was emphasized that the procedure is lengthy and complex; and that in some instances informal communication might take place before the formal procedure is initiated. This approach is recommended so as to facilitate the preparation of the request and prevent delays in requesting mutual legal assistance; it is all the more necessary in those cases where the requested state must pay high attention to the request or act in an urgent manner.

The Group noted that preparation of a formal request for mutual legal assistance can be rather complicated, particularly as regards the format of the request and incorporating documents needed to substantiate the request. Moreover, central authorities responsible for mutual legal assistance need to be easily accessible.

Specific issues relating to the provision of mutual legal assistance were discussed at length. The summary of recommendations is as follows:

1. Ratification and implementation of the UNCAC should be ardently promoted, as the Convention provides for a broad platform for international co-operation in combating corruption. Additionally, national legislation should allow provision of mutual legal assistance and extradition;
2. Apart from international co-operation through mutual legal assistance and extradition provided in the UNCAC and respective national legislation, fostering direct communication between international counterparts should be considered through, for example, establishing a network of anticorruption practitioners;
3. The UNCAC should be ratified so as to prevent the situation in which the requirement of dual criminality obstructs the provision of mutual legal assistance and extradition;

4. The use of the writer tool designed by the UNODC should be encouraged as it facilitates the preparation of the formal request for mutual legal assistance;
5. Freezing, as an interim measure taken to secure future confiscation, needs to be facilitated by means of swift international co-operation. Asset recovery, as provided by the UNCAC, needs to be enforced so as to enable repatriation of assets;
6. Communication and co-operation through INTERPOL and national law-enforcement agencies should be enhanced, while at the same time mutual trust needs to be built so as to provide for more fruitful co-operation.