



Preventing and combating the transfer of assets of illicit origin and returning such assets, in particular to countries of origin, consistent with the United Nations Convention against Corruption





Introduction:

Corruption has been running rampant in developed and developing countries alike for decades, fueled by the trade of assets that emerge from illicit practices. It is without doubt that these practices affect the less developed countries far more than the developed nations, many a times causing widespread and long lasting damage to the countries' political, administrative, judicial and international systems. In the early years of the past decade, the UN started work on taking definitive action against such malpractices.

The threat that corruption poses to the economic and political progress of a country, to its stability, and to its status as an establishment is undeniable. Because of the secretive and illegal nature of the trade of assets of illicit origin it is very difficult to accurately quantify how much of global trade is run with money accrued using corrupt methods. However estimates have been made by various national and international bodies. The International Monetary Fund (IMF), for example, calculates that about 3 – 5% of the world GDP, USD 600 billion – USD 1.8 trillion, is laundered *every year*. Experts say that a large portion of this money and these assets are derived from corruption. Very early on in the process of formalizing potential solutions for the trade of illicit assets, the UN realized that effective recovery of the assets from corruption was essential – but soon enough they saw that this was also most difficult. Not only would these countries benefit greatly from the retrieved assets, but such action would also send across the message that the international community was intolerant of such acts.

Capital drained out of a country through the export of the proceeds of corruption has severe adverse effects on the country. Experts say it “undermines foreign aid, drains currency reserves, reduces the tax base, harms competition, undermines free trade and increases poverty levels.” Economies in transition, that is, all developing nations, are the most likely to be affected as well as the most affected if such high scale corruption were to impede the countries' attempt to develop socioeconomically and politically.

Following are the various *estimated* figures of corruption and money laundering around the globe, as determined by local and international bodies. These figures mainly deal with state resources that have been illegally possessed by private individuals or parties, primarily through the transfer of assets to overseas banking centers and financial havens:

- Nyanga Declaration on the Recovery and Repatriation of Africa's Wealth – USD 20-40 billion has been obtained illegally from “some of world's poorest countries, most of them in Africa, by politicians, soldiers, businesspersons and other leaders, and kept abroad in the form of cash, stocks and bonds, real estate and other assets.”
- Mobutu Sese Seko, former President of Zaire, has reportedly appropriated close to USD 5 billion – an amount equal to Zaire's external debt at the time.
- Framework of the workshop on asset recovery in Vienna (June 21 2002) – money to the tune of USD 227 million, transferred abroad under the Peruvian





government of Alberto Fujimori, was frozen in banking centers and financial institutions across the world and 68 million recovered. These funds were mainly sourced from bribery and illegal corruptions along with public funds' embezzlement.

- Representative (Government) of Nigeria – over USD 400 billion from Africa had been illegally gained and siphoned off abroad, of which USD 100 billion or more was from Nigeria. Nigeria's external debt was \$28 billion, i.e. 28% of the funds stashed away.
- Sani Abacha, former Nigerian dictator now deceased, ransacked the country along with his allies of an estimated \$2.2 billion. The World Bank's estimates that the entire GDP of Nigeria is approximately \$41.1 billion, and over two-thirds of the population live on less than \$1 per day- a statistic entirely demonstrative of the massive damage caused by corruption and the importance of discussing such a topic.
- Mexico faces similar stories, and is in fact notorious for its corrupt leaders. Former President Carlos Salinas for example was worth over \$120 million dollars, with a majority of these assets coming from corruption. Such a large amount as per 2002 costs for annual health care, could pay for more than 594,000 Mexican citizens.

Work Leading Up to UNCAC:

Past work by the General Assembly on the topic included the United Nations Convention against Transnational Organized Crime. This convention did not, however, effectively deal with the problem of assets of illicit origin in specific. As a result, in its December 2000 resolution 55/61 the General Assembly recognized the need for a comprehensive international legal instrument. In this resolution it also decided that work on such an instrument should begin as soon as possible and asked the Secretary General to convene an intergovernmental expert group to prepare draft terms of reference as a starting point for this instrument.

Subsequent resolutions by the General Assembly in the following two years followed up on its previous work and recognized that the convention needed a comprehensive and multidisciplinary approach. Resolution 56/260 of January 2002 by the General Assembly requested the Ad Hoc Committee for (now called) the Negotiation of a Convention Against Corruption to consider indicative elements including the prevention and combat of the transfer of funds of illicit origin. The Economic and Social Council further reinforced the issue, based on the recommendation of the Commission on Crime Prevention and Criminal Justice, by adopting resolution 2001/13. This July 2001 resolution was based on encouraging stronger international ties in "preventing and combating the transfer of fund of illicit origin, from acts of corruption, including the laundering of funds, and in returning such funds".

The work of the Ad Hoc Committee in close co-ordination with the office of the Secretary General was the most integral factor in the



formulation of the United Nations Convention Against Corruption. Based on the request by the Economic and Social Council, the Secretary General prepared a global study for the Ad Hoc Committee. This study included the impact of these illicit funds on “economic, social and political progress”, especially in developing countries. It also included ideas suggested by the Secretary General regarding appropriate ways and means of enabling the States concerned to gain access to information on the illicit funds belonging to them and the recovery of such funds once they are located.

The Ad Hoc Committee for the Negotiation of a Convention against Corruption used these reports by the Secretary General and other recommendations to work on formulating a comprehensive legal document. It convened on more than one occasion to discuss various aspects of the Convention and provided different kinds of assistance to concerned parties. During its second session, for example, there was a one day technical workshop held on the complex issue of asset recovery (which is now the fundamental principle of the UNCAC). This workshop provided interested participants with special technical knowledge to go about recovering illicit assets effectively. The workshop was based on three major themes:

- (a) transfer abroad of funds or assets of illicit origin, efforts to identify the location of such funds or assets and confiscation
- (b) return of funds or assets of illicit origin
- (c) prevention of the transfer of funds or assets of illicit origin

The Ad Hoc Committee and Secretary General’s combined efforts along with guidance

from the UN General Assembly and the Economic and Social Council helped pave the way for what we now know as the United Nations Convention Against Corruption. In this section the background work for the Convention has been outlined. The next section deals with the major themes and principles of the Convention itself.

United Nations Convention Against Corruption:

The United Nations Convention Against Corruption is the first of its kind, a legally-binding document against corruption consisting of a total of 8 Chapters and 71 Articles. 140 member nations have signed it, of which 137 have ratified, acceded, approved or accepted it. It was adopted by the United Nations General Assembly in Merida, Mexico on October 31 2003 by resolution 58/4 after Ecuador became the thirtieth country to sign it.

There are four primary themes of the United Nations Convention Against Corruption which outline the problems within the issue of trade of assets of illicit origin. They serve as guidelines to solve the issue at hand and reflect the Ad Hoc Committee's work in the topic area.

Prevention:

The age old saying "prevention is better than cure" is more useful in no other issue than the one being discussed here: trade of assets of illicit origin, especially those resulting from corrupt practices. The UNCAC has an entire chapter devoted to the subject of preventing public officials from engaging in corrupt practices, because this has positive multiplying effects on the efforts of the UN in the issue. If there are fewer illicit funds being created and traded then not only does this



reduce illegal capital flight from countries, but it also reduces time, money and effort required to locate and retrieve these funds. Moreover a reduction in the future trade of illicit funds allows countries and the UN to focus their efforts on retrieving the hundreds of billions of dollars already siphoned off, as mentioned above. This is why the creators of the Convention have emphasized the importance of having effective measures by individual countries and the international community to prevent further trade in these assets.

Methods to contain corruption have been outlined in substantial detail in the Convention. These include steps such as effective legislation on the national and international level, transparency and accountability in transactions made by public officials, safeguards, setting standards for code of conduct and regular appraisals of the situation at all levels to ensure continuous improvement. The Convention, most importantly, also recognizes the need for the public involvement and the role of society in preventing corruption, outlined in Article 5. Non-governmental organizations and community-based organizations are desirable, along with promotional campaigns that raise public awareness of the issue. It is essential that society as a whole works in preventing corrupt practices because if people do not entertain such practices then public servants will find it harder to use corrupt practices.

Criminalization:

Punishing undesirable behavior is essential in deterring others from repeating the same wrongdoing. The Convention realizes this fact and goes over and beyond previous UN

documents to encompass a wider range of corruption acts as criminal. Although countries have different domestic laws, the Convention establishes ground rules to direct countries towards developing laws that most resemble the ideas in the Convention. In some cases it even legally calls upon States to establish offences, and all members who sign the Convention are expected to abide by these rules.

What is different in this Convention as compared to previous UN papers is that not only are 'traditional' acts of corruption, like bribery and embezzlement of funds, deemed criminal but also acts that support and aid corrupt practices. "Trading in influence" and "concealment and laundering of proceeds of corruption" are some of these acts declared criminal. Having such clauses in the Convention help put a lot of the actors in the trade of illicit assets in danger of being prosecuted. This includes international banks and financial havens that previously did not come under scrutiny and could get away with feigning ignorance. The Convention also has a section devoted to private-sector corruption which is usually very hard to identify and even harder to prosecute, often because of the global reach of many companies. A common international law allows a basic set of rules to be established based on which transnational corruption practices can be punished.

International Co-operation:

Signatories of the Convention are bound to offer specific forms of mutual legal assistance. This results in offenders finding it more difficult to take shelter in a country after having committing an act of corruption in another country. Countries have





agreed to co-operate in the processes of prevention, investigation and persecution. They are required to take measures which will support the locating, freezing, seizure and confiscation of the proceeds of corruption and to help in returning these proceeds to the country from which they were wrongly taken.

The Convention touches upon the tricky issue of international banks and financial institutions' transparency. Mechanisms such as "whistle blower", where an employee of the bank or the bank itself reports suspicious activity by a client, and "know your customer" policies where the bank is asked to perform a background check on the origins of its customers' money are suggested. This involves the support of local governments where the bank is situated, but is potentially the hardest to achieve since this involves convincing banks to give up a large part of their business.

Asset Recovery:

Asset recovery has been stated explicitly as the fundamental principle of the Convention in article 51 of the Convention. One of the biggest accomplishments of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption is the agreement by countries on the topic of asset recovery. It took intensive negotiations by member nations since the country seeking assistance might have different safeguards and laws than the country whose help is being asked for.

Reconciling these differences was essential, especially for many of the less developed

countries, wherein past corrupt actions by public and private sector personnel had caused tremendous harm to national wealth. These countries need international co-operation to regain funds to rehabilitate their society.

The article has several provisions which outline the details according to which assistance will be provided between states. In the case of public embezzlement of funds for example, the retrieved assets will be returned to the state requesting it. When the confiscated property is under another offence stated in the Convention, states would have to show proof of ownership or the UN would have to recognize the damage caused to the requesting state to return the funds to that state. There are also provisions that consider the legitimate determination of the prior owners and the potential compensation that the funds can have to victims of the acts of corruption, before returning assets.

Questions a Resolution Must Answer:

- Which countries (developing and developed) will fulfill the need for human resources, technical and financial support – United Nations Organization for Drugs and Crime
- How can discrepancies between different nations' laws and international law for illicit assets be overcome?
- How can the UN regulate private and public financial institutions in the prevention of money laundering?
- Outlining how to go about asset recovery and return





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