

GROUP 2

EFFECTIVE MEASURES IN INVESTIGATION OF CORRUPTION IN THE AREA OF PUBLIC PROCUREMENT

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I. INTRODUCTION

This report is the result of the joint effort of all members of Group Workshop 2. Members of Group 2 started their first session on 28th of October 2016 at 10:30 AM. Mr. Wael was elected as Chairperson and Mr. Rabizoda and Ms. Claudia as Co-Chairpersons while Ms. Lillian was elected as Rapporteur and both Mr. Mndambi and Mr. Yuasa as Co-Rapporteurs. The Group was required to choose a topic which carries the theme of 19th UNAFEI UNCAC Training Programme. After many discussions, all the members agreed to the topic of “Effective Measures in Investigating Corruption in the Area of Public Procurement”.

II. MEASURES FOR DETECTION AND PUNISHMENT IN RELATION TO CORRUP-TION IN THE AREA OF PUBLIC PROCUREMENT

A. Intelligence Stage: Generating Leads for Investigation

During the group sessions, participants analysed their techniques of gathering information in order to establish reasons for investigation of corruption cases in the area of public procurement. The group agreed on the following as sources of intelligence methods and leads for investigation.

1. Audit Reports

Audit reports are one of the leads to identify crime and generate investigation in the countries mentioned above. Special bodies are established by law for public audits, and inspections include accounting reviews of records and physical inspections of premises. For instance, in Tajikistan the special body, which is called the Agency for State Financial Control and Fight with Corruption, has in its structure a financial control department, and that has been used to initiate investigation based on audit reports from the department.

2. Whistle-Blowers

The disclosure of the crime by an informant is one of the most common methods for investigating bodies to initiate investigation. Most of the country’s main sources of information arise through this method. During the sessions, members found the importance of whistle-blowers, hence the need for the establishment or strengthening of whistle-blowers’ protection laws in member countries. For instance, countries like Tanzania, Peru, Honduras and Japan (to some extent) have whistle-blowers’ protection, while Egypt, Nepal, Lao PDR, Tajikistan and Papua New Guinea have no whistle-blower protection laws.

The group agreed to have whistle-blowers’ protection laws to ensure whistle-blowers are well protected, which will promote and facilitate the reporting of organized crime, corruption offences, unethical conduct, illegal and dangerous activities and at the same time ensure protection against potential retaliation or victimization.

19TH UNAFEI UNCAC TRAINING PROGRAMME
REPORTS OF THE PROGRAMME

3. Media

All investigation authorities in the participants' countries use media to generate leads for investigation. What appears in the eyes of the general public through newspapers, radio and television must be considered seriously by our investigative bodies since they may carry information which link with activities of the enforcement bodies. Most of the participants explained how media helped them in initiating investigation of corruption cases; hence this group considered the method as one of the sources of intelligence reports.

4. Asset Declaration Reports

Another way of collecting intelligence reports is through asset declaration reports. In the participating countries, public officials are required to declare their wealth and assets upon entry into the public service or promotion to a position and have to make this declaration each year. From this declaration, investigators can compare the public officer's wealth with what he or she declared. All countries except Japan have established special bodies for dealing with the asset declarations of public officials.

5. Financial Intelligence Units (FIU)

Information of suspicious transactions collected and analysed by FIUs is transferred to investigation agencies for action. The intelligence is utilized by all participants' countries. It carries important information like criminal activities detected, the suspect's name, email address, domicile, place where withdrawal occurred and beneficial owners.

6. Annual Report of Public Procurement Regulatory Authority

In the area of public procurement, some countries establish authorities to control and audit public procurement operations. Each year they release annual reports of public procurement activities. Most of the time, reports identify embezzlement and misappropriation of public funds. Investigation agencies use the reports to initiate investigations of a specific entity as indicated in the report. However, countries such as Egypt, Japan and Papua New Guinea do not have reports from special public procurement bodies; hence they use other methods to obtain information.

7. Undercover Operations

All the participants' countries except Japan and Papua New Guinea apply undercover operations to detect corruption. An undercover agent identifies, during the course of the operation, corruption actions and reports secretly to investigative bodies for initiating investigation. The group agreed that undercover operations are one of the best methods of intelligence in the investigation of public procurement cases. All participants' countries using this method have successfully attained good results.

8. Hotline Call Centres

One of the effective ways for collecting intelligence is through customer hotline centres which are convenient for reporting corruption 24 hours a day. The members agreed that the use of a call centre reporting hotline should be established for dealing with any complaints that require prompt action as far as corruption allegations are concerned. Most of the countries in this group who have established call centres have succeeded in receiving intelligence reports which provide leads for investigation.

9. Best Practice

It is recommended that in countries with high corruption problems it is better to have an independent and specialized organization to fight and combat corruption using the leads mentioned above. In fact, ICAC in Hong Kong succeeded in decreasing corruption cases using its authority and power as a special body. At the same time, Japan is experiencing success in its way of fighting corruption without establishing and mandating any anti-corruption body. However, establishment of a specialized and independent anti-corruption body in line with UNCAC is needed to easily acquire the trust and cooperation of the general public and to concentrate on investigating corruption cases.

B. Investigation Stage: Collecting Evidence

The duties of the investigators and prosecutors are performed at this stage. The Group discussed the following methods applied in investigation of corruption cases in the area of public procurement and provide the best practices to be used.

1. Surveillance

After investigative bodies gather intelligence through the above-mentioned methods, another technique involves the monitoring of the activities of the suspects through electronic devices and physical tracking. When physical surveillance of a suspect becomes difficult, the installation of an electronic tracking device can be used. Honduras and Peru conduct surveillance to get more information about the lifestyle of the suspect, which enhances the investigation. In Hong Kong, the ICAC has a surveillance unit of over 120 surveillance agents, and they have made significant contributions to the success of a number of major cases. However, not all countries practice this technique.

2. Undercover

Participants from Honduras, Peru and Lao PDR pointed out that undercover investigation is well conducted as it allows the investigative team and the judge to literally see and hear the crime as it occurs. Therefore, the prosecutor should join with the investigators in formulating operation orders which will cover the elements of the crime being investigated, evidence of these elements if it can easily be obtained through an undercover operation and analysing the benefits of using undercover operations against the risks. The Group agreed that some important documents, records and taping can be taken through undercover operations to have solid evidence in court.

3. Collection of the Relevant Documents

Most of the countries agreed that the collection of relevant documents necessary to prove the case is one of the important investigative actions. During the investigation of corruption cases in the area of public procurement documents such as tender board minutes, invitations to tender, bidding companies and their profiles, valuation reports, tender awards, contracts between successful bidders and procuring entity must be collected and used as evidence.

4. Wiretapping/Call History

The monitoring of telephones, telegrams, cellular, faxes, internet communications and call histories are used by most of the enforcement officials of the participants' countries during investigation. Using this method of collecting evidence is widespread and effective for proving corruption-related crimes. In Japan, wiretapping is legally prohibited for corruption cases but call history is allowed.

5. Interviews of Witnesses and Suspects

In almost all participants' countries except Egypt, Lao PDR and Peru, investigation authorities cannot force a person to disclose the facts of the crime, but when a matter is in a court of law, a person who appears before investigators and discloses the facts cannot refuse to give his testimony before the court of law. In all countries when a witness refuses to appear before the court, the court will force the witness to appear.

All participants' countries agreed that witness protection measures are effective in the investigation of corruption cases. On another hand, suspect statements contain essential facts when taken properly according to the law. Japan demonstrates the use of confession which almost always results in conviction. The Group recommended the use of suspect statements as evidence, but certain rights such as the right to be silent and the right to have a lawyer must be given. Also during trial, suspects have the right to be represented. For instance, in Egypt, Honduras, Peru and Tajikistan, it is the duty of the prosecutors to make sure that defendant has a lawyer even before the beginning of the investigation. Honduras and Peru go further by placing a defence lawyer in every prosecutor's office, hence guaranteeing the defendant's access to a lawyer.

6. Immunity

Since corruption is conducted in secrecy, to have a person who disclosed the crime is an advantage to the investigation because it will help to catch the offender but also guarantee having a potential witness. Most of the countries reported offering immunity to the first offender to appear to disclose the crime, except Papua New Guinea and Japan. Since corruption, especially in this area of public procurement, is difficult to trace, offering immunity to the first person to reveal what is going on and his participation is important. As a Group, we recommend adoption and use of this method for the purpose of increasing ways of collecting evidence and tackling the problem of corruption by every possible means.

III. ASSET RECOVERY IN THE AREA OF PUBLIC PROCUREMENT

A. Investigation Measures to Identify, Trace, Freeze and Confiscate the Illicit Profits of Corruption in Relation to Public Procurement

Anti-corruption laws in each country deal with corruption crimes. In most of the participants' countries, their domestic laws provide for recovery of proceeds of crime or asset recovery. Some of these laws include the Criminal or Penal Code, Proceeds of Crime and Anti-Money Laundering, Mutual Legal Assistance, specific anti-corruption laws and other relevant and related legislation. These laws make provisions for restraining orders and confiscation orders, which are available to prevent an accused from benefiting from the proceeds of crime relating to corruption offences.

An application to a judge or court for a restraining order is normally applied for at the outset of the criminal proceedings, otherwise the accused may cause the assets/properties to be moved or dissipated and therefore no longer available to satisfy the confiscation order which is subsequently made.

Confiscation is usually difficult as most of the money has usually been transferred from the bank accounts prior to obtaining a conviction and, as such, most countries laws allow them to freeze assets during the investigation stage until such time as a conviction is obtained. In most countries, asset recovery requires an order from a judge.

B. Difficulties in Asset Recovery in the Area of Public Procurement

Corruption crimes are more sophisticated and cross-border in nature. The two main difficulties or challenges identified are:

1. Jurisdiction Issues

A major problem in investigation and prosecution of corruption cases is the lack of international cooperation when corruption crimes relate to foreigners and international organizations. A requesting country will have to request assistance from the recipient country in evidence gathering. As much of the key evidence can only be gathered abroad, investigators from the requesting country do not have the authority to investigate abroad so they need help from the requested country. Also, the results of assistance in investigation in most cases are slow and sometimes not as expected by the requesting country and may not be admissible in court as evidence.

Further, in most cases, corruption offenders conceal the proceeds obtained through corruption crimes in overseas bank accounts which have strict confidentiality rules protecting customers' information from being obtained by investigation officials. It makes it more difficult where the bank is in a country where there is no agreement for international cooperation between the requesting country and the bank's country.

2. Differences in Legal Systems

International cooperation between countries, especially in terms of enforcement of foreign judgements of another country, is usually difficult due to the fact that countries have different legal systems. For instance, in some countries, requests for confiscation of assets of corruption crimes cannot be enforced until a judgement of conviction is firstly obtained by the requesting country.

3. Best Practice

In Honduras and Peru, asset recovery is non-conviction based as provided for in these two countries' domestic legislation. This means that in Honduras and Peru, proceedings for asset recovery can be opened/filed and determined by the judge even before the offender is charged or convicted of a corruption offence. The prosecutor only has to prove that the asset has been acquired as a result of the corruption crime. From their respectively shared experiences, it is clear that this practice increases the efficiency and effectiveness of the investigation and prosecution of corruption crimes, both inside their countries and abroad.

IV. INTERNATIONAL COOPERATION

Under chapter IV of UNCAC, States Parties are obliged to assist one another in every aspect of the

fight against corruption, including prevention, investigation, and prosecution, the emphasis being laid on mutual legal assistance in the field of gathering information and transformation of evidence for use in prosecuting and extraditing offenders.

During the discussions, we found that all countries represented in this training programme have ratified the United Nations Convention Against Corruption (UNCAC), except Japan. Likewise, we also pointed out some other methods applicable at the international level, like the use of Interpol, because every member agrees that the existence of Interpol in his or her country can be helpful in assisting investigation.

A. Interpol

Interpol is an organization which is widely used all over the world to cooperate between countries in the field of gathering information and collecting evidence. For example, if a country wants to find a suspect, Interpol will be the fastest and most effective channel to use. Therefore, police officers seek Interpol assistance more than any other enforcement agencies.

B. Mutual Legal Assistance

All of the participants' countries are in contact with various countries of the world to intensify cooperation in the area of cross-border and corruption crimes, especially through conclusion of judicial cooperation conventions and treaties, ensuring extradition, as well as, judicial and mutual assistance agreements. In this context, most Latin American countries have subscribed to the Inter-American Convention against Corruption, which obliges countries who are Parties, to provide mutual legal assistance when necessary. Japan has entered into bilateral treaties with some jurisdictions like Hong Kong, the European Union, the United States, South Korea, Russia and China for the purpose of mutual legal assistance.

Almost all participating countries indicated that they faced challenges in requesting mutual legal assistance: According to article 46, paragraph 17, of UNCAC, a request should be executed in accordance with the domestic law of the requested State Party. In addition, the article also stated that it should also be executed in accordance with the procedures specified in the request. However, from a practical point of view the group members agreed on the importance of the existence of an international form of mutual legal assistance request that binds all the items needed for mutual legal assistance to avoid the refusal of the requested countries.

However, we consider that the United Nations Convention against Corruption urges international cooperation in article 46, paragraph 8, which states that the State Parties to the convention cannot refuse to provide mutual legal assistance on the grounds of bank secrecy. Thus, all the group participants agree that it is important to share and exchange information between each country represented here to provide better mechanisms in the field of research and prosecution. It is important to create only one international form for mutual legal assistance request to provide all the information needed to each country, to make the process easier and faster.

C. Law Enforcement Cooperation

All group members indicated that their respective countries have undertaken various forms of law enforcement cooperation. Most participants' countries are members of the Egmont Group, which enhances law enforcement cooperation and information sharing between FIUs.

D. Reciprocity

Most countries provide mutual legal assistance based upon reciprocity without treaties and agreements. When a country requests assistance from another country, it must clarify the items of reciprocity based upon the trusted relationship with the relevant authorities.

E. Extradition

All group members indicated that their respective countries have bilateral treaties in the field of extradition.

V. PUBLIC-PRIVATE COOPERATION AGAINST CORRUPTION IN THE AREA OF PUBLIC PROCUREMENT

To promote public-private cooperation in the fight against corruption, various types of public awareness campaigns, such as media advisements and dramas, training programmes, education curriculum, seminars and workshops should be held in the participants' countries, including transparency of the public procurement procedures and its outcome and a code of conduct for the ethical behaviour of public officials, in order to promote public awareness on the detriments of corruption and its danger on the national economy of each country. The goal is to change the public's attitude: "there is no reason for accepting corruption as a normal way of conducting business and as an inevitable evil."

Best Practice:

Panama established the Regional Anti-corruption Academy for Central America and the Caribbean, requesting assistance from member states of UNCAC in order to develop the training curriculum, training programmes, to support the formal and informal networks and promote awareness in the region.

VI. RECOMMENDATIONS

- Revising the national legislation to be in alignment with UNCAC and the international treaties to apply programmes for protecting whistle-blowers and obtaining statements from witnesses.
- Supporting current initiatives to develop codes of conduct to reduce discretionary powers of public officials, and to determine the rules of ethical behaviour concerning public work whether in the judicial, administrative, political or social arenas.
- Countries with high levels of corruption should establish a special, independent body with the authority to combat corruption at all stages from prevention to investigation and prosecution.
- The importance of creating only one international form for mutual legal assistance requests for the provision of all required information needed by each country for efficiency.
- Countries may seek informal ways of connecting with each other in the field of investigation, gathering information and sharing evidence to avoid wasting time and effort in paperwork.
- Encouraging countries to be a part of regional cooperation networks in the field of asset recovery.