



**Difficulties faced by developing countries in the recovery of
proceeds of corruption.**

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**DAC DEVELOPMENT PARTNERSHIP FORUM
IMPROVING DONOR EFFECTIVENESS IN COMBATING CORRUPTION**

**Organised jointly by
OECD DEVELOPMENT ASSISTANCE COMMITTEE
AND TRANSPARENCY INTERNATIONAL
9-10 DECEMBER 2004**



This paper was prepared for the DAC Development Partnership Forum: Improving Donor Effectiveness in Combating Corruption organised jointly by OECD Development Assistance Committee and Transparency International, 9-10 December 2004. It represents the views of the author and not those of the OECD DAC or Transparency International.

DIFFICULTIES FACED BY DEVELOPING COUNTRIES IN THE RECOVERY OF PROCEEDS OF CORRUPTION

**Presented by Lt. General Munir Hafiez,
Chairman, National Accountability Bureau, Pakistan**

Workshop on supporting legislation and action on recovery of stolen assets and money laundering

1. Corruption is a phenomenon common to all countries. It represents a real threat to the stability and well being of societies and hinders economic and social development of each country. Corrupt practices endanger security of societies, undermine the values of democracy and civil ethics and jeopardize sustainable and political development, in particular when an inadequate national and international response leads to impunity. Needless to stress that government has the primary responsibility in combating and preventing corruption & corrupt practices. However the constant convergence of efforts at the national, regional, and international levels is essential.
2. The realization of the problem by the comity of nations and the urge to move forward has been manifested in the shape of international instruments such as Anti-Bribery Convention and UN Convention Against Corruption. It is expected that the continuity of an international effort coupled with responsible and pragmatic response of the individual states would produce the desired results.
3. Corruption is a multifaceted phenomenon. One of the related operational aspects is the concealment of proceeds of crime to shield from justice. The quest for capital mobilization of various financial systems has been conveniently married to the concealment needs of the criminals resulting in huge capital outflow from the victim states. Pakistan is one of the few developing countries that have taken bold initiatives to counter the menace of corruption. However, the measures have not had the desired level of impact even if there has been an improvement in certain areas. The progress has been hampered by a number of extraneous factors, including less than satisfactory cooperation from other jurisdictions.
4. Resultantly there has been a loss on two counts to the developing countries; failure to recover assets and develop effective deterrence against continued transfer of illicit funds to other jurisdictions.

Problems in Recovery of Stolen Assets

5. The identification and confiscation of proceeds of crime is generally viewed as a form of punishment eliminating incentive to commit corruption; means of depriving offenders of financial resources and a tool to avoid further corruption or other crimes.
6. A typical cycle of events involved in returning assets of criminal origin to the victim states includes the following:
 - Identification of Corruption
 - Initiation of Local Investigation
 - Request for Mutual Legal Assistance (MLA)
 - Acceptance of MLA by the Central Authority
 - Execution of MLA – Central Authority designates a judicial authority
 - Transmission of Evidence to the Requesting State

- Admissibility of Evidence in the Requesting State
- First Judgment in the local legal proceedings
- Final and enforceable judgment in the local legal proceedings
- Request for repatriation of assets
- Acceptance of repatriation request
- Execution of repatriation request

7. This apparently simple and logical sequence may take years, at times rendering the effectiveness of the local proceedings totally redundant. Responsibility for the delays cannot be apportioned to a single country, i.e. the requested or the requesting only, but the major opprobrium falls on the former.

1. Deficiencies related to the Requesting State

Capacity Issues

8. Developing countries face serious resource constraints, specifically, in terms of skilled human resource. These deficiencies surface at both the investigating as well as prosecuting stages. When dealing with the better resourced developed countries the differentials become quite stark resulting into an imbalance that makes cooperation extremely difficult. These deficiencies are manifested in the form of:

- Incomplete audit trails
- Non-availability of forensic techniques
- Lack of legal expertise in realm of public international law
- Un-familiarization with legal framework of the Requested States

9. These problems are exacerbated by an absence of stable institutional arrangements.

Internal Processes and Procedures

10. Effective governance in most developing countries is dragged down by complicated and arcane processes, procedures and rules. A law enforcement agency working within this environment faces the implications of the general governance system in the country. Resultantly speed and quality of investigations, and consequently prosecution, are compromised creating admissibility issues in a jurisdiction with more stringent requirements. Some of the major matters are:

- Delays in obtaining evidence for investigation
- Delay in judicial proceedings
- Inadequate Documentation of requests for legal assistance in terms of establishment of criminality, identification of foreign assets and linkage between the offence and the foreign assets.

2. Problems in relation to the Requested State

Unclear/ Excessive Procedural Requirements.

11. The requested states in their set of requirements fail to differentiate between requirements for establishing a prima facie case for the purposes of investigation (and consequently procuring evidence) and the absolute evidence for successful prosecution. Resultantly the requesting state finds it difficult to mobilize cooperation from the requested state. Such requirements may not only have implications for

domestic success for prosecution but also eventual repatriation of the assets. Insisting for substantial information to accompany MLA tantamount to scuttling the whole process because it is the information whose retrieval will eventually make out the case for successful prosecution. The delay in processes may lead to the transfer of the asset concerned to newer jurisdiction leading to an ab initio revival of the process.

The Attitudinal Factor:

12. The requested states take at best a passive view of the whole proceedings placing the entire burden of compliance on the requesting state. While principally this may be the right approach even for purely managerial reasons, in some major cases, the requested state should take a more proactive approach even if this translates into educating the requesting states on its procedures that would expedite the process.

Identification of Central Authority in Requested States.

13. The designated authorities vary from state to state in accordance with their respective institutional arrangements. An adequate and well-published notice would be helpful for the requesting state to approach the relevant authority. The United Nations Convention Against Corruption also calls for identification of the Central Authority for execution of MLAs. Till the operationalisation of the Convention it would be advisable to have an intermediate arrangement for creation of a database of designated authorities.

Costs

14. The costs of overseas operations for most organizations are extremely high. For an under resourced developing country they are forbidding. In the present arrangement identification of stolen assets in the Requested State is considered to be the primary responsibility of the victim. Resultantly there is a mushroom growth of private asset tracing companies charging heavily to the requesting states.

15. For execution of MLAs, as well as recovery of assets, the requesting States are mostly dependent on private lawyers in foreign jurisdictions. Sometimes high legal costs discourage the developing countries to make efforts for recovery.

16. Even the ancillary costs incurred on overseas travel of personnel are a substantive burden on the exchequer of the developing countries.

Overemphasis on Political Considerations:

17. Requested states, in some instances, unnecessarily make political judgments of a regime or a specific investigation leading to non-cooperation. Principally this should not be the prerogative of the requested state and primary focus should be on substantive issues. However, in obvious situations political judgments cannot be avoided. One method of mitigating suspicions of victimization is increased cooperation and exchange between state agencies.

No support on civil remedies

18. No support on civil remedies for recovery of the stolen assets, which inevitably leads to resort to the more cumbersome criminal procedures.

Suggestions

19. Within the perspective of this workshop the recommendations are primarily based around the topic of this conference viz 'improving donor effectiveness in combating corruption'. In any case they are comprehensively covered under the UNCAC which should provide the guiding principles of all future progress in the domain of anti-corruption. These are:

Provision of Technical Assistance

20. Provision of technical assistance to the developing countries for strengthening human resource involved in the efforts to combat corruption. The mandate of such assistance may include training in financial forensic, preparation of mutual legal assistance requests, investigation and prosecution capacity, familiarization with legal framework of states where these funds are most frequently stashed.

Helping Developing Countries in Reviewing/ Modifying Their Legal Framework

21. Helping Developing countries in reviewing/ modifying their legal framework to implement international commitments such as UNCAC through facilitating the exchange of country models and experts.

Establishment of Effective 'Clearing House'

22. Under the ambit of OECD to assist the developing countries in understanding the legal/ procedural requirements of OECD countries viz. recovery of stolen assets. By using this Clearing House, the developing countries would be able to retrieve information about legal/ procedural requirements of any OECD member state, though its scope can be taken beyond OECD also. Effectively such a clearing house would reduce costs for the less resourced countries and also expedite the process. Such an arrangement would be of mutual benefit for the developed and the developing countries and help in combating other international menaces.

Facilitation of Mutual Exchange of Best Practices

23. There is a need for facilitation of mutual exchange of Best Practices amongst Developing Countries by the Donor agencies. These include enforcement as well as preventive systems established in these countries.

The Requested States should Adopt 'Tell' Rather Than 'Ask' Approach.

24. They must take initiative to guide requesting states about their legal / procedural requirements. Moreover in case of reporting of any suspicious transactions related to the criminality in the overseas jurisdiction, it should proactively shared with the concerned State.

Periodic Peer Review of OECD Members

25. Periodic Peer Review of OECD members may be conducted in terms of facilitation of Restitution of illicit assets to the country of their origin.

Acceptance Based on Legal Considerations

26. The acceptance of request for Mutual Legal Assistance should be based primarily on legal merits rather than stringent political judgments. Political judgment may be exercised in extreme cases and only after ascertaining facts on ground.

Enhanced Due Diligence of ‘Gatekeepers’

27. Enhanced due diligence of ‘gatekeepers’ e.g lawyers, accountants, notaries is also required. In terms of FATF recommendations and EU directives on money laundering, the reporting of suspicious activities by professionals such as lawyers, accountants, notaries etc, must be ensured. The information so received and related to any overseas jurisdiction should be shared with the concerned State. Investigations must be initiated in all cases where instances are reported by developing countries.

The Requested State Should Provide the Legal Assistance to the Developing Countries on Alternate Methods of Recovery

28. The Requested State should provide the Legal Assistance to the Developing Countries on alternate methods of recovery such as civil remedies etc.

Return and Disposal of All Assets

29. This matter should be dealt in accordance with the provision of the UNCAC which states “where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigation, prosecutions or judicial proceedings leading to the return or disposition of confiscated property”.

Conclusion

30. Combating and preventing corrupt practices and transfer of illicit funds and returning such assets to the countries of origin requires an effective and efficient cooperation at the international level. Preventing and Combating Corruption and the repatriation of illicit funds are considered crucial to the mobilization of financial resources for development. The responsibility in the matters remains divided between the developing and developed nations. It should be coalition of partners for the North to the South, working together to define new global landscape hostile to the proceeds of crime in its full ramification. The local ownership of this issue by developing countries is needless to say, imperative for a successful campaign and it therefore calls for the cooperation, alliance and positive action at the platforms like this. As reflected above the donors can play an important role not only in facilitating the sharing best practices amongst the developing nations but also help them in their capacity building to present their case in more convincing and forceful manner.